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Don't You Know That You're Toxic? CERCLA Section 113(H) Challenges, Sovereign Immunity, and Perfluoroalkyl Substances in Pennsylvania Drinking Water in *Giovanni V. Navy*

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DON'T YOU KNOW THAT YOU'RE TOXIC?
CERCLA SECTION 113(H) CHALLENGES, SOVEREIGN
IMMUNITY, AND PERFLUOROALKYL SUBSTANCES IN
PENNSYLVANIA DRINKING WATER IN *GIOVANNI V. NAVY*

I. IT'S IN THE SOIL AND IT'S ALL AROUND: AN INTRODUCTION TO
PERFLUOROALKYL SUBSTANCE CONTAMINATION

Per- and polyfluoroalkyl substances (PFAS) are groups of manufactured chemicals that have been used in the production of various consumer and industrial products worldwide.¹ The two most extensively-produced and well-researched forms of PFAS are perfluorooctane sulfonates (PFOS) and perfluorooctanoic acid (PFOA).² Although the United States has produced PFAS since the 1940s, they were recently discovered to cause adverse human health effects.³ Specifically, exposure to some PFAS — especially PFOS and PFOA — can cause reproductive and developmental issues, kidney and liver complications, cancers, thyroid hormone disruptions, and immunological effects.⁴ Until 2006, PFAS were used domestically in food packaging containers, commercial household products, and industrial workplace products.⁵ While most PFAS are now banned from being manufactured in the United States as a result of the Environmental Protection Agency's (EPA) PFOA Stewardship Program, other countries are still permitted to manufacture and export PFAS products to the United States.⁶

Currently, United States airports and military bases that use firefighting foams are the main sources of PFAS emissions and contamination.⁷ PFOS and PFOA are especially known to permeate soil, thus contaminating both drinking water and the water used to

1. *Basic Information on PFAS*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/pfas/basic-information-pfas> (last visited Dec. 2, 2020) (summarizing general information on PFAS).

2. *Id.* (identifying chemicals qualifying as PFAS).

3. *Id.* (summarizing PFAS history and adverse health effects).

4. *Id.* (exemplifying adverse health complications from PFAS exposure).

5. *Id.* (describing PFAS usage).

6. *See Risk Management for Per- and Polyfluoroalkyl Substances (PFAS) under TSCA*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/risk-management-and-polyfluoroalkyl-substances-pfas#tab-3> (last visited Sept. 6, 2020) (summarizing 2006 call on eight major PFAS manufacturers to work towards eliminating chemicals from emissions and products by 2015).

7. *See Basic Information on PFAS*, *supra* note 1 (explaining firefighting foams' common use).

grow food.⁸ As more manufacturing sites, airports, and military bases test their soil and drinking water, the link becomes more apparent between PFAS-contaminated soil and adverse effects on residents' health.⁹ Since 1999, federal health officials have tested for PFAS in the blood serum of participants exposed to known PFAS-contaminated sites to identify adverse health effects and further develop medical treatments for those negatively affected by PFAS.¹⁰ In *Giovanni v. United States Department of Navy*,¹¹ residents of the nearby Willow Grove Air Reserve Station — concerned for the safety of their children — brought suit to address these potential adverse health effects.¹²

This Note discusses the permissive and prohibitive impacts of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 113(h) with respect to: bringing hazardous waste claims, the limitations of existing state law pertaining to hazardous substances, and the role of judicial activism in environmental law.¹³ Section II of this Note provides a brief overview of the facts and long procedural history leading up to the complaint in *Giovanni*, as well as the current status of the case.¹⁴ Section III provides the relevant precedent behind the case, including the regulatory provisions, federal and state statutes, and binding case law.¹⁵ Section IV looks to the Third Circuit's legal analysis of the case.¹⁶ Section V first breaks down the Third Circuit's analysis to determine whether the court correctly applied the binding pre-

8. *Id.* (explaining PFAS contamination process).

9. See EPA Announces Proposed Decision to Regulate PFOA and PFOS in Drinking Water, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/newsreleases/epa-announces-proposed-decision-regulate-pfoa-and-pfos-drinking-water> (last visited Sept. 6, 2020) (explaining increased testing procedures and public health risks).

10. See *Per- and Polyfluorinated Substances (PFAS) Factsheet*, CTRS. FOR DISEASE CONTROL AND PREVENTION https://www.cdc.gov/biomonitoring/PFAS_Fact_Sheet.html (last visited Nov. 16, 2020) (explaining overview of PFAS testing in U.S.); see also Frank Kummer, *PFAS testing planned for 1,300 adults, children in Bucks, Montgomery Counties*, THE PHILA. INQUIRER (July 10, 2020), <https://www.inquirer.com/health/pfas-bucks-county-montgomery-county-epa-cdc-pennsylvania-health-department-20200710.html> (summarizing planned test of PA residents in PFAS-contaminated areas).

11. 906 F.3d 94 (3d Cir. 2018) (introducing subject case of this Note).

12. *Id.* at 99-100 (introducing case facts).

13. For a discussion of the case, see *infra* notes 100-52 and accompanying text.

14. For a discussion of the procedural history and facts of *Giovanni*, see *infra* notes 21-41 and accompanying text.

15. For a discussion of the relevant regulatory and statutory background, see *infra* notes 42-99 and accompanying text.

16. For a discussion of the Third Circuit's analysis, see *infra* notes 100-52 and accompanying text.

cedent.¹⁷ The second portion of Section V considers the value of the concurrence's approach.¹⁸ Finally, Section VI discusses the impact of the Third Circuit's holding in *Giovanni*, both federally and in the state of Pennsylvania.¹⁹ Section VI also highlights changes to Pennsylvania environmental regulations regarding hazardous substances, as well as the EPA's proposed rule concerning PFAS.²⁰

II. SLOWLY, IT'S TAKING OVER: FACTS OF *GIOVANNI V. NAVY*

In 1995, the EPA listed Willow Grove on the National Priorities List (NPL) for failing to comport with national health standards.²¹ The Defense Base Closure and Realignment Act provided for the closure of Willow Grove in 2005, and all naval flight operations finally ceased in 2011.²² Among the environmental concerns plaguing Willow Grove are its two major base landfills, hazardous waste storage areas, and groundwater and soil contamination from non-PFAS chemical substances.²³ The Navy and National Guard assisted the EPA and led Willow Grove's cleanup efforts.²⁴ The EPA, Navy, and National Guard have rectified one base site's soil contamination issue since 1995, but all other cleanup efforts at Willow Grove are deemed ongoing.²⁵

The EPA tested Willow Grove's nearby water supply in 2014 and found dangerous levels of PFAS, including PFOA and PFOS.²⁶ In 2016, the Giovanni family sued the Navy in the Montgomery County Court of Common Pleas under Pennsylvania's Hazardous Sites Cleanup Act (HSCA) after learning that contamination of the water supply and soil put local residents at risk of various health

17. For a critical discussion of the Third Circuit rationale, see *infra* notes 153-73 and accompanying text.

18. For a critical discussion of the concurrence's approach, see *infra* notes 154-67 and accompanying text.

19. For a discussion of the impact of the case, see *infra* notes 174-203 and accompanying text.

20. For a discussion of *Giovanni*'s impact on Pennsylvania law and regulations, see *infra* notes 190-203 and accompanying text.

21. See *Willow Grove Naval Air and Air Reserve Station Cleanup Activities*, U.S. ENVTL. PROT. AGENCY – SUPERFUND SITE, <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.cleanup&id=0303820> (last visited Sept. 6, 2020) (summarizing Willow Grove's environmental profile and EPA's steps to improve environmental concerns). For a discussion of the NPL, see *infra* notes 47-55 and accompanying text.

22. *Id.* (providing timeline of Naval Station's closure).

23. *Id.* (describing Naval Station's other environmental concerns).

24. *Id.* (noting federal actors responsible for overseeing cleanup).

25. See *Willow Grove Naval Air and Air Reserve Station Cleanup Activities*, *supra* note 21 (summarizing site milestones and progress updates).

26. *Id.* (describing soil and water testing process).

problems.²⁷ The Palmer family simultaneously filed suit against the Navy in the Bucks County Court of Common Pleas.²⁸ The Navy properly removed both cases to the District Court for the Eastern District of Pennsylvania.²⁹

The district court held that the Giovannis' action interfered with Willow Grove's ongoing cleanup efforts under Section 113(h) of CERCLA and dismissed the action under the doctrine of derivative jurisdiction.³⁰ In a footnote to its *Giovanni* opinion, the district court dismissed the Palmers' case for the same reason.³¹

Both the Giovannis and Palmers filed timely appeals to the Third Circuit.³² The Delaware Riverkeeper Network, Toxics Action Center, and various local congresspersons and community members also filed amicus briefs in support of the plaintiffs.³³ On October 2, 2018, the Third Circuit affirmed in part, and vacated and remanded in part, the district court's dismissal of the complaints.³⁴ The Third Circuit held that the request for a government-led health assessment or health effects study constituted a challenge to ongoing cleanup efforts, and was therefore barred by CERCLA Section 113(h).³⁵ The EPA's cleanup efforts were authorized under CERCLA because Willow Grove had been listed on the NPL since 1995 and its cleanup efforts are classified as ongoing.³⁶

CERCLA Section 113(h) does not bar private party medical monitoring, however, because it is not deemed to be a challenge to the ongoing cleanup efforts.³⁷ In addition, the claim for medical monitoring under the HSCA was injunctive relief and thus restricted the Navy's sovereign immunity claim.³⁸ The Third Circuit

27. *Giovanni v. U.S. Dep't of Navy*, 906 F.3d 94, 100 (3d Cir. 2018) (introducing facts of first lower court case where plaintiffs alleged harm from PFAS-contaminated water sources due to Navy's improper disposal of hazardous substances). The plaintiffs requested relief for impacted residents' medical monitoring and blood testing. *Id.* (noting remedy sought by plaintiffs).

28. *Id.* at 98-99 (introducing Palmers' lawsuit).

29. *Id.* at 100-01 (describing removal process); see also 28 U.S.C. § 1442(a)(1)(1969) (stating cases are properly removed to federal district court when federal agency is sued).

30. *Giovanni*, 906 F.3d at 101 (describing lower court's dismissal).

31. *Id.* (noting lower court's dismissal of Palmers' complaint).

32. *Id.* (describing plaintiffs' appeal).

33. *Id.* (highlighting amicus briefs filed in support of plaintiffs).

34. *Id.* at 121 (summarizing Third Circuit's holding).

35. *Giovanni*, 906 F.3d at 102-06 (explaining why health assessments constitute challenge).

36. *Id.* at 99-100 (noting NPL's relevance and EPA's cleanup efforts).

37. *Id.* at 112 (distinguishing medical monitoring from health assessments).

38. *Id.* at 117-21 (explaining distinction between monetary and injunctive relief regarding sovereign immunity).

subsequently vacated the two latter claims and remanded them to the district court.³⁹

On January 15, 2020, the district court held on remand that the Third Circuit properly determined the Navy had waived sovereign immunity pursuant to the Resource Conservation and Recovery Act (RCRA).⁴⁰ Judge Pappert also held that under Pennsylvania's Hazardous Sites Cleanup Act, PFAS did not constitute a hazardous substance at that point, and the court was limited to the current laws of the state.⁴¹

III. A TASTE OF POISON PARADISE: A REGULATORY AND STATUTORY FRAMEWORK

In order to address the court's analysis in *Giovanni*, context must be established through the relevant regulations involved, the implicated federal statutes, the pertinent case law, and the basis in Pennsylvania law.⁴² This section begins with an explanation of the origin of the EPA and provides a brief overview of the NPL.⁴³ This section also provides an overview of CERCLA, as well as a more in-depth summary of Section 113(h) interpreted through the relevant case law.⁴⁴ Next, this section covers RCRA and the EPA's authority to control hazardous waste.⁴⁵ Lastly, this section concludes with a discussion of Section 1115 of the Pennsylvania Hazardous Sites Cleanup Act, explaining the right to a private cause of action from hazardous waste exposure in Pennsylvania.⁴⁶

A. EPA's Regulatory Authority

In 1970, President Nixon proposed the creation of the EPA in response to increased public concern for protecting the environ-

39. *Id.* at 121 (summarizing Third Circuit's holding).

40. *Giovanni v. U.S. Dep't of Navy*, 433 F. Supp. 3d 736, 747 (E.D. Pa. 2020) (summarizing holding on remand).

41. *Id.* (explaining Court's duty in deciding cases based on current law as opposed to prospective law).

42. For a discussion of the legislative and regulatory background to *Giovanni*, see *infra* notes 42-99 and accompanying text.

43. For a discussion of the history of the EPA and its authority, see *infra* notes 47-55 and accompanying text.

44. For a discussion of CERCLA generally and Section 113(h), see *infra* notes 58-89 and accompanying text.

45. For a discussion of the RCRA and EPA authority to control hazardous waste, see *infra* notes 90-93 and accompanying text.

46. For a discussion of the Pennsylvania HSCA and private actions, see *infra* notes 94-99 and accompanying text.

ment from air and water pollution disasters.⁴⁷ When Congress approved the creation of the Agency and its designated regulatory authority, the federal government's environmental responsibilities were consolidated into the EPA, including a specific budget allocated to addressing these persistent environmental concerns.⁴⁸ One of the EPA's main responsibilities is maintaining the NPL, which is a publicly-available list that guides the EPA's cleanup of hazardous waste sites.⁴⁹ The NPL currently lists over one thousand sites throughout the United States where hazardous substances are present, or where the release of hazardous substances is threatened.⁵⁰ Placing a site on the NPL gives the EPA the authority to begin a long-term remedial response action, which includes investigating, testing, and conducting cleanup efforts on sites where there is a serious threat to human health or the environment.⁵¹ The EPA has issued health advisories for PFOS and PFOA, but has yet to establish an enforceable Maximum Contaminant Level or other regulatory determination nationally prohibiting the use of PFOS or PFOA.⁵² As more is discovered about PFAS and their adverse health effects, the EPA continues to evaluate and add sites to the NPL.⁵³ On February 20, 2020, the EPA issued a news release as part of their PFAS Action Plan to implement regulatory determina-

47. See *The Origins of EPA*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/history/origins-epa> (last visited Oct. 11, 2020) (summarizing EPA's creation history).

48. *Id.* (laying out EPA's role authorized by Congress).

49. See *Superfund: National Priorities List (NPL)*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/superfund/superfund-national-priorities-list-npl> (last visited Sept. 7, 2020) (summarizing NPL, listing number of sites on NPL, listing status of sites); see also 40 C.F.R. § 300.2 (giving authority to EPA to maintain current list of sites).

50. See *id.* (listing sites currently on NPL).

51. See *Superfund: CERCLA Overview*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/superfund/superfund-cercla-overview> (last visited Sept. 7, 2020) (discussing NCP and EPA's role in addressing hazardous waste sites).

52. See *PFAS Laws and Regulations*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/pfas/pfas-laws-and-regulations> (last visited Sept. 7, 2020) (explaining EPA's lack of authority in regulatory determination process and difficulties setting MCLs for PFAS because of lack of regulation around PFAS); see also *National Primary Drinking Water Regulations*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/ground-water-and-drinking-water/national-primary-drinking-water-regulations> (last visited Oct. 16, 2020) (defining Maximum Contaminant Level as highest level of contaminant allowed in drinking water).

53. *EPA Actions to Address PFAS*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/pfas/epa-actions-address-pfas> (last visited Sept. 7, 2020) (discussing timeline of actions EPA has taken to address PFAS).

tions for PFOS and PFOA.⁵⁴ This news release established a plan for (1) banning manufacturing and importation of PFAS, (2) implementing new testing procedures, and (3) issuing a notice of proposed rulemaking to add PFOS and PFOA to the Contaminant Candidate List.⁵⁵

B. Federal Statutes for Hazardous Waste

This subsection breaks down the various federal statutes primarily responsible for the control and management of hazardous waste.⁵⁶ The three statutes discussed in this section are (1) CERCLA Section 9601 *et seq.*, as a broad overview of the intent and history behind legislation to control hazardous waste sites; (2) CERCLA Section 113(h), which is the specific “timing of review” that prohibits private actions that cause a challenge to the cleanup of hazardous waste sites; and (3) RCRA Section 6961(a), which waives sovereign immunity for claims for injunctive relief typically seen in mass exposures to hazardous waste.⁵⁷

1. CERCLA § 9601 *et seq.*

Enacted in 1980, CERCLA was enacted to protect public health by controlling hazardous waste sites and providing a path to hold responsible parties liable for damages.⁵⁸ The law authorizes two response actions either by removal, which is generally a short-term process, or a remedial action that requires a longer-term and more expensive response.⁵⁹ CERCLA is administered by the EPA and “grants the President broad power to command government agen-

54. See *PFAS Action Plan: Program Update*, U.S. ENVTL. PROT. AGENCY (Feb. 20, 2020), https://www.epa.gov/sites/production/files/2020-01/documents/pfas_action_plan_feb2020.pdf (summarizing EPA action plan regarding PFAS).

55. See *id.* (detailing plans laid out in news release); see also *Contaminant Candidate List (CCL) and Regulatory Determination*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/ccl/regulatory-determination-4> (last visited Sept. 7, 2020) (summarizing details about list of contaminants that are national priority for water contamination cleanup efforts).

56. For a discussion of the federal statutes governing hazardous waste management, see *infra* notes 57-93 and accompanying text.

57. For a discussion of CERCLA generally, CERCLA Section 113(h), and RCRA Section 6961(a) see *infra* notes 58-93 and accompanying text.

58. *Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act> (last visited Sept. 12, 2020) (summarizing purpose including brief enforcement history).

59. See *Superfund: CERCLA Overview*, *supra* note 51 (defining short-term removal actions and long-term remedial response actions).

cies and private parties to clean up hazardous waste sites.”⁶⁰ CERCLA additionally authorizes the National Contingency Plan, which established the EPA’s NPL and provides guidelines for responding to hazardous waste contamination.⁶¹

2. CERCLA § 9613(h)

As litigation promptly ensued after CERCLA’s enactment, Congress chose to amend the statute to constrain the frequency of litigation in an effort to focus more heavily on cleanup efforts, as opposed to expensive and time-consuming litigation.⁶² CERCLA Section 113(h) bars litigants from bringing state claims that pose a “challenge” to ongoing EPA cleanup efforts titled the “timing of review.”⁶³ Courts, however, have inconsistently applied Section 113(h) since its adoption.⁶⁴ The inconsistent application of Section 113(h) is primarily due to the statute’s ambiguous language and uncertainty of the legislative intent.⁶⁵

The language of the statute is as follows: “No Federal court shall have jurisdiction under Federal law . . . or under State law . . . to review any challenges to removal or remedial action”⁶⁶ The phrases “no federal court,” “any challenges,” and “removal or remedial action” pose interpretive difficulties that are discernable throughout broad and narrow readings in the applicable case law.⁶⁷

In *Boarhead Corp. v. Erickson*,⁶⁸ the owner of a farm designated as a Superfund site on the NPL brought suit against the EPA for

60. See *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994) (quoting landmark recovery action case).

61. See *National Oil and Hazardous Substances Pollution Contingency Plan (NCP) Overview*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/emergency-response/national-oil-and-hazardous-substances-pollution-contingency-plan-ncp-overview> (last visited Sept. 12, 2020) (establishing CERCLA’s implementation regulations as governed by National Contingency Plan).

62. See Jonathan N. Reiter, *CERCLA Section 113(h) & RCRA Citizen Suits: To Bar or Not to Bar?*, 17 UCLA J. ENVTL. L. & POL’Y 207, 208-09 (1999) (describing frequency of CERCLA suits and diversion from congressional intent).

63. See 42 U.S.C. § 9613(h) (1986) (defining Section 113(h) as “timing of review”); see generally Joshua J. Anderson and John E. Van Vlear, “You’re Out of Here!” - CERCLA (Superfund) Federal Preemption of State Environmental Claims in State Courts, NEWMAYER & DILLION (Oct. 13, 2016), <https://www.lexology.com/library/detail.aspx?g=09544d26-dd24-4705-80d5-6f9196ce2a0d> (explaining state claims barred under CERCLA).

64. See Reiter, *supra* note 62, at 208 (discussing courts’ inconsistent application of CERCLA).

65. *Id.* at 210-16 (detailing ambiguous drafting and congressional intent).

66. 42 U.S.C. 9613(h) (quoting language of Section 113(h)).

67. See Reiter, *supra* note 62, at 210-16 (explaining how different courts have interpreted language of statute).

68. 923 F.2d 1011 (3d Cir. 1991) (introducing case).

failing to comply with its preclean-up activities.⁶⁹ The district court dismissed the complaint for lack of subject matter jurisdiction for failing to meet Section 113(h) timing procedures.⁷⁰ The Third Circuit affirmed, opining that the statute's clear language demonstrated Congress's intent to limit *any* private actions not enumerated by the exceptions.⁷¹

In *Clinton County Commissioners v. United States Environmental Protection Agency*,⁷² parties filed a citizen suit under CERCLA for a trial burn and incineration remedy, claiming the toxic substances released into the air would cause irreparable harm to local residents.⁷³ On appeal, the Third Circuit dismissed the suit for lack of subject matter jurisdiction.⁷⁴ Based on the plain language of the statute, the court held that (1) citizen suits were no exception to the jurisdictional bar and (2) removal actions were not to be brought while remedial actions were being conducted.⁷⁵ Further, the court stated the statutory language was clear and Congress intentionally provided for a broadly-worded statute in order to protect a large scope of EPA cleanup efforts and potential dangers to public health.⁷⁶

In *McClellan Ecological Seepage Situation v. Perry*,⁷⁷ a citizen's group brought an action for injunctive relief against the Secretary of the Department of Defense to ensure compliance with waste-disposal environmental laws.⁷⁸ In a broad reading of Section 113(h), the Ninth Circuit interpreted "any challenges" broadly and did not distinguish between types of plaintiffs.⁷⁹ Although the court agreed with the plaintiffs in stating "every action that increases the cost of a cleanup or diverts resources or personnel from it does not thereby become a 'challenge' to the cleanup," it ultimately held that the

69. *Id.* at 1013-15 (summarizing facts of case); *see also* *What Is Superfund?*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/superfund/what-superfund> (last visited Dec. 16, 2020) (defining Superfund sites as sites contaminated with hazardous waste and explaining how CERCLA sites are informally referred to as Superfund sites).

70. *Boarhead*, 923 F.2d at 1013 (summarizing lower court's holding).

71. *Id.* at 1023 (providing Third Circuit's holding limiting private actions).

72. 116 F.3d 1018 (3d Cir. 1997) (introducing case).

73. *Id.* at 1021-22 (explaining facts of case).

74. *Id.* at 1023 (holding there was no subject matter jurisdiction).

75. *Id.* at 1022-25 (summarizing Third Circuit's reasoning).

76. *Id.* at 1023 (expanding court's reasoning and explanation of congressional intent).

77. 47 F.3d 325 (9th Cir. 1995) (introducing case).

78. *Id.* at 327-28 (summarizing facts of case).

79. *Id.* at 328-29 (explaining court's analysis regarding what constituted "challenge" under CERCLA).

request for injunctive relief qualified as a challenge because it directly interfered with the ongoing cleanup efforts.⁸⁰

In *Hanford Downwinders Coalition, Inc. v. Dowdle*,⁸¹ a group of residents in Washington state sued the Agency for Toxic Substances and Disease Registry (ATSDR) seeking injunctive relief in the form of a health surveillance program to monitor medical testing and residents' exposure to radioactive iodine.⁸² The district court granted the defendant's motion to dismiss because of the Section 113(h) jurisdictional bar.⁸³ The Ninth Circuit affirmed the lower court, stating (1) health surveillance fell within the scope of a "removal action" under a plain language reading of the statute, and (2) seeking injunctive relief constituted a "challenge" based on the legislative intent.⁸⁴

In 2014, the D.C. Circuit attempted to provide a clear test for what claims fall within the Section 113(h) limitations in *El Paso Natural Gas Co. v. United States*.⁸⁵ In this case, a natural gas company brought suit against the government under RCRA.⁸⁶ The court analyzed other circuits' interpretations of 113(h) in several dominant cases and concluded with a test inspired by *McClellan*.⁸⁷ The court held that "a claim is a § 113(h) 'challenge' if it will *interfere* with a 'removal' or a 'remedial action,'" and that it is necessary to "assess the nexus between the nature of the suit and the CERCLA cleanup: the more closely related, the clearer it will be that the suit is a 'challenge'" ⁸⁸ The D.C. Circuit ultimately held the plaintiffs failed to meet the timing of review and dismissed the case without prejudice.⁸⁹

80. *Id.* at 330 (quoting *McClellan*'s argument and distinguishing its reasoning under these facts).

81. 71 F.3d 1469 (9th Cir. 1995) (affirming lower court dismissal for lack of jurisdiction).

82. *Id.* at 1471-74 (summarizing facts of case).

83. *Id.* at 1477-80 (holding ATSDR health assessment and surveillance activities to be "removal actions").

84. *Id.* at 1482-83 (defining removal action under plain-language reading).

85. 750 F.3d 863 (D.C. Cir. 2014) (introducing case).

86. *Id.* at 871-73 (summarizing *El Paso* cause of action).

87. *Id.* at 874-81 (explaining holdings of prior case law and court's analyses on determining challenge).

88. *Id.* at 880-81 (establishing test for a "challenge").

89. *Id.* at 883 (reversing lower court's holding and dismissing without prejudice).

3. *The Resource Conservation and Recovery Act §6961*

RCRA is a federal statute that provides the EPA with “the authority to control hazardous waste from the cradle to grave.”⁹⁰ Under Section 6961 of RCRA, the government “expressly waives any immunity otherwise applicable . . . with respect to any such substantive or procedural requirement”⁹¹ This waiver of immunity includes actions for injunctive relief but excludes actions for monetary damages.⁹² In RCRA mass exposure cases, the issue of whether medical monitoring constitutes injunctive or monetary relief is common and determined on a case-by-case basis.⁹³

C. Pennsylvania Hazardous Sites Cleanup Act § 1115

Section 1115 of the Pennsylvania Hazardous Sites Cleanup Act (HSCA) gives citizens the power to file civil actions when their property or person is injured due to the presence of a hazardous substance.⁹⁴ The HSCA specifically defines the terms “hazardous substance” and “hazardous waste.”⁹⁵ In *Redland Soccer Club, Inc. v. Department of the Army of the United States*,⁹⁶ the Third Circuit established the seven elements necessary to bring a claim under the HSCA.⁹⁷

State law claims based on the HSCA brought in federal court are also subject to the CERCLA Section 113(h) preemption.⁹⁸ In February 2020, the Pennsylvania Environmental Quality Board is-

90. See *Summary of the Resource Conservation and Recovery Act*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-resource-conservation-and-recovery-act> (last visited Sept. 12, 2020) (quoting EPA scope of authority within § 6901).

91. 42 U.S.C. § 6961(a) (1992) (citing relevant statutory provision on sovereign immunity).

92. *Id.* (citing inclusions to sovereign immunity rule).

93. See *e.g.*, *Jaffee v. United States*, 592 F.2d 712, 715 (3d Cir. 1979) (explaining how monetary request is not necessarily inequitable in nature); see also *Redland Soccer Club, Inc. v. Dep’t of Army of United States*, 55 F.3d 827, 142 (3d Cir. 1995) (holding medical monitoring via trust fund was equitable remedy).

94. 35 PA. STAT. ANN. § 6020.1115(a) (West 1988) (summarizing right to action under statutory provision).

95. See 35 PA. STAT. ANN. § 6020.103(1) (West 1988) (providing definition for “hazardous substance”); see 35 PA. STAT. ANN. § 6018.103 (West 2018) (providing definition and required elements for designation of “hazardous waste”).

96. 55 F.3d 827 (3d Cir. 1995) (introducing case).

97. See *Giovanni v. United States Dep’t of the Navy*, 433 F. Supp. 3d 736, 747 (E.D. Pa. 2020) (citing *Redland Soccer Club, Inc. v. Dep’t of Army of U.S.*, 55 F.3d 827, 142 (3d Cir. 1995)) (listing seven elements for prima facie claim for medical monitoring, including proven presence of “hazardous substance”).

98. *Id.* at 743-47 (explaining court’s reasoning for barring HSCA and other state law claims under CERCLA).

sued a notice to amend Pennsylvania state law to include PFAS as “hazardous substances” granting future plaintiffs the ability to recover under the HSCA.⁹⁹

IV. SLIPPIN’ UNDER - SECTION 113(H) AND SOVEREIGN IMMUNITY: THE THIRD CIRCUIT’S ANALYSIS

In *Giovanni*, the Third Circuit separately scrutinized the two main issues plaguing the case: (1) the CERCLA Section 113(h) jurisdictional bar, and (2) sovereign immunity.¹⁰⁰ This section includes the Third Circuit’s analysis of what constitutes a challenge under Section 113(h), analyzes the subtleties of removal and remedial actions, and discusses ongoing cleanup efforts.¹⁰¹ This section also includes the concurrence’s analysis and the issues ultimately remanded to the lower district court.¹⁰²

A. Lack of Jurisdiction Over “Challenges” Under Section 113(h)

In *Giovanni*, the Third Circuit analyzed case law to determine what constitutes a “challenge” under Section 113(h) of CERCLA, and whether the claims in the present matter fell within that scope by interfering with ongoing EPA cleanup efforts.¹⁰³ The court additionally reiterated the interpretive complexities and legislative intent behind CERCLA.¹⁰⁴ The interpretive complexities focused on identifying what kind of party could bring forth an action and finding the intended definition for “removal” and “remedial” actions.¹⁰⁵ The court also discussed the benefits of barring state claims under Section 113(h) and how requiring additional responses was inappropriate.¹⁰⁶ The court noted, as *Boarhead* prescribed, that Section 113(h) precludes a state claim from jurisdiction if the claim clearly “delay[s] or interfere[s] with EPA

99. 50 Pa. Bull. 1011 (Feb. 15, 2020) (proposing amendment to 25 PA. CODE § 250.11).

100. *Giovanni v. U.S. Dept. of Navy*, 906 F.3d 94, 102 (3d Cir. 2018) (summarizing court’s opinion).

101. For a discussion of the majority’s analysis, see *infra* notes 103-41 and accompanying text.

102. For a discussion of the concurrence and the issues on remand, see *infra* notes 142-52 and accompanying text.

103. *Giovanni*, 906 F.3d at 102-03 (explaining court’s dissection of parties’ first argument regarding lack of jurisdiction).

104. *Id.* at 109-10 (expressing why Congress adopted Section 113(h) of CERCLA).

105. *Id.* (summarizing court’s interpretive challenges).

106. *Id.* at 113-14 (outlining Congressional intent and reasons for reducing government cleanup effort burdens).

cleanup activities.”¹⁰⁷ The court ultimately held that private party medical monitoring does not constitute a challenge under Section 113(h), but a health assessment does.¹⁰⁸

1. *CERCLA Removal and Remedial Actions*

In order to determine whether Section 113(h) barred the plaintiffs’ claim in *Giovanni*, the court first analyzed whether private party medical monitoring or health assessments, as requests for relief, fit the statutory definitions for “removal” or “remedial” actions.¹⁰⁹ The Third Circuit evaluated this question by examining the plain language definitions in the statute, scrutinized through the lens of prior case law interpretations.¹¹⁰

a. *Private Party Medical Monitoring*

The court assessed that even though the statutory definition uses the word “monitor,” it did not do so in the context of “monitoring of individuals for latent diseases or injuries.”¹¹¹ As for remedial actions, the court rationalized that, although medical monitoring closely mirrored a permanent remedy, it was not an example of a claim that attempted to “minimize the release of hazardous substances.”¹¹²

The court also determined that there was no supporting case law that classified private party medical monitoring as a remedial action.¹¹³ To support its reasoning, the Third Circuit applied the persuasive analysis from the Ninth Circuit’s *Hanford* decision, which distinguished between private party medical monitoring activities and government-led health surveillance activities.¹¹⁴ In applying

107. *Giovanni*, 906 F.3d at 103 (quoting *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1023 (3d Cir. 1991)) (explaining basis for jurisdictional bar under CERCLA Section 113(h)).

108. *Id.* at 115 (concluding plaintiffs could pursue medical monitoring but not health assessments).

109. *Id.* at 104 (quoting precise definition for “removal action” from 42 U.S.C. § 9601(23)); *see id.* at 104-05 (quoting precise definition for “remedial action” from 42 U.S.C. § 9601(24)).

110. *Id.* at 106-07 (summarizing court’s analysis of what constitutes removal or remedial actions).

111. *Giovanni*, 906 F.3d 94 at 106 (distinguishing text of statute from removal action through plain language definition).

112. *Id.* at 106-07 (differentiating medical monitoring from plain language definition for remedial action).

113. *Id.* (summarizing why courts do not consider private party medical monitoring remedial action).

114. *Id.* at 108-10 (citing *Hanford Downwinders Coalition, Inc. v. Dowdle*, 71 F.3d 1469, 1475-82 (9th Cir. 1995)) (using *Hanford* court’s analysis to distinguish how medical monitoring falls outside of scope for claims that Section 113(h) bars).

the *Hanford* standard, the court rationalized that “[p]rivate party medical monitoring falls outside of the definition of response action, but government-led monitoring does not.”¹¹⁵ As this was a question of private party medical monitoring rather than a request for government health surveillance, the court reasoned private party medical monitoring did not fit the statutory definition under Section 113(h) and was not a removal or remedial action.¹¹⁶

b. Health Assessment or Health Effects Study

The Third Circuit held that government-led health assessments, unlike private party medical monitoring, pose a challenge under Section 113(h).¹¹⁷ The court reasoned that while a generic health study — like private party medical monitoring — would not generally trigger removal or remedial actions under Section 113(h), requesting that the Navy conduct health assessments interfered with the government response action under CERCLA.¹¹⁸ The government maintains the authority to conduct health assessments as part of the cleanup efforts for NPL sites.¹¹⁹ The court reasoned that imposing an additional duty and its related costs served as a challenge to ongoing cleanup efforts under Section 113(h).¹²⁰

2. Ongoing Federal Cleanup Efforts

The court doubled down on its argument by venturing beyond the plain language of the statute, and evaluating whether there were additional reasons to believe the plaintiffs’ request interfered with ongoing cleanup efforts.¹²¹ This subsection covers the distinctions between private party medical monitoring and health assessments as forms of requested relief.¹²²

115. *Id.* at 109 (adopting *Hanford* standard as persuasive because private party medical monitoring is not government-led).

116. *Giovanni*, 906 F.3d 94 at 110 (using *Hanford* standard to justify permissibility under CERCLA Section 113(h)).

117. *Id.* (distinguishing between medical monitoring and health assessments).

118. *Id.* (explaining how plaintiffs are seeking government-led assessment as opposed to assessment led by private party, creating CERCLA challenge).

119. *Id.* at 110-11 (explaining ongoing cleanup efforts).

120. *Id.* (explaining issues with imposing additional duties).

121. *Giovanni*, 906 F.3d 94 at 113 (summarizing additional considerations barring claims under Section 113(h)).

122. For a discussion of private party medical monitoring and health assessments, see *infra* notes 123-29 and accompanying text.

a. Private Party Medical Monitoring

The court held that although the use of government funds to address medical monitoring was inevitable, this was not sufficient to conflict with ongoing cleanup efforts.¹²³ This conclusion was distinct from the lower court's reasoning.¹²⁴ The Third Circuit held that the lower court's reliance on *Boarhead* was misplaced because the facts were distinct and the argument was unsupported.¹²⁵ The *Boarhead* plaintiff directly interfered with ongoing cleanup efforts by seeking injunctive relief that would change EPA remedial plans.¹²⁶

Comparatively, the plaintiffs in *Giovanni* sought a trust solely to cover the cost of their own medical monitoring.¹²⁷ Rather than directly requesting that the government take new or diverted actions, the plaintiffs in *Giovanni* sought relief in the form of a trust based on the undisputed existence of PFOA and PFOS released by the Navy.¹²⁸ The court noted that the undisputed existence of PFOA and PFOS was of key importance because any uncertainty surrounding the request would burden ongoing cleanup efforts.¹²⁹

b. Health Assessment or Health Effects Study

Although the private party medical monitoring passed the Section 113(h) "challenge" test, the court deemed that the health assessment failed the test because it impacted and interfered with cleanup efforts under *El Paso* and *McClellan*.¹³⁰ The court reasoned that the requested relief required additional work on behalf of the government and, further, "preempt[ed] the federal government's 'ability to choose the best remedial action among a panoply of re-

123. *Giovanni*, 906 F.3d 94 at 113 (explaining private party medical monitoring meets Section 113(h) bar).

124. *Id.* at 113-14 (citing *Giovanni v. U.S. Dept. of Navy*, 263 F. Supp. 3d 532 (E.D. Pa. 2017)) (noting how district court relied heavily on precedent stating that delays or disputes about costs are counter to Congressional intent to move expeditiously and cost-effectively).

125. *Id.* at 114 (citing *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1019-23 (3d Cir. 1991)) (distinguishing *Giovanni* from *Boarhead*).

126. *Id.* (citing *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1019-23 (3d Cir. 1991)) (summarizing factual and legal differences in *Boarhead*).

127. *Giovanni*, 906 F.3d 94 at 113-14 (highlighting factual and legal differences in *Giovanni*).

128. *Id.* at 114 (clarifying distinction between forms of relief sought).

129. *Id.* (reiterating significance of PFOA and PFOS' uncontended presence in minimizing potential costs hindering cleanup efforts).

130. *Id.* at 114-15 (summarizing added challenges to Section 113(h) for health assessments request).

medial alternatives”¹³¹ This concept of preempting the government’s ability to choose arose directly from the *El Paso* analysis of *McClellan*, which similarly held there was no jurisdiction under Section 113(h).¹³²

B. Sovereign Immunity

The court then analyzed the second issue that the Navy argued: whether the government’s sovereign immunity barred the claim if the plaintiffs succeeded on their claim for jurisdiction under Section 113(h).¹³³ The court found the plaintiffs’ counterargument to be more persuasive based on an analysis of the plain language of RCRA Section 6961(a) and prior case law, categorizing the distinctions between state law claims for injunctive versus monetary relief.¹³⁴ The court began its analysis with RCRA Section 6961(a), which specifically carves out that sovereign immunity is waived where there is a claim for injunctive relief.¹³⁵ The court then analyzed whether the medical monitoring claim was more analogous to monetary damages or to injunctive relief, noting that medical monitoring claims are subject to a case-specific analysis.¹³⁶ The court relied on *Jaffee v. United States*¹³⁷ to establish that a request for an expense or payment of money does not immediately disqualify such a request from the “category of equitable remedies.”¹³⁸ For its case-specific analysis, the court relied heavily on the Pennsylvania Supreme Court’s *Redland* opinion, which dealt with a similar request for relief for private party medical monitoring in the

131. *Id.* at 115 (quoting *El Paso Nat. Gas Co. v. U.S.*, 750 F.3d 863, 881 (D.C. Cir. 2014)) (referencing government’s added burden if court granted requested relief).

132. *Giovanni*, 906 F.3d 94 at 115 (using elements from *El Paso* to address concerns for preempting ongoing cleanup efforts); *see also* *El Paso Nat. Gas Co. v. U.S.*, 750 F.3d 863, 880-81 (D.C. Cir. 2014) (citing *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325 (9th Cir. 1995)) (referencing additional requests for relief that impose on government efforts).

133. *Giovanni*, 906 F.3d 94 at 117 (summarizing defendants’ argument for sovereign immunity).

134. *Id.* at 118 (summarizing plaintiffs’ argument regarding RCRA Section 6961(a) and prior case law).

135. *Id.* (referencing plain language of RCRA Section 6961(a)); *see also* 42 U.S.C. § 6961(a) (explaining when sovereign immunity is waived or applied).

136. *Giovanni*, 906 F.3d 94 at 119 (reviewing case law comparing monetary damages and injunctive or equitable relief).

137. 592 F.2d 712, 715 (3d Cir. 1979) (holding plaintiff’s request for injunction ordering payment of money does not transform damages claim into equitable remedy).

138. *Giovanni*, 906 F.3d 94 at 119 (quoting *Jaffee v. U.S.*, 592 F.2d 712, 715 (3d Cir. 1979)) (noting distinctions made in *Jaffee* for equitable remedies).

form of a trust fund.¹³⁹ Drawing on this precedent, the court concluded that the medical monitoring claims under the HSCA were primarily equitable in nature.¹⁴⁰ The court held the claims were more akin to injunctive relief than to a request for money damages, which compelled a waiver of sovereign immunity pursuant to RCRA Section 6961(a).¹⁴¹

C. Judge Bibas's Concurrence

Circuit Judge Bibas concurred in part and concurred in the judgment.¹⁴² He agreed with the majority's interpretation of the sovereign immunity waiver under RCRA Section 6961(a) but disagreed with its analysis regarding jurisdiction under Section 113(h).¹⁴³ Rather than adopting the *Hanford* standard, Judge Bibas believed the majority should have adopted the D.C. Circuit's standard from *El Paso*.¹⁴⁴ The *El Paso* standard synthesized all the pre-existing tests for determining challenges to removal or remedial actions into one "interference test."¹⁴⁵ Under the *El Paso* standard, Judge Bibas proposed that neither private party medical monitoring nor health assessments posed a challenge to Section 113(h) because neither interfered with any response action.¹⁴⁶ Judge Bibas distilled his argument in favor of the "interference test," stating that Section 113(h) "turns on whether the *action* would interfere with a removal or remedial action, not whether the *actor* is the government."¹⁴⁷ While Judge Bibas did not believe either medical monitoring or health assessments constituted challenges to Section 113(h), he declined to address the question of sovereign immunity regarding health assessments and agreed with the majority's remand to state court.¹⁴⁸

139. *Id.* (citing *Redland Soccer Club, Inc. v. Dept. of Army of U.S.*, 55 F.3d 827 (3d Cir. 1995)) (noting *Jaffee's* distinctions for equitable remedies).

140. *Id.* at 120-21 (explaining similarities between *Giovanni* and precedent to distinguish types of equitable remedies).

141. *Id.* (holding sovereign immunity is waived for medical monitoring).

142. *Id.* at 121 (concurring in part).

143. *Giovanni*, 906 F.3d at 121 (summarizing agreement and distinctions from majority opinion).

144. *Id.* (finding *Hanford's* analysis unpersuasive for current case).

145. *Id.* (referencing "interference test" from *El Paso* and applicability for current case); see also *El Paso Natural Gas*, 750 F.3d at 880 (summarizing "interference test").

146. *Giovanni*, 906 F.3d at 121-22 (synthesizing "interference test" for private party medical monitoring and health assessments).

147. *Id.* at 123 (distilling "interference test" into simple analysis that disrupts majority's construction).

148. *Id.* (declining to answer question of sovereign immunity).

D. Lower Court Remand Decision

On remand to the Eastern District of Pennsylvania, the court agreed with the Third Circuit that the Navy waived sovereign immunity with respect to the private party medical monitoring.¹⁴⁹ The court reasoned that had it not been for HSCA limitations, the Navy could have been held liable for the requested relief.¹⁵⁰ The court reiterated the circuit court's sovereign immunity argument under RCRA and explained HSCA's limitations on recovery.¹⁵¹ Judge Pappert, however, notably remarked that Pennsylvania does not classify PFOS or PFOA as hazardous substances under the HSCA, meaning the plaintiffs were not able to state a claim for relief under current Pennsylvania law.¹⁵²

V. THE MAJORITY SPINNIN' 'ROUND AND 'ROUND: A CRITICAL ANALYSIS OF THE GIOVANNI MAJORITY OPINION

While the majority's analysis of what constitutes a challenge under Section 113(h) adheres to precedent and is logically consistent, Judge Bibas's concurrence summarizes the majority's lengthy and exhaustive argument in a succinct three pages.¹⁵³ The concurring opinion solely relies on a preexisting synthesized test combining elements from prior precedent, which the majority merely referenced in a complimentary footnote to its otherwise holistic approach.¹⁵⁴ Without directly identifying its use of the "interference test" from *El Paso*, the majority essentially repeats the *El Paso* analysis in distinguishing removal and remedial actions for the government-led health assessments and medical monitoring.¹⁵⁵ For Judge Bibas, the only important question is whether the response *action* interferes with ongoing cleanup efforts.¹⁵⁶ The question of whether a response action obstructs or hinders the cleanup efforts

149. *Giovanni v. U.S. Dep't. of the Navy*, 433 F. Supp. 3d 736, 742-43 (E.D. Pa. 2020) (summarizing basis for remand and holding).

150. *Id.* (highlighting HSCA's limitations).

151. *Id.* at 742-47 (arguing consistency with Third Circuit for sovereign immunity claim and limitations under HSCA).

152. *Id.* at 747 (holding court's statutory limitations in providing plaintiffs with opportunities to recover under HSCA).

153. For a discussion of the majority's analysis and the concurrence, see *supra* notes 100-48 and accompanying text.

154. For a discussion of the concurrence, see *supra* notes 143-48 and accompanying text.

155. For a discussion of the "interference test," see *supra* notes 145-47 and accompanying text; see also *supra* notes 130-33 and accompanying text for a discussion of *El Paso*.

156. For a discussion of the concurrence, see *supra* notes 142-48 and accompanying text.

appears to be a straightforward one to answer.¹⁵⁷ Given that legislative intent behind Section 113(h) is to avoid delaying ongoing cleanup efforts, the court ought to rely on what kind of action would cause a delay as the crux of the test, as opposed to looking at the actor or other metrics.¹⁵⁸ If the action would not cause a delay or a prohibitive cost, it is not an interference and, therefore, not a challenge under Section 113(h).¹⁵⁹ The majority's interpretation reached a similar conclusion but focused on the less important trigger for the test.¹⁶⁰ Like many court opinions before *Giovanni*, the majority's analysis was likely due to the perceived ambiguity in the drafting of the statutory definitions.¹⁶¹

The majority's argument also heavily hinges on the purported ongoing efforts to clean up the Naval Station.¹⁶² While the court has no duty to enforce ongoing cleanup efforts, ignoring the fact that the Naval Station had been on the NPL since 1995 — without any semblance of resolve — muddied the effectiveness of the majority's argument and undermined the legislative intent.¹⁶³ Although the Third Circuit's holding was proper in light of precedent, Judge Bibas's concurrence provided a simpler approach to the same conclusion and offered a clearer construction than the majority.¹⁶⁴

Like the majority, however, the concurrence is faulted where it declines to address the issue of whether sovereign immunity is waived regarding health assessments.¹⁶⁵ The majority ignored this question as it already reasoned that health assessments are barred

157. See *Giovanni*, 906 F.3d at 122 (citing ordinary meanings to simplify future Section 113(h) interpretation); see also Reiter, *supra* note 62, at 208-16 (discussing inconsistency with court interpretation because of ambiguous drafting and efforts to establish standard).

158. See Reiter, *supra* note 62, at 208-09 (discussing legislative intent for Section 113(h) amendment to restrict future litigation).

159. For a discussion of the *El Paso* "interference test," see *supra* notes 130-33 and accompanying text.

160. For the concurrence's application of the *El Paso* "interference test," see *supra* notes 145-47 and accompanying text.

161. See Reiter, *supra* note 62, at 208 (discussing courts' inconsistent applications of Section 113(h) due to alleged ambiguity).

162. For the majority's discussion on the impact of ongoing cleanup efforts, see *supra* notes 121-32 and accompanying text.

163. See *Superfund: CERCLA Overview*, *supra* note 51 (discussing role of EPA and NPL in addressing ongoing cleanup efforts); see also *EPA Actions to Address PFAS*, *supra* note 33 (discussing lack of ongoing cleanup efforts at Naval Station).

164. *Giovanni*, 906 F.3d at 121-23 (Bibas, J., concurring) (distinguishing from majority in concise manner).

165. *Id.* at 121, 123 (explaining failure to address sovereign immunity).

under Section 113(h).¹⁶⁶ In contrast, the concurrence claimed Section 113(h) should not bar health assessments, but it failed to conclude whether health assessments are a form of permissible equitable injunctive relief or a prohibited request for money damages.¹⁶⁷

Finally, irrespective of CERCLA jurisdiction and sovereign immunity, this case's ping-ponging between state and federal courts raises questions of judicial efficiency and economy.¹⁶⁸ The case originated in state court, claiming a violation under Pennsylvania law.¹⁶⁹ At the time of filing, no suitable recovery response existed for plaintiffs because HSCA's designations of hazardous waste omitted PFOS and PFOA.¹⁷⁰ Further, the case's course from state court, to the Eastern District of Pennsylvania, to the Third Circuit, and back again — with a final disposition that the plaintiffs could not recover under Pennsylvania law — calls into question the court system's discernment in letting the initial meritless claim proceed.¹⁷¹ While the initial removal by the Navy was procedurally proper, the plaintiffs' claim for relief hinged on an issue of Pennsylvania state law.¹⁷² Irrespective of whether this amounted to a challenge under Section 113(h), plaintiffs would still have no modality for relief or recovery because PFAS are not federally regulated nor are they designated as hazardous waste under Pennsylvania law.¹⁷³

VI. THERE'S NO ESCAPE, IT CAN'T WAIT: QUESTIONING THE FUTURE OF EPA CLEANUP EFFORTS AND PFAS HAZARDOUS WASTE DESIGNATIONS IN PENNSYLVANIA

The ultimate value in examining a case like *Giovanni* is evaluating the efficacy of CERCLA Section 113(h) in limiting federal hazardous waste claims and battling the limitations of procedure for

166. *See id.* at 121 (holding statutory language precludes health assessment form of relief).

167. *Id.* at 121-23 (failing to determine whether health assessments are equitable or monetary damages).

168. *See Giovanni*, 906 F.3d at 100-01 (providing procedural background of case).

169. *See id.* at 100 (detailing state law claim).

170. For a discussion of hazardous waste designation under the HSCA, see *supra* notes 94-99 and accompanying text.

171. *See Giovanni*, 906 F.3d at 100-01 (detailing circuitous route case took before final disposition).

172. *Id.* (discussing Navy's removal to federal district court).

173. For a discussion of hazardous waste designation under the HSCA, see *supra* notes 94-99 and accompanying text.

environmental claims.¹⁷⁴ This section further assesses the potential for judicial economy and highlights the positive role of judicial activism in environmental law.¹⁷⁵ This section concludes by exploring recent attempts to revise or promulgate new PFAS regulations and illustrates a new focus on protecting individuals from adverse health effects caused by PFAS exposure.¹⁷⁶

As discussed in Section III of this Note, Congress enacted CERCLA to clean up hazardous waste sites across the United States that pose a significant environmental and public health threat.¹⁷⁷ In 1986, Congress amended CERCLA with Section 113(h) to shift costs incurred from frequent hazardous waste claims to cleanup efforts.¹⁷⁸ If the overarching intent of CERCLA is to address major environmental and public health concerns, yet parties may be barred from bringing subsequent claims even if the ongoing cleanup efforts amplify or ignore other persistent environmental or public health harms, the statute's efficacy is dubious.¹⁷⁹ As illustrated in *Giovanni* — where there was little evidence of improvement to the Naval Station's environmental status despite ongoing cleanup efforts dating back to 1995 — barring the plaintiffs from receiving government-led health assessments could result in more significant contamination and exacerbate public health concerns.¹⁸⁰ With over one thousand sites listed on the NPL, there are undoubtedly other instances where Section 113(h) may inhibit meritorious claims from being brought, resulting in foreseeable adverse effects.¹⁸¹ Not only does Section 113(h) deter the well-intentioned plaintiff from bringing suit for relief against the

174. For a discussion of the development of CERCLA and the legislative intent, see *supra* notes 58-65 and accompanying text.

175. For a discussion of judicial economy and judicial activism, see *infra* notes 190-94 and accompanying text.

176. For a discussion of recent updates on PFAS regulations, see *infra* notes 195-203 and accompanying text.

177. For a discussion of the adoption of CERCLA, see *supra* notes 56-61 and accompanying text.

178. For a discussion of cleanup efforts to the Naval Station, see *supra* notes 21-27 and accompanying text.

179. For a discussion of barriers to litigation under CERCLA, see *supra* notes 62-89 and accompanying text.

180. For a discussion of the dangers of PFAS, see *supra* notes 1-10 and accompanying text; see also *supra* notes 21-27 and accompanying text for a discussion of ongoing cleanup efforts to the Naval Station.

181. For a discussion of the National Priorities List, see *supra* notes 49-53 and accompanying text.

government, it also limits injured plaintiffs to a very narrow realm of equitable relief.¹⁸²

Also highlighted in Section V of this Note is the ineffectiveness of the state court in its initial assessment of the hazardous waste issue.¹⁸³ Had more attention been brought to the HSCA designations for hazardous waste, the more complex issues of CERCLA jurisdiction and sovereign immunity would have likely never broken the surface.¹⁸⁴ While the Third Circuit does not address — nor is it supposed to address — the HSCA claim, it is ironic that after more than four years of contentious and costly litigation on other substantive legal issues, on remand the plaintiff's outcome is reduced to whether or not PFOS and PFOA are designated as hazardous waste in Pennsylvania.¹⁸⁵ In light of Section 113(h)'s legislative intent, which is to reduce litigation and ensure all efforts are directed to cleanup, there is an inherent flaw in the outcome.¹⁸⁶ The time and money that could have been spent on addressing PFAS contamination, or other hazardous waste at the Naval Station, was instead spent on four years of costly litigation.¹⁸⁷ While there is no precise way to weigh the costs and benefits of Section 113(h) litigation against providing the requested medical monitoring and health assessments, it is likely that the expense of this litigation caused a significant disruption to ongoing cleanup efforts.¹⁸⁸ If the precise statute adopted to curb CERCLA litigation is a direct cause of more confusion and leads to more litigation, legislators and courts must question the efficacy of such a statute.¹⁸⁹

Furthermore, on remand to the Eastern District of Pennsylvania, Judge Pappert commented: “[t]he inherent vagaries of the legislative or regulatory processes aside, the issue is not whether someone in Harrisburg or Washington may someday mold the law

182. For the court's analysis of what constitutes equitable relief under Section 113(h), see *supra* notes 136-41 and accompanying text.

183. See *Giovanni*, 906 F.3d at 100 (discussing state claim for relief).

184. For a discussion of the HSCA and hazardous waste, see *supra* notes 94-99 and accompanying text; see also *supra* notes 26-36 and accompanying text for a discussion of the case's procedural history.

185. For a discussion of the district court's holding on remand, see *supra* notes 149-52 and accompanying text.

186. For a discussion of legislative intent behind Section 113(h), see *supra* notes 62-65 and accompanying text.

187. For a discussion of the case history, see *supra* notes 21-41 and accompanying text.

188. For a discussion of the court's analysis of plaintiffs' claim for medical monitoring and health assessments, see *supra* notes 111-20 and accompanying text.

189. For a discussion of Section 113(h) interpretative confusion and history of litigation, see *supra* notes 62-89 and accompanying text.

to Plaintiffs' current theory. The issue is whether the Plaintiffs can state a claim for relief under the current law"¹⁹⁰ Judge Pappert noted the significant gap in Pennsylvania law and, in an admirable bid of activism, called on state and federal legislators to designate PFAS as hazardous substances.¹⁹¹ The *Giovanni* case revolved around concerns for the public health of Montgomery County residents.¹⁹² Judge Pappert may have been sympathetic to the community's concerns but was restricted by existing law.¹⁹³ Calling on legislators in Harrisburg and Washington D.C. was an attempt to assist future, similarly-situated plaintiffs in seeking recovery and relief.¹⁹⁴

Although the outcome of *Giovanni* was not inherently favorable to the plaintiffs, the resulting impact of public attention, and subsequently the attention of local and federal government, shed a much-needed light on the unintended pitfalls of CERCLA Section 113(h).¹⁹⁵ As a positive outcome from the case, the EPA issued a news release on February 20, 2020 as part of its PFAS Action Plan to implement regulatory determinations for PFOS and PFOA.¹⁹⁶ The EPA's new plan includes (1) banning manufacturing and importation of PFAS, (2) implementing new testing procedures for PFAS, and (3) issuing a notice of proposed rulemaking to add PFOS and PFOA to the Contaminant Candidate List.¹⁹⁷

At the state level, beginning in fall 2020, Pennsylvania and federal health officials planned to recruit one thousand adults and three hundred children in Bucks and Montgomery Counties for a national study on the impacts of PFAS on thyroid function, cholesterol levels, kidney function, the immune systems, liver function, and even behavioral problems.¹⁹⁸ As of February 15, 2020, the

190. *Giovanni v. United States Dept. of the Navy*, 433 F. Supp. 3d 736, 747 (E.D. Pa. 2020) (holding court's statutory limitations in providing plaintiffs with opportunities to recover under HSCA).

191. *Id.* (concluding plaintiffs could not seek requested relief unless there were changes to state or federal law).

192. For a discussion of facts leading up to plaintiffs' complaint, see *supra* notes 21-25 and accompanying text.

193. 433 F. Supp. 3d at 747 (summarizing restrictions to current state law).

194. *Id.* (noting Pappert's call for legislators to change law for future plaintiffs).

195. For a discussion of resulting public attention, see *infra* notes 198-203 and accompanying text.

196. See *EPA Actions to Address PFAS*, *supra* note 53 (describing issuance of EPA news release to address PFAS).

197. See *PFAS Action Plan: Program Update*, *supra* note 54 (summarizing details of PFAS Action Plan).

198. See *Kummer*, *supra* note 10 (explaining planned study to monitor PA residents for adverse health effects from PFAS exposure).

Pennsylvania Environmental Quality Board proposed to amend 25 Pa. Code Section 250.11, which would add PFAS to the list of contaminants and create a maximum threshold for permissible consumption.¹⁹⁹ The proposed rulemaking would add medium-specific concentrations for three types of PFAS, two of which were included in the *Giovanni* case.²⁰⁰ The proposed rulemaking is a preliminary step toward categorizing PFAS as hazardous waste under Pennsylvania law.²⁰¹ This change would allow future claimants, like the *Giovanis* or *Palmers*, to bring suit in Pennsylvania state court.²⁰² Although the Pennsylvania Bulletin did not directly link the proposed rulemaking to *Giovanni*, the rulemaking was notably proposed just one month after the Eastern District of Pennsylvania decided the case.²⁰³

*Stephanie J. Oppenheim**

199. 50 Pa. Bull. 1011 (Feb. 15, 2020) (citing amendment of PA statute).

200. *Id.* (noting effect of amended statute by adopting PFAS as hazardous substances).

201. For a discussion of the district court's holding on remand, see *supra* notes 149-52 and accompanying text.

202. 50 Pa. Bull. 1011 (Feb. 15, 2020) (citing amendment of PA statute).

203. *Id.* (noting date of proposed rulemaking as January 15, 2020).

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