The Importance of “Being Taken”: To Clarify and Confirm the Litigative Reconstructive of CRECLA’s Text

Alfred R. Light
THE IMPORTANCE OF "BEING TAKEN": TO CLARIFY AND CONFIRM THE LITIGATIVE RECONSTRUCTION OF CERCLA'S TEXT

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I. INTRODUCTION

Since its original enactment in 1980, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) has focused scholarly attention on the litigation process and the related policy concerns of economy and efficiency. Critics complain about the inordinate transaction costs of using litigation as the principal means for remedying abandoned hazardous waste sites. The Environmental Protection Agency (EPA) and its lawyers at the Department of Justice (DOJ) have sought to minimize their costs and to maximize efficiency in reimbursement and administration of the Superfund. To achieve this objective in the long run,

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4 See Insurance Hearing, supra note 3, at 54–72 (the EPA responses to questions of Sen. Simpson concerning transaction costs).
they have spent considerable resources in the short run in court litigation and in legislative lobbying to establish favorable interpretations of the statute.\(^5\)

As described below, the government's\(^6\) campaign to obtain favorable interpretations of the statute has been successful, probably more successful than many in the government imagined at the outset. The environmentalist imperative is strong. The hypothesis of this Article, however, is that the campaign has achieved an embarrassment of riches, a string of successes that go beyond the public policies that supposedly underlie those successes. In Lewis Carroll's fable of the snark, the sum of all the witnesses' testimony amounted to much more than any of the witnesses ever had said.\(^7\) In CERCLA, the sum of all the judicial interpretations of specific statutory provisions goes beyond the policies that Congress intended to effectuate in the Act.

Section II of this Article explains the background of the 1986 amendments to CERCLA and their roots in the EPA's and the DOJ's campaign to shape judicial construction of the original 1980 Act. This section shows how the government used its preliminary successes in Congress during reauthorization, prior to enactment of the amendments, to obtain judicial interpretations favorable to its position. Section III explores post-1986 CERCLA litigation on three issues: liability, contribution, and judicial review. After passage of the amendments, the government continued to use purported legislative history of the amendments to "clarify and confirm" positions that it has asserted. The government also developed new, more aggressive stances in some areas. Section IV explains the sacrifice of CERCLA's text in judicial acceptance of the government's more extreme

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\(^5\) In Fiscal Year 1985 (FY85), for example, the Department of Justice (DOJ) billed the Superfund approximately five million dollars. *Insurance Hearing, supra* note 3, at 64. During that year, the EPA told Congress that it intended to "minimize legal costs" by resolving legal questions on: (1) clarification of CERCLA's right of contribution; (2) contribution protection; (3) mandatory deferral of contribution claims; (4) preclusion of pre-enforcement judicial review and record review; and (5) enhanced settlement authorities. *Id.* at 70–71.

\(^6\) Throughout this Article, the EPA and its lawyers at the DOJ are referred to collectively as the "government." This "person" CERCLA enumerates at 42 U.S.C. § 9601(21) as "United States Government."

\(^7\) L. Carroll, *Fit the Sixth: The Barrister's Dream*, in C. Dodgson, *THE HUMOROUS VERSE OF LEWIS CARROLL* 298, 299 (1933):

But the Judge said he never had summed up before;
So the Snark undertook it instead,
And summed it so well that it came to far more
Than the witnesses ever had said.

*Id.*
interpretations. Certain of these interpretations are inconsistent with one another and with the statute's text. Taken together, these inconsistent interpretations create a harsh and inequitable statutory regime far beyond that sought by CERCLA's most government-oriented congressional sponsors. Section V concludes that the courts are "being taken," a phrase whose symbolic importance compels a Supreme Court mid-course correction in interpretation of the Act.

II. EVOLUTION OF THE SUPERFUND REGIME

A. Pre-CERCLA Hazardous Waste Litigation

When CERCLA initially was enacted in December, 1980, the DOJ had already developed a nationwide coordinated approach to hazardous waste litigation. Through the Hazardous Waste Section of the DOJ's Land and Natural Resources Division and an associated task force at the EPA, a serious effort to compel cleanups under pre-existing legal authorities already had achieved considerable success. The effort's achievements included significant settlements, several court rulings expansively interpreting the "imminent hazard" provision in the Resource Conservation and Recovery Act (RCRA), and a congressional amendment to RCRA generally codifying the legal position asserted by the government in the courts to expand RCRA's use in cleaning up old dumpsites.

The centralized, coordinated approach to hazardous waste litigation initiated in the Carter era remained throughout the maligned Gorsuch-Burford/Lavelle era at the EPA. In fact, the fund-conserving instincts of that EPA administration probably enhanced the symbolic importance of the DOJ's campaign to obtain a construction of the new statute that would make injunctions and cost recovery more economical from the government's perspective.

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12 See Mintz, supra note 8, at 703-43.
13 See United States Env'tl Protection Agency, A Report to Congress on the Environmental Protection Agency's Experience with Implementing Superfund 4-3 to 4-15 (1984) (submitted pursuant to section 301(a)(1) of CERCLA (50% of cleanups expected to be attributable to enforcement first response actions/settlements).
By 1986, when CERCLA was amended by the Superfund Amendments and Reauthorization Act (SARA), many federal district courts virtually had eliminated the bases upon which defendants could resist demands that they immediately undertake or pay for the cleanup of hazardous waste sites with which they had some past or present association. In these cases, disputes predictably arose in three major areas: (1) liability and particularly the extent of liability of individual defendants; (2) allocation of equitable responsibility for cleanup tasks or payments among jointly liable persons; and (3) the remedy for the site. The government almost always pursued a select few among many persons who were potentially responsible under the statute for remedying the site. The government’s ostensible objective was settlement—an agreement with financially responsible parties to undertake the remedial action that the EPA selected. The government sought to avoid entanglement with allocation of responsibilities among the parties agreeing to undertake the cleanup or between the settlors and non-settling potential defendants.

B. The Initial Litigation Approach Under CERCLA

To enhance the long-run chances of achieving settlement without the burden of apportionment at most Superfund sites, in the mid-

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17 Light, A Defense Counsel’s Perspective on Superfund, supra note 2, at 10,206 & n.20; Note, When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup, 38 HASTINGS L.J. 1261, 1270 (1987). The government maintained to Congress during the reauthorization that it sought to represent the “majority of the waste by volume at a site” in the defendants it selected to sue. Insurance Hearing, supra note 3, at 6 (statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division, Department of Justice).
18 See Insurance Hearing, supra note 3, at 7 (statement of Gene Lucero, Director, Office of Waste Programs Enforcement, EPA).

[W]e conclude that if we were to go to some sort of upfront mandatory apportionment scheme, there would be several results. One is that it would delay cleanups ultimately. It would also make it a much more complex program for the administration or the Government to manage in that we would be forced to deal with a number of issues that we are now able to give to the private parties in a suit and force them to deal with.

Apportionment is one of those issues that the parties must resolve among themselves.

Id.
1980s the DOJ sought favorable constructions of the statute in several areas. This Article deals with three of the major areas.

First, the DOJ sought a broad construction of the statute's liability provision, section 107, to maximize the number of parties who could be held liable for cleanup costs. For persons identified as being liable in the statute, the DOJ sought to establish a standard of strict, joint and several liability without the need to prove a nexus between the defendant and the harm requiring cleanup. Second, the government sought to separate litigation over the allocation of responsibility among liable parties from the government's case against the main defendants. In this manner, the government might avoid complications and delays in obtaining the relief sought at the site. Third, the government sought to preclude judicial review of government decisions about remedies to be undertaken at a site until such time as the government might choose to commence enforcement litigation. By controlling the timing of judicial review, the government could minimize potential judicial modification of its preferred remedies. This approach, while initially successful, became remarkably so as the CERCLA reauthorization process developed "post-hoc" legislative history favorable to the government's position.

On the issues of liability, the government achieved initial significant successes in 1983 and 1984. Defendants themselves initially raised the liability issues on a motion for summary judgment in United States v. Chem-Dyne Corp. After a careful analysis of CERCLA's 1980 legislative history, Judge Rubin of the Southern District of Ohio concluded in Chem-Dyne that the 1980 lame-duck Congress's deletion of the term "joint and several" from CERCLA section 107

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20 See infra notes 25-28 and accompanying text.
21 See infra notes 39-42 and accompanying text.
22 See infra notes 43-56 and accompanying text.
23 Later the Department added a supplemental argument that any challenge to the remedy in an enforcement action in court is limited to an evaluation of information in the EPA's administrative record. See infra notes 102-112 and accompanying text.
did not mean that joint and several liability never could be imposed under the statute. In December of 1983, again on a defendants' motion for summary judgment, the court in United States v. Wade construed section 107 not to require the government to prove any nexus between a generator's waste sent to a site and the spill or "release" that required cleanup. This greatly eased the plaintiff's burden of proof in CERCLA cases.

The most significant breakthrough on liability, however, probably came in January, 1984, in United States v. South Carolina Recycling & Disposal, Inc. In South Carolina Recycling, the Chemical Manufacturers Association (CMA), a major lobbying force for industry, participated as amicus and argued "generic" positions that it had developed for its members' use. The CMA and the generator defendants filed joint briefs in the district court on defendants' motion for summary judgment. In December, 1983, however, shortly before the defendants' motion was to be argued, the government filed its own motion for partial summary judgment on liability against the defendants, using the freshly minted precedents in Chem-Dyne and Wade.

At oral argument in South Carolina Recycling, the judge ruled for the government and requested that the government draft an order implementing his ruling. The government drafted a lengthy opinion for the court, rooting its explanation in a plaintiff-oriented interpretation of the Chem-Dyne and Wade opinions. The government lawyers took advantage of this opportunity to distinguish another district court's opinion in United States v. A & F Materials

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26 Id. at 810–11.
31 653 F. Supp. at 989. The briefs in support of the defendant generators' motion for summary judgment were filed on June 28, 1983. Unusually, a lawyer for amicus curiae CMA argued the motions for summary judgment on behalf of the defendant generators in January, 1984.
32 The Wade decision came down on December 20, 1983. The government's motion for partial summary judgment on liability was filed on December 27, 1983. The trial judge's hearing on both the defendants' and the government's motion occurred on January 13, 1984. The court's opinion drafted by the government was signed on February 23, 1984.
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Co.,\textsuperscript{34} a less favorable decision that came down after the South Carolina court's bench ruling.\textsuperscript{35} The \textit{A \& F Materials} court expressly had adopted a more liberal, \textit{i.e.} defense-oriented, view of the circumstances in which joint and several liability might be avoided through equitable apportionment under CERCLA. The \textit{South Carolina Recycling} and \textit{Chem-Dyne} opinions became the key early precedents on CERCLA liability issues.\textsuperscript{36}

Prior to 1986 the government had little need and few opportunities to address directly the problem of allocation of liability. Industrial defendants intent on challenging the availability of joint and several liability under CERCLA ignored contribution issues because contribution presumes the existence of joint liability. To the extent that there was any debate at all over contribution, it largely turned around the simple issue of whether there was a right to contribution, given the absence of express statutory language on the point.\textsuperscript{37} The government argued that there was, and should be, a right to contribution because this position shored up its advocacy of joint and several liability.\textsuperscript{38}

A related debate turned around the appropriate order of bifurcated trials, whether remedy or liability should be litigated first. The government generally argued that liability issues should be litigated before remedy issues, but only to the extent of establishing joint and several liability to the government.\textsuperscript{39} The government preferred to have the remedy decided before the court could turn to contribution issues.

\textsuperscript{34} 578 F. Supp. 1249 (S.D. Ill. 1984).

\textsuperscript{35} The original of the South Carolina court's opinion of February 23, 1984, shows that the judge simply initialed most pages of the government's draft. The footnote distinguishing \textit{A \& F Materials} is found at 653 F. Supp. at 994 n.7.

\textsuperscript{36} The \textit{South Carolina Recycling} \& \textit{Disposal} opinion even adopted the government's unusual position that application of the statute's liability regime to defendant's conduct prior to the date of enactment was not "retroactive," but if retroactive was nevertheless constitutional. 653 F. Supp. at 996-97.


Virtually the only way the government was likely to become embroiled in contribution issues prior to passage of the 1986 amendments was when it decided to forego its joint and several liability position against certain defendants and instead accepted a settlement from them for less than the complete relief sought for a site. The question became whether or not the government's covenant not to sue a settlor extinguished any claim for contribution by a non-settlor whom the government continued to pursue. Though the government claimed that it always extinguished such claims, some settlors were unwilling to rely on such assurances. They required commitments from the government that it would make good any shortfall should a court disagree with its legal position on "contribution protection" and find the settlor liable in contribution.

As to judicial review of government remedy decisions, in the early 1980s the government found itself testing the construction of CERCLA in two contexts. In the first type of situation, pre-litigation negotiations between the government and potentially responsible parties dragged on long enough that the government began to proceed with the selection of a cleanup plan contemplating use of the Superfund. Defendants in these cases sought judicial review under the Administrative Procedure Act of the "final agency action," which would be the selection of the remedy the government had chosen to implement. Using the judicial review preclusion factors

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41 Beginning with United States v. Chem-Dyne, 572 F. Supp. 802 (S.D. Ohio 1983), the government argued that the principles of the Uniform Contribution Among Tortfeasors Act (UCATA) should apply to CERCLA settlements. See Note, The Right to Contribution for Response Costs Under CERCLA, supra note 37, at 361. Commentators have argued persuasively that complete incorporation of the UCATA approach would be inappropriate in the context of CERCLA. Id. at 362–63.

42 See, e.g., Seymour, 554 F. Supp. at 1347–48 (liabilities over and above agreed amounts to be sought from other, non-agreement tortfeasors).


set forth in the Supreme Court decision in *Block v. Community Nutrition Institute*, the courts agreed with the government that "[t]o allow judicial review . . . would frustrate Congress [sic] intent to provide a mechanism whereby hazardous sites can be neutralized expeditiously."46

A second type of situation posed additional problems for the government. CERCLA section 106 authorized the EPA to issue administrative orders to compel certain cleanups from responsible parties in lieu of conducting the cleanup itself.47 Some recipients of such orders sought judicial review in advance of any action by the government to enforce the order.48

Plaintiffs in *Aminoil, Inc. v. EPA*49 sought a court injunction and declaratory judgment that no fines or punitive damages could be imposed as a result of their failure to comply with a unilateral administrative order issued to them because of the unavailability of pre-enforcement judicial review of the order. Even in the administrative order context, however, no court interpreted the statute to permit judicial review of the terms of the order prior to government commencement of an action against the recipient.50 Moreover, the courts uniformly supported the government's position that the EPA could conduct the cleanup action after recipients failed to comply with an administrative order instructing them to do so.51 One court, however, enjoined the EPA's imposition of any fines as a result of non-compliance because of the constitutional due process violation posed by the absence of any meaningful opportunity within the EPA to contest the terms of the order prior to the order becoming effective.52

The constitutional due process infirmity existed because the statute appeared to impose fines automatically upon a recipient's failure to comply with an order even if the defendant had a reasonable belief

50 *See* id. at 71.
51 *See, e.g., J.V. Peters & Co. v. EPA, 767 F.2d 263, 264–66 (6th Cir. 1985) (no cause of action available to challenge the EPA response action); *Industrial Park, 604 F. Supp. at 1144 (court denied responsible party's motion for injunction to enjoin the EPA from conducting cleanup).*
52 *Aminoil, 599 F. Supp. at 75–76.*
that it was not subject to the order or that the order was otherwise invalid.\textsuperscript{53} The statute put recipients of the EPA cleanup orders in the constitutional due process dilemma of either complying with the order and foregoing its opportunity to challenge the order's validity or failing to comply with the order and risking daily penalties as a result.\textsuperscript{54}

This judicial decision prohibiting fines for non-compliance obviously undermined the statute's threat of fines for violations of a cleanup order. Indeed, the government began to announce at the time it issued an administrative order that it would not seek fines for any violations in order to avoid having to litigate the constitutionality of the fines provision.\textsuperscript{55} In 1986, however, Congress amended section 106 to provide a "good faith" defense to penalties and a right of reimbursement for successful challengers.\textsuperscript{56}

\textbf{C. The Litigation Issues in the Reauthorization}

The liability, allocation-contribution, and pre-enforcement judicial review issues all became part of congressional consideration during the CERCLA reauthorization process conducted in 1985. In February, 1985, the government expressed its preferences on these and other issues through legislation that the Reagan Administration proposed.\textsuperscript{57} The Administration released its proposal, complete with associated "legislative history," less than a week before the scheduled mark-up of the CERCLA reauthorization bill in the Senate Committee on Environment and Public Works.\textsuperscript{58} In a hurried mark-up session, that committee adopted with minor changes many of the Administration's "enforcement" provisions covering liability, contribution, and judicial review matters with little, if any, debate.\textsuperscript{59}

Later in 1985, however, both the Senate Committee on Environment and Public Works and the Senate Committee on the Judiciary

\begin{itemize}
\item \textsuperscript{53} See id. at 73–74.
\item \textsuperscript{54} Id. at 75–76; see Ex Parte Young, 209 U.S. 123, 147 (1908); Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115, 1119 (2d Cir. 1975), cert. denied, 426 U.S. 911 (1976).
\item \textsuperscript{55} Aminoil, Inc. v. United States, 646 F. Supp. 294, 295–96 (C.D. Cal. 1986) (distinguishing defense to liability for punitive damages from defense to fines; constitutionality of latter moot because government abandoned any claim for fines).
\item \textsuperscript{56} 42 U.S.C. § 9606(b)(1), (2) (1988).
\end{itemize}
examined the Administration's "enforcement" provisions more closely. On liability, Senator Stafford, the Chairman of the Senate Committee on Environment and Public Works, as well as a sponsor of the reauthorization bill, who was bound to support the legislation that he had stampeded through in February, resisted the Senate Judiciary Committee's attempt to obtain a 90-day sequential referral of the bill. In a compromise, Senator Stafford acceded to Senator Thurmond, the Chairman of the Senate Committee on the Judiciary, and agreed to a shorter period for referral. Furthermore, Senator Thurmond limited the Judiciary Committee's review generally to three areas: judicial review, contribution, and citizen suits. Thurmond expressly agreed that his committee would not propose changes to the standards for strict, joint and several liability that had evolved in the courts. Nevertheless, Stafford agreed that the Judiciary Committee's hearings might inquire into the standard of liability area.

Substantial criticisms of the litigation aspects of CERCLA, which the American Insurance Association (AIA) first brought to the attention of Congress in January, 1985, spurred the Judiciary Committee's interest. Indeed, the Senate Committee on Environment and Public Works itself held a hearing on the insurance industry's concerns in April, 1985, even though the bill that AIA criticized had already been reported from that committee. This April, 1985, hearing, as well as similar hearings conducted in the House of Representatives during the same period, did not go well for the government.

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60 See Insurance Hearing, supra note 3; Senate Judiciary Hearing, supra note 39.

61 See Senate Judiciary Hearing, supra note 39, at 1.

62 Id.

63 See id.

64 The AIA document that piqued interest in CERCLA liability issues was the AIA's Proposal to Reform and Expedite Cleanup Under Superfund. Senator Mitchell quoted from the proposal in questioning the government in the April hearing on insurance before the Senate Committee on Environment and Public Works. Insurance Hearing, supra note 3, at 13.

65 Insurance Hearing, supra note 3. In his opening statement, Senator Stafford expressed that he was predisposed against the changes to the proposed bill sought by insurance industry interests. See id. at 2. In addition, he sharply limited the time available for the insurance industry, and in particular the American Insurance Association, to make its presentation during the hearing. Instead, Stafford provided the lion's share of the hearing to the government and to insurance industry critics. See id. at 30 (Stafford informed AIA's president that the insurance industry would have "a cumulative total of 10 minutes" after he delayed the start of the industry's testimony until after its main witness had to leave). Id.

Regarding the CERCLA liability issues, elected officials with the staunchest of environmentalist reputations appeared to question the legal positions that the government had asserted as following congressional intent in the courts. For example, on the joint and several liability issue, Representative James Florio explained in April, 1985, that "where it appears to be fairly clear that one can demonstrate that one did contribute one barrel out of the hundred, one is only going to be responsible for one-hundredth of the cost."\(^67\) He asserted that this view was a clarification of present law and strongly disputed the government's position that joint and several liability must be applied where the harm is indivisible.\(^68\)

During the April, 1985, hearing before the Senate Committee on Environment and Public Works on insurance issues and the hearings before the Senate Committee on the Judiciary in June, 1985, the Assistant Attorney General for the Land and Natural Resources Section of the DOJ testified that no court would ever hold a small volume contributor jointly and severally liable under CERCLA.\(^69\) In essence, the government argued to Congress that the courts would never accept completely the joint and several liability doctrine that government lawyers had been advocating.\(^70\) Indeed, the import of the views that the government expressed to Congress was that the courts should not completely accept its arguments in litigation concerning joint and several liability.

The Judiciary Committee reserved its most heated criticism of the Administration's Superfund reauthorization bill for the allocation/contribution issue. The bill reported by the Senate Committee on Environment and Public Works had proposed to defer all contribution claims associated with a CERCLA lawsuit until after the government had obtained judgment or settlement from the persons it had chosen to sue.\(^71\) The government's "legislative history" accom-

\(^67\) Superfund Hearings, supra note 66, at 706.

\(^68\) Id. at 707.

\(^69\) Insurance Hearing, supra note 3, at 13 ("[W]e have not and don't intend to and I don't think we can impose liability for 100 percent of the costs on a de minimis contributor."); see Senate Judiciary Hearing, supra note 39, at 46–47, 71; Superfund Reauthorization Hearings, supra note 66, at 14.

\(^70\) The Assistant Attorney General also stated his view in published articles that "full liability could not be brought to bear, as a matter of law, against a truly minor contributor." Habicht, Statutory Hazardous Waste Liability: Problem Solving Outside the Judicial Branch, 1 Toxics L. Rep. (BNA) 22, 26 (1986).

\(^71\) S. 51, 99th Cong., 1st Sess. § 126 (1985) (proposed CERCLA § 107(1)(l)) ("In any civil
panying its proposed version stated that the deferral of contribution claims was intended to clarify present law.\textsuperscript{72} Finding the proposed regime to be contrary to the joinder and impleader provisions of the Federal Rules of Civil Procedure, Senators Thurmond, Simpson, Hatch, and Specter lectured the government’s witnesses at length.\textsuperscript{73} Even the government’s fall-back position, that contribution claims could be made but then must be stayed pending resolution of the government’s claim,\textsuperscript{74} found no acceptance during the hearings.\textsuperscript{75} The best the government could manage on the issue of the timing of contribution claims was to compromise with the committee on an amendment expressly incorporating the Federal Rules of Civil Procedure.\textsuperscript{76}

On the “contribution protection” question at issue in partial settlements, the government agreed to two changes from the bill reported by the Senate Environment Committee. First, language in the government’s bill indicating that a partial settlement reduced the government’s “claim” against non-settlors by any amount “stipulated by” the settlement was changed to indicate that the non-settlors’ “potential liability” is reduced by the “amount” of the settlement.\textsuperscript{77} Second, language in the government’s bill indicating that

\textsuperscript{72} H.R. REP. No. 253, 99th Cong., 1st Sess. pt. 1, at 136 (1985) reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2918 (“The amendment would clarify that if an enforcement is underway, claims for contribution or indemnification could not be brought until a judgment or settlement is reached.”); cf. S. REP. No. 11, 99th Cong., 1st Sess. 44 (1985) (“The amendment provides that if an action under section 106 or section 107 of the Act is underway, any related claim for contribution or indemnification may not be brought until a judgment or settlement is reached in such action.”).


\textsuperscript{74} See id. at 64–65 (“In any civil action brought by the United States or a State under this section or by the United States under section 106, all proceedings on claims in the nature of contribution or indemnification shall by stayed pending entry of judgment or settlement on the claims of the United States or the State under this section or section 106.”).

\textsuperscript{75} Id. at 100–01.


after a partial settlement the government may bring an action "for the remainder of the relief sought" was deleted, leaving only language stating that the government may bring an action. 78 Both changes became part of the amended statute. 79

On judicial review issues, the government's positions fared considerably better in the committee hearings. AIA's initial criticisms of the Superfund litigation regime did not focus on the need for judicial review because that association was advocating drastic limitation, not expansion, of litigation in the CERCLA arena. 80 Interest in the Senate Judiciary Committee focused on elaboration of the administrative process of selecting remedies under CERCLA. The committee sought to ensure that the "hybrid" notice and comment processes it previously had advocated for rulemaking in earlier regulatory reform legislation would be applied, where appropriate, to the Superfund process. 81

Otherwise, the committee approached the judicial review preclusion question in a technical way. The committee assisted the government by providing a practical amendment designed to alleviate the constitutional due process problem identified in Aminoil as resulting from the unavailability of pre-enforcement review of section 106 orders. 82 The committee's staff and representatives from the EPA and the DOJ agreed upon amendments in what became known as the Thurmond-EPA-DOJ package. On judicial review, these

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80 The AIA did not mention pre-enforcement review in its hearing before the Senate Committee on Environment and Public Works. Insurance Hearing, supra note 3, at 30–52. In the hearings before the Senate Judiciary Committee, however, the AIA did criticize the preclusion of pre-enforcement review as the reauthorization process proceeded. See Senate Judiciary Hearings, supra note 39, at 574–75 (AIA's prepared statement).


amendments added a “sufficient cause” defense to CERCLA fines.\textsuperscript{83} Because penalties clearly would not be automatic upon the finding of a party liable under a valid order, presumably no constitutional due process question would arise under the revised statute.\textsuperscript{84}

Despite intense criticism of the government’s positions during the Senate hearings on a number of controversial issues, the government emerged from reauthorization with its litigation position in the courts largely intact, and in some cases enhanced. Congress made no changes to the standard and scope of liability, and some new legislative history expressly endorsed the case-by-case application of joint and several liability evolving in the courts. The government compromised on contribution and bowed to the Federal Rules of Civil Procedure, a regime that already supposedly governed CERCLA litigation in the federal courts. New technical settlement reduction rules alleviated the need for the government to include contribution protection in consent decrees and could achieve the same effect by operation of law. Regarding pre-enforcement judicial review, the Senate Judiciary Committee solved the constitutional difficulty with the administrative order regime and adopted judicial review preclusion language codifying the government’s successful position in the courts.

D. Litigation During the Reauthorization

The government did not wait for the final enactment of SARA to make use of valuable “legislative history” that it had influenced during the process. Committee reports that endorsed \textit{United States} \textit{v. Chem-Dyne Corp.}\textsuperscript{85} and its progeny found their way into government briefs and subsequently into judicial opinions affirming the government’s position on strict, joint and several liability.\textsuperscript{86} The government’s successes in Congress on the pre-enforcement review


\textsuperscript{84} 131 CONG. REC. S11,856 (daily ed. Sept. 20, 1985) (statement of Sen. Thurmond).


issue soon found prominence in government briefs and judicial opinions. At first blush, SARA’s evolving legislative history added little more than a congressional endorsement of judicial opinions on the timing of judicial review. The saga of the Wagner Seed Company, however, demonstrates the subtle ways in which even an inchoate SARA could be used. On June 1, 1985, Wagner Seed Company’s warehouse on Long Island, New York, was struck by lightning. The fire required a cleanup of hazardous substances at the property. Prior to passage of SARA, on New Year’s Eve, December 31, 1985, the EPA ordered Wagner Seed Company to do a cleanup. Wagner Seed resisted, asserting that the release of hazardous substances requiring cleanup had been caused solely by an act of God, making out a colorable defense to liability under CERCLA section 107(b)(1).

Wagner Seed sought pre-enforcement judicial review of the order. By this time in 1985, however, the government had modified its approach in light of the Aminoil ruling. In its brief, the government emphasized the availability of the sufficient cause or good faith defense found in CERCLA section 107(c)(3) as a way to avoid the due process problem that had caused the injunction to issue in Aminoil. In a different case, Wagner Electric Corp. v. Thomas, the government had persuaded the court that the imposition of punitive damages was not unconstitutional because the court did not have to impose them when the defendant had failed to comply with the order in a good faith belief that he was not liable to comply. The court agreed with the government that CERCLA section 107(c)(3) prohibits a reviewing court from assessing punitive damages against a party who fails to comply with an EPA order in the reasonable belief that it has a valid defense to that order. As a result, there was no need for the court to enjoin the enforcement of the CERCLA statute, as the court had in Aminoil.
Similarly, in Wagner Seed Co., the district court refused to follow Aminoil because it found an implicit good faith defense to punitive damages in the sufficient cause language of CERCLA section 107(c)(3). Wagner Seed Co. surpassed the Wagner Electric Co. holding, however, by finding that a similar defense existed to fines imposed or levied under CERCLA section 106(b)(1). An injunction against fines assessed also was found unnecessary under the Wagner Seed Co. court’s interpretation because it found that no fines could be imposed in the event Wagner Seed Company proved that it had a reasonable belief that it was not liable for cleanup under the order.

By the time Wagner Seed Co. was decided at the district court level, a number of courts already had decided to defer judicial review of proposed cleanup remedies until the filing of a government enforcement action. Codification of these holdings was the major objective of the government’s 1985 judicial review proposal, which eventually became CERCLA section 113(h) after adoption of SARA. This judicial review provision, however, did something even more significant. The provision proposed to establish a regime in which government decisions to select remedies would be reviewable only with reference to an administrative record prepared by the EPA.

In some ways, the record review regime in the proposed legislation was at war with the position that the government had advocated in the courts to defer judicial review until enforcement. The government had argued successfully that judicial review was unavailable for remedy decisions because the EPA’s selection of a remedy under CERCLA was not a “final agency action” within the meaning of the Administrative Procedure Act’s provisions regarding judicial review. Following the government’s lead, courts deferring review

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97 See Wagner Seed Co. v. Daggett, 24 Env’t Rep. Cas. (BNA) 1156, 1158 (E.D.N.Y.), aff’d, 800 F.2d 310 (2d Cir. 1986). The district court adopted the reasoning of the government’s brief without reciting that reasoning in its opinion. “For all the reasons set forth in section II(a)(2) of defendant’s moranda [sic], however, the Court finds that there is no due process violation here and rejects the reasoning of the principal case relied on by plaintiff.” Id. (citing Aminoil, 599 F. Supp. 69).
98 See id.
99 See id. at 1157–58.
100 See id. at 1157–58.
103 E.g., J.V. Peters & Co. v. EPA, 767 F.2d 263, 265 (6th Cir. 1985) (“Nor do we believe that a response action is final agency action for which there is no other adequate remedy in a court.”). See supra notes 43–52 and accompanying text.
noted that de novo review would be available when the eventual enforcement action took place.104

Limiting judicial review of an administrative order to the administrative record would not meet the Wagner Electric Co. standard of providing "a 'meaningful manner' of affording aggrieved parties an opportunity to be heard," because no hearing would be available in the agency under CERCLA.105 Without any hearing at the EPA, record review limitations in the court could amount to a denial of any meaningful hearing whatsoever. Under the new statute, remedy decisions would be narrowly reviewed under nothing more than an "arbitrary and capricious" standard.106

As soon as the Senate Committee on Environment and Public Works included language embodying the government's proposed review in the Senate reauthorization bill in February, 1985, DOJ lawyers began to cite the "legislative history" of the new provision for the proposition that record review had always been applicable under CERCLA.107 The Environment Committee Report stated that the record review amendment was intended to "clarify and confirm" pre-existing CERCLA law.108 In United States v. Occidental Chemical Corp.,109 in December, 1985, the United States filed an amicus brief in support of New York's motion to argue that judicial review of Love Canal remedy issues should be limited to the EPA's administrative record.110 A major focus of the government's argument was


105 See Wagner Elec. Corp. v. Thomas, 612 F. Supp. 736, 747 (D. Kan. 1985) ("To limit a reviewing court to the administrative record, at least where no administrative hearing is required, would surely not be a 'meaningful manner' of affording aggrieved parties an opportunity to be heard."); Reilly, 606 F. Supp. at 418.

106 42 U.S.C. § 9613(j)(2) (1988). "In considering objections raised in any judicial action under this Chapter, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law." Id.

107 See generally Wagner Seed Co. v. Daggett, 800 F.2d 310 (2d Cir. 1986).

108 S. REP. No. 11, 99th Cong., 1st Sess. 57 (1985) ("This amendment clarifies and confirms that judicial review of a response action is limited to the administrative record . . . ") (emphasis added). See also H.R. REP. No. 253, 99th Cong., 1st Sess. pt. 1, at 82 (1985) ("To ensure that enforcement and cost recovery actions will not be delayed . . . judicial review should continue to be on the administrative record that has been assembled.") (emphasis added); 131 CONG. REC. H11,084 (daily ed. Dec. 5, 1985) ("New subsection 113(j)(1) clarifies that judicial review of the Administrator's selection of a response action shall be based on the administrative record . . . ") (emphasis added).


110 United States' Supplemental Reply Memorandum in Opposition to Occidental Chemical Corporation's Motion to Compel Production of Documents Withheld by New York on the Basis
the "post hoc" legislative history from the Senate Environment Committee Report.

The 1986 changes to the statute adopted in SARA establish record review for remedies "taken or ordered by the President"\(^\text{111}\) where the remedy decision was made using the administrative record-building process that SARA also establishes.\(^\text{112}\) The DOJ's extension of the applicability of the provisions to cases pending and remedy decisions made prior to the enactment of the amendments was novel.

III. POST-SARA LITIGATION

As described above, the government's litigation posture on issues of liability, contribution, and judicial review prior to enactment of SARA was consistent with the government's pursuit of efficiency in the prosecution of these potentially unwieldy and complex cases. An efficiency objective supported perennial emphases on (1) joint and several liability (alleviating the burden of joining defendants); (2) bifurcation or severance (reducing the complications evident with large numbers of parties with diverse claims); (3) preclusion of any judicial review of the government's CERCLA activities at the behest of those unhappy with such activities (allowing the commencement of enforcement suits with all deliberate speed); and (4) limitation to record review (dispensing with the potentially nettlesome processes of discovery or trial).\(^\text{113}\)

As the activities of the reauthorization period show, the government's early successes in the legislative process provided additional ammunition and, indeed, made possible additional arguments for CERCLA interpretations favorable to this efficiency objective. Post-hoc legislative history to "clarify and confirm" principles provided new "evidence" for the government's CERCLA interpretations. It was not until after President Reagan signed SARA in October, 1986, however, that the full extent of the government's possible use of SARA's extensive "legislative history" to support new and novel interpretations of the amended statute became apparent. Not all of SARA's language favored the government's preferred positions, but


\(^{113}\) Of course, minimization of the government's costs does not necessarily coincide with optimization of the total societal resources devoted to remediying any particular site. See United States v. New Castle County, 116 F.R.D. 19, 28 (D. Del. 1987).
its "legislative history," more susceptible to manipulation by government lobbyists and congressional staff, proved quite useful.

A. Liability

Although SARA made no significant changes to the key liability language in CERCLA section 107, the government made extensive use of other provisions added by SARA and of SARA's legislative history to argue that Congress intended to hold small volume contributors jointly and severally liable for all cleanup costs under the statute. The government asserted that the SARA amendments "confirm that factors such as the volume of waste sent to a site are relevant only in contribution actions, and may not be used to under-cut joint and several liability."

This new small contributor argument rested on a description in the House Judiciary Committee report explaining the new contribution provision, section 113(f), of the statute originally drafted in the Senate Judiciary Committee. For example, in the South Carolina Recycling appeal, the government argued that the report of the House Judiciary Committee indicated that a court could not consider volume in deciding the issue of joint and several liability. Only after all questions of liability and remedy have been resolved might a court consider whether there should be an apportionment using such factors as the amount of hazardous substances sent to a site by generators.

This use of SARA's legislative history was ironic. As noted above, the South Carolina Recycling district court opinion, which was

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114 It is difficult for lobbyists and staff to manipulate statutory language, which elected officials tend to focus on in mark-up sessions, or the conference report, which conferees often take a direct role in negotiating. It is easier to manipulate committee reports, which few elected officials probably even read, as well as floor statements and colloquys, which often are inserted in the record without much notice during floor debates. See Hirschey v. Federal Energy Regulatory Comm'n, 777 F.2d 1, 7–8 n.1 (D.C. Cir. 1985) (Scalia, J., concurring). SARA's legislative history is replete with outraged comments by members of the House of Representatives as they became aware of staff manipulation of Senator Stafford's remarks at the time the SARA conference report was agreed to on the floor of the Senate. See 132 Congo Rec. H9562–63, H9565, H9573, H9582–83, H9591–92 (daily ed. Oct. 8, 1986) (statements of Senators Dingell, Lent, Snyder, Glickman and Kindness).

115 See Joint Brief of the United States and South Carolina Department of Health and Environmental Control at 39, United States v. Monsanto, 858 F.2d 160 (4th Cir. 1988), cert. denied, 109 S. Ct. 3156 (1989) (Nos. 86-1261(L), 86-1263, 86-1265) [hereinafter DOJ Monsanto Brief].

116 Id.

117 Id. at 40 n.1.

118 Id. at 40 (citations omitted).
drafted by DOJ lawyers, distinguished away the moderate approach to joint and several liability taken in United States v. A & F Materials Co.\textsuperscript{119} The Judiciary Committee report cited A & F Materials Co. favorably as a source of equitable factors that courts might look to in “apportionment” of CERCLA liability.\textsuperscript{120} The A & F Materials court had referred to equitable factors such as the volume of substances contributed in the context of a possible determination that joint and several liability should not be imposed, not the determination of the equitable shares of persons jointly and severally liable to the government.\textsuperscript{121}

Indeed, the Judiciary Committee report passage to which the government cited in its South Carolina Recycling appellate brief appears to be referring to “apportionment” in the divisibility sense (avoiding joint and several liability) rather than the contribution sense. Immediately following the report’s reference to A & F Materials Co., there is a reference to the passage in Chem-Dyne placing the burden of apportionment in the divisibility sense on the defendant seeking to avoid joint and several liability.\textsuperscript{122} In its South Carolina Recycling appellate brief, however, the government used the report’s references to the A & F Materials Co. factors to support a contrary inference.\textsuperscript{123} The government argued that volume should be looked to only for allocating liability among jointly and severally liable persons, not as a basis for allowing a small volume contributor to avoid joint and several liability.\textsuperscript{124}

The government also referred to part of SARA’s settlement provision, CERCLA section 122(g),\textsuperscript{125} which encourages the government to settle with small volume contributors, in support of its argument that Congress did not intend to allow volume to be used as a basis to avoid joint and several liability. The government wrote that Congress’s inclusion in SARA of section 122(g), a provision designed to encourage the EPA to enter into early settlements with small contributors, meant that waste volume is not a factor that affects joint and several liability. Through the SARA provision, Congress was said to “clarify and confirm” that volume could only

\textsuperscript{119} See supra notes 33–42 and accompanying text.
\textsuperscript{120} See supra note 118 and accompanying text.
\textsuperscript{123} See DOJ Monsanto Brief, supra note 115, at 40.
\textsuperscript{124} Id.
\textsuperscript{125} 42 U.S.C. § 9622(g) (1988).
affect “a responsible party’s ability to limit its monetary exposure by early settlement.”

Prior to SARA, the Assistant Attorney General argued to Congress that no court would or should impose joint and several liability on a small volume contributor. After SARA, in the above-quoted brief, which he signed, he interpreted the revised Act to “clarify and confirm” the opposite position, that Congress meant for joint and several liability to apply no matter how small the volume.

The Court of Appeals for the Fourth Circuit did not adopt the government’s position on small volume contributors in the South Carolina Recycling case. Instead, it allowed that in some circumstances volume might be relevant to a defendant’s establishment of a reasonable basis for apportionment or “divisibility,” to avoid joint and several liability. To establish divisibility under the Fourth Circuit Court of Appeals’ approach, however, such a defendant would need to establish that proportionate volumes are “probative of contributory harm.” The court explained that “[v]olumetric contributions provide a reasonable basis for apportioning liability only if it can be reasonably assumed, or it has been demonstrated, that independent factors had no substantial effect on the harm to the environment.” Because the generator defendants in Monsanto did not even attempt such a demonstration, the Fourth Circuit affirmed the district court’s ruling for summary judgment in favor of the United States.

In O'Neil v. Picillo, however, the Court of Appeals for the First Circuit appears to have been more impressed by the government’s SARA-based arguments. In O'Neil, a court was again presented with defendant generators’ arguments that their demonstrable contribution of substances to a site was insubstantial. They contended that it was possible to apportion the plaintiff’s past removal costs because there was evidence detailing (1) the total number of barrels excavated in each phase, (2) the number of barrels in each phase attributable to them, and (3) the total cost associated with each phase.
The court finessed the issue. Tracking the government’s brief, the court noted that in SARA Congress had added two important provisions designed to mitigate the harshness of joint and several liability, the small contributor settlement provision in CERCLA section 122(g) and the contribution provision in CERCLA section 113(f). The First Circuit went on to hold generator defendant Rohm & Haas jointly and severally liable because of its inability to prove that unidentified wastes at the site at issue had not come from Rohm & Haas, although only very small volumes of waste traceable to Rohm & Haas were found at the site. With the O'Neil holding, apportionment had run its course from divisibility to contribution.

B. Contribution

Since SARA’s enactment, the government has argued that the Senate Committee on Environment and Public Work’s provision proposing to preclude trial of contribution claims until after the government’s case was intended to “clarify and confirm” pre-existing practice. It has argued this position even though the Senate Judiciary Committee subsequently changed the language cited in the earlier committee report regarding compulsory deferral of contribution claims under CERCLA. The government has relied on the history of the later rejected compulsory deferral provision to argue that contribution claims always must be heard after judgment is entered for the government against the main defendants. In most cases, however, the government has argued more modestly that such claims usually should be heard after judgment. In such cases the government has cited the following comment by Senator Stafford on the floor of the Senate:

As a general rule private party cleanup will occur more quickly if the courts first resolve issues of liability and remedies concerning the individual defendants, leaving questions of appor-

135 Id. at 179 (citations omitted).
136 Id. at 182–83.
137 E.g., Objection of the United States to the Motion of Kurfees Coatings, Inc., for Leave to File a Third Party Complaint at 5–9, United States v. Distler, No. C88-0201-L(J) (W.D. Ky. December 19, 1988) (LEXIS, Genfed library, Dist file 3717). Relying in part on the legislative history of the earlier provision of S. 51, it argues that “Congress intended that CERCLA enforcement actions not be delayed by litigation of contribution claims.” Id. at 12. In the alternative, it argues for severance and/or stay of third-party claims because of the defendant’s delay in bringing its third-party claims. Id. at 14–15.
138 Id. at 12–14 & n.17.
There is an obvious inconsistency between the government’s litigation position and the Senate Judiciary Committee’s view of how impleader should work in CERCLA cases. Impleader is intended to foster judicial economy for all parties by resolving allocation issues prior to the entry of judgment. It is not surprising, therefore, that a member of that committee queried the new Assistant Attorney General about the DOJ's position during his confirmation hearing in 1989. Assistant Attorney General Stewart told Senator Grassley that “it is my understanding that the United States generally does not oppose concurrent litigation of its claims and defendants’ claims for contribution.” And, indeed, one of the government’s post-SARA briefs can be interpreted to mean that CERCLA section 113(f) puts within the defendant’s, not the government’s or the court’s, discretion a defendant’s decision to include its contribution claim in the government’s action. Albeit reluctantly and at times haltingly, when it was before Congress, the DOJ appears to have changed its legal position on the timing of contribution claims under CERCLA as a result of the Senate Judiciary Committee’s amendments. The DOJ’s position in the courts on the timing issue has remained largely unchanged, however. The deferral position has prevailed in the courts. In the South Carolina Recycling appeal, the government successfully argued that district courts have discretion to dismiss contribution claims without prejudice without having to file a Rule 54(b) certificate along with the entry of final judg-

140 See supra notes 71–76 and accompanying text.
142 Id. at 4.
145 During the reauthorization, the government acknowledged to Congress “modification” in its position. See supra notes 72–76 and accompanying text.
146 Federal Rule of Civil Procedure 54(b) allows a court to enter final judgment on some claims while other claims, e.g., cross-claims for indemnity and contribution, remain only where it makes an express finding that there is no just reason for delay of entry of final judgment. Fed. R. Civ. P. 54(b). A “partial” final judgment may be appealed only where the district court has prepared the Rule 54(b) certificate to accompany the judgment.
ment.\textsuperscript{147} Similarly, in the \textit{O'Neil} and \textit{United States v. Stringfellow}\textsuperscript{148} cases, the government convinced the trial court to defer trial of contribution claims until after final judgment had been entered in the government's case.

On the related judgment reduction issue discussed above, Congress's changes to the government's reauthorization proposals have not affected the DOJ's adherence to its pre-SARA position either in the courts or in congressional testimony. The government has focused attention on CERCLA section 113(f)(2), which extinguishes claims for contribution against those who have settled with the government, and concurrently reduces the potential liability of non-settlors by "the amount of the settlement."\textsuperscript{149} The government, and now a number of courts following the government's view, implicitly read the word "only" into CERCLA section 113(f)(2).\textsuperscript{150} Thus, in this view, "the words of the statute are clear: the potential liability of the others is reduced 'by the amount of the settlement,' not by the settlor's proportionate share of any damages ultimately determined to have been caused."\textsuperscript{151}

No court yet has had occasion to discuss the changes made by the Senate to CERCLA sections 113(f)(2) and 113(f)(3)(A) from the government's proposal discussed above.\textsuperscript{152} Because no court has reviewed the question, the government has achieved the best of both worlds: protection of its settlors and elimination of the risk it had to bear in pre-SARA settlements that a "sweetheart deal" might prevent full recovery of the remainder of cleanup costs from non-settlors.

\textbf{C. Judicial Review}

The government has handled judicial review issues after SARA somewhat differently from the issues discussed above, at least in degree. On judicial review, SARA was a watershed in which the government's construction of the statute sharply changed. This situation presents the issue of whether or not the new statutory pro-

\begin{itemize}
  \item[147] United States v. Monsanto Co., 858 F.2d 160, 173 (4th Cir. 1988).
  \item[152] See supra notes 77–79.
\end{itemize}
visions, and the government’s new interpretations, should be applied retrospectively.

The continuing saga of the Wagner Seed case is a good place to start. After the Court of Appeals for the Second Circuit’s ruling that there were good faith defenses to fines and punitive damages under the statute prior to the amendments, Wagner Seed decided to comply with the order and finished the cleanup ordered after SARA was enacted. The company petitioned the Superfund for reimbursement of its reasonable expenses under CERCLA section 106(b)(2) of the revised statute on the grounds that it was not liable for cleanup because of the act of God defense.

The government denied the petition on the grounds that the reimbursement provisions added to section 106(b) by SARA were not retroactive. In short, because the order was issued to Wagner Seed prior to the date of SARA’s enactment, no reimbursement was available. On Wagner Seed’s appeal from the EPA decision, the district court agreed with the EPA.

Although the reimbursement provision had been drafted by the government and was contained in early versions of SARA in both the House and the Senate, the sole “legislative history” that could be read as reflecting upon the retroactivity of the provision is found in a short floor statement by Representative Eckart. The statement, inserted in the record when the Conference Report was adopted in October, 1986, contained a single sentence stating that “effective after the date of enactment of these amendments, a party who receives an order can begin the work of environmental cleanup while preserving its right to raise objections in a subsequent proceeding.” Using this passage, the government successfully argued that Congress intended that the provision not be applied to administrative orders issued prior to the date of enactment of the amendments.

The government’s prospective-only interpretation of SARA’s reimbursement provision contrasts sharply with its implicit inter-

153 See supra notes 88–102 and accompanying text.
156 Wagner Seed, 709 F. Supp. at 250.
157 Id. at 252–53.
pretation of SARA's other amendments to CERCLA section 106, such as the addition of the sufficient cause or good faith defense to fines. Only by reading the pre-SARA statute as providing an implicit good faith defense to fines under CERCLA section 106(b)(1), despite the absence of a clear textual basis for such interpretation, had the Second Circuit been able to avoid the *Aminoil* court’s conclusion that CERCLA's administrative order fines were unconstitutional. Only if the amendments’ good faith defense to fines merely clarified and confirmed the already implicit defense could the pre-SARA statute survive the constitutional challenge.

Although the Second Circuit’s opinion in *Wagner Seed Co.*, decided a month prior to SARA’s enactment, provides some support for the notion that the addition of the sufficient cause defense to fines simply clarified and confirmed pre-existing law, no similar opinion exists for a second major judicial review interpretation that the government began to make after SARA's enactment—record review. In the 1986 amendments to CERCLA, Congress added a provision, drafted by the government, providing for record review of the EPA’s selection of a response action for CERCLA cost-recovery cases. The government’s *cause celebre* since the enactment of SARA, however, has been to apply the record review standard retroactively to pending injunctive relief cases. Discovery on remedy issues in these cases had been underway for years and the Agency’s administrative process for obtaining public comment had been, to put it charitably, undisciplined.

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161 See *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 316 (2d Cir. 1986).
162 See *supra* notes 102–112 and accompanying text.

> It is defendants' burden to demonstrate any such inadequacies in the record. As the United States has not yet submitted for review the administrative records for response actions undertaken to date, a finding on their sufficiency is premature. Furthermore, as the record concerning the permanent remedy at this site is not yet closed, there is no basis for challenge of that record at this time.

*Id.* (footnotes omitted); see also *United States v. Hardage*, 663 F. Supp. 1280, 1283 (W.D. Okla. 1987) (“Presently, the government has failed to certify an administrative record to the Court.”); *United States v. Hardage*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 20,242, 20,243 (W.D. Okla. 1986) (“The Court further finds EPA failed to take any administrative action reasonably calculated to yield an administrative record to which this Court would be bound in the instant litigation.”).
Moreover, in several of these cases the government sought to limit review to the administrative record prior to the time in which the EPA had certified the "record" for the court to review. Because the United States often had not submitted for review the administrative records for response actions when they made pre-trial motions seeking to limit review to the administrative record, it is difficult to see how a court could have certified their sufficiency. Despite initial rulings against it regarding its new retroactive record review interpretation, the United States plunged ahead in these cases, seeking reconsideration at every opportunity.

The government charged on in 1988 and 1989 with its record review arguments, expanding the concept in an attempt to extinguish pre-trial discovery on the matter of whether specific costs may be recovered in CERCLA cases. The government began in 1988 to advocate a two-step judicial review process. First, the court determines whether, based on the administrative record, the remedy selected by the EPA is not inconsistent with the national contingency plan under an arbitrary and capricious standard of review. Second, if the court upholds the EPA decision, it examines the United States' costs to determine whether the costs were actually incurred because the statute conclusively presumes all incurred costs to be reasonable. The DOJ has admitted that this interpretation is inconsistent with its previously expressed interpretation of CERCLA, and has acknowledged that its pre-SARA briefs do "not represent the current position of the United States on the legal issue addressed."

Finally, in 1989 the government began interpreting CERCLA to prohibit discovery regarding both the government's decisions implement-
menting a CERCLA cleanup and associated costs it alleges to have incurred, except for "proof that the implemented cleanup was consistent with the response action selected by the EPA and that the claimed costs were actually incurred." According to its fully evolved interpretation of section 107(a)(4)(B), Congress "removed the myriad of implementation decisions made during the course of a response action from the purview of judicial review."

The government's behavior in this area bears all the hallmarks of a litigator coming late to a position on a legal issue. The very statutory language that the EPA and the DOJ drafted for the 1986 amendments is the starting point for defendants' analysis that Congress did not intend record review to apply in injunctive relief cases. The DOJ argues that SARA's record review provision should be applied retroactively to pre-SARA cases because SARA merely "clarified" prior law. If one takes the DOJ seriously, however, before the clarification it too "misunderstood" the applicable law.

Given these peculiarities, it is easy to see why some courts have been less than overwhelmed by the logic of the government's retroactive record review position. Nevertheless, even here the government has made considerable progress in the district courts. In United States v. Rohm & Haas Co., for example, the court agreed with the government that provisions of the statute establishing an administrative record review regime should apply retroactively. Finding that the government had not followed the new procedures specified in SARA, however, the court remanded the case to the EPA for a "retroactive" creation of a record under SARA's standards. Other courts have gone far to curb the availability of discovery on remedy issues in CERCLA cost-recovery cases, which is the principal strategic advantage of record review for the government. The extent to which the courts will adopt the government's judicial review preclusion approach on cost issues remains open at

172 Charles George Gov't Memo., supra note 170, at 5.
174 Id. at 677.
175 Id. at 684.
this writing, the new theory having been offered for the first time in 1988.

IV. TEXTUAL CRITICISM OF THE "CLARIFIED" REGIME

By 1990, the government had fully developed its legal position on how SARA clarified and confirmed the 1980 Act on the issues discussed above. As to liability, the government viewed SARA as clarifying and confirming the standard of strict, joint and several, retroactive liability without proof of causation, no matter how minimal a defendant’s contribution to the harm. Now, joint and several liability must be applied except when a defendant can prove that the harm and threat of harm caused by that particular defendant was clearly separate from the harm caused by other defendants.

As to contribution, the government evolved a position that defendants generally may bring claims seeking contribution in the government's enforcement action. Such contribution claims should be severed, however, or at least deferred for separate trial until after judgment or settlement could be reached between the government and those defendants whom it chose to sue. In the government’s view, the policy of the statute ranks quick recovery for the Superfund above the equity evident in deferring final judgment until each defendant’s equitable share of the liability is known. Similarly, the statute values full recovery for the Superfund over the equity of adjusting the government’s recovery against non-settlors when there has been a demonstrable “sweetheart deal” between the government and favored parties.

As to judicial review, similar efficiency imperatives govern. Judicial review of the government’s position on appropriate response actions has been deferred until the government chooses to bring an enforcement suit. A defendant may not even sue after the government’s response action has been completed. Moreover, judicial review of the response decision has been limited to the administrative record, no matter when or how that record was assembled or whether the government was seeking the court’s exercise of its injunction powers or merely assessing the extent of the government’s recovery of incurred costs. Once the government’s response decision is upheld on the administrative record, no further review of costs or activities implementing the response decision is ever available, no matter how high or apparently unreasonable the expenses. All of these results are for the sake of efficient and expeditious cleanup and cost recovery.
Whatever the desirability of the CERCLA regime that the government has advocated so successfully, its judicial achievements have come at considerable sacrifice to the statute's text. Both the text of the original Act and the text of the amendments, which clarify and confirm the original Act according to the government, have been manipulated to support a pro-government interpretation. Novel interpretation or studied ignorance of the text has been necessary to achievement of the government's policy goals. There are numerous examples. A few of the more prominent ones are provided below.

A. Liability: "Such" and "Or"

To begin, there are two liability issues arising under statutory language that was not changed by the SARA amendments. Section 107(a)(3) brings "generators" within the class of persons potentially liable under the statute. This group includes any person who within the terms of the statute —

arranged for disposal . . . of hazardous substances . . . at any facility . . . containing such hazardous substances . . . from which there is a release . . . of a hazardous substance. 177

A key word in this definition that the courts have construed to relax any requirement for causation under the statute is "such." CERCLA defendants have interpreted the word "such" as a referent to hazardous substances mentioned earlier in the sentence. Thus, the government must prove that the hazardous substances found at the site are those for which the defendant arranged disposal.

In the mid-1980s, however, the government convinced the courts otherwise. The Fourth Circuit Court of Appeals' explanation following the government's construction is typical. Citing the first of several definitions for "such" in Black's Law Dictionary, the court laid out the proposition that the phrase "such hazardous substances" denotes hazardous substances alike, similar, or of a like kind to those that were present in a generator defendant's waste or that could have been produced by the mixture of the defendant's waste with other waste present at the site. Thus, absent proof that a generator defendant's specific waste remained at a facility at the time of release, a showing of chemical similarity between hazardous substances is sufficient. 178

There is little to support this construction of the term “such” in CERCLA’s legislative history. In 1980, the Senate Committee on Environment and Public Works had considered the phrase “any other person who caused or contributed to or is causing or contributing to such . . . release” to be too broad. The language of section 107(a)(3) appears to have been included in the statute in order to narrow, not to expand, the class of potentially liable “generators.”

The construction also creates logical difficulties. Read literally with this interpretation of “such,” any person who arranges for disposal of a substance at a facility is liable for cleanup of the facility, whether their waste ever went to the facility at all. The courts solved this difficulty by inferring a requirement that the generator’s waste must be “sent” to the site needing cleanup. There is no textual basis for this judicially-created element of the government’s prima facie case.

Moreover, it was unnecessary for the courts to strain grammar and settled principles of statutory construction to achieve the policy objective sought by the government through its interpretation of “such.” All that was needed was a decision to allow the government to meet its burden of proof that a defendant’s waste was contained at the site. Absent direct proof regarding the removal of the defendant’s particular waste from the facility, the government could meet this burden upon a showing that waste similar to that of the defendant’s was at the site. This further relaxation of section 107(a)(3) sacrificed the text, as well as logic, to the policy objective.

Another early example of the government’s unnecessary straining of the statutory text involves its advocacy of a stringent joint and several liability standard. In the South Carolina Recycling district court opinion drafted by the government, the court misread Restatement (Second) of Torts section 443A to state that joint and several liability may be avoided only “[i]f the harm is divisible and there is a reasonable basis for apportionment.”

179 H.R. REP. No. 7020, 96th Cong., 2d Sess. § 3071(a) (1980) reprinted in A Legislative History of the Comprehensive Environmental Response Compensation and Liability Act of 1980 at 438 (cited in Monsanto, 858 F.2d at 170 n.17). Ironically, some courts have read this history in an opposite way. Having examined the legislative history of the 1980 House bill, which clearly required causation to establish liability, and finding that the Senate did not adopt the House’s language in the “compromise” that became law, some courts conclude that the Senate intended to omit any causation requirement. E.g., Monsanto, 858 F.2d at 170 n.17; New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985).

180 Monsanto, 858 F.2d at 169 n.15.

section uses the disjunctive "or," not the conjunctive "and," which negates joint and several liability where the harm is not "single" or where there is a "reasonable basis for apportionment of a single harm."[182]

Only when pressed on the point in the South Carolina Recycling appeal did the government abandon its prior position that Chem-Dyne required both physically separate harms and a "reasonable basis" to avoid joint and several liability in any context. Nevertheless, it continued to push for the disjunctive in the district courts, and at times was successful. For example, the district court in Stringfellow held that joint and several liability could be avoided only "if there are distinct harms that are capable of division."[183]

Again, as demonstrated in the Fourth Circuit's and First Circuit's affirmances of their respective district courts' grants of partial summary judgment on liability,[184] such strained construction of the Restatement was unnecessary because of the difficulty of any defendant's showing that a simple indicator such as volume can serve as a reasonable basis for apportionment of a single harm. In Monsanto, generator defendants had not even attempted a showing that their advocated volumetric apportionment was a reasonable basis for apportionment of the harm.[185] In O'Neil, defendants also apparently failed to make a sufficient showing.[186]

B. Contribution: "Any Person" and "Potential Liability"

The government's interpretation of SARA's contribution provision, section 113(f), further evidences the government's loose treatment of the statutory text in pursuit of its policy objectives. Section 113(f) provides that, "[a]ny person may seek contribution from any other person who is liable or potentially liable" under the statute. [187] Like Federal Rule of Civil Procedure 14(a), which provides for impleader, section 113(f) provides for the acceleration of contribution claims at the option of the defendant-contribution plaintiff.[188] Follow-
ing its preference for severance of contribution claims evidenced in its original reauthorization proposal, however, the government successfully argued to the Fourth Circuit that section 113(f) “unambiguously” vests the trial court with discretion to “decide whether contribution claims are more appropriately considered during or following the government’s action under section 107.”

Judge Widener’s dissent in Monsanto is persuasive that the government’s “plain meaning” reading of section 113(f) is not correct:

[T]he statute plainly provides that discretion with respect to contribution is not in the district court to consider relief or not as the majority opinion holds; rather, it is in the generator to seek relief, for “any person” certainly includes the generators of the waste. So, since the matter was before the district court, that court had no discretion but to decide the question... While I agree that the claims may be asserted in a separate action, if they are asserted in the main case they must be decided.

As with the liability issues discussed above, the government’s violence to the statutory language, here in the form of construing “any person” to mean “the court,” is largely unnecessary. The Federal Rules of Civil Procedure, which expressly govern CERCLA contribution actions, provide that a trial court may bifurcate its decision on issues of liability and contribution into separate phases of the same proceeding. The court may even sever contribution claims and render final judgment on the government’s case when it makes the express determinations required by Rule 54(b)—“that there is no just reason for delay.” Given the Senate Judiciary Committee’s rejection of the government’s more extreme position advocated in the Congress, it is far from obvious why the government has chosen in litigation to go beyond the authority of the Federal Rules. It nevertheless has done so successfully at some cost to the statutory text.

The violence to the statutory text wrought by the government’s construction of CERCLA’s contribution protection provision is considerably more subtle. CERCLA’s legislative history does little to

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substantive contribution rights arise); cf. 3 J. Moore, W. Taggart, & J. Wicker, Moore’s Federal Practice § 14.08 (2d ed. 1987) (contribution claims are accelerated under Rule 14(a)).

189 DOJ Monsanto Brief, supra note 139, at 9.


explain the changes to section 113(f)(2) and 113(f)(3)(A) discussed above.\textsuperscript{194} Apparently, however, Congress made these changes to eliminate any implication that the size of the government’s claim against non-settlors would be governed exclusively by the terms of an earlier partial settlement.\textsuperscript{195} Settlement reduces “potential liability” of non-settlors, not the actual “claim.”

Thus, liability must be reduced at least by the amount of the settlement, but may be less than the balance should the court find the non-settlors’ equitable shares to be less than the shares that the settlement contemplated. Accordingly, a CERCLA plaintiff’s action against non-settlors is not necessarily for “the remainder of the relief sought” after settlement because the plaintiff’s claim may be reduced by an amount in excess of the settlement amount. As in the earlier partial settlements, the government would thus bear the risk of a sweetheart deal by having its judgment reduced accordingly.\textsuperscript{196}

The government’s principal basis to avoid these plausible interpretations of the changes to section 113(f) rests on a confused gloss on the changes found in Senator Stafford’s floor statement on the day the Senate Judiciary Committee’s amendments were introduced. Senator Stafford explained that the phrase “the remainder of the relief sought” had been deleted to avoid redundancy. He stated, “It is unnecessary to repeat the phrase. . . . To do so would be redundant and therefore surplusage.”\textsuperscript{197} Even though Senator Stafford offered the Judiciary Committee’s amendments at Senator Thurmond’s request and the amendments became a part of the Senate bill by unanimous consent, Stafford previously had opposed them.\textsuperscript{198} The EPA and the DOJ had a role in drafting Senator Stafford’s statement.

\textbf{C. Judicial Review: “Within” and “All Costs”}

The area of judicial review of the EPA CERCLA decisions also provides some basis to question the textual interpretations that the government had been advocating. For example, the amendments to the administrative order regime were made in order to eliminate the

\textsuperscript{194} See \textit{supra} notes 77–79, 149–151 and accompanying text.

\textsuperscript{195} See Letter from Carol T. Crawford, \textit{supra} note 141, at 2 (fourth question from Grassley).

\textsuperscript{196} See \textit{Light}, \textit{supra} note 150, at 660.


\textsuperscript{198} See Letter from Senator Stafford to Senator Thurmond (June 24, 1985) (disclosing Stafford’s personal opposition to the amendments which he subsequently introduced at Thurmond’s request) (available in \textit{Boston College Environmental Affairs Law Review} offices).
Aminoil-type infirmity resulting from the absence of a meaningful administrative hearing prior to issuance of the order. The government, however, has interpreted the reimbursement provision to authorize judicial review only after completion of the response action, followed by completion of a detailed administrative review process. If this construction of section 106(b)(2) is correct, it may not serve to eliminate the due process problem because post-completion review may not meet the Supreme Court’s standard of review “at a meaningful time and in a meaningful manner for purposes of constitutional due process.”

The language in section 106(b)(2) is somewhat ambiguous. Logically, a petition for reimbursement should be available to an order recipient upon commencement of a response in compliance with the order. That is, the words of the provision “within 60 days after completion” could mean “not beyond 60 days after completion.” The government, however, interprets the provision to mean “inside the limits of 60 days after completion,” thus requiring that the remedy order be completed prior to petition for any reimbursement. The government apparently never has considered the first construction, even though that construction is more likely to avoid the potential due process problem and to encourage compliance with section 106 orders, the purposes of the provision.

The government has taken a hard line interpretation of the phrase “[a]ny person who receives and complies with the terms of any order” to mean that a person must have finished all the tasks called for by the order before petitioning for reimbursement. A person who has received an order and is in the process of complying with it may not petition for reimbursement, no matter how costly that compliance. Having expended millions of dollars in compliance with an order it believes invalid, a recipient still may not petition for reimbursement

199 See 131 CONG. REC. S11,857 (daily ed. Sept. 20, 1985) (Statement of Sen. Thurmond) (“In an attempt to avoid a possible constitutional problem, section 106 is amended to include a good-faith defense to penalties under that section.”).
202 See also discussion of pre-enforcement review cases, supra notes 80-84, 153-176 and accompanying text.
204 WEBSTER’S NEW WORLD DICTIONARY 1634 (2d College ed. 1981).
205 Id.
207 See Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380 (5th Cir. 1989).
of any expenses so long as tasks remain. This largely eliminates the utility of the reimbursement provision for long-term and costly remedial actions.

Moreover, the statutory language on the retroactivity of the provision also offers little in support of the government's conclusion that reimbursement was intended to be prospective only. The government has argued successfully that numerous other aspects of the SARA amendments are retroactive, including the award of prejudgment interest, the waiver of the states' eleventh amendment sovereign immunity, and other statutory definitions. Retroactive "record review" is another prominent example, appearing in the same section 113 as SARA's cost recovery statute of limitations, a provision the government contends is prospective only. Apparently, the DOJ only views provisions that are adverse to the government's financial interest, such as application of SARA's cost recovery statute of limitations and the reimbursement provision, as prospective only. The incongruity in the government's retroactivity positions under CERCLA on the record review and statute of limitations issues is revealed in the following passage from a government brief arguing for a prospective-only statute of limitations:

The United States has argued elsewhere that CERCLA Section 113(j), not in issue here, should be applied to all pending cases because the amendment contained in SARA merely clarifies CERCLA's original intent to confine review of EPA remedial decisions to the administrative record. However, in U.S. v. Hardage . . . and U.S. v. Ottati & Goss, Inc., . . . the Courts held that CERCLA Section 113(j) as amended by SARA, should not be applied "retroactively" in those cases. . . . Whether this Court adopts the reasoning of Chevron [Oil Co. v. Huson] [refusing to apply court decisions retroactively to avoid unfairness] and Bradley [v. City of Richmond] [applying procedural decisions retroactively] or Hardage, it should decline to apply CERCLA Section 113(g)(2)(A) [the statute of limitations] retroactively . . . .

There is an obvious inconsistency between this brief, endorsing the rationales of the Hardage and Ottati & Goss courts, and the prior government briefs opposing the positions adopted by the courts.

211 Id.
Despite the obvious sacrifice of consistency, the majority of courts have so far given the government the best of both worlds on retroactivity matters under the statute.

A few courts have gone the next step to adopt the government's most recent extension of its judicial review position. Its legal argument in support of eliminating discovery on costs and implementation issues—that CERCLA section 107(a)(4)(A) requires this result—has no textual basis. The government reads this "plain language" to confine judicial review of implementation decisions and costs incurred under the statute as "proof that the response action was performed, and that the claimed costs were actually incurred." There is nothing in CERCLA's plain language, however, to suggest that the statute intends to preclude judicial inquiry into implementation decisions and costs in a cost recovery action. At a minimum, the language falls far short of the "showing of 'clear and convincing evidence of a . . . legislative intent' to restrict access to judicial review." First, the plain language of section 107(a)(4)(A) indicates that only certain costs may be recovered, namely costs that are "not inconsistent with the national contingency plan" (NCP), CERCLA's governing regulation. The quoted phrase plainly modifies the word "costs." Effect must be given every word, clause, and sentence of a statute, and each word must be assumed to have a purpose. Had Congress intended that the government could recover all incurred expenditures so long as it performed a cleanup, it would have said so. The statute does not use the term "perform a cleanup" in section

212 See infra notes 213–247 and accompanying text.
214 Charles George Gov't Memo., supra note 170, at 5, 7–10.
217 See id.
107(a)(4)(A) as it does elsewhere.\textsuperscript{219} The EPA and the DOJ actually are trying to excise a limiting phrase in the section that they find inconvenient. Neither the executive nor the courts may rewrite statutory language.\textsuperscript{220}

Second, CERCLA section 107(a)(4)(A) only allows the government to recover costs of “removal or remedial action.”\textsuperscript{221} Many activities fall within these statutory definitions only under limited conditions. For example, “removal” included “[1] actions . . . necessary . . . in the event of the threat of release . . . , [2] such actions as may be necessary to monitor, assess, and evaluate the release or threat of release . . . , or [3] the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage.”\textsuperscript{222} Whether costs incurred by the government fall within these general categories as costs of “removal” depends upon whether they are “necessary.” Thus, even if the phrase “not inconsistent with the national contingency plan” were excised from the statute, when the cost of an activity is not a cost “as may be necessary” within the definitional language, it may not be recoverable because it is not a cost of “removal or remedial action.”\textsuperscript{223}

Third, the government may not excise the further express requirement in CERCLA section 107(a) that the plaintiff prove that the alleged release or threatened release causes the incurrence of the costs sought to be recovered.\textsuperscript{224} The costs of many activities, like the erection of a fence, may or may not be incurred in response to a release of a hazardous substance. If incurred for other reasons, such expenses may not be recovered under CERCLA.\textsuperscript{225}

\textsuperscript{220} See Menasche, 348 U.S. at 538–39.
\textsuperscript{222} Id. § 9601(23) (1988) (emphasis added).
\textsuperscript{223} Artesian Water Co. v. Government of New Castle County, 851 F.2d 643, 651 (3d Cir. 1988). The United States argued that judicial review of the necessity of response costs incurred under CERCLA is available only when the persons incurring the costs are proceeding under CERCLA § 107(a)(4)(B) because the word “necessary” precedes “response costs” in that subparagraph but not in the prior subparagraph at issue here. Charles George Gov’t Memo., supra note 170, at 18. Assuming arguendo that Congress intended a different standard to apply because of the use of this adjective, the effect would be to extend the necessity requirement to all categories of response costs, both removal and remedial, under CERCLA as available only when the persons incurring the costs are proceeding under CERCLA § 107(a)(4)(B) because the word “necessary” precedes “response costs” in that subparagraph but not in the prior subparagraph at issue here. Charles George Gov’t Memo., supra note 170, at 18. Assuming arguendo that Congress intended a different standard to apply because of the use of this adjective, the effect would be to extend the necessity requirement to all categories of response costs, both removal and remedial, under CERCLA § 107(a)(4)(B), as the United States implicitly suggests, to strike the necessity requirement from the “removal” definition where the term appears. An activity always must be either a “removal or remedial action” before its costs are recoverable.
\textsuperscript{225} Amland Properties Corp. v. Aluminum Co. of Am., 711 F. Supp. 784, 795 (D.N.J. 1989);
In its briefs, the government self-consciously confuses the issue of burden of proof with the availability of judicial review. The government emphasizes decisions holding that defendants have the burden under CERCLA section 107(a)(4)(A) of showing that costs are "inconsistent with the national contingency plan" in order to avoid reimbursing those costs. There is nothing in these decisions to suggest that the statute contemplates preclusion of inquiry into or discovery of evidence relevant to inconsistency with the national contingency plan. To the contrary, prior judicial opinions in CERCLA cost recovery cases indicate that there should be careful judicial inquiry into the government's incurrence of specific costs and its reasons for allocating alleged costs to a particular release.

The government's "plain language" argument thus comes down to its assertion that inclusion of the term "all costs" and absence of the term "reasonable" in CERCLA section 107(a)(4)(A) precludes discovery into the reasonableness, prudence, efficiency, or cost-effectiveness of the costs it alleges to have incurred in response to the release of hazardous substances at a Superfund site. This assertion is based on a paragraph in the Eighth Circuit's decision in United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO), stating that costs "not inconsistent with the NCP are conclusively presumed to be reasonable. CERCLA does not refer to 'all reasonable costs' but simply to 'all costs.'"

This citation is arguably inapt. In NEPACCO, the Eighth Circuit was considering the issue of who had the burden of proof on whether

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228 See, e.g., Ottati & Goss, 694 F. Supp. at 987–97.

229 810 F.2d 726 (8th Cir. 1986).

230 Id. at 748. In Charles George Gov't Memo., supra note 170, at 14 n.11, the government also suggests that United States v. Northernaire Plating Co., 685 F. Supp. 410 (W.D. Mich. 1988), aff'd sub nom., United States v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989), cert. denied, 110 S. Ct. 1527 (1990), supports its preclusion position. The Northernaire court, however, examined the specific allegations presented by the defendants, and affidavits submitted by the EPA, before resolving disputes based on the specific facts presented. The government's citation of the case to the contrary notwithstanding, the Northernaire court actually held that agency litigation and related activities did not merit the deferential review applied to "the agencies' choice of cleanup remedy." 685 F. Supp. at 1417. On the government's motion for summary judgment, however, the defendants failed to raise genuine issues of material fact as to the cost-effectiveness of the EPA's response decisions that they had previously challenged in a conclusory way. The Northernaire court expressly noted in its decision granting the government's motion for summary judgment that "there are no discovery disputes pending in this case." Id. at 1414.
a cleanup action is “necessary” or “cost-effective.” The court found these matters to be encompassed in the determination of consistency or inconsistency with the NCP. It therefore found that the burden of proof on the issues normally rests on the defendant in actions by the United States because of the phrase “not inconsistent.” The court likewise considered the reasonableness of costs to be subsumed in the “consistency” issue under this statutory language. No separate reasonableness requirement exists, so defendants normally have the burden to prove that costs are unreasonable with reference to their inconsistency with the NCP.

The NEPACCO defendants had not challenged the reasonableness of specific alleged costs, but relied instead on their legal argument that the burden of proof regarding the necessity and reasonableness of the government’s costs was on the government. The court rejected that burden of proof argument. It is questionable, however, whether the Eighth Circuit intended to imply that it would have ignored material evidence regarding the unreasonableness of costs had the defendants mounted such challenges.

The government has argued that the NCP “does not govern the incurrence of costs in implementing response actions.” The government’s lengthy analysis of the NCP in its *United States v. Charles George Trucking Co.* brief emphasizes that “[t]here are simply no provisions in the NCP which furnish criteria for determining what types of costs may be incurred by the EPA or how costs are to be evaluated.” The government draws the wrong conclusion from this analysis. No court ever has suggested that the government can avoid inquiry into the necessity, cost-effectiveness, or reasonableness of its activities and expenditures by failing to promulgate regulations addressing those three criteria.

Indeed the NEPACCO court noted that whether a particular response action is necessary is “factored into the ‘cost-effectiveness’ equation” under the NCP and thus is judicially reviewable in that

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232 Id. at 747–48.
233 Id. at 747.
234 Id. at 748.
235 Such a result would be absurd. A court may not construe a statute in this manner. See Public Citizen v. United States Dept of Justice, 109 S. Ct. 2558, 2565–66 (1989) (quoting Church of the Holy Trinity v. United States, 148 U.S. 457, 469 (1892)).
236 Charles George Gov’t Memo., supra note 170, at 12.
237 Id. at 16.
The EPA's failure to promulgate regulations thus should mean that there can be no presumption of reasonableness on implementation and cost issues because the NCP has failed to set out a procedure for an agency to create the presumption of reasonableness. Subsequent to its NEPACCO decision, the Eighth Circuit noted in Solid State Circuits, Inc. v. EPA that the burden of proof on an issue under such circumstances is shifted to the government until regulations are promulgated.

Nevertheless, the first court of appeals to address this set of issues suggested that the government may, in fact, achieve the result it seeks, even if the court has not adopted in toto the rationale the government has manufactured. In United States v. R.W. Meyer, Inc., before the Court of Appeals for the Sixth Circuit, the defendants argued that certain categories of costs alleged by the government, such as indirect costs, were not recoverable because they were not demonstrably allocable to the site cleanup at issue. The government, however, presented testimony concerning the mathematical formula it used to allocate indirect costs to individual Superfund projects. Even though no CERCLA regulation embodied the formula, the court found the "internal policy guidance" outlining the formula to be reasonable and a sufficient basis for allowing recovery of such costs in the case before it.

Prior to the 1986 amendments, courts interpreting CERCLA always had assumed that specific costs were judicially reviewable and

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238 NEPACCO, 810 F.2d at 748.
239 Solid State Circuits v. EPA, 812 F.2d 383 (8th Cir. 1987).
240 Id. at 392. The court held that the burden of proof shifts to the government where CERCLA "is silent or ambiguous, and the EPA has failed to promulgate regulations or to issue position statements that could allow a party to weigh in advance the probability that the clean-up order is valid or applicable." Id. The Department of Justice argued in litigation prior to 1988 that cost issues were reviewable de novo and not subject to review of an administrative record. See Light, When EPA Makes a Superfund Mistake: Judicial Review Problems Under SARA, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,148, 10,154 (1987) (citing United States' Supplemental Reply Memorandum in Opposition to Occidental Chemical Corporation's Motion to Compel Production of Documents Withheld by New York on the Basis of Deliberative Privilege at 3 n.4, United States v. Occidental Chem. Corp., 606 F. Supp. 1470 (W.D.N.Y. 1985) (No. 79-990(JTC)). In the Thomas Solvent brief, the government acknowledged that it has now changed its legal position. See Light, Why the Facts Have Become Relevant: The Outer Bounds of Superfund Liability, in POLLUTION LIABILITY: STRATEGIES FOR MANAGING THE COMBINED CHALLENGES OF SUPERFUND AND TOXIC TORT CLAIMS 35, 37 (C. Poirier & J. Mosher ed. 1988).
241 889 F.2d 1497 (6th Cir. 1989).
242 Id. at 1502.
243 See id. at 1503–04.
244 See id.
that the EPA never could recover "unjustified" costs in an action under CERCLA section 107.\textsuperscript{245} Nothing in the 1986 amendments or their legislative history suggests that Congress has ever had a different view. Indeed, the government in its own testimony during the reauthorization process continually affirmed that, following enactment of the proposed "judicial review" amendments to CERCLA section 113, "responsible parties will still be able to establish that the [National Contingency] Plan was not followed or that specific costs were not proper."\textsuperscript{246}

The R.W. Meyer court, however, allowed the recovery of costs not directly allocable to a Superfund project as "response costs," even though the allocation method was not included in the NCP.\textsuperscript{247} Nevertheless, the EPA's default in promulgating any regulations concerning such implementation requirements and the allocation of costs did not shift the burden of proof to the government to establish the necessity and appropriateness of its implementation decisions and costs in individual cost recovery actions, as the Eighth Circuit had intimated in \textit{Solid State Circuits}.

A final, probably unanticipated, "construction" of SARA's judicial review preclusion provisions involving citizen suits merits discussion. In the House Judiciary Committee's version of SARA, the statute's citizen suit provision stated that "[s]uch an action may be maintained during the course of construction and implementation of the remedial action, where the person bringing the action alleges that the specific remedial measures being taken are in violation of this Act."\textsuperscript{248} Environmentalists sought this addition so that citizen suits would be available at a meaningful time for those protesting a remedy that the EPA had selected and proposed to implement.\textsuperscript{249}

\textsuperscript{245} \textit{See}, \textit{e.g.}, Lone Pine Steering Comm. v. EPA, 777 F.2d 882, 887 (3d Cir. 1985) ("Section 9607 provides an adequate opportunity for the alleged responsible parties to object to cost and adequacy of response actions."); J.V. Peters & Co. v. EPA, 767 F.2d 263, 266 (6th Cir. 1985) (costs must not be inconsistent with NCP); United States v. Hardage, 116 F.R.D. 460, 466 (W.D. Okla. 1987) (government's failure to take prompt action and other failures to be "considered in mitigation of any damages"); Industrial Park Dev. Co. v. EPA, 604 F. Supp. 1136, 1144 (E.D. Pa. 1985) (the EPA is not permitted to impose unjustified costs).

\textsuperscript{246} \textit{Superfund Reauthorization Hearings}, supra note 66, at 61 (statement of F. Henry Habicht III, DOJ Assistant Attorney General, Law and Natural Resources Division).

\textsuperscript{247} \textit{See} 889 F.2d at 1503-04.


\textsuperscript{249} \textit{See} \textit{Current Developments, Hazardous Waste, House Panel Votes to Allow Citizens to Sue to Force Dumpers to Clean Up Sites}, 16 Env't Rep. (BNA) 892 (Sept. 20, 1985) ("Environmentalists lobbied hard for the citizen suit provision . . . .").
The House Judiciary Committee's Report, however, "explained" the provision as follows:

The Judiciary Committee amendment modified new subsection 113(i)(4), as reported by the Energy and Commerce Committee, to clarify the right of persons to seek review of response actions under the new citizens suit provisions of CERCLA, which would be established by this Act (Section 207 of H.R. 2817, new Section 310 of CERCLA). With this modification, persons may seek review of remedial action (not removal actions) during construction and implementation of such actions when a specific remedial measure that has been constructed is allegedly in violation of a requirement of this Act.250

Beginning in the House Judiciary Committee Report and continuing in subsequent legislative history offered on the floors of the House and Senate at the time the Conference Report was accepted, Representative Glickman set forth the government's position that "taken" means "completed" and therefore that no judicial review of the EPA remedial actions was to be available except for remedial actions that have been taken.251 Thus, affected citizens may obtain review only of remedial actions that already have been completed. In other words, review is available after it is effectively too late to change the decision that citizens allege to be erroneous.

The sentence added by the House Judiciary Committee created a logical problem with this construction because the provision would allow for review of a measure being completed, a concept at war with the government's objective to avoid review until after completion. Somehow, however, the troubling language dropped by the wayside on its way to the House floor, for the "compromise" markup vehicle accepted by the relevant House committees did not contain it.252 Thus, there was less of a linguistic problem with the committee report's construction of "taken," which Representative Glickman repeated on the floor of the House.253 Although the Conference Report was more equivocal on the meaning of "taken," legislators supporting the government's position dutifully recited the "taken" equals "completed" rationale at the time the report was accepted.254 Not even the detailed "reply brief" of Senator Stafford.

253 Id.
on the matter could overcome the government’s "floor statements."  

V. CONCLUSION: THE IMPORTANCE OF “BEING TAKEN”

This final example dramatically demonstrates the sort of post-hoc legislative history to which the federal courts have so often resorted in construing CERCLA. They have not done so willingly. In its first opportunity to construe a provision of the Act, the Supreme Court in a classic understatement found CERCLA to be “not a model of legislative draftsmanship.” The lower courts occasionally have been less gentle, variously finding the Act to have “less than perfect” draftsmanship with a “slimmer” than usual legislative history, or, more commonly, to have a “well-deserved notoriety for vaguely drafted revisions and an indefinite, if not contradictory, legislative history.” One frustrated district court judge recently commented, “It astounds this Court that a statute as important as CERCLA is to the protection of our environment and the public health remains as inscrutable as ever.” Frequently judicial comments have approached the satire which Representative Harsha predicted in 1980, finding that “Congress did not, to say the least, 

255 See 132 CONG. REC. S17,316 (daily ed. Oct. 17, 1986). Senator Stafford and Representatives Florio and Roe provided the “counter” legislative history provided by environmentalists. 132 CONG. REC. H9600 (daily ed. Oct. 8, 1986) (statement of Rep. Roe) (“The legislation allows citizens to bring a lawsuit under section 310 as soon as the agency announces its decision regarding how a cleanup will be structured. A final cleanup decision, or plan, constitutes the taking of action at a site . . . .”); 132 CONG. REC. S14,898 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford) (“It is crucial, if it is at all possible, to maintain citizens’ rights to challenge response actions, or final cleanup plans, before such plans are implemented . . . .”).


260 Violet v. Picillo, 648 F. Supp. 1283, 1288 (D.R.I. 1986) (quoting United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985)); see also Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 670 (5th Cir. 1989) (legislative history “bereft of discussion” relevant to question presented); id. at 667 (because CERCLA “was enacted as a ‘last minute compromise’ between three competing bills, it has ‘acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory legislative history.’”).


leave the floodlights on to illuminate the trail to the intended meaning,"\textsuperscript{263} and that conflicts in sponsors' interpretations of the statute are "[a]lways a big help."\textsuperscript{264}

A. Supreme Court Jurisprudence of CERCLA

Given the peculiarity of CERCLA's original legislative genesis, one might have predicted that federal judges interpreting the statute would have opted for the English perspective on legislative history and refused to give any credence at all to the confused legislative debates and proceedings.\textsuperscript{265} Justice Scalia is an apostle of what critical academicians now call "the new textualism."\textsuperscript{266} He has become extremely skeptical, if not cynical, about legislative history materials other than the statutory text.\textsuperscript{267} In the Supreme Court, this view has had considerable force in its construction of CERCLA.

In \textit{Exxon Corp. v. Hunt},\textsuperscript{268} the Court construed the statute's purported preemption of a New Jersey tax similar to the Superfund taxes. Declining to "attach any great significance"\textsuperscript{269} to a 1980 floor colloquy between New Jersey Senator Bradley and principal sponsor Senator Randolph, Justice Marshall gave the relevant words in the statute their "ordinary meaning"\textsuperscript{270} and found the New Jersey tax to have been partially preempted.\textsuperscript{271} Of those members of the Court

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{268}] 475 U.S. 355 (1986).
\item[\textsuperscript{269}] Id. at 373–74.
\item[\textsuperscript{270}] Id. at 374.
\item[\textsuperscript{271}] Id. at 376–77.
\end{enumerate}
\end{footnotesize}
participating in the decision, only Justice Stevens would have credited the 1980 colloquy as the “sparse legislative history” embodying congressional intent and refused to find preemption.\textsuperscript{272} The decision has little substantive significance today, however, because the preemption provision that the Supreme Court interpreted in March, 1986, was repealed in the SARA amendments in October of that year.\textsuperscript{273}

In \textit{Pennsylvania v. Union Gas Co.},\textsuperscript{274} the Court confronted the question of whether Congress intended in CERCLA to abrogate the eleventh amendment immunity of the states by making the states liable persons under the statute.\textsuperscript{275} The decision was one among several during the 1988–1989 term of the Supreme Court dealing with the states’ eleventh amendment immunity from suit in federal court.\textsuperscript{276} The Supreme Court previously had held that Congress only abrogates the states’ immunity when it makes its intent “unmistakably clear.”\textsuperscript{277} In a decision that could not have been more divided, the Court held that (1) Congress intended in the amended CERCLA to abrogate the states’ immunity, and (2) the abrogation was constitutionally valid.\textsuperscript{278}

Only four members of the Court (Brennan, Marshall, Blackmun, and Stevens) agreed with both conclusions. In a concurring and dissenting opinion, Justice Scalia read CERCLA’s text (as amended by SARA and without reference to legislative history) as calling for preemption but found the abrogation unconstitutional.\textsuperscript{279} In a dissenting and concurring opinion, after careful analysis Justice White found no unmistakably clear language from which to conclude that Congress intended to abrogate immunity. But then in a short, one-paragraph reversal at the conclusion of his opinion, he concurred in the judgment on the grounds that his “view on the statutory issue has not prevailed” and, while not agreeing “with much of his reasoning,” he agreed with Justice Brennan’s conclusion that abrogation would be constitutional.\textsuperscript{280}

The Supreme Court’s two CERCLA opinions may be viewed in the context of the ongoing dispute among members of the Court.

\textsuperscript{272} Id. at 379–86 (Stevens, J., dissenting).
\textsuperscript{273} See 42 U.S.C. § 9614(c) (1988).
\textsuperscript{274} 109 S. Ct. 2273 (1989).
\textsuperscript{275} Id. at 2276–77.
\textsuperscript{278} Union Gas, 109 S. Ct. at 2296.
\textsuperscript{279} Id. at 2295.
\textsuperscript{280} Id.
about the proper use of legislative history materials. In Union Gas, both Scalia and White based their constructions of the statute on its language, largely without reference to legislative history. This is consistent with these Justices' predilection to rely exclusively on the statutory text. Justice Scalia has waxed with particular eloquence on the unreliability of materials other than statutory language as indicators of congressional intent.

Other than the two cases cited above, however, so far the Supreme Court has refused to involve itself in the many disputes over the meaning of various CERCLA provisions. The lower federal courts have had to proceed to interpret the statute in the absence of any guidance from the nation's highest court. Despite the Court's recent skepticism about the uses of legislative history, the lower courts' approach has been rather conventional.

B. The Snark

To be sure, the lower courts begin, as they must, with the statutory language. However, given CERCLA's gaps and ambiguities, frequently they turn to legislative history or other extrinsic evidence

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282 E.g., Green v. Bock Laundry Machine Co., 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring in the judgment); Blanchard v. Bergeron, 109 S. Ct. 939, 946-47 (1989) (Scalia, J., concurring) (“I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question, even if (as is not always the case) the Reports happened to have been published before the vote . . . .”).


284 In the main, construction of CERCLA is exclusively the province of the federal courts, since all claims arising under the statute can only be resolved in federal court. 42 U.S.C. § 9613(b) (1988).

of congressional intent. In practice, the imperfections in CERCLA's 1980 legislative history, as well as that of the 1986 SARA amendments, almost invariably have benefited the government's litigation position. Where, as is frequently the case, the text is unenlightening, the government may bootstrap its pitch for a liberal interpretation on the simple argument that it is, after all, the government which is charged with administering the statute to be interpreted. The argument has proven particularly useful where the EPA has codified or embodied its interpretation in rules under the Act or expressed its view in internal policy guidance documents.

The argument's utility, however, is not limited to such situations.

In the fable of the snark, the summation added up to far more than the witnesses had said. With CERCLA, no court has done a summation. Instead, each has limited its focus to the issues at hand, whether causation and joint and several liability, contribution, pre-enforcement review, record review, or costs. The regime that has resulted is easily subject to reductio ad absurdum, for there are no established limiting principles under the regime. Let us summarize the government's position, which we have detailed above and which the courts largely have adopted.


287 See Wagner Seed Co. v. Bush, 709 F. Supp. 249, 252 (D.D.C. 1989). The Supreme Court recently has counseled deference to an executive agency's construction of its own governing statute in several situations: (1) where a broad statutory grant was left for agency interpretation, see Webster v. Doe, 486 U.S. 592, 600 (1988) (statute allowing Central Intelligence Agency director to terminate employee when he deems it "necessary or advisable" to government's interest "fairly exudes deference" to the agency); (2) where a single word is susceptible of two plausible meanings, EEOC v. Commercial Office Products Co., 486 U.S. 107, 115 (1988) (deference given to agency interpretation of the word "terminate"); and (3) where an agency is interpreting a matter of scientific or technical complexity within the agency's special competence, see Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125 (1985) (variances from toxic pollutant effluent limitations in the Clean Water Act); Wilshire Westwood Assocs. v. Atlantic Richfield Corp., 881 F.2d 801, 809 (9th Cir. 1989) (definition of "hazardous substance" under CERCLA). However, the Court also has stated that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n.9 (1984).


291 See supra note 7 and accompanying text.
Liability is strict, joint and several, and retroactive, though these words do not appear in the statute. Strained construction of the adjective "such" has eliminated causation. Metamorphosis of the disjunctive "or" to the conjunctive "and" has made the imposition of joint and several liability virtually automatic when wastes have become commingled, no matter how slight a defendant's contribution. If a cleanup took place prior to the SARA amendments, there is not even an applicable statute of limitations because the limitations period is prospective only. Pre-judgment interest, however, is recoverable retroactively.

Consideration of equitable factors must await the contribution action. Contribution, however, may never come up, for the court may sever such claims and need not even decide them in a case where the claims properly were asserted. Instead, the court may enter final judgments for the government without resolution of the related contribution claims, despite the statutory language calling on courts to follow the Federal Rules of Civil Procedure in contribution actions under the statute.

Statutory protection of sweetheart settlors is absolute. Should the time for contribution suit approach, the government may extinguish it within its prosecutorial discretion. Such governmental decisions to extinguish contribution claims are made without judicial review either during the court's evaluation of the settlement or during any government suit against non-settlors because the statute allows the government's claim to be adjusted only for the monetary settlement amount and not for the inequities of any alleged sweetheart deal.

Absent the government's enforcement suit, a potentially responsible party may not accelerate the adjudication of its liability even after the government response action is finished. Compliance with

293 See supra notes 177–180 and accompanying text.
294 See supra notes 181–186 and accompanying text.
295 See supra notes 210–211 and accompanying text.
296 United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1506 (6th Cir.), cert. denied, 110 S. Ct. 1527 (1989). "Because we view SARA as reauthorizing and clarifying the congressional intent underlying CERCLA, because of CERCLA's retroactive application, and because of the broad remedial purposes underlying CERCLA and SARA, we do not believe that Congress would have intended SARA's prejudgment interest provisions only to have prospective effect."
Id.
297 See supra notes 187–193 and accompanying text.
298 See supra notes 71–76 and accompanying text.
299 See supra notes 194–198 and accompanying text.
300 See supra notes 80–84, 88–101 and accompanying text.
a pre-SARA administrative order has even worse consequences, for the potentially responsible party waives its right to contest liability if it yields to the government's threat of daily fines and punitive damages. And should there be an enforcement suit, the other shoe drops because only those protests made to the EPA in an administrative process will be heard. Other protests, foregone perhaps because of a failure to read the legal notices in the local newspaper, can be waived for failure to participate in the administrative process.

Such are the catch-22s of the Superfund regime. The sad truth is that judicial construction of the Superfund statute at the behest of the government has gone beyond both the language of the Act and the policies behind that language. Liability decisions have moved beyond the common-law principles to which Congress referred the courts, creating a regime unprecedented in American jurisprudence. Contribution decisions have gone beyond the Federal Rules of Civil Procedure to create novel bifurcation and severance principles. Judicial review of decisions have become the most extreme as they have neglected consideration of whether an action might, might not, or could not delay cleanup. The resulting preclusion regime furthers the convenience of the government's litigators even when cleanup considerations are not at stake.

301 See supra notes 199–210.
302 42 U.S.C. § 9606(b)(2)(D) (1988) (petitioner may obtain reimbursement "to the extent that it can demonstrate, on the administrative record, that the . . . decision . . . was arbitrary and capricious . . . ." (emphasis added).
303 See 42 U.S.C. § 9617(d) (1988); 55 Fed. Reg. 8844 (1990) (removals) (to be codified at 40 C.F.R. § 300.415(m)(4)(ii)); id. at 8846 (NPL deletions, but also publication in the Federal Register as required by APA) (to be codified at 40 C.F.R. § 300.425(e)(4)(ii)); id. at 8851 (remedial action selection) (to be codified at 40 C.F.R. § 300.430(f)(3)(A)).
304 A few courts have questioned the constitutionality of the government's actual practice in providing notice and an opportunity to comment on its decision within the EPA administrative process. See United States v. Charles George Trucking Co., Nos. 85-2463-WD, 85-2714-WD, slip op. at 1 (D. Mass. Feb. 26, 1990) (LEXIS, Genfed library, Dist file 10,627) (remanding case to the EPA because defendants had not received notice from the EPA that the record was available for review and comment); United States v. Rohm and Haas Co., 669 F. Supp. 672 (D.N.J. 1987) (remanding record to agency for additional explanation).
305 Legislative History, supra note 262, at 686 (Sen. Randolph) ("It is intended that issues of liability not resolved by this Act, if any, shall be governed by traditional and evolving principles of common law."); id. at 778 (Rep. Florio) ("Issues of joint and several liability not resolved by this shall be governed by traditional and evolving principles of common law.").
307 See supra notes 71–76 and accompanying text.
308 See supra note 202 and accompanying text.
Thus far, the Supreme Court has refused to review judicial opinions establishing the Superfund regime discussed herein.\textsuperscript{309} The Court's opinions interpreting CERCLA have involved only peripheral issues.\textsuperscript{310} It has foregone opportunities to elaborate on pre-enforcement review preclusion and major liability and contribution issues.\textsuperscript{311} There is fodder here both for the textualists and for other justices interested in equity.

\textsuperscript{309} See \textit{supra} note 283 and accompanying text.

\textsuperscript{310} See \textit{supra} notes 268–281 and accompanying text.