1995

A Sizeable Sling Stone: The Staggering Impact of United States v. Colorado on the EPA Goliath

James T. Heeney

Follow this and additional works at: https://digitalcommons.law.villanova.edu/elj

Part of the Environmental Law Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/elj/vol6/iss1/6

This Casenote is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Environmental Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
A SIZEABLE SLING STONE: THE STAGGERING IMPACT OF UNITED STATES V. COLORADO ON THE EPA GOLIATH

I. INTRODUCTION

There is no clear solution in any of the applicable legislative sources, yet state and federal governments struggle fervently for control of cleanups at federal hazardous waste sites. Environmental statutes such as the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the Resource Conservation and Recovery Act ("RCRA") embody discrete standards for regulation and enforcement, but the scope of these as well as state and local rules is ambiguous. Cumbersome language and uncertain congressional intentions make application of the law difficult for courts. Even more exacting is the task of reconciling EPA's goals of uniformity in regulation with state and local agency goals of thoroughness in cleanup.

United States v. Colorado dramatizes the conflict between federal and state authorities in environmental waste regulation. Colorado authorities asserted regulatory control, as delegated under RCRA provisions, over cleanup at the Basin F hazardous waste site. In response, the United States Army, presiding over the cleanup, invoked CERCLA provisions to contest state jurisdiction over the matter. The United States Court of Appeals for the Tenth Circuit

3. See Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1080 (1st Cir. 1986) (quoting United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985)) ("CERCLA has acquired a well-deserved notoriety for vaguely drafted provisions and indefinite, if not contradictory, legislative history."); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578 (D. Md. 1986) ("[The owner and operator liability section] like so much of this hastily patched together compromise act [CERCLA], is not a model of statutory clarity."); United States v. Price, 577 F. Supp. 1103, 1109 (D.N.J. 1983) ("[CERCLA] was hastily, and, therefore, inadequately drafted. Even the legislative history must be read with caution since last minute changes in the bill were inserted with little or no explanation.").
4. 990 F.2d 1565 (10th Cir. 1993), cert. denied, 114 S. Ct. 922 (1994).
5. Id. at 1571-72.
6. Id. at 1572.
found, however, that RCRA-driven state actions may carve out a significant role in CERCLA-backed federal cleanups.7

This Note will examine areas where RCRA and CERCLA coincide and diverge, and what United States v. Colorado means for future interpretation of state involvement in federal waste disposal. Part I of this Note will give an overview of the cases in which courts have tried to reconcile them. Part II will review the Colorado court’s statutory analysis and will consider the court’s policy goals of increasing state regulation of federal cleanups. Finally, Part III will speculate about the repercussions of a broader state role in CERCLA actions.

II. BACKGROUND

A. RCRA

Congress devised RCRA in order to manage all solid wastes.8 The legislative intent behind RCRA was twofold. First, Congress intended to assist local and state governments in finding a solution to the discarded materials problem.9 Second, Congress intended to prevent improper waste disposal on a national scale.10 Overall, Congress envisioned a system in which state authorities would carry out minimum performance standards promulgated by EPA.11

7. Id. at 1578.
9. See SWDA § 1003(a), 42 U.S.C. § 6902(a). This provision proposes the objective of “providing technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans. . . .” Id. See also RCRA § 3006, 42 U.S.C. § 6926. (“[EPA], after consultation with State authorities, shall promulgate guidelines to assist states in the development of State hazardous waste programs.”) SWDA § 1003(a), 42 U.S.C. § 6902(a). Moreover, this provision enables states to secure control of hazardous disposal programs by meeting a three prong test. Id. § 3006(b), 42 U.S.C. § 6902(b). First, the state program must be equivalent to the federal program. Id. § 3006(b)(1), 42 U.S.C. § 6902(b)(1). Second, the program must be consistent with the federal program and programs applicable in other states. Id. § 3006(b)(2), 42 U.S.C. § 6902(b)(2). Third, the program must have enforcement provisions compatible with the federal program. RCRA § 3006(b)(3), 42 U.S.C. § 6926(b)(3).
EPA primarily maintains control over RCRA-driven hazardous waste treatment in five ways. First, the agency requires owners and operators of waste facilities to obtain permits for waste treatment and disposal of hazardous waste.12 Second, EPA issues standards for storage, treatment and disposal.13 Third, the agency may perform on-site inspections of facilities.14 Fourth, if inspectors find that facility operators have failed to comply with its standards, EPA may issue administrative compliance orders.15 Fifth, if facility operators fail to follow the orders, the agency reserves the right to seek civil and criminal penalties.16

12. RCRA § 3005(b), 42 U.S.C. § 6925(b). Under this provision, owners and operators of hazardous waste facilities must apply to federal or designated state administrators to receive authorization for storage, treatment and disposal of hazardous and other wastes at a given facility. Id. § 3005(a). The permit application must include information regarding the composition, content and concentration of the waste being handled, the schedule for treatment, transport and disposal, and a description of the site for these activities. Id. § 3005(b). When these criteria are satisfied, the state or federal administrator issues a permit to the facility. This permit may be modified by the administrator or by the operator with permission. A time limit for such modifications is also specified in the permit. Id. § 3005(c). Federal and state administrators retain the power to revoke permits in response to an operator’s non-compliance with permit or other RCRA standards. Id. § 3005(d). Operators who follow proper permit procedure receive interim status during the processing period, during which operators are treated as if they have full permit status. RCRA § 3005(e), 42 U.S.C. § 6925(e).

13. RCRA § 3004(a), 42 U.S.C. § 6924(a). General treatment standards for hazardous waste facilities include obligations to: (1) record hazardous wastes handled and the manner in which they are handled; (2) apply a system to ensure proper storage, treatment and disposal of wastes, as defined in RCRA § 3003(5), 42 U.S.C. § 6922(5); (3) treat waste in accordance with standards of the Administrator; (4) indicate the location, design and construction of the facility; (5) enumerate a contingency plan to minimize any unanticipated damage occurring during the treatment process; and (6) follow any given guidelines regarding ownership, continuity of operation, personnel training and financial responsibility. RCRA § 3004(a), 42 U.S.C. § 6924(a).

14. RCRA § 3007(a), 42 U.S.C. § 6927(a). Under the inspection provision, any person involved in hazardous waste treatment must supply EPA with relevant information to assist in the development and enforcement of RCRA provisions. EPA personnel are also authorized to enter, inspect and take samples at hazardous waste sites. Id.

15. RCRA § 3008, 42 U.S.C. § 6928. When an operator or anyone involved in hazardous waste disposal violates RCRA requirements, the Administrator may issue to that person an order demanding compliance with RCRA requirements. The Administrator may also seek injunctive or other relief in the district court for the district in which the alleged violation occurs. Id. A compliance order may include the suspension or revocation of a permit. Id. § 3008(c).

16. RCRA § 3008(c)-(d), 42 U.S.C. § 6928(c)-(d). For a discussion of an administrator’s rights to bring an action and seek relief, see supra note 15 and accompanying text.
EPA may delegate RCRA operating duties to state authorities and other parties. The state independently enforces the program and has the freedom to apply stricter standards than those given in RCRA, as long as the state maintains minimum federal standards.

B. CERCLA

There were two primary purposes behind the enactment of CERCLA. First, Congress recognized the need to establish a response mechanism to abate and control the national hazardous waste crisis. Second, Congress wanted to provide a basis for government intervention and for allocation of funds necessary for the cleanup of hazardous wastes. In general, Congress meant the statute to go beyond RCRA to facilitate the cleanup of environmental contamination caused by the release of hazardous substances.

CERCLA furnishes EPA with a Hazardous Substance Superfund ("Superfund") to back cleanups at sites contaminated by hazardous substances. Superfund may also finance cleanups per-

17. RCRA § 3008(b), 42 U.S.C. § 6926(b). EPA may authorize state run cleanups in lieu of RCRA. Id. For a further discussion of the three prong test that must be satisfied for EPA to authorize state run cleanups, see supra note 9 and accompanying text.

18. RCRA § 3009, 42 U.S.C. § 6929. See Old Bridge Chems., Inc. v. New Jersey Dep't of Envtl. Protection, 965 F.2d 1287 (3d Cir. 1992), cert. denied, 113 S.Ct. 602 (1992) (holding that a state hazardous waste regulation requiring codification of certain hazardous wastes above and beyond set RCRA standards was consistent with that statute because RCRA set only floor for state hazardous waste regulation).


21. Id. For an overview of CERCLA and its applications, see Colorado v. Idarado Mining Co., 916 F.2d 1486 (10th Cir. 1990) cert. denied, 11 S.Ct. 1584 (1990); see also Daigle v. Shell Oil Co., 972 F.2d 1527, 1533 (10th Cir. 1992).

22. CERCLA § 111, 42 U.S.C. § 9611. The primary purposes of Superfund are: (1) to pay for response costs incurred by a person's authorized action under the National Contingency Plan; (2) to pay for claims resulting from a real or threatened hazardous release; (3) to pay for other rehabilitation and damage assessment costs; (4) to give grants for technical assistance; and (5) to pay for the costs of a pilot program to correct lead contaminated soil. CERCLA § 111(a)(1)-
formed jointly by federal and state or local authorities.23 Once the
cleanup is complete, CERCLA empowers the federal government to
sue responsible parties for the costs.24 Defenses under the statute
are meager25 and liability is strict.26

Absent a cooperative agreement providing Superfund financ-
ing, CERCLA also provides for independent cleanup action by state
authorities.27 Like the federal government, state authorities may
take action under CERCLA against responsible parties to recover
cleanup costs.28

(6), 42 U.S.C. 9611(a)(1)-(6). Remedial actions at federal facili-
ties cannot be financed by Superfund. CERCLA § 111(e)(3), 42 U.S.C. § 9611(e)(3).

23. CERCLA § 104(d), 42 U.S.C. § 9604(d). EPA may enter a contract or co-
operative agreement with a state or political subdivision to commence a cleanup in
accordance with the National Contingency Plan. Id.

24. Id. § 107(a), 42 U.S.C. § 9607(a). Responsible parties may include current
and prior owners or operators of a facility, one of those entity’s parent corpora-
tions, or any person engaged in or contracted for treatment or disposal of hazard-
ous waste at the site. Id. See New York v. Shore Realty Corp., 759 F.2d 1032, 1044
(2d Cir. 1985) (ruling generally that present owners at site where release occurred
and past owners of site when release occurred may be held liable under CERCLA
(giving EPA access to records of subsidiary owner’s parent corporation for pur-
poses of targeting potentially responsible parties and ensuring speedy cleanup,
regardless of any evidence of subsidiary’s ability to finance the cleanup
independently).

25. CERCLA § 107(b), 42 U.S.C. § 9607(b). Potentially liable parties must
demonstrate “by a preponderance of the evidence that the release or threat of
release of a hazardous substance and the damages resulting therefrom were caused
solely by: (1) an act of God; (2) an act of War; (3) an act or omission of a third
party . . .” Id. The third party defense is only available when that person is not
under contract, employ or other business agreement with the defendant and the
defendant showed due care regarding the hazardous substances and took precau-
tions against any foreseeable acts or omissions of third parties. Id. See also United
States v. Fairchild Indus., Inc., 766 F. Supp. 405 (D. Md. 1991) (dismissing allega-
tions of contributory or comparative negligence by United States, lack of for-
seeability of damages and exercise of due care by defendants because of narrow
scope of § 107 defenses); United States v. Bliss, 667 F. Supp. 1298 (E.D. Mo. 1987)
(pointing out that questions of party’s fault or state of mind are irrelevant to CER-
CLA liability).

26. CERCLA § 107(a), 42 U.S.C. § 9607(a). Under this provision, responsible
parties are liable for all costs of a removal or remedial action, other response costs
incurred, and costs for damages to natural resources. Id. See also United States v.
Monsanto Co., 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989)
(imposing CERCLA liability on hazardous waste site owners, over their allegation
that they were innocent absentee landowners, due to their failure to dispute their
ownership of the site and ownership during the hazardous release).

27. CERCLA § 114(a), 42 U.S.C. § 9614(a). States may impose additional lia-
ability for the release of hazardous substances above and beyond liability dictated
under CERCLA provisions. Id.

28. Id. § 107(a), 42 U.S.C. § 9607(a). The cost recovery provision gives regu-
larly authorities access to virtually anyone in any way involved with the release of a
hazardous substance. Id. Costs may include payment for removal or remedial ac-
tion by federal or state governments that is authorized by the National Contin-
CERCLA also grants EPA special authority to respond to threatened or actual hazardous releases.29 One form of an EPA response is an injunction requiring responsible parties to undertake a cleanup.30 Because there are so many problematic sites, CERCLA authorizes EPA to promulgate a National Priority List ("NPL") which ranks sites according to the gravity of their individual hazards.31 Sites which are not on the NPL cannot receive a Superfund remedy.32

C. State and Federal Interests - The Case Law

While CERCLA clearly establishes the federal government's authority to seek injunctive relief, a state's ability to do so is not as clear. This problem is embodied in the clash between two antithetical cases concerning issues of federal government sovereign immunity and states' rights to injunctive relief: *Colorado v. Idarado Mining Co.*,33 and *United States v. Akzo Coatings of America, Inc.*34 In *Idarado*, the court decided that CERCLA's state enforcement provision per-
mits states to seek injunctive relief in federal court against polluters with respect to a particular site, regardless of whether the federal government has commenced cleanup actions there.\(^{35}\) The \textit{Akzo} court, however, interpreted the same provision as only permitting states injunctive relief in actions concerning existing consent decrees (where cleanup under a settlement is already initiated), thereby preventing a state from imposing any additional remedies beyond the consent decree.\(^{36}\)

Another confusing question is whether federal courts have jurisdiction over citizen suits brought pursuant to CERCLA and RCRA. One limitation on jurisdiction appears in CERCLA section 113, which denies federal courts jurisdiction over challenges to CERCLA response actions.\(^{37}\) In \textit{Schalk v. Reilly},\(^{38}\) the Seventh Circuit denied jurisdiction over a CERCLA citizen suit because the plaintiff challenged a consent decree established between EPA and the responsible parties.\(^{39}\) The court reasoned that the citizen suit would cause cleanup delays that section 113 was deliberately enacted to avoid. The provision, therefore, barred the challenge.\(^{40}\) In \textit{Boarhead Co. v. Erickson},\(^{41}\) the United States Court of Appeals for the Third Circuit denied jurisdiction to a claim under the National Historic Site Protection Act,\(^{42}\) because the complainant attempted

\begin{footnotesize}

36. \textit{Akzo}, 719 F. Supp. at 577-80; \textit{see also} CERCLA § 121(b)-(f), 42 U.S.C. § 9621(b)-(f). "[Section 9621] does not empower the State to require the parties to comply with standards that were not embodied in the remedial action plan." \textit{Akzo}, 719 F. Supp. at 578.

37. CERCLA § 113(h), 42 U.S.C. § 9613(h). The provision governing civil proceedings denies federal courts jurisdiction to review challenges to EPA or EPA delegated removal or remedial actions. \textit{Id}. There are specific exceptions to the rule that apply in actions to: recover response costs incurred in a cleanup, and enforce and secure reimbursements for a § 106(a) emergency abatement cleanup. United States v. Colorado, 990 F.2d 1565, 1576 (10th Cir. 1993). \textit{See, e.g.}, Alabama v. EPA, 871 F.2d 1548, 1557 (11th Cir. 1989), \textit{cert. denied}, 493 U.S. 991 (1989) (denying citizen groups standing to challenge EPA remedial action prior to completion). \textit{But see} Reardon v. United States, 947 F.2d 1509 (1st Cir. 1991) (upholding landowners' challenge to EPA's lien on their property because action attacked CERCLA action itself and not any EPA removal or remedial action).


39. In \textit{Schalk}, a citizens' challenge to a consent decree for a CERCLA remedial action was defeated because the court lacked subject matter jurisdiction to consider challenges to remedial actions which had not yet been completed. \textit{Id}. at 1095 (citing \textit{Alabama}, 871 F.2d at 1557).

40. \textit{Id}. at 1097.

41. 923 F.2d 1011 (3d Cir. 1991).

\end{footnotesize}
to delay a CERCLA response action pending a decision regarding the site’s status as a historic landmark.43

II. FACTS

By 1980, Basin F at “the Arsenal,” a federal hazardous waste storage, treatment and disposal facility, was in dire need of cleanup.44 Before a cleanup could occur, however, the United States Army had to obtain a RCRA permit and complete other procedural steps.45 The Army applied for and received RCRA interim status.46 In 1983, the Army made efforts to submit a satisfactory closure plan to EPA, but EPA found the plan deficient.47 The Army never sufficiently completed the permit application process but instead began a CERCLA remedial investigation/feasibility study (“RI/FS”) in 1984.48

Due to the Army’s lack of conformity with RCRA procedure, EPA authorized Colorado to carry out its own waste management

43 Boarhead, 923 F.2d at 1011. In Boarhead, a property owner’s attempt to invoke the National Historic Preservation Act to halt pre-cleanup activities at a designated Superfund site was found to lack subject matter jurisdiction because of CERCLA § 113(h). Id. at 1021.

44 Colorado, 990 F.2d at 1569 (quoting Daigle, 972 F.2d at 1531). The Rocky Mountain Arsenal hazardous waste facility is “one of the worst hazardous waste pollution sites in the country.” Id.

45 Id. The Arsenal is subject to RCRA regulation. Id. See RCRA § 3004(a), 42 U.S.C. § 6924(a). RCRA standards are enforced by requiring owners and operators of hazardous waste treatment facilities to obtain permits. Colorado, 990 F.2d at 1569. See RCRA § 3005, 42 U.S.C. § 6925. There are two parts to the RCRA permit application process. While part A of the application only requires a general description of the facility and its treatment plan, part B requires more specificity. Colorado, 990 F.2d at 1571 n.7. See 40 C.F.R. § 270.13 (1992). For a discussion of RCRA, see supra notes 8-18 and accompanying text.

46 Colorado, 990 F.2d at 1571. “Interim status” is a temporary period during which provisional removal steps are taken until permit application is received and a permanent treatment plan is put into place. RCRA § 3005(e)(1), 42 U.S.C. § 6925(e)(1). The Army had successfully completed part A of the permit application, and was given authorization to begin the cleanup process. Colorado, 990 F.2d at 1571.

47 Colorado, 990 F.2d at 1571. The Army submitted two deficient versions of the part B application, and in 1984, EPA threatened termination of the Army’s interim status. Id.

program, the Colorado Hazardous Waste Management Act ("CHWMA"),49 in lieu of federal action under RCRA.50 CHWMA required the Army to undergo an authorization procedure identical to that under RCRA, but the Colorado Department of Health ("CDH") found the Army's plan to close the site to be unsatisfactory.51 As a result, CDH issued its own plan for the Arsenal cleanup to the Army in 1986, and requested Army cooperation in this effort.52

The Army questioned CDH's jurisdiction over the cleanup and refused to execute CDH's proposed plan.53 In response, CDH brought an action in state court in 1986 to enforce the CHWMA closure plan.54 By 1987, the Army, EPA, Shell Oil and the state of Colorado agreed on an interim response action until the resolution of a final remedy.55 Despite this agreement, Colorado refused to assist the Army in formulating its cleanup plan.56 Soon after, the Army announced to Colorado that it was terminating its cleanup


50. Colorado, 990 F.2d at 1571. EPA delegated RCRA authority to Colorado pursuant to § 3006(b). RCRA § 3006(b), 42 U.S.C. § 6926(b).

51. Colorado, 990 F.2d at 1571. The Army's part B CHWMA/RCRA application was identical to the deficient one submitted to EPA in 1983. Id.

52. Id. at 1571-72.

53. Id. at 1572.

54. Id. The Army removed this action to federal district court. Id. The Army claimed that "CERCLA's enforcement and response provisions pre-empt and preclude a state RCRA enforcement action with respect to the cleanup of hazardous wastes at the Arsenal." Id.

55. Colorado, 990 F.2d at 1572. For over thirty years, Shell Oil had disposed of hazardous waste at the Arsenal. Id. at 1572 n.10.

56. Id. at 1572. In 1987, the Army sought state help in targeting potential applicable or relevant and appropriate requirements ("ARAR's") for the response action and comment on its cleanup proposal, but Colorado gave no response. Id. CERCLA § 121(d) provides in pertinent part:

[Remedial actions] shall attain a degree of cleanup of hazardous substances, pollutants, and contaminants released into the environment and of control of further release at a minimum which assures protection of human health and the environment. Such remedial actions shall be relevant and appropriate under the circumstances presented by the release or threatened release of such substance, pollutant, or contaminant.

CERCLA § 121(d), 42 U.S.C. § 9621(d). The provision further affirms federal and state authority over regulating hazardous cleanups, addresses the applicability of the Clean Water Act, and criteria for enforcement of state regulatory standards. Id.
action under CHWMA and that it would commence the cleanup pursuant to CERCLA.\(^57\)

After issuing a draft decision for its interim response action to EPA, Colorado, and Shell Oil, the Army made progress in its cleanup at Basin F through 1988.\(^58\) Despite the Army's removal efforts under CERCLA, in 1989 the district court decided that Colorado had the authority to enforce CHWMA as delegated by EPA under RCRA.\(^59\) One month later, EPA added Basin F to the NPL, indicating that cleanup there had sparked federal concern.\(^60\) The Army immediately moved for reconsideration of the matter in light of this change of events.\(^61\)

As a follow-up to the district court order, CDH issued a final amended compliance order to the Army, requiring a comprehensive amended closure plan that would be subject to CDH approval and control.\(^62\) Both parties sought a rehearing, and filed cross-motions for summary judgment. The district court applied a CERCLA provision that the court read as prohibiting the state from challenging the Army’s CERCLA remedial action prior to its completion.\(^63\) The court relied on the placement of Basin F on the NPL to distinguish its previous decision, and held that the Army’s CERCLA-

\(^57\) *Colorado*, 990 F.2d at 1572. The Army did indicate that it would comply with CHWMA in so far as it is covered in CERCLA provisions 120(i) and 121(d)(2)(A)(i). *Colorado*, 990 F.2d at 1572. Section 120(i) obligates the United States and any of its agencies to comply with any applicable requirements of the Solid Waste Disposal Act. CERCLA § 120(i), 42 U.S.C. § 9620(i).

\(^58\) *Colorado*, 990 F.2d at 1572. The Army moved and relocated 8,000,000 gallons of hazardous liquid wastes and 500,000 cubic yards of contaminated solid material from basin F, and capped the basin floor. *Id.*

\(^59\) *Id.* at 1572-73. In reaching its decision, the district court relied on several key provisions of RCRA and CERCLA. First, the court invoked the CERCLA provision that applies state law to removal and remedial action at federal facilities for which cleanup is not an official national priority. *Id.* at 1573 (citing Colorado v. United States Dep’t of the Army, 707 F. Supp. 1562, 1569-70 (D. Colo. 1989)); see CERCLA § 120(i), 42 U.S.C. § 9620(i). Second, the court applied the RCRA provision mandating that federal authorities engaging in waste disposal must comply with substantive and procedural requirements for such disposal that are dictated by state, interstate, and local authorities. *Colorado*, 707 F. Supp. at 1565. Third, the court relied on the CERCLA provision that allows state authorities to impose requirements above and beyond those dictated under CERCLA. *Colorado*, 707 F. Supp. at 1565; see CERCLA §§ 114, 152(d), 42 U.S.C. §§ 9614(a), 9652(d).

\(^60\) *Colorado*, 990 F.2d at 1573.

\(^61\) *Id.* The District Court had given particular weight to the CERCLA provision which stated that RCRA-driven state authorities would be binding on federal facilities not listed on the NPL. *Id.* at 1569. Reasoning that the placement on the priority list would preempt CHWMA, the Army moved for a rehearing. *Id.* at 1573.

\(^62\) *Id.*

\(^63\) *Id.* See CERCLA § 113(h), 42 U.S.C. § 9613(h). The court enjoined Colorado and CDH from enforcing the final amended compliance order. *Colorado*, 990 F.2d at 1574.
driven remedial action preempted RCRA, and therefore the state could not enforce its compliance order.64

On appeal, the United States Court of Appeals for the Tenth Circuit reversed, ruling on three important issues. First, the court held that the amended compliance order was not a challenge to the Army's CERCLA response action.65 Second, the court held that placement on the NPL had no bearing on the Army's duties to comply with CHWMA.66 Finally, the court held the presidential authority under CERCLA that delegated to the Army the right to select a remedy did not relegate the state to a mere advisory role or bar the state from enforcing state law independent of CERCLA.67

III. Analysis: United States v. Colorado

A. The Jurisdictional Issue

The threshold question of jurisdiction in United States v. Colorado centered around a CERCLA provision that barred review of state challenges to CERCLA removal actions.68 "Challenges" are not defined explicitly in the statute, but the court interpreted the term according to its plain meaning.69 Challenges, therefore, do not merely arise in any claim against federal CERCLA cleanup authorities; the court found that to hold so would be to give the federal government absolute immunity.70 Rather, for the Tenth

64. Colorado, 990 F.2d at 1574. See CERCLA § 120(a)(4), 42 U.S.C. § 9620(a)(4). While the provision indicates that state laws apply to federal facilities not on the NPL, there is nothing explicitly in the language to indicate that federal facilities on the NPL would not have to answer to state regulation. Colorado, 990 F.2d at 1574.

65. Colorado, 990 F.2d at 1575. The court found that the key issue was not whether a response action had been completed under CERCLA, but whether a challenge to the response action occurred. Id.


67. Colorado, 990 F.2d at 1581. See CERCLA §§ 114(a), 152(b), 42 U.S.C. §§ 9614(a), 9652(b).

68. Colorado, 990 F.2d at 1575. For an analysis of CERCLA § 113(h), 42 U.S.C. § 9613(h), see supra note 37 and accompanying text.

69. Colorado, 990 F.2d at 1579. "[T]he plain language of both statutes [RCRA and CERCLA] provides for state enforcement of its RCRA responsibilities despite an ongoing CERCLA response action. Thus, enforcement actions under state hazardous waste laws . . . do not constitute 'challenges' to CERCLA response actions." Id.

70. Id. at 1577. The fact that enforcement of Colorado's compliance order would "impact the implementation" of the Army's CERCLA response action was insufficient to constitute a challenge under CERCLA § 113(h). Id. For an analysis of Section 113, see supra note 37 and accompanying text.
Circuit, challenges are those efforts that are deliberately made to slow down CERCLA remedial actions.\textsuperscript{71}

The court reasoned that the state's compliance order was not an attempt to hinder or thwart cleanup at Basin F, but instead was an attempt to encourage the cleanup process. As such, the compliance order did not constitute a challenge and thus, the action was clearly within the court's jurisdiction.\textsuperscript{72}

The Army cited two primary cases to support their jurisdiction argument.\textsuperscript{73} In both instances, the court denied jurisdiction where parties initiated challenges against CERCLA response actions.\textsuperscript{74} Nevertheless, the court found that those cases were factually distinguishable from the dispute at hand.\textsuperscript{75}

First, the Army argued that its case was analogous to \textit{Schalk v. Reilly} in which the court barred private citizens from bringing a CERCLA citizen suit challenging a consent decree entered by EPA regarding a hazardous waste cleanup.\textsuperscript{76} The District Court for the Southern District of Indiana held that there was no subject matter jurisdiction over challenges to incomplete CERCLA remedial actions.\textsuperscript{77} Even so, the fact that the appellants in \textit{Schalk} were proceeding under CERCLA's citizen suit provision indicated that \textit{Schalk} involved a different procedural problem from the case at hand.\textsuperscript{78} Recognizing this, the \textit{Colorado} court distinguished \textit{Schalk} on the grounds that the state did not assert jurisdiction, or lose its right to it, under the citizen suit provision.\textsuperscript{79}

Next, the Army invoked \textit{Boarhead Corp. v. Erickson}, which denied jurisdiction over an attempt to stay an EPA CERCLA response

\begin{itemize}
  \item \textsuperscript{71} \textit{Colorado}, 990 F.2d at 1576.
  \item \textsuperscript{72} \textit{Id.} at 1579.
  \item \textsuperscript{73} \textit{Id.} at 1576.
  \item \textsuperscript{74} \textit{Id.}
  \item \textsuperscript{75} \textit{Colorado}, 990 F.2d at 1577.
  \item \textsuperscript{76} \textit{Schalk}, 900 F.2d at 1091. For a further discussion of \textit{Schalk}, see \textit{supra} note 39 and accompanying text.
  \item \textsuperscript{77} \textit{Colorado}, 990 F.2d at 1577. In \textit{Schalk}, the citizen-appellants maintained that their request for EPA to adhere to certain procedural requirements was not a challenge to the removal action. \textit{Schalk}, 900 F.2d at 1097. Nevertheless, the court held that the procedural restrictions ventured by the citizens would hamper expeditious implementation of the CERCLA remedy and as such would contradict congressional intent to avoid undue delay in reaching CERCLA remedies. \textit{Id.}
  \item \textsuperscript{78} The citizens in \textit{Schalk} were trying to establish jurisdiction under CERCLA \S\ 310. \textit{Schalk}, 900 F.2d at 1097. The CERCLA citizen suit provision, \S\ 310, generally authorizes any person or government agency to commence a civil action against any person or government agency allegedly in violation of CERCLA standards. CERCLA \S\ 310(a), 42 U.S.C. \S\ 9659(a).
  \item \textsuperscript{79} \textit{Colorado}, 990 F.2d at 1577.
\end{itemize}
action. The court reasoned that Boarhead did not apply because in that case Boarhead was one of the responsible parties and its action against the EPA removal contravened the congressional intent behind CERCLA section 9613(h). Also, the plaintiff there clearly tried to delay the CERCLA cleanup pending a determination of whether the site qualified for historical landmark status. In the present case, the Tenth Circuit reasoned that Colorado intended the compliance order to apply stricter cleanup standards, not to delay the cleanup.

In distinguishing Schalk and Boarhead, and in enforcing the compliance order, the court paid particular attention to the congressional intent behind CERCLA. The court found that CERCLA's "savings provision" indicates that CERCLA should work in conjunction with other federal and state laws in addressing problems of hazardous waste disposal. Despite the clear language in CERCLA to the contrary, the lower court read the statute as preempting RCRA when interpreting CDH's issuance of the compliance order as belonging in the adversarial context of a challenge.

The next step for the Tenth Circuit was to determine whether RCRA and CHWMA, though generally not preempted by CERCLA, applied in the factual context of the case. The Army failed to demonstrate an authorized exemption from compliance with RCRA in the cleanup. Because Basin F is a federal facility and EPA delegated RCRA authority to Colorado, the court held that RCRA and CHWMA clearly applied to the disposal at Basin F.

Rather than operating under the CERCLA citizen suit provision, as occurred in Schalk, Colorado pursued its counterpart in

80. Boarhead, 923 F.2d at 1014.
81. Colorado, 990 F.2d at 1577.
82. Boarhead, 923 F.2d at 1015.
83. Colorado, 990 F.2d at 1576.
84. Id. at 1575, 1577-78.
85. Id. at 1575; see CERCLA § 302(d), 42 U.S.C. § 9652(d) ("Nothing in [CERCLA] shall affect or modify in any way the obligations or liabilities of any person under other . . . [I]aw . . . with respect to releases of hazardous substances or other pollutants or contaminants."); Manor Care, Inc. v. Yaskin, 950 F.2d at 127 (3d Cir. 1991) ("Congress did not intend for CERCLA remedies to preempt complementary state remedies.").
86. Colorado, 990 F.2d at 1574.
87. Id. at 1576.
88. Id. See RCRA § 6001, 42 U.S.C. § 6961 (authorizing President to exempt federal facilities from compliance with RCRA when such exemption is in "the paramount interest of the United States").
89. Id. See RCRA § 6001, 42 U.S.C. § 6961 (indicating that federal facilities are subject to RCRA regulation); Parola v. Weinberger, 848 F.2d 956, 960 (9th Cir. 1988) (applying RCRA § 6001 to state and local regulation of federal facilities).
RCRA. The statute allows for RCRA enforcement at a site even when a CERCLA enforcement action is underway. Other RCRA citizen suits allow any person to take action against any other in order to confront any substantial threat to human health or the environment. These types of citizen suits are barred, however, when EPA is involved with or is otherwise pursuing a CERCLA removal action. Because Congress explicitly made this limitation to RCRA imminent hazard citizen suits without doing the same for RCRA citizen enforcement suits, the Colorado court concluded that Congress necessarily intended RCRA citizen enforcement actions to apply to CERCLA removal actions.

The matter was not merely one of intent behind the compliance order, for the court held that even if the order constituted a challenge, Colorado could still enforce the order in state court. The court supported this interpretation by looking to CHWMA, which provides for enforcement through the Colorado state courts. As a result, the court held that section 113(h) does not bar Colorado from taking action to enforce its compliance order, and while the facts of the case established jurisdiction in federal court in this case, the court also held that states may also have jurisdiction over challenges to pending federal removal actions.

Finally, the Army contended that the placement of Basin F on the NPL was a clear indication that CERCLA section 113(h) denied

90. Colorado, 990 F.2d at 1577.
91. Id. Under the citizen suit provision, any person may commence a civil action against any other person, including the United States government, to enforce RCRA provisions. RCRA § 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A). These suits are barred only when EPA or the state is tenaciously pursuing a parallel RCRA enforcement action. See, e.g., Supporters to Oppose Pollution, Inc. v. Heritage Group, 973 F.2d 1320, 1323-24 (7th Cir. 1992).
93. Id. For descriptions of CERCLA removal actions that bar RCRA imminent hazard citizen suits, see CERCLA, §§ 104, 106, 42 U.S.C. §§ 9604, 9606.
94. Colorado, 990 F.2d at 1578.
95. Id. at 1579. The court reasoned that the plain language of § 9613(h) only barred federal jurisdiction over the claim. Colorado, 990 F.2d at 1579. “No Federal court shall have jurisdiction under Federal law . . . or under State law . . . to review any challenges to removal or remedial action . . . .” CERCLA § 113(h), 42 U.S.C. § 9613(h). For a discussion of § 113(h), see supra note 39 and accompanying text.
97. Colorado, 990 F.2d at 1579.
CHWMA jurisdiction over the Basin F cleanup. The court found, however, that while the list is useful as a ranking order for EPA cleanups, the list in no way exempts listed facilities from appropriate state regulation. Therefore, for the Colorado court, the NPL had no bearing on the CERCLA jurisdiction provision, nor on the force of the CDH compliance order.

B. EPA's Choice of Remedy:

The Army argued in the alternative that a CERCLA provision that gives EPA the power to choose the remedy, with state input, through the use of applicable relevant and appropriate requirements ("ARARs") precluded Colorado from administering state laws such as CHWMA concurrently with federal CERCLA actions. The Army argued that Congress intended the ARAR provision to provide "a mechanism for state involvement in the selection and adoption of remedial actions which are federal in character." Apparently, however, the Army made the same mistake in interpreting the ARAR provision as it did with the NPL provision; the court stated that just because one particular right is affirmed in one provision, it does not follow that it is excluded everywhere else. Therefore, the court held there was no indication in the statute that

---

98. *Id.* at 1580. The NPL is "the list of priority releases for long term remedial evaluation and response." 40 C.F.R. § 300.425(b) (1992).

99. *Colorado*, 990 F.2d at 1580. The NPL "serves primarily informational purposes, identifying for the States and the public those facilities and sites or other releases which appear to warrant remedial action." S. Rep. No. 848, 96th Cong., 2d Sess. 60 (1980). Under CERCLA, the National Contingency Plan is required to include a hierarchy of cleanups to be conducted under Superfund. CERCLA § 105(a)(8)(A), 42 U.S.C. § 9605(a)(8)(A). In 1982, EPA adopted the Hazardous Ranking System ("HRS") method for prioritizing sites for remedial and removal actions. 47 Fed. Reg. 10,972 (1982). Under the HRS, EPA rates a given site for its toxicity by measuring the potential degree or harm from exposure to hazardous substances at the site. 48 Fed. Reg. 40,658 (1983). Certain test results are worked into a formula which produces that site's HRS score. *Id.* If that site reaches a set threshold score then EPA places the site on the NPL. *Id.* For a thorough discussion of the NPL as promulgated under the NCP, see Eagle-Picher Indus. v. EPA, 759 F.2d 905 (D.C. Cir. 1985).

100. *Colorado*, 990 F.2d at 1580.

101. *Id.* at 1574; see CERCLA § 121(a), 42 U.S.C. § 9621(a) ("[T]he President shall select appropriate remedial actions determined to be necessary to carry out under section 9604 . . . which are in accordance with this section, and to the extent practicable, the national contingency plan, and which provide for cost effective response.").

102. For a discussion of ARARs and the CERCLA cleanup standards provision, see *supra* note 56 and accompanying text.

103. *Idarado*, 916 F.2d at 1495; *see also* Akzo, 949 F.2d at 1455.

104. *Colorado*, 990 F.2d at 1581.
Congress, in enacting CERCLA, intended the ARAR process to be the state's only role in federal hazardous waste actions.105

Furthermore, the court observed that, although the compliance order clearly went beyond the ARAR role so narrowly construed for it by the Army, it did not impinge on EPA's right to select a remedy for the Basin F cleanup.106 Because Congress enacted the ARAR provision years after initial CERCLA provisions outlining state involvement, the provision clearly is not the final limit on state roles in federal hazardous cleanups.107

The ARAR section, CERCLA section 121(d), dictates that EPA must allow state involvement and commentary on remedial plans, but only grants states the power to enforce state law at the completion of the remedial action.108 The Colorado court found, however, that other provisions of CERCLA, contemplating more extensive state involvement, sufficiently sprung CHWMA from the confines of the ARAR provision.109

IV. CRITICAL ANALYSIS

The result of the Colorado decision is a practical step towards resolution of the national hazardous waste problem for several reasons. The government is notorious for being the nation's worst polluter.110 Even so, the federal government has escaped liability for hazardous waste problems by using the sovereign immunity defense against state actions.111 In addition, Congress' view of states' role as secondary and supporting in the national hazardous waste problem is inefficient and impractical.112

105. Id.
106. Id.
107. Id. CERCLA §§ 114(a), 302(d), 42 U.S.C. §§ 9614(a), 9652(d) were present in the initial drafting of the statute, but 42 U.S.C. § 9621(f)(1) was only added in the 1986 CERCLA amendments.
109. Colorado, 990 F.2d at 1581. CERCLA §§ 114(a), 302(d), 42 U.S.C. §§ 9614(a), 9652(d) point towards the application of other federal and state laws even while a CERCLA removal action is pending.
111. See generally Milstein, supra note 8 and accompanying text.
112. States are in a better position to respond to local concerns. James P. Young, Comment, Expanding State Initiation and Enforcement Under Superfund, 57 U. Chi. L. Rev. 985 (1990).
The Arsenal in general, and Basin F in particular, are good examples of the problem of pollution at federal facilities.\footnote{113} Though the facility has been in the control of the United States Army for over forty years, its cleanup efforts were clearly deficient; in 1989, EPA placed Basin F on the NPL for sites most in need of cleanup.\footnote{114} Despite this move by EPA, the facts cast doubt upon the agency's intent to perform a thorough cleanup.\footnote{115} Thus, there is no guarantee of an efficient cleanup when the federal government is the only regulatory authority.\footnote{116}

The sovereign immunity defense, as exemplified by CERCLA section 9613(h), is typically justified by the notion that fines and injunctions imposed on the government divert funds needed for cleanups and slow down the cleanup process.\footnote{117} Even so, United States v. Colorado demonstrates the dire consequences when government authority over hazardous cleanups goes unchecked. While citizen suits must still fall within the available sovereign immunity waiver provisions, this case provides a new channel for increased state regulation of federal hazardous waste disposal sites under RCRA delegated authority.

By allowing the State's compliance order and extending state court jurisdiction to pending CERCLA removal actions under CHWMA, the Colorado court closed a potentially dangerous CERCLA loophole that would have exempted the federal government from state regulation at some of the nation's worst hazardous waste sites. By breaking down CERCLA and state law barriers, the court encourages, if not mandates, cooperation between EPA and state authorities at hazardous waste sites. One can only hope that teamwork in this setting will prompt a more efficient allocation of time and funding resources at these sites.

\footnote{113} Colorado, 990 F.2d at 1569.
\footnote{114} Id. at 1573.
\footnote{115} Although the Army's goal was to complete the cleanup with a minimal expenditure of money and effort, their justice department attorneys in the district court action also represented EPA. Colorado, 707 F. Supp. at 1570.
\footnote{116} According to the inspector general of the Department of the Defense, [t]he Department of Defense is not in full compliance with the Resource Conservation and Recovery Act and other environmental laws and regulations . . . . Overall management of hazardous materials/hazardous waste is unsatisfactory . . . . The hazardous waste disposal contracting method is inefficient, at times ineffective, and costly. Training and education of hazardous material handlers and commanders is inadequate.
\footnote{117} May, supra note 11, at 368 n.26.
There are obvious advantages to creating a central authority for nation-wide hazardous waste cleanup. Uniformity in this cause promotes quicker responses to the ongoing problems and ensures that common standards in cleanups are upheld.\textsuperscript{118} On the other hand, there is evidence that uniform national standards deliberately are geared towards irresponsible industrial polluters rather than desired nation-wide norms.\textsuperscript{119} As a result of their stringency and arbitrariness such standards often penalize well-meaning corporate actors.\textsuperscript{120}

Moreover, EPA sets the requirements for removal actions but when they are handled improperly, EPA is only indirectly politically liable to the local communities that suffer most from shoddy cleanups.\textsuperscript{121} This is inconsistent with the congressional goals of maintaining minimum cleanup standards while otherwise allowing states and other involved parties freedom to increase required performance levels and otherwise handle the projects autonomously.\textsuperscript{122} In \textit{United States v. Colorado}, the court struck a proper balance in allowing the state to impose its own stringent cleanup standards, while allowing EPA to maintain its authority.\textsuperscript{123}

\textit{James T. Heeney}

\textsuperscript{118} "States are better positioned to respond to local concerns than the EPA, which is only indirectly politically accountable to local communities." Young, \textit{supra} note 112, at 985.


\textsuperscript{120} Bardach and Kagan, \textit{supra} note 110, at 1548.

\textsuperscript{121} Young, \textit{supra} note 112, at 985.

\textsuperscript{122} \textit{Id.} at 1003.

\textsuperscript{123} \textit{Id.} at 1003. While the CHWMA compliance order did impinge upon the CERCLA removal action, the CDH proposal only subsumed RCRA with EPA approval. \textit{Id.}