LIMITS ON CERCLA RECOVERY FOR LEGACY SITES: EMERGING STATUTE OF LIMITATIONS ISSUES

Daniel Riesel and Dane Warren

I. CERCLA Overview

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")[1] imposes strict liability for environmental cleanup costs on several categories of parties based on their status, including current owners and operators that had no hand in contaminating the property in question. CERCLA is also retroactive,[2] meaning that it "reaches back indefinitely into the past to make an entity liable for the cleanup of hazardous materials it may have properly disposed of decades ago." *Gov't of Guam v. United States*, 341 F. Supp. 3d 74, 82 (D.D.C. 2018). CERCLA sites are often decades old, and cleanup work may take place in stages and over many years, sometimes by design and sometimes because the full extent of contamination is not discovered until years later. Litigants involved with these legacy sites often raise statute of limitations defenses, resulting in several complex legal issues that confront CERCLA practitioners.

This growth in litigation surrounding CERCLA's statute of limitations has revealed two primary inflection points that the CERCLA practitioner must navigate. The first is whether a party has asserted a cost-recovery claim under CERCLA Section 107(a) or a contribution claim under Section 113(f). Because the two causes of action carry different limitations periods, the application of CERCLA's statute of limitations depends on which of these mutually exclusive remedies is available. The second issue occurs when the statute of limitations accrues (or starts to run), a superficially simple question that has spawned a host of litigation over issues like the elusive distinction between a "removal" or "remedial" action[3] and whether the precise wording of a consent order imposes an obligation to clean up the property in question.[4] These and other issues have given rise to substantial litigation concerning legacy hazardous waste sites.

II. Mutually Exclusive Claims for Relief – Section 107 and Section 113

CERCLA provides plaintiffs with two distinct statutory mechanisms to recover response costs or to shift those costs to others: Section 107(a) cost recovery claims and Section 113(f) contribution claims. *United States v. Atlantic Research Corp.,* 551 U.S. 128 (2007). As a general rule, the remedies set forth in Sections 107 and 113 are mutually exclusive. "[C]osts incurred voluntarily are recoverable only by way of § 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement and recoverable only under § 113(f)." *Id.* at

---

[1] The Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9601 *et seq*.

[2] *Franklin Ctny. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 551 (6th Cir. 2001).

[3] 42 U.S.C. § 9613(g)(2).

[4] *Id*. § 9613(g)(3).

139–140 n.6. Because these claims for relief have different statutes of limitations, which type of claim a party is entitled to bring may determine whether that claim is timely, and therefore whether that party can recover any of its response costs under CERCLA.

A. Claims for Response Costs Under Section 107

Section 107(a) of CERCLA authorizes the United States, a state, or "any other person" to seek reimbursement for all removal or remedial costs associated with the hazardous materials on a property. Section 107(a)(4)(B) provides for the recovery of "necessary" response costs incurred that are consistent with the National Contingency Plan ("NCP").[5] Entities that have incurred response costs cleaning contaminated sites may sue to recover those costs from four categories of potentially responsible parties ("PRPs"): (i) present owners and operators of facilities; (ii) past owners and operators at the time the hazardous substances was disposed of; (iii) those who arranged for disposal or treatment at a facility; (iv) and those who transported hazardous substances to a facility. *State of N.Y. v. Lashins Arcade Co.*, 91 F.3d 353 (2d Cir. 1996).

Section 107(a) cost recovery claims presumptively impose joint and several liability, *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614 (2009), and have two statutes of limitations. The Supreme Court's decision *Atlantic Research* has been interpreted by lower courts to mean that, "[w]ith regard to § 107(a) cost recovery claims… a private party who voluntarily undertakes a cleanup action … [and] remediates the hazardous material *without the judicial spur of § 106 or § 107* – can seek recovery of response costs under § 107(a)(4)(B)." *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 218 (3d Cir. 2010). Indeed, "every federal court of appeals to have considered the question since *Atlantic Research*…has said that a party who *may* bring a contribution action for certain expenses *must* use the contribution action, even if a cost recovery action would otherwise be available." *Whittaker Corp.*, 825 F.3d at 1007 (emphasis in original). (As discussed below, this issue becomes more complex when the costs in a prior action vary from the costs in a subsequent action.)

Armed with the presumption of joint and several liability, a plaintiff bringing a CERCLA action for response costs under Section 107 does not have to prove the equitable share (or responsibility) of a defendant for the total response costs once its prima facia case is proven and can shift the allocation problems to the defendants once its prima facia case is proven. Another significant tactical advantage is the potential to avoid liability for the "orphan" share of the response costs. However, some of this advantage may be blunted by the defendant's ability to

[5] To establish a prima facie case under CERCLA 107, a plaintiff must show that (1) the defendants fall within one or more of the four classes of responsible persons described in Section 107(a) of CERCLA. Plaintiffs that can maintain a Section 107 claim for relief have a tactical advantage due to the presumption of joint and several liability that attaches to such claims, as well as the longer statute of limitations for cost recovery claims (at least for the recovery of remedial costs, *see infra* Section III.A.1). As the Ninth Circuit observed in *Whittaker*: "[s]everal courts have recognized that, given the choice, plaintiffs would generally prefer to proceed under a § 107 cost recovery action, rather than a § 113 contribution action, due to the § 107 cost recovery action's different statute of limitations, its provision for strict liability, its limited defenses, and its opportunity for joint and several recovery." *Whittaker Corp. v. United States*, 825 F.3d 102, 1007 n.4 (9th Cir. 2016) (citing *NCR Corp. v. George A. Whiting Paper Co.,* 768 F.3d 682, 690 (7th Cir. 2014); *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230, 1236–37 (11th Cir. 2012)).

counterclaim against the plaintiff for contribution under Section 113, provided that the plaintiff is a PRP under Section 107(a). But so long as the plaintiff properly brought its claim under Section 107, it will benefit from the statute of limitations applicable to such claims even if the defendant can dull the other tactical advantages by filing a counterclaim under Section 113.

B. Claims for Contribution Under Section 113

A CERCLA contribution claim can be brought in two circumstances. First, Section 113(f)(1) provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable… during or following any civil action under section 9606 … or under section 9607(a)…" Second, Section 113(f)(3)(B) provides a right of contribution against third parties to those who have resolved their CERCLA liability with "the United States or a State in an administrative or judicially approved settlement." In either instance, there must be a "trigger" or condition precedent to allow a CERCLA contribution action to go forward.

As opposed to the joint-and-several liability standard that applies in Section 107 actions, the Plaintiff in a Section 113 action has the burden of proving each defendant's "equitable share" under either of these two contribution claims for relief. *See, e.g.*, *Goodrich Corp. v. Town of Middlebury*, 311 F.3d 154, 168 (2d Cir. 2002) (holding that "[t]he party seeking contribution bears the burden of proof" of establishing each party's equitable share of response costs); *Minyard Enters., Inc. v. Southeastern Chem. & Solvent Co.*, 184 F.3d 373, 385 (4th Cir.1999). Section 113(f)(1) provides that a court "may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1).

The phrase "equitable factors" grants the Court wide discretion to fashion an allocation. *See, e.g., Trinity Indus., Inc. v. Greenlease Holding Co.*, 903 F.3d 333, 360 (3d Cir. 2018) ("CERCLA grants trial courts broad discretion to 'allocate response costs among liable parties using such equitable factors as the court determines are appropriate.'" (quoting 42 U.S.C. § 9613(f)(1))). "[T]he law does not command mathematical preciseness from the evidence in finding damages. Instead, all that is required is that sufficient facts … be introduced so that a court can arrive at an intelligent estimate without speculation or conjecture." *Scully v. US WATS, Inc.,* 238 F.3d 497, 515 (3d Cir. 2001) (internal quotation marks and citation omitted).[6]

[6] *See, e.g.*, *Columbia Falls Aluminum Co., LLC v. Atl. Richfield Co*., No. 21-36042, 2023 WL 1281669, at *2 (9th Cir. Jan. 31, 2023). Courts have considered "a potpourri of factors" in equitably allocating CERCLA response costs among liable parties. *United States v. Davis,* 31 F. Supp. 2d 45, 63 (D.R.I. 1998). Many have used the so-called "Gore factors." The Gore factors are derived from an unsuccessful CERCLA amendment offered by then-Senator Albert Gore in 1980. They would have permitted courts to consider, among other factors, the following: "(i) the ability of the parties to demonstrate that their contribution to a discharge release or disposal of a hazardous waste can be distinguished"; "(ii) the amount of the hazardous waste involved"; "(iii) the degree of toxicity of the hazardous waste involved"; "(iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste"; "(v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such waste"; and "(vi) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or environment." 126 Cong. Rec. 26,779, 26,781 (1980). Although never formally enacted by Congress, many courts have referred to the Gore Factors as establishing a framework for the exercise of the court's discretion pursuant to Section

A critical benefit for PRPs that settle with the government is that CERCLA protects them from "claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2).[7] This scheme was created to ensure "swift and effective response to hazardous waste sites," (*Anspec Co., Inc. v. Johnson Controls, Inc.,* 922 F.2d 1240, 1247 (6th Cir. 1991)), by encouraging the government "and potentially responsible parties to launch clean-up efforts first, then recover the cost from other responsible parties later – through settlements, consent decrees and, if need be, judgments." *RSR Corp. v. Commercial Metals Co.,* 496 F.3d 552, 555 (6th Cir. 2007). Not only do "non-settlors lose their contribution rights, [but] defendants who are parties to a CERCLA settlement retain the right to seek contribution from the *non*-settling PRPs." *United States v. Rohm & Haas Co*., 721 F. Supp. 666, 675 (D.N.J. 1989) (citing 42 U.S.C. § 9613(f)(3); *United States v. Se. Pennsylvania Transp. Auth*., 235 F.3d 817 (3d Cir. 2000)). Although Section 113(f)(2)'s contribution bar applies only to settlements with "the United States or a State," courts frequently extend similar contribution protection to settlements with private parties using the courts' equitable discretion under Section 113(f)(1).[8] Private plaintiffs have also provided the common law equivalent, indemnification, to the settling defendants to facilitate the settlement.

To determine whether a contribution action is barred by a prior consent decree or settlement, courts consider whether the subject matter of the settlement and the contribution action are the same. If they are not, courts turn to the text of the agreement as a starting point for interpreting the scope of the matters addressed. *See United States v. Charter Int'l Oil Co.*, 83 F.3d 510, 517–18 (1st Cir. 1996). When interpreting such an agreement, courts look to various factors, including "the particular location, time frame, hazardous substances, and clean-up costs covered by the agreement." *Akzo Coatings, Inc. v. Aigner Corp*., 30 F.3d 761, 766 (7th Cir. 1994). This topic, which is discussed in greater detail below, can prove outcome-determinative when a statute of limitations defense is raised.

C. Preclusion of Section 107 Claims

A Section 107 claim is not available when a party has a claim for contribution under Section 113 for those same costs. The various circuit courts have recognized that allowing a party to proceed under Section 107 would "in effect nullify" Congressional intent of creating a distinct contribution remedy under Section 113. *Niagara Mohawk Power Corp v. Chevron U.S.A.,*

113(f)(1). Therefore, despite CERCLA's strict liability standard, the concept of culpability or fault often emerges at the allocation stage. *See* Riesel, The Resolution of Complex CERCLA Actions through the Use of Third-Party Neutrals, The Practical Real Estate Lawyer, Vol. 34, ALI (2018).

[7] Any non-settling defendant and any unidentified PRP is generally barred from seeking contribution from any settling defendant for the matters addressed in the settlement. 42 U.S.C. § 9622(f)(1) (EPA may provide settling party "with a covenant not to sue concerning any [CERCLA] liability to the United States"); *id*. (h)(4) ("A person who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement."), *id*. § 9613(f)(2) ("A person who has resolved its liability to the United States or a State in an administratively or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement.").

[8] *See, e.g.*, *San Diego Unified Port Dist. v. Gen. Dynamics Corp.*, No. 07-cv-01955-BAS-WVG, 2017 WL 2655285, at *8-10 (S.D. Cal. June 20, 2017); *Evansville Greenway & Remediation Tr. v. S. Ind. Gas & Elec. Co.*, No. 3:07-cv-66-SEB-WGH, 2010 WL 3781565, at *4, n. 3 (S.D. Ind. Sept. 20, 2010).

*Inc.,*596 F. 3d 112, 128 (2d Cir. 2010); *see also Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 766–67 (6th Cir. 2014) ("[I]t is sensible and consistent with the text to read § 113(f)'s enabling language to mean that if a party is able to bring a contribution action, it must do so under § 113(f), rather than § 107(a)."); *Bernstein v. Bankert*, 733 F.3d 190, 206 (7th Cir. 2012) ("[W]e agree with our sister circuits that a plaintiff is limited to a contribution remedy when one is available."); *Morrison Enters., LLC v. Dravo Corp*., 638 F.3d 594, 603 (8th Cir. 2011) (same); *United Techs. Corp. v. Browning-Ferris Indus., Inc.,* 33 F.3d 96, 103 (1st Cir. 1994) (same); *ITT Indus., Inc. v. BorgWarner, Inc.*, 615 F. Supp. 2d 640, 646–48 (W.D. Mich. 2009) (same); *Whittaker*, 825 F.3d at 1007–08 (holding Sections 107 and 113 are mutually exclusive simply because the two sections' "procedural requirements … are distinct"); *NCR Corp.,* 768 F.3d at 691 (citing *Bernstein*, 733 F.3d at 205–06 which relied on the rationale that allowing a plaintiff to proceed under Section 107 "would in effect nullify the SARA amendment [§ 113]"); *Appleton Papers, Inc. v. George A. Whiting Paper Co.,* 572 F. Supp. 2d 1034, 1043 (E.D. Wisc. 2008) (same).

Although courts have coalesced around this clear rule in the years following *Atlantic Research*, some litigants faced with preclusion of their Section 107 claim still argue that *Atlantic Research* may allow Section 107 actions where the PRP incurred costs (or entered into an agreement) "voluntarily." However, as the Third and Seventh Circuits have observed, "[v]oluntariness is irrelevant." *Cranbury Brick Yard, LLC v. United States*, 943 F.3d 701, 709 (3d Cir. 2019); *see also Bernstein*, 733 F.3d at 210 (observing "CERCLA does not ask whether a person incurs costs voluntarily or involuntarily"). The basic rule is that simply incurring response costs prevents a party from bringing a cost recovery action under Section 107 if those cost are incurred pursuant to some form of an agreement or litigation. *See, e.g., 101 Frost St. Assocs., L.P. v. United States Dep't of Energy*, No. 17-cv-03585(JAM) (ARL), 2019 WL 4415387, at *10 (E.D.N.Y. Sept. 16, 2019).

A critical, but largely unanswered question, is whether the settling parties' contribution bar precludes the non-settlor that has actually incurred response costs from bringing a cost recovery action under Section 107. To be sure, if the non-settlor has incurred those costs by virtue of litigation or a consent decree, it would be restricted to bringing a contribution claim, which would in turn be precluded under a contribution bar in a settlement. However, the Supreme Court suggested that a voluntary expenditure might not preclude an action for response costs,[9] and

[9] In *Atlantic Research*, the Supreme Court appeared softened the hard divide between claims under Section 107 and 113, explaining:

> We do not suggest that §§ 107(a)(4)(B) and 113(f) have no overlap at all. For instance, we recognize that a PRP may sustain expenses pursuant to a consent decree following a suit under § 106 or § 107(a). In such a case, the PRP does not incur costs voluntarily but does not reimburse the costs of another party. We do not decide whether these compelled costs of response are recoverable under § 113(f), § 107(a), or both. For our purposes, it suffices to demonstrate that costs incurred voluntarily are recoverable only by way of § 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under § 113(f). Thus, at a minimum, neither remedy swallows the other, contrary to the Government's argument.

551 U.S. at 139 n.6 (internal citations omitted).

several courts have been reluctant to issue bar orders that would preclude cost-recovery actions under Section 107.[10]

Similarly, a non-settlor that incurs response costs after being issued a unilateral administrative order may be able to maintain a Section 107 action, discussed in greater detail below.

III. Application of the Statute of Limitations

With the essential distinctions between Section 107 and 113 actions in mind, we turn to the different statutes of limitations that apply under CERCLA. At first blush, the rules appear simple. Cost recovery actions are subject to two statute of limitations: for so-called "removal" actions, the plaintiff must seek to recoup costs within three years "after completion of the removal action," *see* 42 U.S.C. § 9613(g)(2)(A); for "remedial" actions, the plaintiff must seek to recoup costs within six years after "initiation of physical on-site construction of the remedial action," *see* § 9613(g)(2)(B).[11] Contribution actions, on the other hand, are subject to a three-year statute of limitations that generally runs from "the date of judgment in any action under this chapter for recovery of such costs," or from the date of certain administrative and judicially approved settlements. *See* § 9613(g)(3)(A).

This deceptively simple framework has given rise to several thorny issues, which we explore in this section.

A. Statute of Limitations for Cost-Recovery Actions

Once it is determined that the plaintiffs can raise a cost-recovery claim under Section 107 of CERCLA, the question become whether that claim is timely.

1. Removal versus Remedial Actions

[10] *City of San Diego v. Nat'l Steel & Shipbuilding Co*., No. 09CV2275 WQH BGS, 2014 WL 4415981, at *4 (S.D. Cal. Sept. 5, 2014) (declining to apply a settlement bar order to cost-recovery claims under Section 107 "because section 6 of the [Uniform Comparative Fault Act] applies to contribution claims, not cost recovery claims"); *Cooper Drum Cooperating Parties Grp. v. Jervis B. Webb Co.*, No. CV1903007ABFFMX, 2021 WL 8441202, at *9 (C.D. Cal. Feb. 19, 2021) (holding that while a cost recovery claim that is not independent of the claims in the action may be subject to a settlement bar, future courts could determine whether such a future claim is "independent"); *Solutia, Inc. v. McWane, Inc*., 726 F. Supp. 2d 1316, 1344 (N.D. Ala. 2010) ("Some of the defendants here have argued that § 113(f)(2) should be interpreted to preclude not only a settling party's liability for contribution under § 113(f) but also its liability for cost recovery under § 107(a). However, the settlement bar § 113(f)(2) by its terms only protects against the former, not the latter.").

[11] Section 113(g)(2)(B) further provides that any "costs incurred in the removal action may be recovered in the cost recovery action" for the remedial action, "if the remedial action is initiated within 3 years after the completion of the removal action." 42 U.S.C. § 9613(g)(2)(B). This section is designed to avoid the inefficient scenario of litigants having to file separate actions to recover removal and remedial costs.

Section 107 generally authorizes federal and state governments to recover response costs for both "removal" and "remedial" actions, subject to three- and six-year statutes of limitations respectively. 42 U.S.C. § 9607(a)(4)(A). Removal actions are "typically short-term cleanup arrangements, which respond to immediate threats to the environment." *MPM Silicones, LLC v. Union Carbide Corp.*, 966 F.3d 200, 214 (2d Cir. 2020); *see also* 42 U.S.C. § 9601 (defining the term); *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1244 (9th Cir. 2005) (explaining "Courts have . . . stressed the immediacy of a threat in deciding whether a cleanup is a removal action" and collecting cases); *State of Minn. v. Kalman W. Abrams Metals, Inc.*, 155 F.3d 1019, 1024 (8th Cir. 1998) (describing removal actions as "those taken to counter imminent and substantial threats to public health and welfare"). Put another way, "[r]emovals are often planned and executed relatively quickly in order to immediately abate public health hazards, such as contaminated drinking water," and "are often undertaken to secure prompt relief from a danger even though the action is not deemed a step toward permanent elimination of the threat." *MPM Silicones, LLC*, 966 F.3d at 220.

Remedial actions, by contrast "include only actions 'consistent with [a] permanent remedy.'" *Id*. (quoting 42 U.S.C. § 9601(24)). Generally, remedial actions are "long-term or permanent containment or disposal programs" "designed to permanently remediate hazardous waste." *New York State Elec. & Gas Corp. v. FirstEnergy Corp.*, 766 F.3d 212, 236 (2d Cir. 2014) ("*NYSEG*"); *see also Schaefer v. Town of Victor,* 457 F.3d 188, 195 (2d Cir. 2006); *California ex rel. Cal. Dep't of Toxic Substances Control v. Neville Chem. Co.,* 358 F.3d 661, 667 (9th Cir. 2004) ("remedial actions generally are permanent responses" (quoting *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 926 (5th Cir. 2000))).

Although Congress may have envisioned a crisp distinction between removal and remedial actions, that has not been borne out in practice. As the Second Circuit observed:

> The statutory definitions do not provide clear insight as to the boundary between removals and remediations. The definitions of each type of action overlap substantially: certain corrective actions — like covering contaminated soil or diverting water away from contaminated areas with drainage controls, the provision of alternative water supplies to replace contaminated water, and related monitoring activities — may be classified as either "removal" or "remedial" actions. Over several decades of CERCLA litigation, courts have agreed on a general principle to distinguish the two: "[r]emoval actions are generally clean-up measures taken in response to immediate threats to public health and safety" that "address contamination at its endpoint," while "[r]emedial actions are typically actions designed to permanently remediate hazardous waste" that address contamination at its source.

MPM Silicones, LLC, 966 F.3d at 219 (quoting *NYSEG*, 766 F.3d at 230–31). Although there continues to be overlap between the two, courts have held that "[t]he key distinction between" removal and remedial actions "is immediacy and comprehensiveness." *Id*.[12]

[12] Although the statutory definitions of remedial and removal overlap, courts have resisted finding statutory ambiguity when an action fits comfortably within one definition or another. *See, e.g.*, *Cooper Crouse-*

Because the removal and remedial actions carry different statutes of limitations, whether a cleanup qualifies as a removal or remedial action can prove dispositive in litigation. The Second Circuit's decision in *New York v. Next Millenium Realty, LLC*, 732 F.3d 117 (2d Cir. 2013), offers an illustrative example. In that case, the State of New York sought to "recover certain costs incurred in investigating and addressing groundwater contamination in the Town of Hempstead." *Id*. at 121. The Town of Hempstead had installed two separate wellhead treatment systems – a granulated activated carbon adsorption system and an air stripper tower – designed to treat the contaminated groundwater. *Id*. at 122–23. The granulated carbon system was installed in 1990, and the air stripper was installed between 1995 and 1997, but the State of New York did not file its claims until 2006. *Id*. at 123. The defendants argued that because these actions were remedial under CERCLA and so the statute of limitations was triggered by "the initiation of physical on-site construction of the remedial action," making the State's claims untimely. 42 U.S.C. § 9613(g)(2)(B).

The district court agreed with the defendants, but the Second Circuit reversed, holding that the wellhead treatment systems were removal actions subject to a three-year statute of limitations that is triggered by the "completion of the removal action." 42 U.S.C. § 9613(g)(2)(A). This was so, the Court held, because "both systems were installed in response to an imminent public health hazard, a defining characteristic of removal actions," and both "were designed as measures to address water contamination at the endpoint—the wells—and not to permanently remediate the problem by 'prevent[ing] or minimiz[ing] the release of hazardous substances so that they do not migrate' from the underlying source of contamination." *New York v. Next Millennium Realty, LLC,* 732 F.3d at 126–27 (quoting 42 U.S.C. § 9601(24)). These considerations trumped the fact that, unlike most removal actions, the wellhead treatments systems had been in operation for many years and were incorporated into the final Record of Decision for the site as part of the permanent, final remedial solution. *Id*. Given the importance of this question and the ongoing remediation of sites with legacy contamination, litigation on this question can frequently prove determinative in litigation.

2. Single-Remediation Principle for a Given Site

Compounding the importance of the distinction between removal and remedial actions, most courts have held that there can generally be only one remedial action per site, absent unusual circumstances. *See NYSEG*, 766 F.3d at 235–36 (collecting cases). As the Second Circuit explained in *NYSEG*, "[t]he very nature of a remedial action is to permanently remediate hazardous waste." *Id*. at 236. Because "[a] remedial action is supposed to be a final, once-and-for-all cleanup of a site," the court reasoned that "once a PRP completes an approved remediation plan, it would not be logical—or fair—to subject that entity to additional CERCLA lawsuits seeking yet additional permanent relief." *Id*. This rule can mean that an initial phase of cleanup work, if

Hinds, LLC v. City of Syracuse, New York, 568 F. Supp. 3d 205, 228 (N.D.N.Y. 2021) (holding that while *MPM Silicones* acknowledged that the statutory definitions overlap, the installation of perimeter fencing falls within one of the enumerated examples of removal actions, so the plain statutory text controls). In other words, *MPM Silicones* cannot be read to create ambiguity where none exists.

categorized as remedial, triggers a single statute of limitations that could bar recovery if litigation is not commenced until later phases of work are completed.

Although the Second Circuit framed the single-remediation principle as a firm rule in *NYSEG*, the court has since clarified that "[a]lthough it is a reliable prescription in the great majority of cases, we do not believe that our *NYSEG* panel intended the principle to control if the circumstances of a case would render it illogical and unfair, and would defeat the statutory design or objectives." *MPM Silicones*, 966 F.3d at 226–27. Specifically, court held that the single-remediation principle clearly applies – and therefore the initiation of physical on-site construction will trigger the statute of limitations – when a party, "with at least a general awareness of the problem" undertakes "at the outset to remedy them," and any "subsequent stages of response were either (1) further steps towards remediating the original problems or (2) steps to remediate different aspects of the known problem." *Id*. at 226. The court explained that the single-remediation principle would not apply when "a subsequent remedial action addresses a problem that did not exist at the time of the prior remedial activity," *id*. at 227, "a site operator discovers a previously unsuspected contamination that was unrelated to, and perhaps far distant from, a previously remediated contamination," *id*., or "the original polluter implemented an inadequate remediation" based on incomplete disclosure to regulators, *id*.[13] It remains to be seen whether other circuits will adopt the Second Circuit's framework.[14]

At least one court has declined to apply the single-remediation principle in the context of a contribution claim brought under Section 113(f). In *BASF Corp. v. Albany Molecular Research, Inc.*, several defendants argued that *NYSEG*'s single-remediation principle should apply to the remediation of river sediments in the Hudson River. No. 1:19-cv-0134(LEK/DJS), 2020 WL 705367, at *8 (N.D.N.Y. Feb. 12, 2020). In particular, the defendants argued that a 2003 settlement with the State of New York for on-site remediation triggered the statute of limitations for all work at the site, including work to remediate the adjacent Hudson River sediments completed pursuant to a 2017 settlement agreement with the State. *Id*. The court rejected this argument, and later denied a motion for reconsideration, declining to extend the single-remediation principle to a contribution action brought under Section 113(f). *Id*., *reconsideration denied*, No. 1:19-cv-0134(LEK/DJS), 2020 WL 3271316 (N.D.N.Y. June 17, 2020).[15]

One important variant on the single-remediation principle is whether "one party's initiation of construction of the remedial action triggered the statute of limitations for another party." *MPM Silicones, LLC v. Union Carbide Corp.*, No. 1:11-cv-1542(BKS/ATB), 2016 WL 3962630, at *17 (N.D.N.Y. July 7, 2016). Based on the language in 42 U.S.C. § 9613(g)(2)(B), which says that

[13] This qualification to the single-remediation principle may prove particularly important in the context of emerging contaminants, such as PFOA and 1,4-dioxane, which are often found on sites that have already been remediated for traditional contaminants. *See ELG Utica Alloys, Inc*., No. 616CV1523BKSATB, 2023 WL 2655111, at *21 (rejecting argument that later remedial phase addressed a "new, different, or unforeseen problem").

[14] One district court outside of the Second Circuit has applied *MPM Silicones* to hold that the single-remediation principle applies "in the great majority of cases." *Long Beach Unified Sch. Dist. v. Santa Catalina Island Co*., No. CV 19-1139-JFW(ASX), 2021 WL 4706552, at *11 (C.D. Cal. Aug. 17, 2021).

[15] The authors of this article are counsel for some of the defendants in this litigation.

the statute of limitations is triggered by the "initiation of physical on-site construction," the district court in *MPM Silicones* held that one party's initiation of construction of the remedial action could trigger the statute of limitations for another party. *Id*. The Second Circuit acknowledged the district court's holding on that question but did not address the issue directly. *MPM Silicones*, 966 F.3d at 215 n.17. In the absence of more specific direction, the Second Circuit's instruction that the single-remediation principle applies unless it would be "illogical or unfair" may guide courts that confront this question.

Time, however, is not always on the defendant's side. In certain circumstances, state or federal regulators may "reopen" closed sites after remedial work is completed through so-called reopener provisions in consent decrees. For example, EPA's model consent decree for a remedial action permits the United States to require a settling party "to perform further response actions relating to the Site" or pay additional response costs where "if, at any time, conditions at the Site previously unknown to EPA are discovered, or information previously unknown to EPA is received, and EPA determines, based in whole or in part on these previously unknown conditions or information, that the Remedial Action is not protective of human health or the environment."[16] This and similar reopener provisions may take on greater prominence in the context of emerging contaminants, such as per- and polyfluoroalkyl substances (PFAS), a class of substances most commonly used in non-stick products and fire-fighting foam. EPA has recently taken steps to list the two most common PFAS compounds, perfluoroctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS), as "hazardous substances" under CERCLA,[17] giving state and federal authorities greater latitude to require response actions to address properties contaminated with those substances. In addition, once these compounds are so listed, EPA and states may seek to reopen closed sites and require additional monitoring or remedial action.

3. <u>One Facility or Multiple Facilities</u>

Whether the single-remediation principle is a categorical rule or a flexible prescription, litigants may try to avoid the issue by arguing that different parts of a remedial project do not constitute a single "facility" or site. However, courts have generally held that sub-units (often called "operating units") will often constitute a single site under CERCLA. *See, e.g.*, *Cytec Indus. Inc. v. B.F. Goodrich Co.,* 232 F. Supp. 2d 821 (S.D. Ohio 2002).

To determine whether sub-sites or parcel should be treated as a single "facility," courts consider factors such as (i) whether the entire site or area where hazardous wastes were historically

[16] EPA, RD/RA Consent Decree at ¶ 71, https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=81 (last visited Jan. 20, 2023). 42 U.S.C. § 9622(f)(6)(A) provides statutory authority for such a provision, requiring that a consent decree "shall include an exception to the [covenant not to sue] that allows the President to sue such person concerning future liability resulting from the release or threatened release that is the subject of the covenant where such liability arises out of conditions which are unknown at the time the President certifies under paragraph (3) that remedial action has been completed at the facility concerned."

[17] Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 87 Fed. Reg. 54,415 (Sept. 6, 2022).

deposited was part of the same operation or management,[18] and (ii) whether a single PRP had authority over the parcel during the time the hazardous substances were deposited, whether regulatory agencies and the PRP treated the entire property as a single facility for CERCLA remediation purposes, and whether hazardous substances were ultimately deposited throughout the entire parcel.[19] A word of caution: courts have held that an division of a site into separate operable units by a regulatory as a matter of convenience will not, standing alone, separate the site into multiple CERCLA "facilities." *ELG Utica Alloys, Inc. v. Niagara Mohawk Power Corp.*, No. 616CV1523BKSATB, 2023 WL 2655111, at *18 (N.D.N.Y. Mar. 27, 2023).

B. Statute of Limitations for Contribution Actions

While claims to recover remedial costs are based on the initiation or completion of work at the site, contribution claims are based on a precondition. They must occur either during or after a judicial action, or following an administrative or judicial settlement. *Cooper Indus., Inc. v. Aviall Serv., Inc.,* 543 U.S. 157 (2004).

The second "trigger," reduction of a settlement to an Administrative or judicial writing, sometimes referred to as an Administrative order on Consent ("AOC") or a consent decree ("CD"), has generated considerable litigation as to whether the settlement instrument meets the qualifications of Section 113(g)(3) of CERCLA. Section 113(g)(3) states:

> No action for contribution for any response costs or damages may be commenced more than 3 years after –
>
> (A) the date of judgment in any action under [CERCLA] for recovery of such costs or damages, or
>
> (B) the date of an administrative order under [Section 122(g)] (relating to de minimis settlements) or [Section 122(h)] (relating to cost recovery settlement) or entry of a judicially approved settlement with respect to such costs or damages.

42 U.S.C. § 9613(g)(3).

The statutory language indicates that only four events trigger the three-year statute of limitations under Section 113(g)(3): (i) the entry of a judgment; (i) a Section 122(g) de minimis settlement; (iii) a Section 122(h) cost recovery settlement; or (iv) a judicially approved settlement.

---

[18] *Cytec,* 232 F. Supp. 2d at 837 (holding that the "facility" was the entire site; thus, also applying a single limitations period to the entire site); *see also United States v. Twp. of Brighton*, 153 F.3d 307, 313 (6th Cir. 1998) (finding the entire Site was a "facility" where the Site was used as one operation, and hazardous wastes were moved from sub-site to sub-site).

[19] *See Axel Johnson, Inc. v. Carroll Carolina Oil Co., Inc.*, 191 F.3d 409, 418–19 (4th Cir. 1999); *Morrison Enters., LLC v. Dravo Corp*., 638 F.3d at 599.

Indeed, according to one commentator, the "main interpretative problem" with Section 113(g)(3) is that, on its face, it only applies in certain factual scenarios, none of which encompass AOCs.[20]

After the Supreme Court clarified in *Atlantic Research* that a PRP could maintain a cost-recovery action under Section 107, appellate and district courts now agree that Section 113(g) is the statute of limitations for all Section 113(f) contribution actions – no matter how that contribution action arises. In particular, any claims brought more than three years after an AOC was executed are time-barred.[21] *Cranbury*, 943 F.3d at 710*; Hobart Corp.*., 758 F.3d at 772–75; *BASF Catalysts LLC v. United States*, 479 F. Supp. 2d 214, 224 (D. Mass. 2007); *The Peoples Gas Light & Coke Co. v. Beazer E., Inc.,* No. 14 C 2434, 2014 WL 4414537, at *4–5 (N.D. Ill. Sept. 8, 2014); *Brooklyn Union Gas Co. v. Exxon Mobil Corp*., No. 17-cv-00045 (MKB) (ST), 2018 U.S. Dist. LEXIS 154903 (E.D.N.Y. Sept. 10, 2018), ECF No. 124.

C. Allowance of Section 107 Claims After Settlement

Courts generally agree that Section 107 claims cannot be brought where contribution claims exist for the same costs, but there has been considerable litigation involving the Section 113 barrier to Section 107 claims.[22] Much of this litigation has centered on the requirement that liability for the response costs be resolved, and to a lesser extent, whether Section 107 actions involving different costs can be brough after a settlement for other costs. This litigation may be thought of as involving two broad issues: (i) when the AOC becomes effective; and (ii) whether the AOC's covenants are enough to resolve a party's CERCLA liability. Both issues relate to the preclusion of Section 107 cost recovery claims, as well as the corresponding statutes of limitations that apply to each type of claim.

Although circuits courts have reached divergent results on some of the issues that follow, there now appears to be a consensus that a case-by-case analysis of the AOC's or CD's terms is required to determine whether the settlement document sufficiently resolves liability to establish a Section 113 contribution claim. *See Niagara Mohawk,* 596 F.3d at 125 (looking at particular

[20] Alfred Light, CERCLA's Cost Recovery Statute of Limitations: Closing the Books or Waiting for Godot?, 16 Southeastern Envtl. L.J., 245, 278 (2008).

[21] No court has yet decided when the three–year statute of limitations is triggered by a UAO, but it would presumably commence when the UAO is issued, analogous to the execution of an AOC. *Cf. Hobart*, 758 F.3d at 772–75.

[22] In *Atlantic Research*, the Supreme Court left open the question of when an action for cost recovery under § 107(a) may be available to a PRP that directly incurs cleanup costs under some judicial or administrative compulsion. *Altantic Research*, 551 U.S. at 139 n.6. The Second Circuit has similar eschewed the issue: "We similarly do not decide whether a § 107(a) action could be pursued by a PRP that incurs cleanup costs after engaging with the federal or a state government, but it is released from any CERCLA liability." *Niagara Mohawk*, 596 F.3d at 127 n.17. In a further footnote, the court concluded: "NiMo in essence financed the cleanup. While NiMo's claims might fall within 'the overlap' of the concepts of cost recovery and contribution recognized by *Alt. Research*, 'concepts' do not alter the plain language of the statute in play here. NiMo's claims clearly meet the more specific parameters of the terms of § 113(f)(3)(B)." *Id.* at 127 n.18.

AOC language to determine whether the order "release[s] NiMo from CERCLA liability"); *Asarco LLC v. Atl. Richfield Co.*, 866 F.3d 1108, 1125 (9th Cir. 2017) ("Whether this test is met depends on a case-by-case analysis of a particular agreement's terms."); *Bernstein*, 733 F.3d at 213 ("Whether or not liability is resolved through a settlement simply is not the sort of question which can or should be decided by universal rule."); *Florida. Power Corp. v. FirstEnergy Corp.,* 810 F.3d 996, 1001 (6th Cir. 2015) ("To determine whether the agreement resolves a PRP's liability, we look to the specific terms of the agreement."). So, while the results of these cases may diverge, the analytical framework is settled.

1. Resolution Conditioned on Performance

The circuit courts disagree about when the statute of limitations accrues (if ever) for a contribution action where the resolution of liability in an AOC or CD is conditional on some future performance. Specifically, there is no consensus about whether the conditional language means that (i) liability is only resolved when the settlement document conditions have been met, or (ii) liability is either resolved or not resolved at the execution of the settlement document and subsequent performance is irrelevant.

There are two approaches on how to treat an AOC or CD where release from liability is conditioned on performance. Some courts hold that, especially when the settlement document has strong language conditioning liability on completed performance, the AOC or CD can resolve liability only at the time the required performance is completed. For this wait-and-see approach, if performance is never completed, the liability is never resolved and a Section 113 claim never ripens.[23] *See Bernstein,* 733 F.3d at 204 ("By the terms of the AOC, when the Non-Premium Respondents completed performance of their obligations under the 1999 AOC … [they] had 'resolved [their] liability to the United States …' through an administrative settlement, thus satisfying the prerequisites for a contribution action pursuant to 42 U.S.C. § 9613(f)(3)(B)."); *DMJ Assocs., L.L.C. v. Capasso,* 181 F. Supp. 3d 162, 168 (E.D.N.Y. 2016) (holding no contribution claim under CERCLA 113 when "th[e] termination [of the AOC] occurred before the parties could fulfill all of their obligations set forth in the AOC").

The Ninth and Sixth Circuits, have held that an AOC or CD either resolves or does not resolve liability immediately upon execution of the agreement based on the language of the document, without considering post-execution performance. *Compare Asarco,* 866 F.3d at 1124 ("Nor do we agree – as the court held in *Bernstein* – that a release from liability conditioned on completed performance defeats 'resolution.'" (citing *Bernstein,* 733 F.3d 190)), *with Fla. Power Corp.*, 810 F.3d at 1008 ("In other words … [with] 'a conditional promise to release from liability if and when performance was completed' ... the effect … is no resolution of liability." (quoting *Bernstein,* 733 F.3d at 213)).

[23] This approach does not necessarily eliminate the possibility that an AOC can resolve liability at the time of execution. If the AOC resolution language is sufficiently certain, it can be deemed to have resolved liability immediately. *See Bernstein*, 733 F.3d at 213 ("Of course, if the EPA had included an immediately effective promise not to sue as consideration for entering into the agreement, the situation would be different.").

Siding with the view of the Ninth and Sixth Circuits, it appears that most courts treat the date of the settlement document to be the necessary trigger. *See Chitayat v. Vanderbilt Assocs.,* 702 F. Supp. 2d 69, 83 (E.D.N.Y. 2010) (internal citation omitted) ("Such a conclusion comports with the rule under the federal common law that it is the discovery of the injury which triggers the statute of limitations. Here, *Chitayat* would have discovered his 'injury' no later than the date he entered into the Consent Order."); C*ooper Indus.,* 543 U.S. at 167 (analyzing contribution claims in the context of "the whole of § 113"); *RSR Corp.,* 496 F.3d at 558 ("And even if the covenant regarding future response costs did not take effect until the remedial action was complete, the statute of limitations for contribution actions runs from the 'entry' of the settlement, U.S.C. § 9613(g)(3)(B), not from the date that each provision of that settlement takes effect."); *Fla. Power Corp.,* 810 F.3d at 1001 ("[T]o trigger the statute of limitations, an agreement must constitute an 'administrative or judicially approved settlement' within the meaning of § 113(f)(3)(B).").[24]

Some of these temporal problems have been eliminated by EPA's March 2009 modification of its model consent orders to include language that the "this settlement constitutes an administrative settlement for purposes of Section[]113(f)(2)" and that a Settling Party is entitled to contribution protection as of an "effective date." However, many CERCLA claims are resolved with states, rather than with the federal government, making uniform application of this model challenging.

2. Different "Buckets" of Costs

Case law is mixed about whether response costs incurred outside of an administrative or judicial settlement can be recovered under Section 107.[25] If response cost that fall outside of the earlier settlement can be recovered, then there is a probability that the statute of limitations may have a new accrual date. The emerging rule appears to be that a plaintiff may bring a Section 107 cost recovery action where some of its costs fall outside of a prior judgment or the matters are covered in a settlement document. *See Whittaker*, 825 F.3d 1002*; Agere Sys., Inc,* 602 F.3d 204*; Bernstein*, 733 F.3d 190; *but see Niagara Mohawk*, 596 F.3d at 127–28. As the Sixth Circuit observed:

> [A] party with a contribution claim under § 113(f) for costs from one judgment may later bring a § 107(a) claim for costs not contained within the judgment that led to the § 113(f) claim. But . . . the 1998 KRSG judgment had a broad scope, covering "the costs of response activities for the NPL Site." [Plaintiff] may bring § 107(a)

[24] The immediate determination approach promotes certainty and finality. Providing clarity as to a party's liability at the time they enter an agreement incentivizes the use of such settlements, "encourag[ing] prompt and effective clean-up of hazardous waste sites." *Niagara Mohawk,* 596 F.3d at 120; *cf. Asarco,* 866 F.3d at 1119 ("Granting a settling party a right to contribution from non-settling PRPs provides a strong incentive to settle and initiate cleanup."). Furthermore, the immediate determination approach helps third parties to timely assess their potential liability for contribution actions, leading to early resolution (or definitive foreclosure) of such claims. *See RSR Corp.*, 496 F.3d at 559.

[25] In *Niagara Mohawk*, the Second Circuit rejected the plaintiff's claim that it was entitled to maintain Section 107 action because it had incurred response costs after entering into an administrative agreement.

> claims for costs that fall outside of that judgment, but the judgment's breadth suggests that identifying such costs will prove difficult in practice.

Georgia-Pac. Consumer Prod. LP v. NCR Corp., 32 F.4th 534, 548 (6th Cir. 2022) (citations omitted).

Thus, costs incurred "voluntarily" that fall outside of a prior settlement might support a Section 107 cost recovery action. The Eastern District of New York observed that voluntary costs could be incurred notwithstanding a judicial or administrative settlement if: (i) if the costs at a site were incurred before the execution of a consent decree or (ii) the costs were incurred after a consent decree but not mandated by the decree. *101 Frost St. Assocs., L.P.*, 2019 WL 4415387 at *8. Where a consent decree existed for a given site, all such voluntary costs were confined to a contribution action. *Id*. ("The Court finds that, because Plaintiffs can assert a contribution action claim …with respect to the costs incurred …[at the site], all costs pertaining to those areas must be pursued under Section113(f) including those costs alleged to have been 'voluntarily' incurred prior to the Consent Orders…."). However, because 101 Frost Street had not entered into a consent decree for a separate and distinct site, the court held that it could maintain a Section 107 action for that area. *Id*.; *see also Appleton Papers, Inc. v. George A. Whiting Paper Co.,* 572 F. Supp. 2d 1034 (E.D. Wis. 2008); *DMJ Assocs., L.L.C. v. Capasso,* 181 F. Supp. 3d 162, 168 (E.D.N.Y. 2016). *Ford Motor Co. v. Michigan Consol. Gas Co.*, No. 08-13503, 2015 WL 540253 (E.D. Mich. Feb. 10, 2015).

A peculiar version of this issue involving the doctrine of *res judicata* was relatively recently addressed by the Ninth Circuit. *GP Vincent II v. Est. of Beard*, No. 21-16555, 2023 WL 3488113 (9th Cir. May 17, 2023) ("*GP Vincent II*"), involved a former circuit board manufacturing facility that had released tetrachloroethylene ("PCE") onto the subject property and an adjacent retirement community. In 2007, the adjacent retirement community discovered soil contamination on its land and sued the then-defunct circuit board manufacturer, Etch-Tek, and the then-current owner of the subject property, Mayhew Center, LLC ("Mayhew"). The retirement community won a large jury verdict for present and future response costs against Mayhew totaling nearly $2 million.

Facing a large jury verdict, Mayhew sued Norma Beard, wife of the man who had operated the defunct circuit board manufacturer, Etch-Tek. Mayhew's complaint asserted a cost recovery claim under Section 107 for response costs associated with the cleanup of the *subject property* and a contribution claim under Section 113 seeking contribution for the jury verdict, which was focused solely on the *adjacent retirement community property*. The cases were consolidated, and the parties negotiated a joint settlement of all claims. Despite the fact that Mayhew filed claims under Section 107 and 113 for costs associated with the subject property and the adjacent retirement community site, the joint settlement focused almost exclusively on the retirement community property, together with a small portion of the subject property "along the boundary with" the retirement community property. *Id*. at *3. The settlement, which was subsequently approved by the district court in 2010, did not purport to establish funding for the final remediation of the subject site.

Mayhew eventually defaulted on its mortgage and failed to complete the cleanup required by the joint settlement. In 2017, GP Vincent took title to the subject property pursuant to a cleanup agreement under the California Land Reuse and Revitalization Act. GP Vincent then filed suit against Etch-Tek (the operator of the circuit board manufacturer), the estates of the former owners and operators of Etch-Tek, and Mayhew. The defendants moved to dismiss under *res judicata*, or claim preclusion, arguing that GP Vincent could not maintain its claims in light of the prior settlement. The district court granted the motion and so dismissed the case. On appeal, the Ninth Circuit reversed. The majority held that the present litigation did not involve the same claim or cause of action as the prior litigation. Acknowledging that "[a]t a high level, both lawsuits arise out of the events involving the release of PCE on the [subject property] and responsibility for that contamination," the majority held that the prior litigation and the settlement emanating therefrom focused on the contamination found on the adjacent retirement community, not the subject property, and therefore the subsequent cost recovery action for response costs associated with the subject property were not barred. *Id*. at *6 & n.6 (noting that "the statutory vehicle is not dispositive" but is "relevant to our understanding of the factual basis of Mayhew's claim and the scope of the obligations covered in the prior litigation."). Concurring in the judgment, Judge Bea argued that the claims were identical but the parties were not. Specifically, Judge Bea would have held that GP Vincent, the current owner of the site, was not in privity with Mayhew simply by virtue of the sale of the property. This was so, Judge Bea argued, because "because CERCLA imposes . . . liability *in personam*—against the person or persons who owned the land—not *in rem*—against the property" itself. *Id*. at *8 (Bea, J. concurring) (emphasizing that liability under CERCLA derives from "a party's landowning *status*" and current and former owners are both PRPs and so are often at odds in contribution actions).

Although it was litigated under the *res judicata* framework, *GP Vincent II* is instructive for practitioners faced with sites involving migration of off-site contamination and cleanup programs undertaken in phases. Judge Bea's concurrence is also notable for its treatment of CERCLA as an *in personam* vs. *in rem* action.[26]

3. Unilateral Administrative Orders

Another statute of limitations issue arises where EPA has issued a Section 106 order[27] and the recipient initiates work implementing the order. If the Section 106 order is considered the statutory equivalent of a civil litigation within the meaning of Section 113(f), the order would require the party to file a contribution action within the three-year limitations period. *See* 42 U.S.C.§ 9613(g)(3). If the order does not arise during or following a "civil" action, the only available claim for relief is Section 107, subject to the two statutes of limitations for removal and remedial actions, respectively. *See id*. § 9613(g)(2).

Although the Supreme Court have not addressed this question, district courts have split on whether a UAO qualifies as a "civil action" sufficient to trigger the contribution action statute of

[26] *See also United States v. JG-24, Inc.*, 331 F. Supp. 2d 14, 60 (D.P.R. 2004), aff'd, 478 F.3d 28 (1st Cir. 2007) (describing *in personam* and *in rem* actions under CERCLA).

[27] Recall that Section 106 Orders are often referred to as unilateral administrative orders or a "UAO."

limitations.[28] In one of the more recent statements on the issue, the District of New Jersey rejected arguments that a UAO order confined the non-settlor to a contribution action:

> This Court finds the reasoning of the district courts that have held that a unilateral administrative order is not a civil action for purposes of Section 113(f)(1) to be more persuasive. In interpreting a statue, courts must presume that a legislature says in a statute what it means and means in a statement what it says there. The natural meaning of civil action is clearly a non-criminal judicia proceeding. Section 113(f)(1) specifically conditions a contribution action on the occurrence of a civil action, whereas Section 113(f)(3)(B) conditions contribution on the existence of a settlement with the government. This Court agrees with the other district courts that have found that the distinction made by the drafters demonstrates they saw a distinction between a civil action and administrative actions and orders.

Occidental Chem. Corp. v. 21st Century Fox Am., No. CV 18-11273, 2019 WL 9078433, at *5 n.8 (D.N.J. July 31, 2019) (internal quotation marks and citations eliminated); *see also Atl. Richfield Co. v. NL Indus., Inc*., No. 20-CV-00234-NYW-KLM, 2023 WL 3096809, at *10 (D. Colo. Apr. 26, 2023), *certification granted, judgment modified*, No. 20-CV-00234-NYW-KAS, 2023 WL 5333756 (D. Colo. Aug. 18, 2023) (relying on circuit precedent holding that the incurrence of "'cleanup costs in response to an EPA unilateral administrative order under § 106 . . . is not one of the triggering events' under Section 113(g)(3)" that creates a contribution cause of action (quoting *Sun Co., Inc. (R&M) v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997))).

This construction may be a barrier to obtaining partial settlements. A motivation for parties to enter into partial settlement is to achieve finality — the end to litigation and its expenses. However, a recalcitrant non-settling party might chose to resist settlement and risk performing work pursuant to a UAO, a situation that might allow that party to bring a Section 107 action arguing that contribution protection does not cover such cost recovery actions. Rewarding parties for not settling was not the intent of the *Atlantic Research* decision, nor is it consistent with the

[28] Compare *Emhart Indus., Inc. v. New England Container Co., Inc.*, 478 F. Supp. 2d 199, 203 (D.R.I. 2007) ("[B]ecause there is no evidence to support the contention that the plain meaning of 'civil action' includes EPA-issued administrative orders, this Court will follow the majority of courts in concluding that 113(f)(1) is unavailable for parties who are merely subject to administrative orders."), *and Raytheon Aircract Co. v. United States*, 435 F. Supp. 2d 1136, 1142–43 (D. Kan. 2006) (dismissing plaintiff's Section 113(f)(1) claim because the incurrence of costs in response to a UAO did not qualify as a "civil action"), *and Blue Tee Corp. v. ASARCO, Inc*., No. 03-5011-cv-SW-FJG, 2005 WL 1532955, at *3–4 (W.D. Mo. June 27, 2005) (same), *and Pharmacia Corp. v. Clayton Chem. Acquisition LLC*, 382 F. Supp. 2d 1079, 1087 (S.D. Ill. 2005) ("[A]n administrative order['s] … natural meaning is far from that of being synonymous with a civil action."), *with PCS Nitrogen, Inc. v. Ross Development Corp*., 104 F. Supp. 3d 729, 742–43 (D.S.C. 2015) (holding an UAO should be treated as a "civil action" because "there are unquestionable similarities between the effect of the UAO and that of a civil action in terms of coercing a party to undertake remedial actions"), *and Carier Corp. v. Piper*, 460 F. Supp. 2d 827 , 840–41 (W.D. Ten. 2006) (holding that a UAO constitutes a civil action under Section 13(f)(1)).

Congressional intent to encourage and facilitate settlement of CERCLA actions. *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 88 (1st Cir. 1990) (holding that "achievement of prompt settlement and a concomitant head start on response activities" is "a principal end of" CERCLA).

To avoid the disruptive tactic where a non-settlor recipient of a UAO seeks to perpetuate litigation, courts have fashioned a federal common law procedure commonly referred to as a Bar Order. The Bar Order prohibits non-settling parties and sometimes non-parties that have at least constructive knowledge of the application from continuing the litigation against the settling parties for matters addressed in the lodged consent decree. Thus, a successful application for a Bar Order will preclude non settlor from circumventing contribution protection. *See, e.g., Eichenholtz v. Brennan*, 52 F.3d 478, 486 (3rd Cir. 1995); *Lewis v. Russell*, No. 2:03-CV-02646 WBS AC 2019 WL 5260731 *3 (E.D. Cal. Oct. 17, 2019).

Although the majority view appears to be that UAO does not qualify as a "civil action" sufficient to trigger the contribution action statute of limitations, the issue will likely continue to arise given the importance of which statute of limitations applies.

4. Specific and Final Resolution of CERCLA Claims

A pair of related issues involving settlements caused circuit split, which the Supreme Court partially resolved in 2021. The first issue was whether a settlement must specifically resolve a party's CERCLA liability (as opposed to liability under other statutes such as the Clean Water Act ("CWA") or the Resource Conservation and Recovery Act ("RCRA")).[29] In *Guam v. United States*, the Supreme Court resolved that question in the affirmative, holding a settlement must resolve CERCLA-specific liability in order to trigger the right to contribution under Section 113(f)(3)(B). 593 U.S. 310, 313 (2021).

The second and related issue was whether the covenants in an AOC must *completely* resolve a person's liability for some of all of a response action in order to trigger the statute of limitations in of Section 113(f)(3)(B). In other words, if the settlement disclaims any liability determination and/or leaves the settling party exposed to future liability, does that trigger a contribution claim under Section 113(f)(3)(B)?

The Sixth and Seventh Circuits have held that the answer to that question is no; although qualifying its position somewhat, the Ninth Circuit has held that the answer is yes. *Compare Florida Power Corp.*, 810 F.3d at 1003–04, *and Bernstein*, 733 F.3d at 212–14, *cert. denied*, 571 U.S. 1175 (2014) (holding a settlement did not trigger the statute of limitations because it contained an "express disclaimer[] of liability" and "condition[ed]" release of settled claims on "complete performance"), *with Asarco.*, 866 F.3d at 1124 (stating the court "disagree[s] with the Sixth and

[29] Prior to the Supreme Court's 2021 decision in *Territory of Guam v. United States*, the Second Circuit had held that a non-CERCLA settlement cannot trigger the statute of limitations; the Third, Seventh, Ninth, and D.C. Circuits had all held otherwise. *Compare Consol. Edison Co. of New York v. UGI Utilities, Inc.*, 423 F.3d 90, 95 (2d Cir. 2005), *with Gov't of Guam v. United States*, 950 F.3d 104, 114 (D.C. Cir. 2020), *and Refined Metals Corp. v. NL Indus. Inc.*, 937 F.3d 928, 932 (7th Cir. 2019), *Asarco LLC v. Atlantic Richfield Co.*, 866 F.3d 1108, 1118–21 (9th Cir. 2017), *and Trinity Indus., Inc. v. Chicago Bridge & Iron Co.*, 735 F.3d 131, 136 (3d Cir. 2013).

Seventh Circuits[]" but holding that a RCRA consent decree that was "replete with references to Asarco's continued legal exposure" "fails to resolve Asarco's liability").

Because courts have generally held that claims under Section 107 and Section 113 are mutually exclusive, the answer to these questions will determine when (and whether) a plaintiff's contribution claim has accrued under Section 113(f).

The facts of *Guam v. United States* illustrate how these two related issues can determine the outcome of litigation. Guam sought to recover response costs to remediate a landfill on the island. From 1898 to the mid-1900s, the U.S. Navy had used the landfill "to dispose of munitions and chemicals, as well as military and civilian waste." *Gov't of Guam v. United States*, 341 F. Supp. 3d 74, 76 (D.D.C. 2018). The Navy relinquished control of the area to the Guam civilian authorities around 1950, and Guam used the landfill thereafter. *Id*. When Guam sued the United States to recover response costs under Section 107 of CERCLA, the United States moved to dismiss, arguing that a 2004 settlement under the CWA had triggered the statute of limitations for a contribution action under Section 113(f). Because Guam had not filed a contribution claim within three years of the date of the administrative order, the United States argued that Guam's 2017 suit was untimely. *Id*. at 77.

The district court denied the motion to dismiss. It held that the CWA consent decree did not trigger the statute of limitations for a contribution action based on several lines of evidence, including the decree's broad reservation of the EPA's rights to pursue Guam for any violation of the law it may have committed (including CERCLA claims), as well as Guam's denial of liability. The district court specifically relied on a clause in the consent decree that read: "[n]othing in this Consent Decree shall limit the ability of the United States to enforce any and all provisions of applicable federal laws and regulations for any violations unrelated to the claims in the Complaint or for any future events that occur after the date of lodging of this Consent Decree." *Id*. at 93.

After the district court certified an interlocutory appeal, the D.C. Circuit reversed, holding that nothing in the text of Section 113(f)(3)(B) required a CERCLA-specific settlement to trigger the statute of limitations for a contribution action. *See Gov't of Guam*, 950 F.3d at 114. The Court of Appeals further held that "Section 113(f)(3)(B) kicks in where a party has resolved its liability for 'some or all of a response action' or for some or all 'of the costs of such action.'" *Id*. at 115 (quoting 42 U.S.C. § 9613(f)(3)(B)). Because the consent decree resolved at least some of Guam's legal exposure and committed Guam "to perform work that qualified as a response action," the Court of Appeals held that the decree triggered Guam's right to contribution under Section 113(f)(3)(B). *Id*. The Court of Appeals also rejected Guam's assertion that the United States' broad reservation of rights and Guam's denial of liability changed the calculus. *Id*. at 116–17. The Supreme Court granted certiorari in the case to consider two questions: (1) whether a non-CERCLA settlement can trigger a contribution claim under CERCLA Section 113(f)(3)(B), and (2) whether a settlement that expressly disclaims any liability determination and leaves the settling party exposed to future liability can trigger a contribution claim under CERCLA Section 113(f)(3)(B).

Although the Supreme Court granted certiorari on both questions, it addressed only the first, unanimously holding that "[a] settlement must resolve a CERCLA liability to trigger a

contribution action under § 113(f)(3)(B)." *Guam*, 593 U.S. at 313. The Court held that Section 113's "interlocking language and structure . . . anticipates a predicate of CERCLA liability," which the Court could not "reconcile with the United States' invitation to treat § 113(f)(3)(B) as a free-roving contribution right for a host of environmental liabilities arising under other laws." *Id*. at 313–20. In so doing, the Court resolved the circuit split identified above.

The *Guam* Court expressly declined to rule on what degree of finality is required to "resolve" one's liability and therefore trigger a right to contribution. However, the Court's decision could be read to offer some guidance on the question; in particular, the Court's unanimous opinion noted that the term "resolve . . . conveys certainty and finality" and suggested that "[i]t would be rather odd to say that a party has 'resolved liability' if that party remains vulnerable to a CERCLA suit." *Id*. at 318–19.[30]

It remains to be seen whether lower courts will find *Guam* instructive on the second, unresolved question on which the Court granted *certiorari*: whether an administrative settlement must *completely* resolve a person's liability for some of all of a response action in order to trigger the statute of limitations in of Section 113(f)(3)(B).

Illustrative of this issue is the recent Sixth Circuit decision in *Georgia-Pacific v. NCR*. There, the plaintiff argued, unsuccessfully, that an earlier bare declaratory judgment that assigns liability but neither quantifies nor awards any "costs or damages" does not trigger the limitations period because it is not a "judgment…for recovery of such costs and damages" within the meaning of Section 113(g)(3)(A) of CERCLA. *Georgia-Pac. Consumer Prod. LP v. NCR Corp*., 32 F.4th at 544. Despite an (arguably) contrary ruling in the First Circuit in *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6 (1st Cir. 2004), the Sixth Circuit held that "references to a judgment for 'response costs' strongly suggest that the 'declaratory judgment on liability for response costs' mentioned in § 113(g)(2) can also serve as a 'judgment in any action under this chapter for recovery of such costs and damages' causing the statute of limitations to begin to run as described in § 113(g)(3)(A)." *Id*. The Supreme Court subsequently denied a certiorari petition. 144 S. Ct. 69 (2023).

---

[30] *See 101 Frost St. Assocs., L.P. v. United States Dep't of Energy,* No. 17-cv-3585 (JMA)(ARL), 2022 WL 5082444, at *6 (E.D.N.Y. July 27, 2022), report and recommendation adopted, 2022 WL 5112154 (E.D.N.Y. Oct. 4, 2022) (holding voluntary cleanup agreement that resolved state liability but did not reference CERCLA or federal claims did not trigger a contribution action); *Stratus Redtail Ranch LLC v. Int'l Bus. Machines Corp.*, No. 19-CV-02611-CMA-NYW, 2022 WL 2187334, at *3 (D. Colo. June 16, 2022) (holding that federal CERCLA consent decree that contemplated further work under a subsequent state order on consent triggered a right to contribution for response costs incurred under both agreements); *Cooper Crouse-Hinds, LLC v. City of Syracuse, New York*, No. 5:16-cv-1201 (MAD/ATB), 2021 WL 4950565, at *15 (N.D.N.Y. Oct. 25, 2021) (holding that a 2004 consent order "[did] not resolve a CERCLA-specific liability" and noting that the order contained a clause stating that "[n]othing contained in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the [New York State Department of Environmental Conservation's] rights"); *Friends of Riverside Airport LLC v. Dep't of the Army*, No. EDCV19-1103-MWF(KKX), 2021 WL 4894275, at *11 (C.D. Cal. Sept. 13, 2021) (declining to extend the *Guam* Court's interpretation of Section 113(f)(3)(B) to "private, non-contribution actions brought under CERCLA section 107").

IV. HINSIGHT INFORMS CAREFUL DRAFTING

A substantial amount of the preceding discussion originates from legacy sites. Fortunately, skilled practitioners can eliminate most of these problems by careful drafting of the settlement instrument. Illustrating the concept, the United States lodged a Consent decree with the District of New Jersey on December 28, 2022, which addresses several of the "sufficiency" issues discussed above:

> The Parties agree and this Court finds that (a) the complaint filed by the United States in this action is a civil action within the meaning of Section 113(f)(1) of CERCLA; (b) the Consent Decree constitutes a judicially-approved settlement under which each Settling Defendant has, as of the Effective Date, resolved liability to the United States within the meaning of Sections 113(f)(2) and 113(f)(3)(B) of CERCLA for OU 2 and OU4; and (c) each Settling Defendant is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, or as may be otherwise provided by law, for the "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with OU2 and OU 4, by the United States or any other person . . . .

Consent Decree at ¶ 23, *United States of America, v. Alden Leeds, Inc., et al*., Civil action 2-22-cv-07326 ECF Dkt. No. 2-1 (D.N.J. Dec. 28, 2022). In particular, the references to the "Effective Date" and the resolution of liability are designed to eliminate any ambiguity as to the decree's effectiveness under Section 113(g)(3)(A).

CONCLUSION

Contaminated sites are often subject to lengthy proceedings, remediated over relatively long periods of time, and subject to new "insights" as to level of cleanliness needed to protect the public health and the environment or the presence of emerging contaminants. These factors do not necessarily lend themselves into neat statute of limitation categories, and CERCLA practitioners should expect further litigation notwithstanding the Supreme Court's decision in *Guam v. United States*.