

December 2013

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### Repository Citation

Brian Carrico, *Mandatory Settlements in CERCLA Enforcement: Fixing a Broken System by Removing the Courts*, 38 Wm. & Mary Envtl. L. & Pol'y Rev. 251 (2013), <https://scholarship.law.wm.edu/wmelpr/vol38/iss1/8>

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# MANDATORY SETTLEMENTS IN CERCLA ENFORCEMENT: FIXING A BROKEN SYSTEM BY REMOVING THE COURTS

BRIAN CARRICO\*

## INTRODUCTION

In 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”)<sup>1</sup> in an attempt to address the issue of hazardous waste disposal sites on a national level. Congress recognized a dire need to create national standards to deal with the increases in hazardous waste disposal created by massive growth in the chemicals industry.<sup>2</sup> Congress had considered a number of bills throughout the late 1970s dealing with the hazardous waste issue, but all prior measures had left the government powerless to act proactively regarding these hazardous waste sites.<sup>3</sup> While CERCLA represents a clear attempt to address this shortcoming, it was considered and passed in the waning days of an outgoing Congress, which created a sense of urgency in its passage.<sup>4</sup> Because of the circumstances surrounding its passage, CERCLA was a hastily written and enacted piece of legislation that left many questions about its enforcement.<sup>5</sup>

Even after over thirty years of existence and a number of amendments and re-enactments, courts are still not sure how to treat a wide array of issues that come up over the course of a CERCLA response.<sup>6</sup> CERCLA

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<sup>1</sup> 42 U.S.C. §§ 9601–9675 (2006).

<sup>2</sup> See Douglas M. Costle & Eckardt C. Beck, *Attack on Hazardous Waste: Turning Back the Toxic Tide*, 9 CAP. U. L. REV. 425, 427, 432 (1980).

<sup>3</sup> Robert C. Eckhardt, *The Unfinished Business of Hazardous Waste Control*, 33 BAYLOR L. REV. 253, 256 (1981).

<sup>4</sup> 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).

<sup>5</sup> John Copeland Nagle, *CERCLA’s Mistakes*, 38 WM. & MARY L. REV. 1405, 1408 (1997).

<sup>6</sup> See Joanna M. Fuller, *The Sanctity of Settlement: Stopping CERCLA’s Volunteer Remediators from Sidestepping the Settlement Bar*, 34 COLUM. J. ENVTL. L. 219, 221–22 (2009).

was enacted following the 1980 election by a lame duck Congress under modified debate rules designed for quick and easy passage.<sup>7</sup> The result of this process was a poorly crafted law that “confounds every theory of statutory interpretation”<sup>8</sup> and that has left courts scrambling for over three decades.

Funding has proven to be the root of many of the issues vexing the courts as they try to strike an equitable balance within the structure of the enacted legislation.<sup>9</sup> “CERCLA’s imposition of strict, joint and several, and retroactive liability without regard to causation”<sup>10</sup> has led to extensive criticism of the enforcement system as an “unforgiving regime” producing “harsh result[s].”<sup>11</sup> Some of the issues, which will be dealt with in depth later in this Note, are orphan shares,<sup>12</sup> contribution actions,<sup>13</sup> and interference actions.<sup>14</sup> The problems surrounding these issues complicate the courts’ desire to reach equitable distributions in deciding CERCLA cases, almost inevitably leaving one party or group of parties taking on a disproportionately large portion of the cleanup costs compared to the relative amount of waste they contributed to the site.<sup>15</sup>

One method that has been used to reach a more equitable distribution of cleanup costs is to take the task of distributing the costs away from the courts, instead having potentially responsible parties (“PRPs”) join in settlement negotiations, reaching results that all of the PRPs involved find tolerable.<sup>16</sup> However, these settlements rarely, if ever, include

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<sup>7</sup> Grad, *supra* note 4, at 1.

<sup>8</sup> Nagle, *supra* note 5, at 1410.

<sup>9</sup> *See id.* at 1446.

<sup>10</sup> *Id.*

<sup>11</sup> *United States v. Saporito*, No. 07 C 3169, 2011 WL 2473332, at \*13 (N.D. Ill. 2011) (“The court acknowledges that this is a harsh result, but CERCLA and the binding precedents that interpret and apply the statute impose a relatively unforgiving regime on individuals like Saporito found to be responsible parties.”); *see also Hanford Downwinders Coal., Inc. v. Dowdle*, 71 F.3d 1469, 1484 (9th Cir. 1995) (acknowledging “seemingly harsh results” but finding a balance of public interest in timely cleanup).

<sup>12</sup> *See generally* Kenneth K. Kilbert, *Neither Joint Nor Several: Orphan Shares and Private CERCLA Actions*, 41 ENVTL. L. 1045 (2011).

<sup>13</sup> *See generally* William D. Araiza, *Text, Purpose and Facts: The Relationship Between CERCLA Sections 107 and 113*, 72 NOTRE DAME L. REV. 193 (1996).

<sup>14</sup> *See generally* Fuller, *supra* note 6.

<sup>15</sup> *See* Araiza, *supra* note 13, at 206–07.

<sup>16</sup> *See* Jerome M. Organ, *Superfund and the Settlement Decision: Reflections on the Relationship Between Equity and Efficiency*, 62 GEO. WASH. L. REV. 1043, 1139 (1994) (noting that in settlements “an allocation formula accomplishes a form of ‘rough justice’ in which all PRPs feel the result is unfair, but not unduly unfair”).

all PRPs.<sup>17</sup> In order to reach a more equitable solution, many commentators have advocated measures aimed at bringing more PRPs to the table for settlement negotiations in CERCLA enforcement,<sup>18</sup> but these suggestions merely shift balance of incentives to encourage settlement.<sup>19</sup> One commentator has gone as far as calling for a requirement that EPA notify all PRPs and invite them to participate in a massive allocation process, but still stops short of requiring all PRPs to participate.<sup>20</sup> Experience has shown that merely shifting the incentives is not enough to lead all PRPs to choose settlement.<sup>21</sup>

Based on the failures of shifting incentives to bring all PRPs to the table, this Note advocates for an entirely new system. This Note suggests that EPA should be required to bring all PRPs into settlement negotiations and appoint representation to participate on behalf of those who choose not to participate. Such a system, if implemented properly with sufficient safeguards, would largely, if not entirely, eliminate the need for contribution and interference actions and allow for a more equitable distribution of cleanup costs than is available under the current system. While this system would alleviate many of the problems with the current CERCLA enforcement mechanisms, it would introduce a number of new difficulties in procedure and implementation. As such, the primary purpose of this Note is to discuss the advantages and disadvantages of the proposed system. While there will be suggestions regarding how to deal with some of the new issues posed, this Note does not attempt to precisely describe all of the procedural details of the new system or detail the proper mechanisms for its implementation.

Part I of this Note will provide background on the legislative history of CERCLA. Part II will outline the current settlement procedures. Parts III, IV, and V will discuss in depth the three major problems in CERCLA enforcement mentioned earlier; Part III will discuss orphan shares, Part IV will discuss contribution actions, and Part V will discuss

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<sup>17</sup> See *id.* at 1068–69 (outlining the factors that lead many PRPs to choose not to settle with EPA).

<sup>18</sup> See, e.g., *id.*; Matthew J. Lawlor, Comment, *Super Settlements for Superfund: A New Paradigm for Voluntary Settlement?*, 27 B.C. ENVTL. AFF. L. REV. 123 (1999).

<sup>19</sup> See, e.g., Organ, *supra* note 16, at 1064.

<sup>20</sup> Martin A. McCrory, *The Equitable Solution to Superfund Liability: Creating a Viable Allocation Procedure for Businesses at Superfund Sites*, 23 VT. L. REV. 59, 89 (1998).

<sup>21</sup> See Organ, *supra* note 16, at 1139 (“Even if all PRPs were invited to participate in the [settlement procedure], however, several factors would encourage some universe of PRPs to refuse to participate.”).

interferences. Part VI will explain the solution this Note proposes. Part VII will discuss the potential problems with what this Note's proposals.

## I. CERCLA OVERVIEW

### A. *Background and Motivation*

There were a number of factors pushing Congress to enact reform measures, the most significant of which was a growth in the chemical industries, which made spills and other releases more common, as well as research showing the harmful impacts of these releases.<sup>22</sup> After looking into the issue, Congress concluded that the hazardous waste disposal sites posed a significant danger and that the laws in place were inadequate to address the scope of the problem.<sup>23</sup> Largely based on these findings, through the late 1970s Congress began to pass hazardous waste acts aimed at both containment and cleanup.<sup>24</sup>

Congress was also motivated by a number of specific events, which were documented in Committee Reports considering the proposed Superfund bills.<sup>25</sup> These incidents included contamination of the James and Hudson Rivers and studies of Michigan livestock.<sup>26</sup> The largest single motivation for new hazardous waste containment laws was likely a major disaster at Love Canal in upstate New York, which drove home the potential human impact of hazardous waste disposal sites.<sup>27</sup> Far more than the general facts, these specific incidents underscored the need for a change in the response mechanisms. In the words of one Congressman, "an occasional disaster has more sex appeal than does the chronic disease."<sup>28</sup> Under the law in place, EPA lacked "adequate authority to take preventative action,"<sup>29</sup> and could only react to these disasters as they came up.

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<sup>22</sup> Grad, *supra* note 4, at 7.

<sup>23</sup> *Id.* at 7-8.

<sup>24</sup> See Costle & Beck, *supra* note 2, at 427-28 (discussing the need for hazardous waste reform and the impact of the Resource Conservation and Recovery Act ("RCRA") of 1976).

<sup>25</sup> Grad, *supra* note 4, at 7.

<sup>26</sup> *Id.*

<sup>27</sup> The Love Canal tragedy involved a chemical waste disposal site that was sold in 1953 to facilitate a major housing development near Niagara Falls, New York. Eckardt C. Beck, *The Love Canal Tragedy*, 5 EPA J. 17, 17 (1979). By the late 1970s the community was seeing the chemicals seeping out of the ground, causing chemical burns and birth defects as well as destroying any plant life in the area. *Id.* For a detailed description of the tragedy, see *id.*

<sup>28</sup> Eckhardt, *supra* note 3, at 263.

<sup>29</sup> *Id.* at 256.

Additionally, the 1980 election created a major shift in the composition of Congress, which many commentators cite as a factor in the late and rushed Congressional action.<sup>30</sup> After years of debating the policy, the Democratic majority Congress reacted quickly to the shift in power from the 1980 election.<sup>31</sup> To some, the result of the 1980 election fully explains why CERCLA was rushed and, in turn, why it still presents so many issues.<sup>32</sup>

### B. *Legislative History*

The foundation of many of the current problems in CERCLA enforcement can be found in its legislative history.<sup>33</sup> Because CERCLA was rushed through Congress, the Act was not fully considered or thoughtfully enacted, “compromis[ing] depth for scope”<sup>34</sup> and leaving many of the largest issues to the courts, “unhelped by most of the tools traditionally used in determining congressional intent.”<sup>35</sup>

Congress readily agreed on a number of issues, including the need for regulation, and that, wherever possible, cleanup should be paid for by the responsible parties.<sup>36</sup> The main differences in the proposals involved funding the cleanup when the responsible parties could not be held accountable.<sup>37</sup> The primary suggestions were payment from general government revenue or coverage through an industry fee.<sup>38</sup> As enacted, CERCLA allows the government to draw from both resources to fund cleanups.<sup>39</sup> While this was a contentious issue in the legislative history, the use of government funds to subsidize cleanup efforts is not an issue that comes up often in practice, so it will not be discussed at length in this Note.<sup>40</sup>

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<sup>30</sup> Grad, *supra* note 4, at 7.

<sup>31</sup> Eckhardt, *supra* note 3, at 264. Eckhardt, a Democratic member of the House until 1981, lamented the power of “a threat of filibuster at the threshold of entry of a Republican Senate.” *Id.*

<sup>32</sup> Nagle, *supra* note 5, at 1412.

<sup>33</sup> This Note will cover only enough of the legislative history of CERCLA to provide necessary background to understand why the Act passed in spite of its significant shortcomings. For a full discussion of the legislative history of CERCLA, see generally Grad, *supra* note 4 and Eckhardt, *supra* note 3.

<sup>34</sup> Eckhardt, *supra* note 3, at 253.

<sup>35</sup> Nagle, *supra* note 5, at 1410.

<sup>36</sup> Eckhardt, *supra* note 3, at 258–59.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 261.

<sup>40</sup> Because of the broad reach of liability established in 42 U.S.C. § 9607, as long as EPA can identify at least one responsible party the costs can be shifted from the government.

Since CERCLA's enactment, subsequent Congresses have attempted to amend the statute, but have failed to resolve many of the issues left by the drafters.<sup>41</sup> The most significant amendment to CERCLA came only six years after its enactment in the form of the Superfund Amendments and Reauthorization Act of 1986 ("SARA").<sup>42</sup> SARA was not a complete overhaul of the system, but it included a number of significant changes.<sup>43</sup> The most influential changes from SARA were increasing the Superfund trust, putting an emphasis on permanent remedies and human health problems in the cleanup process, adding settlement tools and enforcement authorities, and encouraging state and local community involvement.<sup>44</sup> The only other significant statutory amendment to CERCLA is the Small Business Liability Relief and Brownfields Revitalization Act of 2002, which primarily reduced the legal and financial risks involved in redeveloping hazardous waste sites.<sup>45</sup> Throughout the 1990s, a number of interest groups pushed Congress to reform the statute, but those efforts were consistently stalled by partisan politics.<sup>46</sup>

### C. Overall Effectiveness

Congress had two clear objectives in enacting CERCLA, which have persisted through each effort at amendment: cleaning the hazardous waste sites and ensuring that the costs of cleanup efforts are borne by those who had benefitted from the disposal of hazardous waste.<sup>47</sup> CERCLA does an adequate job of addressing these concerns, but leaves too many questions to consider those objectives fully met.<sup>48</sup> In the words of one of the Congressmen who passed the Act, "in attempting to cover them hastily in its waning

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*See also* Press Release, Superfund: Setting the Record Straight, U.S. EPA (Oct. 1, 2003), available at <http://yosemite.epa.gov/OPA/ADMPRESS.NSF/adv>s (search for "Superfund: Setting the Record Straight" and click on "2003" box) ("The majority of Superfund cleanups are paid for by the person or group who bears responsibility for the cleanup.").

<sup>41</sup> Nagle, *supra* note 5, at 1410.

<sup>42</sup> *Id.*

<sup>43</sup> *SARA Overview*, U.S. EPA, <http://www.epa.gov/superfund/policy/sara.htm> (last visited Nov. 13, 2013).

<sup>44</sup> *Id.*

<sup>45</sup> Amy McMorrow, *CERCLA Liability Redefined: An Analysis of the Small Business Liability Relief and Brownfields Revitalization Act and Its Impact on State Voluntary Cleanup Programs*, 20 GA. ST. U. L. REV. 1087, 1087-89 (2004).

<sup>46</sup> Ann R. Klee & Ernie Rosenberg, *The Moribund State of CERCLA Reauthorization*, 13 NAT. RESOURCES & ENV'T. 451, 451 (1999).

<sup>47</sup> Eckhardt, *supra* note 3, at 253.

<sup>48</sup> *Id.*

days, Congress compromised depth for scope.”<sup>49</sup> The amendments since have done little to clarify the questions, with “politics of the extremes”<sup>50</sup> preventing any significant changes.

As a result of the questions unanswered by CERCLA, the Act has been a source of confusion for the courts as well as for the parties involved in the cleanups. Jerome Organ effectively summarized the conflicting messages CERCLA conveys when he concluded that:

By affirming joint and several liability, Congress demonstrated its desire to shift responsibility for remediation to PRPs with little concern for fairness in the distribution of liability among PRPs; by providing EPA with other settlement tools, however, Congress demonstrated a distinct concern for fairness in the distribution of liability . . . .<sup>51</sup>

Organ further explained that the availability of joint and several liability against the PRPs discourages EPA from engaging in “the more time consuming and resource-intensive efforts involved in engaging in equitable allocations of liability.”<sup>52</sup> As a result, CERCLA has in many ways fostered litigation.<sup>53</sup>

This encouragement of litigation comes at a high cost. The vast complications within CERCLA cause many judicial decisions to arrive at an inequitable distribution of costs.<sup>54</sup> Equity should be an essential aim of CERCLA because the statutory framework establishing retroactive liability means that often parties are held liable for actions that “were entirely legal at the time they were undertaken.”<sup>55</sup>

The strict retroactive liability regime was a large point of contention initially, so while a full discussion is beyond the scope of this Note, a brief analysis of the impact and justification will prove helpful.<sup>56</sup> The largest criticism of CERCLA was the unfair costs to businesses who were following

<sup>49</sup> *Id.*

<sup>50</sup> Klee & Rosenberg, *supra* note 46, at 451.

<sup>51</sup> Organ, *supra* note 16, at 1053–54.

<sup>52</sup> *Id.* at 1054.

<sup>53</sup> Klee & Rosenberg, *supra* note 46, at 451.

<sup>54</sup> A general discussion of the inequities created by judicial decisions, including the reasons they occur, will occur later in this Note. *See infra* Parts III, IV, and V.

<sup>55</sup> Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENVTL. AFF. L. REV. 579, 635 (1993).

<sup>56</sup> *See generally* Bruce Howard, *A New Justification for Retroactive Liability in CERCLA: An Appreciation of the Synergy Between Common and Statutory Law*, 42 ST. LOUIS U. L.J. 847 (1998) (analyzing the strict retroactive liability regime).

all applicable legal standards.<sup>57</sup> The strict liability regime was typically justified as essential in order to ensure that the cleanup costs were assumed by those who benefitted from the disposal.<sup>58</sup> Additionally, at least one Senate report concluded that the chemical industry had the capability to internalize the costs of cleanup.<sup>59</sup> Regardless of the industry's ability to cover the costs, the inherent inequity of CERCLA's liability regime highlights the need for an equitable distribution of the costs, for which courts have proven inadequate under the current regime.

## II. CURRENT SETTLEMENT PROCESS

### A. PRP Identification and Notification

Identifying PRPs is one of the more arduous tasks of CERCLA enforcement. Generally, the Superfund sites have been idle for a long period of time, so the search can become very involved.<sup>60</sup> Once a PRP has been identified, EPA notifies those parties through a general notice letter ("GNL") which alerts the party of their potential liability under CERCLA, often with supporting information to justify the designation, and invites the party to discuss or undertake a response at the site.<sup>61</sup> EPA can also use a special notice letter ("SNL"), which begins the enforcement process.<sup>62</sup> After receiving an SNL, a PRP has 60 days to respond with a good faith offer to conduct or finance remedial action at the site.<sup>63</sup> EPA is free to bring any number of parties into the negotiation or to reach agreements with each party individually.<sup>64</sup> Any PRP which does not respond to the SNL with a good faith offer will be liable to the government for cleanup costs under CERCLA.<sup>65</sup>

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<sup>57</sup> Klee & Rosenberg, *supra* note 46, at 452.

<sup>58</sup> See Susan R. Poulter, *Cleanup and Restoration: Who Should Pay?*, 18 J. LAND RESOURCES & ENVTL. L. 77, 81 (1998) (explaining why a fault-based liability regime is inadequate in hazardous material cases).

<sup>59</sup> Grad, *supra* note 4, at 8.

<sup>60</sup> A full discussion of the identification process is beyond the scope of this Note. For more information on this process, see generally *PRP Search Manual*, U.S. EPA (2009), available at <http://www2.epa.gov/sites/production/files/documents/prp-search-man-emp-09b.pdf>.

<sup>61</sup> *Id.* at 34–35.

<sup>62</sup> *Id.* at 35. The special notice letter is stipulated by 42 U.S.C. § 9622(e) which requires EPA to notify parties prior to taking action under CERCLA and prevents EPA from taking action under CERCLA until 120 days after providing notice to allow EPA and PRP to engage in settlement discussions. The procedures described in § 9622 are optional but are typically followed. *Id.* at 36.

<sup>63</sup> 42 U.S.C. § 9622(e)(2)(B) (2006).

<sup>64</sup> 42 U.S.C. § 9622(e)(2)(C) (2006).

<sup>65</sup> 42 U.S.C. § 9622(e)(4) (2006).

### B. *Settlement Mechanisms*

There are a number of mechanisms EPA can use to settle with PRPs. One of the most simple is the de minimis settlement.<sup>66</sup> Under a de minimis settlement, a PRP who contributed comparatively little waste in terms of volume or toxicity or an innocent landowner is able to reach an expedited agreement with EPA.<sup>67</sup> This mechanism is also available to parties who can demonstrate “an inability or a limited ability to pay response costs.”<sup>68</sup>

Once an agreement between EPA and a PRP or some group of PRPs is reached, the terms of the agreement are formalized through one of a number of different documents.<sup>69</sup> The two primary mechanisms are Administrative Orders on Consent (“AOCs”) and Judicial Consent Decrees (“CDs”). EPA typically uses AOCs, which do not require court approval, to finalize de minimis settlements.<sup>70</sup> AOCs are only available to cover short-term costs, such as removal activity and investigative work.<sup>71</sup> Once in the final cleanup phase, EPA must use a CD, which does require the approval of a U.S. district court to finalize agreements.<sup>72</sup>

To enforce a CD or AOC, EPA can also issue a Unilateral Administrative Order (“UAO”) to any party that fails to comply with the agreements.<sup>73</sup> A UAO requires parties to undertake some response action under threat of penalties up to three times the actual cost of cleanup, at the

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<sup>66</sup> 42 U.S.C. § 9622(g) (2006).

<sup>67</sup> *Id.* Regional offices of EPA determine what specific levels of contribution qualify a PRP for de minimis designation. See Memorandum, Streamlined Approach for Settlements with De Minimis Waste Contributors Under CERCLA Section 122(g)(1)(A), U.S. EPA (July 30, 1993), available at <http://nepis.epa.gov/Exe/ZyNET.exe/9100UDWT.TXT?ZyActionD=ZyDocument&Client=EPA&Index=1991+Thru+1994&Docs=&Query=&Time=&EndTime=&QFieldMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&IntQFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=D%3A\zyfiles\Index%20Data\91thru94\Txt\0000026\9100UDWT.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h|-&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150i16/i425&Display=p|f&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=1&SeekPage=x&ZyPURL>.

<sup>68</sup> 42 U.S.C. 9622(g)(7)(A) (2006).

<sup>69</sup> *Negotiating Superfund Settlements*, U.S. EPA, <http://www2.epa.gov/enforcement/negotiating-superfund-settlements> (last visited Nov. 13, 2013).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Superfund Unilateral Orders*, U.S. EPA, <http://www2.epa.gov/enforcement/superfund-unilateral-orders> (last visited Nov. 13, 2013).

discretion of a court.<sup>74</sup> EPA can also issue these orders for sites where it finds “that there may be an imminent and substantial endangerment to the public health or welfare or the environment . . . .”<sup>75</sup>

### C. *Settlement Incentives*

The strongest incentives to settle appear in the context of de minimis settlements. The expedited agreement mechanism of de minimis settlements is important for low level contributors, because under the standard settlement procedure these parties would often face transaction costs higher than the cost of their liability at the site.<sup>76</sup> Allowing de minimis settlements based on ability to pay allows a PRP to settle its liability in a way that will avoid undue hardship but is typically reserved for PRPs who demonstrate that paying their full share of the response costs “is likely to put them out of business or jeopardize their viability.”<sup>77</sup>

Initially, EPA was reluctant to provide the same safeguards included in standard CERCLA settlements to PRPs who settle as de minimis contributors.<sup>78</sup> In particular, EPA was hesitant to provide releases of liability or contribution protection for future costs at the site.<sup>79</sup> However, the use of de minimis settlements has been widely used and legislative changes have allowed EPA to offer many of the same benefits, particularly the covenant not to sue, but also requires the PRP to agree to waive claims against other PRPs.<sup>80</sup>

Outside of the de minimis context, CERCLA provides EPA with a number of tools that provide a strong incentive for PRPs to settle.<sup>81</sup> These incentives include a release from liability on the site both in the form of protection against suits from other PRPs and covenants not to sue, under which EPA agrees not to seek further damages provided the settling PRP fulfills the agreement.<sup>82</sup> CERCLA also provides incentives against rejecting

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<sup>74</sup> *Id.*

<sup>75</sup> 42 U.S.C. § 9606(a) (2006).

<sup>76</sup> William W. Balcke, *Superfund Settlements: The Failed Promise of the 1986 Amendments*, 74 VA. L. REV. 123, 143 (1988).

<sup>77</sup> *PRP Search Manual*, *supra* note 60, at 214.

<sup>78</sup> Kathiann M. Kowalski, *Why Can't We Just Settle These Superfund Cases Once and For All?*, 5 VA. J. NAT. RESOURCES L. 179, 189 (1985).

<sup>79</sup> *See id.*

<sup>80</sup> McMorrow, *supra* note 45, at 1098; 42 U.S.C. § 9622(g)(8)(A) (2006).

<sup>81</sup> *Incentives for Negotiating Superfund Settlements*, U.S. EPA, <http://www2.epa.gov/enforcement/incentives-negotiating-superfund-settlements> (last visited Nov. 13, 2013) [hereinafter U.S. EPA Incentives].

<sup>82</sup> 42 U.S.C. §§ 9622(f)(1), (3) (2006).

an offer to negotiate, primarily through the imposition of joint and several liability.<sup>83</sup> While CERCLA does encourage the courts to seek equitable distributions,<sup>84</sup> courts have nonetheless held that parties “seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists.”<sup>85</sup>

#### D. *Role of the Courts*

As mentioned above, the way CERCLA was enacted left many significant questions for the Court to decide.<sup>86</sup> Leaving so many issues to the courts to resolve has led to many splits in the lower courts.<sup>87</sup> For many reasons Congress had to leave many of these questions open in order to pass CERCLA as a compromise act.<sup>88</sup>

The seemingly inherent judicial involvement in determining the scope of CERCLA directly controverts the words of the Act, which generally restrict, and in some places outright reject, judicial review.<sup>89</sup> According to some scholars, the development of CERCLA common law was inevitable, even encouraged by the legislative history.<sup>90</sup> Others disagree, interpreting the common law that developed around CERCLA as an unwanted but necessary result of sloppy drafting.<sup>91</sup> Regardless of congressional intent for the development of a common law, CERCLA cases have come before the courts in very high numbers.<sup>92</sup> The next sections of this Note will address

<sup>83</sup> *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983) (establishing that while CERCLA did not mandate joint and several liability, hazardous waste sites are of the nature that multiple parties contribute to a single harm, and therefore common law principles dictate that the burden of demonstrating divisibility is on the party seeking to limit his liability).

<sup>84</sup> 42 U.S.C. §§ 9606(a), 9613(f)(1) (2006). Section 9606 handles actions against PRPs on behalf of the government, § 9613 handles actions between PRPs, both encourage the court to consider the equities of the particular case, though § 9613 uses the permissive “may.” *Id.*

<sup>85</sup> *Burlington Northern and Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614 (2009).

<sup>86</sup> *See supra* notes 5–8 and accompanying text.

<sup>87</sup> *See Nagle, supra* note 5, at 1426.

<sup>88</sup> James M. Strock, *Settlement Policy Under the Superfund Amendments and Reauthorization Act of 1986*, 58 U. COLO. L. REV. 599, 601 (1988). *See also Nagle, supra* note 5, at 1438–39.

<sup>89</sup> 42 U.S.C. 9622(a) (2006) (“A decision of the President to use or not to use the procedures in this section is not subject to judicial review.”). *See also* Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 275–76 (1996).

<sup>90</sup> Watson, *supra* note 89, at 292–93.

<sup>91</sup> Nagle, *supra* note 5, at 1444–45.

<sup>92</sup> *See id.* at 1444, 1446.

the two most common mechanisms for CERCLA litigation, primarily addressing cases that arise among PRPs.

### III. ORPHAN SHARES

#### A. *What They Are and Why They Are a Problem*

The root cause of many litigated CERCLA cases is what has come to be referred to as the “orphan shares” of liability.<sup>93</sup> These are the costs associated with the contributions of parties who are defunct or otherwise immune to judgment.<sup>94</sup> Immunity to judgment includes only a few explicitly named defenses: act of God, act of war, and a limit to liability for third party actions.<sup>95</sup> Far more often, orphan shares are the result of parties becoming insolvent before the process of CERCLA enforcement begins.<sup>96</sup>

If complete equity were reached, CERCLA enforcement would leave every party to pay for a portion of the cleanup costs equivalent to the proportion of the hazardous waste they contributed to the site.<sup>97</sup> However, since the insolvency of some PRPs makes such a distribution impossible, the orphan shares must be absorbed by someone. This requires either increasing the burden on solvent PRPs or finding some other entity to pay, which would likely be the taxpayers through the government. While orphan shares present the largest complication in CERCLA enforcement, they are also a natural by-product of the retroactive liability scheme.<sup>98</sup>

#### B. *Orphan Shares Under the Current System*

As CERCLA is currently enforced, the question of who should cover orphan shares has typically been framed as a need to determine whether settling PRPs or non-settling PRPs should be stuck with the burden.<sup>99</sup> Both perspectives are supported by strong justifications. Proponents of assigning orphan shares to non-settling PRPs point to the incentive it provides PRPs to settle.<sup>100</sup> Arguments in favor of assigning the cost of orphan

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<sup>93</sup> Kilbert, *supra* note 12, at 1046.

<sup>94</sup> *Id.* at 1047.

<sup>95</sup> 42 U.S.C. § 9607(b) (2006).

<sup>96</sup> Kilbert, *supra* note 12, at 1046–47.

<sup>97</sup> See Grad, *supra* note 4, at 17 (explaining that the main objection to instituting a strict liability regime in CERCLA was the inequitable distribution of costs that would result).

<sup>98</sup> Kilbert, *supra* note 12, at 1046–47.

<sup>99</sup> *Id.* at 1047–48.

<sup>100</sup> U.S. EPA Incentives, *supra* note 81 (“EPA’s orphan share compensation policy, however,

shares to settling PRPs focus primarily on legal expedience and the fact that any PRP can be held fully liable based on CERCLA's joint and several liability.<sup>101</sup> Courts have ruled both ways, assigning the orphan shares entirely to settling or to non-settling PRPs, often depending on how the action was brought.<sup>102</sup>

While either result is within the constraints of CERCLA,<sup>103</sup> assigning orphan shares entirely to some subset of PRPs directly opposes the typical result in cases involving joint tortfeasors.<sup>104</sup> As a result, many commentators have advocated, and some courts have used, an equitable system of splitting the costs associated with the orphan shares.<sup>105</sup> Though these rulings are becoming more common, many courts still feel constrained by the joint and several liability regimes in the CERCLA statute, which allows recovery of the entire cost from a single defendant.<sup>106</sup>

#### IV. CONTRIBUTION ACTIONS

The typical mechanism for distributing the costs of cleanup, a contribution action, arises when one PRP takes on the burden of the cleanup operation, either financially or directly, and then seeks other reimbursement from other PRPs.

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allows EPA to not pursue some or all of the orphan share from parties that are willing to sign a cleanup agreement.”); Organ, *supra* note 16, at 1096–97.

<sup>101</sup> See *Burlington Northern and Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614 (2009) (citing RESTATEMENT (SECOND) OF TORTS § 433A cmt. i (1963–1964)) (“When two or more causes produce a single, indivisible harm, courts have refused to make an arbitrary apportionment for its own sake.”); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983); RESTATEMENT (SECOND) OF TORTS § 875 (1979).

<sup>102</sup> See *infra* Part IV.

<sup>103</sup> In fact, the result may be required by the imposition of joint and several liability. See Kilbert, *supra* note 12, at 1067–68.

<sup>104</sup> RESTATEMENT (SECOND) OF TORTS § 886A cmt. c (1979) (stating that when a joint tortfeasor is insolvent or beyond their jurisdiction, “the court may be expected to do what is fair and equitable under the circumstances.”).

<sup>105</sup> See, e.g., *Action Mfg. Co. v. Simon Wrecking Co.*, 428 F. Supp. 2d 288, 328–29 (E.D. Pa. 2006) (stating that “it is equitable to allocate the orphan share proportionally between the CSDG and the only remaining defendants,” the court elected “to allocate the entire [remaining cleanup cost after other settlements] between the CSDG and the Simon Entities, in proportion to their relative liability at the Site”); *United States v. Kramer*, 953 F. Supp. 592, 601 (D.N.J. 1997) (“[t]here is no reason in law or equity to rule out the notion that consideration may be given to equitable apportionment of the ‘orphan share’ among all responsible parties”). See also Kilbert, *supra* note 12, at 1073 (discussing the adoption of a regime of comparative responsibility which has been adopted by many states for tort claims, reflecting the RESTATEMENT (THIRD) OF TORTS: Apportionment of Liability § 17).

<sup>106</sup> Kilbert, *supra* note 12, at 1058.

A. *A Demonstrative Case: Fox River*

Approximately 270,000 people live along the Lower Fox River in Wisconsin, which flows for about thirty-nine miles, starting at Lake Winnebago feeding into Green Bay and, ultimately, Lake Michigan.<sup>107</sup> The Fox River is also home to the world's highest concentration of pulp and paper mills.<sup>108</sup> Throughout the 1950s and 1960s, these mills used PCBs to make a carbonless copy paper, a process which resulted in the discharge of about 250,000 pounds of PCBs into the river.<sup>109</sup> After conducting research throughout the late 1990s, EPA issued a cleanup plan for the river in 2002, dividing the river into five sections, or operable units.<sup>110</sup> In April of 2006, EPA reached a settlement agreement with two PRPs at the site, NCR Corp. and Sonoco–U.S. Mills, Inc., under which the two corporations agreed to spend an estimated \$30 million in remedial costs.<sup>111</sup>

Five years later, NCR decided it had done its share of the cleanup work and notified EPA that it would not continue.<sup>112</sup> While admitting liability under CERCLA, NCR argued that “it should not be responsible for 100% of the remediation work.”<sup>113</sup> By that point, at a cost of about \$50 million, NCR had participated in remedial efforts at three operable units.<sup>114</sup> In August of 2012, citing uncertainty in the case, the Seventh Circuit Court of Appeals upheld a preliminary injunction against NCR to compel the corporation to continue the remedial efforts until a full trial on the merits could be held.<sup>115</sup> While NCR's case is not over at this point, the Seventh Circuit's decision highlights the burden that can be placed on parties who settle early and are forced to assume a large role in the remedial effort.

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<sup>107</sup> *Lower Fox River and Green Bay Site Background*, U.S. EPA, <http://www.epa.gov/Region5/cleanup/foxriver/background.htm> (last visited Nov. 13, 2013).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* PCBs, polychlorinated biphenyls, concentrate in an environment and cause health hazards to an assortment of animals and ultimately humans. *Id.* At Fox River, the PCBs have become part of the general sediment and have already contaminated Green Bay and Lake Michigan. *Id.*

<sup>110</sup> *Fox River NRDA/PCB Releases*, U.S. EPA, <http://www.epa.gov/region5/superfund/npl/wisconsin/WI0001954841.html> (last updated June 2013).

<sup>111</sup> Press Release, Companies to Spend \$30 Million on PCB Cleanup at the Lower Fox River and Green Bay Superfund Site, Department of Justice (Apr. 12, 2006), *available at* [http://www.justice.gov/opa/pr/2006/April/06\\_enrd\\_216.html](http://www.justice.gov/opa/pr/2006/April/06_enrd_216.html).

<sup>112</sup> *United States v. NCR Corp.*, 688 F.3d 833, 837 (7th Cir. 2012).

<sup>113</sup> *Id.* at 836.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 844.

*B. Confusion of Legal Claims: The § 107/§ 113 Dichotomy*<sup>116</sup>

Like at Fox River, contribution actions typically arise when one PRP has provided or funded some cleanup efforts and attempts to recover some costs from other parties.<sup>117</sup> While CERCLA, as originally enacted, provided no literal right of action for contribution for PRPs who voluntarily undertook some responsive cleanup action, the courts typically read a right of action into the section defining the basis for private party liability.<sup>118</sup> Attempting to fix the legislative hole, Congress created a private party action through SARA in 1986.<sup>119</sup> Initially, courts read these provisions to establish “similar and somewhat overlapping remed[ies].”<sup>120</sup>

While this distinction is anything but clear, it is significant because of the way courts have interpreted the two sections. Under CERCLA Section 107, courts have used a joint and several liability standard, meaning any one defendant can be liable for the whole cost.<sup>121</sup> Under CERCLA Section 113, courts typically apply a more lenient several standard, which allows courts to consider equitable factors to proportionally divide liability among PRPs.<sup>122</sup> Thus, a PRP can typically recover more from a defendant in a contribution action under Section 107 than under Section 113, which naturally makes § 107 a more appealing avenue for PRPs who have performed voluntary cleanup.<sup>123</sup>

Largely because of the particularly harsh results of joint and several liability under Section 107 claims, courts began to rule that CERCLA Section 107 was unavailable to liable plaintiffs.<sup>124</sup> Over the course of about a decade each circuit came to this decision using a variety of arguments.<sup>125</sup>

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<sup>116</sup> This section of the Note will attempt to provide a concise overview of a very confusing topic. For articles discussing these issues in more detail, see Steven Ferrey, *Inverting the Law: Superfund Hazardous Substance Liability and Supreme Court Reversal of All Federal Circuits*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 633, 648 (2009) and see generally Araiza, *supra* note 13.

<sup>117</sup> Araiza, *supra* note 13, at 194.

<sup>118</sup> *Walls v. Waste Res. Corp.*, 761 F.2d 311, 318 (6th Cir. 1985) (citing Nat'l Contingency Plan, 40 C.F.R. 300.1–300.81 (1982)) (“District Court decisions have been virtually unanimous in holding that section 9607(a)(4)(B) creates a private right of action against section 9607(a) responsible parties for the recovery of ‘necessary costs of response incurred by any other person consistent with the National Contingency Plan.’”).

<sup>119</sup> 42 U.S.C. § 9613(g)(1) (2006).

<sup>120</sup> *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994).

<sup>121</sup> Ferrey, *supra* note 116, at 648.

<sup>122</sup> *Id.* at 650.

<sup>123</sup> *See id.* at 663.

<sup>124</sup> *Id.* at 663–64.

<sup>125</sup> *Id.* at 664–66.

In doing so, the courts effectively turned PRPs' Section 107 claims into Section 113 claims in order to use the more equitable distribution standard.<sup>126</sup>

Despite the uniformity across the Circuit Courts that private party claims were properly heard under Section 113 not Section 107,<sup>127</sup> the Supreme Court in 2004 concluded that CERCLA Section 113 is unavailable to "a private party who has not been sued under CERCLA § 106 or § 107(a)."<sup>128</sup> The result of these rulings was that every Circuit barred Section 107 claims from PRPs and the Supreme Court barred Section 113 claims, leaving PRPs with no avenue to seek contribution for volunteer cleanup, creating a huge disincentive for the volunteer remediation on which the existing system relies.<sup>129</sup> To avoid entirely foreclosing the availability of contribution actions, the Supreme Court then confirmed the availability of Section 107 to private parties.<sup>130</sup> The result of these cases has been vast confusion in the area of contribution claims, which generally discourages voluntary remediation.<sup>131</sup>

## V. NON-SETTLING PRP INTERFERENCE

Another mechanism PRPs have used to ensure equitable distributions is filing interference actions when EPA files a settlement agreement with a subset of the PRPs at a site.

### A. *A Demonstrative Case: San Gabriel Valley*

In 1979, EPA discovered groundwater contamination in the San Gabriel Basin aquifer and five years later added the basin to the National Priorities List, the first step in initiating cleanup efforts under CERCLA.<sup>132</sup> EPA, along with the California Department of Health Services, assessed the extent of the contamination through a well sampling program that showed extremely high levels of volatile organic compounds ("VOCs").<sup>133</sup>

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<sup>126</sup> See, e.g., *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994) ("Whatever label Akzo may wish to use, its claim remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make. Akzo's suit accordingly is governed by section 113(f).").

<sup>127</sup> *Ferrey*, *supra* note 116, at 662.

<sup>128</sup> *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 160–61 (2004).

<sup>129</sup> *Ferrey*, *supra* note 116, at 675–76.

<sup>130</sup> *United States v. Atlantic Research Corp.*, 551 U.S. 128, 128 (2007).

<sup>131</sup> *Ferrey*, *supra* note 116, at 684.

<sup>132</sup> *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1146 (9th Cir. 2010).

<sup>133</sup> *Superfund Site Overview San Gabriel Valley*, U.S. EPA, <http://www.epa.gov/region9/SanGabriel> (last visited Nov. 13, 2013).

Cleanup at this site is ongoing, but the aquifer still provides about 90% of the Valley's drinking water.<sup>134</sup> The site was included on the NPL as four sites comprising six regions of groundwater contamination.<sup>135</sup> The efforts at funding cleanup in the South El Monte region of Area 1, which has included extensive litigation,<sup>136</sup> is illustrative of the problems surrounding interference actions.

While EPA has conducted research and cleanup operations throughout the San Gabriel Valley since the early 1980s, the cleanup of the South El Monte Operable Unit ("SEMOU") began in earnest in the mid-1990s.<sup>137</sup> In 2000, EPA proposed a thirty-year cleanup and containment plan for the region.<sup>138</sup> In 2002, EPA sent SNLs to sixty-seven PRPs it had identified and began negotiating with a group of PRPs.<sup>139</sup> Shortly thereafter, EPA reached a settlement with a subset of that group of PRPs, referred to as the Group of 13, under which the Group of 13 would pay \$4.7 million to cleanup the VOCs at the SEMOU.<sup>140</sup> In 2005, EPA detected another chemical, perchlorate, in the water, which increased the estimated cleanup costs by an estimated \$46 million.<sup>141</sup> Following this discovery, the settling PRPs agreed to provide an additional \$3.4 million to account for the increased cost, which was confirmed in a CD through the Central District of California.<sup>142</sup> A group of the remaining PRPs moved to intervene in the settlement "to protect their rights to contribution under CERCLA, and to ensure that the consent decree embodies a fair and reasonable allocation of liability."<sup>143</sup> Their motion was eventually granted by the Ninth Circuit.<sup>144</sup>

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<sup>134</sup> U.S. EPA, *Progress Report on San Gabriel Valley Ground Water Cleanup* 1, 1 (Dec. 2011), available at [http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/84e3d3f7480943378825723300794f02/0065ed704ae95ccc88257007005e941e/\\$FILE/Final%20SGV\\_VC.pdf](http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/84e3d3f7480943378825723300794f02/0065ed704ae95ccc88257007005e941e/$FILE/Final%20SGV_VC.pdf). It is important to note that all water is treated to meet federal and state standards before it is supplied for drinking. *Id.* at 6.

<sup>135</sup> *Id.* at 1. The Valley is listed as San Gabriel Valley Areas 1 to 4 and Area 1 is further subdivided into three regions. *Id.*

<sup>136</sup> See Richard M. Frank, *The Ninth Circuit Issues Major Superfund Decision*, BERKELEY LAW (June 24, 2010), <http://www.law.berkeley.edu/8744.htm>.

<sup>137</sup> *San Gabriel Valley (area 1) El Monte, South El Monte, Whittier Narrows*, U.S. EPA, <http://www.epa.gov/region9/SanGabrielElMonte> (last visited Nov. 13, 2013).

<sup>138</sup> *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1146 (9th Cir. 2010).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1146–47.

<sup>142</sup> *Id.* at 1147.

<sup>143</sup> *Id.* at 1149.

<sup>144</sup> *Aerojet*, 606 F.3d at 1153.

*B. Considerations of Intervention in CERCLA*

Under the Federal Rules of Civil Procedure, a party has a right to intervention if it has an interest so tied to the issue contested that disposing of the action without its representation would harm its ability to protect its interest.<sup>145</sup> The question of this provision's applicability to CERCLA litigation has emerged as a significant issue of debate among scholars and a split in the circuits.<sup>146</sup>

Much of the criticism of allowing interferences in CERCLA focuses on the complications it introduces to litigation and the interest in finality of settlements.<sup>147</sup> One court went as far as to say "that allowing intervention . . . would only frustrate CERCLA policy and, in effect, eliminate CERCLA's statutory incentive for settlement."<sup>148</sup> Courts have a general preference for settlements for a variety of reasons, which creates a strong incentive for denying interference actions.<sup>149</sup> Additionally, the nature of CERCLA cases creates an added incentive in that early settlement provides funding for cleanup operations more quickly than extensive court cases.<sup>150</sup> Some courts have also taken a more legalistic approach, arguing that a non-settling PRP's interest is not direct enough to justify intervention.<sup>151</sup>

The Ninth Circuit's *Aerojet* decision counters many of these points and provides reasoning for affirming the interests of non-settling PRPs by allowing intervention. In that case, the court was strongly persuaded by CERCLA Section 113's protection of settling PRPs against contribution claims from other PRPs.<sup>152</sup> This protection is necessary to the finality of

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<sup>145</sup> FED. R. CIV. P. 24(a)(2).

<sup>146</sup> Compare *Aerojet*, 606 F.3d at 1152 (finding that the immunity given to settling PRPs makes consideration of the interests of non-settling PRPs essential for finality of the case), and *United States v. Union Elec. Co.*, 64 F.3d 1152, 1158 (8th Cir. 1995) (observing that Rule 24 is to be construed liberally, resolving all doubts in favor of the intervening party), with *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1184 (3d Cir. 1994) (finding that the interest of a non-settling PRP is contingent on some future action between the government and the attempted intervener and therefore is insufficient to justify an interference).

<sup>147</sup> See, e.g., Frank, *supra* note 136. See also *United States v. ABC Indus.*, 153 F.R.D. 603, 607 (W.D. Mich. 1993) ("Under CERCLA, that interest is expressly subordinated by the desire for the early *de minimis* settlements and the finality of judgments obtained through the settlements.").

<sup>148</sup> *Arizona v. Motorola, Inc.*, 139 F.R.D. 141, 146 (D. Ariz. 1991).

<sup>149</sup> Fuller, *supra* note 6, at 246.

<sup>150</sup> *Id.* at 247.

<sup>151</sup> See *Alcan Aluminum*, 25 F.3d at 1183–84; Toby A. McCartt, *Intervention by Non-Settling PRPs in CERCLA Actions*, 41 ENVTL. L. 957, 982–83 (2011).

<sup>152</sup> *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1150 (9th Cir. 2010). See also 42 U.S.C. § 9613(f)(2) (2006) ("A person who has resolved its liability to the United States

a CERCLA settlement, which in turn is essential to encouraging settlements.<sup>153</sup> The Ninth Circuit reasoned that because the non-settling PRPs ultimately agreed liability would be determined by the agreement between the government and the settling PRPs, the non-settling PRPs have a sufficient interest to maintain an interference action.<sup>154</sup> The Court disagreed with the argument that the non-settling PRPs' interest under Section 113 based on their ultimate settlement was only contingent or speculative.<sup>155</sup> The court also acknowledged that the interests of the parties involved in a CERCLA settlement are "directly opposed to those of the [non-settling PRPs]" and, as such, the interests of the non-settling PRPs are not taken into account at all.<sup>156</sup>

## VI. PROPOSED NEW SETTLEMENT PROCESS

### A. *Overview and Mechanics of the Proposed Settlement*

The general idea this Note proposes is a simple one: EPA should be required to bring all PRPs to the same table for negotiations prior to reaching a settlement on a Superfund site. Ideally this would result in EPA reaching a single settlement with all PRPs regarding the distribution of all current and future cleanup costs. Such a system would promote a much greater level of equity in the cost distribution and decrease court and other transactional costs.

Under this system, the initial PRP identification steps would remain largely the same. EPA would be required to identify the PRPs at a site and send out notice letters, as is already done.<sup>157</sup> In the notice letters, EPA would invite notified PRPs to identify other PRPs at the site, which is also already done.<sup>158</sup> However, instead of an invitation to participate in negotiations or a notification of judicial action, the notice letters would provide the PRPs with a timeline of the settlement discussions and instructions regarding who will negotiate on their behalf should they fail to timely

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or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement.”).

<sup>153</sup> Fuller, *supra* note 6, at 244–45.

<sup>154</sup> *Aerojet*, 606 F.3d at 1150. *See also* 42 U.S.C. § 9613(f)(2) (“Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.”).

<sup>155</sup> *Aerojet*, 606 F.3d at 1150. The Court pointed out that CERCLA § 113(f)(1) “provides an interest in such a claim to any ‘liable or potentially liable’ person.” *Id.*

<sup>156</sup> *Id.* at 1153.

<sup>157</sup> *PRP Search Manual*, *supra* note 60, at 33.

<sup>158</sup> *Id.* at 52.

respond. Once a critical mass of the parties is notified, all parties will be brought together for a single negotiation.

*B. De Minimis Settlement in the Proposed System*

The system proposed by this Note would require much heavier and earlier use of de minimis settlements for two significant reasons. First, they would create an early fund which could be used for initial cleanup or administrative work while the larger PRPs worked on settling the distribution of the rest of the costs.<sup>159</sup> Second, early de minimis settlements would limit the number of parties involved in the mass negotiation, which would allow that process to proceed more quickly.<sup>160</sup> In order to make de minimis settlements more effective in accomplishing these goals, the new system should relax the requirements for a PRP to qualify for de minimis status.<sup>161</sup> The specific levels that should be required are difficult to determine, but ideally de minimis settlements should allow most PRPs to cash out with minimal extraneous expenses.

*C. Settlement Preference in the Current System*

An emphasis on settlement rather than litigation is certainly not a new idea; the preference for settlement is even encompassed in the Act itself.<sup>162</sup> A recent report from the United States Government Accountability Office ("GAO") found that roughly eighty percent of all CERCLA enforcements from 1979 through 2007 were consensual, meaning they were the result of a successful settlement.<sup>163</sup> Further, over sixty percent of negotiations were concluded with administrative action, rather than judicial, keeping the courts out of the settlement entirely.<sup>164</sup> Clearly the all-inclusive negotiation advocated by this Note could occur under the current system,

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<sup>159</sup> Jennifer Martin, Comment, *A Prescription to Expedite Hazardous Waste Cleanups: De Minimis Settlements and ADR*, 21 GOLDEN GATE U.L. REV. 361, 369 (1991).

<sup>160</sup> *Id.* at 367 (noting that negotiations become easier among the major contributors once the de minimis parties have cashed out).

<sup>161</sup> *Id.* at 370–71.

<sup>162</sup> "Whenever practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section . . . in order to expedite effective remedial actions and minimize litigation." 42 U.S.C. § 9622(a) (2006).

<sup>163</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-656, SUPERFUND LITIGATION HAS DECREASED AND EPA NEEDS BETTER INFORMATION ON SITE CLEANUP AND COST ISSUES TO ESTIMATE FUTURE PROGRAM FUNDING REQUIREMENTS 24 (2009).

<sup>164</sup> *Id.*

but thirty years of experience has demonstrated that such a system will not arise organically.

While settlements have a large prominence in CERCLA enforcements, each settlement typically only includes some of the PRPs at any particular site, which leads to multiple enforcement actions at a single site.<sup>165</sup> The previously mentioned GAO report noted a median of three enforcement actions across Superfund sites, with one site requiring sixty-eight separate enforcement actions.<sup>166</sup> Such a system, combined with CERCLA's liability scheme, places later settling parties in a more difficult position once others have already settled.<sup>167</sup> For these reasons, an equitable distribution can only be reached when all PRPs are brought to the table together.

#### D. *Super Settlements*

Over the last decade and a half, Super Settlements or environmental liability transfers (“ELTs”) have emerged as a new system to consolidate cleanup efforts.<sup>168</sup> In these systems, a single entity contracts with PRPs to assume their liability and perform cleanup at a site.<sup>169</sup> This system creates many benefits, including an earlier conclusion of CERCLA enforcements as PRPs ‘cash out,’ which allows remedial work to begin sooner.<sup>170</sup> ELTs also ease the difficulties of transferring contaminated property, thus facilitating redevelopment of Superfund sites.<sup>171</sup>

ELTs do have some drawbacks. The use of a third party insurer removes a large degree of oversight and control from the government.<sup>172</sup> Instead of allowing EPA to direct the settlement, a private company takes

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<sup>165</sup> *Id.* at 23.

<sup>166</sup> *Id.*

<sup>167</sup> Courts have noted in the context of interferences that because of the joint and several liability imposed by CERCLA, once EPA has entered into a settlement with some group of PRPs the remaining liability of other PRPs is directly impacted. *See United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1150 (9th Cir. 2010). Because of this, if a group of PRPs settles for less than their proportional share, or even exactly their proportional share, then EPA will not accept a settlement agreement with the remaining PRPs for less than the remaining cost of remediation, even if, because of a favorable settlement for the early settlers or the orphan shares, that share is disproportionate to the remaining PRPs' activity at the site.

<sup>168</sup> *See* Kristin L. Hines, *Examining Contractual Models for Transferring Environmental Liability: How They Work and Where They Are Headed*, 11 VT. J. ENVTL. L. 395, 418 (2009).

<sup>169</sup> Kenneth F. Gray, “*Super Settlements*”: *Early Release for All PRPs at Multiparty Superfund Sites?*, 12 NAT. RES. & ENV'T 298, 298 (1998).

<sup>170</sup> *Id.* at 299.

<sup>171</sup> Hines, *supra* note 168, at 399.

<sup>172</sup> *Id.* at 416.

on the responsibility of estimating the cleanup costs and assigning the relative liability of individual PRPs.<sup>173</sup> Additionally, the for-profit nature of the cleanup companies requires a relatively high baseline cost in order to provide the third party company with enough potential reward to justify the risk of taking on liability for the site, so ELTs are not as effective for small, low cost sites.<sup>174</sup>

## VII. ISSUES WITH THE PROPOSED SYSTEM

The proposal of mandatory settlement with appointed representation appears to be a novel one across all areas of regulatory law. Naturally, this means that there will be novel issues created by the process. The intent in this Part is not to provide definitive answers to all of the possible problems with the proposed system, but to explore some of the system's obvious drawbacks and suggest some ways to deal with them.

### A. *Mechanics of Appointing Representation for Absent PRPs*

Settling the mechanics of the appointed representation is likely to be the most contentious issue in implementing the proposed system. The businesses involved will need reassurances that should they choose not to participate they will still receive adequate representation. The most obvious difficulties are deciding how to fund the appointed representatives for the absent PRPs and who to appoint. The first issue is dealt with fairly easily by passing the costs on to the PRPs that require appointed representatives as part of the cost ultimately demanded of them at the end of the negotiation. Deciding who to appoint poses a much greater challenge.

There are two categorical approaches to determining who to appoint to represent absent PRPs: (1) establish a group within EPA to represent absent PRPs; or (2) bring in independent counsel, likely from a pre-approved list. In weighing the two options a number of factors come into play, primarily the associated costs and the ability to maintain the proper bias. In regards to both factors, independent counsel seems to be the preferred option.

In terms of associated costs, internal representation will either draw resources away from other areas of EPA work or create a department which will see an unpredictable workload. Conversely, using outside groups would allow EPA to take bids from outside counsel to find a low cost option for

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<sup>173</sup> *Id.* at 405.

<sup>174</sup> *Id.* at 406.

representing the absent PRPs. These groups would likely be firms with experience representing PRPs in CERCLA cases who do not have a client in the particular site at issue.

Regarding bias, perceived bias is just as important as actual bias. Ideally, the appointed representatives should look and act just as they would if hired directly by the PRP whom they represent. With that in mind, the perception would likely be that a group within EPA is more likely to simply favor a quick resolution, which could lead to a suspicion that the appointed representatives are taking on more costs than they should. An independent representative would be more likely to act the same as outside counsel hired by the PRP itself, or at least would be more likely to be viewed in that light.

#### *B. Respecting the Finality of the Settlement*

There will be some circumstances in which the absent PRP should not be held responsible for the portion of the total costs that their appointed representative accepted on their behalf. However, there is a critical concern in preserving the finality of the settlement for the other PRPs involved.<sup>175</sup> This finality would be completely undermined if an absent PRP were allowed to object to the final agreement. Therefore, the proposed system should preserve the current protection from contribution for PRPs who participate against absent PRPs.<sup>176</sup> Tracking current law, the agreement should be final as to the liability of the present PRPs with the share assigned to the absent PRPs to be paid by the absent PRP or, if an absent PRP can demonstrate good reason, to the appointed representative of EPA.

#### *C. When to Shift Liability to the Appointed Representative*

Situations may arise in which an absent PRP's appointed representative reaches an agreement that is plainly unfair to the absent PRP. While the new system could be designed to force absent PRPs to honor the agreement made without them,<sup>177</sup> because the proposed system is primarily motivated by equity concerns, rather than punishing the absent

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<sup>175</sup> Fuller, *supra* note 6, at 248 (“Private parties benefit from both the certainty of entering into a negotiated settlement and the finality of settlement.”).

<sup>176</sup> 42 U.S.C. § 9613(f)(2) (2006).

<sup>177</sup> The joint and several liability standard already a part of CERCLA allows EPA to hold an absent PRP responsible for any amount up to the entire cost of cleanup. *See United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810–11 (S.D. Ohio 1983); RESTATEMENT (SECOND) OF TORTS § 875 (1979).

PRPs, there should be a systematic safeguard to protect absent PRPs from plainly unfair agreements. Such an unfair settlement could come from a number of causes. Because the appointed representatives are not actually hired by the party who will ultimately pay the settlement, there may not be a sufficient level of natural accountability. While the system would work best if the absent PRPs were held to the agreement made by their appointed representative,<sup>178</sup> the appointed representative should not be allowed to act in bad faith or against the interests of the PRP they represent and escape liability. In order to address that need, there should be a mechanism in place to ensure that the appointed representatives have sufficient accountability to the PRP whom they are appointed to represent.

The easiest way to ensure that level of accountability would be to create a cause of action for absent PRPs against their appointed representatives. In order to keep these actions from getting out of hand, this Note suggests establishing a gross negligence standard for actions by PRPs against their appointed representative. Under such a standard, appointed representatives would only be held liable if the PRP could demonstrate that they failed to perform more than cursory research, that they relied entirely on the research of other PRPs at the site, or that they negotiated in bad faith. The PRP would not be successful in a suit merely because they would have acted differently in the negotiation or because they are dissatisfied with the result.

Additionally, the appointed representative should be encouraged to reach out to the PRP for any information the PRP has that would be helpful. In order to encourage such interaction, the appointed representative should be granted an affirmative defense to any suit from the PRP based on the PRP's failure to respond to routine inquiries. In addition to bringing the most and best information into the negotiation, such a policy would provide the absent PRPs with an avenue to have some impact on the negotiation.

#### *D. When to Shift Liability to EPA*

An absent PRP should be able to shift liability to EPA any time it can demonstrate that the process as a whole was inherently unfair and led to an unfair agreement. The most obvious scenario in which the process is inherently unfair occurs when EPA fails to properly notify the PRP of the enforcement process. In such situations, the same equity concerns

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<sup>178</sup> Such a requirement would increase the likelihood that PRPs would choose to participate themselves in order to have some control over how much they owe for the cleanup.

which motivate this system would be undermined by enforcing a settlement against a party who had no proper notice regarding their liability at the site.

Demonstrating an unfair agreement should require that the PRP demonstrate that the agreement assigns them a significantly larger portion of the costs than a similarly situated present PRP. Because of the orphan share problem, demonstrating that the costs assigned were disproportionate with their contribution would not be enough to demonstrate an unfair agreement. If the courts determine that despite the systematic unfairness the agreement was nonetheless fair, the case should be dismissed as harmless error and the PRP would still be held liable for the negotiated amount.

In cases in which the PRP can demonstrate both an unfair process and an unfair agreement, their liability should be reduced to that portion of the costs which the courts find equitable. This amount will be determined when the court determines that the agreement was unfair based on the similarly situated present PRP and EPA should be forced to absorb the difference.

*E. PRPs Seeking to Join Negotiations in Progress*

Another difficulty which would naturally arise are PRPs seeking to insert themselves into the negotiation after the process has started. This could arise in one of two ways: (1) a PRP is only identified late in the process; or (2) an absent PRP seeks to replace their appointed representative. The first scenario is most likely to arise with a PRP who qualifies for a de minimis settlement, which can be handled quickly outside of the main negotiation. If the late identified PRP does not qualify for a de minimis settlement, they should be invited to join the negotiation. While this may upset portions of the negotiation, inclusion of new PRPs will necessarily decrease the burden on all of the PRPs already at the table, so objections should be minimal.

The second scenario poses a much larger challenge. While an interest in an inclusive negotiation process would weigh in favor of allowing PRPs to join in at any point, the interests of the other PRPs require some limit on late-joining parties. The entire process is delayed when a party joins the negotiation after it has already begun and any intermediate agreements that had already been made are brought into question. The easiest way to deal with this issue is through encouraging, or potentially requiring, the appointed representative to attempt to maintain contact with the PRP. This would allow the PRP to enter the negotiation at any

time through their appointed representatives while causing only minimal disruptions to the negotiation process.

#### CONCLUSION

Almost twenty years ago, one commentator argued “that for the Superfund program to work efficiently . . . all PRPs must be invited to participate in [settlement talks] and all PRPs must view the decision to participate in [settlement talks] as their reasonable least-cost option.”<sup>179</sup> None of the changes in CERCLA enforcement have accomplished that goal, which is why this Note advocates removing the option of non-participation in settlement talks. Clearly there would still be some sites where settlements would fall through, leaving the courts to decide the equitable distribution. However, the proposed system would lead to many more Superfund sites seeing settlements among all of the PRPs, completely avoiding the judicial system. In the process, this will reduce court costs and direct more of the funds to cleanup and return the primary role of enforcement to EPA.

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<sup>179</sup> Organ, *supra* note 16, at 1140.