1998

Please, Sir, I Want Some More - Can EPA Continue to Feed the Superfund Orphan Share

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PLEASE, SIR, I WANT SOME MORE:¹
CAN EPA CONTINUE TO FEED THE SUPERFUND ORPHAN SHARE?

I. INTRODUCTION

As the nation progresses toward the new millennium, the maintenance and preservation of the environment continues to pose serious concerns for individuals, corporations and government. The days of indiscriminate and uncontrolled waste disposal by parties who may or may not have known the potential future hazards they were creating have disappeared. Today, the focus is on locating the potentially responsible parties (PRPs), remedying the unfortunate and excessively expensive realities of such reckless abandon, and cleaning up thousands of toxic waste sites.²

One of the most controversial issues related to toxic waste sites concerns how PRPs and the Environmental Protection Agency


The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) broadly defines potentially responsible parties (PRPs) as follows:

(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.

(EPA) should pay for the cleanups. More specifically, EPA and PRPs have had to address those portions of cleanups attributable to other PRPs that are unable to pay due to insolvency or bankruptcy. These portions of the cleanup costs are known as “orphan shares.”

Although Congress passed the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) to govern issues directly related to past disposal of hazardous substances, courts have been forced to address orphan share liability issues where the language of CERCLA is unclear. Not surprisingly, circuit courts often reach different conclusions when deciding similar issues concerning orphan share liability.

The purpose of this Comment is to analyze CERCLA liability issues with a particular emphasis on orphan share liability and reform. Part II provides a brief summary of CERCLA's legislative and historical background. Part III presents an analysis of CERCLA liability issues with a broad overview of the case law as it has progressed since the enactment of CERCLA. Part IV traces EPA's response to CERCLA orphan share liability issues, including the ef-

3. See EPA's Interim Guidance on Orphan Share Compensation for Settlers of Remedial Design/Remedial Action and Non-Time-Critical Removals, reprinted in N.Y. Law J., at 54 (Oct. 15, 1996) [hereinafter Interim Guidance] (defining orphan share as "that share of responsibility which is specifically attributable to identified parties EPA has determined are: (1) potentially liable; (2) insolvent or defunct; and (3) unaffiliated with any party potentially liable for response costs at the site"); see also City & County of Denver v. Adolph Coors Co., 829 F. Supp. 340, 343 (D. Colo. 1993) (defining orphan shares as response costs attributable to "bankrupt or financially insolvent PRPs"). Orphan shares do not include shares attributed to "(1) unallocable waste; (2) the difference between a party's share and its ability to pay; or (3) those parties, such as 'de micromis' contributors, municipal solid waste (MSW) contributors or certain lenders or residential homeowners, that EPA would not ordinarily pursue for cleanup costs." Interim Guidance, supra, at 54.

4. See Michael V. Hernandez, Cost Recovery or Contribution: Resolving the Controversy Over CERCLA Claims Brought By Potentially Responsible Parties, 21 Harv. Envtl. L. Rev. 83, 83 (1997) (noting controversy has occurred since some of CERCLA's provisions are "unclear and seemingly contradictory"); see also Frank P. Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980, 8 Colum. J. Envtl. L. 1, 2 (1982) (stating CERCLA is a "hastily assembled bill" and its "fragmented legislative history add to the usual difficulty of discerning the full meaning of the law"). Notably, many originally suggested CERCLA provisions were not included in the statute. See Harold C. Barnett, Toxic Debts and the Superfund Dilemma 59-67 (1994) (discussing such provisions and various proposed bills that were not incorporated into CERCLA).

5. For a discussion on varying court decisions relating to orphan share liability issues, see infra notes 28-67 and accompanying text.

6. For a brief discussion of CERCLA's legislative history and background, see infra notes 10-19 and accompanying text.

7. For a discussion of CERCLA liability issues and a summary of case law as it has progressed since the enactment of CERCLA, see infra notes 20-67 and accompanying text.
fect of the most recent reforms implemented by EPA. Finally, Part V discusses the impact of EPA orphan share reforms on past and potential future CERCLA legislation, and suggests that congressional clarification is needed on specific liability and funding issues.

II. CERCLA: HISTORICAL BACKGROUND

In 1980, Congress reacted to growing public concern over the environmental and health risks posed by past disposal of hazardous substances by enacting CERCLA. Congress's two main objectives in passing CERCLA were to expedite site cleanups and to ensure that those parties responsible for creating the risks, PRPs, pay for

8. For a discussion of EPA's response to orphan share liability issues and EPA reforms, see infra notes 68-93 and accompanying text.

9. For a discussion of the impact of EPA orphan share legislation, see infra notes 94-105 and accompanying text.


Much of the growing public concern regarding the threats of uncontrolled hazardous waste arose in 1978 from heightened public attention to the contamination of homes in areas such as the "Love Canal" area of Niagra Falls, N.Y., and the "Valley of the Drums" in Kentucky. See CERCLA HOUSE REPORT, supra, at 6121 (reporting increases in miscarriages, recognizing New York State Health Department was unable to assure adequate protection of resident's public health, and indicating congressional findings of many dangerous health effects); 1 ALLAN J. TOPOL & REBECCA SNOW, SUPERFUND LAW AND PROCEDURE § 1.1, at 3 (1992) (describing thousands of leaking drums which tainted area groundwater used for drinking in "Valley of the Drums"); Healy, supra, at 68-69 (discussing "well publicized incidents of improper disposal of large amounts of hazardous substances which caused serious public health problems"). Moreover, EPA studies performed in the early eighties indicated that only 10% of waste was disposed in environmentally safe manners. See CERCLA HOUSE REPORT, supra, at 6119.
the cost of the cleanups. 11 To further these objectives, Congress required EPA 12 to develop a list of priority cleanup sites, known as the National Priority List, and provided an initial $1.6 billion trust fund to facilitate the cleanups. 13 This fund, from which CERCLA derives its more commonly used name, “Superfund,” was designed to finance EPA’s cleanup and enforcement costs, as well as eligible


13. See CERCLA § 105(a)(8)(B), 42 U.S.C. § 9605(a)(8)(B) (1994) (explaining process of creating National Priorities List). The National Priorities List (NPL) is “a published list of hazardous waste sites in the country that are eligible for extensive, long-term cleanup under the Superfund program.” This Is Superfund (visited Jan. 20, 1997) <http://www.epa.gov/oerrpage/superfund/web/oerr/sfguide/index2.html>; see also TOPOP & SNOW supra note 10, at 82 (describing NPL original purpose as “quick and inexpensive method of identifying sites that warranted further investigation under CERCLA”). EPA uses a Hazard Ranking System to “accurately assess[] the relative degree of risk to human health and the environment posed by sites and facilities subject to review.” See CERCLA § 105(c)(1), 42 U.S.C. § 9605(c)(1).

The initial NPL included 406 of the most dangerous hazardous sites, but was expanded to approximately 1,500 by the middle of fiscal year 1997. See Superfund: EPA - Claimed Improvements to CERCLA Misleading, Political Consulting Group Says, Chem. Reg. Daily (BNA) (July 15, 1997) (stating “[t]hirty percent of the total number of sites on the National Priorities List - 419 sites - have reached EPA’s definition of ‘construction complete’ midway through fiscal 1997”). In 1992, when the total number of sites on the NPL was 1,072, it was predicted that the number of sites would grow by 100 each year. See Anderson, supra note 2, at 4 n.16 (1993) (citing 40 C.F.R. pt. 300, app. B (1992); see also KATHERINE N. PROBST & PAUL R. PORTNEY, RESOURCES FOR THE FUTURE, ASSIGNING LIABILITY FOR SUPERFUND CLEANUPS: AN ANALYSIS OF POLICY ACTIONS 17 (1992)). Today, EPA lists 1,405 NPL sites, and 498 total completed cleanups. See Administrative Reform Annual Report, Fiscal Year 1997 (visited Feb. 10, 1998) <http://www.epa.gov/superfund/oerr/techres/annrpt97.htm> [hereinafter Annual Report 1997].
claims of private parties. Superfund received its funds from taxes imposed on the petroleum and chemical industries, from an environmental tax on corporations, and from general tax revenue.

Shortly after passing CERCLA, Congress enacted the National Contingency Plan, which sets forth the procedures EPA is to follow to determine which sites require cleanup. Difficulties arising from EPA's inability to accurately identify all PRPs and apportion liability led to numerous arguments and varying litigation regarding PRP liability. Courts disagreed on the issue of whether CER-

14. See CERCLA § 111(a)(2), 42 U.S.C. § 9611(a)(2) (1994) (reflecting that private parties are permitted to recover "[p]ayment of any claim for necessary response costs incurred by any other person"). Though the name appears in section 111(a) of CERCLA, the term "Superfund" finds its origins in a suggestion by a group of large oil companies to create a fund to finance supertanker oil spills. See U.S. ENVIRONMENTAL LAWS 4-1 (Wallis E. McClain, Jr. ed., 1994) (noting Congress never accepted oil company superfund proposal, but adopted its concept in creating Superfund).


Superfund taxation has been described as a fair means of spreading the costs of site cleanups since "taxpayers (individuals and corporations) benefit from the services and products that generate toxic waste." The Continuing Predicament of Allocating Orphan Shares In CERCLA Litigation, 8 Mealey's Lit. Rep. (Mealey Publications, Inc.) No. 18, at 1 (Dec. 27, 1995) [hereinafter Continuing Predicament]; see also TOPOL & SNOW, supra note 20, at 9 (stating "[u]nder the original statute, twelve oil and chemical companies paid seventy percent of the Superfund excise tax"). Some courts have found, however, that Superfund taxation is unfair since the costs of site cleanups should be borne by the parties responsible for creating the hazards. See supra note 11 and accompanying text.

Notably, the Clinton administration has not reauthorized Superfund taxing authority to date. See Interim Guidance, supra note 3, at 54. For a further discussion on reauthorization of Superfund taxation, see infra note 94 and accompanying text.

16. See CERCLA § 105, 42 U.S.C. § 9605 (1994). The National Contingency Plan (NCP) was initially created as an oil spill response plan. See U.S. ENVIRONMENTAL LAWS, supra note 14, at 4-1 (noting oil spills "had aroused outrage and caused tremendous environmental damage worldwide"). The NCP sets forth procedures for the cleanup process which include a preliminary assessment of the site, a simple removal action to stabilize any immediately dangerous situations and potentially, a full-blown site inspection if the simple removal action is inadequate. See CERCLA § 105, 42 U.S.C. § 9605. Additionally, the NCP includes requirements which EPA can use in determining which sites have priority for cleanup. See id. § 105, 42 U.S.C. § 9605. EPA uses these priority determinations to rank sites by priority on the NPL. See id. § 105, 42 U.S.C. § 9605(a)(8)(B). Since CERCLA does not provide an opportunity for a hearing prior to the placement of a site on the NPL, arguments of constitutional due process violations have been raised. See TOPOL & SNOW, supra note 10, at 82.

17. For a further discussion of varying views among the courts regarding PRP liability under CERCLA, see infra notes 20-67 and accompanying text.
CLA authorized the courts to impose joint and several liability on PRPs without permitting such PRPs to sue other PRPs in contribution actions.\textsuperscript{18} In an attempt to prevent such litigation, Congress extensively amended CERCLA in 1986 with the Superfund Amendments and Reauthorization Act (SARA), which provided PRPs with the statutory right to contribution.\textsuperscript{19} SARA, however, did not bring an end to litigation concerning the right to bring a contribution action.

III. SUPERFUND LIABILITY: RECOVERING THE COST OF CLEANUP

A. EPA Cleanup and Cost Recovery

EPA follows procedures prescribed in CERCLA in order to ensure that PRPs either reimburse the government for expenses incurred in the cleanup of toxic sites, or that the PRPs actually perform the cleanup themselves. This is achieved through three principal means. First, pursuant to CERCLA section 106(a), EPA may compel PRPs who have been deemed responsible for the waste sites to initiate and pay for the cleanups.\textsuperscript{20} Second, EPA may compel PRPs who have been deemed responsible for the waste sites to initiate and pay for the cleanups. The Executive delegated his authority under SARA to EPA. \textit{See} Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987). SARA also added section 122(a) which authorized EPA to enter into agreements with private parties \textquotedblleft whenever practicable and in the public interest... to facilitate agreements... that are in the public interest... in order to expedite effective remedial actions and minimize litigation.

\textit{CERCLA} § 122(a), 42 U.S.C. § 9622(a) (1994). Some believe, however, that the reforms provided by the enactment of SARA were ineffective. \textit{See} Robert H. Abrams, \textit{Superfund and the Evolution of Brownfields}, 21 WM. & MARY ENVTL. L. & POL'Y REV. 265, 271 (stating that \textquotedblleft a popular saying evolved that SARA had been misnamed and that her name was really RACHEL, the Reauthorization Act Confirms How Everyone's Liable"). For a further discussion of SARA, see \textit{infra} notes 44-46 and accompanying text.

\textsuperscript{18} For a further discussion of PRP contribution actions under CERCLA, see \textit{infra} notes 24-43 and accompanying text.


\textsuperscript{20} \textit{See} CERCLA § 106, 42 U.S.C. § 9606(a) (1994) (granting government authority to seek injunctive relief in United States district court, when it is determined that "there may be an imminent and substantial endangerment to the public health or welfare or the environment"). CERCLA grants the President authority to issue "such orders as may be necessary to protect public health and welfare and the environment" in the form of Administrative Orders issued by EPA against parties deemed responsible. \textit{Id.} Failure to comply with an Administrative Order carries a penalty of up to $25,000 per day plus punitive damages. \textit{See id.} §§ 106(b)(1), 107(c)(3), 42 U.S.C. §§ 9606(b)(1), 9607(c)(3). Additionally, section 107 provides for treble damages against parties who fail to comply with section...
ate and finance the cleanup itself using Superfund dollars, and then file suit under Superfund section 107 to recover the expenses incurred.\textsuperscript{21} Finally, EPA may entice PRPs to begin the cleanup by entering into settlement agreements in which EPA grants PRPs relief from future contribution actions in exchange for their promise to take partial responsibility for the cost of the cleanup.\textsuperscript{22} Congress added CERCLA's settlement provisions in 1986 when it enacted SARA in hopes of expediting cleanups.\textsuperscript{23}

Under sections 107 and 113 of CERCLA, courts agree that PRPs have the right to sue other PRPs. While all courts now agree that a PRP may bring a contribution claim under section 113 of CERCLA, not all courts permit such an action under section 107 of CERCLA.\textsuperscript{24} Section 107(a) specifies that any person liable under

\begin{itemize}
\item Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section... any person... shall be liable for... all costs of removal or remedial action incurred... [and] any other necessary costs of response incurred by any other person... [and] damages for injury to, destruction of, or loss of natural resources... [and] the costs of any health assessment of health affects study carried out....
\end{itemize}

\textsuperscript{21} See id. § 107(c)(3), 42 U.S.C. § 9607(c)(3).
\textsuperscript{22} See CERCLA § 107, 42 U.S.C. § 9607(a) (1994). The language of section 107(a) provides, in relevant part:

\textsuperscript{23} See H.R. REP. No. 99-253, pt. 1, at 100 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2882 (stating SARA was enacted "to encourage and facilitate negotiated private party cleanup of hazardous substances in those situations where negotiations have a realistic chance of success").
\textsuperscript{24} See CERCLA §§ 107, 113, 42 U.S.C. §§ 9607, 9613 (1994) (providing for federal and private party cost-recovery actions). For a partial reading of the liability language of section 107, see supra note 21 and accompanying text. For a partial reading of the liability language of section 113, see supra note 22 and accompanying text.
CERCLA "shall be liable for . . . any other necessary costs of response incurred by any other person." Section 113 permits liable parties to seek contribution "from any other person who is liable or potentially liable." Depending upon the circuit in which a contribution action is brought, a PRP, bringing a liability action against another PRP, will face different restrictions on recovery. Moreover, courts have differed when determining which party or parties are responsible for the cost of the orphan shares. To understand how courts analyze CERCLA's PRP liability scheme today, a brief history of the interpretation of liability under section 107 and under section 113 follows.

B. Apportioning Liability Prior to SARA

Prior to SARA, EPA initiated liability cost recovery actions against PRPs without identifying every party that could be held legally liable for cleanup costs. In the early 1980's, EPA targeted PRPs who were identifiable among often times inadequate and incomplete site records. Even though the language of CERCLA did not expressly permit PRPs to be held jointly and severally liable, the language of "any other person" described in section 107(a) authorizes EPA and private parties to recover from PRPs. See id. § 107(a) (a) (B); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 667 (5th Cir. 1989) (describing section 107 authority for "both government and private parties"). For a further discussion on divergent court decisions involving CERCLA liability before and after the enactment of SARA, see infra notes 31-67 and accompanying text.

CERCLA § 113, 42 U.S.C. § 9613 (1994); United Tech. Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, 100 (1st Cir. 1994) (describing right to "seek contribution from other potentially liable parties"). Restrictions on recovery stem from past decisions at common law, as well as more recent court decisions that vary in interpreting the Superfund provisions since the enactment of SARA. For a further discussion of restrictions on recovery, see infra notes 29-67 and accompanying text.

For a further discussion of court decisions involving responsibility for orphan share liability, see infra notes 31-67 and accompanying text.

See B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1205 (2d Cir. 1992) (suggesting that EPA routinely brings actions against those PRPs with greatest ability to pay); United States v. Western Processing Co., 734 F. Supp. 930, 938 (W.D. Wash. 1990) (stating "joint and several liability allows the government to sue a manageable number of parties and to collect the entire amount of response costs from those defendants"); Barnett, supra note 4, at 178. This liability scheme is permitted, however, under the rationale that strict liability is "both fair and efficient" since it acts as a "means of encouraging the development of safer waste disposal techniques." See Developments in the Law: Toxic Waste Litigation, 99 Harv. L. Rev. 1458, 1520 (1986) [hereinafter Toxic Waste Litigation].
EPA filed suits against individual PRPs and attempted to hold PRPs jointly and severally liable under section 107.90

As a result, PRPs that had been sued by EPA argued that such suits were unfair unless these PRPs were given the right to seek reimbursement from other PRPs who had not been targeted. Nevertheless, some courts read the language of section 107 to permit courts to impose joint and several liability, and refused to permit PRPs to argue for an implied right of contribution.31 However, this practice was not consistent among all jurisdictions. Other courts found the language of CERCLA to be vague, and thus permitted PRPs the right of contribution under section 107.32 Those courts

30. The common law rationale for joint and several liability finds its origins in Summers v. Tice. 199 P.2d 1 (Cal. 1948). The California Supreme Court in Summers stated that the “real reason for the rule that each joint tortfeasor is responsible for the whole damage is the practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did, when it is certain that between them they did all.” Id. at 3 (quoting 1 JOHN H. WIGMORE, SELECT CASES ON THE LAW OF TORTS app. B § 153 (1991)). This original rationale, therefore, stems from a burden of proof issue, where the plaintiff was unable to prove the exact amount of damage caused by each defendant. See generally Gregory C. Sisk, Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform, 16 U. PUGET SOUND L. REV. 1 (1992).


The Chem-Dyne court and other courts recognized the need for such section 107 actions because the cleanup costs for a particular site often fell upon only a small number of the parties responsible for the costs. The Chem-Dyne court determined that section 433 of the Restatement (Second) of Torts differentiated between joint and several liability and several liability, and was the first court to address joint and several liability under CERCLA. See generally Chem-Dyne, 572 F. Supp. 802 (citing RESTATEMENT (SECOND) OF TORTS § 433 (1979)). Notably, the Energy and Commerce Committee later recognized the Chem-Dyne court’s “establish[ment of ] a uniform federal rule for using joint and several liability.” H.R. REP. NO. 99-253(I), at 74 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2856.
applied common law principles or recognized an implied right of contribution among PRPs in CERCLA controversies.33

33. H.R. REP. No. 99-253(I), at 74 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2856 (noting that since joint and several liability was not part of express language of CERCLA prior to SARA, courts were forced to “establish the scope of liability through a case-by-case application of ‘traditional and evolving principles of common law’ and pre-existing statutory law”); Standing Under Superfund, supra note 32, at 157; see also Colorado v. Asarco, Inc., 608 F. Supp. 1484 (D. Colo. 1985) (stating “Congress intended issues of liability, including joint and several liability and contribution, to be determined under traditional and evolving principles of Federal common law” (citing Chem-Dyne, 572 F. Supp. at 808-10)); United States v. Conservation Chem. Co., 619 F. Supp. 162, 224 (W.D. Mo. 1985) (stating “it is inequitable to require one to pay the entire cost of reparation, and it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability,” while recognizing CERCLA implicitly encompassed right of contribution from legislative history and CERCLA’s purpose, not from common law).

An implied right of contribution permits PRPs who have paid more than their equitable share to sue other PRPs to recoup these costs. See Richard D. Buckley, Jr., Making a Case for Statutory Amendment to the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”): Solving the Section 107/Section 113 Cause of Action Controversy, 31 TULSA L.J. 851, 856 (1996). Courts handled the contribution apportionment of liability under this rationale by following the “global allocation” method of section 886A of the Restatement (Second) of Torts, which provides:

1. Except as stated in Subsection (2), (3), and (4), when two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them, even though judgment has not been recovered against all or any of them.
2. The right of contribution exists only in favor of a tortfeasor who has discharged the entire claim for the harm by paying more than his equitable share of the common liability, and is limited to the amount paid by him in excess of his share. No tortfeasor can be required to make a contribution beyond his own equitable share of the liability.
3. There is no right of contribution in favor of any tortfeasor who has intentionally caused the harm.
4. When one tortfeasor has a right of indemnity against another, neither of them has a right of contribution against the other.

Restatement (Second) of Torts § 886A(2) (1979). For an additional discussion of the “global allocation” method, see infra notes 34-43 and accompanying text. Additionally, some courts relied upon the rationale of section 433A of the Restatement (Second) of Torts which provides:

1. Damages for harm are to be apportioned among two or more causes where
   a. there are distinct harms, or
   b. there is a reasonable basis for determining the contribution of each cause to a single harm.
2. Damages for any other harm cannot be apportioned among two or more causes.

Restatement (Second) of Torts § 443A (1979). For a listing of courts that followed this rationale, see Toxic Waste Litigation, supra note 29, at 1527 n.82. Other courts relied upon the rationale of section 881 of the Restatement (Second) of Torts which provides:

If two or more persons, acting independently, tortiously cause distinct harms or a single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused.

Restatement (Second) of Torts § 881 (1979).
Some courts that permitted section 107 contribution actions divided the trials into two phases, namely, a liability phase and a cost allocation phase. During the liability phase, plaintiff PRPs could sue defendant PRPs for cost recovery under section 107. During the cost allocation phase of these trials, courts would hold defendant PRPs jointly and severally liable unless one or more defendants demonstrated that the total contamination at a site was divisible and each defendant's contribution to the damage could be assessed individually. If a defendant succeeded in making this showing, these courts would then apportion the damages based on a global allocation.

The global allocation rationale was first approved by a district court in *Chesapeake & Potomac Telephone Co. of Virginia v. Peck Iron & Metal Co.* In *Chesapeake & Potomac*, the Chesapeake & Potomac Telephone Company of Virginia (C&P) commenced a hazardous waste cleanup pursuant to an EPA administrative order. C&P

34. See CERCLA § 107, 42 U.S.C. § 9607(a)(4)(B) (1994) (stating "any responsible person . . . shall be liable for . . . any other necessary costs of response incurred by any other person consistent with the national contingency plan") (emphasis added); see also Standing Under Superfund, supra note 32, at 157.

35. See In re Hemingway Transport, Inc., 993 F.2d 915, 921 & n.4 (1st Cir. 1993) (stating "[l]iability under § 107(a) is joint and several unless a defendant carries the 'especially heavy burden' of showing that liability is divisible, i.e., that there is a reasonable basis for apportioning the harm"); see also United States v. Monsanto, 858 F.2d 160, 173 (4th Cir. 1989) (permitting joint and several liability in cases of indivisible harm); but see United States v. A & F Materials Co., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984) (holding when defendant is unable to prove his contribution to injury, joint and several liability will not be used since court has discretion to apportion damages using other factors). Notably, the PRP that brings the contribution suit has the burden of proof to establish the proportional allocation of the costs. See H.R. REP. NO. 99-253 (III), at 19 (1986), reprinted in 1986 U.S.C.C.A.N. 3038, 3042. The joint and several liability apportionment was first applied in a CERCLA action in *Chem-Dyne*. See generally 572 F. Supp. 802. For an additional discussion of *Chem-Dyne*, see supra notes 32-33.


38. See id. at 1272 (noting EPA's Administrative Order to C&P and 16 other PRPs held all parties jointly and severally responsible). The remedial costs incurred by C&P exceeded $350 thousand. See id. at 1273. For a discussion of EPA's authority to issue an administrative order under CERCLA, see supra note 20 and accompanying text.
then filed a cost recovery action under section 107 against 139 other PRPs, alleging that these parties were jointly and severally liable to C&P for all response costs incurred in cleaning up the site.\(^3\)

The district court held that C&P was entitled to bring a section 107 action.\(^4\) In dividing the cleanup costs among PRPs, the court imposed joint and several liability on the defendants only for the response costs attributable to the defendants as a group.\(^4\) In the interest of fairness, however, the court refused to attribute any of the orphan share costs to the defendants at this phase of the trial.\(^4\) Instead, an equitable orphan share allocation among the plaintiff and the defendants was made during the later cost allocation phase.\(^4\)

C. Apportioning Liability After SARA

Congress responded to the differences among pre-SARA judicial decisions and the growing backlog of CERCLA litigation by enacting SARA in 1986. SARA represented a congressional effort to codify the common law implied right of contribution.\(^4\) With the passage of SARA, Congress also attempted to improve settlement procedures by providing settling parties protection against contri-

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39. See id. at 1273, 1280.

40. See id. at 1277 (stating "[n]othing in the language of ... [CERCLA] precludes a party, like C&P, itself liable under CERCLA, to initiate cleanup and sue to recover its costs under Section 107"). The court looked to the legislative history of CERCLA and determined that the language "any other person" was not limited to innocent persons. See id.

41. See id. at 1278 & n.9 (noting court imposed joint and several liability because damages are "indivisible"). In making its determination, the court in Chesapeake & Potomac relied upon the test in section 433A of the Restatement (Second) of Torts. For a reading of the relevant language of section 433A, see supra note 33.

42. See Chesapeake & Potomac, 814 F. Supp. at 1278.

43. See id. In dicta, the court stated that it would determine the plaintiff's and defendant's share first in apportioning liability. See id. The plaintiff would then be liable for only its share of costs and the portion of the orphan share the court determined during the [cost allocation] phase. See id. This rationale enabled the court to "rule[ ...] in advance of the [cost allocation] phase of the lawsuit, that the [p]laintiff will not be allowed to recover those costs attributable to its own dumping or the orphan shares allocated to it by the [c]ourt." Id.

44. See CERCLA HOUSE REPORT, supra note 10, at 62 (statement of Albert Gore, Jr. (noting that a "main goal of the [Superfund] legislation originally was to clarify and codify long-standing common law theories as they relate to liability for damages caused by hazardous waste disposal activities")). Prior to the passage of SARA, Representative John D. Dingell (D-Mich.) stated, "[n]othing in this legislation is intended to change the application of the uniform federal rule of joint and several liability enunciated in the Chem-Dyne case and followed by a number of other federal courts." U.S. ENVIRONMENTAL LAWS, supra note 14, at 4-2 (citing United States v. Chem-Dyne, 572 F. Supp. 802). For a definition of the right of contribution, see supra note 33 and accompanying text.
bution actions by non-settling parties. Unfortunately, the language of SARA was vague, and continued to cause varying decisions among the courts. These varying decisions mainly involved a debate over a private party’s right to sue for contribution under section 107 rather than section 113.

Under section 113, courts have held that liability is several, rather than joint and several. Conversely, liability under section 107 is joint and several for harms that are not shown to be divisible. Therefore, a more controversial issue concerns the cost allocation of orphan shares, since some courts have not been in agreement with regard to the issue of defendant liability for the orphan share. For example, after the enactment of SARA, some courts continued to apply the common law global allocation scheme to cost allocation efforts. A similar rationale was followed by the district court in *Charter Township of Oshtemo v. American Cyanamid Co.* In *Charter Township of Oshtemo*, the plaintiff argued that it should not be responsible for any portion of the orphan share, because a contrary holding would be a disincentive for a PRP to initiate a cleanup. The court refused to assign the orphan share solely to the defendants under that rationale, but instead held that orphan shares must be apportioned equitably among all solvent parties. Nevertheless,

45. See CERCLA § 113(f), 42 U.S.C. § 9613 (1994). For a reading of the language of section 113(f), see supra note 19. Additionally, Congress also intended to promote settlements by shielding settling parties from government suits by issuing “covenants not to sue.” See id. § 122(f), 42 U.S.C. § 9622(f) (providing “[t]he President may, in his discretion, provide any person with a covenant not to sue concerning any liability to the United States under this Act, including future liability”).

46. See H.R. REP. No. 99-253 (I), at 19 (1985), reprinted in 1985 U.S.C.C.A.N. 3038, 3042 (noting that courts in favor of right to section 107 actions hold that legislative history of section 113 implies that addition of section 113 does not limit party’s right of action under section 107). For a discussion of the differences between a section 107 and a section 113 action, see William D. Araiza, *Text, Purpose and Facts: The Relationship Between CERCLA Sections 107 and 113*, 72 NOTRE DAME L. REV. 193, 206 (stating “[f]or a variety of reasons dealing with either the statutory scheme or the nature of contribution actions as interpreted by the courts, the right to contribution is somewhat limited”).


48. See id. at 508. The plaintiff argued that allocating any portion of an orphan share would substantially lessen the incentive for PRPs to participate in a site cleanup. See id. at 509. Moreover, PRPs would have no incentive to initiate cleanups “because they would not have the ability to seek equitable contribution toward the orphan share from recalcitrant [potentially responsible parties] which are found liable under section 113.” Both *Direct Defendants and Third-Party Defendants Liable for CERCLA Orphan Shares*, 4 Pa. Envtl. Compl. Update (M. Lee Smith Publishers LLC) No. 4, at 2 (May 1997) (citing United States v. Kramer, 953 F. Supp. 592 (D.N.J. 1997)).

49. See id. at 509 (agreeing with holding in *Chesapeake & Potomac*). For a discussion of the holding in *Chesapeake & Potomac*, see supra notes 37-43 and accompanying text. Additionally, the court in *Charter Township of Oshtemo* stated that
the district court stated that it would not be unfair to benefit the first PRP who brings the action by allowing the first PRP to control the cleanup.\(^{50}\)

Likewise, in *United States v. Atlas Minerals & Chemicals, Inc.*, the court applied the global allocation scheme, but did so under a different rationale.\(^{51}\) *Atlas Minerals* involved both an EPA enforcement action and a third party contribution claim.\(^{52}\) At the time the action was initiated, the total remediation costs were unknown and undeterminable.\(^{53}\) As a result, the court deferred orphan share determination until after future costs were "actually incurred and proven to be uncollectible."\(^{54}\) The court indicated, however, that a global allocation scheme should be used in future share computations.\(^{55}\) In making its decision, the court relied on section 2(d) of the Uniform Comparative Fault Act (UCFA) to support the global allocation rationale.\(^{56}\)

Other courts have taken a different approach to these liability issues by allowing defendants to avoid responsibility for orphan shares in section 113(f) contribution actions. Most notably, in *Gould, Inc. v. A&M Battery & Tire Service*, the District Court for the Middle District of Pennsylvania held that each party was responsible

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\(^{50}\) See *id.* at 508. Although the court agreed that it would be unfair for a plaintiff to benefit from his wrongdoing, the court noted that the benefit to a PRP that takes part in the cleanup would be the ability to control the cleanup at the site. See *id.* at 508-09.


\(^{52}\) See *id.* at *1.

\(^{53}\) See *id.* at *84.

\(^{54}\) See *id.* at *75.

\(^{55}\) See *id.* at *82.

\(^{56}\) See generally *id.* The Uniform Comparative Fault Act (UCFA) provides in part:

> Upon motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party’s equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

**Uniform Comparative Fault Act** § 2(d) (amended 1977), 12 U.L.A. 136 (1996); *see also Atlas Minerals*, 1995 WL 510304, at *82 (indicating that under the UFCA approach, liability of third-party defendant PRPs would be reduced by the third-party defendant settler’s proportional or equitable share). The court further stated that each PRP that did not settle would be responsible for “its proportionate share.” *Id.* at *83.
only for its proportionate share of harm caused at the waste site. The court concluded that since liability under section 113 is several, not joint and several, it would be inequitable to hold defendants liable for orphan shares when the plaintiff had established the exact amount of harm caused by each defendant. This rationale left the plaintiff fully responsible for the orphan share.

In an attempt to prevent the full burden of the orphan share from falling on the plaintiff, some courts have applied yet another approach known as a "de minimis settlement model." This model was introduced in City and County of Denver v. Adolph Coors Co. where the court approved a settlement agreement for 24 million dollars that involved 119 PRPs. The settling parties in Adolph Coors fell into four categories based on criteria required in CERCLA, which determined their level of liability. Under the settlement proposal, a portion of the orphan shares would be paid by those settlers who had very little overall potential liability, "de minimis settlers." The de minimis settlements in Adolph Coors incorporated an overall orphan share of approximately twenty percent of the cost of the cleanup. To encourage settlement, early de minimis settlement proposals offered an orphan share of five percent; later settlements

57. 901 F. Supp. 906, 913 (M.D. Pa. 1995) (holding defendants in section 113 action are not responsible for orphan shares); see also B.F. Goodrich Co. v. Murtha, 754 F. Supp. 960, 973 (D. Conn. 1991) (reasoning defendants' liability should be limited to "the extent of their contribution to the problem").

58. See Gould, 901 F. Supp. at 913 (refusing to allow downward shift of orphan shares to defendants, thereby leaving orphan share responsibility to plaintiff).

59. 829 F. Supp. 340 (D. Colo. 1993) (noting plaintiffs also moved for order "barring claims against the settlers for contribution or response costs, except as provided for in the settlement agreements . . . [and] declaring that the nonsettler's share of liability is reduced by the amount paid by the settlers for their volumetric share of the remedial costs at the site").

60. See id. These levels included: (1) de minimis settlements of one defendant and many non-parties; (2) mid-tier settlements; (3) high-tier settlements; and (4) settlements not based upon a volumetric waste formula, including settlements based on a party's inability to pay or other unique circumstances affecting a party's legal liability. See CERCLA § 122(g)(5), 42 U.S.C. § 122(g)(5) (1994).

61. See Adolph Coors Co., 829 F. Supp. at 342. Under the settlement agreement, a de minimis PRP had to meet four criteria: (1) the PRP's section 104(e) response was adequate and complete; (2) the PRP's volumetric contribution of waste was below a certain level (300,000 gallons or less); (3) the PRP was not a party to any other litigation against EPA related to the site; and (4) the PRP's waste stream at the landfill was not significantly more toxic or hazardous than other waste streams. See id. In approving the settlement, the court noted that the settlement reflected a portion of response costs attributable to bankrupt or financially insolvent PRPs. See id. at 343.

62. See id.
mandated a thirty percent volumetric orphan share. This settlement model shifted the orphan share liability from the plaintiff to the defendant in a more equitable scheme.

Despite these differences in various courts’ rationales, most courts have held that the legislative history of section 113 implies that the addition of section 113 does not limit a party’s right of action under section 107. However, as discussed above, other courts do not agree. The impact of these decisional splits is that plaintiffs bringing a contribution suit under section 113 may only be able to shift to the defendants the share of the liability that the defendant contributed. As such, these plaintiffs could find themselves responsible for all of the orphan share liability. In contrast, plaintiffs who sue under section 107 may be able to shift orphan share liability to the defendants. Additionally, courts that limit or deny section 107 private party actions refuse to recognize the statutory contribution protection afforded defendant PRPs who settle their liability with the federal government through EPA. As a result, these jurisdictional splits also reflect that a court may base its

63. See id. This rationale was supported by the assumption that many de minimis PRPs will agree to pay a portion of the orphan share to “achieve greater finality in the liability associated with Site litigation.” See id.

64. See H.R. Rep. No. 99-253(I), at 79 (1985). Courts following the reasoning that makes the plaintiff pay for the orphan shares, arguably do not comport with the CERCLA drafters’ original intent of making PRPs pay their share of the damages. See, e.g., Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (noting Congress intended CERCLA would assess costs and responsibility for remedying harmful conditions on PRPs).


66. See Pinal Creek Group v. Newmont Mining Corp., 926 F. Supp. 1400 (D. Ariz. 1996) (holding plaintiff had right to bring CERCLA section 107 cost recovery action against defendants for all response costs arising from site cleanup). The Pinal Creek court noted that “[t]he resolution of this issue will have a significant impact on this litigation. Under Section 107, liability is joint and several, the range of defenses is sharply limited, and the statute of limitations is six years. In contrast, under Section 113(f), liability is severable only, an array of equitable defenses are permitted, and the limitations period is three years.” Id. at 1403.
decisions on its interpretation of CERCLA's overall purpose or policy, as opposed to its legislative history. 67

IV. EPA Response to the Liability Conflicts

Because PRPs continue to bring section 107 and section 113(f) actions, EPA has initiated various reforms in an attempt to halt future litigation. In an effort to enhance Superfund reform, EPA announced a series of new Superfund policies designed to: (1) reduce litigation; (2) limit attorneys' fees; and (3) increase community participation in the toxic waste cleanup process. EPA’s goal in creating these reforms was to encourage PRPs to agree to perform cleanups, to negotiate settlements and to enhance the fairness of settlements. 68

A. EPA Pilot Superfund Cost Allocation Program

In response to conflicting decisions concerning cost allocation in Superfund cleanups, as well as the resulting extreme backlog of litigation, EPA launched a Superfund Administrative Reform Initiative in February 1995. 69 EPA modeled the program after a pro-

67. See ARAIZA, supra note 46, at 226-27. Some courts permitted plaintiffs to sue under section 107 based on a “cleanup goal” which assumed that section 107’s liability scheme would encourage PRPs to perform cleanups because it favored plaintiffs. See id. Other courts have cited the “settlement goal,” which prohibited PRPs from bringing cost recovery actions disguised as contribution suits. See id.

68. See Toxic Waste Litigation, supra note 29, at 1505 (noting “[s]ettlements may thus result in more expeditious resolution of pressing environmental problems with concomitant reductions both in EPA’s aggregate costs of litigation and in the need to finance cleanups through the [SuperFund]”). Today, due to current conflicting court decisions with regard to the section 113 and section 107 conflict, the absence of settlements could leave PRPs liable for the entire cost of the cleanup, including the orphan share. For a further discussion of EPA’s goals in announcing reform measures, see infra notes 69-93 and accompanying text.

69. See EPA Begins Pilot Superfund Cost Allocation Project, Pa. Envtl. Compl. Update (M. Lee Smith Publishers & Printers LLC) No. 7, at 1; (July 1995) [hereinafter Pilot Beginning]; Superfund: Hundreds of Small Parties Released From Enforcement Under Agency Improvements, 26 Env’t Rep. (BNA), 2196 (March 22, 1996) (noting that this Superfund reform initiative was the second round of Superfund Administrative Improvements, with first round of reforms initiated in June 1993); see also Annual Report 1997, supra note 13 (noting that “[t]he first round of Superfund Administrative Improvements, introduced in June 1993 . . . focused heavily on speeding up site investigation and construction completion activities . . . [while t]he second round of reforms was an effort to administratively test or implement many of the innovations contained in the proposal through pilot projects as well as new or revised Agency guidance”). EPA later introduced a third round of Superfund reforms in October 1995, that was “designed to make cost-effective cleanup choices that protect public health and the environment, reduce litigation and transactional costs, and insure that states and communities are more informed and involved in cleanup decisions.” Annual Report 1997, supra note 13, at 4. This third round of Superfund reforms included orphan share reform initiatives and gui-
posed allocation process that had been introduced before the United States House of Representatives in the Superfund Reform Act of 1994. A pilot program set up by EPA was designed to use a form of alternative dispute resolution to assign shares of responsibility among all PRPs at a site. Most significantly, EPA announced that it hoped to pay for all of the orphan shares in these pilot programs.

1. EPA Pilot Program Process

EPA initially invited over 500 PRPs to participate in pilot programs at limited sites. EPA used its authority under CERCLA section 104(e) to gather information in order to create preliminary

dance. See id. at 41. For a discussion of EPA reform measures undertaken in the 1980s, see Toxic Waste Litigation, supra note 29 at 1505-10.


71. See Pilot Beginning, supra note 69, at 1 (noting purpose of program is "to allow PRPs to avoid time-consuming and costly CERCLA cost recovery and contribution actions by using this alternative method of cost allocation"). For a discussion of EPA's use of alternative dispute resolution, see EPA, Use of Alternative Dispute Resolution in Enforcement Actions, 26 Env't Rep. (BNA) 301 (June 2, 1995).

72. See id. EPA was concerned with the potential costs related to allocation pilots, and noted that total orphan funding might not be possible if the total number of pilot projects requiring federal funding was too high. See Superfund: Regional Officials Asked to Evaluate EPA's Proposed Administrative Initiatives, 25 Env't Rep. (BNA) 2034 (Feb. 24, 1995) (statement of Bruce M. Diamond, Director, EPA's Office of Site Remediation Enforcement). Notably, EPA announced in May 1995 that the pilot program had to be limited to a small number of sites since EPA had "not received additional appropriations [that] year to pay the orphan share." Superfund Administrative Reforms Fact Sheet: May 25, 1995, Allocation Pilots, 26 Env't Rep. (BNA) 292 (June 2, 1995). For a further discussion of EPA allocation pilots, see infra notes 73-83 and accompanying text.

73. See Superfund: Hundreds of Small Parties Released From Enforcement Under Agency Reforms, 26 Env't Rep. (BNA) 2196 (March 22, 1996) (citing Superfund Administrative Reforms Semiannual Report, Fiscal Year 1995 (visited Jan. 20, 1997) <http://www.epa.gov/superfund/oerr/techres/annrpt97.htm>). A legislative proposal by Representative Michael Oxley (R-Ohio) and Representative Thomas Bililey (R-Va.), chairman of the House Commerce Committee, considered during the 103d Congress contained an allocation process similar to that used with the EPA allocation pilot programs. See id. EPA initially selected five sites for these pilot programs in 1995. EPA increased its pilot program offer to a total of twelve sites, but three sites did not accept the offer. See Annual Report 1997, supra note 13, at 58. The original five sites included: Old Southington Landfill in Southington, Connecticut; NL Industries site in Pedricktown (Salem County), New Jersey; Hunterstown Road in Gettysburg, Pennsylvania; C&R Battery site in Chesterfield County, Virginia; and Hastings Ground Water Contamination/North Landfill subsite in Hastings, Nebraska. See Superfund: Five Sites Chosen by Agency to Test Liability Allocation Based on Reform Bill, 26 Env't Rep. (BNA) 251 (May 26, 1995) (noting that orphan shares would be paid by EPA at these sites and "[t]he allocation approach to be taken at the pilot sites differs from the traditional approach taken by EPA in that, under the standard approach, the agency would generally pursue one PRP, making it responsible for cleaning up the entire site. That party would then litt-
lists of PRPs eligible for the pilot program at each site. Upon notification, EPA provided PRPs with the opportunity to "nominate" other parties for inclusion on the list. After its review of the nominations, EPA issued a final list of parties, "allocation parties," that would be eligible to participate. Next, EPA, in conjunction with allocation parties, nominated a neutral, non-governmental third party to be the "allocator" for each site.

EPA then assigned to each allocator the responsibility of writing a report specifying the shares of responsibility for each of the allocation parties. EPA afforded substantial discretion to the allocator to create allocation reports, and permitted allocation parties to review a draft of the report and state their positions on the recogate to recover its costs from other parties to the site). Today, the pilot programs at the nine sites are at various stages. See Annual Report 1997, supra note 13, at 58.

74. See Pilot Beginning, supra note 69, at 2 (noting EPA's plans to identify parties eligible for de minimis settlements under CERCLA section 122(g), who would not be part of allocation process if settlements were made). EPA chose the pilot sites to represent a large range of site types based on: (1) the number of PRPs; (2) the type of contamination present at the site; (3) the size of the orphan share; and (4) the cleanup costs potentially involved. See Superfund: Five Sites Chosen By Agency To Test Liability Allocation Based on Reform Bill, supra note 73, at 251.

75. See Pilot Beginning, supra note 69, at 1 (noting also that each nomination had to "include (1) a statement demonstrating that an adequate basis exists to establish that the nominated party is liable under CERCLA, and (2) full disclosure of all information concerning the nominated party's liability").

76. See id. This list included "those parties that will be subject to the allocation process; the EPA, on behalf of the orphan share; and non-settling de minimis parties, municipal solid waste generators/transporters, and ability-to-pay parties." Id.

77. See id. Each party on the allocation list was able to vote for the allocator on a per-capita basis, with EPA voting for each insolvent and defunct party, and retaining veto power for any allocator not nominated by EPA. See id.

78. See id. These allocation reports included the shares attributable to the orphan share. See id. Any share that was not attributable to a specific party was included in the allocated shares. See id. The allocations created by the allocators were to be based on the following factors:

(1) the amount of hazardous substances involved;
(2) the degree of toxicity of hazardous substances contributed by allocation parties;
(3) the mobility of hazardous substances contributed by allocation parties;
(4) the degree of involvement by allocation parties in the generation, transportation, treatment, storage, and disposal of the substances;
(5) the degree of care exercised by the allocation parties with respect to the substances involved; and
(6) the degree of cooperation of the allocation parties with government officials to prevent any harm to public health or the environment.

Id.
ommended allocations. Lastly, EPA used the allocator's final report for settlement discussions with the allocation parties.

2. Outcome of the EPA Pilot Programs

According to EPA, the reforms initiated by the pilot programs have resulted in significant cost savings in the cleanup process. Additionally, EPA highlighted that more than seventy percent of long-term cleanup actions were financed by PRPs as a result of these settlements. Among the twelve pilot program sites, three refused the pilot program offer, three had allocator issued reports "reflecting an agreement regarding the shares of responsibility between the parties," one had "a majority of parties settle[ ]" and the remaining five are in the preliminary phases of the allocation process. These positive results have prompted EPA to initiate additional reforms in a continuing effort to reduce future litigation, to significantly cut costs and to induce PRPs to perform cleanups.

B. Recent EPA Reform for Orphan Share Liability Issues

To further develop orphan share reform, EPA announced in October 1995 that it would provide orphan share compensation at

79. See Pilot Beginning, supra note 69, at 2. EPA assisted the allocator in the information-gathering process and also had authority to reject the final report on several limited grounds. See id.

80. See id. Settlements were described as "cash-out settlements, where a PRP is required only to pay money to the agency, or cleanup settlements, where the PRP is required to conduct site cleanup activities." Id. PRPs required to perform cleanup activities were reimbursed by EPA for costs exceeding their allocation share. See id.

81. See Superfund: Reports Cite Savings in Remedy Selection Resulting from Superfund Reforms at EPA, 27 Env't Rep. (BNA) 1874 (Jan. 10, 1997) (citing Superfund Administrative Reforms Annual Report, Fiscal Year 1996 (visited Jan. 20, 1997) <http://www.epa.gov/oeerrpate/superfund/web/oeerr/sfguide/index2.htm> [hereinafter Annual Report 1996] (noting EPA "has taken a number of steps to ensure that federal superfund resources and projections are focused in the right places")); Annual Report 1997, supra note 13, at 58 (noting "a number of companies believed the actual costs expended were less than [potential costs of] litigation"). Alternatively, some small companies "felt the process was not cost effective for them." Id. at 59. Significantly, EPA observed that "private parties agreed to participate in the pilot because: EPA was funding 100 percent of the orphan share; parties believed the process would be more cost efficient than current Superfund litigation; and the party could enter into a fair share settlement." Id.

82. See Superfund: Reports Cite Savings in Remedy Selection Resulting from Superfund Reforms at EPA, supra note 81, at 1874 (reflecting that "parties that bear the larger burden of responsibility at superfund sites also have benefitted from the reforms").

83. See Annual Report 1997, supra note 13, at 58. EPA has stated that "the pilots have been useful in identifying problems and have indicated the need for flexibility to meet site-specific circumstances." See Annual Report 1996, supra note 81.
additional sites where PRPs agreed to perform cleanups. At the
time of this announcement, EPA also requested that Congress re-
form CERCLA to achieve three main goals: (1) to ensure that pol-
luters, not taxpayers, pay for cleanup costs; (2) to speed up site
cleanups while reducing transaction costs; and (3) to enable local
communities to maintain a larger role in selecting cleanup plans.

EPA subsequently issued an "Interim Guidance" on orphan share
compensation on June 3, 1996. The Interim Guidance an-
ounced EPA's intention to "fundamentally change the way EPA
implements the Superfund program" by paying for some of the or-
phan share. EPA anticipated that its Interim Guidance would
help facilitate and encourage settlements with PRPs. To help ex-
pedite the reforms enumerated in the Interim Guidance, EPA es-

tablished an orphan share assistance team with the Department of
Justice.

84. See Continuing Predicament, supra note 15, at 2 (noting EPA's announce-
ment to fund portion of orphan share costs was made to reduce litigation costs, to
accelerate cleanups and to ensure fairer allocation of cleanup costs).
85. See Continuing Predicament, supra note 15, at 1 (noting that EPA Adminis-
trator Carol M. Browner's "20 new common sense administrative reforms to the
EPA toxic waste cleanup program [were] . . . intended: (1) to make cost-effective
cleanup choices that protect the environmental and public health; (2) to reduce
litigation and its associated costs so that more time could be spent on cleanup; and
(3) to help communities become more knowledgeable and involved so that
cleanup decisions make more sense at the local level").
86. See Interim Guidance, supra note 3, at 54. EPA released the Interim Gui-
dance to "provide[ ] Regions with further direction to address orphan share com-
pensation in Superfund settlements . . . [and to] strike[ ] a balance between the
budgetary constraints of a lapse in Superfund taxing authority and the desire to
provide meaningful reform . . . .
Id.
87. Id. The Interim Guidance states that the Superfund reform applies
where:
(1) EPA initiates or is engaged in ongoing negotiations for a remedial
design or remedial action (RD/RA) at a site or for a non-time-critical
(NTC) removal at a National Priorities List (NPL) site under the
Superfund Accelerated Cleanup Model (SACM);
(2) a PRP or group of PRPs agrees to conduct the RD/RA of RA pursu-
ant to a consent decree or the NTC removal pursuant to an administra-
tive order on consent (AOC) or consent decree; and
(3) an "orphan share" exists at the site.
Id. at 2. For a definition of orphan share, as used by EPA in the Interim Guidance,
see supra note 3 and accompanying text.
88. See id. (noting "EPA anticipates that its willingness to contribute to settle-
ment, based in part upon an increased emphasis on the effect of an orphan share,
will facilitate settlement with performing parties").
89. See id. EPA and the Department of Justice "expanded the orphan share
factors for the government to consider when deciding whether and how much to
compromise a cost recovery claim based on the existence of a significant orphan
share").
Consistent with the purpose and goals set forth in the Interim Guidance, EPA later offered $57 million to parties in recognition of the orphan share at twenty-four Superfund sites.\textsuperscript{90} EPA stated that this compensation might be accomplished through forgiveness of past transaction costs and projected oversight costs, subject to funding availability for the program.\textsuperscript{91} Notably, EPA described the 1996 orphan share reform as a “fundamental and permanent change in EPA’s enforcement process.”\textsuperscript{92} Moreover, EPA suggested that this orphan share reform had reduced litigation and transaction costs by reducing the number of disputes over who should bear the burden of the orphan shares.\textsuperscript{93}

V. IMPACT OF EPA ORPHAN SHARE REFORM ON FUTURE SUPERFUND CLEANUP

A. The Effect of Orphan Share Reform on Recent Legislation

Since EPA’s announcement to compensate parties for some portion of the orphan share liability at Superfund sites, Congress has not provided an appropriation for orphan share compensation.\textsuperscript{94} Congress has also failed to reinstate the Superfund taxing authority which expired in 1995.\textsuperscript{95} Moreover, the Interim Gui-

\textsuperscript{90} See generally Annual Report 1996, supra note 81 (noting purpose of EPA was to increase fairness for PRPs agreeing to perform cleanups). EPA orphan share funding initiatives continued and EPA provided more than $53 million at 20 sites in fiscal year 1997, for a combined total of more than $100 million in orphan share compensation in fiscal years 1996 and 1997. See Annual Report 1997, supra note 13, at 42 (stating “this compensation creates incentives for viable parties to perform cleanups and reduces the time required to complete settlement agreements”).

\textsuperscript{91} See generally Annual Report 1996, supra note 81. PRPs incur costs at sites in part because of EPA’s need to oversee the quality of the work they are doing. EPA describes oversight as “the process EPA uses to ensure that all studies and work performed by PRPs are technically sound and comply with the statute, regulations, guidances, policies, and the signed settlement agreement . . . [which] may include submission of reports for approval, meeting interim milestones, or the scheduling of field visits.” Id.

\textsuperscript{92} Id.

\textsuperscript{93} See id. EPA suggested that the PRPs who have a larger burden of responsibility at the sites have benefitted from Superfund orphan share reforms due to reductions in transaction costs and forgiveness of oversight costs. See id.

\textsuperscript{94} See id. Notably, in late 1997, Carol M. Browner, EPA Administrator “lobbied for Congress to appropriate an extra $650 million for the next two years above the $1.4 billion for the superfund program to double the pace of hazardous waste cleanups by 2000.” Congress Passes EPA Appropriations Bill, Clearing Way for Expected Clinton Approval, 28 Env’t Rep. (BNA) 1223 (Oct. 17, 1997). To date, no such appropriations have been authorized.

dance issued by EPA represented an approach for fiscal year 1996 only, and is devoid of any EPA pledges for future orphan share funding. EPA, however, did follow the guidance and continued to provide orphan share funding in fiscal year 1997. As a result, it is uncertain whether EPA's orphan share reforms will continue to effectively induce PRPs to reach settlement and advance the cleanup of hazardous waste sites. Superfund reform remains at a standstill while democrats and republicans have been deadlocked in their debate of the issues since the compromise Superfund bill in the 103rd Congress. 96

1. Lack of Superfund Reform Legislation Prior to Election 1996

Not surprisingly, scholars, politicians and academics maintain varying views regarding why Congress failed to adopt Superfund legislation prior to the 1996 congressional elections. Environmental issues, including Superfund, may or may not have played key roles in the 1996 congressional elections. Some believe that the effort to make the 1996 congressional elections “a referendum on environmental issues failed.” 97 Others believe that the election year was “historic” because the environmental conservation movement demonstrated that environmental issues significantly influence voters. 98 Despite such conflicting views, Congress has passed major en-

Carol M. Browner (stating “the Administration remains concerned over the expiration of the authority to replenish the Superfund Trust Fund”).

96. See Looking Ahead to the 105th, 14 Envtl. Forum (Envtl. L. Inst.) No. 1, at 30-32 (Jan.-Feb. 1997) (noting that in 1994, Commerce Committee presented Superfund legislation favored by chemical industry, environmentalists, administration, republicans and democrats that was “killed” by Bob Dole just before the November election); The Mechanic, 15 Envtl. Forum (Envtl. L. Inst.) No. 1, at 38 (Jan.-Feb. 1998) (statement of Elliott Laws, former EPA Assistant Administrator for Hazardous Waste) (“We tried comprehensive reform in the 103rd Congress, and it failed. Comprehensive reform was not a bad idea; in fact, it’s still a good idea.”).

97. See Looking Ahead to the 105th, supra note 96, at 32 (opinion of Jonathan Adler, Director of Environmental Studies Competitive Enterprise Institute). Adler stated that “where environmental issues played a role, they did not always help candidates that supported more regulation.” Id. Moreover, Adler posited that a great majority of anti-regulatory incumbents won reelection, despite being “very critical of existing environmental programs.” Id.; see also Superfund: House GOP Pledges Progress on Reform, Says Help From EPA Would Be ‘Welcome,’ 27 Env’t Rep. (BNA) 1656 (Dec. 13, 1996) (noting comment of Rep. Thomas Bliley (R-Va.) that “the administration wasn’t interested in cleanups; it was interested in campaigning”).

98. See Looking Ahead to the 105th, supra note 96, at 30-32 (noting that “the evidence is abundantly clear that Americans don’t want environmental regulations rolled back”). Deb Callahan, President, League of Conservation Voters, noted a recent bipartisan poll by Peter Hart Research and Research Management Strategy, Inc., which “showed that, by three to one, the American public believes environmental regulations do not go far enough.” Id. Moreover, Callahan expressed her
Environmental laws before October in election years on very few occasions. Even so, the fact remains that although the 1996 congressional elections have come and gone, and Superfund bills have been proposed by both democrats and republicans, no Superfund amendments have been enacted. These issues remain at a standstill while the courts continue to hear CERCLA liability and orphan share litigation arguments.

2. Reauthorization of Superfund Taxing Authority

The Clinton administration has failed to reauthorize Superfund taxing authority since its expiration in 1995. Many politicians, industry lobbyists and academics agree that Superfund taxes should not be reinstated until a broad legislative reform of CERCLA takes place. Others, however, believe that Superfund

opinion that the congressional elections show that America desires bipartisanship and strong environmental regulation, noting that "in eight of nine [districts or states], environment was the number one or two issue that persuaded voters to vote for or against a certain candidate." Id. at 31.

Additionally, Don Ritter, Chairman, National Environmental Policy Institute, in the same forum, agreed that the nation desires a quality environment, and in doing so equated environmental benefits with regulation. See id. Ritter, however, did not believe that the election was a mandate for more or stronger regulation; rather, he noted that "a lot of environmentalists believe we can achieve environmental goals by reducing the burden on the system as opposed to increasing it." Id. at 33.

99. See id. at 31 (noting statement of Daniel J. Weiss, Political Director, Sierra Club).

100. See Superfund: House GOP Pledge Progress on Reform, Says Help from EPA Would be 'Welcome,' supra note 97, at 1656 (citing "common complaint among congressional Republicans - that the administration's election politics hindered re-form in the last Congress"). In 1995 and 1996, Republicans presented two comprehensive legislative approaches, and 26 specific proposals on varying Superfund legislation. See id. An alternative proposal to a measure introduced by Representative Michael Oxley (R-Ohio) was released to House democrats on April 30. See id.; see also Major Hurdles Seen for Reform Efforts, 27 Env't Rep. (BNA) 1958 (Jan. 24, 1997) (discussing "obstacle course of possible piecemeal attempts [and] an administration that is sending mixed signals on its commitment to rewriting the legislation, and the struggle to maintain bipartisan coalitions on Capitol Hill").

101. See Interim Guidance, supra note 3. In fact, the Clinton administration has failed to reinstate Superfund taxes to date. See generally Statement of Carol M. Browner, supra note 95 ("In addition to the expiration of the tax, we are disappointed that Congress did not provide the 1st year of the President's request for additional appropriated funds to address the backlog of Superfund sites that are currently awaiting cleanup.").

102. See Superfund: CERCLA Reform, Tax Authority Must Be Combined, CMA Tells Treasury, 27 Env't Rep. (BNA) 1850 (Jan. 3, 1997) (citing letter released by the Treasury Department on December 30, 1995, from Frederick L. Webber, President, Chemical Manufacturers Association (CMA) (stating that Webber and CMA are "greatly concerned that any effort to reinstate these [Superfund] taxes, other than as an integral part of a superfund reform bill, would effectively spell the end of superfund reform in the 105th Congress"); see also Looking Ahead to the 105th,
lacks the capacity to adequately finance cleanup activities and properly effectuate reform initiatives without reauthorization to replenish the Superfund trust fund through taxation.\textsuperscript{103}

B. The Effect of Orphan Share Reform on Future CERCLA Legislation

In December 1996, republicans and democrats pledged to work together to produce a Superfund reform bill in the 105th Congress.\textsuperscript{104} Some members of Congress posit that EPA's new policy with respect to the payment of orphan shares offers an excellent opportunity to resolve this issue in negotiations between EPA and settling parties. If EPA continues to commit orphan share funds, all or part of the orphan share issue will be resolved prior to the cost allocation phase. Whether EPA can achieve this aim is questionable.

\textsuperscript{103} See Anderson, supra note 2, at 6-7 (describing CERCLA as “a black hole that indiscriminately devours all who come near it”).

\textsuperscript{104} See House GOP Pledges Progress on Reform, Says Help from EPA Would Be Welcome, supra note 97, at 1656. Republican House Representative Thomas Bliley (R-Va.), Chairman of the House Commerce Committee, stated he expected “some movement” on Superfund reforms by the Clinton administration, as well as good faith negotiations from Commerce Committee democrats. Id. He also stated that, Representative John Dingell (D-Mich.), ranking minority member of the committee, has “pledged to work with [him] in a bipartisan fashion.” Id. A spokesman for Dingell, however, confirmed only that Bliley and Dingell “had a general conversation about [Superfund reform] issues,” and that “they didn’t discuss any particular bill.” Id.; see also Major Hurdles Seen For Reform Efforts, supra note 100, at 1958 (citing statement of John Arlington, Senior Counsel for Federal Affairs and Policy with the American Insurance Association) (noting “I think the majority is very interested in comprehensive reform’ on both the House and Senate side”). Arguably, however, bipartisan efforts have been and will be ineffective to initiate needed reform. See The Mechanic, supra note 96, at 40. Elliott Laws, former EPA Assistant Administrator for Hazardous Waste, stated:

\begin{quote}
I don’t think there’s any chance we’re going to get a comprehensive reform bill. First, the gulf between Republicans in Congress and the Democrats in the administration is too great to cross at this point. . . . Second, the push was coming from the corporate side, and now the spark is gone. It basically comes down to dollars . . . . One of the criticisms of the administrative reforms is that they are just administrative — as easily as we put them in, a future administration could take them out. That’s why you need legislation. In addition, the administrative reforms are cumbersome, some of them are based on admittedly shaky legal interpretations of the statute.
\end{quote}
ble. If Congress fails to reauthorize Superfund taxing authority, EPA will be forced to work with a weakening Superfund with limited funds available for orphan share funding settlements. As a result, PRPs will no longer benefit from EPA's reform efforts to "feed" the orphan shares with Superfund dollars. Instead, PRPs will again face time-consuming and expensive litigation over orphan share issues. Therefore, it is apparent that to initiate permanent change, democrats and republicans must remain committed to bipartisan reform by enacting CERCLA legislation that includes both a reauthorization of Superfund taxation, as well as an appropriation for orphan share funding.

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105. See Statement of Carol M. Browner, supra note 95 (noting Congressional Budget Office "projected that the [Superfund] Trust Fund will, at the end of next fiscal year, have less remaining than will be needed to keep the program operating, to keep site cleanups underway, in the following fiscal year").