

A “BLUNT WITHDRAWAL”? BARS ON CITIZEN SUITS FOR TOXIC SITE CLEANUP

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Throughout the history of federal statutory environmental law, citizen suits have played a key role in enforcement. Through statutory interpretation, however, courts have narrowed the circumstances under which citizens can sue. This Article explores one such restraint: Courts have severely limited citizen suits under the Resource Conservation and Recovery Act (“RCRA”) by reading very broadly a jurisdiction-stripping provision of RCRA’s companion statute, the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”). This Article argues that courts have read that provision too broadly, not only violating traditional principles for resolving inter-statutory conflict but also undermining the purposes of both statutes by eliminating what could be an essential mechanism for combating delay during toxic site cleanups.

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INTRODUCTION

Toxic site cleanup is slow. Painfully slow. Numerous factors contribute to delay: inadequate funding for cleanup; lack of political will for cleanup; insufficient information about the scope of contamination; infighting among responsible polluters; corruption; turnover in government enforcement offices; and polluter recalcitrance, to name just a few. The average cleanup takes twelve years and some take much longer.¹

Theoretically, citizen suits are a tool to accelerate cleanup. Citizens can play a critical role in identifying toxic harms and in putting pressure on the relevant government agency, polluter, or both, to take action. Imagine the following scenario. Firm A, a coal tar processing plant, operated on the riverbank of a major city for a hundred years. Throughout its operation, Firm A gradually filled in wetlands adjacent to its property with material containing coal tar and other gas manufacturing wastes containing high levels of toxic heavy metals such as benzene and arsenic as well as other carcinogens. The federal government has conducted a study investigating the scope of contamination and identifying possible remedies and has attempted to negotiate with Firm A to develop a cleanup plan. Negotiations, however, have broken down. While Firm A does not contest its liability for the cleanup, it does dispute the scope of cleanup required. Ten years go by, and the site sits not only unremediated but open to general public access. Unaware of the scope of contamination, local community members use the site as a boat launch and for subsistence fishing. Toxic pollutants continue to leach into the groundwater and into the river.²

In this instance, where the federal government has chosen not to pursue enforcement after voluntary negotiations have broken down, a citizen suit against the polluter could force the polluter to remove the contaminated fill or otherwise clean up the site. Specifically, a citizen could file suit under a provision of the Resource Conservation and Recovery Act (“RCRA”) allowing suits to abate “imminent and substantial endangerment” caused by improper handling of hazardous wastes.³

Most federal courts, however, would refuse to hear such a suit. Why? Because the Comprehensive Environmental Response Compensation and Lia-

¹ CONG. BUDGET OFFICE, ANALYZING THE DURATION OF CLEANUP AT SITES ON SUPERFUND’S NATIONAL PRIORITIES LIST 7 (MAR. 1994).

² The facts of this hypothetical are drawn loosely from *Anacostia Riverkeeper v. Washington Gas Light Co.*, No. 11-1453, 2012 WL 4336243 (D.D.C. Sept. 24, 2012).

³ RCRA 7002(a)(1)(B); 42 U.S.C. § 6972(a)(1)(B) (2012).

bility Act (“CERCLA”), the Superfund Act, has a provision stripping federal courts of jurisdiction over suits “challeng[ing]” ongoing federal CERCLA remediation. And federal courts have almost uniformly read this provision — CERCLA section 113(h), 42 U.S.C. § 9613(h) — broadly to bar suits related to any site where any CERCLA remediation is ongoing.

Litigation itself, of course, can delay cleanup, and the purpose of section 113(h) is to ensure that cleanup can proceed efficiently, without interruption. It prevents polluters from stalling cleanup by challenging its scope. But courts have nearly universally applied section 113(h) without regard to whether the litigation in question would cause or remedy delay. Reasoning that CERCLA’s plain language requires this outcome, courts have expressed their regret that their hands are tied and that RCRA suits cannot be salvaged.

But CERCLA’s meaning is not so plain; indeed, this Article argues that the statute actually has more than one permissible reading: one, which courts have adopted, that creates a conflict with RCRA, and others which harmonize the two statutes. Why, given this fact, have courts so consistently sacrificed citizen suits? For the most part, courts have not expressly considered this choice, instead opting for the former option by rote invocation of plain meaning or reliance on precedent. Two policy justifications appear to underlie these decisions: first, deference to the Environmental Protection Agency (“EPA”) (or whatever state level agency is overseeing cleanup); second, administrability of CERCLA. This Article argues that these policy rationales are limited and serve primarily to ease the workload of courts. Harmonizing the statutes would better serve the purpose of both statutes: to protect the public health and the environment from toxic harms.

Part I provides background on RCRA and CERCLA, the two statutes forming a comprehensive scheme governing prevention and cleanup of toxic pollution. It then explores both statutes’ citizen suit provisions. Both statutes allow for citizen enforcement, and both establish significant limitations on when suits may be brought. Specifically, both statutes prohibit suits while certain CERCLA actions are ongoing. Citizen suits in this context, as in most environmental statutes, are a gap-filling measure, designed to stand in where the relevant government agency lacks the will or the resources to pursue enforcement. Part I concludes with a brief discussion of the case law interpreting CERCLA section 113(h). The provision is broadly worded and has been given an expansive reading. Courts apply the provision regardless of the plaintiff and regardless of the underlying cause of action — in other words, section 113(h) strips federal courts of jurisdiction over claims arising under various other federal laws including the National Historic Preservation Act, the National Environmental Policy Act, and the Administrative Procedure Act in addition to RCRA and CERCLA.

Part II considers the primary doctrinal consequence of inter-statutory application: conflict. CERCLA prohibits certain suits that RCRA authorizes. For instance, where cleanup has started but is stalled, RCRA may allow a suit to go forward, but CERCLA almost certainly would not. Part II then looks at how courts have talked about (or not talked about) this conflict. But very few of the

courts considering the scope of CERCLA section 113(h)'s inter-statutory application have addressed the issue of conflict at all. Most that have looked at the issue have quickly assumed that CERCLA, the newer statute, trumps without applying any of the well-developed doctrine governing resolution of inter-statutory conflict.

Part III undertakes the statutory analysis that so many courts have glossed over. Applying the traditional conflict resolution tools — particularly the doctrine of implied repeal — Part III considers whether CERCLA section 113(h) should indeed trump RCRA. It concludes that although some of the language in section 113 supports finding repeal by implication, the statute as a whole does not. Instead, to avoid that repeal, the two statutes ought to be harmonized where possible. It argues that in most cases harmonization is indeed possible, but, where it is not, RCRA, the more specific statute, and not CERCLA, the newer statute, should apply.

By laying out a plausible and textually grounded doctrinal alternative to the conclusion drawn by most courts, Part III demonstrates that, following a textualist approach, CERCLA section 113(h) has two possible meanings. The language of the provision itself supports a sweeping reading, while the context of the remainder of the statutory scheme suggests a narrower reading. Part IV goes on to consider why, given this viable alternative, courts have consistently opted for the broader reading. Many courts have been able to avoid grappling with the problem because they have faced situations without conflict — i.e., situations in which RCRA and CERCLA mandated the same outcome. This is, of course, a limited explanation. Many courts have simply pointed to the plain language without careful exploration of the issue, but two trends in the case law offer further explanation. First, courts appear concerned with treading on agency expertise. In this highly technical area of the law, a jurisdiction-stripping rule saves courts from complex technical analysis. Second, courts appear concerned with administrability. A rule treating RCRA or some subset of RCRA suits differently from other challenges threatens the administrability of CERCLA and may be manipulated by plaintiffs. Part IV argues that neither of these policy considerations is persuasive in this context.

Finally, Part IV concludes by raising some countervailing policy considerations that would support adopting the narrower reading of section 113(h). Primary among those reasons is the underlying purpose of both RCRA and CERCLA: to protect the public and the environment from toxic harms.

I. THE STATUTORY BACKGROUND AND THE PROBLEM

A. *Toxic Site Cleanup: The Federal Statutes*

Prior to the enactment of RCRA and CERCLA, state tort nuisance law provided the primary mechanisms for cleanup of toxic sites.⁴ Together, RCRA

⁴ In many jurisdictions, state law continues to play a robust role in addressing toxic harms. Although some federal courts have held that RCRA and CERCLA preempt those laws, others have

and CERCLA establish a comprehensive scheme governing handling and cleanup of toxic waste. RCRA, enacted in 1976 and beefed up in 1984, governs toxic waste from "cradle-to-grave," establishing requirements for the transportation, treatment, storage, and disposal of toxic waste and requiring permits for those activities.⁵ CERCLA ensures that parties responsible for hazardous waste contamination may be "tagged with the cost of their actions."⁶ CERCLA's strict liability scheme not only provides for cleanup of past pollution but also creates substantial incentives for firms to avoid pollution in the future.⁷ In addition to imposing monetary liability on past polluters, CERCLA establishes a federal fund for cleanup, federal cleanup authority, and guidelines for toxic site cleanup procedure.⁸

The first step in a CERCLA cleanup is "removal action," which includes: immediate cleanup to mitigate initial dangers; studies, in particular the Remedial Investigation and Feasibility Study ("RI/FS"), whose purpose is to identify the scope of harm and evaluate possible cleanup plans; and selection of "remedial actions."⁹ "Remedial actions" are meant to provide permanent solutions for contaminated sites.¹⁰ The statute is fairly flexible regarding how EPA (or another state or federal agency) proceeds through these steps.¹¹ EPA can undertake cleanup itself and then bring a cost recovery action.¹² This avenue is available to any private party as well. Alternately, EPA can require the polluter to undertake the cleanup, either by going to court and seeking an injunction or by

allowed damage actions and medical monitoring claims to go forward. *See, e.g.*, *Durfey v. E.I. DuPont De Nemours & Co.*, 59 F.3d 121 (9th Cir. 1995) (holding that section 113(h) did not bar a state law medical monitoring claim), Alexandra B. Klass, *CERCLA, State Law, and Federalism in the 21st Century*, 41 Sw. L. Rev. 679, 691–703 (2012) (describing relevant state law claims and the landscape of CERCLA preemption).

⁵ "RCRA's primary purpose . . . is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996) (quoting 42 U.S.C. § 6902(b)); *see also* Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 627 (2006) (describing RCRA's 1984 amendments, in comparison to the law's original enactment, as a "comprehensive, detailed, and highly prescriptive" scheme).

⁶ *United States v. Bestfoods*, 524 U.S. 51, 56 (1998) (internal quotation marks and alterations omitted).

⁷ *See, e.g.*, RICHARD L. REVESZ, *ENVIRONMENTAL LAW AND POLICY* 604–05 (2008) (describing how the ex post liability scheme transmits incentives to generators of hazardous waste and owners of hazardous waste sites and arguing that the combination of ex ante regulation and ex post liability is ideal to both create the proper incentives for generators of hazardous waste and owners of hazardous waste sites and to circumvent the insolvency problem).

⁸ CERCLA § 104(a), 42 U.S.C. § 9604(a) (2012); *see also* REVESZ, *supra* note 7, at 605 (pointing out the limits of a liability scheme where firms are insolvent).

⁹ 42 U.S.C. §§ 9604, 9601(23); *Frey v. EPA* ("*Frey II*"), 403 F.3d 828, 835 (7th Cir. 2005).

¹⁰ 42 U.S.C. §§ 9604, 9601(24).

¹¹ *See* Michael P. Healy, *Judicial Review and CERCLA Response Actions: Interpretive Strategies in the Face of Plain Meaning*, 17 HARV. ENVTL. L. REV. 1, 6 (1993) (observing that "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'" (quoting 42 U.S.C. § 9606(a))).

¹² 42 U.S.C. §§ 9604, 9607.

issuing a unilateral administrative order.¹³ CERCLA also includes several provisions that incentivize polluters to enter into consent decrees addressing both cleanup and cost recovery. In particular, the settlements can insulate firms from both contribution suits from other polluters of the same site and enforcement and cost recovery actions from the government.¹⁴ Polluters are therefore often involved in cleanup from an early stage.¹⁵

Although CERCLA provides the primary structure for cleanup, RCRA also plays a role. In particular, although RCRA permitting requirements do not apply to cleanup activities, RCRA standards for handling, storage, and disposal of toxic waste continue to apply at all stages of cleanup.¹⁶

B. Citizen Enforcement

Like almost every other federal environmental statute passed since 1978, RCRA and CERCLA create causes of action for citizen enforcement.¹⁷ RCRA creates multiple private rights of action for citizens.¹⁸ First, it authorizes citizen enforcement actions, allowing citizens to sue “any person . . . who is alleged to be in violation of” specific RCRA requirements.¹⁹ For instance, citizens can prosecute permit requirement violations. Second, it authorizes citizen endangerment actions, allowing citizens to force cleanup where ongoing or past mishandling of toxic waste results in “imminent and substantial endangerment to human health and the environment.”²⁰

¹³ 42 U.S.C. §§ 9604, 9606. If a polluter fails to comply with a unilateral administrative order, EPA can impose hefty fines. *Id.* §§ 9606(b)(1), 9607(c)(3). For a helpful description of the cleanup process, see *Cleanup Process*, EPA, <http://www.epa.gov/superfund/cleanup/index.htm> (last visited Mar. 27, 2013) (on file with the Harvard Law School Library).

¹⁴ 42 U.S.C. §§ 9613(f)(2), 9622.

¹⁵ Polluters can conduct the RI/FS themselves, with federal oversight. 42 U.S.C. § 9604(a)(1) (allowing private parties to conduct an RI/FS with federal permission and oversight). One purpose of CERCLA is to provide funding where polluters are not identifiable or are insolvent. H. REP. 96-1016, at 20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6123 (findings of the House Committee of Interstate and Foreign Commerce).

¹⁶ 42 U.S.C. § 9621(b)(1)(B) (requiring the executive to take into account the “goals, objectives, and requirements” of RCRA when developing a remedial plan under CERCLA); *id.* § 9621(e) (establishing that no federal permit shall be required for “any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with [CERCLA]”); *see also id.* § 9652(d) (declaring that CERCLA will not alter the obligations and liabilities of any persons from other laws involving toxic waste).

¹⁷ The one exception is the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136 (2012). *See* JEFFREY G. MILLER, *CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS* 6 (1987) (hypothesizing that FIFRA contains no citizen suit provision because although every other environmental statute originated in the Senate Environment and Public Works Committee and the House Commerce and Transportation Committee, FIFRA originated in “the more conservative Agriculture Committees in both houses of Congress”).

¹⁸ RCRA actually authorizes three types of suits, but only two are relevant to this Article. The third allows citizens to sue the EPA administrator “where there is alleged a failure of the Administrator to perform any act or duty under [RCRA] which is not discretionary” 42 U.S.C. § 6972(a)(2).

¹⁹ RCRA § 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A) (2012).

²⁰ RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B).

Congress added the latter provision in 1984, as part of a series of amendments that extended the scope of RCRA’s requirements.²¹ One House Committee explained that the expansion of citizen suits would complement EPA enforcement “particularly where the Government is unable to take action because of inadequate resources.”²²

CERCLA likewise provides for private suits, allowing citizens to bring suit “against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to [CERCLA]”²³ Unlike the RCRA provision, which allows citizens to seek injunctions requiring cleanup, CERCLA citizen suits allow only enforcement of CERCLA’s substantive cleanup standards.²⁴ In other words, a citizen cannot compel cleanup but can require that ongoing cleanup meet CERCLA’s standards.

Citizen enforcement serves a dual function. First, it fosters agency accountability.²⁵ Most environmental citizen suit provisions require that prior to bringing suit, the citizen first give notice to the relevant federal and state agencies and the alleged polluter and then wait, usually either sixty or ninety days before filing suit.²⁶ The function of the notice requirement is to goad the government (or the polluter) into action.²⁷ Notice provides citizens a formalized means to alert the relevant state or federal agency that there is an ongoing pollution law violation requiring attention.²⁸ The agency can then choose to act on the information or allow the citizen to sue. The polluter can choose to begin a voluntary cleanup or wait and try its luck in court.

²¹ Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 401, 98 Stat. 3221 (1984).

²² H. REP. NO. 98-198 at 53 (1983), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612.

²³ CERCLA § 310(a)(1), 42 U.S.C. § 9659(a)(1) (2012).

²⁴ Jeffrey M. Gaba & Mary E. Kelly, *The Citizen Suit Provision of CERCLA: A Sheep in Wolf’s Clothing?*, 43 Sw. L. J. 929, 937–40 (1990) (explaining why the CERCLA citizen provision does not allow citizens to compel cleanup where the government has taken no action). The House Judiciary Committee added language to the 1986 Superfund Amendments and Reauthorization Act (“SARA”) that paralleled RCRA’s endangerment action provision, but the Conference Committee removed it, concluding that it was redundant. *Id.* at 935–36 (describing this legislative history).

²⁵ James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. SYMP. J. 1, 5 (2003) (arguing that citizen suits matter because they foster “rule of law, agency accountability, representational democracy, and environmental stewardship”).

²⁶ *See, e.g.*, Clean Air Act § 304(b), 42 U.S.C. § 7604(b) (2012); Clean Water Act § 505(b), 33 U.S.C. § 1365(b) (2012).

²⁷ MILLER, *supra* note 17, at 44 (“The purpose behind the 60-day notice requirements is clearly to enable and encourage the government to perform its enforcement role.”) (citing legislative history of the Clean Air Act).

²⁸ RCRA and CERCLA both contain notice provisions. 42 U.S.C. § 9659(d)(1) (60-day notice requirement for CERCLA suits); 42 U.S.C. § 6972(b)(1)(A) (60-day notice requirement for RCRA enforcement actions); *id.* § 6972 (b)(2)(A) (90-day notice requirement for RCRA endangerment actions).

Second, citizen suits supplement agency efforts.²⁹ Although early citizen suits focused primarily on requiring federal agencies to carry out non-discretionary duties, citizens in the 1980s began bringing suits in large numbers directly against polluters.³⁰ In large part, this expansion in the use of citizen suit provisions came in response to a decline in enforcement during the Reagan administration.³¹

In essence, citizen suit provisions empower citizens to act as private attorneys general.³² And they remain important because they work.³³ They are an insurance policy against deregulation through non-enforcement. An agency can choose to reallocate its resources as it sees fit, but it cannot prevent environmental laws from being enforced.

Under RCRA and CERCLA, as with most environmental statutes, citizens are secondary enforcers. If, in response to notice, the polluter takes sufficient steps to abate the harm, the potential suit may become moot.³⁴ If, in response to notice, the government takes action, the citizen group is barred from suit. Both RCRA and CERCLA bar suit where the government “is diligently prosecuting” an enforcement action.³⁵ The primary function of the “diligently prosecuting” bar is to prevent redundant successive enforcement that could be inefficient for courts, unfair for defendants (because of the risk of inconsistent outcomes), and expensive for taxpayers.³⁶

²⁹ MILLER, *supra* note 17, at 4 (“The citizen suit sections were developed as the answer to the government’s failure to enforce, whether caused by lack of will or lack of resources.”); *see also* Jeffrey G. Miller, *Overlooked Issues in the “Diligent Prosecution” Citizen Suit Preclusion*, 10 WIDENER L. SYMP. J. 63, 63 (2003) (“Congress sought to attain full compliance with environmental statutes. It reasoned that multiple enforcers would provide more comprehensive and effective enforcement than one enforcer.”).

³⁰ MILLER, *supra* note 17, at 10–15 (describing the historical trends in the use of citizen suit provisions).

³¹ MILLER, *supra* note 17, at 11 (noting that “many of the national environmental groups, including [the Natural Resources Defense Council], perceived a breakdown in EPA enforcement in 1981 and 1982, particularly under the Clean Water Act, and were anxious to reverse this trend”).

³² MILLER, *supra* note 17, at 1 & n.1 (citing numerous cases describing the use and value of citizen suits).

³³ May, *supra* note 25, at 3–4 (“Citizen suits work: they have transformed the environmental movement Citizen suits have secured compliance by myriad agencies and thousands of polluting facilities, diminished pounds of pollution produced by the billions, and protected hundreds of rare species and thousands of acres of ecologically important land. The foregone monetary value of citizen enforcement has conserved innumerable agency resources and saved taxpayers billions.”).

³⁴ *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 64 (1987) (holding that provision of Clean Water Act allowing citizens to seek injunction against discharge permit violations did not confer jurisdiction over “wholly past” violations).

³⁵ 42 U.S.C. § 6972(b)(1)(B) (barring RCRA enforcement actions in the face of government enforcement under RCRA); *id.* § 6972(b)(2)(B)(i) (barring RCRA endangerment actions in the face of ongoing government enforcement under RCRA or CERCLA); *id.* § 9659(d)(2) (barring CERCLA actions in the face of ongoing government enforcement under RCRA or CERCLA).

³⁶ *See* Jeffrey G. Miller, *Theme & Variation in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA & Citizens, Part One: Statutory Bars in Citizen Suit Provisions*, 28 HARV. ENVTL. L. REV. 401, 402 (2004) (describing interpretation of these notice and bar preclusion provisions as an exercise in determining how much deference to give to EPA and state prosecutorial discretion); *see also* MILLER, *supra* note 29.

Limits on citizen enforcement also protect legitimate cooperation between government and polluter. Enforcement through consent decrees reduces cleanup costs both for polluters and taxpayers, but citizen suits can stifle legitimate cooperation. Particularly in the CERCLA context where the consent decree process greatly reduces the costs of cleanup, citizen suits may reduce willingness to participate in negotiations with the government if there is the possibility that polluters may face expensive court-ordered cleanups anyway.³⁷

Perhaps because of this additional policy concern, RCRA also bars endangerment suits in several other circumstances, all related to whether or not there is ongoing CERCLA activity at the site in question. Specifically, RCRA bars endangerment suits when the federal or state government “is actually engaging in a removal action” under CERCLA; “has incurred costs to initiate a Remedial Investigation and Feasibility Study [(RI/FS) under CERCLA] and is diligently proceeding with a remedial action” under CERCLA; or “has obtained a court order (including a consent decree) or issued an administrative order” under CERCLA.³⁸ These provisions are carefully designed to allow successive enforcement (i.e., enforcement by citizens and enforcement by the government) only where government enforcement is stalled.³⁹ In other words, not just any government enforcement is sufficient to bar citizen suits; instead, the government must have actually obtained or issued a cleanup order, be “*actually engaging*” in a removal action, “*diligently proceeding with a remedial action,*” or “*diligently prosecuting*” an enforcement action.⁴⁰ The use of the present tense in each of these subsections is particularly significant — CERCLA cleanup activities must be currently ongoing.⁴¹ Congress included the preclusion provisions to ensure that citizen suits would not interfere with federal cleanups, but the conference committee explained that the bar was to be “applied only when

³⁷ Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, & Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 140–41 (2002) (arguing that citizen suits can reduce the effectiveness of bargaining between the regulator and the regulatee: where the regulator might otherwise agree not to pursue enforcement in exchange for the promise of some compensating environmental benefit, a citizen suit might reduce the willingness of the regulatee to agree to the beneficial trade). Of course, not all cooperation is a good thing. Citizen suits can also police against capture. See *id.* at 132–37; see also *infra* Subpart IV.B.3 (limiting citizen suits too much may also be problematic because the threat of citizen suits can be a catalyst to restart stalled negotiations).

³⁸ 42 U.S.C. § 6972(b)(2)(B)(ii)–(iv).

³⁹ Miller, *supra* note 36, at 403–04 (noting that the diligent prosecution bar can be read to mean that it applies only to prosecutions that can reasonably be expected to bring about compliance).

⁴⁰ 42 U.S.C. § 6972(b)(2)(B) (emphasis added).

⁴¹ RCRA “speaks in the present tense, of private actions being barred by removal or remedial actions which are presently proceeding.” *City of Stamps, Ark. v. Alcoa, Inc.*, No. 05-1049, 2006 WL 2254406, at *13 (W.D. Ark. Aug. 7, 2006) (holding that because response activity was complete, plaintiff was not barred under RCRA). Congress’s choice of present tense indicates “the statute’s temporal reach.” *Carr v. United States*, 130 S. Ct. 2229, 2236 (2010); see also MILLER, *supra* note 29, at 75–82 (considering the timing of the “diligently prosecuting” provision and concluding that only ongoing actions could preclude citizen suit).

the RI/[F]S, design, and construction activities at a site occur in a continuous, uninterrupted sequence.”⁴²

Central to this Article, CERCLA likewise contains an additional preclusion provision, added to the statute as part of SARA in 1986. Located in the portion of the statute governing procedure for federal court review, rather than within the citizen suit provision itself, CERCLA section 113(h) establishes that “[n]o Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action selected under [CERCLA].”⁴³ Unlike RCRA’s carefully constructed preclusion provision, this section “effectuates a ‘blunt withdrawal of federal jurisdiction.’”⁴⁴

Section 113(h) codified an approach courts had already begun taking in response to polluter recalcitrance.⁴⁵ In CERCLA’s early years, polluters often tried to evade liability (or, at the least, minimize response costs) by challenging government cleanup plans before they were implemented.⁴⁶ Many also brought suit in order to resolve up front the extent of their liability. Some courts responded by concluding that at least some pre-enforcement review was unavailable.⁴⁷ One court, cited favorably in the legislative history of SARA, explained

⁴² H.R. Conf. Rep. 98-1133 at 118 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5649, 5689 (noting that EPA estimated that four months would pass between the completion of the RI/[F]S and the implementation of the remedy).

⁴³ 42 U.S.C. § 9613(h) (2012). The entire provision reads as follows:

“(h) Timing of review

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

- (1) An action under section 9607 of this title to recover response costs or damages or for contribution.
- (2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.
- (3) An action for reimbursement under section 9606(b)(2) of this title.
- (4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.
- (5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.” *Id.*

⁴⁴ *Oil, Chem. & Atomic Workers v. Richardson*, 214 F.3d 1379, 1382 (D.C. Cir. 2000) (quoting *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1244 (7th Cir. 1991)).

⁴⁵ *See Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1019 (3d Cir. 1991) (noting that the “limits § 113(h) establishes are designed to prevent time-consuming litigation from delaying the prompt clean-up of these sites”).

⁴⁶ This article uses the term “polluter” to refer to what CERCLA terms “potentially responsible parties,” or parties that may be liable for the release or threatened release of toxic substances. 42 U.S.C. § 9613(g)(1)(B), CERCLA § 113(g)(1)(B) (introducing the phrase “potentially responsible party”); *id.* § 9607(a) (listing categories of potentially responsible parties). It uses the term in a descriptive rather than a pejorative sense; CERCLA, after all, is a strict liability statute.

⁴⁷ *See, e.g., J.V. Peters & Co., Inc. v. Admin., EPA*, 767 F.2d 263 (6th Cir. 1985); *see also* Michael P. Healy, *The Effectiveness & Fairness of Superfund’s Judicial Review Preclusion Provi-*

why a bar on pre-enforcement review was so important to the integrity of CERCLA’s statutory scheme:

[E]arlier statutes as well did not permit EPA to respond quickly to problems at a site. While EPA had authority under other environmental statutes to bring legal actions to force cleanup, it lacked clear authority and funds to respond immediately to serious public health hazards from such sites and releases before the legal determinations of liability were made. CERCLA was designed to address this problem by establishing the authority and funding to take immediate response actions, without the need to await a judicial determination of liability (and likewise, before any final administrative determination of liability).⁴⁸

That court went on to express concern that allowing judicial review could delay implementation of the EPA-selected remedy for years at great risk to human health and the environment: “Meanwhile with every passing rainstorm and each day while melting snow percolates through the Lone Pine Landfill deadly chemical wastes would be carried towards the water supplies of substantial numbers of people.”⁴⁹ Following the courts’ lead, Congress enacted section 113(h).⁵⁰ Polluters would have to wait until cleanup was done to bring challenges.⁵¹

sion, 15 VA. ENVTL. L. J. 271, 289–91 (1995–1996) (discussing *J.V. Peters* and other pre-SARA cases barring pre-enforcement judicial review).

⁴⁸ *Lone Pine Steering Committee v. EPA*, 600 F. Supp. 1487, 1495 (D. N.J. 1985), *aff’d*, 777 F.2d 882 (3d Cir. 1985). The Senate Committee on the Environment and Public Works cited *Lone Pine* when it offered the following explanation of section 113(h):

As several courts have noted, the scheme and purposes of CERCLA would be disrupted by affording judicial review of orders or response actions prior to commencement of a government enforcement or cost recovery action. 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. 99-11, at 58 (1985) (citation omitted).

⁴⁹ *Lone Pine Steering Committee*, 600 F. Supp. at 1495.

⁵⁰ Healy, *supra* note 47, at 289–91 (arguing that Congress intentionally picked up on and codified this line of cases).

⁵¹ *See New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1249 (10th Cir. 2006) (observing that the purpose of section 113(h) is to promote efficient cleanup); *see also* Healy, *supra* note 47, at 290–91 (explaining that the purpose of section 113(h) was to prevent delay and foreclose piecemeal review of cleanup actions); Nathan H. Stearns, *Cleaning up the Mess or Messing up the Cleanup: Does CERCLA’s Jurisdictional Bar (Section 113(h)) Prohibit Citizen Suits Brought Under RCRA*, 22 B.C. ENVTL. AFFAIRS L. REV. 49, 60 (1994) (arguing that Congress meant to distinguish between suits brought by polluters and those brought by other citizens including environmental groups).

C. *Inter-Statutory Application of Section 113(h)*

Perhaps because CERCLA section 113(h) was enacted as a reaction to the particular problem of polluters' use of citizen suits to delay cleanup rather than as part of a comprehensive citizen suit provision, as in RCRA and other environmental statutes such as the Clean Air Act and the Clean Water Act, CERCLA's preclusion provision is unique because it is not, on its face, limited to causes of action brought under CERCLA itself. Relying on section 113(h)'s broad language and on the well-articulated purpose of preventing delay, courts have almost universally given it inter-statutory application.⁵² "Section 113(h) is clear and unequivocal[.]" one court explained.⁵³ "[T]he unqualified language of the section precludes 'any challenges' to CERCLA Section 104 cleanups, not just those brought under other provisions of CERCLA."⁵⁴ Every circuit that has considered the issue has determined that the bar applies to RCRA suits.⁵⁵

Courts have rejected even procedural challenges. For instance, in *Schalk v. Reilly*, plaintiffs brought suit to force the EPA to produce an environmental impact statement assessing the environmental impacts of the remedy selection, and to require the agency to conduct more public hearings on the remedy selection.⁵⁶ Rejecting the argument that the plaintiffs were "not really challenging the [remedy selection], but merely asking that certain procedural requirements be met," the court concluded that "challenges to the procedure employed in selecting a remedy nevertheless impact the implementation of the remedy and result in the same delays Congress sought to avoid by passage of the statute."⁵⁷

Much of the case law on the provision has focused on the meaning of the word "challenge." Most courts have concluded that any suit that will "impact the implementation" of the government's selected CERCLA response action constitutes a challenge.⁵⁸ Looking beyond the underlying cause of action,

⁵² See, e.g., *Cannon v. Gates*, 538 F.3d 1328, 1332 (10th Cir. 2008) (RCRA); *Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Richardson*, 214 F.3d 1379, 1382–83 (D.C. Cir. 2000) (NEPA); *N. Shore Gas Co. v. EPA*, 930 F.2d 1239, 1244 (7th Cir. 1991) (RCRA & NEPA); *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1023 (3d Cir. 1991) (NHPA); *Schalk v. Reilly*, 900 F.2d 1091, 1097 (7th Cir. 1990) (NEPA).

⁵³ *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 328 (9th Cir. 1995).

⁵⁴ *Id.* (quoting section 113(h)) (citing *Ark. Peace Ctr. v. Ark. Dep't of Pollution Control and Ecology*, 999 F.2d 1212, 1217 (8th Cir. 1993) and *N. Shore Gas*, 930 F.2d at 1244).

⁵⁵ The Second, Third, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have all reached the issue. *APWU v. Potter*, 343 F.3d 619 (2d Cir. 2003); *Clinton Cnty. Comm'rs v. EPA*, 116 F.3d 1018 (3d Cir. 1997) (en banc); *N. Shore Gas*, 930 F.2d at 1239; *Ark. Peace Ctr.*, 999 F.2d at 1212; *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325 (9th Cir. 1995); *Cannon*, 538 F.3d at 1328; *OSI, Inc. v. United States*, 525 F.3d 1294 (11th Cir. 2008). In DC, only a district court has reached the issue. *El Paso Natural Gas Co. v. United States*, 847 F. Supp. 2d 111, 120 (D.D.C. 2012). The First, Fourth, Fifth, and Sixth Circuits have no published cases on the issue at all (although the Fourth has one unpublished district court opinion finding the provision applicable to RCRA cases). *R.E. Goodson Constr. Co. v. Int'l Paper Co.*, No. C/A 4:02-4184-RBH, 2005 WL 2614927 (D.S.C. Oct. 13, 2005).

⁵⁶ 900 F.2d 1091, 1094 (1990).

⁵⁷ *Id.* at 1097.

⁵⁸ See, e.g., *id.*

courts take a pragmatic approach, considering, if the requested remedy were granted, whether it would interfere with or change the ongoing response action.⁵⁹ For instance, in *Broward Garden Tenants Association v. EPA*, plaintiffs brought suit under the Fifth and Fourteenth Amendments, the Civil Rights Acts of 1964 and 1968, and the Fair Housing Act alleging that defendants were using an inadequate cleanup plan for a landfill site adjacent to the housing project to perpetuate de jure segregation.⁶⁰ The Eleventh Circuit concluded that because the complaint sought injunctive relief — in particular, an order that the defendants adopt and implement stricter remediation standards — the suit challenged the selected remediation plan.⁶¹

As Part III.A.2 will explore in more depth, not every court has read “challenge” so broadly, and a few have identified other limitations to section 113(h)’s scope.⁶² The next section explores, however, what most courts have not — the statutory implications of this broad reading of CERCLA.⁶³

⁵⁹ See, e.g., *id.* at 1091 (rejecting suit under NEPA because goal of seeking additional environmental impact assessment was selection of a different remedy); *Reynolds v. Lujan*, 785 F. Supp. 152, 154 (D.N.M. 1992) (concluding suit was a challenge because granting relief would alter ongoing response activity).

⁶⁰ 311 F.3d 1066, 1070 (11th Cir. 2002). Applying this test, several courts have allowed suits for damages, as opposed to injunctive relief, to proceed. For instance, in *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 675 (8th Cir. 1998), the Eighth Circuit concluded that a suit for damages under the False Claims Act was not a challenge because it sought only financial penalties; the plaintiffs did not seek to alter the terms of cleanup. *Id.* at 675. See also *Beck v. Atlantic Richfield Co.*, 62 F.3d 1240, 1243 (9th Cir. 1994) (holding that suit for damages caused by diversion of water as part of cleanup plan was not a challenge because, “[a]lthough determination of whether [defendant’s] diversions were ‘wrongful’ may require examination of the EPA’s orders, resolution of the damage claim would not involve altering the terms of the cleanup order” (internal citation and footnote omitted)). *But see* *New Mexico v. General Elec. Co.*, 467 F.3d 1223, 1249–50 (10th Cir. 2006) (concluding the “[s]tate’s argument that it is not seeking to alter or expand the EPA’s response plan but rather only to acquire money damages falls on deaf ears. Any relief would substitute a federal court’s judgment for the authorized judgment of both the EPA and [the New Mexico Department of Environment]”). To a certain extent, the availability of damages may restore to potential plaintiffs the enforcement power that section 113(h) takes away. But this is a limited consolation for two reasons. First, although it may create incentives for a polluter to take more care the next time around, it cannot achieve cleanup of an already contaminated site. Second, it is available to a much narrower class of plaintiffs. Only those directly harmed could seek damages; whereas, any citizen potentially within the zone of imminent and substantial endangerment could seek relief in the absence of section 113(h).

⁶¹ *Id.* at 1072–73.

⁶² See, e.g., *United States v. Colorado*, 990 F.2d 1565, 1577 (10th Cir. 1993) (a suit that sought to “stay the CERCLA remedial action . . . clearly constituted a challenge to the CERCLA remedial action,” whereas a suit that sought to require compliance with RCRA during the remedial action did not).

⁶³ One additional point about the existing case law bears mentioning before moving on. Despite the fact that these cases deal squarely with a question of statutory interpretation, not one of them has considered either whether EPA has interpreted the section or whether that interpretation merits any deference under *Chevron U.S.A Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The easy response is that although EPA has devoted extensive pages of the Code of Federal Regulations to setting out procedures for selection of removal and remedial actions, it has given no consideration at all to what it means to “challenge[] . . . [a] removal or remedial action selected under section 9604.” 42 U.S.C. § 9613(h) (2012). Of course, the EPA has put forth an interpretation of the provision on numerous occasions in the context of litigation, but such positions are entitled to no deference. See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (“We have never applied the principle of [*Chevron*] to agency litigating positions that are wholly

II. IMPLICATIONS OF “BLUNT WITHDRAWAL”

Inter-statutory application of CERCLA’s preclusion provision is not without consequences. Setting aside, for the moment, potential policy costs, there is a doctrinal consequence, consideration of which is well within the bounds of a traditional textualist analysis: inter-statutory conflict. Inter-statutory application of section 113(h) creates an irreconcilable conflict with RCRA. Specifically, CERCLA section 113(h) bars more suits than does either RCRA section 7002(b)(1)(B), which bars certain citizen enforcement suits, or RCRA section 7002(b)(2)(B), which bars certain citizen endangerment suits. Section 7002 functions more like a scalpel, while section 113(h) works like a hack saw. Extending CERCLA’s jurisdictional bar to RCRA citizen suits conflicts both with RCRA’s own preclusion provisions and with the provisions of RCRA creating private rights of action.

After demonstrating that a conflict exists, this Part considers the extent to which courts have grappled with this conflict. Indeed, the conflict is a problem that few courts considering section 113(h) have acknowledged and even fewer have resolved. As a whole, the case law addressing the relationship between CERCLA section 113(h) and RCRA leaves the conflict between the two statutes unresolved. One court, the Tenth Circuit in *United States v. Colorado*, gave the issue thorough treatment and held that to avoid implied repeal of RCRA it had to read section 113(h) not to apply to RCRA cases.⁶⁴ Why haven’t other courts followed suit? This Part explores how other courts have responded to *Colorado* and argues that they have misconstrued it and essentially limited it to its facts. Several other courts have acknowledged the issue but given precedence to CERCLA with little or no explanation or analysis.

A. *The Statutory Problem: Conflict*

Conflict is to be avoided in statutory interpretation. It requires courts to perform a legislative function — to choose which of Congress’s enactments to give effect. Accordingly, numerous doctrines of statutory interpretation, ex-

unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel’s interpretation of a statute where the agency itself has articulated no position on the question”); *Sottera, Inc. v. Food & Drug Admin.*, 627 F.3d 891, 903 (D.C. Cir. 2010) (noting that the “Supreme Court held *Chevron* deference appropriate only for statutory interpretations with the ‘force of law’ and ruled that an agency’s litigation briefs — unlike, for example, its regulations — do not warrant such deference”) (internal citations omitted). The more difficult question is why EPA has not interpreted this provision and whether, if it did, its interpretation would merit any deference. The D.C. Circuit has held several times that “*Chevron* does not apply to statutes that . . . confer jurisdiction on the federal courts. It is well established that interpreting statutes granting jurisdiction to Article III courts is exclusively the province of the courts.” *Murphy Exploration & Prod. Co. v. U.S. Dep’t of the Interior*, 252 F.3d 473, 478 (D.C. Cir. 2001) (internal quotation marks and alterations omitted). Reasoning that such provisions do not delegate authority to federal agencies and that agencies have no particular expertise in interpreting them, the D.C. Circuit has undertaken *de novo* review. *Id.* at 480.

⁶⁴ 990 F.2d 1565, 1575–79 (10th Cir. 1993).

plored further in Part IV, below, counsel avoiding inter-statutory conflict and set up norms for how to deal with it when it is unavoidable. Despite these doctrines, the interpretation of section 113(h) preferred by most courts conflicts with RCRA section 7002.

1. Conflict Between Section 113(h) and RCRA’s Enforcement Suit Bar

RCRA section 7002(b)(1)(B) bars enforcement actions only where the government (state or federal) has already begun and is diligently prosecuting its own RCRA enforcement action. Under RCRA alone, citizen enforcement actions can therefore proceed regardless of whether there is any CERCLA activity ongoing at the site in question. Accordingly, section 113(h), which bars essentially all RCRA enforcement suits involving sites at which CERCLA activity is ongoing, bars a much larger universe of suits.

There are only two circumstances where an enforcement suit would be barred under RCRA but not under CERCLA: where the government has opted to use only RCRA to achieve cleanup or where the hazardous pollutant is petroleum.⁶⁵ EPA has a long-standing policy to defer listing a site under CERCLA where it could undertake cleanup under RCRA “to avoid duplicative actions, maximize the number of cleanups, and help preserve the Superfund.”⁶⁶ CERCLA cleanup can also take longer and be more expensive than other types of cleanup.⁶⁷ In this category of suits, then, the RCRA provisions continue to have applicability.

As figure one, below, illustrates, with the exception of this category, where there is no CERCLA activity at all, all suits that section 7002(b)(1)(B) would bar are also barred by section 113(h). And, there are many suits that section 7002(b)(1)(B) does not bar that are nevertheless barred by section 113(h). RCRA expressly allows citizen enforcement actions to proceed despite ongoing CERCLA activity. CERCLA section 113(h), as interpreted, does not. This is a direct conflict. The same facts would lead to different and incompatible results under the two statutes.

For instance, *Shea Homes Ltd. v. United States* demonstrates the conflict between RCRA section 7002(b)(1)(B) and CERCLA section 113(h).⁶⁸ The plaintiff, a real estate developer, purchased and developed a parcel of land formerly owned and utilized by the United States Air Force as a landfill.⁶⁹ Pursu-

⁶⁵ See Ingrid B. Wuerth, *Challenges to Federal Facility Cleanups & CERCLA Section 113(h)*, 8 TUL. ENVTL. L.J. 353, 362–63 & 362 n.49 (1995) (explaining that EPA will conserve resources by declining to list sites subject to RCRA corrective action on the National Priorities List (such listing is the first step of CERCLA cleanup)). EPA has broad discretion in whether it chooses to list a site or not. See *Apache Powder Co. v. United States*, 968 F.2d 66, 69 (D.C. Cir. 1992) (rejecting argument that EPA’s choice to pursue cleanup under CERCLA as opposed to RCRA was irrational); CERCLA § 101(14), 42 U.S.C. 9601(14) (2012) (excluding petroleum from CERCLA’s definition of “hazardous substance”).

⁶⁶ *Apache Powder Co.*, 968 F.2d at 69 (internal quotation marks and alterations omitted).

⁶⁷ Healy, *supra* note 47, at 276–77 (describing high costs of CERCLA cleanup); *Apache Powder Co.*, 968 F.2d at 69.

⁶⁸ 397 F. Supp. 2d 1194 (N.D. Cal. 2005).

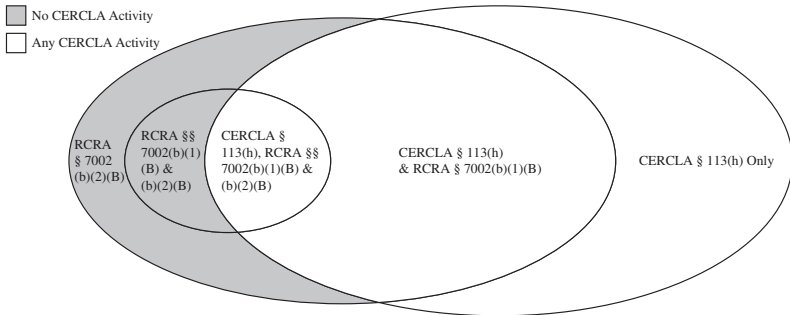
⁶⁹ *Id.* at 1196.

ant to CERCLA section 104, the Army Corps of Engineers was “engag[ing] in various efforts to investigate, remediate, and monitor the waste” on the property.⁷⁰ Plaintiff brought suit alleging, among other things, that the Army Corps was failing to comply with certain RCRA requirements related to methane containment.⁷¹ Analyzing the issue under section 113(h), the court held that the suit for “injunctive relief to ‘improve’ the ongoing clean up . . . constitute[d] a ‘challenge’ . . . and must therefore be dismissed for lack of jurisdiction.”⁷² RCRA, by contrast, would allow this very same suit to proceed. Although there was unarguably some CERCLA activity ongoing at the site, the only RCRA bar for suit had not been triggered: the Army Corps had *not* “commenced” and was not “diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with [a RCRA] permit, standard, regulation, condition, requirement, prohibition, or order.”⁷³

2. *Conflict Between Section 113(h) and RCRA’s Endangerment Suit Bar*

The same problem exists with regard to section 7002(b)(2)(B), which bars RCRA endangerment suits while certain CERCLA actions, including enforcement suits, removal actions, and remedial actions are moving forward.⁷⁴ The RCRA endangerment suit provision anticipates that RCRA and CERCLA activity may take place at the same site and prevents RCRA endangerment suits from interfering where the government “is diligently prosecuting” either a RCRA or CERCLA suit, “is actually engaging in removal action[,]” or “is diligently proceeding with a remedial action.”

FIGURE 1: SHOWING OVERLAP OF SUITS BARRED BY, UNDER RCRA AND CERCLA



⁷⁰ *Id.* at 1197, 1201–04 (resolving question of whether cleanup was pursuant to section 104 or section 120, which governs federal facilities). For a thorough treatment of issues specific to cleanup of federal facilities, see Wuerth, *supra* note 65.

⁷¹ *Shea Homes Ltd.*, 397 F. Supp. 2d at 1197, 1204.

⁷² *Id.* at 1204.

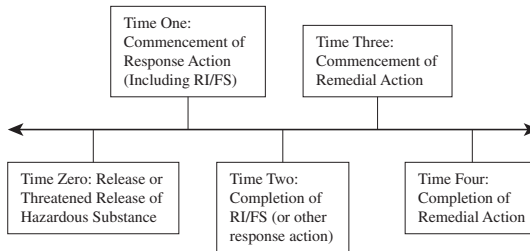
⁷³ 42 U.S.C. § 6972(b)(1)(B) (2012).

⁷⁴ 42 U.S.C. § 6972(b)(2)(B)(ii)–(iii); see *supra* notes 28, 35–42 (describing RCRA’s preclusion provisions).

As with the bar on RCRA enforcement, the RCRA endangerment bar is almost entirely a subset of the CERCLA bar. The same two exceptions apply: Where the relevant federal or state agency opts not to use CERCLA as a cleanup mechanism or where the pollutant involved is petroleum, section 113(h) is not triggered.

But where clean up proceeds pursuant to CERCLA, there are *no* circumstances that would result in RCRA preclusion but would not result in CERCLA preclusion. And, again, there are some circumstances that would result in CERCLA preclusion but not RCRA preclusion — the two provisions are not coterminous. Although the range of endangerment actions barred under CERCLA but not RCRA is a smaller category than the category of enforcement actions barred under CERCLA but not RCRA, it is nevertheless robust. The RCRA preclusion provisions require ongoing CERCLA action and allow citizen suits to proceed after the federal government has undertaken some initial CERCLA cleanup actions (including studies) but before the federal government has begun “diligently” implementing a CERCLA remediation plan. In other words, where a federal agency has undertaken and completed some initial study or other removal action but has not actually moved forward with a final remedial plan, RCRA allows suit, but CERCLA does not.⁷⁵ As illustrated in Figure 2 below, CERCLA precludes suit from Time One through Time Four, with no break. RCRA, by contrast precludes suit from Time One to Time Two⁷⁶ and from Time Three to Time Four.⁷⁷ If there is a break in time between Time Two and Time Three, or if cleanup passes Time Three but stalls, the statute does not bar suit.⁷⁸

FIGURE 2: TIMELINE OF CERCLA ACTIVITY AT A CONTAMINATED SITE



⁷⁵ See, e.g., *Cannon v. Gates*, 538 F.3d 1328, 1332–33 (10th Cir. 2008).

⁷⁶ 42 U.S.C. § 6972(b)(2)(B)(ii) (2012) (barring suit where EPA “has commenced and is actually engaging” in a removal action).

⁷⁷ 42 U.S.C. § 6972(b)(2)(B)(iii) (barring suit where the EPA “has incurred costs to initiate a [RI/FS] and is diligently proceeding with a remedial action”).

⁷⁸ See, e.g., *Acme Printing Ink Co. v. Menard, Inc.*, 812 F. Supp. 1498, 1509 (E.D. Wis. 1992) (“The parties point to no language in RCRA or CERCLA which indicates that Congress intended to allow a party to bootstrap the EPA’s actions so that the initiation of a RI/FS could meet both the requirement that the EPA has incurred costs to initiate such an investigation and study and that it is diligently proceeding with a remedial action. In order to give meaning to both requirements, this Court must interpret § 9672(b)(2)(B)(iii) to require both that the EPA has initiated a RI/FS and is diligently proceeding with some remedial action beyond the remedial investigation and feasibility study.”).

Recall the hypothetical from the introduction — scenario one — which illustrates this situation.⁷⁹ Firm A operates a coal tar manufacturing plant and uses coal tar waste to fill in an adjacent wetland. Hazardous pollutants in the coal tar waste — including benzene and other volatile organic compounds — begin to leach into the groundwater and discharge into a nearby river that is used by the local residential population for subsistence fishing. The site is listed under CERCLA, and the EPA undertakes an RI/FS.⁸⁰ The study determines that the contamination poses a serious risk to neighboring communities, evaluates several possible cleanup methods, and identifies a preferred strategy. After completing the study, EPA begins negotiations with Firm A, attempting to develop a consent decree to govern the scope of cleanup. Six years pass. A local environmental group files an endangerment action against Firm A, alleging that the coal tar waste is creating an “imminent and substantial endangerment to health and the environment” and asking the court to order Firm A to undertake cleanup. Under the current case law in most circuits, the suit is almost certainly barred under CERCLA because the study itself is a response action, and further remedial action “is to be undertaken.”⁸¹ The suit could, however, likely proceed under RCRA because EPA has passed Time Two but has not yet reached Time Three.

Conflict could also occur in a second similar situation — scenario two. Imagine the same underlying facts as described above. Instead of entering into negotiations, EPA decides to undertake cleanup on its own. It commences a remedial action — for instance, it incurs costs for requisition of a bulldozer to begin soil excavation — thus passing Time Three, but then reallocates those funds elsewhere and takes no further action toward implementing a remedy. Here, EPA has passed Time Three, but is not, as section 7002(b)(2)(B)(iii) requires, “diligently proceeding” toward Time Four.

Although these types of delays occur all the time,⁸² these cases tend not to get fully litigated because Time Three often occurs (or EPA begins progressing toward Time Four) before the litigation reaches any kind of conclusion. Thus, although the suit was not precluded at commencement, it may subsequently become moot. In the case of scenario one, a citizen suit may be exactly what is required to jumpstart the negotiations or to ensure that while negotiations regarding comprehensive cleanup drag on at a crawl, Firm A takes some type of response action to prevent imminent and substantial endangerment.⁸³

⁷⁹ See *supra* note 2.

⁸⁰ Such a study is used to establish the scope of harm and to identify and assess possible cleanup procedures. 40 C.F.R. § 300.430(a)(2) (“The purpose of the [RI/FS] is to assess site conditions and evaluation alternatives to the extent necessary to select a remedy.”).

⁸¹ CERCLA § 113, 42 U.S.C. § 9613(h)(4) (2012).

⁸² See Hilary Sigman, *The Pace of Progress at Superfund Sites: Policy Goals & Interest Group Influence*, 44 J.L. & ECON. 315, 317 (2001) (describing ways in which speed of cleanup is affected by interest groups and noting, in particular, that polluters with deep pockets tend to slow down the process).

⁸³ It is also possible that a citizen suit under these circumstances would have the opposite effect. It could distract resources from the negotiations and slow down the settlement process. Because a settlement would, however, likely moot a suit, whether the suit jumpstarts the negotiations may

In either scenario, if not for 113(h), the citizen group could file suit against Firm A, seeking to require Firm A to carry out the remedy that EPA had failed to complete. Further, the court could order Firm A to implement the remedy already selected and would not need to craft its own remedy from scratch.⁸⁴

3. *True Conflict?*

If section 113(h) merely broadened the scope of RCRA’s preclusion provisions, this would not be a true conflict. Instead, this would be a relatively easy case for repeal by implication because the newer statute would occupy the entire field covered by the earlier enactment.⁸⁵ Put another way, the older enactment would simply be surplusage. But section 113(h) does more than broaden the scope of suits barred; it changes the contours of a carefully articulated scheme authorizing certain suits and barring others. Sections 7002(b)(1)(B) and (b)(2)(B) carve out exceptions to a set of statutory private rights of action authorized in sections 7002(a)(1)(A) and (B).⁸⁶ RCRA authorizes private actions in a set of cases the contours of which are defined in part by its preclusion provision. Assuming section 113(h) is read to apply to RCRA suits, the two statutes are in conflict because one subset of citizen suits is authorized by RCRA but barred by CERCLA. In other words, CERCLA does more than simply broaden the scope of one of RCRA’s provisions. It narrows the scope of another of RCRA’s provisions.⁸⁷

B. *The Court Response (or Lack Thereof)*

Although the scope of the conflict is much larger for RCRA enforcement suits than for RCRA endangerment suits, section 113(h) nevertheless creates

depend on whether the Firm believes it will get a better result from the negotiations or from the suit.

⁸⁴ See *infra* Part IV.A (discussing concern of courts about stepping on EPA’s toes and wading into the technical issues).

⁸⁵ NORMAN J. SINGER & J.D. SHAMBIE SINGER, 1A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 23:9 (7th ed. 2012) (stating that where a later statute is “intended to occupy the entire field covered by a prior enactment” courts will often find implied repeal); Note, *Repeal by Implication*, 55 COLUM. L. REV. 1039, 1045–46 (1955) (describing a sort of repeal by field preemption).

⁸⁶ See Solid Waste Disposal Act § 7002, 42 U.S.C. § 6972 (2012).

⁸⁷ In several of the cases applying section 113(h) to other statutes, courts have observed that the sole result of inter-statutory application is to narrow the scope and timing of possible citizen suits and thus there were no concerns about repeal by implication because there are no impacts on the other statute’s substantive provisions. Those cases dealt, however, with the National Environmental Policy Act (“NEPA”) and the National Historic Preservation Act (“NHPA”), neither of which has its own citizen suit provision. See *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1020 n.14 (3d Cir. 1991) (finding clear Congressional intent for applying CERCLA section 113(h) to NHPA); see also *Oil, Chem. & Atomic Workers Int’l Union v. Richardson*, 214 F.3d 1379, 1382–83 (D.C. Cir. 2000) (NEPA); *N. Shore Gas Co. v. EPA*, 930 F.2d 1239, 1244 (7th Cir. 1991); *Schalk v. Reilly*, 900 F.2d 1091, 1096–97 (7th Cir. 1990). Accordingly, although application of section 113(h) does indeed narrow the universe of NEPA and NHPA claims, it does not directly narrow the applicability of any provision of NEPA or NHPA. The ease with which these cases dismiss the concern of repeal by implication should not carry over into the RCRA context.

conflict with both RCRA section 7002(b)(1)(B) and RCRA section 7002(b)(2)(B). Where there is conflict between two statutes, a court has several choices. It could choose among the two statutes and apply only one of them (either the older or the newer). Or it could interpret one or both of the statutes in such a way as to avoid the conflict entirely. A number of canons of statutory interpretation — the presumption against implied repeals, the preference for newer over older, the preference for specific over general, to name a few — offer guidance on which option to select, but here, most courts have selected without analysis, opting to apply the newer statute without acknowledging the conflict.

A handful of courts have recognized the conflict but allowed CERCLA section 113(h) to trump without applying any of the well-developed doctrines of conflict resolution. These courts have asked only whether Congress intended for CERCLA section 113(h) to apply to RCRA suits and, despite arguments by plaintiffs to do so, did not consider the consequences of that application for RCRA's own preclusion provisions. For instance, a recent D.C. District Court rejected a repeal by implication argument, explaining that:

Congress, in enacting CERCLA section 113(h) *after* RCRA was enacted, made no mention of RCRA or its citizen-suit provisions. Therefore, this court can only conclude that Congress not only contemplated RCRA when it enacted section 113(h), but also sought to withdraw jurisdiction for RCRA claims, even where such claims were otherwise authorized under RCRA.⁸⁸

To support this proposition, the court relied on *Jachs v. American University*, which did not involve a RCRA claim,⁸⁹ and on *River Village West LLC v. Peoples Gas Light and Coke Company*, in which the Northern District of Illinois rejected the argument that “in allowing section 113(h) to preclude the present litigation, the court will allow this provision to override the requirements of the RCRA jurisdictional bar, rendering it ineffective.”⁹⁰ The court reasoned that “[h]ad Congress intended to leave suits initiated under [RCRA's imminent and substantial endangerment provision] untouched by section 113(h), it could have created an exception for such suits.”⁹¹ Without citing any precedent on implied repeal, the court reversed the standard presumption, concluding that because Congress did not specify otherwise, it intended for the newer statute to supplant the older one.⁹²

In *Werlein v. United States*, a District of Minnesota court noted that it “is troubling” that “[b]y applying section [113(h)] to RCRA . . . the court is frustrating, to a certain extent, the purpose[] underlying [that] statute” but explained that “[i]t is clear that Congress intended that cleanups under section

⁸⁸ *El Paso Natural Gas Co. v. United States*, 847 F. Supp. 2d 111, 120 (D.D.C. 2012).

⁸⁹ 245 F. Supp. 2d 110, 114 (D.D.C. 2003) (holding that Fifth Amendment Takings claim constitutes a “challenge” to an ongoing cleanup).

⁹⁰ 618 F. Supp. 2d 847, 852 (N.D. Ill. 2008).

⁹¹ *Id.* at 853.

⁹² *See infra* Part III.A (describing the presumption against implied repeal).

[104] go forward unchallenged.”⁹³ The court neither explained why “it [was] clear” nor how it reconciled its conclusion with the precedent on inter-statutory conflict resolution.

In *United States v. Colorado*, the Tenth Circuit gave the issue a more thorough treatment.⁹⁴ In that case, the State of Colorado brought suit in state court to require the United States Army to comply with RCRA standards at a Colorado army base, at which the Army had begun CERCLA remediation.⁹⁵ Pursuant to a district court order in Colorado’s favor, Colorado issued a RCRA compliance order against the Army.⁹⁶ The United States then brought suit, seeking an injunction against enforcement of the compliance order, relying on section 113(h).⁹⁷ The district court granted summary judgment for the United States.⁹⁸ On appeal, the Tenth Circuit recognized the conflict between RCRA and CERCLA and concluded that section 113(h) did not strip jurisdiction over RCRA actions, noting that “to hold otherwise would require us to ignore the plain language and structure of both RCRA and CERCLA, and to find that CERCLA implicitly repealed RCRA’s enforcement provisions contrary to Congress’ expressed intention.”⁹⁹ The court relied on two aspects of RCRA and CERCLA. First, it relied on the CERCLA savings clause establishing that nothing in CERCLA shall “affect or modify the obligations or liabilities of any person under other” laws with respect to the release of hazardous substances¹⁰⁰ and on another “relationship with other laws” provision providing that “[n]othing in [CERCLA] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.”¹⁰¹ Second, the Tenth Circuit looked to RCRA, and observed that pursuant to its own preclusion provisions, enforcement actions could be “brought prior to the completion of the CERCLA response action.”¹⁰² The court noted that RCRA precluded endangerment suits while CERCLA response actions were underway and concluded that by precluding one set of suits but not the other “Congress clearly intended that a CERCLA response action would not prohibit a RCRA citizen enforcement suit.”¹⁰³

⁹³ 746 F. Supp. 887, 894 (D. Minn. 1990).

⁹⁴ 990 F.2d 1565 (10th Cir. 1993).

⁹⁵ *Id.* at 1572. Technically, Colorado sued to enforce not RCRA standards directly but state standards enacted as part of a state RCRA-implementation program. *Id.* RCRA establishes a federal floor for hazardous waste management standards, and where “EPA authorizes a state to carry out the state hazardous waste program in lieu of RCRA, ‘[a]ny action taken by [the] State [has] the same force and effect as action taken by the [EPA].’” *Id.* at 1569 (quoting RCRA § 3006; 42 U.S.C. § 6926(d) (2012)) (alterations in original).

⁹⁶ *Colorado*, 990 F.2d at 1573.

⁹⁷ *Id.* at 1573–74.

⁹⁸ *Id.* at 1574.

⁹⁹ *Id.* at 1575.

¹⁰⁰ CERCLA § 302, 42 U.S.C. § 9652(d) (2012); *see also infra* notes 169–172 and accompanying text (discussing this provision).

¹⁰¹ 42 U.S.C. § 9614(a).

¹⁰² *Colorado*, 990 F.2d at 1577.

¹⁰³ *Id.* at 1578.

In contrast to *Colorado*, *El Paso Natural Gas Company*, *River Village West LLC*, and *Werlein*, the vast majority of courts faced with overlap between CERCLA section 113(h) and RCRA section 7002 have found no conflict at all. In a few cases, courts, responding to arguments of inter-statutory conflict, have recognized some overlap between the two provisions, but the facts of these cases supported dismissal under both statutes, so these courts never addressed the fact that the CERCLA provision is broader in scope — i.e., that there are some circumstances in which CERCLA would point toward dismissal and RCRA would not.¹⁰⁴ In effect, these courts have found no conflict between CERCLA and RCRA because, on the facts before them, both statutes' preclusion provisions called for dismissal.¹⁰⁵

Courts have also universally distinguished and cabined *Colorado*, often misconstruing its reasoning. In *Arkansas Peace Center*, the Eighth Circuit limited *Colorado* to cases involving state enforcement of RCRA.¹⁰⁶ But it did so on the basis that the Tenth Circuit had relied on CERCLA's "relationship with other laws" provision, which protects state law from preemption. Concluding that that provision makes state enforcers special, the Eighth Circuit considered *Colorado* inapplicable. But the Eighth Circuit overlooked the fact that the "relationship with other laws" provision was only one of a number of factors that the *Colorado* court considered relevant, and in particular that the *Colorado* court had placed great emphasis on the impact that section 113(h) would have on RCRA.

Specifically, the *Colorado* court distinguished the circumstances in that case from previous cases in which courts held section 113(h) to have inter-statutory effect not on the basis of the nature of the plaintiff, but because of the nature of the cause of action at issue. First, the Tenth Circuit considered *Schalk v. Reilly*, in which plaintiffs had alleged, among other things, that the cleanup failed to satisfy CERCLA's own procedural requirements for public participation. The Tenth Circuit observed that the "plaintiffs in *Schalk* were attempting to invoke the federal court's jurisdiction under CERCLA's citizen suit provision," but because of the phrasing of subsection (h)(4), the citizen suit excep-

¹⁰⁴ See *Ark. Peace Ctr. v. Ark. Dep't of Pollution Control & Ecology*, 999 F.2d 1212, 1218 (8th Cir. 1993) (finding that CERCLA action triggered both CERCLA section 113(h) and the RCRA "actually engaging" provision); *R.E. Goodson Constr. Co. v. Int'l Paper Co.*, No. C/A 4:02-4184-RBH, 2005 WL 2614927, at *24–26 (D.S.C. Oct. 13, 2005) (same); *Reynolds v. Lujan*, 785 F. Supp. 152, 153–54 (D.N.M. 1992) (same, and also finding RCRA's "diligently proceeding" provision triggered); see also *Clinton Cnty. Comm'rs v. EPA*, 116 F.3d 1018, 1027 n.4 (3d Cir. 1997) (relying on observation that RCRA's "actually engaging" provision and CERCLA section 113(h) shared a common purpose to support application of section 113(h) to RCRA endangerment action).

¹⁰⁵ It is worth noting that even in all the cases cited in note 104, *supra*, there is a degree of conflict: CERCLA renders the RCRA preclusion provisions meaningless. Indeed, in each of the cases that applied both, the discussion of RCRA is dicta. Having first determined that section 113(h) stripped them of subject matter jurisdiction, these courts nevertheless proceeded to determine — needlessly — that RCRA would also have required dismissal.

¹⁰⁶ See, e.g., *Ark. Peace Ctr.*, 999 F.2d at 1217–18 ("Tenth Circuit limited its holding to an action brought by a state"); see also *Shea Homes Ltd. v. United States*, 397 F. Supp. 2d 1194, 1204 (N.D. Cal. 2005) (same).

tion, section 113(h) expressly bars such suits until after the remedial action is complete.¹⁰⁷ By contrast, the exception has no such effect on non-CERCLA citizen suits.¹⁰⁸

Second, the Tenth Circuit considered *Boarhead Corp. v. Erickson*, in which plaintiffs sought an injunction against a response action pending determination of the property’s historic status. The case was inapplicable to the facts of *Colorado*, according to the Tenth Circuit, not because of who the plaintiffs were, but because of what they were asking for.¹⁰⁹ A request to stay cleanup “clearly constituted a challenge to the CERCLA remedial action,” but an attempt to require compliance with RCRA’s substantive requirements did not.¹¹⁰

In sum, the existence of this conflict necessitates treating section 113(h) differently when a plaintiff files suit under RCRA as opposed to CERCLA or any other statute. RCRA is different from the numerous other statutes to which CERCLA section 113(h) has been applied because it specifically contemplates “the issue of whether such suits could be maintained in the face of a CERCLA response.”¹¹¹ The earliest cases of inter-statutory application did not grapple with this question.¹¹² And the cases following *Colorado*, focusing on the *Colorado* enforcer — the state — rather than the court’s underlying reasoning, glossed over the issue as well.¹¹³ RCRA, which both provides for private rights of action and contemplates how such actions will be limited by CERCLA activity, merits special treatment. The conflict must be resolved.

III. A DOCTRINAL JUSTIFICATION FOR PRESERVING RCRA SUITS

Inter-statutory conflict should be avoided because it forces courts to choose between different congressional enactments, elevating one Congress above another. “Wherever possible,” courts have said repeatedly, they are “obligated to construe statutes harmoniously.”¹¹⁴ This doctrine provides little guidance for determining whether or not a conflict exists but merely urges courts to avoid it. Several commentators have noted, in the context of explor-

¹⁰⁷ *Colorado*, 990 F.2d at 1577; see also *infra* notes 155–165 and accompanying text (discussing this exemption).

¹⁰⁸ *Colorado*, 990 F.2d at 1577.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*; see also *Clinton Cnty. Comm’rs*, 116 F.3d at 1027 n.5 (involving a request for injunction and distinguishing *Colorado* in part on this basis).

¹¹¹ Stearns, *supra* note 51, at 71.

¹¹² Indeed, language in the early cases such as *Boarhead* and *Schalk* suggests these courts viewed section 113(h) as intended to deal with the problem of recalcitrant polluters. In *Boarhead*, the court explained “CERCLA’s language shows that Congress concluded that disputes about who is responsible for a hazardous site, what measures actually are necessary to clean-up the site and remove the hazard or who is responsible for its costs should be dealt with after the site has been cleaned up.” *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1019 (3d Cir. 1991).

¹¹³ Even the Tenth Circuit has cabined *Colorado*. See *Cannon v. Gates*, 538 F.3d 1328 (10th Cir. 2008) (applying section 113(h) to a RCRA suit).

¹¹⁴ See *Hammontree v. Nat’l Labor Relations Bd.*, 925 F.2d 1486, 1496 (D.C. Cir. 1991); see also NORMAN J. SINGER & J.D. SHAMBIE SINGER, 2B SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 53:1 (7th ed. 2012) (describing the “principle of harmony in statute law” and citing numerous sources).

ing the presumption against implied repeal, that although the doctrine is intended to protect legislative supremacy, it is in the initial step of determining if conflict exists that courts exercise considerable creativity.¹¹⁵ What these doctrines do make clear, however, is that section 113(h) cannot be interpreted in isolation. Courts must look beyond individual statutes at how statutes work together.¹¹⁶ Accordingly, where conflict is at issue, courts cannot “begin and end with the language” of the provision to be interpreted.¹¹⁷

Having already determined that the potential conflict exists, this Article now turns to the doctrinal tools for conflict resolution. The dominant theme in conflict doctrine is that where it is possible to do so reasonably, courts should try to harmonize two statutes and bypass the conflict. This is all the more true where, as here, two statutes share an underlying purpose. This Part lays out a path by which even the most textualist of courts might preserve RCRA citizen suits.¹¹⁸ Failing to thoroughly examine this issue, most courts have missed this alternate route and have assumed that they are following the only permissible reading of CERCLA. This section posits that there is a second equally permissible, and arguably preferable, reading that eliminates any conflict between the two statutes.

A. *The Doctrine of Implied Repeal*

The doctrine of implied repeal demands that newer statutes be interpreted in light of older statutes. As the Supreme Court has explained, where two statutes whose “literal terms appl[y] to the facts” and require different results, “[s]ole reliance on the ‘plain language’ of [the more recent statute] would assume the answer to the question at issue.”¹¹⁹ According to this reasoning, the

¹¹⁵ See Note, *supra* note 85, at 1043 (arguing that the maxim glosses over the more interesting question of “why [] a court find[s] irreconcilability and thus necessitate[s] repeal when it could adopt a reconciliation which would enable it to leave both statutes in effect”); Karen Petroski, Comment, *Re theorizing the Presumption Against Implied Repeals*, 92 CAL. L. REV. 487, 494 (2004) (“Yet the canons themselves offer no guidance for determining when a relationship of contrariety exists between two statutes. Instead, courts determine the presence or absence of such a relationship through descriptive demonstration, usually either a reconciliation of the two statutes or an explanation of the reasons they cannot be reconciled. Such demonstrations are invariably specific to the potential statutory conflict in question and necessarily involve considerable interpretive and rhetorical creativity. Thus, like the other canons of statutory construction debunked by Llewellyn, the presumption against implied repeals and its corollaries allow courts to exercise interpretive freedom while signaling interpretive restraint.”).

¹¹⁶ Kristen M. Fletcher, *Compromising the Cleanup or Compromising to Cleanup? RCRA Suits Allowed Under CERCLA § 113*, 21 J. LEGIS. 351, 352 (1995) (observing that although CERCLA language appears to be clear, courts must take account of how statutes are “meant to work together, and not against one another”).

¹¹⁷ *Cannon*, 538 F.3d at 1333 (quoting Gen. Elec. Co. v. EPA, 360 F.3d 188, 191 (D.C. Cir. 2004)) (explaining that because the language of section 113(h) was clear the court had no reason to look at the legislative history).

¹¹⁸ This Article accepts textualism as the current dominant frame for statutory interpretation and argues primarily within that framework. It turns to other modes of statutory interpretation only where textualism fails to provide a definitive answer.

¹¹⁹ *Watt v. Alaska*, 451 U.S. 259, 266 (1981).

“plain language” approach the majority of courts have taken to CERCLA is flawed, regardless of whether it is the best reading of CERCLA in isolation, because of the conflict it creates with RCRA — even if courts are ultimately correct to give CERCLA precedence, reading that statute in isolation is a mistake.¹²⁰

Implied repeal is strongly disfavored.¹²¹ The Supreme Court has noted that absent a “clear and manifest” intent to repeal the older of the two statutes, the courts should “read the statutes to give effect to each if they can do so while preserving their sense and purpose.”¹²² Two policy concerns drive this doctrine: deference to the legislature and maintenance of a stable and predictable legal system.¹²³ The former concern is driven in part by the assumption that if the legislature intended repeal, it would say so.¹²⁴ By giving effect to both statutes, courts can avoid exercising their own policy preferences.¹²⁵

The next question, then, is whether section 113(h) demonstrates Congress’s “manifest intent” to partially repeal RCRA section 7002. In *Boarhead*, the Third Circuit found intent to repeal, but, given that the other statute at issue was the National Historic Preservation Act, a statute without its own private right of action or its own preclusion provision and thus a statute with which subsection (h) has no conflict, it is unclear exactly what the Third Circuit found that Congress had intended to repeal.¹²⁶ The case is accordingly not on point. In *Colorado*, on the other hand, the Tenth Circuit looked at RCRA in particular and found no manifest intent for repeal.¹²⁷ In fact, the *Colorado* court distinguished *Boarhead* on the basis that “application of [section 113(h)] to the facts

¹²⁰ Stearns, *supra* note 51, at 72 (“Because RCRA’s citizen suit provision does address this issue, it is an indication that Congress did not intend CERCLA section 113(h) to bar a RCRA citizen suit when RCRA’s provisions specifically allow parties to bring suits in the face of CERCLA clean-ups. To hold that CERCLA section 113(h) bars RCRA citizen suits would be to find that Congress meant to implicitly repeal a right of action conferred by RCRA.”).

¹²¹ Petroski, *supra* note 115, at 489 (expressing concern that doctrine could go too far, noting that “[i]n its strongest form, the presumption amounts to a sort of clear-statement rule — allowing for repeal only by express provision — that negates the very notion of an implied repeal”).

¹²² *Watt*, 451 U.S. at 267 (internal quotation marks omitted); *see also* SINGER & SINGER, *supra* note 85, § 23:9 (explaining that courts avoid implied repeal where possible by “giv[ing] effect to both, unless the text or legislative history of the later statute shows that Congress intended to repeal the earlier one and simply failed to do so expressly”).

¹²³ Jesse W. Markham, Jr., *The Supreme Court’s New Implied Repeal Doctrine: Expanding Judicial Power to Rewrite Legislation Under the Ballooning Conception of “Plain Repugnancy”*, 45 GONZ. L. REV. 437 (2009–10). The two values behind the implied repeal doctrine are judicial deference to the legislature and “maintenance of a legal framework that is predictable, stable, and administrable.” *Id.* at 471.

¹²⁴ *See* Note, *supra* note 85, at 1039–40 (explaining that this assumption is faulty because the legislature often has no knowledge of the earlier enactment); Petroski, *supra* note 115, at 491 (arguing that intentionalism pervades the presumption against implied repeals).

¹²⁵ *See* Markham, *supra* note 123, at 457 (arguing that the doctrine of implied repeal “gives almost equal weight to the newer and older statutes” and finding no *a priori* reason for the rule). *But see* Note, *supra* note 85, at 1039–40 (asserting that the rule disfavoring implied repeal is exercised “to avoid repeal which is deemed undesirable for extrinsic policy reasons Otherwise, the presumption against implied repeals means only that the court in equipoise will decide against repeal”).

¹²⁶ *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3d Cir. 1991).

¹²⁷ *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993).

of that case did not ‘affect or modify in any way the obligations or liabilities’ of a responsible party ‘under other Federal or State law . . . with respect to releases of hazardous substances’¹²⁸ Even if *Boarhead* had been looking at RCRA, it based its finding of intent on the state law carve-out provision, which is, at best, tentative evidence of intent to repeal RCRA’s preclusion provisions.¹²⁹

At core, the search for “manifest intent” is no different from the search for plain meaning: Does CERCLA section 113(h)’s language expressly apply to RCRA suits? Accordingly, the remainder of this Subpart returns to the plain language of CERCLA.

Numerous scholars have combed CERCLA’s text and legislative history, attempting to determine whether Congress in fact intended for section 113(h) to have such broad application.¹³⁰ Every court considering section 113(h) has agreed that it has at least some inter-statutory application. But neither CERCLA’s text nor its legislative history provides a definitive answer for the proper scope of the provision. This Part will take a fresh look at the provision and its statutory context. Read as a whole, the statute provides several powerful arguments for a broad reading. But it also provides several strong arguments for a narrower reading. Ultimately, CERCLA itself provides no definitive answer. This Subpart begins with the subsection’s lead clause: this language appears at first glance to support the broad reading, but it contains a fundamental pragmatic ambiguity. Next, this Subpart turns to the remainder of the subsection and to the rest of section 113. In this statutory context, the ambiguity grows deeper. Finally, this Subpart looks to CERCLA’s two savings clauses and considers the possibility that CERCLA’s savings clauses limit section 113(h)’s inter-statutory application to statutes other than RCRA.

1. “No Federal court shall have jurisdiction”

The subsection’s lead clause is extremely broad. It states that “No Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action selected under [CERCLA section 104], or to re-

¹²⁸ *Id.* at 1577 (quoting CERCLA § 302(d), 42 U.S.C. § 9652(d) (2012)) (first ellipsis in original). *But see* *Razore v. Tulalip Tribes of Wash.*, 66 F.3d 236, 240 (9th Cir. 1995) (“The temporary bar to citizen enforcement does not change the [defendant’s] ‘obligations or liabilities’ under the CWA or RCRA.”).

¹²⁹ *See infra* notes 152–154 and accompanying text (explaining why the state law carve-out is ambiguous evidence of Congress’s intent vis-à-vis other federal law).

¹³⁰ *See, e.g.,* Healy, *supra* note 47, at 289–91 (describing the legislative history of section 113(h)); Karla A. Raettig, *When Plain Language May Not Be Plain: Whether CERCLA’s Preclusion of Pre-Enforcement Judicial Review Is Limited to Actions Under CERCLA*, 26 ENVTL. L. 1049 (1996) (concluding that Congress prioritized preventing delay over preventing irreparable harm); Jonathan N. Reiter, *Comment, CERCLA Section 113(h) & RCRA Suits: To Bar or Not To Bar?*, 17 UCLA J. ENVTL. L. & POL’Y 207, 210–17 (1998–99) (exploring language and legislative history and concluding that language is vague because members of Congress disagreed as to its scope); Stearns, *supra* note 51, at 72 (concluding that Congress did not specifically consider the impact of section 113(h) on RCRA suits).

view any order issued under [CERCLA section 106].”¹³¹ Looking at the provision, the Third Circuit observed 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.”¹³² Indeed, the language refers not to actions brought under CERCLA but to “*any challenges* to removal or remedial action.”¹³³ Numerous courts have therefore concluded that the provision effects a “blunt withdrawal” of federal jurisdiction.¹³⁴

On its face, the language limits neither the type of action nor the plaintiff to which it applies. It also does not limit the defendant to which it applies. Section 113(h) has been invoked by both government agencies and by polluters to stave off citizen suits.

2. “to review challenges to . . . selected” response actions

So what does it mean to “challenge” a selected response action? Could it be that “challenge” limits the type of cause of action, or the relevant plaintiff, or the relevant defendant? What is a challenge?¹³⁵ It is essential to consider this question in order to preserve the distinction, made by the Tenth Circuit in *United States v. Colorado*, between barring courts from reviewing response actions and barring courts from reviewing *challenges to* response actions.¹³⁶ There is a difference between a suit that requires a court to review the response action in the course of asking a different question — such as whether the plaintiff is entitled to damages as a result of the response action¹³⁷ — and one that directly attacks the response action itself — such as in a suit to enjoin incineration.¹³⁸ In other words, an action arguing for a different cleanup plan than one

¹³¹ CERCLA § 113(h), 42 U.S.C. § 9613 (2012). More on the contents of that ellipsis later.

¹³² *Boarhead*, 923 F.2d at 1020.

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

¹³⁴ See, e.g., *Cannon v. Gates*, 538 F.3d 1328, 1333 (10th Cir. 2008); *Oil, Chem. & Atomic Workers Int’l Union v. Richardson*, 214 F.3d 1379, 1382 (D.C. Cir. 2000); *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 328 (9th Cir. 1995); *N. Shore Gas Co. v. EPA*, 930 F.2d 1239, 1244 (1991).

¹³⁵ On a lighter note, I have a copy of the 4th edition of Black’s Law Dictionary sitting in my office, and not quite realizing how old it was, started my search there. Its primary definition for challenge was “a request by one person to another to fight a duel.” This definition does not appear in the current 9th edition.

¹³⁶ 990 F.2d 1565, 1575 (10th Cir. 1993) (using the concept of the challenge as a hook to preserve RCRA suits and thus avoid having to find a repeal by implication).

¹³⁷ *Beck v. Atlantic Richfield Co.*, 62 F.3d 1240, 1243 (9th Cir. 1994) (explaining that “[a]lthough determination of whether [defendant’s cleanup was] ‘wrongful’ may require examination of the EPA’s orders, resolution of the damage claim would not involve altering the terms of the cleanup order” (internal citation and footnote omitted)).

¹³⁸ *Schalk v. Reilly*, 900 F.2d 1091, 1097 (7th Cir. 1990) (holding that suit seeking to enjoin a selected mechanism for cleanup constituted a challenge because it would delay implementation of the cleanup plan); see also H.R. REP. NO. 99-253(I), at 81 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2836 (explaining that “there is no right of judicial review of the Administrator’s selection and implementation of response actions until after the response action have [sic] been completed”).

already selected would constitute a challenge.¹³⁹ The *Colorado* court distinguished between a suit seeking an injunction against cleanup, which would certainly be a challenge, and a suit seeking that cleanup comply with RCRA's substantive requirements, which would not be a challenge, but the court did not determine where exactly the line between those two things would fall.¹⁴⁰

The Ninth Circuit has taken an even broader view of "challenge," concluding that any action "directly related to the goals of the cleanup itself" could constitute a "challenge."¹⁴¹ Under this approach, a suit seeking to improve the cleanup is a challenge, even if it would not result in delay; accordingly, requiring compliance with RCRA's substantive requirements would constitute a challenge.¹⁴² Several other courts have adopted this standard.¹⁴³

Under any of this precedent, however, a suit to compel cleanup where it had stalled would likely be considered a "challenge" because it would "interfere with the remediation process ongoing at the site."¹⁴⁴ It would undermine what many courts have referred to as EPA's discretion to choose not just the mechanism but also the timing of cleanup.¹⁴⁵

But nothing in the "challenge" clause itself provides guidance as to the appropriate scope of the word. *Black's* defines "challenge" as "[a]n act or instance of formally questioning the legality or legal qualifications of a person, action, or thing."¹⁴⁶ This definition suggests that the only direct attacks on remedy selection are those involving arguments that the remedy is legally inadequate (because it does not meet or exceeds statutory requirements).¹⁴⁷ Most courts, however, have read "challenge" more colloquially, asking, as described above, whether the suit would interfere with the ongoing response action and not whether the suit was attacking the legal sufficiency of the response action.

A suit to jumpstart a stalled cleanup process, particularly in the absence of an agency decision to halt work or to do no work,¹⁴⁸ is only a challenge in that

¹³⁹ *Schalk*, 900 F.2d at 1097 (observing that "judicial review itself slows the process down" because "judicial review of agency clean-up activities would hinder and delay the hazardous waste disposal") (quoting *Jefferson Cnty. v. United States*, 644 F. Supp. 18, 182 (E.D. Mo. 1986)).

¹⁴⁰ *Colorado*, 990 F.2d at 1576-77.

¹⁴¹ *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 330 (9th Cir. 1995) (contrasting a suit seeking compliance with RCRA, which is directly related to the CERCLA cleanup action, with a suit seeking to enforce a minimum wage requirement for cleanup workers, which would not be barred).

¹⁴² *Id.* By contrast, a suit that did not seek to alter the terms of the cleanup may not constitute a challenge. *See Beck*, 62 F.3d at 1243 (holding that claim seeking damages for harm caused by diversion of water as a result of cleanup order was not a challenge to the cleanup plan).

¹⁴³ *See, e.g., Costner v. URS Consultants, Inc.*, 153 F.3d 667, 674-75 (8th Cir. 1998) (considering whether complaint sought to "interfere with the remediation process ongoing at the site . . . [or was] directly related to the goals of cleanup itself" and concluding that false claims act suit was not barred (internal quotation marks omitted)).

¹⁴⁴ *Id.* at 675.

¹⁴⁵ *See, e.g., Cannon v. Gates*, 538 F.3d 1328, 1336 (10th Cir. 2008) (expressing sympathy with the plaintiff's "frustration with the long delays").

¹⁴⁶ BLACK'S LAW DICTIONARY (9th ed. 2009).

¹⁴⁷ This definition may also limit the bar to suits brought against the enforcing government agency as opposed to suits brought against the polluter.

¹⁴⁸ *See N. Penn Water Auth. v. Bae Systems*, No. 04-4446 2005 WL 1715718, at *8 (E.D. Pa. Sept. 16, 2005) (relying on fact that the EPA had specifically considered and rejected a remedy

colloquial sense; it does not attack the legal sufficiency of the selected remedy. The D.C. Circuit has observed that section 113(h) does not bar “any challenge” “without qualification.”¹⁴⁹ Rather, it bars challenges to “particular action[s] or order[s].”¹⁵⁰ This alternate reading of “challenge” casts doubt on the certainty with which most courts have read the provision to apply not only to all causes of action but also to all plaintiffs. “Challenge” is, indeed, the fuzziest word in subsection (h)’s lead clause, and it is this word that provides a legitimate entry point for reading the subsection more narrowly.¹⁵¹

3. “*other than under section 1132*”

Perhaps the best argument in favor of inter-statutory application of section 113(h) lies in the ellipsis in the version of the provision quoted above. In that ellipsis is an exception for one entire category of non-CERCLA suits — state law causes of action brought in federal court under diversity jurisdiction. Unabridged, the lead clause of the provision reads: “No federal court shall have jurisdiction under Federal law *other than under section 1332* of Title 28 (relating to diversity of citizenship jurisdiction)”¹⁵² The Third Circuit has hinted that it is this carve out that indicates that the provision extends to all other causes of action that “challenge” selected response actions.¹⁵³ In other words, because Congress created an exception for state law causes of action but not for any other non-CERCLA causes of action, it intended for the provision to bar the latter category of suits.

But the Third Circuit failed to consider the central function of that carve out, which is to protect state law nuisance actions.¹⁵⁴ The provision can be read as a mechanism to ensure relevant state law would not be preempted, a concern that does not exist in the context of suits brought under other federal law. This additional federalism concern undermines the strength of the carve-out as evidence of section 113(h)’s application to other federal law causes of action.

4. “*except one of the following*”

The rest of subsection (h) casts further doubt on the arguments put forth above for finding inter-statutory application. Regardless of how broad or how clear section 113(h)’s jurisdiction-stripping language appears when read in isolation, the remainder of subsection (h), the remainder of section 113, and the

that plaintiffs sought as a basis to conclude that suit to order that remedy was a challenge to the selected response action).

¹⁴⁹ Gen. Elec. Co. v. EPA, 360 F.3d 188, 191 (D.C. Cir. 2004).

¹⁵⁰ *Id.*

¹⁵¹ See *infra* Part IV.C (undertaking this narrower reading).

¹⁵² CERCLA § 113, 42 U.S.C. § 9613(h) (2012) (emphasis added).

¹⁵³ See *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1020 n.14 (3d Cir. 1991).

¹⁵⁴ See H.R. REP. NO. 99-962, at 224 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3317 (suggesting the carve out was to preserve state nuisance actions).

remainder of CERCLA are relevant to its plain meaning.¹⁵⁵ Read in this context, the scope of the jurisdiction-stripping language is even less clear.

First, subsection (h) contains five exceptions, each allowing particular CERCLA actions to proceed.¹⁵⁶ The provision does not bar CERCLA cost recovery actions, actions brought by the government to enforce CERCLA orders, CERCLA reimbursement actions, actions by the United States to compel CERCLA remediation, and, importantly, CERCLA citizen suits. The citizen suit exemption allows CERCLA citizen suits to proceed, despite the jurisdictional bar, once CERCLA cleanup is complete and no remedial action is “yet to be undertaken.”¹⁵⁷ It is this provision that courts turn to when considering whether RCRA citizen suits may proceed. For instance, in *Cannon*, the court observed that section 113(h) bars RCRA suits that challenge a remedial plan only until that “plan has been completed.”¹⁵⁸ The exemption, however, is limited on its face to citizen suits brought pursuant to the CERCLA citizen suit provision.¹⁵⁹ Section 113(h) contains no parallel exception for citizen suits brought under any other federal law. Paying no mind to the fact that the exceptions are directed only to suits arising under CERCLA, many courts have simply assumed that the same completeness rule applies to other types of citizen suits. But nothing in the provision supports this assumption.

One possible explanation for why the exceptions address only CERCLA suits is that other types of citizen suits simply do not fall within the ambit of the bar in the first instance. Indeed, a court presuming otherwise — that non-CERCLA citizen suits are barred — has two unenviable choices. Either it can follow the lead of the *Cannon* court and read the CERCLA citizen suit exception to apply to all types of citizen suits, despite the exception’s clear language. Or it can conclude that non-CERCLA citizen suits are barred indefinitely, regardless of whether the CERCLA action at the site is complete.¹⁶⁰ This latter option would contravene the well-established presumption in favor of judicial review.¹⁶¹ Although the legislative history is not particularly definitive with

¹⁵⁵ See *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991) (explaining the cardinal rule that “a statute is to be read as a whole, [because] the meaning of statutory language, plain or not, depends on context” (internal citation omitted)).

¹⁵⁶ 42 U.S.C. § 9613(h)(1)–(5).

¹⁵⁷ See, e.g., *Clinton Cnty. Comm’rs v. EPA*, 116 F.3d 1018, 1022–25 (3d Cir. 1997) (en banc).

¹⁵⁸ *Cannon v. Gates*, 538 F.3d 1328, 1332 (10th Cir. 2008) (asserting that section 113(h) “does not preclude actions to challenge a remedial plan *after* that plan has been completed”).

¹⁵⁹ Although most courts have ignored this point, the Tenth Circuit, in *United States v. Colorado*, relied on the fact that section 113(h)(4) did not apply when it found that the State of Colorado was not barred from bringing a RCRA enforcement action despite ongoing CERCLA activity. 990 F.2d 1565, 1577 (10th Cir. 1993). Had Colorado instead needed to rely on CERCLA’s citizen suit provision, the express language of the exception, barring suit where remedial action “is to be undertaken,” would have barred the suit. 42 U.S.C. § 9613(h)(4).

¹⁶⁰ A third possibility is that a court could read a completion requirement into the word “challenge.” If a response action is complete, an action is not a challenge to it. Of course, this reading would render subsection (h)(4) surplusage and would be difficult to apply where the primary allegation of the post-cleanup action was that the selected response action was insufficient to address the problem. See 42 U.S.C. § 9613.

¹⁶¹ See *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (“[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that

regard to the precise scope of the bar, it is nearly universal in referring to section 113(h) as a bar on “pre-enforcement review.”¹⁶² Given this characterization of the provision as a limitation on “timing of review,”¹⁶³ it would be incongruous to conclude that Congress intended to permanently withdraw the jurisdiction of federal courts to hear a wide variety of claims whenever those claims happened to involve a site subject to CERCLA cleanup.

Many courts have, nevertheless, relied on the citizen suit exception to justify inter-statutory application of subsection (h). For instance, in *McClellan Ecological Seepage Situation v. Perry*, the Ninth Circuit concluded that “[i]f the prohibitory language did not include citizen suits, there would have been little need for the exception in subsection (h) for citizen suits challenging *past* cleanup actions.”¹⁶⁴ The Ninth Circuit overlooked the fact that plaintiff had filed a RCRA suit, not a CERCLA citizen suit, and thus it never grappled with the fate of non-CERCLA citizen suits in light of the narrow nature of subsection (h)(4).

Next, the remainder of section 113 provides further support for holding that only CERCLA actions are “challenges.” Titled “Civil proceedings,” the provision governs a variety of procedural issues related to actions brought under CERCLA’s various sections, including section 107 cost recovery actions, section 104 and 106 enforcement actions, and section 310 citizen suits. Only one of section 113’s twelve subsections has any bearing on any action brought under any statute other than CERCLA. That one is subsection (i), which provides that “[i]n any action commenced under this chapter or under [RCRA] in a court of the United States, any person may intervene as a matter of right

such was the purpose of Congress.”). Nevertheless, one court has adopted this position. In *Frey v. EPA*, the Southern District of Indiana rejected a RCRA claim despite the fact that remediation was complete. No. 1:00-CV-660-RLY-WTL, 2006 WL 2849715 (S.D. Ind. Sept. 26, 2006). The court reasoned that because section 113(h) provides no exceptions for non-CERCLA claims, CERCLA provides an exclusive remedy for challenging a cleanup. *Id.* at *3. Indeed, an older Seventh Circuit case suggested this very conclusion, explaining that the “method of section 113(h) is not to toll judicial remedies, and leave it at that; it is to specify the remedies that survive. Once the remedial action has been completed, a suit either to enjoin the action or to compel it is moot, and the statute does not authorize either form of suit.” *N. Shore Gas Co. v. EPA*, 930 F.2d 1239, 1245 (7th Cir. 1991) (speculating that section 113(h) may permanently extinguish certain causes of action). The Seventh Circuit also observed that because of the possibility of foreclosing judicial review despite arbitrary agency action, the “breadth of section 113(h) is troublesome.” *Id.* On the ground that the case at issue was squarely within its confines and raised no constitutional concerns, the Seventh Circuit left “for another day the exploration of the outer bounds of this unusual provision.” *Id.*

¹⁶² The legislative history’s characterization of section of section 113(h) as a bar on “pre-enforcement review” of cleanup orders suggests that Congress envisioned “challenge” to mean something more direct than “related to the goals” of cleanup. *See S. REP. NO. 99-11*, at 58 (1985). The phrase “pre-enforcement review” suggests that it is only the recipient of the order that can “challenge” it. Any other plaintiff, i.e., anyone other than the party against whom the order could be enforced, must, by definition, be seeking something other than pre-enforcement review.

¹⁶³ “Timing of review” is also, of course, the title of the subsection. CERCLA § 113(h), 42 U.S.C. § 9613(h) (2012).

¹⁶⁴ 47 F.3d 325, 328 (9th Cir. 1995).

when” certain conditions are met.¹⁶⁵ That subsection (i) expressly extends its scope to RCRA actions while subsection (h) does not is telling.

In the context of the remainder of section 113, then, subsection (h)’s lead clause becomes less “blunt.” In fact, either reading of the clause — that it had inter-statutory application or that it did not — would be reasonable.

5. *The Savings Clauses*

To further confuse matters, CERCLA contains two different savings clauses. One supports inter-statutory application of section 113(h). The other supports protecting RCRA from that inter-statutory application.

The first is a subsection of CERCLA’s citizen suit provision. It reads: “This chapter does not affect or otherwise impair the rights of any person under Federal, State, or common law, except with respect to the timing of review as provided in section [113(h)] of this title”¹⁶⁶ Although this savings clause has been invoked by litigants to argue in favor of inter-statutory application of section 113(h), no court has ever used it to support such application.¹⁶⁷ Instead, courts rely on it to support the proposition that CERCLA is not meant to preempt local and state environmental laws,¹⁶⁸ suggesting that the timing of review provision does in fact alter the rights of persons under other federal laws, possibly including the right of citizens to file suit under RCRA.

By contrast, CERCLA’s other savings clause provides that “[n]othing in [CERCLA] shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants.”¹⁶⁹ In *Colorado*, the Tenth Circuit relied on this language when it allowed the State of Colorado to proceed with a RCRA enforcement action.¹⁷⁰ As mentioned above, it also relied on this language to distinguish *Boarhead*, which found intent to repeal.¹⁷¹ Applying subsection (h) in the facts of *Colorado* would have resulted in altering the defendant’s obligation under RCRA.¹⁷²

The *Colorado* court dealt with the case of an enforcement action. Colorado was attempting to enforce particular RCRA requirements.¹⁷³ But the court’s conclusion would carry equal weight in the context of an endangerment action. Application of section 113(h) to RCRA would modify the “obligation” of polluters to abate “imminent and substantial endangerment to health [and] the environment.”¹⁷⁴

¹⁶⁵ 42 U.S.C. § 9613(i).

¹⁶⁶ CERCLA § 310, 42 U.S.C. § 9659(h) (2012).

¹⁶⁷ *Anacostia Riverkeeper v. Washington Gas Light Co.*, No. 11-1453 (RMC), 2012 WL 4336243, (D.D.C. Sept. 24, 2012).

¹⁶⁸ *See, e.g., Fireman’s Fund Ins. Co. v. City of Lodi, Cal.*, 302 F.3d 928 (9th Cir. 2002) (en banc).

¹⁶⁹ 42 U.S.C. § 9652(d).

¹⁷⁰ *United States v. Colorado*, 990 F.2d 1565, 1575–76 (10th Cir. 1993).

¹⁷¹ *See supra* note 87 and accompanying text (explaining how *Colorado* distinguishes *Boarhead*).

¹⁷² *Colorado*, 990 F.2d at 1576.

¹⁷³ Solid Waste Disposal Act §82, 42 U.S.C. § 6972(a)(1)(A) (2012).

¹⁷⁴ 42 U.S.C. § 6972(a)(1)(B).

Together, these savings clauses may be read to justify inter-statutory application of section 113(h) to all statutes except those creating “obligations or liabilities” related to “releases of hazardous substances.” But one court has taken a different approach. In *Razore v. Tulalip Tribes of Washington*, the Ninth Circuit concluded that because section 113(h) was only a temporary bar on RCRA suits it did not change obligations and liabilities under RCRA.¹⁷⁵ Further, the Ninth Circuit concluded that allowing the savings clause to limit the scope of section 113(h) in this manner would swallow section 113(h).¹⁷⁶ The Ninth Circuit overlooked that this narrowing would preserve only other statutes related to release of hazardous substances; thus much of the section’s inter-statutory application would remain unaffected. But the Ninth Circuit’s emphasis on subsection (h)’s temporal nature highlights some ambiguities in the provision. Are a firm’s obligations and liabilities altered if they kick in later than they otherwise might have? Or is subsection (h) a limitation only on citizens’ right to enforce the firm’s obligations and not an alteration of those obligations directly? Again, the savings clauses provide no definitive answer to the question of the scope of subsection (h).

6. Conclusions

In sum, there are three possible readings of section 113(h). First, as most courts have concluded, it might apply to all causes of action that may interfere with ongoing CERCLA remediation. Second, it may apply to some narrower subset of non-CERCLA causes of action. Or, third, it may apply only to causes of action arising under CERCLA. The legislative history sheds no further light on the matter. And for good reason, members of Congress themselves did not agree on the provision’s meaning.¹⁷⁷ Beyond the statements of individual members, however, nothing in any of the committee reports addresses the question of application of section 113(h) to RCRA suits in particular.¹⁷⁸ Ultimately, the statute offers no clear answer.¹⁷⁹

This suggests two doctrinal conclusions. First, despite the conclusion of most courts, the meaning of section 113(h) is not so plain. There are multiple plausible readings. Second, because there are multiple plausible readings, not

¹⁷⁵ 66 F.3d 236, 240 (9th Cir. 1995).

¹⁷⁶ *Id.*

¹⁷⁷ Reiter, *supra* note 130, at 216–17 (noting contradictory statements within the legislative history as to whether the bar applied to RCRA suits or not and whether it applied to all plaintiffs or just polluters).

¹⁷⁸ See H.R. REP. NO. 99-962, at 222–25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3315-18 (describing addition of section 113(h) and making no mention of RCRA); H.R. REP. NO. 99-253, pt. 1, at 79–83 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861–65 (discussing amendment to section 113 and making no mention of RCRA); H.R. REP. NO. 99-253, pt. 3, at 21–24 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3044–47; H.R. REP. NO. 99-253, pt. 5, at 24–27 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3124, 3147–50.

¹⁷⁹ Healy, *supra* note 47, at 316 (observing that “section 113(h) and the legislative history show[] that Congress did not consider the complexities of the statutory interactions that would arise in these cases and, thus, did not intentionally select its preferred means for resolving statutory inconsistencies that might arise”).

all of which conflict with RCRA, there is no manifest intent to repeal any part of RCRA.

A few additional points bear mentioning. First, treating RCRA differently than other statutes makes sense because, as explained in Part I above, RCRA and CERCLA together form a comprehensive statutory scheme governing toxic waste.¹⁸⁰ The two statutes are designed to work together and function in many ways as a single statutory scheme.¹⁸¹ Several years after passing RCRA, Congress enacted CERCLA “in response to increasing concern over inactive or abandoned sites that contain hazardous wastes or other hazardous substances. Earlier legislation had not effectively dealt with inactive sites.”¹⁸² CERCLA was thus “designed to address many of the same toxic waste problems that inspired the passage of RCRA” and to fill RCRA’s gap¹⁸³ by establishing a scheme of retroactive strict liability for polluters.¹⁸⁴ Because the two statutes are so closely related, they shed light on each other’s meaning.¹⁸⁵

Second, because Congress added section 113(h) to CERCLA just two years after it revisited and amended RCRA’s citizen suit and preclusion provisions¹⁸⁶ and because the two statutes are so closely linked, the usual contention that finding implied repeal may be appropriate because Congress could not have been expected to think through all the implications of its new enactment holds less weight. In other words, critics of the canon argue that courts should not presume that Congress would have said something had it intended repeal. In this case, Congress very well should have said something had it intended repeal.

¹⁸⁰ See *supra* notes 5–8 and accompanying text (describing the two statutes); Stearns, *supra* note 51, at 54–55 (describing the close relationship between the two statutes).

¹⁸¹ See Stearns, *supra* note 51, at 54 (exploring legislative history of both statutes).

¹⁸² Lone Pine Steering Committee v. EPA, 600 F. Supp. 1487, 1495 (D. N.J. 1985); see also United States v. Colorado, 990 F.2d 1565, 1570 (10th Cir. 1993) (stating that RCRA “was ‘clearly inadequate’ to deal with ‘the inactive hazardous waste site problem’” (quoting H.R. REP. NO. 1016, pt. 1, at 17–18 (1980), reprinted in 1980 U.S.C.A.N. 6119 at 6120)).

¹⁸³ Meghriq v. KFC W., Inc., 516 U.S. 479, 485 (1996); see also B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1202 (2d Cir. 1992) (“RCRA is preventative; CERCLA is curative.”).

¹⁸⁴ CERCLA § 107, 42 U.S.C. § 9607.

¹⁸⁵ RCRA and CERCLA are *in pari materia*. Cf. Consolidated Cos., Inc. v. Union Pacific R. Co., 2006 WL 408234 at *13 (W.D. La. 2006) (finding the two statutes were *in pari materia* with regard to the definitions of their terms). In *Pakootas v. Teck Cominco Metals, Ltd.*, one district court compared the two statutes and determined that because “RCRA regulates disposal activities, whereas CERCLA concerns itself with liability for cleaning up hazardous substances which have already been disposed and which have now been released or are threatened to be released into the environment,” the two statutes are not *in pari materia*. 632 F. Supp. 2d 1029, 1033–34 (E.D. Wash. 2009) (internal quotation marks omitted). To be sure, this is an accurate description of the two statutes, but it overlooks the common underlying purpose of the two schemes. It is also inapplicable, at least, to the endangerment provision, which does “concern[] itself with liability for cleaning up hazardous substances which have already been disposed” *Id.* See also SINGER & SINGER, *supra* note 114, § 51:3 (defining and explaining the significance of *in pari materia*).

¹⁸⁶ Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 113, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. § 9613(h)) (amending CERCLA to include section 113(h)); The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 401, 98 Stat. 3221 (1984) (codified at 42 U.S.C. § 6972(a)(1)(B), (b)(2)(B)) (amending the citizen suit provision of RCRA to include endangerment suits and preclusion provisions).

Finally, Congress did, in fact, say something regarding the impact of the CERCLA amendments on RCRA. At the same time that Congress added section 113(h), it amended CERCLA’s “Relationship to Other Law” section, which addresses the impact of CERCLA on RCRA provisions relating to recycled oil.¹⁸⁷ But it made no mention in this section of the impact of section 113(h) on RCRA citizen suits, suggesting either that Congress knew that the provision would not affect RCRA’s endangerment suit preclusion provisions, or that Congress simply did not consider the question. Either way, this omission in the “Relationship to Other Law” section further supports the conclusion that Congress did not intend any repeal.¹⁸⁸

In the absence of any intent, the presumption against implied repeal requires that both statutes be given effect to the extent that doing so would not undermine the purpose of either.¹⁸⁹ Reading section 113(h) narrowly so as not to apply to RCRA endangerment actions would “preserv[e] the [] sense and purpose” of both statutes.¹⁹⁰ Because, as many courts have recognized, the purpose of section 113(h) was to prevent litigants from delaying CERCLA cleanup processes, declining to apply the provision in the context of RCRA suits to abate “imminent and substantial endangerment” would not run contrary to this purpose.¹⁹¹ Further, RCRA itself ensures that the RCRA endangerment suit will not cause the type of delay that subsection (h) is concerned with. RCRA bars suit where CERCLA cleanup is actually proceeding; thus, it prevents polluters from seeking to delay cleanup.

¹⁸⁷ See 42 U.S.C. § 9614(c) (explaining impact of CERCLA amendments on RCRA provisions addressing recycled oil); see H.R. REP. NO. 99-962, at 225–28 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3318–21 (describing amendments to CERCLA’s “Relationship to Other Law” provision).

¹⁸⁸ See *United States v. Fausto*, 484 U.S. 439, 453 (1988) (“[I]t can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change.”).

¹⁸⁹ See *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992) (observing that “[r]edundancies across statutes are not unusual events in drafting, and so long as there is no positive repugnancy between two laws, a court must give effect to both” (internal quotation marks and citation omitted)); *United States v. Colorado*, 990 F.2d 1565, 1575 (1993) (relying on “the plain language and structure of both CERCLA and RCRA” to determine the scope of section 113(h)).

¹⁹⁰ *Watt v. Alaska*, 451 U.S. 259, 266 (1981). Another way of thinking about this is to conceive of section 113(h) as a bar on pre-enforcement review. Whether such a bar is appropriate depends, first, on whether it furthers the goal of the statute and allows for effective agency operations, and second, on whether it is fair, which turns on whether it will be too late later to raise the issue. Healy, *supra* note 47, at 292–94 (summarizing the factors courts consider when determining whether pre-enforcement review is appropriate in a given statutory context). Where pre-enforcement review would actually contravene the statutory scheme, the provision should be read more narrowly.

¹⁹¹ *Oil, Chem., & Atomic Workers Int’l Union v. Richardson*, 214 F.3d 1379, 1382 (D.C. Cir. 2000) (observing that the rationale behind section 113(h) was “that pre-enforcement review would be a significant obstacle to the implementation of response actions and the use of administrative orders”) (quoting S. REP. NO. 99-11, at 58 (1985)); see also H.R. REP. NO. 99-253, pt. 1, at 266 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2941 (stating that “[t]he purpose of [this] amendment is to prevent private responsible parties from filing dilatory, interim lawsuits which have the effect of slowing down or preventing EPA’s cleanup activities”). One commentator has suggested that repeal by implication would contravene the purpose of both statutes. Stearns, *supra* note 53, at 83 (observing that finding intent for implied repeal would be inconsistent with the purposes of RCRA and CERCLA — to avoid cleanup of hazardous contamination).

B. Can They Be Harmonized?

Case after case reiterates the same point. If the court can harmonize the two statutes, it should.¹⁹² Harmonization is only a viable option if it is reasonable. In other words, a court can only avoid conflict if it can do so without butchering the language of the statute in question. *Colorado* offers one route: It explained that a RCRA enforcement action “was not a ‘challenge’ to [a] CERCLA response action. To hold otherwise would require us to ignore the plain language and structure of both CERCLA and RCRA, and to find that CERCLA implicitly repealed RCRA’s enforcement provisions contrary to Congress’s expressed intent.”¹⁹³ “Challenge,” the most flexible word in section 113(h), provides courts an opportunity to read that section in a manner narrow enough to prevent it from creating conflict with RCRA.

With regard to endangerment, this harmonization is very straightforward. Simply put, a suit is only a challenge to a selected cleanup plan where that plan is ongoing. If it is not ongoing, then the challenge is to the delay, not to the selected remedial or removal action.¹⁹⁴ This approach tracks the CERCLA preclusion to the RCRA preclusion: If a removal or remedial action is ongoing, the suit would be barred under RCRA anyway. For instance, if EPA is actively conducting an RI/FS, suit would be precluded by RCRA section 7002(b)(2)(B)(ii), which prevents suit where EPA is “actually engaging in a removal action.”¹⁹⁵ If EPA has completed the RI/FS, however, but has not yet commenced any remedial action, even though it has announced intent to do so, suit would not be barred under RCRA. Under the current case law, CERCLA would bar a suit under this circumstance, but, following the reading of “challenge” put forth here, a suit would not constitute a challenge because there would be no ongoing action to challenge. Essentially, if substantial time lapses between stages of cleanup, between Time Two and Time Three (per figure 2, above), the response actions would be constructively complete. Until EPA or another relevant government agency restarted its efforts, citizen groups would be free to bring suit under RCRA’s endangerment provision.¹⁹⁶

¹⁹² SINGER & SINGER, *supra* note 114, § 51:2 (“Courts try to construe apparently conflicting statutes on the same subject harmoniously, and, if possible, give effect to every provision in both.”).

¹⁹³ *United States v. Colorado*, 990 F.2d 1565, 1575 (10th Cir. 1993) (emphasis added).

¹⁹⁴ One court has rejected this distinction. In *Hanford Downwinders Coal., Inc. v. Dowdle*, plaintiffs raised the policy concern that the agency could “indefinitely avoid judicial review by never taking action.” 841 F. Supp. 1050, 1061–62 (E.D. Wash. 1993). The court rejected plaintiff’s contention that section 113(h) should bar only suits against misfeasance and not suits against nonfeasance, explaining that the distinction was foreclosed by the plain language of section 113(h). *Id.* The court explained that “CERCLA gives the agencies charged with its implementation substantial discretion to select not only the substance of their response actions but also the timing of those actions.” *Id.* But the court failed to consider the possibility that agencies often do not make decisions about timing; rather, projects get derailed for other reasons.

¹⁹⁵ RCRA § 7002(b)(2)(B)(ii), 42 U.S.C. § 6972(b)(2)(B)(ii) (2012); *supra* note 9 (an RI/FS is a removal action).

¹⁹⁶ One difficult practical question this raises is how much delay is enough. If EPA completes an RI/FS and waits a few months before commencing a remedial action, is that enough? Probably not, but in practice, it is likely to make little difference. If a citizen group thought it saw true delay — i.e., a situation where EPA had shifted priorities or where negotiations had stalled — and

Enforcement actions are more complicated. Following *Colorado*, RCRA enforcement actions, which seek merely to have an ongoing cleanup comply with RCRA’s substantive requirements, are not “challenges” because, although they relate to the goals of cleanup, they do not directly interfere with cleanup. But to bring enforcement seeking injunctions against cleanup suits outside the section 113(h) bar requires the more drastic conclusion that section 113(h) has no extra-statutory application at all.¹⁹⁷ Such a narrow reading would also preserve NEPA and NHPA suits and constitutional challenges and other challenges that don’t contain their own internal limits (as RCRA does). Such a narrow reading could easily undermine the section’s fundamental purpose of allowing for expeditious cleanup because it would allow polluters to use other citizen suits to stall cleanup. But adopting the middle path described in Part III.A.6, above, would then preserve only some RCRA suits.

Accordingly, one more canon of statutory interpretation bears mentioning. For the RCRA enforcement action, seeking to enjoin a selected response or remedial action, conflict is unavoidable. In this situation, the general rule is that the newer rule defeats the older rule, but there is one exception to that: The more specific statute trumps the more general statute, even where the latter is newer.¹⁹⁸ Here, RCRA is far more specific. CERCLA section 113(h) broadly governs the scope of federal jurisdiction over challenges to CERCLA actions — stripping jurisdiction, regardless of the nature of the CERCLA activity or the underlying cause of action in the suit. RCRA, by contrast, addresses preclusion in the much more specific context of RCRA citizen suits and takes a much more nuanced approach.¹⁹⁹ This canon, like those aimed at avoiding conflict in the first instance, operates on the principle that the courts ought not to substitute their own judgment for that of Congress. Where Congress has addressed a narrow question in a comprehensive way it cannot be presumed to be tossing that scheme aside when it later addresses a broader question in a general way.

brought suit too early, EPA could bar the suit by recommencing cleanup activities. Although most courts have read the RCRA preclusion provisions to require that the cleanup was ongoing at the time of filing in order to bar suit, there is no reason that the CERCLA provision must be read in that way as well. As soon as cleanup recommences, the suit would become a challenge to that selected response action.

¹⁹⁷ Unlike endangerment suits seeking injunction against ongoing cleanup, which would be barred under RCRA as well, enforcement suits seeking injunction could likely proceed under RCRA. See *supra* notes 34–42 and accompanying text (describing RCRA’s preclusion provisions).

¹⁹⁸ See *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974) (“Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.”); SINGER & SINGER, *supra* note 114, § 51:5 (“Where one statute deals with a subject in general terms and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible. But if two statutes conflict, the general statute must yield to the specific statute involving the same subject, regardless of whether it was passed prior to the general statute, unless the legislature intended to make the general act controlling. . . .”).

¹⁹⁹ Stearns, *supra* note 51, at 72 (“Because RCRA’s citizen suit provision does address this issue, it is an indication that Congress did not intend CERCLA section 113(h) to bar a RCRA citizen suit when RCRA’s provisions specifically allow parties to bring suits in the face of CERCLA cleanups.”).

Another way to think about this is that the RCRA preclusion provisions are a comprehensive and carefully constructed statutory scheme for ensuring that RCRA citizen suits in particular do not interfere with or delay CERCLA cleanup activities. In a number of cases, courts have prevented polluters from using abstention doctrine to make an “end run” around that scheme.²⁰⁰ In response to arguments that federal courts should abstain from RCRA suits out of deference for state administrative actions, courts have concluded that because the RCRA preclusion provision creates a comprehensive scheme governing when suits can proceed, application of *Colorado River* abstention doctrine, which would carve out an additional category of suits that cannot proceed, would be inappropriate. Likewise, allowing polluters to rely on the broad preemption of section 113(h) would allow them to make an “end run” around RCRA’s carefully crafted preemption provisions. It would be ironic to let polluters use section 113(h) to hide from RCRA enforcement.²⁰¹

In sum, a careful reading of CERCLA reveals a viable alternative to the path taken by most courts. This alternative preserves the language of both statutes in most cases. So why have so few courts opted for this alternative? The next Part explores that question and offers several possible explanations, considers the limitations of those explanations, and then offers several reasons to opt for a narrower reading of section 113(h).

IV. LET CITIZENS BACK INTO COURT

The broad reading of section 113(h) threatens not just the public health but also the very function of courts as facilitators of citizen attorneys general. Although courts have raised some legitimate concerns about allowing these cases to proceed, these concerns are primarily self-serving. They protect the courts at the expense of Congress, the Executive, and the general public.

A. *Why Broaden the Bar? Policy Justifications and Their Limitations*

The previous section lays out a course for statutory interpretation that would allow courts to preserve RCRA suits without violating the principles of textualism. Why have so few courts opted for this alternative? Although no court has laid out these options and explained its choice among them, many

²⁰⁰ See, e.g., *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 619 (7th Cir. 1998) (holding that abstention in favor of a state administrative proceeding “would be an end run around RCRA. Congress has *specified* the conditions under which the pendency of other proceedings bars suit under RCRA and . . . those conditions have not been satisfied here”) (emphasis in original). See also *Chico Serv. Station, Inc. v. Sol Puerto Rico Ltd.*, 633 F.3d 20, 30–32, n.14 (1st Cir. 2011) (citing many other cases rejecting abstention arguments). *But see Coal. for Health Concern v. LWD, Inc.*, 60 F.3d 1188, 1193 (6th Cir. 1995) (holding abstention appropriate when “the exercise of federal review at this juncture would be disruptive of [state] efforts to establish a coherent policy”).

²⁰¹ See *infra* Part IV.C (describing how section 113(h) shields polluters from RCRA compliance).

have offered some insight into why they may be so quick to foreclose judicial review.

First, as noted above, many courts have considered suits that would be barred under both statutes and thus have not been forced to grapple with actual conflict. Broadly-drafted opinions coming out of these suits have then been treated as precedential in later cases that do involve conflict. This has been true even when an earlier case expressly limited its own scope or speculated that other types of cases may necessitate limiting the bounds of section 113(h). For instance, in the early case *Boarhead Corp. v. Erickson*, in which the Third Circuit barred a National Historic Preservation Act claim, and on which many later courts have relied to support section 113(h)'s inter-statutory application, the court expressly limited the scope of the holding.²⁰² It explained that EPA regulations demonstrate that “EPA properly construes the [National Historic Preservation Act] to require it to consider the historic preservation concerns [the plaintiff] asserts before it takes action pursuant to CERCLA,” so, because the plaintiff had “not demonstrated” that EPA “cannot or will not abide by” its own regulations, “we do not need to reach the troubling questions of whether judicial review would be available if [the plaintiff] could show that [EPA] failed to comply with [its own regulations.]”²⁰³ No later court has returned to that “troubling question.” In addition, unlike many subsequent cases, *Boarhead* involved a plaintiff who was also the liable party. Although the suit was styled as a citizen suit under NHPA, it was, at core, an attempt by the liable party to stall cleanup. Barring suit was therefore consistent with section 113(h)'s purpose. Many later courts have followed *Boarhead* despite this difference and without regard to *Boarhead*'s limiting language.

Second, toxic site cleanups are highly technical. Although the primary policy justification described in the legislative history is to avoid delay, many courts have cited an additional consideration: deference to agency expertise. Hesitant to second guess EPA determinations as to what level of cleanup is appropriate, courts have repeatedly asserted that they should not interfere with EPA administration of the statute. In rejecting a NEPA claim and a RCRA claim, a Northern District of Illinois court explained that in addition to facilitating prompt cleanup, the purpose of section 113(h) was to “give some deference to the judgment of the USEPA, which [Congress] created to protect the public interest in enforcing federal environmental laws.”²⁰⁴ More recently, the same court was even more direct: “the district court has neither the special resources nor the special expertise necessary to properly address or understand the myriad of scientific and policy issues presented by an alleged imminent and sub-

²⁰² 923 F.2d 1011, 1022 n.17 (3d Cir. 1991).

²⁰³ *Id.*

²⁰⁴ *N. Shore Gas Co. v. EPA*, 753 F. Supp. 1413, 1418 (N.D. Ill. 1990), *aff'd* 930 F.2d 1239 (7th Cir. 1991). *See also* *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1249 (10th Cir. 2006) (declining to “substitute a federal court’s judgment for the authorized judgment of . . . the EPA”); *Hanford Downwinders Coal, Inc. v. Dowdle*, 841 F. Supp. 1050, 1061 (E.D. Wash. 1993) (noting that “CERCLA gives the agencies charged with its implementation substantial discretion to select not only the substance of their response actions but also the timing of those actions”).

stantial endangerment to health or the environment.”²⁰⁵ Reasoning that it is EPA and not the court that “has specifically been charged with the responsibility to develop and enforce regulations to implement the environmental laws passed by Congress,” the court justified its conclusion that plaintiff’s imminent and substantial endangerment claim was a challenge to an administrative consent order.²⁰⁶ Of course, Congress envisioned EPA to be the primary enforcer, but the function of citizen suit provisions is to allow citizens, with the help of courts, to be secondary enforcers where EPA has, for whatever reason, failed.²⁰⁷

Although in insulating agency action from review Congress undoubtedly intended to allow EPA a degree of freedom in administering the statute, freedom of administration was not an end in and of itself. Instead, it was a means to facilitate speedy and efficient cleanup. The nearly complete freedom of administration that courts have given EPA facilitates an additional end: it allows EPA to engage in delay itself, precisely the function citizen suits aim to avoid. In addition, by broadening the categories of barred suits, courts put pressure on agencies to engage in expensive enforcement. Where EPA’s resources are limited, it may welcome the opportunity to allow citizens to step in as private enforcers, as it does every time a citizen group files a notice of intent to sue, and the agency chooses not to bar the suit by taking its own action.²⁰⁸

It is important to distinguish between an agency decision to take no action and agency inaction. Typically, courts cannot review agency inaction at all.²⁰⁹ But here, the statutory scheme contemplates judicial review precisely where the agency has not acted. In such cases, a citizen can step in and sue the polluter directly without stepping on EPA’s toes. This is true even if EPA (or another relevant enforcement agency) has taken some preliminary action but has stopped work. By contrast, where EPA has made an express “no action” determination, a court should perhaps be more hesitant to step in.

A third possible explanation is that courts are concerned with administrability of the statutory scheme. Beyond the concern about the technical expertise necessary to craft and oversee implementation of a remedy, the proposed reading of section 113(h) puts an additional burden on courts. Rather than apply a bright line rule, this reading asks that courts treat different types of suits involving sites with CERCLA cleanup differently.²¹⁰ For example, a suit

²⁰⁵ *River Vill. W. LLC v. Peoples Gas Light & Coke Co.*, 618 F. Supp. 2d 847, 855 (N.D. Ill. 2008).

²⁰⁶ *Id.* at 854–55.

²⁰⁷ *See supra* notes 24–33 and accompanying text (describing the value of citizen suits).

²⁰⁸ EPA also retains the option to intervene in citizen suits whenever it likes. Perhaps courts might adopt the assumption that where, in a suit against a private polluter, EPA does not choose to intervene, EPA is happy to defer to court-facilitated citizen enforcement.

²⁰⁹ *See, e.g.*, Administrative Procedure Act § 706(1), 5 U.S.C. § 706(1) (2012) (allowing challenge to agency inaction only where the agency has a discrete nondiscretionary duty to act).

²¹⁰ In *Werlein v. United States*, the District of Minnesota was explicit about this concern. Superseding an earlier order in which the court had concluded that section 113(h) did not apply to RCRA suits, the court determined that the provision applied to RCRA as well as several other statutes. 746 F. Supp. 887, 892 n.4 (D. Minn. 1990) (*vacated in part, on other grounds*, 793 F. Supp. 898 (D. Minn. 1992)). The court explained that in the previous order, it “approached section [113(h)] as merely the CERCLA codification of the common law doctrine of primary juris-

under NHPA or NEPA would still be barred, while a suit under RCRA could proceed if cleanup were stalled. Of course, a bright line rule is simpler, but, given the countervailing considerations described in the following pages, it undermines not only congressional intent, but also the public interest.

B. *Protecting the Public Interest*

Where Congress has made no express determination to favor other values over those discussed above, and the relevant expert agency has not chimed in, it is left to courts to weigh the policy implications of its interpretive choices. Inter-statutory application of section 113(h) to RCRA reduces the scope of circumstances under which private citizens can enforce RCRA. This result is normatively undesirable. In addition to increasing the risks of toxic harms and undermining the purpose of RCRA, inter-statutory application of section 113(h) to RCRA in particular reduces government accountability and can result in delayed and less effective cleanup.

1. *Irreparable Harm*

The literature on section 113(h) has focused primarily on one problem it creates: irreparable harm. As the Ninth Circuit has recognized, “[s]ection 113(h) may in some cases delay judicial review for years, if not permanently, and may result in irreparable harm to other important interests.”²¹¹ Numerous scholars have considered this problem and have used it as a basis to argue for judicial and legislative reform.²¹² Irreparable harm arises both in the context of RCRA enforcement actions — in which plaintiffs argue that cleanup methods such as incineration violate RCRA’s substantive guidelines for handling and disposal of toxic waste²¹³ — and in RCRA endangerment actions — in which plaintiffs argue that the method of cleanup will create an imminent and substan-

diction.” *Id.* Faced with a new motion involving other claims, the court changed course, treated section 113(h) as “a statutory bar to subject matter jurisdiction,” and concluded that it had “only two principled choices . . . : (1) rule that section [113(h)] applies only to CERCLA itself, and allow plaintiffs’ injunctive claims . . . ; or (2) rule that section [113(h)] bars all challenges to the ongoing cleanup under federal or state law.” *Id.* If “only CERCLA and RCRA [were] involved,” the court admitted, “[it] probably would have let plaintiffs’ RCRA injunctive claims go forward.” *Id.*

²¹¹ McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325, 329 (9th Cir. 1995).

²¹² Healy, *supra* note 47, at 339–41 (explaining that serious fairness concerns arise where section 113(h) is read to bar suits in which plaintiffs allege that the selected cleanup itself will cause irreparable harm); Milos Jekic, Note, *Lowering the Jurisdictional Bar: A Call For an Equitable-Factors Analysis Under CERCLA’s Timing-of-Review Provision*, 59 KAN. L. REV. 157, 186–87 (2010) (calling for a test balancing the nature of alleged harm with duration of response and economic impacts of precluding review); Raettig, *supra* note 130, at 1050 (noting that for plaintiffs alleging violations of the Clean Water Act or RCRA, post-cleanup review may be too late); Reiter, *supra* note 130, at 225 (arguing that courts should carve out an exception where plaintiffs could proceed if they could establish a likelihood of irreparable harm); Stearns, *supra* note 51, at 50 (arguing that the provision should not bar suits alleging irreparable harm).

²¹³ See, e.g., Ark. Peace Ctr. v. Ark. Dept. of Pollution Control and Ecology, 999 F.2d 1212, 1217–18 (8th Cir. 1993) (finding no jurisdiction over claim that cleanup plan violated RCRA’s substantive standards).

tial endangerment to health and the environment.²¹⁴ But only the former type of harm stems from inter-statutory conflict. An Eighth Circuit case, *Arkansas Peace Center v. Arkansas Department of Pollution Control and Ecology*, illustrates this point. Plaintiffs sought an injunction against a planned incineration of waste from herbicide and pesticide production, arguing that the incineration both violated a specific RCRA requirement, governing emissions of dioxins, and that the resulting emission of dioxins constituted an imminent and substantial endangerment.²¹⁵ Examining the enforcement claim, the court found it was a challenge to a removal action and thus was precluded by section 113(h).²¹⁶ Turning to the endangerment claim, the Eighth Circuit rested its conclusion that the suit was barred on RCRA itself.²¹⁷ In particular, the court relied on the provision precluding citizen endangerment actions when the state or EPA is “actually engaging” in a CERCLA removal action.²¹⁸ But the endangerment action would also have been barred under section 113(h) itself. Where cleanup — a removal or remedial action — causes imminent and substantial endangerment there still may be risk of irreparable harm, but there is no inter-statutory conflict because the outcome would be the same under either statute.

Arkansas Peace Center itself demonstrates that the risk of irreparable harm in the enforcement suit context is nonetheless serious. The very purpose of RCRA’s substantive provision is to prevent harm; if section 113(h) forces private citizens to wait until after the harm has occurred to enforce those provisions there is also the chance that some degree of the harm will be irreparable.

2. Government Accountability

In shielding both the government and polluters from allegations of RCRA non-compliance, section 113(h) undermines the very function of RCRA — to reduce future risk to human health and the environment — and government accountability for that function. RCRA’s substantive requirements governing the handling, transportation, storage, and disposal of toxic waste are prospective. In other words, they are designed to stop further pollution before it starts. CERCLA specifically requires that these standards be met during CERCLA cleanups.²¹⁹ In *McClellan Ecological Seepage Situation v. Perry*, the Ninth Circuit noted the possibility that section 113(h) might shield RCRA non-compliance, but concluded that “[w]hatever the theoretical potential for an evasion of RCRA in other cases, it does not exist here” because the site cleanup plan

²¹⁴ See, e.g., *id.* at 1218 (finding no jurisdiction over claim that cleanup created an imminent endangerment).

²¹⁵ *Id.* at 1213–15.

²¹⁶ *Id.* at 1218. RCRA itself bars enforcement actions only when the government is “diligently prosecuting” its own action. RCRA § 7002(b)(1)(B), 42 U.S.C. § 6972(b)(1)(B) (2012); see *supra* note 36 and accompanying text (describing RCRA enforcement suit preclusion provisions).

²¹⁷ *Ark. Peace Ctr.*, 999 F.2d at 1218.

²¹⁸ *Id.* (citing 42 U.S.C. § 6972(b)(2)(B)(ii), (b)(2)(C)(ii)); see also *supra* notes 38–42 and accompanying text (describing RCRA endangerment suit preclusion provisions).

²¹⁹ See *supra* note 16 and accompanying text (describing role of RCRA in CERCLA cleanup).

"incorporates the requirements of all relevant hazardous waste legislation."²²⁰ But the court did not engage with the more fundamental problem: purely post hoc citizen enforcement of RCRA requirements cannot foster government accountability. If the function of RCRA is to ensure that toxics are handled properly the first time around, citizen enforcement cannot enhance this purpose if it can only occur after initial cleanup is complete.

3. *Delayed Cleanup*

Although the purpose of section 113(h) is to prevent delay, the majority rule exacerbates it. For instance, in *Cannon v. Gates*, plaintiffs were barred from bringing suit despite the fact that the polluter (in this case the United States Army) had polluted the site during World War II, begun its initial investigation of the site in the 1970s, and had still not commenced an actual cleanup in 2008.²²¹ The obvious cost related to endangerment suits is that endangerment to health and the environment may continue unabated. This is a serious consideration. Congress added the endangerment provision as an invitation for citizens to help police toxic pollution. Any limitation to the scope of the provision reduces the effectiveness of that policing. Allowing endangerment to continue unabated can result in enormous cost in the form of medical costs, loss of life, loss of consortium, ecosystem damage, etc. For instance, if EPA undertook a study pursuant to CERCLA, selected a remedy, but never took any steps to implement that remedy, section 113(h) would bar the suit, and the harm would continue unabated. Typically, EPA does not simply abandon cleanup projects it has begun, but it can succumb to substantial delay, resulting from insufficient resources or difficulty cooperating with other federal or state agencies involved at a site.²²²

Delay can be harmful not only to human health and the environment but also to firms concerned about the scope of their liability. Although a firm may prefer to spend money on cleanup later, it may also prefer to have the scope of its liability resolved as soon as possible. This motivation may, at least partially, explain why polluters sought pre-enforcement review prior to SARA — to determine the scope of liability up front.²²³

Citizen endangerment suits might bypass this delay, forcing immediate determinations of the scope of cleanup required and the scope of polluter liability, thereby both protecting health and the environment and protecting the polluters' financial solvency by securing certainty.

²²⁰ 47 F.3d 325, 329 (9th Cir. 1995).

²²¹ 538 F.3d 1328, 1336 (10th Cir. 2008) (acknowledging the delay problem).

²²² See Gordon C. Rausser, Leo K. Simon, & Jinhua Zhao, *Information Asymmetries, Uncertainties, and Cleanup Delays at Superfund Sites*, 35 J. ENVTL. ECON. & MNGMT. 48, 48–49 (1998) (explaining that information asymmetry between the polluter and the enforcement agency can prolong the investigation period and delay cleanup); Sigman, *supra* note 82, at 317 (describing various causes of delay).

²²³ Cf. Healy, *supra* note 47, at 300–01 (describing these suits and mentioning other possible motivations such as reducing the scope of liability).

4. *Less Effective and Efficient Cleanup*

For the polluter concerned less with certainty of costs and more with minimizing costs in the long run, expanded preclusion creates a perverse incentive for the polluter to seek out enforcement from a government entity it knows is short on resources and therefore less likely to pursue enforcement vigorously.²²⁴ In this circumstance, minimal enforcement effort by that government entity would preclude citizen enforcement and prevent adequate cleanup. In a more extreme circumstance, a polluter may seek out a slow regulator in order to give the polluter time to hide assets. By the time the regulator brings a cost recovery action or attempts to order cleanup, the polluter would be judgment-proof. In either circumstance, keeping the ready-and-willing enforcer out of court results in delayed cleanup that is more costly to taxpayers.

Similarly, preclusion of endangerment suits can be costly both to the environment and to taxpayers where a government agency has commenced cleanup and is engaged in negotiations with the polluter but because of either the polluter, or the government, or both, negotiations are stalled. Under these conditions a citizen suit may be exactly what is required to move cleanup forward. A citizen suit might put pressure on a recalcitrant polluter to be more cooperative in a consent decree negotiation. Or the suit may give the polluter incentive to put pressure on the government to move forward.

The suit could serve as a catalyst for successful negotiations. In addition, the suit would pose little risk of undermining the outcome of the negotiations because, although a consent decree reached after a suit is commenced would not bar suit under RCRA (which applies only where the consent decree is reached prior to the commencement of suit), it is likely that the polluter will successfully be able to get the case dismissed on mootness grounds.²²⁵

Barring citizen suits under these circumstances puts a burden on the public fisc. The citizen suits under these circumstances can save taxpayer dollars in two ways: first, if a government entity is short on resources, it can allocate them elsewhere, despite having taken initial steps to require cleanup at this site, comforted with the promise that cleanup would still proceed as a result of citizen enforcement. Second, it can reduce government enforcement costs by saving the government the cost of bringing an enforcement action where a polluter is resistant to compromising on a consent decree.

²²⁴ Rausser, et al., *supra* note 222, at 49 (explaining that polluters may benefit from delay because of the discount rate).

²²⁵ See, e.g., *Chesapeake Bay Found. v. Am. Recovery Co.*, 769 F.2d 207, 207 (4th Cir. 1985) (holding that a citizen suit filed prior to a government enforcement action should not be dismissed on statutory preclusion grounds once the government enforcement action is filed but that, in that case, the government enforcement action made the suit effectively moot); *Md. Waste Coal. v. SCM Corp.*, 616 F. Supp. 1474, 1483 (D.C. Md. 1985) (applying mootness doctrine to determine whether portion of plaintiffs' Clean Air Act suit could proceed after EPA took enforcement action).

C. *The Polluter Beneficiary*

Ultimately, the primary beneficiary of expanding the scope of RCRA preclusion is the polluter, and not just because it is protected from successive prosecution. It is also insulated from enforcement where the relevant government agency has begun a cleanup process but then shifted priorities to other projects. In that situation, section 113(h) may protect it from needing to expend resources on cleanup at all (or at least in the near future).²²⁶ Of course, it could be in a particular case that this is an efficient savings, that the cost of enforcement and cleanup would exceed the benefits of cleanup. But it could also be that the benefits outweigh the costs. Unless courts are going to engage in this cost-benefit analysis and bar suit only where it is efficient to do so, the better default rule is to allow suits to proceed and assume cleanup will result in net gain, rather than to bar suit and assume it will result in costs.²²⁷ And, as explained above, the RCRA citizen suit provision was intended to increase RCRA compliance.²²⁸ Thus, the former default rule is better aligned with RCRA's purpose.

Polluters may also argue that allowing citizen suits to proceed under these circumstances threatens government prosecutorial discretion.²²⁹ But it is precisely the purpose of the citizen suit provisions to allow citizens to step in and fill the void where the government simply has insufficient resources to prosecute. Because RCRA suits are against polluters, and require polluters to expend resources on cleanup, they do not detract from the government's discretion to choose to delay a particular cleanup in favor of allocating resources elsewhere. The exception to this is, of course, where the government is the polluter. Indeed, where the government is the polluter, citizen suits seeking cleanup do indeed reduce government discretion with regard to allocation of resources. But this is exactly what citizen suits are supposed to do: to ensure that the executive branch does not have the discretion to choose not to comply with congressionally established environmental mandates.²³⁰

²²⁶ Of course, as discussed above, this circumstance could also be costly for a firm that knows it will have to pay eventually and would prefer to have the dollar amount settled sooner rather than later.

²²⁷ This is a version of the precautionary principle: in the face of scientific uncertainty, it may be desirable to take preventative protective measures. *See, e.g.*, Robert V. Percival, *Who's Afraid of the Precautionary Principle*, 23 *PACE ENVTL. L. REV.* 21, 79 (2005) (The "precautionary principle does not answer the question of how precautionary regulatory policy should be, but it can serve as an important reminder that regulatory policy should seek to prevent harm before it occurs, and that it should reject the insistence of regulatory targets that a never-ending quest for improved information should indefinitely postpone sensible regulatory measures."); *but see, e.g.*, Cass R. Sunstein, *Beyond the Precautionary Principle*, 15 *U. PA. L. REV.* 1003, 1004 (2003) (criticizing the precautionary principle on the ground that it provides no real guidance to regulators).

²²⁸ *See supra* note 29 and accompanying text.

²²⁹ *See supra* note 36 and accompanying text (suggesting that how broadly courts interpret environmental statutory preclusion provisions depends on how much deference courts want to give to state and federal prosecutorial discretion).

²³⁰ *See supra* notes 25–33 and accompanying text (discussing the value of citizen suits).

CONCLUSION

Reading section 113(h) to expand the scope of suits barred under RCRA and thus to reduce the universe of suits authorized under RCRA imposes numerous costs on the environment and on taxpayers. The purpose of section 113(h) was to ensure expeditious cleanup, but reading it to apply to RCRA suits can often do just the opposite. The majority rule creates a costly conflict between RCRA and CERCLA. And the majority of courts have failed to give this conflict thorough airing; instead, courts have developed a rule that inappropriately reduces the role of courts in toxic site cleanup.