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## Settling the tradeoffs between voluntary cleanup of contaminated sites and cooperation with the government under CERCLA

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# Settling the Tradeoffs between Voluntary Cleanup of Contaminated Sites and Cooperation with the Government under CERCLA

*Stefanie Gitler\**

*In United States v. Atlantic Research Corp., the Supreme Court declared that a potentially responsible party can sue other parties under CERCLA for recovery of costs associated with the cleanup of a contaminated site without first being sued by the government. This decision increased the incentives for a party to undertake voluntary cleanup, for it secured the ability to recover costs of remediation from other PRPs at the site. However, the decision simultaneously reduced the incentive for early settlement with the government by removing protection against suit by other PRPs for parties who settled with the government for claims at a particular site.*

*Since CERCLA was first passed in 1980, through the addition of the SARA amendments in 1986 and subsequent Supreme Court decisions, there have been evolving tradeoffs between the incentives to voluntarily clean a contaminated site and the incentives for early settlement with the EPA. In this note, I will discuss those changing tradeoffs, and the state of the incentives as they have come to rest after Atlantic Research Corp. Finally, I will recommend that a legislative amendment protecting parties who have settled with the government from contribution claims would best serve to maximize incentives for both early government settlement and voluntary cleanup at contaminated sites.*

Introduction.....	338
I. A Historic Perspective: Incentives for Settlement and Voluntary Cleanup over the Years .....	343
A. Before It All Began: The State of the Law Pre-CERCLA .....	344

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B.	CERCLA, Pre-SARA: The Big Cleanup Begins .....	344
1.	Voluntary Cleanup Immediately after CERCLA.....	346
2.	Settlements under CERCLA.....	347
C.	SARA Amendments and the Nineties: The Calm before <i>Cooper v. Aviall</i> .....	348
1.	The SARA Amendments Codify the Settlement Option .....	348
2.	SARA Amendments Further Incentivized Settlement, Favoring the Government's Wishes.....	349
3.	Voluntary Cleanup Remains a Viable Option.....	350
D.	<i>Cooper v. Aviall</i> until <i>Atlantic Research Corp.</i> : The Stalling of Voluntary Cleanups .....	351
1.	The Decision in <i>Cooper v. Aviall</i> .....	351
2.	Voluntary Cleanup by Private Parties No Longer Feasible ...	352
3.	Incentives to Settle with the Government Not Significantly Affected by the Decision .....	353
II.	<i>Atlantic Research Corp.</i> : The Supreme Court Gives a Hand to Voluntary Cleanup.....	353
A.	A Unanimous Decision in Favor of Voluntary Cleanup.....	353
B.	Incentives for Voluntary Cleanup Are Now Maximized .....	355
C.	Settlements with the Government No Longer As Appealing As They Once Were.....	355
III.	How the Law Should Be: A Legislative Proposal that Maximizes and Balances Incentives Both to Clean Up without Government Involvement and to Settle Matters with the Government .....	356
A.	Voluntary Cleanups Are Important to Restore the Maximum Number of Sites .....	357
B.	Settlements Are Necessary Too: Voluntary Cleanups Alone Will Not Achieve the Desired Result of Cleaning All Contaminated Land.....	358
C.	Section 107(a) Should Be Amended to Only Allow Voluntary PRPs to Recover Costs from Other Parties Who Have Not Settled Their Liabilities with the Government.....	359
	Conclusion .....	360

## INTRODUCTION

In a country where environmental awareness has only started to develop over the last few decades, it is not surprising that as many as 355,000 different locations in the United States are polluted with hazardous waste and will require varying degrees of remediation.<sup>1</sup> On average, it costs more than 50

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1. ENVIRONMENTAL PROTECTION AGENCY, CLEANING UP THE NATION'S WASTE SITES: MARKETS AND TECHNOLOGY TRENDS 1-4 (2004) [hereinafter *EPA Study*], available at <http://www.clu-in.org/download/market/2004market.pdf>; see also Ronald G. Aronovsky, *Federalism and*

million dollars to clean a contaminated site,<sup>2</sup> and may cost over 250 million dollars to remediate some locations.<sup>3</sup>

To restore contaminated sites to a safe state, the government relies on both voluntary cleanups and early settlement with responsible parties. In order to clean as many sites as possible, the incentives to participate in either one of these options must be maximized. The Supreme Court's recent decision in *United States v. Atlantic Research Corp.*<sup>4</sup> improves incentives for private parties to voluntarily clean up contaminated sites by firmly establishing the right to recover related costs from other parties that also bear responsibility for the contamination. The decision, however, reduces the motivation to settle with the government because it removes an important protection formerly provided to those that settled early—complete immunity from future suits by other involved parties. Only if Congress reinstates this protection for parties that voluntarily clean through a legislative amendment will the state of the law maximize the incentives for a combination of early settlements and voluntary cleanups.

When Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act<sup>5</sup> (CERCLA) in 1980, it had two goals in mind: to clean up as many polluted sites as possible, and to do so in the most efficient manner, by requiring those responsible for the contamination to pay the remediation costs.<sup>6</sup> CERCLA gives the Environmental Protection Agency (EPA) the ability to force private parties to clean up sites they have contaminated, either through administrative orders or lawsuits. At the same time, CERCLA acknowledges the importance of voluntary cleanup efforts in remediating contaminated sites.<sup>7</sup>

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*CERCLA: Rethinking the Role of Federal Law in Private Cleanup Cost Disputes*, 33 *ECOLOGY L.Q.* 1, 7 n.12 (2006).

2. Charles W. Schmidt, *Not-so-superfund growing needs vs. declining dollars – Spheres of Interest*, 111 *ENVTL. HEALTH PERSP.* 162 (2003). In 1988, the estimated cost of remediation at a site averaged \$31 million. Christopher P. Davis, *Do Superfund Settlements Make Sense Anymore?*, 21 *CHEMICAL WASTE LITIG. REP.* 42 (1990).

3. *Ascon Props, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1151 (9th Cir. 1986) (estimating cleanup costs for their contaminated site to be between \$251 million dollars and \$268 million dollars).

4. 127 S. Ct. 2331 (2007) (*ARC III*).

5. 42 U.S.C. §§ 9601–9675 (2006).

6. *United States v. CDMG Realty Co.*, 96 F.3d 706, 717 (3d Cir. 1996).

7. The government recognizes that the voluntary cleanup is important, but mandates that “the [voluntary] action . . . , evaluated as a whole, is found to have achieved ‘substantial compliance’ with specified requirements and resulted in a CERCLA-quality cleanup. . . .” National Oil & Hazardous Substances Pollution Contingency Plan (NCP) Preamble, 55 Fed. Reg. 8666, 8794 (Mar. 8, 1990) (codified at 40 C.F.R. pt. 300.700(c) (2007)) (discussing how the Government seeks to encourage parties to undertake voluntary cleanups). See also 42 U.S.C. § 9617 (2006). A “CERCLA-quality cleanup” is defined as a cleanup which is “‘protective of human health and the environment,’ utilize[s] ‘permanent solutions and alternative treatment or resource recovery technologies to the maximum extent practicable,’ and [is] ‘cost effective,’ . . . and provide[s] for ‘meaningful public participation’” as required under CERCLA section 117. NCP Preamble, 55 Fed. Reg. at 8793.

There are many reasons why a private party might desire to clean up a contaminated site without first being compelled to do so by the government. A current landowner who discovers past pollution of his land, and may have been only a minimal contributor to it, could decide to add value back to his property.<sup>8</sup> A landowner also might recognize that he may be subject to regulatory action and choose to take preventive measures to avoid future litigation or penalties imposed by the EPA.<sup>9</sup> Or, perhaps the landowner is a large corporation seeking to “green” its image by actively remediating a contaminated site on its own initiative.

Additionally, since land is frequently transferred, for example when businesses are purchased or go bankrupt, there are often multiple parties that are responsible for contamination at a particular site. Thus, when a cleanup effort is undertaken each responsible party generally seeks to share the remediation costs with the other parties that contributed to the contamination.

Historically there has been little clarification as to whether private parties that undertake voluntary cleanups can recover their costs from other parties that are responsible, at least in part, for the contamination.<sup>10</sup> The Supreme Court cleared up this confusion with its unanimous decision in *Atlantic Research Corp.*<sup>11</sup> There, the Court determined that a private party could sue other potentially responsible parties under CERCLA section 107(a)(4)(B) for recovery of costs associated with the cleanup of a site without first being sued by the government.<sup>12</sup>

The conflict in *Atlantic Research Corp.* arose out of the confusing interplay between the two sections of CERCLA that provide private parties the opportunity to recover remediation costs from others: sections 107(a) and 113(f).<sup>13</sup> Section 107(a) begins by defining potentially responsible parties (PRPs) as essentially any private party with a connection to a contaminated site.<sup>14</sup> These PRPs are liable for all expenditures made by federal or state

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8. Arnovsky, *supra* note 1, at 8–9.

9. *Id.* at 9. Sections 106(b)(1) and 107(c)(3) of CERCLA impose large fines on parties who choose to ignore Government orders.

10. *See infra*, Part I, for a discussion of the development of the law regarding the options for voluntary cleaners to recover the costs of cleanup.

11. *ARC III*, 127 S.Ct. 2331 (2007).

12. *Id.* at 2339.

13. 42 U.S.C §§ 9607(a), 9613(f) (2006); *see ARC III*, 127 S. Ct. at 2334.

14. 42 U.S.C. § 9607(a)(1)–(4). PRPs are broken down into four categories, including “(1) the owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who . . . arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.” *Id.* Courts considering the definition of PRPs have noted that it is broad in scope. *See, e.g., ARC III*, 127 S. Ct. at 2336 (“[T]he statute defines PRPs so broadly as to sweep in virtually all persons likely to incur cleanup costs.”)

government related to investigating and cleaning a site in accordance with the national contingency plan.<sup>15</sup> The national contingency plan provides the government with guidance on how to properly handle “threatened releases of hazardous substances, pollutants, or contaminants.”<sup>16</sup> Additionally, PRPs are responsible for the costs of investigating and cleaning sites, consistent with the national contingency plan, that are incurred by any person.<sup>17</sup> The structure of the text of section 107(a), and subsequent judicial interpretation, indicated that CERCLA grants the Government the right to recover cleanup costs from PRPs, but does not clearly bestow the same right of cost recovery on private parties.<sup>18</sup>

By contrast, under section 113(f)(1), which was added as part of the 1986 Superfund Amendments and Reauthorization Act (SARA), a private party can seek contribution from any other PRP for costs expended to remediate a contaminated site, and the courts can allocate responsibility as they see fit.<sup>19</sup> However, pursuant to section 113(f)(2), any party that has settled its claims with the government regarding a particular site cannot be sued by other PRPs for contribution under 113(f)(1).<sup>20</sup> Thus, where one party believes that it has overpaid the government in a suit or settlement agreement,<sup>21</sup> or thinks that it has spent more than its fair share to clean up a site under a government compelled action,<sup>22</sup> it can seek contribution from other PRPs that have not yet settled with the government.<sup>23</sup> Following passage of SARA’s amendments in 1986, courts decided that section 113(f) was the exclusive means by which a private party could recover contribution from other PRPs, and therefore, due to the contribution bar in section 113(f)(2), parties were unable to collect from any PRP that had settled its claims with the government.<sup>24</sup>

Voluntary cleanup efforts by PRPs are necessary to fulfill CERCLA’s goal of remediating as many contaminated sites in the United States as possible. Government agencies, both state and federal, lack the resources to handle all of the cleanups on their own or to initiate the thousands of lawsuits that would be required to compel all of the necessary remedial actions.<sup>25</sup> PRPs that embark

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15. *Id.* § 9607(a)(4)(A).

16. United States Environmental Protection Agency, CERCLA Overview, <http://www.epa.gov/superfund/policy/cercla.htm>.

17. *Id.* § 9607(a)(4)(B).

18. *See ARC III*, 127 S. Ct. at 2334. *See infra*, Parts I–II, for detailed discussion of this matter.

19. *Id.* § 9613(f)(1); Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (adding § 113).

20. *Id.* § 9613(f)(2).

21. *See id.* § 9607(a).

22. *See id.* § 9706.

23. Brent Horton, Note, *CERCLA’s Contribution Provision: Must a PRP First Face an Administrative Order or Cost Recovery Action? A Proposal for Amendment*, 53 SYRACUSE L. REV. 209, 214–15 (2003).

24. *See ARC III*, 127 S. Ct. at 2334; *Cooper Indus., Inc. v. Aviall Servs.*, 543 U.S. 157, 169 (collecting cases). For further discussion of how this developed, see *infra*, notes 87–89, and accompanying text.

25. Arnovsky, *supra* note 1, at 3.

on voluntary efforts to clean up land without government involvement, and later sue others to recover their share of the costs, can make productive use of contaminated land by independently funding cleanup efforts, and thereby effectuate the purpose of CERCLA.<sup>26</sup>

Voluntary cleanups are also good for a number of other reasons. They reduce the administrative costs that are generally associated with large-scale government operations, even if the EPA is involved in some level of monitoring.<sup>27</sup> They are also likely to be more cost-effective than EPA cleanups because the government has less incentive to keep costs down compared to the PRP who will probably be held responsible for some share of the expenses.<sup>28</sup> Additionally, the expertise utilized by private parties may also increase the cost-efficiency of a site cleanup as compared with the government.<sup>29</sup> Perhaps unsurprisingly, disputes over voluntary cleanups arise frequently, as PRPs spend a lot of money investigating and remediating a site and then turn to others to have them reimburse a fair share of the expenses.<sup>30</sup>

While encouraging voluntary action is necessary to maximize the number of contaminated sites that are restored, it is also important to maintain incentives for parties to settle with the government. Early settlement allows the government to collect funds from a PRP and then efficiently and quickly begin a cleanup, avoiding wasteful litigation costs, in terms of both time and resources. Most CERCLA claims with the government are settled because PRPs recognize that many of CERCLA's provisions are unfavorable for defendants, and there is a large degree of uncertainty about how much money they will owe if they lose a case. Additionally, settlement has historically provided full protection against claims for contribution and cost recovery by other PRPs.<sup>31</sup>

The Supreme Court's decision in *Atlantic Research Corp.* provides strong incentives for private parties to undertake voluntary cleanups, yet reduces incentives to settle with the government because it allows PRPs to bring suit under section 107(a) against other PRPs, including those who have already settled their claims. Justice Thomas dismisses this concern at the end of the decision, stating that "permitting PRPs to seek recovery under § 107(a) will not eviscerate the settlement bar set forth in § 113(f)(2)."<sup>32</sup> Essentially, he contends that providing parties who undertake voluntary cleanups with a method of recovery under section 107(a) will not affect the protection afforded to PRPs

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26. *Id.* at 4.

27. Joseph Fischer, Comment, *All CERCLA Plaintiffs are Not Created Equal: Private Parties, Settlements, and UCATA*, 30 HOUS. L. REV. 1979, 1990-91 (1994).

28. *Id.* at 1991-92.

29. *Id.* at 1992.

30. *Id.* at 9 (citing Robert C. Goodman, *CERCLA Contribution Actions After Cooper/Aviell*, CAL. ENVTL. INSIDER, July 18, 2005, at 4).

31. See 42 U.S.C. § 7613(f)(2) (2006).

32. 127 S. Ct. at 2339.

who seek early settlement with the government in order to shield themselves from future suits. However, this protection is only afforded for suits brought under section 113(f) for contribution, not suits initiated under section 107(a) for cost recovery.<sup>33</sup>

Justice Thomas lists three factors that support his belief that the decision does not erode protection for PRPs who settle early with the government: first, defendants sued by private parties under 107(a) can counterclaim under 113(f) for apportionment; second, the settlement bar will still protect parties from contribution suits under 113(f) by PRPs that have been sued by the government; and finally, settlement protects PRPs against further suit by the government itself.<sup>34</sup> While these factors are valid, Justice Thomas dismisses the important fact that litigation costs companies millions of dollars and hours of time that could be spent in more productive ways. The threat of potential future litigation with other private parties, albeit not from the government or parties that the government has pursued, will likely reduce motivation to settle with the government as quickly as possible.

This Note explores the connection between the incentives to undertake voluntary cleanups of contaminated sites as they are related to the incentives to settle claims with the government. Part I examines the historical ties between voluntary cleanup and settlement to see how CERCLA amendments and developing case law have changed the balance in favor of one option or another over the past few decades. Part II discusses *Atlantic Research Corp.* and the status of the two options for PRPs after the decision. Lastly, Part III proposes a change in the law to maximize the incentives both to settle with the government and to undertake voluntary cleanup efforts: amending section 107(a) to disallow private party suits against others who have settled their claims with the government. This proposal would restore protection against future litigation to early settlers, while continuing to allow PRPs who voluntarily undertake cleanup efforts to recover costs or contribution from other PRPs who have not settled with the government.

#### I. A HISTORIC PERSPECTIVE: INCENTIVES FOR SETTLEMENT AND VOLUNTARY CLEANUP OVER THE YEARS

The incentives to restore a contaminated site voluntarily, without first being sued by the government, are affected by the amount of protection offered to early settlers. Private parties are less likely to undertake expensive voluntary cleanups if they are not confident that they can recover these costs from other

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33. See 42 U.S.C. § 7613(f)(2). The text of this section states that “[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement.” *Id.* But section 107(a) of CERCLA “permits recovery of cleanup costs [and] does not create a right to contribution.” *ARC III*, 127 S. Ct. at 2338. Thus, the contribution bar in section 113(f)(2) does not protect against 107(a) cost-recovery claims.

34. 42 U.S.C. § 7613(f)(2).

PRPs.<sup>35</sup> On the other hand, PRPs are less likely to settle with the government if they may be forced to litigate later with other parties that have spent money restoring the same site. As CERCLA has evolved over the last three decades, with the passage of the SARA amendments and the development of case law, so have the incentives for voluntary cleanup and early settlement.

A. *Before It All Began: The State of the Law Pre-CERCLA*

In the days before CERCLA was passed, parties had little reason either to clean up a site voluntarily or to settle with the federal government where there was no federal remedy under which to bring suit. Contaminated sites were a significant problem in the United States,<sup>36</sup> but there were no uniform rules prior to CERCLA's passage to deal with them. Instead, state law governed the issue, and the laws varied from state to state.<sup>37</sup> Claims related to contaminated lands came in the form of nuisance, trespass, negligence, abnormally dangerous activities, and strict liability under ultra-hazardous theories.<sup>38</sup> These claims were all private in nature and were generally deemed inefficient for remediating polluted sites.<sup>39</sup> Though Congress recognized the problem of contaminated sites when it passed the Resource Conservation and Recovery Act (RCRA)<sup>40</sup> in 1976, all federal law at this time was focused on regulating current and future activity, and not dealing with contamination from the past.<sup>41</sup>

Unless the cost of cleanup by a private party was deemed lower than the proceeds from productive use after remediation, private parties had little incentive to clean a contaminated site. Moreover, the federal government did not bring many suits against polluters, so there was no reason for parties to try and settle with the government. Essentially, site cleanup was not on the forefront of many landowners' minds prior to 1980.

B. *CERCLA, Pre-SARA: The Big Cleanup Begins*

CERCLA was passed in December of 1980, as the Carter Administration prepared to turn over the White House to President Reagan. The bill was hastily assembled, and came together as a merger of three different bills that Congress

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35. See Fischer, *supra* note 27.

36. A 1979 study by the EPA estimated that there were as many as 50,000 contaminated sites, with 2000 of these presenting a potentially serious health risk to people. H.R. REP. NO. 96-1016, at 18 (1980). More recent studies have noted significantly higher numbers of contaminated sites. See *EPA Study*, *supra* note 1.

37. See Arnovsky, *supra* note 1, at 10.

38. See *id.* at 11; Horton, *supra* note 23, at 231.

39. H.R. REP. NO. 96-1016, at 18 (1980).

40. 42 U.S.C. §§ 6901-6992k (2006).

41. Robert McKinstry, Jr., *The Role of State "Little Superfunds" in Allocation and Indemnity Actions Under the Comprehensive Environmental Response, Compensation, and Liability Act*, 5 VILL. ENVTL. L. J. 83, 86 (1994).

wanted to pass before the term ended.<sup>42</sup> CERCLA created a “superfund”<sup>43</sup> to help pay for the initial costs of cleanup.<sup>44</sup> The fund’s intended use was to kick start the process of cleaning a contaminated site, and it was generally presumed that those who were responsible for the pollution would pay for most, if not all, of the remediation costs.<sup>45</sup>

CERCLA grants the EPA, through authority delegated by the President,<sup>46</sup> two main options to force private parties to clean up a contaminated site. The agency can issue an administrative order requiring parties to take specific action under section 106.<sup>47</sup> These orders are important for conserving valuable government resources by delegating responsibility to a PRP to handle the cleanup. Alternatively, the EPA can clean a site itself, as outlined in section 104, and then sue all PRPs under section 107(a) at the site to recover the costs expended on remediation.<sup>48</sup> Regardless of who completes the actual cleanup, section 121 dictates that a site should be cleaned to a level that is protective of human health and the environment, in a cost efficient manner, and in compliance with the national contingency plan to the extent that it is practicable.<sup>49</sup> Many contaminated sites are cleaned pursuant to a combination of sections 104, 106 and 107: the EPA conducts an investigation under section 104, and then sues a PRP to recover the costs of the investigation under 107, while simultaneously forcing them to take further remedial action under section 106. Though this can theoretically result in full blown litigation, the parties involved tend to settle their claims rather than deal with the associated costs of going to court. In fact, when CERCLA was passed, one of the goals was to “facilitate settlements, i.e., agreements securing voluntary performance or financing of response actions by PRPs.”<sup>50</sup>

When Congress first passed CERCLA, it was more concerned with forcing parties to clean up contaminated sites than with providing incentives to encourage them to clean on their own. The Act sought to empower the government to remediate sites in a timely manner,<sup>51</sup> and thus, provided for

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42. See Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability (“Superfund”) Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1–2 (1982); Fischer, *supra* note 27, at 1982.

43. The term “superfund” has become a common nickname for CERCLA.

44. 42 U.S.C. § 9611(a).

45. See William Araiza, *Text, Purpose, and Facts: The Relationship Between CERCLA Sections 107 and 113*, 72 NOTRE DAME L. REV. 193 (1996).

46. The Act itself refers to the President, but the authority to enforce CERCLA generally has been handed over to the EPA. See *Dico, Inc. v. Diamond*, 35 F.3d 348, 359 n.1 (8th Cir. 2003); Horton, *supra* note 23, at 213.

47. See 42 U.S.C. § 9606 (2006); Arnovsky, *supra* note 1, at 16.

48. See 42 U.S.C. §§ 9704, 9707.

49. 42 U.S.C. § 9721 (2006).

50. 53 Fed. Reg. 51,432 (Dec. 21, 1988).

51. See *United Tech. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 102 (1st Cir. 1994).

strict liability based only on the status of a party.<sup>52</sup> This meant that any party identified in the broad, categorical list of “Potentially Responsible Parties” could theoretically be required to pay the costs expended by the government or for cleaning up the site themselves.<sup>53</sup> This list includes present owners of land, people who at any time owned or operated a facility where the hazardous substances were disposed, any party that arranged for transport of hazardous substances to or from a facility, or any person who transported the substances themselves.<sup>54</sup> Though there was no express mention of joint and several liability in the terms of CERCLA, courts began to interpret section 107(a) as providing it.<sup>55</sup> Joint and several liability simplifies the effort required of the EPA, as it can choose to go after a single PRP and hold it liable for the costs of remediating a site, even if multiple parties are actually responsible.

### 1. *Voluntary Cleanup Immediately after CERCLA*

CERCLA was focused on cleaning up past contamination, and Congress generally ignored the issue of what rights PRPs had against one another when they spent more money than was their fair share remediating a site.<sup>56</sup> However, at the time it was passed, section 107(a)(4)(B) appeared on the face of the text to allow PRPs to sue each other for cost recovery.<sup>57</sup>

The right of one PRP to recover costs from another first garnered attention not because parties had undertaken voluntary cleanup, but because the EPA, in an effort to conserve resources, went after only one of multiple PRPs at a site and utilized joint and several liability principles to recover more than that party's fair share.<sup>58</sup> The courts that considered the issue shortly after the passage of CERCLA had a variety of reactions. In the very beginning, a few courts held that PRPs could not recover funds from other PRPs because the statute provided no private cause of action.<sup>59</sup> In general, though, most courts

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52. 126 CONG. REC. S14,941 (daily ed. Nov. 24, 1980); *see also* *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985).

53. *See* Julie A. Solo, Comment, *Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and Prospects for Change*, 43 BUFF. L. REV. 285, 292–93 (1995).

54. 42 U.S.C. § 9607(a)(1)–(4). Note that some present owners of land who are bona fide purchasers of land are no longer included in this PRP category, thanks to a legislative amendment made in 2002. *See id.* § 9607(r)(1) (Supp. IV 2000).

55. *See, e.g., Shore Realty*, 759 F.2d at 1042 (2d Cir. 1985) (noting that joint and several liability is generally imposed under section 107(a) even though it is not mentioned in the text of the act.) *But see* *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 270–71 (3d Cir. 1992) (holding that a PRP may escape joint and several liability and only be held responsible for its share of the costs if it can show a reasonable basis for apportionment).

56. *See* Kristian E. Anderson, Note, *The Right to Contribution for Response Costs Under CERCLA*, 60 NOTRE DAME L. REV. 345, 351 (1985).

57. 42 U.S.C. § 9607(a)(4)(B); *see also* *Arnovsky*, *supra* note 1, at 17.

58. *Arnovsky*, *supra* note 1, at 20–21.

59. *See, e.g., Walls v. Waste Res. Corp.*, 22 ENV'T REP. CAS. (BNA) 1039 (E.D. Tenn. 1984) (private party action not recognized in early days of CERCLA).

began to allow direct cost recovery claims under section 107(a).<sup>60</sup> Additionally, many courts seemed to find contribution rights for PRPs existed under both federal common law<sup>61</sup> and as an implied cause of action under section 107(a).<sup>62</sup>

Despite uncertainty regarding how courts would treat private parties attempting to recover contribution from other PRPs for their voluntary efforts, there were instances of favorable treatment in the beginning. Some courts allowed voluntary PRPs to recover costs under section 107(a) without first having been sued by the government.<sup>63</sup> While the law was by no means stable at this time, the fact that certain courts had allowed this recovery likely alleviated the fears of some would-be voluntary cleaners. Still, the passage of new laws is often paired with instability, which probably made it difficult for PRPs to develop confidence in the idea of cost recovery, and few voluntary cleanups likely occurred as a result.

## 2. Settlements under CERCLA

Since CERCLA provided for strict liability with regard to any PRP's involvement at a contaminated site, initially including innocent landowners,<sup>64</sup> many parties viewed settling with the EPA as their best option. The uncertainty engendered by the new act also contributed to the PRPs' desires to resolve liability with the government. Section 107(a) provided a broad range of categories of expenses that the government could seek to recover during the remediation process including response costs, natural resource damage, health study costs, interest, etc.;<sup>65</sup> it was difficult to predict the total amount the government would seek in any particular remedial action. Additionally, the EPA preferred settlements, and PRPs knew they would receive the best deal possible by cooperating.<sup>66</sup>

Five years after CERCLA, the EPA created the Interim CERCLA Settlement Policy.<sup>67</sup> The report liberalized the types of settlements that were

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60. *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 n.7 (1994); *see, e.g., Pinole Point Props. v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 291 (N.D. Cal. 1984) (holding that a current landowner PRP could sue other PRPs for cost recover under section 107(a)(4)(B)).

61. *See, e.g., San Springs Home v. Interplastic Corp.*, 670 F. Supp. 913 (N.D. Okla. 1987).

62. *See, e.g., Wehner v. Syntex Agribusiness Inc.*, 616 F. Supp. 27 (E.D. Miss. 1985).

63. *See, e.g., City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1143 (E.D. Penn. 1982) (finding that private recovery costs essential to CERCLA objectives, suit allowed under § 107).

64. This was later added as a defense to a 107(a) action by some courts, but is not uniformly recognized as any PRP who is compelled to act or pay the government can sue other PRPs for equitable allocation under 113(f) for costs. Theoretically if the party is completely innocent they will be reimbursed in the end, but this may ignore the reality of litigation fees and wasted resources.

65. *See* 42 U.S.C. § 9607(a)(4). Natural resources are defined quite broadly in section 101(16) to include "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States."

66. Anderson, *supra*, note 56, at 346.

67. 50 Fed. Reg. 5034 (Feb. 5, 1985).

acceptable, and set the general framework for promoting settlements.<sup>68</sup> The government realized that settlements were the most efficient way to obtain funds to clean up contaminated sites, and began to “consider settlement proposals for cleanup of less than 100% of cleanup activities or cleanup costs.”<sup>69</sup> Furthermore, the possibility of resolving liability for less than the full amount of contamination served as an incentive for parties to settle quickly. However, because later-settling PRPs could still sue for contribution, parties remained subject to potential future liability. Recognizing that granting this kind of protection to early settlers would fully maximize the incentives to settle, Congress took action and amended the law.

C. *SARA Amendments and the Nineties: The Calm before Cooper v. Aviall*

1. *The SARA Amendments Codify the Settlement Option*

The amendments passed in 1986 essentially codified the case law that had developed in the years immediately after CERCLA.<sup>70</sup> The most important aspect of these amendments was turning the “implied third-party right of action” that courts had recognized under section 107(a) into an express right under the newly added section 113(f).<sup>71</sup> In passing this section, Congress sought “to clarify and confirm [] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances.”<sup>72</sup>

In addition to expressly granting the right of PRPs to seek contribution from one another, section 113(f)(2) provides that a party that has “resolved its liability to the United States . . . shall not be liable for claims for contribution regarding matters addressed in the settlement.”<sup>73</sup> Thus, once a party settled with the government, those that settled later were barred from seeking contribution for matters concerning the same site. Furthermore, section 113(f)(3) explicitly provides that after settling, the party “may seek contribution from any person who is not party to a settlement” with the government.<sup>74</sup> In other words, PRPs could go after other non-settling PRPs for contribution to cover the costs of *their* settlements.

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68. *Id.* at 50-38-39.

69. *Id.* at 50-36.

70. Fischer, *supra* note 27, at 1982.

71. Araiza, *supra* note 45, at 197.

72. S. REP. NO. 11, 99th Cong., 1st Sess. 44 (1985), reprinted in 2 Legislative History of Superfund Amendments and Reauthorization Act of 1986, 636, Sp. Print 101-120 (101st Cong., 2d Sess.) (1990).

73. 42 U.S.C. § 9613(f)(2) (2006).

74. *Id.* § 9613(f)(3)(B); *see also* H.R. REP. NO. 99-253, pt. 1, at 79-80 (1985); H.R. REP. NO. 99-962, at 222 (1986) (Conf. Rep.).

## 2. SARA Amendments Further Incentivized Settlement, Favoring the Government's Wishes

Prior to the SARA amendments, PRPs worried about contribution claims by parties that chose to forgo settlement with the EPA and battle it out in court. When Congress added section 113(f), they also “created a statutory settlement scheme.”<sup>75</sup> Congress’s purpose for doing this was “to aid the expeditious resolution of environmental claims . . . [by] employ[ing] incentives for potentially responsible parties to settle and strong disincentives for non-settling potentially responsible parties.”<sup>76</sup>

This incentive scheme created a significant number of reasons for a PRP to settle. First and foremost, the protection from contribution suits provided under section 113(f)(2) alleviated some of the concern about ongoing litigation after settling with the government.<sup>77</sup> PRPs not only obtained protection from future contribution suits by other PRPs, but also were given the right to institute actions against other parties that chose to forego settlement.<sup>78</sup> Furthermore, the fact that the government subtracted only the dollar amount of the settlement from the total liability at a site served as an incentive to settle *first*—for if other PRPs settled ahead of you for smaller shares than they were responsible for, the liability of the remaining PRPs effectively increased to cover the remainder of the settling PRP’s share.<sup>79</sup> Thus, later-settlers faced the risk of disproportionate liability, since the government had adopted the dollar-for-dollar method of allocating settlement funds obtained from the first settlers to the total amount sought to be recovered.<sup>80</sup>

In addition to section 113(f), SARA also added section 122 to the statutory scheme of CERCLA, which offered additional “sweeteners” to induce settlement. These included procedural mechanisms to facilitate negotiations and favorable settlement terms such as “mixed funding,” protection from contribution actions, and covenants not to sue in the future.<sup>81</sup> Combined with the benefit of avoiding litigation costs, the potential for large unpredictable recoveries if sued under the joint and several scheme of section 107(a),<sup>82</sup> and

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75. *Bedford Affiliates v. Sills*, 156 F.3d 416, 427 (2d Cir. 1998).

76. *Id.*

77. 42 U.S.C. § 9613(f)(2) (2006). *See also id.*; Fischer, *supra* note 27, at 1983.

78. *Bedford Affiliates*, 156 F.3d at 427.

79. § 9613(f)(2).

80. *Id.* Note that defendants in CERCLA cases often settle for amounts lower than their total liability. *See In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1019, 1032 (D. Mass. 1989).

81. 42 U.S.C. § 9622 (2006); note that the covenant not to sue is relevant to future liabilities at a site undiscovered at the time of settlement. Some covenants not to sue are discretionary, and can only be used if the government finds they are in the public interest, will expedite an action consistent with the national contingency plan, are approved by the President or the EPA, and the person is in full compliance with any consent decree issued under section 106. *See id.* § 9622(f)(1)(A)–(D). In other circumstances they may be mandatory. *See id.* § 9622(f)(2)(A).

82. It is worth noting that neither Congress nor the Supreme Court has ever clarified whether section 107(a) truly does provide joint and several liability. In fact, in *United States v. Atlantic Research*

tax incentives provided by generous write-offs for cleaning environmental contamination,<sup>83</sup> SARA created powerful incentives for PRPs to settle their liabilities with the government.

Additionally, the EPA has attempted to streamline the settlement process in order to increase the number of settlements. In 1991, the EPA created a model consent decree, which included standardized language to expedite the settlement process.<sup>84</sup> The stated goal of this settlement decree was to “achieve a greater number of settlements in a more expeditious manner, on terms acceptable to the United States and consistent with the intent of CERCLA.”<sup>85</sup> Over the next decade or so, the decree was revised several times, with the most recent version that contained significant changes being published in 2001.<sup>86</sup> In effect, these consent decrees represented the EPA’s commitment to achieving settlements with PRPs.

### 3. *Voluntary Cleanup Remains a Viable Option*

After the SARA amendments were passed, although it was unclear which section PRPs could use for contribution, all of the circuits began to “direct traffic” towards section 113, instead of 107, for contribution claims.<sup>87</sup> The first sentence of section 113(f)(1) states “[a]ny person may seek contribution from any other person who is liable or potentially liable under section [1]07(a) of this title, during or following any civil action under section [1]06 of this title or under section [1]07(a) of this title.”<sup>88</sup> Thus, the contribution rights granted under section 113(f) were to be provided to those parties who had first been sued by the government under section 107(a) or compelled to act under section 106.<sup>89</sup>

Unfortunately, the text of the statute passed by Congress did not reach the issue of what options are available to parties who *have not* been sued or

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*Corp.*, Justice Thomas even notes that the court “assume[s] without deciding that section 107(a) provides for joint and several liability.” 127 S. Ct. at 2339 n.7.

83. See, e.g., Rev. Rul. 94-38, 1994-25 I.R.B. 4 (1994) (finding costs incurred to clean up environmental contamination deductible as ordinary and necessary business expenses under section 162 of the Internal Revenue Code).

84. Environmental Protection Agency, Model CERCLA RD/RA Consent Decree, July 8, 1991, 56 Fed. Reg. 30-996 (July 8, 1991).

85. *Id.*

86. The 2001 version can be accessed at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/mod-rdra-cd.pdf>. Over that decade, the revisions were created in response to complaints that the original versions provided “inflexible, one-sided provisions, which increase[d] the risks, burdens, costs and uncertainties for PRPs . . . [and gave] the EPA virtually unchecked discretion and authority.” Davis, *supra* note 2, at 43.

87. See, e.g., *In re Reading Co.*, 115 F.3d 1111, 1119 (1997) (“In passing § 113(f), Congress acted to codify existing federal common law and to replace the judicially crafted measure with an express statutory remedy. Thus, the language of § 113(f), permitting contribution, replaced the judicially created right to contribution under § 107(a)(4)(B).”); Arnovsky, *supra* note 1, at 27.

88. 42 U.S.C. § 9612(f)(1).

89. See Arnovsky, *supra* note 1, at 22.

otherwise compelled to act by the government, particularly PRPs who sought to clean voluntarily.<sup>90</sup> As it were, voluntary PRPs sought contribution claims under section 113(f), despite not having been sued first.<sup>91</sup> Until the decision in *Cooper Industries, Inc. v. Aviall Services*, courts generally allowed PRPs to recover response costs under CERCLA without questioning congressional intent or the actual availability of this remedy for voluntary PRPs.<sup>92</sup> Instead of focusing on whether a PRP had a right to recover these costs, the courts haggled over which sections of CERCLA—107(a) or 113(f)—provided the means for recovery, implicitly assuming that such a right existed.<sup>93</sup> Eventually, courts concluded that section 107(a) was reserved for innocent parties (not PRPs) to sue contaminators of a site,<sup>94</sup> while section 113(f) was the exclusive means for PRPs to seek cost recovery.<sup>95</sup> At this point, the law implied that any PRP, whether cleaning voluntarily or not, had the right to recover costs under section 113(f).

In the nearly 20 years between the SARA amendments and *Cooper v. Aviall*, the law reached a relatively settled state, and therefore, parties knew what recovery options they could expect from undertaking a voluntary cleanup. Parties generally presumed that if they undertook a voluntary cleanup, with no government involvement, they could recover remediation costs under CERCLA section 113(f). Interestingly, it took nearly two decades before the question of standing for voluntary PRPs to recover remediation costs reached the courts.

D. *Cooper v. Aviall until Atlantic Research Corp.:*  
*The Stalling of Voluntary Cleanups*

1. *The Decision in Cooper v. Aviall*

*Cooper v. Aviall* further affected the ability of voluntary parties to recover cleanup costs, as the issue of whether a voluntary PRP had standing to recover against other PRPs finally reached the Supreme Court.<sup>96</sup> In *Aviall*, the Court denied *Aviall Services*, the purchaser of a previously contaminated site, the

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90. *Id.* at 22–23.

91. *Id.* at 23.

92. 543 U.S. 157 (2004).

93. *Id.* Note that the section 107/113 controversy was of concern to PRPs for a number of reasons, including different statutes of limitations, and the joint and several liability provided by 107 as contracted with the equitable contribution of 113. For a more in-depth discussion of this subject, see *Arnovsky*, *supra* note 1, at 24–30.

94. This interpretation deems the “any other person” language of section 107(a) to mean “any other [innocent] person.” 42 U.S.C. § 9607(a)(4); see *Arnovsky*, *supra* note 1, at 27.

95. See, e.g., *Bedford Affiliates*, 156 F.3d at 423–24 (holding that because section 107 claims impose joint and several liability, a PRP should only be allowed to bring contribution actions under 113(f) to recover costs in excess of its fair share.); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1121–22 (3d Cir. 1997); *Rumpke of Ind., Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1240 (7th Cir. 1997); see also *Arnovsky*, *supra* note 1, at 27–28; *Horton*, *supra* note 23, at 220.

96. 543 U.S. 157 (2004).

opportunity to seek contribution from the prior owner under section 113(f) because the government had not initiated any judicial or administrative action against Aviall under sections 106 or 107(a).<sup>97</sup> Aviall had initially sued Cooper Industries under both sections 107(a) and 113(f), but later amended its claim into one general CERCLA claim only under section 113(f).<sup>98</sup> The Fifth Circuit, in which this case arose, as well as many others, had previously allowed such actions under 113(f).<sup>99</sup> However, the Supreme Court closed that option, and held that in order to bring a suit for contribution under section 113(f), a voluntary PRP must first be sued by, or reach settlement with, the government.

In its decision, the Court focused on the fact that section 113(f) explicitly states that a party may seek recovery “during or following” a government action to recover cleanup costs.<sup>100</sup> Though this case clarified the necessity of government involvement before PRPs can seek contribution under section 113(f), the Court specifically declined to decide if a PRP that had not been sued by the government could bring suit against another PRP under 107(a) to recover some of the costs of a voluntary cleanup effort.<sup>101</sup>

## 2. *Voluntary Cleanup by Private Parties No Longer Feasible*

As mentioned above, the settled state of the law before *Cooper Industries Inc. v. Aviall Services* was that section 113(f) provided the only option for PRPs to recover contribution costs for cleaning a site, while innocent parties still had the option of suing under section 107(a) for cost recovery. Therefore, by eliminating the option of using section 113(f), *Aviall* essentially left PRPs that desired to undertake voluntary cleanups prior to government involvement with no ability to recover contribution costs from others.

A PRP in this situation would be forced to try to persuade the government to either make a claim against it and settle or to sue all parties involved in the case before the PRP could, in turn, sue other parties for contribution under section 113(f). Thus, if the government decided it did not want to be involved with a particular site, and multiple parties were responsible for the contamination, then voluntary cleanup by a PRP was unlikely to occur.<sup>102</sup> In

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97. *Id.* at 161.

98. *Id.* at 164.

99. *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677, 681 (5th Cir. 2002) (en banc). *See also, e.g., Bedford Affiliates*, 156 F.3d 416 (2d Cir. 1998); *Crofton Ventures Ltd. P'ship v. G & H P'ship*, 258 F.3d 292, 294 (4th Cir. 2001); *Kalamazoo River Study Group v. Rockwell Int'l Corp.*, 274 F.3d 1043, 1046 (6th Cir. 2001); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 613 (7th Cir. 1998); *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 932-33, 935 (8th Cir. 1995).

100. *Cooper v. Aviall*, 543 U.S. at 166.

101. *Id.* at 168.

102. It is particularly noteworthy that this interpretation of CERCLA decreases the possibility of remediating sites that were partially contaminated by the Government. For example, suppose the Government is partially responsible for contamination at a site that does not pose imminent harm to the public but is nonetheless not fit for general use. Further suppose that a PRP now owns the site and wants to clean it up. The PRP knows it will not be able to recover any share of its remediation costs from the

effect, the Court's decision in *Aviall* to not examine the purpose of CERCLA—to clean as many sites as efficiently as possible—resulted in a decision that eroded opportunities to achieve that goal.<sup>103</sup>

3. *Incentives to Settle with the Government Not Significantly Affected by the Decision*

Many of the incentives that existed prior to the *Aviall* decision continued to encourage early cooperation by PRPs once the government became involved. In some ways, however, settlements were further encouraged. Parties involved with contaminated sites that were not yet being investigated by the government actually had to *seek out* its attention in order to obtain the status of having been *pursued* by the government. For if a party wanted to recover remediation costs from other PRPs, its only clear option was section 113(f), which, as indicated above, only applied to parties that had been pursued by the government.<sup>104</sup>

II. *ATLANTIC RESEARCH CORP.: THE SUPREME COURT GIVES A HAND TO VOLUNTARY CLEANUP*

A. *A Unanimous Decision in Favor of Voluntary Cleanup*

In *United States v. Atlantic Research Corporation*, the Supreme Court clarified the ongoing source of confusion regarding the right of PRPs to recover cleanup costs from other contributors to a polluted site. The Court unanimously held that if a PRP cleans a site, it may seek to recover some of its expenditures from other PRPs under CERCLA without first being sued or compelled to clean a site by the government.<sup>105</sup>

The controversy in *Atlantic Research Corp.* arose out of a contract between Atlantic Research and the government. In the process of retrofitting rockets for the Department of Defense, Atlantic Research released pollutants into the soil and groundwater surrounding its plant, which had been leased from the government.<sup>106</sup> After completing the project, Atlantic Research voluntarily cleaned the contaminated site, and then brought suit against the government under section 107(a) of CERCLA to recover some of its cleaning costs.<sup>107</sup> Though the suit was initially filed under both sections 107(a) and 113(f),

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Government. The Government will not sue the PRP because it knows that by not bringing suit it cannot be counter-sued for contribution costs. The Government could thereby avoid liability for cleaning up its own past contamination by “cherry-picking” sites where it had no previous involvement. As cleanup costs may be too expensive for PRPs to bear on their own without the chance for Government contribution, certain sites would not be restored.

103. *Cooper v. Aviall*, 543 U.S. at 168 (“Given the clear meaning of the text, there is no need to resolve this dispute or to consult the purpose of CERCLA.”).

104. *See id.*

105. *ARC III*, 127 S. Ct at 2339.

106. *Id.* at 2335.

107. *Id.*

Atlantic Research later dropped the 113(f) claim, as the decision in *Cooper v. Aviall* barred recovery under this section for PRPs who had not yet been sued by the government.<sup>108</sup> The district court granted the government's motion for dismissal, holding that the previous Eighth Circuit decision in *Dico, Inc. v. Amoco Oil Co.*<sup>109</sup> precluded the use of section 107(a) by a PRP to recover from other PRPs.<sup>110</sup> Thus, although the district court acknowledged that its holding produced an unfair result, it found that PRPs could only seek contribution from other parties through section 113(f) of CERCLA, and then only after they had first been sued by, or settled with, the government.<sup>111</sup>

On appeal, the Eighth Circuit reversed, finding that the text of section 107(a) allows any PRP to sue another to recover some of its cleanup costs so long as the government had not previously initiated a recovery action against the suing PRP under sections 106 or 107(a).<sup>112</sup> The court noted that this case did not directly overrule *Dico*, in which the plaintiff sought to recover 100% of its cleanup costs from another party that had already settled with the government.<sup>113</sup> The Supreme Court granted certiorari to consider the rights of a party that voluntarily cleans up a polluted site, as well as to clarify the differences between sections 107(a) and 113(f) of CERCLA.<sup>114</sup>

Atlantic Research initially sought contribution from the Government under both sections 107(a) and 113(f) of CERCLA, but in light of the Supreme Court's decision in *Cooper v. Aviall*, dropped the 113(f) claim.<sup>115</sup> Instead, Atlantic Research relied on section 107(a) and federal common law since the government had not initiated suit against them as would have been necessary for a 113(f) claim.<sup>116</sup> In writing his opinion for the unanimous court, Justice Thomas focused on the phrase "any other person[s]" as contained in section 107(a)(4)(B).<sup>117</sup> He reasoned that statutes must be read as a whole, and since subsection (A) refers to the government, "other necessary costs incurred by any other person" in subsection (B) only makes sense if deemed to mean any person *other* than the government.<sup>118</sup> Additionally, the over-inclusive definition of PRPs contained in subsections 107(a)(1)–(4) would imply that essentially no private party would qualify as "any other person[s]" if PRPs

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108. See *Cooper v. Aviall*, 543 U.S. at 161.

109. 340 F. 3d 525 (8th Cir. 2003) (overruled in part by *ARC III*, 127 S. Ct. at 2331) (holding that the present owner of contaminated land could not sue other previous owners for direct recovery under § 107(a) unless he fell into the exceptions enumerated in § 107(b)).

110. *United States v. Atlantic Research Corp.*, 2005 U.S. Dist. LEXIS 20484 (May 31, 2005) (unpublished) (*ARC I*).

111. *Id.*

112. *Atlantic Research Corp. v. United States*, 459 F.3d 827, 835 (8th Cir. 2006) (*ARC II*).

113. *Id.* at 833; *Dico, Inc. v. Chem. Co.*, 340 F. 3d 525, 531 (8th Cir. 2003).

114. *ARC III*, 127 S. Ct. at 2335.

115. *Id.*

116. *Id.*; see *Cooper v. Aviall*, 543 U.S. 157 (2004).

117. *ARC III*, 127 S. Ct. at 2336 (quoting 42 U.S.C. § 9607(a)(4)(B)).

118. *Id.*

were not included in that definition.<sup>119</sup> The Court generally ignored the legislative history and purpose of CERCLA in making its decision, which rested entirely on the “plain terms of [section] 107(a)(4)(B).”<sup>120</sup> As a PRP that had voluntarily undertaken cleanup efforts, Atlantic Research therefore had a right to sue the government under section 107(a) and recover some of its costs.

### B. *Incentives for Voluntary Cleanup Are Now Maximized*

As compared to the post-*Cooper v. Aviall* state of the law, where voluntary parties had no recourse to recover costs of cleanup from other PRPs, the Supreme Court’s decision in *Atlantic Research Corp.* provides strong incentives for voluntary cleanup efforts.<sup>121</sup> Private parties who decide to voluntarily clean up contaminated sites are now secure in the knowledge that they, regardless of whether they are completely innocent, possess the ability to recover some share of the cleanup costs from other PRPs using section 107(a) of CERCLA. This interpretation of section 107(a) allows remedial action to proceed without the necessity of government involvement.

After the decision of *Cooper v. Aviall*, and prior to the decision in *Atlantic Research Corp.*, PRPs who desired to undertake a voluntary cleanup had essentially two options if they wanted to ensure they could recover the costs. First, they could sit around and wait for the government to decide to “initiate enforcement litigation” so that they could then take advantage of section 113(f).<sup>122</sup> Alternatively, they could attempt to persuade the government to enter into settlement with them, which would also trigger the right to sue other parties for contribution.<sup>123</sup> Now, with access to section 107(a) for cost-recovery claims, PRPs do not have to solicit government involvement before they feel confident that they can recover the costs of a voluntary cleanup. Thus, the decision served to incentivize voluntary cleanups.

### C. *Settlements with the Government No Longer As Appealing As They Once Were*

Increasing the ability for voluntary PRPs to collect contribution from others after cleaning contaminated sites, however, will likely have the negative effect of reducing incentives for private parties to quickly settle CERCLA claims with the government.

In the past, if multiple PRPs had contaminated a site, their best option was to quickly settle with the government in order to prevent other PRPs from suing

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119. *Id.*

120. *Id.* at 2339.

121. *See supra* Part II.B.2, discussing voluntary cleanup incentives after the decision.

122. *Arnovsky, supra* note 1, at 55.

123. *Id.* at 56.

for contribution under section 113(f)(2).<sup>124</sup> Now that the Court has clarified that PRPs may file suit against other PRPs under section 107(a) to recover expenditures, such as investigation costs, the complete immunity from future litigation previously accorded to parties that settled with the government no longer exists. The settlement bar from future suits provided by section 113(f)(2) effectively only prevents future contribution claims by other PRPs.<sup>125</sup> Since claims under section 107(a) are classified as cost recovery actions for expenses incurred in cleaning up a site, the contribution bar does not apply to these kinds of suits.<sup>126</sup>

Removing this contribution protection may encourage parties to wait and see what other PRPs at the same site choose to do, for the protection granted by 113(f)(2) is only relevant if the other PRPs do not actually undertake any response costs but merely pay the government to settle the matter. Accordingly, the prospect of having to litigate 107(a) claims, after already settling with the government, reduces incentives to reach early settlements.

III. HOW THE LAW SHOULD BE: A LEGISLATIVE PROPOSAL THAT MAXIMIZES AND  
BALANCES INCENTIVES BOTH TO CLEAN UP WITHOUT GOVERNMENT INVOLVEMENT  
AND TO SETTLE MATTERS WITH THE GOVERNMENT

Over a decade ago, Judge Selya of the First Circuit warned that “[e]xposing early settlers who make first-instance payments to later contribution actions . . . would greatly diminish the incentive for parties to reach early settlements with the Government.”<sup>127</sup> Though allowing those who use their own funds to voluntarily clean up a contaminated site to recover against others who contributed to that contamination is certainly a desirable result, it leaves the security once enjoyed by many parties who settled their liabilities with the government in limbo.

Suppose, for example, parties Alpha, Beta, and Gamma all owned and contaminated Blackacre at some point in the past. Each of them learns that the EPA has been eyeing the site and is considering forcing past owners to take some sort of remedial action. Alpha, worried about negative effects to its public reputation if word gets out that it has polluted land, wants to deal with the situation before the government becomes fully involved, and spends a significant amount of money on the site to investigate the situation. Meanwhile Beta, who also has public relations concerns, contacts the government to settle and completely resolve potential liability and be done with the matter. However, Alpha, after spending several million dollars investigating, realizes that it was not responsible for any of the significant contamination, which came

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124. 42 U.S.C. § 9613(f)(2). Since PRPs were directed to use section 113(f) for contribution claims, and this section expressly protects those that have already settled with the Government, the early settlers were protected against all suits by other PRPs.

125. *See id.*

126. *See ARC III*, 127 S. Ct. at 2338.

127. *United Tech. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 103 (1st Cir. 1994).

from a chemical that it did not use in its operations. Thus, it decides to sue parties Beta and Gamma under section 107(a) for their share of the investigation costs. Beta now faces mounting costs of litigating against Alpha to defend the cost recovery claim, and may end up spending even more money than if it had decided to delay settling with the government and handle the whole matter at once in a single suit involving Alpha, Beta, Gamma, and the government, to simplify the matter.

As the illustration demonstrates, parties who previously would have jumped at the chance to settle with the government and end the matter, now may be better off delaying settlement, and first determining whether they will be forced to litigate section 107(a) claims against other parties. Unfortunately, this state of the law is not optimal for achieving the maximum rate of contaminated site cleanup. Both voluntary cleanups and quick settlements must be jointly encouraged to remediate as many contaminated sites as possible.

A. *Voluntary Cleanups Are Important to Restore  
the Maximum Number of Sites*

For the goals of CERCLA to be achieved most efficiently, the law must allow parties a reliable mechanism to recover costs if they choose to voluntarily clean a site. Government resources are stretched thin and simply cannot be relied upon to restore all of the nation's contaminated sites.<sup>128</sup> A study by the Public Interest Research Group discovered that "in the late 1990s, the EPA cleaned up [only] an average of 86 Superfund sites a year," and numbers have decreased to around 40 sites a year in the twenty-first century.<sup>129</sup>

The government's internal process for identifying sites that warrant remediation is complicated and prolonged. When a contaminated site is discovered, it is entered into the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS).<sup>130</sup> Before the EPA can clean a particular site, it must be elected to the national priorities list (NPL), which is not only updated infrequently,<sup>131</sup> but also only contains about 2% of the sites submitted to CERCLIS.<sup>132</sup> Thus, though the EPA has assessed over 47,000 sites to date, only 1,569 have made the NPL list since the inception of CERCLA.<sup>133</sup> Voluntary cleanup efforts, without requiring EPA

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128. Fischer, *supra* note 27, at 1986 n.39. Fischer notes that according to some data, only 1.70% of contaminated sites had received any remedial attention at all, and in total a mere 0.22%, received anything close to the attention needed to eliminate the hazards presented.

129. J.R. Pegg, *Fundings Woes Plague Superfund Cleanup*, ENV'T NEWS SERVICE (Aug. 7, 2003), <http://www.ens-newswire.com/ens/aug2003/2003-08-07-10.asp>.

130. See Environmental Protection Agency, Superfund, Cleanup Process, <http://www.epa.gov/superfund/cleanup/index.htm> (last visited June 19, 2008).

131. Currently, twice a year. Susan Parker Bodine, Assistant Administrator, Congressional Quarterly: Superfund and Public Health, Congressional Testimony (Oct. 17, 2007).

132. *Id.*

133. *Id.*

involvement, make it possible to clean up some of the sites that are not elected to the NPL list, yet still present a hazard to humans or the surrounding environment.

*B. Settlements Are Necessary Too: Voluntary Cleanups Alone Will Not Achieve the Desired Result of Cleaning All Contaminated Land*

Historically, most landowners have chosen to wait until the EPA brings actions against them under CERCLA before undertaking site cleanup, so settlements with the government remain critical for cleaning those contaminated sites in the most efficient manner.<sup>134</sup> In fact, since CERCLA was passed in 1980, the government has collected over \$25 billion dollars in settlements with PRPs.<sup>135</sup> The law should not disincentivize quick settlements between PRPs and the government; when the EPA is able to collect money easily, it can be used to clean contamination at a particular site. This thereby “focus[es] the Agency’s appropriated funds on sites where responsible parties cannot be identified or are unable to pay for or conduct the cleanup.”<sup>136</sup>

Another reason that settlements are important is that they allow for government involvement in the cleanup process, which, while not necessary, can be beneficial at many sites. If a party settles with the government—either by paying the costs up front or actually completing the cleanup according to government directions—the government can then be involved with certain decisions, including the level of cleanliness attained, method of remediation, etc. The EPA has been involved in numerous cleanups and, though hampered by the sheer number of sites it must oversee, the agency’s involvement always adds its nearly 30 years of CERCLA experience to cleanups.<sup>137</sup> For parties that take the opportunity to clean a site of their own accord, it may be harder to show that the site has been remediated in accordance with the national contingency plan, as required by CERCLA.<sup>138</sup>

While ideally the same set of EPA officials would be involved in the cleanup at every site to ensure that all of the standards are met, there are too many contaminated sites to make this a feasible option. Luckily, voluntary cleaners have access to private consultants and experts who are just as experienced as the officials working for the government. In the end, it is important to note that the law does not require complete government

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134. Horton, *supra* note 23, at 210.

135. Bodine, *supra* note 131.

136. *Id.*

137. Since CERCLA was passed in 1980, the EPA’s Office of Solid Waste and Emergency Response has employed staff that focus solely on Superfund Response programs. For more information, visit the Solid Waste and Emergency Response (OSWER) website at <http://www.epa.gov/swerrims/>, and the Superfund website at <http://www.epa.gov/superfund/>.

138. See Horton, *supra* note 23, at 237; 42 U.S.C. § 9605(a) (2006).

involvement in a cleanup, just that each cleaned site meet the requirements laid out by CERCLA to fulfill the NCP.<sup>139</sup>

Both voluntary cleanup efforts and early settlements are necessary in order to efficiently restore the nation's contaminated sites. Therefore, the law should provide appropriate incentives to encourage both voluntary clean efforts *and* early settlement.

C. *Section 107(a) Should Be Amended to Only Allow Voluntary PRPs to Recover Costs from Other Parties Who Have Not Settled Their Liabilities with the Government*

For the purposes of encouraging both voluntary cleanup and quick settlements, Congress should amend section 107(a) to contain a provision similar to 113(f). Specifically, section 107(a) should include a clause stating that parties who have settled claims related to a particular contaminated site with the government may not be sued for cost recovery by voluntary PRPs who have accrued expenses at that same site.

Though voluntary cleanups are important, the fact that settlements occur with greater frequency emphasizes this need to insure that settlements are not disincentivized in any way. While this amendment would theoretically limit the ability of voluntary PRPs to recover their remediation costs, in practice, this is unlikely to be the case very often. Generally, one of two scenarios will occur at a contaminated site. In the first case, the site will not receive attention from the government when a voluntary PRP decides to go ahead with a cleanup. Accordingly, no other PRPs at the site would be eligible for the contribution protection afforded by 113(f)(2) for having already *settled* their claims since no settlements have occurred. In the second scenario, when the government is pursuing parties, and one party chooses to voluntarily commence cleanup of a site and then recover its costs, it has several options. If it has truly overpaid, the government can allocate some of the funds collected from the settling parties to the cleanup effort. Otherwise, the voluntary PRP can choose to pursue cost recovery claims against the remaining PRPs who have not already settled their liabilities with the government.

As with all major statutory additions, this change in the law cannot be done by the judiciary, for it would be equivalent to the judiciary "writing new law." The judiciary does not have the power to create new law, just to interpret it.<sup>140</sup>

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139. See 40 C.F.R. 300.700(c)(3)(i); Horton, *supra* note 23, at 238.

140. Courts are delegated authority to interpret the law, while Congress makes new laws. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 221 (1988).

## CONCLUSION

In the thirty years since the landmark passage of CERCLA, judicial interpretations of the statute have affected incentives to settle with the government or undertake voluntary cleanups. Prior to CERCLA, parties had no reason to settle with a government that was not taking action, nor to restore a contaminated site, unless the resulting increase in profitability was worth more than the cost of the cleanup.<sup>141</sup> Immediately after CERCLA, incentives to settle were high, as the new law brought a significant amount of uncertainty, while voluntary PRPs were not yet secure about their ability to recover funds from other PRPs and more hesitant to embark on an expensive cleanup venture without government involvement.<sup>142</sup> Once the law was amended in 1986 to offer protection from contribution suits for those parties that settled early with the government, parties were given extra reason to settle.<sup>143</sup> Settlements became the norm, and though any PRP could not collect contribution from parties that had settled with the government, voluntary PRPs had a recovery mechanism if they undertook a cleanup *prior* to Government involvement.<sup>144</sup> All this changed, however, when *Cooper v. Aviall* removed the recovery mechanism that the voluntary PRPs had been relying upon over the previous decades, by requiring that a PRP first be sued by the Government before using section 113(f) to obtain contribution from other PRPs.<sup>145</sup> With no secure recovery option for remaining PRPs, voluntary cleanups were brought to a halt, while settlement with the government offered true peace of mind that the matter was resolved.<sup>146</sup>

The unanimous decision in *United States v. American Research Corp.* resolved the main ongoing issue: it gave parties who voluntarily clean a site an option to obtain reimbursement from other PRPs for their costs under section 107(a) without first having been sued by the government.<sup>147</sup> But rather than returning the law to its settled state as it was before *Cooper v. Aviall*, the Court's decision to allow voluntary PRPs to utilize section 107(a) instead of section 113(f) removed some of the protection provided to parties who settled with the government, for the settlement bar is only provided for contribution claims under section 113(f), not claims under section 107(a). Despite Justice Thomas's beliefs to the contrary,<sup>148</sup> settling with the government no longer provides the security it once did. However, a simple amendment to section 107(a), providing the same contribution bar for parties that have already settled

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141. See *supra* Part I.A.

142. See *supra* Part I.B.

143. 42 U.S.C. § 9613(f)(2) (2006).

144. See *supra* Part I.C.

145. See *Cooper v. Aviall*, 543 U.S. 157.

146. See *supra* Part I.D.

147. *ARC III*, 127 S. Ct. 2331, 2339 (2007).

148. *Id.*

2008]

*SETTLING THE TRADEOFFS*

361

claims at a site with the government, would solve the problem and maximize incentives to both voluntarily clean and settle matters.<sup>149</sup>

Admittedly, legislative amendments are often difficult to pass. Superfund has not been amended since 1986,<sup>150</sup> and with over 20 years of case law development, attempting to change one small aspect of the code may be quite difficult. Additionally, with other pressing matters, Congress may not want to expend resources dealing with an issue that does not present imminent harm to the public. But given the circumstances, it may be the only way to achieve the highest rate of site cleanup possible.

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149. *See supra* Part III.

150. Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (adding § 113).

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