No. 06-562

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR *AMICI CURIAE* SUPERFUND SETTLEMENTS PROJECT, AMERICAN CHEMISTRY COUNCIL, AMERICAN PETROLEUM INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL, EDISON ELECTRIC INSTITUTE, ENVIRONMENTAL TECHNOLOGY COUNCIL, SOUTH CAROLINA ELECTRIC & GAS, AND UTILITY SOLID WASTE ACTIVITIES GROUP IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

The Superfund Settlements Project, American Chemistry Council, American Petroleum Institute, Chamber of Commerce of the United States of America, Corporate Environmental Enforcement Council, Edison Electric Institute, Environmental Technology Council, South Carolina Electric & Gas, and Utility Solid Waste Activities Group submit this *amici curiae* brief in support of Respondent Atlantic Research Corporation.[1]

INTEREST OF THE *AMICI CURIAE*

Amici curiae represent diverse sectors of American industry that all share a vital interest in the effective implementation of environmental cleanup programs, including the Superfund program. For more than 25 years, the member companies of *amici curiae* have been actively involved in performing cleanups at hundreds of contaminated sites throughout the United States, with the cumulative cost of those cleanups well in excess of $10 billion. Because other parties are responsible for a substantial share of the contamination at many of these sites, the right to collect from those other parties their equitable shares of the cleanup costs is critical to the member companies of *amici curiae* performing such cleanups. This right is referred to throughout this brief as "the right of contribution,"[2] a term that encom-

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[1] In accordance with Rule 37.6, this brief is not authored in whole or in part by counsel for any party. No person or entity other than *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and their letters of consent are on file with the Clerk of this Court.

[2] As a practical matter, every section 107 cost recovery claim by one PRP against another PRP is a claim for contribution. Although a section 107 plaintiff typically proceeds on a theory of joint and several liability, the defendant always may counterclaim under section 113 for equitable contribution from the plaintiff. The net result is that the court determines the equitable shares of both the plaintiff and the defendant, whether or not the section 107 plaintiff specifically pleads a claim for contribution. As the Government acknowledges, cost recovery actions include claims for

passes claims under either section 107 or section 113 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9607(a)(1-4)(B), 9613(f)(1). *See Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994).

In the past, the member companies of *amici curiae* typically have pursued the right of contribution by filing claims under section 113 of CERCLA. But in the wake of this Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), which held that a potentially responsible party ("PRP") may not seek contribution under section 113(f)(1) until it has been sued under CERCLA, section 107 is now the only mechanism available in many cases to compel other liable parties to pay an equitable share of the cleanup costs. If section 107 were to become unavailable, member companies of *amici curiae* would be forced to bear the full burden of those cleanups that already are underway while other parties would escape liability for contaminating those sites, a result contrary to basic notions of equity and fairness. Moreover, without the right of contribution, future cleanups at many thousands of sites would be discouraged and delayed. Thus, disposition of the issue raised in this case will have a direct effect on each of the *amici curiae* and on their member companies.

The Superfund Settlements Project ("SSP") is a non-profit association of major corporations with substantial experience in the Superfund program. The SSP is dedicated to improving the implementation of CERCLA by reducing barriers to settlement, minimizing transaction costs, and using existing legal authorities to make the program faster, fairer, and more efficient. To date, SSP's member companies alone have spent more than $6 billion on site cleanups.

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contribution. *See* Brief for United States at 33 n.14, *United States v. Atlantic Research*, No. 06-562 (filed Mar. 1, 2007) ("Contribution is merely a form of cost recovery, not a wholly independent type of relief.").

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The ACC is committed to improving environmental, health, and safety performance through its Responsible Care© industry initiative, common sense advocacy designed to address major public policy issues, health and environmental research, and product testing. To date, ACC member companies also have spent billions of dollars on Superfund cleanups.

The American Petroleum Institute ("API") is a nationwide, not-for-profit trade association representing about 400 member companies engaged in all aspects of the oil and natural gas industry, including exploration, production, transportation, refining, distribution, and marketing. API frequently represents its members on important legal and policy matters before the courts, agencies, and legislative bodies. API's members are or have been directly involved in the remediation—including voluntary remediations—of numerous sites under CERCLA, often at great economic cost.

The Chamber of Commerce of the United States of America ("Chamber"), founded in 1912, is the world's largest not-for-profit business federation, representing a membership of over three million businesses and business organizations of every size, in every business sector, and from every geographic area. Ninety-six percent of the Chamber's members are businesses with less than one hundred employees. As the nation's preeminent business association, the Chamber has an abiding interest in the scope of federal regulatory authority in general, and in environmental regulation in particular. The Chamber regularly advocates its members' views in court on environmental issues of national concern to the business community.

The Corporate Environmental Enforcement Council ("CEEC") is an organization of corporate counsel and environmental management representing thirty major companies from a wide range of industrial sectors, including metals, chemicals, pharmaceuticals, paper, mining, oil refining, and

natural resource exploration. CEEC focuses on civil and criminal environmental enforcement and enforcement policy issues by providing a forum for review and discussion of such issues and developing constructive recommendations to executive and legislative environmental enforcement policy makers. CEEC member companies are involved in investigation, removal, and remediation activities at hundreds of Superfund sites across the United States.

The Environmental Technology Council ("ETC") is the national trade association for the commercial hazardous waste management industry. ETC firms provide technologies and services to customers for the recycling, treatment, and secure disposal of industrial and hazardous wastes, including the cleanup of contaminated industrial sites. Many ETC members also are involved in corrective action cleanups at their own properties.

South Carolina Electric & Gas ("SCE&G") is a South Carolina corporation and a wholly owned subsidiary of SCANA Corporation. SCE&G currently is working with EPA and the South Carolina Department of Health and Environmental Control to voluntarily investigate, remediate, and monitor a contaminated site. SCE&G has brought claims for response costs and contribution under CERCLA against the former owner and operator of the site.

The Utility Solid Waste Activities Group ("USWAG") was formed in 1978, and is an association primarily dedicated to assisting its members in the management of wastes, the beneficial use of materials associated with the generation, transmission, or sale of electricity and natural gas, and the remediation of contaminated sites in an environmentally-protective and cost-effective manner. Its membership is comprised of approximately 80 energy industry operating companies as well as several energy industry associations, including *amicus* Edison Electric Institute ("EEI"). EEI is the national association of investor-owned electric utility com-

panies and acts as spokesman for those firms on subjects of national interest. Together, USWAG members represent more than 85% of the total electric generating capacity of the United States and service more than 95% of the nation's consumers of electricity and over 93% of the nation's consumers of natural gas.

The member companies of *amici curiae* have incurred, and continue to incur, enormous cleanup costs for which CERCLA offers the only practical means of seeking contribution from other responsible parties. If this Court were to reverse the judgment of the Eighth Circuit and bar PRPs from bringing actions under section 107, then many of *amici curiae*'s member companies would find themselves in an untenable position. Because they initiated cleanup efforts without forcing the Government to initiate CERCLA litigation, *Cooper Industries* bars them from seeking contribution under section 113. Thus, the Government's position here would effectively slam the door on their only means of obtaining equitable contribution from other responsible parties that have resisted sharing in the cleanup costs.

Moreover, denying the right of contribution under section 107 would create an immediate and overwhelming disincentive for companies to perform future cleanups. Absent a secure right of contribution, companies understandably would be reluctant to initiate or complete cleanups. As a result, vitally important cleanups would be discouraged or delayed.

SUMMARY OF ARGUMENT

The Government's interpretation of section 107(a)(4)(B) contradicts EPA's duly-promulgated regulations and long-standing policy. Given the many thousands of contaminated sites around the country and the enormous cost of cleaning them up, EPA has long recognized that cleanups can be achieved only with the cooperation, resources, and expertise of the private sector. EPA also has recognized that the ability of a PRP to recover from other responsible parties any

response costs that exceed its equitable share provides a crucial incentive to perform these cleanups. For this reason, EPA's 1990 revised National Contingency Plan ("NCP") regulations recognized that PRPs may use section 107 to seek contribution from other PRPs, and indeed provided practical guidance on how such claims should be perfected. The Government's reading of section 107 directly contradicts this duly-promulgated regulation.

Curtailing the use of section 107 by PRPs would severely undermine the incentives for companies to undertake cleanups. Indeed, because CERCLA's contribution scheme functions as the recovery vehicle in a broad range of contexts far beyond those sites listed on EPA's National Priorities List ("NPL"), denying PRPs the right to seek contribution under section 107 would create powerful disincentives to cleanup at many thousands of contaminated sites beyond formally designated Superfund sites.

First, curtailing the right of contribution under section 107 would discourage and delay cleanup of the thousands of sites contaminated by departments and agencies of the United States, the majority of which are not formally designated as Superfund sites. Second, the Government's position here would needlessly postpone cleanup of the many thousands of brownfields sites found throughout our inner cities and working-class communities. Third, precluding PRPs from seeking contribution under section 107 would inevitably delay the cleanup of the thousands of Resource Conservation and Recovery Act ("RCRA") "corrective action" sites contaminated by decades of industrial activity. Finally, cleanup of Superfund sites where EPA decides to issue unilateral administrative orders under section 106 of CERCLA to compel the performance of cleanup work would be discouraged. Given the environmental and health risks posed by many of these sites, in addition to the social and economic costs associated with delaying their cleanup, it is imperative that this Court affirm the judgment of the Eighth Circuit.

ARGUMENT

I. THE GOVERNMENT'S READING OF SECTION 107 CONTRADICTS EPA'S DULY-PROMULGATED REGULATIONS AND LONG-STANDING POLICY.

The prime objective of CERCLA is to enable the swift, efficacious, and equitable cleanup of hazardous waste sites. The right of contribution is critical to achieving this goal. If PRPs are foreclosed from pursuing contribution claims under section 107, they will be reluctant to initiate or complete cleanups until they have been sued under CERCLA, thereby triggering their right to seek contribution under section 113. Waiting to be sued under CERCLA, however, can take years, and at many sites, no suit will ever be filed. Curtailing the right of PRPs to seek contribution under section 107 thus inevitably would discourage and delay the cleanup of thousands of contaminated sites, frustrating CERCLA's fundamental purpose.[3]

In 1980, Congress enacted CERCLA, 42 U.S.C. § 9601 *et seq.*, in response to the then new and frightening problem of abandoned toxic waste sites.[4] *See United States v. Bestfoods*, 524 U.S. 51, 55 (1998). The purpose of CERCLA was to "ensure the prompt and effective cleanup of waste disposal sites, and to assure that parties responsible for hazardous substances bore the cost of remedying the conditions they

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[3] Indeed, the Government has acknowledged this very point, arguing to this Court in *Pinal Creek v. Newmont Mining Co.*, 118 F.3d 1298, (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998), that "[t]he right to contribution provides a strong additional incentive [for a PRP] to engage in a *voluntary* cleanup." Brief for the United States as *Amicus Curiae*, 1998 WL 34103033, at *15 (No. 97-795) (emphasis added). In its brief in this case, however, the Government fails to explain its substantial change in position. *See* Brief for United States at 43.

[4] *See generally* John Quarles & Michael W. Steinberg, *The Superfund Program at Its 25th Anniversary*, 36 Envtl. L. Rep. (Envtl. L. Inst.) 10364 (2006).

created." *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1455 (9th Cir. 1986). As this Court has recognized, given the scope of the problem, "[t]he remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the cost of cleanup." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21 (1989) (plurality opinion of Brennan, J.) (emphasis in original), *overruled on other grounds*, *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

To help achieve this ambitious goal, CERCLA combined the individually harsh elements of retroactive liability, strict liability, and joint and several liability into an unprecedented legal framework.[5] Because such a scheme bears an inherent risk of inflicting disproportionate and inequitable liability, the right of contribution provides a crucial safety valve that both mitigates the risk of unfairness and provides incentives for private parties to clean up contaminated sites. Indeed, within CERCLA's web of potentially disproportionate and unjust liability, only the right to seek equitable contribution from other responsible parties holds out a promise of fairness and thus provides an incentive for private parties to move forward swiftly to clean up sites. *See, e.g.*, *Key Tronic*, 511 U.S. at 819 n.13 (one of CERCLA's main goals was to "'encourage private parties to assume the financial responsibility of clean-up by allowing them to seek recovery from others'") (quoting *FMC Corp. v. Aero Industries, Inc.*, 998 F.2d 842, 847 (10th Cir. 1993)).

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[5] Although CERCLA does not expressly state the standard of liability, the courts generally have construed CERCLA section 107 liability to be retroactive, strict, and joint and several. *See, e.g., In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 901-02 (5th Cir. 1993); *United States v. Monsanto* Co., 858 F.2d 160, 168 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985).

From the inception of the Superfund program, EPA viewed this right of contribution as critical to encouraging private parties to perform cleanups. Since as early as 1984, EPA has implemented CERCLA based on the fundamental policy that "[i]t is . . . preferable for private parties to conduct cleanups themselves." Lee M. Thomas and F. Henry Habicht II, U.S. EPA, *Interim CERCLA Settlement Policy* (OSWER Directive No. 9835.0) (Dec. 5, 1984), *published at* 50 Fed. Reg. 5034, 5035 (Feb. 5, 1985) ("recogniz[ing]" that "administrative action and litigation will not be sufficient to accomplish CERCLA's goals, and that voluntary cleanups are essential to a successful program for cleanup of the nation's hazardous waste sites"). EPA's approach to implementing CERCLA is highly pragmatic, as federal and state agencies simply do not have the resources to address all of the contaminated sites, nor are they always able to address those sites quickly or efficiently. Accordingly, EPA committed itself more than 20 years ago to "remov[ing] or minimiz[ing] if possible the impediments to voluntary cleanup." *Id.*

With the passage of the Superfund Amendments and Reauthorization Act ("SARA") in 1986, Congress ratified—and expanded upon—EPA's approach. With the addition of section 113(f), Congress expressly recognized the right of equitable contribution and sought to encourage private parties to perform cleanups by allowing them to recoup their costs from other liable parties:

> Congress did not think it enough . . . to permit only the Federal Government to recoup the costs of its own cleanups of hazardous-waste sites; the Government's resources being finite, it could neither pay up front for all necessary cleanups nor undertake many different projects at the same time. Some help was needed, and Congress sought to encourage that help by allowing private parties who *voluntarily* cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from the other potentially responsible parties.

Union Gas, 491 U.S. at 21-22 (plurality opinion of Brennan, J.) (citations omitted, emphasis added).

Following the passage of SARA, EPA pledged to support in court the equitable claims of those who performed cleanups against those who declined to participate. To this end, in 1990, EPA amended the National Contingency Plan regulations, adding a new subpart H for the express purpose of clarifying how private parties should go about performing cleanups in order to recover their costs from other parties through contribution litigation. *See* 40 C.F.R. pt. 300, subpt. H. (2006).

EPA explained its new subpart H rules with reference to these core policies:

> EPA believes that it is important to encourage private parties to perform *voluntary* cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination.

National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666, 8792-93 (Mar. 8, 1990) (codified at 40 C.F.R. pt. 300, subpt. H (2006)) (emphasis added). EPA also took pains to state that PRPs that clean up sites may seek to recover their costs *before* completing their cleanups because "requiring a party to incur all costs before bringing a cost recovery action may discourage and delay cleanups, contrary to the intent of Congress that sites be cleaned up expeditiously." *Id.* at 8798.

Most importantly, in promulgating subpart H, EPA clearly announced that section 107(a)(4)(B) is broad enough to include claims brought by PRPs against other PRPs. *See id.* at 8792 (section 107(a)(4)(B)'s "other persons" includes "persons who are not the federal government, a state, or an Indian tribe"). Indeed, EPA evidently assumed that most of the parties who would utilize new subpart H were PRPs that were performing cleanups and sought to recover cleanup costs

from other responsible parties.

Thus, the Government's position in this case not only undermines EPA's 20-year old policy that it is "preferable for private parties to conduct cleanups themselves,"[6] but also contradicts subpart H of the revised NCP, a duly-promulgated regulation that has the force of law. *See United States v. Nixon*, 418 U.S. 683, 686 (1974) ("So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it.").

It is surprising that the Government never attempts to reconcile its position here with EPA's regulation. Nor does the Government even acknowledge that EPA's interpretation of the scope of section 107(a)(4)(B) is entitled to substantial judicial deference. *See, e.g.*, *National Cable & Telecommunications Ass'n v. Brand X Internet Svcs.*, 545 U.S. 967, 981-82 (2005) ("*Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps."); *Udall v. Tallman*, 380 U.S. 1, 16, (1965) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."). It is one thing for the Government to change its litigation position over time, but it is quite another to ignore an agency's valid and controlling regulation.

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[6] Recognizing the conflict, one EPA attorney has speculated that the Department of Justice decided to "advocat[e] a position potentially detrimental to EPA's policy interest" because "its motivation was primarily the protection of federal PRPs facing contribution claims[.] It seems apparent that DOJ, charged under the Unitary Executive principle with balancing the competing policy interests of its client agencies, had determined to resolve the conflict in favor of federal agency defense rather than EPA enforcement, with results which may, on balance, prove favorable to the federal purse but not necessarily to environmental protection." William C. Tucker, *The Manacled Octopus: The Unitary Executive and EPA Enforcement Involving Federal Agencies*, 16 Vill. Envtl. L.J. 149, 161-62 (2005).

This conflict is all the more significant given that EPA's reliance on the right of contribution as a powerful incentive to encourage private parties to cleanup contaminated sites has proven to be highly successful, resulting in cleanup settlements at NPL sites with a cumulative value in excess of $20 billion. Indeed, today it is common for companies that have not been sued under CERCLA to agree to perform the entire cleanup at an NPL site, even though their fair share of the responsibility may be relatively modest.[7] Over 70% of the new Superfund NPL cleanups each year are launched through agreements such as these.[8] These agreements are possible only because of the availability of equitable contribution from those who do not consent to participate.[9] Moreover, companies that refuse to participate know that they can be held liable for their equitable shares. But for this right of contribution, companies understandably would resist undertaking new cleanup obligations, and rarely would do so voluntarily.

II. THE GOVERNMENT'S READING OF SECTION 107 WOULD DISCOURAGE AND DELAY CLEANUPS AT MANY THOUSANDS OF CONTAMINATED SITES.

The Government's interpretation of section 107 not only contradicts EPA's duly-promulgated regulation and long-

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[7] A recent study by the Environmental Law Institute reported that cleanups also were underway at over 15,000 sites that were not on the National Priorities List under the auspices of state cleanup programs. *See* John Pendergrass, *An Analysis of State Superfund Programs: 50-State Study, 2001 Update* (ELI) 16-17 (2002).

[8] U.S. EPA, *Superfund Accomplishment Figures, Summary Fiscal Year (FY) 2003*, http://www.epa.gov/superfund/action/process/numbers.htm (last visited December 18, 2006).

[9] *See, e.g.*, *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (implicitly allowing contribution action to proceed without state or federal precursor action of any kind); *Westfarm Assoc. Lim. Part. v. Washington Suburban Sanitary Comm.*, 66 F.3d 669, 677 (4th Cir. 1995) (same).

standing policy, it also would eliminate vital incentives that make prompt and efficient cleanups possible. Indeed, curtailing the right of contribution under section 107 would "create a perverse incentive for PRPs to wait until they are sued before incurring response costs," ultimately discouraging and delaying cleanups across a broad spectrum of contaminated sites. *Syms v. Olin Corp.*, 408 F.3d 95, 106 n.8 (2d Cir. 2005) (observing that after *Cooper Industries*, if PRPs are unable to bring an action under section 107, they are left "with no mechanism for recovering response costs until proceedings are brought against the PRP" and thus, "if a PRP remediates a facility on its own initiative, it reduces the likelihood that it will be sued under § 106 or § 107(a), and thereby jeopardizes its opportunity to seek contribution under § 113(f) from other PRPs"). Because CERCLA's contribution scheme functions as the recovery vehicle in a broad range of contexts beyond the relatively small number of sites listed on the National Priorities List, as explained below, curtailing the statutory right to seek contribution under section 107 would create such perverse incentives at many thousands of sites being addressed outside of the Superfund context.

A. Contribution Claims Provide a Vital Incentive for Private Parties to Initiate and Complete Cleanups.

The Government's interpretation of section 107 would preclude a PRP that initiates or agrees to undertake a cleanup without being sued by the Federal Government from recouping expenditures that exceed its share of the responsibility. Such an inequitable outcome inevitably would create a powerful incentive for a private company to refrain from initiating a voluntary remediation. Indeed, if the only vehicle for seeking contribution from other liable parties is section 113(f), the economically rational response would be for companies to resist undertaking any new cleanup obligations until a governmental agency sues them under CERCLA.

Ultimately, EPA and its state agency counterparts would be required to rely primarily on litigation to achieve progress at contaminated sites. Federal and state agencies, however, lack the resources necessary to initiate litigation for every site, and thus far fewer cleanups would take place. Even where litigation is pursued, far greater judicial and administrative resources would be consumed, and higher transaction costs would be inflicted on all concerned, ultimately diverting precious funds from the limited pool of resources dedicated to the enforcement of environmental laws. Inevitably, the pace of cleanups would be slowed. It was for precisely this reason that EPA committed itself nearly 20 years ago "to encourag[ing] private parties to perform voluntary cleanups of sites, and to remov[ing] unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination." 55 Fed. Reg. at 8792-93.

The Government offers the unrealistic suggestion that cleanups would not be discouraged or delayed because companies can simply enter into settlements with EPA and *then* seek contribution from other parties.[10] *See* Brief for the

[10] It also has been suggested that cleanups might not be discouraged because some companies might be able to seek contribution under state law. *See, e.g.*, *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 263 F.3d 134, 145 (5th Cir. 2001), *rev'd*, 312 F.3d 677 (5th Cir. 2002) (*en banc*), *rev'd*, 543 U.S. 157 (2004). This suggestion is unrealistic for several reasons. First, CERCLA may preempt state-law contribution claims in situations where no recovery would be available under CERCLA itself. *See, e.g., In re Reading*, 115 F.3d 1111, 1117 (3d Cir. 1997) (state common law claims for contribution and restitution preempted by CERCLA's statutory right of contribution). Second, many suits seeking contribution from the United States under state law would be barred by sovereign immunity because CERCLA waives that immunity for state-law claims only at facilities "owned or operated by" federal agencies, 42 U.S.C. § 9620(a)(4), leaving parties cleaning up privately-owned sites that are heavily contaminated with wastes contributed by the United States—including the sites at issue in this case—with no recourse under state law. Third, vexing choice-of-law questions would bog down many state-law contribution

United States at 43. Not only is this option contrary to the approach EPA has followed for over 20 years, it also is unavailable as a practical matter. In practical terms, what the Government is suggesting is that a private party "enter into settlement" with EPA by seeking out a CERCLA consent decree under section 107. *See* CERCLA § 122(d), 42 U.S.C. § 9622(d). Realistically, however, EPA simply does not have the resources—or the desire—to develop such documents for the thousands upon thousands of contaminated sites that are in need of cleanup. Indeed, as explained below, most of the tens of thousands of contaminated sites across the country are of little or no interest to EPA, whose limited CERCLA resources are fully occupied dealing with the roughly 1,245 contaminated sites that it has listed on the NPL.[11] Thus, a company that asks EPA to make time to negotiate a set of documents for a site that is of little or no federal interest almost certainly would be turned down.[12] And because

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claims. Finally, many state law statutes are modeled on CERCLA and thus would not necessarily provide an independent or supplemental basis for seeking contribution. *See, e.g.*, *Hicks Family v. 1st Nat'l Bank of Howell*, No. 268400, 2006 Mich. App. LEXIS 2933, at *17-23 (Mich. App. Ct. Oct. 3, 2006) (finding that the contribution provisions of Michigan's Natural Resources and Environmental Protection Act were subject to the same requirements imposed by the nearly identical language of CERCLA's contribution provisions). This patchwork of state-law contribution rights cannot plausibly be viewed as a substitute for the right of contribution that Congress conferred in CERCLA.

[11] The NPL is "a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States"—that is, the list of contaminated sites that EPA has determined are a priority for further investigation and remediation. *National Priorities List*; Proposed Rule No. 46, 72 Fed. Reg. 10,105 (Mar. 7, 2007).

[12] Indeed, as Justice Ginsburg aptly noted at oral argument in *Cooper Industries*, "EPA has got a lot of things on its agenda . . . [and thus PRPs] might be sitting around waiting forever till EPA comes after [them]." Transcript of Oral Argument at 6-7, *Cooper Industries*, 543 U.S. 157 (No. 02-1192).

States face similar resource constraints, companies seeking to preserve their right to CERCLA contribution by resolving their CERCLA liability to a State (pursuant to section 113(f)(3)(B)) likely will fail as well. As a result, the Government's interpretation of section 107 would needlessly discourage and delay cleanups throughout the United States.

As the Eighth Circuit properly concluded below, "nothing in CERCLA's words[] suggest[s] Congress intended to establish a comprehensive contribution and cost recovery scheme encouraging private cleanup of contaminated sites, while simultaneously excepting—indeed, penalizing—those who voluntarily assume such duties." *Atlantic Research Corp. v. United States*, 459 F.3d 827, 836 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 1144 (2007). *See also* John M. Hyson, *Contribution Claims Under Section 113(f)(1) of CERCLA*, 32 Envtl. L. Rep. (Envtl. L. Inst.) 10151, 10155 (2002) (questioning "why a Congress, bent on *encouraging* voluntary cleanups, would relegate cost recovery actions by volunteers to state courts") (emphasis in original, footnote omitted).[13]

B. Curtailing the Right of Contribution Would Discourage and Delay Cleanups at Thousands of Sites Not Listed on EPA's National Priorities List.

Because CERCLA's contribution scheme serves as the recovery vehicle for companies cleaning up sites that are not listed on EPA's NPL, the Government's approach to section

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[13] *See, e.g.*, *Mobay Corp. v. Allied Signal, Inc.*, 761 F. Supp. 345, 349 (D.N.J. 1991) (quoting H.R. Rep. No. 1016, at 33 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6136) ("A fundamental policy underlying CERCLA is to accomplish this objective at the primary expense of private responsible parties rather than taxpayers. The House Report explained that the purpose of section 107 of CERCLA is 'to provide a mechanism for prompt recovery of monies expended for the costs of [remedial actions] . . . from persons responsible therefore [sic] and to induce such potentially liable persons to pursue appropriate environmental response actions voluntarily.'").

107 would create the counterproductive and inequitable results described above at many thousands of contaminated sites. Indeed, the Government fails to acknowledge the vital role that CERCLA's contribution scheme plays in encouraging cleanups at a broad range of contaminated sites.

In section 105, Congress directed that CERCLA's remedial scheme, as implemented in the National Contingency Plan, apply whenever a party conducts a cleanup of a contaminated site. 42 U.S.C. § 9605(a) ("Following publication of the revised national contingency plan, the response to and actions to minimize damage from hazardous substances releases shall, to the greatest extent possible, be in accordance with the plan."). Because Congress called on CERCLA to apply "to the greatest extent possible," both EPA and private parties have long relied on, and courts have approved, the use of CERCLA's contribution scheme as the means of providing recovery for parties undertaking cleanups at a broad range of sites beyond those listed on the NPL or otherwise designated as Superfund sites.[14] CERCLA's contribution scheme thus serves as the recovery vehicle for companies cleaning up thousands of sites across the country that are not designated as Superfund sites. As explained below, the Government's reading of section 107 would have devastating consequences across a broad spectrum of sites not addressed in its brief.

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[14] *See, e.g.*, *United States v. Rohm & Haas, Inc.*, 2 F.3d 1265, 1272-75 (3d Cir. 1993) (approving the use of CERCLA's recovery scheme in the context of RCRA sites), *overruled on other grounds*, *United States v. E.I. du Pont de Nemours & Co.*, 432 F.3d 161 (3d Cir. 2005) (*en banc*); *United States v. E.I. du Pont de Nemours & Co.*, 341 F. Supp. 2d 215, 237 (W.D.N.Y. 2004) ("There is nothing in this broadly worded provision to suggest that Congress intended to limit recovery to costs of response actions taken under CERCLA."); *Union Carbide Corp. v. Thiokol Corp.*, 890 F. Supp. 1035, 1044 (S.D. Ga. 1994) ("The overwhelming evidence is that Congress intended CERCLA to be cumulative and not . . . to be limited in its application to formally designated Superfund sites.") (quotations and citation omitted).

To demonstrate the severe negative effects of finding that PRPs are precluded from seeking contribution under section 107, *amici* describe below five important categories of cleanups that would be discouraged and/or delayed if the right of contribution is denied. These are: (1) sites polluted by the Federal Government, (2) brownfields sites, (3) RCRA corrective action sites, (4) Superfund site investigations, and (5) cleanups conducted pursuant to CERCLA section 106 unilateral administrative orders ("UAOs").

1. *Cleanups at Sites Polluted by the Federal Government.*

Perhaps the most dramatic impact of curtailing the right of contribution would be seen at the many thousands of sites that have been contaminated by the departments and agencies of the United States itself. These include not just the thousands of sites actually owned and operated by the United States, but also the many private sites to which the United States contributed waste, including those at issue in this case and those at issue in the pending case of *E.I. du Pont de Nemours & Co. v. United States*, No. 06-726 (petition for certiorari filed on Dec. 27, 2006).

The docket of contaminated sites owned and operated by the Federal Government is staggering.[15] As of 1995, the United States owned and managed half a billion acres of land containing more than 60,000 potentially contaminated sites.[16] Among these sites were former nuclear weapons production facilities, military bases, abandoned mines, landfills, and underground storage tanks. According to the Government itself, the total cleanup cost for these sites was estimated to be at

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[15] *See* H. Comm. on Natural Resources, 103d Cong., *Deep Pockets: Taxpayer Liability for Environmental Contamination* (Comm. Print No. 2 1993).

[16] According to a Government estimate, a total of 60,425 potentially contaminated sites are present on land owned by the Departments of Agriculture, Defense, Energy, and Interior. Federal Facilities Policy Group, *Improving Federal Facilities Cleanup* 17 (Oct. 1995).

least $230 billion in 1995, and might be nearly twice that amount.[17]

Also of enormous significance is the docket of privately-owned sites that have been contaminated in whole or in part from the activities of the Federal Government. These sites include waste oil recycling facilities that primarily served military bases,[18] nuclear fuel processing plants that helped support the Cold War weapons production programs,[19] disposal sites that accepted large volumes of waste from the Government,[20] and industrial sites effectively commandeered by the Federal Government for its war efforts.[21]

EPA and state regulatory agencies seeking to expedite the cleanups at these sites often are unable to sue the federal department or agency that helped to create the problem.[22]

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[17] Government estimates in 1995 ranged from $234 billion to $388 billion in cleanup costs. *Id.*

[18] The Bridgeport Rental and Oil Services Superfund site in Logan Township, New Jersey is a good example. The site included a 13-acre oil lagoon containing high levels of PCBs. Most of the oil originated at the Philadelphia Naval Shipyard.

[19] *See, e.g.*, *Westinghouse Electric Co. v. United States*, No. 4:03CV00861 SNL (E.D. Mo., filed June 26, 2003) (CERCLA complaint seeking contribution for cleanup of radioactive and hazardous contamination at former Hematite nuclear fuel processing plant in Festus, Missouri).

[20] For example, the Stringfellow Acid Pits site near Los Angeles, California counted nearby military installations among its major customers.

[21] *See, e.g.*, *General Motors Corp. v. United States*, No. Civ.A. 01-CV-2201, 2005 WL 548266 (D.N.J. Mar. 2, 2005) (permitting plaintiff to amend complaint to include section 107 contribution claim for 15 industrial sites in various states that the United States allegedly owned or operated during and after World War II, the Korean War, and the Vietnam War in order to satisfy its military needs or which the United States effectively commandeered for its war efforts); *Viacom, Inc, v. United States*, 404 F. Supp. 2d 3 (D.D.C. 2005) (CERCLA contribution action arising out of radiological contamination caused by uranium production by Westinghouse for the Manhattan project).

[22] Contrary to the Government's suggestion, *see* Brief for United States at 44, EPA often is prevented from suing other federal agencies under

Instead, they approach private companies that also share the liability at these sites, hoping the companies will agree to undertake the cleanups themselves. Companies, however, cannot reasonably be expected to perform these massive and costly cleanups absent some mechanism for swiftly obtaining equitable contribution from the United States.

Prior to this Court's decision in *Cooper Industries*, private companies often sought contribution from the United States under section 113. In the wake of *Cooper Industries*, however, they are unable to do so because no prior civil action has been filed under section 106 or 107. As a result, if this Court holds that section 107 also is unavailable to a PRP seeking contribution, private companies would have little incentive to perform these cleanups and EPA and its state agency counterparts would be presented with a Hobson's choice. Because EPA and the states typically cannot sue the responsible federal agencies to compel them to clean up these sites, either these agencies will have to expend scarce resources suing private companies to compel cleanups, thereby burdening the courts with needless claims, or else the cleanup of these sites would be unacceptably delayed. Neither result can be squared with the central purpose of CERCLA.

Yet another disturbing aspect of this scenario is that the Government could, as the Eighth Circuit recognized, "insu-

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CERCLA because the Department of Justice views such cases as conflicts within the Executive Branch that present no justiciable case or controversy under Article III of the Constitution. *See* Tucker, 16 Vill. Envtl. L.J. at 150 ("Although CERCLA clearly designates federal and state agencies as potentially liable 'persons,' the Executive Branch has consistently taken the position that EPA cannot independently enforce CERCLA in the federal courts against federal agency PRPs (federal PRPs), because to do so would violate the Constitution."). States seeking to compel cleanup often are prevented from suing the same federal agencies under state law due to the doctrine of sovereign immunity because CERCLA waives that immunity only at facilities "owned or operated by" federal agencies. 42 U.S.C. § 9620(a)(4). *See FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 839-40 (3d Cir. 1994) (*en banc*).

late itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle." *Atl. Research*, 459 F.3d at 837. Permitting the Government to immunize itself from liability in this fashion "results in an absurd and unjust outcome." *Id.* Indeed, it does nothing less than "eviscerate CERCLA whenever the Government, itself, was partially responsible for a site's contamination."[23] *Id.*

Given the staggering number of contaminated sites owned and operated by the Federal Government and the many private sites at which the Government is responsible for at least some of the contamination, it is vitally important that this Court affirm the judgment of the Eighth Circuit holding that section 107 provides a mechanism for PRPs to recover the Government's equitable share of the cost of cleanup.

2. *Cleanups at Brownfields Sites*.

Curtailing the use of section 107 also would retard cleanup efforts at another important category of sites not addressed in the Government's brief: the many thousands of so-called "brownfields" sites around the country. America today is blighted by hundreds of thousands of sites that are smaller and less contaminated than the Superfund sites listed on EPA's NPL. Indeed, over the next 30 years, between 235,000-355,000 contaminated sites will require some level

[23] The Government contends that such a result is "highly improbable." Brief for United States at 44. To the contrary, this result is precisely what occurred in this case as well as in the pending case of *E.I. du Pont de Nemours v. United States*, No. 06-726 (petition for certiorari filed Dec. 27, 2006). Indeed, EPA consistently has adhered to a practice of refusing to pursue enforcement actions against another constituent element of the Executive Branch. *See* Tucker, 16 Vill. Envtl. L.J. at 150. None of the cases cited by the Government supports its contention that EPA has been able to compel other federal agencies to assume responsibility for cleaning up contaminated sites.

of remediation.[24] Even though more than 90 percent of those sites involve smaller, less complex cleanup projects than those being addressed through the NPL, EPA still projects that cleaning up these sites will cost $170-250 billion.[25] EPA further estimates that "only 10-15 percent of the estimated one-half to one million brownfield sites have been identified," and that "most of the remaining sites have not been identified, primarily because they are vacant or underused and the owners do not wish to become involved in the complicated and costly world of remediation."[26] Despite the devastating impact these sites have on this nation's cities and working-class neighborhoods, federal and state regulators simply will never get around to ordering or performing clean-ups of these sites.

Recognizing that voluntary action by private parties is essential to cleaning up these sites, the federal and state governments have established a host of programs over the past few decades to encourage private industry to undertake brownfields cleanups on a voluntary basis. The most recent of these programs is the Brownfields Revitalization and Environmental Restoration Act of 2001, which provides new incentives to spur brownfields redevelopment. *See* Pub. L. No. 107-118, Tit. II, 115 Stat. 2356 (2002). Other preexisting brownfields programs include enterprise zones and empowerment zones, which feature tax benefits for companies that locate in these distressed areas. The overwhelming governmental response to the challenge of brownfields thus has been to encourage voluntary cleanups and redevelopment.

CERCLA's right of contribution plays a vital role in this effort as it encourages companies to clean up these sites by permitting them to seek contribution from other responsible

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[24] *See* U.S. EPA, *Cleaning Up the Nation's Waste Sites: Markets and Technology Trends 2004 Edition*, EPA 542-R-04-015 (Sept. 2004), at 1-5.

[25] *Id.* at 1-6.

[26] *Id.* at 1-23.

parties and postponing disputes over response costs that otherwise would delay such cleanups. Curtailing the right of contribution thus would eliminate critical incentives for private parties to restore these sites. Such a result would directly undermine Congress's attempt to encourage private parties to voluntarily restore brownfields properties to economic productivity.

3. *Cleanups at RCRA Corrective Action Sites*.

The Government's reading of section 107 also would delay the cleanup of the thousands of contaminated sites being addressed through the corrective action program under Subtitle C of RCRA. The RCRA Subtitle C program includes more than 6,500 industrial facilities that handle or formerly handled hazardous wastes and often are heavily contaminated after decades of industrial operations.[27]

In 1984, Congress mandated that contaminated RCRA facilities undergo "corrective action."[28] Corrective action—another term for cleanup of past contamination—is implemented either through RCRA permits or through RCRA administrative orders on consent which are issued to the site owners by state environmental regulatory agencies.[29] After a RCRA permit or order is issued, site owners may seek to challenge the cleanup plans selected by the agencies, or

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[27] *See* U.S. EPA, *Corrective Action: Basic Information*, http://www.epa.gov/epaoswer/hazwaste/ca/backgnd.htm#4 (last updated Feb. 22, 2006).

[28] Section 3004(u) of RCRA provides that permits issued after enactment of the 1984 Amendments "shall require corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit." 42 U.S.C. § 6924(u).

[29] *See* U.S. EPA, *Corrective Action: Basic Information*, http://www.epa.gov/epaoswer/hazwaste/ca/backgnd.htm#6 (last updated Feb. 22, 2006).

instead may choose to perform the work without objection. As a practical matter then, because RCRA corrective action cleanups typically take a decade or longer to complete, the efficient cleanup of these sites depends critically upon the cooperative efforts of site owners.

The right to contribution also is particularly important under RCRA, because RCRA generally imposes cleanup obligations only on the *current* owners of facilities. However, because many RCRA facilities typically have been operated successively by two or more companies over many decades, it is common that a *previous* owner contributed some or even most of the contamination. As a result, site owners performing corrective action under RCRA often seek contribution from other parties. Although RCRA itself contains no express provision for contribution, courts have approved the use of CERCLA to recover costs incurred in cleaning up RCRA corrective action sites. *See, e.g.*, *Rohm & Haas, Inc.*, 2 F.3d at 1272-75; *Union Carbide*, 890 F. Supp. at 1044.

Prior to this Court's decision in *Cooper Industries*, site owners often used section 113 of CERCLA as a vehicle for obtaining contribution. In the wake of *Cooper Industries*, however, they are unable to do so because these cleanups are performed under RCRA permits or orders on consent and thus no prior "civil action" under sections 106 or 107 exists that could trigger contribution under section 113. Thus, the only available mechanism for vindicating the right of contribution is section 107. Absent the ability to seek contribution from other responsible parties, the pace of cleanup at these sites would inevitably be delayed, a result the Government does not even address.

4. *Superfund Site Investigations*.

Curtailing the right of contribution also would prevent a responsible company from seeking equitable contribution toward the often considerable costs of investigating the nature and extent of contamination at a Superfund site and deter-

mining the most appropriate method of cleanup. These site studies, collectively referred to as a Remedial Investigation and Feasibility Studies ("RI/FS"), *see* 40 C.F.R. § 300.430 (2006), are essential to the development and selection of an appropriate cleanup plan, regardless of who will perform the actual cleanup. Typically, RI/FS take years to perform and cost millions of dollars.

Significantly, companies often perform these studies at an early stage in a site's history, long before the commencement (if any) of CERCLA litigation. EPA typically requires that the parties performing RI/FS to sign an administrative order on consent, issued under section 104 of CERCLA, which governs the performance of the work. *See* 42 U.S.C. § 9604. Prior to this Court's decision in *Cooper Industries*, responsible parties often sought contribution under section 113(f)(1) toward the costs of such studies. In the wake of *Cooper Industries*, however, that avenue is no longer available because such studies typically are performed long before any civil action is filed under section 106 or 107 (if any such action is ever filed).[30]

Thus, section 107 remains the only avenue for a responsible party to seek contribution toward the cost of performing the RI/FS. Absent that remedy, companies will be much less willing to perform these critical studies, pursuant to administrative orders on consent or otherwise. Either EPA will have to expend more of its limited resources to persuade and, if necessary, force companies through litigation to do the work, or the work will be unacceptably delayed. Neither

[30] Some parties thus have sought contribution under section 113(f)(3)(B) instead. To date, however, these efforts have been unsuccessful. The lower courts have ruled that EPA administrative orders on consent do not qualify as CERCLA "settlements" that trigger contribution rights under section 113(f)(3)(B). *See, e.g.*, *ITT Industries, Inc. v. BorgWarner, Inc.*, No. 1:05-CV-674, 2006 WL 2460793 (W.D. Mich. Aug. 23, 2006); *Pharmacia Corp. v. Clayton Chemical Acquisition LLC*, 382 F. Supp. 2d 1079 (S.D. Ill. 2005).

result comports with CERCLA's overriding objective. Yet the Government's brief fails to address the problems that would flow from its reading of section 107.

5. *Cleanups at Sites Addressed Under Section 106 Unilateral Administrative Orders.*

Finally, curtailing the right of contribution also would discourage and delay cleanups at another major category of sites not considered by the Government. These are the sites where EPA decides to issue unilateral administrative orders under section 106 of CERCLA to compel the performance of cleanup work. Denying contribution in these situations would be particularly illogical, unfair, and contrary to the goals of CERCLA.

For more than two decades, EPA has made extensive use of its authority to issue UAOs under section 106, issuing over 1,500 such orders to date. Because these orders carry extreme enforcement sanctions, including significant daily penalties and treble damages for noncompliance, they are exceptionally potent weapons. *See* 42 U.S.C. §§ 9606(b)(1), 9607(c)(3); 69 Fed. Reg. 7121 (Feb. 13, 2004). For this reason, EPA has described its authority to issue UAOs as a "unique" and "particularly effective enforcement tool, especially when compared to the penalties for noncompliance available under other [environmental] statutes." U.S. EPA/DOJ Memorandum, *Use of CERCLA § 106 to Address Endangerments That May Also Be Addressed Under Other Environmental Statutes* (Jan. 18, 2001), at 7, 9. Indeed, EPA has recognized that its authority to issue UAOs "is one of the most potent administrative remedies available under any existing environmental statute." U.S. EPA, *Guidance Memorandum on Use and Issuance of Administrative Orders Under Section 106(a) of CERCLA* (Sept. 8, 1983), at 2.

In employing UAOs to compel cleanups, EPA often has issued orders to companies that bear a relatively small share of responsibility for the contamination found at a site. In the

past, companies that performed cleanups under these orders were able to use section 113 to seek equitable contribution from others who were not named by EPA, or who were named but refused to comply. In the wake of *Cooper Industries*, however, several courts have held that contribution claims under section 113 are not available to recipients of section 106 orders.[31] *See, e.g.*, *Pharmacia Corp*, 382 F. Supp. 2d at 1087 (dismissing contribution claim under section 113(f)(1) where plaintiff incurred cleanup expenses in response to UAO because "administrative orders do not qualify as a civil action under section 113(f)(1)"); *Blue Tee Corp. v. ASARCO, Inc.*, No. 03-5011, 2005 U.S. Dist. LEXIS 15360, at *12 (W.D. Mo. June 27, 2005) (dismissing contribution claim after determining there was no "civil action" because plaintiff conducted the cleanup under a UAO). Thus, section 107 may now be the only available mechanism to vindicate the right of contribution. As such, denying PRPs their statutory right to seek contribution under section 107 would be particularly harsh and unfair, especially for companies that already have incurred tremendous expenses cleaning up sites pursuant to section 106 orders. *See Akzo Coatings v. Aigner Corp.*, 30 F.3d 761, 769 (7th Cir. 1994) ("To subsequently preclude a compliant party from seeking contribution for the sums it has expended simply because it had the misfortune to be drafted by the EPA before a remedial plan could be prepared and a settlement negotiated will not expedite cooperative environmental remediation.").

It also would create a cruel dilemma for companies receiving future section 106 orders. If a PRP complies with the UAO, then under *Cooper Industries* it may forfeit the right to seek equitable contribution under section 113. If a PRP defies a UAO, then EPA can perform the cleanup itself

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[31] In *Cooper Industries*, the Court explicitly left open whether an administrative order under section 106 "would qualify as a 'civil action'" as required by section 113(f). 543 U.S. at 168 n.5.

and seek treble damages, plus fines amounting to nearly $12 million per year. Such a dysfunctional and perverse scheme is not the one enacted or intended by Congress.[32]

It may be suggested that the impact of denying contribution rights under section 107 in this context is lessened because the recipients of these UAOs could regain their lost contribution rights by requesting that EPA "convert" those orders into consent decrees under section 107, which would trigger the right to seek contribution under section 113. This approach would entail EPA first suing a UAO recipient under section 107, thereby triggering its contribution rights under section 113, and then simultaneously filing with the court a consent decree to resolve the new "litigation."

This convoluted approach has numerous flaws, and cannot possibly be what Congress intended. First, the recipient of an order may only request—not compel—EPA to "convert" its section 106 order into a consent decree. EPA may simply refuse, and the UAO recipient has no further recourse to save its contribution claim other than not complying with the UAO (with attendant exposure to daily penalties and treble damages). Second, EPA may agree to the "conversion" only in exchange for additional concessions, such as reimbursement of EPA's claimed past costs. Those costs may be substantial, and may be poorly documented and of questionable validity.

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[32] In addition, curtailing the use of section 107 as suggested by the Government would create the anomalous and potentially constitutionally-infirm situation where EPA's issuance of a UAO effectively would deny a PRP the ability to present a meaningful contribution claim, especially if a government agency was a contributor to the contamination. In practical terms, EPA would be able to extinguish the substantive right of contribution through unaccountable and unreviewed administrative action, and thus, at certain sites, immunize the United States from liability for its own contribution to the contaminated site. This prospect raises potentially constitutionally significant issues. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

Third, the standard EPA consent decree for Superfund cleanups includes waivers of significant legal rights, which should not be a prerequisite to exercising the right to seek equitable contribution. Fourth, even if EPA and the responsible parties were in complete agreement and wished to "convert" a section 106 order into a section 107 consent decree, doing so would burden the district courts with new section 107 complaints filed for the sole purpose of enabling parties that already are performing cleanups to exercise their statutory right to seek equitable contribution from other parties. Such litigation would be a waste of scarce judicial, administrative, and private sector resources. Curtailing the right of contribution under section 107 thus inevitably would discourage and delay cleanups under section 106 orders.

To summarize, the Eighth Circuit's decision recognizing the right of PRPs to seek equitable contribution under section 107 should be affirmed. The Government's constrained reading of section 107, on the other hand, contradicts EPA's duly-promulgated regulations interpreting that provision, as well as EPA's long-standing policy of encouraging private parties to initiate cleanups in order to fulfill CERCLA's broad remedial purpose.

Moreover, the Government's reading of section 107 would discourage or delay cleanups at many thousands of contaminated sites around the country. At sites polluted by the Federal Government, private parties would have no incentive to shoulder the burden of cleanup and would instead wait to be sued under CERCLA. As a result, the options for EPA and its state counterparts boil down to more litigation or slower cleanups—or both. Similarly, companies will not voluntarily clean up brownfields sites for fear that they will have no right to recoup their costs from others. Moreover, owners at RCRA corrective action sites would be reluctant to begin performing multi-year cleanups under permits or administrative orders, and would have no incentive to maintain the pace of those cleanups once they were underway. Com-

panies involved at Superfund sites may decline to perform RI/FS, ultimately delaying cleanup of those sites. Finally, companies that receive section 106 orders from EPA would face a difficult dilemma, as the penalties for defying a UAO are severe and complying with a section 106 order may risk forfeiting the right to seek contribution under section 113.

In each of these contexts, restricting the right of contribution under section 107 would have extremely detrimental consequences and would undermine the incentives for private sector cooperation that EPA has leveraged so successfully. These results fly in the face of what Congress sought to achieve by enacting—and amending—CERCLA. The sheer magnitude of these consequences underscores the need for this Court to consider how its decision will impact not just the particular sites at issue in this case, but also the many thousands of sites around the country where it is absolutely necessary that parties initiating a voluntary cleanup be able to seek contribution from other liable parties. Accordingly, *amici curiae* urge this Court to affirm the decision of the Eighth Circuit.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the brief of respondent, the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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