

No. 07-4107

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

F. DOUGLAS CANNON; MARGARET LOUISE CANNON; and
ALLAN ROBERT CANNON,

Plaintiffs-Appellants,

v.

ROBERT M. GATES, Secretary, U.S. Department of Defense;
UNITED STATES DEPARTMENT OF DEFENSE;
UNITED STATES DEPARTMENT OF THE ARMY; and
UNITED STATES OF AMERICA,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Utah, Civil Action No. 05-CV-922-DB
The Honorable Dee Benson, District Judge

APPELLANTS' OPENING BRIEF
(Oral Argument Is Requested)

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CORPORATE DISCLOSURE STATEMENT

Appellants, F. Douglas Cannon, Margaret Louise Cannon, and Allan Robert Cannon, are individuals who have no corporate status; therefore, no corporate disclosure statement is required.

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STATEMENT OF RELATED CASES

The following cases previously before the United States Court of Appeals for the Tenth Circuit are related to this case: Tenth Circuit Numbers 02-4059 and 02-4066, which were published subsequently as *Cannon v. United States*, 338 F.3d 1183 (10th Cir. 2003).

STATEMENT OF JURISDICTION

Jurisdiction in the United States District Court for the District of Utah (hereinafter “District Court”) was predicated upon 28 U.S.C. § 1331 because the matter in controversy arose under the laws of the United States, including, but not limited to, the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6901, *et seq.* (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992), the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §§ 9601, *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551, *et seq.*

On April 27, 2007, Plaintiffs-Appellants (hereinafter “Cannons”) timely filed, pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B), a Notice of Appeal within 60 days of the entry of the District Court’s judgment. This Court has jurisdiction over this appeal, pursuant to 28 U.S.C. § 1291, because this is an appeal from a final decision of the District Court.

ISSUES PRESENTED

1. Whether the District Court erred in granting United States' Motion for Summary Judgment?
2. Whether the District Court erred in finding that it lacked jurisdiction pursuant to Section 113(h) of CERCLA?
3. Whether the District Court erred in holding that the purported activities of the United States Army Corps of Engineers relating to the Cannons' property qualify as removal action pursuant to Section 104 of CERCLA?

STATEMENT OF THE CASE

On July 21, 2005, the Cannons provided Defendants-Appellees (collectively "Department of Defense," "DOD," or "USACE") with their Notice of Endangerment and Intent to File Suit as required by statute prior to the Cannons filing a citizen suit against DOD pursuant to RCRA. This letter notified the DOD that it had contributed or is contributing to endangering activities on property owned by the Cannons. This property consists of approximately 1,425 acres located adjacent to the Army Dugway Proving Ground, in Tooele County, Utah ("Property").

On November 4, 2005, the Cannons filed their Complaint, Doc. No. 1, and, subsequently, DOD answered, Doc. No. 3.

On March 29, 2006, the Cannons filed their First Amended Complaint, setting out three claims for relief. Doc. No. 13 (Aplt. App. at 8–33). The first claim for relief was brought pursuant to the “citizen enforcement suit” portion of the citizen suit provision of RCRA, 42 U.S.C. § 6972(a)(1)(A), in which the Cannons alleged that the DOD’s activities involving the Property violated RCRA and Utah state regulations. Aplt. App. at 13. The second claim for relief was brought pursuant to the “imminent and substantial endangerment” portion of the citizen suit provision of RCRA, 42 U.S.C. § 6972(a)(1)(B). Aplt. App. at 14–15. The Cannons asserted that the DOD, through Project Sphinx,¹ “contributed and continue to contribute to the past or present handling, use, storage, treatment, transportation, or disposal of certain solid and/or hazardous wastes that present or may present an imminent and substantial endangerment to health or the environment on [the Property].” Aplt. App. at 14. The Cannons’ third claim for relief was brought pursuant to the APA, which provides that a court shall compel “agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1).

¹ Project Sphinx is the name given to the United States Army, World War II, weapons testing program that occurred on 11,000 acres of land outside of the Dugway Proving Grounds in northwestern Utah. The Cannons’ Property was included in the bombing range.

The Cannons alleged that the DOD's failure to cleanup the Property is action unlawfully withheld or unreasonably delayed. Aplt. App. at 15–16.

The Cannons sought declaratory judgment that the DOD contaminated the Property, that the DOD was in violation of RCRA and Utah state regulations, and that the DOD had unlawfully withheld and unreasonably delayed the cleanup of the Property. Aplt. App. at 16. The Cannons also requested injunctive relief “including, but not limited to, an order for remediation of the solid and hazardous wastes disposed of on the Property by Defendants, as necessary to address the imminent and substantial endangerment to human health and the environment that currently exists and to restore the property to a safe and useful condition.” Aplt. App. at 17.

On May 26, 2006, the DOD filed its motion for summary judgment. Doc. No. 21. After discovery, the motion was briefed fully and oral argument held. The District Court granted the DOD's Motion for Summary Judgment (“Order”)² Doc. No. 42 (Aplt. App. at 45–52), and issued its written judgment,³ making this case ripe for review in this Court. Doc. No. 43 (Aplt. App. at 53); *Cannon v. Gates*, No.

² The District Court Order Granting Defendants' Motion For Summary Judgment Dismissing Action Without Prejudice, Doc. No. 42, filed April 5, 2007, is filed herewith at Addendum p.49.

2:05-CV-00922-DB (D.Utah April 4, 2007); *see* Fed. R. App. P. 4(a)(1)(B).

Subsequently, the Cannons filed this appeal. Doc. No. 44.

STATEMENT OF FACTS⁴

On May 25, 1945, a “Construction, Survey & Exploration Permit” was signed by the Cannons’ grandfather, Jesse Fox Cannon, granting the DOD access to the Property. *Aplt. App.* at 32–33. The DOD agreed to “leave the [P]roperty in as good condition as it is on the date of the government’s entry.” *Id.* at 33. In September 1945, Jesse Fox Cannon reentered the Property and found that the DOD had damaged his mines and failed to keep its promise to cleanup the property. *Cannon v. United States*, 338 F.3d 1183, 1185 (10th Cir. 2003).

The Property contamination occurred during World War II under a DOD test program called “Project Sphinx” during which the DOD dropped high explosives and bombs, incendiary weapons, and chemical weapons on the Property. *Id.* at n.1. These high explosive bombs and rockets included 12,000-pound “Fall Boy” bombs, “Tiny Tim” rockets, and other types of high explosive munitions. *Cannon*

³ The District Court Judgment, Doc. No. 43, filed April 5, 2007, is filed herewith at Addendum p.57.

⁴ The facts of this case are mostly uncontested. Portions of the Statement of Facts are from the Findings of Fact found in *Cannon v. United States*, No. 98-CV-882J (D.Utah 2002), *rev’d on other grounds*, 338 F.3d 1183 (10th Cir. 2003).

v. United States, No. 98-CV-882J at 3 (D.Utah Feb. 1, 2002). The incendiary weapons included aviation gasoline, butane, gasoline, Napalm, PT Jell, and Napalm-gasoline mixtures. *Id.* at 2. The chemical weapons included the choking agent phosgene, the blood agent hydrogen cyanide, the blistering agent mustard, and distilled mustard. *Cannon*, 338 F.3d at 1185 n.1. In total, the DOD dropped over 3,000 rounds of ammunition containing either chemical or incendiary weapons, a majority of which contained chemical weapons. *Id.* Moreover, the DOD dropped more than 23 tons of chemical weapons on the Property during Project Sphinx. *Cannon*, No. 98-CV-882J at 3.

In 1993, the United States Army Corps of Engineers (“USACE”) conducted an Inventory Project Report (“INPR”) to determine the eligibility of the Yellow Jacket Target area as a Formerly Used Defense Site (“FUDS”).⁵ *Aplt. App.* at 58. One of the findings of fact resulting from the INPR was that, “In June of 1945, Dugway Proving Ground (DPG) conducted tests using persistent and non-persistent gases and flame type munitions in the Yellow Jacket Target Area.” *Aplt. App.* at 90. Based upon this finding of fact, among others, USACE found the Yellow Jacket Target Area qualified as a FUDS. *Id.* The INPR concluded that

⁵ The Yellow Jacket Site or the Yellow Jacket Target Area is the name given the FUDS area bombed by the DOD during Project Sphinx. It is named for the Yellow Jacket patented mining claim owned today by Margaret Louise Cannon.

“the site today represents a safety concern for both the local government and Department of Interior.” *Id.* at 91.

In November 1993, an Archives Search Report (“ASR”) was completed by USACE for the Yellow Jacket Target Area. *Aplt. App.* at 58. The ASR concluded that additional investigation was needed due to the activities of Project Sphinx. *Id.*

On July 13, 1994, the DOD sent an access agreement to Margaret Louise Cannon and Allan Robert Cannon. On July 18, 1994, the DOD sent an access agreement to Floyd Douglas Cannon. In each agreement, the DOD stated that the purpose was “to determine whether or not these lands have been impacted by unexploded ordnance. According to our records, you own property included in the survey area.” *Cannon*, No. 98-CV-882J at 3.

On August 23, 1994, the DOD issued a press release announcing “an informal Availability Session” at the Toole County Courthouse regarding the DOD’s Engineering Evaluation/Cost Analysis (“EE/CA”) to determine risks associated with the Yellow Jacket Target Area. *Cannon*, 338 F.3d at 1186–1187.

The release explained that testing in and around the Property involved:

[T]oxic, smoke, and flame agents in bombs, mortar and artillery shells, rockets, and light case tanks. Gasoline butane, the non-persistent agents Phosgene, Hydrogen Cyanide, and Cyanogen Chloride, and the persistent agent Mustard Gas were used in the tests.

Id. at 1187. The release explained that, once testing ended, “the cleanup process involved a sweep of the areas to clear remaining surface ordnance;” nonetheless,

“some soil contamination and surface Ordnance and Explosive Waste (‘OEW’) may still exist.” *Id.*

On August 3, 1994, Margaret Louise Cannon attended a Public Availability Session conducted by the DOD and obtained “Fact Sheets” that noted potential ordnance contamination at the Property. A portion of the “Fact Sheet” labeled “Potential Hazards” read:

A study by the [USACE] in 1993 . . . reported that it is highly probable that these mine areas are contaminated with hazardous ordnance and explosive waste (OEW). It is suspected that there is subsurface OEW throughout the area which may come to the surface through erosion, frost heaving, intrusive work such as digging, or recreational land use. Additionally, rounds that may have fallen short or long of intended targets could also present public hazards.

Cannon, 338 F.3d at 1187.

In the fall of 1994, the DOD conducted interviews with community members to assess the public’s level of concern regarding the planned EE/CA project. *Id.* On December 6, 1994, Margaret Louise Cannon was interviewed. The Interviewer’s notes indicate that Dr. J. Floyd Cannon, father to the Appellants in the instant case, had asked the DOD four to six times to clean up the ordnance contamination and was “treated horribly.” *Id.* Dr. Cannon witnessed unexploded ordnance “all over” the property and was “livid over” the United States’ inactivity. *Id.*

In 1996, a DOD contractor prepared a draft EE/CA (“draft 1996 EE/CA”) on Project Sphinx’s impacts in the Yellow Jacket Target Area. The Cannons’ Property falls within the area studied by the draft 1996 EE/CA. *Cannon*, No. 98-CV-882J at 3. “A number of military munitions items, including debris, were identified on the surface [of the Yellow Jacket Target Area] and at least one intact ordnance item was disposed of by demolition during the site characterization work.” *Aplt. App.* at 58. The draft 1996 EE/CA concluded:

The density of the geophysical anomalies and ordnance-related debris, the presence of Unexploded Ordnance (“UXO”) and UXO-related items on the surface, and the presence of multiple spent ordnance items imply that a relatively higher hazard exists due to UXO/Chemical Warfare Material (“CWM”) contamination at the Yellow Jacket Mines than at the other investigation areas.

Cannon, 338 F.3d at 1189.

The draft 1996 EE/CA discussed five alternatives for the Yellow Jacket Target Area: Alternative 1: No Further Action; Alternative 2: Fencing, Posting Signs, Public Awareness, Training, and Land Management Plan; Alternative 3: Acquisition of Mine Claims and Property Titles, Fencing, Posting Signs, and Land Management Plan; Alternative 4: Acquisition of Mine Claims and Property Titles, Fencing, Posting Signs, Land Management Plan, Limited Removal Action for Unexploded Ordnance and Chemical Warfare Material, and Mine Sealing; and Alternative 5: Full-Scale Removal of Unexploded Ordnance and Chemical Warfare Material and Mine Clearance. *Cannon*, No. 98-CV-882J at 5.

The cost estimated for Alternative 4 was \$1,830,000 and the cost estimated for Alternative 5 was \$12,703,000. *Id.* After evaluating the findings, and the estimated costs of the various proposed alternatives, the contractor recommended that Alternative 4 be selected. *Id.* Alternative 4 was presented to the Utah State Department of Environmental Quality (“DEQ”), *Aplt. App.* at 70, which rejected it. *Id.* The DOD made no effort to work with the Utah DEQ on a solution. Therefore, the draft 1996 EE/CA was never finalized and no action was taken to clean up the munitions and ordnance related debris remaining on the Cannons’ Property. *Id.*; *Cannon*, No. 98-CV-882J at 6.

On December 8, 1998, Margaret Louise Cannon and Allan Robert Cannon filed suit alleging trespass, loss of quiet enjoyment, and nuisance due to the impact of Project Sphinx on the Property. *Cannon*, No. 98-CV-882J. On February 1, 2002, the District Court awarded the Cannons \$160,936.85. *Id.* On August 11, 2003, this Court held that the Federal Tort Claim Act’s two-year statute of limitations, 28 U.S.C. § 2401(b), had run; thus, this Court vacated the District Court’s ruling. *Cannon*, 338 F.3d at 1193–1194. Nonetheless, this Court stated:

The result the law dictates in this case does not diminish the harm to the Cannons’ property which has persisted over half a century. . . . Prior to testing, the United States expressly promised the Cannons’ grandfather that it would “leave the property of the owner in as good condition as it is on the date of the government’s entry.” Fifty-eight years later, the Government has yet to fulfill its contractual obligation to the Cannon family. They are still waiting.

The United States Government has yet fully to recognize and appreciate Jesse F. Cannon's contribution to National Security during World War II. The Government should have lived up to its obligation long ago. Unfortunately, applicable law rendered the district court powerless to grant the Cannons the monetary relief to which they undoubtedly are entitled absent decontamination.

Cannon, 338 F.3d at 1194.

Meanwhile, in October 2001, an addendum to the 1993 ASR, "Relook for Project Sphinx at the Dugway Mountains (aka Yellow Jacket Ranges-Dugway Proving Ground), Dugway Utah," ("draft ASR Relook") was produced in interim draft form. *Aplt. App.* at 58. This draft ASR Relook found "clear evidence that the [DOD] utilized conventional ordnance at several mines in the Dugway Mountains" and "that the [DOD] utilized chemical warfare materials at several mines in the Dugway Mountains as part of a three month testing program." *Aplt. App.* at 93.

In 2006, a DOD contractor produced the draft 2006 Site Inspection Work Plan for the Yellow Jacket Ranges ("draft 2006 SI Work Plan"). "This plan was developed to evaluate potential Munitions and Explosives of Concern in the former target areas." *Aplt. App.* at 127. This document is based upon the 1993 ASR and archival research. *Id.* The draft 2006 SI Site Inspection Work Plan contains no indication that it will ever be finalized beyond draft form. Furthermore, it contains no timeline for project start or end dates. To be finalized, the draft 2006 SI Site Inspection Work Plan must be commented upon by the Bureau of Land

Management and the DEQ. *Id.* at 129. USACE must then “respond to those comments in writing and negotiate any discrepancies between the DEQ and USACE expectations.” *Id.* USACE has shown a history of refusing to negotiate discrepancies between the DEQ and USACE expectations; it refused to take such action regarding the draft 1993 EE/CA. *See* draft 1993 EE/CA discussion, *supra*.

STANDARD OF REVIEW

This Court reviews questions of statutory interpretation *de novo*. *United States v. RX Depot, Inc.*, 438 F.3d 1052, 1054 (10th Cir. 2006); *Employers Reinsurance Corp. v. Mid-Continent Cas. Co.*, 358 F.3d 757, 774 (10th Cir. 2004).

STATUTORY BACKGROUND

I. RESOURCE CONSERVATION AND RECOVERY ACT.

A. RCRA Applies Against The DOD.

RCRA was enacted in 1976 “to assist the cities, counties and states in the solution of the discarded materials problem and to provide nationwide protection against the dangers of improper hazardous waste disposal.” H.R. Rep. No. 1491, 94th Cong. 2d Sess. 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6249.

Congress declared it to be national policy that “[w]aste [] should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.” 42 U.S.C. § 6902(b).

In accordance with 42 U.S.C. § 6926(b), the Environmental Protection Agency (“EPA”) authorized the State of Utah to “carry out [a hazardous waste program pursuant to RCRA] in lieu of the Federal program . . . and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste.” 40 C.F.R. § 272.2251; *see* H.R. Rep. No. 1491(I) at 32 (under RCRA, states retain “primary authority” to implement hazardous waste programs).⁶ Moreover, “[t]he federal government must comply with RCRA or an EPA-authorized state program ‘to the same extent as any person’” *Id.*; 42 U.S.C. §§ 6926(d), 6961.

B. RCRA Authorizes Citizen Suits.

RCRA authorizes two different citizen suits: “Citizen enforcement suits” by “any person” for any violation of RCRA, 42 U.S.C. § 6972(a)(1)(A), and “imminent and substantial endangerment suits” by “any person” to prevent or abate any action that is a risk to public health or the environment, *id.* § 6972(a)(1)(B).

Citizen enforcement suits are permitted “against prior owners and operators to remedy continuing violations resulting from past disposal practices including the

⁶ “RCRA does not preclude a state from adopting more stringent requirements for the treatment, storage and disposal of hazardous waste.” 42 U.S.C. § 6929; *United States v. Colorado*, 990 F.2d 1565, 1569 (10th Cir. 1993); *see also Old Bridge Chems. Inc. v. New Jersey Dep’t of Env’tl. Protection*, 965 F.2d 1287, 1296 (3d Cir. 1992) (“RCRA sets a floor not a ceiling for state regulation of hazardous wastes”).

performance of proper closure and post-closure care.” *Briggs and Stratton Corp. v. Concrete Sales and Servs.*, 20 F.Supp.2d 1356, 1373 (M.D.Ga. 1998); *see also Toledo v. Beazer Materials and Servs., Inc.*, 833 F.Supp. 646, 655–656 (N.D. Ohio 1993); *Gache v. Harrison*, 813 F.Supp. 1037, 1040–1042 (S.D.N.Y. 1993).

“Imminent and substantial endangerment” suits are permitted regarding past violations, “so long as those violations are a present threat to health or the environment.” *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1014 (11th Cir. 2004); *see also Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485-486 (1996).

The essential elements of an “imminent and substantial endangerment”-based RCRA cleanup action include:

(1) that the defendant is a person, including, but not limited to, one who was or is a generator or transporter of solid or hazardous waste or one who was or is an owner or operator of a solid or hazardous waste treatment, storage, or disposal facility; (2) that the defendant has contributed to or is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste; and (3) that the solid or hazardous waste may present an imminent and substantial endangerment to health or the environment.

Parker, 386 F.3d at 1014 (*quoting Cox v. Dallas*, 256 F.3d 281, 292 (5th Cir. 2001)). The term “endangerment” means “a threatened or potential harm, and does not require proof of actual harm,” *id.*; *see Meghrig*, 516 U.S. at 486; however, the endangerment must be “imminent,” that is, it “threatens to occur immediately.” *Parker*, 386 F.3d at 1014 (*quoting Meghrig*, 516 U.S. at 485).

II. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT.

“Because RCRA only applied prospectively, it was ‘clearly inadequate’ to deal with ‘the inactive hazardous waste site problem.’ Consequently, Congress enacted [CERCLA] in 1980 ‘to initiate and establish a comprehensive response and financing mechanism to abate and control vast problems associated with abandoned and inactive hazardous waste disposal sites.’” *United States v. Colorado*, 990 F.2d 1565, 1570 (10th Cir. 1993), *quoting* H.R. Rep. No. 1016(I) at 17–18. Thus, unlike RCRA, CERCLA is “principally designed to effectuate the cleanup of toxic waste sites and to compensate those who have attended to the remediation of environmental hazards.” *Meghrig*, 516 U.S. at 482; *see also General Electric Co. v. Litton Ind. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990) (the “two . . . main purposes of CERCLA” are “prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party.”).

Section 104 of CERCLA provides:

Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to

remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time⁷

42 U.S.C. § 9604(a)(1).

Congress defined the terms “remove” and “removal” as:

[S]uch actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

42 U.S.C. § 9601(23).

Congress defined the term “remedial action” as:

[T]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not

⁷ The President delegated his authority under Section 104(a) of CERCLA:

To the heads of Executive departments and agencies, with respect to remedial actions for releases or threatened releases which are not on the National Priorities List and removal actions other than emergencies, where either the release is on or the sole source of the release is from any facility or vessel under the jurisdiction, custody or control of those departments and agencies.

Executive Order No. 12580; 52 *Fed. Reg.* 2923, 2924 (Jan. 23, 1987).

migrate to cause substantial danger to present or future public health or welfare or the environment.

42 U.S.C. § 9601(24).

The DOD defined removal actions as “removing a contaminant or removing an endangerment from an activity or site. . . . Usually when you do a removal, it’s time-critical, or even if it’s not time-critical, it’s taking a physical action on a site” Aplt. App. at 62. The DOD defined remedial actions as “a long-term [action], which could be putting in monitoring wells or putting in some kind of long-term treatment system. . . . [Y]ou take physical action, but it has long-term management activities, remedial investigation, feasibility studies, putting in wells, monitoring wells, doing pump-and-treats. . . . it’s a *long-term action* before you actually obtain your goals.” *Id.* (emphasis added).

Under Section 113(h) of CERCLA, federal courts lack jurisdiction over challenges to removal or remedial actions selected under Section 104 of CERCLA, 42 U.S.C. § 9604.⁸ 42 U.S.C. § 9613(h). *See Shea Homes Ltd. P’ship. v. United States*, 397 F.Supp.2d 1194, 1202 (N.D.Cal. 2005).

⁸ Section 113(h) of CERCLA has five exceptions, none of which are at issue here.

III. FORMERLY USED DEFENSE SITES/DEFENSE ENVIRONMENTAL RESTORATION PROGRAM.

The Defense Environmental Restoration Program (“DERP”) was established by the Superfund Amendments and Reauthorization Act of 1986. 10 U.S.C. § 2701(a)(1). “The goal of the DERP . . . is to reduce, in a cost-effective manner, the risks to human health and the environment attributable to contamination resulting from past Department of Defense activities.” *Aplt. App.* at 96. Under DERP, “the Secretary of Defense shall carry out a program of environmental restoration at facilities under the jurisdiction of the Secretary.” *Id.* Additionally, the “Secretary shall carry out (in accordance with the provisions of this chapter and CERCLA) all response actions with respect to releases of hazardous substances from . . . [e]ach facility or site which was under the jurisdiction of the Secretary and owned by, leased to, or otherwise possessed by the United States at the time of actions leading to contamination by hazardous substances.” 10 U.S.C. § 2701(c)(1).

The FUDS program was established to address those locations described under 10 U.S.C. § 2701(c). *See Aplt. App.* at 106. A FUDS is defined as “real property that was formerly owned by, leased by, possessed by, or otherwise under the jurisdiction of the Secretary of Defense . . . prior to October 17, 1986. The status of a site as a FUDS is irrespective of current ownership or current responsibility within the federal government.” *Id.* Furthermore, “[t]he Secretary of Defense shall develop and maintain an inventory of defense sites that are known

or suspected to contain unexploded ordnance, discarded military munitions, or munitions constituents.” 10 U.S.C. § 2710(a). These sites shall then be assigned “a relative priority for response activities related to unexploded ordnance, discarded military munitions, and munitions constituents based on the overall conditions at the defense site.” *Id.* § 2710(b). The DOD is required to update the list of unexploded ordnance (“UXO”) defense sites and the prioritization of UXO defense sites to reflect new information as it becomes available. 10 U.S.C. § 2710(c)(1).

Funding for DERP was authorized through the National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 322(a)(1), 110 Stat. 2422, 2477 (1996). That Act created a number of environmental restoration accounts, including a separate environmental restoration account for FUDS. 10 U.S.C. § 2703(a) & (a)(5).

SUMMARY OF ARGUMENT

The Cannons’ Property was bombed by the DOD during a World War II program known as Project Sphinx. This lawsuit is an attempt to compel the DOD to clean up the Property as it has failed to do so for the past 62 years. The Cannons assert that the DOD has a statutorily mandated duty to clean up the Property pursuant to RCRA, 42, U.S.C. §§ 6901, *et seq.*

The District Court erroneously held that it lacked jurisdiction, pursuant to Section 113(h) of CERCLA, 42 U.S.C. § 9613(h), which provides that “no federal court shall have jurisdiction . . . to review challenges to removal or remedial action selected under section 9604 of this title,” to hear the Cannons claims. In so ruling, the District Court failed to give effect to the language of the statute because the District Court failed to find that the DOD had “selected” a removal or remedial action. Furthermore, given the failure of the DOD to “select[]” a removal or remedial action, the Cannons’ suit can not be a “challenge” as defined by the courts. Additionally, the District Court erroneously found, without analysis, that activities by the DOD were remedial action for the purposes of CERCLA; the cases relied upon by the District Court were inapposite.

Furthermore, the District Court interpreted Section 113(h) of CERCLA so as to prohibit and eliminate any judicial review and remedy. The DOD was required to provide “an objective criterion by which to assess when its amorphous study and investigation phase may end,” *Frey v. Environmental Protection Agency*, 403 F.3d 828 (7th Cir. 2005); nonetheless, the DOD provided no timeline for any activity that allegedly might ever occur at the Cannons’ Property.

Finally, Section 113(h) of CERCLA was not designed to prevent lawsuits that seek only to compel statutorily mandated cleanup. Nevertheless, the District

Court ruling allows the DOD, as the polluter, to use Section 113(h) of CERCLA as a shield to prevent any cleanup of the Cannons' Property in perpetuity.

ARGUMENT

I. THE DISTRICT COURT ERRED IN RULING THAT IT LACKED JURISDICTION; THE DOD HAS NOT SELECTED REMOVAL OR REMEDIAL ACTION UNDER SECTION 104 OF CERCLA.

A. Standard Of Review.

This Court reviews questions of statutory interpretation *de novo*. *United States v. RX Depot, Inc.*, 438 F.3d 1052, 1054 (10th Cir. 2006); *Employers Reinsurance Corp. v. Mid-Continent Cas. Co.*, 358 F.3d 757, 774 (10th Cir. 2004).

B. The District Court Erred In Ruling That The DOD Has Selected Remedial Action Under Section 104 Of CERCLA.

The District Court held that action undertaken by the DOD “fall[s] within the statutory definition of ‘removal. . . .’” Order at 5; Aplt. App. at 49. Without explanation, the District Court then held that “A removal or remedial action taken by an agency under the delegation of Executive Order 12,580 (Jan. 23, 1987), such as the Corps’ activities on the Property, is an action ‘under’ CERCLA section 104” Order at 5-6; Aplt. App. at 49-50 (emphasis added). The District Court is in error.

The terms “removal” and “remedial action” are terms of art defined by Section 101 of CERCLA. Section 101 defines “remedial action” as “those actions

consistent with permanent remedy taken instead of or in addition to removal actions. . . .” 42 U.S.C. § 9601(24). “Remedial action” includes:

[S]torage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling of reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.

Id. § 9601(24).

The District Court never mentioned the statutory definition of “remedial action” or analyzed whether the DOD has selected “remedial action,” as that term is defined by Section 101, at the Property. Had the District Court done so, it would have been required to hold that obligating funds, providing a draft SI Work Plan, and soliciting rights-of-entry for properties involved do not fall within what Section 101 of CERCLA defines as “remedial action.” *See* Order at 5; *Aplt. App.* at 49 (“[T]he Corps has undertaken efforts to begin the site inspection . . . , including having obligated funds for a contract for the work, providing a draft site inspection workplan . . . , and soliciting rights-of entry for properties involved in the investigation.”) Therefore, the District Court erred in holding that the DOD’s activities at the Property were “remedial action” as defined in CERCLA and as interpreted by the courts.

Furthermore, there is no “remedial action” under CERCLA until that action has been selected publicly and has been committed to by USACE in accordance with the procedure specified by law, which involves performance of the remedial investigation and feasibility study (“RI/FS”) to define the contamination problem and assess alternatives and public comments, and preparation of a record of decision. Aplt. App. at 114, 124; 40 C.F.R. § 300.430; *see Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1019 (3d. Cir. 1991) (Section 113 of CERCLA precluded judicial review of completed pre-cleanup studies, including RI/FS); *Shalk v. Reilly*, 900 F.2d 1091, 1093 (7th Cir. 1990) (Section 113 of CERCLA precluded judicial review where Remedial Alternatives Assessment, which “served the same purpose as the present day” RI/FS, had been completed); *Razore v. Tulapip Tribes of Washington*, 66 F.3d 236, 239 (9th Cir. 1995) (RI/FS constitutes a removal or remedial action for purposes of CERCLA section 113); *Reynolds v. Lujan*, 785 F.Supp. 152, 154 (D.N.M. 1992) (Section 113 of CERCLA precluded judicial review where RI/FS had been performed); *Hanford Downwinders Coal., Inc. v. Dowdle*, 841 F.Supp. 1050, 1060 (E.D.Wash. 1993) (CERCLA section 113 precluded judicial review where “health assessments are functionally akin to” RI/FS); *California v. Celtor Chem. Corp.*, 901 F.Supp. 1481, 1488 (N.D.Cal. 1995) (RI/FS constitutes a CERCLA removal action). As the statute and cases

demonstrate, “selection” of a “remedial action” occurs with the completion of the RI/FS and its attendant Record of Decision.

The District Court was incorrect to conclude that the actions it found ongoing at the Cannons’ Property are either “remedial actions” or demonstrate that the DOD has “selected” specific “remedial action.” Therefore, the District Court must be reversed.

C. The DOD Has Not “Selected” A Removal Under Section 104 of CERCLA.

Section 113(h) of CERCLA provides:

No federal court shall have jurisdiction under Federal Law . . . or under State law . . . to review any challenges to removal or remedial action *selected under section 9604 of this title.*

42 U.S.C. § 9613(h) (emphasis added). Read plainly, a federal court lacks jurisdiction to review a challenge to a removal or remedial action if there has been a selection of that action under Section 104 of CERCLA. The District Court failed to give effect to this plain language of Section 113(h) of CERCLA because the DOD has not “selected” a removal or remedial action in accordance with the procedures provided by 42 U.S.C. § 9604.

1. A “decision document” is required before the DOD may “select” a removal.

CERCLA distinguishes between two types of cleanups: removal actions and remedial actions. 42 U.S.C. § 9601(23), (24). “In short, removal actions are

temporary measures taken to protect against the threat of an immediate release of hazardous substances into the environment, whereas remedial actions are intended as permanent solutions.” *Fort Ord Toxics Project, Inc. v. California Env'tl. Prot. Agency*, 189 F.3d 828, 833–834 (9th Cir. 1999); *see Frey v. Environmental Protection Agency*, 403 F.3d 828, 835 (7th Cir. 2005) (“Removal refers to a short-term action taken to halt risks posed by hazardous wastes immediately.”) The DOD has not “selected” any “temporary measures” at the Yellow Jacket Target Area; that is, no temporary measures have been taken to “protect against the threat of an immediate release of hazardous substances into the environment.”

Moreover, it is impossible for a removal action to be selected prior to the completion of a Site Inspection (“SI”) when a SI is scheduled at a FUDS project. The objectives of a SI are to: (1) Eliminate from further consideration those releases that pose no significant threat to public health or the environment; (2) Determine the potential need for removal; (3) Collect or develop additional data, appropriate for HRS scoring by the EPA; and (4) Collect data, as appropriate, to characterize the release for effective and rapid initiation of the RI/FS. Aplt. App. at 115. Therefore, only after the SI is complete can the need for a removal be

determined and hence “selected.” Even then, USACE must still follow additional steps to “select[]” the appropriate removal action.⁹

It is impossible, as the District Court erroneously held, for a draft SI Work Plan to constitute a “selected” “removal” because USACE only has the choice of three removals at FUDS properties: (1) Emergency; (2) Time-Critical; (3) Non-Time-Critical. Aplt. App. at 117. “Emergency removal actions address immediate, unacceptable hazards or risks and must commence within hours of discovery.” *Id.* Time-Critical removal action (“TCRA”) “is a removal action for which less than six months planning time is available before on-site activities must begin.” Aplt. App. at 119. The key items to a TCRA are “providing the lead regulator notice and opportunity for comment on proposed actions, the Action Memorandum, and the availability of the Administrative Record.” Aplt. App. at 119. The Administrative Record file must be available for public review and

⁹ USACE may complete two SIs for FUDS projects. “The NCP does not require that a removal Preliminary Assessment/Site Inspection (“PA/SI”) be performed when a remedial PA/SI has already been completed. 40 C.F.R. § 300.410 provides that removal site evaluation shall be undertaken, as appropriate, by the lead agency and that the removal SI *may* be performed if more information is required than was provided by the PA. Therefore, if during the course of investigations, the determination is made that a removal action is required, the remedial site evaluation already performed will be considered adequate to meet the requirements of a removal site evaluation.” Aplt. App. at 115 (emphasis in original).

comments within 60 days of the start of fieldwork. *Id.* The general difference between a TCRA and a Non-Time-Critical removal action is the time frame; non-time-critical removal actions provide for at least six months before on-site activities are to be initiated. *Id.* at 119.

A USACE “Decision Document” is required prior to the selection of either of these removals. An Action Memorandum must be completed following an emergency removal action and before conducting a TCRA. *Id.* at 117, 119. An EE/CA is required prior to a non-time-critical removal action. *Id.* at 120. The DOD has produced none of these documents and has taken none of these actions at the Cannons’ Property. Therefore the DOD has not “selected” a “removal” pursuant to Section 104 of CERCLA.

Given that the DOD has not completed the SI, EE/CA, RI/FS, or a Decision Document (Action Memorandum or EE/CA), it is clear that the DOD has not “selected” a “removal” pursuant to Section 104 of CERCLA. The activities relied upon by the District Court in its ruling—even if they were valid, final agency decisions, which they are not—are merely paper exercises involving archived

documents.¹⁰ *See* Aplt. App. at 58, 59. The DOD’s activities neither constitute nor will lead to the “select[ion]” of a Section 104 of CERCLA “removal” at the Cannons’ Property. Aplt. App. at 74–75.¹¹ The DOD provided no evidence that it ever has “selected,” or ever will “select[]” a “removal” for the contamination left on the Cannons’ Property.

The mere presence of a potential or hypothetical action in the mind of the DOD’s attorney, which has not been “selected” pursuant to statute by USACE does not qualify as a “removal.” Without a “selected” “removal,” it is impossible for Section 113(h) to apply; therefore, the District Court must be reversed.

2. The District Court failed to analyze whether the DOD “selected” a removal action.

CERCLA does not define the word “select” or “selected.” In interpreting a statute, this Court begins with its plain language. *United States v. Morgan*, 922

¹⁰ The draft 1996 EE/CA was developed for a possible CERCLA removal action at the Yellow Jacket Target Area, Aplt. App. at 58; however, due to FUDS funding limitations and the failure of the DOD to consider comments from DEQ, the document was never finalized. *Id.*; *see also* Aplt. App. at 70. Additionally, the DOD admits that the draft 1996 EE/CA is now invalid and will not be relied upon by the USACE in the selection of any Section 104 of CERCLA removal or remedial action for the Yellow Jacket Target Area. Aplt. App. at 73–74.

¹¹ No funding currently exists for a removal or remedial action at the Property. Aplt. App. at 84. In fact, of the funding “programmed” for 2007, none is for a removal or remedial action at the Property. *Id.*

F.2d 1495, 1496 (10th Cir. 1991). “In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.” *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

The District Court held:

It is undisputed that the Corps has undertaken efforts to begin the site inspection process at the Yellow Jacket FUDS site, including having obligated funds for a contract for the work, providing a draft site inspection workplan to the Plaintiffs and the Utah Department of Environmental Quality (“UDEQ”), and soliciting rights-of-entry for properties involved in the investigation. . . . These actions are also authorized pursuant to CERCLA section 104(b) as “investigations, monitoring, surveys, testing, and other information gathering. . . .” As a result the activities undertaken and to be undertaken by the Corps at the Yellow Jacket FUDS site constitute a “removal or remedial action selected under” CERCLA section 104 within the meaning of section 113(h).

Order at 5, Aplt. App. at 49 (emphasis added). Although the District Court was correct to focus on “removal” as defined by Section 104 of CERCLA, its conclusion was premature because the District Court failed to determine whether USACE had “selected” a “removal” pursuant to Section 104 of CERCLA. Instead, the District Court wrote the word “selected” out of the statute and included in its place the word “undertaken.”

“Selected” is defined as, “To take by preference from among others; to pick out; to cull.” Black’s Law Dictionary 1359 (6th ed. 1995). “Undertaken” is defined as, “To take on oneself; to engage in; to enter upon; to take in hand; set

about; attempt.” *Id.* at 1526. Section 113(h) of CERCLA only robs a court of jurisdiction when the DOD has “selected” a removal or remedial action pursuant to Section 104 of CERCLA. “[I]t is for Congress, not this Court, to rewrite the statute.” *Blount v. Rizzi*, 400 U.S. 410, 419 (1971).

Additionally, that the purported “efforts to begin the site inspection process at the Yellow Jacket FUDS site” include “investigations” or “information gathering” is legally irrelevant since USACE has yet to “select[]” a “removal” pursuant to Section 104 of CERCLA. The DOD produced no evidence that it had “selected” any “removal action” from among other removal actions that it might “undertake[.]” The District Court’s failure to require the DOD to “select[]” a “removal” in accordance with CERCLA is fatal and must be reversed.

D. The Cases Relied Upon By The District Court Are Inapposite.

The District Court cited two cases as examples of removal or remedial actions under Section 104 of CERCLA: *Shea Homes Limited Partnership v. United States*, 397 F.Supp.2d 1194 (N.D. Cal. 2005), and *R.E. Goodson Construction Company, Inc. v. International Paper Co.*, No. C/A 4:02-4284-RBH, 2005 WL 2614927 (D.S.C. Oct. 13, 2005). *See* Order at 6; Aplt. App. at 50. The Cannons agree that these cases provide good examples of removal or remedial actions. In fact, the Cannons have been waiting hopefully for 62 years for the

DOD to perform the same activities at their Property. However, these cases are inapposite here.

In *Shea Homes*, the plaintiff purchased property that was previously part of Hamilton Air Force Base in California, which had been used as a landfill for solid and hazardous waste disposal. The property was designated a DERP/FUDS and the USACE was “engaged in various efforts to investigate, remediate, and monitor the waste.” *Shea Homes*, 397 F.Supp.2d at 1197. A removal had already occurred, a remedy was chosen, and a cap was installed to cover the waste. *Id.* Subsequent methane seepage at the site caused USACE to submit a range of remedial options, including “install[ation of] a 1600 foot Vent Trench with an impermeable liner in the buffer zone area between the landfill cap and Shea’s property in order to intercept any landfill gas prior to migrating off-site.” *Id.* USACE was also working toward a deadline to install a gas control system. *Id.* Clearly, in *Shea Homes*, USACE had taken detailed, on-the-ground removal and remedial actions selected pursuant to Section 104 of CERCLA. Additionally, USACE even had a plan in place to abate further contamination. *Id.* These actions are the exact actions defined by Section 101(23), (24) and Section 104(b) of CERCLA. 42 U.S.C. §§ 9601(23), (24), 9604(b). The Cannons would be thrilled with such actions at the Property and this suit would not be needed if these were the facts in the case at bar! Instead, the Cannons are left with USACE “obligat[ing] funds for

a contract for the work, providing a draft site inspection workplan to the plaintiffs and the Utah [DEQ], and soliciting rights-of-entry for properties involved in the investigation.” Order at 5; Aplt. App. at 49. It is difficult to think of these activities in the same category as the on-the-ground removal and remedial action that took place in *Shea Homes*.

Shea Homes also presented different claims to the court. There the plaintiff alleged that USACE “failed to properly and timely implement its remedy and to satisfactorily abate the contamination, causing [plaintiff] to suffer damages.” *Shea Homes*, 397 F.Supp.2d at 1197. Again, the Cannons wish they were in such a position; *i.e.*, a position where a remedial plan was in place and they knew a cleanup was planned and imminent. Nothing has been done by USACE at the Cannons’ Property that is remotely similar to the actions taken by USACE in *Shea Homes*. *Shea Homes* is inapposite.

Additionally, the District Court relies on *R.E. Goodson Construction Company, Inc.*, an unpublished decision that involved property in South Carolina that was leased by the United States from 1941 through 1948 for World War II weapons testing. In 1953, the United States settled a claim by the original landowner for damages and improvements to the property. *Goodson*, 2005 WL 2614927, *2. Subsequently, USACE determined the property was eligible under the DERP/FUDS program, an ASR was completed, and an EE/CA prepared. *Id.* at

*3. However, “From 2000 to 2002, [USACE] funded and performed a Time-Critical Removal Action on about forty (40) acres of Goodsons’ property inside the Range III Target Zone.” *Id.* (emphasis added). “This work involved the removal of exploded scrap and unexploded ordnance at depths up to twenty-six (26) feet below the land surface. As a result of this action, 2158 items classified as UXO, including a two hundred fifty (250) pound bomb, were discovered and removed.” *Id.* (emphasis added).

Given the existence of the “Time-Critical Removal Action,” it is no surprise that the *Goodson* court held that the activities undertaken by USACE were “removal actions authorized under § 104(a) of CERCLA” thus triggering Section 113(h) of CERCLA and denying the court jurisdiction. *Id.* at *24–25 (“[T]his Court finds that the RI/FS, EE/CA, and the Time Critical Action performed at the Site are removal actions authorized under § 104(a) of CERCLA.”) These are the activities CERCLA requires and that the Cannons wish had been performed at their Property. The Cannons want the United States to comply with the statutory requirements and complete the same activities that were performed for the plaintiffs in *Goodson* and *Shea Homes*.

The District Court failed to apply the law. CERCLA and the cases relied upon by the District Court require that a removal or remedial action be selected under Section 104 of CERCLA. No removal or remedial action has been selected

in this case. Removal or remedial action does not include anything the DOD might decide to do at the site at any time using any procedure. Instead, the DOD must do enough to satisfy the statutory requirements found in CERCLA and as interpreted by the courts. A draft site inspection Work Plan does not rise to the same level as a Time Critical Removal, EE/CA, or RI/FS and does not fall within the statutory definition of removal or remedial action.

II. THE DISTRICT COURT ERRED IN RULING THAT IT LACKED JURISDICTION; THE INSTANT CASE IS NOT A “CHALLENGE” TO A REMOVAL ACTION UNDER SECTION 104 OF CERCLA.

A. Standard Of Review.

This Court reviews questions of statutory interpretation *de novo*. *United States v. RX Depot, Inc.*, 438 F.3d 1052, 1054 (10th Cir. 2006); *Employers Reinsurance Corp. v. Mid-Continent Cas. Co.*, 358 F.3d 757, 774 (10th Cir. 2004).

B. This Case Is Not A “Challenge” to Removal Or Remedial Action.

Section 113(h) of CERCLA provides:

No federal court shall have jurisdiction under Federal Law . . . or under State law . . . to review any challenges to removal or remedial action selected under section 9604 of this title.

42 U.S.C. § 9613(h) (emphasis added). The District Court failed to give effect to this plain language of Section 113(h) of CERCLA, which only postpones, until completion, judicial review of “challenges” to removal or remedial actions that have been selected by USACE using the procedures provided by 42 U.S.C. § 9604.

CERCLA does not define the word “challenge;” however a number of courts have provided an interpretation. “A suit challenges a remedial action within the meaning of 113(h) if it interferes with the implementation of a CERCLA remedy.” *Broward Gardens Tenants Ass’n v. United States Environmental Protection Agency*, 311 F.3d 1066, 1072 (11th Cir. 2002); *see Costner v. URS Consultants, Inc.*, 153 F.3d 667, 675 (8th Cir. 1998). “To determine whether a suit interferes with, and thus challenges, a cleanup, courts look to see if the relief requested will impact the remedial action selected.” *Broward Gardens Tenants Ass’n*, 311 F.3d at 1072 (emphasis added).

For example, in *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325 (9th Cir. 1995), the court, in holding that plaintiffs' citizen suit claims were barred by Section 113(h) of CERCLA, held that vindication of those claims would create “new requirements for dealing with the inactive sites that are now subject to the CERCLA cleanup [and] clearly interfere with the cleanup.” *Id.* at 329–30; *see also Razole*, 66 F.3d at 239 (holding no jurisdiction to entertain potentially responsible party citizen suit where successful suit would “dictate specific remedial actions and . . . alter the method and order for cleanup”). Additionally, this Court, in *New Mexico v. General Electric Co.*, held that a challenge was related to the goals of the cleanup because “the State’s lawsuit calls into question the EPA’s remedial response plan.” *Id.*, 467 F.3d 1223, 1249 (10th Cir. 2006).

The Cannons' suit is not a "challenge[]" as defined by the courts. Their suit, if successful, would not create new requirements for dealing with their Property, interfere with the cleanup, or dictate specific remedial actions for their Property. Since, as explained above, the DOD has not selected a removal or remedial action under Section 104 of CERCLA, there is no cleanup at the Property. Therefore, it is impossible for the Cannons' suit to interfere with or "challenge" a nonexistent cleanup or other imaginary activity. The sole impact of the Cannons' suit, if successful, is that a removal or remedial action would be selected for their Property and the cleanup would begin. This is not a "challenge" to a removal or remedial action selected under Section 104 of CERCLA for purposes of Section 113(h) of CERCLA.

Nonetheless, the District Court held that "Plaintiffs' suit constitutes a 'challenge' to the Corps' activities at the Yellow Jacket FUDS site response process, because the relief Plaintiffs seek would have an impact on the FUDS process there." Order at 6; Aplt. App. at 50. Furthermore, the District Court ruled that "A suit is a 'challenge' to a removal or remedial action if it relates to the goals of the cleanup." *Id.* (citations omitted). Although the District Court was correct that this is one purpose of Section 113(h) of CERCLA, it was incorrect in holding that "Plaintiffs' suit constitutes a 'challenge' to the Corps' activities at the Yellow Jacket FUDS site response process, because the relief Plaintiffs seek would have

an impact on the FUDS process there.” *Id.* The goals of any activity by USACE relating to the Yellow Jacket FUDS site are unknown. USACE has yet to select any removal or remedial action for the site. Furthermore, USACE has yet to describe a response process specifically for “the FUDS process there.” USACE must first “select[]” a removal or remedial action under Section 104 of CERCLA. Then, and only then, does Section 113(h) of CERCLA rob the District Court of jurisdiction. The only impact of the relief the Cannons seek upon the FUDS process is that the process would begin; USACE would be compelled to select the appropriate removal or remedial action as required by CERCLA and finally, after 62 years, to clean up the Property as it is statutorily mandated to do.

III. THE DISTRICT COURT RULING INSULATES FEDERAL ACTION UNDER CERCLA FROM JUDICIAL REVIEW.

A. Standard Of Review.

This Court reviews questions of statutory interpretation *de novo*. *United States v. RX Depot, Inc.*, 438 F.3d 1052, 1054 (10th Cir. 2006); *Employers Reinsurance Corp. v. Mid-Continent Cas. Co.*, 358 F.3d 757, 774 (10th Cir. 2004).

B. Section 113(h) Of CERCLA Does Not Prohibit Or Eliminate Any Judicial Review And Remedy.

1. The DOD must provide “an objective criterion by which to assess when its amorphous study and investigation phase may end” for Section 113(h) of CERCLA to apply.

Although the District Court was silent on the matter, other Courts have been quick to note that “Congress intended to prevent time-consuming litigation that

might interfere with CERCLA's overall goal of effecting the prompt cleanup of hazardous waste sites." *Broward Garden Tenants Ass'n*, 157 F.Supp.2d at 1337 (emphasis added). Notwithstanding Congress's intent regarding Section 113(h), the District Court allowed the DOD to use Section 113(h) of CERCLA as a shield to insulate from judicial review its failure over the last 62 years to take action to cleanup the Property.

The Seventh Circuit examined this issue in *Frey v. Environmental Protection Agency*, 403 F.3d 828 (7th Cir. 2005), where citizens brought an action against the EPA and potentially responsible parties ("PRPs") to cleanup toxic waste dumps. The EPA had conducted removal and remedial actions at the site, which had been selected under Section 104 of CERCLA. When the lawsuit commenced, the EPA was planning the next stage of the cleanup process. The District Court held the case was barred by Section 113(h) of CERCLA because "'active remedial planning' was underway" by the EPA. *Id.*, 403 F.3d at 833 (internal citation omitted).

"At oral argument [before the Seventh Circuit], EPA's counsel asserted that the agency's ongoing investigation and testing of groundwater and soil contamination precludes review under [CERCLA]." *Id.* This assertion caused the Court to conclude that the "EPA considers itself protected from review under CERCLA [Section] 113(h) as long as it has any notion that it might, some day,

take further unspecified action with respect to a particular site.” *Id.* The Court then held that “There is no support in the statute for such an open-ended prohibition on a citizen suit”; furthermore, “[f]or EPA to delay Frey’s suit, it must point to some objective referent that commits it and other responsible parties to an action or plan.” *Id.* (emphasis added). In explaining its holding, the Court demanded “a timetable or other objective criterion to assess when EPA’s amorphous study and investigation phase may end.” *Id.*

In the case at bar, the District Court held that “efforts to begin the site inspection process . . . including having obligating funds for a contract for the work, providing a draft site inspection workplan . . ., and soliciting rights-of-entry for properties involved in the investigation” precludes review under Section 113(h) of CERCLA. It issued this holding even though the DOD provided no timeline as to when its study and investigation would end and selection of a removal action would begin. More specifically, the DOD provided no timeline for completion of the non-binding draft 2006 SI Work Plan, nor a timetable for completion of any actions allegedly contemplated therein that it might undertake.¹²

¹² The DOD is not bound by the draft 2006 SI Work Plan. The document was produced by an independent contractor and contains the following provision: “Acceptance of this document in performance of the contract under which it is prepared does not mean [USACE] adopts the conclusions, recommendations, or

“[T]he time limits in § 113(h) are geared to concrete, existing, remedial measures; not measures that might be devised at some future date.” *Frey*, 403 F.3d at 832, (quoting *Frey v. Environmental Protection Agency*, 270 F.3d 1129, 1134 (7th Cir. 2001)). For the DOD to delay the Cannons’ suit, it had to “point to some objective referent that commits it and other responsible parties to an action or plan.” *Id.* As in *Frey*, no such objective evidence exists in this record. “There is no timetable or other objective criterion by which to assess when [USACE’s] amorphous study and investigation phase may end.” *Id.*¹³ Nonetheless, under the District Court’s Order, the DOD is protected from review under Section 113(h) of CERCLA as long as it has any notion that it might, some day, take further unspecified action with respect to a particular site.

other views expressed herein, which are those of EM-Assist staff only.” Aplt. App. at 127.

¹³ To be completed, the draft 2006 SI Work Plan must first be commented upon by DEQ. Aplt. App. at 129. The DOD must then “respond to those comments in writing and negotiate any discrepancies between the DEQ and USACE expectations.” *Id.* This is the same process that was used in preparation of the draft 1996 EE/CA, which the DOD was unwilling to amend even though DEQ believed it did not protect human health and the environment. If DOD is again unwilling to negotiate with DEQ, the draft 2006 SI Work Plan will never be completed. On February 5, 2007, DEQ submitted comments on the draft 2006 SI Work Plan. Aplt. App. at 130–131. Among the seven substantive comments were concerns related to the scope and intensity of the draft 2006 SI Work Plan. *Id.* at 131. These are similar to its comments on the draft 1996 EE/CA.

The conflict between the holding of the Seventh Circuit in *Frey* and the District Court’s perpetual bar to judicial review becomes even more clear on reviewing the facts of the case at bar with the holdings of *Frey*. The draft 2006 Site Inspection Work Plan provides no “external evaluation, with reasonable target completion dates, of the required work for the site.” *Frey*, 403 F.3d at 835. The draft 2006 Site Inspection Work Plan, which is not a plan for how the DOD intends to cleanup the Cannons’ Property or even a plan for how the DOD will select a removal or remedial action pursuant to Section 104 of CERCLA, falls far short of providing “reasonable target completion dates[] of the required work for the site.” *Id.* (emphasis added). The draft 2006 Site Inspection Work Plan is merely a “desultory testing and investigation process of indefinite duration.” *Id.*

The DOD must not be “protected from review under CERCLA § 113(h) as long as it has any notion that it might, some day, take further unspecified action with respect to a particular site.” *Id.*, at 834. “There is no support in the statute for such an open-ended prohibition on a citizen suit.” *Id.*

2. Section 113(h) of CERCLA does not prohibit litigation seeking to compel statutorily mandated cleanup.

The District Court’s ruling results in a perverse reading of the statute; this result is not what Congress intended when it enacted Section 113(h) of CERCLA. The purpose of the Section 113(h) limitation on judicial review is to prevent litigation that may delay rapid cleanup. *Broward Garden Tenants Ass’n.*, 157

F.Supp.2d at 1337. As the facts demonstrate, the Cannons have been suffering from contamination by exploded and unexploded ordnance on their Property for more than 60 years. For those 62 years, the Cannon family has been affected by the DOD's contamination and perpetual delay at the Property. During those 62 years, the Cannons did nothing to delay the cleanup but, ironically, that is what the District Court has allowed the DOD to do. The DOD now has no check on its desultory testing and investigation process of indefinite duration. It can now continue to do nothing at the Property for as long as it wishes because the District Court held there is no legal recourse for the Cannons. This is exactly what Congress sought to avoid by enacting Section 113(h) of CERCLA:

[P]re-enforcement review would be a significant obstacle to the implementation of response actions and the use of administrative orders. Pre-enforcement review would lead to considerable delay in providing cleanups, would increase response costs, and would discourage settlements and voluntary cleanups.

S.Rep. No. 11, 99th Cong., 1st Sess. 58 (1985). The Cannons are innocent landowners with no reason to delay a cleanup. They have no incentive to settle or undertake a voluntary cleanup because they did not contaminate the land.

In this case, the DOD is the polluter, the responsible party, and the delaying party. The Cannons seek merely to exercise their statutory rights to enforce CERCLA and to end a serious ongoing threat to public health and the environment from unexploded ordnance. The District Court has now adopted an interpretation

of CERCLA that will postpone review such that neither the Cannons nor their counsel will be “available” for the next hearing. Under the District Court’s interpretation, citizen suits will become family obligations passed down from generation to generation until finally those great-grandchildren that survive the unexploded ordnance may come into court and present their case.

In fact, this is precisely the DOD has succeeded in doing in this case. Jesse Fox Cannon was unsuccessful in his quest to compel the DOD to clean up his property. Upon his death, his son, Dr. J. Floyd Cannon unsuccessfully carried the torch. Now the grandchildren, F. Douglas Cannon, Margaret Louise Cannon, and Allan Robert Cannon, are left to challenge the DOD. One would hope the Property would be cleaned up before the great-grandchildren find themselves in this Court.

If the District Court’s interpretation of Section 113(h) of CERCLA is upheld, the primary purposes of CERCLA, which are to provide for a careful and comprehensive study of the contamination as well as an analysis of the feasibility of available alternative remedies, and then a remedy that adequately protects public health and the environment, will be defeated. Those purposes have already been severely compromised by the 60 plus years of delay resulting from the DOD’s reluctance to accept the responsibility for its past contamination of the Cannons’ Property. Congress provided for citizen enforcement in such situations to ensure that CERCLA requirements were implemented to protect the public and the

environment. That clear Congressional intent will also be completely defeated if the District Court's interpretation of Section 113(h) of CERCLA is upheld.

Congress intended the protection from judicial review under Section 113(h) of CERCLA to apply to agency actions selected by the proper statutory procedure that Congress specified. It did not contemplate that Section 113(h) would shield from judicial review a desultory testing and investigation process of indefinite duration. Instead, Congress anticipated timely action resulting in the cleanup of hazardous substances thereby protecting those affected. Here the DOD has set, and the District Court accepted, a timeline that begins sometime between now and never. The DOD wants the protections of Section 113(h) of CERCLA without following the statutory procedures required to obtain that protection. In so doing, the DOD asked the District Court to take Congress's role and rewrite the statute; regrettably, that is what the District Court did. Its holding must be overturned.

CONCLUSION

The Cannons are the innocent landowners whereas the DOD is the polluter that wishes to prevent cleanup of the Property. The District Court erred when it failed to analyze the statutory requirement that the DOD must first select a removal or remedial action before the jurisdictional bar of Section 113(h) of CERCLA may apply. For the DOD to select any removal or remedial action, it must first produce

the requisite decision document. The DOD cannot provide evidence of this decision document. Therefore, the District Court must be reversed.

The District Court erred in ruling that the DOD has undertaken remedial action at the Cannons' Property. The District Court failed to define the term "remedial action" or to perform adequate analysis of the issue. Therefore, the District Court must be reversed.

Additionally, District Court erred in relying upon cases that are inapposite. In both cases relied upon by the District Court a removal or remedial action had been selected under Section 104 of CERCLA and carried out. These two cases demonstrate what is required of the DOD, which the District Court failed to require of the DOD. Therefore, reliance upon these cases was in error and the District Court must be reversed.

Furthermore, the District Court erred in ruling that the Cannons' suit is a "challenge" to removal or remedial action selected under Section 104 of CERCLA. Because the DOD failed to select a removal or remedial action, it is impossible for the Cannons' suit to be a challenge. Similarly, this lawsuit does not seek to delay the cleanup at the Cannons' Property; therefore it is not a challenge.

Finally, the District Court erred when it interpreted Section 113(h) of CERCLA as barring all judicial review and remedy. The District Court failed to require the DOD to provide "an objective criterion by which to assess when its

amorphous study and investigation phase may end” as required by the Seventh Circuit. The District Court also erred in ruling that the Cannons’ suit was of the type intended to be barred by Section 113(h) of CERCLA. That statute was not designed to prevent lawsuits compelling the DOD to select a removal or remedial action when no such selection has been made. Therefore, the District Court must be reversed.

For the foregoing reasons, F. Douglas Cannon; Margaret Louise Cannon; and Allan Robert Cannon, grandchildren of Jesse Fox Cannon, respectfully request that this Court reverse the District Court.

ORAL ARGUMENT STATEMENT

This appeal presents questions of national significance. Thus, the Cannons believe that oral argument would be most beneficial to this Court’s understanding of the questions and issues in this case.

DATED this 20th day of July 2007.

Respectfully submitted by:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing is in compliance with Fed. R. App. P. 32(a)(7)(B) because it is written in a proportionately spaced typeface of 14 points or more and contains 10,884 words.

/s/Joshua D. McMahon
Joshua D. McMahon, Esq.

ADDENDUM

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July 2007, I served two true and accurate copies of APPELLANTS' OPENING BRIEF and APPELLANTS' APPENDIX on all counsel of record by sending said copies *via* e-mail and U.S. mail, first class, postage prepaid, and addressed to:

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Pursuant to 10th Circuit Emergency General Order dated October 20, 2004, amended January 11, 2005, and further amended May 23, 2005, I certify that:

- (1) all required privacy redactions have been made and, with the exception of those redactions, every document submitted in scanned or Digital Form is an exact copy of the written document filed with the Clerk; and
- (2) the digital submission has been scanned for viruses with the most recent version of Norton AntiVirus Corporate Version and according to the program, it is free of viruses.

/s/Joshua D. McMahon
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