ELR
NEWS & ANALYSIS

Endangerment, *Aviall*, and CERCLA Administrative Consent Orders—The New Challenges of Managing Hazardous Waste Contamination

by Kevin A. Gaynor and Julia B. Latham

Editors' Summary: Parties undergoing cleanups at contaminated sites under CERCLA that have also been served with a notice of a citizen suit under RCRA face ambiguity and uncertainty as they try to make sense out of these two statutory schemes.The recent U.S. Supreme Court decision in Cooper Industries, Inc. v. Aviall Services, Inc.*, has further increased this statutory friction, particularly for those undertaking cleanups of contaminated sites pursuant to administrative orders on consent, unilateral administrative orders, or other administratively ordered means. Practitioners with clients currently undergoing such "voluntary" although administratively ordered CERCLA cleanups have an ever-increasing challenge of balancing questions of defenses, viability of contribution claims, and statutes of limitation when advising clients and protecting their interests. As this Article demonstrates, practitioners need to keep these concerns squarely before them when advising clients subject to such administrative cleanup orders.*

I. Introduction

Changing trends in the use of citizen suits, environmental enforcement actions, and recent developments in federal case law are working together to create a particularly uncertain time for parties undertaking cleanups of contaminated sites pursuant to administrative orders on consent (AOC), unilateral administrative orders (UAOs), or other "voluntary," though administratively ordered, means. The laws regulating site contamination cleanup and storage and disposal of solid and hazardous wastes historically have long defied facial interpretation and have been subject to rather arcane twists in application. They continue to produce ambiguity for those trying to cooperatively and economically meet site remediation goals.

As a starting point, environmental defense lawyers are increasingly facing the complex entanglement of two statutory schemes, the Resource Conservation and Recovery Act (RCRA)[1] and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[2] creating a situation rife with potential uncertainty for clients currently undergoing CERCLA cleanups at contaminated sites that have also been served with notice of a RCRA citizen suit. This statutory friction comes at a time when the viability of contribution claims for certain CERCLA cleanups has been shaken by the recent U.S. Supreme Court decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*[3] This is especially so where site cleanup is proceeding under an AOC or a UAO, as most are, rather than as a result of agency action under CERCLA §§106 or 107. Practitioners with clients currently undergoing such "voluntary" although administratively ordered CERCLA cleanups have an ever-increasing challenge of balancing questions of defenses, viability of contribution claims, and statutes of limitation when advising clients and protecting their interests. As this Article demonstrates, practitioners need to keep these concerns squarely before them when advising clients subject to such administrative cleanup orders.

II. The RCRA/CERCLA Tension

A. Background

The building tension between RCRA citizen suits and CERCLA cleanups had its genesis decades ago. In 1976, to

Kevin Gaynor is in Vinson & Elkins' Washington, D.C., office. He cochairs the firm's environmental section. Jules Latham was until recently an associate in Vinson & Elkins' Washington, D.C., office where she worked in the environmental section. She has since relocated to Chicago where she is taking a sabbatical before returning to the practice of law. This Article was presented at the American Law Institute-American Bar Association Course of Study on Hazardous Substances, Remediation, and Enforcement held in Washington, D.C., April 21-22, 2005, cosponsored by the Environmental Law Institute.

1. 42 U.S.C. §§6901-6992k, ELR Stat. RCRA §§1001-11011.

2. *Id.* §§9601-9675, ELR Stat. CERCLA §§101-405.

3. 125 S. Ct. 577, 34 ELR 20154 (2004).

better address the volumes of industrial and municipal solid and hazardous waste being generated nationwide, the U.S. Congress enacted RCRA as an amendment to the Solid Waste Disposal Act of 1965.[4] This "cradle-to-grave" regulatory scheme for toxic and solid wastes was created to provide "nationwide protection against the dangers of improper hazardous waste disposal"[5] through "a multifaceted approach towards solving the problems associated with the 3-4 billion tons of discarded materials generated each year and the problems resulting from the anticipated 8% annual increase in the volume of such waste."[6] As a part of this "multifaceted approach," and in keeping with precedent established in the enactment of the Clean Air Act (CAA)[7] in 1970, Congress included citizen suit provisions in RCRA.

As with RCRA, citizen suit provisions were included in most federal environmental statutes following the enactment of the CAA.[8] Interestingly, despite broad inclusion of avenues for citizen suits, such suits were rarely brought in the first decade after their inclusion in environmental statutes.[9] However, starting in 1982, the number of citizen suits, especially those brought against private parties, sharply increased, causing the U.S. Environmental Protection Agency (EPA) to become concerned about enforcement trends. EPA consequently commissioned the Environmental Law Institute (ELI) to perform a study[10] of such suits brought under six EPA-enforced statutes: the CAA, the Clean Water Act (CWA),[11] RCRA, the Toxic Substances Control Act (TSCA),[12] the Safe Drinking Water Act (SDWA),[13] and the Noise Control Act (NCA).[14]

The ELI study focused on collecting enforcement action information regarding citizen suits from January 1, 1978, to April 30, 1984.[15] Upon completion, ELI's study suggested a number of general conclusions about environmental citizen suits during the study period. First, more environmental enforcement actions had been brought than had been originally anticipated by either EPA or ELI—a total of 349.[16] Second, ELI reasoned that this unexpected difference could be attributed, at least in part, to the dramatic increase in citizen suits that began in 1982, especially under the CWA.[17] Third, ELI concluded that this increase in citizen suits at the end of the study period was due to the lack of EPA enforcement that characterized this period of the Reagan Administration.[18] Fourth, ELI found that a particular group of national and regional environmental organizations, such as the Sierra Club and the National Resources Defense Council, Inc., were bringing a larger percentage of enforcement actions than they historically had been.[19] Finally, ELI's study determined that citizen enforcement actions during the study period were brought primarily under the CWA and the CAA, to a lesser extent under RCRA, and only rarely under TSCA and the SDWA.[20] During the study period, no suits were brought under the NCA.[21]

However, more recent research has revealed that the trend in citizen suit enforcement appears to be turning. A 2004 study published in the *Columbia Journal of Environmental Law*, which reviewed records of environmental citizen suit complaints filed with the U.S. Department of Justice (DOJ) between 1995 and 2000, suggested that RCRA enforcement actions are increasing in popularity.[22] As with previous years, of the 287 cases brought between 1995 and 2000 by citizen plaintiffs, a substantial majority were brought under the CWA, with only a relatively modest number brought under RCRA and the CAA.[23] However, in 2000, the number of RCRA and CAA cases increased nearly fourfold, while the number of CWA actions in the final two years of the study was halved.[24] Experience in practice shows that this rising prevalence of actions brought under the citizen suit provisions of RCRA has continued into the new millennium.

This increase in citizen suit actions under RCRA has helped contribute to the challenging and complex tensions that can occur when a citizen action under RCRA is brought alleging an "imminent and substantial endangerment" present on a site that is undergoing a CERCLA cleanup. While provisions exist under both RCRA and CERCLA that attempt to square any friction caused by such situations, clarity in their application is the exception, not the rule.

4. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§6901-6987 (1988)).
5. H.R. Rep. No. 94-1491, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6249.
6. *Id.* at 2, 1976 U.S.C.C.A.N. at 6239.
7. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
8. *See, e.g.*, Clean Water Act (CWA), 33 U.S.C. §1365; CAA, 42 U.S.C. §7604; Emergency Planning and Community Right-To-Know Act, 42 U.S.C. §11046(a)(1); Noise Control Act, 42 U.S.C. §4911; Safe Drinking Water Act (SDWA), 42 U.S.C. §300j-8; Endangered Species Act, 16 U.S.C. §1540(g); Toxic Substances Control Act (TSCA), 15 U.S.C. §2619; Surface Mining and Reclamation Act, 30 U.S.C. §1270; Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. §1415(g); Deepwater Port Act, 33 U.S.C. §1515; Outer Continental Shelf Lands Act, 43 U.S.C. §1394; and Hazardous Liquid Pipeline Safety Act, 49 U.S.C. §60121.
9. Kristi M. Smith, *Who's Suing Whom?: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought Under EPA-Administered Statutes, 1995-2000*, 29 Colum. J. Envtl. L. 359, 364-65 (2004).
10. Environmental Law Institute (ELI), Citizen Suits: An Analysis of Citizens Enforcement Actions Under EPA-Administered Statutes III-1 (1984) [hereinafter ELI Study].
11. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
12. 15 U.S.C. §§2601-2692, ELR Stat. TSCA §§2-412.
13. 42 U.S.C. §§300f to 300j-26, ELR Stat. SDWA §§1401-1465.
14. 42 U.S.C. §§4901-4918.
15. ELI Study, *supra* note 10, at II-2.
16. *Id.* at III-1.
17. *Id.* at III-1-2. ELI found that 236 of the total 349 citizen actions brought were CWA actions. *Id.* at III-10.
18. *Id.* at III-2.
19. *Id.*
20. *Id.* at III-10-4. Of the 349 total citizen actions brought during the study period, 236 were under the CWA and 57 were under the CAA. *Id.* Of the 349 total citizen actions brought during the study period, 27 were brought under RCRA, 4 were brought under TSCA, and 1 was brought under the SDWA. *Id.*
21. *Id.*
22. Smith, *supra* note 9. Environmental citizen suit provisions require plaintiffs to forward a copy of the complaint upon filing to the DOJ, which the DOJ then retains in a centralized database.
23. *Id.* at 386. Of the 287 total cases brought over the six-year period, 252 were brought under the CWA, 18 were brought under the CAA, and 17 were brought under RCRA. *Id.* No citizen actions were brought under TSCA or the SDWA during the six years studied.
24. *Id.* RCRA and CAA actions averaged two per year in the first five years of the study. In 2000, however, enforcement actions under those statutes increased to seven and eight, respectively. *Id.* During the final two years of the study period, CWA actions decreased from 50 per year to 25. *Id.*

B. Imminent and Substantial Endangerment Suits Under RCRA §7002

As originally enacted in 1976, RCRA contained two types of citizen suit provisions. First, citizens could bring suit against any EPA Administrator who failed to perform duties mandated by RCRA.[25] Second, citizens could bring actions against persons in violation of any RCRA requirement.[26] However, in 1984, Congress amended RCRA and created an additional citizen suit provision, §7002(a), that allows citizens to bring suit against past owners or operators of facilities or generators of hazardous waste who have contributed to the past or present disposal of hazardous waste that "may now present an imminent and substantial endangerment to health or the environment."[27] It is the "imminent and substantial endangerment" subsection of the citizen suit provision that allows for the potential clash with work performed under CERCLA cleanup orders.

As a starting point, plaintiffs do not have to clear a particularly high threshold in alleging a claim for "imminent and substantial endangerment." Under RCRA §7002(a), it is not necessary that a plaintiff show that the alleged contamination is harming, or even will harm, human health or the environment. A finding that an activity may present an endangerment does not require a showing of actual harm.[28] Instead, the general term "endangerment" has been interpreted by courts to mean threatened or potential harm.[29] The standard for endangerment under RCRA §7002(a) is, in fact, even more encompassing than that because courts may award injunctive relief upon a finding that there *may be* a risk of harm, not just where there *is* a risk of harm.[30] "This sweeping provision indicates Congress' intent to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary in order to eliminate *any risk* posed by toxic wastes."[31] Obviously, this is a very low standard.

"An endangerment is 'imminent' if factors giving rise to it are present, even though the harm may not be realized for some time."[32] Courts will find "imminence" upon a showing that the risk of threatened harm is present, even where actual harm will not occur immediately.[33] The Court has stated that "[a]n endangerment can only be 'imminent' if it 'threaten[s] to occur immediately,' . . . and the reference to waste which 'may present' imminent harm quite clearly excludes waste that no longer presents a danger."[34] Clarifying this statement somewhat, the Court also stated that "there must be a threat which is present *now*, although the impact of the threat may not be felt until later."[35] Finally, while "the endangerment must be ongoing, . . . the conduct that created the endangerment need not be."[36] An endangerment is considered "ongoing" as long as the waste has not been cleaned up and the environmental damage has not been "sufficiently remedied."[37]

An endangerment is considered "substantial" if it is serious.[38] In proving the seriousness of the endangerment, a plaintiff does not need to quantify the risk of harm[39]; courts recognize that they must evaluate risks of harm that involve medical and scientific evidence that "clearly lie on the frontiers of scientific knowledge" and that "proof with certainty is impossible."[40] Thus, an endangerment is "substantial" or serious "if there is some reasonable cause for concern that someone or something may be exposed to a risk of harm . . . if remedial action is not taken."[41] As an outer boundary, courts will not find a substantial endangerment if "the risk of harm is remote in time, completely speculative in nature, or de minimis in degree."[42]

The potential conflict of RCRA §7002(a) with an ongoing CERCLA cleanup occurs because the fact that a site may be subject to an ongoing cleanup pursuant to an agency order is not sufficient, in and of itself, to result in a finding of no endangerment should a citizen suit be brought for alleged endangerment at the site. Rather, a court will undertake its own review to determine whether or not an endangerment is currently present, despite the fact that an effort at remediation may be ongoing. For example, in *Spillane v. Commonwealth Edison Co.*,[43] the court denied a motion to dismiss based upon an ongoing cleanup and found that the defendants' voluntary participation in a state-managed remediation program did not moot the question of endan-

25. 42 U.S.C. §6972(a)(2) ("[A]ny person may commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.").

26. *Id.* §6972(a)(1) ("[A]ny person may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter[.]").

27. *Id.* §6972(a)(1)(B):

> [A]ny person may commence a civil action on his own behalf . . . against any person . . . and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid of hazardous waste which may present an imminent and substantial to health or the environment[.]

28. Maine People's Alliance v. Holtrachem Mfg. Co., 211 F. Supp. 2d 237, 246, 32 ELR 20826 (D. Me. 2002).

29. *Id.* (citing, inter alia, Dague v. City of Burlington, 935 F.2d 1343, 1355-56, 21 ELR 21133 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 557, 22 ELR 21099 (1992); United States v. Price, 688 F.2d 204, 211, 12 ELR 21020 (3d Cir. 1982); United States v. Waste Indus., 734 F.2d 159, 14 ELR 20461 (4th Cir. 1984)).

30. *Id.*

31. *Id.* at 246-47 (internal quotation and citation omitted).

32. *Id.* at 247.

33. *Dague*, 935 F.2d at 1356.

34. Meghrig v. KFC W., Inc., 516 U.S. 479, 485-86, 26 ELR 20820 (1996) (citation omitted).

35. *Id.* at 486 (quoting Price v. Department of Navy, 39 F.3d 1011, 1019, 25 ELR 20177 (9th Cir. 1994)).

36. Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., 989 F.2d 1305, 1316, 23 ELR 20699 (2d Cir. 1993).

37. Prisco v. New York, 902 F. Supp. 374, 395, 26 ELR 20415 (S.D.N.Y. 1995).

38. *Price*, 39 F.3d at 1019.

39. Maine People's Alliance v. Holtrachem Mfg. Co., 211 F. Supp. 2d 237, 247, 32 ELR 20826 (D. Me. 2002).

40. Reserve Mining Co. v. EPA, 514 F.2d 492, 519-20, 5 ELR 20596 (8th Cir. 1975).

41. Raymond K. Hoxsie Real Estate Trust v. Exxon Educ. Found., 81 F. Supp. 2d 359, 366, 30 ELR 20308 (D.R.I. 2000) (internal quotation and citations omitted).

42. United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1109, 12 ELR 20954 (D. Minn. 1982) (quoting H.R. Rep. No. 93-1185, at 35-36 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6454, 6487-88).

43. 291 F. Supp. 2d 728 (N.D. Ill. 2003).

germent.[44] Further, even where a site has already been cleaned pursuant to an administrative order (AO), courts may or may not find that fact to be determinative of whether an imminent and substantial endangerment currently exists.[45] Thus, a motion to dismiss based on the fact of an ongoing CERCLA cleanup alone will not be sufficient to dismiss a case where substantial endangerment has been properly alleged. Instead, a court will consider the fact of the cleanup as evidence when making its own determination regarding endangerment.

Nevertheless, failure to obtain a CERCLA §104(a) AOC leaves a party exposed to the threat that RCRA §7002 presents to parties with responsibility for contributing to the endangerment. Perhaps the best cautionary tale is the *Interfaith Community Organization v. Honeywell International, Inc.*[46] case. Honeywell operated a chromate chemical plant in Jersey City, New Jersey, that generated 1.5 million tons of heavily contaminated waste, which Honeywell dumped on a 34-acre site along the Hackensack River. A neighborhood group, Interfaith Community Organization, filed a RCRA §7002 action against Honeywell. Honeywell contested the action and went to trial. The court ruled for Interfaith and ordered Honeywell to excavate all of the waste in order to abate the endangerment.[47] The U.S. Court of Appeals for the Third Circuit recently affirmed the findings of the district court.[48] To carry out the district court's order, Honeywell will have to spend many hundreds of millions of dollars. This case is a graphic illustration of the pitfalls of a party with a heavily contaminated property failing to aggressively manage the contamination and instead simply postponing adequate cleanup for many years, leaving the party with weak defenses if a RCRA §7002 action is brought against it. As discussed below, a CERCLA order might have provided Honeywell with an excellent defense to the RCRA §7002 action. Certainly the cleanup required by EPA under the AOC could not have been as severe as the one determined by the district court.

C. RCRA §7002(b)(2)(B)(iv) and Ongoing CERCLA Cleanups

Anticipating possible conflict between these two statutory schemes, Congress created two vehicles that potentially obviate interference from RCRA endangerment actions with ongoing CERCLA cleanups: RCRA §7002(b)(2)(B)(iv) and CERCLA §113(f). However, as defenses to RCRA endangerment actions where a CERCLA cleanup is ongoing, these provisions have mixed utility. Under RCRA §7002(b)(2)(B)(iv), private enforcement actions may not be brought under RCRA if EPA has commenced and is diligently pursuing specified actions against the responsible party in order to restrain or abate conditions that may have contributed to the activities that may now present an endangerment,[49] including where EPA has issued an AO under CERCLA §106 and the responsible party is diligently conducting a removal action (a remedial investigation and feasibility study (RI/FS)) or remediation pursuant to that order.[50] This provision, however, bars private enforcement RCRA actions "only as to the scope and duration of the administrative order."[51] Thus, the pivotal question in whether a suit may go forward is determined by what is the meaning of "scope" within this subsection.

In answering this question, the legislative history of this particular section is instructive[52]:

> The Conferees intend that the section 7002(b)(2)(B)(iv) prohibition be limited only to the scope and duration of the court or administrative order. For example, an administrative order issued under section 106 of CERCLA or section 7003 of RCRA for surface cleanup at a site would not bar an action alleging that groundwater contamination at the site may present an imminent and substantial endangerment.[53]

The conferees thus drew bold limitations based on the outlines of AOs and intended courts to assume jurisdiction for claims seeking relief beyond those lines. A review of cases shows that courts have done so. Generally, courts are willing to allow citizen suits brought under RCRA §7002 where CERCLA orders exist if they find that alleged dangers are not being addressed by existing orders. For example, in *A-C Reorganization Trust v. E.I. DuPont de Nemours & Co.*,[54] DuPont argued that an existing AOC requiring it to test for arsenic in site surface waters barred a citizen suit brought under §7002 of RCRA.[55] In their complaint, however, the plaintiffs had identified the presence of numerous wastes and had alleged that the site's groundwater was contaminated. Even though the court acknowledged that "there is little to back up Plaintiffs' allegations that contaminants other than arsenic pose an imminent and substantial danger," it determined that

> because the CERCLA §106 Consent Order's scope may not encompass Plaintiffs' claim of imminent and substantial danger to groundwater and Lake Michigan from arsenic and other wastes, the RCRA claim is not barred by 42 U.S.C. §6972(b)(2)(B). While Plaintiffs have not factually substantiated their claims, defendants have not

44. In the *Spillane* case, it should be noted, the plaintiff's allegations included a claim that the remediation itself was causing the spread of contamination from the cleanup site. *Id.* at 730-31, 736.

45. *See, e.g.*, Fishel v. Westinghouse Elec. Corp., 640 F. Supp. 442, 446-47, 16 ELR 20634 (M.D. Pa. 1986) ("We do not believe that the remedial actions taken by Westinghouse in compliance with the government's [CERCLA] order are determinative of whether an imminent and substantial endangerment currently exists but we also do not believe that the current record permits us to decide that issue."). *See also* Price v. Department of Navy, 39 F.3d 1011, 1019-21, 25 ELR 20177 (9th Cir. 1994) (affirming dismissal of §7002(b)(1)(B) claim because the contamination could not pose an imminent and substantial endangerment in part because the state regulatory authority remediated the site and determined that no further threat existed); Avondale Fed. Sav. Bank v. Amoco Oil Co., 170 F.3d 692, 694-95, 29 ELR 21001 (7th Cir. 1999) (affirming grant of summary judgment to defendant on imminent and substantial endangerment issue where the state EPA had issued a letter releasing site from further remediation).

46. 263 F. Supp. 2d 796 (D.N.J. 2003), *aff'd*, No. 03-2760, 2005 WL 387606, 35 ELR 20043 (3d Cir. Feb. 18, 2005).

47. 263 F. Supp. 2d at 874.

48. 2005 WL 387606, at **12-17.

49. 42 U.S.C. §6972(b)(2)(B).

50. *Id.* §6972(b)(2)(B)(iv).

51. *Id.*

52. *See, e.g.*, Coburn v. Sun Chem. Corp., No. 88-0120, 1988 WL 120739, at *12, 19 ELR 20256 (E.D. Pa. Nov. 9, 1988); Fishel v. Westinghouse Elec. Corp., 617 F. Supp. 1531, 1539, 16 ELR 20001 (M.D. Pa. 1985).

53. H.R. REP. NO. 98-198, at 52 (1983), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5649, 5689.

54. 968 F. Supp. 423, 27 ELR 21472 (E.D. Wis. 1997).

55. *Id.* at 431.

> shown that the Consent Order addresses contaminants beyond arsenic. Likewise, the [Wisconsin Department of Natural Resources] Order does not address groundwater. Because the RCRA citizen suit provision is meant to protect the public interest, *the more prudent course is to allow the RCRA claim so long as it may afford better protection of the public health and environment than the EPA-initiated action will*.[56]

Other courts have shown a similar willingness to take a hard look at the AO in question and allow RCRA citizen suits to proceed where the CERCLA order is not comprehensive and the RCRA suit alleges harms that go beyond those that would be remedied by the order. For example, courts have allowed suits to go forward where endangerment is alleged at specific sites not covered by the AO,[57] where soil and shallow groundwater contamination are alleged and the AO covers remediation of regional groundwater,[58] and where surface contamination is alleged and the AO covers groundwater remediation.[59] As the forgoing demonstrates, if a plaintiff can point out a limit to the existing AO's protections and then allege endangerment that will not be addressed because of those limitations, a court will probably be unwilling to dismiss the claim. This seems to be the case even where EPA has considered including in the CERCLA order the relief requested in the plaintiff's RCRA claim and has decided not to do so.[60]

The viability of RCRA §7002(b)(2)(B)(iv) as a bar to a citizen action alleging imminent and substantial endangerment is, therefore, controlled by the scope and nature of the cleanup dictated by the existing order when compared to the scope and nature of the remedy sought by the complaining plaintiffs. Suit may only be barred where the scope and nature of the relief sought in the RCRA citizen action is, in effect, less than or equal to the scope and nature of the relief ensured by the existing CERCLA order. This appears to be a fairly easy threshold to overcome for a diligent would-be plaintiff. As demonstrated above, courts have allowed citizen suits to proceed despite existing CERCLA cleanup orders where the suit and the AO covered different parts of sites[61] and where the suit and the AO covered different remedies.[62] As an additional concern, such issues may be considered questions of fact, not law, by a court, thereby allowing them to survive a motion to dismiss and to be carried over for trial.

D. CERCLA §113(h) and Ongoing CERCLA Cleanups

While RCRA §7002(b)(2)(B)(iv) as applied by courts does not broadly defend against "imminent danger" RCRA actions where a CERCLA cleanup is ongoing, CERCLA §113(h) offers, in many circumstances, a more far-reaching protection. Section 113(h) of CERCLA provides that, except in limited circumstances not relevant here, "[n]o Federal court shall have jurisdiction . . . to review any challenges to removal or remedial action selected under [CERCLA §104]."[63] "This clear and unequivocal provision is a blunt withdrawal of federal jurisdiction over challenges to ongoing CERCLA removal [and remedial] actions, including those brought under RCRA."[64]

The question becomes, then, whether the RCRA citizen suit "challenges" the ongoing CERCLA action. The majority of federal courts view "challenges" to the CERCLA action as any claim that "would interfere" with EPA's cleanup activities at the CERCLA site.[65] Claims that "interfere" with CERCLA cleanups are those that would serve to delay the prompt cleanup of the site.[66] Notably, such "interference" includes not only direct challenges to the EPA action, but also claims seeking relief "designed to improve upon the CERCLA cleanup plan."[67] However, there is a limit to what courts will consider an "improvement." If the claims asserted by the plaintiff are "'not cover[ed]' by the EPA's cleanup activities, they do not constitute 'challenges' under CERCLA."[68]

There is some logical tension between when a claim is "designed to improve upon" a cleanup (which would cause the claim to be stayed) and when a claim is "not covered by EPA's cleanup activities" (which would allow the claim to go forward). It is conceivable that a claim could seek to improve a cleanup by extending it. To clarify this apparent paradox: if a claim seeks to impose *new requirements* to dealing with sites that are now subject to a CERCLA order and these requirements relate to the goals of the cleanup, these would be considered improvements to the cleanup and would prohibit its being heard.[69] For example, seeking heightened re-

56. *Id.* (emphasis added).

57. *Fishel*, 617 F. Supp. at 1538-39 (finding that where EPA considered five sites for remediation, but only issued CERCLA order for two, citizen suit may go forward as to two of the sites considered but for which cleanup had not been required).

58. Goe Eng'g Co. v. Physicians Formula Cosmetics, Inc., No. 94-3576-WDK, 1997 WL 889278, at *9 (C.D. Cal. June 4, 1997); *see also* Organic Chem. Site PRP Group v. Total Petroleum Inc., 58 F. Supp. 2d 755, 764-65 (W.D. Mich. 1999).

59. Coburn v. Sun Chem. Corp., No. 88-0120, 1988 WL 120739, at *12, 19 ELR 20256 (E.D. Pa. Nov. 9, 1988).

60. *See Fishel*, 617 F. Supp. at 1538-39.

61. *Id.*

62. *Coburn*, 1988 WL 120739, at *12 ("Specifically, plaintiffs contend that the Consent Agreement and Order does not 'require removal of hazardous wastes or acquisition of a storage permit for the drums.'"). It should be noted that in the *Coburn* case, the order also required groundwater remediation and plaintiffs were seeking surface cleanup of hazardous wastes. *Id.*

63. 42 U.S.C. §9613(h). A "removal" action is defined broadly under CERCLA to include not only the cleanup and removal of contaminants, but also studies, investigations, testing, and the like done to "identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutant or contaminants involved, and the extent of danger to the public health or welfare or to the environment." *Id.* §9604(b).

64. APWU v. Potter, 343 F.3d 619, 624, 33 ELR 20271 (2d Cir. 2003) (internal quotations omitted) (citing McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325, 328, 25 ELR 20628 (9th Cir. 1995)). *See also* Broward Gardens Tenants Ass'n v. EPA, 311 F.3d 1066, 1075, 33 ELR 20093 (11th Cir. 2002) ("The language of Section 113(h) does not distinguish between constitutional and statutory challenges; instead, it delays judicial review of 'any' challenges to unfinished remedial action.").

65. *See, e.g.*, Natural Resources Defense Council v. NVF Co., No. 97-496-SLR, 1998 WL 372299, at *14 (D. Del. June 25, 1998); *McClellan*, 47 F.3d at 328-30.

66. *NVF Co.*, 1998 WL 372299, at *14.

67. *Id.*; *McClellan*, 47 F.3d at 329 (holding that imposing additional requirement designed to improve a CERCLA cleanup plan constitutes a "challenge" under CERCLA §113(h)).

68. *NVF Co.*, 1998 WL 372299, at *14; *McClellan*, 47 F.3d at 329.

69. *See McClellan*, 47 F.3d at 330. The improvements must go to the goals of the cleanup to be considered a challenge to the action. For example, a claim seeking to enforce minimum wage requirements for cleanup workers might increase the cost of the cleanup and pos-

porting and permitting requirements at a site would constitute a challenge to the CERCLA order.[70] Similarly, seeking to impose a health surveillance program at a site would also be considered an improvement to the cleanup and would be subject to jurisdictional proscription.[71] Likewise, seeking to alter the method and order of a cleanup would constitute an effort to improve upon the cleanup and a "challenge" to the CERCLA order.[72] If a claim, however, seeks to compel activities at a site that are not included in the CERCLA order, no "challenge" will be found and jurisdiction may attach. By way of example, if a plaintiff claims that "current operations" at a site are not in compliance with permitting requirements, and the CERCLA order only pertains to "inactive operations," the plaintiff's claims regarding current operations would be considered "not covered by" the ongoing cleanup activities and would be allowed to proceed.[73]

The U.S. Court of Appeals for the Ninth Circuit has further clarified this question by asking whether the suit would call into question the selected EPA remedial or removal plan.[74] If so, it constitutes a "challenge" to the CERCLA order. The U.S. Court of Appeals for the Eleventh Circuit has interpreted this to mean that if a plaintiff asserts "that a remedial plan is inadequate because it fails to include a measure that it could have included, [it] is challenging the plan for section 113(h) purposes."[75]

The challenge for a party undertaking a CERCLA cleanup and defending against a simultaneous RCRA citizen suit is convincing the court that the plaintiff is seeking to improve upon the existing cleanup, rather than seeking to compel the defendant to address conditions not currently covered by the CERCLA order. The central difference between this question and the less rigorous "scope of the order" question presented by §7002(b)(2)(B)(iv) of RCRA is that in the CERCLA context, a claim may not "call into question" the selected CERCLA remedy. Defendants have the opportunity to argue, where factually accurate, that EPA considered and rejected the very action requested by the plaintiffs. Where such is the case, jurisdiction over the RCRA citizen suit should be barred by CERCLA §113(h).

As the above discussions demonstrate, although there are provisions under both RCRA and CERCLA that protect ongoing CERCLA cleanups from interference by simultaneous suits brought under RCRA, their applications have limitations and, to a large extent, these defenses are fact-specific. While CERCLA §113(h), in most instances, will provide greater protection to a defendant undergoing a CERCLA cleanup than RCRA §7002(b)(2)(B)(iv), this assessment will be driven entirely by the breadth of the complaint, the language of the CERCLA order, and the remedies explored by EPA prior to selecting the approved remedy and filing the order in question. As is suggested by this consideration and because of the fact-specific nature of this inquiry, in many instances, a motion to dismiss will not be a viable strategy even where the defendant might ultimately prevail on the merits.

III. Statute of Limitations for Bringing RCRA Citizen Suits for Imminent and Substantial Endangerment

Where a citizen plaintiff seeks injunctive relief under RCRA, the clear majority view is that no statute of limitations applies.[76] These cases reason that in lieu of a statute of limitations, Congress adopted a timing restriction such that a citizen plaintiff can bring suit under RCRA §7002(a)(1)(B) only where a solid or hazardous waste "may present an imminent and substantial endangerment to health or the environment."[77] Thus, "[t]he imminent, substantial endangerment requirement controls the timing of a solely equitable [§7002(a)(1)(B)] cause of action."[78]

A line of cases does exist, however, that favors applying the catchall statute of limitations set forth in 28 U.S.C. §2462 pertaining to RCRA citizen suits.[79] Section 2462 creates a five-year statute of limitations for actions "for the enforcement of any civil fine, penalty, or forfeiture" where a substantive federal statute provides no statute of limitations.[80] Although some courts have adopted §2462's statute of limitations for environmental citizen suits, because of the dictates of the statute, these cases have involved claims for civil penalties, not injunctive relief.[81] Citizen actions for

sibly slow the cleanup down, but it would not be a challenge to the AO. *Id.*

70. *See id.*

71. *See* Hanford Downwinders Coalition v. Dowdle, 71 F.3d 1469, 1482, 26 ELR 20236 (9th Cir. 1995), *aff'd*, 76 F.3d 385 (9th Cir. 1996) (tbl.).

72. Razore v. Tulalip Tribes of Wash., 66 F.3d 236, 239-40, 26 ELR 20063 (9th Cir. 1995).

73. *See McClellan*, 47 F.3d at 331.

74. *See* Beck v. Atlantic Richfield Co., 62 F.3d 1240, 1243, 25 ELR 21483 (9th Cir. 1995) (per curiam) (holding that plaintiff's action for compensatory damages but not injunctive relief could go forward because "resolution of the damage claim would not involve altering the terms of the cleanup order").

75. Broward Gardens Tenants Ass'n v. EPA, 311 F.3d 1066, 1073, 33 ELR 20093 (11th Cir. 2002).

76. *See, e.g.*, Lefebvre v. Central Maine Power Co., 7 F. Supp. 2d 64, 67-68 (D. Me. 1998); A-C Reorganization Trust v. E.I. DuPont de Nemours & Co., 968 F. Supp. 423, 427-28, 27 ELR 21472 (E.D. Wis. 1997); Nixon-Egli Equip. Co. v. John A. Alexander Co., 949 F. Supp. 1435, 1440-41, 27 ELR 20584 (C.D. Cal. 1996).

77. *A-C Reorganization Trust*, 968 F. Supp. at 427 (quoting Meghrig v. KFC W., Inc., 516 U.S. 479, 485-86, 26 ELR 20820 (1996)).

78. *Id.* at 427-28.

79. This section provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. §2462. *See also* Glazer v. American Ecology Envtl. Servs. Corp., 894 F. Supp. 1029, 1044, 26 ELR 20108 (E.D. Tex. 1995).

80. 28 U.S.C. §2462.

81. *A-C Reorganization Trust*, 968 F. Supp. at 428 (rejecting defendants' argument that the five-year statute of limitations under §2462 should apply to plaintiffs' suit for injunctive relief) (citing Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1521, 18 ELR 20237 (9th Cir. 1987)) (citing cases that have held that §2462 applies to citizen actions seeking the enforcement of civil penalties under the CWA); *Glazer*, 894 F. Supp. at 1033 (seeking civil penalties as well as declaratory and injunctive relief for violation of the CAA and RCRA); Public Interest Research Group of N.J. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 75, 20 ELR 21216 (3d Cir. 1990) (seeking civil penalties under the CWA); United States v. Walsh, 8 F.3d 659, 662, 24 ELR 20030 (9th Cir. 1993) (seeking civil penalties and injunctive relief under the CAA).

Civil penalties are payable to the United States, not the plaintiff, and compensation is not their primary function. 42 U.S.C. §6928(g); 325-343 E. 56th St. Corp. v. Mobil Oil Corp., 906 F. Supp. 669, 685, 26 ELR 20742 (D.D.C. 1995). Further, RCRA's citizen suit provisions do not allow for recovery of past cleanup costs in the form of le-

abatement of substantial and imminent endangerment are, clearly, injunctive in nature. Thus, where an imminent and substantial endangerment is alleged, the clear majority view is to apply no statute of limitations.[82]

IV. Viability of Contribution Actions Where CERCLA Cleanup Proceeds Under an AOC

A. Background of the Court's Decision in Aviall

Complications for parties undertaking cleanups subject to federal AOCs and certain other federal AOs face potential challenges beyond defending against possible citizen actions for imminent and substantial endangerment at their cleanup sites. Recent case law has called into question the very ability of such parties to pursue claims for contribution against potentially responsible parties (PRPs) for funds expended in furtherance of site cleanup. Since the passage of the Superfund Amendments and Reauthorization Act (SARA)[83] in 1986, it has generally been understood that any person who expends response costs to remedy a release of hazardous substances can recover those costs from other PRPs. While SARA amended CERCLA to add a cause of action for contribution (allowing one PRP to recover an equitable share of response costs from other PRPs), even before its passage courts had generally allowed such a right to be implied by CERCLA's cost recovery provision, §107.[84] The Court's decision in *Aviall* has called this framework into question.

In that case, Cooper Industries, Inc., operated an aircraft engine maintenance business at several Texas locations.[85] The rebuilding of aircraft engines released hazardous substances into the soil and groundwater at the company's maintenance facilities. In 1981, Cooper sold its aircraft engine maintenance business and facilities to Aviall Services, Inc. Aviall continued to operate the business and admitted that the pollution of the soil and groundwater continued during Aviall's ownership. After receiving threats of an enforcement action from the predecessor to the Texas Commission on Environmental Quality, Aviall began a cleanup in 1984, in which it spent millions to remediate the contaminated facilities.

In 1997, Aviall filed a lawsuit against Cooper based in part on CERCLA §§107 and 113.[86] To comply with circuit precedent, Aviall amended its complaint and combined the §107 action with its §113 claim. The district court granted summary judgment for Cooper and held that Aviall could not yet assert a claim for contribution under CERCLA because it had not been subjected to an action under §106 (federal administrative abatement action) or §107(a).[87] A majority of a U.S. Court of Appeals for the Fifth Circuit panel affirmed the district court,[88] but in November 2002, the Fifth Circuit, sitting en banc, overturned the panel's decision and held that §113 enables a claim by a PRP "at whatever time in the cleanup process the party, seeking contribution, decides to pursue it."[89] The Court granted certiorari[90] and overturned the Fifth Circuit on the question of the availability of contribution under §113(f)(1), remanding the case in part.[91]

Section 113(f)(1) provides:

> Any person may seek contribution from any other person who is liable or potentially liable under [§107(a)] during or following any civil action under [§106] or [§107(a)]. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§106] or [§107].[92]

The Fifth Circuit en banc decision broadly construed the first sentence of §113, noting that Congress "characterized the actions permissively," i.e., a PRP "may" seek contribution under §107(a).[93] It also emphasized the "savings clause" in the last sentence of §113: "The provision was enacted as confirmation that federal courts, in cases decided prior to [the enactment of SARA], had been right to enable PRPs to recover a proportionate share of their costs in actions for contribution against other PRPs."[94] According to the Fifth Circuit, its reading better fulfilled the twin purposes of CERCLA—to promote prompt and effective cleanup of hazardous waste sites and the sharing of financial responsibility among the parties whose actions created the hazards—and would afford the maximum latitude to parties involved in the complex and costly business of hazardous waste site cleanups.

The Court declined to adopt the Fifth Circuit's expansive reading of the statute. Taking a textual approach, Justice

gal damages or equitable restitution. *See Meghrig*, 516 U.S. at 487-88.

82. At least one court has applied CERCLA's statute of limitations to a RCRA citizen suit. Catellus Dev. Corp. v. L.D. McFarland Co., 910 F. Supp. 1509, 1518-19, 26 ELR 20920 (D. Or. 1995). In that case, the court reasoned that "[b]ecause Plaintiffs' claim for restitution is essentially a cost recovery claim, the CERCLA statute of limitations for recovery of response costs—§113(g)(2)—is the 'relevant' federal statute of limitations." *Id.* at 1518. This reasoning is highly questionable. First, following this decision, the Court in *Meghrig* held that RCRA's citizen suit provisions do not allow for recovery of past cleanup costs in the form of legal damages or equitable restitution. *Meghrig*, 516 U.S. at 487-88. Thus, "it is not correct to say that RCRA is a 'cost recovery' statute like CERCLA." Nixon-Egli Equip. Co. v. John A. Alexander Co., 949 F. Supp. 1435, 1440, 27 ELR 20584 (C.D. Cal. 1996). Moreover, "[t]hough there are similarities [between RCRA and other environmental statutes], courts must at least consider RCRA's unique purposes before finding that another statute is relevant or analogous." *A-C Reorganization Trust*, 968 F. Supp. at 428. Given the "imminent and substantial endangerment" provisions of RCRA with its "immediate action stance" versus the more "traditional tort liability stance" of CERCLA, a strict analogy between the two seems misplaced.

83. Pub. L. No. 99-499, 100 Stat. 1613 et seq.

84. *See, e.g.*, United States v. New Castle County, 642 F. Supp. 1258, 16 ELR 21007 (D. Del. 1986); City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 12 ELR 20915 (E.D. Pa. 1982).

85. Aviall Servs., Inc. v. Cooper Indus., Inc., No. 397CV1926D, 2000 WL 31730, at *1 (N.D. Tex. Jan. 13, 2000) (Aviall I).

86. *Id.* at **1-2.

87. *Id*. at *4.

88. Aviall Servs., Inc. v. Cooper Indus., Inc., 263 F.3d 134, 32 ELR 20069 (5th Cir. 2001) (Aviall II).

89. Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F.3d 677, 686, 33 ELR 20101 (5th Cir. 2002) (en banc) (internal quotation and citation omitted) (Aviall III).

90. 540 U.S. 1099 (2004).

91. Cooper Indus., Inc. v. Aviall Servs., Inc., 125 S. Ct. 577, 586, 34 ELR 20154 (2004) (Aviall IV).

92. 42 U.S.C. §9613 (f)(1).

93. *Aviall III*, 312 F.3d at 686.

94. *Id.* at 687.

Clarence Thomas reasoned that Congress would not first specify conditions under which a person would be allowed to bring a contribution claim and at the same time allow the claim to proceed absent those conditions.[95] He, therefore, rejected the lower court's "permissive" construction of "may": "[T]he natural meaning of 'may' in the context of the enabling clause is that it authorizes certain contribution actions—ones that satisfy the subsequent specified condition—and no others."[96] Thus, under §113(f)(1), contribution actions are only allowed during or following a civil action under §106 or §107(a). Similarly, he reasoned that Congress' inclusion of the limitation, "during or following a civil action" would have no meaning if a claim could be brought absent a civil action.[97] "Aviall's reading would render part of the statute entirely superfluous, something we are loath to do."[98]

The Court similarly rejected arguments that the Saving Clause at the end of the section establishes an independent cause of action, expands §113(f)(1) to allow contribution claims not brought during or following civil actions under §§106 or 107(a), or specifies what contribution claims may proceed outside of §113(f)(1).[99] Reasoning that a statute must be construed to give every word an operative effect, the Court ruled that "the sole function of the sentence is to clarify that §113(f)(1) does nothing to 'diminish' any cause(s) of action for contribution that may exist independently of §113(f)(1)."[100]

In reaching its holding, the Court rejected the argument that Aviall could recover its costs under §107(a)(4)(B), which is a cost recovery provision.[101] Because Aviall asserted a "combined" claim under §§107 and 113, not an independent §107 claim, and because the Fifth Circuit did not reach the merits, or even the existence, of a claim under §107, the Court declined to consider that argument.[102] Instead, the Court remanded to the Fifth Circuit whether Aviall had waived a claim for cost recovery under §107, and, if not, whether a party that is itself a PRP may pursue an action under §107 against another PRP for joint and several liability.[103] The Court, however, specifically noted the long line of cases that have held that such causes of action are not open to PRPs.[104] Finally, although casting a dim light on the possibility, the Court refused to hold whether, post-SARA, an implied right to contribution might exist under §107.[105]

Because orders under CERCLA §104 were not at issue in the facts of the *Aviall* case, the Court declined to acknowledge the tension that it was creating in adopting a narrow construction of §113(f)(1) vis-à-vis AOCs issued under §104. Consequently, the *Aviall* case definitively stands solely for the proposition that under CERCLA §113(f)(1), only parties who have been named in civil actions under §§106 or 107 may bring suit for contribution. It is silent on the question of contribution where cleanup work has proceeded under CERCLA §104.

While on its face the Court appears to have left open the possibility of bringing a cost-recovery action or an implied contribution claim under §107, case law does not support such a construction. As emphasized by the Court in *Aviall*, virtually all courts have determined that PRPs are barred from bringing cost recovery claims under §107 unless a PRP can demonstrate that it was an "innocent" party and did not contribute to the site's contamination.[106] Although Justice Ruth Bader Ginsburg's dissent pointed to *Key Tronic Corp. v. United States*[107] for the proposition that §107 "unquestionably provides a cause of action for . . . [PRPs] to seek recovery of cleanup costs,"[108] that interpretation of *Key Tronic's* dicta does not appear to enjoy the support of a majority of Justices or reflect the majority of circuit court rulings. Should contribution actions pursuant to orders under §104 be recognized, it is highly unlikely that such authority will emanate from §107.

B. The Aviall *Decision and Agency AOs*

Although the Court in *Aviall* declined to address whether AOCs under §104 or other federal AOs may serve as a basis for contribution actions because such an order was not present in the facts of that case, Aviall squarely argued the issue in a brief before the Court. There, Aviall reasoned that if the DOJ's narrow view of contribution as being only available after a §106 or §107 action was accepted, there could be no contribution for work done under federal AOs either:

> All parties (and even the Department) recognize that a right of contribution exists under CERCLA for private parties who have responded to an "administrative order" issued by EPA. However, the "plain language" of the first sentence of section 113(f)(1) does not provide for contribution in such instances. Instead, it provides for contribution only where a "civil action" is pending or concluded . . . .
>
> The Department nowhere disputes that the legal term "civil action" in section 113(f)(1) refers exclusively to

95. *Aviall IV*, 125 S. Ct. at 583.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 583-84.
100. *Id.*
101. *Id.* at 584-85.
102. *Id.*
103. *Id.* at 585-86.
104. *Id.* at 585.
105. *Id.*
106. *Id.* (citing United Technologies Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, 98-103, 24 ELR 21356 (1st Cir. 1994); Bedford Affiliates v. Sills, 156 F.3d 416, 423-24, 29 ELR 20229 (2d Cir. 1998); New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1120-24, 27 ELR 21159 (3d Cir. 1997); Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R., 142 F.3d 769, 776, 28 ELR 21261 (4th Cir. 1998); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 349-56, 29 ELR 20065 (6th Cir. 1998); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301-06, 27 ELR 21211 (9th Cir. 1997); United States v. Colorado & E. R.R., 50 F.3d 1530, 1534-36, 25 ELR 20309 (10th Cir. 1995); Redwing Carriers, Inc. v. Saraland Apartments, Ltd., 94 F.3d 1489, 1496 & n.7, 27 ELR 20028 (11th Cir. 1996)).
107. 511 U.S. 809, 24 ELR 20955 (1994).
108. *Aviall IV*, 125 S. Ct. at 586-87. (Ginsburg, J., dissenting). The dissent written by Justice Ginsburg, and joined by Justice John Paul Stevens, argued that there was no reason to remand to the lower court a decision that it had already made. Justice Ginsburg noted: "Federal courts, prior to the enactment of §113(f)(1), had correctly held that PRPs could 'recover [under §107] a proportionate share of their costs in actions for contribution against other PRPs.'" *Id.* at 588 (Ginsburg, J., dissenting) (quoting Aviall III, 312 F.3d 677, 687, 33 ELR 20101 (5th Cir. 2002)). In a strong suggestion that Aviall properly raised an action for contribution, the dissent closed by reflecting that §113(f)'s "saving clause preserves all preexisting state and federal rights of action for contribution, including the §107 implied right this Court recognized in [the] *Key Tronic* [case]." *Aviall IV*, 125 S. Ct. at 588.

> judicial proceedings pursuant to sections 106 or 107, and not to administrative orders. . . .
>
> *. . . The only way to salvage the jewel of contribution claims connected to administrative orders is to construe section 113(f)(1) to permit Aviall's claim. Otherwise, those claims must also skid down the Department's "plain language" slope into oblivion*.[109]

Despite Aviall's statement that §113(f)(1) represents "the only way" for contribution claims for cleanups undertaken pursuant to AOs to be brought, this is not necessarily so. In the alternative, a claim could possibly proceed under CERCLA §113(f)(3)(B):

> *A person who has resolved its liability to the United States or a State for some or all of the costs of such action in an administrative* or judicially approved *settlement* may seek contribution from any person who is not party to a settlement referred to in paragraph (2) [regarding protection for settling parties].[110]

If it is accepted that this subsection creates a right to contribution, the central question becomes whether an AO, such as a §104(a) AOC, constitutes an "administrative settlement" under the statute.

Although not directly addressing whether a §104(a) AOC is considered a CERCLA "administrative settlement," at least one pre-*Aviall* court allowed a CERCLA contribution claim to go forward where plaintiffs had entered into an AOC with EPA.[111] Additionally, the DOJ's litigation position in *Aviall*,[112] as well as the position taken by the U.S. Court for the District of New Jersey in a previous and similar case,[113] suggest that where parties have entered into "settlement," common precepts of contribution under common law dictate that CERCLA contribution claims should be allowed to proceed. However, the statute itself uses the specific term "administrative settlement," and these cases do not illuminate the definition of that term.

Considering the language of the statute itself, §113(f)(3)(B) cross-references §113(f)(2). Subsection 113(f)(2), entitled simply: "Settlement," sets out protection against contribution claims for those parties that have entered into an "administrative settlement."[114] Notably, many AOCs explicitly provide contribution protection to settling parties. Thus, many AOCs, by their own terms, appear to be "settlements referred to in paragraph (2)" or "administrative settlements." In such cases, the statutory language on its face authorizes a contribution claim under §113(f)(3)(B).

Despite this clean parallel between §§113(f)(2) and 113(f)(3), several ambiguous statutory terms might undermine a party's right to bring a CERCLA contribution action. One of these is the title of §113(f)(3): "Persons not party to settlement." Arguably, this title could be used to argue that this subsection does not create any rights of contribution, but merely governs the effect of the settlements discussed in paragraph (2). If this reading of §113(f)(3) were adopted by a court, the existence of contribution actions would be controlled by §113(f)(1) alone, which the *Aviall* Court found requires prior judicial action, and which would not exist in the context of an AO.

This possibility has been substantially weakened by the Court's dicta in *Aviall*. There, Justice Thomas, writing for the majority, states that "§113 provides two express avenues for contribution: §113(f)(1) ('during or following' specified court actions) and §113(f)(3)(B) (after an administrative or judicially approved settlement that resolves liability to the United States or a State)."[115] Thus, there appears to be little chance that a lower court will hold that §113(f)(3)(B) does not provide its own avenue for a contribution action.

Justice Thomas' dicta in *Aviall*, however, does not completely simplify the argument that all AOs constitute administrative settlements. Following the above observation, Justice Thomas goes on to note the two corresponding three-year statutes of limitation for contribution actions set out in §113(g)(3).[116] One begins at the date of judgment, the other at the date of an AO under §112(g) or §122(h). He observes that "[n]otably absent from §113(g)(3) is any provision for starting the limitations period if a judgment or settlement never occurs, as is the case with a purely voluntary cleanup."[117] He then concludes that this "lack of such a provision supports the conclusion that, to assert a contribution claim under §113(f), a party must satisfy the conditions of either §113(f)(1) or §133 (f)(3)(B)."[118] The Court here strongly emphasizes the statute's harmonization of the authority to bring contribution claims found in §§113(f)(3)(B) and 113(f)(1) with the limitations period of §113(g)(3). Although not explicitly held by the Court, this arguably limits "administrative settlements" for purposes of §113(f)(3)(B) to agreements reached under §§122(g) or 122(h), which are the only types of settlements explicitly referenced in the statute of limitations for CERCLA contribution claims. All other settlements, it could be argued, appear to be "purely voluntary" and outside the contribution scheme created by CERCLA.

Looking at the structure of §122 itself, which is entitled simply: "Settlements," one can make observations that cut both for and against Justice Thomas' observations. Supporting his apparent belief that §§122(h) and 122(g) are unique in their settlement authorities, de minimis settlements (§122(g)) and cost recovery settlements (§122(h)) are the only specifically described types of CERCLA settlements that under the text of the statute explicitly provide contribution protection.[119] One could thereby infer that these are the two kinds of settlements statutorily recognized

109. Response of Appellant Aviall Services, Inc. to the Amicus Curiae Brief of the United States at 12, Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F.3d 677, 33 ELR 20101 (5th Cir. 2002) (No. 00-10197), *available at* 2002 WL 32099831 (emphasis added).

110. 42 U.S.C. §9613(f)(3)(B) (emphasis added).

111. Central Ill. Pub. Serv. Co. v. Indus. Oil Tank & Line Cleaning Serv., 730 F. Supp. 1498, 1509, 21 ELR 20076 (W.D. Mo. 1990).

112. Brief of the United States as Amicus Curiae at 7-9, Aviall Servs., Inc. v. Cooper Indus., Inc. 312 F.3d 677 (5th Cir. 2002) (No. 00-10197), *available at* 2002 WL 32099835.

113. E.I. DuPont de Nemours & Co. v. United States, 297 F. Supp. 2d 740, 748-49 (D.N.J. 2003).

114. Subsection (f)(2) provides, in relevant part: "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. §9613(f)(2).

115. Aviall IV, 125 S. Ct. 577, 584, 34 ELR 20154 (2004).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Compare* 42 U.S.C. §9622(g)(5) (Effect of Agreement) *and id.* §9622(h)(4) (Claims of Contribution) *with id.* §§9622 et seq.

as being "settlements discussed in paragraph (2),"[120] and, thus, are the only two types of settlements that allow a party to bring a claim for contribution. Moreover, only settlements under §§122(g) and 122(h) require publication in the *Federal Register* and a statutorily prescribed notice-and-comment period.[121] This added protection of the interests of other parties augers in favor these settlements being accorded special protections and privileges.

On the other hand, §122 contemplates CERCLA settlements beyond those governed by §§122(g) and 122(h), and does not explicitly identify any of them as "administrative settlements." Indeed, subsection (d) of §122, entitled: "Enforcement," specifically includes a provision relative to agreements under CERCLA §104(b), such as most AOCs.[122] Subsection (d)(3) provides the authority under which EPA may issue orders under §104(b) and may establish the obligations of parties to cleanups.[123] Moreover, subsection (d)(3) explicitly vests the government with the ability to enforce such orders.[124] Orders under §122(d)(3), as well as those issued under §§122(g) and 122(h), clearly emanate from the same general settlement authority provided for in §122(a). Finally, while not requiring adherence to the more rigid publication and notice-and-comment protocols set forth in §122(i), settlements under CERCLA §104 are statutorily required to comply with the special notice procedures of §122(e).[125] The flexibility of the provision compared to §122(i) may well reflect the more cooperative nature of AOCs and other "voluntary" administrative settlements, and not necessarily reflect any congressionally envisioned circumscription of rights and privileges under these settlements, such as an ability to pursue contribution actions under §113(f)(3)(B).

Finally, Justice Thomas' reliance on the textual harmony of §113(f)(3)(B) with §113(g)(3) has clear limitations. CERCLA §113(f)(3)(B) ensures that resolution of liability with a *state*, in addition to the federal government, either by judicially approved or administrative settlement enables a party to bring a contribution claim for cleanup costs.[126] This is true despite the fact that the statute of limitations relative to CERCLA contribution actions does not indicate what event triggers the limitations period in the case of a *state* settlement.[127] Moreover, case law supports that state AOCs may serve as grounds for CERCLA contribution claims and, therefore, must qualify as "administrative settlements" under the statute.[128] It seems highly questionable that Congress would intend to allow parties resolving liability under state AOCs to seek contribution from PRPs while limiting the ability of parties resolving liability under federal AOCs from doing so. And, if so intended, that it would not explicitly state this distinction.

Because of Justice Thomas' observations regarding the absence of "voluntary" cleanups from the statute of limitations for CERCLA contribution claims, the Court's decision in *Aviall* creates greater uncertainty regarding the viability of contribution claims for work performed under an AOC. However, because the case did not directly address this issue, it is difficult to say the degree to which such causes of action have been potentially imperiled. Entering an AOC with EPA, versus proceeding with a cleanup outside of the authority of a §122 settlement altogether, increases the chance of recovering in contribution. However, the viability of such claims is still uncertain.

A recent district court decision places in doubt the viability of a CERCLA contribution claim based on an AOC. In *Pharmacia Corp. v. Clayton Chemical Acquisition Ltd. Liability Co.*,[129] Judge Michael J. Reagan found that the plaintiffs could not base their contribution claim on CERCLA §113(f)(3)(B), reasoning that an AOC was not an "administrative settlement."[130] He rejected plaintiffs' argument that their AOC was an administrative settlement pursuant to §122(d)(3). Facts he found compelling were:

> (1) the title of the AOC referenced CERCLA §106, not §122;
>
> (2) the AOC does not mention it is a settlement under §122;
>
> (3) the AOC apparently was issued pursuant to §106, not §122; and
>
> (4) by the terms of the AOC, violations trigger penalties under §106, not §122.

Parties operating under AOCs are well advised to review their terms in light of the district court's criticisms. Modest amendment of an AOC could be the difference between convincing a court that the AOC is an "administrative settlement" under §113(f)(3)(B) and having a contribution claim dismissed.

In considering other measures to mitigate client risk, §106 of CERCLA provides several alternative paths as a means to seek contribution under CERCLA: (1) EPA issues a UAO ordering the performance of the work contemplated by the AOC; (2) EPA issues a UAO that is then implemented through a consent decree as a cleanup settlement under CERCLA §122; or (3) EPA brings an action under §106 alleging an "imminent and substantial endangerment," which is then settled through a consent decree. All options present procedural and logistical difficulties, most notably securing the cooperation of EPA, as well as potential risks.

Given the limitation on contribution under CERCLA §113(f)(1) imposed by the Court in *Aviall* and that decision's dicta hinting at limitations under §113(f)(3)(B), the third option above appears to offer the safest avenue for assuring a party's ability to bring a contribution action for cleanup costs incurred. Of these, it guarantees the presence of a "civil action," which the Court has determined in *Aviall* to be grounds for a contribution action under §113(f)(1). However, this course of action is not without risks. Among these, this route would require the involvement of the DOJ, and it is not a route that EPA and the DOJ have historically followed because under a direct §106 action the court—not EPA—would determine what the appropriate remedy should be.[131] This course of action has, how-

120. *See id.* §9613(f)(3)(B).

121. *See id.* §9622(i).

122. *Id.* §9622(d)(3).

123. *Id.*

124. *Id.*

125. *Id*. §9622(e).

126. *Id.* §9613(f)(3)(B).

127. *See id.* §9622(g)(3).

128. *See, e.g.*, Pfohl Bros. Landfill Site Steering Comm. v. Allied Waste Sys., Inc., 255 F. Supp. 2d 134 (W.D.N.Y. 2003).

129. No. 02-CV-0428-MJR (S.D. Ill. Mar. 8, 2005).

130. *Id.*

131. United States v. Hardage, 750 F. Supp. 1460, 21 ELR 20721 (W.D. Okla. 1990) (rejecting EPA's proposed remedy and accepting defen-

ever, been implemented, although not following entrance of a valid AOC.[132]

In addition to the risk of delay and the opportunity for notice-and-comment proceedings of the decree by third parties, there is also the possibility that a third party could challenge such an action on constitutional grounds. Arguably in this scenario, since a valid AOC would be in place, the "dispute" brought before the court between EPA and the party subject to the AOC would not constitute a "case and controversy" under Article III of the U.S. Constitution, and, therefore, a federal court could not exercise jurisdiction over the matter. "[I]f two litigants commence a suit with the same goals in mind, no controversy exists to give the district court jurisdiction."[133]

Numerous federal courts have held that the simultaneous filing of a complaint and a proposed settlement does not evidence a collusive suit or impair the court's jurisdiction.[134] In these cases, courts have considered factors such as whether the parties' interests are truly adversarial, whether the consent decree calls for prospective relief, and whether the consent agreement requires judicial approval to be binding.[135] Nevertheless, the argument exists.

Parties undertaking cleanup of contaminated sites should also be aware that the Court left open the likelihood that by virtue of the Saving Clause, valid contribution actions outside of §113(f), such as those authorized by common law or state statute, maintain viability despite its restrictive reading of §113(f). Thus, parties should consider remedies available under state law, such as state statutory rights to contribution, or common-law claims for nuisance or trespass. For example, Texas provides a statutory contribution cause of action to any person who conducts a removal or remedial action that is approved by the Texas Commission on Environmental Quality and is necessary to address a release or threatened release.[136] When considering bringing these state claims, however, parties should be mindful that government PRPs may enjoy immunity from such suits. In such a case, and especially if federal courts determine that contribution is not available for funds expended subject to a federal AO, such government defendants will enjoy significant protection from contribution claims brought by other PRPs.

While risk mitigation measures and alternative means of recovery as described above are important to explore and thoroughly understand, the bottom line of *Aviall* is that the Court did not decide whether a CERCLA contribution claim may be brought for work undertaken pursuant to an AOC, and the issue remains unsettled. The possible reading suggested by Justice Thomas' dicta, that "administrative settlements" are limited to CERCLA §§122(g) and 122(h), is an extremely narrow one and is not supported by precedent or by a primary purpose of CERCLA—encouraging voluntary cleanup of contaminated sites—and Aviall made similar arguments to no avail.[137]

V. CERCLA's Statute of Limitations for Contribution Claims Seeking Funds Expended Pursuant to an AOC

A. Determining the Appropriate Statute

Assuming that CERCLA authorizes suits for contribution based on funds spent in compliance with federal AOCs and other AOs, determining the appropriate statute of limitations presents another challenge. As Justice Thomas' dicta in *Aviall* highlights, CERCLA's scheme for time-barring claims for contribution does not mesh perfectly with the statute's scheme authorizing such claims. For example, while CERCLA authorizes contribution suits for funds expended in cleanups pursuant to state administrative settlements,[138] CERCLA's statute of limitations for contribution suits is not triggered by state administrative settlements.[139] Similarly, ambiguity exists regarding the appropriate statute of limitations for contribution suits for funds expended pursuant to federal AOs other than those under §§122(g) and 122(h).

Generally, as stated above, the three-year statute of limitations under CERCLA §113(g)(3) applies to certain claims in contribution between PRPs.[140] This section 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 costs or damages, or
>
> (B) the date of an administrative order under [CERCLA §122(g)] (relating to de minimis settlements) or [CERCLA §122(h)] (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.[141]

dant's more lenient remedy in direct action under CERCLA §106), *aff'd*, 982 F.2d 1436, 23 ELR 20624 (10th Cir. 1992).

132. *See, e.g.*, Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 763, 24 ELR 21254 (7th Cir. 1994) ("The EPA filed suit against these PRPs in late December 1991 and asked the court to approve the proposed consent decree it filed contemporaneously with its complaint.").

133. Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 290 (E.D. Pa. 1972).

134. Carlough v. Amchem Prods. Inc., 834 F. Supp. 1437, 1463-64 (E.D. Pa. 1993) (citing Securities & Exch. Comm'n v. Randolph, 736 F.2d 525 (9th Cir. 1984); Rodgers v. U.S. Steel Corp., 536 F.2d 1001 (3d Cir. 1976); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975); United States v. TW Servs., Inc., No. 93-20208 JW, 1993 U.S. Dist. LEXIS 7882 (N.D. Cal. Apr. 1, 1993); Colo. Envtl. Coalition v. Romer, 796 F. Supp. 457, 22 ELR 21545 (D. Colo. 1992); West Virginia ex rel. Tompkins v. Coca-Cola Bottling Co., No. 2:90-0044, 1990 WL 17541 (S.D.W. Va. Jan. 16, 1990); United States v. Acton Corp., 131 F.R.D. 431, 20 ELR 21188 (D.N.J. 1990)).

135. *Id. See also Randolph*, 736 F.2d at 528.

136. Tex. Health & Safety Code. Ann. §361.344 (Vernon 2001). Section 361.344(a) reads:

> A person who conducts a removal or remedial action that is approved by the commission and is necessary to address a release or threatened release may bring suit in a district court to recover the reasonable and necessary costs of that action and other costs as the court, in its discretion, considers reasonable. This right is in addition to the right to file an action for contribution, indemnity, or both in an appeal proceeding or in an action brought by the attorney general.

137. *See, e.g.*, Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc., 240 F.3d 534, 542, 31 ELR 20470 (6th Cir. 2001) ("The court concluded that to require additional testing, especially in view of the undisputed presence of benzene in levels which made the substance a hazardous waste, would undercut a primary purpose of CERCLA by discouraging voluntary, private cleanup efforts."); United States v. Domenic Lombardi Realty, Inc., 204 F. Supp. 2d 318, 330 (D.R.I. 2002) ("By its terms, CERCLA is a strict liability statute with limited and narrow defenses. Its primary purpose is to encourage voluntary cleanup and, to achieve this goal, the statute envisions circumstances in which the cleanup must be paid for by those least responsible because those who are most responsible lack funds or cannot be found.") (internal quotations and citation omitted).

138. 42 U.S.C. §9613(f)(3)(B).

139. *See id*. §9613(g)(3).

140. *Id*.

141. *Id.*

Therefore, according to this subsection, a three-year statute of limitations begins to run at the point that any of the four events listed above occurs.

The language of §113(g)(3), however, presents an interesting question where the triggering events listed in that section will not occur because the PRP seeking contribution did not incur its cleanup costs *pursuant to a §106 or §107 civil action brought by the government, or pursuant to an order under either §122(g) or §122(h)*.[142] Where a PRP incurs its costs through other means, such as an AOC under §104 or a UAO under §106, neither of which is "a judicially approved settlement," the three-year statute of limitations set out in §113(g)(3) will arguably never begin to run. One can infer from Justice Thomas' dicta in *Aviall* that, consequently, contribution suits in such cases may not be authorized.

However, this view is not supported by federal precedent. Some courts have dealt with this situation by applying §113(g)(3) strictly and determining that in such cases, no statute of limitations applies. For example, in *Ekotek Site PRP Committee v. Self*,[143] the court determined that because the consent agreement for the cleanup in that case was issued to the PRP committee pursuant to CERCLA §106 and not CERCLA §122, the agreement did not trigger the three-year statute of limitations.[144] The *Ekotek* court further rejected the proposition that in the alternative, the six-year statute of limitations that pertains to CERCLA §107 actions should apply.[145] While this case has been abrogated by the U.S. Court of Appeals for the Tenth Circuit, additional courts have also determined that the language of §113(g)(3) is to be strictly applied, suggesting an unlimited time in which to bring claims.[146]

Other courts, however, have found that in situations where the triggering events of §113(g)(3) will never occur, the statute of limitations for costs referred to in CERCLA §107 (CERCLA's "cost recovery" section) should be applied. In reaching this conclusion, the Tenth Circuit in *Sun Co. v. Browning-Ferris, Inc.*[147] determined that the statute of limitations set out in §113(g)(2) covers PRPs seeking contribution where the triggering events of §113(g)(3) will not occur.[148] Section 113(g)(2) provides, in relevant part:

> An initial action for recovery of the costs referred to in [CERCLA §107] must be commenced:
>
> (A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under [CERCLA §104(c)(1)(C)] for continued response action; and
>
> (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.
>
> * * *
>
> . . . A subsequent action or actions under [CERCLA §107] for further response costs at the . . . facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. . . .[149]

As §113(g) is entitled: "Period in which action may be brought" and is comprehensive,[150] it follows that any §113 action would have to fall under one of the enumerated periods of limitations.

The Tenth Circuit first found that "because §113(f) incorporates the liability provisions of §107, . . . a §113(f) action for contribution *is* an action under §107."[151] Thus, by definition, an action under §113(f) for contribution is an "action for recovery of costs referred to" in §107, as required by §113(g)(3). Moreover, where no previous action under §§106 or 107 have been filed with respect to the site in question, a plaintiff's "contribution action—while governed by the equitable principles of §113(f)—is the '*initial action*' for recovery of such costs," as required by §113(g)(2).[152] Thus, in situations where the events set forth in §113(g)(3) will not occur, a plaintiff's §113(f) "contribution action is the 'initial action for recovery of the costs referred to in [CERCLA §107]' and must be commenced" according to the requirements of CERCLA §113(g)(2).[153] Consequently, depending on the cleanup action taken—(1) a completed removal action or (2) physical on-site construction in a remedial action—either the three-year statute of limitations for a removal action according to §113(g)(2)(A) or the six-year statute of limitations for a remedial action according to subsection (B) will apply. Additionally, in cases where the remedial action is initiated within three years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action for the remedial action.[154] The length of the limitations period thus depends on whether activity at a facility is considered a removal or a remedial action. Moreover, whether the limitations period has begun to run depends on whether the removal action has been completed and/or whether the physical on-site construction of the remedial action has begun, which itself creates numerous complicated issues beyond the scope of this Article.

In sum, the short answer appears to be that many federal courts, apparently unable to accept the absence of a statute of limitations where cleanup work proceeds subject to an

142. Sun Co. v. Browning-Ferris, Inc., 124 F.3d 1187, 1191, 27 ELR 21465 (10th Cir. 1997) ("Thus PRPs who, like Plaintiffs here, incur cleanup costs pursuant to a unilateral administrative order (or by a consent decree, or in some cases, voluntarily) potentially have an unlimited time in which to bring their contribution claims."); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1305, 27 ELR 21211 (9th Cir. 1997).

143. 881 F. Supp. 1516, 25 ELR 21331 (D. Utah 1995), *vacated*, *Sun Co.*, 124 F.3d at 1191.

144. 881 F. Supp. at 1523-24.

145. *Id.* at 1522 n.2.

146. *See, e.g.*, City of Fresno v. NL Indus., Inc., No. CV-F-93-5091 REC/DLB, 25 ELR 21465 (E.D. Cal. July 13, 1995).

147. 124 F.3d 1187, 27 ELR 21465 (10th Cir. 1997).

148. *Id.* at 1192.

149. 42 U.S.C. §9613(g)(2).

150. In addition to cost recovery actions and "contribution," it covers such things as actions for natural resource damages, actions by minors and incompetents, subrogation actions, and indemnification actions. *Id.*

151. *Sun Co.*, 124 F.3d at 1191 (emphasis in original) (quoting Bancamerica Commercial Corp. v. Mosher Steel of Kan., Inc., 100 F.3d 792, 801, 27 ELR 20397 (10th Cir.), *as amended*, 103 F.3d 80 (1996)).

152. *Id*. at 1192 (emphasis in original).

153. *Id.* (quoting 42 U.S.C. §9613(g)(2)(B)).

154. 42 U.S.C. §9613(g)(2)(B).

AOC, notwithstanding the plain reading of CERCLA, have applied the three year-statute of limitations for removal actions (which runs from completion of the removal activity) or the six-year statute of limitations for remedial actions (which runs from the initiation of physical on-site construction of the remedial action) found in CERCLA §113(g)(2). In such instances, it becomes clearly important to understand the scope of work to be performed at the site in order to determine whether a remedial or removal action is complete and, therefore, the applicable statute of limitations and its triggering event.

VI. Conclusion

RCRA §7002 provides a daunting risk of citizen suits for parties with contaminated property. No longer is it safe to sit on the contaminated property and clean it up when the party finds it convenient or in its financial interest. Given the minimal threshold showing a plaintiff needs to make to establish an endangerment, parties with contaminated property need to assess whether to seek a CERCLA §104(a) AOC from EPA, thereby putting the property on a cleanup schedule and providing protection from a RCRA §7002 action. This approach, of course, commits the party to a rigorous cleanup in a timely manner, not necessarily an attractive option but better than the alternative. Obtaining the AOC also sets up a potential contribution claim, although until the lower courts and eventually the Court clarify *Aviall*, the validity of such a claim will not be certain.

Until then, parties will be faced with the Hobson's choice of doing nothing and face a RCRA §7002 action, whereby a court will determine necessary remedial action with possibly disastrous results, or take a leap of faith and hope its CERCLA §104(a) AOC blocks the RCRA §7002 action and unlocks the door to CERCLA §113(f)'s right to contribution.