

# Urban Law Annual ; Journal of Urban and Contemporary Law

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Volume 36 *Housing Symposium*

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January 1989

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### Recommended Citation

William A. Shirley, *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 (1989)

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# WHEN EPA CLEANS A CERCLA SITE: PRECLUSION OF PRE-ENFORCEMENT JUDICIAL REVIEW WITH RESPECT TO GENERATORS AND TRANSPORTERS

## I. INTRODUCTION

Hazardous waste<sup>1</sup> generators<sup>2</sup> and transporters<sup>3</sup> have routinely dis-

1. The Environmental Protection Agency (EPA) has listed as hazardous more than 1,050 discrete substances and more than 100 chemical mixtures. These substances include heavy metals such as lead and beryllium, inorganic compounds such as sulfuric acid and complex organic compounds such as dioxin, toluene and vinyl chloride. Designation, Reportable Quantities, and Notification, 40 C.F.R. § 302.4 (table) (1987). Further, the EPA "Administrator shall promulgate and revise as may be appropriate" the list of hazardous substances. The Comprehensive Environmental Response, Compensation & Liability Act (CERCLA) § 102(a), 42 U.S.C. § 9602(a) (Supp. IV 1986). The Federal Register prints amendments to the hazardous substances list as they are promulgated.

CERCLA defines "hazardous substance" as:

(A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any . . . substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. § 6901] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15.

CERCLA § 101(14), 42 U.S.C. § 9601(14) (Supp. IV 1986).

CERCLA designates hazardous substances by reference to other environmental statutes. For example, the Title 33 sections in (A) and (D), *supra*, are part of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-376 (1982 & Supp. V 1987)) [hereinafter Clean Water Act]. Section 2606 of Title 15 is a section of the Toxic Substances Control

posed hazardous wastes at third-party disposal sites.<sup>4</sup> The United States Environmental Protection Agency (EPA) may initiate remedial action to clean up a waste site pursuant to section 104(a)(1) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980<sup>5</sup> (CERCLA). The EPA must determine that a hazardous substance or an imminently and substantially dangerous material from the site has polluted, or substantially threatens to pollute, the environment.<sup>6</sup> Congress enacted CERCLA section 113(h)<sup>7</sup> as part of the Superfund Amendments and Reauthorization Act of 1986<sup>8</sup> (SARA)

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Act of 1976, Pub. L. No. 94-469, 90 Stat. 2003 (codified as amended at 15 U.S.C. §§ 2601-29 (1982 & Supp. IV 1986)).

2. A hazardous waste generator is:

any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances. . . .

CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3) (Supp. IV 1986).

This section does not predicate responsibility on a person's generation of waste. Brokers, who may never take physical possession of waste, may be responsible for waste cleanup under CERCLA. *United States v. Bliss*, 667 F. Supp. 1298, 1307 (E.D. Mo. 1987).

3. A hazardous waste transporter is "any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance." CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4) (Supp. IV 1986).

4. Estimates of the number of hazardous waste sites vary widely. *Compare EPA Updates List of Hazardous Waste Sites*, CHEMICAL & ENG'G NEWS, Feb. 9, 1987, at 21, col. 1 (report of the EPA's enlargement of the national priorities list which estimates 26,000 sites) *with* States News Service, Jan. 14, 1988 (General Accounting Office report criticizing the EPA's underestimation and estimating potentially 425,000 sites).

5. 42 U.S.C. § 9604(a)(1) (Supp. IV 1986). CERCLA is Pub. L. No. 96-510, 94 Stat. 2676 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1982 & Supp. IV 1986)).

6. CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (Supp. IV 1986). The EPA, pursuant to CERCLA § 106, 42 U.S.C. § 9606 (1982 & Supp. IV), may also compel responsible parties to decontaminate a waste site.

7. 42 U.S.C. § 9613(h) (Supp. IV 1986) (as added by Superfund Amendments and Reauthorization Act § 113(c)(2), Pub. L. No. 99-499, 100 Stat. 1650 (Supp. IV 1986)) [hereinafter SARA], provides in pertinent part: "No Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action selected under section 9604 of this title, . . . in any action except . . . an action under section 9607 of this title to recover costs or damages or for contribution." *Id.*

8. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified in scattered sections of 42 U.S.C.).

expressly to preclude, with only limited exceptions, judicial review of such remedial actions. After the EPA completes a response action, the agency may recover its costs<sup>9</sup> by bringing suit against persons<sup>10</sup> potentially responsible for the waste site. Thus, a generator or transporter, although possibly liable for the EPA's remedial action costs, may not obtain judicial review of the cleanup action until the EPA sues for cost recovery.

Enacted in 1980, CERCLA's principal purpose is prompt hazardous waste site cleanup.<sup>11</sup> Specifically, Congress intended the Act to address rapidly the problem of abandoned waste sites such as Love Canal near Buffalo, New York, and the "Valley of the Drums" near Louisville, Kentucky.<sup>12</sup> Congress enacted SARA in 1986 to reinvigorate CERCLA through increased funding<sup>13</sup> and clarification of unsettled issues. These issues include contribution,<sup>14</sup> intervention,<sup>15</sup> public participation,<sup>16</sup> settlements,<sup>17</sup> citizens suits,<sup>18</sup> and judicial review.<sup>19</sup>

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9. CERCLA § 107(a), 42 U.S.C. § 9607(a) (Supp. IV 1986). The EPA initially bears the cleanup costs using "Superfund" money. CERCLA § 111, 42 U.S.C. § 9611 (1982 & Supp. IV 1986). Congress authorized the expenditure of \$8.5 billion between October 1986 and October 1991 for CERCLA's purposes. CERCLA § 111(a), 42 U.S.C. § 9611(a) (1982 & Supp. IV 1986). The United States district courts have jurisdiction over EPA cost-recovery suits pursuant to CERCLA § 113(a), (b), (h) 42 U.S.C. § 9613(a), (b), (h) (1982 & Supp. IV 1986).

10. CERCLA defines "person" to include "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." CERCLA § 101(21), 42 U.S.C. § 9601(21) (Supp. IV 1986). Courts may also hold corporate officers personally liable. *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986) (imposition of CERCLA liability "upon only the corporation and not the individual corporate officers and employees who are responsible for making corporate decisions about the handling and disposal of hazardous substances would open an enormous, and clearly unintended, loophole"), *aff'g* 579 F. Supp. 823, 847-48 (W.D. Mo. 1984), *cert. denied*, 108 S. Ct. 146 (1987); *see also* *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985) (a managing stockholder may be held "liable . . . as an 'owner or operator'").

11. *Walls v. Waste Resource Corp.*, 761 F.2d 311, 318 (6th Cir. 1985).

12. 126 Cong. Rec. H26,761 (daily ed. Sept. 23, 1980); *see also* H.R. REP. NO. 1016(I), *reprinted in part* in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6119-20 (discussion of gaps in previous law which Congress intended CERCLA to fill).

13. Congress initially funded Superfund with \$1.6 billion. 1980 U.S. CODE CONG. & ADMIN. NEWS 6119. *See supra* note 11 for current funding.

14. CERCLA § 113(f), 42 U.S.C. § 9613(f) (Supp. IV 1986).

15. CERCLA § 113(i), 42 U.S.C. § 9613(i) (Supp. IV 1986).

16. CERCLA § 117, 42 U.S.C. § 9617 (Supp. IV 1986).

17. CERCLA § 122, 42 U.S.C. § 9622 (Supp. IV 1986).

SARA codified the traditional preclusion of judicial review of government agency action with respect to EPA cleanup efforts. This Note analyzes the constitutionality of preclusion with respect to transporters and generators. Section II reviews the potential liability of generators and transporters, addressing the assessments of responsibility, strict liability, and joint and several liability. Section III summarizes the reasons for the pre-SARA preclusion of judicial review and analyzes the constitutionality of the preclusion codification. Finally, section IV suggests methods generators and transporters may use to protect their interests when faced with preclusion of pre-enforcement judicial review.

## II. POTENTIAL LIABILITY

### A. *Responsibility*

Section 107(a) of CERCLA makes hazardous substance generators and the past and present owners and operators of waste disposal facilities responsible for the reparation costs of improper waste disposal.<sup>20</sup> A court may also hold responsible a transporter who selected and used a waste site for a customer.<sup>21</sup> One suggested method for determining a party's liability<sup>22</sup> is to ask, "Who decided to place the waste into the hands of a particular [hazardous waste] facility?"<sup>23</sup> A court may also

18. CERCLA § 310, 42 U.S.C. § 9659 (Supp. IV 1986).

19. CERCLA § 9613(h), (j), 42 U.S.C. § 9613(h), (j) (Supp. IV 1986).

20. 42 U.S.C. § 9607(a) (Supp. IV 1986). Specifically, responsible parties are liable for "all costs of removal or remedial action . . . not inconsistent with the national contingency plan; . . . damages for and injury to, destruction of, or loss of natural resources, [including assessment costs]; and the costs of any [authorized] health assessment or health effects study. . . ." *Id.*

21. On its face, CERCLA § 107(a)(4) holds liable for response costs any person who transports hazardous substances to any place from which there is a release or threatened release. CERCLA § 101(20), 42 U.S.C. § 9601(20)(C) (Supp. IV 1986), excludes common or contract carriers from the definition of "owner or operator" if they have not caused or participated in the release in question. A transporter who merely carries waste to a third-party site at the specific request of a generator should not be responsible for releases that the transporter could not control. Thus, the phrase "selected by such person," as employed by CERCLA § 107(a)(4) in the definition of transporter, seems to modify disposal or treatment facilities, incineration vessels, and sites, as opposed to sites alone. *Cf. New York v. Shore Realty Corp.*, 759 F.2d 1032, 1043 n.16 (2d Cir. 1985) (construing a phrase in CERCLA § 107(a)(4) to apply to CERCLA §§ 107(a)(1)-(3)).

22. Courts may presume that a waste disposal company's routine use of numerous third-party disposal sites indicates that the waste disposal company, rather than the waste generator, chose the hazardous waste disposal sites.

23. *United States v. A & F Materials Co.*, 582 F. Supp. 842, 845 (S.D. Ill. 1984); *see*

hold responsible as a generator a party who exercised ownership over the waste which it brought to third-party sites.<sup>24</sup>

Section 107(b)(3)<sup>25</sup> of CERCLA provides the generator or transporter with three specific affirmative defenses. These defenses absolve from responsibility those parties who prove that the release or the threat of release was caused by an act of God, an act of war, or the act or omission of a third party.<sup>26</sup> To employ the third-party defenses successfully, a generator or transporter must also prove that it exercised due care with regard to the hazardous substances at issue and acted to prevent foreseeable acts, omissions, or consequences caused by any third party.<sup>27</sup>

Although the courts have not established the minimum level of due care required to satisfy the statute and thus preclude responsibility, the decision in *O'Neil v. Picillo*<sup>28</sup> suggests a very high threshold to the invocation of a third-party defense. The *O'Neil* court addressed the

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also *New York v. General Elec. Co.*, 592 F. Supp. 291, 297 (N.D.N.Y. 1984) (holding that persons cannot contract away their responsibility under CERCLA, nor may a generator escape liability for its disposed waste by characterizing the disposal as a sale).

24. *A & F Materials*, 582 F. Supp. at 845; see *supra* note 2 for the definition of a generator and its reference to ownership.

25. 42 U.S.C. § 9607(b) (1982).

26. *Id.* CERCLA § 107(b)(3) absolves those who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by (1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant. . . .

*Id.*

*But cf. Wagner Seed Co. v. Daggett*, 800 F.2d 310 (2d Cir. 1986). In *Wagner Seed Co.*, lightning struck *Wagner Seed's* warehouse, starting a fire which caused the release of toxic chemicals. The court affirmed that the district court "lacked subject matter jurisdiction to consider a challenge on the merits to an EPA order before the EPA initiated an enforcement action." *Id.* at 317. *Wagner Seed Co.* strongly suggests that a party may invoke the act of God defense only after the EPA has sued to compel action or to recover costs.

27. 42 U.S.C. § 9607(b) (1982). A party invoking an affirmative defense has the burden of proof by a preponderance of the evidence. *Id.* See CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A) (Supp. IV 1986) (definition of the term "contractual relationship" as it appears in CERCLA § 107(b)(3)); CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B) (1986) (statutory guidelines for judicial determination of due care); *cf. United States v. Bliss*, 667 F. Supp. 1298, 1305 (E.D. Mo. 1987) (willful ignorance of how a third party disposes of a hazardous substance precludes use of the CERCLA's § 107(b)(3) third-party defense).

28. 682 F. Supp. 706 (D.R.I. 1988).

third-party defense raised by defendants Rohm and Haas Company, Exxon Research and Engineering Company, and American Cyanamid. Although Rohm and Haas “clear[ly] . . . took every precaution” in its waste disposal,<sup>29</sup> the court found the company liable for cleanup costs due to the hazardous nature of the waste and the mere presence of the material at the waste site. The court next found that “Exxon employed every precaution to prevent the illegal and/or improper disposal of its waste.”<sup>30</sup> The court indicated a willingness to hold Exxon liable as it did Rohm and Haas, but noted that a lack of evidence regarding the toxicity of the Exxon wastes precluded the imposition of liability.<sup>31</sup> Finally, the court held American Cyanamid liable for cleanup costs notwithstanding its asserted diligence.<sup>32</sup> The court based its holdings on CERCLA’s strict liability scheme and on conflicting evidence concerning American Cyanamid’s diligence.<sup>33</sup>

### B. *Strict Liability*

Courts generally hold generators and transporters strictly liable for government response costs incurred under section 104 of CERCLA.<sup>34</sup>

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29. *Id.* at 720. The company separated its wastes into categories, packed the waste in 58-gallon metal, open-head drums cushioned with vermiculite and absorbent materials, and disposed of the waste through a licensed transporter. *Id.* Further, the company contracted with the transporter to deliver the drums “exclusively to licensed disposal sites in Pennsylvania and New Jersey with the directions stating, ‘Disposal of these waste materials is not to be in violation of an ordinance, regulation or law of responsibility for safe delivery and disposal after leaving [the premises].’” *Id.* The company never consigned any material for delivery to the waste site where it was found. *Id.*

30. *Id.* at 722. Exxon hired a transporter licensed by New Jersey and the federal government. *Id.* at 721. Further, Exxon employees visited the disposal sites of its transporters to be assured of the adequacy of the disposal sites. *Id.*

31. *Id.* at 722.

32. *Id.* at 723. Cyanamid personnel visited its transporter’s facility and inspected its incinerator and licenses. *Id.* at 722.

33. *Id.* at 722-23. Cyanamid had an exclusive contract with its transporter. The company was aware of an excessive number of drums on the transporter’s property and of an incident in which the transporter was linked to improper waste disposal. *Id.* at 723.

34. *J.V. Peters & Co. v. EPA*, 767 F.2d 263, 266 (6th Cir. 1985). The *Peters* court dismissed a suit for declaratory judgment brought by current and former owners and operators of industrial waste storage facility, ruling that the suit was untimely filed. The court cited the following cases to support its holding that CERCLA § 107 (1980) imposes strict liability: *Bulk Distribution Centers v. Monsanto Co.*, 589 F. Supp. 1437 (S.D. Fla. 1984); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984), *aff’d*, 810 F.2d 726, 749 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987); *United States v. Price*, 577 F. Supp. 1103 (D.N.J. 1983); *United*

In *City of Philadelphia v. Stepan Chemical Co.*,<sup>35</sup> the United States District Court for the Eastern District of Pennsylvania noted that CERCLA section 101(32)<sup>36</sup> incorporates the liability standard which Congress codified in section 311 of the Clean Water Act.<sup>37</sup> The court relied on appellate court decisions<sup>38</sup> to conclude that section 101(32) imposes strict liability.<sup>39</sup>

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*States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982). *Peters*, 767 F.2d at 266.

35. 544 F. Supp. 1135, 1140 n.4 (E.D. Pa. 1982). Multiple defendants used two services to dispose of hazardous industrial waste. *Id.* at 1139. The disposal services bribed city employees to gain permission to dump hazardous waste at a city landfill. *Id.* The court, ruling on a motion for a judgment on the pleadings, found that a controversy existed and allowed the city to pursue its CERCLA claim against the defendants. *Id.* at 1154. The court noted that under CERCLA the defendants would be strictly liable for the city's response costs. *Id.* at 1140.

36. 42 U.S.C. § 9601(32) (Supp. IV 1986). The statute provides that "[t]he term 'liable' or 'liability' under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of Title 33 [§ 311 of the Clean Water Act (CWA)]." CWA § 311 contains that Act's hazardous substance provisions. *See, e.g.*, CWA § 311(f), 33 U.S.C. § 1321(f) (Supp. V 1987) (providing liability for removal costs).

37. *Stepan Chem.*, 544 F. Supp. at 1140 n.4. Congress addressed owner and operator liability in § 311(f) and third-party liability in § 311(g) of the CWA. *See* 33 U.S.C. 1321 (Supp. V 1987). The legislature bound the courts to hold owners and operators liable for discharges of oil or hazardous substances unless the defendant could prove that the "discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent. . . ." CWA § 311(f)(1), 33 U.S.C. § 1321(f) (Supp. V 1987). The third-party exemption in clause (D) appears to negate the theory of strict liability. CWA § 311(g) states, however, that

[w]here an owner or operator . . . alleges that such discharge was caused solely by . . . a third party, such owner or operator shall pay to the United States government the actual costs incurred . . . and shall be entitled by subrogation to all rights of the United States Government to recover such costs from such third party. . . . CWA § 311(g), 33 U.S.C. § 1321(g) (Supp. V 1987).

Thus, taken together, §§ 311(f) and (g) support the strict liability theory, yet allow third-party contribution.

38. *Stepan Chem.*, 544 F. Supp. at 1140 n.4. At least four federal courts of appeals have held CWA § 311 imposes strict liability: *United States v. LeBeouf Bros. Towing Co.*, 621 F.2d 787, 789 (5th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981); *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609, 613 (4th Cir. 1979); *United States v. Tex-Tow, Inc.*, 589 F.2d 1310, 1314-15 (7th Cir. 1978); *Burgess v. M/V Tamano*, 564 F.2d 964, 982 (1st Cir. 1977), *cert. denied*, 435 U.S. 941 (1978).

39. *Stepan Chem.*, 544 F. Supp. at 1140 n.4.



### C. Joint and Several Liability

CERCLA does not explicitly authorize courts to impose joint and several liability on CERCLA violators.<sup>40</sup> Congress debated the codification of joint and several liability but deleted the standard from the final law.<sup>41</sup> The watershed case concerning joint and several liability under CERCLA is *United States v. Chem-Dyne Corp.*<sup>42</sup> The *Chem-Dyne* court considered the Act's legislative history in construing the Act, but did not take individual legislators' comments as controlling.<sup>43</sup> Instead, the court constructed the liability standard from the overall presentation of the legislative history.<sup>44</sup> The court did not consider CERCLA's absence of references to joint and several liability as dispositive, but, based on its reading of the legislative history, found that Congress deleted joint and several liability to avoid potentially inequitable results.<sup>45</sup> The court held that Congress did not intend the deletion to preclude a court's imposition of joint and several liability,<sup>46</sup> instead, courts may apply joint and several liability as equity demands on a case-by-case basis.<sup>47</sup>

The *Chem-Dyne* court held that the imposition of joint and several liability on a defendant turns on the distinctiveness of the harm caused by the particular defendant and on the reasonableness of the basis for

40. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 806-07 (S.D. Ohio 1983).

41. The Committee on Environment and Public Works, reporting on S. 1480 (an unenacted predecessor bill to CERCLA), stated that anything less than joint and several liability would penalize the innocent victims of environmental disasters, while benefiting those who have caused the damage. S. REP. NO. 848, 96th Cong., 2d Sess. 62 (1980); see also 126 Cong. Rec. S14,964 (daily ed. Nov. 24, 1980). Senator Helms, however, worried that the inclusion of joint and several liability could result in extensive responsibility for a party who only minimally contributed to a waste site. 126 Cong. Rec. S15,004 (daily ed. Nov. 24, 1980). Representative Florio explained that Congress deleted the reference to joint and several liability to allow the courts to apply "common or previous statutory law" to cases as they arose. 126 Cong. Rec. H11,787 (daily ed. Nov. 24, 1980).

42. 572 F. Supp. 802 (S.D. Ohio 1983). In *Chem-Dyne*, the United States sued 24 defendants to recover the Superfund expenditures used to restore a site. *Id.* at 804. "The Chem-Dyne facility contain[ed] a variety of hazardous wastes from 289 generators or transporters, consisting of about 608,000 pounds of material." *Id.* at 811.

43. *Id.* at 807. In particular, the court stated that Senator Helms' construction of the statute, see *supra* note 41, was not entitled to deference because he was an opponent of CERCLA. *Id.* at 806.

44. *Id.* at 808.

45. *Id.* at 807-08.

46. See, e.g., Rep. Florio's remarks, *supra* note 41.

47. *Chem-Dyne*, 572 F. Supp. at 808.

apportionment.<sup>48</sup> At common law, courts may hold multiple persons causing a single indivisible harm jointly and severally liable.<sup>49</sup> Because hazardous waste sites often contain wastes from many companies,<sup>50</sup> courts often encounter difficulty apportioning liability between responsible parties in EPA cost-recovery actions.<sup>51</sup>

Apportionment may also create a no-win situation for a CERCLA defendant. A party wishing to limit its liability through apportionment must substantiate the extent of its involvement at the dump site.<sup>52</sup>

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48. *Id.* at 810. To support its conclusion, the court cited the RESTATEMENT (SECOND) OF TORTS §§ 433A, 881 (1964) (provisions defining apportionment and contribution respectively). See also Prager, *Apportioning Liability for Cleanup Costs Under CERCLA*, 6 STAN. ENVTL. L. REV. 198 (1986-87) (analyzing CERCLA liability apportionment).

49. *Chem-Dyne*, 572 F. Supp. at 810. RESTATEMENT (SECOND) OF TORTS § 875 (1964) provides a general rule for contributing tortfeasors: "Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm." *Id.*

50. See *infra* note 113 for the number of parties in three representative cases.

51. In *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361 (D.N.H. 1985), five parties estimated the number of drums of waste they had shipped to the site: Lilly Chemical Products, Inc., 670 drums; General Electric, 458 drums; Solvents Recovery Service Of New England, Inc., 5,962 drums; Lewis Chemical Corporation, 732 to 900 drums; Great Lakes Container Corporation, 500 to 700 drums. *Id.* at 1396. Nevertheless, the court held that "the exact amount or quantity of deleterious chemicals or other noxious matter cannot be pinpointed as to each defendant. The resulting proportionate harm to surface and groundwater cannot be proportioned with any degree of accuracy as to any individual defendant." *Id.*

More recently, the United States District Court for the District of Rhode Island held in *O'Neil v. Picillo*, 682 F. Supp 706 (D.R.I. 1988), that § 881 of the *Restatement (Second) of Torts* was applicable in EPA cost-recovery actions. *Id.* at 723 That provision states that "equitable shares of the liability with respect to an indivisible injury are appropriately resolved in an action for contribution. . . ." RESTATEMENT (SECOND) OF TORTS § 881 (1964). The court noted that the cost-recovery action quickly restores the EPA's funds used to perform future cleanups. *O'Neill*, 682 F.2d at 726. Apportionment of liability during the trial would slow the EPA's fund recovery. *Id.* Thus, "fairness and equitable apportionment [may be] more properly addressed in a subsequent contribution action." *Id.* at 725-26.

52. *Chem-Dyne*, 572 F. Supp. at 810. See RESTATEMENT (SECOND) OF TORTS § 433B (1976) (presenting the burden of proof among the parties in apportionment cases).

The EPA may accept business records to substantiate allegations of waste site contribution. In *United States v. Price*, 577 F. Supp. 1103 (D.N.J. 1983), the government offered loading tickets, indicating that a potentially responsible party (PRP) may have sent waste to a site, to persuade the court to deny Price's requested summary judgment. *Id.* at 1107. The court noted that although the loading tickets were admissible as evidence to deny summary judgment, they might not be admissible as trial evidence. *Id.* at 1116 n.13.

Supporting evidence, however, could disadvantage the party, in the absence of evidence that other parties also contributed to the waste at the site, by locking a defendant into a share of the liability which may be greater than its actual liability. Evidence submitted by a party may not mitigate that party's liability unless the site's total amount of waste is estimable. The evidence may simply constitute an admission by the submitting party. Even if the total amount of waste sent to a site is known, the courts might not view waste volume as "an accurate predictor of the risk associated with [a] waste. . . ."<sup>53</sup> Commingling of wastes from several sources increases the difficulty of apportionment, leaving courts with little choice but to impose joint and several liability on generators and transporters.<sup>54</sup>

### III. PRECULSION OF PRE-ENFORCEMENT JUDICIAL REVIEW

#### A. Introduction

Before Congress enacted the Administrative Procedure Act (APA),<sup>55</sup> which codifies the judicial reviewability of agency action,<sup>56</sup> the United States Supreme Court presumed that agency actions were judicially reviewable, notwithstanding the absence of express congressional authorization.<sup>57</sup> Pursuant to the APA, courts may review statutorily reviewable agency actions as well as final agency actions for which court remedies are inadequate.<sup>58</sup> Congress granted a right of

53. *Chem-Dyne*, 572 F. Supp. at 811.

54. *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1253 (S.D. Ill. 1984).

55. Codified as amended at 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 4301(2)(E), 5335(a)(B), 5362, 7521 (1982 & Supp. II 1984).

56. Administrative Procedure Act §§ 2(a)-(g), 10, 5 U.S.C. §§ 701-06 (1982 & Supp. II 1984) [hereinafter APA]. These sections address application and definitions, right of review, form and venue of proceeding, actions reviewable, relief pending review, and scope of review.

57. *Stark v. Wickard*, 321 U.S. 288, 307-08 (1944) ("The authority for a judicial examination of the validity of the Secretary's action is found in the existence of courts and the intent of Congress as deduced from the statutes and precedents.").

58. APA § 10(c), 5 U.S.C. § 704 (1982). The statute defines those agency actions which may be final:

A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final . . . whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

judicial review, however, to persons wronged by agency action "within the meaning of a relevant statute."<sup>59</sup> The Supreme Court has since stated that the APA's judicial review provisions apply to grievants unless Congress has clearly and convincingly indicated otherwise.<sup>60</sup>

The APA qualifies the right to judicial review, however, if the controversial statute "preclude[s] judicial review or [if] agency action is committed to agency discretion by law."<sup>61</sup> Most statutes limiting judicial review restrict, but do not prohibit, review.<sup>62</sup> Statutes which re-

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*Id.*

59. APA § 10(a), 5 U.S.C. § 702 (1982).

60. *Rusk v. Cort*, 369 U.S. 367, 379-80 (1961) The *Rusk* court affirmed a district court holding that Cort had a right of review under the APA for denial of a passport, notwithstanding the statutory language of the Immigration and Nationality Act of 1952, which neither showed an intention to provide a remedy nor indicated that existing remedies were to be denied. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-40 (1966) (the underlying legislation does not prohibit pre-enforcement review of FDA regulations).

61. APA § 10, 5 U.S.C. § 701(a) (1982). Courts may consider many factors when determining whether an action is committed to agency discretion. See generally Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968) (suggesting that partial review may be feasible in some circumstances). Courts consider factors such as: the presence of broad agency discretion; the importance of expertise to understanding the subject matter; the use of managerial structure in creating the agency involved; the impropriety of judicial intervention; the necessity of informal agency processes; the inability of a reviewing court to ensure a correct result; the need for expedience; the quantity of potentially appealable agency actions; and the existence of other methods to prevent abuse of agency discretion. *Id.*

The Supreme Court in *Heckler v. Chaney*, 470 U.S. 821 (1985), upheld as unreviewable an agency's action which was committed to the agency's discretion by law. In *Heckler*, prison inmates petitioned the Food and Drug Administration (FDA) to take enforcement actions against drugs used for human executions. *Id.* at 823-24. The FDA exercised its discretionary authority and refused to act. *Id.* at 824. In the petitioners' suit to compel the FDA's action, the district court granted summary judgment in favor of the FDA. *Id.* at 825. The court of appeals reversed, holding that the FDA's refusal to act was "irrational." *Id.* at 827. The Supreme Court reversed the judgment of the court of appeals, *id.* at 827, 838, holding that judicial review is precluded if "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 830.

62. G. ROBINSON, E. GELLHORN, & H. BRUFF, *THE ADMINISTRATIVE PROCESS* 238 (1986). Congress may enact statutes which preclude judicial review. The courts, however, will review the constitutionality of such statutes. Congress has precluded review of Veterans' Administration (VA) decisions, thus ensuring that veteran benefit claims do not burden the courts and the VA. See 38 U.S.C. § 211(a) (1982). Furthermore, preclusion ensures that the technical determinations and applications of VA policy regarding veterans' benefits are made adequately and uniformly. See generally *Johnson v. Robison*, 415 U.S. 361 (1974) (involving preclusion of judicial review of 38 U.S.C. § 211(a)).

strict judicial review do not necessarily violate due process if they afford a reasonable opportunity to be heard and to present evidence.<sup>63</sup>

### B. *Pre-SARA Preclusion of Judicial Review*

The EPA's response to a potential waste site ranges from listing the site for future remedial investigation and feasibility study<sup>64</sup> to cleaning up the site.<sup>65</sup> Before SARA's enactment, courts found that section 9604 of CERCLA implicitly disapproved of pre-enforcement judicial review.<sup>66</sup> The bench routinely dismissed challenges to most EPA response actions, short of cost-recovery suits, for two primary reasons: lack of a final agency action and the possible frustration of CERCLA's purposes.<sup>67</sup>

#### 1. Finality

Section 10(c) of the APA<sup>68</sup> allows courts to review final agency actions if court remedies are inadequate.<sup>69</sup> In *Abbott Laboratories v. Gardner*,<sup>70</sup> the Supreme Court stated that courts should consider an

63. *Yakus v. United States*, 321 U.S. 414, 433, 443 (1944) (Congress may constitutionally define inferior federal court jurisdiction and thus limit judicial review to specific courts).

64. *See, e.g., SCA Servs. of Ind. v. Thomas*, 634 F. Supp. 1355, 1357 (N.D. Ind. 1986). Potential Superfund sites are listed on the National Priorities List of the National Contingency Plan. 42 U.S.C. § 9605(g)(2) (Supp. IV 1986).

65. *SCA Servs.*, 634 F. Supp. at 1358.

66. *See, e.g., Lone Pine Steering Comm. v. EPA*, 777 F.2d 882, 887 (3d Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986). The court stated that the policy of preclusion of pre-enforcement judicial review applied to both emergency situations and remedial actions. *Id.*

67. *Pacific Resins and Chems., Inc. v. United States*, 654 F. Supp. 249, 252-53 (W.D. Wash. 1986). The *Pacific Resins* court, citing *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1966), found that *Pacific Resins'* suit against the EPA was not ripe for review because final agency action was lacking and because the plaintiff would not suffer hardship. *Pacific Resins*, 654 F. Supp. at 253. The company had not demonstrated any urgency, was not subject to penalties, and had not incurred liability. *Id.*

The *Pacific Resins* court also addressed the requirement for standing, noting that "[a] litigant must demonstrate a 'distinct and palpable injury' to himself." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). The court also noted that receipt of a notice letter represents only the possibility of injury, which is, in itself, insufficient to gain standing. *Pacific Resins*, 654 F. Supp. at 253.

68. 5 U.S.C. § 704 (1982).

69. *See supra* note 58 (quoting APA § 10(c), which defines "final" agency actions).

70. 387 U.S. 136 (1966) (holding that regulations governing the content of drug labels and advertising were final and, thus, reviewable).

agency action “final” if the action defines an agency’s position, has a “direct and immediate . . . effect on the day-to-day business” of the complaining parties,” has the status of law, and requires “immediate compliance.”<sup>71</sup> Prior to SARA, most courts held on the basis of these factors that EPA actions under CERCLA, short of cost-recovery suits, are not final agency actions.<sup>72</sup>

In *Pacific Resins and Chemicals, Inc. v. United States*,<sup>73</sup> the EPA notified Pacific Resins that the Agency had undertaken a remedial investigation and had identified the company as a potentially responsible party (PRP). The EPA’s notice letter also offered the company an opportunity to participate in the financing of remedial measures at the waste site and required the company to provide certain information.<sup>74</sup> Pacific Resins sought declaratory relief in federal district court concerning its liability.<sup>75</sup> The court held that the EPA’s notice letter was not a final agency action.<sup>76</sup> The court agreed with the EPA that the letter did not define the agency’s position, since a number of questions remained concerning the waste site’s decontamination.<sup>77</sup> Furthermore, the letter had no legal force and did not require judicial review to achieve enforcement or efficiency purposes.<sup>78</sup>

Other courts have interpreted CERCLA as providing an “adequate remedy in court,” albeit after the EPA completes its response activity and sues for section 107 cost recovery.<sup>79</sup> The *Pacific Resins* court noted that the company could challenge the EPA’s response action during a section 107 cost-recovery suit as inconsistent with the Na-

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71. *Id.* at 151-52.

72. *United States v. United Nuclear Corp.*, 610 F. Supp. 527, 528 (D.N.M. 1985) (EPA response activity, consisting of a remedial investigation and feasibility study, neither requires defendant action nor assigns liability and, thus, is not final).

73. 654 F. Supp. 249 (W.D. Wash. 1986).

74. *Id.* at 251. The EPA required the company to furnish information pursuant to 42 U.S.C. § 9604 (1982). 654 F. Supp. at 251.

75. *Id.* at 250.

76. *Id.* at 252-53.

77. *Id.* at 252. Neither the court nor the EPA identified which factors were unresolved.

78. *Id.* at 252.

79. *Lone Pine Steering Comm. v. EPA*, 777 F.2d 882, 887 (3d Cir. 1985) (cost-recovery trial under CERCLA § 107 is adequate safeguard of complainants’ objections and comments), *cert. denied*, 476 U.S. 1115 (1986); *J.V. Peters & Co. v. EPA*, 767 F.2d 263, 266 (6th Cir. 1985) (CERCLA § 107 cost-recovery suit will afford a PRP an adequate remedy in court; the EPA may not impose any costs inconsistent with the National Contingency Plan (NCP)); *Pacific Resins*, 654 F. Supp. at 255.

tional Contingency Plan.<sup>80</sup> If the CERCLA defendant prevailed, the court would not allow the EPA to recover any such costs.<sup>81</sup>

Finally, in *B.R. Mackay & Sons, Inc. v. United States*,<sup>82</sup> the United States District Court for the District of Utah held that in declaratory judgment actions, judicial review is unavailable prior to EPA's initiation of a cost-recovery action, even if the EPA had completed its cleanup.<sup>83</sup> Thus, the generator or transporter will waste its resources should it attempt to obtain a declaratory judgment concerning its liability.

## 2. Frustration of CERCLA's Purposes

In *Block v. Community Nutrition Institute*,<sup>84</sup> the Supreme Court held that the extent to which "a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objective, its legislative history, and the nature of the administrative action involved."<sup>85</sup> Both CERCLA's legislative history and statutory structure support the conclusion that CERCLA's purpose is to act quickly against hazardous waste sites without awaiting a judicial determination of liability.<sup>86</sup>

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80. *Id.* at 255. Congress mandated the creation of an NCP in CERCLA § 105, 42 U.S.C. § 9605 (Supp. IV 1986).

81. 654 F. Supp. at 255. Citing with approval the *J.V. Peters* case, the court held the EPA may not recover costs for actions inconsistent with the NCP. *Id.* Congress expressly limited the EPA to actions that are consistent with the NCP and which "the President deems necessary to protect the public health or welfare or the environment." CERCLA § 9604(a)(1), 42 U.S.C. § 9604(a)(1) (Supp. IV 1986).

82. 633 F. Supp. 1290 (D. Utah 1986).

83. *Id.* at 1295. The court noted that the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 (1982 & Supp. II 1984), does not establish a jurisdictional basis independent of CERCLA. *Id.* In *Mackay*, the EPA completed a cleanup and billed the potentially responsible company \$235,000. During settlement negotiations, the company filed for a declaratory judgment that it was not liable for EPA's expenditures. The court dismissed the company's action based on CERCLA's philosophy of denying judicial intervention of cleanup procedures and on precedent in the Tenth Circuit. *Mackay*, 633 F. Supp. at 1297. See *In re Combustion Equip. Assoc.*, 838 F.2d 35 (2d Cir. 1988) (declaratory judgment action concerning the discharge in bankruptcy of environmental cleanup liability is not ripe for review before the EPA sues for cost recovery); *Pacific Resins & Chems., Inc. v. United States*, 654 F. Supp. 249 (W.D. Wash. 1986) (declaratory judgment requires finality and ripeness of the underlying issue).

84. 467 U.S. 340 (1984).

85. *Id.* at 345.

86. *Pacific Resins*, 654 F. Supp. at 253; see also *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805 (S.D. Ohio 1983) (Congress enacted CERCLA "to provide rapid

To obtain rapid results, Congress implicitly granted the EPA broad discretion in CERCLA enforcement.<sup>87</sup> The EPA's discretionary authority is based on the need for expertise in the cleanup of hazardous waste sites. Determinations of appropriate removal and remedial actions are within the EPA's discretion because they require specialized knowledge and expertise.<sup>88</sup> A reviewing court's function is neither to arbitrate between scientific experts nor to judge the validity of opposing expert theories,<sup>89</sup> but rather to test the EPA's decisions against the "arbitrary and capricious" standard.<sup>90</sup>

Courts recognize the number of potential CERCLA actions is immense.<sup>91</sup> A number of courts, recognizing this potential in CERCLA's language, structure, objectives, legislative history, and the EPA's discretionary authority, have concluded that pre-enforcement judicial re-

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ponses to the nationwide threats posed by 30-50,000 improperly managed hazardous waste sites").

87. Congress' implicit grant of discretionary authority is evident throughout CERCLA. For example, Congress authorized the President to act when a "substantial threat" of pollution exists. See CERCLA § 104(a)(1), 42 U.S.C. § 9604(A)(1) (Supp. IV 1986). The President may also "delegate and assign any duties or powers imposed upon him or assigned to him and to promulgate any regulations necessary to carry out" CERCLA's provisions. CERCLA § 115, 42 U.S.C. § 9615 (1986). Furthermore, "the administrator shall promulgate and revise as may be appropriate, regulations designating . . . hazardous substances." CERCLA § 102(a), 42 U.S.C. § 9602(a) (Supp. IV 1986). Finally, the administrator shall use his discretion to determine reportable quantities. *Id.*

88. *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 748 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987).

89. "Choice among scientific test data is precisely the type of judgment that must be made by EPA, not this court." *Hercules Inc. v. EPA*, 598 F.2d 91, 115 (D.C. Cir. 1978).

90. *Northeastern Pharmaceutical*, 810 F.2d at 748. See *United States v. Ward*, 618 F. Supp. 884, 900 (E.D.N.C. 1985). The *Ward* court held that PRPs "may not seek to have the court substitute its own judgment for that of the EPA. [PRPs] may only show that the EPA's decision about the method of cleanup was 'inconsistent' with the NCP in that the EPA was arbitrary and capricious in the discharge of their duties under the NCP." *Id.* See also *United States v. Dickerson*, 660 F. Supp. 227, 231 (M.D. Ga. 1987) ("to establish its right to conduct a response action, . . . the EPA must establish" that its decision to do so is not "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law").

91. Considering the number of hazardous waste sites and the number of PRPs at each site, one can imagine countless potential CERCLA suits. "To delay remedial action until the liability situation is unscrambled would be inconsistent with the statutory plan to promptly eliminate the sources of danger to health and environment." *Lone Pine Steering Comm. v. EPA*, 777 F.2d 882, 886 (3d Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986). *Lone Pine* involved 142 PRPs. *Id.*



view would frustrate CERCLA's purposes.<sup>92</sup>

### C. *Preclusion of Judicial Review by SARA*

#### 1. Validity

Congress expressly precluded pre-enforcement judicial review when it enacted the Superfund Amendments and Reauthorization Act of 1986.<sup>93</sup> Statutory preclusion effectively rebuts the presumption of judicial reviewability<sup>94</sup> and moots the question whether CERCLA response actions are committed to EPA's discretion. Although federal circuit courts have established that pre-enforcement judicial review is unavailable under the APA, the courts have yet to determine the constitutionality of section 113(h) of CERCLA.

Congress, limited solely by the Constitution, may control federal court jurisdiction.<sup>95</sup> Federal courts are typically hostile to statutes that seek to preclude judicial review of cases involving the deprivation of an individual's constitutional rights. The Supreme Court has held, however, that administrative decisions concerning property rights are not reviewable if Congress has statutorily precluded such review and the litigants are not challenging an agency on due process grounds.<sup>96</sup> The United States District Court for the Eastern District of Michigan recently addressed this aspect of the constitutionality of section 113(h) in

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92. See, e.g., *Lone Pine*, 777 F.2d at 888 (CERCLA's purpose would be frustrated by pre-enforcement judicial review), *cert. denied*, 476 U.S. 1115 (1986); *J.V. Peters & Co. v. EPA*, 767 F.2d 263, 265 (6th Cir. 1985) (citing S. REP. NO. 11, 99th Cong., 1st Sess. 58 (1985) ("Pre-enforcement review would . . . delay . . . cleanups, would increase response costs, and would discourage settlements and voluntary cleanups.")); see generally S. REP. NO. 848, 96th Cong., 2d Sess. 62 (1980); 126 Cong. Rec. 26,757-98 (1980); 126 Cong. Rec. 30,897-30,987 (1980).

93. See *supra* note 7 for text of statute.

94. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984) (specific language may overcome the presumption of judicial reviewability).

95. The Constitution provides that Congress shall have the power "[t]o constitute Tribunals inferior to the Supreme Court." U.S. CONST. art. I, § 8, cl. 9. Further, "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. For a thorough discussion of Congress' authority to expand and restrict federal court jurisdiction, see P. BATOR, D. MELTZER, P. MISHKIN, & D. SHAPIRO, *HART & WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM* 362, 424 (1988).

96. The 1952 Immigration and Nationality Act purported to preclude judicial review of certain deportation orders, thereby affecting the personal right of citizenship. The Supreme Court held in *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955), that such orders were reviewable, notwithstanding the statutory preclusion of review. The Court

*South Macomb Disposal Authority v. United States Environmental Protection Agency*.<sup>97</sup> The court found that because section 113(h) does not absolutely bar review, but simply alters the timing of review,<sup>98</sup> the statute is constitutional.<sup>99</sup>

The Supreme Court has addressed due process concerns in two veins: generally, with respect to a balancing of factors; and specifically, with regard to statutory preclusion of judicial review. The Court examines three factors to determine what process is due: the private interest at risk; the risk of deprivation of that interest and the safeguards against such deprivation; and the corresponding government interest.<sup>100</sup> In cases of environmental liability, the private interest is often the capital invested. Courts must weigh this private interest against the public's interest in a clean environment and the government's interest in a court docket free of frivolous appeals.<sup>101</sup>

In *Ewing v. Mytinger & Casselberry, Inc.*,<sup>102</sup> the Court held that when property rights are in controversy, due process requires that the government afford the litigant a hearing and a judicial determination.<sup>103</sup> Due process requires a hearing before the final administrative order becomes effective, but not regarding an agency's preliminary de-

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explained that Congress enacted APA §§ 10, 12 "to remove obstacles to judicial review of agency action." *Id.* at 51.

In contrast, Congress enacted the Dent Act to compensate persons for "supplies or services furnished or losses incurred in helping the government during the war." *Work v. United States ex rel. Rives*, 267 U.S. 175, 178 (1925). Compensation is a type of property. The Act expressly precluded judicial review of certain discretionary decisions of the Secretary of the Interior. *Id.* at 180. The Court upheld the preclusion of judicial review as a proper exercise of Congress' power. The Court also upheld preclusion of judicial review in *Schilling v. Rogers*, 363 U.S. 666 (1960). The *Schilling* Court justified preclusion of the review of money or property claims under the Trading with the Enemy Act based on statutory language which allowed World War I claims, but did not mention World War II claims. *Id.* at 671. The Court also cited legislative history as support for its decision. *Id.* at 671-73.

97. 681 F. Supp. 1244 (E.D. Mich. 1988).

98. *Id.* at 1251.

99. *Id.* at 1251-52.

100. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

101. SARA also added language to CERCLA mandating that remedial actions under § 104 be cost effective. CERCLA § 121(a), 42 U.S.C. § 9621(a) (Supp. IV 1986). This language, and its implied penalty that the party cleaning up a site will be unable to obtain reimbursement if its actions are not cost effective, tends to safeguard PRPs' financial interests.

102. 339 U.S. 594 (1950).

103. *Id.* at 599 (citing *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931) ("Where only property rights are involved, mere postponement of the judicial enquiry is

cision.<sup>104</sup> When EPA has cleaned up a hazardous waste site but has not commenced a cost-recovery action, the agency has not assessed the liability of the potentially responsible parties. Thus, a final administrative order has not become effective and due process does not require a hearing. Although site owners could argue that the EPA violated their due process rights by trespassing on their land, courts might not allow a generator or transporter, as a third party, to complain.<sup>105</sup>

Potentially responsible parties could argue that an EPA response action is a trespass or invasion of private property<sup>106</sup> that violates the

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not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate.”).

This footnote’s aforementioned cases are distinguishable from *Aminoil, Inc. v. EPA*, 599 F. Supp. 69 (C.D. Cal. 1984). The *Aminoil* court held that due process requires that a hearing “be granted at a meaningful time and in a meaningful manner.” *Id.* at 74. *Aminoil* claimed the assessment of daily fines and treble damages infringed upon its due process rights. *Id.* Typically, once the EPA has cleaned up a hazardous waste site and is about to initiate a § 104 cost-recovery action, liability is postponed until the trial so that the PRPs have an opportunity to be heard and to present evidence.

104. *Mytinger & Casselberry*, 339 U.S. at 598; *Lone Pine Steering Comm. v. EPA*, 777 F.2d 882, 886 (3d Cir. 1985) (“In property deprivation cases, due process does not require access to the courts before final administrative action.”), *cert. denied*, 476 U.S. 1115 (1986).

The Eleventh Circuit recently followed and extended the *Lone Pine* rationale in *Dickerson v. EPA*, 834 F.2d 974 (11th Cir. 1987), *aff’g* *United States v. Dickerson*, 660 F. Supp. 227 (M.D. Ga. 1987). *Dickerson* owned a waste site and filed suit to enjoin the EPA from initiating a response action at the site. 834 F.2d at 976. He argued that “barring pre-enforcement judicial review constitutes a denial of due process because some of the [waste removed from the property] may be resold.” *Id.* at 978 n.7. The court, citing *Lone Pine*, summarily dismissed *Dickerson*’s argument, stating that due process was not violated even though *Dickerson* might suffer financial hardship. *Id.*

An informal hearing will satisfy the hearing requirement. *United States v. Rohm and Haas Co.*, 669 F. Supp. 672 (D.N.J. 1987).

105. Courts have held that site owners and operators, but not generators and transporters, may claim EPA’s trespass was a violation of due process. First, the generator or transporter is usually not the owner of the sites used. *Cf. United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986) (chemical plant officers who did not own or operate the farm where chemicals were dumped could not be considered the owners or operators of the dump site), *cert. denied*, 108 S. Ct. 146 (1987). Second, generators and transporters typically abandon the waste and therefore do not retain an ownership interest in it. Third, courts allow the taking of a site for remedial action as a valid exercise of the EPA’s police power. Finally, rehabilitation will likely vest the property with a higher value than it had as a waste site.

106. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Because generators and transporters usually lack an ownership interest in the affected property, the court might dismiss their “taking” suit for lack of standing.

taking clause of the fifth amendment.<sup>107</sup> The fifth amendment, however, does not require compensation for a taking if the taking furthers public health, safety, or welfare.<sup>108</sup> The *Mytinger* Court noted that the government does not violate due process when it destroys property for the protection of the public, even if it fails to notify the owner or hold a hearing.<sup>109</sup> Clearly, a hazardous waste site endangers the public health. Thus, the fifth amendment does not require the EPA to compensate potentially responsible parties for action taken to alleviate risks associated with the site.<sup>110</sup>

CERCLA's preclusion of pre-enforcement judicial review is further supported by analogy to relevant portions of the Veterans' Administration Act. The Supreme Court has upheld a section of the Act precluding judicial review of some Veterans' Administration (VA) decisions. The Court held preclusion of certain VA claims was necessary to avoid overburdening the courts and the VA.<sup>111</sup> Similarly, in the context of CERCLA, the number of potentially appealable agency actions is immense.<sup>112</sup> Due to multiple dumpings, innumerable parties may be potentially responsible for a given CERCLA site.<sup>113</sup> VA claims are

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107. The Constitution's fifth amendment provides that private property shall not be taken for public use without just compensation. U.S. CONST. amend. V.

108. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (citing *Mugler v. Kansas*, 123 U.S. 652, 655 (1887)) "[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."

109. *Mytinger & Casselberry*, 339 U.S. at 599-600; see also *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 300 (1981) (public health and safety protection is a paramount government interest justifying summary administrative action); *Yakus v. United States*, 321 U.S. 414, 443 (1944) ("For the protection of public health [the legislature] may order the summary destruction of property without prior notice or hearing.").

110. The United States District Court for the District of Massachusetts recently addressed the "taking" issue in *United States v. Charles George Trucking Co.*, 682 F. Supp. 1260, 1270-71 (D. Mass. 1988). The court held that if the EPA determines it can complete the necessary remedial action at a site without acquiring the property, the EPA need not take the property; consequently, a taking claim will not arise.

111. *Johnson v. Robison*, 415 U.S. 361, 370-73 (1974). The Veteran's Administration Act appears at 38 U.S.C. §§ 201-46 (1988). The provision which precludes judicial review of the Administrator's determinations appears at 38 U.S.C. § 211 (1988).

112. See *supra* note 4 for discussion of the number of hazardous waste sites in the United States.

113. See, e.g., *Lone Pine Steering Comm. v. EPA*, 777 F.2d 882, 883 (3d Cir. 1985) (142 PRPs), *cert. denied*, 476 U.S. 1970 (1986); *Pacific Resins & Chem., Inc. v. United States*, 654 F. Supp. 249, 251 (W.D. Wash. 1986) (198 PRPs); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 811 (S.D. Ohio 1983) (289 generators or transporters).

precluded from review to ensure that complex determinations of VA policy regarding veterans' benefits are made adequately and uniformly. By analogy, preclusion of CERCLA claim review ensures that complex determinations of EPA policy regarding hazardous waste are made adequately and uniformly. Thus, courts should uphold the statutory preclusion of judicial review created in section 113(h).<sup>114</sup>

## 2. Standard and Scope of Review

Congress defined the standard and scope of judicial review of EPA response actions, unaddressed prior to SARA, in section 113(j) of CERCLA.<sup>115</sup> Congress also limited judicial review of response actions

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114. *But see* *Chemical Waste Management, Inc. v. EPA*, 673 F. Supp. 1043 (D. Kan. 1987). *Chemical Waste Management (CWM)* operated a hazardous waste incinerator. The EPA, pursuant to CERCLA § 121 (d)(3), 42 U.S.C. § 9621(d)(3) (Supp. IV 1986), declared the facility ineligible to receive wastes. *Chemical Waste Management*, 673 F. Supp. at 1055. Strictly speaking, CERCLA § 113(h) precludes a court's jurisdiction in controversies arising under CERCLA § 121(d)(3). 673 F. Supp. at 1055. The *Chemical Waste Management* court retained jurisdiction because: 1) EPA's shutdown of CWM's incinerator caused the delay in cleanup, not CWM's lawsuit; and 2) CERCLA § 113 allowed companies like CWM to present evidence and to be heard after the cleanup. In this case, however, where there would be no cleanup, due process would be violated. *Id.* Further, CWM would suffer irreparable financial loss from the shutdown of its incinerator. *Id.* at 1057.

In a similar case, *SCA Servs. of Ind. v. Thomas*, 634 F. Supp. 1355 (N.D. Ind. 1986), the court held a company could challenge CERCLA's constitutionality and a court had jurisdiction to hear such a challenge. SCA operated a landfill in Indiana that the EPA planned to list on the National Priorities List. *Id.* at 1357. SCA challenged the proposal under the due process clause and the separation of powers doctrine. *Id.* at 1358. The court retained jurisdiction because SCA demonstrated a "realistic danger of sustaining direct injury" such as damage to reputation and loss of business goodwill, property value, and use of the dump site. *Id.* at 1361. The court ultimately found for the EPA on the merits. *Id.* at 1378, 1382.

115. 42 U.S.C. § 9613(j) (Supp. IV 1986) (added by SARA § 113(c)(2), 100 Stat. 1650). CERCLA § 113(j) provides in pertinent part:

(1) Limitation

In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) Standard

In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision . . . unless the objecting party can demonstrate . . . that the decision was *arbitrary and capricious or otherwise not in accordance with law*.

CERCLA § 113(j), 42 U.S.C. § 9613(j) (Supp. IV 1986) (emphasis added).

to the administrative record, but stated that courts should apply administrative law principles when considering the admissibility of supplemental materials.<sup>116</sup> Thus, the courts will uphold response actions not found to be “arbitrary and capricious or otherwise not in accordance with law.”<sup>117</sup> If the court finds a response action unlawful, it may only award response costs, damages, or other relief that is not inconsistent with the National Contingency Plan.<sup>118</sup> In adding this provision to CERCLA, Congress attempted to balance the need for judicial efficiency with the need for protection against EPA abuse.<sup>119</sup>

#### IV. POTENTIAL RESPONSES

##### A. *Participation in Recordmaking*

Congress mandated in CERCLA section 113(k)(1)<sup>120</sup> that the EPA create an administrative record which will serve as the basis for post-enforcement judicial review.<sup>121</sup> Congress enumerated participation procedures for the development of the administrative record in section 113(k)(2).<sup>122</sup> The legislative command that courts should rely on the

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116. CERCLA § 113(j)(1), 42 U.S.C. § 9613(j)(1) (Supp. IV 1986); *but see* *United States v. Hardage*, 663 F. Supp. 1280 (W.D. Okla. 1987). After ruling that CERCLA § 113(j) did not apply retroactively, the *Hardage* court suggested in dicta that CERCLA § 113(j) allows *de novo* review of proposed EPA remedies when the agency sues for injunctive relief under CERCLA § 106(a). 663 F. Supp. at 1283. The court noted that CERCLA § 113(j)(1) refers to “response action taken or ordered by the President.” Therefore, if the court issued injunctive relief, the court, and not the President, would be ordering the response action. *Id.* at 1284. The court implied, however, that judicial review based on the administrative record may apply to CERCLA § 107 cost-recovery actions. *Id.* at 1285.

117. *See supra* note 115 for text of CERCLA § 113(j)(2). In *United States v. Seymour Recycling Corp.*, 679 F. Supp. 859 (S.D. Ind. 1987), the court addressed the constitutionality of review of the administrative record under the “arbitrary and capricious” standard. Citing *Mathews v. Eldridge*, 424 U.S. 319 (1976), the court held that such review did not violate the due process rights of generators so long as the generators were given a meaningful opportunity to comment. *Seymour*, 679 F. Supp. at 863-65.

118. *See supra* note 115 for text of CERCLA § 113(j)(3).

119. H.R. REP. NO. 253, 99th Cong., 1st Sess., pt. 1, at 81 (1985).

120. 42 U.S.C. § 9613(k)(1) (Supp. IV 1986). The statute provides that “[t]he President shall establish an administrative record upon which the President shall base the selection of a response action.” *Id.*

121. *Id.*

122. 42 U.S.C. § 9613(k)(2) (1986). The statute gives the President the authority to provide for the participation of interested persons, including [PRPs], in the development of the administrative record. The procedures for developing the record include:

administrative record suggests that potentially responsible parties should fully participate in the record's creation to preserve issues for future litigation. A party should not depend on the court to consider supplemental material.<sup>123</sup> The generator or transporter should assess EPA cleanup proposals and provide comments and alternatives. Potential parties should continue this commentary during the waste site's rehabilitation, observe the project, and prepare for a potential EPA cost-recovery suit.<sup>124</sup>

Judicial review based on the administrative record, however, may not provide the court with adequate and understandable scientific evidence.<sup>125</sup> Therefore, potential parties should document thoroughly any comments submitted to the EPA in terms that a nontechnical judge can understand.

### B. *Public Participation*

CERCLA section 117<sup>126</sup> provides that the EPA shall publish a notice and an analysis of plans for remedial action before commencing cleanup. Further, the EPA must provide a reasonable opportunity for written and oral comments and an opportunity for a public meeting to

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(i) Notice to potentially affected persons and the public, which shall be accompanied by a brief analysis of the plan and alternative plans considered. (ii) A reasonable opportunity to comment and provide information regarding the plan. (iii) An opportunity for a public meeting in the affected area. . . . (iv) A response to each of the significant comments, criticisms, and new data submitted in written or oral presentations. (v) A statement of the basis and purpose of the selected action. *Id.*

123. *But see* *United States v. Rohm & Haas Co.*, 669 F. Supp. 672, 683 (D.N.J. 1987) (where inadequacies in an administrative record frustrate proper judicial review of agency action under the arbitrary and capricious standard, the court should remand the case to the underlying agency or allow supplementation of the record).

In *United States v. Nicolet, Inc.*, 1987 U.S. Dist. LEXIS 5139 (E.D. Pa. 1987), the court stated that it may allow supplementation of the record "when the administrative record does not disclose the factors that were considered or the agency's construction of the evidence," when there is a showing of bad faith or improper behavior by the EPA, or when the reasons asserted by the EPA for its actions are inadequate. *Id.* at 10-11.

124. *Lone Pine Steering Comm. v. EPA*, 777 F.2d 882, 887 (3d Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986). The PRP might consider the creation of a photographic record of the remedial action and the use of an independent licensed professional engineer who could serve as a witness in court.

125. The potential problem stems from scientific illiteracy in the judicial system. Ninety-five percent of the United States population is technically illiterate. *CHEMICAL & ENG'G NEWS*, Dec. 7, 1987, at 18, col. 1.

126. 42 U.S.C. § 9617 (Supp. IV 1986).

address the plans.<sup>127</sup> Potential parties should attend meetings which pertain to their site.

### C. *Third Party Suits*

A generator or transporter may attempt to redistribute its costs to other parties through a citizen suit under CERCLA section 310.<sup>128</sup> Section 310 allows a person to sue an alleged CERCLA violator or the EPA when it fails to perform a nondiscretionary duty.<sup>129</sup> One court has suggested that a party might use the citizen suit provision to challenge the adequacy of an EPA-selected remedy.<sup>130</sup> The citizen suit provision does not apply to the delay of section 104 response actions, however, because section 310 expressly precludes citizen suits if a conflict would arise with section 113(h). Thus, a citizen suit may not be brought to challenge a removal or remedial response action under section 104.

Recently, the United States District Court for the Eastern District of Pennsylvania held in *Cabot Corporation v. United States Environmental Protection Agency*<sup>131</sup> that it did not have jurisdiction in a citizen suit alleging the EPA failed to perform nondiscretionary duties.<sup>132</sup> The

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127. *Id.*

128. See Superfund Amendments and Reauthorization Act, Pub. L. No. 96-510, § 310 (as added Oct. 17, 1986, Pub. L. No. 99-499, § 206, 100 Stat. 1703, as codified at 42 U.S.C. § 9659). CERCLA § 310 allows any person to "commence a civil action on his own behalf against any person (including the United States and any other governmental instrumentality . . .) who is alleged to be in violation of any standard, regulation, condition, requirement, or order . . .; or against the President or any other officer of the United States [including the EPA Administrator] where there is alleged a failure to perform any act or duty under [CERCLA]." CERCLA § 310, 42 U.S.C. § 9659 (Supp. IV 1986)

129. CERCLA § 310, 42 U.S.C. § 9659 (Supp. IV 1986) (added by SARA § 206, 100 Stat. 1703).

130. *Artesian Water Co. v. County of New Castle*, 659 F. Supp. 1269, 1290 n.39 (D. Del. 1987). Groundwater pollution from a New Castle County landfill threatened Artesian Water Company's water supply. *Id.* at 1276. Artesian sued the County and submitted a claim against the Superfund, alleging that it suffered damage of a natural resource. *Id.* at 1276, 1287. Although judicial review is normally unavailable prior to EPA enforcement, the court noted that Artesian might challenge the EPA's proposed response action under the citizen suit provision if the EPA's response fails to provide the water company with an alternative water supply. *Id.* at 1290 n.39.

131. 677 F. Supp. 823 (E.D. Pa. 1988)

132. *Id.* at 825-26. The PRPs alleged that the EPA failed to contract with the state, select the most cost-effective remedial plan, and modify the administrative record "to include detailed cost data on all the environmentally acceptable remedial alternatives." *Id.* at 825.



court found that citizen suits by hazardous waste transporters and generators would be contrary to CERCLA's philosophy of providing immediate waste-site cleanup.<sup>133</sup>

CERCLA section 113(i)<sup>134</sup> provides for intervention by right to parties who possess an interest in the underlying litigation. Intervention, however, may expose the intervening party to liability. Nevertheless, a party may wish to intervene to ensure that the court equitably apportion liability to all parties involved.

The generator or transporter probably cannot compel the EPA to impose response-action costs on other parties. While joinder was available before SARA through the use of Rule 19 of the Federal Rules of Civil Procedure,<sup>135</sup> the courts have not viewed joinder as compulsory because joint and several liability precludes such parties' indispensability.<sup>136</sup> As the *United States v. A & F Materials Co.* court noted, however, a party may implead a third-party defendant using Rule 14 of the Federal Rules of Civil Procedure.<sup>137</sup>

#### D. Contribution

Prior to SARA, most courts allowed contribution in CERCLA cases.<sup>138</sup> SARA, through CERCLA section 113(f),<sup>139</sup> codified the

133. *Id.* at 828.

134. 42 U.S.C. § 9613(i) (Supp. IV 1986). The statute provides that "any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest. . . ." *Id.*

135. See FED. R. CIV. P. 19(a), (b) (joinder of persons needed for just adjudication).

136. *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1260-61 (S.D. Ill. 1984). *But see O'Leary v. Moyer's Landfill, Inc.*, 677 F. Supp. 807 (E.D. Pa. 1988). In *O'Leary*, the district court held that the EPA, which was conducting a remedial investigation and feasibility study on the landfill pursuant to CERCLA, could be joined as an indispensable party to a bankruptcy proceeding. Despite the EPA's assertion that judicial review must be deferred until the completion of the cleanup, the court held that it had the equitable power to join the EPA. *Id.* at 814-19. The court also held that the bankruptcy receiver may attempt to join the EPA through a citizen suit. *Id.* at 815-16.

137. *Id.* See FED. R. CIV. P. 14(a) (defining the terms by which a defendant may bring in a third party).

138. The following cases held that contribution was available: *United States v. County of New Castle*, 642 F. Supp. 1258 (D. Del. 1986); *United States v. Conservation Chem. Co.*, 628 F. Supp. 391 (W.D. Mo. 1985); *Wehner v. Syntex Agribusiness Inc.*, 616 F. Supp. 27 (E.D. Mo. 1985); *but see United States v. Westinghouse*, 22 Env't Rep. Cas. (BNA) 1230 (S.D. Ind. 1983) (CERCLA does not imply a cause of action for contribution).

common law and specifically authorized contribution<sup>140</sup> actions by parties subject to CERCLA liability against other potentially liable parties. The courts may resolve contribution claims by using appropriate equitable factors to allocate response costs among responsible parties.<sup>141</sup>

Unfortunately, the apportionment problem remains. The fair value of the response cost attributable to a given company's waste may be based on many factors, including volume, toxicity, and migratory potential.<sup>142</sup> One solution is to require each responsible party to bear a pro rata share of the response costs. This solution, however, would unfairly burden contributors of insignificant amounts of waste at the site. Until more cases are resolved under SARA, a generator or transporter should not rely on the possibility of recovering response costs through contribution unless he is prepared for either protracted arbitration or adjudication.

### E. Settlement

Finally, Congress enacted CERCLA section 122<sup>143</sup> to encourage early settlement of claims between the EPA and responsible parties.<sup>144</sup>

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139. 42 U.S.C. § 9613(f) (Supp. IV 1986) (added by SARA § 113(b), 100 Stat. 1647).

140. For a detailed discussion of contribution under CERCLA, see Garber, *Federal Common Law of Contribution Under the 1986 CERCLA Amendments*, 14 *ECOLOGY L.Q.* 365 (1987).

141. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (Supp. IV 1986).

142. *United States v. Conservation Chem. Co.*, 628 F. Supp. 391, 401 (W.D. Mo. 1985). Courts may also consider the degree of involvement and the care exercised by parties responsible for site creation, as well as the cooperation the parties demonstrated in preventing public health or environmental problems. *United States v. Tyson*, 1988 U.S. Dist. LEXIS 841 at 11 (E.D. Pa. 1988).

The EPA published interim guidelines for the allocation of responsibility in 52 Fed. Reg. 19,919 (1987). The guidelines affirm the use of volume, toxicity, and mobility as factors for the allocation of responsibility. *Id.* The EPA will also consider settlement criteria such as the "strength of evidence tracing the wastes at a site to PRPs, the ability of PRPs to pay, litigative risks in proceeding to trial, public interest considerations, precedential value, value of obtaining a present sum certain, inequities and aggravating factors, and nature of the case that remains after settlement." *Id.* The EPA will often discount toxicity when allocating responsibility because toxicity is often difficult to determine, controversial, and seldom "causally related" to the cleanup cost. *Id.* at 19,920.

143. 42 U.S.C. § 9622 (Supp. IV 1986).

144. CERCLA § 122(a) provides that "[w]henver practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Con-

Because the legislature has precluded claims for contribution between settlers and other responsible parties,<sup>145</sup> the generator or transporter may desire to settle at the earliest possible date. Early settlement, however, is like a roll of the dice: it may minimize liability if more extensive contamination is found, or it may compensate the government "for claims on which the government would not have prevailed."<sup>146</sup> A generator or transporter's settlement strategy will thus depend on the extent of that party's aversion to risk. A risk-averse party might prefer a cash settlement offer to solidify its financial liability, while a risk-taking party may choose to perform future remedial work at the site, hoping that less cleanup than expected will be required.

## V. CONCLUSION

The preclusion of pre-enforcement judicial review of CERCLA remedial actions is founded upon two legitimate bases: the lack of a final agency action and the potential frustration of the Act's purposes. Although courts could impose joint and several liability upon hazardous waste generators and transporters in CERCLA remedial actions, Congress affords these parties an opportunity for a hearing and a judicial determination before the court imposes liability. Further, Congress has constructed CERCLA so as to protect potential parties from EPA abuse. Thus, Congress' preclusion of pre-enforcement judicial review concerning CERCLA claims is a rational and constitutional extension of existing common law.

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tingency Plan in order to expedite effective remedial actions and minimize litigation." CERCLA § 122(a), 42 U.S.C. § 9622(a) (Supp. IV 1986).

145. CERCLA § 122(h)(4), 42 U.S.C. § 9622(h)(4) (Supp. IV 1986), provides:

A person who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement shall not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

*Id.*

146. *United States v. Wade*, 577 F. Supp. 1326, 1336 (E.D. Pa. 1983).

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