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Allocation of environmental cleanup costs among responsible parties is a key component of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund.\(^1\) Indeed, the United States Supreme Court has expressly acknowledged its importance\(^2\) and twice within the past three terms has grappled with how responsible parties\(^3\) may bring CERCLA

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3. The term "responsible party," as used in this article, refers to parties who would be subject to liability if sued under CERCLA § 107 or under RCRA §§ 7002(a)(1)(B) or 7003 with respect to contamination at a site, irrespective of whether they have been sued or found liable yet. See 42 U.S.C. §§ 9607(a), 6972(a)(1)(B), 6973(a) (2000). Under CERCLA § 107, there are four categories of responsible parties who are subject to liability for releases or threatened releases of hazardous substances from a facility: current owners or operators of the facility; past owners or operators at the time hazardous substances were disposed of at the facility; generators or others who arranged for the disposal of hazardous
claims, for contribution or otherwise, to force other responsible parties to share responsibility for cleanup costs at contaminated sites. While some questions remain to be answered around the edges, it is once again fairly clear that a responsible party who is subject to joint and several liability for cleanup costs has a statutory claim under CERCLA by which he can require other responsible parties to bear their equitable shares of the cleanup burden. Thus, because a CERCLA defendant can bring actions for contribution or cost recovery, he may not have to shoulder the entire cleanup burden himself, while other responsible parties avoid liability entirely, just because he had the misfortune of being the one responsible party sued. In addition to providing a whiff of fairness in the Superfund program, the availability of contribution and cost recovery claims by responsible parties is widely credited with promoting settlements and encouraging cleanups of contaminated sites by private parties while preserving governmental resources.

The “imminent hazard” provisions of the Resource Conservation and Recovery Act (RCRA), like CERCLA, are used to force responsible parties to bear the costs of cleaning up contaminated sites. Sections 7003 and 7002(a)(1)(B) authorize the United States and citizens, respectively, to require responsible parties to clean up wastes which may present an “imminent and substantial endangerment” to health or the environment. Defendants in RCRA imminent hazard cases, like CERCLA defendants, generally are subject to strict, retroactive and joint and several liability. But unlike in CERCLA cases, virtually without exception courts have ruled that defendants in RCRA imminent hazard cases do not have a claim under RCRA, for contribution or otherwise, by which they can seek to force other responsible parties to share the cleanup responsibility.


8. Id. §§ 6972(a)(1)(B), 6973(a).


10. See infra Part IV.
By way of illustration, assume a site is contaminated with solvents and presents a threat to health and the environment. The United States, pursuant to CERCLA section 107,\textsuperscript{11} sues Millie, one of many persons who contributed to the solvent contamination at the site, to obtain a judgment making Millie responsible for the costs of cleaning up the site contamination. Millie, pursuant to CERCLA, may file a third-party complaint against other persons responsible for the solvent contamination at the site (e.g., the former site operator, others who generated and disposed of solvents there), and obtain contribution from those other responsible parties for their fair shares of the site cleanup costs.\textsuperscript{12} Secure in the knowledge that she will be able to recoup at least a portion of her costs from other responsible parties via her CERCLA contribution claim, Millie settles with the government and proceeds to perform the necessary cleanup work.

Now assume that the United States chooses to proceed against Millie under RCRA section 7003 instead of CERCLA. The government files suit, seeking to require her to clean up the contamination at the site. According to the prevailing view,\textsuperscript{13} Millie is not allowed to seek contribution under RCRA from other persons who contributed to the contamination, even though they too would be liable to the government under RCRA section 7003. Millie might be able to shift some of her costs to other responsible parties by asserting a claim under CERCLA section 107, though the U.S. Supreme Court has not answered this question yet.\textsuperscript{14} But if we assume that the site is contaminated with gasoline or fuel oil instead of solvents, clearly no CERCLA claim would be available due to CERCLA's petroleum exclusion.\textsuperscript{15} So Millie is left facing the prospect of shouldering the entire cleanup burden.

\textsuperscript{13} See infra Part IV.
\textsuperscript{14} In United States v. Atlantic Research Corp., 127 S. Ct. 2331 (2007), the plaintiff was a responsible party which "voluntarily" incurred cleanup costs, and the Court held that such a responsible party could maintain an action for cost recovery under CERCLA section 107. The Court indicated that a responsible party which was compelled to incur cleanup costs as a result of a CERCLA case would be entitled to recover those costs, pursuant to CERCLA sections 107, 113(f), or both. 127 S. Ct. at 2338 n.6. The Atlantic Research Court did not squarely address whether a responsible party forced to incur cleanup costs pursuant to other authority, such as RCRA's imminent hazard provisions, would have a claim under CERCLA against other responsible parties to recover those costs. See Craig N. Johnston, United States v. Atlantic Research Corp.: The Supreme Court Restores Voluntary Cleanups Under CERCLA, 22 J. ENVTL. L. & LITIG. 313, 335-40 (2007) (discussing issues unresolved by Atlantic Research, including whether a party compelled to clean up a site under state law or federal law other than CERCLA has a claim under CERCLA against other responsible parties).
\textsuperscript{15} 42 U.S.C. § 9601(14) (2000) ("hazardous substance" excludes petroleum, including crude oil and any fraction thereof).
alone. Bereft of better legal options, Millie vigorously defends against
the United States' RCRA section 7003 claim, because otherwise she is
assured of bearing the entire cost of cleanup herself. The United
States incurs more litigation expense, and cleanup of the site is
delayed, unless the government dips further into the treasury and un-
dertakes the cleanup itself.

Why have courts taken a different path in RCRA imminent hazard
cases than in CERCLA cases when determining whether to allow a
defendant to assert a contribution claim against other parties respon-
sible for the site contamination? In general, courts have cited two rea-
sons. One, RCRA, unlike CERCLA, does not expressly provide for
contribution, and courts have invoked U.S. Supreme Court precedents
that disallowed implied contribution claims under certain other fed-
eral statutes to disallow an implied contribution claim under RCRA.
Two, courts have construed the Supreme Court's 1996 decision in
Meghrig v. KFC Western, Inc.,16 which prohibited a private party from
recovering past cleanup costs under RCRA section 7002(a)(1)(B), as
foreclosing a defendant from asserting a claim in the nature of contri-
bution against other responsible parties under RCRA section
7002(a)(1)(B).17

In light of the Supreme Court's decision last year in United States
v. Atlantic Research Corp.18 that once again makes cost allocation
claims among responsible parties broadly available under CERCLA,
this Article re-examines the prevailing view that contribution claims
should not be available to defendants in RCRA imminent hazard
cases. In short, this Article concludes that the refusal to recognize
contribution claims in RCRA imminent hazard cases is both bad law
and bad policy. Part II highlights RCRA's imminent hazard provi-
sions, including their similarities to CERCLA. Because multiple par-
ties can be subject to liability for the same contaminated site under
RCRA's imminent hazard provisions, Part III explores joint and sev-
eral liability and how the common law and CERCLA generally permit
defendants to assert contribution claims against other responsible
parties. Part IV shows that, by contrast, courts generally have re-
fused to recognize a claim for contribution by defendants in RCRA im-
minent hazard cases.

Part V ultimately concludes that RCRA section 7003 authorizes a
claim for contribution in governmental imminent hazard suits, im-
pliedly and as a matter of federal common law, and that RCRA section
7002(a)(1)(B) expressly provides a remedy in the nature of contribu-
tion in RCRA imminent hazard citizen suits. En route, this Article
not only finds Congressional intent to allow contribution for defend-

17. See infra Part IV.
ants in RCRA section 7003 cases, but also detects a flaw in the Supreme Court’s test for implying contribution under federal statutes and taps the roots of contribution to propose a refined approach. Using the Court’s recent CERCLA decision in *Atlantic Research* as a prism, this Article demonstrates how RCRA section 7002(a)(1)(B) expressly authorizes contribution, notwithstanding the Court’s earlier decision in *Meghrig*. Additionally, this Article shows how courts fall prey to the “one-Congress fiction,” by focusing on the presence of an express contribution provision in CERCLA and the absence of such an express provision in RCRA, to the exclusion of more telling indicia of statutory interpretation. A defendant’s ability to force other responsible parties to share the cleanup load should not depend on whether a plaintiff, governmental or private, chose to sue under CERCLA rather than RCRA. If a contribution remedy in RCRA imminent hazard cases were recognized, it would promote fairness, settlements and private party cleanups. Part VI goes on to suggest a framework for addressing issues likely to arise in the context of contribution claims among responsible parties in RCRA imminent hazard cases.

II. RCRA'S IMMINENT HAZARD PROVISIONS

Congress enacted the Resource Conservation and Recovery Act in 1976. Acting in the wake of the Clean Air and Clean Water Acts earlier in the decade, Congress optimistically declared that RCRA “eliminates the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous waste.” RCRA, and regulations promulgated thereunder, establish a cradle-to-grave tracking and management system for hazardous waste, setting standards for generators, transporters, and treatment, storage and disposal facilities, as well as establishing a permit system to enforce such standards. The statute, though, is not exclusively focused on managing and regulating hazardous waste. RCRA's scope

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also includes "solid waste," of which hazardous waste is a subset, and the statute's imminent hazard provisions are designed to protect health and the environment by effectuating the prompt cleanup of contaminated sites by those who contributed to the contamination.24

A. Section 7003 Governmental Actions

Section 7003 of RCRA provides the United States Environmental Protection Agency (EPA) with substantial power to require the cleanup of sites contaminated with hazardous or solid wastes. As part of the statute as originally enacted in 1976, and amended in 1980 and 1984, section 7003 authorizes the EPA to sue any person who has contributed to, or is contributing to, the presence of any solid or hazardous waste that may present an imminent and substantial endangerment to health or the environment. Section 7003 provides, in pertinent part:

Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both.27

In addition to authorizing judicial suit, section 7003 permits EPA to issue administrative orders "as may be necessary to protect public health and the environment."28

23. "Hazardous waste" as defined by RCRA is a subset of the statutory definition of "solid waste." Compare 42 U.S.C. § 6903(5) (definition of "hazardous waste) with § 6903(27) (definition of "solid waste"). Subtitle D of RCRA covers non-hazardous solid waste, though much of the regulation of non-hazardous solid wastes is left to the states. Id. §§ 6951-6956.


27. 42 U.S.C § 6973(a).

28. Id. Failure to comply with such an order can lead to fines of up to $5000 per day. Id. § 6973(b).
1. Elements

Patterned after other "imminent and substantial endangerment" provisions in other federal statutes, section 7003 is a powerful tool by which liable parties can be forced to abate the endangerment, inter alia, by cleaning up the waste. Courts have identified three fundamental elements for a government action under section 7003: (1) conditions may present an imminent and substantial endangerment to health or the environment; (2) the endangerment arises from the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste; and (3) the defendant has contributed or is contributing to such handling, storage, treatment, transportation or disposal. In most cases, the government has had little trouble establishing these elements.

a. Imminent and Substantial Endangerment

The phrase "imminent and substantial endangerment" arguably was intended to make sure that the EPA did not use its powers under section 7003 routinely. However, focusing on the preceding words "may present"—and the fact that Congress in 1980 substituted "may present" for the words "is presenting" in the 1976 original—courts have interpreted the "imminent and substantial endangerment" element of a section 7003 claim expansively. Neither certainty nor proof of actual harm has been required; merely a showing of a risk of harm seems to suffice. There need not be an emergency in order for there to be an "imminent" endangerment. Rather, it has been found that even though the harm may not be realized for years in the future, an endangerment is "imminent" if the current conditions indicate that

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31. For example, a 1976 Senate report notes that section 7003 was envisioned as a means of providing "emergency authority." S. Rep. No. 94-988, at 16 (1976). See Me. People's Alliance v. Mallinckrodt, Inc., 471 F.3d 277, 286–95 (1st Cir. 2006), cert. denied, 128 S. Ct. 93 (2007) (noting merit in some arguments made by defendant that "imminent and substantial endangerment" should connote a higher standard of risk or harm, but ultimately rejects the arguments).
there may be a future risk of harm. The level of potential harm, like the degree of risk, need not be quantified.

b. Handling, Storage, Treatment, Transportation or Disposal of Solid or Hazardous Waste

RCRA has both statutory and regulatory definitions of "hazardous waste" and "solid waste." The focus of Subtitle C of RCRA is on "hazardous waste," as defined in the regulations, which is a subset of the regulatory definition of "solid waste." As a result, most of the RCRA program's complex and detailed requirements for those who generate, transport, treat, store or dispose of "hazardous waste" depend upon there being a "listed" or "characteristic" hazardous waste within the meaning of the RCRA regulations.

But the scope of section 7003 goes far beyond "hazardous waste" and "solid waste" as defined under the regulations. For purposes of section 7003, all materials that meet the broad statutory definition of "solid waste" are included. "Solid waste" as defined by the statute includes virtually all "discarded" materials of any type—including semi-solids, liquids and containerized gases. Wastes which meet the statutory definition of "hazardous waste" are included within the statutory definition of "solid waste."

41. Id. § 6903(5), (27) (defining hazardous and solid waste respectively). Of course, wastes that meet the regulatory definitions of "solid waste" and "hazardous waste" are also subject to section 7003. See 40 C.F.R. § 261.1(b)(2) (2007) (Section 7003 covers more than "solid" and "hazardous" wastes as defined under the regulations). Wastes that have been exempted from regulation under subtitle C of RCRA nevertheless may be subject to required remediation under section 7003, because they are within the statutory definition of "solid waste." Examples include Bevill wastes, such as fly ash and mining wastes. 42 U.S.C. § 6921(b)(3)(A). "Solid waste" under RCRA § 7003 can be even broader than "hazardous substances" under CERCLA, particularly due to CERCLA's petroleum exclusion. See Id. § 9601(14) (definition of "hazardous substance").
The terms “storage,” “treatment,” “transportation” and “disposal” all have fairly broad definitions under RCRA, but section 7003 also uses the undefined term “handling,” which has been interpreted even more broadly to include anyone who deals with or has responsibility for waste. Thus, any “handling” of any “solid waste”—that is, virtually any involvement with virtually any discarded material—can satisfy this element of liability under RCRA section 7003.

c. Contributed or Contributing to

Prior to 1984, there was a split of authority as to whether section 7003 covered past acts and inactive sites. Even the EPA was of two minds on the subject: in 1978 it interpreted section 7003 as not being applicable to inactive sites, but in 1980 the agency reversed field and interpreted section 7003 as authorizing cleanups at inactive sites. But Congress’ 1984 amendments added language which clarified that the government could use section 7003 to require abatement of current conditions that arose from past acts. It is now clear that RCRA section 7003 can be used to require cleanups at any site where there may be an imminent and substantial endangerment, irrespective of whether operations at the site are still active.

Congress has expressed its intent that the phrase “contributing to” should be liberally construed. Section 7003 is a strict liability provision, imposing liability upon persons regardless of fault or negligence. Although “contributing to” necessitates some degree of

causation, the level of causation required to establish liability under section 7003 generally has been fairly low. For example, a landowner who failed to abate an existing hazardous condition of which he was aware was held to have "contributed to" the endangering condition.50 "Any person" who has contributed to or is contributing to the presence of waste which may present an imminent and substantial endangerment is subject to liability under section 7003.51 Such persons expressly may include past or present generators and transporters of waste, and past or present owners or operators of treatment, storage or disposal facilities.52

2. Relief

Relief the government may obtain under section 7003 expressly includes the power "to restrain" and to order "such other action as may be necessary."53 Accordingly, the government has obtained a wide range of injunctive relief under section 7003. This relief includes not only prohibitory injunctions but also mandatory injunctions requiring a liable person to abate the endangering conditions by investigating and remediating property contaminated with solid or hazardous wastes.54

The power and breadth of relief afforded by section 7003 was underscored by the Third Circuit in United States v. Price.55 The United States sought an injunction requiring the current and former owners and operators of a New Jersey landfill to fund a governmental study of groundwater contamination around the landfill. Although it affirmed the district court's denial of a preliminary injunction, the Third Circuit made clear that section 7003 afforded courts expansive powers to grant equitable relief where a contaminated site poses a risk of harm to health or the environment.56 The Third Circuit specifically rejected arguments that the court's equitable powers under section 7003 could not afford relief that would cause a defendant to spend money, fund an

50. United States v. Price, 688 F.2d 204 (3d Cir. 1982). However, current owners who acquired contaminated properties after the contaminating activities ceased have been held not liable, at least where the owners were not aware of the contamination at the time of acquisition. Marriott Corp. v. Simkins Indus., Inc., 929 F. Supp. 396 (S.D. Fla. 1996); First San Diego Prop. v. Exxon Co., 859 F. Supp. 1313 (S.D. Cal. 1994).
52. Id.
53. Id.
55. 688 F.2d 204 (3d Cir. 1982).
investigation, or reimburse the government for cleanup work already undertaken.\textsuperscript{57}

Subsequently, the Senate report on the 1984 amendments to RCRA cited \textit{Price} with approval and quoted liberally from the Third Circuit's opinion. The report noted that section 7003 is "intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate risks posed by toxic waste."\textsuperscript{58}

As a result, some courts have invoked their equity powers to require responsible parties to fund the United States' future cleanup work,\textsuperscript{59} and to grant the United States restitution of past costs the government incurred to clean up endangering conditions posed by wastes, even for costs incurred prior to the government filing suit.\textsuperscript{60}

3. \textit{Overlap with CERCLA}

So the United States pursuant to section 7003 can, via suit or administrative order, require a defendant to investigate and remediate a site contaminated with solid waste, to pay toward the government's future cleanup work, and perhaps even to reimburse past costs expended by the government to investigate and remediate such a site. As such, there are considerable similarities between section 7003 and the government's authority under CERCLA.

CERCLA was enacted in 1980, just four years after Congress thought it had closed the "last remaining loophole" in environmental law by passing RCRA.\textsuperscript{61} Prompted by Love Canal, where chemicals

\begin{thebibliography}{9}
\bibitem{57} Id. at 213-14.
\end{thebibliography}
from an old waste dump began oozing through a residential community near Niagara Falls, New York that had been constructed on the site, CERCLA was enacted primarily to fund the investigation and cleanup of sites where hazardous substances formerly had been disposed.\textsuperscript{62} CERCLA allows the government to bring suit to recover past and future costs of addressing releases of hazardous substances at a site under CERCLA section 107, as well as to issue an administrative order mandating a cleanup pursuant to CERCLA section 106 if the site may present an imminent and substantial endangerment.\textsuperscript{63} The statute makes four categories of parties strictly liable: (1) current owners and operators of the facility; (2) past owners and operators at the time hazardous substances were disposed of at the facility; (3) generators or others who arranged for the disposal of hazardous substances at the facility; and (4) transporters of hazardous substances to the facility.\textsuperscript{64} One of CERCLA's aims was to provide for the cleanup of contaminated sites by requiring polluters to pay rather than the public.\textsuperscript{65}

There is considerable overlap between CERCLA and RCRA, and that is certainly true with respect to section 7003 and CERCLA sections 106 and 107. At many sites the same contamination may constitute both releases of "hazardous substances" under CERCLA and "solid wastes" presenting an imminent and substantial endangerment under RCRA, thus giving rise to claims under either CERCLA or RCRA section 7003. Congress and the courts have made clear that RCRA section 7003 can apply to inactive sites as well as ongoing operations,\textsuperscript{66} and likewise CERCLA has been applied to active as well as


\textsuperscript{63} 42 U.S.C. §§ 9606(a), 9607(a) (2000). Under CERCLA section 106, the United States can seek injunctive relief judicially as well, id. § 9606(a), but seldom does.


abandoned sites. Indeed, the United States sometimes takes actions against a defendant pursuant to RCRA section 7003 and CERCLA at the same site simultaneously. Courts have recognized that the legislative purposes, core liability issues and responsible parties under RCRA section 7003 and CERCLA are similar.

Acknowledging the overlap, the EPA has issued a guidance document for its regions to help decide when to use CERCLA and when to use section 7003. For example, CERCLA imposes harsher penalties for violations of orders and contains an express bar against pre-enforcement review. The guidance emphasizes that the regions should consider using section 7003 instead of CERCLA where the pollutants are statutory “solid wastes” under RCRA but are outside of CERCLA’s definition of “hazardous substances.” The most important example of such a pollutant is petroleum, which is excluded from “hazardous substances” under CERCLA, but which if spilled or otherwise discarded is a “solid waste” under RCRA. As a result, many RCRA imminent hazard cases involve petroleum contamination.

B. Section 7002(a)(1)(B) Citizen Suits

Many environmental statutes contain citizen suit provisions that allow suits by “private attorney generals,” either against persons who have violated the requirements of the law, or against the EPA for failure to discharge a non-discretionary duty thereunder. When enacted in 1976, section 7002 of RCRA provided for such citizen suits against persons alleged to be in violation of any permit, regulation or other requirement of RCRA, and against the Administrator of the EPA.
where there is an alleged failure to perform an act or duty under RCRA which is not discretionary.\textsuperscript{76} These traditional citizen suit provisions are now codified at sections 7002(a)(1)(A) and 7002(a)(2), respectively.\textsuperscript{77}

In 1984, though, Congress added a third, unique type of citizen suit to RCRA.\textsuperscript{78} Patterned after section 7003, section 7002(a)(1)(B) authorizes "any person" to sue anyone who has contributed or is contributing to the presence of solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment:

\begin{enumerate}[(a)]
    \item In general
        \begin{enumerate}[(1)]
            \item Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—

        \end{enumerate}
    \end{enumerate}

\textsuperscript{80}Consistent with section 7003, section 7002(a) provides a court with jurisdiction "to restrain any person who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment . . . .\textsuperscript{79}

Section 7002(b) establishes certain pre-conditions for bringing a citizen suit under section 7002(a)(1)(B).\textsuperscript{81} At least 90 days prior to commencing suit, a citizen suit plaintiff must give notice of the endangerment to the EPA Administrator, the state in which the endangerment occurs, and the putative defendants.\textsuperscript{82} Section 7002(b) also sets forth a number of limitations intended to assure that such citizen suits do not disrupt ongoing federal or state actions under RCRA or CERCLA. For example, no citizen suit may be commenced pursuant to section 7002(a)(1)(B) where the United States is already addressing the endangerment by diligently prosecuting an action under RCRA

\begin{itemize}
    \item \textsuperscript{76} Pub. L. No. 94-580, § 7002(a), 90 Stat. 2795, 2825 (1976).
    \item \textsuperscript{77} 42 U.S.C. § 6972(a)(1)(A), (a)(2) (2000).
    \item \textsuperscript{79} 42 U.S.C. § 6972(a)(1)(B) (2000).
    \item \textsuperscript{80} Id. § 6972(a).
    \item \textsuperscript{81} Id. § 6972(b)(2).
    \item \textsuperscript{82} Id. § 6972(b)(2)(A). Additionally, the plaintiff must serve copies of the complaint upon the Attorney General of the United States and the Administrator of the EPA. Id. § 6972(b)(2)(F).
\end{itemize}
section 7003 or CERCLA section 106, is engaged in a CERCLA removal or remedial action, or has issued an order under CERCLA section 106 or RCRA section 7003 requiring a liable party to conduct a removal or remedial action.\(^{83}\) Similarly, a section 7002(a)(1)(B) citizen suit is barred where a state is diligently prosecuting its own citizen suit under section 7002(a)(1)(B) or is engaged in a removal or remedial action under CERCLA with respect to the endangerment.\(^{84}\)

The apparent impetus for the 1984 addition of this unique imminent hazard citizen suit power was Congressional concern that the EPA during the early 1980s lacked the resources and will to bring actions itself pursuant to section 7003. Hence, Congress conferred the right upon private citizens to sue to abate imminent and substantial endangersments “pursuant to the standards of liability established under section 7003,” where the EPA failed to act.\(^{85}\)

1. Elements

Courts generally have heeded Congress’ instruction and interpreted section 7002(a)(1)(B) co-extensively with section 7003. The three main elements for an imminent hazard claim under section 7003 are the same core elements necessary to maintain a citizen suit under section 7002(a)(1)(B): (1) conditions at the site may present an imminent and substantial endangerment; (2) the endangerment stems from the past or present handling, storage, treatment, transportation or disposal of any hazardous or solid waste; and (3) the defendant has contributed or is contributing to such handling, storage, treatment, transportation or disposal.\(^{86}\) Courts have liberally construed these elements in citizen suits as well, frequently citing cases decided under section 7003 and legislative history pertaining to section 7003 as authority.\(^{87}\)

By its terms, section 7002(a) allows “any person” to commence a citizen suit, including an imminent hazard action under section 7002(a)(1)(B).\(^{88}\) Accordingly, even if the plaintiff contributed to the endangerment and itself would be a responsible party under RCRA sections 7003 or 7002(a)(1)(B), courts consistently have allowed such a

\(^{83}\) Id. § 6972(b)(2)(B). This further illustrates that RCRA’s imminent hazard provisions and CERCLA are overlapping and similar.

\(^{84}\) Id. § 6972(b)(2)(C).


\(^{86}\) See, e.g., PMC Inc. v. Sherwin-Williams Co., 151 F.3d 610 (7th Cir. 1998).


non-innocent plaintiff to maintain a citizen suit under section 7002(a)(1)(B) against another responsible party.89

As with all citizen suit provisions, a plaintiff suing under RCRA section 7002(a)(1)(B) must establish constitutional standing by demonstrating injury in fact, causation and redressability.90 While plaintiffs typically have little trouble satisfying these Article III requirements, occasionally an individual or organization will be barred from maintaining a section 7002(a)(1)(B) claim due to lack of standing.91

2. Relief

Section 7002(a), like section 7003, expressly authorizes a court “to restrain” persons who have contributed to or are contributing to the presence of waste which may present an imminent and substantial endangerment to health or the environment, and to order such persons “to take such other action as may be necessary.”92 As in section 7003 cases, courts can and do grant mandatory injunctions under section 7002(a)(1)(B) to remediate wastes which may present an imminent and substantial endangerment.93

One area where courts construing section 7002(a)(1)(B) have diverged from precedent under section 7003, however, is with respect to restitution. As mentioned above, some courts pursuant to section 7003 have allowed the United States to recover its past costs incurred to clean up a site contaminated with solid or hazardous wastes.94 By contrast, the United States Supreme Court in Meghrig v. KFC Western, Inc.95 held that section 7002(a)(1)(B) does not authorize a citizen suit plaintiff to recover cleanup costs incurred prior to initiating suit.


91. For example, a plaintiff was found to lack injury in fact where he failed to show a present connection—economic, aesthetic or recreational—to the area allegedly posing the endangerment. Pape v. Lake States Wood Pres., Inc., 948 F. Supp. 697 (W.D. Mich. 1995). See also Citizens for a Better Env't v. Caterpillar, Inc., 30 F. Supp. 2d 1053 (C.D. Ill. 1998) (holding that plaintiff failed to establish causation and redressability).


94. See supra note 60.

Plaintiff KFC Western discovered that its property was contaminated with petroleum and spent $211,000 removing and disposing of oil-contaminated soils. Three years later, plaintiff initiated a citizen suit under section 7002(a)(1)(B) against Meghrig, a prior owner of the site who allegedly had contributed to the contamination, seeking reimbursement of its cleanup costs. Reversing a Ninth Circuit ruling upholding KFC Western's complaint, the U.S. Supreme Court in Meghrig pointed to two aspects of section 7002(a)(1)(B) to support its holding that a private plaintiff cannot use section 7002(a)(1)(B) to recover cleanup costs incurred prior to commencing suit. First, only where conditions "may present an imminent and substantial endangerment" will a citizen suit lie—if the site already is cleaned up, the Court reasoned, it no longer could present an imminent danger. Second, a plaintiff under section 7002(a)(1)(B) can seek a mandatory injunction for a defendant to "take action," or a prohibitory injunction to "restrain" a defendant, but according to the Court section 7002(a)(1)(B) does not authorize equitable restitution for past costs.

In so holding, the Court compared section 7002(a)(1)(B) with CERCLA, which expressly provides for cost recovery and contribution by private parties under sections 107(a) and 113(f)(1). "Congress thus demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and that the language used to define remedies under RCRA does not provide that remedy." Rejecting arguments by plaintiff, and the United States as amicus curiae, that a private party could seek equitable restitution for pre-complaint cleanup costs where the site continued to pose an imminent endangerment at the time the suit was initiated, the Court emphasized that where Congress has provided "elaborate enforcement provisions" for remedying violation of a federal statute, "as Congress has done with RCRA and CERCLA," it cannot be assumed that Congress intended to authorize additional implied judicial remedies for private citizens. As discussed infra, although RCRA section 3008 has relatively elaborate enforcement provisions, including compliance orders, civil penalties and criminal sanctions of up to fifteen years imprisonment, section 3008 is inapplicable to RCRA's imminent hazard provisions. 42 U.S.C. § 6928 (2000); United States v. Waste Indus., Inc., 734 F.2d 159, 164 (4th Cir. 1984). RCRA sections 7002(a) and 7003(a), by contrast, outline broad equitable powers "to restrain[,] . . . to take such other action as may be necessary, or both . . . ." 42 U.S.C. §§ 6972(a), 6973(a) (2000).
a particular remedy or remedies, a court must be chary of reading others into it."101

The Meghrig Court left open whether a citizen suit plaintiff could recover costs incurred post-complaint where the site continued to pose an imminent and substantial endangerment at the time suit was initiated.102 Although some courts and commentators have concluded that such post-complaint costs should be recoverable under section 7002(a)(1)(B),103 subsequent decisions by some other courts have ruled that the language and rationale of Meghrig serve to deny restitution for such post-complaint costs as well.104 As the Seventh Circuit explained in denying recovery of costs incurred by a private plaintiff after initiating a section 7002(a)(1)(B) citizen suit, the Meghrig opinion "emphasizes that in interpreting RCRA we need to take Congress at its word and that we must be 'chary of reading' additional remedies into a statute that, like RCRA, expressly provides for a particular remedy."105

101. Meghrig, 516 U.S. at 488 (quoting Transamerica Mortgages Advisors, Inc., v. Lewis, 444 U.S. 11, 19 (1979)). The Meghrig Court also made three other points. First, there is no statute of limitations in RCRA, whereas CERCLA section 113(g)(2) contains limitation periods governing suits for cost recovery. Second, RCRA does not expressly require that costs being sought are reasonable, whereas CERCLA section 107(a)(4) expressly provides that costs recovered by private parties must be "consistent with the national contingency plan." Third, the Court reasoned that if RCRA were designed to compensate private parties for past cleanup costs, the RCRA provisions barring citizen suits unless there has been ninety days notice and the government is not already taking action would be "wholly irrational," because they would allow only private parties at sites with waste problems that were insufficiently severe to attract the attention of government officials to recover past costs, while private parties at sites with substantial problems would be foreclosed from recovering pasts costs. Id. at 486–87.

102. Id. at 488.


105. Avondale, 170 F.3d at 694. In Avondale the Seventh Circuit stated that "Congress deliberately limited RCRA's remedies to injunctive relief—more specifically, injunctive relief obtained before the property is cleaned up, while danger to health or the environment is 'imminent and substantial.' Neither Meghrig nor RCRA can be read to allow a party to recover cleanup costs." Id. The dissent, though, noted that the Meghrig opinion left open the issue of recovery of post-complaint costs, that the plaintiff in Avondale could have obtained an injunction at the time it initiated suit and should not be penalized for undertaking the cleanup while suit was pending, and that the language of section 7002(a) allowing the court to "order such person to take such other action as may be neces-
Because the terms of sections 7002(a) and 7003 are virtually identical with respect to the types of relief available, it is questionable whether post-Meghrig the United States, pursuant to section 7003, can obtain reimbursement for past cleanup costs incurred. The EPA in published guidance takes the position that Meghrig's bar on recovery of pre-complaint costs under section 7002(a)(1)(B) should not be extended to section 7003 actions. However, at least one court has relied on Meghrig to rule that the United States cannot recover cleanup costs under section 7003.

Despite the unavailability of cost recovery for private plaintiffs, the prospect for injunctive relief and attorney fees makes section 7002(a)(1)(B) a powerful and popular tool for parties seeking to clean up contaminated property. Section 7002(e), applicable to all RCRA citizen suits, provides that a court "may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party." Illustrative of the power of a RCRA citizen suit under section 7002(a)(1)(B) to force remediation of a contaminated site is Interfaith Community Organization v. Honeywell International, Inc. Wastes from former operations by Honeywell's corporate predecessor were contributing to contamination of the adjacent Hackensack River in New Jersey, and a citizen group filed suit under RCRA section 7002(a)(1)(B) against Honeywell. In a decision affirmed by the Third Circuit, the federal district court found that the waste at the site constituted an imminent and substantial endangerment and issued an injunction that required Honeywell to excavate and remove about 1.5 million tons of chromium-contaminated soil and waste, at an estimated cost of more than $400 million; to remediate contaminated sediments in the river; and to further investigate groundwater.

107. OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, supra note 30, at 22–23.
108. United States v. Apex Oil Co., 438 F. Supp. 2d 948 (S.D. Ill. 2006). In Apex, the court held that the government's section 7003 action against a refinery owner was not a claim dischargeable in bankruptcy under 11 U.S.C.A. § 101(5) (West 2000 & Supp. 2008), because section 7003 does not authorize recovery of monetary relief. The court relied on Meghrig, emphasizing that sections 7002(a)(1)(B) and 7003 are "nearly identical" and that the wording of the language authorizing relief is "the same." 438 F. Supp. 2d at 953. It should be noted that in Apex it was the United States which was arguing that the claim should not be discharged because it was seeking solely injunctive relief to force the defendant to clean up contamination at the refinery; it was the defendant which was contending that section 7003 gave the United States the right to recover cleanup costs in lieu of injunctive relief.
contamination. In a separate opinion, the district court assessed approximately $12 million in attorney fees and litigation costs against Honeywell.

3. Overlap with CERCLA

As with government suits under CERCLA and RCRA section 7003, there is a great deal of overlap between private actions under CERCLA section 107 and RCRA section 7002(a)(1)(B). The elements of a private CERCLA section 107 action for response costs are virtually identical to the elements of a governmental CERCLA claim. Hence, just as the same site may allow the United States to sue under CERCLA and RCRA section 7003, private parties sometimes can bring both CERCLA section 107 and RCRA section 7002(a)(1)(B) claims at the same contaminated site versus the same defendants.

A private plaintiff under CERCLA section 107 can recover past costs incurred to investigate and clean up contamination, unlike under RCRA section 7002(a)(1)(B). In several ways, though, RCRA citizen suits can be even more attractive for plaintiffs than CERCLA actions. A plaintiff in a RCRA section 7002(a)(1)(B) citizen suit can recover its litigation expenses, including attorney and expert fees. By contrast, litigation expenses such as attorney fees are not recoverable by private plaintiffs in CERCLA actions. Under CERCLA section 107, the plaintiff must expend some response costs before bringing a cost recovery action, and the relief available is limited to recovery of past costs and a declaratory judgment requiring a defendant to reimburse future response costs that the plaintiff incurs. That is, under CERCLA a private plaintiff must conduct the cleanup itself and obtain reimbursement from the defendant.

111. Id. Indeed, the Third Circuit stated that the lower court had erred by using a standard that was more stringent than required in determining whether there is an imminent and substantial endangerment. Interfaith Cmty., 399 F.3d at 259.


113. 42 U.S.C. § 9607(a) (2000). One exception is that a private plaintiff under CERCLA section 107 must show that its costs were “necessary” and “consistent with the national contingency plan,” whereas in a governmental cost recovery action under CERCLA section 107, the defendant has the burden of showing that the response costs were incurred “inconsistent with the national contingency plan.” Id.


117. “An action may be commenced under section 107 for recovery of costs at any time after such costs have been incurred.” 42 U.S.C.§ 9613(g)(2) (2000). CERCLA section 113(g)(2) also expressly authorizes a “declaratory judgment on liability for response costs.” Id.; see In re Dant & Russell, Inc., 951 F.2d 246 (9th Cir. 1991)
7002(a)(1)(B) allows a private plaintiff to obtain an injunction forcing the defendant to undertake the cleanup; plaintiff need not expend any out-of-pocket cleanup costs.\textsuperscript{118}

RCRA section 7002(a)(1)(B) is particularly important and useful where a CERCLA claim is unavailable to the plaintiff. As mentioned above, RCRA citizen suits are frequently initiated at sites contaminated by petroleum, including oil, gasoline and diesel fuel, because petroleum is expressly excluded from the scope of "hazardous substances" under CERCLA.\textsuperscript{119} Also, RCRA citizen suits became more popular in the wake of \textit{Cooper Industries, Inc. v. Aviall Services, Inc.}\textsuperscript{120} As a result of that watershed 2004 Supreme Court decision, responsible parties under CERCLA could no longer sue under CERCLA section 113(f) unless they had been sued under CERCLA sections 106 or 107 or they had settled under CERCLA with the government in an administrative or judicially approved settlement.\textsuperscript{121} Under pre-\textit{Aviall} precedents in many circuits, responsible parties could not maintain an action under CERCLA section 107.\textsuperscript{122} Such courts had held that only innocent private plaintiffs could maintain an action under CERCLA section 107; responsible parties could only sue under section 113(f). Post-\textit{Aviall} this combination potentially left some responsible parties without a CERCLA remedy and led some commentators to advocate the use of RCRA section 7002(a)(1)(B) for such responsible parties facing cleanups.\textsuperscript{123} The Supreme Court's recent decision in

\begin{footnotesize}


\textsuperscript{120} 543 U.S. 157 (2004).

\textsuperscript{121} Id. at 165–67; 42 U.S.C. § 9613(f)(1), (3) (2000).

\textsuperscript{122} See, e.g., Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R., Co. 142 F.3d 769 (4th Cir. 1998); Bedford Affiliates v. Sills, 156 F.3d 416 (2d Cir. 1998); New Castle County v. Halliburton NUS Corp., 111 F.3d 1116 (3d Cir. 1997); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298 (9th Cir. 1997); United States v. Colo. & E. R.R. Co., 50 F.3d 1530 (10th Cir. 1995); United Techs. Corp. v. Browning-Ferris Indus., 33 F.3d 96 (1st Cir. 1994).

\textsuperscript{123} See, e.g., Nicholas J. Wallwork, et al., \textit{A Consideration of The RCRA Citizen Suit Option as a Tool for Business to Shift Environmental Remediation Liability to More Culpable Entities}, 21 TOXICS L. REP. 37 (2006); Carter E. Strang, \textit{The Re-
Atlantic Research\textsuperscript{124} has re-opened the courthouse door for many responsible parties to sue under CERCLA section 107, but it remains unclear exactly how widely the door has swung open.\textsuperscript{125}

Contaminated properties, of course, can give rise to potential state common law claims such as nuisance, trespass or negligence. In many instances, however, state law is inadequate to address the problem. Common law claims often falter due to causation hurdles, statutes of limitations, the reasonableness or benefits of defendants' conduct, and restrictions on who can assert the claim, the measure of damages and the availability of injunctive relief.\textsuperscript{126} The equitable powers and strict, retroactive liability scheme of RCRA section 7002(a)(1)(B) offer a claim and remedy at contaminated sites where neither may be viable at common law.

III. MULTIPLE RESPONSIBLE PARTIES

A wide swath of persons may be liable under RCRA sections 7003 or 7002(a)(1)(B). Any person who has contributed or is contributing to the presence of solid or hazardous waste which may present an imminent and substantial endangerment is subject to liability.\textsuperscript{127} RCRA expressly includes past and present generators, transporters, owners and operators as among those who may be liable.\textsuperscript{128} Thus, it is not uncommon for there to be multiple parties subject to liability under RCRA's imminent hazard provisions at the same contaminated site.\textsuperscript{129}

\textsuperscript{125} For instance, the Atlantic Research opinion focused on allowing responsible parties who voluntarily clean up to sue under CERCLA section 107 for recovery of expenses they incur. Section 113(f), the Court said, would be available for reimbursement of costs paid to the government as a result of a suit under CERCLA section 106 or section 107. 127 S. Ct. at 2337–38, n.6. The Court left unclear, inter alia, whether a liable party who is forced to perform work or pay costs pursuant to a unilateral administrative order under CERCLA section 106 or some other statute, such as RCRA section 7003, could maintain an action for cost recovery under CERCLA section 107 or could seek reimbursement under CERCLA section 113(f). See Craig N. Johnston, United States v. Atlantic Research Corp.: The Supreme Court Restores Voluntary Cleanups Under CERCLA, 22 J. ENVTL. L. & LITIG. 313, 335–40 (2007).
\textsuperscript{126} See PERCIVAL, ET AL., supra note 62, at 75–76, 87; Ronald G. Aronovsky, Federalism and CERCLA: Rethinking the Role of Federal Law in Private Cleanup Cost Disputes, 33 ECOLOGY L.Q. 1, 71–79 (2006); see also KFC W., Inc. v. Meghrig, 49 F.3d 418, 523–24 n.6 (9th Cir. 1995), rev’d, 516 U.S. 479 (1996) (recognizing inadequacy of state law claims for plaintiff).
\textsuperscript{128} Id.
A. Joint and Several Liability

The essence of joint and several liability is that the plaintiff may sue and recover the full amount of relief from any one of the jointly and severally liable parties.\textsuperscript{130} By contrast, if a defendant's liability is merely several, the plaintiff may only recover from that defendant its share of the plaintiff's damages.\textsuperscript{131} The common law widely imposes joint and several liability among tortfeasors whose conduct causes indivisible harm.\textsuperscript{132}

The terms of the statute do not expressly address whether persons liable under RCRA sections 7003 or 7002(a)(1)(B) are subject to joint and several liability. Despite the absence of statutory language so specifying, courts routinely have held that section 7003 imposes joint and several liability upon defendants in favor of the United States. Illustrative is United States \textit{v.} Conservation Chemical Co.,\textsuperscript{133} in which the court ruled that multiple generator and owner defendants would be subject to joint and several liability under RCRA section 7003, as well as under CERCLA section 107. Citing Price and legislative history instructing that the court has broad authority under section 7003 to grant equitable relief necessary to eliminate endangerments posed by toxic wastes, the court held that Congress "has authorized the imposition of joint and several liability to ensure complete relief."\textsuperscript{134} Moreover, citing legislative history indicating that Congress intended section 7003 to be a codification and expansion of the common law of public nuisance,\textsuperscript{135} the court reasoned that "Congress must also have intended for joint and several liability to be applied where the injury is indivisible."\textsuperscript{136} Consistent with the common law, if the defendant can demonstrate that the harm is divisible and that there is a reasonable basis of apportionment, the defendant will be responsible only for its own contribution to the harm.\textsuperscript{137}

In citizen suits under section 7002(a)(1)(B), courts similarly have held that a defendant's liability is joint and several. Thus, although

\begin{itemize}
  \item \textsuperscript{130} \textit{Restatement (Third) of Torts: Apportionment of Liability} § 10 (2000).
  \item \textsuperscript{131} \textit{Id.} § 11.
  \item \textsuperscript{132} \textit{See Restatement (Second) of Torts} §§ 433A, 875 (1965, 1979).
  \item \textsuperscript{133} 619 F. Supp. 162 (W.D. Mo. 1985).
  \item \textsuperscript{134} \textit{Id.} at 199 (citing Price, 688 F.2d 204, 213–14 (3d Cir. 1982); S. Rep. No. 98-284, at 59 (1984)).
  \item \textsuperscript{136} \textit{Id.} Accord United States \textit{v.} Ottati & Goss Inc., 630 F. Supp. 1361 (D.N.H. 1985) (citing \textit{Restatement (Second) of Torts} § 433A). \textit{But see United States \textit{v.} Stringfellow, No. CV-83-2501-MML, 1984 WL 3206, at *5–7 (C.D. Cal. 1984) (holding that joint and several liability is not appropriate for mandatory injunctive relief under RCRA section 7003 or CERCLA section 106 because court must specify the steps to be taken and the party to take them).}
  \item \textsuperscript{137} \textit{See Restatement (Second) of Torts} § 433A (1965); \textit{Conservation Chem.}, 619 F. Supp. at 199.
\end{itemize}
some of the contamination may be attributable to other contributors, a liable defendant will be required to perform the entire remedy for the site where the harm is indivisible. Joint and several liability for defendants is not necessarily the rule, however, where the plaintiff also is a responsible party. In at least one case, the court permitted the plaintiff, a responsible party, to maintain an action under section 7002(a)(1)(B) but refused to hold the defendants jointly and severally liable for contamination to which the plaintiff had contributed.

The CERCLA experience with respect to joint and several liability largely parallels that of RCRA's imminent hazard provisions. Given the broad categories of responsible persons under CERCLA section 107, it is quite common for multiple persons to be liable under CERCLA at the same contaminated site. Although CERCLA is silent with respect to whether responsible persons are subject to joint and several liability or are merely severally liable, courts routinely have found that CERCLA imposes joint and several liability upon responsible parties, at least to the government and innocent private plaintiffs. This is so despite somewhat ambiguous legislative history. Explicit references to joint and several liability appeared in earlier versions of the bill that became CERCLA, but were deleted from the final version.

Thus, a single defendant at a CERCLA landfill site may be subject to joint and several liability for all of the response costs incurred and to be incurred at the site, even though numerous other responsible parties also contributed to the contamination, unless the defendant

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142. See United States v. Atl. Research Corp., 127 S. Ct. at 2338-39, n.7 (assuming, without deciding, that section 107(a) provides for joint and several liability). The availability of joint and several liability for a plaintiff under CERCLA § 107 was one of the reasons that led most courts, pre-Aviall, to restrict claims for responsible party plaintiffs to section 113(f), which expressly provides for allocation of costs among liable parties. See, e.g., Cooper Indus., Inc. v. Aviall Serv., Inc., 543 U.S. 157, 169 (2004) (collecting cases); 42 U.S.C. § 9613(f)(1) (2000).

143. See 126 CONG. REC. 30932 (Nov. 24, 1980). A key Congressional sponsor explained that unresolved issues of liability, such as joint and several liability, should be resolved by "traditional and evolving principles of common law." Id. (statement of Sen. Randolph). For a discussion of CERCLA's legislative history regarding joint and several liability, see United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805-08 (S.D. Ohio 1983); HYSON, supra note 65, at 16.
can establish that the harm it caused is divisible. The burden of divisibility has been a heavy one, and defendants are seldom successful in showing divisibility.

B. Contribution Under Common Law and CERCLA

The harsh consequences of joint and several liability can be ameliorated by allowing a defendant to bring a claim for contribution against other responsible parties. The essence of contribution is that where multiple persons are liable to the same plaintiff for the same harm, one liable party who discharges the common liability has a claim against the other liable parties for the amount he has paid in excess of his fair share of the common liability. Contribution has long been recognized in courts of equity, but historically was not generally available at common law. The common law rule against contribution among joint tortfeasors had its origin in Merryweather v. Nixan, a 1799 English case in which contribution was denied to an intentional wrongdoer. Subsequent English cases prohibited contribution for intentional wrongdoers, but they generally allowed contribution for defendants held liable in cases of negligence and other unintentional acts. Early American cases tended to follow the same dichotomy. However, the origin of the rule was soon lost, and for many years United States courts widely prohibited contribution among all tortfeasors, even in cases of mere negligence. During the 20th Century, spurred by scholars who decried the injustice of a rule banning contribution for defendants held jointly and severally liable for non-intentional acts, the vast majority of states authorized a right of con-

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144. See Restatement (Second) of Torts §§ 433A, 875 (1965, 1979); Chem-Dyne Corp., 572 F. Supp. at 810.
145. See, e.g., United States v. Alcan Aluminum Corp., 315 F.3d 179 (2d Cir. 2003); see also Restatement (Second) of Torts § 433A (1965) (allowing divisibility only where two distinct harms exist or where the contribution of each cause to a single harm can be reasonably determined).
150. Id. Compare Peck v. Ellis, 2 Johns. Ch. 131 (N.Y. Ch. 1816) (no contribution for willful misconduct) with Thweatt's Admr v. Jones, 328 Va. (1 Rand.) (1825) (contribution for negligence).
tribution among tortfeasors, either judicially or by statute. The modern view of contribution is reflected by the *Restatement (Second) of Torts* section 886A, which provides for a right of contribution when two or more persons become liable in tort to the same person for the same harm. The right of contribution exists only in favor of a tortfeasor who has discharged the plaintiff's claim by paying more than his equitable share of the common liability, and the right is limited to the amount paid by him in excess of his share. Under the *Restatement*, there is no right of contribution in favor of any tortfeasor who has intentionally caused the harm.

CERCLA likewise has alleviated the harshness of joint and several liability by allowing a defendant to bring suit to force other responsible parties to bear their fair shares of the costs to clean up the site. When originally enacted in 1980, CERCLA did not expressly provide for contribution. Nevertheless, courts in the early 1980s repeatedly held that a responsible party had a right of contribution, either impliedly or under federal common law. In so ruling, the courts reasoned that contribution goes hand-in-hand with joint and several liability; that responsible parties are more likely to settle with the government and undertake response actions where there is a prospect for recouping some of their costs from other responsible parties; that government litigation and cleanup costs are reduced; and that fundamental fairness is promoted. As one court put it: "No goal of CERCLA is promoted by requiring one defendant to bear all the costs of injuries caused in part by others."

In 1986, as part of the Superfund Amendments and Reauthorization Act, Congress added section 113(f), specifically labeled "Contribution," to clarify and confirm the right of a person held jointly and severally liable under CERCLA to seek contribution from other responsible parties. Allocation of response costs among liable parties

154. *Id.* § 886A(3).
158. ASARCO, 608 F. Supp. at 1491.
RCRA's Imminent Hazard Provisions is based on "such equitable factors as the court determines are appropriate." The legislative history makes clear that Congress believed contribution was crucial to the statute's liability scheme, because it would promote settlements, decrease litigation and facilitate cleanups. Congress recognized that responsible parties would be more willing to settle and perform the cleanup themselves where they were assured that they could seek contribution against other responsible parties.

The importance of allocating cleanup costs among responsible parties under CERCLA is highlighted by the Supreme Court having issued two major opinions regarding contribution and cost allocation claims under CERCLA during the past three terms. The Court in Cooper Industries Inc. v. Aviall Services, Inc., giving effect to the "plain meaning" of section 113(f), held that a private party could seek contribution under section 113(f) only after being sued under sections 106 or 107 or after resolving its CERCLA liability to the government in an administrative or judicially approved settlement. By ascribing such "plain meaning" to the terms of section 113(f), the Court significantly limited the circumstances pursuant to which responsible parties could seek contribution under section 113(f). Prior to the Court's decision in Aviall, for many years most circuit and district courts had held that a responsible party could seek "contribution" under section 113(f) irrespective of any prior suit or government involvement. Section 107 claims for cost recovery, on the other hand, were held to be available only to plaintiffs who were not responsible parties.

The Aviall decision meant that a responsible party who

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164. See, e.g., Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R., Co., 142 F.3d 769 (4th Cir. 1998); Bedford Affiliates v. Sills, 155 F.3d 416 (2d Cir. 1998); New Castle County v. Halliburton NUS Corp., 111 F.3d 1116 (3d Cir. 1997); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298 (9th Cir. 1997); United States v. Colo., & E.R.R. Co., 50 F.3d 1530 (10th Cir. 1995); United Techs. Corp. v. Browning-Ferris Indus., 33 F.3d 96 (1st Cir. 1994).
165. Indeed, claims by responsible parties seeking recovery of costs "voluntarily" incurred were deemed to be "quintessential contribution claims." See Bedford Affiliates, 156 F.3d at 424. At common law, though, "contribution" arises when multiple parties become liable to the same person for the same harm, in favor of the tortfeasor which has discharged the claim by paying more than its equitable share of the common liability. Volunteers who incur costs but are not in fact liable have no claim for contribution. Restatement (Second) of Torts § 886A, cmt. e (1979). Arguably, a responsible party-plaintiff who undertakes a cleanup without waiting to be sued is not truly a "volunteer." For purposes of this Article, however, the term "contribution" will be reserved for claims brought by responsible parties who have been sued or otherwise found liable to a plaintiff, as opposed
had "voluntarily" conducted a cleanup without first being sued or formally settling with the government could no longer bring suit under section 113(f). Since pre-Aviall precedent held that such a responsible party could not sue for cost recovery under section 107, a responsible party who voluntarily cleaned up a site could be left shouldering the entire cleanup cost burden, without a CERCLA remedy against other responsible parties.166 Not surprisingly, responsible parties were no longer inclined to voluntarily undertake CERCLA cleanups, which meant that the government would have to bring suit or conduct the cleanup itself, resulting in delays in site remediation and increased government litigation and cleanup costs.167

The Supreme Court in 2007 largely rectified this situation in United States v. Atlantic Research Corp.168 The Court held that a responsible party which voluntarily incurs response costs may bring suit under section 107 to recover the costs it incurred or will incur. Focusing on the "plain language" of CERCLA section 107(a)(4)(B), the Court ruled that "any person" may maintain an action for cost recovery under section 107—irrespective whether the claimant is a responsible party.169 The decision overruled the numerous lower court decisions which had restricted section 107 cost recovery actions to the government and innocent private plaintiffs.170 The Atlantic Research opinion opened an avenue for responsible parties under CERCLA to recover at least a portion of their response costs from other responsible parties, notwithstanding that they could not bring a claim for "contribution" under the terms of section 113(f).

In short, claims by responsible parties at Superfund sites against other responsible parties—under sections 107 or 113(f), via complaint, cross-claim, counterclaim or third-party complaint—to allocate cleanup costs equitably among responsible parties, have been and continue to be routine, important aspects of the CERCLA legal landscape. By contrast, though RCRA's imminent hazard provisions and CERCLA share similar purposes and liability schemes, provide overlapping remedies aimed at cleaning up contaminated sites, and have to claims brought by responsible party-plaintiffs who "voluntarily" incurred cleanup costs.


169. Id. at 2336.

170. Id. at 2334–35.
been interpreted as imposing joint and several liability, courts typically have refused to recognize a cause of action by a defendant, for contribution or otherwise, to allocate cleanup cost responsibility imposed by RCRA sections 7003 and 7002(a)(1)(B).

IV. CONTRIBUTION CASES UNDER RCRA

A. Early Cases Split Regarding Contribution

Perhaps the earliest reported decision in which a defendant in a RCRA imminent hazard case sought contribution from another allegedly liable party was United States v. Westinghouse Electric Corp. in 1983.171 The United States sought injunctive relief and cost recovery against Westinghouse at PCB-contaminated landfills in Indiana pursuant to RCRA section 7003 and CERCLA section 106. Westinghouse filed a third-party complaint against Monsanto Company, which had produced and sold the PCB-containing fluid that Westinghouse allegedly disposed at the landfills, seeking contribution for a portion of any cleanup liability imposed upon Westinghouse as a result of the government's RCRA and CERCLA claims. Westinghouse argued that RCRA section 7003 and CERCLA section 106 invested the court with equitable powers such that a contribution claim should be implied under those federal laws to apportion any liability at the landfills between Westinghouse and Monsanto, which it claimed had contributed to the endangering conditions. The court, however, rejected Westinghouse's argument and dismissed the third-party complaint, citing Supreme Court cases that had refused to imply contribution claims under other federal statutes.172 Specifically, the court relied upon Texas Industries, Inc. v. Radcliff Materials, Inc.,173 in which the Court declined to imply contribution under the Sherman and Clayton Acts, and Northwest Airlines, Inc. v. Transport Workers Unions,174 in which the Court refused to imply a contribution claim under the Equal Pay Act or Title VII of the Civil Rights Act.175

172. Id. at *3–4. The Westinghouse decision was rendered before Congress added CERCLA § 113(f) in 1986, and it was one of the only decisions in the early 1980s that did not allow a contribution claim on behalf of a defendant in a CERCLA case. See Colo. v. ASARCO, Inc., 608 F. Supp. 1484, 1492 (D. Colo. 1985).
175. Westinghouse, No. IP 83-9-C, 1983 WL 160587, at *4. Northwest Airlines and Texas Industries continue to be viewed by the Supreme Court as leading cases relating to contribution claims, implied or under federal common law, where a federal statute does not expressly provide for contribution. See Aviall, 543 U.S. at 162. The Court did not decide whether CERCLA section 107 or section 113(f) gave rise to an implied contribution claim for a responsible party which voluntarily incurred cleanup costs, but stated that it was “debatable” in light of Texas Industries and Northwest Airlines. Id.
In another early government RCRA action, a federal district court held that a defendant could not obtain contribution by asserting a claim under section 7002(a)(1)(B). In *United States v. Production Plated Plastics Inc.*, the court dismissed a contribution claim by a defendant in an RCRA section 3008 enforcement action, ruling that the defendant could not rely upon section 7002(a)(1)(B) for an implied contribution claim. As in *Westinghouse*, the court relied upon *Texas Industries* and *Northwest Airlines* to hold that no contribution claim should be implied. The court reasoned that Congress did not intend to allow an implied right of contribution because the remedial scope of RCRA is so broad that no additional remedy should be implied.

The leading case upholding an implied right of contribution under section 7003 is *United States v. Valentine*. The United States filed a complaint under RCRA section 7003 against ten defendants, seeking to require investigation and remediation of a petroleum-contaminated site in Wyoming. Eight defendants entered into a consent decree with the government under section 7003 to conduct the investigation and cleanup, and those eight then moved for leave to assert cross-claims against non-settling original defendants and third-party complaints against various non-parties who allegedly contributed to the contamination. The court granted the motion, ruling that the settling defendants had a right to contribution, impliedly under section 7003 and as a matter of federal common law.

The *Valentine* court relied heavily on the statute's broad grant of authority and its legislative history in finding that a right to contribution arises from section 7003 by clear implication. Quoting language from *Price* that had been quoted with approval in the Senate report on the 1984 amendments to RCRA, the court found that section 7003 granted sweeping authority to award all relief necessary to eliminate endangerment posed by toxic wastes. "Courts should not undermine the will of Congress by either withholding relief or granting it grudg-

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177. The government did not sue under RCRA section 7003. Rather, section 3008, 42 U.S.C. § 6928, is the primary federal enforcement provision under RCRA. Where a defendant has committed a violation of RCRA subtitle C or of regulations issued thereunder, section 3008 authorizes various remedies, including administrative orders, civil and criminal penalties, and injunctive relief. Id. § 6928 (2000). The defendant in *Production Plated Plastics* was seeking contribution for penalties and the cost of injunctive relief to come into compliance; it was not seeking contribution for the costs of abating an imminent and substantial endangerment. *Prod. Plated*, 32 ERC at 1739.
179. 856 F. Supp. 627 (D. Wyo. 1994). Indeed, it apparently is the only reported decision squarely so holding.
180. Id. at 632–37.
Since courts had awarded equitable restitution to the United States to recover costs under section 7003, the court reasoned that likewise "contribution is an equitable remedy designed to prevent unjust enrichment, and there is no legitimate reason for courts to grant the former remedy and yet deny the latter." Since courts had awarded equitable restitution to the United States to recover costs under section 7003, the court reasoned that likewise "contribution is an equitable remedy designed to prevent unjust enrichment, and there is no legitimate reason for courts to grant the former remedy and yet deny the latter." Since courts had awarded equitable restitution to the United States to recover costs under section 7003, the court reasoned that likewise "contribution is an equitable remedy designed to prevent unjust enrichment, and there is no legitimate reason for courts to grant the former remedy and yet deny the latter."

The court in Valentine also stated that since joint and several liability is the rule in section 7003 cases, the right to contribution should follow, since both are part of the modern common law of nuisance. Citing to CERCLA cases finding that contribution is an integral component of joint and several liability, the court ruled that "contribution must be recognized precisely because joint and several liability is the rule in RCRA cases."

Finally, the court found that contribution serves the purposes underlying RCRA section 7003. In the absence of contribution, the settling defendants would be penalized for stepping forward to conduct the cleanup, because they would bear the full costs of the cleanup without recourse against other responsible parties, while the non-settling defendants and other responsible parties would be rewarded for refusing to participate in the cleanup. According to the Valentine court, contribution would encourage early settlements with the government and expeditious cleanups, by affording settling defendants the chance to recoup a portion of the cleanup expenses later from other responsible parties.


183. Id. at 633-34 (citing RESTATEMENT (SECOND) OF TORTS § 886A cmt. B (1965)).


185. Id. at 634. The court assumed that if there were no settlement, the court could apportion responsibility for the costs among all the liable defendants. For example, one defendant could be required to perform the entire cleanup and the other parties could be required to pay for their shares of the costs. Id. at 634-35 n.7. However, the court did not cite any authority by which the court could apportion responsibility or that would guide how such apportionment should be decided in the absence of a contribution claim, and the court did not address how the non-
The *Valentine* court also concluded that a right to contribution exists as a matter of federal common law in a section 7003 case. Stating that a court can formulate federal common law where it is necessary to protect "unique federal interests" or where Congress has authorized the courts to develop substantive law, the *Valentine* court looked to CERCLA and its case law by analogy.\(^{186}\) Prior to the 1986 amendments, CERCLA contained no express contribution provision. Nevertheless, some courts found a right to contribution on the basis that Congress intended courts to develop a substantive law of CERCLA contribution as a matter of federal common law and that it would enhance unique federal interests—namely, encouraging expeditious cleanups by private parties, and reducing government cleanup and litigation expenses.\(^ {187}\) Saying that the same reasoning applies to RCRA, the court in *Valentine* ruled that Congress had authority to recognize a federal common law right to contribution in actions brought under RCRA section 7003, and doing so would serve the same unique federal interests of promoting faster cleanups and preserving the public treasury.\(^ {188}\)

In *Valentine*, the court explained that Supreme Court precedent supported recognition of a right to contribution in RCRA section 7003 cases. The court distinguished *Texas Industries* and *Northwest Airlines* because, unlike the statutes at issue in those cases, RCRA does not contain detailed, specific and comprehensive remedial provisions evincing a Congressional intent not to authorize additional remedies: "To the contrary, this case involves a statute that mentions only one specific remedy, injunctions, and clearly authorizes the federal courts to fashion supplemental equitable remedies."\(^ {189}\) Rather, the court followed *Musick, Peeler & Garrett v. Employers Insurance of Wausau*,\(^ {190}\) in which the Supreme Court held there was an implied right of contribution in securities cases brought under Rule 10b-5 of the Securities Exchange Act of 1934. The *Valentine* court found that recognizing a

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\(^{186}\) Id. at 635–36.


\(^{188}\) 856 F. Supp. at 636.

\(^{189}\) Id. at 637.

\(^{190}\) 508 U.S. 286 (1993).
right to contribution under section 7003 was fully consistent with *Mussick*, emphasizing that, as with respect to Rule 10b-5 private causes of action, section 7003 leaves to the courts the precise remedies available; that since CERCLA expressly grants a right to contribution, coherence and consistency demand such an equitable remedy in analogous RCRA cases under section 7003 as well; and that contribution will advance rather than frustrate the purpose of RCRA.  

The following year, the court in *Olin Corp. v. Fisons PLC* upheld a third-party complaint for contribution under section 7002(a)(1)(B) in the context of a citizen suit pursuant to section 7002(a)(1)(B). Plaintiff Olin Corp., owner of a chemical plant, pursuant to section 7002(a)(1)(B) sued certain prior owners and operators of the plant, including Nor-Am Chemical Co., seeking to force defendants to conduct the cleanup of the plant. Nor-Am asserted a third-party complaint under section 7002(a)(1)(B) against Stepan Company, another former owner which had settled with Olin prior to suit, seeking an order requiring Stepan to conduct the cleanup. The court denied Stepan's motion to dismiss Nor-Am's third-party complaint, citing *Valentine* as authority for upholding a contribution claim by a defendant liable under RCRA for conducting a cleanup.

**B. Later Cases Deny Contribution**

All of the cases discussed in Part IV.A above, including *Valentine*, were decided prior to the Supreme Court's 1996 decision in *Meghrig*. Since *Valentine*, there has been little reported case law pertaining to contribution in section 7003 cases. However, although *Meghrig* was not a contribution case, post-*Meghrig* courts consistently have invoked *Meghrig* in ruling that there is no right to contribution in citizen suits under section 7002(a)(1)(B). An example is *Davenport v. Neely*. Plaintiffs-neighbors brought suit against the current owners and operators of a tire recycling facility pursuant to RCRA section 7002(a)(1)(A), alleging violations of RCRA and seeking removal of abandoned tires and other wastes. Defendants filed a third-party complaint for contribution against multiple third-party defendants, arguing that plaintiffs could have brought their action pursuant to section 7002(a)(1)(B) instead of section 7002(a)(1)(A) and that the

193. *Id.* at *12 n.19. The court expressed doubts about whether Olin could make Nor-Am jointly and severally liable for the cleanup under section 7002(a)(1)(B), inter alia, because Olin itself was a responsible party. *Id.* at *9–12. If Nor-Am were merely severally liable to Olin, the court explained, there would be no need for contribution against Stepan. *Id.* at *4*. But the court allowed the third-party complaint to stand on the premise that Olin might succeed in obtaining relief that would make Nor-Am fully responsible for the cleanup. *Id.* at *12.
court should recognize contribution under section 7002(a)(1)(B) just as the Valentine court had found a right to contribution under section 7003.\textsuperscript{195} The court dismissed the third-party complaint, primarily in reliance on Meghrig. Equating the third-party complaint with a suit to recover future cleanup costs, the Davenport court ruled that the Supreme Court’s reasoning in Meghrig—specifically, that Congress knows how to provide for recovery of cleanup costs and declined to so provide in RCRA—precludes recovery of future costs via contribution.\textsuperscript{196} The court concluded, “While such a result may seem inequitable, such a conclusion is mandated by existing law.”\textsuperscript{197}

Similarly, in FCA Associates v. Texaco, Inc.,\textsuperscript{198} plaintiffs sued Texaco under section 7002(a)(1)(B), seeking cleanup of a petroleum-contaminated site. The court dismissed Texaco’s third-party complaint seeking contribution under RCRA section 7002(a)(1)(B), ruling that Texaco lacked standing to assert such a claim because there is no cause of action for contribution under RCRA.\textsuperscript{199}

\textsuperscript{195.} Id. at 1224–27.

\textsuperscript{196.} Id. at 1229. The court also relied on lower court decisions holding that recovery of cleanup costs is not available under RCRA section 7002(a)(1)(B), including \textit{Furrer v. Brown}, 62 F.3d 1092 (8th Cir. 1995), and \textit{Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.}, 174 F.R.D. 609 (M.D. Pa. 1997).

\textsuperscript{197.} \textit{Davenport}, 7 F. Supp. 2d at 1230. The court noted somewhat cryptically that other claims, perhaps under state law, might be available for defendants to force other responsible parties to share in the costs of cleanup. \textit{Id.} at 1230 n.4.

\textsuperscript{198.} No. 03-CV-6083T, 2005 WL 735959 (W.D.N.Y. March 31, 2005).

\textsuperscript{199.} Id. at *3. Not all courts, though, have flatly rejected the notions of contribution and cost allocation in RCRA imminent hazard cases. In \textit{Waste Inc. Cost Recovery Group v. Allis Chalmers Corp.}, 51 F. Supp. 2d 936 (N.D. Ind. 1999), the EPA issued a unilateral administrative order under CERCLA section 106 to the members of the Group to implement the EPA’s selected remedy at a waste disposal facility in Michigan. After implementing the remedy, the Group brought a RCRA contribution claim against other allegedly liable parties urging that the EPA could have issued the order under RCRA section 7003 instead of CERCLA section 106, so Valentine should provide for contribution in this case. The court dismissed the RCRA contribution claim, stating that a necessary prerequisite for contribution under section 7003 is liability under that statute, either in the form of a settlement or judgment. But the court cited Valentine with seeming approval and did not squarely find that Meghrig or Avondale was dispositive. 51 F. Supp. 2d at 941–42.

In \textit{Nashua Corp. v. Norton Co.}, 116 F. Supp. 2d 330 (N.D.N.Y. 2000), the plaintiff owner of a contaminated industrial site sued the former owner under CERCLA and RCRA section 7002(a)(1)(B). The court found both parties to be liable under CERCLA and allocated past and future response costs 90% to defendant and 10% to plaintiff. The court permitted plaintiff to maintain the RCRA citizen suit claim despite having contributed to the contamination, but refused to allow plaintiff to recover any costs already incurred, pre- or post-complaint. However, the court did award injunctive relief that paralleled the CERCLA judgment: defendant was ordered to pay 90% of future response cost bills presented by plaintiff, which was performing the work, unless defendant filed objections to the bill within a specified time period. Plaintiff also was awarded its litigation attor-
Other cases likewise have relied upon Meghrig in refusing to recognize a right to contribution in cases brought under RCRA. In United States v. Domestic Industries, the United States sued defendants pursuant to RCRA section 3008 seeking civil penalties for violations of oil management requirements under RCRA. Defendants filed a third-party complaint against their suppliers, seeking contribution for any penalties assessed against defendants, relying on Valentine. But the court dismissed the third-party complaint, ruling that Meghrig and Davenport instruct that there should be no contribution claims in RCRA cases because Congress had provided for no such remedy.

Some commentators likewise have taken the position post-Meghrig that contribution claims are foreclosed to defendants in imminent hazard cases under RCRA.

A recent case, City of Bangor v. Citizens Communications Co., illustrates the contrast between CERCLA and RCRA with respect to contribution. The plaintiff-city sued the corporate successor to the former owner of a manufactured gas plant, under CERCLA section 107 and RCRA section 7002(a)(1)(B), alleging the defendant was responsible for coal tar contamination in the river. The complaint sought to force defendant to abate the contamination or pay for the city’s abatement work. Defendant counterclaimed under CERCLA section 113(f)(1) and RCRA section 7002(a)(1)(B), claiming the city also was liable for the tar contamination in the river and should share the burden of remediation. The court found that both the city and defendant were liable parties under CERCLA, as owners and arrangers, and under RCRA, as contributors to the tar contamination.

Bangor was decided after Aviall but before Atlantic Research, so because the city was a responsible party under CERCLA and had neither been sued under CERCLA nor settled with the government to discharge CERCLA liability prior to initiating the case, no CERCLA

ney fees as a substantially prevailing party, pursuant to RCRA section 7002(e). 116 F. Supp. 2d at 359.
201. Id. at 871. The government in Domestic Industries did not sue under RCRA section 7003, and the defendant was not seeking contribution toward abatement of an imminent and substantial endangerment.
202. See Nicholas J. Wallwork & Mark E. Freeze, Spreading the Costs of Environmental Cleanup—Contribution Claims Under CERCLA and RCRA, 2007 ALI-ABA COURSE OF STUDY: ENVIRONMENTAL AND TOXIC TORT LITIGATION 667, 690–91 (stating that “the continued viability of Valentine is in doubt and that subsequent decisions have overwhelmingly rejected a right of contribution under RCRA”). The article goes on to note that responsible parties may be able to obtain the “functional equivalent” of contribution by asserting a claim for injunctive relief under section 7002(a)(1)(B), citing cases which permit responsible party plaintiffs to maintain section 7002(a)(1)(B) citizen suits. Id. at 691 n.77.
204. Id. at 182, 211–12.
section 113(f) claim was viable and there was a real question whether the city could maintain its CERCLA section 107 claim. The court, though, held that the city could maintain a claim under CERCLA section 107, finding that section 107 allows "any other person"—not just innocent plaintiffs—to bring an action for cost recovery, and that preventing responsible parties from seeking cost allocation would discourage CERCLA's goal of promoting private party remediations.\textsuperscript{205} The court permitted the defendant to counterclaim for contribution under CERCLA section 113(f). The court went on to allocate past and future response cost responsibility under CERCLA: a 60\% equitable share to defendant and a 40\% share to the city.\textsuperscript{206} In this private CERCLA action, because both the plaintiff and defendant were responsible parties, the court noted that the liability of the parties to each other was several, not joint.\textsuperscript{207}

Pursuant to the parties' claims against each other under RCRA's imminent hazard citizen suit provision, however, the court held both parties jointly and severally liable to remedy the tar contamination, since the harm was not divisible. Though the liability of the parties under CERCLA was several and not joint, the court nonetheless adopted the general rule of joint and several liability in RCRA cases, reasoning that it would be difficult to craft an injunction that would abate the endangerment unless both parties were responsible for the entire mandatory injunctive relief. As the court explained, if one party did not do its share of the remedy, then even if the other party did, it likely would not abate the endangerment.\textsuperscript{208} In so ruling, the court noted that "the possibility of contribution under RCRA is likely foreclosed under Meghrig."\textsuperscript{209}

In Bangor, the consequences of not having a contribution right under RCRA probably were not critical for the parties, as the court presumed that the 60\% - 40\% CERCLA allocation would likely apply to any future costs incurred in complying with the RCRA injunction.\textsuperscript{210} But what would the court have done if there had been no CERCLA claim available, such as if the contamination were petroleum-based rather than coal-based? All the court did under RCRA was hold both parties jointly and severally liable for doing the work necessary to abate the endangering conditions. How would the responsibility, and costs, for doing the work have been allocated between the liable parties? In the absence of a recognized claim for allocating

\begin{footnotes}
\footnote{205. Id. at 220-23.}
\footnote{206. Id. at 225-26. The court used equitable factors to determine the relative shares, as contemplated by CERCLA §113(f)(1). Id. at 224 n.24.}
\footnote{207. Id. at 219.}
\footnote{208. Id. at 219-20.}
\footnote{209. Id. at 220 n.18.}
\footnote{210. Id.}
\end{footnotes}
the responsibilities and costs, via contribution or otherwise, the parties seemingly would be left to themselves to work it out, without any recognized legal paradigm for doing so.

V. COURTS SHOULD RECOGNIZE CONTRIBUTION CLAIMS UNDER RCRA'S IMMINENT HAZARD PROVISIONS

Courts generally have refused to recognize a contribution claim by a defendant in RCRA imminent hazard cases to allocate cleanup costs among responsible parties. The consequences are stark. If there is no claim for contribution recognized for a defendant under RCRA, then:

A. The United States or a citizen suit plaintiff can choose one responsible party to sue, thus forcing that person to shoulder the entire burden of taking action to abate the endangerment at a site, with no cause of action available to share a portion of the cleanup responsibility with any of the many other responsible parties who contributed to the presence of the wastes at the site—perhaps to a much greater extent than did the targeted defendant.

B. Where multiple responsible parties are sued by the United States or a citizen suit plaintiff, there is neither a recognized claim by which the defendants can force allocation of responsibilities for the cleanup among them, nor a recognized legal paradigm for a court to follow in making such an allocation. As a result, unless the parties can reach a voluntary agreement regarding how they will divide the work or the costs, who must do the work and bear the costs may be left to the whim of the plaintiff when deciding whom to enforce the judgment against.

C. As the Bangor case reflects, where the plaintiff itself is a contributor to the endangerment and hence a responsible party, there likewise is no established legal paradigm for the court to follow in awarding relief, and there is nothing to guide the parties legally even if they wanted to try to reach a voluntary agreement regarding allocation of the work or costs.

It is manifestly unfair for one defendant to bear the entire cleanup responsibility at a site, while other contributors to the contamination are free from such responsibility. As Dean William Prosser criticized the no-contribution rule more generally: "There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free."211 Further, where the targeted defendant has

211. PROSSER, supra note 149, § 50, at 307. There certainly are more opportunities for collusion and "gaming" the system where no contribution is available. For exam-
no possibility of recouping a fair share of her costs in cleaning up the site from any other responsible party, she may well choose to vigorously defend against the RCRA imminent hazard suit, thus driving up litigation costs and delaying the cleanup of the site. Additionally, in cases where there are multiple responsible parties, the absence of any recognized legal claim or paradigm for allocating responsibilities and costs among them leaves both judges and litigants without legal guidance for adjudicating or settling the case, likewise leading to potential injustice and delays both in resolving the dispute and in remediation of the sites.

A review of the cases discussed in Part IV above reveals that courts have cited two main reasons for refusing to recognize a claim for contribution among responsible parties in RCRA imminent hazard cases: (1) unlike CERCLA, RCRA does not include an express provision authorizing contribution, and Supreme Court precedents such as Northwest Airlines and Texas Industries have been interpreted as auguring against implying a claim for contribution under federal statutes; and (2) the Supreme Court's 1996 decision in Meghrig, which bars the recovery of past cleanup costs under section 7002(a)(1)(B), has been interpreted as foreclosing the remedy of contribution as well. In light of the Supreme Court's decision last year in Atlantic Research that once again makes cost allocation broadly available to responsible parties in CERCLA cases, courts should re-examine their bases for denying contribution claims in RCRA imminent hazard cases. This part of the Article sets forth why courts can and should recognize (1) a contribution claim under section 7003, by implication and under federal common law, and (2) a claim in the nature of contribution based on the express terms of section 7002(a)(1)(B).

A. Section 7003

Only the Administrator of the EPA on behalf of the United States is authorized to bring suit under section 7003. The express language of section 7003 does not provide for a cause of action by any other private person or governmental entity and makes no mention of contribution. As Valentine showed, however, that section 7003 does not expressly grant a right to contribution is not dispositive of whether a person sued by the United States under section 7003 has a

right to contribution. The Supreme Court has made clear that a right to contribution may arise from a statute, not only expressly, but also by clear implication, or through the power of federal courts to fashion a federal common law of contribution.\textsuperscript{213}

Decided just one month apart in 1981,\textsuperscript{214} \textit{Northwest Airlines} and \textit{Texas Industries} remain the leading Supreme Court cases regarding whether to recognize an implied right of contribution or a federal common law remedy of contribution, where a federal statute does not expressly provide for a contribution right. In \textit{Northwest Airlines}, an airline had been held liable to female flight attendants for back pay because collectively bargained wage differentials for male and female attendants were found to violate the Equal Pay Act and Title VII. The airline then filed suit seeking contribution against the attendants' unions. The Supreme Court dismissed the airline's complaint, holding that there is no implied right of action for contribution under either statute and that there is no federal common law right of contribution from the unions.\textsuperscript{215} In \textit{Texas Industries}, a concrete purchaser sued a Louisiana concrete manufacturer, alleging price fixing violations of the Sherman and Clayton Acts and seeking treble damages. The original defendant filed a third-party complaint against other Louisiana concrete manufacturers seeking contribution in the event it should be held liable to plaintiff. The Supreme Court upheld dismissal of the third-party complaint, holding that there was neither an implied right of contribution under the antitrust statutes nor a federal common law right to contribution in that case.\textsuperscript{216}

\textbf{1. Implied Right of Contribution}

In both cases, the Court articulated the same basic test for determining whether a right to contribution arises by implication from a federal statute. The ultimate question is whether Congress intended to establish a right to contribution, despite not having expressly so provided.\textsuperscript{217} Factors relevant to this inquiry include: the language of the statute; legislative history; the underlying purpose and structure

\begin{itemize}
\item \textsuperscript{214} Tex. Indus., 451 U.S. 630; Nw. Airlines, 451 U.S. 77; see Cooper Indus., Inc. v. Aviall Serv., Inc. 543 U.S. 157, 162 (2004). The court in \textit{Cooper Industries} did not decide whether CERCLA section 107 or section 113(f) gave rise to an implied contribution claim for a responsible party which voluntarily incurred cleanup costs, but stated that it was "debatable" in light of \textit{Texas Industries} and \textit{Northwest Airlines}. \textit{Id}.
\item \textsuperscript{215} Nw. Airlines, 451 U.S. at 91–98.
\item \textsuperscript{216} Tex. Indus., 451 U.S. at 638–47.
\item \textsuperscript{217} \textit{Id}. at 639; Nw. Airlines, 451 U.S. at 90–91.
\end{itemize}
of the statutory scheme; and the likelihood that Congress intended to supercede or supplement existing state remedies.\textsuperscript{218}

With respect to RCRA section 7003, each of these indicia of Congressional intent—statutory language, legislative history, the underlying purpose and structure of the legislative scheme, and the inadequacy of state law remedies—all point strongly in favor of implying a right to contribution for parties liable under section 7003.

\textit{a. Statutory Language & Legislative History}

While it does not use the term "contribution" expressly, section 7003 broadly empowers courts not only to "restrain" but also to "take such other action as may be necessary."\textsuperscript{219} Congress, by using such language in section 7003, intended to invest the courts with expansive equity powers to grant all relief necessary to protect public health and the environment from the risks and effects of discarded wastes.\textsuperscript{220} The legislative history echoes this broad grant of equitable power, emphasizing that courts under section 7003 have broad and flexible powers to award affirmative equitable relief.\textsuperscript{221} The legislative history goes on to state that "section 7003 is essentially a codification of common law public nuisance remedies," incorporating theories and remedies that have been used for centuries.\textsuperscript{222} Contribution has long been available in equity, even where no right of contribution existed at law.\textsuperscript{223} Modern public nuisance common law clearly favors contribution and apportionment of liability among multiple liable parties.\textsuperscript{224}

Section 7003 makes wide categories of parties subject to liability, including past and present handlers, storers, treaters, transporters, and disposers of solid or hazardous wastes.\textsuperscript{225} As a result, multiple parties may be subject to liability for the presence of waste at the same site. Courts have invoked their broad equitable powers and the

\textsuperscript{218} \textit{Tex. Indus.}, 451 U.S. at 639; \textit{Nw. Airlines}, 451 U.S. at 91. At least the first three are common factors for ascertaining legislative intent in interpreting statutes. 2A, \textsc{Norman Singer, Sutherland Statutory Construction} § 45.05 (6th ed. 2000).

\textsuperscript{219} 42 U.S.C. § 6972(a) (2000).


\textsuperscript{221} Congress, by enacting section 7003, "intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes." S. REP. No. 98-284, at 59 (1984) (quoting \textit{Price}, 688 F.2d at 213–14).


\textsuperscript{223} \textsc{Restatement (Second) of Torts} § 886A cmt. c (1979); \textit{Flint & Moore, supra} note 147, at 11; Hernandez, \textit{supra} note 147, at 100.

\textsuperscript{224} \textsc{Restatement (Second) of Torts} § 886A (1979); \textsc{Restatement (Third) of Torts: Apportionment of Liability} (2000); see \textit{Nw. Airlines, Inc. v. Transp. Workers Union}, 451 U.S. 77, 86–87 n.17 (1981).

\textsuperscript{225} 42 U.S.C. § 6973(a) (2000).
common law of public nuisance to impose joint and several liability under RCRA section 7003, despite no express mention of joint and several liability in the statute or the legislative history.\textsuperscript{226} Since the right of contribution cannot arise in the absence of joint and several liability,\textsuperscript{227} it is hardly surprising that Congress did not expressly mention contribution in the statutory terms and the legislative history. But if Congressional intent for joint and several liability can be gleaned from the terms of the statute and its legislative history, then a right of contribution should be similarly implied. While joint and several liability does not automatically translate into a right of contribution under all circumstances,\textsuperscript{228} the statute's sweeping grant of equitable powers and remedies to the court, and its roots in common law public nuisance, evince a strong intent toward recognizing an implied right of contribution under section 7003.

\textit{b. Structure & Purpose}

Further, implying a right to contribution under section 7003 is consistent with the structure and underlying purpose of section 7003. The purpose of RCRA section 7003 is to provide the EPA with a tool to force responsible parties promptly to remediate wastes which may be endangering the public or the environment.\textsuperscript{229} Recognizing a right to contribution would facilitate early settlements with the United States and avoid delays in cleaning up contaminated sites. If a defendant knows it has the chance to recoup cleanup costs in excess of its fair

\begin{itemize}
\item \textsuperscript{227} See \textit{Reatement (Third) of Torts: Apportionment of Liability} § 11 cmt. c (2000); Hyson, \textit{supra} note 65, at 267–73.
\item \textsuperscript{228} See \textit{Conservation Chem.}, 619 F. Supp. at 226. To the extent the court in \textit{Valentine} equated the existence of joint and several liability to the right to contribution, such a syllogism is overly simplistic. United States v. Valentine, 856 F. Supp. 627, 634 (D. Wyo. 1994).
\item \textsuperscript{229} It is often said that the primary purpose of RCRA is to regulate the generation, transportation, treatment, storage and disposal of hazardous waste. \textit{See}, e.g., Meghrig v. KFC W., Inc., 516 U.S. 479, 483 (1996) (noting that the statute "governs the treatment, storage, and disposal of solid and hazardous waste"). Indeed, that is true with respect to subtitle C of RCRA. But RCRA covers more than the management and regulation of hazardous waste. The language and legislative history of RCRA's imminent hazard provisions make clear that their purpose is to protect health and the environment by providing the government and private plaintiffs with the authority to force prompt cleanups of contaminated sites by those responsible for the contamination. \textit{See Note, Hazardous Waste—A Right of Contribution Under RCRA: U.S. v. Valentine, 30 Land & Water L. Rev.} 489, 504 (1995).
\end{itemize}
share, that defendant will have an incentive to settle and seek contribution. On the other hand, if the defendant has no chance to recoup any portion of the cleanup costs, the defendant will be more inclined to litigate every issue and exhaust every defense in an effort to avoid liability to the government and the resulting cleanup costs responsibility, thus increasing the government’s litigation expenses and delaying cleanup of the site.\textsuperscript{230}

Moreover, given the expansive equitable powers afforded to courts by Congress under section 7003, Supreme Court precedent indicates that it would be improper to limit a court’s traditional equitable powers, in the absence of express language or clear Congressional intent to the contrary.\textsuperscript{231} As discussed above, an award of contribution is among an equity court’s traditional powers.

c. State Law

Contribution for cleanup liability under section 7003 would not intrude upon an area traditionally relegated to state law. Section 7003 was enacted because existing authorities, including state law, were not adequate to address the problems posed by sites contaminated with solid or hazardous wastes.\textsuperscript{232} Section 7003’s liability scheme is a significant expansion of the common law in order to address problems state nuisance law often could not.\textsuperscript{233} For example, in many states, the efficacy of a nuisance claim is blunted by, inter alia, the need to balance the reasonableness of the defendant’s activities; causation hurdles, particularly where there may be multiple contributors to the problem; and statutes of limitations.\textsuperscript{234} Hence, section 7003 often provides the government with a cause of action or remedy where no such claim or remedy could be maintained under state law. Concomitantly, a defendant in a section 7003 action often may not have any viable claim under state law against other parties who may nevertheless be liable under section 7003. Accordingly, this factor also favors implication of a right to contribution under section 7003.

2. Federal Common Law

The Northwest Airlines and Texas Industries Courts also outlined the circumstances under which a federal court has a responsibility to formulate a federal common law right to contribution. Although federal courts are of limited jurisdiction, they have authority to develop

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\item \textsuperscript{230} See Valentine, 856 F. Supp. at 634, 636; Hazardous Waste, supra note 229.
\item \textsuperscript{233} Id.
\item \textsuperscript{234} See Percival et al., supra note 62, at 75–76, 87; Ronald Aronovsky, Federalism and CERCLA: Rethinking the Role of Federal Law in Private Cleanup Cost Disputes, 33 Ecology L.Q. 1, 71–79 (2006).
\end{itemize}
federal common law in essentially two instances: (1) where it is necessary to protect "uniquely federal interests," and (2) where Congress has given the courts power to develop substantive law.\textsuperscript{235}

There are strong indicia of Congressional intent authorizing federal courts to develop federal common law to fill in the gaps of section 7003. The statutory language makes multiple categories of persons liable for contributing to the endangering conditions at a site,\textsuperscript{236} yet is silent with respect to critical issues relevant to such multiple party liability. These include the nature of the liability (e.g., joint and several or just several) and, if joint and several, whether one party must bear all the responsibility for a cleanup while other responsible parties get off scot-free or whether there should be a right of contribution.

The language of the statute and the legislative history show that Congress intended the courts to develop substantive law, drawing on common law principles, to fill in the gaps of section 7003. Section 7003 broadly authorizes courts to use their full equitable powers in granting relief, permitting them to order defendants "to take such action as may be necessary."\textsuperscript{237} The Senate report on the 1980 amendment to section 7003 made clear that "section 7003 is essentially a codification of common law nuisance remedies," yet Congress also made clear that section 7003 "should not be construed solely with respect to the common law" and should not be constrained by common law limitations. Rather, section 7003 is intended to provide an enhanced liability and remedial scheme.\textsuperscript{238} In essence, Congress was exhorting the courts to build upon the common law in order to fully implement the expansive equitable powers and remedies outlined in RCRA's imminent hazard provisions.\textsuperscript{239} Hence, courts should recog-


\textsuperscript{236} See 42 U.S.C. § 6973(a) (2000). The statute extends liability to "any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to" the handling, storage, treatment, transportation or disposal of solid or hazardous waste that may present an imminent and substantial endangerment to health or the environment. Id.

\textsuperscript{237} Id. § 6973; United States v. Waste Indus., Inc., 734 F.2d 159, 164–67 (4th Cir. 1984); United States v. Price, 688 F.2d 204, 211 (3d Cir. 1982).

\textsuperscript{238} S. REP. No. 96-172, at 5 (1980), reprinted in 1980 U.S.C.A.N.N. 5019, 5023. For example, "contributing to" should be construed more liberally than common law theories of causation. Id. See Waste Indus., 734 F.2d at 166–68 (noting that Congress's intent was to expand upon common law in establishing liability).

\textsuperscript{239} See also 42 U.S.C. § 6972(f) (2000) ("Nothing in this section shall restrict any right which any person . . . may have under any statute or common law . . . ."). When this savings provision was added in 1984, an opponent noted that it would allow the development of federal common law. H.R. REP. No. 98-198, at 20
nize a federal common law right to contribution in favor of a defendant in a RCRA section 7003 case.240

3. Northwest Airlines & Texas Industries: Distinguishable and Flawed

In neither Northwest Airlines nor Texas Industries did the Court recognize a right of contribution impliedly or under federal common law. Both cases are distinguishable, though, because they involved statutory provisions far different from RCRA section 7003, and their holdings do not preclude recognition of an implied claim for contribution or a contribution right pursuant to federal common law in a section 7003 case. Further, their approach to ascertaining Congressional intent regarding the availability of contribution claims under federal statutes is flawed.

In both cases, the Court relied heavily on the fact that the statutes in question set forth comprehensive, detailed remedial schemes. Under such circumstances, said the Court, Congressional intent to offer additional remedies should not be implied from the statute or fashioned under federal common law.241 The provisions of the Sherman


Although courts applying federal common law may look to state law, the need for uniformity, and the vagaries and inadequacies of state law with respect to contaminated sites, strongly indicate that courts should develop a federal common law of contribution applicable to RCRA imminent hazard cases. See United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) (noting factors for determining whether to apply federal common law or refer to state law when evaluating issues related to a federal program).

240. In Valentine, the court also held that a federal common law right of contribution would enhance “unique federal interests” by encouraging defendants to settle quickly with the government, implead other responsible parties, and perform the cleanup privately, thus preserving the public treasury and fostering faster cleanups. United States v. Valentine, 856 F. Supp. 627, 635-36 (D. Wyo. 1994) (citing United States v. New Castle County, 642 F. Supp. 1258 (D. Del. 1986) (recognizing federal common law contribution claim in CERCLA case)). Whether such interests are “unique” enough to warrant development of a federal common law right to contribution, however, is questionable in light of Supreme Court cases seemingly circumscribing the scope of “unique federal interests” to matters such as interstate and international disputes or admiralty law. See Tex. Indus., 451 U.S. at 640–43; Nw. Airlines, 451 U.S. at 95–98; 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4518 (1996) (noting trend in recent Supreme Court decisions reflects very restrained attitude toward formulation of federal common law); see also Mark A. Johnson, Contribution Among Defendants in Actions Under Section 7003 of the Resource Conservation and Recovery Act, 2 Wis. Envtl. L.J. 225, 231 (1995) (agreeing with Valentine court’s conclusion to imply right of contribution, but questioning conclusion that contribution right exists under federal common law, noting that encouraging cleanups and settlements and reducing enforcement costs do not seem like “unique federal interests”).

241. Texas Indus., 451 U.S. at 644–45; Nw. Airlines, 451 U.S. at 93–94; see also 19 WRIGHT ET AL., supra note 240, § 4516 (noting if statute is detailed, it is less
and Clayton Acts at issue in *Texas Industries* subjected a violator of the antitrust laws to specific penalties, terms of imprisonment, and treble damages.\(^{242}\) Similarly, the Equal Pay Act and Title VII provisions at issue in *Northwest Airlines* subjected an unlawfully discriminating employer to specific penalties, terms of imprisonment, and back pay damages.\(^{243}\) By contrast, as discussed above, RCRA section 7003’s remedies are stated in broad, expansive terms, including authorization “to take such other action as may be necessary.”\(^{244}\) RCRA’s federal enforcement provision, section 3008, provides for civil and criminal penalties based on violations of certain RCRA statutory and regulatory requirements, but it has no applicability to section 7003.\(^{245}\) Implying a contribution remedy in section 7003 cases does no violence to the statutory remedial scheme established by Congress; rather, as discussed above, contribution is consistent with the RCRA remedial scheme in imminent hazard cases.\(^{246}\)

More troubling, though, is that the Court in both *Northwest Airlines* and *Texas Industries* supported its decisions not to imply a contribution right by finding that the claimants were not members of a

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\(^{244}\) 42 U.S.C. § 6973(a) (2000).

\(^{245}\) Id. § 6928(b) (2000). For example, RCRA section 3008(a) limits authority for compliance orders to violations of any requirements of “this subchapter,” meaning subtitle C. Id. § 6928(a). The provisions pertaining to criminal sanctions and civil penalties are likewise limited to violations of subtitle C. Id. § 6928(d), (g); see United States v. Waste Indus., Inc., 734 F.2d 159, 164 (4th Cir. 1984) (noting that section 7003, unlike subtitle C, does not regulate conduct but regulates and mitigates endangerments).

\(^{246}\) The *Meghrig* Court observed that “where Congress has provided 'elaborate enforcement provisions' for remedying the violation of a federal statute, as Congress has done with RCRA and CERCLA, it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under the statute.” *Meghrig* v. KFC W., Inc., 516 U.S. 479, 487–88 (1996) (quoting Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 14 (1981)). The holding in *Meghrig*, though, was that section 7002(a)(1)(B) cannot be interpreted to allow a citizen to recover past cleanup costs incurred prior to initiating suit. *Id.* at 488. The opinion did not address contribution at all. As discussed more fully in Part V.B *infra*, RCRA’s imminent hazard provisions, in contrast to RCRA § 3008, do not have elaborate enforcement mechanisms, and *Meghrig* should not stand in the way of recognition of a contribution remedy in RCRA imminent hazard cases.
class for whose benefit the statutes were enacted. In so doing, the Court was relying on cases in which it was determining whether to imply a private cause of action where a federal statute expressly authorized only a governmental claim; in such cases the Court has looked at whether the claimant is a member of a class for whose benefit the statute was enacted. How important that factor—or any single factor—remains today with respect to implying private causes of action is not free from doubt; later Court opinions have made clear that Congressional intent is the lodestar for implying private rights of action. But in a broad sense, a defendant in a section 7003 case

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247. "It cannot possibly be said that employers are members of the class for whose special benefit either the Equal Pay Act or Title VII was enacted. To the contrary, both statutes are expressly directed against employers; Congress intended in these statutes to regulate their conduct for the benefit of employees." Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 92 (1981). "The Sherman Act and the provision for treble damages under the Clayton Act were not adopted for the benefit of participants in a conspiracy to restrain trade. On the contrary, petitioner is a member of the class whose activities Congress intended to regulate for the protection and benefit of an entirely different class." Tex. Indus., Inc. v. Radcliff Materials, 451 U.S. 630, 639 (1981) (citation omitted).

248. Both opinions looked to Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977) (holding that defeated tender offeror had no private cause of action under section 14e of the Securities and Exchange Act of 1934). Tex. Indus., 451 U.S. at 639; Nw. Airlines, 451 U.S. at 92. See generally Cort v. Ash, 422 U.S. 66 (1975), in which the Court held that no private cause of action was available based on a violation of the Federal Election Campaign Act. Cort listed four factors as relevant for determining whether to imply a private remedy where the statute did not expressly provide one: "First, is the plaintiff one of the class for whose especial benefit the statute was enacted—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" Id. at 78 (citations omitted).

249. See Touche Ross & Co. v. Redington, 442 U.S. 560 (1979), in which the Court held that there was no private action for damages based on a violation of § 17(a) of the Securities Exchange Act of 1934. The Court made clear that legislative intent is the key factor in determining whether to imply a private right of action and that the other Cort factors are entitled to lesser weight or are merely indicia of Congressional intent. Id. at 575–76; see also Thompson v. Thompson, 484 U.S. 174, 179 (1988) (observing that the Court has used other tools of statutory construction, along with the Cort factors, to discern whether Congress intended to imply a private cause of action); Id. at 189–90 (Scalia, J., concurring) (noting that the Cort analysis has been "effectively overruled," because Touche Ross made Congressional intent the "determinative factor," and the other three factors are simply indicia).

The Court's recent decisions reflect an increased reluctance to recognize private rights of action not expressly provided for in federal statutes. 19 Wright et al., supra note 240, § 4516; see Alexander v. Sandoval, 532 U.S. 275 (2001) (holding that no private cause of action exists to enforce Title VI of Civil Rights Act of
arguably is within the class that Congress intended to be benefited by RCRA's imminent hazard provisions. Section 7002(a) expressly allows "any person" to sue another for contributing to the presence of endangering waste at a site, which has been interpreted to allow even persons responsible for contributing to the endangerment to maintain a section 7002(a)(1)(B) action.

More fundamentally, though, inquiring whether the claimant is a member of a class for whose benefit the statute was enacted seems particularly ill-suited for evaluating whether a contribution remedy should be implied. Mechanical application of this factor in the narrow sense would always weigh against implying a contribution right, since by definition the party seeking contribution is one who is liable under the statute, so it may be difficult to say that the statute was enacted for the benefit of the class of which defendant is a member. To the extent this factor has continued relevance in divining Congressional intent to imply a contribution remedy, it should be revised in light of the roots and purpose of contribution, as well as the fact that the party seeking contribution necessarily must be a liable party under the statute. Specifically, where the purpose of the federal statute is not to punish intentional bad acts but rather is remedial, courts should be more willing to imply the remedy of contribution.

A greater willingness to imply contribution in favor of defendants whose liability does not stem from intentional bad acts is consistent with the history and purpose of contribution in equity and at common law. That is, contribution originally was an equitable doctrine, and equity

1964's disparate impact regulations). Query whether the Court should be similarly reluctant to recognize a remedy for contribution?


252. The Court criticized the D.C. Circuit for rejecting and mis-applying this factor in Northwest Airlines. 451 U.S. at 92 n.25. But, as discussed below, a strict application of this factor should have no weight in evaluating whether to imply a contribution claim in favor of a defendant found strictly liable for a remedial statute such as RCRA section 7003. See Chemung Canal Trust Co. v. Sovran Bank, 939 F.2d 12, 15 (2d Cir. 1991) (finding the first Cort factor too simplistic for determining whether to imply contribution claim for fiduciary under ERISA).

253. See Flint & Moore, supra note 147, at 13–14 (noting that courts are more likely to imply contribution right for defendant where liability under federal statute is based on negligence rather than intentional tort); Mark J. Loewenstein, Implied Contribution Under the Federal Securities Laws: A Reassessment, 1982 Duke L.J. 543, 558 (1982) (arguing that it is more unfair to deny contribution to negligent defendant than one engaged in intentional wrongdoing).
does not favor persons with unclean hands.\textsuperscript{254} At common law, historically and today, contribution was and is not available to an intentional tortfeasor.\textsuperscript{255} Rather than framing the inquiry as to whether the defendant is a member of a class the statute intended to benefit, more properly the inquiry should be whether the defendant is an intentional wrongdoer that the statute aims to punish for violations of its provisions. If so, implied contribution should be disfavored; if not, contribution should be more readily implied. So framed, this factor unquestionably augurs in favor of contribution for a defendant sued under RCRA section 7003.

Recall that the Equal Pay Act, Title VII, Sherman Act and Clayton Act all regulate intentional unlawful conduct and target specific categories of wrong-doers: discriminating employers and conspirators in restraint of trade. These statutes provide for penalties and prison terms based on violations of their terms.\textsuperscript{256} The parties asserting contribution claims in \textsl{Northwest Airlines} and \textsl{Texas Industries} were clearly the culpable targets those statutes intended to regulate; it was easy for the Court to conclude that such intentional violators of the statutes were not among the class of intended beneficiaries under the statutes and that such violators should not be allowed to off-load some of their sanctions upon others.

By contrast, RCRA section 7003, like CERCLA, is a retroactive, strict liability statute intended to be remedial rather than punitive. Liability under RCRA section 7003 does not depend upon the defendant violating any statutory or regulatory prohibition; there are no penalties, prison terms or damages associated with acts or omissions that give rise to liability under section 7003.\textsuperscript{257} Defendants in section 7003 cases need not be culpable at all. Liability under section 7003 may be triggered simply by having contributed to the presence of solid waste at a site; the defendant may have used utmost care and state-of-the-art practices and yet still be liable.\textsuperscript{258} Accordingly, courts should

\begin{itemize}
\item \textsuperscript{254} See \textsc{Restatement (Second) of Torts} § 886A cmt. c (1979); 30A C.J.S. \textit{Equity} § 109 (2007).
\item \textsuperscript{255} See \textsc{Restatement (Second) of Torts} § 886A cmts. a, j (1979).
\item \textsuperscript{256} See supra notes 242–243.
\item \textsuperscript{257} RCRA § 7003(b) provides for a penalty of up to $5000 per day for failure to comply with an order issued pursuant to section 7003(a). 42 U.S.C. § 6973(b) (2000). But it is not a “violation” to have contributed to the presence of waste which may present an endangerment, and being liable under section 7003 does not result in any penalties, unless the defendant fails to comply with an order once he is found liable. See \textit{United States v. Waste Indus., Inc.}, 734 F.2d 159, 164 (4th Cir. 1984).
\item \textsuperscript{258} See \textit{Waste Indus.}, 734 F.2d at 164 (holding that “Section 7003, unlike the provisions of the Act’s subtitle C, does not regulate conduct but regulates and mitigates endangerment.”); \textit{United States v. Conservation Chem. Co.}, 619 F. Supp. 162, 198 (W.D. Mo. 1985) (finding that persons contributing to the endangerment are subject to liability under RCRA section 7003 “regardless of fault or negligence”).
\end{itemize}
be inclined to imply a remedy of contribution for defendants in RCRA section 7003 cases.\textsuperscript{259}

The Valentine court relied on another Supreme Court case, \textit{Musick, Peeler & Garrett v. Employers Ins. of Wausau},\textsuperscript{260} to support its holding that a contribution right should be recognized for defendants in a section 7003 case. The Court in \textit{Musick} held that a defendant in a private action for damages pursuant to Rule 10b-5 impliedly has a right to contribution. Unlike the statutes in \textit{Northwest Airlines} and \textit{Texas Industries}, Rule 10b-5 did not expressly provide for a private cause of action, but rather courts had judicially implied a private cause of action, based on the express governmental claim under Rule 10b-5. The \textit{Musick} Court reasoned that it would be unfair to imply a claim against a defendant and then refuse to imply a contribution claim for defendant.\textsuperscript{261}

While not directly on point, \textit{Musick} is instructive for how it framed the question of Congressional intent. Rather than looking for evidence that Congress intended to provide a contribution right, as the Court did in \textit{Northwest Airlines} and \textit{Texas Industries}, the \textit{Musick} Court viewed that quest as futile where Congress had not even provided for the underlying cause of action against the defendant. Instead, the Court saw its role as trying to discern whether Congress would have included a contribution right if it had expressly provided for a private cause of action under Rule 10b-5. As a result, the Court did not require as much evidence of Congressional intent in order to imply a contribution right in a private cause of action under Rule 10b-5 as the Court had required with respect to the statutes at issue in \textit{Northwest Airlines} and \textit{Texas Industries}.\textsuperscript{262}

It is important to recognize that joint and several liability is not expressly provided for in section 7003 or its legislative history, so it is not surprising that there is no mention of contribution in the statute or legislative history either. Rather, joint and several liability has been judicially implied in RCRA section 7003 cases.\textsuperscript{263} Accordingly, the relevant inquiry regarding Congressional intent should not be whether there is evidence of Congressional intent to provide for contribution in a section 7003 case; rather, the proper question is if Con-

\textsuperscript{259} On the other hand, contribution should be disfavored for a defendant in a RCRA § 3008 enforcement action. Section 3008 provides for civil penalties and criminal sanction and is designed to punish those who violate RCRA's hazardous waste management requirements. \textit{See} 42 U.S.C. § 6928 (2000).

\textsuperscript{260} 508 U.S. 286 (1993).

\textsuperscript{261} \textit{Id.} at 292.

\textsuperscript{262} \textit{Id.} at 294.

\textsuperscript{263} \textit{See}, \textit{e.g.}, United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1401 (D.N.H. 1985) (holding that defendant must show reasonable basis for apportioning harm to avoid joint and several liability); \textit{Conservation Chem.}, 619 F. Supp. at 199 (holding that liability is joint and several where endangerment is indivisible).
gress had expressly provided for joint and several liability in RCRA section 7003, would Congress also have provided for a right of contribution. Using this more lenient standard, there should be no doubt that the requisite intent can be shown.

4. **CERCLA Supports Contribution Under RCRA**

CERCLA, unlike RCRA, contains an express contribution section. CERCLA section 113(f) grants liable parties the right to seek contribution against other parties who are liable under section 107, either during or following a civil action under sections 106 or 107, or following resolution of CERCLA liability to the federal or state government via an administrative or judicially approved settlement. Some courts have zeroed in on the lack of a comparable express contribution section in RCRA as showing that Congress did not intend to allow contribution claims under RCRA's imminent hazard provisions.\(^{265}\)

That RCRA lacks such an express contribution provision does not show that Congress did not intend to allow contribution claims under RCRA or that courts should not imply a contribution claim or fashion one under federal common law. First, the notion that Congress knew how to provide for contribution because it did so in CERCLA, and hence Congress must have affirmatively decided that it did not want defendants in RCRA imminent hazard cases to have a contribution remedy, is an example of a dubious statutory interpretation arising from what Professor William Buzbee has termed the "one-Congress fiction."\(^{266}\) That is, the terms of statute A should not be compared to

\(^{264}\) CERCLA section 113(f)(1), 42 U.S.C. § 9613(f)(1) (2000), provides:

> 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.


> 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).


\(^{266}\) William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. Pa. L. Rev. 171 (2000) (advocating that interpreters of statutes should rely on the language, structure, and historical context of each statute rather than comparing the terms of two different statutes enacted years apart).
the terms of statute B as if they were written by the same drafter as a single law; such a comparison ignores the reality that the two statutes were enacted at different times, by different Congresses, under different circumstances. Inter-statutory comparisons of language are particularly suspect where, as here, the statute being interpreted (RCRA) was enacted before the statute to which it is being compared (CERCLA), and where the interpretation rests upon the absence of language in the statute being interpreted.267

Second, courts in CERCLA cases found a right to contribution even before Congress added an express contribution provision to the statute in 1986. CERCLA as originally enacted in 1980 had no express language providing for contribution; section 113(f) was added by the 1986 amendments.268 Prior to the time CERCLA was expressly amended to provide for contribution among responsible parties, courts repeatedly held that a liable party had a right of contribution, either impliedly or under federal common law.269 In 1986, Congress expressly added section 113(f) to eliminate any question regarding the existence of a right to contribution under CERCLA and to confirm its availability.270 The legislative history shows that Congress believed contribution to be important because it would promote settlement, decrease litigation and facilitate cleanups. Congress recognized that responsible parties would be more willing to settle and perform the cleanup themselves where they were assured they could seek contribution against other responsible parties.271


269. See supra note 156.


Third, as illustrated by *Atlantic Research*, even after an express contribution section was added to CERCLA, courts have continued to allow claims in the nature of contribution even where the responsible party could not take advantage of section 113(f) under the express terms of the statute. Because the Supreme Court in *Atlantic Research* based its decision to allow a responsible party to sue under section 107 upon the express terms of the statute, the Court did not reach the alternative holding of the Eighth Circuit: an implied right of contribution exists under CERCLA for responsible parties who are not eligible for contribution in the post-*Aviall* world under the terms of section 113(f). Finding that "[c]ontribution is crucial to CERCLA's regulatory scheme," the Eighth Circuit in *Atlantic Research* implied a right to contribution for responsible parties under CERCLA who cannot maintain an action for contribution under section 113(f) because they cleaned up the site voluntarily without first being sued under sections 106 or 107 or formally settling with the government. The Eighth Circuit recited the same test as the Supreme Court had used in *Northwest Airlines*: the ultimate question is Congress' intent, which can be discerned by looking at the statute's language, its legislative history, its underlying purpose and structure, and the likelihood that Congress intended to supercede or supplement existing state remedies. The Eighth Circuit did not specifically address whether responsible parties under CERCLA were in the class whose members especially benefited from CERCLA. Instead, the Eighth Circuit found that CERCLA's language and legislative history demonstrate an intent to provide for contribution, that Congress did not intend to preclude other rights to contribution under the statute when it enacted section 113(f), and that baring contribution to responsible parties who voluntarily clean up contaminated sites is contrary to CERCLA's purpose of encouraging private cleanups of contaminated sites and preserving the public treasury. The Eighth Circuit concluded that nothing in the terms of CERCLA or otherwise suggested that Congress intended to penalize parties who "voluntarily" engaged in cleanups by foreclosing contribution to them, while rewarding responsible

272. United States v. Atl. Research Corp., 127 S. Ct. 2331, 2339 n.8 (2007). Such use of the term "contribution" is not completely accurate in the traditional common law sense, inter alia, because the contribution-plaintiff has not been found liable, been sued by, or paid money to another party. See *Restatement (Second) of Torts* § 886A(1) cmt. e (1979). The focus of this Article is on claims by defendants in RCRA imminent hazard cases; this Article is not using the term "contribution" to include section 7002(a)(1)(B) claims by responsible parties who "voluntarily" incur cleanup costs because they might be sued under RCRA's imminent hazard provisions.


274. Id. (citing Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 91 (1981)).

275. Id.
parties who are sued under CERCLA sections 106 or 107 by allowing them contribution expressly under section 113(f)(1).276

Similarly, nothing in the terms or purpose of RCRA suggests that Congress intended to foreclose contribution to responsible parties who are sued under section 7003 while allowing contribution for those sued under CERCLA, nor to require a responsible party sued under section 7003 to bear the entire cost of cleaning up a site while other responsible parties who contributed to the endangerment escape responsibility for any such costs. Requiring one such strictly liable party, among many contributors to the endangerment, to carry the entire burden of cleanup, without any right of recourse against other responsible parties, does not further RCRA's goals. Indeed, it would be counter-productive and contrary to the statute's purpose to force only certain responsible parties to bear the entire cleanup costs—such as those who agree to settle with the government and perform the necessary work—and allow the other responsible parties to sit back and evade all liability.277

Thus, simply because RCRA lacks an express contribution provision such as CERCLA should not preclude a finding of a right to contribution under RCRA section 7003. Not only is such a comparison an example of the flawed "one-Congress fiction" approach to statutory interpretation, the right to contribution under CERCLA does not even depend upon that statute's express contribution section; an action for contribution claims under RCRA would increase litigation and delay cleanups, pointing to the CERCLA experience. Statistics indicate that as much as 33% of costs associated with Superfund sites go to attorneys, ENVIRONMENTAL LITIGATION 6 (Janet S. Kole & Stephanie Nye eds., 2d ed. 1999), and lengthy cleanups are not unusual at CERCLA sites. The high legal costs and remediation delays of the Superfund program, however, should not be reasons to bar the availability of contribution claims under RCRA. One, contribution litigation is far from the only cause of CERCLA's high transactional costs and cleanup delays. See PERCIVAL ET AL., supra note 62, at 434–37. Two, effective case management in RCRA imminent hazard cases could allow the government's case to proceed against the original defendants, with cross-claims and third-party complaints for contribution stayed until a judgment or settlement is reached with the original defendants, whereupon the cleanup could proceed while contribution claims are litigated. Three, although calls for Superfund reform are common, noticeably absent are calls to eliminate contribution claims for responsible parties while maintaining joint and several liability. See id.
contribution has been implied by courts under CERCLA where there was no express right to contribution, both before and after section 113(f) was added to CERCLA.

Rather, the importance of allocating costs among responsible parties under CERCLA, as evidenced by Atlantic Research, makes it even more appropriate to imply a contribution claim under its sibling site cleanup authority, RCRA section 7003. Section 7003 and CERCLA share a similar purpose—to make responsible parties clean up (or pay for the cleanup of) contaminated sites. Both statutes use similar strict, retroactive, expansive liability schemes to achieve that common goal; the same contaminated site often may give rise to suits against the same defendants under either RCRA section 7003 or CERCLA or both. Joint and several liability is not expressly required by either statute, yet courts have implied joint and several liability under both. Contribution in CERCLA cases is common and has been widely recognized as crucial to realizing CERCLA's purpose. Congress and courts recognize that a right to contribution not only promotes fairness but also encourages settlements and results in a decrease in the amount of funds expended by the government in cleanup and litigation. The same reasoning applies to RCRA, and therefore a contribution claim should be available in section 7003 cases. It makes no sense for the right of contribution to depend upon which alternative site cleanup authority the plaintiff chooses to employ.

B. Section 7002(a)(1)(B)

As discussed in Part II.B above, section 7002(a)(1)(B) is patterned after section 7003. The language is virtually identical, the responsible parties and elements of liability are the same, and courts largely have interpreted the two sections co-extensively. Accordingly, for the same reasons set forth in Part V.A of this Article, a defendant in a citizen suit under section 7002(a)(1)(B) arguably should have the same right to contribution as a defendant in a section 7003 action, impliedly under the statute or by virtue of federal common law.

But unlike section 7003, section 7002(a)(1)(B) authorizes an express cause of action to parties other than the United States. This part of the Article demonstrates that a defendant in a section 7002(a)(1)(B) citizen suit should be able to maintain a claim, in the nature of contribution, against other responsible parties under the express terms of section 7002(a)(1)(B). The Supreme Court's decision in


279. See Valentine, 856 F. Supp. at 636.
Meghrig should not be viewed as foreclosing such a remedy, particularly in light of the Court's most recent CERCLA cost allocation opinion.

1. Statute Expressly Provides for Citizen Suit in Nature of Contribution

Section 7002(a) expressly provides that "any person" may commence a civil action against anyone who has contributed or is contributing to the presence of solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. Noting that the statute says "any person" may commence a citizen suit under section 7002(a)(1)(B), courts consistently have allowed parties who themselves could be liable for the endangerment to maintain actions under section 7002(a)(1)(B) against others. Since "any person" can include a responsible party, a defendant in a section 7002(a)(1)(B) action likewise should be able to assert a section 7002(a)(1)(B) claim against another person who has contributed or is contributing to the endangerment—as a third-party complaint, a cross-claim or a counterclaim. The plain language of the statute permits such a claim.

A potentially more difficult question is whether section 7002(a)(1)(B) authorizes relief that would force another responsible party to share the costs for work the defendant may be ordered to perform in a section 7002(a)(1)(B) citizen suit. The court in a section 7002(a)(1)(B) suit has jurisdiction "to restrain" any person who has contributed or is contributing to the presence of such solid or hazardous waste, and "to order such person to take such other action as may

282. Standing normally should be easy to demonstrate: The defendant is threatened with economic injury as a result of its potential liability for the contamination, causation exists where there is evidence linking the other parties to the contamination, and the court can redress the injury by awarding relief in favor of the defendant. See also Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 17 (1981) (recognizing that economic injury may constitute injury in fact); Sierra Club v. Morton, 405 U.S. 727, 737 (1972) (recognizing economic injury may constitute injury in fact); cf. 110 W., LLC v. Red Spot Paint & Varnish Co., No. l:05-cv-1670-LJM-WTL, 2007 WL 3036876, at *2 (S.D. Ind. Oct. 15, 2007) (holding that plaintiff had standing in light of economic injury posed by its contaminated site).
be necessary."\textsuperscript{283} Courts consistently have found that Congress intended to afford claimants under section 7002(a)(1)(B) with broad injunctive relief, both prohibitory and mandatory, in order to clean up sites contaminated with solid or hazardous wastes.\textsuperscript{284} Hence, a defendant should be able to assert a claim for injunctive relief against another responsible party under section 7002(a)(1)(B) seeking, for example, an order requiring that the other responsible party take affirmative action to clean up the wastes.

But how does a court order such affirmative relief when a plaintiff seeks and obtains an injunction to abate the endangerment against an original defendant, and the original defendant seeks and obtains an injunction to abate the same endangerment against a third-party defendant? It appears well settled that the original defendant will be jointly and severally liable to the innocent plaintiff, and thus the court should order the original defendant to perform all the work necessary to abate the endangerment (unless the original defendant can establish divisibility).\textsuperscript{285} But should the original defendant get the benefit of a similar order requiring the third-party defendant to perform all the work, where both the original and third-party defendants are responsible parties? If so, the third-party defendant may ultimately have to do all the work and pay all the costs to abate the endangerment, while the original defendant escapes without having to do or pay anything toward such abatement.

Similarly, where multiple original defendants are sued under section 7002(a)(1)(B), a court may order the defendants, as jointly and severally liable, to perform the work to abate the endangerment.\textsuperscript{286} But again, if one or both defendants assert a section 7002(a)(1)(B) claim for injunctive relief against the other, how does the court coordinate its award of relief for the plaintiff against the defendants with an order or orders in favor of each of the defendants inter se?

A court, consistent with its equitable powers, could issue an affirmative injunction in favor of the innocent plaintiff that would require the liable defendant(s) to perform the entire work to abate the endan-

\textsuperscript{283} 42 U.S.C. § 6972(a).
\textsuperscript{285} See, e.g., Me. People's Alliance v. Mallinckrodt, Inc., 471 F.3d 277, 298 (1st Cir. 2006), cert. denied, 128 S. Ct. 93 (2007) (holding that defendant is responsible for totality of damage unless harm is divisible); United States v. Conservation Chem. Co., 619 F. Supp. 162, 199 (W.D. Mo. 1985) (holding that liability is joint and several where endangerment is indivisible); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361 (D.N.H. 1985) (holding that defendant must show reasonable basis for apportioning harm to avoid joint and several liability).
germent, and then try to craft another order or orders that would require each liable defendant to do some lesser portion of the entire work.\textsuperscript{287} However, there may be legal and practical difficulties for a court trying to craft such affirmative injunctions against a third-party defendant or co-defendant in favor of an original defendant. First, it may be hard for a court to determine with any precision what work equates with each liable party's equitable share. For example, the court may believe that the third-party defendant should bear a 2/3 share versus the original defendant's 1/3 share, but it may be difficult for a court to ascertain what subset of the necessary cleanup work equates to a 1/3 or 2/3 share. Second, Federal Rule of Civil Procedure 65(d) mandates that every order granting an injunction "shall be specific in terms" and "shall describe in reasonable detail" the acts that the party must do or not do.\textsuperscript{288} Thus, it may be difficult for a court to specify what each liable party must do, while assuring that the multiple injunctions comprehensively abate the endangerment and that the citizen suit plaintiff's entitlement to joint and several liability against the defendant(s) is not compromised.\textsuperscript{289} Third, requiring multiple responsible parties to perform parts of a cleanup could pose substantial problems in coordinating and completing the work efficiently and safely.

A preferable solution, therefore, legally and practically, would be for the court to order the original defendant (D1) to perform the work required to abate the endangerment, and order the third-party defendant or co-defendant (D2), not to perform a share of the work, but rather to pay money to D1 to fund D2's fair share of the work. In such circumstances, a remedy of a cash contribution to D1 from D2 is the effective equivalent of an award of affirmative injunctive relief in favor of D1 against D2.

As the Third Circuit made clear in construing identical remedy-authorizing language under section 7003—in language quoted approvingly in the legislative history for the 1984 amendments—Congress sought to invoke broad and flexible equity powers, including an order

\textsuperscript{287} Cf. United States v. Valentine, 856 F. Supp. 627, 634 n.7 (D. Wyo. 1994) (holding that the court has authority to order jointly and severally liable defendants to fund the cleanup and to apportion responsibility); \textsc{Restatement (Second) of Torts} § 886A (1979) (providing for contribution among defendants to the extent one has paid more than its equitable share of the common liability).

\textsuperscript{288} This requirement applies to permanent as well as preliminary injunctions. \textit{See}, \textit{e.g.}, Reich v. ABC/York-Estes Corp., 64 F.3d 316, 319–20 (7th Cir. 1995) (holding that Federal Rules of Civil Procedure were violated when order was not specific enough in its terms and did not reasonably describe acts to be restrained); \textsc{Steven Baicker-McKee et al., Federal Civil Rules Handbook} 1019 (2006).

\textsuperscript{289} \textit{See} Bangor, 437 F. Supp. 2d at 219 (ordering both liable parties to perform the cleanup jointly and severally, because of concerns that splitting the work between the two parties might not result in attaining the goal of abating the endangerment).
that requires a liable party to pay money to fund investigative and remedial work. Requiring one liable party to fund a share of the work, in lieu of performing a portion of the work itself, should be well within the scope of the court's equitable powers under section 7002(a)(1)(B).

Congress also intended that section 7003, and concomitantly section 7002(a)(1)(B), be a codification and expansion of common law public nuisance remedies. Contribution clearly is—and was at the time sections 7003 and 7002(a)(1)(B) were enacted—an important component of the remedies of common law public nuisance. Therefore, it is consistent with the express language of section 7002(a)(1)(B) and the intent of Congress for a remedy in the nature of contribution to be available to defendants under section 7002(a)(1)(B).

2. Meghrig Is Not a Bar to Contribution, Particularly When Viewed Through the Prism of Atlantic Research

The Supreme Court's decision in Meghrig does not preclude recognition of a right to such contribution-type relief under the express terms of section 7002(a)(1)(B). The citizen suit plaintiff in Meghrig had completed cleanup of the oil contaminated site and sought recovery of costs it already had incurred prior to initiating suit. There was no longer any imminent and substantial endangerment. The Court's holdings were that the terms of section 7002(a) do not contemplate the award of past cleanup costs incurred pre-complaint, and that section 7002(a)(1)(B) permits a citizen to bring suit only upon an allegation that the contaminated site presently poses an imminent and substantial endangerment, not merely that it posed an endangerment some time in the past.

From a timing perspective, Meghrig makes plain that a section 7002(a)(1)(B) claim cannot be brought if there is no longer an imminent and substantial endangerment. But if a defendant were to assert a section 7002(a)(1)(B) claim in a third-party complaint (or cross-claim or counterclaim) while there was still an endangerment, neither the terms of the statute nor the teachings of Meghrig would bar such a claim.

293. RESTATEMENT (SECOND) OF TORTS § 886A (1979); PROSSER, supra note 149, § 50.
295. Id. at 484–88.
296. Id. at 484.
With respect to relief available under section 7002(a)(1)(B), all of the Meghrig Court's language regarding available relief is directed at explaining why a private party cannot voluntarily undertake a cleanup and then file suit under section 7002(a)(1)(B) to recover those past costs incurred prior to bringing suit. It is in this context that the Meghrig Court compared section 7002(a)(1)(B) to CERCLA sections 107 and 113(f)(1) and concluded that Congress did not intend the language of RCRA section 7002(a)(1)(B) to provide for recovery of past cleanup costs. However, contrary to the conclusions drawn by certain later courts, Meghrig does not preclude all awards of monetary relief. The Meghrig opinion certainly did not so hold. Indeed, the Court specifically did not decide "whether a private party could seek to obtain an injunction requiring another party to pay cleanup costs which arise after an RCRA citizen suit has been properly commenced ... or otherwise recover cleanup costs paid out after the invocation of RCRA’s statutory process.” Further, neither the language nor logic of Meghrig should foreclose all remedies that would require a liable party to pay for future cleanup costs. Orders requiring liable parties to perform work that will cost them money in the future are common under section 7002(a)(1)(B). Nor should Meghrig be construed to prevent a court from ordering a responsible party to pay another responsible party for performing such future work. As discussed in preceding Part V.B.1, an order requiring a liable party D2 to pay cash to fund a portion of the work the liable party D1 has been ordered to conduct is the functional equivalent, and superior practical alterna-

297. The Court expressly stated that it was not deciding whether section 7002(a)(1)(B) could be used to require a responsible party to reimburse a plaintiff for past cleanup costs incurred post-complaint. Id. at 488. The Court's reference to section 113(f)(1) in this context should not be viewed as an indication that the Court would look askance at a contribution claim under RCRA due to the absence of an express contribution section. At the time Meghrig was decided in 1996, CERCLA case law was fairly well settled that a responsible party could maintain an action for cost recovery only pursuant to section 113(f), not section 107. Even cost recovery actions by responsible party plaintiffs which had never been sued under CERCLA and had "voluntarily" incurred their response costs were often termed "contribution" actions and maintained pursuant to section 113(f). See, e.g., Azko Coatings, Inc. v. Aigner, Inc., 30 F.3d 761 (7th Cir. 1994); United Techs. Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96 (1st Cir. 1994); United States v. Colo. & E. R.R. Co., 50 F.3d 1530 (10th Cir. 1995). As the Court later explained in Meghrig, "the cost recovery provisions of CERCLA, amply demonstrate that Congress did not intend for a private citizen to be able to undertake a cleanup and then proceed to recover its costs under RCRA.” 516 U.S. at 487 (emphasis added).


299. 516 U.S. at 488.

tive, to requiring both D1 and D2 to perform distinct portions of the required work.

The Supreme Court's decision in *Atlantic Research* further instructs that section 7002(a)(1)(B) should be interpreted in a manner that provides for a remedy in the nature of contribution. First, the Court made clear that there are differences between claims for cost recovery and contribution under CERCLA. Cost recovery claims under CERCLA section 107 are for parties who voluntarily incur cleanup costs and seek to recover them from responsible parties. Contribution claims under section 113(f), by contrast, are for defendants which have been sued under CERCLA sections 106 or 107 or have resolved their CERCLA liability to the government in an administrative or judicially approved settlement. As the Court emphasized, a claim for cost recovery may be available where no claim for contribution is allowed, and a claim for contribution may be available where there is no claim for cost recovery. Similarly, a difference can be recognized between cost recovery and contribution under RCRA section 7002(a)(1)(B). That is, although RCRA section 7002(a)(1)(B) in *Meghrig* was construed to preclude a plaintiff from recovering past costs voluntarily incurred, it does not mean that section 7002(a)(1)(B) cannot be interpreted to allow for a remedy in the nature of contribution toward future cleanup work by a defendant who has been sued under section 7002(a)(1)(B).

Second, the *Atlantic Research* Court made clear that the statutory language should be interpreted in a manner consistent with its "plain meaning" to allow a responsible party to allocate responsibility for cleanup costs to other responsible parties, rather than in a strained manner that would preclude responsible parties from cost allocation and perhaps force one responsible party to bear all of the costs itself. The United States had argued that only innocent parties should be permitted to maintain an action for cost recovery under CERCLA section 107, but the Court found that the plain language of the statute permitted "any person" to maintain an action under section 107—even responsible parties. Similarly, the expansive language of RCRA section 7002(a)(1)(B), including "to take such other action as may be necessary," should not be construed in a pinched fashion to deny a defendant the ability to seek contribution from other responsible parties.

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301. "We have previously recognized that 107(a) and 113(f) provide two 'clearly distinct' remedies." United States v. Atl. Research Corp., 127 S. Ct. 2331, 2337–38 (2007) (quoting Cooper Indus., Inc. v. Aviall Serv., Inc., 543 U.S. 157, 163 n.3 (2004)).


303. *Id.* at 2335–36.
Third, Atlantic Research reflects the importance of permitting responsible parties a claim by which they can share the cleanup cost burden with other responsible parties. Even in circumstances where it was unclear whether the express terms of CERCLA sections 107 or 113(f) would provide a responsible party with a claim to allocate costs among other responsible parties, the Atlantic Research Court declared that the responsible party would have a cost allocation remedy under CERCLA. Specifically, the Court made clear that a defendant which was compelled to incur future cleanup costs in the aftermath of a suit under CERCLA sections 106 or 107—a scenario that did not fall neatly into the Court’s descriptions of section 113(f) contribution and section 107 cost recovery claims—would be able to obtain relief against other responsible parties “under section 113(f), section 107(a), or both.”\(^{304}\) Similarly, courts should not interpret RCRA section 7002(a)(1)(B) in a manner that would deny a defendant the right to maintain an action in the nature of contribution to force other responsible parties to share in the cost of the future cleanup the defendant has been compelled to conduct. Rather, section 7002(a)(1)(B) should be interpreted in a manner, consistent with its language and purpose, that allows a defendant to obtain contribution for a share of those future cleanup costs from other responsible parties.

Fourth, in Atlantic Research the Court observed that a defendant sued by a responsible party under CERCLA section 107 could assert a contribution counterclaim under CERCLA section 113(f).\(^{305}\) It would be absurd to allow a responsible party-plaintiff to maintain a RCRA section 7002(a)(1)(B) claim against responsible parties, while preventing a responsible party-defendant from asserting a section 7002(a)(1)(B) claim against other responsible parties, including the plaintiff. For example, assume P, D1 and D2 are all responsible parties at a site. If P can initiate a section 7002(a)(1)(B) suit to force D1 to clean up the site, there should be no reason why D1 cannot assert a section 7002(a)(1)(B) counterclaim against P and a third-party complaint to force D2 to participate in the cleanup as well. If D1 were not permitted to assert such section 7002(a)(1)(B) claims in the nature of contribution, it would mean that D1 is left with the entire cleanup burden, simply because P was faster to the courthouse and D2 was luckier.\(^{306}\) Congress could not have intended that allocation of re-

\(^{304}\) Id. at 2338 n.6.

\(^{305}\) Id. at 2339. In so doing, the Court assumed, without deciding, that the responsible party-plaintiff would be entitled to joint and several liability under CERCLA section 107. Id. at 2339 n.7.

\(^{306}\) This hypothetical assumes that the court would subject D1 to joint and several liability in favor of P. If D1’s liability were merely several under RCRA section 7002(a)(1)(B), there would likely be no need for D1 to assert a counterclaim or third-party complaint, because D1 would only be liable for its fair share of the
sponsibility for RCRA-mandated cleanups should be decided by such factors.

3. Section 7002(b)(2) Requirements

As discussed in Part II.B above, plaintiffs initiating a citizen suit pursuant to section 7002(a)(1)(B) must comply with the requirements of subsection (b)(2) of section 7002, which preclude commencement of an action: (1) unless the plaintiff has provided ninety days advance notice to the EPA, the state in which the endangerment may occur, and any person alleged to have contributed to or be contributing to the presence of the waste which may present the endangerment, \(^{307}\) or (2) where the EPA or the state has commenced and is diligently prosecuting an action under sections 7003 or 7002(a)(1)(B) of RCRA or has taken certain actions pursuant to CERCLA with respect to the alleged endangerment. \(^{308}\)

Although by its terms subsection (b)(2)(A) states that “[n]o action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment,” \(^{309}\) courts have held that the ninety-day notice requirement also applies to cross-claims and third-party complaints as a jurisdictional prerequisite. \(^{310}\) The purpose of the section 7002(b)(2)(A) advance notice requirement is to allow the agency to assume the lead in bringing the action and to allow the defendant to remedy the situation. \(^{311}\) Thus, the advance notice requirement may make sense for a third-party complaint adding a new party to the case, or where the cross-claim or counterclaim is the first section 7002(a)(1)(B) claim asserted in the case. \(^{312}\) However, where the plaintiff has filed a section 7002(a)(1)(B) citizen suit and provided the requisite advance notice, it

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\(^{308}\) Id. § 6972(b)(2)(B).

\(^{309}\) Id. § 6972(b)(2)(A) (emphasis added).


\(^{311}\) See A.M. Int'l v. Datacard, 106 F.3d 1342, 1349 (7th Cir. 1994).

\(^{312}\) Indeed, courts which have applied the ninety-day notice requirement to a defendant’s pleading were faced with just such circumstances. In Portsmouth, 847 F. Supp. 380, plaintiff initiated a CERCLA cost recovery case, and the cross-claim and counterclaim by defendant were the initial RCRA § 7002(a)(1)(B) claims in that case. In Walker, 135 F. Supp. 2d 787, plaintiff brought a section 7002(a)(1)(B) claim, but defendant's third-party complaint under section 7002(a)(1)(B) added a new party to the case who had not received plaintiff's original notice.
makes little sense to require a defendant to provide ninety days advance notice for its counterclaim or cross-claim, since notice of the endangerment situation already has been provided to the EPA, the state, and all the existing parties to the case who would be subject to the cross-claim or counterclaim. The EPA and the state already had the chance to take action under RCRA or CERCLA during plaintiff's ninety-day notice period, and the existing parties in the case likewise had a chance to act during plaintiff's notice period.\(^{313}\)

The restrictions of sections 7002(b)(2)(B) & (C), pertaining to EPA and state actions, should have no relevance to a defendant's assertion of a section 7002(a)(1)(B) claim in response to a private plaintiff's section 7002(a)(1)(B) citizen suit, since the plaintiff's suit would be barred in the first instance by such restrictions.\(^{314}\) However, a defendant seemingly could be precluded by section 7002(b)(2)(C) from asserting a section 7002(a)(1)(B) claim against another responsible party in the context of a citizen suit brought by a state under section 7002(a)(1)(B) regarding the alleged endangerment. "No action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment—(i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section."\(^{315}\) Since the plaintiff-state has commenced the citizen suit under section 7002(a)(1)(B), the literal terms of section 7002(b)(2)(C) would seem to preclude a defendant from asserting a section 7002(a)(1)(B) claim in the nature of contribution.\(^{316}\)

\(^{313}\) See Zands v. Nelson, 779 F. Supp. 1254 (E.D. Cal. 1991) (requiring the plaintiff to provide ninety days notice before amending its complaint to add a section 7002(a)(1)(B) claim, but not requiring that the ninety days must have preceded initiation of the lawsuit).

\(^{314}\) See 42 U.S.C. § 6972(b)(2)(B)–(C). One of the reasons cited in Meghrig v. KFC Western, Inc., for denying recovery of past cleanup costs under RCRA section 7002(a)(1)(B) was that if RCRA were designed to compensate private parties for past cleanup costs, the RCRA provisions barring citizen suits unless there has been 90 days notice and the government is not taking action would be "wholly irrational," because they would allow recovery of costs only by private parties at sites with waste problems that were insufficiently severe to attract the attention of government officials, while private parties at sites with substantial problems would be foreclosed from recovering past costs. 516 U.S. 479, 486–87 (1996). Where the plaintiff's section 7002(a)(1)(B) claim is not barred by section 7002(b)(2), this reason would have no relevance to a section 7002(a)(1)(B) claim asserted by a defendant.

\(^{315}\) 42 U.S.C. § 6972(b)(2)(C)(i). In the context of a section 7002(a)(1)(B) suit by any party besides the state, neither subsection (b)(2)(B) nor (b)(2)(C) would prevent a defendant from asserting a section 7002(a)(1)(B) claim against any person.

\(^{316}\) See United v. Prod. Plated Plastics, Inc., 32 ERC 1737, 1740–41, 1741 n.6 (W.D. Mich. 1991) (holding that because State of Michigan was one of the plaintiffs in this RCRA enforcement case, defendants' third-party complaint for contribution
It is in this situation, however, where a claim for contribution should be implied under section 7002(a)(1)(B) or recognized under federal common law. As discussed in Part V.A above, there should be an implied or federal common law claim for contribution available in actions brought by the United States under section 7003. Since section 7002(a)(1)(B) is modeled after section 7003, and has largely been interpreted co-extensively with section 7003, a defendant in a state-initiated citizen suit should have the same contribution rights as a defendant in a United States-initiated suit. Section 7002(b) is intended to prevent citizen suits from interfering with government actions to address the endangerment conditions. Allowing a defendant to seek to have more responsible parties contribute to the costs of the work should not so interfere.\(^{317}\) The state's claim against the defendant can be litigated independently of the defendant's contribution claims against others, and if liable the defendant will still be obligated to the state to perform the work, regardless of whether the defendant may ultimately be successful in requiring other responsible parties to share in the costs of the work.\(^{318}\)

VI. FRAMEWORK FOR ADDRESSING ISSUES LIKELY TO ARISE DURING CONTRIBUTION CLAIMS IN RCRA IMMINENT HAZARD CASES

As set forth in Part V above, courts should recognize a claim for contribution by a person sued under RCRA sections 7002(a)(1)(B) or 7003. But what should this contribution claim look like? The statute itself obviously does not offer much guidance, and no court—not even Valentine—has tackled many issues in the context of a contribution claim under RCRA imminent hazard provisions.\(^{319}\) In short, consis-

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317. CERCLA section 113(f)(1) expressly allows a defendant to assert a contribution claim during a suit brought by the government or a private party pursuant to CERCLA sections 106 or 107, and such contribution claims frequently are asserted before the cleanup is completed. See, e.g., United States v. Kramer, 757 F. Supp. 397 (D.N.J. 1991); see also 42 U.S.C. § 9613(h) (2000) (Although section 113(h) broadly bars a party from seeking judicial review of a response action selected by the government under many circumstances, it does not prevent a challenge to the remedy in a cost recovery action under section 107.).

318. A defendant in a section 7003 action by the United States would be similarly precluded from asserting a section 7002(a)(1)(B) citizen suit in an effort to force allocation of costs among other responsible parties. But the unavailability of an express section 7002(a)(1)(B) citizen suit claim to a defendant in a section 7003 action should be no barrier to such a defendant asserting the implied and federal common law contribution claims discussed in Part V.A above.

319. In United States v. Valentine, the decision recognizing a right of contribution for section 7003 defendants was rendered at the pleading stage of the case, granting
tent with the language, roots and purpose of RCRA sections 7003 and 7002(a)(1)(B), courts dealing with such contribution claims should look to principles of equity and common law as well as to practices under the most analogous federal statute, CERCLA.

A. Allocation Principles

Under modern common law principles, the right to contribution arises only where two or more persons are liable to the same plaintiff for the same harm, and one of the liable parties has paid more than his equitable share of the common liability. Each liable party's fair share is determined in comparison to that of the other liable parties. Exactly how the comparison is made and equitable shares are determined is largely left to the equitable powers and discretion of the judges. No single factor is determinative, and a wide variety of factors may be relevant.

When Congress added an express provision authorizing contribution in CERCLA cases, it directed that “equitable factors” would guide allocation of cleanup cost responsibility among liable parties. Section 113(f)(1) provides: “In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.” Courts in CERCLA cases have employed a plethora of different equitable factors to allocate responsibility for response costs. The so-called Gore factors frequently

leave to file a third-party complaint and cross-claim for contribution. 856 F. Supp. 627, 629, 637 (D. Wyo. 1994). As one commenter has noted, “the equity and efficiency of § 7003 [contribution] actions will ultimately turn substantially on related issues that Valentine left open.” Johnson, supra note 240, at 237.

320. See RESTATEMENT (SECOND) OF TORTS § 886A (1979) (allowing defendant a contribution right where he has paid more than his “equitable share”); Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 87-88 (1981) (recognizing contribution when one joint tortfeasor has paid more than its “fair share” of the common liability); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 23 (2000) (stating that a defendant entitled to contribution can recover no more than the amount paid to plaintiff in excess of that defendant’s “comparative share” of responsibility).


have been invoked by courts, but virtually any factor a lawyer can think of has been utilized, and no single factor is determinative.

In RCRA contribution claims, courts should look to equity, common law and CERCLA and strive to allocate responsibilities for the cleanup and its costs based on what seems fair and equitable under the circumstances of the case. The many CERCLA cases regarding equitable factors and allocation should serve as helpful guidance and precedent for courts allocating RCRA cleanup responsibilities.

B. Orphan Shares

Where a defendant is jointly and severally liable to plaintiff, the risk posed by so-called "orphan shares"—i.e., the equitable shares of non-parties who are insolvent or otherwise unavailable—traditionally falls upon the defendant rather than the plaintiff. That is, although other non-parties may also be subject to liability, plaintiff can obtain the entire relief against the defendant, and even though the defendant may have a right of contribution, he may end up paying more than his equitable share if the other responsible non-parties are insolvent or cannot be located. The traditional rationale for joint and several liability is that it makes more sense to impose the risk of orphan shares upon the culpable defendant rather than the innocent plaintiff. Where there are multiple original defendants, the orphan shares can be distributed among the various liable defendants, in accordance with their respective equitable shares.

The traditional rationale for joint and several liability, however, does not hold where the claimant also is a responsible party. In the past, the common law doctrine of contributory negligence provided that any degree of liability by the plaintiff could deny plaintiff recovery. The modern trend, though, is toward comparative responsibil-

324. In 1980 during Congress' consideration of the bill that would become CERCLA, then-Representative Al Gore proposed that the following factors be considered when allocating response costs among liable parties: (i) the ability of the party to demonstrate that its contribution to the contamination can be distinguished; (ii) the amount of hazardous substance involved; (iii) the degree of toxicity of hazardous substance involved; (iv) the degree of involvement by the party in the generation, transportation, treatment, storage or disposal of the hazardous substance; (v) the degree of care exercised by the party; and (vi) the degree of cooperation by the party with government officials to prevent harm to public health or the environment. 126 Cong. Rec. 26779, 26781 (Sept. 23, 1980).


327. Id.

328. HYSON, supra note 65, at 262.

329. See PROSSER, supra note 149, § 65, at 306.
ity, whereby the plaintiff's recovery is reduced by plaintiff's equitable share.330

Under CERCLA, judges have largely adopted the same paradigm. Governmental plaintiffs or innocent private plaintiffs get the benefit of joint and several liability, whereas plaintiffs who are responsible parties traditionally have not been entitled to assert joint and several liability under CERCLA.331 However, the Supreme Court's recent ruling in *Atlantic Research* casts some doubt on the unavailability of joint and several liability to a plaintiff who is a responsible party. In ruling that a responsible party may maintain a section 107 action for cost recovery, the Court "assume[d] without deciding that section 107(a) provides for joint and several liability," even in favor of a non-innocent plaintiff.332 According to the Court, a defendant in a section 107 suit by a responsible party-plaintiff could blunt any inequitable allocation of costs by asserting a section 113(f)(1) counterclaim, thus triggering an equitable allocation of costs among all liable parties, including the plaintiff.333

Courts in RCRA imminent hazard cases have often ruled that the defendant is subject to joint and several liability, even though the statute is silent on the subject.334 Consistent with the Supreme Court's approach under CERCLA in *Atlantic Research*, where the plaintiff in a RCRA section 7002(a)(1)(B) action is a responsible party, a court presumably could hold the defendant(s) jointly and severally liable to plaintiff, requiring the defendant(s) to assert a counterclaim under section 7002(a)(1)(B) in order to trigger allocation among all the liable parties in the case, including the plaintiff.

A better alternative, though, may be for courts to find that a responsible party plaintiff in a section 7002(a)(1)(B) citizen suit is not entitled to the benefit of joint and several liability. RCRA, of course, does not expressly provide for joint and several liability, and the rationale for joint and several liability is not advanced where the plaintiff also is a responsible party. Rather, courts could simply allocate responsibility among all the liable parties in the case, including the plaintiffs.

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330. Restatement (Third) of Torts: Apportionment of Liability §1 cmt. a (2000).
333. Id. at 2339. Since joint and several liability is not mandated by CERCLA, a preferable approach may be to make defendants in cases brought by non-innocent plaintiffs simply severally liable. Thus, all liable parties, including the plaintiff, would bear equitable shares, and any orphan shares could be allocated among the plaintiff and liable defendants equitably as well.
plaintiff, using equitable factors. This would parallel common pre-
Aviall practice under CERCLA.335 Similarly, a defendant asserting
an implied or federal common law contribution claim, or a section
7002(a)(1)(B) suit in the nature of contribution, likewise should be en-
titled only to a judgment of several liability against the other responsi-
ble parties.336

Under either alternative, the “orphan shares”—i.e., the equitable
shares of non-parties who are insolvent or otherwise unavailable—
could be distributed among the various liable parties, including the
plaintiff, in accordance with their respective equitable shares. That
is, the risk of orphan shares would fall upon all liable parties, plaintiff
and defendants.337

C. Timing/Statute of Limitations

In denying recovery of costs incurred by the plaintiff pre-complaint
under section 7002(a)(1)(B), the Meghrig Court pointed out that there
is no statute of limitations set forth in RCRA that would be applicable
to such a claim for past cost recovery.338 It is true that RCRA does not
contain a statute of limitations applicable to section 7003 or
7002(a)(1)(B) suits. However, both section 7003 and section
7002(a)(1)(B) contemplate suits only where the presence of waste may
present an imminent endangerment.339 Accordingly, a RCRA immi-
nent hazard suit is timely only if initiated prior to the endangerment
being abated.340

Because a citizen suit claim under section 7002(a)(1)(B) must be
brought while there is still an endangerment, a claim for injunctive
relief in the nature of contribution based on the terms of section
7002(a)(1)(B) likewise would seem to be required to be initiated before
the endangerment is completely abated. That is, consistent with
Meghrig, the defendant would need to assert its section 7002(a)(1)(B)
counterclaim, cross-claim or third-party complaint relatively soon af-

335. See Hyson, supra note 65, at 261–62.
CERCLA original defendants jointly and severally liable, but third-party defend-
ants only severally liable); Restatement (Third) of Torts: Apportionment of
Liability § 23 (2000) (contribution-claimant can recover no more than amount
paid to plaintiff in excess of his comparative share of responsibility).
337. Cf. Kramer, 953 F. Supp. at 600–01 (orphan shares under CERCLA can be spread
among original and third-party defendants); Restatement (Third) of Torts: Ap-
portionment of Liability § 11 cmt. c (2000) (suggesting a hybrid track of joint
and several liability, where orphan shares are spread among all liable parties,
including the responsible party plaintiff).
340. This is certainly the teaching of Meghrig with respect to section 7002(a)(1)(B)
complaints. 516 U.S. at 484.
ter the plaintiff commenced suit, before site conditions are abated such that they no longer may present an imminent and substantial endangerment.\textsuperscript{341}

While a section 7003 claim by the United States seemingly also must be initiated prior to the endangerment being abated, it does not necessarily follow that a claim for contribution, impliedly under section 7003 or pursuant to federal common law, must be initiated while an endangerment still exists in order to be timely. At common law, the right to contribution did not arise until after the defendant was found liable and he had discharged the common liability to plaintiff.\textsuperscript{342} So a court should not lightly require a defendant to bring a claim for contribution at an earlier stage, absent a statutory limitation to the contrary.

However, permitting a defendant in a section 7003 action to have an unlimited period of time in which to assert a contribution claim makes little sense where a plaintiff asserting a citizen suit, and a citizen suit defendant asserting a claim in the nature of contribution, must assert their section 7002(a)(1)(B) claims while an endangerment remains. Therefore, in an effort to maintain maximum symmetry between sections 7003 and 7002(a)(1)(B) actions, and to avoid stale claims for contribution under section 7003, courts should require a defendant in both types of cases to assert his contribution claim while an endangerment is still presented.\textsuperscript{343}

\textsuperscript{341} That the endangerment is eliminated during the pendency of the suit, however, should not preclude a court from awarding contribution against other liable parties. Since the award of cash contribution is simply a substitute for an order to perform work, as long as the defendant's claim is asserted before the endangerment is abated, there should be no barrier to awarding such cash contribution. A contrary rule would serve to delay cleanups, because a defendant would want to obtain judgment on his contribution claim before abating the endangerment. See Gilroy Canning Co. v. Cal. Canners and Growers, 15 F. Supp. 2d 943, 945 (N.D. Cal. 1998) (recognizing court could require defendant to pay for future cleanup costs pursuant to RCRA § 7002(a)(1)(B)); Nashua Corp. v. Norton Co., 116 F. Supp. 2d 330 (N.D.N.Y. 2000) (awarding injunctive relief requiring defendant to pay 90% of plaintiff's future cleanup bills, even though plaintiff could not recover past costs under RCRA section 7002(a)(1)(B)); see also Randall James Butterfield, Note, Recovering Environmental Cleanup Costs Under the Resource Conservation and Recovery Act: A Potential Solution to a Persistent Problem, 49 VAND. L. REV. 689, 744-49 (1996) (advocating that cleanup costs incurred post-complaint should be recoverable under RCRA section 7002(a)(1)(B), inter alia, to avoid cleanup delays). But see Avondale Fed. Sav. Bank v. Amoco Oil Co., 170 F.3d 692 (7th Cir. 1999) (denying recovery under section 7002(a)(1)(B) of cleanup costs incurred post-complaint).

\textsuperscript{342} Prosser, supra note 149, § 50, at 309 (4th ed. 1971) (cause of action for contribution does not arise until payment discharging obligation to plaintiff); RESTATEMENT (SECOND) OF TORTS § 886A(1), (2) (1979).

\textsuperscript{343} If the United States were permitted to bring an action under section 7003 to recover cleanup costs after the cleanup was completed, the timing rule proposed in this article could prevent the defendant from seeking contribution, because the
D. Reasonableness of Costs/What is Covered

The Court also buttressed its holding in Meghrig by stating that CERCLA requires that response costs be reasonable in order to be recoverable under section 107, noting that costs recoverable under CERCLA must be "consistent with the national contingency plan." By contrast, said the Meghrig Court, RCRA section 7002(a)(1)(B) does not require a showing that the costs being sought are reasonable. While the accuracy of the Court's statement regarding the required reasonableness of CERCLA recoverable costs is debatable, its statement regarding RCRA is outright misleading. Under section 7003 as well as section 7002(a)(1)(B), a court cannot order a defendant to engage in work that is unnecessary. Both sections 7003 and 7002(a)(1)(B) authorize relief only where conditions at a site may present an imminent and substantial endangerment to health or the environment. A court may "restrain" a defendant or order a defendant "to take such other action as may be necessary." Therefore, if work were unnecessary to abate the conditions presenting the endangerment, a plaintiff would not be able to obtain relief requiring such work. Plus, since contribution is an equitable remedy under RCRA's imminent hazard provisions, a court could deny contribution where circumstances would make it inequitable or unreasonable.

A defendant in a RCRA section 7003 or section 7002(a)(1)(B) action will be seeking contribution toward the relief that has been, or will be, awarded in favor of plaintiff. Because the costs or work the defendant has been ordered to pay or do must be "necessary," the costs the contribution-plaintiff will be able to recover from the contribution-defendant likewise must be "necessary" within the meaning of the statute.

endangerment already had been abated. Rather than reflecting a shortcoming of the proposed timing rule, though, this scenario provides a further reason why the United States should not be permitted to initiate a section 7003 action when there no longer is an endangerment.

344. Meghrig v. KFC W., Inc., 516 U.S. 479, 486 (1996); see 42 U.S.C. § 9607(a)(4)(B) (2000) (private party can recover response costs only if they are "consistent with the national contingency plan").

345. 516 U.S. at 486.


348. Id.

349. See RESTATEMENT (SECOND) OF TORTS § 886A cmts. c, d (1979).
E. Contribution Protection

Issues pertaining to the effects of a settlement by plaintiff with less than all jointly and severally liable defendants have bedeviled courts and litigants at common law and under CERCLA.\textsuperscript{350} Perhaps most significantly, does the settlement cut off contribution claims against the settling defendant by the non-settling defendants?

A responsible party’s incentive to settle with a plaintiff is diminished if the settler could thereafter be subject to a contribution action by the non-settling defendants. If the settler makes a favorable settlement in the sense that he pays less to plaintiff than what would be his equitable share, he may still have to pay the difference to the non-settlers in a subsequent contribution action.\textsuperscript{351} Even if the contribution action by non-settlers is unsuccessful, the settler is still subject to the time, expense and aggravation of defending a lawsuit—the avoidance of which may have been a prime motive for settling with plaintiff in the first place. When Congress added section 113(f) to CERCLA in 1986, an express “contribution protection” provision was included in section 113(f)(2).\textsuperscript{352} Persons who settle with the United States or a state in an administrative or judicially approved settlement resolving CERCLA liability “shall not be liable for claims for contribution regarding matters addressed in the settlement.”\textsuperscript{353} Thus, responsible parties could settle with the government, secure in the knowledge that they would be protected from future contribution suits by non-settling responsible parties.

In \textit{Atlantic Research}, however, the Court restricted the scope of section 113(f)(2)’s contribution protection. The Court, focusing on the term “claims for contribution,” ruled that section 113(f)(2) only protected settlers from “contribution” claims under CERCLA section 113(f) and did not protect settlers from cost recovery actions brought by responsible parties under section 107.\textsuperscript{354} Thus, under the Court’s interpretation, parties who settle with the government at a site may nevertheless be sued by other non-settling responsible parties, at least

\begin{footnotes}
\item[350] See Prosser, \textit{supra} note 149, § 50, at 309; City & County of Denver v. Adolph Coors Co., 829 F. Supp. 340 (D. Colo. 1993) (discussing, as result of plaintiff’s settlement with less than all defendants in CERCLA case, whether to bar non-settlers from suing settlers and how to credit the settlements against plaintiff’s potential recovery against non-settlers). If the defendants are subject to only several liability, a settlement with one defendant will not impact the liability of the remaining defendants, because each defendant is liable for just its equitable share. Hyson, \textit{supra} note 65, at 268–69. A defendant which is merely severally liable has no claim for contribution. \textit{Restatement (Third) of Torts: Apportionment of Liability} § 11 cmt. c (2000).
\item[353] Id.
\end{footnotes}
for cleanup costs incurred by the non-settlers themselves.\textsuperscript{355} That the non-settlers' claim may be functionally equivalent to contribution—i.e., liable parties seeking to require another liable party to pay its fair share of the common cleanup liability—made no difference to the Atlantic Research Court. The Court opined that "this supposed loophole" would not discourage settlements, inter alia, because courts evaluating equitable factors would consider the prior settlement.\textsuperscript{356} While undoubtedly true, the settling party still may be required to defend another CERCLA lawsuit.

RCRA, not surprisingly, has no express contribution protection provision. However, this does not mean that a responsible party who settles with the United States will be subject to a potential contribution action by non-settlers. RCRA provides courts with broad equitable powers to fashion remedies, which should include the power to issue orders barring settling defendants from further suit by non-settling defendants. Bar orders are not uncommon in actions under other federal statutes which lack express contribution protection provisions.\textsuperscript{357}

\section*{VII. CONCLUSION}

Courts have almost universally refused to recognize a right to contribution for defendants in suits brought under RCRA's imminent hazard provisions. This Article shows that, especially in light of the Supreme Court's decision last year in Atlantic Research addressing allocation of cleanup costs among responsible parties under CERCLA,

\textsuperscript{355} If the other responsible parties had reimbursed the government for cleanup costs the government incurred, an action to recover those reimbursed costs would be in the nature of a contribution action and hence barred by section 113(f)(2). See id. at 2338-39.

\textsuperscript{356} Id. at 2339.

\textsuperscript{357} See, e.g., Franklin v. Kaypro Corp. 884 F. 2d 1222 (9th Cir. 1989) (issuing order barring non-settling defendants from seeking contribution from settling defendants in class action suit under Securities Exchange Act).

Indeed, the controversy over bar orders is not their propriety, but rather how the settlement affects the amount of liability of the non-settling defendants. It is generally agreed that non-settling defendants subject to joint and several liability are entitled to a credit when the plaintiff settles with one of the liable defendants. There is a divergence of views, though, about how the credit should be determined. Most jurisdictions, and federal common law, follow one of two modern approaches: (a) pro tanto, which reduces the non-settling defendants' liability by the actual settlement amount paid by the settling defendant to plaintiff; or (b) proportionate share, which reduces the non-settling defendants' liability by the equitable share of the settling defendant. See Restatement (Second) of Torts § 886A cmt. m (1979); McDermott v. AmClyde, 511 U.S. 202 (1994) (admiralty). The pro tanto approach is embraced by the Uniform Contribution Among Tortfeasors Act (UCATA), 12 ULA 185–290 (1996) (1955 Revised Act), while the Uniform Comparative Fault Act (UCFA), 12 ULA 123–53 (1996) follows the proportionate share alternative.
their refusals to recognize contribution in RCRA imminent hazard cases are erroneous, resulting from cramped and mechanical interpretations of Supreme Court precedents, flawed comparisons to CERCLA, and disregard for the expansive remedial language, purpose and equitable and common law roots of sections 7003 and 7002(a)(1)(B). Courts can and should recognize (1) a contribution claim for defendants in RCRA section 7003 cases, arising by implication and under federal common law, and (2) a claim in the nature of contribution for defendants in RCRA imminent hazard citizen suits, based on the express terms of section 7002(a)(1)(B). Such contribution claims are consistent with the terms of the statute and Congressional intent, and they will promote fairness, settlements and private cleanups.

Finally, in adjudicating these contribution claims in RCRA sections 7003 and 7002(a)(1)(B) cases, courts should look for guidance not only to the terms of the statute, but also to the equitable and common law principles on which the statutory provisions are based, as well as practice and precedents under analogous CERCLA provisions, to address such important issues as how cleanup costs should be allocated among the responsible parties, the timing and scope of such claims, and the effects of settlements with less than all responsible parties.