Federalism and CERCLA:

Rethinking the Role of Federal Law in Private Cleanup Cost Disputes

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Voluntary cleanups are essential to addressing the hundreds of thousands of contaminated sites that still require remediation in the United States, as government agencies lack the resources to conduct these cleanups themselves or to file thousands of lawsuits compelling private party cleanups. Most sites have been contaminated by the acts of more than one potentially responsible party (PRP). For two decades, PRPs voluntarily cleaned up sites assuming they could then seek cleanup cost contribution from other PRPs under CERCLA (the "Superfund" statute). The December 2004 U.S. Supreme Court decision in Cooper Industries, Inc. v. Aviall Services, Inc. *caused a sea change in environmental law, upsetting the reliance interests of regulatory agencies and PRPs by holding that a PRP in most situations cannot sue other PRPs for their fair share of cleanup costs under CERCLA's contribution provision. After* Aviall, *federal law may no longer play any role in most private cleanup cost disputes. This Article examines the federalism consequences of the* Aviall *decision. The Article explores whether federal or state law should serve as the primary rule of decision in private cleanup cost disputes, concluding that a uniform federal rule of decision remains superior to the incoherent patchwork quilt of current state law remedies as a tool for facilitating voluntary cleanups. It further concludes*

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that a private CERCLA cleanup cost remedy should provide a "safety net" assuring the availability of cleanup cost contribution rights to PRPs in every state without broadly preempting potentially available state law remedies.

INTRODUCTION

The contamination of soil and groundwater across the United States presents enormous public health and natural resource degradation problems. Hundreds of thousands of sites contaminated by hazardous substances await cleanup; the total bill may cost hundreds of billions of dollars. Voluntary cleanups are essential to cleaning up the nation's contaminated properties, as government agencies lack the resources to conduct these cleanups themselves or to file tens of thousands of lawsuits compelling private cleanups.

At most sites, more than one party has contributed to site contamination.[1] Parties who may be liable for the remediation of site contamination are often referred to as "potentially responsible parties" or "PRPs." During the past twenty-five years, part of the "conventional wisdom" of American environmental law was that a PRP who voluntarily incurred the cost of cleaning up contamination could obtain cost contribution from other PRPs under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).[2] Private parties came to rely on the availability of a CERCLA cleanup cost remedy to make a wide variety of decisions relating to contaminated property.[3] For example, PRPs agreed to comply voluntarily with regulatory agency cleanup orders at multi-PRP sites under the assumption that they could then sue other PRPs under CERCLA to recover their fair shares of cleanup costs. Similarly, developers acquired contaminated real estate assuming that they could then use CERCLA to recover cleanup costs from the PRPs who caused the contamination.

The decision in December 2004 by the U. S. Supreme Court in *Aviall Services, Inc. v. Cooper Industries, Inc.*[4] upended this CERCLA private enforcement scheme. In *Aviall*, the Supreme Court held that a PRP who voluntarily incurs cleanup costs cannot sue other PRPs under CERCLA's contribution provision.[5] The Court then declined to decide whether a PRP had a cleanup cost remedy under any other provision of CERCLA.[6] *Aviall* undermined two decades of lower federal court decisions holding that a PRP *could* bring such a contribution action under CERCLA and that such an action was the *only* cleanup cost remedy available to a PRP under CERCLA.[7] As a result, after *Aviall* federal law may no longer play a role in most private cleanup cost disputes.

This is a watershed moment in environmental federalism. Federal courts throughout the country will have to revisit their prior decisions regarding the availability of PRP cleanup cost remedies under CERCLA.[8] Unless these courts reverse their prior holdings in light of

1. ENVTL. LAW INST., AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50 STATE STUDY, 1998 UPDATE 33 ("Most hazardous substance sites have more than one potentially responsible party.").

2. Pub. Law No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601–9675 (2000)). CERCLA is sometimes referred to as the "Superfund" statute. CERCLA refers to cleanup costs incurred in response to the release of hazardous substances as "response costs." 42 U.S.C. § 9607(a)(4). A "PRP" under CERCLA is a person who fits within one of the four categories of "covered persons" set forth in CERCLA section 107(a)(1)–(4), 42 U.S.C. § 9607(a)(1)–(4). *See infra* notes 42–49 and accompanying text.

3. *See infra* notes 78–81, 146–154 and accompanying text.

4. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 147 (2004).

5. *Id.* at 167.

6. *Id.* at 167–69.

7. *See infra* notes 101–44 and accompanying text.

8. *See infra* notes 244–47 and accompanying text.

Aviall, PRPs who voluntarily undertake cleanup of contaminated property will have no remedy for recovering cleanup costs under federal law.[9] Instead, the current incoherent patchwork quilt of often inadequate state law theories will provide the only rules of decision for the vast majority of private cleanup cost disputes, taking the nation back to the state of affairs that helped inspire Congress to pass CERCLA in the first place.

Aviall's significance extends far beyond the narrow CERCLA statutory interpretation question the Supreme Court decided. *Aviall*'s restriction of PRP cost contribution remedies under federal law raises two critical questions about the future of American environmental policy. First, should federal law continue to provide the primary rule of decision in private cleanup cost disputes? Second, assuming that a federal rule of decision should continue to play a significant role in private cleanup cost disputes, what effect should a private federal law remedy have on state law?

This second question invites two alternative responses. On the one hand, the federal remedy could be viewed as providing a "safety net"—assuring the availability of a federal cleanup cost remedy whether or not a cleanup cost remedy exists under state law. A full range of state law remedies (some more generous to a private plaintiff than CERCLA) would remain available to a potential plaintiff PRP. On the other hand, a federal private cleanup cost remedy could be viewed as a tool for encouraging national cleanup standards under CERCLA in order to best achieve the national goal of a cleaner environment. State law remedies inconsistent with such a CERCLA cleanup paradigm would be subject to preemption. The tenuous post-*Aviall* status of federal law in most private cleanup cost disputes and the preemptive effect that a continued primary role for federal law could have on state law have created a "perfect storm" of uncertainty in the law governing contaminated properties.

The Article examines these questions engendered by *Aviall* and examines the appropriate role of federal law as a rule of decision in private cleanup cost disputes.[10] This introduction and the following three

9. After *Aviall,* a PRP could only bring a claim under CERCLA's contribution provision (CERCLA section 113(f), 42 U.S.C.§ 9613(f)) in the uncommon event that either the PRP had first been sued under CERCLA or had settled its CERCLA liabilities with the government. *See infra* notes 220–29 and accompanying text.

10. Contaminated sites implicate a wide variety of legal issues. First, contamination of soil or groundwater can raise public law problems. Hazardous substance contamination degrades natural resources and may pose a threat to public health, implicating a variety of environmental regulatory requirements. Second, soil and groundwater contamination can raise private law problems. Potentially responsible parties may be liable to the current owner of a contaminated site for some or all of the costs of cleaning up the contamination in order to satisfy public law regulatory requirements. The presence of contamination may also result in the temporary or permanent diminution of property values, and may interfere with the use or enjoyment of

parts of the Article provide necessary background. Part I of the Article describes the scope of the contaminated soil and groundwater problem in the United States and the state of the law prior to the enactment of federal environmental statutes. Part II reviews the structure of CERCLA and the evolution of CERCLA case law regarding PRP claims for cleanup costs, including the statutory interpretation conundrum that gave rise to the *Aviall* decision. Part III discusses the *Aviall* decision and its potential impact on voluntary PRP cleanups.

Once the necessary background is set, the Article addresses the problems *Aviall* created. Parts IV and V explore the future role that federal law should play in private cleanup cost disputes. Part IV analyzes whether, after *Aviall*, federal law should continue to provide the primary rule of decision in private party cleanup cost disputes or be replaced by state law. This part concludes that a uniform federal rule of decision remains superior to the current jumble of varied state law remedies; the law governing private cleanup cost disputes should not be returned to its pre-CERCLA status. It further concludes that a uniform federal cleanup cost remedy available to all PRPs can be secured either through a clarifying amendment to CERCLA or by lower federal courts revisiting their prior decisions in light of *Aviall* to conclude that CERCLA currently authorizes cleanup cost claims by PRPs.

Finally, Part V analyzes the federalism implications of such a federal rule of decision—whether and to what extent a federal rule of decision should preempt state law. This part concludes that CERCLA's private cleanup cost remedy should be viewed as a "safety net" ensuring the availability of a cleanup cost contribution remedy to PRPs conducting voluntary cleanups throughout the United States. It further concludes that CERCLA should not be interpreted to preempt alternative and potentially broader state law remedies. Finally, it urges the courts to interpret CERCLA in the context of these overarching federalism issues when they address the post-*Aviall* availability of a cleanup cost remedy for PRPs under CERCLA.

In short, as this Article ultimately concludes, the law governing private cleanup cost disputes is in disarray—but it does not have to be this way. With appropriate rules of decision and a healthy respect for federalism, the legal framework that encouraged voluntary cleanups for a quarter-century can be settled once again.

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private property. Finally, the contamination of private property may give rise to toxic tort issues in the event exposure to hazardous substances causes health problems. This Article focuses on the legal framework for allocating cleanup costs among private parties; however, regulatory and toxic tort issues may be relevant to the balance between federal and state law in private cleanup cost disputes. *See infra* Part IV.

I. BACKGROUND

A. *The Scope of the Problem*

The problem of investigating and remediating contaminated sites in the United States is enormous. Congress enacted CERCLA in 1980 after receiving estimates that there were approximately 30,000–50,000 contaminated sites across the country;[11] more recent estimates reach into the hundreds of thousands.[12] These polluted properties range from large, complicated sites placed by the United States Environmental Protection Agency (EPA) on the National Priorities List[13] to smaller sites such as abandoned gas stations. EPA plays a regulatory oversight role at only a relative handful of the nation's many thousands of sites.[14] At most sites,

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11. SUPERFUND SECTION 301(E) STUDY GROUP, 97TH CONG., INJURIES AND DAMAGES FROM HAZARDOUS WASTES—ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES 6 (Comm. Print 1982), *citing* 10 Env't Rep. (BNA) 2152 (1980); H.R. REP. NO. 96-1016, at 18 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 6119, 6120.

12. KATHERINE N. PROBST & DAVID M. KONISKY, SUPERFUND'S FUTURE: WHAT WILL IT COST? 85 (2001), write that

> [a]ccording to a survey of state hazardous waste officials conducted in 1998 by the Environmental Law Institute, states identified 69,000 'known and suspected sites.' [The U. S. General Accounting Office] and others have estimated the number of contaminated sites in the country to range from 150,000 to 500,000, although only a small percentage of these sites are likely to warrant placement on the NPL.

In 2004, the U.S. Environmental Protection Agency (EPA) estimated that approximately 77,000 sites already had been discovered and that approximately 217,000 sites would be discovered in the future. EPA, CLEANING UP THE NATION'S WASTE SITES: MARKETS AND TECHNOLOGY TRENDS, UNITED STATES viii (2004), *available at* http://www.clu-in.org/download/market/2004market.pdf. According to the EPA, "it is estimated that there are more than 450,000 brownfields" in the United States. EPA, Brownfields Cleanup and Redevelopment, http://www.epa.gov/swerosps/ bf/about.htm (last visited April 18, 2006). *Accord* U.S. GEN. ACCOUNTING OFFICE, COMMUNITY DEVELOPMENT: LOCAL GROWTH ISSUES—FEDERAL OPPORTUNITIES AND CHALLENGES 118 (2000). A "brownfield" is a property, "the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." CERCLA § 101(39)(A), 42 U.S.C.A. § 9601(39)(A) (West 2005).

13. Section 105(a)(8)(B) of CERCLA, 42 U.S.C. § 9605(a)(8)(B), requires that the EPA prepare and update a list of national priorities (the "National Priorites List" or "NPL") of known or threatened releases of hazardous substances throughout the country. NPL sites are among the most seriously contaminated in the nation. As of December 6, 2005, 1,238 sites were listed on the NPL, with another sixty-two sites proposed for addition to the NPL. *See* EPA, NPL Site Totals by Status and Milestone, http://www.epa.gov/superfund/sites/query/queryhtm/npltotal.htm (last visited Dec. 11, 2005).

14. According to the EPA, the "vast majority" of contaminated sites will be cleaned up under state authority, rather than pursuant to EPA oversight under the Superfund program. EPA, State and Tribal Response Programs, http://www.epa.gov/swerosps/bf/state_tribal.htm (last visited Dec. 11, 2005), *quoting* S. REP. NO. 107-2, (2001), 2001 WL 254419, at *15. EPA has estimated that approximately 90 percent of current and future sites will likely either be managed under state cleanup programs or underground storage tank sites. EPA, CLEANING UP THE NATION'S WASTE SITES, *supra* note 12, at viii.

state or local government agencies serve as the lead regulatory entity.[15] Cleaning up all of these sites may cost hundreds of billions of dollars[16] and will take decades to complete.[17]

Contaminated sites usually involve more than one PRP.[18] A landfill may have been contaminated by waste disposal from hundreds of businesses or individuals. An industrial site may have been contaminated by a series of successive property owners or operators. Contamination from one parcel of property (e.g., a gas station) may have migrated and become co-mingled with contamination emanating from a nearby property (e.g., another gas station on the opposite street corner). PRPs voluntarily conduct cleanups at multi-party sites for a variety of reasons. For example, a current landowner may take the lead cleaning up

15. *See* EPA, CLEANING UP THE NATION'S WASTE SITES, *supra* note 12, at viii; *see also* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 596–97 (2001) (describing the role played by state regulatory agencies at a majority of contaminated sites); Roger D. Schwenke, *Applying and Enforcing Institutional Controls in the Labyrinth of Environmental Requirements—Do We Need More Than the Restatement of Servitudes to Turn Brownfields Green?*, 38 REAL PROP. PROB. & TR. J. 295, 297 (2003) ("[S]tates are responsible for the bulk of environmental enforcement activities, including contamination detection, site remediation, and notification requirements."); Philip Weinberg, *Local Environmental Laws: Forging a New Weapon in Environmental Protection*, 20 PACE ENVTL. L. REV. 89, 107 (2002) (describing the role of local environmental controls to fill gaps in state and federal environmental regulation).

16. *See, e.g.*, EPA, CLEANING UP THE NATION'S WASTE SITES, *supra* note 12, at viii (estimating that 294,000 sites will need cleanup during the next three decades at a cost of $209 billion); PROBST & KONISKY, *supra* note 12, at xxv (estimating that the average cleanup cost of a "mega" NPL site was approximately $140 million and that the average cleanup cost of a "nonmega" NPL site was $12 million); *see also* Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 349 n.9 (6th Cir. 1998) (noting that cleanup costs have "nearly tripled since CERCLA's inception in 1980. During the 1980s the average cost for a hazardous waste cleanup was between six to ten million dollars. . . . Figures now place the average cost of cleanups anywhere between twenty-five to thirty million dollars per site.") (citing Thomas C.L. Roberts, *Allocation of Liability Under CERCLA: A "Carrot and Stick" Formula*, 14 ECOLOGY L.Q. 601, 604 (1987); JEFFREY G. MILLER & CRAIG N. JOHNSTON, THE LAW OF HAZARDOUS WASTE DISPOSAL AND REMEDIATION 9 (1996); and Susan R. Poulter, *Cleanup and Restoration: Who Should Pay?*, 18 J. LAND RESOURCES & ENVTL. L. 77, 78 (1998)).

17. Remediation of sites at which only soil is contaminated often can be completed relatively quickly by techniques such as excavation, capping or *in situ* treatment. Remediation of groundwater contamination, on the other hand, may require extraction from the subsurface and treatment or disposal of contaminated groundwater from a plume that may extend for miles. Where the source of groundwater contamination can be found and removed, it still may take years to extract the contaminated groundwater. Where the source cannot be located and thus will continue to contaminate groundwater, a common remediation approach is containment of the contaminated plume within as small an area as possible around the suspected general source area, such as by a system of extraction wells located downgradient from the suspected source area, and operation of this system for years until natural attenuation or source removal resolves the problem. *See generally* EPA, CLEANING UP THE NATION'S WASTE SITES, *supra* note 12, chs. 2 (describing remediation technologies used at NPL sites), 14 (describing source location and remediation problems at contaminated groundwater sites where dense non-acqueous phase liquid contamination is present).

18. *See supra* note 1 and accompanying text.

contamination caused by others in order to restore the value and utility of her property. A PRP named as a respondent under a regulatory agency cleanup order may choose to comply voluntarily with the order rather than face enforcement litigation or severe statutory penalties for non-compliance.[19] Private cleanup cost disputes frequently arise when PRPs take the lead and incur costs to investigate and remediate past contamination and then turn to other responsible parties for payment of their perceived "fair share" of cleanup costs.[20]

B. Legal Framework for Cleanup Cost Disputes Before CERCLA

Before Congress enacted CERCLA at the end of 1980, private disputes over hazardous substance contamination were governed exclusively by state law.[21] There was no remedy for cleanup cost recovery under federal law.[22] Four legal theories provided the primary common law bases available for private claims relating to soil or groundwater

19. *See infra* note 254 and accompanying text.

20. *See* Robert C. Goodman, *CERCLA Contribution Actions After* Cooper/Aviall, CAL. ENVTL. INSIDER, July 18, 2005, at 4 (discussing the "enormous importance" of *Aviall* in light of the estimated 450,000 contaminated sites around the nation and noting that "most of those sites are cleaned up by private parties, who then allocate responsibility among themselves, often through contribution litigation").

21. *See, e.g.*, Theodore Baurer, *Love Canal: Common Law Approaches to a Modern Tragedy*, 11 ENVTL. L. 133 (1980) (discussing common law theories potentially applicable to the Love Canal site); Steven T. Singer, *An Analysis of Common Law and Statutory Remedies for Hazardous Waste Injuries*, 12 RUTGERS L.J. 117, 122–38 (1980) (reviewing available common law theories of recovery).

22. *See* Robert B. 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) ("Prior to 1980, no federal legislation existed which addressed past disposals of hazardous wastes; all existing laws were directed only at regulating current activity."); Singer, *supra* note 21, at 147 (before CERCLA, no federal statute "would support a claim for damages from toxic chemicals"). In 1976, Congress adopted the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6992k (2000), creating a "cradle to grave" regulatory scheme for the generation, storage, treatment and disposal of solid or hazardous waste with regard to operating facilities. As originally enacted, RCRA included a citizen's suit provision, 42 U.S.C. § 6972(a), which allowed private citizens to bring an action seeking a court order for injunctive relief or other necessary action in connection with an alleged violation of a RCRA permit. In 1984, Congress amended the citizen's suit provision by adding RCRA section 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B), authorizing a citizen's suit for injunctive relief to respond to the environmental endangerment against any person who contributed to the generation, treatment, storage, or disposal of solid or hazardous waste which may present an imminent and substantial endangerment to the environment. RCRA does not provide a remedy for recovery of pre-lawsuit (or, according to some courts, post-lawsuit) cleanup costs. *See infra* note 270. CERCLA filled gaps left by RCRA, which had left inactive sites largely unmonitored by the EPA unless they posed an imminent hazard. H.R. REP. NO. 96-1016, at 21–22 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 6119, 6124–25. CERCLA "addressed this problem 'by establishing a means of controlling and financing both governmental and private responses to hazardous releases at abandoned and inactive waste disposal sites.'" Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 667 (5th Cir. 1989) (citation omitted).

contamination:[23] nuisance;[24] trespass;[25] negligence;[26] and strict liability for ultra-hazardous activity.[27]

Because tort law varies from state to state, no uniform, nationally applicable rule of decision governing private cleanup cost liabilities existed prior to CERCLA. Moreover, as discussed in more detail in Part IV(C), *infra*, common law theories have significant limitations, each potentially restricting the ability of plaintiffs to recover for environmental damage.[28] First, nuisance, trespass, and negligence each require proof of culpability. For example, nuisance liability typically depends on a showing either of an intentional act or negligent conduct causing an "unreasonable" interference with the use and enjoyment of property.[29]

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23. *See* Baurer, *supra* note 21, at 133; Singer, *supra* note 21, at 122–38. Contractual relationships between plaintiff and defendant also could support cleanup cost claims based on breach of contract (e.g., condition of property different than as promised in real property purchase and sale agreement), waste (e.g., contamination caused by lessee of real property), or misrepresentation (misstatement during lease or sale negotiations regarding property conditions). *See* Andrew R. Klein, *Hazardous Waste Cleanup and Intermediate Landowners: Reexamining the Liability-Based Approach*, 21 HARV. ENVTL. L. REV. 337, 374 (1997) ("The cause of action that most directly protects 'vertical' landowners in hazardous waste litigation is fraud.").

24. *See, e.g.*, Helms v. E. Kan. Oil Co., 169 P. 208, 209 (Kan. 1917) (permitting large quantities of oil, refuse, and poisonous substances to escape from refinery and flow over and upon plaintiff's neighboring property supported claim for private nuisance); Assoc. Metals & Minerals Corp. v. Dixon Chem. & Research, Inc., 197 A.2d 569, 580 (N.J. Super. Ct. App. Div. 1963) (recognizing nuisance action based on defendant intentionally allowing sulfur dust to escape property).

25. *See, e.g.*, Elsey v. Adirondack & St. Lawrence R.R. Co., 161 N.Y.S. 391, 393 (Sup. Ct. 1916) (granting injunction where pollutants leached from defendant's railroad embankment through subsurface to plaintiff's property); Curry Coal Co. v. M.C. Arnoni Co., 266 A.2d 678, 683 (Pa. 1970) (holding that written notice to property owner that dumping of sludge on ground surface caused harmful seepage into mine gave grounds for intentional trespass claim); Burr v. Adam Eidemiller, Inc., 126 A.2d 403, 406–08 (Pa. 1956) (upholding trespass judgment arising from defendant's intentional spraying water on slag pile resulting in run-off water leaching into and contaminating plaintiff's underground water supply).

26. *See, e.g.*, Ewell v. Petro Processors of La., Inc., 364 So. 2d 604, 606 (La. Ct. App. 1978) (defendants negligently permitted toxic waste to leak from disposal pits onto plaintiff's property); P. Ballantine & Sons v. Pub. Serv. Corp. of N.J., 91 A. 95, 97 (N.J. 1914) (affirming negligence judgment where tar products escaping from defendant's plant leached through soil to groundwater that migrated to plaintiff's well).

27. *See, e.g.*, Cities Serv. Co. v. State, 312 So. 2d 799, 803 (Fla. Dist. Ct. App. 1975) (applying strict liability to breach of waste reservoir damaging public waters); Atlas Chem. Indus., Inc., v. Anderson, 514 S.W.2d 309, 314–15 (Tex. App. 1974), *aff'd*, 524 S.W.2d 681 (Tex. 1975) (contaminants released into stream that crossed plaintiff's land), *abrogated by* Neely v. Cmty. Prop., Inc., 639 S.W.2d 452 (Tex. 1982). *See generally* Alexandra B. Klass, *From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims*, 39 WAKE FOREST L. REV. 903, 917–18, 934 (2004) (noting few reported strict liability environmental contamination cases before CERCLA passed in 1980).

28. CERCLA, by contrast, created a status-based, strict liability scheme without a causation requirement and with few available affirmative defenses, reflecting a policy choice to ease the burden of establishing liability for plaintiffs incurring cleanup costs. *See infra* notes 40–60 and accompanying text.

29. *See infra* note 304 and accompanying text.

Negligence requires proof that the defendant breached the relevant standard of care.[30] Similarly, strict liability for ultra-hazardous activity requires a multi-factor inquiry into whether an activity was abnormally dangerous.[31]

Second, establishing a prima facie liability case for a common law tort requires proof that the defendant's conduct was a legal cause of plaintiff's injury.[32] Causation can be particularly difficult to establish at older contamination sites, for which there would be fewer witnesses and sources of tangible proof.

Third, a wide variety of potential defenses may defeat common law liability, ranging from *caveat emptor* to landowner consent.[33] Moreover, at sites where the activity causing the contamination occurred years—if not decades—before plaintiff filed her lawsuit, statutes of limitations usually would bar recovery,[34] although in some jurisdictions otherwise untimely cleanup cost claims could be saved by application of the "discovery rule"[35] or the "continuing tort" doctrine.[36]

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30. *See* RESTATEMENT (SECOND) OF TORTS § 282 (1965) ("[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."). Proving negligence in connection with sites operated decades before discovery of the contamination could be further complicated by the fact that the activity causing the contamination may have met or exceeded state of the art practices for the relevant era. *See, e.g.*, Singer, *supra* note 21, at 124 ("[W]here the alleged negligence occurred prior to the development of new disposal techniques or the establishment of a correlation between exposure to a toxicant and occurrence of a disease, the defendant may argue that due care was exercised in light of existing knowledge."); *see also infra* note 304.

31. *See* RESTATEMENT (SECOND) OF TORTS § 519 (1977) (engaging in an activity which is abnormally dangerous subjects the actor to strict liability for harm caused to his neighbors resulting from the abnormally dangerous character of the activity, even though the actor has exercised the utmost care and has acted without negligence). The Restatement identifies six factors as guidelines to determine whether an activity is abnormally dangerous:

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.

Id. § 520.

32. *See* Gary Milhollin, *Long-Term Liability for Environmental Harm*, 41 U. PITT. L. REV. 1, 6 (1979) ("Whether the theory is negligence, nuisance or strict liability, the plaintiff must prove that it was the defendant's act which caused the harm.").

33. *See infra* notes 307–314 and accompanying text.

34. *See infra* notes 315–318 and accompanying text.

35. A "discovery rule" tolls the limitations period until plaintiff knew or should have known of her claim. *See, e.g.*, McKelvey v. Boeing N. Am. Inc., 86 Cal. Rptr. 2d 645, 651 (Ct. App. 1999) (under California law, the period of limitations runs "without regard to whether the plaintiff is aware of the specific facts . . . , provided that he has a 'suspicion of wrongdoing,' which he is charged with once he has 'notice or information of circumstances to put a reasonable person on inquiry.'" (citations omitted)); *see also infra* note 71 and accompanying text.

36. A "continuing tort" (usually nuisance or trespass) differs from a "permanent" tort in two primary respects. First, a new continuing tort claim accrues every day that the underlying

Finally, the form of potential liability varies by theory and by state. For example, some states recognize joint and several liability for tort theories, others do so in limited circumstances, and still others recognize only several tort liability.37

Accordingly, as the nation began to focus at the end of the 1970s on the problem of soil and groundwater contamination, the scope and availability of remedies under state law varied dramatically from state to state. Moreover, no federal remedy existed for claims between private parties to recover the costs of cleaning up contamination—until Congress enacted CERCLA.

II. CERCLA

A. The Structure of CERCLA

Congress passed CERCLA in the waning hours of its December 1980 "lame duck" session,[38] following a series of highly publicized discoveries of large abandoned hazardous waste disposal sites.[39] Congress

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condition causing nuisance or trespass has not yet been remedied (or, in some jurisdictions, every day that the harmful condition continues to change, as with migrating contaminated groundwater). Second, because a continuing tort can be remedied, the scope of available damages is limited to those accruing during the limitations period calculated back from the date of filing the lawsuit(s) and does not include types of damages that assume permanent harm, such as permanent diminution in property value. "Continuing tort" law varies from state to state. *See infra* notes 319–26 and accompanying text.

37. *See infra* notes 305–06 and accompanying text. The approaches taken by various states that have abolished joint and several liability in tort cases may fall into one of four broad categories: (a) no joint and several liability; (b) no joint and several liability, but if plaintiff cannot collect a judgment against one of the tortfeasors, that tortfeasor's share of liability may be reallocated among the parties, including the plaintiff, on the basis of comparative responsibility; (c) no joint and several liability for tortfeasors whose comparative fault is below a stated threshold; or (d) no joint and several liability for noneconomic damages like pain and suffering, but such liability remains for economic damages like medical expenses or lost wages. DAN B. DOBBS, THE LAW OF TORTS § 389, at 1087 (2001).

38. *See* Ian G. John, *Too Much Waste: A Proposal For Change in the Government's Effort to Clean Up the Nation*, 70 IND. L.J. 951, 954 (1995) ("CERCLA was passed in the early morning hours of December 3, 1980, by the outgoing Democratic Congress and signed by President Jimmy Carter. . . . CERCLA was rushed through Congress and the Oval Office in anticipation of the probable environmental policies of the soon-to-be-inaugurated Reagan administration."). As the Fifth Circuit noted in *Amoco Oil Co. v. Borden, Inc.*, "because the final version was enacted as a 'last-minute compromise' between three competing bills, it has 'acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history.'" 889 F.2d 664, 667 (5th Cir. 1989) (citation omitted).

39. These sites included the Love Canal and S-Area sites in Niagara Falls, New York, the Valley of the Drums site in Sherpardsville, Kentucky, the Chemical Control site in Elizabeth, New Jersey, and the Occidental Chemical Company site in Lathrop, California. *See* H.R. REP. NO. 96-1016, at 18–20 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 6119, 6121–23. *See generally* Martina E. Cartwright, *Superfund: It's No Longer Super and it Isn't Much of a Fund*, 18 TUL. ENVTL. L.J. 299, 301–06 (2005) (describing the legislative and political history of CERCLA).

designed CERCLA to impose strict liability[40] to avoid many of the proof requirements that limited the reach of common law culpability-based liability schemes.[41] To that end, CERCLA liability is status-based; that is, liability is imposed on any party meeting the definition of "covered persons" (i.e., liable parties) under the statute.[42] CERCLA section 107(a)(1)–(4)[43] identifies four classes of covered persons: (1) the present owner and operator[44] of a "facility" (e.g., contaminated property),[45] (2) any "person" [46] who owned or operated a facility at the time of the disposal[47] of a hazardous substance at the facility; (3) any person who arranges for the disposal of a hazardous substance at the facility of another;[48] and (4) any person who transports a hazardous substance to a disposal facility.[49]

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40. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) ("Congress intended that responsible parties be held strictly liable . . . .").

41. A House of Representatives report on the CERCLA legislation contrasted the proposed statute with state tort law schemes, concluding:

> Existing state tort laws present a convoluted maze of requirements under which a victim is confronted with a complex of often unreasonable requirements with regard to theories of causation, limited resources, statutes of limitations and other roadblocks that make it extremely difficult for a victim to be compensated for damages.

H.R. Rep. No. 96-1016, at 63–64 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 6119, 6140–41.

42. 42 U.S.C. § 9607(a) (2000).

43. 42 U.S.C. §§ 9607(a)(1)–(4).

44. CERCLA defines the "owner or operator" of a facility as "any person owning or operating such facility," excluding "a person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the . . . facility." CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (2000). This circular definition of "owner or operator" has generated considerable debate regarding whether federal or state law should be used to fill the interstices in the statutory definition of "owner or operator" in connection with issues such as piercing the corporate veil and successor liability. *See infra* notes 273–76 and accompanying text.

45. CERCLA § 101(9)(b), 42 U.S.C. § 9601(9)(B), broadly defines "facility" to include "any site or area where a hazardous substance has been deposited, stored, disposed of or placed, or otherwise come to be located [except] any consumer product in consumer use or any vessel."

46. CERCLA § 101(21), 42 U.S.C. § 9601(21), defines "person" to include "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body."

47. CERCLA § 101(29), 42 U.S.C. § 9601(29), incorporates the definition of "disposal" used in section 1004 of the Solid Waste Disposal Act, 42 U.S.C. § 6903(3) (2000), which provides that:

> [t]he term 'disposal' means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

See infra note 314 and accompanying text.

48. Courts have expansively interpreted the scope of "arranger" liability to include such persons as (a) those who arrange to dispose of hazardous substances at landfills, *see* B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1201 (2d Cir. 1992) (municipality arranging to dispose of waste at landfill potentially liable as CERCLA "arranger"), (b) toll formulators (pesticide

CERCLA does not require proof of causation to establish liability.[50] Section 107(b) provides a section 107(a) "covered person with just three liability defenses: (1) act of God;[51] (2) act of War;[52] and (3) act of a third party.[53] With a few narrow exceptions, no other defenses are available to

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producers who send chemicals to a plant where the chemicals are mixed with inert materials and shipped back to the producer as a finished product with the understanding that some of the chemicals will be lost during the formulation process), *see* United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1375, 1381 (8th Cir. 1989) (holding that toll formulators could be liable as arrangers and noting that "[c]ourts have also held defendants 'arranged for' disposal of wastes at a particular site even when defendants did not know the substances would be deposited at that site or in fact believed they would be deposited elsewhere"), and (c) persons who send material containing hazardous substances to recyclers with the knowledge that some of the material will not be returned, *see* Cal. Dept. of Toxic Substances Control v. Interstate Non-Ferrous Corp., 298 F. Supp. 2d 930, 962–65 (E.D. Cal. 2003) (holding that owner of smelting facility and truck-parts company which took waste materials to facility for processing did not qualify for the 42 U.S.C. § 9627 affirmative defense to arranger liability for certain recyclers of scrap paper, plastic, glass, textiles, or rubber).

49. CERCLA section 107(a), 42 U.S.C. § 9607(a) (2000), defines these covered persons as follows:

> (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 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 . . . .

50. *See, e.g.*, Kalamazoo River Study Group v. Menosha Corp., 228 F.3d 648, 656–57 (6th Cir. 2000). However, a defendant may show a lack of causation as part of a divisibility affirmative defense. *Id. See also infra* notes 75, 96, 99–100 and accompanying text.

51. CERCLA § 107(b)(1), 42 U.S.C. § 9607(b)(1).

52. CERCLA § 107(b)(2), 42 U.S.C. § 9607(b)(2).

53. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3). *See, e.g.*, Lincoln Props., Ltd. v. Higgins, 823 F. Supp 1528, 1539–44 (E.D. Cal. 1992) (describing requirements of third party defense and holding that defendant county met burden in connection with alleged releases of dry cleaning solvents from county sewers). The third party defense is difficult to establish, requiring the defendant to show

> by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions . . . .

CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3). Section 107(b)(3) excludes from the definition of a "third party" a person with whom the defendant had a "contractual relationship." CERCLA section 101(35), 42 U.S.C. § 9601(35), provides that the term "contractual relationship" includes instruments transferring title or possession to real property unless the defendant (a) acquired the property after the disposal of the hazardous substances on the property; (b) otherwise satisfies the requirements of the third party defense; (c) cooperates fully with actions responding to the

defeat CERCLA liability.[54] Moreover, CERCLA is retroactive, applying to pre-1980 conduct by PRPs.[55]

CERCLA applies to the release or threatened release of any "hazardous substance," a broadly defined term incorporating a wide variety of contaminants.[56] Congress, however, expressly excluded petroleum from the definition of "hazardous substance," placing the costs of responding to petroleum contamination beyond CERCLA's reach.[57] The procedures and standards for responding to a release of hazardous substances under CERCLA[58] are set forth in the "National Contingency Plan" (NCP),[59] a set of EPA regulations that predates CERCLA itself.

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release of hazardous substances; and (d) the defendant (i) neither knew or had reason to know at the time of acquisition of the disposal, or (ii) is a government entity that acquired the property by escheat or the power of eminent domain, or (iii) the defendant acquired the property by inheritance or bequest.

54. *See, e.g.*, W. Props. Serv. Corp. v. Shell Oil Co., 358 F.3d 678, 692–93 (9th Cir. 2004) ("[E]quitable defenses such as laches are not available as a bar to section 107(a) liability"); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989) (summary judgment of defendant's liability appropriate if plaintiff establishes prima facie case and defendant cannot demonstrate genuine issue of material fact supporting a section 107(b) defense); Stanley Works v. SnyderGeneral Corp., 781 F. Supp. 659, 667–68 (E.D. Cal. 1990) (equitable defenses unavailable to preclude CERCLA liability). CERCLA also exempts certain activities from liability. *See, e.g.*, CERCLA § 107(j), 42 U.S.C. § 9607(j) (federally permitted releases); § 107(i), 42 U.S.C. § 9607(i) (federally registered pesticide discharges); § 107(d), 42 U.S.C. § 9607(d) (persons acting pursuant to the NCP or following orders given by an on-site response coordinator appointed under the NCP). In 2002, Congress added two narrow affirmative defenses to CERCLA liability, found in sections 107(o) (*de micromis* generators of waste at NPL sites before April 1, 2001) and 107(q) (certain owners or operators of properties contiguous to upgradient contamination sources). 42 U.S.C.A. §§ 9607(o), (q) (West 2005).

55. *See, e.g.*, United States v. Alcan Aluminum Corp., 315 F.3d 179, 188–89 (2d Cir. 2003) (holding that CERCLA liability is retroactive and that application of retroactive CERCLA liability is constitutional), *cert. denied*, 540 U.S. 1103 (2004).

56. Section 101(14) of CERCLA, 42 U.S.C. § 9601(14) (2000), defines "hazardous substance" to mean:

> (A) any substance designated pursuant to . . . the Federal Water Pollution Control Act [33 U.S.C. § 1321(b)(2)(A)], (B) any element, compound, mixture, solution, or substance designated pursuant to section 102 of this Act [42 U.S.C. § 9602], (C) any hazardous waste having the characteristics identified under or listed pursuant to . . . the Solid Waste Disposal Act [42 U.S.C. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. §§ 6901, et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under . . . the Federal Water Pollution Control Act [33 U.S.C. § 1317(a), (E) any hazardous air pollutant listed under . . . the Clean Air Act [42 U.S.C. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to . . . the Toxic Substances Control Act [15 U.S.C. § 2606].

57. CERCLA § 101(14), 42 U.S.C. § 9601(14).

58. CERCLA § 105, 42 U.S.C. § 9605.

59. National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 C.F.R. pt. 300 (2005). The NCP was first published in 1968, twelve years before the enactment of CERCLA, primarily to provide guidance to governmental agencies responding to oil spills under the Clean Water Act. *See* Robert P. Dahlquist, *Consistency with the National Contingency Plan in 2000 and Beyond*, NAT. RESOURCES & ENV'T, Summer 2000, at 32. The NCP was amended in

A core policy choice underlying CERCLA is that "the polluter pays"[60]: PRPs—rather than the taxpayers—should bear the cost of cleaning up hazardous substance contamination, even in the absence of tort-like culpability. CERCLA created both governmental and private remedial schemes to enforce this policy choice.

1. *Government Remedies*

CERCLA gives the government several tools to compel responsible parties to contribute to the cleanup of a site. First, the EPA may issue a unilateral administrative order directing a responsible party to take specific measures to clean up the site pursuant to CERCLA section 106.[61]

Second, the agency may undertake remedial measures itself pursuant to section 104(a)(1)[62] and then sue the responsible party or parties under section 107(a)(4)(A)[63] to recover the costs of responding to and cleaning up the release of hazardous substances ("response costs").[64] Section 107(a)(4)(A) provides that PRPs (that is, persons within the section 107(a)(1)-(4) categories of covered persons) shall be liable for "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."[65]

1980 (amendments adopted March 19, 1980, nine months before CERCLA was enacted), 1982, 1985 and 1990. *Id.* The NCP describes its purpose as "to provide the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants." 40 C.F.R. § 300.1. Among other things, the NCP requires (a) the development of a remedial investigation report to determine the nature and scope of a contamination problem and a remedial feasibility study to identify and evaluate potential cleanup options, 40 C.F.R. § 300.430(a)(2); (b) the selection of a remedy in compliance with "all otherwise legally applicable or relevant and appropriate federal, state and local requirements" (e.g., cleanup standards and permit requirements), 40 C.F.R. § 300.430(e)(9)(iii)(B); and (c) that a private party undertaking cleanup provide the opportunity for public comment on the selection of a course of action. 40 C.F.R. § 300.700(c)(6).

60. *See, e.g.*, United States v. CDMG Realty Co., 96 F.3d 706, 717 (3d Cir. 1996) (Congress enacted CERCLA "to facilitate the cleanup of potentially dangerous hazardous waste sites" and "to force polluters to pay the costs associated with their pollution") (citations omitted); United States v. Alcan Aluminum Corp., 964 F.2d 252, 258 (3d Cir. 1992) (CERCLA was "designed to force polluters to pay for costs associated with remedying their pollution."); S. REP. NO. 96-848, at 13 (1980) (one of CERCLA's primary objectives is "assuring that those who caused chemical harm bear the cost of that harm . . . .").

61. 42 U.S.C. § 9606(a) (2000).

62. 42 U.S.C. § 9604(a)(1).

63. 42 U.S.C. § 9607(a)(4)(A).

64. Under CERCLA section 101(25), 42 U.S.C. § 9601(25), the term "response" means "remove, removal, remedy, and remedial action; all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." Generally speaking, "removal actions" involve short term responses to releases or threatened releases of hazardous substances, while "remedial actions" involve actions consistent with a permanent remedy taken instead of or in addition to removal actions in response to a release or threatened release of hazardous substances. CERCLA §§ 101(23), (24), 42 U.S.C. §§ 9601(23), (24).

65. 42 U.S.C. § 9607(a)(4)(A).

2. *Private Party Cleanup Cost Recovery*

CERCLA also provides a private party remedial scheme to complement government remedies. The availability of a private response cost remedy is particularly significant at multiple PRP sites where one PRP takes the lead (at its own initiative or at the direction of a regulatory agency) in cleanup activities.[66] The lead PRP may spend money in excess of what it perceives to be its fair share of cleanup responsibility.[67] As enacted in 1980, CERCLA appeared to address this concern by authorizing anyone who conducts a cleanup to then sue other PRPs under CERCLA for cost recovery. Section 107(a)(4)(B) provides that PRPs shall be liable for "any other necessary costs of response incurred by *any other person* consistent with the national contingency plan."[68] To establish a prima facie case for cost recovery under section 107(a)(4)(B), a private "plaintiff must prove four elements: (1) the site is a 'facility'; (2) a release or threatened release of hazardous substance has occurred; (3) the release has caused the plaintiff to incur 'necessary costs of response' consistent with the NCP; and (4) the defendant falls within one of the four categories" of section 107(a)(1)-(4) covered persons (i.e., PRPs).[69]

CERCLA does not create a private right of action for any monetary claim other than recovery of cleanup costs. For example, there is no CERCLA remedy for personal injury damages or diminution in property value caused by the release of hazardous substances.[70] A plaintiff seeking

66. At sites with a large number of PRPs, a committee representing a subset of all PRPs may take the lead conducting a cleanup. *See, e.g.*, David B. Graham & Richard B. Stoll, *Negotiating Waste Site Cleanups*, 573 PRACTICING LAW INST. CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES, 337, 354–66 (1987) (describing PRP committee operations and relations with agencies and non-cooperating PRPs at large multi-PRP sites).

67. A current landowner, for example, may wish to take the lead with a voluntary cleanup in the absence of contemporaneous financial contribution from other PRPs in order to restore the value of her property or avoid statutory penalties for non-compliance with a cleanup order.

68. 42 U.S.C. § 9607(a)(4)(B) (emphasis added). The phrase "any other person" refers to persons other than the United States, States, or Indian tribes who have a right of cost recovery under the preceding subsection, 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A). *See supra* notes 62–65 and accompanying text, and *infra* note 350.

69. Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc., 240 F.3d 534, 541 (6th Cir. 2001); *accord* Carson Harbor Vill., Ltd. v. County of Los Angeles, 433 F.3d 1260, 1265 (9th Cir. 2006); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 347–48 (6th Cir. 1998). A minority view holds that consistency with the NCP is not an element of a prima facie section 107(a)(4)(B) liability case. *See infra* note 265 and accompanying text.

70. *See, e.g.*, Artesian Water Co. v. Gov't of New Castle County, 659 F. Supp. 1269, 1285 (D. Del. 1987) ("Congress in enacting CERCLA clearly manifested an intent not to provide compensation for economic losses or for personal injury resulting from the release of hazardous substances.").

to assert a claim for non-cleanup cost damages must rely on state law theories of recovery.[71]

3. *Joint and Several Liability under CERCLA*

Although CERCLA explicitly defines who is liable for response costs, it is silent with respect to the scope of that liability. Congress considered including in the statute a variety of factors that courts could weigh in order to decide between imposing joint and several liability or only several liability in a particular case.[72] In the end, however, Congress left this issue to the courts.[73] By the mid-1980s, courts generally concluded that liability to the government under CERCLA section 107(a) was joint

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71. While CERCLA does not create non-cleanup cost remedies for private parties, it nevertheless imposes on the states a "federally required commencement date" in connection with the tolling of statutes of limitations on state law remedies. CERCLA section 309(a)(1), 42 U.S.C. § 9658(a)(1) (2000), provides that the "federally required commencement date" (defined in § 309(b)(4) as "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damage [allegedly caused by a CERCLA hazardous substance, pollutant or contaminant] were caused or contributed to by the hazardous substance or pollutant or contaminant concerned") shall be the commencement date for applicable state statutes of limitations in the event that application of the state statute would otherwise provide for a shorter limitations period. *See, e.g.*, Union Pac. R.R. v. Reilly Indus., Inc., 215 F.3d 830, 840 (8th Cir. 2000) (holding that federally required commencement date preempts state statute of limitations if state law claims based on exposure to hazardous substances released to the environment and state law otherwise would provide for earlier commencement date); *accord* Freier v. Westinghouse Elec. Corp., 303 F.3d 176, 196–97 (2d Cir. 2002); *see also supra* note 35.

72. In 1980, the House passed the "Gore Amendment" (introduced by then-Representative Albert Gore), which would have identified in CERCLA the following factors which might persuade a court to reject joint and several liability where the harm is indivisible:

> (1) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished; (2) the amount of the hazardous waste involved; (3) the degree of toxicity of the hazardous waste involved; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (6) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.

126 Cong. Rec. 26,779, 26,781 (Sept. 23, 1980). The Senate did not adopt the Gore Amendment. *See* Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F. Supp. 1100, 1116–17 (N.D. Ill. 1988) (reviewing legislative history on joint and several liability). While the Gore Amendment factors did not become part of CERCLA, courts have used them to allocate costs in CERCLA contribution actions. *See, e.g.*, United States v. Consolidation Coal Co., 345 F.3d 409, 413 (6th Cir. 2003) (recognizing that Gore Amendment factors are commonly used but not exclusive allocation criteria).

73. *See, e.g.*, United States v. A & F Materials Co., 578 F. Supp. 1249, 1255 (S.D. Ill. 1984) ("Congress intended the courts to enforce CERCLA by applying evolving principles of common law on a case by case basis."); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 806–08 (S.D. Ohio 1983) (reviewing legislative history and concluding that scope of CERCLA liability to be determined from "traditional and evolving principles of common law.").

and several.[74] A defendant could avoid joint and several liability only by demonstrating that the environmental harm at the site was divisible and that a reasonable basis existed for apportioning liability to hold the defendant responsible only for the contamination that the defendant caused.[75] The courts concluded that liability under section 107(a) for costs incurred by private parties was similarly joint and several.[76] As discussed more fully in Part II(D), *infra*, these decisions regarding the scope of liability imposed by a private CERCLA section 107(a) claim unintentionally laid the groundwork for much of the uncertainty created by the Supreme Court's *Aviall* decision.[77]

B. Early Private Cleanup Cost Claims under CERCLA

In the early 1980s, PRPs conducting voluntary cleanups (i.e., cleanups conducted at the PRP's own initiative or at the direction of a regulatory agency, rather than by a court order) started using CERCLA to recover cleanup costs from other PRPs. Some courts permitted these PRP v. PRP actions as direct cost recovery claims under CERCLA section 107(a)(4)(B) (i.e., an action by "any other person" to recover necessary costs of response consistent with the NCP).[78] Other courts found that claims by one PRP against another PRP sounded in

74. *See Chem-Dyne Corp.*, 572 F. Supp. at 810 (joint and several liability applied under section 107(a) at sites with indivisible harm); *see also* John M. Hyson, *"Fairness" and Joint and Several Liability in Government Cost Recovery Actions Under CERCLA*, 21 HARV. ENVTL. L. REV. 137, 150–60 (1997) (describing development by courts of joint and several liability standards in CERCLA cases); *cf. A & F Materials Co.*, 578 F. Supp. at 1256–57 (court has power to impose joint and several liability but may apportion damages according to Gore factors).

75. *See, e.g.*, United States v. Alcan Aluminum Corp., 990 F.2d 711, 722 (2d Cir. 1993) (PRP may avoid liability by showing that its waste did not contribute more than background levels of contamination); United States v. Alcan Aluminum Corp., 964 F.2d 252, 270–71 (3d Cir. 1992) (if PRP shows harm divisible and reasonable basis for apportionment, it should be held liable only for the response costs relating to that portion of the harm to which it contributed).

76. *See, e.g.*, Bedford Affiliates v. Sills, 156 F.3d 416, 423–24 (2d Cir. 1998) (reasoning that because a section 107(a)(4)(B) claim imposes joint and several liability at site with indivisible harm, a PRP may only bring section 113(f) claim to recover costs in excess of its *pro rata* share); New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1121–22 (3d Cir. 1997) (PRP may only assert section 113(f) contribution claim because it would be unfair for liable plaintiff to impose joint and several liability under section 107(a) claim); Rumpke of Ind., Inc. v. Cummins Engine Co., 107 F.3d 1235, 1240 (7th Cir. 1997) (section 107(a)(4)(B) claim imposes joint and several liability and may be maintained by current landowner in lieu of section 113(f) contribution claim if current owner did not add contamination to site).

77. *See infra* notes 97–154 and accompanying text.

78. *See, e.g.*, Walls v. Waste Res. Corp., 761 F.2d 311, 318 (6th Cir. 1985) ("Allowing a private action to recover response costs from responsible parties under section 9607(a)(4)(B) is thus consistent with both the language of section 9607(a)(4)(B) and with the congressional purpose underlying CERCLA as a whole."); Pinole Point Props., Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 291 (N.D. Cal. 1984) (current landowner PRP has standing to sue other PRPs under section 107(a)(4)(B)); City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1143 (E.D. Pa. 1982) (dump site owner may bring section 107(a) cost recovery action against other PRPs).

contribution because they involved claims by one liable party against another.[79] Although the original version of CERCLA did not contain an express right of contribution, courts in the early 1980s consistently held that a PRP incurring cleanup costs could assert a contribution claim against other PRPs, either as a matter of federal common law[80] or as implied under section 107(a).[81]

Claims by one PRP against another PRP for cleanup costs have been quite common under CERCLA because one PRP (voluntarily or involuntarily) often incurs cleanup costs in excess of what she perceives to be her equitable share. Cleanup cost litigation among PRPs is substantially a function of the joint and several liability any PRP has to the government. Regulatory agencies usually have little incentive to issue cleanup orders against any more PRPs than necessary to ensure satisfactory site remediation. For example, assume that for many years one hundred companies (i.e., "arrangers" within the meaning of CERCLA section 107(a)(3)) disposed of waste on Blackacre with the permission of Blackacre's former owner (i.e., the owner of a "facility" at the time of "disposal" within the meaning of CERCLA section 107(a)(2)). Assume also that the current owner of Blackacre cannot qualify for a CERCLA section 107(b) defense and thus is liable under CERCLA section 107(a)(1) as the current owner and operator of contaminated property. The current owner, past owner, and one hundred arrangers are all PRPs under CERCLA. Finally, assume that the current owner has the financial ability to pay for a satisfactory cleanup of the property.

An environmental regulatory agency may have the authority to issue cleanup orders against the one hundred arrangers and Blackacre's former owner, but may choose instead to issue an order only against the current owner of Blackacre. Focusing regulatory enforcement activity only on the current owner would be efficient for the agency, saving the time and

79. In *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994), the Supreme Court observed that "[i]n its original form CERCLA contained no express provision authorizing a private party that had incurred cleanup costs to seek contribution from other PRPs. In numerous cases, however, district courts interpreted the statute—particularly the section 107 provisions . . .—to impliedly authorize such a cause of action." (footnote omitted). *See also* Kristian E. Anderson, Note, *The Right to Contribution for Response Costs Under CERCLA*, 60 NOTRE DAME L. REV. 345 (1985) (discussing pre-SARA analytical framework for contribution in CERCLA cases).

80. *See, e.g.*, United States v. New Castle County, 642 F. Supp. 1258, 1265–68 (D. Del. 1986) ("Congress intended federal courts to develop CERCLA contribution as a matter of federal common law."); Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 1489 (D. Colo. 1985) (Congress intended CERCLA liability issues, including contribution, to be determined under evolving principles of federal common law); United States v. Ward, No. 83-63-CIV-5, 1984 WL 15710, at *4 (E.D.N.C. 1984).

81. *See, e.g.*, Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27, 31 (E.D. Mo. 1985) ("CERCLA implicitly recognizes a right to contribution.").

transaction costs required to locate, coordinate cleanup efforts among, and potentially litigate with the former owner of Blackacre and one hundred arranger PRPs. Moreover, the current owner can be easily located and has an interest in cleaning up the property both to satisfy regulatory obligations and to restore the value of her asset.

Under these circumstances, the current owner likely would be forced to incur cleanup costs far in excess of her equitable share, and it follows that she would have an obvious interest in getting the other PRPs to share in these costs. Through the mid-1980s, the current owner would have been able to use CERCLA to recover those excess costs from other PRPs, either through a direct CERCLA section 107(a)(4)(B) action (as "any other person" incurring response costs) or an implied contribution action.

C. SARA: Congress Creates an Express Right to Contribution

In 1986, Congress amended CERCLA by enacting the Superfund Amendment and Reauthorization Act (SARA). The SARA amendments addressed a wide range of CERCLA issues, including the right to contribution. Congress added section 113(f)(1), which provides that:

> [a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.[82]

Congress also added sections 113(f)(2)[83] and (3)[84] expressly to authorize contribution rights for parties entering into CERCLA settlements and

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82. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (2000).

83. Section 113(f)(2), 42 U.S.C. § 9613(f)(2), provides:

> 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. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

84. Section 113(f)(3), 42 U.S.C. § 9613(f)(3), provides:

> (A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

added section 113(g)(3)[85] to provide a statute of limitations for the newly-created express rights to contribution.

As with much of CERCLA, the legislative history underlying the SARA contribution amendments is limited and murky. On the one hand, it may well be that by adopting section 113 as part of the SARA amendments, Congress intended to "remov[e] any doubt as to the right of contribution"[86] and to "clarify" and "confirm" contribution rights.[87] But to what contribution rights did Congress refer? The first sentence of section 113(f)(1) makes clear that a PRP could bring a contribution action against another PRP during or after a civil action under section 106[88] or section 107(a).[89] In other words, the first sentence of section 113(f)(1) confirms that a contribution action would be available to a PRP if that PRP first was sued under section 106 or 107(a). Section 113(f)(1) also makes clear that any such action would be "governed by Federal law" and that contribution claims would be resolved by allocating response costs among liable parties "using such equitable factors as the court determines are appropriate."[90]

But what—if anything—did Congress have in mind with regard to CERCLA claims brought by a PRP who had not first been sued under section 106 or 107(a)? This is not an uncommon scenario. To the contrary, most private CERCLA claims involve claims by a PRP plaintiff

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

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

85. CERCLA § 113(g)(3), 42 U.S.C. § 9613(g)(3) provides, among other things, that:

No action for contribution for any response costs or damages may be commenced more than 3 years after—(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or (B) the date of an administrative order under § 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

86. 131 Cong. Rec. 11,830 (Sept. 20, 1985) (statement of Sen. Stafford).

87. S. REP. NO. 99-11, at 4 (1985) (objective of proposed new contribution provision was to "clarif[y] 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"); H.R. REP. NO. 99-253, at 79 (1985), *as reprinted in* 1986 U.S.C.C.A.N. 2835, 2861.

88. CERCLA § 106, 42 U.S.C. § 9606 (2000), authorizes an action by the United States for an order requiring a PRP to abate an imminent and substantial endangerment to public health or the environment from a release or threatened release of a hazardous substance.

89. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1).

90. *Id.*

who has not first been sued herself. The federal government, which would initiate a section 106 civil action, is actively involved in an environmental regulatory capacity at only a small percentage of the nation's contaminated sites.[91] A PRP, rather than a government agency or a non-PRP private party, usually takes the lead incurring costs and conducting the cleanup. The PRP, therefore, typically would seek contribution from other PRPs without first having been sued in a cost recovery action under section 107(a) by someone else[92]—even though the language of section 113(f)(1) did not explicitly authorize such a claim.

The last sentence of section 113(f)(1) contains a savings clause: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title."[93] But what did this sentence intend to preserve? All cleanup cost claims by one PRP against another PRP where the plaintiff PRP has not first been sued? State law contribution claims? Implied contribution claims under section 107(a)? Federal common law contribution claims? Was it appropriate to characterize a claim by a plaintiff PRP who has not first been sued herself as a "contribution" claim in the first place? The legislative history sheds little light to resolve these questions.

Nevertheless, in the eighteen years before *Aviall* was decided, the courts, regulatory agencies, and regulated community appeared not to have been overly troubled by this statutory muddle. Instead, it was generally assumed after the SARA amendments that a PRP had a right to recover response costs from other PRPs under CERCLA. Thus, the issue PRPs raised before the courts after the SARA amendments was not whether a PRP had a right to recover response costs from another PRP. Rather, the courts were asked to decide under what section of CERCLA such a claim should be asserted. As discussed below, courts concluded that a PRP's cost recovery rights differed depending on the CERCLA section under which the PRP brought her claim.

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91. *See, e.g.*, Larry Schnapf, *Impact of* Aviall *on Real Estate and Corporate Transactions*, 20 Toxics L. Rep. (BNA) 607, 610 (2005) ("[S]tates bring over 70 percent of enforcement actions and the vast majority of contaminated sites are remediated under [state Superfund] programs . . . ."); *see also supra* notes 14–15 and accompanying text. There would, of course, be no need for the United States to bring a section 106 civil enforcement action so long as a PRP was acting to abate an imminent and substantial endangerment to public health or the environment through compliance with the terms of an administrative cleanup order.

92. A PRP may be sued under section 107(a) by a non-PRP in several situations, including a private cost recovery in the rare circumstance in which an "innocent" private party incurs cleanup costs; a cost recovery claim by a governmental agency following a cleanup conducted by the agency; or a claim by a governmental agency to recover the costs of overseeing a private cleanup. 42 U.S.C § 9607(a)(4)(A), (B). *See, e.g.*, United States v. E.I. Dupont De Nemours & Co., 432 F.3d 161, 179 (3d Cir. 2005) (en banc) (federal government oversight costs recoverable under section 107(a)(4)(A)); United States v. Lowe, 118 F.3d 399, 400–01 (5th Cir. 1997) (same).

93. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1).

D. Cost Recovery or Contribution? The Section 107/Section 113 Conundrum

After the SARA amendments, PRPs continued to bring cleanup cost claims against other PRPs. On the face of CERCLA, these claims would not seem controversial. Section 107(a)(4)(B) permitted claims against a PRP for any "necessary costs of response incurred by any other [i.e., non-federal government, state government, or Indian tribe] person consistent with the national contingency plan."[94] A PRP who incurred response costs would appear to fall squarely within the authorized category of "any other person" under section 107(a)(4)(B). A PRP plaintiff, therefore, could assert a section 107(a) cost recovery claim; the defendant could then assert a section 113(f)(1) contribution counterclaim against the liable plaintiff (or third party claims against other PRPs), allowing for an equitable allocation of cleanup costs. Cases interpreting the nature and scope of CERCLA liability, however, soon began to undermine what would appear to be a straightforward application of the statute.

As noted above, CERCLA does not specify whether or not section 107(a) cost recovery liability is joint and several.[95] In the early 1980s, courts came to hold that section 107(a) liability both to the government and to private plaintiffs was joint and several, subject to an affirmative defense of divisibility.[96] Following the enactment of CERCLA section 113(f), defendant PRPs objected with increasing frequency to PRP plaintiffs asserting section 107(a) claims, contending that these plaintiffs should be limited to section 113(f) contribution claims.[97] These defendants reasoned that it was improper for a PRP plaintiff to assert a claim for joint and several cleanup cost liability. Instead, they contended

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94. 42 U.S.C. § 9607(a)(4)(B).

95. *See supra* notes 72–73 and accompanying text.

96. *See supra* notes 74–76 and accompanying text.

97. This section 107/section 113 conundrum became the subject of scholarly debate. *See, e.g.*, Michael V. Hernandez, *Cost Recovery or Contribution?: Resolving the Controversy over CERCLA Claims Brought by Potentially Responsible Parties*, 21 HARV. ENVTL. L. REV. 83, 113 (1997) (arguing that a PRP who voluntarily cleans up a site can only file a joint and several cost recovery claim with defendants assuming orphan share risk; a PRP seeking only to share liability rather than remediate a site should be limited to several contribution liability, including portion of any orphan share); Karl Tilleman & Shane Swindle, *Closing the Book on CERCLA Section 107 "Joint and Several" Claims by Liable Private Parties*, 18 VA. ENVTL. L.J. 159, 177–78 (1999) (arguing that sections 107 and 113 work together to provide several liability remedy for PRP plaintiff); Jason E. Panzer, Note, *Apportioning CERCLA Liability: Cost Recovery or Contribution, Where Does a PRP Stand?*, 7 FORDHAM ENVTL. L.J. 437, 482 (1996) (arguing that the language and policy of CERCLA support joint and several cost recovery claims by plaintiff PRPs); William D. Araiza, *Text, Purpose and Facts: The Relationship Between CERCLA Sections 107 and 113*, 72 NOTRE DAME L. REV. 193, 200 (1996) (arguing that a PRP plaintiff should be permitted to bring section 107(a) cost recovery claim and litigate its own liability; if found liable the PRP could no longer proceed with a section 107(a) claim but could proceed with a section 113 contribution claim).

that where the plaintiff herself was liable for some of the contamination for which a defendant might also be liable, the plaintiff actually was asserting a contribution claim—a claim to recover costs in excess of the plaintiff's fair share of liability. The PRP plaintiff, defendants reasoned, should only be permitted to assert a CERCLA contribution claim under section 113(f)(1), a mechanism that would not impose joint liability, only several.

Whether or not a CERCLA-liable plaintiff could bring a section 107 claim mattered for two reasons: "orphan shares" and burdens of proof. An "orphan share" is the share of cleanup costs at a contaminated site equitably attributable to a PRP that is unable to pay. Orphan shares can arise because an individual or corporate PRP cannot be located or is insolvent, deceased, dissolved, or bankrupt. Similarly, because many sites were contaminated in whole or in part by activities that took place decades before discovery of the problem, the passage of time might make it impossible to determine the historic source of contamination. For example, assume that A, B, C, and D are PRPs for a $10 million cleanup of the contaminated Blackacre site. A, B, and C each contributed 30 percent of the contamination at the site and D, the current owner, contributed 10 percent. C, however, is insolvent. If D, the current owner, can impose joint and several liability, A and/or B may end up assuming C's 30 percent "orphan share." On the other hand, if D can only impose several liability under section 113(f), A, B, *and* D each will absorb their *pro rata* shares of C's "orphan" liability. Accordingly, at sites with substantial cleanup costs and large orphan shares, the PRP plaintiff's ability to assert a "windfall" joint and several section 107(a) claim and potentially avoid absorbing some or all of the orphan share herself became a critical issue.[98]

The difference between a joint and several liability claim and a contribution claim also mattered because of differences in the burdens of proof relating to cost allocation. A plaintiff asserting a joint and several liability claim can recover all claimed costs unless the defendant carries her burden of showing that the environmental harm at issue is divisible and that the defendant is only responsible for costs associated with her

98. *See, e.g.*, Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1303 (9th Cir. 1997) (holding that a PRP cannot assert a joint and several section 107(a) claim against other PRPs, because "those defendant-PRPs would end up absorbing all of the cost attributable to 'orphan shares'—those shares attributable to PRPs who either are insolvent or cannot be located or identified."); *cf.* Ninth Ave. Remedial Group v. Allis Chalmers Corp., 974 F. Supp. 684, 692 (N.D. Ind. 1997) (denying motion to dismiss joint and several section 107(a) claim on grounds that plaintiff had not admitted PRP status or been adjudicated liable under CERCLA, but warning that if defendants proved that plaintiff was a PRP the court could then allocate a portion of any orphan share to plaintiff).

discrete, divisible contribution to the contamination.[99] On the other hand, a plaintiff asserting a contribution claim would have the burden of demonstrating an equitable allocation of costs among all parties, and each defendant, in turn, could argue for an alternative equitable cost allocation.[100]

1. *Rewriting CERCLA: Section 107(a) Claims Unavailable to PRPs*

In the 1990s, the courts of appeals began to address whether a PRP plaintiff could bring a section 107(a) cost recovery action. By the time the Supreme Court decided *Aviall* in December 2004, the First,[101] Second,[102] Third,[103] Fourth,[104] Sixth,[105] Seventh,[106] Eighth,[107] Ninth,[108] Tenth[109] and

99. *See, e.g.*, United States v. Alcan Aluminum Corp., 964 F.2d 252, 270–71 (3d Cir. 1992) (if PRP shows harm divisible and reasonable basis for apportionment, it "should be held liable only for the response costs relating to that portion of the harm to which it contributed"); *see also supra* note 75.

100. *See, e.g.*, Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co., 142 F.3d 769, 776 & n.4 (4th Cir. 1998) (holding that a PRP may recover costs under section 113(f) rather than under section 107(a), and noting that under section 113(f) the district court would employ appropriate equitable allocation factors but, unlike a joint and several liability action under section 107(a), should not impose a divisibility of harm allocation burden on defendants).

101. *E.g.*, United Tech. Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, 100–01 (1st Cir. 1994); *see infra* notes 114–18 and accompanying text.

102. *E.g.*, Bedford Affiliates v. Sills, 156 F.3d 416, 425 (2d Cir. 1998); *see infra* note 135.

103. *E.g.*, New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1120 (3d Cir. 1997) (holding that section 107 imposed joint and several liability that would be inappropriate for a liable plaintiff, noting that "[e]very court . . . has come to the same conclusion: a section 107 action . . . may be brought only by *innocent* parties that have undertaken clean-ups. . . . We agree with the conclusion reached by our sister courts" (citations omitted)); *see infra* note 135.

104. *E.g.*, *Pneumo Abex Corp.*, 142 F.3d at 776.

105. *E.g.*, Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 356 (6th Cir. 1998); *see infra* note 125.

106. *E.g.*, Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 764 (7th Cir. 1994) (culpable PRP limited to section 113(f)(1) contribution action); *accord*, Rumpke of Ind., Inc. v. Cummins Engine Co., 107 F.3d 1235, 1239–40 (7th Cir. 1997) (section 107(a) action available to current landowner liable under section 107(a)(1) but who did not contribute to site contamination; all other PRPs limited to section 113(f) contribution action); *see infra* notes 130–33 and accompanying text.

107. *E.g.*, Dico, Inc. v. Chem. Co., 340 F.3d 525 (8th Cir. 2003). In *Dico*, the Eighth Circuit rejected an argument that *dicta* in *Key Tronic Corp. v. United States*, 511 U.S. 809, 818 (1994) (holding that private parties could not recover attorneys fees as response costs and in *dicta* describing section 107 as "impliedly authorizing private parties to recover cleanup costs from other PRP's") meant that a PRP could bring a section 107(a) claim. *Dico*, 340 F.3d at 530–31. Instead, the *Dico* court concluded that unless the plaintiff as the current owner of contaminated property could establish one of the section 107(b) affirmative defenses to liability it could only proceed with a contribution action under section 113(f). *Id.* at 531.

108. *E.g.*, Pinal Creek Group v. Newmont Mining Corp. 113 F.3d 1298, 1306 (9th Cir. 1997); *see infra* notes 119–27 and accompanying text.

109. *E.g.*, United States v. Colo. & E. R.R. Co., 50 F.3d 1530, 1536 (10th Cir. 1995) (holding that a claim between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make constituted the "quintessential claim for

Eleventh[110] Circuits had addressed the section 107/section 113 conundrum.[111] Each of these courts held that a PRP could *not* bring a section 107(a) cost recovery action against another PRP. Instead, these courts uniformly held that a PRP seeking to recover cleanup costs from another PRP under CERCLA was limited to a contribution action for several liability under section 113(f).[112] No federal appellate court reached a contrary conclusion. Moreover, none of these courts addressed whether a PRP who had not first been sued under sections 106 or 107(a) had standing to bring a section 113(f)(1) claim in light of the first sentence of the statute.[113] By drawing a bright line between section 107(a) claims and section 113(f) claims, the courts interpreted the seemingly plain "any other person" language of section 107(a)(4)(B) to mean "any other [innocent] person."

For example, in *United Technologies Corp. v. Browning-Ferris Industries*,[114] the First Circuit addressed the section 107/section 113 conundrum in the context of a statute of limitations dispute. The PRP plaintiff's cost claim would have been timely if brought under section

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contribution" and observing that, if a PRP could recover costs under section 107(a), "§ 113(f) would be rendered meaningless").

110. *E.g.*, Redwing Carriers v. Saraland Apartments, 94 F.3d 1489, 1513 (11th Cir. 1996) (holding that "when one liable party sues another liable party under CERCLA, the action is not a cost recovery action under section 107(a). Rather, it is a claim for contribution under section 113(f)").

111. The Fifth Circuit's three-judge panel in *Aviall* concluded that "a PRP cannot file a section 107(a) suit against another PRP; it must pursue a contribution action instead." Aviall Servs., Inc. v. Cooper Indus., Inc., 263 F.3d 134, 137 (5th Cir. 2001), *reh'g en banc*, 312 F.3d 677 (2002), *rev'd*, 543 U.S. 157 (2004). The three-judge panel decision was supplanted by the Fifth Circuit's en banc decision in *Aviall* that, in turn, was reversed by the Supreme Court. *Id. See also* Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672 (5th Cir. 1989) ("When one liable party sues another to recover its equitable share of response costs, the action is one for contribution, which is specifically recognized under CERCLA") (citing section 113(f)). *But see* OHM Remediation Servs. v. Evans Cooperage Co., 116 F.3d 1574, 1582 n.1 (5th Cir. 1997) ("We express no opinion . . . whether a PRP may seek to hold other parties jointly and severally liable under section 107(a) for response costs.").

112. *See supra* notes 101–11 and *infra* notes 114–44 and accompanying text.

113. "Any person may seek contribution from any other person who is liable or potentially liable under § 9607(a) of this title, during or following any civil action under § 9606 of this title or under § 9607(a) of this title. . . ." CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (2000). The Seventh Circuit in *Rumpke of Indiana, Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1241 (7th Cir. 1997) observed in *dicta* that

> [I]f it turns out that Rumpke is not the innocent party it portrays itself to be, then Rumpke will not qualify for the *Akzo* exception. It would still be entitled to seek contribution for its expenses from the other PRPs, assuming it met the requirements of § 113(f)(1). (We acknowledge, as other courts have, that this seems to provide a disincentive for parties voluntarily to undertake cleanup operations, because a § 106 or § 107(a) action apparently must either be ongoing or already completed before § 113(f)(1) is available. This appears to be what the statute requires, however).

See infra note 148.

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

107(a)(4)(B) but time-barred if brought under section 113(f).[115] The court held that plaintiff's claim was time-barred because a PRP could not bring a section 107(a) claim, concluding that:

> it is sensible to assume that Congress intended only innocent parties—not parties who were themselves liable—to be permitted to recoup the whole of their expenditures. By contrast, 42 U.S.C. section 9613(g)(3) allows a "non-innocent" party (*i.e.*, a party who himself is liable) only to seek recoupment of that portion of his expenditures which exceeds his *pro rata* share of the overall liability—in other words, to seek contribution rather than complete indemnity. The statutory language thus suggests that cost recovery and contribution actions are distinct and do not overlap.[116]

The court also rejected the argument that section 107(a)(4)(B) authorized all cost claims by liable parties except for derivative contribution claims, i.e., claims relating to costs paid to reimburse the government or other first-instance payers.[117] The court ironically concluded that, "[p]ut bluntly, a court cannot rewrite a statute by the simple expedient of calling a camel a horse, notwithstanding the obvious humps."[118]

2. *A Middle Ground: Sections 107 and 113 Working Together*

Some courts of appeal, while holding that a plaintiff PRP could only seek contribution under CERCLA rather than bring a joint and several liability claim under section 107, employed a more sophisticated analysis of the interrelationship between sections 107 and 113. These courts concluded that the two statutes worked together to create a contribution claim for CERCLA-liable parties. The Ninth Circuit's decision in *Pinal*

115. Plaintiff brought its claim 5 1/2 years after beginning construction of the remedial action. *Id.* at 98. CERCLA section 113(g)(2)(B) requires that a section 107(a) action be brought within six years after initiation of on-site construction of a remedial action, while section 113(g)(2)(B) (presumed by the court to apply to any section 113(f)(1) action) requires that a contribution action be brought within three years after the date of a judgment or settlement. 42 U.S.C. §§ 9613(g)(2)(B), (g)(3).

116. *United Tech. Corp.*, 33 F.3d at 100. The court reasoned that because some pre-SARA courts had characterized claims by PRPs as "contribution" claims (i.e., claims that did not permit joint and several liability), and Congress "confirmed" existing "contribution" rights by adding section 113 as part of the SARA amendments, it similarly confirmed that PRP claims should be characterized as "contribution" claims brought under SARA's contribution provisions. *Id.* at 101–02.

117. The court also found that limiting "contribution" to derivative claims would undermine CERCLA's goal of providing contribution protection to those who settled claims with the government pursuant to CERCLA section 122, 42 U.S.C. § 9622 (providing contribution protection to settling PRPs and allowing non-settling PRPs a reduction in judgment for response costs paid by the settling PRP). *United Tech.*, 33 F.3d at 102–03.

118. *Id.* at 102.

Creek Group v. Newmont Mining Corp.[119] is a leading example of this "middle ground" approach to the section 107/section 113 conundrum.

In *Pinal Creek*, plaintiff (an organization composed of three mining companies who had incurred cleanup costs at an Arizona hazardous waste site) sued other PRPs under CERCLA.[120] Although plaintiff had admitted that it was partly responsible for a portion of these cleanup costs, it asserted a claim for all of these costs and sought to impose joint and several liability on defendants.[121] Plaintiff reasoned that defendants could assert a contribution claim against plaintiff to recover that portion of the costs for which plaintiff would be responsible.[122] Defendants moved to dismiss the joint and several CERCLA claim for all the response costs plaintiffs incurred; the district court denied the motion.[123] On interlocutory appeal, the Ninth Circuit reversed.

The Ninth Circuit observed that "[b]ecause all PRPs are liable under the statute, a claim by one PRP against another PRP necessarily is for contribution. A PRP's contribution liability will correspond to that party's equitable share of the total liability and will not be joint and several. CERCLA simply does not provide PRPs who incur cleanup costs with a claim for the joint and several recovery of those costs from other PRPs."[124] The court concluded, however, that section 107(a) and section 113(f) overlap in connection with a cleanup cost claim by a liable plaintiff:

> Together, §§ 107 and 113 provide and regulate a PRP's right to claim contribution from other PRPs. *Key Tronic*, 511 U.S. at 814–18 (remedies in sections 107 and 113 described as "similar and somewhat overlapping"). The contours and mechanics of this right are now governed by § 113. Put another way, while § 107 created the right of contribution, the 'machinery' of § 113 governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 107. . . .The relationship between the two sections has been aptly described, thusly: Section 113(f), however, does not create the right of contribution—rather the source of a contribution claim is § 107(a). Under CERCLA's scheme, §107 governs liability, while section 113(f) creates a mechanism for apportioning that liability among responsible parties.[125]

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119. Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298 (9th Cir. 1997).

120. *Id.* at 1300.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 1301 (footnote omitted). The court also noted that "after balancing the equities as required by § 113," a court could find "that a particular PRP's equitable share of the total liability should be zero." *Id.* at 1301 n.3.

125. *Id.* at 1301–02 (citations omitted). A year later, the Sixth Circuit embraced this reasoning in *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, observing that "if § 113(f) is incorporated under § 107, then a § 113(f) action *is* an action to recover the necessary costs of response by any other person, as referred to in § 107. The action only happens to be an action for

The court also rejected plaintiff's argument that a "working" PRP, i.e., a PRP who has cooperated with agencies and incurred cleanup costs, should be rewarded for its initiative by being allowed to assert a claim for joint and several liability against non-cooperating PRPs.[126] Instead, the court noted that the district court "may take into account the degree of cooperation shown by a PRP when equitably allocating liability among PRPs under section 113(f)(1)."[127]

3. *Whither the Liable but Non-Culpable Plaintiff?*

The courts' uniform rejection of PRP claims under section 107(a) left a statutory interpretation question unanswered. If it would be inequitable for a liable PRP to bring a cost recovery action under section 107(a)(4)(B), what purpose then was served by the section 107(a)(4)(B) "any other person" private cost recovery remedy? Federal or state government agencies and Indian tribes could seek joint and several cost recovery under section 107(a)(4)(A). If a CERCLA-liable plaintiff could not sue under section 107(a)(4)(B), then for all practical purposes[128] only the rare non-liable, "innocent" owner of contaminated property—i.e.,

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contribution." 153 F.3d 344, 350 (6th Cir. 1998). The *Centerior Service* court concluded that "the right of contribution has always been established pursuant to § 107, yet only after the codification of § 113(f) was the right made explicit." *Id.* at 352. The Third Circuit in *New Castle County v. Halliburton NUS Corp.* similarly concluded that section 107 and 113 work together to provide the basis for a cleanup cost claim by a liable plaintiff under CERCLA, observing that "section 113 does not in itself create any new liabilities; rather, it confirms the right of a potentially responsible person under section 107 to obtain contribution from other potentially responsible persons." 111 F.3d 1116, 1122 (3d Cir. 1997). The Tenth Circuit recognized in *Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc.*, that while plaintiff PRP "cost apportionment actions must be brought under the rubric of § 113(f), that section does not of itself create any new liabilities. Rather, it simply confirms the right of a person potentially jointly and severally liable under § 107(a) to obtain contribution from other potentially liable persons." 100 F.3d 792, 800 (10th Cir. 1996). The court also rejected plaintiff's argument that characterizing a PRP voluntary cleanup cost claim as a contribution claim would mean that there would be no event (i.e., judgment or settlement) to trigger the section 113(g)(3) contribution statute of limitations. The *Bancamerica* court declined to decide what limitations period would apply to a voluntary PRP cleanup cost claim, noting that:

> [plaintiff's] argument is based on the incorrect premise that a contribution action is not brought under § 107. Thus, the choice presented by this premise, between a contribution action created and governed exclusively by § 113, on the one hand, and an independent 'cost recovery action' available to working PRPs exclusively under § 107, on the other, is a false one. As we have concluded above, a PRP's contribution action finds implicit recognition in § 107; § 113 merely regulates its implementation.

Id. at 1305 n.7.

126. *Id.* at 1304.

127. *Id.*

128. In theory, a private person who never owned the subject facility, never transported waste to the facility and never arranged for the disposal of a hazardous substance at the facility could incur response costs and bring a section 107(a)(4)(B) action. It is unlikely, however, that such an uninvolved private party would bestir herself to clean up another person's hazardous waste site.

persons who would qualify for a section 107(b) defense—could bring a private section 107(a)(4)(B) cost recovery action.[129]

The Seventh Circuit was the only circuit that appeared to find this question troubling. In 1994, that court in *Akzo Coatings, Inc. v. Aigner Corp.*[130] held that a PRP who contributed to contamination was limited to a section 113(f) action. The court went on to suggest in *dicta* that a section 107(a) action might be available to "a landowner forced to clean up hazardous materials that a third party spilled onto its property or that migrated there from adjacent lands."[131] Three years later, in *Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.*,[132] the Seventh Circuit permitted "a landowner PRP to bring a direct liability suit for cost recovery under section 107(a) against other PRPs (in this case 'arrangers'), if it contributed nothing to the hazardous conditions at the site."[133]

No other circuit embraced the so-called "*Akzo* exception;" indeed, some courts expressly rejected it as inconsistent with the CERCLA statutory scheme. For example, in 2004 the Ninth Circuit in *Western Properties Service Corp. v. Shell Oil Co.*[134] refused to find any "non-polluting PRP landowner exception" to *Pinal Creek* by holding that a liable plaintiff may only recover costs under CERCLA by a section 113(f) contribution action.[135] Plaintiff Western Properties had acquired property that it knew had been used decades earlier as a dump site for tar and

129. Section 107(a)(1) imposes CERCLA liability on the current owner and operator of a facility (e.g., contaminated property) whether or not that person caused any of the contamination. 42 U.S.C. § 9607(a)(1). The current owner may avoid liability by proving the section 107(b)(3) "third party defense," which would require the defendant to demonstrate that the contamination was caused solely by a third party, that she did not know of the contamination before acquiring the property, that she took all foreseeable precautions regarding the contamination, and exercised due care upon discovering the contamination. *See supra* note 53 and accompanying text.

130. Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761 (7th Cir. 1994).

131. *Id.* at 765.

132. Rumpke of Ind., Inc. v. Cummins Engine Co., 107 F.3d 1235 (7th Cir. 1997).

133. *Id.* at 1239–40.

134. 358 F.3d 678, 689 (9th Cir. 2004).

135. *Id.* at 692. The Ninth Circuit was not alone in its rejection of the "*Akzo* exception." For example, in *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998), the Second Circuit joined with other courts of appeals in holding that a PRP could not bring a section 107(a) joint and several cost recovery claim and instead was limited to a section 113(f) contribution action. *Id.* at 424. It also rejected the "*Akzo* exception" and *Rumpke*, concluding that accepting the argument that a party "innocent" of causing contamination should escape liability for the costs of cleanup "would carve out judicially an additional defense that Congress itself chose not to create." *Id.* at 425. *See also* New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1124 (3d Cir. 1997) (rejecting the "*Akzo* exception" and concluding "that a potentially responsible person under section 107(a), who is not entitled to any of the defenses enumerated under section 107(b), may not bring a section 107 action against another potentially responsible person").

sludge wastes.[136] The Ninth Circuit described some of the transactions and history leading up to Western Properties' acquisition of the site:

> The Wardlows [who sold the rights to dump waste on the site in the early 1940s for $2,000] sold the property in 1946 to some people named Thomas, and it came to be known as Thomas Ranch. The sludge was still conspicuously present. The gravel pits had become acid filled tar pits that ate cows. One local paper reported that '[a]s the years passed a crust of varying thickness formed over the top .... Animals that ventured too far out upon this crust disappeared forever into the gooey pits and cattle were lost in that manner on a number of occasions.' In 1955, the Thomases tried burning the waste, which created a 'sensational fire that burned throughout the day and into the night.' The resulting clouds and columns of black smoke attracted more than 600 curious viewers from far and near.[137]

Western Properties, which did nothing to further contaminate the site, worked with regulatory agencies to remediate the property at a cost of about $5,000,000.[138] It then filed claims under CERCLA sections 107 and 113 against various oil companies alleged to have disposed of waste on the site.[139] After a trial, the district court allocated 100 percent of the costs to the oil companies jointly and severally, and none to Western Properties because it had been a non-polluting landowner.[140]

The Ninth Circuit reversed and remanded, concluding that Western Properties, as a liable current landowner,[141] could only maintain a section 113(f)(1) several liability contribution claim[142] rather than a section 107(a) joint and several liability claim. The court found the "*Akzo* exception" inconsistent with the underlying rationale of *Pinal Creek* that "[s]ection 113 is a comprehensive scheme for adjustment of the burden among parties that are liable or potentially liable for § 107(a) recoveries."[143] The court found that "[t]he attractiveness [of a non-polluting

136. W. Prop. Servs. Corp. v. Shell Oil Co., 358 F.3d 678, 691 (9th Cir. 2004).

137. *Id.* at 682 (footnotes omitted).

138. *Id.*

139. *Id.*

140. *Id.* at 683.

141. *Id.* at 688. Western Properties admitted that it knew of the waste pits before it acquired the property. *Id.* at 688 n.43. The Ninth Circuit observed that "[e]ven if Western Properties had not known of the acid sludge pits, the statutory requirement [to establish the section 107(b)(3) third party defense that defendant show that it carried out all appropriate inquiries] would prevent it from claiming it had no reason to know of the cow-eating pits." *Id.*

142. *Id.* The court agreed with the Fifth Circuit's decision in *Aviall Services Inc. v. Cooper Indutries, Inc.*, 312 F.3d 677 (5th Cir. 2002) (en banc), *rev'd*, 543 U.S. 157 (2004), that a PRP could bring a section 113(f)(1) claim even if it had not first been sued under section 106 or section 107.

143. *W. Prop. Servs. Corp.*, 358 F.3d at 690.

landowner exception] is equitable, not textual, and the contribution statute already allows for equity to be taken into account."[144]

4. *Settled Pre-*Aviall *State of PRP Cleanup Cost Claims under CERCLA*

The first twenty years of CERCLA were marked by hard-fought litigation on a wide variety of issues as stakeholders and courts wrestled with the structure and limits of a hastily (and sometimes awkwardly) drafted statute that governed liability for, and allocation of, billions of dollars in cleanup costs. Remarkably, by early in the first decade of the twenty-first century, the state of CERCLA case law with regard to the allocation of cleanup costs among private parties appeared to have settled to the point where the regulated community could organize its behavior around certain predictable guidelines for the allocation of private cleanup cost responsibilities at multi-PRP sites.

The status of the case law was as follows: The lower federal courts had concluded that a PRP could not bring a CERCLA section 107(a) joint and several liability cost recovery claim against another PRP.[145] The courts had also concluded that, in order to recover costs under CERCLA, a PRP was relegated to bringing a section 113(f) several liability contribution claim to obtain an equitable allocation of cleanup costs. The availability of a section 113(f) contribution claim among PRPs became part of the conventional wisdom of CERCLA practice.[146] Courts did not question whether a PRP had standing to bring a section 113(f)(1) claim in light of the first sentence of the statute;[147] prior to *Aviall,* courts and litigants simply assumed that a PRP could always assert a section 113(f)

144. *Id.* Because the court allocated 100 percent of the costs jointly and severally to the defendants and failed to perform an equitable allocation of costs among all PRPs, including Western Properties, the court remanded the case to the district court to conduct another cost allocation analysis. *Id.* at 693. The court noted that issues such as whether the non-polluting landowner knew of the contamination before purchasing the property and received a discount in the purchase price (thus raising the potential of a windfall or "double-recovery" if the discount exceeded cleanup costs) or whether the landowner would have known of the contamination by exercising reasonable diligence were among the equitable factors that a court could take into account in arriving at a section 113(f)(1) cost allocation. *Id.* at 691.

145. The Seventh Circuit was the only Court of Appeals to permit a liable but non-culpable landowner to maintain a section 107(a) cost recovery claim. *See supra* notes 130–33 and accompanying text.

146. *See, e.g.*, Schnapf, *supra* note 91, at 608 (by the mid-1990s, it "became common for parties to perform cleanups voluntarily and then bring contribution actions under Section 113(f) to recover their response costs from other PRPs."); Arthur J. Spector, *Trustees to PRPs: "Please Join Me in Cleaning Up This Mess"*, 2003 AM. BANKR. INST. J. 24, 48 (considering the costs and volume of litigation involved, "one must assume that talented attorneys have had sufficient incentive and opportunity to explore statutory lacunae such as those created by a cramped reading of § 113(f)(1). Yet all that existed before [*Aviall*] arose are isolated dicta. The absence of direct precedent is like the dog that didn't bark.").

147. *See supra* note 113.

contribution claim against another PRP whether or not the plaintiff PRP first had been sued under CERCLA section 106 or 107 or had settled its CERCLA liabilities with the government.[148]

Cleanup cost litigation among PRPs thus began to take on a familiar pattern. If a PRP had taken the lead in a cleanup and wanted to take advantage of the strict, retroactive, status-based liability scheme of CERCLA, it would file a section 113(f)(1) contribution claim in federal court.[149] The evolution of CERCLA section 113(f) case law had provided the regulated community with "considerable guidance concerning (1) the critical factors that will be evaluated in the [cleanup cost] allocation process, and (2) the likely range of outcomes that [could] be expected in a judicially determined allocation of liability,"[150] giving rise to a trend

148. The Supreme Court in *Key Tronic Corp. v. United States*, 511 U.S. 809, 817 (1994), had observed in *dicta* that the SARA amendments appeared to have endorsed the pre-SARA cases finding an implied right to contribution under section 107(a), noting that CERCLA after SARA "now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107." Before the *Aviall* litigation, several Courts of Appeal had allowed section 113(f) actions by plaintiffs who had not first been sued under CERCLA section 106 or 107, although the standing of plaintiffs in those actions appears not to have been contested. *See, e.g.*, Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344 (6th Cir. 1998); PMC, Inc., v. Sherwin Williams Co., 151 F.3d 610 (7th Cir. 1998); Sun Co., v. Browning-Ferris, Inc., 124 F.3d 1187 (10th Cir. 1997); Amoco Oil v. Borden, Inc., 889 F.2d 664 (5th Cir. 1989). Before *Aviall*, there had been virtually no suggestion by the courts that the first sentence of section 113(f)(1) limited the availability of CERCLA contribution rights. The Seventh Circuit in *Rumpke of Ind., Inc. v. Cummins Engine Co., Inc*, 107 F.3d 1235, 1241 (7th Cir. 1997), questioned in *dicta* whether a PRP could bring a section 113(f)(1) contribution without first having been sued under section 106 or 107(a), an issue that was not before the court. Before *Aviall*, one district court in the Seventh Circuit interpreted the *Rumpke dicta* to require dismissal of a section 113(f)(1) claim brought by a PRP who had not first been sued under CERCLA, Estes v. Scotsman Group, Inc., 16 F. Supp. 2d 983, 989 (N.D. Ill. 1998), while another Seventh Circuit district court rejected the *Rumpke dicta* and permitted such an action. Ninth Ave. Remedial Group v. Allis Chalmers Corp., 974 F. Supp. 684, 690–91 (N.D. Ind. 1997). *See also* Ameritrust Co. Nat'l Ass'n v. Lamson & Sessions Co., No. 1:92CV0087, 1992 WL 738774, at *3 (N.D. Ohio May 21, 1992) (plaintiff could not bring section 113(f) claim when it could not "point to a third party that has threatened it with potential liability."); Rockwell Int'l Corp. v. IU Int'l Corp., 702 F. Supp. 1384, 1389 (N.D. Ill. 1988) (PRP plaintiff who had not first been sued under sections 106 or 107(a) could maintain CERCLA contribution declaratory relief action against other PRPs; actual payment of damages would occur if plaintiff later found liable). As noted by the court in *City of Waukesha v. Viacom, Inc.*, 221 F. Supp. 2d 975, 979 (E.D. Wis. 2002), in the course of holding that a PRP could maintain a section 113(f)(1) action without first having been sued under CERCLA, the absence of reported decisions on the section 113(f)(1) standing issue may reflect the common understanding among the bench and bar that such an action was available to any PRP. *Accord* Adobe Lumber, Inc. v. Hellman, 415 F. Supp. 2d 1070, 1076 (E.D. Cal. 2006) (permitting PRP plaintiff to proceed with section 107(a) action and noting that "the Ninth Circuit's pre-*Aviall* precedents assumed a cost recovery suit was not a prerequisite for a §113(f) contribution action.").

149. *See* CERCLA § 113(b), 42 U.S.C. § 9613(b) (2000) (federal courts have exclusive subject matter jurisdiction over claims "arising under" CERCLA).

150. Robert P. Dahlquist, *Making Sense of Superfund Allocation Decisions: The Rough Justice of Negotiated and Litigated Allocations*, 31 Envtl. L. Rep. (Envtl. L. Inst.) 11098, 11108 (2001).

toward increased settlements.[151] PRPs often joined claims under a state Superfund statute[152] or state common law tort theory with a CERCLA claim pursuant to the federal court's supplemental subject matter jurisdiction in order to fill liability or remedial gaps in the CERCLA statutory framework.[153]

At bottom, by 2004, a set of reliance interests had developed among persons dealing with contaminated property. Real estate developers, industries, and others with interests in contaminated property assumed the availability of a uniform national strict liability cleanup cost remedy under CERCLA whether or not they were deemed to be a PRP at a particular site. The availability of such a remedy provided an incentive for PRPs to comply "voluntarily" (i.e., without first having been sued) with environmental regulatory agency cleanup orders. It encouraged risk-taking in connection with the acquisition or development of brownfield or other potentially contaminated properties. It provided a common (federal court) forum for judges[154] to apply uniform rules of decision applicable to multi-PRP site cleanup cost disputes at any site in the country.

And then came *Aviall*. . . .

III. THE *AVIALL* DECISION AND ITS CONSEQUENCES

In *Cooper Industries, Inc. v. Aviall Services, Inc.*,[155] the Supreme Court of the United States was asked to decide whether a PRP could bring a CERCLA section 113(f)(1) contribution claim if the PRP had not first been sued under CERCLA sections 106 or 107(a). Recall that the first sentence of section 113(f)(1) provides that a contribution action

151. Richard G. Opper, *The Brownfield Manifesto*, 37 URB. LAW. 163, 168 (2005).

152. Most states have adopted their own "Superfund" statutes providing regulatory enforcement mechanisms for state environmental agencies and often providing private cost recovery and/or contribution remedies. *See infra* notes 327–37 and accompanying text.

153. 28 U.S.C. § 1367(a) (2000). State law cleanup cost claims might be asserted under an alternative state law liability scheme or to provide a vehicle for recovering costs that could not be recovered under CERCLA. *See, e.g.*, William W. Watts, *Common Law Remedies in Alabama for Contamination of Land*, 29 CUMB. L. REV. 37, 39 (1999) (describing use of common law theories for cost claims regarding Alabama sites as alternative to CERCLA); Michael B. Hingerty, *Property Owner Liability for Environmental Contamination in California*, 22 U.S.F. L. REV. 31, 37–42, 63–82 (1987) (describing California common law and statutory theories potentially applicable to landowners); *see also infra* notes 273–76 and accompanying text. Claims for property damage (e.g., diminution in value, stigma, lost use of property) or personal injury could not be asserted under CERCLA and thus could only be brought under state tort law.

154. There is no right to a jury trial under CERCLA. *See, e.g.*, Hatco Corp. v. W.R. Grace & Co., 59 F.3d 400, 414 (3d Cir. 1995) (no right to jury trial for CERCLA section 107(a) or section 113(f) claims); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 750 (8th Cir. 1986) (finding CERCLA cost recovery claims are equitable in nature so no right to jury trial).

155. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004).

could be brought "during or following any civil action under section [106] of this title or under section [107(a)] of this title."[156] Recall further that the last sentence of section 113(f)(1) provides 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 section [106] of this title or section [107] of this title."[157] As previously discussed, the courts of appeals had effectively assumed the existence of a CERCLA contribution remedy for any PRP seeking to recover cleanup costs from other PRPs; that assumption in substantial part provided the basis for their uniform conclusion that a PRP could not assert a section 107(a) cost recovery claim against another PRP.

In *Aviall,* the Supreme Court held that a PRP who had not first been sued under section 106 or 107(a) could *not* bring a section 113(f)(1) contribution action.[158] The Court, however, expressly declined to decide whether a PRP could recover costs from other PRPs under section 107(a) instead. As explained below, the *Aviall* decision caused a sea change in CERCLA practice, upset reliance interests relating to contaminated property litigation and transactions, and shined a spotlight onto a fundamental question of environmental federalism: what role—if any—should federal law play in private cleanup cost disputes?

A. Background Facts and the District Court Decision

The *Aviall* litigation concerned four aircraft engine maintenance facilities in Texas operated for many years by Cooper Industries, Inc.[159] The rebuilding of aircraft engines required the use of hazardous substances, some of which seeped into the ground and groundwater through spills and leaks from underground storage tanks.[160] In 1981, Cooper sold its aircraft engine maintenance business and facilities to Aviall Services, Inc.[161] Several years later, Aviall discovered that both it and Cooper had contaminated the facilities.[162] Aviall notified the Texas National Resource Conservation Commission (the "Commission") of the contamination; the Commission "informed Aviall that it was violating state environmental laws, directed Aviall to clean up the site, and

156. 42 U.S.C. § 9613(f)(1).

157. *Id.*

158. The Summer 2005 issue of the Tulane Environmental Law Journal includes articles about the *Aviall* litigation by counsel for each party. Richard O. Faulk & Cynthia J. Bishop, *There and Back Again: The Progression and Regression of Contribution Actions Under CERCLA*, 18 TUL. ENVTL. L.J. 323 (2005) (article by counsel for Aviall); Wm. Bradford Reynolds & Lisa K. Hsiao, *The Right of Contribution Under CERCLA After* Cooper Industries v. Aviall Services, 18 TUL. ENVTL. L.J. 339 (2005) (article by counsel for Cooper).

159. *Aviall,* 543 U.S. at 163.

160. *Id.* at 163–64.

161. *Id.* at 163.

162. *Id.* at 163–64.

threatened to pursue an enforcement action if Aviall failed to undertake remediation."[163]

Beginning in 1984, Aviall began to clean up the properties under the Commission's supervision. In 1995 and 1996, Aviall sold the properties to third parties but remained contractually responsible for the ongoing cleanup.[164] Overall, Aviall incurred cleanup costs in excess of $5 million in connection with the properties it purchased from Cooper.[165]

In August 1997, Aviall filed a complaint against Cooper in United States District Court for the Northern District of Texas.[166] The original complaint included a claim for cost recovery under CERCLA section 107(a) and a separate claim for contribution under CERCLA section 113(f)(1). Aviall later amended its complaint to combine its two CERCLA claims into a single CERCLA claim.[167] The combined claim alleged that under section 113(f)(1) Aviall was entitled to seek contribution because Cooper was a PRP under section 107(a).[168] Aviall also asserted state law claims against Cooper.[169]

Aviall and Cooper each moved for summary judgment on Aviall's combined section 113(f)(1) contribution claim.[170] In January 2000, the district court granted Cooper's motion. The court held that the first sentence of section 113(f)(1) limited the availability of a CERCLA contribution action to claims asserted during or following a section 106 or section 107(a) action, neither of which, Aviall conceded, had been asserted against it.[171] The court rejected Aviall's argument that its contribution claim was permitted under the savings clause of section 113(f)(1), concluding that "[t]his proviso is likely intended to ensure that parties who cannot fulfill the prerequisites of section 113(f)(1) are not precluded from bringing contribution claims that are otherwise available, such as under state law."[172] The district court thus dismissed Aviall's CERCLA claim without prejudice[173] and declined to retain supplemental jurisdiction over Aviall's state law claims.[174]

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163. *Id.* at 164.

164. *Id.*

165. *Id.*

166. *Id.*

167. Aviall contended that it amended its complaint to assert a combined section 107 and section 113 claim to conform with the Fifth Circuit's CERCLA pleading requirements set forth in *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 924 (5th Cir. 2000). *Id.* at 164 n.4.

168. *Id.* at 164.

169. *Id. See also* Aviall Servs. Inc. v. Cooper Indus., Inc., No. Civ.A.397CV1926D, 2000 WL 31730, at *1 (N.D. Tex. Jan. 13, 2000).

170. Aviall Servs. Inc. v. Cooper Indus., Inc., 2000 WL 31730, at *1.

171. *Id.* at *2.

172. *Id.*

173. *Id.* at *4 n.4. The court did not analyze whether Aviall could assert a section 107 claim against Cooper, relying on the amendment to Aviall's complaint to note that "[b]ecause Aviall does not assert an independent claim for recovery under section 107(a), the court need not

B. The Fifth Circuit Three-Judge Panel and En Banc Decisions

In August 2001, a divided Fifth Circuit panel affirmed the district court's decision.[175] The majority opinion by Judge Garza started its analysis from the premise—consistent with the holdings of other courts of appeals—that "a PRP cannot file a section 107(a) suit against another PRP; it must pursue a contribution action instead."[176] The court then examined the structure of section 113(f)(1) to reach its conclusion that a PRP could only bring a CERCLA contribution action during or following a section 106 or 107(a) action. First, it interpreted "contribution" to require "a tortfeasor to first face judgment before it can seek contribution from other parties."[177] Second, it interpreted "may" in the first sentence of section 113(f)(1) to mean "shall" or "must."[178] Third, it interpreted the savings clause in the last sentence of section 113(f)(1) to mean that "the

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decide whether Aviall, as a PRP, is precluded from maintaining such a claim against Cooper." *Id.* at *4 n.3. The court dismissed Aviall's CERCLA claim without prejudice "because Aviall arguably can bring such a claim against Cooper in the future if Aviall becomes subject to a CERCLA enforcement action that gives rise to a right of contribution." *Id.* at *4 n.4.

174. *Id.* at *4–5. The court did not question whether it had supplemental subject matter jurisdiction under 28 U.S.C. section 1367(a), but declined to exercise its discretion to retain such jurisdiction under 28 U.S.C. section 1367(c)(3) because it had dismissed all claims over which it had original jurisdiction. *Id.* at *5. The court expressed concern about "venturing *Erie*-type guesses" about how Texas courts would decide issues raised by Aviall's state law claims under the Texas Solid Waste Disposal Act and the Texas Water Code. *Id.*

175. Aviall Servs. Inc. v. Cooper Indus. Inc., 263 F.3d 134 (5th Cir. 2001). The *Aviall* litigation attracted the attention of scholars when it reached the Fifth Circuit. *See, e.g.*, Daniel C. Chang, Comment, *CERCLA: The Problems of Limiting Contribution Claims for Potentially Responsible Parties*, 35 LOY. L.A. L. REV. 1107, 1124–29 (2002) (arguing that to require section 106 or section 107(a) action before PRP can seek contribution undermines CERCLA policy); Brent J. Horton, *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 (2003) (proposing amendment to CERCLA section 113(f)(1) eliminating the requirement of prior or pending section 106 or 107 action against contribution plaintiff); Laurie M. Hughes, Comment, *Cleaning Up Federal CERCLA Jurisprudence: The Timing of Contribution Actions Under Section 113(f)*, 51 EMORY L.J. 1281, 1316 (2002) (arguing that PRPs should be able to bring CERCLA contribution action without prior or pending CERCLA action); *see also* Ronald G. Aronovsky, *Liability Theories in Contaminated Groundwater Litigation*, 1 J. ENVTL. FORENSICS 97, 104 (2000) (discussing *Aviall* after the district court decision).

176. *Aviall*, 263 F.3d at 137 (citing OHM Remediation Servs. v. Evans Cooperage Co., 116 F.3d 1574, 1583 (5th Cir. 1997)). *See supra* note 111.

177. *Aviall*, 263 F.3d at 138. The majority opinion relied on portions of the legislative history of SARA that quoted or paraphrased the language of the first sentence of section 113(f)(1). *Id.* at 140–41. It did not address pre-SARA case law recognizing contribution claims by PRP who had not first been sued under CERCLA or the effect of the section 113(f)(1) savings clause on such claims. Judge Wiener, in dissent, focused on those pre-SARA cases. *Id.* at 149–50.

178. *Id.* at 138–39 ("We have held that when the word 'may' is used as an enabling provision creating a cause of action (as it is here), it establishes an exclusive cause of action and means 'shall' or 'must.'"). In dissent, Judge Wiener objected that the majority's interpretation changed the phrase "[a]ny person may seek contribution [during or after a section 106 or 107(a) action]" in the first sentence of section 113(f)(1) to provide that any person "may *only*" seek contribution under such circumstances. *Id.* at 146.

statute does not affect a party's ability to bring contribution actions based on *state* law."[179] The majority opinion concluded by questioning the role of federal law in private cleanup cost disputes: "we do not believe that Congress wanted to afford a federally-based contribution right to a party merely because a state agency had found it to have violated a state environmental law."[180] Instead, it observed that "[p]arties may be able to rely on state environmental laws to recover costs from other liable parties."[181]

On December 19, 2001, the Fifth Circuit agreed to rehear the case en banc.[182] On November 14, 2002, by a 10-3 vote, the Fifth Circuit en banc reversed the three-judge panel's decision.[183] In a majority opinion by Judge Jones, the court concluded that "a PRP may sue at any time for contribution under federal law to recover costs it has incurred in remediating a CERCLA site," not just during or after a section 106 or section 107(a) action.[184] The court first examined the context in which Congress passed section 113(f)(1) and the policy reasons why Congress allowed contribution claims without a pre-existing section 106 or section 107(a) claim:

> First, a way had to be found to encourage cost-sharing among PRPs. Second, lower federal courts were implementing, albeit unevenly, contribution rights that did not depend on pre-existing EPA administrative orders and that did not arise solely "during or following" CERCLA enforcement actions. Third, the Supreme Court had cast doubt on the availability *vel non* of federal common law contribution claims, arguably including those under CERCLA. Section 113(f) was born as the "machinery" to govern and regulate

179. *Id.* at 139. Judge Wiener in dissent interpreted the savings clause to include all PRP claims for contribution "[i]n view of Congress's express intention to 'confirm' the federal common law of contribution under CERCLA . . . ." *Id.* at 150.

180. *Id.* at 145. In dissent, Judge Wiener dismissed as "interpretive sleight-of-hand" the majority's conclusion that a PRP could seek section 113(f)(1) contribution upon issuance of a section 106 administrative order (in contrast to "a civil action" under section 106 (the phrase used in section 113(f)(1) enforcing such an order)) but could not seek contribution with regard to costs incurred by a similar state agency order. *Id.* at 147.

181. *Id.* at 145.

182. By letter dated May 22, 2002, the Fifth Circuit ordered the United States to submit a brief addressing whether a party can bring a contribution claim under CERCLA section 113(f)(1) only if there is a prior or pending claim under section 106 or 107(a) against that party. Brief for the United States as Amicus Curiae, Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F.3d 677 (5th Cir. 2002) (en banc) (No. 00-10197), 2002 WL 32099835, at *1. The United States endorsed Cooper's interpretation of section 113(f)(1) before both the Fifth Circuit and the Supreme Court. *See infra* notes 208–16 and accompanying text.

183. Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F.3d 677 (5th Cir. 2002) (en banc).

184. *Id.* at 681.

> actions for contribution, "providing the details and explicit recognition that were missing from the text of section 107."[185]

Interpreting section 113(f)(1) against this background, the court observed that "it would seem odd that a legislature concerned with clarifying the right to contribution among PRPs and with facilitating the courts' development of federal common law apportionment principles would have rather arbitrarily cut back the then-prevailing standard of contribution."[186]

In contrast to the district court, the en banc Fifth Circuit majority found that the first sentence of section 113(f)(1) was permissive rather than exclusive, concluding that had Congress "intended to make contribution actions available 'only' after the referenced CERCLA [section 106 or 107(a)] lawsuits have been brought, it could have done so."[187] It then reconciled the first and last sentences of section 113(f)(1) "as logically complimentary, if somewhat unusual in this regard."[188] It determined that the savings clause "was enacted as confirmation that federal courts, in cases decided prior to SARA's enactment, had been right to enable PRPs to recover a proportionate share of their costs in actions for contribution against other PRPs."[189] The court then concluded that "[t]he first and last sentences of section 113(f)(1) combine to afford the maximum latitude to parties involved in the complex and costly business of hazardous waste site cleanups."[190] Finally, the court cautioned that limiting CERCLA contribution actions to PRPs who already had been sued under CERCLA would slow the equitable reallocation of cleanup costs, discourage voluntary cleanups by PRPs fearful of absorbing more than their fair share of cleanup costs, and chill the willingness of PRPs to report contamination to state agencies.[191]

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185. *Id.* at 683 (quoting Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1302 (9th Cir. 1997)).

186. *Id.* at 685. The court placed little reliance on what it described as the "inconclusive, if not contradictory, legislative history" of CERCLA. *Id.* at 684. It identified portions of the legislative history characterizing the purpose of section 113(f)(1) as confirming federal court decisions giving PRPs the right to sue for contribution and encouraging federal courts to devise equitable solutions for apportioning cleanup costs. *Id.* It also noted that the legislative history relied on by the three-judge panel majority referencing the availability of contribution during or after section 106 or 107(a) actions referred to a prior, narrower version of the section 113(f)(1) rather than the version enacted by Congress. *Id.* at 685. Nevertheless, the court concluded that the "mixed and shifting signals from legislative history yield no guide that should color the textual interpretation of section 113(f)(1)." *Id.*

187. *Id.* at 686.

188. *Id.* at 687.

189. *Id.*

190. *Id.*

191. *Id.* at 689–90. Judge Garza, the author of the three-judge panel majority opinion, dissented with two other judges from the en banc majority opinion. His dissent embraced the analysis of the three-judge panel majority opinion that "the plain language and statutory structure of CERCLA's contribution provisions demonstrate that the contribution remedy in

C. Aviall *in the Supreme Court*

On February 12, 2003, Cooper filed a petition for writ of certiorari with the United States Supreme Court.[192] The Cooper petition identified the question presented as:

> Whether a private party who has not been the subject of an underlying civil action pursuant to CERCLA Sections 106 or 107, 42 U.S.C. §§ 9606 or 9607, may bring an action seeking contribution pursuant to CERCLA section 113(f)(1), 42 U.S.C. § 9613(f)(1), to recover costs spent voluntarily to clean up properties contaminated by hazardous substances.[193]

On January 9, 2004, notwithstanding the absence of any conflict in the circuits or groundswell for the Court's intervention from the regulated community, the Court granted Cooper's petition.[194] In addition to the briefs submitted by Aviall[195] and Cooper,[196] briefs filed by forty-seven amici curiae underscored the important policy and economic interests at stake depending on whether PRPs had the right under federal law to seek cleanup cost contribution from other PRPs.

1. Amici Curiae in Support of Aviall

Forty-six amici curiae supported Aviall. Their views were expressed through briefs filed by: (a) Lockheed Martin Corporation ("Lockheed"), an aeronautical research, development, and manufacturing company and a PRP at a multiple sites;[197] (b) the "Superfund Settlements Project" and seven other industry groups with members actively involved in cleanups

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section 113(f)(1) does not create categories of liability but instead adopts the section 107(a) definition of liability and apportions costs among liable parties, a section 113(f)(1) action should be contingent on commencement of a section 106 or 107(a) action. *Id.* at 693. The dissent found it incongruous to permit a contribution action under section 113(f)(1) in the absence of a prior section 106 or 107(a) action when the section 113(g)(3) three year statute of limitations for contribution would not begin to run until after entry of a judgment or a judicial approval of a settlement—triggering events that might never occur if a PRP could sue for contribution without first having been sued herself. *Id.* at 694. The dissent did not respond to the policy arguments advanced by the majority, advising that "[i]t is not our role to substitute our judgment for that of Congress when weighing the effectiveness of statutory provisions." *Id.* at 696–97.

192. Petition for a Writ of Certiorari, *Aviall*, 543 U.S. 157 (No. 02-1192), 2003 WL 23015035.

193. *Id.* at i.

194. Cooper Indus., Inc. v. Aviall Servs., Inc., 540 U.S. 1099 (2004).

195. Brief for Respondent, *Aviall*, 543 U.S. 157 (No. 02-1192), 2004 WL 768554.

196. Brief for Petitioner, *Aviall*, 543 U.S. 157 (No. 02-1192), 2004 WL 341586.

197. Brief for Lockheed Martin Corp. as Amicus Curiae in Support of Respondent, *Aviall*, 543 U.S. 157 (No. 02-1192), 2004 WL 759685, at *1.

around the country[198] (the "SSP amici"); (c) Atlantic Richfield Company and six other entities[199] with a variety of interests relating to the remediation of CERCLA sites (the "Arco amici"); (d) ConocoPhillips Company and five other companies involved in many environmental cleanups (the "ConocoPhillips amici");[200] and (e) twenty-three states and the Commonwealth of Puerto Rico (the "multi-state amici").[201]

The forty-six amici supporting Aviall made a variety of arguments that limiting CERCLA contribution rights would dramatically change contaminated property law, upsetting reliance interests and undermining the uniform federal cleanup cost allocation scheme developed over two decades. Amici supporting Aviall argued, among other things, that barring a PRP who had not first been sued under CERCLA or settled its CERCLA liabilities with the government from bringing a CERCLA contribution claim would: (a) discourage voluntary cleanups and delay remediations until enforcement actions were brought against PRPs;[202] (b) embolden recalcitrant PRPs;[203] (c) upset the settled expectation of the regulated community that a PRP could take the lead in cleaning up contamination contributed to by other PRPs and still recover from the

198. The American Chemistry Council, the American Petroleum Institute, the Corporate Environmental Enforcement Council, the Environmental Technology Council, the Utility Solid Waste Activities Group, the Edison Electric Institute, and the American Gas Association joined the Superfund Settlements Project. These eight entities stated that for over twenty years their member companies have been "actively involved in performing cleanups at hundreds of contaminated sites throughout the United States at a cumulative cost well in excess of $10 billion." Brief for Superfund Settlements Project, et al., as Amici Curiae Supporting Respondent, *Aviall*, 543 U.S. 157 (No. 02-1192), 2004 WL 782370, at *1–2.

199. Brief for Atlantic Richfield Co., et al., as Amici Curiae Supporting Respondent, *Aviall*, 543 U.S. 157 (No. 02-1192), 2004 WL 791894. The brief was submitted by three companies (Atlantic Richfield Co., Federal Mogul Corp. and Crane Co.) that are PRPs at numerous CERCLA sites; an environmental organization (Bluewater Network) describing itself as representing members "dedicated to championing innovative solutions and inspiring individuals to protect the earth's finite and vulnerable ecosystem" and ensuring that PRPs continue to undertake cleanups; and three engineering and consulting firms (LRF, Inc., the Source Group, Inc. and Geomatrix Consultants, Inc.) that regularly conduct and oversee cleanup of contaminated properties under CERCLA and who expressed concern that Cooper's position "could result in a less efficient cleanup process under CERCLA." *Id.* at *2.

200. Brief for ConocoPhillips Co, et al., as Amici Curiae Supporting Respondent, *Aviall*, 543 U.S. 157 (No. 02-1192), 2004 WL 3038116. The brief was submitted by ConocoPhillips Co., E.I. DuPont De Nemours & Co., Ford Motor Co., General Dynamics Corp., General Motors Corp., and Montrose Chemical Corp. of California. The ConocoPhillips amici said that they had engaged in more than 170 cleanups at sites with past and estimated future response costs in excess of $1.7 billion. *Id.* at *20.

201. The multi-state brief was submitted by the Attorneys General of the states of New York, Arizona, California, Colorado, Connecticut, Delaware, Illinois, Louisiana, Massachusetts, Michigan, Missouri, Montana, Nevada, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Washington, Wisconsin, and Wyoming. Brief for the States of New York, et al., as Amici Curiae Supporting Respondent, *Aviall*, 543 U.S. 157 (No. 02-1192), 2004 WL 782371. *See infra* note 206 and accompanying text.

202. Brief for Lockheed Martin Corp., *supra* note 197, at *1, 6, 24.

203. *Id.* at *25; Brief for Atlantic Richfield Co., *supra* note 199, at *11.

other PRPs under CERCLA's strict liability regime costs incurred beyond the lead PRP's fair share;[204] (d) create additional burdens on an overstretched EPA to initiate enforcement actions to trigger private rights to contribution;[205] (e) undermine state and local government programs providing incentives for voluntary cleanups which, they contended, often occur "because the party performing the cleanup expects to obtain equitable contribution from other responsible parties;"[206] and (f) cause contamination conditions to worsen while forcing government and private parties to incur needless litigation costs.[207] The arguments made by the forty-six amici in support of Aviall illustrated the breadth of concern by states and the regulated community about the consequences of restricting PRP contribution rights.

2. *Amicus Curiae Brief of the United States in Support of Cooper*

The Supreme Court highlighted the importance of the policy and economic stakes at issue in *Aviall* by inviting the views of the federal government on the availability of a contribution remedy under section 113(f)(1).[208] On April 12, 2003, the Court issued an order inviting the Solicitor General to file a brief expressing the views of the United States. The United States did so as amicus curiae on December 12, 2003, in support of the Cooper writ petition[209] and again on February 23, 2004, in support of Cooper's position on the merits.[210] The Office of the Solicitor General reportedly embraced the Cooper position over the reported objection of the EPA that limiting contribution rights could undermine voluntary cleanup programs and increase pressure on EPA's limited oversight and enforcement resources.[211] The federal government's

204. Brief for Atlantic Richfield Co., *supra* note 199, at *7; Brief for ConocoPhillips Co., *supra* note 200, at *2. The ConocoPhillips amici also cautioned that if the Supreme Court held that Aviall could not bring a claim for contribution without first having been sued under CERCLA, "no company with a colorable claim for contribution against other PRPs would ever undertake a cleanup until forced to do so by court order." *Id.* at *4.

205. Brief for Amici Curiae Superfund Settlements Project, *supra* note 198, at *19–20.

206. *Id.* at *24; *accord*, Brief for the States of New York, et al., *supra* note 201, at *7 (warning that Cooper's argument "could have serious ramifications for State environmental enforcement authorities throughout the Nation" by discouraging PRPs from settling with state agencies and complicating state enforcement efforts).

207. Brief for Atlantic Richfield Co., *supra* note 199, at *11–12.

208. The Fifth Circuit similarly had similarly invited the views of the federal government in connection with the re-hearing en banc of the three-judge panel decision. *See supra* note 182.

209. Brief for the United States as Amicus Curiae Supporting Petitioner, Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004) (No. 02-1192), 2003 WL 22977858.

210. Brief for the United States as Amicus Curiae Supporting Petitioner, *Aviall*, 543 U.S. 157 (No. 02-1192), 2004 WL 349899.

211. *See Ruling on Superfund Costs May Boost Push for Supreme Court Review*, INSIDE THE EPA, Jan. 9, 2004, *available at* 2004 WLNR 70249 (reporting that EPA was concerned that "the government's position in [*Aviall*], as laid out by the U.S. solicitor general, could undermine EPA's voluntary cleanup program by removing an incentive for liable parties to voluntarily

interest in the section 113(f)(1) question, however, extended beyond environmental regulatory issues: the United States is itself a PRP facing substantial potential contribution claims from other PRPs at sites across the country.[212]

In its amicus brief, the United States urged that an expansive interpretation of section 113(f)(1) would upset CERCLA's "carefully structured liability scheme," which created a "coherent and workable mechanism for ensuring that cleanup costs are properly apportioned among liable parties."[213] It argued that Congress enacted SARA to eliminate uncertainty regarding the availability of contribution under CERCLA by carefully prescribing the specific circumstances (i.e., during or after a section 106 or 107(a) action) in which it would be available.[214]

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cleanup contaminated sites because it would make it more difficult to seek reimbursements."); *see also Aviall May Divert Superfund Enforcement Funds, EPA Official Says*, INSIDE THE EPA, Jan. 23, 2004, *available at* 2004 WLNR 71226 (reporting EPA sources' concern that reversing the *Aviall* Fifth Circuit en banc decision "would remove incentives for companies to voluntarily remediate contaminated sites").

212. Beginning at the Fifth Circuit, Aviall questioned the motives behind the federal government's decision to support Cooper. It contended that the United States supported Cooper's interpretation of section 113(f) in order to narrow substantially the government's own liability under CERCLA and to avoid any liability under state law pursuant to sovereign immunity for sites (except those it currently owned or operated) at which the United States had contributed contamination. Response of Appellant Aviall Servs., Inc. to the Amicus Curiae Brief for the United States, Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F.3d 677 (5th Cir. 2002) (No. 00-10197), 2002 WL 32099831, at *5–6; Brief for Respondent, *supra* note 195, at *30 n.18. Lockheed advised that it "owns or operates a number of facilities that were formerly owned or operated by the federal government or at which work is performed pursuant to government contracts." Brief for Lockheed Martin Corp., *supra* note 197, at *1. Lockheed argued that the federal government faced over $307 billion in response cost liabilities at 158 or more National Priorities List sites, with respect to which it contended the government would be insulated from liability (unless the EPA brought an enforcement action against the United States) because state law remedies in theory would be unavailable against the federal government. It contended that a Supreme Court decision reversing the Fifth Circuit en banc ruling thus would result in an unfair windfall to the federal government. *Id.* at *7, 26–27. Amici curiae Superfund Settlements Project, et al., argued that the federal government was a PRP at more than 60,000 potentially contaminated sites, the cleanup cost for which would be at least $230 billion, and questioned whether the federal government would ultimately pay its fair share of such costs if it could not be sued for contribution under CERCLA by other PRPs. Brief for Amici Curiae Superfund Settlements Project, *supra* note 198, at *17–18.

213. Brief for the United States, *supra* note 210, at *20.

214. *Id.* at *16–17. The United States did not take a position in its brief regarding whether a PRP should be able to bring a section 107(a) claim. After the Supreme Court's decision in *Aviall*, the United States took the position in several CERCLA cases brought by PRPs against the United States that a PRP could not assert a section 107(a) claim. For example, in *R.E. Goodson Construction Co. v. International Paper Co.*, No. 4:02-4184-RBH, 2005 WL 2614927 (D.S.C. Oct. 13, 2005), plaintiffs brought a section 107(a) claim and sought leave to add an implied CERCLA contribution claim against the United States. Plaintiffs contended that because of government delays in removing unexploded ordnance placed on their property by the government during the World War II era, they might remove the ordnance themselves. At the hearing on the United States' motion for summary judgment on plaintiff's section 107(a) claim, the government "surprisingly claimed that the federal policy underlying RCRA and CERCLA discourages voluntary cleanup, and if these [plaintiff] landowners are PRPs and undertake that

The United States' brief rejected the public policy analysis of the Fifth Circuit en banc opinion, the forty-six amici for Aviall and, reportedly, the EPA, that the absence of a contribution remedy would have a chilling effect on equitably allocating cleanup costs and provide a disincentive for PRPs proactively to address contamination problems. Instead, the Solicitor General's brief argued that a PRP who is not sued under section 106 or 107(a) could still pursue contribution from other PRPs either by entering into an administrative or judicially approved settlement and then seeking contribution under CERCLA section 113(f)(2) [215] or under state law.[216] The United States filed the only amicus curiae brief in support of defendant Cooper.

3. The Supreme Court's Decision

At oral argument, Aviall's counsel contended that "the purpose of CERCLA was to get parties involved in voluntary cleanup"[217] and that

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cleanup on their own, they will be precluded . . . from seeking any cost recovery or contribution . . . ." *Id.* at *5. The court noted that "[t]his position by the U.S. appears contrary to previous government policy." *Id.* The district court denied plaintiffs' motion to amend on the ground that Fourth Circuit precedent barred implied contribution claims under Section 107(a). *Id.* at *6. The court further ruled that while Fourth Circuit precedent barred a PRP from asserting any section 107(a) claim, it refused to grant the United States' motion for summary judgment on the section 107(a) claim because genuine issues of fact remained regarding whether plaintiffs were PRPs. *Id.* at *19. Similarly, on April 22, 2005, the United States argued to the Third Circuit that a PRP could not assert a cleanup cost contribution claim against the government pursuant to section 107(a). Brief for the Federal Appellees, E. I. DuPont de Nemours Co. v. United States, No. 04-2096 (3rd Cir. April 22, 2005). The United States contended, among other things, that (a) a cleanup cost claim by a PRP against another PRP is necessarily for contribution, *id.* at 24–26; (b) section 107(a)(4)(B) does not provide an express right to bring a contribution claim independent of section 113(f), *id* at 27–28, 48–50; (c) there is no implied right to a stand-alone contribution claim under section 107(a)(4)(B), *id.* at 28–47; and (d) the federal government's sovereign immunity bars any federal common law cleanup cost contribution claim against the United States, *id* at 51–52.

215. *See* 42 U.S.C. § 9613(f)(2) (2000). In their brief to the Supreme Court in *Aviall*, the SSP amici dismissed as unrealistic the federal government's suggestion that settlements with EPA would solve the contribution problem for PRPs:

> Not only is this option contrary to the approach EPA has followed for the last 20 years, it is also unavailable as a practical matter. By 'entering into a settlement,' the Government means a CERCLA consent decree and a CERCLA complaint under section 107. EPA simply does not have the resources—or the desire—to draft and file such documents for the thousands upon thousands of contaminated sites that are in need of cleanup. Most of these sites are of no interest to EPA, which is fully occupied dealing with the sites on its National Priorities List. Thus, a company that asks EPA to make time to negotiate a set of documents for a site that is of no federal interest almost certainly will be turned down.

Brief for Superfund Settlements Project, *supra* note 205, at *11 n.21.

216. Brief for the United States, *supra* note 210, at *27 n.12.

217. Transcript of Oral Argument at *41–42, Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004) (No. 02–1192) ("Transcript of *Aviall*"), 2004 WL 2290642. The Court permitted the Solicitor General's Office to participate in oral argument.

the statute should not be interpreted in a way that undermines the "settled expectations of the parties" regarding CERCLA contribution law developed over the preceding twenty years.[218] Justice O'Connor responded to this argument by observing that "[w]ell, perhaps Congress should have used different language. That's our problem. We can't make it up."[219] Justice O'Connor's comments came to reflect the Court's decision.

On December 13, 2004, the Supreme Court issued its decision in *Aviall.* By a 7-2 vote, the Court reversed the Fifth Circuit's en banc decision and remanded the case to the Fifth Circuit.[220] Justice Thomas authored the majority opinion; Justice Ginsburg dissented in an opinion joined by Justice Stevens. The Court held that a private party who has not been sued under CERCLA section 106 or 107(a) could not obtain contribution under CERCLA section 113(f)(1) from other liable parties.[221]

The Court rested its decision on the language and structure of section 113(f) and declined to address competing policy or legislative history arguments regarding which reading of section 113(f) better served the purpose of CERCLA. Indeed, the Court observed that "[g]iven the clear meaning of the text, there is no need to resolve this [legislative history] dispute or to consult the purpose of CERCLA at all."[222] The Court concluded that the "natural meaning" of the first sentence of section 113(f) "is that contribution may only be sought subject to the specified conditions, namely, 'during or following' a specified civil action."[223]

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218. *Id.* at *47.

219. *Id.* at *42. Justice Scalia, on the other hand, observed at oral argument that the statute was "admirably drafted," *id.* at *37, and questioned, "[W]hy isn't a perfectly adequate explanation of the last sentence that it was referring to the State causes of action?" *Id.* at *36.

220. Cooper Indus. v. Aviall Servs., Inc., 543 U.S. 157 (2004).

221. *Id.* at 167.

222. *Id.* As a result, the Court did not address, among other things, the fact that the enabling clause of section 113(f)(1) evolved from the original language proposed by the Reagan Administration that would have expressly authorized contribution actions only after section 106 or 107(a) enforcement actions in order to "allow the government to limit the number of parties in its actions, so that litigation could be conducted in a more efficient and expeditious fashion." *See* Commc'n from the President of the U.S. Transmitting a Draft of Proposed Legislation to Amend [CERCLA] to Assure Adequate Funding for the Cleanup of Abandoned Hazardous Waste Sites, & for Other Purposes (Feb. 26, 1985), WL SARA-LH-2, at * 73–74. As enacted, this language was amended to permit contribution actions *during* as well as following section 106 or 107(a) actions. Accordingly, a reasonable interpretation of section 113(f)(1) when taking this portion of the legislative history into account would have been that contribution actions may be brought during or after enforcement or other CERCLA actions under section 106 or 107(a), without otherwise foreclosing the rights of PRP plaintiffs who were not the subject of enforcement actions to recover costs from other PRPs.

223. *Aviall*, 543 U.S. at 166.

The Court rejected plaintiff Aviall's argument that the enabling clause in the first sentence of section 113(f)(1) was permissive. It reasoned that allowing a PRP to bring a section 113(f) contribution claim without first having been sued under section 106 or 107(a) would render the enabling clause superfluous, and that the enabling clause thus should be interpreted to authorize contribution actions "that satisfy the subsequent specified condition [i.e., a pending or prior section 106 or section 107(a) action]—and no others."[224]

The Court also rejected plaintiff Aviall's argument that it could bring a contribution action based on the savings clause in the last sentence of section 113(f)(1). To the contrary, the Court stated that while the savings clause confirmed that section 113(f)(1) does nothing to diminish any contribution claims that might exist independent of section 113(f)(1), the savings clause does not itself establish a cause of action; nor does it expand section 113(f)(1) to authorize contribution actions not brought "during or following" a section 106 or section 107(a) civil action; nor does it specify what causes of action for contribution, if any, exist outside section 113(f)(1).[225]

The Court drew support for its interpretation of section 113(f)(1) from the overall structure of section 113. It noted that section 113 provided "two express avenues for contribution: section 113(f)(1) ('during or following' specified civil actions) and section 113(f)(3)(B) (after an administrative or judicially approved settlement that resolves liability to the United States or a State)."[226] It proceeded to note that "section 113(g)(3) then provides two corresponding 3-year limitations periods for contribution actions, one beginning at the date of judgment, section 113(g)(3)(A), and one beginning at the date of settlement, section 113(g)(3)(B)."[227] By contrast, the Court pointed out that CERCLA contained no "provision for starting the limitations period if a judgment or settlement never occurs, as is the case with a purely voluntary cleanup."[228] The absence of such a statute of limitations provision, the Court explained, "supports the conclusion that, to assert a contribution claim under section 113(f), a party must satisfy the conditions of either section 113(f)(1) or section 113(f)(3)."[229]

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224. *Id.*

225. *Id.* at 167.

226. *Id.* The Court noted that because Aviall had not been the subject of a section 106 administrative order, it did not need to decide whether such an order would qualify as a "civil action under section 9606" within the meaning of CERCLA § 113(f)(1). *Id.* at 168 n.5.

227. *Id.* at 167.

228. *Id.*

229. *Id.* The multi-state amici had been particularly concerned about Cooper's argument regarding the absence of an express statute of limitations period for a PRP contribution action (except an action brought after a judgment or administrative or judicially approved settlement) in light of the fact that CERCLA also does not expressly provide a limitations period for

The Court did not go so far as to hold that Aviall could not state any claim under CERCLA. Aviall had urged the Court to hold that, in the alternative to an action for contribution under section 113(f)(1), Aviall could recover costs under section 107(a)(4)(B) even though it was a PRP.[230] The majority opinion declined to address the issue, instead remanding the case to the Fifth Circuit to address whether (a) Aviall had waived any section 107(a)(4)(B) claim and, if not, (b) whether a PRP could assert a cleanup cost claim under section 107(a).[231]

The majority noted the "numerous decisions of the Courts of Appeals" holding "that a private party that is itself a PRP may not pursue a section 107(a) action against other PRPs for joint and several liability."[232] The majority concluded that the Supreme Court should not address the section 107(a) issue because to do so it would need to consider whether the court of appeals' decisions were correct, an issue that it felt had not been briefed and fell outside the scope of the section 113(f)(1) question presented to the Court.[233] Significantly, the Court noted that among the issues that might be considered on remand was whether Aviall "may pursue a section 107 cost recovery action for some form of liability other than joint and several."[234] Finally, the Court declined to decide whether Aviall had an implied right to contribution under section 107(a).[235] While it left this issue to the Fifth Circuit for consideration in the first instance, the Court hinted that it might not be receptive to such an argument by its citation to several Supreme Court opinions declining to imply a right of action for contribution arising in the context of other statutory schemes.[236]

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contribution actions following settlements with state regulatory agencies. Brief for the States of New York, et al., *supra* note 201, at *1, 3, 5, 8–9.

230. *Aviall*, 543 U.S. at 168. Section 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B), provides for the recovery of "any other necessary costs of response" incurred by "any other person," i.e., any "person" other than the persons entitled to cost recovery under section 107(a)(4)(A)—the United States, a State or an Indian tribe. Aviall contended that a PRP was "any other person" within the meaning of the statute. Brief for Respondent, *supra* note 195, at *1.

231. *Aviall*, 543 U.S. at 168–70.

232. *Id.* at 169.

233. *Id.* at 169–79.

234. *Id. See supra* notes 72–77 and *infra* notes 348–349 and accompanying text.

235. *Id.* at 170–71.

236. *Id.* The Court noted that it had "visited the subject of implied rights of contribution before," citing *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639–46 (1981) (holding in connection with a civil antitrust price fixing case that there was no implied right to contribution under either the Sherman or Clayton Acts), and *Northwest Airlines, Inc. v. Transportation Workers Union of America*, 451 U.S. 77, 90–99 (1981) (holding that an employer had no implied right to contribution against a union regarding collectively bargained wage differences found to violate the Equal Pay Act and Title VII of the Civil Rights Act of 1964). *Aviall*, 543 U.S. at 171. The *Aviall* Court further stated that "Congress explicitly recognized a particular set (claims 'during or following' the specified civil actions) of the contribution rights previously implied by courts from provisions of CERCLA and the common law," citing by comparison *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) (holding that

Justice Ginsburg dissented, in an opinion joined by Justice Stevens. The dissent did not quarrel with the majority's interpretation of section 113(f)(1). Instead, it argued that by remanding the case to the Fifth Circuit, the Court unnecessarily deferred a decision on whether Aviall was entitled at all to recover cleanup costs from Cooper under CERCLA.[237]

The dissent rejected any contention that Aviall had waived its ability to assert a section 107 claim and argued that no useful purpose would be served by remanding the section 107(a) issue to the Fifth Circuit.[238] The dissent observed that the Fifth Circuit already had concluded that section 107(a) supplied the right of action for Aviall's claim and that section 113(f)(1) prescribed the procedural framework. [239] The dissent also noted that the Fifth Circuit had stated in its en banc opinion that, prior to enactment of section 113(f)(1) in 1986, the federal courts had "correctly" held under section 107(a) that PRPs could recover a proportionate share of cleanup costs in contribution actions against other PRPs and that "nothing in section 113 retracts that right."[240] The dissent, therefore, saw no reason to require the Fifth Circuit "to revisit a determination it [had] essentially made already" and concluded that the Supreme Court should have proceeded to decide whether Aviall could pursue a section 107(a) claim against Cooper.[241]

The majority, however, chose not to decide the section 107(a) issue or call for further briefing. As a result, the *Aviall* decision (a PRP cannot sue for contribution under section 113(f)(1) without first having been sued under CERCLA) and non-decision (whether such a PRP can recover cleanup costs under CERCLA at all) turned on its head the seemingly settled state of CERCLA case law and brought enormous uncertainty to the regulated community. As discussed below, the *Aviall* decision upset reliance interests and brought to the forefront a fundamental question of environmental federalism: what role—if any—should federal law play in private cleanup cost disputes.

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while an investor could maintain an implied action for rescission of the type of contract that Investment Advisors Act of 1940 expressly declared to be "void," no private right of action by an investor for damages or other monetary relief could be implied where Congress already had expressly provided for other judicial and administrative enforcement mechanisms under the statute). *Aviall*, 543 U.S. at 171. The *Aviall* Court, however, cautioned that it was not deciding whether any judicially implied right of contribution survived SARA and the enactment of section 113(f). *Id.*

237. Cooper Indus. v. Aviall Servs., Inc., 543 U.S. 157, 170 (2004) (Ginsburg, J., dissenting).

238. *Id.* at 174.

239. *Id.* at 173.

240. *Id.* at 174.

241. *Id.*

D. *The Aftermath of the* Aviall *Decision*

1. *Uncertainty: Does a PRP Have Any CERCLA Remedy?*

Prior to Aviall, the courts, the bar, and industry all generally assumed that a PRP could use both federal law (CERCLA) and the federal courts (exclusive federal court subject matter jurisdiction for CERCLA claims) to obtain cleanup cost contribution from another PRP. That "conventional wisdom" was undermined by the Aviall decision, which brought with it a variety of attendant consequences.

The Supreme Court expressly declined to decide whether section 107(a)(4)(B) provided a CERCLA remedy for a PRP plaintiff. A PRP would appear to qualify as "any other person" and be able to bring a section 107(a) cost recovery claim. At a minimum, it would not appear controversial to suggest that the language of section 107(a)(4)(B) is no less "clear" than the language of section 113(f)(1). [242] Despite the seeming availability of section 107(a)(4)(B), however, each court of appeals that had addressed the issue before *Aviall* held that a PRP could not bring a section 107(a) claim. As noted earlier, they did so based expressly or implicitly on two assumptions: (a) section 107(a)(4)(B) claims imposed joint and several liability; and (b) a PRP could always bring a contribution claim under section 113(f).[243] The Supreme Court in *Aviall* declined to address whether the former assumption was correct while holding that the latter assumption was incorrect, calling into question the premises underlying these earlier lower court decisions. Rather than seize the opportunity to resolve the role of federal law in private response cost allocation disputes, the Supreme Court instead left the question to the lower federal courts to sort out. The result will be years of litigation regarding whether federal law will continue to play any role in these disputes.

At the heart of this uncertainty is the post-*Aviall* status of court of appeals decisions barring PRPs from bringing a section 107(a) claim. District courts initially will be forced to choose between (a) following circuit precedent that a PRP cannot bring a section 107(a) action or (b) determining whether *Aviall* undermined the rationale of otherwise binding appellate decisions and deciding the issue afresh. Some post-*Aviall* district court decisions have concluded that prior court of appeals decisions holding that a PRP may not bring a section 107(a) claim compel

242. *Cf. id.* at 167.

243. The Seventh Circuit would permit the current owner of contaminated property who did not herself contaminate the property to maintain a section 107(a)(4)(B) cost recovery action. *See* Rumpke of Ind., Inc. v. Cummins Engine Co., 107 F.3d 1235, 1240–41 (7th Cir. 1997); *see also supra* notes 130–33 and accompanying text.

dismissal of such a claim; they have done so even though, under *Aviall,* the PRP now would be barred from asserting *any* claim under CERCLA.[244] On the other hand, other post-*Aviall* district courts have reached the opposite conclusion, holding that a section 107(a) contribution claim was available to a PRP or refusing to dismiss such a claim until the court of appeals for the circuit in which the district court

244. *See, e.g.*, AMW Materials Testing, Inc. v. Town of Babylon, 348 F. Supp. 2d 4, 11–12 (E.D.N.Y. 2004) (only innocent plaintiff could maintain section 107(a) claim); Montville Twp. v. Woodmont Builders, L.L.C., No. Civ.A. 03-2680DRD, 2005 WL 2000204, at *7 (D.N.J. Aug. 17, 2005) (holding that current owner of contaminated property who does not qualify for the third party defense under section 107(b)(3) may not maintain section 107(a) claim); City of Rialto v. Dept. of Def., No. EDCV 04-00079-VAP(SSx), 2005 U.S. Dist. LEXIS 26941 at *12 (C.D. Cal., Aug. 16, 2005) (dismissing section 107(a) claim of plaintiff PRPs who had not first been sued under sections 106 or 107(a) in light of Ninth Circuit decisions in *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997) and *Western Properties Service Corp. v Shell Oil Co.*, 358 F.3d 678 (9th Cir. 2004), holding that an implied contribution claim by a PRP under section 107(a) requires the application of section 113); Kaladish v. Uniroyal Holding, Inc., No. Civ.A. 300CV854CFD, 2005 WL 2001174, at *4 (D. Conn. Aug. 9, 2005) (finding that PRP current owner of contaminated property who did not qualify for section 107(b)(3) third party defense remained barred under *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998) (PRP must use section 113(f) rather than section 107(a) to recover contribution under CERCLA), from asserting a section 107(a) claim); Cadlerock Props. Joint Venture, L.P. v. Schilberg, No. 3:01CV896, 2005 WL 1683494, at *8 (D. Conn. July 19, 2005) (Second Circuit precedent in *Bedford Affiliates* compels judgment on the pleadings dismissing section 107(a) claim by PRP); Blue Tee Corp. v. ASARCO, Inc., No. 03-5011-CV-SW-F-JG, 2005 WL 1532955, at *8 (W.D. Mo. June 27, 2005) (denying as futile PRP plaintiff's motion to amend complaint to add section 107(a) claim based on Eighth Circuit precedent); Benderson Dev. Co. v. Neumade Prods. Corp., No. 98-CV-0241SR, 2005 WL 1397013, at *11 (W.D.N.Y. June 13, 2005) (holding that "Bedford Affiliates remains controlling precedent" after *Aviall*); City of Waukesha v. Viacom Int'l, Inc., 362 F. Supp. 2d 1025, 1027–28 (E.D. Wis. 2005) (dismissing PRP plaintiff section 113(f) claim in light of *Aviall* and denying as futile motion to amend complaint adding a CERCLA section 107(a) claim in light of Seventh Circuit decisions in *Rumpke of Indiana, Inc. v. Cummins Engine Co.*, 107 F.3d 1235 (7th Cir. 1997) and *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994) that a culpable PRP could not bring a section 107(a) cost recovery claim); Elementis Chems., Inc. v. T H Agric. & Nutrition, L.L.C., 373 F. Supp. 2d 257, 269–71 (S.D.N.Y. 2005) (noting that *Aviall* did not undermine holding in *Bedford Affiliates* that a PRP was required to use section 113(f) rather than section 107(a) to recover cleanup cost contribution under CERCLA); *see also infra* note 356. Courts also will be asked to define what constitutes the pendency of a section 106 or section 107(a) action for purposes of triggering section 113(f)(1) contribution rights. For example, in *Boarhead Farm Agreement Group v. Advanced Environmental Technology Corp.*, the district court held that while Third Circuit precedent barred a section 107(a) action by PRPs, *Aviall* permitted a PRP plaintiff who had not first been sued under CERCLA to assert a section 113(f)(1) action because section 106 and section 107(a) actions had been brought against *other* parties to the lawsuit. 381 F. Supp. 2d 427, 435–37 (E.D. Pa. 2005). Similarly, while *Aviall* was pending before the Supreme Court, the Ninth Circuit in *Western Properties Services Corp. v. Shell Oil Co.* held that a PRP who had not first been sued could bring a section 113(f)(1) claim and observed further that "unlike in *Aviall*," plaintiff had asserted both section 107(1) and section 113(f)(1) claims and defendant had made identical counterclaims, so "consistent with § 113(f)(1) and the law of our circuit, the contribution action in this case was pursued 'during . . . [a] civil action under . . .107(a).'" 358 F.3d 678, 685 (9th Cir. 2004) (modification in original).

sat addressed the issue.[245] In short, every court of appeals at some time will be required to revisit the availability to a PRP of a section 107(a)(4)(B) claim in a very different context because, after *Aviall,* reaffirming prior decisions that a PRP cannot bring a cost recovery claim under section 107(a)(4)(B) would mean that most PRPs[246] will no longer have available any CERCLA cleanup cost remedy.[247]

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245. *See, e.g.*, Seneca Meadows, Inc. v. ECI Liquidating, Inc., No. 95-CV-6400L, 2006 WL 1030321 at * 7 (W.D.N.Y., April 20, 2006) (court revisited pre-*Aviall* ruling dismissing PRP plaintiff's section 107(a) claim to hold in light of "overarching principle" that allowing cleanup cost claims served CERCLA goal of encouraging PRPs to assume cleanup responsibilities that PRP plaintiff could assert a several liability section 107(a)(4)(B) claim, observing that the decision in *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998), that a PRP could not maintain a section 107(a) action was of "questionable validity" after *Aviall*); Adobe Lumber, Inc. v. Hellman, 415 F. Supp. 2d 1070, 1078 (E.D. Cal. 2006) (denying motion to dismiss PRP plaintiff's section 107(a) claim despite Ninth Circuit precedent that a PRP cannot bring section 107(a) joint and several or partial indemnity action and doubtful availability in the Ninth Circuit of an implied right of contribution, because "the court has difficulty imagining that the Ninth Circuit would prevent PRPs from pursuing contribution claims for clean up costs incurred voluntarily."); McDonald v. Sun Oil Co., No. Civ. 03-1504-HA, 2006 WL 696316 (D. Or. Mar. 14, 2006) at *16 (denying plaintiff's motion for summary judgment on CERCLA contribution counterclaim by defendant who incurred costs without having been sued under CERCLA, concluding that "[w]hen a plaintiff falls outside the technical requirements of § 113, the contribution claim is allowed under § 107, and the mechanics of apportionment are governed by the factors established in § 113."); Aggio v. Aggio, No. C 04-4357 PJH, 2005 WL 2277037, at *6 (N.D. Cal. Sept. 19, 2005) (holding that under *Pinal Creek*, a PRP has an implied right of contribution under section 107(a)); Viacom, Inc. v. United States, 404 F. Supp. 2d 3, 7 (D.D.C. 2005) (noting that the D.C. Circuit had not addressed the issue and holding that "in light of *Aviall,* a PRP that cannot sue for contribution for voluntary cleanup costs under § 113(f) may still seek to recover its costs in a § 107(a) proceeding."); Adobe Lumber, Inc. v. Taecker, No. CV S02-186 GEB GGH, 2005 WL 1367065, at *1-2 (E.D. Cal. May 24, 2005) (relying on *Pinal Creek* to hold that "in the wake of *Aviall,* [plaintiff's] section 107 claim is construed as it was before the congressional enactment of section 113."); Metro. Water Reclamation Dist. of Greater Chi. v. Lake River Corp., 365 F. Supp. 2d 913, 918 (N.D. Ill. Apr. 12, 2005) (holding that PRP may pursue section 107(a) claim, promoting prompt and proper cleanup); Vine St., L.L.C. v. Keeling, 362 F. Supp. 2d 754, 764 (E.D. Tex. Mar. 24, 2005) (stating that "section 107(a), in enabling innocent parties' claims for response costs, entails a wider range of other actions, including potentially responsible parties seeking contribution for costs incurred in voluntary cleanups"); Gen. Motors Corp. v. United States, No. Civ.A. 01-CV-2201, 2005 WL 548266 (D.N.J. Mar. 2, 2005) (dismissing plaintiff PRP's section 113(f)(1) claim in light of *Aviall* but granting leave to amend complaint to add section 107(a) claim because defendant would suffer no prejudice until Third Circuit decides whether to revisit holding in *New Castle County v. Haliburton NUS Corp.*, 111 F.3d 1116, 1121 (3d Cir. 1997), that a PRP may not bring a section 107(a) cost recovery action).

246. Most PRPs neither have first been sued under CERCLA section 106 or 107(a) nor qualify for the Seventh Circuit's "*Akzo* exception."

247. Some courts of appeals may in the first instance defer decision of the section 107(a) issue by remanding to the district courts cases in which appeals were pending at the time *Aviall* was decided. Indeed, the Fifth Circuit elected to do so in the *Aviall* litigation. Following the Supreme Court's decision, the Fifth Circuit remanded the case to the district court with instructions to permit Aviall to amend its complaint to add a section 107(a) claim without deciding whether Aviall as a PRP could maintain such a claim. Aviall Servs., Inc. v. Cooper Indus., Inc., No. 00-10197 (5th Cir. Feb. 15, 2005), *petition for writ of mandamus denied, In re* Cooper Indus., Inc., 125 S. Ct. 2255 (U.S. May 16, 2005) (No. 04-1182); *see also Supreme Court*

At bottom, after the PRP-plaintiff section 107(a) cases work their way through the courts of appeals, the Supreme Court may well have occasion to address the issue it deferred in *Aviall*. In the meantime, affected potential stakeholders (e.g., respondents named as PRPs on government cleanup orders, current property owners, prospective property purchasers, real estate developers, and state and local regulatory agencies) may only guess whether a CERCLA strict liability cleanup cost remedy will be available to a PRP who incurs cleanup costs without first having been sued under CERCLA. If not, PRPs who formerly relied on CERCLA claims in federal court to obtain cost contribution instead will have to look to state law (usually in state court) for a remedy. As discussed in Part IV(C), *infra*, primary reliance on the current hodgepodge of varied state law remedies would undermine national policy goals of encouraging prompt, efficient, voluntary cleanups.

A PRP incurring cleanup costs at a site faces a series of difficult choices in light of *Aviall*. (1) Should the PRP make no change in its behavior and assume that the courts of appeals will reverse prior decisions and hold that a PRP may bring a section 107(a) claim? (2) Should the PRP refuse "voluntarily" to comply with a regulatory agency cleanup order and wait to be sued under section 106 (in the rare instance that EPA is involved in the site and issues an administrative order) or section 107(a) in order to obtain CERCLA cost contribution from other

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Refuses to Intervene in CERCLA Contribution Case, 25 Andrews Envtl. Litig. Rep., June 3, 2005, at 5 (discussing Cooper writ petition arguing that Fifth Circuit's remand instructions were inconsistent with the Supreme Court's decision). Others may try to distinguish rather than abandon or wholly embrace prior decisions barring PRP section 107(a) claims. For example, in *Consolidated Edison Co. of New York v. UGI Utilities*, the Second Circuit held that a PRP could bring a section 107(a) claim to recover cleanup costs incurred before entering into a voluntary cleanup agreement. 423 F.3d 90, 100–03 (2d Cir. 2005). The court distinguished *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2d Cir. 1998), which held that a PRP could not maintain a section 107(a) claim, by noting that the *Consolidated Edison* plaintiff had incurred cleanup costs without first having settled its CERCLA liabilities or having been sued or adjudged liable, and by questioning whether cleanup costs incurred solely due to the imposition of liability could constitute recoverable "costs of response" within the meaning of section 107(a). *Consol. Edison*, 423 F.3d at 101. *See also supra* note 135, and *infra* note 356. Another Second Circuit panel had earlier deferred addressing the impact of *Aviall* on *Bedford Affiliates*. In *Syms v. Olin Corp.*, 408 F.3d 95, 107 (2d Cir. 2005), the current owner of contaminated property sued the federal government and a private company under CERCLA section 107(a) and 113(f) as well as other federal and state law theories, seeking, among other things, recovery of cleanup costs associated with the remediation of munitions and aviation fuel contamination. The district court granted summary judgment for defendants and plaintiff appealed to the Second Circuit. The Supreme Court decided *Aviall* after oral argument on appeal in *Syms*. The Second Circuit in *Syms* then chose "to vacate the judgment and to allow the district court to address in the first instance the issue of [plaintiff's] eligibility to sue under section 107(a)." *Id.* At some point, however, each court of appeals will be required to address directly whether a PRP can maintain a section 107(a) claim.

PRPs?[248] (3) Should the PRP try to negotiate a settlement with the EPA or a state regulatory agency in order to trigger CERCLA contribution rights? Such questions, and their consequential unpredictability, became unavoidable after *Aviall.*

2. *Uncertainty:* Aviall's *Effect on "Voluntary" Cleanups*

Aviall and several amici curiae expressed concern[249] to the Supreme Court that reversing the Fifth Circuit could have a chilling effect on the willingness of PRPs to engage in "voluntary" cleanups[250] on their own initiative or pursuant to a state regulatory administrative order[251] rather

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248. A number of observers cautioned that the *Aviall* decision could have a chilling effect on the willingness of parties to enter into voluntary cleanup agreements with state agencies in the absence of a CERCLA contribution remedy. *See, e.g.*, Ron Cardwell, *Voluntary Cleanups: Down for the Count or Just on the Ropes?*, 16 S.C. LAW. 14, 17 (2005) ("The Aviall decision will likely discourage the voluntary cleanup of contaminated property in South Carolina except in a narrow set of circumstances."); Charles F. Helsten et al., *The Effect of Aviall on the Vitality of Brownfields Programs*, A.B.A. ENVTL. TRANSACTIONS & BROWNFIELDS COMM. NEWSL., Mar. 2005, at 4 (*Aviall* decision "has raised many questions that may make developers leery of brownfields projects" in light of uncertain cleanup cost contribution rights); Richard G. Leland & Toni L. Finger, *The Supreme Court's Limitation on Private Cost Recovery Actions Under Superfund: No Good Deed Goes Unpunished—Part II*, METRO. CORP. COUNS., May 2005, at 8 (parties may hesitate entering into voluntary cleanup agreements, particularly in states without state superfund statute contribution rights); Locke Liddell & Sapp LLP, *Basic Understanding of Liability Under CERCLA Overturned*, TEX. ENVTL. COMPLIANCE UPDATE, Feb. 2005, at 1 ("[O]ne possible effect of the decision will be to reduce the number of voluntary cleanups that are undertaken, especially at the most heavily contaminated sites."); NAT'L GOVERNORS ASS'N, POLICY POSITION STATEMENT NR-04: SUPERFUND POLICY § 4.4 (2000) (revised Winter Meeting 2005) ("[A] recent U.S. Supreme Court decision [*Aviall*] has the potential to diminish a significant incentive under CERCLA for responsible parties to properly perform voluntary cleanups under state oversight.").

249. Brief for Respondent, *supra* note 195, at *10; Brief for Lockheed Martin Corp., *supra* note 197, at *6, 24; Brief for Superfund Settlements Project, *supra* note 205, at *2–3; Brief for Atlantic Richfield Co., *supra* note 199, at *11–13; Brief for ConocoPhillips Co., *supra* note 200, at *4–5.

250. Encouraging voluntary cleanups can serve a variety of policy objectives:

> From an environmental perspective, voluntary cleanups are highly advantageous. Governmental regulators face inevitable budgetary and personnel constraints and can therefore bring only a limited number of enforcement actions. As a result, voluntary cleanups can significantly increase the number of successfully remediated sites. Earlier intervention, made possible by not spending time in the litigation of enforcement actions, also reduces the time individuals are exposed to contamination.
>
> Moreover, cleanup costs tend to rise sharply over time if the contamination is left unattended. For example, the leakage of hazardous substances from damaged barrels may initially affect only the surrounding soil, which may be remediable through soil removal and incineration. Over time, however, the groundwater may become affected, significantly raising the costs and lowering the probability that the cleanup will be successful.

Revesz, *supra* note 15, at 598 (footnotes omitted).

251. The Supreme Court in *Aviall* left open whether a section 106 administrative cleanup order issued by EPA would qualify as a section 106 "civil action" for purposes of triggering rights to contribution under CERCLA section 113(f)(1). 543 U.S. at 157 n.5. Several courts after

than as a consequence of regulatory agency enforcement litigation. Following the *Aviall* decision, PRPs and the environmental bar began to consider how to structure a response to a governmental cleanup directive that would improve the chance of obtaining CERCLA contribution. For instance, some commentators suggested that PRPs delay cleanups and wait for a government agency to initiate enforcement litigation as a trigger for section 113(f)(1) contribution rights.[252] An explosion of enforcement litigation, however, would seem inconsistent with the goal of encouraging prompt, efficient cleanups. [253] The prospect of increased

Aviall narrowly construed the term "civil action" in section 113(f)(1) to limit contribution rights. *See, e.g.*, Blue Tee Corp. v. ASARCO, Inc., No. 03-5011-CV-SW-F-JG, 2005 WL 1532955, at *4 (W.D. Mo. June 27, 2005) (section 106 order not a "civil action"); Pharmacia Corp. v. Clayton Chem. Acquisition, L.L.C., 382 F. Supp. 2d 1079, 1091 (S.D. Ill. Mar. 8, 2005) (dismissing section 113(f)(1) claim because section 106 order and administrative order on consent did not constitute section 106 "civil action"). Unilateral administrative cleanup orders issued by state and local regulatory agencies (which oversee the vast majority of cleanups) do not constitute section 106 civil actions and thus cannot trigger section 113(f)(1) contribution rights. *See, e.g.*, Cadlerock Props. Joint Venture, L.P. v. Schilberg, No. 3:01CV896, 2005 WL 1683494, at *6 (D. Conn. July 19, 2005) (holding state administrative order is neither a CERCLA section 106 order or a section 106 "civil action" for purposes of triggering section 113(f)(1) contribution rights). In August 2005, the EPA and Department of Justice published, in light of *Aviall*, interim revisions to model administrative orders on consent for removal actions, remedial designs, and remedial investigation/feasibility study preparation in order to further clarify EPA's position that such orders constitute a settlement of CERCLA liabilities within the meaning of CERCLA section 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B). Memorandum from Susan E. Bromm & Bruce S. Gelber, Interim Revisions to CERCLA Removal, RI/FS and RD AOC Models to Clarify Contribution Rights and Protection Under Section 113(f), Attachment (Aug. 3, 2005), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-rev-aoc-mod-mem.pdf.

252. *See, e.g.*, Daniel M. Steinway, *The Ramifications of the Aviall Decision: Where Do We Go From Here?*, 20 Toxics L. Rep. (BNA) 190, 194–95 (2005) (potential techniques for a PRP to obtain CERCLA contribution rights include inviting a "friendly" lawsuit from a regulatory agency); Cardwell, *supra* note 248, at 17 (noting possibility that "[a] volunteer who is responsible for only a small portion of the contamination might consider delaying the cleanup until [the state environmental regulatory agency] pursues a civil action against it."); Albert M. Cohen, *Certainty and Uncertainty in the Post* Cooper v. Aviall *Superfund World*, 20 Toxics L. Rep. (BNA) 73, 76–77 (2005) (discussing potential PRP strategies after *Aviall*, and noting that PRPs at sites where EPA or state is involved should consider whether voluntarily to incur costs without a pending section 106 or section 107(a) suit or administrative settlement); Diane R. Smith & Summer L. Nastich, *Special Feature:* Cooper Industries, Inc. v. Aviall Services, Inc., ORANGE COUNTY LAW., May 2005, at 21 (noting that parties may "have to 'drop out' of state Brownfields program[s] and become a PRP, then convince the EPA to bring a 'friendly' enforcement action, to preserve contribution rights against other PRPs").

253. *Aviall* is not the first judicial decision with the potential consequence of creating incentives for increased litigation as a triggering mechanism to obtain funding for site cleanups. For example, in *Foster-Gardner, Inc. v. National Union Fire Insurance Co.*, the California Supreme Court held that insurance company duties to defend and indemnify "suits" against policyholders were not triggered by administrative agency cleanup orders. 959 P.2d 265 (1998). As a result, *Foster-Gardner* created incentives for California-insured PRPs looking to secure cleanup cost coverage either to defer incurring cleanup costs until sued by a regulatory agency or to seek out lawsuits brought by other PRPs in order to trigger insurance coverage. *See* Michael Asimow, *California Supreme Court Holds Insurance Does not Cover Cost of Informally Resisting Agency Cleanup Order*, ADMIN. & REG. L. NEWS, Fall 1998, at 6–7 (in light of *Foster-*

litigation, whether as a consequence of deliberate non-compliance with cleanup orders by a PRP or in connection with an "understanding" that litigation was necessary to provide the funding (through a CERCLA section 113(f)(1) contribution action) for a cleanup, would be a dubious legacy of the *Aviall* decision. Pursuit of such a strategy also would be problematic in light of (a) the risk to the PRP of statutory penalties for non-compliance with a cleanup order,[254] (b) the limited litigation resources of state and federal regulatory agencies, and (c) the preclusion risks that would be assumed by an agency filing but not aggressively prosecuting an enforcement action.

Others suggested that a PRP enter into an "administrative or judicially approved settlement"[255]with the EPA or state administrative agencies in order to trigger contribution rights under CERCLA section 113(f)(3).[256] From a broader perspective, however, it is unrealistic to expect that the cleanup cost contribution problem unleashed by *Aviall* could possibly be resolved by the negotiation of settlement agreements at thousands of sites around the country. State agencies lack the resources necessary to negotiate agreements for the hundreds or thousands of sites that may be within their jurisdictions.[257] An agency also may be reluctant to negotiate an agreement resolving a PRP's CERCLA liability out of concern that the agency may later determine that the nature or scope of contamination at the site exceeds what was anticipated at the time of the

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Gardner, cleanup order respondents "may be motivated to ignore the cleanup orders and force the agency to file an enforcement action, since the costs of defending such actions would be covered by insurance"); *see also* Schnapf, *supra* note 91, at 615 (because of trend that environmental insurance policies require the insured to be "legally obligated" to perform a cleanup for the policy to be triggered, "some insureds have requested that prior voluntary cleanup agreements be amended so they are captioned as settlements or ask the state to file a 'friendly' lawsuit so the insured could assert that the cleanup was not voluntary").

254. *See, e.g.*, CERCLA § 106(b)(1), 42 U.S.C. § 9606(b)(1) (2000) (imposing $25,000 per day fines for non-compliance absent "sufficient cause"); § 107(c)(3), 42 U.S.C. § 9607(c)(3) (authorizing EPA to seek damages up to three times the costs incurred as a result of failure to take proper action).

255. CERCLA section 113(f)(2) provides that a person who enters into an administrative or judicially approved settlement shall not be liable for contribution claims regarding matters addressed in the settlement, while section 113(f)(3)(B) authorizes contribution claims by section 113(f)(2) settling parties against non-settling persons. 42 U.S.C. §§ 9613(f)(2), (3)(B).

256. *See, e.g.*, Cohen, *supra* note 252, at 77 (explaining PRPs should consider attempting to enter into an administrative settlement to trigger section 113(f) contribution rights); *see also* Transcript of *Aviall*, *supra* note 217, at *26 (argument of counsel for the United States suggesting that PRPs should settle with the government to get contribution rights).

257. *See* Cohen, *supra* note 252, at 77 ("EPA will likely be reluctant to take on any additional sites, particularly if the site is not listed as a federal superfund site."). Successfully persuading EPA or a state environmental regulatory agency to enter into settlement negotiations for sites at which the state and federal governments had not previously taken action could prove a Pyrrhic victory for the PRP if the negotiations bring with them an elevated level of regulatory scrutiny that increases the time and transaction costs required to remediate a site. *See id.*

settlement.[258] Moreover, a PRP seeking to settle with a regulatory agency in order to trigger contribution rights often will lack negotiating power. As a result, even if a PRP successfully gets an agency to the negotiating table, the agency may insist on unattractive or unacceptable settlement terms.[259]

3. Uncertainty: The Role of State Law Claims

The uncertainty *Aviall* created regarding the availability of a CERCLA remedy likely will result in an increased reliance on state law theories as the basis for recovering cleanup costs. By turning to state

258. Section 113(f)(2) contemplates a settlement by a "person who has resolved its liability to the United States or a State . . . ." An agency may fear that it would be unable to locate another PRP with the ability to conduct cleanup activities in the event that its settlement with the would-be plaintiff PRP fails adequately to address a contamination problem. The agency could consider settling only the CERCLA liabilities of a PRP. If the "resolved its liability" language of section 113(f)(2) is interpreted as limited only to CERCLA liability, such a settlement would permit the agency freely to pursue other federal or state law claims against the PRP, allowing the PRP to pursue CERCLA contribution under section 113(f)(3)(B) as well as other available contribution or damage remedies. *See* 42 U.S.C. §§ 113(f)(2), (3).

259. *See* Schnapf, *supra* note 91, at 612 (observing states may be reluctant to comply with requests for negotiating administrative settlements in light of limited state agency enforcement resources, so "[a]s a result, parties may have to offer some sort of 'carrots' to state agencies to justify diverting limited resources by performing a more comprehensive cleanup than normally would be required or perhaps implementing a supplemental environmental project."); Cohen, *supra* note 252, at 77 n.15 ("EPA could be cooperative and enter into such agreements. On the other hand, it may see the lack of a right to contribution as a means to put additional pressure on parties which refuse to settle."). An agency with limited resources may insist on a standard or "model" form of consent decree or settlement agreement and be reluctant to address site-specific, risk-based cleanup standards or other significant, cost-sensitive settlement provisions. Alternatively, states attempting to encourage CERCLA settlements may develop model forms making it clear in order to trigger section 113(f) contribution rights that the agreement is resolving CERCLA liabilities to the state. *See* Schnapf, *supra* note 91, at 612, 613 (describing Wisconsin Department of Natural Resources model forms); see also Seneca Meadows, Inc. v. ECI Liquidating, Inc., No. 95-CV-6400L, 2006 WL 1030321 at *5-6 (W.D.N.Y., April 20, 2006) (holding that consent orders settling PRP's CERCLA and state law liability to state permitted PRP to seek contribution under section 113(f)(3)(B) notwithstanding absence of cooperative agreement between state agency and EPA); *cf.* W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc., No. 98-CV-838S(F), 2005 WL 1076117, at *7 (W.D.N.Y. May 3, 2005) (holding administrative consent order that made no reference to CERCLA or CERCLA liabilities settled only state claims and thus did not trigger contribution rights under *Aviall* and section 113(f)); City of Waukesha v. Viacom Int'l, Inc., 404 F. Supp. 2d 1112, 1118 (E.D. Wis. 2005) (denying as futile plaintiff's motion to amend complaint to add CERCLA contribution claim under section 113(f)(3), because settlement agreement with state agency that had not entered into cooperative agreement with EPA providing that EPA had not waived its CERCLA claims did not resolve plaintiff's CERCLA liability within the meaning of section 113(f)(3)); Asarco, Inc. v. Union Pac. R.R. Co., No. CV 04-2144-PHX-SRB, 2006 WL 173662, at *7 (D. Ariz. Jan. 24, 2006) (granting defendant's motion for summary judgment because settlement did not provide basis for a section 113(f)(3)(B) contribution claim where the state agency lacked EPA settlement authorization, the agreement did not reference CERCLA liabilities, and the settlement did not follow section 122 settlement procedure).

Superfund statutory claims[260] or common law theories such as nuisance, trespass, or negligence[261] as vehicles for recovering cleanup costs, a PRP could avoid the risk that the federal courts will hold that section 107(a) remains unavailable to a PRP after *Aviall*.

Increased use of state law theories in lieu of (rather than as supplemental to) CERCLA claims would dramatically change the nature of private cleanup cost disputes in three major respects. First, the primary forum for the allocation of cleanup costs would shift from federal court to state court.[262] Second, reliance on state common law theories would transform private cleanup cost disputes from status-based strict liability scheme cases to primarily culpability-based liability scheme cases. Third, because state law theories vary dramatically from state to state, increased reliance on state courts and state law would dilute the uniformity of behavioral and liability norms that had developed over the past twenty-five years through the application of a federal statute (CERCLA) to private cleanup cost disputes in a common forum—federal court.[263] The policy implications of these potential changes in the nature of private cleanup cost disputes are discussed in greater detail in Part IV of this Article.

4. Opportunity: Rethinking the Role of Federal Law in Private Party Cleanup Cost Allocation Disputes

The aftermath of the *Aviall* decision will be years of litigation regarding whether CERCLA allows a PRP who has not been sued under section 106 or 107(a) to sue another PRP for cleanup costs. In the meantime, PRPs will wrestle with a variety of strategies designed to place themselves in a position to trigger the right to a CERCLA contribution remedy. Congress could enter into the picture with an amendment to CERCLA addressing PRP contribution rights. All of this activity, however, assumes that federal law should remain the primary rule of decision in private party cleanup cost allocation disputes. But why?

The *Aviall* decision and the legacy of twenty-five years of CERCLA practice provide the opportunity to return to first principles: Should there be a private right of action for recovery of cleanup costs under federal law at all? If not, why would state law provide an adequate or superior

260. *See infra* notes 266, 270, 327–37 and accompanying text.

261. *See supra* notes 23–27 and *infra* notes 267–90 and accompanying text.

262. State law cleanup cost disputes, of course, could be filed in federal court pursuant to diversity subject matter jurisdiction. *See* 28 U.S.C. § 1332 (2000). The frequent presence of corporate PRPs in cleanup cost allocation litigation and the dual citizenship of corporations for purposes of determining diversity of citizenship, i.e., state of incorporation and principal place of business, limit the availability of federal courts as a forum to resolve many state law cleanup cost cases. *See id.* § 1332(c).

263. *See supra* notes 145–54 and *infra* notes 304–42 and accompanying text.

substitute? If so, why should federal law influence the ordering of private hazardous substance disposal and remediation behavior and the expenditure of billions of dollars in cleanup costs? What should be the purpose of a federal remedy?

The short and obvious answer is "uniformity." But a goal of "uniformity" begs the question: What is the value of a uniform national rule of decision? There are two potential answers to this question. On the one hand, a uniform federal rule of decision effectively could provide a "safety net" that ensures the availability of a status-based strict liability cost recovery remedy regardless of whether a parallel or broader state law remedy also might be available. On the other hand, a uniform federal rule of decision could serve to foster compliance with a set of national policies regarding the nature of cleanup cost liabilities and the way cleanups are conducted throughout the country. As discussed below in Parts IV and V, a uniform federal rule of decision should remain available in private cleanup cost disputes across the country as a "safety net" remedy without broadly preempting otherwise available state law theories.

IV. SHOULD FEDERAL OR STATE LAW PROVIDE THE PRIMARY RULE OF DECISION IN PRIVATE PARTY CLEANUP COST DISPUTES?

A. Introduction

This section of the Article explores potential consequences if state law supplants federal law as the primary[264] rule of decision in private clean-up cost disputes. After this introduction, Part IV(B) looks at arguments supporting a return of state law to its pre-CERCLA status as the primary rule of decision applicable to private cleanup cost disputes. Part IV(C) then argues why federal law should remain as the primary rule of decision in these cases. Part IV(D) analyzes alternative approaches to ensuring the availability of such a federal rule.

264. As used in this Article, the "primary" rule of decision refers to the body of law most frequently relied on by PRPs in private cleanup cost disputes. After its passage in 1980, CERCLA served as the primary rule of decision in private cleanup cost disputes because PRPs found attractive a retroactive, nationally-applicable, status-based strict liability cleanup cost remedy against other PRPs. CERCLA claims likely would remain the primary rule of decision if, after *Aviall*, a PRP may continue to assert CERCLA claims against other PRPs without first having been sued under CERCLA. A related question, discussed in Part V, *infra*, is whether (and, if so, to what extent) the primacy of such a federal claim should have a preemptive effect on state law.

B. Arguments Supporting State Law As the Primary Rule of Decision

Broadly speaking, there are three reasons why state law should serve as the primary rule of decision in private cleanup cost disputes: efficiency, flexibility, and tradition.

1. Efficiency

Elevating the role of state law in private cleanup cost disputes by denying a CERCLA cleanup cost remedy to most PRPs could make private contaminated-property litigation more efficient by limiting rules of decision to a common body of state law rather than a mixture of federal and state law. Plaintiffs often join state law claims with CERCLA claims, for several possible reasons. First, they may join state law claims in case their CERCLA claim is unsuccessful. CERCLA sections 107(a)(4)(B) and 113(f) limit recovery to response costs incurred in a manner consistent with the NCP.[265] State common law theories and some state Superfund statutes,[266] on the other hand, do not make consistency with the NCP part of the plaintiff's prima facie cleanup cost claim or a *per se* limitation on the availability of damages. A PRP seeking to recover costs under CERCLA, therefore, might also include a state law cleanup cost claim to provide a cost recovery vehicle in the event that the PRP could not prove that some or all claimed costs were incurred in a manner consistent with the NCP.[267]

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265. *See, e.g.*, Carson Harbor Vill., Ltd. v. County of Los Angeles, 433 F.3d 1260, 1265 (9th Cir. 2006) (prima facie case under section 107(a) requires, *inter alia*, showing that plaintiff incurred costs consistent with NCP); Pub. Serv. Co. of Colo. v. Gates Rubber Co., 175 F.3d 1177, 1181 n.5 (10th Cir. 1999) (consistency with NCP is essential element of proof under section 107(a) and the "lynchpin" for recovery under section 113); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1150 (1st Cir. 1989) (consistency with NCP is a necessary element "for a prima facie case in a private-party lawsuit under CERCLA"); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 667–68 (5th Cir. 1989) (noting that CERCLA cases often are divided into liability and remedy phases, and stating that "[a] plaintiff may recover those response costs that are necessary and consistent with the National Contingency Plan ('NCP') . . . once liability is established, the court must determine the appropriate remedy and which costs are recoverable."); Jones v. Inmont Corp., 584 F. Supp. 1425, 1430 (S.D. Oh. 1984) ("[T]he national contingency plan is a means to assure that response actions are both cost-effective and environmentally sound and that, therefore, consistency with that plan goes more to the recoverability of various items of damages than to the existence of a claim for relief under [CERCLA]"); *see also* James R. Deason, Note, *Clear as Mud: The Function of the National Contingency Plan Consistency Requirement in a CERCLA Private Cost-Recovery Action*, 28 GA. L. REV. 555, 586 (1994) (arguing that NCP consistency should be used to measure the proper amount of CERCLA damages rather than to determine whether a defendant is liable under CERCLA).

266. *See, e.g.*, ARIZ. REV. STAT. ANN. § 49-285(B) (2005); DEL. CODE ANN. tit. 7, § 9105 (2005); FLA. STAT. § 403.727 (2005); GA. CODE ANN. § 12-8-96.1 (2004); MICH. COMP. LAWS § 324.20126 (2005).

267. *See, e.g.*, Eric E. Nelson & Curt R. Fransen, *Playing With A Full Deck: State Use of Common Law Theories to Complement Relief Available Through CERCLA*, 25 IDAHO L. REV.

Second, a plaintiff might join state law claims because of concern that CERCLA may not apply to the type of contamination found at the site. CERCLA section 107(a) provides for the recovery of costs of responding to releases or threatened releases of "hazardous substances."[268] While the CERCLA definition of "hazardous substances" is quite broad, it expressly excludes petroleum.[269] As a result, CERCLA provides no cost recovery remedy at all for the remediation of petroleum contamination. At sites involving both petroleum and non-petroleum contamination, a PRP could look only to state law claims to recover petroleum cleanup costs.[270]

493, 515 (1989) (noting in the context of state government cost recovery claims that "if a state has responded to a release of hazardous substances in a manner that is likely to be considered inconsistent with the National Contingency Plan, a public nuisance and restitution action can provide the recovery of response costs where CERCLA will not."); Charles C. Steincamp, Note, *Toeing the Line: Compliance with the National Contingency Plan for Private Party Cost Recovery Under CERCLA*, 32 WASHBURN L.J. 190, 228–36 (1993) (describing various uses of state Superfund statutes and common law theories, including to recover cleanup costs that do not satisfy the NCP consistency requirements). The use of state law claims to recover costs that are not consistent with the NCP, however, may raise preemption issues. *See* PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, 617–18 (7th Cir. 1998) (plaintiff unable to recover response costs under CERCLA section 113(f)(1) because of inconsistency with the NCP could not use Illinois Contribution Act to recover those costs); *see also infra* notes 383–405 and accompanying text.

268. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (2000) (permitting recovery of "costs of response"); CERCLA § 101(25), 42 U.S.C. § 9601(25) ("response" means "removal" or "remedial" action); CERCLA § 101(23), (24), 42 U.S.C. § 9601(23), (24) ("removal" or "remedial" action refers to actions taken in response to release or threatened release of a "hazardous substance").

269. CERCLA § 101(14), 42 U.S.C. § 9601(14).

270. State Superfund statutes often adopt portions of CERCLA's liability scheme. *See* Mckinstry, *supra* note 22, at 85 (noting that state Superfund statutes mirror CERCLA in many respects); *see also infra* note 329 and accompanying text. Several state Superfund statutes, however, have not adopted the CERCLA petroleum exclusion and thus could provide a status-based strict liability cleanup cost remedy for petroleum contamination. *See, e.g.*, ARIZ. REV. STAT. ANN. § 49.283.02 (2005); CONN. GEN. STAT. § 22a-134(24) (2004); HAW. REV. STAT. § 128D-1 (2004). RCRA likely does not provide a federal law vehicle for recovering petroleum contamination cleanup costs. RCRA allows a citizen's suit for an order directing any person who has contributed to the disposal of any "solid or hazardous waste" to take such "action as may be necessary" to address "an imminent and substantial endangerment to health or the environment" caused by the disposal. 42 U.S.C. § 6972(a) (2000). The RCRA definition of "solid or hazardous waste" does not exclude petroleum. *See* 42 U.S.C. § 6903(5)(27). RCRA, however, likely does not provide a federal cleanup cost recovery remedy for petroleum or other contamination. In *Mehgrig v. KFC Western, Inc.*, 516 U.S. 479, 484–86 (1996), the U. S. Supreme Court held that a RCRA citizen's suit does not permit recovery of pre-suit cleanup costs. The Court in *Mehgrig*, however, expressly declined to address whether a court could award cleanup costs incurred *after* a RCRA citizen's suit was filed. *Id.* at 488. Courts have differed as to whether a RCRA citizen's suit plaintiff may recover post-filing cleanup costs. *Compare* Avondale Fed. Sav. Bank v. Amoco Oil Co., 170 F.3d 692, 695 (7th Cir. 1999) (rejecting RCRA post-filing cost claim) *with* Nashua Corp. v. Norton Co., 116 F. Supp. 2d 330, 358–59, (N.D.N.Y. 2000) (where impracticable for defendant liable under both CERCLA and RCRA to assume responsibility for ongoing cleanup, court permitted RCRA injunction ordering defendant who had "shown a willingness to fight costs and liability on thin grounds" to pay 90 percent of all

Third, CERCLA only addresses the costs of responding to releases or threatened releases of hazardous substances. Soil or groundwater contamination, of course, can cause harm other than cleanup costs. CERCLA, however, does not provide a remedy for other harm caused by contamination, such as damages for personal injury, diminution in property value, post-remediation stigma to property, or lost, delayed, or impaired use of real property.[271] A current landowner PRP incurring cleanup costs, therefore, still would have to rely on state law to recover personal injury, property, or economic damages caused by hazardous substance contamination.[272]

Moreover, state law has played an increasingly important role filling in the interstices of CERCLA. For example, in *United States v. Bestfoods*,[273] the U. S. Supreme Court in 1998 held that a parent corporation could be indirectly liable under CERCLA section 107(a)(1) or (2) as the "owner" of a subsidiary corporation's contaminated facility under a "piercing the corporate veil" theory. The Court, however, expressly left open whether state or federal veil-piercing law should be used to fill this definitional gap in the statute.[274] Several courts have applied state veil-piercing law to determine whether a parent corporation

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future CERCLA recoverable clean up and investigative costs unless it files specific objections to a particular bill within a certain period of time) *and* Gilroy Canning Co. v. Cal. Canners & Growers, 15 F. Supp. 2d 943, 945 (N.D. Cal. 1998) (under *Mehgrig*, "post-filing cleanup costs are not clearly barred by RCRA. If at trial the court finds Cal Can liable, the court may enjoin Cal Can to pay for future investigation and remediation costs at the Site.").

271. *See, e.g.*, Artesian Water Co. v. Gov't of New Castle County, 659 F. Supp. 1269, 1285 (D. Del. 1987) ("Congress in enacting CERCLA clearly manifested an intent not to provide compensation for economic losses or for personal injury resulting from the release of hazardous substances.").

272. Joining state law claims to CERCLA claims also would permit a jury to address common issues. Courts consistently have characterized CERCLA claims as restitutionary in nature; accordingly, there is no Seventh Amendment right to a jury trial of CERCLA claims. *See supra* note 154. Generally speaking, a nuisance, negligence, or other common law tort plaintiff would have a right to a jury trial and could insist on jury determination of common tort and CERCLA issues. *See* Goe Eng'g Co. v. Physicians Formula Cosmetics, Inc., No. CV 94-3576-WDK, 1997 WL 889278, at *5–6 (C.D. Cal. June 4, 1997) (under *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), CERCLA claims could not be tried unless supplemental state law claims for which there was a right to jury trial were tried first, so court dismissed supplemental state law claims pursuant to 28 U.S.C. § 1367(c) because of delay and complexity arising from jury trial issues).

273. 524 U.S. 51, 63–64 (1998).

274. *Id.* at 63 n.9. The Court cited the following as examples of cases and commentators addressing each perspective: Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1225 (3d Cir. 1993) ("[G]iven the federal interest in uniformity in the application of CERCLA, it is federal common law, and not state law, which governs when corporate veil-piercing is justified under CERCLA."), Ronald G. Aronovsky & Lynn D. Fuller, *Liability of Parent Corporations for Hazardous Substance Releases Under CERCLA*, 24 U.S.F. L. REV. 421, 455 (1990) ("CERCLA enforcement should not be hampered by subordination of its goals to varying state law rules of alter ego theory and limited liability."), and Richard G. Dennis, *Liability of Officers, Directors and Shareholders Under CERCLA: The Case for Adopting State Law*, 36 VILL. L. REV. 1367 (1991) (arguing that state law should apply). 524 U.S. at 63 n.9.

should be indirectly liable under CERCLA section 107(a)(1) or (2).[275] Courts have also turned to state law to fill other gaps in the CERCLA liability scheme, such as whether to impose successor liability on a corporation that acquires the assets of a CERCLA-liable company.[276]

In sum, state law will continue to occupy a significant place in many private cleanup cost disputes whether or not a CERCLA cleanup cost remedy remains available to PRPs. As a result, combining all private contamination claims in one proceeding through the application of a common body of state law as the rule of decision could promote institutional efficiency and assure adjudication in state court of all claims by a tribunal comfortable and familiar with the underlying law.

2. Flexibility

CERCLA imposes status-based, strict liability on a wide spectrum of PRPs to further the policy that "the polluter pays" the cost of cleanup.[277] It brings with it, however, a cumbersome and often inflexible private cost recovery process. A prime example is the requirement that to recover response costs under section 107(a)(4)(B) or section 113(f), a private plaintiff must demonstrate that those costs were incurred in a manner consistent with the National Contingency Plan (NCP).[278]

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275. *See, e.g.*, Carter-Jones Lumber Co. v. Dixie Distrib. Co., 166 F.3d 840, 846 (6th Cir. 1999); Pfohl Bros. Landfill Site Steering Comm. v. Allied Waste Sys., Inc., 255 F. Supp. 2d 134, 179 (W.D.N.Y. 2002) (applying New York veil-piercing law); Aero-Motive Co. v. Becker, 2001 WL 1699194, at *6 (W.D. Mich. Dec. 6, 2001) (applying Michigan veil-piercing law); *cf., e.g.*, United States v. Union Corp., 259 F. Supp. 2d 356, 388 (E.D. Pa. 2003) (federal law should govern alter ego liability in CERCLA context).

276. *See, e.g.*, New York v. Nat'l Servs. Indus., Inc., 352 F.3d 682, 687 (2d Cir. 2003) (after *Bestfoods*, New York state successor liability law should apply); United States v. Davis, 261 F.3d 1, 54 (1st Cir. 2001) (applying Massachusetts successor liability law); Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1248 (6th Cir. 1991) (directing district court to apply Michigan law of successor liability); s*ee also* Ronald H. Rosenberg, *The Ultimate Independence of the Federal Courts: Defying the Supreme Court in the Exercise of Federal Common Law Powers*, 36 CONN. L. REV. 425 (2004) (analyzing in the context of whether corporate asset purchasers should be liable for response costs under CERCLA the degree of lower court adherence to Supreme Court jurisprudence on the limited jurisdiction of federal courts to create federal common law filling in the interstices of federal statutes); *cf., e.g.*, United States v. Gen. Battery Corp., 423 F.3d 294, 303 (3d Cir. 2005) (applying federal common law of successor liability because "incorporating variable and uncertain state successor liability standards would increase significantly CERCLA litigation and transaction costs—in conflict with the statutory interests embodied in 42 U.S.C. § 9622, which aims to encourage early settlements, and § 9607(r) which aims to facilitate a liquid market in brownfield assets"); Bradford C. Mank, *Should State Corporate Law Define Successor Liability?: The Demise of CERCLA's Federal Common Law*, 68 U. CIN. L. REV. 1157, 1197 (2000) ("While a federal common law based on the substantial continuity doctrine would better serve CERCLA's broad remedial goals, it is unlikely that following state successor liability principles will significantly interfere with the EPA's implementation of CERCLA.").

277. *See supra* note 60 and accompanying text.

278. The 1990 NCP (the most recent version of the NCP) provides that a private party response action is consistent with the NCP if it is in "substantial" compliance with applicable requirements of the NCP. 40 C.F.R. § 300.700(c)(3)(i) (2005). Immaterial or insubstantial

Private cleanup actions that result in a "CERCLA-quality cleanup" are considered consistent with the NCP.[279] For a private response action to constitute a "CERCLA-quality cleanup," the selected remedy must: (1) protect human health and the environment; (2) employ permanent solutions and alternative treatment technologies to the maximum extent practicable; (3) be cost effective; (4) identify and attain applicable or relevant and appropriate requirements ("ARARs", i.e., cleanup standards) for the site; and (5) provide for meaningful public participation in the remedy selection process.[280] Compliance with NCP requirements for investigating the extent of contamination and evaluating remedial alternatives[281] as well as affording the required level of public participation[282] can be time consuming and very expensive.[283] These costs

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deviations from NCP provisions will not cause a response action to be deemed inconsistent. § 300.700(c)(4). Cleanups conducted pursuant to an EPA section 106 administrative order or a section 122 consent decree entered into under CERCLA are presumed consistent with the NCP. § 300.700(c)(3)(ii).

279. 40 C.F.R. § 300.700(c)(3)(i).

280. *See* National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8793 (Mar. 8, 1990); *see* Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc., 240 F.3d 534, 543 (6th Cir. 2001) (identifying "CERCLA-quality cleanup" NCP factors); *see also* Dahlquist, *supra* note 59, at 35 (attempting to "distill the 1990 NCP into a concise, plain-English statement of the main requirements 'potentially applicable' to private parties . . . .").

281. The NCP requires preparation of a remedial investigation and feasibility study ("RI/FS"), which involves, *inter alia*, an extensive analysis of contamination conditions and remedial alternatives. 40 C.F.R. § 300.430(e)(9) (2005). *See, e.g.*, Sherwin-Williams Co. v. City of Hamtramck, 840 F. Supp. 470, 478 (E.D. Mich. 1993) (citations omitted):

> EPA regulations indicate that private parties are to provide for appropriate site evaluation and investigation, as well as an analysis of remedial alternatives. Private parties must substantially comply with the detailed provisions of section 300.430 in order to meet this requirement. Section 300.700(c)(5)(viii) directs private parties to compile a remedial investigation/feasibility study ("RI/FS") before conducting a cleanup. The RI/FS process requires an analysis of the initial threat of the contamination to health, welfare, and the environment. The investigation must also take into account fifteen factors ranging from hydrogeological concerns to contaminate mobility in deciding the type of remedial action to be taken. The failure of a party seeking cost recovery under CERCLA to perform an RI/FS, and all the analysis and investigation that it implies, defeats a claim of substantial compliance with the NCP.

See also Carson Harbor Vill., Ltd. v. County of Los Angeles, 433 F.3d 1260, 1268–1269 (9th Cir. 2006) (plaintiff failed to substantially comply with NCP where feasibility study contained full analysis of only one remedial alternative).

282. Public participation requirements include designing and implementing a public information and community relations plan and providing an appropriate opportunity for public comment on the RI/FS and selection of a proposed remedy. 40 C.F.R. § 300.700(c)(6) (2005). Failure to comply with public participation requirements may constitute inconsistency with the NCP and prevent cost recovery. *See, e.g., Carson Harbor Vill.*, 433 F.3d at 1266–67 (plaintiff failed to show compliance with public participation requirement; "minor and ministerial" involvement of public agency did not provide effective substitute for public participation); Union Pac. R.R. Co. v. Reilly Indus., 215 F.3d 830, 835 (8th Cir. 2000) ("Failure to provide a meaningful opportunity for public participation and comment in the selection of a remedial

and delays may have a chilling effect on the willingness of prospective purchasers to acquire and develop or restore urban properties. [284] One consequence of this chilling effect is increased risk of development sprawl into relatively pristine suburban and rural areas.[285]

Consistency with the NCP is not a requirement for a damage remedy under state common law theories.[286] A state law rule of decision for cost

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action at a particular cleanup site is inconsistent with the NCP."); County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1514–15 (10th Cir. 1991) (holding that where no opportunity for public comment on proposed remedy response was provided, cleanup was not consistent with NCP and costs are not recoverable under section 107).

283. *See, e.g.*, Opper, *supra* note 151, at 182–83 (noting that NCP requirements apply on their face to all sites regardless of their complexity, and arguing for amending the NCP to streamline brownfield and other low-risk site regulation).

284. *See id.* at 183 ("The NCP needs to be updated to fit the new brownfields paradigm, or else it should adopt language to allow a finding of 'consistency' after little or no elaborate process for certain types of common urban projects."); Schwenke, *supra* note 15, at 297 ("The potential liability for environmental contamination continues to stand as a major impediment to acquisition, financing, and development of these vacant or abandoned sites.").

285. Many parcels of former industrial urban brownfield property lie abandoned because developers fear acquiring these sites and instantly assuming joint and several CERCLA liability to the government. Kenneth A. Manaster & Daniel P. Selmi, 1 State Envtl. L. (West) § 9:52 (2005) (noting that critics of CERCLA "allege that the uncertainty of liability under CERCLA, and under its state counterparts, has been a prime reason why contaminated properties have not been cleaned up and re-utilized."). In light of these concerns, Congress adopted the Brownfields Revitalization and Environmental Restoration Act of 2001 (the "2001 Brownfields Act"), Pub. L. No. 107-118, §§ 201–232, 115 Stat. 2360 (2002), codified at 42 U.S.C.A. §§ 9601(35), (39)–(41), 9607(q), (r), 9628 (West 2005), to provide, *inter alia*, liability relief for certain qualified purchasers of brownfield sites in order to encourage urban in-fill development. The 2001 Brownfields Act amended CERCLA to exempt "bona fide prospective purchasers" of contaminated property from CERCLA section 107(a)(1) liability as the current owner of a facility so long as the prospective purchaser conducts "all appropriate inquiries" determined by EPA rule-making as an appropriate level of due diligence to qualify for the liability exemption. 42 U.S.C.A. § 9601(35)(B)(i)(I), (40) (West 2005). *See* Innocent Landowners, Standards for Conducting All Appropriate Inquiry, 40 C.F.R. pt. 312 (2005). Should the developer fail to qualify for bona fide purchaser status, it would lose its liability exemption and become a PRP. In that event, the developer as PRP would be unable to bring a CERCLA section 107(a) claim (based on court of appeals precedent as of the time the Supreme Court decided *Aviall*) or a CERCLA 113(f)(1) claim against the PRPs who actually caused the contamination. If the developer does qualify as a bona fide purchaser and wishes to recover its cleanup costs under CERCLA section 107(a)(4)(B), it will need to demonstrate consistency with the NCP to recover its costs—added transaction costs that, coupled with the expense of cost recovery litigation, could make the development project prohibitively expensive. Notwithstanding the 2001 Brownfields Act, "[i]t is the states, however, that have led in the recent changes responding to the brownfields phenomenon." Manaster & Selmi, *supra*, § 9:52. State brownfield statutes seek to induce voluntary cleanup of non-NPL hazardous waste sites "to which EPA is unlikely to apply its resources." *Id.*

286. Similarly, some state Superfund statutes that have adopted portions of the CERCLA remedial scheme do not require consistency with the NCP for cost contribution. *See, e.g.*, ARIZ. REV. STAT. ANN. § 49-285(B) (2005); DEL. CODE ANN. tit. 7, § 9105 (2005); FLA. STAT. § 403.727 (2005); GA. CODE ANN. § 12-8-96.1 (2004); MICH. COMP. LAWS § 324.20126 (2005). In *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 617–18 (7th Cir. 1998), the Seventh Circuit held that a plaintiff unable to recover response costs under CERCLA section 113(f)(1) because of inconsistency with the NCP could not recover those costs under the Illinois Contribution Act,

recovery, therefore, might be far more attractive for current landowners and prospective purchasers of contaminated real estate interested in conducting a technically sound cleanup but unable for financial or business planning reasons to absorb the additional time and expense required to conduct the "CERCLA-quality cleanup" that is necessary for CERCLA cost recovery.

Additionally, state or local agencies serve as the lead regulatory agency at the vast majority of contaminated sites. Emergence of state law as the primary rule of decision in private cleanup cost disputes would encourage greater coordination of regulatory enforcement action and private cost recovery by correlating any cleanup cost or other contamination-related damages available under state law to state regulatory requirements. Similarly, state cleanup cost liability schemes would be consistent with applicable state tort theory on a variety of interrelated issues, such as the continuing nuisance doctrine,[287] damages measurement,[288] and contribution bar rules.[289] Finally, to the extent that

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reasoning that plaintiff PMC's attempted "invocation of Illinois' contribution statute is an attempt to nullify the sanction that Congress imposed for the kind of CERCLA violation that PMC committed." Whether CERCLA should so preempt state statutory or common law remedies is discussed in Part V, *infra*. *See infra* notes 383–405.

287. *See infra* notes 319–26 and accompanying text. In some states, a plaintiff must demonstrate that a nuisance is reasonably abatable at a reasonable cost in order to prove that contamination should be treated as a continuing rather than as a permanent nuisance and in many cases preserving an otherwise time-barred claim. The cost of abatement may be impacted substantially by whether the additional time and cost of a "CERCLA-quality cleanup" and NCP consistency is required.

288. The RESTATEMENT (SECOND) OF TORTS, section 929, describes this damage measure:

> (1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for (a) the difference between the value of the land before the harm and the value after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred, (b) the loss of use of the land, and (c) discomfort and annoyance to him as an occupant.
>
> (2) If a thing attached to the land but severable from it is damaged, he may at his election recover the loss in value to the thing instead of the damage to the land as a whole.

State common law rules regarding the measure of damages thus may take into account the reasonableness of property restoration costs, including such factors as the efficiency and effectiveness of cleanup actions and any substantive or procedural requirements placed on the plaintiff by regulatory agencies. A state Superfund statute may also prescribe the measure of recoverable costs in a statutory contribution action, which may include consistency with the NCP. *See infra* notes 330–37 and accompanying text.

289. Generally, settlements with some but not all PRPs at a site are difficult to obtain without contribution protection for the settling party; a PRP will be unlikely to settle a cleanup cost lawsuit with the plaintiff only then to be sued for contribution by the non-settling defendants. A "contribution bar order" protects the settling and non-settling parties by barring contribution claims against the settling defendant in exchange for a reduction in judgment against the non-settling parties in an amount roughly reflecting the settling party's fair share of liability. This reduction in judgment can either be *pro tanto* (the amount paid in settlement, as reflected in the Uniform Contribution Among Tortfeasors Act (UCATA)), confirmed by the

environmental regulatory policy in general, and private cleanup liabilities in particular, influence commercial economic behavior, state law would provide a more flexible and responsive laboratory to experiment with and implement choices associated with the interrelationship of economic and environmental policies.[290]

3. *Tradition*

Before CERCLA was enacted in December 1980, state law provided the only vehicle for a private party to recover costs incurred to remediate contamination caused by someone else.[291] Land use regulation—limitations or prohibitions on the use of private property to serve a public purpose pursuant to the police power[292]—always has been primarily

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court after a "fairness" hearing on the settlement, or *pro rata* according to the settling defendant's equitable share of liability determined at trial by the trier of fact (as reflected in the Uniform Comparative Fault Act (UCFA)). CERCLA cases with state law claims can cause uncertainty regarding contribution bar orders. Settlements with government agencies under CERCLA provide *pro tanto* contribution protection, *see* CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2) (2000), while federal courts are split as to whether to give *pro tanto* or *pro rata* contribution protection in private cleanup cost cases. *See, e.g.*, Eric DeGroff, *Raiders of the Lost ARCO: Resolving the Partial Settlement Credit Issue in Private Cost Recovery and Contribution Claims Under CERCLA*, 8 N.Y.U. ENVTL. L.J. 332, 397 (2000) (concluding that the UCFA should apply to CERCLA contribution claims and the UCATA to cost recovery claims). Complications arise when the federal contribution bar rule differs from the state law contribution bar rule. The emergence of state law as the primary rule of decision in private cleanup cost disputes would eliminate this discrepancy.

290. There has been considerable scholarly debate regarding whether aggressive state environmental protection regulation causes business to relocate to states with less stringent requirements, thus creating a "race to the bottom." Articles rejecting the so-called "race to the bottom" theory include James E. Krier, *Environmental Federalism: On the Topology of Uniform Environmental Standards in a Federal System—And Why It Matters*, 54 MD. L. REV. 1226, 1236–37 (1995); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1233–44 (1992); Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997); and Richard B. Stewart, *International Trade and Environment: Lessons from the Federal Experience*, 49 WASH. & LEE L. REV. 1329, 1343–44 (1992). Articles reflecting a perspective that federal regulation can mitigate any "race to the bottom" include Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "to the Bottom?"* 48 HASTINGS L.J. 271, 367 (1997); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 597–98 (1996); and Joshua D. Sarnoff, *A Reply to Professor Revesz's Response in "The Race to the Bottom and Federal Environmental Legislation"*, 8 DUKE ENVTL. L. & POL'Y F. 295 (1998).

291. *See supra* notes 21–27 and accompanying text.

292. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 32 (1954) ("Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs."); Daniel J. Curtin, Jr., *Symposium 2005: Regulating Big Box Stores: The Proper Use of the City or County's Police Power and its Comprehensive Plan—California's Experience*, 6 VT. J. ENVTL L. 8, 34–35 (2005) ("The legal basis for all land use regulation is the police power of the city to protect the public health, safety, and welfare of its residents. A land use regulation lies within the police power if it is reasonably related to the public welfare." (footnotes omitted)); David A. Thomas, *Finding More Pieces For The Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U.

within the province of state and local law.[293] Rules of decision relating to private party cleanup disputes share many of the attributes of traditional land use regulation. Private party cleanup activity may limit or prohibit private property usage and thus interfere with the use and enjoyment of other property.[294] Moreover, remedial alternatives, cleanup standards, and the recoverability of remediation costs may take into account community concerns and the effectiveness of remedial choices on restoring the environment, limiting human exposure to contaminants, and protecting public health—all historically areas of local concern.[295] At bottom, because state law traditionally has played a predominant role in land use disputes, the (re-)emergence of state law as the primary rule of decision in most private cleanup cost disputes would hardly be a revolutionary turn of events.

C. Arguments Supporting Federal Law As the Primary Rule of Decision

Soil and groundwater contamination remain national problems of enormous proportion. Hundreds of thousands of potential sites may still require investigation or remediation, requiring billions of dollars in

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COLO. L. REV. 497, 543 (2004) ("[T]he main objective of early police power land use regulations was to restrain nuisance-type land uses.").

293. *See* Michael Asimow, *The Fourth Reform: Introduction to the Administrative Law Review Symposium on State Administrative Law*, 53 ADMIN. L. REV. 395, 395 (2001) ("We look to state and local agencies for reasonable land use regulation and many vital forms of environmental protection."); Carol R. Goforth, *"Not in My Backyard!": Restrictive Covenants as a Basis for Opposing Construction of Cellular Towers*, 46 BUFF. L. REV. 705, 713 (1998) ("[Z]oning and land use regulation have traditionally been matters left to state and local law.").

294. For example, groundwater contamination problems may involve a release of hazardous substances at one parcel of property, which then leach through the soil and contaminate groundwater that migrates downgradient to other properties. A response action under CERCLA (as well as an injunction to abate a nuisance under state law) could require excavation of contaminated soil on the originating parcel to eliminate or mitigate any remaining sources of groundwater contamination as well as the installation and maintenance of groundwater or soil vapor extraction wells to prevent conditions on the originating parcel from further impacting downgradient properties. Regulatory agencies may also attempt to impose restrictions on the future land use of either the originating or downgradient properties, depending on the health risks presented by the contamination. *See generally* Schwenke, *supra* note 15 (discussing regulatory agency use of and potential enforceability issues presented by environmental covenants and other servitudes, sometimes referred to as "institutional controls" or "deed restrictions").

295. *See* Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 719 (1985) (federal regulations governing collection of blood plasma from paid donors did not preempt local ordinances, noting that "the regulation of health and safety matters is primarily, and historically, a matter of local concern."); *see also* Alexandra Manchik Barnhill, *Entrenching the Status Quo: The Ninth Circuit Uses Preemption Doctrines to Interpret CERCLA as Setting a Ceiling for Local Regulation of Environmental Problems*, 31 ECOLOGY L.Q. 487, 518–22 (2004) (municipal police power includes authority to regulate nuisances and preserve public safety, health, and welfare).

cleanup costs.[296] In theory, CERCLA's goals of encouraging prompt and efficient cleanups,[297] ensuring that polluters rather than taxpayers bear the cost of remediating contamination to which the polluters contributed,[298] and facilitating the redevelopment of urban "brownfield" property[299] all could be well-served with state law as the primary rule of decision in private cleanup cost disputes. In reality, however, the limitations of state statutory and common law theories and the dramatic variation among state law regimes demonstrate that to best accomplish these goals, a federal law remedy should remain available as a rule of decision in private cleanup cost disputes.

Nuisance Theories in Private Cleanup Cost Disputes: A variety of tort and other common law theories have been used to address private cleanup cost disputes, including nuisance, trespass, negligence, and strict liability for abnormally dangerous activity.[300] Generally speaking, the tort of nuisance[301] can cast the widest net[302] among potential common law

296. *See supra* notes 1, 16 and accompanying text.

297. *See, e.g.*, United States v. County of Denver, 100 F.3d 1509, 1511 (10th Cir. 1996) ("Congress enacted CERCLA to provide a mechanism for the prompt and efficient cleanup of hazardous waste sites."); United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1416–17 (6th Cir. 1991) (noting that CERCLA was enacted to ensure prompt and efficient cleanup of hazardous waste sites and to place the costs of those cleanups on responsible parties).

298. *See, e.g.*, United States v. Alcan Aluminum, 964 F.2d 252, 258 (3d Cir. 1992) (CERCLA was "designed to force polluters to pay for costs associated with remedying their pollution.").

299. Opper, *supra* note 151, at 164–65.

300. *See supra* notes 21–37 and accompanying text.

301. Nuisances fall into two broad categories: public and private. *See infra* note 304 (RESTATEMENT (SECOND) OF TORTS definition of private nuisance). A public nuisance is "an unreasonable interference with a right common to the general public." RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979). Governmental entities may bring an action to enjoin and compel the abatement of a public nuisance. *Id.* § 821C(2)(b). Private parties affected by a public nuisance (e.g., the owner of property impacted by a contaminated groundwater plume) must show a special injury different than that suffered by other affected property owners in order to state a prima facie public nuisance claim. *See id.* § 821C(1) ("In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference."). Distinctions between public and private nuisance that vary among the states, including the requirement for a plaintiff's "special injury" that provides standing for a private party to bring a public nuisance claim, may further restrict the availability of private cleanup cost remedies at contaminated groundwater sites. *See generally* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755 (2001) (discussing the development and various applications of the special injury requirement for private standing to bring a public nuisance claim).

302. *See* Klein, *supra* note 23, at 353–54 (noting that "[i]n light of CERCLA's failures, legal commentators have increasingly suggested that courts supplement or replace the legislative regime through an expanded use of common law tort actions—in particular, nuisance law," and citing the observation of WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 112–13 (2d ed. 1994), that "[t]here is no common law doctrine that approaches nuisance in comprehensiveness or detail as a regulator of land use and of technological abuse."); *see also* WARREN FREEDMAN, HAZARDOUS WASTE LIABILITY 121 (1992) ("[N]uisance is a more reliable theory of liability than trespass or negligence for the hazardous waste disposal situation."). Depending on the

theories for recovery of cleanup costs.[303] But proving a prima facie nuisance claim may present potentially challenging culpability issues that are irrelevant to proving liability under a status-based strict liability scheme for recovering cleanup costs.[304]

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jurisdiction, a nuisance theory can expand the range of potential cleanup cost contribution defendants beyond the four categories of CERCLA "covered persons" and further the equitable sharing of remediation responsibility. *See, e.g.*, City of Modesto Redev. Agency v. Super. Ct., 13 Cal. Rptr. 3d 865, 876 (Ct. App. 2004) (under California law, common law nuisance principles permit groundwater contamination cleanup cost claims against dry cleaning solvent and equipment manufacturers who improperly designed dry cleaning solvent waste disposal system or instructed users of system to dispose of waste improperly, resulting in discharge of solvents into leaking public sewers).

303. Nuisance claims are not subject to some of the limitations potentially applicable to other common law cost claim theories. For example, trespass claims are limited by potential consent defenses and intentional conduct requirements. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 158 cmt. e (1965) (intentional conduct required for trespass, but intrusion with consent of possessor is privileged). Negligence claims require proof that defendant breached a standard of care and are not subject to the continuing tort doctrine to avoid a statute of limitations defense. *See* Andritz Sprout-Bauer, Inc. v. Beazer E., Inc., 12 F. Supp. 2d 391, 417 (M.D. Pa. 1998) (finding current landowner's negligence claim against former owner and operator of site time-barred; continuing tort doctrine applies only to trespass and nuisance, not negligence); RESTATEMENT (SECOND) OF TORTS § 282 (1965) ("[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."). Strict liability for abnormally dangerous activity is not recognized as a tort with regard to hazardous substances in some jurisdictions. *See, e.g.*, Nat'l Tel. Coop. Ass'n v. Exxon Corp., 38 F. Supp. 2d 1, 8 (D.D.C. 1998) (doctrine not yet explicitly adopted in the District of Columbia); Jones v. Texaco, Inc., 945 F. Supp. 1037, 1050 (S.D. Tex. 1996) (Texas courts have rejected doctrine of abnormally dangerous activities as a basis for strict liability in the context of hazardous wastes) and is an unreliable theory on which to base a cleanup cost claim in light of the multi-factor balancing required to establish liability; *see also supra* note 27. *See generally* RESTATEMENT (SECOND) OF TORTS § 520 (1977), *supra* note 31 (identifying the six factors to consider in determining whether an activity is abnormally dangerous). Breach of contract, fraud and waste claims, by definition, each require a contractual or reliance relationship between plaintiff and defendant. These limitations generally do not apply to a nuisance claim.

304. As described in section 822 of the RESTATEMENT (SECOND) OF TORTS (1979):

> [o]ne is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Unlike CERCLA's status-based strict liability regime, private nuisance requires a plaintiff to prove intentional and unreasonable, negligent, reckless or "abnormally dangerous" conduct by the defendant. In some jurisdictions, culpable conduct by plaintiff may present an obstacle to recovery. *See, e.g.*, Copart Indus., Inc. v. Consol. Edison Co. of N.Y., 362 N.E.2d 968, 970 (N.Y. 1977) ("[A]lthough contributory negligence may be a defense where the basis of the nuisance is merely negligent conduct, it would not be where the wrongdoing is founded on the intentional, deliberate misconduct of defendant."); RESTATEMENT (SECOND) OF TORTS § 840E cmt. d (where plaintiff contributes to pollution and, if the harm is capable of apportionment, the apportionment will be made and the defendant will be held liable to the extent of his own contribution, but where apportionment cannot be made the plaintiff's own responsibility for the entire harm will bar recovery). In addition, proof of negligence may be problematic for sites at which the contamination occurred many years before. Indeed, conduct ultimately causing millions of dollars in cleanup costs may have been considered "state of the art" when it occurred decades earlier. For example, on August 27, 2001, the U.S. Department of the Interior

Moreover, nuisance law (as well as other tort theories) varies dramatically from state to state. A brief review of the dramatic differences in current state nuisance law underscores the importance of preserving a uniform federal rule of decision in private cleanup cost disputes.

Form of liability: As discussed above in the context of the section 107/section 113 conundrum, the form of potential cleanup cost liability can present a significant issue in private cleanup cost disputes. There is no consistency among the states regarding the form of nuisance liability. In some states, liability for nuisance can be joint and several.[305] In other states, a private nuisance action only brings several liability.[306] Joint and several liability for hundreds of thousands (if not millions) of dollars in cleanup costs may be too harsh for defendants who contributed little to a contamination problem. On the other hand, a nuisance claim for several liability at such a site may be as or more unfair to a non-culpable plaintiff who cannot locate or enforce judgments against every severally liable defendant and thus must absorb their "orphan shares" herself.

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designated California's Fresno Sanitary Landfill a National Historic Landmark, citing it as "the first landfill to employ the trench method of disposal, and the first to utilize compaction." The Fresno Sanitary Landfill, which operated from 1937 until the late 1980s, may once have been a state of the art facility. It also has been a Superfund site on the National Priorities List since 1989, at which nearly $40 million in response costs have been incurred. The Department of the Interior rescinded the landmark designation on August 28, 2001. *See The Fresno Sanitary Landfill as a National Historic Landmark*, AM. SOC'Y FOR ENVTL. HIST. NEWS (Am. Soc'y for Envtl. Hist., Durham, N.C.), Summer 2002, at 1, *available at* http://www.h-net.org/~environ/ASEH/ASEH_news/2002_2.pdf; *U.S. EPA Begins Five-Year Review of Cleanup at Site*, Mar. 2005, http://www.epa.gov/region9/waste/sfund/superfundsites.html (follow hyperlinks to "Fact Sheets;" then "Fresno Municipal Sanitary Landfill;" then "March 2005"); *Landfill Loses Landmark Status Due to Superfund History*, BROWNFIELDS WKLY. (Ctr. for Brownfields Initiatives, Univ. of New Orleans), Sept. 6, 2001, http://www.brownfields.com/newsletters/BF_090601.cfm.

305. *See, e.g.*, Michie v. Great Lakes Steel Div., Nat'l Steel Corp., 495 F.2d 213, 217 (6th Cir. 1974) (under Michigan law the form of liability is a question of fact, such that "[w]here the injury itself is indivisible, the judge or jury must determine whether or not it is practicable to apportion the harm among the tortfeasors. If not, the entire liability may be imposed upon one (or several) tortfeasors subject, of course, to subsequent right of contribution . . . ."); Oakland v. Pac. Gas & Elec. Co., 118 P.2d 328, 331 (Cal. Ct. App. 1941) (under California law, defendant must show limited responsibility for a specified proportion of the damage caused by a condition of nuisance or else be liable for the whole); Landers v. E. Tex. Salt Water Disposal Co., 248 S.W.2d 731, 734 (Tex. 1952) (affirming joint and several judgment awarding damages for and enjoining pollution of plaintiff's lake by salt water escaping from pipeline of one defendant and oil from oil well of another defendant). When nuisance liability is premised on negligent conduct by defendants, a plaintiff who negligently contributed to the nuisance may still be able to impose joint and several liability on the negligent defendants with regard to the portion of harm not attributable to plaintiff's negligence. *See, e.g.*, Abrahamsen v. Trans-State Express, Inc., 24 F.3d 804, 806 (6th Cir. 1994) (applying Ohio negligence law); Mountain Mobile Mix, Inc. v. Gifford, 660 P.2d 883, 883 (Colo. 1983) (applying Colorado law).

306. *See, e.g.*, KY. REV. STAT. ANN. § 411.182 (LexisNexis 2004); MICH. COMP. LAWS § 600.6304(4) (2005).

Successive Owner Claims: Soil contamination disputes commonly involve a claim by the current owner of property against a prior owner or occupant of the property.[307] Some states permit private nuisance actions between persons with successive interests in the same parcel.[308] Other jurisdictions, however, bar nuisance actions against prior owners of the same property, either under the doctrine of *caveat emptor* or after sufficient time has passed to permit a reasonable buyer to discover the contamination constituting the nuisance.[309] Similarly, some states limit the law of private nuisance to disputes between neighboring property owners.[310]

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307. Groundwater contamination cases may involve a release of contaminants that occurred at another parcel of property located upgradient from property to which the contamination has migrated and at which the contamination was discovered. Soil contamination, on the other hand, generally occurs as a result of surface behavior by owners or occupants of the same parcel on which the contamination is located. The "midnight dumper" problem, where a polluter surreptitiously trespasses on the property of another to dispose of hazardous substances, represents a relatively rare exception to this pattern.

308. *See, e.g.*, Union Pac. Co. v. Reilly Indus., Inc., 4 F. Supp. 2d 860, 867 (D. Minn. 1998) (under Minnesota law, plaintiff "may maintain a nuisance claim even though the claim does not involve adjacent property of neighboring property holders"); Mangini v. Aerojet-Gen. Corp., 281 Cal. Rptr. 827, 832 (Ct. App. 1991) ("Under California law, it is not necessary that a nuisance have its origin in neighboring property."); *see also* Joseph F. Falcone III & Daniel Utain, *You Can Teach an Old Dog New Tricks: The Application of Common Law in Present-Day Environmental Disputes*, 11 VILL. ENVTL. L.J. 59, 84–91 (2000) (describing as the minority view that a property owner may sue predecessors-in-interest of the same property for private nuisance).

309. *See* Phila. Elec. Co. v. Hercules, Inc., 762 F.2d 303, 312–14 (3d Cir. 1985) (under Pennsylvania law, doctrine of *caveat emptor* barred nuisance action for injunction against successor to prior property owner relating to ground and surface water contamination caused by prior owner's operation of chemical plant on the property); Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp., 737 F. Supp. 1272, 1280, 1282 (W.D.N.Y. 1990) (concluding that New York courts would apply the doctrine of *caveat emptor* to preclude private nuisance claim by current owner against former owner from whom site was purchased before passage of CERCLA, but that current owner "did not relinquish its right to bring an action [for public nuisance, alleging CERCLA response costs as special injury] based on statutes such as CERCLA and SARA that were not in existence at the time of the conveyance"), *aff'd*, 964 F.2d 85 (2d Cir. 1992); N.Y. Tel. Co. v. Mobil Oil Corp. 473 N.Y.S. 2d 172, 174 (App. Div. 1984) (under New York law, prior owner nuisance liability terminated if reasonable opportunity for new owner to discovery harmful condition to property); *see also* Falcone & Utain, *supra* note 308, at 78–84 (describing as the majority view that a property owner may not sue predecessors-in-interest of the same property for private nuisance); Klein, *supra* note 23, at 356 ("Historically, however, private nuisance has had virtually no application in cases where current waste site owners and operators seek contribution from previous landowners for the costs of cleaning waste. The reason behind this lack of application is the adherence of the courts to the doctrine of caveat emptor.").

310. *See, e.g.*, *Phila. Elec. Co.*, 762 F.2d at 314 (applying Pennsylvania law, describing "historical role of private nuisance law as a means of efficiently resolving conflicts between neighboring, contemporaneous land uses."); Metro. Water Reclamation Dist. of Greater Chi. v. Lake River Corp., 365 F. Supp. 2d 913, 918–19 (N.D. Ill. 2005) (under Illinois law, purpose of private nuisance action is to resolve disputes between neighboring, contemporaneous landowners); Amland Props. Corp. v. Aluminum Co. of Am., 711 F. Supp. 784, 808 (D.N.J. 1989) ("Because New Jersey courts have read private nuisance to encompass only instances of danger to the public or interference with the use of adjoining land, Amland's claim here must fall."); *see*

Intermediate Property Owners and Maintenance of a Nuisance: Nuisance problems involving the same parcel of property are not necessarily limited to two successive property owners. For example, property owner A may release hazardous substances into Blackacre's soil, which gradually migrate deeper into the soil and into the groundwater table. A then sells Blackacre to B, who does not add to the contamination but also does nothing to abate it. B then sells Blackacre to C, who eventually discovers the contamination. May C maintain a nuisance action against B? In those jurisdictions that recognize successive interest nuisance, the intermediate owner who fails to abate a nuisance on her property may be liable for maintaining a nuisance, at least where the intermediate owner knows or has reason to know of the contamination.[311] Other states either do not recognize maintenance of a nuisance as a tort theory,[312] or impose limitations on its applicability.[313] The availability of such a nuisance claim may be particularly significant at sites where A, the original owner, cannot be found or is judgment proof, leaving C, the current owner, without a cleanup cost remedy unless the

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also 9 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 64.02[3], at 64-11 (Michael Allan Wolf ed., 2000) ("Unreasonableness has a role to play in private nuisance law in that plaintiffs are not expected to tolerate unreasonable interference with use and enjoyment of their real property. . . . The conclusion of 'unreasonableness' depends then upon liability-inviting conduct of the defendant plus a finding that this conduct violates a protected interest of the neighbor-plaintiff."); Edward Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA. L. REV. 1299, 1319 (1977) ("An interference is not a nuisance unless, among other things, it *substantially* interferes with the use and enjoyment of neighboring land."). By contrast, CERCLA makes the owner or operator of a facility at the time of disposal of a hazardous substance liable for response costs without limiting direct or derivative private response cost recovery rights to neighboring property owners. CERCLA §§ 107(a)(2), (4), 42 U.S.C. §§ 9607(a)(2), (4) (2000).

311. *See, e.g.*, CAL. CIV. CODE § 3483 (Deering 2005) ("Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by the former owner, is liable therefor in the same manner as the one who first created it."); OKLA. STAT. tit. 50, § 5 (2005) (same); IDAHO CODE ANN. § 52-102 (2005) (same).

312. *See, e.g.*, Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93, 98–99 (D. Mass. 1990) (holding property owner did not have actionable claim for continuing nuisance against prior owner who was alleged to have released oil and hazardous materials at the site because, under Massachusetts law, "private nuisance requires that the interference be to persons outside the land upon which the condition is maintained"). *See generally* Klein, *supra* note 23 (discussing application of nuisance and other tort theories to intermediate owners).

313. *See, e.g.*, Borenstein v. Joseph Fein Caterers, Inc., 255 So. 2d 800, 806 (La. Ct. App. 1971) (rejecting nuisance claim because,"[a]lthough the lessee made no effort to trim or prune the vine or to correct the condition of the raised planter, neither did he actively participate in or contribute to the conditions which caused plaintiffs' damages."); Lance v. City of Mission, 308 S.W.2d 546, 548 (Tex. Civ. App. 1957) ("[T]he purchaser of land on which exists a nuisance created by his grantor is not liable for merely permitting it to remain or continue, in the absence of a request to abate it."); Wilkerson v. Garrett, 229 S.W. 666, 668 (Tex. Civ. App. 1921) ("[W]here the purchaser by affirmative acts continues the nuisance, such as making changes in the structure or character of the nuisance, he is liable for all damages caused thereby.").

site is in a jurisdiction that permits a claim against an intermediate owner who knowingly maintains the nuisance.[314]

Statutes of Limitations: Statute of limitations issues present particularly challenging problems under state law at sites where the contamination at issue was created decades ago.[315] The limitations period for a nuisance claim generally begins to run upon the discovery of the nuisance or the time at which the plaintiff knew or reasonably should have known of the claim.[316] In an action involving tortious injury to property, the injury is considered to be to the property itself rather than to the property owner; the limitations period does not begin to run again

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314. Under CERCLA, the intermediate owner could be liable only if the continued leaking, leaching, or other passive migration of hazardous substances in the subsurface is considered a "disposal" of the substance within the meaning of CERCLA section 101(a)(2), 42 U.S.C. § 9607(a)(2) (2000). Most federal courts that have addressed the issue have held that passive migration does not constitute a "disposal" within the meaning of CERCLA. *See* Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 879 (9th Cir. 2001) (holding gradual passive migration of contamination through the soil was not a "disposal" within the meaning of section 107(a)(2)); United States v. 150 Acres of Land, 204 F.3d 698, 706 (6th Cir. 2000) (finding no section 107(a)(2) "disposal" absent "any evidence that there was human activity involved in whatever movement of hazardous substances occurred on the property"); ABB Indus. Sys. Inc., v. Prime Tech, Inc., 120 F.3d 351, 359 (2d Cir. 1997) (rejecting prior owner liability for subsurface leaching of pre-existing contamination); United States v. CDMG Realty Co., 96 F.3d 706, 718 (3d Cir. 1996) (passive migration of contamination in landfill not a CERCLA "disposal"). *But see* Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 946 (4th Cir. 1992) (past owners liable under section 107(a)(2) for "disposal" of contaminants that leaked from an underground storage tank).

315. CERCLA statute of limitations issues typically concern delays in filing claims after the plaintiff first incurred cleanup costs or cost liabilities. CERCLA section 113(g)(2), 42 U.S.C. § 9613(g)(2) (2000), creates a three-year limitation period to recover removal costs from completion of the removal action and a six-year limitation period to recover remedial costs from the initiation of physical on-site construction of the remedial action. Section 113(g)(3), 42 U.S.C. § 9613(g)(3), creates a three-year limitation period for contribution from the date of entry of a cost recovery judgment or the date of an administrative order or judicially approved settlement.

316. *See, e.g.*, McKelvey v. Boeing N. Am., Inc., 86 Cal. Rptr. 2d 645, 651 (Ct. App. 1999) (under California law, "the period of limitations will begin to run without regard to whether the plaintiff is aware of the specific facts necessary to establish his claim, provided that he has . . . 'notice or information of circumstances to put a reasonable person on inquiry.'") (citations omitted). CERCLA section 309(a)(1), 42 U.S.C. § 9658(a)(1) (2000), imposes on the states a "federally required commencement date" in connection with the tolling of state statutes of limitations. Section 309(a)(1) provides that the "federally required commencement date" shall be the commencement date for applicable state statute of limitation in the event that application of the state statute would otherwise provide for a shorter limitations period. The "federally required commencement date" is defined in section 309(b)(4) as "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages [allegedly caused by a CERCLA hazardous substance, pollutant, or contaminant] were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. § 9658(b)(4). *See, e.g.*, Freier v. Westinghouse Elec. Corp., 303 F.3d 176, 196-97 (2d Cir. 2002) (federally required commencement date preempts state statute of limitations if state law claims based on exposure to hazardous substances released to the environment and state law otherwise would provide for earlier commencement date); *accord,* Union Pac. R.R. Co. v. Reilly Indus., Inc., 215 F.3d 830, 840 (8th Cir. 2000).

each time the property is sold.[317] Accordingly, a current landowner may only recently discover contamination or its significance, but if a prior landowner discovered the problem years before, the statute of limitations for nuisance may have expired.[318]

Availability of Continuing Nuisance Doctrine: A critical exception to the problem of time-barred claims at old contamination sites is the doctrine of "continuing nuisance." A nuisance may be classified as either "permanent" or "continuing."[319] A "permanent nuisance" reflects an interference with the use or enjoyment of property that will not materially change or disappear over time.[320] A plaintiff bringing a timely claim for permanent nuisance may recover in one action all past, present, and future damages caused by the nuisance, such as damage for lost past use of the property and prospective damages for diminution in property value.[321] Once the statute of limitations has expired, claims for all permanent nuisance damages are time-barred.

A "continuing nuisance," on the other hand, is an interference with the use or enjoyment of property that can vary or cease with the passage of time.[322] As a result, a plaintiff may bring successive actions until the nuisance is abated; in effect, a new cause of action arises for continuing

317. *See, e.g.*, Beck Dev. Co. v. S. Pac. Transp. Co., 52 Cal. Rptr. 2d 518, 556 (Ct. App. 1996) ("In an action involving tortious injury to property, the injury is considered to be to the property itself rather than to the property owner, and thus the running of the statute of limitations against a claim bars the owner and all subsequent owners of the property.").

318. *See id.*

319. *See, e.g.*, Hoery v. United States, 64 P.3d 214, 218 (Colo. 2003) (describing differences between permanent and continuing nuisance and trespass under Colorado law); Mangini v. Aerojet-Gen. Corp., 281 Cal. Rptr. 827, 839–43 (Ct. App. 1991) (describing differences between permanent and continuing nuisance and trespass under California law).

320. *See, e.g.*, Spaulding v. Cameron, 239 P.2d 625, 628 (Cal. 1952) (plaintiff may elect to seek past, present and future damages for permanent nuisance "if the defendant is not privileged to continue the nuisance or trespass but its abatement is impractical or the plaintiff is willing that it continue if he can secure full compensation for both past and anticipated future injuries." Some jurisdictions focus on the continuation of harmful conduct rather than the failure to abate the harm as the touchstone for determining whether a nuisance is permanent or continuing. *See, e.g.*, Union Pac. R.R. Co. v. Reilly Indus., Inc., 4 F. Supp. 2d 860, 867 (D. Minn. 1998) (removal of leaking storage tank ended continuing nature of nuisance notwithstanding continuing presence of contaminants that had leaked from the tank into the subsurface).

321. *See, e.g.*, *Spaulding*, 239 P.2d at 626–28 (permanent nuisance claim contemplates one action for all past, present, and future damages); Mitchell Energy Corp. v. Bartlett, 958 S.W.2d 430, 444 (Tex. App. 1997) (submitting claim for future damages to jury constituted election to proceed on permanent nuisance theory).

322. *See, e.g.*, Capogeannis v. Superior Ct., 15 Cal. Rptr. 2d 796, 801 (Ct. App. 1993) (under California law, a nuisance is continuing if offensive condition can be discontinued or reasonably abated at any time); N. States Power Co. v. Franklin, 122 N.W.2d 26, 30–31 (Minn. 1963) ("Where a structure is erected or junk is stored and the harmful effect is 'one that may be abated or discontinued at any time,' there is 'a continuing wrong so long as the offending object remains,' and the courts regard such as a continuing trespass.") (footnotes omitted).

nuisance every day that the condition is allowed to continue.[323] State law varies dramatically with regard to whether a continuing nuisance claim is available at all,[324] how to define a continuing nuisance,[325] and the burden of proof associated with such a claim.[326] These variations, in turn, affect to a substantial degree whether any state common law private cleanup cost remedy may be available for older contamination conditions.

Variations Among State Superfund Statutes: Variations among states regarding the availability, form, and scope of cleanup cost remedies extend beyond common law theories of recovery. For example, along with nuisance and other common law theories, every state has enacted some form of "state Superfund" statute;[327] these statutes often adopt provisions of CERCLA.[328] These statutes can serve a variety of purposes,

323. *See, e.g.*, Wilshire Westwood Ass'n v. Atl. Richfield Co., 24 Cal. Rptr. 2d 563, 569 (Ct. App. 1993) ("[W]here the nuisance involves a use which may be discontinued at any time, it is characterized as a continuing nuisance, and persons harmed by it may bring successive actions for damages until the nuisance is abated."); Tri-County Inv. Group, Ltd. v. So. States, Inc., 500 S.E.2d 22, 25 (Ga. Ct. App. 1998) (quoting *City Council of Augusta v. Lombard*, 28 S.E. 998 (1897), to show that under Georgia law, "[w]here a nuisance is not permanent in its character, but is one which can and should be abated by the person erecting or maintaining it, every continuance of the nuisance is a fresh nuisance for which a fresh action will lie.").

324. *Compare* Nelson v. C & C Plywood Corp., 465 P.2d 314, 325 (Mont. 1970) (under Montana law, pollution of groundwater by dumping glue waste is a continuing temporary nuisance) *with* Citizens & S. Trust Co. v. Phillips Petroleum, 385 S.E.2d 426, 428 (Ga. Ct. App. 1989) (under Georgia law, continuing tort theory is limited to cases in which personal injury is involved and is inapplicable to cases that involve only property damage).

325. *See, e.g.*, Union Pac. R.R. Co. v. Reilly Indus., Inc., 4 F. Supp. 2d 860, 867 (D. Minn. 1998) (holding that ongoing leaching of creosote after storage tanks had been removed was a permanent, rather than a continuing nuisance); Mangini v. Aerojet-Gen. Corp., 281 Cal. Rptr. 827, 840 (Ct. App. 1991) (noting that "the crucial distinction between a permanent and continuing nuisance is whether the nuisance may be discontinued or abated."); Field-Escadon v. DeMann, 251 Cal. Rptr. 49, 53 (Ct. App. 1988) ("[T]he salient feature of a continuing trespass or nuisance is that its impact may vary over time."); *Tri-County Inv. Group*, 500 S.E.2d at 25 (continuing nuisance claim available where the nuisance "'can and should be abated by the person erecting or maintaining it'" (citation omitted.)); Carpenter v. Texaco, Inc., 646 N.E.2d 398, 399 (Mass. 1995) ("[A] continuing trespass or nuisance must be based on recurring tortious or unlawful conduct and is not established by the continuation of harm caused by previous but terminated tortious or unlawful conduct."); Kulpa v. Stewart's Ice Cream, 534 N.Y.S.2d 518, 520 (App. Div. 1988) (continuing nuisance claim stated where defendant drained storage tank source of contamination but plaintiff's well water remained contaminated).

326. *See, e.g.*, *Mangini v. Aerojet-Gen. Corp.*, 912 P.2d at 1221 (reversing continuing nuisance damage award for lost use of contaminated property on grounds that because plaintiff failed to prove that the contamination was capable of being abated at a reasonable cost, nuisance should be deemed permanent and claim time-barred); Pettit v. Inc. Town of Grand Junction, 93 N.W. 381, 383 (Iowa 1903) ("[T]he burden is upon the party asserting that an obstruction in the highway is a permanent nuisance, instead of a continuing one, to establish the fact by proof.").

327. *See* ENVTL. LAW INST., *supra* note 1, at 53 (all fifty states have state Superfund laws that provide enforcement authority).

328. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 25323.5 (Deering 2005) (incorporating CERCLA definitions of "responsible party" and "liable person"); IND. CODE § 13-25-4-8 (2004) (incorporating CERCLA definition of liable parties); UTAH CODE ANN. § 19-6-302(20) (2005) ("remedial investigation" means a remedial investigation and feasibility study as defined in the NCP).

such as providing the authorization for state regulatory agencies to issue cleanup orders, conduct cleanups, and recover oversight and response costs.[329]

Many state Superfund statutes also include private party cleanup cost remedies. These statutory remedies, like their common law counterparts, vary dramatically from state to state. For example, some require that a private plaintiff demonstrate consistency with the NCP to obtain cost recovery;[330] others have no NCP consistency requirement.[331] Most state Superfund statutes impose retroactive liability,[332] while others only apply to releases occurring after the statute was enacted.[333] Like CERCLA, some state statutory schemes exclude petroleum from the definition of regulated substances,[334] while others permit a claim for recovery of petroleum cleanup costs.[335] Some state Superfund contribution statutes mirror CERCLA section 113(f) by permitting contribution claims during or after judicial or administrative proceedings against a PRP,[336] while others permit contribution claims regardless of whether the PRP has already been sued by others.[337]

This brief survey of the variations in state law underscores the importance of preserving a uniform federal cleanup cost remedy for PRPs across the country. The nature and availability of a PRP cleanup

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329. Mckinstry, *supra* note 22, at 92, notes:

> A large number of states have enacted little Superfunds or have amended existing response legislation to enable them to: (1) effectively fulfill their statutory responsibilities under CERCLA; (2) recover costs incurred fulfilling those statutory responsibilities; and (3) supplement CERCLA by creating a state program for cleanup of sites not included on the National Priorities List . . . .

330. *See, e.g.*, KY. REV. STAT. ANN. § 224.01-400 (LexisNexis 2004); N.J. STAT. ANN. § 58:10-23.11f3 (West 2005).

331. *See, e.g.*, ARIZ. REV. STAT. ANN.§ 49-285(B) (2005); DEL. CODE ANN. tit. 7, § 9105 (2005); FLA. STAT. § 403.727 (2005); GA. CODE ANN. § 12-8-96.1 (2004); MICH. COMP. LAWS § 324.20126 (2005).

332. *See* ENVTL. LAW INST., *supra* note 1, at 32 (as of 1998, forty-three states imposed retroactive liability).

333. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 25366(a) (Deering 2005) (no liability for actions before January 1, 1982 if the actions were not in violation of then-existing state or federal law); HAW. REV. STAT. § 128D-6 (2004) (no person other than a government entity may recover costs under Hawaii state Superfund statute arising from a release occurring before July 1, 1990).

334. *See, e.g.*, ALASKA STAT. § 46.09.900 (2005); CAL. HEALTH & SAFETY CODE § 25317 (Deering 2005); KY. REV. STAT. ANN. § 224.01-400(1)(a) (LexisNexis 2004); VA. CODE ANN. § 10.1-1400 (2005).

335. *See, e.g.*, ARIZ. REV. STAT. ANN. § 49-283.02 (2005); CONN. GEN. STAT. § 22a-134(24) (2004); HAW. REV. STAT. § 128D-1 (2004).

336. *See, e.g.*, MICH. COMP. LAWS § 324.20129(3) (2005); PA.STAT. ANN. tit. 35, § 6020.705(a) (West 2005).

337. *See, e.g.*, ARIZ. REV. STAT. ANN. § 49-285; CAL. HEALTH & SAFETY CODE § 25363 (Deering 2005); Johnson v. City of San Diego, No. D043448, 2005 WL 503310, at *9 (Cal. Ct. App. 2005) (*Aviall* inapplicable because California Hazardous Substances Account Act contribution statute does not require private contribution action to be brought during or after another action).

cost remedy affects the willingness of PRPs at multi-PRP sites to cooperate with regulatory agencies and comply with government cleanup directives short of enforcement litigation.[338] Prompt, efficient remedial action, in turn, eliminates or reduces threats to public health and degradation of natural resources. A uniform, nationally-applicable rule of decision serves these objectives by providing PRPs with reliable, predictable cost recovery and allocation mechanisms that permit them to make rational business decisions. The current patchwork quilt of state law statutory and common law theories standing alone is too unpredictable and inequitable to serve these national policy goals.[339]

The right to obtain an equitable allocation of cleanup costs gives a PRP powerful incentive to address a contaminated site proactively and voluntarily. If the United States is serious about remediating contaminated sites, its environmental policy should not depend on the coincidence of pollution occurring in a state that happens to make available to a PRP common law or statutory cleanup cost remedies.

A hypothetical case study illustrates the inequity of relying exclusively on current state law as the rule of decision in private cleanup cost disputes. Assume that A, the former owner of Blackacre (a parcel of industrial property), disposed of hazardous substances on Blackacre in the 1970s. A sold Blackacre to B, who did not add to the contamination. B learned about the prior waste disposal (triggering the statute of limitations for permanent nuisance as well as other torts) but neither sued A about the existing contamination nor conducted any remediation. B later sold Blackacre to C, who did not add to the contamination. C, however, failed to make any inquiry into prior waste disposal practices at Blackacre before buying the property. Upon learning about the Blackacre contamination, state regulatory agency officials issued an administrative order directing C to clean up the Blackacre contamination. If C then voluntarily complies with the order, can C obtain cleanup cost contribution from A?[340]

Before *Aviall*, C could seek cleanup cost contribution from A under CERCLA section 113(f)(1). After *Aviall* and under federal appellate

338. *See supra* notes 249–59 and accompanying text.

339. *See* Tom Kuhnle, *The Rebirth of Common Law Actions for Addressing Hazardous Waste Contamination*, 15 STAN. ENVTL. L J. 187, 225–26 (1996) (noting that reliance on common law claims could lead to a lack of predictability and uniformity in liability standards for addressing national problem of cleaning up hazardous waste); Susan R. Poulter, *Cleanup and Restoration: Who Should Pay?*, 18 J. LAND RESOURCES & ENVTL. L. 77, 82 (1998) (identifying tort law limitations, including difficulties of proving causal connection between defendant's conduct and harm, particularly at older sites).

340. C would have no claim against B under CERCLA because B, who did not own Blackacre at the time of disposal, is not a section 107(a)(1)–(4) covered person. C could assert maintenance of a nuisance claim against B in some states, but not in others. *See supra* notes 311–14 and accompanying text.

case law holding that a PRP cannot bring a section 107(a) action, C has no cleanup cost remedy under CERCLA. C cannot bring a section 113(f) action because she has neither been sued under CERCLA nor has she settled her CERCLA liabilities (for a site at which she contributed nothing to the contamination) with the government. C cannot bring a section 107(a)(4)(B) cost recovery claim because she is a PRP, i.e., the current owner and operator of a facility (Blackacre) and thus a liable party under CERCLA section 107(a)(1).[341]

Whether C can recover cleanup costs under state law depends on a coincidence of geography. If Blackacre is located in a state where: (1) nuisance actions are not limited to disputes between neighboring property owners; (2) the doctrine of *caveat emptor* does not apply; (3) the soil contamination is sufficiently abatable to qualify as a "continuing tort" under state law; and (4) if C can prove causation and A's culpability (either negligent or intentional conduct) regarding acts that occurred thirty years ago, then C can recover reasonable tort damages. If applicable state law does not satisfy one or more of these conditions or C fails to prove causation or culpability, C will have no tort remedy. Similarly, C might have a cleanup cost remedy under a state Superfund statute, but only in a state where the state Superfund statute: (1) provides a contribution remedy; (2) does not require a prior or pending action against C for C to bring a contribution claim; and (3) imposes retroactive liability; but only if (4) C incurred recoverable cleanup costs (e.g., costs consistent with the NCP or other state procedural requirements) as defined by the statute. Simply put, C has a remedy if Blackacre happens to be located in a limited number of states. Otherwise, C must absorb the entire cost of cleaning up contamination she did not cause.

At bottom, fifty varying approaches to private party cleanup cost disputes constitute an incoherent response to a significant national problem. The availability of a uniform federal rule of decision, applicable in federal courts throughout the country, would better serve policy objectives of encouraging prompt, effective cleanups pursuant to an equitable system of cost allocation. Moreover, a federal rule of decision also would facilitate the equitable allocation of response costs by providing an effective mechanism by which the federal government could be held accountable for its fair share of billions of dollars in cleanup costs at sites across the country.[342]

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341. Because C failed to inquire about past waste disposal practices before buying Blackacre, she cannot qualify for the section 107(b)(3) third party defense as an "innocent purchaser." *See supra* note 53.

342. *See, e.g.*, Sophia Strong, Note, Aviall Services v. Cooper Industries*: Implications for the United States' Liability Under CERCLA, the "Superfund Law"*, 56 HASTINGS L.J. 193, 199, 211–16 (2004) (describing impact of the *Aviall* litigation on federal government cleanup cost liabilities); *see also supra* notes 212–14.

D. Ensuring a Cleanup Cost Remedy for PRPs under CERCLA

There are two means by which a federal rule of decision could remain available in private cleanup cost disputes. First, Congress could amend CERCLA to address the impact of the *Aviall* decision. Second, the courts could interpret the current version of CERCLA section 107(a) to allow a PRP to recover cleanup costs.

1. Amending CERCLA Section 113(f) to Address Aviall

The *Aviall* decision generated calls to amend CERCLA in order to eliminate uncertainty regarding PRP contribution rights.[343] Indeed, amending CERCLA section 113(f)(1) would be far simpler and faster than waiting years for courts throughout the country to revisit whether section 107(a) authorizes a cleanup cost action by a PRP. Such an amendment would provide that a person liable or potentially liable under CERCLA could seek contribution from other liable or potentially liable persons for response costs incurred by the plaintiff, whether or not a section 106 or section 107(a) action had been initiated in connection with the site at issue. The remaining provisions of section 113(f)(1) would still apply to such a contribution action: federal law would govern the claim and response costs would be allocated "using such equitable factors as the court determines are appropriate."[344]

CERCLA section 113(g) also would require amendment to expressly address the applicable statute of limitations for a contribution claim brought in the absence of a CERCLA section 106 or 107(a) action or a CERCLA settlement. This could be accomplished most simply by adopting the section 113(g)(2) statute of limitations for section 107(a) cost recovery claims.[345]

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343. *See, e.g.*, *Hill Fix Eyed After Supreme Court Ruling Limits Voluntary Cleanups*, INSIDE THE EPA, Dec. 17, 2004, *available at* 2004 WLNR 14176049 (industry and local government sources say they will push Congress to amend the Superfund law in light of *Aviall*); *U.S. Supreme Court Forces Reinvention of Private Party Actions Under the Superfund*, MONDAQ BUS. BRIEFING, Dec. 21, 2004, *available at* 2004 WLNR 15669833 (discussing likelihood that agencies and other interested parties will seek legislation amending CERCLA).

344. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) (2000).

345. CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2) creates a three-year limitation period from completion of the removal action to recover removal costs and a three-year limitation period from the initiation of physical on-site construction of the remedial action to recover remedial costs. Section 113(g)(3), 42 U.S.C. § 9613(g)(3), creates a three-year limitation period for contribution from the date of entry of a cost recovery judgment or the date of an administrative order or judicially approved settlement. These limitations periods could be applied in a PRP contribution claim, depending (as currently required under section 107(a)) on whether the response costs at issue are characterized as "remedial action" or "removal action" costs. In the alternative, Congress could make the policy choice that another triggering event (e.g., date of first expenditure of claimed costs) should apply to such a contribution claim.

While in theory a legislative solution would be the fastest and most direct way to ensure the availability of a federal rule of decision, such a solution may not be realistic. First, introduction of such a proposed amendment could inspire members of Congress to revisit many of CERCLA's more controversial provisions. This could render Congress unable to develop the political consensus to pass legislation including the PRP contribution provision. Prior attempts to amend core liability provisions of CERCLA opened a "Pandora's Box" of objections and alternatives from the myriad stakeholders affected by the Superfund statute (e.g., insurance companies, environmental groups, industry groups, regulatory agencies) that ultimately doomed these efforts to amend the statute.[346]

Second, even if passed by Congress, such an amendment to CERCLA would require the signature of the President absent a veto-proof congressional majority supporting the legislation. The Department of Justice, however, filed an amicus curiae brief with both the Fifth Circuit and the U. S. Supreme Court in *Aviall* in support of Cooper's position that the current section 113(f)(1) did not authorize a contribution action by a PRP who had not first been sued under CERCLA.[347] Accordingly, it is uncertain whether the current administration would support an amendment to CERCLA providing PRPs who have not first settled with the government or been sued the right to contribution. As of this writing, no bill amending CERCLA to address the issues in *Aviall* had been introduced in either house of Congress.

2. *Interpreting Section 107(a) to Permit PRP Cost Claims*

While a legislative solution could ensure the availability of a federal rule of decision, it is not necessary to accomplish this goal. CERCLA section 107(a), properly interpreted, should allow a PRP to bring a cleanup cost claim against other liable parties.

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346. *See, e.g., Hill Fix Eyed After Supreme Court Ruling Limits Voluntary Cleanups*, *supra* note 343 (pursuing legislation could open the statute "to other controversial reform proposals"); John Copeland Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405, 1454 (1997) ("all efforts to amend CERCLA have failed in recent years because the proponents of sweeping changes and the proponents of more modest changes have been unwilling to compromise."); Steinway, *supra* note 252, at 192 (proposed PRP contribution legislation could open the door for consideration of other controversial reform proposals that would "effectively impede efforts to amend section 113(f)").

347. *See* Brief for the United States, *supra* note 210. The Department of Justice did note in its amicus curiae brief to the Supreme Court that Congress could amend CERCLA to permit PRPs to seek contribution under CERCLA in order to facilitate cleanups. *Id.* at *27–28 n.13. It did not, however, represent to the Court that it would support such an amendment. *See also supra* notes 208–16 and accompanying text.

The Supreme Court in *Aviall* expressly left open whether a PRP such as Aviall could bring a section 107(a) claim to recover cleanup costs, including whether it "may pursue a section 107 cost recovery action for some form of liability other than joint and several."[348] Before *Aviall*, every court of appeals to have addressed the issue had held that a PRP could not bring a section 107(a) cost recovery action. Those decisions assumed that (1) section 107(a)(4)(B) imposed joint and several liability (to which, the courts concluded, a liable plaintiff should not be entitled), and (2) the PRP instead could always bring a section 113(f)(1) contribution claim.[349] The *Aviall* decision undermined the latter assumption and a closer examination of section 107(a) undermines the former.

a. Section 107(a)(4)(B) Does Not Limit Cost Claims to "Innocent" Plaintiffs

Section 107(a)(4)(B) allows "any other person" the right to recover his "necessary costs of response." The statute does not limit cost recovery rights to "any other innocent, non-liable and non-culpable person." The plain meaning of section 107(a)(4)(B) compels an interpretation that a PRP, as "any other person," may bring a cost recovery claim. Indeed, any other interpretation of the statute's "plain language" would be inconsistent with the *Aviall* Court's narrow interpretation of section 113(f)(1).[350] Implicit in the Court's decision in *Aviall* was the conclusion

348. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 170 (2004).

349. *See supra* notes 101–48 and accompanying text.

350. After *Aviall*, courts may be asked to decide whether the phrase "any other person" in section 107(a)(4)(B) refers not to persons other than the government, but to persons other than a section 107(a)(1)–(4) covered person. *See* John M. Hyson, *Textualism and the Limits of Federal Common Law: Addressing the Unresolved Questions in* Cooper Industries v. Aviall Services, SK 057 A.L.I.-A.B.A. COURSE OF STUDY 207, 209 (2005) (disputes about the meaning of "any other person" may arise in light of "[t]he [*Aviall*] Court's message: Lower courts are to use a textualist approach, if at all possible, in resolving the questions that the Court declined to address," including whether a PRP who has not been named in a section 106 or 107 action may bring a section 107(a)(4)(B) cost recovery claim); *cf.* City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1142 (E.D. Pa. 1982) ("any other person" means any person other then the federal or state government, not any person other than a section 107(a)(1)–(4) covered person). Such a broad interpretation of "any other person" would be inconsistent with CERCLA's "polluter pays" and voluntary cleanup policy objectives (presumably relevant considerations under *Aviall* assuming, *arguendo*, that there are multiple reasonable interpretations of "any other person") and the phrase's placement immediately following the federal and state government (as well as Indian tribe) cost recovery provision of section 107(a)(4)(A). (The definition of "person" under CERCLA section 101(21), 42 U.S.C. § 9601(21), includes federal and state governments.) Moreover, textualism does not compel barring PRPs from asserting section 107(a)(4)(B) claims in order to preserve the section 113(f)(2) contribution protection rights of settling parties. CERCLA section 113(f)(2), 42 U.S.C. § 9613(f)(2), provides 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." A several liability section 107(a)(4)(B) claim by a PRP would

that it should strictly interpret the "plain language" of section 113(f)(1) without regard to whether an expansive interpretation would foster more equitable results or encourage voluntary cleanups. The courts should similarly recognize that the plain language of section 107(a)(4)(B) allows cost recovery by "any other person," not "any other innocent, non-liable and non-culpable person," whether or not the courts view such rights of action as sound public policy[351]

Several analytical paths could get the lower courts to this conclusion. As noted in Part II(D)(2), *supra*, before *Aviall*, some courts attempted to resolve the section 107/section 113 conundrum by taking a middle ground approach, concluding that sections 107 and 113 work in tandem.[352] These courts reasoned that although a PRP could not bring a section 107(a)(4)(B) joint and several cost recovery claim, section 107(a) nevertheless created a right to cost contribution with section 113(f) providing the mechanism for apportioning that cost contribution liability among responsible parties.[353] *Aviall*, of course, established that section 113(f)(1) does not provide a vehicle to enforce cost contribution rights for a PRP who has not first been sued under CERCLA and left open the question of whether private section 107(a)(4)(B) actions necessarily require imposition of joint and several liability.[354] The "middle ground" courts, having recognized that the right to PRP cost contribution is created by section 107(a), could reason that section 107(a)(4)(B) provides a several (rather than joint and several) liability cost contribution remedy for a PRP plaintiff.[355]

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function as a contribution claim and thus should fall within the scope of "contribution" claims barred by section 113(f)(2). *Cf.* Hyson, *supra*, at 211 (*Aviall* distinguished section 107(a)(4)(B) "cost recovery" and section 113(f) "contribution" claims).

351. Such an interpretation would suggest that it is for Congress to so amend section 107(a)(4)(B), not the courts, and that Congress, in turn, entrusted the courts to shape the form of liability under section 107(a) as appropriate on a case-by-case basis. *See supra* notes 72–73 and accompanying text.

352. *See, e.g.*, Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301–02 (9th Cir. 1997); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 350, 352 (6th Cir. 1998); New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1121–22 (3d Cir. 1997); *see also supra* notes 119–27 and accompanying text.

353. *See supra* note 352.

354. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 169–70 (2004) (remanding the action to the Fifth Circuit to consider, *inter alia*, whether Aviall "may pursue a section 107 cost recovery action for some form of liability other than joint and several.").

355. *See* McDonald v. Sun Oil Co., No. Civ. 03-1504-HA, 2006 WL 696316 (D. Or. Mar. 14, 2006) at *16 (holding that after *Aviall* and under Ninth Circuit precedent in *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997) and *West. Props. Serv. v Shell Oil Co.*, 358 F.3d 678 (9th Cir. 2004), "[w]hen a [PRP] plaintiff falls outside the technical requirements of § 113, the contribution claim is allowed under § 107, and the mechanics of apportionment are governed by the factors established in § 113."); Ferguson v. Arcata Redwood Co., No. C 03-05632, 2005 WL 1869445, at *6 (N.D. Cal. Aug. 5, 2005) (denying defendant's summary judgment motion on PRP plaintiff's section 107(a) claim on the ground that the Ninth Circuit in *Pinal Creek*, 118 F.3d at 1298, recognized PRP right to contribution under section 107(a),

Courts that have not adopted the "middle ground" approach will be required to revisit directly their prior decisions holding that a PRP may not bring a section 107(a) claim. Each court of appeals that had addressed this issue before *Aviall* had assumed, expressly or implicitly, that a PRP who could not bring a section 107(a)(4)(B) claim could still proceed under section 113(f). These courts should revisit their prior decisions and hold that a PRP may maintain a section 107(a)(4)(B) several liability action in light of the clarified understanding about the structure of CERCLA and the limited role of section 113(f)(1) mandated by *Aviall*.[356]

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barring only PRP joint and several liability claims); Kotrous v. Goss-Jewett Co. of N. Cal., Inc., No. Civ. S02-1520, 2005 WL 1417152, at *3–4 (E.D. Cal. June 16, 2005) (recognizing PRP contribution claim under section 107(a), and distinguishing the Ninth Circuit's decision in *Pinal Creek* as holding only that a PRP could not state a joint and several liability claim under section 107(a)); Adobe Lumber, Inc. v. Taecker, No. CV S02-186 GEB GGH, 2005 WL 1367065, at *1 (E.D. Cal. May 24, 2005) (PRP could maintain section 107(a) claim, noting that Ninth Circuit in *Pinal Creek* had recognized that basis for CERCLA contribution rights arose from section 107(a)); *cf.* Consol. Edison Co. of N.Y., Inc. v. UGI Util., Inc., 423 F.3d 90, 103 (2d Cir. 2005) (holding that a PRP could seek section 107(a)(4)(B) cost recovery for voluntarily incurred cleanup costs but observing that *Aviall*, by distinguishing between section 107(a) and section 113 remedies, was "at odds with *Pinal Creek*"). On the other hand, courts in circuits that had embraced a "middle ground" approach also could reason that section 107(a) created a cost recovery right but that, in light of *Aviall*, Congress has not created a remedy to enforce such a right for PRPs who have not first been sued under CERCLA or entered into an administrative or judicially approved settlement. *See, e.g.*, City of Rialto v. U.S. Dept. of Defense, No. EDCV 04-00079-VAP(SSx), 2005 U.S. Dist. LEXIS 26941 at *12-19 (C.D. Cal., Aug. 16, 2005) (dismissing section 107(a) claim of plaintiff PRPs who had not first been sued under sections 106 or 107(a) in light of *Aviall* and Ninth Circuit decisions in *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997) and *West. Props. Serv. v Shell Oil Co.*, 358 F.3d 678 (9th Cir. 2004), holding that a PRP may not assert an implied contribution claim under section 107(a) unless it can also satisfy the requirements of section 113(f)).

356. In *Consolidated Edison Co. v. UGI Utilities*, 423 F.3d 90 (2d Cir. 2005), the Second Circuit considered whether a PRP could bring a section 107(a) action by distinguishing rather than addressing head-on its prior decision in *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998). In *Bedford Affiliates*, the Second Circuit held that a CERCLA claim by a PRP who had entered into CERCLA consent decrees was "a quintessential claim for contribution" which could be brought only under section 113(f), not section 107(a). 156 F.3d at 424. In *Consolidated Edison*, a PRP brought a CERCLA action to recover cleanup costs incurred before entering into a voluntary cleanup agreement. 423 F.3d at 93. The Second Circuit held that, after *Aviall*, a PRP who had not been sued, allocated response costs by a court or made to participate in an administrative proceeding could bring a section 107(a)(4)(B) action to recover voluntarily incurred response costs. *Id.* at 100–02. The court found it inappropriate to impose an "innocence" condition on the "any other person" language of section 107(a)(4)(B). *Id.* at 99. The court concluded that *Aviall* had not undermined its prior decision in *Bedford Affiliates*. *Id.* at 100. Instead, it distinguished *Bedford Affiliates* by stressing that the *Consolidated Edison* plaintiff had incurred cleanup costs without first having been sued or adjudged liable or having settled its CERCLA liabilities, in contrast to the *Bedford Affiliates* plaintiff who incurred costs only after having entered into a consent decree. *Id.* at 100–103. Moreover, the *Consolidated Edison* court also questioned whether cleanup costs incurred solely due to the imposition of liability could constitute recoverable "costs of response" within the meaning of section 107(a)(4)(B). *Id.* at 101. The *Consolidated Edison* decision thus postponed deciding whether *Bedford Affiliates* would continue to bar a section 107(a) action by a PRP who incurred cleanup costs because of government directive or state law litigation, or whether a court can interpret "necessary costs of response" to mean "necessary [and voluntarily incurred] costs of response."

Similarly, these courts could accept the invitation of the Supreme Court in *Aviall* to re-evaluate whether a private section 107(a)(4)(B) claim necessarily is a claim for joint and several liability.

b. Section 107(a)(4)(B) Does Not Require Joint and Several Liability

Concerns about a PRP asserting a joint and several liability cost recovery claim under section 107(a) are ill-founded because nothing in section 107(a) compels imposition of joint and several liability in a section 107(a)(4)(B) action.[357] The statute is silent regarding the form of section 107(a)(4)(B) liability, as implicitly recognized by the Supreme Court in *Aviall*.[358] The legislative history of CERCLA reveals that Congress chose not to include language regarding the form of section 107(a) liability, leaving the issue for the courts to address on a case-by-case basis.[359]

The courts, therefore, are free to fashion a form of liability in section 107(a)(4)(B) cases that reflects the underlying circumstances of the dispute: a non-liable plaintiff may bring a claim imposing joint and several liability, while a liable plaintiff should be limited to a contribution-like claim imposing several liability. Courts would still need to determine the source of law (federal or state) for allocating several

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By drawing such fine distinctions rather than directly addressing the extent to which *Aviall* undermined *Bedford Affiliates*, the *Consolidated Edison* decision created new uncertainty regarding PRP cleanup cost claims. After *Consolidated Edison*, district courts in the Second Circuit were left to decide on a case-by-case basis whether a plaintiff PRP was asserting a claim for cleanup costs that more closely resembled the more purely "voluntary" costs in *Consolidated Edison* (and thus permitted under section 107(a)) or the costs incurred as a consequence of some level of governmental involvement in *Bedford Affiliates* (and thus still potentially barred under section 107(a) after *Consolidated Edison*). *See, e.g.*, Seneca Meadows, Inc. v. ECI Liquidating, Inc., No. 95-CV-6400L, 2006 WL 1030321 at * 8 (W.D.N.Y., April 20, 2006) (holding that PRP plaintiff landfill owner who incurred cleanup costs in connection with consent order with state agency may assert a several liability section 107(a)(4)(B) claim, noting that "it would not be entirely accurate to characterize [the landfill owner's] response costs as 'involuntary'" where the consent orders provided that the landfill owner did not admit liability or fault, the owner had not been sued, and that there was no threat that the owner might imminently be held liable under an administrative or court order or judgment); City of New York v. N.Y. Cross Harbor R.R. Terminal Corp., No. 98CV7227ARRRML, 2006 WL 140555, at *4 n.6 (E.D.N.Y. Jan. 17, 2006) (although plaintiff if sued would be held liable under section 107(a), under *Consolidated Edison* it could nevertheless maintain a section 107(a) claim because it conducted a voluntary investigation and cleanup without first having been sued or made to participate in an administrative proceeding).

357. *See* Tilleman & Swindle, *supra* note 97, at 163–64 (noting that courts addressing the section 107/section 113 conundrum "asserted, without explanation, that all [cost recovery] claims under section 107(a) are joint and several claims.").

358. *Aviall*, 543 U.S. at 170.

359. *See supra* notes 72–73 and accompanying text. In *Consolidated Edison*, the Second Circuit held that a PRP could bring a section 107(a)(4)(B) claim to recover voluntarily incurred cleanup costs. 423 F.3d 90. The court did not reach the issue of whether such a claim would impose joint and several liability, but noted that even if it did there would be no bar precluding the defendant from bringing a section 113(f)(1) counterclaim against the plaintiff for an equitable allocation of costs. *Id.* at 100 n.9.

liability under section 107(a). There is no principled reason why several liability under section 107(a)(4)(B) should be any different than several liability under section 113(f)(1), which expressly requires federal law to determine the equitable allocation of costs. Several liability under section 107(a) should be allocated using the same federal common law factors that courts have used under section 113(f)(1). In short, there is a logical way to interpret section 107(a)(4)(B) to preserve CERCLA contribution rights for all PRPs.

Maintaining the availability of a uniform rule of decision under federal law would serve the national policy goals underlying CERCLA and could be accomplished either by legislation or by a correct interpretation of section 107(a).[360] Simply identifying the benefits of a uniform rule of decision and the means for establishing the availability of a CERCLA remedy for a PRP, however, does not end the analysis. The question of greater importance is to determine the purpose to be served by a uniform federal rule of decision. That question, in turn, compels an analysis of the appropriate relationship of federal and state law in private cleanup cost disputes.

V. FEDERALISM AND CERCLA: HOW SHOULD A FEDERAL RULE OF DECISION AFFECT THE AVAILABILITY OF STATE LAW REMEDIES?

In the aftermath of *Aviall*, the government is writing on a relatively clean slate. If neither the courts nor Congress extend federal contribution rights to PRPs who have not first been sued under CERCLA or settled with the government, then state law will govern most private cleanup cost disputes. As argued in Part IV of this Article, a federal contribution right of action should remain available to assure a uniform remedy applicable to sites across the country, providing predictability and protecting the reliance interests of affected stakeholders. But providing a federal remedy is only part of the puzzle. Just as important is how courts

360. Ensuring the availability of a cleanup cost remedy for all PRPs (either by correctly interpreting CERCLA section 107(a)(4)(B) or amending section 113(f)(1)) would avoid another problem created by *Aviall*: whether section 113(f)(1) authorizes only derivative claims. The Court in *Aviall* held that a PRP could only bring a section 113(f)(1) contribution claim if it first has been sued under sections 106 or 107(a). Left unanswered is whether a section 113(f)(1) contribution right applies only to the response costs that are the subject of the predicate section 107(a) or section 106 claim. For example, assume that a PRP spends $1,000,000 to investigate extensive site contamination and produce a remedial investigation and feasibility study ("RI/FS") report, and that EPA spends $100,000 to oversee the PRP's work. If EPA then sues the PRP under section 107(a) to recover the $100,000 in EPA oversight costs, may the PRP then bring a section 113(f)(1) action against other PRPs to obtain contribution as to the $1,000,000 in RI/FS costs it incurred, or is its section 113(f)(1) action a derivative claim limited to the subject of the predicate section 107(a) action, i.e., contribution only as to the $100,000 EPA oversight cost claim? This issue would become moot or be rendered insignificant as a practical matter if a PRP could bring a several liability cleanup cost action under a correctly interpreted section 107(a) or an amended section 113(f)(1) with regard to *all* response costs incurred by the PRP.

characterize the underlying purpose of such a federal right of action as this could dramatically restrict the role of state law in private cleanup cost disputes.

A uniform federal rule of decision could serve two potential roles in a comprehensive regulatory regime. On the one hand, a private CERCLA remedy could serve as a default or "safety net" remedy. Viewed this way, the CERCLA remedy would assure the availability of a cleanup cost contribution remedy at sites throughout the country, including where such a claim was not available under state law,[361] without affecting the availability of state law cost claims based on alternative or different liability and damage schemes. On the other hand, a uniform federal rule of decision could be viewed as serving a CERCLA remedial paradigm, e.g., accomplishment of "CERCLA-quality cleanups." Viewed this way, a private CERCLA cleanup cost remedy would reward PRPs who further these CERCLA goals while sanctioning through the preemption of state law claims PRPs who behave in a manner inconsistent with a CERCLA cleanup paradigm and then try to use a state law claim as a substitute for a barred federal claim. How a federal PRP cleanup cost contribution right is characterized, therefore, could have enormous environmental federalism consequences.

A. Private CERCLA Remedy as a "Safety Net"

A private CERCLA "safety net" remedy would assure the availability of a cleanup cost remedy in every state. As discussed above, in many states a private state law cleanup cost remedy may be unavailable or inadequate. A CERCLA "safety net" remedy would ensure that a PRP conducting a voluntary cleanup did not fall into the gaps created by the wide variations among states in available common law and statutory remedies.[362] At the same time, it would not prevent a plaintiff from using state law claims to recover cleanup costs that might be unavailable under CERCLA, as well as other damages.[363]

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361. State law may not permit cost contribution for a variety of reasons. *See supra* Part IV(C).

362. *See supra* notes 305–42 and accompanying text; *see also* Gessner Harley Harrison, *'A House Divided': The Structure of U.S. Environmental Law After* PMC, Inc. v. Sherwin-Williams Co., 28 REAL EST. L.J. 122, 125 (1999) (arguing that if CERCLA is applied according to congressional intent to supplement, rather than supplant, state statutory and common law, "CERCLA and state laws achieve in combination what neither could accomplish alone: a means of assigning financial responsibility that encourages parties to promptly and voluntarily engage in environmental cleanup activities by increasing the likelihood of successful cost recovery for those activities.").

363. *See* Kuhnle, *supra* note 339, at 218–29 (describing the role of common law torts in contaminated property litigation); Mckinstry, *supra* note 22, at 108–14 (1994) (arguing that state Superfund contribution claims promote particular state policies and in the "unusual cases where

For example, CERCLA requires that recoverable response costs must be incurred in a manner consistent with the National Contingency Plan (NCP).[364] Consistency with the NCP depends on whether the plaintiff incurred costs toward a "CERCLA-quality cleanup."[365] A plaintiff who chooses to follow the cleanup methodology embodied in the NCP thus would enjoy the benefits of a CERCLA remedy, including status-based strict liability, and would be able to recover from other CERCLA-liable parties their fair share of cleanup costs.

In the alternative, the PRP could choose to conduct the cleanup and seek cleanup costs under available state law theories in conjunction with or in lieu of a CERCLA claim. For example, a PRP may intend to perform a technically and scientifically sound cleanup in coordination with state or local regulatory agencies,[366] but for financial or business

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state and federal interests conflict and there is no clear federal intent to override the state law . . . courts will need to balance the respective state and federal interests.").

364. CERCLA §§ 107(a)(4)(A), (B), 42 U.S.C. §§ 9607(a)(4)(A), (B) (2000). *See, e.g.*, Wash. State Dep't of Transp. v. Wash. Natural Gas Co., 59 F.3d 793 (9th Cir. 1995) (denying more than $4.5 million in cleanup costs where plaintiff failed to prove substantial compliance with public participation, site characterization, soil sample testing protocol and feasibility of remedial alternative requirements of the NCP).

365. *See supra* notes 279–85 and accompanying text.

366. *See* Schnapf, *supra* note 91, at 614 ("Because one of the incentives of state brownfield programs and [voluntary cleanup programs] is to streamline the site remediation process, cleanups performed under these programs may not comply with the NCP."); Schwenke, *supra* note 15, at 318–19 ("Most of the state voluntary cleanup programs directed toward brownfields have not been burdened by the classical CERCLA preference of permanent remediation, and many of these programs expressly incorporate opportunities to allow landowners to consider different tiers and risk pathways in the process of deciding cleanup levels."). State voluntary cleanup programs may not contemplate all of the procedural steps or remedial goals required by the NCP:

> In the past, a cornerstone of hazardous waste cleanup has been the assumption that properties must be cleaned up to pre-contamination levels. CERCLA contains a presumption in favor of permanent protective cleanup remedies for every Superfund site. In practice, this presumption has meant that sites would be cleaned up to a level that allows for residential use. This principle, however, seems to ignore the reality that many of the sites now characterized as brownfields were urban sites used for industry, and that if they are re-used in the future, they will probably be put to the same types of uses. Critics argue that requiring remediation to such pristine levels wastes money for no good reason.
>
> Thus one general thrust of the state voluntary cleanup initiatives is to restructure the level of cleanup required. Many of the new statutes require the agency to consider, and sometimes to adopt, "risk-based" cleanup levels. Of course, in abandoning the standard of cleanup to pre-contamination levels, the legislation is implicitly trading off the lesser cleanup level for other benefits that will be obtained. As one author put it bluntly, the statutes "envision voluntary cleanups that trade increased health risks to the affected community for the prospect of new jobs and higher tax revenues." Others argue, however, that the risk-based cleanups simply tailor the cleanup to the risks that the contamination poses, a reasonable change from the previous system.

Manaster & Selmi, *supra* note 285, at § 9:56 (footnotes omitted); *see also* Lynn Singband, *Brownfield Redevelopment Legislation: Too Little, But Never Too Late*, 14 FORDHAM ENVTL. L.J. 313, 337–41 (2003) (critiquing limitations of the 2001 Brownfield Act and New Jersey

planning reasons the PRP may prefer to avoid or simply not be able to afford the delays and substantial transaction costs required by the NCP process.[367] Similarly, the plaintiff may attempt but inadvertently fail to comply with the NCP. State law theories could permit recovery of environmentally sound cleanup costs without requiring proof that the costs were incurred in a manner consistent with the NCP.[368] The state law plaintiff instead would be required to prove culpability and causation under the applicable state common law theory, while the defendant could assert state law liability defenses as well as challenge the efficacy of cleanup costs incurred under state law.[369]

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counterpart and pressures on state and local government to approve inadequate cleanup levels, and proposing higher brownfield cleanup standards coupled with federal and state funding to developers equating brownfield and "greenfield" development costs).

367. *See supra* notes 279–285 and accompanying text. For example, the NCP requires completion of a remedial investigation and feasibility study ("RI/FS") as part of a common CERCLA response. EPA's goal to complete the RI/FS process at a typical site is two years. National Oil and Hazardous Substances Contingency Plan, 55 Fed. Reg. 8705 (Mar. 8, 1990); *see also* Kuhnle, *supra* note 339, at 206–07 (describing delays associated with RI/FS). A PRP required to prove consistency with the NCP to recover cleanup costs from other PRPs may feel compelled to incur substantial environmental transaction costs that may not be warranted by the risks posed by the site in an attempt to improve the chances that a court will later conclude that a cleanup was conducted in a manner consistent with the NCP. *See* Rachel Giesbar, *Foolish Consistency? Compliance with the National Contingency Plan Under CERCLA § 107*, 70 TEX. L. REV. 1297, 1303 (1992) ("[J]udicial attempts to define what actions are required to satisfy the [National Contingency Plan] are confusing, inconclusive, and contradictory."); *see also* Jerry L. Anderson, *The Hazardous Waste Land*, 13 VA. ENVTL. L.J. 1, 40 n.185 (1993) (observing that the CERCLA cost allocation "system breeds transaction costs that in some cases outstrip the response costs themselves" and citing a 1992 study by the Rand Institute for Civil Justice of transaction costs incurred by five large industrial firms, finding that of the seventy-three sites at which these firms had spent over $100,000, approximately 27 percent of them produced transaction costs that equaled or exceeded expenditures for site study and remediation and that "[a]cross all sites, 21% of the companies' Superfund costs were transactional").

368. Rather than seek monetary damages, a plaintiff bringing a claim for continuing nuisance also could seek injunctive relief requiring the defendant to abate the nuisance the defendant caused or maintained. *See* Kuhnle, *supra* note 339, at 223 (injunctive relief is not available to a private plaintiff under CERCLA but may be available under nuisance law). A defendant resisting such an injunction could, *inter alia*, assert applicable liability defenses or argue that plaintiff had failed to demonstrate entitlement to an injunctive relief, e.g., failure to satisfy the balancing requirements under state law for equitable relief or failure to establish that a nuisance was abatable and thus continuing. *See supra* notes 307–26 and accompanying text.

369. In theory, a PRP plaintiff who prevailed at trial could receive differing awards under state law and CERCLA, e.g., an award of 75 percent of cleanup costs under federal law and 80 percent of cleanup costs under state law. Determining whether plaintiff should recover the larger or smaller award would then turn on an analysis of several potential factors, including whether the state law and CERCLA judgments addressed identical costs, whether the state law claim required proof of culpability, and whether the plaintiff had been proactive in response to the contamination and merited recovery of the higher judgment. At bottom, the court would need to balance these considerations and any competing state and federal law policy considerations in fashioning the form of judgment. The benefits of ensuring the availability of state law cleanup cost claims, however, outweigh any potential challenges that might be presented in this theoretically possible but practically unlikely circumstance.

B. Private CERCLA Remedy and a Federal Remedial Paradigm

A private CERCLA "safety net" remedy would ensure the availability of a cleanup cost claim for PRPs in every state. In the alternative, rather than operate as a "safety net" a private CERCLA remedy could serve a federal remedial paradigm. In other words, such a remedy could be viewed as part of an overarching congressional goal to prescribe through CERCLA the nature of cleanup liabilities and the manner by which cleanups are conducted throughout the United States.

For example, Congress made consistency with the NCP (which requires a "CERCLA-quality cleanup") part of a CERCLA plaintiff's prima facie case.[370] CERCLA encourages CERCLA-quality cleanups by rewarding plaintiffs who incur costs consistent with the NCP with a uniform, strict liability cost recovery remedy. What should be the consequences, however, for failing to comply with the NCP? Should a private party be able to recover cleanup costs under state law when those costs could not be recovered under CERCLA? If CERCLA is viewed as a "safety net" (i.e., one potential but not exclusive vehicle for cost contribution), the answer would be yes. On the other hand, interpreting CERCLA as creating a paradigm for responding to the release of hazardous substances would call into question the availability of state law remedies that differ from CERCLA, particularly those that would permit cost recovery where CERCLA would not. The lens through which a private CERCLA remedy is viewed, therefore, implicates federal preemption issues.

C. CERCLA Preemption

Federal law may preempt the application of conflicting or overlapping state or local law. The doctrine of federal preemption is derived from the Supremacy Clause of the United States Constitution.[371] From the early nineteenth century, the Supreme Court has recognized that under the Supremacy Clause state or local laws that "interfere with, or are contrary to the laws of Congress" must yield to federal law.[372] Federal preemption can arise in several circumstances:

> Sometimes courts, when facing the pre-emption question, find language in the federal statute that reveals an explicit congressional intent to pre-empt state law. More often, explicit pre-emption

370. *See supra* note 265 and accompanying text. In order to perform a CERCLA-quality cleanup, a PRP must, *inter alia*, conduct a thorough remedial investigation and feasibility study and elicit appropriate public participation through the investigation and remedy selection process. *See supra* notes 279–285 and accompanying text.

371. U.S. CONST. art. VI, cl. 2; Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (under the Supremacy Clause, state law that conflicts with federal law is without effect).

372. Gibbons v. Ogden, 22 U.S. 1, 211 (1824).

> language does not appear, or does not directly answer the question. In that event, courts must consider whether the federal statute's "structure and purpose," or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent. A federal statute, for example, may create a scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Alternatively, federal law may be in "irreconcilable conflict" with state law. Compliance with both statutes, for example, may be a "physical impossibility," or, the state law may "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[373]

Federal preemption, therefore, may be express or implied: Congress may have intended to occupy the field ("field preemption") or state or local law may conflict with accomplishing congressional purposes and objectives ("conflict preemption").[374] In either case, federal law would preempt state or local law.

It is well settled that Congress did not intend through the enactment of CERCLA to displace state law or to occupy the field of hazardous substance remediation rights and obligations.[375] As previously noted, environmental regulation addresses a variety of health, safety, and land use issues that have traditionally been subject to state police power regulation. Federal preemption analysis regarding potentially conflicting state law "has long been tempered, however, by judicial recognition that preemption of traditional realms of state power is not to be found lightly."[376] Indeed, CERCLA contains three separate savings clauses expressly purporting to preserve the ability of the states to regulate in the field of hazardous waste cleanup.[377] First, section 114(a) states that "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with

373. Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 31 (1996) (citations omitted) (federal statute granting national banks in small towns the authority to sell insurance preempted Florida state law prohibiting national banks from selling insurance).

374. *Cipollone*, 505 U.S. at 516.

375. *See, e.g.*, ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality, 213 F.3d 1108, 1114 (9th Cir. 2000) ("CERCLA does not completely occupy the field of environmental regulation"); Bedford Affiliates v. Sills, 156 F.3d 416, 426 (2d Cir. 1998) (Congress did not intend to occupy field by enacting CERCLA).

376. Manaster & Selmi, *supra* note 285, at § 5:5.

377. In contrast to these broad savings clauses, Congress also demonstrated its capacity to craft express preemption provisions in CERCLA with regard to particular issues. *See, e.g.*, CERCLA § 309(a)(1), 42 U.S.C. § 9658(a)(1) (2000) ("federally required commencement date" shall be the commencement date for applicable state statute of limitations in the event that application of the state statute would otherwise provide for a shorter limitations period); CERCLA § 114(b), 42 U.S.C. § 9614(b) (barring plaintiff from recovering removal costs under both CERCLA and state law); CERCLA § 310(h), 42 U.S.C. § 9659(h) (expressly excluding the effect of CERCLA section 113(h) from the savings clause).

respect to the release of hazardous substances within such State."[378] Second, section 302(d) states that "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to release of hazardous substances or other pollutants or contaminants. . . ."[379] Finally, section 310(h) states that "[t]his chapter does not affect or otherwise impair the rights of any person under Federal, State, or common law, except with respect to the timing of review as provided in section 9613(h)."[380]

The savings clauses and the absence of field preemption would appear to resolve the question of whether CERCLA could preempt private state law cleanup cost remedies.[381] Indeed, PRPs for years have joined state law cleanup cost claims with CERCLA claims,[382] assuming that these state law claims remained fully available. The potential for preemption remains, however, if the private CERCLA remedy is viewed as facilitating a federal cleanup paradigm. If so, state law remedies perceived as "undermining" federal cleanup policy could be at risk of preemption. Two recent court of appeals cases illustrate such an approach, one in the context of the NCP and the other in the context of

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378. 42 U.S.C. § 9614(a).

379. 42 U.S.C. § 9652(d).

380. 42 U.S.C. § 9659(h). 42 U.S.C. section 9613(h) governs the timing of challenges to the selection under CERCLA sections 104 or 106(a) of removal or remedial actions.

381. Several courts have held that CERCLA does not preempt state law remedies. *See, e.g.*, New York v. Hickey's Carting, Inc., 380 F. Supp. 2d 108, 114 (E.D.N.Y. 2005) (no conflict preemption when state law restitution and unjust enrichment claims brought with section 107(a) claims); FMC Corp. v. Vendo Co., 196 F. Supp. 2d 1023, 1040–41 (E.D. Cal. 2002) (rejecting argument that state declaratory relief claim against a settled party was preempted under CERCLA because "[a]ny complexity that may arise in apportioning liability due to the FMC settlement agreement's lack of specificity as to how liability is apportioned under the settlement, has no effect on the basic principle that CERCLA does not preempt state law claims related to environmental cleanup."); Caldwell Trucking PRP Group v. Caldwell Trucking Co., 154 F. Supp. 2d 870, 876 (D.N.J. 2001) (granting motion to remand, finding state law restitution claim not preempted by CERCLA); City of Merced v. Fields, 997 F. Supp. 1326, 1336 (E.D. Cal. 1998) (permitting PRP to assert negligence-based nuisance claim seeking joint and several liability, relying on savings clause of CERCLA section 9652(d) to hold that "while liability for the CERCLA claims is several, liability of all parties to the City under state-law theories is joint and several" and rejecting argument that it is not possible to recover CERCLA response costs under a state-law theory "because CERCLA does not preempt state-law causes of action that concern cleanup of hazardous materials."); United States v. Montrose Chem. Corp. of Cal., 788 F. Supp. 1485, 1495–96 (C.D. Cal. 1992) (denying motion to dismiss state negligence, nuisance, dangerous condition of public property, failure to discharge mandatory duty and breach of trust claims, each alleging potential CERCLA liability as injury; holding that "CERCLA is not an exclusive remedy, and that Defendants are entitled to bring counterclaims based on both CERCLA and tort law"); Manor Care, Inc. v. Yaskin, 950 F.2d 122, 127 (3d Cir. 1991) (holding state Superfund statute cost claim not preempted by CERCLA since "Congress did not intend for CERCLA remedies to preempt complementary state remedies."). Some courts, however, have held that CERCLA preempts state law claims sounding in contribution or indemnity. *See infra* note 390 and accompanying text.

382. *See supra* notes 152–153 and accompanying text.

the form of private party cost claim liability. These cases illustrate the importance of thinking afresh about the role of a federal rule of decision in the post-*Aviall* era of private party cleanup cost disputes.

1. Conflict Preemption and the NCP: PMC, Inc. v. Sherwin-Williams Co.

In *PMC, Inc. v. Sherwin-Williams Co.*,[383] PMC, the current owner of contaminated property, brought an action under CERCLA and the Illinois Contribution Act[384] against Sherwin-Williams, the former owner of the property, to recover costs PMC incurred after the Illinois Environmental Protection Agency required it to clean up toxic waste discovered at the site. After a bench trial, the district judge awarded PMC recovery of past costs under the state statute and future costs under CERCLA.[385] The district court held that PMC's past costs could not be recovered under CERCLA because PMC failed to submit the proposed remedy (for which it sought cost recovery) for public comment before its implementation,[386] but nevertheless awarded the past cleanup costs to PMC under Illinois's general contribution law governing joint tortfeasors.[387]

The Seventh Circuit reversed the award of past costs under state law on the ground of conflict preemption. It concluded that:

> CERCLA limits the right of contribution by the requirement in section 107(a)(4)(B) of consistency with the national contingency plan. When the requirement is flouted, contribution is denied; that is the sanction for the violation. PMC's invocation of Illinois' contribution statute is an attempt to nullify the sanction that Congress imposed for the kind of CERCLA violation that PMC committed.[388]

The court rejected PMC's argument that the CERCLA section 302(d) savings clause preserved its right to state law contribution, stating that:

> CERCLA's savings clause must not be used to gut provisions of CERCLA. The purpose of a savings clause is merely to nix an inference that the statute in which it appears is intended to be the exclusive remedy for harms caused by the violation of the statute. The

383. PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610 (7th Cir. 1998).

384. 740 ILL. COMP. STAT. 100/1–100/5 (2005). PMC also asserted an injunctive relief claim under RCRA. *PMC*, 151 F.3d at 613. *See supra* notes 22, 270.

385. *PMC*, 151 F.3d at 613.

386. *Id.* at 616.

387. *Id.* at 617.

388. *Id.* at 618. *See also* County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1518 n.13 (10th Cir. 1991) (holding that a section 113(f) plaintiff must prove NCP consistency to obtain CERCLA cost contribution, and "[i]n passing, we also note that it would be incongruous for federal law to bar private recovery unless there has been substantial compliance with the NCP, but then permit recovery under a contribution theory through mere compliance with less demanding state regulations").

> legislature doesn't want to wipe out people's rights inadvertently, with the possible consequence of making the intended beneficiaries of the legislation worse off than before it was enacted. The passage of federal environmental laws was not intended to wipe out the common law of nuisance.[389]

Implicit in the Seventh Circuit's conflict preemption analysis is the assumption that Congress intended to encourage "CERCLA-quality cleanups" by requiring NCP consistency, and that private plaintiffs who fail to conduct cleanups in accordance with the procedural requirements of the NCP should not be rewarded by an award of cleanup costs under state contribution law. The *PMC* court did not limit the applicability of its holding and reasoning to derivative claims under a general state law contribution statute similar to the Illinois statute at issue.[390] Similarly, *PMC* did not appear to involve a contribution claim in conflict with a settlement giving rise to contribution protection pursuant to CERCLA section 113(f)(2).[391]

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389. *PMC*, 151 F.3d at 618 (citations omitted). The court did not address how it implicitly distinguished between recovery of cleanup costs under Illinois' general contribution law (which it reversed as preempted) and a potential cleanup cost claim under the common law of nuisance, which it advised that CERCLA "was not intended to wipe out." *Id.*

390. Several courts have held that CERCLA may preempt state derivative or equitable cleanup cost remedies. *See, e.g.*, Bedford Affiliates v. Sills, 156 F.3d 416, 426–27 (2d Cir. 1998) (barring as preempted state restitution and indemnification claims relating to costs addressed by CERCLA section 122 settlement; "instituting common law restitution and indemnification actions in state court would bypass this carefully crafted settlement system, creating an actual conflict therefore between CERCLA and state common law causes of action."); Benderson Dev. Co. v. Neumade Prods. Corp., No. 98-CV-0241SR, 2005 WL 1397013, at *18–19 (W.D.N.Y. June 13, 2005) (CERCLA preempts state law remedies of restitution and indemnification as conflicting with CERCLA, but because "the torts of public nuisance and abnormally dangerous activity afford remedies distinct from those available pursuant to CERCLA, they are not preempted."); Allied Corp. v. Frola, Civ. A. No. 87-462, 1993 WL 388970, at *11 (D.N.J. Sept. 21, 1993) (dismissing state law equitable indemnity claim as disguised contribution claim in violation of CERCLA section 113(f)(2) contribution bar but permitting abnormally dangerous activity state law claim to proceed against party who settled with EPA because CERCLA section 113(f)(2) did not bar independent tort claims with its own elements); *see also In re* Reading Co., 115 F.3d 1111, 1117 (3d Cir. 1997) (barring common law claims based on claims covered by bankruptcy consummation, and stating that section 113(f)(1) preempted common law tort remedies in this case because "[Congress] made that [section 113(f)(1)] remedy a part of an elaborate settlement scheme aimed at the efficient resolution of environmental disputes. Permitting independent common law remedies would create a path around the statutory settlement scheme, raising an obstacle to the intent of Congress."); *cf.* Edward Hines Lumber Co. v. Vulcan Materials Co., 685 F. Supp. 651, 658 (N.D. Ill. 1988) (CERCLA does not bar state law contribution claim against person not liable under CERCLA) *aff'd*, 861 F.2d 155 (7th Cir. 1988). *See generally* Howard H. Schweber, *Cleaning Up the System: The Need for Federal Preemption of Third-Party Contribution Claims Under CERCLA*, 12 TEMP. ENVTL. L. & TECH. J. 187 (1993) (arguing that CERCLA preemption of third party contribution claims furthers Congressional intent that only section 107(a)(1)–(4) covered parties bear clean up costs in accordance with cost allocation under sections 107(a) and 113(f), rather than impleader of additional parties and alternative allocations under fifty different state law systems).

391. 42 U.S.C. § 9613(f)(2) (2000).

If encouraging "CERCLA-quality cleanups" is one of the objectives of CERCLA, the reach of *PMC* could extend far beyond cases in which an unsuccessful CERCLA plaintiff tries to use a general state law contribution statute to recover non-NCP consistent cleanup costs. For example, a number of state Superfund statutes do not require cleanup cost plaintiffs to prove consistency with the NCP as a condition of cost recovery.[392] Similarly, common law tort theories applicable to contamination disputes, such as nuisance, trespass, or negligence, have no such NCP consistency requirement for damages. If encouraging private plaintiffs to conduct "CERCLA-quality cleanups" is considered to be one of the purposes of CERCLA,[393] *PMC* could apply with equal force to cleanup cost claims brought under state Superfund or common law claims, including claims brought in state court.[394]

The *PMC* decision illustrates the problem with an overly expansive judicial view of Congress' purpose in creating a private CERCLA cleanup up cost remedy. CERCLA offers private plaintiffs the option to conduct a "CERCLA-quality cleanup" and enjoy the benefits of a status-based strict liability cost recovery remedy. Viewed as a "safety net" remedy, a CERCLA cost contribution claim under section 107(a)(4)(B) would ensure that plaintiffs who conduct a "CERCLA-quality cleanup" at any site in the country can recover cost contribution from other PRPs. CERCLA, however, does not purport to authorize as a "sanction" the

392. *See, e.g.*, ARK. CODE ANN. § 8-7-520 (2005); DEL. CODE ANN. tit. 7, § 9105(d) (2005); FLA. STAT. § 403.727 (2005); GA. CODE ANN. § 12-8-96.1 (2004); HAW. REV. STAT. § 128D-18 (2004).

393. *See* New York v. Hickey's Carting, Inc., 380 F. Supp. 2d 108, 117–18 (E.D.N.Y. 2005) (disagreeing with the *PMC* decision and noting that CERCLA "should be construed in a way that requires defendants to repay those who clean up their hazardous waste, which in this case tips the balance towards finding that there is no actual conflict between the state common law and CERCLA's NCP requirements."); *cf.* Schweber, *supra* note 390, at 212 (contending that Congress "intended to establish important incentives to ensure that only certain kind of cleanup efforts would be undertaken.").

394. Advocates of broad CERCLA conflict preemption may fear that current landowners and other PRPs could feel emboldened to seek cleanup cost recovery under state law after performing cleanups that fall far short of NCP requirements, or that a PRP concerned about community reaction to an inadequate cleanup plan could turn to state law cleanup cost remedies to avoid NCP public participation requirements, implicating environmental justice concerns. *See supra* note 282. Interpreting CERCLA broadly to preempt state law private cleanup cost remedies, however, would not necessarily result in better quality cleanups or increased community involvement. First, developers may choose not to acquire and voluntarily clean up contamination at some brownfield or other sites if required to incur high NCP compliance transaction costs. Second, should Congress amend CERCLA or the courts interpret section 107(a) to provide that all PRPs have a cleanup cost remedy, many PRPs will continue to comply with the NCP to obtain the benefits of CERCLA's status-based, strict liability cleanup cost claim scheme. Third, state regulatory agencies may impose cleanup requirements comparable to or more stringent than the public participation and other provisions of the NCP. Finally, a PRP who conducts a technically inadequate or procedurally suspect cleanup runs the risk that a defendant will persuade a court that claimed cleanup costs are unreasonable, or that the EPA or a state agency will require the PRP to perform further site investigation or remediation.

denial of cost recovery for non-NCP cleanups, nor does it purport to mandate as federal policy that all private cleanups must be conducted in accordance with the NCP.[395] Nothing in CERCLA's legislative history reflects any congressional intent to dictate the methodology by which all cleanups in the United States must be conducted.[396] Indeed, such an interpretation of CERCLA would be inconsistent with CERCLA's savings clauses.[397]

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395. In *Fireman's Fund Insurance Co. v. City of Lodi*, the Ninth Circuit rejected the NCP consistency preemption analysis embraced by the Seventh Circuit in *PMC*. 302 F.3d 928, 951–52 (9th Cir. 2002). *See also infra* notes 407–29 and accompanying text. The court held that a municipality could impose cleanup requirement that were less stringent than the NCP and "make sense under the circumstances," stating that "[l]ocal environmental legislation may be particularly useful to California cities in dealing with smaller, marginally contaminated sites . . . for which the extensive procedural requirements of the NCP may unnecessarily prolong cleanup and raise its cost." *Id.* at 952. The court also held that in order to avoid uncertainty and encourage cleanup CERCLA preempted municipal cleanup requirements that were *more* stringent than the NCP. *Id. See* Alexandra Manchik Barnhill, *supra* note 295, at 518–22 (criticizing the *Lodi* court's holding that CERCLA preempted local cleanup standards that are more stringent than the NCP); *see also* People v. Northbrook Sports Club, No. 1:99CV04038, 1999 WL 1102740, at *2 n.1 (N.D. Ill. Nov. 24, 1999) (granting motion to remand to state court state agency cost recovery action, rejecting defendant's argument that CERCLA preempted state Superfund act claim that could seek costs that were not consistent with the NCP).

396. A different conflict preemption problem is presented where the EPA directs or approves a particular remedial action and a state or PRP instead attempts to implement or obtain a judgment for an inconsistent remedial action, a remedial action that EPA had rejected, or a remedial action that conflicts with or violates a federal court order. Under these circumstances, such a direct conflict with a federal administrative or judicial directive would support application of federal preemption of the inconsistent alternative action. *See, e.g.*, United States v. County of Denver, 100 F.3d 1509, 1512–13 (10th Cir. 1996) (affirming declaratory judgment that CERCLA preempted municipal cease and desist order directing PRP not to take remedial action called for by EPA administrative order); United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1457 (6th Cir. 1991) (state may not bring action under state environmental statutory and public nuisance theories because "more stringent state environmental laws must be incorporated by EPA into federal consent decrees if relevant and applicable, but thereafter the state may not seek other remedies that are at odds with the terms of the decree."); Colorado v. Idarado Mining Co., 916 F.2d 1486, 1495 (10th Cir. 1990) (state agency implementation of cleanup plan not approved by EPA because allowing state to enforce separate plan under state law would defeat intended scope of state involvement in selection of remedy contemplated by CERCLA section 121(f)). Significant federalism issues also are presented by state or local efforts to regulate contaminated sites at which the federal government is engaged in regulatory activity, e.g., issuance of a section 106 order by the EPA or a federal court consent decree. *See generally* Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377 (2005) (assessing impact of Supreme Court federalism decisions on federal environmental regulation); Peter M. Manus, *Federalism Under Siege at the Rocky Mountain Arsenal: Preemption and CERCLA after* United States v. Colorado, 19 COLUM. J. ENVTL. L. 327 (1994) (discussing relationship between state and federal agencies with interests in contaminated sites). A detailed analysis of these regulatory federalism issues is beyond the scope of this Article.

397. The *PMC* court found the CERCLA section 302(d) savings clause inapplicable to plaintiff PMC, stating that:

> The purpose of CERCLA's savings clause is to preserve to victims of toxic wastes the other remedies they may have under federal or state law. PMC, even if it does have rights under the broadly worded section 107(a), is not a victim of toxic-wastes

State law theories should remain available to private plaintiffs as a supplement or an alternative to a CERCLA remedy.[398] For example, a PRP may choose not to follow the often cumbersome and expensive requirements of the NCP for a variety of legitimate economic or business reasons.[399] Compliance with the NCP may be too expensive in light of the value of the subject property, the development timeline required for the site, or the nature of the contamination problem.[400] A developer might proceed with a brownfield project by conducting a technically sound (but not NCP-consistent) cleanup if it could then recover its non-NCP consistent cleanup costs under state law, but choose not to do so if it was required incur the additional delay and expense required to satisfy the

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> contamination in any realistic sense. It bought the property from Sherwin-Williams knowing there were toxic wastes there, and by buying it became a responsible party strictly liable for the consequences of those wastes. That PMC may have rights against other, more culpable responsible parties does not change PMC into the victim of a tort; it is merely the less guilty of two tortfeasors.

151 F.3d at 617–18 (citations omitted). The *PMC* court cited no authority for the proposition that the CERCLA savings clauses or other CERCLA provision distinguished between "victims" and "non-victims" incurring cleanup costs, or that CERCLA provided a mechanism for how to determine whether a would-be plaintiff qualified as a "victim."

398. Alternative federal and state remedies exist in other substantive contexts, such as private antitrust claims. *See, e.g.*, Turnbull & Turnbull v. ARA Transp., Inc., 268 Cal. Rptr. 856, 964–65 (Ct. App. 1990) (no direct conflict and thus no preemption where California allows plaintiffs to establish prima facie case by showing prices below average total cost, and shifting burden to defendant to negate inference of illegal intent or establish affirmative defense, while federal law requires plaintiff to prove no legitimate business reason for below-cost pricing); Crown Oil Corp. v. Lapidus Popcorn, Inc., 223 Cal. Rptr. 164, 167–69 (Ct. App. 1986) (state statutory claim by indirect purchaser of coconut oil from defendant not preempted even though federal law only offered remedy to direct purchasers; difference in federal and state law did not result in physical impossibility to comply with both); R.E. Spriggs Co. v. Adolph Coors Co, 112 Cal. Rptr. 585, 594 (Ct. App. 1974) (private antitrust action under California's Cartwright Act by beer distributor challenging alleging unlawful territorial restrictions, price fixing and conspiracy to exclude plaintiff from markets not preempted by federal Sherman Act; California statute sought to facilitate competition and California statute conformed with like policies of the federal statute). *But see* Partee v. San Diego Chargers Football Co., 668 P.2d 674, 678–679 (Cal. 1983) (holding that application of state antitrust statute to National Football League is preempted because professional football is a unique activity requiring national operating rules, so application of state antitrust rules constituted an unreasonable burden on interstate commerce).

399. The NCP was not promulgated in connection with CERCLA; indeed, the NCP first was adopted in 1968 (twelve years before the enactment of CERCLA) and was "designed primarily to provide guidance to governmental agencies responding to oil spills under the Clean Water Act." As a result, "private parties—who now conduct the vast majority of contaminated site cleanups—are required to conduct the cleanups consistent with a complex federal regulation that was written primarily for government bureaucrats performing other functions." Dahlquist, *supra* note 59, at 32–33; *see also* Opper, *supra* note 151, at 166–67 (NCP designed to be applied to the nation's most serious sites, i.e., NPL sites).

400. *See, e.g.*, Harrison, *supra* note 362, at 150–51 (arguing that preempting state law claims for non-NCP compliant costs will discourage voluntary cleanups); Mark D. Anderson, *The State Voluntary Cleanup Program Alternative*, NAT. RESOURCES & ENV'T, Winter 1996, at 22–23 (arguing that expense and delay of NCP requirements discourage cleanup of contaminated properties).

NCP in order to recover cleanup costs from the original polluter or other PRPs.[401]

Most cleanups are conducted under the oversight of a state or local regulatory agency.[402] If a PRP fails to conduct a cleanup to the technical or procedural satisfaction of the lead regulatory agency (whether or not the agency's requirements also happen to be consistent with the NCP), it runs the risks that the agency will require further work and that a court in a subsequent cleanup cost case would find the costs of such an "inadequate" cleanup are not recoverable as a matter of state damages law.[403] A PRP who conducts a technically sound brownfield or other cleanup in accordance with state regulatory requirements should be able to recover cleanup costs in excess of her fair share from other PRPs.[404] A post-*A viall* uniform federal rule of decision should not be interpreted to have such an expansive conflict preemptive effect.[405]

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401. Some have argued that CERCLA cost recovery as a practical matter is often unavailable to brownfield developers because of the cost of NCP compliance and have urged EPA to amend the NCP to allow more streamlined processes at brownfield or other, less complicated sites. *See, e.g.*, Opper, *supra* note 151, at 182–83 (noting that preparation of feasibility studies for many brownfield projects "is wasteful, time consuming, and unnecessarily expensive" and urging EPA to amend the NCP to "adopt an approach to brownfield redevelopment that is both efficient and potentially consistent with the needs of the marketplace as well as the needs of our communities for projects that are safe to build and safe to use."); *Brownfields Legislation: "The Brownfields Revitalization and Environmental Restoration Act of 2001," and "Gillmor Discussion Draft," and "Democratic Discussion Draft": Hearing Before the Subcomm. on Env't & Hazardous Materials of the H. Comm. on Energy & Commerce*, 107th Cong. 39, 44 (2001) (statement of Erin M. Crotty, Comm'r, New York Dep't of Envtl. Conservation) ("New York's experience indicates that we can reach our objective of making brownfields cleanups protective of public health and the environment without requiring adherence to the NCP.").

402. *See supra* notes 14-15 and accompanying text.

403. *See* Colorado v. Idarado Mining Co., 916 F.2d 1486, 1496 n.8 (10th Cir. 1990) (holding remedial plans selected independent of EPA involvement not required to comply with NCP, but PRP failing to comply with NCP runs risks of cost recovery difficulties and that EPA will not concur with the remedy or require additional work); *see also supra* note 288.

404. *See* Dahlquist, *supra* note 59, at 69 ("The NCP was never intended to stifle creativity in conducting contaminated site cleanups. Courts must continue to be vigilant to protect against shoddy cleanups and the recovery of unnecessary response costs. But the NCP should not be used to defeat otherwise valid cost-recovery claims . . . .").

405. In *Stanton Road Associates v. Lohrey Enterprises*, the Ninth Circuit rejected the argument that a state law damages award should be invalid because it would permit the plaintiff to circumvent the requirement under CERCLA that response costs be necessary and consistent with the national contingency plan. 984 F.2d 1015 (9th Cir. 1993). In *Stanton Road*, the district court awarded plaintiffs $1,100,000 monetary damages for future cleanup costs under both CERCLA and state law in order to avoid subsequent proceedings regarding whether future costs incurred by plaintiff were consistent with the NCP. *Id.* at 1021. The Ninth Circuit reversed and remanded the monetary damages award on the grounds that (a) CERCLA did not permit an award of future response costs and (b) the district court "failed to indicate what portion of the monetary damages awarded to Stanton Road was compensation for the costs of repair based on a finding of liability under the state law claims." *Id.* at 1022.

2. *Conflict Preemption and Forms of Liability:* Fireman's Fund v. Lodi

The potential federalism and preemption problems that can arise from an overbroad interpretation of imagined congressional intent underlying CERCLA are not limited to the measurement of recoverable cleanup costs and requirement of compliance with the NCP as a national paradigm for how to conduct a cleanup. For example, in *Fireman's Fund Insurance Company v. City of Lodi*,[406] the Ninth Circuit held that CERCLA preempted a municipal ordinance that attempted to create for a PRP municipality a joint and several liability cleanup cost cause of action. The reasoning employed by the *Lodi* court on its face could be extended to preempt state common law tort and statutory theories imposing forms of liability perceived as inconsistent with a CERCLA paradigm of several liability for CERCLA-liable plaintiffs.

In *Lodi*, several insurance companies brought actions seeking to enjoin the enforcement of a municipal ordinance enacted by the City of Lodi, California, entitled the Comprehensive Municipal Environmental Response and Liability Ordinance (MERLO).[407] The *Lodi* case concerned perchlorethylene (PCE) contamination in soil and groundwater. Investigations revealed that four small businesses were potentially responsible for PCE-contaminated wastewater that migrated throughout Lodi.[408] The California Department of Toxic Substances Control (DTSC) began an administrative action against not only the businesses, but also the City as the owner of sewers from which the contaminated dry cleaning wastewater allegedly leaked.[409]

In response, the City and DTSC entered into an agreement that required, among other things, that the City adopt MERLO to supplement its local environmental regulatory authority.[410] In exchange, the DTSC gave the City a covenant not sue regarding the contamination from City sewers and agreed to protect the City from contribution claims for matters addressed in the agreement.[411] Among other things, MERLO purported to give the City authority (a) to investigate and remediate existing or threatened environmental nuisances affecting the City, and (b) to hold PRPs or their insurers jointly and severally liable for the cost of the City's nuisance abatement activities.[412] MERLO adopted many

406. 302 F.3d 928 (9th Cir. 2002).
407. *Id.* at 934.
408. *Id.* at 934–35. PCE is a solvent that for years was commonly used by dry cleaners. ROBERT D. MORRISON, ENVIRONMENTAL FORENSICS: PRINCIPLES AND APPLICATIONS 10–12 (2000).
409. Fireman's Fund Ins. Co. v. City of Lodi, 302 F.3d 928, 934–35 (9th Cir. 2002).
410. *Id.* at 935.
411. *Id.*
412. *Id.* at 937.

CERCLA provisions, including the definition of who may be considered a PRP.[413]

In May 1998, the City began an abatement action under MERLO, which precipitated the federal court injunctive relief actions brought by the insurance companies.[414] The insurance companies alleged that the City adopted MERLO to shift its own liability for the PCE contamination to the insurers of other PRPs, and moved for summary judgment enjoining the enforcement of MERLO on the ground that various provisions of MERLO were preempted by the federal and state constitutions.[415] The district court denied motions for injunctive relief and summary judgment on the preemption issues.[416]

The Ninth Circuit reversed and remanded the case to the district court, agreeing with a number of the preemption arguments advanced by the insurance companies.[417] Among other things, insurance companies argued that CERCLA preempted MERLO's provision allowing the City to impose joint and several liability on other PRPs.[418] The Ninth Circuit agreed:

> Our circuit has held [in *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997)] that a PRP may not bring a CERCLA § 107 cost recovery action, and instead may bring only a claim for contribution under CERCLA § 113(f). This means that a PRP 'does not have a claim for the recovery of the totality of its cleanup costs against other PRPs, and a PRP cannot assert a claim against other PRPs for joint and several liability.' In support of our decision in *Pinal Creek,* we noted that allowing a party responsible for part of the contamination to impose joint and several liability on other PRPs would result in unfair cost shifting and 'guarantee[ ] inefficiency, potential duplication, and prolongation of the litigation process in a CERCLA case.' We have not recognized any exception to *Pinal Creek* for municipal PRPs and we decline to do so now. Thus, if the district court determines that Lodi is a PRP, Lodi may not escape its share of responsibility by imposing all the costs of cleanup on others. Allowing it to do so would interfere with CERCLA's PRP cost allocation scheme, and would implicate the same policy concerns

413. *Id.*

414. *Id.*

415. *Id.*

416. Fireman's Fund Ins. Co. v. City of Lodi, 41 F. Supp. 2d 1100 (E.D. Cal. 1999).

417. The Ninth Circuit agreed with the insurers that (a) CERCLA preempted MERLO to the extent that imposed more stringent cleanup requirements than the NCP and imposed a higher burden of proof for divisibility, (b) California insurance law preempted the section of MERLO allowing direct actions against insurers, and, (c) in the event the City was found to be PRP, CERCLA preempted those sections of MERLO allowing the City to impose joint and several liability on other PRPs, authorizing the City to collect its attorneys' fees as "action abatement costs," and barring contribution claims against the City. *Lodi*, 302 F.3d at 956–57. *See infra* note 419.

418. *Id.* at 946–47.

> relied upon by this court in *Pinal Creek* in rejecting a § 107 cost recovery action for PRPs. For these reasons, we find that MERLO is preempted to the extent that it legislatively insulates Lodi from bearing its share of responsibility by imposing joint and several liability on other PRPs.[419]

The *Lodi* case is unusual—PRPs typically lack the capacity to enact legislation relating to their own liability. Nevertheless, the Ninth Circuit's analysis raises potentially far-reaching preemption questions. The court held that MERLO was preempted because one PRP should not be able to impose joint and several liability against another PRP under local law in light of CERCLA case law that PRPs cannot assert joint and several section 107(a) claims against other PRPs. The *Lodi* court thus must have concluded that limiting a PRP to cost claims for several liability was one of the "purposes and objectives of Congress"[420] when it enacted CERCLA. If so, the conflict preemption holding in *Lodi* logically could be extended to *any* state law claim under which a CERCLA-liable plaintiff could impose joint and several liability.

The *Lodi* reasoning could have widespread preemptive effect on state common law and statutory cleanup cost theories. In many states, plaintiffs may seek to impose joint and several liability under common law claims for nuisance,[421] trespass,[422] or negligence.[423] In some states, a tort-liable plaintiff (e.g., a negligent plaintiff) may still impose joint and several liability on multiple defendants with regard to that portion of

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419. *Id.* at 947 (citations omitted) (modifications in original). On remand, the district court found that the City was a PRP and that CERCLA thus preempted MERLO's joint and several liability provisions. Fireman's Fund Ins. Co. v. City of Lodi, 296 F. Supp. 2d 1197, 1215 (E.D. Cal. 2003).

420. Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 31 (1996).

421. *See supra* note 305 and accompanying text.

422. *See, e.g.*, KY. REV. STAT. ANN. § 454.040 (LexisNexis 2004) (under Kentucky law, "[i]n actions of trespass the jury may assess joint or several damages against the defendants."); LeClercq v. Lockformer Co., No. 1:00CV07164, 2002 WL 992671, at *2 (N.D. Ill. May 7, 2002) (denying defendant's motion for summary judgment on plaintiff's common law claims of negligence, private nuisance, trespass and willful and wanton misconduct; rejecting defendant's argument that plaintiff must attribute proper portions of injury among defendants because Illinois law recognized joint and several liability for multiple tortfeasors contributing to same indivisible injury).

423. *See, e.g.*, D & W Jones, Inc. v. Hampton Collier, 372 So. 2d 288, 294 (Miss. 1979) (holding separate, concurrent and successive negligent acts of appellees which combined to proximately cause pollution of ponds and contamination of catfish rendered appellees jointly and severally liable); Velsicol Chem. Corp. v. Rowe, 543 S.W.2d 337, 343 (Tenn. 1976) (permitting third party complaint against joint tortfeasors alleging each operated a plant that discharged pollutants, and holding that under Tennessee law there may be "joint and several liability when an indivisible injury has been caused by the concurrent, but independent, wrongful acts or omissions of two or more wrongdoers, whether the case be one of negligence or nuisance."); Landers v. E. Tex. Salt Water Disposal Co., 248 S.W.2d 731, 734 (Tex. 1952) (plaintiff could state joint and several liability claim for single indivisible harm against two pipeline carriers whose separate salt water lines ruptured, polluting a lake).

harm not attributable to the plaintiff's culpable conduct.[424] Under the *Lodi* reasoning, all such joint and several liability tort claims by a CERCLA-liable plaintiff could be preempted by CERCLA—in federal *or state* court.[425]

Moreover, CERCLA is a status-based, strict liability statute. For example, the current landowner of contaminated property who does not qualify for a section 107(b) defense is a liable party under CERCLA section 107(a)(1). The landowner, however, may be wholly "innocent" from a common law tort perspective, i.e., the landowner neither caused any contamination nor act negligently. Nevertheless, under *Lodi* this "tort-innocent" but "CERCLA-liable" plaintiff could be barred from asserting a joint and several liability tort claim under state law because, as a PRP, she could not impose joint and several liability under CERCLA.

The *Lodi* decision, like *PMC*, reaches too far by applying conflict preemption to joint and several liability claims. The statutory language of CERCLA says nothing about joint and several liability; its legislative history suggests that the form of CERCLA liability would be left to the courts for determination on a case-by-case basis.[426] The structure of CERCLA is not necessarily inconsistent with joint and several liability; indeed, the government may impose joint and several liability on PRPs.[427]

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424. *See, e.g.*, City of Merced v. Fields, 997 F. Supp. 1326, 1336 (E.D. Cal. 1998) (denying defendant chemical manufacturers' motion to dismiss state law joint and several liability claims for groundwater contamination cleanup cost damages, noting that "[i]n California, joint, concurrent, or successive tortfeasors generally have joint liability for economic damages. . . . In a negligence claim under California law, liability among joint defendants is joint and several, even if the plaintiff is partially at fault.").

425. One could attempt to distinguish *Lodi* on a variety of grounds. *Lodi* involved a local ordinance adopted by the plaintiff PRP and modeled after CERCLA rather than a common law tort claim; however, the court based its conflict preemption decision on the joint and several nature of the liability the city wished to impose on other PRPs rather than on the statutory or "CERCLA-like" nature of the City's MERLO claim. Similarly, *Lodi* involved a municipality asserting a claim that was the product of legislation enacted by the municipality itself in response to a known contamination problem. Once again, however, the *Lodi* analysis on its face turns more broadly on the plaintiff's ability to use a non-federal claim to impose joint and several liability where as a PRP it would be limited to several liability for a cleanup cost claim under CERCLA. Finally, the City sought to recover cleanup costs as a "lead regulatory enforcement agency" as opposed to a private party. The court's preemption reasoning with regard to the joint and several liability claim, however, could apply as well to a PRP taking the lead in cleaning up contamination and then trying to recover costs from other PRPs.

426. *See supra* notes 72–73 and accompanying text.

427. Moreover, even assuming, *arguendo*, that prohibition of a joint and several liability claim for a CERCLA-liable plaintiff somehow constitutes one of Congress' goals in enacting CERCLA, the imposition of joint and several liability under a culpability-based state law claim (e.g., nuisance, negligence) would not impede the goals of CERCLA's status-based strict liability scheme. *See, e.g.*, Durham Mfg. Co. v. Merriam Mfg. Co., 128 F. Supp. 2d 97, 103 (D. Conn. 2001) ("By virtue of the stricter culpability standard under state law, allowing plaintiff to proceed under both state law and CERCLA would not defeat or impede any purpose or objective of CERCLA.").

It simply asks too much to extrapolate from cases holding that a PRP may not seek joint and several liability under CERCLA that Congress intended that a PRP could not seek joint and several liability under state law as well. CERCLA section 302(d) states that CERCLA does not "affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to release of hazardous substances."[428] Horizontal uniformity is a consequence of a federal rule of decision; vertical uniformity among state and federal private cleanup cost remedies is not and should not be a goal of CERCLA.

At bottom, the decisions in *PMC* and *Lodi* illustrate the significant federalism concerns that arise from how courts characterize Congress' purpose in creating a CERCLA private cleanup cost remedy. The federalism issues raised by these decisions must play an important role in the post-*Aviall* debate regarding whether federal law should continue to provide the primary rule of decision in private cleanup cost disputes.[429] The courts must not decide in a vacuum whether a PRP may assert a cleanup cost claim under CERCLA. The language used by the courts in deciding this issue, including language about congressional intent and the goals of CERCLA, will shape future preemption decisions about the roles of federal and state law in private cleanup cost disputes.

Courts addressing whether a PRP may bring a CERCLA claim without first having settled its CERCLA liability or having been sued under CERCLA should conclude that such a remedy exists as a complement to potentially available state law remedies. The structure of

428. 42 U.S.C. § 9652(d) (2000). *See* City of Merced v. Fields, 997 F. Supp. 1326, 1336 (E.D. Cal. 1998) (permitting PRP to assert negligence-based nuisance claim seeking joint and several liability, relying on savings clause of CERCLA section 9652(d) to hold that "while liability for the CERCLA claims is several, liability of all parties to the City under state-law theories is joint and several" and rejecting argument that it is not possible to recover CERCLA response costs under a state-law theory "because CERCLA does not preempt state-law causes of action that concern cleanup of hazardous materials.").

429. An expansive analysis of CERCLA's preemptive effect on state law could support a narrow interpretation of PRP contribution rights under section 107(a)(4)(B) if relegating most PRP plaintiffs to state law claims would promote the use of state common law and statutory theories that are not burdened by the NCP consistency and other procedural requirements of private CERCLA claims. Such a perspective assumes, of course, that CERCLA does not preempt state law claims by PRPs who are ineligible to bring CERCLA claims. To the extent, however, that courts view CERCLA as creating a national cleanup procedural paradigm, the preemptive effect of CERCLA may not depend on whether a particular plaintiff has standing to bring a CERCLA cost contribution claim. Such a perspective could require preemption of a wide variety of state law cleanup cost claims (e.g., joint and several liability claims or claims seeking recovery of non-NCP consistent costs) litigated in state court. Such an analysis underscores the potential inequity of denying a cost contribution remedy to PRPs under CERCLA as well as the public policy risks presented by an overbroad view of CERCLA's preemptive effect.

CERCLA[430] does not require broad conflict preemption and principles of federalism and sound public policy considerations militate against it. Instead, the courts should interpret CERCLA to permit PRPs the right to seek contribution from other PRPs under CERCLA as well as under a potentially broad array of state law remedies. Such an interpretation of CERCLA would encourage voluntary cleanups at all sites, provide incentives for procedurally efficient and technically sound cleanups, inspire development of state law cleanup cost remedies, and reduce legal and technical transaction costs for PRPs. In the aftermath of *Aviall*, courts must interpret the language of CERCLA with these policy and federalism issues in mind.

CONCLUSION

Twenty-five years after the enactment of CERCLA, the nation finds itself back at square one: addressing whether federal law should serve as the primary rule of decision in private cleanup cost disputes. It should. CERCLA should be interpreted or amended to provide PRPs with a right of action to ensure the availability of a default (or "safety net") cleanup cost remedy at sites across the country. A uniform, nationally applicable rule of decision would provide the regulated community with predictability and reliability regarding the equitable allocation of cleanup costs among PRPs that cannot come from current state law remedies because of their dramatic variations from state to state. It would encourage voluntary cleanups because a PRP could take the lead at a site knowing that regardless of potential state law limitations it could obtain contribution from other PRPs under federal law. Similarly, PRPs could comply with regulatory agency cleanup orders without being compelled first to negotiate a CERCLA settlement or require agencies to initiate enforcement litigation in order to create a triggering event for CERCLA section 113(f) contribution. CERCLA's private right of action provisions leave room for supplemental or alternative state law theories and thus should not be given the broad conflict preemption effect applied by the *PMC* and *Lodi* courts. Voluntary remedial action by PRPs is essential in order to clean up the nation's vast inventory of contaminated sites. PRPs must have a private cleanup cost contribution remedy to help solve this multi-billion dollar problem.

430. CERCLA's savings clauses confirm that the statute was not designed to impair, affect, or modify liabilities under state common and statutory law relating to the release of hazardous substances. CERCLA §§ 114(a), 302(a), 310(h), 42 U.S.C. §§ 9614(a), 9652(d), 9659(h) (2000). Indeed, Congress knew how to preempt state law in CERCLA when it chose to do so. *See supra* note 377 and accompanying text.