Michigan Law Review

Volume 98 | Issue 1

1999

Citizen Suits Under the Resource Conservation and Recovery Act: Plotting Abstention on a Map of Federalism

Charlotte Gibson
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Courts Commons](#), [Environmental Law Commons](#), [Jurisdiction Commons](#), [Natural Resources Law Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Charlotte Gibson, *Citizen Suits Under the Resource Conservation and Recovery Act: Plotting Abstention on a Map of Federalism*, 98 MICH. L. REV. 269 (1999).

Available at: <https://repository.law.umich.edu/mlr/vol98/iss1/6>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

NOTE

Citizen Suits Under the Resource Conservation and Recovery Act: Plotting Abstention on a Map of Federalism

Charlotte Gibson

TABLE OF CONTENTS

I. PRIMARY JURISDICTION	272
A. <i>Notice and Preclusion</i>	274
B. <i>Uniformity, Broad Enforcement, and the Federal Courts</i>	276
C. <i>Technical Expertise</i>	279
D. <i>Concurrent Proceedings</i>	280
II. <i>BURFORD</i> ABSTENTION	283
A. <i>RCRA's Federal Mandate</i>	284
1. <i>The Statutory Framework</i>	284
2. <i>State Regulatory Schemes</i>	286
3. <i>Specialized State Court Review</i>	288
B. <i>Permitting and Sitting Challenges</i>	289
1. <i>Statutory Bars</i>	289
2. <i>Other Opportunities for Hearing</i>	294
III. ABSTENTION AND THE VALUES OF FEDERALISM	295
A. <i>Instrumentalist Values</i>	296
B. <i>Diffusion of Power</i>	297
CONCLUSION.....	299

In the shadow of the Supreme Court's constitutional federalism doctrines,¹ lower federal courts have developed doctrines of common

1. For recent cases developing constitutional federalism doctrine, see, e.g., *Alden v. Maine*, 119 S. Ct. 2240 (1999) (establishing state sovereign immunity from suits brought under federal law in state court); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (limiting congressional power under section 5 of the Fourteenth Amendment to control state action); *Printz v. United States*, 521 U.S. 898 (1997) (forbidding congressional action that commandeers state officers); *New York v. United States*, 505 U.S. 144 (1992) (forbidding, under Tenth Amendment, congressional action that commandeers state legislatures). For general discussions of federalism doctrine, see, e.g., Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997); Edward Rubin & Malcolm Feeley, *Federalism, Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994). On the federalism cases of the Court's most recent term, see Linda Greenhouse, *States Are Given New Legal Shield by Supreme Court*, N.Y. TIMES, June 24, 1999, at A1, ("[I]t was also strikingly apparent that the fault line that runs through the current Court as an all but unbridgeable gulf has to do not with the higher profile issues of race, religion, abortion, or due process, but with federalism.").

law federalism through vehicles such as abstention.² In the environmental law arena, courts have employed a number of abstention theories to dismiss citizen suits brought under federal statutes.³ The appearance of primary jurisdiction and *Burford* abstention in citizen suits brought under the Resource Conservation and Recovery Act ("RCRA")⁴ exemplifies this trend.

In rejecting RCRA suits, some courts have relied on primary jurisdiction, a doctrine conceived as a mechanism to allocate responsibility for limited fact-finding between courts and agencies, to dismiss RCRA citizen suits. These courts have emphasized the technical nature of evaluating RCRA violations and the superiority of state agencies as the bodies to address such issues.⁵ Although primary jurisdiction often allows the plaintiff to return to court following agency resolution of particular issues,⁶ RCRA dismissals under the doctrine may be so open-ended that they are effectively final.⁷ Because RCRA creates an exclusively federal cause of action,⁸ dismissals leave citizen plaintiffs with no judicial forum.

2. Little systematic study has been devoted to how lower federal courts are applying abstention doctrines. See Gordon G. Young, *Federal Court Abstention and State Administrative Law from Burford to Ankenbrandt: Fifty Years of Judicial Federalism Under Burford v. Sun Oil and Kindred Doctrines*, 42 DEPAUL L. REV. 859, 982-83 (1993) (suggesting a longitudinal study that would assist the Supreme Court in fashioning abstention doctrine).

3. Other abstention doctrines cropping up in environmental cases generally, but not discussed in this Note, include the *Colorado River* doctrine, the *Pullman* doctrine, and *Younger* abstention. See William Daniel Benton, *Application of Res Judicata and Collateral Estoppel to EPA Overfiling*, 16 B.C. ENVTL. AFF. L. REV. 199, 270-78 (1988). The *Colorado River* doctrine has made a few recent appearances in RCRA suits. See *Mutual Life Ins. Co. v. Mobil Corp.*, No. CIV.A.96CV1781RSP/DNH, 1998 WL 160820, at *5 (N.D.N.Y. Mar. 31, 1998) (refusing to abstain under *Colorado River*); *Morton College Board of Trustees v. Town of Cicero*, 18 F. Supp. 2d 921, 928-29 (N.D. Ill. 1998) (same). The doctrine's prerequisites are so exhaustive, however, that it seems unlikely to become the basis for dismissal of many future RCRA citizen suits. See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-20 (1976) (requiring parallel state and federal suits and a consideration of many factors to justify application of the doctrine).

4. 42 U.S.C.A. § 6901 et seq. (West 1997); see also § 6902(b) ("National Policy": "The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.").

5. See *Davies v. National Coop. Refinery Ass'n*, 963 F. Supp. 990, 997-998 (D. Kan. 1997); *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1349-50 (D.N.M. 1995); *Carroll v. Litton Systems, Inc.*, No. B-C-88-253, 1990 WL 312969, at *209 (W.D.N.C. Oct. 29, 1990).

6. See *Louis L. Jaffe, Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1038 (1964).

7. See, e.g., *Davies*, 963 F. Supp. at 997-98. In that case, the federal court declined jurisdiction with no specifications about the conditions under which plaintiffs might return to court. See 963 F. Supp. at 1000. The court did not return the matter to the agency's jurisdiction for any factual determinations or pending an agency enforcement proceeding, but rather deferred generally to the agency's power. See 963 F. Supp. at 1000.

8. See 42 U.S.C.A. § 6972. The Sixth Circuit recently splintered off from the previously unanimous view that RCRA's citizen suit causes of action are exclusively federal. See *Davis*

Other courts have applied the doctrine of *Burford* abstention, which allows federal court dismissal where adjudication would involve complicated questions of state law or would interfere with a state's attempts to develop a regulatory scheme. Although the appellate courts that have invoked *Burford* abstention have only addressed suits that challenged permitting or siting decisions,⁹ lower courts have applied the reasoning to abstain from RCRA citizen suits more generally. District courts using these rulings have extended the use of *Burford* to cases where the plaintiffs sought to redress RCRA violations or endangering conditions.¹⁰ *Burford* claims have arisen with increasing frequency in RCRA suits,¹¹ probably because RCRA's jurisdictional provisions are too clear to allow for disputes about when the statute precludes a claim.

Courts that have employed these doctrines have ignored the explicit goals and jurisdictional structure of RCRA. In enacting the comprehensive statutory and regulatory provisions of RCRA, Congress adopted a scheme of environmental law with national minimum standards and provisions for federal court enforcement. To facilitate judicial oversight, Congress created two federal causes of action for citizen suits in addition to EPA and state regulatory enforcement.¹² The statute also articulates the limited circumstances under which a citizen suit is barred: if either the state agency or the EPA has already commenced an enforcement action regarding the

v. Sun Oil Co., 148 F.3d 606 (6th Cir. 1998). This Note rejects this novel approach. See *infra* notes 65-79 and accompanying text.

9. See *Coalition for Health Concern v. LWD, Inc.*, 60 F.3d 1188, 1189-90 (6th Cir. 1995) (plaintiffs claimed that hazardous waste facility was operating without a final permit); *Sugarloaf Citizens Ass'n v. Montgomery County*, 33 F.3d 52 (4th Cir. 1994) (unpublished disposition) (plaintiffs challenged issuance of permits for an incinerator facility); *Palumbo v. Waste Techs. Indus.*, 989 F.2d 156, 159-60 (4th Cir. 1993) (same).

10. See *Davies*, 963 F. Supp. at 998-99 (abstaining where state agency had created a remedial plan, but no court action had been undertaken); *Friends of Santa Fe County*, 892 F. Supp. at 1347-48 (state agency and defendants had reached stipulated agreement after administrative proceedings).

11. *Burford* claims are also raised in suits brought under other federal environmental statutes. The Fifth Circuit, for example, recently applied *Burford* in the context of an Endangered Species Act case. See *Sierra Club v. San Antonio*, 112 F.3d 789 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 879 (1998).

12. These causes of action include an enforcement action that encourages private plaintiffs to fill in enforcement gaps where the EPA or state agency has not noticed or decided not to pursue an alleged violation, see 42 U.S.C.A. § 6972(a)(1)(A) ("[A]ny person may commence a civil action on his own behalf—against any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter . . ."), and where there is an "imminent and substantial endangerment" cause of action, see § 6972(a)(1)(B) ("against any person . . . who has contributed . . . to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment").

alleged violation,¹³ or if plaintiffs are using the citizen suit as a way to challenge the terms of a permit or a determination as to where a particular facility will be located.¹⁴ These statutory limits determine precisely when a federal court must dismiss a RCRA citizen suit.

This Note argues that dismissals based on the primary jurisdiction and *Burford* abstention doctrines violate the enforcement approach developed by Congress under RCRA and constitute judicial rule-making beyond the established boundaries of the two doctrines. Part I argues that the policy concerns underlying the primary jurisdiction doctrine make it inapplicable for dismissals of RCRA citizen suits because RCRA's statutory scheme depends on federal court oversight, not agency independence, to ensure uniformity. Part II turns to the *Burford* doctrine, describing the local law focus of the doctrine and demonstrating that the explicitly federally centered statutory scheme makes RCRA suits inappropriate candidates for *Burford* abstention. Part II also asserts that because citizen suits challenging state-issued permits — the factual setting in which the Fourth and Sixth Circuits have employed *Burford* abstention — are outside of the statute's jurisdictional grant, invocation of *Burford* in that setting is unnecessary. Part III addresses the suitability of the primary jurisdiction and *Burford* doctrines as methods for creating a judicially fashioned theory of federalism. This Part argues that in the RCRA context, federal court abstention does not productively further a more state-centered vision of cooperative federalism. This Note concludes that abstention theories are inappropriate in the context of an expansive federal statutory scheme, and that, absent constitutional infirmities, policy judgments as to the wisdom of such federal regulation should be left to Congress.

I. PRIMARY JURISDICTION

Primary jurisdiction, often discussed by courts along with the *Burford* doctrine in the context of RCRA citizen suits,¹⁵ allows a court

13. See § 6972 (b)(1)(B), (b)(2)(B), (C). Courts have consistently interpreted "enforcement action" under RCRA as requiring an actual civil penalty action in a court, not simply agency review or monitoring of possible violations. See *Morris v. Primetime Stores of Kansas, Inc.*, No. 95-1328-JTM, 1996 WL 563845, at *3 (D. Kan. Sept. 5, 1996) (interpreting RCRA); *City of Toledo v. Beazer Materials & Servs., Inc.*, 833 F. Supp. 646, 656-57 (N.D. Ohio 1993) (interpreting 42 U.S.C. § 6972(b)(1)(B)).

14. See § 6976.

15. This Note addresses primary jurisdiction because it has met with some limited success as a ground for abstention, and because many of its policy goals intertwine with those of the *Burford* doctrine. See *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 619 (7th Cir. 1998), cert. denied, 119 S. Ct. 871 (1999) (Posner, C.J.) (defendant's requests for dismissal based on *Burford* or primary jurisdiction "amount to the same thing"); James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1076-77 (1994) (factors cited in favor of *Burford* abstention "virtually identical" to those cited in favor of primary jurisdiction).

to allocate jurisdiction between itself and an administrative agency where the forums share the ability to decide one or more of the issues at stake in the lawsuit.¹⁶ The doctrine, first articulated by the Supreme Court in *Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.*, allows a court either to stay its jurisdiction or to grant a dismissal pending a hearing before the agency.¹⁷

Four policy concerns underlying primary jurisdiction are frequently discussed in the RCRA context. As a prerequisite to applying the primary jurisdiction doctrine, the statutory scheme at issue must be vague about whether a court or an agency should assume jurisdiction over a matter.¹⁸ Second, the doctrine is appropriate only where the relevant legislative body specifically holds an agency responsible for providing uniform application of a statute,¹⁹ or where a statute dictates that an agency's particular duties supersede those of the court.²⁰ A court must not defer where the federal judiciary provides the only guarantee that a federal statutory scheme is uniformly applied.²¹

16. See *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68 (1970) ("[T]his Court [has] recognized . . . that coordination between traditional judicial machinery and these agencies was necessary The doctrine of primary jurisdiction has become one of the key judicial switches through which this current has passed.").

17. See Sidney A. Shapiro, *Abstention and Primary Jurisdiction: Two Chips Off the Same Block?—A Comparative Analysis*, 60 CORNELL L. REV. 75, 76 (1974). Theoretically, primary jurisdiction allows a court to stay jurisdiction temporarily pending agency resolution of a specific factual issue, not to avoid adjudication of a suit altogether. In effect, however, the "stay" might amount to a permanent end to federal court jurisdiction. See Kenneth F. Hoffman, *The Doctrine of Primary Jurisdiction Misconceived: End to Common Law Environmental Protection?*, 2 FLA. ST. U. L. REV. 491, 497 (1974) (discussing case law where plaintiffs have no remedy once primary jurisdiction is invoked by the federal court).

18. See Jaffe, *supra* note 6, at 1041 ("It is undoubtedly an implied aspect of the statutory purpose that a specialized administrative tribunal has been created to deal with problems in a certain area But a grant of power implies a limit, and the simultaneous grant of jurisdiction to the courts or a failure to abolish jurisdiction potentially conflicting may indicate where that limit is.").

19. See *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 353 (1963) (noting that primary jurisdiction "requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme"); *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440-41 (1907) (federal court judgment might impair Interstate Commerce Commission's ability to impose uniform freight rates for common carriers, the duty assigned to it by statute).

20. See *Keogh v. Chicago & NW Ry. Co.*, 260 U.S. 156, 162 (1922) (staying jurisdiction because regulatory powers of the ICC superseded private plaintiff's remedy under the Sherman Act).

21. Courts are split over whether a federal court may ever defer to a state, rather than to a federal agency, under primary jurisdiction. In the type of RCRA case relevant to this Note, where the acting agency is a state body, agency action might never provide the requisite authority for deferral. Compare *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1310 (2d Cir. 1990) (primary jurisdiction generally unsuitable basis for federal court deference to jurisdiction of a state administrative agency), and *Sierra Club v. United States DOE*, 734 F. Supp. 946, 951 (D. Colo. 1990) (interpreting RCRA, and holding that a federal court may not defer to a state agency on a matter of federal law), with *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1349 (D.N.M. 1995) (applying primary jurisdiction in favor of state agency).

Third, courts have applied primary jurisdiction where a statute relies on an agency's technical specialization as a factfinder.²² Finally, primary jurisdiction may cure various problems arising when an agency and a court share jurisdiction in a way that affects the regulation of a particular defendant.²³ The assessment of each of these concerns turns on the purposes of the statute and the roles assigned to each governmental body acting under it.²⁴

This Part argues that each of these concerns weighs against applying primary jurisdiction to RCRA citizen suits.²⁵ Section I.A examines the jurisdictional grant under the statute and demonstrates that this framework represents a codified system of court/agency roles needing no further judicial articulation. Section I.B argues that the main policy underlying primary jurisdiction, ensuring the uniform application of a statute, weighs against the doctrine's application to RCRA suits because RCRA's statutory scheme relies on federal courts, not state agencies, to provide such uniformity. Section I.C rejects the view that the issue of an agency's technical specialization favors dismissing RCRA citizen suits on primary jurisdiction grounds because the statute allocates resources for courts to achieve proficiency. Section I.D concludes that the various issues raised by potentially conflicting court and agency action do not require the application of primary jurisdiction in the RCRA context.

A. Notice and Preclusion

RCRA's jurisdictional provisions are so specific that they leave the

22. See *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303-04 (1976) (discussing application of primary jurisdiction where an issue "involves technical questions of fact uniquely within the expertise and experience of an agency such as matters turning on an assessment of industry conditions" (citations omitted)).

23. See *Davies v. National Coop. Refinery Ass'n*, 963 F. Supp. 990, 998 (D. Kan. 1997) (existence of agency proceedings deemed relevant regarding possible conflicting orders, venue for plaintiffs, diligence of agency in pursuing action); *Friends of Santa Fe County*, 892 F. Supp. at 1350 (considering whether agency and court determinations might impose conflicting obligations on the defendant as part of primary jurisdiction analysis).

24. See *Craig Lyle Ltd. Partnership v. Land O'Lakes, Inc.*, 877 F. Supp. 476, 483 (D. Minn. 1995) (doctrine must be consistent with congressional intent underlying the statute); see also Jaffe, *supra* note 6, at 1041 (statutory purpose should underlie application of primary jurisdiction).

25. Primary jurisdiction has been less successful than *Burford* as a ground for RCRA citizen suit dismissals. See, e.g., *Craig Lyle Ltd.*, 877 F. Supp. at 483 (primary jurisdiction generally disfavored for federal citizen suits); *Sierra Club*, 734 F. Supp. at 950-51; *United States EPA v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172, 1194-95 (N.D. Ind. 1989), (concluding that application of primary jurisdiction would thwart legislative intent of RCRA) *aff'd*, 917 F.2d 327 (7th Cir. 1990); *Environmental Defense Fund, Inc. v. Wheelabrator Tech. Inc.*, 725 F. Supp. 758, 775 (S.D.N.Y. 1989) (refusing to apply primary jurisdiction pending EPA review where issue involved statutory construction); *Merry v. Westinghouse Elec. Corp.* 697 F. Supp. 180, 182-83 (M.D. Pa. 1988) (stating that primary jurisdiction should be invoked sparingly in the citizen suit context).

federal courts with no opportunity to assert jurisdictional discretion. This congressional guidance dictates that a federal court must assume jurisdiction when a citizen suit meets the jurisdictional requirements of the statute.²⁶

The first jurisdictional limitation allows suit only when notice requirements have been met. Citizen plaintiffs must provide notice to any potential defendant, the EPA, and the state administrative agency prior to commencing suit.²⁷ This notice mechanism allows the state or the EPA to prevent a citizen suit altogether by filing its own action against the defendant²⁸ or by compelling compliance before the citizen suit can commence.²⁹

The specific window of time in which an alleged violator may correct problems without court involvement defines the role of state agencies within the context of citizen suits.³⁰ Rather than dismissing a case under an abstention doctrine in order to allow state participation in the remedying of violations, federal courts need only ascertain that the plaintiff has properly complied with the statutory notice provisions. Observance of this notice rule guarantees that states have an opportunity to participate in the cooperative scheme without jeopardizing RCRA's mandate for timely remediation of solid and hazardous waste violations.³¹

26. See *Trident Inv. Management, Inc. v. Bhabra*, No. 95 C 4260, 1995 WL 736940, at *2 (N.D. Ill. Dec. 11, 1995) (RCRA's statutory terms override common law doctrine of primary jurisdiction); *Sierra Club*, 734 F. Supp. at 951-52 (same); *Werlein v. United States*, 746 F. Supp. 887, 892 n.4 (D. Minn. 1990) (vacated in part on other grounds) (finding RCRA's jurisdictional limits under 42 U.S.C. § 6972(b)(2)(B) to be a codification of primary jurisdiction). But see *Davies*, 963 F. Supp. at 997-99 (applying primary jurisdiction); *Friends of Santa Fe County*, 892 F. Supp. at 1348-51 (same).

27. Plaintiffs must provide 60-days notice under the enforcement provision of the statute, see 42 U.S.C.A. § 6972(b)(1)(A) (West 1997), and 90-days notice under the imminent endangerment authority, see § 6972(b)(2)(A). Plaintiff must give notice *before* filing suit. Effective notice, or the staying of an action pending post-filing notice, is not permitted. See *Hallstrom v. Tallamook County*, 493 U.S. 20, 29 (1989).

28. See 42 U.S.C. § 6972(b)(1)(B) (prohibiting citizen suit where the EPA or state has filed an enforcement action); *Hallstrom*, 493 U.S. at 29 (“[N]otice allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits.”).

29. See *Hallstrom*, 493 U.S. at 29 (“[N]otice gives the alleged violator ‘an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit.’ ” (citing *Gwaltney of Smithfield, Inc. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987))).

30. See *Wilson v. Amoco Corp.*, 989 F. Supp. 1159, 1170 (D. Wyo. 1998) (stating that invoking primary jurisdiction would abandon statutorily-imposed duty); *Trident Inv. Management*, 1995 WL 736940, at *2 (rejecting primary jurisdiction for RCRA citizen suit, noting that statutory notice requirements provide accommodation of agency and court actions).

31. To the extent that courts find endangerment challenges more sympathetic candidates for abstention than enforcement suits, the notice provisions are more generous for the former type of suit. See *supra* note 28

The second limitation on jurisdiction prohibits a citizen suit if the EPA or state agency is diligently prosecuting its own action under RCRA or a specific sister statute.³² By specifying that only formal court action bars citizen suit litigation, Congress implicitly instructed federal courts not to treat various administrative activities, such as inspections of a site or compliance agreements between an alleged violator and the state agency, as jurisdictional hurdles.³³ Courts have unanimously understood the statutory bar to require court action, not simply administrative inquiry.³⁴

Together, the notice provisions and preclusion language create a clear path guiding federal court jurisdiction over RCRA citizen suits. Accordingly, RCRA does not leave open the kind of jurisdictional gaps required for an application of the primary jurisdiction doctrine.

B. Uniformity, Broad Enforcement, and the Federal Courts

The task of ensuring uniform application of RCRA falls upon the federal courts rather than state agencies. Minimum national standards are a core component of RCRA's mandate, and the broad enforcement mechanisms embedded in the statute charge federal courts with guaranteeing those minimums. Without that oversight, state agencies act in isolation and will develop disparate standards for solid and hazardous waste disposal.³⁵

32. Under section 6972(b)(1)(B), only diligent prosecution of "a civil or criminal action in a court" precludes a citizen enforcement suit. For citizen endangerment suits, an action may be precluded by an action in a court, by EPA or state action under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C.A. § 9606 et seq., or by an EPA suit under its own endangerment authority pursuant to section 6973 of RCRA, *see* § 6972(b)(2)(B), (C).

33. *See* *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 619 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 871 (1999) ("Congress has specified the conditions under which the pendency of other proceedings bars suit under RCRA, and . . . those conditions have not been satisfied here [where agency had corresponded with the defendant]."); *Proffitt v. Commissioners*, 754 F.2d 504, 506 (3d Cir. 1985) (overruled on other grounds) (no preclusion where EPA had entered a compliance order against the defendant); *Morris v. Primetime Stores of Kansas, Inc.*, No. 95-1328-JTM, 1996 WL 563845, at *3 (D. Kan. Sept. 5, 1996) (no preclusion where a state agency and the defendant were developing a remediation plan); *City of Toledo v. Beazer Materials & Servs., Inc.*, 833 F. Supp. 646, 657 (N.D. Ohio 1993) (holding that state agency proceedings absent action in a court are insufficient to bar a RCRA citizen suit); *cf.* *Davies v. National Coop. Refinery Ass'n*, 963 F. Supp. 990, 997 (D. Kan. 1997) (although abstaining on other grounds, conceding that statutory jurisdiction exists where defendants and state agency had entered into a consent order).

34. The statutory language in RCRA has prevented the kind of court disagreement that has taken place in interpreting the analogous provision of the Clean Water Act. The Clean Water Act prohibits suit where the state is prosecuting an action "comparable" to a citizen suit action. *See* 33 U.S.C. § 1319(g)(6)(A). For a discussion of the Clean Water Act dilemma, *see* Arne R. Leonard, *When Should an Administrative Enforcement Action Preclude a Citizen Suit Under the Clean Water Act?*, 35 NAT. RESOURCES J. 555, 579-617 (1995).

35. *See* *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1310 (2d Cir. 1990) ("The uniformity rationale clearly does not support application of the [primary jurisdiction] doctrine in the federal question/state agency context. Indeed, since application . . . might

Under RCRA, Congress has determined that solid and hazardous waste disposal is a matter of national concern.³⁶ The statute delineates this focus clearly, concluding that "while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal . . . have become a matter national in scope and in concern and necessitate Federal action"³⁷ Moreover, Congress enacted national legislation because piecemeal efforts by the states had proved inadequate to address U.S. waste disposal problems.³⁸

To enforce minimum national standards, RCRA empowers the EPA and citizens with broad enforcement authority. The EPA may bring either a civil or criminal suit to enforce alleged RCRA violations³⁹ and may also bring a suit if some activity creates an "imminent hazard" justifying injunctive relief, regardless of whether the activity involves a permit violation.⁴⁰ The EPA's ongoing role demonstrates that the statutory scheme seeks to promote federal guidelines, not to sanction diverse regulatory policies in individual states.

Citizen suit availability acts as a crucial complement to EPA enforcement suits in supplying uniformity. Courts have understood the overarching purpose of citizen suits as creating private attorneys general that supplement governmental enforcement of a regulatory scheme.⁴¹ In amending RCRA, Congress specifically recognized that the EPA alone had been unable to enforce the statute.⁴² Accordingly,

well result in review by fifty different state agencies with fifty different charters, resort to state agencies is more likely to ensure non-uniformity.").

36. See 42 U.S.C.A. §§ 6901(a)(4) (West 1997); 6902(a) (captioned "Objectives and national policy," and including objectives of "establishing a viable Federal-State partnership" and "promoting a national research and development program").

37. § 6901(a)(4).

38. See David R. Hodas, *Symposium, Environmental Federalism: Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States and Their Citizens?*, 54 MD. L. REV. 1552, 1615-16 (1995) (discussing states reluctant to pursue penalties because it deters businesses from settling there and noting that competitive issues also drive local government enforcement).

39. See § 6928.

40. See § 6973.

41. See *Bennett v. Spear*, 520 U.S. 154, 165 (1997). For examples of citizen suit provisions under other environmental statutes, see, e.g., 33 U.S.C.A. § 1365(a) (Clean Water Act); 42 U.S.C.A. § 7604(a) (Clean Air Act), 42 U.S.C.A. § 9659(a) (CERCLA), and 42 U.S.C.A. § 11046(a) (Emergency Planning and Community Right-to-Know Act).

42. See H.R. REP. NO. 98-198, pt. 1, at 20 (1984), reprinted in 1984 U.S.C.C.A.N. 5576, 5579; see also Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1226-28 (1999) (discussing problems of federal government in monitoring and sanctioning states regarding grant-in-aid programs); Michael J. Scicchitano & David M. Hedge, *From Coercion to Partnership in Federal Partial Preemption: SMCRA, RCRA, and OSH Act*, PUBLIUS, Fall 1993, at 107, 114 (categorizing EPA threat of revoking state's status as an approved program as an empty one).

in order to maximize federal court oversight, two aspects of RCRA's citizen suit provisions are particularly broad.

First, RCRA's double grant of federal court jurisdiction for citizen suits features an imminent endangerment provision that is unique to RCRA among federal environmental statutes,⁴³ allows suit against both past and present contributors,⁴⁴ and assesses liability without fault.⁴⁵ The jurisdictional grant both for enforcement and imminent endangerment allows a wide variety of environmental harms to be actionable under RCRA's statutory mandate.

Second, the statute provides generous standing for potential citizen plaintiffs. Unlike some federal environmental statutes, which impose a zone-of-interests requirement for the establishment of statutory standing,⁴⁶ RCRA's standing provision allows "any person" to bring suit.⁴⁷ In choosing this language, Congress conferred standing to the fullest extent permitted by Article III.⁴⁸ Congress created the broadest possible class of potential plaintiffs in order to maximize the number of private "enforcers" and to avoid dismissals in federal court based on lack of standing.⁴⁹

Through its extensive jurisdictional grants for citizen- and EPA-initiated suits, RCRA charges federal courts, not state agencies, with enforcing the statute and overseeing its uniform application. Applications of primary jurisdiction frustrate the realization of federal court oversight.⁵⁰

43. See Ashley C. Schannauer, *RCRA Endangerment Actions: Is a Permit a Defense?*, 21 COLUM. J. ENVTL. L. 287, 303 (1996) (endangerment authority under other statutes limited to the government).

44. See 42 U.S.C.A. § 6972(a)(1)(B) (West 1997).

45. See H.R. CONF. REP. NO. 98-1133, at 119 (1984), reprinted in 1984 U.S.C.A.N. 5649, 5690 (endangerment provision in § 7003 applies "regardless of fault or negligence").

46. See *Bennett*, 520 U.S. at 164-65. The *Bennett* Court reasoned that its broad construction of statutory standing for "any person" under the Endangered Species Act ("ESA") was supported by the fact that the statute was environmental, and that Congress was obviously attempting to create "private attorneys general." 520 U.S. at 165. The Court also noted that the "any person" language was much broader than in some other environmental statutes, which create a zone-of-interests requirement. 520 U.S. at 164-65.

47. § 6972(a) ("any person may commence a civil action on his own behalf").

48. See *Bennett*, 520 U.S. at 165.

49. See *Bennett*, 520 U.S. at 165.

50. See *Craig Lyle Ltd. Partnership v. Land O'Lakes, Inc.*, 877 F. Supp. 476, 483 (D. Minn. 1995) (stating that primary jurisdiction stay would defeat congressional intent in creating citizen suits under RCRA); *United States EPA v. Waste Control, Inc.*, 710 F. Supp. 1172, 1184 (N.D. Ind. 1989), *aff'd*, 917 F.2d 327 (7th Cir. 1990); *Merry v. Westinghouse Elec. Corp.*, 697 F. Supp. 180, 183 (M.D. Pa. 1988) (stating that primary jurisdiction could "frustrate the congressional intent to broaden enforcement authority"); see also *Proffitt v. Rohm & Haas*, 850 F.2d 1007 (3d Cir. 1988) (overruled on other grounds) (stating that application of primary jurisdiction would frustrate purposes of the Clean Water Act).

C. Technical Expertise

The third justification for primary jurisdiction, that the court should defer to an administrative body with specialized competence in a particular area,⁵¹ is a tempting rationale in favor of applying the doctrine to RCRA citizen suits. There is no dispute that RCRA is a complicated statute⁵² and that environmental regulations involve complex technical matters that federal courts may not commonly encounter.⁵³ It is understandable that a judge might prefer to transfer jurisdiction to a state agency whose sole function is to interpret and apply environmental regulations.

What such deferrals depend on, however, is not the claim that a federal court cannot properly adjudicate the issues before it, but that it would be time-consuming for the court to acquire an understanding of the complicated factual and legal issues.⁵⁴ Because Congress has already chosen to allocate federal court resources to this problem by enacting RCRA's citizen suit provisions,⁵⁵ a federal court judge may not reallocate resources away from federal court jurisdiction. The statutory jurisdictional grant indicates that Congress expects federal courts to devote the time necessary to acquire competence in the issues presented by a RCRA suit.⁵⁶

51. See *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922) (finding that determination of issue requires evaluation of facts known only to "body of experts," members of ICC).

52. See 4 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 7.13, at 113 (1992) ("The EPA's graphic on the RCRA permitting process looks something like the organizational chart of the Prussian army . . ."); Randolph L. Hill, *An Overview of RCRA: The "Mind-Numbing" Provisions of the Most Complicated Environmental Statute*, 21 ENVTL. L. REP., May 1991, at 10254.

53. See *Davies v. National Coop. Refinery Ass'n*, 963 F. Supp. 990, 997 (D. Kan. 1997) (court adjudication would involve determining the threat posed by particular levels of hazardous waste and choice of remedial measures); *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1349-1350 (D.N.M. 1995) (court less institutionally suited for developing remedial plan).

54. See *Davies*, 963 F. Supp. at 997 (adjudication would duplicate extensive agency fact-finding); *Friends of Santa Fe County*, 892 F. Supp. at 1349-50 (reasoning that court could acquire knowledge through expert testimony or appointment of a special master, but these methods would be a waste of judicial resources).

55. See *Hodas*, *supra* note 38, at 1576 ("[c]ongress has leveraged the scarce federal enforcement resources" by creating citizen suits) (citation omitted).

56. See *Wilson v. Amoco Corp.*, 989 F. Supp. 1159, 1170 (D. Wyo. 1998) (issues under RCRA not too "esoteric" for judicial evaluation); *Merry v. Westinghouse Elec. Corp.*, 697 F. Supp. 180, 183 (M.D. Pa. 1989). The *Merry* court, enforcing the CWA, whose requirements are similarly technical to those of RCRA, cited the CWA legislative history asserting that "enforcement of pollution regulations is not a technical matter beyond the competence of the courts." *Merry*, 697 F. Supp. at 183 n.2 (citing S. REP. NO. 92-414 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3747).

D. Concurrent Proceedings

The final consideration under the primary jurisdiction doctrine relates to the problems raised by concurrent agency and court actions. Concurrent jurisdiction may require the court to make several inquiries: whether continuing parallel proceedings might impose conflicting orders on the defendant;⁵⁷ whether the administrative body will diligently pursue the issue if the court stays or dismisses the judicial action;⁵⁸ and whether the federal court plaintiff will be able to obtain relief from the administrative agency if the federal court stays the action.⁵⁹ In the context of RCRA citizen suits, these issues do not justify application of the primary jurisdiction doctrine.

The first concern, that agency and federal court involvement might result in conflicting obligations for the defendant, is simply not viable where the state and federal bodies operate as part of a single regulatory scheme. In order to receive authorization from the EPA, the state's program must be equivalent to the federal program: the state may not impose requirements less stringent than those in force under the federal regulations.⁶⁰ Thus, a federal court's imposition of more stringent obligations on the defendant simply brings the state administrative rule back into compliance with the federal statute. Under the terms of RCRA's federal-state structure, relief granted by the federal court thus cannot create a "conflicting" order on the defendant because federal authority ultimately defines the defendant's statutory obligations.

Second, rejecting primary jurisdiction keeps the meaning of "diligence" consistent with RCRA's statutory standard as to what level of administrative diligence bars a citizen suit.⁶¹ RCRA specifies that only

57. See *Davies*, 963 F. Supp. at 998; *Friends of Santa Fe County*, 892 F. Supp. at 1350.

58. See *Davies*, 963 F. Supp. at 998; *Friends of Santa Fe County*, 892 F. Supp. at 1350.

59. See *Rosado v. Wyman*, 397 U.S. 397, 406 (1970) (primary jurisdiction inappropriate where agency had no procedure through which petitioners could seek review of adverse administrative ruling).

60. See 42 U.S.C.A. § 6929 (West 1997) (regarding hazardous waste plans); § 6947(a) (regarding state plans generally). As articulated in section 6929, nothing prohibits a state from developing more stringent guidelines than those required by RCRA. In a case where a citizen plaintiff claimed a violation under such a state law, however, there would not be a RCRA cause of action and abstention would not be an issue.

61. See *Trident Inv. Management, Inc. v. Bhambra*, No. 95 C 4260, 1995 WL 736940, at *2 (N.D. Ill. Dec. 11, 1995) (holding that judicial restraint is defined not by common law primary jurisdiction doctrine, but by statutory mandate); *Sierra Club v. United States DOE*, 734 F. Supp. 946, 951-52 (D. Colo. 1990) (holding that citizen suit goes forward unless agency is "diligently prosecuting" an action in a court pursuant to § 6972(b)(1)(B)). But see *Davies*, 963 F. Supp. at 998 (applying primary jurisdiction to RCRA citizen suit where agency had ongoing oversight over defendant); *Friends of Santa Fe County*, 892 F. Supp. at 1350 (applying primary jurisdiction to RCRA citizen suit where agency proceedings preceded suit).

"diligent prosecut[ion]"⁶² by the EPA or state agency in a court bars a RCRA citizen suit. Given that statutory command, a federal court may not create a separate standard as to what level of administrative investigation is sufficient to dismiss a citizen suit. When federal courts have ignored the statutory definition of "diligence" in favor of deference to local agencies, communities have waited years for genuine enforcement of the statute.⁶³ Such a result allows the old problems of purely local enforcement to resurface and thus defeats the purpose of enacting national legislation.

The final policy concern, fairness to plaintiffs, particularly supports a rejection of primary jurisdiction in the citizen suit context. Because RCRA establishes exclusive federal causes of action for citizen suits,⁶⁴ citizen plaintiffs cannot take their cases to other tribunals.⁶⁵ Federal court jurisdiction is thus necessary to allow plaintiffs access to the remedies provided by the statute.⁶⁶

Until recently, the federal courts were in accord that the RCRA provision stating that citizen suits "*shall* be brought in the district court"⁶⁷ confers exclusive jurisdiction on the federal courts.⁶⁸ The Sixth Circuit recently defected from that view in *Davis v. Sun Oil Co.*,⁶⁹ however, concluding that RCRA's jurisdictional language is insufficient to overcome the strong presumption in favor of concurrent

62. See § 6972(b)(1)(B), (6)(2)(B), (b)(2)(C)(i), (b)(2)(C)(iii).

63. See *Merry v. Westinghouse Elec. Corp.*, 697 F. Supp. 180, 183 (M.D. Pa. 1988) (stating that primary jurisdiction could allow state or federal government to frustrate congressional intent "by delay in action or applications"). In one case where the court applied primary jurisdiction, it admitted that the administrative agency, which had failed to take action for *fourteen years*, did not appear to fare particularly well under primary jurisdiction's "diligence" factor. The court concluded, however, that a stay of federal court jurisdiction was warranted because the agency was "on the verge of addressing remediation" of a contaminated site. *Davies*, 963 F. Supp. at 998.

64. See § 6972(a).

65. See *Craig Lyle Ltd. Partnership v. Land O'Lakes, Inc.*, 877 F. Supp. 476, 483 (D. Minn. 1995) (primary jurisdiction would greatly reduce cases where plaintiffs could bring citizen suits). But see *Friends of Santa Fe County*, 972 F. Supp. at 1350 (applying primary jurisdiction, reasoning that plaintiffs could have pursued remedies through state court review of administrative determinations).

66. The Supreme Court has not always considered comparable relief for plaintiffs in the administrative forum to be a necessary prerequisite for the application of primary jurisdiction. See *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289 (1973). *Ricci* applied the primary jurisdiction doctrine even though plaintiff had no right to initiate or intervene in a proceeding before the administrative body. See *Ricci*, 409 U.S. at 311-12 (Marshall, J., dissenting). The majority, however, noted that if the agency refused to act, the federal court could again assume jurisdiction. See *Ricci*, 409 U.S. at 304 n.14.

67. 42 U.S.C.A. § 6972(a) (West 1997) (emphasis added).

68. See *Fletcher v. United States*, 116 F.3d 1315, 1327 (10th Cir. 1997); *Reservation Tel. Coop. v. Three Affiliated Tribes of Fort Berthold Reservation*, 76 F.3d 181, 185-86 (8th Cir. 1996).

69. *Davis v. Sun Oil Co.*, 148 F.3d 606 (6th Cir. 1998) (state courts may also hear RCRA citizen suits).

jurisdiction.⁷⁰ That decision was misguided for two reasons.

First, the court improperly relied on the Supreme Court's decision in *Yellow Freight System, Inc. v. Donnelly*.⁷¹ That case held that Title VII's jurisdictional language, providing that federal courts "shall have jurisdiction of actions,"⁷² did not confer exclusive jurisdiction on the federal courts. Yet Title VII's jurisdictional provision is easily distinguishable from RCRA's. The mandatory language of Title VII discusses only whether federal courts shall have jurisdiction in general, i.e., the power to hear a case.⁷³ The language of RCRA, on the other hand, discusses where citizen plaintiffs *must* bring their suits. The *Sun Oil* court reached a contrary view only by narrowly focusing on the word "shall" without attention to the surrounding language.

Second, the Supreme Court has elsewhere suggested that mandatory statutory language regarding where plaintiffs should bring suits would confer exclusive jurisdiction on the federal courts. In *Tafflin v. Levitt*,⁷⁴ the Court held that language in RICO, which reads that "[a]ny person injured . . . may sue therefor [sic] in any appropriate United States district court,"⁷⁵ did not establish exclusive jurisdiction.⁷⁶ The Court noted that RICO "provides that suits of the kind described 'may' be brought in the federal district courts, *not that they must be*."⁷⁷ This statement suggests that mandatory language such as "shall" in the place of "may" would have established exclusive jurisdiction.⁷⁸

* * *

The doctrine of primary jurisdiction allows courts to further the purposes of a statutory scheme by allocating jurisdiction already

70. 148 F.3d at 611-612.

71. *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 825 (1990).

72. *Yellow Freight*, 494 U.S. at 823 (quoting 42 U.S.C. § 2000e-5(f)(3) (1982)).

73. See BLACK'S LAW DICTIONARY 584(6th ed. 1991) (defining "[j]urisdiction of the subject matter" as "[p]ower of a particular court to hear the type of case that is then before it").

74. *Tafflin v. Levitt*, 493 U.S. 455 (1990).

75. 493 U.S. at 460 (emphasis added by Court) (quoting 18 U.S.C. § 1964(c)).

76. 493 U.S. at 460.

77. 493 U.S. at 460-61 (emphasis added) (quoting *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 506 (1962)).

78. The legislative history also supports the exclusive jurisdiction rule. The House Report addressed the concern that the cause of action would allow plaintiffs to bring many state law claims with their RCRA cause of action under the pendent jurisdiction doctrine. See H.R. REP. NO. 98-198, pt. 1, at 118 (1984), reprinted in 1984 U.S.C.A.N. 5576, 5634 (stating minority views on the amendment, which complain that new burden on federal courts is "potentially crushing" and that federal court judges will have to turn to state courts for guidance during the course of the suit). No House member suggested the obvious solution: that such mixed claims of federal and state law could be brought in state court.

shared by courts and agencies. Where, as in RCRA, the statute has explicitly delineated the jurisdictional relationship, a court cannot transfer its duties to an administrative body, particularly when those duties achieve the very goals that the primary jurisdiction doctrine seeks to protect. Beyond seeking an agency's opinion on a limited factual matter,⁷⁹ a court should not decline jurisdiction of a RCRA citizen suit based on primary jurisdiction.

II. *BURFORD* ABSTENTION

The *Burford* abstention doctrine seeks to protect "complex state administrative processes" from undue interference by the federal courts.⁸⁰ Three core components are necessary for the application of the *Burford* doctrine: the presence in a case of "distinctively local regulatory facts or policies";⁸¹ a danger that federal court adjudication will disrupt a state's policy or regulatory framework on a broad basis;⁸² and an assurance that the federal court plaintiffs will be able to pursue their claim in state courts if the federal court dismisses the matter.⁸³ The doctrine should be applied only in rare and compelling circumstances.⁸⁴ The Supreme Court has described the federal courts' obligation to hear suits within their jurisdiction as "virtually unflagging."⁸⁵

This Part argues that application of the *Burford* doctrine is never appropriate for a federal statute like RCRA, which operates under a theory of cooperative federalism. Section II.A demonstrates that the federal focus of RCRA makes *Burford* abstention incompatible with RCRA citizen suits. Section II.B addresses the special problem of citizen suits brought as siting or permitting challenges and concludes

79. This Note does not challenge more limited uses of primary jurisdiction, in which a court stays an action pending an agency's factual determination regarding a discrete issue.

80. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 362 (1989).

81. 491 U.S. at 364.

82. The *Burford* doctrine describes two types of such disruption: "(1) when there are 'difficult questions of state [or local] law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'; or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *New Orleans Pub. Serv.*, 491 U.S. at 361 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)).

83. See 491 U.S. at 361. This requirement seeks to assure a federal court considering abstention that dismissing or staying the federal suit will not work an injustice on the individual litigants. See *Burford v. Sun Oil*, 319 U.S. 319 (1943). Such a system of state court review is simply a prerequisite for performing a *Burford* analysis, not a satisfaction of the test itself. See *New Orleans Pub. Serv.*, 491 U.S. at 361; *Colorado River*, 424 U.S. at 814.

84. See *New Orleans Pub. Serv.*, 491 U.S. at 358.

85. *New Orleans Pub. Serv.*, 491 U.S. at 359 (citing *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988)).

that statutory bars, rather than *Burford* abstention, justify dismissal of such suits.

A. RCRA's Federal Mandate

RCRA citizen suits are singularly poor candidates for *Burford* abstention. This section demonstrates that the cluster of issues necessary for an application of *Burford* abstention is not present in a RCRA citizen suit, which provides a federal cause of action and requires the application of federal law. Section II.A.1 addresses the "local law" requirement of *Burford* and argues that in passing RCRA, Congress explicitly defined waste disposal as a matter of national concern and developed a comprehensive federal statutory scheme. Section II.A.2 illustrates that the concern that federal courts might interfere with a state's efforts to establish a coherent waste disposal policy is not relevant in the RCRA context. Section II.A.3 demonstrates that federal courts that have applied *Burford* in situations where states have developed a specialized state court review system have mistaken a prerequisite for applying the doctrine for a satisfaction of its criteria. This error has allowed a circumvention of the federal focus of the statute.

1. The Statutory Framework

RCRA's comprehensive mandate deprives a federal court of the authority to define waste disposal as a local problem. As discussed in Part I, RCRA establishes waste disposal as a matter of national concern.⁸⁶ Unlike the particularly local issues held applicable for *Burford* abstention, a RCRA citizen suit presents a statutory federal cause of action to enforce national minimum standards and thus does not provide the types of state-based legal issues that would implicate *Burford*.

Despite the statute's emphasis on the importance of national goals and federal enforcement, courts have varied in their assessments of whether a RCRA suit involves only "local" law.⁸⁷ Courts that have dismissed RCRA citizen suits as local matters under *Burford* have done so under two theories. First, some courts have argued that an underlying issue in a RCRA case, land use generally, has traditionally

86. See *supra* section I.B.

87. See *White & Brewer Trucking, Inc. v. Donley*, 952 F. Supp. 1306, 1314 (C.D. Ill. 1997) (finding open dumping to be a national rather than local problem); *Craig Lyle Ltd. Partnership v. Land O'Lakes, Inc.*, 877 F. Supp. 476, 484 (D. Minn. 1995) (ruling that under RCRA, "Congress has found the problems of solid and hazardous waste to be national as opposed to an 'essentially local problem'"). But see *Coalition for Health Concern v. Natural Resources Defense Council, Inc.*, 60 F.3d 1188, 1194 (6th Cir. 1995) ("Kentucky has an overriding interest in the protection of its environment . . . exercise of federal review would be disruptive of Kentucky's efforts to establish a coherent policy with respect to the licensing of hazardous waste facilities.").

been treated as a local problem.⁸⁸ Second, others have claimed that once the EPA has authorized a state program to operate "in lieu"⁸⁹ of RCRA's federal regulations, the issues at stake in a RCRA citizen suit become local matters suitable for abstention.⁹⁰ Neither of these characterizations is persuasive.

The first rationale, based on the characterization of land use law as a local matter, ignores the fact that the specifically national attention given by Congress to solid and hazardous waste disposal overrides the traditional treatment of a general area of law.⁹¹ RCRA's clear national mandate does not allow retreat to the traditional view of waste disposal as a local land use issue.

The applicability of the second theory, that an authorized state program transforms RCRA issues into local ones, ignores the relationship between the approved program and the federal statute.⁹² In drafting and amending RCRA, Congress envisioned a cooperative relationship between the federal government and the states.⁹³ The legislative history of the 1984 amendments to RCRA emphasizes the centrality of a federal-state partnership to the statutory goals:

The successful implementation of the 1984 amendments will require an improved working relationship between the Environmental Protection Agency and the states. The development of a viable federal-state partnership is one of the highest priorities of this legislation, and the agency should devote greater effort to assisting states in achieving authorization of their RCRA programs.⁹⁴

88. See *Sugarloaf Citizens Ass'n v. Montgomery County*, No. 93-2475, 1994 WL 447442, at *3 (4th Cir. Aug. 17, 1994).

89. See, e.g., 42 U.S.C.A. § 6926 (West 1997) (regarding approval of state programs pertaining to hazardous waste disposal).

90. See *Coalition for Health Concern*, 60 F.3d at 1194. The court abstained because plaintiffs' RCRA claims did not "arise in isolation from state law issues." 60 F.3d at 1194. This formulation deviates from established confines of the *Burford* test and would bring a wide array of cases with mixed issues of federal and state law into the realm of the *Burford* doctrine.

91. See *White & Brewer Trucking*, 952 F. Supp. at 1314; *Craig Lyle Ltd.*, 877 F. Supp. at 484; *Sierra Club v. United States DOE*, 734 F. Supp. 946, 947 (D. Colo. 1990) (noting that state regulations essentially mirror those of the EPA and concluding that "analysis of the federal scheme [RCRA] overlays and defines that of Colorado"); see also *supra* section I.B.

92. This Note does not address the issue of whether state law operating "in lieu" of the federal regulations with EPA approval preempts a RCRA citizen suit, even though the EPA may still bring an enforcement or endangerment action. Most courts have rejected this view. See *Acme Printing Ink Co. v. Menard, Inc.*, 881 F. Supp. 1237, 1244 (E.D. Wis. 1995) (rejecting preemption theory and collecting cases with both views). The position of the EPA is that citizen suit availability is not preempted by state authorization. See 49 Fed. Reg. 48,300, 48,304 (1984); see also Adam Babich, *Is RCRA Enforceable by Citizen Suit in States with Authorized Hazardous Waste Programs?*, 23 ENVTL. L. REP. 10, 56 (Sept. 1993) (arguing no preemption).

93. See *supra* notes 37, 87.

94. H.R. CONF. REP. 98-1133, at 81 (1984), reprinted in 1984 U.S.C.C.A.N. 5649, 5651.

While the statute promotes state implementation of solid and hazardous waste disposal programs, such plans are approved and constantly overseen at the federal level to maintain their conformance with the RCRA guidelines.⁹⁵ Because the federal guidelines control and shape state programs operating pursuant to them, there is no ambiguity about the dominance of the federal statutory goals in enforcing the state regulations.

This interdependent relationship is distinct from the two fact settings in which the Supreme Court has utilized the *Burford* doctrine. The core issues of those cases were state or local rules given substantial deference by federal courts and operating independently from any federal legislation.⁹⁶ No federal statutory scheme was at issue.⁹⁷

In the context of intertwined federal and state regulatory schemes, the Court has specifically rejected the applicability of the *Burford* doctrine. In *New Orleans Public Service, Inc. v. Council of New Orleans ("NOPSI")*,⁹⁸ the plaintiff nuclear power company challenged a local rate-making body's allocation among energy producers of Federal Energy Regulatory Commission rate increases.⁹⁹ Although the actions of a local regulator were at issue,¹⁰⁰ the Court held that the suit's nucleus of federal issues precluded an application of *Burford*.¹⁰¹ Because RCRA similarly involves federal law operating through a state apparatus, *Burford* abstention is inappropriate in the context of a citizen suit brought under the statute.

2. State Regulatory Schemes

RCRA's federal emphasis also disallows *Burford* abstention under

95. See 42 U.S.C.A. § 6947(a) (West 1997). The EPA has continuing oversight over the state program and may modify or revoke the state's authority to operate under RCRA. See text accompanying notes 40-41 regarding the EPA's enforcement power.

96. See *Alabama Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 347 (1951) (raising issues about local need for intrastate rail service); *Burford v. Sun Oil*, 319 U.S. 315, 331 (1943) (involving the state regulation of oil drilling).

97. See *Southern Ry. Co.*, 341 U.S. at 349 (involving legality of state commission's order for railroad to continue intrastate rail service); *Burford*, 319 U.S. at 327, 331 (case centered on state commission's application of Texas oil and gas regulations). Even commentators favoring abstention agree that abstention must conform to statutory intent, not overrule it. See, e.g., Michael Wells, *Why Professor Redish is Wrong About Abstention*, 19 GA. L. REV. 1097, 1103-1108 (1985) (abstention appropriate where a cause of action is judge-made rather than statutory).

98. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358-64 (1989). *NOPSI*, along with *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), are the Court's most recent discussions of *Burford* abstention.

99. *New Orleans Pub. Serv.*, 491 U.S. at 352-57 (suit raised preemption, due process, and takings issues).

100. Indeed, the plaintiff also filed a suit in Louisiana state court. See 491 U.S. at 357-58 & n.3.

101. See 491 U.S. at 361.

the theory that federal adjudication might disrupt the development of a state's whole policy or regulatory framework in some area.¹⁰² In the RCRA context, judicial determinations in favor of dismissal have failed to provide any reason why federal court review of a particular state administrative action would be disruptive to the state's policy *as a whole*.¹⁰³ It is doubtful that a determination as to one defendant's compliance with federal and state law would disrupt the entire waste disposal policy of a state.¹⁰⁴

More importantly, such deference to a state's hazardous waste policy assumes that under RCRA, federal judges should give deference to the integrity of a state's individual program rather than to that of the federal program. The explicit goals and structure of RCRA run counter to a conclusion that the best interests of a state's program are at odds with federal oversight. The only situation where a state's policy might be affected by adjudication would be one in which a state had exercised its right to enact *stricter* standards than the federal statute required.¹⁰⁵ In this case, however, violations of the state's unique rule would not be actionable under the federal RCRA cause of action.¹⁰⁶ Abstaining from hearing a RCRA suit on *Burford* grounds is inappropriate because it requires the federal court to ignore the federal-state structure of the statute.

102. See 491 U.S. at 363 ("[T]here is . . . no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy.") (citing *Zablocki v. Redhail*, 434 U.S. 374, 380 n.5 (1978)).

103. See *Coalition for Health Concern v. LWD, Inc.*, 60 F.3d 1188, 1195 (6th Cir. 1995) (concluding, without explanation, that adjudication would interfere with state's policy); *Davies v. National Coop. Refinery Ass'n*, 963 F. Supp. 990, 999 (D. Kan. 1997) (abstaining because interference with state agency's activities could undercut efforts by Kansas to develop a coherent hazardous waste policy).

104. See *Morton College Bd. of Trustees v. Town of Cicero*, 18 F. Supp. 2d 921, 927 (N.D. Ill. 1998) (rejecting defendant's claim that federal court adjudication would disrupt Illinois's environmental policy). One court has abstained partly on the basis that the policy impact of the case would transcend the results of the litigation itself. See *Sugarloaf Citizens Ass'n v. Montgomery County*, No. 93-2475, 1194 WL 447442, at *3 (4th Cir. Aug. 17, 1994). This reasoning appears to reflect a concern that the court's adjudication would amount to legislative, rather than judicial, action. If a court finds the task before it to be truly legislative in character, it should dismiss the action on ripeness grounds, not under *Burford*. See *NOPSI*, 491 U.S. 350, 372 (1989); see also Young, *supra* note 2, at 886-900 (discussing blurred distinctions over time between "legislative," "executive," and "judicial" legal forms, and the mystification of the administrative law process at the time *Burford* doctrine developed).

105. States are free to enact stricter standards than the federal statute requires. See 42 U.S.C.A. § 6929 (West 1997).

106. Where state standards are identical to RCRA regulations, violations of a state permit in a state approved to regulate in lieu of RCRA continue to be actionable under federal law. See, e.g., § 6928(a)(2) (authorizing suit by EPA regarding violation of a state's hazardous waste program).

3. *Specialized State Court Review*

The final rationale for *Burford* abstention of RCRA citizen suits, that the state has developed a specialized court process for review of state administrative decisions, is unpersuasive for three reasons: the purpose underlying the state court review requirement, which seeks to protect plaintiffs' interests if their federal case is dismissed; the failure of a state court procedural rule to supply a substantive state interest; and the opportunity such a rule would provide to circumvent the federal statute.

First, the rationale behind *Burford*'s state court review rule, providing fairness to litigants, weighs heavily against abstention. Under RCRA, Congress has conferred exclusive jurisdiction on the federal courts for the vindication of a statutory right.¹⁰⁷ Citizen plaintiffs cannot pursue their RCRA claims if a federal court abstains under *Burford*.

The second reason weighing against using state court review as a ground for abstention is that a state's establishment of a specialized state court review process does not provide a state interest that overrides RCRA's statutory jurisdictional grants.¹⁰⁸ The federal or state nature of a statutory scheme stems from its substantive subject matter, not from the procedural trappings of one system or another.¹⁰⁹ In passing RCRA, Congress clearly delineated the substantive federal issues at stake.

Third, federal court abstention based on state court reviewability creates an opportunity for recalcitrant states to avoid federal judicial review under RCRA by developing "specialized" state court procedures that the state claims are central to the development of a state waste disposal policy. Such procedures, which could be as simple as assigning challenges to state administrative procedures to a court in a particular county,¹¹⁰ would allow a state to become the final judge of

107. See *supra* notes 64-78 and accompanying text; see also *White & Brewer Trucking, Inc. v. Donley*, 952 F. Supp. 1306, 1311 (C.D. Ill. 1997) (holding that exclusive federal cause of action for RCRA citizen suits prevents application of *Burford*). The *White & Brewer Trucking* court applied the Seventh Circuit's standard for *Burford* abstention under *General Ry. Signal Co. v. Corcoran*, 921 F.2d 700, 708-09 (7th Cir. 1991), which explicitly considers whether the cause of action is exclusively federal as part of its *Burford* analysis. See *White & Brewer Trucking*, 952 F. Supp. at 1311.

108. See *White & Brewer Trucking*, 952 F. Supp. at 1313 (allowing RCRA claim despite fact that plaintiffs could have participated in state administrative review process, partially because plaintiffs can only raise section 6972 claims before federal court). But see *Coalition for Health Concern*, 60 F.3d at 1194 (process of review for permit issuance is evidence of Kentucky's interest in developing a coherent state policy); *Ada-Cascade Watch Co. v. Cascade Resource Recovery, Inc.*, 720 F.2d 897, 905 (6th Cir. 1983) (finding that centralized review in a single state court is evidence of Michigan's interest); *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1348 (D.N.M. 1995).

109. See *supra* note 83.

110. See *Ada-Cascade Watch Co.*, 720 F.2d at 905 (holding that Michigan had manifested

its solid and hazardous waste decisions, and thus would defeat the statutory mandate in favor of ongoing federal oversight.

B. *Permitting and Siting Challenges*

RCRA's expansive jurisdictional grants leave a federal court with little discretion as to whether to decline jurisdiction of a citizen suit. Some citizen suits, however, amount solely to challenges of permitting or siting determinations. These suits make no claim that the defendant company has violated a permit or that the disposal plan will be endangering for reasons not considered by the permitting agency; rather, they question the validity of the agency's permitting or siting determination. The Fourth and Sixth Circuits have abstained from hearing such citizen suits by invoking the *Burford* doctrine.¹¹¹ In turn, these decisions have paved the way for courts to use the doctrine to decline jurisdiction in other types of RCRA citizen suits.¹¹²

This section argues that Congress did not intend for citizen suits to provide a federal forum for the review of solid or hazardous waste disposal permits or siting determinations, but instead, designed the statute so that the permitting and siting decisions of the EPA and state agencies would have res judicata effect on this type of citizen suit challenge. Section II.B.1 illustrates that RCRA's broad jurisdictional grant does not extend to suits that simply challenge an agency's permitting or siting decision. Section II.B.2 maintains that the statutorily provided review process regarding permitting and siting determinations should be plaintiffs' exclusive forum as long as they were granted a full hearing of the issues subsequently raised in the RCRA citizen suit. This statutory exclusion obviates the necessity for courts to employ the *Burford* abstention doctrine to dismiss RCRA citizen suits that challenge permits and siting.

1. *Statutory Bars*

The broad statutory authority for RCRA citizen suits does not extend to actions that are simply appeals of state or EPA permitting or siting decisions. Two specific jurisdictional limits illustrate that Congress did not intend citizen suits to provide an avenue for permitting or siting appeals.¹¹³

desire for coherent policy by centralizing review of hazardous waste management in one county's circuit court; centralization allowed that court to gain expertise in the field).

111. See *supra* note 9

112. See *supra* note 10.

113. A citizen suit plaintiff could sue the governmental agency directly regarding an improperly issued permit, subject to Eleventh Amendment limitations. See 42 U.S.C.A. § 6972(a)(1)(A) (West 1997).

The first jurisdictional limit, section 6976(b), constrains the forum for all EPA-issued permit challenges to circuit court review within ninety days of the permitting decision.¹¹⁴ Section 6976(b) further states that after the 90 days have passed, the terms of permits may not be challenged in any suit for enforcement.¹¹⁵ Because the provision describes the barred claims as "enforcement suits," some commentators¹¹⁶ and plaintiffs have claimed that the jurisdictional bar applies only to "enforcement" suits, which challenge violations of the statute or a permit,¹¹⁷ and not to "imminent endangerment" suits, which challenge conditions that pose an immediate danger to the environment.¹¹⁸ This "plain meaning" reading accomplishes a result contrary to the structure of the statute as a whole.

The jurisdictional bar applies to both types of RCRA citizen suits for two reasons.¹¹⁹ First, including endangerment suits in the section 6976(b) provision would have appeared unnecessary at the time Congress passed the provision. The original purpose of section 6976(b) was to preclude defendants from challenging the terms of their RCRA permits as a defense to EPA, state, or citizen enforce-

114. See § 6976(b) ("Review of the Administrator's action . . . may be had by any interested person in the Circuit Court of Appeals of the United States Action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement. Such review shall be in accordance with sections 701 through 706 of [The Administrative Procedure Act].") (emphasis added)).

115. See § 6976(b). This bar applies to state-issued permits, as well. See 40 C.F.R. § 271.14(b)(1998). That provision makes 40 C.F.R. § 270.4(a) applicable to state programs. Section 270.4(a) reads, "compliance with a RCRA permit during its term constitutes compliance, for purposes of enforcement, with subtitle C of RCRA" § 270.4(a).

116. See Schannauer, *supra* note 43, at 287-92, 317.

117. See § 6972(a)(1)(A).

118. See § 6972(a)(1)(B). One commentator has defined the "imminent and substantial endangerment" cause of action as one alleging a "significant potential risk of eventual environmental harm." See Adam Babich, *RCRA Imminent Hazard Authority: A Powerful Tool for Businesses, Governments, and Citizen Enforcers*, ALI-ABA Course of Study, Environmental Law (C883 ALI-ABA 81), Feb. 17-19, 1994, at 97. Courts have described the provision as a federalization of the common law nuisance claim. See *Middlesex City Bd. of Chosen Freeholders v. New Jersey*, 645 F. Supp. 715, 721-22 (D.N.J. 1986).

119. The judicial review provision was copied from identical language in the Clean Water Act and Clean Air Act, neither of which have imminent endangerment causes of action. See S. REP. NO. 96-172, at 5 (1980), reprinted in 1980 U.S.C.C.A.N. 5019, 5024. Congress added the estoppel language to RCRA, however, as part of the same amendment in which RCRA's imminent endangerment provisions were added. See H.R. REP. NO. 98-198, pt. 1, at 47-49 (1984), reprinted in 1984 U.S.C.C.A.N. 5576, 5606-08. The chronology of the amendments is thus ambiguous: on one hand, Congress may have used generic statutory language for environmental legislation and failed to consider the necessity of broader language for RCRA's judicial review provision; on the other hand, Congress must have considered that necessity because the endangerment provisions were specifically on the table at the time, and rejected estoppel that would preclude permit or siting challenges as part of an endangerment citizen suit.

ment of the statute.¹²⁰ While endangerment suits have now been brought against permitted facilities, the jurisdictional provision had in the past only been used to address abandoned or dormant facilities that had not undergone a permitting process.¹²¹ Thus there would have appeared no possibility that endangerment suit defendants could mount a permit challenge defense, making the bar of section 6976(b) irrelevant to that type of suit.

Second, applying the permit-challenge bar only to enforcement suits would interpret the section in a manner that conflicts with other provisions of RCRA. In other parts of the Act, the jurisdictional grant for enforcement suits is more generous than that for endangerment suits. The endangerment provision requires a longer waiting period between the time notice is given to the defendant and governmental officials and the time suit is filed.¹²² In addition, the endangerment cause of action is precluded by a wider variety of governmental remedial steps.¹²³ It would be illogical to grant a stricter jurisdictional bar on enforcement suits, the more encouraged provision in the statutory scheme, than on endangerment suits.

Allowing citizen suits as an alternative route for permitting and siting challenges would create one further, serious statutory inconsistency: the scope of judicial review of the agency's decision would be different under the permit-review provision than under the permit-challenge citizen suit. The scope of judicial review under section 6976(b) of RCRA occurs pursuant to the standards of the Administrative Procedure Act ("APA").¹²⁴ For purposes of reviewing RCRA decisions, the APA allows judicial reversal only where the agency's decision is arbitrary and capricious, without observance of required procedures or unsupported by substantial evidence.¹²⁵ This standard is deferential to the agency.¹²⁶

120. See H.R. REP. NO. 98-198, pt. 1 at 55 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5614 ("Addition of this language . . . would clarify that defendants in Federal enforcement proceedings cannot challenge permit terms and conditions or State program provisions if such provisions could have been challenged in the courts of appeals at the time the permit was issued.").

121. See Schannauer, *supra* note 43 at 291. Under the EPA's parallel authority to bring analogous imminent endangerment suits under section 6973, all actions to date have involved non-permitted facilities. See *id.* at 319-320.

122. See *supra* note 28.

123. See *supra* note 32.

124. See 42 U.S.C.A. § 6976(b) (West 1997) ("Such review shall be in accordance with sections 701 through 706 of Title 5 [the judicial review provisions of the Administrative Procedure Act].").

125. See 5 U.S.C. § 706(2)(A), (D), (E) (1994).

126. See *Motor Vehicle Manufacturers' Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency.").

In hearing a citizen suit, on the other hand, a district court looks at all issues of endangerment on a blank slate and would labor under no such statutory restraints.¹²⁷ The statute cannot plausibly contain such disparate review standards based merely on the plaintiff's choice of statutory provision.

In summary, the history of section 6976(b), the jurisdictional treatment of endangerment suits compared to enforcement suits, and the inconsistent scopes of review between the permit-review and citizen suit provisions all demonstrate that section 6976(b) should apply with equal force whether a plaintiff brings an endangerment or enforcement suit regarding a *permitted* facility. A citizen suit may not function as an alternate route to the circuit court for appeal of a permitting decision of the EPA.¹²⁸

The second jurisdictional bar, section 6972(b)(2)(D), prohibits imminent endangerment suits as a challenge to either EPA or state siting or permitting of a "hazardous waste treatment, storage, or a disposal facility."¹²⁹ The fact that the provision mentions hazardous waste and not solid waste again reflects a failure to anticipate the breadth of purposes for which imminent endangerment suits have come to be used.

The inclusion of section 6972(b)(2)(D) reflected a realization that citizen plaintiffs might otherwise use their imminent endangerment authority, an "emergency" provision, to challenge the siting of hazardous waste facilities.¹³⁰ Including solid waste siting and permitting in the bar would have appeared unnecessary. RCRA defines "hazardous waste" as solid waste that could be endangering to human health or the environment.¹³¹ Only hazardous waste, therefore, would seem to present conditions giving rise to an imminent endangerment cause of

127. No citizen suit provision mentions any deference to any permitting terms. This silence is consistent with the thesis of this Note that citizen suits are not meant as permit-challenge mechanisms.

128. See *Greenpeace, Inc. v. Waste Techs. Indus.*, 9 F.3d 1174, 1178 (6th Cir. 1993) (describing citizen suit as "improper collateral attack on the prior permitting decisions of the U.S. EPA"); *Palumbo v. Waste Techs. Indus.*, 989 F.2d 156, 159 (4th Cir. 1993) (overruled on other grounds) (citizen suit may not replace direct appeal procedure under § 6976(b)).

129. See 42 U.S.C.A. § 6972(b)(2)(D) (West 1997) ("No action may be commenced under subsection (a)(1)(B) of this section by any person (other than a State or local government) with respect to the siting of a hazardous waste treatment, storage or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.").

130. The legislative history indicates that the imminent endangerment provision was designed to respond to hazardous waste emergencies. See H.R. REP. NO. 98-198, pt. 1, at 118-19 (1984), reprinted in 1984 U.S.C.A.N. 5576, 5634-35.

131. See § 6903(5) (" 'hazardous waste' means a solid waste, . . . [which may] (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed").

action.¹³² Permitting and siting decisions regarding non-hazardous solid waste disposal are inherently outside the scope of RCRA's grant of jurisdiction under the imminent endangerment provision.

The 1984 House Report regarding section 6972(b)(2)(D) confirms this reading, concluding that "other legal authority [besides citizen suits] is available to challenge deficiencies in the permitting process."¹³³ To read the statute as creating an exception for citizen suits that challenge solid waste disposal permits reaches an absurd result: citizen plaintiffs would have more authority under the endangerment provision to challenge solid waste disposal than hazardous waste disposal, even though the latter category is defined by its potential for endangerment.¹³⁴

Congress intended neither the enforcement nor endangerment RCRA citizen suit provisions to provide an alternate route for direct permit appeal. Admittedly, no single statutory provision spells out a blanket prohibition on citizen suits as permit challenges. Yet when the statutory authority disallowing particular types of such actions is taken together, as Table 1 demonstrates, it is apparent that Congress did not consider citizens' dissatisfaction with siting or permitting decisions, without any other complaint, to state a cause of action under RCRA.

Table 1. Provisions barring permitting/siting challenges through RCRA citizen suits.

	Hazardous Waste Permit	Solid Waste Permit
Endangerment Suit 6972(a)(1)(B)	6972(b)(2)(D)	<i>[Combination of both provisions suggest this quadrant is barred as well]</i>
Enforcement Suit 6972(a)(1)(A)	6976(b)	6976(b)

132. See H.R. Rep. 98-198, pt. 1, at 47 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5606. The legislative history notes that the EPA's parallel imminent endangerment authority extends to "all wastes that meet the statutory definition of hazardous waste (section 1004(5))." *Id.*

133. H.R. REP. NO. 98-198, pt. 1, at 53 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612.

134. See generally 40 C.F.R. § 270.4 (1998) ("Compliance with a RCRA permit during its term constitutes compliance, for purposes of enforcement, with subtitle C of RCRA except for those requirements not included in the permit . . .").

2. *Other Opportunities for Hearing*

Although RCRA's citizen suit relief is unavailable for siting and permit challenges, other legal procedures allow public participation during the process of site determination and issuance or denial of permits. RCRA protects citizens by building a number of procedural opportunities into the requirements of the permitting and siting process. These mechanisms allow some form of citizen involvement at all stages of the regulatory process.

Opportunities for public participation extend to siting and the issuance of permits. Before issuing any permit, the EPA must provide public notice of its intent and must hold hearings if it receives written notice of opposition to the permit.¹³⁵ In order for a state to be authorized to operate in lieu of the EPA, the state must abide by equivalent notice and hearing requirements.¹³⁶ RCRA also provides that "any person" may petition for the promulgation, amendment, or repeal of any regulations.¹³⁷

Once the EPA has reached a permitting decision, citizen plaintiffs may appeal directly to a federal circuit court.¹³⁸ While RCRA does not specify a method of appeal for state-issued permits, the availability of judicial review under a state's program is taken into account by the EPA when it decides whether to approve the state's program.¹³⁹ This emphasis on congressionally required opportunities to participate in the proceedings and to appeal supports the notion that the statute creates a route for citizen input within the permitting and siting process that citizen suits may not circumvent.

Permit challenges through citizen suits should still be available in certain limited circumstances: where new issues arise after the issuance of the permit and appellate review is no longer available;¹⁴⁰ or where, under a state-approved program, the plaintiffs have not been allowed to participate in the permitting process or to obtain judicial review of the permit. Other than these situations, there is no statutory authority under RCRA to use a citizen suit as a permit or siting appeal. The use of *Burford* dismissals rather than statutory authority to

135. See 42 U.S.C.A. § 6974(b)(2) (West 1997).

136. See § 6974(b)(2) ("No State program which provides for the issuance of permits referred to in this paragraph may be authorized by the Administrator under section 6926 of this title unless such program provides for the notice and hearing required by the paragraph.").

137. See § 6974(a).

138. See § 6976(b). Review "may be had by any interested person." *Id.*

139. See 40 C.F.R. 271.14 (x), (y), (z), (aa). These provisions refer the reader to regulations applicable to approved state programs operating under the Clean Water Act. See 40 C.F.R. 124.10, 124.11, 124.12(a), 124.17.

140. See § 6976(b).

dismiss such suits has lead to a distortion of the doctrine and to dismissals of other types of RCRA suits that were properly before a court.

* * *

Burford allows a federal court to avoid a collision with distinctively local regulatory schemes, not to substitute its judgment for that of Congress about what types of state court action should preclude a RCRA citizen suit. Where, as in RCRA, Congress has created a comprehensive, national, legislative scheme, a federal court lacks the power to redefine the issue as "local," and to reassess when it should assume jurisdiction. For suits which simply amount to challenges of a permitting or siting process, federal courts need not resort to abstention to refuse jurisdiction because there is no statutory authority for citizen suits in those situations. For other kinds of RCRA citizen suits, federal courts must assume jurisdiction unless the statutorily defined enforcement action has been undertaken.

III. ABSTENTION AND THE VALUES OF FEDERALISM

Given the specificity and breadth of RCRA's statutory scheme, abstaining from hearing a RCRA citizen suit is outside the established boundaries of the *Burford* and primary jurisdiction doctrines. Even beyond the statutory mandate, abstention fails to serve the values of federalism claimed by pro-abstention advocates. Courts and commentators have credited federalism with advancing a number of benefits, including the opportunity for citizen involvement, a government more responsive to its citizens through interstate competition and innovation and experimentation in government.¹⁴¹ Proponents of federalism have also identified a normative function: avoiding overreaching by the national government by reserving some affairs for state governments.¹⁴² When the Supreme Court has rejected national legislation on federalism grounds, it has responded primarily to this value.¹⁴³

This Part argues that judicial abstention from RCRA citizen suits does not advance these values of federalism. Section III.A demon-

141. See *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (listing values). Academic discussions of federalism's benefits include Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 524-30, 533-39 (1995), and Rubin & Feeley, *supra* note 1, at 907. This discussion does not exhaust all values claimed on behalf of federalism. For an example of other suggested benefits, see SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 386-88 (1993) (discussing values of community, utility, and liberty).

142. See *New York v. United States*, 505 U.S. 144, 188 (1992).

143. The *New York* opinion alludes to this focus by noting that the Constitution would require a vertical separation of powers between the national government and the states even if "federalism secured no advantages to anyone." 505 U.S. at 157.

strates that the statutory framework of RCRA explicitly addresses the instrumentalist benefits of federalism. Section III.B argues that constitutional doctrine amply addresses federalism's normative claim and is compromised by common law additions.

A. *Instrumentalist Values*

RCRA already takes into account federalism's claimed benefits of responsiveness, innovation, and citizen involvement. The statute's structure of cooperative federalism seeks to build the values of responsiveness and innovation into the waste disposal scheme. RCRA citizen suits directly involve citizen participation, a value which abstention can make no plausible claim to advance.

Acting alone, state and local governments may face heavy pressure to lower their environmental standards.¹⁴⁴ Competition among states may translate better into a competition for businesses who prefer minimal environmental regulation than into a contest for the cleanest waste program.¹⁴⁵ The problems of economic competition, along with externalities created when one state's pollution affects another state's environment,¹⁴⁶ identify the field as one justifying national legislation in some fashion.¹⁴⁷

Supporters of the values of federalism should view cooperative federal-state statutes such as RCRA as the best type of national legislation: the statute aims to preserve some state autonomy rather than to preempt the field altogether. RCRA facilitates government responsiveness and innovation by encouraging states to operate programs in lieu of its statutory terms,¹⁴⁸ an approach which allows state agencies flexibility in their approaches to solid and hazardous waste disposal.¹⁴⁹ RCRA balances those local advantages against the need for national minimum standards by eliminating competition based on safety levels.¹⁵⁰ Broadly applied, a body of abstention dismissals dis-

144. See Adam Babich, *Symposium, Environmental Federalism: Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1532, 1537 (1995) (hereinafter "Our Federalism"); Hodas, *supra* note 38, at 1615-16.

145. See Hodas, *supra* note 38.

146. See Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 608-610 (1995).

147. See *id.*

148. See 42 U.S.C.A. § 6926 (West 1997).

149. See § 6902(a)(7) (listing objective of federal-state partnership as "giv[ing] a high priority to assisting and cooperating with States in obtaining full authorization of State programs."); see also Babich, *supra* note 144, at 1531 ("The 'built-in restraints' protecting the states' primacy in their traditional domains are reflected in Congress's practice of pursuing environmental protection . . . through 'programs of cooperative federalism' . . .").

150. See J. William Futrell, *The Administration of Environmental Law*, in SUSTAINABLE ENVIRONMENTAL LAW 93, 118 (Celia Campbell-Mohn et al. eds., 1993).

courages such cooperative arrangements by sending a message to Congress that federal law preemption is necessary to create enforceable solid and hazardous waste standards.

Abstention has an even weaker claim regarding the third instrumentalist value, that of promoting citizen involvement. This value addresses the comparative ease of taking part in a local legislative process as opposed to a national one.¹⁵¹ To the extent that this assumption has force, it is inapplicable to the arena of judicial review. When citizens have an interest that becomes sufficiently pronounced to bring suit in a court,¹⁵² the jurisdictional grant under RCRA enables them access to a regulatory process that is no more cumbersome for being federal rather than state or local. Where federal courts abstain from such suits, it is hard to imagine how citizen involvement is enhanced: the plaintiffs cannot bring suit,¹⁵³ and there is no other group whose participatory opportunities increase.

RCRA accommodates both the instrumentalist values of federalism and the necessity for some national action in order to achieve environmental goals. RCRA explicitly preserves an active role for states and promotes public participation through citizen suits, the very avenue that abstention would obstruct.

B. *Diffusion of Power*

Federalism's normative claim of power diffusion between the national and state governments also fails to support an application of abstention doctrines. The Supreme Court's evolving federalism jurisprudence has rested mainly on this claim, rejecting federal laws that require states to enact specific legislation¹⁵⁴ or engage the efforts of state executive officers.¹⁵⁵ One might argue that abstention should rest on this view as well, acting as a weak lower court signal that complements and reinforces the constitutional federalism doctrines. This view is misguided.

The constitutional analysis developing in the Supreme Court's federalism jurisprudence has foreclosed several avenues through which Congress can create federal-state partnerships in order to bring about national, uniform legislation.¹⁵⁶ The Court, however, has retained two important methods as constitutional: conditional grants, where a state

151. See Rubin & Feeley, *supra* note 1, at 915.

152. Both the costs of litigation and the federal rules of standing constrain this event.

153. See *supra* notes 65-79 and accompanying text.

154. See *New York v. United States*, 505 U.S. 144, 188 (1992).

155. See *Printz v. United States*, 521 U.S. 898 (1997).

156. See, e.g., *Printz*, 521 U.S. at 932-33 (holding unconstitutional federal law that enlisted state officials to perform federal administrative functions); *New York*, 505 U.S. at 188 (holding unconstitutional federal law that "commandeered" state legislatures).

must enact particular legislation in return for optional federal funding;¹⁵⁷ and conditional preemption, the statutory scheme employed under RCRA, where a state chooses either to regulate pursuant to federal guidelines or to allow the federal government to regulate the field itself.¹⁵⁸ Because each of these statutory structures allows state governments to choose whether or not to participate in the federal plan,¹⁵⁹ the Supreme Court considers them a minimal threat to state autonomy.¹⁶⁰

Abstention from RCRA citizen suits on common law federalism grounds ignores the balance established by the Supreme Court in the constitutional arena. In disallowing certain types of federal-state arrangements created by Congress, the Court implicitly relied on the permissibility of other mechanisms as a means for Congress and states to create cooperative working relationships.¹⁶¹ Lower federal courts should not understand the Supreme Court's federalism doctrine as a cry to arms against any intergovernmental cooperation but rather recognize that restrictive rules in some areas are balanced against expansive rules in others.¹⁶²

The growth of constitutional federalism should thus discourage lower federal courts from abstaining from a suit whose underlying federal statute passes constitutional muster. Rather than adopting the position that if a little federalism doctrine is good, even more will be better, federal courts should take into account the federalism struc-

157. See *South Dakota v. Dole*, 483 U.S. 203 (1987) (allowing Congress to condition grant of highway funds upon states imposing a specific drinking age limit).

158. See *FERC v. Mississippi*, 456 U.S. 742, 763-66 (1982); see also *New York*, 505 U.S. at 145.

159. Some commentators have complained that states are not really free to decline a conditional grant. See, e.g., Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 119 (discussing, among other theories, idea that "choices" offered by Congress are illusory). Others dispute the idea that states are powerless faced with Congressional incentives. See Roderick M. Hills, *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 871-91 (1998). Hills argues that states have the ability to bargain during the legislative process and later during the grant application process, at the time the federal government decides exactly how the state will be regulated, and by declining a grant when the program would entail special opportunity costs for the state. See *id.*

160. See *New York v. United States*, 505 U.S. 144, 188 (1992). One commentator has claimed that some provisions of RCRA are unconstitutional as "commandeering" pursuant to *Printz v. United States*. See Jonathan H. Adler, Comment, *The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law*, 6 GEO. MASON L. REV. 573, 615-16 (1998) (discussing regulation of underground storage tanks).

161. See *New York*, 505 U.S. at 188.

162. See Evan Caminker, *Context and Complementarity Within Federalism Doctrines*, 22 HARV. J.L. PUB. POL'Y 161, 163-66 (1998). Caminker advances the theory that courts might accommodate the enforcement of federal norms and concerns for state dignity across a set of doctrines rather than within the precise delineation of a single rule. See *id.*

tures developed by the Court that already limit and shape congressional power over the states.

CONCLUSION

In enacting RCRA, Congress fashioned a comprehensive regulatory scheme dependant on the interplay among various governmental actors performing specific roles. When a federal court forgoes jurisdiction over a RCRA citizen suit under *Burford* abstention or primary jurisdiction, it frustrates the congressional scheme and misapplies those common law doctrines.

Dismissals of RCRA citizen suits on primary jurisdiction grounds fail to recognize that the jurisdictional gaps necessary to apply the doctrine are absent from RCRA. Such dismissals thwart the policy considerations of uniformity, technical expertise, and fairness to plaintiffs. The core prerequisites for *Burford* abstention, distinctively local law issues and an independent state regulatory process, are absent from a RCRA citizen suit. A state's provision of a centralized review process cannot remedy those absences for purposes of applying *Burford*. Cases where citizen suits amount to challenges of agency siting or permitting determinations should be dismissed on statutory, not *Burford*, grounds.

While abstention may seem consistent with the new environment of state-centered federalism, dismissals of RCRA citizen suits on *Burford* or primary jurisdiction grounds thwart the values of federalism claimed by its proponents and discourage the development of coherent doctrines of constitutional federalism. Given a statute with sound constitutional footing, federal courts should respect the roles assigned to them by RCRA's framework and assume jurisdiction when the law so requires.