

April 1992

Pre-Enforcement Review of Administrative Orders to Abate Environmental Hazards

David Montgomery Moore

Follow this and additional works at: <https://digitalcommons.pace.edu/pelr>

Recommended Citation

David Montgomery Moore, *Pre-Enforcement Review of Administrative Orders to Abate Environmental Hazards*, 9 Pace Envtl. L. Rev. 675 (1992)

DOI: <https://doi.org/10.58948/0738-6206.1632>

Available at: <https://digitalcommons.pace.edu/pelr/vol9/iss2/9>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

COMMENT

**Pre-enforcement Review of
Administrative Orders to Abate
Environmental Hazards**

David Montgomery Moore

The author discusses the availability of review of administrative orders issued by the Environmental Protection Agency (EPA) under the major federal environmental statutes. When statutes are silent, the appropriateness of pre-enforcement review is discussed in light of congressional intent, the EPA's need for prompt abatement of environmental hazards and the constitutional requirements of due process.

I. Introduction

A basic tenet of our legal system is that aggrieved individuals be allowed review of government actions affecting their rights. The right to judicial review is founded upon principles of fairness and equity, and provides a means by which society can protect itself from arbitrary government action. With the growing concern for the environment and the substantial body of legislation passed in recent years to address

environmental concerns, government agencies such as the Environmental Protection Agency (EPA) are being given ever broadening control over environmental affairs. Congress has explicitly provided that some of this control is not always subject to judicial review.¹

As part of its power to enforce the environmental laws of the United States, the EPA is authorized to issue administrative orders under most of the major federal environmental statutes.² The requirements of administrative orders range from directing the recipient to clean up a hazardous waste site, to enjoining the recipient from discharging pollutants to land, water or air.³ Statutory grants of authority for administrative orders can be broad. The language of some environmental statutes authorizes EPA to issue "such orders as may be necessary to protect public health and welfare and the environment."⁴

1. See *infra* notes 89-231 and accompanying text.

2. This paper will focus on orders issued under the following federal environmental statutes: Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) §§ 104, 106, 42 U.S.C. §§ 9604, 9606 (1988); Resource Conservation and Recovery Act of 1976 (RCRA) §§ 3004, 3008, 3013(a), 7003(a), 42 U.S.C. §§ 6924, 6928, 6934(a), 6973(a) (1988); Clean Air Act (CAA) §§ 113, 303, 42 U.S.C. §§ 7413, 7603 (Supp. II 1990); Clean Water Act (CWA) §§ 309, 504, 33 U.S.C. §§ 1319, 1364 (1988). This is by no means an exhaustive list of the EPA's authority for issuing administrative orders.

3. Under RCRA § 7003, 42 U.S.C. § 6973 (1988), the government has secured relief in the form of preliminary injunctions ordering defendants to (1) clean up drums, tanks, etc.; (2) restrict public access to sites; (3) provide alternate water supplies; (4) develop and implement a plan to prevent further contamination; (5) provide financial guarantees to insure implementation of plans; (6) restore groundwater and other contaminated resources; (7) implement monitoring programs to determine adequacy of cleanup; (8) restore sites and resources and (9) reimburse EPA for funds expended in connection with an action at a site. See *United States v. Hooker Chem. & Plastics Corp.*, 749 F.2d 968, 971 (2d Cir. 1984); *United States v. Waste Indus., Inc.*, 734 F.2d 159, 168 (4th Cir. 1984) (mandatory injunctive relief); *United States v. Price*, 688 F.2d 204 (3d Cir. 1982) (alternate water supply); *United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334 (S.D. Ind. 1982); *United States v. Midwest Solvent Recovery, Inc.*, 484 F. Supp. 138 (N.D. Ind. 1980); *United States v. Solvents Recovery Serv.*, 496 F. Supp. 1127 (D. Conn. 1980) (monitoring program); *United States v. Vertac Chem. Corp.*, 489 F. Supp. 870 (E.D. Ark. 1980). See generally RIDGWAY M. HALL, TOM WATSON, JEFFREY J. DAVIDSON, DAVID R. CASE, & NANCY S. BRYSON, *RCRA HAZARDOUS WASTES HANDBOOK* (7th Ed. 1987).

4. CERCLA § 106(a), 42 U.S.C. § 9606(a) (1988). RCRA § 7003(a), which was enacted four years prior to CERCLA, contained this identical language, except for the

Under many of the major federal environmental statutes, administrative orders are not immediately reviewable in the courts.⁵ Congress has expressly precluded review of administrative orders under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)⁶ and the Clean Air Act (CAA).⁷

CERCLA is perhaps the best example of a statute which precludes pre-enforcement review⁸ of administrative orders. The recipient of a CERCLA order cannot challenge the validity of the order, its requirements, or the evidence and assumptions upon which the order was issued.⁹ The bar to review remains until EPA chooses to enforce the order in federal court, which only occurs if the recipient fails to comply with the order.¹⁰ Thus, the recipient who questions the validity of the order is put in a difficult position. The recipient may refuse to comply and wait for the EPA to enforce the order in the courts,¹¹ but faces potential penalties of up to \$25,000 per day for failure to comply.¹²

words "and welfare." 42 U.S.C. § 6973(a) (1988).

5. Under CERCLA, for example, administrative orders issued pursuant to § 104 and § 106 are expressly precluded from review by § 113(h), 42 U.S.C. § 9613(h) (1988). See *infra* notes 107-26 and accompanying text. Similarly, provisions of the Clean Air Act explicitly preclude review. See *infra* notes 127-65 and accompanying text. As will be explained, review of these orders is ultimately available when EPA seeks to enforce an order in the courts.

6. 42 U.S.C. §§ 9601-9675 (1988); Pub. L. No. 96-510 (1980), as amended by Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986). See *infra* notes 107-26 and accompanying text.

7. CAA § 307(e), 42 U.S.C. § 7607(e) (1988). See *infra* notes 127-65 and accompanying text.

8. Pre-enforcement review, undefined in BLACK'S LAW DICTIONARY (6th ed. 1990), is judicial review of administrative orders prior to the agency's attempt to enforce the order or take action under the order. See *Lone Pine Steering Comm. v. EPA*, 777 F.2d 882 (3d Cir. 1985). In the context of CERCLA, pre-enforcement review has been defined as "judicial review of EPA actions prior to the time that the EPA or a third party undertakes a legal action to enforce an order or seek a recovery of costs for the cleanup of a hazardous waste site." *Barmet Aluminum Corp. v. Reilly*, 927 F.2d 289 (6th Cir. 1991)(quoting *Reardon v. United States*, 922 F.2d 28, 30, n. 4 (1st Cir. 1990)).

9. See *infra* notes 98-126 and accompanying text.

10. *Id.*

11. *Id.*

12. EPA may also assess treble fines for failure to comply with an administrative

The primary reason offered for CERCLA's bar to pre-enforcement review of administrative orders is that under many circumstances pre-enforcement review would delay the EPA's response to environmental emergencies and waste the agency's scarce time and resources on litigation.¹³ Review of administrative orders has been found to frustrate the purpose of the act — to rapidly abate environmental hazards posed by toxic substances.¹⁴ Prior to 1986, CERCLA was silent as to whether review of administrative orders was available, but the majority of the courts considering the issue found that the statute implicitly barred review.¹⁵ In 1986, Congress codified the judicially created bar to judicial review in the Superfund Amendments and Reauthorization Act (SARA).¹⁶

Unfortunately, Congress has left other federal environmental statutes silent as to whether pre-enforcement review is precluded,¹⁷ leaving the recipients of administrative orders in doubt as to whether to challenge the validity of the order in court. Because of Congress' silence, courts are left to guess Congress' intent, searching for hints in the statutes' language, legislative histories, and purposes.¹⁸

When administrative orders are issued to address emergency hazards to human health or the environment, the policies supporting a bar to pre-enforcement review are overriding.¹⁹ However, when environmental statutes are silent as to

order, increasing the penalty to up to \$75,000 per day per violation. CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3) (1988).

13. See *infra* notes 95-103 and accompanying text.

14. *Id.* See also *Wagner Seed Co. v. Daggett*, 800 F.2d 310 (2d Cir. 1986); *Ami-noil, Inc. v. EPA*, 599 F. Supp. 69 (C.D. Cal. 1984) ("Allowing an alleged responsible party to challenge the merits of the § 106(a) administrative order prior to an enforcement or recovery action would handcuff the [EPA] by delaying effective responses to emergency situations.") *Id.* at 73).

15. See *infra* notes 107-26 and accompanying text.

16. Pub. L. No. 99-499, 100 Stat. 1613 (1986). The SARA amendments added § 113(h) which expressly bars review of § 104 and § 106(a) orders. 42 U.S.C. § 9613(h) (1988). See *infra* notes 107-26 and accompanying text.

17. Neither the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6922(k) (1988) nor the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (1988) expressly provide for, or preclude, pre-enforcement review.

18. See *infra* notes 42-58 and accompanying text.

19. See *infra* notes 81-82, 95-106, 145-155, 179-180 and accompanying text.

pre-enforcement review, a challenge to an administrative order may force EPA to litigate the validity of the order. As a result, little or no response actions take place to abate the environmental hazard, litigation expenses mount, and the resources of the EPA and the judiciary are wasted.

The sensitive nature of environmental hazards and the costs of litigation are such that Congress must clearly establish whether administrative orders under the federal environmental statutes are reviewable.²⁰ Otherwise, the EPA and responsible parties will waste their time, efforts, and resources in litigation rather than using those resources to abate the environmental hazard.

This paper will set forth the factors the courts have used to analyze whether pre-enforcement review of administrative orders is barred, and will apply those factors to issues of pre-enforcement review of administrative orders that have not reached the courts. Finally, this paper will discuss the appropriateness of a legislative prohibition on pre-enforcement review of administrative orders under the major federal environmental statutes.²¹

II. Sources of Judicial Review

Petitions for review of administrative orders usually seek to invoke jurisdiction under: the Administrative Procedure Act (APA),²² the enabling statute itself (the environmental

20. When pollution to the environment poses a hazard of impending significant damage, immediate action by either the EPA or the recipient of the order is required. *See, e.g.*, CERCLA §§ 104(a), 106(a), 42 U.S.C. §§ 9604(a), 9606(a) (1988). Immediate remedial action prevents further contamination that could require more complex and expensive remediation efforts. The longer environmental hazards remain, the greater the possibility of migration of pollutants into surface or groundwater, air, or soil. Greater migration of pollutants into environmental media complicates cleanup because it requires that remedial efforts be taken upon a greater volume of the environmental media, involving additional time and resources.

21. RCRA, CWA and CAA were chosen because they represent the permitting programs for the three major environmental media: land, water, and air. CERCLA serves as a model for discussion because the statute was originally silent as to pre-enforcement review and, after the courts decided pre-enforcement review would be barred, Congress enacted CERCLA § 113(h) which expressly precluded review of many CERCLA administrative orders. *See infra* notes 86-126 and accompanying text.

22. 5 U.S.C. §§ 551-559 (1988). However, the APA is not an independent source

statute, for the purposes of this discussion), one of the general jurisdictional statutes granting review of federal questions,²³ such as actions arising out of the regulation of commerce²⁴ or actions arising from a government official's deprivation of constitutional rights.²⁵ Suit may be commenced in the federal district courts or the courts of appeals, depending on the jurisdictional provisions of the enabling statute.

Most courts have held that constitutional questions are always reviewable, regardless of the provisions of the APA or the enabling statute.²⁶ For example, if the recipient of an order seeks to review whether a statutory scheme abrogates constitutional rights, the courts may consider the question even if review is expressly precluded by the statute.²⁷

III. The Administrative Procedure Act

Judicial review of agency actions are governed by the APA, in addition to any review explicitly provided for in the enabling statute.²⁸ The APA, however, is not an independent

of judicial review. *Califano v. Sanders*, 430 U.S. 99 (1977).

23. 28 U.S.C. § 1331 (1988) (granting jurisdiction over all federal questions arising under the "Constitution, laws, or treaties of the United States").

24. 28 U.S.C. § 1337 (1988).

25. 42 U.S.C. § 1983 (1988). Parties may also claim jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 (1988). *Cost Control Mktg. and Management, Inc. v. Pierce*, 848 F.2d 47, 50 (3d Cir. 1988) (the Declaratory Judgment Act may not be used to circumvent statutory procedural methods, however).

26. See, e.g., *Webster v. Doe*, 108 S. Ct. 2047 (1988).

27. For the federal environmental statutes, constitutional challenges under the due process clause of the Constitution are most common. See *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991) (reviewing constitutionality of CERCLA lien, and holding lien violative of due process for failure to provide for notice and predeprivation hearing, but denying pre-enforcement review of validity of CERCLA lien and applicability of statutory defenses due to express statutory bar); *Aminoil, Inc. v. EPA*, 599 F. Supp. 69, 72 (C.D. Cal. 1984) (reviewing constitutionality of CERCLA statutory scheme, but denying pre-enforcement review of merits of administrative order); *SCA Serv. of Indiana, Inc. v. Thomas*, 634 F. Supp. 1355, 1359 (N.D. Ind. 1986) (same). But see *Barmet Aluminum Corp. v. Reilly*, 927 F.2d 289 (6th Cir. 1991) (CERCLA provision barring pre-enforcement judicial review applies to bar constitutional challenges); *South Macomb Disposal Auth. v. EPA*, 681 F. Supp. 1244 (E.D. Mich. 1988) (same); *Lone Pine Steering Comm. v. EPA*, 600 F. Supp. 1487 (D.N.J. 1985) (no subject matter jurisdiction over constitutional challenge), *aff'd* 777 F.2d 882 (3d Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986).

28. See generally WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW

source of judicial review.²⁹ Rather, its provisions define judicial jurisdiction or a cause of action upon which jurisdiction created by other statutes may be invoked.³⁰

Review of administrative orders presumably would be available under two of the APA's provisions. Section 704 of the APA provides specifically for review of final agency action "for which there is no adequate remedy in a court. . . ."³¹ Section 702 states that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof."³²

The plain meaning of these provisions would apparently provide for review of a broad range of disputes with agency actions. In the case of administrative orders requiring a responsible party to abate an environmental hazard, certainly the party is adversely affected by agency action so as to invoke the APA judicial review provisions. However, section 701 of the APA exempts certain agency actions from review. Section 701(a) states that judicial review under the APA applies except "to the extent that: (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."³³

Of the statutes to be discussed authorizing issuance of administrative orders to abate environmental hazards, only CERCLA clearly falls under the first exception by explicitly precluding pre-enforcement review. CERCLA expressly precludes review through a statutory provision barring pre-enforcement review of administrative orders.³⁴ The Clean Air Act (CAA)³⁵ contains a broad prohibition to judicial review

(1986).

29. *Califano v. Sanders*, 430 U.S. 99 (1977).

30. *Id.* In some rare situations the courts may invoke the jurisprudential doctrine of nonstatutory review to decide cases. See *United States v. Fausto*, 484 U.S. 439, 444 (1988) (listing cases in which nonstatutory review of agency action for personnel disputes under the Civil Service Reform Act of 1978 was attempted).

31. 5 U.S.C. § 704 (1988).

32. 5 U.S.C. § 702 (1988) (emphasis added).

33. 5 U.S.C. § 701(a) (1988).

34. CERCLA § 113(h), 42 U.S.C. § 9613(h) (1988). See, e.g., *Dickerson v. EPA*, 834 F.2d 974 (11th Cir. 1987).

35. CAA §§ 101-618, 42 U.S.C. §§ 7401-7671(q) (1988 & Supp. II 1990).

where review has not been provided for in other sections of the statute.³⁶ Other environmental statutes that are the focus of this discussion, the Resource Conservation and Recovery Act (RCRA)³⁷ and the Clean Water Act (CWA),³⁸ do not contain provisions explicitly addressing pre-enforcement review of administrative orders.³⁹

The second exception from judicial review under the APA, the exception for action committed to agency discretion, is probably not applicable to the administrative orders to be discussed.⁴⁰ The Supreme Court has deemed the exception for actions committed to agency discretion "a very narrow exception"⁴¹ and has applied the exception only in rare circumstances.⁴²

36. CAA § 307(e), 42 U.S.C. § 7607(e) (1988). See *infra* notes 128-67 and accompanying text. The Clean Air Act also boldly proclaims under the subsection governing review of rulemaking, that the APA "shall not, except as expressly provided in [section 307(d)], apply to actions to which this subsection applies." CAA § 307(d), 42 U.S.C. § 7607(d) (1988 & Supp. II 1990). The validity of such a broad exclusion of agency action from the APA has not been addressed by the courts.

37. 42 U.S.C. §§ 6901-6992 (1988).

38. 33 U.S.C. §§ 1251-1387 (1988).

39. See *infra* notes 166-230 and accompanying text.

40. No courts have applied the "committed to agency action" exception to administrative orders issued under the environmental statutes.

41. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the Supreme Court stated that the exception for action committed to agency discretion was "a very narrow exception." *Id.* at 408. The Court indicated that "review is not to be had if the statute is drawn so that a court would not have a meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 410. The Court cited the legislative history of the APA and stated that the exception for actions committed to agency discretion applies only in those "rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id.* (citing S. REP. NO. 752, 79th Cong., 1st Sess., 26 (1945)).

42. See, e.g., *Heckler v. Chaney*, 470 U.S. 821 (1985) (held that the Food and Drug Administration's (FDA) decision not to require drugs used in lethal injection of prisoners on death row to be "safe and effective" for execution was committed to agency discretion by law and was therefore not reviewable).

Some factors which might be determinative of whether an action is committed to agency discretion by law are: (1) the degree of agency discretion which already exists, (2) the expertise and experience necessary to understand the subject matter, (3) the appropriateness of judicial intervention and the ability of a court to ensure correct results (4) the agencies need for informality and speed in decision-making, and (5) whether other controls on agency discretion exist. See generally Harvey Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion"*, 82 HARV. L. REV. 367 (1968).

Statutory preclusion of judicial review need not be express, but may be implied from statutory language and legislative history.⁴³ In the absence of an express statutory provision barring review, the United States Supreme Court has established a number of criteria that are generally applicable to all statutes to determine whether review is proper. As the Supreme Court stated in *Block v. Community Nutrition Institute*, "[w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved."⁴⁴

The first place to look to determine whether review of administrative orders is precluded is the enabling statute itself.⁴⁵ Statutes often state their purpose and intent. Many of the environmental statutes have extensive legislative histories that may be consulted to determine what Congress had in mind. Most environmental statutes have congressional findings and declarations of purpose that may be helpful in determining congressional intent.⁴⁶

The courts will also look to what procedures are afforded by the statute in the absence of judicial review to determine whether a bar to pre-enforcement review is appropriate.⁴⁷

The agency actions which are most clearly committed to agency action by law are decisions not to take requested enforcement action. The decision not to enforce has traditionally been relegated to prosecutorial discretion and is presumptively unreviewable. See *Heckler*, 470 U.S. 821 (1985).

43. *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984). The standards for whether Congress intended to preclude judicial review of *statutory* claims and *constitutional* claims should not be confused. The Supreme Court has repeatedly held that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592 (1988). See also *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Johnson v. Robison*, 415 U.S. 361 (1974).

44. *Block*, 467 U.S. at 345.

45. *Id.*

46. See, e.g., CAA § 101, 42 U.S.C. § 7401 (1988 & Supp. II 1990); CWA § 101, 33 U.S.C. § 1251 (1988); TSCA § 2, 15 U.S.C. § 2601 (1988); RCRA §§ 1002, 1003, 42 U.S.C. §§ 6901, 6902 (1988).

47. See, e.g., *Lloyd A. Fry Roofing Co. v. EPA*, 415 F. Supp. 799 (W.D. Mo. 1976), *aff'd*, 554 F.2d 885 (8th Cir. 1977) (interpreting judicial review of the Clean Air Act).

Under many of the major environmental statutes, the EPA must bring an action in court to enforce the administrative order.⁴⁸ The courts can review the validity of the order at that time. Any excessive penalty assessments can be reduced by invoking the equitable powers of the courts.⁴⁹ Courts addressing the issue have often indicated that these types of procedures provided for in the statute may substitute for pre-enforcement review.⁵⁰

When statutes are silent as to judicial review of administrative orders, the absence of a provision specifically affording review is not clear and convincing evidence of an intent to withhold review.⁵¹ However, as the Court held in *Block*, the structure of the statute will give clues as to whether Congress intended to preclude review.⁵² For example, the fact that review is explicitly provided for one class of persons affected by an administrative order may be "strong evidence" that Congress intended to preclude the other class from obtaining judicial review.⁵³ Similarly, when two different provisions of the same statute are precisely drawn, the express inclusion of judicial review in one provision will provide "persuasive evidence that Congress deliberately intended to foreclose further review" of the other provision.⁵⁴

Case law has recognized a general presumption in favor of judicial review,⁵⁵ unless there is "clear and convincing evidence of a contrary legislative intent" to restrict access to judicial review.⁵⁶ The presumption "may be overcome by spe-

48. See, e.g., CERCLA § 106, 42 U.S.C. § 9606 (1988); CAA §§ 113, 303, 42 U.S.C. §§ 7413, 7603 (Supp. II 1990).

49. *Fry Roofing*, 554 F.2d at 891 (suggesting that the doctrine of laches may be invoked if the EPA fails to promptly seek enforcement).

50. See *infra* notes 118-26, 156-65, 177-80 and accompanying text.

51. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970). Interpreting § 701 of the APA the court stated, "[t]he mere failure to provide specifically by statute for judicial review is certainly no evidence of intent to withhold review." *Id.* at 402-03. (citing H.R. REP. NO. 1980, 79th Cong., 2d Sess., 41 (1945)).

52. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345 (1984).

53. *Id.* at 345-48.

54. *United States v. Erika, Inc.*, 456 U.S. 201, 208 (1982).

55. *Block*, 467 U.S. 340 (1984). See also *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986).

56. *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967). See also *Citizens to Pre-*

cific language or specific legislative history that is a reliable indicator of congressional intent.”⁵⁷ The Supreme Court has indicated that the presumption favoring judicial review is not to be applied in the “strict evidentiary sense”⁵⁸ but may be overcome whenever the congressional intent to preclude is “fairly discernible in the statutory scheme.”⁵⁹

Additionally, the courts have long recognized a requirement of finality of agency action before cases will be heard. Section 704 of the APA provides that only final agency actions are reviewable.⁶⁰ This finality requirement is important in the case of administrative orders because, as will be seen, the EPA has successfully prevented pre-enforcement review by arguing that its administrative actions are not final.⁶¹ When administrative procedures are not yet exhausted, the courts cannot hear the action.⁶² Exceptions to the exhaustion requirement may arise in the case of constitutional questions,⁶³ and when irreparable injury⁶⁴ or statutory or constitutional violations will result.⁶⁵

Several factors are relevant to the inquiry of whether agency action is final. Final agency action should represent

serve *Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970) (“To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.” *Id.* at 156-57 (citing H.R. REP. NO. 1980, 79th Cong., 2d Sess., 41 (1945)); *Traynor v. Turnage*, 485 U.S. 535 (1988); *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380 (5th Cir. 1989) (precluding judicial review in a CERCLA § 104 order).

57. *Block*, 467 U.S. at 349.

58. *Id.* at 350.

59. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. at 157 (1970). See also *Block*, 467 U.S. at 351; *United States v. Fausto*, 484 U.S. 439 (1988).

60. 5 U.S.C. § 704 (1988).

61. See *infra* notes 125-27, 144, 164-65, 181-85, 204-10 and accompanying text.

62. *Bell v. New Jersey & Pennsylvania*, 461 U.S. 773, 779-780 (1983) (focusing on whether review will disrupt the administrative agency process); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938).

63. *McGee v. United States*, 402 U.S. 479, 486 (1971).

64. *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1 (1974); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

65. *Republic Indus., Inc. v. Central Pa. Teamsters Pension Fund*, 693 F.2d 290, 293 (3d Cir. 1982).

the final and definitive legal position of the agency, should have a practical and immediate impact upon the daily operations of the affected interest, and review should foster agency and judicial efficiency.⁶⁶

Strong policy implications support the finality and exhaustion requirements. The finality and exhaustion requirements avoid interruption of agency activities, respect the autonomy of administrative agencies, and allow the agency to develop the necessary factual background, apply its expertise, and crystallize its position.⁶⁷ Furthermore, the finality and exhaustion requirements promote conservation of judicial resources because if the complaining party successfully vindicates his rights at the agency level, the courts may never have to intervene.⁶⁸

If agency action is final and the statute does not preclude review, an action must be ripe in order to be reviewed by the courts.⁶⁹ Ripeness is required to prevent the courts from interfering with abstract administrative policy-making prior to an agency's development of its legal position.⁷⁰ In determining whether a pre-enforcement agency action is ripe, courts must consider the "fitness of the issue for judicial decision, and the hardship to the parties of withholding court consideration."⁷¹ As will be discussed, pre-enforcement review of administrative

66. *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-243 (1980). See also *Solar Turbines, Inc. v. Seif*, 879 F.2d 1073, 1080 (3d Cir. 1989) (applying finality and exhaustion to EPA action under the Clean Air Act).

67. *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975); *McKart v. United States*, 395 U.S. 185, 194-95 (1969).

68. *Christian v. New York State Dep't of Labor*, 414 U.S. 614, 622 (1974).

69. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-149 (1967).

70. *Id.*

71. *Abbott*, 387 U.S. at 149. In *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430 (D.C. Cir. 1986), the Circuit Court for the District of Columbia held that a letter issued by EPA constituted final agency action and imposed sufficient hardship on the recipient to warrant review. *Id.* at 437. In that case, compliance with the terms of the letter would have resulted in a 50% loss in sales of the pesticide at issue. *Id.* at 432. The court found that judicial review would not disrupt the orderly process of administrative decision-making, or threaten health or safety. *Id.* at 437-438. The court quoted *Independent Bankers Assoc. v. Smith*, 534 F.2d 921, 929 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976), for the proposition that "an agency's interpretation of its governing statute, with the expectation that regulated parties will conform to and rely on this interpretation, is final agency action fit for judicial review." *Id.* at 438.

orders has been denied based on finality, exhaustion, and ripeness.⁷²

IV. Pre-enforcement Review Case Law in the Federal Environmental Statutes

The question of whether administrative orders are reviewable is an important one. Judicial review of administrative orders is an important safeguard against arbitrary action by the agency.⁷³ If review is available, private parties may be protected from significant potential civil penalties and intrusive actions such as groundwater monitoring or remediation.⁷⁴ Since most statutory penalties accrue each day violations occur, the civil penalties for failure or refusal to comply with an administrative order to abate environmental hazards can quickly become enormous.⁷⁵ The potential financial liability can force responsible parties to consent to EPA orders rather than risk an unfavorable outcome after prolonged litigation.⁷⁶

Furthermore, if the order is subject to review, the alleged violator may be able to persuade the court to allow a lesser degree of pollution abatement, representing considerable savings in cleanup costs.⁷⁷ The court always has the option of invalidating the order altogether.⁷⁸ Often, the scientific data is conflicting and is almost always subject to differing interpre-

72. See *infra* notes 110-11,

73. See generally Sidney A. Shapiro & Robert L. Glicksman, *Congress, The Supreme Court, And The Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819 (1988).

74. See, e.g., *Aminoil, Inc. v. EPA*, 599 F. Supp. 69 (C.D. Cal. 1984) (barring pre-enforcement review of CERCLA § 106(a) order, but enjoining EPA's assessment of civil penalties under § 106(b)).

75. The penalties for violation of EPA imminent and substantial endangerment orders under CERCLA § 106(b) can be up to \$25,000 per day per violation. CERCLA § 106(b), 42 U.S.C. § 9606(b) (1988). Both RCRA and the CAA imminent hazard provisions provide for penalties of not more than \$5000 per day for failure to comply with administrative orders. RCRA § 7003(b), 42 U.S.C. § 6973(b) (1988); CAA § 303, 42 U.S.C. § 7603 (Supp. II 1990).

76. *Bethlehem Steel Corp. v. EPA*, 669 F.2d 903 (3d Cir. 1982).

77. See *Lone Pine Steering Comm. v. EPA*, 600 F. Supp. 1487, 1498-99 (D.N.J. 1985)(objection to cleanup method may be brought up in the cost recovery action), 777 F.2d 882 (3d Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986).

78. See *infra* notes 119-23, 159-60 and accompanying text.

tations. Disputes as to the level of contaminants on site, the method of removal and remediation, and the level of cleanup required, arise and can significantly affect cleanup costs.⁷⁹ As a result, the costs of undertaking removal and remedial action in a particular situation could vary dramatically depending on the assessment of the site. Often companies feel that removal and remedial action would be cheaper if they chose their own contractors rather than use those chosen by the EPA.

On the other hand, allowing pre-enforcement review will inevitably result in delay which could frustrate the quick response required to prevent environmental damage. In many situations, even the slightest postponement in cleaning up a site can dramatically increase the risk of harm to health or the environment.⁸⁰ Under these types of circumstances, the Supreme Court created bar to pre-enforcement review of administrative orders in emergency situations applies. The Supreme Court has long recognized an exception to allowing review of administrative orders issued in emergency situations.⁸¹ In emergency situations, rapid administrative action is justified by the need to protect the public health and safety.⁸²

Whether these statutes, which are silent as to review, preclude pre-enforcement review under section 701(a) of the APA will depend upon factors set forth by the Supreme Court: (1) the structure of the statutory scheme; (2) the statute's objectives; (3) legislative history; and (4) the nature of the adminis-

79. Selection of the proper design and technology for cleanup of a hazardous waste site, for example, is dependent upon a number of different factors. See, e.g., MARK HANEY & JANE CASLER, RCRA HANDBOOK: A GUIDE TO PERMITTING, COMPLIANCE, CLOSURE AND CORRECTIVE ACTION UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT 94-104 (3d ed. 1990)(available from ENSR Consulting and Engineering).

80. See Sharon M. Murphy, *The "Sudden and Accidental" Exception to the Pollution Exclusion Clause in Comprehensive General Liability Insurance Policies: The Gordian Knot of Environmental Liability*, 45 VAND. L. REV. 161, 178-179 (1992).

81. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 299-300 (1981) (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 677-80 (1974); *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950); *Fahey v. Mallonee*, 332 U.S. 245, 253-54 (1947); *Yakus v. United States*, 321 U.S. 414, 442-43 (1944); *Bowles v. Willingham*, 321 U.S. 503, 519-20 (1944); *Phillips v. Commissioner*, 283 U.S. 589, 595-99 (1931); *North Am. Cold Storage Co. v. Chicago*, 211 U.S. 306, 315-21 (1908).

82. *Hodel*, 452 U.S. at 301.

trative action involved.⁸³ The structure, objectives, and legislative history of each statutory scheme differ, requiring each environmental statute to be analyzed separately.⁸⁴ In addition, many courts have considered the principles of finality, exhaustion, and ripeness in determining whether to review an administrative order.⁸⁵

A. Pre-enforcement Review of Administrative Orders Under CERCLA

As a result of congressional concern with the disposal of wastes before RCRA's regulatory scheme took effect, Congress passed CERCLA to provide resources to clean up hazardous waste sites as rapidly as possible.⁸⁶ CERCLA was enacted to fill gaps in RCRA and to insure clean up of thousands of dormant sites and alleviate problems locating financially responsible owners of hazardous waste dumps.⁸⁷ Part of the reason for the apparent overlap of the statutes is that at the time CERCLA was written, the EPA interpreted RCRA as applying only to active RCRA regulated facilities.⁸⁸ In order to avoid lengthy and uncertain legal battles over section 7003,⁸⁹ Congress passed CERCLA, with its sections 104 and 106, which apply retroactively to clean up facilities where hazardous substances were disposed of in the past, even prior to the statute's enactment in 1980.⁹⁰ Thus, CERCLA empowers the EPA to issue orders to abate hazards at both active and abandoned facilities.⁹¹

CERCLA is a remedial statute, focusing on cleanup of fa-

83. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345 (1984).

84. Because the statutes to be discussed are silent as to pre-enforcement review, the legislative history is ambiguous at best.

85. See *infra* notes 125-27, 144, 164-65, 181-86, 205-11 and accompanying text.

86. S. REP. NO. 848, 96th Cong., 2d Sess. 12 (1980).

87. See H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, *reprinted in* 1980 U.S.C.A.N. 6119.

88. See 43 Fed. Reg. 58,984 (1978).

89. See S. REP. NO. 848, 96th Cong., 2d Sess. 11 (1980).

90. *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd on other grounds*, 810 F.2d 726 (8th Cir. 1986) (hereinafter NEPACCO).

91. CERCLA §§ 104, 106, 42 U.S.C. §§ 9604, 9606 (1988).

cilities where hazardous substances come to be found rather than regulating the treatment, storage, and disposal of hazardous wastes as does RCRA. Under section 106(a), the EPA can either issue orders requiring the recipient to clean up an "imminent and substantial endangerment," or sue in federal district court for an injunction to compel clean up⁹² and assess civil penalties.⁹³ The advantage of using section 106 rather than EPA commencing removal and remedial action under section 104 is that through section 106(a) orders, the site may be cleaned up without depleting the Superfund, and EPA time and resources are not wasted on a suit against the responsible party for reimbursement. A commonly perceived difficulty in using section 106(a) is that the EPA must establish that there "may be" an "imminent and substantial endangerment."⁹⁴

Even prior to Congress' explicit bar to pre-enforcement review enacted in the 1986 amendments,⁹⁵ the courts almost unanimously held that pre-enforcement review of CERCLA section 106(a) orders was impliedly prohibited.⁹⁶ The ration-

92. CERCLA § 106(a), 42 U.S.C. § 9606(a) (1988). See, e.g., *B.F. Goodrich v. Murtha*, 697 F. Supp. 89, 94 (D. Conn. 1988); *United States v. A & F Materials*, 578 F. Supp. 1249, 1257-58 (S.D. Ill. 1984); *United States v. Price*, 577 F. Supp. 1103, 1113 (D.N.J. 1983).

93. CERCLA § 106(b), 42 U.S.C. § 9606(b) (1988).

94. See, e.g., *B.F. Goodrich*, 697 F. Supp. at 96-97 (D. Conn. 1988). Analysis of the case law demonstrates that the burden of establishing an imminent and substantial endangerment under CERCLA § 106(a) is not great. It has been found that the words "may be" indicate a congressional intent to allow injunctive relief before an endangerment arises. *United States v. Waste Indus., Inc.*, 734 F.2d 159, 165 (4th Cir. 1984). An endangerment has been considered imminent if factors giving rise to it are present, even though the harm may not be realized for years. *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 193-94 (D. Mo. 1985). An endangerment is "substantial" if there is a reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or threatened release of a hazardous substance. *Id.* at 194. The quantity of hazardous material and the nature of the material may be determinative of the issue. *Id.* However, a minimal amount of hazardous material may still deem an endangerment to be "substantial." *NEPACCO*, 579 F. Supp. 823, 832 (W.D. Mo. 1984).

95. Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986).

96. Judicial review has been barred by nearly every court addressing the issue. *Wagner Seed Co. v. Daggett*, 800 F.2d 310 (2d Cir. 1986); *Wheaton Indus. v. United States*, 781 F.2d 354 (3d Cir. 1986); *Solid State Circuits, Inc. v. EPA*, 23 Env't Rep.

ale for denying review was that the emergency nature of section 106(a) orders is such that judicial review could delay effective response action.⁹⁷ Courts found that the legislative history indicated that Congress intended for section 106(a) orders, as well as section 104 removal and remedial actions, to be barred from review.⁹⁸

Rapid response actions are important in the CERCLA scheme to prevent irreparable harm to persons or the environment.⁹⁹ In *Aminoil, Inc. v. EPA*,¹⁰⁰ the District Court for the Central District of California found that "[a]llowing an alleged responsible party to challenge the merits of the section 106(a) administrative order prior to an enforcement or recovery action would handcuff the EPA by delaying effective re-

Cas. (BNA) 1758 (W.D. Mo. 1985), *aff'd* 812 F.2d 383 (8th Cir. 1987); *Pollution Control Indus. of America, Inc. v. Reilly*, 715 F. Supp. 219 (N.D. Ill. 1989) (no review of EPA decision against use of particular contractor for cleanup); *United States v. Reilly Tar & Chem. Corp.*, 22 Env't Rep. Cas. (BNA) 1753, 1757 (D. Minn. 1985); *Wagner Elec. Corp. v. Thomas*, 612 F. Supp. 736 (D. Kan. 1985); *Aminoil, Inc. v. EPA*, 599 F. Supp. 69 (C.D. Cal. 1984); *Earthline Co. v. Kin-Buc, Inc.*, 21 Env't Rep. Cas. (BNA) 2161 (D.N.J. 1984).

97. See, e.g., *Aminoil*, 599 F. Supp. 69 (C.D. Cal. 1984) (allowing a challenge to the section 106 administrative order would delay effective response to emergency situations). In the context of § 104 orders, see *Lone Pine Steering Comm. v. EPA*, 777 F.2d 882, 886-87 (3d Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986) ("The statutory approach to the problem of hazardous waste is inconsistent with the delay that would accompany pre-enforcement review. . . . [W]e find in [§ 104] an implicit disapproval of pre-enforcement judicial review." *Id.* at 886-87.).

98. "[E]mergency action will often be required prior to the receipt of evidence which conclusively establishes an emergency. Because delay will often exacerbate an already serious situation, the bill authorizes the Administrator to take action when an imminent and substantial endangerment may exist." H.R. REP. NO. 1016, 96th Cong., 2d Sess., Pt. 1, 28 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6131. See *Aminoil*, 599 F. Supp. at 73 (the structure of the statute is such that Congress did not intend to allow judicial review of § 106(a) orders prior to the commencement of either an enforcement action under § 106(b), 42 U.S.C. § 9606(b), or a cost recovery action under § 107(c)(3), 42 U.S.C. § 9607(c)(3)) (1988). See also *Eureka v. United States*, 770 F. Supp. 500 (E.D. Mo. 1991) (denying review of remedial actions taken by EPA).

99. See H.R. REP. NO. 1016, 96th Cong., 2d Sess., Pt. 1, 28 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6131. If chemical spills or leaking drums can be rapidly cleaned up, costly contamination of ground and surface waters can be prevented. Once hazardous substances have reached underground aquifers, cleanup costs are significantly increased. If hazardous substances have already contaminated aquifers or water bodies, rapid action is required to prevent further contamination and prevent persons from using the water.

100. 599 F. Supp. 69 (C.D. Cal. 1984).

sponses to emergency situations."¹⁰¹ Similarly, in *Wagner Seed Co. v. Daggett*,¹⁰² the Second Circuit stated that:

Congress envisioned a procedure that permits the EPA to move expeditiously in the face of a potential environmental disaster. To introduce the delay of court proceedings at the outset of a cleanup would conflict with the strong congressional policy that directs cleanups to occur prior to a final determination of the party's rights and liabilities . . .¹⁰³

Indeed, the courts have barred other CERCLA provisions from review in accordance with CERCLA's underlying purpose, most notably EPA response actions under section 104(a).¹⁰⁴ As the Second Circuit Court of Appeals stated, "pre-enforcement review of EPA's remedial actions . . . [is] contrary to the policies underlying CERCLA."¹⁰⁵ Thus, the delay caused by judicial review of agency action overrides an alleged violator's right to judicial review.¹⁰⁶

In 1986, Congress codified the prohibition on pre-enforcement review of administrative orders in the Superfund Amendments and Reauthorization Act of 1986 (SARA).¹⁰⁷

101. *Id.* at 71.

102. 800 F.2d 310 (2d Cir. 1986).

103. *Id.* at 315.

104. See, e.g., *Lone Pine Steering Comm. v. EPA*, 777 F.2d 882 (2d Cir. 1986), cert. denied, 476 U.S. 1115 (1986). See also *Dickerson v. EPA*, 834 F.2d 974 (11th Cir. 1987); *Wheaton Indus. v. EPA*, 781 F.2d 354 (3d Cir. 1986).

105. *Wagner Seed Co.*, 800 F.2d at 315. See also *Reardon v. United States*, 947 F.2d 1509, 1513 (1st Cir. 1991) (noting that clean up of hazardous substances that endanger public health would be delayed if EPA were forced to litigate each detail of its removal and remedial plans before implementing them).

106. See *Lone Pine Steering Comm.*, 777 F.2d at 884 (Congress intended to empower the EPA to take "prompt action without the delays associated with litigation." Once EPA initiated suit under § 107 for recovery of costs effective review could be had. *Id.*). See also *B.R. MacKay & Sons, Inc. v. United States*, 633 F. Supp. 1290 (D. Utah 1986); *Jefferson County v. United States*, 644 F. Supp. 178 (E.D. Mo. 1986); *Aminoil*, 599 F. Supp. 69, 71-72 (C.D. Cal. 1984).

107. Pub. L. No. 99-499, 100 Stat. 1613 (Oct. 17, 1986). The enactment of § 113(h) of the Superfund Amendments and Reauthorization Act of 1986 (SARA) codified the judicially created bar to preenforcement review and allowed preenforcement review of CERCLA orders under only 5 specific limited circumstances: (1) in actions under § 107 to recover response costs, or damages for contribution; (2) in actions

SARA amended CERCLA by removing section 104 and section 106 administrative orders from the purview of the courts.¹⁰⁸ Exceptions are for suits brought by the EPA to recover costs of remedial action, enforce an order issued under section 106, or in suits by the recipient of the order to recover costs under section 106(b)(2).¹⁰⁹

brought by the EPA to enforce § 106(a) orders; (3) in actions for reimbursement for fines levied pursuant to § 106(a), as provided for in § 106(b)(2); (4) in citizen suit actions under § 310 alleging that a remedial action taken does not meet the requirements of CERCLA; or (5) in actions under § 106 by the EPA to compel remedial action. 42 U.S.C. § 9613(h) (1988). *See, e.g.,* Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380 (5th Cir. 1989) ("Additionally, the fact that section 113 of SARA was designed 'to confirm . . . and build . . . upon existing case law,' supports the view that 'this is a situation in which Congress intended to withhold judicial review.'" *Id.* at 1389, quoting 132 CONG. REC. S14,928 (daily ed. Oct. 3, 1986) (Statement of Senator Thurmond, the Chairman of the Judiciary Committee that drafted SARA's judicial review provision)); Schalk v. Reilly, 900 F.2d 1091, 1096 (7th Cir. 1990) ("The jurisdictional bar in SARA merely codified the established rule that pre-implementation review of response actions would not be allowed . . ."), *cert. denied sub nom.* Frey v. Reilly, 111 S. Ct. 509 (1990), *reh'g denied* 111 S. Ct. 802 (1991).

108. CERCLA § 113(h)(3), 42 U.S.C. § 9613(h)(3) (1988) reads as follows: No federal court shall have jurisdiction . . . to review any challenges to removal or remedial action selected under section [§ 104], or to review any order issued under section [§ 106(a)], 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) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.
- (5) An action under section 9606 of this title which the United States has moved to compel a remedial action.

Id.

109. CERCLA § 113(h), 42 U.S.C. § 9613(h) (1988). *See also* Browning-Ferris Indus. of South Jersey, Inc. v. Muszynski, No. 89-CIV-1929-LLS (S.D.N.Y. 1989); Pollution Control Indus. of Am., Inc. v. Reilly, Civ. No. 89-C-4036, 18 Chem. Waste Lit. Rptr. 550 (N.D. Ill. 1989).

The bar to pre-enforcement review has not prevented courts from allowing EPA and private parties to obtain declaratory judgments of liability for past and future response costs prior to filing cost recovery suits. *Voluntary Purchasing Groups, Inc.,*

An additional factor in denying pre-enforcement review of EPA enforcement activities is the practical consideration that information courts need to decide challenges to agency actions may not be available at the point when pre-enforcement review is sought.¹¹⁰ One of the purposes of the bar to pre-enforcement review of CERCLA section 113(h) is to "delay review until enough is known to decide these issues."¹¹¹

CERCLA's bar to pre-enforcement review has been construed broadly. In *Reardon v. United States*, the First Circuit Court of Appeals refused pre-enforcement review of a lien placed upon a piece of property for the recovery of costs of clean up of hazardous substances on the site by EPA.¹¹² The court found that the placement of the lien on the property was an enforcement activity that came under the guise of "removal" or "remedial" action as those terms are defined in the statute,¹¹³ and therefore the challenge to a removal or remedial action was explicitly barred from pre-enforcement review under section 113(h) of the statute.¹¹⁴ Thus, under *Reardon's* broad reading of the definition of removal or remedial action, a great number of CERCLA enforcement activities are barred from pre-enforcement review.¹¹⁵

Section 113(h) of CERCLA bars pre-enforcement review even in the face of irreparable harm, which has been traditionally construed as an exception to the finality and exhaustion requirements under the APA.¹¹⁶ In *Boarhead v. Erickson*,

889 F.2d 1380, 1387 n. 11 (5th Cir. 1989); *Pinole Point Properties v. Bethlehem Steel Corp.*, 596 F. Supp. 283 (N.D. Cal. 1984).

110. *Reardon*, 947 F.2d at 1513.

111. *Id.* at 1513. The argument that review must be delayed until EPA possesses enough information about a facility is akin to denying review based on the ripeness doctrine. See *supra* notes 68-72 and accompanying text.

112. 947 F.2d 1509, 1510 (1st Cir. 1991) (en banc). Liens such as the one in this case are filed pursuant to explicit federal lien authority in CERCLA § 107(l), 42 U.S.C. § 9607(l) (1988).

113. See CERCLA §§ 101(23),(24), 42 U.S.C. §§ 9601(23),(24) (1988).

114. *Reardon*, 947 F.2d at 1512, 1514. See also *Alabama v. EPA*, 871 F.2d 1073 (3d Cir. 1989) (challenge to remedial plan barred by section 113(h)).

115. Note, however, that bankruptcy proceedings concerning CERCLA sites do not constitute pre-enforcement review barred by CERCLA. *In re Chateaugay Corp.*, 944 F.2d 997, 1005-06 (2d Cir. 1991).

116. See *supra* notes 60-72 and accompanying text.

the Court of Appeals for the Third Circuit held Congress had determined that the potential for irreparable harm to archeological or historical resources was outweighed by the public interest in removing hazardous wastes from Superfund sites.¹¹⁷

The language of section 113(h) of CERCLA indicates that it does not totally bar review, but merely delays review until enforcement actions are brought by EPA.¹¹⁸ Therefore, arguments that a prohibition on judicial review gives the EPA unfettered discretion, in violation of the due process clause,¹¹⁹ are rebutted by the fact that review of the validity of an order is always available when the EPA brings an enforcement action to recover penalties¹²⁰ or sues to recover costs.¹²¹ However, as a practical matter review may be denied altogether if EPA never brings an enforcement action.¹²²

The courts have addressed this issue in a variety of ways.

117. 923 F.2d 1011, 1023 (3d Cir. 1991).

118. See CERCLA § 113(h), 42 U.S.C. § 9613(h) (1988). The section is appropriately entitled "Timing of review."

The fact that a suit was dismissed under section 113(h) does not preclude a party from filing after an enforcement action is taken. *Wagner Seed Co. v. Bush*, 946 F.2d 918, 919 (D.C. Cir. 1991).

119. U.S. CONST., amend. V, XIV.

120. If the recipient of an administrative order refuses to comply with that order, the EPA must seek to enforce the order in district court. *Lone Pine Steering Comm. v. EPA*, 777 F.2d 882 (2d Cir. 1986), *cert. denied*, 476 U.S. 1115 (1986). Persons failing to comply may be liable for up to \$25,000 per day per penalty, as well as treble punitive damages in some cases. CERCLA §§ 106(b), 107(c)(3), 42 U.S.C. §§ 9606(b), 9607(c)(3) (1988).

121. Under CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1988), the EPA may recover all costs "not inconsistent with" the National Contingency Plan (NCP). The NCP was revised at 53 Fed. Reg. 51,394 (1988) and is found at 40 C.F.R. § 300 (1991). Cleanup by the EPA under § 104 must meet the consistency with the NCP requirement more rigidly than § 106(a) cleanups by responsible parties. Section 106(a) actions are subject to the "not inconsistent with" the NCP criteria with a few exceptions. See 40 C.F.R. § 300 (1991). Under CERCLA § 121(a), 42 U.S.C. § 9621(a) (1988), cleanup standards for § 106(a) must be in accordance with the NCP to the *extent practicable*, and must take into account the cost effectiveness of the response. 40 C.F.R. § 300.415(j) and § 300.65(h) (1991) exempt § 106 actions from many of the requirements of § 104 removal and remedial actions. For example, § 106(a) removal actions must meet NCP standards to the "extent practicable considering the exigencies of the situation." 40 C.F.R. § 300.415(i) (1991).

122. See *Reardon v. United States*, 947 F.2d 1509, 1515 n.1 (1st Cir. 1991).

Courts have held that CERCLA administrative orders do not affect property interests until a suit for reimbursement is filed, and therefore due process is not implicated.¹²³ Other courts have found that the issuance of administrative orders under CERCLA is not "final agency action" within the meaning of section 704 of the APA¹²⁴ because it is up to EPA's discretion whether to enforce the order or not.¹²⁵ Thus, actions seeking to review the merits of an order prior to an attempt by the EPA to enforce it are not ripe for review under the APA.¹²⁶

B. Pre-enforcement Review of Administrative Orders Under the Clean Air Act

Administrative orders for the enforcement of the CAA may be issued under section 113 and section 303.¹²⁷ Section 113(a) authorizes EPA to issue orders requiring a source to comply with state implementation plans (SIPs),¹²⁸ requiring states with permit programs to enforce the provisions of the CAA,¹²⁹ or requiring compliance with any other violation of the CAA.¹³⁰ Under section 113(a), EPA may issue administrative pollution abatement orders after notifying the responsible

123. *Lone Pine Steering Comm.*, 777 F.2d at 887.

In *Solid State Circuits, Inc. v. EPA*, 812 F.2d 383 (8th Cir. 1987), the recipient of a CERCLA § 106(a) order argued that its property interests were affected by the order because it would have to carry the potential liability for treble punitive damages on its financial statements. *Id.* at 389. The Court of Appeals for the Eighth Circuit concluded that due process was not violated because treble damages would not be assessed if it was found that the party opposing an administrative order had reasonable grounds for challenging the order. *Id.* at 390.

124. 5 U.S.C. § 704 (1988).

125. *Earthline v. Kin-Buc, Inc.*, 21 Env. Rep. Cas. (BNA) 2161 (Apr. 13, 1984).

126. *Wagner Elec. Corp. v. Thomas*, 612 F. Supp. 736 (D. Kan. 1985).

127. CAA §§ 113, 303, 42 U.S.C. §§ 7413, 7603 (Supp. II 1990). CAA administrative orders are generally an alternative to civil judicial action. *Id.*

128. CAA § 113(a)(1), 42 U.S.C. § 7413(a)(1) (Supp. II 1990). EPA must first issue a notice of violation 30 days prior to the issuance of an administrative order to comply with a SIP requirement. *Id.*

129. CAA § 113(a)(2), 42 U.S.C. § 7413(a)(2) (Supp. II 1990). This provision applies when the EPA "finds that violations of an applicable implementation plan . . . are so widespread that such violations appear to result from a failure of the State . . . to enforce the plan . . ." *Id.*

130. CAA § 113(a)(3), 42 U.S.C. § 7413(a)(3) (Supp. II 1990).

party of a violation and giving the violator thirty days to comply with the order's requirements.¹³¹ The order does not take effect until the responsible party has had an opportunity to confer with EPA.¹³² EPA also has the option of bringing a civil action in the district in which the violation occurred.¹³³ Failure to comply with section 113(a) administrative orders can result in fines of up to \$25,000 per day per violation, and/or imprisonment of up to one year.¹³⁴ Section 113, like section 303, is silent as to whether pre-enforcement review is available.

Section 303 authorizes EPA to bring suit in district court to restrain persons contributing to pollution presenting an "imminent and substantial endangerment" to public health.¹³⁵ If suit "is not practicable to assure prompt protection of public health or welfare," EPA may issue "orders as may be necessary to protect public health or welfare or the environment."¹³⁶

The timing and procedures for judicial review of agency actions under the CAA are set forth in section 307 of the Act.¹³⁷ That section does not explicitly provide for review of administrative orders issued under sections 113 and 303 of the CAA.¹³⁸ Section 307(e) provides that "[n]othing in this chapter shall be construed to authorize judicial review of regula-

131. CAA § 113(a), 42 U.S.C. § 7413(a) (Supp. II 1990).

132. CAA § 113(a)(4), 42 U.S.C. § 7413(a)(4) (Supp. II 1990).

133. CAA § 113(b), 42 U.S.C. § 7413(b) (Supp. II 1990).

134. CAA § 113(b),(c), 42 U.S.C. § 7413(b),(c) (Supp. II 1990).

135. CAA § 303, 42 U.S.C. § 7603 (Supp. II 1990).

136. *Id.*

137. CAA § 307, 42 U.S.C. § 7607 (1988 & Supp. II 1990).

138. In addition to providing for review of "final agency action," CAA § 307(b), 42 U.S.C. § 7607(b) (Supp. II 1990), section 307 explicitly provides for judicial review of EPA action in promulgating any national ambient air quality standards (NAAQS) under CAA § 112, 42 U.S.C. § 7412 (Supp. II 1990); motor vehicle emission and fuel standards issued under CAA § 202, 42 U.S.C. § 7521 (1988 & Supp. II 1990); aircraft emission standards under CAA § 231, 42 U.S.C. § 7571 (1988 & Supp. II 1990); rules issued under CAA §§ 113, 119, 120, 42 U.S.C. §§ 7413, 7419, 7420 (1988 & Supp. II 1990); promulgation or approval of implementation plans pursuant to CAA §§ 110, 111, 42 U.S.C. § 7410, 7411 (1988 & Supp. II 1990); orders issued under CAA §§ 111(j), 112, 119, & 120. See CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1) (Supp. II 1990). The section also provides for review of rulemaking action by the EPA. See CAA § 307, 42 U.S.C. § 7607 (1988 & Supp. II 1990).

tions or orders of the Administrator under this chapter, except as provided in this section."¹³⁹ By omitting a provision for judicial review, Congress has explicitly barred pre-enforcement review of emergency administrative orders issued under section 303, and orders issued under section 113 of the CAA. The question of whether review of section 303 orders are barred from pre-enforcement review has not been reached by the courts. However, unlike section 303, the question of whether pre-enforcement review of section 113(a) orders is available has reached the courts.

Section 307(e) has been interpreted as implicitly barring review of all administrative actions other than those specifically spelled out in section 307.¹⁴⁰ In *Solar Turbines, Inc. v. Seif*, the Third Circuit denied pre-enforcement review of a compliance order issued under section 113 of the CAA.¹⁴¹ The court relied heavily on the fact that section 307 explicitly provided for review of certain administrative orders and section 307(e) explicitly denied review for all other administrative orders.¹⁴² The court found that since section 307 was the sole avenue for judicial review, it could not look elsewhere for authority.¹⁴³ Furthermore, the court reasoned that issuance of a compliance order was not final agency action because although the order represented EPA's definitive position on whether the CAA had been violated, no civil or criminal penalties would result unless EPA brought an enforcement proceeding in district court.¹⁴⁴

139. CAA § 307(e), 42 U.S.C. § 7607(e) (1988).

140. See, e.g., *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), cert. denied 409 U.S. 1125 (1973) (Court held that review of administrative orders issued under § 167 was implicitly barred. "If Congress specifically designates a forum for judicial review of administrative action, such a forum is exclusive." *Id.* at 356.). See also *Solar Turbines Inc. v. Seif*, 879 F.2d 1073 (3d Cir. 1989) (administrative order issued under § 167 barred from pre-enforcement review).

141. 879 F.2d 1073 (3d Cir. 1989).

142. 879 F.2d at 1077 (citing *Getty Oil v. Ruckelshaus*, 467 F.2d 349, 356 (3d Cir. 1972), cert. denied 409 U.S. 1125 (1973)).

143. *Id.* "Because the Act explicitly provides for review of certain actions and explicitly denies review for everything else, we cannot look elsewhere for authority [for] review." *Id.* at 1077.

144. *Id.* at 1081-88.

Courts passing on the question of whether federal enforcement procedures under CAA section 113(a)(1)¹⁴⁵ are reviewable have found that Congress implicitly intended to preclude review.¹⁴⁶ In addition to the implication that pre-enforcement review is barred due to the language of section 307 of the Act, the courts have found that the statutory framework of the CAA would be disrupted if pre-enforcement review of administrative orders was allowed.¹⁴⁷ The legislative history of the CAA supports the conclusion that pre-enforcement review of administrative orders for abatement of air pollutants is precluded.¹⁴⁸ The legislative history of the act indicates that Congress was concerned that EPA expedite enforcement of the CAA.¹⁴⁹ Accordingly, proponents of the 1970 amendments discussed the need for authority to issue immediate cease-and-desist type of orders to protect public health.¹⁵⁰

The Senate bill to amend the CAA in 1970 contained a provision for judicial review of administrative pollution abatement orders,¹⁵¹ but the House-Senate Conference Committee

145. 42 U.S.C. § 7413(a)(1) (1988) (amended 1990). This provision was significantly revised in the 1990 Clean Air Act Amendments without inclusion of a provision for pre-enforcement review. See CAA § 113(a), 42 U.S.C. § 7413(a) (Supp. II 1990).

146. *Asbestec Constr. Serv., Inc. v. EPA*, 849 F.2d 765 (2d Cir. 1988); *Union Elec. Co. v. EPA*, 593 F.2d 299 (8th Cir. 1978), *cert. denied*, 444 U.S. 839 (1979); *West Penn Power Co. v. Train*, 522 F.2d 302 (3d Cir. 1975), *cert. denied*, 426 U.S. 839 (1979); *Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885 (8th Cir. 1976).

147. *Solar Turbines*, 879 F.2d at 1078. See also *Fry Roofing*, 554 F.2d 885 (8th Cir. 1977).

148. *Lloyd A. Fry Roofing Co. v. EPA*, 415 F. Supp. 799, 805-806 (W.D. Mo. 1976).

149. See *Fry Roofing*, 554 F.2d at 889. See, e.g., *Asbestec*, 849 F.2d at 769 (speedy action by EPA is essential to enforcement of the CAA) (citing *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 317 (2d Cir. 1986)); *Union Elec. Co. v. EPA*, 593 F.2d 299, 304 (8th Cir. 1979).

150. Testimony on S. 3466, Environmental Policy Division of the Congressional Research Service of the Library of Congress for the Committee on Public Works, United States Senate, 93d Cong., 2d Sess., (1974), reprinted in *A Legislative History of the Clean Air Act Amendments of 1970*, 1005-1006 (Comm. Print 1974).

151. S. 4358, 91st Cong., 2d Sess. (1970) (citing H.R. Rep. No. 1146, 91st Cong., 2d Sess., reprinted in 1970 U.S.C.C.A.N. 5356, 5374; S. Rep. No. 1196, 91st Cong., 2d Sess. (1970)).

specifically deleted this provision from the final version.¹⁵² The Supreme Court has indicated that such deletions are not conclusive evidence of Congressional intent to preclude review,¹⁵³ but may suggest that the omitted portion was rejected.¹⁵⁴ At least one court has found that removal of such a provision "strongly suggests" that Congress intended that these administrative orders be precluded from review, and held that "Congress knowingly meant to and did foreclose" review of administrative orders under section 113.¹⁵⁵

In some respects, pre-enforcement review is inconsistent with the method of enforcement of administrative abatement orders under section 113. Since section 113(a) orders do not automatically lead to enforcement actions, injury is speculative and due process does not require review.¹⁵⁶ EPA always has the option of bringing suit in the appropriate district court to enforce the order and assess penalties.¹⁵⁷ If administrative orders are invalid, then the courts could invalidate them at this time.¹⁵⁸ As for the regulated communities' argument that enforcement actions can be delayed to accumulate large fines, the court could invoke its equity powers to reduce those fines.¹⁵⁹

The procedures of section 113 of the CAA do not differ significantly from the procedures that were partly responsible for precluding pre-enforcement review under CERCLA section 106.¹⁶⁰ EPA has the option of issuing a compliance order or proceeding directly to district court.¹⁶¹ If the recipient of an

152. 1970 U.S.C.C.A.N. at 5374. The Conference Committee report gave no reason for deletion of the provision. *Id.* See *Fry Roofing*, 554 F.2d at 890.

153. *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975).

154. *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 200 (1974).

155. *Fry Roofing*, 554 F.2d at 890-92.

156. *Asbestec*, 849 F.2d at 769 (arguing that denial of pre-enforcement review inhibits liberty and property rights. Court denied review on due process grounds because only injury was to reputation); *Union Elec. Co.*, 593 F.2d at 304; *Fry Roofing*, 554 F.2d at 891; *West Penn Power*, 522 F.2d at 311.

157. *Fry Roofing*, 554 F.2d at 891.

158. *Fry Roofing Co. v. EPA*, 415 F. Supp. 799, 806-807 (W.D. Mo. 1976).

159. *Id.*

160. See *supra* notes 118-26 and accompanying text.

161. CAA § 113(a); 42 U.S.C. § 7413(a) (Supp. II 1990).

administrative compliance order fails to comply, EPA must bring an action in district court to enforce the order.¹⁶² Section 113(a)(4) provides the extra procedural safeguard of guaranteed negotiation of the order with EPA.¹⁶³

The requirement that EPA bring an action in district court to enforce CAA compliance orders has persuaded courts to find that pre-enforcement review is precluded by the Act. Because the EPA must bring an action in district court, it has been held that CAA compliance orders do not constitute "final" agency action.¹⁶⁴ Further, because compliance orders issued under the CWA merely require compliance with laws which a recipient was already subject to prior to the issuance of the order, no property rights are affected and due process is not implicated.¹⁶⁵

C. Pre-enforcement Review of Administrative Orders Under the Clean Water Act

The Clean Water Act (CWA) is silent as to whether pre-enforcement review of administrative orders is available. Judicial review of orders is explicitly provided for by section 309(b) of the Act¹⁶⁶ when EPA brings an enforcement action or seeks to enforce a compliance order.¹⁶⁷ Under the CWA, emergency abatement of water pollution is handled through the district courts rather than via administrative orders.¹⁶⁸

The issue of pre-enforcement review arises most often

162. CAA § 113(b), 42 U.S.C. § 7413(b) (Supp. II 1990).

163. CAA § 113(a)(4), 42 U.S.C. § 7413(a)(4) (Supp. II 1990). The Eighth Circuit Court of Appeals considered preenforcement review of section 113(a) orders as conflicting with these conferences provided for in section 113. See *Fry Roofing*, 554 F.2d at 890. In a typical case, EPA and the responsible party negotiate a consent decree, but the EPA reserves its enforcement powers under the act. In 1985, the regulations were amended to include public participation. See 40 C.F.R. §§ 65.04 & 65.05. WILLIAM H. RODGERS, ENVIRONMENTAL LAW AIR AND WATER § 3.36 (1986).

164. *General Motors Corp. v. EPA*, 871 F.2d 495 (5th Cir. 1989); *Asbestec Constr. Serv., Inc. v. EPA*, 849 F.2d 765, 769 (2d Cir. 1988).

165. *Asbestec*, 849 F.2d at 768.

166. Compliance orders are enforced in the district courts under CWA § 309(b), 33 U.S.C. § 1319(b) (1988).

167. Compliance orders are issued administratively under CWA § 309(a)(3), 33 U.S.C. § 1319(a)(3) (1988).

168. See CWA §§ 311(e), 504, 33 U.S.C. §§ 1321(e), 1364 (1988).

when EPA issues an administrative compliance order under section 309(a)(3) of the Act¹⁶⁹ and prior to any agency attempt to enforce the order.¹⁷⁰ Civil penalties may be assessed administratively,¹⁷¹ but are explicitly subject to pre-enforcement review pursuant to section 309(g)(8) of the Act.¹⁷²

In determining whether pre-enforcement review of compliance orders is available under the Clean Water Act, courts have focused on the language of the statute, its structure, objectives, legislative history and the nature of the administrative action involved.¹⁷³ Under this analysis, it has been held that the statutory scheme of the CWA provides "clear and convincing evidence" that Congress intended to preclude pre-enforcement review of administrative compliance orders issued under the Clean Water Act.¹⁷⁴ The courts have recognized that by providing a detailed mechanism for judicial review of compliance orders once EPA seeks to enforce them, Congress impliedly precluded judicial review of orders prior to their enforcement.¹⁷⁵

EPA cannot force recipients of orders to comply with the Act unless an enforcement action is brought in the district court.¹⁷⁶ Thus, the recipient of an administrative compliance order is afforded a full opportunity to oppose an order and is entitled to review once EPA chooses to enforce the order.¹⁷⁷ Furthermore, because EPA has the option of issuing a compli-

169. 33 U.S.C. § 1319(a)(3) (1988).

170. See, e.g., *Hoffman Group, Inc. v. EPA*, 902 F.2d 567 (7th Cir. 1990). Jurisdiction may be sought pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1988), and federal question jurisdiction pursuant to 28 U.S.C. § 1331 (1988).

171. CWA § 309(g), 33 U.S.C. § 1319(g) (1988).

172. CWA § 309(g)(8), 33 U.S.C. § 1319(g)(8) (1988). Notices of appeal of an administrative penalty assessment must be filed in the appropriate court within 30 days from the date an administrative penalty order is issued. *Id.* Administrative penalty assessments will be upheld unless they are not supported by substantial evidence or they constitute an abuse of discretion. *Id.*

173. *Southern Pine Assoc. v. United States*, 912 F.2d 713, 715 (4th Cir. 1990)(quoting *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345 (1984)).

174. *Southern Pines Assoc.*, 912 F.2d at 715-16.

175. *Hoffman Group, Inc. v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990).

176. CWA § 309(b), 33 U.S.C. § 1319(b) (1988).

177. *Hoffman*, 902 F.2d at 569-570.

ance order or directly bringing an action in district court, the recipient of a compliance order is in no worse position for EPA's having issued a compliance order rather than immediately bringing an enforcement action.¹⁷⁸

The policy rationale for precluding review of CWA compliance orders is similar to that for administrative orders under the other environmental statutes. Congress provided the EPA with flexibility to address environmental problems quickly, without becoming entangled in litigation.¹⁷⁹ In barring pre-enforcement review, due process is not denied because no property rights are implicated until EPA seeks an injunction or penalties in an enforcement proceeding in the district court.¹⁸⁰

Agency action amounting to mere assertion of jurisdiction over an environmental issue is not final agency action and will not be subject to pre-enforcement review under the exhaustion and ripeness doctrines.¹⁸¹ In *Deltona Corp. v. Alexander*¹⁸², the Court of Appeals for the Eleventh Circuit held that judicial review of a landowner's challenge to an Army Corps of Engineers' denial of a dredge-and-fill permit was precluded.¹⁸³ The court found that since the Corps had not yet assessed the property to determine jurisdiction, agency action was not final.¹⁸⁴ The court determined that allowing the Corps to make a wetland determination prior to judicial review of the action promoted the policies supporting the exhaustion requirement.¹⁸⁵ Similarly, the issuance of a cease-and-desist order is a mere assertion of jurisdiction, not a final agency action subject to review.¹⁸⁶

178. *Southern Pines Assoc.*, 912 F.2d at 715, n. 3.

179. *Southern Pines Assoc.*, 912 F.2d at 716.

180. *Id.* at 717.

181. See *supra* notes 60-72 and accompanying text.

182. 682 F.2d 888 (11th Cir. 1982).

183. *Id.*

184. *Id.* at 893.

185. *Id.*

186. *Route 26 Land Development Ass'n v. United States*, 753 F. Supp. 532, 539 (D. Del. 1990). The court found that the CWA impliedly precluded this type of review. The court held that assertion of jurisdiction alone did not constitute final agency action, relying upon the Third Circuit Court of Appeals holding in *Solar Tur-*

D. Pre-enforcement Review of Administrative Orders Under the Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act (RCRA) is silent as to whether pre-enforcement review of administrative orders is available. EPA has broad authority to issue orders under RCRA. For example, administrative orders may be issued under section 3008(a) for compliance or civil penalties;¹⁸⁷ section 3008(h) for corrective action to remediate releases;¹⁸⁸ section 3004(u) for corrective actions at permitted facilities;¹⁸⁹ section 3004(v) for contamination beyond the facility boundary;¹⁹⁰ and section 3013(a) for monitoring, testing, analysis or reporting.¹⁹¹ Administrative orders for abatement of "immi-

bines Inc. v. Seif, 879 F.2d 1073 (3d Cir. 1989) (holding that a Clean Air Act compliance order was not a final agency action). Further, the court found that the issue could not be ripe until the ultimate effect of the Corps assertion of jurisdiction is known. 753 F. Supp. at 540. See also *Leslie Salt Co. v. United States*, 22 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,359 (N.D. Cal. Dec. 31, 1991); *Mulberry Hills Dev. Co. v. United States*, 772 F. Supp. 1553, 1557 (D. Md. 1991) (the CWA does not provide for pre-enforcement review); *Banks v. Page*, 768 F. Supp. 809 (S.D. Fla. 1991); *Hampton Venture No. One v. United States*, 768 F. Supp. 174 (E.D. Va. 1991) (Corps jurisdictional determination not final agency action) *McGown v. United States*, 747 F. Supp. 539 (E.D. Mo. 1990); *United States v. Hobbs*, 21 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,830 (E.D. Va. Aug. 22, 1990); *Fiscella & Fiscella v. United States*, 717 F. Supp. 1143 (E.D. Va. 1989).

In contrast, the Court of Appeals for the Ninth Circuit has allowed review of CWA compliance orders or cease-and-desist orders. In *Swanson v. United States*, 600 F. Supp. 802 (D. Idaho 1985), *aff'd* 789 F.2d 1368 (9th Cir. 1986), the plaintiff sought declaratory and injunctive relief in the form of a decree that the land in question was not a navigable water of the United States. *Id.* at 1370. See also *Bailey v. United States*, 647 F. Supp. 44 (D. Idaho 1986).

187. RCRA § 3008(a), 42 U.S.C. § 6928(a) (1988).

188. RCRA § 3008(h), 42 U.S.C. § 6928(h) (1988). According to EPA estimates, as many as 80,000 Solid Waste Management Units (SWMU's) will be subject to corrective action requirements. See EPA, "Draft Proposed Rule for RCRA Corrective Action for SWMU's" at 16 (Dec. 11, 1987).

189. RCRA § 3004(u), 42 U.S.C. § 6924(u) (1988). The most common scenario involves corrective action pursuant to § 3004(u) as a condition of a permit issued under § 3005. See, e.g., *W.R. Grace & Co. v. EPA*, 959 F.2d 360 (1st Cir. 1992).

190. RCRA § 3004(v), 42 U.S.C. § 6924(v) (1988).

191. 42 U.S.C. § 6934(a) (1988). Section 3013(a) orders give the recipient thirty days to submit a proposal to EPA for monitoring, testing, analysis or reporting. RCRA § 3013(c), 42 U.S.C. § 6934(c) (1988).

Other provisions of RCRA grant EPA power similar to that of administrative orders. For example, section 3007 authorizes information requests which can be en-

nent and substantial endangerments" is addressed under section 7003(a).¹⁹²

The judicial review section of the Act is brief and only specifically addresses review of final regulations, permits and state hazardous waste regulatory programs.¹⁹³ The legislative history of RCRA is surprisingly sparse and provides little guidance as to pre-enforcement review of administrative orders.¹⁹⁴ RCRA's legislative history in 1976 only consisted of a few pages.¹⁹⁵

RCRA was enacted by the Ninety-fourth Congress during the Fall of 1976 to deal with the growing health and environmental problems resulting from improper disposal of wastes.¹⁹⁶ RCRA was designed to deal with the "rising tide of scrap, discarded and waste materials"¹⁹⁷ and to "reduce the amount of waste . . . and . . . provide for proper disposal and economical solid waste disposal practices."¹⁹⁸ RCRA was Congress' first comprehensive effort to deal with the dangers posed by mismanagement of hazardous substances.¹⁹⁹ At the time RCRA was enacted, waste disposal consisted of dumping barrels and drums, or sometimes liquids, into unlined trenches and lagoons.²⁰⁰

RCRA's primary function is regulatory. RCRA regulates the treatment, handling and disposal of hazardous wastes through a "cradle to the grave" approach by regulating all aspects from generation to disposal. RCRA requires documentation as to the specific contents of a waste shipment, its origin, and destination. Wastes are tracked through each link from the "cradle" (the generation of hazardous wastes), to the "grave", (disposal) and points between by a manifest system

forced using the procedures set forth in RCRA § 3008. 42 U.S.C. §§ 6927, 6928 (1988).

192. RCRA § 7003(a), 42 U.S.C. § 6973(a) (1988).

193. See RCRA § 7006, 42 U.S.C. § 6976 (1988).

194. See H.R. REP. No. 1491, 94th Cong., 2d Sess. (1976), reprinted in 1976 U.S.C.C.A.N. 6238.

195. 1976 U.S.C.C.A.N. 6238.

196. See *id.* 6254-61.

197. RCRA § 1002(2), 42 U.S.C. § 6902(2) (1988).

198. RCRA § 1002(4), 42 U.S.C. § 6901 (1988).

199. HALL, ET. AL., *supra* note 3.

200. See H.R. REP. No. 1491, 94th Cong., 2d Sess. 17-23 (1976).

which requires documentation of each link by a manifest.²⁰¹

Despite EPA's broad authority to issue administrative orders for a variety of situations, the issue of pre-enforcement review has been addressed by only a handful of courts.²⁰² In *W.R. Grace & Co. v. EPA*, the Court of Appeals for the First Circuit refused to review potential permit modifications pursuant to a corrective action order under RCRA section 3004(u).²⁰³ In that case, W.R. Grace & Co. (Grace) challenged the permit modification in question as violating due process because it potentially imposed costs of millions of dollars to drill a number of monitoring wells without providing Grace any opportunity for an impartial review of the validity of the modification requirements.²⁰⁴ Although review of permits is specifically provided for in RCRA section 7006(b), the court held that section 7006(b) applied only to final permits and that therefore the issue was not ripe for review.²⁰⁵

Grace argued that due process was denied because review after the permit was finalized would be moot since any additional wells required by EPA would already be drilled by the time review was provided, and thus the damage to Grace would be complete.²⁰⁶ Further, Grace argued that if it failed to comply with modifications, it would be subject to penalties of up to \$25,000 per day for violating a compliance order.²⁰⁷

The court held that the issue was not ripe for review because EPA had not yet required a modification to the permit,

201. See 40 C.F.R. § 264.70-264.77 (1991).

202. *W.R. Grace & Co. v. EPA*, 959 F.2d 360 (1st Cir. 1992); *Sinclair Oil Co. v. Scherer*, 20 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,009 (D. Wyo. June 30, 1989), *vacated*, No. C88-0190-8 (July 23, 1991); *E.I. DuPont de Nemours & Co. v. Daggett*, 610 F. Supp. 260 (W.D.N.Y. 1985).

203. 959 F.2d 360 (1st Cir. 1992). In that case, EPA issued a draft corrective action permit under § 3005(a). Section 3004(u) requires such permits to contain schedules of corrective action compliance. 42 U.S.C. § 6924(u) (1988). The draft permit at issue in *Grace* contained a modification provision whereby EPA was given the power to choose methods of remediation that would become part of the final permit's requirements. 959 F.2d at 362.

204. *Id.* at 364-65.

205. *Id.* at 366.

206. *Id.* at 363-64.

207. *Id.* Penalties for violating a section 3004(u) compliance order are authorized under sections 3008(a) and (c). 42 U.S.C. § 6928(a), (c) (1988).

and had not rejected any of Grace's groundwater monitoring proposals.²⁰⁸ The court held that for an injunction to issue, hardship could not consist of purely contingent harm.²⁰⁹ Further, since there was no concrete dispute, there was no direct and immediate dilemma as required for ripeness.²¹⁰ Review of the issue at that time, the court found, would deprive the agency of the ability to resolve the issue.²¹¹

In *E.I. DuPont de Nemours & Co. v. Daggett*, E.I. DuPont de Nemours & Co. (DuPont) sought a preliminary injunction to an administrative order issued by the EPA under RCRA section 3013(a) requiring DuPont to submit a proposal for groundwater monitoring at a landfill disposal facility.²¹² DuPont alleged that section 3013 violated the due process clause of the Constitution²¹³ because there was no opportunity for judicial review prior to the imposition of penalties.²¹⁴ The District Court for the Western District of New York found that in order to avoid finding section 3013(a) unconstitutional, pre-enforcement review was not precluded.²¹⁵ The court rejected EPA's arguments that pre-enforcement review was precluded for section 3013(a) orders under the same rationale as review had been precluded for CERCLA emergency hazard abatement orders under CERCLA section 106(a),²¹⁶ and section 120 of the Clean Air Act.²¹⁷ The court specifically found

208. *Id.* at 364-65.

209. *Id.* at 366.

210. *Id.* at 365. See discussion, *supra* notes 68-70 and accompanying text.

211. *Id.* at 366.

212. 610 F. Supp. 260, 261-62 (W.D.N.Y. 1985).

213. U.S. CONST. amend. V, XIV.

214. *DuPont*, 610 F. Supp. at 262.

215. *Id.* at 263.

216. 42 U.S.C. § 9606(a) (1988).

217. *DuPont*, 610 F. Supp. at 263. See CAA § 120, 42 U.S.C. § 7420 (1988) (amended 1990). The court stated,

Although the structure of the statute is somewhat similar to that of other environmental laws that have been construed so as to bar pre-enforcement review despite the possible accrual of substantial civil penalties, a finding of unavailability of timely judicial scrutiny of the April 29th order is crucial to plaintiff's instant due process challenge to section 6934. Timeliness in this regard means that plaintiff must have, as it will, adequate opportunity to be heard prior to any substantial impingement upon or derogation of its rights or property.

that RCRA section 3013(a) lacked the emergency abatement rationale that supported preclusion of pre-enforcement review under CERCLA.²¹⁸

In *Sinclair Oil Co. v. Scherer*,²¹⁹ the District Court for the District of Wyoming reviewed a section 7003 order despite EPA's arguments that review of section 7003(a) should be precluded for the same reasons that review of section 106(a) orders under CERCLA is precluded.²²⁰ Because section 7003(a) dealt with emergency abatement of "imminent and substantial" endangerments to health or the environment, EPA argued that pre-enforcement review must be denied.²²¹ The holding was subsequently vacated upon the entry of a consent decree between EPA and Sinclair Oil Co.,²²² leaving the resolution of the issue in doubt.

A brief discussion of the *Sinclair* case may be useful in fleshing out the issue of preclusion of administrative orders under RCRA section 7003. The District Court for the District of Wyoming recognized that the purpose of both RCRA section 7003(a) and CERCLA section 106(a) was to provide prompt response to emergency situations.²²³ The court acknowledged the similarities of RCRA section 7003 to CERCLA section 106, and that other courts had barred section 106(a) from review because "pre-enforcement review of EPA's remedial actions . . . [is] contrary to the policies underlying CERCLA," and might "delay an effective response."²²⁴ However, the court also pointed out that under the unique facts of the case, Sinclair had already complied with the administrative order at the time the case was brought, the emergency had "largely been abated," and that "pre-enforcement judicial

610 F. Supp. at 263-264 (citations omitted).

218. *Id.* at 263.

219. 20 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,009 (D. Wyo. June 30, 1989), *vacated*, No. C88-0190-8 (July 23, 1991).

220. 20 Env. L. Rep. (Env'tl. L. Inst.) at 20,011-12.

221. *Id.*

222. *Sinclair Oil Co. v. Scherer*, No. C88-0190-8 (July 23, 1991).

223. 20 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,011.

224. *Id.* (citing *Wagner Seed Co. v. Daggett*, 800 F.2d 310 (2d Cir. 1986); *Ami-noil, Inc. v. EPA*, 599 F. Supp. 69 (C.D. Cal. 1984)).

review is appropriate in this particular case.”²²⁵ The court stated:

Under these circumstances, the emergency response objective of [section] 7003(a) has been all but satisfied. Allowing a review of the [section] 7003(a) order would not undermine EPA’s ability to swiftly respond to future emergency conditions, or establish a precedent allowing the recipient of such an order to evade or delay compliance by seeking pre-enforcement review.²²⁶

Thus, the court was persuaded to review the order because the EPA brought forth no evidence that a delay in compliance would result from hearing the case at that point.²²⁷

The *Sinclair* court relied on cases decided prior to the enactment of CERCLA section 113(h), which expressly bars review of CERCLA section 106(a) orders.²²⁸ However, the court distinguished the case at bar from those prohibiting review of CERCLA section 106(a) orders because the CERCLA cases had all arisen as pre-compliance challenges to section 106(a) administrative orders.²²⁹ The court then went on to say “[g]iven the presumption in favor of judicial review, and the fact that neither the structure or the statutory scheme nor its objectives preclude judicial review under such non-emergency situations as presented in this case, summary judgment on the [section 7003 order] on these grounds is appropriate.”²³⁰

Given that the issue of pre-enforcement review has only been addressed three times under RCRA, it is difficult to determine whether courts will determine that pre-enforcement review of administrative orders is impliedly barred under RCRA. Where the policies would most clearly bar pre-enforcement review, in the case of emergency abatement orders under section 7003, the single court considering the issue in

225. *Id.* at 20,011.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

Sinclair rejected a bar to pre-enforcement review. On the other hand, *W.R. Grace & Co.* barred pre-enforcement review under non-emergency circumstances where there was great potential costs to the recipient of the order. These decisions were heavily dependent upon the factual situations involved and do very little to establish a broadly applicable rule of law. As will be discussed in the following section, the policies underlying RCRA and the nature of its administrative order scheme support a bar to pre-enforcement review for precisely the same reasons that review has been barred under CERCLA, the Clean Air Act and the Clean Water Act.

V. Analysis of Pre-enforcement Review Case Law

A. General Principles of Pre-enforcement Review in Non-emergency Situations

The issue of whether pre-enforcement review of administrative orders is available may be analyzed on three levels. First, review of an administrative order may be barred under traditional administrative law principles of finality and ripeness.²³¹ Second, courts may construe the statute under which the order is issued to determine whether pre-enforcement review is impliedly barred.²³² Third, courts may analyze whether pre-enforcement review is required under principles of due process.

Even in the case of administrative orders issued in non-emergency situations, a bar to pre-enforcement review under the environmental statutes discussed is appropriate under most circumstances. Under most environmental statutes, the procedures for enforcement are such that there is no final agency action until EPA seeks to enforce an order in district court. Therefore, review must be precluded on ripeness grounds. When a bar to pre-enforcement review may be implied from the language of the statute, this same procedural feature satisfies due process requirements because property

231. See *supra* notes 30-72, 124-27, 145-66, 182-87, 203-12 and accompanying text.

232. See *supra* notes and accompanying text.

rights cannot be said to be truly implicated until the order is enforced by the courts.

1. Finality and Ripeness

The most important factor in each level of analysis will be the procedural requirements for enforcement of an order set forth in the statute. Because EPA's decision whether to enforce an administrative order or not is discretionary, the issuance of an order is not "final" agency action subject to review under the Administrative Procedure Act and therefore the order is not ripe for review.²³³ This rationale has been applied to bar pre-enforcement review of administrative orders under CERCLA²³⁴ and the Clean Air Act.²³⁵ Barring pre-enforcement review based on finality is separate and distinct from any express or implied preclusion of review under the statute.

Under the enforcement procedures of administrative orders under each of the statutes discussed, the recipient of an order may refuse to comply or pay civil penalties until ordered by a district court.²³⁶ Thus, EPA has not taken the final action required for enforcement until a decision is made to seek enforcement of the order in the district courts.²³⁷ A bar to pre-enforcement review under the finality principle of administrative judicial review is appropriate because resolution of disputes may take place at the agency level, never requiring judicial action.²³⁸ By the time pre-enforcement review is sought, the EPA may not have developed adequate factual information required to make a final decision.²³⁹ By denying pre-enforcement review, the courts accomplish the dual purpose of deferring to agency authority in settling disputes while conserving scarce judicial resources.

233. See *supra* notes 124-27, 145-66, 182-87, 203-12 and accompanying text.

234. See *supra* notes 124-27 and accompanying text.

235. See *supra* notes 145-66 and accompanying text.

236. See *supra* notes 146-230 and accompanying text.

237. *Id.*

238. *Id.*

239. *Reardon v. United States*, 947 F.2d 1509, 1513 (1st Cir. 1991). See *supra* notes 111-12 and accompanying text.

In some cases, agency actions are a mere assertion of jurisdiction, and not final agency action subject to judicial review. This is most clearly the case in Army Corps of Engineers' cease-and-desist orders issued under the Clean Water Act.²⁴⁰ The same rationale may be applied to some types of RCRA administrative orders which amount to an assertion of jurisdiction, such as section 3013(a) orders for monitoring and testing.²⁴¹

Under the finality and ripeness doctrines, RCRA administrative orders which require a decision by the EPA to enforce them in district court must be barred from review. Barring pre-enforcement review allows EPA to resolve the issue with the recipient without ever bringing the issue to the courts, and provides for the development of a factual record in case the issue must be brought to court. The recipient of the order is protected from arbitrary action by EPA through review of the substantive merits of the order once EPA seeks to enforce the order. If EPA never seeks to enforce the order, it cannot be said that any property rights of the recipient have been implicated. Furthermore, barring pre-enforcement review of RCRA orders that require an EPA decision to enforce based on finality or ripeness is consistent with the law as applied to the other major federal environmental statutes.

2. Implied Preclusion of Pre-enforcement Review

Second, analysis may turn upon whether the statute expressly or impliedly precludes pre-enforcement review. For

240. *Route 26 Land Dev. Ass'n v. United States*, 753 F. Supp. 532, 539 (D. Del. 1990). See *supra* notes 182-86 and accompanying text.

241. In *E.I. DuPont de Nemours & Co. v. Daggett*, 610 F. Supp. 260 (W.D.N.Y. 1985), the court reviewed the requirements of a RCRA § 3013(a) order. The court found the order valid in all respects, but allowed pre-enforcement review because of the potential implication of the order on property rights, specifically rejecting arguments that pre-enforcement review was barred under RCRA due to the need for rapid responses to environmental problems. See *supra* notes 213-19 and accompanying text. However, the court did not address the issues of finality or ripeness, and there is no indication in the decision whether these issues were raised. The second circuit in *W.R. Grace & Co. v. EPA*, 959 F.2d 360 (1st Cir. 1992), however, has held that pre-enforcement review of a § 2004(u) order was not ripe for review, notwithstanding a due process argument. See *supra* notes 203-12 and accompanying text.

those statutes that do not expressly preclude review, the analysis is based upon the structure, objectives, and legislative history of each statutory scheme to determine whether pre-enforcement review is impliedly precluded by the statute.²⁴²

Preclusion of review has been implied when a statute provides for judicial review of certain agency actions but is otherwise silent as to pre-enforcement review.²⁴³ Implied preclusion of review is also appropriate when the purposes and structure of the statute are best served by denying review, as in the case of prompt responses to emergency pollution episodes.²⁴⁴ For some of the statutes, the emergency response rationale to bar pre-enforcement review has been found to be necessary in any situation where pollutants have been released.²⁴⁵ Thus, as will be discussed in section V, part B, the recognized need for rapid response has led courts to bar pre-enforcement review of administrative orders issued under the Clean Air Act.²⁴⁶ However, that same rationale has not been applied to administrative orders under RCRA as of yet.

3. Due Process

The third level of inquiry is constitutional: whether preclusion of pre-enforcement review will constitute a denial of due process. Barring pre-enforcement review of administrative orders under CERCLA, the Clean Air Act and the Clean Water Act has been held to be in accordance with constitutional due process requirements.²⁴⁷ When assessment of penalties for the violation of administrative orders requires a hearing, either a judicial hearing in the federal courts or a quasi-judicial hearing at the agency level, courts have been more inclined to find pre-enforcement review is barred and in accor-

242. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345 (1984). *See supra* notes 84-86, 174-76 and accompanying text.

243. *See supra* notes 138-45 and accompanying text.

244. *See supra* notes 97-104 and accompanying text.

245. Under the Clean Air Act, the courts have held that the need for rapid response to air pollutants requires a bar to pre-enforcement review. *See supra* notes 147-153 and accompanying text.

246. *See infra* notes 258-87 and accompanying text.

247. *See supra* notes 119-27, 157-66, 179-80, 207-12 and accompanying text.

dance with the due process clause.²⁴⁸

Because EPA must bring an action in district court to enforce an order before any property rights are implicated, due process is not denied under most administrative orders. Due process cannot be violated unless liberty or property rights are implicated.²⁴⁹ When the decision of whether to seek judicial enforcement of an order is discretionary, property interests are not implicated until the EPA decides to enforce the order in the federal courts.²⁵⁰ If the order is legally insufficient or otherwise invalid, courts can invalidate the order when EPA seeks to enforce it, thereby providing due process to recipients of the order at that time.²⁵¹ The recipient is allowed a full and fair opportunity to oppose the order before any deprivation of property occurs.

The recipient of an order is put in no worse position for EPA's having issued a compliance order rather than immediately bringing an enforcement action in district court.²⁵² Due process cannot be denied because the order merely requires the recipient to comply with environmental laws that it was otherwise subject to prior to the issuance of the order.²⁵³ Thus, as the courts have held, the effect of the order on due process property or liberty rights is no greater than the substantive requirements of the environmental statute itself.²⁵⁴

The argument that the accrual of large fines for failure to comply with administrative orders violates due process at first appears compelling. However, in all cases, the courts have a clear opportunity to determine the merits of EPA's issuance of an administrative order and any penalty assessment for noncompliance before any fines are paid. The recipient of an order who opposes its terms in good faith cannot be compelled

248. *Id.*

249. See *supra* note 166 and accompanying text. See, e.g., *Asbestec Constr. Serv. v. EPA*, 849 F.2d 765, 770 (2d Cir. 1988). In *Asbestec*, the Second Circuit Court of Appeals indicated that a showing of interference with an actual contractual interest might be enough to warrant review of the due process issue. *Id.*

250. See *supra* notes 119-27, 157-66, 180-81, 207-12 and accompanying text.

251. See *infra* notes 159-61 and accompanying text.

252. See *infra* notes 180-81 and accompanying text.

253. See *infra* notes 159, 165-66 and accompanying text.

254. *Id.*

to take action until EPA brings a suit to enforce the order.²⁵⁵ Thus, a predeprivation hearing is afforded before any actual affect on property rights, satisfying the requirements of due process. Furthermore, the courts may adjust fines to equitably reflect a recipient's good faith opposition to an order, and any delay in EPA's enforcement of the order that may have compounded daily fines.²⁵⁶

B. Orders Requiring a Rapid Response to Environmental Hazards

In addition to conforming to finality and exhaustion doctrines of judicial review and satisfying due process, as described above, a bar to pre-enforcement review of administrative orders under the environmental statutes promotes the policies underlying environmental protection. This is most clearly true in the case of administrative orders issued in emergency situations to abate "imminent and substantial endangerments" to health or the environment, as provided for in most of the environmental statutes.²⁵⁷ In the case of imminent and substantial endangerments, the Supreme Court's exception to review of administrative orders in emergency situations is especially applicable.²⁵⁸ Any delay in abatement, remediation or removal action can risk human life or health and worsen environmental damage, inevitably resulting in increased costs of remediation and clean up of complex ecological systems. Thus, the emergency nature of the administrative action should be considered in determining whether pre-enforcement review is available.²⁵⁹

255. The decision of whether to bring an enforcement action to seek penalties or enforcement of an order is discretionary. *See supra* notes 119-27, 157-66, 180-81, 207-12 and accompanying text.

256. *See supra* note 160 and accompanying text.

257. Most of the environmental statutes contain provisions authorizing EPA to issue administrative orders to immediately abate the hazard when environmental catastrophes threaten people or the environment with serious harm. *See* CERCLA § 106(a), 42 U.S.C. § 9606(a) (1988); RCRA § 7003(a), 42 U.S.C. § 6973(a) (1988); CAA § 303, 42 U.S.C. § 7603 (Supp. II 1990); CWA § 504, 33 U.S.C. § 1364 (1988); TSCA § 7, 15 U.S.C. § 2606 (1988).

258. *See supra* notes 82-83 and accompanying text.

259. *See supra* notes 96-127, 148-56, 180-81 and accompanying text.

As aforementioned, CERCLA is the only statute authorizing issuance of administrative orders to abate environmental hazards that expressly precludes review. By explicit congressional mandate, pre-enforcement review of administrative orders issued under CERCLA section 106(a) (emergency orders to abate "imminent and substantial" hazards) or section 104 (remedial and response actions by EPA) is not available.²⁶⁰ Under the Clean Water Act, any issues concerning pre-enforcement review of emergency administrative orders are avoided because the statute requires the EPA to bring an action directly in district court for abatement of the environmental hazard.²⁶¹

Under the Clean Air Act and the Resource Conservation and Recovery Act, the issue of whether pre-enforcement review of emergency administrative orders is available has not been settled by the courts.²⁶² In light of the case law discussed in section IV of this paper, and given the policies underlying emergency orders, pre-enforcement review of emergency abatement orders under the CAA and RCRA must be barred.

The case for barring review of emergency administrative orders under the CAA is easily made. Courts have already barred pre-enforcement review of compliance orders under the CAA that do not possess the urgency of emergency abatement orders, citing the need for expedited enforcement of the act nonetheless.²⁶³ In addition to finding that pre-enforcement review is barred by the finality and ripeness doctrines, an implicit bar to review under the CAA is supported by the language of section 307 of the Act.²⁶⁴

Under the analysis set forth in this discussion, pre-enforcement review of emergency orders issued under RCRA

260. See *supra* notes 105-27 and accompanying text. CERCLA § 113(h), 42 U.S.C. § 9613(h) (1988). Exceptions to the bar to pre-enforcement review are listed in section 113(h), or may be had when state law provides standards of cleanup that may be at issue. *Id.*

261. See CWA §§ 311(e), 504, 33 U.S.C. §§ 1321(e), 1364 (1988). See also section 7 of the Toxic Substances Control Act, TSCA § 7, 15 U.S.C. § 2606 (1988).

262. See *supra* notes 128-66, 188-231.

263. See *supra* notes 147-56 and accompanying text.

264. See *supra* notes 138-45 and accompanying text.

clearly must be barred. This result is required due to the need for rapid action to abate releases of hazardous wastes under the rationale set forth by courts analyzing the issue pursuant to the CAA and CERCLA. The analogies between the RCRA and CERCLA imminent hazard provisions, and the fact that courts barred pre-enforcement review of CERCLA orders prior to the SARA amendments when the statute was silent, support a bar to pre-enforcement review for RCRA orders. Additionally, the procedural scheme for issuance of RCRA emergency orders requires EPA to bring an action in district court to enforce them, thereby avoiding denial of due process, and precluding review based on finality and ripeness doctrines. Finally, RCRA's explicit provision for judicial review of other agency actions tends to strengthen arguments that pre-enforcement review should be barred.

The imminent hazard provisions of RCRA and CERCLA contain nearly identical language and have a very similar purpose.²⁶⁵ Under both statutes, when hazardous substances (or wastes, in the case of RCRA) pose an "imminent and substantial endangerment" to health or the environment, the EPA may bring suit in district court or issue administrative orders for abatement of the imminent hazard.²⁶⁶ CERCLA section 106(a)²⁶⁷ and RCRA section 7003(a)²⁶⁸ grant EPA the authority to bring abatement actions when there "may" be an "imminent and substantial endangerment" to health or the environment.²⁶⁹ Under most circumstances, the EPA may take action under either provision depending on the specific

265. The purpose of RCRA § 7003(a) is to provide EPA with emergency powers to respond to similar emergency situations as those addressed by CERCLA section 106(a). *See United States v. Price*, 688 F.2d 204 (3d Cir. 1982) (Section 7003(a) "was intended to confer 'overriding authority to respond to situations involving a substantial endangerment to health or the environment.'" *Id.* at 213 (quoting H.R. COMM. PRINT NO. 96-IFC 31, 96th Cong., 1st Sess. 32 (1979)).

266. *See* RCRA § 7003(a), 42 U.S.C. § 6973(a) (1988); CERCLA § 106(a), 42 U.S.C. § 9606(a) (1988).

267. 42 U.S.C. § 9606(a) (1988).

268. 42 U.S.C. § 6973(a) (1988).

269. RCRA § 7003(a), 42 U.S.C. § 6973(a) (1988); CERCLA § 106(a), 42 U.S.C. § 9606(a) (1988).

situation.²⁷⁰

The single case addressing the issue of whether RCRA emergency abatement orders are reviewable allowed review under unusual factual circumstances, but later the decision was vacated. In *Sinclair Oil Co. v. Scherer*, the court reviewed an emergency hazard abatement order issued under RCRA section 7003(a) despite the court's recognition of the strong policies supporting preclusion of pre-enforcement review of emergency abatement orders.²⁷¹ However, the court was careful to distinguish the *Sinclair* facts from the earlier CERCLA cases, and pointed out that in the case at bar, the emergency

270. In practice, EPA may prefer using the CERCLA imminent hazard provisions because of the substantial body of case law establishing strict, retroactive, and joint and several liability upon responsible parties.

Although there is a considerable amount of overlap between the two sections, CERCLA applies only to "hazardous substances" while RCRA § 7003 applies to solid or hazardous wastes. Compare CERCLA § 101(14), 42 U.S.C. § 9601(14) (1988) with RCRA § 1004(5), 42 U.S.C. § 6903(5) (1988) and 40 C.F.R. Part 261 (1990). Hazardous substances as defined by CERCLA encompasses RCRA hazardous wastes as well as pollutants identified in the CWA, the CAA, and the TSCA. There are three potential situations in which a RCRA § 7003(a) order can be issued and a CERCLA § 106 order cannot: (1) When the endangerment is caused by solid waste rather than hazardous waste; (2) when the waste is hazardous under the statutory definition at RCRA § 1004(5), but is not listed in 40 C.F.R. Part 261; or (3) when the waste is a petroleum product or constituent which is excluded under CERCLA. *Id.* Exception (1) arises because RCRA § 7003(a) explicitly applies to "solid waste or hazardous waste." 42 U.S.C. 6973(a) (1988). Exception (2) arises because wastes which are not listed or for which characteristics have not been identified by the EPA under the regulations at 40 C.F.R. Part 261 (1991), promulgated pursuant to RCRA § 3001, 42 U.S.C. § 6921 (1988), may be still be hazardous under section 7003 if the statutory elements for an imminent hazard action are established. See 40 C.F.R. § 261.1(b)(2)(1990). Since the RCRA hazardous wastes that are defined as CERCLA hazardous substances in § 101(14) are limited to those hazardous wastes listed at 40 C.F.R. Part 261, and wastes subject to abatement under RCRA § 7003(a) are not so restricted, RCRA § 7003(a) may be used to abate hazards posed by solid or hazardous wastes not covered under CERCLA by § 106.

Another potential difference in application of the two provisions is that the CERCLA provision has been applied only to potentially responsible parties, defined generally as owners and operators of facilities, found in CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988), while the RCRA imminent hazard provision applies to the much broader class defined by "any person." RCRA § 7003, 42 U.S.C. 6973 (1988). Thus, RCRA § 7003 can be applied to persons not necessarily owning or operating a hazardous waste facility. The implications of this difference are potentially quite broad.

271. 20 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,009 (D. Wyo. June 30, 1989), *vacated*, No. C88-0190-8 (July 23, 1991).

situation was largely abated.²⁷²

In practice, the EPA has used both RCRA section 7003(a) and CERCLA section 106(a) to compel cleanup of active and inactive hazardous waste dump sites, often using both provisions in the same case.²⁷³ In 1980, Congress expanded the authority of section 7003 by authorizing EPA to issue "such orders as may be necessary to protect public health and the environment."²⁷⁴ The Hazardous and Solid Waste Amendments (HSWA) of 1984²⁷⁵ settled a dispute concerning section 7003 when Congress amended the language of section 7003(a) to include facilities where *past* disposal practices presented an "imminent and substantial endangerment" by amending the language to include past owners and operators of TSD facilities, generators, or transporters of hazardous wastes.²⁷⁶ Prior

272. *Id.* See *supra* notes 220-31 and accompanying text.

273. See generally Joel A. Mintz, *Abandoned Hazardous Waste Sites and the RCRA Imminent Hazard Provision: Some Suggestions for a Sound Judicial Construction*, 11 HARV. ENVTL. L. REV. 247 (1987); DONALD W. STEVER, LAW OF CHEMICAL REGULATION AND HAZARDOUS WASTE § 6.05[1] (1991) ("Shortly after CERCLA was signed into law, the Department of Justice began amending the complaints in the pending Section 7003 actions to include a separate claim for relief under Section 106(a).").

274. H.R. CONF. REP. NO. 1444, 96th Cong., 2d Sess. 44 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5028-5043.

275. Pub. L. No. 98-616, 98 Stat. 3221 (Nov. 8, 1984).

276. HSWA Amendments, Section 402, Title IV—Provisions Relating Primarily to Subtitle G of the Solid Waste Disposal Act.

SEC. 402. Section 7003(a) of the Solid Waste Disposal Act is amended by—

- (1) inserting 'past or present' after 'evidence that the';
- (2) striking 'to immediately restrain any person' and inserting in lieu thereof 'against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is';
- (3) striking 'to stop' and inserting in lieu thereof 'to restrain such person from';
- (4) striking 'or to take such other action as may be necessary' and substituting ', to order such person to take such other action as may be necessary, or both'; and
- (5) inserting after the first sentence thereof the following: 'A transporter shall not be deemed to have contributed or to be contributing to such handling, storage, treatment, or disposal taking place after such solid waste or hazardous waste has left the possession or control of such transporter if the transportation of such waste was under a sole contractual arrangement arising from a published tariff and acceptance for carriage by common carrier by rail

to this clarification, some courts,²⁷⁷ and even EPA, considered that section 7003 only applied to current disposal.²⁷⁸

Taking into account the purposes of the respective statutes, the policy rationale supporting a bar to pre-enforcement review of emergency administrative orders under RCRA is in many ways even stronger than under CERCLA. CERCLA was enacted to deal with perceived problems in cleaning up sites contaminated by past disposal of hazardous substances.²⁷⁹ RCRA, on the other hand, deals with past disposal of hazardous wastes as well as regulation of current hazardous waste disposal.²⁸⁰ Thus, it would seem less likely that emergency situations would arise involving these hazardous substances that were placed in landfills many years ago as compared with the potential for emergency situations at facilities that are currently receiving hazardous wastes and are regulated by RCRA. If administrative orders under CERCLA, which is intended to deal with past disposal of hazardous wastes, are barred from review because of the need for swift action in emergency hazard situations, then why should not the same types of orders under a similar provision of RCRA, which regulates ongoing disposal of hazardous waste, be similarly barred?

The HSWA amendments provide some support for the argument that Congress considered CERCLA section 106(a) and RCRA section 7003(a) analogous. In discussing the enactment of CERCLA section 106(a), Congress stated that the "EPA should continue to use [CERCLA section 106(a)] expansively and no implication should be drawn from this section of the bill that the Congress intends to narrow the existing section 7003."²⁸¹

Congress did address some aspects of judicial review of

and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste.'

277. See *United States v. Wade*, 546 F. Supp. 785 (E.D. Pa. 1982); *United States v. Waste Indus.*, No. 80-4-Civ-7 (E.D.N.C. June 11, 1985); *United States v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 579 F. Supp. 823 (W.D. Mo. 1984).

278. See *supra* note 89 and accompanying text.

279. See *supra* notes 87-95 and accompanying text.

280. See *supra* note 195-202 and accompanying text.

281. See HSWA Amendments, Section 233—Interim Status Corrective Action Orders, House Conference Rep. No. 98-1133, *reprinted in* 1984 U.S.C.C.A.N. 5659.

section 7003 in the HSWA amendments. The legislative history indicates that Congress intended that EPA's decisions whether to settle section 7003 orders are not subject to judicial review.²⁸² Judicial review of section 7003 orders is also barred in citizen enforcement suits under section 7002.²⁸³ However, Congress was silent on the issue of whether judicial review of section 7003(a) orders was available.

Congress' total silence on whether section 7003 orders are reviewable exacerbates the problems of interpretation. One argument for review is that if Congress had intended to preclude review of section 7003 orders, it would have done so in the HSWA amendments where judicial review was certainly an issue, at least in the context of other RCRA provisions. The argument could be made that since review of section 7003(a) orders is expressly barred in citizen suits and EPA settlements, one may infer that section 7003(a) orders are otherwise reviewable.²⁸⁴ The argument goes, if Congress did not include an express provision for review of section 7003 orders, it intended that they were not reviewable, and therefore there is no need to amend RCRA to expressly bar review. This is exactly what EPA argued in the *Sinclair* case, that silence is a clear indication that pre-enforcement review was intended to be precluded.²⁸⁵

The inferences seem to be in favor of preclusion of pre-enforcement review of section 7003(a) orders, but do not rise to the level of clear and convincing evidence of intent to preclude review.²⁸⁶ However, given the policy of rapid abatement of environmental hazards, the procedural requirements for enforcement of the orders, and the finality and ripeness issues, the better rule of law would bar pre-enforcement review of emergency administrative orders under RCRA.

282. The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (Nov. 8, 1984)(codified as 42 U.S.C. § 6973(d) (1988)).

283. See the citizen suit provision, RCRA § 7002, 42 U.S.C. § 6972 (1988).

284. RCRA § 7002(b), 42 U.S.C. § 6972(b) (1988).

285. *Sinclair Oil Co. v. Scherer*, 20 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,009, 20,011 (D. Wyo. June 30, 1989), *vacated*, No. C88-0190-8 (July 23, 1991). 20 Env'tl. L. Rep. (Env'tl. L. Inst.).

286. See *supra* notes 43-59 and accompanying text.

VI. Conclusion

The courts have barred pre-enforcement review when EPA issues administrative orders that require enforcement by a district court action, either through finding an implicit bar to review or that review is precluded under finality and ripeness analysis. It is well established that in certain situations pre-enforcement review may be barred to ensure that environmental damage is not exacerbated by the delay of litigation or inaction by the EPA or responsible parties. Cleaning up hazards to the environment rapidly will be, in most cases, to the benefit of all — the EPA, the responsible party, and the public.

Recipients of administrative orders have little to gain by delay, and a lot to lose. Waiting may put off the inevitable declaration that the responsible party is liable, but can increase the total costs of cleanup dramatically. It is better to address pollution episodes rapidly before they spread to do more expensive harm.

In those statutes where Congress has not spoken, a bar to pre-enforcement review should be enacted to avoid a needless waste of resources litigating the issue. The potential environmental damage is simply too uncertain to leave it up to the courts to dig through statutory language and legislative history for the slightest of hints that Congress did or did not intend to bar pre-enforcement review of administrative orders.