Denver Law Review

Volume 81
Issue 3 *Tenth Circuit Surveys*

Article 5

January 2004

Colorado v. Sunoco: The Tenth Circuit's Stand on Statute of Limitations for CERCLA Cost Recovery Actions

Steve Rypma

Colorado v. Sunoco: The Tenth Circuit's Stand on Statute of Limitations for CERCLA Cost Recovery Actions

COLORADO V. SUNOCO: THE TENTH CIRCUIT'S STAND ON STATUTE OF LIMITATIONS FOR CERCLA COST RECOVERY ACTIONS

INTRODUCTION

In 1980, the United States Congress responded to a series of national environmental disasters[1] by passing the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").[2] Congress wrote the legislation in hopes of protecting human health and the environment by providing a "comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites."[3] In 1986, Congress amended CERCLA with the Superfund Amendments and Reauthorization Act ("SARA"), and further facilitated the "prompt clean-up of hazardous waste sites"[4] by enhancing the effectiveness of CERCLA's primary financing tool, the Superfund.[5] SARA broadened the extent of the Superfund as a financial resource because it allowed for payments into the fund from producers of chemicals and petroleum products, often in exchange for CERCLA liability exemptions.[6] In essence, the Superfund provides the government with the capital necessary to immediately respond to toxic releases at dangerous hazardous waste sites, without initially having to deal with the often intricate and lengthy process of assigning liability.[7]

After the government spends Superfund dollars to facilitate response at a hazardous substance release site, it may then concentrate its efforts on the assignment of liability, using CERCLA's cost-shifting provisions.[8] The Superfund Amendments of 1986 ensure that after the gov-

---

1. *See, e.g.*, Pub. Serv. Co. of Colo. v. Gates Rubber Co., 175 F.3d 1177, 1181 (10th Cir. 1999) ("Congress enacted CERCLA, 42 U.S.C. §§ 9601-9675, in the wake of the Love Canal disaster . . . .").

2. 42 U.S.C. §§ 9601-75 (2000).

3. H.R. REP. NO. 96-1016, pt. 1, at 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6125.

4. *See generally* Brock Elliot Czeschin, United States v. Navistar International Transportation Corp.*: Seventh Circuit Bars Government's CERCLA Claim Based on Violation of the Statute of Limitations*, 10 VILL. ENVTL. L.J. 399, 429 (1999). "Congress enacted . . . the Superfund Amendments and Reauthorization Act (SARA) . . . to correct perceived inadequacies in the CERCLA framework." *Id.* at 399 n.2.

5. *Id.* at 429. In January of 2002, Congress again amended CERCLA with the "Brownfields Amendments." United States v. Domenic Lombardi Realty, Inc., 290 F. Supp. 2d 198, 209 (D.R.I. 2003). These amendments provided certain exemptions for CERCLA liability, namely in allowing property owners or surveyors to re-develop certain CERCLA sites without fear of facing liability. *See Domenic Lombardi Realty, Inc.*, 290 F. Supp. 2d at 209.

6. *See* Ulvestad v. Chevron U.S.A., Inc., 818 F. Supp. 292, 293-94 (C.D.Cal. 1993); *see also* Consumers Power Co. v. Dep't of Treasury, 597 N.W.2d 274, 281 (Mich. Ct. App. 1999).

7. *See Gates Rubber Co.*, 175 F.3d at 1181.

8. *See* Morrison Enters. v. McShares, Inc., 302 F.3d 1127, 1132 (10th Cir. 2002).

ernment promptly responds to a release or threat of release of a hazardous substance, it can then "shift the cost of environmental response from the taxpayers to the parties who benefitted [sic] from the wastes that caused the harm."[9] Further, CERCLA imposes retroactive, strict, and joint and several liability upon several classes of potentially responsible parties ("PRPs").[10] Such liability may attach to:

> (1) the owner and operator of a vessel or a facility [where the release occurred],
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who . . . arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, . . . and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities . . . .[11]

Many courts have found that Congress intended the potential liability under CERCLA to be quite expansive.[12] Because CERCLA imposes joint and several liability, a single PRP may be held liable for all costs relating to the cleanup of the hazardous substance release, regardless of that party's degree of responsibility.[13] However, Congress did provide PRPs various forms of equitable relief, permitting PRPs to spread the response costs among themselves.[14] If found liable, a PRP may invoke either the contribution provisions of the statute, whereby "[a]ny person [that is held liable under the statute] may seek contribution from any other person who is liable or potentially liable,"[15] or the PRP may choose to initiate its own cost recovery action against another PRP.[16] By allowing PRPs to initiate CERCLA cost recovery actions themselves, Congress provided an avenue through which response costs are spread only among the responsible parties, sparing taxpayers the burden of financing the cleanup of hazardous wastes.[17]

---

9. *Gates Rubber Co.*, 175 F.3d at 1181.
10. *Morrison Enters.*, 302 F.3d at 1132-33.
11. 42 U.S.C. §§ 9607(a)(1)-(4).
12. *See* Aaron A. Garber, *The PRP, the Section 106 Administrative Order, the Contribution Claim, and CERCLA's Statute of Limitations: A Complete Statutory Analysis*, 16 TEMP. ENVTL. L. & TECH. J. 115, 121 (1997).
13. *Id.* at 120.
14. *See* id.
15. 42 U.S.C. § 9613(f)(1).
16. Garber, *supra* note 12, at 120 ("Jurisdictions are split over who may bring section 107 [i.e., 42 U.S.C. § 9607] cost-recovery actions. Since the adoption of SARA, some jurisdictions have granted section 107 cost-recovery actions only to voluntary or innocent parties; thereby, limiting a PRP's right to recover clean-up costs to section 113 [i.e., 42 U.S.C. § 9613] contribution claims.").
17. *Id.* at 118.

It is clear that under CERLCA, Congress intended for PRPs, not taxpayers, to bear the costs of all responses to hazardous substance releases into the environment.[18] To protect PRPs from perpetual liability, Congress incorporated a statute of limitations into CERCLA, which limits the timeframe during which the government or private individuals may pursue cost recovery actions.[19] CERCLA's statute of limitations is said to both encourage the "timely clean-up of affected sites and to ensure replenishment of the [Super]fund . . . ."[20]

Some courts have found CERCLA's statute of limitations fundamentally vague.[21] However, where the interpretation of CERCLA's statute of limitations is at issue in a case, courts traditionally have construed the statute of limitations in favor of the government.[22] Courts have adopted such a construction to further the underlying structures and policies Congress intended in passing the law, primarily, the notion that PRPs, not taxpayers, should bear the costs of hazardous substance cleanup.[23] Courts have interpreted CERCLA as a "broad remedial statute,"[24] mandating that "those who benefit financially from a commercial activity internalize the environmental costs of the activity as a cost of doing business."[25] Although it appears that reasonable policy concerns would encourage courts to construe CERCLA's statute of limitations in favor of governmental cost recovery, the Tenth Circuit Court of Appeals recently rejected such a construction in *Colorado v. Sunoco, Inc.*[26]

The Tenth Circuit's decision in *Sunoco* is questionable because of its departure from the reasoning many courts have adopted in construing CERCLA's statute of limitations. This comment will first examine CERCLA's statute of limitations as applied to both removal and remedial actions. Most courts typically lend deference to administrative bodies in characterizing such actions, as was done by the Tenth Circuit in *Sunoco*.[27] In light of the traditional deference afforded to agency characterizations, one would assume that a court should also defer to the Environmental Protection Agency's ("EPA") *application* of statutes of limitation according to its preferred characterizations, such as the "operable units" characterization at issue in *Sunoco*.[28] This comment will also examine the Tenth Circuit's deference to the EPA's characterizations of response actions at the *Sunoco* site. Next, this comment will contrast that degree of

18. United States v. Manzo, 182 F. Supp. 2d 385, 403 (D.N.J. 2000).
19. 42 U.S.C. §§ 9613(g)(2)(A), (B).
20. United States v. Navistar Int'l Transp. Corp., 152 F.3d 702, 707 (7th Cir. 1998).
21. *E.g.*, Kelley v. E.I. DuPont De Nemours & Co., 17 F.3d 836, 842 (6th Cir. 1994) (applying presumptions to CERCLA's statute of limitations because of perceived statutory ambiguity).
22. *See, e.g., Manzo*, 182 F. Supp. 2d at 403.
23. *Id.*
24. B.F. Goodrich v. Betkoski, 99 F.3d 505, 514 (2d Cir. 1996) (internal quotations omitted).
25. *B.F. Goodrich*, 99 F.3d at 514 (internal quotations omitted).
26. 337 F.3d 1233, 1241-42 (10th Cir. 2003).
27. *Sunoco*, 337 F.3d at 1243.
28. *See id.*

deference with the court's less deferential stance toward the EPA's application of CERCLA's statute of limitations to separate "operable units" of a CERCLA site. Further, this comment will examine and contrast other jurisdictions' treatment of the "operable units" issue, and address the pragmatic reasoning and policy concerns underlying those courts' decisions. Finally, this comment will evaluate the negative implications of the Tenth Circuit's decision in *Sunoco*—for the environment, taxpayers, and responsible parties alike.

I. CERCLA'S STATUTE OF LIMITATIONS AS APPLIED TO SEPARATE OPERABLE UNITS

A. *Background: CERCLA's Statute of Limitations for Cost Recovery Actions*

For purposes of applying CERCLA's statute of limitations, 42 U.S.C. § 9613(g)(2), Congress divided response activities into two categories: removal actions and remedial actions.[29] A removal action generally "costs less, takes less time, and is geared to address an immediate release or threat of release [of a hazardous substance]."[30] Therefore, CERCLA's statute of limitations requires that the initial cost recovery suit for a removal action be filed within three years after the completion of that action.[31] A remedial action is typically more comprehensive, implementing a permanent solution to the release or threatened release of hazardous substances at the site.[32] Remedial actions are often significantly more costly and time consuming than removal actions, and consequently Congress mandated that a government entity or private party must initiate the cost recovery suit for a remedial action within six years "after initiation of physical on-site construction of the remedial action . . . ."[33] Notably, Congress also structured the statute of limitations in a flexible manner, anticipating the complexity and long-term nature of site cleanups, along with the potential for unforeseen future costs commonly associated with CERCLA response actions.[34] Such flexibility is exhibited in 42 U.S.C. § 9613(g)(2), which requires that the court hear an initial cost recovery action prior to issuing a declaratory judgment, allowing the plaintiff to file subsequent cost-recovery actions to recapture further response costs incurred at the site.[35] A party must commence a subsequent

29. 42 U.S.C. §§ 9613(g)(2)(A), (B).
30. Pub. Serv. Co. of Colo. v. Gates Rubber Co., 175 F.3d 1177, 1182 (10th Cir. 1999).
31. 42 U.S.C. § 9613(g)(2)(A).
32. *Gates Rubber Co.*, 175 F.3d at 1182.
33. 42 U.S.C. § 9613(g)(2)(B). The section goes on to state that where remedial actions begin within three years of completion of the removal action on the same site, a party may recover the removal costs in the same action as that brought to recover the remedial costs. *Id.*
34. *Id.*
35. *Id.*

action to recover additional costs "no later than 3 years after the date of completion of all response action."[36]

B. Degree of Deference Lent to the Environmental Protection Agency in Determining Appropriate Response to Hazardous Substance Releases

In providing the Environmental Protection Agency ("EPA") with two means of responding to the release of hazardous substances at a particular site, Congress declared that EPA's decision on the matter should receive a substantial degree of deference from courts. In 42 U.S.C. § 9613(j)(2), Congress set forth the standard it deemed appropriate for judicial review of EPA's determination of a proper response, in declaring that "the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate . . . that the decision was arbitrary and capricious . . . ."[37]

However, some courts have lent somewhat of a lesser degree of deference to EPA in both its characterizations of response actions and in its interpretation of environmental laws.[38] Although CERCLA does grant EPA substantial deference in choosing methods of response, CERCLA does not directly speak to the appropriate standard that courts should utilize when reviewing EPA's characterizations of response actions.[39] In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the United States Supreme Court ruled that where a "statute is silent or ambiguous with respect to the specific issue," the proper standard of review is whether "the agency's answer is based on a permissible construction of the statute."[40] Courts grant such a wide degree of deference only in cases where "Congress delegated authority to the agency generally to make rules carrying the force of law," and where the agency's determination in question "was promulgated in the exercise of that authority."[41]

Not all agency actions or decisions may warrant *Chevron*-type deference.[42] However, EPA characterizations of response actions will often carry at least some weight on judicial review.[43] Courts base this lesser degree of deference on *Skidmore v. Swift & Co.*, where the United States Supreme Court held that an agency's rulings and opinions are due at least some weight, being "made in pursuance of official duty, based upon

---

36. *Id.* Case law suggests that no statute of limitations applies where a PRP seeks contribution from another PRP. *See* Garber, *supra* note 12, at 122.

37. 42 U.S.C. § 9613(j)(2).

38. *See, e.g.*, American Wildlands v. Browner, 260 F.3d 1192, 1196-97 (10th Cir. 2001); *see also* United States v. Navistar Int'l Transp. Corp., 152 F.3d 702, 712 (7th Cir. 1998).

39. Colorado v. Sunoco, Inc., 337 F.3d 1233, 1243 (10th Cir. 2003).

40. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

41. United States v. Mead Corp., 533 U.S. 218, 226-27 (2001). Courts typically refer to this degree of deference as "*Chevron* deference." *Mead Corp.*, 533 U.S. at 226.

42. *See Sunoco*, 337 F.3d at 1243.

43. *Id.* (holding that because of EPA's "expertise in selecting and executing removal and remedial actions," agency characterizations of those actions are due at least some weight).

more specialized experience and broader investigations" than what are likely to arise in a courtroom.[44]

Courts may either defer to EPA characterizations as carrying the force of law, or consider them with somewhat lesser weight.[45] Either way, it is clear that in furthering the statutory purposes behind CERCLA, both Congress and the Supreme Court intended that an EPA characterization made in the course of responding to a hazardous substance release, such as the characterization of a removal versus a remedial action, deserves at least some deference by a court reviewing those agency decisions.[46]

C. The Environmental Protection Agency's Characterization of Operable Units

The release of hazardous substances into the environment poses a substantial risk to human health and the environment.[47] Governmental response to such releases should be rapid and thorough.[48] It seems apparent that courts should lend at least some deference to the governmental agency's decisions, expertise, and characterizations necessary to successfully carry out that response.[49] One frequently disputed characterization made in relation to CERCLA response actions is EPA's organization of a Superfund site into 'operable units,' and EPA's separate application of CERCLA's statutes of limitation thereto.[50]

The EPA will approach a site where a hazardous substance release threatens to occur or is occurring, evaluate possible cleanup options, and issue a final Record of Decision ("ROD") to officially memorialize the response decision.[51] A single Superfund site may contain several types of waste requiring differing methods of treatment, or the waste may contaminate several types of media; therefore, a ROD may set forth multiple response actions for a single site, as is suggested by 42 U.S.C. § 9621(d).[52] Where a site requires separate "phases" of remedial action, the

---

44. Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944). Courts typically refer to this type of deference as "*Skidmore* deference." *See, e.g., Gates Rubber Co.*, 175 F.3d at 1181.

45. *Skidmore*, 323 U.S. at 139-40.

46. *See Sunoco*, 337 F.3d at 1243.

47. *Gates Rubber Co.*, 175 F.3d at 1181(quoting H.R. REP. NO. 96-1016, pt. I, at 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6125).

48. *Id.* (citing OHM Remediation Servs. v. Evans Cooperage Co., 116 F.3d 1574, 1578 (5th Cir. 1997)).

49. *See Skidmore*, 323 U.S. at 139-40.

50. *See, e.g., Sunoco*, 337 F.3d at 1241; United States v. Manzo, 182 F. Supp. 2d 385, 399 (D.N.J. 2000).

51. *Manzo*, 182 F. Supp. 2d at 401. However, a ROD is required only in cases where the EPA places the site on the National Priorities List ("NPL"). United States v. Ambroid Co., 34 F. Supp. 2d 86, 89 (D.Mass. 1999). If the site is not on the NPL, and depending upon the nature of the response action, the EPA may choose to issue an "Action Memorandum." *See Ambroid Co.*, 34 F. Supp. 2d at 90.

52. *Manzo*, 182 F. Supp. 2d at 401 (citing 42 U.S.C. § 9621(d)). Reports accompanying the SARA legislation suggested that the agency should issue a separate ROD for "'each separate and

EPA has commonly labeled those phases as "operable units,"[53] defined as:

> a discrete action that comprises an incremental step toward comprehensively addressing site problems. This discrete portion of a remedial response manages migration, or eliminates or mitigates a release, threat of a release, or pathway of exposure. The cleanup of a site can be divided into a number of operable units, depending on the complexity of the problems associated with the site. Operable units may address geographical portions of a site, specific site problems, or initial phases of an action, or may consist of any set of actions performed over time or any actions that are concurrent but located in different parts of a site.[54]

In facilitating cleanup of a hazardous substance, in encouraging equitable remedies in assigning liability, and in support of Congress' intent to create economic disincentives for businesses engaging in activities that threaten human health and the environment, courts have addressed and consequently accepted the EPA's characterization of operable units as an essential tool in the comprehensive remedial design.[55] Courts have found that when EPA encounters a complex CERCLA site, "it is beneficial to divide response actions into different operable units and RODs because EPA is therefore able to move quickly to reduce health and environmental risks while continuing the process of studying other matters on the site."[56]

Not only does the division of response action into operable units aid the EPA in cleanup, but operable units can also help in apportioning liability between various PRPs in subsequent cost recovery or contribution actions.[57] At a Superfund site where numerous substances are present and where several PRPs are potentially liable, it may be true that a single PRP contributed to the release of a particular substance, or it may have released that substance in one particular geographic portion of the site.[58] When the EPA divides its response actions into operable units, it will do so according to the perceived ease of dealing with various substances individually, or in separating response action by geographical area.[59] Therefore, the costs accrued in response to a particular operable unit will

---

distinct phase of a response action . . . .'" *Id.* at 402 (quoting H.R. CONF. REP. NO. 99-962, at 224 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3317).

53. *Id.* at 402.

54. *Id.* (quoting 40 C.F.R. § 300.5 (2000)).

55. *See, e.g., id.*

56. *Id.* at 403.

57. Interview with Nancy Mangone, Enforcement Attorney, United States EPA Region VIII, in Denver, Colo. (Nov. 4, 2003).

58. *Id.*

59. *Id.*

be more accurately known, and more fairly apportioned among PRPs based upon their actual liability.[60]

In recognizing the important role that operable units play both to the EPA and to PRPs, some courts have sustained the separate application of CERCLA's statute of limitations upon each operable unit of a remediation plan.[61] However, in its recent *Sunoco* decision, the Tenth Circuit disagreed with the reasoning of these courts, and narrowly construed the statute of limitations provisions of CERCLA.[62]

D. Tenth Circuit: Colorado v. Sunoco

1. Facts

The *Sunoco* case was filed in the United States District Court for the District of Colorado.[63] In January 2001, the State of Colorado brought a cost-recovery action under CERCLA § 107 against a series of defendants, including A.O. Smith Corporation, ASARCO, Inc., Bechtel Corporation, and Sunoco, Inc.[64] The District Court granted the defendant corporations' ("Sunoco") motion for summary judgment, holding that Colorado's claims were time-barred by CERCLA's six-year statute of limitations for remedial actions.[65] Colorado appealed the judgment, and with the United States filing as amicus curiae, the Tenth Circuit heard the case on August 5, 2003.[66]

In *Sunoco*, the State of Colorado sought to recover costs accrued in cleaning up mine waste and contaminated water that had originated from the abandoned Summitville mine site in southern Colorado.[67] At the filing of the suit, cleanup at the Summitville site was ongoing and expected to continue until early 2006, with anticipated total costs exceeding $200 million.[68]

The Summitville Mine Site was first operated in the late 1870s and was most recently operated as a cyanide heap leach facility in the 1980s and early 1990s.[69] During the mine's historic operations (between 1890 and 1950), its shafts and tunnels often filled with groundwater, requiring the mine's operators to drill adits (horizontal openings intended to drain

60. *Id.*
61. *Manzo*, 182 F. Supp. 2d at 402-03.
62. *See Sunoco*, 337 F.3d at 1242.
63. *See id.* at 1235.
64. *Id.*
65. *Id.*
66. *See id.* at 1233.
67. *Id.* at 1236.
68. Appellant's Reply Brief at 1, Colorado v. Sunoco, Inc., 337 F.3d 1233 (10th Cir. 2003) (No. 02-1014).
69. Interim Record of Decision for Water Treatment at 4, Summitville Mine Superfund Site, Summitville, Colo. (on file with the United States Environmental Protection Agency, Region VII, Denver, Colo.).

water).[70] Following abandonment of the mine, highly contaminated, acidic water seeped from two main locations within the site: the Chandler adit and the Reynolds adit.[71]

A second source of contamination at the Summitville site was the heap-leach mining pad.[72] Heap-leach mining was a technique employed by the later-day operators of the mine, which entailed spraying a sodium cyanide solution over piles of crushed ore in efforts to extract gold.[73] After abandonment, snow and rainwater would leach through the piles of ore, and collect high amounts of residual cyanide and metals.[74] Due to a leaky and generally faulty water treatment system, the water, rich with cyanide and toxic metals, had accumulated into a million gallon holding pond on the site.[75] Periodically, the mine would experience releases of the cyanide and metal-rich water from the holding pond.[76] These releases caused numerous operational problems at the site and presented substantial danger to fisheries and ecosystems within the surrounding Alamosa River Watershed.[77]

In 1992, EPA, at the request of the State of Colorado, took emergency control of the Summitville site from the bankrupt operator and initiated a response plan, whereby the primary goal was treatment and containment of the millions of gallons of contaminated water until EPA could formulate a more permanent remedial plan.[78] The three actions of interest to the court in this case were "(1) the plugging of the Chandler adit; (2) the installation of monitoring wells in the Reynolds and Chandler adits; and (3) the construction of the sludge disposal area."[79] The first two actions commenced in 1994; the sludge disposal area was constructed sometime thereafter, and other long-term remedial actions began at the site in the spring and summer of 1995.[80] Colorado as well as the United States filed an initial cost-recovery suit in May 1996; however, that suit did not include the present defendants.[81] Instead, the State filed the suit against Sunoco in January 2001.[82] In the latter suit, the district

70. *Sunoco*, 337 F.3d at 1236.
71. *Id.* at 1236.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. Colorado v. Sunoco, Inc., Civil Action No. 01-N-0001, at 2-3 (D. Colo. Sep. 14, 2001) (order and memorandum opinion).
77. *Sunoco*, 337 F.3d at 1237 n.1.
78. *Id.* at 1236-37.
79. *Id.* at 1237-38.
80. *Id.* Some sources indicate that construction began on the sludge disposal area sometime in 1994, while other sources suggest that it had not begun until April of 1995. *Id.* at 1238.
81. *Id.* at 1238.
82. *Id.*

court rejected Colorado's arguments,[83] and held that the governments had initiated construction of the three "remedial" actions prior to January of 1995, therefore rendering cost-recovery claims for those actions time-barred by CERCLA's statute of limitations.[84]

After entry of the District Court's judgment, Colorado filed a motion to reconsider, asserting the response action at the Summitville site could be separated into five operable units, each worthy of its own recovery action and thus, its own statute of limitations.[85] The district court rejected this argument on the merits and on grounds of timeliness, stating that Colorado had sufficient time to brief the issue in its response to Sunoco's motion for summary judgment.[86]

2. Decision

On appeal, the Tenth Circuit overturned the district court's holding on the grounds that it had not properly deferred to EPA characterizations made in the course of its response at the Summitville Mine Site, and it had inaccurately characterized EPA's actions at the site.[87] EPA and Colorado had argued before the Tenth Circuit that the three response actions in question at the Summitville site were "removal" actions and not "remedial" actions as the district court had found.[88]

This distinction had a direct impact upon the timeliness of the present claim because according to the district court's classification "the initiation of those ["remedial"] activities [would have] triggered the running of the [six year] statute of limitations under § 9613(g)(2)(B)," rendering the present cost recovery actions untimely.[89] However, if the actions at the site were deemed "removal" actions, as the agencies contended, the cost recovery claim would have been timely assuming scheduled "remedial" actions commenced as planned.[90] Under § 9613(g)(2)(b), when a subsequent "remedial" action commences within three years of a prior "removal" action, the statute of limitations for cost recovery on the second-stage "remedial" actions is extended.[91] The EPA was to commence construction of remedial actions at the Summitville site in the summer of 2004.[92] Therefore, when the EPA commences its planned "remedial" action at the Summitville site in the Summer of 2004, this action would fall within three years of the completion of the "removal"

83. *Id.* "Colorado asserted there were genuine issues of material fact concerning whether activities undertaken at the Site constituted removal or remedial actions and when physical on-site construction of a remedial action began at the Site." *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 1238-39.

87. *Id.* at 1243.

88. *See id.* at 1245.

89. *Id.* at 1243.

90. *Id.* at 1238.

91. 42 U.S.C. § 9613(g)(2)(B).

92. Mangone interview, *supra* note 57.

action at the site, and toll the statute of limitations for cost-recovery for another six years after the initiation of on-site construction of EPA's planned "remedial" action, according to 42 U.S.C. § 9613(g)(2)(B).[93] If Colorado could label the plugging of adits, the installation of monitoring wells, and construction of the sludge-disposal area as "removal" actions (and label the planned response action as "remedial"), it would then toll CERCLA's statute of limitations for six additional years, thus rendering the present cost-recovery action timely.[94]

The Tenth Circuit found that EPA's characterization of the three actions at the Summitville site were not worthy of *Chevron*-type deference, because it found "no indication that Congress intended for the EPA 'to speak with the force of law' in characterizing response actions for purposes of the application of CERCLA's statutes of limitation."[95] However, the Tenth Circuit did find the district court had erred in that such determinations by EPA were made in continuance of a congressionally assigned duty, and were worthy of *Skidmore*-type deference, which carries a weight on review not acknowledged by the district court.[96] The Tenth Circuit evaluated the plugging of the Chandler and Reynolds adits and the installation of the adit monitoring wells, concluding that those actions by the EPA constituted removal actions and not remedial actions as the district court had found.[97] Further, the Tenth Circuit found that genuine issues of material fact existed as to when the sludge disposal area was constructed.[98] Such a finding rendered a "removal" versus "remedial" determination irrelevant for this activity, and once again, the Tenth Circuit held that the district court erred in classifying that action as "remedial."[99]

A key, albeit collateral, argument made by Colorado in the case asserted that "cost recovery statutes of limitation in CERCLA were intended by Congress to apply separately to each individual removal and/or remedial action."[100] Colorado suggested several policy considerations to the Tenth Circuit that would underlie such a reading of the statute.[101] One of the most compelling arguments suggested by Colorado was its concern over the risk of mismanagement of government resources.[102] Colorado pointed out that in highly complex response actions, the cleanup of hazardous substances should be the primary focus of government resources, and therefore, the court should allow separable response actions

93. *See Sunoco*, 337 F.3d at 1241-42.
94. *Id.* at 1237; *see* 42 U.S.C. §§ 9613(g)(2)(A), (B).
95. *Sunoco*, 337 F.3d at 1243 (quoting *Mead Corp.*, 533 U.S. at 229).
96. *See id.* (citing *Skidmore*, 323 U.S. at 140).
97. *See id.* at 1243-44 (citing 42 U.S.C. § 9601(23)).
98. *Id.* at 1245.
99. *Id.* at 1245-46.
100. *Id.* at 1240.
101. *Id.* at 1240-41.
102. *Id.*

so that the government would be free from prematurely undergoing extensive investigations and the filing of speculative recovery actions against every PRP imaginable at an early juncture in the response period.[103] Furthermore, Colorado suggested that separating response actions into operable units "encourages at least partial government recovery of its cleanup costs from responsible parties, even if early time periods for recovery expire."[104]

Given the admonishment to the State that it did not raise the issue below, and having conceded that the issue of operable units may not have properly been before it, the Tenth Circuit chose to evaluate the issue nonetheless.[105] After acknowledging Colorado's policy arguments in favor of applying separate statutes of limitations to operable units, the court proceeded to a highly textual analysis of 42 U.S.C. § 9613(g)(2), finding that Congress's use of the articles "a" and "the" in the modification of the phrases "removal action" and "remedial action" obviated a congressional intention to render those actions whole and inseparable.[106] The court further affirmed this conclusion with an argument in equity, noting that 42 U.S.C. § 9613(g)(2)(A), (B) allows for the filing of subsequent actions to recover further costs, so long as the initial action is filed within the statutory period.[107] The Tenth Circuit, following this analysis, barred the application of CERCLA's statutes of limitation to separate operable units within a Superfund site.[108] Although the court's decision in regard to operable units may prove questionable, the Tenth Circuit's decision in *Sunoco* does leave potential for at least partial governmental cost recovery.[109] A favorable outcome remains possible if on remand Colorado can prove the actions were indeed removal actions, which were then followed by subsequent remedial actions within at least three years, tolling the statute of limitations according to 42 U.S.C. § 9613(g)(2)(B).[110]

---

103. *See id.*
104. *Id.* at 1241.
105. *See id.*
106. *Id.*; 42 U.S.C. §§ 9613(g)(2)(A), (B).
107. *Sunoco*, 337 F.3d at 1241-42. However, this conclusion fails to address the very point that Colorado was asserting. That is, investigations following complex CERCLA response actions may uncover additional PRPs not contemplated at the initiation of the suit, or within the statutory time period. However, the court does point out that the defendants in this particular case were known at the filing of the initial action and the State simply failed to include those parties in the initial action. *Id.* at 1242 n.2.
108. *Id.* at 1240.
109. *See id.* at 1241-42.
110. *See id.*

E. Differing Analyses of the Operable Units Argument

1. *United States v. Manzo*[111]

a. Facts

The case of *United States v. Manzo* was a CERCLA cost-recovery action heard before the United States District Court for the District of New Jersey.[112] The defendants in that case acquired several lots of land that their predecessors had used as a landfill and as disposal areas for "waste oil, used filter clay, and [chemical] sludge."[113] After acquiring the land, the defendant leveled waste lagoons, spread waste over portions of the land parcels, mixed the waste with sand and gravel, and used some of this product to build a road through the land.[114] In 1979, EPA and the New Jersey Department of Environmental Protection ("NJDEP") (collectively "the Agencies"), discovered the presence of several hazardous substances at the site,[115] and entered into a cooperative agreement to use Superfund dollars for a response action.[116]

The Agencies initiated the response by dividing the remedial action into three operable units, each with a separate ROD.[117] At the time of the Agencies' filing of this suit, EPA had expended over $8 million in response costs at the Manzo's property, with additional costs expected in the future to undertake further response action.[118]

b. Decision

The court in *Manzo* first granted the United States' partial motion for summary judgment on grounds of liability for the response costs.[119] Next, the court addressed the Manzos' affirmative defense that the United States' claims were barred by CERCLA's statute of limitations.[120] The court acknowledged that little case law existed to guide it in applying "the statute of limitations provisions for cost recovery actions under CERCLA in the context of multiple RODs and operable units."[121] However, the court found that "[g]iven the prominent role of the concept of

111. 182 F. Supp. 2d 385 (D.N.J. 2000).

112. *Manzo*, 182 F. Supp. 2d at 388.

113. *Id.* at 389. The defendants also used portions of the land as a landfill until 1969, when a zoning injunction banned such a use. *Id.*

114. *Id.* at 390.

115. *Id.* At the Manzo's property, the EPA and NJDEP discovered various contaminants, including "polychlorinated bi-phenyls ("PCBs"), lead, methylene chloride, trichloroethylene, chloroform, and benzene . . . ." *Id.*

116. *Id.* at 391.

117. *Id.* at 391-92. The operable units were designated OU1, OU2, and OU3, each with a corresponding ROD, designated as ROD1, ROD2, and ROD3. *Id.*

118. *Id.* at 393. The $8 million figure included only the costs incurred through OU2 and OU3 response actions. *Id.*

119. *Id.* at 396.

120. *Id.* at 399.

121. *Id.*

operable units in the administrative framework governing the actual implementation of CERCLA, the Court cannot conclude that it is irrelevant for purposes of the statute of limitations whether EPA divided its task into different operable units."[122] Therefore, the court addressed the issue finding guidance in reasonable judicial presumptions, EPA's administrative framework, and policy considerations.[123]

The court in *Manzo* adhered to the general notion that in aims of at least partial government recovery of response costs, statutes of limitation should be construed liberally in the United States' favor.[124] The court recognized that the designation of operable units as part of EPA's response plan was vital to the effective cleanup of the site, and at least deserved some degree of deference.[125] In light of the policy concerns and practical advantages[126] of recognizing separate operable units and statutes of limitations, the court concluded that, "the statute of limitations does not bar compensation for [subsequent] operable units qualifying under the limitation even if the plaintiff is barred from seeking compensation for earlier operable units."[127] The court therefore denied Manzo's affirmative defense to bar cost recovery for OU2 and OU3, while the United States acknowledged that the statute of limitations had already barred cost recovery for OU1.[128]

2. *United States v. Azko Nobel Coatings, Inc.*[129]

United States v. Azko Nobel Coatings, Inc. was a cost recovery action against owners of a landfill in Lapeer County, Michigan.[130] Over the course of response activities on the site, EPA had issued two RODs, outlining two separate operable units within the response action.[131] In the cost recovery action, the defendants moved for summary judgment on grounds of CERCLA's statute of limitations.[132] However, the United States District Court for the Eastern District of Michigan, without extensive analysis of the issue, concluded that in following with United States Supreme Court precedent, statutes of limitation should be strictly construed "in favor of the Government where application of them might

122. *Id.* at 402.
123. *Id.* at 399.
124. *Id.* at 401.
125. *Id.*
126. *Id.* at 402-03 ("The United States asserts that, because of the complexity of Superfund sites, it is beneficial to divide response actions into different operable units and RODs because EPA is therefore able to move quickly to reduce health and environmental risks while continuing the process of studying other matters on the site.").
127. *Id.* at 402.
128. *Id.* at 403.
129. 990 F. Supp. 897 (E.D.Mich. 1998).
130. *Azko*, 990 F. Supp. at 899.
131. *Id.* at 902-03.
132. *Id.* at 900. EPA estimated at one point in the feasibility study that the response costs for OU1 alone would exceed $20 million. *Id.* at 902.

otherwise bar its rights."[133] Therefore, the *Azko* court separately applied CERCLA's statutes of limitation to the two operable units at the site, and further concluded that each response action fell within the allowable statutory period, thus dismissing the defendant's motion for summary judgment.[134]

3. *United States v. Ambroid Co.*[135]

In *United States v. Ambroid Co.*, the United States District Court for the District of Massachusetts found that CERCLA's statute of limitations barred an EPA cost-recovery action on grounds that the response action *must* be divided into separable units.[136] The court noted that most courts have interpreted "removal action" broadly so as to further the "essential purposes of CERCLA [which entails] cleaning up hazardous waste and doing so at the expense of those who created it."[137] Here, the United States tried to merge several phases of removal actions into one action, with hopes of tolling the statute of limitations upon the completion of the entire removal action.[138] However, the court begrudgingly held that contrary to the acknowledged underpinnings of CERCLA, the "broadest reasonable statutory interpretation . . . cannot save this case from its fate of partial summary judgment."[139] Interestingly, the court did not hesitate to separate ongoing response into distinct removal actions, and applied the statute of limitations to bar recovery for costs spent on the first "division."[140] The court divided the response action regardless of the fact that EPA had issued no official documentation (such as a ROD for a remedial action, or for removal actions, an Action Memorandum) for any removal actions undertaken at the site.[141] Such an unrestrained action suggests that the court in *Ambroid Co.* felt unhindered from freely separating multiple response actions within a site, and applying a separate statute of limitations to each.

II. ANALYSIS

It is apparent from the preceding cases that congressional intent, policy considerations, and practical concerns all have contributed to a broad statutory interpretation of CERCLA's statute of limitations. Courts' interpretation of CERCLA's statute of limitations has repeatedly allowed for governmental recapture of response costs in cases where the

133. *Id.* at 904; E.L. Du Pont de Nemours & Co. v. Davis, 264 U.S. 456 (1924)).
134. *Azko*, 990 F. Supp. at 903.
135. 34 F. Supp. 2d 86 (D.Mass. 1999).
136. *See Ambroid*, 34 F. Supp. 2d at 91.
137. *Id.* at 87 (citing Kelley v. E.I. DuPont De Nemours & Co., 17 F.3d 836, 843 (6th Cir. 1994)).
138. *See id.*
139. *Id.* at 90.
140. *See id.* at 89-90.
141. *See id.* RODs were not required because the site was not listed on the National Priorities List. *Id.* at 89.

PRP attempts to escape financial responsibility for its actions.[142] In addition, courts have generally deferred to EPA expertise in responding to releases at CERCLA sites, and as argued in this comment, they should continue to do so by giving EPA significant deference in characterizing response actions as removal or remedial, and by allowing EPA to apply separate statutes of limitations to operable units at a site.[143] Such deference allows for an orderly and phased approach to site cleanup without requiring the Agency to exhaust resources on liability investigations and legal proceedings at the expense of human health and the environment.

In the *Sunoco* decision, the Tenth Circuit rejected such an approach.[144] For the most part, the court sided with opponents to an expansive reading of CERCLA's statute of limitations who based their rationale upon a perceived congressional "intention that the government bring CERCLA suits in a prompt and timely manner,"[145] and upon a fear of unbridled and unlimited governmental recovery suits, potentially extending PRP liability indefinitely.[146] The opponents to multiple statutes of limitations argue that CERCLA's retroactivity may hold PRPs liable for actions taken decades in the past, and if left unbridled, liberally applied statutes of limitations may hold PRPs liable for decades into the future.[147] However, this concern merely amounts to a balancing of public interest.[148] Courts that have considered this balancing test have found that the "promotion of . . . [CERCLA's] goals outweighs the . . . argument that [broad] construction would permit the United States to extend the period of liability indefinitely . . . ."[149]

The Seventh Circuit Court of Appeals voiced its objection to a broad reading of CERCLA's statute of limitations in *United States v. Navistar International Transportation Corporation*.[150] The dispute in *Navistar*, like in *Sunoco*, centered on whether the cost recovery actions filed by the United States were time-barred by CERCLA's statute of limitations.[151] However, the court in *Navistar* focused its analysis upon whether the action filed constituted an "initial" cost recovery action, or a "subsequent" cost recovery action.[152] In *Navistar*, the Seventh Circuit rejected the United States' arguments that it should construe statutes of

142. *See generally* Czeschin, *supra* note 4, at 402.
143. *E.g.*, United States v. Manzo, 182 F. Supp. 2d 385, 401 (D.N.J. 2000).
144. Colorado v. Sunoco, Inc., 337 F.3d 1233, 1235 (10th Cir. 2003).
145. Czeschin, *supra* note 4, at 419.
146. *See* Garber, *supra* note 12, at 116.
147. *See generally* Czeschin, *supra* note 4, at 421 (construing United States v. Navistar Int'l Transp. Corp., 152 F.3d 702 (7th Cir. 1998)).
148. Czeschin, *supra* note 4, at 400.
149. *Manzo*, 182 F. Supp. 2d at 403.
150. 152 F.3d 702 (7th Cir. 1998).
151. *Navistar*, 152 F.3d at 705-06.
152. *Id.* at 706. In *Navistar*, if the court chose to label the suit before it a "subsequent action," it would have withstood the statute of limitations challenge. *Id.* The court instead labeled the action an "initial" one, and consequently barred the suit because the cost-recovery action was for a remedial action and had not commenced within six years of the initiation of on-site construction. *Id.*

limitations in the government's favor, and instead strictly interpreted CERCLA's statute of limitations as congressional recognition of a "need for filing of cost recovery actions in a timely fashion, to assure that evidence concerning liability and response costs is fresh . . . ."[153] The court in *Navistar* also asserted that "in order to achieve timely clean-up of affected sites and to ensure replenishment of the fund, cost recovery actions must commence in a timely fashion."[154]

The reasoning proffered by the court in *Navistar*, and implicitly followed by the Tenth Circuit in *Sunoco*, seems to accomplish little but to frustrate CERCLA cost-recovery actions. It appears ironic that in claimed efforts of ensuring replenishment of the fund, these courts did little but strengthen PRP defenses against the government in cost-recovery actions. These arguments also have the effect of placing government agencies and PRPs at risk of filing haphazard cost recovery suits in situations where evidence may be incomplete or undiscovered. Further, the approach taken by the *Navistar* and *Sunoco* courts may lead to rushed liability assignments, and may therefore bar cost-recovery claims against additional PRPs that government agencies have not yet been able to investigate or identify.

To refute the strict judicial interpretation of CERCLA's statute of limitations, opponents of the *Navistar* court's decision have submitted that "the negligence of public officers, who fail to act within the statutory period, should not prejudice the public interest the statute seeks to protect."[155] CERCLA was enacted primarily to protect human health and the environment, and secondly to ensure that the responsible parties, not the general public, are held financially accountable for cleaning up the pollution they caused.[156] In safeguarding these two concerns, Congress contemplated that several response actions may occur at a single site and thus intended courts to treat those response actions separately when challenged. [157] Such intent is apparent in the legislative history surrounding the enactment of CERCLA's statutes of limitation, in that Congress found the structure of CERCLA's statute of limitations "consistent with the overall structure of CERCLA, which contemplates that the President may bring a series of claims for response costs . . . with regard to a particular site . . . ."[158] Congress intended for courts to apply CERCLA's statutes of limitation separately to operable units because such application is consistent with typical deference lent to EPA characterizations made in the fulfillment of congressionally-assigned duties.[159] In addition,

153. *Id.* at 708 (quoting H.R. REP. NO. 99-253, pt. 1, at 138 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3043).
154. *Id.* at 707.
155. Czeschin, *supra* note 4, at 410.
156. Garber, *supra* note 12, at 118.
157. *See* H.R. REP. NO. 99-962, at 221 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3314.
158. H.R. REP. NO. 99-962, at 223 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3316.
159. *See generally Manzo*, 182 F. Supp. 2d at 402.

such application encourages expeditious cleanup of hazardous substances, and it rightly confers financial obligations for cleanup upon responsible parties.[160]

Undoubtedly, Colorado could have avoided the unfortunate decision of the Tenth Circuit in *Sunoco* had it filed the Sunoco action with the initial complaint in 1996, or in some intermediate time thereafter. As mentioned previously, Colorado knew of the current defendants at the filing of the initial action, and therefore if the State had joined Sunoco at that time it could have ensured at least partial recovery of costs accrued at the Summitville Mine Site. Moreover, if the State had properly set forth the operable units argument in its motion to deny summary judgment, the argument may have fared better with the Tenth Circuit on appeal. As it stood, the State set forth the operable units argument on a motion to reconsider and the Tenth Circuit proceeded to address the issue in its decision. If the issue was fully briefed and considered on its merits, the Tenth Circuit may have concluded differently, possibly finding persuasion from other jurisdictions' treatment of the operable units issue. As it stands, the decision in *Sunoco* may prove damaging for future cost-recovery claims arising from separate operable units of a response action.

The Tenth Circuit, by finding the district court's determinations of response actions inadequate, lent typical *Skidmore*-type deference to EPA characterizations of removal versus remedial actions, and remanded the case for further proceedings.[161] However, when considering EPA's determinations of CERCLA's statutes of limitation as applied to separate operable units, the Tenth Circuit found no need to extend *Chevron*-type deference or even *Skidmore*-type deference. In effect, the Tenth Circuit honored government agency decision-making in technical characterizations, but undercut the agencies as soon the time came to enforce those determinations in the manner that the agencies saw fit.

CONCLUSION

The Tenth Circuit decision in *Sunoco* will have an uncertain impact on future cases. In supposedly issuing a "wake-up call" to state and federal agencies to file timely and prompt cost-recovery actions, the Tenth Circuit may have overstepped its aims and in so doing, damaged future cost-recovery claims. The Tenth Circuit provided PRPs with a stronger affirmative defense than what Congress likely intended, and implicitly freed other potential PRPs from liability by mandating rushed or possibly incomplete agency investigations. On a different note, the decision may also harm PRPs in that the operable unit determination is advantageous to PRPs in their own cost-recovery or contribution actions, and the *Sunoco* decision impairs the enforceability of that characterization.

160. Czeschin, *supra* note 4, at 399-400.
161. *Sunoco*, 337 F.3d at 1243.

In the future, it is certain that legitimate CERCLA cost recovery actions will require an expansive reading of CERCLA's statute of limitations to ensure that all PRPs are discovered, and to guarantee that sufficient facts are known so that the agencies can competently prosecute them. Because of the Tenth Circuit's decision in *Sunoco*, government agencies may now have to divert resources away from site cleanup actions, and toward evidence collection and legal actions at early stages of the response. This decision circumvents Congress' intent to protect human health and the environment from hazardous substances at the expense of those profiting from the endangerment, and rewards them by allowing them to benefit from the fruits of their misfeasance. In so doing, the decision leaves the American public with the inherent dangers of hazardous substances while also requiring them to foot the bill for the cleanup.

Steve Rypma[*]

* J.D. Candidate, 2005, University of Denver College of Law. The author would like to thank Nancy Mangone for her guidance in researching and writing this comment.