CERCLA Section 113(h) & RCRA Citizen Suits: *To Bar or Not to Bar?*

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I.
INTRODUCTION

In December 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or the "Act")[1] to cope with the most heavily polluted hazardous waste sites in the country.[2] CERCLA's substantive provisions combat the environmental menace on two fundamental fronts. First, the Act codifies a long-standing common law tort doctrine by holding potentially responsible parties ("PRPs")[3] strictly liable for conduct involving hazardous, or, as referred to in tort law, abnormally dangerous, substances.[4] Second, the Act establishes a trust fund—known as the Superfund—which the United States Environmental Protection Agency

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1. 42 U.S.C. §§ 9601-9675 (1998).

2. *See* 42 U.S.C. § 9604 (a)(1) (providing for removal and remedial action consistent with the national contingency plan), § 9605(a) (establishing "national contingency plan for the removal of. . .hazardous substances" and a national priorities list) and § 9605(c) (providing for a "hazard ranking system" to assess the relative danger from contaminated sites to determine listing on the NPL).

3. CERCLA imposes liability upon (1) current owners and operators of facilities; (2) former owners and operators; (3) generators; and (4) transporters. While each group is held liable, the extent to which they are held liable may vary. *See* 42 U.S.C. § 9607.

4. "CERCLA is not primarily an abandoned dump cleanup program, although that is included in its purposes. The main purpose of CERCLA is to make spills or dumping of hazardous substances less likely through liability, enlisting business and commercial instincts for the bottom line instead of traditional regulation." ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 282 (2d ed. 1996) (quoting Philip Cummings, chief counsel of the Senate Environment Committee when CERCLA was drafted).

("EPA") utilizes to finance remedial and removal efforts[5] at abandoned waste sites selected from the National Priorities List.[6] In short, the Act's underlying mission is to protect the natural environment and save human lives.

By the mid-1980's, expedited CERCLA cleanups were rare events. Sites targeted for cleanup were often mired in lawsuits commenced by PRPs challenging their expected financial contribution. As such, litigation and its incumbent costs commonly diverted money away from CERCLA's primary objective. "Nearly half of Superfund money is frittered away on litigation, bureaucracy and studies. Only 53 percent of funds are spent actually cleaning up sites . . . ."[7] Moreover, the time consumed litigating these lawsuits jeopardized the ultimate success of some cleanups, as halting the spread of improperly handled hazardous materials is often a race against time.

In response to this problem, Congress amended CERCLA in 1986 to include provisions that reduce the frequency of such litigation. Among these provisions was CERCLA § 113(h) ("§ 113(h)" or the "Section") which prohibits federal courts from reviewing "any challenges" to CERCLA cleanups once an EPA-ordered "removal or remedial action" is underway.[8] This Section was consistent with the "clean up now, litigate later" philosophy advanced by Members of Congress from both sides of the aisle.

Unfortunately, courts have inconsistently applied § 113(h) since its passage. This is largely due to widespread confusion over the question of whether § 113(h) broadly bars *all* legal challenges at ongoing CERCLA cleanups or whether the bar is narrowly limited to those challenges filed by PRPs intending to postpone their eventual financial contribution. This debate high-

5. CERCLA authorizes two types of EPA response actions. First, the EPA may engage in short term removal actions designed to "prevent, minimize, or mitigate" immediate dangers to the public health or natural environment. 42 U.S.C. § 9601(23). Second, the EPA may engage in long term remedial actions which involves a "permanent remedy taken instead of or in addition to removal actions." 42 U.S.C. § 9601(24). *See also* 42 U.S.C. § 9604; PERCIVAL, *supra* note 4, at 383.

6. *See* 42 U.S.C. § 9611. The EPA pays especially close attention to those sites that have been abandoned by their respective polluters.

7. Michael Oxley, *Superfund Reform: A Solution . . . or a Sellout? Making It Work*, WASH. TIMES, Dec. 17, 1995, at B4. *See also, e.g.*, E. Donald Elliot, *Superfund: EPA Success, National Debacle*? NAT. RESOURCES & ENV'T, Winter 1992, at 12 ("[I]t takes, on average, ten years to clean up each site, but only about three years is actual on site construction work!"); *Id.* at 13 ("[I]t takes seven years and at least $4 million in transaction costs at each site to conduct the necessary studies and design remedies before the final cleanup can begin.").

8. 42 U.S.C. § 9613(h).

lights the underlying tension between competing governmental interests with respect to hazardous waste site cleanups. On the one hand, if courts permit challenges to proceed at ongoing CERCLA sites, cleanup efforts may be unacceptably delayed, having the potential effect of further contaminating those sites and threatening human lives. Time is often the enemy in these circumstances. On the other hand, other environmental or health-based harms may occur while the cleanup process is ongoing. Even worse, EPA ordered response actions may be the cause of such harms. If challenges to enforce all laws are unconditionally barred, then some CERCLA cleanups may be the source of more problems then they seek to resolve. Again, time is the enemy.

This paper addresses the issue of whether § 113(h) unconditionally bars plaintiffs from bringing citizen suit challenges under the Resource Conservation and Recovery Act ("RCRA")[9] once removal and remedial efforts are underway at CERCLA sites. The paper concludes that § 113(h) broadly bars all legal challenges that call into question the EPA's selected remedial or removal action regardless of the plaintiff's identity or the authority used to bring the challenge. However, courts should read an implicit exception into § 113(h) that permits challenges to proceed, including RCRA citizen suits, when the plaintiff can demonstrate convincingly that a continued EPA cleanup would result in further environmental or health-based harms. Section I analyzes the plain language and legislative history of § 113(h), concluding that both are vague and offer little guidance. Section II reconciles the circuit cases that have explored the meaning of § 113(h) by extracting two common principles encountered in those decisions. Section III recommends that the courts make an exception to the general jurisdictional bar of § 113(h) to balance the competing governmental interests of expeditiously cleaning up hazardous waste sites and diligently ensuring the public's health and safety. Section IV dissects a 1997 Third Circuit decision that bars plaintiffs from bringing any form of citizen suit at an ongoing CERCLA site. The Section demonstrates that the court overlooked important policy considerations in reaching its conclusion and that the opinion itself is internally flawed and overly presumptuous. Section V applies these principles and the exception from Section III to the case of RCRA citizen suits.

9. 42 U.S.C. §§6901-6992.

II.

THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 113(h) ARE VAGUE

A. *The Plain Language is Ambiguously Drafted*

Courts reviewing § 113(h) have examined three areas of CERCLA's broad statutory framework to determine the Section's ultimate scope and applicability. Specifically, courts have reviewed the plain language of (1) § 113(h) and its citizen suit exception; (2) other, related sections within CERCLA; and (3) sections in RCRA that directly refer to citizen suits under CERCLA. Unfortunately, the definitive answers reviewing jurists seek have been elusive because of the vague and seemingly contradictory nature of the plain language.

1. Section 113(h) and Its Citizen Suit Exception

Congress added § 113(h) to CERCLA as part of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). Citizen suits are explicitly addressed in one of the exceptions to the general jurisdictional bar in § 113(h)(4). The Section and this particular exception provide:

> (h) Timing of review
>
> No Federal court shall have jurisdiction under Federal law. . .or under State law . . . to review any challenges to removal or remedial action selected under section 9604 of [CERCLA], or to review any order issued under section 9606(a) of [CERCLA], in any action except one of the following:
>
> . . . .
>
> (4) An action under section 9659 of [CERCLA] (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of [CERCLA] or secured under section 9606 of [CERCLA] was in violation of any requirement of this act. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.[10]

Proponents of the broad interpretation of § 113(h)—whereby the Section completely prohibits suits under all authorities brought by all plaintiffs—argue that the plain language is clear and concise.[11] Therefore, courts need not look beyond the text of § 113(h) to determine that the Section bars RCRA citizen

10. 42 U.S.C. § 9613(h).

11. *See* Clinton County Comm'rs v. EPA, 116 F.3d 1018, 1022-23 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 687 (1998); Boarhead Corp. v. Erickson, 923 F.2d 1011, 1018-

suits. There are four textual arguments supporting this conclusion. First, "*[n]o* Federal court shall have jurisdiction" indicates that Congress likely intended to categorically deny the judiciary from reviewing CERCLA cleanups. In short, the Section clearly "amounts to a 'blunt withdrawal of federal jurisdiction.' "[12] Second, because Congress added the word "any" before "challenges," it likely intended to bar suits authorized under other statutes, including RCRA. Third, nowhere does the plain language distinguish between PRPs and other interested parties filing citizen suits, suggesting Congress probably did not intend to bar PRP suits only. If Congress had intended to so, it likely would have stated it explicitly in this Section. Finally, if the prohibitory language of § 113(h) did not include citizen suits, there would arguably be no need to explicitly refer to them in § 113(h)(4). It follows that, under the broad interpretation of § 113(h), absolutely no citizen suit "challenges" will be heard at ongoing CERCLA sites.

The plain language of the citizen suit exception itself (§ 113(h)(4)) further supports the broad interpretation of § 113(h). The exception speaks in the past tense with verbs like "was," "secured," and "taken" suggesting that unless the response action has already occurred, no court may hear a challenge. In addition, the final sentence of the exception bars any action challenging a removal action if a remedial action is "to be undertaken" at the same site. Taken together, these two sentences arguably define the parameters of when courts may hear RCRA citizen suits at CERCLA sites.

Proponents of the narrow interpretation of § 113(h)—whereby the Section only bars suits brought by PRPs—argue that the plain language is anything but clear.[13] Concededly, § 113(h) bars claims that call into question whether EPA administrators "selected" the appropriate "removal or remedial action." But the bar may only apply to those actions "selected under . . . [CER-

20 (3d Cir. 1991); McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325, 328-30 (9th Cir. 1995).

12. *McClellan Ecological*, 47 F.3d at 328 (quoting North Shore Gas Co. v. EPA, 930 F.2d 1239, 1244 (7th Cir. 1991)).

13. *See* United States v. Princeton Gamma-Tech, Inc., 31 F.3d 138 (3d Cir. 1994), *overruled by* Clinton County Comm'rs v. EPA, 116 F.3d 1018 (3d Cir. 1997); 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."). *See also* Karen M. Hoffman, Note, *Clinton County Commissioners v. EPA: Closing Off a Route to Pre-Enforcement Review*, 66 FORDHAM L. REV. 1939, 1966-71 (1998).

CLA]," not other statutory authorities. The term "challenges" was left undefined, suggesting a probable Congressional willingness to punt the interpretation to the judiciary for review based upon factual inquiries. In addition, the word "taken" can have multiple meanings, some of which support the narrow interpretation of the Section, others that support the broad reading. In short, under the narrow interpretation, nothing in the plain language of the Section suggests that § 113(h) precludes parties from bringing RCRA citizen suits at CERCLA sites.

2. Related Statutory Provisions in CERCLA and RCRA

Those that have narrowly interpreted § 113(h) argue that a full understanding of § 113(h) requires an investigation beyond the confines of the Section's plain language. There are two provisions located elsewhere in CERCLA and a third provision located in RCRA that offer additional guidance as to what "challenges" § 113(h) permits. Again, the plain language in these provisions is just as inconclusive as the language in § 113(h) itself.

First, the "relationship to other laws" provision in CERCLA states that "nothing in [CERCLA] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements . . . ."[14] This language strongly suggests that § 113(h) does not bar *all* forms of lawsuits at CERCLA sites. If it did, CERCLA would be internally inconsistent on its face and would render § 113(h) completely ineffective.[15]

However, although the "relationship to other laws" provision indicates that CERCLA sites are not completely immune to legal challenges generally, it does not enumerate the authorities under which challenges are permitted. On the one hand, the "relationship to other laws" provision suggests that Congress recognized the importance and viability of permitting some lawsuits to proceed while cleanups are ongoing at CERCLA sites. If Congress expected to completely bar all suits, then it arguably would have exempted § 113(h) from the reach of the "relationship to other laws" provision. On the other hand, the "relationship to other laws" provision may solely limit CERCLA from preempting state environmental laws and, therefore, has absolutely no bear-

14. 42 U.S.C. § 9614(a).

15. *See* North Shore Gas Co. v. EPA, 930 F.2d 1239, 1245 (7th Cir. 1991) ("In such a case section 113(h) would be doing a good deal more than affecting the 'timing' of judicial review; it would be extinguishing judicial review.").

ing on the relationship of other federal laws, like RCRA, to CERCLA.[16] If Congress intended to permit challenges under other federal laws, it arguably would have listed the applicable statutes in this provision. Couple Congress' explicit omission of any mention of federal law in the "relationship to other laws" provision with the plain language of § 113(h) which bars "jurisdiction under Federal Law" and one could logically conclude that the "relationship to other laws" provision does not lift the bar on challenges under the RCRA citizen suit provision.

Second, a "savings" provision in CERCLA states that CERCLA shall not "affect or modify in any way the obligations or liabilities of any person under other Federal or State law . . . with respect to releases of hazardous substances or other pollutants or contaminants."[17] Clearly, RCRA falls within the definition of a federal law that imposes "obligations or liabilities . . . with respect to the releases of hazardous substances." Furthermore, RCRA predates CERCLA, suggesting that this language in CERCLA refers directly to RCRA.

Another "savings" provision appears in CERCLA that possibly eliminates any speculation as to whether RCRA and CERCLA were intended to function in concert. It provides that CERCLA shall not "affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of the Solid Waste Disposal Act."[18] This explicit reference in CERCLA to RCRA suggests that Congress did not intend for the former to trump the latter. However, if this "savings" provision trumps § 113(h) by allowing RCRA citizen suits to proceed, § 113(h) would be ineffectual, defeating the presumption that Congress never enacts legislation without intending for it to have the force of law. Thus, to reconcile this apparent inconsistency, an alternative reading of the two provisions would define the jurisdictional bar in § 113(h) as just temporary (*i.e.,* the bar is lifted once the cleanup is complete).[19]

Finally, a 1984 amendment to RCRA suggests that at least one type of RCRA citizen suit may be permissible at ongoing CERCLA sites. RCRA authorizes two types of citizen suits. First,

16. *See, e.g.,* Karla A. Raettig, *When Plain Language May Not Be Plain: Whether CERCLA's Preclusion of Pre-Enforcement Judicial Review Is Limited To Actions Under CERCLA,* 26 ENVTL. L. 1049, 1065-68 (1996).

17. 42 U.S.C. § 9652(d).

18. 42 U.S.C. § 9620(i).

19. *See* Razore v. Tulalip Tribes, 66 F.3d 236, 240 (9th Cir. 1995); *McClellan Ecological,* 47 F.3d at 329.

"citizen enforcement suits" authorize individuals to sue for a violation of any established environmental law.[20] Second, "imminent and substantial endangerment suits" broadly authorize individuals to sue in order to prevent or abate any action that is a risk to public health or the environment.[21]

RCRA, however, expressly limits the availability of these two causes of action in the subsections that follow. In particular, RCRA prohibits individuals from filing the "imminent and substantial endangerment" suits at ongoing CERCLA sites without mentioning whether the same prohibition applies to "citizen enforcement suits."[22] Arguably, this omission suggests that "citizen enforcement suits" remain viable causes of action, even when CERCLA response actions are underway.[23] Had Congress intended to ban both categories of RCRA citizen suits when challenging ongoing CERCLA sites, it would have likely done so in this particular RCRA provision.

On the other hand, there may be a logical explanation for this dissimilar textual treatment of the two types of RCRA citizen suits. Congress may have been realistically acknowledging that the process of cleaning up a site often becomes the cause of an alleged "endangerment." If citizens are broadly authorized to challenge the government under the "imminent and substantial endangerment" citizen suit provision because a substantive CERCLA cleanup presented temporary risks, then the system would be self-defeating. Thus, logically speaking, an explicit limitation is necessary. However, the same limitation may not have been necessary for "citizen enforcement suits." Just because some health problems may be temporarily exacerbated during a CERCLA cleanup does not necessarily mean that the government is in violation of RCRA, giving rise to a "citizen enforcement suit." In fact, administrators are required to comply with the terms of RCRA when cleaning up a CERCLA site. So in theory, no actionable "citizen enforcement suits" should ever arise, which possibly explains why Congress omitted an express limitation of "citizen enforcement suits" from the statutory language.

What is clear from this analysis of the plain language of § 113(h) and related provisions elsewhere in CERCLA and in

20. *See* 42 U.S.C. § 6972(a)(1)(A).

21. *See* 42 U.S.C. § 6972(a)(1)(B).

22. *See* 42 U.S.C. § 6972(b)(2)(B)(ii).

23. *See* Ingrid Brunk Wuerth, *Challenges to Federal Facility Cleanups and CERCLA Section 113(h)*, 8 TUL. ENVTL. L.J. 353, 379-84 (1995).

RCRA is that there is absolutely no consensus on the Section's interpretation. Those that interpret § 113(h) broadly argue that it bars all legal challenges at ongoing CERCLA sites. Those that interpret § 113(h) narrowly argue that it does not bar citizen suit claims under RCRA and that if it did, it would be internally inconsistent with other provisions within CERCLA and RCRA. Without a clear statutory mandate, the courts look to the legislative history to determine what the authors intended the scope of § 113(h) to be.

B. *The Congressional Sponsors of § 113(h) Disagreed on the Scope of the Section, Enabling Courts to Utilize its Legislative History for Both a Narrow and Broad Interpretation*

When the plain language of a statute contains inherent ambiguities, courts ordinarily look to the legislative history leading to its enactment for an understanding of its ultimate breadth. Unfortunately, the legislative history of § 113(h) is as murky as the statutory language itself and fails to provide clear-cut guidelines for courts to follow.

Congress originally enacted CERCLA with one underlying objective: cleaning up America's most dangerous hazardous waste sites as quickly as possible.[24] Often times, achieving this goal requires the federal government to "front" the necessary funding for cleanup projects, then seek reimbursement from the various parties who are determined liable after the site has been cleaned up. Unfortunately, after CERCLA's enactment, PRPs were regularly engaging the government in legal battles before the cleanups were complete in order to delay their inevitable financial obligations.

Congress enacted § 113(h) in order to "confirm[ ] and build[ ] upon existing case law"[25] that presumed an implied bar to judicial review prior to the completion of a CERCLA cleanup. The Sixth Circuit ruled in *J.V. Peters & Co. v. EPA* that Congress' "primary purpose [of enacting CERCLA was] the prompt cleanup of hazardous waste sites" and that permitting parties to stall the cleanup would "debilitate the central function of the Act."[26] Most Congressional leaders agreed upon this general

24. *See supra* notes 1-6 and accompanying text.

25. 132 CONG. REC. S14,928 (1986) (statement of Sen. Thurmond).

26. J.V. Peters & Co. v. EPA, 767 F.2d 263, 264 (6th Cir. 1985) (quoting Walls v. Waste Resource Corp., 761 F.2d 311, 318 (6th Cir. 1985)).

concept that litigation had impeded much of the impact of CERCLA and that a limit, or even an outright bar, upon litigation at CERCLA sites was imperative.[27] § 113(h) was the resultant legislation.

As to which legal "challenges" and which plaintiffs § 113(h) bars, Congress was unclear. This lack of clarity is largely due to several Members of Congress who articulated their varying interpretations of § 113(h) in the Congressional Record, knowing that their remarks would later resurface in litigation certain to arise over the meaning of § 113(h).

a. Which Legal Challenges Are Barred?

Some Members of Congress intended § 113(h) to broadly bar all lawsuits at ongoing CERCLA sites. Representative Daniel Glickman asserted that § 113(h) "covers all lawsuits, under any authority."[28] Other Members of Congress disagreed. In response to Representative Glickman's comments, Senator George Mitchell argued that Congress did not have the constitutional authority to preempt other laws in such a broad manner.

> [Representative Glickman and others] suggested that section 113(h) covers all lawsuits under the authority of any law, State or Federal, concerning the response actions that are performed by EPA and other Federal agencies, by States pursuant to cooperative agreements, and by private parties pursuant to an agreement with the Federal Government. Under this suggestion, section 113 would become preemptive in a way never contemplated or intended by the Congress, in any case in which the executive branch took or endorsed response actions.[29]

Mitchell, endorsing the narrow interpretation of § 113(h), would argue that the Section does not bar RCRA citizen suits. In contrast, Glickman, endorsing the broad interpretation of

27. 132 CONG. REC. H9600 (1986) (statement of Rep. Roe) ("When the essence of a lawsuit involves contesting the liability of the plaintiff for cleanup costs, the courts should apply the other provisions of section 113(h), which require such plaintiff to wait until the Government has filed a suit under sections 106 or 107 to seek review of the liability issue.").

28. 132 CONG. REC. H9582 (1986) (statement of Rep. Glickman). Senator Thurmond echoed Glickman's comments when he argued that "[t]he timing of review section is intended to be comprehensive. It covers all lawsuits, under any authority, concerning the response actions that are performed by the EPA . . . ." 132 CONG. REC. S14,929 (1986) (statement of Sen. Thurmond).

29. 132 CONG. REC. S17,213 (1986) (statement of Sen. Mitchell).

§ 113(h), would argue that the Section bars all lawsuits unconditionally.

Which Plaintiffs Are Barred? In defining § 113(h) broadly, some Members of Congress argued that no plaintiff is exempt from the bar. Representative Glickman indicated that § 113(h) should be applied broadly by refusing to differentiate between citizen suits and suits initiated by PRPs. "Clearly the conferees did not intend to allow any plaintiff, whether the neighbor who is unhappy about the construction of a toxic waste incinerator in the neighborhood, or the potentially responsible party who will have to pay for its construction, to stop a cleanup by what would undoubtedly be a prolonged legal battle."[30] Senator Strom Thurmond agreed with Glickman. He explained that "[c]itizens, including potentially responsible parties, cannot seek review of the response action or their potential liability for a response action" until after a cleanup is complete.[31]

On the other hand, the House Energy and Commerce Report indicated that § 113(h) was only intended to be narrowly directed at PRPs. "The purpose of [§ 113(h)] is to prevent private responsible parties from filing dilatory, interim lawsuits which have the effect of slowing down or preventing [the] EPA's cleanup activities. By limiting court challenges to the point in time when the agency has decided to enforce the liability of such private responsible parties, the amendment will ensure both that effective cleanup is not derailed and that private responsible parties get their full day in court to challenge the agency's determination that they are liable for cleanup costs."[32] Senator Robert T. Stafford and Representative Robert A. Roe both argued that § 113(h) differentiated between "lawsuits by potentially responsible parties involving only monetary damages and legitimate citizens' suits complaining of irreparable injury that can be only addressed only if a claim is heard during or prior to response action."[33] The distinction was clear. PRPs, being concerned solely with their finances, could be made whole after the completion of a CERCLA cleanup; whereas such a wait may be fatal,

30. 132 CONG. REC. H9583 (1986) (statement of Rep. Glickman).

31. 132 CONG. REC. S14,929 (1986) (statement of Sen. Thurmond).

32. *See* H.R. REP. No. 99-253, pt. 1, at 266-67 (1985).

33. 132 CONG. REC. S14,898 (1986) (statement of Sen. Stafford). *See also* 132 CONG. REC. H9600 (1986) (statement of Rep. Roe).

both figuratively and literally, for those citizens concerned with the health of the natural environment and the public's safety.[34]

It is plainly clear that there was no general consensus among Members of Congress when § 113(h) was debated and enacted.[35] This confusion has enabled courts to selectively employ the legislative history to argue either the narrow or broad interpretation of § 113(h). The Section serves, therefore, as a prime example of the dangers in relying upon legislative histories as "senators and congressman try[ ] to put their spin on [a] statute's interpretation" with lengthy quotations in the Congressional Record.[36]

III.

THE CIRCUIT COURTS HAVE NOT REACHED A CONSENSUS ON THE MEANING OF SECTION 113(h)—OR HAVE THEY?

Several circuits have heard cases litigating the meaning and scope of § 113(h). Each has scrutinized its plain language and legislative history. Some have barred suits under various authorities, while others have permitted suits to proceed under some of those exact same authorities. However, the purported circuit split is arguably due more to the variance in factual circumstances in each case rather than different applications of the law. Thus, despite this apparent circuit incongruity, one would have little trouble extracting common baseline principles from nearly

34. *See* 132 CONG. REC. S14,898 (1986) (statement of Sen. Stafford) ("[P]laintiffs concerned with the monetary consequences of a response can be made whole after the cleanup is completed by reducing the amount of the Government's recovery. But citizens asserting a true public health or environmental interest in the response cannot obtain adequate relief if an inadequate cleanup is allowed to proceed . . . .").

35. Note that committee reports are often given more weight than statements made by members of Congress in the Congressional Record. This notion was articulated by the concurring judge in United States v. Princeton Gamma-Tech, Inc., 31 F.3d 138, 152 (1994) (Nygaard, J., concurring) with respect to the majority's failure to "come to grips with the conference report and the reports of the standing committees." ("[I]t is a well-established principle of statutory interpretation that contradictory floor statements by individual members, even sponsors of the bill, are of extremely limited authority and cannot override the committee and conference reports."). While this observation may be accurate, Judge Nygaard failed to acknowledge the committee reports, not cited by the majority, supporting the *Princeton* holding. *Cf. infra* note 33. Moreover, this judicial tenet does not diminish the relevance of the clear disagreement among members of Congress on this issue. *See* also Raettig, *supra* note 16, at 1065 n.169; Wuerth, *supra* note 23, at 381.

36. Schalk v. Reilly, 900 F.2d 1091, 1096 n.4 (7th Cir. 1990) (citing United States v. Taylor, 487 U.S. 326 (1988) (Scalia, J., concurring); I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987) (Scalia, J., concurring); Wallace v. Christensen, 802 F.2d 1539, 1560 (9th Cir. 1986) (Kozinski, J., dissenting)).

all of the cases that have probed the meaning of § 113(h). The following subsections discuss two principles that thread together the various cases.

A. *Section 113(h)'s Primary Objective is Cleanup Now, Litigate Later*

The courts have expressly recognized the importance of § 113(h)'s primary objective: to prevent the delay of EPA ordered cleanups at ongoing CERCLA sites. This was a common principle whether the plaintiff was a PRP or a citizen asserting a claim with a citizen suit, and whether the court concluded that § 113(h) barred the plaintiff from bringing suit or permitted the suit to proceed.

In *Schalk v. Reilly*, citizens sued the EPA for failing to comply with the procedural requirements of the National Environmental Policy Act ("NEPA") by not preparing an environmental impact statement ("EIS") for a CERCLA cleanup site.[37] The Seventh Circuit rejected the plaintiffs' assertion that the request for an EIS was merely procedural and did not fall under the § 113(h) bar. The court stated that "challenges to the procedure employed in selecting a remedy nevertheless impact the implementation of the remedy and result in the same delays Congress sought to avoid by passage of [113(h)]; [§ 113(h)] necessarily bars [the plaintiffs' NEPA challenges]."[38]

In *Boarhead Corp. v. Erickson*, the plaintiff-landowner (a PRP) claimed that the EPA violated the National Historic Preservation Act because its CERCLA cleanup activities threatened archeological artifacts possibly embedded in the soil at the site in question.[39] Recognizing that § 113(h) was intended to permit the EPA to "respond expeditiously to serious hazards without being stopped in its tracks by legal entanglement before or during the hazard clean up,"[40] the Third Circuit dismissed the claim because it would necessarily impede the clean-up process.

In *In re Chateaugay Corp.*, the Second Circuit rejected the EPA's argument that a bankruptcy proceeding commenced by several PRPs would "embroil the parties and the bankruptcy court in disputes over the wisdom and scope of possible reme-

37. *See* Schalk v. Reilly, 900 F.2d 1091 (7th Cir. 1991).
38. *Id.* at 1097.
39. *See* Boarhead Corp. v. Erickson, 923 F.2d 1011 (3rd Cir. 1991).
40. *Id.* at 1019.

dies."[41] The court held that although the bankruptcy proceeding may have a financial effect on the site, "[§ 113(h) was] simply inapplicable" because it would not delay the clean-up efforts.[42]

In *Reardon v. United States*, the plaintiff-landowners (PRPs) contested a notice of lien filed by the EPA on their property.[43] The plaintiffs argued that the lien should be removed for three reasons. First, they asserted the "innocent landowner" defense, claiming that even if the property was indeed polluted, they were not liable for "any cleanup costs."[44] Second, they argued that the lien filed by the EPA was "overbroad" in that only part of their property was to be affected by the cleanup.[45] Finally, the plaintiffs argued that the lien violated the due process clause of the Fifth Amendment.[46] The First Circuit permitted the plaintiffs to proceed with their third claim only, holding that the lien claims would defeat the primary Congressional objective in enacting § 113(h)[47] while the due process claim would not slow the cleanup.[48]

B. *Section 113(h) Bars All Claims That Challenge the EPA's Selected Mode of Cleanup*

With one notable exception,[49] all claims that have challenged the EPA's selection of a proper remedy for a CERCLA site have

41. *In re* Chateaugay Corp., 944 F.2d 997, 1006 (2nd Cir. 1991).

42. The court cited to a provision in the bankruptcy code that permitted claims to be "estimated if their liquidation 'would unduly delay the administration of the case.'" *Id.* at 1006 (citing 11 U.S.C. §502 (c)). Referring to the case at bar, the court concluded that "nothing prevents the speedy and rough estimation of CERCLA claims for purposes of determining EPA's voice in the Chapter 11 proceedings, with ultimate liquidation of the claims to await the outcome of normal CERCLA enforcement proceedings in which EPA will be entitled to collect its allowable share (full or pro rata, depending on the reorganization plan) of incurred response costs." *Id.* at 1006.

43. *See* Reardon v. United States, 947 F.2d 1509 (1st Cir. 1991).

44. *Id.* at 1511 (citing 42 U.S.C. §9607(b)).

45. *See id.* at 1511(citing 42 U.S.C. §9607(1)).

46. *See id.* at 1511.

47. "Congress was no doubt concerned, first and foremost, that clean-up of substances that endanger public health would be delayed if EPA were forced to litigate each detail of its removal and remedial plans before implementing them." *Id.* at 1513. Citing the Senate Judiciary Committee Report, the court continued, "Pre-enforcement review would lead to considerable delay in providing cleanups, would increase response costs, and would discourage settlement and voluntary cleanups." S.REP. No.11, 99th Cong., 1st Sess. 58 (1985).

48. *See Reardon,* 947 F.2d at 1514-24.

49. *See* United States v. Colorado, 990 F.2d 1565 (10th Cir. 1993) [hereinafter *US v. CO*]. In *US v. CO*, the Tenth Circuit concluded that §113(h) does not bar a state from enforcing its EPA-delegated RCRA authority at ongoing CERCLA sites. The

been dismissed. The courts have been unified in deferring to the EPA when the central issue at bar is the administration of CERCLA cleanups, regardless of the plaintiffs' identity or the authority used in bringing suit. The corollary to this interpretation of § 113(h) is that if the suit did not call into question the actual EPA remedial or removal plan, then the suit proceeded and was not considered a "challenge" under § 113(h).

1. Challenges to the EPA's Selected Mode of Cleanup are Barred Under § 113(h)

In *Arkansas Peace Center v. Arkansas Department of Pollution Control*, the Eighth Circuit dismissed the plaintiff's RCRA citizen suit.[50] The court held that the claim "challeng[ed] a removal action" undertaken by the EPA and was therefore barred by the plain language of § 113(h).[51]

In *McClellan Ecological Seepage Situation v. Perry*, the court rejected the plaintiffs' citizen suits under RCRA and the Clean Water Act (the "CWA").[52] Citing its "clear and unequivocal" statutory language, the court held that § 113(h) was not limited to only CERCLA challenges and PRP plaintiffs.[53] Congress had "already balanced all concerns" and concluded that any claim that is directly related to the goals of a CERCLA cleanup is barred until the completion of that cleanup.[54] The court held that compliance with RCRA and the CWA would create "new

court found that the statutory language and legislative history merely prohibit PRPs from filing citizen suits under CERCLA, not under RCRA. *Id.* at 1577. "To hold otherwise would require [the court] to ignore the plain language and structure of both CERCLA and RCRA, and to find that CERCLA implicitly repealed RCRA's enforcement provisions contrary to Congress' expressed intention." *Id.* at 1575. The court opined that Colorado was not seeking to "halt" the cleanup, which would run counter to Congress' express wishes, but rather, it was merely modifying the process so as to comply with RCRA. *Id.* at 1576. Curiously, however, the court stated that it had "no doubt" that Colorado's action would "'impact the implementation'" of the proposed cleanup, but found that "this alone is not enough to constitute a challenge" under §113(h). *Id.* at 1577 (citing Schalk v . Reilly, 900 F.2d 1091 (7th Cir. 1991)). But is the distinction between "halting" and "modifying" a CERCLA cleanup desirable? Isn't this type of challenge exactly what Congress had in mind when it contemplated the enactment of §113(h)? This case is discussed in greater detail in Section V, *infra*.

50. *See* Ark. Peace Ctr. v. Ark. Dep't. of Pollution Control, 999 F.2d 1212 (8th Cir. 1993).

51. *Id.* at 1217.

52. *See* McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325 (9th Cir. 1995).

53. *Id.* at 328-29.

54. *Id.* at 329.

requirements for dealing with the inactive sites that are now subject to the CERCLA cleanup [and] clearly interfere with the cleanup."[55]

In *Razore v. Tulalip Tribes of Washington*, a former owner of a landfill site (a PRP) filed citizen suits under RCRA and the CWA seeking the court's assistance in "fashion[ing] RCRA and CWA remedies that [did] not interfere with the [EPA's selected cleanup plan under CERCLA]."[56] The Ninth Circuit dismissed the suits holding that, if successful, the citizen suits would "dictate specific remedial actions and . . . alter the method and order for cleanup" in clear violation of § 113(h).[57] Moreover, the court asserted that the RCRA and CWA claims were only temporarily barred and that the "obligations and liabilities" were still enforceable at a later date.[58]

2. Suits Not Challenging the EPA's Selected Mode of Cleanup are Permitted to Proceed

In *Beck v. Atlantic Richfield Co.*, downstream water users first filed claims under state law to enjoin a CERCLA cleanup because the EPA had ordered the defendant-polluters to divert water from the plaintiffs' water source.[59] The Ninth Circuit denied the injunction because it challenged an EPA-ordered CERCLA cleanup.[60] In contrast, the court permitted the plaintiffs to proceed with a second cause of action to collect compensatory damages for lost profits and devaluation of property.[61] The court distinguished the request for an injunction from the damage claims by asserting that "resolution of the damage claim would not involve altering the terms of the cleanup order."[62]

In *Reardon v. United States*, discussed above, the First Circuit concluded that the "innocent landowner" and "overbroad lien" claims brought into question the manner in which the EPA chose to cleanup the property in question. In contrast, the due process claim did not challenge the EPA's administration of the statute. "Rather, it [was] a challenge to the CERCLA statute itself—to a

55. *Id.* at 330.
56. Razore v. Tulalip Tribes of Wash., 66 F.3d 236, 238-39 (9th Cir. 1995).
57. *Id.* at 239-40.
58. *Id.* at 240.
59. *See* Beck v. Atlantic Richfield Co., 62 F.3d 1240, 1242 (9th Cir. 1995) (per curiam).
60. *Id.* at 1243.
61. *Id.* at 1242-43.
62. *Id.* at 1243.

statutory scheme under which the government is authorized to file lien notices without any hearing on the validity of the lien."[63] The court was careful to note, however, that some constitutional challenges may fall under the § 113(h) bar.[64]

In *In re Chateaugay,* discussed above, the Third Circuit held that it was not being called on to "review any challenges to removal or remedial action selected under [CERCLA]."[65] It therefore permitted the bankruptcy proceeding filed by the PRPs to proceed.

IV.

COURTS SHOULD BALANCE THE COMPETING GOVERNMENTAL INTERESTS OF EXPEDITIOUSLY CLEANING UP HAZARDOUS WASTE SITES AND DILIGENTLY ENSURING THE HEALTH OF THE NATURAL ENVIRONMENT AND THE PUBLIC'S SAFETY

Although not found in the plain language of the Section, courts should infer an implicit exception to the general jurisdictional bar of § 113(h) to reflect CERCLA's ultimate objective of protecting the natural environment and saving human lives. If a claim arises that "clearly interfere[s] with [a] cleanup,"[66] courts should not automatically dismiss the challenge with a strict application of § 113(h). Rather, they should preliminarily determine whether the cleanup itself or the challenge modifying that cleanup will more likely cause deleterious environmental and health impacts.[67] This exception should be applied even if the challenge calls into question the EPA's selected mode of cleanup. Ultimately, such an approach will simultaneously serve the general objectives of CERCLA and the specific objectives of § 113(h).

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63. *Reardon,* 947 F.2d at 1514.

64. *See id.* at 1515.

65. *Chateaugay,* 944 F.2d at 1006.

66. *See* McClellan Ecological Seepage Situation v. Perry, 47 F.3d at 325, 330 (9th Cir. 1995).

67. "The problem may be illustrated by an extreme scenario that has the EPA deciding to take leaking drums containing a highly toxic substance from a dump site and to empty them into a nearby lake, thus causing permanent damage to public health and environment." Lucia Ann Silecchia, *Judicial Review of CERCLA Cleanup Procedures: Striking a Balance to Prevent Irreparable Harm,* 20 HARV. ENVTL. L. REV. 339, 343-44 (quoting Princeton Gamma-Tech Inc., 31 F.3d 138, 146 (3rd Cir. 1994)).

This notion of considering environmental and health-based impacts in implementing § 113(h) is not without precedent.[68] In *EPA v. Princeton Gamma-Tech Inc.*,[69] the Third Circuit held that it would be willing to lift the jurisdictional bar mandated by § 113(h) if the party bringing suit could demonstrate to the district court a bona fide allegation of "irreparable injury to public health or environment. . .even though the cleanup may not yet be completed."[70] The court admonished that reviewing courts "must be wary of dilatory tactics by potentially responsible parties who might raise specious [claims]."[71] But ruled that "[t]he mere possibility of such abuse. . .does not justify an abdication by the courts of their responsibility to adjudicate legitimate claims of irreparable harm."[72]

Unfortunately, the broad, substantive ruling in *Princeton* has not been widely followed. The court relied more on its own policy analysis[73] rather than the statutory language, the legislative history or the existing precedent surrounding the litigation of § 113(h), all of which the court deemed unclear.[74] Further, the

68. *See id.* at 353-366.

69. Princeton Gamma-Tech Inc. v. United States, 31 F.3d 138 (3rd Cir. 1994). The defendant, Princeton Gamma-Tech, owned real property above an aquifer in Rocky Hill, New Jersey. In 1984, the EPA discovered trichloroethylene (TCE) in the groundwater beneath the defendant's property and placed the property on the National Priorities List. After four years of investigating and monitoring, the EPA issued a report detailing its proposed remedial action, which entailed extracting the groundwater, treating it, then reinjecting it into the aquifer. In 1991, the EPA brought a reimbursement suit against the defendant under 42 U.S.C. §9607(a). The defendant responded with a cross-motion to dispute both the cost issue and the response action. "Gamma-Tech asserted that the EPA's selected remedy will exacerbate the existing environmental damage and cause further irreparable harm to the environment. . .[T]he system devised by the EPA will cause contaminated water. . .to be drawn down into the deep zone where contamination has not been established conclusively, thus increasing, rather than remedying, the pollution of the water supply." *Id.* at 141. The district court held that it did not have subject matter jurisdiction pursuant to CERCLA §113(h). *Id.* The defendant successfully appealed in 1994 and the case was reversed and remanded. *Id.* at 150. *See also* Cabot Corp. v. U.S. EPA, 677 F. Supp. 823, 829 (E.D. Pa. 1988) (stating in dicta that "[h]ealth and environmental hazards must be addressed as promptly as possible.").

70. *Princeton*, 31 F.3d at 148.

71. *Id.* at 149.

72. *Id.*

73. Specifically, the court recognized the incongruity between the general goals of CERCLA and the specific goals of §113(h). An absolute citizen suit bar "is contrary to the objectives of CERCLA and results in the evisceration of the right to remedy envisioned by [§113(h). We are convinced that Congress did not intend such a result." *Id.* at 148. *See* Silecchia, *supra* note 67, at 380.

74. "Subsection [113(h)(4)] grants a district court jurisdiction to review challenges raised by citizens' suit, but some doubt exists about when such a suit may be enter-

opinion was very fact specific and tailored to the procedural posture of that particular case.[75] And, most importantly, the Third Circuit sitting en banc overruled the *Princeton* decision in 1997.[76] Nevertheless, despite its lack of a judicial following, Congress is currently reconsidering amending CERCLA and may adopt a provision codifying the ruling in *Princeton*.[77] If it does, the provision should provide for the followingexception that modifies and expands upon the *Princeton* exception (referred to hereinafter as the "Modified Exception"):

> If the plaintiff can demonstrate convincingly[78] in pretrial motions that allowing the EPA-selected cleanup poses a likely, irreparable health-based or environmental risk, then the reviewing court should allow the plaintiff's challenge to proceed on its merits. However, if the plaintiff fails to meet its burden convincingly, the court should dismiss the challenge to allow for an expeditious EPA cleanup.

While the Modified Exception places a heavy 'clear and convincing' burden on the plaintiff,[79] it is not unreasonable requirement. First, the alternative standard of proof asks judges to rely on speculative and contestable evidence that demonstrates an unlikely possibility of health-based or environmental risks arising from the cleanup in question. This is not practical and would significantly interfere with the Congressional goal of "cleaning up now, litigating later." Second, a high burden is likely appropriate considering the dubious motives of many challengers, es-

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tained. The legislative history on that point is confusing, and the issue is a troublesome one that has been the subject of several appellate opinions." *Princeton*, 31 F.3d at 144.

75. *See* Silecchia, *supra* note 67, at 372-75, 380-81. Gamma-Tech challenged the EPA's response action after the EPA began proceedings seeking reimbursement for cleanup costs, arguing that "once the EPA brought its cost-recovery suit under CERCLA, the general jurisdictional bar to the review of challenges was lifted pursuant to the cost-recovery action exception under 42 U.S.C. §9613 (h)(1)." *Princeton*, 31 F.3d at 141. See *Id.* at 142-45.

76. *See* Clinton County Commissioners v. EPA, 116 F.3d 1018 (3rd Cir. 1997). This case and the rationale articulated for overruling *Princeton* are discussed in depth and refuted in Section IV, *infra.*

77. *See* Silecchia, *supra* note 67, at 388-395.

78. *See id.* at 385 ("the exception may only be exercised by plaintiffs who can allege in good faith that the nature of the cleanup plan in place will, if continued as ordered, create an (1) irremediable; (2) serious; (3) non speculative threat to either human health and safety or the natural environment.").

79. To successfully argue that a lawsuit should proceed on its merits, plaintiffs would have to present compelling evidence to the court reflecting the substantiality of the pending health-based and environmental harms and the likelihood of such harms occurring.

pecially PRPs.[80] Third, although the *Princeton* court expressly placed the burden on the plaintiff to overcome the presumption of § 113(h),[81] it did not set the threshold high enough. A 'clear and convincing' standard of proof may allay some of judicial concerns that PRPs could successfully launch diversionary or dilatory litigation. In short, the Modified Exception will simply ensure that plaintiffs are challenging CERCLA cleanups in good faith, not with the intent of delaying their inevitable financial responsibilities.

Although this approach appears to mitigate the specific, cleanup now, litigate later objective of § 113(h), it leans closer to the general health and safety objectives of CERCLA, thereby striking an equitable balance. As such, whether Congress codifies the *Princeton* exception or not, courts should be flexible enough to take into account all the potential risks, including those posed by the cleanups themselves, and apply Modified Exception or some variant. Surely, the legislators who originally conceived of CERCLA would not consider their vision realized if sites are blindly cleaned up at the risk of creating greater environmental and health-based risks in the process.

V.

THE CLINTON COUNTY COMMISSIONERS COURT ERRED WHEN IT OVERRULED *PRINCETON*

In 1997, the Third Circuit, sitting en banc, ruled in *Clinton County Commissioners v. EPA*[82] that "Congress intended to pre-

80. Theoretically, it may be possible to differentiate between types of plaintiffs to account for distinct motivations for challenging the EPA cleanup. For example, a third-party citizen claiming that the cleanup will result in irreparable health-based harms may only need to demonstrate the threat by a preponderance of the evidence standard while the PRP making the same claim would have to demonstrate the threat on clear and convincing basis. However, problems will arise in determining which parties are PRPs with dubious objectives and which are concerned citizens.

81. "Congress' intention that cleanup not be delayed or diverted by dilatory litigation must be honored. To overcome that admonition, [the plaintiff]. . .has the burden to establish that the EPA's choice of remedy was indeed arbitrary and capricious or otherwise contrary to law." *Princeton*, 31 F.3d 149.

82. Clinton County Commissioners v. EPA, 116 F.3d 1018 (3rd Cir. 1997). In 1982, the EPA took control of a chemical manufacturing site owned by Drake Chemical to commence cleanup efforts. After a six year notice and comment period, the EPA concluded that the optimal response action involved extracting the contaminated soils, treating it with an incinerator, then returning the "cleaned" soil back to the property. A government contractor initiated the cleanup in 1993 with a "trial burn" to preliminarily determine that the incinerator met performance standards, what the operating requirements of the project would be, and the extent of the potential risks

clude *all* citizens' suits against the EPA remedial actions under CERCLA until such actions are complete, *regardless* of the harm that the actions might allegedly cause."[83] This decision expressly overruled *Princeton* and seemingly precludes the application of the Modified Exception suggested in Section III, *supra.* Nevertheless, the *Princeton* decision and its modified version are grounded in definitive policy rationale that the *Clinton County* court evidently overlooked. Furthermore, in reviewing the application of § 113(h) and subsequently overruling *Princeton*, the *Clinton County* court made far-reaching presumptions and asserted inconsistent arguments, rendering it an internally flawed opinion. The following subsections discuss the *Clinton County* court's reasoning for overruling *Princeton* and underscore the illogical conclusions the court reached with respect to the Section's plain language, its legislative history and general policy rationales.

A. *Plain Language*

The *Clinton County* court asserted that Congress offered "a clear indication of its intention that citizen-initiated review of EPA removal or remedial actions take place only after such actions are complete."[84] This statutory clarity, however, eluded various circuit courts over several years, and, judging from the *Clinton County* court's own convoluted discussion of the plain language of § 113(h), also drifted far from this very opinion.[85]

The court begins with a misguided grammar lesson. It opined that because Congress chose to use the past tense, it must have intended for the word "taken" to be interpreted as "com-

involved with the selected remedial action. At the request of concerned citizens, the EPA conducted a risk assessment survey. This study was released to the public and, after a notice and comment period, the EPA decided to proceed with the trial burn. In 1996, the plaintiffs sued the EPA under the citizen suit provision of CERCLA claiming that the remedial action selected by the EPA would result in irreparable harm to the public health and the natural environment. After a series of motions, the district court dismissed the case for lack of subject matter jurisdiction, contradicting the Third Circuit's earlier decision in *Princeton.* The plaintiff appealed and obtained a remand from a three-judge panel citing *Princeton.* Despite the panel's unwillingness to diverge from the circuit's precedent, it expressed reservations about adhering to the ruling in *Princeton* and recommended that the Third Circuit reconsider *Princeton*'s central holding. With this recommendation, the Third Circuit reheard the issue en banc and overruled its prior decision in *Princeton.*

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

84. *Id.* at 1023.

85. For a generalized discussion of the plain language of §113(h), *see* Section I, *supra.*

pleted."[86] The court reaches this conclusion by groundlessly linking "completion" with the obvious fact that the "subsection deals with the 'timing of review,'" as its title indicates. To reinforce this speculative argument, the court draws a distinction between the two words "selected" and "taken," used by Congress in the general jurisdictional bar of § 113(h) and its citizen suit exception, respectively. The distinction assumes that "selected" is a response action "chosen not fully implemented" and "taken" is a response action "chosen and has been completed."[87]

While "completion" may be *a* reasonable interpretation of the past tense verb "taken" in this context and the court's distinction between "selected" and "taken" may be *a* useful contrast, it is overly presumptuous to assert that this analysis is "the most reasonable"[88] as the *Clinton County* court conclusively stated. Another, equally reasonable interpretation of the word "taken" could be "underway" as opposed to "completed." If "underway" was indeed Congress' intended definition, the *Princeton* exception and its variants would be viable applications of the citizen suit exception in § 113(h)(4). As the *Clinton County* court would surely concede, the application of § 113(h) hinges on Congress' definition of the word; the two suggestions discussed above—"completed" and "underway"—are both reasonable, but, as several circuit courts have concluded, Congress was unclear in its statutory articulation.

The *Clinton County* court also points to the final sentence of the citizen suit exception as further evidence supporting its conclusion. According to the court, in situations where the EPA expects a removal action to be followed by a more extensive remedial action, Congress intended to bar citizens from bringing suit "so long as 'remedial' action remains 'to be undertaken.'"[89] Put simply, the court interpreted the final sentence to mean that Congress intended to bundle into one response action the removal and remedial actions ordered at one site for the purposes of the citizen suit exception. Any citizen suit challenge must therefore await the conclusion of the entire response action.

But the court's interpretation of this final sentence in § 113(h)(4) is equally as presumptuous as its statutory analysis of the rest of § 113(h). First, it broadly applies its interpretation of

86. *See Clinton County*, 116 F.3d at 1022-23.
87. *Id.* at 1023.
88. *Id.*
89. *Id.*

a narrow exception-to-an-exception, conclusively assuming that Congress intended one narrow application of the jurisdictional bar for the entire citizen suit exception. Again, Congress was unclear on this point, which further underscores the flawed assertion that § 113(h) is "clear." Second, the phrase "a 'remedial' action to be undertaken" can be interpreted in ways not contemplated in the *Clinton County* opinion. "To be undertaken" could arguably mean that Congress intended to preclude citizen suits on the removal action until the EPA selected the entire, bundled response action. For example, this situation would arise in circumstances whereby the EPA had not selected the actual remedial action in question but had already completed the removal. To bring a citizen suit before the selection of the remedial action would not give the appropriate level of deference to the EPA, especially since Congress intended to bundle the removal and remedial actions in these circumstances. To bar suits until the remedial action is completed, as the *Clinton County* court suggests, would render the citizens suit exception ineffectual.

Another reasonable interpretation of the phrase "to be taken" entails analyzing the tense of the phrase, as the *Clinton County* court had previously done with the word "taken." Congress used the future tense in this final sentence arguably intending the polar opposite of what the *Clinton County* court concluded. That is, Congress may have wanted citizens to wait until remediation commenced before bringing suit. At first glance, this seems counterintuitive. Why would Congress want to give citizen's the authority to bring suit once remediation has begun? Congress may have wanted citizens to observe how the remedial action progressed before challenging the EPA in court. This would grant the appropriate level of deference to the EPA, while simultaneously giving citizens the authority to mitigate any errors in the EPA's judgment.

The only "clear indication" arising from this statutory analysis is that the *Clinton County* court was overly presumptuous in concluding that the plain language of § 113(h) is "clear" and that its interpretation is the "most reasonable" one. Not only have other circuits struggled to derive an unequivocal Congressional intent from the plain language of § 113(h), but the *Clinton County* court's own complex discussion further demonstrates that the plain language is anything but clear.

B. *Legislative History*

The *Clinton County* court generously considered the legislative history of § 113(h) despite its "conclusion that the statutory language is clear [so that it] need not consult legislative history."[90] Again, the court found that "Congress enacted [§ 113(h)] to prevent judicial interference, however well-intentioned, from hindering EPA's efforts to promptly remediate sites that present significant danger to public health and environment."[91]

But the court failed to acknowledge the patent disagreements among Members of Congress articulated in both committee reports and the Congressional Record, as discussed throughout the precedential case law and earlier in this paper.[92] What is especially interesting about the court's one-sided conclusion regarding the legislative history is its willingness to cite "support in the legislative history for the [citizens'] interpretation of [the exception in § 113(h)(4)], that judicial review of incomplete EPA remedial actions is permitted whenever a challenge involves bona fide allegations of irreparable harm to public health or the environment."[93] But rather than concede that the legislative history is more ambiguous than the court suggests, it simply disregards equally valid legislative histories.

Again, the *Clinton County* court failed to demonstrate the legislative clarity it so confidently asserted in this opinion.

C. *Policy Considerations*

The *Princeton* court concluded and this paper agrees that federal courts must strike a balance between the general objectives of CERCLA and the specific objectives of § 113(h). But the *Clinton County* court disagreed, concluding that an absolute jurisdictional bar would not compromise CERCLA's mission.

First, the court averred that Congress already determined "citizen suit challenges posed a greater risk to the public welfare than the risk of EPA error in the selection of methods of remediation."[94] To an extent, this assertion is correct. The EPA by design and by virtue of its experience and expertise is entitled to an appropriate level of deference. However, excessive deference to

90. *Id.*
91. *Id.*
92. For a generalized discussion of the legislative history of §113(h), *see* Section I, *supra.*
93. *Clinton County*, 116 F.3d at 1024, note 2.
94. *Id.* at1025.

administrative agencies is perilous, especially when lives are potentially at stake. Thus, some citizen refuge is critical. Unfortunately, the *Clinton County* court offers citizens no recourse, even in rare cases. For example, the *Princeton* court envisaged the following "extreme scenario:" "The problem may be illustrated by an extreme scenario that has the EPA deciding to take leaking drums containing a highly toxic substance from a dump site and to empty them into a nearby lake, thus causing permanent damage to public health and environment. If citizens cannot prevent such dumping from taking place, no effective remedy exists."[95]

To its credit, the *Clinton Court* aptly expressed concerns that permitting citizens to freely halt ongoing CERCLA cleanups could open a Pandora's Box. Litigation would once again dominate the landscape of CERCLA implementation, exactly what § 113(h) was intended to minimize. To strike a balance, therefore, between affording an appropriate level of deference to the EPA and granting some means of recourse to the citizenry, the Modified Exception discussed above would place a 'clear and convincing' burden on the citizen(s) bringing suit. This burden of proof—which is higher than the burden called for by the *Princeton* court—would assuage judicial concerns that citizen suits would become dilatory litigation tactics or would devolve into a fight over the "legitimate difference of opinion about the preferred remedy for a particular site."[96] Without substantive evidence demonstrating the likelihood of an irreparable harm at the particular site in question, the plaintiff-citizen would fail to meet his or her burden. The case would be dismissed, preserving judicial deference to the EPA.

Second, the *Clinton County* court argued that Congress provided a means by which the public can participate in the selection of a response action, suggesting that it is not the judiciary's duty to furnish additional avenues for the public to engage the EPA in legal battles. Both CERCLA and the Code of Federal Regulations call for a preremediation notice and comment period. In addition, states may play a significant role in choosing EPA cleanup standards.

Nevertheless, these recourse measures are insignificant and ineffectual. Opposition comments, once addressed, can be entirely ignored by EPA administrators in the ultimate decision-making

95. *Princeton*, 31 F.3d at 146.
96. *Clinton County*, 116 F.3d at 1024.

process. The EPA, for better or for worse, often makes decisions in the interest of cost savings and/or political expediency. If § 113(h) is an absolute bar, then it would be difficult, if not impossible, for the public to check any errors or impropriety on the part of the EPA. Again, this issue looms even larger when the subject matter at bar is the public's health, safety and welfare.

Third, the *Clinton County* court reasoned that a general jurisdictional bar at the federal level does not impede all avenues of relief for the average citizen. "Congress apparently left citizens the option of obtaining relief in state court nuisance actions."[97] By simply mentioning the state remedy, the court essentially defeats its own holding on several fronts. It acknowledges that, in certain circumstances, citizens need relief, even after an EPA response action is underway. Then the court recognizes that § 113(h) is not an absolute bar despite its contentions to the contrary throughout the opinion. Most notably, the viability of state court claims begs the obvious question: Wouldn't a state court claim have the same delay effect at an ongoing CERCLA site as a citizen suit claim under RCRA or CERCLA? Indeed, it likely would have such an effect, further highlighting the court's misguided reference to state court nuisance claims as an alternative remedy.

Finally, the court concludes with a catch-all statement that acknowledges the tension between the general objectives of CERCLA and the specific objectives of § 113(h). It again relies on *its* interpretation of the "clear" statutory language and nobly asserts that it is not within the purview of the judiciary to "act as a super-legislature and second guess the policy choice that Congress made."[98]

Nevertheless, a simple reading of *Clinton County* reveals that the court did exactly what it explicitly said it would not do—legislate. The court reached its conclusions on flawed policy, not law. And there appears to be no viable reasons to conclude that this court's interpretation of § 113(h) is any "more reasonable" than that of the *Princeton* court, despite its contentions to the contrary.

The plain language, legislative history, and policy rationales employed in *Clinton County* were flawed, presumptuous and internally inconsistent. Despite the court's assertions to the con-

97. *Id.* at 1025.

98. *Id.* (citing *Princeton*, 31 F.3d at 153 (Nygaard, J., concurring)).

trary, the plain language and legislative history of § 113(h) are, as discussed in Section I, *supra* and the existing case law, unclear. Moreover, there does exist a tension between the general objectives of CERCLA and the specific objectives of § 113(h), as addressed by the court in *Princeton*. The *Clinton County* court's characterization of the *Princeton* court as a "super-legislature" is hypocritical, considering it engaged in a similar, if not identical, method of analysis. If courts follow the lead of the *Clinton County* court, they will leave concerned citizens with no practicable form of recourse against the EPA, a result that would effectively gut the citizen suit exception in § 113(h) altogether; such a result is the only one that *clearly* contradicts Congressional intent.

VI.

APPLICATION TO RCRA CITIZEN SUITS: TO BAR OR NOT TO BAR?

As discussed in Section I.A., *supra*, RCRA provides for two types of citizen suits—the "citizen enforcement" and the "imminent and substantial endangerment" suits, the latter of the two being expressly barred by RCRA at ongoing CERCLA sites.[99] The present question, therefore, is whether § 113(h) unconditionally bars plaintiffs from bringing RCRA "citizen enforcement suits." If courts adopt the broad interpretation of § 113(h) as espoused in *Clinton County*, then the answer to the question posed above is simply 'yes'. However, if applying the implicit Modified Exception discussed in Section III, *supra*, courts should permit at least *some* RCRA citizen suits to proceed at ongoing CERCLA sites, provided that the plaintiffs in these cases convincingly demonstrate the likelihood and severity of the threat posed by the cleanup to the natural environment and/or those living in the local vicinity. Two cases provide solid factual examples to illustrate the applicability of the Modified Exception to the case of RCRA citizen suits. Arguably, both cases would have resulted in different outcomes had the reviewing courts considered the potential environmental and health-based risks of the EPA-selected remedial action.

In *Arkansas Peace Center*, the court dismissed the plaintiffs' RCRA citizen suit, concluding that it qualified as a "challenge" under § 113(h) which interfered with the EPA's selected mode of

99. *See* 42 U.S.C. §6972(b)(2)(B)(ii).

cleanup.[100] The EPA-selected removal action consisted of assisting the state to incinerate and dispose of abandoned drums of dioxin contaminated herbicide wastes and monitor the air circulating the site.[101] EPA regulations require that incineration of dioxin wastes "achieve a destruction and removal efficiency of 99.9999%,"[102] a standard that the plaintiff demonstrated the EPA did not meet.[103] Nevertheless, the court dismissed the challenge pursuant to § 113(h).

If the Eighth Circuit applied the Modified Exception in this case and considered the negative environmental and health based impacts of the EPA-selected remedial action, including the increased probability of cancer to those living within the vicinity,[104] it would have likely permitted the citizen suit to proceed. The challenge, although calling into question the EPA-selected mode of cleanup, would have met the larger Congressional goal of protecting the environment and saving human lives.

Conversely, in *United States v. Colorado*, the Tenth Circuit allowed the plaintiff's RCRA citizen suit to proceed, concluding that it sought to modify, not halt the cleanup effort.[105] The plaintiff challenged the United States Army's efforts to cleanup hazardous liquid wastes at a base in Colorado because they were not approved by the state agency delegated with RCRA-enforcement authority.[106] The plaintiff did not argue that it would have chosen a different remedial action than the one chosen by the Army nor did the plaintiff present evidence demonstrating that the remedial actions selected by the Army presented any environmental or health-based risks. Nevertheless, the court permitted the citizen suit to continue on procedural grounds. What makes this decision especially contestable was the court's explicit acknowledgment that the challenge would delay the cleanup. The court had "*no doubt* that Colorado's [challenge would] 'impact the implementation' of the Army's CERCLA response action."[107] Thus, the court's decision neither adheres to § 113(h)'s specific goal of "cleaning up now, litigating later" nor CER-

100. *Ark. Peace Ctr.*, 999 F.2d at 1216-18.
101. *See id.* at 1214.
102. *Id.* at 1214 (citing 40 C.F.R. §264.343(a)(2)).
103. *See Ark. Peace Ctr.*, 999 F.2d at 1214.
104. *See id.*
105. *US v. CO*, 990 F.2d at 1577.
106. *See id.* at 1571-1574.
107. *Id.* at 1578 (emphasis added).

CLA's general goal of protecting the environment and saving human lives.

Had the Tenth Circuit applied the Modified Exception in this case and considered that there were no environmental or health-based risks associated with the cleanup (and that the plaintiff certainly did not demonstrate any in a clear and convincing fashion), it would have likely dismissed the case to allow the cleanup to continue pursuant to § 113(h).

These two cases and this simple analysis illustrate the method courts should employ when reviewing RCRA citizen suits challenging EPA-selected remedial actions at CERCLA sites. By preliminarily considering the substantiality of the potential harm arising from the proposed remedial or removal action and the likelihood of that harm occurring, courts can determine whether the environmental and general health-based objectives of CERCLA are best served by cleaning up now or litigating now. Thus, the question of whether "to bar or not to bar" RCRA citizen suits at ongoing CERCLA sites should be answered by courts reviewing the facts in a given case and balancing the competing governmental interests, both of which inherently seek to promote human safety and the health of the natural environment.

VII.
CONCLUSION

The addition of an environmental and health-based exception to the general jurisdictional bar provided for in § 113(h) will effectively permit courts to balance both Congressional objectives of providing for an expeditious cleanup of dangerous hazardous waste sites while accounting for human safety and health of the natural environment. If Congress does not codify the *Princeton* exception itself or a modified version, courts should begin to follow its rationale because, realistically speaking, excessive deference to an administrative agency does not always yield optimum results. The Modified Exception outlined herein is an equitable compromise.