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United States v. Atlantic Research Corp.: The Supreme Court Restores Voluntary Cleanups Under CERCLA

United States v. Atlantic Research Corp.[1] is easily the most important decision to date involving the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[2] In *Atlantic Research*, a unanimous Supreme Court restored CERCLA to its proper place in the environmental cleanup world, making it "comprehensive" once again. The opinion's significance lies not in any earth-shaking pronouncements—indeed, the Court's analysis is both straightforward and unadorned—but rather, in its context. As will be seen below, prior to this decision, the lower courts had taken a rather tortured path that, when combined with the Supreme Court's 2004 decision in *Cooper Industries v. Aviall Services, Inc.*,[3] left CERCLA's viability as a cost-spreading tool doubtful in most private party cleanup contexts. This doubt tended to discourage cleanup as landowners became nervous about their ability to bring to the table other entities who may have contributed to the relevant contamination.

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[1] United States v. Atl. Research Corp., 127 S. Ct. 2331 (2007).

[2] 42 U.S.C. §§ 9601-9675 (2006).

[3] Cooper Indus. v. Aviall Servs., Inc., 543 U.S. 157 (2004).

The specific legal issue in *Atlantic Research* was one the Supreme Court explicitly had left unresolved in *Cooper Industries*: whether those who themselves bear potential liability under CERCLA (often referred to as "potentially responsible parties" or "PRPs") may seek cost recovery under section 107(a)(4)(B) of CERCLA when they engage in voluntary cleanups.[4] This issue hinged on the significance of the "any other person" language in that provision.[5] In short, Atlantic Research argued that the "other person[s]" to which section 107(a)(4)(B) refers are juxtaposed in contrast to the parties referenced in section 107(a)(4)(A) (the United States, the states, and Indian tribes).[6] From this, the *Atlantic Research* Court reasoned that section 107(a)(4)(B) gives private parties a right of cost-recovery regardless of whether they themselves may bear potential liability under CERCLA.[7] The United States, by contrast, argued that the "other person[s]" in section 107(a)(4)(B) are set off against the liable parties listed in sections 107(a)(1)-(4).[8] Thus, according to the government's logic, those who bear liability themselves would be precluded from seeking cost recovery.

The Supreme Court unanimously sided with Atlantic Research, determining that "the plain language of subparagraph (B) authorizes cost-recovery actions by any private party, including PRPs."[9] Noting that CERCLA's liability scheme sweeps in "virtually all persons likely to incur cleanup costs," the Court also pointed out that "if PRPs do not qualify as 'any other person' for purposes of [section] 107(a)(4)(B), it is unclear what private party would."[10]

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[4] *Atl. Research*, 127 S. Ct. at 2333-34. The term "voluntary" exists nowhere in CERCLA, but the courts have routinely used it to describe cleanups that companies or others perform without any binding legal edicts requiring them to do so. *See, e.g.*, *id.* at 2334 (referencing "voluntarily incurred response costs"). Thus, a voluntary cleanup is one that occurs without any attendant decree or administrative order, under consent or otherwise. *See also infra* Part IV.

[5] *Atl. Research*, 127 S. Ct. at 2335-36.

[6] *Id.*

[7] *Id.* at 2336.

[8] *Id.* at 2335. These include the current owner and operator of the relevant property, anyone who owned or conducted operations on the property at the time of disposal, anyone who arranged for the disposal of hazardous substances at the property, and anyone who transported hazardous substances to the property, if they were involved in the site-selection process. *See* 42 U.S.C. § 9607(a) (2006).

[9] *Atl. Research*, 127 S. Ct. at 2336.

[10] *Id.*

As a result of *Atlantic Research*, it is once again clear that even PRPs have full resort to CERCLA's liability provisions as a potential means to redistribute some or all of their cleanup costs among those who bear responsibility for contaminated sites. Thus, CERCLA will continue to operate as it has for most of the last twenty-seven years: as the primary statutory driver of both EPA and private-party cleanup.

This Article will address four points of analysis: (1) a quick overview of the historical backdrop for the *Atlantic Research* decision; (2) a brief description of the facts of the case and its procedural posture, together with an extended summary of the Supreme Court's analysis; (3) a short critique of the opinion; and (4) a preliminary overview of some of the remaining questions regarding private party cost recovery and contribution under CERCLA.[11]

I

THE HISTORICAL BACKDROP

Congress passed CERCLA in 1980.[12] In so doing, it provided two different categories of plaintiffs with causes of action to recover costs incurred in cleanup efforts.[13] First, section 107(a)(4)(A) provides the United States government, states, and Indian tribes with the authority to sue those deemed responsible under section 107(a) to recover costs "not inconsistent with" a document known as the National Contingency Plan (NCP).[14] Second, section 107(a)(4)(B) gives "other person[s]" that same authority, though these persons are required to demonstrate that their cleanups are necessary and consistent with the NCP.[15]

Congress has amended CERCLA comprehensively only once, through the Superfund Amendments and Reauthorization Act of

[11] It should be noted that the author of this Article also wrote an amicus brief for the Natural Resources Defense Council (NRDC) (among others) in the *Atlantic Research* case. *See* Brief for Amici Curiae Natural Resources Defense Council, *Atl. Research*, 127 S. Ct. 2331 (No. 06-562), *reprinted in* 37 ENVTL. L. 411 (2007) [hereinafter NRDC Brief]. Portions of Parts I and III of this Article draw heavily from that brief.

[12] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (2006)).

[13] 42 U.S.C. § 9607(a)(4).

[14] *Id.* § 9607(a)(4)(A).

[15] *Id.* § 9607(a)(4)(B).

1986 (SARA).[16] Before SARA was passed, the courts unanimously recognized that section 107(a)(4)(B) created a right of cost recovery for private parties who cleaned up sites without having first been sued by the government, regardless of any potential liability they may have borne under the statute.[17] There was less agreement, however, regarding the availability of contribution rights for those who, in response to a lawsuit, had either undertaken cleanup measures or reimbursed the government for its cleanup costs.[18]

Congress acted against this backdrop in 1986. In passing SARA, Congress left section 107(a)(4)(B) unaltered,[19] seemingly preserving the private right of cost recovery. It did, however, move to solidify the contribution rights of two groups of parties. First, in section 113(f)(1), Congress created an express right of contribution for those who either have been or are being sued under either section 106 or 107 of CERCLA.[20] Additionally, in section 113(f)(3)(B), Congress did the same with respect to those who have entered into settlements with either the United States or an individual state.[21]

As the Eighth Circuit noted in its consideration of the *Atlantic Research* case, in the wake of SARA, but before the Supreme Court's decision in *Cooper Industries,* the lower courts began "directing traffic" between sections 107 and 113(f), generally steering all CERCLA plaintiffs who were themselves potentially liable under section 107 toward the contribution-based provisions of section 113(f), rather than the cost-recovery authority under section 107(a)(4)(B).[22] In some cases, this decision was perhaps justifiable, as parties who had been given contribution

16 Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601-9675 (2006)).

17 *See, e.g.*, Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 891-92 (9th Cir. 1986).

18 *Compare* Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 1486-90 (D. Colo. 1985) (finding a federal common law right of contribution), *and* Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27, 31 (E.D. Mo. 1985) (contribution right implied in section 107(e)(2)), *with* United States v. Westinghouse Elec. Corp., No. IP 83-9-C, 1983 WL 160587, at *4 (S.D. Ind. June 29, 1983) (no right of contribution).

19 *See* Superfund Amendments and Reauthorization Act of 1986 § 107.

20 *Id.* § 113(f)(1).

21 *Id.* § 113(f)(3)(B).

22 Atl. Research Corp. v. United States, 459 F.3d 827, 832 (8th Cir. 2006) (citing decisions from eleven circuits, including the Eighth Circuit's decision in Dico, Inc. v. Amoco Oil Co., 340 F.3d 525 (8th Cir. 2003), *cert. granted*, 127 S. Ct. 1144 (2007), *and aff'd*, 127 S. Ct. 2331 (2007)).

claims under section 113(f) tried to circumvent that section's shorter statute of limitations by availing themselves of the more favorable limitations period applicable to section 107(a) claims.[23] In other cases, however, courts steered parties to contribution-based remedies despite the fact that they had express claims under section 107(a)(4)(B), but textually much more problematic claims under section 113(f).[24] Significantly, by the time the Supreme Court heard *Cooper Industries*, at least ten circuits had determined that PRPs could not bring cost-recovery actions against other PRPs.[25]

The courts provided three main rationales for steering parties toward section 113(f). First, they cited the above-mentioned concern about the circumvention of section 113(f), often with little or no analysis regarding the applicability of that section.[26] Second, they expressed concern that any application of section 107(a)(4)(B) would result in the plaintiff being able to impose all of the relevant cleanup costs on the defendants under principles of joint and several liability, in lieu of the equitable allocation contemplated under section 113(f)(1).[27] Third, some expressed concern that allowing PRPs to bring claims under section 107(a)(4)(B) might eviscerate the contribution protection that settling parties may have received under section 113(f)(2).[28]

Tellingly, despite the courts' reluctance to apply section 107(a)(4)(B) on behalf of parties who bore potential liability under CERCLA, none of the pre-*Cooper Industries* courts denied the plaintiffs a claim. Even in the absence of a prior or pending CERCLA action, every circuit addressing the issue held that potentially liable plaintiffs had either an express contribu-

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[23] *See, e.g.*, United Techs. Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, 97-98 (1st Cir. 1994); *compare* 42 U.S.C. § 9613(g)(2)(B) (2006) (creating a six-year limitations period for most cost-recovery claims), *with* 42 U.S.C. § 9613(g)(3) (three-year period for contribution claims). The correctness of this approach will be further discussed in Section IV, *infra*.

[24] *See, e.g.*, Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1300-03 (9th Cir. 1997) (involving plaintiffs who had cleaned up a site without being subjected to any lawsuit or administrative edict).

[25] *See supra* note 22 and accompanying text. Although the Eighth Circuit cited decisions from eleven circuits, this author is not convinced that one of those cases, *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989), stands for the proposition for which it was cited.

[26] *See, e.g.*, Bedford Affiliates v. Sills, 156 F.3d 416, 424 (2d Cir. 1998); *United Techs.*, 33 F.3d at 101.

[27] *See, e.g.*, *Bedford Affiliates*, 156 F.3d at 424.

[28] *See, e.g.*, *United Techs.*, 33 F.3d at 102-03.

tion claim under section 113(f) or an implied contribution claim either under section 107 itself or some combination of sections 107 and 113(f).[29] During that time, even the United States took the position that potentially liable plaintiffs had claims absent a prior or pending lawsuit; it argued that these claims arose through a combined effect of sections 107(a) and 113(f).[30] Thus, neither the courts nor the government questioned whether the plaintiffs were entitled to relief. Rather, they merely considered which provision (or provisions) of CERCLA provided the best basis for relief.

In *Cooper Industries*, the Supreme Court held that section 113(f)(1) does not provide a contribution claim if the would-be plaintiff is not being or has not been sued under CERCLA.[31] As mentioned earlier, the *Cooper Industries* Court expressly declined to address the question, whether one who may bear partial responsibility for a contaminated site, but who cleans it up before being sued or otherwise compelled to do so, could sue other potentially liable parties for either cost recovery under section 107(a)(4)(B) or implied contribution under section 107.[32]

The combined effect of *Cooper Industries* and the preexisting law of the circuits cast a chill over private-party cleanups. At least ten circuits had already said that PRPs do not have cost-recovery claims under section 107(a)(4)(B).[33] Then, the Supreme Court indicated that PRPs do not have claims under section 113(f) either, except in narrowly-tailored circumstances.[34] The impact on those PRPs who either had engaged or were thinking about engaging in voluntary cleanups seemed all too ap-

[29] *See, e.g.*, *Bedford Affiliates*, 156 F.3d at 423-24 (plaintiff who had entered into an informal administrative agreement with the state had a claim under section 113(f)(1)); Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R., 142 F.3d 769, 776 (4th Cir. 1998) (one who has received unilateral orders from both the state and EPA may proceed under section 113); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 351-52 (6th Cir. 1998) (the recipient of a unilateral order under section 106 has a claim under the combined effect of sections 107(a) and 113(f)); Sun Co. (R&M) v. Browning-Ferris, Inc., 124 F.3d 1187, 1190-91 (10th Cir. 1997) (same as *Centerior*); *Pinal Creek*, 118 F.3d at 1300-02 (one who engages in a voluntary cleanup has a claim under a combination of sections 107(a) and 113(f)); Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 768-69 (7th Cir. 1994) (a unilateral order recipient has a contribution claim under section 113(f)(1)).

[30] *See, e.g.*, *Centerior*, 153 F.3d at 350.

[31] Cooper Indus. v. Aviall Servs., Inc., 543 U.S. 157, 168 (2004).

[32] *Id.* at 168-71.

[33] *See supra* text accompanying note 25.

[34] *Cooper Indus.*, 543 U.S. at 168.

parent and was duly noted by practitioners, academics, and courts.[35] While it is impossible to quantify the precise impacts of this chill, in terms of cleanups either cancelled or scaled back, it is clear that private party cleanups traditionally have constituted a significant percentage of the overall CERCLA cleanup world.[36] Limiting the ability of landowners to spread the cleanup costs among others who played a part in causing the relevant contamination was bound to have a dampening effect.

Remarkably, after *Cooper Industries* was decided, three circuits, including the Eighth Circuit in *Atlantic Research*, agreed to revisit their earlier holdings regarding the inapplicability of section 107(a)(4)(B) in the voluntary cleanup context.[37] Even more remarkably, all three of them reversed course to find that even potentially liable parties have such claims.[38] By contrast, in *E.I. DuPont De Nemours & Co. v. United States*, the Third Circuit

[35] *See, e.g.*, Richard O. Faulk & Cynthia J. Bishop, *There and Back Again: The Progression and Regression of Contribution Actions Under CERCLA*, 18 TUL. ENVTL. L.J. 323, 324-25 (2005); JEFFREY G. MILLER & CRAIG N. JOHNSTON, THE LAW OF HAZARDOUS WASTE DISPOSAL AND REMEDIATION: CASES, LEGISLATION, REGULATIONS, POLICIES 573-78 (Thompson/West 2d ed. 2005); Syms v. Olin Corp., 408 F.3d 95, 106 n.8 (2d Cir. 2005) (noting that, taken together, *Cooper Industries* and *Bedford Affiliates* "might discourage PRPs from voluntarily initiating clean-up, contrary to CERCLA's stated purpose[s]").

[36] In the process of writing its amicus brief in *Atlantic Research*, the Natural Resources Defense Council reviewed all CERCLA decisions appearing in Westlaw that were decided between 1995 and 2000. NRDC Brief, *supra* note 11, at 420 n.12. In reviewing these decisions, which involved 364 contaminated sites, it determined that 210 of these (nearly fifty-eight percent) involved cases that would not meet the requirements of section 113(f). *Id.* Even this picture, however, does not begin to convey the full impact that CERCLA has outside of the realm of cases that would qualify under section 113(f). It has been noted that "private-party CERCLA actions are significant not only for the numbers of cases they generate, but also for the nature of the problems addressed in those cases." MILLER & JOHNSTON, *supra* note 35, at 563-64. While the EPA and the states tend to focus on only the highest-priority sites, private parties often deal with smaller-scale contamination problems. *Id.* at 564. The net result is that these private-party actions "have the effect of dramatically expanding the scope of the CERCLA program." *Id.* at 563. While responsibility for the vast majority of these cleanups may be resolved without resorting to the courts, that does not mean they would happen without CERCLA. In many cases, it is the underlying threat of such an action that convinces those responsible to come to the table.

[37] Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc., 473 F.3d 824, 828-31 (7th Cir. 2007); Atl. Research Corp. v. United States, 459 F.3d 827, 829-31 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 1144 (2007), *and aff'd*, 127 S. Ct. 2331 (2007); Consol. Edison Co. of N.Y. v. UGI Utils., Inc., 423 F.3d 90, 97-100 (2d Cir. 2005).

[38] *Metro. Water*, 473 F.3d at 834-37; *Atl. Research*, 459 F.3d at 834-37; *Consol. Edison Co.*, 423 F.3d at 100.

found that *Cooper Industries* did not provide an adequate basis for reconsidering its prior position.[39] Coincidentally, two of the first four cases that rose to the appellate level in the wake of *Cooper Industries* involved the United States as a defendant (*Atlantic Research* and *DuPont*). Perhaps motivated by this odd circumstance, the government changed course—for the first time taking a position that neither it nor any appellate court had ever embraced—that those who voluntarily clean up contaminated properties have no claims against other PRPs under CERCLA unless they themselves have first been sued under the statute (which would qualify them for a claim under section 113(f)).[40]

This split in the circuits represented by the three circuits that reversed course, on the one hand, and *DuPont*, on the other, set the stage for the Supreme Court's grant of certiorari in *Atlantic Research*.

II

ATLANTIC RESEARCH

Atlantic Research involved a company that contaminated land in the course of retrofitting rocket motors for the United States.[41] After cleaning up the site, it sought to recover some of its cleanup costs from the United States under section 107(a)(4)(B) of CERCLA on the theory that the government also bore liability under section 107(a).[42] The district court granted the government's motion to dismiss, relying on the Eighth Circuit's pre-*Cooper Industries* precedent, *Dico, Inc. v. Amoco Oil Co*.[43] The Eighth Circuit reversed, finding that *Cooper Industries* undermined the logic of *Dico*.[44]

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[39] E.I. DuPont De Nemours & Co. v. United States, 460 F.3d 515, 538-39 & n.27 (3d Cir. 2006), *cert. granted and judgment vacated*, 127 S. Ct. 2971 (2007).

[40] The government apparently first advanced in full form the legal theories it ultimately urged upon the Supreme Court in *Atlantic Research* in an amicus brief it submitted to the Seventh Circuit in *Metropolitan Water*. *See* Brief of the United States as Amicus Curiae at 10-13, *Metro. Water*, 473 F.3d 824 (No. 05-3299). Interestingly, the United States did not develop the same arguments in its briefing at the Eighth Circuit level in *Atlantic Research* itself. Instead, it focused its arguments on negating Atlantic Research's implied contribution theory. *See* Brief of the Appellee at 16-17, *Atl. Research*, 459 F.3d 827 (No. 05-3152).

[41] *Atl. Research*, 127 S. Ct. at 2335.

[42] *Id.*

[43] *Id.* (referencing Dico, Inc. v. Amoco Oil Co., 340 F.3d 525 (8th Cir. 2003)).

[44] *Atl. Research*, 459 F.3d at 829 & n.2, 830 & n.4.

Once the issue reached the Supreme Court, Justice Thomas, writing for a unanimous Court, analyzed the statute in two steps. First, he interpreted section 107(a) independent of the rest of the statute.[45] Next, he addressed the government's argument that the perceived tension with section 113(f) should influence the Court's interpretation of section 107(a)(4)(B).[46]

To set the stage for consideration of the Court's section 107(a) discussion, it is worth summarizing the relevant portions of that subsection. Section 107(a) identifies four categories of liable parties under CERCLA, including: (1) the owner and operator of the relevant facility; (2) anyone who owned or operated the facility when the disposal occurred; (3) anyone who arranged for disposal of hazardous substances at the site; and (4) transporters, if they selected the site to which to bring the relevant substances.[47] It further provides that, subject only to the defenses set forth in section 107(b), these parties "shall be liable for — (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; [and] (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan . . . ."[48]

In analyzing these provisions, the Court first stressed that the statute must be read as a whole.[49] Applying this maxim, the Court determined that:

> [T]he language of subparagraph (B) can be understood only with reference to subparagraph (A). The provisions are adjacent and have remarkably similar structures. Each concerns certain costs that have been incurred by certain entities and that bear a specified relationship to the national contingency plan. Bolstering the structural link, the text also denotes a relationship between the two provisions. By using the phrase "other necessary costs," subparagraph (B) refers to and differentiates the relevant costs from those listed in subparagraph (A). In light of the relationship between the subparagraph, it is natural to read the phrase "any other person" by referring to the immediately preceding subparagraph (A), which permits suit only by the United States, a State, or an Indian tribe. The phrase "any other person" therefore means any person

[45] *Atl. Research*, 127 S. Ct. at 2335-37.

[46] *Id.* at 2337-39.

[47] 42 U.S.C. § 9607(a) (2006).

[48] *Id.*

[49] *Atl. Research*, 127 S. Ct. at 2336 (quoting King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991)).

> other than those three. Consequently, the plain language of subparagraph (B) authorizes cost-recovery actions by any private party, including PRPs.[50]

The Court went on to point out that the government's reading of the "any other person" language would belie the symmetry between the two subparagraphs:

> The Government's interpretation makes little textual sense. In subparagraph (B), the phrase "any other necessary costs" and the phrase "any other person" both refer to antecedents–"costs" and "person[s]"–located in some previous statutory provision. Although "any other necessary costs" clearly references the costs in subparagraph (A), the Government would inexplicably interpret "any other person" to refer not to the persons listed in subparagraph (A) but to the persons listed as PRPs in paragraphs (1)-(4). Nothing in the text of § 107(a)(4)(B) suggests an intent to refer to antecedents located in two different statutory provisions. Reading the statute in the manner suggested by the Government would destroy the symmetry of §§ 107(a)(4)(A) and (B) and render subparagraph (B) internally confusing.[51]

Justice Thomas also noted that, given the breadth of CERCLA's liability scheme, the government's reading of section 107(a)(4)(B) would have stripped that provision of virtually all operative effect:

> [T]he statute defines PRPs so broadly as to sweep in virtually all persons likely to incur cleanup costs. Hence, if PRPs do not qualify as "any other person" for purposes of § 107(a)(4)(B), it is unclear what private party would. The Government posits that § 107(a)(4)(B) authorizes relief for "innocent" private parties-for instance, a landowner whose land has been contaminated by another. But even parties not responsible for contamination may fall within the broad definitions of PRPs in §§ 107(a)(1)-(4). The Government's reading of the text logically precludes all PRPs, innocent or not, from recovering cleanup costs. Accordingly, accepting the Government's interpretation would reduce the number of potential plaintiffs to almost zero, rendering § 107(a)(4)(B) a dead letter.[52]

The Court also responded to the government's argument that Atlantic Research's interpretation would create a statutory redundancy in section 107(a)(4)(B). As explained by Justice Thomas:

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[50] *Id.* (footnotes and citations omitted).

[51] *Id.*

[52] *Id.* at 2336-37 (footnote and citations omitted).

> According to the Government, our interpretation suffers from [an] infirmity because it causes the phrase "any other person" to duplicate work done by other text. In the Government's view, the phrase "any other necessary costs" "already precludes governmental entities from recovering under" § 107(a)(4)(B). Even assuming the Government is correct, it does not alter our conclusion. The phrase "any other person" performs a significant function simply by clarifying that subparagraph (B) excludes the persons enumerated in subparagraph (A). In any event, our hesitancy to construe statutes to render language superfluous does not require us to avoid surplusage at all costs. It is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render the entire provision a nullity.[53]

In addressing the interface between sections 107(a) and 113(f), the Court turned to the concerns that had led the lower courts to "direct traffic" toward section 113(f); i.e., that allowing PRPs to pursue cost recovery would allow them to circumvent section 113(f)'s shorter statute of limitations at will, that it would inappropriately allow plaintiff PRPs to use joint and several liability to impose all of the liability onto defendant PRPs, and that it would eviscerate contribution protection that prior settling parties may have received under section 113(f)(2).[54]

The Court found the first of these concerns to be baseless, at least in the context of voluntary cleanups.[55] First, it noted that it already had recognized in *Cooper Industries* that sections 107(a) and 113(f) provide "clearly distinct" remedies.[56] Second, citing both CERCLA and Black's Law Dictionary, the Court expanded on the differences between cost recovery and contribution, eventually summarizing its discussion in the following terms:

> Section 113(f)(1) authorizes a contribution action to PRPs with common liability stemming from an action instituted under § 106 or § 107(a). And § 107(a) permits cost recovery (as distinct from contribution) by a private party that has itself incurred cleanup costs. Hence, a PRP that pays money to satisfy a settlement agreement or a court judgment may pursue § 113(f) contribution. But by reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under § 107(a). As a result, though eligible to seek contribution under § 113(f)(1),

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[53] *Id.* at 2337 (citation omitted).

[54] *Id.*; *see supra* text accompanying notes 22-28.

[55] *Atl. Research*, 127 S. Ct. at 2337-38.

[56] *Id.* at 2337 (quoting Cooper Indus. v. Aviall Servs., 543 U.S. 157, 163 n.3 (2004)).

> the PRP cannot simultaneously seek to recover the same expenses under § 107(a).[57]

While acknowledging that this reasoning does not resolve all issues regarding the intersection of sections 107(a) and 113(f),[58] the Court nonetheless concluded that "at least in the case of reimbursement, the PRP cannot choose the 6-year statute of limitations for cost-recovery actions over the shorter limitations period for § 113(f) contribution claims."[59]

The Court gave even shorter shrift to the government's argument that allowing PRPs to file suit under section 107(a)(4)(B) might result in full recovery under principles of joint and several liability, rather than the sort of equitable distribution contemplated under section 113(f)(1).[60] First, it noted that this is not a matter of the plaintiffs choosing between the two remedies; for those who engage in voluntary cleanups, the Court stated, "[t]he choice of remedies simply does not exist" because they cannot bring contribution claims.[61] More significantly, the Court determined that a defendant PRP in a section 107(a) suit may "blunt any inequitable distribution of costs by filing a § 113(f) counterclaim," which "would necessitate the equitable apportionment of costs among the liable parties, including the PRP that filed the § 107(a) action."[62]

Turning to the potential impacts on contribution protection, which was the point upon which the government placed its heaviest reliance at oral argument,[63] the Court summarily concluded that cost-recovery claims are not barred under the literal terms of section 113(f)(2).[64] The Court was not deterred by this, however. It simply indicated why it found this outcome not to be as troubling as the government did:

> For several reasons, we doubt this supposed loophole would discourage settlement. First, as stated above, a defendant PRP

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[57] *Id.* at 2338.

[58] *Id.* at 2338 n.6; *see also infra* Part IV.

[59] *Atl. Research*, 127 S. Ct. at 2338; *see also supra* note 23 and accompanying text.

[60] *Id.* at 2338-39.

[61] *Id.* at 2339.

[62] *Id.* (citations omitted).

[63] *See* Transcript of Oral Argument at 21-22, *Atl. Research*, 127 S. Ct. 2331 (No. 06-562) (where the government's lawyer, Thomas Hungar, argued that "the first and foremost way in which the sky is falling is that the court of appeals approach, Respondent's approach would eviscerate the settlement bar"); *see also id.* at 52 (where Justice Scalia refers to this as the government's "principal argument").

[64] *Atl. Research*, 127 S. Ct. at 2339.

> may trigger equitable apportionment by filing a § 113(f) counterclaim. A district court applying traditional rules of equity would undoubtedly consider any prior settlement as part of the liability calculus. Second, the settlement bar continues to provide significant protection from contribution suits by PRPs that have inequitably reimbursed the costs incurred by another party. Third, settlement carries the inherent benefit of finally resolving liability as to the United States or a State.[65]

Finally, in a footnote, the Court determined that since it was recognizing an express right of action for PRPs in section 107(a), there was no need for it to address whether that provision also provides an implied right of contribution for PRPs who are ineligible for relief under section 113(f).[66]

III

A CRITIQUE

As an exercise in statutory interpretation, Justice Thomas' opinion was short and to-the-point. Its brevity is perhaps unsurprising, given both the straightforward thrust of the statutory provisions and the clear consensus that existed in the Court.[67]

More importantly, the Court is correct, for both the reasons it set forth and many others. In this latter regard, for example, the structural parallels between subsections 107(a)(4)(A) and (B) are even more extensive than the Court lets on. In addition to the symmetries noted by the Court, both subparagraphs create causes of action, albeit in different sets of parties, with the potential defendants being named before the plaintiffs. Moreover, both refer to the same categories of costs, and both use the same passive verb formulation, "incurred by."[68] Additionally, the natural understanding of the "any other person" language in section 107(a)(4)(B) is further underscored by the use of the phrase

[65] *Id.* (citation and footnote omitted).

[66] *Id.* at 2339 n.8.

[67] The extent of this consensus was revealed at oral argument, where all of the Justices who spoke (Justice Thomas was the only Justice who did not speak) expressed some degree of skepticism about the government's interpretation. Two comments from Justices whom one might have expected to be friendly to the government's position are illustrative. Chief Justice Roberts characterized the government's reading, and its subsequent defense thereof, as "glid[ing] over" a "great [structural] difficulty" and, by contrast, termed Atlantic Research's argument as reflecting "the most natural reading" of the statute. Transcript of Oral Argument, *supra* note 63, at 9. And for his part, Justice Scalia referred to the government's reading of the term "other" as "strange." *Id.* at 52.

[68] 42 U.S.C. § 9607(a)(4)(A)-(B) (2006).

"other person" in section 111(a) of CERCLA, where, again, the contrast is between governmental entities and "other person[s]."[69]

Beyond these basic statutory dynamics, the government's reading of section 107(a)(4)(B) suffered from serious problems with respect to both how it would have worked and what its effect would have been. While the Court's opinion touched only on the second of these concerns, the Court was aware of them both. And there was more to the second of these concerns than the opinion demonstrates.

Perhaps the best way to begin discussing these problems is to start with the simple statement that the vast majority of private parties who clean up contaminated property either own the property or operate a business thereon, or both. Indeed, as was mentioned at oral argument,[70] in writing its amicus brief in *Atlantic Research*, the Natural Resources Defense Council (NRDC) researched all CERCLA cases reported on Westlaw between the years 1995 and 2000. In so doing, it identified 210 private-party cases where cost recovery would be at issue (because they involved situations that did not meet the requirements of section 113(f)).[71] Of these, only one involved a plaintiff that, it appeared, would not clearly qualify as either an owner and/or an operator under section 107(a).[72]

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[69] Section 111(a) speaks to the uses to which monies in the Hazardous Substance Superfund (Fund) may be put. Subsection 111(a)(1) specifies that these monies may be used for the "[p]ayment of governmental response costs incurred pursuant to [§ 104] . . . ." 42 U.S.C. § 9611(a)(1). By contrast, section 111(a)(2) provides that these funds may also be made available for costs incurred by "any other person," so long as the costs are approved by the responsible federal official. 42 U.S.C. § 9611(a)(2). There is simply no hint that the phrase "other person" is meant to exclude anyone other than the governmental entities who are covered already under the prior provision. Indeed, Congress acted on the assumption that PRPs are "other person[s]" under this language when it enacted section 106(b)(2)(D), in which it provided that even those unilateral-order recipients who prove to be liable under section 107 are sometimes entitled to reimbursement from the Fund after they comply with those orders. 42 U.S.C. § 9606(b)(2)(D); *see also* Wagner Seed Co. v. Bush, 946 F.2d 918, 929 & n.5 (D.C. Cir. 1991) (Williams, J., dissenting).

[70] Transcript of Oral Argument, *supra* note 63, at 35 (argument of Owen T. Armstrong, counsel for Atlantic Research).

[71] *See* NRDC Brief, *supra* note 11, at 420 n.12.

[72] *Id.* An argument could be made that even the plaintiff involved in the 210th case may have qualified as an "operator" under section 107(a)(1). *See* Ohm Remediation Servs. v. Evans Cooperage Co., 116 F.3d 1574, 1577-78 (5th Cir. 1997) (brought by a cleanup contractor).

In *Atlantic Research*, the Supreme Court correctly noted that the fact that virtually all those who engage in voluntary cleanups qualify as either owners or operators means that they meet the prima facie elements of liability under section 107(a)(1), regardless of whether they played any role in causing the relevant contamination.[73] This dynamic, of course, raises the very concern that, in the end, troubled the Court (i.e., that "accepting the Government's interpretation would reduce the number of potential plaintiffs to almost zero, rendering § 107(a)(4)(B) a dead letter.").[74]

The government's response to this problem was basically to argue that those who come within either CERCLA's defenses (such as the innocent landowner defense)[75] or its liability exclusions (such as the prospective purchaser exclusion)[76] could still bring claims under section 107(a)(4)(B).[77] This solution, however, suffers from several problems. First, the government never gave a convincing explanation as to how issues relating to a would-be cost-recovery plaintiff's liability would be resolved. At the time such a plaintiff files a section 107 claim, the plaintiff would of course be presumed to be innocent in the eyes of the law, regardless of any interest it might have in the contaminated property. This is so because there is simply nothing in either CERCLA or any other law that requires such a plaintiff to self-identify as a liable party under section 107 at the time it files its complaint. An obvious corollary is that the defendant in any such action would have the burden of both pleading and proof on any issues relating to the plaintiff's liability.[78]

Given this presumption of innocence, the question arises as to how the defendant would put the plaintiff's liability at issue. Presumably, the defendant would try to raise it as a defense. But

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[73] *Atl. Research*, 127 S. Ct. at 2336-37.

[74] *Id.* at 2337.

[75] *See* 42 U.S.C. §§ 9607(b)(3), 9601(35) (2006).

[76] *See* 42 U.S.C. §§ 9607(r), 9601(40).

[77] Brief for the United States at 15-16, *Atl. Research*, 127 S. Ct. 2331 (No. 06-562) (regarding the prospective purchaser defense); Transcript of Oral Argument, *supra* note 63, at 6-9 (argument of Thomas Hungar, counsel for the United States regarding those to whom he refers as "so-called innocent person[s] under the statute").

[78] This, of course, is consistent with how tort law deals with the issue of the plaintiff's potential role in contributing to its own injuries; that is, the defendant generally bears the burden of both pleading and proof with respect to defenses such as contributory and comparative negligence. DAN B. DOBBS, THE LAW OF TORTS, § 198, at 493 (West Group 2000).

could this be done consistently with section 107(a), which indicates that liability under that section is subject only to the defenses in section 107(b)?[79] When several of the justices raised this procedural awkwardness at oral argument,[80] the best the government could do was to argue that "the court could obviously structure the issues as it saw fit but certainly [the innocence of the person who was bringing the action] would be one of the issues in the case . . . ."[81] Regardless, the plain truth is that nothing in CERCLA seems to contemplate an unstated affirmative defense having nothing to do with the defendant's connection to either the site or the contamination thereof.

On the substantive question regarding who, in the end, could bring a cost-recovery suit under the government's reading of section 107(a)(4)(B), the Court's responses, though brief, spoke volumes. First, the Court highlighted the implausibility of relying on later-enacted defenses or exclusions to interpret a provision—section 107(a)(4)(B)—that has been in CERCLA since its initial enactment.[82] And second, the Court correctly noted that the government's interpretation would, in any event, "reduce the number of potential plaintiffs to almost zero."[83] Again, this conclusion is certainly supported by NRDC's research.[84] It is also worth pointing out that, despite arguing that its interpretation would have left section 107(a)(4)(B) with substantial operative effect, the government failed to cite a single case in which a landowner (or anyone else) had filed and successfully prosecuted an action under its reading of that provision.[85]

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[79] *See* 42 U.S.C. § 9607(a).

[80] Transcript of Oral Argument, *supra* note 63, at 6-10.

[81] *Id.* at 8.

[82] *Atl. Research*, 127 S. Ct. at 2337 n.4 ("[I]t would be implausible at best to conclude that § 107(a)(4)(B) lay dormant until the enactment of § 107(r)(1) in 2002."). While Justice Thomas mentioned only the prospective purchaser exclusion, and not the innocent landowner defense, this is presumably because the government did not mention the latter defense in its briefs. Congress created the innocent landowner defense in 1986, as part of SARA. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 101, 100 Stat. 1613 (codified as amended at 42 U.S.C. § 9601 (2006)). Hence, the same logic applies—the fact that Congress enacted these defenses well after it created section 107(a)(4)(B) belies any argument that the parties who might qualify for those defenses were those whom Congress had in mind when it created the private right of cost recovery.

[83] *Atl. Research*, 127 S. Ct. at 2337.

[84] *See supra* text accompanying notes 70-72.

[85] *See* Brief for the United States, *supra* note 77, at 15-16.

The Supreme Court was also on solid footing in its treatment of the alleged tension between its reading of section 107(a)(4)(B) and the later-enacted section 113(f). As the Court pointed out, nothing in section 113(f) suggests that Congress was using the term "contribution" in a manner different from its traditional common law meaning of a "tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault."[86] Once one understands the distinctness of the legal theories underlying cost-recovery and contribution actions, it becomes clear that the cost-recovery statute of limitations is the only one that can apply to voluntary cleanups.

The Court's analysis regarding a section 107(a)(4)(B) defendant's ability to preclude any possibility of joint and several liability by successfully bringing a counterclaim is also compelling. The plain language of section 113(f)(1) allows for a claim against "any other person who is liable or potentially liable under [section 107]";[87] there is simply no reason why this language cannot be read as the Court read it: to include counterclaims against plaintiffs who may bear responsibility. The government previously conceded that the statute worked this way when it invoked section 107(a)(4)(A), despite its own potential liability at a given site.[88]

The Court's response regarding what the government termed the evisceration of contribution protection[89] is likely to be the most controversial part of the opinion. One reason it may be controversial is that Justice Thomas took the issue on despite the fact that, technically speaking, it was not before the Court. The defendant, the United States, had not entered into a prior settle-

[86] *Atl. Research*, 127 S. Ct. at 2337-38 (quoting BLACK'S LAW DICTIONARY 353 (8th ed. 1999)). Here also, the tort analogy discussed is instructive. *See supra* note 78. Again, under tort law one who may bear partial responsibility for her own harm need not sue in contribution. *See* DOBBS, *supra* note 78, §§ 197-98, at 491-94. Instead, she may sue anyone else who may bear responsibility for her harm for full recovery. *See id.* The defendant in any such action generally would then bear the burden of both pleading and proof with respect to defenses such as contributory and comparative negligence. *Id.* § 198, at 494.

[87] 42 U.S.C. § 9613(f) (2006).

[88] United States v. Chrysler Corp., 157 F. Supp. 2d 849, 860-61 (N.D. Ohio 2001).

[89] *See Atl. Research*, 127 S. Ct. at 2337; *see also* Transcript of Oral Argument, *supra* note 63, at 21-22 (oral argument of Thomas Hungar, counsel for the government), *and* Brief for the United States, *supra* note 77, at 31.

ment and hence, had no claim to contribution protection.[90] The second reason is that, as will be seen below, the Court's logic could lead to dramatic, real-world consequences that could upset the expectations of some settling parties.

The first of these criticisms is probably valid, although it is easy to see why the Court weighed in with such definitive language ("[t]he settlement bar does not by its terms protect against cost-recovery liability under § 107(a)")[91] given that the government placed such heavy reliance on this proverbial gorilla in the closet. It is even easier when one considers how readily this conclusion flows from the rest of the Court's discussion emphasizing the separateness and distinctness of CERCLA's cost-recovery and contribution remedies. The Court is indisputably correct that section 113(f)(2) protects settling parties only from claims based in contribution. Thus, once one recognizes that section 107(a)(4)(B) claims do not sound in contribution, it becomes obvious that settling parties may still be exposed to cost-recovery claims.

To understand the potential real-world consequences, it may help to imagine a hypothetical in which the EPA deems two parties, Company A and Company B, to be equally responsible for having caused a $20 million contamination problem. Imagine further that Company A voluntarily remediated half of the contamination at a cost of $10 million, and that the EPA then entered into a settlement with Company B, pursuant to which Company B agreed to complete the final $10 million worth of cleanup measures in exchange for contribution protection regarding the entire cleanup. And finally, imagine that Company A then sues Company B under section 107(a)(4)(B), arguing that Company B should bear more than half of the cleanup costs.

In line with the above, Justice Thomas' first response to this hypothetical would be to concede that Company A has a cause of action against Company B under section 107(a)(4)(B) and that this cause of action is not subject to the contribution-protection bar in section 113(f)(2).[92] He couples this, however, with the conclusion that once Company B raises the issue of Company A's liability through a counterclaim, the "district court applying

[90] *See Atl. Research*, 127 S. Ct. at 2335; *see also* Atl. Research Corp. v. United States, 459 F.3d 827, 829-30 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 1144 (2007), *and aff'd*, 127 S. Ct. 2331 (2007).

[91] *Atl. Research*, 127 S. Ct. at 2339.

[92] *See id.*

traditional rules of equity would undoubtedly consider any prior settlement as part of the liability calculus."[93] While this seems correct, it may be of small consolation to Company B, which now has to both defend against a lawsuit and, in the course of that defense, convince the court of the appropriateness of EPA's view that Company B should only bear half the cleanup costs. While, in many cases, the court may conclude that Company B has paid its fair share, this outcome would not be a foregone conclusion in all cases. Moreover, Company B will at a minimum need to pay its defense costs, which would be either non-existent or greatly reduced if contribution protection were applicable.

Having said all this, this author keeps coming back to the fact that, dictum though it may be, the Court's conclusion is indisputably correct. Contribution protection is what it is—protection against contribution claims.[94] I will have a few more words to say about the extent to which the lower courts are likely to apply this conclusion in Part IV. In the meantime, I will note only that the text of section 113(f)(2) always has revealed that its protection is less than absolute. Not only is it limited to contribution claims, but even where it applies, section 113(f)(2) extends only to matters addressed in the settlement.[95] Significantly, the government consistently has conceded that, in many cases, it would be unfair for it to characterize cleanup costs incurred by others as matters addressed.[96] The government also has conceded that the courts can review such characterizations as part of their fairness

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[93] *See id.*

[94] For whatever it is worth, the government actually agreed with the Court that contribution protection has no effect on section 107(a) claims (although it disagreed as to the consequences that should flow from this conclusion). In the government's Reply Brief, for example, it conceded that those to whom it referred as "non-settling sovereigns" and "'innocent' private parties" would not be bound by any contribution protection provisions the EPA or a state might have granted under section 113(f)(2) when the former entities proceed under either section 107(a)(4)(A) or (B), respectively. Reply Brief for the United States at 16 n.8, *Atl. Research*, 127 S. Ct. 2331 (No. 06-562). By "non-settling sovereign," the United States presumably was referring to any sovereign other than the one which doled out the contribution protection. By "innocent" private party, the government meant one that has no liability itself under CERCLA.

[95] 42 U.S.C. § 9613(f)(2) (2006).

[96] Memorandum from Bruce S. Gelber, Deputy Chief, Envtl. Enforcement Section, Env't & Natural Res. Div., U.S. Dep't of Justice & Sandra L. Conners, Dir., Reg'l Support Div., Office of Site Remediation Enforcement, U.S. Envtl. Prot. Agency, to all EES Attorneys and Paralegals 4-5 (Mar. 4, 1997), *available at* http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/defin-cersett-mem.pdf.

analysis when the signatories to any such settlements move to have them entered as consent decrees.[97]

Finally, it is worth noting that, although the Court's opinion was short and to-the-point, Justice Thomas had several other strong arguments upon which he could have drawn, and which lend further support to the correctness of the Court's result. For example, while the government bemoaned the perceived structural tension between the Court's reading of section 107(a)(4)(B) and section 113(f), it ignored the fact that its reading of section 107(a)(4)(B) would have led to a far greater structural problem. Although *Atlantic Research* did not pose the issue of what claim or claims those who receive unilateral orders under section 106 may have against other PRPs, it seems evident that under the government's interpretation they would have had none. Their liability status would preclude any cost-recovery claims under section 107(a)(4)(B), and the absence of a settlement would preclude any contribution claims under section 113(f)(3)(B).[98] Moreover, it appears highly unlikely that they would have any contribution claims under section 113(f)(1). This is so because EPA-issued unilateral orders under section 106 are in all likelihood not "civil action[s] under section 9606 . . . or under section 9607(a)."[99] If not, section 113(f)(1) simply would not apply. Thus, if the government had prevailed in *Atlantic Research*, the result would have been a strange dichotomy. It would allow a party who enters into either a judicial or administrative settlement with the EPA to have a contribution claim under section 113(f)(3)(B). But, a party to whom the EPA issued a unilateral order would have had no claim at all. It seems highly unlikely that Congress would have intended for the EPA's choice as to

[97] *Id.*; *see also* Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 766-67 & n.7 (7th Cir. 1994) (deeming cleanup work Akzo undertook prior to the entry of the relevant consent decree not to be a "covered matter" thereunder).

[98] 42 U.S.C. §§ 9607(a)(4)(B), 9613(f)(3)(B).

[99] 42 U.S.C. § 9613(f)(1). Section 122(g)(1) suggests as much by establishing a juxtaposition between "administrative or civil action under section 9606 or 9607." 42 U.S.C. § 9622(g)(1); *see also* BP Am. Prod. Co. v. Burton, 127 S. Ct. 638, 648 (2006) (deeming an administrative order not to be an "action" under the Mineral Leasing Act). It is also worth noting that the Supreme Court mentioned the existence of the issue under CERCLA in *Cooper Industries*, but declined to address it. 543 U.S. 157, 167 n.5 (2004).

how to exercise its enforcement discretion to have such drastic consequences.[100]

The correctness of the Court's result draws further support from the legislative history of both CERCLA and SARA. When it first passed CERCLA, Congress had two interrelated goals: to promote cleanup activities and to "assur[e] that those who caused chemical harm bear the costs of that harm . . . ."[101] With respect to promoting cleanup, Congress wanted to supplement governmental efforts by "induc[ing] . . . potentially liable persons to pursue appropriate environmental response actions voluntarily."[102] Moreover, in the context of private party cleanups, the purposes of promoting cleanup and holding accountable those responsible were linked. As the Supreme Court previously recognized in *Key Tronic Corp. v. United States*, the purpose of providing for private cost recovery was "to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others."[103]

In passing SARA, Congress made no changes to the relevant portions of section 107.[104] Given that, it is unsurprising that no legislative history bearing directly on section 107(a)(4)(B) exists. SARA, however, does have legislative history relating to the ability of those who bear potential liability under the statute to

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100 The jarring nature of this anomaly is brought further into focus when one considers that, given the frequent applicability of joint and several liability under CERCLA, (*see, e.g.*, O'Neil v. Picillo, 883 F.2d 176, 183 (1st Cir. 1989)) the EPA often would have the power to issue a unilateral order requiring one out of perhaps dozens of PRPs to implement an entire remedy, even though these remedies often involve tens of millions of dollars in response costs. Under the government's reading of section 107(a)(4)(B), the recipient of such an order would have had no way to spread the costs of such a cleanup among the other jointly and severally liable PRPs. The EPA's settlement leverage, which has always been great under the statute (*see, e.g.*, 42 U.S.C. § 9607(c)(3)) will have been truly breathtaking if it could threaten at any time to issue any jointly and severally liable PRP a unilateral order depriving it of any recourse against other PRPs.

101 S. REP. NO. 96-848, at 13 (1980); *see also* United States v. Olin Corp., 107 F.3d 1506, 1514 (11th Cir. 1997) (citing "Congress's twin goals of cleaning up pollution . . . and of assigning responsibility to culpable parties").

102 H.R. REP. NO. 96-1016, at 33 (1980); *see also* S. REP. NO. 96-848, at 31 ("This liability standard is intended to induce potentially liable persons to voluntarily mitigate damages rather than simply rely on the government to abate hazards.").

103 Key Tronic Corp. v. United States, 511 U.S. 809, 819 n.13 (1994) (quoting FMC Corp. v. Aero Indus., Inc., 998 F.2d 842, 847 (10th Cir. 1993)).

104 *See* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 107, 100 Stat. 1613 (codified as amended at 42 U.S.C. § 9607 (2006)).

bring cost-recovery actions. Specifically, the House Energy and Conference Committee stated:

> [Section 113(f)] does not affect the right of the United States to maintain a cause of action for cost recovery under Section 107 or injunctive relief under Section 106, whether or not the U.S. was an owner or operator of a facility or a generator of waste at the site.[105]

Read fairly, this statement supports two important propositions: first, that the Committee agreed with the unanimous case law that one's potential liability should not preclude one from using section 107(a) to seek cost recovery; and second, that section 113(f) should not be read as eviscerating this authority.

In the end, one can only conclude that *Atlantic Research* was correctly decided. The Court's unanimity only serves to underscore one's sense of wonder at how so many lower courts got it wrong the first time around.

IV

Remaining Issues

Taken together, *Cooper Industries* and *Atlantic Research* resolve many important issues regarding the nature and viability of private-party cleanup claims under CERCLA. Still, however, the opinions leave several significant issues unresolved. As previously mentioned, one of these unresolved issues may be the question of whether a settling party to whom the government has given contribution protection under section 113(f)(2) may be sued by those who otherwise have valid cost-recovery claims.[106] Again, while the Court spoke definitively on this question by stating "[t]he settlement bar does not by its terms protect against cost-recovery liability under § 107(a),"[107] the issue, as Justice Ginsburg pointed out at oral argument, technically was not before the Court because the defendant in the case, the United States, had received no contribution protection.[108] Still, it seems likely that the lower courts will follow the Supreme Court's guidance for three reasons: (1) it was carefully considered; (2) it

105 H.R. Rep. No. 99-253, at 79-80 (1985).

106 *See supra* text accompanying notes 86-88.

107 United States v. Atl. Research Corp., 127 S. Ct. 2331, 2339 (2007).

108 *See* Transcript of Oral Argument, *supra* note 63, at 33 (colloquy between Justice Ginsburg and Owen T. Armstrong, counsel for Atlantic Research).

constituted an important component of the Court's analysis; and, perhaps most importantly, (3) it is correct.[109]

In order to understand what other issues these two opinions leave unresolved, it may help to consider the categories of potential plaintiffs who may seek to rely on CERCLA to impose some, or all, of their cleanup costs on others. By my count, there are at least seven such categories:

(1) those who voluntarily clean up contamination despite the fact that they bear no potential liability under section 107;
(2) those who do the same despite bearing potential liability under the statute;
(3) those who either are being or have been sued under CERCLA;
(4) those who have entered into either a judicial or administrative settlement with either the EPA or a state that qualifies under section 113(f)(3)(B);
(5) those who remediate sites pursuant to EPA-issued unilateral orders under section 106;
(6) those who either are being or have been compelled to clean up a site under either state law or a federal law other than CERCLA, through some mechanism other than a settlement (e.g., a unilateral order or a judicial decree); and
(7) those who have been compelled to reimburse either a state or a private party for cleanup costs in a state-law-based judicial action that did not result in a consent decree.

Atlantic Research and *Cooper Industries* speak most clearly to the first four of those categories. On its face, *Atlantic Research* dealt only with the second category—PRPs (like Atlantic Research) who voluntarily clean up sites and then sue others to collect some or all of their cleanup costs.[110] But both the parties and the Court assumed that those potential plaintiffs in the first category (to the extent that they exist) would have claims under section 107(a)(4)(B), and one can safely assume that issue is set-

[109] *See, e.g.*, *In re* Troff, 488 F.3d 1237, 1241 (10th Cir. 2007) (quoting Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996)) (court considered itself "bound by Supreme Court dicta almost as by the Court's outright holdings"); McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991) ("[F]ederal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement.").

[110] *Atl. Research*, 127 S. Ct. at 2335.

tled.[111] Similarly, while neither case actually dealt with someone in either the third or fourth categories (those who either have been sued under CERCLA or who have entered into qualifying settlements), both decisions operate on the basic assumption that the potential plaintiffs in these categories will at least have contribution claims under subsections 113(f)(1) and (f)(3)(B), respectively.[112]

Two interesting issues remain, however, regarding the third and fourth categories. In *Atlantic Research*, Justice Thomas specifically noted that some of the potential plaintiffs who appear to qualify for contribution claims under section 113(f)(1) and/or section 113(f)(3)(B) also have arguable claims for cost recovery.[113] The Court, however, saw no need to resolve this potential overlap:

> [W]e recognize that a PRP may sustain expenses pursuant to a consent decree following a suit under § 106 or § 107(a). In such a case, the PRP does not incur costs voluntarily but does not reimburse the costs of another party. We do not decide whether these compelled costs of response are recoverable under § 113(f), § 107(a), or both.[114]

Thus, the lower courts will need to revisit this issue in light of *Atlantic Research*. To date, when faced with this overlap, the courts have favored the specificity of section 113(f) over the general cost-recovery authority in section 107(a)(4)(B).[115] In so doing, they have been motivated by their perception that the claims under section 113(f) fit within the classic definition of what contribution is all about.[116] It may be that *Atlantic Research* will lead them to conclude that these potential plaintiffs can choose between the various provisions. What seems certain, at least, is that "none of the above" is not an option. The real question is which provisions are available to these settling parties, not whether they have a claim at all.

The second extant issue regarding the third and fourth categories, as I have denominated them, relates to the proper identification of the potential plaintiffs who should fit within the fourth

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111 *See id.* at 2336.

112 This statement is subject to a slight qualification based on the issue discussed in the two immediately-following paragraphs.

113 *Atl. Research*, 127 S. Ct. at 2338 n.6.

114 *Id.* (citations omitted).

115 *See, e.g.*, Bedford Affiliates v. Sills, 156 F.3d 416, 424 (1998).

116 *See, e.g.*, *id.*

category. Section 113(f)(3)(B) confers a right of contribution on "[any] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement . . . ."[117]

On its face, this language appears to create an extremely broad right of contribution in all those who have resolved their cleanup liabilities through settlements with either the EPA or the states, regardless of whether the settlements required the settling parties to undertake cleanup actions or reimburse the relevant sovereigns for cleanup costs. Moreover, this right appears to apply regardless of whether the relevant settlement occurs under the auspices of CERCLA or some other federal or state law. The conclusion that settlements under both federal and state law qualify is strongly suggested by the fact that while section 113(f)(3)(B) on its face contemplates that it applies to state-generated administrative settlements, CERCLA itself gives the states no power to enter into such settlements.[118]

The Second Circuit muddied the waters on this second issue in the *Consolidated Edison* case. In an otherwise exemplary opinion, the court indicated that section 113(f)(3)(B) creates "a contribution right only when liability for CERCLA claims, rather than some broader category of legal claims, is resolved."[119] The court defended this conclusion by explaining that "[it] seems clear because resolution of liability for 'response action[s]' is a prerequisite to a section 113(f)(3)(B) suit—and a 'response action' is a CERCLA-specific term describing an action to clean up a site or minimize the release of contaminants in the future."[120]

In this author's view, the Second Circuit's analysis is problematic. It ignores that section 113(f)(3)(B) itself contemplates that it applies to state settlements. Additionally, the Second Circuit's opinion places too much stock in the use of the term "response action."[121] In that regard, the court's logic is directly contrary to

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117 42 U.S.C. § 9613(f)(3)(B) (2006).

118 *Compare* 42 U.S.C. § 9606(a) (giving the EPA, but not the states, the authority to issue unilateral orders), *and* § 9622(g)(4) (authorizing the EPA, but not the states, to enter into administrative cost-recovery settlements in limited circumstances), *with* § 9607(a)(4)(A) (authorizing both the EPA and the states to file judicial cost-recovery actions).

119 Consol. Edison Co. of N.Y. v. UGI Utils., Inc., 423 F.3d 90, 95 (2d Cir. 2005).

120 *Id.* at 95-96.

121 *See id.*

the Third Circuit's analysis on a conceptually identical issue in *United States v. Rohm & Haas Co*.[122] There, the court dealt with the question of whether certain EPA oversight activities qualified as a removal action for cost-recovery purposes, despite the fact that the EPA had undertaken them under the Resource Conservation and Recovery Act (RCRA).[123] In holding that they did constitute a removal action, the court concluded its analysis as follows:

> We find no support in the text or legislative history of CERCLA for the suggestion that identical oversight activity on the part of the government should be considered a removal if the government invokes CERCLA, but not a removal if other statutory authority is invoked. Moreover, given the similarity of the provisions of RCRA and CERCLA authorizing EPA to order private parties to conduct corrective expenses, we fail to perceive any reason why Congress might have wished to make government oversight expenses recoverable if the government invoked CERCLA statutory authority, but not if it invoked RCRA.[124]

While the *Rohm & Haas* analysis seems more compelling than the Second Circuit's reasoning in *Consolidated Edison*, the latter case at least guarantees that there will be further litigation on this front in the context of both state settlements entered into under state law (as in *Consolidated Edison*) and EPA settlements under non-CERCLA laws (e.g., under RCRA).[125]

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[122] United States v. Rohm & Haas Co., 2 F.3d 1265 (3d Cir. 1993), *overruled by* United States v. E.I. Dupont De Nemours & Co., 432 F.3d 161 (3d Cir. 2005).

[123] *Id.* at 1274-76.

[124] *Id.* at 1275.

[125] At some level, the court's mistake in *Consolidated Edison* (if it was a mistake) generated a "no harm, no foul" situation, because the court wound up deeming Consolidated Edison eligible to recover under section 107(a). Consol. Edison Co. of N.Y. v. UGI Utils., Inc., 423 F.3d 90, 99-100 (2d Cir. 2005). In this vein, *Consolidated Edison* reveals that it can be difficult to determine which of my categories a particular plaintiff may fit within. The plaintiff in *Consolidated Edison* entered into a "Voluntary Cleanup Agreement" with the state, pursuant to which the plaintiff would receive a "Release and Covenant Not to Sue" (covering state law claims) if it satisfactorily completed the cleanup. *Id.* at 95-96. There is no indication in the opinion, however, that Consolidated Edison was bound to implement the remedy. As is often the case, the opinion reads as if the worst that would happen to the company if it did not follow through is that it would not receive the desired release. Seen in this light, the *Consolidated Edison* court may very well have been correct to treat the case as one that should have been brought under section 107(a). Still, however, the court's analysis regarding the need for state settlements to resolve CERCLA liabilities in order to qualify under section 113(f)(3)(B) is troubling. Presumably, the Second Circuit would apply the same analysis to one who has entered into a more traditional, binding consent agreement. If such a party does not fit into

In *Atlantic Research*, neither the parties nor the Court appeared to give much consideration to anyone in the fifth, sixth or seventh categories I described above. Earlier, the Court in *Cooper Industries* observed that the question remained whether those potential plaintiffs in the fifth category (those who receive unilateral orders from the EPA under section 106) have contribution claims under section 113(f)(1), as that case did not involve the recipient of such an order.[126] Nonetheless, the Court declined to address the merits of that question.[127]

As previously mentioned, this author believes that the potential plaintiffs who have received unilateral orders under section 106 have weak arguments under section 113(f)(1).[128] It seems unlikely that the issuance of a unilateral order under section 106 would be a civil action within the meaning of section 113(f)(1). The order recipients likely have stronger claims, however, under section 107(a). They will have incurred actual expenses on response costs. Additionally, unlike those who have incurred response costs under consent decrees, they do not have more specific claims under section 113(f) (at least assuming as much for present purposes). Finally, it would be quite strange if the EPA could deprive someone of recourse against other PRPs to which they would otherwise be entitled under *Atlantic Research* merely by issuing them a unilateral order.[129]

The chief characteristics of the potential plaintiffs in my sixth category are: (1) they were forced to clean up the site (which takes them out of my first two categories); (2) they were not sued under CERCLA (which takes them out of the third); (3) they have not settled (which takes them out of the fourth); and (4) the legal force that was used to require their cleanup measures came from something other than section 106 (which takes them out the fifth). In terms of how they fit into the statute, they would seem to be conceptually identical to those in my fifth category, with

my fourth category (i.e., those who have claims under section 113(f)(3)(B)), it would seem that the closest fit would be the sixth category, which would include, among others, those who have received state-issued unilateral orders. While courts may be likely to decide that those who fit that profile have claims under section 107(a)(4)(B), if I were representing such a party in a different circuit (i.e. other than the Second), I would prefer that my client had a clear claim to contribution under section 113(f)(3)(B) than a possible cost-recovery claim under section 107(a)(4)(B).

126 Cooper Indus. v. Aviall Servs., Inc., 543 U.S. 157, 168 & n.5 (2004).

127 *Id.* at 168 n.5.

128 *See supra* note 99 and accompanying text.

129 *See supra* note 100 and accompanying text.

the sole difference being that these parties were forced to clean up the site under either state law or a different federal law. Also, it would seem odd if these parties had less of a claim to cost recovery as compared to potential plaintiffs, like Atlantic Research, who engaged in voluntary cleanups.

The central question relating to the potential plaintiffs in both my fifth and sixth categories is whether voluntariness is a key element of the *Atlantic Research* Court's section 107(a)(4)(B) analysis. Although *Atlantic Research* itself did involve a voluntary cleanup, the voluntary nature of the company's activities seemed to play almost no role in the Court's analysis. Further, although the Court mentioned the absence of voluntariness when it discussed the uncertainty regarding the claims of those who clean up pursuant to consent decrees, it gave no indication that this absence would pose difficulties under section 107(a)(4)(B).[130] The Court's lack of focus on voluntariness is, of course, fully consistent with section 107(a)(4)(B), which simply contains no voluntariness element.[131] Thus, the language of section 107(a)(4)(B) itself suggests that those in my fifth and sixth categories should be treated in the same fashion as those who engage in voluntary cleanups.

Lastly, there is the seventh category: potential plaintiffs who have been compelled under a state law to reimburse either a state or a private party for cleanup expenses, and who did not negotiate a settlement. These parties seem to be in the most tenuous situation, as compared to the parties in the other categories. *Atlantic Research* clearly indicates that those who have reimbursed others for cleanup expenses cannot pursue a cost-recovery claim: "by reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under § 107(a)."[132] The fact that they have not been sued under either section 106 or section 107 precludes any application of section 113(f)(1). The fact that they do not have a settlement precludes any application of section 113(f)(3). Thus, it is likely that they are simply out of luck under CERCLA, at least in terms of explicit statutory claims.

This result seems slightly counter-intuitive, especially if those who have entered into state-law-based, cost-recovery settlements

130 United States v. Atl. Research Corp., 127 S. Ct. 2331, 2338 n.6 (2007).
131 *See* 42 U.S.C. § 9607(a)(4)(B) (2006).
132 *Atl. Research*, 127 S. Ct. at 2338.

with states have a right of contribution under section 113(f)(3)(B).[133] Nonetheless, it would seem that the best argument that those in this position could advance is that there is an implied contribution claim in section 107, an argument that the Court declined to address in both *Cooper Industries* and *Atlantic Research*, but about which it expressed skepticism in the earlier of the two opinions.[134]

V

CONCLUSION

The position that the United States took in *Atlantic Research* was stark indeed. If the Supreme Court had accepted it, it would have been the death knell for CERCLA's application at any other than the very highest priority sites, which are the only sites with respect to which the EPA and the states tend to file CERCLA-based judicial actions (thus triggering section 113(f)). Fortunately, the Supreme Court did not go down this road. Instead, it read section 107(a)(4)(B) to be what it is—a straightforward grant of cost-recovery authority in any and all private parties that have incurred cleanup costs.

The Court's opinion in *Atlantic Research* will reverberate for years, as lower courts backtrack to conform their analyses to its teachings. The central lesson of *Atlantic Research* is clear: those who voluntarily address contamination have claims against others who may be liable under section 107, regardless of whether they may also be caught in CERCLA's liability web. At the margins, its lessons are a little less clear. Both its logic and its spirit would seem to suggest that anyone who has undertaken cleanup measures, as opposed to having reimbursed someone else for having done so, should have a basis for recovery under CERCLA. In most cases, this claim will be best grounded in section 107(a)(4)(B). For those parties who clean up either after having been sued under CERCLA or after having entered into a qualifying settlement, their claim may best be grounded in section 113(f). In any case, the most important conclusion is that these parties have claims. As such, their incentives to engage in cleanup activities are maximized.

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[133] *See supra* text accompanying notes 117-18.

[134] Cooper Indus. v. Aviall Servs., Inc., 543 U.S. 157, 170-71 (2004); *Atl. Research*, 127 S. Ct. at 2339 n.8.