

Saint Louis University Law Journal

Volume 51
Number 1 *Fall 2006*

Article 7

2006

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Recommended Citation

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

Available at: <https://scholarship.law.slu.edu/lj/vol51/iss1/7>

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**COOPER INDUSTRIES, INC. v. AVIALL SERVICES, INC.: TIME FOR
A LEGISLATIVE RESPONSE TO RESTORE VOLUNTARY
REMEDATION**

NANCY KUBASEK* & JAY THREEET**

INTRODUCTION

At a time when much of the current rhetoric from the Environmental Protection Agency emphasizes voluntary compliance, and when the number of annual completed hazardous waste site cleanups is significantly declining,¹ the United States Supreme Court handed down a surprising decision that is likely to dramatically curtail voluntary cleanups of contaminated property² unless Congress steps in³ and amends the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).⁴ In the December 2004 case of *Cooper Industries, Inc. v. Aviall Services, Inc.*,⁵ the United States Supreme Court overturned settled case law that allowed the owner of contaminated property to voluntarily remediate the property and then seek contribution from other potentially responsible parties,⁶ a decision that will impose significant

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1. The number of completed CERCLA cleanups in fiscal years 2002 through 2004 has decreased by 50 percent since the late-1990s. U.S. PIRG EDUC. FUND & SIERRA CLUB, THE TRUTH ABOUT TOXIC WASTE CLEANUPS: HOW EPA IS MISLEADING THE PUBLIC ABOUT THE SUPERFUND PROGRAM 6 (2004), available at <http://www.sierraclub.org/toxics/factsheets/leanups.pdf> (last visited Oct. 12, 2006).

2. See, e.g., *Supreme Court Limits Contribution Claims Under CERCLA*, AllBusiness.com, <http://www.allbusiness.com/north-america/united-states-michigan-metro-areas-lansing/911506-1.html> (last visited Oct. 12, 2006).

3. Some commentators do not believe that congressional intervention to save CERCLA is likely. Citing congressional refusal to reauthorize the tax that helped fund CERCLA since its expiration in 1995, some commentators argue that the focus should be on revitalizing state Brownfield legislation to clean up severely contaminated sites. See, e.g., David A. Dana, *State Brownfields Programs as Laboratories of Democracy?*, 14 N.Y.U. ENVTL. L.J. 86, 89 (2005).

4. 42 U.S.C. §§ 9601–9675 (2000).

5. 543 U.S. 157 (2004).

6. See Robert Longstreth, *Supreme Court Decision Imperils Voluntary Environmental Cleanups*, MONDAQ BUS. BRIEFING, March 4, 2005, available at 2005 WLNR 3312112 (stating,

costs on property owners who are trying to be good citizens by fulfilling their legal obligations under CERCLA without waiting for a lawsuit to force them into compliance. And what was almost as surprising as the Court's decision itself was the fact that despite the Bush administration's vocal public support for voluntary action over government enforcement, the United States Attorney General filed an amicus curiae brief⁷ urging the Court to render this unexpected verdict.⁸ Not surprisingly, twenty-three states and the Commonwealth of Puerto Rico joined together and filed an amicus brief urging the opposite outcome.⁹

I. BACKGROUND

Congress enacted CERCLA¹⁰ in 1980 "to facilitate the prompt cleanup of hazardous waste sites and to shift the cost of environmental response from the taxpayers to the parties who benefitted [sic] from the wastes that caused the

"Federal court decisions over the past two decades had firmly established that a party incurring costs to investigate and remediate contaminated property could bring a contribution action to recover some or all of these costs under the federal Superfund law . . .").

7. 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).

8. There are two key reasons why it is confusing that the Attorney General urged for this verdict:

First, under the current administration, the Department of Justice has dropped a number of "adversarial" lawsuits in the environmental area, preferring instead to rely on industry to voluntarily come into compliance with environmental regulations, so it seems illogical for the Attorney General to argue on behalf of a decision that would discourage the very kind of voluntary compliance the Department of Justice had been advocating. Second, historically, federal and state environmental agencies have relied on private parties to "voluntarily" clean up thousands of sites and then utilize private contributions actions to work out the allocation of cleanup costs with other potentially responsible parties (PRPs) without the government having to use its scarce Superfund resources to file actions to force these cleanups. And because Congress has failed to reauthorize the tax that had previously provided much of the funding for enforcement actions under CERCLA, the government is now able to bring even fewer of these actions, meaning that without voluntary cleanups, more contaminated property will remain contaminated for longer periods of time.

Nancy Kubasek, *From the Environment*, 34 REAL EST. L.J. 98, 107 n.4 (2005); see Douglas McLeod, *Superfund Lawsuits Limited: Common Pollution Cleanup Action Barred*, BUS. INS., Dec. 20, 2004 (citing numerous environmental law attorneys who argue that the decision will, at minimum, slow voluntary cleanups).

9. Brief 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, and The Commonwealth of Puerto Rico, as Amici Curiae Supporting Respondent, *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004) (No. 02-1192) [hereinafter Amici Brief of the States].

10. 42 U.S.C. §§ 9601-9675 (2000).

harm.”¹¹ CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA),¹² is often celebrated as “a vital program to safeguard human health and the environment from the toxic consequences of decades of irresponsible waste handling.”¹³

The legislative format created by CERCLA provides two options for cleaning up contaminated sites: the federal government may choose to clean up a contaminated area itself,¹⁴ or alternatively, it may compel responsible parties to undertake the cleanup.¹⁵ In either case, the Government may recover its response costs under § 107, the so-called “cost recovery” section of CERCLA.¹⁶ Section 107(a) lists four classes of potentially responsible persons (PRPs) and provides that they “shall be liable” for, among other things, “all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan.”¹⁷ Section 107(a) further provides that PRPs shall be liable for “any other necessary costs of response incurred by any other person . . . not inconsistent with the national contingency plan.”¹⁸

When CERCLA was amended in 1986,¹⁹ it provided an express cause of action for contribution in § 113(f)(1).²⁰ This section, the interpretation of which is the focus of *Cooper Industries*, provides:

Any 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.²¹

11. OHM Remediation Servs. v. Evans Cooperage Co., 116 F.3d 1574, 1578 (5th Cir. 1997).

12. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

13. JOHN G. SPRANKLING & GREGORY S. WEBER, THE LAW OF HAZARDOUS WASTES AND TOXIC SUBSTANCES IN A NUTSHELL 256 (1997).

14. 42 U.S.C. § 9604(a)(1) (2000).

15. *Id.* § 9606(a).

16. *Id.* § 9607(a).

17. *Id.* § 9607(a)(4)(A).

18. *Id.* § 9607(a)(4)(B).

19. Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended in 42 U.S.C. § 9601 (1986)).

20. *See* 42 U.S.C. § 9613(f)(1).

21. *Id.* § 9613(f)(1).

Section 113(f)(3)(B) of CERCLA provided incentives for PRPs to enter into judicially approved or administrative settlements with the United States or individual states by providing that any party who resolved its liability through such settlements would be allowed to seek contribution from other PRPs.²² Such a party also could not be held liable for claims by non-settling PRPs “for contribution regarding matters addressed in the settlement.”²³

Since the passage of CERCLA, litigation has arisen over the issue of whether a private party that has incurred response costs, but that has done so voluntarily and is not itself subject to suit, has a cause of action for cost recovery against other PRPs. A number of courts have held that § 107(a)(4)(B) and its predecessors authorize such a cause of action.²⁴

Other litigation has questioned whether a private entity that has been sued in a cost recovery action by the Government or by another PRP can obtain contribution from other PRPs, even though CERCLA contains no provision explicitly granting a right for contributions. Several district courts have found that such a right arises either impliedly from the provisions of the statute,²⁵ or as a matter of federal common law,²⁶ even though CERCLA, as originally enacted, contained no provision expressly providing for a right of action for contribution under such circumstances. The Second, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits all allowed contribution suits under § 113(f) without a prior § 106 or § 107 action.²⁷ In light of all of these decisions, the

22. *See id.* § 9613(f)(2).

23. *Id.*

24. *See, e.g.,* Wickland Oil Terminals v. ASARCO, Inc., 792 F.2d 887, 893 (9th Cir. 1986) (noting that the absence of an enforcement action against Wickland under CERCLA did not “render the controversy between Wickland and [another potentially responsible party] remote and hypothetical.”); Walls v. Waste Resource Corp., 761 F.2d 311, 318 (6th Cir. 1985) (noting that allowing a private party to “recover response costs from responsible parties . . . is consistent with both the language . . . and the congressional purpose underlying CERCLA as a whole.”); Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1143 (E.D. Pa. 1982) (noting that an “action is not barred because of some theoretical inconsistencies with statutory provisions which have not been made operative in this case.”).

25. *Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985) (arguing that a contribution right is implicit in § 9607(e)(2)).

26. *United States v. New Castle County*, 642 F. Supp. 1258, 1264 (D. Del. 1986) (noting that “[t]he CERCLA liability provision . . . leaves little room for doubt that Congress intended the liability provision . . . to be employed as a major tool to facilitate cleanup.”); *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1486–92 (D. Colo. 1985).

27. *See, e.g.,* *W. Props. Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 683–84 (9th Cir. 2004); *Cadillac Fairview/Cal., Inc. v. Dow Chem. Co.*, 299 F.3d 1019, 1023–24 (9th Cir. 2002); *Morrison Enters. v. McShares, Inc.*, 302 F.3d 1127, 1132–33 (10th Cir. 2002); *Crofton Ventures Ltd. P’ship v. G & H P’ship*, 258 F.3d 292, 297 (4th Cir. 2001); *Kalamazoo River Study Group v. Rockwell Int’l Corp.*, 274 F.3d 1043, 1046 (6th Cir. 2001); *Bedford Affiliates v. Sills*, 156 F.3d 416, 422 (2d Cir. 1998); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 613 (7th Cir. 1998);

Supreme Court's holding in *Cooper Industries* was a dramatic reinterpretation of CERCLA.²⁸

Prior to *Cooper Industries*, two of the most common precursors to contribution actions were not civil suits, but rather arose under the Unilateral Administrative Order (UAO) and the Administrative Order on Consent (AOC);²⁹ the former is an administrative order to conduct a cleanup, with strict penalties available for non-performance, and the latter is an order that arises by an agreement among the responsible parties and the government.³⁰ Those who did the cleanup subject to the UAO or AOC would then sue other PRPs to recover part of their costs.³¹ As the next section demonstrates, such actions may no longer be a common tool.

II. *COOPER INDUSTRIES, INC. v. AVIALL SERVICES, INC.*

This case originated when the buyer of an aircraft maintenance business, Aviall Services, filed an action under CERCLA against the seller, Cooper Industries, for contribution for environmental cleanup costs that Aviall had voluntarily undertaken.³² Cooper Industries had owned and operated four aircraft maintenance sites until 1981, when Aviall Services bought the sites.³³ After operating the sites for a number of years, Aviall discovered that both it and the seller, Cooper Industries, had contaminated the facilities when petroleum and other hazardous substances leaked into the groundwater through spills and underground storage tank leaks.³⁴ Following the law, Aviall notified the Texas Natural Resource Conservation Commission of the contamination and was notified by the Commission that it should clean up the site.³⁵ The company was informed that if it did not clean up the site, an enforcement action would be brought against it.³⁶ However, neither the Commission nor the EPA actually took any judicial or administrative actions to force a cleanup.³⁷

United States v. Colo. & E. R.R. Co., 50 F.3d 1530, 1536 (10th Cir. 1995); Wickland Oil Terminals v. ASARCO, Inc., 792 F.2d 887, 893 (9th Cir. 1986).

28. 543 U.S. 157 (2004).

29. Richard F. Ricci, *Cooper Industries Inc. v. Aviall Services Inc.: Whither (Or Is It Wither) Superfund?*, METRO. CORP. COUNS., Apr. 2005, at 1, 18.

30. *Id.*

31. *Id.* The author also notes that since *Cooper Industries*, at least one district court has found that contribution actions could not be brought based on cleanups performed under a UAO or AOC. *Id.*

32. *See Cooper Indus.*, 543 U.S. at 163–164.

33. *See id.* at 164.

34. *See id.* at 160–65 (offering a detailed explanation of the background facts of the case).

35. *Id.* at 164.

36. *Id.*

37. *Cooper Indust.*, 543 U.S. at 164.

In 1984, Aviall began to clean up the site under the supervision of the state of Texas.³⁸ In 1995 and 1996, Aviall sold the properties to a third party, but remained contractually liable for the cleanup.³⁹ In August of 1997, facing liability of approximately \$5 million in cleanup costs, Aviall filed a claim for cost recovery under CERCLA § 107(a), a claim for contribution under CERCLA § 113(f)(1), and various state law claims.⁴⁰

Relying on the Fifth Circuit's holding that a § 113 claim is a type of § 107 claim,⁴¹ the company subsequently amended its complaint to state a single CERCLA claim.⁴² Aviall alleged that it was entitled to contribution from Cooper, as a PRP under CERCLA § 107, for response costs and other liability that it had incurred to clean up the Texas facilities.⁴³

Both Aviall and Cooper filed for summary judgment, and the District Court granted Cooper's motion, holding that Aviall had abandoned its § 107 claim and that it was not entitled to recover under § 113 because Aviall had not previously been sued under CERCLA § 106 or § 107.⁴⁴

A divided panel of the Court of Appeals for the Fifth Circuit affirmed the lower court's decision.⁴⁵ The majority held that, "a PRP seeking contribution from other PRPs under § 113(f)(1) must have a pending or adjudged § 106 administrative order or § 107(a) cost recovery action against it."⁴⁶

On rehearing en banc, the Fifth Circuit reversed by a divided vote, holding that § 113(f)(1) allows a PRP to obtain contribution from other PRPs regardless of whether the PRP has previously been sued under § 106 or § 107.⁴⁷ The court held that "[s]ection 113(f)(1) authorizes suits against PRPs in both its first and last sentence[,] which states without qualification that 'nothing' in the section shall 'diminish' any person's right to bring a contribution action in the absence of a § 106 or § 107(a) action."⁴⁸ The court reasoned in part that the word "may" in § 113(f)(1) did not mean "may only."⁴⁹

38. *Id.*

39. *Id.*

40. *Id.*

41. *See Geraghty & Miller, Inc. v. Conoco Inc.*, 234 F.3d 917, 924 (5th Cir. 2000); *see also* *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 349–53 (6th Cir. 1998); *Sun Co., Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1191 (10th Cir. 1997); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301–02 (9th Cir. 1997).

42. *See Cooper Indus.*, 543 U.S. at 164.

43. *See id.*

44. *See id.* at 164–65. The district court also declined to hear Aviall's state law claims because its federal law claims were dismissed. *Id.* at 164.

45. *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 263 F.3d 134 (5th Cir. 2001), *overruled by* *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677 (5th Cir. 2002) (en banc).

46. *Id.* at 145.

47. *Aviall*, 312 F.3d at 677.

48. *Id.* at 681.

49. *Id.* at 686–687.

Three members of the en banc court dissented, arguing that the majority's reading of the statute was not supported by the statute's text or its structure.⁵⁰

On December 13, 2004, the United States Supreme Court overturned the Fifth Circuit's en banc decision, holding that a potentially responsible party cannot maintain a contribution action unless such contribution is sought either during or after a Superfund action has been filed in federal court, or the PRP has resolved its liability to the state or federal government in an administrative or judicial settlement.⁵¹

The majority on the Court reached this decision by strictly interpreting the language of the statute. In explaining why § 113(f)(1) does not authorize Aviall's suit, Justice Thomas wrote:

The first sentence, the enabling clause that establishes the right of contribution, provides: "Any person *may* seek contribution . . . *during or following* any civil action under section 9606 of this title or under section 9607(a) of this title," 42 U.S.C. § 9613(f)(1) (emphasis added). The natural meaning of this sentence is that contribution may only be sought subject to the specified conditions, namely, "during or following" a specified civil action.⁵²

A majority of the United States Supreme Court was not convinced by the reasoning of Aviall and the Fifth Circuit that the word "may" was permissive, and did not mean "only."⁵³ To the contrary, Justice Thomas explained that if § 113(f)(1) was intended to authorize contribution actions at any time, then Congress would not have included the explicit "during or following"⁵⁴ conditional language, and noted that the Court avoids statutory interpretations that render part of a statute's language superfluous.⁵⁵

Justice Thomas also found that the savings clause in the last sentence of § 113(f)(1), which states that, "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title,"⁵⁶ is not intended to create any additional causes of action other of those "during or following a civil action."⁵⁷ Rather, the sentence simply "rebut[s] any presumption that the express right of contribution provided by the enabling clause is the exclusive cause of action for contribution available to a PRP."⁵⁸

As further support for the majority's interpretation of the statute, Justice Thomas cited the lack of any statutory time limit during which an action based

50. *See id.* at 691 (Garza, J., dissenting).

51. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 165–66 (2004).

52. *Id.*

53. *See id.* at 166–168.

54. *Id.* at 165–166.

55. *Id.* at 166; *see also* *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 35 (1992).

56. 42 U.S.C. § 9613(f)(1) (2000).

57. *Cooper Indus.*, 543 U.S. at 167.

58. *Id.* at 166–67.

on a voluntary cleanup can be brought.⁵⁹ He pointed out that there are two specific situations in which contribution can be sought: “‘during or following’ specified civil actions” under § 113(f)(1), and “‘after an administrative or judicially approved settlement that resolves liability to the United States or a State.’”⁶⁰ For the former actions, there is a three-year time limit to commence suit, which begins to run on the date of the judgment,⁶¹ and for the latter there is a three-year limitations period that begins to run on the date of settlement.⁶² Nowhere in the statute is there a limitations period for the commencement of contribution actions based on voluntary cleanups, and therefore, Justice Thomas concluded that such actions must not have been contemplated by Congress.⁶³

The decision in this case, however, was not as destructive to PRP rights as it could have been. The Court did leave a couple issues unresolved that might ultimately provide a route for some PRPs to recover. The Court noted in a footnote, for example, that it was not addressing the issue of whether a party that has received a unilateral administrative order by the EPA under § 106, unaccompanied by an enforcement lawsuit under § 106, would be able to pursue contribution under § 113(f)(1).⁶⁴

Aviall could not persuade the Court to consider an alternative implied right of recovery from Cooper under § 107(a)(4)(B) of CERCLA.⁶⁵ The Court chose to leave this issue unresolved⁶⁶ because Aviall had neglected to raise the issue in the lower courts.⁶⁷ Even if Aviall had raised the issue in the lower

59. *Id.* at 167. In their brief, the States had urged the Court not to rely too heavily on the lack of a specific limitations period for the commencement of suits by those doing voluntary cleanups because “when CERCLA was enacted in 1980 and amended in 1986, it was far from unusual for Congress to create a cause of action but fail to provide a pertinent period of limitations, thereby leaving it to the courts to ‘borrow’ an appropriate applicable period from other sources of law.” Amici Brief of the States, *supra* note 9, at 7.

60. *Cooper Indus.*, 543 U.S. at 167.

61. 42 U.S.C. § 9613 (G)(3)(A) (2000).

62. *Id.* § 9613(g)(3)(B).

63. *Cooper Indus.*, 543 U.S. at 167.

64. *Id.* at 168, n.5. For further discussion of this unresolved issue, see Christopher P. Davis, *United States: Navigating the CERCLA Contribution Landscape in the Aftermath of Cooper Industries, Inc. v. Aviall Services, Inc.*, MONDAQ BUS. BRIEFING, Jan. 2005, available at 2005 WLNR 1804060.

65. *Cooper Indus.*, 543 U.S. at 170–71 (citing *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638–47 (1981) and *Nw. Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 90–99 (1981)). The Court has previously refused to read an implied right of contribution into federal statutes. See *Nw. Airlines*, 451 U.S. at 91–95.

66. *Cooper Indus.*, 543 U.S. at 168–69.

67. *Id.* (citing *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) for the proposition that “[w]e ordinarily do not decide, in the first instance issues not decided below”).

courts, it is safe to assume that the lower courts would have relied on the Court's previous precedent, and not found an implied right of recovery.⁶⁸

As the lawyer representing Cooper Industries pointed out, many states have laws that allow parties who voluntarily clean up a site to seek contributions from others who contributed to the contamination.⁶⁹ However, although contribution actions can still be brought under state law, the Court's interpretation of the "savings clause" in § 113(f)(1) leaves a void in the federal hazardous waste cleanup efforts.

III. STATE SOLUTIONS TO THE CLEANUP OF HAZARDOUS WASTE

A private party can attempt to obtain contribution through state law, but there is a risk that state law contribution schemes may be pre-empted by CERCLA.⁷⁰ Currently, twenty-seven states have addressed the problem of hazardous waste through legislation on voluntary remediation. These states go beyond defining a "responsible party" or mirroring CERCLA in their respective environmental management laws. Though they attack the problem of voluntary remediation differently, it can be said that they are headed in the right direction. One can only hope the federal government will follow in rewarding voluntary remediation instead of discouraging it.

Alabama, Florida, and Louisiana have recognized that encouraging the voluntary remediation and redevelopment of property is in their states' respective interest. Alabama has established a revolving fund program to "encourage and assist the assessment, remediation, and redevelopment of previously used property which is contaminated or perceived to be contaminated."⁷¹ Florida allows those who voluntarily remediate their site to apply for compensation through their Inland Protection Trust Fund.⁷² The route chosen by these states, although encouraging from an environmental perspective, leaves the taxpayers financially responsible for the remediation.

Louisiana has chosen to give tax credit for voluntary remediation of hazardous waste.⁷³ This legislation may be in response to the "[h]azardous

68. Several appellate courts have held that a PRP is limited solely to a claim for contribution under CERCLA § 113. See *Bedford Affiliates v. Sills*, 156 F.3d 416, 423-24 (2nd Cir. 1998); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 776 (4th Cir. 1998) (stating that PRPs must seek contribution under CERCLA § 113).

69. See *infra*, Part III (discussing state law solutions to cleanup of hazardous waste).

70. See *In re Reading Co.*, 115 F.3d 1111, 1117 (3d Cir. 1997); *Bedford Affiliates*, 156 F.3d at 425-27.

71. ALA. CODE § 22-30F-2 (2005).

72. FLA. STAT. ANN. § 376.3071 (2006).

73. LA. REV. STAT. ANN. § 47:6021. Louisiana's Brownfield cleanup tax credit is equal to 25 percent of the investment in a voluntary remediation of a state-certified contaminated site, or 15 percent of the investment in a voluntary remedial investigation. *Id.* Credit can be carried

chemicals and substances [that] have been disposed of in Louisiana for many years in a manner that, although possibly legal at the time, was careless and inappropriate and created conditions which are extremely dangerous and may cause long-term health and environmental problems for the people of this state.”⁷⁴

Nineteen states that have addressed voluntary remediation have extensive laws discussing everything from redevelopment of the land to future liability of those undertaking voluntary remediation.⁷⁵ These laws establish programs of

forward for up to ten years. *Id.* This statute became effective July 1, 2005, for tax periods beginning after Dec. 31, 2004. *Id.*

74. *Id.* at § 30:2271(A)(1) (2005). The additional purposes of the statute are as follows:
- (2) Hazardous substances are produced and transported on a regular basis around this state and there have been numerous recent discharges resulting from accidents which have caused extensive damage to the citizens of the state and have caused the state to expend large sums to respond to these incidents.
 - (3) Those persons generating these substances knew or were in a position to know of the hazardous and dangerous nature of the substances which they were producing and knew or should have known that improper disposal could have long-term health risks and could cause irreversible environmental damage.
 - (4) The state cannot and should not bear the costs associated with a private profit making venture.

Id. § 30:2271(A)(2)–(4).

75. *See* Voluntary Remediation Program, ARIZ. REV. STAT. §§ 49-171–49-188 (2005); Voluntary Clean-up and Redevelopment Act, COLO. REV. STAT. §§ 25-16-301–25-26-311 (2005); Idaho Land Remediation Act, IDAHO CODE ANN. §§ 39-7201–39-7210 (2002 & Supp. 2006); Voluntary Remediation of Hazardous Substances and Petroleum Act, IND. CODE ANN. §§ 13-25-5-1–13-25-5-23(2000 & Supp. 2005); Voluntary Cleanup and Property Redevelopment Act, KAN. STAT. ANN. §§ 65-34,161–65-34,174 (2003 & Supp. 2005); Voluntary Environmental Remediation Program, KY. REV. STAT. ANN. §§ 224.01-510–224.01-532 (2002 & Supp. 2005); LA. REV. STAT. ANN. §§ 30:2285–30:2290 (2000 & Supp. 2006); Mississippi Brownfields Voluntary Cleanup and Redevelopment Act, MISS. CODE ANN. §§ 49-35-1–49-35-27 (2003 & Supp. 2005); MO. REV. STAT. §§ 260.565–260.575 (2000 & Supp. 2005); Voluntary Remediation Act, N.M. STAT. ANN. §§ 74-4G-1–74-4G-12 (2000 Supp. 2005); Comprehensive Environmental Cleanup and Responsibility Act, MONT. CODE ANN. §§ 75-10-701–75-10-752 (2005); MONT. CODE ANN. § 27-1-702 (establishing a comparative negligence system in assigning fault in hazardous waste cases); Oklahoma Brownfields Voluntary Redevelopment Act, OKLA. STAT. ANN. tit. 27A, §§ 2-, §§ 15-101–15-110 (1997 & Supp. 2006) (stating that Oklahoma’s Department of Environmental Quality will issue a certificate of completion for successful voluntary remediation programs); Hazardous Sites Cleanup Act, 35 PA. CONS. STAT. ANN. §§ 6020.101–6020.1305 (2003 & Supp. 2006) (defining the responsible person, scope of liability, and defenses to liability in the cleanup of hazardous sites); Brownfield Projects Voluntary Cleanup Oversight and Assistance Program, TENN. CODE ANN. § 68-212-224 (2001 & Supp. 2005); Voluntary Remediation Program, VA. CODE ANN. § 10.1-1232 (2006); Voluntary Waste Reduction Plan, WASH. REV. CODE ANN. § 70.95C.200 (2002 & Supp. 2006); Voluntary Remediation and Redevelopment Act, W. VA. CODE §§ 22-22-1–22-22-21 (2002 & Supp. 2006); WIS. STAT. ANN. § 292.15 (2004); WYO. STAT. ANN. §§ 35-11-1601–35-11-1613 (2005).

governmental evaluation and step-by-step completion of voluntary remediation.

Three states, California, Oregon, and Rhode Island, have strong statutes that take the extra step of determining the liability of not only one who voluntarily cleans up a site, but also previous owners who are potentially responsible. California's Carpenter-Presley-Tanner Hazardous Substance Account Act⁷⁶ "explicitly authorizes any [potentially responsible party] that has incurred response costs to seek contribution from any other [potentially responsible party]."⁷⁷ It should also be noted that this Act excludes "[p]etroleum, including crude oil or any fraction thereof"⁷⁸

In Oregon, a person who is liable or may be liable may seek contribution from others who are liable or may be liable.⁷⁹ This statute is applicable in contracts of leases.⁸⁰ The contribution costs among liable parties are determined by the court.⁸¹

Rhode Island's Industrial Property Remediation and Reuse Act (IPRRA)⁸² is unique in the fact that it was intended to explain portions of the Hazardous Waste Management Act⁸³ that may have been unclear.⁸⁴ The IPRRA explicitly refers to previous owners as responsible parties.⁸⁵ Now the courts have further interpreted liability under both statutes to be attached to incidents that occurred prior to enactment.⁸⁶

76. CAL. HEALTH & SAFETY CODE §§ 25300–25395.40 (2006).

77. *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 945–46 (9th Cir. 2002). The court went on to note:

[U]nlike liability under CERCLA, liability under HSAA is not truly joint and severable.

Any person found liable for costs under HSAA who establishes by a preponderance of the evidence that only a portion of those costs or expenditures are attributable to that person's actions will be required to pay only for that portion. Liability under HSAA is therefore apportioned according to fault.

Id. at 946.

78. CAL. HEALTH & SAFETY CODE § 25317(a) (2006); *see Ulvestad v. Chevron U.S.A., Inc.*, 818 F. Supp. 292, 294 (C.D. Cal. 1993) (stating that because gasoline is a crude oil fraction, but is not a specifically listed hazardous substance, gasoline is exempt from the Act).

79. OR. REV. STAT. § 465.257 (2005).

80. *See Newell v. Weston*, 946 P.2d 691, 701 (Or. Ct. App. 1997). In this case, the trial court allocated all of the remediation costs to the defendant because the evidence showed that the release of gasoline took place entirely during the defendant's lease term from a tank that the defendant had installed, and that the defendant had refused to participate in the remediation. *Id.*

81. OR. REV. STAT. § 465.257(1) (2005).

82. R.I. GEN. LAWS §§ 23-19.14-1–23-19.14-19 (2001 & Supp. 2005).

83. R.I. GEN. LAWS §§ 23-19.1-1–23-19.1-36 (2001 & Supp. 2005).

84. *See Charter Int'l Oil Co. v. United States*, 925 F. Supp. 104 (D. R.I. 1996) (arguing that the Hazardous Waste Management Act includes previous owners as responsible parties).

85. R.I. GEN. LAWS § 23-19.14-6(a)(2) (2001 & Supp. 2005).

86. *See, e.g., Charter Int'l Oil Co.*, 925 F. Supp. at 109; *see also* R.I. GEN. LAWS § 23-19.14-1 (indicating that the legislative intent was to extend liability under the act to instances in which the contamination occurred prior to enactment of this act).

New Jersey will also be impacted by the ruling in *Cooper Industries* since its Spill Compensation and Control Act⁸⁷ is similar to CERCLA. Buying property in states that lack strong environmental laws such as the Spill Act is likely to make potential purchasers somewhat reluctant to invest in property without receiving adequate representation and indemnification.⁸⁸ “Without such contractual obligations, the former owners may now avoid contributing to any cleanup.”⁸⁹ Now, pre-acquisition environmental audits are even more important.⁹⁰ Therefore, “it is critical that any environmental consultant performing such an audit be held accountable for failure to identify environmental contamination so that the purchaser [will not] be left shouldering all environmental cleanup costs.”⁹¹

States have a strong interest in encouraging cleanups and avoiding litigation. The fact that twenty-three state attorneys general filed an amicus brief in support of Aviall Services’ position and urged the Court to affirm the Fifth Circuit’s en banc decision indicates that some states are sympathetic to a PRP’s right to contribution.⁹² Because of this, private parties should consult with the relevant state agencies for recent pronouncements on how to handle such a settlement.

Such parties should also consider whether § 128 of the Small Business Liability and Brownfields Revitalization Act⁹³ might result in their having resolved their liability in states that have entered into memoranda of agreement (MOAs) with the EPA. Under such agreements, a party’s participation in the state’s voluntary cleanup program precludes the EPA from taking CERCLA enforcement action.⁹⁴

87. N.J. STAT. ANN. § 58:10-23.11 (1992 & Supp. 2006).

88. Gerald M. Giordano, *Ruling Makes it Harder to Recoup Cleanup Cost; CERCLA Contribution at Issue*, 14 N.J. LAW., Mar. 21, 2005, at 7, 10.

89. *Id.*

90. *Id.*

91. *Id.*

92. Amici Brief of the States, *supra* note 9.

93. 42 U.S.C. § 9628 (2000).

94. New York, New Jersey, and Connecticut have not entered into a Voluntary Cleanup Program MOA with the EPA, while the state of Pennsylvania has entered into an MOA. See Office of Solid Waste and Emergency Response Office of Brownfields Cleanup and Redevelopment, EPA, STATE BROWNFIELDS AND VOLUNTARY RESPONSE PROGRAMS: AN UPDATE FROM THE STATES, (Feb. 2005), available at http://www.epa.gov/brownfields/pubs/st_res_prog_report.htm (last visited Mar. 10, 2005); see also *One Cleanup Program: Memorandum of Agreement Between the Commonwealth of Pennsylvania Department of Environmental Protection and Region 3 of the United States Environmental Protection Agency* (Apr. 21, 2004), available at <http://www.epa.gov/reg3hwmd/newsletters/2004-04-21.htm> (last visited Oct. 12, 2006).

IV. THE FAILURE OF THE COURT TO FOLLOW THE CIRCUIT COURT PRECEDENT

The Supreme Court chose not to follow the reasoning of the Fifth Circuit that a § 113(f) contribution action was essentially a type of cost recovery action under § 107.⁹⁵ The Fifth Circuit's reasoning had been mirrored by the Tenth Circuit in the case of *Sun Co., Inc. v. Browning-Ferris, Inc.*,⁹⁶ as well as by five other circuits.⁹⁷ The Court decided in *Sun Co., Inc.* that one starting voluntary cleanup of hazardous waste should have a six-year limitations period to seek contribution from a PRP.⁹⁸ The Court was not persuaded by the plaintiff's argument that cleanup costs were not incurred pursuant to a civil action under §§ 106 or 107.⁹⁹ The Court ruled that "if a contribution action is *not* the initial action, then by definition a previous action will have been filed, and one of the four triggering events in § 113(g)(3) will occur."¹⁰⁰ There are, in effect, two different types of contribution actions under CERCLA, each governed by the same rules of § 113(f) and each seeking to equitably allocate costs referred to in § 107, but governed by different statutes of limitation.¹⁰¹

If the Supreme Court had adopted this reasoning in *Cooper Industries*, the Court would have reached a result that was consistent with one of the primary goals of CERCLA: the prompt cleanup of dangerous substances.¹⁰² Instead, we now have a statute that discourages PRPs from removing harmful materials from the environment until they are sued.

The dissenting opinion by Justices Ginsburg and Stevens in *Cooper Industries* criticizes the Court's refusal to see that § 107(a) "enable[s] a PRP to sue other covered persons for reimbursement, in whole or part, of cleanup costs the PRP legitimately incurred."¹⁰³ Their dissent is well founded. Nearly ten years before *Cooper Industries*, in *Key Tronic Corp. v. United States*, the Court found that § 107(a) enables one to sue for reimbursement.¹⁰⁴ What the *Key Tronic* Court could not agree upon was whether the right of action was

95. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004).

96. 124 F.3d 1187, 1192 (10th Cir. 1997).

97. *See W. Properties Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 683 (9th Cir. 2004); *Crofton Ventures Ltd. P'ship v. G & H P'ship*, 258 F.3d 292, 294–95 (4th Cir. 2001); *Kalamazoo River Study Group v. Rockwell Int'l Corp.*, 274 F.3d 1043, 1049 (6th Cir. 2001); *Bedford Affiliates v. Sills*, 156 F.3d 416, 423–24 (2d Cir. 1998); *PMC, Inc. v. Sherwin-Williams, Co.*, 151 F.3d 610, 616 (7th Cir. 1998).

98. *Sun Co., Inc.*, 124 F.3d 1187, 1192–93.

99. *Id.* at 1192.

100. *Id.* at 1193 (emphasis in original).

101. *See Key Tronic Corp. v. United States*, 511 U.S. 806, 816 (1994) (recognizing two "similar and somewhat overlapping" contribution actions under §§ 107 and 113).

102. *OHM Remediation Servs. v. Evans Cooperage Co., Inc.*, 116 F.3d 1574, 1578 (5th Cir. 1997).

103. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 172 (2004) (Ginsburg, J., dissenting).

104. 511 U.S. 806, 816 (1994).

express or implied.¹⁰⁵ Following this fact pattern, Aviall would have a right to contribution. The dissenters in *Cooper Industries*, in order to avoid protracting the litigation, thought that the Supreme Court should have decided that a potentially responsible party like Aviall could recover a proportionate share of its costs pursuant to § 107(a)(4)(B) of CERCLA,¹⁰⁶ which provides for the recovery from the “covered persons” in § 107(a) of “any . . . necessary costs of response incurred by any other person consistent with the national contingency plan.”¹⁰⁷ The majority specifically declined to address that issue and others.¹⁰⁸ Further investigation of the intent behind CERCLA shifts the blame for this confusion from the majority of the Court to the legislators on Capitol Hill.

The issue of recovery under a § 107 claim was raised last year in the Southern District of New York.¹⁰⁹ In *Elementis*, the current owner of several contaminated sites sought to bring a § 107(a) cost recovery action against the former property owner.¹¹⁰ The plaintiff maintained that current Second Circuit precedent, set forth in *Bedford Affiliates v. Sills*,¹¹¹ precluding a PRP from proceeding under § 107(a), is no longer binding in light of the *Cooper Industries* decision.¹¹² The Southern District rejected this argument, holding that the Supreme Court in *Cooper Industries* expressly “withheld judgment regarding the correctness of *Bedford Affiliates* and other decisions of the Courts of Appeals.”¹¹³ The Southern District further held that, “in the Second Circuit, the Supreme Court will not be held to have implicitly expressed an opinion on a question which it explicitly declines to address . . . even if the Supreme Court’s future expression of that opinion is viewed by some as quite likely”¹¹⁴ “Thus, it appears that the question of how §§ 107 and 113 of CERCLA meant to co-exist is still a complicated one that may be taken up by the Courts of Appeals and the Supreme Court” soon.¹¹⁵

105. *Id.*

106. *Cooper Indus.*, 543 U.S. at 174.

107. 42 U.S.C. § 9607(a)(4)(B) (2000).

108. For example, the majority did not address whether a § 106 administrative order is a “civil action” within the meaning of § 113(f)(1) or what the “savings clause” of § 113(f)(1) saved. The majority’s refusal to do so leaves it to the lower courts to resolve such issues.

109. *Elementis Chems. Inc. v. T H Agric. and Nutrition, L.L.C.*, 373 F. Supp. 2d 257, 263–265 (S.D.N.Y. 2005).

110. *Id.* at 263.

111. 156 F.3d 416, 423–24 (2d Cir. 1998).

112. *See Elementis*, 373 F. Supp. 2d at 269.

113. The Court declined to decide whether a PRP had an implied right of contribution under CERCLA § 107. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004).

114. *Elementis*, 373 F. Supp. 2d at 270.

115. 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. COUNSEL: NE. ED., May 2005, at 8.

A. *Impact of Cooper Industries: Before and After*

Before the Supreme Court's ruling in *Cooper Industries*, the courts of appeals had held that PRPs may sue each other for apportionment of costs under § 113 alone,¹¹⁶ or together with § 117.¹¹⁷ The courts of appeals agreed that a PRP must sue for contribution under § 113 because such a claim can be considered an "initial action of recovery."¹¹⁸ With the federal appellate courts in agreement, it was taken for granted that PRPs had legitimate cost-recovery claims under CERCLA.

Like Aviall, post-*Cooper Industries* PRPs have run into trouble recovering contribution in many cases. The same federal courts that once held in favor of recovery under § 113 are now obligated to follow the Court's stance from *Cooper Industries*. The current legal scene makes the recovery process almost comical. A PRP must be sued by the EPA under § 106 or be sued under § 107(a) in order to bring a contribution suit under § 113(f)(1). There is some mystery as to whether being in the process of settlement with a state agency would constitute an "administrative settlement" under § 113.¹¹⁹

In the first case, the PRP would need to be in the process of an order to be sued by the EPA under § 106. The problems with this route abound. The PRP would initially have to receive an administrative order from the EPA, fail to comply with it, and then wait for the EPA to sue.¹²⁰ Or else, the EPA could proceed to conduct the response action on its own, and then seek to recover potentially three times the cost of cleanup from the party.¹²¹ In this case, the noncompliant PRP could be liable for daily penalties of \$32,500 per day over the course of a cleanup that could last for years.¹²²

In the case of settlement with a state agency, it is undetermined whether conducting a cleanup under state supervision is considered an administrative

116. *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2d Cir. 1998); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *United States v. Colo. & E. R.R. Co.*, 50 F.3d 1530, 1534–36 (10th Cir. 1995); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

117. *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1302 (9th Cir. 1997). "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." *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1122–23 (3d Cir. 1997).

118. *Geraghty & Miller, Inc. v. Conoco Inc.*, 234 F.3d 917, 924–925 (5th Cir. 2001); *Sun Co., Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997).

119. 42 U.S.C. § 9613(f)(3)(B) (2000).

120. *Id.* § 9606(b)(1).

121. *Id.* § 9607(c)(3).

122. *See* Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121, 7126 (Feb. 13, 2004) (to be codified at 40 C.F.R. pt. 19).

settlement. This “administrative settlement” is a requirement to bring an action for contribution under CERCLA § 113(f)(3)(B).¹²³

The United States can effectively limit its contribution exposure by electing to use enforcement authorities other than civil actions under §§ 106 and 107.¹²⁴ This is something private parties do not have the luxury of doing. The RCRA citizen suit provision provides that a person may bring suit against any person “who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.”¹²⁵ At least four requirements must be met to qualify for contribution rights:

- (1) there must be at least a partial resolution of liability to the United States or a state, (2) for some or all of a response action or for some or all of the costs of such an action, (3) the resolved liability must be for “response” actions or costs, and (4) the resolution of liability must be documented in an administrative or judicially approved settlement.¹²⁶

The problem with fulfilling these requirements is often a procedural one. The EPA and its counterpart state regulatory agencies “lack the resources to grind out large numbers of these documents.”¹²⁷ Even when completed, the provision has its limits. It provides for broad substantive and procedural relief including injunctive relief and recovery of attorney fees, but cannot be used to recover past costs.¹²⁸

B. *The EPA’s Role in CERCLA*

The EPA showed a lack of confidence in cleanup activities performed on a purely voluntary basis by private PRPs. It preferred the role of dealing out “negotiated settlements” with the agency to reduce future litigation.¹²⁹ The EPA wanted to sanction even voluntary cleanups to ensure the remedial steps taken were adequate.¹³⁰ If not, the PRPs who acted voluntarily could still be subject to enforcement action.¹³¹

This is the background for the SARA amendments in 1986. Thus, the right of contribution was, as the Supreme Court affirmed in *Cooper Industries*, made

123. 42 U.S.C. § 9613(f)(3)(B) (2000).

124. Examples include § 106 orders and Resource Conservation and Recovery Act (RCRA) enforcement actions.

125. 42 U.S.C. § 6972(a)(1)(B) (2000).

126. William H. Hyatt, Jr. & Emily L. Won, *CERCLA Contribution Rights After Cooper Industries*, METRO. CORP. COUNS., at 14 (Ne. ed. Apr. 2005).

127. *Id.*

128. *Id.* § 6972(a), (e).

129. See Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034, 5037–38 (Feb. 5, 1985).

130. *Id.*

131. *Id.*

available under § 113(f)(1) solely to PRPs initiating response actions “during or following” enforcement suits under §§ 106 and 107(a).¹³² Moreover, the only other “federal contribution” door opened by SARA allowed one PRP to pursue another for an apportionment of cleanup costs under § 113(f)(3)(B), but only after the party seeking contribution had first held an administratively or judicially approved settlement with the state or federal environmental authorities.¹³³

“The law gives the EPA authority to go after industrial polluters, and it also taxes the chemical and petroleum industries to set up a cleanup fund. If no person or party is found liable for a hazardous waste site, Superfund money is allocated for clean-up.”¹³⁴

Russell Selman, an environmental partner at Katten, Muchin, Zavis, Rosenman, believes that consent decrees from the EPA are the only answer for his corporate clients if someone else is responsible.¹³⁵ According to Selman, “[p]arties can no longer afford not to do their homework on the assumption they can recover their costs down the line.”¹³⁶ If a party settles with the EPA under a consent decree, the party will be able to receive contribution, though the EPA more often issues orders through § 106.¹³⁷

C. *The Department of Defense: A Roadblock to Reversing the Supreme Court*

Within the United States, the Department of Defense (DOD) has left a “toxic legacy . . . as a result of [two] centuries of testing, training, [and] weapons manufacturing, [ranging] from unexploded bombs to nuclear waste.”¹³⁸ The DOD is the world’s largest polluter, producing more hazardous waste per year than the five largest United States chemical companies combined.¹³⁹ Of the 428 Superfund sites in 2004,¹⁴⁰ at least 135 were federally-owned or operated sites marked for cleanup and remediation as National Priorities list sites.¹⁴¹ The federal government faced over \$249

132. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004).

133. 42 U.S.C. § 9613(f)(3)(B) (2000); *see also Cooper Indus.*, 543 U.S. at 167.

134. Tom McCann, *Aviall Throws Wrench in Environmental Cleanup Machine*, CHI. LAW., May, 2005, at 58.

135. *Id.* “We have clients with anywhere from 10 to 120 polluted sites around the country. We’ve submitted them to several federal and state voluntary cleanup programs, and we’re now ripping them out and determining if there is anyone we can sue.” *Id.*

136. *Id.*

137. *Id.*

138. 149 Cong. Rec. H1909 (daily ed. Mar. 18, 2003) (statement of Rep. Blumenauer).

139. Bob Feldman, *War on the Earth*, DOLLARS & SENSE, Mar./Apr. 2003, at 24.

140. FISCAL YEAR 2004 SUPERFUND ANN. REP., at A-1 (2005), *available at* <http://www.epa.gov/uperfund/action/process/fy2004.htm>. This number includes all EPA lead sites, Potentially Responsible Party lead sites, and Federal Facility sites. *Id.*

141. *Id.* at 11.

billion in environmental liabilities at the end of fiscal year 2004.¹⁴² More than \$64 billion dollars in those environmental liabilities comes from the DOD alone.¹⁴³

As Hyatt and Woo point out in an article directed toward corporate counsel, since the United States, unlike private parties, will be immune from state contribution liability, except at federal facilities, the ruling in *Cooper Industries* would appear to provide the federal government with an entirely new defense strategy to avoid CERCLA liability.¹⁴⁴ This strategy would be to limit its exposure in contribution to the instances in which the United States has instituted a § 106 abatement action,¹⁴⁵ or when a state or tribe has sued for § 107 cost recoveries.¹⁴⁶ These two situations represent a small percentage of cleanup activity; the ruling in *Cooper Industries* has allowed the government to cover itself effectively with this strategy.¹⁴⁷

The United States has both an interest in limiting CERCLA's scope to protect itself from liability and a duty to keep its citizens safe from the destructive ramifications of hazardous waste. It is truly a delicate balance. The Supreme Court's ruling limiting the timing of § 113 contribution actions results in the federal government's having to defend fewer CERCLA contribution suits.¹⁴⁸ Despite the desire to protect the DOD, Congress and the Department of Justice¹⁴⁹ must put the health and safety of its citizens first.

142. 2004 FIN. REP. OF THE U.S. GOV., 125, available at <http://www.gao.gov/inancial/4frusg.pdf>.

143. *Id.*

144. Hyatt & Won, *supra* note 126.

145. 42 U.S.C. § 9606(b)(1) (2000).

146. Hyatt & Won, *supra* note 126. CERCLA also provides liability 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." 42 U.S.C. § 9607(a)(4)(A) (2000).

147. *Id.*

148. See *Syms v. Olin Corp.*, 408 F.3d 95, 101 (2005) (noting that plaintiff-appellants are not eligible to seek contribution under CERCLA § 113(f) unless they have been sued under §§ 106 or 107(a)); see Steve Seidenberg, *Conflicting Rulings Leave Superfund Clean-Ups In Limbo*, CORP. LEGAL TIMES, Aug. 2005, at 50 (stating that "[t]he decision has huge ramifications for owners of superfund sites, companies that allegedly polluted such sites, and communities that want to clean up Superfund sites quickly.").

149. See Ricci, *supra* note 29, at 18. This theory attributes the DOJ's position to a desire to insulate the Department of Defense from contribution liability. Perhaps the most conspiratorial theory is that the DOJ's position was driven by a desire to gut the Superfund program. The logic of this theory is that the construction of the statute that the DOJ advocated and the Supreme Court adopted will act as a strong disincentive to voluntary investigations and cleanups. At the same time, federal budget deficits coupled with Congress' refusal to reinstate the tax that had initially funded the Superfund program, will severely hamper the government's ability to conduct cleanups on its own or bring the civil actions which are now a predicate to contribution actions under § 113. This combination of events, over time, could bring the Superfund program to a grinding halt.

Limiting the government's liability and failing to protect the health and safety of its citizens seem to stem further back than the judiciary. Congress enacted CERCLA with enough room for interpretation to result in the ruling of *Cooper Industries*. Amending CERCLA to specifically allow contribution suits under § 113 without a PRP being sued by the EPA under §§ 106 or 107 is the rational way to correct this inadvertent error.

CONCLUSION

A number of commentators have speculated that the decision in *Cooper Industries* is going to slow the cleanup of contaminated sites.¹⁵⁰ Prior to *Cooper Industries*, a property owner who discovers that his property might be contaminated would often voluntarily investigate and remediate his site to avoid being the target of a government action, knowing that he would be able to recover at least part of the costs of cleanup from other potentially responsible parties. However, after *Cooper Industries*, the property owner has no incentive to move expeditiously. If he acts voluntarily, he now has to bear the cost of cleanup alone. Because Congress has not reauthorized the Superfund tax, there is even less money available for remediation under CERCLA, and thus the number of actions filed by the federal government is likely to increase, and consequently, more sites will go unremediated for longer amounts of time. Also, given the current administration's less than aggressive attitude toward enforcement, firms are not likely to be motivated by fear of enforcement to clean up unremediate sites voluntarily.¹⁵¹

The parties most adversely affected by the decision, of course, are those PRPs who relied on existing case law, and voluntarily began cleanup action

150. See, e.g., Richard G. Leland & Toni L. Finger, *The Supreme Court's Limitation on Private Cost Recovery Actions Under Superfund: No Good Deed Goes Unpunished—Part I*, METRO. CORP. COUNS., Apr. 5, 2005, at 16. Leland and Finger argue:

The Supreme Court's decision is likely to discourage PRPs from voluntarily cleaning up contaminated sites because they will not be able to recoup their response costs from other PRPs under CERCLA. Rather, PRPs will be relegated to asserting state statutory claims or common law claims to recover response costs, which method of recovery is typically not preferable, as such claims will not allow PRPs the same degree of access to the Federal courts. To preserve their right to seek contribution under CERCLA and avail themselves of the Federal courts, PRPs aware of contamination on their property may be apt to wait for government to compel a cleanup or remediate the site and sue for the recovery of its response costs. Given the government's limited resources and the less-than-aggressive posture of the Bush Administration (which submitted a brief supporting the prevailing party's decision) in environmental enforcement, many contaminated sites that otherwise may have undergone a voluntary cleanup may remain unremediated for longer periods of time.

Id.; see also Robert C. Longstreth, *Supreme Court Decision Imperils Voluntary Environmental Cleanups*, MONDAQ BUS. BRIEFING (Mar. 4, 2005).

151. Leland & Finger, *supra* note 150, at 16.

and then filed cost recovery claims under CERCLA. Their options have dwindled. Lower courts, relying on *Cooper Industries*, have already begun dismissing such claims,¹⁵² and the remaining state solutions available to them are few and far between.

Because the decision of this case is so inconsistent with the intent of Congress in passing CERCLA initially, and because the holding negates many of the benefits of the Brownfield Revitalization and Environmental Restoration Act, some environmental attorneys believe it is likely that Congress will act to limit the impact of the decision in *Cooper Industries*.¹⁵³

There are three possible approaches the legislative fix could take: eliminate the words “during or following” from the enabling clause,¹⁵⁴ add the word “before” in front of that phrase in the statutory language, or amend CERCLA to explicitly authorize any potentially responsible party that has incurred response costs to seek contribution from any other potentially responsible party. It is time that Congress put the best interests of United States citizens and the environment ahead of the interests of the PRPs responsible for the creation and unsafe disposal of hazardous waste.

152. See, e.g., *Cadlerock Properties Joint Venture, L.P. v. Schilberg*, No. 3:01CV896 (MRK), 2005 WL 1683494, at *7 (D. Conn. Jul. 19, 2005); *City of Waukesha v. Viacom Int'l, Inc.*, 362 F. Supp. 2d 1025 (E.D. Wis. 2005); *Pharmacia Corp. v. Clayton Chem. Acquisition, LLC*, 382 F. Supp. 2d 1079 (S.D. Ill. 2005).

153. Norman Carlin & Andrea L. Courtney, *Cooper v. Aviall Decision*, MONDAQ BUS. BRIEFING (Jan. 26, 2005).

154. 42 U.S.C. § 9613(F)(1) (2000).