ARTICLES

The Silent Strength of CERCLA: Private Party Cleanups—and the Judicial Decisions Jeopardizing Them

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INTRODUCTION

On November 15, 2021, President Joe Biden signed into law the Infrastructure Investment and Jobs Act (commonly known as the Bipartisan Infrastructure Law or IIJA),[1] a law the White House describes as "a once-in-a-generation investment in our nation's infrastructure and competitiveness."[2] Among other goals, the law is intended to "[d]eliver the largest investment in tackling legacy pollution by cleaning up Superfund and Brownfield sites, reclaiming abandoned mines, and capping orphaned oil and gas wells," funded by an investment of twenty-one billion dollars.[3] Of this $21 billion, $3.5 billion is allocated to Superfund cleanups[4] and $1.5 billion is allocated to Brownfield cleanups.[5] Additionally, the law's most significant contribution to Superfund cleanup is the reinstatement of the Superfund Excise Tax, which imposes taxes on entities that import, manufacture, produce or utilize any of forty-two listed chemicals.[6] The Superfund Excise Tax became effective on July 1, 2022 and is anticipated to raise an additional $14.4 billion for Superfund projects through its new expiration date of December 31, 2031.[7]

The importance of the Superfund Excise Tax should not be understated. After it was allowed to expire in 1995, the loss of the Superfund Excise Tax contributions to the Superfund Trust Fund resulted in stagnation of cleanups at sites listed on the National Priorities List (NPL)—those most severely contaminated. Cleanup rates dropped from an average of seventy-one sites per year to a low of six sites decontaminated in 2019.[8] After 1995, the American taxpayer bore the

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1. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

2. THE WHITE HOUSE, FACT SHEET: THE BIPARTISAN INFRASTRUCTURE DEAL (Nov. 6, 2021) https://perma.cc/TH6X-3FAZ.

3. *Id*.

4. EPA, CLEANING UP SUPERFUND SITES: HIGHLIGHTS OF BIPARTISAN INFRASTRUCTURE LAW FUNDING, (Nov. 16, 2022), https://perma.cc/FK36-ZM99.

5. EPA, BIPARTISAN INFRASTRUCTURE LAW: A HISTORIC INVESTMENT IN BROWNFIELDS (Nov. 17, 2022), https://perma.cc/CKT5-JQY9.

6. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 80201 135 Stat. 429, 1328-30 (2021); *see also* Lynn Mucenski Keck, *Superfund Excise Tax is Catching Many Companies by Surprise*, FORBES (July 25, 2022), https://perma.cc/3Q4L-AE5S.

7. Keck, *supra* note 6.

8. Vanessa Zainzinger, *US Reinstates Superfund Taxes to Clean Up 1300 Contaminated Sites*, CHEMISTRY WORLD (July 1, 2022), https://perma.cc/HXZ4-VBKE. As of September 2021, 78.5% of the 1,334 sites on the NPL had been on the list for more than 20 years. John Rumpler, *Make Polluters Pay: How Public Education and Advocacy Revived the Polluter Pays Principle*, ENVIRONMENTAMERICA (Sept. 30, 2021), https://perma.cc/66NW-SYKU; *see also* Paul J. Lioy & Thomas A. Burke, *Superfund: Is It Safe to Go Home?*, J. OF EXPOSURE SCI. & ENVTL. EPIDEMIOLOGY 20, 113–14 (Feb. 17, 2010), available at https://perma.cc/5EUK-5LBQ (noting that Superfund sites listed for more than 20 years expose multiple generations to pollution, and concluding there are inadequate protections to health throughout the cleanup process).

financial burden of cleanups instead of the industries that profit from dealing in hazardous substances, in an amount of $21 billion over twenty years.[9] In addition to this tax burden, cleanup delays raise environmental justice concerns and pose health threats to a significant number of Americans. Nearly one in four Americans live within three miles of a Superfund site, and those are disproportionately minority, low-income, linguistically isolated, and less educated compared to the national average.[10]

Yet, as important as the Superfund Excise Tax is to government-funded cleanup of NPL sites, it will fund only a fraction of all NPL and non-NPL CERCLA cleanups. Only around thirty percent of "nonfederal" NPL sites[11] are funded through the Superfund Trust Fund and cleaned up by EPA.[12] The other seventy percent of nonfederal NPL sites are cleaned up by private parties, many of which are potentially responsible parties (PRPs). PRPs are the original entities or successors to entities that polluted a contaminated site.[13] Further, only a fraction of contaminated sites is deemed contaminated enough to warrant listing on the NPL,[14] leaving most contaminated sites privately funded.

It is clear that private party cleanups are the predominant mechanism for decontaminating the environment in the United States. Yet, recent federal court decisions have restricted in numerous ways the ability of the PRPs performing the cleanup to effectively cooperate and pursue claims for cost recovery or contribution from non-performing PRPs.

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9. *E.g.*, Bryan Anderson, *Taxpayer Dollars Fund Most Oversight and Cleanup Costs at Superfund Sites*, THE WASHINGTON POST (Sept. 20, 2017), https://perma.cc/Y2GU-CY8A (citing GOVERNMENT ACCOUNTING OFFICE (GAO), TRENDS IN FEDERAL FUNDING AND CLEANUP OF EPA'S NONFEDERAL NATIONAL PRIORITIES LIST SITES, GAO-15-812, (Sept. 2015), available at https://perma.cc/2BDX-D4FG (stating Superfund appropriations of $23 billion in the period from 1999 through 2013, of which only a few billion had come from the Superfund trust account)). In addition to Superfund appropriations to EPA, States must contribute 10% of EPA's costs of cleaning up NPL sites within their borders. *See* 42 U.S.C. § 9604(c); *see generally* EPA, WHO PAYS FOR SUPERFUND?, Pub. No. 9200.5-008G (Nov. 1990), available at https://perma.cc/272T-2AX8.

10. EPA, POPULATION SURROUNDING 1,877 SUPERFUND SITES (July 2022), available at https://perma.cc/7ULZ-RRJV.

11. "Federal" NPL sites—those owned by a department, agency, or instrumentality of the United States—are funded by the landholding agency and not by EPA's Superfund appropriation. *See* GAO-15-812, *supra* note 9, at 1 note 2. "Nonfederal" NPL sites are all other sites. As of June 27, 2023, only 158 of the 1,336 currently-listed NPL sites are federal sites. EPA, SUPERFUND: NATIONAL PRIORITIES LIST, available at https://perma.cc/DN9Q-S5VE (last visited June 26, 2023).

12. CONGRESSIONAL RESEARCH SERVICE, SUPERFUND TAXES OR GENERAL REVENUES: FUTURE FUNDING ISSUES FOR THE SUPERFUND PROGRAM (Feb. 4, 2008), available at https://perma.cc/Z75Y-H95W ("At approximately 30% of the NPL sites, either EPA cannot locate PRPs for these properties, or the PRPs located do not have the necessary financial resources to assist with cleanup. It is primarily at this group of NPL sites that EPA uses funds from the trust fund to conduct cleanup activities.").

13. *See* 42 U.S.C. § 9607(a) (identifying the classes of liable parties).

14. EPA estimates the total number of uncontrolled or abandoned hazardous waste sites at around 44,000, whereas the current number of NPL sites is 1,336 (not counting proposals or already deleted sites). *See supra* note 11; *see* Zainzinger, *supra* note 8.

First, the courts have imposed strict mutual exclusivity between contribution and cost recovery causes of action, disallowing simultaneous claims for both, even though a performing PRP may simultaneously incur response costs pursuant to a judicial or administrative order as well as additional response costs not governed by such orders. This mutual exclusivity and cost preclusion may discourage PRPs from participating in cleanup or bar their claims for reimbursement altogether. It also fails to recognize that actions for recovery of cleanup costs incurred pursuant to an administrative order are more appropriately cost recovery actions in the traditional sense contemplated by CERCLA's tort origins, as recognized by the Supreme Court in *United States v. Atlantic Research Corp.*

Second, this court-forced mutual exclusivity has significant repercussions for the timing of litigation. The statute of limitations for contribution is usually three years after a lawsuit or order for cleanup, whereas the statute of limitations for cost recovery is much longer (three years after completion of a removal action, unless the removal action ends within three years of the initiation of the remedial action, which has a six-year statute of limitations). But recent interpretations of the statute of limitations clauses have forced private parties into a sue-first-settle-later rush to the courthouse. The performing PRPs must file suit before a thorough search for additional PRPs can be completed and even before a cost estimate has been generated for decontaminating a site. This is fundamentally contrary to CERCLA's plain text and early settlement scheme.

Third, recent district court decisions have forced performing PRPs to file suit as individually-named plaintiffs, rather than naming the performing PRP group as a single, associational plaintiff, basing their analyses on the real party in interest doctrine. Private party cleanups are usually run by a working group of performing PRPs, and the individual PRPs typically assign their CERCLA rights to the PRP group as a whole. These performing PRPs have intricate internal cost-sharing mechanisms as between parties with complicated and sometimes conflicting interests. A key benefit of forming a PRP group is avoiding individualized litigation. Thus, these real party in interest rulings threaten to destabilize PRP groups and disrupt the functionality of everyday cleanup operations.

Finally, the Supreme Court in *Territory of Guam v. United States* recently overturned widespread federal precedent and held that contribution is unavailable for private parties cleaning up sites under laws other than CERCLA. This threatens to disincentivize private parties from cleaning up sites under RCRA Corrective Action or other laws.

Taken together, these restrictions on private party actions place contaminated sites in jeopardy of delayed cleanup and increased, messy litigation. This Article summarizes the historical context and critical need for effective CERCLA cleanups, identifies causes of inefficiencies inherent in CERCLA's poor drafting and the private party cleanup process, further analyzes the federal court decisions that jeopardize CERCLA's private party cleanup incentives, and offers suggestions

for simple administrative fixes and legislative amendments to CERCLA that would rectify these issues and incentivize speedy cleanup.

I. THE ORIGINS AND OMISSIONS OF MODERN ENVIRONMENTAL LAW LEADING TO CERCLA

On the morning of Sunday, June 22, 1969, the Cuyahoga River burned in a conflagration five stories high near the Republic Steel mill in southeast Cleveland, Ohio[15] in an area known as the Flats.[16] The damage was not extensive and the fire was extinguished in a matter of minutes.[17] The cause was likely accumulation of oily wastes and debris underneath two railroad bridges, sparked by a passing train.[18]

To many locals, this fire was unremarkable.[19] After all, this was not the first time the Cuyahoga River had caught fire. It was at least the fourteenth.[20] The Cuyahoga first ignited in 1868, with additional fires in 1912, 1936 and 1952 and other minor fires along the way.[21] This was also not first river in the United States to catch fire. Indeed, there had been a large fire on the Buffalo River in Buffalo, New York only the year before, on January 24, 1968,[22] and the Rouge River in Detroit, Michigan would burn only a few months later on October 9, 1969.[23] The Cuyahoga shared company with numerous other contaminated waterways throughout the Rust Belt and the Northeast that suffered a slow death from pollution until they ignited.

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15. *See, e.g.*, Lorraine Boissoneault, *The Cuyahoga River Caught Fire at Least a Dozen Times, but No One Cared Until* 1969, SMITHSONIAN MAGAZINE, (June 19, 2019), https://perma.cc/CQA7-PA2Z.

16. *See, e.g.*, Rebekkah Rubin, *Oral Histories of the 1969 Cuyahoga River Fire*, BELT MAGAZINE (June 3, 2019), https://perma.cc/5YYV-YL7L.

17. *See Cuyahoga River Fire*, CASE WESTERN RESERVE UNIV. ENCYCLOPEDIA OF CLEVELAND HISTORY, https://perma.cc/ZZX3-X9G9 (the fire only lasted about 20 minutes and caused approximately $45,000 in damage to one railway trestle owned by the Norfolk & Western Railway Co. and $5,000 to another owned by the Newburgh & South Shore Railroad Co.).

18. *Id.*

19. *See* JONATHAN ADLER, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. LAW J. 89, at 96–97 (2002), available at https://perma.cc/AW82-3A9X (noting one firefighter stated the fire "wasn't that big a deal") (collecting sources).

20. *E.g.*, *Distillations Episode 241: The Myth of the Cuyahoga River Fire: The Blaze that Sparked the Modern Environmental Movement . . . or Did It?*, SCIENCE HISTORY INST. (May 28, 2019), https://perma.cc/G4VU-2KRQ.

21. *Id.*

22. John Zach, *Mister Buffalo River*, WESTERN NEW YORK HERITAGE 62, 68 (Oct. 14, 2020), available at https://perma.cc/3V6E-S8PC (last visited May 4, 2023) (referring to the Buffalo River's status as biologically dead starting in 1969); *see also* Peter Gallivan, *Remembering the Day the Buffalo River Burned and WNY's First Environmental Activist*, WGRZ NEWS (Jan. 26, 2021, 7:59 AM; updated Jan. 27, 2021, 7:06 AM), https://perma.cc/E2YU-43RD.

23. *See Distillations*, *supra* note 20; ADLER, *supra* note 19, at 105 (citing case taking judicial notice that the Cuyahoga River and Rouge River had "repeatedly caught fire").

The American Industrial Revolution—the "Second Industrial Revolution"—began in the late 1800s.[24] Shortly thereafter, rivers, serving as highways, sewers and industrial dumping grounds alike, were frequently ablaze.[25] The Schuylkill River in Philadelphia caught fire multiple times starting as early as November 1, 1892.[26] The Harlem River, a tidal strait between the Hudson and East Rivers separating Manhattan Island from mainland New York City at the Bronx, first burned on October 9, 1885.[27] Heavy industry saved money by externalizing environmental costs, but such costs were often paid later through the ruination of infrastructure and livelihoods, and even loss of human life.[28] Some rivers—including the Cuyahoga—were even legally designated "industrial," essentially becoming state-sanctioned toxic waste dumps.[29] The Cuyahoga and others were declared "biologically dead," that is, incapable of sustaining any life.[30]

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24. LIBRARY OF CONGRESS, THE INDUSTRIAL REVOLUTION IN THE UNITED STATES, https://perma.cc/EPV8-BF29.

25. News of these fires in the more industrialized Northeast must not have traveled far. Ironically, an 1897 newspaper commentary in Tennessee notes that the phrase "setting the river on fire"—a derogatory remark used to describe a dull or lazy boy akin to "not the sharpest tool in the shed"—did not refer to rivers at all, as "even the smartest man in the world could never set a stream of water on fire." Instead, the paper reported that the English phrase originated as a misunderstanding of the word "temse" for Thames (the river running through London). In earlier times, people sifted flour with a machine requiring a sieve called a "temse." The temses were prone to catching fire when the sifter (often a boy) turned the machinery fast enough to cause sufficient friction. Thus, a boy who "set the temse on fire" was hardworking and the opposite was said of a lazy boy. As the sifting machines went out of use, the phrase was still used, but its reference to a "temse" was forgotten, and with the Thames being pronounced exactly the same, the phrase "setting the river on fire" became a substitute. BAPTIST AND REFLECTOR, *Setting the River on Fire* (May 6, 1897, p.14), available at https://perma.cc/7EKT-NCWD. This sort of muddling of phrases is known as an eggcorn. *Eggcorn Definition*, MERRIAM-WEBSTER.COM, https://perma.cc/3PTH-9JG2 (last visited July 15, 2023).

26. *See The River Set on Fire; One Life Lost, Two Men Badly Burned, and a Vessel Damaged*, N.Y. TIMES, Nov. 2, 1892, at 1, available at https://perma.cc/K3DX-S22P.

27. *Harlem River on Fire; Leaking Oil Caused an Explosion and Lively Blaze; Residents Rushed from Houses*, N.Y. TIMES, Oct. 10, 1895, at 8, available at https://perma.cc/KQ97-4WKH.

28. Historic newspapers are excellent at detailing damage caused by river fires. *The New York Times* reported that the November 1, 1892 Schuylkill River fire occurred after an industrial fire at an oil works, stating, "A thoughtless act cost one life and much suffering to two men and destroyed $15,000 worth of property this evening at Point Breeze, the extreme southern point of the city. The Schuylkill River at Point Breeze is always covered with a thin scum of oil from adjacent oil works, and since the oil fire there on Sunday more than the usual quantity has been floating on the surface." *See The River Set on Fire, supra* note 26. Likewise, the October 9, 1885 Harlem River fire started after a long-term leak from one of Standard Gas Company's underground pipes had leaked into the river 100 feet away and so saturated the soil in between as to cause explosions underground. *See Harlem River on Fire, supra* note 27.

29. ADLER, *supra* note 19, at 95–96.

30. *See Distillations*, *supra* note 20 (referring to the Cuyahoga's status as dead); *America's Sewage System and the Price of Optimism*, TIME MAGAZINE (Aug. 1, 1969), available at https://perma.cc/HAZ5-97GD ("The Federal Water Pollution Control Administration dryly notes: 'The lower Cuyahoga has no visible life, not even low forms such as leeches and sludge worms that usually thrive on wastes.'"); *Mister Buffalo River*, *supra* note 22. Across the pond where the original Industrial Revolution began earlier, the mighty River Thames in London deteriorated to this "biologically dead" status over a decade sooner, brandishing the label in 1957; it only shed itself of the moniker as recently as 2021. Rasha Aridi,

With such a history, the 1969 Cuyahoga River fire should not have been particularly remarkable or shocking to the national audience, either. After all, when a river "oozes rather than flows," it is bound to catch fire.[31] Yet, the 1969 Cuyahoga River fire broke the tide for a groundswell of public support already building for environmental reform. Among other influences in the 1960s, Rachel Carson's 1962 book *Silent Spring* rang a warning bell for the effects of industrial chemicals on the natural world, Ralph Nader's 1965 book *Unsafe at Any Speed* raised questions about the adequacy of governmental oversight of corporations, and Paul Ehrlich's controversial 1968 book *The Population Bomb* connected human population to environmental degradation. In addition, New York City had a severe smog event in 1966 and Los Angeles was routinely logging 200 smoggy days per year and the massive Santa Barbara oil spill dumped 100,000 gallons of crude off the California coastline in January 1969.[32] So when the Cuyahoga River blazed in mid-1969, it ignited a public reaction.

In part due to the passion and media savvy of Cleveland Mayor Carl B. Stokes, who started a media frenzy over the fire and the pollution that caused it (and arguably sowed the seeds of the environmental justice movement by calling out the disparate effects industrial pollution had on low-income citizens),[33] and in part due to a somewhat-misleading article in Time Magazine published August 1, 1969 that used a photo of the much larger 1952 Cuyahoga River blaze, a raft of environmental legislation soon followed the fire.[34]

Once Deemed 'Biologically Dead,' A New Report Shows London's River Thames Recovering, SMITHSONIAN MAGAZINE (Nov. 12, 2021), https://perma.cc/QQ99-ZPFC.

31. *America's Sewage System*, *supra* note 30 (describing the Cuyahoga a few weeks after the 1969 fire, stating "Some river! Chocolate-brown, oily, bubbling with subsurface gasses, it oozes rather than flows. 'Anyone who falls into the Cuyahoga does not drown,' Cleveland's citizens joke grimly, 'He decays.'")

32. *See, e.g.*, *Environmental Crisis in the late 1960s*, UNIV. OF MICH. HIST. DEPT., https://perma.cc/6PU7-PJRE (part of the 2017 "Give Earth a Chance: Environmental Activism in Michigan Exhibit," this website summarizes environmental and cultural events in the late 1960s and early 1970s).

33. Mayor Stokes made public announcements shortly after the 1969 Cuyahoga fire that he would sue upstream sources of pollution. *Id.* at 114. Mayor Stokes also provided testimony in the U.S. Congress critical of the state's lax enforcement of water permitting laws, *id.* at 116-7, and called upon Congress to enact federal legislation. *Id.* at 129, note 210. *See Carl Stokes: A Pioneer of Environmental Justice*, NAT'L PARK SERV., CUYAHOGA VALLEY NAT'L PARK, https://perma.cc/K7R3-S5GK (last visited Jan. 24, 2024); *Carl B. Stokes and the 1969 River Fire*, NAT'L. PARK SERV., CUYAHOGA VALLEY NAT'L PARK, https://perma.cc/REY8-69Q5 (last visited Jan. 24, 2024) ("The person most responsible for turning a modest fire into an icon of the environmental movement was Cleveland's mayor, Carl B. Stokes. Yet, Stokes did not see himself as an environmentalist. The definition felt too narrow. His concerns were closer to what we now call environmental justice.")

34. In addition to the Cuyahoga River article using a photograph of an earlier Cuyahoga River fire, the August 1, 1969 issue of Time Magazine drew more attention to the fire because it was one of the magazine's best-selling issues ever: its cover photo was a grim-faced Senator Ted Kennedy in a neck brace after the car wreck and the death of his 28-year-old female companion, covering a story that would become known as the "Chappaquiddick Incident." *See Distillations*, *supra* note 20; *America's Sewage System*, *supra* note 30.

Whether the Cuyahoga River fire was itself the primary catalyst or merely more tinder piled on a cultural and social zeitgeist primed for reform, it is undeniable that the 1970s saw a dramatic increase in federal environmental law and regulation and a backlash to toxic industrialism.[35] The laws enacted after the Cuyahoga River fire form the foundation of "modern" environmental law as we know it today.[36] A brief timeline of some of the most significant federal actions and nationwide initiatives from the year 1970 alone is illustrative:

> On January 1, 1970, President Nixon signed into law the National Environmental Policy Act (NEPA), which, among other things, required all governmental agencies to consider the environmental effects of their actions, provided for citizen suits, and laid the groundwork for the creation of the Environmental Protection Agency (EPA).[37]
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> On April 22, 1970, the first Earth Day was celebrated, and although not a legislative action, it was created by prominent environmentalist Senator Gaylord Nelson of Wisconsin, who served three consecutive terms in the U.S. Senate from 1963 to 1981.[38]
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> On July 9, 1970, President Nixon issued Reorganization Plan No. 3 which created the EPA effective December 2, 1970.[39]
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> On December 31, 1970, President Nixon signed the Clean Air Act into law.[40]

Yet, the law designed to address contamination of waterways would not follow for another few years. In 1972, Congress significantly overhauled the 1948

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35. Shortly after the close of the 1960s, early modern environmentalism gained additional momentum from, *inter alia*, the publication of Dr. Seuss's *The Lorax* in 1971, German economist and philosopher E.F. Schumacher's 1973 book *Small is Beautiful: A Study of Economics as if People Mattered*, which criticized unrestrained automation and industrialism and became hailed as an "eco-bible." New schools of thought such as environmental philosophy, environmental ethics, and environmental economics also came of their own in the 1960s and 1970s.

36. As it has been over a half-century since most keystone environmental statutes were enacted, "modern" is a misnomer. Considering the existential threat of climate change, the ongoing Sixth Mass Extinction, massive deforestation and a human population over 8 billion, some argue that the key environmental statutes, although still useful, are anachronistic and call for a new regime focused on restoration and grounded in the public trust. *See, e.g.*, Mary Wood, Professor of Environmental Law, University of Oregon School of Law, *Environmental Law & the Defense of Nature*, Keynote Speech for the Public Interest Environmental Law Conference (Mar. 2, 2023), available at https://perma.cc/CU3C-VBX8.

37. Pub. L. No. 91-190, 83 Stat. 852 (1970), now codified at 42 U.S.C. § 4321 *et seq*.

38. Gaylord Nelson, *Earth Day '70: What It Meant*, EPA JOURNAL (April 1980), available at https://perma.cc/94V6-EGPN.

39. Reorganization Plan No. 3 of 1970 (July 9, 1970), *reprinted in* 84 Stat. 2086 (1970), *and by* 1970 U.S.C.C.A.N., 91st Cong., Vol. 3 (2d Sess. 1970); *see also* REORGANIZATION PLAN NO. 3 OF 1970, EPA, available at https://perma.cc/5BK8-FVZR.

40. 42 U.S.C. § 7401 *et seq*. Originally enacted on July 14, 1955, the law had numerous amendments in the 1950s and 1960s.

Federal Water Pollution Control Act,[41] now known as the Clean Water Act.[42] Yet, President Nixon vetoed the legislation, forcing Congress to override the veto to make the Clean Water Act law on October 18, 1972.[43] On December 28, 1973, Congress enacted the Endangered Species Act.[44] In the area of chemical and waste management, Congress significantly revised the 1965 Solid Waste Disposal Act,[45] by enacting cradle-to-grave waste disposal restrictions in the Resource Conservation and Recovery Act of 1976, signed into law on October 21, 1976 by President Ford.[46]

These are only the most significant of a slew of laws in the early to mid-1970s regulating air, natural resources, occupational health and safety, water, waste and wildlife. By the mid-1970s, with sweeping new environmental laws, broad enforcement authority vested in the newly established EPA, and a mechanism for improved policymaking and citizen review under NEPA, it appeared that the United States was on a path toward redemption of its vast natural resources and protection of public health.

Unfortunately, a series of tragedies that came to light in the late 1970s revealed a critical flaw in the environmental laws of the 1970s: they did not address historic contamination. They were preventative and prospective, not ameliorative and retroactive. Bans on dumping waste did nothing for waste already dumped.

The stories of four of the first sites to be listed on the NPL are particularly illustrative of the urgency of creating a cleanup statute. The first of these to make national headlines in the 1970s was the Love Canal neighborhood of Niagara Falls, New York. Love Canal got its name from William T. Love, the man who envisioned a navigation project that was later scrapped, with the canal turned into a municipal dump, and later lined with clay and filled with toxic chemicals by Hooker Chemical Company.[47] In 1952, the Niagara Falls School Board began

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41. Originally enacted on June 30, 1948, ch. 758, 62 Stat. 1155, the law had numerous amendments in the 1950s, 1960s and 1970 and 1971.

42. Now codified at 33 U.S.C. § 1151 *et seq*.

43. *See* N. William Hines, *History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform*, J. OF ENERGY & ENVTL. L. 80, 98 (Summer 2013), available at https://perma.cc/8KKH-7U39.

44. Pub. L. No. 93-205, 87 Stat. 884 (1973), now codified at 16 U.S.C. § 1531 *et seq*. Originally the Endangered Species Preservation Act of 1966, this was amended and renamed the Endangered Species Conservation Act in 1969, and repealed and replaced by the Endangered Species Act in 1973. *See* U.S. FISH & WILDLIFE SERVICE, ENDANGERED SPECIES ACT: MILESTONES PRE-1973, https://perma.cc/8SHR-9P26.

45. Pub. L. No. 89-272, 79 Stat. 997 (1965).

46. Pub. L. No. 94-580, 90 Stat. 2795 (1976), as codified at 42 U.S.C. § 6901 *et seq*.

47. *See, e.g*., EPA, SUPERFUND SITE: LOVE CANAL, NIAGARA FALLS, NY https://perma.cc/VV6F-TLCD (last visited July 29, 2023); Michael H. Brown, *Love Canal and the Poisoning of America*, THE ATLANTIC (Dec. 1, 1979), available at https://perma.cc/874Z-ALVU; Eckardt C. Beck, *The Love Canal Tragedy*, EPA JOURNAL (Jan. 1979), available at https://perma.cc/6283-33RC. Beck was Administrator of EPA Region 2, the Region in which Love Canal sits, from 1977 to 1979. *Id*. He was only in his late 30s when he was put in charge of managing the cleanup at the country's most infamous Superfund site but had a reputation as an undaunted advocate of environmentalism. *See* Dena Kleiman, *Unwavering Environmental Aide Eckardt Christian Beck*, THE NEW YORK TIMES (Dec. 20, 1978, section B p. 5),

eyeing Love Canal for construction of a new school on a tight budget. Hooker Chemical ceased its dumping and deeded the property to the School Board for one dollar, with extensive provisions in the deed attempting to release Hooker Chemical from all environmental liability for Love Canal.[48] Afterward, a school and many homes were built near the former dump site. Although residents began complaining years earlier,[49] the state's investigation became serious in 1977 and the site garnered national attention when President Jimmy Carter issued an emergency declaration in 1978 and relocation efforts began.[50] Toxins were reported to be oozing up in people's yards, noxious odors filled the air, high rates of birth defects, spontaneous abortions, cancers and other maladies plagued the residents.[51]

Times Beach, Missouri was similarly insidious, although it gained public infamy later, shortly after CERCLA's passage.[52] Times Beach was intended as a resort community on the Meramec River but ended up a blue-collar community.[53] Russell Bliss made a living driving a spray truck for dust suppression. He

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available at https://perma.cc/AN5K-U5W8 (describing him as a "kamikaze pilot" and a "bulldog" who did not mince words about Love Canal being a "ticking time bomb.").

48. Although the common narrative portrays a malevolent Hooker Chemical Company using subterfuge to rid itself of its own mess, some evidence points to a fully-informed and negligent—if not reckless—school board that was willing to cut corners for cash and failed to warn subsequent developers of the property's hazards, despite a covenant in the deed from Hooker Chemical Company requiring disclosure of the environmental conditions. *See, e.g.*, Eric Zeusse, *Love Canal: The Truth Seeps Out*, REASON MAGAZINE, (Feb. 1981), available at https://perma.cc/LDU8-5ZZC.

In 1979, U.S. Representative Al Gore published a 1958 internal memo by Hooker Chemical Company describing several children burned by chemicals at the site. Randy Alfred, *Nov. 21, 1968: Love Canal Calamity Surfaces*, WIRED.COM (Nov. 21, 2011, 6:30 AM, originally posted Nov. 21, 2008), available at https://www.wired.com/2011/11/1121love-canal-birth-defects/.

49. *See* Brown, *supra* note 47 (reporting the earliest reported issue was in 1959, when a resident noticed chemical odors in their basement, and baby Sheri Schroeder was born in 1968 to a second-generation resident of Love Canal with multiple birth defects and mental retardation); Alfred, *supra* note 48.

50. *See* EPA, SUPERFUND SITE: LOVE CANAL, *supra* note 47.

51. *See* Brown, *supra* note 47.

52. *See, e.g.*, Art Harris, *Town Struggles with Toxic Legacy*, THE WASHINGTON POST (Jan. 10, 1983), available at https://perma.cc/259D-P5QT; Jacob H. Wolf, *Veterinarian Says Horses Died by Unknown Poison* (Jan. 26, 2023), UNITED PRESS INTERNATIONAL, INC., available at https://perma.cc/X4S4-Y3M5; Dale Russakoff, *U.S. Offers to Buy Poisoned Homes of Times Beach*, THE WASHINGTON POST (Feb. 23, 1983), available at https://perma.cc/DR9C-BW32; Robert Reinhold, *Missouri Dioxin Cleanup: A Decade of Little Action*, THE NEW YORK TIMES (Feb. 20, 1983), available at https://perma.cc/DY36-HKD6 (noting that Judy Piatt, owner of Shenandoah Stables, where 50 horses died and her own family became ill, became her own private investigator after Russell Bliss sprayed her horse barn and reported the issue to authorities as early as 1973, nearly a decade before federal action, and stating that "[t]he Missouri investigation was for years carried on mainly by a poorly paid state veterinarian in his 20's" focused on the horse deaths). Ms. Piatt later wrote an autobiographical account of her experience, KILLING HORSES: A PERSONAL CHRONICLE OF AN ENVIRONMENTAL DISASTER IN MISSOURI (2009). Shenandoah Stables became its own Superfund site in Moscow Mills, MO, about 45 miles from Times Beach. *See* EPA, SUPERFUND SITE: SHENANDOAH STABLES, MOSCOW MILLS, MO, https://perma.cc/MFN7-QUPQ.

53. William Powell, *Remember Times Beach: The Dioxin Disaster, 30 Years Later*, ST. LOUIS MAGAZINE (Dec. 3, 2012), https://perma.cc/AM48-KPE7.

contracted with Verona-based Northeastern Pharmaceutical & Chemical Co.,[54] which manufactured Agent Orange, to dispose of its dioxin-laden chemical byproducts, blended them with oil, and sprayed them on dirt roads and at horse barns in numerous locations in eastern Missouri and western Illinois.[55] After the deaths of dozens of horses in the area raised alarms,[56] EPA conducted sampling in Times Beach 1982, just before the Meramec flooded and required evacuation of its residents. When the sample results came back, CDC recommended they never reoccupy the town.[57] The story hit the national news media in early 1983. Ultimately, the town was leveled, its topsoil incinerated, and today it is the scenic Route 66 State Park, showing no signs of the community that once thrived there or the invisible harm it suffered.

Where Love Canal and the Times Beach sites were cautionary tales of unseen dangers that may be lurking in your own back yard, the Valley of the Drums and Chemical Control Corporation sites were in-your-face indictments of rampant industrial pollution and the lack of governmental oversight.[58] The A.L. Taylor (Valley of the Drums) site located on twenty-three acres in rural Brooks, Kentucky,[59] took in over 100,000 drums of industrial waste during its operations.[60] A drum fire in 1966 had caught the eye of state

54. Northeastern Pharmaceutical & Chemical Co. is defunct and was absorbed by Syntex Agribusiness Inc. in 1969, after which Russell Bliss continued accepting chemical wastes. *See* Harris, *supra* note 52. BCP Ingredients Inc., a large subsidiary of Balchem, took over the Verona, MO facility in the early 2000s and it has continued the legacy of environmental harm, with repeated environmental violations relating to chemicals tied to cancers. *See* Ashley Reynolds, *On Your Side Update: Chemical Spill at Verona, MO Plant*, KY3 NEWS, (May 8, 2023), https://www.ky3.com/2023/05/09/your-side-update-chemical-spill-vernon-mo-plant/(reporting releases of ethylene oxide, a known carcinogenic gas, and increased incidence of cancer in the area). BCP Ingredients is also a key contributor to the pollution in "Cancer Alley," an 85-mile stretch of predominantly poor, black communities along the Mississippi River in Louisiana. *See Cancer Alley: BCP Ingredients Profile*, CORPWATCH, https://perma.cc/A3XR-NMJD (last visited July 29, 2023); see also Tristan Baurick, Lylla Younes & Joan Meiners, *Welcome to "Cancer Alley," Where Toxic Air Is About to Get Worse*, PROPUBLICA (Oct. 30, 2019, 12 p.m. EDT), https://perma.cc/K2K6-YW2D.

55. *See* Harris, *supra* note 52.

56. *Id.*

57. *See* U.S. Env't Prot. Agency, SUPERFUND SITE: TIMES BEACH, MO, https://perma.cc/H228-93PG.

58. *See* James Bruggers, *CJ Exclusive; Valley of the Drums 30 Years Later; Toxic Legacy Revisited*, THE COURIER-JOURNAL (Louisville, KY), Dec. 14, 2008, at A1 (quoting Love Canal activist Lois Gibbs as stating that while Love Canal looked like a suburban community, "Valley of the Drums became the visualization of the problem."), available at https://perma.cc/4NKV-JAZL.

59. *See generally* EPA, SUPERFUND SITE: A.L. TAYLOR (VALLEY OF THE DRUMS) SITE, https://perma.cc/C4RF-7QTS (last visited July 26, 2023).

60. *Valley of the Drums*, WIKIPEDIA, https://perma.cc/XAV7-GSCP (citing a 1978 Kentucky Dept. of Natural Resources & Envtl. Protection investigation). EPA's Cumulis records for Valley of the Drums are very sparse, with no administrative records, reports or documents available. EPA reports that 17,051 drums were still on-site in 1979, including 11,629 empty drums. EPA, A.L. TAYLOR, *supra* note 59. Third party websites cite to historic EPA documents supporting that the Valley of the Drums site processed over 100,000 drums. *See, e.g.*, The Levin Center for Oversight and Democracy, *Portraits in Oversight: Congress and the Love Canal Disaster,* https://perma.cc/TKU5-C29M (citing to OIL AND SPECIAL MATERIALS CONTROL DIVISION, U.S. ENV'T PROT. AGENCY, EPA-430/9-80-014, "VALLEY OF

officials,[61] but the site was allowed to continue operating until 1977, leaching toxic chemicals into nearby Wilson Creek, a tributary to the Salt River, which flows into the Ohio River.[62-63] Wilson Creek, too, caught fire.[64] After a period of state enforcement, in January 1979, EPA began an emergency removal action at the request of the state, with national media coverage.[65]

Likewise, the Chemical Control Corp. site (CCC) in Elizabeth, New Jersey was shocking. In January 1979, the facility went into a receivership, at which time it contained around 65,000 drums of untreated hazardous chemical waste, seven storage tanks containing chemicals, and several buildings.[66] During the cleanup, a massive fire occurred in April 1980,[67] blasting drums into the air, "spewing black smoke over a 15-mile radius," and closing area schools.[68] This made the decontamination work even more hazardous.[69]

In response to these disasters and others, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and President Jimmy Carter signed it into law on December 11, 1980.[70] "Few statutes have had a less propitious origin than the beleaguered CERCLA legislation. . . CERCLA in its original form was the precipitate of three major hazardous substance response bills originating in Congress and one from the Carter

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the Drums" Bullitt County, Kentucky (1980). THIS CONTEMPORANEOUS EPA PUBLICATION WHICH DETAILS CLEANUP ACTIVITIES IN 1979 LIKEWISE STATES DRUMS BEGAN TO BE ACCEPTED IN 1967, WITH NO REFERENCE TO A WEEK-LONG 1966 FIRE.

61. The author notes that EPA's information page for the Valley of the Drums site states the facility was in operation from 1967 to 1977, but this is inconsistent with numerous sources stating there was a massive fire in 1966 which burned for a week. The author has reported this inconsistency to EPA and is awaiting response.

62. *See* John Filiatreau & Margot Hornblower, *Kentucky Hunts Cleanup Funds for Valley of the Drums*, THE WASHINGTON POST, (Feb. 4, 1979), https://perma.cc/2SYZ-GPYK.

63. *See* Kentucky Energy & Environment Cabinet, *Looking Back: Valley of the Drums* (Aug. 3, 2021), https://www.youtube.com/watch?v=7MX-O03r-HE (video interview of Kentucky Department of Environmental Protection Commissioner Tony Hatton).

64. Filiatreau & Hornblower, *supra* note 62.

65. *Id.*

66. U.S. ENV'T PROT. AGENCY, NPL SITE NARRATIVE FOR CHEMICAL CONTROL (1983), https://perma.cc/P53E-DV92.

67. *Id.*

68. Joanne Omang, *Blasts, Fire Hit N.J. Toxic Waste Dump*, THE WASHINGTON POST (April 23, 1980), https://perma.cc/D4ZH-ZW7N.

69. *See* U.S. Env't Prot. Agency, *Chemical Control Site Fire and Cleanup New Jersey 1980,* https://www.youtube.com/watch?v=NPgwifGzJRU. This YouTube video is a clipping of a longer original EPA video from 1980. The narrator describes that after the fire, EPA identified 182 unmarked cylinders with unidentifiable chemicals, some hand-made and not built to ASME specifications. Because the contaminants at the site were so toxic, including radioactive and pathogenic agents, EPA treated these cylinders with the utmost caution, individually encasing them in specially-designed steel outer canisters and leaving them in place for 5 years.

70. Comprehensive Environmental Response, Compensation, and Liability Act, Pub. L. No. 96-510, 94 Stat. 2771 (1980) (codified at 42 U.S.C. §§ 9601-9675).

Administration, S. 1341, which died in committee."[71] Interestingly, the primary purpose of one of these bills was cleaning up national waterways, with no provision for cleanup of hazardous substances on land, although the compromise bill that ultimately became CERCLA did essentially the opposite.[72] Perhaps the image of the Cuyahoga River on fire still had its hold on Congress.

From this complicated legislative history, CERCLA emerged as a broad remedial statute, with twin aims of ensuring that potentially responsible parties (PRPs)[73] "may be tagged with the cost of their actions"[74] and to "encourage the timely cleanup of [contaminated] sites."[75] CERCLA imposes strict liability on PRPs, without regard to fault or intent.[76] In effect, Congress implicitly codified the "Polluter Pays Principle"[77] retroactively, by imposing strict liability on those who contributed to historic contamination, and proactively, though to a lesser

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71. Rhodes v. Cnty. of Darlington, S.C., 833 F. Supp. 1163, 1173 (D.S.C. 1992). Although older, this case has one of the most robust narratives of CERCLA's legislative history.

72. *Id*. (summarizing that the first bill introduced by Rep. Biaggi on January 15, 1979, H.R. 85, 96th Cong. (1979) encountered opposition from the chemical and oil industry lobby after introduction to the House and thereafter Rep. Breaux introduced a substitute bill as an amendment which focused on cleanup of oil and chemical spills in navigable waters. In addition to omitting land-based cleanup, the revised H.R. 85 lacked cost recovery provisions for the government or private parties. It survived Committee and was ultimately considered and passed by the House but tabled for the next legislative session).

73. Under Section 107(a) of CERCLA, establishing liability, the universe of PRPs includes any past or present owner or operator of the facility, any party who arranged for disposal or treatment of waste containing hazardous substances (commonly known as a "generator" of waste), and any party that transported said waste to the facility. *See* 42 U.S.C. § 9607(a).

74. U.S. v. Bestfoods, 524 U.S. 51, 56 (1998) (quoting S. REP. NO. 96–848, at 13 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 6119); *see also* S. REP. NO. 96–848, at 13 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 6119 (CERCLA's purpose is "[f]irst assuring that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions.").

75. *E.g*., W.R. Grace & Co.–Conn. v. Zotos Int'l, Inc., 559 F.3d 85, 88 (2d Cir. 2009) (citation omitted).

76. *See* 42 U.S.C. § 9607(a). Proposed iterations of CERCLA expressly included joint and several liability, but those terms were removed to allow the courts flexibility to apply common law principles as necessary. U.S. v. Chem-Dyne Corp., 572 F. Supp. 802, 805–08 (S.D.Ohio 1983). Accordingly, the courts impose joint and several liability only if the harm is indivisible. *Id*. at 810.

77. The Polluter Pays Principle posits that those who create pollution should pay for it, rather than the government or citizenry as a whole. It is "a normative doctrine of environmental law." Jonathan R. Nash, *Too Much Market? Conflict Between Tradeable Pollution Allowances and the "Polluter Pays" Principle*, 24 HARV. ENVTL. L. REV. 465, 466 (2000); *see also* Eric T. Larson, *Why Environmental Liability Regimes in the United States, the European Community, and Japan Have Grown Synonymous with the Polluter Pays Principle*, 38 VANDERBILT J. OF TRANSNAT'L L. 541, 545 (2005) (citing same).

However, it is relatively new. Many mark its origin to a document prepared by the Organization for Economic Cooperation and Development (OECD) and published in May 1972. *See, e.g*., *id*. at 545. Yet, the concept appears to have been first articulated by a governmental body in a 1968 Declaration of Principles on Air Pollution Control by the Committee of Ministers of the Council of Europe, Article 6 of which states: "The cost incurred in preventing or abating pollution should be borne by whoever causes the pollution." But it was a topic of economic study even earlier. Dr. Muhammad Munir, History and Evolution of the Polluter Pays Principle: How an Economic Idea Became a Legal Principle? (Sept. 8, 2013) (unpublished manuscript) (on file with SSRN).

degree, by imposing Superfund Excise Taxes on the companies most likely to cause contamination in the future.

On December 30, 1982, EPA published the first list of proposed NPL sites in the Federal Register, naming 418 of the worst contaminated sites in the nation, including Love Canal, the CCC site, and Valley of the Drums.[78] After public comment, some sites were removed and Times Beach was added, resulting in 406 sites listed on the final NPL.[79] With a massive Superfund Trust Fund, new enforcement tools and CERCLA's strict, retroactive liability, the process of reversing the nation's toxic legacy could begin.

Yet despite the urgency with which CERCLA was enacted and the clear intent of Congress to deal with legacy contamination through CERCLA, whether CERCLA has been successful in meeting its goal of timely cleanup is debatable.[80] Many believe it has not lived up to expectations. Many PRPs are not pursued, leaving polluters unaware of and unaccountable for their pollution. Cleanups are time-consuming and costly, or they simply do not occur at all.

II. FUNDAMENTAL FLAWS: HOW CERCLA FUNDS—OR DOESN'T FUND—CLEANUPS

The primary hindrances to timely cleanup under CERCLA are process and expense. First, the discovery of contamination triggers an arduous, multi-phase cleanup process: (1) an emergency removal action[81] to stop the immediate spread of contamination; (2) a more in-depth removal action to eliminate the immediate threats of contamination by off-site disposal and containment of on-site contaminants; (3) a Remedial Investigation and Feasibility Study (RI/FS), which identifies the scope of contamination through subsurface soil and often groundwater sampling and results in a handful of proposed alternative long-term remedies for EPA's consideration;[82] (4) a public notice and comment period, after which EPA selects one of the proposed remedies and issues a Record of Decision

78. *See* Amendment to the National Oil and Hazardous Substance Contingency Plan; National Priorities List, 48 Fed. Reg. 40658 (finalized Sept. 8, 1983) (codified at 40 C.F.R. pt. 300).

79. *Id.*

80. *See, e.g.*, THOMAS C. VOLTAGGIO, JOHN ADAMS, JOHN BACHMANN & BOB WAYLAND, EPA ALUMNI ASSOCIATION, SUPERFUND: A HALF CENTURY OF PROGRESS 12 (2020), https://perma.cc/SY9S-ALQX ("One reaction could be that only 424 sites have been fully remediated and removed from the list, and there is still much work that needs to be done to clean up all the sites on the list. This view does not consider the complexities of studying and remediating contamination that is underground, and thus difficult to locate and remove, even with today's technologies. Another view could be that over 90% of sites either have been fully cleaned up or are in the process of being cleaned up. The public's reaction to the Superfund program tends to gravitate toward these two views.").

81. "Removal" is defined as the cleanup of hazardous substances released from the environment or to address a threat of release. *See generally* 42 U.S.C. § 9601(23).

82. EPA's regulations governing RI/FS and remedy selection are in 40 C.F.R. § 300.430.

(ROD);[83] and (5) a remedial action[84] which implements the long-term remedy that the EPA selected in the ROD.[85] The first four phases can take several years followed by the remedial action which can take decades. For example, in the situation of groundwater contamination, with a final remedy requiring an *in-situ* pump-and-treat system, pumps are in place and operating for many years, with gradually diminishing returns in the amount of waste they extract from the groundwater plume.[86]

As a result, it often takes decades for a site to be deleted from the NPL and only around 25% of all listed sites have been deleted.[87] Moreover, as discussed in the introduction above, the number of sites on the NPL is only a fraction of the total contaminated sites in the country.[88] Using the late 1970s sites described above as examples, Valley of the Drums was deleted in 1996, Times Beach in 2001 and Love Canal in 2004.[89] This was thirteen, eighteen, and twenty-one years, respectively, after these three sites were listed on the first NPL in 1983. Yet, the CCC site is still on the NPL list forty years later. These delays pose significant public health risks, often raising environmental justice concerns.[90] As of

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83. *See id.*

84. CERCLA defines "remedy" or "remedial action" as "those actions consistent with permanent remedy taken instead of or in addition to removal actions . . . to prevent or minimize" a release or threatened release of hazardous substances "so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." *See* 42 U.S.C. § 9601(26).

85. For simplicity, this article assumes a federal cleanup led by U.S. EPA. However, states and tribes may perform this role at non-NPL sites (discussed below) or through cooperative agreements with EPA at NPL sites under Section 104(e) of CERCLA. *See, e.g.*, 42 U.S.C. § 9604(e).

86. *See, e.g.*, EPA, A CITIZEN'S GUIDE TO PUMP AND TREAT, EPA 542-F-12-017 (Sept. 2012), available at https://perma.cc/MA7U-E283 (stating, as of 2012, that pump and treat systems are in place at over 800 Superfund sites across the country).

87. EPA, SUPERFUND: NATIONAL PRIORITIES LIST, *supra* note 11 (identifying 1,336 current federal and non-federal NPL sites with an additional 41 proposed to be listed, and only 456 deleted NPL sites in the history of the program).

88. EPA estimates the total number of uncontrolled or abandoned hazardous waste sites at around 44,000. Zainzinger, *supra* note 8. However, this 44,000 is only a subset of contaminated sites. On the state level, for instance, Massachusetts alone records over 44,000 hazardous waste sites in its state, factoring in both Superfund sites and oil and gas sites that may be regulated under other avenues. MASS. DEPT. OF ENVTL. PROTECTION, FIND OUT ABOUT A CONTAMINATED PROPERTY, https://perma.cc/N5CJ-VA6K (last visited July 25, 2023). Notably, most leaks of crude oil or "fractions of crude oil" are excluded from CERCLA by the "petroleum exclusion." 42 U.S.C. § 9601(14). In the oil and gas arena, EPA also estimates there are more than 3.2 million abandoned oil and gas wells, and believes 2 million of those were never properly plugged and are leaking methane and other contaminants, contributing to climate change as well as contamination. Nichola Groom, *Special Report: Millions of Abandoned Oil Wells Are Leaking Methane, A Climate Menace*, REUTERS (June 16, 2020), available at https://www.reuters.com/article/us-usa-drilling-abandoned-specialreport/special-report-millions-of-abandoned-oil-wells-are-leaking-methane-a-climate-menace-idUSKBN23N1NL.

89. EPA, DELISTED NATIONAL PRIORITIES LIST (NPL) SITES – BY STATE, https://perma.cc/SVW7-4KT6 (last visited Sep. 7, 2023).

90. As noted in the introduction, Superfund sites disproportionately affect minorities and lower income communities, with multi-generational health effects. POPULATION SURROUNDING 1,877 SUPERFUND SITES, *supra* note 10; *see also* Lioy & Burke, *Superfund: Is It Safe to Go Home?*, *supra* note 8 (noting that Superfund sites listed for more than 20 years expose multiple generations to pollution, and concluding there are inadequate protections to health throughout the cleanup process).

May 2010, of the 239 nonfederal NPL sites with *unacceptable* or unknown human exposure, more than 60% had little to no remedial work completed.[91] This is despite EPA having spent $3 billion on the seventy-five sites with unacceptable human exposure and $1.2 billion on the 164 sites with unknown exposure. These risks will likely be exacerbated by climate change in many locations, with additional flooding and extreme weather posing risks of new releases of hazardous substances, even at Superfund sites where the hazardous substances have already been contained.[92]

Moreover, deletion from the NPL is not a guarantee that cleanup is final, and cleanup duration may lengthen (and costs increase) as new information becomes available, or upon the discovery of previously unidentified contaminants. Contaminant thresholds are ever ratcheting downward. New scientific research on human health risks of a known hazardous substance may result in EPA requiring more protection against human exposure pathways at a site.[93] For example, if the human exposure threshold for a volatile organic chemical is lowered, EPA may require adding vapor intrusion mitigation and ventilation systems in the basements of nearby homes even though the total concentration of the VOCs in the basements remain unchanged. Or a lower threshold for a heavy metal soil contaminant found on-site may require a much larger asphalt cap to eliminate the soil-based human exposure pathway. Additionally, chemicals formerly thought harmless may be identified as emerging contaminants (or "contaminants of emerging concern") and could significantly expand the scope of a Superfund cleanup if EPA designates them as "hazardous substances" under CERCLA. This threat looms nationwide for the "forever" chemicals PFOA and PFOS (both under the umbrella of polyfluoroalkyl substances or PFAS). By March 2019, EPA had identified 180 existing Superfund sites as having PFAS contamination.[94] This number will continue to grow. In September 2022, EPA proposed to designate two PFAS as hazardous substances, and in April 2023

91. U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-380, EPA'S ESTIMATED COSTS TO REMEDIATE EXISTING SITES EXCEED CURRENT FUNDING LEVELS, AND MORE SITES ARE EXPECTED TO BE ADDED TO THE NATIONAL PRIORITIES LIST (May 2010).

92. U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-555T, STATEMENT OF J. ALREDO GÓMEZ, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT BEFORE THE SUBCOMMITTEE ON ENVIRONMENT AND CLIMATE CHANGE, COMMITTEE ON ENERGY AND COMMERCE, HOUSE OF REPRESENTATIVES: EPA SHOULD TAKE ADDITIONAL ACTIONS TO MANAGE RISKS FROM CLIMATE CHANGE EFFECTS (May 2021).

93. *See, e.g.,* Identification of Dangerous Levels of Lead, 66 Fed. Reg. 1206, 1211 (Jan. 5, 2001) (to be codified at 40 C.F.R. pt. 745) (Setting the dust-lead clearance level (DLCL) for homes and childcare facilities at 40 μg/ft^2 for floors and 250 μg/ft^2 for window sills); EPA, HAZARD STANDARDS AND CLEARANCE LEVELS FOR LEAD IN PAINT, DUST AND SOIL (TSCA SECTIONS 402 AND 403), https://perma.cc/7KW5-5LRH (last visited Sep. 7, 2023) (Recognizing that EPA reduced the dust-lead clearance level (DLCL) for homes and childcare facilities to 10 μg/ft^2 for floors and 100 μg/ft^2 for window sills in 2019, and proposed further reductions in 2023 to 3 μg/ft^2 for floors and 20 μg/ft^2 for window sills).

94. U.S. SENATE COMM. ON ENV'T & PUB. WORKS, *Superfund Sites Identified by the EPA to Have PFAS Contamination*, https://perma.cc/FQS7-RVEH (last visited July 26, 2023) (identifying sites that EPA Assistant Administrator David Ross provided to the Senate EPW in a March 2019 hearing entitled "*Examining the federal response to the risks associated with per- and polyfluoroalkyl substances (PFAS)"*).

EPA issued an Advance Notice of Proposed Rulemaking seeking input on potential hazardous substances designations for additional PFAS.[95]

Second, decontamination is terribly expensive. The statute itself anticipates high costs, providing monetary caps for owners or operators as follows: (1) for vessels carrying hazardous substances as cargo the greater of $300/gross ton or $5 million; (2) for other vessels, the greater of $300/gross ton or $500,000; (3) for any motor vehicle, aircraft, hazardous liquid pipeline facility or rolling stock (trains) an amount of $5 to $50 million; and (4) for incineration vessels or any other facility, the total of all response costs plus $50 million for any damages.[96]

Yet the actual costs of decontamination, whether for a specific site or nationwide, are not well-known. As background, CERCLA creates two funding mechanisms, one public and one private. Publicly-funded cleanup costs are paid from the Superfund Trust Fund, a massive government trust account. CERCLA is commonly known as the "Superfund" law for that reason. Often, the sites for which cleanup costs are paid from the Superfund are orphan sites—those where no PRPs can be found and the EPA (or state or tribal agencies) must conduct the response activities itself.

At publicly-funded sites, EPA's average costs of cleanup at an individual site vary widely and although EPA reports its total annual Superfund outlay, identifying EPA's total costs at any given site or on average is difficult. EPA allocated $220–267 million annually for remedial actions during fiscal years 2000 to 2009 alone.[97] As of 2010, EPA estimated its costs would range from $335–681 million for fiscal years 2010 to 2014.[98] As of 2009, one source reported the average cost of a Superfund cleanup was $43 million.[99] At the same time, the Government Accountability Office criticized EPA for its lack of sufficient information on cleanup cost activities at Superfund sites.[100]

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95. EPA, KEY EPA ACTIONS TO ADDRESS PFAS, https://perma.cc/NY2F-7JW9 (last visited Dec. 19, 2023).

96. *See* 42 U.S.C. § 9607(c)(1) (setting the same recoverable costs as originally set by Congress in 1980); Comprehensive Environmental Response, Compensation, and Liability Act, Pub. L. No. 96-510, § 107, 94 Stat. 2767, 2782 (1980).

97. *See* GAO-10-380, *supra* note 91, at 20.

98. *Id*. at 19.

99. THE WILSON QUARTERLY, *43 Million for What?* (Summer 2009), https://perma.cc/E68B-WPD7 (noting Superfund had produced an economic benefit "likely quite close to zero," citing Clemson University economist Daniel K. Benjamin and a study showing no improvement in rents, sales and housing desirability even 20 years after cleanup. However, the researchers involved in the study admit that there may be aesthetic and health benefits that were not accounted for in their data).

100. U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-287R, SUPERFUND: INFORMATION ON THE NATURE AND COSTS OF CLEANUP ACTIVITIES AT THREE LANDFILLS IN THE GULF COAST REGION (Feb. 18, 2011); U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-656, SUPERFUND: LITIGATION HAS DECREASED AND EPA NEEDS BETTER INFORMATION ON SITE CLEANUP AND COST ISSUES TO ESTIMATE FUTURE PROGRAM FUNDING REQUIREMENTS (July 15, 2009).

As discussed briefly in the Introduction, the Superfund was originally funded[101] in part by petroleum excise taxes, chemical feedstock excise taxes and environmental income taxes.[102] However, these taxes expired in 1995, at which point the Superfund increasingly had to be funded by general revenue funds. This undermined the polluter pays principle by shifting the financial burden away from industries causing the most significant environmental harm and onto everyday taxpayers.[103] After the Superfund taxes expired in 1995, cleanup efforts stagnated, dropping from an average of seventy-one sites decontaminated per year to a low of six sites decontaminated in 2019.[104] These taxes were reinstated with certain modifications by Section 80201 of the Infrastructure Investment and Jobs Act of 2021.[105]

For non-orphan sites where there are viable PRPs—the actual owners, operators or generators of waste who contributed hazardous substances to a contaminated site, or their successors in interest—private parties usually fund the cleanup. Information on private party cleanup costs is even more difficult to find than information on EPA's cleanup costs for any given site because private party costs are often treated as confidential.[106] An early study of eighteen private-party Superfund cleanups between 1981 and 1991 estimated an average of $32 million per site, for which the transaction cost share was thirty-two percent.[107] This dated estimate does not account for inflation. By comparison, one of the largest ongoing private sector cleanup sites is the Portland Harbor Superfund Site on the Willamette River in Oregon. After sixteen years of study, EPA's final remedial cost estimate for the site is a massive $1.05 billion, which will be allocated across at least 150 PRPs, including private and governmental entities.[108] Again, these cost estimates are never a guarantee: the emerging concern over PFAS prompted the U.S. Chamber of Commerce to call for EPA to undertake a cost-benefit analysis after its own study determined that listing PFAS as hazardous substances at existing non-federal Superfund sites alone would result in an annualized cost to the private sector of

101. Internal Revenue Code 26 U.S.C. § 9507 (codifying CERCLA's superfund provisions); *see also* 42 U.S.C. § 9601(11) (defining the Superfund); § 9611 (detailing uses of the Superfund); § 9604 (discussing governmental response authorities).

102. Internal Revenue Code 26 U.S.C. § 9507 (codifying CERCLA's superfund provisions); *see also* 42 U.S.C. § 9601(11) (defining the Superfund); § 9611 (detailing uses of the Superfund); § 9604 (discussing governmental response authorities).

103. *E.g.*, Anderson, *supra* note 9.

104. Zainzinger, *supra* note 8.

105. Pub. L. No. 117-58, § 80201, 135 Stat. 429, 1328 (2021) (reinstating chemical taxes through December 31, 2031).

106. GAO-15-812, *supra* note 11, at 8; Anderson, *supra* note 9.

107. Lloyd S. Dixon, Deborah S. Drezner & James K. Hammitt, *Private-Sector Cleanup Expenditures and Transaction Costs at 18 Superfund Sites* 45, RAND, EE-0265 (1993) (note that the significant transactional cost for these early sites was in the pre-*Key Tronic* era, before litigation-related attorney fees were barred, see discussion *infra* note 119).

108. Cassandra Profita, *EPA Calls for $1 Billion Portland Harbor Superfund Cleanup*, OR. PUB. BROAD. (Jan. 6, 2017), https://perma.cc/SM8U-4XLH; Jessica Hamilton, PORT OF PORTLAND, PORTLAND HARBOR SUPERFUND SITE: WHO PAYS? (May 2016), http://cdn.portofportland.com/pdfs/Superfund%20Who%20Pays.pdf [https://perma.cc/UFC4-LMAU].

$700–800 million, or a total of $17.4 billion. This is well over the $100 million annual threshold for a regulation to be "economically significant" regulation requiring more stringent review.[109]

As discussed above, the vast majority of cleanups are privately funded, often at enormous—if not always disclosed—expense. Only a fraction of cleanups are funded by the Superfund, and the Superfund itself is not always fully funded. But whether public or private, each site must go through the same relatively burdensome, time-consuming process. Because most sites are privately funded, making this process as seamless as possible and eliminating obstacles to recovery are critical to quickly and efficiently remediating legacy contamination across the country.

III. HOW PRIVATE PARTY CLEANUPS WORK AND WHY PRIVATE PARTIES CLEAN UP CONTAMINATION

Private party cleanups can be either voluntary or compulsory. A typical compulsory private party cleanup goes something like this: contamination is discovered at a facility, such as a former solvent recovery facility or drum disposal site. The EPA conducts an emergency removal action to eliminate major threats to human health and stabilize the site, then solicits the involvement of PRPs. However, due to administrative and financial constraints, EPA's list of PRPs is often limited to the most obvious targets, with limited enforcement against smaller PRPs.[110] Some or all of the target PRPs then agree to participate in the cleanup. These target PRPs must also reimburse EPA's cleanup and oversight costs.[111] The target PRPs must negotiate and are governed by a series of administrative orders on consent (AOCs) for cleanup: first a Removal Action AOC; then a RI/FS AOC; and then an AOC for Remedial Design/Remedial Action (most often a consent decree entered by a federal district court), which implements the long-term remedy EPA selected in the ROD.

Alternatively, either a PRP (i.e., a polluter or its successor) or an "innocent" party (for example, a *bona fide* prospective purchaser[112] or adjacent landowner[113])

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109. U.S. CHAMBER OF COM., PFOS AND PFOA PRIVATE CLEANUP COSTS AT NON-FEDERAL SUPERFUND SITES 3-4 (June 8, 2022), https://perma.cc/WZX2-W65S.

110. Sometimes EPA enters into early *de minimis* (or *de micromis*) settlements with small-bit players under Section 122(g) of CERCLA; however, these PRPs settle for monetary values and do not participate in cleanups. *See* 42 U.S.C. § 9622(g); EPA, SUPERFUND CLEANUP SUBJECT LISTING DE MINIMIS/DE MICROMIS POLICIES AND MODELS, https://perma.cc/9U29-BKDM. EPA, MEMORANDUM: REVISIONS TO 2009 ARC MEMO AND ISSUANCE OF REVISED CERCLA PAST COST, PERIPHERAL, *DE MINIMIS*, *DE MICROMIS*, AND MUNICIPAL SOLID WASTE SETTLEMENT MODELS 7 app. (Sept. 26, 2014) (noting that in some cases, the monetary consideration paid by a *de micromis* party to settle its liabilities may be $1.00 or less for EPA's oversight and response costs, and natural resource damages will also be waived for such parties).

111. *See* 42 U.S.C. § 9622(h); 42 U.S.C. § 9607(a)(4)(A). As another example of CERCLA's poor drafting, the requirement to reimburse EPA's costs is identified as a subsection of the liability clause for transporters under subsection 107(a)(4), but it is clearly intended—and interpreted by courts—to apply to all PRPs, including owners, operators and arrangers identified in subsections 107(a)(1), (2) and (3), as well.

112. 42 U.S.C. § 9601(40) (defining *bona fide* prospective purchaser).

113. 42 U.S.C. § 9607(q) (reviewing liability for owners of contiguous properties).

may conduct a cleanup voluntarily, without a predicate enforcement action by the EPA. Voluntary cleanups typically address contamination at a smaller scale without federal involvement. For example, a real estate development company may determine the benefits of redeveloping a Brownfield property outweigh the costs of remediation. In Missouri alone, from 1995 through May 2023 there were 1,588 sites listed on the state's Brownfields & Voluntary Cleanup Program (VCP).[114] Only a fraction of those have been state or federally funded: the rest are privately funded.[115] The number of sites involved in these programs is astounding. As early as 2006, around 47,000 sites had been successfully remediated under state supervision.[116] As of July 1, 2023, EPA reports that since 2006, states and tribes have completed more than 219,956 cleanups, yielding over 3.7 million acres of property ready for reuse.[117] In this respect, CERCLA's VCP program has been much more successful than the Superfund program for NPL sites.

Why would anyone voluntarily clean up a contaminated site, when doing so at even a small property can cost millions of dollars? Because CERCLA provides a right to reimbursement. Parties that settle with EPA also get the benefit of contribution protection from any other PRPs.[118] One of CERCLA's primary purposes is to "encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others."[119] Whether proceeding voluntarily or compelled by a judgment or administrative order, the performing parties typically conduct a comprehensive search for additional PRPs not already identified by EPA, create a settlement framework, and issue settlement offers to non-performing PRPs. Viable, non-settling, non-performing PRPs are often sued in a federal district court[120] under CERCLA for either or both of cost recovery under Section 107 or contribution under Section 113. Congress built in this "settlement

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114. The Small Business Liability Relief and Brownfields Revitalization Act of 2002 was the genesis of Brownfields and VCP programs such as Missouri's. Due to CERCLA's strict liability provisions, contaminated sites languished as "brownfields" because no one wanted to risk becoming a PRP through lending or operating a contaminated facility, even if the "operations" were for cleanup. The Brownfields amendments exempted *bona fide* prospective purchasers from liability and transferred certain authority to states to manage cleanups. *See* EPA, SUMMARY OF THE SMALL BUSINESS LIABILITY RELIEF AND BROWNFIELDS REVITALIZATION ACT, https://perma.cc/87B3-5Z4B (last visited Nov. 9, 2023).

115. *See* MO. DEPT. OF NAT. RESOURCES, ENVIRONMENTAL CLEANUP SITE SPECIFIC DATA: SITE STATUS LIST, available at https://perma.cc/C7KM-WC8N (last visited May 11, 2023).

116. *See* Amy L. Edwards, *The CERCLA Craziness Continues: What do the Latest Post-Cooper v. Aviall Decisions Mean for Brownfields Transactions?* HOLLAND & KNIGHT NEWSLETTER (2nd Quarter 2006), https://perma.cc/7VDG-3DXS.

117. EPA, BROWNFIELDS PROGRAM ACCOMPLISHMENTS AND BENEFITS, https://perma.cc/L2ZR-VEPZ (last visited Jul. 26, 2023).

118. 42 U.S.C. § 9613(f)(2).

119. Key Tronic Corp. v. United States, 511 U.S. 809, 819 note 13 (1994) (citation omitted).

120. 42 U.S.C. § 9613(b) (providing exclusive original jurisdiction in U.S. district courts for claims "arising under" CERCLA).

incentive" scheme to encourage private parties to undertake the cleanup work, reduce litigation and limit reliance on the Superfund.[121,122]

CERCLA's settlement incentive scheme can be a powerful tool in expediting decontamination. Yet, too often in the past, the billable hour limited the ability of performing PRPs to identify and pursue all viable, non-performing PRPs at a given site. When faced with hefty attorneys' fees, it simply was not cost effective to pursue smaller companies or those companies that only sent a small amount of waste to the site. Rather, waste volume from these entities is treated as orphaned waste to be allocated among the other viable PRPs. One result of casting a smaller net is that some companies that contributed to contamination face no consequences for their historic pollution. Unless they received a settlement demand from EPA or the performing PRPs, such companies may be completely unaware of their role in legacy pollution. Such companies have no incentive to modify their waste disposal practices or endeavor to more diligently investigate in the future the processing facilities to which they send their waste. The other result was more litigation because all of the remaining PRPs—both the performing PRPs and the smaller net of PRPs they pursue—took on more than their fair share. All of this resulted in more money in attorneys' pockets and less money in the cleanup kitty.[123] In the last few decades, there has been a shift from billable hour-based retention to alternative fee structures or contingency fee agreements. This allows

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121. *See, e.g.*, Chubb Custom Ins. Co. v. Space Systems/Loral, Inc., 710 F.3d 946, 971 (9th Cir. 2013) ("Aside from the timely cleanup of polluted sites and imposing liability on responsible parties, '[o]ne of the core purposes of CERCLA is to foster settlement through its system of incentives and without unnecessarily further complicating already complicated litigation.'") (citation omitted); *In re* Cuyahoga Equip. Corp., 980 F.2d 110, 119 (2d Cir. 1992) ("Congress sought through CERCLA . . . to encourage settlements that would reduce the inefficient expenditure of public funds on lengthy litigation.").

122. 42 U.S.C. §§ 9607, 9613

123. In an earlier CERCLA case upholding a private party's right to recover attorneys' fees incurred in pursuing its cost recovery claims, the Eighth Circuit Court of Appeals reasoned its decision was consistent with two of the main purposes of CERCLA—prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party. These purposes would be undermined if a non-polluter. . .were forced to absorb the litigation costs of recovering its response costs from the polluter. The litigation costs could easily approach or even exceed the response costs, thereby serving as a disincentive to clean the site. Gen. Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422 (8th Cir. 1990). This conclusion rested on statutory construction of both 42 U.S.C. § 9607(a)(4)(B), which allows recovery of the "necessary costs of response . . ." and 42 U.S.C. § 9601(25), which defines "response" to include "enforcement activities related thereto," and the court concluded that private party cost recovery action is an "enforcement activity" within the meaning of the statute. *Id*. at 1422 (citing Cadillac Fairview/California, Inc. v. Dow Chem. Co., 840 F.2d 691, 694 (9th Cir. 1988); Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 892 (9th Cir. 1986)). The U.S. Supreme Court later rejected the conclusion that litigation-related attorneys' fees were recoverable costs of "response." *Key Tronic Corp*., 511 U.S. 809, 819. If the Eighth Circuit's statutory analysis was flawed, its observation that litigation costs could overshadow any meaningful recovery was nonetheless accurate. Yet, *Key Tronic* appears to have provided a solution: prohibiting recovery of litigation-related attorney fees resulted in reduced litigation. In a 2009 study, the Government Accounting Office found that from fiscal years 1994 through 2007, "the number of Superfund cases filed annually in U.S. district courts decreased by almost 50 percent . . . because (1) fewer sites were listed on the NPL, and, as cleanups progressed, fewer sites required cleanup and parties had less

performing PRPs to cast a wider net and pursue smaller parties for *de minimis* or *de micromis* settlements when those PRPs would otherwise remain unaccountable for their pollution. However, as explained below, several flawed judicial rulings have significantly undermined the ability of private parties to take advantage of CERCLA's early settlement provisions.

IV. FLAWED JUDICIAL RULINGS THAT UNDERMINE CERCLA AND THREATEN TO SLOW CLEANUP

A. FAILURE TO RECOGNIZE THE *ATLANTIC RESEARCH* GAP BETWEEN SECTIONS 107(A) AND 113(F)(1) BY IMPROPERLY DISALLOWING SIMULTANEOUS CLAIMS FOR COST RECOVERY AND CONTRIBUTION

In *United States v. Atlantic Research Corp.*, the Supreme Court held that PRPs could seek cost recovery under § 107(a) from other PRPs, abandoning any notion that cost recovery actions were reserved for "innocent" parties.[124] The Court also confirmed that the causes of action for cost recovery and contribution are mutually exclusive, stating that, if "eligible to seek contribution under § 113(f)(1), the PRP cannot simultaneously seek to recover the *same expenses* under § 107(a)," in order to benefit from the longer six-year statute of limitations and joint and several liability available in cost recovery actions.[125]

However, the Supreme Court also identified a gap between the two causes of action (hereafter the "*Atlantic Research* Gap"). The Court noted that, although costs incurred "voluntarily" are recoverable only under Section 107 and response costs "compelled" to be reimbursed to another party are recoverable only under Section 113, "compelled" response costs without reimbursement to another party may be recoverable under either Section 107 or Section 113.[126] This voluntary/compelled language has proven problematic and not particularly meaningful.[127] A better line laid down by the Supreme Court in *Atlantic Research*, is between costs incurred post-establishment of liability versus pre-establishment of liability.[128] However, as will be demonstrated further below, the best line should be

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reason to go to court; (2) EPA promoted settlements with responsible parties; and (3) the courts clarified several legal uncertainties." GAO-09-656, *supra* note 100.

124. 551 U.S. 128 (2007).

125. *Id.* at 139 (emphasis added).

126. *Id.* at 139 & n.6.

127. *See, e.g.*, Bernstein v. Bankert, 733 F.3d 190, 210 (7th Cir. 2012) (noting that no cases it reviewed had "treated the voluntary/compelled costs dichotomy as dispositive"); Exxon Mobil Corp. v. United States, 108 F. Supp. 3d 486, 512 n.18 (S.D. Tex. 2005) ("[T]he distinction between 'compelled' and 'voluntary' cleanups is in some measure artificial; virtually all cleanups are performed by a party who is at least facing the specter of potential liability under CERCLA.") (quoting Solutia, Inc. v. McWane, Inc., 726 F. Supp. 2d 1316, 1340–41 (N.D. Ala. 2010)).

128. *Atlantic Research*, 551 U.S. at 139 ("a PRP's right to contribution under § 113(f)(1) is contingent upon an inequitable distribution of common liability among liable parties" but "[a] private party may recover under § 107(a) without any establishment of liability to a third party.")

drawn between "response costs" incurred directly (cost recovery) versus "reimbursements" paid to another (contribution in its "traditional sense").

Despite its inadequate terminology, the *Atlantic Research* Gap makes sense. In practice, performing PRPs often incur both voluntary and compelled costs. For example, performing PRPs may be involved in preliminary cleanup negotiations not included in the "work" as defined by the Removal Action AOC, or they may conduct interim measures to contain the spread of contamination (for example, pumping and treating groundwater to prevent a larger plume) while awaiting EPA's selection of a remedy. Additionally, PRP search costs are voluntary and recoverable costs not compelled by an AOC.[129] Because these are not the "same expenses" as the AOC-driven costs, under the current mutual exclusivity paradigm, the performing PRPs should be allowed to simultaneously bring *both* a contribution action for costs "compelled" under an AOC or reimbursed to the government or another PRP, and a cost recovery action for "voluntary" response costs not reimbursed to another party.

Federal courts reviewing this issue since *Atlantic Research* have reached conflicting results. The Western District of Kentucky in *LWD PRP Group v. ACF Industries, LLC* refused to dismiss a PRP group's 107(a) claim for costs incurred before an administrative order was entered because "the courts have left open the potential for a PRP . . . to assert both a § 107(a) claim for its voluntary response costs and a § 113(f) contribution claim for its compelled response costs."[130] Yet as recently as 2020, the Eastern District of Pennsylvania reached the opposite result in *Metro Container Group v. AC&T Co., Inc.*, dismissing a PRP group's cost recovery claim despite the plaintiff's arguments that it had incurred costs outside of the AOCs at the site.[131] In so holding, the district court erroneously relied in part on Third Circuit case law holding that only "innocent" parties can bring a cost recovery action,[132] an interpretation abrogated by *Atlantic Research*, repeatedly rejected by federal courts reviewing the issue after *Atlantic Research* and *Cooper Industries, Inc. v. Aviall Services, Inc.*[133] and implicitly overruled by

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129. Key Tronic Corp. v. United States, 766 F. Supp. 865, 872 (E.D. Wash. 1991) (holding PRP search costs are recoverable "necessary costs of response" under 42 U.S.C. § 9607(a)(4)(B) because "response" is defined to include "enforcement activities relating thereto" under 42 U.S.C. § 9601(25))), *rev'd on other grounds by* Key Tronic Corp. v. United States, 984 F.2d 1025 (9th Cir. 1993), *aff'd in part and rev'd in party by* Key Tronic Corp. v. United States, 511 U.S. 809, 820 (1994) (reasoning that "[t]racking down other responsible . . . polluters increases the probability that a cleanup will be effective and get paid for" and are "clearly distinguishable from litigation expenses.")

130. LWD PRP Grp. v. ACF Indus., No. 5:12-CV-00127-JHM, 2014 WL 901648, * 7 (W.D. Ky. Feb. 7, 2014), *rev'd on other grounds sub nom.* LWD PRP Grp. v. Alcan Corp., 600 Fed. App'x. 357 (6th Cir. 2015). *See also* United States v. Pharmacia Corp., 713 F. Supp. 2d 785, 789 (S.D. Ill. 2010) (observing that plaintiffs "may pursue their § 107(a) cost recovery action for any so-called 'voluntary costs'—*if* the potentially voluntary nature of these costs is supported, of course, by sufficient evidence.")

131. 450 F. Supp. 3d 583 (E.D. Pa. Mar. 30, 2020), *vacated on reconsideration on other grounds*, No. 18-3623, 2020 WL 3060381 (E.D. Pa. June 8, 2020) (slip copy).

132. *Id.* at *5 (relying on the outdated New Castle County v. Halliburton NUS Corp., 111 F.3d 1116 (3d Cir. 1997)).

133. *See, e.g.*, Atlantic Research Corp. v. United States, 459 F.3d 827, 832–35 (8th Cir. 2006), *aff'd.*, 551 U.S. 128 (2007) (analyzing Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2007) which

the Third Circuit itself in *E.I. DuPont de Nemours and Co. v. United States*.[134] The district court also placed undue reliance on the Third Circuit's 2007 decision in *Cranbury Brick Yard, LLC v. United States*, which was unremarkable in holding that contribution and cost recovery are mutually exclusive remedies.[135] The Third Circuit in *Cranbury Brick Yard* did not have before it a claim for costs incurred outside an administrative order like the one raised by the plaintiff in *Metro Container Group* and should not have received the weight given it by the Eastern District of Pennsylvania.

This forced mutual exclusivity places performing PRPs at risk of losing claims for voluntarily incurred costs not directly compelled by an AOC for cleanup, such as attorneys' fees for negotiations with EPA prior to the AOC, PRP search costs, and early or interim response activities before or during implementation of the AOC. But as explained below, AOCs for cleanup should not even trigger a contribution action in the first place and are instead more squarely cost recovery actions.

B. IMPROPERLY READING § 122(A) SETTLEMENTS INTO THE § 113(G)(3)(B) STATUTE OF LIMITATIONS FOR CONTRIBUTION ACTIONS

One of the most critical distinctions between cost recovery and contribution actions is the statute of limitations. Cost recovery actions must be brought within three years after *completion* of a removal action,[136] or within six years after "initiation of physical on-site construction" of a remedial action.[137] However, there is an important exception: "if the remedial action is initiated within three years after completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action" for remedial costs (hereafter, the "Cost Recovery Clawback").[138] In other words, so long as the remedial action starts within three years after the removal action is complete, the claimant has a maximum of nine years—not three—to recover its removal action costs (the three

held that liable parties could pursue cost recovery actions under Section 107, and expressly identifying *New Castle County* among the pre-*Aviall* cases that "no longer make[] sense.").

134. 508 F.3d 126 (3d Cir. 2007).

135. 943 F.3d 701 (3d Cir. 2019). Although the Third Circuit in *Cranbury Brick Yard* rejected an argument that the plaintiff was entitled to cost recovery because its work was "voluntary," that work was still "pursuant to" an administrative order. Thus, the language in the opinion that "voluntariness is irrelevant" is inapposite to claims relating to response costs incurred outside of AOCs. *Cranbury*, 943 F.3d at 709. Further, the primary factor in *Cranbury Brick Yard* was whether the response costs were incurred pursuant to an administrative order that provided contribution protection (or "contribution immunity"). *Cranbury Brick Yard*, 943 F.3d at 704–06. The district court emphasized the same contribution immunity argument in Metro Container Grp. v. AC&T Co., 450 F. Supp. 3d 583, 596 n.9 (E.D. Pa. 2020). Clearly, PRPs would not have statutory contribution protection for costs incurred outside an AOC, whether "voluntarily" or otherwise.

136. 42 U.S.C. § 9613(g)(2)(A).

137. § 9613(g)(2)(B).

138. *Id.*

years between completion of removal and initiation of remediation, plus the six years after initiation of remediation).[139]

Likewise, there are two limitation provisions for contribution actions. Under Section 9613(g)(3)(A), contribution actions must be brought within three years of the date of judgment in a cost recovery action (that is, a civil action, including judicial consent decree, brought by EPA, a state, or a performing party to recover cleanup costs).[140] On the other hand, under Section 9613(g)(3)(B), contribution actions must be brought within three years of "the date of an administrative order under section 9622(g) of this title (relating to *de minimis* settlements [with EPA]) or 9622(h) of this title (relating to cost recovery settlements [with EPA])," or entry of a judicially approved settlement "with respect to *such* costs or damages."[141] Each of these circumstances contemplates a contribution action in the "traditional sense" as articulated in *Atlantic Research*: an action by one party for "reimbursement" of damages that party has paid (or owed) to another,[142] rather than "response" costs, regardless whether "compelled" or incurred "voluntarily." In the first situation, the party adjudged liable in a cost recovery action has been or will be required to pay for someone else's response costs, whether EPA, a state or a performing PRP. The party adjudged liable may then seek contribution against other PRPs. In a *de minimis* settlement situation, a small-bit PRP has paid EPA to buy out of its share of liability at a contaminated site, with no duty to perform any response action, and may seek contribution against other PRPs. In the cost recovery settlement situation, the settling party has reimbursed EPA's cleanup and oversight costs, and may seek contribution against other PRPs.

Notably absent from Section 113(g)(3)(B) is any reference to Section 122(a). Section 122(a) is the primary authority under which EPA orders private party cleanups.[143] It authorizes EPA to enter into administrative settlements with other parties "to perform any response action."[144] Parties who enter into such administrative settlements are "compelled" to cleanup contamination, but without any payment of damages to another person. The provision for reimbursement of EPA's response and oversight costs is governed by Section 122(g), not Section 122(a).

For more than thirty years after the passage of CERCLA in 1980, CERCLA practitioners operated on the understanding that contribution actions for response

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139. For example, if the removal action is completed on January 1, 2023 and the remedial action commences on December 31, 2025, the prospective plaintiff will have an additional 6 years from December 31, 2025 to file a cost recovery action which could seek removal action costs, for a total of 9 years from the completion of the removal action. Since a removal action may itself take several years, the date from which the removal action costs were incurred could well exceed a decade.

140. 42 U.S.C. § 9613(g)(3)(A).

141. § 9613(g)(3)(B) (emphases added).

142. United States v. Atlantic Research Corp., 551 U.S. 128, 138 (2007) ("Nothing in § 113(f) suggests that Congress used the term 'contribution' in anything other than this traditional sense.").

143. 42 U.S.C. § 9622(a).

144. *Id.*

costs incurred under a Section 122(a) administrative order could be brought within three years of *completion* of the removal action.[145] In the statutory context, this is consistent with the Cost Recovery Clawback referenced above. And although cost recovery liability is in theory joint and several, cost recovery damages are subject to a divisibility analysis and equitable allocation, acting as a functional equivalent of the contribution analysis.

However, this commonsense approach was tossed by the Sixth Circuit's 2014 holding in *Hobart Corp. v. Waste Management of Ohio, Inc.*[146] In that case, the Court of Appeals "borrowed" the three-year statute of limitations in Section 113(g)(3) for administrative orders under Section 122(g) and (h) and applied it to administrative orders under Section 122(a).[147] The Court of Appeals interpreted the limitations period in Section 113(g)(3)(B) to require that performing PRPs must bring a contribution action against non-performing PRPs within three years of the effective date of a 122(a) administrative order for cleanup. *Hobart*'s holding ignores the plain text of the statute, with its express application only to EPA *de minimis* and EPA cost recovery settlements. It is also at odds with Section 113(g)(2)'s limitation on contribution actions for "any response costs or damages," which must have already been incurred under traditional notions of contribution. Most response costs under a Section 122(a) order will not be incurred for many years beyond the three-year limitation period.

In practice, *Hobart*'s requirement that a contribution action be brought within three years of the effective date of the administrative order is nonsensical and impracticable. The performing PRPs will not know the total cost of cleanup until they complete the RI/FS and EPA issues its ROD selecting the remedy, a process that inevitably takes more than three years. The costs to conduct the initial removal action and RI/FS are often a fraction of the costs of the long-term remedy. Moreover, Superfund sites are often decades old, so the process of identifying non-performing PRPs is time consuming and can itself take years. The effect of such a broad interpretation of the three-year statute of limitation in Section 113(f)(3)(B) is to force performing PRPs to file suit without knowing how much a site will cost and without knowing the identity of all non-performing PRPs from whom they are entitled to contribution. This results in a sue-first-settle-later situation that completely undermines CERCLA's early settlement incentives. For example, the performing PRPs may issue settlement offers premised on the non-performing PRPs paying a set percentage of all future costs, without designating

145. *See, e.g.*, David Fotouhi & Michael K. Murphy, *Do CERCLA Cost Recovery and Contribution Rights Overlap?* LAW360 (Aug. 7, 2015), https://perma.cc/4WCM-8Z3H (noting the ongoing uncertainty post-*Atlantic Research* over which cause of action is available and when, and that *Hobart* created a circuit split in whether the statute of limitations for a 113(f)(3)(B) contribution action is three years from the date of the administrative order for cleanup or three years from completion of the removal action; the default was the latter pre-*Hobart*).

146. 758 F.3d 757 (6th Cir. 2014).

147. *Id.* at 775.

what those costs may be. Or the settlement offer may provide for a cash-out settlement based on a percentage of a "worst case scenario," such as a sediment cleanup that ranges in the billions of dollars. In either case, the settlement offer includes much greater uncertainty, which reduces the likelihood of settlement and increases the likelihood of litigation.

The effect of *Hobart*'s holding on judicial efficiency cannot be understated. In the rush to the courthouse, performing PRPs must name as defendants many more parties—sometimes numbering in the thousands[148]—than they would have before, because they do not have time for a pre-litigation settlement process. These defendants often include more unidentifiable and likely defunct parties because the performing PRPs have not had time to conduct robust corporate research beyond a preliminary PRP search. This corporate research is crucial to identifying the correct PRP. For example, for a site active in the 1960s, the sixty-year gap to the present day means that many of the business entities that disposed of waste at the site have changed names or merged numerous times and the potential witnesses are often deceased. In some recent cases, PRP plaintiff groups have filed suit against many hundreds of defendants, only to seek an immediate stay of litigation to allow for the settlement process that otherwise would have occurred pre-litigation.[149] Meanwhile, when faced with a months-long or years-long stay at the outset of litigation, many named defendants will take a "wait-and-see" approach rather than settle. All the while, publicly traded corporate defendants must disclose ongoing litigation to their shareholders.

Even if the Supreme Court ultimately picks up the issue and sides with *Hobart* to conclude that actions for Section 122(a) settlement costs are contribution actions governed by the three-year statute of limitations in Section 113(f)(3)(B), the plain text of that subsection allows contribution only for "*such* costs or damages" (that is, those already incurred). Thus, it cannot preclude successive actions for contribution of additional costs incurred as the response activities progress. But why burden the judiciary and the hundreds or thousands of PRPs at a given site with duplicative litigation each time additional costs are incurred? The courts should recognize and treat actions for Section 122(a) settlement costs for what they really are—cost recovery actions—that can be brought six years after initiation of the remedial action, once most costs have been incurred and future costs are definitively estimated.

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148. *E.g.*, Complaint at 1–19, Metro Container Grp. v. AC&T Co., 450 F. Supp. 3d 583 (E.D. Pa. 2020) (No. CV 18-3623).

149. *See e.g.*, Order Granting Mot. to Stay, Metro Container Grp. v. AC&T Co. (E.D. Pa. 2020) (No. CV 18-3623) (staying case filed on August 24, 2018 to June 1, 2019); Order Granting Mot. for Stay and Extension of Time to Serve All Defs., Chemetco Site PRP Grp. v. A Square Systems, Inc., No. 3:18-179-SMY-SCW (S.D. Ill. Feb. 20, 2018) (LEXIS, Fed. Other Ct. Docs.) (staying case filed on February 12, 2018 to March 1, 2019).

C. REIMAGINING THE REAL PARTY IN INTEREST

As summarized in the discussion on the private party cleanup process above, once the performing PRPs have been identified, they typically form a working group. These PRP groups manage the day-to-day interactions with EPA and environmental engineers for conducting the cleanup. It is also common practice for the PRP group to serve as the named plaintiff in actions for contribution or cost recovery.[150] This practice has historically gone unquestioned. "The courts treat these groups for what they are—convenient devices for the assertion of claims or defenses of similarly situated litigants—and 'look through' the group structure to the constituent members."[151]

Yet recently, there has been a trend of district courts prohibiting PRP groups from proceeding in the name of the group on grounds that the PRP group is not the "real party in interest" under Rule 17 of the Federal Rules of Civil Procedure. Rule 17(a) simply states that "[a]n action must be prosecuted in the name of the real party in interest."[152] The Advisory Committee Notes make clear that Rule 17(a) is "intended to insure against forfeiture and injustice," is "permissive in

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150. *See generally, e.g.*, Metro Container Grp. v. AC&T Co., Inc., 450 F. Supp. 3d 583 (E.D. Pa. 2020), *vacated in part on reconsideration* No. 18-2623, 2020 WL 3060381 (E.D. Pa. June 8, 2020) (unincorporated association plaintiff sought contribution and cost recovery under CERCLA); Chemetco Site PRP Grp., v. A Square Systems, Inc., No. 3:18-179-SMY-SCW (S.D. Ill. filed Feb. 5, 2018) (unincorporated association plaintiff sought contribution under CERCLA); USOR Site PRP Group v. A&M Contractors, Inc., 275 F. Supp. 3d 808 (S.D. Tex. 2017) (unincorporated association plaintiff sought contribution and cost recovery under CERCLA and state law); LCCS Group v. A.N. Webber Logistics, Inc., 341 F. Supp. 3d 847 (N.D. Ill. 2018) (unincorporated association plaintiff sought CERCLA contribution); LWD PRP Group v. ACF Indus., LLC, No. 5:12-CV-00127-HJM, 2014 WL 901648, *15 (W.D. Ky. Feb. 7, 2014), *rev'd on other grounds by* LWD PRP Group v. Alcan Corp., 600 Fed. Appx. 357 (6th Cir. 2015) (unincorporated association plaintiff sought CERCLA contribution); Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC, No. CV–04–3060–LRS, 2012 WL 3067379, at **2–**3 (E.D. Wash. July 27, 2012), (holding unincorporated association had both standing and capacity to sue to enforce a CERCLA consent decree); Jostens, Inc. v. Vopak, Inc., No. CIV. 02-3761-DWF/JSM, 2003 WL 20273567 (D. Minn. May 29, 2003) ("statutorily created" unincorporated association plaintiff sought CERCLA contribution); Karras v. Teledyne Indus., Inc., 191 F. Supp. 2d 1162, 1164 (S.D. Cal. 2002) (holding unincorporated association trustees of PRP group trust accounts were real parties in interest for CERCLA contribution claims); Kalamazoo River Grp. v. Rockwell Int'l, 107 F. Supp. 2d 817 (W.D. Mich. 2000), *aff'd* 274 F.3d 1043 (6th Cir. 2001) (unincorporated association plaintiff sought CERCLA contribution); Booth Oil Site Admin. Group v. Safety-Kleen Corp., 137 F. Supp. 2d 228 (W.D. N.Y. 2000) (unincorporated association plaintiff sought CERCLA contribution); City of Kalamazoo v. Mich. Disposal Serv. Corp., 125 F. Supp. 2d 219 (W.D. Mich. 2000) (unincorporated association plaintiff sought CERCLA contribution); Waste, Inc. Remedial Design/Remedial Action Group v. Cohn, 60 F. Supp. 2d 833 (N.D. Ind. 1997) (unincorporated association plaintiff sought to enforce CERCLA cleanup order); Hunt's Generator Comm. v. Babcock & Wilcox Co., 863 F. Supp. 879 (E.D. Wis. 1994) (unincorporated association plaintiff sought CERCLA contribution); and Neighborhood Toxic Cleanup Emergency v. Reilly, 716 F. Supp. 828 (D.N.J. 1989) (unincorporated association plaintiff sought to enjoin CERCLA cleanup plan).

151. City of Kalamazoo v. Mich. Disposal Serv. Corp., 125 F. Supp. 2d 219, 238 (W.D. Mich. 2000) (citing Kalamazoo R. Study Grp. v. Menasha Corp., 228 F.3d 648 (6th Cir. 2000) (describing the plaintiff group as an 'unincorporated association' but analyzing the claims of its constituent members)).

152. FED. R. CIV. P. 17(a)(1).

purpose," and "should not be misunderstood or distorted."[153] "Real parties in interest are the persons or entities possessing the right or interest sought to be enforced through the litigation. The 'real party in interest' provision is intended to protect defendants from multiple liability in actions by subsequent claimants and to ensure that the judgment will have preclusive *res judicata* effect."[154] Like standing, the real party in interest provision is jurisdictional in nature, which reviewing courts must review *sua sponte*, even if not raised by the parties.[155] Therefore, one may assume that so many CERCLA cases have proceeded with a PRP group as the named plaintiff because the reviewing courts must have determined that such PRP groups are the real parties in interest with standing to sue.

Within CERCLA, there are statutory arguments for allowing PRP groups to proceed as the named plaintiff. First, Rule 17 includes as real parties in interest those persons "authorized by statute."[156] CERCLA defines "person" to include "associations."[157] Second, as discussed above, the individual members of the PRP groups often assign their individual CERCLA rights to the PRP group as a whole. An assignment of claims leaves no right in the assignor.[158] Thus, if there are assignments in place, the PRP group is itself the real party in interest.[159] regardless of any statutory authorization.[160] This contractual agreement reduces any risk of prejudice to moving defendants.[161]

Three decisions have prohibited PRP groups from proceeding as the named plaintiffs, most recently with unusual and burdensome procedural effects. The

153. *Id*. at 1966 Amd. Note.

154. Karras v. Teledyne Indus., Inc., 191 F. Supp. 2d 1162, 1171–72 (S.D. Cal. 2002) (citing Pac. Coast Agric. Export Ass'n v. Sunkist Growers, 526 F.2d 1196, 1208 (9th Cir. 1975)).

155. *See, e.g*., Chong v. District Director, Immigration & Naturalization Serv., 264 F.3d 378, 383 (3d Cir. 2001) (addressing standing); Steele v. Blackman, 236 F.3d 130, 134 n. 4 (3d Cir. 2001) (addressing standing); *see also In re* Grant-Covert, 658 Fed.Appx. 175, 177 (3d Cir. 2016) (noting "real parties in interest always have standing, but the converse is not always true").

156. FED. R. CIV. P. 17(a)(1).

157. 42 U.S.C. § 9601(21).

158. *See, e.g., Addax* [RG1] Energy SA v. M/V Yasa H. Mulla, 987 F.3d 80, 92 (4th Cir. 2021) (Agee, J., dissenting) (stating "the generally accepted proposition that . . . '[a]n unequivocal and complete assignment extinguishes the assignor's rights against the obligor. . .") (quoting Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, N.A., 731 F.2d 112, 125 (2d Cir. 1984)); Pub. Serv. Comm'n of Md. v. Panda-Brandywine, L.P., 825 A.2d 462, 469 (Md. 2003) (citing Restatement (Second) of Contracts § 317 (1981))).

159. FED. R. CIV. P. 17(a)(1).

160. FED. R. CIV. P. 17(a)(1).

161. *See, e.g., Karras,* 191 F. Supp. 2d at 1170–71 (noting that a judgment can bind persons not parties to the litigation in question and not subject *in personam* to the jurisdiction of the court if the persons are in privity with" the plaintiff, and likewise, where a plaintiff is "suing for the benefit of another, the preclusive effect of the representative's suit protects the defendant from subsequent suits by the one who ultimately benefits from the litigation") (citing United States v. Truckee–Carson Irrigation Dist., 649 F.2d 1286, 1303 (9th Cir. 1981), *modified on other grounds*, 666 F.2d 351 (9th Cir. 1982), *aff'd in part & rev'd in part on other grounds sub nom.,* Nevada v. United States, 463 U.S. 110 (1983)).

first, although less recent, is *Boarhead Farm Agreement v. Advanced Envt'l Tech. Corp.*[162] There, the Eastern District of Pennsylvania held the real parties in interest were the individual members of the PRP group, but allowed the parties to amend their complaint to name the individual group members. In *Boarhead*, there was no allegation of an assignment in the relevant complaint or in the arguments before the district court. Importantly, the PRP group in that case was choosing to amend in the name of the individual members and the effect of the district court's decision in that case was to *preserve* the PRP group's claims, not preclude them. In *Boarhead*, the plaintiff, Boarhead Farm Agreement Group (Boarhead Group), responded to a motion to dismiss its amended complaint based in part on a Rule 17 (a) challenge in 2003.[163] However, there was no ruling on the motion, and the case proceeded with Boarhead Group as the named plaintiff for an additional two years until 2005.[164] At that time, Boarhead Group moved to further amend its complaint due to the Supreme Court's intervening decision in *Cooper Ind., Inc. v. Aviall Services, Inc.*,[165] which addressed when a party could pursue contribution under CERCLA Section 113(f).[166] The decision in *Cooper Industries* undermined a 2003 stipulation in which defendants had agreed that Boarhead Group had stated a claim for relief under Section 113(f), in exchange for Boarhead Group's agreement that its members would act as parties to the case for purposes of discovery.[167] As a result, Boarhead Group moved to amend its complaint to proceed in the name of the individual group members. The defendants challenged this on statute of limitations grounds, arguing that the proposed amendment could not relate back to the original pleading.[168] The district court held that the individual group members were the real parties in interest, noting that real parties can be substituted at any time under Rule 17(a)(3).[169] Boarhead Group was therefore allowed to amend its complaint to proceed in the names of the individual members.[170]

Importantly, by ruling on the Rule 17(a) issue, the district court was able to avoid the statute of limitations issue, and the attendant prejudice to the Boarhead Group that a dismissal of the case would have caused.[171] The court's ruling also effectively preserved the parties' prior stipulation regarding discovery. Both aspects served the goals of fundamental fairness and judicial economy in advancing litigation that had been ongoing for several years.

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162. 381 F. Supp. 2d 427 (E.D. Pa. 2005).
163. *Boarhead,* 381 F. Supp. 2d 427 (E.D. Pa. 2005).
164. *See generally Boarhead* Docket.
165. 125 S.Ct. 577 (2004)
166. *Boarhead*, No. 2:02-cv-03830-LDD, Doc. 137.
167. *Id.*
168. *Boarhead,* 381 F. Supp. at 431.
169. *Id.* at 432–33.
170. *Id.* at 433.
171. *See id.* at 433 (stating "courts [have] applied Rule 15(c) and Rule 17(a) in tandem to prevent the dismissal of the action and to allow an amendment substituting the real party in interest to relate back," noting there was no risk of prejudice to defendants at issue in the case).

Second, in 2015 in *Pasco Sanitary Landfill NPL Site Industrial Waste Area Generator Group III v. Basin Disposal, Inc.* (*IWAG III*),[172] a newly appointed judge with little experience in CERCLA in the Eastern District of Washington held the PRP group was not the real party in interest with extremely unusual procedural outcomes prejudicial to the PRP group. As in *Boarhead*, there was no allegation of an assignment of claims from the PRP group members to the PRP group. But rather than allowing the PRP group to amend its complaint to proceed in the names of the individual group members, the judge dismissed the complaint altogether. The PRP group plaintiff filed the original complaint against numerous defendants.[173] Certain defendants, contemporaneously with their motion to dismiss, filed their *own* complaint, naming the PRP group as defendants, instead of filing counterclaims or cross-claims (arguably violating Rule 13 of the Federal Rules of Civil Procedure).[174] The defendants disputed the PRP group's status as a real party in interest and argued that the new complaint was better than the PRP group's.[175] The judge took the drastic step of dismissing entirely the PRP group's complaint and denying the PRP group leave to amend, and proceeded with the defendants' complaint in a completely new case.[176] The new case omitted several important players that the *IWAG III* PRP group had named as defendants in their complaint in the original action, requiring additional litigation measures by the PRP group members (now individually named defendants) to join the missing defendants (now as co-defendants). Importantly, in *IWAG III*, the district court's opinion appears to have been influenced by the false belief that the PRP group was formed solely for the purpose of litigation.[177] This is despite that the PRP group had long been formed for cooperating in site cleanup.

In 2020, in *Metro Container Grp. v. AC&T Co., Inc.*,[178] an experienced judge in the Eastern District of Pennsylvania considered and rejected arguments that the PRP group plaintiff was not the real party in interest. The court distinguished *IWAG III* and *Boarhead* on grounds that the plaintiff had alleged assignments from the individual PRPs group members to the group as a whole. The court reasoned that "'[p]laintiff associations are permitted under CERCLA to sue for contribution despite the fact that they are creatures of contract, created to facilitate cleanup and cost recovery efforts of the PRPs[,]' so long as they bind the members of the association to the ruling of the suit."[179] Because the plaintiff had

172. 2015 WL 12516735, No. 4:15-CV-05022-SMJ (E.D. Wash. Nov. 16, 2015), *reconsideration denied* 2016 WL 11498029 (E.D. Wash. Feb. 8, 2016).

173. *See generally IWAG III*, No. 4:15-CV-05022-SMJ (filed Mar. 5, 2015).

174. *See generally* Basin Disposal Inc. v. 3M Company, et al., No. 4:15-cv-05078 (E.D. Wash. filed Aug. 5, 2015).

175. Defs.' Br., *IWAG III*, No. 4:15-CV-05022-SMJ (E.D. Wash. Aug. 5, 2015), Dkt. No. 99.

176. *See IWAG III*, 2015 WL 12516735, *3; *Basin Disposal Inc.*, No. 4:15-cv-05078.

177. *IWAG III*, 2015 WL 12516735, *2 ("Plaintiff is a group of PRPs that was formed for the purpose of bringing this action.")

178. 450 F. Supp. 3d 583 (E.D. Pa. 2020).

179. *Id.* at 605 (quoting *Karras*, 191 F. Supp. 2d at 1167–68).

alleged an assignment of claims from the individual members to the group, the group was the real party in interest.[180-181]

Third, in late 2021, another newly appointed judge inexperienced in CERCLA litigation ruled that the PRP group was not the real party in interest in *68th Street Site Work Group v. Airgas, Inc.*[182] There, like in *IWAG III*, the ruling was on several pending motions to dismiss, not on a procedural motion for leave to amend as in *Boarhead*. But there, like in *Metro Container* and unlike in *IWAG III* or in *Boarhead*, the plaintiff PRP group had alleged assignments of CERCLA rights from the individual members of the PRP group to the PRP group as a whole. Despite the court deciding a motion to dismiss, where all reasonable inferences should be drawn to the benefit of the plaintiff, and despite the fact that the plaintiff had attached as exhibits to its briefs the assignment agreements from the PRP group members to the PRP group,[183] the district court appeared to have believed that plaintiff did not produce any evidence of the existence of the assignments of claims from the individual members of the PRP group, stating:

> ". . . Plaintiff *has not alleged or established* that its members would be bound to the rulings in this suit if they are not joined as parties. Its repeated invocation of 'unequivocal' assignments does not indicate that those assignments bind its members in this matter. The *absence of evidence* of binding

180. *Id.*

181. The Metro Container rationale is consistent with other the rationale of earlier decisions that did not require proof of assignment. Unincorporated associations "are permitted under CERCLA to sue for contribution despite the fact that they are creatures of contract, created to facilitate cleanup and cost recovery efforts of the PRPs. Indeed, the purposes of CERCLA include facilitating efficient responses to environmental harm, holding responsible parties liable for the costs of the cleanup, and encouraging settlements that reduce the inefficient expenditure of public funds on lengthy litigation.'" Karras v. Teledyne Indus., Inc., 191 F. Supp. 2d 1162, 1168 (S.D. Cal. 2002) (quoting B.F. Goodrich v. Betkoski, 99 F.3d 505, 514 (2d Cir. 1996)).

In *City of Kalamazoo*, the district court analyzed the real party in interest doctrine in the context of a PRP group and emphasized that the failure to allege assignment by the individual parties to the PRP group was a critical factor in its decision. 125 F. Supp. at 237–38 ("Nor does the complaint allege an assignment by these parties to the Group. In such circumstances, the individual members of the association are necessary parties to the lawsuit." (citing Warth v. Seldin, 422 U.S. 490, 516 (1975)). The court in *City of Kalamazoo* also emphasized that the doctrine of standing would typically preclude an unincorporated association from asserting a claim for monetary damages, as opposed to prospective or injunctive relief, but this would be overcome by an assignment. *Id.* (citing and quoting United Food & Comm. Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 546 (1996); Hunt v. Wash. State Apple Adv. Comm'n, 432 U.S. 333, 343 (1977)). The district court acknowledged that treating the PRP group as a separate entity could undermine the rights of the individual members, but underscored that "[s]uch a view however, is not the one adopted by the federal courts in dealing with litigation groups in environmental cases. The courts treat these groups for what they are—convenient devices for the assertion of claims or defenses of similarly situated litigants—and 'look through' the group structure to the constituent members." *Id.* at 238 (citing Kalamazoo R. Study Grp. v. Menasha Corp., 228 F.3d 648 (6th Cir. 2000) (describing the plaintiff group as an 'unincorporated association' but analyzing the claims of its constituent members)).

182. No. SAG-20-3385, 2021 WL 4255030 (D. Md. Sept. 16, 2021) (slip copy).

183. *See* Pl.'s Responses in Opp. to Mot. to Dismiss by Defendants Airgas, Inc., Drug City Pharmacy, LLC and Melibelle USA, Inc. (Dkt. Nos. 775-5, 776-5 and 777-7) (filed Sept. 2, 2021).

> assignments leaves the Defendants potentially subject to a second suit by the member entities, a result contravening the purpose of the real party in interest doctrine."[184]

Based on the perceived lack of evidence, the district court distinguished the facts in the underlying case from the *Metro Container Group* case, which was directly on point for this same issue.[185] The district court suggested it may be willing to allow leave to amend to substitute the individual PRP group members as individual plaintiffs. However, the court ultimately granted motions to dismiss without prejudice on other unusual grounds: novel interpretations of CERCLA's liability provisions that would require not only showing a defendant intended to dispose of hazardous substances, but also knew that its waste contained hazardous substances *per se*, and intended to dispose of waste at the site in question.[186] The court thereby misapplied the intent required for establishing liability for sales of useful product to the classic disposal of waste at a dump, an incorrect and onerous precedent for future litigants in the District of Maryland, but one unlikely to be followed in other jurisdictions.[187]

The problems with these real party in interest decisions are numerous. As a matter of procedure, Rule 17 does not even require amendment of a complaint to name the individual PRP group members. Although "joining" or "substituting" the real party in interest is *allowed*, so is "ratification" by the real party in interest.[188] If a court refuses to "look through" the PRP group to the individual members, all that it should require is filing of the assignment or any other form of

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184. 68th St. Site Work Grp., 2021 WL 4255030, at *27 (emphases added). The court's September 16, 2021 order was issued on the same day as the replies to plaintiff's responses were filed by Airgas, Drug City Pharmacy and Melibelle were filed, with dozens of motions before the court, suggesting the court failed to review the full record, and its ruling was based on an oversight. See Dkt. Nos. 784, 785, 783 (Sept. 16, 2021).

185. 68th St. Site Work Grp., 2021 WL 4255030, at *27 ("The exception described in Metro Container Group, then, is inapplicable here") (citing and distinguishing Metro Container Grp., v. AC&T Co., Inc., 450 F. Supp. 3d 583, 605 (E.D. Pa. 2020)).

186. *Id.* at **20–23. This interpretation would eviscerate CERCLA's liability provisions, allowing for plausible deniability of the presence of hazardous substances in one's waste, and preventing imposition of liability for disposal of substances prior to being listed as hazardous. In the context of PFOAs, this interpretation would prevent CERCLA liability for any PFOAs in the ground because they were not listed "hazardous substances" at the time of disposal. Indeed, CERCLA's retroactivity would have been useless at the time it was passed because "hazardous substance" was not a defined term until CERCLA's passage: no one could be liable for contaminants in the ground before they were designated hazardous because no one could "know" that their waste contained "hazardous substances" at the time of disposal.

187. Indeed, it has already been rejected as legislation from the bench. *See* City of Lincoln v. County of Placer, No. 2:18-cv-00087-KJM-AC, 2023 WL 2776091, at *14 (E.D. Cal. April 3, 2023) (stating "[b]y its own terms, section 107(a)(3) imposes liability on those who arrange for the disposal of hazardous substances regardless of whether they knew or should have known those substances were hazardous at the time" and declining to follow Airgas, stating "[i]f any court's interpretation is not what Congress intended, it may revise section 107(a)(3). This court will not add provisions to the statute when the statute's text does not provide for them.").

188. FED. R. CIV. P. 17(a)(3).

ratification, and then the action should "proceed[] as if it has been originally commenced by the real party in interest."[189] Forcing amendment of a complaint results in duplicative litigation, as defendants will inevitably file motions to dismiss on both the original and then the amended complaint. Further, forcing the individual PRP group members to proceed as named plaintiffs severely complicates attorney representation. Although one attorney may represent the PRP group as a whole as an unincorporated association, representing each one of the PRP group members is challenging. It requires additional and separate retention agreements, and almost certainly requires conflict of interest waivers, as the PRP group members have conflicting interests, each of them having their own share of often-overlapping liabilities (i.e., transporters and generators of the same waste). Moreover, PRP group members may not want to be named individually and may withdraw from the PRP group to avoid becoming a named plaintiff.[190] All of this threatens to disturb the sensitive balancing act that PRP groups undertake to cooperate in efficiently decontaminating the environment, negotiating with EPA or state and local governments, establishing their internal allocations. And it makes litigation much more costly.

Section V discusses legislative and administrative fixes to correct the *Hobart* issue and close the *Atlantic Research* Gap. However, the real party in interest issue has no easy legislative fix. The real party in interest doctrine is jurisdictional in nature, comparable to the standing doctrine, with its constitutional origins. Private parties must instead attempt to guard against Rule 17's strictures contractually by executing assignments and procedurally by ratifying litigation in the name of the PRP group. Litigants should also be sure to disclose assignments—whether in camera or on the record—early in a case to avoid unnecessarily litigating the issue.

D. THE UNEXPECTED BENEFIT OF *TERRITORY OF GUAM* RESTRICTING CONTRIBUTION TO CERCLA-DERIVED LIABILITIES

Atlantic Research's analysis of contribution was general in nature but focused on contribution under Section 113(f)(1), which governs contribution actions after

189. *Id.*

190. This is what happened in the 68th Street Site case. When the plaintiff attempted to satisfy the judge's ruling by modifying its allegations of waste disposal to incorporate more "intent" language, it also attempted to avoid additional motions to dismiss by naming the individual PRP group members in its proposed amended complaint. However, some group members refused to join in the proposed amended complaint. The original complaint described the PRP group as having 12 members; the proposed amended complaint identified only 9 members. *Compare* 68th St. Site Work Grp., 2021 WL 4255030, at *2 *with* 68th Street Site Work Group v. 7-Eleven, Inc., No. SAG-20-3385, 2022 WL 227966, at *1 (D. Md. Jan. 26, 2022). Ultimately, the district court refused to grant the motion for leave to amend because it did not add allegations of "specific intent" to "dispose of hazardous substances" *per se*, as opposed to waste "containing hazardous substances," again misapplying *Burlington Northern*'s useful product analysis to disposal at a dump.

a civil suit establishing liability.[191] Yet there are two contribution causes of action in CERCLA. The second, in Section 113(f)(3), authorizes contribution claims for a person who has resolved its liability for a response action or for the costs of such response action in an administrative or judicially approved settlement.[192]

In 2021, the U.S. Supreme Court analyzed Section 113(f)(3)(B) in *Territory of Guam v. United States*, and concluded that contribution is only available if a person has resolved *CERCLA*-related liabilities, not just any environmental liability.[193] In so holding, the Supreme Court overturned what had emerged as the majority rule in the federal courts, which was that Section 113(f)(3)(B) contribution claims could proceed for response costs incurred pursuant to other statutes, such as the Resource Conservation and Recovery Act.[194]

Prior to *Territory of Guam*, courts in almost every federal circuit had acknowledged, explicitly or implicitly, the availability of causes of action for either cost recovery or contribution under CERCLA §§ 107 and 113 even when the costs were incurred in environmental cleanups conducted under other statutes.[195] This

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191. *See* United States v. Atlantic Research Corp., 551 U.S. 128 (2007); 42 U.S.S. § 9613(f)(1).

192. 42 U.S.C. § 9613(f)(3).

193. Territory of Guam v. United States, 593 U.S. 310, 311 (2021).

194. Peter R. Knight, *U.S. Supreme Court Clarifies Predicate to CERCLA Contribution Actions*, THE NATIONAL LAW REVIEW, Vol. 13, No. 219 (June 7, 2021), available at https://www.natlawreview.com/article/us-supreme-court-clarifies-predicates-to-cercla-contribution-actions (identifying the D.C. Circuit, Third Circuit, Ninth Circuit and Tenth Circuit as holding CERCLA contribution actions are available for response costs incurred in non-CERCLA administrative orders, with only the Second Circuit holding the opposite).

195. Most decisions are at the district court level. There is no particularly clear precedent within the 6th or 8th Circuits. Within the 1st Circuit: BASF Catalysts LLC v. United States, 479 F.Supp.2d 214 (D. Mass. 2007) (acknowledging a government contractor could recover its RCRA corrective action costs from the United States as a PRP under CERCLA § 113, but rejecting the claim because the RCRA consent order was not an "administrative settlement" because it did not resolve liability and the claim was time-barred);

Within the 2nd Circuit: United States v. E.I. du Pont de Nemours & Co., Inc., 341 F.Supp.2d 215 (W. D. N.Y. 2004) (holding PA's costs overseeing a RCRA § 3013 cleanup order were recoverable under CERCLA §107 because the order was consistent with the NCP, even if the particular response action may have been unavailable under CERCLA); Town of New Windsor v. Tesa Tuck, Inc., 919 F. Supp. 662, 669–72 (S.D. N.Y. 1996) (town seeking recovery of landfill closure costs incurred under state law recoverable under CERCLA survived motion for summary judgment); *Matter of Reading Co.,* 900 F. Supp. 738, 744–45 (E.D. Pa. 1995) (holding government's response costs incurred under Clean Water Act recoverable under CERCLA (citing *Rohm and Haas, Co.,* 2 F.3d 1265 (3d Cir. 1993)));

Within the 3rd Circuit: Chemical Waste Mgmt., Inc. v. Armstrong World Industries, Inc., 669 F. Supp. 1285, 1289–91 (E.D. Pa. 1987) (holding owner and operator of a RCRA § 3005(e) "interim status facility" could recover response costs from hazardous waste generators under CERCLA § 107) (*following* Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986) (holding RCRA does not preempt CERCLA claims); United States v. Rohm and Haas Co., 2 F.3d 1265, 1274–78 (3rd Cir. 1993), rev'd and remanded on other grounds United States v. E.I. Dupont De Nemours and Co. Inc., 432 F.3d 161 (3rd Cir. 2005) (holding that RCRA corrective action response costs were recoverable under CERCLA); Trinity Industries, Inc. v. Chicago Bridge & Iron Co.,735 F.3d 131, 136 (3rd Cir. 2013) (allowing a private party to pursue a CERCLA § 113 contribution action for response costs incurred under Pennsylvania's Hazardous Sites Cleanup Act and Land Recycling and Environmental Remediation Standards Act);

is the case for the government as well as private parties. This conclusion was bolstered by agency interpretation. In the preamble to the National Contingency Plan, EPA stated:

> "... [I]t is important to note that CERCLA section 107(a)(4)(B) does not require private parties to conduct cleanups consistent with the NCP; rather, it establishes a right of action under CERCLA for cost recovery in those cases where non-governmental parties have incurred necessary response costs consistent with the NCP. The result of not meeting this standard is that cost recovery under CERCLA may not be available; however, this does not mean that the action may not proceed, or that cost recovery may not be available under

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Within the 4th Circuit: South Carolina Dept. of Health and Environmental Control v. Commerce and Industry Ins. Co., 372 F.3d 245 (4th Cir. 2004) (held that CERCLA §§ 107 and 113 claims could be asserted directly against insurers pursuant to RCRA's direct action provision, because CERCLA has no regulations authorizing direct action against insurers; not objecting to the recovery of RCRA response costs under CERCLA as a general matter, thereby implicitly acknowledging the possibility of recovery);

Within the 5th Circuit: Exxon Mobil Corp. v. United States, 108 F. Supp. 3d 486, 510–11 (S.D. Tex. 2015) (holding that agreed orders with the State of Texas constituted "administrative settlements" which resolved liability for violations of the State's version of RCRA under the Texas Solid Waste Disposal Act) (collecting cases);

Within the 7th Circuit: Clean Harbors Services, Inc. v. Illinois Intern. Port Dist., 2013 WL 678271 (N. D. Ill. 2013) (not denying that a plaintiff had a CERCLA cause of action for RCRA response costs, but not allowing the claim to proceed under CERCLA § 113 because plaintiff had not yet been subject to a civil action under CERCLA §§ 106 or 107);

Within the 9th Circuit: Mardan Corp. v. C.G.C. Music, Ltd., 600 F.Supp. 1049, 1054-58 (D.Ariz. 1984), aff'd by Mardan Corp. v. C.G.C. Music, Ltd. 804 F.2d 1454 (9th Cir. 1986) (concluding that a private party's costs incurred under a RCRA Consent Agreement's interim requirements were "necessary costs of response" under CERCLA § 107, but ultimately concluding that costs were not recoverable due to contractual provisions between plaintiff and defendant); Catellus Development Corp. v. L.D. McFarland Co., 910 F. Supp. 1509 (D. Or. 1995) (holding CERCLA statute of limitations applied to RCRA citizen suit "restitution" action because the statute of limitations for citizen suits under 28 U.S.C. § 2462 was inapplicable to what a claim which was comparable to a CERCLA cost recovery actions, and also noting that, "[i]ncidentally, response actions which are characterized as removal or remedial under CERCLA, are also removal or remedial actions for the purposes of RCRA" (citing Rohm and Haas, Co., 2 F.3d 1265, 1274–75 (3rd Cir. 1993)) and ASARCO LLC v. Atlantic Richfield Co., 73 F. Supp. 3d 1285, 1288–93 (D. Montana 2014) (holding right to contribution under CERCLA § 113(f) applies where a party has resolved its liability and is conducting a "response action" as defined in CERCLA, regardless whether the action is a CERCLA response action in case where plaintiff had resolved its liability under a consent decree and had incurred response costs in RCRA and Clean Water Act response activities));

Within the 10th Circuit: State of Colorado v. United States, 867 F. Supp. 948, 953 (D. Colo. 1994) (holding the state's costs overseeing response under the state's version of RCRA were recoverable under CERCLA § 107 (citing United States v. Rohm & Haas and United States v. State of Colorado, 990 F.2d 1565, 1580 (10th Cir. 1993) (stating that the definitions of "removal and remedial action" under CERCLA are "conceivably broad enough to encompass certain RCRA corrective actions.");

Within the 11th Circuit: Union Carbide Corp. v. Thiokol Corp., 890 F. Supp. 1035, 1044 (S.D. Ga. 1994) (holding that a private party's costs for monitoring and assessment under RCRA were "necessary response costs" under CERCLA §107, with the limitation that any RCRA response costs must also be consistent with the NCP. The court also suggested attorneys fees for RCRA work could be recoverable under CERCLA § 107 if "closely tied" to cleanup, and ultimately denied in part and granted in part plaintiff's CERCLA §113 contribution claims as time-barred).

> other federal or state law. *Of course, even if a party takes a cleanup action under an authority other than CERCLA (e.g. RCRA corrective action), it may have a right of cost recovery under CERCLA section 107 if the action was a necessary response to a release of hazardous substances, and was performed consistent with the N.C.P.*"[196]

Courts have emphasized this interpretation and the necessary deference to it when analyzing CERCLA claims for costs incurred under other statutes.[197]

Despite the overwhelming majority of federal courts deciding to the contrary, the U.S. Supreme court in *Territory of Guam* concluded it was a "far superior approach" to deny *contribution* claims to parties conducting cleanups under other statutes. The holding was actually a win for the Territory of Guam, allowing it to pursue a *cost recovery* claim that had been denied under the mutual exclusivity approach which limited it to a contribution action.

For now, cost recovery actions remain available for parties conducting cleanups under other statutes. Indeed, *Territory of Guam* could be beneficial to many performing PRPs. Rather than "directing traffic" to contribution claims and a three-year statute of limitations, federal courts will be forced to treat actions for response costs as cost recovery actions with the longer statutes of limitations—at least for *non-CERCLA* settlements … and at least for now. This is consistent with the "response costs" versus "reimbursements" dichotomy advanced herein, consistent with contribution in its "traditional sense."

It is possible that the "resolution of liability" issue raised by *Territory of Gaum* could also be addressed administratively to preserve contribution claims. Where the non-CERCLA cleanup meets the definition of "removal" or "remedial" action as defined by CERCLA and would be consistent with the NCP, EPA need only specify in a cleanup order under other statutes (RCRA or the Clean Water Act, for example), that the order is also "resolving liability" under CERCLA. But performing PRPs may not want this. It would create a right to contribution with a shorter three-year statute of limitations whereas the new standard under *Territory of Guam* forces courts to recognize such actions as cost recovery actions with a longer statute of limitations.

V. FIXING THE FLAWS: RECOMMENDATIONS FOR THE LEGISLATURE, EPA AND PRP GROUPS

The barriers created by CERCLA's imprecise language and federal courts' interpretations of it are not insurmountable. Likewise, some of the issues discussed above arise not from the statutory language itself, but from EPA's drafting

196. EPA, *National Oil and Hazardous Substances Pollution Contingency Plan*, 55 Fed.Reg. 8666, 8796 (March 8, 1990) (codified at 40 C.F.R. Part 300) (emphasis added).

197. *See, e.g.*, Reading Co. v. City of Philadelphia, 823 F. Supp. 1218, 1229–30 (E.D. Pa. 1993) (emphasizing this language in context of Reading Co.'s claims for CERCLA contribution for costs incurred in a TSCA PCB-cleanup).

of administrative settlement agreements in a way that combines reimbursements and cleanup orders. This Section recommends several simple modifications to EPA's handling of administrative settlement agreements and proposes simple amendments to the statutory language that would clarify the distinct nature of relief for PRPs conducting cleanups under Section 122 to achieve CERLCA's goals of expedient cleanup.

A. ADMINISTRATIVELY CORRECTING *HOBART* AND CLOSING THE *ATLANTIC RESEARCH* GAP

In light of the chaos that *Hobart* has and will continue to create—at least until the Supreme Court weighs in again—it is much more desirable and simpler to categorize actions for response costs incurred pursuant to Section 122(a) as cost recovery actions, and categorize actions for reimbursement of costs paid (or owed) to another as contribution actions. This is consistent with CERCLA's statutory text, and consistent with contribution in its "traditional sense" as expressed in *Atlantic Research*. The "response costs" versus "reimbursements" dichotomy would also close the *Atlantic Research* Gap because "voluntary" response costs that are not "compelled" by an administrative order, but also not reimbursed to another, should be recoverable in a cost recovery action, so long as they are otherwise allowable under the statute.[198]

There are a few potential problems with this proposed "response costs" versus "reimbursements" approach, all of which are caused by, and could be avoided by EPA modifying its model language for administrative orders for private party cleanups. The first issue is that EPA combines into the same administrative order both Section 122(a) cleanup orders and Section 122(g) orders to reimburse its cleanup and oversight costs. The easiest fix going forward is administrative: EPA can simply create separate administrative orders for cost recovery (of its own costs) under Section 122(g) and for the private party response actions under Section 122(a). For administrative orders already in place, certainly the judiciary can overcome this hurdle without an exercise of mental gymnastics: it is logical and consistent with the statutory language to rule that, (a) the "date of the administrative order" is the trigger for reimbursing EPA's Section 122(g) costs for a contribution action under the plain text of Section 113(f)(3)(B), whereas (b) completion of the removal action or initiation of on-site construction is the trigger for recovering response costs for the work that will take years to complete under Section 113(g)(2). Treating actions for Section 122(a) administrative order costs as cost recovery actions would also require less meddling in statutory construction and "borrowing" limitations periods from one section to apply to another.

Federal district courts have the authority to and often do exercise continuing jurisdiction over Superfund sites long after entering the AOC for the site in the record for purposes of enforcing the order. Maintaining jurisdiction over an AOC

198. Response cost must be "necessary" and consistent with the National Contingency Plan. *See* 42 U.S.C. § 9607(a)(4)(B).

for cost recovery purposes after a contribution action for EPA response costs should be no different. This may still put the performing PRPs in a position of rushing to identify other target PRPs to seek contribution for costs reimbursed to EPA. But EPA's costs are only a fraction of the overall costs at any site. In the first contribution action, the performing PRPs can pursue the most obvious PRPs as defendants, leaving it up to those parties to identify additional contributors if they choose. Meanwhile, the performing PRPs may continue a more robust search for additional PRPs to name in the future in a cost recovery action for their response costs, which will far exceed EPA's costs.

The second potential problem with the "response costs" versus "reimbursements" approach is that Section 113(f)(3)(B) authorizes contributions actions for a person who has "resolved its liability" for a response action or costs of such action. Again, EPA's administrative orders complicate the judicial analysis by purporting to "resolve liability" for both EPA's response and oversight costs as well as the performing PRPs' response activities that will be ongoing for many years in the future. It is illogical and fallacious for EPA to "resolve liability" for future response costs.[199] Again, going forward, this problem can be solved by a simple administrative fix. All EPA must do is specify in its administrative orders that liability for Section 122(a) work is resolved upon completion of the work, not the date of the administrative order. For administrative orders already in place purporting to "resolve liability," courts should be able to recognize that it is impossible to resolve future liabilities for unknown costs at a Superfund site. This is particularly true in light of the reopening of Superfund sites caused by lowering risk thresholds and identification of additional contamination or new and emerging contaminants, as discussed above.

B. LEGISLATIVELY CORRECTING *HOBART* AND CLOSING THE *ATLANTIC RESEARCH* GAP

This Article has proposed administrative solutions to overcome the numerous hurdles federal courts have laid for private party recovery under CERCLA, and to clarify the confusion judicial decisions have created over the cause of action available and when it may be brought. Yet, CERCLA is notoriously poorly drafted.[200] To avoid further judicial muddling of the messy statutory language, these fundamental uncertainties should be resolved legislatively.

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199. Alfred R. Light, *EPA's 'Back to the Future' Model Administrative Orders: Statutory Limits on Resolving Future CERCLA Liability,* BLOOMBERG LAW, ENVIRONMENT & ENERGY (May 4, 2016), https://perma.cc/BF9R-VXNN (citing Alfred R. Light, *Dealing with the Complexity of Settling Private CERCLA Claims: Due Process, Article III, and Sovereign Immunity*, 1 ST. THOMAS J. COMPLEX LIT. 1, 36 (2015)).

200. *E.g.*, Exxon Corp. v. Hunt, 475 U.S. 355, 363 (1986) (CERCLA's language is "at best inartful and at worst redundant"); W.R. Grace & Co.–Conn. v. Zotos Int'l, Inc., 559 F.3d 85, 88 (2d Cir. 2009) (CERCLA "is known neither for its concinnity nor its brevity."); Artesian Water Co. v. New Castle Cnty., 851 F.2d 643, 648 (3d Cir. 1988) ("CERCLA is not a paradigm of clarity or precision").

There are several simple amendments that would comport with longstanding expectations and CERCLA practice. First, the statute of limitations for contribution in Section 113(g)(3) should be amended to clarify that "judgments" in subsection 113(g)(3)(A) and "administrative order" in subsection 113(g)(3)(B) do not apply to judgments or orders for response activities under Section 122(a). In other words, contribution will be limited to its "traditional sense" of recouping costs already paid for a joint liability. Likewise, the statute of limitations for cost recovery in Section 113(g)(2) should be amended as follows:

> Current: An initial action for recovery of costs referred to in Section 9607 of this title must be commenced. . . .
>
> Proposed: An initial action for recovery of costs referred to in Section 9607 of this title, including but not limited to an action for recovery of response costs incurred under an administrative settlement under Section 9622(a) of this title, must be commenced . . . .

Likewise, the current contribution cause of action in Section 113(f)(3)(B) could be amended in numerous ways. The current language is as follows:

> Current: A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administratively or judicially approved settlement may seek contribution from any person who is not a party to a settlement referred to in paragraph (2).

It could be amended as follows to clarify that it does not apply to Section 122 (a) settlements:

> Proposal 1: A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administratively or judicially approved settlement under Section 9622(g) or 9622(h) of this title may seek contribution from any person who is not a party to a settlement referred to in paragraph (2).

Or as follows:

> Proposal 2: A person who has resolved its liability to the United States or a State in an administratively or judicially approved settlement for some or all of a response action under Section 9622(g) of this title or for some or all of the costs of such action under Section 9622(h) of this title may seek contribution from any person who is not a party to a settlement referred to in paragraph (2).

Alternatively, it could be amended as follows to clarify the distinction between settlements for reimbursement versus settlements for response costs:

> Proposal 3: A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administratively or judicially approved settlement under Section

> 9622(g) or 9622(h) may seek contribution from, or under Section 9622(a) may file a cost recovery action against, any person who is not a party to a settlement referred to in paragraph (2).

Or it could be amended as follows to account for the impossibility of resolving all liabilities for future response activities taking decades in an early cleanup settlement:

> Proposal 4: A person who has resolved its liability by payment to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administratively or judicially approved settlement may seek contribution from any person who is not a party to a settlement referred to in paragraph (2).

Bridging the *Atlantic Research* Gap to address costs incurred outside of any administrative order should be addressed by the above amendments, which would codify a "response costs" versus "reimbursements" approach. It should be obvious that response costs not compelled by an administrative order and not paid to another are recoverable by way of a cost recovery action and not forced into a contribution action. But for avoidance of doubt, these costs could be accounted for by amending the contribution statute of limitations in Section 113 (g)(3) to clarify that the costs or damages sought must be "matters addressed by" the judgment or administrative order. This would be consistent with the limitation on the statutory contribution protection afforded to settling parties for "matters addressed by" an administrative or judicially approved settlement in Section 113(f)(2). Regardless of the mechanism, a failure to legislatively correct recent case law bodes ill for rapid environmental response intended by the drafters of CERCLA.

CONCLUSION

Following the surge of environmental reforms in the 1970s, and their failure to reach the backwaters of legacy contamination, CERCLA emerged as a tsunami-style statute designed to wipe out contamination for good. But EPA's ability to remediate the worst of the worst contaminated sites on the NPL has been bogged down by litigation and lack of consistent resources driven by a political pendulum that first gives and then takes away funding, first staffs and then cuts staffing to the nation's environmental watchdog.

Private party cleanups have become the backbone of CERCLA, giving it strength regardless of the prevailing tax policy or congressional appropriations in any given year. Private parties have shouldered the bulk of the expense of cleaning up of the few thousand NPL sites and of the tens to hundreds of thousands of non-NPL sites in state VCP programs. However, they have done so under the promise of reimbursement when they spend more than their fair share, offsetting

costs through contribution and cost recovery actions against non-performing PRPs.

It is critical that private parties are not precluded from recovery by judicial fiat in order to achieve expeditious cleanup and bring into the fold as many PRPs as possible. The issues addressed in this Article are relatively narrow, limited to the triggers for the contribution and cost recovery causes of action and their statutes of limitation. Yet, federal courts have also imposed higher bars to establishing intent to dispose of hazardous substances[201] and more limiting interpretations of causation as between the hazardous substances disposed of and the contamination driving the response costs,[202] suggesting CERCLA's strict liability isn't strict.

To continue to serve CERCLA's purposes and guard against the increasingly critical judiciary, EPA should modify its model administrative orders with private parties to account for the distinct nature of contribution for reimbursements paid to another versus cost recovery for response costs paid for cleanup. But the onus should not be on an administrative agency already overworked, understaffed and plagued by citizen suits. Given CERCLA's notoriously messy drafting, it is Congress' burden to clarify the statute's contribution and cost recovery provisions to live up to the aspirations of the 1970s and the critical need for cleanup that is still our legacy.

Looking back, as powerful as the environmental movement of the 1960s and 1970s was and as successful as the environmental laws it produced have been in clearing the air and cleansing the waters, this progress has been achieved primarily through regulating pollution. That is, by allowing pollution to continue, just more closely supervised. Looking ahead, this means that more Superfund sites will continue to be created and identified—though perhaps less shocking to the public conscience and more latent and insidious in nature—underscoring the need for a fully-functional CERCLA.

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201. *See City of Lincoln*, 2023 WL 2776091, at *14 (listing three recent cases in addition to the 68th Street Site decision that have imposed a heightened level of intent for disposal to trigger liability).

202. *E.g.*, Cal. Dept. of Toxic Substances Control v. NL Industries, Inc., 636 F. Supp. 3d 1092 (C.D. Cal. Oct. 20, 2022) (imposing heightened causation requirement to determine whether lead contamination from an Exide battery plant caused the Department of Toxic Substances Control to incur response costs).