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

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF CALIFORNIA WATER AGENCIES, NATIONAL ASSOCIATION OF WATER COMPANIES, CALIFORNIA WATER ASSOCIATION, CALIFORNIA STATE ASSOCIATION OF COUNTIES, CASTAIC LAKE WATER AGENCY, SAN GABRIEL BASIN WATER QUALITY AUTHORITY, AND MAIN SAN GABRIEL BASIN WATERMASTER IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

The *amici curiae* are associations of public agencies, publicly regulated water utilities, and individual public agencies that – either directly or indirectly – manage water supplies and provide water to other water agencies or end users. The *amici* or their members are involved, or may become involved, in efforts to clean up groundwater resources contaminated by hazardous substances. A number of the *amici* or their members are involved in litigation under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in conjunction with their respective roles in the management of water supplies and provision of water to other water agencies or end users.

The *amici* are as follows:

The Association of California Water Agencies is an association with a membership of 450 public water agencies. Member agencies are collectively responsible for 90 percent of the water delivered to cities, farms, and businesses in California.

The National Association of Water Companies (NAWC) represents all aspects of the private water service industry. NAWC members own regulated drinking water and wastewater utilities, are party to public-private partnerships, and have management contract arrangements.

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

The California Water Association (CWA) represents the interests of approximately 140 investor-owned water utilities that are regulated by the California Public Utilities Commission. CWA members provide water utility services to nearly six million people throughout California.

The California State Association of Counties represents all 58 county governments in California before the California Legislature, administrative agencies, and the federal government.

Castaic Lake Water Agency (CLWA) is a public water agency that serves an area of 195 square miles in Los Angeles and Ventura Counties. CLWA supplements local groundwater supplies with State Water Project water from northern California and provides water to the Santa Clarita Valley through four purveyors: Los Angeles County Water District #36, Newhall County Water District, CLWA Santa Clarita Water Division, and Valencia Water Company. As a result of the detection of perchlorate contamination in its groundwater wells, CLWA has incurred response costs and is engaged in litigation to recover those response costs.

The San Gabriel Basin Water Quality Authority (WQA) is a political subdivision of the State of California. The Legislature created WQA to protect the public health and safety by planning, financing, constructing and/or operating groundwater extraction and treatment projects to be carried out in the San Gabriel basin, to provide potable water for beneficial uses in the basin, and to contribute to the basin-wide remedial objectives established by state and federal agencies. WQA has incurred response costs to treat and remediate the contaminated groundwater in the San Gabriel basin, and has sued

parties responsible for the contamination to recover such costs.

The Main San Gabriel Basin Watermaster is the agency charged with administering adjudicated water rights and managing groundwater resources within the watershed and groundwater basin known as the Main San Gabriel Basin. The Watermaster was created in 1973 by the California Superior Court of Los Angeles County to administer the Basin's adjudicated water rights and to provide a basin-wide governing body for management of water resources.

SUMMARY OF ARGUMENT

Section 107(a) of CERCLA creates a right of action that is available to any person other than the United States, a State, or an Indian tribe against responsible parties for necessary costs of response incurred consistent with the National Contingency Plan (NCP). The text of section 107(a) resolves the issue before the Court. In any event, the availability of a broad right of action under section 107(a) furthers the public interest by allowing water purveyors to clean up contaminated groundwater resources and then recover cleanup costs from polluters.

A. Section 107(a)(1)-(4)(B) states that covered persons that are unable to invoke an affirmative defense set forth in section 107(b) shall be liable for necessary costs of response incurred by "any other person" consistent with the NCP. The phrase "any other person" refers to any person other than those persons referred to in section 107(a)(1)-(4)(A), that is, the United States, a State, or an Indian tribe. This interpretation is consistent with lower

court precedent, the position advanced by the United States until the Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), and relevant rules of grammar. Furthermore, Congress did not affect the scope of the remedy in section 107(a)(1)-(4) when it amended CERCLA in 1986 and added section 113(f)(1).

B. The right of action contained in section 107(a) serves the public interest by allowing water purveyors to clean up contaminated groundwater resources and then seek to recover their cleanup costs from polluters. Groundwater is a critical resource in California and elsewhere, and groundwater contamination is a significant, widespread problem. Water purveyors play an important role in the cleanup of groundwater contamination; they frequently are both the first responders to groundwater contamination and the parties expected to establish and oversee cleanup efforts with limited federal or state involvement. Although water purveyors may be adjudged innocent parties when they seek to recover response costs, polluters have argued that water purveyors contribute to contamination because, *inter alia*, they own and operate wells. A broad right of action will allow water purveyors to focus on their roles as first responders and their mission of providing water of sufficient quantity and quality to their customers without fear that cleanup costs incurred cannot be recouped from polluters.

ARGUMENT

THE LOWER COURT PROPERLY INTERPRETS SECTION 107(a) OF CERCLA TO PROVIDE A RIGHT OF ACTION TO SO-CALLED RESPONSIBLE PARTIES

A. Section 107(a)(1)-(4)(B) Creates a Right of Action that Is Available to Any Person Other than the United States, a State, or an Indian Tribe

This Court has made plain that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Accord *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (holding that "when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms"). The language of section 107(a) of CERCLA is clear on its face; it creates a right of action that is available to any person other than the United States, a State, or an Indian tribe in certain prescribed circumstances.

Section 107(a) of CERCLA provides rights of action to certain specified parties under certain circumstances. Section 107(a) states, *inter alia*, as follows:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section –
>
> (1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, *shall be liable for* –

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) *any other necessary costs of response incurred by any other person* consistent with the national contingency plan . . .

42 U.S.C. § 9607(a)(1)-(4)(A) & (B) (emphasis added).

The phrase "any other person" included in section 107(a)(1)-(4)(B) plainly encompasses so-called responsible parties.[2] In context, there is no question that the modifier

[2] The terms "potentially responsible party" and "PRP" are not used herein because they may be misunderstood; whereas in plain English

(Continued on following page)

"other" refers to *any person* other than those persons referred to in section 107(a)(1)-(4)(A), that is, the United States, a State, or an Indian tribe. This interpretation, which relies on the language of the statute itself, is consistent with Court of Appeal precedent.[3] Moreover, prior to this Court's decision in *Aviall*, the United States consistently advanced this same interpretation in this Court.[4]

The word "other" is used in the same section of CERCLA to modify the term "any [ ] necessary costs of response." 42 U.S.C. § 9607(a)(1)-(4)(B). Just as the phrase

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they connote culpability, in the CERCLA context they do not necessarily do so. *E.g.*, *Consolidated Edison Company of New York, Inc. v. UGI Utilities, Inc.*, 423 F.3d 90, 97 n.8 (2d Cir. 2005). Instead, the term responsible party is used to describe persons covered by section 107(a)(1)-(4).

[3] See, *e.g., Atlantic Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006), *cert. granted,* 127 S. Ct. 1144 (Jan. 19, 2007) ("We have held that 'any other person' means any person other than the statutorily enumerated 'United States Government or a State or an Indian tribe.' " (citing *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 936 n. 9 (8th Cir. 1995))); *Consolidated Edison Company of New York, Inc. v. UGI Utilities, Inc.*, 423 F.3d 90, 99 (2d Cir. 2005) ("Section 107(a) makes its cost recovery remedy available, in quite simple language, to *any* person that has incurred necessary costs of response, and nowhere does the plain language of *section 107(a)* require that the party seeking necessary costs of response be innocent of wrongdoing." (emphasis in original)); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997), *cert. denied,* 524 U.S. 937 (1998) ("Under the literal language of § 107, the Pinal Group, as a PRP, is partly responsible for its cleanup costs and as 'any other person' under § 107, can also hold other PRPs liable for a portion of those same costs.").

[4] See, *e.g.*, Amicus Brief for the United States at 20-21, *Cooper Industries, Inc. v. Aviall Services., Inc.*, 543 U.S. 157 (2004) ("Section 107(a)(1)-(4)(B)'s reference to 'any person' is broad enough to allow one jointly liable party to sue another for the former's response costs"); Amicus Brief for the United States at 10, 14, *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997), *cert. denied,* 524 U.S. 937 (1998) (same).

"any other person" refers to section 107(a)(1)-(4)(A), the phrase "any other . . . costs" refers to section 107(a)(1)-(4)(A). See, *e.g., Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 891 (9th Cir. 1986) ("The word 'other' . . . reasonably functions to distinguish between government response costs in part (A) and private response costs in part (B).").[5] It would be incongruous to interpret the two phrases differently.

Nonetheless, the United States now contends that the phrase "any other person" in section 107(a)(1)-(4)(B) does not refer to any person other than those referred to in section 107(a)(1)-(4)(A). Instead, the United States advances the novel argument that the phrase "any other person" in section 107(a)(1)-(4)(B) refers to any person other than those referred to in section 107(a)(1)-(4). See Brief for the United States at 15, *Atlantic Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006), *cert. granted,* 127 S. Ct. 1144 (Jan. 19, 2007). This argument is contrary to basic rules of grammar. Where, as here, the apposite phrase may refer either to the immediately preceding phrase or to a phrase that appears earlier in the sentence, rules of grammar provide that the apposite phrase refers to the immediately preceding phrase. See William Strunk, Jr. & E.B. White, *The Elements of Style* 28 (4th ed. 2000) ("The position of words in a sentence is the principal

[5] The United States agrees with the interpretation of the phrase "any other necessary costs of response" articulated herein. See Brief for the United States at 20, *Atlantic Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006), *cert. granted,* 127 S. Ct. 1144 (Jan. 19, 2007) ("Section 107(a)(1)-(4)(B) permits recovery only for 'any other necessary costs of response . . . consistent with the national contingency plan' – *i.e.*, costs other than the government's costs as specified in Section 107(a)(1)-(4)(A).").

means of showing their relationship. . . . The writer must, therefore, bring together the words and groups of words that are related in thought and keep apart those that are not so related.").

B. Section 113(f)(1) Does Not Affect the Scope of the Right of Action Provided by Section 107(a)(1)-(4)(B)

When Congress amended CERCLA in 1986 (via the Superfund Amendments and Reauthorization Act or SARA, Pub. L. No. 99-499, 100 Stat. 1616) and added section 113(f)(1), 42 U.S.C. § 9613(f)(1), it neither reduced nor expanded the class of persons that have a right of action under section 107(a)(1)-(4)(B), 42 U.S.C. § 9607(a)(1)-(4)(B). Section 113(f)(1) states, as follows:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C. § 9613(f)(1). Section 113(f)(1) does not, by its express terms, extinguish the availability of a right of action under section 107(a)(1)-(4)(B) to any person or persons.

Furthermore, this Court has established a strong presumption against implied repeals.[6] Nevertheless, the United States argues that, by implication, section 113(f)(1) extinguishes the availability of a right of action under section 107(a)(1)-(4)(B) to persons who are responsible parties (*i.e.*, to persons that fall within section 107(a)(1)-(4) of CERCLA) and who have not been sued under section 106 or 107(a) of CERCLA.[7] Brief for the United States at 26, *Atlantic Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006), *cert. granted,* 127 S. Ct. 1144 (Jan. 19, 2007) (stating that section 113(f)(1) "delineates the exclusive circumstances under which one private PRP may bring a suit against another under CERCLA"). The United

[6] *Morton v. Mancari*, 417 U.S. 535, 549-50 (1974) (noting the cardinal rule that repeals by implication are not favored and stating that "the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable" (citation omitted)); see also *Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion) ("We have repeatedly stated . . . that absent a clearly established congressional intention, repeals by implication are not favored. An implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." (internal quotation marks and citations omitted)).

[7] In support of this argument, the United States cites *United States v. Fausto*, 484 U.S. 439 (1988), in which this Court held that the Civil Service Reform Act ("CSRA") precludes judicial review of personnel actions based on the Back Pay Act. But *Fausto* is readily distinguishable from the present matter on two grounds. First, whereas the CSRA is a comprehensive statute that overhauls the entire civil service system including the process for reviewing personnel action taken, *Fausto*, 484 U.S. at 443, 455, SARA is a set of specific, tailored amendments to CERCLA. Second, whereas this Court held that the CSRA does not repeal the Back Pay Act and only affects the judicial interpretation of that Act, the United States is asking this Court to alter the text of section 107(a)(1)-(4)(B) and thereby repeal that provision to the extent it provides a right of action to responsible parties.

States fails to provide sufficient grounds to depart from the language of the statute and well-established canons of interpretation.

In light of the plain language of CERCLA, there is no need to consult the legislative history. See, *e.g.*, *Lamie v. United States Trustee*, 540 U.S. at 534, 539. But the legislative history of section 113(f) of CERCLA clarifies that Congress did not intend to limit the scope of the right of action set forth in section 107(a)(1)-(4)(B). Instead, Congress sought to confirm the availability of a right of action in the nature of contribution to defendants in CERCLA actions and persons that settle with the Environmental Protection Agency (EPA) or a State. See, *e.g.*, S. Rep. No. 99-11, at 43 (1985) (indicating that section 113(f)(1) "clarifies and confirms existing law governing liability of potentially responsible parties"); H.R. Rep. No. 99-253, pt. I, at 79 (1985) (indicating that section 113(f)(1) "clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties."); 131 Cong. Rec. 34,645 (Dec. 5, 1985) (indicating that section 113(f)(1) "simply clarifies and emphasizes that persons who settle with EPA (and who are therefore not sued), as well as defendants in CERCLA actions, have a right to seek contribution from other potentially responsible parties."). There was consensus in Congress regarding the availability of a right of action under section 107(a)(1)-(4)(B); the legislative history demonstrates Congressional desire to confirm that remedy through enactment of section 113(f)(1). There is no basis for a claim that, by enacting section 113(f)(1), Congress sought to reduce the class of persons that have a right of action under section 107(a)(1)-(4)(B).

THE BROAD RIGHT OF ACTION IN SECTION 107(a) SERVES THE PUBLIC INTEREST BY ALLOWING PUBLIC AND PRIVATE WATER MANAGERS AND PROVIDERS TO CLEAN UP CONTAMINATED GROUNDWATER RESOURCES AND THEN RECOVER CLEANUP COSTS FROM POLLUTERS

Water is the natural resource that has had the most significant influence on the growth of the State of California for more than a century. The importance of surface water supplies is widely understood due to well-known political and economic battles over such supplies, for example, the controversy stemming from the damming of the Hetch Hetchy Valley in Yosemite National Park in the early 20th century to provide water to San Francisco. See Roderick Frazier Nash, *Wilderness and the American Mind* 161-181 (4th ed. 2001). Groundwater supplies also are critical to the vitality of the State and are the source of approximately 30 percent of average annual water deliveries in California. State Water Resources Control Board, *Report to the Governor and Legislature: A Comprehensive Groundwater Quality Monitoring Program for California* 1 (2003); California Department of Water Resources, *The California Water Plan Update Bulletin 160-98* at ES3-5 (1998).

Of course, the importance of water is not limited to California or to the western United States for that matter. But consciousness of the dependence on water is heightened in California and other western states because of the magnitude of the demand for water coupled with the disjuncture between the loci of available supplies and the loci of consumers. When layers of complexity – such as species recovery efforts, long-term sustenance of groundwater aquifers, and climate change – are brought to the

forefront, it should not be difficult to understand why Westerners are concerned about their water.

A multitude of public and private entities are involved in the management of water supplies and provision of water to other water agencies or end users. *Amici* are leading representatives of those entities. Most public and private water managers and providers in California were established to secure adequate water supplies and ensure sufficient water quality to meet the demands of their constituents or customers. Over the past 25 years, a substantial number of those managers have also been forced to address contamination of water supplies, specifically groundwater contamination, to secure continued adequate and safe water supplies for their constituents or customers.

A. Groundwater Contamination Is a Significant, Widespread Problem

Groundwater contamination is a pervasive problem in California. *E.g.*, Anthony Saracino & Harrison Phipps, *Groundwater Contaminants and Contaminant Sources* 1 (Cal. Dept. of Health Services 2002) (indicating that more than 4,000 public water wells in California were taken out of service due to groundwater contamination between 1984 and 2001); Alex N. Helperin et al., *California's Contaminated Groundwater* viii (Natural Resources Defense Council 2001). Statewide, between 5 and 42 percent of existing public water supply wells sampled exceed one or more drinking water standards. California Department of Water Resources, *California Water Plan Update 2005* at 4-1537 (2005).

In addition to the fact that instances of contamination are commonplace, a number of groundwater basins that provide important water sources for populated areas are plagued by significant contamination. For example, the San Gabriel groundwater basin, which is located approximately 10 miles east of Los Angeles and provides water for more than 1,000,000 residents, is included on the Environmental Protection Agency's National Priorities List (NPL) of high priority contaminated sites.[8] Numerous chemicals contaminate the San Gabriel basin, and the area of contamination covers more than 30 square miles.[9]

B. Public Water Agencies and Publicly Regulated Water Utilities Play an Important Role in the Cleanup of Groundwater Contamination

Under the California Constitution and state statutes, public agencies must maximize the reasonable and beneficial use of available water resources.[10] Cal. Const. art. X,

[8] 40 C.F.R. Pt. 300, App. B, Table 1; U.S. Environmental Protection Agency, San Gabriel Valley (All Areas), California, EPA ID# CAD980818579, available at http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/vWSOAlphabetic?OpenView.

[9] U.S. Environmental Protection Agency, Water, Water Everywhere . . . Finally a Drop to Drink, available at http://www.epa.gov/superfund/accomp/success/pdf/sangabriel.pdf.

[10] In addition, California law requires public water agencies to assess and verify their ability to meet projected water demand over a 20-year period. Cal. Water Code §§ 10910 *et seq*.; Cal. Gov't Code §§ 66493 *et seq*.; Cal. Water Code §§ 10610 *et seq*. California caselaw holds that, in meeting these obligations, public water agencies cannot rely on contaminated water sources. *Friends of the Santa Clara River v. Castaic Lake Water Agency*, 123 Cal. App. 4th 1 (2004) (invalidating an Urban Water Management Plan for not adequately addressing both the time needed to implement the available method for treating contaminated water and the reliability of the groundwater supply prior to

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§ 2; Cal. Water Code § 100. In addition, public water agencies and publicly regulated water utilities must meet federal and state drinking water requirements. See, *e.g.*, Safe Drinking Water Act, 42 U.S.C. §§ 300f-330j-26; California Safe Drinking Water Act, Cal. Health & Safety Code, §§ 116270-116293; Cal. Code Regs. tit. 22, §§ 64400-64483; Cal. Pub. Util. Code § 770. These federal and state legal requirements and the responsibility to provide safe and reliable water supplies to the public generally foreclose public agencies and utilities from waiting for a determination of liability before acting to protect water supplies. For this reason, public water agencies (and other regional or local public agencies) and utilities frequently assume responsibility to address groundwater contamination that threatens public water supplies or public health and safety more generally. Such agencies and utilities (collectively referred to as "water purveyors") often are both the first responders to groundwater contamination and the parties expected to establish and oversee cleanup efforts with limited federal or state involvement. This arrangement is sensible in light of the familiarity of water purveyors with the context in which they operate and their responsibilities to the public.

By acting to protect groundwater resources as well as public health and safety, water purveyors assume considerable risk that they will not be reimbursed for cleanup activities by those ultimately responsible for

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completion of treatment); see also Cal. Water Code § 10634 ("The plan shall include information, to the extent practicable, relating to the quality of existing sources of water available to the supplier . . . and the manner in which water quality affects water management strategies and supply reliability.").

contamination. The availability of a broad right of action under section 107(a)(1)-(4)(B) of CERCLA is an important tool to address hazardous contamination and thereby limit the risk that water purveyors must accept when initiating response actions to clean up contaminated groundwater supplies.

For the most part, water purveyors, which manage water supplies and provide water to other water purveyors and end users, do not cause or contribute to groundwater contamination. For this reason, such water purveyors may be adjudged innocent parties that have a right of action under section 107(a)(1)-(4)(B) under the interpretation of that provision advanced by either party to this lawsuit. But parties that do cause or contribute to groundwater contamination (*i.e.*, polluters) have argued that water purveyors fall within the broad definition of responsible parties established by CERCLA. For example, polluters have argued that water purveyors are responsible parties because they operate wells that result in the migration of contamination.

The availability of a right of action under section 107(a)(1)-(4)(B) of CERCLA to water purveyors, irrespective of their status as innocent or responsible parties for the purposes of CERCLA, provides these water purveyors with a powerful tool to seek reimbursement for response costs incurred consistent with the National Consistency Plan (NCP), 40 C.F.R. Pt. 300. The availability of such a right of action also can function to bring polluters to the table to seek compromise regarding allocation of groundwater cleanup costs without resort to litigation.

C. EPA's Ability to Ensure the Cleanup of Contaminated Groundwater Is Constrained

Due to EPA's limited resources and the extent of hazardous contamination nationwide, EPA can only exercise oversight and take enforcement action with respect to an extremely small proportion of instances of hazardous contamination. There are an estimated 450,000 contaminated sites nationwide. S. Rep. No. 107-2 at 15 (2001). Fewer than 1250 of these 450,000 sites are NPL sites. 40 C.F.R. Pt. 300, App. B. Even with respect to NPL sites, such as the San Gabriel Groundwater Basin referenced above, EPA's role reflects its limited resources.

The role of water purveyors in addressing groundwater contamination is consistent with an underlying goal of CERCLA to facilitate cleanups with little or no Federal or State involvement. Their efforts also are consistent with the NCP, which includes an entire subpart regarding cleanup by persons other than governments. 40 C.F.R. § 300.700; see also 58 Fed. Reg. 54,702, 54,725 (Oct. 22, 1993) ("The focus of this subpart is on those authorities that allow persons other than governments to respond to releases and to recover necessary response costs."). Where water purveyors play a prominent role in cleanup of contaminated groundwater, EPA can husband its resources and minimize its involvement.

EPA has – at least as a practical matter – typically taken the position that water purveyors involved in cleanup of groundwater contamination are not responsible parties. As a result, EPA neither files administrative or judicial enforcement actions against water purveyors, nor enters into settlements with them that would trigger

section 113(f)(1) or (f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(1), (f)(3)(B).

D. Specific Cases Are Representative of the Larger Problem

1. The Castaic Lake Litigation

In 1997, four public and private water purveyors to the north of Los Angeles discovered perchlorate contamination in the groundwater wells used to supply drinking water to their customers. The water purveyors shut down those wells due to the contamination, which limited the ability of those purveyors to provide drinking water to their customers. At the same time, the water purveyors took action to address the groundwater contamination. Though EPA was notified of the contamination, to date EPA has not overseen the cleanup effort. California, through the Department of Toxic Substances Control (DTSC), has exercised oversight. In 2003, the water purveyors entered into an Environmental Oversight Agreement with DTSC to ensure that the remediation is consistent with the NCP.

The water purveyors contended that the source of the contamination was the former Whittaker Bermite facility located in Santa Clarita, California. The Whittaker Bermite facility covers approximately 1,000 acres and was formerly owned by Whittaker Corporation. Whittaker – a defense-based industrial corporation – manufactured ammunition, flares, detonators, and related explosive products from at least 1943 to 1987.

The water purveyors affected by the contamination – CLWA, Newhall County Water District, Santa Clarita Water Company and Valencia Water Company – filed a

complaint in the United States District Court for the Central District of California against Whittaker and the current owners and operators of the Whittaker Bermite facility, that is, Santa Clarita LLC and Remediation Financial, Inc. (collectively "Whittaker").[11] The water purveyors assert that hazardous substances released from the Whittaker Bermite facility contaminated their water production wells.

Whittaker filed a counter-claim against the water purveyors. In its counter-claim, Whittaker argued that the water purveyors are liable for contribution because they owned groundwater wells that are "facilities" as defined by CERCLA. Because hazardous substances passively migrated to the water purveyors' wells, Whittaker argued that a release occurred at those wells for purposes of determining CERCLA liability.

In July 2002, the water purveyors moved the court for partial summary judgment to establish Whittaker's liability for response costs under CERCLA. At the same time, Whittaker moved the Court to establish the water purveyors' liability under CERCLA. In July 2003, the district court granted in part the water purveyors' motion. The court ruled that Whittaker is liable for the response costs incurred by the water purveyors that are necessary and consistent with the NCP. *Castaic Lake Water Agency v. Whittaker Corporation*, 272 F. Supp. 2d 1053, 1069 (C.D. Cal. 2003). At the same time, the court ruled that the water purveyors' groundwater wells are "facilities" as defined by CERCLA. *Id*. at 1077. Citing *ABB Industrial*

[11] Neither EPA nor the State of California has filed an enforcement action against the defendants in this action.

Systems, Inc. v. Prime Technology, Inc., 120 F.3d 351, 358 (2d Cir. 1977) and *United States v. CDMG Realty Co.*, 96 F.3d 706 (3d Cir. 1996), the court further concluded that the passive migration of contamination into the water purveyors' wells constituted a "release" within the meaning of 42 U.S.C. § 9601(22). *Id*.

This ruling exposes water purveyors to liability under CERCLA merely for owning groundwater wells used to supply drinking water to their customers. The ruling shifts the burden of proof to water purveyors, requiring them to prove they can invoke one of CERCLA's limited affirmative defenses, such as the innocent landowner defense. To establish this defense, the district court found that a water purveyor must prove: (1) that the release or threat of release of hazardous substances was caused solely by the acts of a third party, (2) that the third party was not an employee or agent of the water agency, and (3) that the water agency exercised due care with respect to the hazardous substances and took precautions against foreseeable third-party acts or omissions. *Castaic Lake Water Agency*, 272 F. Supp. 2d at 1079-80.

In *Castaic Lake Water Agency*, Whittaker argued that the water purveyors were not protected by the innocent landowner defense. In support of this argument, Whittaker asserted that, by pumping groundwater production wells, the water purveyors helped draw the contamination toward the wells. Whittaker further argued that the water purveyors should have "done more" to mitigate groundwater resource problems and taken greater care in the siting of their wells.

The district court ultimately concluded that the water purveyors presented evidence sufficient to create a genuine issue of fact as to whether the purveyors exercised due care, and whether the releases at their wells were caused solely by third party acts. *Id*. at 1080-83. In support of its conclusion, the district court found that the water agencies presented evidence that they had neither used the hazardous substances at issue nor had knowledge of the contamination at the time their wells were sited. These facts supported an inference that any releases at the wells were not foreseeable. *Id*. at 1082. The court also cited evidence presented showing that the effect of pumping from the wells was insignificant compared to the natural migration of contamination, which supports an inference either that the water agencies were not a "but for" cause of the releases or that their acts were "so indirect and insubstantial in the chain of events leading to the release" that the innocent landowner defense still should be available to them. *Id*.

Citing *Lincoln Properties, Ltd. v. Higgins*, 823 F. Supp. 1528, 1539 (E.D. Cal. 1992), the court concluded that, for purposes of CERCLA,

> "caused solely by" incorporates the concept of proximate or legal cause. If the defendant's release was not foreseeable, and if its conduct – including acts as well as omissions – was "so indirect and insubstantial" in the chain of events leading to the release, then the defendant's conduct was not the proximate cause of the release and the third party defense may be available.

Castaic Lake Water Agency, 272 F. Supp. 2d at 1082.

In addition, the district court noted that its ruling did not decide whether water purveyors' CERCLA claims are actually for cost recovery under section 107(a) or for

contribution under sections 107(a) and 113(f). *Castaic Lake Water Agency*, 272 F. Supp. 2d at 1069. In light of this Court's decision in *Aviall*, Whittaker filed a motion currently pending before the district court arguing that the water purveyors cannot pursue a section 107(a) claim.

The assertions set forth by Whittaker in *Castaic Lake Water Agency* illustrate the difficulties and challenges facing water agencies and utilities seeking to provide a safe and reliable water supply to their customers. Even though the water purveyors presented evidence that they never used the hazardous substances at issue and sited their production wells before knowledge of the contamination, they were still subject to counter-claims resulting in a finding that, for purposes of CERCLA, they owned facilities from which releases took place. This shifted the burden of proof to the water purveyors to establish the elements required by the innocent landowner defense.

2. The South El Monte Operable Unit Litigation

The San Gabriel groundwater basin provides drinking water to more than 1,000,000 residents of the San Gabriel Valley and nearby areas. These residents have no adequate alternative water supplies to groundwater from the basin. Thus, despite the widespread groundwater contamination in the basin, San Gabriel Valley residents must rely on this basin for their drinking water, including numerous water supply wells that draw water directly from contaminated portions of the basin. More than one-quarter of the more than 366 water supply wells in the San Gabriel basin draw contaminated groundwater.

In 1984, EPA added the San Gabriel groundwater basin to the NPL as four separate sites (collectively, SGV

Superfund Sites). 49 Fed. Reg. 19,480 (May 8, 1984). These sites include multiple areas of contaminated groundwater in the 170-square-mile San Gabriel Valley. EPA estimates that more than 30 square miles of groundwater in the San Gabriel groundwater basin may be contaminated, including groundwater found under the Cities of Alhambra, Arcadia, Azusa, Baldwin Park, Industry, El Monte, La Puente, Monrovia, Rosemead, South El Monte, and West Covina in Los Angeles County, California. EPA has further divided the four SGV Superfund Sites into various operable units, and each operable unit has its own remedy. One such unit is the South El Monte Operable Unit (SEMOU).

The SEMOU is an area of groundwater contamination that covers a surface area of approximately eight square miles in and near the Cities of South El Monte, Rosemead, and El Monte. The groundwater in the SEMOU is contaminated as a result of improper handling and/or disposal of various chemicals, including various volatile organic compounds (VOCs), chlorinated solvents, perchlorate, and 1,4-dioxane. From the 1940s through the 1980s, many industrial facilities in the SEMOU used VOCs and chlorinated solvents for degreasing, metal cleaning, and other purposes.

The groundwater contamination in the SEMOU has impacted numerous public water supply wells, which previously had the capacity to produce thousands of gallons per minute of potable water. The three water purveyors in the SEMOU – the City of Monterey Park (CMP), Golden State Water Company (GSWC), and San Gabriel Valley Water Company (SGVWC) – have had to shut down and/or add "wellhead treatment" facilities to many of their public water supply wells in the SEMOU.

These treatment facilities not only treat the groundwater so that the water purveyors may provide a safe and adequate water supply to their customers, but they also have come to serve as EPA's selected remedy for the SEMOU.

Between 1984 and 1998 – some 14 years – EPA conducted investigations and studies regarding the sources and extent of groundwater contamination in the SEMOU. In 1998, EPA released its Remedial Investigation (RI) Report for the SEMOU. A year later, EPA issued its Feasibility Study (FS) Report for the SEMOU that considered potential alternative remedies. In September 2000, EPA issued its Interim Record of Decision (IROD) for the SEMOU that selected a remedy. U.S. Environmental Protection Agency, Interim Record of Decision (Sept. 20, 2000). The IROD envisioned using "wellhead treatment" facilities at the water purveyors' existing public water supply wells to provide the remedy for the SEMOU.

During the next three years, EPA tried to reach settlements with the various parties responsible for the contamination in the SEMOU, to no avail. In August 2003 – almost 20 years after adding the SEMOU to the NPL – EPA issued its Unilateral Administrative Order (UAO) under section 106(a) of CERCLA, 42 U.S.C. § 9606(a), for the SEMOU, directing 41 responsible parties to perform the remedy. U.S. Environmental Protection Agency, Unilateral Administrative Order (Aug. 29, 2003). EPA did not name any of the SEMOU water entities in the UAO, as EPA does not consider them liable parties. Although EPA issued this UAO nearly four years ago, EPA has yet to commence a civil action against any responsible party and has not yet consummated any judicially-approved settlement with any responsible party.

While EPA was conducting its investigations and studies, the contamination continued to spread and necessitated multiple well closures in the SEMOU. The affected water purveyors had to act. So with the help of funding from the San Gabriel Basin Water Quality Authority (WQA), each of the water purveyors constructed treatment facilities to ensure that they could continue to supply safe and adequate water supplies to their customers:

1) CMP constructed VOC treatment facilities for at least seven of its wells, plus perchlorate treatment facilities for two of its wells.

2) GSWC constructed VOC treatment facilities for two of its wells, as well as temporary perchlorate treatment facilities for these wells.

3) SGVWC constructed VOC treatment facilities for two of its plants, each of which consists of multiple wells.

In addition to helping fund the above treatment facilities, WQA constructed and operated a temporary shallow barrier treatment facility to contain and treat VOCs and 1,4-dioxane in the shallow portion of the SEMOU aquifer in an effort to prevent this contamination from spreading into the Whittier Narrows Operable Unit of the SGV Superfund Sites. WQA is constructing another 1,4-dioxane treatment facility for the shallow portion of the SEMOU aquifer in an effort to keep this contaminant from spreading into drinking wells in the SEMOU.

To date, the SEMOU water entities have spent nearly $30,000,000 in response costs to ensure continued safe and adequate water supplies. But for the contamination of the groundwater caused by the recipients of EPA's UAO (and other industrial parties), the SEMOU water entities would

not have had to incur any of these costs. WQA has estimated that the total cost of the SEMOU remedy and certain additional "wellhead treatment" facilities needed to provide an adequate and safe drinking water supply will exceed $180,000,000.

In 2002, because the water entities needed funds to construct and operate their treatment facilities, they commenced the following federal actions to recover their past and future response costs: *San Gabriel Basin Water Quality Authority v. Aerojet-General Corp., et al.*, Case No. CV 02-4565 (C.D. Cal. Filed June 11, 2002); *City of Monterey Park v. Aerojet-General Corporation, et al.*, Case No. CV 02-5909 (C.D. Cal. Filed July 29, 2002); *Southern California Water Company v. Aerojet-General Corporation, et al.*, Case No. CV 02-6340 (C.D. Cal. Filed Aug. 14, 2002);[12] and *San Gabriel Valley Water Company v. Aerojet-General Corporation, et al.*, Case No. CV 02-6346 (C.D. Cal. Filed Aug. 14, 2002). In these lawsuits, the water entities seek, *inter alia*, to hold the responsible parties jointly and severally liable under section 107 of CERCLA, 42 U.S.C. § 9607. The defendants moved to dismiss the water purveyors' section 107 claims on the ground that the water purveyors themselves allegedly are responsible parties, and thus their claims are limited to contribution under section 113, 42 U.S.C. § 9613.[13] The district court – much like the district court in the Castaic Lake litigation discussed above – ruled that the water purveyors' wells that had been impacted by contaminated groundwater

[12] After this lawsuit was filed in 2002, Southern California Water Company changed its name to Golden State Water Company.

[13] The SEMOU defendants did not move to dismiss WQA's complaint and have not argued that WQA is a responsible party.

were CERCLA "facilities" and that as owners of these wells the water purveyors were "presumptive" responsible – though not necessarily liable – parties under section 107(a)(1). This ruling required the water purveyors to amend their complaints to affirmatively assert their own "innocence" and plead CERCLA affirmative defenses just to maintain their claims under CERCLA section 107(a), 42 U.S.C. § 9607(a).

Since *Aviall*, the SEMOU defendants have alleged that the water entities have no remedy at all under CERCLA because they have neither entered into a settlement with EPA nor been sued by EPA, notwithstanding the fact that EPA does not consider the water entities to be responsible parties. The defendants' reliance on *Aviall* has further complicated and prolonged the water entities' efforts to reach settlements under the auspices of a court-appointed settlement master (appointed in 2004), which process remains ongoing.

If this Court recognizes a broad right of action under section 107(a) it will: (1) continue to encourage water purveyors to take urgently needed response actions – particularly given the limited ability of EPA to direct cleanup efforts – by foreclosing the possibility that the water purveyors will have no remedy under CERCLA; (2) encourage settlements (one of the stated goals of CERCLA) to provide desperately needed funding to effectuate groundwater cleanup and provide adequate and safe potable water to residents; and (3) help ensure that the polluters – as distinguished from the water purveyors and their taxpayers and ratepayers – pay their fair share of the costs of necessary response actions.

CONCLUSION

For the foregoing reasons, the judgment of the lower court should be affirmed.

Respectfully submitted,

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