

# RECENT DEVELOPMENT

## RECENT TREATMENT OF THE CHALLENGES CLAUSE IN CERCLA § 113(h)

Under section 113(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), federal district courts have exclusive original jurisdiction over all cases arising under the Act with two exceptions.<sup>1</sup> First, the District of Columbia Circuit Court of Appeals has exclusive original jurisdiction to review promulgated regulations.<sup>2</sup> Second, CERCLA § 113(h) denies federal subject-matter jurisdiction for most challenges to removal or remedial actions selected by the U.S. Environmental Protection Agency (“EPA”) remedial action taken under § 104 before completion of the remediation.<sup>3</sup> Courts have found cases to constitute such “challenges” under a variety of circumstances. This Recent Development examines several recent opinions in which courts have interpreted section 113(h) to determine whether a particular action constitutes a challenge.

Section 113(h) of CERCLA provides that:

No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any *challenges to removal or remedial action* selected under section 9604 of this title [or to review any order issued under section 9606(a) of this title].<sup>4</sup>

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1. 42 U.S.C. § 9613(b) (2006).

2. 42 U.S.C. § 9613(a) (2006).

3. Elizabeth Williams, *What Claims Fall Within Limitation Imposed by § 113(h) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. § 9613(h)) on judicial review of cases arising under CERCLA*, 116 A.L.R. Fed. 69 § 2(a) (1993).

4. 42 U.S.C. § 9613(h) (2006) (emphasis added). The complete section reads as follows:

Section 106 (42 U.S.C.A. § 9604) authorizes the EPA to undertake studies and investigations of sites while § 106 (42 U.S.C.A. § 9606) allows the EPA to order a liable party to cleanup a site.<sup>5</sup> The terms “removal” and “remedial action” are defined under CERCLA to include the removal of hazardous substances from the environment and additional remedial actions taken to mitigate the effects of released hazardous substances.<sup>6</sup> Although section 113(h) denies legal challenges, the statute includes five exceptions which pertain to citizens’ suits or government action seeking to enforce or recover the cost for enforcing CERCLA.<sup>7</sup>

In 1986, the Superfund Amendments and Reauthorization Act (“SARA”) amended section 113 to include subsection (h).<sup>8</sup> The Sixth Circuit determined that Congress expressly intended to foreclose pre-enforcement review of EPA remedial action.<sup>9</sup> According to the court, CERCLA provided EPA with the legal means to respond quickly to environmental hazards, and thus, pre-enforcement review would lead to unnecessary delays.<sup>10</sup> However, even before passage of SARA, the Third and Sixth Circuits both agreed that CERCLA’s goal of responding quickly to environmental hazards precluded federal jurisdiction for pre-enforcement review.<sup>11</sup>

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

An action under section 9607 of this title to recover response costs or damages or for contribution.

An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.

An action for reimbursement under section 9606(b)(2) of this title.

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

An action under section 9606 of this title in which the United States has moved to compel a remedial action.

5. 42 U.S.C. § 9604 (2006).

6. See 42 U.S.C. §§ 9601(23)–(24) (2006).

7. Reardon v. United States, 947 F.2d 1509, 1512 (1<sup>st</sup> Cir. 1991).

8. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 113(c)(2), 100 Stat. 1613 (1986).

9. Barmet Aluminum Corp. v. Reilly, 927 F.2d 289, 293 (6<sup>th</sup> Cir. 1991).

10. *Id.*

11. Lone Pine Steering Comm. v. U.S. Env’tl. Prot. Agency, 777 F.2d 882, 887–88 (3<sup>rd</sup> Cir. 1985) (stating agreement with Sixth Circuit); J.V. Peters & Co. v. U.S. Env’tl.

One year after passage of SARA, the Eleventh Circuit held that section 113(h) “clearly provides federal courts do not have subject matter jurisdiction for pre-enforcement reviews of EPA [removal and remedial action].”<sup>12</sup> Subsequent courts found, under various circumstances, that many legal actions were actually challenges under section 113(h) and, thus, outside federal jurisdiction. In *Alabama v. EPA*, the Eleventh Circuit held that a district court improperly granted an injunction against an EPA remedial action.<sup>13</sup> Alabama brought a citizens’ suit seeking an injunction and alleged that the EPA failed to issue notice or conduct a hearing before implementing the remediation plan.<sup>14</sup> The circuit court held that the district court did not have jurisdiction to hear the case because Alabama’s citizen suit action constituted a challenge to the EPA’s remedial action plan before the remedy was completed.<sup>15</sup>

In *ARCO Environmental Remediation, LLC v. Montana*, the Ninth Circuit drew upon earlier holdings that broadly defined what types of claims create challenges under section 113(h) and found that “[a]n action constitutes a challenge to the CERCLA cleanup ‘if it is related to the goals of the cleanup.’”<sup>16</sup> Regardless, not every action that defeats Congress’ intent to reduce costs and expedite remediation will necessarily constitute a challenge.<sup>17</sup>

In *Razore v. Tulalip Tribes of Wash.*, the EPA had not begun physical remediation of a landfill leaking hazardous substances into the surrounding wetlands.<sup>18</sup> Instead, the EPA had entered into an Administrative Order of Consent for a remedial investigation/feasibility study (“RI/FS”) with the tribe that owned the landfill, the prior operator of the landfill, and other principally responsible parties.<sup>19</sup> The operator filed suit alleging that the tribes were managing the landfill in violation of the Clean Water Act and the Resource Conservation and Recovery Act.<sup>20</sup> The district court dismissed the case,<sup>21</sup> and the Ninth

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Prot. Agency, 767 F.2d 263 (6<sup>th</sup> Cir. 1985).

12. Dickerson v. U.S. Env’tl. Prot. Agency, 834 F.2d 974, 977–78 (11<sup>th</sup> Cir. 1987).

13. State of Ala. v. U.S. Env’tl. Prot. Agency, 871 F.2d 1548, 1551 (11<sup>th</sup> Cir. 1989).

14. *Id.* at 1554.

15. *Id.* at 1559.

16. ARCO Env’tl. Remediation, LLC v. Dep’t of Health & Env’tl. Quality, 213 F.3d 1108, 1115 (9<sup>th</sup> Cir. 2000) (quoting *Razore v. Tulalip Tribes of Wash.*, 66 F.3d 236, 239 (9<sup>th</sup> Cir. 1995)).

17. McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325, 330 (9<sup>th</sup> Cir. 1995).

18. *Razore v. Tulalip Tribes of Wash.*, 66 F.3d 236, 238 (9<sup>th</sup> Cir. 1995).

19. *Id.*

20. *Id.* at 239–40.

21. *Id.* at 239.

Circuit affirmed, holding that a RI/FS satisfies the definition of removal action and that the operator's suit presented a challenge under section 113(h).<sup>22</sup>

More recently, two courts reached different conclusions on the question of whether a challenge ensues from a state cause of action seeking monetary relief for natural resource damage. First, in *New Jersey Department of Environmental Protection v. Occidental Chemical Corporation*, a district court found that New Jersey's request for monetary relief was distinguishable from other cases where injunctive relief had been held to constitute a challenge.<sup>23</sup> In contrast, the Tenth Circuit in *New Mexico v. General Electric Company* determined that, although New Mexico sought only monetary damages for injuries to natural resources, the state's lawsuit "called into question the EPA's remedial response plan" and constituted a challenge.<sup>24</sup> The Tenth Circuit, while accepting jurisdiction to review the district court order for summary judgment, dismissed New Mexico's natural resources claim due to lack of jurisdiction under CERCLA section 113(h).<sup>25</sup>

The different outcomes in the two cases resulted from application of section 113(h) to two similar sets of underlying facts that were treated very differently by the parties bringing suit. In the *New Jersey* case, the state brought suit under state law in state court seeking monetary relief for damages to New Jersey's natural resources, among other damages.<sup>26</sup> New Jersey alleged that, between 1940 and 1971, the defendant Occidental Chemical Corporation ("OCC"), through its predecessor, "used, produced, and discarded" certain toxic chemicals, including a dioxin known as TCDD.<sup>27</sup> The resulting contamination affected the soil, groundwater, and an area around the lower seventeen miles of the Passaic River referred to as the Newark Bay Complex.<sup>28</sup> In 1984, the state and OCC entered into two administrative consent orders ("ACO") to address the site of the contamination.<sup>29</sup> Twenty years later, in 2004, and ten years after one study of the contaminated site, EPA entered into ACO with

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22. *Id.* at 240.

23. *N.J. Dept. of Env'tl. Prot. v. Occidental Chem. Corp.*, Civ. No. 06-401(GEB), 2006 WL 2806231, at \*8-10 (D. N.J. Sept. 28, 2006).

24. *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1249 (10<sup>th</sup> Cir. 2006).

25. *Id.* at 1226, 1252.

26. *New Jersey*, 2006 WL 2806231, at \*3.

27. *Id.* at \*1.

28. *Id.*

29. *Id.* at \*2.

OCC and others to study the Newark Bay Complex.<sup>30</sup>

New Jersey brought suit in December 2005, and the defendants immediately removed the case to federal district court.<sup>31</sup> New Jersey filed a motion to remand,<sup>32</sup> and the court concluded that the defendants failed to demonstrate any congressional intent to permit removal despite a plaintiff's reliance on strictly state law claims.<sup>33</sup>

The defendants brought their removal action based on two cases where federal courts accepted jurisdiction over state law claims. First, in *N. Penn Water Auth. v. BAE*, a district court found that the plaintiff's state law action sought to "dictate specific remedial actions" by requesting an order requiring defendants to install a treatment system on a public water well, a remedy rejected by the EPA.<sup>34</sup> The court ruled that removal was proper because the plaintiff water authority's state law claims actually fell under federal law and, in addition, that the claims were a challenge under section 113(h) and thus preempted by CERCLA.<sup>35</sup>

Second, in *Fort Ord Toxics Project, Incorporated v. California Environmental Protection Agency*, the plaintiff brought suit because the EPA's remedial cleanup plan called for removing contaminated soil from a site on federal land and then re-depositing it into a federal landfill.<sup>36</sup> The proposed removal allegedly violated a state statute prohibiting disposal of hazardous waste in a landfill.<sup>37</sup> The Ninth Circuit concluded that the EPA's efforts were a remedial action under CERCLA section 120 and that while section 113(h) precludes challenges to a CERCLA *removal* action on federal property when such actions are conducted under section 104's grant of authority, section 113(h) would not preclude challenges to a CERCLA *remedial* action when such actions are conducted under section 120's grant of authority.<sup>38</sup> The prohibition against federal jurisdiction under section 113(h) applies to "challenges to removal or remedial action selected under section 9604," but the statute is silent to

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30. *Id.*

31. *New Jersey*, 2006 WL 2806231, at \*1, \*3.

32. *Id.* at \*3.

33. *Id.* at \*7-8.

34. *N. Penn Water Auth. v. BAE Sys.*, No. Civ. A. 04-5030, 2005 WL 1279091, at \*9 (E.D. Pa. May 25, 2005).

35. *Id.* at \*10.

36. *Fort Ord Toxics Project, Inc. v. Cal. Env'tl. Prot. Agency*, 189 F.3d 828, 830 (9th Cir. 1999).

37. *Id.*

38. *Id.* at 834.

actions under section 120, which applies to remedial action on federal facilities.<sup>39</sup>

The *New Jersey* court held that the action brought by the New Jersey Department of Environmental Protection was not the same type of challenge as in *N. Penn* and *Fort Ord*.<sup>40</sup> The cases were distinguishable in that the *New Jersey* action requested monetary relief for remediation costs incurred by the state for damages to natural resources and for compensatory and punitive damages.<sup>41</sup> However, the *N. Penn* and *Fort Ord*. plaintiffs had requested injunctions seeking to either alter or prohibit the EPA's remedial action. Importantly, *New Jersey* explicitly noted that the state was not seeking an injunction requiring cleanup, remediation, or removal of hazardous waste.<sup>42</sup>

In *New Mexico v. General Electric Company*, the State of New Mexico brought suit seeking monetary relief for alleged contamination of the state's groundwater in Albuquerque's South Valley.<sup>43</sup> The suit developed from events beginning more than twenty-five years ago. In 1981, New Mexico shut down one of Albuquerque's municipal water wells because the state had found volatile organic compounds ("VOC") in water from the well.<sup>44</sup> The contamination originated from a nuclear weapons production facility, where General Electric was one of the facility operators.<sup>45</sup> Beginning in 1984, the EPA adopted several remedial actions, summarized in several Records of Decision ("ROD").<sup>46</sup>

Throughout the many years of removal and remedial action, the EPA and New Mexico cooperated to develop and implement the current plan which is set to conclude in 2016.<sup>47</sup> In 1999, however, New Mexico hired independent counsel to file two lawsuits, one suit in federal court under CERCLA and another suit in state court based on state law.<sup>48</sup> The state court defendants removed that case to federal court, where a district judge consolidated the two cases.<sup>49</sup> In 2002, after extensive procedural action, New Mexico filed a motion to dismiss its

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39. 42 U.S.C. § 9613(h); § 9620 (2006).

40. *New Jersey*, 2006 WL 2806231 at \*8.

41. *Id.*

42. *Id.*

43. *New Mexico*, 467 F.3d at 1226.

44. *Id.* at 1227.

45. *Id.* at 1226, 1228–29.

46. *Id.* at 1227.

47. *Id.* at 1233–34.

48. *New Mexico*, 467 F.3d at 1235–36.

49. *Id.* at 1236.

CERCLA causes of action, and the district court granted the motion, dismissing the federal causes of action with prejudice.<sup>50</sup> The district court, however, denied New Mexico's motion to remand the remaining state law causes of action back to state court.<sup>51</sup>

The district court noted that, throughout the remediation process, New Mexico did not suffer a loss of use of its water supply because the EPA's remedial action included development of a replacement well.<sup>52</sup> The court further found that New Mexico had failed to prove the existence of any contamination that remained outside the reach of the EPA's remedial action plan.<sup>53</sup> In addition, the Tenth Circuit held that New Mexico's assertion that the EPA's remedial action plan would not address all groundwater contamination constituted a challenge under section 113(h).<sup>54</sup> The Tenth Circuit reasoned that any award of monetary damages would involve the conclusion that the EPA's plan was not comprehensive, which would effectively entail adjudication of the very subject matter denied under section 113(h) pending completion of the plan.<sup>55</sup> Therefore, the Tenth Circuit dismissed all remaining state law claims for lack of jurisdiction under section 113(h).<sup>56</sup>

The *New Jersey* and the *New Mexico* cases came to different outcomes because the plaintiffs addressed the underlying EPA remedial action plan in different ways. Principally, the *New Mexico* plaintiffs questioned the adequacy of the EPA plan, but the *New Jersey* action embraced its respective EPA plan.

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50. *Id.* at 1237.

51. *Id.*

52. *Id.* at 1238.

53. *New Mexico*, 467 F.3d at 1241.

54. *Id.* at 1249.

55. *Id.* at 1249–50.

56. *Id.* at 1250.

\* The general theme for this paper was developed under the mentorship of Micheal Dobbs of Jackson Fischer Gilmour & Dobbs, PC in Houston, Texas.