

## Voluntary Cleanup of Contaminated Sites Under CERCLA: Does Section 107 Allow Cost Recovery or Contribution Actions by Potentially Liable Parties?

### Introduction

Throughout much of the twentieth century, no mechanism existed for the regulation of toxic waste disposal such as hazardous industrial chemicals and municipal wastes. The careless disposal of this waste contributed to widespread contamination across the country, posing serious threats to human health and ecosystems. A site known as the Love Canal brought this problem to the forefront of public awareness and prompted public outrage.<sup>1</sup> An abandoned canal in Niagara County, New York had been used in the 1940s and 1950s by various companies and municipalities to dispose of hazardous and municipal wastes. Because the canal was surrounded by clay and the waste subsequently covered with clay, the site was thought to be safe for such disposal. In the early 1970s, homes and an elementary school were built around the canal. But just a few years later, a flood in the area brought chemicals to the surface and to the basements and backyards of the nearby homes. Children would go out to play and come back with burns on their faces and hands. An unusually high rate of miscarriages and birth defects followed. A health emergency was declared, and in the face of growing public awareness of environmental contamination and subsequent public outrage, Congress was forced to act.

In 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Litigation quickly followed between parties who had been sued by the government under CERCLA for the cleanup of contaminated sites and other parties who had caused or contributed to the contamination. Courts found a right to cost recovery actions in

Section 107 of the statute. Although CERCLA did not originally provide an express cause of action for contribution, courts also found an implied right to contribution under Section 107. These causes of action were extended to private parties who had not been sued by the government but had voluntarily cleaned up contaminated sites. Given the vast number of contaminated sites around the country and the limited funds available for the government to clean up the sites and then seek reimbursement later, the cleanups are proceeding at a relatively slow rate. Because of the danger these sites pose to human health and the environment, it is critical that private parties who know the location of these sites be encouraged to voluntarily clean them up, rather than waiting for the government to have the time and resources to go after them.

Congress amended CERCLA in 1986 with the passage of the Superfund Amendments and Reauthorization Act (SARA). Section 113 of SARA contains an express cause of action for contribution from other parties who were responsible for contaminating the site, and lower courts began allowing all actions for contribution to proceed under Section 113, including actions by parties who voluntarily commence cleanup. However, in 2004, the Supreme Court held in *Cooper v. Aviall* that parties who voluntarily clean up contaminated sites do not have a cause of action for contribution against other responsible parties under Section 113. The Court held that a cause of action for contribution under Section 113 only exists for parties who have first been sued under Section 106 or 107, or have settled their liability with the government. The Court did not rule on the question of whether parties who have not been subject to a civil suit under Section 106 or 107 or a party to a settlement have a cause of action for cost recovery or contribution under Section 107.

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<sup>1</sup> The Love Canal tragedy has been well-documented. *See, e.g.*, <http://www.epa.gov/history/topics/lovecanal/index.htm>; [http://en.wikipedia.org/wiki/Love\\_Canal](http://en.wikipedia.org/wiki/Love_Canal) (last visited May

This note surveys the circuit split after *Aviall* over whether Section 107 of CERCLA provides a cause of action for cost recovery or contribution by potentially liable parties who voluntarily clean up contaminated sites. The Second, Seventh, and Eighth Circuits have all held that such an action exists under Section 107, while the Third Circuit has held that it does not. On January 19, 2007, the Supreme Court granted certiorari in the Eighth Circuit decision to resolve this issue. Part I of this note gives an overview of CERCLA and the relevant sections, including a summary of lower court interpretations of Sections 107 and 113 before and after the passage of SARA. Part II discusses the Supreme Court decision in *Aviall*, the dicta in the majority opinion that indicates how the Court may rule on the Section 107 issue, and the dissenting opinion that supports a cause of action for contribution under Section 107. Part III reviews the circuit decisions post-*Aviall* and discusses how different circuits have approached the Section 107 issue in the wake of the *Aviall* decision. It also discusses the district court decision on remand in *Aviall*. Part IV discusses the arguments for and against an interpretation of Section 107 that allows cost recovery and contribution actions for potentially liable parties who voluntarily clean up contaminated sites, and recommends an interpretation that will allow such parties to bring cost recovery actions under Section 107.

## I. CERCLA and SARA

CERCLA<sup>2</sup> was enacted to address the problem of hazardous waste sites around the country. The primary purposes of the statute are to protect the public and the environment by encouraging prompt cleanup of hazardous waste sites, and to ensure the costs for cleanup are borne by the parties responsible for the contamination whenever possible, instead of by

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11, 2007).

<sup>2</sup> 42 U.S.C. §§ 9601 – 9675 (2000).

taxpayers.<sup>3</sup> CERCLA allows the President, through the Environmental Protection Agency (EPA), to identify hazardous waste sites.<sup>4</sup> The EPA can then either file an action against the party or parties responsible for the contamination to compel them to clean up the site under Section 106<sup>5</sup>, or it can undertake the cleanup of the site itself and then file an action against the responsible party or parties to recover the cost of the cleanup under Section 107.<sup>6</sup> Congress envisioned that cleanups would be funded through a combination of cost recovery actions and taxes imposed on the chemical and petroleum industries.<sup>7</sup> The EPA maintains a Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS) database that contains general site information, such as location, contaminants, status, and actions taken.<sup>8</sup> Sites that are identified as possible candidates for cleanup are added to the CERCLIS database and additional investigation determines the priority ranking of the sites.<sup>9</sup> Since the passage of CERCLA, more than 46,000 potentially contaminated sites have been identified.<sup>10</sup> Those sites that are determined to pose a significant risk to human health and the environment are placed on the National Priorities List (NPL).<sup>11</sup> As of April 23, 2007, there are 1,243 sites on the list.<sup>12</sup>

Liability under CERCLA is strict and retroactive, and is covered in Section 107 of the Act. According to § 107(a):

“Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section –

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<sup>3</sup> See, e.g., *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996); *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 935-936 (8th Cir. 1995).

<sup>4</sup> 42 U.S.C. §§ 9604 & 9615.

<sup>5</sup> 42 U.S.C. § 9606.

<sup>6</sup> 42 U.S.C. §§ 9604 & 9607.

<sup>7</sup> *United States v. Hercules, Inc.*, 247 F.3d 706, 715 (8th Cir. 2001). The fund established is commonly known as Superfund.

<sup>8</sup> The CERCLIS database can be accessed online at <http://www.epa.gov/superfund/sites/cursites/>.

<sup>9</sup> 42 U.S.C. § 9605.

<sup>10</sup> See <http://www.epa.gov/superfund/sites/cursites/>.

<sup>11</sup> 42 U.S.C. § 9605.

- (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 by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport 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 substance for transport or 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, shall be liable for –
  - A. All costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;<sup>13</sup>
  - B. Any other necessary costs of response incurred by any other person consistent with the national contingency plan; . . . .”<sup>14</sup>

After the passage of CERCLA, various courts held that § 107 created a cause of action for cost recovery for private parties as well as the government.<sup>15</sup> Some courts also found an implied right to contribution under either § 107<sup>16</sup> or under federal common law.<sup>17</sup>

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<sup>12</sup> The Center for Public Integrity, at <http://www.publicintegrity.org/superfund/default.aspx?act=faq#7> (last visited on May 11, 2007). An additional 61 sites have been proposed for inclusion on the NPL.

<sup>13</sup> The National Contingency Plan (NCP) was promulgated by the EPA under CERCLA and details the standards and procedures for remediation of contaminated sites. These regulations are codified in 40 C.F.R. Part 300.

<sup>14</sup> 42 U.S.C. § 9607(a).

<sup>15</sup> *Walls v. Waste Resource Corp.*, 761 F.2d 311, 318 (6th Cir. 1985)(collecting cases).

<sup>16</sup> *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457 n.3 (9th Cir. 1986)(collecting cases).

<sup>17</sup> *United States v. New Castle County*, 642 F.Supp. 1258, 1265-66 (D. Del. 1986).

In 1986, Congress enacted SARA,<sup>18</sup> adding a section to CERCLA that contained an express cause of action for contribution. Section 113(f)(1) states that “[a]ny person may seek contribution from any other person who is liable or potentially liable under [§ 107(a)] of this title, during or following any civil action under [§ 106] of this title or under [§ 107(a)] of this title. . . .”<sup>19</sup> “ Congress added this section to “clarif[y] and confirm” a cause of action for contribution.”<sup>20</sup>

Unfortunately, the issue of when a cause of action arises under § 107 and when it arises under § 113 was not made clear by Congress. In *Key Tronic Corp. v. United States*, the Supreme Court noted that provisions of § 113 indicated an acceptance by Congress of the judicial view that a cause of action did exist under § 107.<sup>21</sup> The Court characterized the remedies in the two sections for contribution actions as “similar and somewhat overlapping.”<sup>22</sup> However, the primary differences between the two sections seem to favor § 107 actions over § 113 actions. Under § 107, there is a six-year statute of limitations and the plaintiff can recover one hundred percent of its costs from responsible parties.<sup>23</sup> In contrast, the statute of limitations under § 113 is only three years and plaintiffs may only seek contribution in excess of their equitable share.<sup>24</sup>

Because of these differences, lower courts were concerned that plaintiffs would ignore § 113 and continue to bring actions for contribution under the more generous provisions of § 107.<sup>25</sup> To prevent this from happening, the courts adopted an approach that was not consistent with the language of the statute or with previous decisions in which courts had found an implied

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<sup>18</sup> Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

<sup>19</sup> 42 U.S.C. § 9613(f)(1).

<sup>20</sup> *United Technologies Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 100 (1st Cir. 1994) (citing S.Rep. No. 11, 99<sup>th</sup> Cong., 1<sup>st</sup> Sess. 44 (1985)).

<sup>21</sup> *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994).

<sup>22</sup> *Id.*

<sup>23</sup> 42 U.S.C. § 9607.

<sup>24</sup> 42 U.S.C. § 9613(f)(1), (f)(2), (g)(3).

<sup>25</sup> *Atlantic Research Corp. v. United States*, 459 F.3d 827, 832 (8th Cir. 2006).

cause of action for contribution under § 107.<sup>26</sup> Instead, § 107 became reserved for cost recovery actions by “innocent” plaintiffs that were not responsible for any of the contamination, while potentially liable parties had to use § 113 to bring contribution actions against other liable parties.<sup>27</sup> Under this judicial narrowing, a potentially liable party could bring a contribution action under § 113 regardless of whether that party had been subject to a civil suit under §§ 106 or 107.<sup>28</sup>

## II. Supreme Court Decision in *Cooper v. Aviall*

The Supreme Court changed the landscape for contribution actions with its decision in *Cooper v. Aviall*.<sup>29</sup> Aviall Services purchased four aircraft engine maintenance sites from Cooper Industries, and found out years later that both it and Cooper had contaminated the sites.<sup>30</sup> Aviall notified the state environmental agency of the contamination, and was told that it would have to clean up the site or the agency would pursue an enforcement action. Under state supervision, Aviall cleaned up the site and then filed an action for contribution against Cooper. The original complaint included a claim for cost recovery under § 107 and a claim for contribution under § 113. The complaint was later amended to only include a claim for contribution under § 113.<sup>31</sup>

The Supreme Court focused on the language in § 113 that allowed contribution actions “during or following any civil action under [§ 106] of this title or under [§ 107(a)] of this title.” The Court said that if it were to interpret § 113 to allow contribution actions at any time, the “during or following” language would be meaningless.<sup>32</sup> Therefore, because Aviall had cleaned

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<sup>26</sup> *Consolidated Edison Co. of NY, Inc. v. UGI Utilities, Inc.*, 423 F.3d 90, 100 n.11 (2d Cir. 2005) (collecting cases).

<sup>27</sup> *Atlantic Research*, 459 F.3d at 832.

<sup>28</sup> *Id.* at 832-833.

<sup>29</sup> *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004).

<sup>30</sup> *Id.* at 163-164.

<sup>31</sup> *Id.* at 164.

<sup>32</sup> *Id.* at 166.

up the site voluntarily and had never been subject to a civil action under §§ 106 or 107, it had no cause of action for contribution under § 113. The Court said it was leaving open two issues under § 107: 1) whether Aviall could seek cost recovery under § 107 and 2) whether Aviall had an implied right to contribution under § 107.<sup>33</sup>

Part of the confusion created by this decision can be attributed to ongoing confusion over the way in which courts use the terms “cost recovery” and “contribution.” Either the EPA or a private party may bring an action against a potentially liable party under § 107 to recover “necessary costs of response.”<sup>34</sup> This is known as a “cost recovery action,” under which liability is joint and several.<sup>35</sup> Therefore, the EPA can sue one party to recover the entire cost of the cleanup, regardless of whether other parties contributed to the contamination. Under a cost recovery action, damages are only apportioned according to fault if the defendant can affirmatively demonstrate that the harm is divisible.<sup>36</sup>

Naturally, a party who is not solely responsible for the contamination but has been found jointly and severally liable will want to bring an action against other responsible parties for contribution. A contribution action is a claim “by and between jointly and severally liable parties for an appropriate division of payment one party has been compelled to make.”<sup>37</sup> Liability under a contribution action is merely several, such that each party is responsible only for its equitable share, to be determined by the court.<sup>38</sup> Black's Law Dictionary defines

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<sup>33</sup> *Id.* at 170

<sup>34</sup> 42 U.S.C. § 9607(a)(4)(A)-(B).

<sup>35</sup> *United States v. Colorado & Eastern Railroad Co.*, 50 F.3d 1530, 1535 (10th Cir. 1995).

<sup>36</sup> *Id.*

<sup>37</sup> *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

<sup>38</sup> *Centerior Svc. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir. 1998) (citing *United States v. Conservation Chemical Co.*, 619 F.Supp. 162, 229 (W.D. Mo. 1985)).

contribution as the “[r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear.”<sup>39</sup>

In *Aviall*, the majority and the dissent have different views of the language in *Key Tronic* regarding the characterization of the similar but overlapping remedies of §§ 107 and 113. The majority acknowledges that the two sections are similar in that they both allow private parties to recoup costs from other private parties.<sup>40</sup> However, in that same sentence, the majority characterizes § 107 as a cost recovery remedy and § 113 as a contribution remedy. The dissent, on the other hand, seems to use cost recovery and contribution interchangeably. The dissent first states that the Court’s finding in *Key Tronic* (that § 107 allows potentially liable parties to seek recovery of cleanup costs) rested on the determination that § 107 clearly allows any person to recover all *or a portion* of the costs incurred in cleanup from other liable parties.<sup>41</sup> However, the dissent went on to say that the only dispute in *Key Tronic* over § 107 was whether the right to *contribution* is implicit in the text or expressly conferred, giving no explanation for the change in terms from “recovery” to “contribution.”<sup>42</sup> Because a party is not required to bring a cost recovery action for all of its costs but can instead recover merely a portion under § 107, it seems that the dissent is characterizing such a recovery action as an action for contribution.

The majority appears to reject this characterization by making the distinction between cost recovery actions under § 107 and contribution actions under § 113. In addition to this distinction, there is another indication from the majority in *Aviall* that it will not find a right to contribution under § 107. The Court points out that in spite of language in the Fifth Circuit opinion indicating that it *would* find an implied right to contribution under § 107, the Supreme

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<sup>39</sup> Black’s Law Dictionary 328 (6th ed. 1990).

<sup>40</sup> *Aviall*, 543 U.S. at 163 n.3.

<sup>41</sup> *Id.* at 172 (Ginsberg, J. dissenting) (emphasis added).

<sup>42</sup> *Id.*

Court has declined to find implied rights to contribution in other contexts.<sup>43</sup> However, because the Court felt that the § 107 issue was too important to be decided in the absence of briefing on that particular issue, it declined to address it and remanded the case.<sup>44</sup>

### III. Circuit Court Decisions post-*Aviall* and District Court Decision on Remand

#### A. Second Circuit – *Consolidated Edison v. UGI Utilities* and *Schaefer v. Town of Victor*

The first circuit to address the § 107 issue post-*Aviall* was the Second Circuit. In *Consolidated Edison*, the court held that a liable party who voluntarily cleans up a site can recover necessary response costs under § 107(a).<sup>45</sup> The court declined to read a requirement into § 107 that parties had to be innocent in order to bring an action for cost recovery under § 107, explaining that such an interpretation would impermissibly discourage voluntary cleanup.<sup>46</sup>

The Second Circuit also discussed its previous decision in *Bedford Affiliates*<sup>47</sup> in which it implicitly held that a party could bring an action under § 113 even if it had not been sued under §§ 106 or 107.<sup>48</sup> Although the *Aviall* decision overruled that holding, the court declined to revisit the *Bedford* holding in *Consolidated Edison* because of a critical difference in the two cases. In *Bedford Affiliates*, the plaintiff had entered into an administrative consent order with a government agency before beginning the cleanup, unlike the plaintiff in *Consolidated Edison* who voluntarily cleaned up the site. The court said its decision in *Bedford Affiliates* that a party who enters into a consent order with a government agency has been found partially liable under § 113 and is therefore not eligible to pursue an action under § 107 did not conflict with its holding

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<sup>43</sup> *Id.* at 170-171.

<sup>44</sup> *Id.* at 169-170.

<sup>45</sup> *Consolidated Edison*, 423 F.3d at 100.

<sup>46</sup> *Id.*

<sup>47</sup> *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998).

<sup>48</sup> *Consolidated Edison*, 423 F.3d at 101 n.12.

in *Consolidated Edison* that a party who has not been found liable but has incurred cleanup costs voluntarily can pursue an action under § 107.<sup>49</sup>

In an expansion of its holding in *Consolidated Edison* and in distinction from its holding in *Bedford Affiliates*, the Second Circuit further held in *Schaefer v. Town of Victor* that even when a party enters into a consent order with a government agency, it can still pursue an action under § 107 for any cleanup activities commenced prior to the consent order.<sup>50</sup> Interestingly, the court acknowledged in a footnote that the reason it found an action for cost recovery under § 107 in *Consolidated Edison* rather than an action for contribution is because it was reading between the lines of the Supreme Court dicta in *Aviall* that seems to indicate the Supreme Court will not find an implied right to contribution under § 107.<sup>51</sup>

#### B. Eighth Circuit – *Atlantic Research Corp. v. United States*

The Eighth Circuit joined the Second Circuit in *Atlantic Research*, holding that a potentially liable party that voluntarily cleans up a contaminated site may pursue an action against another liable party under § 107.<sup>52</sup> However, the Eighth Circuit went beyond the Second Circuit and explicitly held that such a party could pursue an action for either direct recovery *or* contribution under § 107.<sup>53</sup> The Eighth Circuit also discussed a previous decision that seemed to go against its holding in *Atlantic Research*.<sup>54</sup> In *Dico*, the court held that a potentially liable party could not pursue an action under § 107. Although the Supreme Court decision in *Aviall* changed the underlying reasoning for the holding in *Dico* by preventing parties who voluntarily clean up sites from pursuing an action under § 113, the court did not need to revisit that holding

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<sup>49</sup> *Id.* at 102.

<sup>50</sup> *Schaefer v. Town of Victor*, 457 F.3d 188, 201-202 (2d Cir. 2006).

<sup>51</sup> *Id.* at 199 n.15.

<sup>52</sup> *Atlantic Research*, 459 F.3d at 837.

<sup>53</sup> *Id.*

<sup>54</sup> *Dico Inc. v. Amoco Oil Co.*, 340 F.3d 525 (8th Cir. 2003).

because it still holds true for parties who are able to pursue actions under § 113.<sup>55</sup> If a party is not barred from an action under § 113, that party cannot decide to bring an action under § 107 instead. In *Atlantic Research*, the court was addressing the specific issue of whether a party who is barred from an action under § 113 because of the *Aviall* decision can still pursue an action under § 107.

In discussing the rationale for its holding in *Atlantic Research*, the Eighth Circuit “reject[ed] an approach which categorically deprives a liable party of a § 107 remedy.”<sup>56</sup> In agreement with the Second Circuit, the court found that there was no basis for reading a requirement that a party be innocent into the language “any other person” in § 107(a)(4)(B).<sup>57</sup> The court discussed its reasons for finding both a right to cost recovery for a liable party and an implied right to contribution under § 107. Although the language “any other necessary costs of response” could suggest one hundred percent recovery of costs incurred, it does not compel such a percentage.<sup>58</sup> Therefore, a liable party is not prevented from using § 107 to recover costs that it incurred in excess of its equitable share. In the event that a liable party may be tempted to use § 107 to recover its costs in entirety from another party, CERCLA allows the other party to counterclaim for contribution under § 113.<sup>59</sup>

As for an implied right to contribution, the court found that such a right existed before SARA, and was not eliminated by the addition of § 113. Courts found that such a right was fairly implied from the language and the purpose of CERCLA, given the crucial importance of contribution to the statute’s regulatory scheme.<sup>60</sup> Congress confirmed that implication with the

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<sup>55</sup> *Atlantic Research*, 459 F.3d at 830.

<sup>56</sup> *Id.* at 835.

<sup>57</sup> *Id.* at 834.

<sup>58</sup> *Id.* at 835.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 835-836.

passage of SARA by creating an express right of contribution. The court found that Congress did not intend to eliminate the implied right to contribution under § 107 by its passage of § 113 because it did not do so explicitly. In addition, Congress included a saving clause in § 113, providing that “[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§ 106] of this title or [§ 107] of this title.”<sup>61</sup> The court also pointed to legislative history indicating Congress’ intent to clarify and confirm the existing right to contribution, as opposed to a desire to supplant or extinguish it.<sup>62</sup> In the court’s view, nothing in the language of CERCLA suggests that Congress wanted to prohibit liable parties who voluntarily clean up contaminated sites from pursuing a cause of action for contribution from other responsible parties. Therefore, an interpretation of CERCLA that allows parties who have been sued to bring contribution actions under § 113, while parties who have voluntarily undertaken cleanup can bring contribution actions under § 107, gives meaning to each of CERCLA’s sections.<sup>63</sup>

### C. Third Circuit – *DuPont v. United States*

In the first appellate decision to reach a different conclusion, the Third Circuit held in *DuPont* that liable parties who voluntarily clean up contaminated sites cannot seek contribution from other responsible parties.<sup>64</sup> It is the view of the Third Circuit that CERCLA provides no remedy, either implied or otherwise, for parties who voluntarily clean up contaminated sites if the parties themselves were partially responsible for the contamination. This view is inconsistent

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<sup>61</sup> 42 U.S.C. § 9613(f)(1).

<sup>62</sup> *Atlantic Research*, 459 F.3d at 836.

<sup>63</sup> *Id.* at 837.

<sup>64</sup> *E.I. DuPont De Nemours & Co. v. United States*, 460 F.3d 515, 518 (3d Cir. 2006).

with the court's admission that CERCLA provides that "everyone who is potentially responsible for hazardous waste contamination may be forced to contribute to the costs of cleanup."<sup>65</sup>

The Third Circuit agrees with the characterization by the Supreme Court in *Aviall* that § 107 is for cost recovery actions while § 113 is for contribution actions,<sup>66</sup> and further explains that cost recovery actions are only available to innocent parties.<sup>67</sup> The court reasons that § 107 does not apply to potentially liable parties, even though the language of § 107 does not support such a limitation, because the section "was designed to enable innocent persons . . . to recover their costs from potentially responsible persons."<sup>68</sup> In an earlier case, the court found that § 113 provides an express statutory remedy for liable parties that replaces the previously implied remedy under § 107.<sup>69</sup> Unlike the Second and Eighth Circuits, the Third Circuit refused to reconsider this view in light of the *Aviall* decision that barred actions under § 113 for parties who voluntarily clean up contaminated sites.<sup>70</sup>

Although the court acknowledges legislative history supporting the idea that Congress wants to encourage voluntary cleanups, it chooses instead to focus on Congress' encouragement of settlements under SARA. There is one other express cause of action for contribution provided under § 113 for liable parties who enter into an administrative or judicially approved settlement.<sup>71</sup> The court finds that the legislative history in support of encouraging settlements is stronger than the history in favor of encouraging voluntary cleanups. It interprets Congress' decision to include two express causes of action for contribution, one during or following a civil action and one for parties who settle, as a statement by Congress of its preference for liable

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<sup>65</sup> *Id.* at 518-519 (citing *United States v. Bestfoods*, 524 U.S. 51, 56 n.1 (1998)).

<sup>66</sup> *Id.* at 521.

<sup>67</sup> *Id.* at 533 n.22.

<sup>68</sup> *Id.*

<sup>69</sup> *Matter of Reading Co.*, 115 F.3d 1111, 1120 (3d Cir. 1997).

<sup>70</sup> *DuPont*, 460 F.3d at 528.

<sup>71</sup> 42 U.S.C. § 9613(f)(3)(B).

parties to enter into settlement agreements rather than undertake cleanups voluntarily.<sup>72</sup> Because Congress provided an incentive in § 113 for parties to settle by allowing an express cause of action for contribution, the court argues, an interpretation of § 107 that allows a contribution action for liable parties will have the effect of discouraging liable parties from entering into settlement agreements.<sup>73</sup>

Finally, the court turned to the public policy argument in favor of allowing a contribution action for parties who voluntarily clean up sites that pose an imminent danger to human health and welfare. While agreeing that there is some merit to this argument, the court said that was a matter to be taken up by Congress, not the courts.<sup>74</sup> The court suggested that rather than wait to be sued, potentially liable parties who want to be good corporate citizens should approach the EPA or a state environmental agency and offer to settle their liability.<sup>75</sup>

#### D. Seventh Circuit – *Metropolitan Water v. N.A. Galvanizing & Coating*

After the development of the circuit split described above, the Seventh Circuit also addressed the § 107 issue and declined to follow the position taken by the Third Circuit. The court held in *Metropolitan Water* that a potentially liable party who voluntarily cleans up a contaminated site may pursue an action under § 107 to recover necessary response costs.<sup>76</sup> Unlike the district court, which held that an implied right to contribution existed under § 107, the Seventh Circuit noted that it was hesitant to label the action as an implied right to contribution.<sup>77</sup>

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<sup>72</sup> *DuPont*, 460 F.3d at 534-542.

<sup>73</sup> *Id.* at 538-539.

<sup>74</sup> *Id.* at 542-543.

<sup>75</sup> *Id.* at 544. Note that the court characterizes voluntary cleanups as *sua sponte* cleanups, and does not acknowledge that § 107 only allows recovery of costs incurred consistent with the NCP. Aviall Services did in fact notify the state environmental agency of the contamination and cleaned up the site under state supervision because the agency threatened to sue if it did not. A voluntary cleanup is not necessarily a *sua sponte* cleanup, and even when it is, a party must comply with the NCP in order to recover cleanup costs.

<sup>76</sup> *Metro. Water Reclamation Dist. Of Greater Chi. v. N. A. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 834-835 (7th Cir. 2007).

<sup>77</sup> *Id.* at 836 n.17.

The court explained that the technical definition of contribution requires a party to have been found liable. In this case, Metropolitan Water was not the subject of any civil action and had therefore not been found liable of anything, even though it was a potentially liable party under CERCLA's strict liability provisions. Because of this, the court found that Metropolitan Water's § 107 action was more appropriately characterized as a cost recovery action.<sup>78</sup>

In finding that § 107 applies to potentially liable parties and not just to innocent parties, the Seventh Circuit disagreed that the word "other" in the phrase "any other person" under § 107(a)(4)(B) means a party other than the four categories of liable parties listed in § 107(a)(1)-(4).<sup>79</sup> Instead, the word "other" in subsection B distinguishes other parties from the parties listed in subsection A, namely the United States Government, a State, or an Indian tribe. The reason for the distinction is that the parties in subsection A are allowed to seek recovery of costs "not inconsistent with the national contingency plan" while "any other party" in subsection B is limited to the recovery of costs that are consistent with the NCP, creating slightly different burdens of proof.<sup>80</sup> Therefore, a § 107 action is available to private parties, whether or not they are potentially liable.

The court also found that its interpretation of § 107 was consistent with the saving clause of § 113, and furthered the policies of CERCLA.<sup>81</sup> The Seventh Circuit was concerned that prohibiting an action by a liable party who voluntarily cleans up a site would undermine CERCLA's main purposes of encouraging the voluntary cleanup of hazardous waste sites while ensuring that all parties responsible for contaminating the site contribute to the costs of the

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 835.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 835-836.

cleanup.<sup>82</sup> The court agreed that the provision of a contribution action for parties who settle in § 113(f)(2) seems to indicate Congress' interest in encouraging parties to settle, but said that it was simply not an issue in a situation where a party voluntarily cleans up a site in the absence of any involvement by a state or federal environmental agency.<sup>83</sup>

#### E. District Court Decision on Remand in *Aviall*

After the Supreme Court decision in *Aviall*, the Fifth Circuit remanded the case with instructions to allow *Aviall* to amend its complaint.<sup>84</sup> The district court then had to determine whether *Aviall* could bring a cost recovery or contribution action under § 107. The court held that potentially liable parties are barred from bringing an action for cost recovery under § 107(a).<sup>85</sup> It also held that no cause of action for contribution exists under § 107, either implicitly or under federal common law.<sup>86</sup>

Because no Fifth Circuit decision had previously addressed the issue of whether a potentially liable party could file a cost recovery action under § 107, the district court looked at the statute as a whole and determined that the word “other” in “any other person”<sup>87</sup> referred to any party not included in the list of liable parties given in § 107(a)(1)-(4).<sup>88</sup> The court reasoned that because Congress provided protection for settling parties from contribution actions in § 113(f)(3)(B), it would be absurd to allow other responsible parties to circumvent this protection by bringing an action for cost recovery under § 107 when they could no longer bring an action for contribution under § 113.<sup>89</sup> The court declined to find a right of contribution under § 107, whether implied or under federal common law, because of the Supreme Court dicta in *Aviall* that

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 837.

<sup>84</sup> *Aviall Servs., Inc. v. Cooper Indus., Inc.*, No. 00-10197, order at 1-2 (5th Cir. Feb. 15, 2005)(en banc).

<sup>85</sup> *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 2005 WL 2263305, 8 (N.D. Tex. 2006).

<sup>86</sup> *Id.* at 10.

<sup>87</sup> 42 U.S.C. § 9607(a)(4)(B).

<sup>88</sup> *Aviall*, 2005 WL 2263305 at 7.

suggested it would reject such an argument.<sup>90</sup> The court suggested that if there is a remedial gap in the statute when it comes to liable parties who clean up sites voluntarily, Congress can fill that gap by amending CERCLA.<sup>91</sup>

#### IV. Arguments For and Against a Right of Contribution or Cost Recovery under Section 107

In spite of the Supreme Court's indication in *Aviall* that it will decline to find an implied cause of action for contribution under § 107 and that § 107 only provides an action for cost recovery, it is not clear how the Court is using the term "cost recovery." It could be using the term in the same sense indicated by the dissent, under which interpretation a potentially liable party could sue to recover a portion of its costs from another responsible party. If that is the case, the Court in *Aviall* was merely instructing future plaintiffs on the language they should use in their complaints under § 107, namely "cost recovery" instead of "contribution." However, it could also be making the distinction that a cost recovery action is one that is only available to a party that is not potentially liable and is suing to recover its costs in entirety, in the same way that lower courts made the distinction between § 107 and § 113 after the passage of SARA.<sup>92</sup>

One way to resolve this issue is to adopt the view of the Seventh Circuit in *Metropolitan Water*.<sup>93</sup> In the absence of a civil action, a potentially liable party has not yet been found liable, and no costs have been awarded against that party. Because contribution is the "right of one who has discharged a common liability,"<sup>94</sup> a contribution action is only appropriate if a party has been found liable. Nothing in the text of CERCLA imposes a legal obligation on any party to clean up a site in the absence of an action compelling them to do so. A party who voluntarily

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 9-10.

<sup>91</sup> *Id.* at 8.

<sup>92</sup> *See, e.g., Consolidated Edison*, 423 F.3d at 98 (explaining that an action by one liable party to recover a portion of the cleanup costs from another liable party is a claim for contribution).

<sup>93</sup> *Metropolitan Water*, 473 F.3d at 836 n.17.

<sup>94</sup> *See supra* note 39.

cleans up a contaminated site is not a liable party, but a potentially liable party, and cannot bring an action for contribution seeking to apportion liability that does not yet exist. Such a party is not barred, however, from bringing a cost recovery action under § 107 because it meets the definition of “any other person” who has incurred “necessary costs of response.”<sup>95</sup> Therefore, a party who voluntarily cleans up a site should be allowed to bring a cost recovery action, regardless of whether that party falls under one of the categories of liable parties in § 107(a)(1)-(4) and would therefore be strictly liable in a civil action brought under the statute. Under this interpretation, a § 107 cost recovery action is only available to parties who have no liability whatsoever and those who are potentially liable but have not been sued. Therefore, § 113 has a separate and distinct remedy and both voluntary cleanups and settlements are still encouraged, consistent with the goals of CERCLA. This is also consistent with the holding of the Second Circuit in *Consolidated Edison*.<sup>96</sup>

An interpretation that allows potentially liable parties to bring cost recovery actions under § 107 provides obvious incentives for parties who commence voluntary cleanups. In a cost recovery action, a plaintiff only needs to prove that each defendant is a liable party.<sup>97</sup> The burden then shifts to the defendant to affirmatively demonstrate that the harm is divisible in order for the damages to be apportioned according to fault.<sup>98</sup> In contrast, the plaintiff in a contribution action has the burden of establishing each defendant’s equitable share of the response costs.<sup>99</sup> The other primary advantage in cost recovery actions arises in the context of

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<sup>95</sup> 42 U.S.C. § 9607(a)(4)(B).

<sup>96</sup> *Consolidated Edison*, 423 F.3d at 102 (holding that a party who has not been found liable but has incurred cleanup costs voluntarily can pursue a cost recovery action under § 107).

<sup>97</sup> See, e.g., *Colorado & Eastern Railroad*, 50 F.3d at 1535; *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1121 n.4 (3d Cir. 1997); *O’Neil v. Picillo*, 883 F.2d 176, 178 (1st Cir. 1989).

<sup>98</sup> *Id.*

<sup>99</sup> See, e.g., *Adhesives Research, Inc. v. American Inks & Coatings Corp.*, 931 F.Supp. 1231, 1244 n.13 (M.D. Pa. 1996); *United States v. Taylor*, 909 F.Supp. 335, 361 (M.D. N.C. 1995).

“orphan shares,” shares of insolvent or defunct liable parties.<sup>100</sup> Under a contribution action in which each party is only responsible for its equitable share, orphan shares are either not allocated among any of the responsible parties and borne by the government, or divided equally among all parties. Restricting potentially liable parties to contribution actions under § 107 would remove any incentive for parties to voluntarily clean up contaminated sites.<sup>101</sup> However, if a hypothetical party A voluntarily cleans up a site and brings a cost recovery action against three parties and one of those parties is insolvent, the other two parties are jointly and severally liable for the costs in excess of A’s equitable share.<sup>102</sup> These parties will then have to settle their respective liability through a contribution action. In contribution actions, the court “may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.”<sup>103</sup> Dividing the orphan share among the remaining two parties while holding party A responsible only for its equitable share would encourage potentially liable parties to promptly and voluntarily clean up contaminated sites.

Allowing potentially liable parties to bring cost recovery actions but not contribution actions under § 107 undercuts the argument that the saving clause of § 113 allows parties who have not been sued to pursue a contribution action under § 107. Unlike generic saving clauses that merely preserve general causes of action, Congress was very specific in § 113. The saving clause of § 113 states that “[n]othing in this subsection shall diminish the right of any person to bring an action *for contribution* in the absence of a civil action under [§ 106 or § 107].”<sup>104</sup> If Congress had been trying to make the same distinction that the Supreme Court appears to be

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<sup>100</sup> Michael V. Hernandez, *Cost Recovery or Contribution?: Resolving the Controversy over CERCLA Claims Brought by Potentially Responsible Parties*, 21 Harv. Envtl. L. Rev. 83, 83 (1997).

<sup>101</sup> *Id.* at 122-123 (noting that if forced to pay a portion of the orphan share, parties will have no incentive to promptly and voluntarily clean up contaminated sites but will sit back and wait for the EPA to act).

<sup>102</sup> *See id.* at 116-122 for a detailed hypothetical involving a potentially responsible party who voluntarily cleans up the site.

<sup>103</sup> *Id.* at 122-123.

making in *Aviall* between cost recovery actions and contribution actions, and if Congress intended § 113 to be the exclusive remedy for contribution under CERCLA, it should have used the term “cost recovery” in place of “contribution” in the saving clause. However, it is not clear whether Congress was referring to an action for contribution under § 107 or whether it was excluding contribution actions under § 107 while leaving open other possibilities such as state law contribution actions.

The Supreme Court did not clarify what causes of action for contribution exist outside of § 113(f)(1) when it acknowledged that the saving clause rebuts the presumption that the express right of contribution is the exclusive cause of action available to a potentially liable party.<sup>105</sup> It is a stretch to argue, as the Third Circuit did in *DuPont*,<sup>106</sup> that the Court could have been referring to the additional cause of action for contribution in § 113(f)(3) for parties who settle with the government. The Third Circuit accepted the lower court argument that the saving clause was merely a clarification that the provision in § 113(f)(3) did not require a prior primary action under § 106 or § 107 before settlement.<sup>107</sup> If Congress needed to make such a clarification for settlements, it would have done so in the section that specifically addressed settlements. In the unlikely event that Congress would decide to use the saving clause in (f)(1) merely to clarify the right in (f)(3), it would have done so explicitly. It is more consistent with the language to infer that Congress included the saving clause to ensure it did not exclude potentially liable parties from its remedial scheme if they cleaned up contaminated sites in the absence of a civil action under § 106 or § 107. The saving clause in § 113(f)(1) appears to be specifically directed at remedies available to potentially liable parties who undertake voluntary cleanup actions, as they

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<sup>104</sup> 42 U.S.C. § 9613(f)(1)(emphasis added).

<sup>105</sup> *Aviall*, 543 U.S. at 166-167.

<sup>106</sup> *DuPont*, 460 F.3d at 532.

<sup>107</sup> *Id.* at 532-533.

are the only ones who would incur costs of response outside of actions under §§ 106 or 107 and would need to go after other responsible parties. Congress' use of "contribution" rather than "cost recovery" could demonstrate either a misunderstanding of the difference in terms by Congress, or a recognition of the misunderstanding that has plagued the courts and a desire to make it clear that such parties could still sue other responsible parties.

Another issue that must be addressed is the judicial narrowing of the lower courts prior to the Supreme Court decision in *Aviall*. After the passage of SARA, the lower courts decided that only "innocent" parties could bring actions under § 107, and all potentially liable parties were required to bring contribution actions under § 113, even if they had not been sued under §§ 106 or 107. Courts determined that "innocent" parties were those that did not fit any of the four categories in § 107(a)(1)-(4), in spite of the fact that the language of the statute does not support such an interpretation.<sup>108</sup>

The Seventh Circuit invited the EPA to provide its views on the issue as *amicus curiae* in *Metropolitan Water*.<sup>109</sup> The EPA argued that the word "other" in the phrase "any other person" under § 107(a)(4)(B) was a distinction between parties who are strictly liable listed in § 107(a)(1)-(4) and those who may sue for "necessary costs of response," adopting the view that only "innocent" parties have a cause of action under § 107.<sup>110</sup> However, a logical reading of the statute leads to the interpretation that the word "other" in B is meant to distinguish those parties from the specific parties listed in A, not from parties listed in a subsection that is a level higher in the statute. Moreover, a position that discourages voluntary cleanups by removing an ability to

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<sup>108</sup> Some courts recognized that this was not fair to landowners who are strictly liable as one of the categories under § 107(a), but had nothing to do with the release of hazardous waste, and developed the so-called "innocent landowner" exception that allowed such parties to continue to bring actions under § 107. This covered landowners who were forced to clean up hazardous materials that had either been spilled by a third party or had migrated to the property from adjacent lands. See *Akzo*, 30 F.3d at 764.

<sup>109</sup> *Metropolitan Water*, 473 F.3d at 826.

<sup>110</sup> *Id.* at 831.

recover costs is inconsistent with previous positions taken by the EPA. The Third Circuit highlighted the views of the EPA that were expressed in the 1983 amendment to the NCP. At that time, the EPA indicated a preference for consent agreements over voluntary cleanups.<sup>111</sup> The EPA also stated that its concerns did not preclude voluntary cleanups, but merely cautioned that such cleanups must be sanctioned by the EPA or the party could still be subject to an enforcement action.<sup>112</sup>

Moreover, the EPA stressed the importance of encouraging private parties to perform voluntary cleanups and removing obstacles to their ability to recover their costs in its amendments to the NCP after SARA.<sup>113</sup> The EPA went on to state that in order to ensure that only CERCLA-quality cleanups were encouraged, a standard must be adopted against which to measure whether the cleanup was “consistent with the NCP,” and proposed that it should be measured by whether the cleanup as a whole achieved “substantial compliance” with potentially applicable requirements and actually resulted in a CERCLA-quality cleanup.<sup>114</sup> The NCP requires notification to the EPA and mandates detailed and comprehensive record-keeping.<sup>115</sup> It also requires a remedial investigation and design, and continued monitoring post-cleanup. The concern that allowing liable parties to recover costs incurred in a voluntary cleanup under § 107 will result in non-CERCLA quality cleanups is unfounded in light of the condition in § 107 that limits recovery to costs incurred that are “consistent with the national contingency plan.” As the

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<sup>111</sup> *DuPont*, 460 F.3d at 539-540 (citing Amendment to National Oil and Hazardous Substance Contingency Plan, 48 Fed. Reg. 40,661 (Sept. 8, 1983)).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 540 n.30 (citing National Oil and Hazardous Substance Contingency Plan, 55 Fed. Reg. 8666, 8792-94 (March 8, 1990)).

<sup>114</sup> *Id.*

<sup>115</sup> 40 C.F.R. Part 300.

dissent in *DuPont* pointed out, “A party that seeks contribution for costs incurred in a cleanup that does not comport with the national contingency plan is without recourse.”<sup>116</sup>

Allowing a potentially liable party to bring an action for cost recovery under §107 does not circumvent the contribution actions expressly provided by Congress under § 113. Parties who have been found liable or have settled their liability are limited to actions for contribution under § 113 and cannot opt to pursue actions under § 107 instead. A cost recovery action under § 107 is limited to innocent parties and potentially liable parties who have not been sued. The Third Circuit expressed a concern that this interpretation would remove the protection afforded under § 113 to settling parties by allowing potentially liable parties to bring actions against them under § 107.<sup>117</sup> The Third Circuit misinterprets § 113(f)(2) by adopting the view of the attorneys for Cooper in *Aviall* that protection from all future contribution actions is provided by this section.<sup>118</sup> In fact, § 113(f)(2) only protects the settling party from contribution claims “regarding matters addressed in the settlement.”<sup>119</sup> A voluntary cleanup undertaken before any action on the part of the government cannot be a matter addressed in the settlement unless the party who has already incurred the costs is also included in the settlement. Indeed, if the Third Circuit’s interpretation is adopted, it is more likely that a responsible party will try to quickly settle with the government on its own as soon as it learns that another party has commenced cleanup in an attempt to settle for less than its equitable share and insulate itself against future contribution or cost recovery actions. As the Seventh Circuit noted, settlement negotiations typically involve responsible parties working together toward a joint cleanup goal, and a settlement would not include cleanup activities already conducted and paid for by private parties

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<sup>116</sup> *DuPont*, 460 F.3d at 549 (Slovitor, J., dissenting).

<sup>117</sup> *DuPont*, 460 F.3d at 538-539.

<sup>118</sup> *Id.* at 541.

<sup>119</sup> 42 U.S.C. § 9613(f)(2)

who are not parties to such negotiations.<sup>120</sup> While it is certainly important to ensure that a party to a settlement does not have to pay twice for the same cleanup, it is equally important to ensure that such a party does not get a windfall by settling.<sup>121</sup>

An additional concern was raised by the Eighth Circuit in *Atlantic Research*. Because the government is responsible for bringing actions or settling liability under CERCLA, but could also be a potentially liable party, an interpretation that bars actions under § 107 for potentially liable parties has the perverse result of allowing the government to insulate itself from liability.<sup>122</sup> The Department of Defense is the world’s largest polluter, and its testing, training and weapons manufacturing activities produce more hazardous waste per year than the five largest chemical companies in the United States combined.<sup>123</sup> “The federal government faced over \$249 billion in environmental liabilities at the end of fiscal year 2004.”<sup>124</sup> If the government knows it is a responsible party, it can simply decline to bring an action against other responsible parties or refuse a settlement offer from a liable party. If a potentially liable party cannot recover its costs in the absence of any action on the part of the government, this also provides an incentive for the government to thwart the purpose of CERCLA by refusing to bring enforcement actions for any sites at which it contributed to the contamination. Congress understood this when it included a broad waiver of sovereign immunity with the enactment of SARA.<sup>125</sup> The amendment provides that “[e]ach department, agency, and instrumentality of the United States” is subject to CERCLA’s provisions “in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under

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<sup>120</sup> *Akzo*, 30 F.3d at 767.

<sup>121</sup> *Id.* at 769.

<sup>122</sup> *Atlantic Research*, 459 F.3d at 837.

<sup>123</sup> Nancy Kubasek & Jay Threet, *Cooper Industries, Inc. v. Aviall Services, Inc.: Time for a Legislative Response to Restore Voluntary Remediation*, 51 St. Louis U. L.J. 165, 181 (2006).

<sup>124</sup> *Id.* at 181-182 (citing 2004 Fin. Rep. of the U.S. Gov., 125, available at <http://www.gao.gov/financial/4frusg.pdf>).

<sup>125</sup> 42 U.S.C. § 9620(a)(1).

[§107] of this title.”<sup>126</sup> Congress could not have intended to provide an incentive for the government to avoid liability under CERCLA.

There is no support for the argument made by the Third Circuit that with the passage of § 113, Congress intended to express a preference for settlements over voluntary cleanups. In addition to the fact that there is nothing in the language of § 113 to support such a proposition, nothing in the legislative history or the purpose of the statute as a whole supports such a view. As the dissent in *DuPont* pointed out, there is evidence in the legislative history of an opposite view. During the debate on the SARA amendments, Congress stated that “[v]oluntary cleanups are essential to a successful program for clean up of the Nation’s hazardous substance pollution problem.”<sup>127</sup> It also stated that “[t]he goal of CERCLA is to achieve effective and expedited cleanup of as many uncontrolled hazardous waste facilities as possible. One important component of the realistic strategy must be the encouragement of voluntary cleanup actions or funding without having the President relying on the panoply of administrative and judicial tools available.”<sup>128</sup> The Supreme Court has recognized that encouraging voluntary cleanups is an essential component of CERCLA. In a plurality opinion, Justice Brennan stated that it was insufficient to merely allow the government to recover the costs of its own cleanups, as it could neither pay for all of the cleanups up front nor undertake too many of them at a time.<sup>129</sup> To fully address the magnitude of this problem, Congress wanted to encourage private parties to also clean up sites “by allowing private parties who voluntarily cleaned up hazardous waste sites to

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<sup>126</sup> *Id.*

<sup>127</sup> *DuPont*, 460 F.3d at 549 (Sloviter, J., dissenting)(citing H.R. Rep. No. 99-253, pt. 5, at 58 (1985).

<sup>128</sup> *Id.* (citing 131 Cong. Rec. 24725, 24730 (1985)(statement of Sen. Domenici)).

<sup>129</sup> *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21-22 (1989)(overruled on other grounds).

recover a proportionate amount of the costs of cleanup from the other potentially responsible parties.”<sup>130</sup>

### Conclusion

Ultimately, it is not consistent with the language of the statute or the comprehensive nature of the remedial scheme to assume that by its enactment of SARA, Congress meant to prohibit potentially liable parties who voluntarily commence cleanup from bringing an action for either cost recovery or contribution against other responsible parties. To achieve the twin goals of encouraging voluntary cleanups as well as settlement for parties who have been notified of liability by a government agency, the most sensible interpretation of CERCLA is that parties who have been found liable or settled with the government can bring contribution actions under § 113, while potentially liable parties who voluntarily clean up sites can bring an action under § 107. This action should be characterized as a cost recovery action, as suggested by the Seventh Circuit, rather than a contribution action. In addition to the fact that the Supreme Court has already indicated its unwillingness to find an implied action for contribution under § 107, such an action is inconsistent with the language of the statute when applying the correct meaning of the terms.<sup>131</sup>

Private parties who undertake voluntary cleanups must be able to recover their costs from other responsible parties. The magnitude of the problem and the inability of the government to undertake all of these cleanups on its own demands a provision to encourage voluntary cleanups of these contaminated sites that pose such a threat to human health and the environment. The need for such cleanups is all the more pressing due to the current lack of funding for Superfund and a decline under the current administration in the number of sites being cleaned up as the

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<sup>130</sup> *Id.*

result of government enforcement actions against responsible parties.<sup>132</sup> The EPA tracks sites that are “not under control” because people can be exposed to the contaminants. As of April 2007, the EPA has determined that 114 sites exist at which human exposure to contaminants is not under control, and 224 sites at which groundwater migration is not under control.<sup>133</sup> The target for the completion of cleanups currently underway is just 24 for 2007 and 30 for 2008.<sup>134</sup> Cleanups have been started at a mere 145 sites during the past six years, in contrast with three times that number of cleanups started under the previous administration.<sup>135</sup>

The temptation for the government itself, as a potentially liable party at so many of these contaminated sites, to insulate itself from liability by refusing to bring actions or enter into settlements also demands that any interpretation of § 107 cannot create such a loophole. There is nothing in the language of § 107 that supports previous decisions that limited cost recovery actions to “innocent” parties. Indeed, now that the Supreme Court has barred potentially liable parties from bringing contribution actions under § 113, allowing them to bring cost recovery actions under § 107 is the only interpretation that is consistent with the language and purpose of CERCLA.

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<sup>131</sup> See Michael V. Hernandez, *supra* note 100, for an excellent discussion of the difference between cost recovery and contribution.

<sup>132</sup> Joaquin Sapien, “Superfund Progress Drops Off Under Bush,” April 26, 2007, The Center for Public Integrity, at <http://www.publicintegrity.org/Superfund/report.aspx?aid=853> (last visited on May 11, 2007).

<sup>133</sup> The Center for Public Integrity, at <http://www.publicintegrity.org/superfund/default.aspx?act=faq#7> (last visited on May 11, 2007).

<sup>134</sup> Joaquin Sapien, *supra* note 132.

<sup>135</sup> *Id.*