

# A Proposal to Balance Polluter and Community Intervention in CERCLA Litigation

Maya Waldron\*

Introduction.....	402
I. Background: CERCLA.....	404
II. Background: Polluter Intervention .....	407
A. Courts Granting Polluter Intervention: <i>United States v. Aerojet</i> ..	408
B. Cases Denying Polluter Intervention .....	412
III. Background: Environmental Justice and Community Group Intervention .....	413
IV. An Amendment to Balance CERCLA Litigation.....	415
A. Polluter Timeliness .....	416
1. At Present.....	416
2. Proposed Change .....	417
3. Rationale.....	418
a. Reconciling the Statutory Rights Granted by CERCLA with General Timeliness Analysis .....	418
b. Provide a Bright-line Rule that Sends a Clear Message to Polluters and Courts.....	420
c. Incentivize and Reward Early Settlement.....	420
4. Drawbacks .....	421
B. Adequacy of Representation .....	421
1. At Present.....	421
2. Proposed Change .....	421
3. Rationale.....	422
a. Different Perspectives.....	423
b. Different Interests .....	424
c. Inadequate Representation of Minority Groups.....	424
4. Drawbacks .....	425
Conclusion .....	426

## INTRODUCTION

Communities directly affected by toxic sites in their backyards motivated the passage of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>1</sup> However, courts have since interpreted CERCLA to largely exclude these victim communities from the process surrounding cleanups. Rather, the law has evolved from protecting communities to protecting the polluters of toxic sites, by placing great import on what is fair to polluters involved in CERCLA settlements.

This shift is most apparent from litigation dealing with cleanup costs for toxic sites. When the government seeks cleanup reimbursement costs from the polluters, a settlement usually ends the litigation. Significantly, a settlement with the government protects the settling party from any claims by communities for contribution regarding matters already addressed in the settlement.<sup>2</sup> Because all identified polluters share these reimbursement costs, oftentimes polluters not participating in the settlement intervene in the court action at the last minute, claiming that the settlement would leave them to pay too large of a share.<sup>3</sup> Courts have allowed intervention, reasoning that denying intervention would be unfair to polluters who may end up paying disproportionate shares of cleanup costs.

One recent example is *United States v. Aerojet General Corporation*,<sup>4</sup> where the Ninth Circuit analyzed CERCLA's intervention provision, section 113(i),<sup>5</sup> and Federal Rule of Civil Procedure 24(a)(2) (Rule 24)<sup>6</sup> to hold that a

---

Copyright © 2011 Regents of the University of California.

\* J.D. Candidate, University of California, Berkeley, School of Law (Boalt Hall), 2012; B.A., Spanish, B.A., Philosophy, University of Oregon, 2007. My thanks to Professor Bob Infelise for his guidance and humor, as well as everyone at the *Ecology Law Quarterly* for all of their hard work.

1. See Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2006). CERCLA was sparked by extreme environmental disasters such as Love Canal. *Superfund 30th Anniversary Timeline*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/superfund/30years/timeline/#> (last visited April 1, 2011).

2. See 42 U.S.C. § 9613(f)(2) (2006).

3. See *infra* note 30 and accompanying text. Many of the cases dealing with intervention show parties moving to intervene after parties have reached a settlement and are awaiting judicial approval. See, e.g., *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142 (9th Cir. 2010); *United States v. Albert Inv. Co.*, 585 F.3d 1386 (10th Cir. 2009).

4. See *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142 (9th Cir. 2010).

5. 42 U.S.C. § 9613(i) (“In any action commenced under this chapter or under the Solid Waste Disposal Act in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person’s ability to protect that interest.”).

6. Rule 24 provides: (1) the motion must be timely; (2) the applicant must claim a “significantly protectable” interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant’s interest must be inadequately

non-settling polluter may intervene to challenge approval of a settlement that would bar the non-settling polluter from seeking indemnification of cleanup costs from the settling parties.<sup>7</sup> *Aerojet* and a slew of other section 113(i) intervention decisions with varying outcomes highlight the confusion created by section 113(i) intervention.<sup>8</sup>

On the other hand, courts rarely allow victim communities to intervene under section 113(i), reasoning that the government adequately represents their interests.<sup>9</sup> Statistical data, however, shows quite the opposite<sup>10</sup>: the communities around toxic sites generally have different concerns, perspectives, and practical interests from the government.<sup>11</sup> Unsurprisingly, those living around CERCLA sites tend to be minority groups, which the government does an especially poor job of representing.<sup>12</sup> Denying intervention to the community victims is thus both illogical and ironic, as those communities suffer the greatest tangible impacts from the pollution and are practically unrepresented by the government.

These two trends—allowing polluters to freely intervene, yet denying victim intervention—have tilted the scales of CERCLA too far in favor of polluters. This Note explores two proposals to amend section 113(i) in order to give effect to the original goals of CERCLA and reestablish a balance of power between polluters and victims. The proposed amendments spring from existing scholarship on environmental justice<sup>13</sup> and environmental inequality<sup>14</sup> within the CERCLA context.

---

represented by the parties to the action. FED. R. CIV. P. 24(a)(2). Because 113(i) is interpreted as nearly identical to intervention as of right, this Note does not address permissive intervention.

7. See *Aerojet Gen. Corp.*, 606 F.3d at 1153.

8. Courts in several cases have allowed non-settling polluter intervention. *United States v. Albert Inv. Co., Inc.*, 585 F.3d 1386 (10th Cir. 2009); *United States v. Union Elec. Co.*, 64 F.3d 1152 (8th Cir. 1995); *United States v. ExxonMobil Corp.*, 264 F.R.D. 242, 246–48 (N.D.W. Va. 2010); *United States v. Acton Corp.*, 131 F.R.D. 431, 433–34 (D.N.J. 1990). Other courts have denied intervention under identical circumstances. See *United States v. Acorn Eng'g Co.*, 221 F.R.D. 530, 534–39 (C.D. Cal. 2004); *United States v. ABC Indus.*, 153 F.R.D. 603 (W.D. Mich. 1993); *Arizona v. Motorola, Inc.*, 139 F.R.D. 141, 145–46 (D. Ariz. 1991).

9. See *Acorn Eng'g Co.*, 221 F.R.D. at 534–39; *ABC Indus.*, 153 F.R.D. at 603; *Motorola, Inc.*, 139 F.R.D. at 145–46.

10. See Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Law's Place in Environmental Regulation*, 26 HARV. ENVTL. L. REV. 1, 6–18 (2002); Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law, A Special Report*, NAT'L L.J., Sept. 21, 1992, at S2; *History: Environmental Equity: Reducing Risks for all Communities*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/history/topics/justice/01.htm> (last visited Mar. 19, 2011).

11. See Yang, *supra* note 10, at 15; Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 2–4 (1995).

12. According to Tseming Yang, “continuing severe criticism of EPA efforts in regard to environmental justice shows that there still has not been a ‘meeting of the minds’ regarding approaches and values that should form the basis of appropriate regulation.” Yang, *supra* note 10, at 2.

13. See Robert J. Brulle & David N. Pellow, *Environmental Justice: Human Health and Environmental Inequalities*, 27 ANN. REV. PUB. HEALTH 103, 104 (2006) (defining environmental justice as the idea that “all people and communities are entitled to equal protection by environmental and public health laws and regulations”); see also Yang, *supra* note 10, at 20 (describing environmental

This Note begins, in Part I, by discussing the relevant sections of CERCLA: intervention,<sup>15</sup> the right to contribution,<sup>16</sup> the bar to contribution,<sup>17</sup> citizen suits,<sup>18</sup> and citizen suit timing.<sup>19</sup> Part II summarizes *Aerojet* and the reasoning behind granting and denying polluter intervention, while Part III summarizes environmental justice and victim community intervention within the CERCLA context. Part IV justifies two amendments to CERCLA section 113(i).

## I. BACKGROUND: CERCLA

Congress enacted CERCLA to address releases of hazardous waste posing a danger to public health and the environment.<sup>20</sup> To this end, CERCLA regulates hazardous waste sites, establishes polluter liability, and provides funds to clean up toxic sites where no polluter has been identified.<sup>21</sup> This process is essentially bifurcated into two phases: cleanup and cost recovery. In the cleanup phase,<sup>22</sup> the Environmental Protection Agency (EPA)<sup>23</sup> identifies contaminated sites and uses the National Contingency Plan (NCP) as a regulatory template for cleanup.<sup>24</sup> The NCP “sets performance standards, identifies methods for investigating the environmental impact of a release or threatened release, and establishes criteria for determining the appropriate extent of response activities.”<sup>25</sup> The cleanup is then implemented and paid for

---

justice as a “more holistic concept that includes the right to a safe, healthy, productive, and sustainable environment for all”) (citing FIRST NAT’L PEOPLE OF COLOR ENVTL. LEADERSHIP SUMMIT, PRINCIPLES OF ENVIRONMENTAL JUSTICE (1991), reprinted in MARK DOWIE, LOSING GROUND 284–85 (1996)).

14. See Brulle & Pellow, *supra* note 13, at 104 (describing environmental inequality as “a situation in which a specific social group is disproportionately affected by environmental hazards”).

15. See 42 U.S.C. § 9613(i) (2006).

16. See *id.* § 9613(f)(1).

17. See *id.* § 9613(f)(2).

18. See *id.* § 9659.

19. See *id.* § 9613(h).

20. See *Superfund: CERCLA Overview*, U.S. ENVTL. PROT. AGENCY (Feb. 18, 2011), <http://www.epa.gov/superfund/policy/cercla.htm>.

21. See *id.*

22. For a general overview of the cleanup process, see *Superfund: Cleanup Process*, U.S. ENVTL. PROT. AGENCY (Feb. 28, 2011), <http://www.epa.gov/superfund/cleanup/index.htm>.

23. While this Note addresses cleanup actions initiated by the government, private parties may also bring cost-recovery actions under CERCLA section 107. See 42 U.S.C. § 9607 (2006).

24. See *id.* § 9605. Section 9604 states that “the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action” of hazardous substances. *Id.* § 9604. According to section 9605, the President publishes an NCP, including a “national hazardous substance response plan which shall establish procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants.” *Id.* § 9605. Section 9621 sets out cleanup standards, which should also comply with the national contingency plan to the extent practicable. See *id.* § 9621.

25. *Pub. Serv. Co. of Colo. v. Gates Rubber Co.*, 175 F.3d 1177, 1181 (10th Cir. 1999); 40 C.F.R. § 300 (2010). The NCP sets forth standards for removal and remediation. Removal addresses an immediate release or threat of release of hazardous substances, making it both less expensive and relatively speedy. Remedial actions take longer and cost more, but better address long-term problems associated with the site. See *Pub. Serv. Co. of Colo.*, 175 F.3d at 1182.

either by the government or the party conducting the cleanup.<sup>26</sup> If the government pays for the cleanup, it must then recoup its costs during the cost recovery phase. By allowing the government to work directly on the cleanups, rather than forcing the polluters to conduct the cleanup, the basic CERCLA framework aims to serve CERCLA's main goals: cleaning up toxic sites quickly, encouraging fast settlements with responsible parties, and limiting government expenditure on litigation.<sup>27</sup>

In the cost recovery phase, EPA can negotiate settlements with parties that may be responsible for the pollution<sup>28</sup> in order to recover cleanup costs.<sup>29</sup> Under what courts have interpreted as a type of joint and several liability scheme,<sup>30</sup> polluters may be liable for all of the cleanup costs unless they can either prove that they did not contribute to the pollution or can provide a reasonable estimate of how much of the pollution they actually caused.<sup>31</sup> A judicially approved settlement between polluters and the government should therefore be

---

26. See 42 U.S.C. § 9604. According to section 9604, “[w]hen the President determines that such action will be done properly and promptly by the owner . . . operator . . . or by any other responsible party, the President may allow such person to carry out the action.” *Id.*

27. See *Burlington N. & Santa Fe Ry. v. United States*, 129 S. Ct. 1870, 1874 (2009); *United States v. Acorn Eng'g Co.*, 221 F.R.D. 530, 536 (C.D. Cal. 2004); *Arizona v. Motorola, Inc.*, 139 F.R.D. 141, 145 (D. Ariz. 1991).

28. See *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1145 (9th Cir. 2010). A potentially responsible party (PRP) is a party the government believes has contributed to pollution in a CERCLA site, which the “President shall make reasonable efforts to identify and notify . . . as early as possible before selection of a response action.” 42 U.S.C. § 9613(k)(2)(D). The following parties may be liable under CERCLA section 9606:

- (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.

*Id.* § 9607.

29. See *Aerojet Gen. Corp.*, 606 F.3d at 1145. CERCLA section 107 authorizes private parties, state governments, and federal governments to recover cleanup costs from contaminating parties. See 42 U.S.C. § 9607(a). These cleanup costs must be consistent with the National Contingency Plan in order for them to be recoverable. See *id.*

30. Congress removed the term “joint and several liability” from CERCLA prior to enactment. See *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 807 (S.D. Ohio 1983); 126 CONG. REC. 11787 (1980) (statement of Representative Florio) (“Issues of joint and several liability . . . shall be governed by traditional and evolving principles of common law.”); 126 CONG. REC. 14964 (1980) (statement of Senator Randolph) (“[W]e have deleted any reference to joint and several liability, relying on common law principles to determine when parties should be severally liable.”). However, it is well accepted that “CERCLA defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists.” *Burlington N. & Santa Fe Ry.*, 129 S. Ct. at 1881 (citing *Chem-Dyne Corp.*, 572 F.Supp. at 810).

31. See *Burlington N. & Santa Fe Ry.*, 129 S. Ct. at 1881.

“substantively fair,” meaning it should be reasonably proportionate to the amount of pollution caused by a given polluter, if that amount can be proven by the polluter.<sup>32</sup>

Despite this attempt to fairly estimate costs in proportion to a polluter’s liability, settlement may still have significant impacts on non-settling polluters, particularly if cleanup costs turn out to be higher than was foreseeable. Section 113(f)(1) provides a right to contribution: “[a]ny person may seek contribution from any other person who is liable or potentially liable” under CERCLA, in a sort of joint and several liability.<sup>33</sup> After settlement, however, section 113(f)(2) prevents a non-settling polluter from seeking compensation from a settling polluter, leaving non-settling polluters to shoulder the remaining cleanup costs.<sup>34</sup> Therefore, if a non-settling polluter does not dispute the reasonableness of the portion of the cleanup that a settling polluter will pay, then the non-settling polluter could be liable for the remaining cleanup costs even if they could have established that the settling polluter’s contribution was disproportionate to the actual pollution caused.<sup>35</sup>

The intervention provision, section 113(i), allows “any person” to intervene when “such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person’s ability to protect that interest.”<sup>36</sup> Courts allowing polluter intervention have interpreted section 113(i) to be nearly identical to intervention as of right under Rule 24,<sup>37</sup> which allows for intervention where (1) the motion is timely, (2) the intervenor has a “significantly protectable” interest in the litigation, (3) the disposition of the action may impair or impede the intervenor’s ability to protect that interest, and (4) the intervenor’s interest is not adequately represented by the existing parties.<sup>38</sup> The only difference between Rule 24 and section 113(i) is that Rule 24 places the burden of proving inadequacy of representation on the intervening party, while section 113(i) places the burden on the government to prove that they adequately represent the intervening party’s interest.<sup>39</sup>

---

32. *See id.*

33. 42 U.S.C. § 9613(f)(1). In a CERCLA action, typically the government or a private entity cleans up a given site and then seeks “cost recovery” of its cleanup expenses. *See supra* note 26 and accompanying text. This should not be confused with the “right to contribution” conferred on PRPs by § 113(f)(1), which allows a PRP to seek reimbursement from other PRPs when the first PRP paid more than their fair share to the government or private cleanup group in the form of cost recovery. *See* 42 U.S.C. § 9613(f)(1).

34. *Id.* § 9613(f)(1)–(2); *Aerojet Gen. Corp.*, 606 F.3d at 1149.

35. *See Burlington N. & Santa Fe Ry.*, 129 S. Ct. at 1881.

36. 42 U.S.C. § 9613(i). Congress added 113(i) as part of the 1986 Superfund Amendments and Reauthorization Act (SARA) “[i]n response to concerns about the limited degree of public involvement in the selection of CERCLA remedies.” 2 JAMES T. O’REILLY, INTERVENTION IN JUDICIAL PROCEEDING, SUPERFUND & BROWNFIELDS CLEANUP § 22:16 (2009–10).

37. *See, e.g., Aerojet Gen. Corp.*, 606 F.3d at 1149.

38. FED. R. CIV. P. 24(a)(2).

39. *See Aerojet Gen. Corp.*, 606 F.3d at 1149.

Otherwise, the analysis courts conduct under either Rule 24 and section 113(i) is nearly identical.

Separate from the general intervention provision, the citizen suit provision of CERCLA, section 310(a)(2), provides that “any person may commence a civil action on his own behalf . . . against the President or any other officer of the United States . . . where there is alleged a failure . . . to perform any [non-discretionary] act or duty under this chapter.”<sup>40</sup> However, section 113(h)(4) states that challenges to cleanup method “may not be brought with regard to a removal where a remedial action is to be undertaken at the site.”<sup>41</sup> As victim communities may only bring citizen suits after cleanup has taken place, this citizen suit provision is practically useless for communities seeking to challenge a given type of cleanup. Therefore, both intervention and citizen suits have left victim communities with little legal recourse.

## II. BACKGROUND: POLLUTER INTERVENTION

Three circuit courts and numerous district courts have addressed whether polluters may intervene in cost-recovery settlements.<sup>42</sup> Most recently, the Ninth Circuit in *Aerojet* agreed with the Eighth and Tenth Circuits in holding that polluters did have a right to intervene in the settlements.<sup>43</sup>

In determining whether or not a polluter should be allowed to intervene under section 113(i), courts have split along two general lines of reasoning. The first, as in *Aerojet*, finds the language of section 113(i) to be unambiguous and grants intervention.<sup>44</sup> While this result is the most logical interpretation of the

---

40. 42 U.S.C. § 9659(a)(2).

41. *Id.* § 9613(h)(4). The statutory bar on citizen suits has received much attention, leading to numerous criticisms and proposed amendments. See Karen M. Hoffman, *Clinton County Commissioners v. EPA: Closing Off a Route to Pre-Enforcement Review*, 66 *FORDHAM L. REV.* 1939, 1940 (1998) (critiquing the proposal by Professor Lucia Ann Silecchia, in light of *Clinton County Commissioners v. EPA*, 116 F.3d 1018 (3d Cir. 1997)); Paul McConnell, *CERCLA Wrestling—Grappling with Conflicting Legislative Intent and the Citizens’ Suit Provision*, 14 *TEMP. ENVTL. L. & TECH. J.* 115 (1995) (commenting on the decision in *United States v. Princeton Gamma-Tech*, 31 F.3d 138 (3d Cir. 1994), and its impact on section 113(h)(4)); Lucia Ann Silecchia, Note, *Judicial Review of CERCLA Cleanup Procedures: Striking a Balance to Prevent Irreparable Harm*, 20 *HARV. ENVTL. L. REV.* 339, 344 (1996) (proposing that “Congress create a specific exception to the bar which would allow a plaintiff to allege that a cleanup must be reviewed if it poses a threat of irreparable harm to human health or the environment”).

42. See *United States v. Aerojet Gen. Corp.* 606 F.3d 1142, 1150; *United States v. Albert Inv. Co.*, 585 F.3d 1386, 1386 (10th Cir. 2009) (granting polluter intervention as of right); *United States v. Union Elec. Co.*, 64 F.3d 1152, 1170 (8th Cir. 1995) (granting polluter intervention as of right); *United States v. ExxonMobil Corp.*, 264 F.R.D. 242, 246–48 (N.D.W. Va. 2010); *United States v. Acton Corp.*, 131 F.R.D. 431, 433–34 (D.N.J. 1990); *United States v. Acorn Eng’g Co.*, 221 F.R.D. 530, 534–39 (C.D. Cal. 2004); *United States v. ABC Indus.*, 153 F.R.D. 603, 603 (W.D. Mich. 1993); *Arizona v. Motorola, Inc.*, 139 F.R.D. 141, 145–46 (D. Ariz. 1991).

43. See *Albert Inv. Co.*, 585 F.3d at 1386; *United States v. Union Elec. Co.*, 64 F.3d 1152 (8th Cir. 1995); see also *ExxonMobil Corp.*, 264 F.R.D. at 246–48; *Acton Corp.*, 131 F.R.D. at 433–34.

44. See *Albert Inv. Co.*, 585 F.3d at 1386; *United States v. Union Elec. Co.*, 64 F.3d at 1170 (8th Cir. 1995); see also *ExxonMobil Corp.*, 264 F.R.D. at 246–48; *Acton Corp.*, 131 F.R.D. at 433–34.

statute, it ignores the main goals of CERCLA.<sup>45</sup> The second, supported by a number of district courts, looks beyond what these courts considered to be the “ambiguous” language of the statute to analyze legislative intent and ultimately deny intervention.<sup>46</sup> This rationale reaches a sound conclusion as to CERCLA’s purposes, but a weak conclusion as to the plain statutory interpretation.<sup>47</sup>

#### A. Courts Granting Polluter Intervention: *United States v. Aerojet*

Courts allowing intervention<sup>48</sup> usually rely on the “unambiguous language” of section 113(i) to hold that “at a minimum” the non-settling polluter must have “an interest that could be adversely affected by the litigation.”<sup>49</sup> As these courts interpret section 113(f)(2)’s right to seek contribution from other polluters to satisfy this requirement, they appear to grant blanket permission of intervention for all identified polluters.

The Ninth Circuit was the most recent court to allow broad polluter intervention in *United States v. Aerojet*. The facts of *Aerojet* begin in 1979, when EPA discovered contaminants in the waters of the San Gabriel Basin in Los Angeles County.<sup>50</sup> Throughout the 1990s, EPA sought to clean up volatile organic compounds in the South El Monte Operable Unit (SEMOU) and recover costs from the industries that caused the pollution.<sup>51</sup> EPA outlined a cleanup plan<sup>52</sup> requiring various water providers in the basin to pump, clean, and sell the SEMOU water to their customers.<sup>53</sup> The industry polluters would then compensate the water providers and EPA for the cleanup costs.<sup>54</sup>

In 2002, EPA and the water providers asked the industry polluters for reimbursement.<sup>55</sup> A group of thirteen polluters (the “large group”) agreed to pay \$4.7 million to the water providers.<sup>56</sup> In turn, the water providers would

---

45. See *Albert Inv. Co.*, 585 F.3d at 1386; *United States v. Union Elec. Co.*, 64 F.3d at 1170 (8th Cir. 1995); see also *ExxonMobil Corp.*, 264 F.R.D. at 246–48; *Acton Corp.*, 131 F.R.D. at 433–34.

46. See *Acorn Eng’g Co.*, 221 F.R.D. at 534–39; *ABC Indus.*, 153 F.R.D. at 603; *Motorola, Inc.*, 139 F.R.D. at 145–46.

47. See *Acorn Eng’g Co.*, 221 F.R.D. at 534–39; *ABC Indus.*, 153 F.R.D. at 603; *Motorola, Inc.*, 139 F.R.D. at 145–46.

48. See *Albert Inv. Co.*, 585 F.3d at 1386; *Union Elec. Co.*, 64 F.3d at 1152; see also *ExxonMobil Corp.*, 264 F.R.D. at 246–48; *Acton Corp.*, 131 F.R.D. at 433–34.

49. *Albert Inv. Co.*, 585 F.3d at 1392 (citing *San Juan Cnty. v. United States*, 503 F.3d 1163, 1199 (10th Cir. 2007) (en banc)).

50. See *United States v. Aerojet Gen. Corp.* 606 F.3d 1142, 1146 (9th Cir. 2010).

51. See *id.*

52. The preliminary cleanup plan, or Interim Record of Decision (IROD) is a temporary “public document that explains which cleanup alternative(s) will be used at National Priorities List sites where, under CERCLA, Trust Funds pay for the cleanup.” *Terms of Environment: Glossary, Abbreviations, and Acronyms*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/OCEPAterms/rterms.html> (last visited Mar. 20, 2011).

53. See *Aerojet Gen. Corp.*, 606 F.3d at 1146. The water providers are also referred to as the “Water Entities.”

54. See *id.*

55. See *id.*

56. See *id.*



join with the large group in seeking judicial approval.<sup>57</sup> However, the original negotiations involved only VOC pollution.<sup>58</sup> When EPA later discovered perchlorate in the SEMOU, the water providers sued other polluters for the perchlorate cleanup costs.<sup>59</sup> The SEMOU defendants in turn brought third-party contribution complaints against the large group and other polluters.<sup>60</sup>

In 2007, ten of the polluters from the large group (the “small group”) settled with EPA, agreeing to pay an additional \$3.4 million for the perchlorate pollution.<sup>61</sup> Shortly afterwards, EPA sought to combine the first agreement with the large group and the second agreement with the small group. Once judicially approved, the combined agreement would bar future contribution claims by the large group against the small group.<sup>62</sup> The government made the proposed consent decree public as required by CERCLA, allowing for a thirty-day comment period.<sup>63</sup> A number of polluters previously uninvolved in the negotiations (“intervening polluters”), as well as some of the SEMOU defendants, moved to intervene pursuant to Federal Rule of Civil Procedure 24(a)(2) and section 113(i) of CERCLA.<sup>64</sup> The district court denied the motion, and the ruling was appealed to the Ninth Circuit.<sup>65</sup>

The *Aerojet* decision turned on whether the intervening polluters had a significantly protectable interest that could be impaired by the settlement.<sup>66</sup> A “significantly protectable interest” is one that is protected by law and relates to the litigation at issue.<sup>67</sup> Because section 113(f)(1) gives polluters a right to seek contribution from other polluters, and has been interpreted to require substantively fair consent decrees, the court held the intervening polluters had significant interests that were legally protected by CERCLA.<sup>68</sup> These interests

---

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.*

61. *See id.*

62. *See id.* at 1147.

63. *See id.*

64. *See* 42 U.S.C. § 9613(i) (2006); *Aerojet Gen. Corp.*, 606 F.3d. at 1147; FED. R. CIV. P. 24(a)(2).

65. *See Aerojet Gen. Corp.*, 606 F.3d at 1148.

66. *See id.* at 1152.

67. *See id.* at 1149.

68. *See supra* note 30; *see also* 42 U.S.C. § 9613(f)(1) (2006); *Aerojet Gen. Corp.*, 606 F.3d at 1150; *United States v. Montrose Chem. Corp. of Cal.*, 50 F.3d 741, 743 (9th Cir. 1995); *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 85 (1st Cir. 1990) (quoting H.R. REP. NO. 253, pt. 3, at 19 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3042). The *Montrose* court considered whether a consent decree was “reasonable, fair, and consistent with the purposes that CERCLA is intended to serve.” *Montrose Chem. Corp. of Cal.*, 50 F.3d at 743. The court stated that

[i]n conducting that evaluation, the court, in addition to considering any other relevant factors, should determine the proportional relationship between the [money] to be paid by the settling defendants and the governments’ current estimate of total potential damages. The court should evaluate the fairness of that proportional relationship in light of the degree of liability attributable to the settling defendants.

*Id.* at 747.

were directly affected by the settlement because the settlement would impact the cleanup costs owed by the intervening polluters, as section 113(f)(2) had the practical effect of barring section 113(f)(1) contribution claims by the intervening polluters against the settling polluters.<sup>69</sup> Thus, settlement would “impair or impede [each intervening polluter’s] ability to protect its interests”<sup>70</sup> if the would-be intervener could not receive contributions for costs above and beyond its share of costs from the settling parties. Although the settling parties argued that these interests were protected through a notice and comment process that would allow the intervening polluters thirty days to comment on the proposed settlement,<sup>71</sup> the court ruled that this was inadequate protection because the settling parties were unlikely to alter the settlement due to the intervening polluters’ comments.<sup>72</sup> Therefore, because the settlement would impact the potential cleanup costs paid by the intervening polluters, they were allowed to intervene.<sup>73</sup>

In further support of its conclusion, the Ninth Circuit rejected the argument that polluters in general could not intervene, instead finding that section 113(i) unambiguously allowed *any person* to intervene.<sup>74</sup> Section 113(i) “contain[ed] no restriction on intervention by non-settling PRPs,” but rather “confers a right to intervene on ‘any person’ who ‘claims an interest’ in the litigation, should the disposition of the action ‘impair or impede’ that interest.”<sup>75</sup> Therefore, as long as the non-settling polluter made a timely application to intervene, the court would permit its intervention.<sup>76</sup>

The court also addressed the conflict between achieving speedy settlements and conducting fair litigation.<sup>77</sup> By redirecting government resources from the cleanup into defending settlements, intervention undermines CERCLA’s goals of encouraging fast settlements, limiting government expenditure on litigation, and cleaning up toxic sites quickly.<sup>78</sup> However, as non-settling parties can intervene to challenge the compensation amount on which the settling parties have agreed, intervention ensures that non-settlers’ interests are fairly represented and that responsible parties pay their share of

---

69. See 42 U.S.C. § 9613(f)(2); *Aerojet Gen. Corp.*, 606 F.3d at 1151. Because courts have interpreted CERCLA to provide for joint and several liability, the court stated that the settlement “would directly affect [the non-settling polluter’s] interest in maintaining their right to contribution” from the settling polluters. *Aerojet Gen. Corp.*, 606 F.3d at 1150; see also *supra* note 30 and accompanying text. The settlement amount would be subtracted for the total response cost, leaving the non-settling polluters to pay the remainder. See *Aerojet Gen. Corp.*, 606 F.3d at 1150.

70. *Id.* at 1152 (citing *United States v. Union Elec. Co.*, 64 F.3d 1152, 1166 (8th Cir. 1995) (quotations omitted)).

71. See *id.*

72. See *id.* at 1152–53.

73. See *id.* at 1152.

74. See *id.* at 1151; see also *Union Elec. Co.*, 64 F.3d at 1165.

75. *Aerojet Gen. Corp.*, 606 F.3d at 1151; see also *Union Elec. Co.*, 64 F.3d at 1165.

76. See *Aerojet Gen. Corp.*, 606 F.3d at 1151.

77. See *id.*

78. See *id.* at 1152.

cleanup costs.<sup>79</sup> The Ninth Circuit reasoned that intervention did not necessarily create a conflict between these two points, as “even if intervention is allowed, the approval of a settlement will still cut off the non-settling [polluters’] contribution interest, thus keeping intact the intent . . . to induce prompt settlement.”<sup>80</sup> Furthermore, the court stated that it would not rely on whether CERCLA policy and legislative intent were incompatible with allowing intervention because the unambiguous language of section 113(i) granted an indisputable right to intervene.<sup>81</sup> As section 113(f)(1) would have given the intervening polluters a right to seek contribution from the settling polluters if not for the settlement, the intervening polluters had a significantly protectable interest in the settlement and could therefore intervene in the settlement process.<sup>82</sup>

In coming to this conclusion, the Ninth Circuit followed the pattern set by other courts that have allowed polluters to intervene even at the latest stages of a settlement. These courts typically discuss the purposes of CERCLA only briefly, as they find the plain language of section 113(i) unambiguous.<sup>83</sup> Others, like *Aerojet*, do not find the legislative intent to prevent non-settling polluters from intervening, stating that because “CERCLA specifically provides for, and therefore contemplates, any delay caused by intervention . . . [w]e cannot ignore Congress’s balance between section 113(i) and early settlement.”<sup>84</sup> Lastly, the courts noted the countervailing interest in ensuring that “the costs of . . . cleanup efforts were borne by those responsible for the contamination,” which would be best accomplished if polluters were allowed to intervene.<sup>85</sup>

---

79. *See id.*

80. *Id.* (citing *Union Elec. Co.*, 64 F.3d at 1166 (quotations omitted)).

81. *See id.* at 1151 (stating that “we do not rely on arguments based on policy. We agree with the Eighth and Tenth Circuits that § 113(f) and 113(i) of CERCLA are unambiguous.”).

82. *See id.*

83. “Although this language is very broad, a statute’s breadth does not make it ambiguous.” *United States v. Albert Inv. Co.*, 585 F.3d 1386, 1395 (10th Cir. 2009); *see also Union Elec. Co.*, 64 F.3d 1152, 1166 (finding that “[b]y its terms, subsection § 113(f)(1) provides for contribution, subsection § 113(f)(2) provides for the termination of that interest as to settling PRPs, and subsection § 113(i) provides for intervention to protect that and other interests of persons affected by the litigation,” and also stating that “under the terms of § 113(f)(1) itself, the interest arises at any time during or following litigation pursuant to § 106 or § 107 between persons who are or are *potentially* liable”).

84. *Albert Inv. Co.*, 585 F.3d at 1396. The court in *Union Electric* noted that the

district court acknowledged some of the applicable standards for intervention pursuant to [Rule] 24, but then failed to apply those standards, focusing instead on what it perceived to be a conflict between allowing intervention and CERCLA’s policy of fostering prompt settlement of suits to recover clean-up costs . . . . [P]olicy considerations are not part of the Rule 24(a) intervention analysis.

*Union Elec. Co.*, 64 F.3d at 1158 & n.1.

85. *See Albert Inv. Co.*, 585 F.3d at 1397 (citing *Burlington N. & Santa Fe Ry. v. United States*, 129 S. Ct. 1870, 1874 (2009)).

### B. Cases Denying Polluter Intervention

A number of district court cases have denied intervention, finding that the non-settling polluter lacked a significantly protectable interest.<sup>86</sup> Looking to the text of section 113(i), these courts reasoned that the interest claimed by the non-settling polluters was “at most a contingency,”<sup>87</sup> “indirect,” and “not significantly protectable” because the proposed settlement would not necessarily affect the amount to be paid by the non-settling polluter.<sup>88</sup> *United States v. Acorn Engineering Company* even stated that “a non-settling polluter’s contribution interest is not only *unrecognized* by the substantive law, but is also expressly *prohibited* by the substantive law, namely, by section 113(f)(2), which bars polluters from seeking contribution under 113(f)(1) after the court approves a settlement.”<sup>89</sup> The court rejected the reasoning of other courts that the contribution “interest is statutory and recognized by the substantive law because CERCLA provides for a generalized right to contribution under section 113(f)(1).”<sup>90</sup> The courts declared this “merely economic” interest one that, in stark contrast with the circuit courts’ findings, does not by itself warrant intervention.<sup>91</sup>

Many of the district courts have found that the language of CERCLA is ambiguous, and have looked to legislative intent for guidance.<sup>92</sup> Considering CERCLA’s goals of encouraging early settlement and limiting government expenditure, these courts determined that legislative intent weighed against allowing intervention by non-settling polluters,<sup>93</sup> as interventions would delay the cleanup process. While denying intervention could cause the non-settling

---

86. See *United States v. Acorn Eng’g Co.*, 221 F.R.D. 530, 534–39 (C.D. Cal. 2004); *United States v. ABC Indus.*, 153 F.R.D. 603, 603 (W.D. Mich. 1993); *Arizona v. Motorola, Inc.*, 139 F.R.D. 141, 145–46 (D. Ariz. 1991).

87. *ABC Indus.*, 153 F.R.D. at 607.

88. See *United States v. Beazer East, Inc.*, 1991 WL 557609, at \*3, \*5 (N.D. Ohio Mar. 6, 1991). Settlements will not necessarily affect the amount that non-settling polluters pay because, unlike joint and several liability, CERCLA settlements must be substantively fair to be judicially approved. See *supra* note 32 and accompanying text. Thus, the settlement amount will likely represent the portion of cleanup costs that the settling party is actually liable for. As such, the non-settling polluter would not need to seek contribution from the would-be settling polluter as each would pay their portion of cleanup costs directly to the government, rather than seeking any contribution from one another.

89. *Acorn Eng’g Co.*, 221 F.R.D. at 538; see also 42 U.S.C. § 9613 (2006).

90. *Acorn Eng’g Co.*, 221 F.R.D. at 538; see also 42 U.S.C. § 9613.

91. See *Acorn Eng’g Co.*, 221 F.R.D. at 538.

92. “To say that this language is ‘plain’ on its face is nothing short of absurd.” *Id.* at 536 (referring to § 113(f)).

93. See *id.* at 537 (stating that “[c]ongressional purpose is better served through settlements which provide funds to enhance environmental protection, rather than the expenditure of limited resources on protracted litigation”); *United States v. ABC Indus.*, 153 F.R.D. 603, 607 (W.D. Mich. 1993) (finding that “treating this interest as a ‘direct’ one would confer all non-settling PRPs who are somehow financially affected by a *de minimis* settlement agreement the right to intervene to a litigation at the time when it is almost at a close. This would effectively thwart the CERCLA’s statutory goal of facilitating a rapid settlement to conserve the Superfund resources for cleanups, particularly for the *de minimis* parties.”).

polluter to shoulder a disproportionate cleanup cost, “Congress allowed this possibility, however unfair it may seem, to exist.”<sup>94</sup>

Despite these district court cases, the three circuit court decisions granting intervention indicate that resourced polluters will increasingly be able to intervene in CERCLA litigation simply because the government has identified them as polluters. This is not the case, however, for victim communities. Not only are scarce resources already a major barrier to the ability of victim communities to get into the courts, but courts generally accept the legal fiction that the federal government adequately represents the interests of communities living near CERCLA sites.<sup>95</sup> The combination of these disparate judicial responses to intervention results in the disproportionate involvement of polluters and victims in government-led settlements, leading to both unfair outcomes in CERCLA litigation and further problems of environmental discrimination.

### III. BACKGROUND: ENVIRONMENTAL JUSTICE AND COMMUNITY GROUP INTERVENTION

Environmental justice embodies the concept that “all people and communities are entitled to equal protection by environmental and public health laws and regulations.”<sup>96</sup> In general, race and class are directly correlated to disparate environmental burdens.<sup>97</sup> The concept of environmental justice is particularly relevant in the CERCLA context, as the communities near toxic sites are often composed of minorities, resulting in a disproportionate effect on these groups.<sup>98</sup> For example, one study found that “three of every five African

---

94. *ABC Indus.*, 153 F.R.D. at 607–08 (referring to *United States v. Cannons Eng’g Corp.*, 899 F.2d 79, 91–92 (1st Cir. 1990)); *Arizona v. Motorola, Inc.*, 139 F.R.D. 141, 145 (D. Ariz. 1991) (explaining that “allowing intervention in this matter would [not] be consistent with CERCLA’s joint and several liability scheme and its policy favoring early settlements”).

95. 2 JAMES T. O’REILLY, *supra* note 36, § 22:16.

96. Brulle & Pellow, *supra* note 13, at 104; *see also* Yang, *supra* note 10, at 20 (describing environmental justice as a “more holistic concept that includes the right to a safe, healthy, productive, and sustainable environment for all”) (citing FIRST NAT’L PEOPLE OF COLOR ENVTL. LEADERSHIP SUMMIT, PRINCIPLES OF ENVIRONMENTAL JUSTICE (1991), *reprinted in* DOWIE, *supra* note 20, at 284–85); Eileen Gauna, *supra* note 11, at 39 (“The goal of environmental justice in poor and minority communities illustrates well the interconnectedness of the physical environment, market economic behavior, bureaucratic behavior, political forces, the dynamics of institutional racism, differing cultural world views, the ability to obtain information, and limited access to political and economic resources.”).

97. *See* Brulle & Pellow, *supra* note 13, at 106 (citing Phil Brown, *Race, Class and Environmental Health: A Review and Systemization of the Literature*, 69 ENVTL. RESEARCH 15 (1995) (noting that “both race and class were significant determinates of proximity to known and prospective environmental hazards and the timing and extent of remediation actions”)); Gary W. Evans & Elyse Kantrowitz, *Socioeconomic Status and Health: The Potential Role of Environmental Risk Exposure*, 23 ANN. REV. PUB. HEALTH 303 (2002) (finding that “significant relationships exist between the ethnic and class characteristics of a community and levels of exposure to environmental risk”); *see also* Gauna, *supra* note 11, at 3, 8.

98. *See* Brulle & Pellow, *supra* note 13, at 106.

and Hispanic Americans lived in communities with uncontrolled toxic waste sites.”<sup>99</sup>

The government recognized this reality in 1990 when EPA administrator William Reilly formed a workgroup to analyze environmental disparities and draft a report of the findings.<sup>100</sup> Environmental justice advocates considered this a landmark because it was the “first official acknowledgment of the problem by a federal agency in a position to do something about it.”<sup>101</sup> However, many criticized the report for ignoring the social dynamics that may cause environmental inequities, not considering how institutionalized racial and class discrimination may influence environmental policies and decision making, and not recommending solutions to these problems.<sup>102</sup>

In 1992, the *National Law Journal* published findings on government enforcement at 1177 toxic waste sites.<sup>103</sup> According to the report, hazardous waste law penalties at sites within predominantly white communities were 500 percent higher than penalties at sites within predominantly minority communities.<sup>104</sup> Further, “[for] all the federal environmental laws aimed at protecting citizens from air, water and waste pollution, penalties in white communities were 46 percent higher than in minority communities.”<sup>105</sup>

Given this harsh reality, it is ironic that CERCLA litigation almost entirely excluded victim communities.<sup>106</sup> First, most courts find that community groups cannot intervene in any CERCLA litigation under the legal fiction that the community’s interests are adequately represented by the government, despite the differences in perspectives and interests of the government and community groups.<sup>107</sup> Second, citizen suits are equally disappointing.<sup>108</sup> Because section 113(h)(4) bars challenges to a cleanup method until *after* the cleanup has taken place, the citizen suit provision is nothing more than lip service to victim communities’ concerns, as challenging a cleanup method after the fact is unlikely to result in another cleanup action.<sup>109</sup> The inadequacies of intervention

---

99. Yang, *supra* note 10, at 5–6.

100. See Brulle & Pellow, *supra* note 13, at 112; see also *Environmental Equity: Reducing Risks for All Communities*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/history/topics/justice/01.htm> (last visited Mar. 20, 2011).

101. Brulle & Pellow, *supra* note 13, at 112.

102. See Gauna, *supra* note 11, at 16.

103. See Lavelle & Coyle, *supra* note 10; Yang, *supra* note 10, at 18; Gauna, *supra* note 11, at 11.

104. See Yang, *supra* note 10, at 6 (discussing Lavelle & Coyle, *supra* note 10).

105. See *id.*

106. See 42 U.S.C. 9613(h)(4), (i); 2 JAMES T. O’REILLY, *supra* note 36, § 22:16. The EPA does, at least by way of policy, ask for community participation in the CERCLA cleanup process. See *Superfund Community Involvement*, ENVTL. PROT. AGENCY, <http://www.epa.gov/superfund/community/index.htm> (last visited Mar. 20, 2011).

107. See 2 JAMES T. O’REILLY, *supra* note 36, § 22:16.

108. See 42 U.S.C. § 9659(a)(2) (2006).

109. See *supra* note 40 and accompanying text; § 9613(h)(4). Congress enacted the timing of review provision in the 1986 SARA amendments because polluters frequently brought suit simply to slow the cleanup process. See Brian Patrick Murphy, Note, *CERCLA’s Timing of Review Provision: A*

and citizens' suits thus leave communities struggling with the complexities and hardships of a toxic site with little legal recourse.

#### IV. AN AMENDMENT TO BALANCE CERCLA LITIGATION

As interpreted by courts allowing polluter intervention, section 113(i) is nearly identical to Rule 24.<sup>110</sup> Yet there is ample reason why the two should function differently and, in turn, why courts should use only section 113(i) for CERCLA intervention. First, Congress codified this provision in CERCLA itself. If the only intended difference between the two provisions is which party has the burden of proof as to adequacy of representation,<sup>111</sup> there is no obvious reason why Congress would draft section 113(i), rather than simply rely on Rule 24 intervention. Second, as the *Acorn* court states, reading section 113(i) to allow polluter intervention creates disharmony with other CERCLA provisions.<sup>112</sup> Third, interpreting section 113(i) to grant intervention to essentially all polluters, yet to deny intervention to victim community groups, would frustrate many of the purposes of CERCLA.<sup>113</sup> Allowing polluter intervention slows down settlement and cleanup, while denying community intervention ignores the very human health concerns that CERCLA was designed to address. Lastly, aside from the general purposes of CERCLA,<sup>114</sup> there is ample evidence in CERCLA's legislative history that Congress intended section 113(i) as a tool for communities affected by toxic sites, rather than for polluters.<sup>115</sup>

---

*Statutory Solution to the Problem of Irreparable Harm to Health and the Environment*, 11 *FORDHAM ENVTL. L.J.* 587, 597 (2000).

110. See *supra* Part I.

111. See, e.g., *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1149 (9th Cir. 2010).

112. "Simply put, section 113(i) allows intervention by anyone for any reason . . . yet section 113(f) precludes non-settling PRPs from bring [sic] contribution claims against settling PRPs. The disharmony is obvious." *United States v. Acorn Eng'g Co.*, 221 F.R.D. 530, 534 n.5 (C.D. Cal. 2004).

113. Congress designed CERCLA to foster quick cleanup of toxic sites, encourage fast settlements with the responsible parties, and limit government expenditure on litigation. See *Burlington N. & Santa Fe Ry. v. United States*, 129 S. Ct. 1870, 1874 (2009); *Acorn Eng'g Co.*, 221 F.R.D. at 536; *Arizona v. Motorola, Inc.*, 139 F.R.D. 141, 145 (D. Ariz. 1991).

114. The court in *Acorn* noted that "CERCLA was designed to protect and preserve public health and the environment. . . . Without question, Congress passed the SARA amendments to encourage settlements for this very reason." *Acorn Eng'g Co.*, 221 F.R.D. at 537 (internal quotation marks omitted) (quoting *In re Acushnet*, 712 F. Supp. 1019, 1028–29).

115. Representative Glickman stated:

When a motion to intervene is granted under [section 113(i)], the intervenor shall only be able to raise issues relating to the selected remedy. Issues not directly related to the selection of remedy should not be entertained by the court because the purpose of review under new subsection § 113 of CERCLA is only to resolve issues relating to the remedy. Moreover, nothing in this provision is intended to make intervenors necessary parties to any consent decree referred to in this section or to interfere with the rights of the United States to enter into settlements with potentially responsible parties under this Act.

131 CONG. REC. 11069 (1985) (statement of Rep. Glickman). The "remedy" refers to the type of cleanup, containment, and future uses of a CERCLA site. *Land Use in the CERCLA Remedy Selection Process*, U.S. ENVTL. PROT. AGENCY, [http://www.epa.gov/fedfac/documents/land\\_use\\_cercla\\_remedy](http://www.epa.gov/fedfac/documents/land_use_cercla_remedy).

Considering this, Congress should create two exceptions to section 113(i) intervention. First, Congress should amend the timing provision of CERCLA so that polluters on notice, who choose to remain uninvolved in the litigation and settlement, waive their right to intervene. The ultimate goal of this amendment is to prevent polluters from stalling settlements by playing “settlement victim.” Second, to encourage and enable community member participation, section 113(i) should presume that the government does *not* adequately represent community groups living near toxic sites. Narrowly tailoring both these exceptions will prevent disruption of CERCLA’s general framework while providing better balance in CERCLA litigation, settlement, and cleanup.

### A. *Polluter Timeliness*

#### 1. *At Present*

Courts have traditionally applied section 113(i)’s timeliness provision to allow polluter intervention in the same way as Rule 24.<sup>116</sup> Under the current rule, timeliness is determined by looking at “all the circumstances of the case.”<sup>117</sup> Three key considerations for the timeliness of intervention, as borrowed from Rule 24 intervention, are “the reason for any delay by the proposed intervenor in seeking intervention, how far the litigation has progressed before the motion to intervene is filed, and how much prejudice the delay in seeking intervention may cause to other parties if intervention is allowed.”<sup>118</sup> Despite CERCLA’s goal of reaching quick settlements, many courts have found that prolonging the settlement process is not grounds to deny

---

htm#background (last visited April 1, 2011); *see also Acorn Eng’g Co.*, 221 F.R.D. at 536 (finding that “[s]ection 113(i)’s legislative history reveals that CERCLA’s right of intervention was not intended to extend to non-settling [polluters] seeking to protect a contribution interest”); *United States v. Beazer East, Inc.*, 1991 WL 557609, at \*3 (N.D. Ohio Mar. 6, 1991) (explaining that “the real persons who Congress were attempting to protect through enactment of Section 113(i) are those who live in close proximity to hazardous waste sites and who would, conceivably, be the most affected by proposed remedial schemes for cleaning up toxic waste dumps”).

116. For examples of timely intervention, see *United States v. Union Elec. Co.*, 64 F.3d 1152, 1159–60 (8th Cir. 1995); *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174 (3d Cir. 1994); *United States v. ExxonMobil Corp.*, 264 F.R.D. 242, 248–49 (N.D.W. Va. 2010) (holding intervention timely where motion occurred after entry of the consent decree, but where court found that existing parties would not be prejudiced by the intervention). For examples of untimely intervention, see *Cal. Dep’t of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F.3d 1113, 1119 (9th Cir. 2002) (finding intervention untimely where parties were involved in six years of litigation and the motion to intervene was filed on the same day that the existing parties moved for judicial approval of the consent decree); *Cnty. of Orange v. Air California*, 799 F.2d 535, 538 (9th Cir. 1986) (holding intervention untimely where the party filed the motion to intervene after the other parties litigated for five years and had finally come to an agreement); *United States v. Bliss*, 132 F.R.D. 58 (E.D. Miss. 1990) (finding motion untimely where intervenor waited six years to intervene and was on notice during that time).

117. *See Union Elec. Co.*, 64 F.3d at 1160.

118. *See id.*



intervention in a proposed settlement.<sup>119</sup> Perhaps this is because these courts analyze timeliness exactly as they would under Rule 24, and thus fail to consider CERCLA's unique objectives of cleaning up toxic sites quickly, encouraging fast settlements, and limiting government expenditure on litigation.<sup>120</sup>

## 2. *Proposed Change*

The timeliness exception should stipulate that polluters on notice of the negotiations leading to settlement lose their right to intervene if they do not intervene within ninety days.<sup>121</sup> In effect, this would allow polluters to intervene at any point up to the approval of a consent decree, so long as they sought intervention upon learning of the litigation. This bar would not apply to permissive intervention by polluters,<sup>122</sup> nor intervention by parties that are not polluters.

Despite the attention placed on whether the polluter seeking intervention had a "significantly protectable interest," an amendment is best aimed at timeliness rather than construing the section 113(f)(1) right to contribution as an insufficient interest. First, the interpretation of section 113(i)'s intervention provision by *Aerojet* and other courts allowing polluter intervention is persuasive in light of its plain language. As courts have interpreted CERCLA to impose joint and several liability,<sup>123</sup> it only seems fair to find a polluter's interest in the amount they are left to pay after other polluters settle to be substantial and legally protectable. Second, allowing these parties to seek contribution from other liable parties encourages and incentivizes parties to settle both quickly and without government involvement, again aiding a

---

119. *See id.*

120. *See Burlington N. & Santa Fe Ry. v. United States*, 129 S. Ct. 1870, 1874 (2009); *Acorn Eng'g Co.*, 221 F.R.D. 530, 536 (C.D. Cal. 2004); *Arizona v. Motorola, Inc.*, 139 F.R.D. 141, 145 (D. Ariz. 1991).

121. While intuition says to leave the "reasonable amount of time" to the court's discretion, a strict timeline would be more effective in preventing polluters from unnecessarily dragging out settlements. Thus, laying down a bright line rule, like a waiver of intervention after being on notice for ninety days, would give the appropriate incentives.

122. Courts often allow permissive intervention, according to Federal Rule of Civil Procedure 24(b), when intervention as of right is denied. Rule 24(b) allows for permissive intervention: "[o]n timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b). The courts have great discretion, but generally consider

(1) whether the application is timely; (2) the nature and extent of the applicant's interest; (3) whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties; (4) whether the applicant will benefit by the intervention; (5) whether the applicant's interests are adequately represented by the other parties; and (6) whether the applicant will significantly contribute to the full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

2 JAMES T. O'REILLY, *supra* note 36, § 22:16; *see, e.g., In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1019, 1022–26 (D. Mass. 1989).

123. *See Burlington N. & Santa Fe Ry.*, 129 S. Ct. at 1881; *supra* note 30 and accompanying text.

number of CERCLA objectives.<sup>124</sup> Third, to take away or redefine section 113(f)(1)'s contribution right would uproot CERCLA to such a degree that many other parts of CERCLA would need amending.<sup>125</sup> Therefore, construing this contribution right as insufficient under section 113(i) would be counterproductive to forwarding CERCLA's goals.

### 3. *Rationale*

The proposed ninety-day amendment is an improvement over the current timeliness rule because (1) many courts have already found CERCLA to confer a non-speculative interest<sup>126</sup> on polluters once the government has labeled them as polluters;<sup>127</sup> (2) a bright-line rule prevents prejudice to settling parties and is easy to administer and follow; and (3) the amendment better addresses CERCLA's concerns with quick settlements and minimal spending on litigation.<sup>128</sup>

#### *a. Reconciling the Statutory Rights Granted by CERCLA with General Timeliness Analysis*

Creating a ninety-day intervention deadline, beginning to run from the time a polluter is on notice of settlement negotiations, is consistent with many courts' current view that a polluter's interest in a settlement is a non-speculative, legally protectable interest. If a party's interest in a settlement is sufficient enough to satisfy the requirements for section 113(i) intervention, then they should be sufficient to fairly require the party to intervene in those same negotiations leading up to settlement. Yet courts have treated this interest differently in different situations: when asking *if intervention is timely*, courts consider the polluter's interest to be speculative until the two existing parties reach a settlement, and so courts consider timeliness beginning at the settlement proposal. In contrast, when asking *if a party has a sufficient interest to grant*

---

124. See *Burlington N. & Santa Fe Ry.*, 129 S. Ct. at 1874; *Acorn Eng'g Co.*, 221 F.R.D. at 536; *Motorola, Inc.*, 139 F.R.D. at 145.

125. Section 113(f) supplies one of the very basic mechanisms of the CERCLA cost-recovery process. By allowing polluters to seek contribution from other polluters under section 113(f)(1), the government is able to equitably seek cost recovery from whichever polluters it chooses. Section 113(f)(2) encourages early settlement by shielding settling parties from future contribution claims from other polluters. Because these mechanisms are at the very core of CERCLA, altering them would drastically change the basic operation of CERCLA.

126. Non-speculative interests are those interests which an intervenor has a right to, independent of any other event or fact. See *United States v. Union Elec. Co.*, 64 F.3d 1152, 1162 (8th Cir. 1995). However, some courts have held that an interest that is non-speculative may be contingent on the outcome of litigation, so long as that litigation only defines the interest but cannot take away that interest entirely. See *Union Elec. Co.*, 64 F.3d at 1162.

127. *United States v. Albert Inv. Co.*, 585 F.3d 1386, 1393 (10th Cir. 2009) (citing *Union Elec. Co.*, 64 F.3d at 1167); see also *supra* note 28 and accompanying text.

128. See cases cited *supra* note 113 and accompanying text.

*intervention*, courts state that merely being labeled a polluter is sufficient interest to grant intervention.

As for the first conclusion, courts have reasoned that timeliness “should be measured from the point which an applicant knows . . . its rights are directly affected by the litigation, not . . . from the time the applicant *learns* of the litigation.”<sup>129</sup> Here, the courts have reasoned that a polluter will only know that its rights are directly affected by litigation once a settlement is reached between the other parties, and thus will only have a non-speculative interest at that point.<sup>130</sup> The courts found this despite the fact that 113(f)(1) grants identified polluters a right to contribution from other polluters, independent of a settlement agreement.<sup>131</sup> The second conclusion uses this same line of logic to find that parties have a non-speculative interest sufficient to grant intervention once the government *merely labels* them as a polluter, thus conferring the section 113(f)(2) right to contribution.<sup>132</sup> These two conclusions contradict each other: if section 113(f)(2) confers a non-speculative interest on polluters as soon as they are identified by the government,<sup>133</sup> regardless of whether a settlement has been reached by other polluters, then courts should not simultaneously find the polluter’s interest to be so speculative that the polluter is allowed to wait to intervene until after other polluters reach a settlement.<sup>134</sup>

Rather, because these courts interpret section 113(f)(2) as granting a statutory right to contribution from polluters, CERCLA grants an interest to polluters before any finding of actual liability.<sup>135</sup> In short, polluters know that their interests will be directly affected as soon as another polluter enters into negotiations with the government because they will lose their right to contribution from settling polluters as soon as a judicially-approved settlement is made. The only speculation is the amount of the future settlement. Because section 113(f)’s conferral of a contribution interest grants a non-speculative interest to polluters, this interest should be sufficient to start the clock on section 113(i) polluter intervention as soon as any named polluters begin

---

129. *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1182 (3d Cir. 2004) (emphasis added). The *Alcan* court may have also been influenced by the particular circumstances in the case. The non-settling polluter had kept in touch with the government during the government’s negotiations with another polluter. The government had assured the non-settling polluter that the consent decree would not affect their right to contribution from the settling party. Therefore, “the [non-settling polluters] had no reason to believe they should try to intervene because the government led them to believe their interests were not at stake in the litigation.” *Alcan Aluminum, Inc.*, 25 F.3d at 1182.

130. *See Alcan Aluminum, Inc.*, 25 F.3d at 1182. The *Alcan* court even stated that “a rule making knowledge of the pendency of the litigation the critical event would be unsound because it would induce both too much and too little intervention.”

131. *See* 42 U.S.C. 9613(f)(2).

132. *See Albert Inv. Co., Inc.*, 585 F.3d at 1393 (citing *Union Elec. Co.*, 64 F.3d at 1167).

133. *See* 42 U.S.C. 9613(f)(2). 113(f)(2); *Albert Inv. Co., Inc.*, 585 F.3d at 1393; *Union Elec. Co.*, 64 F.3d at 1167.

134. *But see Alcan Aluminum, Inc.*, 25 F.3d at 1182 (stating that “timeliness should not prevent intervention where an existing party induces the applicant to refrain from intervening”).

135. Section 113(f)(2) has been interpreted to grant a statutory right to contribution from other polluters. *See Albert Inv. Co.*, 585 F.3d at 1393–94; *Union Elec. Co.*, 64 F.3d at 1165–66.

negotiating settlements.<sup>136</sup> Therefore, “[a] party seeking to intervene must act as soon as [he or she] knows or has reason to know that [his or her] interests *might* be adversely affected by the outcome of the litigation,”<sup>137</sup> and this interest should include the contribution interest granted by § 113(f)(1).

*b. Provide a Bright-line Rule that Sends a Clear Message to Polluters and Courts*

Providing a set window for polluter intervention will promote the interests of parties acting cooperatively to reach a settlement, rather than allow parties that initially refuse to negotiate to then intervene at the last minute, thwarting the cooperative parties’ settlement. At the same time, it will provide a clear rule for intervenors and courts to rely on. Intervenors will be able to consider their potential liability and options for intervention during the ninety-day window, and courts will only need to ask when a given polluter was put on notice in deciding whether to allow intervention. A time of notice would be easy to ascertain, as the government notifies parties it believes to have contributed to the pollution,<sup>138</sup> and it would be in the settling parties’ interest to document any communications it made to other polluters about settlement efforts. This deadline would not go so far as to deny intervention altogether, but would recognize that parties refusing to participate in settlement should not then be able to claim prejudice.<sup>139</sup> This provision will consequently take some of the focus away from polluters playing the “settlement victim.”

*c. Incentivize and Reward Early Settlement*

Because polluters would waive intervention if the polluter does not participate in settlement within ninety days of being put on notice of their liability, the practical effect of this amendment would be to incentivize intervention by parties with a true interest in settlement. Parties would be unable to drag out litigation by stalling settlements with last-minute intervention, thus furthering one of CERCLA’s primary goals of reaching settlements quickly.<sup>140</sup> The government would also spend fewer resources on litigation, thus accomplishing another one of CERCLA’s goals.<sup>141</sup>

---

136. The amendment would require polluters to notify other named polluters when they begin any negotiations.

137. *Cal. Dep’t of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F.3d 1113, 1120 (quoting *United States v. Oregon*, 913 F.2d 576, 589 (9th Cir. 1990)).

138. *See supra* note 28 and accompanying text; 42 U.S.C. § 9613(k)(2)(D) (2006).

139. *See Arizona v. Motorola, Inc.*, 139 F.R.D. 141, 146 (D. Ariz. 1991) (citing *United States v. Mid-State Disposal, Inc.*, 131 F.R.D. 573, 577 (W.D. Wis. 1990)).

140. *See United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1152 (9th Cir. 2010).

141. *See id.*

#### 4. *Drawbacks*

One drawback of this amendment is the potential for too much or unnecessary intervention.<sup>142</sup> In instances where the existing parties eventually, but after the ninety day intervention window, come to a settlement that the intervenor does not object to, intervention would be unnecessary and could actually thwart CERCLA's goal of efficiency.<sup>143</sup> This concern is misplaced; because of the cost of intervention, only parties with substantial interests in the litigation will intervene. Moreover, intervention is not the only way for polluters to protect their interest.<sup>144</sup> If a party chooses not to "engage in meaningful settlement negotiations," then the "appropriate avenue" would be to object to the settlement itself.<sup>145</sup>

### B. *Adequacy of Representation*

#### 1. *At Present*

The adequacy of representation analysis is the only part of section 113(i) that differs from Rule 24.<sup>146</sup> "In the CERCLA context, the burden rests with the government to demonstrate that [the intervenors'] interests are sufficiently represented."<sup>147</sup> However, this shift in burden should not be confused with a shift in presumption, particularly when it comes to the legal fiction of governments and victim communities. Even though section 113(i) places the burden on the government, courts still operate under the presumption that the government acts in the interests of victim communities, thus adequately representing them.<sup>148</sup> This contrasts starkly with polluter intervenors, where both the parties and the courts assume that the government in no way represents their interests.<sup>149</sup>

#### 2. *Proposed Change*

To give victim communities a greater voice in the cleanup of their neighborhoods,<sup>150</sup> Congress should amend the adequacy of representation

---

142. See *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1183 (3d Cir. 1994).

143. See *id.* (finding that "a rule making knowledge of the pendency of the litigation the critical event would be unsound because it would induce both too much and too little intervention").

144. See *Motorola, Inc.*, 139 F.R.D. at 145.

145. See *id.* While the *Motorola* court does not state how a party would object to settlement, presumably it refers to the requirement that the government make the proposed consent decree public and allow for a thirty-day comment period. See *Aerojet Gen. Corp.*, 606 F.3d at 1147.

146. See, e.g., *id.* at 1149.

147. *United States v. Albert Inv. Co.*, 585 F.3d 1386, 1399 (10th Cir. 2009).

148. See 2 JAMES T. O'REILLY, *supra* note 36, § 22:16.

149. See, e.g., *Aerojet Gen. Corp.*, 606 F.3d at 1152-53.

150. Professor James O'Reilly notes that there have been few challenges by community groups, possibly because "EPA has tried to take into account community views in its remedy selections, because relatively few community groups are active in Superfund issues, or because CERCLA issues are

provision to presume that the government does *not* adequately represent victim communities' interests. This is in keeping with the general proposition that "[w]here . . . interests are disparate, even though directed at a common legal goal . . . intervention is appropriate."<sup>151</sup> This presumption would not apply only to settlement intervention, but to all section 113(i) interventions by victim communities.

### 3. *Rationale*

While community groups currently lack a practical means of challenging cleanup methods, there is evidence that Congress intended section 113(i) to give groups representing victim communities a voice in the management of nearby CERCLA sites.<sup>152</sup> Thus Congress intended section 113(i) to allow intervention for cleanup methods and not challenges to cost recovery settlements.<sup>153</sup>

Legislative intent aside, community members deserve the ability to represent themselves in litigation because (1) the government and community members have different ideological perspectives fueling their decisions,<sup>154</sup> (2) the two groups have very different practical interests in the litigation,<sup>155</sup> and (3) the government represents minority groups, who are often most affected by toxic sites,<sup>156</sup> very poorly.<sup>157</sup> Because the government does not in fact adequately represent the victim communities near toxic sites, the law should recognize this reality accordingly.

---

technically and scientifically complex." 2 JAMES T. O'REILLY, *supra* note 36, § 22:16. Of these challenges, few have been successful. *See* EPA v. Envtl. Waste Control, Inc., 710 F. Supp. 1172, 1188–89 (N.D. Ind. 1989), *aff'd*, 917 F.2d 327 (7th Cir. 1990). The court allowed a local environmental group to intervene under the Resource Conservation and Recovery Act's intervention provision, 42 U.S.C. § 9613(i). *See* EPA v. Envtl. Waste Control, Inc., 710 F. Supp. 1172, 1188 (granting motion to intervene is unreported). However, STOP was allowed to intervene on the condition that it not bring any claims extraneous to those already before the court. *See id.* Therefore, while the court ultimately found for the EPA and STOP, the impact of STOP's presence in the litigation is unclear.

151. *United States v. Union Elec. Co.*, 64 F.3d 1152, 1169–70 (8th Cir. 1995) (citing *Kan. Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs.*, 60 F.3d 1304, 1308–09 (8th Cir. 1995)).

152. *See supra* note 115 and accompanying text. For example, see Representative Glickman's statement from the House floor, *supra* note 115. For a discussion of SARA legislative history, see Megan A. Jennings, Note, *Frey v. Environmental Protection Agency: A Small Step Toward Preventing Irreparable Harm in CERCLA Actions*, 33 *ECOLOGY L.Q.* 675, 681–83 (2006).

153. *See supra* note 115 and accompanying text.

154. *See* Yang, *supra* note 10, at 19 (citing Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *HARV. L. REV.* 1669, 1704–11 (1975)).

155. *See* Yang, *supra* note 10, at 28.

156. *See* Brulle & Pellow, *supra* note 13, at 106; Yang, *supra* note 10, at 6 (citing Lavelle & Coyle, *supra* note 10).

157. *See supra* notes 103–105 and accompanying text. "The failure of environmental law to sufficiently consider the special needs of minority groups also explains the problems associated with devolving control over environmental decision making, in particular the siting of hazardous waste facilities, to local governments." Yang, *supra* note 10, at 15.

a. *Different Perspectives*

The way these two groups look at a particular problem differs greatly. The government, from a very removed perspective, uses scientific and economic analysis to inform its decisions.<sup>158</sup> This “heavy reliance on quantifiable information” fails to recognize the intangible factors that matter most to communities,<sup>159</sup> such as mental and emotional security, confidence in the adequacy of the cleanup process, frustration towards polluters, and their ability to be heard. Not only is quantifiable information susceptible to scientific deficiencies and human bias, it entirely removes the human element from environmental concerns. To examine a given problem in terms of pure numbers and statistics ignores how each number is representing an entire community, an actual family, or an individual life. Moreover, many of the interests of these communities, families, and individuals cannot be quantified and categorized in a computer database, nor can they be completely understood by a governmental entity with no relation to the specific people and places. For example, the mental and emotional impacts of simply knowing a hazardous waste site is nearby are not easily quantifiable, nor do they necessarily correspond to the actual quantifiable harm that science believes the waste site may pose.

In addition, conventional environmentalism is “narrowly focused on the preservation of pristine ecosystems or on the science and technology of environmental pollution regulation,” while environmental justice activists see environmental issues as “one part of the larger social issues of racism and cultural and economic injustice.”<sup>160</sup> “[I]t is the totality of such impacts that citizens in the community are exposed to in daily life and that is most palpable to them.”<sup>161</sup>

By denying victim community intervention, courts are not only denying these communities’ legitimate and unquantifiable interest in the cleanup of their neighborhoods, but also reaffirming the helplessness that these communities may feel and institutionalizing the unimportance of their opinions and desires. To the contrary, by allowing polluter intervention courts cater to the desires of large corporations and their easily quantifiable monetary interests. Therefore, the current intervention provision is inadequate for victim communities because “environmental injustice cannot be adequately addressed solely within the confines of scientific study, technical risk assessment, and risk

---

158. See Yang, *supra* note 10, at 15; Gauna, *supra* note 11, at 27 (stating that the “environmental justice movement adheres to a social justice perspective on environmentalism, while EPA and many national environmental organizations adhere to a science and technology-oriented perspective on environmentalism”).

159. See Yang, *supra* note 10, at 19 (referencing Stewart, *supra* note 154, at 1704–11).

160. Gauna, *supra* note 11, at 12.

161. Yang, *supra* note 10, at 21 (referencing NAT’L ADVISORY COUNCIL FOR ENVTL. POL’Y & TECH., REPORT OF THE TITLE VI IMPLEMENTATION ADVISORY COMMITTEE: NEXT STEPS FOR EPA, STATE, AND LOCAL ENVIRONMENTAL JUSTICE PROGRAMS 57–65, 70–75 (1999), available at [usepa.gov/nscep](http://usepa.gov/nscep) (search by document name)).

redistribution.”<sup>162</sup> Thus, a CERCLA action should consider the affected community’s unquantifiable concerns by allowing the victim community to voice their particularly relevant and distinct views.

*b. Different Interests*

While the government may have the same interests as the general U.S. population in CERCLA proceedings, the government’s interests in cleanup and cost recovery settlements are not the same as that of the victim communities. The key issue revolves around “the question of whose interests are of primary concern to the regulatory system—the larger collective’s or minority groups’,”<sup>163</sup> and again affects the direction of a cleanup and its impacts on the most affected individuals.

While the victim communities focus on human health, the government takes many more factors into account.<sup>164</sup> The government must consider not just one settlement or cleanup plan, but a slew of toxic sites<sup>165</sup> with varying numbers of polluters, financial capabilities, levels of toxicity, and acceptable cleanup methods.<sup>166</sup> As a result, community health may become a lower priority, clouded by the many factors that the government must take into account. Furthermore, the government prefers a quick cleanup, but a quick cleanup is not necessarily the best cleanup.<sup>167</sup> The government often plans merely to contain a site, while a community would prefer to have the pollution removed entirely<sup>168</sup> to avoid any unforeseen health hazards from living next to a hazardous waste site.

*c. Inadequate Representation of Minority Groups*

Finally, the government represents minority groups more poorly than others.<sup>169</sup> The inadequacy of government representation often leads to different results when it comes to enforcing CERCLA; for example, hazardous waste penalties are higher in predominantly white communities, and race and class

---

162. Gauna, *supra* note 11, at 28.

163. Yang, *supra* note 10, at 28.

164. See *Superfund: Cleanup Process*, U.S. ENVTL. PROT. AGENCY (Feb. 28, 2011), <http://www.epa.gov/superfund/cleanup/index.htm>; *supra* note 24 and accompanying text.

165. See *Superfund Sites Where You Live*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/superfund/sites/index.htm> (last visited Mar. 20, 2011).

166. See *supra* note 24 and accompanying text.

167. The government generally prefers only to cap or contain a site, rather than treat or remove the waste, which are the cleanup methods preferred by law. Gauna, *supra* note 11, at 37.

168. See *id.* (citing Lavelle & Coyle, *supra* note 10 (“[A]t the minority sites, EPA chooses ‘containment,’ the capping or walling off of a hazardous dump site, 7% more frequently than the cleanup method preferred under the law, permanent “treatment,” to eliminate the waste or rid it of its toxins. At the White sites, EPA orders treatment 22% more often than containment.”)).

169. See Yang, *supra* note 10, at 6; Gauna, *supra* note 11, at 2 (stating that the term environmental racism “was directed at the practices of the guardians of the environment, in particular the Environmental Protection Agency”).



continue to be highly correlated to environmental burdens.<sup>170</sup> While there are signs of improvement in government policies surrounding environmental justice issues,<sup>171</sup> the government and minority community groups are a long way from ideological agreement,<sup>172</sup> and governance has not achieved practical equality.<sup>173</sup>

Community members' voices are extremely valuable, as members' emotional and physical health are directly impacted by the toxic site cleanup.<sup>174</sup> Because the government does not, practically speaking, adequately represent victim communities, those communities deserve the right to represent themselves.

#### 4. *Drawbacks*

A potential problem with this amendment is that it may not have any impact on community intervention because the low rates of community involvement in CERCLA actions are attributable to factors other than the inability to intervene under section 113(i) and the citizen suit time bar under section 113(h).<sup>175</sup> For example, community members may lack the organization to join together and act as one legal entity,<sup>176</sup> lack the economic means to get involved in a legal battle,<sup>177</sup> or be dissuaded from participation entirely because they do not believe involvement will benefit them in any way.<sup>178</sup> However, the history of the environmental justice movement, specifically the level of

---

170. See Yang, *supra* note 10, at 6 (citing Lavelle & Coyle, *supra* note 10); Brulle & Pellow, *supra* note 13, at 106; *supra* note 97 and accompanying text.

171. See *supra* Part IV. In 1994, President Clinton signed an executive order requiring federal agencies to consider environmental justice issues in their decision making. Exec. Order No. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (Feb. 14, 1994); see Yang, *supra* note 10, at 2. The EPA also acknowledges and addresses environmental justice concerns on its website. See *Environmental Justice in Waste Programs*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/oswer/ej/index.html> (last visited Mar. 20, 2011).

172. According to Tseming Yang, "continuing severe criticism of EPA efforts in regard to environmental justice shows that there still has not been a 'meeting of the minds' regarding approaches and values that should form the basis of appropriate regulation." Yang, *supra* note 10, at 2.

173. "EPA's heavy reliance on technical and quantitative analysis in the processing of administrative complaints under its regulations implementing Title VI of the Civil Rights Act casts considerable doubt on whether EPA's change is real." Yang, *supra* note 10, at 20-21; see also Gauna, *supra* note 11, at 18 (noting that "EPA's oblique response to the [National Law Journal's 1992] investigation was an assertion that environmental laws are enforced in a neutral manner according to neutral criteria"). See *supra* note 103.

174. See *supra* note 98 and accompanying text.

175. See Gauna, *supra* note 11, at 30 (stating that "[t]he reasons that communities of color and low income communities receive too little environmental protection are varied and complex").

176. *But see id.* at 16 (describing how community based organizations have "established regional and national networks to prevent the shifting of environmentally harmful activities from one poor and/or minority community to another" and challenge the EPA's practices).

177. Low-income communities are often those situated in and around CERCLA sites. See *supra* note 97 and accompanying text.

178. See *infra* note 179.

involvement and protest of environmental disparities, indicates that communities will get involved if they have the legal means.<sup>179</sup> While many more obstacles stand in the way of community participation in CERCLA litigation, this is no reason to ignore the problem altogether.

#### CONCLUSION

While society may want to wish away environmental racism, the practical reality is that minority communities continue to suffer disproportionate harms. Unless our society and legal system recognize these discrepancies, they will go untreated. While CERCLA itself only deals with a fraction of the problem, each step in the right direction will bring us closer to the goal of environmental equality. Rather than focusing solely on the polluter's interest, rethinking CERCLA with an eye to environmental justice, the original purposes of the statute, and balancing polluter and community interests, will not only improve the cleanup of toxic sites, but also remedy some of the environmental injustices facing society.

---

179. See Gauna, *supra* note 11, at 9–13. For example, in 1982, citizens of a predominantly African-American community began protesting the siting of a polychlorinated biphenyl landfill in their community, arguing that the siting of the landfill was directly related to the racial makeup of the community. This led to an investigation which concluded that three of the four hazardous waste facilities in that region were located in predominantly African-American communities. Strikingly, the landfill was still sited in this community. See *id.* at 9; see also *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (where citizen's group sought intervention in Superfund litigation); HUNTER'S POINT SHIPYARD CITIZENS ADVISORY COMM., <http://www.hpscac.com> (last visited Apr. 8, 2011) (describing the citizens advisory committee's involvement in Hunters Point, a CERCLA site).

**We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact [ecologylawcurrents@boalt.org](mailto:ecologylawcurrents@boalt.org). Responses to articles may be viewed at our website, <http://www.boalt.org/elq>.**