No. _____

In the Supreme Court of the United States

HOBART CORPORATION; KELSEY-HAYES COMPANY; NCR CORPORATION,

Petitioners,

v.

WASTE MANAGEMENT OF OHIO, INC., as successor to Industrial Waste Disposal Co., Inc.; BRIDGESTONE FIRESTONE INC, fka Dayton Tire and Rubber Company; CARGILL INC.; DAYTON POWER AND LIGHT COMPANY; MONSANTO COMPANY, nka Pharmacia LLC, a Delaware Limited Liability Company; VALLEY ASPHALT CORPORATION; JOHN DOE CORPORATION(S), one or more unknown entities; COCA-COLA ENTERPRISES, INC.; GLAXOSMITHKLINE, LLC; THE SHERWIN-WILLIAMS COMPANY; DAP PRODUCTS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

NORMAN W. BERNSTEIN
Counsel of Record
INGA CALDWELL
N.W. Bernstein & Associates, LLC
800 Westchester Ave., Suite N-319
Rye Brook, NY 10573
(914) 358-3500
nwbernstein@nwbllc.com

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) § 113(f)(3)(B) provides that any person that has resolved its liability to the government "may" bring a contribution claim against any potentially responsible party (PRP) that has not settled. The Sixth Circuit held (as have several others) that "may" means "must" and that a party that resolves its liability by settling with the government is limited to a contribution claim and cannot bring a CERCLA § 107(a) claim to recover cleanup costs.

The question presented is whether the word "may" contained in CERCLA § 113(f)(3)(B) means "must".

CERCLA § 113(g)(2) and § 113(g)(3) provide differing statutes of limitations. The former applies to recovery of cleanup costs and the latter, although entitled "Contribution", by its terms applies to only two types of administrative settlements—de minimis and government cost recovery settlements. In the instant case, the Sixth Circuit held that the shorter § 113(g)(3) statute should be applied to "all" contribution claims, including claims to recover cleanup costs and expressly declined to follow Fifth and Tenth Circuit decisions that applied the longer § 113(g)(2) cost recovery statute, stating that those decisions are "no longer good law".

The question presented is, after a party enters into an administrative settlement with the government to undertake cleanup work and then asserts a contribution claim against non-settling PRPs, what statute of limitations applies - CERCLA § 113(g)(2) or § 113(g)(3).

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE STATEMENT

The caption of this petition contains all parties to the proceedings.

Petitioner Hobart Corporation is a wholly-owned subsidiary of Illinois Tool Works Inc. Illinois Tool Works Inc. is a publicly owned company and it is not aware of any other publicly owned company owning 10% or more of its stock.

Petitioner Kelsey-Hayes Company is a wholly-owned subsidiary of LucasVarity Automotive Holding Company; LucasVarity Automotive Holding Company is a wholly-owned subsidiary of TRW Automotive Inc.; and TRW Automotive Inc. is a wholly-owned subsidiary of TRW Automotive Holdings Corp. TRW Automotive Holdings Corp. is a publicly owned company and it is not aware of any other publicly owned company owning 10% or more of its stock.

Petitioner NCR Corporation is a publicly owned company and it is not aware of any other publicly owned company owning 10% or more of its stock.

We state "not aware" because under the SEC's Rule, 17 C.F.R. § 240.13d-1, any person who acquires 5% or more of a company's stock has ten days during which to file a statement of such ownership on Schedule 13D. Thus, during that time window, it is not possible for a company to know with certainty whether 10% or more of its stock has been acquired by another publicly owned company. We have reviewed the above approach to Rule 29.6 disclosure with the Clerk's office. In the event of any change in the above disclosures

while this case is pending, we will immediately notify the Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutory Provisions:

Legislative History:

Other Authorities:

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 758 F.3d 757. App. 1-38. The District Court's opinion is reported at 923 F.Supp.2d 1086. App. 39-64.

JURISDICTION

The Sixth Circuit entered judgment on July 14, 2014. A timely petition for rehearing en banc was denied on August 19, 2014. App. 65-66. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The most directly relevant provisions of CERCLA are set out in this section. The remaining provisions of CERCLA that are referenced in this Petition are set forth in the appendix to this Petition. App. 140-54.

CERCLA § 107[1]

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

[1] Because of nomenclature differences, CERCLA §§ 107, 113, and 122 are referred to respectively in 42 U.S.C. as §§ 9607, 9613, and 9622. For simplicity in this Petition we will use only CERCLA §§ 107, 113, and 122 without parallel citation to the U.S.C. form of citation (unless we are quoting from a source that uses the U.S.C. form of citation).

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;….

CERCLA §§ 113(f)(3)(B), (g)(2), (g)(3)

(f) Contribution…

(3) Persons not party to settlement

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

***

(g) Period in which action may be brought

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after—

> (A) the date of judgment in any action under this chapter for recovery of such costs or damages, or
>
> (B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

CERCLA § 122(i)

(i) Settlement procedures

(1) Publication in Federal Register

At least 30 days before any settlement (including any settlement arrived at through arbitration) may

become final under subsection (h) of this section, or under subsection (g) of this section in the case of a settlement embodied in an administrative order, the head of the department or agency which has jurisdiction over the proposed settlement shall publish in the Federal Register notice of the proposed settlement. The notice shall identify the facility concerned and the parties to the proposed settlement….

INTRODUCTION

In 2006, the three Petitioners voluntarily entered into a CERCLA administrative order on consent (AOC) with EPA to do a remedial investigation and feasibility study (RI/FS) of a hazardous waste site—the first step in cleaning it up. The Petitioners then sued other potentially responsible parties (PRPs) who had not settled with the government in order to obtain a sharing of the costs. Rejecting opinions of the Fifth and Tenth Circuits that applied the longer CERCLA § 113(g)(2)(A) and (B) "removal" and "remedial" statutes of limitations as "no longer good law", the Sixth Circuit ruled that CERCLA's shorter contribution statute, § 113(g)(3), controlled "all" contribution actions even though that is not what the plain language of § 113(g)(3) says.

The Sixth Circuit also ruled that any PRP that has a potential contribution claim for a sharing of cleanup costs "must" proceed in contribution, even though CERCLA § 113(f)(3)(B) plainly says "may". In doing so, it failed to consider controlling precedent from this Court as to how the term "may" is to be construed and drastically restricted the reach of this Court's landmark decision in *United States v. Atl. Research*

Corp., 551 U.S. 128 (2007). That case held that a PRP that incurs its own response costs and does so voluntarily, at least in the sense that it has not been sued, could bring a CERCLA § 107(a) direct action and is not limited to a contribution claim.

In dismissing the Petitioners' claims, the Sixth Circuit departed from the plain language of the statute in two ways, failed to consider controlling precedent from this Court, stood the polluter pays principle on its head, and also created a split among the Circuits as to the applicable statute of limitations when one PRP sues another PRP in contribution.

This case is of exceptional importance. First, the data discussed in the Reasons for Granting Certiorari section below show that AOCs (such as the one in this case) apply to more sites than either of the other two enforcement tools provided by CERCLA (consent decrees or unilateral administrative orders (UAOs)) and CERCLA sites can involve hundreds of millions of dollars (in some cases more than a billion dollars) in potential liability. The ability of parties entering into AOCs to share these costs with other PRPs is essential to encourage settlement and to avoid unfair and in some cases potentially ruinous liability.

Second, the combination of the two doctrines adopted by the Sixth Circuit, that: (a) parties entering into AOCs that resolve their liability to the government can only sue in contribution and can never bring a cost recovery action (because "may" means "must"); and (b) when they bring a contribution action they are subject to the shortest possible statute of limitations (which the Sixth Circuit acknowledged was not triggered but applied anyway), constitutes a

devastating one-two punch to the polluter pays principle. The former doctrine, which drastically narrows the pool of companies that can avail themselves of *Atlantic Research*, has gone viral infecting at least six Circuit Courts of Appeals, none of which considered this Court's precedents as to how "may" is to be construed. The latter doctrine, grounded in the notion that precedents from the Fifth and Tenth Circuits (as well as prior precedent from the Sixth Circuit itself) that applied the longer statute of limitations are "no longer good law" has now spread from one ill-reasoned District Court opinion in another Circuit to the Sixth Circuit.

Certiorari should be granted to resolve this split in the Circuits and to review the two dubious doctrines that "may" means "must" (thereby precluding anyone who settles with the government from ever bringing a CERCLA § 107(a) claim) and that the shorter CERCLA § 113(g)(3) contribution statute applies to "all" contribution actions, including actions to recover response costs covered by the plain language of the longer statute, § 113(g)(2). The grant of Certiorari would be judicially efficient since the split in the Circuits and both doctrines are presented in a single case. The grant of Certiorari will also provide notice to the bench and bar that those doctrines are under review by this Court and thus should serve to quarantine their further spread while the Court considers the merits.

STATEMENT OF THE CASE

1. Background

CERCLA creates liability in § 107(a) for four classes of persons: the current owner and operator of the site; the owner and operator at time of disposal; anyone who arranged for disposal or treatment of hazardous substances; and anyone who transported hazardous substances. CERCLA § 107(a). An action to enforce liability may be brought either by the government or by "any other person" that incurred certain response costs. *Id.*[2] The liability created is "strict" in the sense that it is liability without fault. After the November 1980 elections, a provision for express joint and several liability along with provisions for personal injury and property damage claims were stripped from the bill by its sponsors and a last minute compromise was cobbled together from three other bills to get something passed in a lame duck session. There were no hearings or reports on the compromise bill. The House substituted the Senate compromise bill for the two bills it had passed and on December 11, 1980, President Carter signed CERCLA into law. Congress left the question of joint and several liability to the courts applying common law principles. There was also no express statute of limitations nor any express right to contribution.

When the government began initiating lawsuits to enforce § 107(a) liability alleging joint and several liability to force the cleanup of sites (or to reimburse

---

[2] Response actions are divided into "removal" actions and "remedial" actions. *See* CERCLA §§ 101(23), (24), (25).

the government when it cleaned up first and sued for its costs afterward), the question was whether the parties that the government targeted had a right to sue other PRPs in contribution. Some lower courts held that there was an implied right of contribution under CERCLA, but in two cases involving other statutes this Court had held that unless Congress expressly created such a right, it did not exist.

By 1986, Congress had grown unhappy with the way the statute was being administered and passed the Superfund Amendments and Reauthorization Act (SARA). In SARA, Congress added numerous provisions for the administration of CERCLA including an express right of contribution, statutes of limitations applicable to different situations, and other provisions in what are now § 113 and § 122 of CERCLA.

In two landmark cases, this Court held that CERCLA is to be read narrowly to mean what it says. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 165-68 (2004) (When CERCLA § 113(f)(1) says "during or following any civil action under section 9606 of this title or under section 9607(a) of this title", it means what it says.); *Atl. Research Corp.*, 551 U.S. at 136-37 (The statute says that § 107(a) actions can be brought by the government or "any other person". The statute means what it says—it does not mean any other "innocent" person.).

2. The Instant Case

By its terms, the 2006 AOC, called an Administrative Settlement Agreement and Order on Consent (ASAOC) for a Remedial Investigation/ Feasibility Study was entered into "voluntarily" by all

parties. ASAOC ¶ 1, App. 70.[3] It required that, under EPA's direction, respondents on the ASAOC (Petitioners in this Court) undertake a RI/FS at the South Dayton Dump and Landfill Site located in Moraine, Ohio. A remedial investigation (the "RI") generally involves a detailed sampling of a site's soil, groundwater, and other media, and a feasibility study (the "FS") involves the analysis against engineering and legal criteria of feasible alternatives for remedying the conditions found during the RI. Petitioners were required to meet certain milestones and would be subject to stipulated and other penalties for failure to meet those milestones. The government did not recover its past costs in the ASAOC but provision was made for payment of the government's future costs in overseeing implementation of the RI/FS. The government agreed that the Petitioners had resolved their liability to the United States and covenanted not to sue, contingent on continued compliance. ASAOC ¶¶ 1, 66-67, 79-85, App. 70, 110-12, 116-23. The ASAOC became effective on August 15, 2006. App. 139.

On May 24, 2010, Petitioners sued eight companies (and John Doe Corporation(s)) under CERCLA § 107(a) and CERCLA § 113(f)(3)(B) to recover their costs in carrying out the ASAOC, for unjust enrichment under Ohio law, and for declaratory judgment (*Hobart I*). On June 29, 2012, Petitioners filed a second suit under the

---

[3] At some point prior to the entry of the order in the instant case, EPA changed the name of its standard form of consent order from an AOC to an ASAOC, as its terms evolved. For purposes of this Petition, there is no material difference and we use the terms interchangeably.

same basic facts against four additional companies (*Hobart II*). Because of potential attorney conflict issues, the *Hobart II* defendants were not added to *Hobart I* and the District Court did not consolidate the cases. In June and August 2012, motions for summary judgment were filed in *Hobart I* and in August 2012 a motion to dismiss was filed in *Hobart II*.

On February 8, 2013, the District Court ruled on both cases simultaneously. With regard to the CERCLA claims, it ruled that: (a) under the terms of the ASAOC, Petitioners had resolved their liability to the United States for the matters covered by the ASAOC; (b) since Petitioners had resolved their liability they had a claim for contribution under CERCLA § 113(f)(3)(B); (c) since Petitioners had a claim for contribution, they could not have a claim under CERCLA § 107(a); and (d) their claim for contribution was untimely because, in the District Court's view, CERCLA § 113(g)(3) applied to "all" contribution actions.[4] App. 52-60. The cases were timely appealed to the Sixth Circuit.

The appeals were consolidated in the Sixth Circuit. On July 14, 2014, the Sixth Circuit affirmed the dismissal of all of Petitioners' claims and on August 19, 2014 denied rehearing en banc. In its opinion, the

---

[4] In July and August 2010, three defendants also filed motions to dismiss in *Hobart I*. On February 10, 2011, the District Court sustained the motions to dismiss Petitioners' claims for contribution under CERCLA § 113(f)(3)(B) as time barred. Judgment dismissing all of the claims in both *Hobart I* and *Hobart II* was entered on February 8, 2013. The portion of the dismissal that relates to the Ohio common law count is not in issue on this Petition.

Sixth Circuit ruled that CERCLA § 107(a)(4)(B) and § 113(f)(3)(B) were mutually exclusive and that "if a party is able to bring a contribution action, it must do so…." (App. 18), otherwise, § 113(f)(3)(B) would lose its "bite" because plaintiffs would always resort to § 107(a)'s more favorable terms (App. 17). The Sixth Circuit reasoned that since the ASAOC resolved the liability of the Petitioners, it constituted an administrative settlement within the meaning of § 113(f)(3)(B) that triggered a "right" of contribution. Thus, in the Court's view, the Petitioners could only bring a contribution action and could not bring a CERCLA § 107(a) cost recovery action. App. 19-27.

As to the timeliness of the Petitioners' contribution claim, the Sixth Circuit noted that there were two potential statutes of limitations in CERCLA, § 113(g)(2) (governing removal and remedial action claims) and § 113(g)(3) (entitled "Contribution" but which by its terms covers only de minimis and cost recovery administrative settlements). App. 27-28. Although acknowledging that under Sixth Circuit precedent an RI/FS may be a removal action,[5] the Sixth Circuit declined to apply the removal action statute because in its view CERCLA § 113(g)(3) "governs *all* contribution actions." App. 29 (emphasis in original). The Court declined to follow the Fifth and Tenth Circuits' decisions in *Geraghty and Miller, Inc. v. Conoco Inc.*, 234 F.3d 917 (5th Cir. 2000) and *Sun Co., Inc. (R&M) v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997) that applied § 113(g)(2) to sustain

---

[5] The cases have noted that an RI/FS is a removal action. *Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836 (6th Cir. 1994); *Atl. Richfield Co. v. Am. Airlines, Inc.*, 98 F.3d 564 (10th Cir. 1996).

contribution actions for recovery of removal or remedial costs:[6]

> [T]hese cases conceived of contribution actions as a subset of cost-recovery actions under § 107 [citations omitted]. *Cooper Industries* and *Atlantic Research* have clarified that §§ 107 and 113 offer distinct causes of action and, therefore, are governed by distinct statutes of limitations. Thus, the cases cited by Appellants are no longer good law on this point.

App. 31. The Court went on to acknowledge that CERCLA § 113(g)(3) had not been triggered since the AOC had not been shown to be a CERCLA § 122(h) (cost recovery) settlement—one of the two types of administrative settlements expressly covered in § 113(g)(3). App. 31-33. (No one argued that the settlement was the other type—a de minimis settlement—which it clearly was not.) However, after concluding that the statute of limitations had not by its terms been triggered, the Court reasoned that: (a) there must be a trigger; (b) the effective date of the ASAOC was the most logical and convenient triggering event; (c) in its view three years was sufficient time to identify other PRPs; and (d) using that trigger would prevent a PRP who did settle from dragging out a removal action until it identifies every other PRP. App. 33-35.

---

[6] It also distinguished prior Sixth Circuit cases. App. 31.

REASONS FOR GRANTING CERTIORARI

1. AOCs Are The Primary Way CERCLA Liability Is Implemented And Vast Sums Are At Stake In Apportioning Or Allocating Site Cleanup Costs

A search of EPA's CERCLIS database shows that of the active CERCLA sites, through the close of Fiscal Year 2013 (the latest date for which data is currently available), 1,777 sites are covered by AOCs, 1,046 sites are covered by UAOs, and 1,282 sites are covered by consent decrees. U.S. Envtl. Prot. Agency, Search Superfund Site Information, http://cumulis.epa.gov/supercpad/cursites/srchsites.cfm (follow "Action Types" hyperlink; then follow "ADMINISTRATIVE ORDER ON CONSENT" hyperlink, "CONSENT DECREE" hyperlink, and "UNILATERAL ADMIN ORDER" hyperlink) (last visited Nov. 11, 2014).

Thus, AOCs are used more frequently to enforce CERCLA liability than either of the other two enforcement methods and CERCLA cases can involve vast sums. For example, contribution claims have recently been reinstated against non-settling PRPs at the Lower Fox River site, *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682 (7th Cir. 2014), a site where the cleanup costs for part of the river are projected to be more than three quarters of a billion dollars.[7] The Gowanus Canal cleanup in New York has

---

[7] *See* TETRA TECH EC, INC. ET AL., LOWER FOX RIVER REMEDIAL DESIGN 100 PERCENT DESIGN REPORT FOR 2010 AND BEYOND REMEDIAL ACTIONS 170-72 (2012), http://www.epa.gov/region5/cleanup/foxriver/pdf/foxriver-design-report2012.pdf; U.S. ENVTL. PROT. AGENCY, RECORD OF DECISION AMENDMENT OPERABLE UNIT 1

been estimated to cost half a billion dollars.[8] Other examples of site costs are: the Portland Harbor, $200 million to $1.7 billion;[9] the Operating Industries, Inc. Landfill, over $600 million;[10] the San Gabriel Valley, over $300 million to date plus another $200 million over the next ten years;[11] and the Lower Passaic River, $1.7 billion.[12]

LOWER FOX RIVER AND GREEN BAY SUPERFUND SITE 17 (2008), http://www.epa.gov/region05/cleanup/foxriver/pdf/foxriver_rod_ou1_200806_complete.pdf.

[8] U.S. ENVTL. PROT. AGENCY, RECORD OF DECISION GOWANUS CANAL SUPERFUND SITE iv. (2013), http://www.epa.gov/region2/superfund/npl/gowanus/ri_docs/692106_gowanus_canal_rod_9_27_13_final.pdf .

[9] Scott Learn, *Portland harbor Superfund cleanup alternatives have 'many deficiencies that need substantial revision,' Environmental Protection Agency says*, THE OREGONIAN, Jan. 22, 2013, http://www.oregonlive.com/environment /index.ssf/2013/01/portland_harbor_superfund_opti.html.

[10] U.S. Envtl. Prot. Agency, Operating Industries, Inc. Landfill, http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/ViewByEPAID/CAT080012024#prps (last visited Nov. 4, 2014).

[11] U.S. ENVTL. PROT. AGENCY, SAN GABRIEL VALLEY GROUNDWATER CLEANUP SUPERFUND PROGRESS REPORT 1 (2014), http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/84e3d3f7480943378825723300794f02/0065ed704ae95ccc88257007005e941e/$FILE/46442366.pdf/SGV%201_14.pdf.

[12] U.S. ENVTL. PROT. AGENCY, SUPERFUND PROPOSED PLAN LOWER EIGHT MILES OF THE LOWER PASSAIC RIVER PART OF THE DIAMOND ALKALI SITE 40 (2014), http://passaic.sharepointspace.com/Public%20Documents/2014-04-10%20Lower%208%20Proposed%20Plan%20final_compiled.pdf.

The questions presented by this case are thus extraordinarily important because: (a) the data show that AOCs are the primary way that CERCLA is being implemented; (b) vast sums can turn on who has to pay; and (c) the Sixth Circuit's approach of both forcing any PRP that signs an AOC that resolves its liability to bring only a contribution action and then shortening the time limit to sue to recover its costs, allows polluters who have not signed AOCs to "hide in the weeds" and get a "free ride" if they are not found in time.

Letting other PRPs get a "free ride" discourages companies from stepping forward to conduct cleanups. That is not what Congress intended. The issue of whether "may" means "must" and as to the proper statute of limitations applicable to claims among PRPs to allocate or apportion costs are reoccurring and need to be resolved by this Court. Because this case poses both questions, it is a good vehicle for resolving them.

2. The Sixth Circuit's "May" Means "Must" Decision Is Inconsistent With This Court's Construction Of Those Terms, Is Not Supported By Legislative History Or Necessary To Give Effect To Other CERCLA Provisions, And Renders *Atlantic Research* A Dead Letter As To Any Party Signing An AOC That Resolves Its Liability

CERCLA provides three significant avenues for PRPs that incur cleanup costs to force other PRPs to pay a share. A PRP that has not been sued and has incurred its own costs of response may bring a direct action under CERCLA § 107(a) against other PRPs for its response costs. *Atl. Research Corp.*, 551 U.S. at 139.

If it has been sued it may seek contribution under CERCLA § 113(f)(1), or if not sued but the costs were incurred under an AOC that resolves CERCLA liability to the United States or a State, it "may" seek contribution from any person who is not a party to the settlement, CERCLA § 113(f)(3)(B). The issue of whether "may" means "must" (and therefore a PRP signing an AOC resolving its liability "must" bring a § 113(f)(3)(B) contribution action and "may not" bring a § 107(a) action) has been ruled on in at least six Circuit Court cases since *Atlantic Research*, including the instant case. All have held that "may" means "must" and have thus limited PRPs that resolve their liability to the government to contribution claims and barred them from bringing § 107(a) cost recovery claims. *See* App. 17-19, 26; *NCR Corp.*, 768 F.3d at 690; *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230, 1236–37 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 427 (2012); *Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594, 603 (8th Cir. 2011); *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 229 (3d Cir. 2010); and *Niagara-Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 128 (2d Cir. 2010).

A. This Court's Precedents Establish That "May" Does Not Mean "Must" Absent Compelling Legislative History Or Structural Reasons For Construing The Statute Otherwise—Neither Of Which Exist Here

This Court has granted certiorari to determine whether "may" means "must" in other statutory contexts. In *United States v. Rodgers*, this Court noted:

> The word 'may,' when used in a statute, usually implies some degree of discretion. This common-sense principle of statutory construction… can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute.

461 U.S. 677, 706 (1983). In *Rodgers*, this Court found no direct explanation for the change in the language of § 7403 of the Internal Revenue Code from "shall" to "may". *Id.* at 707. Absent legislative history to the contrary, this Court applied what it noted was the "natural meaning" of the term "may", reading "may" as conferring equitable discretion, which, in turn, was consistent with the policies of the statute. *Id.* at 708-09.

In *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, this Court held that the venue provisions of the Federal Arbitration Act were permissive, not mandatory. 529 U.S. 193, 204 (2000). Although Congress' use of the word "may" is not necessarily permissive, this Court looked to the statutory history of the Federal Arbitration Act and the practical consequences of holding that "may" meant "must" with respect to venue. *Id.* at 198-203. This Court reasoned that a restrictive view of the venue provisions: "would be…clearly at odds with…the FAA's 'statutory policy of rapid and unobstructed enforcement of arbitration agreements'…." *Id.* at 201 (citations omitted). The Court concluded that "may" meant "may", not "must". *Id.* at 204.

The legislative history set out below shows that in enacting SARA, Congress sought to confirm that PRPs had a *right* of contribution under § 113(f). There is

nothing to show that Congress intended to take away the right granted in the original statute for "any other person" to sue under § 107(a), or to make the use of § 113(f) mandatory.

B. SARA's Legislative History Provides No Support For The "May" Means "Must" Interpretation And Construing It That Way Is Not Necessary To Give Effect To All Of CERCLA's Provisions

As this Court noted in *Cooper Industries*, despite the absence of an explicit right of contribution under CERCLA as originally adopted, several lower courts found an implied right of contribution under CERCLA § 107(e)(2) or under federal common law. *Cooper Indus., Inc.*, 543 U.S. at 162. This Court, however, had held that there was no implied or common law right of contribution under other federal statutes. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638–47 (1981) (no contribution right in the Sherman Act or the Clayton Act); *Northwest Airlines, Inc. v. Transp. Workers,* 451 U.S. 77, 90–99 (1981) (no contribution right in the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964).

Against this backdrop of uncertainty, Congress amended CERCLA to provide an express right of contribution. Senator Stafford, a sponsor of the bill that became SARA, explained:

> This amendment removes any doubt as to the *right* of contribution on the part of any person involved in an action under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980: those potentially liable

> under CERCLA; those held liable in a suit by EPA, a State or a private party under CERCLA; or, those who settle with EPA, the State or a private party. The amendment is necessary because the Supreme Court, in recent decisions, has refused to imply a *right* of contribution under other statutes unless expressly stated. These decisions could create doubt regarding the existence of a *right* of contribution under the Comprehensive Environmental Response, Compensation, and Liability Act, despite several recent district court cases correctly confirming that we intended the law to confer such a *right*.

131 CONG. REC. S11855 (daily ed. Sept. 20, 1985) (statement of Senator Stafford) (emphasis added).

> New subsection 113(f) of CERCLA deals with the *availability* of contribution for claims under Superfund. This provision confirms that potentially responsible parties have a *right* of contribution under CERCLA.

131 CONG. REC. H11083 (daily ed. Dec. 5, 1985) ("Explanation of Purpose and Intent," House Comm. on the Judiciary) (emphasis added).

Congress' use of the words "*right*" and "*availability*" are consistent with the "natural meaning" of the word may—a permissive act, not a mandatory act. None of the Circuit Courts that have adopted the "may" means "must" doctrine considered this Court's precedents on the interpretation of those terms. Instead, the rationale used to justify the "must" interpretation by the Sixth Circuit (and the other Circuits) was that it is necessary to give "bite" to § 113(f)(3)(B) because as a

practical matter a PRP would always use § 107(a) if it could, and thus § 113(f)(3)(B) would be rendered mere surplusage. App. 17. But under this Court's *Atlantic Research* decision, that is simply not correct. A PRP not suing for its own costs, but for costs incurred in reimbursing others, would still be required to bring a contribution action for those costs. *Atl. Research Corp.*, 551 U.S. at 139. Such a contribution claim would still be governed by § 113(f)(3)(B). Moreover, when an AOC settling party that incurs cleanup costs sues a non-settling PRP under § 107(a), the defendant could bring a third party contribution action under § 113(f)(1) against others for any excess amounts that it is forced to pay the settling party. Therefore, allowing a PRP to bring a § 107(a) action for the removal or remedial costs they themselves have incurred is not unfair and would not render § 113(f)(3)(B) mere surplusage.

C. The "May" Means "Must" Doctrine Renders *Atlantic Research* A Dead Letter As To Anyone That Resolves Its Liability In An AOC To Do Cleanup Work

The "may" means "must" doctrine closes off the right to bring a CERCLA § 107(a) action to persons that have never been sued and who incur their own response costs after resolving their liability in an AOC. It has been argued that in footnote 6 to *Atlantic Research*, this Court left open the question of whether a PRP that administratively settled with EPA could bring a CERCLA § 107(a) action. That is not what footnote 6 says. What this Court left open was the question of whether a PRP that incurred response costs "pursuant to a consent decree *following a suit*" could recover "under § 113(f), § 107(a), or both." *Atl.*

Research Corp., 551 U.S. at 139 n.6 (emphasis added). "We do not decide whether *these* compelled costs of response are recoverable" under either or both of those sections. *Id.* (emphasis added). The word "these" refers back to costs incurred under a consent decree after a lawsuit. In the instant case, there was no prior lawsuit and no consent decree. To the extent that Petitioners are seeking recovery of their own costs of response, they should fall squarely on the § 107(a) side of the line.

As to the reference to costs being "voluntary" in *Atlantic Research*, the plaintiff in *Atlantic Research* had voluntarily incurred its costs in the sense that it had not been sued and had not entered into any kind of settlement with the government. *Id.* at 133. Although the Court's opinion was written narrowly confining itself to the facts before it, in footnote 6 the Court made it clear that "involuntary" costs were costs compelled by a lawsuit. Moreover, even if the word "voluntary" has a broader meaning, the opening sentence of the ASAOC in the instant case says that the ASAOC was "voluntarily" entered into by the parties. ASAOC ¶ 1, App. 70.

Consent orders (like consent decrees) are construed as contracts. *See*, *e.g.*, *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 238 (1975) ("[A] consent decree or order is to be construed for enforcement purposes basically as a contract…."). To a similar effect, see *Pharm. Soc. of the State of N.Y., Inc. v. Cuomo*, 856 F.2d 497, 501 (2d Cir. 1988). And under Ohio law, the parties to a contract are to be taken at their word. *See*, *e.g.*, *Sunoco, Inc. (R&M) v. Toledo Edison Co.*, 953 N.E.2d 285, 292 (Ohio 2011) ("When

the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties."); *Westfield Ins. Co. v. Galatis*, 797 N.E.2d 1256, 1261 (Ohio 2003) ("When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties.").[13] The ASAOC says it was entered into "voluntarily". The parties are to be taken at their word.

It has also been argued that *Atlantic Research* does not apply because once an order is entered into, the costs are no longer "voluntary." But that's like saying a contractor is compelled to build you a house. That would be true only if the contractor first voluntarily entered into a contract to do so. The Seventh Circuit has noted that the focus in *Atlantic Research* is really not on the degree of voluntariness, but rather on whether one is suing for its own costs, or suing to recover costs that it has reimbursed to others. *Bernstein v. Bankert*, 733 F.3d 190, 208-10 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1024 (2014). The simple reality is that the "may" means "must" doctrine has drastically limited the persons who can benefit from *Atlantic Research* and has rendered it a "dead letter" as to any PRP that enters into an AOC that resolves its liability to the government.

---

[13] In a general sense, all settlements are to avoid (or terminate) litigation. But the statement in the Sixth Circuit's opinion that Petitioners entered into the ASAOC to avoid being sued by EPA (App. 9) was gratuitous. That is not what the ASAOC says in its first sentence and the record does not show an EPA threat of litigation.

D. Although Not Pressed Below, The "May" Means "Must" Issue Was Expressly Decided By The Sixth Circuit And Thus Is Available For Review By This Court

Petitioners' complaint sought relief under both CERCLA § 107(a) and CERCLA § 113(f)(3)(B). The Sixth Circuit, after finding that Petitioners had resolved their liability to the United States (a determination that is not challenged in this Petition) held:

> [I]f a party is able to bring a contribution action, it *must* do so. . .
>
> Therefore, in summary, we adopt the position that a PRP, which [sic] has entered into an administrative settlement with the government, thereby having met a statutory trigger for filing a contribution action, *can bring only a § 113(f)(3) action for contribution—not a § 107(a)(4)(B) cost-recovery action*.

App. 18, 19 (emphasis added). Having directly "passed upon" the question, the decision is open for review by this Court. *See, e.g.*, *Verizon Commc'ns, Inc. v. F.C.C.*, 535 U.S. 467, 473 (2002) ("Any issue pressed *or passed upon* by a federal court is subject to this Court's broad discretion on certiorari") (emphasis added)*; United States v. Wells*, 519 U.S. 482, 488 (1997) (Circuit Court practices limiting review when a party changes position do not replace "this Court's traditional rule that we may address a question properly presented in a petition for certiorari if it was 'pressed [in] *or passed on'* by the Court of Appeals") (emphasis added); *United States v. Williams*, 504 U.S. 36, 41 (1992) (certiorari

precluded "*only* when 'the question presented was not pressed *or passed upon* below.'") (emphasis added).

If "may" does not mean "must", the Petitioners' claims under CERCLA § 107(a), to the extent they seek recovery of Petitioners' own response costs, were incorrectly dismissed. The only statute of limitations that would be applicable for those costs would be the longer statute of limitations for "removal" and "remedial" actions that no party alleges has run. The question as to the proper statute of limitations for contribution actions after an AOC would, however, remain to the extent that Petitioners also sought reimbursement for amounts to be paid to EPA for EPA's future costs—a classic contribution remedy claim. *Atl. Research Corp.*, 551 U.S. at 139.

3. As To CERCLA Contribution Claims, The Fifth And Tenth Circuits Applied CERCLA § 113(g)(2) When § 113(g)(3) Was Not Triggered; The Sixth Circuit Acknowledged That § 113(g)(3) Was Not Triggered In The Instant Case, But Applied It Anyway. The Cases Are In Irreconcilable Conflict – Which Is Correct?

A. The Statute Should Be Read To Mean What It Plainly Says

To the extent that Petitioners were required to bring a contribution action under CERCLA § 113(f)(3)(B) because they sought recovery of future costs they would reimburse to the government for its costs, or because all of their claims for response costs had to be brought in contribution (assuming *arguendo* that "may" really does means "must"), the question

remains what statute of limitations is applicable to contribution claims arising under CERCLA after a party has entered into an AOC to undertake cleanup work at a site? The cases have focused on two possible statutes of limitations within CERCLA.

CERCLA § 113(g)(2) provides:

> (2) Actions for recovery of costs
>
> An initial action for recovery of the costs referred to in section 9607 of this title must be commenced –
>
> (A) for a removal action, within 3 years after completion of the removal action …; and
>
> (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action ….

CERCLA § 113(g)(3) provides:

> (3) Contribution.
>
> No action for contribution for any response costs or damages may be commenced more than 3 years after –
>
> (A) the date of judgment in any action under this chapter for recovery of such costs or damages, or
>
> (B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

Under the plain language of § 113(g)(3)(B), the only triggering events provided in the statute as to administrative settlements are: "(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements)…."

Both a de minimis settlement and a cost recovery settlement involve the payment of money only—not the incurrence of costs to implement cleanup actions which can take years to complete. As a matter of policy, applying the shorter statute of limitations only to administrative orders for the payment of money, as Congress did, thus makes sense. Applying the removal or remedial statute of limitations to claims arising out of removal or remedial actions as the Fifth and Tenth Circuits have, also makes sense.

Reading CERCLA § 113(g)(3)(B) to mean what it says is also consistent with the limited Federal Register notice provisions for just those two types of administrative orders contained in CERCLA § 122(i). By contrast, extending CERCLA § 113(g)(3) to "all" administrative settlements, as the Sixth Circuit has done, destroys the symmetry of Congress' wording of CERCLA § 113(g)(3)(B) and its wording of CERCLA § 122(i). Moreover, the use of the word "or" between subsections "(A)" and "(B)" of CERCLA § 113(g)(3) leaves no room for a subsection "(C)". Additionally, CERCLA § 113(g)(2) begins with the opening phrase: "An initial action for recovery of the costs referred to in section 9607 of this title must be commenced…." The Petitioners were never sued. *Hobart I* and *Hobart II* are the initial actions for recovery of the costs referred to in section 9607 from the respective defendants sued

in those actions. The facts thus fit CERCLA § 113(g)(2), not CERCLA § 113(g)(3).

B. The Instant Case Cannot Be Reconciled With The Fifth And Tenth Circuit Cases

In *Sun Co.*, the plaintiffs implemented a UAO and then sued other PRPs to collect the costs they incurred. 124 F.3d at 1189. As to the statute of limitations, the District Court deemed the claim to be one in contribution and reasoned that because none of the triggering events under § 113(g)(3) had occurred, there was no express statute. *Id.* To fill the perceived gap, it held that the statute ran from the point at which the plaintiffs had paid more than their fair share, thus barring most of the plaintiffs' claims. *Id.* The Tenth Circuit also deemed the claim to be in contribution and rejected the District Court's reasoning as to the statute of limitations. *Id.* at 1190-92. It noted that in § 113(f) Congress simply confirmed the right of parties to seek contribution but did not create new liabilities. *Id.* at 1191. Section 113(f) is only a "'mechanism for apportioning [CERCLA]-defined costs'…'Thus, of necessity it must incorporate the liabilities set forth in § 107(a), as those are the costs to be equitably apportioned.'" *Id.* (citations omitted). Applying §§ 113(f) and (g) as written does not create a gap, the Tenth Circuit reasoned, because a contribution action

> is, by definition, an action for recovery of the *costs referred to* in § 107. In this case, because no previous action under §§ 106 or 107 has been filed with respect to this site, Plaintiffs contribution action – while governed by the equitable principles of § 113(f) – is the "*initial action*" – for recovery of such costs. Thus,

> Plaintiffs § 113(f) contribution action is the "initial action for recovery of the costs referred to in section 9607 of this title," and must be commenced "within 6 years after initiation of physical on-site construction of the remedial action." 42 U.S.C. § 9613(g)(2)(B).

Id. at 1192 (emphasis in the original). The Tenth Circuit went on to reject the argument that § 113(g)(3) applies to "all" contribution claims. *Id*. at 1192-93. By contrast, the Sixth Circuit in the instant case held that § 113(g)(3) does apply to "all" contribution claims. App. 29.

In *Geraghty and Miller*, the defendants, as to their counterclaims, asserted that CERCLA § 113(g)(3) was the only statute of limitations that applied to contribution claims and because none of its triggering events had occurred, they had an indeterminate amount of time to assert their claims. 234 F.3d at 924. After reviewing some alternatives, the Fifth Circuit rejected that view and expressly adopted the Tenth Circuit's *Sun Co*. rationale. *Id*. at 924-25. After summarizing the Tenth Circuit's reasoning, the Fifth Circuit held that "the statute of limitations found in CERCLA section 113(g)(2) applies to initial contribution actions such as this." *Id.* at 925. The Fifth Circuit then reviewed the facts before it and concluded that the monitoring wells in issue were part of a "removal" not a "remedial" action and sustained the claim as not time barred. *Id*. at 925-27. *See* § 113(g)(2)(A). In the instant case, the Sixth Circuit expressly rejected the application of § 113(g)(2) (App. 29) and rejected the reasoning of both Circuits as "no longer good law" (App. 31). The instant decision

and the Fifth and Tenth Circuit decisions cannot be reconciled.

It may be argued that *Sun Co.* and *Geraghty and Miller* are distinguishable because the former case involved a contribution claim arising out of a UAO, which by its nature is not a settlement, and in the latter case the source of the obligation to cleanup was unclear, but that neither involved an AOC. The argument fails because, although § 113(g)(3) would not by its terms apply, it does not matter why § 113(g)(3) does not apply. If it does not apply to a contribution action, the same question is presented—what statute of limitations should be applied? *Sun Co.* and *Geraghty and Miller* reasoned that if § 113(g)(3) was not triggered, courts should apply the cost recovery removal action statute, §113(g)(2)(A), to claims that arose out of a removal action, or the remedial action statute, §113(g)(2)(B), to claims that arose out of a remedial action. The instant case flatly rejected that reasoning and applied §113(g)(3) to "all" contribution actions. *Sun Co.* and *Geraghty and Miller* are not distinguishable.

C. The Fifth And Tenth Circuit Cases Remain Good Law And The Sixth Circuit's Rationale For Rejecting Those Decisions Is Inconsistent With Basic Contribution Law And The Structure Of CERCLA

The Sixth Circuit accepted the "no longer good law" rationale. App. 31. The only prior case expressly supporting that view is *Chitayat v. Vanderbilt Assoc.*, 702 F.Supp.2d 69 (E.D.N.Y. 2010). While it is true that *Cooper Industries* and *Atlantic Research* discussed in general terms the differences in time limits for

CERCLA §§ 107(a) and 113 claims, neither decision analyzed what types of administrative orders are or are not covered under CERCLA § 113(g)(3)(B). Those two cases ruled that CERCLA §§ 107 and 113 provided different "remedies" for persons in different circumstances, not that they were unrelated causes of action or that § 113 somehow created stand-alone liability that required a different time limit in "all" cases. Indeed, the whole point of a contribution action is to enforce liability against a person *jointly liable* for the same harm.

Contribution under CERCLA is "the 'tortfeasor's right to collect from others responsible *for the same tort* after the tortfeasor has paid more than his or her proportionate share ...." *Atl. Research Corp.*, 551 U.S. at 138 (citing Black's Law Dictionary) (emphasis added).

> [S]ection 113(f) creates a right to contribution for parties already subject to liability in either a section 107 action or an action by the government under CERCLA § 106.

NCR Corp., 768 F.3d at 690 (citations omitted).

> Section 113(f) is closed to a litigant without a preexisting or pending liability determination against it even if it wants to proceed by that route, because that statute creates a right to contribution, and contribution exists only among joint tortfeasors liable for the same harm. See RESTATEMENT (SECOND) OF TORTS § 886A. See also *Cooper Indus.*, 543 U.S. at 166–68, 125 S.Ct. 577 (unavailability of section 113(f)); *Atl.*

Research Corp., 551 U.S. at 135–36, 127 S.Ct. 2331 (availability of section 107(a)).

Id. at 691.

Moreover, in private party litigation, CERCLA § 107 is the only liability provision of CERCLA. All private party contribution claims under CERCLA § 113, whether for recovery of costs or for declaratory relief, are premised on the defendant being liable under CERCLA § 107. The Sixth Circuit's reasoning in rejecting *Sun Co.* and *Geraghty and Miller* is thus inconsistent with basic contribution law and the structure of CERCLA. Neither *Cooper Industries* nor *Atlantic Research* undermined the reasoning of the Fifth and Tenth Circuits that liability under CERCLA § 113 is derived from liability under CERCLA § 107(a) and thus that the cost recovery statute of limitations, § 113(g)(2), should apply to contribution claims that do not trigger the § 113(g)(3) statute.

4. Other Arguments Likely To Be Made Against Granting Certiorari Are Also Unavailing

The argument that providing more time to bring in other PRPs to share costs will delay cleanup and give the Petitioners that sign an AOC time to litigate rather than cleanup the site simply does not make sense. A PRP that delays implementing an AOC that it signed does so at its peril. For example, in the instant case, the ASAOC provides stipulated penalties for any delay (including on and after the 31st day, $3,000 per day of delay) for failure to meet a series of "Compliance Milestones" and "for failure to submit timely or adequate plans, reports, technical memoranda or other written documents" required by the assigned tasks.

ASAOC ¶¶ 66-67, App. 110-12. If there is any dispute about the penalties, the penalties continue to accrue while the dispute is being resolved. ASAOC ¶ 73, App. 114. EPA reserved its right to seek additional penalties under § 122(l) of CERCLA (up to $25,000 per day), or punitive damages under CERCLA § 107(c)(3). ASAOC ¶ 75, App. 114-15.[14] These penalty provisions are consistent with EPA's model order. U.S. ENVTL. PROT. AGENCY, REVISED MODEL ADMINISTRATIVE ORDER ON CONSENT FOR REMEDIAL INVESTIGATION/ FEASIBILITY STUDY 27-28 (2004), http://www2.epa.gov/sites/production/files/2013-10/documents/rev-aoc-rifs-mod-04-mem.pdf.

It may also be argued that the ASAOC in the instant case contained a promise to pay future (but not past) oversight costs of EPA and, therefore, was at least as to those costs a "cost recovery" settlement under CERCLA § 122(h). Even if that were correct (which it is not), it would change nothing as to the claim for recovery of Petitioners' own response action costs. Moreover, the Sixth Circuit rejected the argument, which was put forward by both the government in an amicus brief and by the industry PRPs, that the whole ASAOC should be treated as coming under § 122(h).[15] App. 31-33. As the Sixth

---

[14] CERCLA § 122(l) references CERCLA § 109 which includes in subsections (a)(1)(D), (E) enforcement of orders under § 104(b). As noted above, in addition to being brought under §§ 107 and 122, the ASAOC was brought under § 104. ASAOC ¶ 2, App. 70. Therefore, the penalty provisions of CERCLA § 109 are applicable.

[15] The Seventh Circuit has recently noted that the government sometimes represents EPA in enforcing CERCLA, and at other times defends federal PRPs from CERCLA § 113 contribution

Circuit noted, although the ASAOC referenced CERCLA § 122 generally as one of the sources of EPA's authority to enter into the ASAOC (ASAOC ¶ 2, App. 70), there are other relevant provisions in CERCLA § 122.[16] App. 32. Those include a grant of enforcement authority to the President under CERCLA § 122(a) (which has been delegated to the Administrator of EPA) and authority to enter into consent decrees under CERCLA § 122(d)(1). Accordingly, a reference to CERCLA § 122 generally as the basis for the ASAOC does not, as the Sixth Circuit noted, automatically make the whole ASAOC just a cost recovery ASAOC under CERCLA § 122(h). App. 32-33. Moreover, the ASAOC includes only a promise to pay future response costs (ASAOC ¶¶ 79-81, App. 116-20) and does not provide for "recovery" of any of the government's past costs or reference § 122(h) at all.

The one boilerplate paragraph (¶ 96a) near the end of the ASAOC that purports to grant contribution protection to the Petitioners and includes a reference to CERCLA § 122(h)(4) does not convert the entire ASAOC into a "cost recovery" settlement under § 122(h). The ASAOC, as the Sixth Circuit noted, provided among other things that the actions required

---

claims or from direct CERCLA § 107(a) claims. *Menasha Corp. v. U.S. Dep't of Justice*, 707 F.3d 846, 849 (7th Cir. 2013). Similarly, the government's role in *Atlantic Research* was in defense of a federal PRP. *Atl. Research Corp.*, 551 U.S. at 133.

[16] The two other sources of authority referenced in ASAOC ¶ 2 are Section 104 (authorizing the President to enter into agreements for site studies) and Section 107 (the general liability section). App. 70. The same three sections are again recited in ASAOC ¶ 25 as to Petitioners' liability. App. 84.

by the ASAOC [the RI/FS] "will expedite effective remedial action." App. 32. In other words, the main purpose of the ASAOC was to provide for the conduct of the RI/FS. Payment of future government costs in overseeing the RI/FS was collateral to facilitating the cleanup of the site and did not convert the ASAOC into a simple cost recovery settlement.

Moreover, that isolated paragraph is, in any event, a nullity. The parties to an AOC cannot agree among themselves to grant or withhold contribution protection as to the claims of third parties who have not signed the AOC. It is CERCLA itself that provides contribution protection as a matter of law. "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." CERCLA § 113(f)(2). The whole basis for denying Petitioners the right to bring a CERCLA § 107(a) action was because the Court concluded that under the terms of this ASAOC, Petitioners had "resolved" their liability to the United States. App. 19-27. The determination that the ASAOC resolved Petitioners' liability to the United States is binding not only on Petitioners but also on Respondents who cannot appeal an issue on which they prevailed below.[17]

---

[17] *See Perez v. Ledesma*, 401 U.S. 82, 87 n.3 (1971), (a successful party "cannot appeal from its victory."); *Partmar Corp. v. Paramount Pictures Theatres Corp.*, 347 U.S. 89, 99 n.6 (1954) ("A [successful] party may not appeal findings not necessary to support the decree.") (citation omitted). Respondents may cite to one paragraph of the second amended complaint in *Hobart I* which also references CERCLA § 122(h). Legal conclusions in a complaint are

The Respondents have not signed the ASAOC and want to pay nothing toward the cleanup. Denying Petitioners a CERCLA § 107(a) claim and applying the wrong statute of limitations has given the Respondents what they want—a "free ride." This case presents a clear conflict between the Circuits on an important issue of federal law (what is the applicable statute of limitations after PRPs sign an AOC that resolves their liability to the government and want other PRPs to share the costs of doing work at a site). It also presents the "may means must" doctrine that has spread among the Circuits even though that doctrine is inconsistent with this Court's precedents as to how those terms are to be interpreted and drastically undermines the reach of *Atlantic Research*.

---

not binding. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In response to the amended complaint, one defendant, DP&L, moved to dismiss on unrelated grounds. The other defendants denied knowledge sufficient to form a belief as to that paragraph. The complaint in *Hobart II* contains no such reference.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

NORMAN W. BERNSTEIN
Counsel of Record
INGA CALDWELL
N.W. Bernstein & Associates, LLC
800 Westchester Ave., Suite N-319
Rye Brook, New York 10573
(914) 358-3500
nwbernstein@nwbllc.com

Counsel for Petitioners

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 14a0152p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 13-3273/3276

[Filed July 14, 2014]

HOBART CORPORATION; KELSEY-HAYES COMPANY; NCR CORPORATION, *Plaintiffs-Appellants*,	)
v.	)
WASTE MANAGEMENT OF OHIO, INC. et al. (13-3273) and COCA-COLA ENTERPRISES, INC. et al. (13-3276), *Defendants-Appellees*.	)

Appeal from the United States District Court
for the Southern District of Ohio at Dayton.
Nos.: 3:10-cv-00195; 3:12-cv-00213—
Walter H. Rice, District Judge.

Argued: June 26, 2014

Decided and Filed: July 14, 2014

Before: MOORE and KETHLEDGE, Circuit Judges; TARNOW, District Judge.[*]

COUNSEL

ARGUED: Nicholas A. DiMascio, UNITED STATES DEPARTMENT OF JUSTICE, Denver, Colorado, for Amicus Curiae. Larry Silver, LANGSAM STEVENS, SILVER & HOLLAENDER LLP, Philadelphia, Pennsylvania, for Appellants. Glenn A. Harris, BALLARD SPAHR LLP, Cherry Hill, New Jersey, for Appellees. **ON BRIEF:** Nicholas A. DiMascio, UNITED STATES DEPARTMENT OF JUSTICE, Denver, Colorado, for Amicus Curiae. Larry Silver, LANGSAM STEVENS, SILVER & HOLLAENDER LLP, Philadelphia, Pennsylvania, James A. Dyer, David C. Ahlstrom, SEBALY SHILLITO + DYER LLP, Dayton, Ohio for Appellants. Glenn A. Harris, BALLARD SPAHR LLP, Cherry Hill, New Jersey, William E. Coughlin, Susan R. Strom, Ronald M. McMillan, CALFEE, HALTER & GRISWOLD LLP, Cleveland, Ohio, Robert H. Eddy, Erik J. Wineland, GALLAGHER SHARP, Toledo, Ohio, Stephen Haughey, FROST BROWN TODD LLC, Cincinnati, Ohio, Leah J. Knowlton, BALLARD SPAHR LLP, Atlanta, Georgia, Robert Sherwood, GOLDENBERG SCHNEIDER, L.P.A., Cincinnati, Ohio for Appellees in 13-3276. Frank L. Merrill, Drew H. Campbell, Anthony M. Sharett, BRICKER & ECKLER LLP, Columbus, Ohio, William D. Wick, WACTOR & WICK LLP, Oakland, California, William H. Harbeck, QUARLES & BRADY

---

[*] The Honorable Arthur J. Tarnow, United States District Judge for the Eastern District of Michigan, sitting by designation.

LLP, Milwaukee, Wisconsin, Jack A. Van Kley, VAN KLEY & WALKER, LLC, Columbus, Ohio, Vicki J. Wright, KRIEG DE VAULT LLP, Indianapolis, Indiana, Steven M. Sherman, KRIEG DE VAULT LLP, Carmel, Indiana, Martin H. Lewis, TUCKER ELLIS LLP, Columbus, Ohio, for Appellees in 13-3273.

OPINION

KAREN NELSON MOORE, Circuit Judge. This case involves the apportionment of liability between various entities that allegedly created an environmental hazard at a landfill in Ohio. In 2006, Plaintiffs-Appellants, Hobart Corporation, Kelsey-Hayes Company, and NCR Corporation (collectively, "Appellants"), entered into a settlement agreement with the United States Environmental Protection Agency ("EPA"), agreeing to pay for a study of the site and to reimburse the government's response costs in exchange for a partial resolution of Appellants' liability. Nearly four years later, Appellants filed the first of two actions under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 94 Stat. 2767, the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 100 Stat. 1613 (both of which are codified at 42 U.S.C. §§ 9601–9675), and Ohio common law, seeking to recover their costs or gain contribution from other entities responsible for the contamination. In this first case ("*Hobart I*"), Appellants sued Waste Management of Ohio, Inc. ("Waste Management"), Bimac Corporation, Bridgestone Firestone, Inc. ("Bridgestone"), Dayton Power & Light Company

("DP&L"), Cargill, Inc. ("Cargill"), Monsanto Company ("Monsanto"), Valley Asphalt Corporation ("Valley Asphalt"), IRG Dayton I, LLC ("IRG Dayton"), and other unknown entities. Appellants alleged three relevant causes of action: a cost-recovery action under CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B); a contribution action under CERCLA § 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B); and an unjust-enrichment action under Ohio common law. In 2012, Appellants brought another case ("*Hobart II*"), alleging the same three causes of action, against DAP Products, Inc. ("DAP"), Coca-Cola Enterprises, Inc. ("Coca-Cola"), The Sherwin-Williams Company ("Sherwin-Williams"), and GlaxoSmithKline LLC ("GSK") (collectively, with the defendants in *Hobart I*, "Appellees").

In both cases, the district court dismissed Appellants' § 113(f)(3)(B) contribution claims as untimely and dismissed the unjust-enrichment claims for failing to state a valid cause of action under Ohio law. In *Hobart I*, the district court allowed limited discovery on the § 107(a)(4)(B) claims but, ultimately, granted summary judgment to the *Hobart I* defendants, finding that CERCLA and controlling caselaw prohibit a party that has entered a liability-resolving settlement agreement with the government from prosecuting such an action. The district court, in the same order, dismissed the cost-recovery action in *Hobart II* for the same reasons. Appellants now bring this consolidated appeal. We **AFFIRM** the district court's dismissals and its grant of summary judgment to Appellees.

I. BACKGROUND

A. CERCLA Primer

"Congress enacted CERCLA in 1980 to 'promote the timely cleanup of hazardous waste sites' and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination.'" *CTS Corp. v. Waldburger*, 573 U.S. ---, 134 S. Ct. 2175, 2180 (2014) (quoting *Burlington N. & Santa Fe R. Co. v. United States*, 556 U.S. 599, 602 (2009)). To that end, CERCLA imposes liability upon four types of parties:

> (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 . . . at any facility . . . , 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 . . . .

CERCLA § 107(a)(1)–(4); 42 U.S.C. § 9607(a)(1)–(4).

The statute also creates a complicated network of cost-shifting provisions, which apply depending upon who pays what and why. If the federal government identifies a contaminated site, it has several options. The government may clean up the site itself under CERCLA § 104, 42 U.S.C. § 9604; the government may compel a "Potentially Responsible Party" ("PRP") to clean up the site through an action under CERCLA § 106, 42 U.S.C. § 9606; or the government may enter into an agreement with a PRP under CERCLA § 122, 42 U.S.C. § 9622, that requires the PRP to clean up the site. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004); *RSR Corp. v. Commercial Metals Co.*, 496 F.3d 552, 554–55 (6th Cir. 2007). If the government removes the waste and remediates the site, it may recover its response costs from PRPs under § 107(a)(4); if a private party actually incurs response costs rehabilitating the site, it may partially recover those response costs under § 107(a)(4)(B).[1] *United States v. Atl. Research Corp.*, 551 U.S. 128, 131 (2007). In turn, any party sued under §§ 106 or 107, by the

---

[1] In *United States v. Atlantic Research Corp.*, the Supreme Court assumed without deciding that § 107(a) imposes joint-and-several liability upon PRPs. *See* 551 U.S. 128, 140 & n.7 (2007). In *Burlington Northern*, the Court determined that joint-and-several liability is not appropriate in every case; rather, liability must be divided according to common-law principles. 556 U.S. at 613–14 (citing *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983); Restatement (Second) of Torts § 433A (1976)). In this case, the government contends that "unlike liability to the government under § 107(a)(4)(A), liability to a PRP under § 107(a)(4)(B) is not joint and several." United States Br. at 8 n.3. We need not answer now whether § 107(a)(4) imposes joint-and-several liability in all cases and, therefore, we decline to do so.

government or a private party, may seek contribution[2] from other PRPs under § 113(f)(1), so that the recovery costs can be distributed in an equitable fashion. *Cooper Indus.*, 543 U.S. at 165–66.

Another option for the government is to clean up the site itself and enter into a settlement agreement with PRPs to cover the government's response costs. *See* § 122(a), (g), (h). In this scenario, "[a] person who has resolved its liability to the United States . . . for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any [PRP] who is not a party to [the] settlement." § 113(f)(3)(B). In exchange for resolving its liability, the settling PRP "shall not be liable for claims for contribution regarding matters addressed in the settlement." § 113(f)(2).

While there are multiple avenues for the government and PRPs to apportion the costs of contamination and clean up, CERCLA contains several specific statutes of limitations as to the timing of lawsuits. Cost-recovery actions under § 107(a)(4) must be brought within three years "after completion of the removal action" or "for a remedial action, within [six] years after initiation of physical on-site construction." § 113(g)(2). Actions for contribution under § 113(f),

---

[2] The Supreme Court has given "contribution" its common-law definition: "the 'tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault.'" *Atl. Research*, 551 U.S. at 138 (quoting Black's Law Dictionary 353 (8th ed. 2004)).

however, must be filed within three years of "(A) the date of judgment in any action under [CERCLA] for recovery of such costs or damages, or (B) the date of an administrative order under [§ 122(g)] (relating to de minimis settlements) or [§ 122(h)] (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages." § 113(g)(3); *see also RSR Corp.*, 496 F.3d at 556–58 (discussing limitations periods).

B. Facts

Since 1941, various parties have allegedly been disposing of waste at the South Dayton Dump and Landfill Site ("the Site"). R. 69 at 2, 5 (2d Am. Compl. at ¶¶ 2, 22) (Page ID #758, 761).[3] Between July 1973 and July 1976, hazardous substances—including arsenic, barium, mercury, and polynuclear aromatic hydrocarbons—were deposited at and around the Site. *Id.* at 2 ¶ 3, 5 ¶ 22 (Page ID #758, 761).

In the early 2000s, the EPA discovered that the soil and groundwater "had concentrations [of these substances] above background levels or maximum contaminant levels as established by the EPA." *Id.* at 8 ¶ 39 (Page ID #764). In 2002, the EPA proposed listing the Site on the National Priorities List under CERCLA § 105, 42 U.S.C. § 9605. *Id.* at 2 ¶ 3 (Page ID #758). The EPA withdrew this proposal for some reason and, then, proposed listing the Site again in 2004. *Id.*

---

[3] Unless otherwise noted, all record citations are to the record in *Hobart, Inc. v. Waste Mgmt. of Ohio, Inc.* ("*Hobart I*"), No. 3:10-cv-195 (S.D. Ohio).

According to the Second Amended Complaint, the Site remains a proposed listing. *Id.*

The EPA identified several PRPs, including Appellants, who might be liable under CERCLA § 107(a) for the contamination. *Id.* at 8 ¶ 40 (Page ID #764). Rather than face a lawsuit, Appellants agreed to enter into an Administrative Settlement Agreement and Order on Consent ("ASAOC") with the EPA. *Id.* at 8 ¶ 41 (Page ID #764). Under the ASAOC, Appellants agreed to conduct a Remedial Investigation and Feasibility Study ("RI/FS"), which would determine the extent of the contamination and alternatives for remedial action, and to cover the EPA's response costs. *Id.* at 8 ¶ 42 (Page ID #764); R. 17-1 at 19–23, 33–35 (ASAOC at 11–17 ¶¶ 35–41, 25–27 ¶¶ 79–81) (Page ID #201–05, 215–17). In exchange, "[the] EPA agreed to suspend its proposed listing of the Site on the [N]ational [P]riorities [L]ist and address the Site through its Superfund Alternative Sites program." R. 69 at 8 (2d Am. Compl. at ¶ 41) (Page ID #764).

The ASAOC went into effect on August 15, 2006. *See* R. 17-1 at 50 (ASAOC at 37) (Page ID #232). In Paragraph 96, titled "Contribution," Appellants and the EPA explicitly agreed that the ASAOC "constitutes an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that [Appellants] are entitled, as of [August 15, 2006], to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for 'matters addressed' in [the ASAOC]." *Id.* at 39 (ASAOC at 31 ¶ 96(a) (Page ID #221). The "matters addressed" were the RI/FS and the EPA's response costs. *Id.* In

addition, Paragraph 96 stated that, by signing the ASAOC, Appellants "resolved their liability to the United States for [the RI/FS] and Future Response Costs." *Id.* at 39 (ASAOC at 31 ¶ 96(b) (Page ID #221).

C. Procedural History

According to Appellants, "[they] have incurred response costs . . . in connection with the Site," and those costs are "in excess of [their] equitable shares . . . ." R. 69 at 9 (2d Am. Compl. at ¶ 43) (Page ID #765). As a result, they filed a lawsuit in *Hobart I* on May 24, 2010 against Waste Management, Bimac Corporation, Cargill, DP&L, Monsanto, Valley Asphalt, IRG Dayton,[4] and other unknown entities, seeking cost recovery and contribution under CERCLA §§ 107(a) and 113(f)(3)(B), respectively, damages for unjust enrichment, and a declaratory judgment regarding liability. R. 1 at 9–12 (Compl. at ¶¶ 44–60) (Page ID #9–12). The gravamen of the complaint was that the defendants (or the companies of which they are the

---

[4] In their initial complaint, Appellants filed this action against "Industrial Realty Group, LLC." R. 1 at 1 (Compl.) (Page ID #1). However, Appellants "learned that a different entity, IRG Dayton 1, LLC, [was] the proper party-defendant in this matter" and moved to amend their complaint. R. 16 at 1 (Mot. to Amend Compl.) (Page ID #152). The district court allowed this amendment, and Appellants filed their First Amended Complaint on July 19, 2010 with the proper parties listed. *See* R. 17 at 1, 14 (1st Am. Compl.) (Page ID #169, 182). On January 11, 2011, the district court ordered Appellants to file a Second Amended Complaint because the First Amended Complaint omitted two sentences included in the original Complaint. R. 68 at 1–2 (D. Ct. Order Re: Am. Complaint) (Page ID #755–56). That day, Appellants satisfied the order. *See* R. 69 at 1–14 (2d Am. Compl.) (Page ID #757–770).

legal successors in interest) were also PRPs, liable for the contamination of the Site, and should, therefore, bear some of the clean-up costs.

On July 29, 2010, the *Hobart I* defendants filed motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.[5] R. 27 at 1 (DP&L Mot. to Dismiss) (Page ID #265). The *Hobart I* defendants argued that (1) the ASAOC does not qualify as an administrative settlement under § 113(f)(3)(B), *see id.* at 11–14 (DP&L Mot. to Dismiss) (Page ID #275–78) (citing *ITT Indus., Inc. v. BorgWarner, Inc.*, 506 F.3d 452 (6th Cir. 2007)); (2) even if the ASAOC qualifies as an administrative settlement, Appellants' § 113 claim is time-barred, *see id.* at 14–15 (Page ID #279); (3) Appellants failed to allege facts sufficient to state a § 107 claim, *id.* at 16–21 (Page ID #281–85); and (4) CERCLA preempts Appellants' unjust-enrichment claim, *id.* at 21–24 (Page ID #285–88). Appellants replied. *See* R. 39 at 1–38 (Pl. Opp. to Mot. to Dismiss) (Page ID #520–557).

On February 20, 2011, the district court granted the motions to dismiss in part and denied them in part. With respect to most of Appellants' direct § 107(a) claims, the district court overruled the *Hobart I* defendants' motions to dismiss, finding that the Second Amended Complaint contained sufficient allegations to

---

[5] On August 10, 2010, Bridgestone also filed a motion to dismiss. *See* R. 33 at 1 (Bridgestone Mot. to Dismiss) (Page ID #363). And on August 17, 2010, IRG Dayton filed a motion to dismiss. *See* R. 35 at 1 (IRG Dayton Mot. to Dismiss) (Page ID #429). DP&L's motion contained all arguments relevant to this appeal, and therefore, we refer only to DP&L's motion for the sake of simplicity.

support a finding that the *Hobart I* defendants arranged to have contaminants placed on the Site. *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 840 F. Supp. 2d 1013, 1031 (S.D. Ohio 2011). The district court, however, did dismiss Appellants' migration-based § 107(a) claims against the *Hobart I* defendants; it also dismissed all § 107(a) claims against IRG Dayton. *Id*. With respect to Appellants' § 113(f)(3)(B) claims against the *Hobart I* defendants, the district court found that § 113's three-year limitations period applied to this contribution action and that, because the action was filed more than three years after the ASAOC went into effect, it was time-barred. *Id.* at 1034–35. As a result, the district court dismissed Appellants' § 113(f)(3)(B) claims in their entirety. *Id.* at 1035. Finally, the district court found that Appellants failed to state valid unjust-enrichment claims. *Id.* at 1037. On June 23, 2011, the district court entered an order applying its decision on the above motions to dismiss to the other parties involved. R. 87 at 1–2 (D. Ct. Order Dismissing Claims) (Page ID #903–04).

The parties then engaged in a protracted battle over discovery that is irrelevant to this appeal. On June 21, 2012, DP&L, one of the *Hobart I* defendants, filed a motion for summary judgment, arguing that §§ 107(a) and 113(f) provide two, mutually exclusive causes of action. R. 121 at 2–3 (DP&L Mot. for Summ. J.) (Page ID #1177–78). Because Appellants could have filed a § 113(f) action—but failed to do so timely—DP&L claimed that CERCLA prohibits the district court from entertaining Appellants' § 107(a) action. *Id.* The other *Hobart I* defendants either joined this motion or filed nearly identical ones.

On June 29, 2012, Appellants filed a Motion for Leave to File a Third Amended Complaint. This new complaint sought (1) "to add additional defendants," including the United States; (2) "to add theories of owner/operator liability against [DP&L]"; and (3) "to allege that [Waste Management] is the successor to additional [liable parties]." R. 124 at 3 (Mot. for 3d Am. Compl.) (Page ID #1350). On the same day, Appellants also filed another action against four different defendants,[6] alleging the same claims as in *Hobart I*. R. 1 at 1–10 (Compl.) (Page ID #1–10) (*Hobart II*). The *Hobart II* defendants filed motions to dismiss, raising the same arguments as in the *Hobart I* defendants' motions to dismiss and motions for summary judgment.

On February 8, 2013, the district court addressed the outstanding motions in both cases. The district court concluded that a party can seek the recovery of costs under § 107(a) or contribution under § 113(f), but not both; that the ASAOC was an administrative settlement under §§ 113(f)(3)(B); and that Appellants were barred from bringing a § 107(a) action because they could have sought contribution under § 113(f). *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 923 F. Supp. 2d 1086, 1091–96 (S.D. Ohio 2013). Accordingly, the district court granted the *Hobart I* defendants' motions for summary judgment and the *Hobart II* defendants' motions to dismiss. This consolidated appeal follows.

---

[6] The district court assigned this action, *Hobart II*, case number 3:12-cv-213.

II. Standard of Review

Appellants challenge the district court's orders dismissing certain claims under Federal Rule of Civil Procedure 12(b)(6) and orders granting summary judgment. We review de novo dismissals for failure to state a claim. *Bright v. Gallia Cnty.*, --- F.3d ---, 2014 WL 2457629, at *9 (6th Cir. 2014). Likewise, we review de novo a district court's grant of summary judgment. *Demyanovich v. Cadon Plating & Coatings, LLC*, 747 F.3d 419, 426 (6th Cir. 2014). While there are differences in reviewing these two types of decisions, Appellants' claims require only the resolution of questions of statutory and contract interpretation, which are questions of law that we review de novo. *United States v. Coss*, 677 F.3d 278, 283 (6th Cir. 2012) (statutory interpretation); *Royal Ins. Co. v. Orient Overseas Container Line Ltd.*, 514 F.3d 621, 634 (6th Cir. 2008) (contract interpretation).

III. Appellants' § 107(a) Claims

Appellants first attack the district court's conclusion that Appellants could not bring a cost-recovery action under § 107(a)(4)(B) because signing the ASAOC allowed Appellants to bring a § 113(f)(3)(B) contribution action. Appellants do not contest the notion that §§ 107(a)(4)(B) and 113(f)(3)(B) are mutually exclusive remedies. Rather, Appellants argue that the ASAOC is not an "administrative settlement" under § 113(f)(3)(B) and, therefore, that they never could file a § 113(f)(3)(B) contribution action. In particular, Appellants cite the agreements in *ITT Industries*, 506 F.3d 452, and *Bernstein v. Bankert*, 733 F.3d 190 (7th Cir. 2013), and claim that the ASAOC is materially indistinguishable. *See* Appellants Br. at

13–28. Appellees and the United States disagree with this characterization of the ASAOC.[7] *See* DP&L Br. at 11–26; DAP Br. at 10–15; United States Br. at 12–22. After reviewing the agreements, we conclude that the ASAOC resolves Appellants' liability and, therefore, that the agreement is an administrative settlement under § 113(f)(3)(B). As a result, because Appellants could have sued for contribution, they could not file and cannot proceed with a § 107(a)(4)(B) cost-recovery action. Thus, the district court was correct, and we **AFFIRM** the district court's decisions dismissing this claim and granting summary judgment on this issue.

A. Sections 107(a)(4)(B) and 113(f)(3)(B) Provide Mutually Exclusive Remedies

When Congress passed CERCLA in 1980, parties could proceed only under § 107, and the federal courts inferred a right to contribution. *See Agere Sys., Inc. v. Advanced Envt'l Tech. Corp.*, 602 F.3d 204, 217 (3d Cir. 2010); *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 127 (2d Cir. 2010). In 1986, with SARA, Congress created the explicit contribution cause of action found today in § 113. *See Niagara Mohawk*, 596 F.3d at 127. The Supreme Court has recognized that these two sections "authorize[] . . . similar and somewhat overlapping remed[ies]," *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994), but these sections "provide two clearly distinct

---

[7] These arguments mirror the ones made by the parties in the district court except for the fact that each party has now adopted the other side's contentions. *See* R. 27 at 6–10 (DP&L Mot. to Dismiss) (Page ID #275–79); R. 39 at 23–28 (Pl. Resp. to DP&L Mot. to Dismiss at 17–22) (Page ID #542–547).

remedies" and "provid[e] causes of action to persons in different procedural circumstances," *Atl. Research*, 551 U.S. at 138, 139 (internal quotation marks omitted).

Navigating the interplay between these sections is not easy. The best help that the Court has given us is to say that "costs incurred voluntarily are recoverable only by way of § 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under § 113(f)."[8] *Id.* at 139–40 n.6. Problems arise, as the Court foresaw, when PRPs do not voluntarily incur expenses or involuntarily reimburse another entity—the dichotomy upon which the Court's divide seems to operate. *See id.*; *see also Bernstein*, 733 F.3d at 208–09 (taking issue with the voluntary/involuntary dividing line). Here, for instance, Appellants directly paid for the RI/FS, incurring an expense, but they commissioned the study only because they were obligated to do so under the ASAOC. (Appellants also agreed to reimburse the government for response costs in the ASAOC, which clearly falls on the contribution side of the divide.) PRPs in such situations find themselves in the twilight between a core § 107 cost-recovery action and a core § 113 contribution action. The fact that Appellants directly incurred expenses

---

[8] In *Atlantic Research*, the Court focused upon § 113(f)(1)'s interaction with § 107(a), but the Court also repeatedly minimized the differences between § 113(f)(1) and (f)(3)(B). *See, e.g.*, 551 U.S. at 140 n.7. We see no logical distinction between the two subsections, and the parties offer none. Therefore, we treat the Court's pronouncements upon § 113(f)(1)'s relationship with § 107(a) as if they were pronouncements upon § 113(f)(3)(B)'s relationship with § 107(a) as well.

suggests that they could seek cost recovery under § 107(a)(4)(B), while the existence of the administrative settlement seems to indicate that they are eligible only to bring a contribution action under § 113(f)(3)(B). The question is whether Appellants may choose under which section to proceed or whether CERCLA limits them to a certain cause of action.

CERCLA's text and structure lead us to conclude that PRPs must proceed under § 113(f) if they meet one of that section's statutory triggers. Section 107(a) sets out a PRP's liability, which the Supreme Court has interpreted to include liability to another PRP for response costs incurred by that PRP. *Atl. Research*, 551 U.S. at 135–37. Given this existing liability, the Court has inferred a cause of action, allowing any liable PRP to recover costs incurred. *Id.* Section 113(f), in contrast, is an explicit authorization for certain PRPs to file an action for contribution. *See Cooper Indus.*, 543 U.S. at 165–66. In *Cooper Industries*, the Court held that a PRP must demonstrate that certain preconditions were met before proceeding under § 113(f). *Id.* If § 113(f)'s enabling language is to have bite, though, it must also mean that a PRP, eligible to bring a contribution action, can bring only a contribution action. Given the choice, a rational PRP would prefer to file an action under § 107(a)(4)(B) in every case. Section 107(a)(4)(B) likely provides a broader avenue for recovery, *see supra* note 1, and has a longer limitations period than § 113(f), *see* § 113(g)(2)–(3). There would be no reason to limit § 113(f)'s availability if PRPs have § 107(a)(4)(B) as a fall-back option, and we generally do not interpret congressional enactments to render certain parts of these enactments superfluous. *See, e.g.*, *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 724

(2011). Therefore, it is sensible and consistent with the text to read § 113(f)'s enabling language to mean that if a party is able to bring a contribution action, it must do so under § 113(f), rather than § 107(a).

Moreover, this reading is fair. The language of § 113(f) permits PRPs to recover costs incurred pursuant to an administrative settlement agreement. Section 113(f)(3)(B) states: "A person who has resolved its liability to the United States . . . for some or all of a response action or for some or all of the costs of such action in an administrative . . . settlement may seek contribution from any person who is not party to a [similar] settlement . . . ." CERCLA defines "response" to include "removal" actions, which are defined—in part—as "such actions as may be necessary to monitor, assess, and evaluate [site clean up]." CERCLA § 101(23), (25), 42 U.S.C. § 9601(23), (25). The expense of a RI/FS fits within this definition. Therefore, Appellants, who sustain costs pursuant to an administrative settlement agreement, are not barred from seeking contribution for all costs under the terms of § 113(f)(3)(B).

In holding that §§ 107(a)(4)(B) and 113(f)(3)(B) provide mutually exclusive remedies we are saying nothing new or controversial. Every one of our sister circuits to reach this issue has held that §§ 107(a)(4)(B) and 113(f)(3)(B) provide mutually exclusive remedies. *See Bernstein*, 733 F.3d at 202; *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230, 1237 (11th Cir. 2012); *Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594, 603 (8th Cir. 2011); *Agere Sys.*, 602 F.3d at 225; *Niagara Mohawk*, 596 F.3d at 127–28 & n.18. The reasoning in *Atlantic Research* leads easily to this conclusion, as it

focuses upon giving each section meaning. Neither the parties nor the government contend otherwise. *See* Appellants Br. at 16; DP&L Br. at 12–13; DAP Br. at 11–12; United States Br. at 10. Therefore, in summary, we adopt the position that a PRP, which has entered into an administrative settlement with the government, thereby having met a statutory trigger for filing a contribution action, can bring only a § 113(f)(3)(B) action for contribution—not a § 107(a)(4)(B) cost-recovery action.

B. The ASAOC Is an "Administrative Settlement" Under § 113(f)(3)(B)

In this case, whether Appellants can bring a § 107(a)(4)(B) action depends upon whether the ASAOC is an "administrative settlement" under § 113(f)(3)(B). Only if the ASAOC does not qualify as an "administrative settlement" under § 113(f)(3)(B) may Appellants' § 107(a)(4)(B) cost-recovery action go forward. The district court determined that the express terms of the ASAOC, particularly the "unambiguous language [in] paragraph 96b," indicated that the ASAOC allowed Appellants to bring a contribution action under § 113(f)(3)(B). *Hobart Corp.*, 923 F. Supp. 2d at 1094. In addition, the district court distinguished a variety of cases cited by Appellants, including *ITT Industries*. *Id.* at 1094–96. We agree with this conclusion.

Under § 113(f)(3)(B) and this circuit's caselaw, the defining feature of an "administrative settlement" is that the agreement "resolve[s] [the PRP's] liability to the United States or a State for some or all of a response action or for some or all of the costs of such action . . . ." § 113(f)(3)(B); *see ITT Indus.*, 506 F.3d at

459. In determining whether the ASAOC resolves some of Appellants' liability, we interpret the settlement agreement as a contract according to state-law principles. *John B. v. Emkes*, 710 F.3d 394, 407 (6th Cir. 2013). Under Ohio law, "[t]he cardinal purpose for judicial examination of any written instrument is to ascertain and give effect to the intent of the parties. The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Foster Wheeler Enviresponse, Inc. v. Franklin Cnty. Convention Facilities Auth.*, 678 N.E.2d 519, 526 (Ohio 1997) (internal quotation marks and citation omitted).

With this standard in mind, there are several aspects of the ASAOC that indicate that the parties intended for the ASAOC to resolve Appellants' liability with the government, making the ASAOC an "administrative settlement" under § 113(f)(3)(B). First, Paragraph 96b states: "The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of *Section 113(f)(3)(B)* of CERCLA . . . pursuant to which [Appellants] have, as of the Effective Date, *resolved their liability* to the United States for the Work, and Future Response Costs."[9] R. 17-1 at 39 (ASAOC at 31 ¶ 96b) (Page ID #221) (emphasis added). Not only does this paragraph explicitly state that Appellants have resolved their

[9] The ASAOC defines "Work" as "all activities [that Appellants] are required to perform under this Settlement Agreement, except . . . Retention of Records." R. 17-1 at 13 (ASAOC at 5 ¶ 11x) (Page ID #195). "Future Response Costs" are all costs incurred by the government in relation to the ASAOC. *Id.* at 11 (ASAOC at 3 ¶ 11i) (Page ID #193).

liability, but it also cites the specific section of CERCLA at issue here.

Second, Paragraph 96a states: "[t]he parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(2) of CERCLA . . . and that [Appellants] are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA . . . ." *Id.* at 39 (ASAOC at 31 ¶ 96a) (Page ID # 221). For this paragraph to have any meaning and Appellants to receive any protection from contribution actions, the ASAOC must be an administrative agreement under § 113(f). *See Atl. Research*, 551 U.S. at 139; *ITT Indus.*, 506 F.3d at 458. In addition, this paragraph cites § 122(h)(4), a provision governing cost-recovery settlements that § 113(g)(3)(B)—CERCLA's statute-of-limitations section—classifies with the other contribution actions. *See ITT Indus.*, 506 F.3d at 460 (instructing courts to read § 113(f)(3)(B) in concert with § 113(g)(3)).

Third, the parties titled the ASAOC an "*Administrative Settlement Agreement* and Order on Consent." R. 17-1 at 9 (ASAOC 1 ¶ 1) (Page ID #191) (emphasis added). In doing so, the parties precisely matched the statutory language in § 113(f)(3)(B) ("administrative or judicially approved settlement").

Fourth, Paragraph 82 states: "In consideration of the actions that will be performed and the payments that will be made by [Appellants] under the terms of this Settlement Agreement, . . . EPA covenants not to sue or to take administrative action against [Appellants] pursuant to Sections 106 and 107(a) of

CERCLA . . . for the Work and Future Response Costs." *Id.* at 36 (ASAOC at 28 ¶ 82) (Page ID #218). Reading these provisions in concert, as Ohio law requires, we think it clear that Appellants and the government intended for the ASAOC to resolve Appellants' liability to the government. Accordingly, the ASAOC is an administrative agreement within the meaning of § 113(f)(3)(B), allowing Appellants to bring a contribution action. As a result of that ability, CERCLA and relevant caselaw preclude Appellants from bringing a § 107(a)(4)(B) cost-recovery action.

C. Appellants' Counterarguments Are Unconvincing

Even though Appellants agreed with our conclusion on this issue in the district court, *see* R. 39 at 23–28 (Pl. Resp. to DP&L Mot. to Dismiss at 17–22) (Page ID #542–547), they now offer several arguments against their former position. They are not convincing.

First, Appellants claim that *ITT Industries* precludes a court from finding that the ASAOC is an administrative settlement within § 113(f)(3)(B). *See* Appellants Br. at 18–24. In *ITT Industries*, a previous panel of this court concluded that an "Administrative Order of Consent" ("*ITT* AOC") between the EPA and ITT Industries did not constitute a § 113(f)(3)(B) administrative settlement based on the specific terms of that document. 506 F.3d at 459–60. But that decision does not compel Appellants' now-desired conclusion for at least two reasons.

One, the ASAOC here and the *ITT* AOC are not identical. Given that this court must look to the specific terms of an agreement to determine whether it resolves

a PRP's liability, *see id.* (parsing *ITT* AOC's terms to determine whether that agreement resolved the PRP's liability), *ITT Industries* does not control this court's interpretation of the ASAOC, *see Foster Wheeler*, 678 N.E.2d at 526 ("[T]he meaning of any particular . . . contract is to be determined on a case-by-case and contract-by-contract basis, pursuant to the usual rules for interpreting written instruments."). As explained above, the ASAOC resolves some of Appellants' liability to the government, and under Ohio law, *ITT Industries* cannot change the import of that settlement agreement.

Two, to the extent that *ITT Industries* is relevant to our construction of the ASAOC, there are important differences between the ASAOC here and the *ITT* AOC.[10] To start, the parties titled the ASAOC an "Administrative Settlement Agreement and Order on Consent," R. 17-1 at 9 (ASAOC at 1 ¶ 1) (Page ID #191), whereas the *ITT* parties titled their agreement an "administrative order by consent,"[11] *ITT* AOC at Page ID #225. More substantively, the ASAOC contains

---

[10] Again, the ASAOC is available at R. 17-1 at 9–50 (ASAOC at 1–37) (Page ID #191–232). The *ITT* AOC can be obtained from the Western District of Michigan's electronic docket. The case number is 1:05-cv-674, and the *ITT* AOC is attached at R. 27-2 at 4–30 (*ITT* AOC at 1–26) (Page ID #224–50). For the sake of clarity, we cite the *ITT* AOC as "*ITT* AOC at Page ID #[__]."

[11] As Appellants noted in the district court, the EPA changed the title of these agreements following *Cooper Industries* to make clear that agreements of this type were intended to be § 113(f)(3)(B) administrative settlements. *See* R. 39 at 26–27 (Pl. Resp. to DP&L Mot. to Dismiss at 20–21) (Page ID #545–46); *see also* R. 39-1 at 2–3 (EPA Mem.) (Page ID #559–60).

Paragraph 96b, explicitly stating that Appellants' liability is resolved and citing § 113(f)(3)(B), as detailed above. *See* R. 17-1 at 39 (ASAOC at 31 ¶ 96a–b) (Page ID #221). In contrast, the *ITT* AOC's analogous paragraph contains only language stating that the "Respondent is entitled to protection from contribution actions or claims to the extent provided by Section 113(f)(2) and 122(h)(4)." *ITT* AOC at Page ID #245. There is no explicit statement that ITT Industries had resolved its liability—in paragraphs pertaining to contribution or elsewhere in the *ITT* AOC—nor is there any reference to § 113(f)(3)(B). In addition, the government's covenant not to sue in the ASAOC is much broader than in the *ITT* AOC, *compare* R. 17-1 at 36 (ASAOC at 28 ¶ 82) (Page ID #218) *with ITT* AOC at Page ID #245; this covenant not to sue took effect immediately in this case, *compare* R. 17-1 at 36 (ASAOC at 28 ¶ 82) (Page ID #218) *with ITT* AOC at Page ID #245 (requiring payment first); and the government's reservation of rights and ability to withdraw from the ASAOC is much narrower in this case, *compare* R. 17-1 at 18 (ASAOC at 10 ¶ 29b) (Page ID #200) *with ITT* AOC at Page ID #243–44. Given these material differences between the ASAOC and the *ITT* AOC, we conclude that *ITT Industries* is factually distinct.

Second, Appellants argue that the distinctions between the ASAOC and the *ITT* AOC are irrelevant because the government intended for the changes in its forms only to "'clarify and confirm'" its intent that these agreements resolve a settling PRP's liability under § 113(f)(3)(B). Reply Br. at 22 n.19 (quoting R. 39-1 at 2 (EPA Mem.) (Page ID #559)). The problems with this argument are twofold. One, the EPA

memorandum is parol evidence, which can be consulted only in certain limited circumstances. *Williams v. Spitzer Autoworld Canton LLC*, 913 N.E.2d 410, 415 (Ohio 2009). This situation does not fall within one of those narrow exceptions, and therefore, this memorandum is outside the scope of our consideration. Two, even if we could consult this memorandum, it does not mean that *ITT Industries* was correct in its interpretation of the *ITT* AOC. For instance, Congress—on occasion—overrides Supreme Court statutory-interpretation decisions. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 332 n.2, 338 tbl.1 (1991) (collecting cases and documenting frequency). Sometimes, that phenomenon happens because Congress erred or overlooked the implications of statutory language. *See id.* at 388–89. Other times, however, it happens because the Court "misinterpret[s] congressional preferences," erring itself. *Id.* at 388. In those latter cases, Congress's original preferences have not changed, but the legislature alters the language to make those preferences clear to the courts. The government's change in the language of its settlement agreements may be simply this latter scenario playing out. Accordingly, the fact that the EPA memorandum claims only to be clarifying the government's position does not compel this panel to conclude that the ASAOC here is equivalent to the *ITT* AOC. If that logic were applied broadly, it would mean that no actor could ever correct its mistakes or remedy its failure to be clear.

Third, Appellants' other out-of-circuit cases are not persuasive. The consent order in *W.R. Grace & Co.—Conn. v. Zotos Int'l, Inc.*, 559 F.3d 85 (2d Cir. 2009), made no reference whatsoever to CERCLA,

which was particularly relevant given that the agreement was between the private party and the *state* environmental department. *Id.* at 91. Here, the ASAOC was between the EPA and Appellants and cited CERCLA throughout. In *Agere Systems*, the private parties had no contribution protection. 602 F.3d at 225. Here, the ASAOC explicitly gives Appellants contribution protection under §§ 113(f)(2) and 122(h). Finally, in *Bernstein*, the Seventh Circuit held that a PRP could continue its § 107(a)(4)(B) action because it had not sufficiently resolved its liability with the government. 733 F.3d at 212. The *Bernstein* PRP had to meet certain prerequisites before the administrative order of consent went into effect. *Id.* Here, as in *RSR Corp.*, which the Seventh Circuit specifically distinguished, the ASAOC went into effect on the Effective Date—August 15, 2006. Therefore, Appellants' liability was definitively settled—the agreement was in effect, and their liability was certain—and this case is factually distinct from *Bernstein*.

***

In summary, the ASAOC resolved at least some of Appellants' liability with the government. As a result, the ASAOC is an administrative settlement within the meaning of § 113(f)(3)(B), which allows Appellants to file an action for contribution and fend off similar claims. Because Appellants can prosecute a § 113(f)(3)(B) contribution action, CERCLA and relevant caselaw prevent Appellants from bringing a § 107(a)(4)(B) action. Therefore, the district court did not err in dismissing this § 107(a)(4)(B) claim or granting summary judgment on the issue. As a result,

we **AFFIRM** the district court's judgment regarding this issue.

IV. Appellants' § 113(f)(3)(B) Claims

Appellants next assert that the district court erred in dismissing their § 113(f)(3)(B) claims as untimely. The district court determined that § 113(g)(3) contained the appropriate limitations period—three years from the date of settlement—and that because Appellants filed these actions more than three years from August 15, 2006, their § 113(f)(3)(B) claims were untimely. *Hobart Corp.*, 840 F. Supp. 2d at 1032. On appeal, Appellants contend that this decision was wrong because, under their reading, § 113(g)(3)'s three-year limitations period applies only to administrative settlements entered into under § 122(g) and (h). More importantly, according to Appellants, the applicable limitations period can be found in § 113(g)(2), which allows actions for recovery of costs up to three years from the completion of the removal action. There are several problems with Appellants' argument, however, and as a result, we **AFFIRM** the district court's dismissal of Appellants' contribution actions under § 113(f)(3)(B) for being untimely.

"In the ordinary course, a statute of limitations creates 'a time limit for suing in a civil case, based on the date when the claim accrued.'" *CTS Corp.*, 134 S. Ct. at 2182 (quoting Black's Law Dictionary 1546 (9th ed. 2009)). On this point, CERCLA contains several potentially relevant provisions:

> (g) Period in which action may be brought . . .
>
> (2) Actions for recovery of costs

> An initial action for recovery of the costs referred to in section [107 of CERCLA, 42 U.S.C. § 9607] must be commenced—
>
> > (A) for a removal action, within 3 years after completion of the removal action . . . .
>
> (3) Contribution
>
> No action for contribution for any response costs or damages may be commenced more than 3 years after—
>
> > (A) the date of judgment in any action under this chapter for recovery of such costs or damages, or
> >
> > (B) the date of an administrative order under section [122(g) of CERCLA, 42 U.S.C. § 9622(g)] (relating to de minimis settlements) or [122(h) of CERCLA, 42 U.S.C. § 9622(h)] (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

CERCLA § 113(g)(2)–(3); 42 U.S.C.§ 9613(g)(2)–(3). No one accuses CERCLA of being a well-drafted or an easy-to-follow statute. *See, e.g.*, *Exxon Corp. v. Hunt*, 475 U.S. 355, 363 (1986) (noting that CERCLA "is not a model of legislative draftsmanship"); *Bernstein*, 733 F.3d at 200 ("CERCLA is not known for its clarity, or for its brevity."). But several conclusions can be drawn from these provisions and relevant caselaw.

First, the text of § 113(g) and the controlling caselaw defeat Appellants' contention that their claim is governed by § 113(g)(2). Appellants may be correct that conducting a RI/FS is a removal action, *see Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 840 (6th Cir. 1994), and that the government's authority to enter into a settlement regarding a RI/FS flows from § 122(d), not from § 122(g) or (h). *See* Appellants Br. at 31–32. But these facts do not mean that Appellants' *action* is a cost-recovery action under § 107(a)(4)(B) and, therefore, governed by § 113(g)(2). As explained above, Appellants' action is one for contribution under § 113(f)(3)(B) because Appellants resolved some of their liability with the government in the ASAOC. Section 113(g)(3) states explicitly that "[n]o action for contribution . . . may be commenced more than 3 years after [a triggering event]." This court has interpreted this introductory clause to indicate that § 113(g)(3) governs *all* contribution actions. *RSR Corp.*, 496 F.3d at 556, 558.[12] And this position finds support from an array of courts. *See, e.g.*, *Atl. Research*, 551 U.S. at 138–39 (noting that § 107(a) and § 113(f) provide distinct causes of action); *Cooper Indus.*, 543 U.S. at

---

[12] To the extent that *ITT Industries* holds that § 113(g)(3) governs only contribution actions stemming from § 122(g) or (h) settlements, *see* 506 F.3d at 460–61, *RSR Corporation* forecloses such a result. Under the law of the circuit, a three-judge panel cannot overrule a prior panel's published decision without an intervening United States Supreme Court decision or a contrary decision by this court sitting en banc. *Darrah v. City of Oak Park*, 255 F.3d 301, 309 (6th Cir. 2001). Here, there was no such decision. Thus, we remain bound by the earlier panel decision—*RSR Corporation*—on this point. *Sowards v. Loudon Cnty.*, 203 F.3d 426, 431–32 n.1 (6th Cir. 2000).

167 ("[Section] 113 provides two express avenues for contribution: § 113(f)(1) . . . and § 113(f)(3)(B) . . . . Section 113(g)(3) then provides two corresponding 3-year limitations periods for contribution actions . . . ."); *Niagara Mohawk*, 596 F.3d at 128 n.19 ("Claims under § 107 do enjoy a six-year statute of limitations while claims under § 113 have a three-year statute of limitations.") (citing 42 U.S.C. § 9613(g)); *United Tech. v. Browning-Ferris Indus.*, 33 F.3d 96, 98 (1st Cir. 1994) ("Cost recovery actions are subject to a six-year statute of limitations, *see* [42 U.S.C.] § 9613(g)(2), while contribution actions must be brought within half that time, *see id.* § 9613(g)(3)."); *Chitayat v. Vanderbilt Assocs.*, 702 F. Supp. 2d 69, 82 (E.D.N.Y. 2010) ("[T]he decisions in *Cooper Industries* and *Atlantic Research Corp.* eliminate the availability of the six-year statute of limitations set forth in section [113(g)(2)] as an option for contribution cases."); *Carrier Corp. v. Piper*, 460 F. Supp. 2d 827, 843 (W.D. Tenn. 2006) ("[T]he proper statute of limitations to apply to a contribution action pursuant to § 113(f)(3)(B) is § 113(g)(3) . . . ."). We see no reason to depart from this widely accepted view and, therefore, hold that § 113(g)(2) is irrelevant to resolving whether Appellants' contribution action was timely filed and that § 113(g)(3) provides the statute of limitations for all contribution actions.

The cases that Appellants cite to the contrary are easily distinguished. To start, this court simply did not hold in *GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433 (6th Cir. 2004), that "it is appropriate to look to § 113(g)(2)'s limitations periods for the applicable statute of limitations" "where a party bringing a contribution suit incurs costs by means other than one of the triggering events identified in § 113(g)(3)." Appellants Br. at 48

(citing *GenCorp*, 390 F.3d at 443). Rather, this pre-*Cooper Industries* decision stated that the party's "counterclaim constituted 'an initial action for recovery of [] costs,'" and the parties agreed that § 113(g)(2) provided the proper statute of limitations. *GenCorp*., 390 F.3d at 443. Here, Appellants are suing for contribution, not cost recovery, and the proper statute of limitations is in dispute. Appellants cite three other pre-*Cooper Industries* cases for the proposition that contribution actions can be governed by the limitations found in § 113(g)(2). *See* Appellants Br. at 48 (citing *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917 (5th Cir. 2000); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998); *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997)). However, these cases conceived of contribution actions as a subset of cost-recovery actions under § 107. *See Geraghty*, 234 F.3d at 924; *Centerior*, 153 F.3d at 353; *Sun Co.*, 124 F.3d at 1191. *Cooper Industries* and *Atlantic Research* have clarified that §§ 107 and 113 offer distinct causes of action and, therefore, are governed by distinct statutes of limitations. Thus, the cases cited by Appellants are no longer good law on this point.

Second, even though § 113(g)(3) provides the limitations period in this case, the parties have not demonstrated that that section also indicates the triggering event in this case. Appellees and the government contend otherwise, arguing that the ASAOC is a § 122(h) administrative order, which is listed in § 113(g)(3)(B). *See* DP&L Br. at 30–43; United States Br. at 17–19, 23. For support, they cite two paragraphs in the ASAOC and an internal EPA memorandum. *See, e.g.*, United States Br. at 17–19,

n.8. These provisions, however, do not do the work that Appellees and the government claim that they do. Paragraph 2 of the ASAOC states: "This Settlement Agreement is issued under authority vested in the President of the United States by Sections 104, 107 *and 122* of [CERCLA]." R. 17-1 at 9 (ASAOC at 1 ¶ 2) (Page ID #191) (emphasis added). While this statement brings § 122 into the conversation, Appellees and the government forget that subsection (h) is not the only provision in § 122. Section 122 provides a general grant of settling authority to the President, *see* § 122(a), and it allows for consent decrees under § 106, *see* § 122(d)(1). A general citation to § 122 does not necessarily make the ASAOC a § 122(h) agreement. Moreover, a reference to § 122(h)(4)'s contribution-protection language in Paragraph 96a, *see* R. 17-1 at 39 (ASAOC at 31 ¶ 96a) (Page ID #221), does not make the ASAOC a full-blown § 122(h) administrative order either, *see ITT Indus.*, 506 F.3d at 461. This is particularly true for administrative orders, such as the ASAOC, that state that "[t]he actions required by this Settlement Agreement are necessary . . . [under] [§ 122(a)], are consistent with CERCLA . . . [§ 122(a)], and will expedite effective remedial action and minimize litigation, [§ 122(a)]." R. 17-1 at 17 (ASAOC at 9 ¶ 26) (Page ID #199). Lastly, while the EPA memorandum from 1998 indicates that the ASAOC *could be* a § 122(h) administrative order,[13] it does not

---

[13] *See* Memorandum from Sandra L. Connors, Director, Regional Support Division, EPA Office of Site Remediation Enforcement, "Guidance on Administrative Response Cost Settlements under Section 122(h) of CERCLA" (Dec. 22, 1998), *available at* http://www2.epa.gov/enforcement/guidance-superfund-settlements-adminsitrative-response-cost-and-cashout-peripheral.

show—nor can it—that the ASAOC (from 2006) *is* such an order.[14] Given the language of the ASAOC, we cannot conclude definitively that the ASAOC is a § 122(h) administrative order, nor that the ASAOC fits into one of the other triggering events explicitly listed in § 113(g)(3).

Third, even though § 113(g)(3) does not provide an explicit triggering event, controlling and persuasive caselaw indicates that there must be one. Appellants contend that § 113(g)(3)'s listing of several triggering events precludes a finding that other ones can exist under the principle of *expressio unius est exclusio alterius*. *See* Appellants Br. at 39 (citing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978)). However, the Supreme Court has "long held that the *expressio unius* canon does not apply unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it, and that the canon can be overcome by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion." *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1175 (2013) (internal quotation marks and citations omitted). In this case, reading § 113(g)(3) to provide for a statute of limitations only in contribution actions triggered by a § 122(h) settlement

---

[14] The best evidence that the ASAOC is a § 122(h) administrative order would be that EPA published it in the Federal Register and considered any comments put forward, as required by § 122(i). Neither Appellees nor the government provided any evidence that the ASAOC was published, as required, in the Federal Register, and at oral argument, Appellants represented that it had not been. While not dispositive, this information indicates that the ASAOC is not exclusively a § 122(h) agreement.

"would work considerable damage to the statute." *RSR Corp.*, 496 F.3d at 557; *see also Chitayat*, 702 F. Supp. 2d at 83 ("*Cooper Industries* also suggests that the conclusion that there is no statute of limitations is incorrect.") (citing 543 U.S. at 167). After all, CERCLA's "principal purpose" in having "limitations periods . . . is to ensure that the responsible parties get to the bargaining—and clean-up—table sooner rather than later." *RSR Corp.*, 496 F.3d at 559. Reading § 113(g)(3)'s enumeration of a few triggering events to preclude finding others would defeat this purpose in any instance in which a state, as opposed to the EPA, settles with a PRP or in which the EPA settles according to its general § 122(a) power. *See id.* This result would be illogical.

Fourth, the effective date of the ASAOC is the most logical and convenient triggering event. It is well known that Congress frequently leaves a void in federal statutory law related to limitations periods, *see, e.g.*, *Comm'r v. Fink*, 483 U.S. 89, 104 (1987) (Stevens, J., dissenting), and when that happens, the Supreme Court "do[es] not ordinarily assume that Congress intended that there be no time limit on actions at all," *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 158 (1983). Instead, the Court "'borrow[s]' the most suitable statute or other rule of timeliness from some other source." *Id.* The Court, in most cases, will adopt a "state law of limitations governing an analogous cause of action." *Bd. of Regents of the Univ. of N.Y. v. Tomanio*, 446 U.S. 478, 483–84 (1980). In some cases, however, doing so "would only stymie the policies underlying the federal cause of action," and the Court will instead "look[] for a [statute of limitations] that might be provided by analogous federal law, more in

harmony with the objectives of the immediate cause of action." *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995). Here, § 113(g)(3)(B) itself provides the most analogous triggering event. It starts the limitations clock for contribution actions related to administrative agreements under § 122(g) and (h) on the date when the settlements become effective. It is only logical that the effective date of the ASAOC—a settlement agreement entered into under § 122(a)—would be the most analogous triggering event in this case.

Appellants claim that such a decision would be unjust because § 122(a) agreements "tend to occur early in the Superfund process and before PRPs who enter into such agreements have had a full opportunity to investigate the involvement of other persons that might have liability at the Site." Appellants Br. at 46. While this statement may be true, it does not change the fact that PRPs, such as Appellants, have three years from the date that the settlement agreements are signed to identify and file a contribution action against other PRPs. In any event, setting a different triggering event would undermine CERCLA's goal of encouraging prompt cleanup, as a liable PRP may drag out the removal action until it identifies every other PRP.

***

In summary, we hold that § 113(g)(3) sets the proper limitations period for contribution actions; that § 113(g)(3) does not explicitly list a triggering event in this case; that there must be a triggering event; and that the signing of the ASAOC is the most logical triggering event. Given these conclusions, the district court did not err in dismissing Appellants' § 113(f)(3)(B) claims as untimely. The ASAOC's

effective date was August 15, 2006. R. 17-1 at 50 (ASAOC at 37) (Page ID #232). Appellants first filed an action for contribution on May 24, 2010. R. 1 at 1 (Compl.) (Page ID #1). May 24, 2010 is more than three years from August 15, 2006, and therefore Appellants filed their action outside of the limitations period. Accordingly, we **AFFIRM** the district court's dismissal of Appellants' § 113(f)(3)(B) claims for contribution.

V. Appellants' Unjust-Enrichment Claims

Appellants' final claim on appeal is that the district court erred in dismissing their unjust-enrichment claim. Specifically, Appellants argue that the district court incorrectly relied upon federal law in adjudicating this state-law claim. Appellants Br. at 49–52; Reply Br. at 27–31. Appellants, however, misunderstand the district court's decision: there was no Ohio law on point to decide this question, and the district court turned to federal cases in determining whether Appellants failed to state a claim for unjust enrichment under Ohio law. *See Hobart Corp.*, 840 F. Supp. 2d at 1036–37. We conclude that this was not error and, thus, **AFFIRM** the dismissal of this state-law claim.

Unjust enrichment is a state-law claim for restitution. In Ohio, a plaintiff must allege facts satisfying the following elements: "(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment." *Johnson v. Microsoft Corp.*, 834 N.E.2d 791, 799 (Ohio 2005) (internal quotation marks omitted). Ohio law requires that a plaintiff also "show

that the substantial benefit to the defendant is 'causally related' to the substantial detriment to the plaintiff." *Andersons, Inc. v. Consol, Inc.*, 348 F.3d 496, 501–02 (6th Cir. 2003) (quoting *Gaier v. Midwestern Grp.*, 601 N.E.2d 624, 627 (Ohio Ct. App. 1991)). Moreover, "[i]n determining whether a defendant received an unjust or unconscionable benefit, we must consider whether 'the defendant was the party responsible for the plaintiff's detrimental position.'" *Id.* at 502 (quoting *United States Health Practices, Inc. v. Blake*, No. 00AP-1002, 2001 WL 277291, at *2 (Ohio Ct. App. Mar. 22, 2001)).

Under this standard, it is clear that the district court correctly dismissed Appellants' unjust-enrichment action for failure to state a claim under Ohio law. The "benefit" that Appellees received was Appellants' failure to file a contribution action in a timely manner. Even if we assume that this failure qualifies as a "benefit" under the first prong in *Johnson*, Appellees did not cause Appellants' detrimental position—having to shoulder the cost of the RI/FS and the government's response costs alone. Appellants were already liable under the ASAOC for paying the cost of the RI/FS and for reimbursing the government's response costs. As Appellants concede, the ASAOC was a "voluntary agreement." Appellants Br. at 51. Therefore, Appellees were not responsible for "plaintiff's detrimental position," and Appellants have failed to allege a valid unjust-enrichment claim under Ohio law. As a result, we **AFFIRM** the district court's dismissal of the claim.

VI. CONCLUSION

Appellants cannot bring a § 107(a)(4)(B) cost-recovery action because they resolved their liability with the government in the ASAOC, which allowed them to bring a § 113(f)(3)(B) contribution action. These remedies are mutually exclusive. Appellants failed to file their § 113(f)(3)(B) contribution action within the applicable statute of limitations, however, and Appellants failed to allege facts showing that Appellees caused Appellants' detriment, thus failing to state a valid unjust-enrichment cause of action under Ohio law. For these reasons, we **AFFIRM** the district court's dismissals and grants of summary judgment to Appellees on each claim.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed February 8, 2013]

Case No. 3:10-cv-195
JUDGE WALTER H. RICE

HOBART CORPORATION, *et al.*,

Plaintiffs,

v.

WASTE MANAGEMENT OF OHIO, INC., *et al.*,

Defendants

Case No. 3: 12-cv-213
JUDGE WALTER H. RICE

HOBART CORPORATION, *et al.*,

Plaintiffs,

v.

COCA-COLA ENTERPRISES,

INC., *et al.*,)
)
Defendants)
_____)

DECISION AND ENTRY SUSTAINING DEFENDANT DAYTON POWER & LIGHT'S MOTION FOR SUMMARY JUDGMENT (DOC. #121 IN CASE NO. 3:10-CV-195); SUSTAINING DEFENDANT CARGILL, INC.'S MOTION FOR SUMMARY JUDGMENT (DOC. #139 IN CASE NO. 3:10-CV-195); SUSTAINING DEFENDANTS' MOTION TO DISMISS (DOC. #12 IN CASE NO. 3:12-CV-213); OVERRULING PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT (DOC. #124 IN CASE NO. 3:10-CV-195); DISMISSING AS MOOT ALL COUNTERCLAIMS AND CROSSCLAIMS FILED IN CASE NO. 3:10-CV-195; OVERRULING AS MOOT DEFENDANT'S OBJECTION TO MAGISTRATE JUDGE OVINGTON'S MARCH 23, 2012, DECISION AND ENTRY ON PLAINTIFFS' MOTION TO COMPEL AND DEFENDANT'S MOTION TO QUASH (DOC. #109 IN CASE NO. 3:10-CV-195); OVERRULING AS MOOT DEFENDANTS' MOTION TO STAY DISCOVERY (DOC. #122 IN CASE NO. 3:10-CV-195), AND OVERRULING AS MOOT PLAINTIFFS' MOTION TO MODIFY SCHEDULING ORDER (DOC. #127 IN CASE NO. 3:10-CV-195); JUDGMENT TO ENTER IN FAVOR OF DEFENDANTS AND AGAINST PLAINTIFFS IN CASES 3:10-CV-195 AND 3:12-CV-213; TERMINATION ENTRY

In each of the above-captioned cases, Plaintiffs Hobart Corporation, Kelsey-Hayes Company and NCR Corporation seek to recover certain costs incurred in connection with a remedial investigation and feasibility study related to environmental hazards at the South Dayton Dump and Landfill Site.

This matter is currently before the Court on several pending dispositive motions: (1) Defendant Dayton Power & Light Company's motion for summary judgment (Doc. #121 in Case No. 3:10-cv-195); (2) Defendant Cargill, Inc.'s motion for summary judgment (Doc. #139 in Case No. 3:10-cv-195); and (3) Defendants' motion to dismiss (Doc. #12 in Case No. 3:12-cv-213).

The following non-dispositive matters are also pending: (1) Defendant Dayton Power & Light Company's objections to Magistrate Judge Ovington's March 23, 2012, Decision and Entry granting Plaintiffs' motion to compel discovery and denying Defendant's motion to quash subpoena (Doc. #109 in Case No. 3:10-cv-195); (2) Defendant Dayton Power & Light Company's motion to stay discovery (Doc. #122 in Case No. 3:10-cv-195); and (3) Plaintiffs' motion to modify the scheduling order (Doc. #127 in Case No. 3:10-cv-195).

For the reasons set forth below, the Court SUSTAINS Defendants' dispositive motions, DISMISSES all pending counterclaims and cross-claims, and OVERRULES the remaining matters AS MOOT.

I. Background and Procedural History

The South Dayton Dump and Landfill Site (the "Site"), located in Moraine, Ohio, is contaminated with several hazardous substances. The United States Environmental Protection Agency ("EPA") has proposed listing the Site on the National Priorities List. Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § § 9601-9675, Plaintiffs were identified as potentially responsible parties ("PRPs") because they either generated the hazardous substances found at the Site, owned or operated the Site or facility when hazardous substances were disposed of there, or arranged for disposal or transport for disposal of hazardous substances at the Site. *See generally* 42 U.S.C. § § 9604, 9607, and 9622.

In 2006, Plaintiffs and the EPA entered into an "Administrative Settlement Agreement and Order on Consent for Remedial Investigation/Feasibility Study" ("ASAOC"). This settlement agreement became effective on August 15, 2006.

A. ASAOC

Pursuant to the ASAOC, Plaintiffs agreed to conduct a remedial investigation and feasibility study ("RI/FS") for the Site. Stated objectives included the determination of the nature and extent of contamination and any current or potential threats to the public health, welfare, or the environment, the identification and evaluation of remedial alternatives, and the recovery of response and oversight costs incurred by the EPA with respect to the ASAOC. Ex. A to Compl., ¶ 9.

In exchange, the EPA agreed not to sue or take administrative action against Plaintiffs for the "Work" that was the subject of the ASAOC or for "Future Response Costs." Ex. A to Compl., ¶ 82.[1] The parties agreed that the "Settlement Agreement constitute[d] an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2)," and that Plaintiffs were therefore entitled to protection from contribution actions for matters addressed therein. They also agreed that the Settlement Agreement constituted "an administrative settlement for purposes of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9113(f)(3)(B)," pursuant to which Plaintiffs "have, as of the Effective Date, resolved their liability to the United States for the Work, and Future Response Costs." The ASAOC did not prevent the parties from asserting claims for indemnification, contribution, or cost recovery against others who were not parties to it. Ex. A to Compl., ¶ 96.

B. *Hobart I* (Case No. 3:10-cv-195)

On May 24, 2010, Plaintiffs filed suit against numerous other PRPs, including Waste Management of Ohio, Inc. ("Waste Management"), The Bimac Corporation, Bridgestone Americas Tire Operations, LLC ("Bridgestone"), Cargill, Inc., The Dayton Power & Light Company ("DP&L"), Monsanto Company, Valley Asphalt Corporation, and IRG Dayton I, LLC ("IRG").

---

[1] The ASAOC defines "the Work" as "all activities Respondents are required to perform under this Settlement Agreement." "Future Response Costs" are defined as all costs incurred by the United States in implementing, overseeing, and enforcing the Settlement Agreement. Ex. A to Com pl. ¶ 11 (i) and (x).

Plaintiffs asserted four causes of action related to the RI/FS: (1) cost recovery under CERCLA § 107(a); (2) contribution under CERCLA § 113(f)(3)(B); (3) unjust enrichment; and (4) declaratory judgment.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants DP&L, Bridgestone, and IRG filed motions to dismiss for failure to state a claim upon which relief can be granted. On February 10, 2011, the Court issued a Decision and Entry ruling on those motions. Doc. #71. The Court dismissed in part the § 107(a) cost recovery claim asserted in Count 1. To the extent Plaintiffs alleged that Defendants disposed of hazardous substances directly at the Site, the allegations were sufficient to state a claim under § 107(a); however, to the extent Plaintiffs alleged that Defendants released hazardous substances on property adjacent to the Site and allowed those substances to migrate through the groundwater to contaminate the Site, Plaintiffs had failed to state a claim upon which relief could be granted.

The Court dismissed Count 2 in its entirety, finding that Plaintiffs' contribution claims under § 113(f) of CERCLA were not filed within the applicable three-year statute of limitations and were therefore time-barred. The Court also dismissed Count 3 in its entirety, holding that because Plaintiffs had a legal duty to pay remediation costs, they were precluded from pursuing a claim for unjust enrichment. As to Count 4, which sought declaratory judgment concerning the parties' rights and responsibilities under CERCLA for the response costs incurred by Plaintiffs, the Court sustained the motion to dismiss to

the same extent it had sustained the motion to dismiss the substantive claims under § § 107(a) and 113(f).

On March 23, 2012, Magistrate Judge Ovington issued a Decision and Entry granting Plaintiffs' motion to compel discovery, and denying Defendant DP&L's motion to quash a subpoena and to exclude the use of information derived from *ex parte* communications by Plaintiffs' counsel with a DP&L employee. Doc. #107. DP&L filed an objection to the Magistrate Judge's order, Doc. #109, and the Magistrate Judge stayed the Decision and Entry pending resolution of that objection, Doc. #115.

On June 21, 2012, Defendant DP&L filed a motion for summary judgment on the remaining portion of Plaintiffs' § 107(a) claim and related request for declaratory judgment. Doc. #121. Defendants Waste Management, Bridgestone, and Cargill joined in that motion. Docs. #125, 126, 140. Defendants argue that § § 107(a) and 113(f) of CERCLA are mutually exclusive, and that, because Plaintiffs entered into an administrative settlement under § 113(f)(3)(B) of CERCLA, resolving some of their liability to the United States, Plaintiffs were limited to a § 113(f) contribution claim. Defendants maintain that Plaintiffs are barred, as a matter of law, from pursuing a cost recovery claim under § 107(a).[2]

---

[2] DP&L notes that the subject matter of Plaintiffs' claims relates only to costs incurred in connection with the RI/FS. Actual remediation costs have not yet been incurred, and dismissal of Plaintiffs' current claims will not prevent Plaintiffs from attempting to recover those remediation costs at a later date.

DP&L also moved to stay discovery pending a decision on the motion for summary judgment, Doc. #122, and Plaintiffs moved to modify the scheduling order, Doc. #127. On June 29, 2012, Plaintiffs moved for leave to file a third amended complaint, seeking to add newly-discovered defendants, a theory of owner/operator liability against DP&L, and allegations concerning Waste Management's successor liability. Doc. #124.

On August 13, 2012, Defendant Cargill filed a separate motion for summary judgment based, in part, on the same grounds previously asserted by the other Defendants. Doc. #139. These motions are all fully briefed and ripe for decision.

C. *Hobart II* (Case No. 3:12-cv-213)

On June 29, 2012, Plaintiffs filed a second lawsuit arising out of the same facts, and asserting the same four causes of action asserted in *Hobart I*.[3] Defendants named in the second suit include Coca-Cola Enterprises Inc., DAP Products Inc., GlaxoSmithKline, LLC, and The Sherwin-Williams Company.

On August 15, 2012, these defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Doc. #12. They note that, in *Hobart I,* the Court previously dismissed many of the claims asserted. They further argue that the remaining claims

---

[3] During a conference call held on August 30, 2012, the Court discussed the possibility of consolidating *Hobart I* with *Hobart II*. Sherwin-Williams objected to consolidation because of a conflict of interest. The Court agreed to resolve the pending dispositive motions prior to deciding whether the cases should be consolidated.

should be dismissed for the same reason asserted in the summary judgment motions filed by the defendants in *Hobart I,* namely that a PRP with a § 113(f) contribution claim cannot also seek cost recovery under § 107(a).

II. Dayton Power & Light Company's Motion for Summary Judgment (Doc. #121) (*Hobart I)*

Pursuant to Federal Rule of Civil Procedure 56(a), Defendant DP&L has moved for summary judgment on Plaintiffs' remaining claim for cost recovery under § 107(a) of CERCLA and the related claim for declaratory judgment. The motion is joined by Defendants Waste Management, Bridgestone, and Cargill.

A. Standard of Review/Timeliness

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Plaintiffs correctly note that DP&L's motion for summary judgment is based solely on a legal issue, *i.e.,* whether the remedies provided in § § 107(a) and 113(f) of CERCLA are mutually exclusive. Plaintiffs argue that because the motion for summary judgment involves purely a legal issue, it should be deemed an untimely attempt to file a second motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).

True, the legal arguments raised by DP&L could have been presented in the context of a 12(b)(6) motion. However, nothing in the Federal Rules of Civil Procedure prohibits a party from moving for summary judgment based solely on a legal issue. So long as there

is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," summary judgment is properly granted. Fed. R. Civ. P. 56(a). Here, the court can reach the dispositive legal issue without having to resolve any material factual disputes. Moreover, a motion for summary judgment may be filed "anytime until 30 days after the close of all discovery." Fed. R. Civ. 56(b). Since discovery in this case is ongoing, Defendants' motion was timely filed.

B. Analysis

1. **Relevant Law: §§ 107(a) and 113(f) of CERCLA**

CERCLA "facilitates cleanup and remediation of contaminated lands, and shifts the financial burden of such environmental response action to the parties responsible for releasing hazardous substances." *ITT Indus., Inc. v. Borg Warner, Inc.*, 506 F.3d 452, 456 (6th Cir. 2007). Persons who incur such response costs may be able to recoup them from other potentially responsible parties ("PRPs") through a "cost recovery" action under § 107(a) of CERCLA, or a "contribution" action under § 113(f) of CERCLA.

Section 107(a)(4) makes PRPs strictly liable for "all costs of removal or remedial action incurred by the United States," 42 U.S.C. § 9607(a)(4)(A), and for "any other necessary costs of response incurred by any other person consistent with the national contingency plan," 42 U.S.C. § 9607(a)(4)(8). Liability under § 107(a) is joint and several. Prior to 1986, courts read § 107(a)(4)(8) to also create an implied private right of action for contribution for PRPs who were sued under § 107(a) and had to pay more than their fair share of

response costs. *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir. 1998).

Then, as part of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Congress enacted § 113(f), creating an express private right of contribution in two situations. *Id.* First, a person may "seek contribution from any other person who is liable or potentially liable under section 9607(a) . . . , during or following any civil action under section 9606 . . . or under section 9607(a)." 42 U.S.C. § 9613(f)(1). Second, a person "who has resolved its liability to the United States . . . for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not a party" to the settlement agreement. 42 U.S.C. § 9613(f)(3)(8). A party who has resolved its liability to the government in an administrative or judicially approved settlement "shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2).

Generally speaking, actions for contribution are subject to a three-year statute of limitations, while remedial cost recovery actions are subject to a six-year statute of limitations. 42 U.S.C. § 9613(g)(2)-(3).

In *United States v. Atlantic Research Corp.*, 551 U.S. 128 (2007), the Supreme Court explained that § 107(a) and § 113(f) "provide two 'clearly distinct' remedies." *Id.* at 138 (quoting *Aviall Servs. Inc. v. Cooper Indus. Inc.*, 543 U.S. 157, 163 n.3 (2004)). "[T]he appropriateness of a § 107(a) cost recovery or § 113(f) contribution action varies depending on the

circumstances leading up to the action." *ITT Industries*, 506 F.3d at 458.

PRPs who voluntarily fund and execute a cleanup action themselves, without any administrative or judicial involvement, have "incurred" their own response costs and may bring a "cost recovery" action under § 107(a). *Atlantic Research*, 551 U.S. at 139. But when a PRP pays to satisfy a settlement agreement or a court judgment, it does not "incur" its own response costs of response, and therefore cannot recover under § 107(a). In this situation, the PRP, who is reimbursing others, must instead seek contribution under § 113(f). It "cannot simultaneously seek to recover the same expenses under § 107(a)." *Id.*[4]

The Supreme Court acknowledged a possible overlap between the remedies, and left open the question of whether a PRP who is compelled to pay response costs pursuant to a consent decree following a suit under § § 106 or 107(a) may recover those costs under § 107(a), § 113, or both. The Court noted that "[i]n such a case, the PRP does not incur costs voluntarily but does not reimburse the costs of another party." 551 U.S. at 139 n.6.

Appellate courts that have subsequently considered this question have determined that PRPs who are compelled to pay response costs pursuant to an

---

[4] As explained in *ITT Industries*, "[t]o maintain the vitality of § 113(f), . . . PRPs who have been subject to a civil action pursuant to § § 106 or 107 or who have entered into a judicially or administratively approved settlement must seek contribution under § 113(f)." 506 F.3d at 458 (citing *Atlantic Research*, 551 U.S. at 139).

administrative settlement or a consent decree are limited to a contribution action under § 113(f). In *Morrison Enterprises, LLC v. Dravo Corp.,* 638 F.3d 594, 603-04 (8th Cir. 2011), the court held that § 113 provides "the exclusive remedy for a liable party compelled to incur response costs pursuant to an administrative or judicially approved settlement under § § 106 or 107."

In *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230, 1236 (11th Cir. 2012), the court explained that "[i]f a party subject to a consent decree could simply repackage its § 113(f) claim for contribution as one for recovery under § 107(a), then the structure of CERCLA remedies would be completely undermined," and parties could circumvent § 113(f)'s shorter statute of limitations. Likewise, in *Niagara Mohawk Power Corp. v. Chevron USA, Inc.*, 596 F.3d 112, 128 (2d Cir. 2010), the court held that allowing such plaintiffs to proceed under § 107(a) "would in effect nullify the SARA amendment and abrogate the requirements Congress placed on contribution claims under § 113."

Notably, *"Atlantic Research* did not overrule decisions holding that claims for costs incurred in performing a cleanup pursuant to a judicial or administrative settlement are limited to a contribution action under § 113(f)." *ITT Indus., Inc. v. BorgWarner, Inc.*, 615 F. Supp. 2d 640, 647 (W.D. Mich. 2009) (on remand). In *Bernstein v. Bankert*, -- F.3d --, 2012 WL 6601218, at * 11 (7th Cir. Dec. 19, 2012), the Seventh Circuit recently reiterated that "a plaintiff is limited to a contribution remedy when one is available." The salient question is whether a party has resolved its liability to the government "for some or all of a

response action or for some or all of the costs of such action in an administrative or judicially approved settlement." 42 U.S.C. § 9613(f)(3)(B). If the party has resolved its liability in such a fashion and seeks to recoup response costs from other PRPs, a contribution claim under § 113(f)(3)(B) is the only possible avenue of recovery. A cost recovery action under § 107(a) is not available.

2. Application

The dispositive question in this case, then, is whether the ASAOC constitutes an "administrative settlement" for purposes of § 113(f)(3)(B). If it does, then a contribution action under § 113(f) was the exclusive remedy available to Plaintiffs. As previously noted, the Court has previously dismissed Plaintiffs' § 113(f) contribution claim as time-barred since it was filed outside the three-year statute of limitations set forth in 42 U.S.C. § 9613(g)(3).[5]

Plaintiffs make several arguments in support of their claim that a cost recovery action under § 107(a),

---

[5] The Court declines Plaintiffs' invitation to revisit this ruling. The cases cited by Plaintiffs in their response to the motion to dismiss in Case No. 3:12-cv-213, Doc. #23, concerning this issue, are inapposite. *American Premier Underwriters, Inc. v. Gen. Elec. Co.*, No. 1:05-cv-437, 2012 WL 1104805 (S.D. Ohio March 31, 2012), and *GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433 (6th Cir. 2004), both involved *unilateral* administrative orders, which, by their very nature, cannot be construed as "settlements." In contrast, as explained more fully herein, the ASAOC in this case is an "administrative settlement" that resolved some of Plaintiffs' liability for response costs. As such, Plaintiffs had a contribution claim under § 113(f)(3)(B), rendering inapplicable the statute of limitations relevant to § 107(a) cost recovery actions.

with its longer statute of limitations, remains a viable option. For the reasons set forth below, however, the Court finds that the ASAOC was, in fact, an administrative settlement for purposes of § 113(f)(3)(B), and Plaintiffs were therefore limited to a contribution action under § 113(f). Accordingly, Plaintiffs cannot proceed on their cost recovery action under § 107(a) or their accompanying request for declaratory relief.

a) Express Terms of ASAOC

Section XXIII of the ASAOC is entitled "Contribution." It reads in relevant part as follows:

> 96. a. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that Respondents are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. § § 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Settlement Agreement. The "matters addressed" in this Settlement Agreement are the Work, and Future Response Costs.
>
> b. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. §9113(f)(3)(B) [sic], pursuant to which Respondents have, as of the Effective Date, resolved their liability to the United States for the Work, and Future Response Costs.

ASAOC at ¶96.

Despite their best efforts to distance themselves, Plaintiffs cannot escape the unambiguous language of paragraph 96b. They expressly agreed that, as of the Effective Date of the ASAOC, *i.e.,* August 15, 2006, they resolved their liability to the United States for "the Work" and "Future Response Costs." Plaintiffs also expressly agreed that the Settlement Agreement was an "administrative settlement for purposes of Section 113(f)(3)(B) of CERCLA."[6]

Accordingly, because Plaintiffs have "resolved [their] liability to the United States . . . for some or all of a response action or for some or all of the costs of such action in an administrative . . . settlement," 42 U.S.C. § 9613(f)(3)(B), they were limited to a contribution action under § 113(f), but failed to file their claim in a timely manner. They cannot now circumvent that statute of limitations through a cost recovery action under § 107(a).

b) Cases Cited by Plaintiffs are Factually Distinguishable

Plaintiffs do cite to several cases in which PRPs, who entered into administrative or judicially approved

---

[6] As DP&L notes, the EPA and the Department of Justice purposely used this particular language, and called the document an "Administrative Settlement Agreement and Order on Consent," to make it very clear that the settling PRPs had resolved their liability to the government within the meaning of § 113(f)(3)(B) and were entitled to seek contribution from others. *See* August 3, 2005, Joint Memorandum concerning "Interim Revisions to CERCLA Removal, RI/FS and RD AOC Models to Clarify Contribution Rights and Protection Under Section 113(f)," Ex. A to Doc. #135.

settlements with the government, were permitted to pursue § 107(a) claims for cost recovery. Each case cited, however, is factually distinguishable from the case at bar. The plaintiffs in those cases could not bring a § 113(f)(3)(B) contribution claim since they had not been sued under § § 106 or 107 and, despite the "settlement agreements," had not resolved their liability to the government for some or all of the costs of the response action.

In each case cited, a cost recovery claim under § 107(a) remained a viable option only because the plaintiffs had no § 113(f) claim available. *See Chevron Envtl. Mgmt. Co. v. BKK Corp.*, No. CV F 11-1396, 2012 U.S. Dist. LEXIS 100509, at * 18-20 (E. D. Cal. July 19, 2012) (refusing to dismiss § 107(a) claim where consent decree did not resolve any liability and Chevron therefore had no viable § 113(f) claim); *Agere Systems, Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 225-26 (3d Cir. 2010) (allowing plaintiffs to proceed under § 107(a) since neither trigger for a § 113(f) contribution claim had been satisfied); *W.R. Grace & Co.- Conn. v. Zotos Int'l, Inc.*, 559 F.3d 85, 92-93 (2d Cir. 2009) (allowing plaintiff to pursue § 107(a) claim where no § 113(f) contribution claim was available because consent order had not resolved CERCLA liability).

Bernstein v. Bankert, --F.3d--, 2012 WL 6601218 (7th Cir. Dec. 19, 2012), cited by Plaintiffs, is also factually distinguishable. There, the court found that no § 113(f) claim was available to the plaintiffs because, even though the 2002 Administrative Order by Consent ("AOC") contained covenants not to sue, those covenants were expressly conditioned on plaintiffs' successful discharge of all their obligations

under the AOC. Citing 42 U.S.C. § 9622(f)(3), which provides that a covenant not to sue concerning future liability does not take effect until the President certifies completion of the remedial action, the court concluded that because plaintiffs had not yet fully resolved their liability to the United States, the statutory trigger for a contribution claim had not been met. The court emphasized that the statutory trigger for a § 113(f)(3)(B) contribution claim is not the fact of settlement, but rather the "resolution of liability through that settlement." *Id.* at *7.

In contrast to the AOC in *Bernstein*, the ASAOC at issue here expressly stated that plaintiffs had "as of the Effective Date [August 15, 2006], resolved their liability to the United States for the Work, and Future Response Costs." ASAOC, ¶ 96b. In fact, it was that resolution of liability that gave them protection from other contribution claims pursuant to § 113(f)(2), and gave them authority to seek contribution from other PRPs pursuant to § 113(f)(3)(B). This resolution of liability provided the statutory trigger for a contribution claim.

Finally, Plaintiffs maintain that their ASAOC is materially identical to the AOC at issue in *ITT Industries*, 506 F.3d 452. In that case, the Sixth Circuit held that the AOC did not trigger a contribution claim under § 113(f) because the AOC did not fully resolve any of plaintiff's liability to the United States, and because the AOC, executed by the EPA under the authority of § 122(a), did not fall within the definition of an "administrative settlement" for purposes of § 113(f)(3)(B). *Id.* at 459-61. The Court will address each of these grounds in turn.

The Sixth Circuit found that the AOC did not resolve plaintiff's liability to the United States because: (1) the EPA expressly reserved its right to sue if plaintiff failed to comply with the terms of the AOC, and reserved its right to terminate the AOC if it disapproved of plaintiff's work plan, and to complete all necessary work itself and then obtain reimbursement from the plaintiff; and (2) the plaintiff had not conceded liability for the contamination.

As in *ITT Industries*, Plaintiffs in this case have not conceded liability, and the EPA has reserved its right to seek legal or equitable relief to enforce the terms of the ASAOC. That, however, is where the similarities end. The EPA, in this case, did not reserve its right to terminate the ASAOC, complete the work itself, and obtain reimbursement from Plaintiffs. Rather, the ASAOC contains a covenant not to sue under § 107(a), and includes provisions for dispute resolution. Moreover, the ASAOC expressly states that it "constitutes an administrative settlement for purposes of Section 113(f)(3)(B) . . . pursuant to which Respondents have, as of the Effective Date, resolved their liability to the United States for the Work, and Future Response Costs." ASAOC, ¶ 96b. Under the circumstances presented here, the ASAOC clearly resolves Plaintiffs' liability to the United States for some or all of the costs of the response action.

The Sixth Circuit, in *ITT Industries*, also found it significant that the AOC was executed by the EPA under authority granted by § 122(a). That subsection of the statute generally provides that, in order to expedite remedial actions and minimize litigation, the President may enter into a settlement agreement with any person

to perform a response action if the President determines that such action will be done properly. 42 U.S.C. § 9622(a).

The Sixth Circuit nevertheless held that settlements under this particular subsection do not constitute "administrative settlements" within the meaning of § 113(f)(3)(B) for purposes of deciding whether a contribution claim exists. The court stated that § 113 must be interpreted as a whole, and noted that § 113(g)(3)(B), which establishes a three-year statute of limitations for contribution actions, refers only to administrative orders under § 122(g), relating to *de minimis* settlements, and § 122(h), relating to cost recovery settlements. It then reasoned that because an administrative settlement under § 122(a) is not mentioned in § 113(g)(3), such a settlement cannot constitute an "administrative settlement" for purposes of § 113(f)(3)(B). 506 F.3d at 460.

As an initial matter, the Court notes the tension between this particular holding and the Sixth Circuit's holding in *RSR Corp. v. Commercial Metals Co.*, 496 F.3d 552 (6th Cir. 2007), which was issued a few months before the *ITT Industries* decision. In *RSR*, the Sixth Circuit specifically rejected a similar argument that § 113(g)(3)(B) should be so narrowly construed, and essentially held that § 113(g) establishes a three-year statute of limitations for *all* contribution actions. *Id.* at 557-58.[7] In light of this conflicting case law, it is not entirely clear whether a settlement agreement

[7] Judge Clay, who authored the opinion in *ITT Industries*, filed a dissenting opinion in *RSR Corp.*

under § 122(a) constitutes an "administrative settlement" for purposes of § 113(f)(3)(B).

In any event, the ASAOC at issue here could also be interpreted as an administrative order under § 122(h), bringing it squarely within the definition of an "administrative settlement" as construed by the *ITT Industries* court. Paragraph 4 of the Second Amended Complaint specifically states that the EPA entered into the ASAOC pursuant to the authority delegated to it by the President and authorized by "Sections 104, 107 and 122, including Section 122(h), of CERCLA," governing cost recovery settlements. Doc. #69, at ¶ 4. Likewise, the ASAOC itself states that one of its objectives is to "recover response and oversight costs incurred by U.S. EPA with respect to this Settlement Agreement," ASAOC, at ¶ 9, and that Plaintiffs are entitled "to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA," ASAOC, at ¶ 96a. This language makes the ASAOC in this case factually distinguishable from the AOC at issue in *ITT Industries*.

In contrast to all of the cases relied upon by Plaintiffs, the ASAOC in this case did expressly resolve Plaintiffs' liability to the United States for some of the costs of a response action, *i.e.*, for "the Work, and Future Response Costs." Moreover, the parties expressly agreed that the ASAOC was an "administrative settlement" for purposes of § 113(f)(3)(B), triggering the right of the Plaintiffs to bring a contribution claim against other PRPs. Accordingly, as a matter of law, Plaintiffs cannot pursue a cost recovery action under § 107(a). The Court

therefore SUSTAINS DP&L's motion for summary judgment on the remaining § 107(a) claim.

3. Declaratory Judgment

In Count IV of the Second Amended Complaint, Plaintiffs sought a declaratory judgment concerning Defendants' liability under § § 107(a) and/or 113(f)(3)(B). As the Court noted in its February 10, 2011, Decision and Entry, the viability of the declaratory judgment claim hinges on the viability of the substantive CERCLA claims. Accordingly, the Court previously dismissed those portions of the declaratory judgment claim related to the § 113(f) claim and the "migration" portion of the § 107 claim. Having now determined as a matter of law that Plaintiffs have no viable cost recovery claim under § 107(a), the Court also SUSTAINS DP&L's motion for summary judgment on the remaining portion of the declaratory judgment claim.

III. Defendant Cargill's Motion for Summary Judgment (Doc. #139) (*Hobart I*)

Defendant Cargill has also moved for summary judgment on all remaining claims. Doc. #139. Cargill argues that summary judgment is warranted because: (1) Plaintiffs cannot show that hazardous substances from Cargill were actually taken to the Site; and (2) as argued in DP&L's motion for summary judgment, Plaintiffs have no viable cost recovery claim under § 107(a). In addition, Cargill argues that the cross-claim for contribution and indemnification brought by co-defendant Waste Management must be dismissed because such remedies are available only if Cargill is liable or potentially liable under § 107.

Having found, as a matter of law, that Plaintiffs have no viable cost recovery claim under § 107, the Court SUSTAINS Cargill's motion for summary judgment, Doc. #139, on that ground. There is no need to address Cargill's alternative argument.

IV. Defendants' Motion to Dismiss (Doc. #12) (*Hobart II*)

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants GlaxoSmithKline LLC, DAP Products Inc., Coca-Cola Enterprises Inc. and The Sherwin-Williams Company have moved to dismiss Plaintiffs' Complaint in *Hobart II* for failure to state a claim upon which relief can be granted. Doc. #12. As previously noted, the causes of action asserted against these defendants are identical to the causes of action asserted against the defendants in *Hobart I*.

For the reasons set forth in this Court's February 10, 2011, Decision and Entry in *Hobart I* (Doc. #71), and for the reasons set forth above, the Court finds that Plaintiffs have failed to state a claim upon which relief can be granted. The Court therefore SUSTAINS Defendants' motion to dismiss Plaintiffs' Complaint in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6).

V. Plaintiffs' Motion for Leave to Amend Complaint (Doc. #124)

Plaintiffs have also moved for leave to file a third amended complaint (Doc. #124 in Case No. 3:10-cv-195) so that they can: (1) add several newly-discovered defendants; (2) assert a theory of owner/operator liability against Defendant DP&L; and (3) add allegations that Defendant Waste Management is the

successor to waste transporters not previously identified. The proposed Third Amended Complaint asserts the same claims previously asserted: (1) CERCLA cost recovery under § 107(a); (2) CERCLA contribution under § 113(f)(3)(B); (3) unjust enrichment; and (4) declaratory judgment.[8]

Federal Rule of Civil Procedure 15(a)(2) states that the court should freely give leave to amend "when justice so requires." Nevertheless, leave may be denied when there has been undue delay, bad faith, a repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, or when the proposed amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

As Defendants correctly note, the proposed amendments in this case would be futile; they do nothing to cure the fatal defect inherent in Plaintiffs' remaining claims. Because Plaintiffs resolved some of their liability to the United States in an administrative settlement, they were limited to a contribution action under § 113(f). They cannot pursue a cost recovery action under § 107(a). For this reason, the Court OVERRULES Plaintiffs' motion for leave to file a third amended complaint. Doc. #124.

---

[8] During a conference call held on July 18, 2012, counsel for Plaintiffs acknowledged that the Court had previously dismissed Counts 2 and 3, and portions of Counts 1 and 4. He assured the Court and opposing counsel that Plaintiffs are aware that the previous rulings are the law of the case, and are not seeking reconsideration; they simply want to preserve the issues for appeal.

VI. Counterclaims and Crossclaims

In *Hobart I*, Defendants Waste Management and Cargill filed cross-claims against all other defendants, seeking contribution and indemnification in the event they were found liable. Cargill also filed a similar counterclaim against Plaintiffs. Having now determined that Defendants are entitled to dismissal of all claims asserted by Plaintiffs, the Court finds that all outstanding counterclaims and crossclaims are moot and must be dismissed.

VII. Other Pending Motions

In light of the foregoing, the Court OVERRULES AS MOOT the following pending motions: (1) Defendant DP&L's objection to Magistrate Judge Ovington's March 23, 2012, Decision and Entry (Doc. #109); (2) Defendant DP&L's motion to stay discovery pending a decision on the motion for summary judgment (Doc. #122); and (3) Plaintiffs' motion to modify the scheduling order (Doc. #127).

VIII. Conclusion

For the reasons set forth above, the Court:

- **SUSTAINS** Defendant DP&L's motion for summary judgment (Doc. #121 in Case No. 3:10-cv-195);
- **SUSTAINS** Defendant Cargill's motion for summary judgment (Doc. #139 in Case No. 3:10-cv-195);
- **SUSTAINS** Defendants' motion to dismiss (Doc. #12 in Case No. 3:12-cv-213);

- **OVERRULES** Plaintiffs' motion for leave to file a third amended complaint (Doc. #124 in Case No. 3:10-cv-195);
- **DISMISSES AS MOOT** all counterclaims and cross claims filed in Case No. 3:10-cv-195;
- **OVERRULES AS MOOT** Defendant DP&L's objection to Magistrate Judge Ovington's March 23, 2012, Decision and Entry (Doc. #109 in Case No. 3:10-cv-195);
- **OVERRULES AS MOOT** Defendant DP&L's motion to stay discovery (Doc. #122 in Case No. 3:10-cv-195); and
- **OVERRULES AS MOOT** Plaintiffs' motion to modify scheduling order (Doc. #127 in Case No. 3:10-cv-195).

Judgment will be entered, in both of the above-captioned cases, in favor of Defendants and against Plaintiffs.

The captioned causes are hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

Date: February 8, 2013

/s/Walter H. Rice
WALTER H. RICE
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 13-3273/3276

[Filed August 19, 2014]

HOBART CORPORATION; KELSEY-HAYES COMPANY; NCR CORPORATION,	)
Plaintiffs-Appellants,	)
v.	)
WASTE MANAGEMENT OF OHIO, INC., ET AL. (13-3273) AND COCA-COLA ENTERPRISES, INC., ET AL. (13-3276),	)
Defendants-Appellees.	)

O R D E R

BEFORE: MOORE and KETHLEDGE, Circuit Judges; and TARNOW, District Judge.*

* The Honorable Arthur J. Tarnow, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX D

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 5

[Effective Date August 15, 2006]

IN THE MATTER OF:	)
SOUTH DAYTON DUMP	)
AND LANDFILL	)
	)
City of Moraine	)
	)
Montgomery County, Ohio	)
	)
Respondents	)
	)

Listed in Appendix C

ADMINISTRATIVE SETTLEMENT AGREEMENT AND ORDER ON CONSENT FOR REMEDIAL INVESTIGATION/FEASIBILITY STUDY

U.S. EPA Region 5
CERCLA Docket No. V-W '06-C-852

Proceeding Under Sections 104, 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9604, 9607 and 9622.

RI/FS ADMINISTRATIVE SETTLEMENT AGREEMENT AND ORDER ON CONSENT

TABLE OF CONTENTS

ADMINISTRATIVE SETTLEMENT AGREEMENT AND ORDER ON CONSENT FOR REMEDIAL INVESTIGATION/FEASIBILITY STUDY

I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Settlement Agreement and Order on Consent ("Settlement Agreement") is entered into voluntarily by the United States Environmental Protection Agency ("U.S. EPA") and the Respondents listed in Appendix C ("Respondents"). The Settlement Agreement concerns the preparation and performance of a remedial investigation and feasibility study ("RI/FS") at the South Dayton Dump and Landfill Site located on Dryden Road (sometimes called Springboro Pike) in Moraine, Ohio.("Site") and the reimbursement for future response costs incurred by U.S. EPA in connection with the RI/FS for this Site.

2. This Settlement Agreement is issued under the authority vested in the President of the United States by Sections 104, 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9604, 9607 and 9622 ("CERCLA"). This authority was delegated to the Administrator of U.S. EPA on January 23, 1987, by Executive Order 12580, 52 Fed. Reg. 2926 (Jan. 29, 1987), and further delegated to Regional Administrators on May 11, 1994, by U.S. EPA Delegation Nos. 14-14-C and 14-14-D. This authority was further redelegated by the Regional Administrator, U.S. EPA, Region 5 to the Director, Superfund Division, U.S. EPA, Region 5 by U.S. EPA Delegation Nos. 14-14-C and 14-14-D on May 2, 1996.

3. In accordance with Section 104(b)(2) and Section 122(j)(1) of CERCLA, 42 U.S.C. §§ 9604(b)(2) and 9622(j)(1), U.S. EPA notified the Federal and State natural resource trustees on August 1, 2005 of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under Federal trusteeship. In accordance with Section 121(f)(1)(F), U.S. EPA has notified the State of Ohio (the "State") on August 4, 2005, of negotiations with potentially responsible parties regarding the implementation of the remedial investigation and feasibility study for the Site.

4. U.S. EPA and Respondents recognize that this Settlement Agreement has been negotiated in good faith and that the actions undertaken by Respondents in accordance with this Settlement Agreement do not constitute an admission of any liability. Respondents do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Settlement Agreement, the validity of the findings of fact, conclusions of law and determinations in Sections V and VI of this Settlement Agreement. Respondents agree to comply with and be bound by the terms of this Settlement Agreement and further agree that they will not contest the basis or validity of this Settlement Agreement or its terms.

II. PARTIES BOUND

5. This Settlement Agreement applies to and is binding upon U.S. EPA and upon Respondents and their agents, heirs, successors and assigns. Any change in ownership or corporate status of a Respondent including, but not limited to, any transfer of assets or

real or personal property shall not alter such Respondent's responsibilities under this Settlement Agreement.

6. Respondents are jointly and severally liable for carrying out all activities required by this Settlement Agreement. However, the **financial** contribution of Respondents Boesch and Grillot to carrying out the activities required by this Settlement Agreement is limited to the balance in the South Dayton Environmental Remediation Trust being made available to the other Respondents to carry out the Work. In the event of the insolvency or other failure of any one or more Respondents to implement the requirements of this Settlement Agreement, the remaining Respondents shall complete all such requirements.

7. Respondents shall ensure that their contractors, subcontractors, and representatives receive a copy of this Settlement Agreement and comply with this Settlement Agreement. Respondents shall be responsible for any noncompliance with this Settlement Agreement.

8. Each undersigned representative of Respondents certifies that he or she is fully authorized to enter into the terms and conditions of this Settlement Agreement and to execute and legally bind the Respondents to this Settlement Agreement.

III. STATEMENT OF PURPOSE

9. In entering into this Settlement Agreement, the objectives of U.S. EPA and Respondents are: (a) to determine the nature and extent of contamination and any current or potential threat to the public health,

welfare, or the environment posed by the release or threatened release of hazardous substances, pollutants or contaminants at or from the Site and to collect sufficient data for developing and evaluating effective remedial alternatives by conducting a Remedial Investigation ("RI") as more specifically set forth in the Statement of Work ("SOW") attached as Appendix A to this Settlement Agreement; (b) to identify and evaluate remedial alternatives that protect human health and the environment by preventing, eliminating, reducing or controlling any release or threatened release of hazardous substances, pollutants, or contaminants at or from the Site, by conducting a Feasibility Study ("FS") as more specifically set forth in the Statement of Work ("SOW") in Appendix A to this Settlement Agreement; and (c) to recover response and oversight costs incurred by U.S. EPA with respect to this Settlement Agreement

10. The Work conducted under this Settlement Agreement is subject to approval by U.S. EPA and shall provide all appropriate and necessary information to assess site conditions and evaluate alternatives to the extent necessary to select a remedy that will be consistent with CERCLA and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300 ("NCP"). Respondents shall conduct all Work under this Settlement Agreement in compliance with CERCLA, the NCP and all applicable U.S. EPA guidances, policies, and procedures.

IV. DEFINITIONS

11. Unless otherwise expressly provided herein, terms used in this Settlement Agreement which are defined in CERCLA or in regulations promulgated

under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Settlement Agreement or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

a. "ARARs" mean all applicable local, state, and federal laws and regulations, and all "applicable requirements" or "relevant and appropriate requirements" as defined at 40 C.F.R. § 300.5 and 42 U.S.C. § 9261(d).

b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

c. "Day" shall mean a calendar day. In computing any period of time under this Settlement Agreement, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

d. "Effective Date" shall be the effective date of this Settlement Agreement as provided in Section XXIX.

e. "EPA" or "U.S. EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

g. "OEPA" shall mean the Ohio Environmental Protection Agency and any successor departments or agencies of the State.

h. "Engineering Controls" shall mean constructed containment barriers or systems that control one of the following: downward migration, infiltration or seepage of surface runoff or rain; or natural leaching migration of contaminants through the subsurface over time. Examples include caps, engineered bottom barriers, immobilization processes, and vertical barriers.

i. "Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in, reviewing or developing plans, reports, technical memoranda and other items pursuant to this Settlement Agreement, conducting community relations, providing technical assistance grants to community groups (if any), verifying the Work, or otherwise implementing, overseeing, or enforcing this Settlement Agreement, including but not limited to, payroll costs, contractor costs (including fees), travel costs, laboratory costs, ATSDR costs, the costs incurred pursuant to Paragraph 55 and 57 (costs and attorneys fees and any monies paid to secure access, including the amount of just compensation) and Paragraph 41 (emergency response)

j. "Institutional controls" shall mean non-engineered instruments, such as administrative and/or legal controls, that help to minimize the potential for human exposure to contamination and/or protect the integrity of a remedy by limiting land and/or resource use. Examples of institutional controls include easements and restrictive covenants, zoning restrictions, special building permit requirements, and well drilling prohibitions.

k. "Interest" shall mean interest at the rate specified for interest on investments of the U.S. EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

l. "NCP" or "National Contingency Plan" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

m. "Settlement Agreement" shall mean this Administrative Settlement Agreement and Order on Consent, the SOW, all appendices attached hereto (listed in Section XXVII) and all documents incorporated by reference into this document including without limitation U.S. EPA-approved submissions. U.S. EPA-approved submissions (other than progress reports) are incorporated into and become a part of the Settlement Agreement upon approval by U.S. EPA. In the event of conflict between this Settlement Agreement and any appendix, this Settlement Agreement shall control.

n. "Paragraph" shall mean a portion of this Settlement Agreement identified by an Arabic numeral.

o. "Parties" shall mean U.S. EPA and Respondents.

p. "RCRA" shall mean the Resource Conservation and Recovery Act, also known as the

Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq*.

q. "Respondents" shall mean those Parties identified in Appendix C, which is a list of those Parties which have signed this Settlement Agreement and agreed to be bound by the terms of this Administrative Order on Consent (Settlement Agreement).

r. "RI/FS Planning Documents" shall mean the RI/FS Work Plan; the Sampling and Analysis Plan, consisting of both the Field Sampling Plan and the Quality Assurance Project Plan; Laboratory and Contractor Quality Management Plans; and a Health and Safety Plan.

s. "Section" shall mean a portion of this Settlement Agreement identified by a Roman numeral.

t. "Site" shall mean the South Dayton Dump and Landfill Superfund Site, ("Site") located on Dryden Road (sometimes called Springboro Pike) in Moraine, Ohio. The Site is depicted generally on the figures (map and aerial photograph of the Site) attached as Appendix B and includes nearby areas where hazardous substances, pollutants or contaminants have or may have come to be located from the Site, or from former operations at the Site.

u. "State" shall mean the State of Ohio.

v. "Statement of Work" or "SOW" shall mean the Statement of Work for development of a RI/FS for the South Dayton Dump and Landfill Site, as set forth in Appendix A to this Settlement Agreement. The Statement of Work is incorporated into this Settlement Agreement and is an enforceable part of this

Settlement Agreement as are any modifications made thereto in accordance with this Settlement Agreement. The SOW is divided into eight numbered Tasks. Each Task is divided into numbered subdivisions (*e.g.*, 1.2.1.3. Leachate Investigation). References to numbered Task subdivisions in the SOW will be so identified, for example, SOW Task 1.2.1.3. Leachate Investigation).

w. "Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any "hazardous waste" under Ohio Revised Code, Section 3734.01 (J).

x.. "Work" shall mean all activities Respondents are required to perform under this Settlement Agreement, except those required by Section XIV (Retention of Records).

V. FINDINGS OF FACT

12. Based on available information, including the Administrative Record in this matter, U.S. EPA hereby finds and, for purposes of enforceability of this Order only, the Respondents stipulate that the factual statutory prerequisites under CERCLA necessary for issuance of this Settlement Agreement and Administrative Order have been met. U.S. EPA's finding is based on the following specific findings which U.S. EPA asserts as facts:

13. The South Dayton Dump and Landfill Site comprises approximately 80 acres and is located at

1975 Dryden Road (sometimes called Springboro Pike) in Moraine, Ohio. The Site is adjacent to the floodplain of the Great Miami River. Approximately 25,060 people live within a 4-mile radius of the Site. Six single family residences are located on the northwest side of East River Road and are adjacent to the southeast boundary of the Site. A seventh single family home is located on the southeast side of East River Road and is within 300 feet of the Site. A trailer park with several residences is also situated approximately 300 feet southeast of the Site at the southeast intersection of Dryden Road and East River Road.

14. Valley Asphalt, Jim City Salvage, the Miami Conservancy District, Ronald Barnett, Margaret C. Grillot and Kathryn A. Boesch are the current owners of the Site. A 49.87 acre portion of the Site (Parcel A) was purchased by Horace Boesch in 1937. In 1945 Horace Boesch purchased an additional 30 acre portion of the Site (Parcel B). In 1947, Horace and Roxie Boesch conveyed an undivided ½ interest in Parcel B to Cyril Grillot. In 1951, Horace and Roxie Boesch conveyed an undivided ½ interest in Parcel A to Cyril Grillot. From 1947 until the present, most of the Site has been owned by various members of the Boesch and Grillot families. In 1958, Horace and Roxie Boesch and Cyril J. and Ruby Grillot recorded a conveyance of a property interest (Right of Way Grant) to Dayton Power and Light. In 1975, Horace and Kathryn A. Boesch and Cyril J. and Ruby Grillot recorded a conveyance of a property interest (easement) to the University of Dayton. After Horace Boesch died in 1979, his estate conveyed shares of his interest in the Site property to members of his family. Some of these heirs conveyed their interest or a portion thereof to

Katharine Boesch. Current owners of the real property where hazardous waste dumping and landfilling areas took place in the past, as part of the operations of the South Dayton Dump and Landfill, include Kathryn A. Boesch, Margaret C. Grillot, Valley Asphalt, Jim City Salvage, Miami Conservancy District and Ronald Barnett.

15. Disposal of waste materials began at the Site in 1941. Materials dumped at the Site included drummed wastes. Known hazardous substances were disposed at the Site between June 1973 and July 1976, including drums containing hazardous waste from nearby facilities. Some of the drums contained cleaning solvents (1,1,1-trichloroethane ("TCA"); methyl ethyl ketone ("MEK"); and xylene); cutting oils; paint; Stoddard solvents; and machine-tool, water-based coolants. Handwritten notes on an undated tax map from the Montgomery County Health Department indicate that the site had previously accepted materials including "oils, paint residue, brake fluids, chemicals for cleaning metals, solvents, etc." In addition, a CERCLA Notification of Hazardous Waste Site Form submitted by Industrial Waste Disposal Company, Inc. ("IWD") in 1981 indicated that the Site had been used as a disposal facility for the industrial and municipal wastes of IWD's customers. The notification did not include information about the specific types of wastes. More recently, the Site operated under a solid waste disposal permit issued by Moraine County Health Department ("MCHD"). The permit allowed disposal of solid, inert, insoluble materials such as unregulated foundry sand, slag, glass, and demolition debris. There is no liner at the Site.

16. In 1985, OEPA conducted a Preliminary Assessment ("PA") at the Site. Based on this PA's findings, a U.S. EPA Field Investigation Team ("FIT") conducted a Supplemental Site Investigation ("SSI") at the Site. In 1991, the FIT collected 11 soil samples at or near the Site. Contaminants have been detected in on-Site soil samples at levels above background. Additionally, hazardous substances were reportedly disposed of at the Site in the past.

17. Soil sample results during the 1991 EPA FIT sample detected hazardous substances in on-Site soil samples at levels significantly above background. The following substances were detected: 1,2-Dichloroethene at 200 micrograms per kilogram in soil sample S8, tetrachloroethene at 11 micrograms per kilogram in soil sample S8, toluene at 7 micrograms per kilogram in soil sample S5, polychlorinated biphenyls, including Aroclor 1248 and Aroclor 1260 at 4,200 and 2,800 micrograms per kilogram, respectively, in soil sample S2, antimony at 31.6 milligrams per kilogram in soil sample S3, arsenic at 69.3 milligrams per kilogram in soil sample S9, barium as high as 991 milligrams per kilogram in soil sample S1, cadmium as high as 14 milligrams per kilogram in soil sample S3, chromium at 91.7 milligrams per kilogram in soil sample S3, mercury as high as .31 milligrams per kilogram in soil sample S3, nickel as high as 402 milligrams per kilogram in soil sample S8, lead as high as 3,300 milligrams per kilogram in soil sample S3, and zinc as high as 2,350 milligrams per kilogram in soil sample S3. Also, several polynuclear aromatic hydrocarbons were detected in several soil samples. Phenanthrene, benzo[a]anthracene, and benzo[a]pyrene were detected at concentrations as high as 16,000, 8,500, and 5,700

micrograms per kilogram, respectively, in soil sample S3; and fluoranthene was detected at 21,000 micrograms per kilogram in soil sample S6. Selected soil samples collected during OEPA's July 9, 1996 Phase II Site Team Evaluation Prioritization ("STEP") Investigation revealed higher concentrations than those found during the 1991 EPA FIT sampling. These samples included the following concentrations:

Tetrachloroethene: 59 micrograms/kilogram (S01)
Trichloroethene: 11 micrograms/kilogram (S10)
Antimony: 278 milligrams/kilogram (S08)
Arsenic: 141 milligrams/kilogram (S08)
Barium: 13,000 milligrams/kilogram (S08)
Cadmium: 16.3 milligrams/kilogram (S10)
Copper: 191,000 milligrams/kilogram (S10)
Lead: 12,100 milligrams/kilogram (S10)
Zinc: 11,500 milligrams/kilogram (S10)

See OEPA Site Team Evaluation Prioritization Report South Dayton Dump and Landfill, December 24, 1996, Table 1 on pages 18-21.

18. In 2000, Valley Asphalt conducted a drum and soil removal from real property it owned within the boundaries of the Site. A composite sample collected from the drums was TCLP toxic for cadmium (detected at 2.11 milligrams/liter; regulatory limit 1 milligram/liter) and lead (detected at 8.26 milligram/liter; regulatory limit 5 milligrams/liter) and contained contaminants including:

PCB-1254: 75,000 micrograms/kilogram
Benzene: 7,000 micrograms/kilogram
Chlorobenzene: 1,700 micrograms/kilogram
Ethylbenzene: 84,000 micrograms/kilogram

Toluene: 530,000 micrograms/kilogram
Trichloroethene: 64,000 micrograms/kilogram
Vinyl Chloride: 840 micrograms/kilogram
Xylene: 340,000 micrograms/kilogram"

See Sample "Valley Dryden A 05/17/00" in "Appendix C, Laboratory Results" of TCA Environmental, Inc. "Environmental Remediation Report at Valley Asphalt, Dryden Road Moraine, Ohio, Montgomery County" prepared for Valley Asphalt dated September 5, 2000.

19. Between 1998 and 2004, the owners of part of the Site conducted several investigations at the landfill, including groundwater and surface water sampling. Groundwater analytical results from 2002 revealed maximum concentrations of vinyl chloride at 180 micrograms/liter (MW-101A) and trichloroethylene at 76 micrograms/liter in MW-210. In 2004 the maximum concentration of vinyl chloride detected in the groundwater by the owners was 20 microgram/liter (MW-101A) and the maximum concentration of trichloroethylene was 250 micrograms/liter (MW-210, sampling date 10/15/04). The U.S. EPA Maximum Contaminant Level ("MCL") for vinyl chloride is 2 micrograms/liter and the MCL for trichloroetheylene is 5 micrograms/liter.

20. The South Dayton Dump and Landfill Site was proposed for inclusion on the National Priorities List ("NPL"), pursuant to CERCLA Section 105, 42 U.S.C. § 9605, on September 23, 2004. The Site received a Hazard Ranking Score ("HRS") of 48.63. *See* 69 FR 56970-01 (2004).

VI. CONCLUSIONS OF LAW AND DETERMINATIONS

Based on the Findings of Fact set forth above, and the Administrative Record in this matter, U.S. EPA has determined that:

21. The South Dayton Dump and Landfill Site is a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

22. The contamination found at the Site, as identified in the Findings of Fact above, includes "hazardous substances" as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

23. The conditions described in paragraphs 16-18 of the Findings of Fact above constitute an actual and/or threatened "release" of a hazardous substance from the facility as defined in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

24. Each Respondent is a "person" as defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

25. Respondents are responsible parties under Sections 104, 107 and 122 of CERCLA, 42 U.S.C. §§ 9604, 9607 and 9622. Each Respondent is either: a person who generated the hazardous substances found at the Site, a person who at the time of disposal of any hazardous substances owned or operated the Site, a person who is the "owner(s)" and/or "operator(s)" of the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1), or is a person who arranged for disposal or transport for disposal of hazardous substances at the Site. Each

Respondent therefore may be liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

26. The actions required by this Settlement Agreement are necessary to protect the public health, welfare or the environment, are in the public interest, 42 U.S.C. § 9622(a), are consistent with CERCLA and the NCP, 42 U.S.C. §§ 9604(a)(1), 9622(a), and will expedite effective remedial action and minimize litigation, 42 U.S.C.§ 9622(a).

27. U.S. EPA has determined that Respondents are qualified to conduct the RI/FS within the meaning of Section 104(a) of CERCLA, 42 U.S.C.§ 9604(a), and will carry out the Work properly and promptly, in accordance with Sections 104(a) and 122(a) of CERCLA, 42 U.S.C. §§ 9604(a) and 9622(a), if Respondents comply with the terms of this Settlement Agreement.

VII. SETTLEMENT AGREEMENT AND ORDER

28. Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for this Site, it is hereby Ordered and Agreed that Respondents shall comply with all provisions of this Settlement Agreement, including, but not limited to, all appendices to this Settlement Agreement and all documents incorporated by reference into this Settlement Agreement.

VIII. DESIGNATION OF CONTRACTORS AND PROJECT COORDINATORS

29. Selection of Contractors, Personnel.

a. All Work performed under this Settlement Agreement shall be under the direction and supervision of qualified personnel. Within 7 days of the Effective Date of this Settlement Agreement, and before the Work outlined below begins, Respondents shall notify U.S. EPA in writing of the names, titles, and qualifications of the personnel, including contractors, subcontractors, consultants and laboratories to be used in carrying out such Work. With respect to any proposed contractor, Respondents shall demonstrate that the proposed contractor has a quality system which complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan ("QMP"). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)," (EPA/240/B01/002, March 2001) or equivalent documentation as determined by U.S. EPA. The qualifications of the persons undertaking the Work for Respondents shall be subject to U.S. EPA's review, for verification that such persons meet minimum technical background and experience requirements. If Respondents fail to demonstrate to U.S. EPA's satisfaction that Respondents are qualified to perform properly and promptly the actions set forth in this Settlement Agreement, U.S. EPA may take over the work required by this Settlement Agreement.

b. If U.S. EPA disapproves in writing of any person(s)' technical qualifications, Respondents shall notify U.S. EPA of the identity and qualifications of the replacement(s) within 14 days of the written notice. If U.S. EPA subsequently disapproves of the replacement(s), U.S. EPA reserves the right to terminate this Settlement Agreement and to conduct a complete RI/FS, and to seek reimbursement for costs and penalties from Respondents. During the course of the RI/FS, Respondents shall notify U.S. EPA in writing of any changes or additions in the personnel used to carry out such Work, providing their names, titles, and qualifications. U.S. EPA shall have the same right to disapprove changes and additions to personnel as it has hereunder regarding the initial notification.

30. Within 7 days after the Effective Date, Respondents shall designate a Project Coordinator who shall be responsible for administration of all actions by Respondents required by this Settlement Agreement and shall submit to U.S. EPA the designated Project Coordinator's name, address, telephone number, and qualifications. To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during Site Work. U.S. EPA retains the right to disapprove of the designated Project Coordinator. If U.S. EPA disapproves of the designated Project Coordinator, Respondents shall retain a different Project Coordinator and shall notify U.S. EPA of that person's name, address, telephone number and qualifications within 14 days following U.S. EPA's disapproval. Respondents shall have the right to change their Project Coordinator subject to U.S. EPA's right to disapprove. Respondents shall notify U.S. EPA three (3) days before such change is made. The initial

notification may be made orally, but shall be promptly followed by a written notification.

31. U.S. EPA has designated Karen Cibulskis of the Superfund Division, Region 5 as its Project Coordinator. U.S. EPA will notify Respondents of a change in its designation of the Project Coordinator. Except as otherwise provided in this Settlement Agreement, Respondents shall direct all submissions required by this Settlement Agreement to:

Ms. Karen Cibulskis
Remedial Project Manager
U.S. EPA, Superfund Division
Mail Code SR-6J
77 West Jackson
Chicago, Illinois 60604-3590

Respondents are encouraged to make their submissions to U.S. EPA on recycled paper (which includes significant post-consumer waste paper content where possible) and using two-sided copies. Respondents shall make submissions electronically according to U.S. EPA Region 5 specifications. Receipt by Respondents' Project Coordinator of any notice or communication from U.S. EPA relating to this Settlement Agreement shall constitute receipt by Respondents. Documents to be submitted to the Respondents shall be sent to:

Steve Quigley, P.E.
Principal-in-Charge/Project Manager
Conestoga-Rovers & Associates Ltd.
651 Colby Drive
Waterloo, Ontario N2V 1C2

32. U.S. EPA's Project Coordinator shall have the authority lawfully vested in a Remedial Project

Manager ("RPM") and On-Scene Coordinator ("OSC") by the NCP. In addition, U.S. EPA's Project Coordinator shall have the authority consistent with the NCP to halt any Work required by this Settlement Agreement, and to take any necessary response action when s/he determines that conditions at the Site may present an immediate endangerment to public health or welfare or the environment. The absence of the U.S. EPA Project Coordinator from the area under study pursuant to this Settlement Agreement shall not be cause for the stoppage or delay of Work.

33. U.S. EPA and Respondents shall have the right, subject to Paragraph 30, to change their respective Project Coordinator. Respondents shall notify U.S. EPA three (3) days before such a change is made. The initial notification by either party may be made orally, but shall be promptly followed by a written notice.

34. U.S. EPA shall arrange for a qualified person to assist in its oversight and review of the conduct of the RI/FS, as required by Section 104(a) of CERCLA, 42 U.S.C. § 9604(a). Such person shall have the authority to observe Work and make inquiries in the absence of U.S. EPA, but not to modify the RI/FS Planning Documents or other work plans.

IX. WORK TO BE PERFORMED

35. a. Respondents shall conduct the RI/FS in accordance with the provisions of this Settlement Agreement, the SOW, CERCLA, the NCP, U.S. EPA guidance related to remedial investigations and feasibility studies including, but not limited to: the "Interim Final Guidance for Conducting Remedial

Investigations and Feasibility Studies under CERCLA" (OSWER Directive # 9355.3-01); "Guidance for Data Useability in Risk Assessment" (OSWER Directive #9285.7-05); Risk Assessment Guidance for Superfund (RAGS), Volume I - Human Health Evaluation Manual (Part A), Interim Final (EPA-540-1-89-002), OSWER Directive 9285.7-01A, December 1, 1989; and Risk Assessment Guidance for Superfund (RAGS), Volume I - Human Health Evaluation Manual (Part D, Standardized Planning, Reporting, and Review of Superfund Risk Assessments), Interim, (EPA 540-R-97-033), OSWER Directive 9285.7-01D, January 1998; Implementing Presumptive Remedies, U.S. EPA, Office of Emergency and Remedial Response, EPA-540-R-97-029, October 1997; Presumptive Remedy for CERCLA Municipal Landfill Sites, U.S. EPA, OSWER Directive No. 9355.0-49FS, EPA-540-F-93-035, September 1993; Presumptive Remedies: CERCLA Landfill Caps RI/FS Data Collection Guide, U.S. EPA, OSWER Directive 9355.3-18FS, EPA/540/F-95/009, August 1995; Presumptive Response Strategy and Ex-Situ Treatment Technologies for Contaminated Ground Water at CERCLA Sites, OSWER Directive 9283.1-12, EPA-540-R-96-023, October 1996; and any other guidances referenced in the SOW, and any RI/FS related guidance subsequently issued by U.S. EPA.

b. In the RI and FS Reports, Respondents shall address the factors required to be taken into account in Section 121 of CERCLA, 42 U.S.C. § 9621, and Section 300.430 of the NCP, 40 C.F.R. § 300.430. The RI shall characterize the geology and hydrogeology of the Site, determine the nature and extent of hazardous substances, pollutants or contaminants at or from the Site, and characterize all ecological zones including

terrestrial, riparian, wetlands, aquatic/marine, and transitional. Respondents shall prepare, for inclusion with the RI Report, a determination of the nature and extent of the current and potential threat to the public health or welfare or the environment posed by the release or threatened release of any hazardous substances, pollutants, or contaminants at or from the Site, including a "Baseline Human Health Risk Assessment" and "Baseline Ecological Risk Assessment." In the FS Report, Respondents shall determine and evaluate (based on treatability testing, where appropriate) alternatives for remedial action that protect human health and the environment by recycling waste or by eliminating, reducing and/or controlling risks posed through each pathway at the Site. In the FS Report, the Respondents shall evaluate a range of alternatives including but not limited to those alternatives described in 40 C.F.R. § 300.430(e) and remedial alternatives that utilize permanent solutions and alternative treatment technologies or resource recovery technologies. The FS Reports shall include a detailed analysis of individual alternatives against each of the nine evaluation criteria in 40 C.F.R. § 300.430(e)(9)(iii) and a comparative analysis that focuses upon the relative performance of each alternative against the nine criteria in 40 C.F.R. § 300.430(e)(9)(iii). Respondents shall submit to U.S. EPA and the State six (6) copies of all plans, reports, submittals and other deliverables required under this Settlement Agreement, the SOW and the RI/FS Planning Documents in accordance with the approved schedule for review and approval pursuant to Section X (U.S. EPA Approval of Plans and Other Submissions). All deliverables required by the SOW shall be submitted as directed by the SOW (see Page 2

of the SOW for detailed instructions on this point). Upon request by U.S. EPA, Respondents shall submit in electronic form all portions of RI and FS Reports, any report or other deliverable Respondents are required to submit pursuant to provisions of this Settlement Agreement, including the SOW. Detailed requirements for all reports and deliverables required by the SOW are set forth on page 2 of the SOW. Upon approval by U.S. EPA, all deliverables under this Settlement Agreement, including the SOW, shall be incorporated into and become enforceable under this Settlement Agreement.

36. Community Involvement Plan

U.S. EPA will prepare a Community Involvement Plan, in accordance with U.S. EPA guidance and the NCP. As requested by U.S. EPA, Respondents shall provide information supporting U.S. EPA's community relations programs.

37. Modification of any plans.

a. If at any time during the RI/FS process, Respondents identify a need for additional data, Respondents shall submit a memorandum documenting the need for additional data to the U.S. EPA Project Coordinator within seven (7) days of identification. U.S. EPA in its discretion will determine whether the additional data will be collected by Respondents and whether it will be incorporated into reports and deliverables.

b. In the event of unanticipated or changed circumstances at the Site, Respondents shall notify the U.S. EPA Project Coordinator by telephone within 24 hours of discovery of the unanticipated or changed

circumstances. In addition to the authorities in the NCP, in the event that U.S. EPA determines that the immediate threat or the unanticipated or changed circumstances warrant changes in the RI/FS Planning Documents, U.S. EPA shall modify or amend the RI/FS Planning Documents in writing accordingly. Respondents shall perform the RI/FS Planning Documents as modified or amended.

c. U.S. EPA may determine that in addition to tasks defined in the initially approved RI/FS Planning Documents, other additional Work may be necessary to accomplish the objectives of the RI/FS as set forth in the SOW for this RI/FS. U.S. EPA may require that Respondents perform these response actions in addition to those required by the initially approved RI/FS Planning Documents, including any approved modifications, if it determines that such actions are necessary for a complete RI/FS.

d. Respondents shall confirm their willingness to perform the additional Work in writing to U.S. EPA within 7 days of receipt of the U.S. EPA request. If Respondents object to any modification determined by U.S. EPA to be necessary pursuant to this Paragraph, Respondents may seek dispute resolution pursuant to Section XV (Dispute Resolution). The SOW and/or RI/FS Planning Documents shall be modified in accordance with the final resolution of the dispute.

e. Respondents shall complete the additional Work according to the standards, specifications, and schedule set forth or approved by U.S. EPA in a written modification to the RI/FS Planning Documents or written work plan supplement. U.S. EPA reserves the right to conduct the Work itself at any point, to seek

reimbursement from Respondents, and/or to seek any other appropriate relief.

f. Nothing in this Paragraph shall be construed to limit U.S. EPA's authority to require performance of further response actions as otherwise provided in this Settlement Agreement.

38. Off-Site Shipment of Waste Material.

a. Respondents shall, prior to any off-site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility's state and to U.S. EPA's Designated Project Coordinator. However, this notification requirement shall not apply to any off-site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

b. Respondents shall include in the written notification the following information: (1) the name and location of the facility to which the Waste Material is to be shipped: (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. Respondents shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

c. The identity of the receiving facility and state will be determined by Respondents following the award of the contract for the remedial investigation and feasibility study. Respondents shall provide the

information required by Subparagraph 38.b and 38.d as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

d. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-site location, Respondents shall obtain U.S. EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Respondents shall only send hazardous substances, pollutants, or contaminants from the Site to an off-site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence.

39. Meetings. Respondents shall make presentations at, and participate in, meetings at the request of U.S. EPA during the initiation, conduct, and completion of the RI/FS. In addition to discussion of the technical aspects of the RI/FS, topics will include anticipated problems or new issues. Meetings will be scheduled at U.S. EPA's discretion.

40. Progress Reports. In addition to the deliverables set forth in this Settlement Agreement, Respondents shall provide to U.S. EPA monthly progress reports by the 10th day of the following month. At a minimum, with respect to the preceding month, these progress reports shall (1) describe the actions which have been taken to comply with this Settlement Agreement during that month, (2) include hard copies and electronic copies (according to U.S. EPA Region 5 specifications) of all results of sampling and tests and all other data received by the Respondents (3) describe Work planned for the next

two months with schedules relating such Work to the overall project schedule for RI/FS completion, and (4) describe all problems encountered and any anticipated problems, any actual or anticipated delays, and solutions developed and implemented to address any actual or anticipated problems or delays.

41. Emergency Response and Notification of Releases.

a. In the event of any action or occurrence during performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Respondents shall immediately take all appropriate action. Respondents shall take these actions in accordance with all applicable provisions of this Settlement Agreement, including, but not limited to, the Health and Safety Plan, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. Respondents shall also immediately notify the U.S. EPA Project Coordinator or, in the event of his/her unavailability, the On Scene Coordinator ("OSC") or the Regional Duty Officer, U.S. EPA Region 5 Emergency Planning and Response Branch at (Tel: (312) 353-2318) of the incident or Site conditions. In the event that Respondents fail to take appropriate response action as required by this Paragraph, and U.S. EPA takes such action instead, Respondents shall reimburse U.S. EPA all costs of the response action not inconsistent with the NCP pursuant to Section XVIII (Payment of Response Costs).

b. In addition, in the event of any release of a hazardous substance from the Site, Respondents shall immediately notify the U.S. EPA Project Coordinator, the OSC or Regional Duty Officer at (312) 353-2318 and the National Response Center at (800) 424-8802. Respondents shall submit a written report to U.S. EPA within 7 days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, *et seq.*

X. U.S. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

42. After review of any plan, report or other item that is required to be submitted for approval pursuant to this Settlement Agreement, including the SOW, U.S. EPA shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that Respondents modify the submission; or (e) any combination of the above. However, U.S. EPA shall not modify a submission without first providing Respondents at least one notice of deficiency and an opportunity to cure within 21 days, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved due to material defects.

43. In the event of approval, approval upon conditions, or modification by U.S. EPA, pursuant to Subparagraph 42(a), (b), (c) or (e), Respondents shall proceed to take any action required by the plan, report or other item, as approved or modified by U.S. EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XV (Dispute Resolution) with respect to the modifications or conditions made by U.S. EPA. Following U.S. EPA approval or modification of a submittal or portion thereof, Respondents shall not thereafter alter or amend such submittal or portion thereof unless directed by U.S. EPA. In the event that U.S. EPA modifies the submission to cure the deficiencies pursuant to Subparagraph 42(c) and the submission had a material defect, U.S. EPA retains the right to seek stipulated penalties, as provided in Section XVI (Stipulated Penalties). U.S. EPA also retains the right to perform its own studies, complete the RI/FS (or any portion of the RI/FS), and seek reimbursement from Respondents for its costs; and/or seek any other appropriate relief.

44. Resubmission of Plans.

a. Upon receipt of a notice of disapproval, Respondents shall, within 15 days or such longer time as specified by U.S. EPA in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XVI, shall accrue during the 15-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 45 and 46.

b. Notwithstanding the receipt of a notice of disapproval, Respondents shall proceed to take any action required by any non-deficient portion of the submission unless otherwise directed by U.S. EPA. Implementation of any non-deficient portion of a submission shall not relieve Respondents of any liability for stipulated penalties under Section XVI (Stipulated Penalties).

c. Respondents shall not proceed further with any subsequent activities or tasks until receiving U.S. EPA approval for the following deliverables: RI/FS Work Plan/Field Sampling Plan, Quality Assurance Project Plan, Draft Remedial Investigation Report, Treatability Testing Work Plan and Sampling and Analysis Plan, and Draft Feasibility Study Report. While awaiting U.S. EPA approval on these deliverables, Respondents shall proceed with all other tasks and activities which may be conducted independently of these deliverables, in accordance with the schedule set forth in this Settlement Agreement.

d. For all remaining deliverables not enumerated above in subparagraph 44.c., Respondents shall proceed will all subsequent tasks, activities and deliverables without awaiting U.S. EPA approval on the submitted deliverable. U.S. EPA reserves the right to stop Respondents from proceeding further, either temporarily or permanently, on any task, activity or deliverable at any point during the RI/FS.

45. If U.S. EPA disapproves a resubmitted plan, report or other item, or portion thereof, U.S. EPA may direct Respondents to correct the deficiencies. U.S. EPA also retains the right to modify or develop the plan, report or other item. Respondents shall implement any

such plan, report, or item as corrected, modified or developed by U.S. EPA, subject only to their right to invoke the procedures set forth in Section XV (Dispute Resolution).

46. If upon resubmission, a plan, report, or item is disapproved or modified by U.S. EPA due to a material defect, Respondents shall be deemed to have failed to submit such plan, report, or item timely and adequately unless Respondents invoke the dispute resolution procedures in accordance with Section XV (Dispute Resolution) and U.S. EPA's action is revoked or substantially modified pursuant to a Dispute Resolution decision issued by U.S. EPA or superceded by an agreement reached pursuant to that Section. The provisions of Section XV (Dispute Resolution) and Section XVI (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If U.S. EPA's disapproval or modification is not otherwise revoked, substantially modified or superceded as a result of a decision or agreement reached pursuant to the Dispute Resolution process set forth in Section XV, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XVI.

47. In the event that U.S. EPA takes over some of the tasks, but not the preparation of the RI Report or the FS Report, Respondents shall incorporate and integrate information supplied by U.S. EPA into the final reports.

48. All plans, reports, and other items submitted to U.S. EPA under this Settlement Agreement shall,

upon approval or modification by U.S. EPA, be incorporated into and enforceable under this Settlement Agreement. In the event U.S. EPA approves or modifies a portion of a plan, report, or other item submitted to U.S. EPA under this Settlement Agreement, the approved or modified portion shall be incorporated into and enforceable under this Settlement Agreement.

49. Neither failure of U.S. EPA to expressly approve or disapprove of Respondents' submissions within a specified time period, nor the absence of comments, shall be construed as approval by U.S. EPA. Whether or not U.S. EPA gives express approval for Respondents' deliverables, Respondents are responsible for preparing deliverables acceptable to U.S. EPA.

XI. QUALITY ASSURANCE, SAMPLING AND DATA AVAILABILITY

50. Quality Assurance. Respondents shall assure that Work performed, samples taken and analyses conducted conform to the requirements of the SOW, the QAPP and guidances identified therein. Respondents will assure that field personnel used by Respondents are properly trained in the use of field equipment and in chain of custody procedures. Respondents shall only use laboratories which have a documented quality system that complies with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by U.S. EPA.

51. Sampling.

a. All results of sampling, tests, modeling or other data (including raw data) generated by

Respondents, or on Respondents' behalf, during the period that this Settlement Agreement is effective, shall be submitted to U.S. EPA (in paper and electronic form according to U.S. EPA Region 5 specifications) in the next monthly progress report as described in Paragraph 40 of this Settlement Agreement. U.S. EPA will make available to Respondents validated data generated by U.S. EPA unless it is exempt from disclosure by any federal or state law or regulation.

b. Respondents shall verbally notify U.S. EPA, and the State at least 15 days prior to conducting any field events as described in the SOW and RI/FS Work Plan/Field Sampling Plan. At U.S. EPA's verbal or written request, or the request of U.S. EPA's oversight assistant, Respondents shall allow split or duplicate samples to be taken by U.S. EPA (and its authorized representatives) and the State, of any samples collected by Respondents in implementing this Settlement Agreement. All split samples of Respondents shall be analyzed by the methods identified in the QAPP.

52. Data Availability.

a. At all reasonable times, U.S. EPA and its authorized representatives shall have the authority to enter and freely move about all property at the Site and off-site areas where Work, if any, is being performed, for the purposes of inspecting conditions, activities, the results of activities, records, operating logs, and contracts related to the Site or Respondents and its contractor pursuant to this Settlement Agreement; reviewing the progress of Respondents in carrying out the terms of this Settlement Agreement; conducting tests as U.S. EPA or its authorized representatives deem necessary; using a camera, sound

recording device or other documentary type equipment; and verifying the data submitted to U.S. EPA by Respondents. Respondents shall allow these persons to inspect and copy all records, files, photographs, documents, sampling and monitoring data, and other writings related to Work undertaken in carrying out this Settlement Agreement. Nothing herein shall be interpreted as limiting or affecting U.S. EPA's right of entry or inspection authority under federal law. All persons accessing the Site under this paragraph shall comply with all approved Health and Safety Plans.

b. Respondents may assert business confidentiality claims covering part or all of the documents or information submitted to U.S. EPA and the State under this Settlement Agreement to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA. 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by U.S. EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when it is submitted to U.S. EPA and the State, or if U.S. EPA has notified Respondents that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondents. Respondents agree not to assert confidentiality claims with respect to any data related to Site conditions, sampling, or monitoring. Respondents shall segregate and clearly identify all documents or information submitted under this Settlement Agreement for which Respondents assert business confidentiality claims.

53. In entering into this Settlement Agreement, Respondents waive any objections to any data gathered, generated, or evaluated by U.S. EPA, the State or Respondents in the performance or oversight of the Work that has been verified according to the quality assurance/quality control (QA/QC) procedures required by the Settlement Agreement or any U.S. EPA-approved Work Plans or Sampling and Analysis Plans. If Respondents object to any other data relating to the RI/FS, Respondents shall submit to U.S. EPA a report that specifically identifies and explains their objections, describes the acceptable uses of the data, if any, and identifies any limitations to the use of the data. The report must be submitted to U.S. EPA within 15 days of the monthly progress report containing the data.

XII. SITE ACCESS AND INSTITUTIONAL CONTROLS

54. If the Site, or any other property where access is needed to implement this Settlement Agreement, is owned or controlled by any of Respondents, such Respondents shall, commencing on the Effective Date, provide U.S. EPA ,the State, and their representatives, including contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Settlement Agreement.

55. Where any action under this Settlement Agreement is to be performed in areas owned by or in possession of someone other than Respondents, Respondents shall use their best efforts to obtain all necessary access agreements within 15 days after the Effective Date, or as otherwise specified in writing by

the U.S. EPA Project Coordinator. Respondents shall immediately notify U.S. EPA if after using their best efforts they are unable to obtain such agreements. For purposes of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of access. Respondents shall describe in writing their efforts to obtain access. U.S. EPA may then assist Respondents in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as U.S. EPA deems appropriate. Respondents shall reimburse U.S. EPA for all costs and attorney's fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XVIII (Payment of Response Costs).

56. Notwithstanding any provision of this Settlement Agreement, U.S. EPA retains all of its access authorities and rights, as well as all of its rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

57. If Respondents cannot obtain access agreements, U.S. EPA may obtain access for Respondents, perform those tasks or activities with U.S. EPA contractors, or terminate the Settlement Agreement. In the event that U.S. EPA performs those tasks or activities with U.S. EPA contractors and does not terminate the Settlement Agreement, Respondents shall perform all other activities not requiring access to that property, and shall reimburse U.S. EPA for all costs incurred in performing such activities. Respondents shall integrate the results of any such

tasks undertaken by U.S. EPA into its reports and deliverables.

XIII. COMPLIANCE WITH OTHER LAWS

58. Respondents shall comply with all applicable local, state and federal laws and regulations when performing the RI/FS. No local, state, or federal permit shall be required for any portion of any action conducted entirely on-site, including studies, if the action is selected and carried out in compliance with Section 121 of CERCLA, 42 U.S.C. § 9621. Where any portion of the Work is to be conducted off-site and requires a federal or state permit or approval, Respondents shall submit timely and complete applications and take all other actions necessary to obtain and to comply with all such permits or approvals. This Settlement Agreement is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

XIV. RETENTION OF RECORDS

59. During the pendency of this Settlement Agreement and for a minimum of 10 years after commencement of construction of any remedial action, each Respondent shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary. Until 10 years after commencement of construction of any remedial action, Respondents shall also instruct their

contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to performance of the Work.

60. At the conclusion of this document retention period, Respondents shall notify U.S. EPA at least 90 days prior to the destruction of any such records or documents, and, upon request by U.S. EPA, Respondents shall deliver any such records or documents to U.S. EPA. Respondents may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondents assert such a privilege, they shall provide U.S. EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged.

61. Each Respondent hereby certifies individually that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by U.S. EPA or the filing of suit against it regarding the Site and that it has fully complied with

any and all U.S. EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XV. DISPUTE RESOLUTION

62. Unless otherwise expressly provided for in this Settlement Agreement, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Settlement Agreement. The Parties shall attempt to resolve any disagreements concerning this Settlement Agreement expeditiously and informally.

63. If Respondents object to any U.S. EPA action taken pursuant to this Settlement Agreement, including billings for Future Response Costs, they shall notify U.S. EPA in writing of their objection(s) within 10 days of such action, unless the objection(s) has/have been resolved informally. U.S. EPA and Respondents shall have 20 days from U.S. EPA's receipt of Respondents' written objection(s) to resolve the dispute (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of U.S. EPA. Such extension may be granted verbally but must be confirmed in writing to be effective.

64. Any agreement reached by the Parties pursuant to this Section shall be in writing and shall, upon signature by the Parties, be incorporated into and become an enforceable part of this Settlement Agreement. If the Parties are unable to reach an agreement within the Negotiation Period, an U.S. EPA management official at the Superfund Branch Chief level or higher will issue a written decision. U.S. EPA's

decision shall be incorporated into and become an enforceable part of this Settlement Agreement. Respondents' obligations under this Settlement Agreement shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondents shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with U.S. EPA's decision, whichever occurs. Respondents shall proceed in accordance with U.S. EPA's final decision regarding the matter in dispute, regardless of whether Respondents agree with the decision. If Respondents do not agree to perform or do not actually perform the Work in accordance with U.S. EPA's final decision, U.S. EPA reserves the right in its sole discretion to conduct the Work itself, to seek reimbursement from Respondents, to seek enforcement of the decision, to seek stipulated penalties, and/or to seek any other appropriate relief.

XVI. STIPULATED PENALTIES

65. Respondents shall be liable to U.S. EPA for stipulated penalties in the amounts set forth in Paragraphs 66 and 67 for failure to comply with any of the requirements of this Settlement Agreement specified below unless excused under Section XVII (Force Majeure). "Compliance" by Respondents shall include completion of the Work under this Settlement Agreement or any activities contemplated under any of the RI/FS Planning Documents, work plans or other plan approved under this Settlement Agreement identified below in accordance with all applicable requirements of law, this Settlement Agreement, the SOW, and any plans or other documents approved by

U.S. EPA pursuant to this Settlement Agreement and within the specified time schedules established by and approved under this Settlement Agreement.

66. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per day for any noncompliance identified in Subparagraph 66(b):

Penalty Per Violation Per Day	Period of Noncompliance
$1,000.00	1st through 21st day
$2000.00	22d through 30th day
$3000.00	31st day and beyond

b. Compliance Milestones:

- Timely notification to U.S. EPA in writing of names, titles and qualification of the personnel, including contractors, subcontractors, consultants, and laboratories to be used in carrying out the Work [Paragraph 29(a) and (b)].
- Submission to U.S. EPA of Respondent's designated Project Coordinator's name, address, telephone number and qualifications [Paragraph 30].
- Conduct site characterization activities as described in the SOW and RI/FS Work Plan/Field Sampling Plan [Paragraph 35].
- Prepare Technical Assistance Plan [Paragraph 36].
- Submission of Memorandum documenting need for additional data collection activities identified by Respondents [Paragraph 37(a)].

- Provide written commitment of willingness to perform additional Work identified by U.S. EPA [Paragraph 37(d)].
- Provide copy of written notification to U.S. EPA of off-site shipment of Waste Material from the Site to an out-of-state waste management facility [Paragraph 38].
- Monthly Progress Reports [Paragraph 40].
- Written report due in the event of any release of a hazardous substance from the Site [Paragraph 40(b)].
- Report objecting to RI/FS data [Paragraph 53].
- Provide written description of failed efforts to obtain access [Paragraph 55].
- Payment of Future Response Costs [Paragraph 79].
- Establish escrow account in the event of any dispute over billing.

67. Stipulated Penalty Amounts - RI/FS Planning Documents, Reports and Technical Memoranda

a. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate plans, reports, technical memoranda or other written documents required by Tasks 1 through 7 of the SOW in accordance with the Schedule in the SOW:

Penalty Per Violation Per Day	Period of Noncompliance
$1,000	1st through 21st day
$2,000	22d through 30th day
$3,000	31st day and beyond

68. Respondents shall be liable for stipulated penalties in the amount of $500.00 per day for the first week or part thereof and $1,000.00 per day for each week or part thereof thereafter for failure to meet any other obligation under this Settlement Agreement including the SOW.

69. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section X (U.S. EPA Approval of Plans and Other Submissions), during the period, if any, beginning on the 31st day after U.S. EPA's receipt of such submission until the date that U.S. EPA notifies Respondents of any deficiency; and (2) with respect to a decision by the U.S. EPA Management Official at the Superfund Branch Chief level or higher, under Paragraph 64 of Section XV (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the U.S. EPA management official issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement Agreement.

70. Following U.S. EPA's determination that Respondents have failed to comply with a requirement of this Settlement Agreement, U.S. EPA may give Respondents written notification of the same and describe the noncompliance. U.S. EPA may send Respondents a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether U.S. EPA has notified Respondents of a violation.

71. All penalties accruing under this Section shall be due and payable to U.S. EPA within 30 days of Respondents' receipt from U.S. EPA of a demand for payment of the penalties, unless Respondents invoke the dispute resolution procedures in accordance with Section XV (Dispute Resolution). All payments to U.S. EPA under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to U.S. EPA, Region 5, P. O. Box 371531, Pittsburgh, PA 15251-7531, shall indicate that the payment is for stipulated penalties, and shall reference the U.S. EPA Region and Site/Spill ID Number B52B, the U.S. EPA Docket Number V-W- '06-C-852, and the name and address of the party(ies) making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s) shall be sent to:

Thomas C. Nash	Karen Cibulskis
Site Attorney	Remedial Project Manager
Office of Regional Counsel	Superfund Division
Mail Code C-14J	Mail Code SR-6J
77 West Jackson	77 West Jackson
Chicago, IL 60604-3590	Chicago, IL 60604-3590

72. The payment of penalties shall not alter in any way Respondents' obligation to complete performance of the Work required under this Settlement Agreement.

73. Penalties shall continue to accrue as provided in Paragraph 69 during any dispute resolution period, but need not be paid until 15 days after the dispute is resolved by agreement or by receipt of U.S. EPA's decision.

74. If Respondents fail to pay stipulated penalties when due, U.S. EPA may institute proceedings to collect the penalties, as well as Interest. Respondents shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 71.

75. Nothing in this Settlement Agreement shall be construed as prohibiting, altering, or in any way limiting the ability of U.S. EPA to seek any other remedies or sanctions available by virtue of Respondents' violation of this Settlement Agreement or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA, 42 U.S.C. § 9622(l), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that U.S. EPA shall not seek civil penalties pursuant to Section 122(l) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of willful violation of this Settlement Agreement or in the event that U.S. EPA assumes performance of a portion or all of the Work pursuant to Section XX (Reservation of Rights by U.S.

EPA), Paragraph 86. Notwithstanding any other provision of this Section, U.S. EPA may, in its sole and unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Settlement Agreement.

XVII. FORCE MAJEURE

76. Respondents agree to perform all requirements of this Settlement Agreement within the time limits established under this Settlement Agreement, unless the performance is delayed by a *force majeure*. For purposes of this Settlement Agreement, *force majeure* is defined as any event arising from causes beyond the control of Respondents or of any entity controlled by Respondents, including but not limited to their contractors and subcontractors, which delays or prevents performance of any obligation under this Settlement Agreement despite Respondents' best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work or increased cost of performance.

77. If any event occurs or has occurred that may delay the performance of any obligation under this Settlement Agreement, whether or not caused by a *force majeure* event, Respondents shall notify U.S. EPA orally within twenty four hours of when Respondents first knew that the event might cause a delay. Within five (5) days thereafter, Respondents shall provide to U.S. EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondents' rationale

for attributing such delay to a *force majeure* event if they intend to assert such a claim; and a statement as to whether, in the opinion of Respondents, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Respondents from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

78. If U.S. EPA agrees that the delay or anticipated delay is attributable to *a force majeure* event, the time for performance of the obligations under this Settlement Agreement that are affected by the *force majeure* event will be extended by U.S. EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If U.S. EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, U.S. EPA will notify Respondents in writing of its decision. If U.S. EPA agrees that the delay is attributable to a *force majeure* event, U.S. EPA will notify Respondents in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.

XVIII. PAYMENT OF RESPONSE COSTS

79. Payments for Future Response Costs.

a. Respondents shall pay U.S. EPA all Future Response Costs not inconsistent with the NCP. On a periodic basis, U.S. EPA will send Respondents a bill

requiring payment that includes Region 5's Itemized Cost Summary, which includes direct and indirect costs incurred by U.S. EPA and its contractors. If the U.S. Department of Justice has incurred costs for this Site, the bill will also include a DOJ-prepared cost summary, which would reflect costs incurred by DOJ and its contractors, if any. Respondents shall make all payments within 30 days of receipt of each bill requiring payment, except as otherwise provided in this Settlement Agreement. Respondents shall make all payments required by this Paragraph by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party(ies) making payment and U.S. EPA Site/Spill ID number B52B. Respondents shall send the check(s) to:

U.S. Environmental Protection Agency, Region 5
P. O. Box 371531,
Pittsburgh, PA 15251-7531

Payment made pursuant to this paragraph may also be made to U.S. EPA by Electronics Funds Transfer ("EFT") in accordance with current EFT procedures to be provided to Respondents by U.S. EPA Region 5, and shall be accompanied by a statement identifying the name and address of the party(ies) making payment, the Site name, the U.S. EPA Region and Site/Spill ID Number B52B, and the U.S. EPA docket number for this action. Region 5 EFT procedures are: make payment to:

Federal Reserve Bank of New York
ABA No. 021030004
Account No. 68010727

33 Liberty Street
New York, NY 10045

Field Tag 4200 of the Fedwire message is: "D 68010727 Environmental Protection Agency."

Respondents shall: 1) complete Respondents' required bank form; 2) include Federal Reserve Bank of New York ABA # 021030004 on the bank form; 3) include the U.S. EPA Account # 68010727 on the form; and 4) include a statement identifying the name and address of the party(ies) making payment, the Site name, and the U.S. EPA Region and Site/Spill ID Number B52B.

b. At the time of payment, Respondents shall send notice that payment has been made to:

Thomas C. Nash	Karen Cibulskis
Site Attorney	Remedial Project Manager
Office of Regional Counsel	Superfund Division
Mail Code C-14J	Mail Code SR-6J
77 West Jackson	77 West Jackson
Chicago, IL 60604-3590	Chicago, IL 60604-3590

c. The total amount to be paid by Respondents pursuant to Subparagraph 79.a. shall be deposited in the South Dayton Dump and Landfill Site Special Account within the U.S. EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by U.S. EPA to the U.S. EPA Hazardous Substance Superfund.

80. If Respondents do not pay Future Response Costs within 30 days of Respondents' receipt of a bill, Respondents shall pay Interest on the unpaid balance

of Future Response Costs. The Interest on unpaid Future Response Costs shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment. If U.S. EPA receives a partial payment, Interest shall accrue on any unpaid balance. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondents' failure to make timely payments under this Section, including but not limited to, payments of stipulated penalties pursuant to Section XVI. Respondents shall make all payments required by this Paragraph in the manner described in Paragraph 79.

81. Respondents may contest payment of any Future Response Costs under Paragraph 79 if they determine that U.S. EPA has made an accounting error or if they believe U.S. EPA incurred excess costs as a direct result of an U.S. EPA action that was inconsistent with the NCP. Such objection shall be made in writing within 30 days of receipt of the bill and must be sent to the U.S. EPA Project Coordinator. Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, Respondents shall within the 30 day period pay all uncontested Future Response Costs to U.S. EPA in the manner described in Paragraph 79. Simultaneously, Respondents shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of Ohio and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. Respondents shall send to the U.S. EPA Project Coordinator a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a

copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, Respondents shall initiate the Dispute Resolution procedures in Section XV (Dispute Resolution). If U.S. EPA prevails in the dispute, within 5 days of the resolution of the dispute, Respondents shall pay the sums due (with accrued interest) to U.S. EPA in the manner described in Paragraph 79. If Respondents prevail concerning any aspect of the contested costs, Respondents shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to U.S. EPA in the manner described in Paragraph 79. Respondents shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XV (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Respondents' obligation to reimburse U.S. EPA for its Future Response Costs.

XIX. COVENANT NOT TO SUE BY U.S. EPA

82. In consideration of the actions that will be performed and the payments that will be made by Respondents under the terms of this Settlement Agreement, and except as otherwise specifically provided in this Settlement Agreement, U.S. EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for

the Work and Future Response Costs. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the complete and satisfactory performance by Respondents of all obligations under this Settlement Agreement, including, but not limited to, payment of Future Response Costs pursuant to Section XVIII. This covenant not to sue extends only to Respondents and does not extend to any other person.

XX. RESERVATIONS OF RIGHTS BY U.S. EPA

83. Except as specifically provided in this Settlement Agreement, nothing herein shall limit the power and authority of U.S. EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing herein shall prevent U.S. EPA from seeking legal or equitable relief to enforce the terms of this Settlement Agreement, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondents in the future to perform additional activities pursuant to CERCLA or any other applicable law.

84. The covenant not to sue set forth in Section XIX above does not pertain to any matters other than those expressly identified therein. U.S. EPA reserves, and this Settlement Agreement is without prejudice to, all rights against Respondents with respect to all other matters, including, but not limited to:

a. claims based on a failure by Respondents to meet a requirement of this Settlement Agreement;

b. liability for costs not included within the definitions of Future Response Costs;

c. liability for performance of response action other than the Work;

d. criminal liability;

e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

f. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site; and

g. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site.

h. liability for costs incurred if U.S. EPA assumes the performance of the Work pursuant to paragraph 85.

85. Work Takeover. In the event U.S. EPA determines that Respondents have ceased implementation of any portion of the Work, are deficient or late in their performance of the Work, or are implementing the Work in a manner which may cause an endangerment to human health or the environment, U.S. EPA may assume the performance of all or any portion of the Work as U.S. EPA determines necessary. Respondents may invoke the procedures set forth in Section XV (Dispute Resolution)

to dispute U.S. EPA's determination that takeover of the Work is warranted under this Paragraph. Notwithstanding any other provision of this Settlement Agreement, U.S. EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

XXI. COVENANT NOT TO SUE BY RESPONDENTS

86. Respondents covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, Future Response Costs, or this Settlement Agreement, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of the Work or arising out of the response actions for which the Future Response Costs have or will be incurred, including any claim under the United States Constitution, the Ohio Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Work or payment of Future Response Costs.

87. Except as provided in Paragraph 91, these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 84 (b), (c), and (e) - (g), but only to the extent that Respondents' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

88. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

89. **AGREEMENT NOT TO CHALLENGE LISTING.** Respondents agree not to seek judicial review of a decision to list the Site on the NPL at any time after the Effective Date of this Settlement Agreement based on a claim that changed site conditions that resulted from the performance of the Work in any way affected the basis for listing the Site.

90. **WAIVER OF CLAIMS AGAINST DE MICROMIS PARTIES.** Respondents agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Respondents with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if all or part of the disposal, treatment, or transport occurred before April 1, 2001, and the total amount of material containing

hazardous substances contributed by such person to the Site was less than 110 gallons of liquid materials or 200 pounds of solid materials.

91. The waiver in Paragraph 90 shall not apply with respect to any defense, claim, or cause of action that a Respondent may have against any person meeting the above criteria if such person asserts a claim or cause of action relating to the Site against such Respondent. This waiver also shall not apply to any claim or cause of action against any person meeting the above criteria if U.S. EPA determines:

a. that such person has failed to comply with any U.S. EPA requests for information or administrative subpoenas issued pursuant to Section 104(e) or 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) or 9622(e), or Section 3007 of the Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act or "RCRA"), 42 U.S.C. § 6972, or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site, or has been convicted of a criminal violation for the conduct to which this waiver would apply and that conviction has not been vitiated on appeal or otherwise; or

b. that the materials containing hazardous substances contributed to the Site by such person have contributed significantly, or could contribute significantly, either individually or in the aggregate, to the cost of response action or natural resource restoration at the Site.]

92. **NATURAL RESOURCE DAMAGES.** For the purposes of Section 113(g)(1) of CERCLA, the

parties agree that, upon issuance of this Settlement Agreement, remedial action under CERCLA shall be deemed to be scheduled and an action for damages (as defined in 42 U.S.C. § 9601(6)) must be commenced within 3 years after the completion of the remedial action.

XXII. OTHER CLAIMS

93. By issuance of this Settlement Agreement, the United States and U.S. EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondents.

94. Except as expressly provided in Section XXI, Paragraph 90, (Non-Exempt De Micromis Waivers) and Section XIX (Covenant Not to Sue by U.S. EPA), nothing in this Settlement Agreement constitutes a satisfaction of or release from any claim or cause of action against Respondents or any person not a party to this Settlement Agreement, for any liability such person may have under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

95. No action or decision by U.S. EPA pursuant to this Settlement Agreement shall give rise to any right to judicial review.

XXIII. CONTRIBUTION

96. a. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that Respondents are entitled, as of

the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Settlement Agreement. The "matters addressed" in this Settlement Agreement are the Work, and Future Response Costs.

b. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(3)(B) of CERCLA, 42. U.S.C. § 9113(f)(3)(B) [sic], pursuant to which the Respondents have, as of the Effective Date, resolved their liability to the United States for the Work, and Future Response Costs.

c. Except as provided in Section XXI , Paragraph 90 of this Settlement Agreement (Non-Exempt De Micromis Waivers),"nothing in this Settlement Agreement precludes the United States or Respondents from asserting any claims, causes of action, or demands for indemnification, contribution, or cost recovery against any person not a party to this Settlement Agreement. Nothing herein diminishes the right of the United States, pursuant to Section 113(f)(2)and (3), 42 U.S.C. § 9613(f)(2) and (3), to pursue any such persons to obtain additional response costs or response action, and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2).

XXIV. INDEMNIFICATION

97. Respondents shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of

action arising from, or on account of negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Settlement Agreement. In addition, Respondents agree to pay the United States all costs incurred by the United States, including but not limited to attorneys fees and other expenses of litigation and settlement, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, subcontractors and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Settlement Agreement. The United States shall not be held out as a party to any contract entered into by or on behalf of Respondents in carrying out activities pursuant to this Settlement Agreement. Neither Respondents nor any such contractor shall be considered an agent of the United States.

98. The United States shall give Respondents notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondents prior to settling such claim.

99. Respondents waive all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between any one or more of Respondents and any person for performance of Work on or relating to the Site. In addition, Respondents shall indemnify and hold harmless the United States with respect to any and all claims for

damages or reimbursement arising from or on account of any contract, agreement, or arrangement between any one or more of Respondents and any person for performance of Work on or relating to the Site.

XXV. INSURANCE

100. At least 21 days prior to commencing any On-Site Work under this Settlement Agreement, Respondents shall secure, and shall maintain for the duration of this Settlement Agreement, comprehensive general liability insurance and automobile insurance with limits of five million dollars, combined single limit, naming the United States as an additional insured. Within the same period, Respondents shall provide U.S. EPA with certificates of such insurance and a copy of each insurance policy. Respondents shall submit such certificates and copies of policies each year on the anniversary of the Effective Date. In addition, for the duration of the Settlement Agreement, Respondents shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondents in furtherance of this Settlement Agreement. If Respondents demonstrate by evidence satisfactory to U.S. EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in an equal or lesser amount, then Respondents need provide only that portion of the insurance described above which is not maintained by such contractor or subcontractor.

XXVI. FINANCIAL ASSURANCE

101. Within 30 days of the Effective Date, Respondents shall establish and maintain financial security for the benefit of U.S. EPA in the amount of $1,500,000 in one or more of the following forms, in order to secure the full and final completion of Work by Respondents:

a. a surety bond unconditionally guaranteeing payment and/or performance of the Work;

b. one or more irrevocable letters of credit, payable to or at the direction of U.S. EPA, issued by financial institution(s) acceptable in all respects to U.S. EPA equaling the total estimated cost of the Work;

c. a trust fund administered by a trustee acceptable in all respects to U.S. EPA;

d. a policy of insurance issued by an insurance carrier acceptable in all respects to U.S. EPA, which ensures the payment and/or performance of the Work;

e. a corporate guarantee to perform the Work provided by one or more parent corporations or subsidiaries of Respondents, or by one or more unrelated corporations that have a substantial business relationship with at least one of Respondents; including a demonstration that any such company satisfied the financial test requirements of 40 C.F.R. § 264.143(f);

f. a corporate guarantee to perform the Work by one or more of Respondents, including a

demonstration that any such Respondent satisfies the requirements of 40 C.F.R. § 143(f); and/or

g. any other financial mechanism acceptable to and approved by U.S. EPA

102. Any and all financial assurance instruments provided pursuant to this Section shall be in form and substance satisfactory to U.S. EPA, determined in U.S. EPA's sole discretion. In the event that U.S. EPA determines at any time that the financial assurances provided pursuant to this Section (including, without limitation, the instrument(s) evidencing such assurances) are inadequate, Respondents shall, within 30 days of receipt of notice of U.S. EPA's determination, obtain and present to U.S. EPA for approval one of the other forms of financial assurance listed in Paragraph 102, above. In addition, if at any time U.S. EPA notifies Respondents that the anticipated cost of completing the Work has increased, then, within 30 days of such notification, Respondents shall obtain and present to U.S. EPA for approval a revised form of financial assurance (otherwise acceptable under this Section) that reflects such cost increase. Respondents' inability to demonstrate financial ability to complete the Work shall in no way excuse performance of any activities required under this Settlement Agreement.

103. If Respondents seek to ensure completion of the Work through a guarantee pursuant to Subparagraph 101.e. or 101.f. of this Settlement Agreement, Respondents shall (i) demonstrate to U.S. EPA's satisfaction that the guarantor satisfies the requirements of 40 C.F.R. § 264.143(f); and

(ii) resubmit sworn statements conveying the information required by 40 C.F.R. § 264.143(f) annually, on the anniversary of the Effective Date, to U.S. EPA. For the purposes of this Settlement Agreement, wherever 40 C.F.R. § 264.143(f) references "sum of current closure and post-closure costs estimates and the current plugging and abandonment costs estimates," the current cost estimate of $1,500,000 for the Work at the Site shall be used in relevant financial test calculations.

104. If, after the Effective Date, Respondents can show that the estimated cost to complete the remaining Work had diminished below the amount set forth in Paragraph 102 of this Section, Respondents may, on any anniversary date of the Effective Date, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining Work to be performed. Respondents shall submit a proposal for such reduction to U.S. EPA, in accordance with the requirements of this Section, and may reduce the amount of the security after receiving written approval from U.S. EPA. In the event of a dispute, Respondents may seek dispute resolution pursuant to Section XV (Dispute Resolution) and may reduce the amount of security in accordance with U.S. EPA's written decision resolving the dispute.

106. Respondents may change the form of financial assurance provided under this Section at any time, upon notice to and prior written approval by U.S. EPA, provided that U.S. EPA determines that the new form of assurance meets the requirements of this Section. In the event of a dispute, Respondents may

change the form of the financial assurance only in accordance with the written decision resolving the dispute.

XXVII. SEVERABILITY/ INTEGRATION/APPENDICES

106. If a court issues an order that invalidates any provision of this Settlement Agreement or finds that Respondents have sufficient cause not to comply with one or more provisions of this Settlement Agreement, Respondents shall remain bound to comply with all provisions of this Settlement Agreement not invalidated or determined to be subject to a sufficient cause defense by the court's order.

107. This Settlement Agreement including its appendices, and any deliverables, technical memoranda, specifications, schedules, documents, plans, reports (other than progress reports), etc. that will be developed pursuant to this Settlement Agreement and become incorporated into and enforceable under this Settlement Agreement constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Settlement Agreement. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Settlement Agreement. The following appendices are attached to and incorporated into this Settlement Agreement:

"Appendix A" is the SOW.

"Appendix B" consists of two documents depicting the Site, an aerial photograph and a map produced by the Montgomery County Appraiser's Office.

"Appendix C" is the list of Settling Parties ("Respondents") who have signed this Settlement Agreement and agreed to be bound by the terms of this Administrative Order on Consent (Settlement Agreement).

XXVIII. ADMINISTRATIVE RECORD

108. U.S. EPA will determine the contents of the administrative record file for selection of the remedial action. Respondents shall submit to U.S. EPA documents developed during the course of the RI/FS upon which selection of the response action may be based. Upon request of U.S. EPA, Respondents shall provide copies of plans, task memoranda for further action, quality assurance memoranda and audits, raw data, field notes, laboratory analytical reports and other reports. Upon request of U.S. EPA, Respondents shall additionally submit any previous studies conducted under state, local or other federal authorities relating to selection of the response action, and all communications between Respondents and state, local or other federal authorities concerning selection of the response action. U.S. EPA shall establish a community information repository at or near the Site, to house one copy of the administrative record.

XXIX. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION

109. This Settlement Agreement shall be effective three days after the Settlement Agreement is signed by

the Director of the Superfund Division or his/her delegate.

110. This Settlement Agreement may be amended by mutual agreement of U.S. EPA and Respondents. Amendments shall be in writing and shall be effective when signed by U.S. EPA. U.S. EPA Project Coordinators do not have the authority to sign amendments to the Settlement Agreement.

111. No informal advice, guidance, suggestion, or comment by the U.S. EPA Project Coordinator or other U.S. EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondents shall relieve Respondents of their obligation to obtain any formal approval required by this Settlement Agreement, or to comply with all requirements of this Settlement Agreement, unless it is formally modified.

XXX. NOTICE OF COMPLETION OF WORK

112. When U.S. EPA determines, that all Work has been fully performed in accordance with this Settlement Agreement, with the exception of any continuing obligations required by this Settlement Agreement, including but not limited to, payment of Future Response Costs, provision of Access, and record retention, U.S. EPA will provide written notice to Respondents. If U.S. EPA determines that any such Work has not been completed in accordance with this Settlement Agreement, U.S. EPA will notify Respondents, provide a list of the deficiencies, and require that Respondents modify the RI/FS Planning Documents or other work plan if appropriate in order to correct such deficiencies. Respondents shall

implement the modified and approved RI/FS Planning Documents or other approved work plan and shall submit the required deliverable(s) in accordance with the U.S. EPA notice. Failure by Respondents to implement the approved modified RI/FS Planning Documents or other work plan shall be a violation of this Settlement Agreement.

The Undersigned Party enters into this Administrative Settlement Agreement and Order on Consent in the matter of the South Dayton Dump and Landfill Site.

Agreed this 2ND day of AUGUST, 2006

For Respondent KATHRYN A. BOESCH

Signature: Kathryn A. Boesch

Name: C/O TIMOTHY D. HOFFMAN

Title: COOLIDGE WALL

Address: 33 W 1ST ST
DAYTON OHIO 45402
(937) 449-5540

Agreed this 1st day of August, 2006.

For Respondent GENERAL MOTORS CORPORATION

Signature: James P. Walle

Name: JAMES P. WALLE
Attorney At Law P31198

Title: _____

Address: 300 RENAISSANCE CENTER
M/C 482-C24-D24
DETROIT, MI 48243

Agreed this 2ND day of AUGUST, 2006

For Respondent MARGARET C. GRILLOT

Signature: Margaret C. Grillot

Name: C/O TIMOTHY D. HOFFMAN

Title: COOLIDGE WALL

Address: 33 W 1ST ST
DAYTON, OHIO 45402
(937) 449-5540

Agreed this 1 day of August, 2006

For Respondent Hobart Corporation

Signature: [signature]

Name: Philip S. Dallosto

Title: Associate General Counsel

Address: Illinois Tool Works Inc.
3600 West Lake Avenue
Glenview, IL 60026

NOTE: Hobart Corporation is a wholly owned subsidiary of Illinois Tool Works Inc.

Agreed this 3 day of August, 2006.

For Respondent Kelsey Hayes Company

Signature: [signature]

Name: David Bialosky

Title: Vice President & General Counsel

Address: 12001 Tech Center Drive, Livonia, MI 48154

Agreed this 4th day of August, 2006.

For Respondent NCR Corporation

Signature:

Name: Susan R Ohara

Title: Chief Litigation Counsel

Address: 1700 S. Patterson Blvd. Dayton, OH 45479

It is so ORDERED AND AGREED this 10th day of August, 2006.

BY: for Richard C. Karl, Director
Superfund Division
U.S. Environmental Protection Agency
Region 5

DATE: 8/10/2006

EFFECTIVE DATE: 8/15/2006

* * *

[*Appendices A - C to this ASAOC have been omitted in the printing of this appendix*]

APPENDIX E

ADDITIONAL STATUTORY PROVISIONS INVOLVED

CERCLA § 104

(a) Removal and other remedial action by President; applicability of national contingency plan; response by potentially responsible parties; public health threats; limitations on response; exception

(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. When the President determines that such action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 9622 of this title. No remedial

investigation or feasibility study (RI/FS) shall be authorized except on a determination by the President that the party is qualified to conduct the RI/FS and only if the President contracts with or arranges for a qualified person to assist the President in overseeing and reviewing the conduct of such RI/FS and if the responsible party agrees to reimburse the Fund for any cost incurred by the President under, or in connection with, the oversight contract or arrangement. In no event shall a potentially responsible party be subject to a lesser standard of liability, receive preferential treatment, or in any other way, whether direct or indirect, benefit from any such arrangements as a response action contractor, or as a person hired or retained by such a response action contractor, with respect to the release or facility in question. The President shall give primary attention to those releases which the President deems may present a public health threat.

(2) Removal action

Any removal action undertaken by the President under this subsection (or by any other person referred to in section 9622 of this title) should, to the extent the President deems practicable, contribute to the efficient performance of any long term remedial action with respect to the release or threatened release concerned.

***

(b) Investigations, monitoring, coordination, etc., by President

(1) Information; studies and investigations

Whenever the President is authorized to act pursuant to subsection (a) of this section, or whenever the President has reason to believe that a release has occurred or is about to occur, or that illness, disease, or complaints thereof may be attributable to exposure to a hazardous substance, pollutant, or contaminant and that a release may have occurred or be occurring, he may undertake such investigations, monitoring, surveys, testing, and other information gathering as he may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment. In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.

(2) Coordination of investigations

The President shall promptly notify the appropriate Federal and State natural resource trustees of potential damages to natural resources resulting from releases under investigation pursuant to this section and shall seek to coordinate the assessments, investigations, and planning under this section with such Federal and State trustees.

CERCLA § 106

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

(b) Fines; reimbursement

(1) Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

(2) (A) Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus

interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26.

CERCLA § 107

[CERCLA § 107(a) is reproduced on Pet. 1-2.]

(c) Determination of amounts

(3) If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 9612(c) of this title. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.

CERCLA § 109

(a) Class I administrative penalty

(1) Violations

A civil penalty of not more than $25,000 per violation may be assessed by the President in the case of any of the following—…

> (D) A violation of an order under section 9622(d)(3) of this title (relating to settlement agreements for action under section 9604(b) of this title).
>
> (E) Any failure or refusal referred to in section 9622(l) of this title (relating to violations of administrative orders, consent decrees, or agreements under section 9620 of this title).

CERCLA § 113

(f) Contribution

(1) Contribution

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.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

[CERCLA § 113(f)(3)(B) is reproduced on Pet. 2.]

[CERCLA §§ 113(g)(2), (g)(3) are reproduced on Pet. 2-3.]

CERCLA § 122

(a) Authority to enter into agreements

The President, in his discretion, may enter into an agreement with any person (including the owner or operator of the facility from which a release or substantial threat of release emanates, or any other potentially responsible person), to perform any response action (including any action described in section 9604(b) of this title) if the President determines that such action will be done properly by such person. Whenever practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation. If the

President decides not to use the procedures in this section, the President shall notify in writing potentially responsible parties at the facility of such decision and the reasons why use of the procedures is inappropriate. A decision of the President to use or not to use the procedures in this section is not subject to judicial review.

***

(d) Enforcement

(1) Cleanup agreements

(A) Consent decree

Whenever the President enters into an agreement under this section with any potentially responsible party with respect to remedial action under section 9606 of this title, following approval of the agreement by the Attorney General, except as otherwise provided in the case of certain administrative settlements referred to in subsection (g) of this section, the agreement shall be entered in the appropriate United States district court as a consent decree. The President need not make any finding regarding an imminent and substantial endangerment to the public health or the environment in connection with any such agreement or consent decree.

(B) Effect

The entry of any consent decree under this subsection shall not be construed to be an acknowledgment by the parties that the release

or threatened release concerned constitutes an imminent and substantial endangerment to the public health or welfare or the environment. Except as otherwise provided in the Federal Rules of Evidence, the participation by any party in the process under this section shall not be considered an admission of liability for any purpose, and the fact of such participation shall not be admissible in any judicial or administrative proceeding, including a subsequent proceeding under this section.

(C) Structure

The President may fashion a consent decree so that the entering of such decree and compliance with such decree or with any determination or agreement made pursuant to this section shall not be considered an admission of liability for any purpose.

(2) Public participation

(A) Filing of proposed judgment

At least 30 days before a final judgment is entered under paragraph (1), the proposed judgment shall be filed with the court.

(B) Opportunity for comment

The Attorney General shall provide an opportunity to persons who are not named as parties to the action to comment on the proposed judgment before its entry by the court as a final judgment. The Attorney General shall consider, and file with the court, any written comments,

views, or allegations relating to the proposed judgment. The Attorney General may withdraw or withhold its consent to the proposed judgment if the comments, views, and allegations concerning the judgment disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper, or inadequate.

(3) 9604(b) agreements

Whenever the President enters into an agreement under this section with any potentially responsible party with respect to action under section 9604(b) of this title, the President shall issue an order or enter into a decree setting forth the obligations of such party. The United States district court for the district in which the release or threatened release occurs may enforce such order or decree.

***

(g) De minimis settlements

(1) Expedited final settlement

Whenever practicable and in the public interest, as determined by the President, the President shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative or civil action under section 9606 or 9607 of this title if such settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the President, the conditions in either of the following subparagraph (A) or (B) are met:

(A) Both of the following are minimal in comparison to other hazardous substances at the facility:

(i) The amount of the hazardous substances contributed by that party to the facility.

(ii) The toxic or other hazardous effects of the substances contributed by that party to the facility.

(B) The potentially responsible party—

(i) is the owner of the real property on or in which the facility is located;

(ii) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and

(iii) did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission.

This subparagraph (B) does not apply if the potentially responsible party purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.

(2) Covenant not to sue

The President may provide a covenant not to sue with respect to the facility concerned to any party who has entered into a settlement under this subsection unless such a covenant would be inconsistent with the

public interest as determined under subsection (f) of this section.

(3) Expedited agreement

The President shall reach any such settlement or grant any such covenant not to sue as soon as possible after the President has available the information necessary to reach such a settlement or grant such a covenant.

(4) Consent decree or administrative order

A settlement under this subsection shall be entered as a consent decree or embodied in an administrative order setting forth the terms of the settlement. In the case of any facility where the total response costs exceed $500,000 (excluding interest), if the settlement is embodied as an administrative order, the order may be issued only with the prior written approval of the Attorney General. If the Attorney General or his designee has not approved or disapproved the order within 30 days of this referral, the order shall be deemed to be approved unless the Attorney General and the Administrator have agreed to extend the time. The district court for the district in which the release or threatened release occurs may enforce any such administrative order.

(5) Effect of agreement

A party who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible parties unless its

terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(6) Settlements with other potentially responsible parties

Nothing in this subsection shall be construed to affect the authority of the President to reach settlements with other potentially responsible parties under this chapter.

***

(h) Cost recovery settlement authority

(1) Authority to settle

The head of any department or agency with authority to undertake a response action under this chapter pursuant to the national contingency plan may consider, compromise, and settle a claim under section 9607 of this title for costs incurred by the United States Government if the claim has not been referred to the Department of Justice for further action. In the case of any facility where the total response costs exceed $500,000 (excluding interest), any claim referred to in the preceding sentence may be compromised and settled only with the prior written approval of the Attorney General.

(2) Use of arbitration

Arbitration in accordance with regulations promulgated under this subsection may be used as a method of settling claims of the United States where the total response costs for the facility concerned do not exceed $500,000 (excluding interest). After consultation with the Attorney General, the department or agency

head may establish and publish regulations for the use of arbitration or settlement under this subsection.

(3) Recovery of claims

If any person fails to pay a claim that has been settled under this subsection, the department or agency head shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount of such claim, plus costs, attorneys' fees, and interest from the date of the settlement. In such an action, the terms of the settlement shall not be subject to review.

(4) Claims for contribution

A person who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement shall not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(i) Settlement procedures…

[CERCLA § 122(i)(1) is reproduced on Pet. 4-5.]

(2) Comment period

For a 30-day period beginning on the date of publication of notice under paragraph (1) of a proposed settlement, the head of the department or agency which has jurisdiction over the proposed settlement shall provide an opportunity for persons who are not parties to the proposed settlement to file written comments relating to the proposed settlement.

(3) Consideration of comments

The head of the department or agency shall consider any comments filed under paragraph (2) in determining whether or not to consent to the proposed settlement and may withdraw or withhold consent to the proposed settlement if such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate.

***

(l) Civil penalties

A potentially responsible party which is a party to an administrative order or consent decree entered pursuant to an agreement under this section or section 9620 of this title (relating to Federal facilities) or which is a party to an agreement under section 9620 of this title and which fails or refuses to comply with any term or condition of the order, decree or agreement shall be subject to a civil penalty in accordance with section 9609 of this title.