Will the Legislative Branch Please Stand Up: Ending Three Years of Uncertainty in a Post-*Cooper* World

Armand M. Perry*

I. INTRODUCTION

It is a well-worn aphorism: Congress writes the laws and the judiciary interprets and applies them. But what happens when Congress writes poorly? Or ambiguously? Or fails to see some of the implications of its own laws? While Congress may intentionally draft ambiguity into some statutes, to provide agencies with discretion, for example, some statutes inadvertently fail to address clearly a particular issue. Drafting deficiencies can be all the more disastrous because of the subject matter of the laws, the reliance on these laws by market actors, and the judiciary's need to be able to interpret laws in an honest and fair manner. In 2004, the United States Supreme Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.* reopened a critical environmental issue affecting contaminated site cleanup.[1] This Comment assesses the state of voluntary cleanups and the right of contribution for potentially responsible parties in the aftermath of the Supreme Court's *Cooper* decision.

Specifically, this Comment argues that the legislative branch is the body best suited to resolve the uncertainty highlighted in the *Cooper*

* J.D. candidate 2008, Tulane University School of Law; B.A. 2002, Reed College.
1. 543 U.S. 157 (2004).

decision. Part II of this Comment provides some background information on the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and analyzes the actual *Cooper* decision. Part III surveys the reaction to *Cooper* in federal courts, the market, and the legislature. Part IV analyzes CERCLA and the avenues it potentially offers for businesses to recover from potentially responsible parties and provides a critical look at the immediate problems facing the Supreme Court and Congress on this issue. Finally, Part V concludes with some thoughts on the judicial and legislative branches' responsibilities in resolving the issue.

II. THE SETUP

A. CERCLA

CERCLA was enacted in 1980 with the oft-cited twin goals of encouraging prompt cleanup of hazardous waste sites and placing the cleanup cost on the parties responsible for the contamination.[2] CERCLA was passed under less than ideal circumstances, on a hurried schedule, with limited debate, during the final days of a lame duck Congress a month before Ronald Reagan took office.[3] It is this legislative background, in part, that has led some commentators and courts to note that "CERCLA is poorly drafted and ambiguous in many key respects."[4] One of these statutory ambiguities is at the center of this Comment.

CERCLA enforcement falls primarily on the Environmental Protection Agency (EPA), which in turn has broad enforcement options to ensure that contaminated sites are effectively cleaned.[5] When faced with a contaminated site, the EPA has several cleanup options. Under section 104, the EPA can clean the site itself.[6] CERCLA is perhaps best known for its Superfund component—essentially a bank account holding money collected through appropriations, fees, and industry taxes, which

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2. Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F.3d 677, 681 (5th Cir. 2002) (en banc), *rev'd*, 543 U.S. 157 (2004).

3. Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1 (1982).

4. Kevin A. Gaynor & Benjamin S. Lippard, Am. Law Inst., Recent Developments in Hazardous Waste Litigation and Enforcement, SM028 ALI-ABA 97, 101 (2006); *see, e.g.*, Artesian Water Co. v. Gov't of New Castle County, 851 F.2d 643, 648 (3d Cir. 1988) ("CERCLA is not a paradigm of clarity or precision [due to] inartful drafting and numerous ambiguities attributable to its precipitous passage.").

5. Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc., 473 F.3d 824, 827 (7th Cir. 2007).

6. *See* CERCLA § 104, 42 U.S.C. § 9604 (2000).

the EPA may use to clean sites.[7] Once cleanup is initiated, the EPA may then proceed under section 107(a) to recover the costs of cleanup from responsible parties.[8] A second option is for the EPA to order responsible parties to clean the site themselves under section 106.[9] The EPA monitors cleanups undertaken by responsible parties and may recover the cost of that monitoring under section 107(a).[10] When the EPA seeks to recover costs under either of these scenarios, it is limited to going after so-called potentially responsible parties (PRPs)—a term of art used by courts and commentators to describe the classes of parties in the four subparts of CERCLA sections 107(a)(1)-(4).[11] These PRPs face two significant obstacles: they are statutorily limited to certain defenses[12] and they may be held jointly and severally liable.[13] Therefore, a PRP found liable for part of the contamination of a site could end up paying for the entire cleanup cost.

A critical problem arose soon after CERCLA was enacted: What should happen when one PRP is held liable under section 107(a) and ends up paying more than its fair share of the cleanup costs? Could a PRP recover contribution from other PRPs? CERCLA provided no express statutory right for a PRP to do so, but courts soon began implying such a right.[14] In 1982, a district court in Pennsylvania held that a liable party could seek contribution from other PRPs, despite the absence of an express right to do so in CERCLA.[15] Other courts followed suit, leading, a decade later, to the Supreme Court acknowledging that section 107 impliedly authorizes a cause of action for contribution.[16] Courts implied a right to seek contribution from PRPs for both so-called "innocent parties"—those parties who were not responsible for the contamination but voluntarily cleaned the site, such as

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7. *Metro. Water*, 473 F.3d at 827.

8. *See* CERCLA § 107(a), 42 U.S.C. § 9607(a). For ease of reference, I will refer in text to the actual section numbers as they appear in CERCLA, while citing to their codified counterpart in the footnotes.

9. *See* CERCLA § 106, 42 U.S.C. § 9606.

10. *See* CERCLA § 107(a), 42 U.S.C. § 9607(a).

11. *See* CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4). Note that the term "potentially responsible party" does not appear in CERCLA but is used in nearly every court decision and scholarly or practitioner commentary discussed herein.

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

13. United States v. Alcan Aluminum Corp., 964 F.2d 252, 268 (3d Cir. 1992); New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1120-21 (3d Cir. 1997).

14. *See, e.g.*, United States v. S.C. Recycling & Disposal, Inc., 653 F. Supp. 984, 994 (D.S.C. 1986); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 807-08, 810 (S.D. Ohio 1983); City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982).

15. *Stepan Chem.*, 544 F. Supp. at 1142.

16. Key Tronic Corp. v. United States, 511 U.S. 809, 816 (1994).

new landowners—as well as for parties responsible, at least in part, for the contamination.[17]

In 1986, Congress modified CERCLA through the Superfund Amendments and Reauthorization Act (SARA), which provided an express right of contribution in section 113(f).[18] Courts then had a clear statutory avenue to provide contribution rights for parties, but they were faced with the history of their own jurisprudence—did section 107(a) still contain an implied right to contribution? Courts said no and, instead, directed liable parties to seek contribution claims under the newly enacted section 113(f)(1), rather than continue to seek recovery in an implied fashion under section 107.[19] As the Supreme Court later noted, sections 107 and 113 provide two distinct, if not somewhat overlapping, remedies.[20] While section 107(a)(4)(B) provides a cost recovery remedy, section 113(f) provides a contribution remedy.[21] Specifically, section 113(f)(1) created an express right of contribution for parties that had been found liable (i.e., parties that had been sued under section 106 or 107) to pursue contribution actions against other PRPs,[22] and section 113(f)(3)(B) allowed a liable party to seek contribution after settling its liability with the government.[23] Section 107(a)(4)(B), on the other hand, allowed a party to recover "any other necessary costs of response incurred by any other person."[24]

There is another key difference between section 107(a) and 113(f) regarding how much parties can recover. Section 113(f) contribution claims are for PRPs "seeking to apportion damages among themselves."[25] Section 107(a), however, provides for joint and several cost recovery "where a party is seeking direct recovery of costs incurred in cleaning up a hazardous waste site."[26] In noting the difference between these two

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17. *See, e.g.*, Walls v. Waste Resource Corp., 761 F.2d 311, 318 (6th Cir. 1989); Bulk Distrib. Ctrs., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1443-44 (S.D. Fla. 1984); Jones v. Inmont Corp., 584 F. Supp. 1425, 1428 (S.D. Fla. 1984); Pinole Point Props., Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 290-91 (N.D. Cal. 1984).

18. CERCLA § 113(f), 42 U.S.C. § 9613(f) (2000). SARA also provided a broad waiver of sovereign immunity, which partly explains the government's interest in the resolution of this issue. CERCLA § 120(a), 42 U.S.C. § 9620(a).

19. Gaynor & Lippard, *supra* note 4, at 100; New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1121 (3d Cir. 1997).

20. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 163 n.3 (2004).

21. *Id.*

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

23. CERCLA § 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B).

24. CERCLA § 106(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B).

25. Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc., 473 F.3d 824, 826 (7th Cir. 2007).

26. *Id.* (internal quotations and citations omitted).

recovery schemes, the United States Court of Appeals for the Third Circuit has described section 107 as "substantially more generous" than section 113.[27]

Lastly, a quick look at the nuts and bolts of section 113(f)(1) helps illuminate the particular conflict in the *Cooper* decision. Section 113(f)(1) is broken into four sentences. The first is often referred to as the "enabling clause" because it states under what circumstances a person may seek contribution, namely, "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."[28] The next two sentences of section 113(f)(1) affirm the existence of federal subject matter jurisdiction for claims arising therein as well as the equitable power of the courts when apportioning costs.[29] The fourth and final sentence of section 113(f)(1) is often referred to as the "savings clause." This sentence provides that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title."[30] The first and last sentences of section 113(f)(1), the enabling and savings clauses, received the most play in the *Cooper* controversy.

B. Cooper Industries v. Aviall Services

Holding that a party may not seek contribution from other potentially responsible parties absent certain statutorily recognized administrative or cost recovery actions, the Supreme Court's decision in *Cooper* significantly altered the landscape of environmental cleanups under CERCLA.[31] Writing for a seven justice majority, Justice Thomas identified the "natural meaning"[32] of CERCLA's text and concluded that it was clear: section 113(f)(1) "authorizes contribution claims only 'during or following' a civil action under § 106 or § 107(a)."[33] As one practitioner's guide understatedly summarized, this "is not the way that Section 113 had previously been applied."[34]

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27. New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1123 (3d Cir. 1997).
28. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1).
29. *Id.*
30. *Id.*
31. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 165-66 (2004).
32. *Id.* at 166.
33. *Id.* at 168.
34. CAROLE STERN SWITZER & LYNN A. BULAN, BASIC PRACTICE SERIES: CERCLA 68 (2002).

The facts leading to the *Cooper* decision are not particularly unique. In 1981, Aviall Services purchased four aircraft engine maintenance sites, all located in Texas, from Cooper Industries.[35] In the process of operating the engine maintenance sites, first Cooper, and later Aviall, contaminated the sites through spills, as well as leaks of hazardous substances into the ground and ground water through underground storage tanks.[36] The Texas Natural Resource Conservation Commission told Aviall to clean the sites, and threatened to bring enforcement actions if Aviall failed to do so.[37] The EPA, however, never contacted Aviall.[38] Aviall heeded the call of the Texas Commission and, in the course of cleaning the sites, incurred several million dollars in expenses.[39] Aviall then sought to recover some of the cleanup cost under CERCLA sections 107(a) and 113(f)(1), as well as damages under state law.[40] Cooper and Aviall both contaminated the sites, and recognizing as much, both conceded their status as PRPs under CERCLA.[41]

The United States District Court for the Northern District of Texas dismissed Aviall's claim for contribution under section 113(f)(1), finding that "Aviall could not yet assert a claim for contribution under CERCLA because it had not been subjected to an action under §§ 106 or 107(a)."[42] On appeal, a divided three judge panel of the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision.[43] The Fifth Circuit granted a rehearing en banc, however, noting "the importance of this question to the allocation of financial responsibility for CERCLA cleanups."[44] On review, the Fifth Circuit en banc reversed the panel's decision and held that "a PRP may sue at any time for contribution under federal law to recover costs it has incurred in remediating a CERCLA site."[45] The Fifth Circuit en banc relied in particular on the savings clause in section 113(f)(1).[46] The Supreme Court granted certiorari on January 9, 2004.[47]

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35. *Cooper*, 543 U.S. at 163.
36. *Id.* at 163-64.
37. *Id.* at 164.
38. Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F.3d 677, 679 (5th Cir. 2002) (en banc), *rev'd*, 543 U.S. 157 (2004).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 680.
45. *Id.* at 681.
46. *Id.* at 687.
47. Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F.3d 677 (5th Cir. 2002), *cert. denied*, 71 U.S.L.W. 3552 (U.S. Jan. 9, 2004) (No. 02-1192).

Justice Thomas's majority opinion focused almost exclusively on section 113(f)(1), and his analysis was described by one commentator as "a brief textualist interpretation."[48] The majority opinion begins with a quick look at CERCLA's enactment, and a note on the history of interpretation of contribution rights under CERCLA both pre- and post-SARA.[49] After a recitation of the facts and procedural history, Justice Thomas's analysis begins in full, stating the conclusion in the first sentence: "Section 113(f)(1) does not authorize Aviall's suit."[50] For a majority of the Court, the enabling clause in section 113(f)(1) was dispositive.[51] The majority read the enabling clause such that "contribution may *only* be sought subject to the specified conditions."[52] The majority reasoned that if "may" were read permissively—as Aviall argued—then the rest of the clause would be superfluous.[53] The Court then stated, "there is no reason why Congress would bother to specify conditions under which a person may bring a contribution claim, and at the same time allow contribution actions absent those conditions."[54]

The Court next addressed the savings clause, which the Fifth Circuit en banc held to enable Aviall's contribution action. The Court reasoned that this sentence exists solely to assure the reader that section 113(f)(1) does not preclude other independent causes of action, such as those available under state law.[55] Again, the Court was averse to read one section of the statute so that it would render another part inoperative.[56]

The Court then analyzed section 113 as a whole, pointing in particular to the interplay of section 113(f)(1) with the limitation periods for contribution actions provided in section 113(g)(3).[57] The Court highlighted the absence of a starting point for the limitations clock in voluntary cleanup scenarios and contrasted this absence with the clearly articulated start points for the two express avenues of contribution in section 113(f) (i.e., during or following a section 106 or 107(a) civil action, or after an approved settlement in which a person has resolved his

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48. Joseph Ferrucci, *No Contribution Claims for Voluntary Cleanup of Superfund Sites: The Troubling Supreme Court Decision in* Cooper Industries v. Aviall Services, 12 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 73, 81 (2005).

49. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 161-63 (2004).

50. *Id.* at 165.

51. *Id.* at 165-68.

52. *Id.* at 166 (emphasis added).

53. *Id.*

54. *Id.*

55. *Id.* at 166-67.

56. *Id.* at 167.

57. *Id.*

or her liability to the United States or a state).[58] Acknowledging its own textualist approach, the Court concluded this portion of the opinion by noting that "given the clear meaning of the text, there is no need . . . to consult the purpose of CERCLA at all."[59]

Lastly, the majority acknowledged Aviall's secondary argument, that even if Aviall could not pursue a contribution action under section 113(f)(1), it should be allowed to seek contribution under section 107(a)(4)(B).[60] The crux of the ensuing controversy lies in this section. The majority refused to analyze this argument because the issue was not considered by any of the lower courts.[61]

It is important to note, however, that the lack of decisional history is not for lack of presentment. Aviall's complaint to the district court originally included separate section 107 and 113 claims, but Aviall later amended the complaint and asserted a combined section 107 and 113 claim.[62] After hearing oral argument about the distinction between these complaints, the district court concluded that "Aviall relies on § 107 to the extent necessary to maintain a viable § 113(f)(1) contribution claim, not as an independent cause of action against Cooper."[63] On appeal, the Fifth Circuit's panel decision viewed Aviall's complaint solely as a question of section 113(f)(1), reasoning that because "a PRP cannot file a § 107(a) suit against another PRP,"[64] and because "Aviall and Cooper concede[d] that they are both PRPs,"[65] Aviall had dropped its section 107(a) claim.[66] In other words, the three-judge panel of the Fifth Circuit didn't address the merits of a section 107(a) claim because they felt such a claim could not exist. On review en banc, the Fifth Circuit deemed it "unnecessary to reach this [section 107(a)] question," because, under their ruling, Aviall could seek contribution from Cooper via section 113(f)(1).[67] So while the Court is not incorrect in saying that Aviall's section 107(a) claim was

58. *Id.*
59. *Id.*
60. *Id.* at 168.
61. *Id.*
62. Aviall Servs., Inc. v. Cooper Indus., Inc., No. Civ.A.397CV1926D, 2000 WL 31730, at *2 (N.D. Tex. Jan. 13, 2000), *rev'd en banc*, 312 F.3d 677 (5th Cir. 2002).
63. *Id.* at *2 n.2.
64. Aviall Servs., Inc. v. Cooper Indus., Inc., 263 F.3d 134, 137 (5th Cir. 2001), *aff'g*, *Aviall*, 2000 WL 31730, *rev'd en banc*, 312 F.3d 677 (5th Cir. 2002).
65. *Id.*
66. *Id.* at 137 n.2.
67. *Aviall*, 312 F.3d at 685 n.15 (en banc), *rev'd*, 543 U.S. 157 (2004).

not considered by the lower courts, it is nevertheless a bit disingenuous to say as much.[68]

The two dissenters, on the other hand, maintained that the Court should decide the section 107(a) issue to avoid protracting litigation, a delay made all the more unnecessary because the Fifth Circuit essentially had decided that PRPs could recover under section 107(a).[69] Again, while this statement is not incorrect, it requires some clarification. In the Fifth Circuit en banc decision, the court noted that the savings clause in section 113(f)(1) "was enacted as confirmation that federal courts, in cases decided prior to SARA's enactment, had been right to enable PRPs to recover a proportionate share of their costs in actions for contribution against other PRPs."[70] The Court's dissenters proceeded carefully—although perhaps they did not proceed carefully enough—by stating that, essentially, this issue had been decided already.[71] In the Fifth Circuit en banc decision, the court merely noted its interpretation of the legislative history and intent behind the SARA amendments and suggested that it is probably correct that there is an implied remedy under section 107.[72] The extent, type, and availability of a section 107 contribution action, especially post-SARA, remained unclear.

Several large corporations, as well as nearly half of the states, filed amici curiae in support of Aviall.[73] Only one organization filed an amicus

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68. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 168 (2004). Note also the dissent's argument that (1) Aviall amended its original complaint in the district court to conform to the Fifth Circuit's precedent that "a CERCLA contribution action arises through the joint operation of § 107(a) and § 113(f)(1)" and section 107 supplies the right of action, and (2) at the appellate level, Aviall expressly urged the court to adjudicate its section 107(a) claim if the court concluded that Aviall could not proceed under section 113(f)(1). *Id.* at 173-74 (Ginsburg, J., dissenting).

69. *Id.*

70. *Aviall*, 312 F.3d at 687.

71. *Cooper*, 543 U.S. at 174.

72. *Aviall*, 312 F.3d at 687.

73. In addition to companies already involved in litigation relating to this specific CERCLA provision, such as Consolidated Edison and DuPont, other industry members supporting Aviall included Ford, GM, ConocoPhillips, and Lockheed Martin. Twenty-four states and Puerto Rico also filed amicus briefs in support of Aviall. *See* Brief Amici Curiae of ConocoPhillips et al. in Support of Respondent Aviall Services, Inc., Aviall Services, Inc. v. Cooper Indus., Inc., 543 U.S. 157 (2004) (No. 02-1192), 2004 WL 3038116 [hereinafter ConocoPhillips Amici Curiae Brief]; Brief of Lockheed Martin Corp. as Amicus Curiae in Support of Respondent, Aviall Services Inc., Aviall Services, Inc. v. Cooper Industries, Inc., 543 U.S. 157 (2004) (No. 02-1192), 2004 WL 759685 [hereinafter Lockheed Amicus Curiae Brief]; Brief of Amici Curiae Superfund Settlements Project et al. in Support of Respondent, Aviall Services, Inc. v. Cooper Industries, Inc., 543 U.S. 157 (2004) (No. 02-1192), 2004 WL 782370 [hereinafter Superfund Project Amicus Curiae Brief]; Brief of the States of New York et al. as Amici Curiae in Support of Respondent, Aviall Services, Inc. v. Cooper Industries, Inc., 543 U.S. 157 (2004) (No. 02-1192), 2004 WL 782371.

brief on behalf of Cooper: the Department of Justice (DOJ).[74] While the DOJ's brief does not acknowledge as much, the Court's validation of Cooper's position opens the door for big savings for the Department of Defense (DOD). Some commentators have speculated that because the DOD is a defendant in many CERCLA cost recovery claims, the DOJ supported Cooper because it would narrow the DOD's liability.[75] Whether this is the DOJ's true motive, clear benefits remain for the DOD under *Cooper*.

Even though state law claims remain available post-*Cooper*, many do not provide a right of contribution, while others fail expressly to waive sovereign immunity of the state or federal government.[76] Compare this with CERCLA section 120(a), which provides a broad waiver of sovereign immunity.[77] As the United States Court of Appeals for the Eighth Circuit has correctly noted, the government's position could have bizarre consequences if the government were on both sides of the litigation (as the EPA and as a PRP).[78] "The government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle. This . . . would eviscerate CERCLA whenever the government, itself, was partially responsible for a site's contamination."[79]

III. THE AFTERMATH

A. The Courts

The issue left undecided in *Cooper*—whether section 107(a) provides its own cause of action for a party to recover from other PRPs—has been addressed in four circuit courts post-*Cooper*.[80] The United States Court of Appeals for the Second Circuit held in September 2005

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74. Brief for the United States as Amicus Curiae Supporting Petitioner, Aviall Services, Inc. v. Cooper Industries, Inc., 543 U.S. 157 (2004) (No. 02-1192), 2004 WL 349899.

75. *See Failed Senate* Aviall *Amendment Suggests Long Haul for Industry Fix*, INSIDE THE EPA, Feb. 17, 2006, *available at* 2006 WLNR 2690590 [hereinafter *Failed Senate* Aviall *Amendment*].

76. Response of Appellant Aviall Services, Inc. to the Amicus Curiae Brief of the United States, Aviall Services, Inc. v. Cooper Industries, Inc., 312 F.3d 677 (2002) (No.00-10197), 2002 WL 32099831.

77. CERCLA § 120(a), 42 U.S.C. § 9620(a) (2000).

78. Atl. Research Corp. v. United States, 459 F.3d 827, 837 (8th Cir. 2006), *cert. granted*, 75 U.S.L.W. 3236 (U.S. Jan. 19, 2004) (No. 06-562).

79. *Id.*

80. Consol. Edison Co. of N.Y. v. UGI Utils., Inc., 423 F.3d 90 (2d Cir. 2006); *Atl. Research*, 459 F.3d 827, *cert. granted*, 75 U.S.L.W. 3236; E.I. DuPont de Nemours & Co. v. United States, 460 F.3d 515 (3d Cir. 2006); Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc., 473 F.3d 824 (7th Cir. 2007).

that a PRP may seek recovery from other PRPs under section 107(a).[81] The Second Circuit reasoned that sections 107(a) and 113(f)(1) each "embod[y] a mechanism for cost recovery available to persons in different procedural circumstances."[82] The Second Circuit found the issue "easily resolved" based on the plain language of section 107(a)(4)(B).[83] As in *Cooper*, the facts were straightforward. Consolidated Edison (Con Ed) entered into a voluntary cleanup agreement after the New York State Department of Environmental Conservation inquired into the environmental status of over 100 gas manufacturing plants.[84] Con Ed incurred around $4 million in costs cleaning a site that UGI Utilities, Inc. (UGI) previously operated, so Con Ed sought remedial costs from UGI under CERCLA.[85] The Second Circuit set up a two-part statutory checklist for whether a party is eligible to recover under section 107(a): "The only questions we must answer are whether Con Ed is a 'person' and whether it has incurred 'costs of response.'"[86] Con Ed easily met these two elements, and the Second Circuit concluded that Con Ed could seek recovery under section 107(a).[87] The Second Circuit revised the district court's grant of summary judgment to UGI, and remanded the case for further proceedings.[88]

While the Second Circuit's analysis hinged primarily on the text of CERCLA, the court did note that its decision comported with CERCLA's policy goals.[89] In particular, the Second Circuit pointed to the economic disincentive to clean if a party could only gain reimbursement *after* being sued.[90] The Second Circuit also added a few particularly nice points of analysis to the reinvigorated discussion of section 107(a). First, in an attempt to clarify the debate, the Second Circuit refused to use the term "PRP."[91] The term "PRP" does not appear in CERCLA, could conceivably apply to anyone before any fact finding has been made, and seems to confer a legal status, being at least partially responsible for the

81. *Consol. Edison*, 423 F.3d at 100.
82. *Id.* at 99.
83. *Id.*
84. *Id.* at 93.
85. *Id.* Originally, Con Ed sought recovery under section 113(f)(1), but after the Supreme Court issued the *Cooper* decision, the Second Circuit ordered additional briefing on the state of the law, which opened up the section 107(a) avenue of recovery. *Id.* at 93-94.
86. *Id.* at 99.
87. *Id.*
88. *Id.* at 104.
89. *Id.* at 100.
90. *Id.*
91. *Id.* at 98 n.8.

contamination of a site, that is not necessarily deserved.[92] Second, the Second Circuit argued that the distinction of "*innocent* parties" conflicts with the "quite simple language" of section 107(a), which does not require that a party seeking cost recovery be innocent of any wrongdoing.[93] Finally, the Second Circuit rejected the possible unjust enrichment argument against its holding (i.e., if a party that is partially responsible for the contamination of a site is allowed to recover 100 percent of the cleanup costs under section 107(a), the recovering party escapes liability).[94] In dispensing with this argument, the Second Circuit reasoned that there is nothing barring a party that has been forced to pay cleanup costs under section 107(a) from counterclaiming under section 113(f)(1) so that the party who first sought to recover cleanup costs pays his or her fair share.[95]

A year later, the Eighth Circuit became the next court of appeals to address the issue and joined the Second Circuit in holding that section 107(a) creates a right of cost recovery.[96] In this case, Atlantic Research Corporation (Atlantic) cleaned and retrofitted rocket motors for the United States at its Arkansas facility.[97] In the process of doing this work, burnt rocket fuel contaminated the ground.[98] Atlantic voluntarily cleaned the site and then sought to recover part of the cleanup cost from the United States.[99] Although Atlantic originally sought recovery under section 113(f)(1), Atlantic amended its complaint after the Supreme Court issued its *Cooper* decision.[100]

A panel of the Eighth Circuit previously had held, in a claim unrelated to the *Atlantic* case, that a liable party could not bring an action under section 107(a).[101] While the district court found the precedent dispositive, the panel in *Atlantic* held that its analysis had been undermined by the recent *Cooper* decision.[102] Because section 113(f)(1) was no longer available to a party that voluntarily cleans a site, the Eighth Circuit held that "it no longer makes sense to view § 113 as a liable

92. *Id.*
93. *Id.* at 99-100.
94. *Id.*
95. *Id.* at 100.
96. Atl. Research Corp. v. United States, 459 F.3d 827, 836 (8th Cir. 2006), *cert. granted*, 75 U.S.L.W. 3236 (U.S. Jan. 19, 2007) (No. 06-562).
97. *Id.* at 829.
98. *Id.*
99. *Id.*
100. *Id.* at 829-30.
101. Dico, Inc. v. Amoco Oil Co., 340 F.3d 525 (8th Cir. 2003).
102. *Atl. Research*, 459 F.3d at 830.

party's exclusive remedy."[103] The Eighth Circuit's earlier justification for denying access to section 107(a)—that section 113 was available—was no longer true post-*Cooper* for parties who commenced suit prior to a CERCLA enforcement action.[104] Interestingly, the Eighth Circuit countered the unjust enrichment argument differently than the Second Circuit, simply finding that while section 107(a) permits 100 percent cost recovery, it does not compel it.[105] Instead, the Eighth Circuit held that "a right to contribution may be fairly implied from the text of § 107(a)(4)(B)."[106]

Less than three weeks after the *Atlantic* decision, the Third Circuit held that there is no implied "cause of action for contribution under § 107 or the common law available to PRPs engaged in *sua sponte* voluntary cleanups."[107] The Third Circuit refused to reexamine its precedent and, instead, followed a line of cases, all post-SARA, that allowed section 107 recovery only for "innocent" parties.[108] The court reasoned that "*Cooper Industries* did not explicitly or implicitly overrule our precedents; indeed, the Supreme Court expressly declined to consider the very questions at issue here."[109]

The Third Circuit acknowledged the practical consequences of its ruling, noting that the decision does not necessarily ensure the most prompt and effective cleanups, but determined that this is a problem for Congress, not the courts.[110] In addition, the Third Circuit noted that its holding does not force parties that wish to clean a site to wait to be sued.[111] Instead, these parties can settle their liability with the government and, then, seek contribution under section 113(f)(3)(B).[112] The drawback of this approach, however, is that few parties may opt for this route, because the terms of settlement may not be as favorable as cleaning the site and then collecting contribution from other parties.[113]

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103. *Id.* at 834.
104. *Id.* at 834-35.
105. *Id.* at 835.
106. *Id.*
107. E.I. DuPont de Nemours & Co. v. United States, 460 F.3d 515, 543 (3d Cir. 2006). It is worth noting that this three-judge panel featured a visiting judge from the United States Court of Appeals for the Federal Circuit and is the only on point post-*Cooper* circuit court case with a dissenting opinion.
108. *Id.* at 542 n.32.
109. *Id.* at 532.
110. *Id.* at 543.
111. *Id.* at 544.
112. *Id.* at 544-45.
113. *Id.* at 545.

Lastly, the United States Court of Appeals for the Seventh Circuit issued a decision in January 2007 holding that there is an implied right to contribution under the cost recovery provision (section 107(a)) of CERCLA.[114] In this case, Metropolitan Water leased about fifty acres of property to Lake River, a subsidiary of North American.[115] Lake River stored chemicals on the site, but its above ground storage tanks leaked around 12,000 gallons of industrial chemicals onto the ground over the course of several decades. Metropolitan Water cleaned the site voluntarily, but sought to recover some of the cleanup costs from North American.[116] The Seventh Circuit relied primarily on the text of section 107(a),[117] but paid considerable attention to CERCLA's general purpose, especially the history of its enactment.[118]

At the Seventh Circuit's invitation, the EPA filed an amicus brief in the case.[119] The EPA argued that Metropolitan Water should not have a cost recovery remedy under section 107(a)(4)(B), because that would render sections 113(f)(1) and (f)(3)(B) superfluous.[120] The EPA argued that section 107(a) is only available to "persons who are not themselves liable."[121] Under the EPA's reading, PRPs may not seek recovery under section 107(a).[122] Looking carefully at the statutory language, the EPA argued that section 107(a) provides for "the liability of PRPs in cost recovery actions brought by others, rather than providing them [PRPs] with a right of cost recovery."[123] Thus, the dispute between the EPA and Metropolitan Water centered on who constituted "any other person" in section 107(a)(4)(B).[124] While Metropolitan Water read this phrase as applying to any person other than those mentioned in section 107(a)(4)(A)—namely, the United States, individual states, and Indian tribes—the EPA argued that the phrase applies to everyone other than those mentioned in section 107(a)(4)(A) *and* other than those mentioned in sections 107(a)(1)-(4).[125]

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114. Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc., 473 F.3d 824, 837 (7th Cir. 2007).

115. *Id.* at 825.

116. *Id.*

117. *Id.* at 826-30.

118. *Id.* at 826.

119. *Id.*

120. Brief of the United States as Amicus Curiae at 1, Metropolitan Water Reclamation District v. North American Galvanizing & Coatings, Inc., 473 F.3d 824 (7th Cir. 2007) (No. 05-3299), 2006 WL 1354188 [hereinafter United States Amicus Curiae Brief].

121. *Id.* at 7.

122. *Id.* at 9.

123. *Id.*

124. *Id.*

125. *Id.* at 10-11.

The EPA's argument is not persuasive given the statutory construction. The "any other person" language is a sub-point of section 107(a)(4) only. There is no justification for importing the subparts of one section to other parts of the statute. If Congress had intended the subparts of section 107(a)(4) to apply to sections 107(a)(1)-(3), then the statute would have been constructed accordingly.[126] Some have argued that "this provision is an example of the poor legislative drafting structure found in various parts of CERCLA."[127] While there is no definitive answer to this question, courts start with the statute in front of them. When the structure and language are clear, it is not the job of the courts to make the statute better, but rather to apply the law to the facts. Pre-SARA, courts remained within the text of the statute and implied a right of contribution in section 107 in order to further the purpose of CERCLA.[128] Congress affirmed this interpretation by expressly codifying section 113(f) as part of SARA a few years later.[129] Unlike that situation, the EPA's proffered reading requires rearranging statutory subparts in order to disincentivize voluntary cleanups—the very opposite purpose of CERCLA.[130]

B. The Polluter's Dilemma

From the PRP's perspective, the *Cooper* decision creates uncertainty in environmental cleanup, a very expensive area of corporate liability. Post-*Cooper*, a PRP has a few limited options. First, a PRP can proceed with a voluntary cleanup and hope that the courts in that particular jurisdiction read section 107(a) to support cost recovery actions. While the uncertainty of this approach warrants caution, there remains several strong arguments for a PRP to go forward with voluntary cleanups regardless of a jurisdiction's interpretation of section 107(a). Two environmental practitioners recently noted five factors that push toward voluntary cleanup, even if contribution recovery is unlikely: (1) the exposure risk to employees through continued site contamination, (2) potential third-party claims if the contamination migrates off the

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126. *See* CERCLA § 107(a)(1)-(3), 42 U.S.C. § 9607(a) (2000) (placing subparts A-D wholly within section 9607(a)(4) rather than making these modifiers generally applicable to all of section 9607(a) by placing them before the enumerated subparts of section 9607(a)).

127. SWITZER & BULAN, *supra* note 34, at 66 n.2.

128. *See, e.g.*, Walls v. Waste Resource Corp., 761 F.2d 311, 318 (6th Cir. 1989); Bulk Distrib. Ctr., Inc. v. Monsanto Co., 589 F. Supp. 1437, 1443-44 (S.D. Fla. 1984); Jones v. Inmont Corp., 584 F. Supp. 1425, 1428 (S.D. Fla. 1984); Pinole Point Props., Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 290-91 (N.D. Cal. 1984).

129. *See* CERCLA § 113(f), 42 U.S.C. § 9613.

130. *See* United States Amicus Curiae Brief, *supra* note 120.

property, (3) the effect on property value and the diminished ability to sell property with unresolved environmental liability, (4) other laws that may require remediation, and (5) the increased cost of delaying cleanup efforts.[131] Taken together, the certainty, savings, and decreased liability of early cleanup may be cheaper than cleaning a site later, even if the cost of that later cleanup is reduced by contributions from other PRPs.

A second post-*Cooper* option available to a PRP that wants to clean a site is simply to meet the explicit requirements of section 113. This task, however, is easier said than done. To satisfy section 113, "[r]esponsible parties must either (1) seek an administrative or judicially approved settlement with the state or EPA; (2) wait to be sued by EPA, the state, or a private party under section 107; or (3) wait to be sued by EPA under section 106."[132] While this approach does secure a clear statutory right to seek contribution from other PRPs, it does so at a significant cost. As the attorneys for Aviall noted in a post-*Cooper* article, these three alternatives "delay cleanups, increase cleanup costs, and shift control of the cleanup from private parties to government agencies."[133] Furthermore, waiting to be sued under sections 106 or 107 entails more than just "waiting." Under section 107, a party could wait for a suit by either the EPA, the state, or a private party. Waiting for a suit to be brought against oneself is costly not only because of the delayed cleanup but also because of the cost of responding to the suit—the private party or state is clearly suing for *something*. EPA action is not necessarily any cheaper though. The EPA will only bring suit after a party fails to comply with an order to clean a site, but noncompliance with the order exposes the party to penalties that can reach up to $32,500 per day.[134]

The third post-*Cooper* option available to a PRP that wants to clean a site is to proceed under state law. States provide recovery actions that vary among them, while thirteen states, as well as the District of Columbia, do not appear to have any specific statutory authorization for

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131. Luis Nido & Jason Hutt, *Voluntary Cleanups—Alive After* Aviall*?*, 20 NAT. RESOURCES & ENV'T 57, 57-58 (2005-2006).

132. 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, 335 (2005) (noting that it remains unresolved whether an administrative settlement under section 106 meets the requirements for a cost recovery action under section 113). *But cf.* Bradford Reynolds & Lisa K. Hsiao, *The Right of Contribution Under CERCLA After* Cooper Industries v. Aviall Services, 18 TUL. ENVTL. L.J. 339 (2005) (representing Cooper Industries and arguing that section 107(a)(4)(B) is unavailable to PRPs).

133. Faulk & Bishop, *supra* note 132, at 335.

134. *Id.* at 335 (citing *Civil Monetary Penalty Inflation Adjustment Rule*, 69 Fed. Reg. 7121, 7126 (Feb. 13, 2004)).

a party to collect from other PRPs.[135] Additionally, some states model their environmental recovery statutes after CERCLA, which means that the statutory uncertainty currently plaguing the federal recovery may complicate actions at the state level as well.[136]

A fourth option is for PRPs to pursue cost recovery under section 113(f)(3)(B):

> A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph 2.[137]

Determining the viability of this section depends on judicial interpretation of what constitutes "an administrative or judicially approved settlement."[138] Post-*Cooper*, the United States District Court of Arizona held that section 113(f)(3)(B) requires that "any settlement between a 'person' and a 'State' must settle the person's CERCLA liability, not merely its liability under state law. Absent a settlement of CERCLA liability, the person may not proceed with an action under Section 113(f)(3)(B)."[139] This ruling seems to remove the incentive for parties to settle with states, because it will not allow them to seek contribution under CERCLA. In the *Cooper* case, the state agency contacted Aviall and threatened disciplinary proceedings if Aviall failed to comply.[140] It is not surprising that a state-based regulatory agency, rather than a federal one, would be better informed and able to respond more quickly to environmental problems within its borders. As demonstrated in the Arizona district court opinion, however, a quick state response does not necessarily help a party collect from other PRPs under CERCLA.

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135. *Id.* at 335 n.69.

136. It is particularly hard to reconcile this predicament with the Supreme Court's reasoning in *Cooper* that the savings clause in section 113(f)(1) exists so as not to diminish other independent rights, such as state action. *See* Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 166-67 (2004).

137. CERCLA § 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B) (2000). Paragraph two states: "[A] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2).

138. CERCLA § 113(f)(3)(b), 42 U.S.C. § 9613(f)(3)(B).

139. Asarco, Inc. v. Union Pac. R.R., No. CV 04-2144-PHX-SRB, 2006 WL 173662, at *9 (D. Ariz. Jan. 24, 2006).

140. Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F.3d 677, 679 (5th Cir. 2002) (en banc), *rev'd*, 543 U.S. 157 (2004).

C. Legislative Branch

Congress has not taken any formal action to address the uncertainty created by the *Cooper* decision. There is evidence to suggest, however, that Congress has its eye on the issue. Senator James Jeffords (I-VT), in conjunction with Environment & Public Works Committee Chairman James Inhofe (R-OK), reportedly drafted language that would strike down the Supreme Court's *Cooper* decision.[141] The amendment was intended to be attached to the 2005 highway funding bill, but it never appeared.[142] Policy analysts have suggested that the amendment faced difficulty because of its substance, introduction procedure, and timing.[143] Specifically, some of the roadblocks to successful introduction and passage of the amendment included: a lack of congressional hearings on the issue; the likelihood of raising other Superfund legislative issues, particularly the expiration of Superfund taxes; a general disfavor against last minute attachments to large bills, especially when Congress is trying to distance itself from lobbying scandals; the absence of an EPA introduced legislative proposal; and opposition by the Bush Administration, which presumably supported the DOJ's position as articulated in its *Cooper* amicus brief.[144] Aside from this rumored false start, no further action has been taken by Senator Jeffords.

Representative John D. Dingell (D-MI) sent a letter to the EPA in October 2006, which asked for comment on the *Cooper* decision.[145] At the time, Dingell was a ranking member on the House of Representatives' Committee on Energy and Commerce and, since the transfer of power after the 2006 elections, has regained the committee chairmanship.[146] It is worth noting that Dingell was the chair of the Energy and Commerce Committee during the ninety-third to one hundred third congressional sessions (1981-1992), which included the period in which Congress enacted the SARA amendments and section 113.[147] Dingell's letter to the EPA included an attachment which asked fourteen numbered questions, emphasizing in particular whether the

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141. *Failed Senate* Aviall *Amendment*, *supra* note 75.

142. *Id.*

143. *Id.*

144. *Id.*

145. Letter from John D. Dingell, U.S. Congressman, to Stephen L. Johnson, EPA Administrator (Oct. 23, 2006), *available at* http://energycommerce.house.gov/Press_109/109-ltr.102406.EPA.Johnson.CERCLA.Ltr.pdf.

146. *See* Congressman John D. Dingell, Biography, http://www.house.gov/dingell/bio.htm (last visited Feb. 16, 2007).

147. *See* Biographical Directory of the United States Congress, Dingell, John David, Jr., http://bioguide.congress.gov/scripts/biodisplay.pl?index=D000355 (last visited Feb. 16, 2007).

Cooper decision actually had affected the pace of cleanups.[148] Dingell's letter also included a proposed amendment to CERCLA, which would strike from the enabling clause of section 113(f)(1) the language that limited contribution claims to those made "during or following any civil action under . . . Section 106 or under Section 107(a)."[149] Despite the Congressman's request for a formal response by November 9, 2006,[150] the EPA did not respond until January 12, 2007.[151] The response to Congressman Dingell's fourteen questions consisted almost entirely of one or two sentence answers to complex questions of law and policy.[152] Many of the answers simply referred Congressman Dingell to already available documents, such as amicus briefs and cert petitions, or deflected questions to other agency departments.[153] In response to several questions on the actual effect of *Cooper*, the EPA stated that it did not know the answer because the agency did not track such data.[154] In one instance, the EPA stated that it did not know the answer because it had "not done a legal analysis" on that question, even though Congressman Dingell asked the EPA to make such an analysis.[155] The EPA's response to Congressman Dingell's request for comment on the proposed legislative change to section 113(f)(1) is perhaps the most telling and the most frustrating: "While we recognize that the proposed legislative language is intended to address that portion of the statute upon which the Supreme Court focuses, making such a change in the statute may raise unintended legal or policy issues."[156] The EPA did not elaborate.

Representative Albert Wynn (D-MD), also a member of the Energy and Commerce Committee, is the newly appointed chair of the Environmental and Hazardous Materials Subcommittee, which has jurisdiction over the EPA and Superfund sites.[157] Representative Wynn has stated that his subcommittee will discuss the issue highlighted in

148. *See* Letter from John D. Dingell to Stephen L. Johnson, *supra* note 145, at 3-5.

149. *Id.* at 3.

150. *Id.* at 2; *Dupont Brief May Boost Odds Court Will Review Superfund Cost Issue*," INSIDE THE EPA, Dec. 1, 2006, *available at* 2006 WLNR 20685343.

151. Letter from Stephanie N. Daigle, EPA Associate Administrator, to John d. Dingell, Chairman, Committee on Energy and Commerce (Jan. 12, 2007) (on file with author).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. Press Release, Office of Congressman Albert R. Wynn, Wynn Selected As Chairman of Environmental and Hazardous Substances Subcommittee (Jan. 9, 2007), *available at* http://www.wynn.house.gov/index.php?option=com_content&task=view&id=178.

Cooper, but he has not committed to introduce legislation on the issue.[158] Aside from these faint murmurs, Congress has been largely silent on the *Cooper* issue despite the support that industry, many of whom have considerable lobbying resources, placed on the losing side.[159] The Supreme Court's decision to review *Atlantic Research Corp. v. United States*, however, has bought Congress some time to consider possible legislative action.[160]

IV. ANALYSIS

The Supreme Court should affirm the Eighth Circuit's decision in *Atlantic Research Corp. v. United States*, which held that there is an implied right of contribution for a party, either "innocent" or a PRP, to collect from PRPs under section 107(a)(4)(B).[161] First, and most persuasively, the plain text of section 107(a)(4)(B) provides only two requirements for whether a party may use this section to collect from PRPs: whether they are a person, and whether they have incurred response costs.[162] The plain text of CERCLA resolved the section 113(f)(1) issue presented in *Cooper*, and there is no reason why the same textualist method should not apply to the Supreme Court's interpretation of other portions of the statute.[163] Although the two-part checklist used by the Second Circuit may seem like an oversimplification, it is nothing if not true to the text.[164]

Second, the policy implications behind CERCLA mandate the availability of a contribution action for parties, regardless of whether they are "innocent" or fellow PRPs. Allowing parties to seek contribution actions against PRPs fulfills CERCLA's twin goals of encouraging prompt cleanup of hazardous waste sites and placing the cost of cleanup on the parties responsible for the contamination.[165] Pre-SARA, courts recognized the importance of implying contribution actions, and Congress affirmed this understanding by creating section 113(f)(1).[166]

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158. *Key House Panel Chair Vows To Pressure EPA on Environmental Justice*, INSIDE THE EPA, Jan. 12, 2007, at Sec. 2, *available at* 2007 WLNR 592091.

159. *See* ConocoPhillips Amici Curiae Brief, *supra* note 73; Lockheed Amicus Brief, *supra* note 73; Superfund Project Amicus Curiae Brief, *supra* note 73.

160. 459 F.3d 827 (8th Cir. 2006), *cert. granted*, 75 U.S.L.W. 3236 (U.S. Jan. 19, 2007) (No. 06-562).

161. *Id.* at 837.

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

163. *See* Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 165 (2004).

164. Consol. Edison Co. of N.Y. v. UGI Utils., Inc., 423 F.3d 90, 99 (2d Cir. 2006).

165. *See* Aviall Servs., Inc. v. Cooper Indus. Inc., 312 F.3d 677, 681 (5th Cir. 2002) (en banc), *rev'd* 543 U.S. 157 (2004).

166. *Cooper*, 543 U.S. at 162; CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1).

Now that *Cooper* has limited section 113(f)(1), courts should continue to interpret the plain text of the statute with CERCLA's twin policy goals in mind. Such an approach leads to one conclusion: parties who voluntarily clean sites should be able to seek contribution from PRPs. This approach encourages the quickest cleanup, limits government involvement and expense, and generally ensures that the parties who created the contamination are held responsible.

Lastly, the industry's reliance on the availability of a contribution action after voluntary cleanup strongly favors the continuation of such a right. While courts generally place a low amount of weight on reliance interests, it is nevertheless an important consideration when contemplating the total impact of the statute. Countless practitioner guides, law firm web sites, and EPA explanations have followed the *Cooper* decision.[167] Often, attorneys have suggested that companies contemplating a cleanup should wait until the uncertainty is resolved by the courts.[168] If the Supreme Court denies the contribution right, parties have no motivation to initiate cleanup. Rather, parties have an incentive to wait until they are sued so that they can proceed under section 113(f)(1). In the meantime, contamination remains undisturbed and on-site.

While the Supreme Court is bound by the text in front of it, Congress has the power to change the text. For this reason, regardless of how the Court interprets section 107(a)(4)(B), Congress should make an explicit right of contribution for parties to collect from PRPs. The issue is too important to the health of the environment, and too costly to parties that wish to remediate a contaminated site, for Congress to ignore the market demands for effectuating quick and efficient cleanups.

The Supreme Court seems unlikely to find an implied right of contribution in section 107(a). The seven justice majority in *Cooper* noted that when courts first began implying a right of contribution in the pre-SARA version of CERCLA, it was "debatable" whether they could do so.[169] In an opinion that made a concerted effort to remain "prudent

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167. *See, e.g.*, Superfund Frequently Asked Questions: Aviall, http://www.epa.gov/compliance/resources/faqs/cleanup/superfund/aviall-faqs.html (last visited Mar. 30, 2007); Supreme Court Holds That PRPs Cannot Use CERCLA § 113 To Recover Costs of Voluntary Cleanup, Update (Perkins Coie LLP, Seattle, Wash.) (Dec. 15, 2004), http://www.perkinscoie.com/news/pubs_detail.aspx?publication896&op=updates [hereinafter Perkins Coie]; Steven Jones, Partner, Martin Law Group, Congress Stays Out of *Aviall* Debate, Leaving the Courts To Resolve Uncertainties Created by Landmark Superfund Ruling (Mar. 8, 2006), http://www.martenlaw.com/news/?20060308-aviall-debate.

168. Jones, *supra* note 167; Perkins Coie, *supra* note 167.

169. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 162 (2004).

[and] to withhold judgment" on issues not directly before it, the Court seemed to be tipping its hand.[170]

Regardless of the Supreme Court's decision, it is the legislature's job to write the law. Here, there is strong demand from both environmentalists and industry to allow contribution actions after voluntary cleanup. The drafting challenges are minimal, and the lack of legislative action post-*Cooper* suggests a clear path for making the statutory change. Congress needs to hold hearings on the issue to create an open environment for debate, counter any criticism of fly-by-night lawmaking, and ensure an adequate legislative record sufficient to support changing a very powerful statute. Furthermore, Congress needs to separate contribution rights from the other issues that plague CERCLA. Right now, industry is affected by contribution rights and the judiciary continues to be weighted down by the uncertainty. Other CERCLA issues are not necessarily as immediate and have not reached the same critical mass.

V. CONCLUSION

The *Cooper* decision exposed a critical lack of clarity in CERCLA. It is vital that Congress resolves this issue as soon as possible, because the facts that led to the unresolved issue in *Cooper* are not unique, and the issue continues to reemerge nationally. There is reason to be optimistic, however, because several powerful forces seem to be converging on this one issue: the actual welfare of the environment; corporate liability; and the government as representatives of the people, law enforcers, and PRPs. It is a testament to CERCLA's power that so many groups, from environmentalists to multinational corporations, benefit from the predictability of environmental laws. What is perhaps a unique factor in this case is that environmentalists and corporations seem to be on the same side; they all want to read CERCLA so that section 107(a) provides an implied right of contribution for PRPs. The number of cases that have quickly followed the *Cooper* decision only reinforce the critical need to keep CERCLA comprehensible. Ultimately, the predictability of the law assures that parties will follow CERCLA and meet CERCLA's policy goals. While the courts can imply a right of contribution for parties that voluntarily clean a site, Congress should make such a right explicit.

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170. *Id.* at 170.