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Alyse Hakami

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THE RCRA/CERCLA DEBATE: APPLICATION OF STATE STANDARDS AT FEDERAL HAZARDOUS WASTE SITES *United States v. Colorado*¹

by Alyse Hakami

The cleanup of contaminated hazardous waste facilities is provided for by two separate and distinct Acts of Congress: the Resource Conservation and Recovery Act (RCRA)² and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).³ Although these Acts both provide for the protection of human health and the environment, problems arise when it appears that both Acts apply to the same contaminated facility. A state's ability to enforce its delegated authority under RCRA at a federal facility where a CERCLA response is underway is currently under scrutiny. Addressing this dispute of whether state or federal law controls at such a hazardous waste site, the court in *United States v. Colorado* paved the way for states to enforce their own hazardous waste stan-

dards at federal facilities even though CERCLA provisions would seemingly apply.

II. FACTS AND HOLDING

The United States Army operates a hazardous waste disposal pond designated as Basin F which is located within the Rocky Mountain Arsenal (Arsenal) near Commerce City, Colorado.⁴ The Arsenal is a hazardous waste treatment, storage, and disposal facility which is subject to regulation under RCRA.⁵ Built in 1942, the Arsenal is a site where chemical warfare agents, chemical products, and incendiary munitions are manufactured and assembled.⁶ In the early 1980's the Army submitted parts A and B of its RCRA permit application to the Environmental Protection Agency (EPA) as part of

the closing procedure mandated by RCRA for Basin F, which was listed as a "hazardous waste surface impoundment."⁷ Noting deficiencies in Part B of the application, the EPA requested a revised plan from the Army.⁸ Instead of submitting a revision, the Army undertook a remedial investigation and feasibility study, which is the first step in a CERCLA remedial action.⁹

In 1984, following the enactment of the Colorado Hazardous Waste Management Act (CHWMA),¹⁰ the EPA authorized the Colorado Department of Health (CDH) to implement the CHWMA in place of RCRA hazardous waste cleanup provisions.¹¹ At this time the Army submitted part B of its RCRA/CHWMA application to the CDH which, as did the EPA, found deficiencies in the application.¹² Two years later the CDH issued its own closure plan for Basin F.¹³ In response, the Army questioned CDH's jurisdictional authority in requiring the Army to implement CDH's plan.¹⁴

Colorado brought suit against the federal government seeking an order that the Army comply with its closure plan for Basin F.¹⁵ In response, the Army argued that Colorado's cleanup plan, authorized by RCRA, was precluded by CERCLA's hazardous waste provisions.¹⁶ At that time, the Army had undertaken a CERCLA interim response action for Basin F whereby the Army made an agreement with Shell Chemical Company to provide storage tanks for the hazardous wastes located at Basin F.¹⁷ The Army then requested that Colorado provide poten-

¹ 990 F.2d 1565 (10th Cir. 1993), *cert denied*, 114 S.Ct. 922 (1994).

² Pub.L.No. 94-580, 90 Stat. 2795, as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), Pub.L.No. 98-616, 98 Stat. 3221 (codified as amended at 42 U.S.C. §§ 6901-6992 (1988 and Supp. IV 1992)).

³ Pub.L.No. 96-510, 94 Stat. 2767, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub.L.No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988 and Supp. IV. 1992)).

⁴ 990 F.2d at 1569.

⁵ *Id.*

⁶ *Colorado v. United States Dep't of the Army*, 707 F.Supp. 1562, 1563 (D. Colo. 1989).

⁷ *Id.* at 1571. To obtain a RCRA permit, the Army had to submit general information about Basin F and its hazardous waste processing to the EPA in Part A of its application. 40 C.F.R. § 270.13 (1993). Under Part B, the Army provided detailed information about its plan to remedy the hazardous waste problems at Basin F. 40 C.F.R. § 270.14 (1993).

⁸ 990 F.2d at 1571.

⁹ *Id.*

¹⁰ COLO. REV. STAT. § 25-15-301 to § 25-15-316 (1989 and Supp. 1992).

¹¹ 990 F.2d at 1571. The EPA is authorized to allow states to create their own hazardous waste management plans as long as they meet minimum federal standards. 42 U.S.C. § 6926(b) (1992).

¹² 990 F.2d at 1571.

¹³ *Id.*

¹⁴ *Id.* at 1571, 1572.

¹⁵ *Id.* at 1572.

¹⁶ *Id.*; *Colorado v. United States Dep't of the Army*, 707 F.Supp. 1562, 1565 (D. Colo. 1989).

¹⁷ *Id.*

tially applicable or relevant and appropriate requirements (ARAR's) for the interim response action and that it comment on the Army's plan, but Colorado did not comply with the Army's requests.¹⁸ Further, the Army contacted CDH and revealed that it was withdrawing its RCRA/CHWMA permit application because of the remedial measures taken pursuant to CERCLA, but that it would still comply with RCRA and CHWMA in accordance with certain CERCLA provisions.¹⁹

The federal district court originally held that Colorado could enforce its CHWMA provisions for the cleanup of Basin F even though CERCLA response was already underway, because Basin F was not listed on the EPA's national list of priority hazardous waste sites and further that Colorado's program, as opposed to CERCLA, would most likely ensure a proper and thorough cleanup of Basin F.²⁰ However, soon after the district court's decision the EPA placed Basin F on its national priority list and the Army moved for reconsideration of the decision.²¹ Afterwards, CDH issued a final amended compliance order to the Army for its closure and cleanup plans for Basin F.²²

The United States then brought the instant action against Colorado in federal district court challenging the enforcement of CDH's final amended compliance order, while Colorado counterclaimed for injunctive relief.²³ The district court granted summary judgment in favor of the United States,

holding that CDH could not enforce its compliance order against the Army because the EPA's listing of Basin F on the national priority list took away the district court's jurisdiction on the matter.²⁴ In so holding, the court relied on CERCLA's provision limiting the jurisdiction of federal courts to review challenges to CERCLA response actions.²⁵

Colorado appealed the district court's decision, arguing that: (1) the CERCLA provision relating to federal court jurisdiction and review of CERCLA response challenges did not prohibit Colorado from implementing its "EPA-delegated RCRA authority;" (2) Basin F's placement on the national priority list was irrelevant to the issue; and (3) the district court's holding that CERCLA precludes Colorado from enforcing its own program was against well-established principles.²⁶ The United States argued that (1) the CERCLA federal court jurisdiction statute prohibited Colorado from enforcing its hazardous waste plan, and (2) CERCLA's ARAR's provision, which allows state input on remedial actions chosen by the President, also prevents Colorado from implementing its hazardous waste law independent of CERCLA.²⁷ The Tenth Circuit reversed, holding that Colorado had the power to enforce its EPA-delegated RCRA authority.²⁸ First, the court found that as Colorado was attempting to enforce its own RCRA requirements through the CHWMA as opposed to challenging a CERCLA response

action, CERCLA's provision relating to federal court jurisdiction did not bar Colorado from attempting to enforce its own compliance order.²⁹ Next, the court reasoned that even if Colorado's action to enforce its compliance order was considered a challenge to the CERCLA response already underway and thus barred by CERCLA in federal court, Colorado could still seek enforcement of its order in state court.³⁰ Further, the court held that the listing of Basin F as a national priority site was irrelevant to whether a state can enforce its own hazardous waste cleanup laws at a federally-owned site or whether such a facility is obligated to comply with state hazardous waste laws.³¹ Finally, the Court responded to the United States' claim that CERCLA barred Colorado enforcement of its law independently of CERCLA since under the Act the state's involvement is limited to giving the President input as to which remedy should be selected.³² The court found that Congress did not intend this provision to be an exclusive means of state involvement (i.e. merely giving the President input in choosing a remedial action) in hazardous waste cleanup and thus Colorado was not barred from enforcing its own law.³³

III. LEGAL BACKGROUND

A. RCRA and CERCLA in General

Before analyzing the specific provisions of RCRA and CERCLA which are integral to the instant decision, it is helpful to have an

¹⁸ *Id.* Under § 9621 of CERCLA, remedial actions must at a minimum assure protection of human health and the environment. "Such remedial actions shall be relevant and appropriate under the circumstances presented by the release or threatened release of such substance, pollutant, or contaminant." 42 U.S.C. § 9621(d)(1) (1988).

¹⁹ 990 F.2d at 1572.

²⁰ *Id.* at 1573; *Colorado v. United States Dep't of the Army*, 707 F.Supp. 1562 (D. Colo. 1989).

²¹ 990 F.2d at 1573.

²² *Id.* Pursuant to the amended compliance order the Army was required to submit an amended closure plan, schedule for soil contamination, monitoring and mitigation, groundwater contamination, and other plans for each unit containing hazardous waste, and further required that the CDH approve all Army plans. *Id.*

²³ *Id.* at 1573, 1574.

²⁴ *Id.* at 1574.

²⁵ *Id.* 42 U.S.C. § 9613(h) provides that "[n]o Federal court shall have jurisdiction under Federal law ... to review any challenges to removal or remedial action selected under [CERCLA]."

²⁶ 990 F.2d at 1574.

²⁷ *Id.*

²⁸ *Id.* at 1584.

²⁹ *Id.* at 1575.

³⁰ *Id.* at 1579.

³¹ *Id.* at 1580.

³² *Id.* at 1581, 1582.

³³ *Id.*

overall view of the general purposes and objectives of each statute. Congress established RCRA in 1976 to create a system for the treatment, storage, and disposal of hazardous waste.³⁴ The statute outlines its objective of promoting the "protection of health and the environment and to conserve valuable material and energy resources..." and further sets forth the national policy of the United States: to reduce or eliminate the presence of hazardous waste or to treat, store, or dispose of it so as to minimize the present and future threat to human health and the environment.³⁵ Under RCRA, waste management is completed pursuant to strict performance standards established by the EPA.³⁶ In turn, the EPA enforces such standards by establishing a permit requirement for all owners and operators of hazardous waste facilities, issuing compliance orders, and imposing civil and criminal penalties for violations.³⁷ In addition, preexisting hazardous waste facilities (i.e. those hazardous waste facilities that were already in existence on November 19, 1980 when the RCRA permit requirement became effective) could apply for "interim status" pending permit approval in order to continue the operation of such treatment, storage, and disposal facilities.³⁸

Congress amended RCRA in 1984 with the Hazardous and Solid Waste Amend-

ments (HSWA), which expanded RCRA's corrective action authority.³⁹ Following HSWA, RCRA corrective action applies to on-site and off-site releases from solid waste management units at facilities involved in the treatment, storage, and disposal of waste which are RCRA permit applicants, regardless of when the waste was placed in the unit.⁴⁰ In addition, interim status facilities and past or present management facilities involved in releases which present imminent danger to health or the environment are included under RCRA corrective action requirements.⁴¹

However, RCRA was still limited in scope.⁴² Since the statute only applied prospectively, there was no adequate way to deal with inactive hazardous waste sites.⁴³ Therefore, in 1980 Congress enacted CERCLA "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites."⁴⁴ As explained by one author, "[t]he fundamental difference between RCRA and CERCLA is that CERCLA is designed to target and fund the cleanup of areas that are already contaminated, whereas RCRA is better viewed as a regulatory mechanism to avoid creating the same kinds of problems in the

future."⁴⁵

CERCLA provides that whenever there is a release or the threat of a release of any hazardous substance into the environment the President is authorized to act in accordance with the national contingency plan to remove and provide remedial action, or take any action which the President deems necessary in order to protect the public health and environment.⁴⁶ In addition, the President is allowed to "establish procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants" by making revisions to the national contingency plan.⁴⁷ These cleanup response actions are funded through the Hazardous Substance Superfund.⁴⁸ CERCLA in turn provides for the reimbursement of government-incurred cleanup costs by parties found to be strictly liable for the hazardous waste contamination.⁴⁹ Further, CERCLA requires the prioritized listing of hazardous waste sites.⁵⁰ Finally, it should be noted that the Superfund cannot be used to finance remedial operations at a federal facility.⁵¹

B. Specific Statutory Provisions Regarding State Hazardous Waste Programs

This case note analyzes the conflict between RCRA and CERCLA regarding whether a state is allowed to enforce its own

³⁴ See generally 42 U.S.C. §§ 6901-6992 (1988 and Supp. IV 1992).

³⁵ 42 U.S.C. § 6902(a) and (b) (1988). See *Old Bridge Chems., Inc. v. New Jersey Dep't of Env'tl. Protection*, 965 F.2d 1287 (3rd Cir. 1992).

³⁶ 42 U.S.C. § 6924(a) (1988).

³⁷ 42 U.S.C. § 6925 (1988 and Supp. IV 1992); 42 U.S.C. § 6928 (1988).

³⁸ 42 U.S.C. § 6925(e)(1) (1988 and Supp. IV 1992).

³⁹ As outlined in J. Stanton Curry, James J. Hamula, and Todd W. Rallison, *The Tug-of-War Between RCRA and CERCLA at Contaminated Hazardous Waste Facilities*, 23 ARIZ. SR. L.J. 359, 365-366 (1991): 42 U.S.C. § 6924(u) (1988) requires those facilities seeking permits to undertake corrective action for any hazardous waste released from any solid waste management unit regardless of when the waste was placed in the unit; 42 U.S.C. § 6924(v) (1988) requires RCRA permit applicants to undertake corrective action for hazardous wastes that escape outside of the facility; 42 U.S.C. § 6928(h) (1988) requires facilities with interim status that release hazardous waste to take corrective actions ordered by the EPA as it deems necessary; 42 U.S.C. § 6973(a) (1988) allows the EPA to bring action against any past or present facility whose actions contributed, or are presently contributing, to any imminent threat to human health or the environment.

⁴⁰ *Id.* at 366.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *United States v. Colorado*, 990 F.2d at 1570 (citing H.R. REP. NO. 1016(I), at 17-18, reprinted in U.S.C.A.N. at 6120). Although RCRA amendment 42 U.S.C. § 6928(h) does apply to past hazardous waste management programs, the corrective action is limited to imminent dangers to health or the environment.

⁴⁴ *Id.*

⁴⁵ Major William D. Turkula, *Determining Cleanup Standards for Hazardous Waste Sites*, 135 MIL. L. REV. 167 (1992).

⁴⁶ 42 U.S.C. § 9604(a)(1) (1988).

⁴⁷ 42 U.S.C. § 9605(a) (1988 and Supp. IV 1992).

⁴⁸ 42 U.S.C. § 9611(a)(1) (1988 and Supp. IV 1992); 26 U.S.C. § 9507 (1988).

⁴⁹ 42 U.S.C. § 9607(a) (1988 and Supp. IV 1992).

⁵⁰ 42 U.S.C. § 9605(a)(8)(A) (1988). This prioritized listing is compiled by the EPA. 40 C.F.R. § 300.425(b)(1) (1993).

⁵¹ 42 U.S.C. § 9611(e)(3) (1988). Recognize that the instant case considers Basin F to be a federal facility.

authorized hazardous waste treatment program under RCRA at a federal facility even though an EPA-initiated CERCLA response is underway. What is now required is a detailed review of RCRA and CERCLA statutory provisions regarding state programs in order to determine which statutory scheme should prevail.

1. RCRA

Under §6926, RCRA encourages the EPA to work with states so that the EPA is able to "promulgate guidelines to assist states in the development of state hazardous waste programs."⁵² If a state wants to administer and enforce their own hazardous waste program it must first submit an application to the EPA for approval of the program.⁵³ If the state hazardous waste program is authorized, "[s]uch state is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste."⁵⁴ States with such an authorization are allowed to enforce their programs in lieu of RCRA. If the state thereafter takes any action under its own hazardous waste program pursuant to its EPA authorization, such action is deemed to have the same force and effect as if the action was taken by the EPA.⁵⁵ In addition, not only are states allowed to promulgate their own hazardous waste programs with EPA approval, they are allowed to enforce

standards which have more stringent requirements for the treatment, storage, and disposal of hazardous waste than the standards set forth in RCRA.⁵⁶ If it is found that a state with EPA delegated RCRA authorization is not enforcing its program in accordance with the requirements of the statute, the EPA has the authority to withdraw its authorization and establish a federal program to deal with the contaminated site.⁵⁷ States may receive federal assistance to develop and implement their authorized hazardous waste programs.⁵⁸ For example, this money may be used for such things as planning for hazardous waste facilities, and for the development and implementation of state plans aimed at protecting human health and the environment from inactive facilities containing hazardous waste.⁵⁹

Federal facilities are subject to state and local regulation under RCRA.⁶⁰ In particular, any instrumentality of the federal government, agency, or department that either has jurisdiction over a solid waste site or is involved in any activity which results or could result in the disposal or management of solid or hazardous waste "shall be subject to, and comply with, all Federal, State, interstate, and local requirements ... respecting control and abatement of solid waste or hazardous waste disposal and management."⁶¹ In addition, the United States waives any type of immunity it may have with respect to any procedural or substantive requirements promulgated by the state.⁶² However, the Presi-

dent may exempt federal facilities from complying with the above requirement if it is in the paramount interest of the United States.⁶³

2. CERCLA

"Congress clearly expressed its intent that CERCLA should work in conjunction with other federal and state hazardous waste laws in order to solve this country's hazardous waste cleanup problem."⁶⁴ CERCLA's "Relationship to Other Law" provision indicates that states are not precluded from imposing additional requirements relating to the release of any hazardous waste within that state.⁶⁵ At federal facilities which are not placed on the National Priority List, state laws concerning the cleanup and remedial action at the facility shall apply.⁶⁶ Where the state law applies more stringent standards at the federal facility than those applicable to facilities that are not owned or operated by an instrumentality of the United States, then state law shall not apply.⁶⁷ However, courts construe the national priority list requirement as merely for informational purposes and therefore this requirement does not affect whether state law will apply to a site which is placed on the national priority list.⁶⁸

Another important provision provides that "[a] state may enforce any Federal or State standard, requirement, criteria, or limitation to which the remedial action is required to conform under this chapter in the United States district court for the district in which the facility is located."⁶⁹ Whether this allows

⁵² 42 U.S.C. § 6926(a) (1988 and Supp. IV 1992).

⁵³ 42 U.S.C. § 6926(b) (1988 and Supp. IV 1992). The EPA Administrator has 90 days to determine and notify whether the state program is expected to be accepted, and an additional 90 days to publish whether the state program is (1) equivalent to the Federal program, (2) consistent with Federal or State programs underway in other states, or (3) provides sufficient means of compliance with the requirements of RCRA. *Id.*

⁵⁴ *Id.*

⁵⁵ 42 U.S.C. § 6926(d) (1988 and Supp. IV 1992).

⁵⁶ 42 U.S.C. § 6929 (1988).

⁵⁷ 42 U.S.C. § 6926(e) (1988 and Supp. IV 1992).

⁵⁸ 42 U.S.C. § 6931(a) (1988).

⁵⁹ 42 U.S.C. § 6931(c) (1988).

⁶⁰ 42 U.S.C. § 6961(a) (1988 and Supp. IV 1992); *Parola v. Weinberger*, 848 F.2d 956, 960 (9th Cir. 1988).

⁶¹ 42 U.S.C. § 6961(a) (1988 and Supp. IV 1992).

⁶² *Id.*

⁶³ *Id.* This exemption only applies to solid waste management facilities and does not mention hazardous waste treatment, storage, or disposal facilities. *Id.*

⁶⁴ *United States v. Colorado*, 990 F.2d at 1575.

⁶⁵ 42 U.S.C. § 9614(a) (1988).

⁶⁶ 42 U.S.C. § 9620(a)(4) (1988).

⁶⁷ *Id.*

⁶⁸ See *infra* text accompanying notes 91-103.

⁶⁹ 42 U.S.C. § 9621(e)(2) (1988).

a state the freedom to enforce its own hazardous waste program at a Superfund site even when such program standards differ from those enforced by the federal government is the issue addressed in *United States v. Colorado*.⁷⁰ This same provision also provides that no federal, state, or local permit is required when a remedial action conducted on site is carried out under this section.⁷¹ In addition, CERCLA allows the President to promulgate regulations allowing for state involvement in the initiation, development, and selection of remedial action that is to take place in that particular state.⁷² This is more commonly known as the ARAR's process, referring to state identification of "applicable or relevant and appropriate remedies" for the cleanup of a hazardous waste site.⁷³

Finally, and arguably most important, CERCLA's savings provision provides that nothing in CERCLA "shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law ... with respect to releases or hazardous substances or other pollutants or contaminants."⁷⁴ "Any person" under CERCLA is defined to include individuals, states, and the United States Government.⁷⁵ This provision seems to clear the way for states to implement and enforce their own hazardous waste programs even when enforcement under

CERCLA applies as well, but the instant conflict between RCRA and CERCLA is evidence that this conclusion is under debate.

B. Case Law

Several cases have addressed the issues raised by the relationship between federal and state law at hazardous waste facilities, as well as the statutory interpretation that is required to determine which cleanup standard shall apply. One case which concluded that a state did not have cleanup authority at a Superfund site was *Colorado v. Idarado Mining Company*.⁷⁶ In this case, the Tenth Circuit held that the state was not authorized to compel its own remedial enforcement plan under CERCLA § 9621(e)(2), which deals with cleanup standards applicable to federal remedial actions and the state's right to participation in such actions, because this type of injunctive relief is not available to the state as envisioned by CERCLA.⁷⁷ This case involved Colorado's enforcement of its own plan for remedial activities at the Idarado mine and milling facility for the cleanup of metallic releases in several rivers and creeks located in southwestern Colorado.⁷⁸ Colorado argued that CERCLA authorizes injunctive relief for states under § 9621(e)(2), which enables them to enforce any requirement mandated by the remedial action.⁷⁹ In

other words, under this section of CERCLA the state is allowed to enforce any standards under CERCLA or other federal or state law (i.e. other "applicable or relevant and appropriate requirements" (ARAR's)).⁸⁰ However, looking to the intent behind § 9621, the court held that the remedial measures envisioned by this section are those selected by the federal government or its delegates such as the EPA, not by the states.⁸¹ The court concluded that accepting Colorado's argument would "defeat the intended scope of state involvement as contained in § 121(f)."⁸²

In *Manor Care, Inc. v. Yaskin*, the Third Circuit dealt with a state's authority to enact hazardous waste laws which are supplemental to federal laws regarding the cleanup of hazardous waste.⁸³ The facts of this case involved an agreement between the EPA and New Jersey regarding who would fund the removal of hazardous wastes from two New Jersey sites.⁸⁴ Pursuant to this agreement, the federal government would pay for 90% of the costs, while New Jersey would fund the other 10%.⁸⁵ However, under New Jersey's Spill Act the state issued directives to have the responsible parties reimburse it for the 10% of the cleanup costs paid under the CERCLA agreement.⁸⁶ Manor Care and the other responsible parties argued that the Spill Act, including the directives issued that

⁷⁰ Turkula, *supra* note 45.

⁷¹ 42 U.S.C. § 9621(e)(1) (1988).

⁷² 42 U.S.C. § 9621(f)(1) (1988). These regulations must at least include (1) state involvement on the decision to perform preliminary assessments and site inspections, (2) allocate responsibility to states for hazard ranking system scoring, (3) state involvement in the deletion of sites from the National Priority List, (4) state involvement in long-term planning for remedial sites within that state, (5) opportunity for state review and comment on any remedial investigation and feasibility study, its remedial action, engineering design after the remedial action is chosen, other information relating to the remedy, and the President's exercise of authority in selecting a remedial action, (6) notice to states of negotiation and settlement with potentially responsible parties in a response action at a facility in that state, (7) notice and opportunity to comment on the President's proposal and alternate plans for remedial action, and (8) notice and explanation to states of proposed actions at facilities within that state. *Id.*

⁷³ *United States v. Colorado*, 990 F.2d at 1572.

⁷⁴ 42 U.S.C. § 9652(d) (1988).

⁷⁵ 42 U.S.C. § 9601(21) (1988 and Supp. IV 1992).

⁷⁶ 916 F.2d 1486 (10th Cir. 1990).

⁷⁷ *Id.* at 1493, 1494.

⁷⁸ *Id.* at 1488-1490.

⁷⁹ *Id.* at 1493.

⁸⁰ *Id.* at 1494.

⁸¹ *Id.* at 1495.

⁸² *Id.* Section 9621(f) is the provision under CERCLA which provides for state involvement in choosing remedial actions which are "federal in character." *Id.*

⁸³ 950 F.2d 122 (3d Cir. 1991).

⁸⁴ *Id.* at 123, 124.

⁸⁵ *Id.* at 124.

⁸⁶ *Id.* The Spill Act provides that the State of New Jersey, acting through the New Jersey Department of Environmental Protection, can remove hazardous wastes by itself or require any responsible party to do so. *Id.*; N.J. REV. STAT. § 58:10-23.11(a). The Jersey Supreme Court held this to impliedly mean that the Department of Environmental Protection had the authority to issue directives to these responsible parties for reimbursement of the cleanup costs. *Id.* (citing *Matter of Kimber Petroleum Corp.*, 539 A.2d 1181 (1988)).

provided for reimbursement, was preempted by CERCLA.⁸⁷ The court began its opinion by stating that “[f]ederal law may preempt state law by express provision or by provisions that evidence a congressional intent to occupy a field and leave no room for supplementary state regulation.”⁸⁸ However, the court then looked to CERCLA § 9614(a) which provides that states are not prevented from imposing additional standards with regards to contaminated hazardous waste facilities.⁸⁹ Noting that this particular CERCLA section originally did not provide for reimbursements to a state for costs compensated under CERCLA, the court reasoned that the repeal of the original language revealed that there was no Congressional intent leading to the conclusion that CERCLA preempted the Spill Act in any way, and that New Jersey was free to enact such laws regarding the cleanup of hazardous waste sites.⁹⁰ This particular case is distinguishable from *Colorado v. Idarado* since *Manor Care* allows states to recover cleanup costs under their own state laws whereas the *Idarado* case only dealt with states’ inability to obtain certain injunctive relief.⁹¹

The D.C. Circuit addressed the policy questions surrounding whether RCRA or CERCLA applies to the cleanup of a hazardous waste site in *Apache Powder Company v. United States*,⁹² although this decision did

not deal directly with the issue of state law enforcement of environmental hazardous waste plans and federal facilities.⁹³ The Apache Powder Company was responsible for the release of nitrates from its plant in Arizona and appealed the EPA’s decision to place the Company on the National Priority List.⁹⁴ Apache claimed that this listing was in violation of EPA’s policy not to include sites on its National Priority List if the situation could be remedied under RCRA.⁹⁵ “This deferral is designed ... to avoid duplicative actions, maximize the number of cleanups, and help preserve the [Superfund].”⁹⁶ Apache first argued that it was irrational for the cleanup to be handled under CERCLA standards because the costs would then have to be paid out from the Superfund.⁹⁷ However, the court disagreed, stating that this was not a factor to be taken into consideration, and further that the cleanup under RCRA may be slower, uncertain, and less thorough, thus justifying the cleanup under CERCLA.⁹⁸ In addition, the court recognized that Apache’s placement on the National Priority List was not determinative of whether the site would be cleaned under CERCLA.⁹⁹ Apache’s second argument was based on the EPA’s apparent disregard for its deferral policy to RCRA.¹⁰⁰ However, the court recognized that this deferral policy does not apply when it is questionable whether RCRA applies to a particular site.¹⁰¹ Since nitrates are not

considered hazardous wastes or constituents, the court found that RCRA did not apply.¹⁰² Therefore, the court found that the EPA was authorized to implement its policy under CERCLA instead of RCRA.¹⁰³

IV. THE INSTANT DECISION

In *United States v. Colorado*, the Tenth Circuit held that Colorado’s attempt to enforce its own compliance order did not constitute a “challenge” to the CERCLA response action underway at Basin F, and therefore Colorado’s action could be reviewed in federal court.¹⁰⁴ In reaching this conclusion, the court looked to the express language of CERCLA and RCRA to determine Congress’ intent in dealing with such issues of federalism.¹⁰⁵ The court noted that “Congress clearly expressed its intent that CERCLA should work in conjunction with other federal and state hazardous waste laws in order to solve this country’s hazardous waste cleanup problem.”¹⁰⁶

The court first analyzed CERCLA’s “savings provision,”¹⁰⁷ which provides that CERCLA shall not modify any person’s liability under other federal or state hazardous waste law, along with CERCLA’s “relationship to other laws” provision¹⁰⁸ giving states the authority to impose additional requirements or liability for the release of hazardous waste within the state.¹⁰⁹ The court stated that if Colorado is barred from

⁸⁷ *Manor Care*, 950 F.2d at 124.

⁸⁸ *Id.* at 125.

⁸⁹ *Id.*

⁹⁰ *Id.* at 126. Originally § 9614(c) (repealed 1986) stated that a responsible party was not required to compensate for any cost of response actions which could be compensated for under CERCLA.

⁹¹ *Id.* at 127.

⁹² 968 F.2d 66 (D.C. Cir. 1992).

⁹³ *Id.*

⁹⁴ *Id.* at 67.

⁹⁵ *Id.*

⁹⁶ *Id.* (citing 54 Fed. Reg. 41,008 (1989)).

⁹⁷ *Apache Powder*, 968 F.2d at 69.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* RCRA will apply only to hazardous wastes or constituents. *Id.* (citing 42 U.S.C. §§ 6924(u)-(v) (1988)).

¹⁰² *Apache Powder*, 968 F.2d at 70.

¹⁰³ *Id.* at 67.

¹⁰⁴ *United States v. Colorado*, 990 F.2d at 1575.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*; 42 U.S.C. § 9652(d) (1988).

¹⁰⁸ *Id.*; 42 U.S.C. § 9614(a) (1988).

¹⁰⁹ 990 F.2d at 1575-1576.

enforcing the CHWMA under CERCLA's provision prohibiting federal courts from reviewing CERCLA challenges, the Army's responsibility under CHWMA would be modified in violation of § 9652(d).¹¹⁰ Further, the court explained that federal law would preempt Colorado state law by imposing additional liabilities and responsibilities for the release of hazardous materials which is in violation of § 9614(a).¹¹¹

In addition, the court noted that since the Arsenal is a federal facility it follows that it is subject to regulation under RCRA.¹¹² As Colorado has EPA-delegated RCRA authority (manifested in CHWMA), it also follows that unless the Army was granted an exemption from complying with RCRA or respective state laws, the Arsenal is under CHWMA's jurisdiction.¹¹³ The court reasoned that since there was no evidence of such an exemption, Colorado had the authority to enforce its program at the Arsenal.¹¹⁴

The court turned next to CERCLA's provision barring federal courts from reviewing challenges to CERCLA response actions.¹¹⁵ The court confronted this provision by reasoning that "an action by a state to enforce its hazardous waste laws at a site undergoing a CERCLA response action is not necessarily a challenge to the CERCLA action."¹¹⁶

The court felt that Colorado's enforcement of its compliance order was in accord with its EPA-delegated RCRA authority and as such was not a challenge to the CERCLA response action.¹¹⁷

After analyzing the relationship of § 9613(h) with § 9652(d) and § 9614(a) of CERCLA, the court then looked to the inconsistencies between § 9613(h) and RCRA's citizen suit provision.¹¹⁸ Although CERCLA citizen suits are barred if brought before the completion of a CERCLA response, RCRA citizen suits are allowed prior to the completion of a CERCLA response in order to enforce RCRA provisions at the site where CERCLA action is underway.¹¹⁹ These citizen suits allow any person to commence a civil suit to either enforce any provision effective under RCRA or prevent immediate and substantial danger to health or the environment.¹²⁰ Because only imminent hazard suits are barred where CERCLA response is underway, and not enforcement suits, the court reasoned that there is clear congressional intent that a CERCLA response action would not prohibit a RCRA citizen enforcement suit or any similar state action authorized by the EPA to enforce its own hazardous waste laws in lieu of RCRA.¹²¹

The court went on to add that even if Colorado's action to enforce its final amended

compliance order constituted a "challenge" to the CERCLA response action at the Arsenal and thus is barred by § 9613(h), Colorado still has the ability to enforce its compliance order in state court.¹²² Thus, as the court pointed out, "§ 9613(h) cannot bar Colorado from taking 'any' action to enforce the final compliance order."¹²³ In fact, the court recognized that under Colorado law any CHWMA enforcement action must be brought in Colorado state district court.¹²⁴ Therefore, the court concluded that the Army is subject to CHWMA enforcement under Colorado state law in Colorado state court.¹²⁵

Next, the court addressed the significance of the EPA placing Basin F on the national priority list.¹²⁶ Section 9620(a)(4) of CERCLA provides that state law shall apply to removal and remedial actions at federal facilities when such facilities are not on the national priority list.¹²⁷ The court determined that the congressional intent behind § 9620 was not to preclude states from enforcing their EPA-delegated RCRA authority since Congress could have specifically provided for such a result if it had wanted to.¹²⁸ In addition, the court supported this conclusion by pointing out that § 9620(i), providing that federal facilities must comply with any requirement of RCRA corrective actions, "indicates that

¹¹⁰ *Id.* at 1576.

¹¹¹ *Id.*

¹¹² *Id.*; 42 U.S.C. § 6961 (1988 and Supp. IV 1992).

¹¹³ 990 F.2d at 1576.

¹¹⁴ *Id.* "[T]he President has authority to exempt federal facilities from complying with RCRA or respective state laws if he determines it to be in the paramount interest of the United States." *Id.* (citing 42 U.S.C. § 6961 (1988 and Supp. IV 1992)).

¹¹⁵ 990 F.2d at 1576; 42 U.S.C. § 9613(h) (1988). "The most stark example of section 113's breadth was *United States v. Colorado*." *Heart of Am. N.W. v. Westinghouse Hanford Co.*, 820 F.Supp. 1265, 1277 (E.D. Wash. 1993).

¹¹⁶ 990 F.2d at 1576. Other cases addressing § 9613 are *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3d Cir. 1991) (§ 9613 prohibited federal court jurisdiction in case involving EPA's CERCLA response action) and *Schalk v. Reilly*, 900 F.2d 1091 (7th Cir. 1990), *cert. denied* 498 U.S. 981 (1990) (§ 9613 barred CERCLA citizen suit challenging consent decree between EPA and responsible party.)

¹¹⁷ 990 F.2d at 1576.

¹¹⁸ *Id.* at 1577; 42 U.S.C. § 6972 (1988) (RCRA citizen suit provision).

¹¹⁹ 990 F.2d at 1577.

¹²⁰ *Id.* at 1578; 42 U.S.C. § 6972 (1988).

¹²¹ 990 F.2d at 1578.

¹²² *Id.* at 1579.

¹²³ *Id.*

¹²⁴ *Id.* (citing COLO. REV. STAT. §§ 25-15-305(2)(b) and 25-15-309(1) (Supp. 1992)).

¹²⁵ *Id.*

¹²⁶ *Id.* at 1579-1580.

¹²⁷ *Id.* (citing 42 U.S.C. § 9620(a)(4) (1988)).

¹²⁸ 990 F.2d at 1580.

Congress did not intend that RCRA, or state laws authorized by the EPA to be enforced in lieu of RCRA, to be [sic] equivalent to laws concerning removal and remedial actions."¹²⁹ As the court noted, placement of a federal facility on the EPA's national priority list is merely for informational purposes and is not determinative of a federal facility's obligation to comply with a state's EPA delegated RCRA authority or the state's ability to enforce this authority.¹³⁰

The next issue addressed by the court was how the CERCLA provision giving the President authority to select an appropriate remedy with the state's input affects Colorado's ability to enforce its state law independently of CERCLA.¹³¹ The court held that this provision was not the exclusive means whereby a state may have involvement in CERCLA hazardous waste cleanup already in progress.¹³² Rejecting the argument that Colorado was imposing upon the President's authority, the court found instead that Colorado was enforcing its delegated authority under RCRA, which CERCLA recognizes as valid under sections 9614(a) and 9652(d).¹³³ The court reasoned that if Colorado did not have the authority to enforce its cleanup plan through RCRA, its involvement would be limited to giving input to the President who would then decide on remedial measures for the cleanup site.¹³⁴ However, as the court pointed out, Colorado does have this independent authority, and therefore CERCLA sections 9614(a) and 9652(d) allow for Colorado enforcement of the CHWMA even though CERCLA response is underway.¹³⁵

The court then proceeded to address the United States' argument that CERCLA § 9621(e)(1), which prohibits any requirement of permits for removal and remedial actions conducted in compliance with CERCLA, renders Colorado's compliance order unenforceable.¹³⁶ Since the compliance order only required the Army to update its RCRA/CHWMA permit application, as opposed to requiring the Army to obtain a permit, the court held that the compliance order did not violate § 9621(e)(1).¹³⁷

Finally, the court turned to the dispute over CERCLA's "inconsistent response action" provision, which states that where the President or a potentially responsible party under CERCLA has initiated a remedial investigation and feasibility study at a particular site, a potentially responsible party may not commence an action that has not been authorized by the President.¹³⁸ Stating that it was "unclear" why the United States deemed this argument relevant to this case, the court held that the "inconsistent response action" provision does not prevent states from carrying out their own hazardous waste programs under RCRA-delegated authority at a site where a remedial investigation and feasibility study has been initiated.¹³⁹

V. COMMENT

A. Policy

The provisions of RCRA and CERCLA need to be harmonized in order to clarify federal and state roles at hazardous waste sites. Although the main goal of these envi-

ronmental statutes is to achieve an efficient and effective means of cleaning up the affected site, this goal is subverted by continued litigation over which entity has authority to implement and enforce a remedial plan. The unresolved conflict between RCRA and CERCLA can only result in the wasting of time and limited state and federal resources.¹⁴⁰ In particular, "[i]t offers no additional benefits, delays contamination cleanup, confuses cleanup negotiations, increases the risk of court action, risks driving facilities into insolvency, and squanders available governmental and private resources."¹⁴¹

In addition, states and the EPA continue to be at odds with the way hazardous waste cleanups are conducted. States complain that the EPA's cleanup procedures are so clouded with bureaucracy that effective and innovative remediation have become difficult, and that any EPA-delegated authority to the states allows little added relief since such authority is at best merely a duplicate of the EPA's role.¹⁴² On the other hand, the EPA protests that state efforts at federal hazardous waste sites impede the remediation process because states are not capable of effectively executing a cleanup plan, and further that CERCLA is ill-served by allowing states unfettered control over federal sites.¹⁴³

Since it is evident that the disparate provisions of RCRA and CERCLA will continue to provide an impractical and confusing situation for those involved in the cleanup of contaminated hazardous waste sites, a workable solution is necessary in order to provide for efficient and effective remedies for fed-

¹²⁹ *Id.* (citing 42 U.S.C. § 9620(i) (1988)).

¹³⁰ *Id.* (citing S.Rep. No. 848, 96th Cong., 2nd Sess. 60 (1980)).

¹³¹ *Id.*; 42 U.S.C. § 9621 (1988 and Supp. IV 1992).

¹³² 990 F.2d at 1581.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 1582; 42 U.S.C. § 9621(e)(1) (1988).

¹³⁷ 990 F.2d at 1582.

¹³⁸ *Id.* (citing 42 U.S.C. § 9622(e)(6) (1988 and Supp. IV. 1992)).

¹³⁹ *Id.* at 1582-1583.

¹⁴⁰ Curry, *supra* note 39, at 408.

¹⁴¹ *Id.* The authors suggest that Congress should enact a new CERCLA section that would provide for a mandatory RCRA deferral policy under RCRA in order to provide certainty to treatment, storage, and disposal facility owners and operators when dealing with contamination problems. *Id.* at 407-408.

¹⁴² Peter M. Manus, *Federalism Under Siege At The Rocky Mountain Arsenal: Preemption and CERCLA After United States v. Colorado*, 19 COLUM. J. ENVTL. L. 327, *1-*2 (1994).

¹⁴³ *Id.* at *2.

eral facilities dealing with hazardous waste contamination. However, how does one decide whether federal law (CERCLA) or state law (RCRA-delegated EPA authority) is the appropriate source of law in such situations? On one hand, federal law preemption will provide for uniform treatment and remedial measures throughout the states at contaminated facilities. The fact that CERCLA was intended to be a comprehensive statute is apparent from the acronym itself. On the other hand, since each state is aware of and must deal with its own peculiar environmental problems, the use of state law will ensure that contaminated sites will be treated in a matter best suited within that particular state.

One way to solve the conflict is to more clearly define the roles of RCRA and CERCLA in the treatment and cleanup of hazardous waste sites. One commentator states that in order to provide a degree of certainty to facility operators: (1) CERCLA should apply to all instances when facilities are not subject to RCRA corrective action; (2) the EPA should be able to address, under CERCLA, facilities which are unwilling to conduct a RCRA corrective action; and (3) the EPA should address corrective actions that RCRA is unable to address.¹⁴⁴ Although only considering standards for Superfund sites, another writer who is in favor of federal plenary authority proposed that: (1) the EPA should be responsible for selecting remedies at Superfund sites, and if states wish to intervene by imposing stricter requirements they may do so if they are willing to pay the extra cost; (2) states should not be able to impose more stringent requirements without assuming the extra financial burden; and (3) once a site has been remediated according to EPA standards, states could pursue further measures without additional expense to responsible parties.¹⁴⁵

B. Present Interpretation

The instant case indicates the current

need to reconcile the provisions of RCRA and CERCLA. Although Basin F has been identified as "one of the worst hazardous waste pollution sites in the country," the focus has been on the litigation surrounding this hazardous waste site rather than the cleanup itself.¹⁴⁶ However, how useful is the court's interpretation of the preceding RCRA and CERCLA provisions in light of the fact that the holding in the present case is limited to instances where a claim is brought by a state to enforce its own hazardous waste remedial plan at a federal facility? In addition, as a federal facility Basin F was not subject to funding through CERCLA's Superfund but rather was under the direction of RCRA. In light of these particularities, it is difficult to state that *United States v. Colorado* stands for the proposition that states have gained power to govern cleanups at CERCLA sites located within that state. Rather than signaling a newfound control by states that is independent of CERCLA, this decision does no more than solve the problem raised specifically at Basin F and merely indicates that judicial intervention was necessary to pave the way for the resolution to this hazardous waste problem in the face of statutory ambiguity.¹⁴⁷ Although this case is an affirmation of a state's role in the cleanup of a federal hazardous waste facility, it is very limited in scope and therefore contributes little towards finding a solution to the RCRA/CERCLA conflict.

The court in *United States v. Colorado* adhered to a strict and literal interpretation of the various provisions of CERCLA and RCRA to come to the conclusion that Colorado had the authority to implement and enforce its own hazardous waste program at Basin F. The court identified that the root of the problem was limited to an inherent discrepancy between CERCLA and RCRA. By framing the issue as a RCRA/CERCLA conflict, the court was able to come to a conclusion after a careful and deliberate

reading of the statutes' wording and then clarified where one statute prevails over the other. However, some commentators go beyond the mere RCRA/CERCLA conflict and analyze the broader issue of federal preemption granted by the Supremacy Clause of the Constitution.¹⁴⁸ One particular author recently wrote that "RCRA delegation does not reduce the entire debate over cleanup control at a specific site to one involving only the comparison of two federal laws, CERCLA and RCRA ... [rather] it is appropriate to consider the case in light of the federal authority to preempt or otherwise displace state activity."¹⁴⁹ The fact that the court restricted its opinion to the RCRA/CERCLA conflict and did not include an analysis of the federal preemption issue lends credence to the position that the *United States v. Colorado* decision cannot be construed as a general affirmation regarding a state's ability to enact and enforce its own law in the face of existing federal law, and that the decision's impact is limited to the facts before it.

VI. CONCLUSION

This case note highlights attempts by the courts to reconcile the provisions of RCRA and CERCLA so as to provide a workable solution to an ongoing problem of how to remedy and prevent contamination at hazardous waste facilities. Congress' desire to protect human health and the environment with a broad plan for hazardous waste facilities is evident given the advent of both RCRA and CERCLA. However, states also play a large role in this comprehensive plan for hazardous waste management. In order to give states a chance to implement their programs within their own boundaries, while simultaneously allowing the federal government to provide for a uniform system of environmental laws, conflicting provisions of RCRA and CERCLA must be resolved so as to provide the most efficient and effective standards for the cleanup of contaminated hazardous waste facilities.

¹⁴⁴ Curry, *supra* note 39, at 408.

¹⁴⁵ Turkula, *supra* note 45, at 192-193. In addition, Turkula proposes that responsible parties should be immune from further liability once the EPA selects a remedy, and criticizes numerical expressions of risk.

¹⁴⁶ *United States v. Colorado*, 990 F.2d at 1569 (citing *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1531 (10th Cir. 1992)).

¹⁴⁷ See Manus, *supra* note 142, at *24.

¹⁴⁸ Manus, *supra* note 142, at *16.

¹⁴⁹ *Id.* This author analyzes express and implied federal preemption under the authority of the Supremacy Clause and its relation to environmental law.