The Effectiveness and Fairness of Superfund's Judicial Review Preclusion Provision

Michael P. Healy
University of Kentucky College of Law, healym@uky.edu

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THE EFFECTIVENESS AND FAIRNESS OF SUPERFUND'S JUDICIAL REVIEW PRECLUSION PROVISION

Michael P. Healy*

I. INTRODUCTION

This article examines the effectiveness and fairness\(^1\) of section 113(h)\(^2\) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund).\(^3\) That broadly-worded provision forecloses judicial review of Superfund cleanups prior to enforcement or cleanup completion by requiring that any review action fall within several narrowly-defined exceptions.

After providing an overview of the statute, its enforcement mechanisms, and a context for considering section 113(h), the article summarizes how courts have applied CERCLA's timing of

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* Associate Professor, University of Kentucky College of Law; J.D., University of Pennsylvania, 1984; B.A., Williams College, 1978. From 1987 until July 1990, Michael Healy was an attorney in the Appellate Section of the Environment and Natural Resources Division, United States Department of Justice. This article is based on a Report entitled, “An Evaluation of the Fairness and Effectiveness of the Judicial Review Preclusion Provision in the Superfund Statute,” which Mr. Healy prepared for the Administrative Conference of the United States. Congress failed to continue funding for the Administrative Conference, so the Conference did not have an opportunity to consider recommendations based on the Report. The University of Kentucky College of Law also assisted in preparing this article through a summer research grant. Mr. Healy wishes to acknowledge the help of an anonymous official who encouraged him to compare the review of response actions to the review of corrective actions. Thanks to Debbie Mains, Class of 1996, for her work as a research assistant.

1 In Michael P. Healy, Judicial Review and CERCLA Response Actions: Interpretive Strategies in the Face of Plain Meaning, 17 HARV. ENVTL. L. REV. 1 (1993), the author analyzes the problems of statutory construction that are posed by CERCLA’s review preclusion provision. In this article, the author will discuss the various judicial interpretations of § 113(h) only briefly, except where there have been important developments in the law since the earlier article.

2 42 U.S.C. § 9613(h) (1988). This provision states that, unless the action is one of five proceedings identified in the statute:

No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law . . . to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title . . . .

Id.

review provision,\(^4\) focusing principally on recent interpretations of the provision.\(^5\) Finally, the article evaluates the effectiveness and fairness of CERCLA review preclusion and concludes by offering recommendations about how the provision should be interpreted and amended.

Given the terms and intent of section 113(h), courts uniformly hold that a district court lacks jurisdiction when, prior to a government action to recover response costs, a potentially responsible party (PRP) seeks judicial review to determine its liability under section 107 of CERCLA.\(^6\) By foreclosing review of such claims, the provision has been quite effective in ensuring that cleanups are not slowed as a result of litigation concerning CERCLA liability. However, because section 113(h) postpones litigation of the liability issue, the review preclusion provision intensifies PRP concerns about the fairness of CERCLA's liability scheme.

Section 113(h) has been less effective in foreclosing immediate judicial review of CERCLA claims that are unrelated to liability, with a minority of courts deciding that immediate review is available because delayed review would be inadequate.\(^7\) A particularly troublesome claim of this type is present when a plaintiff contends that the implementation of the challenged response action will itself do irreparable harm to public health and the environment. If section 113(h) forecloses review of this type of claim until after implementation of the response action, the provision operates to bar adequate review of the claim because the health-based concerns arise out of the planned cleanup measures themselves.

Courts must also decide whether section 113(h) bars federal court jurisdiction when claimants rely on other federal statutes or the Constitution to gain review of a CERCLA response action. Courts have come to a variety of inconsistent conclusions about whether the provision forecloses review in these cases. When courts have decided that section 113(h) does not bar judicial review, they have typically allowed review because of fairness con-

\(^4\) 42 U.S.C. § 9613(h).

\(^5\) The author includes a much more detailed discussion of the cases interpreting § 113(h) in Healy, supra note 1. For an alternative summary of how courts have interpreted § 113(h), see Elizabeth Williams, Annotation, What Claims Fall Within Limitation Imposed by § 113(h) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 USCS § 9613(h)) on Judicial Review of Cases Arising Under CERCLA, 116 A.L.R. Fed. 69 (1993).

\(^6\) 42 U.S.C. § 9607.

\(^7\) See infra parts III.B., IV.B.
cerns. That is, notwithstanding the broad and categorical terms of section 113(h), concern for the preservation of statutory and constitutional rights through timely judicial review has motivated such grants of early review.

II. Overview of CERCLA, Section 113(h), and the Problem of Pre-Enforcement Review

A. CERCLA and the Cleanup of Hazardous Substances

In 1980, Congress enacted CERCLA so that the federal Environmental Protection Agency (EPA) would have "the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal." CERCLA provided federal funds to ensure cleanup of hazardous substances and federal authority to recover cleanup costs from those responsible for contamination. CERCLA included substantial federal funding, increased by subsequent statutes, to allow the federal government to begin cleanups of the "most significant releases of hazardous substances." The enforcement provisions and

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8 See id.
9 United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982). The concerns about hazardous waste that gave rise to CERCLA's enactment may be traced to "[s]everal well-publicized incidents of improper disposal of large amounts of hazardous substances which caused serious public health problems." Michael P. Healy, Direct Liability for Hazardous Substance Cleanups Under CERCLA: A Comprehensive Approach, 42 CASE W. RES. L. REV. 65, 68 (1992). Congress recognized that a new environmental statute was necessary in order to address adequately the very significant problem that it believed was confronting the nation. See id. at 69 n.10.

Since Congress enacted CERCLA in 1980, clean-up costs have risen significantly. At the time of CERCLA's enactment, the EPA estimated that spending between $13.1 and $22.1 billion would permit the cleanup of the 1200 to 2000 most dangerous sites. See United States v. Wade, 577 F. Supp. 1326, 1338 n.11 (E.D. Pa. 1983). More recently, a 1991 "University of Tennessee study calculates that the eventual costs of cleaning up all hazardous waste sites could reach $752 billion." House Subcomm. on Investigations and Oversight of the Comm. on Public Works and Transportation, Administration of the Federal Superfund Program, H.R. Doc. No. 35, 103d Cong., 1st Sess. 5-6 (1993) [hereinafter Report on Superfund Administration].


Congress intended Superfund to provide seed money for cleanups and replenish that money by recovering the costs of cleanup from parties identified as liable for those costs.
mechanisms included in CERCLA are based on a “polluter pays” principle and seek to impose cleanup costs on those responsible for the release of hazardous substances into the environment. A basic understanding of CERCLA and the relationship between cleanup and enforcement is important before one can evaluate the effect of and concerns related to the review preclusion provision. As the article discusses, CERCLA is structured so that the cleanup function may be pursued independently of enforcing or imposing liability under the Act.

1. The Structure of CERCLA Cleanups

CERCLA grants the federal government and other parties the authority to pursue response actions (cleanups). When there is a release or the threat of a release of a hazardous substance from a facility, the EPA, states, tribes, or other persons may take response actions that fall into either of two categories.

A first response option is a removal action, a short-term response to a release intended “to abate, prevent, minimize, stabilize, mitigate, or eliminate the release or the threat of release.” 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 sub-

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stances. Because these removal actions allow for immediate abatement and are usually limited in terms of the money and time that may be expended for them, they may be pursued without the prior completion of a substantial administrative process.

Between CERCLA's enactment in 1980 and May 1992, the "EPA calculated that 3,269 cleanup [removal] projects had been started at 2,602 waste sites with 2,757 projects at 2,238 sites completed." A recent study of CERCLA observed that "[t]he removal program is generally believed to be the unsung success story of the Superfund program." Indeed, the EPA has indicated that one of CERCLA's most valuable contributions to human health and the environment has been the authorization for and completion of these removal actions.

A remedial action, the other type of response action, refers to a cleanup designed to achieve a permanent remedy at the site. Examples of remedial actions include several of the actions that may be part of a removal action, as well as mechanisms to collect leachate and runoff, the treatment or incineration of hazardous substances at the site, and reasonable monitoring to ensure the adequacy of the remediation effort. The 1986 Amendments to CERCLA establish a preference for permanent, treatment-based

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22 Subject to narrow exceptions, CERCLA limits Superfund response action expenditures to $2 million and duration to 12 months, unless the action involves investigation and monitoring permitted under 42 U.S.C. § 9604(b). Id. § 300.415(b)(5).
23 A pre-removal planning process is required only when "a planning period of at least six months exists before on-site activities must be initiated." Id. § 300.415(b)(4).
24 REPORT ON SUPERFUND ADMINISTRATION, supra note 9, at 42.
25 PROBST ET AL., supra note 10, at 15.
26 See Review of the Hazardous Substance Superfund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 102d Cong., 2d Sess. 223 (1993) (statement of Don R. Clay, Assistant Adm'r, Office of Solid Waste and Emergency Response, U.S. Envtl. Protection Agency) [hereinafter Ways and Means Review Hearings]. "[T]he 2,800 separate emergency removal actions we have taken have been very successful. We believe these actions prevented fires, explosions, and other catastrophic events from occurring at unstable sites. I think this area has been a big success for the program, and we often do not talk about them." Id.
28 A remedial action is taken "to prevent or minimize 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.
29 For example, the statute states that a remedial action may involve "confinement . . . clay cover . . . cleanup of released hazardous substances . . . [and] repair or replacement of leaking containers." Id. These actions are the same as those discussed in connection with removal actions. See supra note 21 and accompanying text.
remedies. The cost of these preferred remedies is higher than the cost of a removal that merely contains the hazardous substance and remediates the effects of any prior releases into the environment.

Because of the significant public health concerns related to ensuring permanent remedies and substantial average costs (between $25 and $30 million per site) of remedial actions, the process of funding, selecting, and implementing remedial actions is very complex and time consuming. Only a small number of remedial actions have been completed since CERCLA's enactment. The EPA has vowed, however, that the number of completed remedial actions will increase significantly through the end of this century. Additionally, the EPA has suggested that CERCLA's success should not be judged solely upon the number of

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32 See Ways and Means Review Hearings, supra note 26, at 19 (statement of Jan Paul Acton, Assistant Director, Natural Resources and Commerce Division, Congressional Budget Office).
33 When it added § 121 to CERCLA in 1986, Congress stated its intent that "remedial actions must assure protection of human health and the environment." H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 245 (1986), reprinted in 1986 U.S.C.C.A.N. 3276, 3338. Congress' fundamental concern with the protection of human health is also apparent in the Conference Committee's explanation of the requirement of cost-effectiveness, which was included in § 121:
The term "cost-effective" means that in determining the appropriate level of cleanup the President first determines the appropriate level of environmental and health protection to be achieved and then selects a cost-efficient means of achieving that goal. Only after the President determines ... that adequate protection of human health and the environment will be achieved, is it appropriate to consider cost effectiveness.
Id.
34 Report on Superfund Administration, supra note 9, at 5 ("The cost of cleaning up hazardous waste sites is enormous. [The] EPA estimates that the average cost for a Superfund cleanup is between $25 and $30 million per site ... "); see Probst et al., supra note 10, at 20 (estimating a cost of $29.1 million for a site cleanup).
35 The time period needed to plan for and complete a remedy is quite long. See Report on Superfund Administration, supra note 9, at 6 ("The Congressional Budget Office estimates that 15 years or more is needed from discovery to the completion of cleanup construction for the average Superfund site.").
36 See id. at 1 (In the thirteen years since CERCLA was enacted, "only 49 sites have been cleaned up and taken off the NPL. Cleanup construction has been completed at another 112 sites, and it is estimated that about half of all NPL sites have had some waste removal completed."; National Priorities List for Uncontrolled Hazardous Waste Sites, 59 Fed. Reg. 65,206, 65,207 (1994) (reporting that, as of December 1994, 67 sites have been deleted from the NPL following cleanup).
37 See Ways and Means Review Hearings, supra note 26, at 229 (statement of Don R. Clay, Assistant Adm'r, Office of Solid Waste and Emergency Response, U.S. Envtl. Protection Agency) ("[T]he number of sites at which the construction of a remedy has been completed is now growing at a pace of approximately one completion per week; [the] EPA is targeting 650 construction completions by the year 2000.").
completed remedial actions, but upon the effectiveness of response actions in reducing or eliminating risks to public health and the environment.\textsuperscript{38} To encourage this new measure of effectiveness, the EPA developed the Superfund Accelerated Cleanup Model (SACM), which "is an attempt to measure the effectiveness of the Superfund program by risk reduction, rather than solely by how many sites are deleted from the NPL."\textsuperscript{39} Regulated parties appear to support this change in focus because the new standard for effectiveness should ensure that the EPA's remedial priorities are not based merely on the ease of completing the action.\textsuperscript{40}

CERCLA financed remedial actions are limited to the approximately 1,300 sites on the National Priorities List (NPL). The NPL consists of sites the EPA has identified as posing the greatest risk to human health and the environment.\textsuperscript{41} This limitation reflects Congress' understanding that priorities had to be established — CERCLA funding was simply inadequate to respond to all releases of hazardous substances.\textsuperscript{42}

The cost and effectiveness of a remedial action depend on its design and selection, including the preparation of the Remedial Investigation and Feasibility Study (alternatively referred to as the

\begin{itemize}
  \item \textsuperscript{38}See id. at 25 (statement of Jan Paul Acton, Assistant Director, Natural Resources and Commerce Division, Congressional Budget Office). "[B]y eliminating the distinction between removal sites and remedial sites, the agency hopes to change the yardstick by which Superfund is measured, shifting the emphasis from NPL completions to risk reductions." Id.
  \item \textsuperscript{39}REPORT ON SUPERFUND ADMINISTRATION, supra note 9, at 56.
  \item \textsuperscript{40}See Ways and Means Review Hearings, supra note 26, at 360 (statement of Bill Mulligan, manager of Environmental Affairs, Chevron Corp., on behalf of the American Petroleum Institute). "Pressures to get the greatest number of sites cleaned up within a certain time frame have caused [the] EPA to expend its limited resources on less complex sites that generally pose lesser risks. API believes this inefficient practice should be reviewed and attention focused on those sites presenting higher public health and environmental risks." Id.
  \item \textsuperscript{41}"The NPL is the list of priority releases for long-term remedial evaluation and response." 40 C.F.R. § 300.425(b) (1995). The NPL list identifies sites that pose the greatest threat to human health and the environment, according to a hazard ranking system or a prior determination by a state or the EPA. Id. § 300.425(c). See generally Eagle-Picher Indus. v. United States EPA, 822 F.2d 132 (D.C. Cir. 1987) (describing and clarifying the process by which sites are placed on the NPL). As of December 1994, there were 1,288 final and proposed sites on the NPL. See National Priorities List for Uncontrolled Hazardous Waste Sites, 59 Fed. Reg. 65,206, 65,206 (1994). The number of sites on the NPL is expected to increase significantly for the foreseeable future. See REPORT ON SUPERFUND ADMINISTRATION, supra note 9, at 1-2. "[The] EPA estimates that more than 100 [sites] will be added annually to the NPL through the year 2000, producing an NPL more than five times its originally anticipated size." Id.
  \item \textsuperscript{42}See supra notes 33-36 and accompanying text.
\end{itemize}
RI/FS). This critical stage of the remedial action, which typically requires three to four years to complete, is subject to strict procedural and rather uncertain substantive constraints. Procedurally, the 1986 CERCLA Amendments added section 117, which ensures substantial public participation in the selection and design of the remediation plan.

Two elements are critical to the substance of the remedial action, but the statute subjects neither to uniform and predictable controls. The first element involves the standards to determine whether the remedial action is complete; that is, whether the site is clean enough following the remedial action. In general, a remedy is required to protect human health and the environment adequately. To reach this goal, a site must comply with standards identified in other environmental statutes that are “legally applicable . . . or . . . relevant and appropriate under the circumstances” (ARARs).

Because CERCLA grants a state “substantial and

43 See 40 C.F.R. § 300.430 (1994) (discussing the RI/FS). The National Contingency Plan states that “[t]he purpose of the [RI/FS] is to assess site conditions and evaluate alternatives to the extent necessary to select a remedy.” Id. § 300.430(a)(2).

44 See REPORT ON SUPERFUND ADMINISTRATION, supra note 9, at 83 (“The selection of a remedy is a major part of the cleanup process. Mr. Grumbly [President of Clean Sites, Inc.] said that the selection of remedy is ‘the linchpin of any cleanup program . . . ’.”).

45 See id. at 53.

46 42 U.S.C. § 9617. This section requires that, before any remedial action may be pursued, notice and a brief analysis of the proposed remediation plan must be published and made available to the public. The public must then be provided with “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 be available for review by the public. Id. § 9617(b). The final plan must be accompanied by discussion of significant changes from the proposed plan and responses to any significant public comments on the proposed plan. Id. Consistent with these formal procedural requirements, CERCLA also requires the EPA to keep an administrative record regarding the selection of a remedial action. Id. § 9613(k). Finally, the EPA must publish an explanation of any “significant differences” between the final remediation plan and any action “taken” or the terms of any final settlement. Id. § 9617(e).

Congress intended the 1986 Amendments to encourage support for cleanups within the community. See, e.g., H.R. No. 253, 99th Cong., 1st Sess., pt. 5, at 65 (1985) (“[I]ncreased 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.”), reprinted in 1986 U.S.C.C.A.N. 3124, 3188. CERCLA also provides funding for technical assistance grants so that public participation is well-informed and productive. 42 U.S.C. § 9617(e).

47 42 U.S.C. § 9621(d)(1). This provision was added to CERCLA in 1986 to codify Congress’ intent that “remedial actions must assure protection of human health and the environment.” See H. R. CONF. REP. NO. 962, supra note 33, at 245.

48 42 U.S.C. § 9621(d)(2)(A)(i). In cases where an ARAR does not define a “protective level” for a hazardous substance, the final remediation goal for carcinogens is to reduce the risk to one incidence of cancer in one million. See Ways and Means Review Hearings, supra
meaningful involvement” in the promulgation of cleanliness standards, they may vary among the states, particularly when states have adopted pollution control standards that are more stringent than federal standards. This process must be repeated for each remediation site, producing new ARARs and thus uncertainty about the final cleanup standards that will apply. Ultimately, this process makes the cost of the cleanup less certain, reduces the willingness of private parties to agree upon remedial actions, and increases the likelihood of litigation.

The second critical substantive element is the actual technical plan for remediation. Although CERCLA prefers permanent treatment-based remedies, there are often many alternative methods for treating or otherwise remediating a site and the costs associated with each method may vary greatly. Generally, the EPA has undertaken the time-consuming process of identifying the appropriate cleanup methodology on a site-by-site basis. This process tends to slow cleanups and increase transaction costs for two reasons: choosing a proper cleanup methodology is itself difficult, and section 107 PRPs are often unwilling to settle before the

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49 42 U.S.C. § 9621(f)(1). See also United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1418 (6th Cir. 1991) (“CERCLA . . . provides a substantial and meaningful role for the individual states in the selection and development of remedial actions to be taken within their jurisdictions.”). CERCLA also provides the states with a limited right to judicial review of an EPA decision and allows substitution of alternative remedies for EPA proposals, including environmental standards viewed as relevant and appropriate by the state. See 42 U.S.C. § 9621(f)(2)-(3); 40 C.F.R. § 300.515(f)(2) (1995).

50 See REPORT ON SUPERFUND ADMINISTRATION, supra note 9, at 79 (“In the absence of specific statutory cleanup goals and levels, [the] EPA must determine 'how clean is clean' at each Superfund site, a process requiring lengthy investigation and decisionmaking.”).

51 See id. at 110 (“The ARARs requirement does lend uncertainty and inconsistency to the remedy selection process, making responsible party litigation over the remedy and delays in the cleanup process likely. Further, the uncertainty over which standards and remedies will be applied is a disincentive for responsible parties to initiate cleanups.”).

52 See supra note 31 and accompanying text.

53 See Ways and Means Review Hearings, supra note 26, at 234 (statement of Don R. Clay, Assistant Adm'r, Office of Solid Waste and Emergency Response, U.S. Envtl. Protection Agency, stating that the EPA is seeking to change the ad hoc nature of remedy selection and move to “[t]he use of presumptive remedies [which] will streamline removal actions, site studies, and remedial actions, thereby improving consistency, reducing costs, and increasing the speed with which hazardous waste sites are cleaned up”).

54 42 U.S.C. § 9607.
cleanup methodology is determined because the amount of their liability will vary according to the chosen methodology.\textsuperscript{55} Moreover, PRPs have raised concerns that the EPA selects the method of remediation without regard to the related costs.\textsuperscript{56}

In sum, because there are few predictable and consistent substantive standards established for remedial actions, transaction costs increase, settlement with PRPs becomes less likely, and concerns that the cleanup program is unfair increase.\textsuperscript{57}

2. The Structure of CERCLA Enforcement

CERCLA provides two formal enforcement methods, as well as an informal method available only to the EPA. Any party authorized to undertake a response action\textsuperscript{58} may initiate the first method, a section 107 cost-recovery action. After an authorized party has expended response costs, section 107(a)\textsuperscript{59} allows an action to recover such costs from parties defined as responsible under the

\textsuperscript{55} See Ways and Means Review Hearings, supra note 26, at 81 (statement of Jan Paul Acton, Assistant Director, Natural Resources and Commerce Division, Congressional Budget Office). Regarding cleanup negotiations, PRPs commented that “being forced to sign up for a share of a cost of unknown magnitude too early causes PRPs to put up a lot of resistance. That is often true at the stage of the [RI/FS].” \textit{Id.}

\textsuperscript{56} See \textit{id.} at 352 (statement of Bernard J. Reilly, Corporate Counsel, Du Pont Company). “[T]he liability scheme is wrong because it places the remedy selection decision in the hands of regulators with absolutely no incentive to control costs, since the law allows recovery of every penny from the parties. This is an unhealthy dynamic.” \textit{Id.}

\textsuperscript{57} See Report on Superfund Administration, supra note 9, at 91. According to this report, when the EPA is deciding upon a remedy:

[the] EPA tends to focus on the highest potential health risks and chooses protective remedies, while responsible parties would rather focus on an estimate of the most likely risks which results in less conservative cleanup levels and less expensive remedies to meet those levels. The pace of cleanup can be delayed significantly by responsible parties litigating over the risk assessment upon which [the] EPA bases its remedy selection.

\textit{Id.}

\textsuperscript{58} See Healy, supra note 1, at 9-10.

\textsuperscript{59} 42 U.S.C. § 9607(a).
Act. Section 107(a) also defines the four classes of "person[s]" or responsible parties who are liable for bearing CERCLA cleanup costs. Responsible parties include present owners and operators of the facility or site, some past owners or operators, generators, and transporters. This section has been uniformly interpreted as imposing retroactive, strict, and joint and several liability on responsible parties. This strict liability scheme is based on "the 'polluter pays' principle, which has allowed the federal government and taxpayers to limit the cleanup costs they must incur." Since CERCLA's enactment, the EPA has significantly increased the amount of money sought from PRPs in cost-recovery actions. Even after taking this into account, these recovered costs

60 40 C.F.R. § 300.700(c) (1995) outlines a § 107(a) cost-recovery action. When the United States, a state, or a tribe incurs response costs, all costs "not inconsistent with the NCP" may be recovered from responsible parties. Id. § 300.700(c)(1). When other parties incur response costs, all "necessary costs . . . consistent with the NCP" may be recovered. Id. § 300.700(c)(2). Courts have construed the distinction between recoverable costs to create a presumption in favor of recovery of costs incurred by the United States, a state, or a tribe; such response costs will be disallowed only when a responsible party demonstrates that they were not consistent with the NCP. See County Line Investment Co. v. Tinney, 933 F.2d 1508, 1512 n.8 (10th Cir. 1991) (explaining that "claims to recover government response costs [are] subject to a lessened standard of proof"); United States v. Kramer, 757 F. Supp. 397, 436 (D.N.J. 1991) (stating that in cost-recovery actions brought by the government, "[d]efendants have the burden to prove that response costs are inconsistent with the NCP" (citation omitted)). When a private party brings an action to recover CERCLA response costs, the party must prove that the response costs incurred were consistent with the NCP. Tinney, 933 F.2d at 1512.

61 CERCLA defines "person" broadly to include corporations and business entities as well as individuals. 42 U.S.C. § 9601(21).

62 Id. § 9607(a). See generally Healy, supra note 9 (analyzing the difficulties that arise in determining whether particular parties are liable for response costs under § 107 of CERCLA). Some courts have recently held that a PRP may not bring a § 107 cost recovery action and may instead bring only a contribution action under § 113(f). See Hydro-Mfg. v. Kayser-Roth Corp., 903 F. Supp. 273 (D.R.I. 1995).


64 Id. § 9607(a)(2).

65 Id. § 9607(a)(3) (responsible parties include those who arranged for the disposal or treatment of the hazardous substances).

66 Id. § 9607(a)(4) (responsible parties include those who have transported the hazardous substances and selected the disposal facility).

67 See Healy, supra note 9, at 81-84 (discussing retroactive liability), 86-87 (discussing strict liability), 102-03 (discussing joint and several liability).

68 REPORT ON SUPERFUND ADMINISTRATION, supra note 9, at 12. In part, when it defined the groups of responsible parties, Congress intended to improve the level of care with which hazardous substances are handled and disposed. See Healy, supra note 9, at 72-86 (discussing the intent of the liability scheme).

69 See Healy, supra note 9, at 32-33 ("[T]he] EPA has increased its emphasis on cost recovery of federal fund expenditures at Superfund sites. In 1987, the Agency sought to recover $81 million from responsible parties. By 1992, the Agency was seeking to recover
will continue to amount to only a small fraction of the total Superfund.\textsuperscript{70}

CERCLA does not require that the cost-recovery action be brought immediately after response costs are incurred. The Act merely establishes a statute of limitations, which in the case of remedial actions forecloses a cost recovery action brought more than “6 years after initiation of physical on-site construction of the remedial action.”\textsuperscript{71} Because construction at a Superfund site may not begin until ten or more years after it has been listed on the NPL,\textsuperscript{72} the average $30 million claim\textsuperscript{73} for the remedial action will not typically have to be brought until approximately 15 years after a PRP has some notice that it may be liable for those costs.\textsuperscript{74}

The second formal enforcement option is available only to the EPA. In addition to imposing liability under section 107 and authorizing actions to recover the costs of cleanup, CERCLA provides the EPA with greater flexibility to respond to releases or threatened releases that pose “an imminent and substantial endangerment to the public health or welfare or the environment.”\textsuperscript{75} In that situation, section 106 authorizes the EPA to issue administrative orders compelling private cleanup of the facility.\textsuperscript{76} These administrative orders may be issued, for example, to instigate a

\textsuperscript{70} See Probst et al., supra note 10, at 14 (“By the end of the 1993 fiscal year, $728[ ] million in costs had been recovered by the government since the program’s inception. Such recoveries are likely to continue to provide a relatively small portion of the total trust fund revenues.”).

\textsuperscript{71} 42 U.S.C. § 9613(g)(2)(B). For removal actions, the cost recovery action must be brought within three years after the removal is completed. See id. § 9613(g)(2)(A).

\textsuperscript{72} See Report on Superfund Administration, supra note 9, at 52-53. According to the report:

The entire process from site identification to construction cleanup may last 15 years. The time required to progress from waste site identification to listing on the NPL averages between seven and eight years. The RI/FS, cleanup design, and construction stages average a total of approximately eight years, with the RI/FS alone averaging from three to four years.

\textsuperscript{73} See supra note 34 (discussing the average cost of a remedial action).

\textsuperscript{74} See infra note 90 (discussing the EPA’s views on when a cost-recovery action should be brought).

\textsuperscript{75} 42 U.S.C. § 9606(a).

\textsuperscript{76} See id. (“The President may ... after notice to the affected State, take other action ... including ... issuing such orders as may be necessary to protect public health and welfare and the environment.”). See generally Environmental Protection Agency, Guidance on CERCLA Sec. 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Orders (1990), reprinted in 20 Envtl. L. Rep. (Envtl. L. Inst.) 35,253 (1990). Section 106(a) also authorizes the United States to sue in federal district
removal action or to force implementation of a remedial action that has been selected by the EPA.\textsuperscript{77}

If an ordered party fails to take the required actions, the EPA may bring an action to enforce the order\textsuperscript{78} or it may itself proceed with the response action. When the EPA sues to recover the response costs, it may also seek fines and damages for the party's violation of the section 106 administrative order.\textsuperscript{79} Section 106 administrative orders are thus a powerful enforcement tool because, if the subject of the order improperly fails to perform the actions that are ordered, the government may recover fines\textsuperscript{80} and punitive damages of up to triple the Superfund expenditures.\textsuperscript{81}

CERCLA does not specifically define the final enforcement option available to the EPA. This informal option involves an agreement between the EPA and one or more of the PRPs — ultimately formalized as a consent decree that is filed with a federal district court — pursuant to which the settling PRPs agree to a private response action at a Superfund site. Because the Superfund program can support only a limited number of cleanups, this third enforcement option has become "critical" to the EPA's administration of CERCLA.\textsuperscript{82} The $8.3 billion total value of these so-called "PRP-lead" cleanups\textsuperscript{83} and their $1.3 billion yearly value, compared to $1.6 billion annual expenditures out of Superfund, demonstrate their significance to CERCLA.\textsuperscript{84}

Indeed, in 1989 when the EPA was faced with growing congressional concern about the tardiness of CERCLA cleanups, the agency decided to pursue an "enforcement-first" policy in administering CERCLA.\textsuperscript{85} This policy sought to increase the number of

\begin{footnotesize}
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  \item \textsuperscript{77} See United States v. Akzo Coatings of Am., 949 F.2d 1409, 1417-18 (6th Cir. 1991).
  \item \textsuperscript{78} See 42 U.S.C. § 9606(b)(1).
  \item \textsuperscript{79} See id. § 9607(c)(3).
  \item \textsuperscript{80} Id. § 9606(b)(1) (authorizing award of fines of up to $25,000 per day against "any person who, without sufficient cause, willfully violates, or fails or refuses to comply with" a § 106 order).
  \item \textsuperscript{81} Id. § 9607(c)(3) (authorizing recovery of punitive damages from a party liable for response costs under § 107 who, "without sufficient cause," fails to comply with a § 106 order).
  \item \textsuperscript{82} PROBST ET AL., supra note 10, at 24 ("As long as the trust fund remains at current funding levels, getting responsible parties to take the lead in site studies and remedial actions is critical to achieving cleanups at all NPL sites.").
  \item \textsuperscript{83} Id.
  \item \textsuperscript{84} Id.
  \item \textsuperscript{85} See REPORT ON SUPERFUND ADMINISTRATION, supra note 9, at 29.
\end{itemize}
\end{footnotesize}
PRP-lead cleanups. As a result of this policy, the EPA now devotes more resources to identifying PRPs once a site is listed on the NPL. After PRPs have been identified, the EPA negotiates in an effort to encourage one or more PRPs to pursue a remedial action.

There are three important and related impacts of the EPA's pursuit of the enforcement-first policy. First, the EPA has substantially increased the number of PRP-financed remedial actions so that more than three-quarters of them are now funded by responsible parties. This success makes the formal cost-recovery action a less important enforcement option for the EPA.

86 See Ways and Means Review Hearings, supra note 26, at 235 (statement of Don R. Clay, Assistant Adm't, Office of Solid Waste and Emergency Response, U.S. Envtl. Protection Agency) ("The first component of the enforcement process involves maximizing the number of sites where [PRPs] are conducting the response.").

87 See Report on Superfund Administration, supra note 9, at 29 ("Under the agency's 'enforcement first' approach, a responsible party search is undertaken after a site is listed on the NPL.").

88 See id. at 30 ("[The] EPA will negotiate with the identified responsible parties to pay for cleanup; the final terms and conditions of the response settlement are entered into a judicial consent decree.").

89 See Probst Et Al., supra note 10, at 17 ("In fiscal year 1987, responsible parties took the lead in only 39 percent of remedial actions; by fiscal year 1993, they had taken the lead in 79 percent of these cleanups." (footnote omitted)); see also Report on Superfund Administration, supra note 9, at 30 ("[The] EPA's enforcement-first strategy has, since 1989, increased the amount of cleanups being paid for by responsible parties. [The] EPA calculates that more than 60 percent of Superfund cleanups are now being paid for by responsible parties, up from approximately 30 percent during the program's first eight years." (footnote omitted)); Benefits and Drawbacks of the Superfund Statute's Liability Provisions: Hearing Before the Environment, Energy, and Natural Resources Subcomm. of the House Comm. on Government Operations, 103d Cong., 1st Sess. 118 (1994) (statement of Katherine N. Probst, fellow, Resources for the Future, noting that slightly more than 70 percent of cleanups are PRP financed) [hereinafter House Liability Hearing].

90 An EPA official recently explained how the cost-recovery action fits within the EPA enforcement-first policy. He stated that:

The final component of the enforcement process is recovery of trust fund expenditures. Cost recovery actions are essential both to replenish the fund and, along with treble damage provisions, to deter other PRPs from trying to avoid responsibility for performing response actions themselves. Cost recovery actions may take place at several points during the enforcement process and are integral throughout. As a rule, [the] EPA attempts to negotiate recovery of its oversight costs and all of its past site costs simultaneously with negotiations for site response actions. Where there are non-settling PRPs, [the] EPA may chose [sic] to waive the recovery of past costs from settling parties and pursue non-settling parties for those past costs. If [the] EPA uses its unilateral order authority under Section 106 of CERCLA to obtain PRP response, we will first pursue non-settling/non-complying parties for these costs. If no such parties exist, [the] EPA will pursue the complying PRPs through a subsequent cost recovery action. Finally, where a response action is
Second, the EPA's success in dramatically increasing the number of PRP-financed cleanups demonstrates that settlement between the EPA and PRPs is quite likely. PRPs often agree to pursue private cleanups because the EPA's cleanup costs are about 20% higher — a cost the PRPs will ultimately have to bear. The EPA also has incentives to settle with PRPs: shifting the cost of cleanup away from the Superfund; reducing transaction costs and the burden that those costs pose for the fund. Litigation rarely follows an agreement to pursue a PRP-lead cleanup, and thus the agency has very low litigation-related transaction costs for that site.

Finally, the enforcement-first policy has increased the EPA’s reliance on section 106 unilateral administrative orders (UAOs) to compel cleanups by identified responsible parties. However, PRPs have criticized the EPA’s use of UAOs as unfair, arguing that the policy allows the EPA to target certain PRPs and to force those deep-pocket parties to bear the very significant costs of cleaning up a site.

In addition to these formal and informal EPA enforcement actions, CERCLA contains a citizens' suit provision. This provision authorizes private parties to bring actions in federal district court alleging that the United States or any other person is violating CERCLA, or that an officer of the United States has failed to perform a nondiscretionary duty under CERCLA.

fund financed, [the] EPA will pursue PRPs for cost recovery following the completion of one or more of the major phases of the cleanup.


See PROBST ET AL., supra note 10, at 17 (“Compared to the federal government, responsible parties are believed to achieve cost savings on the order of 15 to 20 percent when they implement site cleanup. These savings, it is argued, reflect the inherent inefficiencies of large bureaucracies and government contract requirements.” (footnotes omitted)); see also House Liability Hearing, supra note 89, at 98 (statement of Katherine N. Probst, Fellow, Resources for the Future) (“If there is one element of Superfund on which almost everyone agrees, it is that the private sector can more effectively manage site cleanups than the Federal Government.”).

PROBST ET AL., supra note 10, at 17.

See id. at 30-31 (“The number of [unilateral administrative orders] issued under § 106 increased as well, from 13 in 1988 to 110 in 1992.” (footnote omitted)); Ways and Means Review Hearings, supra note 26, at 236 (statement of Don R. Clay, Assistant Adm'r, Office of Solid Waste and Emergency Response, U.S. Envtl. Protection Agency) (“Since 1980, [the] EPA has issued 780 UAOs for response actions. Of that number, more than 50% have been issued since ‘Enforcement-First.’ More than 80% of the 175 UAOs issued for cleanup design and implementation have been issued since ‘Enforcement First.’”).

See infra notes 355-57 and accompanying text.

42 U.S.C. § 9659(a).
B. CERCLA's Review Preclusion Provision

All litigation, including a citizens' suit under section 310,\textsuperscript{96} that requires a federal court "to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any [Section 106 administrative] order" is subject to CERCLA's judicial review preclusion provision, which imposes critical limits on the timing of review.\textsuperscript{97} This "unusual provision,"\textsuperscript{98} which was added to CERCLA by SARA in 1986,\textsuperscript{99} bars federal court jurisdiction "under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction)" to review the aforementioned challenges,\textsuperscript{100} unless the challenge is brought in one of the five specific CERCLA proceedings identified by the statute.\textsuperscript{101}

These five actions fall into three categories. The first is a cost-recovery action (or contribution action) that will assign liability for section 107 response costs.\textsuperscript{102} The second category includes actions brought by the United States in exercise of its authority under section 106\textsuperscript{103} or by a party seeking reimbursement for costs incurred in a section 106 ordered cleanup.\textsuperscript{104} The final category includes certain defined citizens' suits.\textsuperscript{105} The general effect of these provisions is that judicial review is delayed until an enforcement action is pursued under sections 106 or 107, or until the response action (or a defined portion of the response action) is completed.

The meaning of "pre-enforcement review" varies somewhat depending on the administrative law context.\textsuperscript{106} In the CERCLA

\textsuperscript{96} See id. (noting that a citizens' suit may be brought "[e]xcept as provided in ... section 9613(h) of this title (relating to timing of judicial review)").

\textsuperscript{97} Id. § 9613(h).

\textsuperscript{98} North Shore Gas Co. v. United States EPA, 930 F.2d 1239, 1245 (7th Cir. 1991) ("We can leave for another day the exploration of the outer bounds of this unusual provision."). Although this type of provision may be unusual, it is certainly not unique. See, e.g., Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 318(b)(6)(A), 103 Stat. 745 (1989).


\textsuperscript{100} 42 U.S.C. § 9613(h). The exception for diversity cases has not been the subject of significant controversy and is not discussed in this article.

\textsuperscript{101} Id. § 9613(h)(1)-(5); see infra notes 102-105 and accompanying text.

\textsuperscript{102} 42 U.S.C. § 9613(h)(1).

\textsuperscript{103} Id. § 9613(h)(2) & (5).

\textsuperscript{104} Id. § 9613(h)(3).

\textsuperscript{105} Id. § 9613(h)(4).

\textsuperscript{106} For example, the Administrative Conference of the United States stated that pre-enforcement review is review gained "by instituting a direct review proceeding against the
Judicial Review Preclusion

context, a citizens' suit under section 310 and public or private enforcement actions may challenge agency action as unlawful. The meaning of pre-enforcement review under CERCLA must therefore be rather broad, including actions brought prior to (1) a section 107 cost-recovery action,\textsuperscript{107} (2) a government section 106 enforcement action,\textsuperscript{108} or (3) completion of a cleanup at the site (or at least completion of a discrete portion of a remedial action).\textsuperscript{109} Section 113(h), by its terms, bars such pre-enforcement review of CERCLA response actions.\textsuperscript{110} This section discusses the terms of section 113(h) and Congress' intent in enacting the provision.

1. The Broad Terms of the Review Preclusion Provision

The terms of the review preclusion provision bar pre-enforcement review of two categories of claims. First, section 113(h) limits judicial review of "any challenges to removal or remedial action selected under section 9604 of this title"\textsuperscript{111} thus foreclosing immediate review of removal or remedial actions. Section 101 of the Act\textsuperscript{112} defines these terms broadly, including specifically "enforcement activities related to" the removal or remedial action.\textsuperscript{113}

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\textsuperscript{107} See 42 U.S.C. § 9613(h)(1).
\textsuperscript{108} Id. § 9613(h)(2), (5).
\textsuperscript{109} Id. § 9613(h)(3)-(4).
\textsuperscript{110} Id. § 9613(h).
\textsuperscript{111} Id.
\textsuperscript{112} See id. § 9601(23) (defining the terms "remove" and "removal"); id. § 9601(24) (defining the terms "remedy" and "remedial action").
\textsuperscript{113} Id. § 9601(25) provides that, "[t]he terms 'respond' or 'response' means [sic] remove, removal, remedy, and remedial action; [sic] all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto."

The 1986 Amendments added this provision to CERCLA. See Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 101(e)-(f), 100 Stat. 1613 (1986). In \textit{Reardon v. United States}, 947 F.2d 1509, 1514 (1st Cir. 1991) (en banc), the court stated that, to the extent § 101(25) expanded the scope of review preclusion under § 113(h), this result was an "inadvertent[] rather than purposeful[]" action by Congress. The court believed the expanded definition included in § 101(25) was intended to ensure that the government would recover the costs of enforcement actions brought against responsible parties. \textit{Id.} at 1514 (citing relevant legislative history). However, the court held that, even if Congress had no specific intent to expand the scope of review preclusion in § 113(h), the court was bound to apply the statute's definition uniformly in applying CERCLA. \textit{Id.} at 1514; see \textit{Estate of Cowart v. Nicklos Drilling Co.}, 505 U.S. 469, 479 (1992) (identifying "the basic canon of statutory construction that identical terms within an Act bear the same meaning" (citations omitted)). The dissent in \textit{Reardon} disagreed strongly with the court's reliance on this legislative history in deciding that a lien was an enforcement activity
In *Reardon v. United States*, the First Circuit provided the most detailed judicial analysis of the meaning of removal and remedial action. In that case, the plaintiffs challenged the EPA's placement of a CERCLA lien on their property. To determine whether section 113(h) barred this claim, the court relied upon the plain and ordinary meaning of the terms used in section 113(h) and concluded that "the activity of filing liens is, in ordinary language, an 'enforcement activity.'" Accordingly, the court decided that the district court lacked jurisdiction to consider whether the government's lien was permissible under CERCLA.

In addition to foreclosing review of immediate challenges to "removal or remedial actions," the review preclusion provision forecloses review of a second category of cases: challenges to "any order issued under section 9606(a) of this title." In deciding whether this provision forecloses immediate review, a court must determine whether the claimant's action challenges the issuance of an order under section 106. This second part of the review preclusion provision has not been the subject of significant litigation, and the meaning of its terms does not appear to be controversial.

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related to the response action and therefore could not be challenged prior to EPA enforcement. See 947 F.2d at 1525 n.6 (Cyr, J., dissenting).

114 947 F.2d 1509 (1st Cir. 1991) (en banc).

115 The CERCLA lien was imposed pursuant to 42 U.S.C. § 9607(l)(1), which states that:

All costs and damages for which a person is liable to the United States under [42 U.S.C. § 9607(a) — the CERCLA liability provision] ... shall constitute a lien in favor of the United States upon all real property and rights to such property which —

(A) belong to such person; and

(B) are subject to or affected by a removal or remedial action.

The lien arises as a matter of law under 42 U.S.C. § 9607(l)(2) and "continue[s] until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable" as a result of the statute of limitations provided in 42 U.S.C. § 9613(f).

The claimants in *Reardon* argued that the EPA had violated CERCLA in imposing a lien because they were innocent purchasers of property and therefore not liable for response costs under § 107. *Reardon*, 947 F.2d at 1511. The claimants also contended that the lien imposed by the EPA covered too much property and therefore violated the terms of the lien provision. *Id.*

116 947 F.2d at 1513. The court also stated that "[w]hen the government files a lien on property to secure payment of that [CERCLA] liability, it can reasonably be described as seeking to enforce the liability provision." *Id.* at 1512.

117 42 U.S.C. § 9613(h).

118 *Id.*

119 *Pollution Control Indus. of Am. v. Reilly*, 715 F. Supp. 219 (N.D. Ill. 1989), is one action that involved this second portion of the review preclusion provision. In that case, the EPA had issued a § 106 order requiring the plaintiff to perform an emergency removal action at a site the plaintiff owned. *Id.* at 220. After the plaintiff notified the EPA of a contractor it wanted to use for the response action, the EPA disqualified the contractor
2. The Legislative History and Purpose of Section 113(h): Ensuring the Effectiveness of Cleanups by Foreclosing Pre-enforcement Review of CERCLA Liability Issues

Congress enacted section 113(h) to “confirm and build upon existing case law,” foreclosing judicial review prior to government enforcement actions. This line of pre-SARA appellate cases began with *J.V. Peters & Co. v. Administrator, Environmental Protection Agency*. In that case, the plaintiffs sought to enjoin a response action pursued by the EPA. They asserted first that they would become liable for response costs once the EPA had undertaken the cleanup and second, that they needed an immediate hearing or they would be without an adequate remedy.

The Sixth Circuit held that CERCLA barred pre-enforcement review, even in the absence of an express provision. The court concluded that, “[b]ecause the Act’s primary purpose is the prompt cleanup of hazardous waste sites,” allowing the immediate review sought by the plaintiffs “would debilitate the central function of the Act.” The court also concluded that the section 107 cost recovery action, during which the existence and scope of the plaintiffs’ CERCLA liability would be adjudicated, was an adequate legal remedy for the plaintiffs. In short, the court held that pre-

because of a prior case of fraud. *Id.* The plaintiff then sought a preliminary injunction to bar the EPA from enforcing the disqualification order. *Id.* The court held that § 113(h) barred the action, because the EPA issued the disqualification order pursuant to its “broad” authority under § 106. *Id.* at 220-21.

120 132 CONG. REC. 528,441 (1986) (statement of Sen. Thurmond, Chairman of the Senate Judiciary Committee); see Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1387-88 (5th Cir. 1989) (“Section 113(h) . . . codified earlier case law limitations on ‘pre-enforcement’ review of remedial and removal actions.”); Readon v. United States, 731 F. Supp. 558, 564 (D. Mass. 1990), rev’d in part, 947 F.2d 1509 (1st Cir. 1991) (en banc) (“Section 113(h), enacted as part of the SARA Amendments, codified this prior case law prohibiting the pre-enforcement review of EPA cleanup actions.”).

121 767 F.2d 263 (6th Cir. 1985).

122 *Id.*

123 *Id.* (citations and internal quotations omitted). The court was unwilling to find that CERCLA implied a cause of action permitting review of an EPA response action, prior to an EPA enforcement action. The court therefore held that judicial review would be available only if permitted under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. *J.V. Peters*, 767 F.2d at 264.

124 Because the “agency determination to take a response action” under 42 U.S.C. § 9604(a) was not a “final agency action for which there is no adequate remedy in a court,” review was unavailable under the APA. *J.V. Peters*, 767 F.2d at 265. The court supported this decision in part by identifying a requirement in the NCP to conduct EPA response actions in a cost-effective manner. *See supra* note 16. The plaintiffs would therefore not be liable for any response costs that were inconsistent with the NCP. 767 F.2d at 265.
enforcement review was barred because it would slow cleanups and was unnecessary to ensure adequate judicial review.

Other courts soon followed the Sixth Circuit, uniformly holding that CERCLA's strong prompt cleanup policy implicitly foreclosed early review of the liability issue. Courts reached this conclusion when a party sought immediate review of a long-term EPA remedial action, an EPA decision prohibiting a PRP from preparing a RI/FS, and an EPA decision to issue an administrative order under section 106. In short, when Congress enacted section 113(h) in 1986 and essentially ratified these decisions, it intended to enact a uniform rule barring pre-enforcement review of CERCLA liability issues so that cleanups of hazardous substances could be pursued promptly and without externally-imposed delays.

Several courts have reviewed the legislative history and concluded that Congress intended section 113(h) to serve two important purposes: prevent delays in cleanups and foreclose

127 Wagner Seed Co. v. Daggett, 800 F.2d 310 (2d Cir. 1986).
128 In addition to expressing support for the results reached by these courts, the legislative history of SARA includes several explicit statements that PRPs should not be permitted to litigate the issue of CERCLA liability prior to an enforcement action. See 132 Cong. Rec. S28,441 (1986) (statement of Sen. Thurmond) (“Citizens, including potentially responsible parties, cannot seek review of the response action or their potential liability for a response action — other than in an action for contribution — unless the suit falls within one of the categories provided in this section.”); 132 Cong. Rec. H29,755 (1986) (statement of Rep. Roe) (“[W]hen 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.”); see also H.R. Rep. No. 253, 99th Cong., 2d Sess., pt.1, at 266-67 (1986), reprinted in 1986 U.S.C.C.A.N. 2941-42 (separate and dissenting views of Rep. Florio and nine other Representatives). This Report states that:

The purpose of the [committee amendment foreclosing review except under limited circumstances] 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.

Id.
129 See, e.g., North Shore Gas Co. v. EPA, 930 F.2d 1239, 1244 (7th Cir. 1991) (“[T]he purpose of section 113(h) is to prevent litigation from delaying remediation.”); Schalk v. Reilly, 900 F.2d 1091, 1097 (7th Cir. 1990); Apache Powder Co. v. United States, 738 F. Supp. 1291, 1292 (D. Ariz. 1990).
piecemeal review of CERCLA cleanups. Relying upon the legislative history and these two purposes, these courts have identified several functional tests to decide whether immediate review of plaintiff's challenge is barred.

In sum, the legislative history of SARA shows Congress' intent to speed cleanups by delaying litigation of CERCLA liability issues until a government enforcement action is brought. When deciding whether judicial review is barred by section 113(h), courts must usually decide whether the claim involves a challenge to a removal or remedial action. Courts have construed these terms broadly, applying a functional test grounded on the language and intent of the review preclusion provision.

C. Preclusion of Pre-Enforcement Review in Administrative Law and in an Alternative Hazardous Waste Cleanup Context

In order to broaden the context for evaluating the effectiveness and the fairness of the review preclusion provision in CERCLA, it is valuable to consider the extent to which other statutes foreclose pre-enforcement review of administrative actions. Additionally, the availability of administrative and judicial review of corrective actions under the Resource Conservation and Recovery Act (RCRA) can enhance one's understanding of CERCLA review preclusion. These corrective actions have a great deal in common with CERCLA response actions. Indeed, one text states that the RCRA "corrective action program [is] strikingly similar to the CERCLA cleanup process." Notwithstanding this similarity, RCRA permits pre-cleanup review, an important type of pre-enforcement review, under its corrective action provisions.

130 Senator Thurmond identified this purpose, explaining that the review preclusion provision included in SARA "is designed to preclude piecemeal review." 132 CONG. REC. S28,441 (1986). See Reardon v. United States, 947 F.2d 1509, 1513 (1st Cir. 1991); Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1390 (5th Cir. 1989).

131 See Healy, supra note 1, at 21-23 (describing functional tests).

132 For a general discussion of the availability of pre-enforcement review under the principal environmental statutes, see David M. Moore, Comment, Pre-enforcement Review of Administrative Orders to Abate Environmental Hazards, 9 PACE ENVTL. L. REV. 675 (1992).


135 See supra note 109 and accompanying text.
1. Pre-Enforcement Review in Administrative Law

When Congress grants an agency the authority to administer and enforce federal law, courts must often decide whether pre-enforcement judicial review sought by an aggrieved party is available. In most cases, the organic statutes are silent on the question of review availability. This was true when a claimant sought pre-enforcement review of CERCLA claims prior to the enactment of SARA and section 113(h) in 1986. Indeed, the current judicial review provisions of CERCLA atypically include specific language that is intended to define the extent to which the statute forecloses review of certain claims.

In the context of a silent statute, courts evaluate challenges to an agency's enforcement decision with a general presumption that meaningful judicial review is available to determine the lawfulness of an agency action. A court may, however, infer from the structure of the statute's judicial review provisions that immediate review is unavailable.

If a statute's review provisions suggest exclusivity of the defined avenues for relief, the court will tend to hold that immediate review is unavailable. For example, in Thunder Basin Coal Co. v. Reich, the Supreme Court decided whether a mining company was permitted to bring a pre-enforcement claim in federal court challenging a requirement of the Federal Mine Safety and Health Amendments Act of 1977 (Mine Act). Notwithstanding the fact that the statute did not expressly bar such review, the Court held that there was no federal court jurisdiction over the claim because the Mine Act "establishes a detailed structure for reviewing violations" and this "comprehensive review process" does not provide for pre-enforcement claims in district court by regulated

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136 See supra notes 121-27 and accompanying text (discussing cases prior to the enactment of § 113(h) that foreclose pre-enforcement review of response actions).

137 Thus, before a court will construe a statute to foreclose entirely judicial review, the agency proposing such a construction "bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of [its] decisions." Dunlop v. Bachowski, 421 U.S. 560, 567 (1975); see Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670-73 (1986). This presumption is less weighty when a court is asked only to delay review until a time when meaningful review is available under the statute. See Thunder Basin Coal Co. v. Reich, 114 S. Ct. 771, 776 n.8 (1994).

138 114 S. Ct. at 776.

139 Id. at 771.


141 114 S. Ct. at 776.

142 Id. at 777.
parties. Similarly, in *Rueth v. United States EPA*, a lower court held that the recipient of a Clean Water Act compliance order could not bring an action in district court challenging that order because the Act defined the only two circumstances in which compliance orders could be challenged.

A court is also more likely to infer review foreclosure if the statute provides for administrative review with an implied exhaustion requirement or requires a final agency action for review. In short, a court may infer that pre-enforcement review is foreclosed because the statute makes no provision for such review, and/or requires exhaustion of administrative remedies.

In addition to focusing on the statute’s structure, a court also considers the effectiveness and the fairness of permitting immediate review. Regarding effectiveness, a court typically considers whether permitting pre-enforcement review will impede the effective implementation of the federal statute in either of two different ways. First, a court considers whether granting or denying jurisdiction will promote the substantive goals of the underlying federal statute. Second, a court considers whether pre-enforcement review undermines the effective operation of the administrative agency.

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143 13 F.3d 227 (7th Cir. 1993).
145 *See Rueth*, 13 F.3d at 230 (“[C]ongress intended judicial review of challenges to agency administrative actions only after the agency seeks judicial enforcement of a compliance order or the agency seeks to enforce administrative penalties.”).
146 *See Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation and Enforcement*, 20 F.3d 1418, 1422-23 (6th Cir. 1994) (holding that pre-enforcement review of a cessation order was unavailable because the statute requires that administrative remedies be exhausted).
147 *See Asbestec Const. Serv., Inc. v. United States EPA*, 849 F.2d 765, 768-69 (2d Cir. 1988) (holding that review of a Clean Air Act compliance order is not available prior to court of appeals enforcement because it is not the kind of final agency action required by the statute).
148 In a number of cases, courts have held that a statute foreclosed pre-enforcement review where review would delay movement toward environmental goals established by Congress. As discussed earlier, prior to the 1986 Amendments, courts construed CERCLA to bar pre-enforcement review because such review would slow cleanups and thereby undermine the key purpose of the statute. See supra notes 121-27 and accompanying text; see also *Union Elec. Co. v. EPA*, 593 F.2d 299, 304-05 (8th Cir. 1979) (permitting pre-enforcement review of notice of violation Acts would undermine enforcement provisions of the Clean Air Act intended to obtain expeditious compliance).
149 A court will be wary of permitting pre-enforcement review when the agency will thereby forfeit its enforcement discretion. See *Southern Ohio Coal Co.*, 20 F.3d at 1427 (holding pre-enforcement review is not available because such review would “interfere with the EPA’s ability to quickly respond to environmental problems”); see also *Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885, 890-91 (8th Cir. 1977) (permitting pre-enforcement
Regarding fairness, a court is far less willing to hold that pre-enforcement review is unavailable if it concludes that delayed review will be inadequate for the party asserting the pre-enforcement claim. Moreover, even if a court infers a bar of pre-enforcement review, courts often recognize, either implicitly or explicitly, three safety valves that temper the effect of review preclusion.

First, courts will decide constitutional due process claims arising from delayed review. Second, courts will review a colorable claim that the agency has taken an action that is plainly unauthorized by Congress. Third, courts find pre-enforcement review available where an agency's action would place too great an actual burden on the affected party prior to final resolution.

review of compliance order would undermine Clean Air Act enforcement procedures designed to promote abatement without judicial involvement). Moreover, courts infer that judicial review is unavailable where the proffered claim turns on expert fact-finding or technical review. See Rueth, 13 F.3d at 230 n.2 (pre-enforcement review is not available under Clean Water Act because the agency must still make a final, fact-based decision about whether the statute applies). Courts of appeals, in particular, are not well-placed to make findings of fact, or to otherwise develop a factual record for decision making. See Asbestec Constr. Serv., Inc., 849 F.2d at 769 (noting that agency action is not final and is thus unreviewable because the dispute between the parties is fact-based and the courts of appeals "are not designed and are ill-equipped to serve as fact-finding forums").

After deciding that the Mining Act barred pre-enforcement review of the claim being asserted by the plaintiff in Thunder Basin Coal, 114 S. Ct. at 780-81, the Supreme Court considered the merits of the plaintiff's claim and decided that its due process rights would be violated if it could not seek immediate review of the order of the Mine Safety and Health Administration. See id. at 781-82 (rejecting claim of due process violation where the statute did not subject the claimant "to a serious prehearing deprivation"); see also Asbestec Constr. Serv., 849 F.2d at 769-70 (concluding that the Clean Air Act bars pre-enforcement review of a plaintiff's claim and considering the underlying due process claim).

See Rueth, 13 F.3d at 231 (specifying that the court "will not hesitate to intervene in pre-enforcement activity" of an agency if the court finds that the agency has "completely overextend[ed its] authority"); accord Southern Ohio Coal Co., 20 F.3d at 1427. This exception seems to follow from the Court's decision in Leedom v. Kyne, 358 U.S. 184, 188 (1958), that a court may intervene when an agency makes a final action "in excess of its delegated powers and contrary to a specific [statutory] prohibition." Id.

See Thunder Basin Coal, 114 S. Ct. at 779 (holding that a district court may exercise pre-enforcement jurisdiction over claims that are collateral to the enforcement action when precluding review would make meaningful review unlikely); see also Southern Ohio Coal Co., 20 F.3d at 1424 (holding that immediate review of agency action may be available if irreparable injury would result in the absence of such review).
Clearly, the issue of pre-enforcement review is one that arises quite often in administrative law. Courts will foreclose pre-enforcement review, even in the absence of statutory language dictating that result, where they conclude that barring review is necessary to secure the statute's goals. Generally however, immediate review will be available in the event that the court believes such review is necessary to prevent serious unfairness to the claimant seeking review.

2. RCRA Corrective Actions and Their Review

Having reviewed the extent to which pre-enforcement review is generally available in administrative law, we turn next to pre-enforcement review of corrective actions under RCRA. Congress enacted RCRA in order to provide for the prospective, "cradle-to-grave" management of hazardous waste disposal.\textsuperscript{154} RCRA is intended to prevent prospectively the conditions that will result in the release of hazardous substances into the environment, while CERCLA generally provides for the cleanup of hazardous substances that are released into the environment as a result of past disposal practices.\textsuperscript{155} RCRA's corrective action requirement illustrates an important area of overlap between the two statutes.\textsuperscript{156} Congress included this requirement in the 1984 amendments to RCRA to relieve the Superfund program of some of the burden of cleaning up releases of hazardous substances into the environment.\textsuperscript{157}

The RCRA corrective action program has been described as "quite 'CERCLA-like' in scope and effect,"\textsuperscript{158} and the program may apply to about 3700 RCRA facilities across the country containing about 64,000 units needing corrective action.\textsuperscript{159} The corrective action requirement basically mandates that facilities subject to regulation under RCRA (treatment, storage, or disposal of hazardous waste facilities (TSDs)) conduct cleanups (i.e., corrective actions) when they release hazardous waste or its constituents from any active or inactive solid waste management unit at the facility,

\textsuperscript{154} PERCIVAL ET AL., supra note 134, at 215.
\textsuperscript{155} See id. at 214; Healy, supra note 9, at 81-82.
\textsuperscript{156} See PERCIVAL ET AL., supra note 134, at 214-15.
\textsuperscript{157} See JACKSON B. BATTLE & MAXINE I. LIPELES, HAZARDOUS WASTE 103 (2d ed. 1993).
\textsuperscript{159} See WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW §7.7, at 637 (2d ed. 1994).
regardless of when the waste was placed in the unit. The corrective action requirement applies somewhat differently depending on the type of RCRA TSD facility involved.

Under RCRA, TSD facilities that are to be used for the current treatment, storage, or disposal of hazardous wastes must obtain a permit. To receive a permit, the TSD facility must complete a "corrective action for all releases of hazardous waste or constituents from any solid waste management unit at [the facility], regardless of the time at which waste was placed in such unit." If completion of the corrective action at the TSD facility is not possible prior to the issuance of the permit, then the permit itself "shall contain schedules of compliance for such corrective action . . . and assurances of financial responsibility for completing such corrective action." RCRA thus ties permits to permittee cleanups of releases of hazardous wastes and substances at their TSD facility, with facility defined broadly to include "all contiguous property under the owner or operator's control."

Interim status facilities compose a second group of TSD facilities subject to RCRA regulation, although TSD operating permits have not been sought. For these facilities, Congress has provided in section 3008(h) of RCRA that when "there is or has been a release of hazardous waste into the environment from a [interim status] facility . . . the Administrator may issue an order requiring corrective action," or may bring an action in district court seeking appropriate relief.

It is difficult to summarize the process for identifying the required corrective action and the standards that apply to assess

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160 See 42 U.S.C. § 6924(u); see also id. § 6928(h).
161 See id. § 6925(a). This permit requirement also applies to a TSD facility receiving hazardous wastes after November 19, 1980 (the effective date of RCRA's TSD permitting requirement), that failed to apply formally for an interim status permit, and that has not been clean closed. Such facilities are subject to RCRA's closure and post-closure permit requirements. See In re Consolidated Land Disposal Regulation Litig., 938 F.2d 1386 (D.C. Cir. 1991).
162 42 U.S.C. § 6924(u). Corrective action requirements may be imposed when a facility first applies for a RCRA operating permit or when it seeks a permit renewal. See 1 SUSEN M. COOKE, THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY, AND LITIGATION § 5.04[6][e], at 5-156.6 (1995).
163 42 U.S.C. § 6924(u).
165 Interim status facilities are the TSD facilities authorized to operate under 42 U.S.C. § 6925(e).
166 Id. § 6928(h)(1).
whether a corrective action has been successful.\textsuperscript{167} Furthermore, the standards differ somewhat depending on whether the corrective action is a permit condition or an order to an interim status facility, for which less formal procedures apply.\textsuperscript{168} The process does, however, resemble in many respects the RI/FS process for CERCLA remedial actions. First, a RCRA Facility Assessment (RFA) defines the nature of the releases and potential releases at the site. Next, a RCRA Facility Investigation (RFI) fully characterizes those releases. These two steps are somewhat analogous to the CERCLA Remedial Investigation (RI). The third step involves an analysis of the appropriateness of particular corrective measures. Based on this Corrective Measures Study (CMS), which is analogous to the CERCLA Feasibility Study (FS), the necessary corrective actions are identified for the facility. The final step is the Corrective Measures Implementation (CMI).\textsuperscript{169}

Although this RCRA process resembles the CERCLA process, performs similar functions, and controls many of the same risks as CERCLA response actions, review of a corrective action required by the EPA is available at a much earlier time than review of a CERCLA response action. As discussed, a corrective action may be compelled as a condition for a RCRA operating permit.\textsuperscript{170} After drafting a proposed permit and subjecting it to public comment and, in many cases, a public hearing, the terms and conditions of a RCRA permit are written. Once the permit is issued in final form, "any person who filed comments on th[e] draft permit or participated in the public hearing may petition the Environmental Appeals Board [EAB] to review any condition of the permit decision."\textsuperscript{171} This petitioner must file within thirty days of the issuance of the final permit.\textsuperscript{172} The EAB also has authority to "decide on its own initiative to review any condition of any RCRA ... permit."\textsuperscript{173}

\textsuperscript{167} For more detailed discussions, see, e.g., Cooke, supra note 162, § 5.04[6][e], at 5-156.5 to 156.17; Stoll, supra note 158, at 1309-12.

\textsuperscript{168} See Rodgers, supra note 159, § 7.7, at 636-37.

\textsuperscript{169} See supra notes 43-56 and accompanying text. The summary of RCRA corrective action processes in the text is based on the summary in Rodgers, supra note 159, § 7.7, at 638.

\textsuperscript{170} See supra notes 161-64 and accompanying text.

\textsuperscript{171} 40 C.F.R. § 124.19(a) (1995). The EAB, composed of three judges appointed by the EPA Administrator, "acts as the final [EPA] agency decisionmaker for appeals on various permit and civil penalty decisions under all the major environmental statutes that [the] EPA administers." Edward E. Reich, EPA's New Environmental Appeals Board, 8 Nat. Resources & Env't 39, 39 (1994).

\textsuperscript{172} 40 C.F.R. § 124.19(a) (1995).

\textsuperscript{173} Id. § 124.19(b).
The EAB may deny review of the petition, issue a decision resolv-
ing the merits of the petition, or remand the matter for further pro-
ceedings on the permit.\textsuperscript{174} A party aggrieved by a decision of the
EAB may then seek review of that decision in the federal court of
appeals for the judicial district in which the party resides or does
business.\textsuperscript{175}

Administrative review is also available when the EPA orders an
interim status facility to perform a corrective action. When acting
unilaterally under section 3008(h), the EPA issues an initial admin-
istrative order requiring the corrective action and giving notice to
the recipient of the "right to request a hearing with respect to any
issue of material fact or the appropriateness of the proposed cor-
rective action."\textsuperscript{176} Unless the recipient responds within thirty days
to that order and requests a hearing, the initial order becomes a
final order.\textsuperscript{177}

Although the precise hearing procedures differ depending upon
the directions included in the initial order,\textsuperscript{178} the hearing is held
before the regional judicial officer or another EPA lawyer, and that
presiding officer prepares a recommended decision for the regional
administrator.\textsuperscript{179} The presiding officer's recommendation must
state whether the regional administrator should modify the correc-
tive action order, withdraw the order, or issue the order without
modification.\textsuperscript{180} The regional administrator then takes final agency
action on the order by either signing or modifying the recom-
manded decision presented by the presiding officer.\textsuperscript{181} This deci-
sion may not be appealed to the administrator.\textsuperscript{182} RCRA does not
provide expressly for a right to judicial review of the regional
administrator's decision (which is not a permitting decision), and it
is unclear whether judicial review of that final agency action is
available under the Administrative Procedure Act (APA).\textsuperscript{183}

\textsuperscript{174} See id. § 124.19(f).
\textsuperscript{175} See 42 U.S.C. § 6976(b). In its regulations, the EPA requires a party to petition the
Environmental Appeals Board for review before it may bring such an action in federal
court. This is meant to ensure that the party exhausts its administrative remedies. See 40
\textsuperscript{176} 40 C.F.R. § 24.02(c)(3) (1995).
\textsuperscript{177} See id. § 24.05(a).
\textsuperscript{178} See id. § 24.08.
\textsuperscript{179} See id. §§ 24.09, 24.17.
\textsuperscript{180} Id. §§ 24.12(b), 24.17(a).
\textsuperscript{181} Id. §§ 24.18-19.
\textsuperscript{182} Id. § 24.20.
\textsuperscript{183} 5 U.S.C. §§ 701-06 (1994).
In sum, unlike CERCLA, RCRA provides for immediate administrative review and the potential for judicial review of RCRA corrective actions. The availability of this review under RCRA begs the question why such immediate review is not also available under CERCLA. As we consider the effectiveness and fairness of CERCLA review preclusion, we must therefore consider how cleanups under the two statutes compare and contrast with each other: Do the programs differ in ways that make immediate review of CERCLA cleanups or particular CERCLA claims inappropriate? Does the availability of immediate review under RCRA show that CERCLA’s broad bar against early review is unwarranted?

III. THE SIX LITIGATION CONTEXTS IN WHICH THE ISSUE OF CERCLA REVIEW PRECLUSION TYPICALLY ARISES

Litigation of CERCLA’s review preclusion provision typically occurs in one of six different contexts, and the willingness of courts to foreclose judicial review is often dependent on the particular litigation context. The first litigation context is likely the most common and certainly the one that primarily concerned Congress when section 113(h) was added in 1986. Cases in this category include those in which a PRP seeks review to determine its liability solely under section 107 of CERCLA.\(^\text{184}\) The fairness or effectiveness of barring immediate judicial review is more difficult to assess in the next four litigation contexts — here, competing policies support both permitting and barring immediate review. Specifically, even though permitting early review in the next four litigation contexts may slow the CERCLA cleanup, early review may also either (1) serve another important policy of CERCLA, such as ensuring the safety of individuals residing nearby the site;\(^\text{185}\) or (2) ensure that important policies identified in other statutes are not subverted by the cleanup.\(^\text{186}\) When called upon to apply the review preclusion provision in these other litigation contexts, courts may allow review to proceed, notwithstanding the statute’s express and categorical preclusion of review.

The sixth and final litigation context involves immediate judicial review of a claim that the CERCLA cleanup offends constitutional rights.\(^\text{187}\) In this litigation context, courts concerned about the fairness of sanctioning a violation of basic constitutional prote-
tions have been most willing to hold that judicial review is available immediately, notwithstanding the terms of section 113(h).

A. Preclusion of Pre-Enforcement Review of CERCLA Liability Claims

Given the terms of section 113(h) and the structure and purposes of CERCLA, courts uniformly decline review of either the existence or extent of liability for section 107 response costs prior to a government action to recover such costs. This result is consistent with both Congress' intent and the provision's text, which expressly states that issues related to liability may be litigated only in an enforcement action. Indeed, CERCLA's pre-enforcement review preclusion is so strong that courts have rejected PRP efforts to avoid the bar through a citizens' suit and its exemption from section 113(h), and have thus foreclosed district court jurisdiction of pre-enforcement liability claims. In sum, courts have consistently interpreted the plain terms of CERCLA and its legis-

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188 42 U.S.C. § 9613(h). For an overview of CERCLA and its purposes, see supra parts I.A-B.
190 Healy, supra note 1, at 12. In that article, the author cites cases that exemplify several of these settings: a PRP seeking a declaratory judgment that it is not liable for an ongoing cleanup; a PRP action seeking to enjoin the EPA from proceeding with a response action under § 104, because the PRP believes the response action is too costly; and a § 106 administrative order recipient challenging the order, claiming that it is not liable for response costs under CERCLA.
191 See 42 U.S.C. § 9613(h)(1) (specifying that a federal court has jurisdiction to review a response action challenge in "[a]n action under section 9607 of this title to recover response costs or damages or for contribution"). Although the issue has rarely been litigated, one court of appeals held that, once the EPA brings a § 107 cost recovery action against a PRP, the agency has "open[ed] the door" to challenges against the selected response action. United States v. Princeton Gamma-Tech, Inc., 31 F.3d 138, 142 (3d Cir. 1994); see Ehrlich v. Reno, 1994 WL 613698, at *4 (E.D. Pa. 1994) ("[W]hen the EPA files a cost recovery action, section 113 does not bar jurisdiction over an injunctive action alleging irreparable harm inconsistent with CERCLA."). cf Princeton Gamma-Tech, 31 F.3d at 150 n.1 (Nygaard, J., concurring) ("[W]hen the EPA opens the door by bringing a cost recovery suit while a response action remains in progress, common sense and judicial economy require us to review both the completed work and those similar portions of the response phase that are either planned or partially completed."). If other courts were to follow the holding that an EPA cost-recovery action opens the door for challenges to a response action, the rule would not pose a serious threat to the EPA's ability to administer the program because the EPA may refrain from bringing the cost-recovery action.
192 See supra part II.B.2.
194 Voluntary Purchasing Groups, Inc. (VPG) v. Reilly, 889 F.2d 1380 (5th Cir. 1989).
lative history to foreclose pre-enforcement review of CERCLA liability claims.\footnote{Several judges on the First Circuit Court of Appeals voiced the only dissent to the otherwise unanimous view that pre-enforcement review of CERCLA liability is barred. In a withdrawn panel decision, \textit{Reardon v. United States}, 922 F.2d 28, 32 (1st Cir. 1990), and a dissent to an en banc decision, \textit{Reardon v. United States}, 947 F.2d 1509, 1524 (1st Cir. 1991) (Cyr, J., dissenting), these judges concluded that the statute was ambiguous in defining when district court review of liability issues was foreclosed. Based on PRP claims that the delayed review available in an enforcement action would be both too delayed and inadequate, these judges construed the statute's ambiguous terms narrowly in order to permit immediate judicial review. Given these judges' underlying view that delayed review is inadequate, these decisions follow the approach described earlier, which permits pre-enforcement review to avoid undue unfairness. \textit{See supra} notes 150-53 and accompanying text.}

B. Preclusion of Nonliability-Based CERCLA Claims Prior to the Completion of the Cleanup

Application of section 113(h)'s broad language to a CERCLA claim unrelated to the existence or scope of liability is the next issue. CERCLA's policies may be read to support immediate jurisdiction in this context.

These CERCLA claims arise most commonly when a private party brings a citizens' suit claiming that a response action poses a threat to public health or the environment while judicial review of that claim would have the effect of slowing implementation of the response action.\footnote{\textit{See infra} part IV.B.} Health-based claims in the context of a CERCLA response action may be divided into two broad categories: claims that, when completed, a remedial action will not sufficiently protect human health and the environment because hazards will remain at the site\footnote{This category includes two related types of claims. The first type relates to the appropriate standards for defining a sufficiently clean site following remediation. The second type of claim relates to whether the remedial action will actually result in compliance with the applicable cleanliness standards. Both claims, however, relate to the threat to human health posed by the site after the remedial action is complete.} and claims that the implementation of the proposed response action itself poses an undue threat to human health and the environment. Some pre-enforcement claims are related neither to liability nor the cleanup's health effects. These claims cannot be categorized into any more specific or descriptive classifications.

Claimants hoping to assert such health and nonliability-based claims in challenging response actions have usually relied on the express terms of section 113(h)(4), which provides that such challenges may be brought in:
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.  

However, courts have generally denied these claims, deferring to Congress' intention to foreclose early litigation of all CERCLA claims to ensure that the pace of cleanups is not slowed. This reluctance to review CERCLA claims has been particularly evident in the case of adverse health claims.

As more fully described in an earlier article, the leading case in this litigation context is Schalk v. Reilly. In that case, the court relied on the "plain language" of section 113(h)(4) in holding that immediate review under the 113(h)(4) exception to review preclusion is unavailable when the response action has not yet been completed, notwithstanding a claim that the response action itself poses unreasonable risks to human health and the environment and therefore violates CERCLA. The Ninth Circuit recently adopted the broad holding in Schalk.

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198 42 U.S.C. § 9613(h)(4). CERCLA's citizens' suit provision states that:

Except as provided in . . . section 9613(h) of this title (relating to timing of judicial review), any person may commence a civil action on his own behalf—

(1) against any person (including the United States . . .) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter . . . .

Id. § 9659(a).

199 See Healy, supra note 1, at 36-37.

200 900 F.2d 1091 (7th Cir. 1990).

201 Id. at 1095. For the scant support of this broad review preclusion rule in the legislative history, see H.R. Rep. No. 253, 99th Cong., 2d Sess., pt. 1, at 81 (1986), reprinted in 1986 U.S.C.C.A.N. 2863 ("[T]here 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.").

202 See McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325, 328 (9th Cir. 1995) (noting that the exception to review preclusion applies to "citizen[s'] suits challenging past cleanup actions"). In dicta, another court also suggested that CERCLA policies require a broad preclusion rule that applies to all claims, regardless of whether they raise CERCLA liability issues. See Boarhead Corp. v. Erickson, 923 F.2d 1011, 1019 (3d Cir. 1991). The Boarhead court stated:

The limits sec. 113(h) imposes on a district court's jurisdiction are an integral part of Congress's overall goal that CERCLA free the EPA to conduct forthwith clean-up related activities at a hazardous site. . . . CERCLA's language shows Congress concluded that disputes about who is responsible for a hazardous site, what measures are actually necessary to clean-up the site and remove
Other courts, however, have relied on the legislative history of section 113(h) in holding that a party is not required to wait until the cleanup's completion to bring its citizens' suit. These courts conclude that a citizens' suit may be brought to challenge a cleanup phase after that phase has been completed. This interpretation is based on the discussion of the scope of the citizens' suit exception to review preclusion in SARA's Conference Committee Report. The Conference Report states:

In new section 113(h)(4) ... the phrase "removal or remedial action taken" is not intended to preclude judicial review until the total response action is finished if the response action proceeds in distinct and separate stages. Rather, an action under section 310 would lie following completion of each distinct and separate phase of the cleanup ... . It should be the practice of the President to set forth each separate and distinct phase of a response action in a separate Record of Decision document. Any challenge under this provision to a completed stage of a response action shall not interfere with those stages of the response action which have not been completed.

The hazard or who is responsible for its cost should be dealt with after the site has been cleaned up.

Id. (emphasis added); see also Environmental Waste Control, Inc. v. Agency for Toxic Substances and Disease Registry, 763 F. Supp. 1576 (N.D. Ga. 1991) (construing broadly the scope of review preclusion provision in health-related claim).


In Neighborhood Toxic, an association of citizens residing near a NPL site brought a citizens' suit to enjoin the EPA's scheduled remedial action, alleging that the cleanup posed health hazards. 716 F. Supp. at 829-30. The site at issue covered sixty acres, ranked twelfth on the NPL, and was located near large numbers of residences. See id. The facts and decision in Schalk are discussed supra notes 200-01 and accompanying text.

204 The Neighborhood Toxic court viewed this Report as "the most authoritative legislative history." 716 F. Supp. at 833-34. See Commissioner v. Acker, 361 U.S. 87, 94 (1959) (Frankfurter, J., dissenting) ("The most authoritative form of such [contemporaneous legislative] explanation is a congressional report defining the scope and meaning of proposed legislation. The most authoritative report is a Conference Report acted upon by both Houses and therefore unequivocally representing the will of both Houses as the joint legislative body.").

205 H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 224 (1986), reprinted in 1986 U.S.C.C.A.N. at 3317; see also id. (noting that judicial review may proceed when "all the activities set forth in the Record of Decision for the surface cleanup phase have been completed"); 132 CONG. REC. 28,429 (1986) (statement of Sen. Mitchell) ("A suit to compel compliance with the CERCLA standards would be permitted under section 113(h) after each stage of cleanup is complete. In this way, an entire cleanup need not be complete before a citizen can sue.").
Based on this language, one court concluded that, although a citizens' suit could be brought before the entire cleanup was completed, "in no event is judicial review [available] to delay the start of a cleanup remedy." This interpretation of section 113(h)(4) thus would permit a citizens' suit prior to completion of the entire cleanup, even though it still effectively forecloses adequate review of a claim that the implementation of a phase of the cleanup will cause adverse health or environmental effects.

In contrast to the two foregoing interpretations of section 113(h), other courts have expressly or impliedly concluded that review of nonliability-based CERCLA claims should be available prior to implementation of the cleanup. In these cases, the plaintiffs have convinced the courts that policy considerations, such as protection of public health and the environment, the speed of the cleanup process, or the inadequacy of delayed review, weigh strongly in favor of immediate review. These courts also appear to decide that, because the citizens' suit claims are unrelated to CERCLA liability, there is no clear congressional intent to foreclose pre-enforcement review. Indeed, some legislative history indicates that Congress intended to permit review of nonliability-based CERCLA claims once a cleanup plan had been selected.

Other parts of the legislative history indicate that Congress intended something more than the selection of a plan for a cleanup is required before a citizens' suit can be brought. See H.R. Rep. No. 253, 99th Cong., 2d Sess., pt. 3, at 23 (1986), reprinted in 1986 U.S.C.C.A.N. 3046. According to that piece of legislative history, the citizens' suit exception to the bar on CERCLA review was not intended to allow review of the selection of a response action prior to completion of the action: the provision allows for review only of an "action taken..." Thus, after the RI/FS has been completed, the remedial action has been selected and designed, and the construction of the selected action has begun, persons will be able to maintain suit to ensure that a specific on-the-ground implementation of the response action is consistent with the requirements of the Act... The Committee emphasizes that this paragraph is not intended to allow delay of the clean-up and that, in actions under this paragraph, courts should not entertain claims to re-evaluate the selection of remedial action.

See also 132 Cong. Rec. 28,441 (1986) (statement of Sen. Thurmond) (stating that § 113(h) is intended to preclude "premature challenges in court to remedy selection or liability").

Several legislators argued that the selection of a response action is an "action taken" under § 310 of CERCLA, 42 U.S.C. § 9659, and that a citizens' suit may therefore be brought once the remedial action is selected. See 132 Cong. Rec. 29,754 (1986) (statement of Rep. Roe) ("A final cleanup decision, or plan, constitutes the taking of action at a site, and the legislative language makes it clear that citizens' suits under section 310 will lie alleging violations of law and irreparable injury to health as soon as — and these words are
In *United States v. Princeton Gamma-Tech, Inc.*, the court concluded that citizens’ suit jurisdiction is available for a health-based claim “even though the cleanup may not yet be completed.” The Court of Appeals presented three arguments in support of its decision that review of health-based claims is not barred until at least a particular phase of the cleanup has been completed. First, the text of section 113(h)(4) “does not speak in clear terms” when it provides that a citizens’ suit may be brought once there is an “action taken.” Second, an absurd result would arise if the text of section 113(h)(4) were read to foreclose review until the cleanup has been completed: “The citizens’ suit provision is effectively nullified if litigation must be delayed until after irreparable harm or damage has been done. In such circumstances, a statutory interpretation that calls for the full completion of the plan before review is permitted makes the citizens’ suit provision an absurdity.”

Finally, the court asserted that a construction of the statute permitting review of a health-based claim prior to implementation of the cleanup is necessary given CERCLA’s purposes: “In 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.” Although the

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*Id.* In a case where delay in implementing the cleanup would likely result in public health improvements, the applicability of the bar against early review is more doubtful.

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208 31 F.3d 138 (3d Cir. 1994).
209 Id. at 148.
210 Id. at 145.
211 Id. at 146.
212 Id. at 144-45.
Princeton Gamma-Tech court distinguished its case from earlier circuit decisions by asserting that those courts had not been "confronted with bona fide assertions of irreparable environmental damage resulting from violations of CERCLA's policies," the Princeton Gamma-Tech court is the only circuit court that has construed section 113(h) to permit citizens' suit jurisdiction prior to cleanup implementation.

The result in Princeton Gamma-Tech, however, finds support in dictum by the District Court in Cabot Corp. v. United States EPA. In that case, the court stated that citizens' suit jurisdiction should be available for a health-based claim immediately after a cleanup plan is selected. The Cabot court came to this conclusion after first deciding that the citizens' suit exception made the scope of review preclusion provision ambiguous. The court then concluded that this ambiguity should be resolved in favor of permitting early review of health-based CERCLA claims both because the legislative history indicated that Congress intended

\[213\] Id. at 144 (footnote omitted).

\[214\] 677 F. Supp. 823, 828-30 (E.D. Pa. 1988); see supra note 193 and accompanying text.

\[215\] 677 F. Supp. at 829. In one other case, Artesian Water Co. v. Government of New Castle County, 659 F. Supp. 1269 (D. Del. 1987), the court stated, with little analysis and without discussing the full terms of § 113(h), that "[w]ithout deciding the issue, it appears that [the plaintiff] may . . . challenge in a citizens' suit the adequacy of [the] EPA's selected remedy, particularly its failure to provide [an alternative water supply]." Id. at 1290 n.39.

\[216\] 677 F. Supp. at 828 ("[S]ubsection 9613(h)(4) appears to be the provision most hospitable to early judicial review. . . . Th[e] language arguably permits challenges to [the] EPA's plans even before they have been implemented." (citations omitted)).

\[217\] See id. at 828-29; see also supra notes 128, 205, 207 (summarizing the relevant legislative history). During the debate that preceded final enactment of SARA, Representative Glickman sought to foreclose an interpretation of § 113(h) that would permit immediate review of a claim because it was health-based. Representative Glickman instead compared a citizen's health-based claim to a PRP's premature liability claim and argued that they are substantially the same because they delay cleanups. See 132 CONG. REC. 29,736 (1986). Rep. Glickman states:

This is a valid argument and one which both neighbors of sites and potentially responsible parties have asserted. Neither of these persons want[s] to see an inadequate or inappropriate remedy built. If the remedy is not adequate the neighbors may be injured and the potentially responsible parties may be liable under State law for those injuries. If the remedy has to be rebuilt, the potentially responsible parties may have to pay twice for the cleanup of one site. Notwithstanding these arguments, the conferees decided to ensure expeditious cleanups by restricting such preimplementation review.

Id. Rep. Glickman went on to conclude:

[C]learly 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.
Judicial Review Preclusion

this result and because only pre-cleanup review would ensure adequate review of a claim of irreparable injury.

Thus, the Cabot court — like the Princeton Gamma-Tech court — found that it would be objectionable to permit judicial review only after a stage of the cleanup has been completed in a health-based citizens' suit. In such a case, the 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. The Cabot Corp. court premised its analysis in part on the expectation that private citizens rather than PRPs would bring these citizens' suits. However, the party relying on citizens' suit jurisdiction in Princeton Gamma-Tech was a PRP.

In sum, courts have reached different conclusions about the extent to which section 113(h) forecloses immediate judicial review of CERCLA claims that are not related to liability, with a minority of courts deciding that immediate review is available because delayed review would be inadequate.

C. Preclusion of Bankruptcy Review Claims Prior to Completion of the CERCLA Cleanup

The next litigation context is the first of three in which plaintiffs assert claims under an alternative statutory scheme to secure immediate review of CERCLA cleanup issues. The first context involves a PRP seeking to extinguish a CERCLA claim in a bankruptcy proceeding, while the EPA contends that CERCLA bars such a discharge until it has brought a cost recovery action.

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218 See 677 F. Supp. at 829 ("Health and environmental hazards must be addressed as promptly as possible rather than awaiting the completion of an inadequately protective response action." (emphasis added)).

219 See id. at 829 n.6. The court states that:

The compatibility with due process of deferring judicial review of claims of compensable harm [(such as the issue of liability for response costs)], as distinguished from the need for prompt review of allegations of irreparable injury, such as harm to public health or the environment, supports the distinction here drawn between PRPs' suits alleging essentially monetary harms and bona fide citizens' suits alleging irreparable harm.

220 Other courts have also indicated a willingness to allow immediate judicial review of CERCLA claims unrelated to liability. See Healy, supra note 1, at 51-56 (discussing Alabama v. United States EPA, 871 F.2d 1548 (11th Cir. 1989), and Chemical Waste Management, Inc. v. United States EPA, 673 F. Supp. 1043 (D. Kan. 1987)).

221 This type of case is discussed infra notes 224-46 and accompanying text.
As discussed, review preclusion is clearest when a PRP seeks to litigate the existence or scope of its liability prior to an EPA enforcement action. Such claims threaten delays in cleanup and were specifically slated for litigation only after the United States itself brings a section 107 cost recovery action. In an increasing number of cases, however, the PRP does not assert a pre-cost recovery claim against the EPA, but instead files for bankruptcy and seeks to have any claim available to the EPA for CERCLA response costs discharged in the bankruptcy proceeding.

In the bankruptcy context, a plain "conflict" has developed between the Bankruptcy Code, the purpose of which is to provide debtors with a "fresh start, an objective made more feasible by maximizing the scope of a discharge, and CERCLA, one purpose of which is to expedite cleanups with "litigation about cleanup costs delayed until after the cleanup." In trying to reconcile this conflict, courts have come to three different conclusions about how these two statutory schemes interact, none of which adheres

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222 See supra part III.A.

223 See David H. Topol, Hazardous Waste and Bankruptcy: Confronting the Unasked Questions, 13 VA. ENVT. L.J. 185, 191 (1994) ("[T]he EPA has projected that thirty percent of all hazardous waste site owners will be forced to file for bankruptcy. Many other companies that generate hazardous waste may also be forced into bankruptcy because of the costs of hazardous waste cleanup." (footnotes omitted)).


225 In re Chateaugay, 944 F.2d at 1002.

226 In re Combustion Equip., 838 F.2d at 37. That policy is, of course, the substance of § 113(h).
fully to section 113(h)'s intended foreclose of pre-enforcement review of the CERCLA liability issue.\textsuperscript{227}

\textit{In re Chateaugay Corp.} first addressed section 113(h)'s impact on a bankruptcy court's ability to discharge claims related to a PRP's CERCLA liability before the EPA has itself sought to recover those costs under section 107.\textsuperscript{228} In \textit{Chateaugay}, the Second Circuit rejected the EPA's contention that section 113(h)'s "ban on pre-enforcement judicial review requires that it receive a declaratory judgment upholding its contention that unincurred response costs are not dischargeable 'claims.'"\textsuperscript{229}

The court construed section 113(h) very narrowly and held that "CERCLA's prohibition of pre-enforcement review is simply inapplicable."\textsuperscript{230} Although the court clearly erred by asserting that section 113(h) was irrelevant to its decision,\textsuperscript{231} the court had to identify the scope of CERCLA claims that were subject to the discharge. Using Congress' broad definition of the term "claim" in the Bankruptcy Code,\textsuperscript{232} the Second Circuit affirmed the district court's holding that CERCLA claims are discharged in bankruptcy for "releases that have occurred pre-petition, even though they have not then been discovered by [the] EPA (or anyone else)."\textsuperscript{233} In short, the Second Circuit read the review preclusion provision narrowly in order to further the fresh start policy of the Bankruptcy Code.\textsuperscript{234}

The district court decision in \textit{In re National Gypsum Co.} presented an alternative interpretation of how CERCLA interacts

\textsuperscript{227} The interaction between CERCLA and bankruptcy has received extensive comment in law reviews. See John R. Bevis, Case Note, \textit{In Re Jensen: Demonstrating the Need for Supreme Court Resolution of the Conflict Between CERCLA and the Bankruptcy Code}, 9 J. LAND USE & ENVTL. L. 179, 184-96 (1993) (summarizing in greater detail the current state of the law); see also Healy, \textit{supra} note 1, at 61-70 (examining bankruptcy cases in greater detail).

\textsuperscript{228} 944 F.2d. at 1006.

\textsuperscript{229} Id.

\textsuperscript{230} Id.

\textsuperscript{231} See Healy, \textit{supra} note 1, at 64-65.

\textsuperscript{232} See 944 F.2d at 1005.

\textsuperscript{233} Id. at 1000.

\textsuperscript{234} In interpreting how the two statutes interact, however, it should be noted that the Second Circuit rejected the debtor's argument that the discharge should also include claims for all response costs "whenever based on LTV's pre-petition conduct, a position that would have included LTV's pre-petition conduct of placing hazardous substances in sealed containers, followed by release of the substances into the environment years after confirmation." \textit{Id.}
with the Bankruptcy Code. Unlike the Second Circuit, this court recognized that section 113(h) applies generally to questions of PRP liability under CERCLA and that those liability issues are implicated when claims are estimated and liquidated in bankruptcy. In attempting to harmonize the statutes, the court decided that CERCLA review preclusion could not be viewed so broadly that courts would be able to discharge claims in bankruptcy only after the EPA had brought a CERCLA cost recovery action. Instead, the court decided that there was an important distinction “between costs associated with pre-petition conduct resulting in a release . . . that could have been ‘fairly’ contemplated by the parties; and those that could not have been ‘fairly’ contemplated by the parties.” Only claims related to the former costs could be discharged in bankruptcy, but those could be discharged regardless of whether the EPA had brought a cost recovery action. The court stated in this regard that when a court considers whether CERCLA costs are associated with claims within the “fair contemplation” of the parties, the court must consider several factors that reflect CERCLA policy.

Following the district court decision and because CERCLA policy must be harmonized with the Bankruptcy Code’s fresh start policy, the EPA is no longer able to retain its full enforcement discretion when deciding whether to file a notice of CERCLA claims once PRPs have filed for bankruptcy. Under the district court’s view,

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235 139 B.R. 397 (N.D. Tex. 1992). National Gypsum had filed a voluntary petition for bankruptcy under Chapter 11. Id. at 399. On behalf of the EPA and the Department of the Interior, the United States thereafter filed a proof of claim asserting that National Gypsum was liable for response costs and damages under CERCLA. Id.

236 Id. at 411 (“Section 113(h) is applicable in these circumstances.”). But cf. id. at 406 n.21 (“[T]he presentation of evidence and testimony for purposes of reaching an estimate [of a claim in bankruptcy] is not tantamount to the litigation precluded by 42 U.S.C. § 9613(h).”).

237 Id. at 407 (footnotes omitted). The court criticized Chateaugay because the Second Circuit provided no basis for excluding from its broad definition of claims response costs related to sites where the debtor had disposed of hazardous substances, but where a release or a threat of a release had not occurred pre-petition: “[T]here exists no meaningful distinction between debtor’s conduct and the release or threatened release resulting from this conduct.” Id. (footnote omitted); see id. at 407 n.24 (“[I]t is not clear to the Court why the placing of hazardous substances in sealed containers pre-petition, followed by release of the substances into the environment years after confirmation, is not a claim; while the release of substances at locations unknown to the parties pre-petition is a claim.”).

238 See id. at 407 & n.24.

239 See id. at 411 n.36 (noting that in VPG, “[t]he Fifth Circuit was not faced with the unique circumstances surrounding the interaction of the Code and CERCLA”).
Judicial Review Preclusion

In order for the EPA to preserve its claims in regard to a PRP in bankruptcy, its duties are triggered by the mere discovery of a site linked to the Debtors, and extends to such activity that would allow a rough and speedy estimation of CERCLA claims under the Code.²⁴⁰

In short, the court recognized that its interpretation of section 113(h) curtailed the EPA's enforcement discretion and forced the EPA to modify its enforcement priorities, to the extent that in some cases the EPA was now required to make an earlier filing of claims against PRPs in bankruptcy.²⁴¹

Two circuits have recently adopted the general approach of the National Gypsum court in deciding whether a CERCLA claim has been discharged in bankruptcy.²⁴² Neither of these cases, however, involved the discharge of an EPA claim, thus neither case involved the strongest case for holding that the claim is not discharged. Both courts held that a private party claim for CERCLA response costs was discharged because the party had had adequate notice of the claim prior to the discharge in bankruptcy and the claimant had failed to assert the claim in the bankruptcy proceeding.²⁴³

Dictum in another district court decision suggests a third approach to the discharge of CERCLA claims in bankruptcy — an approach that is more favorable to the EPA than the National Gypsum approach. In United States v. Union Scrap Iron & Metal,²⁴⁴ the court relied upon the terms of section 113(h) to reject a reorganized company's contention that in a bankruptcy proceeding "a release or threatened release alone constitutes a dischargeable claim."²⁴⁵ Having disposed of the basic approach taken by the Second Circuit in Chateaugay, the court stated that a CERCLA claim could be discharged in bankruptcy only for a claim as to which the EPA had incurred response costs prior to the bankruptcy discharge

²⁴⁰ Id. at 409 (emphasis added).
²⁴¹ See id. at 411 n.34.
²⁴² See In re Chicago, Milwaukee, St. Paul & Pac. R.R., 3 F.3d 200, 202 (7th Cir. 1993); In re Jensen, 995 F.2d 925, 930 (9th Cir. 1993).
²⁴³ In re Chicago, 3 F.3d at 206-07; In re Jensen, 995 F.2d at 931.
²⁴⁵ Id. at 837. The court stated that such a rule would conflict directly with CERCLA's policies:

Congress did not intend the EPA to be embroiled in litigation over the wisdom, scope, and costs of various possible remedies to clean up dangerous sites before the EPA had spent any resources investigating, evaluating, and implementing a remedy for these sites. [The reorganized company's] position cannot be squared with the CERCLA legislative scheme.

Id. at 838.
This approach will result in fewer CERCLA claims being subject to discharge in bankruptcy and thus will impose the fewest constraints on the EPA’s administration of the Superfund program. Notwithstanding this effect, the approach still does not bar entirely the discharge of CERCLA claims in bankruptcy prior to an EPA enforcement action and thus limits the effect of section 113(h).

In sum, the bankruptcy context is one in which two important statutory goals conflict in ways that are quite apparent to courts and litigants. When called upon to reconcile this conflict, courts have taken various approaches, all of which modify to some extent the effect of section 113(h) in foreclosing pre-enforcement review.

D. Preclusion of Substantive Federal Statutory Claims Prior to CERCLA Enforcement

A claimant can also rely upon other federal statutes to establish district court jurisdiction when seeking early review of a CERCLA claim. Cases involving claims for statutory review under a federal statute other than CERCLA can be divided into two broad categories for the purpose of summarizing the applicable law.

The first category consists of claims arising under another statute where Congress has provided for the interaction of that statute with CERCLA. Recently, this situation has arisen in two cases where parties have sought indirect review of CERCLA response actions by relying directly or indirectly on the right of review granted in RCRA. In United States v. Colorado, the government sought a declaratory judgment to foreclose Colorado from taking any action to enforce a compliance order that the state had issued pursuant to its delegated authority to enforce RCRA.

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246 See id. at 838 (labelling the approach described in the text as a “sensible approach to balancing environmental and bankruptcy policy goals”). However, the court’s discussion of this approach appears to be dictum for two reasons. First, the case did not involve any of the types of fair contemplation claims that could be discharged according to the court in National Gypsum. Second, the Union Scrap court appeared willing to discharge other claims even when the PRP had not yet incurred actual response costs at the time of the bankruptcy proceeding, because there may be “a contingent claim based on pre-confirmation contacts between the parties.” Id. at 839.

247 The remainder of this section discusses these cases in detail.

248 See Ingrid Brunk Wuerth, Challenges to Federal Facility Cleanups and CERCLA Section 113(h), 8 Tul. Envtl. L.J. 353 (1995) (discussing the extent to which CERCLA’s § 113(h) forecloses review of a RCRA citizens’ suit); 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 (1994).

249 990 F.2d 1565 (10th Cir. 1993), cert. denied, 114 S. Ct. 922 (1994).

250 Id. at 1573-74.
The government argued that resolution of the RCRA compliance order dispute would involve the court in the review of an ongoing CERCLA response action that was barred by section 113(h).251

The Tenth Circuit considered the interaction of CERCLA and RCRA by analyzing CERCLA’s savings provisions252 and RCRA’s citizens’ suit provision, which specifically regulates the circumstances under which an ongoing CERCLA response action would bar a RCRA citizens’ suit.253 In the court’s view, the RCRA citizens’ suit provision indicated a congressional intent to permit state enforcement of a RCRA compliance order, even if that involved review of a CERCLA response action.254 The court contrasted the availability of this type of RCRA citizens’ suit with a citizens’ suit alleging that RCRA is being violated because a party is creating an imminent and substantial endangerment. RCRA expressly provides that such an imminent hazard citizens’ suit is foreclosed when a CERCLA response action is under way.255 In the court’s view, Congress had specifically legislated regarding the interaction of CERCLA and RCRA when it enacted the RCRA citizens’ suit provision, and that Congress decided to permit a RCRA citizens’ suit to enforce a RCRA order, notwithstanding the existence of an ongoing CERCLA response action.256

In Arkansas Peace Ctr. v. Arkansas Dep’t of Pollution Control and Ecology,257 the Eighth Circuit also relied on the RCRA citizens’ suit provision to define how CERCLA interacted with RCRA. In that case, a citizens group opposed the decision to incinerate dioxin as part of a planned emergency removal action under CERCLA.258 The group’s citizens’ suit contended that the incineration plan violated the applicable RCRA regulations and posed an imminent and substantial endangerment to human health.259 Because the citizens group was raising an imminent hazard claim, rather than seeking enforcement of a RCRA order, the court held that Congress had intentionally foreclosed the citizens’

251 Id. at 1574.
252 See id. at 1575-77 (construing 42 U.S.C. §§ 9652(d), 9614(a)).
253 See id. at 1577-78 (construing 42 U.S.C. § 6972(a)).
254 See id. at 1578 (construing 42 U.S.C. § 6972(b)(1)(A) and noting that the RCRA citizens’ suit provision does not specifically foreclose such a citizens’ suit when a CERCLA response action is present).
255 See id. at 1578 (construing 42 U.S.C. § 6972(b)(2)(B)).
256 See id.
257 999 F.2d 1212 (8th Cir. 1993), cert. denied, 114 S. Ct. 1397 (1994).
258 See id. at 1215.
259 See id. at 1215, 1217.
suit because of the ongoing CERCLA removal action.\textsuperscript{260} The court distinguished the \textit{Colorado} case, pointing out that that case involved a citizens’ suit to enforce a RCRA order.\textsuperscript{261} In sum, when courts have applied CERCLA’s review preclusion provision to RCRA claims, RCRA itself indicates the extent to which Congress intended to preclude review.\textsuperscript{262}

In the second category of challenges to CERCLA response actions based on claims arising out of other substantive statutes, the statutes do not indicate congressional intent, and thus do not coordinate different, and possibly conflicting, statutes. In this context, courts may rely on their discretion. However, they must first conclude that the broad and categorical language of section 113(h) permits a decision that pre-enforcement review of a CERCLA response action, even under another statute, is not foreclosed.

\textsuperscript{260} See \textit{id.} at 1218.

\textsuperscript{261} See \textit{id.} at 1217-18. One commentator contends that § 113(h) should not foreclose any RCRA citizens’ suits and criticizes the \textit{Arkansas Peace Center} decision for its reasoning and result. See Wuerth, \textit{supra} note 248, at 383-85.

\textsuperscript{262} In a third case involving the interaction between CERCLA and RCRA, the court did not rely on the RCRA citizens’ suit provision to define the scope of review preclusion. In \textit{Browning-Ferris Indus. of South Jersey, Inc. (BFI) v. Muszynski}, 899 F.2d 151 (2d Cir. 1990), a RCRA consent order to which BFI and the EPA were parties required BFI to use wells to monitor groundwater affected by leaching from a BFI landfill. \textit{Id.} at 152-53. A dispute arose between the parties over the type of pipe that should be used for monitoring. \textit{Id.} This dispute continued until the EPA issued a § 106 order under CERCLA, requiring BFI to submit a new monitoring plan, which would provide for the installation of stainless steel pipes — the type of pipes desired by the EPA and opposed by BFI. \textit{See id.}

After receiving the § 106 order — review of which is expressly barred by § 113(h) until the EPA itself brings an action to enforce it — BFI brought an action in district court, challenging the new monitoring requirement under RCRA and CERCLA. \textit{See id.} at 153. BFI did not bring the action as a RCRA citizens’ suit based on the RCRA consent order, but instead sought pre-enforcement review of the § 106 order, arguing that the EPA acted beyond its statutory authority in issuing that order and the court should review its claim to provide an adequate and timely remedy. BFI relied on \textit{Leedom v. Kyne}, 358 U.S. 184 (1958), to support this argument. \textit{See BFI, 1989 WL 51916, at *3 (S.D.N.Y. 1989), aff’d,} 899 F.2d 151 (2d Cir. 1990). Relying on the terms of § 113(h), the district court dismissed BFI’s action. \textit{See 899 F.2d at 153-54.}

After stating that § 113(h) was “not dispositive” of the jurisdiction issue, the Second Circuit came to the uncommon conclusion that the case “is an appropriate one in which to assume jurisdiction \textit{arguendo} without deciding the issue,” \textit{Id.} at 154, 159. The court declined to rule on the jurisdiction issue because it was concerned that “[a] comprehensive ruling on the jurisdictional issues would necessarily have a broad impact on future EPA pollution remediation efforts.” \textit{Id.} at 154. The court stated that defining the scope of review preclusion under § 113(h) poses a knotty problem because, even though the purposes of CERCLA are very important and are furthered by delaying review, the breadth of preclusion under § 113(h) may allow the EPA to prevent judicial review of its actions by relying on CERCLA authority when the EPA views review preclusion as necessary to accomplish its remedial objectives. \textit{See id.} at 160. Having assumed jurisdiction, the court then rejected BFI’s claim on the merits. \textit{Id.} at 164.
A court may, however, be unwilling as a threshold matter to construe section 113(h) narrowly. In McClellan Ecological Seepage Situation (MESS) v. Perry, a citizens group brought an action against the United States Department of Defense, owner of McClellan Air Force Base, the site of an ongoing CERCLA response. The plaintiff group brought statutory claims under the Clean Water Act (CWA) and sought injunctive relief and civil penalties.

In deciding that pre-enforcement review of the statutory claims was not available, the Ninth Circuit focused exclusively on the "clear and unequivocal" language of section 113(h), which "amounted to a blunt withdrawal of federal jurisdiction." In the court's view, this "unqualified language .. precluded 'any challenges' to CERCLA Section 104 cleanups, not just those brought under other provisions of CERCLA." The court inferred from the broad terms of section 113(h) that Congress believed that any such review would slow cleanup, undermine CERCLA policies, and therefore, intended to bar early review under other statutes. The court recognized that delayed review of the non-CERCLA statutory claims raised by the plaintiff might necessarily result in inadequate review of those claims. Nevertheless, the court stated that, "[w]e must presume that Congress has already balanced all concerns and 'concluded that the interest

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263 47 F.3d 325 (9th Cir. 1995), cert. denied, 116 S. Ct. 51 (1995).
264 Id. at 326-27.
265 Id.
266 Id.
267 Id. at 328 (quoting North Shore Gas Co. v. EPA, 930 F.2d 1239, 1244 (7th Cir. 1991)).
268 Id. (quoting Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control and Ecology, 999 F.2d 1212, 1217 (8th Cir. 1993)); accord Razore v. Tulalip Tribes of Wash., 66 F.3d 236, 239-40 (9th Cir. 1995); see Werlein v. United States, 746 F. Supp. 887, 893-94 (D. Minn. 1990). Wuerth discusses and criticizes the Werlein decision, supra note 248, at 365-367.

The MESS court's treatment of the plaintiff's RCRA claims also indicates the court's view of the broad scope of review preclusion mandated by § 113(h). See 47 F.3d at 327. The court viewed the text of § 113(h) as plainly foreclosing those claims. See id. at 328-29. Accordingly, the MESS court did not follow the approach of the cases discussed infra notes 284-98 and accompanying text, and did not examine the terms of the RCRA citizens' suit provision to determine whether Congress had expressly provided that RCRA review was available. See 47 F.3d at 331 ("Section 113(h) withholds federal jurisdiction to review citizens' suits and actions brought under other, non-CERCLA statutes that challenge ongoing CERCLA cleanup actions.").

269 See 47 F.3d at 329 ("Although judicial review is an important element in the enforcement of laws such as RCRA and the Clean Water Act, Congress has determined that the need for swift execution of CERCLA cleanup plans outweighs this concern.").
270 Id.
in removing the hazard of toxic waste from Superfund sites' clearly outweighs the risk of irreparable harm arising out of delayed review of non-CERCLA statutory claims.271

However, it is not certain that Congress actually made the intentional decision to dispense with adequate statutory review of non-CERCLA claims when it enacted section 113(h). The legislative record offers no direct support for the court's inference. A better reading of section 113(h) and the legislative history shows that Congress did not consider the complexities of the statutory interactions that would arise in these cases and, thus, did not intentionally select its preferred means for resolving statutory inconsistencies that might arise.

Not all courts have construed section 113(h) to apply so broadly as to foreclose statutory review of non-CERCLA claims. In Penn Central Corp. v. United States,272 the Special Court established by the Regional Rail Reorganization Act of 1973 (Rail Act)273 did not construe section 113(h) to foreclose pre-enforcement review of all CERCLA response actions. There, Penn Central was potentially liable for CERCLA response costs incurred at two different sites. Penn Central brought a declaratory judgment action in the Special Court, requesting an adjudication of its CERCLA liability based on several rail documents and court orders.274 The government moved to dismiss the action on grounds that section 113(h) barred the court's jurisdiction.275

The court rejected this argument and held that it had jurisdiction to review Penn Central's claim, based on section 209(e)(2) of the Rail Act.276 That provision gives the Special Court exclusive jurisdiction to review any claim that involves interpreting a rail order entered by that court.277 Because a court would have to interpret such an order to determine Penn Central's liability for response costs under CERCLA, the Special Court held that it had exclusive jurisdiction over Penn Central's claim notwithstanding the terms of section 113(h).278 Moreover, the court concluded that its assumption of exclusive jurisdiction would not unduly undermine CERCLA because the EPA was already in a position to litigate the

271 Id. (quoting Boarhead Corp. v. Erickson, 923 F.2d 1011, 1023 (3d Cir. 1991)).
274 See 814 F. Supp. at 1118.
275 See id. at 1118, 1121-22.
277 See 814 F. Supp. at 1119 (quoting and explaining § 209(c) of the Rail Act).
278 See id. at 1119-21.
CERCLA claims, so that the case did not truly involve pre-enforcement review. 279

In sum, conflicts will arise between CERCLA’s policy of delayed review and the policies identified in other substantive federal statutes. The broad, categorical, and plain language of section 113(h) may be a significant hurdle to gaining timely review of those non-CERCLA claims. The claim for immediate review under another statute — if it is to be available at all — requires a strong showing through the text or purposes of that other statute that Congress intended to permit review of the non-CERCLA claim.

E. Preclusion of Administrative Procedure Act Claim Review 
Prior to CERCLA Enforcement

The final situation in which a plaintiff seeks pre-enforcement review through another federal statute involves claims under procedural statutes that do not explicitly provide for statutory review. In such a case, the court must decide whether section 113(h) bars the action, which is necessarily brought pursuant to the APA, 280 given that the statute giving rise to the claim does not itself provide a right of action. Claims falling into this category typically occur when CERCLA response actions or section 106 orders are challenged on the underlying procedural rights in the National Environmental Policy Act (NEPA) 281 and the National Historic Preservation Act (NHPA). 282

As more fully discussed in an earlier article, 283 two courts of appeals have decided whether claims may be asserted under the APA to gain pre-enforcement review of a CERCLA response action. In Schalk v. Reilly, 284 the court held that CERCLA barred federal jurisdiction over a NEPA claim asserted under the APA. 285

279 See id. at 1123.
280 5 U.S.C. §§ 701-06.
283 See Healy, supra note 1, at 77-82.
284 900 F.2d 1091 (7th Cir. 1990).
285 See 5 U.S.C. §§ 702, 704. Because NEPA itself does not include provisions granting a statutory right of review, the plaintiffs had to assert a cause of action for nonstatutory review under the APA. See William Murray Tabb & Linda A. Malone, Environmental Law: Cases and Materials 295 (1992) (“NEPA contains no specific provision for judicial enforcement; however, courts have interpreted its procedural requirements as establishing a ‘strict standard of compliance’ judicially reviewable under the [APA].”) (quoting Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm’n, 449 F.2d 1109, 1112 (D.C. Cir. 1971)).
The APA, however, does not provide a right of review when other federal "statutes preclude judicial review."286 The Seventh Circuit relied on Congress' broad intent "to remove challenges to remedial action plans from the jurisdiction of the federal courts until the remedial action has been taken,"287 and held that the court lacked jurisdiction because "APA review is not available when a federal statute specifically precludes judicial review."288

In Boarhead Corp. v. Erickson,289 (Boarhead) the Third Circuit considered whether a NHPA challenge of a CERCLA cleanup could be pursued prior to enforcement or implementation. Consistent with the Schalk analysis, the Boarhead court held that the plaintiff could pursue the NHPA claim only to the extent that the APA established such a claim — the only source available for a waiver of sovereign immunity by the United States.290 The court then concluded that there was no jurisdiction because the APA provides that a claim may not be asserted when another statute — CERCLA in this context — bars review.291

In both cases, to determine whether the plaintiff could assert the procedural claim, the court considered how the relevant statutes — CERCLA, the APA, NEPA or NHPA — interacted. The decision in both cases that there was no jurisdiction follows from Congress' decision that review of claims under NEPA and the NHPA is available only when other federal statutes do not foreclose review. This statutory structure and the implicit legislative intent may be contrasted with the previous litigation context involving statutory

287 900 F.2d at 1097 (quoting Alabama v. EPA, 871 F.2d 1548, 1560 (11th Cir. 1989)).
288 Id. (citing Block v. Community Nutrition Inst., 467 U.S. 340, 345 (1984)). Other courts have also reached the conclusion that pre-enforcement review of a CERCLA response action cannot be gained through the APA because CERCLA itself precludes such review. See, e.g., Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1390-91 (6th Cir. 1989); Dickerson v. Administrator, EPA, 834 F.2d 974, 977-78 (11th Cir. 1987). One court reached the identical conclusion even before Congress enacted § 113(h) as part of SARA. See J.V. Peters & Co. v. Administrator, EPA, 767 F.2d 263, 265 (6th Cir. 1985).
289 923 F.2d 1011 (3d Cir. 1991).
290 The court reached this conclusion through two steps. First, the court held that, in enacting the NHPA, "Congress must have intended to establish a private right of action to interested parties, such as Boarhead, in these situations." Id. at 1017. This conclusion has no real significance because the APA establishes a private right of action for injunctive relief in cases of illegal government action. 5 U.S.C. § 702. In any event, the court acknowledged that the NHPA does not itself include a waiver of sovereign immunity for actions against the United States. 923 F.2d at 1017 n.11. Therefore, the court stated: "The government has waived sovereign immunity insofar as the APA gives Boarhead a right to judicial review." Id. (citing 5 U.S.C. § 702). In short, Boarhead's claim was reviewable only to the extent allowed by the APA.
review. When a challenge to a CERCLA cleanup is asserted in that context, Congress has created a statutory right and has provided the express means for gaining judicial review of government actions alleged to impair that statutory right. When statutory review is involved, a court must weigh the policies of both CERCLA and the other federal statute in deciding whether review is foreclosed.

F. Preclusion of Constitutional Claims Review Prior to CERCLA Enforcement

The final litigation context in which courts must decide whether section 113(h) forecloses pre-enforcement review involves claims that response actions or section 106 orders violate the Constitution. In deciding whether review of such claims is available prior to enforcement, courts have reached three different conclusions. The decision whether to adopt one or another of these interpretations turns on whether the court relies only on CERCLA's text or accounts as well for nontextual policies.

Two courts, including the Sixth Circuit Court of Appeals, have held that CERCLA bars pre-enforcement jurisdiction of a PRP's due process claims regarding its inability to challenge issues related to its CERCLA liability. The Sixth Circuit concluded that the text of section 113(h) does not include any exception for constitutional challenges. The court also concluded that the legislative history of section 113(h)...

292 42 U.S.C. § 9613(h).
293 See 42 U.S.C. § 9604.
295 Cases involving these claims are discussed in greater detail in Healy, supra note 1, at 82-95.
297 Barmet, 927 F.2d at 293 (“Notably, the statutory language of section 9613(h) does not include any explicit provision for constitutional challenges.”); accord South Macomb, 681 F. Supp. at 1249-50 (“Reading the language of § 9613(h) [foreclosing jurisdiction under 28 U.S.C. § 1331] for its everyday meaning supports the notion that this subsection prohibits constitutional as well as statutory challenges until the time proscribed [sic] by the statute.”); Reardon v. United States, 731 F. Supp. 558, 567 (D. Mass. 1990), rev'd in relevant part, 947 F.2d 1509 (1st Cir. 1991) (en banc) (noting that the plain language of § 113(h) “divests all federal courts from jurisdiction subject to its express provisions. By implication, this section specifically bars any federal court from asserting federal question jurisdiction under 28 U.S.C. § 1331 which would include possible constitutional challenges.”).
confirmed Congress' intent not to extend jurisdiction over constitutional claims prior to enforcement by the EPA.\textsuperscript{298}

A second group of cases is comprised of decisions in which courts have decided the merits of constitutional claims prior to both EPA enforcement actions and implementation of the response action.\textsuperscript{299} The courts deciding those cases, however, have failed to provide any statutory or nonstatutory reasons why review of the constitutional claims is not barred by the broad and categorical terms of section 113(h).\textsuperscript{300}

In contrast to these decisions, the First Circuit has concluded that, notwithstanding the categorical language of section 113(h), a court does have jurisdiction to adjudicate some constitutional challenges to CERCLA cleanups, while the court has no jurisdiction to adjudicate other such claims. In \textit{Reardon v. United States},\textsuperscript{301} the First Circuit, sitting en banc, held that section 113(h) did not bar federal court review of the plaintiffs' claim "that [the] EPA's imposition of the [CERCLA] lien without a hearing violated the due process clause of the Fifth Amendment to the United States Constitution."\textsuperscript{302} The court reached this conclusion because the consti-

\textsuperscript{298} \textit{Barmet}, 927 F.2d at 293 (citing S. REP. No. 11, 99th Cong., 1st Sess. 58 (1985)); \textit{accord South Macomb}, 681 F. Supp. at 1250-51. For an explanation of why this reading of the legislative history is flawed, see Healy, \textit{supra} note 1, at 83-86.

\textsuperscript{299} \textit{See Schalk v. Reilly}, 900 F.2d 1091 (7th Cir. 1990); \textit{Environmental Waste Control, Inc. v. Agency for Toxic Substances and Disease Registry}, 763 F. Supp. 1576, 1580 (N.D. Ga. 1991). Although the \textit{Environmental Waste Control} court concluded that "it lack[ed] subject matter jurisdiction to review the Health Assessment at this time," the court proceeded to consider and reject on the merits the plaintiffs' due process claim that inadequate procedures led to publication of the health assessment. \textit{Id.}; \textit{see also United States v. M. Genzale Plating, Inc.}, 723 F. Supp. 877, 885 (E.D.N.Y. 1989) (rejecting due process challenges on the merits both as to the NPL listing and the preclusion of pre-enforcement review); \textit{Neighborhood Toxic Cleanup Emergency v. Reilly}, 716 F. Supp. 828, 836 (D.N.J. 1989) (declining to review the EPA's Record of Decision for illegacies, and also rejecting on the merits the claim "that [the] EPA denied plaintiff's members due process in selecting a remedy for the GEMS landfill").

\textsuperscript{300} For a colorable, supporting rationale for the result reached in these cases, see Healy, \textit{supra} note 1, at 87-91.

\textsuperscript{301} 947 F.2d 1509 (1st Cir. 1991) (en banc).

\textsuperscript{302} \textit{Id.} at 1511. The EPA imposed the CERCLA lien pursuant to 42 U.S.C.\textsuperscript{§} 9607(l). \textit{Id.} The United States had not disputed the district court's decision in \textit{Reardon} that CERCLA permitted federal court jurisdiction of the constitutional claim. Appellees' Petition for Rehearing with Suggestion for Rehearing En Banc at 12 n.9, \textit{Reardon v. United States}, 947 F.2d 1509 (1st Cir. 1991) (No. 90-1319) (stating that, "[g]iven the narrowness of the district court's holding, we have concluded that review of the due process issue, in the circumstances of this case, does not contravene the intent of Congress in enacting Section 113(h)"). The United States did not, however, provide additional analysis in support of its position. \textit{Id.}
tutional claim did not relate to the EPA’s “administration” of the statute and, accordingly, the plaintiffs were not seeking review of a “challeng[e] to removal or remedial action selected under section 9604 of this title.”

Because the constitutional claim did not come within the plain terms of section 113(h), the court held that there was jurisdiction over the plaintiffs’ pre-enforcement claim. However, the court also stated that pre-enforcement review was not available for all constitutional claims. Indeed, in the court’s view, Reardons’ claim was exceptional because court review did not threaten CERCLA’s purposes:

- extending jurisdiction to the Reardons’ due process claim does not necessarily run counter to the purposes underlying § 9613(h). For example, resolution of the due process issue does not require any information that is not likely to be available until clean-up of a site is finished. Because it is a purely legal issue, its resolution in a pre-enforcement proceeding does not have the potential to force [the] EPA to confront inconsistent results (as would a finding, for example, that a particular spill was caused by an act of God).

947 F.2d at 1514 (emphasis removed).

See 42 U.S.C. § 9613(h). In Reardon, the court stated that the plaintiffs’ due process claim challenging the CERCLA lien provision:

- does not fit into the literal language of § 9613(h) . . . . Under our reading, [the section] divests federal courts of jurisdiction over challenges to [the] EPA’s administration of the statute — claims that [the] EPA did not “select[ ]” the proper “removal or remedial action,” in light of the standards and constraints established by the CERCLA statutes. The Reardons’ due process claim is not a challenge to the way [the] EPA is administering the statute; it does not concern the merits of any particular removal or remedial action. Rather, it is a challenge to the CERCLA statute itself — to a statutory scheme under which the government is authorized to file lien notices without any hearing on the validity of the lien.

947 F.2d at 1514. Although the court’s analysis focuses on the express terms of CERCLA, the court also discusses the legislative history of the provision and rejects the view that SARA’s legislative history demonstrates congressional intent to bar pre-enforcement review of constitutional claims. See id. at 1515-16.

The court stated,

- we do not believe that the statute expresses a clear congressional intent to preclude the type of constitutional claim the Reardons are making — a challenge to several statutory provisions which form part of CERCLA . . . . We find only that a constitutional challenge to the CERCLA statute is not covered by § 9613(h).

947 F.2d at 1515.

Id. The court in Ehrlich v. Reno, 1994 WL 613698, *8 (E.D. Pa. 1994), reached a similar decision, holding that § 113(h) did not foreclose immediate review of the plaintiff’s constitutional claim. The court stated: “Ehrlich alleges that because CERCLA fails to
Thus, Reardon implies that section 113(h) bars pre-enforcement review of a constitutional claim only when the claim arises out of the EPA's administration of a particular cleanup and when a court would have to inquire into the facts related to that cleanup in order to adjudicate the claim.\(^3\) In sum, notwithstanding the broad and categorical language of section 113(h), courts have come to different conclusions about the extent to which it bars pre-enforcement review of constitutional claims, with most courts holding that there is jurisdiction over such claims.

IV. The Effectiveness and Fairness of CERCLA Review Preclusion

Having surveyed how section 113(h) has been applied in the various litigation contexts in which pre-enforcement claims are asserted, this article will now evaluate the provision's effectiveness and fairness. In doing so, we must consider the opinions and concerns of those interested in and affected by the statute.

A. The Effectiveness and Fairness of Foreclosing Review of CERCLA Liability Claims

1. The Assumptions Underlying Section 113(h)

This section will first examine whether the assumptions underlying CERCLA review preclusion have any basis in fact. There appear to be two such critical assumptions. First, it is assumed that PRPs would litigate the liability issue if they were given the opportunity, rather than pursue or permit the EPA to pursue response actions. Second, it is assumed that cleanups would be slowed if PRPs were permitted to litigate their CERCLA liability before the cleanup begins and the government brings an enforcement action. If these assumptions are true, section 113(h) must be viewed as effective because courts have uniformly read it as barring pre-enforcement review of CERCLA liability.

\(^3\) In addition to relying upon the language and intent of CERCLA, the court also supported its decision to distinguish between constitutional claims by analogizing the case at issue to McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991). See also Reardon, 947 F.2d at 1517. The court viewed McNary as identifying a distinction between constitutional claims related to the administration of a statute in a particular case (no jurisdiction) and to the statute itself (jurisdiction). See id.
Regarding the first assumption, PRPs have been clear that sound business judgment dictates that they litigate and resolve the liability issue as soon as possible. Because CERCLA liability is both large and uncertain, there is great pressure to pursue litigation which would fix and possibly minimize PRP liability.

It is unremarkable that PRPs express a strong desire to litigate and resolve the liability issue at an early date. However, two other facts must be considered to gain a more complete understanding of the PRPs' interest in fixing and minimizing the extent of their CERCLA liability. First, the PRPs' desire to minimize their cleanup liability is evident because they willingly enter into settle-

308 See Ways and Means Review Hearings, supra note 26, at 482 (statement of William H. Bode, General Counsel, Superfund Action Coalition). According to Mr. Bode, imposition of retroactive liability has resulted, not unexpectedly, in huge transaction costs. Transaction costs are those associated with non-cleanup activities such as the costs of litigation and attorney fees. ... When companies face cleanup bills in the hundreds of thousands of dollars, they turn to lawyers for protection, in an attempt to shift these costs elsewhere. Id.; see id. at 414 (statement of John D. Cole, Senior Vice President, Zurich Insurance Group, on behalf of the American Insurance Association) (“[G]iven the enormity of cleanup costs and the potential consequences of the liability system, PRPs and insurers have a responsibility to their employees, customers, shareholders, and communities to exercise all legal remedies and defenses which are available to them.”); see also REPORT ON SUPERFUND ADMINISTRATION, supra note 9, at 80 (arguing that the “nonstandardized approach” to remedy selection causes a “lack of consistency [that], in turn, generates disputes over the remedy [the] EPA selects, further slowing the pace of cleanups and adding to their costs”); Ways and Means Review Hearings, supra note 26, at 478 (statement of Donald S. Bunin, Vice President, Sequa Corp., on behalf of the Superfund Action Coalition) (“The enormous cost of CERCLA clean-ups fosters litigation at every step of the process: PRP against the EPA with respect to remedy selection and assignment of liability; PRP against PRP for response and contribution costs; and PRP against insurance company.”).

309 See REPORT ON SUPERFUND ADMINISTRATION, supra note 9, at 130. The report states:

During the course of the Subcommittee hearings, no less than 25 witnesses, representing industry, federal and state elected officials and environmental personnel, and research and public advocacy groups, identified cost allocation as a major factor preventing more timely and cost-effective Superfund cleanups. Cost allocation among responsible parties is often the catalyst for litigation and costly duplicate site studies, waste characterization, and analysis — often referred to as “defensive” engineering. Id.; see also Ways and Means Review Hearings, supra note 26, at 483 (statement of William H. Bode, General Counsel, Superfund Action Coalition). Mr. Bode states:

A company facing CERCLA liability, [c]onsidering itself blameless for the past contamination, is inclined to litigate with [the] EPA and other parties at virtually every stage of the Superfund remedial process: [The] EPA’s right to enter a site; the factual connection between its property and the contamination damage; the selection and implementation of remedies; and the apportionment of response costs among the PRPs.

Id.
ments providing for PRP-lead cleanups. Three-quarters of all cleanups are now pursued by PRPs, at an expected cost savings of twenty percent below the cost of an EPA-lead cleanups. Indeed, these settlements are now so important to the current administration of CERCLA that the effectiveness of the review preclusion provision depends to a significant degree on whether it promotes these settlements. By foreclosing pre-enforcement litigation as an alternative to fix and minimize liability, the provision has that beneficial effect.

A second variable affecting PRPs’ interest in quickly determining the full extent of their liability is that pre-enforcement litigation against the EPA is unlikely to define the precise extent of a PRP’s liability, because that determination will turn ultimately on how liability is allocated among all PRPs for the site. Pre-enforcement action against the EPA will not necessarily decide the allocation of liability. If PRPs conclude that a pre-enforcement action will not yield a final allocation of liability, then they are less likely to seek such review.

Regarding the second critical assumption underlying section 113(h) — that pre-enforcement litigation will slow cleanups — most CERCLA observers are in agreement that such litigation causes significant delays, as litigation of any sort slows CERCLA cleanups. Typically, litigation slows the cleanup of a particular

310 See supra note 89 and accompanying text.
311 See supra note 91 and accompanying text.
312 Interview with EPA Official (Feb. 22, 1995) [hereinafter Interview].
313 See REPORT ON SUPERFUND ADMINISTRATION, supra note 9, at 53 (noting that “cost allocation disputes and litigation can delay all stages of cleanup”); id. at 130 (“Because of the high costs of cleanup, and the uncertainties of cost allocation, responsible parties engage in extensive litigation over the extent of their financial responsibility for cleanup. This litigation can generate substantial transaction costs and slow the pace of cleanups.”). Numerous witnesses testified that transaction costs — expenditures that do not contribute to the identification, characterization, or cleanup of a site — represented too large a percentage of total costs at Superfund sites. These costs are primarily litigation and other settlement expenses and are principally generated by cost allocation disputes at Superfund sites. This extensive litigation further slows the pace of cleanups.

Id. at 119; see also Ways and Means Review Hearings, supra note 26, at 479 (statement of Donald S. Bunin, Vice President, Sequa Corp., on behalf of the Superfund Action Coalition) (“The incentives under CERCLA to litigate at every step explain why the average clean-up of a Superfund site now exceeds 10 years.”). A representative of an insurance company described the situation as follows:

Today, instead of facing a few million dollars in cleanup costs, a company is staring at liabilities in the tens, even hundreds of millions of dollars. The stakes are higher, the impact on profitability and shareholder returns are much higher, and the potential pain is much greater. It is no wonder, then,
site for about one year. Delays result from litigation for two basic reasons: first, it drains agency resources and second, it draws agency legal resources into other (non-cleanup, non-settlement) judicial proceedings. The adverse impact of litigation on agency resources is twofold. First, the EPA regional office program personnel primarily responsible for working directly on cleanup matters are diverted to developing a factual record to resolve liability issues. Moreover, the administrative burdens associated with developing facts relating to liability are more imposing and time consuming when the facts have to be investigated at an early stage in the response action. Indeed, the administrative difficulties that companies large and small are spending huge sums on lawyers and consultants to debate the most cost-effective cleanup remedies, to reduce their individual share, to find others to share the burden, and to attempt to collect as much insurance as they can.

And so begins the cycles of negotiation, litigation, and adversarial warfare that have done so much to impede Superfund cleanups and waste scarce public and private sector resources on huge legal and consulting bills — transaction costs.

Id. at 423 (statement of Jan Edelstein, Special Assistant to the Chairman, American International Group, Inc.).

See House Liability Hearing, supra note 89, at 146 (statement of Keith O. Fultz, Director, Planning and Reporting, U.S. General Accounting Office) ("[The] EPA has an estimate of something like 10, 12 months longer if it is involved in litigation.").

In considering the extent of cleanup delays caused by litigation, the findings in a Report by the General Accounting Office (GAO) are relevant. The report states that "[a]s of September 1, 1993, approximately 62 separate lawsuits had challenged [the] EPA's actions at Superfund sites before those actions were complete." General Accounting Office, GAO/RCED-94-256, Superfund: Status, Cost, and Timeliness of Hazardous Waste Site Cleanups 15 (1994) [hereinafter GAO Report]. The GAO focused on ten of these lawsuits, finding that three of them delayed cleanups by more than one month. Id. at 15-16. All three of these challenges were ultimately dismissed either by the district court or court of appeals. Id. at 16. One of the appendices to the GAO report provides greater details about litigation-related delays that occurred at four Superfund sites. The delays ranged from less than one month to three years. Id. at 37.

The GAO, in summarizing its study of the timeliness of CERCLA cleanups, found that litigation delays principally resulted from court orders halting response actions, and also from "diver[sion]" of EPA staff from work on the cleanup to "prepar[ation] for litigation." GAO Report, supra note 314, at 37-40. The GAO report also stated that, when litigation causes delays in cleanup, it may also increase cleanup costs because the EPA may incur contractor costs during the time that the cleanup is halted. Id. at 38. Finally, the GAO summary indicates that litigation challenging cleanups may have off-site impacts as well: "according to the EPA site attorney, the challenge delayed negotiations with responsible parties at two other sites: one where [the] EPA planned to use the same incineration contractor and another site where similar contamination was present." Id. at 39.

See Interview, supra note 312.

The task of identifying PRPs for the often abandoned Superfund site is difficult and time consuming. See Report on Superfund Administration, supra note 9, at 68. Even PRPs have recognized the enormity of this task. See Ways and Means Review Hearings, supra note 26, at 484 (statement of William H. Bode, General Counsel, Superfund Action
associated with defining individual PRP liability had made the EPA reluctant to pursue *de minimis* settlements with PRPs. However, the EPA is now increasing the already substantial resources it commits to such settlements.

Litigation also adversely impacts agency resources by involving agency lawyers directly in liability litigation — lawyers engaged in defending pre-enforcement claims against the agency are unavailable to provide support for agency actions and decisions that would further cleanup efforts. They are also unavailable to negotiate settlements that would result in PRP-lead site cleanups.

Cleanup delays result from litigation for a second reason that is unrelated to agency resources. Litigants typically seek injunctions to preserve the status quo when a planned or ongoing cleanup is at issue. Moreover, even in the absence of a court order that bars additional action at the site, the EPA is concerned about the appearance of contemptuous conduct and is accordingly reluctant to continue a cleanup at a site when the ongoing response action is itself the subject of pending litigation. In sum, the assumption

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318 See *REPORT ON SUPERFUND ADMINISTRATION*, supra note 9, at 140 (“In the past, EPA regions had been reluctant to use de minimis settlements because gathering the information necessary to arrive at this type of settlement is very labor-intensive.”); *House Liability Hearing*, supra note 89, at 62-63 (statement of Keith O. Fultz, U.S. General Accounting Office) (“[T]he cost to the [EPA] regions of de minimis settlements represents a major impediment to completing such settlements. [EPA officials] said that de minimis settlements compete for limited enforcement resources and can distract already overburdened regional site teams from site cleanup.”); see also id. at 68 (statement of Keith O. Fultz, U.S. General Accounting Office) (“[P]reparing a [nonbinding allocation of responsibility (NBAR)], like preparing de minimis determinations, can divert the regional site team from site cleanup.”).

319 See Interview, supra note 312; see also *House Liability Hearing*, supra note 89, at 65-67 (statement of Keith O. Fultz, U.S. General Accounting Office) (describing administrative actions taken by the EPA to encourage greater use of de minimis settlements).

320 See Interview, supra note 312.

321 See id.; see also supra note 315 (discussing a consistent finding in a GAO REPORT).

322 See Interview, supra note 312. Because of the effects of litigation on the cleanup of a site, the EPA is concerned about the alternative holding in *United States v. Princeton*...
that pre-enforcement review will slow cleanups has an apparent factual basis.

Given the accuracy of section 113(h)'s two underlying assumptions — accuracy that no interested observer has ever contested — the provision is plainly necessary to prevent cleanup delays from CERCLA liability litigation. Moreover, the provision has been quite effective in foreclosing pre-enforcement review of the CERCLA liability issue.\textsuperscript{323}

2. Pre-Enforcement Review of RCRA Corrective Actions

The conclusion that CERCLA needs a provision to foreclose early review of liability issues begs the question why there is no such need in the RCRA corrective action program. As we have seen, immediate review of corrective action requirements is avail-

\textit{Gamma-Tech, Inc.}, 31 F.3d 138 (3d Cir. 1994). In that case, the court held that, once the EPA brings a cost-recovery action against a PRP under § 107, the PRP may challenge the response action even if the response action is ongoing and the PRP has not yet completed any discrete portion. \textit{Id.} at 147. The EPA is concerned that, if adopted by other courts, this construction of the Act could slow down cleanups at sites subject to cost-recovery actions or could force the EPA to change its enforcement strategy. See Interview, supra note 312.

\textsuperscript{323} Results of the cases discussed in part II of this article demonstrate the effectiveness of this provision. A GAO report reached the similar conclusion that, "[w]ith few exceptions, the statutory limits appear to have accomplished the Congress's goal of ensuring that [the] EPA's cleanup activities are not hindered by legal challenges." \textit{GAO Report, supra} note 314, at 17. The GAO report also included the following summary of government views about the review preclusion provision:

Department of Justice (DOJ) and [the] EPA attorneys believe that the limits on judicial review have been very effective in discouraging or quickly eliminating challenges to [the] EPA's cleanup activities. While the courts have historically disallowed early challenges to [the] EPA's cleanup decisions, these attorneys also maintain that the statutory limits have made it even more difficult for parties to succeed with these challenges, thereby discouraging parties from bringing these suits. Most of the challenges we reviewed had little effect on cleanup schedules. According to government attorneys, only three site cleanups have been delayed by legal challenges since the statutory bar was enacted.

\textit{Id.} at 15. The GAO report also discussed how the review preclusion provision is perceived as deterring parties from filing a legal challenge:

The DOJ official responsible for overseeing the government's response to legal challenges noted that the review bar is most effective when it discourages parties from filing challenges. Although it is impossible to predict how many challenges would have occurred if the statutory bar had not existed, DOJ and EPA attorneys believe that the bar has discouraged many parties from challenging [the] EPA's actions. The DOJ official reported that one anticipated challenge to [the] EPA's site access was averted simply by providing the potential claimant with an explanation of the statutory limitation on judicial review.

\textit{Id.} at 17.
able under RCRA — a distinguishable context. First, the RCRA context differs because liability vel non is not an important issue since RCRA’s cleanup requirement is tied to the existence of a TSD facility with a known owner or operator. Thus, investigating and assigning liability does not drain agency resources under RCRA as it does under CERCLA. Second, CERCLA, unlike RCRA, has the NCP, which defines whether cleanup expenditures are appropriate — the government cannot recover response costs that a liable party demonstrates are inconsistent with the NCP. Consistency with the NCP thus provides a standard that can be applied in CERCLA cases after a cleanup is complete to ensure that the expenses were not inappropriate and that the scope of liability is not improper.

Notwithstanding these important differences, it is nevertheless true that parties subject to RCRA corrective action requirements will be concerned about the extent of their liability, which may vary depending on the corrective action measures that are ordered. These parties have the right to challenge the need for or adequacy of these measures prior to their implementation. The fact that RCRA has succeeded while allowing such pre-implementation review undercuts to some extent the view that pre-enforcement review of CERCLA liability issues would significantly harm the Superfund program. On the other hand, post-completion review under CERCLA for consistency with the NCP means that delayed review should be adequate. Accordingly, there is no compelling argument under the CERCLA scheme that review of liability issues must occur before significant cleanup costs are expended in order to guarantee the review’s adequacy.

3. Consequences of Section 113(h)

Even if one accepts that section 113(h) has been very effective in foreclosing litigation of liability issues that would seriously slow cleanups of Superfund sites, the provision may nevertheless damage the overall effectiveness of CERCLA and the cleanup of hazardous substances if it makes other aspects of the Superfund statute less effective. Because courts hold that section 113(h) bars pre-enforcement review of the liability issue, new pressures have

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324 See supra part II.C.2.
325 See supra note 60.
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developed within the Superfund program in two areas relating to allocation of Superfund liability among PRPs. 326

First, one scholar has argued that, by foreclosing pre-enforcement review of response actions, the statute has encouraged PRPs to focus their litigation resources on the NPL listing decision in the hopes of avoiding the CERCLA liability issue if the site is never listed on the NPL. 327 This type of litigation has made NPL listing more difficult for the EPA, which establishes the priority list for Superfund cleanups. 328 However, the EPA does not believe that this is a significant side effect of pre-enforcement review preclusion. In the EPA’s view, a PRP is likely to challenge a listing on the NPL only if it has a major connection to the site. Therefore, even if pre-enforcement review were available, such review would not likely absolve a PRP in that position. 329

Second, because the courts are not open for early resolution of their CERCLA liability, the PRPs have increased pressure on the EPA to resolve liability issues through settlements. 330 Even in the absence of PRP pressure, the EPA has become more interested in CERCLA settlements, especially given the congressional intent of the 1986 CERCLA Amendments to encourage settlements, 331 and because the limited amount of the trust fund constrains the EPA’s ability to pursue publicly-financed cleanups. 332 The EPA’s approach to settlement has focused principally on promoting PRP-
lead cleanups, since PRPs view such settlements as a practical way to control their cleanup costs. As a result of this approach, PRPs now pursue private cleanups at more than three-quarters of all Superfund sites, a significant benefit of section 113(h). The review preclusion provision has facilitated the EPA's settlement efforts because litigation is not available to PRPs as an alternative way to determine and minimize liability.

Although the EPA's administration of CERCLA depends greatly on PRP-lead settlements, the EPA has generally refrained from significant use of the settlement tools provided and encouraged by Congress in 1986 and endorsed by PRPs — de minimis settlements and nonbinding allocations of responsibility (NBARs). These tools aid the actual allocation of liability among the PRPs for a site. Before they can be used, however, three open questions will usually have to be answered.

First, the EPA must identify the PRPs for the site, a labor intensive task. Second, in some of these settlements, the EPA and the PRPs must come to an agreement upon each PRP's share of cleanup responsibility — a divisive issue that has no generally accepted method for apportionment. Finally, allocation of PRP liability must usually wait for a determination of the cleanup's costs — in the absence of knowing those costs, neither party may be willing to settle.

Because many critical aspects of the response

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333 See supra note 317 and accompanying text.
334 See Ways and Means Review Hearings, supra note 26, at 379-80 (statement of Brent J. Gilhousen, Corp. Counsel, Monsanto, on behalf of the Superfund Settlements Project). In the hearings, one PRP representative stated that

[s]ince the initial efforts to implement Superfund in the early 1980s, allocation issues have presented many of the most significant obstructions to progress in Superfund proceedings. Efforts to achieve settlements under which PRPs would perform Superfund work were often blocked by the fact that the PRPs could not determine the basis of their respective responsibilities. In the past three years, since May 1989 when [the] EPA enunciated its Enforcement First policy, the government has intensified pressure on PRPs to accelerate their internal negotiations while at the same time it has shortened the deadlines, with the result that PRPs still are often held back by allocation uncertainties.

Id.
335 See Report on Superfund Administration, supra note 9, at 132 (“It is also not unusual for responsible parties that contributed large quantities of less toxic waste to try to apportion cleanup costs based upon the toxicity or hazardous characteristics of the waste, rather than its volume alone. The competing interests often lead to protracted litigation.”).
336 See Ways and Means Review Hearings, supra note 26, at 388 (statement of Brent J. Gilhousen, Corp. Counsel, Monsanto, on behalf of the Superfund Settlements Project). Mr. Gilhousen stated:

A true premium [in a settlement] can only be calculated after it becomes reasonably clear what base of PRPs will be liable and available to bear the costs
action — e.g., the standards for cleanliness at the site, the cleanup methodology — are uncertain, the cost of cleanup cannot often be determined early enough to permit a settlement that minimizes transaction costs. Indeed, in the view of PRPs, foreclosing pre-enforcement review and postponing it until after costs are incurred exacerbates the problem of waste and inefficiency in the cleanup of sites. The EPA rejects this view because CERCLA forecloses

not paid by the settling parties. Some allowance for uncertainties in collection from within the PRP base must be calculated into the premium charged those who settle out early, and the amount of the allowance will have to be determined by reference to the specific circumstances relevant to each site.

Id.; see also id. (statement of Brent J. Gilhousen, Corp. Counsel, Monsanto, on behalf of the Superfund Settlements Project) (stating also that “we remain apprehensive that the difficulties of making a reliable estimate [of potential remedial costs] will drag down the settlement process and cause settlements to be delayed until most of the transaction costs have already been incurred”).

See REPORT ON SUPERFUND ADMINISTRATION, supra note 9, at 9-10 (stating that “the determination of ‘relevant and appropriate’ requirements is subject to considerable uncertainty that generates unnecessary litigation over choice of remedy. Modification of ARARs could speed cleanups by reducing this unneeded litigation’’); id. at 82 (“As such, generic cleanup standards and remedies do not exist, requiring cleanup levels and methods to be determined on a site-by-site basis. As a result, disputes arise over the issue ‘how clean is clean?’ and over what remedy should be selected to achieve the required level of cleanliness.”); Ways and Means Review Hearings, supra note 26, at 361 (statement of Bill Mulligan on behalf of the Am. Petroleum Inst.) (agreeing that “a contentious issue at numerous sites is how much cleanup is necessary to protect human health and the environment, or ‘How Clean Is Clean?’ Cleanups at many sites have been delayed because of protracted arguments among [the] EPA, PRPs, states, and the public over the levels to which the PRP must remediate”); id. at 374-75 (statement of Brent J. Gilhousen, Corp. Counsel, Monsanto, on behalf of the Superfund Settlements Project). Mr. Gilhousen notes,

[w]ithout any question, the greatest problem that impairs the cost-effectiveness of the current program is that the framework for making decisions on what remedial action should be undertaken at each site is skewed in the direction of idealistic solutions that can impose exorbitant costs, particularly when contrasted to alternative approaches that could provide equivalent practical protection with far greater economy.

Id.

See Ways and Means Review Hearings, supra note 26, at 377 (statement of Brent J. Gilhousen, Corp. Counsel, Monsanto, on behalf of the Superfund Settlements Project). Mr. Gilhousen argues,

[The present statutory and regulatory framework of Superfund provides little incentive to emphasize efficiency in the performance of work. Section 107 provides blanket authority for the government to recover “all” costs not inconsistent with the [NCP]. The statute also explicitly prohibits efforts by PRPs to limit wasteful government actions by barring any form of pre-enforcement judicial review. There are no standards to assure that government expenditures are properly controlled or carefully monitored . . . . This makes settlement unlikely, fosters increasing litigation, and contributes to a sense of unfairness by our government’s actions.

Id.
the recovery of unreasonable costs — that is, costs that are inconsistent with the NCP.\textsuperscript{339}

Thus, notwithstanding pressure to increase settlements and the reforms included in the 1986 Amendments, the contentious, open issues that must be resolved prior to a settlement allocating liability among PRPs have made such settlements a little-used method for defining liability and relieving the pressure to gain pre-enforcement review.\textsuperscript{340} Indeed, the EPA does not employ such settlements for basically the same reasons that Congress barred pre-enforcement review of the CERCLA liability issue: the EPA does not want to spend an undue amount of time working to allocate liability up front, and would prefer to leave that issue for resolution after the cleanup and principally among PRPs themselves in contribution actions or settlements.\textsuperscript{341} In fact, the EPA’s current settlement focus on PRP-lead cleanups forces the PRPs themselves to

\textsuperscript{339} See Interview, supra note 312. Because the trust fund supporting EPA-lead cleanups is limited, reimbursement of the trust fund is important to the EPA, and it will be wary of incurring costs that are inconsistent with the NCP.

\textsuperscript{340} See Ways and Means Review Hearings, supra note 26, at 426 (statement of Jan Edelstein, Special Assistant to the Chairman, American Int'l Group, Inc.). This part of the hearing discusses the EPA’s failure to make use of de minimis settlements, mixed funding agreements, and NBARs, all of which Congress included in SARA in order “to accelerate cleanup and eliminate many of the program’s obvious inequities.” This interested observer concluded that

\begin{quote}
[t]here are good reasons for the failure of these supposedly cure-all remedies. First, all are enormously resource and labor intensive and [the] EPA’s Superfund spending request has been cut year in and year out by Congress. Second, the data required to do NBARs and \textit{de minimis} settlements frequently does not exist at many sites and no amount of wishing or mandating will cause waste disposal records to materialize from the past 30 years.
\end{quote}

\textit{Id.}

\textsuperscript{341} See \textit{REPORT ON SUPERFUND ADMINISTRATION}, supra note 9, at 147. The report specifies,

EPA regional officials have determined that Superfund personnel should concentrate on overseeing and completing the various site cleanup stages — remedial investigations and feasibility studies, records of decision, and cleanup construction — rather than devote time to negotiating de minimis settlements or mixed funding agreements or fashioning NBARs. EPA headquarters and regional offices appear resigned to the current practice of responsible parties determining their own cost allocation through contribution litigation.

\textit{Id.} The report also notes,

\begin{quote}
[t]he experience of Region I, where so much EPA time and effort was expended without reaching a timely cost allocation among the responsible parties, may have served to discourage the use of NBARs by other EPA regions. The allocation of cleanup costs among responsible parties through litigation relieves EPA personnel of the time-consuming duties of negotiating NBARs.
\end{quote}

\textit{Id.} at 143. The report states,
bear the transaction costs associated with allocating liability among all PRPs in contribution actions. The EPA might have to bear many or all of these costs if CERCLA did not foreclose early review of response actions.

In sum, section 113(h) has been effective in foreclosing what would otherwise be extensive pre-enforcement litigation intended to allocate each PRP's share of CERCLA liability. Although foreclosing this litigation may make the NPL listing decision more controversial, that effect is acceptable, particularly because section 113(h) increased settlements that result in PRP-lead cleanups. Because the provision has been effective in foreclosing litigation of liability issues, it speeds cleanups, reduces overall cleanup costs by encouraging PRP-lead cleanups, and relieves the trust fund of transaction costs related to a full allocation of liability among PRPs.

4. Fairness Concerns Outside Section 113(h)

Before considering the fairness of review preclusion, it is important to reiterate that PRPs have consistently challenged the fairness of CERCLA's liability scheme. PRP concerns about the fairness of the Superfund statute focus on its retroactive, strict, joint and several liability scheme. Because section 113(h) delays EPA Region III completed a de minimis settlement in 1992 at the Tonolli Corp. Superfund site in Nesquehoning, Pennsylvania, that took over one and one-half years to complete with more than 3,300 work hours expended by two EPA attorneys, one civil investigator, the site project manager, and clerical staff.

Id. at 140-41 (footnote omitted); see also supra note 317.

The EPA need not incur these transaction costs in the RCRA corrective action program, because under that program a particular owner or operator of a TSD facility must take corrective action at one or more solid waste management units located at its facility.

Ways and Means Review Hearings, supra note 26, at 477 (statement of Donald S. Bunin, Vice President, Sequa Corp., on behalf of the Superfund Action Coalition) ("In an effort to 'make the polluter pay,' CERCLA imposed on this country a liability scheme radically different from any other under law, and which repudiates 200 years of American jurisprudence. Liability for clean-ups is based upon . . . status . . . rather than culpability."); see REPORT ON SUPERFUND ADMINISTRATION, supra note 9, at 133 ("One of the major criticisms of the current Superfund liability system focused on its equity and fairness."); Ways and Means Review Hearings, supra note 26, at 24 ("The most familiar equity questions have dealt with the definition of the set of PRPs and the allocation of costs among them. This category includes such questions as . . . how volume and toxicity should be
resolution of liability issues for potentially long periods of time, PRPs criticize the provision itself as unfair.\textsuperscript{345} These concerns about the fairness of the liability scheme should be considered in light of both its congressional purpose — that those responsible for the problems of hazardous waste disposal, rather than taxpayers, should bear the costs of cleanup \textsuperscript{346} — and the reality that adversely affected parties are likely to view any liability scheme for hazardous substance cleanups as unfair.\textsuperscript{347}

The only way to entirely eliminate PRP concerns about the unfairness of CERCLA liability would be to eliminate CERCLA's retroactive, strict, joint and several liability provisions.\textsuperscript{348} Such a

\textsuperscript{345} See \textit{Report on Superfund Administration}, supra note 9, at 269 (additional views of Rep. Bill Zeliff). Representative Zeliff proposed amending CERCLA's provisions regarding judicial review of liability. He developed the proposals based on his work with the New Hampshire Superfund Task Force, "which represented a wide scope of interested parties from all over the State." \textit{Id.} at 265. His first proposal was to "[a]mend CERCLA to provide a meaningful opportunity for judicial review of remedy selection and liability, and this opportunity should be available, whenever possible, before PRPs must make payments." \textit{Id.} at 269.

\textsuperscript{346} See supra note 10 and accompanying text.

\textsuperscript{347} See \textit{House Liability Hearing}, supra note 89, at 114 (statement of Katherine Probst) ("There probably is no 'fair' Superfund financing scheme — either in terms of liability, or in terms of the taxes to finance the trust fund. Each of the liability schemes introduces a new element of unfairness.").

\textsuperscript{348} See \textit{Ways and Means Review Hearings}, supra note 26, at 485 (statement of William H. Bode, Gen. Counsel, Superfund Action Coalition). Mr. Bode argues,

\textit{[p]ast societal mistakes should be paid for out of a common fund without worrying about which companies contributed and to what degree, except in those few cases where an intentional 'black-hat' polluter was the culprit. . . . [T]rying to pinpoint liability for mistakes happening decades ago is a waste of resources that could be spent on cleanup.}

\textit{Id.} PRPs continue their long-standing desire to reform the CERCLA liability scheme. Indeed, "[i]n 1986, Congress was concerned enough about [h]e unfairness [of the liability scheme] that it gave [the] EPA a new set of tools to use in order to mitigate the harshness of the liability standard. These tools included mixed funding, de minimis settlements, and non-binding allocations of responsibility ('NBARs')." \textit{Id.} at 348 (statement of the Chemical Manufacturers Association). Because Congress believes that the current liability system has been useful in generating non-public sources of money to pay for cleanups, Congress appears unlikely to abandon the CERCLA liability scheme. \textit{See Report on Superfund Administration}, supra note 9, at 126 ("Unquestionably, the current system is generating private party involvement in the Superfund cleanup process. The parties
change would likely result in new and different claims of unfairness. In the absence of such a fundamental change in the liability scheme, affected parties have alternative ideas about the equitable administration of CERCLA, even given section 113(h)’s review preclusion.

As we have seen, the PRPs’ intense desire to allocate liability arises in large part from the fact that the extent of liability is so uncertain. The EPA’s increased use of presumptive remedies should reduce such uncertainty and allow easier, more certain, and earlier calculation of cleanup costs, making settlements

responsible for generating and disposing of the hazardous waste found at Superfund sites are paying for more than 60% of current site cleanup. Changing the liability system could have adverse effects.”). In fact, concerns that Superfund cleanups would be slowed make it unlikely that the Act will be amended more modestly to require an early administrative allocation of a fair share of liability for each PRP. See id. at 167-68. According to the report, amending the CERCLA liability scheme to require a front-end determination by an ALJ of a party’s “fair share” of liability would require that the Superfund absorb very large costs for orphan shares, as well as require [the] EPA or the state to expend extensive resources to identify all responsible parties. A tax increase would be needed to cover these additional costs. The elimination of joint and several liability would reduce incentives for responsible parties to assist in the expensive and difficult task of identifying other responsible parties.

As an alternative to reforming the liability system, PRPs have also argued to amend CERCLA to limit the costs for which a PRP may be held liable. See Ways and Means Review Hearings, supra note 26, at 377 (statement of Brent J. Gilhousen, Corp. Counsel, Monsanto, on behalf of the Superfund Settlements Project) (“Section 107(a) should be amended to limit [the] EPA’s right of cost recovery to ‘reasonable’ costs. Although this standard would lack precise definition, it would provide a yardstick of common prudence against which government expenditures would be tested.”).

350 See supra notes 51, 53-56, 348 and accompanying text.
351 See Ways and Means Review Hearings, supra note 26, at 234 (statement of Don R. Clay, Assistant Adm’n, Office of Solid Waste and Emergency Response, U.S. Env’t Protection Agency) (noting that the EPA plans to make greater use of presumptive remedies, which “will streamline removal actions, site studies, and remedial actions, thereby improving consistency, reducing costs, and increasing the speed with which hazardous waste sites are cleaned up”).
352 Greater predictability regarding cleanup costs should reduce litigation and transaction costs related to liability. See id. at 81 (statement of Jan Paul Acton, Assistant Director, Natural Resources and Commerce Div., Congressional Budget Office) (noting that while discussing cleanup negotiations, PRPs commented that “being forced to sign up for a share of a cost of unknown magnitude too early causes PRPs to put up a lot of resistance. That is often true at the stage of the remedial investigations and feasibility study.”).
more likely. These efforts now involve major investments of agency resources.

PRPs have also vigorously contended that fairer use of the Unilateral Administrative Order (UAO) authorized by section 106 would make CERCLA more equitable. PRPs protest that the EPA’s increasing reliance on UAOs intensifies CERCLA’s unfairness by permitting the EPA to order a cleanup by one or a few (typically deep pocket) PRPs. PRPs contend that this use of UAOs unfairly burdens UAO recipients, and undermines any chance for cooperation and settlement among PRPs. Therefore,

353 See Report on Superfund Administration, supra note 9, at 80 (“The lack of certainty about what cleanup remedy [the] EPA will choose discourages responsible parties from taking the lead in cleaning up hazardous waste, fosters disputes over remedy selection, and creates inconsistencies in the stringency and cost of the cleanup.”); see also id. at 110 (“The ARARs requirement does lend uncertainty and inconsistency to the remedy selection process, making responsible party litigation over the remedy and delays in the cleanup process likely. Further, the uncertainty over which standards and remedies will be applied is a disincentive for responsible parties to initiate cleanups.”).

If the EPA identified presumptive cleanups after public notice and comment, such response actions might also reassure PRPs that the actions are not unnecessarily costly. See Ways and Means Review Hearings, supra note 26, at 352 (statement of Bernard J. Reilly, Corp. Counsel, Du Pont Co.) (“[T]he liability scheme is wrong because it places the remedy selection decision in the hands of regulators with absolutely no incentive to control costs, since the law allows recovery of every penny from the parties. This is an unhealthy dynamic.”).

Unfortunately, the reality of “enforcement first” has been that [the] EPA has relied almost exclusively on Section 106 unilateral orders, and the threat of treble damages for non-compliance, to coerce cleanups. This increased use of unilateral orders has produced a number of dramatic results that surely were never intended by Congress. [The] EPA routinely issues these orders to only a small handful of PRPs at each site and leaves it to them to seek cost recovery from other PRPs.

354 See Interview, supra note 312.

355 Ways and Means Review Hearings, supra note 26, at 349 (statement of the Chemical Mfrs. Ass’n). One trade association stated that

This increased use of unilateral orders has produced a number of dramatic results that surely were never intended by Congress. [The] EPA routinely issues these orders to only a small handful of PRPs at each site and leaves it to them to seek cost recovery from other PRPs.

356 See id. at 352 (statement of Bernard J. Reilly, Corp. Counsel, Du Pont Co.) (“Adding to the inequities that result from paying for the share of owners, operators and other defunct parties, [the] EPA selectively enforces against a subset of the viable parties.”); id. at 370 (statement of Stanley Blossom, Director, Envtl. Affairs, Oryx Eng’g Co., on behalf of the Nat’l Ass’n of Mfrs.) (“Regardless of how small a contributor is, it is not equitable for [the] EPA to select only a percentage of waste contributors and require them to fund the entire cleanup effort. [The] EPA must develop a system that deals with these small entities to allow them participation based on waste contribution.”).

357 See id. at 376 (statement of Brent J. Gilhousen, Corp. Counsel, Monsanto, on behalf of the Superfund Settlements Project). Mr. Gilhousen stated:

No action is more divisive among the PRPs or counterproductive to overall progress than [the] EPA’s frequent practice of issuing a . . . [UAO] under § 106 to only a handful of identified PRPs, omitting the names of other companies that are clearly liable, financially viable, and — in some cases — even
PRPs strongly urge that the EPA name all identifiable PRPs for the site in a UAO. For similar reasons, a House Member has suggested that CERCLA be amended to allow pre-enforcement review of section 106(a) orders. If such review were available, section 106(a) orders would be far less useful to the EPA.

Finally, other administrative steps could expedite the settlement and allocation of CERCLA liability, thereby easing fairness concerns. PRPs, for example, have urged the EPA to share immediately information about the identity of all known waste generators (known as waste-in lists) for disposal sites, allowing PRPs to coordinate and settle liability issues among themselves. PRPs have recalcitrant. This style of enforcement action divides the PRP group, tremendously complicating the challenge of developing a cooperative agreement among the PRPs to contribute funds and labor to undertake a remedial responsibility.

Id. Mr. Gilhousen also noted:

Another major concern of PRPs in addressing allocation issues is the unfortunate divisiveness that results from government enforcement actions. The worst offender in this regard is the issuance of a . . . [UAO] naming a limited subset of PRPs as liable under the order. This creates a division among the PRPs and can instantly demolish months of tedious negotiations to achieve understandings on allocations.

Id. at 384 (statement of Brent J. Gilhousen, Corp. Counsel, Monsanto, on behalf of the Superfund Settlements Project).

See id. at 362 (statement of Bill Mulligan on behalf of the Am. Petroleum Inst.). Mr. Mulligan states:

API also encourages [the] EPA to name all identifiable PRPs in implementing the Section 106(a) unilateral enforcement order provision. [The] EPA's practice of naming only a few "deep pocket" PRPs in an order and expecting those few to go after other PRPs through third party actions creates serious and presumably unintended obstacles to cleanup. This mode of implementation initiates legal maneuvering on the part of named PRPs resulting in protracted court battles as opposed to a cooperative settlement.

Id.

See REPORT ON SUPERFUND ADMINISTRATION, supra note 9, at 269 (containing recommendation of Rep. Bill Zeliff that Congress "amend CERCLA to make available to private parties a pre-enforcement hearing to determine if a Section 106 Administrative Order is arbitrary and capricious or otherwise unlawfully issued, or to determine if the private parties are liable under Section 106").

See Interview, supra note 312.

See Ways and Means Review Hearings, supra note 26, at 375-76 (statement of Brent J. Gilhousen, Corp. Counsel, Monsanto, on behalf of the Superfund Settlements Project).

Mr. Gilhousen notes:

The government should be mandated to share with PRPs basic data revealing who sent wastes to a site and data that is neither deemed confidential nor enforcement-sensitive (narrowly construed) on an automatic basis. Congress can achieve this result by amending CERCLA §§ 106(a), 107(a), and 113 to provide that [the] EPA cannot bring cost recovery actions or issue § 106 orders for remedial actions until it has provided all waste-in data to all parties that have requested such information. Uniform compliance with this proce-
also asked the EPA to facilitate CERCLA liability settlements earlier in the remedial process by using clauses that permit them to change the settlement amount if final cleanup costs differ from projected costs (known as cost re-opener clauses). Finally, PRPs have urged the EPA to administer CERCLA in a way that treats all PRPs the same, instead of offering more favorable treatment to PRPs that are municipalities or have fewer resources to fund a cleanup. Although EPA officials view pleas for the “same treatment” skeptically, the agency itself has taken steps to administer the program more equitably. The EPA has committed itself to fairer use of the CERCLA lien and has made major efforts to release liability information to PRPs, develop presumptive remedies, and provide guidance to streamline response selection further.

In sum, the review preclusion provision tends to intensify concerns about the Superfund liability scheme by delaying liability procedure would accelerate PRP organization at every site and avoid unnecessary delays and costs.

Id.; see also id. at 381 (statement of Brent J. Gilhousen, Corp. Counsel, Monsanto, on behalf of the Superfund Settlements Project) (“By all accounts, the single most important ingredient in achieving PRP organization is the development of an acceptable waste-in list. This has been a longstanding issue in the history of dialogue between [the] EPA and PRPs.”); id. at 426 (statement of Jan Edelstein, Special Assistant to the Chairman, Am. Int’l Group, Inc.) (“Absent reliable and complete data, fairly determining and allocating liability is difficult, if not impossible.”).

See id. at 394 (statement of Brent J. Gilhousen, Corp. Counsel, Monsanto, on behalf of the Superfund Settlements Project) (“In order for de minimis settlements to achieve wide usage, they must be implemented early in the process before the RI/FS is advanced, or the transaction cost savings will be already lost. That means that the Cost Overrun Reopeners must become routine.”).

See id. at 376 (statement of Brent J. Gilhousen, Corp. Counsel, Monsanto, on behalf of the Superfund Settlements Project) (“By requiring the government to deal with all PRPs with even-handed uniformity, unfairness in the program would be reduced and a message would be sent to every PRP that would provide a direct incentive for its constructive participation in performance of responsibilities under the program.”).

In the EPA’s view, it administers CERCLA appropriately by accounting for a PRP’s ability to pay and its status as a municipality when considering whether a settlement is reasonable. See Interview, supra note 312.


We will take several actions to provide greater fairness for owners at Superfund sites. [The] EPA will issue guidance on filing federal liens against property at Superfund sites. The guidance will provide the site owner the opportunity to submit information to or meet with EPA officials prior to [the] EPA placing a Federal lien on the owner’s property.

Id.

See Interview, supra note 312.
determinations — delay that may have adverse economic effects on PRPs.\textsuperscript{367} However, PRPs have not directed criticism at the review preclusion provision independent of its effect on delaying liability decisions. It is difficult to assuage PRPs’ underlying concerns about the fairness of CERCLA liability, although the EPA has the ability to respond to them partially by modifying its administration of the program. In any event, section 113(h) has successfully foreclosed litigation of the liability issue, a benefit too important to lose through a repeal of section 113(h), at least as long as the current liability scheme is retained.

B. The Effectiveness and Fairness of Foreclosing Review of Nonliability-Based CERCLA Claims

Most nonliability-based CERCLA challenges claim that a proposed remedial action will irreparably injure human health or the environment. Regardless of whether these claims relate to a chosen remedy’s desirability or a site’s cleanliness standards, such claims will necessarily slow cleanups if brought prior to enforcement or cleanup completion. In the absence of a provision that forecloses immediate judicial review, the number of health-based CERCLA claims would be quite large because the RI/FS process is so controversial.\textsuperscript{368} However, since courts have almost uniformly interpreted section 113(h) to bar litigation of these claims prior to completion of at least a discrete phase of the cleanup, this provision has been effective in promoting prompt cleanups.\textsuperscript{369}

However, if CERCLA’s prompt cleanup goal is understood more generally as a public health protection goal, then the provision loses some of its effectiveness when the provision forecloses review of legitimate claims by affected parties that implementation of the proposed remedial plan will itself harm public health. It is impossible to review adequately such a claim after completing a challenged phase of the cleanup and the feared harm has already

\textsuperscript{367} See Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1390 n.18 (5th Cir. 1989).

\textsuperscript{368} See Report on Superfund Administration, \textit{supra} note 9, at 9-10 (“The determination of ‘relevant and appropriate’ requirements is subject to considerable uncertainty that generates unnecessary litigation over choice of remedy.”); \textit{see also id.} at 80 (stating that the “nonstandardized approach” to remedy selection causes a “lack of consistency [that], in turn, generates disputes over the remedy [the] EPA selects, further slowing the pace of cleanups and adding to their costs”); \textit{id.} (“The lack of certainty about what cleanup remedy [the] EPA will choose . . . fosters disputes over remedy selection, and creates inconsistencies in the stringency and cost of the cleanup.”).

\textsuperscript{369} But see United States v. Princeton Gamma-Tech, Inc., 31 F.3d 138 (3d Cir. 1994).
occurred. Of course, public health concerns themselves compete with continuing health risks posed while a cleanup is delayed by litigation. In general, courts have not chosen to further public health protection by construing the provision to permit pre-completion review of such health-based claims.

In contrast to its effectiveness in barring pre-completion review of health-based CERCLA claims, the provision has been less effective in barring early review of sporadic citizens' suits asserting CERCLA claims that are related neither to liability nor health. The willingness of courts to entertain these other CERCLA claims reflects a view that review in these rare cases will not significantly impact the speed of cleanups.

The nonliability-based CERCLA claims that give rise to the greatest concerns about the unfairness of review preclusion are health-based claims. This article has discussed how those claims should be divided into two broad categories for purposes of analysis. First, many claims assert that implementation of the response action will itself harm public health or the environment, mandating alternative cleanup measures. Second, other claims assert that completed cleanups will not sufficiently protect human health. The cleanup may fail either because the cleanliness standards are too lax or because the cleaning methods are simply insufficient to reach the desired level of cleanliness.

The first category of claims gives rise to the greatest concerns about the unfairness of review preclusion. For this category of claims, delayed review is necessarily inadequate because the health-based concerns arise out of the actual cleanup measures.

However, delayed review of the second category of claims does not give rise to the same concerns about unfairness. Even if review of those claims takes place after the completion of the cleanup, that review should still be adequate. A court is able to order implementation of new, more protective cleanup standards or additional efforts to ensure compliance with the cleanup standards that

370 See supra note 220.
371 See supra part III.A.
372 See Interview with William Shutkin, Co-Director, Alternatives for Community & Environment, Inc. (Feb. 15, 1995) [hereinafter Shutkin Interview]. It may have been as a result of this perception of unfairness that the deliberations of the New Hampshire Superfund Task Force, “which represented a wide scope of interested parties from all over the State,” led to the recommendation of Rep. Bill Zeliff that CERCLA be amended “to provide a meaningful opportunity for judicial review of remedy selection and liability.” REPORT ON SUPERFUND ADMINISTRATION, supra note 9, at 265 (additional views of Rep. Bill Zeliff), 269.
properly apply to the site. An order to engage in further cleanup almost fully redresses the concerns raised by the second category of claims. To be sure, redress is not completely adequate because postponing review delays a proper cleanup of the site. However, such a delay is not unfair — a delay in cleanup would also have resulted from pre-completion review of those same claims. Indeed, there is a marginal public health benefit to litigating such a claim after the site has been cleaned up to a significant (and presumptively reasonable) degree. In sum, review preclusion of the second category of claims does not raise a significant concern about unfairness.

Nonetheless, the inadequacy of post-completion review of the first category of claims does give rise to very serious concerns about unfairness — delayed review in that case may result in harms to public health. For this reason, section 113(h) should permit pre-completion review when a plaintiff contends that the implementation of the proposed remedy will harm public health or the environment. This narrow interpretation of the review preclusion provision has received a mixed, but generally hostile, reaction in the courts.

Because PRPs would raise such claims and thereby slow CERCLA cleanups, the EPA has great concerns about permitting early review of health-based claims. In the EPA’s view, slowing cleanups endangers human health and the environment because hazardous substances would continue to be released into the environment during the review. This concern is certainly legitimate. Indeed, it is the core concern that led to the enactment of CERCLA.

To assess the significance of the EPA’s concern about public health risks, three facts should be considered. First, given the structure of EPA response actions, the EPA or the state will in almost all cases have previously conducted a removal action to stabilize the site (and the risks associated with it), before engaging in

373 See Healy, supra note 1, at 43-51. This argument relies in part on the procedural requirements of the statute and the statute’s purpose to protect human health and the environment. See id.

374 Compare, e.g., Hanford Downwinders Coalition, Inc. v. Dowdle, 841 F. Supp. 1050, 1062 (E.D. Wash. 1993) (“Unfortunately, the position does not find support in the plain language of the statute or in the many cases that have interpreted the statute.”), aff’d, 71 F.3d 1469 (9th Cir. 1995), with United States v. Princeton Gamma-Tech., Inc., 31 F.3d 138 (3d Cir. 1994) (permitting immediate review of health-based CERCLA claims under the CERCLA citizens’ suit provision).

375 PRPs might bring such actions if they could claim that cheaper cleanup measures would pose no risk or a reduced risk to public health, or if they believed they could delay the time at which they incur significant response costs.
work on the RI/FS and developing the plans for the remedial action. Thus, when the health-based claims arise out of a planned remedial action, an earlier removal action will most likely have greatly reduced the threat to human health and the environment. Second, even if pre-completion review of the health impacts of a proposed remedial action were permitted, the EPA would retain its authority under section 106 to order or to bring an action in district court ordering abatement of any "imminent and substantial endangerment to the public health" caused by the release or threat of a release of hazardous substances.\textsuperscript{376} Thus, if delaying cleanup poses a substantial endangerment, the EPA could order or seek relief needed to abate that threat. Third, the availability of immediate review in RCRA corrective actions suggests that the risks that such review poses to human health are outweighed by the value of early review. As discussed, the release of hazardous waste or constituents into the environment triggers the corrective action requirement.\textsuperscript{377} The public health hazards associated with those releases should be, on the whole, equivalent to the public health risks resulting from the hazardous substance releases that result in CERCLA remedial actions, especially after a removal action is completed and the CERCLA site has been stabilized. In sum, allowing immediate review of claims that implementation of a CERCLA cleanup will harm public health and the environment should not itself result in an undue risk to public health and the environment.

Constraints on pre-completion review of the health-based claim could also minimize the risks that pre-completion review poses to public health and the environment. First, there should continue to be a strong bar against pre-completion review of removal actions. The EPA could thus continue to rely upon removal actions to stabilize sites and reduce the risks of hazardous substance releases, without the delays associated with litigation. Because CERCLA imposes significant limits on the duration and expense of removal actions, this more limited bar against pre-completion review should not be viewed as unfair.\textsuperscript{378} Constraints on removal actions ensure that their implementation is unlikely to pose significant risks to human health, particularly when balanced against the risks arising from an unstable site.

Second, constraints on pre-completion review of the health-based claims associated with remedial action implementation pre-

\textsuperscript{376} See 42 U.S.C. § 9606(a).
\textsuperscript{377} See supra note 88 and accompanying text.
\textsuperscript{378} See supra note 22 and accompanying text.
vent undue delay and the risks to human health associated with such delay. RCRA corrective action review provides examples of key constraints in a context where undue delay may also present public health concerns. One such constraint is initial review by the expert Environmental Appeals Board (EAB) within the EPA. Such review should provide consistency and expertise in decision-making, particularly because the EAB has significant experience with considering petitions for the review of corrective action requirements included in RCRA permits. The EAB, when it initially reviewed a CERCLA health-based claim, would ensure that the petition involved a health claim that could not be reviewed adequately following the cleanup. Review by the EAB would also provide an administrative record and decision, subject to subsequent court review. The other key constraint would be time limits on requests for review and responsive briefing before the EAB. Persons seeking review of corrective action conditions within a permit must file a petition within thirty days after the permit is issued. The EAB then typically provides the Regional Office forty-five days to file a response along with an administrative record. In almost all cases, briefing is complete at that point.

Regardless of whether pre-completion review becomes available for health-based claims related to implementation of remedial actions, more sensitive administration of the RI/FS and selection of the remedy can mitigate the unfairness that results from applying section 113(h)’s review preclusion to these claims. If the EPA designs and selects remedial actions in an open manner — providing for a full airing of the concerns of affected parties — the local community is more likely to support the action finally selected, decreasing the likelihood of a court challenge. The EPA has

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379 For a similar recommendation that the EAB play a role in the CERCLA settlement review context because of its expertise, see David L. Markell, “Reinventing Government”: A Conceptual Framework for Evaluating the Proposed Superfund Reform Act of 1994’s Approach to Intergovernmental Relations, 24 ENVTL. L. 1055, 1080-81 (1994). At present, the EAB’s sole CERCLA function is to review § 106(b) petitions for reimbursement from the trust fund. See ENVIRONMENTAL PROTECTION AGENCY, THE ENVIRONMENTAL APPEALS BOARD PRACTICE MANUAL 21-23 (1994).


381 See ENVIRONMENTAL PROTECTION AGENCY, supra note 379, at 6.

382 See id. at 6-7.

383 See Shutkin Interview, supra note 372; see also REPORT ON SUPERFUND ADMINISTRATION, supra note 9, at 65. The Subcommittee reports that:

When [the] EPA proceeds with a Superfund cleanup without providing adequate information to the local community or without taking into consideration the community’s objections to the cleanup, delays can occur as community resistance to the cleanup remedy grows. Witnesses representing
made a significant effort to ensure better and earlier community involvement in selecting a remedial action.\footnote{384}{See Interview, \textit{supra} note 312.}

One activist contends that an open process of formulating the response action is helpful in breaking down the basic mistrust that exists between the EPA and communities affected by CERCLA cleanups, and may yield agreement between the EPA and these communities regarding the most appropriate cleanup.\footnote{385}{Id. See \textit{generally id.} at 74 ("Community acceptance of a cleanup remedy is essential for a timely completion of a Superfund cleanup. Local communities should be involved with site progress before [the] EPA develops the Record of Decision and selects the cleanup remedy.").}

In this regard, CERCLA's technological assistance grants to community groups\footnote{386}{See Shutkin Interview, \textit{supra} note 372.} help to inform the community and to instill mutual confidence.\footnote{387}{These grants are available pursuant to § 117(e) of CERCLA. See \textit{supra} note 46 (discussing public involvement in remediation plans).} This activist hypothesized that, if the process leading to remedy selection were improved, the desire for litigation would wane and the availability of immediate review would slow cleanups only marginally.\footnote{388}{See \textit{id.}} He cited the New Bedford Harbor cleanup as an example of the impact of an improved CERCLA process.\footnote{389}{See \textit{id.}}

There, openness, informal consultation, and mediation between the EPA and the affected community avoided the need for litigation and its dilatory effects.\footnote{390}{See \textit{Stearns, \textit{supra} note 248, at 79-82 (telling the story of the remedy selection for New Bedford Harbor). It may be important that the community used the threat of a citizens' suit to encourage the use of mediation with the community in defining the proper remediation plan. \textit{See id.}}}

\section{The Effectiveness and Fairness of Foreclosing Review of CERCLA Liability in Bankruptcy Proceedings}

This article has summarized how section 113(h) has achieved limited success in foreclosing review of CERCLA liability claims prior to government enforcement when a debtor seeks to discharge a CERCLA claim in a bankruptcy proceeding.\footnote{391}{See \textit{supra} part III.C.} Section 113(h) becomes progressively less effective depending on the test that the
court applies. Under the *Chateaugay* approach, the EPA must file any CERCLA claims related to the cleanup costs of any release that occurred prior to the bankruptcy petition’s filing for which the debtor is a responsible party. This requirement applies regardless of the cleanup’s stage or whether a cleanup has been initiated at all. Thus, once the EPA learns that a debtor has filed a bankruptcy petition, the agency must first devote its administrative resources to identifying any CERCLA liability for that debtor and then to estimating the likely cleanup costs for which that debtor is responsible. Each of these tasks is labor intensive. The task of identifying PRPs is quite time consuming, particularly for old and abandoned sites. The EPA estimates the amount of the claim against the debtor in the next step — this turns on several difficult to define variables. Given the EPA’s limited resources, completing these tasks likely reduces the EPA’s ability to pursue cleanups at other sites.

Two alternative approaches to identifying when a claim may be discharged in bankruptcy intrude less on the EPA’s administrative flexibility. Before a CERCLA claim will be discharged, the claim either must be within the EPA’s fair contemplation or the EPA must have expended response costs. In both of these circumstances...

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392 See supra notes 228-34 and accompanying text.
393 See *Ways and Means Review Hearings*, supra note 26, at 484 (“Consider the quandary of [the] EPA, charged with the task of sorting out Superfund liability at a particular 40-year old dump site. . . . It’s no wonder that up to 70 percent of the funds available for clean-up have been consumed on these enormously complex administrative tasks.”).
394 See *Report on Superfund Administration*, supra note 9, at 170-71 (discussing the desirability of early de minimis settlements with PRPs, the report states that “after the initial indemnification of responsible parties, [the] EPA seldom has reliable waste contribution data, site characterization data, or cleanup cost estimates” to permit the estimates needed for such settlements); see also *Ways and Means Review Hearings*, supra note 26, at 237 (statement of Don R. Clay, Assistant Adm’r, Office of Solid Waste and Emergency Response, U.S. Envtl. Protection Agency) (noting that bankruptcy cases “are often resource-intensive, but in some instances can yield significant cost recovery”).
395 For example, the EPA has recognized that if it expends the administrative resources needed to complete a settlement (which requires the sort of administrative tasks needed to estimate claims in bankruptcy), the agency will be less successful in cleaning up hazardous substances. See *Report on Superfund Administration*, supra note 9, at 141 (“Despite the success in securing responsible party cleanup funds, the extensive work hours taken [in Region III] to secure the settlement caused some delays at other Superfund sites in the region, another disincentive to the use of de minimis settlements.”); see also *Ways and Means Review Hearings*, supra note 26, at 415 (statement of John D. Cole, Senior Vice President, Zurich Ins. Group, on behalf of the Am. Ins. Ass’n) (“[A] bankruptcy filing stays all claims against the bankrupt party, thus possibly delaying the cleanup of any Superfund sites with which the bankrupt party is involved.”); Schuh, supra note 224, at 207.
396 *National Gypsum* and *Union Scrap* present these approaches, discussed supra notes 235-46 and accompanying text.
stances, the EPA will at least have identified the debtor as a responsible party at a release site so that the EPA will be left with the sole (but difficult) task of estimating the amount of the claim.  

By allowing the discharge of so many CERCLA claims, the result in *Chateaugay* may increase the number of bankruptcy petitions. One commentator has also argued that *Chateaugay* will make the settlement of CERCLA claims more difficult. On the other hand, other commentary has decried the result in *Chateaugay* because the court defined the scope of discharged claims too narrowly.

Although commentators do not agree about the proper circumstances under which CERCLA liability ought to be discharged in bankruptcy, they concur that CERCLA is very difficult to recon-
Judicial Review Preclusion

With the Bankruptcy Code, and that, notwithstanding its categorical terms, section 113(h) should not bar litigation of the liability issue (and a discharge in bankruptcy) until the government brings an enforcement action. In sum, section 113(h) has not been effective in barring the discharge in bankruptcy of CERCLA liability claims prior to cleanup or an EPA enforcement action.

To evaluate the fairness of the application of section 113(h) in the bankruptcy context, one must consider first the statutory values that conflict when the two statutory schemes interact. A provision that delays the estimation and discharge of claims that affect reorganization and solvency undermines the fresh start value that animates the Bankruptcy Code. Thus, PRPs who rely on bankruptcy protections to settle debts and claims and re-start operations will find a statutory scheme that retains CERCLA liabilities unfair. Such PRPs would favor Chateaugay's broad rule for discharging CERCLA liability, while they would view the other, narrower rules of discharge as unfair.

Solvent responsible parties, subject to joint and several liability for cleanup costs along with debtors, voice a countervailing claim of unfairness. These responsible parties are increasingly concerned about the fairness of CERCLA liability if debtors may readily discharge CERCLA claims through bankruptcy, thus placing greater portion of the cleanup costs on solvent parties. PRPs in this

is detected and the party is actually notified that the EPA has identified [it] as a PRP.

Another commentator has argued that the issue of when a CERCLA claim is subject to discharge is not of central importance and would become decidedly less important if Congress amended the Bankruptcy Code to prioritize environmental claims. See Topol, supra note 223, at 232.


Cf. Ryland, supra note 402, at 771 ("While almost all courts agree that CERCLA liability can be discharged in bankruptcy, there is vast disagreement as to when such liability becomes dischargeable."). But see Nancy H. Kratzke, Dischargeability Issues and Superfund Claims: The Conflict Between Environmental and Bankruptcy Policies, 17 COLUM. J. ENVTL. L. 381, 415-16 (1992) (arguing that cleanup costs should not be discharged in bankruptcy because CERCLA cleanups serve important public policies when financed by those responsible for the contamination).

See supra note 225 and accompanying text.

See Ways and Means Review Hearings, supra note 26, at 415 (statement of John D. Cole, Senior Vice President, Zurich Ins. Group, on behalf of the Am. Ins. Ass'n) ("Bankruptcy increases the proportionate share of other responsible parties, regardless of their
position would view narrow rules of discharge as fair, and would oppose the broad, Chateaugay rule.

Indeed, fairness concerns motivated (at least in part) the district court in *National Gypsum* to adopt its rule of bankruptcy discharge. That court concluded that claims subject to discharge (and a filing obligation) are those within the fair contemplation of the parties. Such a rule appears to be fairest to all parties involved.

D. The Effectiveness and Fairness of Foreclosing Review of Claims Under Other Substantive Statutes

When considering the effectiveness of review preclusion of claims raised under other substantive statutes, one must consider more than only the pace and effectiveness of CERCLA cleanups. In deciding whether review is foreclosed, a court should undertake a case and statute-specific analysis of the extent to which immediate review threatens the policies of both CERCLA and the other federal statute. To the extent that these potentially competing policies are properly weighed in deciding whether section 113(h) forecloses review under the other statute, the vindication of rights established under other federal statutes will more than offset any negative effect on the efficiency of CERCLA cleanups. Congress has seen fit to protect those competing rights by providing for a right of review in court.

The following example illustrates how effectiveness must be assessed in the context of litigation involving CERCLA and other statutes. Although no case has addressed this potential conflict, suppose that a plaintiff brings a claim asserting that a CERCLA response action is inconsistent with the Endangered Species Act of 1973 (ESA) and that later review will not adequately protect the ESA interests. In that setting, a court should have the ability to weigh whether the statutes can be harmonized and whether the policies of the ESA mandate that review be conducted before the response action threatens the existence of an endangered species. If the court concludes that the ESA claim should proceed, it will have effectively prioritized ESA interests over a swift CERCLA

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actual involvement at a site.

406 See *supra* notes 235-43 and accompanying text.


408 *Cf.* Stearns, supra note 248, at 83-84 (arguing for jurisdiction under CERCLA to review a CERCLA remedial plan that would result in obvious and irremediable harms to the environment).
response. However, given the broad and categorical terms of section 113(h), a court is more likely to forego the balancing of statutory values and foreclose review reflexively. That outcome does not undermine the effectiveness of CERCLA cleanups, although it may not protect other statutory values effectively.  

Notwithstanding the categorical terms of section 113(h), if courts carefully consider the interrelation of statutory schemes and policies of the other federal statute with CERCLA, they will not degrade the overall and effective protection of statutory rights. The ultimate conclusion courts reach about whether section 113(h) forecloses jurisdiction may properly differ based on the competing statutory policies underlying the substantive law that supports the plaintiff's claim. The results will likely vary because each case will present a statutory conflict implicating CERCLA or other statutory values to different degrees — the impact that early review would have on furthering or undermining those values may change as well.

However, one EPA official has expressed serious reservations about permitting pre-cleanup review of health and welfare-based challenges to response actions. The principal concern is that PRPs will transform claims relating to cleanup costs (and therefore the scope of their CERCLA liability) into health or environmental-based claims. Providing this opportunity for early litigation would, in the official's view, result in a significant amount of pre-cleanup litigation. Furthermore, a jurisdictional approach that involves balancing statutory policies would not be workable and would be inferior to a clear and categorical rule barring jurisdiction. For this latter reason, the EPA official believes that the current text of section 113(h), which is clear and categorical, bars courts from balancing competing statutory policies.

Fairness concerns arise in the present litigation context when a court forecloses review pursuant to section 113(h) and makes meaningful review of a claim under another statute impossible. These concerns are not compelling because courts seem willing to decide the merits of the asserted statutory claims when it is neces-

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409 One commentator argues that, by broadly foreclosing review of RCRA citizens' suits seeking review of cleanups at federal facilities, this approach has "largely thwarted . . . important oversight." Wuerth, supra note 248, at 385.
410 See Interview, supra note 312.
411 See id.
412 See id.
413 See id.
sary to ensure meaningful review. Indeed, courts have shown a willingness to decide statutory claims on the merits even after they have concluded that review of the statutory claim is unavailable or the availability of review is uncertain. Thus, in *Arkansas Peace Center*, the Eighth Circuit decided a citizen group's RCRA claim on the merits after concluding that section 113(h) foreclosed district court review of the RCRA claim. Similarly, the court in *BFI* assumed the existence of jurisdiction to resolve the RCRA claim asserted by the plaintiff. In sum, courts in this litigation context are concerned about equity and the adequacy of delayed review of the statutory claim. If a plaintiff can convince the court that foreclosing review will deprive the claimant of meaningful review, then the claimant is likely to gain immediate review of the statutory claim.

E. The Effectiveness and Fairness of Foreclosing Review of Claims for Nonstatutory Review Brought Under the APA

The categorical language of section 113(h) has been effective in foreclosing review sought through the APA. A contrary interpretation requiring the EPA to comply with the procedural dictates of NEPA or the NHPA before proceeding with a response action would make the EPA's decisionmaking more cumbersome and its actions slower.

Although section 113(h) has effectively foreclosed review under these procedural statutes, such preclusion might be criticized as unfair because it denigrates the procedural values protected by federal statutes such as NEPA and the NHPA. The concern about fairness does not seem strong for several reasons. First, CERCLA and the NCP mandate procedures for the RI/ES process that are intended to protect the affected parties' procedural rights and ensure adequate consideration of environmental impacts. See supra note 46 (describing the CERCLA procedures for remedial plan selection and implementation). For discussion on how CERCLA procedures provide affected states with additional procedural protection, see supra note 49 and accompanying text. The NCP provides that, when designing a remedial action, the EPA should consider impacts on the habitat of endangered and threatened species. See 40 C.F.R. § 300.430(e)(2)(i)(G) (1995). Also, one of the nine critical criteria for evaluating alternatives when selecting a remedial action relates to the "[o]verall protection of human health and the environment." *Id.* § 300.430(e)(9)(iii)(A).
ond, with regard to the historic preservation values protected by the NHPA, the EPA indicated that it would consider historic preservation values when designing the remedy. 418 Finally, the Boarhead court recognized that one of the traditional safety valves that make pre-enforcement review available in special circumstances could allow a court to exercise pre-enforcement jurisdiction to protect preservation values in a case where delayed review would be inadequate to protect those values. 419 In sum, section 113(h) pre-enforcement review foreclosure does not raise significant concerns about fairness under the APA.

F. The Effectiveness and Fairness of Foreclosing Review of Constitutional Claims

Section 113(h) has been least effective in foreclosing pre-enforcement review of constitutional claims, with the majority of courts permitting pre-enforcement review in this context. Given that courts generally permit pre-enforcement review of constitutional claims in other administrative law contexts 420 the provision's lack of effectiveness in this context is understandable. Permitting review of constitutional claims has a limited impact on the pace of CERCLA cleanups. First, there are relatively few such claims, particularly when compared to liability claims. Second, the EPA need not expend significant administrative resources to litigate these claims because they do not typically turn on resolving the CERCLA liability issue or the issue of the adequacy of the proposed cleanup. Indeed, the court in Reardon fashioned its rule permitting pre-enforcement review to minimize the burden on the EPA. 421 Third, and finally, when a PRP or an affected group brings a constitutional claim, the EPA has completed the difficult preliminary work of PRP identification and, possibly, remedy selection at the site. This means that the EPA will have already dedicated some of its resources to pursuing a cleanup at the site. Allowing litigation of these claims thus does not pose the same threat to

418 See Boarhead Corp. v. Erickson, 923 F.2d 1011, 1022 n.17 (3d Cir. 1991).
419 See id. (noting that because the EPA accounts for historic preservation concerns in the RI/FS process, the court did not have to "reach the troubling question" of whether review would be available to protect those values in the absence of such administrative consideration).
420 See supra notes 130, 137 and accompanying text.
421 An EPA official argued that the Reardon court properly interpreted § 113(h) by permitting a court to review not the response action, but the constitutionality of the statute. See Interview, supra note 312; see also supra notes 301-07 and accompanying text (discussing Reardon).
cleanups as that posed by litigating discharge of CERCLA claims in bankruptcy. To protect those latter claims when the broad Chateaugay rule of discharge is applied, the EPA will often have the onerous tasks both of identifying PRPs and estimating their share of liability.422

The courts that permit pre-enforcement review of constitutional claims are principally motivated by concerns about fairness and the preservation of basic constitutional rights. The cases decided in this context reflect the concerns that have motivated courts to develop well-recognized exceptions, serving as safety valves to a general rule foreclosing pre-enforcement review of agency actions.423

V. Conclusion

Having reviewed how courts apply section 113(h), as well as its effectiveness and fairness, it is valuable to state some general conclusions about (1) the utility of the provision as currently enacted and (2) the desirability of amending the provision.

A. Evaluation of Section 113(h) as Enacted

1. In General

CERCLA’s review provision expressly limits the availability of pre-enforcement review. It speaks directly to the availability of judicial review and is therefore preferable to the provisions of many other statutes. Because CERCLA includes this provision, courts need not infer limits on pre-enforcement review.

2. Review of CERCLA Liability Claims

The CERCLA review preclusion provision has been very effective in meeting its intended purpose — foreclosing the litigation of CERCLA liability issues prior to a government enforcement action. Commentators have generally recognized this effectiveness as important to the EPA’s ability to pursue timely response actions. However, PRPs view the provision as unfair because it delays the liability determination while the PRP’s potential exposure is very high. This derives from the inherent unfairness of strict, joint, and several liability on responsible parties. However, the availability of adequate, delayed review of the liability issue (including review of

422 See supra notes 393-95 and accompanying text.
423 See supra notes 148-55 and accompanying text (discussing the safety valves to review preclusion).
the appropriateness of cleanup costs) undercuts the unfairness claims. The EPA may seek to minimize further the perceived unfairness of the provision by improved administration of the program and the use of procedures that moderate the impact of joint and several liability.

3. **Review of Other CERCLA Claims**

Section 113(h) has also been applied to foreclose review of other health-based CERCLA claims that are unrelated to liability. The use of section 113(h) in this context prevents the slowing of cleanups, but creates problems by foreclosing adequate review if the underlying claim asserts that cleanup implementation will itself cause irreparable injury to human health and the environment, thus undermining the core reason for Superfund cleanups. Moreover, when the underlying claim relates to the adverse impacts on human health and the environment expected from implementation of a proposed remedial action, immediate review of the claim appears to be appropriate under *Abbott Laboratories v. Gardner*.\(^{424}\) The issue is fit for judicial review and potentially great and irreparable hardship will result if review is withheld.\(^{425}\)

For these reasons, courts should interpret section 113(h) to permit immediate review of such health and environmental-based claims. In undertaking this review, courts should ensure that the process leading to the selection of the remedial plan has been adequate. Such process-based review is, of course, best accomplished before agency action is taken.\(^{426}\)

4. **Review of CERCLA Liability Claims in Bankruptcy Proceedings**

Cases in which courts must decide whether CERCLA claims are discharged in bankruptcy present the greatest controversy involving review preclusion effects. Results in this litigation context are least consistent with and quite likely to harm CERCLA values because such litigation diverts agency personnel from cleanups. These cases involve CERCLA liability; Congress decided with sec-

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425 See id. at 140-41.
426 See Administrative Conference of the United States, Recommendation 82-7, Judicial Review of Rules in Enforcement Proceedings 17 (1982) ("When objections on procedural grounds are raised early, errors may be remedied promptly and the rule-making process recommenced with a minimum of disruption to the interests of those affected by the rule.").
tion 113(h) that litigation of this issue should not slow CERCLA cleanups. Courts must account for Congress’ decision in this regard when they resolve the issue of when CERCLA claims arise and are subject to discharge in bankruptcy. Courts must, of course, also consider the fresh start policy of the Bankruptcy Code when deciding this issue, but that latter policy must not predominate and thereby undercut the EPA’s effective administration of the Superfund program.

5. Review of Other Statutory and Constitutional Claims

Courts are also faced with difficult issues when they must decide whether section 113(h) forecloses pre-CERCLA-enforcement review of claims based on other statutes or the Constitution. As in the bankruptcy context, courts should decide whether to permit such review based on a sensitive balancing of the conflicting statutory (or constitutional) values, including consideration of the adequacy of delayed review of the claims being asserted.

B. Amendment of Section 113(h)

1. In General

Section 113(h) is drafted in broad and categorical terms so that it has the potential to foreclose pre-enforcement review of much more than CERCLA liability issues. Courts have applied the provision unevenly in various nonliability contexts. Given that courts have not applied consistently the uniform terms of section 113(h), this provision should be amended to permit on its face a greater range of judicial responses in different litigation contexts. Even though Congress is to be commended for including a provision that expressly governs the availability of pre-enforcement review, the current terms of section 113(h) are too categorical and expansive to tolerate the flexible construction that courts have adopted in different litigation contexts.

2. Specific Recommendations

a. CERCLA Liability Claims

An amended section 113(h) should maintain a strong rule of review preclusion when PRPs bring actions against the EPA to adjudicate any CERCLA liability issues prior to a cost-recovery or other enforcement action. Preclusion of review in these cases ensures the timeliness and effectiveness of CERCLA cleanups.
b. CERCLA Health-based Claims

CERCLA should be amended to permit pre-completion review of a claim that implementation of a portion (or the entirety) of a remedial action will itself result in irremediable injury to public health or the environment.\(^{427}\) This review should take place initially at the administrative level before the EPA Environmental Appeals Board (EAB), using the same limits on timing that apply to EAB review of RCRA permits. The EAB decision should then be subject to judicial review as a final agency action.

c. CERCLA Liability Claims in Bankruptcy Proceedings

Congress should amend section 113(h) to define expressly when CERCLA liability claims may be discharged in bankruptcy. Courts have differed greatly in their interpretations of the current text. Congress itself ought to balance the fresh-start policy of bankruptcy (which favors a broad discharge) and the prompt cleanup policy of CERCLA (which favors a narrow discharge). The “fair contemplation” standard adopted by the National Gypsum court is a fair balance of the two competing policies.

d. Other Statutory and Constitutional Claims

In order to ensure adequate review and consideration of legal values that arise independently of CERCLA, an amended statute should provide for district court jurisdiction when a claim is made that a response action will itself irreparably damage other statutory values or violate the Constitution, and when those harmed interests outweigh the interest in foreclosing CERCLA review prior to implementation or enforcement. Courts applying a review-preclusion provision amended in this way will have to engage in careful decisionmaking that accounts for the statutory and constitutional values that are at issue. Because Congress will likely conclude that it is impossible to identify prospectively a legislative rule that will accommodate competing policies, an amended statute will likely have to rely upon a court’s weighing of the competing values at issue in a particular case.

\(^{427}\) However, such pre-completion review should not be available when the health-based claim relates to the potential effects of implementing a removal action. Cf. Wuerth, \textit{supra} note 248, at 370-71 (arguing that § 113(h) should bar review of removal actions, but not remedial actions, at federal facilities).