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1996

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### Recommended Citation

Lucia A. Silecchia, Judicial Review of CERCLA Cleanup Procedures: Striking a Balance to Prevent Irreparable Harm, 20 HARV. ENVTL .L. REV. 339 (1996).

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# JUDICIAL REVIEW OF CERCLA CLEANUP PROCEDURES: STRIKING A BALANCE TO PREVENT IRREPARABLE HARM

*Lucia Ann Silecchia\**

*O if we but knew what we do  
When we delve or hew—  
Hack and rack the growing green! . . . .  
Where we, even where we mean  
To mend her we end her,  
When we hew or delve:  
After-comers cannot guess the beauty been.<sup>1</sup>*

## I. INTRODUCTION

When Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")<sup>2</sup> in 1980 in response to the problems of toxic waste and hazardous substances, the central goals of the Act were clear. CERCLA was intended to provide an effective mechanism for cleaning up such dangers as quickly as possible,<sup>3</sup> with as little expense as feasible, and with as

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1. GERARD MANLEY HOPKINS, Binsey Poplars, *in* THE POEMS OF GERARD MANLEY HOPKINS 78, 78-79 (W.H. Gardner & N.H. MacKenzie eds., 4th ed. 1970).

2. 42 U.S.C. §§ 9601-9675 (1994).

3. *See, e.g.*, H.R. REP. NO. 253, 99th Cong., 2d Sess. 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3038 ("CERCLA has two goals: (1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups."); 132 CONG. REC. H9599 (daily ed. Oct. 8, 1986) (statement of Sen. Scheuer) ("[The people] want the overriding purpose of this bill which is to protect the lives, the health, and the safety and the well-being of the American public from these nauseating toxic wastes that litter our country by the thousands.").

Cases decided since the passage of CERCLA—both before and after the 1986 amendments—have echoed these goals. *See, e.g.*, *Price v. United States Navy*, 39 F.3d 1011, 1015 (9th Cir. 1994) ("CERCLA was enacted to facilitate the cleanup of environmental contamination caused by hazardous waste releases."); *United States v. Colorado*, 990 F.2d 1565, 1570 (10th Cir. 1993) ("Congress enacted CERCLA in 1980 'to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites.'") (quoting H.R. REP. NO. 1016(I), 96th Cong., 2d Sess. 22 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6125), *cert. denied*, 114 S. Ct. 922 (1994); *Boarhead Corp. v.*

much of that expense as possible borne by the responsible parties, rather than by the taxpayers.<sup>4</sup> Accordingly, CERCLA included provisions for establishing liability for the costs of cleaning up hazardous waste sites. Congress also created the Superfund to pay for those cleanups for which no solvent responsible parties could be found.<sup>5</sup>

In order to further CERCLA's goals, Congress passed the Superfund Amendments and Reauthorization Act ("SARA")<sup>6</sup> in 1986.

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Erickson, 923 F.2d 1011, 1019 (3d Cir. 1991) ("Congress enacted CERCLA so that the EPA would have the authority and the funds necessary to respond expeditiously to serious hazards without being stopped in its tracks by legal entanglements before or during the hazard clean-up."); *Solid State Circuits, Inc. v. United States EPA*, 812 F.2d 383, 387 (8th Cir. 1987) ("Recognizing the grave consequences arising from delays in cleaning up hazardous waste sites, Congress gave the EPA authority to direct clean-up operations prior to a final judicial determination of the rights and liabilities of the parties affected."); *Lone Pine Steering Comm. v. United States EPA*, 777 F.2d 882, 886 (3d Cir. 1985) ("CERCLA was enacted in response to concerns about the danger to public health presented by hazardous waste sites and the slow reaction by the EPA to solve the problem."), *cert denied*, 476 U.S. 1115 (1986); *United States v. M. Genzale Plating, Inc.*, 723 F. Supp. 877, 883 (E.D.N.Y. 1989) ("The purpose of CERCLA is to enable the President to target and clean up hazardous waste sites in an efficient manner."); *United States v. Rohm & Haas Co.*, 669 F. Supp. 672, 674 (D.N.J. 1987) ("In CERCLA, Congress established a statutory scheme to ensure prompt and efficient clean-up of hazardous waste disposal sites."); *Pacific Resins & Chems., Inc. v. United States*, 654 F. Supp. 249, 253 (W.D. Wash. 1986) ("The purpose of Congress in passing CERCLA was to establish the authority and funding for the prompt, unhindered clean-up of dangerous hazardous waste sites without the need to await a final judicial determination of liability or even before any final agency determination of liability."); *B.R. MacKay & Sons v. United States*, 633 F. Supp. 1290, 1293 (D. Utah 1986) ("Congress enacted [CERCLA] in response to increasing concern over the severe environmental and public health effects from improper disposal of hazardous waste . . . . While the EPA had authority under other statutes to bring suit and compel cleanup, it lacked the authority and the funding to respond immediately . . . before legal determinations of liability were made.").

4. For a general discussion of recovery actions against responsible private parties and CERCLA's general "polluter pays" liability schemes, see James B. Brown & Michael V. Sucaet, *Environmental Cleanup Efficiency: Private Recovery Actions for Environmental Response Costs*, 7 COOLEY L. REV. 363, 363-71 (1990); Alfred R. Light, *SARA's Consequences: The Emerging Legal Debate Over Liability, Contribution, & Administrative Law*, in HAZARDOUS WASTE LITIGATION AFTER THE RCRA AND CERCLA AMENDMENTS 1987, at 57 (PLI Litig. & Admin. Practice Course Handbook Series No. 326, 1987).

5. See generally 42 U.S.C. § 9611 (1994) (regulating use of Superfund money). The Superfund itself is "a trust fund fueled by taxes on the oil and petrochemical industries, corporations, and general revenues, to be used to clean up releases of hazardous substances into the environment." Alfred R. Light, *The Importance of "Being Taken": To Clarify and Confirm the Litigative Reconstruction of CERCLA's Text*, 18 B.C. ENVTL. AFF. L. REV. 1, 1 n.1 (1990) [hereinafter Light, *The Importance of "Being Taken"*].

6. Pub. L. No. 99-499, 100 Stat. 1613 (1986). This section became effective on October 17, 1986. For an analysis of the ways in which the SARA amendments changed each individual portion of CERCLA, see Timothy B. Atkeson, Seth Goldberg, Frederick E. Ellrod III & Sandra L. Connors, *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (SARA)*, 16 ENVTL. L. REP. (ENVT. L. INST.) 10,363 (Dec. 1986). For a general discussion of SARA's structure and goals, see David J.

Through SARA, Congress intended to address some of CERCLA's initial limitations,<sup>7</sup> fine-tune some of its major components,<sup>8</sup> focus greater attention on human health issues,<sup>9</sup> and provide ways of

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Hayes & Conrad B. MacKerron, *Superfund II: A New Mandate: A BNA Special Report*, 17 Env't Rep. (BNA) No. 42 part II (Feb. 13, 1987).

7. For discussions of the weaknesses of CERCLA as originally written, examine 132 CONG. REC. H9586 (daily ed. Oct. 8, 1986) (statement of Rep. Fields) ("When Congress first enacted the Superfund Program 6 years ago, little was known about the extent of our Nation's hazardous waste problem. Now, we know a great deal more. We know the problem is bigger than anyone initially anticipated . . . . We know that the Superfund Program which is now in [sic] place has not worked as well as its [sic] authors had hoped."); 132 CONG. REC. S14,898 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford) ("A major goal of [SARA] is to establish specific, uniform national health standards that will apply to cleanup decisions at Superfund sites . . . . The Congress has been compelled to develop such specific standards because the executive branch failed to do so during the first 4 years of the program . . . ."). It has been theorized that the relatively hasty passage of CERCLA led to its inadequacies:

The bill which became law was hurriedly put together by a bipartisan leadership group of senators (with some assistance from their House counterparts), introduced, and passed by the Senate in lieu of all other pending measures on the subject . . . . It was considered on December 3, 1980, in the closing days of the lame duck session of an outgoing Congress. It was considered and passed, after very limited debate, under a suspension of the rules, in a situation which allowed for no amendments. Faced with a complicated bill on a take it-or-leave it basis, the House took it, groaning all the way.

Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1 (1982).

The murky legislative history of CERCLA is also discussed by Jeffrey H. Howard & Linda B. Benfield, *CERCLA Liability for Hazardous Waste Generators: How Far Does Liability Extend?*, 19 Env't Rep. (BNA) No. 24, at 1193, 1195-97 (Oct. 14, 1988).

8. See Patricia L. Quentel, Comment, *The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA*, 1988 WIS. L. REV. 139, 142 n.12 (1988) ("[SARA] toughened hazardous waste cleanup standards, accelerated Superfund activity, broadened the EPA's power to reach settlements with responsible parties, and gave new and more compelling incentives for private parties to become involved in cleanup activities as soon as possible."); William A. Shirley, Note, *When EPA Cleans a CERCLA Site: Preclusion of Pre-Enforcement Judicial Review with Respect to Generators and Transporters*, 36 WASH. U. J. URB. & CONTEMP. L. 187, 189 (1989) (identifying "contribution, intervention, public participation, settlements, citizens suits, and judicial review" as primary targets of 1986 amendments (citations omitted)). However, praise for SARA's accomplishments is far from unqualified. See, e.g., James R. Deason, Note, *Clear as Mud: The Function of the National Contingency Plan Consistency Requirement in a CERCLA Private Cost-Recovery Action*, 28 GA. L. REV. 555, 559 (1994) ("The substantial revision to CERCLA during its 1986 reauthorization did little to clarify matters. In fact, criticism of CERCLA remains rampant." (citations omitted)); see also *infra* note 197 (discussing current dissatisfaction with CERCLA scheme).

9. See Martin R. Siegel, *Integrating Public Health Into Superfund: What Has Been the Impact of the Agency for Toxic Substances and Disease Registry?*, 20 ENVTL. L. REP. (ENVTL. L. INST.) 10,013, 10,013 (Jan. 1990) ("With the passage of the Superfund Amendments and Reauthorization Act (SARA) in 1986, Congress showed increased interest in

budget allocation and taxation necessary to fund the Superfund as its staggering true cost began to become apparent.<sup>10</sup>

One of the most important ways in which Congress attempted to refine CERCLA was through the inclusion of a provision in SARA which placed strict limitations on the timing of pre-enforcement judicial review of ordered cleanups.<sup>11</sup> Congress recognized that the ambitious goals of CERCLA and SARA, especially the goal of providing rapid cleanups, could be seriously hampered by dilatory litigation.<sup>12</sup> Thus, Congress added provisions to CERCLA

the relationship between hazardous waste sites and human health effects." (footnote omitted)).

10. See Earl K. Madsen, Dennis L. Arfmann, & John Galbavy, *Superfund Reauthorization: An Opportunity to Rectify Major Problems*, 24 Env't Rep. (BNA) No. 22, at 1020, 1024 (Oct. 1, 1993) ("During the 1980s, cost effectiveness was, at best, a secondary concern. Since the average cleanup cost at NPL sites is estimated at \$21 million to \$30 million and total estimates range up to \$750 billion, cost effectiveness should be a primary goal of Superfund." (footnotes omitted)).

The exact cost of CERCLA cleanup efforts is still a matter of uncertainty and ever-increasing estimates:

[O]ver the past decade, the estimated number of sites potentially contaminated with hazardous wastes has escalated from a few thousand to between 300,000 and 400,000. In turn, more recent government estimates of the eventual cost for the privately and publicly financed cleanup of such sites over the next few decades exceeds \$500 billion.

Michael J. Gergen, *The Failed Promise of the "Polluter Pays" Principle: An Economic Analysis of Landowner Liability for Hazardous Waste*, 69 N.Y.U. L. REV. 624, 624 (1994).

Yet, "[a] 1989 Standard & Poor's study predicted that the cost of cleaning up existing hazardous waste sites could be as high as \$700 billion." *Id.* at 624 n.2 (citing Bruce F. Freed, *The Politics of Pollution Liability*, 89 Best's Review, Property/Casualty/Insurance Edition, at 38, 40 (Mar. 1989); see also Michael Oxley, *Making it Work*, WASH. TIMES, Dec. 17, 1995, at B4 (Superfund's "abysmal record comes at the cost of more than \$60 billion in public and private monies.")).

11. Of course, the judicial bar was not the only significant subject of the amendments; other issues also faced Congress as part of this review process. Specifically, it has been observed that the amendment process was geared "generally to three areas: judicial review, contribution, and citizen suits." Light, *The Importance of "Being Taken"*, *supra* note 5, at 11.

12. Even without the obstacles to remediation posed by litigation, CERCLA cleanups are lengthy procedures under the best of circumstances. See, e.g., E. Donald Elliot, *Superfund: EPA Success, National Debacle?*, NAT. RESOURCES & ENV'T, Winter 1992, at 11, 12 ("[I]t takes, on average, ten years to clean up each site, but only about three years is actual on-site construction work!"); *id.* at 13 ("[I]t takes seven years and at least \$4 million in transaction costs at each site to conduct the necessary studies and design remedies before the final cleanup can begin."), quoted in Michael P. Healy, *Judicial Review & CERCLA Response Actions: Interpretive Strategies in the Face of Plain Meaning*, 17 HARV. ENVTL. L. REV. 1, 7 n.27 (1993); see also 132 CONG. REC. S14,928 (daily ed. Oct. 3, 1986) (statement of Sen. Thurmond) ("[T]he timing of review section ensures that Government and private cleanup resources will be directed toward mitigation, not litigation. The section is designed to preclude piecemeal review and excessive delay of

which severely limit the jurisdiction of the federal district courts to review removal or remedial actions before those actions are completed.<sup>13</sup> These limitations reflect the “clean up first, litigate later” philosophy behind this hazardous waste legislation.<sup>14</sup>

Courts to date have applied this philosophy fairly consistently,<sup>15</sup> declining jurisdiction on the theory that hearing the litigation would likely hamper CERCLA’s legitimate focus on speedy resolution of environmental disputes and provideresponsible parties with the means for ducking or delaying responsibility. Ironically, however, there may be instances in which avoiding judicial intervention could actually undermine CERCLA’s goal of environmental protection. This possibility exists in those cases where the cleanup procedures ordered may themselves cause irreparable harm to health or to the environment.<sup>16</sup> For example, “[t]he problem may be illustrated by an extreme scenario that has the EPA deciding to take leaking

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cleanup.”); Jennifer Silverman, *Bliley to Offer Amendments on Liability, Brownfields to GOP Reform Bill at Markup*, 1996 Daily Env’t Rep. (BNA) No. 17 (Jan. 26, 1996) [hereinafter Silverman, *Bliley to Offer*] (quoting Rep. Thomas Bliley (R-Va.), commenting that “[o]f the \$15 billion spent on superfund in the last 16 years, ‘over \$7 billion has gone to litigation—wasted on a silly, complex liability scheme’”); Oxley, *supra* note 10, at B4 (“Nearly half of Superfund money is frittered away on litigation, bureaucracy and studies. Only 53 percent of funds are spent actually cleaning up sites.”).

13. 42 U.S.C. § 9613(h) (1994); see discussion of “completion” *infra* note 30.

14. See 132 CONG. REC. 28,409 (1986) (statement of Sen. Stafford), cited in *United States v. Princeton Gamma-Tech, Inc.*, 31 F.3d 138, 146 (3d Cir. 1994); see also *B.R. MacKay & Sons v. United States*, 633 F. Supp. 1290, 1294 (D. Utah 1986):

It appears that with the dangers or potential dangers caused by hazardous substances, shooting first and asking questions later was the intent of Congress, making it clear that under CERCLA the EPA should have and has full reign to conduct or mandate uninterrupted cleanups for the benefit of the environment and the populous [sic].

*Id.*, quoted in Michael T. Rosenberg, Note, *SARA’s Effect on EPA Cleanup Discretion Under Superfund: Have the Courts Gone Too Far?*, 4 ADMIN. L.J. 559, 561 n.10 (1991).

15. For a comprehensive listing of cases that have addressed this issue, see Elizabeth Williams, Annotation, *What Claims Fall Within Limitation Imposed by § 113(h) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 USCS § 9613(h)) on Judicial Review of Cases Arising Under CERCLA*, 116 A.L.R. FED. 69 (1993). For a compilation of cases addressing the recovery of response costs generally, see Annotation, *Governmental Recovery of Cost of Hazardous Waste Removal Under Comprehensive Environmental Response, Compensation, and Liability Act (42 USCS §§ 9601 et seq.)*, 70 A.L.R. FED. 329 (1984).

16. See, e.g., *United States v. Princeton Gamma-Tech, Inc.*, 31 F.3d 138 (3d Cir. 1994). The factual basis for the *Gamma-Tech* case, described in detail *infra* part IV, provides one specific example of a circumstance in which this may happen. Throughout this Article however, when “irreparable harm” is mentioned, it refers to *all* those circumstances in which the execution of a cleanup may pose a health or environmental risk.

drums containing a highly toxic substance from a dump site and to empty them into a nearby lake, thus causing permanent damage to public health and the environment."<sup>17</sup> Despite the danger that this may happen, the CERCLA/SARA scheme currently provides no statutory authorization for courts to review or enjoin proposed cleanup procedures before the actions are completed.

However, Congress is now considering substantial revisions to the CERCLA/Superfund scheme.<sup>18</sup> The issues to be considered include a wide range of initiatives that respond to many complex issues.<sup>19</sup> One significant, albeit less "high profile," question that Congress has an excellent opportunity to address is whether the strict jurisdictional bar created in SARA should be left intact or whether it should be changed to permit any judicial review. If Congress elects to keep the bar as it currently stands, the danger remains that some cleanups that may ultimately harm the environment or pose a health threat will be implemented with no meaningful judicial inquiry into their potential hazards. Yet, dropping the jurisdictional bar completely overcompensates and may lead to the protracted, dilatory litigation that Congress feared a decade ago.

This Article suggests that, rather than pursue either of these unwise extremes, Congress should strike a balance. Such a compromise should retain the general jurisdictional bar and those features that make the bar an effective curb on dilatory litigation. However, the Article proposes that Congress create a specific exception to the bar which would allow a plaintiff<sup>20</sup> to allege that a cleanup must be reviewed if it poses a threat of irreparable harm to human health or the environment.

Fortunately, the proposal this Article advocates that Congress adopt need not be made in a vacuum. Instead, in considering this new approach Congress may find guidance in *United States v. Princeton Gamma-Tech, Inc.*,<sup>21</sup> a 1994 decision of the Third Circuit

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17. *Gamma-Tech*, 31 F.3d at 146.

18. As this Article went to press in mid-April, Congress had yet to pass legislation reforming CERCLA. See discussion *infra* part V.B., regarding the current state of the CERCLA amendment process. This Article was unable to account for any developments in the legislative proposals that occurred after that date.

19. These issues are discussed more comprehensively in part V.B. of this Article.

20. As will be addressed later, this class of "plaintiffs" may include responsible parties themselves and/or third parties bringing citizens suits.

21. 31 F.3d 138 (3d Cir. 1994). A rehearing was denied in this case, en banc, in

Court of Appeals that offers a framework for such a compromise. In *Gamma-Tech*, the court deviated from the existing, strict, pre-enforcement litigation ban. The *Gamma-Tech* court created an exception for cases in which (1) a cost recovery action is brought by the Environmental Protection Agency prior to the completion of the allegedly harmful cleanup,<sup>22</sup> and (2) a responsible party responds by alleging that the ordered cleanup may itself cause "irreparable harm" to human health or the environment.<sup>23</sup>

Finding such circumstances present in *Gamma-Tech*, the Third Circuit decided that it had jurisdiction to review the case. This decision represents a wise compromise in that it balanced the harms of dilatory litigation against the danger of turning a blind eye and a deaf ear to a potential hazard until it was too late to provide a meaningful remedy.<sup>24</sup> Unfortunately, while the exception crafted by the Third Circuit was a sound and practical one from a policy standpoint, it has little direct support in the existing language of CERCLA that guarantees—or even allows—it to be applied to cases other than *Gamma-Tech* itself. However, when Congress re-examines the jurisdictional bar in its current review of CERCLA, it should draft a rule adopting those parts of the *Gamma-Tech* decision which have particular merit, thereby allowing them to be broadly applied. This Article explains how Congress might draft such an amendment to CERCLA and why such a rule is desirable.

The Article examines the timing of judicial review of CERCLA cleanup programs and the delicate balance needed to create an equitable rule. It begins with an overview of the legislation as it is currently written: the general ban on judicial review, its limited

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United States v. Princeton Gamma-Tech, Inc., No. 93-5252, 1994 U.S. App. LEXIS 30566, at \*1 (3d Cir. 1994).

22. See *Gamma-Tech*, 31 F.3d at 142-44. As discussed later, this procedural "twist" made the court's decision much easier to justify.

23. See *id.* at 138; see also *infra* discussion of *Gamma-Tech* in part IV. Part of this decision was grounded, of course, in the view that the remedial intent of these statutes would be violated by the use of the jurisdictional bar to allow harmful action to continue.

24. Interestingly, this is not the first time a court has been concerned with the reality that delay of review may, at times, lead directly to a denial of meaningful remedy. In *North Shore Gas Co. v. EPA*, 930 F.2d 1239 (7th Cir. 1991), the court complained that "the breadth of section 113(h) is troublesome" since there will be circumstances in which "section 113(h) would be doing a good deal more than affecting the 'timing' of judicial review; it would be extinguishing judicial review." *Id.* at 1245. After posing hypotheticals in which this might be the practical outcome, the *North Shore Gas* court determined that "[w]e can leave for another day the exploration of the outer bounds of this unusual provision." *Id.* It may well be that the *Gamma-Tech* litigation is that "other day."



exceptions, and the legislative history justifying it.<sup>25</sup> The Article then explores the ways in which courts prior to *Gamma-Tech*—both before and after SARA—have addressed this issue and worked within the parameters of the legislation.<sup>26</sup> Next, the Article discusses the *Gamma-Tech* decision, the logic behind the court's creation of an exception not found on the face of the Acts,<sup>27</sup> and the effect of the court's ruling on subsequent cases. The Article posits that the rule of *Gamma-Tech* provides an effective way to foster the remedial goals of CERCLA. Thus, the Article presents a model for a legislative solution to the problem based on the reasoning of the *Gamma-Tech* case.<sup>28</sup> The Article concludes by critiquing some of the relevant proposals before Congress that address the jurisdictional bar and explains how the *Gamma-Tech* approach is superior.<sup>29</sup>

This is the ideal time for the problem illustrated in *Gamma-Tech* to be resolved in a complete and thoughtful way. In adopting a new rule, Congress must find a solution that is consistent with the scheme underlying CERCLA and which advances CERCLA's goals rather than undermines them.

## II. CERCLA & SARA: ADOPTING A "CLEAN UP FIRST, LITIGATE LATER" PHILOSOPHY

CERCLA and the SARA provisions that refined it express a clear disfavor for legal challenges to uncompleted environmental cleanups,<sup>30</sup> particularly when the challenges are brought by the

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25. See discussion *infra* part II.

26. See discussion *infra* part III.

27. See discussion *infra* part IV.

28. See discussion *infra* part V.A.

29. See discussion *infra* part V.B.

30. The appropriate definition of "completed" is a matter of debate. The legislative history of SARA suggests that, "the phrase 'removal or remedial action taken' is not intended to preclude judicial review until the total response action is finished if the response action proceeds in distinct and separate stages. Rather, an action under section 310 would lie following completion of each distinct and separable phase of the cleanup." H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. 224 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3317. However, over-reliance on this piecemeal review process is criticized by the court in *In re Hanford Nuclear Reservation Litig.*, 780 F. Supp. 1551 (E.D. Wash. 1991), *rev'd sub nom.*, *Durfey v. E.I. Dupont De Nemours Co.*, 59 F.3d 121 (9th Cir. 1995). In evaluating a plaintiff's argument that the court should have jurisdiction to review com-

responsible or potentially responsible parties (“PRPs”) themselves.<sup>31</sup> The statute itself contains a comprehensive jurisdictional bar on the review of removal or remedial actions.<sup>32</sup> The statute provides:

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 . . . .<sup>33</sup>

Only five exceptions to this bar currently exist. They allow for review of the removal or remedial measures in the following narrowly defined circumstances:

- (1) An action under section 9607 of this title to recover response costs or damages or for contribution;<sup>34</sup>
- (2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order;<sup>35</sup>
- (3) An action for reimbursement under section 9606(b)(2) of this title;<sup>36</sup>

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pleted segments of a larger project, the court reflected, “[D]espite whatever practical appeal [this reading of § 9613(h) may] possess, [it] is unsupported by the statute itself and appears clearly contrary to those several portions of the legislative record . . . which seemingly say exactly the opposite.” *Id.* at 1560. A full discussion of the meaning of “completion” is beyond the scope of this Article. However, the practical issue of defining “completion” is a significant one in evaluating when to invoke § 9613(h). See Light, *The Importance of “Being Taken”*, *supra* note 4, at 44–45 (discussing legislative debate concerning meaning of term “completed”).

31. For general background on the jurisdictional restrictions prior to *Gamma-Tech*, see Healy, *supra* note 12; David Montgomery Moore, Comment, *Pre-Enforcement Review of Administrative Orders to Abate Environmental Hazards*, 9 PACE ENVTL. L. REV. 675 (1992); Rosenberg, *supra* note 14; Light, *The Importance of “Being Taken”*, *supra* note 5; Jeffrey M. Gaba & Mary E. Kelly, *The Citizen Suit Provision of CERCLA: A Sheep in Wolf’s Clothing?*, 43 Sw. L.J. 929 (1990); and Shirley, *supra* note 8.

32. Although beyond the scope of this Article, a fundamental threshold question is the necessity of labeling an EPA action as a “removal” or a “remedy.” Until this is done, it is arguable that the strictures of § 9613 may not apply. Thus, as a practical matter, defining the cleanup as something other than a removal or a remedy is no mere semantic issue. For a full discussion of this definitional question and its far-reaching ramifications, see Jerry L. Anderson, *Removal or Remedial? The Myth of CERCLA’s Two-Response System*, 18 COLUM. J. ENVTL. L. 103 (1993).

33. 42 U.S.C. § 9613(h) (1994).

34. *Id.* at § 9613(h)(1).

35. *Id.* at § 9613(h)(2).

36. *Id.* at § 9613(h)(3).

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site;<sup>37</sup>

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.<sup>38</sup>

Several features of the restriction and its exceptions are readily apparent. First, other than the citizens suit provisions, none of the exceptions explicitly provides a means for challenging a removal or remedial plan between the time the plan is ordered and the time it is completed.<sup>39</sup> Second, the government has the authority to bring an action against PRPs at any point to recover response costs, to enforce orders against them, or seek penalties against them for violating those orders.<sup>40</sup> However, these rights to bring proactive litigation rest solely with the government—there is no corresponding right for the PRPs. Finally, and most relevant to this Article, there is absolutely nothing on the face of any of these exceptions that allows for emergency review of plans that pose a potential threat to human health or the environment.

Undoubtedly, a fair amount of cynicism as to the motives for challenges by PRPs contributed to the stringency of the rule.<sup>41</sup> The legislative history of these provisions indicates that Congress implemented the jurisdictional bar to prevent PRPs

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37. *Id.* at § 9613(h)(4).

38. *Id.* at § 9613(h)(5).

39. The harsh impact of this is, perhaps, offset in part by the fact that CERCLA does provide for extensive participation by citizens and potentially responsible parties in the initial creation of the remedy. See discussion *infra* note 202 (outlining CERCLA provisions allowing public participation). Thus, ideally, potential health and environmental risks will be considered at that early stage. However, there are circumstances where those harms are either undiscovered, unremedied, or underestimated in the development stage and must be addressed later on. See also 132 CONG. REC. H9583 (daily ed. Oct. 8, 1986) (statement of Rep. Glickman) ("To balance this restriction on judicial review of the remedy selected by the EPA, the conferees included provisions that require EPA to develop extensive procedures for public participation in the selection of the cleanup plan and the compilation of an administrative record.").

40. 42 U.S.C. § 9613(h)(1)-(2) (1994).

41. See Gaba & Kelly, *supra* note 31, at 946. In what is perhaps an understatement, the authors comment, "In virtually all cases, PRP's are concerned not with the environmental adequacy of a clean-up, but with the cost of cleanup that they will be required to bear." *Id.*

from using dilatory litigation to delay<sup>42</sup> or prevent cleanup actions.<sup>43</sup> Furthermore, Congress sought to avoid the increased trans-

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42. The legislative history seems to indicate, however, that such unwanted delay may continue to be achieved if accomplished via state suits. *See* H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. 224 (1986), *reprinted in* 1986 U.S.C.A.N. 3276, 3317 (“New section 113(h) is not intended to affect in any way the rights of persons to bring nuisance actions under State law with respect to releases or threatened releases of hazardous substances, pollutants, or contaminants.”).

43. *See, e.g.*, 132 CONG. REC. H9583 (daily ed. Oct. 8, 1986) (statement of Rep. Glickman) (“[N]obody want[s] to see an inadequate or inappropriate remedy built. If the remedy is not adequate the neighbors may be injured . . . . If the remedy has to be rebuilt, the potentially responsible parties may have to pay twice for the cleanup of one site. *Notwithstanding these arguments*, the conferees decided to ensure expeditious cleanups by restricting such preimplementation review.”) (emphasis added); *id.* (“Clearly the conferees did not intend to allow any plaintiff, whether the neighbor who is unhappy about the construction of a toxic waste incinerator in the neighborhood, or the potentially responsible party who will have to pay for its construction, to stop a cleanup by what would undoubtedly be a prolonged legal battle. It was for this very reason that the conferees included section 113(h).”); 132 CONG. REC. H9586 (daily ed. Oct. 8, 1986) (statement of Rep. Fields) (“I discovered that as much as 50 percent of Superfund money was being spent on litigation, not cleanup of waste sites.”); 132 CONG. REC. S14,928 (daily ed. Oct. 3, 1986) (statement of Sen. Thurmond) (“[T]he timing of review section ensures that Government and private cleanup resources will be directed toward mitigation, not litigation. The section is designed to preclude piecemeal review and excessive delay of cleanup.”).

This legislative history is often incorporated by reference in court opinions narrowly interpreting the jurisdictional bar:

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

*Wagner Seed Co. v. Daggett*, 800 F.2d 310, 315 (2d Cir. 1986); *see also* *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1019 (3d Cir. 1991) (“The limits § 113(h) establishes are designed to prevent time-consuming litigation from delaying the prompt clean-up of these sites.”); *Alabama v. United States EPA*, 871 F.2d 1548, 1560 (11th Cir. 1989) (“As the legislative history indicates, Congress enacted this delay in judicial review to ensure prompt and effective permanent cleanup of hazardous waste sites that threaten human health and safety.”), *cert. denied*, 493 U.S. 991 (1989); *Reynolds v. Lujan*, 785 F. Supp. 152, 153 (D.N.M. 1992) (“The purpose of § 113(h) is to ensure that judicial challenges do not unnecessarily delay CERCLA cleanup actions.”); *Neighborhood Toxic Cleanup Emergency v. Reilly*, 716 F. Supp. 828, 832 (D.N.J. 1989) (“Defendants cite SARA’s legislative history to show that Congress intended to foreclose pre-remedial review to promote the policy of cleanup without delay.”).

There are also broader policies underlying the mere avoidance of delay:

These policies include avoiding piecemeal court battles that would increase response costs for all parties and waste EPA resources; allowing swift action by the EPA to minimize physical harm to the environment by preventing delays caused by litigation; deference to the EPA’s decisions in the area of its expertise; and the congressional determination that cleaning up potential contamination is a more important goal than sorting out liability.

action costs which are associated with dilatory litigation.<sup>44</sup> However, from the beginning, this same legislative history acknowledges the difficulty in determining which lawsuits are legitimately motivated by health or safety concerns and which are impermissibly dilatory.<sup>45</sup> It is precisely this determination that the *Gamma-Tech* court was forced to make and precisely this issue that Congress

Richard D. Faulkner, Jr., Comment, *CERCLA and the Constitution: Reardon v. United States Permits Constitutional Jurisdiction and Invalidates Federal Lien*, 26 GA. L. REV. 861, 871 (1992) (footnotes omitted).

In spite of all Congress' best efforts, however, courts continue to face "the dominance of CERCLA litigation as the largest component of Environmental Litigation." David Sive, *Environmental Litigation in 1994: Procedural & Jurisdictional Matters*, C981 A.L.I.-A.B.A. CONTINUING LEGAL EDUC. 611, 613 (1995).

44. For a general discussion of the litigation costs associated with Superfund litigation, see John J. Lyons, *Deep Pockets and CERCLA: Should Superfund Liability be Abolished?*, 6 STAN. ENVTL. L.J. 271 (1986-87); see also Deason, *supra* note 8, at 589 ("[E]xcessive transaction costs, especially those resulting from prolonged litigation, impede [CERCLA's] goals by delaying cleanups and depleting available resources. Logic therefore dictates that mechanisms that can speed the litigation process will promote the overall goals of CERCLA." (footnote omitted)). The costs of litigation have long been seen as one of the most negative side effects of CERCLA:

One of the most troubling parts of Superfund is its unfair and highly litigious liability system . . . . As it now stands, the EPA typically orders the larger polluters to clean up a site. They in turn sue smaller polluters, and their insurance companies, to recover some of the costs . . . . This liability system has become a cash cow for lawyers and has forced EPA and industry to spend more time and money finding culprits than cleaning up contaminated sites.

Gergen, *supra* note 10, at 629 n.18 (quoting 140 CONG. REC. S1058-59 (daily ed. Feb. 7, 1994) (statement of Sen. Baucus)); see also Don J. DeBenedictis, *How Superfund Money is Spent*, A.B.A. J., Sept. 1992, at 30, 30 (indicating that administration and litigation of claims accounts for 88% of the insurance company money spent on CERCLA suits), cited in Deason, *supra* note 8, at 559 n.26; Moore, *supra* note 31, at 678 ("The primary reason offered for CERCLA's bar to pre-enforcement review of administrative orders is that under many circumstances pre-enforcement review would delay the EPA's response to environmental emergencies and waste the agency's scarce time and resources on litigation." (citations omitted)).

45. For instance, Senator Stafford stated:

Concerns have been expressed throughout the reauthorization process that potentially responsible parties, in the guise of aggrieved citizens, might also take advantage of such opportunities for judicial review. If these fears were realized, such specious suits would slow cleanup and enable private parties to avoid or at least delay paying their fair share of cleanup costs.

To avoid such results, the courts must draw appropriate distinctions between dilatory or other unauthorized lawsuits by potentially responsible parties involving only monetary damages and legitimate citizens' suits complaining of irreparable injury that can be only addressed only if a claim is heard during or prior to response action . . . .

. . . The crucial distinction between these two types of suits is that plaintiffs concerned with the monetary consequences of a response can be made whole after the cleanup is completed . . . . But citizens asserting a true

should now address by statute as part of a comprehensive CERCLA reform.

### III. APPLICATION OF THE JURISDICTIONAL BAR

#### A. *Pre-SARA Litigation*

Arguably, when Congress passed the SARA amendments adding the jurisdictional bar to CERCLA, it merely codified the patterns that had developed in the CERCLA cases decided prior to SARA.<sup>46</sup> As originally drafted, CERCLA did not unequivocally and explicitly bar pre-enforcement judicial review of remedial actions.<sup>47</sup> However, a series of cases prior to the passage of SARA—includ-

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public health or environmental interest in the response cannot obtain adequate relief if an inadequate cleanup is allowed to proceed . . . .

132 CONG. REC. S14,898 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford); *see also id.* at 14917–18 (statement of Sen. Mitchell):

[A]n entire cleanup need not be complete before a citizen can sue. Similarly, responsible parties cannot halt cleanup because of concerns that the cleanup is excessive.

. . . .  
Clearly the risk to the public health is more of an irreparable injury than the momentary loss of money. If a response action is proven to be too expensive, responsible parties can be reimbursed by the fund for the excess cost. The public, however, has no recourse if their health has been impaired. For this reason, courts should carefully weigh the equities and give great weight to the public health risks involved.

*Id.*

46. *See* *Dickerson v. EPA Adm'r*, 834 F.2d 974, 977–78 (11th Cir. 1987) (“A recent amendment to CERCLA . . . clearly provides that federal courts do not have subject matter jurisdiction for pre-enforcement reviews of EPA removal actions . . . . This legislation reflects Congress’ intent to preclude pre-enforcement judicial review and is consistent with earlier cases barring such review.”); 132 CONG. REC. H9582 (daily ed. Oct. 8, 1986) (remarks of Rep. Glickman) (“In essence, new section 113(h) of CERCLA ratifies existing case law on the timing of review and establishes the circumstances under which courts will have jurisdiction to review response actions.”); 132 CONG. REC. S14,928 (daily ed. Oct. 3, 1986) (statement of Sen. Thurmond) (“It is my understanding that the provision confirms and builds upon existing case law.”); *see also* the discussion of *Southern Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir. 1990), *infra* note 63.

For a general discussion of the ways in which the jurisdictional bar in the SARA amendments was connected to the pre-SARA common law on the subject, consult Light, *The Importance of “Being Taken”*, *supra* note 5, at 15–19.

47. *See* Cheryl Kessler Clark, *Due Process and the Environmental Lien: The Need for Legislative Reform*, 20 B.C. ENVTL. AFF. L. REV. 203, 216 (1993) (“Prior to the enactment of the Superfund Amendments and Reauthorization Act of 1986 (SARA), CERCLA did not expressly prohibit pre-enforcement judicial review of EPA actions.”).

ing *Solid State Circuits, Inc. v. United States EPA*,<sup>48</sup> *Wagner Seed Co. v. Daggett*,<sup>49</sup> *Barnes v. United States District Court*,<sup>50</sup> *United States v. Outboard Marine*,<sup>51</sup> *Wheaton Industries v. United States EPA*,<sup>52</sup> *Lone Pine Steering Committee v. United States EPA*,<sup>53</sup> *J.V.*

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48. 812 F.2d 383 (8th Cir. 1987). In this case, the Court of Appeals entertained the plaintiff's constitutional challenge to CERCLA's scheme of treble damages. *Id.* at 386. However, regarding a review of the *substantive merits* of the ordered cleanup, the Court of Appeals stated, "We agree with the district court's decision that it lacked jurisdiction to review the merits of an EPA clean-up order prior to an attempt by the EPA to enforce it." *Id.* at 386 n.1.

49. 800 F.2d 310 (2d Cir. 1986). As in *Solid State Circuits*, the *Wagner Seed* court determined that it had jurisdiction to entertain constitutional challenges to the CERCLA scheme. *Id.* at 314. It found these challenges to be "without merit." *Id.* at 317. However, it ruled that "[t]he district court's order denying appellant's motion for a preliminary injunction must be affirmed. It properly held that it lacked subject matter jurisdiction to consider a challenge on the merits to an EPA order before the EPA had initiated an enforcement action." *Id.*

50. 800 F.2d 822, 822 (9th Cir. 1986) (stating that "[t]he Comprehensive Environmental Response, Compensation and Liability Act . . . does not authorize pre-enforcement review of Environmental Protection Agency orders").

51. 789 F.2d 497 (7th Cir. 1986), *cert. denied*, 479 U.S. 961 (1986). The *Outboard Marine* court reported that:

Courts that have addressed the issue of a trial court's jurisdiction to review the appropriateness of the EPA's removal efforts have held that CERCLA does not authorize pre-enforcement judicial review of the EPA's R.O.D. . . . . Rather, these courts have held that the jurisdiction rests with the trial court only after the EPA has enforced the R.O.D. and the government subsequently sues under CERCLA . . . to recover the cleanup costs incurred in enforcing the R.O.D.

*Outboard Marine*, 789 F.2d at 505-06.

52. 781 F.2d 354 (3d Cir. 1986). Here, the court agreed that "the district court correctly ruled that judicial review was not available under section 104 of CERCLA at this time." *Id.* at 356. Thus, the court refused to entertain the plaintiff's argument that it should review the EPA/DEP's refusal to allow Wheaton to perform the remedial investigation/feasibility study. *Id.* The court reached this conclusion notwithstanding the plaintiff's argument that the Administrative Procedure Act generally favors judicial review of agency action. As the court reasoned, this "argument fails to take into account the effect of the provision of the APA itself that precludes judicial review under the APA whenever the relevant statute precludes judicial review." *Id.* at 356. Hence, the jurisdictional bar in CERCLA "trumps" the general administrative law preference for judicial review.

53. 777 F.2d 882 (3d Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986). The *Lone Pine* plaintiffs raised a number of challenges to an EPA ordered cleanup action. Specifically, they alleged that "the EPA's plan was too costly, the agency had failed to evaluate adequately the Committee's proposal, and the Record of Decision contained inaccurate technical data and erroneous assumptions resulting in duplicative and unnecessary corrective measures." *Id.* at 884. Although the district court granted the government's motion to dismiss the claim for lack of jurisdiction, *see Lone Pine Steering Comm. v. United States EPA*, 600 F. Supp. 1487 (D.N.J. 1985), the plaintiffs advanced a number of arguments on appeal that supported the court's review. Specifically, they contended that they would be disadvantaged in post-enforcement litigation because EPA would be able to demonstrate the efficacy of the plan actually undertaken. Thus, they argued that they would be unable to make a convincing showing after the fact that their theoretical proposal would have

*Peters & Co. v. Administrator*,<sup>54</sup> *Pacific Resins & Chems., Inc. v. United States*,<sup>55</sup> *B.R. MacKay & Sons v. United States*,<sup>56</sup> *Wagner Electric Corp. v. Thomas*,<sup>57</sup> and *Aminoil, Inc. v. United States EPA*<sup>58</sup>—made it clear that the courts perceived such a ban to have been Congress' unwritten intent.<sup>59</sup> Indeed, many of the decisions issued immediately prior to the actual passage of the statutory ban in

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been just as good if it had been selected. See *Lone Pine*, 777 F.2d at 885. In addition, they pointed out that there was no emergency existing at the cleanup site that justified immediate action without the possibility of review. *Id.*

However, the *Lone Pine* court found that § 9604 of CERCLA implicitly prevented the court from reviewing an EPA cleanup plan prior to its completion. The court concluded that "although not explicitly stated in the statute, we find in § 9604 an implicit disapproval of pre-enforcement judicial review. That policy decision is not limited to emergency situations but applies to remedial actions as well." *Id.* at 887.

54. 767 F.2d 263, 265 (6th Cir. 1985) ("Pre-enforcement review would lead to considerable delay in providing cleanups, would increase response costs, and would discourage settlements and voluntary cleanups.").

55. 654 F. Supp. 249, 253 (W.D. Wash. 1986) ("The most recent appellate and district court decisions addressing the issue have concluded there is no pre-enforcement review under CERCLA.").

56. 633 F. Supp. 1290 (D. Utah 1986). This case arose in an atypical procedural posture. The EPA's cleanup action *had been completed*. However, the government had not brought its cost-recovery action. The plaintiffs sought to litigate the issue of liability prior to the government's filing of the cost-recovery suit. *Id.* at 1292. This case would seem to be an ideal example for allowing the court to have jurisdiction since the goal of the bar—to prevent dilatory tactics from delaying needed cleanups—could, by definition, not be thwarted by disallowing recovery *after* the cleanup has taken place. Nevertheless, the *Mackay* court took very seriously the "shooting first and asking questions later" philosophy underlying CERCLA. See *id.* at 1294. Thus, it dismissed the plaintiffs' complaint for lack of jurisdiction.

57. 612 F. Supp. 736 (D. Kan. 1985). As with *Solid State Circuits* and *Wagner Seed*, the court here determined that it had jurisdiction to hear the constitutional challenges to CERCLA. *Id.* at 741. However, it found that it lacked jurisdiction under CERCLA to do a pre-enforcement review of the subject matter merits of the complaint. It explained, "[T]he reported district court decisions are virtually unanimous in holding that a federal court lacks subject matter jurisdiction to review the merits of a CERCLA order prior to EPA's seeking to enforce that order." *Id.* at 740.

58. 599 F. Supp. 69 (C.D. Cal. 1984). Again, the court here found it had jurisdiction to hear the constitutional challenges to CERCLA but determined that "to the extent that pre-enforcement review of the merits of the administrative order is sought, this Court lacks jurisdiction to hear the arguments raised by plaintiffs." *Id.* at 71.

59. See *Rosenberg*, *supra* note 14, at 563. In commenting on these pre-SARA cases, the author observes:

Prior to SARA's enactment, courts applying CERCLA to PRP suits for pre-enforcement review of EPA cleanup generally determined that CERCLA precludes judicial review of Agency cleanup actions until after the cleanup actions were completed . . . . The courts reasoned that although CERCLA does not expressly prohibit pre-enforcement judicial review of the cleanup actions, the legislative history of CERCLA indicates that Congress intended to enable EPA to cleanup hazardous waste sites without such judicial encumbrances. The decisions interpreted CERCLA in accordance with both Congress' legislative intent and the Administrative Procedure Act (APA), which



SARA used that pending legislation as evidence that the courts' assessment of Congress' intent was accurate.<sup>60</sup>

Some pre-SARA cases did allow for review of proposed actions when it was the *constitutionality* of CERCLA itself that was at issue.<sup>61</sup> However, when plaintiffs sought review of the actual details of a particular cleanup plan, such review was consistently denied.<sup>62</sup>

Given this set of precedents, it is fair to say that once section 9613(h) was added to CERCLA, it merely reaffirmed what courts throughout the early eighties had already decided the jurisdictional rule should be.<sup>63</sup> Through the use of legislation, however, Congress

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provides that agency decisions are not "ripe" for judicial review unless they are "final actions."

*Id.*

60. *See, e.g.,* Solid State Circuits, Inc. v. United States EPA, 812 F.2d 383, 386 (8th Cir. 1987) ("The October, 1986, amendments to CERCLA confirm Congress' intent to preclude pre-enforcement review."). However, the Third Circuit Court of Appeals correctly refused to accept an argument based on the pending SARA legislation, explaining, "The legislation is still pending and may undergo additional changes before passage. Hence, we do not rely on it here." *Wheaton Indus. v. United States EPA*, 781 F.2d 354, 356 n.1 (3d Cir. 1986). The *Wheaton* decision followed the Third Circuit's decision in *Lone Pine Steering Comm. v. United States EPA*, 777 F.2d 882 (3d Cir. 1983), *cert denied*, 476 U.S. 1115 (1986), by displaying an ambivalent attitude toward claims that pending legislation constitutes an expression of intent. Although the *Lone Pine* court began by saying, "we do not rely on [the bills] since they have not been approved by both Houses," it went on to concede that "the proposed legislation and its legislative history are instructive on the question of pre-enforcement judicial review." *Id.* at 888.

61. Fuller discussion of this aspect of the jurisdictional bar may be found in William A. Montgomery, Jr., *Constitutional Implications of CERCLA: Due Process Challenges to Response Costs and Retroactive Liability*, 31 WASH. U. J. URB. & CONTEMP. L. 279 (1987).

62. There was one notable exception to this line of cases. In *Outboard Marine Corp. v. Thomas*, 773 F.2d 883 (7th Cir. 1985), *vacated*, 479 U.S. 1002, the court heard a challenge to EPA's alleged right to enter plaintiff's property to do "the field work necessary to prepare the design plans and specifications for the anticipated clean-up construction." *Id.* at 887. This "field work" involved a large tract of land not alleged to be contaminated. *Id.* at 887-88. After the plaintiff refused to allow the EPA access, the agency was granted a warrant for administrative entry; the plaintiff refused access even with the warrant and moved to quash the warrant. The district court denied the plaintiff's request for this injunctive relief. *Id.* at 888. However, the court of appeals reversed and granted the plaintiff an injunction against EPA entry. *Id.* at 891. The court's action in this case, however, should not be seen as an early departure from the jurisdictional ban. Rather, the rationale for the court's decision centered around its finding that EPA had not yet obtained clear authority to begin the cleanup at all. Because the intrusive entry it proposed was so related to the conduct of the cleanup construction project, the court reasoned that without authority to do the cleanup, EPA lacked authority to engage in activities integrally intertwined with the cleanup. *Id.* at 889. However, had the EPA been authorized to do the underlying cleanup, the court may well have been subject to the jurisdictional bar.

63. In *Southern Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir. 1990), the

was able to state the rule in clearer terms than the common law was able to. Accordingly, until *Gamma-Tech*, the SARA amendments resulted in court decisions almost uniformly stating that the federal courts cannot engage in pre-enforcement review of EPA's cleanup orders.<sup>64</sup>

### *B. Post-SARA Litigation Leading Up to Gamma-Tech*

In various ways and in different procedural postures, the past ten years have seen a clear line of post-SARA cases continuing to disfavor challenges to cleanup plans. It is because these cases have been so consistent and so adamant that the *Gamma-Tech* ruling is so noteworthy.<sup>65</sup>

A core of oft-cited cases has established the foundation for the prevailing narrow reading of the jurisdictional bar in section 9613(h).<sup>66</sup> Through their reliance on legislative history, strict interpretation of the statutory language, and fervent appeal to the sound policy of speedy cleanups, the courts in these cases have forbidden pre-enforcement review in a wide variety of circumstances. Perhaps the most vehemently stringent interpretation of the bar came from the Third Circuit in *Boarhead Corp. v. Erick-*

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court discussed the way in which the SARA amendments appear to "rubberstamp" the approach the courts had already decided to take with regard to the jurisdictional bar:

Prior to 1986 courts held that pre-enforcement remedial actions taken by the EPA under CERCLA were not subject to judicial review because litigation would interfere with CERCLA's policy of prompt agency response . . . . In 1986 Congress added a provision to CERCLA which specifically precludes federal jurisdiction over pre-enforcement remedial action.

*Id.* at 716.

64. Interestingly, the jurisdictional bar in SARA was based on the limitation that was read into CERCLA by the pre-SARA courts. Similarly, now Congress should follow a model presented by a court as basis for its legislation. Obviously, this analogy may be a bit strained since the pre-SARA decisions claimed to be reading into CERCLA what they claimed to *know* Congress *really* meant. Nevertheless, it still provides an interesting example of legislative/judicial dialog and demonstrates the times when it is in the legislature's interest to follow the lead of the court.

65. Equally important, the dissatisfaction that many courts express when applying the rule illustrates that their adamant consistency does not come from uniform satisfaction. Rather, the courts seem to be doing with displeasure what they believe the statute requires them to do. Thus, this lack of judicial debate should not be seen as an argument favoring legislative inaction in this area.

66. See discussion *infra* notes 75-88 and accompanying text, describing the key cases in this line.

son.<sup>67</sup> There, EPA had developed a CERCLA cleanup plan for property on which the plaintiffs alleged "American Indian remains and artifacts"<sup>68</sup> were found. The plaintiffs challenged EPA's authority to conduct its proposed cleanup without reviewing the plan as required under applicable provisions of the National Historic Preservation Act.<sup>69</sup> Failing to allow plaintiffs to challenge the cleanup, they argued, would violate the Preservation Act and would allow potentially irreparable harm to irreplaceable cultural artifacts.<sup>70</sup> In response, the government argued that allowing the review would violate the jurisdictional bar as set forth in CERCLA.<sup>71</sup>

Although the *Boarhead* court expressed sympathy for the irreparable harm that might arise if it could not hear the plaintiffs' claim,<sup>72</sup> it ruled that its ability to prevent that harm was limited by CERCLA's plain language. Accordingly, the court unenthusiastically upheld the district court's finding that it lacked jurisdiction to review the cleanup:

Although post-study judicial review cannot rectify damage to historical artifacts or remains on this landmark site that occurs in the course of the EPA's clean-up, we must presume Congress balanced the problem of irreparable harm to such interests and concluded that the interest in removing the hazard of toxic waste from Superfund sites outweighed it. *Boarhead's* remedy lies with Congress, not the district court.<sup>73</sup>

Thus, in weighing the difficult problem of reconciling the statutory requirement with the reality of irreversible harm, the *Boarhead*

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67. 923 F.2d 1011 (3d Cir. 1991).

68. *Id.* at 1013.

69. *Id.* The National Historic Preservation Act, § 106, as amended, 16 U.S.C. § 470(f) provides, in relevant part, that those responsible for federally assisted undertakings—of which a CERCLA cleanup is, obviously, an example—must:

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

*Id.*, cited in *Boarhead*, 923 F.2d at 1013 n.2.

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

71. *Id.* at 1018.

72. Of course, unlike *Gamma-Tech*, the *Boarhead* case did not involve irreparable harm to either *health* or the *environment*.

73. *Boarhead*, 923 F.2d at 1023.

court concluded that it must defer to the judgment of Congress, even where undesirable consequences may result.<sup>74</sup>

In cases that were somewhat less dramatic than *Boarhead*, a number of other post-SARA courts have also rejected plaintiffs' attempts to broaden the jurisdictional scope of CERCLA. For example, in *Barnet Aluminum Corp. v. Reilly*,<sup>75</sup> *Arkansas Peace Center v. Arkansas Department of Pollution Control & Ecology*,<sup>76</sup> *North*

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74. For further discussion of the *Boarhead* decision, see Nathan H. Stearns, Comment, *Cleaning Up the Mess, or Messing Up the Cleanup: Does CERCLA's Jurisdictional Bar (Section 113(h)) Prohibit Citizen Suits Brought Under RCRA*, 22 B.C. ENVTL. AFF. L. REV. 49, 71-72 (1994). Unlike *Gamma-Tech*, the *Boarhead* case did not involve irreparable harm to health or the environment. Nevertheless, resolving the conflict between the possibility of irreversible harm and the statutory requirement is the cornerstone issue in *Gamma-Tech*. The *Gamma-Tech* case is discussed in detail *infra* part IV.

75. 927 F.2d 289 (6th Cir. 1991). In this case, the court rejected an argument that the plaintiff should be able to make constitutional challenges to CERCLA without being subject to the pre-enforcement restrictions. The court found this argument unpersuasive because "[t]he CERCLA statutory scheme, as amended by SARA, merely serves to effectuate a delay in a plaintiff's ability to have a full hearing on the issue of liability and does not substantively affect the adequacy of such a hearing." *Id.* at 295. This case appears to contradict the court's holding in *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991) discussed *infra* note 115. However, the *Barnet* court is very careful to explain that *Reardon* is only narrowly applicable to its facts. *Barnet*, 927 F.2d at 295.

76. 999 F.2d 1212 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1397 (1994). Here, the plaintiffs filed a complaint and a motion for a preliminary injunction that would enjoin a proposed removal plan involving incineration of dioxin. This injunctive relief was granted in part by the trial court. *Arkansas Peace Ctr.*, 999 F.2d at 1215. Later, the lower court granted "a preliminary injunction barring all incineration of drums of hazardous wastes that had not already been shredded . . ." *Id.* At issue on appeal was the validity of that injunction. The arguments against the injunction were based in part on the EPA's claim that the lower court could not grant the preliminary injunction because it lacked jurisdiction. *Id.* at 1216. The court accepted this argument, finding two parts of it especially compelling. First, the court considered the fact that the statute itself allows a challenge to a removal or remedial action only where "the removal or remedial action taken . . . was in violation of any requirement of [CERCLA]." *Id.* (citing 42 U.S.C. § 9613(h)(4)). As the EPA argued, this passage uses the past tense in referring to the removal and remedial actions that may be challenged. Thus, the court accepted the premise that Congress could not have intended to allow challenges to ongoing cleanups because, grammatically, the past tense requires that the cleanup be completed. *See id.* at 1216-17. In ruling this way, the court explicitly rejected the plaintiffs' argument that the case should be heard as a claim involving a RCRA violation separate and distinct from the CERCLA claim. *See id.* at 1217.

A more detailed analysis of *Arkansas Peace Ctr.* may be found in Stearns, *supra* note 74, at 76-78. *See also Court Dismisses Case that Sought to Bar Burning of Dioxin Waste at Superfund Site*, 24 Env't Rep. (BNA) No. 12, at 520 (July 23, 1993). The petition for certiorari to the Supreme Court in this case is discussed in *Supreme Court May Decide on Challenges to CERCLA Cleanups*, HAZARDOUS WASTE NEWS, Mar. 21, 1994, available in Westlaw, HAZWEN File, WL 2516099; *Petitioners Seek Supreme Court Review on State Regulation of Superfund Sites*, 24 Env't Rep. (BNA) No. 40, at 1722-23 (Feb. 4, 1994); *Supreme Court Asked to Decide RCRA Applicability to Superfund*, PESTICIDE & TOXIC CHEMICAL NEWS, Jan. 12, 1994, available in Westlaw, PTCHEMN File, WL 2524422. The Supreme Court's decision not to grant the petition is discussed in *Supreme Court Declines*

*Shore Gas Co. v. EPA*,<sup>77</sup> *Schalk v. Reilly*,<sup>78</sup> *Voluntary Purchasing Groups v. Reilly*,<sup>79</sup> *Alabama v. United States EPA*,<sup>80</sup> *In re Combustion*

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*Review of Ruling that Dismissed Suit Over Vertac Cleanup*, 24 Env't Rep. (BNA) No. 49, at 2068 (Apr. 8, 1994).

77. 930 F.2d 1239, 1244 (7th Cir. 1991) ("The district court was in any event right that the suit is blocked by the blunt withdrawal of federal jurisdiction in section 113(h). The withdrawal applies only to removal and to remedial actions, but the construction of the new slip is remedial."). However, the *North Shore Gas* court seemed ambivalent about ruling as it did, reflecting that "the breadth of section 113(h) is troublesome." *Id.* at 1245.

78. 900 F.2d 1091 (7th Cir. 1990), *cert. denied*, *Frey v. Reilly*, 498 U.S. 981 (1990). In *Schalk*, the plaintiffs challenged a cleanup plan that would involve the incineration of polychlorinated biphenyls (PCBs) pursuant to a consent decree with a responsible party. *Schalk*, 900 F.2d at 1093-94. In particular, the plaintiffs objected to the fact that this plan was put in place without prior preparation of an Environmental Impact Statement as required by the National Environmental Policy Act. *Id.* at 1094. However, the court ruled that "federal court review of the remedial action proposed . . . is explicitly barred by CERCLA's plain language." *Id.* at 1095. The court was particularly concerned that subjecting all CERCLA cleanups to Environmental Impact Statements and Feasibility Studies would cause a great deal of dilatory maneuvering. *See id.* In reaching this conclusion, the court also rejected arguments by the plaintiffs that the SARA amendments should not be applied retroactively, and that the action they were bringing was not truly a "challenge" of the type covered by the statute. *Id.* at 1096. For further discussion of *Schalk*, see Paul H. McConnell, Note, *CERCLA Wrestling—Grappling with Conflicting Legislative Intent and the Citizens' Suit Provision—United States v. Princeton Gamma-Tech*, 14 TEMP. ENVTL. L. & TECH. J. 115, 125-26 (1995).

79. 889 F.2d 1380 (5th Cir. 1989). In this opinion, the court found that SARA prohibited "review prior to the issue of liability prior to the filing of a cost-recovery action by the government." *Id.* at 1389. The opinion spends a great deal of time explaining why such a restrictive view of SARA is wise. The court began by invoking the traditional argument that the goal of the SARA provision was to prevent delay in implementing remedies. *See id.* at 1390. The court acknowledged that in this case the review sought would not necessarily result in delay. However, the court identified reasons other than mere delay to read § 113 strictly. The court explained that any other result would create two additional indirect harms:

[I]t would force the EPA—against the wishes of Congress—to engage in 'piecemeal' litigation and use its resources to protect its rights to recover from any PRP filing such a declaratory judgment action . . . . [M]uch of the EPA's time and resources could end up being allocated to litigation in this area . . . . Moreover, the crazy quilt litigation that could result from allowing PRPs to file suits for declaratory judgments of non-liability prior to the initiation of government cost-recovery actions could force the EPA to confront inconsistent results.

*Id.* at 1390.

Thus, *Voluntary Purchasing Groups* undercuts any argument by a plaintiff that only claims directly harming the cleanup process should be precluded. The mere fact that delay will not occur in a particular case will not justify pre-enforcement review. This aspect of the case is discussed more fully in *Court Finds No Pre-Enforcement Review Even Where CERCLA Remedy Already Completed*, 20 Env't Rep. (BNA) No. 35, at 1445-46 (Dec. 29, 1989).

80. 871 F.2d 1548 (11th Cir. 1989), *cert. denied*, 493 U.S. 991 (1989). The court here found that there was no pre-enforcement jurisdiction over such cases by attaching the same significance to the statutory use of the past tense that the *Arkansas Peace Ctr.* court did:

*tion Equipment Associates*,<sup>81</sup> *Reynolds v. Lujan*,<sup>82</sup> *Redland Soccer Club, Inc. v. Department of the Army*,<sup>83</sup> *Cooper Industries v. United*

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The plain language of the statute indicates that section 113(h)(4) applies only after a remedial action is actually completed. The section refers *in the past tense* to remedial actions taken under section 104 or secured under section 106. Absent clear legislative intent to the contrary, this language is conclusive.

*Alabama v. United States EPA*, 871 F.2d at 1557. For further discussion of the *Alabama* decision, see *Federal Appeals Court Lifts Injunction, Allows Shipment of Waste to Alabama Site*, 13 Chem. Reg. Rep. (BNA) 164 (May 5, 1989); McConnell, *supra* note 78, at 126.

81. 838 F.2d 35 (2d Cir. 1988). In this case, the court faced an interesting tension between the goals of the bankruptcy laws and those of CERCLA. The plaintiffs essentially sought a declaratory judgment discharging their liability for a cleanup under CERCLA. This would assist them in their bankruptcy proceedings to determine their financial obligations. *See id.* at 37. As the court acknowledged, bankruptcy proceedings have as one of their goals early litigation "allowing a bankruptcy judge to estimate contingent liabilities . . . thereby fixing them for the purpose of sharing in the assets of the estate before they would have otherwise matured." *Id.* at 37 (citation omitted). In contrast, CERCLA "embraced a policy of delaying litigation about cleanup costs until after the cleanup." *Id.* This dichotomy naturally produced a tension. Reflecting the strong presumption in favor of a strict reading of CERCLA, the court resolved the tension in favor of avoiding delay under CERCLA:

If the EPA is forced to expend its resources on preserving its rights to eventual recovery against any PRP that has recently emerged from bankruptcy, the EPA will have less ability to pursue its primary mission of cleaning the sites. Of course, any time an agency is forced to litigate it expends funds it might otherwise have used to further its primary purpose, but, as already discussed, Congress has directed the courts to be especially wary of interfering with CERCLA work . . . .

*Id.* at 40. Thus, *In re Combustion Equip.* clearly illustrates that the courts are willing to interpret the restrictions narrowly even if that may undermine the legitimate policy objectives of other federal statutes.

82. 785 F. Supp. 152 (D.N.M. 1992). Illustrating that the jurisdictional ban should be read in a way that eliminates as many "loopholes" for plaintiffs as possible, the court here held that § 113(h) barred it from hearing a challenge *even though* the plaintiffs made their challenge to the cleanup under RCRA rather than CERCLA. As the court explained, "The language of § 113(h) is broad. It precludes 'any challenges' rather than specified actions and goes beyond CERCLA itself since there shall be no federal jurisdiction under any federal or state law." *Id.* at 153.

83. 801 F. Supp. 1432 (M.D. Pa. 1992). Here, the court granted motions to dismiss two citizens suits challenging EPA actions taken pursuant to CERCLA. In dismissing the federal claim the court reasoned that "[b]oth the plain language and the legislative history indicate a broad congressional intent that federal courts not hear such challenges until the remedial actions are complete." *Id.* at 1435. More interesting, however, was the court's parallel dismissal of challenges to the cleanup brought under Pennsylvania state law. The court held that the "claims brought under state environmental protection statutes must be dismissed along with CERCLA claims . . . . Were we to do otherwise, we would frustrate the legislative intent behind § 9613(h)." *Id.* at 1436. Thus, the *Redland* court employed § 9613(h) to close off another avenue of potential litigation. For further discussion of the *Redland* decision, see *Suit Dismissed Pending Cleanup of Pennsylvania Hazardous Waste Site*, 23 Env't Rep. (BNA) No. 26, at 1645-46 (Oct. 23, 1992).

However, *Redland* was not the final word on the complex question of CERCLA's relationship to state law. For further discussion of that issue, see the discussion of *United States v. Colorado* accompanying *infra* note 117.

*States EPA*,<sup>84</sup> *City of Eureka v. United States*,<sup>85</sup> *Frey v. Thomas*,<sup>86</sup> and *South Macomb Disposal Authority v. United States EPA*<sup>87</sup> courts

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84. 775 F. Supp. 1027 (W.D. Mich. 1991). Here, the court faced a challenge that did not go to the substantive merits of a response action; rather, the plaintiff objected to the process of *selecting* the response. *Id.* at 1038. The thrust of the plaintiff's argument was that because the challenge concerned remedy *selection* rather than remedial *action*, the jurisdictional bar should not apply. *Id.* The court rejected this argument, finding that the difference was semantic rather than real:

[W]here the underlying principle of the bar to pre-enforcement review is the need to prevent litigation that may delay rapid cleanup, the principle is no less applicable where a party seeks injunctive relief on the eve of the EPA's remedy selection and Record of Decision. Pre-enforcement judicial review, whether before or after the selection of a remedy, thwarts the purpose of prompt response intended by CERCLA.

*Id.* at 1039.

85. 770 F. Supp. 500 (E.D. Mo. 1991) (granting government's motion to dismiss for lack of subject matter jurisdiction).

86. No. IP88-948-C, 1988 U.S. Dist. LEXIS 16967 (S.D. Ind. 1988). Here, the court rejected a challenge to a remedial action that was based on the claim that the process by which the remedy was pursued violated the Environmental Impact Statement requirement of the National Environmental Policy Act. The court rejected this claim, finding that the conflict should be covered by the CERCLA ban:

NEPA is not CERCLA, and is in a different chapter of the United States Code. Thus, SARA's citizen's suit provision cannot be used to compel a federal official to perform an act allegedly required by NEPA . . . . [B]ecause the citizen's suit provision does not encompass NEPA, the Court finds no jurisdictional basis for plaintiffs' allegation under NEPA.

*Id.* at \*7.

Although this would significantly reduce plaintiffs' ability to challenge the details of proposed plans, the court justified this outcome by explaining that the same statute that created the strict jurisdictional bar also provided extensive opportunities for citizen involvement in selecting the actual cleanup plan. *Id.* *Frey v. Thomas* is discussed in *Federal Court Should Have Reviewed Remedy in Indiana PCB Site Case, Supreme Court Told*, 21 *Env't Rptr.* (BNA) No. 20, at 905 (Sept. 14, 1990).

87. 681 F. Supp. 1244 (E.D. Mich. 1988). In a marked departure from earlier cases that allowed courts significant leeway to hear constitutional challenges to the jurisdictional bar, the *South Macomb Disposal* court refused to hear a constitutional challenge to the bar on judicial review. *Id.* at 1245. As the court reasoned, while there are substantive differences between a constitutional challenge and a fact-specific challenge, the net result of both is a delay in the cleanup. Finding the congressional sentiment against such delays to be so compelling, the court ruled:

[T]he court holds that Congress intended that federal courts not have subject-matter jurisdiction to hear constitutional challenges to CERCLA at this stage of the proceedings under the Act. To hold otherwise would allow the filing of lawsuits that would impede the EPA's ability to clean up hazardous waste sites promptly and expeditiously. If the court were to consider the constitutionality of CERCLA, an injunction would have to issue to prevent any potentially unconstitutional actions from taking place. Such injunctions are precisely the type of impediment that the preenforcement review was meant to prohibit.

rejected plaintiffs' attempts to broaden the jurisdictional scope of CERCLA.<sup>88</sup>

In addition to these cases, several decisions warrant special notice. In particular, the court in *Hanford Downwinders Coalition, Inc. v. Dowdle*<sup>89</sup> specifically rejected a health-related challenge to a removal action. In *Hanford Downwinders Coalition*, the plaintiffs sought an injunction to prevent the Agency for Toxic Substances & Disease Registry (ATSDR)<sup>90</sup> from spending any further funds on Hanford, a federal Superfund site, until the agency completed a required health assessment of the location.<sup>91</sup> Predictably, the defendant moved to dismiss, saying that the court's review of the plaintiffs' claim was barred by the timing of review restrictions in section 113(h).<sup>92</sup> The plaintiffs made four arguments in favor of having the court grant review. The first three were procedural arguments turning on the definitions of the jurisdictional bar.<sup>93</sup> The court rejected these three arguments.<sup>94</sup>

However, the plaintiffs' fourth argument is the most relevant for this Article. Plaintiffs argued that section 113 should not bar

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*Id.* at 1251.

88. See also *Dickerson v. EPA Adm'r*, 834 F.2d 974, 977 (11th Cir. 1987) ("CERCLA precludes pre-enforcement judicial review of EPA response actions."); *Environmental Waste Control, Inc. v. Agency for Toxic Substances & Disease Registry*, 763 F. Supp. 1576 (N.D. Ga. 1991) (dismissing, for lack of subject matter jurisdiction, plaintiff's challenge to remedy based on its allegedly deficient Health Assessment); *United States v. M. Genzale Plating, Inc.*, 723 F. Supp. 877 (E.D.N.Y. 1989) (rejecting both factual and constitutional challenges to jurisdictional ban).

89. 841 F. Supp. 1050 (E.D. Wash. 1993), *aff'd*, 71 F.3d 1469 (9th Cir. 1995).

90. For a fuller discussion of the role of the Agency for Toxic Substances & Disease Registry under CERCLA, see Gaba & Kelly, *supra* note 31, at 943-45; and Siegel, *supra* note 9.

91. *Hanford Downwinders Coalition*, 841 F. Supp. at 1054-55. Specifically, the plaintiffs requested "declaratory relief as to [the] alleged failures of duty . . . clarification regarding the appropriate means for accessing authorized funds, and an accounting . . . [and] an injunction against any further spending by the ATSDR at Hanford until plaintiffs obtain the declaratory relief, clarification, and accounting they seek." *Id.* at 1056.

92. *Id.*

93. Specifically, the plaintiffs argued that § 113(h) should not bar review because:

—their claim "does not 'challenge' a removal action because it does not seek to enjoin any ongoing activities but merely to enforce the obligation to take further actions." *Id.* at 1057.

—their claim is permissible because "the health assessment is a distinct stage of the removal action that has been completed or taken." *Id.*

—their claim would not undermine the goal of preventing delays in cleanup activities. *Id.*

94. See *id.* at 1059-61.



their request for review because their challenge did not involve a monetary claim but, instead, was "health related."<sup>95</sup> They argued that "the legislative history suggests that health related challenges should be allowed even though challenges based on monetary harm are barred."<sup>96</sup> While the *Hanford Downwinders Coalition* plaintiffs were correct in arguing that monetary claims seem most antithetical to Congress' intent,<sup>97</sup> the court still felt constrained to reject plaintiffs' argument because Congress did not authorize a health-related exception to the general jurisdictional bar. As the court logically reasoned:

Congress was aware of citizen suits when it drafted section 113(h) . . . . Congress was aware of the timing of review issue when it provided for citizen suits. Despite this clear awareness that citizen suits were subject to the timing of review restrictions of section 113(h), Congress provided no exception to section 113(h) for health related claims.<sup>98</sup>

In part, this strict view appears to have been motivated by fear that allowing such an exception would open the floodgates to litigation. As a realistic matter, "[m]any section 113(h) cases have confronted claims that were based on threats to human health."<sup>99</sup> Thus, the court acknowledged, however reluctantly,<sup>100</sup> that the intent of Con-

95. *Id.* at 1062.

96. *Id.*

97. *See id.*

98. *Id.*

99. *Id.*

100. The court expressed its dissatisfaction with the decision it was compelled to make:

Harsh as this result may be, it is compelled by the severely restrictive language Congress has chosen to limit the jurisdiction of the federal courts. Remedy for this harm must be sought with Congress, who should by now be well aware of how the courts have unanimously interpreted section 113(h)

. . . .

As the court has noted before, the equities of the situation at Hanford make section 113(h)'s harsh jurisdictional limitations particularly troubling . . . .

Nevertheless, Congress, through enacting section 113(h), has determined that the courts are not the appropriate forum for directing response actions at Superfund sites . . . . Accordingly, unless Congress amends CERCLA, this court cannot substitute its judgement for that of Congress and may not review the agency actions underway at Hanford.

*Id.* at 1063. It is precisely this need for Congressional action that this Article advocates.

gress and the interest in avoiding dilatory and open-ended litigation required it to uphold the bar.<sup>101</sup>

The strict reading of the jurisdictional bar was also upheld in *Neighborhood Toxic Cleanup Emergency v. Reilly*,<sup>102</sup> another case in which the court declined to create any exception for claims of potentially irreparable harm to health.<sup>103</sup> In *Neighborhood Toxic Cleanup Emergency*, the plaintiffs claimed that "if implementation of the current remedial plan goes forward without further study, it could pose a health hazard to residents living near the landfill."<sup>104</sup> The plaintiffs sought injunctive relief that would temporarily halt the proposed cleanup until the information was gathered and considered.<sup>105</sup> Before the court could consider this request for relief, it found that it was first necessary to determine whether the jurisdictional bar precluded review, even though health considerations were implicated. The court determined that while lifting the bar for health reasons "might make good sense as a matter of policy,"<sup>106</sup> it could not do so because, again, "the most authoritative legislative history supports the view that a citizens suit cannot lie until at least one phase of the clean-up is completed."<sup>107</sup>

Interestingly, in positing that such an exception should exist, the plaintiffs in *Neighborhood Toxic Cleanup Emergency* made an argument that directly foreshadowed the theory that would ultimately prevail in *Gamma-Tech*.<sup>108</sup> They reasoned, "Congress's ultimate goal in enacting CERCLA/SARA is to safeguard the public from hazardous waste and . . . an unsafe cleanup would subvert that goal."<sup>109</sup> However, the court here, as in *Hanford Downwinders Coalition*, felt constrained to rule that the current jurisdictional bar deprived it of any authority to adjudicate the merits of the plaintiffs' claim.<sup>110</sup> In so ruling, the court also rejected arguments that

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101. *See id.*

102. 716 F. Supp. 828 (D.N.J. 1989).

103. For further discussion of *Neighborhood Toxic Cleanup Emergency*, see McConnell, *supra* note 78, at 126-27.

104. *Neighborhood Toxic Cleanup Emergency*, 716 F. Supp. at 829. The thrust of the plaintiffs' complaint was that the EPA had not gathered sufficient information about the potential health risks before deciding on a plan, and thus it was uncertain whether the safety procedures at the cleanup site would be adequate. *Id.* at 829-30.

105. *Id.* at 830.

106. *Id.* at 833.

107. *Id.* at 834.

108. *Gamma-Tech* is discussed in detail *infra* part IV.

109. *Neighborhood Toxic Cleanup Emergency*, 716 F. Supp. at 834.

110. *See id.* at 837.

the potentially irreparable harm that may arise from the jurisdictional bar might constitute a due process violation.<sup>111</sup> The court was relatively unsympathetic to this argument since it found clear evidence that Congress intended to postpone judicial review and that a wide range of alternative remedies were available to plaintiffs.<sup>112</sup>

Thus, these cases reveal a clear pattern of decisions in which courts' read the jurisdictional bar very strictly both prior to and after the passage of the SARA amendments.<sup>113</sup> This strictness is evident both in cases involving health threats and in those that do not. This history illustrates the dramatic departure from the traditional rule which came in the *Gamma-Tech* decision and demonstrates the major effect that legislative reform in this area could have on CERCLA litigation.

### C. Court-Created Exceptions Prior to Gamma-Tech

There have been some exceptions to this strict reading of the rule. In various cases courts have refused to allow the bar's retroactive application;<sup>114</sup> found that the judiciary does have authority to determine the constitutionality of a CERCLA lien;<sup>115</sup> and ruled

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111. *See id.*

112. *See id.* at 835. Specifically, the court identified five avenues of relief that remained open:

A person's rights to challenge the choice of removal or remedial action are preserved, however, and can be exercised when an action is taken against a responsible party to recover response costs of damages under section 107, an action to enforce an order to perform response actions, an action for reimbursement for cleanup costs expended by a person order [sic] than the Administrator, a citizen suit alleging that the removal or remedial action was in violation of any requirement of the Act, and an action under section 106 by the United States to secure injunctive relief.

*Id.* (quoting H.R. REP. NO. 253(V), 99th Cong., 2d Sess. 25-26 (1986), reprinted in, 1986 U.S.C.A.N. 3124, 3148-49).

113. The courts have also used this line of precedents to create an analogy allowing strict interpretation of the jurisdictional bar in other environmental statutes as well. *See, e.g.,* Southern Pines Assocs. v. United States, 912 F.2d 713 (4th Cir. 1990) (discussing jurisdictional bar in Clean Air Act); Hoffman Group, Inc. v. United States EPA, 902 F.2d 567 (7th Cir. 1990) (discussing jurisdictional bar in Clean Water Act).

114. *See* O'Leary v. Moyer's Landfill, Inc., 677 F. Supp. 807, 818 (E.D. Pa. 1988) ("[I]n the rare circumstances in which substantial remedial efforts predate any EPA action under CERCLA, barring judicial review is unwarranted by the words of the statute and by its underlying policies."). For a general discussion of the retroactivity issue, see Light, *The Importance of "Being Taken"*, *supra* note 5, at 36-38.

115. *See* Reardon v. United States, 947 F.2d 1509 (1st Cir. 1991). The court found

that a state is entitled to ensure that a cleanup is in compliance with state hazardous waste laws authorized by the EPA as a substitute to the Resource Conservation Recovery Act ("RCRA")<sup>116</sup> in that state.<sup>117</sup> These cases have slightly ameliorated some of the harsh impact of the strict jurisdictional bar.

In particular, the plaintiffs in *Durfey v. E.I. DuPont De Nemours Co.*<sup>118</sup> fared better than their counterparts in *Hanford Downwinders Coalition* and *Neighborhood Toxic Cleanup Emergency*. In *Durfey* the plaintiffs alleged a health harm. They claimed that there was a potential health risk at the federally owned<sup>119</sup> Hanford Nuclear Reservation, a designated Superfund site.<sup>120</sup> However, the plaintiffs

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that this was not subject to the jurisdictional bar because it was not a challenge to the administration of CERCLA, but a challenge to the constitutionality of the statutory scheme itself, particularly its provisions allowing for imposition of a lien without a prior hearing. *See id.* at 1517. For further discussion of *Reardon*, consult Clark, *supra* note 47; Faulkner, *supra* note 43; Note, *First Circuit Finds that CERCLA Lien Provision Violates Due Process*, 105 HARV. L. REV. 1420 (1992); *CERCLA Liens Illegal, First Circuit Rules, Finding Law Lacking in Procedural Safeguards*, 22 Env't Rep. (BNA) No. 28, at 1741 (Nov. 8, 1991); *First Circuit Allows Pre-Enforcement Review of EPA Lien Imposed Following CERCLA Cleanup*, 21 Env't Rep. (BNA) No. 37, at 1645 (Jan. 11, 1991). The lower court opinion in the case is reported at *Reardon v. United States*, 731 F. Supp. 558 (D. Mass. 1990), and the issues involved are discussed in *Landowners Allege Superfund Lien Illegal, Violates Due Process Clause of Constitution*, 20 Env't Rep. (BNA) No. 31, at 1362 (Dec. 1, 1989).

116. 42 U.S.C. §§ 6901-6992 (1994).

117. *See United States v. Colorado*, 990 F.2d 1565, 1578 (10th Cir. 1993) ("[E]nforcement actions under state hazardous waste laws which have been authorized by the EPA to be enforced by the state in lieu of RCRA do not constitute 'challenges' to CERCLA response actions; therefore § 9613(h) does not jurisdictionally bar Colorado from enforcing the final amended compliance order."), *cert. denied*, 114 S. Ct. 922 (1994). This case raised many complex issues regarding federal/state relations in the area of CERCLA enforcement. Although the Supreme Court declined to hear the case, it was widely commented on. *See, e.g.*, Jason H. Eaton, *Creating Confusion: The Tenth Circuit's Rocky Mountain Arsenal Decision*, 144 MIL. L. REV. 126 (1994); *Reform Bill Would Limit States' Role at Federal Sites*, HAZARDOUS WASTE NEWS, Feb. 15, 1994, available in Westlaw, HAZWN File, WL 2516132 (discussing proposed legislative reversal of *Colorado* case); *U.S. Petitions for Certiorari in Rocky Mountain Arsenal Case*, PESTICIDE & TOXIC CHEMICAL NEWS, Dec. 1, 1993, available in Westlaw, PTCHEMN File, WL 2757217; Vicky L. Peters, Laura E. Perrault & Susan MacKay Smith, *Can States Enforce RCRA at Superfund Sites? The Rocky Mountain Arsenal Decision*, 23 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,419 (July 1993).

118. 59 F.3d 121 (9th Cir. 1995).

119. For a full discussion of the § 113(h) questions unique to federal facilities, see Ingrid Brunk Wuerth, *Challenges to Federal Facility Cleanups and CERCLA Section 113(h)*, 8 TUL. ENVTL. L.J. 353 (1995).

120. The *Durfey* case had previously been consolidated as part of the *In re Hanford Nuclear Reservation Litig.*, 780 F. Supp. 1551 (E.D. Wash. 1991), *rev'd sub nom.*, *Durfey v. E.I. Dupont De Nemours Co.*, 59 F.3d 121 (9th Cir. 1995). That court had held, among other things, that medical monitoring was a "challenge" and, therefore, it constituted a barred claim under § 113(h) of CERCLA. For a fuller discussion of the lower court

brought suit for the tort of medical monitoring, rather than for a specific statutory remedy. Although the lower court found the claim to be barred on jurisdictional grounds, the Ninth Circuit reversed, finding that medical monitoring should not be defined as a "response" cost; thus, it was not subject to the section 113(h) bar.<sup>121</sup>

In addition, *Cabot Corp. v. United States EPA*<sup>122</sup> also addressed allegations that a response plan might harm the environment. Initially, the court faced a PRP's request seeking an injunction against a cleanup plan until the EPA "enters into a contract or cooperative agreement with [Pennsylvania], evaluates each plan, including the PRP's alternative, for cost-effectiveness and seeks public review and comment on its determination."<sup>123</sup> It was alleged that EPA's failure to take these actions constituted a violation of CERCLA and the National Contingency Plan ("NCP") that would justify the injunction sought.<sup>124</sup> The government opposed this request for an injunction on the merits<sup>125</sup> as well as on the grounds that the court lacked jurisdiction pursuant to section 9613(h).<sup>126</sup>

Interestingly, and without citation to any direct authority, the *Cabot* court stated in dicta that *if* irreparable harm to health and the environment were to be alleged, the court could justifiably review the proposed remedy:

Although PRPs are not in terms barred from bringing citizen suits, Congress' decision to enable EPA to clean up hazardous waste sites prior to litigating the allocation of the expenses of those clean-ups supports a distinction between citizen suits alleging irreparable harm and those claiming monetary damages. Health and environmental hazards must be addressed as promptly as possible . . . Irreparable harms are precisely those that one would expect "typical" concerned citizens . . . to raise

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opinion, see *Medical Monitoring Costs Not Recoverable Under Superfund Law, Federal Court Decides*, 22 Env't Rep. (BNA) No. 29, at 1774-75 (Nov. 15, 1991).

121. *Durfey*, 59 F.3d at 126. In reaching this conclusion, the court relied heavily on *Price v. United States Navy*, 39 F.3d 1011, 1016-17 (9th Cir. 1994), in which the court also classified medical monitoring as beyond the scope of "response" costs. *Durfey*, 59 F.3d at 125. The *Durfey* decision is discussed in *Ninth Circuit Finds No Jurisdictional Bar to Court Review of Medical Monitoring Claims*, 26 Env't Rep. (BNA) No. 11, at 553-54 (July 14, 1995).

122. 677 F. Supp. 823 (E.D. Pa. 1988).

123. *Id.* at 825.

124. *Id.*

125. *Id.* at 826 n.3. The EPA argued that it did, in fact, comply with the CERCLA and NCP requirements when formulating the remedial plan involved.

126. *Id.* at 825.

in a lawsuit under CERCLA . . . . But where PRPs allege harms the implications of which are essentially monetary, those allegations should be tested when EPA seeks to collect clean-up costs . . . .<sup>127</sup>

The *Cabot* court eventually ruled that it did not have jurisdiction over the case because the alleged harm was purely monetary and could be adequately addressed later as part of a cost-recovery action.<sup>128</sup> Thus, *Cabot* is not completely inconsistent with the vast majority of cases, and it placed clear limits on the ability of PRPs to recast their challenges as health-related citizens suits.<sup>129</sup> However, in dicta, the *Cabot* court made the same arguments that the *Gamma-Tech* court later adopted as part of its holding<sup>130</sup> and that Congress should find compelling as well.<sup>131</sup>

Three themes should be clear from these cases. First, although there have been a few relatively narrow exceptions, courts have been strict in enforcing the jurisdictional bar. Secondly, courts that do apply the bar strictly often do it with expressed reluctance. Third, when courts have voiced dissatisfaction with strict application of the bar, they have suggested that legislative action, and not judicial maneuvering, is the proper mechanism for correcting the bar. It is into this environment that two significant developments have occurred: the *Gamma-Tech* decision, in which a court *does* alter the strictness of the bar through judicial action, and Congressional reconsideration of CERCLA, which makes a legislative change in the jurisdictional bar possible.

#### IV. *UNITED STATES V. PRINCETON GAMMA-TECH: A MODEL FOR A LEGISLATIVE EXCEPTION FOR "IRREPARABLE HARM"*<sup>132</sup>

While most courts have refused to create exceptions to the jurisdictional bar, in *United States v. Princeton Gamma-Tech*,

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127. *Id.* at 829.

128. *Id.* at 830.

129. For a discussion of this aspect of *Cabot*, see Rosenberg, *supra* note 14, at 574.

130. See *Cabot*, 677 F. Supp. 823 at 829; *United States v. Princeton Gamma-Tech, Inc.*, 31 F.3d 138, 148 (3d Cir. 1994).

131. Further discussion of *Cabot* may be found in McConnell, *supra* note 78, at 127.

132. For a thoughtful case note discussing the *Gamma-Tech* case, see McConnell *supra* note 78. The heart of Mr. McConnell's argument suggests that while he supports the policy justifications for the decision, see *id.* at 128-30, the case was wrongly decided

*Inc.*,<sup>133</sup> the United States Court of Appeals for the Third Circuit offered a more liberal reading of the restrictive jurisdictional requirements.<sup>134</sup> In what it characterized as a case of first impression,<sup>135</sup> the court held that:

[W]hen the EPA sues to recover initial expenditures incurred in curing a polluted site, a district court may review a property owner's bonafide allegations that continuance of the project will cause irreparable harm to public health or the environment and, in appropriate circumstances, grant equitable relief.<sup>136</sup>

If followed by other courts or adopted legislatively by Congress, this rule will make a substantial change in the way the jurisdictional bar functions as a restriction on pre-completion cleanup review.<sup>137</sup>

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because (1) it is inconsistent with applicable precedents, *see id.* at 131-32; (2) it misconstrues the legislative history, *see id.* at 130-31; and (3) it opens the door to abuse by PRPs, *see id.* at 132-33.

133. 31 F.3d 138 (3d Cir. 1994).

134. When *Gamma-Tech* was decided, its novel approach to the jurisdictional bar attracted the immediate attention of practitioners and the regulated community. *See Appeals Court Finds No Jurisdictional Bar to Review of Cleanup Remedy at New Jersey Site*, 25 Env't Rep. (BNA) No. 14, at 629-30 (Aug. 5, 1994); *Injunctive Relief OK'd in Ongoing Superfund Actions*, 25 Env't Rep. (BNA) No. 16, at 743 (Aug. 19, 1994); Frank M. Thomas Jr. & Sarah E. Davies, *Challenging Superfund Remedies: EPA's Decisions May Be Judicially Reviewed and Enjoined Before Project Completion*, 25 Env't Rep. (BNA) No. 18, at 846 (Sept. 2, 1994); *Appeals Court Allows Challenge to Superfund Remedy Before Completion*, PESTICIDE & TOXIC CHEMICAL NEWS, Aug. 10, 1994, available in Westlaw, PTCHEMN File, WL 2523429; *Court Rules EPA Remedies May be Challenged Before Completion*, HAZARDOUS WASTE NEWS, Sept. 12, 1994, available in Westlaw, HAZWN File, WL 2516245. Indeed, EPA's request for rehearing, and the court's denial, was also reported. *See Superfund Remedy Challenges*, PESTICIDE & TOXIC CHEMICAL NEWS, Oct. 19, 1994, available in Westlaw, PTCHEMN File, WL 3219211; *Rehearing Sought in Superfund Remedy Challenge*, PESTICIDE & TOXIC CHEMICAL NEWS, Sept. 28, 1994, available in Westlaw, PTCHEMN File, WL 2524801; *Third Circuit Declines Rehearing in CERCLA Cases*, 25 Env't Rep. (BNA) No. 27, at 1318 (Nov. 4, 1994); *Superfund Remedy Challenge*, PESTICIDE & TOXIC CHEMICAL NEWS, Nov. 9, 1994, available in Westlaw, PTCHEMN File, WL 3219349. This attention was caused to a great extent by the fact that the decision "marks a major change from past decisions." *Court Rules EPA Remedies May be Challenged Before Completion*, *supra*. For further discussion of *Gamma-Tech*, consult William F. Mahoney, Michelle Dall, Melissa A. Flom, Gayle Tennison-Croxton & Sharon Boudreaux, *Recent Developments in Toxic & Hazardous Substances & Environmental Law*, 30 TORT & INS. L.J. 597, 621-23 (1995) (summarizing ruling of the case).

135. *Gamma-Tech*, 31 F.3d at 146.

136. *Id.* at 140.

137. For a discussion of later courts' treatment of *Gamma-Tech*, see *infra* part IV.C.

### A. The Gamma-Tech Cause of Action

The dispute in *Gamma-Tech* arose when trichloroethylene contamination was found on two New Jersey properties owned by the defendant, Princeton Gamma-Tech.<sup>138</sup> Following this discovery, the sites were placed on the National Priorities List (“NPL”), as mandated by CERCLA.<sup>139</sup> EPA began its preliminary studies of the sites and the required remediation and issued two Records of Decisions outlining its plans for cleaning up the contamination.<sup>140</sup>

In 1991, the EPA sued Gamma-Tech,<sup>141</sup> seeking reimbursement for the costs it had already incurred in responding to the contamination, as well as “a declaratory judgement on Gamma-Tech’s liability for future response costs.”<sup>142</sup> Notwithstanding the consistent rulings against pre-completion challenges, Gamma-Tech filed a cross-motion against EPA for a preliminary injunction preventing the agency from pursuing its chosen cleanup procedure.<sup>143</sup> Gamma-Tech based this request on its assertion that continued pursuit of the remedial plan would “exacerbate the existing environmental damage and cause further irreparable harm to the environment.”<sup>144</sup> If factually true, the potential harm from EPA’s ordered plan would have either been difficult or impossible to remedy after the EPA

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138. *Gamma-Tech*, 31 F.3d at 140.

139. *Id.* The NPL lists the nation’s most hazardous waste sites, pursuant to 42 U.S.C. § 9605 (1994).

140. *Gamma-Tech*, 31 F.3d at 140–41. The first Record of Decision was issued in 1987, and it outlined the preliminary plan for remediation. *Id.* The second Record of Decision was issued the following year. It provided the details about the proposed cleanup and provided the public and the PRPs with the opportunity to comment on the proposed plan. *Id.* at 141. This second Record of Decision:

[P]roposed to extract contaminated water from the primary contamination plume in the shallow aquifer, to treat it, and then to reinject it into the aquifer. In addition, the plan provided for the installation of “open-hole” wells that penetrate through the shallow source to the deep aquifer to allow for monitoring and sampling.

*Id.*

141. This suit was brought under CERCLA, 42 U.S.C. § 9607(a) (1994).

142. *Gamma-Tech*, 31 F.3d at 141.

143. *Id.* Specifically, the defendant sought an injunction that would require the EPA “to cease the installation of open-hole wells . . . and to cease construction of the remedial system provided for in the 1988 decision.” *Id.*

144. *Id.* “According to Gamma-Tech, the system devised by the EPA will cause contaminated water from the shallow strata of the aquifer to be drawn down into the deep zone where contamination has not been established conclusively, thus increasing, rather than remedying, the pollution of the water supply.” *Id.*



completed its proposed cleanup.<sup>145</sup> This differed significantly from the typical challenge. The usual challenge to a cleanup order is more focused—explicitly or not—on the economic ramifications to the responsible party. Such financial consequences will always be compensable, at least in theory if not in practice.<sup>146</sup>

Based on the language of the statute and the case law interpreting it,<sup>147</sup> the district court concluded that it was barred from addressing the defendant's request due to the statutory jurisdictional bar.<sup>148</sup> The appellate court reversed. It departed from a strict reading of the jurisdictional bar, making a significant substantive ruling rejecting its appropriateness in the face of irreparable harm. Its opinion reflects dissatisfaction with an overly stringent bar that may well defeat the goals of CERCLA. It is this departure from the strict rule that makes *Gamma-Tech* worth examining to determine whether Congress should use it as a model to create a clear exception in CERCLA.<sup>149</sup>

### B. *The Gamma-Tech Rationale*

In its decision, the *Gamma-Tech* court followed three lines of reasoning to justify its conclusion that PRPs should enjoy judicial review of EPA cleanup orders posing irreparable health or environmental threats.<sup>150</sup> These issues were: CERCLA's legislative history;

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145. For a review of the circumstances at the Gamma-Tech site, see McConnell, *supra* note 78, at 117–22.

146. In contrast, if a harm poses a *truly* irreparable harm to health or the environment, its consequences will not be compensable.

147. See *supra* parts II–III.

148. See *United States v. Princeton Gamma-Tech*, 817 F. Supp. 488 (D.N.J. 1993); see also *Irreparable Harm Allegations Insufficient to Create Jurisdiction, Federal Court Rules*, 23 Env't Rep. (BNA) No. 52, at 3202 (Apr. 23, 1993) (discussing district court opinion upholding jurisdictional ban).

149. If modelled after *Gamma-Tech*, such an exception would allow review and injunctive relief in those cases where no review would likely result in irreparable environmental harm or a threat to human health and safety. This proposed exception is developed fully *infra* part V.B.

150. The court also faced a potential due process claim by Gamma-Tech concerning the court's refusal to add supplemental materials to the record. *Gamma-Tech*, 31 F.3d at 149–50. This argument is beyond the scope of this Article and was not addressed by the court, although some due process concerns were raised in the legislative history of the provisions. See H.R. REP. NO. 253(III), 99th Cong., 2d Sess. 22 (1986), reprinted in 1986 U.S.C.C.A.N. 3038, 3045.

the unique procedural posture of the case; and the function of CERCLA's citizens suit provisions.<sup>151</sup>

### 1. *Legislative History in Gamma-Tech*

The *Gamma-Tech* court began its analysis of the problem by explicating the legislative history of the jurisdictional bar and the intent of CERCLA itself. Like earlier courts, the *Gamma-Tech* court acknowledged the conflict between CERCLA's goal of "combat[ing] the hazards that toxic waste sites pose to public health or the environment"<sup>152</sup> and the competing desire to "safeguard EPA remedial efforts from delays brought by potentially responsible parties."<sup>153</sup> The court discussed the danger of dilatory litigation and recognized the sound policies justifying the bar.<sup>154</sup> However, the court elected to read the legislative history differently. It focused on the obvious fact that CERCLA and SARA were created to remedy environmental harm. In the court's view, using the jurisdictional bar to prevent the court from averting environmental harm would, in and of itself, violate the statutes' remedial intent as expressed by Congress.<sup>155</sup> Taking into account the potentially conflicting goals of CERCLA, the Third Circuit attempted to strike a

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151. For a general discussion of environmental citizens suits, see MICHAEL D. AXLINE, *ENVIRONMENTAL CITIZEN SUITS* (1992).

152. *Gamma-Tech*, 31 F.3d at 141.

153. *Id.* The court, in support of this position, cites extensively to the legislative history of the Superfund Amendments & Reauthorization Act of 1986. See 31 F.3d 138, 141-42 (quoting 132 CONG. REC. 28,409 (1986) (statement of Sen. Stafford) (indicating a congressional desire to deter "specious suits [that] would slow cleanup and enable private parties to avoid or at least delay paying their fair share of cleanup costs").

154. See, e.g., H.R. Rep. No. 253(V), 99th Cong., 2d Sess. 25, reprinted in 1986 U.S.C.A.N. 3124, 3148 ("The purpose of this provision is to ensure that there will be no delays associated with a legal challenge of the particular removal or remedial action . . . . Without such a provision, responses to releases or threatened releases of hazardous substances could be unduly delayed, thereby exacerbating the threat of damage to human health or the environment.").

155. As with so many uses of legislative history, there are statements in the legislative records that support opposing positions. While the court rightly points to those sections supporting the bar, there are also plentiful references supporting the more liberal review policy the court ultimately adopts. See, e.g., 132 CONG. REC. 29,741 (1986) (statement of Rep. Florio) ("In order to be fully effective in enforcing the law's cleanup standards provisions, such suits must be brought at a point in the cleanup process where the agency could easily be ordered to modify its violative behavior.").

Indeed, in the context of CERCLA the use of "post-hoc legislative history" as a way to resolve the ambiguities of the statute is particularly criticized. See, e.g., Light, *The Importance of "Being Taken"*, *supra* note 5, at 45-49.

balance. In striking that balance, the court determined that the risk of dilatory litigation was the lesser of two evils when compared to the prospect of allowing an environmentally harmful "cleanup" to occur.<sup>156</sup>

Whether this was the correct balance is an arguable point, and there certainly are legitimate interests both in avoiding delay and in averting harm. However, justifying its decision by using the legislative history as this court did poses a dangerous precedent. The *Gamma-Tech* court used logic that may encourage other courts to depart even farther from the bright line rule of the current statute in both principled and unprincipled ways.<sup>157</sup>

## 2. *The Procedural Posture in Gamma-Tech*

The *Gamma-Tech* court further advanced its opinion because the case came before it in a unique procedural posture. The challenge to the cleanup plan was not raised by the defendant in an action it initiated entirely of its own accord. Instead, the government brought the cost-recovery suit before the cleanup had actually been completed. Procedurally, then, *Gamma-Tech's* challenge to the cleanup plan came as a response to the cost-recovery suit. This order of events provided the court with legal grounds for distinguishing this case from earlier ones and reaching the outcome it wanted. Specifically, the *Gamma-Tech* court noted that earlier courts had established that the proper time for cleanup challenge was during a cost-recovery suit brought by the government for reim-

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156. As with most litigation of this sort, the court remanded to the district court the question of whether and how the actual circumstances of this remedy constituted a potentially irredeemable health, safety, or environmental hazard. See Light, *The Importance of "Being Taken"*, *supra* note 5, at 48.

157. In addition, it has been suggested that the use of the legislative history by the *Gamma-Tech* court was not entirely sound as a matter of construction. McConnell, *supra* note 78, at 130-31. Mr. McConnell suggests that "[r]ather than coming to grips with the most authoritative legislative history, the majority in *Princeton Gamma-Tech* relied on conflicting statements made on the House and Senate floors by individual conferees." *Id.* McConnell concludes that this "further demonstrate[s] the dangers of judicial reliance on legislative history." *Id.* at 131. Perhaps this is an argument that can be made anytime legislative history is asserted by a court to justify an outcome that does not seem to be clearly required on the face of the statute it purports to apply. However, the court's decision was particularly dangerous in this situation because adoption of this general remedial purpose rationale to justify a departure may well justify more widespread departures in the future.

bursement of response costs.<sup>158</sup> Based on this precedent, there is little dispute that *once a cleanup is completed* and EPA brings a cost-recovery suit, the court hearing that claim also obtains jurisdiction to hear other challenges to the EPA action brought by the responsible party.<sup>159</sup> However, the effect of this precedent on the *Gamma-Tech* situation was less clear, because the EPA had brought the recovery action before the cleanup was completed. Given this difference, the court was required to determine whether, in these circumstances, it was (1) bound to find that jurisdiction over the cost-recovery suit included jurisdiction over challenges to EPA's action, or (2) compelled to rule that the interest in delaying challenges to the cleanup was important enough to deprive the court of jurisdiction, even when the EPA's cost-recovery suit was rightfully before the court.

While acknowledging that there are sound reasons for delaying challenges until the cleanup work is complete, the court pointed out that CERCLA did authorize the EPA to bring a cost-recovery suit before a cleanup was complete.<sup>160</sup> Furthermore, the statutory language does not differentiate "between the scope of an action where all the remedial work has been completed and one filed while the project is still in progress."<sup>161</sup> Thus, the litigation was in court at the government's initiative and in defiance of no explicit statutory command. Given this, the court felt justified in intervening on procedural grounds that distinguished this case from its predecessors.

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158. Specifically, the court referred to *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991); *Voluntary Purchasing Groups v. Reilly*, 889 F.2d 1380 (5th Cir. 1989); *Barnet Aluminum Corp. v. Reilly*, 927 F.2d 289 (6th Cir. 1991); and *Dickerson v. EPA Adm'r*, 834 F.2d 974 (11th Cir. 1987). These cases are more fully discussed *supra* notes 115, 79, 75 and 88. Furthermore, the court relied on *United States v. Hardage*, 982 F.2d 1436, 1446 (10th Cir. 1992), *cert. denied*, 114 S. Ct. 300, for the proposition that once a cost-recovery suit is brought by EPA, the responsible party may challenge EPA's expenditures, the appropriateness of the remedy selected, and the fundamental question of the "responsible" party's actual liability. *Gamma-Tech*, 31 F.3d at 143.

159. Indeed, at present, this is one of the primary means through which the suitability or even legality of EPA's course of action is determined.

160. *Gamma-Tech*, 31 F.3d at 143.

161. *Id.* As the court points out, should the government choose to bring the action prior to the completion of the cleanup, it may only recover costs "incurred." *Id.* Thus, this may provide a disincentive for premature government suits since later litigation will be required to recover subsequently incurred costs associated with the cleanup.

The court found the procedural posture of the case helpful in another regard as well. The court stated that, in its view, while the government may bring suit for reimbursement of its remedial expenses, the court was authorized to grant reimbursement only for those expenses which were consistent with the NCP.<sup>162</sup> Thus, if the government's chosen remedy is determined to be harmful and hence inconsistent with the NCP the court reasoned that it must have the ability to deny reimbursement to the government.<sup>163</sup> By definition, in order to make such a finding, the court would have to review the proposed cleanup action in some substantive way.

Going one step further, the court also pointed out that, it may "also grant 'such other relief as is consistent with the National Contingency Plan,'"<sup>164</sup> when reviewing a claim. Because "such other relief" includes injunctive relief,<sup>165</sup> the court reasoned that it could, of its own accord, grant an injunction prohibiting the cleanup from proceeding.<sup>166</sup> Thus, if the court could grant injunctive relief voluntarily, there was no sound reason which would prevent the court from granting such relief at the request of a moving party. So, according to *Gamma-Tech*, "[W]hen irreparable harm to public health or the environment is threatened, an injunction may be issued under the citizens' suit exception of subsection 9613(h)(4) even though the cleanup may not yet be completed . . . [D]elay in preventing such injury is contrary to the objectives of CERCLA."<sup>167</sup> The court went on to say, procedurally that:

It follows that if the section 9613(h)(4) exception allows an injunction to be issued in a separate citizens' suit that is filed simultaneously in the same court with an answer to a cost-recovery action for which review is available under section 9613(h)(1), there is no logical basis to deny similar relief in the

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162. See H.R. REP. NO. 253(V), 99th Cong., 2d Sess. 26, reprinted in 1986 U.S.C.C.A.N. 3124, 3149 ("If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with the law, the court is to award only the response costs or damages or other relief being sought to the extent that this relief is not inconsistent with the National Contingency Plan.").

163. *Gamma-Tech*, 31 F.3d at 147.

164. *Id.*

165. Such injunctive relief is based on the court's reading of *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982); *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979); and *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960).

166. *Gamma-Tech*, 31 F.3d at 147.

167. *Id.* at 148.

cost-recovery litigation when irreparable harm has been established.<sup>168</sup>

### 3. *The CERCLA Citizens Suit Provision*

Finally, the *Gamma-Tech* court also justified its conclusion by relying on the citizens suit cases which allow review of an allegedly harmful cleanup order when that challenge is brought through a citizens suit.<sup>169</sup> The court acknowledged that judicial precedents had been unclear as to when a citizen may bring such an action and acknowledged that "some doubt exists about when such a suit may be entertained."<sup>170</sup> The court further acknowledged precedents limiting the right of citizens to bring pre-completion challenges.<sup>171</sup> However, the court observed that those cases did not address the question of irreparable environmental harm. Because the court did not feel bound by those precedents, it examined *exclusively* those cases<sup>172</sup>

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168. *Id.* at 148-49.

169. Presumably, the drafters of CERCLA included the citizens suit provision for many of the same reasons underlying inclusion of a citizens suit provision in any statute—to provide an additional avenue for enforcement to ensure that the statutory mandate is carried out. *See* 132 CONG. REC. 29,741 (1986) (statement of Rep. Florio) ("[P]ast experience has demonstrated that enforcement of such legal requirements by affected citizens' groups—acting as private attorneys general—is an essential component in the implementation of any detailed statutory mandate. For this reason, the amendments establish an independent citizens' suit provision."); H.R. REP. NO. 253(III), 99th Cong., 2d Sess. 37, reprinted in 1986 U.S.C.C.A.N. 3038, 3060 ("In view of the government's limited and overburdened enforcement authority, citizens suits are essential to assure compliance with the law."). At the time the citizens suit provision was written into SARA, such provisions were already included in eleven existing federal environmental laws. *Id.* at 3056.

170. *Gamma-Tech*, 31 F.3d at 144.

171. Specifically, the court acknowledged the holdings in *Schalk v. Reilly*, 900 F.2d 1091, 1095 (7th Cir. 1990); *Alabama v. United States EPA*, 871 F.2d 1548, 1557 (11th Cir. 1989), *cert. denied*, 493 U.S. 991 (1989); and *Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control & Ecology*, 999 F.2d 1212, 1216-19 (8th Cir. 1993). *Gamma-Tech*, 31 F.3d at 144. In those cases, the citizen plaintiffs alleged that the cleanup proposed violated CERCLA regulations. The court also acknowledged *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3d Cir. 1991), in which the plaintiffs alleged that the action planned would irreparably harm historical artifacts. *Gamma-Tech*, 31 F.3d at 147. In none of these cases did the courts allow the action to be heard prior to completion of the cleanup. However, no citizens alleged irreparable *environmental* harm would occur as a result of the cleanup. This distinction was central to the *Gamma-Tech* court.

172. For example, the court compared *Cabot Corp. v. United States EPA*, 677 F. Supp. 823 (E.D. Pa. 1988) with *Neighborhood Toxic Cleanup Emergency v. Reilly*, 716 F. Supp. 828 (D.N.J. 1989). Both cases acknowledge the vagueness of the statutory guidance on this point. However, the former resolved this ambiguity in favor of earlier cleanup, while the latter required completion of at least the first stage of the cleanup before a challenge could be entertained. *See Gamma-Tech*, 31 F.3d at 145-46 for full discussion.

and legislative authorities<sup>173</sup> which dealt directly with alleged irreparable harm. Such cases, arguably, provided more leeway for courts to decide when review was permissible since they addressed a more compelling reason to depart from the strict reading of the jurisdictional bar.

Specifically, CERCLA explicitly authorizes citizens suits if the parties are "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."<sup>174</sup> Reasoning that mandating a cleanup that harmed the environment would constitute such a violation,<sup>175</sup> the court accepted without question that a citizen would be allowed to bring the suit.<sup>176</sup> Build-

173. Among others, the court found particularly applicable the following two conflicting statements:

The section [§ 9613(h)(4)] is designed to preclude lawsuits by any person concerning particular segments of the response action . . . until those segments of the response have been constructed and given the chance to operate and demonstrate their effectiveness in meeting the requirements of the act. Completion of all of the work set out in a particular record of decision marks the first opportunity at which review of that portion of the response action can occur.

132 CONG. REC. 28,441 (1986) (statement of Sen. Thurmond), *quoted in Gamma-Tech*, 31 F.3d at 145, and:

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

132 CONG. REC. 28,409 (1986) (statement of Sen. Stafford), *quoted in Gamma-Tech*, 31 F.3d at 145.

174. 42 U.S.C. § 9613 (h)(4) (1994).

175. This violation would occur because, presumably, a "cleanup" that was harmful would violate the NCP, to which actions must conform. *See Gamma-Tech*, 31 F.3d at 147 ("If the response the EPA has selected is determined to be arbitrary and capricious, or 'otherwise not in accordance with law,' the court is only permitted to award the response costs that are consistent with the National Contingency Plan.").

176. In spite of the importance attached here to the right of citizens to bring enforcement actions under CERCLA, see Gaba & Kelly, *supra* note 31. In that piece, the authors argue that the citizens suit provision in CERCLA is a weak one that does not carry with it the full range of powers that such provisions have in other environmental statutes:

Although the language of section 310 is similar to the language in citizen suit provisions of other federal environmental statutes, its effect is not. While citizen suit provisions under other statutes have given citizens important tools

ing on this, the court stated without much additional comment that, “[e]ven though it is a potentially responsible party, Gamma-Tech could qualify as a plaintiff in a citizens’ suit alleging irreparable harm to the environment.”<sup>177</sup> Hence, “as a defendant in the EPA’s cost-recovery suit, [Gamma-Tech] [was] permitted to allege matters that would normally be considered by the court in a separate citizens suit.”<sup>178</sup>

The court’s statement on this point may be fair, in that the rationale behind the citizens suit and the *Gamma-Tech* challenge is theoretically identical: preventing an allegedly harmful cleanup from taking place.<sup>179</sup> However, this conclusion—albeit logical—does not acknowledge significant distinctions between third party citizens and PRPs. While the “citizens suit” provision may technically allow suits by either third party citizens or PRPs, there are significant differences between these two types of plaintiffs and their likely motives.<sup>180</sup> The danger that a potentially responsible party will use a citizens suit as a dilatory tactic appears to be greater than the danger of an unrelated<sup>181</sup> citizen doing so.<sup>182</sup> While

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to challenge private and government actions, section 310 may have only a limited role in implementing the environmental objectives of CERCLA. The citizen suit provision of CERCLA may prove to be a sheep in wolf’s clothing.

*Id.* at 931. The authors go on to identify the jurisdictional bar as a primary reason for this limited role of the citizens suit.

177. *Gamma-Tech*, 31 F.3d at 148.

178. *Id.*

179. Although the scientific underpinnings of the creation of a remedy are beyond the scope of this Article, what should not be forgotten or underestimated is the significant health risk of CERCLA sites. See Siegel, *supra* note 9, at 10,017 (“ATSDR estimates that about 80 percent of all NPL sites have a pathway of potential human exposure to hazardous substances and that 10 percent of all NPL sites present a pathway of potential exposure of sufficient concern to warrant further health study.” (footnote omitted)).

180. Indeed, SARA’s drafters were particularly wary of attempts to recast actions by responsible parties as citizens suits:

When the essence of a lawsuit involves contesting the liability of the plaintiff for cleanup costs, the court should apply the other provisions of § 113(h), which require such plaintiff to wait until the Government has filed a suit under sections 106 or 107 to seek review of the liability issue. *The courts should not be misled by any effort to present such cases as legitimate “citizens’ suits” challenging illegal action by the agency.*

132 CONG. REC. 29,754 (1986) (statement of Rep. Roe) (emphasis added).

181. “Unrelated” need not imply that the citizen have *no* interest in the resolution of the dispute. However, unlike the PRPs, they will not be named as a party in the EPA action, but will, instead enter the dispute voluntarily.

182. See McConnell, *supra* note 78, at 115 for a cynical view of the PRPs motives and morals:



third party citizens, as well as PRPs, may have impure or mixed motives, any benefit a third party would stand to gain would likely be more indirect, and the rationale for keeping such claims out of court seems to be far less compelling. However, this is a significant policy issue glossed over by the court<sup>183</sup> as it emphasized the similarities between, but not the differences among, challenges brought by these very diverse groups.<sup>184</sup>

### C. *The Judicial Impact of Princeton Gamma-Tech*

The true impact of the *Gamma-Tech* decision in CERCLA jurisprudence has yet to be determined. It is consistent with the Third Circuit's ruling in *United States v. American Color & Chemical, Corp.*,<sup>185</sup> a decision that reversed the lower courts' dismissal of a challenge on jurisdictional grounds.<sup>186</sup> In addition, in *Employers Insurance of Wausau v. Browner*,<sup>187</sup> the Seventh Circuit cited *Gamma-Tech* for the principle that "[t]he defendant would have an opportunity [in a cost recovery] suit to put the EPA to its proof that the Superfund law really did require the defendant to clean up the site."<sup>188</sup>

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Attention all PRP's! Now all you have to do in the Third Circuit to get preenforcement review is allege "irreparable harm" to the environment. If you establish irreparable harm to the environment you may be entitled to injunctive relief. Even if you don't, you can tie the EPA up in prolonged litigation. Heck its worth a shot; and it's all in the name of saving the environment!

*Id.*

183. Indeed, the court briefly acknowledged that the EPA is concerned with "potential for interference with future work at a polluted site." *Gamma-Tech*, 31 F.3d at 149. However, this concern was dismissed quickly as the court pointed out that "that possibility exists in every case in which the agency brings its cost-recovery action before conclusion of the work to be performed at the site." *Id.*

184. This was acknowledged by the drafters of the statute. *See, e.g.*, 132 CONG. REC. 28,409 (1986) (statement of Sen. Stafford) (emphasizing "distinctions between dilatory or other unauthorized lawsuits by potentially responsible parties involving only monetary damages and legitimate citizens' suits complaining of irreparable injury"). Of course, the problem has been that while Congress did recognize this difference, it did not do anything in the statute itself to require that the two types of plaintiffs be treated differently.

185. 37 F.3d 1489 (3d Cir. 1994), *rev'g* 832 F. Supp. 106 (M.D. Pa. 1993).

186. For discussions of *American Color & Chemical*, consult *Court Rules EPA Remedies May be Challenged Before Completion*, *supra* note 134; and Thomas & Davies, *supra* note 134.

187. 52 F.3d 656 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 699 (1996).

188. *Browner*, 52 F.3d at 661. However, the court went no further and held that the

In the district courts, the Eastern District Court of Pennsylvania, in *Ehrlich v. Reno*,<sup>189</sup> acknowledged that *Gamma-Tech* created “two notable exceptions to the requirement that a cleanup must be completed before it may be challenged.”<sup>190</sup> However, because the two exceptions—EPA’s initiation of the cost recovery action and irreparable harm—were not applicable in *Ehrlich*, the court was not forced to follow the *Gamma-Tech* holding.

It has been suggested that the *Gamma-Tech* decision will have a significant judicial impact and have “broader implications on PRP’s who are constantly on the lookout for ways to challenge the EPA.”<sup>191</sup> This argument may be correct if the impact of *Gamma-Tech* on the courts and on the strategies of PRPs becomes significant. However, a more important and more positive impact of this decision is that it furnishes an excellent model for legislative reform.

#### V. TOWARD A LEGISLATIVE SOLUTION TO THE JUDICIAL REVIEW QUESTION<sup>192</sup>

The *Gamma-Tech* court’s liberal reading of the jurisdictional bar protected the environment from a potentially harmful

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defendant “could not challenge the order in advance of having to comply; that route is . . . closed.” *Id.*

189. No. CIV.A.93-5829, 1994 WL 613698 (E.D. Pa. 1994), *vacated*, 68 F.3d 456 (3d Cir. 1995). This decision, however, focused more on the liability issue rather than the nature of the cleanup.

190. *Ehrlich*, 1994 WL 613698, at \*4.

191. See McConnell, *supra* note 78, at 132. Mr. McConnell cites five largely negative impacts of the *Gamma-Tech* decision:

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

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

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

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

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

192. The fact that this problem must be resolved by the legislature has often been remarked on by the courts. Although in a different context, the court in *Boarhead Corp. v. Erickson* made the case quite clearly that even if failing to provide judicial relief will result in irreparable harm, the courts are bound not to give themselves jurisdiction when Congress has not done so. *Boarhead*, 923 F.2d at 1021. The court reluctantly concluded:

cleanup.<sup>193</sup> In that sense, it was a “good” decision. However, this resolution of the case is not directly supportable by the text of the statute<sup>194</sup> or by the most analogous precedents.<sup>195</sup> Furthermore, if the rule the court created is read too broadly, it has the potential to become much more widely employed than the *Gamma-Tech* court intended.<sup>196</sup> At the same time, because the decision is so closely

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In *Boarhead*'s situation post clean-up review is likely to be inadequate to redress harm that occurred to archeological and historical resources on *Boarhead Farm* during the EPA's clean-up. Nevertheless, the statute's plain language eliminates *Boarhead*'s opportunity to obtain judicial review even in such circumstances . . . . Although post-study judicial review cannot rectify damage to historical artifacts or remains on this landmark site that occurs in the course of the EPA's clean-up, we must presume Congress balanced the problem of irreparable harm to such interests and concluded that the interest in removing the hazard of toxic waste from Superfund sites outweighed it. *Boarhead*'s remedy lies with Congress, not the district court.

*Id.* at 1022–23. Although *Boarhead* involved irreparable harm to historical artifacts rather than to health, the point raised seems directly applicable: no matter how compelling the interest or irrevocable the harm, the solution to the mischief caused by the bar is best created by Congress, rather than by a court.

193. On remand, *Gamma-Tech* would have to demonstrate that the allegedly harmful remedy was indeed arbitrary and capricious. *United States v. Princeton Gamma-Tech, Inc.*, 31 F.3d 138, 149 (3d Cir. 1994).

194. In Stearns, *supra* note 74, the author suggests an interesting alternative to a legislative reform of CERCLA. He argues that if citizens suits are allowed to be brought under RCRA to challenge CERCLA cleanups, then irreparable harm as a result of CERCLA cleanups will be prevented “[b]ecause RCRA compels handlers of hazardous wastes to manage their wastes in a way that eliminates risk of future harm to public health and the environment.” *Id.* at 52.

The author develops his argument persuasively by showing the close ties between RCRA & CERCLA, *id.*, *passim*, and theorizing that allowing challenges under RCRA will not undermine CERCLA's focus on undelayed remediation. *Id.* As the author points out, courts—particularly the Eighth and Tenth Circuits—are split as to whether the CERCLA bar also prevents RCRA challenges. *Id.* at 73–78. Assuming that more courts adopt the view that RCRA challenges are compatible with the CERCLA scheme, the author's theory has merit as an indirect solution to the problem caused by the inflexibility of the jurisdictional bar.

However, a direct solution that addresses the problem at its source is preferable. The source of the problem is CERCLA's failure to consider situations in which a health and safety exception is needed. Building in such an exception to the statute rather than requiring courts to extrapolate a RCRA solution is the most efficient way to solve the problem. In the interim, though, the RCRA solution is well worth greater consideration. Unfortunately, a full critique of the RCRA analysis is beyond the scope of this Article.

195. In petitioning for a rehearing of the decision, EPA argued that allowing jurisdiction in this case “creates a direct split with the well-reasoned decisions of every other court of appeals that has decided the issue.” *Rehearing Sought in Superfund Remedy Challenge*, *supra* note 134.

196. Indeed, fear that broad reading of the ruling would “unleash a torrent of litigation against the United States, which will seriously undermine EPA's ability to remediate hazardous sites effectively and promptly” underlaid the EPA's argument for a rehearing. *Id.* The EPA also emphasized the diversion of limited funds from response actions to defense of suits, the disincentive it provides for EPA cost recovery suits, and

tailored to the procedural posture and factual specifics of this particular case, the ruling is potentially limited in scope and may therefore shrink into oblivion as an anomaly of CERCLA jurisprudence. The ruling seems crafted to apply in such a small, subjectively determined group of cases that it almost does not seem worth creating an exception to the rule at all. Thus, ironically, the *Gamma-Tech* court's expansive rule is both overly narrow and dangerously broad.

Despite its limitations as a common law precedent, the great contribution of the *Gamma-Tech* decision is its treatment of a specific and serious flaw in the current CERCLA regime. It is also noteworthy for suggesting limited circumstances that may justify an exception. Coming at a time when Congress is considering reauthorization of CERCLA amidst general dissatisfaction with the CERCLA scheme,<sup>197</sup> the *Gamma-Tech* decision can provide some guidance in creating a refined jurisdictional rule.

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the administrative difficulties district courts would face if forced to engage in extensive pre-completion review. *Id.*

197. The notion that CERCLA is "broken" has been widely reported among the public, politicians at all points of the political spectrum, and the EPA itself. *See, e.g.,* Don Ritter, *Progress is Possible—With a Vision*, ENVTL. F., Jan./Feb. 1996 at 44 ("Superfund reform may still have the greatest prospects in the 104th because there has been a lot of sensible dialog on it and everybody knows it's broken."); *Slants & Trends*, HAZARDOUS WASTE NEWS, Feb. 5, 1996, available in Westlaw, HAZWN File, WL 7981644 ("Superfund is a poster child for regulatory reform' . . .") (quoting Rep. David McIntosh (R-Ind.)); Brown & Sucaet, *supra* note 4, at 387 ("A decade of CERCLA litigation . . . has resulted in great sums of resources being spent in litigation, rather than successfully cleaning up pollution."); Madsen, Arfmann & Galbavy, *supra* note 10, at 1020 ("As the time for reauthorization of Superfund approaches, the call for change is intensifying . . . This is not surprising given the groundswell of criticism aimed at the superfund due to its unwieldy transaction costs, cost to the U.S. economy and the minimal remediation benefits to the environment."); Jennifer Silverman, *Superfund Seeks Permanence in Unstable Congress*, 1996 Daily Env't Rep. (BNA) No. 22 (Feb. 2, 1996) [hereinafter Silverman, *Superfund Seeks Permanence*] ("A consensus has emerged that superfund needs to be fixed."). *But see* Statement of Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, Before the Subcommittee on Water Resources and Environment, Transportation and Infrastructure Committee, United States House of Representatives, Concerning Superfund Reauthorization, June 27, 1995 [hereinafter Schiffer I] ("The Superfund enforcement program is now working very well to get the responsible parties to clean up hazardous waste sites. The strict, retroactive, and joint and several liability scheme is fundamental to maintaining this effectiveness. We recognize that there are problems, but those problems all have targeted solutions.").

A. *Creating a Health and Environmental Harm Exception: A Modest Proposal*

Rather than retain the strict jurisdictional bar that allows potentially harmful cleanups to continue,<sup>198</sup> or adopt an arbitrary court-created remedy for a serious statutory flaw, Congress should reconsider the issue of the jurisdictional bar in the text of the statute itself. While concern about dilatory litigation is a legitimate reason not to abandon the bar,<sup>199</sup> concern about potential health or environmental harms is a reason to create a very narrow sixth<sup>200</sup> exception in the statute.<sup>201</sup> This exception should allow a remedial order to be challenged through a citizens suit under a set of guidelines that will allow courts to block an unhealthy or environmentally harmful remedial plan from progressing.

Obviously, the best way to avoid a judicial challenge to a dangerous plan is to prevent that plan from ever being implemented in the first place. To that end, the first step should be a careful refinement of the public comment provisions in CERCLA that speak to the ways in which remedial plans are initially created.<sup>202</sup>

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198. The danger of the strict ban is also expressed in McConnell, *supra* note 78, at 128:

There are strong policy reasons for interpreting the citizens' suit provision so as to permit judicial review prior to completion of a clean-up phase, where there are bona-fide allegations of "irreparable harm" to the environment or the public health. Delay in preventing such injuries is contrary to the objectives of CERCLA and results in the nullification of the right to the remedy envisioned by the citizens' suit provision.

*Id.*

199. See Oxley, *supra* note 10, at B4 ("The average federal Superfund cleanup costs an astronomical \$30 million. Because of the expense, companies choose to litigate rather than clean up. This begins the food chain of litigation where big polluters seek to gobble up small ones, resulting in no cleanup and years of stagnation."). Although this comment was addressed to the problem of CERCLA litigation generally, it is apropos to any discussion of jurisdiction.

200. See *supra* notes 33-38 and accompanying text for a listing of the five existing exceptions.

201. Creating this exception necessarily involves the very delicate balancing act described by Gaba & Kelly, *supra* note 31, at 952 ("[T]he challenge of interpreting the role of pre-implementation citizen challenges to EPA cleanup plans lies in resolving the conflicting objectives of ensuring proper cleanup plans by the government while not unduly delaying the cleanup of hazardous waste sites.").

202. Currently, CERCLA provisions for public participation may be found in 42 U.S.C. § 9613(k) (1994) (allowing for public participation in creation of administrative record on which selection of remedy and judicial review of remedy will be based); 42 U.S.C. § 9617(a),(b),(c) (1994) (providing for publication of and public participation in

It is preferably at this stage—rather than at the litigation stage—that the community and the PRPs have the opportunity to air concerns about potential irreparable harm to health and the environment. At this stage all members of the affected community should be given as extensive an opportunity as is feasible to contribute their evidence of medical or ecological concern. Thus, ideally, the plans that are put into effect will only be ordered after all genuine concerns have been addressed satisfactorily.<sup>203</sup> Resolving these questions earlier rather than later will ensure that they are addressed before harm actually happens; identified so that costly mistakes are not made in plan development; and resolved in a forum that is hopefully less expensive, divisive and protracted than formal litigation.

However, even if these steps are taken, there will, unfortunately, be times when a questionable plan is ordered and judicial review is needed. Thus, the question becomes how to allow for review of those plans without inviting the dilatory litigation that was so feared by the drafters of the jurisdictional bar.

Underlying this proposal is the basic notion that the question of liability should, for purposes of creating this sixth exception, be divorced from the question of the appropriateness of the remedy.<sup>204</sup>

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developing proposed and final remedial action plans); and 42 U.S.C. § 9622(d)(2) (1994) (describing public participation in proposed settlement agreements). For a fuller discussion of participation issues, consult William J. Friedman, *Judicial Review Under the Superfund Amendments: Will Parties Have Meaningful Input to the Remedy Selection Process?*, 14 COLUM. J. ENVTL. L. 187 (1989).

203. Of course, this stage will be complicated by the fact that there will often be other issues besides health and safety that are “on the table” at this point—issues such as cost-effectiveness, quality of the cleanup, the level to which the site will be remediated, etc. These issues, as well as local political and economic issues, can easily dominate the preliminary decision making process. However, studying health and environmental safety should be made an explicit priority in the information gathering/plan development stage, and they should take precedence over other concerns when participation from the public is sought.

204. This view is not universally held. See Madsen, Arfmann, & Galbavy, *supra* note 10, at 1023–24. Madsen and his colleagues argue that a debate over liability should be a factor in pre-enforcement review:

[W]here a PRP can in good faith assert it is not liable, it should be afforded the opportunity for a declaration of non-liability before incurring substantial cleanup and transaction costs . . . . The statute should be amended to clearly provide for pre-enforcement review when liability is at issue and should specify the test or tests to be employed.

*Id.* at 1023. However, liability is a distinct issue from the nature of the remedy, and it should be kept separate in the proceedings.

PRPs are entitled to, and should receive, all the benefits of proving that they are not or should not be responsible for the cleanup because they were not liable for the dumping.<sup>205</sup> To the extent that they are wrongly held responsible, they should be entitled to appeal the decision and be reimbursed for the costs they have already incurred. There can always be the option of financial reimbursement to make a defendant whole after a wrongful determination of liability.<sup>206</sup> Hence, PRPs contesting their underlying liability should do that explicitly and openly in a judicial hearing on liability—and not disguise it as a pre-enforcement review challenge to the merits of the remedy selected.

While it may seem artificial to separate the question of “who must pay for the cleanup?” from “what kind of clean up must they pay for?,” the distinction is principled and the liability issue must remain separated from this sixth exception. It is consistent with the “clean up first, litigate later” theory behind CERCLA since it will allow the cleanup to continue safely while liability is still incompletely resolved.

Once the question of liability is divorced from the question of the environmental merits of the cleanup plan, it is then possible to create an exception that retains the jurisdictional bar, but allows for review where there are legitimate health and safety concerns about implementing the plan.<sup>207</sup> Specifically, this sixth exception

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205. A discussion of liability determination is beyond the scope of this Article. However, the method of allocating responsibility/liability and the strict, retroactive, joint and several liability scheme that currently underlies CERCLA is the subject of much debate in current legislative reform of CERCLA. *See* discussion in and accompanying *infra* notes 221–222.

206. Once the cleanup is complete and the government brings an enforcement action, under the scheme currently in place, the PRP will have another opportunity to address any grievances about the plan. In addition, if the PRP is convinced that the plan poses a health or environmental threat but was not able to meet the heavy burden of proof under this new exception, he could still raise it in a later enforcement proceeding. For example, the PRP may claim that he should not have to pay for the cleanup because it violated the NCP by harming rather than helping the environment. Or, he may want to get a declaratory judgement against the government holding it liable for any potential claims made by third parties against the PRP for the harm resulting from the facility cleanup. While the details of these defenses will vary a great deal depending on the cases and the scientific merits of the health claims, the fundamental issue is that the PRP will have a later opportunity to address these harms. Thus, this economic harm is not irremediable. *See also* discussion *supra* note 44.

207. The urgency of protecting human health and the environment is exacerbated by the fact that “one-quarter of Americans . . . live within four miles of a Superfund site.” *Budget Impasse Will Halt Cleanups of Toxic Waste*, S.F. CHRON., Dec. 30, 1995, at A6 (quoting EPA Administrator Carol Browner).

adopts a balanced approach that has its roots in the *Gamma-Tech* analysis. This balance requires (1) strict requirements as to the nature of the harm that must be alleged; (2) limitations on joinder of non-ecological claims to the cleanup challenge; and (3) allocation of costs to the losing party.

First, the exception may only be exercised by plaintiffs who can allege in good faith that the nature of the cleanup plan in place will, if continued as ordered, create an (1) irreducible;<sup>208</sup> (2) serious;<sup>209</sup> (3) non-speculative<sup>210</sup> threat to either human health and safety or to the natural environment. The plaintiff must bear the burden of proof on the existence of this level of harm, and the court should give great deference to the views of EPA.<sup>211</sup> Such a rule will *not* allow for claims that are based on the cost-effectiveness of the

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208. It is necessary that the plan be proven to cause harm that cannot be remedied by action taken after the cleanup plan is completed. This is an essential element of the test since it will ensure that the cleanup is not delayed if corrective action may be taken after the cleanup. This harkens back to the "clean up first, litigate later" philosophy that should still govern work undertaken pursuant to CERCLA. If a harm can be easily remedied later on, even at a higher cost, the interest in cleaning the site promptly outweighs the interest in saving those later correction costs. Most often, to prove that a harm is irreducible will require a showing that the plan could lead to the death of or physical harm to humans or wildlife. However, a harm may be found to be irreducible if it results in contamination of land, water, or air that will, in the long run, pose such dangers. At some point, a court may find itself facing a situation in which a harm technically may be remedied later, but at a cost that is so astronomical that it becomes a wasteful financial impracticality. These "scientifically feasible/fiscally impractical" cases will pose the biggest challenge for judges. At no time should mere high cost equal irreducibility. Concededly, however, at *some* point, if the cost reaches out of a feasible range, a judge *may* be justified in ruling that the harm is irreducible. However, this should happen in *very* rare cases only.

209. Determining "seriousness" will undoubtedly create some difficult questions for the courts. It may also put them in the unenviable position of having to decide whether there is ever a harm to human health that can be deemed to be anything but serious. However, because almost every cleanup will have some effect on the environment, such a provision is a necessary part of the rule to serve as an effective check on litigation over plans with de minimis impacts.

210. As with "seriousness," the requirement that the alleged harm be "non-speculative" is, unfortunately, non-self explanatory. Obviously, these two must co-exist to ensure that the exception does not allow for frivolous claims. Determining what is "non-speculative" is not an easy task, but it is one that courts have been asked to do before, albeit in different contexts.

211. The rationale for this is logical. When judging EPA's decision to order a specific clean up plan, "a reviewing court *should* give deference to the scientific expertise of the agency. This is not a circumstance where a court is called upon simply to acquiesce in a determination of law; rather, this is a situation where an administrative agency *does* possess expert knowledge in a factual and scientific field." *United States v. Princeton Gamma-Tech, Inc.*, 31 F.3d 138, 149 (3d Cir. 1994) (emphasis added). Interestingly, in *Gamma-Tech*, the court, of course, *declined* to give deference to the EPA. Nevertheless, it recognized the general presumption that favors doing so.



plan or the technical details of its execution. Rather, the only challenges that may be made to the plan under this exception are those based on an allegation of an irremediable, serious, and non-speculative threat to human health and safety or the natural environment. This first part of the rule clearly builds on the health exception created by the *Gamma-Tech* court, but provides more concrete and limiting guidance.<sup>212</sup>

This first requirement would narrow the type of *claims*, establishing that the exception is appropriate only in a specific set of circumstances. Secondly, however, the scope of potential *plaintiffs* must be scrutinized to help eliminate any potential PRP "citizen plaintiffs" who might seek to use this exception as a disguise for claims with less pure motives.<sup>213</sup> In theory, this might be accomplished by requiring that any challenge brought under this exception may be brought only by a third party citizen plaintiff rather than by someone who is also a PRP for the site in question.<sup>214</sup> This restriction has initial appeal. It would provide a layer of protection against initiation of suits thinly disguised as "health threat" claims brought by those with a financial interest in delaying the litigation.<sup>215</sup>

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212. The only restrictions the *Gamma-Tech* court placed on judicial review were that the alleged responsible party "has the burden to establish that the EPA's choice of remedy was indeed arbitrary and capricious or otherwise contrary to law." *Id.*

213. These would, of course, be the dilatory motives that were the basis for the bar. This cynicism as to the motive of a PRP challenging the adequacy of a remedial plan is noted in Gaba & Kelly, *supra* note 31, at 946. In what is, perhaps, an understatement, the authors comment, "In virtually all cases, PRP's are concerned not with the environmental adequacy of a clean-up, but with the cost of cleanup that they will be required to bear." *Id.*

214. *See id.* at 952-53. In a more general discussion not pertaining directly to a health-based exception, these authors argue:

[D]istinctions between citizen suits by responsible parties and other parties are warranted. PRPs can satisfy their concerns with being held responsible for unnecessary costs of cleanups through post-cleanup challenges. Citizens challenges to the environmental adequacy of cleanups cannot effectively be satisfied by post-cleanup litigation.

*Id.* But see *Cabot Corp. v. United States EPA*, 677 F. Supp. 823, 829 (E.D. Pa. 1988) ("The statutory language empowers any person to bring a citizen suit, irrespective of whether that person is also a PRP . . .").

215. *See also* Gaba & Kelly, *supra* note 31, at 946-47:

Although limitation of pre-implementation review of cleanup plans by responsible parties serves to satisfy both the objectives of CERCLA and the PRPs, the same is not true of limiting pre-implementation review by citizens concerned with the environmental adequacy of the cleanup plans. PRPs can

Unfortunately, of course, this is a restriction that may be both overinclusive and underinclusive. It may allow bad faith lawsuits brought by alleged third party citizens who are, in fact, financed or used by the PRPs.<sup>216</sup> Yet, at the same time, it will not allow an action brought by a PRP acting in good faith on a legitimate health concern. This is particularly dangerous in those circumstances where there is no third party plaintiff other than the PRP who has the resources for or interest in bringing the suit. Thus, it is a necessary evil to allow this exception to be used by PRPs as well as third party plaintiffs. However, the danger should be abated by a strict limitation on the claims that can be raised under the exception. The statute must be clear that *only* the health and ecological questions may be raised, and no other claims may be joined. This should reduce the incentives of PRPs to use this provision to “piggyback” claims with a dilatory intent. Of course, this raises the possibility of duplicative litigation since it will not allow related issues to be addressed in one lawsuit. However, this is a less serious problem than the alternative.

The third aspect of this proposed exception would require litigation costs and attorneys fees to be paid by the losing party to a challenge brought under this exception to the bar. Thus, the government must bear the cost if a challenger succeeds in proving that the cleanup plan poses an unacceptable health or ecological risk. This should provide the impetus for the bringing of legitimate citizens suits, since those who bear the burden of litigating a meritorious case will be compensated for their efforts if they succeed.<sup>217</sup> It may also provide some added incentive for the government to consider the health aspects of its remedies since the failure to do so may become costly. Alternatively, those citizens or PRPs who are considering a frivolous or bad faith lawsuit should be deterred from doing so because of the possibility of hefty litigation costs. This third prong, then, provides another way of ensuring that while

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always have their monetary liability reduced if the government plan is in error. Judicial review of the environmental adequacy of a plan *after* it has been completed, however, is of limited significance.

*Id.*

216. Although no specific examples of this have been found to date, creating such an exception may well create this temptation.

217. This may be particularly important to the extent that citizens suits may often be brought by non-profit public interest groups with limited resources.

meritorious concerns do not go unaddressed, frivolous complaints are deterred.

The net result of an action brought under this new exception should be a ruling that grants injunctive relief to the successful plaintiff. Typically, this relief will take the form of an order prohibiting the cleanup—or its dangerous aspects—from taking place. It should also include an order directing reformulation of the plan so that cleanup may safely and expeditiously continue.

With such a narrow exception as this proposal creates, the goals of the original jurisdictional bar will be maintained. However, the major drawback to that bar will be ameliorated. No longer will the bar block relief from dangerous remedies.

### *B. Congressional Efforts at Reforming the Jurisdictional Bar*

The 104th Congress has been and is now considering bills which, if passed, would change many aspects of the CERCLA scheme.<sup>218</sup> This legislative reform effort provides an opportunity for the rewriting of the jurisdictional bar. This would, ideally, include a revision to the jurisdictional bar like the one this Article proposes.

The impetus behind these CERCLA reform bills has been general dissatisfaction with the current Superfund scheme<sup>219</sup> as well as the practical reality that funding authorization for the Superfund expired on December 31, 1995. Although CERCLA reform bills had been considered and abandoned by the 103rd Congress in 1994,<sup>220</sup> these two factors have given the reform effort a new immediacy that it lacked in 1994.

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218. The major House bill on CERCLA reform is H.R. 2500, 104th Cong., 1st Sess. (1995), originally introduced on October 18, 1995. Its principal sponsor is Representative Michael G. Oxley (R-Ohio). The bill is under the jurisdiction, primarily, of the House Committee on Commerce, as well as the Committees on Transportation and Infrastructure and the Committee on Ways & Means. In the Senate, the primary initiative on CERCLA reform is S. 1285, 104th Cong., 1st Sess. (1995), originally introduced by Senator Robert C. Smith (R-N.H.) on September 29, 1995. It was referred to the Senate Committee on Environment and Public Works. As this Article went to press in mid-April, the bills were winding their ways through the House and Senate committees, but Congress had taken no final action on either of the bills. This Article has, thus, been unable to address any changes in the bills made after that point.

219. This dissatisfaction is discussed *supra* note 197.

220. See *Environmental Laws Face Revisions*, CONG. Q. WKLY. REP., June 17, 1995,

The process of Superfund reform involves resolution of a number of issues more controversial, well-publicized, and polarizing than the narrow question of the jurisdictional bar. These issues include retroactive liability;<sup>221</sup> alterations of the “joint and several liability” scheme;<sup>222</sup> liability exemptions for some small pollut-

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at 1688, 1701 (“Despite winning bipartisan approval from five committees and the support of the Clinton administration, a bill to revamp Superfund died in the final weeks of the 103rd Congress, the victim of disagreements over proposed taxes, new cleanup standards and wages paid to federal contractors.”).

The fact that there had been an attempt at Superfund reform in the 103rd Congress has not made the current reform process easier. In fact, it has, perhaps, exacerbated partisan tensions. See L. Carol Ritchie, *Liability Controversy Slows Reform of Superfund Program*, Cong. Green Sheets, Jan. 29, 1996, at 11 (“[R]anking committee Democrat John D. Dingell (Mich.) and others complain that Republicans—along with a broad coalition of environmentalists and industry leaders—had already agreed to a more moderate superfund overhaul in 1994. They question whether that bill—which never reached the floor—was acceptable then but not now.”). However, in the opinion of some, these bills should be considered as part of the foundation for the current discussions. See Schiffer I, *supra* note 197 (“Last year, there was broad consensus among a wide variety of parties affected by Superfund on the solutions to the problems of Superfund. Committees of both houses of Congress passed similar versions of the Superfund reform bill, with bipartisan votes. I urge you to look at these bills again, as you search in this new Congress for solutions to the problems of Superfund.”).

221. The issue of retroactive liability is, unquestionably, the most controversial of the issues being debated in the Superfund reform process. It is also the single issue most likely to make compromise difficult to achieve. See Ritchie, *supra* note 220, at 10 (“The controversial issue of retroactive liability for hazardous waste clean-up costs is holding up progress in the House on a bill overhauling the superfund program.”); Silverman, *Superfund Seeks Permanence*, *supra* note 197 (“[T]he title governing retroactive liability repeal under H.R. 2500 remains the biggest barrier to Superfund reform . . .”). A number of proposals have been made that would change the scheme of retroactive liability. One would be close to a full repeal of retroactive liability for all except those who own the land on which hazardous wastes are dumped. Another would retain retroactive liability but provide a rebate of nearly 50% to those PRPs who are remediating harm caused long ago. Other proposals concern the date at which liability would be deemed to be “retroactive.” Two of the more popularly mentioned dates are 1980 and 1987. The EPA, meanwhile, opposes the end of retroactive liability because, among other things, a reduction in retroactive liability will necessitate that more sites be cleaned with limited public funds rather than the private monies of the PRPs. See *Superfund Revision: Statement of Lois J. Schiffer, Assistant Attorney General, Environment & Natural Resources Division, U.S. Department of Justice, Before the Subcommittee on Water Resources & Environment, Committee on Transportation & Infrastructure, U.S. House of Representatives, Concerning Superfund*, Nov. 2, 1995 [hereinafter Schiffer II] (arguing that 50% rebate for cleaning up retroactively “would cost [the EPA] more than \$1 billion in excess of its current annual Superfund budget . . . [and] will require the creation of a whole new bureaucracy to process claims, and lead to considerable litigation.”). In contrast, proponents of the repeal argue that the elimination of the “retroactive PRPs” from the liability scheme will reduce the amount of litigation, and that these savings will help offset any of the increased cleanup costs. For a discussion of these various issues related to the repeal of retroactive liability, see Timothy Noah, *House Plan Would Cut Firms’ Cleanup Liability*, WALL ST. J., Feb. 13, 1996, at A2.

222. Proportional liability, in some form, has been suggested by some advocates. See Ritchie, *supra* note 220, at 11 (discussing proportional liability generally).

ers;<sup>223</sup> Brownfields redevelopment initiatives;<sup>224</sup> administrative reforms to reduce Superfund transaction and litigation costs;<sup>225</sup> insurance liability debates;<sup>226</sup> caps on sites added to the NPL;<sup>227</sup> limits on the amount of wildlife restoration awards against PRPs;<sup>228</sup> significant federalism questions governing the relationship between the federal government and the states in handling Superfund matters;<sup>229</sup> and the ever-present budgetary debates, to name but a few.<sup>230</sup> A full discussion of any of these issues is beyond the scope of this Article. However, these issues are highlighted because it would be a serious error to view reform of the jurisdictional bar in a vacuum without considering the impact of other reforms on any changes to the bar.<sup>231</sup>

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223. These would include exemptions for PRPs at municipal landfills and generators and transporters of wastes in quantities deemed to be de minimis.

224. See Silverman, *Bliley to Offer*, *supra* note 12 (discussing, generally, brownfields redevelopment issues in Superfund reform initiatives).

225. As explained throughout this Article, protracted litigation over cleanups and the costs associated with that litigation has always been a major criticism of CERCLA. See DeBenedictis, *supra* note 44, at 30 (“[A] mere 12 percent of the money spent by insurance companies goes toward actually cleaning up hazardous wastes. The remaining 88 percent is spent on litigating claims and administration . . . . [I]nsurance companies spent about \$410 million on Superfund transaction costs in 1989, the last year studied.”). This is now a driving impetus for its reform. There are a number of proposals being discussed that would do this in a variety of ways. For example, one proposal has been the use of a neutral third party to allocate cleanup responsibility in a non-litigation setting. See Schiffer II, *supra* note 221 (criticizing one version of a third party allocator system as unworkable). Interestingly, however, a full repeal of the jurisdictional bar as is currently being discussed would run counter to these efforts.

226. See DeBenedictis, *supra* note 44, at 30 (discussing, generally, impact of CERCLA scheme on insurance industry).

227. See Ritchie, *supra* note 220, at 12 (discussing disagreements over NPL cap).

228. See Schiffer II, *supra* note 221 (sharply criticizing \$50 million liability cap as obstacle preventing cleanup of serious harm).

229. See *Superfund: NCSL Committee Approves Policy Listing CERCLA Reform Recommendations*, 1995 Daily Env't Rep. (BNA) No. 241 (Dec. 15, 1995) (discussing reaction of environment committee of National Conference of State Legislatures to CERCLA reform initiatives, focussing on state perspectives); John Pendergrass, *So Far, Reviews on 104th Are Mixed*, ENVTL. F., Jan./Feb. 1996, at 6 (discussing impact of Superfund reform proposals on states generally).

230. These budgetary debates include two primary issues. The first is the amount of money that will be placed in the Superfund and, of course, the source of that money. See *The Taxing Dilemma*, INS. ADVOC., Jan. 6, 1996, at 1, 36 (discussing difficulties in resolving source and amount of tax revenue for Superfund). The second question is the resource allocation question concerning how much money Congress will give to the EPA to conduct its investigatory and remedial work connected with the Superfund program. For a general review of some of the significant focal points for reform, see Madsen, Arfmann, & Galbavy, *supra* note 10.

231. For example, if retroactive liability is eliminated, there should be significantly less litigation. If that is true, perhaps the overwhelming fear of dilatory litigation becomes less compelling.

Whether or not Superfund and CERCLA reform happens during the 104th Congress will turn largely on whether or not these contentious issues are resolved. It will also turn on whether the budget impasse of early 1996 has a lasting negative impact;<sup>232</sup> the role of environmental issues as a matter of political concern during the 1996 election season;<sup>233</sup> and the state of relations between oppos-

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232. These budget impasses resulted in two periods of federal government "shut-downs" in late 1995 and early 1996. This has had a three-fold impact on the legislative agenda, environmental and otherwise. First, it has delayed consideration of many issues on the legislative calendar. *See, e.g.,* Ritchie, *supra* note 220 at 11 ("The continuing budget battle between Congress and the White House has bogged down just about everything else moving through committees."); *Congressional Impasse Has GOP, EPA Reshaping Approaches*, 1996 Daily Env't Rep. (BNA) No. 22 (February 2, 1996) ("President Clinton and Congress are locked in seemingly fruitless negotiations over the seven-year balanced budget plan and individual fiscal 1996 appropriations bills, and a significant portion of the federal government has been limping along on a series of stopgap spending bills."). Secondly, because environmental statutes have significant budgetary implications, it is particularly difficult for them to be addressed effectively until budgetary issues are resolved. For a general discussion of the particular impact of the budget impasse on Superfund, see John H. Cushman, Jr., *New Jersey Lawmakers in Support of Superfund*, N.Y. TIMES, Jan. 18, 1996, at A15. Finally, the budget crisis has exacerbated tensions between the legislature and the executive, as well as between the two political parties, making necessary environmental compromises more difficult than they otherwise might have been. *See Wrap-Up Report 104th Congress, First Session*, PULSE REPORT (Environmental and Energy Study Institute), Jan. 1996, at 1 ("[B]udget and appropriations debate ground the [Republican] charge to a near halt, with intra-party and inter-chamber disputes over funding and policy for the Environmental Protection Agency, Interior Department and other agencies taking a huge toll on Republican unity, while energizing a Democratic opposition that had been tepid for much of the session."); *4 Members of Congress Agree Budget Negotiations Holding Up Actions on HUD, Superfund, 'Disasters'*, INS. ADVOC., Mar. 23, 1996, at 23 ("[T]he ongoing budget negotiations are stymieing activities on other key pending legislation such as Superfund reform . . .").

233. The fact that 1996 is an election year may have an impact in a number of ways. First, some may have a real incentive to postpone controversial legislation until after the election when the political makeup of Congress may be different. *See Silverman, Superfund Seeks Permanence*, *supra* note 197 ("George Baker, executive director of the Superfund Reform '95 coalition [predicted] that a liberal constituency exists among the Democrats 'that would prefer not to have any bill.' Their reasoning is that the Democrats may take over the House and Senate in the November 1996 elections, giving their party free reign to do their own Superfund reform bill . . ."). In addition, the status of the environment as a 1996 campaign issue is unclear. The public's concern with the environment waxes and wanes. *See Amy Porter, Superfund, Clean Water Top Priority for House Commerce Panel, Counsel Says*, Natl. Env't Daily (BNA) (Jan 24, 1996) (noting that "attempts to reform environmental statutes lack support outside the Washington Beltway"); Bob Benenson, *A Mature "Green" America Spawns Grass-Roots Anti-Regulatory Rebellion*, CONG. Q. WKLY. REP., June 17, 1995, at 1694, 1695 (quoting University of Chicago economist Don Cousey, who "describes environmental protection as a 'luxury good,' the demand for which rises in times of affluence and declines in periods of economic stress"); Bob Benenson, *GOP Sets the 104th Congress on New Regulatory Course*, CONG. Q. WKLY. REP., June 17, 1995, at 1693, 1697 ("Election Day exit polls show that the environment is rarely a galvanizing issue for voters . . ."). *But see id.* at 1696. ("[A]n annual survey conducted by Roper Starch Worldwide, Inc. has shown consistently in recent years that

ing political factions in the legislative and executive branches.<sup>234</sup> However, if Superfund reform does take place, the jurisdictional bar should be "on the table" for reform.

In the current discussions of CERCLA reform, there have been a number of proposals for dealing with the issue of the jurisdictional bar. Unfortunately, neither of the major proposals has adopted the approach advocated by this Article or created by the *Gamma-Tech* court; thus both are seriously flawed.<sup>235</sup>

One proposal being seriously considered in House Bill 2500 is to eliminate the bar completely<sup>236</sup> by adding a sixth opportunity to challenge a cleanup plan. Rather than the narrow exception advocated by this article, this proposal in H.R. 2500 would allow the review of a cleanup plan in "[a]ny action to review a final record of decision regarding the selection of a remedy under this Act."<sup>237</sup> This would, in effect, allow a PRP to challenge any cleanup order from the moment it became finalized. This would obviously address the desire to allow a challenge based on health and safety concerns, but it also would "throw out the baby with the bath water" by allowing all other challenges to be made as well.

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more than 75 percent of Americans view themselves as active environmentalists or sympathetic but not active on the environment."); John H. Cushman Jr., *Democrats Fight to Restore Curbed Programs*, N.Y. TIMES, Mar. 14, 1996, at B3 ("The Democrats, citing poll data showing that many Americans were concerned about environmental issues, believe that Republican efforts to roll back environmental regulations might be a potent issue in this year's Presidential campaign."); Dennis Farney & Timothy Noah, *Down to Earth: Environmental Stands Alienate Some Backers of the GOP's Agenda*, WALL ST. J., Mar. 5, 1996, at A1 ("The environment will be one of the concerns at the forefront of GOP primaries . . ."). To the extent that the environment does not emerge as a matter of popular voter concern, attention may be focused instead on more dramatic campaign issues. See also John H. Cushman, Jr., *Adversaries Back the Current Rules Curbing Pollution*, N.Y. TIMES, Feb. 12, 1996, at A1 (discussing development of President Clinton's environmental campaign platform).

234. See, e.g., *The 104th Congress and Clinton's Home Stretch*, ENVTL. F., Jan./Feb. 1996, at 38 ("This month marks the beginning of the 104th Congress's second, and last, session and President Clinton's home stretch going into the fall election. Needless to say, the two sides have had little to agree on in the area of environmental policy.").

235. It was reported that a draft report to the Judicial Review Committee of the Administrative Conference of the United States advocated a form of health-based challenge to cleanup plans. See *Draft ACUS Report Recommends End to Superfund Judicial Review Bar*, PESTICIDE & TOXIC CHEMICAL NEWS, Apr. 26, 1995, available in Westlaw, PTCHEMN File, WL 8217806. However, the committee postponed any action on the preliminary draft. *Id.*

236. This proposal may be found in H.R. 2500, 104th Cong., 1st Sess. (1995), as introduced October 18, 1995.

237. *Id.* at § 114.

Assistant Attorney General Lois Schiffer expressed these concerns when that particular provision was before the House committees:

I am particularly concerned that significant delays in cleanups would be caused by the provision that destroys the current "pre-enforcement review bar" of Section 113(h) of CERCLA. This opens the door to private parties to go to court to stop cleanups that are now underway. The result could be severe delays in cleanup while the issue of what remedy is appropriate is revisited and litigated. Once the door is opened to this kind of litigation, the delays in remedies could be widespread and could go on for years.<sup>238</sup>

In addition to concerns about runaway litigation, concerns were also raised about the financial cost of such a proposal.<sup>239</sup> Yet, other proposals continued to include similarly broad expansions of the pre-enforcement review provisions.

The major Senate reform bill embodies another proposal to change the jurisdictional bar.<sup>240</sup> This, too, would add a sixth method through which a remedial plan may be challenged under section

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238. Schiffer II, *supra* note 221.

239. For instance:

One of the fiercest debates arose over an amendment by Rep. Bart Stupak (D-Mich) that would have removed the provision of HR 2500 allowing parties to reopen old cleanup method decisions to court challenges. The provision also would allow potentially responsible parties to challenge a cleanup decision before cleanup occurs. Stupak quoted a Justice Department statement that the provision could reopen 1,900 new cases and cost an additional \$800 million.

Ritchie, *supra* note 220, at 11. "But, Oxley said reopening old cleanup decisions could save money if cheaper methods can qualify under an overhauled superfund law." *Id.* There is some merit to the claim that early review will, at times, result in a savings to the EPA—a savings that may, at times, even offset the cost. This was recognized by the *Gamma-Tech* court itself:

Interim judicial review is often advantageous to the EPA . . . . [I]f a court finds defects in the EPA's response action, they may be corrected before further unwarranted drains on limited Superfund resources occur—a result the EPA would no doubt find desirable. A knee-jerk opposition to a reasonable interpretation of the jurisdictional limitations on judicial review in CERCLA is therefore not consistent with the aims of the Act.

*United States v. Princeton Gamma-Tech, Inc.*, 31 F.3d 138, 149 (3d Cir. 1994). However, as a general rule the danger of dilatory litigation would seem to outweigh this potential benefit.

240. S. 1285, 104th Cong., 1st Sess. (1995).



113(h). Specifically, it would allow for a review in “[a]n action under section 129(c).”<sup>241</sup> Section 129(c), unfortunately, is a fairly open-ended proposal that allows judicial review of “a remedial action plan the implementation of which is projected to cost more than \$15,000,000.”<sup>242</sup> There is no other limit beyond projected cost specified in the bill. Given that the average cost of a cleanup is significantly higher than \$15,000,000,<sup>243</sup> this proposed exception will likely allow legal challenges at most sites.<sup>244</sup> In addition, there are few advantages to linking the ability to challenge a cleanup to the cost of the cleanup, since health and safety risks are not always tied to the cost of the cleanup.

Thus, it appears as though current Congressional thinking on this issue wisely recognizes the danger of the strict ban. However, in seeking to lift the jurisdictional bar so expansively, legitimate concerns about efficient cleanups are dismissed.

## VI. CONCLUSION

CERCLA and its refinements through SARA were created to foster efficient cleanup of hazardous waste sites that contaminate the land and pose a health and safety risk to humans and to the natural environment. Yet, from the beginning, this ambition was inextricably intertwined with the reality that judicial review can both help and hinder this goal.<sup>245</sup> As a general rule, delaying judicial review will advance the improvement of the environment by expediting necessary—and often long overdue—remedial measures.<sup>246</sup> However, like all “general rules,” there are circumstances in which

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241. *Id.* at § 407(a).

242. *Id.* at § 404.

243. See Madsen, Arfmann, & Galbavy, *supra* note 10, at 1024.

244. Although the monetary limitation may weed out challenges to some of the smaller cleanup projects, this provision is not one that will have any impact on many of the major, most troubling sites.

245. See, e.g., H.R. REP. NO. 253(III), 99th Cong., 2d Sess. 16 (1986), reprinted in 1986 U.S.C.C.A.N. 3038, 3039 (addressing the necessity “to strike a balance between the need to protect the rights of those affected by hazardous waste sites (both those potentially harmed by those sites and those responsible for the clean-up of those sites) and the need to ensure speedy cleanups of hazardous waste sites”).

246. See generally Moore, *supra* note 31, for a discussion of bars on pre-enforcement jurisdictional review in the context of the Clean Air Act and the Clean Water Act. This article provides an excellent comparison between the enforcement review problems under each of these environmental statutes.

the jurisdictional bar poses a potential threat to the environment when it requires a "remedy" to be pursued that irrevocably harms health or the environment.

These cases will, undoubtedly, be few. However, prevention of environmental harm is a need compelling enough to justify an exception that will allow a court to review a proposed remedial plan if it is an environmental or health threat. Congress is now in an excellent position to create a narrow exception to accomplish this. It has a judicial model in the form of the *Gamma-Tech* decision and the proposal advocated in this Article. Crafting this exception narrowly and carefully will help thwart some of its potential pitfalls. Doing so may be difficult and may require compromise. But, this does not justify leaving the task undone and untried, nor should it be the impetus for removing a bar that serves a legitimate role.

