NATURAL RESOURCES JOURNAL

Volume 32
Issue 4 *Fall 1992*

Winter 1992

Boarhead Corporation v. Erickson: CERCLA Precludes the Use of Other Statues to Challenge EPA Cleanup Actions

Chris Schatzman

CASENOTE

Boarhead Corporation v. Erickson: CERCLA Precludes the Use of Other Statutes to Challenge EPA Cleanup Actions

INTRODUCTION

A farm in eastern Pennsylvania became the focal point for a legal battle involving two federal statutes and the cleanup of toxic wastes. In *Boarhead Corp. v. Erickson*[1], the Court of Appeals for the Third Circuit (the Third Circuit) interpreted the conflicting requirements of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)[2] and the National Historic Preservation Act of 1966 (Preservation Act).[3]

CERCLA was hastily enacted in the waning days of the Carter Administration to govern the cleanup of sites containing hazardous substances. Under CERCLA, the Environmental Protection Agency (the EPA) places sites containing hazardous substances on the National Priorities List (the Superfund List) after interested parties[4] are provided appropriate notice and a comment period. Owners of designated sites may be financially responsible for the costs incurred in removing the hazardous substances.[5]

The haste with which CERCLA was drafted and passed resulted in conflicts between it and other statutes. In 1986 Congress passed the Superfund Amendments and Reauthorization Act (SARA) to extend the life of CERCLA, clarify its meaning, and increase the effectiveness of the earlier legislation.[6] In *Boarhead*, the EPA contended that in enacting SARA, Congress intended to preclude all judicial review of challenges to EPA plans to remove or remediate toxic wastes until after the removal or remediation actions were completed.

---

1. 923 F.2d 1011 (3d Cir. 1991).
2. 42 U.S.C. §§9601–9675 (1988).
3. 16 U.S.C. §§470–470w-6 (1988).
4. The term 'interested party' is not defined in CERCLA. At a minimum, a court should apply a test for standing to determine if a party has sufficient 'interest' to be given notice and afforded an opportunity to comment about placing a property on the Superfund List.
5. 42 U.S.C. §9607(a).
6. L. Peck, Note, *Viable Protection Mechanisms for Lenders Against Hazardous Waste Liability*, 18 Hofstra L. Rev. 89, 95 (1989).

The Preservation Act is intended to protect the cultural and historical resources of the nation.[7] State historic preservation agencies are responsible for surveying and nominating properties for inclusion on the National Register of Historic Places under criteria established by the Department of Interior. Federal agencies are required to take into account the effect their actions may have on property listed or eligible to be listed on the National Register.[8] The *Boarhead* plaintiff argued that judicial review of proposed cleanup actions was available under the Preservation Act to determine if the EPA complied with that act in fulfilling its mandate under CERCLA.

This note examines whether the Third Circuit correctly interpreted CERCLA's legislative history when it ruled that Congress intended to preclude judicial review of challenges to EPA plans to remove or remediate toxic wastes until after the removal or remediation actions were completed. The Third Circuit concluded that Congress intended to prevent such challenges, including those brought under other statutes, even the Preservation Act, unless the challenges met the requirements of one of five exceptions set forth in CERCLA.

THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980

Congress enacted CERLCA in 1980 to address the cleanup of improperly managed hazardous waste sites.[9] CERCLA imposed liability for cleanups on four classes of persons or enterprises:

1) the owners or operators of the waste site at the time of the cleanup;
2) the owners or operators of the site at the time of the disposal of the waste;
3) the generators of the waste who arranged for it to be disposed of at the site; and,
4) those who transported the waste to the site for disposal.[10]

The statute established a trust fund, known as the Superfund, to provide the money to deal with the health threats posed by the waste sites.[11] General revenues and a tax on petrochemicals provided the financing for the Superfund.[12]

7. 16 U.S.C. §470(b).
8. 16 U.S.C. §470f.
9. M. Conyngham, Comment, *Robbing the Corporate Grave: CERCLA Liability, Rule 17(b), and Post-Dissolution Capacity to be Sued*, 17 B.C. Envtl. Aff. L. Rev. 855, 857 (1990) [hereinafter *Robbing the Corporate Grave*].
10. 42 U.S.C. §9607(a) (1982).
11. *Robbing the Corporate Grave, supra* note 9, at 857.
12. 26 U.S.C. §§4611–4682 (1982).

CERCLA was enacted in December 1980 during the closing days of a lame-duck Congressional session.[13] For the previous three years, Congress had not been able to pass legislation to deal with the problem of hazardous waste sites.[14] In passing CERCLA, Congress recognized that if it did not act before the end of that session, hazardous waste legislation might not become law under the new administration.[15]

The bill enacted has virtually no legislative history.[16] "The final version of the bill . . . was a compromise worked out by an ad hoc bi-partisan group of Senators."[17] The compromise bill was substituted on the floor as an amendment of a bill reported by the Senate Committee on Environment and Public Works.[18]

The amendment was introduced by Sen. Stafford (R-Vt.) and was managed on the floor by Sen. Randolph (D-W.Va.), chairman of the Senate Committee on Environment and Public Works.[19] Randolph described the compromise bill as being less far-reaching than the bill originally reported by the committee he chaired, but he said that supporters of the legislation had to settle for less in order to pass a bill to deal with the hazardous waste problem.[20] CERCLA, as adopted by the Senate, established a $1.6 billion Superfund to be expended over five years.[21]

After the Senate approved the bill, the legislation was treated as if it originated in the House because CERCLA was in part a revenue measure.[22] To accomplish this, the Senate took up for consideration a hazardous waste bill previously passed by the House.[23] The Senate amended the House bill, substituting its own bill for the House version and passed the bill on a voice vote.[24]

The House considered the Senate's version of the CERCLA legislation under a suspension of the rules,[25] which meant no amendments

13. F. Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980, 8 Colum. J. Envtl. L. 1 (1982) [hereinafter A Legislative History of CERCLA]

14. A. Anderson, Note, *Corporate Life after Death: CERCLA Preemption of State Corporate Dissolution Law,* 88 Mich. L. Rev. 131, 137 (1989) [hereinafter *CERCLA Preemption*].

15. *Id.* at 145 & n. 72 (quoting the statements of Sen. Mitchell and Rep. Florio as reported in 126 Cong. Rec. 30,941 and 31,968–69 (1980)).

16. *A Legislative History of CERCLA, supra* note 13, at 1.

17. *CERCLA Preemption, supra* note 14, at 145 & n. 73.

18. *A Legislative History of CERCLA, supra* note 13, at 20–21.

19. *Id.* at 21.

20. 126 Cong. Rec. 30,930–31 and 30,936. Sen. Randolph apparently did not feel enough votes could be secured to pass the legislation in the form originally recommended by the committee he chaired.

21. *A Legislative History of CERCLA, supra* note 13, at 22. Initially, the Superfund was to be $4.1 billion, to be spent over six years. Apparently as part of the compromise that resulted in the passage of CERCLA, the Senate leadership agreed to an amendment by Sen. Helms reducing the fund. *Id.* at 20.

22. *Id.* at 29.

23. *Id.*

24. *Id.*

25. *Id.* at 29–30.

were permitted and debate was limited.[26] Rep. Florio (D-N.J.), the floor leader for the bill in the House, used much of his allotted time to reassure supporters of the earlier House legislation that, despite the lack of input by House members in the final version of the legislation, "everything would be fine."[27] Rep. Broyhill (R-N.C.), floor leader of the opposition, criticized the process by which the compromise bill was arrived at, drawing attention to numerous flaws in the bill.[28] The House passed the bill by a vote of 274 in favor, 94 against, and 64 not voting.[29]

As the product of a last-minute compromise, CERCLA not only lacked a legislative history to aid in its interpretation, it was poorly drafted. The bill was described by one court as "hardly a model of concise legislative draftsmanship."[30] Another court said that Congress had once again placed the courts in "the undesirable and onerous position of construing inadequately drawn legislation."[31] In part, the problems with interpreting CERCLA led to its amendment in 1986.

THE SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986

The process of enacting the Superfund Amendments and Reauthorization Act (SARA) took three years, beginning with President Reagan's 1984 State of the Union message.[32] In that speech, President Reagan said the administration would develop a proposal for extending the life of CERCLA.[33] After that announcement, however, the administration took no further action in 1984, and, while some members of Congress viewed the reauthorization of CERCLA as a useful election-year issue, a final bill did not make it through Congress.[34]

The Reagan Administration introduced its proposal to amend CERCLA in February 1985, calling for replenishing the Superfund with $5.3 billion dollars, to be spent over a five-year period.[35] The review of CERCLA was extensive. During the course of review, the EPA made pre-

26. *Id.* at 31.
27. *Id.*
28. *Id.* at 30, 34.
29. *Id.* at 34.
30. Artesian Water Co. v. New Castle County, 659 F.Supp. 1269, 1277 (D. Del. 1987), *aff'd.*, 851 F.2d 643 (3d Cir. 1988).
31. United States v. Northeastern Pharmaceutical & Chemical Co., 579 F.Supp. 823, 838–39 n. 15 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986).
32. T. Atkeson et al., *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (SARA)*, 16 Envtl. L. Rep. (Envtl. L. Inst.) 10,360, 10,366–67 (Dec. 1986) [hereinafter *An Annotated Legislative History of SARA*].
33. *Id.* at 10,367.
34. *Id.*
35. *Id.*

sentations to seven congressional committees, each of which filed a report.[36]

The Senate and House versions of the CERCLA amendments were significantly different, and the Conference Committee began the work of reconciling them in February 1986.[37] The committee was chaired by Sen. Stafford (R-Vt.), chairman of the Senate Environment and Public Works Committee and Rep. Dingell (D-Mich.), chairman of the House Energy and Commerce Committee.[38] The Conference Committee filed its report and both houses passed the revised legislation in October 1986.[39]

The bill faced the danger of a veto by President Reagan, who objected to the excise tax imposed by SARA to replenish the CERCLA Superfund.[40] The veto threat was limited by the large margins with which the Senate and the House passed the bill. The Senate passed the bill by a vote of 88–8 and the House by 386–27,[41] margins sufficient to override a presidential veto. To avoid a pocket veto, Congress threatened to stay in session for two additional weeks, despite the desire of many members to adjourn so they could turn their attention to re-election campaigns.[42]

A coalition of congressional members and representatives of industry and environmental groups lobbied the President to sign the bill.[43] Several Republican members warned the President a veto would harm their re-election campaigns.[44] In addition, a group of 50 senators, led by Senate Majority Leader Dole (R-Kan.) and Sen. Stafford, gave the President a written commitment that the group would support a veto of any future Congressional attempt to enact a general purpose broad-based tax or to increase the amount of the special tax in SARA to fund CERCLA-mandated cleanups.[45] President Reagan signed SARA on October 17, 1986, without the usual signing ceremony.[46]

---

36. *Id.* at n. 62. *See also* 1986 U.S.C.C.A.N. 2835. The House Ways and Means Committee actually issued two reports. One accompanied the bill as originally passed by the House. This bill carried the number of the bill that was finally enacted after substantial changes by the Senate. A second report accompanied an early version of H.R. 2005. In addition, the House Science and Technology Committee issued a report on H.R. 3065, another proposal to amend CERCLA.

37. *An Annotated Legislative History of SARA, supra* note 32, at 10,368.

38. *Id.* at 10,369.

39. H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 183 (1986), *reprinted in* 132 Cong. Rec. H9032 (daily ed. Oct. 3, 1986) (Conference Report on H.R. 2005, Superfund Amendments and Reauthorization Act of 1986), *also reprinted in* 1986 U.S.C.C.A.N. 3276 [hereinafter Conference Report]. The Senate passed the Committee's version of the bill on Oct. 3, 1986, followed by the House on Oct. 8, 1986. *See* 132 Cong. Rec. S14,943 (daily ed. Oct. 3, 1986) and 132 Cong. Rec. H9634 (daily ed. Oct. 8, 1986).

40. *An Annotated Legislative History of SARA, supra* note 32, at 10369–70.

41. 132 Cong. Rec. S14,943 (daily ed. Oct. 3, 1986); 132 Cong. Rec. H9634 (daily ed. Oct. 8, 1986).

42. *An Annotated Legislative History of SARA, supra* note 32, at 10,370.

43. *Id.*

44. *Id.*

45. *Id.* at 10367, 10370.

46. *Id.* at 10,367.

SARA replenished the Superfund with $8.5 billion,[47] established mandatory cleanup standards,[48] created guidelines for settlements with potentially responsible parties[49] and guidelines for public participation in the selection of the method to be used to clean up a Superfund site,[50] and ordered the cleanup of toxic wastes on federal facilities.[51] In addition, SARA added a section to CERCLA prohibiting judicial review of challenges to removal or remedial actions selected by the EPA to clean up a Superfund site.[52] This was the section at issue in *Boarhead Corp. v. Erickson.*

THE NATIONAL HISTORIC PRESERVATION ACT OF 1966

Congress enacted the Preservation Act in 1966 to preserve "the historical and cultural foundations of our Nation as a living part of community life and development to give a sense of orientation to the American people."[53] The Preservation Act is the basis for most of the "administrative apparatus, protective devices and financial incentives employed by the federal government to carry out the national historic preservation policy."[54] Earlier legislation designed to foster preservation directed federal efforts towards the preservation of historical and archeological sites for public use, usually through public ownership.[55] The 1966 Act expanded the scope of federal efforts to include 'cultural' resources and a commitment to stimulate and assist the preservation of properties in non-federal ownership.[56]

Four elements of the Preservation Act are the heart of federal preservation programs.[57] First, the National Register of Historic Places is an inventory of "districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture."[58] Under criteria established by the Secretary of Interior, state officials nominate properties for listing in the Register.[59]

Second, federal funds for preservation are channeled either as matching grants-in-aid to the states or the National Trust for Historic Pres-

47. 42 U.S.C. §9611(a).
48. 42 U.S.C. §9621.
49. *Id.* §9622.
50. *Id.* §9617.
51. *Id.* §9620; 10 U.S.C. §§2701–2707 and 2810 (1988).
52. 42 U.S.C. §9613(h).
53. 16 U.S.C. §470(b)(2).
54. J. Fowler, *Historic Preservation and the Law Today,* 12 Urb. Law. 3, 7 (1980).
55. J. Fowler, *Federal Historic Preservation Law: National Historic Preservation Act, Executive Order 11593, and Other Recent Developments in Federal Law,* 12 Wake Forest L. Rev. 31, 40 (1976) [hereinafter *Federal Historic Preservation Law*].
56. *Id.*
57. Fowler, *supra* note 54, at 7.
58. 16 U.S.C. §470a(a) (1988).
59. *Id.*

ervation, or as direct grants for the preservation of properties listed on the National Register.[60] The federal monies help fund state preservation programs and surveys, pay for restoration of publicly and privately owned properties listed on the National Register, train skilled labor in preservation techniques, and assist private individuals and small businesses to remain in historic districts.[61]

Third, the Advisory Council on Historic Preservation advises the President and Congress on matters relating to historic preservation, recommends measures to coordinate the preservation-related activities of public and private entities, and provides advice on the dissemination of information related to such activities.[62] The Council is composed of representatives of the federal government, the states and cities, experts in the field of preservation, and the general public.[63]

The fourth major element of the Preservation Act is Section 106. This is the section of the Act that was at issue in *Boarhead*. The clash occurred because the EPA said that §113 of CERCLA, which denies the district courts jurisdiction to hear challenges to Superfund cleanup or pre-cleanup activities, barred challenges brought under other statutes such as the Preservation Act.[64] The *Boarhead* plaintiff insisted that §106 of the Preservation Act did apply to CERCLA-mandated cleanups and the proposed cleanup had to conform to that section's requirements before the EPA could proceed.[65]

Section 106 establishes a mandatory review program to ensure that federally administered, funded or licensed programs conform to the requirements of the Preservation Act.[66] The section directs all federal agencies with jurisdiction over a federal or federally assisted undertaking, or any federal agency with licensing authority over any undertaking, to take into account the effect of the undertaking on any property listed on the National Register before approving the expenditure of any federal funds or the issuance of any license.[67]

Under the review process, federal agencies are guided by historic preservation experts in planning agency activities to minimize damage to historic properties. Agencies are to provide the Advisory Council a reasonable opportunity to comment on such undertakings.[68] Federal agencies have interpreted Section 106 to cover a wide variety of administrative actions, including: grants for highway and urban renewal projects;

60. *Id.* §470a(d).
61. *Id.*
62. *Id.* §470j.
63. *Id.* §470i.
64. *Boarhead*, 923 F.2d at 1015 n. 9 (and accompanying text), 1018.
65. *Id.*
66. *Federal Historic Preservation Law, supra* note 55, at 41.
67. 16 U.S.C. §470f.
68. *Id.*

approval of urban renewal plans; transfers of surplus federal buildings; alterations of federal buildings; permits for bridges, levees, power lines and plants, construction of coastal improvements, granting rights-of-way over federal lands; condemnation of land for a national forest; and approval of federal loan guarantees.[69]

Where a federal agency maintains discretionary control over an action, the agency can require changes to the action to fulfill recommendations of the Advisory Council.[70] However, where a federal agency acts solely in a ministerial capacity, Section 106 is not applicable.[71]

STATEMENT OF THE CASE

Boarhead arose when the owner of a farm, which potentially was eligible for listing on the National Register of Historic Places, filed suit under the Preservation Act to enjoin the EPA from taking any actions affecting the farm and to request that the farm be removed from the Superfund list. In addition, the owner sought damages for the EPA's infringement on the right to quiet enjoyment of its property and to recover attorneys' fees. On appeal, the Third Circuit held that Congress, in enacting CERCLA, removed from the district courts jurisdiction over all challenges to the EPA's cleanup activities of Superfund sites, except for five exceptions enumerated in §113(h) of CERCLA.[72] The court found that the

69. *Federal Historic Preservation Law, supra* note 55, at 50.

70. *Id.* at 52–53.

71. *Id.* at 51–52, 53 n. 84.

72. *Boarhead*, 923 F.2d at 1019. Section 1139(h) reads:

"No federal court shall have the jurisdiction under Federal law other than section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

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

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

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

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

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

42 U.S.C. §9613(h).

The only opportunities for judicial review not covered by §113(h) are found in §121(f)(2) and (3), which permit a state to challenge an abatement action secured under §106 or a remedial action on a federally owned or operated facility, where such actions will not conform to the cleanup standards established in §121. *See* 42 U.S.C. §121(f)(2) and (3) and 132 Cong. Rec. H9582 (daily ed. Oct. 8, 1986).

plaintiff's complaint did not meet any of the exceptions.[73] Thus, the congressional prohibition of judicial review extended to causes of action that arose under other statutes, including the Preservation Act and the Administrative Procedures Act (hereinafter the APA).[74]

BACKGROUND

Boarhead Corp. owns a 118-acre farm in Bucks County, Pennsylvania, near the Delaware Canal, in an area that contains many historic and archeological sites. The farm includes a late eighteenth century farmhouse, is traversed by stone field walls and might have historic remains. The Pennsylvania Historical and Museum Commission determined that the farmhouse was eligible for the National Register of Historic Places.[75] The Commission also believed the farm might contain significant historic and prehistoric archeological resources. The farm is adjacent to state gamelands, and, in recent history, most of the acreage has been used as gamelands. In addition, two large automobile graveyards are partially contiguous with the farm. The developed portion of the Boarhead land includes a horse farm. Unfortunately for the owners, the property also includes a service and repair shop for construction and transport vehicles.[76]

From the late 1960s through the mid-1970s, Boarhead used the shop to repair trucks that hauled chemicals for companies 'involved' with its president.[77] At times, the chemical transport trucks were parked overnight at the farm. During the 1970s, three or four serious chemical spills from those trucks occurred on the farm. Boarhead did not deny the existence of those spills. The EPA also claimed that wastes were brought to the site and buried, apparently in drums. The source of this information was not disclosed.[78]

On March 31, 1989, the EPA designated the farm a Superfund site because there was a significant risk of the release of hazardous substances. The designation was made after appropriate notice to interested parties and a comment period. On May 18, 1989, the EPA notified Boarhead Corp. that the agency intended to conduct studies to determine the extent of the problem. The EPA told Boarhead that it considered the company poten-

73. *Boarhead*, 923 F.2d at 1019.

74. *Id.* at 1024.

75. Brief for Amici Curiae National Trust for Historic Preservation in the United States and the Pennsylvania Historical and Museum Commission at 10–11, *Boarhead*, 923 F.2d 1011 (3d Cir. 1990) (No.90-1040).

76. Appellant's Opening Brief at 7, *Boarhead*, 923 F.2d 1011 (3d Cir. 1991) (No. 90-1040).

77. *Id.* at 8. (The Appellant's brief uses the word "involved" to describe the relationship between Boarhead's president and the companies. The brief does not explain what "involved" means.)

78. *Id.*

tially responsible for the site contamination. Depending on the outcome of the studies, the EPA said it might undertake remedial action.

In reply, Boarhead told the EPA that the farm was eligible for listing as an historic place and asked whether the EPA had conducted a review of the site as required under the Preservation Act.[79] On July 10, 1989, before it received the EPA's reply, Boarhead filed suit in United States District Court for the Eastern District of Pennsylvania under the Preservation Act.[80] The suit requested that the District Court remove the farm from the Superfund List and enjoin any EPA activities that might affect the farm. The complaint alleged that the EPA failed to conduct the review required by §106 of the Preservation Act and regulations implementing to the Act. In a letter dated September 19, 1989, the EPA replied to Boarhead's earlier letter. The reply said that while the EPA had not conducted a formal §106 review, appropriate historic preservation issues would be considered under procedures established pursuant to CERCLA.[81]

On December 15, 1989, the District Court granted the EPA's motion to dismiss Boarhead's suit, holding that it lacked jurisdiction. The District Court said that under CERCLA only the Court of Appeals for the District of Columbia Circuit could remove the farm from the Superfund list or grant damages for the farm having been listed. In addition, the court held that under CERCLA federal courts could not review removal or remedial actions until either an enforcement or cost-recovery action was commenced or a removal or remedial action was completed.[82] The court refused to transfer the case to the Court of Appeals for the District of Columbia Circuit because the statutory deadline for filing a challenge to a Superfund listing passed before Boarhead filed the suit.[83] Boarhead appealed the District Court's ruling to the Third Circuit.

LEGAL ISSUES

A central issue in *Boarhead* was whether the actions of the EPA, in carrying out the requirements of CERCLA, may be challenged under

79. *Boarhead*, 923 F.2d at 1014.

80. 726 F.Supp. 607 (E.D. Pa. 1989).

81. *Boarhead*, 923 F.2d at 1014. The letter further requested that Boarhead provide the EPA with any information supporting the contention that the farm was eligible for listing on the National Register. The EPA sent similar letters to the Pennsylvania Historic Preservation Officer and to the Executive Director of the Bucks County Historical Society. *Id.* at 1014 n. 6.

82. 726 F.Supp. at 611.

83. *Id.* at 612. 42 U.S.C. §9613(a) provides that any regulation promulgated under CERCLA may be reviewed when an interested person applies to the District of Columbia Circuit Court of Appeals within 90 days of promulgation of the regulation. The listing of a site on the National Priorities List (or Superfund List) is considered promulgation of a regulation. 726 F. Supp. at 610. (The term 'interested party' is not defined. At a minimum, a court presumably would apply a test for standing to determine if a party could challenge a regulation.)

other federal statutes for failure to meet the requirements of those other statutes. Boarhead Corp. contended that the EPA was required to comply with §106 of the Preservation Act[84] before conducting pre-cleanup activities under CERCLA.[85] Section 106 requires that federal agencies consult with the Advisory Council on Historic Preservation and state historic preservation officers to "consider alternate approaches to problems in order to minimize the damage to historic property without frustrating the agencies in fulfilling their obligations under federal law."[86]

Jurisdiction Under the Preservation Act

Federal courts of appeal generally have recognized that the Preservation Act provides federal-question jurisdiction and a private right of action.[87] Relying on the decisions of the Third Circuit and other courts of appeal, the *Boarhead* court found no barrier to federal jurisdiction.[88] The Third Circuit also noted that the Preservation Act allows private parties to recover attorneys' fees in a civil action brought to enforce the Act and concluded that Congress must have intended to provide such a private right of action.[89]

The Private Right of Action Is Preempted

Recognizing that the Preservation Act generally provides for judicial review of federal agency actions that affect historic properties, the Third Circuit then reviewed CERCLA to decide if CERCLA permitted judicial review of EPA actions taken under the statute. The court found that §113(h) creates a general prohibition on judicial review of challenges

84. 16 U.S.C. §470f.

85. *Boarhead*, 923 F.2d at 1012–13. In addition to the challenge brought under the Preservation Act, Boarhead argued that the EPA's alleged violations of the Preservation Act were subject to review under the Administrative Procedures Act (APA) 5 U.S.C. §§701–706. *Id.* at 1023–24. Section 702 of the APA provides that a party "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. §702. Agency action includes the failure of an agency to act. *Id.* Because the reasoning the Court applied to disposing of the challenge brought under the Preservation Act applies to a challenge brought under the APA, that claim will not be dealt with separately.

86. *Boarhead*, 923 F.2d at 1015. On appeal, the parties agreed that the District Court was correct in finding that §113(a) of CERCLA provided that only the Circuit Court of Appeals for the District of Columbia could review the farm's listing as a Superfund site. Because Boarhead did not make a timely or proper application for removal of the case to that court, that issue was not heard on the appeal. *Id.* at 1015–16.

87. *Id.* at 1017–18.

88. *Id.* at 1017 (citing Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271 (3d Cir. 1983); Lee v. Thornburgh, 877 F.2d 1053 (D.C. Cir. 1989); Vieux Carre Property Owners, Residents & Assocs. v. Brown, 875 F.2d 453 (5th Cir. 1989), *cert. denied* 493 U.S. 1020 (1990) [hereinafter Vieux Carre]; National Center for Preservation Law v. Landrieu, 635 F.2d 324 (4th Cir. 1980) (per curiam); WATCH v. Harris, 603 F.2d 310 (2d Cir.), *cert. denied*, 444 U.S. 995 (1979)).

89. 923 F.2d at 1017 (citing Vieux Carre, 875 F.2d at 458); Bywater Neighborhood Ass'n v. Tricarico, 879 F.2d 165, 167 (5th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990) (citing Vieux Carre, 875 F.2d 453).

to removal or remedial actions selected under §104 of CERCLA or to abatement actions under §106(a) and allowed only five exceptions.[90] According to the Third Circuit, the plaintiff did not satisfy any of the exceptions.[91]

The court specifically reviewed the citizen's complaint exception in §113(h) and found the plaintiff's claim failed to meet the requirements for a citizen's suit.[92] A citizen's suit may by brought by persons acting on their own behalf against any party, including the federal government, alleged to be violating CERCLA or the regulations carrying out the purposes of the act.[93] A citizen's suit may also be brought when the federal government allegedly fails to carry out a nondiscretionary duty under the act.[94] The court found that Boarhead neither made the allegations essential for a citizen's suit nor gave the 60 day notice required to bring such a suit.[95] The complaint did not charge that the EPA violated the requirements of the statute or the CERCLA regulations or that a government official failed to carry out a nondiscretionary duty required by CERCLA.[96]

The court reviewed both legislative intent and the plain language of the statute to decide if Congress intended to preclude judicial review in all but the five exceptions provided. The Third Circuit held that the language "[n]o federal court shall have jurisdiction under federal law . . ." could not have been a clearer statement of congressional intent to preclude judicial review.[97] The Court concluded that Congress in enacting CERCLA intended to provide the EPA with the authority and funds to respond expeditiously to serious hazards without judicial challenges delaying or stopping the work prior to or during a cleanup.[98] Under the

90. 923 F.2d at 1013–14. The five exceptions are listed *supra* note 72.

91. *Id.* at 1019. The court did not explicitly address the exceptions other than that for 'citizens suits,' which is discussed below. *See infra* text accompanying notes 92–96. The nature of *Boarhead* clearly shows why the case did not fit the remaining exceptions. The first exception permits judicial review of an action under §9607 to recover costs or damages or to seek a contribution from a responsible party to repay costs incurred in a cleanup. No such costs had been incurred when this case was brought. The second exception permits review of an order issued by the EPA under §9606(a), directing a person to abate an actual or threatened release of a hazardous substance or seeking to collect a penalty for violation of such an order. No such order had been issued when this case was brought. The third exception permits a party ordered to undertake an abatement action to recover the costs of the abatement where the party can prove that it should not be liable for the abatement or where the party can prove that the abatement ordered was arbitrary or capricious or excessive in cost. Boarhead did not bring suit to recover the costs for an abatement under this exception. The fourth exception permits a 'citizens suit' to challenge whether a removal or remedial action under §§9604 or 9606 was a violation of any of the requirements of CERCLA. As noted, this exception is reviewed in the text below. The final exception permits a party compelled to take a remedial action under §9606 to challenge that action.

92. *Id.* at 1019 n. 13.

93. 42 U.S.C. §9659(a)(1).

94. *Id.* §9659(a)(2).

95. *Boarhead*, 923 F.2d at 1019 n. 13.

96. *Id.*

97. *Id.* at 1020.

98. *Id.* at 1019.

congressional plan, disputes about proper cleanup measures and responsibilities are to be dealt with after the cleanup.[99]

In determining that judicial review was precluded under §113(a), the Third Circuit looked to its own precedent. However, in the Third Circuit cases, the challenges to the EPA action were brought under CERCLA, not another statute.[100] Because those cases did not involve challenges to cleanup actions based on a claim brought under another statute, the cases did not provide clear precedent for this case.[101] The Third Circuit recognized this, saying that the *Boarhead* decision was more difficult because the complaint was "based on the Preservation Act, not CERCLA, *and* irreparable harm could occur if subject matter jurisdiction were denied until the EPA completed its cleanup activities. . . ."[102] Nevertheless, the court found that the plain language of CERCLA precluded judicial review and the granting of equitable relief.[103] The fact that Boarhead's claim was brought under another statute was not sufficient to defeat the court's interpretation of CERCLA.

The Third Circuit suggested that any relief to be granted in this area would have to come from Congress.[104] However, the court did leave open the possibility of an additional means of judicial review. In a footnote, the court pointed out that the EPA did not deny that its actions under CERCLA are bound by the terms of the Preservation Act and even acknowledged that the EPA's own regulations required the agency to consider preservation factors in planning activities conducted under CERCLA.[105] The Third Circuit said "the EPA would be well advised to follow its own regulations" in planning the cleanup.[106] The court left unanswered the "troubling questions" of whether judicial review would be available if the plaintiff could show that the EPA did not follow its own regulations or whether the plaintiff would have standing in such a case.[107]

LEGISLATIVE HISTORY

The Third Circuit decision did not set forth in detail the legislative history that led the court to determine that Congress clearly intended

99. *Id.*
100. *Id.* at 1021–22.
101. *Id.*
102. *Id.*
103. *Id.* at 1022–23.
104. *Id.* at 1021.
105. *Id.* at 1022 n. 17.
106. *Id.*
107. *Id.* The court did not describe what it considered troubling about the availability of judicial review if the EPA did not adhere to its own regulations or the standing of Boarhead to bring a suit requesting such review. Presumably the court was concerned that §113(h) may effectively prohibit review of a failure by the EPA to follow regulations not mandated by CERCLA itself.

CERCLA to override the requirements of other federal legislation. The §113(h) language cited by the Third Circuit was added to CERCLA as part of SARA.[108] A review of SARA's legislative history supports the EPA's position. However, conflict between the provisions of CERCLA and other legislation was not specifically mentioned in committee reports and debates on SARA. Therefore, support for the view that CERCLA preempts the requirements of other statutes is implied from the language of the act and legislative history and is not derived from a clear expression in the history that Congress intended CERCLA to preempt other statutes.

The Conference Report[109]

The Conference Report on SARA does not explicitly state that §113(h) was meant to override any right to judicial review of CERCLA-mandated cleanups brought under other statutes.[110] However, the Conference Report states that the proposed Senate amendments to CERCLA provided for "judicial review of the response under *only* three circumstances."[111] The House version of the amendments included three exceptions identical to those proposed by the Senate, plus five others.[112] In the final version of §113(h), the Conference Committee substitute adopted the three exceptions common to both bills, the fourth exception proposed by the House, and a modified version of the fifth House exception in the final version of §113(h).[113] The Conference Report said that the new section "is not intended to affect in any way the rights of persons to bring nuisance actions under State law with respect to releases or threatened releases of hazardous substances, pollutants, or contaminants."[114]

The strong implication of the language in the Conference Report is that there is to be no judicial review of CERCLA cleanups or the actions leading up to them, except as provided in the five exceptions under §113(h), unless the suit is based in nuisance law and is intended to prevent further releases of hazardous materials. A suit based on a right of action conferred in another statute is not one of the recognized exceptions, and,

108. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

109. A conference report is generally one of the last steps in passage of a bill by Congress. After each house passes its version of the proposed statute, a conference committee, composed of members of each house, meets to iron out the differences between the two versions. When a conference committee completes its work, the revised bill is returned to each house for final passage. The bill is accompanied by a conference report that explains the various sections of the legislation and the reasons for the changes the committee made to the orginal versions passed by each house. Floor amendments are usually not permitted to a bill recommended by a conference committee. A conference report carries additional weight in the interpretation of legislation as it represents the opinion of the senators and representatives who created the final version of a bill.

110. Conference Report, *supra* note 39, at H9032, *reprinted in* 1986 U.S.C.C.A.N. 3276.

111. Conference Report, *supra* note 39, at H9095, *reprinted in* 1986 U.S.C.C.A.N. at 3314 (emphasis added).

112. Conference Report, *supra* note 39, at H9095, *reprinted in* 1986 U.S.C.C.A.N. at 3315.

113. Conference Report, *supra* note 39, at H9095, *reprinted in* 1986 U.S.C.C.A.N. at 3316–17.

114. Conference Report, *supra* note 39, at H9096, *reprinted in* 1986 U.S.C.C.A.N. at 3317.

therefore, is not permitted. A review of the Senate and House committee reports on the legislation that eventually became SARA and the floor commentary on the legislation supports this interpretation.

Legislative History in the Senate

The Senate Committee on the Environment and Public Works report on the proposed CERCLA amendments favorably cited the lower court decision in *Lone Pine Steering Committee v. United States E.P.A.*,[115] saying that the case correctly interpreted CERCLA in holding that both the language and the legislative history of CERCLA indicated that Congress did not intend to allow pre-enforcement judicial review of CERCLA actions.[116] The Committee believed that "the scheme and purpose of CERCLA would be disrupted by affording judicial review of orders or response actions prior to commencement of a government enforcement or recovery action."[117]

The Senate Committee said that the purpose of the proposed amendments to CERCLA was to "expressly recognize that pre-enforcement review would be a significant obstacle to the implementation of response actions and the use of administrative orders."[118] Pre-enforcement review would result in considerable delay in carrying out cleanups, increase response costs, and discourage settlements and voluntary cleanups.[119] After completion of a response action, judicial review was limited to review of the administrative record.[120] The intent of limiting judicial review was to expedite the process of review and ensure that the court focused on the information and criteria used to select the response.[121] Agency decisions were to be overturned only if the action chosen was arbitrary and capricious.[122]

In *Lone Pine Steering Committee v. U.S. Environmental Protection Agency*,[123] the Third Circuit Court of Appeals found that the language of the original §9604 in CERCLA contained an implicit disapproval of pre-enforcement judicial review.[124] The court also noted that the CERCLA's legislative history indicated that it was preferable to err on the side of pro-

115. 600 F.Supp. 1487 (D.N.J. 1985).

116. S. Rep. No. 11, 99th Cong., 1st Sess., at 58 (1985) (*Senate Report of the Committee on the Environment and Public Works on the Superfund Improvement Act of 1985*) [hereinafter *S. Rep. No. 11, 99th Cong.*]. This bill was the predecessor to the final 1986 act. The committee report was issued prior to Lone Pine Steering Committee v. U.S. E.P.A., 777 F.2d 882 (3d Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986), which upheld the lower court decision.

117. S. Rep. No. 11, 99th Cong. at 58.

118. *Id.*

119. *Id.*

120. *Id.* at 57.

121. *Id.*

122. *Id.*

123. 777 F.2d 882 (3rd Cir. 1985). This case was the appellate review of 600 F.Supp. 1487 (D.N.J. 1985), *supra* note 115.

124. *Id.* at 886–87.

tecting public health and the environment in administering the Superfund because delays in site cleanup often would exacerbate already serious problems.[125] The Sixth Circuit Court of Appeals, in *J.V. Peters & Co., Inc v. Administrator, E.P.A.*,[126] also held that the "allowance of a cause of action prior to a response action would debilitate the central function of [CERCLA]."[127] *Wagner Seed Co. v. Daggett*,[128] stated that "pre-enforcement review of EPA's remedial actions . . . [is] contrary to the policies underlying CERCLA."[129]

The Senate Committee report influenced the Third Circuit's *Lone Pine*[130] decision and the Sixth Circuit's *J.V. Peters & Co., Inc.*[131] decision. Both cases cited the committee report in refusing to overturn lower court decisions denying pre-enforcement judicial review of EPA Superfund actions.[132] The report also may have influenced the Second Circuit in *Wagner Seed Co.*[133] The Second Circuit did not cite the committee report, but did cite the *Lone Pine* and *J.V. Peters* appellate decisions in refusing to overturn a district court decision that the court lacked jurisdiction to review a pre-enforcement challenge.[134]

While not specifically mentioning other statutes, the Senate Committee report supports the Third Circuit's interpretation in *Boarhead* that the intent of §113(h) was to bar all pre-enforcement challenges to cleanup actions, whether brought under CERCLA or under the terms of another statute. Cleanups are to be unimpeded by prior judicial review.[135] The Committee report stated that the amendment confirmed that judicial review of a response action is limited to the administrative record, unless major deficiencies exist in the record.[136]

The juxtaposition of the language supporting expeditious cleanups with the language stating the proposed §113 would limit judicial review to the administrative record after completion of the cleanup supports the interpretation that the Senate Environment and Public Works Committee did not view challenges to cleanups brought under other statutes any more favorably than challenges brought under CERCLA. The "review on the basis of administrative record" demonstrates that the Senate committee contemplated that the APA would come into play in

125. *Id.* at 887 (quoting S. Rep. No. 848, 96th Cong., 2d Sess., 56 (1980)).
126. 767 F.2d 263 (6th Cir. 1985).
127. *Id.* at 264.
128. 800 F.2d 310 (2d Cir. 1986).
129. *Id.* at 315 (quoting Wheaton Industries v. E.P.A. 781 F.2d 354, 356 (3d Cir. 1986)).
130. 777 F.2d 882 (3d Cir. 1985).
131. 767 F.2d 263 (6th Cir. 1985).
132. 777 F.2d at 887 n. 3; 767 F.2d at 265.
133. 800 F.2d 310 (2d Cir. 1986).
134. *Id.* at 314–15. The court also cited Wheaton Industries v. E. P. A., 781 F.2d 354 (3d Cir. 1986), in which the Third Circuit followed its earlier *Lone Pine* decision.
135. S. Rep. No. 11, 99th Cong., *supra* note 116, at 58.
136. *Id.* at 57.

cleanup reviews, but not until completion of the cleanup. The same should hold true for other statutes.

SARA was enacted in the second session of the 99th Congress. The Environment and Public Works Committee Report was issued during the first session. Floor commentary in the Senate when it passed the Conference Committee version of SARA shows similar support for the position that §113(h) precluded pre-cleanup judicial review. Sen. Simpson (R-Wyo.), a floor manager for the bill,[137] and Sen. Thurmond (R-S.C.), chairman of the Judiciary Committee,[138] in a colloquy, indicated that §113(h) was intended to limit all challenges to the response actions of the EPA or any other party to the opportunities set forth in §113(h), no matter what authority provided the basis for the challenge.[139]

One senator held a slightly different view of §113(h). In his remarks, Sen. Stafford (R-Vt.), then chairman of the Senate Committee on Environment and Public Works, said that the section was not applicable to all suits.[140] He specifically cited the Conference Report, which said suits under state nuisance law with respect to releases of hazardous substances were not within the general prohibition contained in §113(h).[141] In later remarks, Sen. Stafford said that §113 governs only suits "brought under" or "arising under" CERCLA and that there was no support for the proposition that any controversy over a response action could be heard only in federal court and only under the provisions of §113.[142] The senator did not define the terms "brought under" or "arising under"; however, an argument can be made that he meant that a challenge to a cleanup could be brought under another statute.

While Sen. Stafford's statements could be used to support an argument that §113(h) did not prohibit a challenge to a cleanup that arose under another law, the balance of his remarks lend little support to this interpretation. The rest of his remarks on October 17, 1986, focus on the preservation of other federal and state laws that establish cleanup standards and the necessity of the selection of a response that is a cost-effec-

137. Conference Report, *supra* note 39, at H9083, *reprinted in* 1986 U.S.C.C.A.N. at 3440.

138. Sen. Thurmond was also a manager of the bill, although not so designated for §113(h). Conference Report, *supra* note 39, at H9083, *reprinted in* 1986 U.S.C.C.A.N. at 3440.

139. 132 Cong. Rec. S14,929 (daily ed. Oct. 3, 1986). Sen. Thurmond inquired of Sen. Simpson whether §113(h) was to be comprehensive, covering "all lawsuits, under any authority, concerning the response actions that are performed by EPA and other Federal agencies, by States . . . and by private parties . . . ." He further inquired whether that section covered "all issues that could be construed as a challenge to the response, and limits those challenges to the opportunities specifically set forth in the section." Sen. Simpson stated that Sen. Thurmond's interpretation of the provision was correct. As chairman of the Senate Judiciary Committee, Sen. Thurmond would have been influential in drafting any section of the bill affecting the right to judicial review.

140. *Id.* at S14,899.

141. *Id.* at S14,899. *See* Conference Report, *supra* note 39, at H9096, *reprinted in* 1986 U.S.C.C.A.N. at 3317.

142. 132 Cong. Rec. S17,136–37 (daily ed. Oct. 17, 1986) (statement of Sen. Stafford).

tive, permanent solution to a human health or environmental threat.[143] In his remarks on October 3, 1986, Sen. Stafford said that citizens' right to challenge cleanup actions must be maintained to prevent actions in violation of the law and the waste of large amounts of money on what might be an illegal action.[144] However, the senator said the courts must distinguish between legitimate citizens' suits regarding irreparable injury that could be addressed only if heard before or during a response action and those of potentially responsible parties designed to slow cleanup actions.[145]

Sen. Stafford was concerned that "citizens asserting a true public health or environmental interest in the response cannot obtain adequate relief if an inadequate cleanup is allowed to proceed and . . . create a nuisance or a violation of this or other laws."[146] In this sense, Sen. Stafford's comments lend support to the view expressed by Sens. Thurmond and Stafford and the Environment and Public Works Committee report that cleanups under CERCLA are to be carried out expeditiously.

Legislative History in the House of Representatives

The legislative history in the House of Representatives offers similar support for the *Boarhead* decision. Prior to passage of SARA, the position of the EPA was that the unique statutory provisions of CERCLA and the actions required to respond to hazardous substance spills were such that strict compliance with the provisions of other environmental statutes was often inappropriate or unnecessary.[147] The House report on SARA stated that the section that became §113(h) codified the position of the EPA and the Department of Justice's positions that "there is no right of judicial review of the Administrator's selection and implementation of response actions until after the response action [sic] have been completed to their completion."[148] When judicial review does occur, it is limited to the administrative record.[149] The language of the House report parallels that of the Senate committee report.[150] Again, the language supports the conclusion that the House intended that challenges to cleanup actions, whether brought under CERCLA or other statutes, are not to be heard until after the cleanup is completed. The only exceptions to this prohibition are those specifically created by §113(h).[151]

143. *Id.* at S17,138.
144. 132 Cong. Rec. S14,898 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford).
145. *Id.*
146. *Id.*
147. H.R. Rep. No. 253, 99th Cong., 2d Sess., pt. 1, at 132 (1986) (statement of Lee M. Thomas, Administrator, U.S. Environmental Protection Agency), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2914.
148. H. Rep. No. 253, 99th Cong., 2d Sess., pt. 1, at 81 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2863.
149. *Id.*
150. S. Rep. No. 11, 99th Cong., *supra* note 116, at 57–58.
151. 42 U.S.C. §9613(h).

Floor commentary on SARA in the House confirms this interpretation. Rep. Dan Glickman (D-Kan.) was the House member of the conference committee responsible for defending the House position on judicial issues, including citizens' suits and judicial review.[152] In his floor statement, Rep. Glickman said §113(h) "covers all lawsuits, under any authority, concerning the response actions that are performed" by any party.[153] Judicial review, no matter what the issue, is limited to five exceptions set forth in §113(h).[154]

Rep. Glickman said that while Sen. Stafford's remarks of October 3, 1986, concerning the value of pre-implementation judicial review were valid, the Conference Committee decided that the need for expeditious cleanups outweighed the value of pre-implementation review.[155] State nuisance law could be used by states or private citizens to bring actions to compel cleanups where those laws did not conflict with CERCLA, but "the conferees did not intend to allow any plaintiff, whether [it be] the neighbor who is unhappy about the construction of a toxic waste incinerator . . . or the potentially responsible party . . . to stop a cleanup by what would undoubtedly be a prolonged legal battle."[156]

Because the House version of §113(h) was largely the basis of the final version adopted, Rep. Glickman's description of the intent of that section has additional weight. Glickman's description reflects the understanding of the House in adopting the section. In addition, the House Report on SARA supports his statement. As noted above, that report states that the intention of §113(h) was to recognize the EPA and the Department of Justice view that the intent of CERCLA as originally passed was to prohibit judicial review of cleanup-related actions until after completion of the response.[157]

CONCLUSION

While the Third Circuit does not detail the review of the legislative history it analyzed to come to its decision in *Boarhead*, that history does support the court's decision. The Conference Committee report[158] does not explicitly state that the intent of §113(h) is to preempt judicial review based on other statutes of CERCLA-mandated actions. Nevertheless, the statements in the Senate and House committee reports on their

152. 132 Cong. Rec. H9563 (daily ed. Oct. 8, 1986) (statement of Rep. Dingell). Rep. Dingell was chairman of the House Committee on Energy and Commerce and the majority manager of the bill on the House floor. *Id.* at 9562.

153. *Id.* at H9582.

154. *Id.*

155. *Id.* at H9582–83.

156. *Id.* at H9583.

157. *See supra* note 148 and accompanying text.

158. Conference Report, *supra* note 39.

versions of the language in §113(h) strongly support this interpretation. The comments of the managers of the Conference Committee bill, notwithstanding the statements of Sen. Stafford, also support this interpretation.

Sen. Thurmond was the chairman of the Senate Judiciary Committee during the drafting of the bill, as well as a manager of the bill, although not for the section in question. Rep. Dingell designated Rep. Glickman to speak for the House on that section of the bill. Sen. Thurmond and Rep. Glickman made their statements during consideration of SARA; these statements were not challenged by other managers of the bill, who yielded their time to Sen. Thurmond and Rep. Glickman for the purpose of interpreting §113.[159] Even Sen. Stafford's limited view of §113(h) does not seem to go so far as to support requests for judicial review designed to delay the timely implementation of necessary responses to hazardous wastes. He warns the courts to distinguish between legitimate citizens' suits intended to prevent inadequate cleanups and dilatory suits by potentially responsible parties.

Because of the legislative history, challenges to CERCLA cleanup actions may be doomed to failure. In most cases failure will be a desirable result, given the purposes of CERCLA. The harm caused by delaying a CERCLA response action while ensuring that the requirements of a statute such as the Preservation Act are met usually will far outweigh the benefits received.

However, because the challenge could be the result of a direct conflict between other important environmental protection statutes and CERCLA, Congress may consider amending CERCLA to address the issue in advance of the problem. But proposing additional amendments to CERCLA may create more problems than are solved. The temptation to carve out exceptions to CERCLA to further a particular position may well lead to legislation that could make an already complex statute unworkable. Efforts to weaken or strengthen particular portions of the statute to further what ultimately is a less significant problem than toxic waste cleanups could undermine public support for CERCLA as a whole. Congress should carefully review any future amendments to CERCLA intended to limit potential problems caused by the broad reach of §113(h) to ensure that greater problems are not being created by proposed amendments.

CHRIS SCHATZMAN

159. *See supra* notes 139, 153 and accompanying text.