Clean Up of a Legislative Disaster: Avoiding the Constitution Under the Original CERCLA

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The congressional process leading to the enactment of the original CERCLA in December 1980 was a legislative disaster. The "compromise" statute which emerged left many gaps and ambiguities for the federal courts to resolve. These included deletions of the phrase "joint and several," the right of contribution, and of the statute of limitations provision that had appeared in earlier bills. The structure of the statute imposing retroactive liability on multiple parties for the same cleanup in informal administrative and complex judicial proceedings presented substantial legal questions. From 1981 to 1986, the Department of Justice advocated interpretations of the statute that pushed the regime to the very limits of or completely ignored the Constitution. Presented with these interpretations, the federal courts had to consider the definitions of those constitutional limits, sometimes leading to judicial interpretations of CERCLA to avoid constitutional difficulties. Here we consider several of these lower court interpretations: the right of contribution, the "sufficient cause" exception to statutory fines, and the statute of limitations. Amendments to CERCLA in 1986 largely short-circuit the judicial need to further address these matters.

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I. THE "LAME DUCK" SESSION OF 1980

Prior to the presidential election in November 1980, the House of Representatives of the 96th Congress had passed two waste cleanup bills. One was H.R. 7020, which dealt with abandoned waste sites; H.R. 85 dealt with oil spills.

H.R. 7020 provided for a cleanup liability system for reimbursement of the Superfund by those parties responsible for a release of a hazardous waste.[1] Although H.R. 7020 permitted strict, joint and several liability, it did so only where the court apportioned harm without considering a number of equitable factors, including the amount of waste contributed, the degree of toxicity, the degree of involvement, the degree of care exercised, and the degree of cooperation with governmental authorities.[2] Those equitable apportionment factors that *were* enumerated in H.R. 7020 had been added to the bill by Congressman Gore on the House floor to move the statutory liability system closer to common law principles.[3] H.R. 7020 as passed by the House also preserved common law standards for proximate causation.[4] Notwithstanding these limitations, opponents of the bill criticized the liability system heavily to the extent that it might provide for any retroactive liability.[5]

The Senate had been unable to pass any bill, but its Environment and Public Works Committee had reported one bill, S. 1480, to the floor, despite a stinging denunciation of its liability provisions by several senators in a committee report.[6] These senators particularly took issue with changing the rules of the game retroactively.[7] Specifically they argued: "The issue of applying the new standards retroactively remains a troubling one. While the Committee accepted a Domenici amendment to limit the scope of the retroactivity, the issue remains

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[1] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, H.R. 7020, 96th Cong. § 3071 (1980) (as passed by House), *reprinted in* 2 STAFF OF SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 97TH CONG., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), PUBLIC LAW 96-510, at 438-442 (Comm. Print 1983) [*hereinafter* HOUSE LEGIS. HIST.].

[2] *Id.* at 3071(a)(3), *reprinted in* HOUSE LEGIS. HIST. at 438-40.

[3] *See* 126 CONG. REC. 26,782-88 (1980) (remarks of Congressman Alan Gore), *reprinted in* HOUSE LEGIS. HIST. at 345-57.

[4] H.R. REP. NO. 96-1016, pt.1, at 33-34 (1980), *reprinted in* House Legis. Hist. at 64-65; 126 CONG. REC. 26785-86 (1980) (remarks of Congressman Edward Madigan), *reprinted in* HOUSE LEGIS. HIST. at 356-57.

[5] *See* 126 CONG. REC. 26,766 (1980) (remarks of Congressman Steve Stockman), *reprinted in* HOUSE LEGIS. HIST. at 358-59.

[6] *See* S. REP. NO. 96-848, at 119-22 (1980), *reprinted in* COMM. ON ENVIRONMENT AND PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), PUB. LAW 96-510 at 426-29 [hereinafter SENATE LEGIS. HIST.] (statements of Senator Peter Domenici, Senator Lloyd Bentsen, and Senator Howard Baker).

[7] *See* S. REP. NO. 96-848, at 120 (1980), *reprinted in* SENATE LEGIS. HIST. at 427.

unresolved. To expect individual businesses to absorb the costs imposed by a doctrine not consistent with American standards of jurisprudence is not only unreasonable, but may be unconstitutional."[8] These senators feared that three evils would follow the creation of new substantive liability to be imposed retroactively. First, retroactivity would shift the balance between private litigants, principally by permitting private claimants to piggy-back on the "massive resources" of the Justice Department. Second, senate critics feared that "[the] government is perfectly prepared to punish the innocent for the sins of the guilty."[9] Third, senators recognized that retroactivity would make it impossible for the private sector to assess its liability risks.[10] Avoidance of retroactivity would eliminate the threats posed to the continuing availability of insurance and nullify the constitutional problems posed by unlimited retroactive imposition of liability.[11]

The opposition of key senators such as minority leader Howard Baker and Senators Domenici and Bentsen, who had co-authored the denunciation of the bill's liability provisions in committee, forecasted the demise of S. 1480. Senators Stafford and Randolph, however, announced on November 14, 1980, that they were introducing a compromise bill. Senator Stafford admitted that there had been "a great deal of speculation. . .that the superfund legislation is dead."[12] He complained that his enthusiasm for S. 1480 "was shared by all of my colleagues."[13]

When the compromise bill came up for consideration on November 20, Senator Baker objected, stating, "I do not think, in all candor, that the Randolph-Stafford bill is a compromise in the sense that it would permit us to proceed at this time to the consideration of this measure."[14]

Several days later an entirely different "compromise bill" was introduced.[15] During these few days, no committee or subcommittee hearings, open or closed, were held. No committee reports or bill drafts were printed. Nothing resembling the usual process of congressional debate occurred. All discussions and negotiations took place behind closed doors.[16] The press, of course, was fully aware of the backroom maneuverings. The *Washington Star* editorialized that "the frenzied atmosphere of a lameduck session is not the climate in which to

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[8] *Id.*

[9] *Id.* at 121 (1980), *reprinted in* SENATE LEGIS. HIST. at 428.

[10] *Id.*

[11] *Id.* at 120-22; *reprinted in* SENATE LEGIS. HIST. at 427-29.

[12] 126 CONG. REC. 29,699 (1980).

[13] *Id.*

[14] 126 CONG. REC. 30,349 (1980), *reprinted in* SENATE LEGIS. HIST. at 554.

[15] *See* 126 Cong. Rec. 30,916-70 (1980), *reprinted in* SENATE LEGIS. HIST. at 560-773.

[16] It has been reported that President Jimmy Carter personally participated in these negotiations, presumably in between briefings regarding the release of the American hostages held in Iran. *See* United States v. Olin, 927 F. Supp. 1502 (S.D. Ala. 1996).

translate urgency [regarding the toxic waste issue] into law."[17]

The *Wall Street Journal* complained that "[t]he superfund bill may even be, as its proponents have it, the most important environmental legislation of the Eighties. But if so, it's worth spending the time to get it right."[18]Nonetheless, a vastly revised bill appeared on November 24th. Senator Baker, who had opposed the earlier "compromise", co-sponsored the November 24th version.[19] Senator Randolph reported that "[w]e have had during the past several days approximately 25 or 30 Senators from varying viewpoints and backgrounds, experiences, contacts and interests participating in the discussions."[20] Since these were off-the-record private discussions, however, none of these deliberations could be incorporated into the legislative history. No transcripts of committee hearings or bill mark-ups are available for examination, nor was any report of these informal gatherings, analogous to a committee or conference report, issued along with the compromise bill.

Instead, Senator Randolph simply reported his own observations about the meaning of the changes made between S. 1480 and the compromise. He explained the "concessions from the original bill reported last summer,"[21] clearly indicating his preference for the earlier S. 1480, which could not pass. The changes Randolph reported were largely deletions of provisions that had been in S. 1480 but had evoked opposition, such as the "Federal cause of action for medical expenses or property or income loss," which Senators Domenici, Bentsen, and Baker had opposed.[22]

In many cases, Randolph reported that the backroom negotiations had deliberately created ambiguity and equivocation in the statute by deleting provisions that had resolved important legislative policy choices in S. 1480. As a proponent of the earlier language, Randolph argued that "[t]he changes do not reflect a rejection of the standards in the earlier bill."[23] Instead, he explained, the resolution of legislative policy issues upon which backroom negotiators had focused and agreed to disagree was to be left to the courts. He stated, "It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law."[24] Then, as if to demonstrate the meaninglessness of his qualifier "if any," he provided an example based on his own reading of the statute. He opined that "the liability of

[17] 126 CONG. REC. 30,946 (1980) (printed at the request of Sen. Humphrey), *reprinted in* SENATE LEGIS. HIST. at 725.

[18] 126 CONG. REC. 30,946-47 (1980), *reprinted in* SENATE LEGIS. HIST. at 725-26.

[19] 126 CONG. REC. 30,916 (1980), *reprinted in* SENATE LEGIS. HIST. at 562.

[20] 126 CONG. REC. 30,930 (1980), *reprinted in* SENATE LEGIS. HIST. at 681.

[21] 126 CONG. REC. 30,932 (1980), *reprinted in* SENATE LEGIS. HIST. at 685.

[22] *Id.*

[23] 126 CONG. REC. 30,932 (1980), *reprinted in* SENATE LEGIS. HIST. at 686.

[24] *Id.*

joint tort feasors[sic] will be determined under common or previous statutory law."[25] He then presented some of his views regarding the common law principles that he believed courts should use to resolve the major policy issues he and his fellow negotiators had deliberately avoided. After Randolph completed his initial remarks, Senator Stafford tried again to explain the unusual backroom congressional compromise process that had occurred. The senators were about to vote without reference to any of the usual explanatory materials, such as committee reports. Stafford stated, "I am afraid that there may still be some confusion in the minds of some Members as to what was deleted from S. 1480 in our original compromise."[26] He went on to enumerate several items in somewhat confused language, for example stating, "We eliminated the scope of liability."[27]

After Randolph and Stafford had spoken, other senators offered their own views about the ambiguities created by these deletions and by unexplained new provisions. Several senators engaged in staged colloquy with Senator Randolph, the bill's floor leader, on matters of vital concern to them. For example, Senator Bradley of New Jersey and Randolph had a question and answer session on tax preemption to "clarify" that the New Jersey spill fund had not been preempted, notwithstanding the plain language of the statute indicating the contrary.[28] To make matters worse, the usual raft of senators who were not even present inserted into the Congressional Record their post hoc statements of "legislative history."[29] On many issues, the statements of senators on the floor who had been involved in the backroom negotiations flatly contradicted each other.[30]

On the same day as these confused and contradictory explanations and dialogues, the Senate passed the bill. On December 1, 1980, Senators Stafford and Randolph sent a letter to Congressman Florio, the sponsor of H.R. 7020, which the Senate had gutted and replaced with its backroom compromise. The letter explained the unusual legislative process and warned against further tinkering by the House:

> On Monday, November 24, the Senate passed a compromise "superfund"

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[25] *Id.*

[26] 126 CONG. REC. 30,935 (1980), *reprinted in* SENATE LEGIS. HIST.at 695.

[27] *Id.*

[28] *See generally* 126 CONG. REC. 30,939-40 (1980), *reprinted in* SENATE LEGIS. HIST. at 731-33.

[29] The remarks of these senators are indicated in the record by the presence of a dot before their names. *See* 126 CONG. REC. 30,949-50.

[30] *Compare* 126 CONG. REC. 30,972 (1980) (statement of Sen. Helms regarding tax preemption), *reprinted in* SENATE LEGIS. HIST. at 758, *with* 126 CONG. REC. 30,949-50 (1980) (statements of Senators Randolph and Bradley), *reprinted in* SENATE LEGIS. HIST. at 732. *Compare* 126 CONG. REC. 30,972 (1980) (statement of Sen. Helms regarding joint and several liability), *reprinted in* SENATE LEGIS. HIST. at 759-60 *with* 126 CONG. REC. 30,932 (1980) (statement of Sen. Randolph), *reprinted in* SENATE LEGIS. HIST. at 686.

> bill and sent it to the House. . . That the bill passed at all is a minor wonder. Only the frailest, moment-to-moment coalition enabled it to be brought to the Senate floor and considered. Indeed, within a matter of hours that fragile coalition began to disintegrate to the point that, in our judgment, it would now be impossible to pass the bill again, even unchanged . . .
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> Had we changed a coma [sic] or a period, the bill would have failed. With the evaporation of the balance of interests which permitted us to go to the Floor in the first place, amendments to the bill will kill it if it is returned to the Senate.[31]

The preface to the "legislative history" of CERCLA, compiled by the Congressional Research Service, clarifies for its readers familiar with more conventional legislative histories that "this procedure explains the absence of a [House/Senate] conference report," the usual authoritative description of the provisions of a bill which Congress passes.[32]

Not to be outdone, when the "Senate's" H.R. 7020 reached the House floor, members of the House gave their own contradictory explanations of the bill, even though they had no official drafting role and had been instructed in advance not to change even the slightest detail.[33] Congressman Florio attempted to apologize on the House floor for some of the less controversial errors by saying that "A number of technical errors were apparently made in the drafting of the Senate amendments. These errors are elaborated upon below and the true intent of Congress relative to the errors is outlined."[34] Congressman Broyhill, however, objected to voting for such an error-filled bill stating, "it offends my sensibilities as a person and it offends my sense of responsibility as a Member of Congress. This bill is technically flawed. A cursory reading reveals hundreds of errors."[35] And Representative Harsha exclaimed:

> We are establishing civil liability and criminal penalties in this legislation, and numerous questions have been raised as to what we are doing to common law with this new statute. These are not spurious issues. They are going to be litigated and the courts are going to have a field day in ridiculing the Congress on passing laws that are vague, internally inconsistent, and using tools such as superseding laws which are in conflict without any further guidance. This bill is not a superfund bill — it is a welfare and relief act for lawyers.[36]

A number of other congressmen, many of whom voted for the measure,

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[31] SENATE LEGIS. HIST. at 774-75.

[32] SENATE LEGIS. HIST. at VII.

[33] *See* 126 CONG. REC. 31,964-82 (1980), *reprinted in* SENATE LEGIS. HIST. at 776-824.

[34] 126 CONG. REC. 31,966 (1980), *reprinted in* SENATE LEGIS. HIST. at 783.

[35] 126 CONG. REC. 31,970 (1980), *reprinted in* SENATE LEGIS. HIST. at 787.

[36] 126 CONG. REC. 31,970 (1980), *reprinted in* SENATE LEGIS. HIST. at 788-89.

similarly decried the failure "to follow the normal course of the legislative process"[37] and argued that "this is legislating the wrong way."[38] Congressman Snyder reported: "[The House] legislative counsel briefly looked at this bill and found 45 technical errors, 45 in this one bill. There is no telling how many he could find if he got to study it a little bit. . . ."[39] The House nevertheless passed the bill.

Subsequently, members of Congress persevered in their *post hoc* efforts to "clarify" the ambiguity they had deliberately created. Some of this fabricated history may be found in the official compilation of the legislative history,[40] but some of it is found elsewhere.[41] The *post hoc* legislative history reemphasizes the congressional intent to leave the resolution of complex legislative choices to the courts.[42]

These *post hoc* statements demonstrate the danger of using the confused discussions on the Senate or House floor as a guide to CERCLA's meaning. For example, nearly a year after CERCLA was enacted, Senator Stafford stated:

> [T]he floor statements which are most relevant are those of the bill's drafters, including myself. . . . Frankly, in the confusion which surrounded these final days, I may have slipped up once or twice. . . . I do not attach any moral blame to these attempts to take advantage of the law's apparent silence. In fact, I anticipated that this would happen.[43]

In the scholarly search for "legislative history," there is not even a consensus on which predecessor bills are relevant. Professor Frank P. Grad concludes in his treatise: "It was H.R. 7020 which, at least in its designation, carried the formal steps of the legislative process, and the ultimate focus [in the treatise is] . . . .on its progress."[44] West Publishing Company's legislative history in U.S. Code Congressional and Administrative News makes a similar assumption and reprints several House reports, but not the Senate Report on S.1480. The editors commented, "The House bill was passed in lieu of the Senate bill. The House

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[37] 126 CONG. REC. 31,971 (1980), *reprinted in* SENATE LEGIS. HIST. at 792 (statement of Congressman Edward Madigan).

[38] 126 CONG. REC. 31,972 (1980), *reprinted in* SENATE LEGIS. HIST. at 793 (statement Congressman Herbert Roberts).

[39] 126 CONG; REC. 31,975-76 (1980), *reprinted in* SENATE LEGIS. HIST. at 805.

[40] *E.g.*, ENV'T & NATURAL RES. POLICY DIV. LIBRARY OF CONG., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), TOGETHER WITH A SECTION-BY-SECTION INDEX at 343-52 (U.S. Gov't Printing Office, Ser. No. 97-14, 1983).

[41] *E.g.*, 127 Cong. Rec. 19,777-78 (1981).

[42] 127 CONG. REC. 19,778 (1981) (remarks of Sen. Stafford) ("We left development of the concept to the courts and the common law.").

[43] 127 CONG. REC. 19,778 (1981).

[44] 4A F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4A.04[2][a], at 4A-124 (1985).

Report. . . .a Related [House] Report are set out."[45] Senator Stafford, on the other hand, in his *post hoc* legislative history in 1981, finds the report on S.1480 to be relevant:

> The enacted compromise was drafted by whittling away sentences, phrases, or pages of S.1480 to arrive at a politically acceptable bill. Much of S.1480 was left by the wayside, but a great deal of it remained when the process was completed. Thus, although there was no committee report per se, the report on S.1480 remains very relevant in construing the compromise law.[46]

Senator Stafford's recitation is closer to the truth.

II. THE LEGISLATIVE DISASTER

Because of these ambiguities, during CERCLA's early years, the Department of Justice devoted substantial resources to developing judicial precedents to support its litigation position. During fiscal year 1985, for example, the Department billed the Superfund approximately five million dollars. During that year, the EPA told Congress that it intended to "minimize [its] legal costs" by resolving legal questions on: (1) clarification of CERCLA's right of contribution; (2) contribution protection; (3) mandatory deferral of contribution claims; (4) preclusion of pre-enforcement judicial and record review; and (5) enhanced settlement authorities.[47] The disputes we describe below demonstrate the reasons for these litigation priorities.

A. Right of Contribution

Congressional objections to CERCLA liability in 1980 mainly were to its strict, joint and several, and retroactive nature. This accounts for the deletion of the phrase "joint and several" from the statute as well as the related contribution provision from the compromise bill. The first major decision addressing the joint and several issue, *United States v. Chem-Dyne Corp.*,[48] viewed the deletion as permitting, but not requiring, imposition of joint and several liability under the standards set forth in the Restatement (Second) of Torts.[49] Almost as an aside, the *Chem-Dyne* court interpreted CERCLA Section 113(e)(2) as implying the

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[45] P.L. 96-510, COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980, H.R. REP. 96-1016, *reprinted in* 1980 U.S.C.C.A.N. 6119.

[46] 127 CONG. REC. 19,778 (1981).

[47] *Insurance Issues and Superfund: Hearing on S.51 Before the Senate Comm. on Environment and Public Works*, 99th Cong. 70-71 (1985).

[48] United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983).

[49] The United States Supreme Court endorsed this approach in *Burlington N. v. United States*, 556 U.S. 599, 614 (2009).

availability of a right of contribution.[50] This section of CERCLA simply says, "Nothing in this title. . . .shall bar a cause of action that an owner or operator or any other person subject to liability under this section. . . . has or would have, by reason of subrogation or otherwise against any person."[51] The implication of a right from this savings clause is problematic. A savings clause had been interpreted to preserve a cause of action arising under other law.[52] The *Shore Realty* court in 1986 concluded that a private party must base "its third-party action for contribution from past owners and operators of the site and the generators of the waste on § 107(a)(4)(B) of CERCLA, which allows recovery of those response costs 'consistent with the [national contingency plan].'"[53]

The thoughtful district court opinion that considered the potential availability of a right of contribution under CERCLA found such a right but did not rely on Section 107(a)(4)(B) or Section 107(e)(2). The special master for the *Conservation Chemical* court even cited a law review article for the proposition that the Section 107(e)(1) prevention of the transfer of liability from one party to another may "implicitly preclude contribution."[54] He found "ambiguity" in the language of the statute,[55] but found support in the legislative history for "*some* right of contribution"[56] and evidence there that Congress intended to authorize courts to create such a right in support of the statutory scheme.[57] He thus concluded that Congress in CERCLA had delegated the creation of a "federal common law right of contribution to the courts."[58]

From the perspective of the United States Supreme Court precedent of the

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[50] *Chem-Dyne Corp.*, 572 F. Supp. at 807. In *Conservation Chemical*, the court found that the imposition of joint and several liability did not pose a constitutional question in part **because** the statutory scheme included a correlative right of contribution among those persons jointly and severally liable to the plaintiff. United States v. Conservation Chemical Corp. 619 F. Supp. 162, 214-15 (W.D. Mo. 1985) ("Where there are opportunities for contribution (see extensive discussion herein suggesting that contribution is available) as well as for joinder or impleader of responsible parties (FED. R. CIV. P. 14, FED. R. CIV. P. 20 and FED. R. CIV. P. 21), it can hardly be said that imposition of joint and several liability would be unconstitutional.").

[51] 42 U.S.C. § 9607(e)(2) (2002).

[52] *But see* Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 15-18 (1981) (refusing to infer a federal common law right of action from a savings clause under the Clean Water Act).

[53] New York v. Shore Realty Corp., 648 F. Supp. 255, 260 (E.D.N.Y. 1986).

[54] *Conservation Chemical* , 619 F. Supp. at 226 (citing Note, *The Role of Injunctive Relief in Settlements in Superfund Enforcement*, 68 CORNELL L. REV. 706, 722, n. 114 (1983)).

[55] *Conservation Chemical*, 619 F. Supp. at 226.

[56] *Id*. at 227.

[57] *Id.* at 227-29.

[58] *Id.* at 228-30 ("Because Congress has largely left to the judiciary the responsibility for fashioning rules of joint and several liability and remedies resulting therefrom, the federal judiciary has no choice but to accept its charge by fashioning a federal remedy of contribution in CERCLA cases as it has done in similar circumstances under other statutes," (criticizing United States v. Westinghouse Elec. Corp., No. IP 83-9-C, 1983 WL 160587 (S.D. Ind. June 29, 1983), which appears to deny the existence of a contribution claim.)

time, however, the omission from the 1980 statute of an express right of contribution likely was quite serious. Shortly after CERCLA was enacted, the Supreme Court looked with disfavor on implying a right to contribution under two other federal statutes. In *Northwest Airlines, Inc. v. Transport Workers Union*, the court found no federal common law right to contribution under the Equal Pay Act.[59] In *Texas Industries, Inc. v. Radcliff Materials, Inc.*, the Court found no federal common-law right of contribution with respect to the antitrust laws, the Sherman Act and the Clayton Act.[60] These decisions came in the context of the Court's trend away from inferring rights of action under federal regulatory statutes, requiring express congressional intent to create a private remedy. As Justice Stewart, speaking for the Court in *Transamerica Mortgage Advisors, Inc. v. Lewis*, claimed, "what must ultimately be determined is whether Congress intended to create the private remedy asserted."[61] The Court rejected a multi-factor approach it had previously followed in *Cort v. Ash*,[62]stating, "our task is limited solely to determining whether Congress intended to create the private right of action asserted."[63] Other cases disfavoring the inference of private rights of action included environmental statutes such as the Clean Water Act and the Rivers and Harbors Appropriations Act.[64]

Chief Justice Burger, writing for a unanimous Court in *Texas Industries*, found that the Court could create no right of contribution with respect to liability.[65] The Court distinguished situations involving exclusively federal lawmaking authority such as rights and obligations of the United States, interstate and international disputes, and admiralty cases. Absent such exclusively federal lawmaking authority, the federal courts could make law only interstitially, not in the wholesale manner required by this legislation.[66] Thus, the Court held that no authorization to declare a right of contribution was found in the Sherman or Clayton Acts, and that contribution was an issue of policy for Congress to resolve.[67]

The special master in the *Conservation Chemical* case in an extensive discussion of these cases reached somewhat contradictory conclusions. First, he determined:

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[59] Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO, 451 U.S. 77, 98-99 (1981).

[60] Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 646-47 (1981).

[61] Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 15-16 (1979).

[62] Cort v. Ash, 422 U.S. 66, 78-85 (1975) ("[I]s there any indication, explicit or implicit, either to create such a remedy or to deny one?").

[63] Touche Roll & Co. v. Redington, 442 U.S. 560, 568 (1979).

[64] *Middlesex County*, 453 U.S. at 21(no private right of action under Federal Water Pollution Control Act); California v. Sierra Club, 451 U.S. 287, 298 (1981).

[65] *Texas Industries*, 451 U.S. at 646.

[66] *Id.* at 640-41.

[67] *Id.* at 646.

> Because Congress has largely left the judiciary with the responsibility for fashioning rules of joint and several liability and remedies resulting therefrom, the federal judiciary has no choice but to accept its charge by fashioning a federal remedy of contribution in CERCLA cases, as it has done in similar circumstances under other statutes.[68]

Then, after examining another environmental statute (the Federal Water Pollution Control Act), he concluded in a somewhat complex paragraph:

> A right of contribution, then, is encompassed by CERCLA itself, not by independent considerations of fundamental fairness and not by the federal common law, as such. The mere vesting of jurisdiction in the federal courts does not give rise to authority to formulate federal common law. Rather, some congressional authorization to formulate federal rules of decision must exist, as it does in this case for the right of contribution. Evolving principles of common law may guide formation of such rules, but they do not themselves authorize formulation.[69]

Then, after distinguishing a CERCLA case apparently finding no right of contribution, he concluded:

> Congress did not intend to preclude actions under CERCLA for contribution, but rather intended that the scope of liability for contribution under 42 U.S.C. § 9607 be determined as a matter of federal common law, by superseding or supplementing existing state remedies. Accordingly, third-party plaintiffs' alternative arguments that they are entitled to contribution under the law of the State of Missouri need not be addressed. Where Congress has authorized federal courts to formulate federal rules of decision, our federal system does not permit the controversy to be resolved under state law.[70]

The issues addressed by the Supreme Court decisions which troubled these first district courts interpreting CERCLA were not "constitutional"; they concern policies of statutory construction and judicial decision-making. Yet those policies are grounded in the constitutional structure of the separation of powers. These Supreme Court decisions call for an approach to statutory construction that curtails open-ended legislative delegations and avoids unguided judicial resolution of important questions of public policy. Where the fact or extent of congressional motivation is uncertain, the courts are to resolve the uncertainty against the change. Thus, the plurality in *Industrial Union Dept. v. American Petroleum Institute*,[71] also decided in 1980, construed a statute

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[68] *Conservation Chemical*, 619 F. Supp. at 228.

[69] *Id.* at 228.

[70] *Id.* at 229.

[71] 448 U.S. 607 (1980).

narrowly because otherwise "the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional."[72] One can easily envision the United States Supreme Court, after reviewing the legislative history we have set forth above, deciding in the 1980s that no right of contribution existed under CERCLA and that Congress, if it desired such a right, should have provided expressly for it, as evidenced by the Court opinion in *Texas Industries*. The Court ended its decision finding no right of contribution under the antitrust laws by quoting an earlier 1980 decision:

> The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.[73]

Even if applicable principles of jurisprudence permitted courts to infer or create a right of contribution correlative to its authority to apply joint and several liability, the absence of a statutory contribution provision presented other difficulties. Consider the issue of contribution protection. The United States took the position in the 1980s that the details of the CERCLA right of contribution followed the principles of the Uniform Contribution Among Tortfeasors Act (UCATA).[74] Under UCATA, a settlement protects a party settling with the plaintiff from contribution claims against it arising out of the plaintiff's remaining claim against nonsettlors. Nonetheless, because of the absence of a statutory contribution protection provision, cautious settling parties insisted that EPA, where possible, guarantee that they would not be subjected to contribution suits. In the infamous *Seymour* settlement, for example, the United States agreed in advance to reduce its judgment against a nonsettlor to the extent necessary to eliminate any contribution claims the nonsettlor might be found to have against the settling defendant.[75] Defendants seemed especially cautious where a settlement was administrative, without judicial approval.[76] Courts have

[72] *Id.* at 646. Justice Rehnquist concurred in the case on the ground that the act did make a standardless delegation of legislative authority and was for that reason unconstitutional. *Id.* at 671.

[73] *Texas Indus.*, 451 U.S. at 647 (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980)).

[74] *See* EPA Interim Settlement Policy, 50 Fed. Reg. 5034, 5043 (1985).

[75] United States v. Seymour Recycling Corp., 554 F. Supp. 1334, 1347-48 (S.D. Ind. 1982).

[76] *See, e.g.*, Superfund Amendments and Reauthorization Act of 1986 , Pub. L. No. 99-499, Sec. 122, 100 Stat. 1613 ("If an administrative settlement under Section 122 has the effect of limiting any person's right to obtain contribution from any party to such settlement, and if the effect of such limitation would constitute a taking without just compensation in violation of the fifth amendment of the Constitution of the United States, such person shall not be entitled, under other laws of the United States, to recover compensation from the United States for such taking, but in any

subsequently explained that CERCLA's statutory right of contribution "is a property interest that cannot be extinguished without procedural due process."[77]

B. Administrative Cleanup Orders

CERCLA Section 106 authorizes the EPA to issue administrative compliance orders to compel certain cleanups from responsible parties in lieu of conducting the cleanup itself and seeking reimbursement.[78] The statute allows the assessment of daily fines and the imposition of punitive damages for those who fail to comply with such an order.[79] Punitive damages can be avoided where a failure to comply was "without sufficient cause."[80] However, prior to 1986, no such "sufficient cause" defense existed with respect to fines, up to $25,000 per day.[81] EPA has never provided recipients of compliance orders any hearing prior to the effective date of such an order.[82] Recipients thus sometimes sought declaratory and injunctive relief from the orders prior to any EPA suit to enforce the order or collect fines or punitive damages. After one court enjoined the imposition of fines and damages,[83] the Agency typically avoided the "sanctions problem" by declaring, at the time it issued the order or upon the filing of a declaratory judgment action by the recipient, that it would not seek imposition of a Section 106(b) fine as a result of any violation prior to the initiation of the enforcement suit.[84] By mooting the issue of fines, EPA attorneys avoided constitutional difficulties arising from the omission of a "sufficient cause" defense to fines.

None of the courts facing the "sanctions problem," however, granted recipients requested injunctive relief to prevent EPA from conducting a response action as a result of the recipient's failure to comply with the order.[85] Order recipients argued unsuccessfully in the lower courts that judicial review of the order was immediately available upon issuance of the order pursuant to the

such case, such limitation on the right of contribution shall be treated as having no force and effect.") (adding 42 U.S.C. § 9657).

[77] General Time Corp. v. Bulk Materials, Inc., 826 F. Supp. 471, 477 (M.D. Ga. 1993). *See generally* Christopher D. Man, *The Constitutional Rights of Non-Settling Potentially Responsible Parties in the Allocation of CERCLA Liability*, 27 ENVTL. L. 375 (1997).

[78] 42 U.S.C.A. § 9606 (1986).

[79] 42 U.S.C.A. § §9606(b), 9607(c)(3) (1986).

[80] 42 U.S.C.A. § 9607(c)(3) (1986).

[81] 42 U.S.C.A. § 9606(b) (1986).

[82] *See* ENVTL. PROT. AGENCY, OSWER DIRECTIVE NO. 9833.0-1a, GUIDANCE ON CERCLA SECTION 106(A) UNILATERAL ADMINISTRATIVE ORDERS FOR REMEDIAL DESIGN AND REMEDIAL ACTIONS 10-13 (1990).

[83] Aminoil, Inc. v. EPA, 599 F. Supp. 69 (E.D. Cal. 1984).

[84] *E.g.*, Wagner Elec. Corp. v. Thomas, 612 F. Supp. 736, 740 (D. Kan. 1985).

[85] *E.g.*, Industrial Park Dev. Authority v. EPA, 604 F. Supp. 1136 (E.D. Pa. 1985).

Administrative Procedure Act.[86] Recently, however, the United States Supreme Court rejected similar arguments presented by the Government in the context of another environmental statute.[87] The Court found that EPA's issuance of an administrative compliance order under the Clean Water Act had all the hallmarks of final agency action subject to review under the APA. Justice Scalia explained:

> The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into "voluntary compliance" without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction. Compliance orders will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to question their validity.[88]

It is quite possible that the 2013 Supreme Court would have found judicial review of CERCLA administrative orders available upon issuance, avoiding the constitutional questions which the absence of pre-enforcement review poses.

The ultimate constitutional due process challenge (the "sanctions problem") hinges on the Supreme Court's decision in *Ex Parte Young*.[89] A statutory scheme violates due process if "the penalties for disobedience are by fines so enormous . . . .as to intimidate the [affected party] from resorting to the courts to test the validity of the legislation [because] the result is the same as if the law in terms prohibited the [party] from seeking judicial [review]" at all.[90] The Supreme Court has made clear, however, that statutes imposing fines — even "enormous" fines — on noncomplying parties may satisfy due process if such fines are subject to a "good faith" or "reasonable ground[s]" defense.[91] Without such a defense, however, CERCLA's unilateral administrative order (UAO) regime prior to the 1986 amendments was problematic.

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[86] Wagner Seed Co. v. Daggett, 800 F.2d 310, 314-15 (2d Cr. 1986) (presumption in favor of jurisdiction over actions of administrative agency because "pre-enforcement review of EPA's remedial actions. . .[is] contrary to the policies underlying CERCLA"); *Aminoil*, 599 F. Supp. at 71 (C.D. Cal. 1984); *Earthline v. Kin-Buc, Inc*., 21 Envt. Rep. Cas. 2157, 2161 (D.N.J. 1984) (issuance of order not final agency action under APA).

[87] Sackett v. EPA, 132 S. Ct. 1367, 1374 (2012).

[88] *Id.*

[89] *See Ex Parte Young*, 209 U.S. 123 (1908).

[90] *Id.* at 147.

[91] *See* Reisman v. Caplin, 375 U.S. 440, 446-50 (1964); Okla. Operating Co. v. Love, 252 U.S. 331, 338 (1920).

C. Statute of Limitations

The original version of CERCLA omitted an express statute of limitations.[92] The first district courts to address the limitations issue in the absence of statutory language expressed concern about the matter.[93] Some courts found the most analogous statute to be 28 U.S.C. § 2415, which imposes a six-year limit on United States sovereign actions sounding in contract.[94] Another court in a private cost recovery action against the Government found the statute of limitations in CERCLA Section 112(d) analogous to state statutes, concluding that it should apply a three-year statute from the date the plaintiff incurred response costs and not tolled until the plaintiff discovered the identity of responsible parties.[95] Other courts focused on the equitable nature of CERCLA cost recovery and found the equitable doctrine of laches applicable.[96] Some courts found the doctrine of laches inapplicable to suits by the United States suing in its sovereign capacity.[97] Some refused to decide whether a cost recovery action is equitable or legal and addressed the issue in an either/or manner.[98] Some simply found that CERCLA provided no statute of limitations and Congress intended none.[99] Confusion thus reigned in the district courts

[92] H.R. 7020, 96th Cong. § 4(a) (proposed § 3071(c)) (1980), *reprinted in* HOUSE LEGIS. HIST. 391, 441 (the Superfund bill that had passed the House, had provided simply, "The Administrator, or any other governmental entity to which a person is liable under this section for the recovery of costs. . .shall bring an action under this section for the recovery of such costs against the person liable promptly following his determination of any such costs.").

[93] *E.g.*, United States v. Mottolo, 605 F. Supp. 898, 907-10 (D.N.H. 1985) (finding based on an extensive analysis of CERCLA's legislative history which included deletion of a cost recovery statute of limitations provision that neither a statute of limitation nor the doctrine of laches was applicable to the cost recovery suit before it). The House Judiciary Committee cited two orders in *Mottolo* in explaining why an express statute of limitations was needed. H.R. Rep. No. 99-253, pt. 3, at 21 (1985), *as reprinted in* 1986 U.S.C.C.A.N. 3038, 3044 ("The Committee believes that this amendment addresses the concerns raised by *Mottolo*, No. 83-547-D (D.N.H. July 18, 1985 and Aug. 15, 1985) (orders issued).").

[94] *See* Kelly v. Thomas Solvent Co., 714 F. Supp. 1439 (W.D. Mich. 1989); *Mottolo*, 605 F. Supp. at 909 (D.N.H. 1985).

[95] *See* Merry v. Westinghouse, 684 F. Supp. 852, 857 (M.D. Pa. 1988); Mola Dev. Corp. v. U. S., No. CV 82-819-RMT(JRx), 15 ELR 21029 (C.D. Cal. July 30, 1985).

[96] U. S. v. Hardage, 116 F.R.D. 460, 467 (W.D. Okla. 1987) (rejecting U.S. position that no statute of limitations applies to claims under Section 106 and that laches cannot apply, while declining to specify what limitations period applies); *see also Mottolo*, 695 F. Supp. at 626-27 (equitable defenses available because CERCLA cost recovery is action in equitable restitution, CERCLA liability is based on standards of CWA, under which Supreme Court has ruled equitable defenses available); *see also* United States v. Reilly Tar & Chem. Co., 7 Chem. Waste Lit. Rep. 252 (D. Minn. 1984).

[97] U.S. v. Fairchild Indus., Inc., 766 F. Supp. 405, 414 (D. Md. 1991); Am. Nat'l Can Co. v. Kerr Glass Mfg. Co., 89-C-0168, 1990 WL 129657 (N.D. Ill. Aug. 22, 1990), 11; U.S. v. Dickerson, 640 F. Supp. 448, 451 (D. Md. 1986); *Conservation Chem.*, 619 F. Supp. at 206.

[98] Kelley v. Thomas Solvent Co., 714 F. Supp. 1439, 1450 (W.D. Mich. 1989).

[99] *Dickerson*, 640 F. Supp. at 450-51; U.S. v. Bliss, 17 ELR 21217 No. 84-200C(1) (E.D. Mo. June 15, 1987).

during the period in which amendments to the statute were being considered in the mid-1980s.

The absence of a statute of limitations exacerbated the unfairness associated with retroactive application of the statute.[100] Many non-lawyers erroneously thought that the prohibition of ex post facto laws in Article I section 9 of the Constitution would prohibit retroactive civil legislation.[101] Indeed, by the 1980s the constitutionally-based hostility to retroactive legislation had given rise to a presumption against retroactivity and a corollary requirement that any intent to impose such liability be unequivocally expressed.[102] Indeed, the Supreme Court had refused to retroactively apply certain Supreme Court decisions interpreting federal civil liability statutes when the decision made a clear break with prior decisional law.[103] These presumptions likely explain why the Government initially tried to avoid the constitutional issues by arguing that CERCLA's liability merely established a new remedy and should not be viewed as retroactive at all.[104]

III. SARA's Solutions

In *Crowell v. Benson*,[105] Chief Justice Hughes observed that: "When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[106]CERCLA was amended in 1986,[107] filling in the gaps in the statute upon which we have focused here: creating an express right of contribution,[108] establishing express preclusion of pre-enforcement judicial review with a sufficient cause defense to fines,[109] and including an express

[100] *E.g.*, Jennifer R. Yelin, *Retroactivity Revisited: A Critical Appraisal of CERCLA's Retroactive Liability Scheme in Light of* Landgraf v. USI Film Products *and* Eastern Enterprises v. Apfel, 8 N.Y.U. ENVTL. L.J. 94, 94 (1999).

[101] Carpenter v Pennsylvania, 58 U.S. 456, 463 (1856) (limiting *ex post facto* clause to criminal legislation).

[102] Greene v. U.S., 376 U.S. 149, 160 (1964); Miller v. U.S., 294 U.S. 435, 439 (1935).

[103] Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971).

[104] *Conservation Chemical*, 619 F. Supp. at 219 (discussing U.S. v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984 (D.S.C. 1984)).

[105] Crowell v. Benson, 285 U.S. 22, 22 (1932).

[106] *Id.* at 62.

[107] Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613 § 2 (1986).

[108] 42 U.S.C. § 9613(f); Alfred R. Light, *Regressing Toward Federal Common Law: The Catalytic Effect of CERCLA's Private Cause of Action*, 41 SW. L. REV. 661, 662 (2012).

[109] 42 U.S.C. § § 9606(b)(1), 9613(h); *see generally* GE v. Jackson, 610 F.3d 110, 115, 117-19 (D.C. Cir. 2010) (It is not certain, though, that the amended scheme for preclusion of judicial review of unilateral order would survive Supreme Court scrutiny under the due process standards set forth in Mathews v. Eldridge, 424 U.S. 319 (1976). The absence of pre-enforcement review also presents constitutional problems for the lien provision added in 1986. *Reardon v. U.S.*, 947 F.2d 1509 (1st Cir. 1991)).

statute of limitations.[110] In short, Congress in 1986 filled in gaps which created constitutional difficulties in the earlier statute. Ultimately, Congress avoided the constitutional separation of powers and some due process problems it had created through its legislative disaster of 1980.In February 1985, the Reagan Administration proposed an Administrative Superfund Amendments bill.[111] In a hurried mark-up session shortly thereafter, the Senate Environment and Public Works Committee adopted many of the Administration's enforcement provisions covering liability and related legal matters with little, if any, debate.[112] As to contribution, the Administration acknowledged that "The fairness of a joint and several liability scheme depends upon the clear availability of contribution. Moreover, responsible parties need both a right of contribution and contribution protection to bring all other responsible parties to settlement table."[113] After the Senate Judiciary Committee pointed out that the Administration's proposal (adopted by the Environment Committee) "would affect the procedural rights that responsible parties have under the Federal Rules of Civil Procedure,"[114] the Administration redrafted its contribution proposal.[115] As detailed elsewhere, the Senate Judiciary Committee again modified the proposal, which then found its way into CERCLA via amendments to the Superfund Amendments bill on the floor of the Senate.[116]

With respect to the administrative cleanup order provision, the Administration Bill approved the Senate Environment and Public Works Committee's express preclusion of pre-enforcement judicial review, but allowed those who complied with an administrative order without judicial supervision to petition EPA for

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[110] 42 U.S.C. § 9613(g).

[111] *See* H.R. 1342, 99th Cong. (1985); S. 494, 99th Cong. (1985). The Government's "legislative history" for its proposal is found in H.R. REP. NO. 99-253, pt. 1, at 120, 126 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1835, 2908-25.

[112] S. 51, 99th Cong. (1985) (as reported from U.S. Senate Committee on Environment and Public Works).

[113] *A Bill to Extend and Amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and for Other Purposes: Hearings before the Senate Commitee on the Judiciary on S. 51*, 99th Cong., Sess. 1, at 52 (1985) (statement of F. Henry Habicht II, Assistant Attorney General Land and Natural Resources Division, U.S Department of Justice) [hereinafter "Habicht"].

[114] Habicht, *supra* note 114, at 52.

[115] Habicht, *supra* note 114, at 52-53, 64-65 (Appendix to Testimony).

[116] *See* Alfred R. Light, *CERCLA's Wooden Iron: The Contribution Counterclaim*, 23 Toxics L. Rep. (BNA) 642, 642-47 (July 24, 2008) ("Following these hearings, the Senate Judiciary Committee offered its substitute amendment on the Senate floor as part of a package of amendments introduced by Senator Thurmond… In the House of Representatives, Administration witnesses affirmed that they had modified their position in response to the concerns of members of the Senate Judiciary Committee.76 This work product are the provisions now found in CERCLA Section 113(f)."); *see* 126 Cong. 24,452 (1985) (statement of Sen. Thurmond) ("The committee proposal would codify that right [of contribution] and, retaining current law, would allow a judge the discretion and flexibility to best manage the contribution issues in a law suit.").

reimbursement of their expenses after completion.[117] The original proposal did not, however, contain the "sufficient cause" defense to fines which the *Aminoil* court had found fatal to the constitutionality of the regime. The Committee subsequently required that the "sufficient cause" defense be included.[118] Senator Thurmond explained on the floor of the Senate:

> In an attempt to avoid a possible constitutional problem, section 106 is amended to include a good-faith defense to penalties under that section. Our proposal would provide a defense to these damages by allowing a defendant to make a good-faith showing that he reasonably believed that he would not be liable under the act or that the required response action was inconsistent with the national contingency plan. This addition codifies the leading court decisions in this area.[119]

As detailed elsewhere,[120] the SARA amendments also included an express statute of limitations, arising from the House Judiciary Committee.[121] While the Justice Department has resisted implementation of the provision, it has the potential for limiting the retroactivity of the statute by requiring that claims be asserted within a reasonable time after a cleanup has started.[122]

The Supreme Court did its part over the past few years by clarifying issues in the CERCLA statute which the 1986 amendments did not resolve, such as the scope of joint and several liability[123] as well as complexities arising out the amendments.[124] Hopefully, Congress can avoid such "lame duck" legislative disasters in the future.

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[117] S. 51, 99th Cong., § 133(c) (as reported from Senate Environment and Public Works Committee).

[118] 126 CONG. REC. 24,449 (1985).

[119] *See* 126 CONG. REC. 24,452 (1985) (statement of Sen. Thurmond); *see also* H. REP. NO. 99-252, pt. 1, at 82 (1986). Occasionally, defendants have been able to employ this "good faith" defense to avoid imposition of fines and punitive damages; *see, e.g. U.S. v. DWC Trust Holding Co*., 42 Env't Rep. Cas. (BNA) 2139, 1996 WL 250011 (D. Md. Jan. 22, 1996) (holding that defendants had a "good faith defense" to liability under CERCLA).

[120] Alfred R. Light, *CERCLA's Cost Recovery Statute of Limitations: Closing the Books or Waiting for Godot?* 16 SE. ENVTL L J. 245, 249 (2008).

[121] *Id.* at 255-56.

[122] *Id.* at 285-89.

[123] *See generally* Alfred R. Light, *Restatement for Joint and Several Liability under CERCLA after* Burlington Northern, 39 Envtl. L. Rep. 11058-67 (2009); *see also* Alfred R. Light, *Restatement for Arranger Liability under CERCLA: Implications of* Burlington Northern *for Superfund Jurisprudence*, 11 VT. J. ENVTL. L., 371-93 (2009).

[124] *E.g.,* U.S. v. Atlantic Research Corp., 551 U.S. 128, (2007); Cooper Indus., Inc. v. Aviall Serv., Inc. 543 U.S. 157, 162-63 (2004).