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Judicial Review and CERCLA Response Actions: Interpretive Strategies in the Face of Plain Meaning

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JUDICIAL REVIEW AND CERCLA RESPONSE ACTIONS: INTERPRETIVE STRATEGIES IN THE FACE OF PLAIN MEANING

Michael P. Healy*

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I. INTRODUCTION

This Article examines the role courts play under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") in cleaning up releases of hazardous substances. Congress intended the courts to have an important role in implementing the cleanup process—particularly in defining the scope of liability for CERCLA cleanups. But Congress also included a broadly-worded provision that forecloses federal judicial review of CERCLA cleanups unless the review action falls within several narrowly-defined exceptions.

Notwithstanding the terms of the provision foreclosing review, litigants have turned to the courts, asserting that immediate review should be available in cases beyond those exceptional proceedings. Those asserting a need for immediate review rely on a number of theories grounded either in the language of CERCLA and its policies, or in the terms and policies of other statutes, or in the Constitution. In response to these claims, courts have applied CERCLA's categorical limits on review to particular cases with greatly varying outcomes.

This Article considers the efforts by the courts to apply the plain meaning of CERCLA section 113(h). After a brief overview of CERCLA and section 113(h), the Article explores the various interpretive strategies courts have employed in applying this “[t]iming of review” provision. The analysis begins with an “easy

3. CERCLA § 113(h), 42 U.S.C. § 9613(h). This provision states that unless the action falls within one of five categories specified 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.
4. See infra part II.
5. 42 U.S.C. § 9613(h).
case" of review preclusion, in which there is little chance of establishing federal court jurisdiction. This best case for review preclusion occurs when judicial review will stop or slow a site's cleanup, when the claimant is a potentially responsible party ("PRP") seeking judicial review to determine its liability under CERCLA, and when that claimant presents no alternate statutory or constitutional basis for review.

After discussing claims for which immediate review is plainly foreclosed, the Article examines increasingly more difficult cases. These cases become more difficult where early review (1) presents no apparent threat to the policies of CERCLA; (2) may affirmatively serve another important policy of CERCLA, such as ensuring the safety of individuals residing nearby the site; or (3) may ensure that the cleanup does not subvert important policies identified in other statutes. In each of these circumstances, courts may rely on interpretive strategies to distinguish the case from CERCLA's express and categorical preclusion of review. Finally, the Article considers cases seeking early judicial review where the litigants claim that a CERCLA cleanup offends constitutional rights. In this circumstance, courts have willingly allowed immediate judicial review, although many courts have failed to articulate an explicit rationale for this result. This Article proposes a defensible rationale for these courts' conclusion.

Two issues will be central to this analysis and to the conclusions of this Article: (1) whether the language of the current review preclusion provision can be construed fairly to permit the wide variations that courts have established regarding the availability of review; and (2) whether CERCLA needs to be amended to allow judges greater discretion regarding the availability of review in order candidly to address and accommodate the courts' legitimate concerns about the social costs of review preclusion. The Article concludes that Congress should amend CERCLA to permit preenforcement review in a limited number of circumstances discussed in Parts III, IV and V. Failure to amend CERCLA jeopardizes the implementation of its underlying policies and under-

6. See infra part III.A.
7. See infra part III.B.1.
8. See infra part III.B.2.
9. See infra part IV.
10. See infra part V.
mines the legitimacy of the judiciary's good-faith efforts to interpret the broad and categorical language of the review preclusion provision.

II. OVERVIEW OF CERCLA AND SECTION 113(H)

Congress enacted CERCLA in 1980 to provide the United States Environmental Protection Agency ("EPA") with "the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal." CERCLA included substantial federal funding, which subsequent legislation has increased, to allow the federal government to begin cleanups at the sites of the "most significant releases of hazardous substances." Congress has authorized a total of approximately $15 billion to date for the Hazardous Substance Superfund ("Superfund").

When it finds a release or threatened release of hazardous substances, the government can pursue response actions under

11. United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982). The concerns about hazardous waste that gave rise to the substantial support for CERCLA's enactment arose from "[s]everal well-publicized incidents of improper disposal of large amounts of hazardous substances which caused serious public health problems." Healy, supra note 2, at 68; see id. at 68–69 (describing incidents and Congress's awareness of them). Congress enacted CERCLA because it thought the existing environmental laws inadequate to address what it saw as a major national problem. See id. at 69 n.10.


Congress intended that the Superfund would be used to provide seed money for cleanups and would be replenished by recovering the costs of cleanup from parties identified as liable for those costs under the Act. See Healy, supra note 2, at 75 & n.34; see also infra notes 40–51 and accompanying text (discussing cost recovery actions brought under 42 U.S.C. § 9607).

13. See UNITED STATES GENERAL ACCOUNTING OFFICE, SUPERFUND: EPA COST ESTIMATES ARE NOT RELIABLE OR TIMELY 1 (1992). In its 1990 Superfund Report, EPA estimated that the program will actually cost $27.2 billion. Id. The General Accounting Office thought that even EPA's figure was too low. Id. at 7. The language codified at 26 U.S.C. § 9507 (1988) establishes the Superfund.

14. 42 U.S.C. § 9601(22) defines a "release" as any discharge of hazardous substances into the environment, subject to several exceptions.

CERCLA as specified in section 104 of the Act. The response actions CERCLA allows fall into two categories. The first is a "removal action," which is 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 substances. Because a removal action allows for immediate abatement and CERCLA limits the total amount of money that may be expended for removal, implementation does not require the prior completion of a substantial administrative process.

The second type of response action is a "remedial action." A remedial action consists of cleanup activities designed to achieve a permanent remedy at the site. Remedial actions can include...
several of the approaches considered removal actions, as well as the collection of leachate and runoff, the treatment or incineration of hazardous substances at the site, and reasonable monitoring to ensure the adequacy of the remediation effort. Significant public health concerns related to ensuring a permanent remedy at the site, combined with the substantial costs of a remedial action, make the process of funding, designing, and implementing a remedial action complex.

Remedial actions financed from the Superfund target the sites that EPA has identified as posing the greatest risk to human health.

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23. For example, the statute states that a remedial action may involve "confinement, ... clay cover, ... [and] repair or replacement of leaking containers." Id. These actions may also qualify as removal actions. See supra note 18 and accompanying text.


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.


27. This complexity may partly explain CERCLA's cumbersome process of remediation. CERCLA cleanups demand substantial effort; cleanups at individual sites progress slowly. See E. Donald Elliot, Superfund: EPA Success, National Debacle?, NAT. RESOURCES & ENV'T, Winter 1992, at 11, 12 ("The single most damning statistic about the Superfund program is that it takes, on average, ten years to clean up each site, but only about three years is actual on-site construction work!"); see also id. at 13 ("it takes seven years and at least $4 million in transaction costs at each site to conduct the necessary studies and design remedies before the final cleanup can begin."). The overall pace of remediation of CERCLA sites has been similarly slow. A 1989 study indicates that, although EPA expended more than $4 billion in pursuit of cleanups, it had accomplished final remediation at only 43 sites. FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 642 (1990) (citing report by Clean Sites); see also Problems in Program Management, supra note 26, (reporting statement by Rep. Pickle that "[o]nly 80 of the 1,200 sites on the Superfund National Priorities List have been cleaned up in 10 years of program operation.").
and the environment. This limitation reflects Congress’s understanding that priorities must be established because the Superfund does not contain enough money to respond adequately to all covered releases of hazardous substances.

The design and selection of a remedial action, a process that includes preparation of the Remedial Investigation and Feasibility Study ("RI/FS") “to assess site conditions and evaluate alternatives to the extent necessary to select a remedy,” operates under both procedural and substantive constraints. In 1986, Congress amended CERCLA by adding section 117, which ensures the public a substantial opportunity to participate in the selection and design of the plan for remediation. Section 117 requires that before the pursuit of any remedial action, EPA must publish notice of the proposed remediation plan and must make the full plan available to the public. The public must then be afforded “a reasonable opportunity for submission of written and oral comments.” CERCLA also requires public notice of the final remedial action plan, which must also be available for review by the public.

28. The National Priorities List ("NPL") “is the list of priority releases for long-term remedial evaluation and response.” 40 C.F.R. § 300.425(b). That list identifies sites that pose the greatest threat to human health and the environment, as evaluated according to a hazard ranking system or a priority determination by a state or EPA. See id. § 300.425(c); see generally Eagle-Picher Indus. v. EPA, 822 F.2d 132 (D.C. Cir. 1987). As of 1991, the NPL listed 1185 sites. See Lisa K. Friedman et al., Solid and Hazardous Waste Committee 1991 Annual Report, 8 A.B.A. Sec. Nat. Resources, Energy, & Envtl. Law: 1991 Year in Review 187, 199 (1992). EPA may pursue Superfund-financed remedial actions only at sites listed on the NPL. 40 C.F.R. § 300.425(b)(1). Because Superfund plays the primary role in funding remedial actions, the restriction that the Superfund finance remedial actions only at NPL sites has greatly limited the number of sites eligible for a remedial action. See Richard H. Mays, Who's Afraid of CERCLA § 106 Remedial Orders?, 3 Toxics L. Rep. (BNA) 1305, 1311 n.39 (1989) ("A 1988 study showed that, as of Sept. 30, 1987, approximately 80 per cent of remedial investigations and feasibility studies, 70 per cent of remedial designs, and 50 per cent of remedial actions were fund-financed." (citation omitted)).

29. See supra note 12.
30. 40 C.F.R. § 300.430(a)(2); see generally id. (discussing RI/FS).
32. Congress intended that § 117 would encourage support within the community for the cleanup. See H.R. Rep. No. 253, 99th Cong., 2d Sess., pt. 5, at 65 (1986), reprinted in 1986 U.S.C.C.A.N. 3124, 3188 ("[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."). CERCLA also provides funding for technical assistance grants to the public to encourage well-informed and productive public participation. See 42 U.S.C. § 9617(e); see also H.R. Rep. No. 253, 99th Cong., 2d Sess., pt. 1, at 38 (1986) ("Grants would be available to help communities understand the proposal and allow them to comment in a meaningful manner.").
A discussion of significant changes from the proposed plan and responses to any significant public comments on the proposed plan must also accompany the final plan. Finally, EPA must publish an explanation of "any significant" differences between this final remediation plan and any action "taken" or the terms of any settlement.

The process of selecting and designing a remedial action principally focuses on identifying a cleanup plan that will adequately protect both human health and the environment. This process aims to ensure compliance with standards from other environmental statutes that are "legally applicable . . . or . . . relevant and appropriate under the circumstances" ("ARARs"). CERCLA authorizes and encourages "substantial and meaningful involvement" by the states in this process in order to identify properly these environmental standards. CERCLA also grants the states a limited right to judicial review of an EPA decision that a remedy will not have to conform to an environmental standard viewed as relevant and appropriate by the state.

EPA, states, tribes, or other persons may pursue removal and remedial actions. After any of these parties incurs a

34. Id. § 9617(b). Consistent with these formal procedural requirements, CERCLA also requires the development of an administrative record regarding the selection of a remedial action. Id. § 9613(k).

35. Id. § 9617(c).


38. 42 U.S.C. § 9621(f)(1). See 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.").

39. See 42 U.S.C. § 9621(f)(2)-(3); 40 C.F.R. § 300.515(f)(2). The remedial action must be one "secured by EPA under CERCLA section 106." 40 C.F.R. § 300.515(f)(2). Judicial review is "on the administrative record," and CERCLA requires that the remedial action meet the ARARs desired by the State "if the State establishes . . . that the finding of the President was not supported by substantial evidence." 42 U.S.C. § 9621(f)(2)(B).

40. Section 104 gives EPA the authority to respond to a release or a threat of a release of hazardous substances by taking any "response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment." 42 U.S.C. § 9604(a)(1).

41. See 40 C.F.R. § 300.500.

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

43. Id. § 300.700(a) ("Any person may undertake a response action to reduce or eliminate a release of a hazardous substance, pollutant, or contaminant.").
response action expense, CERCLA allows that party to bring an action under section 107(a)\(^4\) to recover the costs incurred in the response action from those parties defined as responsible under the Act.\(^4\) Section 107(a) also defines the four classes of "person[s]"\(^6\) that may be liable for bearing the costs of a CERCLA cleanup.\(^4\) Responsible parties include present owners and operators of the facility or site,\(^8\) some past owners or operators,\(^9\) generators,\(^50\) and transporters.\(^51\)

CERCLA also provides EPA with increased authority and flexibility to respond to releases or threatened releases that may pose "an imminent and substantial endangerment to the public health or welfare or the environment."\(^52\) Most importantly, section 106 allows EPA to issue administrative orders compelling the private cleanup of a facility.\(^53\) EPA may issue administrative orders

\(^4\) 42 U.S.C. § 9607(a).
\(^5\) 40 C.F.R. § 300.700(c) outlines the § 107 cost-recovery action. This provision also identifies the types of costs that may be recovered in such an action. When the United States, a state, or an Indian tribe incurs response costs, it may recover all costs "not inconsistent with the NCP." 40 C.F.R. § 300.700(c)(1). When other parties incur response costs, they may recover all costs "consistent with the NCP" from the responsible parties. Id. § 300.700(c)(2). Courts have construed this difference between the definitions of recoverable costs to create a presumption that costs incurred by the United States, a state, or a tribe may be recovered. See County Line Inv. 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 action brought by government, "[d]efendants have the burden of proving that response costs are inconsistent with the NCP" (citation omitted)). When a private party brings a section 107(a) action to recover CERCLA response costs, that party carries the affirmative burden of proving that the response costs incurred were consistent with the NCP. See Tinney, 933 F.2d at 1512.

\(^6\) CERCLA defines "person" broadly to include corporations and commercial entities as well as individuals. 42 U.S.C. § 9601(21).

\(^7\) Id. § 9607(a). See generally Healy, supra note 2, for an analysis of difficulties that arise in determining whether particular parties are liable for response costs under 42 U.S.C. § 9607.

\(^8\) 42 U.S.C. § 9607(a)(1).

\(^9\) Id. § 9607(a)(2).

\(^50\) Id. § 9607(a)(3) (imposing liability on responsible parties who arranged for disposal or treatment of hazardous substances).

\(^51\) Id. § 9607(a)(4) (imposing liability on responsible parties who have transported hazardous substances and selected disposal facility).

\(^52\) Id. § 9606(a).

\(^53\) 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 also EPA, 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 court and "to secure such relief as may be necessary to abate such danger or threat." 42 U.S.C. § 9606(a).
to instigate a removal action or to force implementation of a remedial action it has selected. If the subject of the order fails to perform the ordered actions, the government may recover fines and punitive damages of up to three times the amount of Superfund moneys expended to perform the ordered cleanup. Once EPA issues a section 106 order and the subject of the order fails to take the required actions, EPA may bring an action to enforce the order or EPA may itself proceed with the response action and seek damages for the violation of the order in its action to recover the response costs.

Private parties also may bring actions under section 310 of CERCLA claiming that the United States or any person is violating CERCLA or that an officer of the United States has failed to perform a nondiscretionary duty under CERCLA. These citizens suits, as well as all other litigation that requires a federal court "to review any challenges to removal or remedial action selected under section 9604 . . . , or to review any order issued under section 9606(a)," must satisfy a critical limit on the "[t]iming of review." This "unusual provision," added to the Act by SARA in 1986, bars federal court jurisdiction "under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction)" to review the citizens suit challenges identified above, unless it is brought in one of the five specific CERCLA proceedings that the statute identifies. The rest of this Article addresses the meaning and effect of section 113's categorical and substantial limitation on federal court jurisdiction.

54. See Akzo Coatings of Am., 949 F.2d at 1417–18.
55. 42 U.S.C. § 9606(b)(1) (authorizing award of fines of up to $25,000 per day against "[a]ny person who, without sufficient cause, willfully violates, or fails or refuses to comply with" a section 106 order).
56. 42 U.S.C. § 9607(c)(3) (authorizing recovery of punitive damages from a party liable for response costs under section 107 who, "without sufficient cause," fails to comply with a section 106 order).
57. See id. § 9606(b)(1).
58. See id. § 9607(c)(3).
59. Id. § 9659(a).
60. See id.
61. Id. § 9613(h).
63. SARA § 113(h), codified at 42 U.S.C. § 9613(h).
64. Id. § 9613(b)(1)–(5).
III. PRECLUSION OF THE LITIGATION OF CERCLA CLAIMS

A. Attempts to Litigate the Liability Issue Prior to Completion of the Cleanup: Is Review Foreclosed in the Easy Case?

Given the terms of Section 113(h) and the structure and purposes of CERCLA, one would expect that federal court jurisdiction would be most plainly foreclosed when, prior to completion of a government cleanup and a government action to recover response costs, a party potentially responsible for CERCLA response costs under section 107 seeks to litigate either the existence of or the extent of liability for response costs. This type of claim may be raised in several contexts: a PRP might seek a declaratory judgment that it is not liable for an ongoing cleanup; a PRP might seek to enjoin EPA from proceeding with a response action under section 104, because the response action is viewed as too costly; or a recipient of a section 106 administrative order might challenge the order on the grounds that the party is not liable under CERCLA for response costs.

Preclusion of review of PRP claims would be expected in these circumstances because the statute expressly identifies the pro-

65. Id. § 9613(h). An overview of CERCLA and its purposes is presented supra notes 11–64 and accompanying text.
68. See Dickerson v. Administrator, EPA 834 F.2d 974, 978 (11th Cir. 1987); Lone Pine Steering Comm. v. United States EPA, 777 F.2d 882 (3d Cir. 1985), cert. denied, 476 U.S. 1115 (1986); Cooper Indus. v. EPA, 775 F. Supp. 1027, 1036 (W.D. Mich. 1991). This may be the most common circumstance in which a PRP would want to gain early review of an EPA response action. In these cases the PRP may itself have proposed to EPA an alternative plan for cleanup that the PRP believes to be more cost effective. See, e.g., Lone Pine Steering Comm., 777 F.2d at 883–84.
69. See Solid State Circuits, Inc. v. EPA, 812 F.2d 383, 385 (8th Cir. 1987); Wagner Seed Co. v. Daggett, 800 F.2d 310, 313 (2d Cir. 1986). No definitive ruling exists on whether a person must be a responsible party under 42 U.S.C. § 9607 in order to be the subject of a § 106 order, 42 U.S.C. § 9606(a). See Healy, supra note 2, at 70 n.14.
A PRP might also seek to litigate CERCLA liability issues prior to a cost recovery action and completion of the response action if EPA asks a federal court to issue an order in aid of access to a site under section 104(e), 42 U.S.C. § 9604(e). In such cases the defendant may try to oppose the requested order on the ground that the planned response action is not cost effective and will result in too expansive liability for the defendant. See United States v. M. Genzale Plating, Inc., 723 F. Supp. 877, 885 (E.D.N.Y. 1989); United States v. Charles George Trucking Co., 682 F. Supp. 1260, 1266 (D. Mass. 1988).
ceedings in which PRPs may litigate issues related to liability and requires that such claims await enforcement action by the government. Moreover, in enacting section 113(h) Congress sought to "confirm[] and build[] upon existing case law" that had identified limits on the availability of judicial review prior to government enforcement actions. As a summary of this pre-SARA, review preclusion case law demonstrates, Congress clearly intended section 113(h) to foreclose review of CERCLA liability issues prior to government enforcement.

The first federal appellate decision to address the issue of preenforcement review under CERCLA was *J.V. Peters & Co. v. Administrator, EPA.* There, EPA had tried to negotiate with the claimants to clean up an Ohio site containing substantial amounts of hazardous substances. When the parties failed to reach an agreement, EPA decided to exercise section 104 authority and

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70. See 42 U.S.C. § 9613(h)(1)-(5).
71. See id. § 9613(h)(1)-(3). This construction of the statute's terms receives additional strength from SARA's legislative history. See 132 Cong. Rec. S14,929 (daily ed. Oct. 3, 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. H9609 (daily ed. Oct. 8, 1986) (statement of Rep. Roe) ("When the essence of a lawsuit involves contesting the liability of the plaintiff for cleanup costs, the courts should apply the other provisions of section 113(h), which require such plaintiff to wait until the Government has filed a suit under sections 106 or 107 to seek review of the liability issue."). 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. 2835, 2941-42 (separate and dissenting views of Rep. Florio and nine other Representatives):

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 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.* The importance of legislative history to a court's interpretation of a statute is discussed *infra* at note 109.
72. 132 Cong. Rec. S14,928 (daily ed. Oct. 3, 1986) (statement of Sen. Thurmond). 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."); *Reardon,* 731 F. Supp. at 564 ("Section 113(h), enacted as part of the SARA amendments, codified this prior case law prohibiting the pre-enforcement review of EPA cleanup actions.").
73. 767 F.2d 263 (6th Cir. 1985).
74. See id. at 264.
75. For a discussion of the cleanup authority granted to EPA under CERCLA § 104, see supra notes 14–27 and accompanying text.
proceed with its own response action. The plaintiffs thereafter sought an injunction in federal court, asserting that because they would become liable for response costs once EPA had undertaken the cleanup, they needed an immediate hearing or they would be without an adequate remedy.

In affirming the district court’s dismissal of the plaintiffs’ claim, the court of appeals presented two reasons that CERCLA barred the preenforcement review being sought by the plaintiffs, even without an express provision. First, the court concluded that “[b]ecause the Act’s primary purpose is the prompt cleanup of hazardous waste sites,” permitting the immediate review sought by the plaintiffs “would debilitating the central function of the Act.” Second, the court concluded that immediate review would not be available because the cost recovery action under section 107, during which the existence and scope of the plaintiffs’ CERCLA liability would be adjudicated, was an adequate legal remedy. In short, preenforcement review was barred because it would slow cleanups and was unnecessary to ensure adequate judicial review.

Immediately after the Sixth Circuit decision in J.V. Peters, the Third Circuit followed suit in Lone Pine Steering Comm. v. United States EPA, holding that CERCLA barred preenforcement review of liability claims. The principal claimant, a committee of six PRPs allegedly responsible for the costs of cleaning up substantial amounts of hazardous substances at the Lone Pine Land Fill in New Jersey, sought a declaratory judgment that the remedial action EPA selected was too costly and otherwise was...
unlawful under CERCLA.\textsuperscript{82} The court of appeals affirmed the district court's dismissal of the action because "delay[ing] remedial action until the liability situation is unscrambled would be inconsistent with the statutory plan to promptly eliminate the sources of danger to health and environment."\textsuperscript{83}

The strong CERCLA policy of ensuring prompt cleanups led the court to conclude that the statute implicitly forecloses early review of liability—not only when the response action involves emergency removals, but also when EPA pursues a long-term remedial action.\textsuperscript{84} The court also did not want judicial review availability to turn on whether preenforcement review in a particular case would slow the cleanup, and held that the facts of a particular case should not determine jurisdiction.\textsuperscript{85} Finally, the court rejected the plaintiffs' contention that its remedy would be inadequate if the court delayed review until the government had

\textsuperscript{82.} See id. The plaintiffs brought this action one month after EPA signed the Record of Decision ("ROD") adopting a cleanup plan. See id.
Following its selection of the plan for remedial action, EPA provided 142 PRPs with written notice that they could undertake the proposed remedial action and that, if the PRPs did not pursue the cleanup, EPA would proceed with the remedy using federal money. The Committee responded to EPA by urging a less costly plan, which could serve as the basis for a settlement. Shortly thereafter, an EPA official signed the ROD adopting the EPA remedial alternative and this lawsuit followed. See id.

\textsuperscript{83.} Id. at 886. The district court had also concluded that preenforcement review of the claims related to CERCLA liability "'would frustrate Congress' intent to provide a mechanism whereby hazardous sites can be neutralized expeditiously.'" Id. at 884 (quoting district court decision).

The court of appeals viewed Congress's decision to defer judicial review as permissible when acting to protect public health and safety: "[A] statute, at least in a public health area, may prohibit pre-enforcement judicial review." Id. at 886. See id. at 885-86 (discussing other examples of delaying review to promote public health and safety).

\textsuperscript{84.} See id. at 887.

\textsuperscript{85.} See id. at 886. The plaintiffs had argued that judicial review of their claims would not slow the cleanup of the site. See id. Nevertheless, the court worried that a reviewing court would be required to monitor implementation of the remedy, if it granted review prior to enforcement action by the government. See id.

Consistent with its view that jurisdiction over a preenforcement claim should not turn on the specific underlying facts, the Third Circuit rejected another attempt to gain early review of a CERCLA claim in Wheaton Indus. v. EPA, 781 F.2d 354 (3d Cir. 1986). The plaintiff brought that action seeking a declaratory judgment and an injunction against spending Superfund money, after negotiations with the state to design and implement a remedial plan had broken down and the state and EPA had agreed on the use of Superfund money to complete the RI/FS. Id. at 355-56. The plaintiff in Wheaton argued that it sought review only of EPA's refusal to allow the plaintiff to perform the R/FS, and thus should be distinguished from Lone Pine. The Third Circuit rejected this distinction because, in both cases, "the plaintiff sought control of an activity that is a necessary component of remedial actions and based the substantive claim on Section 104 of CERCLA." Wheaton, 781 F.2d at 356. Thus, both of the plaintiffs threatened EPA's ability to administer CERCLA cleanups promptly.
completed its cleanup and had sought to recover its response costs.\textsuperscript{86}

In\textit{ Wagner Seed Co. v. Daggett},\textsuperscript{87} the Second Circuit also held that CERCLA foreclosed preenforcement review of EPA’s hazardous substance cleanup efforts. The \textit{Wagner Seed} plaintiff owned a warehouse storing agricultural chemicals. Lightning struck the warehouse, causing a fire that totally destroyed the building, as well as water runoff that carried toxic chemicals onto surrounding properties.\textsuperscript{88} After the plaintiff conducted an initial cleanup, EPA decided that additional cleanup measures were necessary and accordingly issued a section 106 order to the plaintiff, indicating that the site posed an imminent and substantial endangerment to public health and the environment, and requiring plans to eliminate contamination completely.\textsuperscript{89}

The plaintiff’s district court action alleged that Wagner Seed was not properly subject to the section 106 order because the release of hazardous substances was caused by “an act of God,”\textsuperscript{90} and that it therefore was not liable for response costs under section 107.\textsuperscript{91} Relying on the prior cases that had rejected attempts to gain early review of CERCLA liability issues, the Second Circuit affirmed the district court decision and dismissed the CERCLA claims:

These courts believe that Congress envisioned a procedure that permits the EPA to move expeditiously in the face of a potential environmental disaster. To introduce the delay of court proceedings at the outset of a cleanup would conflict with the strong congressional policy that directs cleanups to occur prior to a final determination of the parties’ rights and liabilities under CERCLA. These policy concerns extend across the

\textsuperscript{86} The plaintiffs in \textit{Lone Pine} had argued that they would be unable to show in an action brought after completion of the government’s cleanup that “the response action was excessive. If the EPA’s remedial action is effective, plaintiffs will not be able to demonstrate that their less comprehensive proposal would also have been adequate to the task. To that extent, the remedial measures would destroy the evidence which plaintiffs require.” \textit{Lone Pine}, 777 F.2d at 885. The Third Circuit believed that CERCLA provided sufficient cost-recovery action review: “The courts are not unaware of bureaucratic excesses and will undoubtedly look carefully at the claims made by the government when suit for reimbursement is brought under § 9607.” \textit{Id.} at 887.
\textsuperscript{87} 800 F.2d 310 (2d Cir. 1986).
\textsuperscript{88} \textit{Id.} at 313.
\textsuperscript{89} \textit{Id.}
\textsuperscript{90} 42 U.S.C. § 9607(b)(1).
\textsuperscript{91} See \textit{Wagner Seed}, 800 F.2d at 313.
spectrum of possible EPA responses including the response taken here—ordering a private party to remedy a chemical spill. . . . The district court lacks jurisdiction to consider the appropriateness of appellant's act of God defense.92

As these cases show, prior to the enactment of CERCLA's timing of review provision in 1986, the courts had uniformly concluded that allowing preenforcement review of CERCLA liability issues would be inconsistent with Congress's intent for prompt, undelayed cleanups of hazardous substances.

PRPs may assert two significant interests to support early judicial review of their CERCLA liability claims, notwithstanding the compelling argument that, based on codification of the results in the above cases, section 113(h) bars district court jurisdiction to consider CERCLA liability issues before enforcement. First, a PRP will probably argue that, by proceeding with the cleanup under section 104 or by promulgating the section 106 order, EPA has placed the PRP in a situation of immediate and likely long-term economic harm that will not be alleviated until a court determines the existence and scope of CERCLA liability.93 Second, a PRP will likely contend that the post-cleanup proceedings, in which liability issues otherwise will be adjudicated,94 come too late because post-response costs will be higher than they would have been had review preceded the cleanup.95

Judge Posner has articulated the latter concern in dicta.96 Specifically, Judge Posner worried that, because the statute pre-
cisely identifies the proceedings in which the issue of the cost effectiveness of a cleanup may be litigated, some litigants may never be able to adjudicate whether certain cleanup costs should have been expended, and consequently they may be forced to bear unnecessary costs.

Given these concerns about the effects of delaying review of PRP liability claims, we consider whether stress points in the statutory scheme would allow immediate judicial review in situations where the PRP seeking to litigate liability issues suffers substantially because the CERCLA liability issues will remain unresolved for long periods of time or because post-cleanup review will be inadequate. Three such stress points provide the basic interpretive strategies for judicial responses to section 113(h)'s broadly preclusive language.

1. The Definition of Removal and Remedial Action

Section 113(h) by its terms limits review only of "challenges to removal or remedial action selected under section 9604 of this

Posner recognized, his discussion is dictum both because the claimant in North Shore Gas only raised claims under other statutes to which the claimant had no standing, see id. at 1244, and because the case did not raise a CERCLA claim that could not be reviewed adequately if review were delayed, see id. at 1245.


98. In North Shore Gas, Judge Posner considered an unusual situation in which two adjacent Superfund sites partly overlapped. EPA held Outboard Marine Corporation responsible for pursuing the cleanup at one of the sites and ordered North Shore Gas to clean up the second site. See North Shore Gas, 930 F.2d at 1241. Outboard Marine's remedial plan involved the construction of a boat slip where the two sites overlapped. North Shore Gas argued that construction of the slip would substantially increase the cost of cleanup at the site for which North Shore Gas was responsible. See id.

Judge Posner considered § 113(h)'s impact if North Shore Gas had contended that the cleanup plan being pursued by Outboard Marine violated CERCLA, and review of that claim had to be delayed until the cleanup was complete. See id. at 1244–45. Examining the post-cleanup remedies that might be available to a PRP in North Shore's position, Judge Posner first discussed a contribution action under 42 U.S.C. § 9607(a)(4)(B), which is permitted by 42 U.S.C. § 9613(h)(1), and declared this action inadequate because its effect would be limited. See North Shore Gas, 930 F.2d at 1244. The action also would result in only the sharing of the costs of an improperly required remedial action. "Such a suit would not rectify the error, but merely change the victim." Id.

Then Judge Posner discussed an action by North Shore Gas against EPA for the reimbursement of improperly incurred costs. See id. (citing 42 U.S.C. § 9606(b)(2)(D) and the exception to the judicial review bar in 42 U.S.C. § 9613(h)(3)). Judge Posner questioned the adequacy of this delayed relief as well: "The rub is that the statute as worded envisages a suit by the person [Outboard Marine] to whom the remedial order was addressed." 930 F.2d at 1244. Judge Posner suggested finally that the solution to this quandary might be to hold that the arbitrary character of the order to Outboard Marine resulted in an arbitrary order to North Shore Gas. Id. at 1245. Although "the breadth of section 113(h) is troublesome," the court did not have to resolve these knotty problems because North Shore Gas had only raised claims under other statutes. Id.
A court's decision whether to foreclose immediate review therefore depends upon whether the PRP is challenging a "removal or remedial action." Those terms, broadly defined in section 101, specifically include "enforcement activities related to" the response action.

The most detailed judicial analysis of CERCLA's definitions of removal and remedial action is contained in the First Circuit's en banc decision in Reardon v. United States ("Reardon II"). There, the plaintiff sought to challenge EPA's placement of a

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100. Because § 113(h) also severely limits judicial review of challenges to "any order issued under section 9606(a) of this title." 42 U.S.C. § 9613(h), a court must also determine whether a party's claim is foreclosed because it challenges the issuance of an order under § 106, 42 U.S.C. § 9606. See Pollution Control Indus. of Am. v. Reilly, 715 F. Supp. 219, 221 (N.D. Ill. 1989). There, EPA had issued a section 106 order requiring the plaintiff to perform an emergency removal action at a site the plaintiff owned. Id. at 220. After the plaintiff notified EPA of the contractor it desired to use for the response action, EPA issued an order disqualifying the contractor because of its involvement in a prior fraud case. Id. The plaintiff then filed the action in question, seeking a preliminary injunction to bar EPA from enforcing the disqualification order. Id. The court held that § 113(h) barred the action because the disqualification order was issued pursuant to EPA's "broad" authority under § 106. See id. at 220–21. The court concluded, moreover, that "[t]o allow plaintiffs to enjoin the EPA's disqualification order would in effect permit them to utilize a judicial mechanism by which to promulgate delay. This would frustrate the very policy underlying section 113(h) . . . ." Id. at 221.


102. 42 U.S.C. § 9601(25) provides that "the 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."

In Reardon II, 947 F.2d at 1514, the court stated that, to the extent § 101(25) had the effect of expanding the scope of review preclusion under § 113(h), the result was an "inadvertent[] rather than purposeful[]" action by Congress. Id. at 1514. The court viewed the expanded definition included in § 101(25) as intended to ensure that the government could recover the costs of enforcement actions brought against responsible parties. Id. at 1514 (citing relevant legislative history). The dissent in Reardon II disagreed strongly with the court's reliance on this legislative history in deciding that a lien was an enforcement activity related to the response action and, therefore, could not be challenged prior to EPA enforcement. See id. at 1525 n.6 (Cyr, J., dissenting).

The court held, however, 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. Id. at 1514. This is a well accepted rule of statutory construction. See Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589, 2596 (1992) (identifying "basic canon of statutory construction that identical terms within an Act bear the same meaning" (citations omitted)); Patterson v. Shumate, 112 S. Ct. 2242, 2251 (1992) (Scalia, J., concurring) ("consistency of usage within the same statute is to be presumed"). But see Nicklos Drilling Co., 112 S. Ct. at 2607 (Blackmun, J., dissenting) ("It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended . . . ." (quoting Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932))).

103. 947 F.2d 1509 (1st Cir. 1991).
CERCLA lien on the plaintiff's property. The court first considered whether section 113(h) barred judicial review of the statutory claims that the Reardons had raised in challenging the legality of the lien. Consistent with the generally accepted starting point for statutory analysis, the court considered the plain and ordinary meaning of the statutory language.

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.

Id. 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(g). 42 U.S.C. § 9607(l)(2).

105. See Reardon II, 947 F.2d at 1512–14. The claimants argued that EPA had violated CERCLA in imposing a lien because the plaintiffs were innocent purchasers of property under 42 U.S.C. § 9601(35), and therefore were not liable for § 107 response costs. See 947 F.2d at 1511; 42 U.S.C. § 9607(b). They also contended that the lien violated the terms of the lien provision because it covered too much property. See 947 F.2d at 1511; 42 U.S.C. § 9607(l)(1) (quoted supra note 104).

106. See Nicklos Drilling Co., 112 S. Ct. at 2594 ("In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance is finished." (citation omitted)); see also United States v. Ron Pair Enterprises, 489 U.S. 235, 241 (1989). This fundamental approach to statutory construction reflects a basic understanding that the governed should have fair notice of the laws that apply to them. See, e.g., Cass R. Sunstein, After the Rights Revolution: Reconceiving the Regulatory State 114 (1990); William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321, 339 (1990); Robert Weisberg, The Calabresian Judicial Artist: Statutes and the New Legal Process, 35 Stan. L. Rev. 213, 233 (1983).

The plain meaning approach also receives strong support from the constitutional structure, which assigns Congress the power to legislate. See Sunstein, supra, at 113; Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, 78 Geo. L.J. 281, 283 (1989). Placing principal reliance on the terms of the statute also serves political process values by encouraging enforcement of the choices elected representatives made on behalf of the public. See A. Michael Froomkin, Climbing the Most Dangerous Branch: Legisprudence and the New Legal Process, 66 Tex. L. Rev. 1071, 1087 (1988); Eskridge & Frickey, supra, at 356. See also Felix Frankfurter, Foreword—A Symposium on Statutory Construction, 3 VAND. L. Rev. 365, 368 (1950) (arguing reliance on statute's text will promote more care in drafting statutes). Finally, reliance by a court on plain meaning may be important to the court's own institutional interest because it provides "a way in which people with potentially divergent views and potentially divergent understandings of what the context would require may still be able to agree about what the language they all share requires." Frederick Schauer, Statutory Construction and the Coordinating Function of Plain Meaning, 1990 Sup. Ct. Rev. 231, 254.

These generally recognized values of a plain meaning rule of interpretation for courts have not foreclosed substantial controversy about how courts actually should apply the rule. For example, many judges and scholars would agree that "[d]eference to plain meaning
nary meaning of the terms used in section 113(h) and concluded that "the activity of filing liens is, in ordinary language, an 'enforcement activity.'"\textsuperscript{107}

This linguistics-based rationale closely relates to the functional approach that several other courts have relied upon to give greater substance to the meaning of CERCLA's terms.\textsuperscript{108} Reliance upon the functional approach requires courts to look beyond the plain terms of CERCLA and to consider as well Congress's reasons for carefully limiting the availability of judicial review.\textsuperscript{109}

requires examination of more than an isolated word." William D. Popkin, The Collaborative Model of Statutory Interpretation, 61 S. CAL. L. REV. 541, 592 (1988). This view of plain meaning appears sensible "because it is impossible to make sense of statutory language without some context." Richard A. Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. CHI. L. REV. 800, 808 (1983). Commentators are less likely to agree, however, on how courts should properly identify the "context" within which to understand the statute's terms. Compare id. ("Of course the words of a statute are always relevant, often decisive, and usually the most important evidence of what the statute was meant to accomplish.") with Patricia M. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 IOWA L. REV. 195, 199 (1983) ("In the context of the statute, other related statutes, or the problems giving rise to the statute, words may be capable of many different meanings, and the literal meaning may be inapplicable or nonsensical.").

Indeed, flexibility in the application of the plain meaning rule has caused Chief Judge Wald to claim that the rule no longer has any real force. See id. at 195 ("[A]lthough the [Supreme] Court still refers to the 'plain meaning' rule, the rule has effectively been laid to rest. No occasion for statutory construction now exists when the Court will not look at the legislative history." (footnote omitted)).

Despite claims that the plain meaning rule no longer exists or that it cannot be applied in a coherent manner, however, the rule continues to influence theories of statutory construction. Reference to a statute's language substantially defines negative theories of statutory interpretation. See William N. Eskridge, Spinning Legislative Supremacy, 78 GEO. L.J. 319, 333; see also id. at 331. Even for scholars who are not strict textualists, the text of the statute—the alpha in the "hierarchy of sources"—is the important, occasionally decisive starting point. See Eskridge & Frickey, supra, at 353 (beginning "Practical Reasoning Model Of Statutory Interpretation" with "Most Concrete Inquiry," the "Statutory Text"). Like this practical reasoning model, Popkin's collaborative model of statutory construction likewise relies on plain meaning. See Popkin, supra, at 595; cf. SUNSTEIN, supra, at 114 ("[T]he words of a statute provide the foundation for interpretation, and those words, together with widely shared conventions about how they should be understood, often lead to uniquely right answers, or at least sharply constrain the territory of legitimate disagreement."). Although authorities differ on the weight that should be given to a statute's plain meaning, the text of a statute remains a fundamental source for its interpretation.

\textsuperscript{107} Reardon II, 947 F.2d at 1512–13. The court also stated in this regard 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.

\textsuperscript{108} Decisions employing the functional approach are discussed infra at notes 110–111 and accompanying text.

\textsuperscript{109} This is a well-accepted next step for courts seeking to understand the meaning of statutory terms or to strengthen the construction that they have given to the statute. The approach involves reference to and reliance upon extrinsic evidence of a statute's meaning, evidence that most often comes from legislative history. See, e.g., Eskridge & Frickey, supra note 106, at 356; SUNSTEIN, supra note 106, at 128. Judge Easterbrook has
Courts have found two purposes of the review preclusion provision important in defining the meaning of the terms "removal" and "remedial actions": the prevention of delays in cleanups and the avoidance of piecemeal review of CERCLA cleanups. Based upon these purposes, courts have identified several tests for determining whether section 113(h) bars immediate review. Courts have held that a plaintiff challenges a removal or remedial action (1) when the contested action constitutes part of the response action and "is reasonably related to the [cleanup] plan's objec-

criticized this general style of statutory construction first because it places too much lawmakersing power in the undemocratic judiciary. See Frank H. Easterbrook, The Role of Original Intent in Statutory Construction, 11 Harv. J.L. & Pub. Pol'y 59, 62 (1988) ("The use of original intent rather than an objective inquiry into the reasonable import of the language permits a series of moves. Each move greatly increases the discretion, and therefore the power, of the court."). He also claims that the method is flawed because, given the insights of public choice theorists, it "ignores the fact that laws are born of compromise" by favoring one side of the compromise at the expense of the other. Id. at 63.

Commentators generally distinguish between judicial reliance on "intent" and on "purpose" in construing statutes. Professor Dickerson has explained the basic distinction as follows: "in general legal usage the word 'intent' coincides with the particular immediate purpose that the statute is intended to directly express and immediately accomplish, whereas the word 'purpose' refers primarily to an ulterior purpose that the legislature intends the statute to accomplish or help to accomplish." Reed Dickerson, The Interpretation and Application of Statutes 88 (1975). Construing a statute according to its general purpose has been subjected to stronger criticism than judicial reliance on the typically narrower intent of a legislative provision, because of the difficulty of discerning a statute's purpose and the consequent likelihood that a court may infer its own purposes from a statute. See, e.g., Sunstein, supra note 106, at 137-38. Courts may also find discerning the legislature's (narrower) intent from the extrinsic source of legislative history difficult, because evidence of legislative intent in the legislative history may itself be ambiguous. See Schalk v. Reilly, 900 F.2d 1091, 1096 n.4 (7th Cir. 1990) (stating, in a discussion of the scope of 42 U.S.C. § 9613(h) review foreclosure, that "[b]oth sides support their interpretation of the statute with lengthy quotations from senators and congressmen trying to put their spin on the statute's interpretation; these contradictory explanations further demonstrate the dangers of judicial reliance on legislative history instead of statutory text." (citations omitted)).

110. See North Shore Gas 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 at 1097 ([c]hallenges ... impact the implementation of the remedy and result in the same delays Congress sought to avoid by passage of the statute ... .

Congress primarily intended to foreclose judicial review that would delay cleanups. In this regard, the Senate Report states that CERCLA bars judicial review of response actions prior to enforcement because preenforcement review "would be a significant obstacle to the implementation of response actions and the use of administrative orders [under § 106, 42 U.S.C. § 9606]. Preenforcement review would lead to considerable delay in providing cleanups, would increase response costs, and would discourage settlement and voluntary cleanups." S. Rep. No. 11, 99th Cong., 1st Sess. 38 (1985).

111. See Voluntary Purchasing Groups ("VPG"), 889 F.2d at 1390; see also Reardon II, 947 F.2d at 1513 (quoting VPG, 889 F.2d at 1390). Senator Thurmond had explained that the review preclusion provision included in SARA "is designed to preclude piecemeal review." 132 Cong. Rec. S14,928 (daily ed. Oct. 3, 1986) (statement of Sen. Thurmond).
Interpreting CERCLA Review Preclusion

tives;”\textsuperscript{112} (2) when the challenged action is “actually part of the enforcement process related to” the cleanup;\textsuperscript{113} (3) when immediate review would “impact [upon] the [cleanup’s] implementation;”\textsuperscript{114} or (4) when immediate review would involve the litigation of issues resolvable only by using information unavailable until government enforcement.\textsuperscript{115}

Notwithstanding these decisions, which rely on the intent of CERCLA and its terms to foreclose judicial review of CERCLA claims in a broad range of cases, other judges have sought to allow early review of CERCLA claims by narrowly construing the definition of removal and remedial actions. These judges viewed the CERCLA terms as ambiguous\textsuperscript{116} because they do not compel a particular conclusion,\textsuperscript{117} and then identified alternative strategies for properly construing the statute. In the most elaborate attempt to explain a narrow construction of the terms “removal” and “remedial actions,” Judge Cyr’s dissent in \textit{Reardon II} supported immediate federal court jurisdiction by relying on two meta-policies that he argued must inform the court’s construction of a statute

\textsuperscript{112} North Shore Gas, 930 F.2d at 1244 (“[A] measure that is ordered as part of a remedial plan, and that is reasonably related to the plan’s objectives so that it can be fairly considered an organic element of the plan, is itself remedial within the meaning of section 113(h).”)

\textsuperscript{113} VPG, 889 F.2d at 1388–89.

\textsuperscript{114} Schalk v. Reilly, 900 F.2d at 1097. The court there relied upon this rule to bar early review of the procedures used by EPA in developing a remedy at the site. \textit{See id.}

\textsuperscript{115} \textit{See Reardon II, 947 F.2d at 1513.}

\textsuperscript{116} A court’s decision that a statute contains an ambiguity is important, because the court is then forced to look beyond the provision’s terms in interpreting the statute. \textit{See, e.g.,} Dewsnup v. Timm, 112 S. Ct. 773, 778 (1992) (concluding that § 506 of the Bankruptcy Code is ambiguous, causing courts to interpret the provision to conform to pre-Code practice). Whether a court chooses to find that statutory language is ambiguous is a significant decision, one that is largely unconstrained. \textit{See Easterbrook, supra note 109, at 62 (“[t]he court may choose when to declare the language of the statute ‘ambiguous.’ There is no metric for clarity.”).} \textit{Compare United States v. American Trucking Ass’n, 310 U.S. 534, 543–44 (1940) (“When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on ‘superficial examination.’” (footnotes omitted)), with Dickerson, supra note 109, at 139 (stating that when a court decides whether a statute is ambiguous, “the statutory text is normally to be read, at least initially, without benefit of legislative history.”).}

\textsuperscript{117} Judge Cyr, in his dissent to the en banc decision of \textit{Reardon II}, described in detail why neither the language nor the legislative history of CERCLA necessarily leads to the conclusion that CERCLA bars immediate review of the lien’s legality under the statute. \textit{Reardon II, 947 F.2d at 1524–27.} Prior to the en banc decision, discussed \textit{supra} notes 103–107 and accompanying text, a First Circuit panel had concluded that the meaning of “response action” was unclear and then had held that CERCLA did not foreclose jurisdiction to resolve claims that the lien violated CERCLA. \textit{See Reardon v. United States, 922 F.2d 28, 32 (1st Cir. 1990) (withdrawn).}
susceptible of multiple meanings. Judge Cyr principally interpreted the statute in accordance with the first meta-policy, the constitutional principle of due process. Applying this principle, he concluded that a CERCLA lien is not an activity related to the enforcement of a removal or remedial action and thus a federal court can review such a lien immediately to determine whether it is permissible under CERCLA.

118. Reardon II, 947 F.2d at 1527–28. Professor Eskridge has suggested that one situation in which "it is not inconsistent with legislative supremacy for a judge to interpret a statute dynamically" arises "when . . . statutory or constitutional meta-policies suggest a narrowing interpretation." Eskridge, supra note 106, at 330 (footnote omitted). Judicial deference in this context accounts for the fact that "there are certain meta-principles that underlie legislative activity. True deference to legislative supremacy will strive to effectuate these underlying principles." Id. at 344. Cf. Sunstein, supra note 106, at 114–15 ("the significance of congressional enactments necessarily depends on background norms about how words should be understood, and those norms are rarely supplied by the legislature itself . . . . [I]n easy as well as hard cases, courts must resort to background assumptions if interpretation is to proceed.").

A court may also seek to account for "statutory or constitutional meta-policies" by requiring a clear statement from Congress before it will interpret a statute in a manner that is contrary to or in tension with those meta-policies. See Harry H. Wellington & Lee A. Albert, Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson, 72 Yale L.J. 1547 (1963). The authors state that:

the invocation of the clear statement rule would seem appropriate . . . where one interpretation of a statute would work vast and far-reaching changes in an established body of jurisprudence, either statutory or common law. Such changes in a body of existing doctrine is [sic] not a factor Congress is likely to have considered in passing a statute, and the disruption worked by such a statute is a consideration worthy of legislative attention.

Id. at 1563 n.50. In this context, judicial construction of statutes in a manner sensitive to underlying meta-principles is consistent with democratic values. See id. at 1563. Cf. id. at 1566 ("Certain issues should be faced squarely by legislatures, and rules of statutory interpretation are, among other things, instruments for inducing such confrontation and instruments for the protection of the people from the courts and the courts from the people.").

119. See Reardon II, 947 F.2d at 1527–28. Cf. id. at 1530 (Cyr, J., dissenting) ("I believe the statute is reasonably interpreted as permitting a prompt postdeprivation challenge at the instance of innocent landowners and is therefore constitutional . . . ."). In this regard, Judge Cyr relies upon the Supreme Court's admonition in Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council, 485 U.S. 568, 575 (1988), that a court "will construe [a] statute to avoid [constitutional] problems unless such construction is plainly contrary to the intent of Congress." 947 F.2d at 1524. The plain meaning rule of statutory construction and a criticism of the rule are discussed supra notes 106–109 and accompanying text.

120. Reardon II, 947 F.2d at 1528. This use of a constitutional meta-principle to inform and indeed to determine the interpretation of a statute is a strategy available to courts, even when the terms of the statute support an alternative interpretation and would not be unconstitutional. See Eskridge & Frickey, supra note 106, at 359 (footnote omitted), who explain that, in one Supreme Court decision "where the plain meaning of the statutory text undercut the Court's interpretation and the historical evidence was ambiguous, the fact that constitutional values supported denying the tax exemption was crucial to the
Judge Cyr relied on a second meta-principle in urging that removal and remedial actions be construed narrowly to allow review: individuals asserting violations of CERCLA should have an opportunity for meaningful review of their claims that the government is acting illegally.121 Regarding the Reardons’ claim that the innocent purchaser exemption protected them from a CERCLA lien, Judge Cyr concluded that the long delayed review CERCLA otherwise provided would be inadequate. Delayed review would not redress “the inability to dispose of the encumbered property while awaiting EPA’s discretionary initiation of an in rem action to recover on an invalid CERCLA lien.”122 This reliance on a judicial review meta-principle comports with interpretive strategies pursued by the Supreme Court.123

Judges have thus taken one of two approaches in interpreting the terms “removal” and “remedial actions,” which initially define the scope of review preclusion under section 113(h). They have either construed the terms broadly by applying a functional test grounded on the language and intent of the review preclusion provision, or they have relied on important meta-policies to narrow the construction of terms that they conclude have no plain, unambiguous meaning.

decision.” Id. When courts rely upon meta-principles to trump the otherwise clear meaning of a text, as the Supreme Court did in this latter context, their actions are much more difficult to defend as consistent with legislative supremacy. But cf. supra note 118 (explaining how judicial reliance on meta-principles is arguably consistent with legislative supremacy).

121. See Reardon II, 947 F.2d at 1527 (contending that foreclosing early review of the Reardons’ CERCLA claims will put it “beyond the court’s power to grant later and adequate relief” and that review preclusion was thus not intended by Congress (citation and internal quotations omitted)).

122. Id. at 1527. Judge Cyr distinguished the inadequacy of review in this limited context from the delayed, but presumably adequate, review available to PRPs “seeking to challenge their potential liability for cleanup costs,” whose injury can be “made whole” by review of the “recent assessment of unwarranted cleanup costs.” Id.

123. See Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670–73 (1986). For additional support in legal scholarship, see Sunstein, who writes that:

Broad delegations of power to regulatory agencies have been allowed largely on the assumption that courts would be available to ensure agency fidelity to whatever statutory directives have been issued. If agencies are able to interpret ambiguities in these directives, the delegation problem increases dramatically. A firm judicial hand in the interpretation of statutes is thus desirable. The point can be made more vivid by imagining cases involving the question whether agency action is reviewable . . . .

Sunstein, supra note 106, at 143.
2. The CERCLA Citizens Suit Provision

The second major stress point for the interpretation of CERCLA's review preclusion originates in the scope of its citizens suit provision.\(^{124}\) The citizens suit provision may provide courts with some flexibility in deciding whether CERCLA forecloses judicial review, because section 113(h)(4) states that a federal court has immediate jurisdiction over a citizens suit "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."\(^{125}\) Section 113(h) thus does not foreclose review of a cleanup in a proper citizens suit. CERCLA does not expressly state, however, the circumstances in which a PRP may bring a citizens suit.

In *Cabot Corp. v. EPA*,\(^{126}\) EPA was working to develop and implement a remedial plan to clean up the Moyer's Landfill site.\(^{127}\) The PRPs responded to EPA's efforts by forming a committee to negotiate with EPA about a possible settlement and by developing an alternative cleanup plan, which became the focus of the committee's negotiations with EPA.\(^{128}\) After this negotiation process broke down and it was certain that EPA would proceed with its own remedial plan,\(^{129}\) the PRPs filed a citizens suit against EPA\(^{130}\) seeking an injunction to bar EPA from pursuing any remedial action at the site.\(^{131}\) The plaintiffs claimed that EPA's remedial plan violated CERCLA because it was not cost effective.\(^{132}\) The court therefore squarely faced the issue of whether this action

\(^{124}\) 42 U.S.C. § 9659.
\(^{125}\) Id. § 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 . . . .

\(^{127}\) Id. at 824.
\(^{128}\) Id. at 825.
\(^{129}\) Id.
\(^{130}\) Id.
\(^{131}\) See 42 U.S.C. § 9659.
\(^{132}\) *Cabot Corp.*, 677 F. Supp. at 825.
could proceed as an exception under section 113(h)(4) to section 113(h)’s general rule of preenforcement review preclusion.

The court concluded that it would look beyond the plain language of section 310\textsuperscript{133} to determine whether these plaintiffs could bring their citizens suit. Even though the PRPs could be plaintiffs in a citizens suit,\textsuperscript{134} the court concluded that the terms of section 113(h) limited the type of claim that plaintiffs could raise in a citizens suit under section 310.\textsuperscript{135} This construction of CERCLA properly recognizes the significance that the entire statute’s structure should have on the construction of a particular provision: courts should construe individual provisions so that they form part of a harmonious statutory structure.\textsuperscript{136} The court harmonized

\textsuperscript{133} 42 U.S.C § 9659.
\textsuperscript{134} See Cabot Corp., 677 F. Supp. at 829 (“The statutory language empowers any person to bring a citizen suit, irrespective of whether that person is also a PRP . . . .”).
\textsuperscript{135} See id. at 826-27 (“The citizen-suit provision is on its face limited by subsection 9613(h) . . . which delays judicial review of most "challenges to removal or remedial actions selected under section 9604" of CERCLA. The PRPs' suit is covered by sec. 9613(h), because it challenges EPA's cleanup activities which thus far have been conducted pursuant to sec. 9604.” (footnote omitted)).
\textsuperscript{136} The court’s interpretive strategy is proper for three reasons. First, a strategy that construes a statute so that it forms a harmonious structure intelligently approaches reading and understanding of the words of the statute:

The interpreter should approach the statutory text as a reasonably intelligent reader would and give the text its most commonsensical reading . . . . Textual analysis should . . . consider how the statutory provision at issue coheres with the general structure of the statute, since other provisions in the statute might shed light on the one being interpreted.

Eskridge & Frickey, supra note 106, at 355 (footnotes omitted); see Oesterich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233, 238 (1968) (“[L]iteral reading" of a provision foreclosing jurisdiction will not be adopted “where literalness in statutory language is out of harmony . . . with an Act taken as an organic whole.” (citation omitted)); see also JAMES W. HURST, DEALING WITH STATUTES 46, 59-60 (1982) (discussing “presumption . . . which enjoins that we read particular words or phrases in the light cast by other parts of the same statute” (footnote omitted)).

Second, the strategy properly accounts for “certain meta-principles that underlie legislative activity. . . . One such principle is that statutes are part of a coherent body of public law that should be implemented in a reasonable manner.” Eskridge, supra note 106, at 344. Presumably that “coherent body” includes the law that is itself being applied. See supra notes 118-120 and accompanying text for a discussion of the significance of meta-principles in construing statutes.

Finally, construing statutory provisions with due regard for the purposes and structure of the entire statute permits a court to account for statutory interactions that arise as a statute moves from enactment to implementation. See T. Alexander Aleinikoff, Updating Statutory Interpretation, 87 Mich. L. Rev. 20, 57 (1988) (“The statute ‘means’ nothing until it takes its place in the legal system, until it begins to interact with judges, lawyers, administrators, and lay people. Each of these interactions changes, or fills out, the meaning of the statute.”).
CERCLA's language and provisions by holding that the Act forecloses immediate review of challenges to response actions that the citizens suit exception otherwise would allow, when the citizen raises claims that, under section 113(h), PRPs cannot have courts review before the government brings an enforcement action.\textsuperscript{137} This construction of the statute was reinforced by Congress's broad intent that cleanups of hazardous waste sites not be delayed by litigation,\textsuperscript{138} as well as by the statements of some legislators that the citizens suit provision should not provide jurisdiction for a PRP's claim relating to the existence or scope of liability for a response action.\textsuperscript{139}

The \textit{Cabot Corp.} court's harmonizing approach suggests that, notwithstanding section 310's broad language which permits challenges to CERCLA violations in citizens suits,\textsuperscript{140} courts should interpret section 113(h) to limit section 310 by allowing review only when a citizen alleges irreparable harm, such as when the plaintiff claims that the government response action threatens harm to the public health or the environment.\textsuperscript{141} Correspondingly, courts should hold that section 113(h) provides no cause of action when a PRP alleges monetary harm, as it typically does when

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\textsuperscript{137} The court stated that:

If the PRPs here, in the guise of citizens, were permitted to raise the same challenges in a citizens suit timed in accordance with § 9613(h)(4) that they, as PRPs, would have had to wait to raise under § 9613(h)(1), subsection (4) would eviscerate subsection (1). In order to avoid reading §§ 9659 and 9613(h)(4) as permitting an 'end-run' around the ban on preenforcement review that would otherwise apply here, § 9613(h)(4) must be read as applying only to those claims that would not otherwise be deferred under §§ 9613(h)(1), (2), (3) or (5).

\textit{Cabot Corp.}, 677 F. Supp. at 828.

\textsuperscript{138} See id. Courts of appeals have relied on this view of CERCLA's purpose to give a broad, functional meaning to the terms removal and remedial action. See \textit{supra} note 110 and accompanying text.

\textsuperscript{139} See \textit{Cabot Corp.}, 677 F. Supp. at 829.

\textsuperscript{140} See \textit{supra} note 125 (quoting relevant portions of citizens suit provision).

\textsuperscript{141} See \textit{Cabot Corp.}, 677 F. Supp. at 829:

Congress' decision to enable EPA to clean up hazardous waste sites prior to litigating the allocation of those cleanups supports a distinction between citizen suits alleging irreparable harms and those claiming monetary damages. Health and environmental hazards must be addressed as promptly as possible rather than awaiting the completion of an inadequately protective response action.

\textit{Id.}
challenging liability. This conclusion reflects the necessary consideration of intra-statutory interactions. The result also comports with the significant narrowing function that context plays in the understanding of language and, more importantly, the narrowing function that courts must perform when construing a text that may be overbroad on its face.

3. Adequacy of Delayed Review

Judge Posner suggested the last of the three initial judicial strategies for interpreting section 113(h) in the context of a PRP’s attempt to litigate the existence or scope of liability. By looking to the caption of the provision—“it is notable that section 113(h)
is captioned ‘timing of review’—and to the legislative purpose of the provision—which does not intend “to defeat an aggrieved person’s presumptive right of judicial review of agency action, but merely to postpone the exercise of the right to the completion of the remedial action”—Posner suggested that, in an appropriate case, a court may allow jurisdiction over a PRP’s preenforcement liability claim. Section 113(h) does more than merely toll the availability of judicial remedies; the statute “specifi[es] the remedies that survive” and may thereby directly affect the adequacy of the relief available after EPA finally brings an enforcement action.

Judge Posner’s view thus appeared to be that, in cases in which section 113(h) has the effect of foreclosing adequate judicial review of liability issues, a court may be able to rely on Congress’s intent that adequate review be ensured, and therefore proceed with immediate review. This construction of CERCLA is strengthened when considered in the context of the meta-policy that effective judicial review should be available to ensure the legality of government action.

146. North Shore Gas Co. v. EPA, 930 F.2d 1239, 1245 (7th Cir. 1991). The general rule of statutory construction is that a court should not look to the title of the statutory provision, if the text of the statute itself has a clear meaning. See Caminetti v. United States, 242 U.S. 470, 490 (1917) ("[W]hen words are free from doubt they . . . are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction or from any extraneous source"); see also West Coast Truck Lines v. Arcata Community Recycling Ctr., 846 F.2d 1239, 1243 (9th Cir.), cert. denied, 488 U.S. 856 (1988).

147. North Shore Gas, 930 F.2d at 1245 (citation omitted).

148. Id.

149. See generally supra notes 118–123 and accompanying text.

150. See supra note 121 and accompanying text for a discussion of this meta-policy.

The United States has suggested one other context in which a question of CERCLA liability may be litigated prior to government enforcement, notwithstanding the broad terms and intent of 42 U.S.C. § 9613(h). The government has taken the position that:

Even though review of the recordation of a lien . . . is generally barred under Section 113(h) until such time as EPA files a cost recovery action . . ., we believe that immediate relief against recordation or a lien would be available if . . . EPA's actions are utterly without foundation in CERCLA and the uncontested facts . . .. In such a situation, the government's action would verge on a violation of due process.

Appellees' Petition for Rehearing with Suggestion for Rehearing En Banc at 13, Reardon v. United States, 947 F.2d 1509 (1st Cir. 1991) (No. 90-9319) (on file with the Harvard Environmental Law Review); see supra note 120 and accompanying text. The government cites Enochs v. Williams Packing Co., 370 U.S. 1 (1962), in support of its position, which appears to be that courts may act immediately to review a government action that would fix CERCLA liability when it is clearly based on undisputed facts that "by no legal possibility" could the government's claim of liability succeed. Id. at 5 (internal quotations
B. Is Review Foreclosed in Cases that Pose No Apparent Threat to CERCLA's Goals or that May Promote Competing CERCLA Goals?

Having surveyed the basic strategies available to courts in deciding whether CERCLA allows judicial review in a case that contests CERCLA liability and that threatens to slow the cleanup of hazardous substances, the Article now considers those strategies in two contexts where the need to foreclose review appears less compelling. In the first, a PRP raises the liability issue after the cleanup has been completed. In the second, citizens claim a response action poses a threat to public health or the environment, in a suit whose judicial review would slow the action's implementation.

1. Judicial Review of a Liability Claim Filed After Completion of the Response Action

In Voluntary Purchasing Groups, Inc. v. Reilly, the court of appeals had to determine whether a district court had jurisdiction over the claim by Voluntary Purchasing Group, Inc. ("VPG") that it was not liable for any of the costs of a removal action conducted by EPA. EPA sent VPG a letter stating that EPA had completed the emergency response action, explaining that VPG was potentially responsible for the response costs, and demanding that VPG (alone or in conjunction with other PRPs) pay EPA the cost of the response action. Upon receipt of this letter, VPG filed an action in district court seeking a declaratory judgment that...
it was not a party liable under section 107 for the costs of the EPA removal.\textsuperscript{156}

Unlike the cases discussed previously,\textsuperscript{157} judicial review of the PRP’s claim in *Voluntary Purchasing Groups* would not have slowed the site’s cleanup.\textsuperscript{158} The court concluded, however, that the plain language of section 113(h) reflected Congress’s “obvious intent to preclude review in relation to removal and remedial actions except in the limited circumstances described in section 113(h).”\textsuperscript{159} Because section 113(h)(1) specifically identifies “[a]n action under section 9607 of this title to recover response costs or damages or for contribution” as one of the five proceedings\textsuperscript{160} in which a court has jurisdiction to review a challenge to a “removal or remedial action selected under section 9604,”\textsuperscript{161} the court straightforwardly concluded that it did not have jurisdiction to adjudicate VPG’s claim for a declaratory judgment of no liability under section 107.\textsuperscript{162}

The court also looked beyond the plain terms of the statute to support its decision that there was no jurisdiction by relying on the broader purposes of section 113(h).\textsuperscript{163} These “[o]ther CERCLA [o]bjectives” are to preclude piecemeal review, thereby allowing EPA to focus its resources as the agency sees fit, and to promote judicial and administrative efficiency by foreclosing “crazy quilt litigation.”\textsuperscript{164}

\textsuperscript{156} Id. at 1383–84. The United States thereafter filed a cost recovery action in another district seeking to recover its response costs from VPG and six other parties that had received the January 1988 letter. *Id.* When the district court denied the motion by EPA to dismiss VPG’s declaratory judgment action, EPA pursued an interlocutory appeal. *Id.*

\textsuperscript{157} See supra part III.A.

\textsuperscript{158} See *Voluntary Purchasing Groups*, 889 F.2d at 1388 (“[R]emoval action has already taken place and any delay caused by the VPG suit will not interfere with the emergency cleanup of the Rogerdale Road site.”). The court stated that CERCLA’s preclusion of judicial review was “clear . . . where such review will delay cleanup.” *Id.*

\textsuperscript{159} Id.

\textsuperscript{160} 42 U.S.C. § 9613(h)(1). The other proceedings are identified in 42 U.S.C. § 9613(h)(2)–(5).

\textsuperscript{161} *Id.* § 9613(h).

\textsuperscript{162} In addition to the terms of the statute, the court relied on two pre-SARA cases that barred review in this type of circumstance. *Voluntary Purchasing Groups*, 889 F.2d at 1389 (citing B.R. MacKay & Sons, Inc. v. United States, 633 F. Supp. 1290, 1294–97 (D. Utah 1986); Pacific Resins and Chems. Inc. v. United States, 654 F. Supp. 249, 253 (W.D. Wash. 1986)).

\textsuperscript{163} See *Voluntary Purchasing Groups*, 889 F.2d at 1390. This common approach to statutory construction is generally discussed *supra* note 109.

\textsuperscript{164} *Voluntary Purchasing Groups*, 889 F.2d at 1390. In a footnote, the court elaborated on this rationale. *Id.* at 1390 n.22 (“If PRPs are allowed to bring actions for declaratory judgment, as VPG asserts here, the government will lose some of the flexibility
Interpreting CERCLA Review Preclusion

In determining that section 113(h) foreclosed the declaratory judgment action, the court appeared to assume that the remedy available to VPG at the time EPA brought the cost recovery action would be adequate.\(^{165}\) The situation in *Voluntary Purchasing Groups* does not, therefore, present the sort of worst case scenario for precluding review that Judge Posner hypothesized in *North Shore Gas*.\(^{166}\) Although there does not yet appear to have been any claim by a PRP alleging that irreparable injury will occur in the absence of immediate review,\(^{167}\) the *Voluntary Purchasing Groups* decision demonstrates that the greatest hurdles to review of such a claim are (1) the terms of section 113(h), where section 113(h)(1) specifically states that liability issues must be litigated in cost recovery actions,\(^{168}\) and (2) Congress's broad intent in section 113(h) to avoid piecemeal review with its attendant disruptions and delays.\(^{169}\)

Beyond the aforementioned stress points that a court might use to find jurisdiction over a PRP claim that does not threaten direct delay of an ongoing cleanup, the statute's only remaining flexibility lies in the meaning in section 113(h)(1) of "[a]n action under section 9607 of this title to recover response costs or damages or for contribution."\(^{170}\) Relying on a broad reading of this

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\(^{165}\) See id. at 1390 n.21 (citation omitted) (the court's "finding that the district court lacks jurisdiction in this matter does not mean that VPG will be deprived of its day in court. VPG will be able to assert all of its allegations from its [declaratory judgment] suit ... as defenses in the [cost-recovery] action filed by the United States ... ").

\(^{166}\) North Shore Gas Co. v. EPA, 930 F.2d 1239, 1244–45 (7th Cir. 1991); see supra note 98. The only immediate injury that VPG asserted to demonstrate an urgent need for prompt review of its declaratory judgment claim was the triggering of liability for prejudgment interest as of the date of EPA's January 1988 letter demanding payment of a sum certain for the EPA removal action. 42 U.S.C. § 9607(a)(4)(D) ("interest [on the amounts recoverable under section 9607] shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned." (emphasis added)). See also Voluntary Purchasing Groups, 889 F.2d at 1390 n.18 ("We realize that the inability of a PRP to initiate a proceeding to resolve the existence and amount of its liability may result in a material adverse impact on some aspects of a PRP's ability to conduct its business (e.g., obtaining credit.").

\(^{167}\) It may well be that the inadequacies of delayed review, which greatly concerned Judge Posner, will not arise in the instant context because a challenge to an ongoing response action is not at issue. Judge Posner feared that, once response costs have already been incurred, a PRP would be left merely to divide up those costs rather than to litigate effectively whether the costs should have been incurred. A PRP in VPG's position will not be able to raise such a claim, because EPA has already completed the response action.

\(^{168}\) 42 U.S.C. § 9613(h)(1).

\(^{169}\) See supra notes 110–111 and accompanying text.

language, which defines when the response action may be challenged, a PRP might argue that an EPA demand letter, such as the one received by VPG shortly before it brought its declaratory judgment action, initiates the section 107 “action . . . to recover response costs.” Under this reading, the PRP, following receipt of the demand letter, would be able to raise in district court any claims it wished regarding the cleanup. A PRP might support this argument by citing the terms of section 107, which refers to the use of a demand letter as though it were part of the usual process of recovering costs.

The Voluntary Purchasing Groups court rejected this argument, because “the [demand] letter did not establish that recovery would be sought from all recipients of the letter.” Although stated imprecisely, the court’s analysis quite convincingly builds upon two other points made in the decision. First, at the definitional level, the court held that the demand letter was an “enforcement activit[y] related” to EPA’s removal action at the site, and therefore the demand letter itself could not be challenged by VPG except in a section 107 cost recovery action. Second, the court presented a functional argument: a decision that the date of the demand letter identifies when a PRP may bring an action to determine the extent of its CERCLA liability would fatally undermine the effectiveness of the letter, because the demand letter is intended in part to encourage settlement with EPA and negotiations among PRPs named in the letter. This functional argument is stronger than the court’s discussion suggests. In the 1986 amendments to CERCLA, which added the review preclusion provision, Congress also added section 122—a provision establishing settlement procedures intended “to expedite settlements.”

171. Id.
172. See id. § 9607(a)(4)(D). This provision is quoted and discussed supra note 166.
173. Voluntary Purchasing Groups, 889 F.2d at 1388. The court supported this point by noting that the United States in fact brought a cost recovery action against only seven of the ten parties identified as potentially responsible in the demand letter. Id. at 1388 n.16.
174. EPA’s demand letter by its terms did in fact “seek” reimbursement of the Superfund from every recipient of the letter. See id. at 1383.
177. See id. at 1388–89.
178. See supra note 63 and accompanying text.
Thus, the *Voluntary Purchasing Groups* court's construction of section 113 properly promotes harmonization of the goals and structure of CERCLA.\(^{181}\)

The *Voluntary Purchasing Groups* decision articulates a convincing rejoinder to any theory that would narrow the range of jurisdiction preclusion under section 113(h) by expanding the scope of a cost recovery action under section 113(h)(1).\(^{182}\) The case also illustrates why, consistent with the Act, preenforcement review of CERCLA liability issues should be foreclosed, even if a response action is complete and review therefore does not threaten to slow an ongoing cleanup.

2. Judicial Review of a Health- or Other Nonliability-Based Claim Filed While a Response Action Is Ongoing

The last of the general circumstances in which a party might claim that a removal or remedial action violates CERCLA arises when the party claims that the response action threatens public health or the environment or contradicts some other policy of CERCLA. In the cases within this category, the plaintiffs could not litigate the same claim in a section 107 cost recovery action.\(^{183}\)

\[a. \text{Availability of Immediate Review Based on the Section 113(h)(4) Exception to Review Preclusion}\]

Claimants asserting health- and other nonliability-based claims in challenging response actions have relied on the express terms

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181. The importance of construing a statute so that it is implemented in an internally coherent manner is discussed supra note 136 and accompanying text.


183. As previously noted, a principal policy reason for holding that review of such liability claims is foreclosed under § 113(h)(1) is that Congress intended for such claims to be reviewed only at the time the government brought the cost recovery action. See supra notes 71–72.
of section 113(h)(4), which provides that such challenges may be brought in:

[a]n 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.\(^{184}\)

Courts have adopted three basic approaches to this exception to review preclusion. Their decisions have turned on the extent to which such courts viewed the terms of section 113(h)(4) as permitting the consideration of overall CERCLA policy to resolve any ambiguity. This Article now considers each of the three principal tactics, and offers a new approach to applying the preclusion exception.

i. Narrow Construction of the Citizens Suit Exception: Reliance on Plain Meaning and Narrow Statutory Goals

In *Schalk v. Reilly*,\(^ {185}\) the plaintiffs sued in federal court alleging that a remedial plan identified by the United States and a private party in an approved consent decree was illegal because the parties had not complied with CERCLA when completing the RI/FS for a site.\(^ {186}\) Specifically, these plaintiffs objected to the plan to dispose of the polychlorinated biphenyls (PCBs) contaminating two landfills through incineration.\(^ {187}\)

The court relied on the "plain language" of section 113(h)(4) in holding that the provision bars review of the proposed remedial action in the context of a citizens suit.\(^ {188}\) The court, applying the

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186. Id. at 1094. The RI/FS is defined supra notes 30–35 and accompanying text. The plaintiffs also claimed that the remedial plan was illegal because EPA had not prepared an environmental impact statement pursuant to the requirements of the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970). Schalk v. Reilly, 900 F.2d at 1094.
188. Id. at 1095. This broad rule of review preclusion is supported, though minimally, by the legislative history. See H.R. Rep. No. 253, supra note 32, pt. 1, at 81, reprinted in 1986 U.S.C.C.A.N. 2863 (“there is no right of judicial review of the Administrator’s selection and implementation of response actions until after the response action [sic] have been completed . . . ”).
last sentence of the provision and particularly noting its use of the past tense, stated that section 113(h)(4) strictly foreclosed the citizens suit provision from being used to challenge remedial actions prior to their completion:

In a challenge to a removal action where a remedial action "is to be undertaken," no action may be brought. That is our situation. An incinerator has been chosen as the method to dispose of hazardous wastes in the Bloomington area, but the remedial action outlined in the consent decree has not yet been undertaken... The statute precludes federal court review at this stage—when a remedial plan has been chosen, but not "taken" or "secured."189

The breadth of the review preclusion becomes even clearer when the court states that CERCLA policy supports the broad preclusion rule identified in the "plain language" of section 113(h)(4): "The legislative history supports the conclusion that federal courts are deprived of subject matter jurisdiction where remedial action has not been completed."190 The first approach thus holds that, despite the presence of a claim that implementation of a response action violates CERCLA because it poses unreasonable risks to human health and the environment, immediate review under the 113(h)(4) exception to review preclusion nonetheless will be unavailable when the response action has not yet been completed.191

189. Schalk v. Reilly, 900 F.2d at 1095.
190. Id. at 1096 (emphasis added). The court in Schalk v. Reilly earlier stated that a broad rule of preclusion is required. See id. at 1095 ("The obvious meaning of this statute is that when a remedy has been selected, no challenge to the cleanup may occur prior to completion of the remedy." (emphasis added)).
191. Two other courts of appeals have reached similar conclusions about the broad scope of CERCLA claim preclusion. See Alabama v. United States EPA, 871 F.2d 1548, 1557 (11th Cir. 1989) ("The plain language of the statute indicates that section 113(h)(4) applies only after a remedial action is actually completed. The section refers in the past tense to remedial actions taken under section 104 or secured under 106. Absent clear legislative intent to the contrary, this language is conclusive." (initial emphasis added)), cert. denied Alabama ex rel Siegelman v. United States EPA, 493 U.S. 991 (1989); Boarhead Corp. v. Erickson, 923 F.2d 1011, 1019 (3d Cir. 1991) ("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 the hazard or who is responsible for its cost should be dealt with after the site has been cleaned up." (emphasis added)).
ii. More Flexible Construction of the Citizens Suit Exception: Reliance on Stages of Response Action Implementation in Light of Statutory Goals

The second of the three approaches that courts have taken in construing section 113(h)(4)'s exception to review preclusion reflects an attempt by courts to apply an apparent textual ambiguity to further the broad policies of CERCLA. In these cases, the courts identify a linguistic ambiguity in the section 113(h)(4) exception but conclude that, because of the text's plain language and CERCLA policy, the exception is not broad enough to allow immediate litigation of all health claims.

In *Neighborhood Toxic Cleanup Emergency v. Reilly*, an association of citizens residing near a site listed on the NPL brought a citizens suit to enjoin EPA's scheduled remedial action because the cleanup presented a health hazard. The court examined section 113(h)(4)'s language and concluded that "Congress's use of the past tense ... combined with its final sentence ... point[s] to one conclusion: Congress intended judicial review of EPA remedial action only after some action is undertaken ... [T]he statute's language fails to answer the question of how much must be done before review is available." To resolve this ambiguity, the court turned to the legislative history of SARA. The court did find "some support" therein for reading the exception broadly to allow review after a remedial plan is formulated, based on the view that plan formulation constitutes action taken. This support was outweighed, however, by the

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193. See id. at 829–30. The site at issue was ranked 12th on the NPL and covered 60 acres and a large number of nearby residences.
194. Id. at 833 (emphasis added). Earlier, the court had made a similar statement about the ambiguity of the exception from review preclusion. See id. at 831 ("[A]lthough the statutory language [in section 113(h)(4)] clearly states that review is unavailable until action is taken, the provision is not entirely clear about what constitutes action taken.").
Conference Committee Report discussion of the scope of the citizens suit exception to review preclusion—"the most authoritative legislative history," according to the court. The Conference Report "clearly indicates that a citizens suit will not lie to challenge a choice of remedy until after a distinct phase of the cleanup is completed." In the court's view, this legislative history meant possible, to maintain citizens' rights to challenge response actions, or final cleanup plans, before such plans are implemented even in part . . . .

196. Neighborhood Toxic Cleanup Emergency, 716 F. Supp. at 833–34. The court commented, "Because the conference committee report on SARA was commended to the entire Congress, it carries 'greater weight than any other of the legislative history.'" Id. See Commissioner of Internal Revenue 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."); see also GWENDOLYN B. FOLSOM, LEGISLATIVE HISTORY: RESEARCH FOR THE INTERPRETATION OF LAWS 33 (1972) ("Where the language in issue has been the subject of difference between measures approved by the two houses and then reconciled in conference, the conference report will be most important.") (footnote omitted)).


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 separable 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.

H.R. Conf. Rep. No. 962, supra note 25, at 224 (1986), reprinted in 1986 U.S.C.C.A.N. 3276, 3317; see also id. (stating that judicial review may proceed when "all the activities set forth in the Record of Decision for the surface cleanup phase have been completed."). Other parts of the legislative record additionally support the view that a stage of the response action must be implemented before a court has jurisdiction over a citizens suit challenging that part of the response action. See H.R. Rep. No. 253, supra note 32, pt. 3, at 23, reprinted in 1986 U.S.C.C.A.N. at 3046, which states that the citizens suit exception to the bar on CERCLA review:

is 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 . . . ." (italics added). 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
that "in no event is judicial review [available] to delay the start of a cleanup remedy."\(^{198}\) In reaching this conclusion, the court necessarily decided that the legislative history upon which it relied is more decisive than Congress's broad intent to protect the public health by safeguarding the public from hazardous wastes.\(^{199}\)

The district court in *Schalk v. EPA*\(^{200}\) reached the same conclusion in dismissing the citizens suit that challenged the selection of a remedial plan, which involved the incineration of PCBs.\(^{201}\) The court first concluded that "the statute is not entirely clear about just when in the course of a remedial action a citizen's [sic] suit may be brought" and therefore it considered CERCLA's legislative history.\(^{202}\) Relying on the committee reports and the statements of particular members of Congress,\(^{203}\) the court concluded that section 113(h)(4) "permits citizens' [sic] suits challenging EPA actions only once a remedial action or discrete phase of a remedial action has been completed."\(^{204}\) The court dismissed the plaintiffs' citizens suit as "premature" because the remedial action at issue had "not yet been implemented."\(^{205}\)

Courts applying this second approach to the review preclusion exception distinguish between claims brought after mere selection under this paragraph, courts should not entertain claims to re-evaluate the selection of remedial action.

See also 132 Cong. Rec. S14,917 (daily ed. Oct. 3, 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."); 132 Cong. Rec. S14,929 (daily ed. Oct. 3, 1986) (statement of Sen. Thurmond) (declaring that § 113(h) is intended to preclude "premature challenges in court to remedy selection or liability").

198. *Neighborhood Toxic Cleanup Emergency*, 716 F. Supp. at 834. In addition to the legislative history, the court cited other cases interpreting § 113(h) to support its decision. See id. at 832. The court did recognize, however, that § 113(h)(4) "arguably allows judicial review of a specific part of the remedial plan already effectuated but alleged to have been effected in violation of some CERCLA/SARA requirement." *Neighborhood Toxic Cleanup Emergency*, 716 F. Supp. at 834.

199. The plaintiffs argued that this policy supported jurisdiction over their claim. See id. at 834.


202. Id. at 1657.

203. See id. at 1657–59.

204. Id. at 1659.

205. Id. Cf. *Werlein v. United States*, 746 F. Supp. 887, 895 (D. Minn. 1990) ("[T]o the extent that plaintiffs can show that they seek under section 9659 [the citizens suit provision] to challenge a distinct, separate phase of the cleanup which has been completed, this Court has jurisdiction to hear such a claim for injunctive relief." (footnote omitted)).
of a site and those following completion of a phase or stage of a remedial action; these courts would refuse review in the former situation and grant review in the latter. The distinction corresponds with the terms of the statute and with the legislative history. However, the approach to the exception discussed below shows that allowing review only after a stage of the cleanup has been completed is problematic when there is a health basis for the citizens suit claim: a court will be unable to prevent the threatened harm if the harmful phase of the remedial plan has already been implemented at the time of review.

iii. Most Flexible Construction of the Citizens Suit Exception: Health- or Other Nonliability-Based Claim May Be Brought Any Time After the Remedial Plan Has Been Selected

The final approach to defining the scope of section 113(h)(4)'s exception to review preclusion focuses principally on CERCLA's policies, once the court has concluded that the statutory language admits a colorable claim that review is not foreclosed.206 This approach reflects a particular concern that broader statutory values will be demeaned by postponed review. Review only after implementation of a phase of the cleanup may be inadequate to ensure protection of important CERCLA values, including protection of human health.207

Although this issue was not resolved by the court, the discussion of the scope of the citizens suit exception to review preclusion

206. Any such colorable claim must be premised on the argument that § 113(h)(4) is ambiguous and that the selection of a response action constitutes "action taken" that is subject to judicial review. See supra note 194.

207. This approach to the review preclusion issue receives some inferential support from a House Report, which ties Congress's concerns about litigation delays to its concern that public health will be threatened:

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

in *Cabot Corp. v. United States EPA* supports a broad exception, at least when the plaintiff raises public health issues. The court in *Cabot Corp.* first identified the ambiguity in the citizens suit exception: "subsection 9613(h)(4) appears to be the provision most hospitable to early judicial review ... Th[e] language arguably permits challenges to EPA's plans even before they have been implemented."210

After identifying what it viewed as an ambiguity in the statute's terms, the court employed two important strategies to resolve that ambiguity. Relying in part on the statements of members of Congress, the court first concluded that the court should construe the provision to promote CERCLA's intent to allow preimplementation review of a claim that implementation of a remedial action plan threatens public health and the environment.212 Second, the court found support for a broad construction of the citizens

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209. See *Neighborhood Toxic Cleanup Emergency*, 716 F. Supp. at 833 ("The [*Cabot Corp.*] court concluded in dicta that pre-remedy citizens suits could [be] brought under section 9613(h)(4) if the plaintiffs sought to address health and environmental hazards, but that they could not be brought if they alleged in essence monetary harm." (citation omitted)).


211. See id. at 828–29. The relevant legislative history is summarized supra note 109. During the debate that preceded final enactment of SARA, however, Representative Glickman sought to foreclose an interpretation of § 113(h) that would permit immediate review of a claim because it was health-based. The Congressman compared a citizen's health-based claim to a PRP's premature liability claim and argued that they are substantially the same because both delay cleanups. Rep. Glickman stated that:

This is a valid argument and one which both neighbors of sites and potentially responsible parties have asserted. Neither of these persons wants 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.

132 CONG. REC. H9583 (daily ed. Oct. 8, 1986). See also id. (statement of Rep. Glickman) ("Clearly the conferees did not intend to allow any plaintiff, whether [a] neighbor . . . or [a] potentially responsible party . . . to stop a cleanup by what would undoubtedly be a prolonged legal battle.").

212. See *Cabot Corp.*, 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)).
suit exception in the due process meta-policy,\footnote{213} because it ensures adequate review of a claim of irreparable injury.\footnote{214}

The analysis in \textit{Cabot Corp.} thus supports a third interpretation of the citizens suit provision, which permits preimplementation review of a citizens suit claim if the claim alleges that implementation of a response action will cause an irreparable injury to public health or the environment.\footnote{215}

\textbf{iv. An Alternative Approach to the Availability of Citizens Suit Jurisdiction Over Health-Based Claims Prior to Implementation of the Response Action}

Although the \textit{Cabot Corp.} decision correctly seeks to promote the central CERCLA purpose of protecting human health and the environment from the dangers posed by hazardous substances, the decision nevertheless is insufficiently attentive to the remedial structure of CERCLA.\footnote{216} This Article suggests an alternative approach, consistent with CERCLA's structure and policies, which allows review in certain circumstances where the preimplementation claim alleges that implementing the proposed response action threatens public health.

\footnote{213} The relevance of meta-policies to statutory construction is discussed \textit{supra} notes 118–123 and accompanying text. The articulation of a due process meta-policy and how that policy relates to CERCLA is discussed \textit{supra} notes 119–120 and accompanying text.\footnote{214} See \textit{Cabot Corp.}, 677 F. Supp. at 829. The court stated that:

\begin{quote}
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.
\end{quote}

\textit{Id.} at 829 n.6.

\footnote{215} In one other case, \textit{Artesian Water Co. v. New Castle County}, 659 F. Supp. 1269 (D. Del. 1987), a 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 EPA's selected remedy, particularly its failure to provide [an alternative water supply]."""" \textit{Id.} at 1290 n.39.

\footnote{216} Admittedly, the \textit{Cabot Corp.} court had no need to engage in a detailed inquiry into whether the court should draw distinctions among health-based claims when deciding whether immediate review is available. The court in fact only had to decide whether PRPs could bring a citizens suit and thereby avoid preclusion of the liability issues the PRPs hoped to litigate. \textit{See supra} notes 134–137 and accompanying text.
Health-based claims in the context of a CERCLA response action may be divided into two broad categories: claims that a remedial action, when completed, will insufficiently protect human health and the environment because hazards will remain at the site; and claims that the implementation of the proposed response action itself poses an undue threat to human health and the environment.

The first of these broad categories includes two related types of claims. The first type relates to the standards that should define a sufficiently clean site following remediation. The second type of claim relates to whether the remedial action has actually resulted in compliance with the applicable cleanliness standards. Both of these claims concern the threat to human health that the site will pose after the remedial action is complete.

CERCLA directly addresses substantive and procedural issues related to the sufficiency of a remedial action. In the 1986 amendments, Congress added section 121, which governs the identification of cleanliness standards, called ARARs, by reference to other statutes. CERCLA ensures that the states are “substantially and meaningfully involved” in the process of identifying these standards and the remedial means for meeting them. States play a substantial role in identifying the ARARs that define whether a remedial action is sufficiently clean, and a decision by EPA to waive any ARAR suggested by the state during the RI/FS process must meet a standard defined in the NCP.

Consistent with these procedural requirements, Congress has also provided directly for judicial review to ensure adequately healthful cleanliness standards in several ways: CERCLA identifies the state as the party with a right to assert a claim alleging that cleanliness standards are inadequate; it specifies the focus

217. See 42 U.S.C. § 9621. This provision is discussed generally supra notes 37-39 and accompanying text.
219. See 40 C.F.R. § 300.515(d) (“A key component of the EPA/state partnership shall be the communication of potential federal and state ARARs.”).
220. The NCP describes six circumstances under which EPA may pursue a remedy that will not result in compliance with an ARAR recommended by the state. See 40 C.F.R. § 300.430(f)(1)(ii)(C). The Record of Decision that accompanies the selection of the remedial action must identify the grounds for deciding not to ensure compliance with a state-recommended ARAR. See id. § 300.430(f)(1)(ii)(B).
221. See 42 U.S.C. § 9621(f)(2)-(3); 40 C.F.R. § 300.515(f)(2).
of judicial review; and it limits review to situations where the remedial action is the subject of a section 106 order.

These CERCLA provisions have important implications both for a court's construction of CERCLA's citizens suit provision and its determination of the specific issue of whether to allow citizens suit jurisdiction when the plaintiff claims that the proposed remedial action will not guarantee a sufficiently clean site. First, when Congress has identified the specific means for vindicating a statutory right that it has created, courts should refrain from modifying the means selected by Congress. Rather, courts should defer to Congress's considered judgment on the question as reflected in the legislative compromise of the enacted statute. The avail-

222. Judicial review considers "the administrative record," and, if "substantial evidence" does not support the EPA decision, CERCLA requires that the remedial action be designed to meet the ARAR identified by the State and improperly waived by EPA. 42 U.S.C. § 9621(f)(2)(B).

223. Id. § 9621(f)(2); 40 C.F.R. § 300.515(f)(2). CERCLA provides that a state may raise its claim by intervening in the action brought by the United States under § 106, 42 U.S.C. § 9606, which would otherwise have resulted in a consent decree including the terms of the remedial action plan EPA selected. See 42 U.S.C. § 9621(f)(2)(B). Section 106 orders are discussed generally supra notes 52-58 and accompanying text.

SARA's legislative history indicates that Congress knew that review under 42 U.S.C. § 9621(f)(2) was available notwithstanding 42 U.S.C. § 9613(h), and was to be the only exception to that latter provision. Declared Rep. Glickman:

The only opportunity for review that is not specifically provided for in the timing of review provision is the opportunity set forth in new section 121(f)(2) and (3), the cleanup standards section relating to remedial actions secured under section 106 and remedial actions at facilities owned or operated by a Federal agency . . . . This opportunity does not exist for fund-financed remedial action.


224. See Farber, supra note 106, at 316 ("[T]he [legislative] supremacy principle does not allow courts to rechoose strategies for Congress."). Judge Easterbrook has explained the theoretical basis for judicial restraint in the face of congressional selection of the means by which a statute is to be applied:

A legislature that seeks to achieve Goal X can do so in one of two ways. First, it can identify the goal and instruct courts or agencies to design rules to achieve the goal. In that event, the subsequent selection of rules implements the actual legislative decision, even if the rules are not what the legislature would have selected itself. The second approach is for the legislature to pick the rules. It pursues Goal X by Rule Y. The selection of Y is a measure of what Goal X was worth to the legislature, of how best to achieve X, and of where to stop in pursuit of X. Like any rule, Y is bound to be imprecise, to be over- and under-inclusive. This is not a good reason for a court, observing the inevitable imprecision, to add to or subtract from Rule Y on the argument that, by doing so, it can get more of Goal X. The judicial selection of means to pursue X
ability of review for states in circumstances identified in the statute also undermines any meta-policy claim to grant citizens suit jurisdiction because meaningful review of claims relating to health-based cleanliness standards is otherwise completely foreclosed.  

Although a private litigant or a court might worry that Congress has fashioned too narrow a remedy, the remedy prescribed by Congress is not unreasonable on its face. First, CERCLA provides the public that will be affected by the quality of cleanliness standards with substantial rights to participate in the formulation of the remedy. These procedural rights allow the public to convince both the state and EPA to select a remedial action ensuring compliance with particular ARARs and to encourage the state to seek federal court review if EPA waives an ARAR that the state had recommended. Second, the remedial structure established by Congress reflects its intent that EPA, and not the states, play the leading role in deploying and protecting the limited resources of the Superfund. Accordingly, states may not pursue judicial review of an EPA decision to waive state-recommended ARARs if EPA itself is pursuing the remedial action and therefore depleting the Superfund. In these circumstances, the state can enforce more rigorous cleanliness standards only by paying for the costs of a more expensive cleanup. In other words, if the remedial action selection process produces sufficient public support for en-

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Frank H. Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 546–47 (1983) (footnotes omitted); cf. Farber, supra note 106, at 293 ("Although courts may not violate clearly enacted legislative intent, the supremacy principle does not prevent them from going beyond such intent in implementing statutory language when there are gaps in the legislative scheme.").

225. The Supreme Court has appeared less willing to hold that Congress has foreclosed review in a statute when, in the absence of a holding that jurisdiction is present, the party seeking review would be severely prejudiced because the issue being raised would not otherwise be the subject of meaningful review. See Board of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc., 112 S. Ct. 459, 466 n.16 (1991); McNary v. Haitian Refugee Ctr., Inc., 111 S. Ct. 888, 896–99 (1991).

226. See 42 U.S.C. § 9617. This provision is described supra at notes 31–35 and accompanying text.

227. Both Congress and EPA recognize that the Superfund has insufficient funds to pay for cleanups of all hazardous substance releases. See supra notes 12–13 and accompanying text; see also Healy, supra note 2, at 73–77.


hanced cleanliness standards in a remedy EPA is pursuing, CERCLA forecloses judicial review of EPA's waiver of the state-recommended ARAR, and the state can respond to the public support only by funding an enhanced remedy. Thus, CERCLA's structure, coupled with underlying congressional intent, should convince the courts that no jurisdiction exists over citizens suits which claim, prior to completion of a discrete phase of the remedial action, that the applicable cleanup standards or ARARs are inadequate.

A court also should conclude that section 113(h) forecloses preimplementation review of the second of the two types of claims relating to post-remedy health hazards at a cleanup site. When a claimant brings an action prior to implementation contending that the planned remedial action will not, in fact, result in compliance with the relevant ARARs, a court will not be able to deny jurisdiction based on Congress's express decision that only a specific method of review is available for such claims. Still, several considerations would support a court's decision to refuse to hear the action.

A denial of jurisdiction comports with legislative history indicating a general congressional intent that review of a response action should not occur until after completion of a discrete phase of the action. The decision that CERCLA bars preimplementation jurisdiction is consistent, moreover, with legislative history indicating that review of this specific type of claim should be foreclosed until EPA has implemented a relevant phase of the cleanup. This decision is also consistent with CERCLA's central

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230. See supra note 197.

231. See H.R. REP. No. 253, supra note 32, pt. 3, at 23, reprinted in 1986 U.S.C.C.A.N. at 3046 ("[A] suit . . . may be appropriate where a specific aspect of the remedial action, which has been taken, in fact fails to attain a standard required under this Act . . . . [T]his paragraph is not intended to allow delay of the clean-up . . . . [C]ourts should not entertain claims to re-evaluate the selection of remedial action."); see also H.R. Rep. No. 253, supra note 32, pt. 1, at 267 (separate and dissenting views of Rep. Florio and nine other Representatives), reprinted in 1986 U.S.C.C.A.N. at 2941, which states that:

The amendment [that included the provision barring preenforcement review] also recognizes the full rights of affected citizens to obtain court review of the adequacy of the remedies selected by EPA at a site. It is the intention of the legislation to permit citizens to bring such challenges at the earliest opportunity without permitting such suits to delay or prevent ongoing cleanup work. Affected citizens should be able to file suit and obtain judicial review while there is still adequate time to require the agency to revise its response action plans to meet applicable legal requirements.

Id.
intent to protect human health. If review is delayed until after a
discrete phase of the cleanup is completed, citizens can still gain
adequate review of these health-based claims because the claims
address the sufficiency of the cleanup in the future. Indeed, by
delaying review until completion of a discrete phase of the cleanup,
a court should be in a position to demand that the parties provide
strong evidence about the program’s effectiveness in meeting the
applicable cleanup standards.

With regard to the second broad category of health-based
claims—claims that the process of implementing a response action
will itself injure public health and the environment—different con-
siderations should determine whether a district court has citizens
suit jurisdiction prior to completion of either a phase of or the
entire response action. When a claimant has participated in the
section 117 process of identifying a cleanup plan and has raised
health-based concerns about the effects of the cleanup procedures
in that context, a court should have jurisdiction over a citizens
suit raising the health-based claims that were unsuccessful in the
proceeding.

Congress enacted the procedural guarantees of section 117 in
order to ensure that communities affected by response actions
would support cleanups that may cause inconveniences for long
periods of time. Without jurisdiction over a citizens suit claiming
that implementation of a proposed response action will be harmful
to public health, the prescribed CERCLA process will not meet
the purposes Congress identified. Most importantly, as the court

233. This claim by affected citizens should be distinguished from a preimplementation
claim by a PRP that the remedial plan selected by EPA will result in undue expenditures
and increased liability for cleanup costs. See supra note 68 and accompanying text. Courts
should deny pre-cost recovery review of such a PRP claim because Congress has determined
that, to prevent delay of cleanups, these liability issues should not be litigated at the urging
of PRPs.
U.S.C.C.A.N. at 2872 (“The Committee is of the strong opinion that communities affected
by Superfund sites will demonstrate much stronger support for actions necessary to clean
up those sites if the community is involved from the beginning in determining the actions
which will be necessary to complete the cleanup.”); H.R. Rep. No. 253, pt. 3, at 26 (1986),
in 1986 U.S.C.C.A.N. at 3188 (“The Committee believes that increased public participation
will in the short term add procedural steps to the decision-making process, but in the long
term will expedite cleanup progress and increase public understanding of and support for
remedial actions undertaken at Superfund sites.”).
235. It should be recognized, however, that parts of the legislative history could
support an inference that Congress viewed the CERCLA public information procedures as
in Cabot Corp. v. United States EPA recognized generally,\textsuperscript{236} when litigants challenge the means selected to pursue a response action as dangerous to human health, barring judicial review until after EPA has implemented the action (or a relevant phase of the action) eviscerates the suit’s purpose: by the time post-implementation review finally becomes available, the threatened damage to human health and the environment already may have occurred. The meta-policy favoring the availability of adequate review thus strongly weighs in favor of jurisdiction in this context.\textsuperscript{237} Moreover, as courts recognized when they granted judicial review of compliance with the National Environmental Policy Act ("NEPA"),\textsuperscript{238} review prior to action by the government is necessary to ensure that the agency fairly and fully considers the environmental and health impacts before the government action is a fait accompli.\textsuperscript{239}
Finally, unlike the issue of the sufficiency of cleanliness standards, Congress has defined no other mechanism to ensure a fair process for considering claims about the effects of implementing a response action. It is anomalous for Congress to establish a process that allows these claims to be raised administratively so as to encourage public participation in and support of the cleanup, but that fails to provide any means to ensure adequate consideration in developing the response action; the absence of meaningful review would likely subvert local support for the cleanup and lead the public to question whether EPA is seriously concerned about important local public health issues.

The process that Congress specified for reviewing the adequacy of cleanliness standards is not, however, irrelevant to the availability of preimplementation review of health-based claims relating to response action implementation. In the cleanliness standard context, Congress’s limited remedy indicates concern that the Superfund not bear undue costs of cleanup and that EPA have discretion to weigh the costs and benefits associated with a Superfund-financed cleanup. This congressional intent should in-

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240. See supra notes 217–223 and accompanying text.

241. Notwithstanding the important policies that would be served by allowing preimplementation review of the limited type of health claim at issue here, review has its costs. As the Seventh Circuit indicated in another context when it rejected a request for preimplementation review of a remedial action, “challenges to the procedure employed in selecting a remedy nevertheless impact the implementation of the remedy and result in the same delays Congress sought to avoid by passage of the statute.” Schalk v. Reilly, 900 F.2d 1091, 1097 (7th Cir. 1990).


243. Cooper Indus. v. EPA, 775 F. Supp. 1027, 1038 (W.D. Mich. 1991) holds broadly that § 13(h)’s “ban on preimplementation review extends not only to parties’ contentions that the remedy selected does not meet the substantive requirements of CERCLA, but also to procedural claims regarding the EPA’s remedy selection process.” Id. This court’s holding went beyond the plaintiff’s original claims that EPA’s proposed response was unnecessarily costly and that the PRP would be held liable for improperly high cleanup costs. Id. at 1038–39. The court instead could have decided the case on the more limited grounds that Congress intended review of these liability issues to be foreclosed until EPA brings an enforcement action to recover response costs. See supra notes 132–139.

244. See supra notes 227–229 and accompanying text. This intent that EPA make its best judgment about the use of the Superfund is also evident in the broad discretion that Congress gave to EPA in deciding the general priority for cleanups in the light of the limited funds available. See S. Rep. No. 848, supra note 12, at 57, reprinted in 1 CERCLA History, supra note 12, at 364 (“In order to achieve the maximum protection of public health, welfare and the environment with the limited resources of the Fund, the President
crease judicial deference to a decision by EPA to pursue a response action, notwithstanding contrary public comment, because EPA concludes that a potential lower-risk cleanup plan simply does not warrant the increased costs to the Superfund of implementing that safer plan.

b. Availability of Immediate Review of Claims Unrelated to CERCLA Liability Issues

A litigant seeking review of a CERCLA claim unrelated to the issue of liability for response costs under section 107 may use other strategies to support a claim for immediate review. Reliance on the basic strategies already identified in discussing liability claims should have a greater chance of succeeding when the underlying claim is not related to liability for two reasons. First, because CERCLA identifies proceedings to litigate liability for section 107 response costs as an exception to section 113(h), courts properly mistrust efforts to hasten the liability determination which was intended to begin only after the government initiates an enforcement action. Second, when the claim being raised is unrelated to liability, competing policy considerations, such as the protection of public health and the environment, the speed of the cleanup process, or the adequacy of delayed review, may weigh in favor of immediate review and prompt courts to define the scope of section 113(h) more narrowly.

In particular, plaintiffs raising these claims which are unrelated to CERCLA liability rely on the strategy that the claim at issue does not present “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,” and thus hope...
to avoid review preclusion under section 113. In *Alabama v. EPA*, the court had to decide whether Alabama could receive immediate review of its claim that EPA had violated CERCLA in allowing hazardous substances removed from a site in Texas to be permanently deposited at a large waste disposal site in Alabama. Although the court specifically rejected the plaintiffs’ argument that their suit was “not a challenge to the remedial action plan selected for the... site” and therefore fell outside the scope of section 113(h), the court nevertheless proceeded to decide this claim on the merits, notwithstanding the terms of section 113.

In allowing review, the court apparently distinguished between a challenge to the remedial action, for which there is no jurisdiction, and a challenge to the procedures resulting in the selection of the remedial action, for which there is jurisdiction. This approach appears to preclude review of the substance of the section 104 response action, which may be conducted only in the limited proceedings identified in section 113(h), but to permit immediate review of the procedures resulting in the response action. Although the *Alabama* court did not express its views

250. *871 F.2d 1548* (11th Cir. 1989).
251. *Id.* at 1551.
252. *Id.* at 1559.
253. *See id.* (addressing and rejecting claims on the merits “to the extent plaintiffs’ complaint may in part be read as not challenging the remedial action plan and therefore not removed from federal jurisdiction by § 113(h)”). The plaintiffs’ claims related to whether, under § 104(c)(2), 42 U.S.C. § 9604(c)(2), EPA should have allowed Alabama to participate as an affected state in public hearings on the appropriate remedial action. *Alabama*, *871 F.2d* at 1556. The court held that Alabama was not an affected state at the time EPA issued the ROD. *Id.* at 1559. The court also held on the merits that citizens of Alabama were not “interested persons” or “affected persons” within the meaning of § 113(k)(2)(B), 42 U.S.C. § 9613(k)(2)(B), at the time EPA issued the ROD. *Alabama*, *871 F.2d* at 1559. Finally, the court held that EPA complied with the publication and comment requirements of §§ 117(a)-(b), 42 U.S.C. §§ 9617(a)-(b). *Alabama*, *871 F.2d* at 1559.

254. *See Alabama*, *871 F.2d* at 1560. Several provisions of CERCLA identify the required procedures. *See supra* Part II for an overview of CERCLA’s response action procedures. The plaintiffs’ claims in this case related to failure to comply with § 104(c)(2) and § 113(k). *See Alabama*, *871 F.2d* at 1556. The court rejected the plaintiffs’ procedural claim under § 117(c), 42 U.S.C. § 9617(c), and stated that, even when a revised remedial plan differs significantly from the original plan, CERCLA merely requires that EPA publish the reason for the change in the remedial plan. *See Alabama*, *871 F.2d* at 1558–59.

255. If a citizens suit were brought to challenge the procedures, a court might conclude that such a procedural challenge applies by definition to actions that have been taken and that are alleged to be inadequate. *See 42 U.S.C. § 9659* (quoted *supra* note 125); *see also supra* note 197 (discussing legislative history supporting construction of citizens suit provision to require completed action). The plaintiff’s action in such a case would therefore arguably fall within the exception for citizens suits identified in § 113(h)(4). The *Alabama* court apparently rejected this reading of § 113(h)(4) when it held that a remedial action must be completed before a citizens suit may challenge it. *See supra* note 191 and accompanying text.
directly, its decision to review the plaintiffs' procedural challenges seems to reflect a concern about whether review delayed until the remedial action has been completed is adequate. Once the remedial action is completed, review would be wholly inadequate because the procedural claims would be moot.256

Another court's willingness to construe narrowly the scope of section 113(h)'s preclusion of judicial review appears in the context of non-liability claims in *Chemical Waste Management, Inc. v. EPA.*257 In this case, the owner of one of the very few incinerators "capable of destroying polychlorinated biphenyls"258 brought a claim contending that EPA had violated CERCLA when it relied on its off-site policy to bar the incinerator from receiving and incinerating PCB-contaminated wastes generated during CERCLA response actions.259 The claimant was therefore neither a PRP nor a citizen affected by implementation of a response action. EPA moved to dismiss, contending that the action was precluded by section 113(h).260

Although EPA had specifically relied on section 106(a)261 in promulgating the off-site policy, which was the subject in part of the plaintiff’s challenge, the court concluded that CERCLA did not foreclose jurisdiction.262 The court identified both a technical statutory basis and a functional, policy-based rationale for its decision to proceed with review of the CERCLA claim. First, the court relied on one of the threshold statutory stress points to justify its holding that there was jurisdiction: the court simply concluded that the claim did not involve a challenge to a section 106 order and that section 113(h) was accordingly inapplicable.263 Second,

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256. See supra part III.B.2.a.iv.
258. Id. at 1045.
259. Id. at 1044–45. This long-standing dispute involved EPA’s application of its “off-site policy” for CERCLA and of 42 U.S.C. § 9621(d)(3), which was enacted as part of SARA. See *Chemical Waste Management,* 673 F. Supp. at 1047–53.
260. Id. at 1054.
263. See id., where the court states that:

[A]s a technical matter, the present ineligibility of the SCA-Chicago facility derives from SARA section 121(d)(3), 42 U.S.C. § 9621(d)(3), and not from the off-site policy (promulgated under section 106). The facility is receiving wastes from sites whose records of decision are governed by the off-site policy. So, in a strict sense, section 113(h) is facially inapplicable.

This conclusory rationale does not explain why the challenge does not attack an order
the court relied on the purposes of the statute and held that immediate review should be available.\textsuperscript{264} CERCLA's goals would be served in such cases because immediate review would not delay the cleanup of CERCLA sites and because delayed review would be inadequate. The court concluded that Congress had intended to foreclose review in order to ensure that cleanups are not delayed,\textsuperscript{265} but found that the remedy sought would in fact hasten cleanups because the specific EPA policy being challenged had actually slowed the pace of cleanups.\textsuperscript{266} The court also found that its second policy rationale—ensuring adequate judicial review—was implicit in CERCLA\textsuperscript{267} and that delayed review of the plain-

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\textsuperscript{264} See supra note 109 (discussing judicial reliance on general purposes of a statute in construing the statute, and identifying criticisms of this approach to statutory construction).

\textsuperscript{265} See Chemical Waste Management, 673 F. Supp. at 1055 ("[T]he legislative history of section 113(h) establishes that it was designed to preclude piecemeal review and excessive delay of cleanup.").

\textsuperscript{266} The court stated in this regard that:

The [challenged] policy enforced by the EPA in determining CERCLA eligibility [to receive materials removed during cleanups] has resulted in documented delays in effectuating the cleanup at CERCLA sites . . . . [S]everal remedial actions have had to be stopped because of a lack of disposal capacity . . . . In this lawsuit, the plaintiffs do not seek any remedy that will result in a delayed cleanup, but rather seek relief that could speed up the disposal of wastes.

\textit{Id.}

\textsuperscript{267} Id. The court noted that "section 113(h) implicitly contemplates that in foreclosing a lawsuit in federal court, an aggrieved party will still have an opportunity to be heard in an action following the completion of the cleanup." \textit{Id.} It likely referred to the most typical preenforcement review situation, when a PRP wishes to litigate liability issues, notwithstanding that those issues may be reviewed adequately in a cost recovery action brought by the government under § 107, 42 U.S.C. § 9607. Judge Posner located a policy of ensuring adequate review in the title of § 113(h), 42 U.S.C. § 9613(h): "Timing Of Review." See supra part III.A.3.
tiff's claim would be inadequate since it would prevent the plaintiff from receiving Superfund dollars. Because these CERCLA policies converged, the court found a strong case for immediate judicial review under CERCLA.

This approach by the Chemical Waste Management court, allowing immediate review of a challenge to a specific EPA procedure, in many respects resembles a construction of CERCLA that would allow immediate review of a citizens suit challenging a proposed response action prior to implementation because of the risks that implementing the chosen plan allegedly poses to public health. In both situations, from a claimant's perspective, the plain meaning of the statutory text is at best ambiguous, and surely would allow a conclusion that there is no immediate jurisdiction. To overcome this language, the claimant therefore must rely on other important policies—adequacy of review, protection of public health, and prompt cleanups. These policies may strongly favor immediate review. First, the inadequacy of delayed review is plain in both contexts. Regarding the other policies, however, the two contexts differ. In Chemical Waste Management, the claimant convinced the court that both of the other policies would be served by immediate review, making the holding granting review relatively uncontroversial. In the case of a citizen wishing to assert a health-based claim, however, the claimant will likely have to convince the court that CERCLA's broad policy to protect human health and the environment outweighs the intent that there be no delay in cleanups. This health-based claim will necessarily present a harder case for a court because review of such a claim

268. See Chemical Waste Management, 673 F. Supp. at 1055. The court declared:

[T]o the extent that plaintiffs . . . are presently being foreclosed from receiving a substantial dollar amount of hazardous waste business because of EPA's wrongful actions, there exists no effective protection of their rights except for this lawsuit. The court will not read section 113(h) . . . to eliminate any opportunity for the plaintiffs to be heard.

Id.

269. Such a theory is proposed supra part III.B.2.a.iv. The theory presented earlier is stronger, however, because it is grounded more firmly on CERCLA's text, structure and policies.

270. This important meta-principle should affect statutory construction and is arguably implicit in CERCLA. See supra notes 121-123 and accompanying text.

271. See supra notes 11, 25 & 192 (identifying Congress's intent that CERCLA protect public health); see also supra note 207 (relating the intent to speed cleanups to the underlying intent to protect public health).

272. See supra notes 11 & 78.
will slow the cleanup, thereby undercutting an important and well-articulated CERCLA policy.\textsuperscript{273} Thus not all claims unrelated to CERCLA response costs liability stand an equal chance of gaining immediate review.

IV. \textbf{Is Judicial Review Foreclosed When Plaintiffs Seek to Litigate Issues Related to Liability or to the Adequacy of CERCLA Cleanups Under Other Statutory Schemes?}

This second principal group of cases allows plaintiffs an entirely new strategy for persuading courts to allow immediate review of CERCLA issues despite section 113(h)'s broad preclusion of review. This different approach entails seeking review of a CERCLA response action by asserting claims under another statutory scheme.

This strategy may offer important advantages to a claimant who requests assistance from the courts in light of claimed incon-

\textsuperscript{273} In addition to this conflict with a CERCLA policy, allowing immediate review of the health-based claim would be in tension with the language of § 113(h)(4), which refers to cleanups that have already been implemented. 42 U.S.C. § 9613(h)(4).

At least one other consideration is important to a court's decision about whether to hear immediately a citizens suit claim. A claim that on its face is both unrelated to liability and intended to promote the public health may still fail to sidestep the review preclusion provision. When a PRP raises a CERCLA claim that appears unrelated to liability for response costs, a court will more likely find review to be precluded than it would have if another party had raised the claim. PRP non-liability claims will most typically threaten the speed and extent of a cleanup. Yet Congress determined that PRPs should shoulder the potential harms associated with delayed review until the government brings a cost recovery action. Moreover, it often may be arguable that, despite the PRP's averment to the contrary, such a claim by a PRP actually relates to the extent of response cost liability.

One example of review preclusion in this context is Environmental Waste Control, Inc. v. Agency for Toxic Substances and Disease Registry, 763 F. Supp. 1576 (N.D. Ga. 1991). There, the plaintiffs owned and operated a landfill that posed a risk to public health. \textit{Id.} at 1578. Pursuant to the discretion provided in § 104, 42 U.S.C. § 9604, the defendant agency performed an assessment of the risks to the public posed by suspected or known health hazards at the landfill. \textit{Environmental Waste Control}, 763 F. Supp. at 1578–79. The plaintiffs' action, brought shortly after the assessment was published, challenged the legality of the assessment. \textit{Id.} at 1579. Plaintiffs alleged that the assessment was false and misleading, that it had damaged their business reputation, and that the process leading to its publication was unconstitutional. \textit{See id.} at 1579. Relying on CERCLA's "very broad definition for 'removal,'" the court stated that "the definition for 'removal' encompasses the preparation of health assessments," which EPA uses to monitor and assess the health risks posed by releases. \textit{Id.} at 1580. The court, relying as well on Congress's intent that cleanups not be slowed, also stated that "the statutory provisions . . . make plain that health assessments are an integral part of a series of regulatory measures which Congress evidently desires to allow to proceed unhindered up to a certain point." \textit{Id.} The court finally held that preparation of the health assessment is an action "selected" under § 104 and that the terms of § 113(h) foreclosing review applied in this case. \textit{Id.}
Sistencies arising from the interaction of different statutory schemes. Such interstatutory inconsistencies might render the ordinarily clear plain meaning of a statute ambiguous when read in its broader context, and it is a function of the courts to recognize and reconcile this conflict. Yet the methods of reso-
ution employed likewise lack consistency. Courts may fashion a judicial resolution to this type of ambiguity through a practical reasoning approach to statutory construction, which seeks to acknowledge and harmonize the relevant statutory directives, or through a mechanical application of traditional canons of statutory construction. These two approaches, however, often point in opposite directions.

...
A litigant wishing to gain immediate review of a CERCLA cleanup may benefit from this strategy if the litigant can bring suit pursuant to an identifiable statute associated with a strong policy favoring prompt consideration of the statutory claim. A court might hear these claims immediately, notwithstanding the broad terms of section 113(h), if it is unwilling to hold that CERCLA has impliedly foreclosed the federal court review that Congress had provided to further other policies of other statutes. Because of the complex issues of statutory construction arising in this context, "one of the most challenging tasks of any court is to unpack interacting statutory policies."279

This Part of the Article considers three paradigm cases where claimants have presented—with varying degrees of success—a

the place of the canons of statutory construction in contemporary law). For a recent example of the canons of statutory construction supporting contrary interpretive conclusions, see American Nat’l Red Cross v. S.G., 112 S. Ct. 2465 (1992), where Justice Scalia, in dissent, states that "[e]ven if it were the case that my reading of the clause rendered [a statutory] phrase superfluous, I would consider that a small price to pay for adhering to the competing (and more important) canon that statutory language should be construed in accordance with its ordinary meaning." Id. at 2481.

In the present context, the generally recognized canon is that "repeals by implication are not favored." Posadas v. National City Bank, 296 U.S. 497, 503 (1936). See also Morton v. Mancari, 417 U.S. 535, 549 (1974); 1A SINGER, supra note 274, § 23.09 ("[S]ubsequent legislation is not presumed to repeal the existing law in the absence of expressed intent." (footnote omitted)). A contrary canon, however, is the "established rule of statutory construction: leges posteriores, priores contrarias abrogant." Watt v. Alaska, 451 U.S. 259, 285 (1981) (Stewart, J., dissenting). Justice Stewart explains that this canon requires that, when two statutes directly conflict, the later statute is to be given effect; see also 1A SINGER, supra note 274, § 23.09 (In the case of irreconcilable conflict between two statutes, "the latest legislative expression prevails, and the prior law yields to the extent of the conflict." (footnotes omitted)).

Judge Posner has devoted scholarly attention to the "popular" canon disfavoring repeal by implication. Posner, supra note 106, at 812. Suggesting that the explanatory rationale that Congress "combs" the statutes and explicitly repeals any statute conflicting with a new one is implausible, Posner argues against the canon:

Since total foresight is not possible, if some latent inconsistency becomes actual all a court can do is figure out as best it can whether Congress would have wanted to forbid the inconsistent application of the old statute or give less scope to the new one.

An alternative basis for this canon is the idea that if the choice is between giving less scope to the new statute and cutting down the intended scope of the old (because both cannot be enforced fully without conflict), Congress must desire the courts to do the first. But there is no basis for this imputation of congressional purpose, and the opposite inference is if anything more plausible—that the enacting Congress cares more about its statutes than those of previous Congresses.

Id. at 812–13.

279. Eskridge, supra note 106, at 338.
conflict between statutory purposes to support the argument that immediate judicial review should be available. The first case arises when a PRP seeks to have a CERCLA claim extinguished in a bankruptcy proceeding and EPA contends that CERCLA bars the review sought by the PRP prior to a cost recovery action. The second paradigm case occurs when a plaintiff seeks early statutory review of claims presented under other statutes and the government argues that section 113(h) of CERCLA nonetheless bars review of the claim. The final case arises when a plaintiff seeks to raise a claim arising under another statute that does not itself provide for statutory review and the government seeks dismissal on the ground that CERCLA forecloses jurisdiction. The relevant language in CERCLA applicable to all three cases is both broad and categorical: “No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 . . . 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,” except in certain defined proceedings that are inapplicable prior to enforcement or implementation.

280. This type of case is discussed infra part IV.A.
281. This type of case is discussed infra part IV.B.
282. This type of case is discussed infra part IV.C.
283. See Reardon v. United States, 731 F. Supp. 558, 563 (D. Mass. 1990) (section 113(h) limitation on jurisdiction “drafted broadly”), aff’d in part and rev’d in part, 947 F.2d 1509, 1515 (1st Cir. 1991) (en banc). Furthermore, the legislative history “reflect[s] the intent that section 9613(h) apply broadly.” Werlein v. United States, 746 F. Supp. 887, 894 (D. Minn. 1990). Comments by legislators, in particular, suggest that the provision was intended to be broad enough to foreclose review under other statutes. See 132 CONG. REC. S14,929 (daily ed. Oct. 3, 1986) (statement of Sen. Thurmond) (“The timing of review section is intended to be comprehensive. It covers all lawsuits, under any authority, concerning the response actions that are performed by EPA . . . . The section also covers all issues that could be construed as a challenge to the response, and limits those challenges to the opportunities specifically set forth in the section.”) (emphasis added); 132 CONG. REC. H9582 (daily ed. Oct. 8, 1986) (statement of Rep. Glickman) (“[Section 113(h)] covers all issues that could be construed as a challenge to the response, and limits challenges to the opportunities specifically set forth in the section.”); id. (statement of Rep. Glickman) (“[C]itizens, including potentially responsible parties, cannot seek review of the response action or their potential liability for a response action unless the suit falls within one of the categories provided in this section.”); cf. S. REP. No. 11, 99th Cong., 1st Sess. 58 (1985) (“[T]he scheme and purposes of CERCLA would be disrupted by affording judicial review of orders or response actions prior to commencement of a government enforcement or cost recovery action.”).
284. 42 U.S.C. § 9613(h) (emphasis added).
A. May a PRP’s CERCLA Liability Be Discharged in a Bankruptcy Proceeding that Occurs Before EPA Attempts to Recover its Cleanup Costs Under Section 107?

As previously explained, the best case for foreclosing review under CERCLA until EPA initiates a response action occurs when a PRP seeks to litigate the existence or scope of its liability under the Act. Such claims threaten to delay cleanups and specifically were intended to be litigated only after the United States itself brings the cost recovery action under section 107. How should a court respond, however, if rather than merely bringing an early claim against EPA, the PRP files for bankruptcy and seeks to have any claim available to EPA for CERCLA response costs discharged in bankruptcy?

Bankruptcy is indeed one area of the law in which several courts have recognized a plain “conflict” with the policies of CERCLA: the Bankruptcy Code policy goal that debtors achieve a “fresh start, an objective made more feasible by maximizing the scope of a discharge,” sometimes collides with the intent of CERCLA that cleanups be pursued promptly with “litigation about cleanup costs [delayed] until after the cleanup.”

Courts so far have endorsed various approaches to interpreting CERCLA based upon consideration of interactions between these two statutory schemes. The Court of Appeals for the Second Circuit was the first appellate court to decide whether section 113(h) affects a bankruptcy court’s ability to discharge claims related to a PRP’s CERCLA liability before EPA has itself sought to recover those costs under section 107. In In re Chateaugay,
LTV Corporation ("LTV") sought reorganization under Chapter 11 of the Bankruptcy Code. During the proceeding, the company identified contingent claims held by EPA and state environmental agencies. Thereafter, "EPA filed a proof of claim for approximately $32 million, representing response costs incurred pre-petition at 14 sites where LTV had been identified as a [PRP] under CERCLA." The government then sought a declaratory judgment that the response costs to be incurred after bankruptcy confirmation could not be discharged, and appealed the district court’s decision that all pre-petition claims, including claims for CERCLA cleanup costs relating to hazardous releases that occurred prior to the petition, could be estimated and discharged.

Presented with what the parties identified as "a conflict between the Bankruptcy Code and CERCLA," the Second Circuit first stated that the result EPA sought would not necessarily promote environmental goals because it might encourage corporations to seek Chapter 7 liquidation or dissolution under state law, ultimately reducing sums available to pay CERCLA response costs. The court also stated, however, that it would construe any inconsistencies in favor of the bankruptcy policy because of the broad intent of the bankruptcy statute, an intent that a statute with a narrower focus could not overcome. The court finally responded

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290. Id. at 999.
291. Id.
292. Id. The $32 million proof of claim was, in EPA’s view, possibly only a fraction of LTV’s total CERCLA liability. The response action had been completed at only one of the sites and LTV may have been liable for response costs to be incurred at additional sites. See id.
293. See id. at 1000.
294. See id. at 1000–01.
295. Id. at 1002.
296. Id. The court stated in greater detail:

[w]hile EPA obviously prefers in this case to keep its CERCLA claim outside of bankruptcy so that it may present it, without reduction, against the reorganized company that it anticipates will emerge from bankruptcy, one may well speculate whether, if unincurred CERCLA response costs are not claims, some corporations facing substantial environmental claims will be able to reorganize at all.

Id. at 1005.
297. Id. at 1002 ("[The B]ankruptcy statute . . . is intended to override many provisions of law that would apply in the absence of bankruptcy—especially laws otherwise providing creditors suing promptly with full payment of their claims.").
298. The court stated in this regard that:
Interpreting CERCLA Review Preclusion

Relying on the most basic interpretive strategy available under CERCLA, the court rejected EPA's argument in very concise and conclusory terms:

CERCLA's prohibition of pre-enforcement review is simply inapplicable. The Court is not being called upon 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." 42 U.S.C. sec. 9613(h) (1988). We therefore need not decide whether CERCLA's ban on pre-enforcement review, if applicable, would constitute an implied repeal of the authority otherwise conferred on federal courts by the Bankruptcy Code.

Thus, the Second Circuit did not address the issue of implied repeal, but instead it relied upon an overly narrow construction of section 113(h).

If the Code, fairly construed, creates limits on the extent of environmental cleanup efforts, the remedy is for Congress to make exceptions to the Code to achieve other objectives that Congress chooses to reach, rather than for courts to restrict the meaning of across-the-board legislation like a bankruptcy law in order to promote objectives evident in more focused statutes.

Id. As the court subsequently made clear, the court did not view § 113(h) as a limited, implied repeal of the Bankruptcy Code, notwithstanding its broad preclusion of federal court jurisdiction. See id. at 1006. The court did not, however, detail further the reasoning behind its decision that the Bankruptcy Code is the "broad legislation" that must receive priority in enforcement.

The court failed to consider the more coherent, contrary approach that inconsistent statutes be construed by giving primary effect to the statute with a limited, special focus. See Alabama ex rel. Siegelman v. EPA, 911 F.2d 499, 504 (11th Cir. 1990) ("traditional view" is that "specific statutes prevail over general statutes dealing with the same basic subjects" (citations omitted)); Popkin, supra note 106, at 615–16 ("The assumption is that the legislature intends the more specific statute to prevail, given the close attention to detail implied by the statute's specificity."); cf. supra note 278 (critiquing repeal by implication canon of statutory construction); Board of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc., 112 S.Ct. 459 (1991) (holding that Bankruptcy Code automatic stay provision, 11 U.S.C. § 362, does not qualify or supersede plain, preclusive language of Financial Institutions Supervisory Act of 1966, 12 U.S.C. § 1818(o)(1)).

299. In re Chateaugay, 944 F.2d at 1006.
300. Id.
301. See supra note 278 for discussion of the implied repeal canon of statutory construction.
Determining a PRP’s liability for CERCLA cleanup costs necessarily involves review of the EPA response action under section 104. Even to estimate contingent liability under section 502(c) of the Bankruptcy Code, a court must consider whether the corporation that has filed for bankruptcy is a responsible party under section 107 of CERCLA and whether EPA is claiming proper response costs. The court accordingly erred in deciding that section 113(h) was irrelevant to the court’s jurisdiction to estimate and discharge claims in bankruptcy.


303. The leading treatise on bankruptcy law includes the following description about the estimation of contingent claims: “In estimating a claim, the bankruptcy court should use whatever method is best suited to the particular circumstances. Although the bankruptcy court is bound by the legal rules which govern the ultimate value of the claim, there are no other limitations on the court’s authority to estimate claims.” 3 COLLIER ON BANKRUPTCY ¶ 502.03, at 502-75 (15th ed. 1991) (footnotes omitted) (emphasis added). Federal appellate courts concur that, when estimating contingent or unliquidated claims, a “bankruptcy court is bound by the legal rules which may govern the ultimate value of the claim. For example, when the claim is based on an alleged breach of contract, the court must estimate its worth in accordance with accepted contract law.” Bitner v. Borne Chem. Co., 691 F.2d 134, 135 (3d Cir. 1982) (citation omitted) (emphasis added). Accord In re Brints Cotton Mktg., Inc., 737 F.2d 1338, 1341 (5th Cir. 1984); see also In re Lane, 68 B.R. 609, 613 (D. Haw. 1986) (estimating value of unliquidated misrepresentation claim based on the likelihood of its success); see generally Note, Procedures for Estimating Contingent or Unliquidated Claims in Bankruptcy, 35 STAN. L. REV. 153 (1982).

In the context of estimating a contingent claim for CERCLA cleanup costs, courts estimating the claim’s worth will consider whether the bankrupt person is liable under § 107, 42 U.S.C. § 9607, and whether the costs sought are consistent with the NCP. See supra note 45 and accompanying text. As previously discussed, review of these issues necessarily involves review of a response action or a § 106 order barred by 42 U.S.C. § 9613(h).

304. In the decision under review by the Second Circuit, the district court had recognized that allowing discharge and estimation of CERCLA claims related to pre-petition releases would result in “administrative difficulties,” but believed that such difficulties “are more properly directed to Congress, which may, if it chooses, provide appropriate legislative redress. They are not and should not be a basis for this Court to imply an exception to the Bankruptcy Code which Congress has not yet seen fit to enact . . . .” In re Chateaugay Corp., 112 B.R. 513, 524–25 (S.D.N.Y. 1990), aff’d, 944 F.2d 997 (2d Cir. 1991). The lower court had described these administrative difficulties in the following terms:

At best, the Court has been told that it will be administratively difficult for state and federal environmental agencies to determine and select which sites should be subject to enforcement action and what remedies should be pursued as to each because of the large number of potentially hazardous sites. However, these problems can be dealt with by increasing the resources assigned to such tasks, and by appropriating sufficient funds for that purpose. They hardly suffice as a basis to ignore the debtor’s right to reorganize its affairs in a rational way . . . .

Id.

The district court’s implicit rationale—that the court exercised appropriate restraint in construing CERCLA narrowly and allowing Congress to make legislative judgments—
Having decided that it had jurisdiction under the Bankruptcy Code to estimate and discharge claims related to liability for the costs of CERCLA response actions, the court then decided the scope of the CERCLA claims subject to the discharge. Relying on Congress’s broad definition of the term “claim” in the Bankruptcy Code, the Second Circuit adopted the district court’s view that claims related to “pre-petition releases or threatened releases of hazardous substances” would be discharged. More specifically, in adopting the district court ruling, the court held that CERCLA claims are discharged in bankruptcy for all “releases that have occurred pre-petition, even though they have not then been discovered by EPA (or anyone else).”

The Second Circuit’s decision to elevate the policies of the Bankruptcy Code over CERCLA contrasts sharply with the discharge of claims may actually have the effect of undercutting legislative supremacy. As Judge Posner has written, “[t]o construe a statute strictly is to limit its scope and its life span—to make Congress work twice as hard to produce the same effect.” Posner, supra note 106, at 821 (footnote omitted); see also Sunstein, supra note 106, at 119 (noting that formalist approach tied solely to literal meaning of the text “would force the legislature to spend its limited time correcting, after the fact, mechanical judicial interpretations.”).

305. See In re Chateaugay, 944 F.2d at 1005.

306. Id. This holding as to the scope of claims subject to discharge was based on the “fresh start” policy of the Bankruptcy Code. See id. See also infra note 318 and accompanying text.

307. In re Chateaugay, 944 F.2d at 1000; see id. at 1005 (“[T]he location of these [unknown] sites, the determination of their coverage by CERCLA, and the incurring of response costs by EPA are all steps that may fairly be viewed, in the regulatory context, as rendering EPA’s claim ‘contingent,’ rather than as placing it outside the Code’s definition of ‘claim.’”). By allowing the discharge of claims related to all pre-petition releases, the court not only denigrated the significance of CERCLA’s review preclusion provision, but also made settlement of CERCLA claims more difficult for EPA. See Kevin J. Saville, Note, Discharging CERCLA Liability in Bankruptcy: When Does a Claim Arise?, 76 Minn. L. Rev. 527, 532 (1991) (“If the debtor can escape both known and unknown liability by entering into bankruptcy, it has no incentive to settle with EPA.”). But see Kenneth E. Aaron, The Chateaugay Appeal: Crash at the Intersection of Bankruptcy and Environmental Law, 6 Toxics L. Rep. (BNA) 535 (1991). Aaron criticizes the Second Circuit for improperly narrowing the definition of “claim” that the district court had adopted. Id. at 536-37.

Notwithstanding the Second Circuit’s affirmation of the district court’s decision, Aaron also argues that the Second Circuit established a threshold requirement of a nexus between the debtor (LTV) and the creditor (EPA), satisfied by an “acute awareness” by the agency of the debtor. See id. at 536. According to Aaron, as long as there is a pre-petition release or threat of a release, EPA’s awareness of a PRP and of the PRP’s pre-petition conduct should have no bearing on whether a dischargeable claim exists. Id.

Although it allowed discharge of claims for pre-petition releases, the court rejected the debtor’s argument that the discharge should also include claims for all response costs “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.” In re Chateaugay, 944 F.2d at 1000.
strict court decision in *In re National Gypsum Co.* There, the court, consistent with the interpretive strategy identified at the outset of this Part, sought to determine the interaction between the two statutes [that] serves most faithfully the policy objectives embodied in the two separate enactments of Congress. In order to best serve the goals of CERCLA in the context of bankruptcy, the Court must recognize the circumstances particular to bankruptcy proceedings and the provisions of the Code that by necessity affect the PRP's ability to partake in environmental costs and remedies, as well as its ability to reorganize.

In seeking to harmonize the two statutes, the district court reached conclusions conflicting with those of the Second Circuit on both of the issues discussed above—the applicability of section 113(h) to the estimation and discharge of a claim in bankruptcy, and the scope of the discharge of CERCLA claims in bankruptcy. The court's analysis of the first issue began with the proposition that the Second Circuit had rejected: the *National Gypsum* court recognized that the section 113(h) bar against preenforcement review applies generally to questions of PRP liability under CERCLA and that those liability issues are implicated when courts estimate and liquidate claims in bankruptcy. This decision did not, however, compel a conclusion that claims related to CERCLA response actions could not be discharged in bankruptcy. The court recognized the exceptions to the bar on review of liability issues and characterized those exceptions as "various enforcement or cost-recovery measures." The court then held that "[i]n reading the Code and CERCLA together, the

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308. 139 B.R. 397 (N.D. Tex. 1992). National Gypsum had filed a Chapter 11 petition for bankruptcy. *Id.* at 399. The United States thereafter filed a proof of claim on behalf of EPA and the Department of the Interior asserting that National Gypsum was liable for response costs and damages under CERCLA. *Id.* at 399–400.

309. *See supra* notes 274–277 and accompanying text.

310. *In re* National Gypsum, 139 B.R. at 404. The court also stated in this regard that "[i]n reading the Code and CERCLA together, the

311. *Id.* at 411. 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). ").

312. *Id.* at 411.
filing of a Proof of Claim [in a bankruptcy proceeding] constitutes such governmental [enforcement or cost recovery] action, and falls under the enumerated exceptions to Section 113(h).” Notwithstanding this judicial sleight of hand, the court properly sought to merge the two statutory policies and narrowed the preclusion of review provision to satisfy Bankruptcy Code policy. The court believed that a broader reading of review preclusion would allow the United States, by not filing a Proof of Claim, to preserve its claims for all sites for post-bankruptcy proceedings to the detriment of all other creditors whose claims are discharged, and of the Debtors to the extent post-bankruptcy environmental claims impact[ ] their ability to effectively reorganize.

With regard to the second issue—the scope of the discharge of CERCLA claims—the court began its analysis by recognizing that Congress intended that the term “claim” would have a broad meaning in the Bankruptcy Code so that, for example, a claim would exist for purposes of bankruptcy without regard to whether a statutory cause of action was ripe for adjudication outside the bankruptcy context. The court did not, however, look solely to this intent and the Bankruptcy Code’s “fresh start” policy. Rather, the court believed the critical distinction to be “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.” The National Gypsum court recognized the general sig-

313. Id.
314. The exceptions to the bar against jurisdiction established by section 113(h) are more specific than the court’s analysis suggests. In fact, the exceptions identify specific proceedings available under CERCLA, and do not specify a bankruptcy proceeding as an enforcement action in which liability issues may be litigated. See 42 U.S.C.§ 9613(h)(1)-(5).
315. See supra note 145 for a discussion of the proper narrowing function that courts perform when statutory language proves to be too broad.
316. In re National Gypsum, 139 B.R. at 411.
317. See id. at 405.
318. See id. at 407 (“This Court is not willing to favor the Code’s objective of a ‘fresh start’ over CERCLA’s objective of environmental cleanup to the extent exhibited by Chateaugay.” (footnote omitted)).
319. Id. at 408 (footnotes omitted). In this regard, the National Gypsum court criticized the Second Circuit Chateaugay court, stating that the Second Circuit provided no basis for excluding response costs from its broad definition of claims in situations where the debtor had disposed of hazardous substances pre-petition, but where a release or a
nificance of the decision in Voluntary Purchasing Groups, Inc. v. Reilly\textsuperscript{320} in seeking to harmonize the policies of CERCLA and the Bankruptcy Code.\textsuperscript{321} There the Fifth Circuit concluded that Congress had enacted section 113(h) precisely to ensure that EPA would have the ability to exercise its discretion in allocating its own resources toward the cleanup of hazardous substances, rather than having EPA's resources allocated to "piecemeal" litigation every time a PRP raises the issue of CERCLA liability prior to the government filing a costly recovery action.\textsuperscript{322} The National Gypsum court concluded that, in cases where PRPs file for bankruptcy, EPA no longer retains full enforcement discretion when

\textsuperscript{320} 889 F.2d 1380 (5th Cir. 1989).
\textsuperscript{321} See In re National Gypsum, 139 B.R. at 411.
\textsuperscript{322} Voluntary Purchasing Groups, 889 F.2d at 1390. CERCLA litigation requires a substantial commitment of administrative resources. A study recently published by the RAND Institute for Civil Justice reports that "enforcement costs were 11 percent of the Environmental Protection Agency's outlays between FY 1984 and FY 1988." Jan Paul Acton et al., Superfund and Transaction Costs xv (1992). Studying the transaction costs for Superfund cleanups incurred by five very large industrial firms, the RAND study found that "[t]ransaction-cost shares appear to fall as sites move through the remedial process." Id. at 61. If courts adopt a broad rule allowing contingent CERCLA claims to be estimated and discharged in bankruptcy, EPA will be forced to adjudicate many of these claims at a very early stage in the cleanup process and thus dedicate a greater proportion of its administrative resources to litigation transaction costs. A new limit on EPA's ability to allocate its resources according to its own discretion and priorities may substantially affect the implementation of CERCLA, including the speed of cleanups. See Voluntary Purchasing Groups, 889 F.2d at 1390.
deciding whether to file a notice of CERCLA claims;\textsuperscript{323} "[i]n 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."\textsuperscript{324} This modification of EPA's priorities, which demands an earlier filing of claims against PRPs in bankruptcy, and the resulting limitation on EPA's enforcement discretion were necessitated by the policy underlying bankruptcy law.\textsuperscript{325} The significance of the court's decision, however, is that, unlike the Second Circuit, the district court in \textit{National Gypsum} sought to harmonize the two conflicting statutory schemes and limit the erosion of EPA's discretion under CERCLA as much as possible.

The preceding decisions reveal that two important statutory goals conflict within the bankruptcy context. When called upon to reconcile this conflict, the Second Circuit sought to avoid it and held that section 113(h) simply was inapplicable to the analysis.\textsuperscript{326}

\textsuperscript{323} See \textit{In re National Gypsum}, 139 B.R. at 411 n.36 (noting that in \textit{Voluntary Purchasing Groups}, "[t]he Fifth Circuit was not faced with the unique circumstances surrounding the interaction of the Code and CERCLA").

\textsuperscript{324} Id. at 409 (emphasis added).

\textsuperscript{325} See id. at 411 n.34, where the court states that:

\begin{quote}
The Court is cognizant \ldots that the combined effect of its ruling is that in order to preserve its CERCLA claims against a bankrupt PRP, the United States must file a Proof of Claim [for all claims that are fairly contemplated]; and that in filing such Proof of Claim, the United States subjects itself to declaratory relief, otherwise precluded by Section 113(h) \ldots. However, this is the only reading of CERCLA and the Code that strikes a balance between the objectives served by both statutes.
\end{quote}

\textsuperscript{326} In \textit{In re Combustion Equipment Assocs.}, 838 F.2d 35 (2d Cir. 1988), the Second Circuit in dicta cautioned that CERCLA was intended to ensure that EPA's resources be available for the cleanup of hazardous wastes, rather than for piecemeal, atomistic review of CERCLA liability issues. \textit{See id. at 40.} \textit{Combustion Equipment} did not involve an attempt to discharge in bankruptcy CERCLA claims related to pre-petition releases.

The case was filed by Carter Day, the successor to Combustion Equipment Associates, after its December 1983 Chapter 11 reorganization. Carter Day sought a declaratory judgment that bankruptcy reorganization discharged any CERCLA liability that it might have had for two landfill cleanups. \textit{Id.} at 36. Carter Day brought the action after EPA's September and October 1983 identification of Combustion Equipment and 190 other parties as potentially responsible for the costs of cleaning up the two landfills, and after EPA completed the ROD for the sites in 1986. \textit{Id.} The district court concluded that the action was not ripe and dismissed the complaint. \textit{Id.}

On appeal, the Second Circuit viewed ripeness -- and not the scope of section 113(h) preclusion— as the underlying issue. \textit{Id.} at 37. The appeals court agreed that Carter Day's claims were not ripe for review, and expressly stated that it would not reach the question
In contrast, the district court in *National Gypsum* recognized the conflict between the statutes and sought an accommodation that reflected the best possible legal answer in light of the conflict. The Second Circuit’s approach in *Chateaugay* to statutory construction allowed the court to sidestep the broad preclusive language of CERCLA. While permitting the potentially premature discharge of CERCLA claims, the opinion shortchanged the goals of CERCLA in deference to a competing scheme of legislation, and called into doubt the effectiveness of section 113(h) by inviting its circumvention. This is not the problem in itself; rather, the opinion’s fault lies in its overly facile resolution of the conflict between statutes and the future effects that its rationale may have on resolving other statutory inconsistencies. The *National Gypsum* court, on the other hand, narrowed the effect of the broad and categorical terms of section 113(h) preclusion, based on its assessment of the intent and purpose of the competing statutes. In performing this narrowing function, the *National Gypsum* court refrained from adhering blindly to a canon of construction and from deciding the issue based only on a conclusory analysis.

of whether the CERCLA claims could have been discharged, if they had been considered during reorganization. *Id.* at 37. See *id.* at 41 (“Since we have not attempted to rank the various factors . . . , we express no opinion about the outcome of other cases seeking declaratory judgments relating to the discharge of non-CERCLA liability or even of CERCLA liability based on distinguishable facts.”). The court did suggest, however, that the result might very well have been different in the bankruptcy reorganization context:

[The bankruptcy court’s power to estimate contingent liabilities, 11 U.S.C. sec. 502(c), substitutes for ripeness. The fact that some claims could be estimated does not mean that those claims would be ripe for resolution after confirmation, but only that the Bankruptcy Code authorizes the bankruptcy court to decide, in one particular procedural context, what would otherwise be unripe disputes. Under this view, the power to ripen expires with the bankruptcy court’s power to estimate, and Carter Day, having not availed itself of that power, would have lost the opportunity and would now have to wait until the claim is actually ripe. We reiterate that we do not necessarily adopt this view . . . .

*Id.* at 40.

327. This approach was adopted by the district court in Manville Corp. v. United States, 139 B.R. 97 (S.D.N.Y. 1992). The court stated, “to the extent there is a clash between the Bankruptcy Code and CERCLA in the [bankruptcy] context CERCLA does not completely override the Code.” Noting that the Second Circuit in *Chateaugay* pronounced the inapplicability of § 113(h) to a bankruptcy pre-confirmation adversary proceeding, the *Manville* court rejected the government’s claim that the case at bar was distinguishable—that the appellate ruling did not extend to a determination of post-confirmation dischargeability. See *id.* at 104–05.
B. May a PRP (or Another Party) Obtain Preenforcement Statutory Review of a Claim Arising Under Another Substantive Federal Statute that in Effect Challenges a Section 104 Response Action or a Section 106 Order?

The issue raised in the context of a claim brought under another substantive federal statute is very similar to that raised when a PRP seeks to discharge its CERCLA cleanup liability before the government asserts any claim for response costs. Resolution of this issue should turn on how the statutory schemes and policies interrelate with CERCLA. There should be, therefore, a consistent approach to resolving the issue, even though the ultimate conclusion about whether jurisdiction is foreclosed may properly differ in different contexts because the underlying statutory policies will vary. 328 Yet courts have been reluctant to hold that jurisdiction is available because section 113(h) includes such broad and categorical language foreclosing review.

The Second Circuit demonstrated such reluctance in Browning-Ferris Industries of South Jersey v. Muszynski. 329 In that case, Browning-Ferris Industries ("BFI") and EPA were parties to a Resource Conservation and Recovery Act of 1976 ("RCRA") 330 consent order requiring BFI to install wells to monitor groundwater affected by leaching from a BFI landfill. 331 A dispute arose between the parties over the type of pipe to use for monitoring. 332 This dispute continued until EPA issued a section 106 order under CERCLA 333 that required BFI to submit a new monitoring plan that would provide for the installation of stainless steel pipes. EPA intended for this section 106 order to supersede the prior RCRA consent decree, which included no details regarding monitoring. 334

After receiving the section 106 order, judicial review of which section 113(h) expressly bars until EPA itself brings an action to

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328. The basic approach to statutory interpretation when the terms of one statute must be harmonized with one or more other statutes is discussed supra notes 275–279 and accompanying text.
329. 899 F.2d 151 (2d Cir. 1990).
331. 889 F.2d at 152–53. The landfill was listed on the NPL. Id.
332. Browning-Ferris Industries ("BFI") intended to use polyvinyl chloride pipes, while EPA preferred stainless steel pipes. Id.
334. See Browning-Ferris Indus., 899 F.2d at 152–53.
enforce the order, BFI brought an action in district court, asserting claims under RCRA and CERCLA. Relying on the terms of section 113(h), the district court dismissed BFI's action.

The Second Circuit unexpectedly concluded that the case was "an appropriate one in which to assume jurisdiction arguendo without deciding the issue." The court raised the specific concern that "[a] comprehensive ruling on the jurisdictional issues would necessarily have a broad impact on future EPA pollution remediation efforts." The court worried that such a ruling might thwart the important purposes of CERCLA and the breadth of section 113(h), which appears on its face to permit EPA to avoid review of its actions whenever it thinks delayed review is necessary to accomplish its remedial objectives:

A decision [that there is jurisdiction over BFI's claim] might have serious implications for future EPA remediation efforts and could hamper protection of the environment in a way that runs counter to congressional design. Other CERCLA orders that might be one component of an EPA cleanup project that relies upon several statutes could become subject to lengthy and costly legal challenges. Conversely, a decision in EPA's favor could turn a powerful weapon in the fight against pollution into a bludgeon to be used against alleged polluters regardless of prior agreements or understandings.

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336. Browning-Ferris Indus., 899 F.2d at 153. The CERCLA claims challenged the basis for the § 106 order and the existence of an imminent and substantial endangerment. See id. BFI also asserted claims under the Administrative Procedure Act, 5 U.S.C. §§ 701–706, 715–21 (1988), and the Constitution. See id. Such claims are discussed in detail infra, part IV.C and part V.
337. Browning-Ferris Indus., 899 F.2d at 153–54. The district court held that BFI had a sufficient remedy if it complied with the § 106 order and then sued for reimbursement of costs under § 106(b). See Browning-Ferris Indus., 899 F.2d at 153–54.
338. Id. at 159. On the merits, the court concluded that EPA had the authority and the support in the scientific record to require BFI to use stainless steel pipes for testing. See id. at 160–64.
339. Id. at 154.
340. Id. at 160; see EPA Seeks to Avoid Decree’s Protections, Judicial Review, Generator Argues in Brief, 5 Toxics L. Rep. (BNA) 766 (1990) (discussing claim that EPA seeks to avoid terms of a consent decree entered in a RCRA case by initiating administrative procedures under CERCLA and then relying on § 113(h) to avoid judicial review).

The interaction between RCRA and CERCLA has been discussed in other contexts. See Note, United States v. Fisher: "Posner's Dilemma" and the Uncertain Triumph of Outcome Over Process, 21 ENVTL. L. 427, 450 (1991) (arguing that court improperly discourages settlements when it allows review of CERCLA action after consent decree already settled RCRA claim related to same site and contamination); cf. United States v.
The Second Circuit's analysis is striking for three reasons. First, by recognizing the difficulty in resolving the question of jurisdiction and therefore by assuming jurisdiction on that basis, the court did not read CERCLA's plain language as foreclosing absolutely a court's ability to hold that immediate review is available notwithstanding section 113(h)’s broad language.

Second, although the court acknowledged that the statute may not have to be interpreted in a categorical manner, the court's analysis focuses almost exclusively on CERCLA’s policies, ignoring the countervailing policies of other statutes. To be consistent with the approach to statutory construction discussed above, courts facing similar claims should instead construe section 113(h) in the context of the substantive policies of statutes other than CERCLA that may strongly favor immediate review of the plaintiff’s claim. The decision whether jurisdiction is present, therefore, may vary from case to case and should depend on a balancing of the CERCLA policies implicated in the particular case against the applicable policies of the other statute.

The third and final point about Browning-Ferris Industries is that the court plainly viewed the categorical language of section 113(h) as a substantial obstacle to a conclusion that jurisdiction was available immediately. The court, despite its ultimate ruling, seemed reluctant to read CERCLA as giving a court jurisdiction over a claim seeking review of a CERCLA response action or section 106 order prior to enforcement or implementation.

This reluctance to construe section 113(h) narrowly given its broad and categorical terms is also evident in Werlein v. United States. That court focused primarily on the categorical nature of CERCLA's language. In Werlein, several citizens residing near a CERCLA site brought an action against the United States, which owned the site, and several corporations that had rented the site.

Vineland Chem. Co., 692 F. Supp. 415, 420 (D.N.J. 1988) (discussing meaning and effect of 42 U.S.C. § 6905(b), which requires that RCRA be integrated with other statutes, and stating that provision "creates no rights in defendants to resist regulation" and "constitutes an exhortation to the EPA to avoid unnecessary and overlapping regulation. Thus, the decision of when to regulate and under which statutes to regulate is left to the EPA's discretion.").

341. See supra note 328 and accompanying text.
343. Id. at 890.
In addition to asserting claims under CERCLA, the plaintiffs brought statutory claims under RCRA and the Clean Water Act ("CWA") and sought injunctive relief and damages.

The court declared that it lacked jurisdiction to review the claims raised under the other federal (and state) statutes and offered two interpretive strategies as support. First, the court said the "very terms" of the statute compelled this result: "the Court has no subject matter jurisdiction to hear 'any challenges' 'under Federal law . . . or under state law.' The fact that the statute states that it applies to state law shows that Congress intended section 9613(h) to extend beyond CERCLA." In the court's view those terms "obviously permitted "two principled choices . . .: (1) [to] rule that section 9613(h) applies only to CERCLA itself, and allow plaintiffs' injunctive claims under RCRA, CWA and [Minnesota state law] to challenge the ongoing cleanup; or (2) [to] rule that section 9613(h) bars all challenges to the ongoing cleanup under federal or state law."

The court's "all or nothing" approach to interpreting uniformly a statutory provision written "in the plainest of words" appears to receive support from the Supreme Court's construction of the terms of NEPA in Andrus v. Sierra Club. There, the Court explained that "[i]t will ordinarily decline to fracture the clear language of a statute," and held that NEPA did not require that an environmental impact statement be prepared for any appropriation request. But Werlein implicates different statutory policies

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344. Id. See supra note 205.
346. Id.
347. Id. at 892-93.
348. Id. at 892 n.4. In dictum, the court went on to state that, "[f]rankly, were only CERCLA and RCRA involved, the Court probably would have let plaintiffs' RCRA injunctive claims go forward." Id. The court's statement appears to reflect its view that "RCRA has its own limitation of review provision, which only bars review of ongoing remediation which is proceeding diligently," and that the plaintiffs' claim was that the defendants' remedial action was not proceeding diligently. Id.
351. Id. The Court accordingly declined to adopt the position of the District of Columbia Circuit, which had held that statements had to be prepared to accompany any significant appropriation requests. See id. at 355. Cf. ASARCO, Inc. v. EPA, 578 F.2d 319, 328 (D.C. Cir. 1978) (noting EPA cannot define same statutory language—"source" in the Clean Air Act—one way for new source policy and another way for source modification policy).
from *Andrus*; *Andrus* does not categorically foreclose a court’s attempt to harmonize a later statute with preexisting statutory schemes when Congress apparently has not considered them.\(^{352}\) In fact, in an analogous context, the Supreme Court refused to read the ordinary meaning of the term “radioactive materials” into pollution control laws precisely because it would subvert pre-existing statutory policies.\(^{353}\) The *Werlein* court’s first interpretive strategy fails because the court did not recognize that interstatutory conflicts may create ambiguities that necessitate careful lawmaking by courts.

The *Werlein* decision utilized a second interpretive strategy which was powerful in theory, although its application may not

\(^{352}\) In *Werlein*, the court held that CERCLA foreclosed review of the claims that plaintiffs sought to raise under other statutes, notwithstanding the court’s clear understanding that “the purposes underlying those statutes” would be “frustrat[ed].” *Werlein*, 746 F. Supp. at 894. The court stated that:

> By applying section 9613(h) to RCRA, CWA and [the Minnesota state statute] the Court is frustrating, to a certain extent, the purposes underlying those statutes . . . . Nevertheless, it is clear that Congress intended that cleanups under section 9604 go forward unchallenged until completion of a discrete phase. Allowing plaintiffs to challenge the [site’s] cleanup under RCRA, CWA and [the Minnesota statute] would totally eviscerate section 9613(h) and the intent of Congress.

*Id.*

\(^{353}\) *See supra* note 276 (discussing Supreme Court decision in *Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1 (1976)).

A series of Supreme Court cases further supports the need to consider preexisting policies, rather than blindly applying ordinary meaning to a statute’s terms. Construing the scope of federal court jurisdiction to review directly National Labor Relations Board certifications under section 9(c) of the National Labor Relations Act (“NLRA”), 29 U.S.C. § 159(c), the Court has “consistently refused to allow direct review of such orders in the Courts of Appeals.” *Boire v. Greyhound Corp.*, 376 U.S. 473, 479 (1964) (citation omitted). Yet one of the two “extraordinary” exceptions to consistent refusal under the NLRA arose because of the Court’s concerns about important policies independent of the NLRA. Specifically, in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), the court held that direct review of a certification order was available because:

> [T]he Board’s assertion of power to determine the representation of foreign seamen aboard vessels under foreign flags has aroused vigorous protests from foreign governments and created international problems for our Government . . . . [T]he presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial resolution of the controversy over the Board’s power . . . .

*Id.* at 16–17. When a court does look beyond the text and policies of the statute to interpret the document, the resulting interpretation may conflict with an interpretation based only on the terms of the statute.
have been supported by the legislative record. The court inferred that Congress intended to bar early review under other statutes, without regard to whether CERCLA’s policies were directly threatened by the requested judicial review, because Congress believed that any such review would slow cleanup of the site and improperly undermine CERCLA policies.\footnote{See Werlein, 746 F. Supp. at 894 n.8, where the court states that:} The court suggested that Congress had considered CERCLA’s potential interactions with other statutes and decided to reject early jurisdiction to ensure that the CERCLA goal of prompt cleanups remained paramount. Stated in these terms, the court’s decision parallels this Article’s analysis of whether section 113(h) forecloses early review of a health-based CERCLA claim.\footnote{See supra part III.B.2.a.iv. This Article concluded that, because Congress had specifically identified the appropriate means for reviewing claims about appropriate cleanliness standards, early review of a health-based claim contesting ARARs should be barred unless the claim is raised by a state. This conclusion is premised on the view that courts should be most reluctant to construe a statute in a way that alters the specific means identified by Congress for implementing the statute. See supra note 224 and accompanying text.}

Whether the Werlein court’s second theory is correct thus turns on whether Congress actually made the intentional decision inferred by the court from the categorical terms of section 113(h). Because the legislative record offers no direct support for the court’s inference, however, a more likely reading of section 113(h) is that Congress did not consider the complexities of statutory interactions being raised in these cases and that Congress did not intentionally select its preferred means for resolving statutory inconsistencies that might arise.\footnote{This conclusion is also consistent with the clear statement rule, which could be applied in this context to support the meta-policy that courts should interpret statutes in ways that do not significantly change underlying legal rules. See supra note 118.}

Although conflicts between CERCLA’s policy of delayed review and the policies identified in other federal statutes may provide a plaintiff with an argument compelling the grant of jurisdiction...
tion over claims that would otherwise be barred as "premature" under section 113(h),\(^357\) judicial reluctance—fueled by the broad preclusive language of CERCLA—to hear such claims prior to EPA action suggests that the plaintiff’s task likely will be a difficult one. The most reasonable course of action for courts facing such arguments as they arise from the various federal statutes is to accord some, but not presumptive, weight to the broad and categorical plain language of preclusion in section 113(h), and to decide the availability of immediate review not by conclusory, lopsided reliance on a single statute either in favor of or against jurisdiction, but by seeking to harmonize the policies of the two statutes and to achieve the combined intent of the two legislative schemes.\(^358\)

C. May a Party Assert a Claim Under the Administrative Procedure Act and Thereby Obtain Preenforcement Nonstatutory Review of a Section 104 Response Action or a Section 106 Order?

The third group of cases posing possible statutory conflicts involves the challenges to cleanups that are based on rights identified in other, typically procedural, statutes that do not themselves provide for statutory review. Where the federal statute does not itself provide for statutory review, the claimant will have to look

\(^357\) For example, a plaintiff may seek to assert a claim under the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. §§ 1531–1544 (1988), that a CERCLA response action is inconsistent with ESA, 16 U.S.C. § 1540(g), and that a court cannot consider those interests properly after the remedial action or a segment of it is completed. A court should be able to decide in that setting whether the statutes can be harmonized and whether the policies of ESA require that a court conduct review early so that the response action will not threaten the existence of an endangered species. There do not yet appear to be any cases addressing this potential conflict.

\(^358\) This interpretive process should involve a case-specific analysis of the extent to which immediate review threatens the policies of both CERCLA and the other federal statute. This approach would almost surely mean that the decision whether jurisdiction is available for review of a claim raised under a particular federal statute would not be the same for all claims and statutes. Review in different cases would interfere to varying degrees with CERCLA policy goals and other statutory values.

The meta-policy of ensuring the adequacy of judicial review, see supra notes 121–123 and accompanying text, may further support an interpretation that harmonizes the statutes by allowing immediate review when needed to protect rights established by Congress that would be effectively lost if review were delayed. See Leedom v. Kyne, 358 U.S. 184, 190 (1958) ("This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." (citations omitted)). This argument is particularly strong when Congress has provided a statutory right of review under the other federal statute.
to the APA\textsuperscript{359} for a right of action against the government. This situation has arisen when claimants have sought to challenge CERCLA response actions or section 106 orders by relying on procedural rights identified in NEPA\textsuperscript{360} and the National Historic Preservation Act ("NHPA").\textsuperscript{361} Two courts of appeals have decided directly whether claims available under these statutes may be raised to gain early review of a CERCLA response action.

In \textit{Schalk v. Reilly},\textsuperscript{362} a court-approved consent decree between the United States and Westinghouse Electric Corp. had provided for the cleanup of two landfills where polychlorinated biphenyls (PCBs) had been disposed. The decree provided that, as part of the cleanup, PCBs removed from the site would be incinerated.\textsuperscript{363} The complaint brought against EPA alleged that the remedial plan adopted through the consent decree was illegal because, contrary to the requirements of NEPA, EPA had failed to prepare an environmental impact statement.\textsuperscript{364}

To pursue their NEPA claim, the plaintiffs had to assert a cause of action for review under the APA because NEPA itself does not include provisions granting a statutory right of review.\textsuperscript{365} By its terms, however, the APA accords no right of review in cases where federal "statutes preclude judicial review."\textsuperscript{366} Deciding whether a statute withdraws the APA cause of action for nonstatutory review turns on an analysis of that statute—in this case, CERCLA.\textsuperscript{367} The \textit{Schalk v. Reilly} court relied on Congress's broad

\begin{enumerate}
\item[363.] \textit{Id.} at 1093.
\item[364.] \textit{Id.} at 1094.
\item[365.] \textit{See} WILLIAM M. 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]." (citation omitted)); \textit{see also supra} note 239 and accompanying text (discussing courts' rationale that review is available to enforce NEPA's procedures).
\item[366.] 5 U.S.C. § 701(a)(1).
\item[367.] \textit{See} Wheaton Indus. \textit{v. United States EPA}, 781 F.2d 354, 357 (3d Cir. 1986) ("Since CERCLA is the relevant underlying statute, its preclusion of judicial review at this time renders the APA also unavailable as a basis for judicial review."); \textit{see also} Block \textit{v. Community Nutrition Inst.}, 467 U.S. 340, 345 (1984) ("Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.").
\end{enumerate}
interpretation as "to remove challenges to remedial action plans from the jurisdiction of the federal courts until the remedial action has been taken," and held that the NEPA claims could not be raised because "APA review is not available when a federal statute specifically precludes judicial review."

The Schalk v. Reilly court's analysis of the plaintiffs' ability to assert claims under NEPA properly considers the interaction of the three relevant statutes—CERCLA, NEPA, and APA. Plaintiffs' inability to assert their NEPA claims thus reflects Congress's decision that review of such claims would be available only when other federal statutes do not foreclose review. This situation may be contrasted with one in which Congress has created a statutory right and has also provided the express means for gaining judicial review of government actions alleged to impair that statutory right. In the latter situation, a court must weigh both CERCLA and the other federal statute in deciding whether review is foreclosed. This decision should consider Congress's own prescription for adjudicating rights protected by the other statute.


369. Id. at 1097 (citing Block v. Community Nutrition Inst., 467 U.S. 340, 345 (1984)). Other courts have reached the same conclusion that preenforcement review of a CERCLA response action cannot be asserted through the APA because CERCLA itself precludes such review. E.g., Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1390–91 (5th Cir. 1989); Dickerson v. Administrator, EPA, 834 F.2d 974, 977–78 (11th Cir. 1987). The identical conclusion had been reached even before Congress enacted § 113(h) as part of SARA. E.g., J.V. Peters & Co., v. Administrator, EPA, 767 F.2d 263, 264 (6th Cir. 1985).

370. When a PRP asserts the NEPA claim to try to obtain early review of the EPA response action, the APA's preclusion of review provision is not the only obstacle to jurisdiction. One court has held that a PRP lacks standing to assert such a claim because the PRP is not asserting interests within the zone of interests that Congress sought to protect. See North Shore Gas Co. v. EPA, 930 F.2d 1239 (7th Cir. 1991), where the plaintiff was a PRP concerned about the costs of a site cleanup and a related study. Id. at 1241. North Shore Gas brought the action to enjoin implementation of a part of a remedial plan, claiming that, prior to implementation, EPA was required by NEPA to complete an environmental impact statement. Id. at 1241–42. The court concluded that, although North Shore had Article III standing, it did not come within the "zone of interests" protected by NEPA. Id. at 1243. See also Lone Pine Steering Comm. v. United States EPA, 777 F.2d 882, 888 n.4 (3d Cir. 1985) (affirming district court decision that plaintiffs lacked standing to assert NEPA claim because “[t]heir professed interests were limited to potential financial liability for the remedial action”), cert. denied, 476 U.S. 1115 (1986).

371. In the context of CERCLA cleanups, this inability to pursue NEPA claims should have little significance, because CERCLA itself identifies certain important procedural rights, as well as substantive concerns about public health effects, that should be proper subjects of timely judicial review directly under CERCLA. See supra notes 234–243 and accompanying text.

372. See supra note 224 (discussing view that courts should be reluctant to make
The Third Circuit has addressed the issue whether a statute that fails to establish a right of review may support a claim challenging a CERCLA cleanup prior to enforcement in the context of the NHPA. In *Boarhead Corp. v. Erickson*, the plaintiff owned a tract of land in Upper Bucks County, Pennsylvania. Located on the property were a late-eighteenth-century stone farmhouse, stone field walls, and fields that may have contained historical and archeological remains.

Because there had been several serious chemical spills on the property more than a decade earlier, EPA placed the site on the NPL in March 1989. After EPA informed Boarhead that it was a potentially responsible party under CERCLA for the costs of the site's cleanup, Boarhead sued in district court for an injunction against further EPA actions at the site pending completion of a section 106 review under the NHPA. The district court dismissed the claim based on its conclusion that CERCLA’s section 113(h) barred the action.

The Third Circuit’s decision affirming the dismissal of Boarhead’s claim appears to approach the jurisdictional problem in two different ways. From one perspective, the court’s decision that there is no jurisdiction for the NHPA claim is analogous to the decision that there is no jurisdiction over a NEPA claim when that claim involves a challenge to a CERCLA response action. The court appears to hold that the NHPA claim may be pursued only to the extent the plaintiff may establish a right of action under the APA, which in *Boarhead* was the only authority available to a plaintiff arguing that the United States had waived sovereign immunity. Given these premises, the court’s conclusion that there

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373. 923 F.2d 1011 (3d Cir. 1991).
374. *Id.* at 1014.
375. *Id.* The farm was eligible for the National Register of Historic Places. *Id.* at 1014 n.5.
376. *Id.* at 1014.
377. 16 U.S.C. § 470(f) (1988 & Supp. II 1990). Before bringing its claim, Boarhead had informed EPA that the site was eligible for listing pursuant to the NHPA and had asked whether a § 106 review had been conducted as required by the NHPA. *Boarhead*, 923 F.2d at 1014. After Boarhead brought its action in district court, EPA informed Boarhead by letter that, although the § 106 review had not been completed, historic preservation issues would be considered as part of the CERCLA process. *Id.*
378. *See Boarhead*, 923 F.2d at 1016.
379. The court reached this conclusion in two steps. First, the court concluded that, in enacting the NHPA, “Congress must have intended to establish a private right of action
is no jurisdiction is unobjectionable because the APA provides that a claim may not be asserted when another statute—CERCLA in this context—bars review. This Article has discussed the sound basis for this conclusion when considering the court’s holding that there was no jurisdiction over the NEPA claim in Schalk v. Reilly.

Boarhead may be viewed, however, from a second perspective. The case includes extensive analysis that construes the broad and categorical language of section 113(h) as precluding review under all other federal statutes. This analysis relies on the plain terms of section 113(h), which led the court to state that “we must presume Congress balanced the problem of irreparable harm to [the archaeological or historical resources on Boarhead Farm] and concluded that the interest in removing the hazard of toxic waste from Superfund sites outweighed it. Boarhead’s remedy lies with Congress, not the district court.”

This reasoning by the court was therefore constrained to state that: “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 that the APA made it reviewable.

Boarhead, 923 F.2d at 1024 (holding that § 113(h) “deprives [the district court] of the power to hear claims under the Preservation Act, or any other statute, that would interfere with EPA’s clean-up activities on a Superfund site.”).

383. The court stated that:

Congress could hardly have chosen clearer language to express its intent generally to deprive the district court of jurisdiction over claims based on other statutes when the EPA undertakes the clean-up of toxic wastes at a Superfund site. The section begins: “No federal court shall have jurisdiction under federal law . . . .” No language could be plainer. Thus it is unnecessary for us to rely upon the legislative history . . . , even though it is consistent with the statute’s plain language.

Boarhead, 923 F.2d at 1020; see also id. at 1024 (“We cannot understand what clearer evidence could be provided than this [statutory] language.” (citation omitted)).

384. Boarhead, 923 F.2d at 1023. The court equivocated somewhat on the question...
Boarhead court is subject to the same criticism that applied in the decision in Werlein v. United States. The court is too much the servant of overbroad language: if Congress had indeed established rights and a means for pursuing and vindicating those rights under the NHPA, the court should have considered something more than the mere categorical terms of section 113(h) before concluding that review is barred by CERCLA and that those other statutory rights cannot be vindicated.

Courts so far have not adopted a consistent approach to deciding whether section 113(h) of CERCLA bars early review in cases where claimants also assert rights under other federal statutes. This Article contends that a consistent approach to this issue is available and necessitates close attention to the interrelationship of the relevant statutes in deciding whether CERCLA bars early statutory review under another statute. When the claimant challenges a response action by seeking nonstatutory review under the APA and asserts rights established by another statute, however, a court should conclude that CERCLA bars such nonstatutory review without considering the nature of the other statutory rights or the interaction of those rights with CERCLA.

V. Does Section 113(h) Foreclose Preenforcement Review of a Claim That a Section 104 Response Action or Section 106 Order Is Illegal Because the Claimant’s Constitutional Rights Are Being Violated?

Part V considers the extent to which section 113(h) forecloses review of constitutional claims that involve a challenge to a response action or a section 106 order. Particularly in this context, one can appreciate the significance of a court’s decision of whether the court would actually tolerate a situation where NHPA values were in fact being irreparably injured because review was delayed. See id. at 1022 n.17, where the court stated that “the EPA properly construes the Preservation Act to require it to consider the historic preservation concerns . . . before it takes action pursuant to CERCLA.” Accordingly, the court stated that it did not have to “reach the troubling questions of whether judicial review would be available if Boarhead could show that Erickson failed to comply with the regulations the EPA has promulgated pursuant to CERCLA or whether Boarhead would have standing to bring such a suit.” Id. at 890.


386. See id. § 9604.

387. See id. § 9606(a).
whether to rely only on CERCLA’s text or to consider external policies as well to decide the extent to which CERCLA forecloses review of constitutional claims. This Article identifies the three conclusions that courts have reached in interpreting the statute, and the conclusion that reflects the best legal judgment in light of the constitutional and statutory values at issue.

A. Reliance on the Terms of CERCLA and the Legislative History to Support a Decision that CERCLA Forecloses Preenforcement Review

One court of appeals has held that CERCLA bars preenforcement jurisdiction of a PRP’s claim that its inability to challenge liability for a CERCLA response action deprived the claimant of due process and thus violated the Constitution. The plaintiff contended that the court should resolve this claim on the merits, because section 113(h) does not apply to constitutional challenges to CERCLA’s statutory scheme. The Sixth Circuit rejected this contention, holding that section 113(h) itself makes no express provision for jurisdiction over constitutional challenges and that the legislative history of the provision confirms Congress’s intent that there be no jurisdiction prior to enforcement action by EPA.

388. Barmet Aluminum Corp. v. Reilly, 927 F.2d 289 (6th Cir. 1991). In this case, Barmet Aluminum Corp. ("Barmet") had disposed of secondary aluminum dross at two sites in Kentucky. In a June 1988 proposed regulation, EPA listed the two sites on the NPL. Barmet commented to EPA that aluminum dross was not a hazardous substance under CERCLA. Barmet thereafter received a letter from EPA indicating EPA’s belief that Barmet was a responsible party and suggesting that Barmet conduct a study of remedies at one of the sites. EPA subsequently gave Barmet formal notice that it was a PRP for that site. Id. at 290.

389. Id. at 292.

390. Id. at 293 (“Notably, the statutory language of section 9613(h) does not include any explicit provision for constitutional challenges.”). Accord Reardon v. United States, 731 F. Supp. 558, 567 (D. Mass. 1990) (declaring that plain language of section 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.”), rev’d in part, 947 F.2d 1509 (1st Cir. 1991) (en banc).

391. Barmet, 927 F.2d at 293 (citing S. REP. No. 11, supra note 110, at 58). The court was also predisposed to hold that jurisdiction was barred, see 927 F.2d at 292, because, prior to the enactment of 42 U.S.C. § 9613(h), the court had held in J.V. Peters & Co., v. Administrator, EPA, 767 F.2d 263 (6th Cir. 1985), that CERCLA barred preenforcement review of a PRP’s due process claim.

After concluding that CERCLA foreclosed jurisdiction over the constitutional claim Barmet sought to raise, the court rejected Barmet’s argument that Congress lacks power to restrict jurisdiction in a manner that violates litigants’ due process rights. Barmet, 927
This decision is consistent with the decision in South Macomb Disposal Authority v. United States EPA,\(^{392}\) which considered "whether the 1986 Amendments deprive this court of hearing a constitutional challenge to the statutory scheme as a whole" prior to enforcement by EPA.\(^{393}\) The court held that such review was foreclosed by relying first upon the plain meaning of section 113(h):\(^{394}\) "Reading the language of sec. 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."\(^{395}\)

The court also viewed its decision as consistent with the legislative history, which the court believed demonstrated congressional approval of a district court decision prior to the enactment of the 1986 Amendments that had held that CERCLA barred preenforcement review of constitutional claims.\(^{396}\) The South Macomb

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393. Id. at 1245. This case involved two NPL-listed landfills that were operated by the Authority. Id. EPA wrote to the South Macomb Disposal Authority ("Authority") and other PRPs to suggest that they proceed with an RI/FS and to inform them that, in the absence of such action, EPA itself would perform the RI/FS using Superfund monies. Id. at 1246. The Authority later supplied EPA with information EPA had requested and informed EPA that it was proposing to conduct the RI/FS. EPA responded that the Authority's RI/FS was inadequate and that EPA would delay any remedial action until after an adequate RI/FS was completed. Id. The Authority did not respond to this communication and instead brought action in district court. Id. EPA thereafter wrote to the Authority and other PRPs stating that, because it had not received any good faith offer to perform the RI/FS, EPA would itself undertake that project. Id.
394. 42 U.S.C. § 9613(h).
395. South Macomb, 681 F. Supp. at 1249–50. The court also stated in this regard that "neither in its brief nor at oral argument did the plaintiff contend that its suit fell within one of the five exceptions to subsection (h)" that would have provided immediate jurisdiction for the plaintiff's claim. Id. at 1249.
396. Id. at 1250–51. The court quoted from the following legislative history:

Response actions or orders under section 104 and orders under section 106 may be subject to judicial review at the time the government seeks cost
court’s effort to give its decision an aura of certitude by relying on legislative history fails, however, because the legislative history is no clearer than the statute’s terms. Before CERCLA was amended in 1986 to include section 113(h), courts had generally foreclosed preenforcement review of CERCLA claims because of concerns about delayed cleanups, but disagreed on the question of whether CERCLA foreclosed preenforcement review of constitutional claims. Indeed, the South Macomb court stated its conclusion

recovery or acts to enforce the order and collect penalties for noncompliance. This amendment clarifies and confirms that response actions and orders are not subject to judicial review prior to that time.

As several courts have noted, the scheme and purposes of CERCLA would be disrupted by affording review of orders and response actions prior to commencement of a government enforcement or cost recovery action. See, e.g., Lone Pine Steering Committee v. EPA, 22 Env’t Rep. Cas. (BNA) 1118 [sic] (D.N.J. January 21, 1985). These cases correctly interpret CERCLA with regard to the unavailability of pre-enforcement review. This amendment is to expressly recognize that pre-enforcement review would be a significant obstacle to the implementation of response actions and the use of administrative orders. Pre-enforcement review would lead to considerable delay in providing cleanups, would increase response costs, and would discourage settlements and voluntary cleanups.

S. Rep. No. 11, supra note 110 at 58.

The district court commented, “It is noteworthy that the Senate Committee specifically referred to Lone Pine. . . . The court in that case held that the plaintiff could bring neither constitutional challenges nor statutory challenges.” South Macomb, 681 F. Supp. at 1251. This was the same legislative history that the Sixth Circuit relied upon in Barmet Aluminum Corp. v. Reilly, 927 F.2d 289 (6th Cir. 1991), to support its conclusion that jurisdiction over the constitutional claim was barred. Id. at 293. The district court in Reardon v. United States, 731 F. Supp. 558 (D. Mass. 1990) ("Reardon 1"), rev’d in part, 947 F.2d 1509 (1st Cir. 1991) (en banc), also gave great weight to this portion of the Senate Report. Because that Report affirmatively cited the district court decision in Lone Pine, which “held that the plaintiff could bring neither constitutional nor statutory challenges until the EPA brought an enforcement action under CERCLA,” 731 F. Supp. at 567 (citation omitted), the district court in Reardon 1 decided that the Senate Report “clearly implied that section 113(h) was to preclude constitutional as well as statutory claims from judicial review.” Id. The court viewed the Report’s citation to Lone Pine as “particularly telling of Congress’ intent to preclude constitutional as well as statutory claims.” Reardon I, 731 F. Supp. at 567 n.9.

The court’s reliance on a citation included in legislative history is not unprecedented. See Blanchard v. Bergeron, 489 U.S. 87, 91–92 (1989) (concluding that court is bound to follow results in lower court fee decisions because decisions were cited in Committee Report). But see id. at 98–99 (Scalia, J., concurring) (sharply criticizing majority’s use of legislative history in analysis).

397. See SUNSTEIN, supra note 106, at 129 ("[T]here are risks of ambiguity, overinclusiveness, and underinclusiveness in relying on legislative intent, just as in relying on [a statute’s] text and purpose.").


399. The leading cases reaching this conclusion are discussed supra part III.A.

400. See South Macomb, 681 F. Supp. at 1248.
that "[t]he majority position . . . held that while statutory challenges to an EPA administrative order were precluded prior to an enforcement suit for reimbursement, a PRP could challenge the constitutionality of individual provisions of CERCLA."\footnote{401} Given this disagreement among courts about when a plaintiff may raise constitutional claims, the South Macomb court engaged in an overinterpretation of the Senate Report's citation when it inferred that the Report supported a rule that barred early review of constitutional claims.

The most natural reading of the Senate Report suggests that the case cited was one of a number of cases holding that review of illegality claims under CERCLA should be barred until either government enforcement or a cost recovery action is initiated.\footnote{402} The First Circuit's analysis in Reardon v. United States supports this reading.\footnote{403} That court did not think the case cited by the Senate Report specifically addressed whether CERCLA foreclosed jurisdiction over constitutional claims, and therefore it concluded that the case had little precedential value.\footnote{404}

The decisions holding that CERCLA bars preenforcement jurisdiction of constitutional claims have relied on the plain terms of section 113(h) and its legislative history.\footnote{405} The decisions have not, however, offered convincing arguments in support of constitutional claim preclusion.

\footnote{401. Id.}
\footnote{402. Indeed, the Senate Report precedes the citation to the district court decision in Lone Pine with a "See, e.g.," signal. S. Rep. No. 11, supra note 110, at 58 (quoted at supra note 396).}
\footnote{403. 947 F.2d 1509 (1st Cir. 1991) (en banc) ("Reardon II").}
\footnote{404. See id. at 1516.}
\footnote{405. The South Macomb court also reached the question whether Congress had authority to foreclose jurisdiction of constitutional challenges to CERCLA response actions. The court held that, "because CERCLA affords a PRP an opportunity to bring its constitutional challenges when the EPA brings an action against it, Congress has properly exercised its power to limit the jurisdiction of the lower federal courts." South Macomb, 681 F. Supp. at 1252. The district court in Reardon I, which also held that CERCLA foreclosed preenforcement judicial review, reached a contrary conclusion on the question of congressional authority. It held that "the limitations on Congress' powers to describe federal jurisdiction dictate that section 113(h) not limit this Court's authority to review the Raronds' constitutional claim. This Court must retain jurisdiction of this case for the limited purpose of reviewing section 107(l) for procedural due process infirmities." Reardon I, 731 F. Supp. at 570 (footnote omitted). This issue is beyond the scope of this Article.}
B. Interpretation by Conclusory Holding: Cases Allowing Preenforcement Review of Constitutional Claims

In a second group of cases, courts have been willing to decide on the merits constitutional claims raised both by PRPs and by other claimants prior to EPA enforcement actions and implementation of the response action. Notably, the courts in these cases have failed to grapple with the underlying issue of statutory construction and have set forth no persuasive rationale for deciding these constitutional claims on the merits.

In Schalk v. Reilly, after deciding that section 113(h) foreclosed review of plaintiffs’ claims of illegality under CERCLA and NEPA, the Seventh Circuit rejected the plaintiffs’ due process claim on the merits without addressing the question of jurisdiction. A number of district court decisions share the analytic shortcomings the Schalk v. Reilly court exhibited in its unsupported decision to hear constitutional claims on the merits. These district court cases involve constitutional claims raised both by PRPs and by other affected citizens. In deciding the constitutional claims posed by plaintiffs, these courts have not even felt the need to rely on the Second Circuit’s strategy of assuming jurisdiction so as not to have to decide a difficult question of statutory construction.

407. These aspects of the case are discussed supra at notes 185–191 (CERCLA claims) & 362–369 (NEPA claims) and accompanying text.
408. Schalk v. Reilly, 900 F.2d at 1097–98.
412. The difficult question of statutory interpretation at issue here did not exist prior to the enactment of § 113(h), 42 U.S.C. § 9613(h). Before SARA was enacted, a court could merely hold that jurisdiction over a plaintiff’s constitutional claim was available pursuant to 42 U.S.C. § 9613(b) as a “controvers[y] arising under this chapter.” See Wagner Seed Co. v. Daggett, 800 F.2d 310, 315 (2d Cir. 1986) (“[W]hile declining to review the
Although these courts uniformly failed to articulate why jurisdiction over the constitutional claims was available in view of the broad language of section 113(h) that "[n]o Federal court shall have jurisdiction under Federal law . . .," the result that the courts have reached may be explained by reference to two important principles of statutory construction. It should be noted, however, that these courts failed to provide such a rationale for their holdings, and thus their approach subverts the role of the judiciary in the lawmaking process.

First, these courts might have decided that CERCLA does not foreclose preenforcement review of constitutional claims by employing a clear statement rule and by foregoing "the ordinary process" of statutory interpretation. That ordinary process is one of "projection and imputation," whereby a court avoids any "free, non-institutional consideration of the import or validity of the result arrived at through the process of projection and imputation. Indeed [the ordinary] process consists of attuning the mind to a vision comparable to that possessed by the legislature."
Rather than pursue this course, which would likely lead to a conclusion of no jurisdiction given the broad terms of section 113(h), the courts could have required an even clearer statement of no jurisdiction based on the canon that statutes should be construed to avoid constitutional issues.\textsuperscript{416} "[I]n requiring Congress emphatically to decide certain issues," this clear statement rule means that the court must "reject or ignore at least a portion of congressional intent as that intent is derived from legislative purpose."\textsuperscript{417} By taking this approach to section 113(h) and applying this canon of construction, the court arrives at a different legal conclusion than would otherwise be reached by the ordinary process of interpretation.\textsuperscript{418}

Although the clear statement rule has sometimes been subject to criticism,\textsuperscript{419} the rule is "founded upon institutional values that are not accounted for in the ordinary process of projection and imputation."\textsuperscript{420} Most importantly, the rule reinforces the primacy of the legislature in making political judgments that have significance for the electorate\textsuperscript{421} and ensures that legislators are account-

\textsuperscript{416} E.g., Public Citizen v. United States Dept. of Justice, 491 U.S. 440, 466 (1989); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); see Wellington & Albert, supra note 118, at 1560 n.42 (discussing Supreme Court decision in United States v. Rumely, 345 U.S. 41 (1953), where Court narrowly construed statutory provision to avoid a constitutional issue, notwithstanding legislative history that supported broad reading of provision).

\textsuperscript{417} Wellington & Albert, supra note 118, at 1559 (emphasis added).

\textsuperscript{418} Thus, Dean Wellington discusses how, in order to avoid a constitutional question, the Court had to construe a statute in a way that "prohibited unions from using money obtained from dissenting employees for purposes that realistically cannot be said to raise serious constitutional difficulties." Harry H. Wellington, \textit{Machinists v. Street: Statutory Interpretation and the Avoidance of Constitutional Issues}, 1961 Sup. Cr. REV. 49, 67. The Court would not have construed the statute in that manner if the statute had not otherwise raised a constitutional issue. Dean Wellington suggests, however, that a court should not abandon ordinary principles of statutory construction in order to avoid a constitutional issue when the court reasonably anticipate that it will shortly be unable to avoid deciding the same constitutional issue in another case. \textit{Id.} at 70.

\textsuperscript{419} See Posner, supra note 106, at 814–16 ("The practical effect of interpreting statutes to avoid raising constitutional questions is therefore to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Constitution . . . .").

\textsuperscript{420} Wellington & Albert, supra note 118, at 1559 (footnote omitted).

\textsuperscript{421} Dean Wellington provides the following rationale for the clear statement rule:

Before governmental restriction upon individual freedom is held to be either unconstitutional or constitutional, it should be absolutely clear to a majority of the Supreme Court that Congress has faced the issue squarely and determined clearly that in its judgment it was necessary to impose the restriction . . . . Is not this canon of statutory interpretation really a corollary of the doctrine of judicial self-restraint in constitutional adjudication?
able to the voters. Another way to conceptualize the clear statement rule is to analogize it to the principle that statutes when possible should be construed so that they are consistent with basic meta-principles.

A second, and decidedly less significant, reason why courts may be deciding that CERCLA allows jurisdiction over constitutional claims is a concern that the contrary holding would necessitate a conclusion that section 113(h) is unconstitutional and a decision about severability would then be required. The latter decision places the court directly in a position where the court alone must weigh the underlying statutory policies without any


422. See Wellington & Albert, supra note 118, at 1560, where the authors state that:

The most familiar situation in which the clear statement canon is operative is where the Court is confronted with a federal statute that would raise serious constitutional questions if interpreted in the manner most consistent with its underlying purpose. Where this is the case, it seems generally appropriate for the Court to construe the statute in a way that does not pose the constitutional issue, unless it is inescapably clear that Congress itself directly confronted the situation before the Court and spoke unequivocally. The elected branches of government should have a responsibility to the people to determine explicitly and for the record that constitutionally questionable action is, in their opinion, necessary action.

Id.

423. Professor Sunstein states that:

The aggressive construction of questionable statutes, removing them from the terrain of constitutional doubt, can be understood as a less intrusive way of vindicating norms that do in fact have constitutional status.... An approach of this sort ensures a greater degree of compliance with constitutional norms, taking account of judicial underenforcement and requiring congressional deliberation on troublesome issues.

SUNSTEIN, supra note 106, at 165. The significance of meta-principles in interpreting statutes is discussed supra at notes 118–123.

424. Indeed, one court has concluded that Congress has no authority to foreclose early review of constitutional claims in the CERCLA context. See supra note 405.


426. See Froomkin, supra note 106, at 1092 (“A pluralist theory cannot explain the Court’s severability rulings, because severing risks ripping quid from quo.... To this day, the Court has never offered a constitutionally satisfactory explanation of its severability decisions.”); Popkin, supra note 106, at 609–10 (noting that policy is directly introduced into the equation when a court has held that a statute is unconstitutional and then must decide what to do with the statute).
basis for deciding how the legislature would decide the question of policy.\textsuperscript{427}

Courts have generally reviewed constitutional claims that both PRPs and affected citizens have raised prior both to completion of a response action, or of a discrete phase of the response, and to an enforcement or cost recovery action by EPA. Although these courts have not provided any rationale for their decisions, possible bases can be inferred. The next section of the Article considers a recent decision that has sought to identify reasons why \textit{limited} preenforcement review of constitutional claims should be permitted.

\section*{C. A Move Beyond Section 113(h)'s Text and Legislative History: Is CERCLA Sufficiently Ambiguous to Allow a Court to Hold that CERCLA Does Not Bar Preenforcement Review of Some Constitutional Claims?}

In \textit{Reardon v. United States},\textsuperscript{428} the First Circuit, sitting en banc, considered whether section 113(h) barred federal court jurisdiction of the plaintiffs' claim "that 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{429} The court resolved this issue by relying first on one of the basic strat-

\textsuperscript{427} See, e.g., Popkin, supra note 106, at 614 n.314 ("a court may have no way of knowing what the historical legislature would do 'if certain provisions found to be invalid were excised.'" (citation omitted)). Although CERCLA does provide that "the remainder of this chapter shall not be affected" by a decision that "any provision of this chapter . . . is . . . invalid," 42 U.S.C. 9657, the Supreme Court has held that such a severability clause is not binding, but "creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." Alaska Airlines, Inc., 480 U.S. at 686 (citations omitted).

\textsuperscript{428} 947 F.2d 1509 (1st Cir. 1991) (en banc) ("Reardon I").

\textsuperscript{429} Id. at 1511. The CERCLA lien had been imposed pursuant to § 107(f), 42 U.S.C. § 9607(f). See Reardon II, 947 F.2d at 1511. The Reardons also raised two statutory claims contending that the lien violated the terms of CERCLA because they were not liable for CERCLA response costs and the lien covered too much property. See id.

The United States had not disputed the district court's decision in Reardon v. United States, 731 F. Supp. 558 (D. Mass. 1990), rev'd in part, Reardon II, that CERCLA permitted federal court jurisdiction of the constitutional claim. Appellees' Petition for Rehearing with Suggestion for Rehearing En Banc at 12 n.9, Reardon v. United States, 947 F.2d 1509 (1st Cir. 1991) (No. 90-1319) (on file with the Harvard Environmental Law Review) (United States 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.
strategies available to a court that wishes to construe section 113(h) narrowly: the court concluded that the plaintiffs' challenge did not come within the provision because the constitutional claim did not relate to EPA's "administration"\textsuperscript{430} of the statute and the plaintiffs accordingly were not seeking review of a "challenge[] to removal or remedial action selected under section 9604 of this title."\textsuperscript{431}

Having concluded that the constitutional claim did not come within the plain terms of section 113(h), the court relied on the clear statement rule\textsuperscript{432} to hold that review of the plaintiffs' preenforcement claim was not barred.\textsuperscript{433} The court stated, however, that preenforcement review was not available for all constitutional claims. The court held that Congress's statement of its intent to foreclose review of the Reardons' constitutional claim was not sufficiently clear, because:

extending jurisdiction to the Reardons' due process claim does not necessarily run counter to the purposes underlying

\begin{itemize}
\item \textsuperscript{430} Reardon II, 947 F.2d at 1514 (emphasis omitted).
\item \textsuperscript{431} 42 U.S.C. § 9613(h). The court stated that the plaintiffs' due process claim challenging the CERCLA lien provision
does not fit into the literal language of sec. 9613(h) . . . . Under our reading, [the section] divests federal courts of jurisdiction over challenges to EPA's administration of the statute—claims that 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 EPA is administering the statute; \textit{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.
\item \textsuperscript{432} Reardon II, 947 F.2d at 1514 (emphasis added). Although the court's analysis focused on the express terms of CERCLA, the court also discussed the legislative history of the provision later in the decision and rejected the view that SARA's legislative history demonstrates congressional intent that pre-enforcement review of constitutional claims is barred. \textit{See id.} at 1515–16.
\item \textsuperscript{433} This rule and the underlying rationale for it are discussed supra notes 416–423 and accompanying text.
\end{itemize}

\textit{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 sec. 9613(h)}.\textit{ Reardon II, 947 F.2d at 1514–15.}
§ 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 EPA to confront inconsistent results (as would a finding, for example, that a particular spill was caused by an act of God) . . . 434

Stated alternatively, the Reardon II court concluded that the language and intent of CERCLA were sufficiently clear to foreclose preenforcement review of certain constitutional claims, but not others. According to the court, CERCLA specifically forecloses preenforcement review of a constitutional claim when the claim is based on EPA’s administration of a particular cleanup and litigating the claim would necessitate inquiry into the facts related to that cleanup.435

Unlike the decisions by other courts allowing federal court jurisdiction of constitutional claims prior to government enforcement or completion of the cleanup, the Reardon II court sought to identify a principled basis for distinguishing among constitutional claims related to CERCLA cleanups and for allowing immediate jurisdiction of some of those claims. The Reardon II decision provides a strong argument in support of its rule, because its argument is grounded in the language and intent of CERCLA as well as in the basic principles of statutory interpretation.436

434. Id. at 1515.
435. Id. at 1517. In addition to relying upon the language and intent of CERCLA, the court also sought to support its decision to distinguish among constitutional claims by analogizing the case at issue to McNary v. Haitian Refugee Ctr, Inc., 111 S. Ct. 888 (1991). See Reardon II, 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 allowed). See Reardon II, 947 F.2d at 1517. The Reardon II court’s distinction also is supported by Justice Harlan’s concurring opinion in Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233, 241-44 (1968). There, Justice Harlan concluded that the claim being asserted was outside the scope of the review preclusion provision because the claim was one of procedural invalidity. See id. at 241. As such, the claim did not “present opportunity for protracted delay” by necessitating the review of disputed facts, but did present a claim within the special competence of courts. Id. at 241-43.
436. Analysis of the Reardon II court’s decision on the merits of the constitutional claim—that the CERCLA lien provision violates the due process clause—is beyond the scope of this Article. The court’s due process analysis is summarized and critiqued in Recent Case, 105 Harv. L. Rev. 1420 (1992).
VI. CONCLUSION

Despite the broad and categorical language of section 113(h), courts have reached a variety of conclusions about the extent to which CERCLA forecloses review in each of the broad types of cases examined. This Article has proposed a legal solution for each of the various categories of cases in which the courts consider the availability of immediate review. In addition, it has outlined strategies for interpreting CERCLA that are designed to enable the courts to perform their quasi-legislative function in interpreting section 113(h) more effectively.\textsuperscript{437}

This judicial role, however, is auxiliary to the lawmaking role Congress needs to exercise by amending section 113(h) to permit on its face a greater range of responses by courts. The current statute’s categorical language improperly constrains the courts’ ability to fashion the best legal solution to CERCLA cases in two ways.

First, the terms of section 113(h) are now too categorical and broad to tolerate easily the various constructions adopted by courts, and suggested by this Article, in different litigation contexts. Because the best interpretations of section 113(h) are motivated by a variety of strong statutory and constitutional values that courts are unwilling to believe were wholly trumped by the CERCLA value of prompt cleanups, the statute should be amended to allow the jurisdiction that courts must now exercise in the face of CERCLA’s contrary plain language. Amendment of the statute will enhance its legitimacy, which is now being undermined by the difference between what the statute says and how courts are (and often should be) interpreting the statute.\textsuperscript{438}

Second, in its current form, section 113(h) too many times leads courts to reach reflexive conclusions in the face of its broad and categorical language. Particularly with regard to CERCLA claims that implementation of a response action threatens human health, many courts view the statute’s terms as an insurmountable

\textsuperscript{437} See Wellington & Albert, supra note 118, at 1550 (“Judicial legislation is a necessary condition of the legal system because legislatures deal with problems prospectively, cannot foresee all they deal with, and cannot resolve all they do foresee.”); see also Sunstein, supra note 106, at 111 (“It is through interpretation, in the courts and the executive branch, that regulatory improvements, interstitial to be sure, can be brought about most easily.”).

\textsuperscript{438} See supra note 106 (discussing how a plain meaning approach to statutory construction is supported by a concern about legitimacy).
barrier to preimplementation review. An automatic refusal to exercise jurisdiction in such cases will likely occur more frequently as the judiciary becomes increasingly textualistic in its approach to statutory construction.\footnote{439} In other contexts, however, the broad, uncalibrated language of section 113(h) results in reflexive judgments that preenforcement review is available based on an apparent belief that the language cannot mean what it says. Courts may respond in this way when a claimant relies on another statute or the Constitution for prompt adjudication.

In all such cases, the courts err in failing to consider what this Article has mapped as the most sensible application of section 113(h). Courts should refuse review when PRPs bring actions against EPA to adjudicate any issues of CERCLA liability prior to a cost recovery action. But district court review should be available when plaintiffs claim that the process of implementing a remedial plan will itself significantly threaten public health and the environment, and when other statutory or constitutional policies outweigh the interest in foreclosing CERCLA review prior to implementation or enforcement. This Article has argued that the request for jurisdiction in particular cases will necessitate careful decisionmaking by courts that accounts for such statutory and constitutional values.

An amended statute thus should expressly grant the courts discretion to weigh the values implicated in a particular case, since Congress will likely conclude that it is impossible to legislate prospectively a rule capable of accommodating all of the competing statutory policies at issue.\footnote{440} The amended statute should maintain, however, a strong and absolute rule of review preclusion when PRPs bring actions against EPA to adjudicate issues of CERCLA liability prior to a cost recovery action or another enforcement action.

Amending CERCLA in this manner will legitimate the courts' efforts to interpret and apply the statute and will encourage judicial decisionmaking to be undertaken more openly and analytically. Moreover, amending CERCLA will specifically recognize the important role that courts necessarily play in deciding whether early review of CERCLA response actions should be available.

\footnote{440} See supra notes 106, 118.