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Clean up Your Federal Mess in My State: Colorado Has a State RCRA-Voice at the Rocky Mountain Arsenal

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CLEAN UP YOUR FEDERAL MESS IN MY STATE: COLORADO HAS A STATE RCRA-VOICE AT THE ROCKY MOUNTAIN ARSENAL

I. INTRODUCTION

The horror of the environmental cleanup nightmares scattered throughout the federal facilities of the United States is overwhelming. The U.S. Department of Defense ("DOD"), has over ninety-four Superfund sites and over 17,000 contaminated sites nationwide. Sixty-three percent of these federal facilities are classified as Class I RCRA violations,[1] contrasted with only thirty-eight percent of private facilities with similar violations.[2] As of 1988, only 30 of nearly 1100 federal facilities listed on the United States Environmental Protection Agency ("EPA"), Federal Agency Hazardous Waste Compliance Docket[3] had been cleaned up.[4] The worst DOD pollution is found on nearly twenty munitions production and testing sites.[5] If the federal government is the facility owner or operator, why should the government not be required to comply with the same regulations as any non-government owner or operator?[6]

This Comment investigates the RCRA-CERCLA tension through the continuing struggle between Colorado and the U.S. Department of the Army ("Army"), over the cleanup of Basin F at the Rocky Mountain Arsenal, ("RMA"). The recent Tenth Circuit Court of Appeals decision in *United States v. Colorado*[7] yields precedent for the Tenth Circuit and a victory for Colorado and the twenty-one states who filed an amicus brief in support of Colorado.[8]

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1. A Class I RCRA violation is defined as:
> a violation that results in a release or serious threat of release of hazardous waste to the environment, or involves the failure to assure that ground water will be protected, that proper closure and post-closure activities will be undertaken, or that hazardous wastes will be destined for and delivered to permitted or interim status facilities.

S. REP. NO. 553, 101st Cong., 2d Sess. 4 (1990). *See* RCRA § 3053, 42 U.S.C. § 6973 (1988) (granting courts authority to equitably eliminate risks posed by toxic wastes).

2. S. REP. NO. 553, *supra* note 1, at 4. *See also* 138 CONG. REC. S14,755 (daily ed. Sept. 22, 1992) (comments of Sen. Baucus).

3. The Federal Agency Hazardous Waste Compliance Docket lists all federal facilities "that handle or store hazardous wastes or that contain actual contamination problems." CONG. BUDGET OFFICE, FEDERAL LIABILITIES UNDER HAZARDOUS WASTE LAWS, S. DOC. NO. 95, 101st Cong., 2d Sess. 25 (1990), [hereinafter FEDERAL LIABILITIES], *cited in* J.B. Wolverton, Note, *Sovereign Immunity and National Priorities: Enforcing Federal Facilities' Compliance With Environmental Statutes*, 15 HARV. ENVTL. L. REV. 565, 565 n.1 (1991).

4. FEDERAL LIABILITIES *supra* note 3, at 19.

5. *Id.* at 28.

6. Joseph M. Willging, *Why EPA's Current Policies on Potential CERCLA-RCRA Authority Conflicts May be Wrong*, 1 FED. FACILITIES ENVTL. J. 69, 83 (1990).

7. 990 F.2d 1565 (10th Cir. 1993).

8. *See* Amicus Brief of the States of Alaska, Arkansas, Connecticut, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Utah, and Wyoming, United States v. Colorado, 990 F.2d 1565 (10th Cir. 1993) (No. 91-1360) [hereinafter Amicus Brief].

The environmental statutes and regulations at issue plus the numerous lower court actions preceding the instant decision present a complex case. This Comment navigates through the dominant issues the court addressed and presents the thorny peculiarities inherent to the federal facility environmental compliance arena. Part II introduces the environmental statutes and details the history of the struggle between Colorado and the United States over Basin F. Part III outlines the regulatory methods available at the federal and state level to a state (delegated with RCRA authority) wishing to participate in a federal facility remediation. Part IV provides the court's disposition of the issues in the instant case while Part V analyzes the court's reasoning concluding with a look to the future.

II. BACKGROUND

A. *The Environmental Statutes*

Congress recognized the magnitude of the hazardous waste problem and drafted legislation to act in addition to, and in conjunction with, existing laws.[9] The Comprehensive Environmental Response, Compensation, and Liability Act, ("CERCLA"),[10] is a federal environmental statute which focuses on the cleanup of inactive hazardous waste sites. CERCLA contains a specific section for federal facilities.[11]

Under existing environmental legislation, Congress expected the states to assume the burden of implementing the national air, water and hazardous waste programs.[12] Congress also provided a waiver of sovereign immunity in each of the major federal environmental statutes with respect to the activity of federal facilities.[13] The Resource Conservation and Recovery Act ("RCRA"),[14] regulating active hazardous waste activities, is based on the delegation of authority to the states. Congress acknowledged the duty of the states to protect their own territories and that the states are in the best position to oversee environmental compliance.[15] Because RCRA provides for the delegation of primary regulatory authority to the states, it is utilized most to enforce cleanups of polluted federal facilities.[16]

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9. H.R. REP. No. 1016, 96th Cong., 2d. Sess., pt. 1, at 17-18 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119-20.

10. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767, *amended by* the Superfund Amendments and Reauthorization Act, (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988 & Supp. III 1991)).

11. CERCLA § 9620 (requiring that each department, agency and instrumentality of the United States comply with CERCLA).

12. *See* Clean Air Act (CAA), § 110, 42 U.S.C. § 7410 (1988 & Supp. III 1991); Clean Water Act (CWA), § 101(b), 33 U.S.C. § 1251(b) (1988); Resource Conservation and Recovery Act (RCRA), § 1003(a)(1), (7), 42 U.S.C. § 6902(a)(1), (7), (1988).

13. *See* CAA § 118, 42 U.S.C. § 7418 (1988); CWA § 113, 33 U.S.C. § 1323 (1988); RCRA § 6001, 42 U.S.C. § 6961 (1988); CERCLA § 120, 42 U.S.C. § 9620 (1988).

14. Resource Conservation and Recovery Act (RCRA), Pub. L. No. 94-580, 90 Stat. 2795, *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)).

15. Wolverton, *supra* note 3, at 598.

16. *Id.* at 581.

RCRA authorization requires states to adopt standards equivalent to federal requirements.[17] As of February 1988, forty-four states, the District of Columbia and Guam were administering all or part of the RCRA program pursuant to EPA-delegated RCRA authority.[18]

B. *The Rocky Mountain Arsenal*

The Rocky Mountain Arsenal ("RMA"), "possibly the most contaminated site on Earth",[19] covers more than twenty-seven square miles in Adams County, northeast of Denver. The land holds a collection of chemical warfare agents, incendiary munitions and other hazardous substances dumped by the military and private industry since 1942.[20] In 1956 the Army constructed Basin F in response to complaints from farmers that their crops and livestock were being damaged from Arsenal-contaminated well water.[21] Basin F is a ninety-three acre asphalt lined impoundment once containing "deadly aquamarine sludge,"[22] built to store and dispose of contaminated liquid wastes generated by the chemical manufacturing and processing activities of the Army and Shell.[23] Basin F began receiving contaminated liquid waste in October, 1956.[24] After reports of human illness, unexplained sickness among livestock and extensive crop damage, the well waters from farms near the RMA were examined in 1959.[25] Numerous chlorides, acids and arsenic had travelled the three miles from the arsenal holding ponds to the nearest farm.[26] Reports from the 1960's in-

17. RCRA § 3006(b),(c), 42 U.S.C. § 6926(b),(c), (1988) (codified at 40 C.F.R. § 271 (1992)) (authorizing states to carry out their own hazardous waste programs in lieu of the Federal RCRA program).

18. John C. Chambers & Peter L. Gray, *EPA and State Roles in RCRA and CERCLA*, 4 NAT. RESOURCES & THE ENV'T., Summer 1989, at 7, 7-8.

19. Tamara Jones, *Record $1-Billion Cleanup OK'd for Colorado Arsenal*, L.A. TIMES, Feb. 2, 1988, at 1. A risk assessment undertaken by Colorado indicated that if humans were exposed to the RMA toxic contaminants, cancer deaths could increase by one person out of every 100. *Id.*

20.

> The RMA property was purchased by the U.S. government in 1942 for use in World War II to manufacture and assemble chemical warfare materials, such as mustard and lewisite, and incendiary munitions. Beginning in the 1950's, the RMA produced the nerve agent GB (isopropyl methylphosphonofluoridate) until late 1969. A significant amount of chemical warfare materials destruction occurred during the 1950's and 1960's. Since 1970, RMA has mostly dealt with the destruction of chemical warfare materials. The last military operations ended in the early 1980's. In November 1988, the RMA was reduced to inactive military status reflecting the fact that the only remaining mission at the arsenal is contamination cleanup.

U.S. Environmental Protection Admin., History of the Complex Disposal Trenches, Record of Decision, Rocky Mountain Arsenal, EPA-ID CD5210020769, May 3, 1990.

21. Vicky L. Peters, Laura E. Perrault & Susan Mackay Smith, *Can States Enforce RCRA at Superfund Sites? The Rocky Mountain Arsenal Decision*, 23 ENVTL. L. REP. (ENVTL. L. INST.) 10419 (1993) [hereinafter *RMA Decision*].

22. SETH SHULMAN, THE THREAT AT HOME: CONFRONTING THE TOXIC LEGACY OF THE U.S. MILITARY xiii (1992).

23. *See* Carolyn L. Buchholz, *Can a Jurisdictional Showdown Under Superfund Be Avoided?*, 19 ENVTL. L. REP. (ENVTL. L. INST.) 10327, 10328 (1989).

24. *Id.*

25. RACHEL CARSON, SILENT SPRING 43 (1962).

26. *Id.* Scientists could not suggest a method to contain or control the contamination. *Id.*

dicate that Basin F's liner was damaged and leaking.[27] The Army halted deep well injection of liquid waste after this method caused earthquakes in the metropolitan Denver area.[28] Toxic chemicals have leached out of dumpsites on the facility, contaminating groundwater and killing crops.[29] Basin F is so dangerous that the Army has fenced the area and fires gas guns to scare wildlife away.[30] Now the RMA contains 10.5 million gallons of supersaturated liquid waiting to be treated.[31] Since 1988 the toxins remain stored in three tanks and a covered surface pond, slowly precipitating excess salts and depositing solid-phase waste.[32] Massive quantities of contaminated soil identified by dieldrin, (a Shell manufactured pesticide), have been found in the area near Basin F from deposits of windblown spills and evaporated disposal basins.[33] Until June 1991, the quantity and chemical or physical composition of the Basin F liquid remained a mystery.[34] The murk is so deadly that two technicians assigned to collect samples were forced to wear double space suits and breathe air from scuba tanks while meticulously working from a floating steel platform.[35]

1. The Beginnings of Environmental Compliance

In November 1980, the Army as RMA operator, submitted Part A of its RCRA permit[36] to the EPA listing Basin F as a hazardous waste surface impoundment.[37] The Army continued to operate the RMA as a hazardous waste treatment, storage and disposal facility during the permit applica-

27. *RMA Decision, supra* note 21 at 10419.

28. *Id.*

29. *Rockies Menace: Toxic Waste at an Arsenal*, TIME, Dec. 27, 1982, at 70, *cited in* David W. Goewey, Note, *Assuring Federal Facility Compliance With The RCRA and Other Environmental Statutes: An Administrative Proposal*, 28 WM. & MARY L. REV. 513, 517 (1987).

30. Jones, *supra* note 19 at 1. Canadian birds flying south over the arsenal may be tempted to land at Basin F, but the liquid brew would penetrate the birds' feathers and there would be no escape. *Id.* According to Connelly Mears, (EPA co-ordinator for Basin F during 1987), "a duck that lands on Basin F does not fly away." Stephen Labaton, *Business and the Law; Big Courtroom for Toxic Web*, N.Y. TIMES, Nov. 16, 1987, at D2. Army and Shell Oil officials confirmed that the Basin F cleanup efforts created harsh odors and that the air quality measurements forced evacuation of workers during November 1987. T.R. Reid, *Coloradans Ask: Is Toxic-Waste Cleanup Dangerous to Our Health?*, WASH. POST, Dec. 24, 1988, at A5.

31. JoAnn Tischler & Ed Berry, *Field Studies of Aqueous Wastes at the Rocky Mountain Arsenal*, 3 FED. FACILITIES ENVTL. J. 209 (1992).

32. *Id.*

33. *RMA Decision, supra* note 21, at 10419-20. The extent of the actual contamination and danger is still a mystery even though the federal government has spent more than $100 million over nine years to investigate the remediation of Basin F. *Id.*

34. Tischler & Berry, *supra* note 31, at 209.

35. *Id.* at 214.

36. To obtain a RCRA permit, the Part A application requires general information regarding the facility, the operator, the hazardous waste and the process for transport, storage, and disposal. *See* 40 C.F.R. § 270.13 (1992). A Part B RCRA permit application requires more specific information including a specific closure plan. *See* 40 C.F.R. § 270.14 (1992).

37. As a hazardous waste surface impoundment Basin F is subject to specific RCRA regulations. *See* 40 C.F.R. §§ 265.220-.230 (1992) (providing interim status standards for surface impoundments). HSWA requires that the facility cannot receive, store or treat hazardous waste after November 8, 1988 unless the facility is in compliance with the specific minimum technological requirements of RCRA § 3004(o)(1)(A), 42 U.S.C. § 6924(o)(1)(A) (1988).

tion time under a RCRA "interim status."[38] In May 1983, the Army submitted Part B of the RCRA permit application to the EPA with a required closure plan for Basin F followed by a revised closure plan for Basin F in June 1983.[39]

2. EPA Actions

In May 1984, the EPA notified the Army of a deficiency regarding Part B of the RCRA permit application and requested a revised Part B application within sixty days subject to termination of the Army's interim status.[40] The Army never complied. In October 1984, the Army commenced a CERCLA remedial investigation/feasibility study ("RI/FS").[41]

3. Colorado Is Delegated RCRA Authorization

On November 2, 1984, the EPA authorized Colorado to administer its own Hazardous Waste Management Program pursuant to the Colorado Hazardous Waste Management Act ("CHWMA")[42] "in lieu of RCRA."[43] Consequently, in November 1984 the Army submitted the Part B permit application originally submitted to the EPA in June 1983, to the Colorado Department of Health ("CDH"), seeking a Part B RCRA/CHWMA permit.[44] CDH found the application inadequate, particularly the Basin F closure scheme.[45] In May 1986 CDH issued its own draft partial closure plan for Basin F to the Army followed in October 1986 by a final RCRA/CHWMA modified closure plan for Basin F.[46]

4. Colorado Against the Army

After the Army challenged CDH jurisdictional authority and indicated no intention of implementing the CDH Basin F closure plan, Colorado filed suit in November 1986, seeking injunctive relief to stop the Army's violations of CHWMA and to enforce CDH's closure plan for Basin F.[47] The Army removed the action to Federal district court and moved to dismiss the Colorado CHWMA enforcement action claiming that "CERCLA's enforcement and response provisions pre-empt and preclude a state

38. RCRA § 3005(e)(1), 42 U.S.C. § 6925(e)(1) (1988) (granting interim status to a facility owner or operator until the final administrative disposition of the RCRA application).

39. United States v. Colorado, 990 F.2d 1565, 1571 (10th Cir. 1993).

40. *Id.*

41. *Id.* A RI/FS is the first step in a CERCLA remedial action in order to "assess site conditions and evaluate alternatives to the extent necessary to select a remedy." 40 C.F.R. § 300.430(a)(2) (1992).

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

43. RCRA § 3006(b), 42 U.S.C. § 6926(b) (1988) (providing states with the authority to implement and enforce RCRA through state hazardous waste programs). *See* United States v. Colorado, 990 F.2d 1565, 1571 (10th Cir. 1993); Final Authorization of State Hazardous Waste Program, 49 Fed. Reg. 41,036 (1984).

44. CDH is delegated with administration and enforcement authority of CHWMA pursuant to COLO. REV. STAT. § 25-15-301 (1989 & Supp. 1992).

45. United States v. Colorado, 990 F.2d 1565, 1571 (10th Cir. 1993).

46. *Id.* at 1571-72.

47. *Id.* at 1572.

RCRA enforcement action with respect to cleanup of hazardous waste at the Rocky Mountain Arsenal."[48]

Other court actions concerning RMA and Shell Oil were ongoing.[49] In June 1987, the EPA, the Army, Shell Chemical Company and Colorado agreed on a Basin F interim response action whereby the Army was required to remove hazardous wastes to temporary holding areas pending a final cleanup agreement.[50] In August 1987, the Army requested Colorado to identify potential applicable or relevant and appropriate requirements ("ARAR's")[51] for the Basin F interim response action, and in October 1987, the Army solicited comment on its plan.[52] Colorado did not comply with either Army request.[53]

On February 24, 1989, the district court issued the decision in *Colorado v. Army*[54] holding that the Colorado enforcement of CHWMA is "not precluded by CERCLA in circumstances here presented."[55] The court relied on CERCLA § 120(a)(4)[56] noting that state laws concerning removal and remedial actions shall apply to federal facilities "when such facilities are not included on the National Priorities List."[57]

5. The Army Fights Back

On March 13, 1989, the EPA expanded the RMA listing on the National Priority List ("NPL") to include Basin F.[58] Directly following, the Army moved for relief from, or reconsideration of the district court's February 24, 1989, decision since Basin F was listed on the NPL.[59]

6. Colorado Presses On

On September 1, 1989, Colorado issued a Final Amended Compliance Order ("FACO"),[60] which directed cleanup methods for each unit

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

49. United States v. Shell Oil Co., 605 F. Supp. 1064 (D. Colo. 1985).

50. United States v. Colorado, 990 F.2d 1565, 1572 (10th Cir. 1993).

51. *Id. See* CERCLA § 121(d), 42 U.S.C. § 9621(d) (1988). Remedial actions selected must comply with ARAR's, the compliance standards set forth in other federal and state environmental laws which are "legally applicable" to the hazardous substance or are "relevant and appropriate" under the circumstances. *Id.*

52. United States v. Colorado, 990 F.2d 1565, 1572 (10th Cir. 1993). *See* 42 U.S.C. § 9621(f)(1)(E) (1988).

53. United States v. Colorado, 990 F.2d 1565, 1572 (10th Cir. 1993).

54. 707 F. Supp. 1562, 1570 (D. Colo. 1989).

55. *Id.*

56. 42 U.S.C. § 9620(a)(4) (1988) (applying state laws to facilities not included on the National Priorities List).

57. *Army*, 707 F. Supp. at 1569-70. *See* FEDERAL LIABILITIES, *supra* note 3, at 17. The National Priorities List ("NPL"), mandated under CERCLA § 105(a)(8), 42 U.S.C. § 9605(a)(8) (1988) identifies sites the EPA believes pose "the greatest risk to human health and the environment." *Id. See also* EPA Listing Policies for Federal Facilities, 54 Fed. Reg. 10,520, 10,521 (1989) (placing federal facility sites on the NPL sets priorities and focuses cleanup on federal sites that present the most serious problems).

58. *See* 54 Fed. Reg. 10,512 (1989).

59. United States v. Colorado, 990 F.2d 1565, 1573 (10th Cir. 1993).

60. *Id.* at 1573.

containing Basin F hazardous waste, plus stated that the Army was not to implement any closure plan or work plan without Colorado approval.[61] In response to the FACO, the United States filed a declaratory action[62] seeking an order declaring the FACO "null and void" and enjoining Colorado and CDH from taking any enforcement action.[63]

7. *United States v. Colorado* in District Court

Colorado counterclaimed, and on cross motions for summary judgment, the district court ruled that any attempt by Colorado to enforce its CHWMA would require the court to review the ongoing CERCLA remedial action at RMA prior to its completion. CERCLA § 9613(h) prohibits this review.[64]

8. *United States v. Colorado* in the Tenth Circuit

On April 6, 1993, the Court of Appeals for the Tenth Circuit reversed the district court's grant of summary judgment for the United States and remanded the case to the district court with instructions to vacate the order prohibiting Colorado and CDH from taking any enforcement action on the FACO.[65]

III. State Participation at Federal Facilities

A. *The Federal Scheme*

1. CERCLA

CERCLA provides a number of sections which create a role for the states at cleanup sites.[66] Congress realized the slowness of CERCLA activities at federal facilities and encouraged the states to utilize state authority to hasten cleanup.[67] Both the Senate and House noted that SARA strengthened the EPA's authority and preserved state authority.[68] Through a series of executive orders the President has delegated his CER-

61. *Id.*

62. United States v. Colorado, No. 89-C-1646, 1991 U.S. Dist. LEXIS 13138 (D. Colo. Aug. 14, 1991).

63. United States v. Colorado, 990 F.2d 1565, 1573-74 (10th Cir. 1993).

64. United States v. Colorado, No. 89-C-1646, 1991 U.S. Dist. LEXIS 13138, at *14 (D. Colo. Aug. 14, 1991). *See* CERCLA § 113(h), 42 U.S.C. § 9613(h) (1988). No Federal court shall have jurisdiction to review any challenges to removal or remedial action selected under § 9604 (CERCLA response authority). *Id.*

65. United States v. Colorado, 990 F.2d 1565, 1584 (10th Cir. 1993).

66. *See* 42 U.S.C. § 9614(a) (1988) (giving a state the authority to act independent of CERCLA; state can impose additional liability for release of hazardous substances); 42 U.S.C. § 9652(d) (1988) (mandating liability to all persons for releases of hazardous substances); 42 U.S.C. § 9620(i) (1988) (requiring federal government entities to comply with RCRA); 42 U.S.C. § 9621(d) (1988) (requiring remedial actions to meet state ARAR's); 42 U.S.C. § 9621(e)(2) (1988) (allowing states to enforce standards for remedial action); 42 U.S.C. § 9621(f) (1988) (giving state substantial involvement in remedial actions); 42 U.S.C. § 9659 (1988) (providing that states can initiate civil actions against any person for violations).

67. 132 Cong. Rec. 28,437 (1986) (remarks of Sen. Chafee).

68. *Id.* In adopting SARA in 1986, Congress chose to leave 42 U.S.C. §§ 9606(a), 9614(d), and 9652(d) as originally promulgated. *See supra* note 66 and accompanying text.

CLA response authority[69] with respect to DOD facilities to the Secretary of Defense.[70]

2. EPA Authority

The EPA contends that at most federal facilities it is appropriate to act comprehensively under CERCLA pursuant to an Interagency Agreement ("IAG"),[71] signed by the federal facility, the EPA, and the state (if possible).[72] Any disagreements in the implementation of the IAG are resolved by the signatory parties under the dispute resolution terms of the IAG.[73] Following this course the EPA has final authority over selection of any remedial action.[74] But even the EPA's remedial selections are subject to dispute resolution[75] and these disputes may ultimately be referred to the Office of Management and Budget or to the Attorney General.[76] If the EPA should decide that it is not appropriate to authorize a RCRA state action to continue under CERCLA § 122(e)(6),[77] participation by state officials in the ARAR's process is specifically provided in CERCLA § 120(f).[78] Conversely, the EPA may contract with a state and thereby authorize a state to use some or all of the authorities conferred upon the EPA in CERCLA including site investigation and removal or remedial action.[79]

a. The Federal Family

The U.S. Department of Justice ("DOJ"), endorses the unitary executive theory asserting that Article II of the U.S. Constitution creates a unitary executive branch headed by the President who is solely responsible for all executive branch activities.[80] In this position the Chief Executive

69. *See* 42 U.S.C. § 9604(a), (b) (1988) (authorizing the President to act in response to environmental threats or substantial danger to the public health or welfare).

70. Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (1981), *as amended by* Exec. Order No. 12,418, 48 Fed. Reg. 20,891 (1983), *revoked by and current delegation of authority at* Exec. Order No. 12,580, 52 Fed. Reg. 2,923 (1987).

71. An Interagency agreement (IAG), under CERCLA § 120(e)(2), 42 U.S.C. § 9620(e)(2) (1988) provides for an agreement between the head of the agency concerned and the Administrator for the expeditious completion of the remedial action at the federal facility.

72. *See* 54 Fed. Reg. 10,523 (1989).

73. *See id.*

74. *See* 42 U.S.C. § 9620(e)(4)(A) (1988) (specifying that if unable to reach agreement on selection of a remedial action, the IAG shall include the selection of the Administrator).

75. *See* Exec. Order No. 12088, 43 Fed. Reg. 47,707 (1978); Exec. Order No. 12146, 44 Fed. Reg. 42,657 (1979).

76. *See* Exec. Order No. 12580, § 10(a), 52 Fed. Reg. 2,923 (1987); Exec. Order No. 12146, § 1-4, 44 Fed. Reg. 42,657 (1979).

77. 42 U.S.C. § 9622(e)(6) (1988) (no remedial action to be undertaken unless authorized by the EPA).

78. 42 U.S.C. § 9620(f) (1988). State officials participate in remedy selection including, but not limited to, data review and development of action plans. *See* 54 Fed. Reg. 10,523 (1989).

79. 42 U.S.C. § 9604(d) (1988) (authorizing the EPA to enter contracts with a state to carry out specific CERCLA activities).

80. *See* United States House of Representatives Floor Debate on H.R. 1056, the Federal Facilities Compliance Act of 1989, 135 CONG. REC. H3893, H3906 (daily ed. July 19, 1989)

"must have an unfettered opportunity to take action in the event of a disagreement or disputes within the Executive Branch."[81]

Allowing the judiciary to adjudicate disputes between two executive agencies (members of the same federal family), would violate the separation of powers doctrine as well as the Constitutional Article III requirement for justiciable controversies.[82] Consequently, at the federal level, EPA enforcement actions for environmental law violations become extended negotiations because the DOJ refuses to allow the EPA to issue compliance orders or seek civil penalties against federal facilities.[83] Disputes between administrative agencies can only be arbitrated by the President.[84] The Senate and House both discovered that the lack of aggressiveness in enforcement by the EPA and DOJ actually encouraged the slow response by federal facilities to CERCLA.[85] Governors and state attorneys general have petitioned Congress and the President to hasten federal facilities cleanup endeavors and deliver more power to the EPA and the states to enforce the environmental laws at federal sites.[86] The EPA is "hamstrung" by the DOJ unitary executive theory.[87] The nation's chief environmental watchdog must sit obediently while environmental statutes and regulations are ignored at federal facilities.[88] The EPA was reported to have relied on "jawboning at elevated bureaucratic levels" to enforce RCRA at federal facilities.[89]

(letter from former Attorney General Griffin Bell to Rep. Richard Ray) [hereinafter Debate], *cited in Sovereign Immunity, supra* note 15, at 570.

81. Statements of F. Henry Habicht II, Assistant Attorney General, before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce 28 (Apr. 28, 1987), *cited in* James R. Moore, *Enforcement Against Federal Facilities: The Unitary Executive Theory*, 1 FED. FACILITIES ENVTL. J. 143, 144 n.2 (1990). The dispute between the EPA and DOJ over whether the EPA can enforce environmental laws at federal facilities is not a new argument. *Justice Department Nixes EPA Plan to Issue Administrative Orders at Federal Facilities*, DAILY REP. FOR EXECUTIVES (BNA), May 1, 1987, at A1.

82. *See* Moore, *supra* note 81, at 144.

83. Mike Rothmel, Note and Comment, *When Will The Federal Government Waive The Sovereign Immunity Defense and Dispose of Its Violations Properly?*, 65 CHI.-KENT L. REV. 581, 581-82 (1990). Executive Order 12,580 provides that the EPA can issue administrative orders to another federal agency only with the concurrence of the DOJ. Moore, *supra* note 81, at 147. Executive Order 12,580, § 4(e) specifies that the CERCLA authority to seek "information, entry, inspection, samples or response action from the Executive Department and agencies may be exercised only with the concurrence of the Attorney General." *Id.*

84. *See Suits Against Federal Agencies Possible, EPA Deputy Administrator Nominee Tells Senate*, 20 ENV'T. REP. (BNA) 142 (1989).

85. *See* 132 CONG. REC. 28,413 (1986) (remarks of Sen. Stafford); 132 CONG. REC. 29,735 (1986) (remarks of Rep. Synar).

86. *Environment, Governors, Attorneys General Urge More Enforcement Power for States, EPA*, DAILY REP. FOR EXECUTIVES (BNA), February 12, 1990, at A15.

87. *Id.*

88. *Id.*

89. *See House Staff Report Hits DOD, DOE for Violations of Environmental Statute*, 19 ENV'T. REP. (BNA) 199 (1988).

B. *The State Scheme*

1. ARAR's

The state level of environmental law enforcement at federal facilities allows state participation in the ARAR's process[90] or the use of state RCRA authority.[91] CERCLA § 121(d)[92] mandates that the selected remedy must achieve a level of protection at least equivalent to any ARAR standard under the federal environmental laws or any more stringent state environmental law, including state RCRA programs.[93] If the EPA should decide to waive an ARAR, the state may obtain review once the remedy is selected.[94] Further, if an ARAR is waived, a state may provide additional funds to ensure the waived standards are enforced.[95] The EPA has stated that only substantive requirements may be ARAR's and the EPA utilizes a very narrow interpretation of "substantive" so that actual state substantive requirements may still be waived.[96] The EPA has final discretion.[97]

2. EPA-Delegated State RCRA Authority

RCRA § 3006(b)[98] authorizes a state to operate a RCRA hazardous waste management program "in lieu of" the federal program and states must modify their programs to meet new EPA regulations.[99] RCRA § 6001[100] specifically subjects federal facilities to all state requirements while CERCLA § 120(i)[101] is a clear waiver of sovereign immunity for federal facilities from RCRA requirements.[102] The House explained that § 120(i) ensures the continued authority of the states in selecting remedial actions and establishing cleanup schedules at federal facilities pursuant to RCRA.[103] Actions taken under state programs have the same force and effect as actions ordered by the EPA.[104]

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90. *See supra* note 51 and accompanying text.

91. *See supra* note 43 and accompanying text.

92. 42 U.S.C. § 9621(d) (1988) (requiring that the degree of cleanup must be at least equivalent to any Federal ARAR standard or any more stringent state standard).

93. *Id.*

94. CERCLA § 121(f)(3)(B), 42 U.S.C. § 9621(f)(3)(B) (1988) (detailing the method by which a state may bring a review action).

95. *Id.*

96. *See, e.g.*, 53 Fed. Reg. 51,394, 51,436, 51,443 (1988).

97. *Id.*

98. 42 U.S.C. § 6926(b) (1988) (authorizing the establishment of state hazardous waste programs in lieu of RCRA).

99. *See, e.g.*, 54 Fed. Reg. 48,608 (1989).

100. 42 U.S.C. § 6961 (1988) (applying federal, state and local laws to federal facilities).

101. 42 U.S.C. § 9620(i) (1988) (waiving sovereign immunity for federal facilities from RCRA enforcement).

102. United States v. Pennsylvania Dep't of Envtl. Resources, 778 F. Supp. 1328, 1331-32 (M.D. Pa. 1991) (holding that CERCLA establishes a clear waiver of federal sovereign immunity from all state hazardous waste laws, procedural and substantive).

103. 132 CONG. REC. 29,764 (1986) (remarks of Rep. Wyden).

104. 42 U.S.C. § 6926(d) (1988).

IV. INSTANT CASE

A. *Prevailing Issues*

1. A Challenge To The Remediation

The United States Court of Appeals for the Tenth Circuit unanimous decision in *U.S. v. Colorado*,[105] in an opinion written by Judge Baldock, analyzed the prevailing issue of whether a state can enforce its EPA-delegated state RCRA authority to regulate a NPL federal hazardous waste facility where a CERCLA cleanup is underway. The court decided that an attempt to enforce state hazardous waste laws is not a "challenge" to the CERCLA remedial action and thus there is no jurisdictional bar for the court to review this action or for Colorado to enforce its compliance orders,[106] contrary to the district court grant of summary judgment.[107]

2. Basin F on the NPL

The court found that placement on the NPL has no bearing on a federal facility's obligation to comply with EPA-delegated state hazardous waste laws under RCRA authority or a state's ability to enforce such laws.[108] The court asserted that if Congress had intended the placement of a federal facility on the NPL to exclude states from enforcing their EPA-delegated RCRA responsibilities, then Congress would have expressly so indicated.[109]

3. ARAR's As Exclusive State Participation

The court expressed that nothing in CERCLA supports the argument that Congress intended the ARAR's provision to be the singular method of state contribution in a hazardous waste cleanup.[110] Further, the court noted that ARAR's only allow a state to ensure compliance with state law at the completion of a remedial action, yet separate CERCLA provisions expressly contemplate the application of other state hazardous waste laws, regardless of whether a CERCLA response is underway.[111] The court also reasoned that since RCRA applies during the closure period of a regulated facility, the ARAR's process cannot be the exclusive means of state participation in the cleanup of a site subject to both RCRA and CERCLA.[112]

4. CERCLA Already Underway

Finally, the court did not afford any deference to the EPA's assertion that a state is precluded from exercising its EPA-delegated RCRA authority

105. United States v. Colorado, 990 F.2d 1565 (10th Cir. 1993).
106. *Id.* at 1579.
107. United States v. Colorado, No. 89-C-1646, 1991 U.S. Dist. LEXIS 13138 (D. Colo. Aug. 14, 1991).
108. United States v. Colorado, 990 F.2d 1565, 1580 (10th Cir. 1993).
109. *Id.*
110. *Id.* at 1581.
111. *Id.*
112. *Id.*

at a federal facility where a CERCLA response has been initiated.[113] The CERCLA § 122(e)(6) relied on by the EPA in its argument is buried within a subsection titled "Notice Provisions" in a separate part of the statute addressing settlements with potentially responsible parties and is contrary to the plain and sensible meaning of other applicable CERCLA sections.[114] The court reversed the district court's grant of summary judgment for the United States and remanded the case back to the district court with instructions to vacate the order prohibiting Colorado from enforcing the FCO.[115]

V. ANALYSIS

A. *Statutory Construction*

The Tenth Circuit supplied a masterful examination of some intricate details within two very complicated statutes. By rules of statutory construction, prior statutes relating to the same subject matter are compared and construed, if possible, to give effect to every provision in both.[116] "When two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[117] When considering federal pre-emption of a state regulatory law three possibilities exist. First, there must be a clear intent from Congress to pre-empt the state regulatory programs where the nature of the regulated matter permits no other conclusion or the Congress has unmistakably so ordered.[118] Next, pre-emption may be implicit if the scheme of the federal law is so pervasive as to make a reasonable inference that Congress left no room for the states to supplement the law.[119] And pre-emption is apparent when compliance with both federal and state regulations is impossible or when a state law is an obvious block to the accomplishment and objective of Congress.[120] The Tenth Circuit was correct to rule that CERCLA does not pre-empt Colorado's RCRA authority in the cleanup of the RMA. As in *Jones*,[121] the relationship between the state and federal laws must be considered as interpreted and applied, not merely as

113. United States v. Colorado, 990 F.2d 1565, 1583-84 (10th Cir. 1993).

114. *Id.* CERCLA § 122 (e)(6), 42 U.S.C. § 9622 (e)(6) (1988) (requiring presidential authorization to undertake remedial action at a site where an RI/FS is underway) is contrary to CERCLA §§ 114(a), 122, 152(d), 42 U.S.C. §§ 9614(a), 9622, 9652(d) (1988) (providing that states may impose additional requirements with respect to the release of hazardous substances, that CERCLA does not modify any liability of any person for the release of hazardous substances and that settlements may be agreed upon).

115. United States v. Colorado, 990 F.2d at 1584.

116. 2B NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 51.02, at 122 (5th ed. 1992).

117. County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 112 S. Ct. 683, 692 (1992) (citing Morton v. Mancari, 417 U.S. 535, 551 (1974)).

118. Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963). *See also* California v. ARC America Corp., 490 U.S. 93, 101 (1989) (holding that the historic police powers of the states were not to be superseded by federal acts, subject to the clear and manifest purpose of Congress).

119. Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2481 (1991).

120. *Id.* at 2482.

121. Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977).

written. Section 114(a) of CERCLA, allowing states to impose additional requirements with respect to the release of hazardous substances, originated in Senate Bill 1480[122] and emphasizes the intent of CERCLA to supplement and not to replace other statutes applicable to CERCLA sites. The Senate committee report on the 1986 SARA amendments to CERCLA reaffirmed that CERCLA was not intended to pre-empt state laws.[123] The SARA conference report "section 120" clarifies that CERCLA and RCRA require federal facilities to comply with all federal, state and local laws (excepting permits).[124]

The Tenth Circuit did not stop at rejecting the government's argument that CERCLA § 113(h) denies jurisdiction to a federal court to review any challenges to a remediation.[125] The court suggested that Colorado could still enforce a RCRA compliance order through a state court.[126]

The Appeals Court shrewdly rejected the federal government's interpretation of CERCLA and thereby averted the creation of a gaping CERCLA loophole. Endorsement of the federal government's argument would have also exempted private facilities and potentially responsible parties from many environmental laws which delegate enforcement authority to the states. The court thus avoided delivering a Superfund exemption to thousands of this country's worst toxic waste sites.[127]

B. *Available Negotiation Format*

Colorado has a duty to protect the health and safety of its citizens and to ensure a safe environment within its borders; the Tenth Circuit has endorsed Colorado's role as an equal partner in the cleanup scheme.[128] Surely, when the EPA and the Army finally recognize Colorado's legal status, negotiation regarding the controlling authority will occur.[129] Conflicts can be mediated through an IAG[130] with assignment of roles and responsibilities and shared authority between the EPA and Colorado. Other federal facilities on the NPL (Rocky Flats, Colorado and Hanford, Washington) are subject to remediation through the interagency process with recognition of CERCLA and RCRA authorities.

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122. S. REP. No. 848, 96th Cong., 2d. Sess. 95 (1980). *See also* 126 CONG. REC. 30984 (1980) (remarks of Sen. Stafford).

123. S. REP. No. 11, 99th Cong., 1st Sess. 3 (1985). Looking to the SARA legislative history of § 120(i) of CERCLA, it is obvious that Congress intended for the states to retain corrective action authority at federal facility CERCLA sites. Willging, *supra* note 6, at 80.

124. H.R. CONF. REP. No. 962, 99th Cong., 2d. Sess. 242 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3335.

125. United States v. Colorado, 990 F.2d 1565, 1579 (10th Cir. 1993).

126. *Id.*

127. *See RMA Decision supra* note 21, at 10423.

128. United States v. Colorado, 990 F.2d 1565 (10th Cir. 1993).

129. *See* Listing Policy for Federal Facilities, 54 Fed. Reg. 10,520, 10,523 (1989) (avoiding potential duplication and inconsistency are implementation issues, to be resolved in light of the facts of the case and after consultation between the EPA and the concerned state).

130. *See* IAG, *supra* note 71 and accompanying text.

C. *ARAR's in Effect*

The Tenth Circuit correctly recognized that the ARAR's process participation offered to Colorado for Basin F is frustrating to Colorado's interests and rights. At private sites the EPA is a state ally, but the EPA abandons the state when a federal facility is involved. The legislative history of SARA confirms the congressional intent to preserve the state hazardous waste laws at federal facilities as separate and distinct from the ARAR's provision.[131] It becomes obvious that Congress could not have intended ARAR's as the only means of state involvement in CERCLA cleanups since the ARAR's were enacted with the SARA amendments in 1986, six years after CERCLA. As a practical matter, the RMA Basin F cleanup would not meet the ARAR's until the remedial action is finished. Decades will pass before Colorado can be satisfied as to the quality of the remediation. Certainly this is no substitute for the Congressional intent of state involvement.

D. *The Crippled EPA*

The Tenth Circuit and the district court expressed concern regarding the unitary executive theory[132] which allows the Army and the EPA, "the federal family," to be represented by the same DOJ attorneys.[133] The district court in *Colorado v. Army*[134] also recognized the conflict of interest when the EPA's job is to achieve a quick and thorough cleanup and the Army's financial interest is to spend as little as possible. The court could not imagine how one attorney could vigorously and wholeheartedly advance both positions.[135] EPA's inability to enforce the necessary hazardous waste requirements against the Army heightens the importance of the enforcement role Colorado must serve at RMA.[136] The Tenth Circuit decided properly to allow Colorado its EPA-delegated RCRA authority. Otherwise Colorado has no protection from the Army controlling the Basin F cleanup through the circumscribed ARAR's process and the ineffective DOJ "family" attorneys. The federal government's historic poor compliance with environmental laws coupled with the lame EPA powers at federal sites leaves individual states as the sole authorities to ensure speedy and safe cleanups of contaminated federal facilities.[137]

Critics of the Tenth Circuit decision believe the court has opened the door to more "cooks in the kitchen." Some express fear that this decision will foster unavoidable delays and unnecessary litigation in the federal facilities cleanup scheme.[138] Yet Colorado, like other states with massive

131. *See* 132 CONG. REC. 28,449 (1986) (remarks of Sen. Chafee); 132 CONG. REC. 29,735 (1986) (remarks of Rep. Synar); 132 CONG. REC. 29,764 (1986) (remarks of Rep. Wyden).

132. *See* Debate, *supra* note 80 and accompanying text.

133. United States v. Colorado, 990 F.2d 1565, 1573 (10th Cir. 1993).

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

135. *Id.* at 1570.

136. *See* Amicus Brief *supra* note 8, at 12.

137. *RMA Decision*, *supra* note 21, at 10422-23.

138. John F. Seymour, *Tenth Circuit Rules that States May Enforce RCRA Requirements During Federal Facility Cleanups*, 4 FED. FACILITIES ENVTL. J. 245, 254 (1993). Mr. Seymour lists the

toxic contamination within state borders, does not look for one-upmanship or further litigious delay. In her letter of April 13, 1993 to Janet Reno, the United States Attorney General, Gale Norton, Attorney General for Colorado, expressed the belief that the federal government and the states should develop a cooperative relationship emphasizing cleanup instead of litigation.[139] Ms. Norton encouraged Ms. Reno to take a "fresh look at the Justice Department's position on the role of the states in regulating federal facility cleanups."[140]

E. *On The Horizon*

The future of federal facility compliance with state hazardous waste laws in CERCLA cleanup activities has become more certain. On October 6, 1992, Congress amended RCRA with the enactment of the Federal Facilities Compliance Act[141] including a provision that federal agencies are not immune from state civil penalties imposed under RCRA. The FFCA requires EPA to inspect and initiate enforcement actions for federal agency violations of environmental laws with the same treatment as that extended to a private party.[142] The legislative history confirms that the federal government is required to comply with all environmental laws, including RCRA.[143] Senator Baucus' comments express the Act's intent:

> This bill will ensure the Federal Government is required to comply with RCRA like everyone else. Quite frankly, I had thought this was always Congressional intent. The courts, however, have ruled that while that may have been our desire, the statute was not clear. With this legislation, there will be no question.[144]

Because the FFCA has made RCRA state enforceable, states may choose to withdraw from previous federal facility compliance agreements and enforce state RCRA requirements directly.[145] After the FFCA, federal agencies, states and local communities must relinquish the past struggles for superior position and work together to achieve environmental quality.[146]

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following concerns in light of the Tenth Circuit decision: 1) both states and private parties will be able to obtain pre-enforcement review of CERCLA cleanups; 2) states will now be less motivated to enter into interagency agreements (IAG); 3) it is unclear whether RCRA permits, not previously required, may now be needed for on-site CERCLA actions; 4) litigation may flourish since a RCRA citizen suit does not meet the general prohibition in CERCLA of "pre-enforcement review;" 5) CERCLA remediations will be more expensive since the state RCRA standards will reduce agency discretion and tailored site-specific remediation selection. *Id.* at 249-52.

139. *See* Editor's Postscript to Seymour, *supra* note 138, at 255.

140. *Id.* at 256.

141. Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (1992) [hereinafter FFCA].

142. Steve Gerstel, *Senate Votes to Crack Down on Federal Polluters*, UPI, Oct. 25, 1991, *available in* LEXIS, Nexis Library, UPI File.

143. 138 CONG. REC. S14,758 (daily ed. Sept. 23, 1992) (remarks of Sen. Chafee).

144. 138 CONG. REC. S14,756 (daily ed. Sept. 23, 1992) (remarks of Sen. Baucus).

145. *DOD OK in Norwalk, says GAO*, 3 DEFENSE CLEANUP ISSN: 0083-9735, Oct. 30, 1992.

146. Laurent R. Hourcle & William J. McGowan, *Federal Facility Compliance Act of 1992: Its Provisions and Consequences*, 3 FED. FACILITIES ENVTL. J. 359, 376 (1992).

VI. CONCLUSION

The entity which created the toxic hazard cannot be allowed to have the exclusive voice in how the mess is to be remedied. The states must be an equal partner in the cleanup process. As the deputy Colorado attorney general for natural resources aptly expressed, "at no other site do you have the person who polluted saying how much should be cleaned up."[147] Armed with the precedent of *United States v. Colorado*[148] and the enforcement power in the Federal Facility Compliance Act,[149] states possess muscle to regulate federal facilities under state RCRA authority and impose penalties for regulatory violations. The EPA must be permitted to wield its masterful enforcement authority over its sister executive branch agencies as it does over the private sector. Private citizens and individual states, not compromised by the unitary executive theory, must not be the only guardians over the federal facility compliance program. The federal government, states and the EPA must develop a collaborative strategy to cleanup the toxins and unknown future consequences of our irresponsible hazardous waste legacy.

Alana Bissonnette

147. *See Appeals Court Grants Colorado Authority to Regulate Day-To-Day Waste Management*, 23 ENV'T. REP. (BNA) 3161, 3162 (1993) (comments of Patricia S. Bangert).

148. United States v. Colorado, 990 F.2d 1565 (10th Cir. 1993).

149. *See* FFCA, *supra* note 141 and accompanying text.