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INTRODUCTION

The Tenth Circuit handed down several important decisions in the field of environmental law between September 1994 and September 1995.[1] This Survey focuses on two substantial decisions on environmental law issues. The first case, *United States v. Colorado & Eastern Railroad*,[2] discussed the complex, and as yet unsettled, distinction between cost recovery and contribution as governed by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980.[3] Secondly, *Laguna Gatuna, Inc. v. Browner*,[4] a case of first impression in the Tenth Circuit, treated the issue of pre-enforcement judicial review of a Clean Water Act (CWA)[5] compliance order issued by the Environmental Protection Agency (EPA).[6]

Part I of this Survey discusses the *Colorado & Eastern* decision in light of the statutory and case law that preceded it. Part II examines *Laguna Gatuna*. Finally, this Survey argues that these two decisions have affected environmental law inconsistently, even though both case opinions attempt to follow congressional intent. On the one hand, the Tenth Circuit eroded the structure of CERCLA with its holding in *Colorado & Eastern*, and created substantial legal uncertainty in future cost recovery and contribution actions. On the other hand, the Tenth Circuit's holding in *Laguna Gatuna* provides needed legal certainty by barring pre-enforcement judicial review of EPA compliance orders under the CWA.

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1. Other Tenth Circuit decisions in the survey period relating to environmental law but not discussed include: Leadville Corp. v. United States Fidelity & Guar. Co., 55 F.3d 537 (10th Cir. 1995) (affirming dismissal of an indemnity claim for failure to abide by notice provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) liability insurance policy); Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co., 52 F.3d 1522 (10th Cir. 1995) (interpreting a pollution exclusion clause); Pueblo of Scandia v. United States, 50 F.3d 856 (10th Cir. 1995) (reversing and remanding summary judgment against a Native American claim for bad faith failure to preserve Forest Service land used for cultural and religious purposes as required by the National Historic Preservation Act); Red Panther Chem. Co. v. Insurance Co. of N. Am., 43 F.3d 514 (10th Cir. 1994) (resolving an interpretation dispute regarding an insurance policy excluding pollution); Brever v. Rockwell Int'l Corp., 40 F.3d 1119 (10th Cir. 1994) (reversing dismissal of a federal whistleblowing claim stemming from the FBI investigation of the Rocky Flats Superfund site in Colorado).

2. 50 F.3d 1530 (10th Cir. 1995).

3. 42 U.S.C. §§ 9601-9675 (1994).

4. 58 F.3d 564 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 771 (1996).

5. 33 U.S.C. §§ 1251-1387 (1994).

6. *Laguna Gatuna*, 58 F.3d at 564.

I. COST RECOVERY VS. CONTRIBUTION UNDER CERCLA: *UNITED STATES V. COLORADO & EASTERN RAILROAD*[7]

A. *Background*

1. Statutory Background

CERCLA is arguably one of the most significant environmental statutes in existence.[8] Its comprehensive structure allows the federal government to take control of an environmentally dangerous site; clean it or require the potentially responsible parties (PRPs) to clean it; and, under CERCLA's cost recovery provisions, hold each PRP responsible for the cleanup costs.[9] Under both court-imposed and statutory joint and several liability,[10] a party may be held liable in a cost recovery action for the full cost of a site's remediation, regardless of the party's culpability or the amount of contamination the party actually contributed.[11]

In 1986, Congress added the Superfund Amendments and Reauthorization Act (SARA)[12] to CERCLA. These new provisions codified a remedy which already had been made available to PRPs by the courts: a right to contribution from other PRPs for a completed cleanup.[13] Furthermore, SARA also provided a "contribution bar" for PRPs that settle with the EPA, at least for the "matters addressed" in their consent decree.[14] As a result, CERCLA's complex and controversial structure juxtaposed two extremes: protection contribution from claims for settlors and joint and several liability for nonsettlors. These sharply contrasting options provide substantial incentive for PRPs to

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7. 50 F.3d 1530 (10th Cir. 1995).

8. *See* Michael V. Sucaet, *Contribution Protection Under CERCLA: What Have You Settled and Not Settled?*, 40 WAYNE L. REV. 1477, 1479 (1994).

9. 42 U.S.C. §§ 9601(9), 9607(a) (1994); Sucaet, *supra* note 8, at 1479; Gregory J. Walch, Note, Burlington Northern Railroad v. Time Oil: *Contribution Protection Under the 1986 Superfund Amendments*, 22 ENVTL. L. 757, 758 (1992).

10. *Colorado & Eastern*, 50 F.3d at 1535. For a sampling of various court interpretations of joint and several liability under CERCLA, see County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1515-16 (10th Cir. 1991); United States v. Monsanto Co., 858 F.2d 160, 171 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983). *See generally* Lynda J. Oswald, *New Directions in Joint and Several Liability Under CERCLA?*, 28 U.C. DAVIS L. REV. 299 (1995). For a discussion of statutorily imposed joint and several liability, see Sucaet, *supra* note 8, at 1481-83.

11. *Colorado & Eastern*, 50 F.3d at 1535; Allen Samelson, *"Whose Liability Is This Anyway?": The Allowability of Environmental Clean-up Costs Potentially Attributable to Other Responsible Parties*, 24 PUB. CONT. L.J. 293, 304 (1995).

12. Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. §§ 9601-9675 (1994)); *see* Karen L. DeMeo, Note, *Is CERCLA Working? An Analysis of the Settlement and Contribution Provisions*, 68 ST. JOHN'S L. REV. 493, 494-95 (1994).

13. 42 U.S.C. § 9613(f). Courts were concerned about the inequity of holding a single defendant liable for the cost of an entire site cleanup with no way to recoup expenditures from other PRPs. *Id.* Courts therefore implied a right of contribution between PRPs in CERCLA cases before Congress actually codified the right in SARA. *Colorado & Eastern*, 50 F.3d at 1535.

14. SARA states, "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding *matters addressed* in the settlement." 42 U.S.C. § 9613(f)(2) (emphasis added). A consent decree is a cleanup agreement entered in a federal district court settling remedial action issues with the PRP. *Id.* § 9622(d)(1)(A)-(C).

settle with the EPA as early as possible in the overall cleanup process.[15] By entering into a protective consent decree with the EPA quickly, a PRP can indemnify itself from further liability.[16] Absent a settlement, a PRP may find itself financially responsible for all costs of cleanup which are uncollected or uncollectible by the EPA.[17]

The distinction between cost recovery and contribution is complex.[18] Cost recovery actions reimburse those who cleanup a CERCLA site for costs associated with the cleanup.[19] Courts hold defendants in cost recovery suits jointly, severally, and strictly liable.[20] Contribution actions, however, apportion liability between guilty parties.[21] Defendants subject to joint and several liable may, in contribution actions, invoke defenses such as equity and divisibility to divert some or all of their liability.[22] Additionally, the statute of limitations differs for each action.[23]

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15. DeMeo, *supra* note 12, at 500-03; Sucaet, *supra* note 8, at 1484-85.

16. 42 U.S.C. §§ 9613(f)(2), 9622(d)(1)(A)-(C).

17. *Id.*; *see also* Sucaet, *supra* note 8, at 1484-86.

18. For examples of cases in which courts have addressed the differences between two methods of recovery, see United Technologies Corp. v. Browning-Ferris Indus., 33 F.3d 96 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1176 (1995); Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761 (7th Cir. 1994); *County Line Inv. Co.*, 933 F.2d 1508; Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co., 814 F. Supp. 1269 (E.D. Va. 1992).

19. Section 9607(a)(4)(B) provides the statutory basis for cost recovery by a party that has already financially contributed to a cleanup. It states that another PRP shall be liable for "any other necessary costs of response incurred by *any other person*." 42 U.S.C. § 9607(a)(4)(B) (emphasis added); *see also* General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415 (8th Cir. 1990) (addressing the ability of appellants to obtain cost recovery), *cert. denied*, 499 U.S. 937 (1991); Walch, *supra* note 9, at 758. Under § 9607, the EPA can initiate a cleanup and then seek recovery from a later-identified PRP. Sucaet, *supra* note 8, at 1479.

20. *Colorado & Eastern*, 50 F.3d at 1535. A PRP liable in a cost recovery action can, on its own initiative, find and sue other PRPs under a contribution theory to recoup any portion of the cleanup costs that it alleges were another PRP's responsibility. *Id.* A cost recovery action is riskier for a PRP than a contribution action, because cost recovery is a matter of strict liability. *Id.* If other PRPs have settled and properly worded their consent decrees, a PRP may not be able to recover from them. 42 U.S.C. § 9613(f)(2).

21. 42 U.S.C. § 9613(f); *Colorado & Eastern*, 50 F.3d at 1536.

22. Oswald, *supra* note 10, at 334-42. CERCLA's contribution provisions instruct that "the court may allocate response costs among the liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). The Tenth Circuit has pointed to the use of the "Gore Factors" proposed by Senator Albert Gore as a moderate approach. *Colorado & Eastern*, 50 F.3d at 1536 n.5. The Gore Factors are:

> (i) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished; (ii) the amount of the hazardous waste involved; (iii) the degree of toxicity of the hazardous waste involved; (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (vi) the degree of cooperation by the parties with the Federal, State or local officials to prevent any harm to the public health or the environment.

Id. (quoting Environmental Transp. Sys., Inc. v. ENSCO, Inc., 969 F.2d 503, 508-09 (7th Cir. 1992)). On the other hand, the Second Restatement of Torts offers a bright-line test allowing apportionment only when a court may adequately determine the divisibility of the harm. RESTATEMENT (SECOND) OF TORTS § 433A (1965).

23. 42 U.S.C. § 9613(g)(2)-(3). Parties have six years in which to file a cost recovery action but only three years to file a contribution action. *Id.*

2. Case Law Background

Since CERCLA's enactment, courts have struggled with interpreting and applying it. Specifically, courts approach the cost recovery and contribution provisions of CERCLA inconsistently.[24] Some courts have held that only innocent parties may sue under a theory of cost recovery, limiting lawsuits between PRPs to contribution actions.[25] Other courts, however, have held that any party that actually cleaned up a private or governmental site may bring a cost recovery action against a PRP.[26] Under this approach, PRPs not participating in a site's cleanup may only pursue contribution actions against other PRPs.[27] Most courts agree, however, that consent decrees may bar subsequent contribution actions against the settling party, depending on the factual situation.[28] Courts consider a consent decree's wording[29] as well as other factors[30] in determining which "matters" it "addresses."[31]

B. United States v. Colorado & Eastern Railroad[32]

1. Facts

The Colorado & Eastern Railroad Company (CERC), its holding company, and its former president and sole shareholder (collectively "the CERC parties") owned land purchased from Farmland Industries.[33] Both the CERC parties and Farmland bought the land after substantial initial contamination had occurred.[34] Upon discovering the contamination and performing a remedial

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24. DeMeo, *supra* note 12, at 496; Sucaet, *supra* note 8, at 1489; Walch, *supra* note 9, at 760.

25. For examples of cases in which PRPs were limited to contribution actions, see *United Technologies Corp.* 33 F.3d at 101-03; *Akzo Coatings, Inc.*, 30 F.3d at 763; *County Line Inv. Co.*, 933 F.2d at 1515-17; *General Elec. Co.*, 920 F.2d at 1417-21.

26. *See, e.g., Chesapeake & Potomac Tel. Co.*, 814 F. Supp. at 1277.

27. *See United Technologies Corp.*, 33 F.3d at 103.

28. *Akzo Coatings, Inc.*, 30 F.3d at 766; DeMeo, *supra* note 12, at 512-17; Sucaet, *supra* note 8, at 1492-99; Walch, *supra* note 9, at 759-61.

29. *Akzo Coatings, Inc.*, 30 F.3d at 765 ("Our starting point, naturally, is the consent decree itself."); Sucaet, *supra* note 8, at 1490-91.

30. Courts are inconsistent in both their delineation of these factors and in an overall conceptual approach to their determination:

> Other courts have suggested that the 'matters addressed' by a consent decree be determined with reference to the particular location, time frame, hazardous substances, and clean-up costs covered by the agreement . . . . [But] this [list] should not be treated as an exhaustive list of appropriate considerations, for the relevance of each factor will vary with the facts of the case.

Akzo Coatings, Inc., 30 F.3d at 766 (citations omitted). The statute is silent on how we are to determine what particular "matters" a consent decree addresses. Some courts have used balancing tests. "Other courts have concluded that [the contribution bar provision] was intended to encourage settlement while providing settling PRPs with a measure of finality in return for their willingness to settle." *Colorado & Eastern*, 50 F.3d at 1537 (citations omitted). The court later noted that it was taking "a fact-specific approach." *Id.* at 1538; *see also* Sucaet, *supra* note 8, at 1493-94 (explaining that courts have used "fact driven test[s]," "flexible and fact based approach[es]," and tests involving "equitable apportionment of costs").

31. 42 U.S.C. § 9613(f)(2).

32. 50 F.3d 1530 (10th Cir. 1995).

33. *Colorado & Eastern*, 50 F.3d at 1532-33.

34. *Id.* at 1532. Both pesticides and metals were found in the soil at the site. *Id.*

investigation and feasibility study, the EPA sued Farmland, the CERC parties, and other PRPs for response costs and future cleanup costs.[35] Farmland and another party, McKesson Corporation, entered into a consent decree with the EPA, in which they agreed to pay $700,000 and clean the entire site—including the CERC parties' land.[36]

Farmland and McKesson cleaned up the site at a total cost of over $15 million.[37] Two months before completion of the cleanup, the CERC parties entered into a consent decree with the EPA, paying $100,000 to the EPA and acquiring absolution of further liability to the EPA.[38] The CERC parties later defaulted on their consent decree with the EPA.[39]

Farmland alleged that almost $1.5 million of its cleanup costs were a direct result of the CERC parties' actions and cross-claimed in the EPA action under a theory of cost recovery.[40] The district court awarded Farmland over $734,000.[41]

2. Decision

The CERC parties appealed the district court's decision, which was based on a cost recovery theory.[42] The Tenth Circuit held that actions between PRPs are claims for contribution and not for cost recovery, regardless of how they are worded.[43] The court found enough validity in Farmland's claim for contribution to survive summary judgment and therefore remanded the case for further proceedings consistent with a contribution action.[44]

C. *Analysis*

The *Colorado & Eastern* court based its holding on two primary issues: cost recovery versus contribution, and indemnification due to matters addressed in the consent decree.[45] The facial distinction between what constitutes a cost recovery claim as compared to a contribution claim under CERCLA can be easily determined. Courts find it more difficult to articulate who may use which claim, and the degree to which causation may enter into each theory is even more difficult to articulate, and, unfortunately, courts have not provided a consistent answer.[46]

The *Colorado & Eastern* court attempted to explain clearly the difference between a cost recovery action and a contribution action.[47] Specifically, it

35. *Id.* at 1533.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 1534.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *See supra* notes 24-27 and accompanying text.
47. *Colorado & Eastern*, 50 F.3d at 1535.

sought to identify which types of parties could recover under each action.[48] First, citing one of its own cases and several cases from other jurisdictions, the Tenth Circuit established that cost recovery actions are governed by both strict liability and joint and several liability.[49] Then, after analyzing the contribution provisions of CERCLA, the court concluded that "any claim that would reapportion costs between [PRPs] is the quintessential claim for contribution."[50] Finally, noting that Farmland sought reapportionment, the court limited Farmland to a contribution action, and further stated that the district court's allowance of a cost recovery claim under the facts of the case constituted error.[51]

The second major issue the court addressed was the CERC parties' claim of immunity as a result of its judicially approved consent decree with the EPA.[52] A consent decree indemnifies a PRP from contribution actions only if the consent decree expressly addresses matters forming the basis of the contribution actions.[53] In determining what constitutes such a "matter addressed," the court noted that some courts use balancing tests and that others use settlement incentives.[54] Taking a "fact-specific approach," the court concluded that Farmland could not have expected contribution indemnification because of the late execution of the CERC parties' consent decree and the relatively small settlement involved.[55] The CERC parties could have specifically placed language in the decree providing indemnification, but as they failed to do so, they must pay their share of the cleanup costs.[56] Furthermore, the CERC parties' default on the consent decree through nonpayment did not affect CERCLA's contribution protections.[57]

Ultimately, based on the foregoing analysis, the court concluded that any action for reapportionment of costs between PRPs constitutes a contribution action.[58] Additionally, the court held that a judicially approved consent decree will not automatically indemnify the settlor unless it specifically includes indemnification.[59]

D. *Other Circuits*

Ironically, the various attempts made by other circuits to uphold and enforce CERCLA have undermined the statute's effectiveness. Though many district courts have ruled on these issues,[60] decisions by the two circuits that

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48. *Id.*
49. *Id.* (citing Farmland Indus. v. Morrison-Quirk Grain, 987 F.2d 1335 (8th Cir. 1993); *County Line Inv. Co.*, 933 F.2d at 1508; *Chem-Dyne Corp.*, 572 F. Supp. at 802).
50. *Id.* at 1536.
51. *Id.*
52. *Id.*
53. *Id.* at 1537.
54. *Id.* For a discussion of the various factors that courts employ, see *supra* note 30.
55. *See Colorado & Eastern*, 50 F.3d at 1538.
56. *See id.* at 1537-38.
57. *Id.* at 1538.
58. *Id.* at 1539.
59. *Id.*
60. *See, e.g.*, United States v. SCA Serv., Inc., 865 F. Supp. 533, 546 (N.D. Ind. 1994) (holding that hazardous waste site owner who cleaned up site pursuant to consent decree had

have taken a stance fail to paint a complete picture. In *United Technologies Corp. v. Browning-Ferris Industries*,[61] the court relied on the canons of statutory construction, legislative intent, and statutory history to limit only PRPs to contribution actions.[62] In the First Circuit, therefore, both the EPA and innocent parties may bring cost recovery actions for their respective response costs. All other claims must be for contribution among the guilty parties.

Similarly, in *Akzo Coatings, Inc. v. Aigner Corp.*,[63] the Seventh Circuit held that any suit between PRPs must be based on contribution.[64] In deciding whether the consent decree barred the action in that case, the court referred to "both the reasonable expectations of the signatories and the equitable apportionment of costs."[65]

Thus, though not fully settled, the views of both the First and Seventh Circuits are on par with those of the Tenth. The trend indicates that courts will limit all PRPs to contribution actions to recover their costs. Furthermore, the EPA will always possess the power to use CERCLA's cost recovery provisions to recoup costs of site cleanup. In the First Circuit, innocent parties who clean up a site may also sue under the cost recovery provision.[66] In the remaining circuits, whether or not such an innocent actor may maintain a cost recovery action remains unclear.

The additional "matters addressed" controversy surrounding settlement serves to intensify an already complex conceptual conundrum.[67] Though the Tenth Circuit seems firm in its stance toward barring contribution actions via express provisions in consent decrees, other circuits employ various, somewhat more nebulous approaches.[68] Furthermore, because the statute of limitations differs for each action, a party who has missed the deadline for a contribution

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pursued a cost recovery as opposed to contribution action); General Time Corp. v. Bulk Materials, Inc., 826 F. Supp. 471, 478 (M.D. Ga. 1993) (stating that a consent decree did not bar contribution action against signatory under the facts presented therein); Avnet, Inc. v. Allied-Signal, Inc., 825 F. Supp. 1132, 1138 (D. R.I. 1992) (holding that de minimus settlors were not subject to contribution actions by other PRPs); United States v. Asarco, Inc., 814 F. Supp. 951, 957 (D. Colo. 1993) (holding that contribution provision in consent decree absolving party of liability to government barred contribution action by another codefendant); Transtech Indus. v. A & Z Septic Clean, 798 F. Supp. 1079, 1090 (D. N.J. 1992) (stating that settlement with government for its costs did not bar actions for contribution), *appeal dismissed*, 5 F.3d 51 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 2692 (1994); United States v. Alexander, 771 F. Supp. 830, 841 (S.D. Tex. 1991), *vacated*, 981 F.2d 250 (5th Cir. 1993) (explaining that de minimus settlors were not subject to contribution actions and that Rule 11 sanctions could be leveled against parties who brought contribution actions against them).

61. 33 F.3d 96 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1176 (1995).

62. *See United Technologies Corp.*, 33 F.3d at 99-100.

63. 30 F.3d 761 (7th Cir. 1994).

64. *Akzo Coatings, Inc.*, 30 F.3d at 764-65.

65. *Id.* at 766.

66. *See United Technologies Corp.*, 33 F.3d at 96.

67. In fact, just filing a CERCLA contribution action in some jurisdictions could be considered dangerous. At least two district courts have sanctioned or threatened to sanction PRPs under FED. R. CIV. P. 11 for filing contribution actions against settling parties. *See Avnet*, 825 F. Supp. at 1142-43; *Alexander*, 771 F. Supp. at 841; DeMeo, *supra* note 12, at 525 n.155.

68. For a discussion of the various approaches taken by courts, see *supra* note 30.

claim will likely attempt to characterize its action as one for cost recovery, thereby adding to the confusion.[69]

As a result of these inconsistent holdings, PRPs, as well as other parties required to assist in a cleanup of a CERCLA site, will be subject to substantial uncertainty with regard to their respective liability for cleanup-associated costs. Furthermore, parties will be reluctant to settle if they cannot be assured indemnity from further liability. These varied holdings frustrate the very structure of CERCLA. Instead of encouraging quick settlements, parties will probably wait until other PRPs are identified before seriously considering a settlement. By holding out until the last minute, PRPs will be better able to gauge their potential exposure based on the number, solvency, and other attributes of additional exposed PRPs.

II. AVAILABILITY OF PRE-ENFORCEMENT JUDICIAL REVIEW OF AN EPA COMPLIANCE ORDER UNDER THE CLEAN WATER ACT: *LAGUNA GATUNA, INC. V. BROWNER*[70]

A. *Background*

1. Statutory Background

The Federal Water Pollution and Control Act, commonly referred to as the Clean Water Act (CWA), broadly aims to preserve the quality of the United States' waters.[71] Its provisions impose responsibilities on entities whose actions may harm water[72] and provide the federal government enforcement authority to stop acts harmful to the integrity of the water.[73] The CWA's expansive jurisdictional provisions encompass bodies of water ranging from navigable waterways to "wet meadows."[74] Two enforcement methods specifically afforded to the EPA are the power to bring a civil suit against an offender and the power to issue a compliance order.[75] Should the EPA unilaterally find that a violator has failed to obey a compliance order, it may elect to bring suit to enforce its order,[76] but it incurs no obligation.[77]

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69. *See supra* note 23 and accompanying text.

70. 58 F.3d 564 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 771 (1996).

71. 33 U.S.C. § 1251(a) (1994) ("The objective . . . is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.").

72. 33 U.S.C. §§ 1311(a), 1344(a), 1344(f)(2) (1994) (requiring permit for "discharge of dredged or fill material into the navigable waters"); Edward A. Kazmarek & W. Scott Laseter, *Environmental Law, 1992 Eleventh Circuit Survey*, 44 MERCER L. REV. 1187, 1194-95 (1993).

73. 33 U.S.C. § 1319(a)(3) (1994) (requiring the EPA to "issue an order requiring . . . [compliance] or . . . [to] bring a civil action"); 33 U.S.C. § 1319(b) (authorizing a "civil action for appropriate relief, including a permanent or temporary injunction").

74. 40 C.F.R. § 122.2 (1995). As a result, the parties that may be subject to a CWA action can be similarly diverse.

75. 33 U.S.C § 1319(a)(6)(b); Andrew I. Davis, Comment, *Judicial Review of Environmental Compliance Orders*, 24 ENVTL. L. 189, 189-90 (1994). A compliance order must be served on the violator, must explain the nature of the violation, and must specifically provide a deadline for completion. 33 U.S.C. § 1319(a)(5)(A).

76. 33 U.S.C § 1319(b). For a general discussion of how a potential defendant responds to an impending suit, see Symposium, *Responding to a Government Environmental Investigation: Shaping the Defense*, 34 ARIZ. L. REV. 509 (1992).

77. 33 U.S.C. § 1319(b). Courts have unanimously interpreted this provision to preclude

Administrative orders issued by federal agencies (such as EPA compliance orders) are governed by both the agency's enabling legislation and the Administrative Procedure Act (APA).[78] Under the APA, a final agency action is generally presumed reviewable provided the party bringing the action has standing and meets other prudential requirements such as ripeness.[79] The APA rarely allows de novo review and normally commands a higher standard for judicial review of administrative orders.[80]

2. Case Law Background

Courts must presume that final agency actions are reviewable.[81] This presumption is rebuttable by strong, persuasive, or clear and convincing evidence of legislative intent to preclude judicial review.[82] Despite this apparently narrow exception allowing preclusion of review, courts which have heard cases asking for judicial review of compliance orders prior to EPA enforcement have unanimously refused review.[83] Because of this interpretation of the EPA's permissible enforcement provision, parties who receive compliance orders find themselves in a difficult dilemma. A party served with a compliance order must either comply or risk incurring penalties if it fails to comply. The party may not invoke judicial review until the EPA seeks enforcement.[84]

Three cases provide a foundation for analysis: *Southern Pines Associations v. United States*,[85] *Rueth v. EPA*,[86] and *Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation and Enforcement*.[87] *Southern Pines* involved an EPA compliance order prohibiting Southern Pines from dumping in

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judicial review of the compliance order before the EPA seeks enforcement. *See infra* notes 120-28 and accompanying text.

Many commentators believe that precluding pre-enforcement judicial review of EPA compliance orders is not only unfair, but in conflict with both current Supreme Court precedent and express congressional intent (notwithstanding the cases discussed *infra*). For a thorough and cogent argument of why pre-enforcement judicial review should be allowed, see Davis, *supra* note 75.

78. Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1994) [hereinafter APA]; David M. Moore, Comment, *Pre-enforcement Review of Administrative Orders to Abate Environmental Hazards*, 9 PACE ENVTL. L. REV. 675, 680 (1992).

79. APA §§ 702, 704; JOHN H. REESE, ADMINISTRATIVE LAW 533-34 (1995); Davis, *supra* note 75, at 194-95; Moore, *supra* note 78, at 681.

80. APA § 706; *see* ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY 543-44 (1992). The primary standard for review is whether an agency acted arbitrarily or capriciously, but other sources of jurisdiction exist including federal questions, ultra vires actions, etc. *Id.*

81. APA § 702; Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967). For an in-depth analysis and critique of environmental statutes and their judicial review, see Edward W. Warren & Gary E. Marchant, *"More Good Than Harm": A First Principle for Environmental Agencies and Reviewing Courts*, 20 ECOLOGY L.Q. 379 (1993).

82. *See* APA §§ 701(a)(1), 706; Davis, *supra* note 75, at 196-97; Moore, *supra* note 78, at 684-85.

83. *See* Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement, 20 F.3d 1418, 1426-27 (6th Cir.), *cert. denied*, 115 S. Ct. 316 (1994); Rueth v. EPA, 13 F.3d 227, 231 (7th Cir. 1993); Southern Pines Assocs. v. United States, 912 F.2d 713, 715 (4th Cir. 1990); Davis, *supra* note 75, at 190; Moore, *supra* note 78, at 690-96 (addressing reviewability under CERCLA).

84. *See infra* note 120 and accompanying text.

85. 912 F.2d 713 (4th Cir. 1990).

86. 13 F.3d 227 (7th Cir. 1993).

87. 20 F.3d 1418 (4th Cir. 1990), *cert. denied*, 115 S. Ct. 316 (1994).

certain Virginia wetlands.[88] Southern Pines had previously filed an action for both declaratory and injunctive relief, seeking to avoid compliance on the grounds that the EPA lacked jurisdiction over the dumping site.[89] The district court dismissed for lack of jurisdiction, and the Fourth Circuit affirmed.[90]

To reach its decision, the court examined the legislative history of the CWA[91] and pointed out the similarities in structure[92] and enforcement provisions[93] that the CWA shares with the Clean Air Act (CAA)[94] and CERCLA.[95] The court concluded that Congress envisioned an EPA that could respond to environmental crises quickly and efficiently without being subject to immediate, debilitating, and time-consuming litigation.[96] Therefore, the EPA compliance orders governed by the CWA (and likely the CAA and CERCLA) were not intended to receive judicial review.[97]

In *Rueth*, the second leading case in this area, the EPA issued a compliance order to cease dumping into a wetland, and to begin restoration of the area.[98] Rueth filed an action for injunctive relief and a declaratory judgment, alleging that the EPA did not have jurisdiction over the wetland at issue.[99] The district court dismissed for its own lack of jurisdiction.[100] The Seventh Circuit affirmed, concluding that EPA compliance orders are not reviewable until the agency seeks to enforce them.[101] The circuit court adopted the reasoning of the district court and indicated that the CWA expressly provides for judicial review at the enforcement stage, thereby precluding review before that time.[102]

A third significant case involving pre-enforcement judicial review of an EPA compliance order, *Southern Ohio Coal*,[103] successfully challenged an EPA threat to issue a compliance order in district court.[104] On appeal, the Sixth Circuit reversed, agreeing with the holdings of both *Southern Pines* and *Rueth* by stating that Congress had not intended to allow judicial review of EPA compliance orders.[105]

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88. *Southern Pines*, 912 F.2d at 714.

89. *Id.* Southern Pines advanced an additional theory in support of its claim, alleging that the EPA's order constituted an actual controversy under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 (1994). *Id.*

90. *Southern Pines*, 912 F.2d at 717.

91. *Id.* at 716.

92. *Id.*

93. *Id.*

94. 42 U.S.C. §§ 7401-7642 (1994).

95. 42 U.S.C. §§ 9601-9675 (1994). Courts have viewed the CAA and CERCLA as sharing similar legislative histories with regard to legislative intent towards judicial reviewability of EPA compliance orders. *Laguna Gatuna*, 58 F.3d at 565; *Southern Ohio Coal*, 20 F.3d at 1426; *Southern Pines*, 912 F.2d at 716.

96. *Southern Pines*, 912 F.2d at 716.

97. *Id.*

98. *Rueth*, 13 F.3d at 228.

99. *Id.*

100. *Id.*

101. *Id.* at 230-31.

102. *Id.* at 229 (citing Rueth Dev. Co. v. EPA, No. CIV.A.H91-152, 1992 WL 560944, at *5 (N.D. Ind. Nov. 24, 1992)).

103. 20 F.3d 1418 (4th Cir. 1990), *cert. denied*, 115 S. Ct. 316 (1994).

104. *Southern Ohio Coal*, 20 F.3d at 1422.

105. *Id.* at 1426. The *Southern Ohio Coal* court endorsed both the Fourth and Seventh

B. Laguna Gatuna, Inc. v. Browner[106]

1. Facts

In 1987, Laguna Gatuna's "predecessor in interest" asked the EPA if a sinkhole on its land was considered water subject to EPA jurisdiction.[107] The EPA responded in the negative.[108] In 1991, the EPA discovered dead migratory birds in the vicinity of the sinkhole and issued a compliance order the following year, which prohibited Laguna Gatuna from further dumping into the sinkhole.[109] Laguna Gatuna complied with the order.[110]

2. Decision

After Laguna Gatuna sought declaratory relief in federal district court asserting that the EPA did not have jurisdiction to issue the compliance order, the court dismissed the action for lack of jurisdiction.[111] On appeal, the Tenth Circuit affirmed the trial court's dismissal on the same ground.[112]

C. *Analysis*

The Tenth Circuit found that the issue of pre-enforcement judicial reviewability of EPA compliance orders under the CWA was one of first impression in the circuit.[113] It qualified this statement, however, by indicating that other circuits had uniformly dealt with the issue and that it would follow their

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Circuit's holdings, even though both circuits used different rationales to reach their respective conclusions. *Compare Southern Pines*, 912 F.2d at 715 (using statutory structure and legislative history and intent to reach its holding) *with Rueth*, 13 F.3d at 229-31 (analyzing both legislative intent and the express wording of the CWA to make its decision) *and* Hoffman Group, Inc. v. EPA, 902 F.2d 567, 569 (7th Cir. 1990) (relying on CWA statutory language to reach its holding).

The *Southern Ohio Coal* court further stated, "Congress provided one forum in which to address all issues, including constitutional challenges, raised by the issuance of a[n EPA] compliance order: an enforcement proceeding." *Southern Ohio Coal*, 20 F.3d at 1426. Therefore, judicial review of an order after an enforcement proceeding is constitutionally mandated. Until the enforcement proceeding actually occurs, however, review is neither available nor constitutionally required. *Id.* at 1427.

106. 58 F.3d 564 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 771 (1996).

107. *Laguna Gatuna*, 58 F.3d at 565.

108. *Id.* The Code of Federal Regulations includes in its definition of "waters of the United States":

> (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters . . . .
>
> . . . .
>
> (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

40 C.F.R. § 122.2 (1995). Wetlands are further defined as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." *Id.*

109. *Laguna Gatuna*, 58 F.3d at 565.

110. *Id.*

111. *Id.*

112. *Id.* at 564, 566.

113. *Id.* at 565.

lead.[114] The court then dismissed the arguments put forth by Laguna Gatuna.[115]

In reaching its decision, the court followed the reasoning of the three leading cases discussed above.[116] In short order, it cited *Southern Pines, Rueth,* and *Southern Ohio Coal,* and presented a brief summary of each case's facts, holding, and rationale.[117] Concluding that the reasoning from these other jurisdictions was sound, the *Laguna Gatuna* court announced that it would follow them.[118]

Thus, the Tenth Circuit established that pre-enforcement judicial review of an EPA compliance order under the CWA is unavailable on two bases: legislative intent and the constitutional requirement that judicial review occur after a party seeks actual enforcement of a compliance order.[119]

D. *Other Circuits*

As discussed previously, the Fourth, Sixth, Seventh, and Tenth Circuits have all prohibited pre-enforcement judicial review of EPA compliance orders under the CWA.[120] The remaining circuits have not yet addressed this issue as it relates to the CWA.[121] It appears, though, that given the three leading

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114. *Id.* The court cited *Southern Ohio Coal,* 20 F.3d 1418; *Rueth,* 13 F.3d 227; and *Southern Pines,* 912 F.2d 713 as persuasive authority for its dismissal for want of jurisdiction. *Laguna Gatuna,* 58 F.3d at 565.

115. *Laguna Gatuna,* 58 F.3d at 565. Laguna Gatuna unsuccessfully argued that *Rueth, Southern Ohio Coal,* and *Southern Pines* were distinguishable. Laguna cited Riverside Irrigation Dist. v. Stipo, 658 F.2d 762 (10th Cir. 1981) as binding authority, but the court found the case to be factually distinguishable. *Laguna Gatuna,* 58 F.3d at 565. Laguna Gatuna also failed to convince the court that parties should not be forced to expose themselves to fines or penalties to receive judicial review. *Id.* Even though Laguna Gatuna put forth such a "strong due process argument[]," the court indicated that preclusion of judicial review of an EPA compliance order nonetheless passed constitutional muster. *Id.* at 565.

In its petition for certiorari, Laguna Gatuna attempted to distinguish its facts, insisting that the sinkhole was not a playa lake, was hydrologically isolated, and could not fall within the definition of "waters of the U.S." Petition for Writ of Certiorari at 5, Laguna Gatuna, Inc. v. Browner, 58 F.3d 564 (10th Cir. 1995) (No. 95-465), *cert. denied,* 116 S. Ct. 771 (1996). Laguna Gatuna's attorney insisted that although the area received abnormally high rainfall the year the dead birds were found, water never stood in the sinkhole. Telephone interview with Todd Welch, Attorney for Petitioner, Mountain States Legal Foundation (Dec. 3, 1995). He asserted, therefore, that the sinkhole could not be defined as water of the U.S. *Id.* Furthermore, Laguna Gatuna's counsel argued that any discharges emanating from the sinkhole were ten times cleaner than natural discharges. *Id.*

116. *Laguna Gatuna,* 58 F.3d at 565-66.

117. *Id.*

118. *Id.* at 566.

119. The court did not expressly state that pre-enforcement judicial review of an EPA order under the CAA or CERCLA is not available, but the similarities of the three statutes indicate that the legislative intent argument holds for all three statutes. *See* discussion *supra,* text accompanying notes 92-96. The constitutional due process argument, presumably, rings true for all three statutes.

120. *Southern Pines,* 912 F.2d 713; *Southern Ohio Oil,* 20 F.3d 1418; *Rueth,* 13 F.3d 227; *Laguna Gatuna,* 58 F.3d 564.

121. Two district courts have also issued opinions consistent with the conclusions of the four circuits discussed above. *See* Child v. United States, 851 F. Supp. 1527, 1536 (D. Utah 1994) (concluding that the "CWA precludes review of . . . pre-enforcement action[s]"); Howell v. United States Army Corps of Engineers, 794 F. Supp. 1072, 1074-75 (D.N.M. 1992) (applying *Southern Pines* even though the acting entity under the CWA was the Army Corps of Engineers rather than

cases as well as *Laguna Gatuna* this issue is now settled.

The Third Circuit, in *Getty Oil Co. v. Ruckelshaus,*[122] supported this trend. It held that, within the context of the CAA, pre-enforcement judicial review of an EPA compliance order is specifically precluded by the statute itself.[123] Also within the context of the CAA, the Eighth Circuit addressed the issue in *Lloyd A. Fry Roofing Co. v. EPA.*[124] *Lloyd A. Fry* upheld the district court's finding of want of jurisdiction.[125] The CAA's legislative history indicated a pre-enforcement bar against judicial review notwithstanding the absence of an express prohibition.[126] The court stated that such review would be inconsistent with the CAA's enforcement provisions.[127]

The prevailing trend therefore establishes that an EPA compliance order is not subject to judicial review until after an enforcement action has begun. Parties who receive compliance orders must either comply or risk incurring penalties that the party may not challenge unless and until the EPA decides it wishes to enforce its order.[128]

CONCLUSION

These two cases represent two drastically different approaches that courts may take when interpreting environmental statutes. On one hand, the Tenth Circuit has caused substantial uncertainty with its interpretation of CERCLA's cost recovery and contribution provisions. By addressing the questions presented in *Colorado & Eastern* narrowly, the partial answers provided not only differ from the law of other circuits, but give rise to more questions that will surely require answers in the future. Until the court addresses these questions, parties potentially involved in CERCLA situations will be subject to substantial risk and uncertainty.

On the other hand, *Laguna Gatuna,* has helped to increase certainty and consistency by adding to a legal foundation shared by environmental law and administrative law. By following three other circuits in its holding and dismissing constitutional due process arguments, the Tenth Circuit has endorsed Congress's apparent intent that pre-enforcement judicial review of an EPA compliance order shall not occur.

Cameron R. Getto

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the EPA).

122. 467 F.2d 349 (3d Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973).
123. *Getty Oil Co.,* 467 F.2d at 356.
124. 554 F.2d 885 (8th Cir. 1977).
125. *Lloyd A. Fry,* 554 F.2d at 892.
126. *Id.* at 890.
127. *Id.* at 890-91.
128. *See supra* note 77.