CERCLA's Cost Recovery Statute of Limitations: Closing the Books or Waiting for Godot?

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CERCLA’S COST RECOVERY STATUTE OF LIMITATIONS: CLOSING THE BOOKS OR WAITING FOR GODOT?

ALFRED R. LIGHT*

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I. CERCLA OVERVIEW AND ATLANTIC RESEARCH

In 1980, a lame duck Congress created the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) Juggernaut.1 Like the ancient Indian shrine, once moving, the statute became an inertial force capable of crushing everything and everyone in its path.2 Its liability is akin to the natural justice described in the gospel of St. Matthew, where God “sendeth rain on the just and on the unjust alike.”3 As the Justice Department put it in the original debate over CERCLA, the Government is “perfectly prepared to punish the innocent for the sins of the guilty.”4 There is strict, joint and several, retroactive liability for all—generators and transporters of hazardous substances, past and present owners and operators of polluted sites—even if they had nothing to do with the contamination which now requires cleanup.5 These so-called potentially responsible parties (“PRPs”)6 include the Government itself.7 Subject to three quite limited affirmative defenses, all are responsible for the costs of response to

1 Exxon Corp. v. Hunt, 475 U.S. 355, 380 n.5 (1986) (Stevens, J., dissenting) (CERCLA “was introduced as a floor amendment in the Senate in the waning days of the lame-duck session of the 96th Congress” and “became the subject of an 11th-hour compromise.”); United States v. W.R. Grace & Co., 429 F.3d 1224, 1240 (9th Cir. 2005), cert. denied, 127 S. Ct. 379 (2006) (“legislative history is particularly unhelpful because of the haphazard passage of CERCLA with many of the more lucid descriptions of the statute falling under the oxymoronic category of post-enactment ‘history.’”); Ohio ex rel. Brown v. Georgeoff, 562 F. Supp. 1300, 1310 n.12 (N.D. Ohio 1983) (“CERCLA was rushed through a lame duck session of Congress, and therefore, might not have received adequate drafting.”); see Frank P. Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability (“Superfund”) Act of 1980, 8 COLUM. J. ENVTL. L. 1, 1-2 (1982).

2 “Juggernaut” is a Sanskrit word meaning “lord of the world.” Anantavarman Colaganga, a king of India, completed the crudely carved and brightly colored Juggernaut idol at Puri in the state of Orissa, India, in the 1100s. During religious festivals, the idol is pulled through the streets in a car forty-five feet high and having sixteen wheels. Pilgrims have been crushed beneath these wheels. See Juggernaut, 11 WORLD BOOK ENCYCLOPEDIA 185-86 (1991 ed.).

3 Matthew 5:45.


5 42 U.S.C. § 9607(a) (2000); see Alfred R. Light, The Importance of “Being Taken”: To Clarify and Confirm the Litigative Reconstruction of CERCLA’s Text, 18 B.C. ENVTL. AFF. L. REV. 1, 5-7, 20-23 (1990) (explaining the government’s position towards strict, joint and several liability).


7 42 U.S.C. §§ 9601(21), 9620(a).
any release of the hazardous substances into the environment incurred by the
United States, a State, an Indian Tribe, or any other person.8

Until recently, however, the Government had also jerry-rigged a procedural
artifice to avoid having the Juggernaut reverse and run over itself. Interpreting
language added to CERCLA by the Superfund Amendments and Reauthorization
Act of 1986 ("SARA"),9 the Government argued that no PRP could bring an
action against any other PRP except "during or following" a lawsuit which the
Government had itself brought.10 Where the Government itself was a PRP, it thus
could avoid its own day of reckoning before the courts simply by not suing at a
site.11 Because of CERCLA’s bar on pre-enforcement judicial review, no anxious
PRP was able to bring a declaratory judgment action to force the Government’s
hand.12 Under the Government’s theory, the Environmental Protection Agency
("EPA") also had authority to settle with its potentially liable agencies (e.g. the
armed forces or the Department of Energy) and extinguish its own liability
through interagency settlement without litigation and the miracle of "contribution
protection."13 Other PRPs could only observe such incestuous machinations, even
if there were sweetheart deals in which the agency paid less than its fair share.14
Even better from its point of view, the Government could force PRPs to undertake
cleanup through unilateral exercise of its administrative order authority, subjecting
the recipient to the risk of punitive damages and daily penalties for any violation,

8 42 U.S.C. § 9607(a), (b).
(2004) (considering whether a party who has not been sued under CERCLA may obtain
contribution from other liable parties).
11 This resulted from the conjunction of exclusive federal court jurisdiction over CERCLA claims
established in 42 U.S.C. § 9613(b), the preclusion of pre-enforcement judicial review in federal
court established in 42 U.S.C. § 9613(h), and the Aviall decision preventing contribution actions
except "during or following" a civil action within the discretion of the Government to bring or not to
12 See, e.g., Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1387-88 (5th Cir. 1989).
See generally Alfred R. Light & M. David McGee, Preenforcement, Preimplementation, and
Postcompletion Preclusion of Judicial Review under CERCLA, 22 EnvTL. L. Rep. (EnvTL. L. Inst.)
13 42 U.S.C. § 9613(f)(2). See generally Alfred R. Light, CERCLA’s Wooden Iron: The
Contribution Counterclaim, 23 Toxics L. Rep. (BNA) 642 (2008) (discussing the ability of
CERCLA defendants to seek contribution protection from other liable parties) [hereinafter Light,
CERCLA’s Wooden Iron].
without going to court where the terms of the order might be reviewed by an impartial judge.15

Last year, though, in United States v. Atlantic Research Corp.,16 the United States Supreme Court rejected the Government’s interpretation of CERCLA by which it had been avoiding the day of reckoning at sites where it had not chosen to sue. Instead, the Court acknowledged a private cause of action under CERCLA section 107(a)(4)(B), in which a PRP that itself is incurring cleanup costs may sue other PRPs, even before the Government has chosen to sue.17 Justice Thomas, speaking for a unanimous Court, clarified that a PRP conducting a cleanup could sue, “at least in the case of reimbursement.”18 It could sue the Government as another PRP; the Government as defendant wishing to keep the costs on a private PRP plaintiff must litigate its fair allocation by bringing a “counterclaim for contribution” in the PRP’s cost recovery suit.19 When a private party decides to seek recovery of its cleanup costs, therefore, the Government PRP often may no longer postpone its day of reckoning. Where there are no private PRPs undertaking response action, however, the question remains whether there are any consequences for the Government when as plaintiff it chooses to postpone the day of reckoning indefinitely for reasons other than its own liability.20 Potential defendants in such cases continue to wait for the Government’s cost recovery suit

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15 42 U.S.C. §§ 9606(b), 9607(c)(3); see Solid State Circuits, Inc. v. EPA, 812 F.2d 383 (8th Cir. 1987).
17 Id. at 2338.
18 Id. The Court expressly reserved the question of whether a PRP incurring expenses pursuant to a consent decree following a suit under § 106 or § 107(a) might bring suit under § 107(a)(4)(B). Id. at 2338 n.6. Presumably, it also reserved that question with respect to administrative orders under § 106 as well. See Light, CERCLA’s Wooden Iron, supra note 13, at 642 (claim available).
19 Id. at 2339 (“In any event, a defendant PRP in such a § 107(a) suit could blunt any inequitable distribution of costs by filing a § 113(f) counterclaim.”); FED. R. CIV. P. 13(a). The Government has sovereign immunity if PRPs seek to join it as a necessary party plaintiff under FED. R. CIV. P. 19(a).
20 See, e.g., In re Hemingway Transp., Inc., 70 B.R. 549, 25 Env’t Rep. Cas. (BNA) 1791 (D. Mass. 1987); Missouri v. Indep. Petrochemical Corp., 12 Chem. Waste Lit. Rep. 1084 (E.D. Mo. Oct. 16, 1984). Thus, while it may be unwise for the United States not to join a private cost recovery action at a site where the Government has also incurred response costs because of the risk of a persuasive precedent against it on PRP liability issues in the private suit, nonetheless it may choose not to join. This only applies, however, where the Government is not itself a PRP. There sovereign immunity is waived pursuant to 42 U.S.C. § 9620. In addition, as shown in this Article, the Government as potential plaintiff can wait too long and lose its ability to sue at all to recover its costs because of the statute of limitations.
so that they can contest liability and the Government’s response action. Must they wait forever, or is there a time certain after which the Government may not sue? This Article addresses this question.

II. COST RECOVERY STATUTES OF LIMITATIONS

In light of Atlantic Research, it is time to revisit CERCLA’s cost recovery statute of limitations. Prior to SARA, CERCLA did not expressly contain a statute of limitations, and the Government initially was able to avoid application of the statute in all cases by convincing the courts either that there was no applicable statute or that a longer statute for which the day of reckoning had not arrived was most analogous. SARA, however, added a complex and elaborate statute of limitations provision. That 1986 amendment was a product of legislative negotiations in which the House Judiciary Committee radically changed a cost recovery statute of limitations proposal which the Government had drafted in its proposed Superfund amendments bill.
For over twenty years now, the lower courts have struggled over its correct interpretation. For the first few years after 1986, the Government avoided the day of reckoning by successfully arguing that the amendment operated prospectively only and did not apply to cost recovery actions prior to the amendment’s date of enactment. Since then, where it has delayed in bringing its cost recovery claims the Government has been forced to argue for constructions of particular provision terms to avoid the bar on its claim in the particular case before the court. There have been a number of interpretative difficulties. When is a removal action complete so as to trigger the running of the statute on that type of cleanup? When has there been initiation of physical on-site construction of a remedial action so as to trigger the statute on that type of cleanup? Is the cost recovery suit an initial action to which these terms apply, or is it a subsequent action that may be brought after all cleanup at the site has been completed? How does the statute apply when there have been multiple remedial actions at the same site? How does the provision relate to claims in the nature of contribution between PRPs at a site? The judicial resolution of these questions is surveyed below.

A short evaluation of general policy approaches embedded in many of these decisions is in order. There were some early indications trial courts would simply comply with the wishes of the Government to avoid barring its claims wherever possible. Over the past decade, though, various circuit courts have adopted a more independent and less deferential approach in construing the relevant statutory terms. On the critical distinction between removal and remedial actions made in the statute, however, all have fumbled by totally ignoring critical statutory language. This language creates a separate trigger date and limitations period for removal actions which exceed one year or two million dollars. The statute of limitations provision which triggers the period upon “completion” of the action simply does not apply to such lengthy or costly removals. Instead, the applicable limitations period begins to run on the date when EPA grants the waiver.
permitting these limits to be exceeded.37 Once this thus far ignored provision is acknowledged and properly applied, CERCLA’s statute of limitations will become the meaningful incentive to prompt resolution of CERCLA disputes which Congress intended.38 Without that acknowledgment, PRPs waiting for the statute of limitations to expire will continue to be waiting for Godot.39

A. Legislative Background

The original version of CERCLA, enacted during the lame duck session of Congress in 1980 after President Carter had been defeated, was the product of a peculiar legislative process in which there were no mark-up sessions, hearings, or other public processes.40 The stripped-down liability provision did not address many aspects of the regime.41 One of the omissions was an express statute of limitations.42 The first district courts to address the limitations issue in the absence of statutory language expressed concern about the matter.43 Some courts

37 See infra note 273 and accompanying text.
38 See infra notes 276-287 and accompanying text.
39 See infra notes 290-293 and accompanying text.
40 See 1 LEGIS. HIST., supra note 4, at 774-75 (statement of Rep. Florio) (“Had we changed a coma[sic] or a period, the bill would have failed. With the evaporation of the balance of interests which permitted us to go to the Floor in the first place, amendments to the bill will kill it if it is returned to the Senate.”); see also FRANK GRAD, 4A A TREATISE ON ENVIRONMENTAL LAW § 4A.04[2][a], at 4A-123 (1981) (“Faced with a complicated bill on a take-it or leave-it basis, the House took it, groaning all the way.”).
41 Senator Robert T. Stafford of Vermont provided the following definitive description of the process:

“The enacted compromise was drafted by whittling away sentences, phrases, or pages of S. 1480 to arrive at a politically acceptable bill. Much of S. 1480 was left by the wayside, but a great deal remained when the process was completed. Thus, although there was no committee report per se, the report of S. 1480 remains very relevant in construing the compromise law.”

42 H.R. 7020, the Superfund bill that had passed the House, had provided simply:

The Administrator, or any other governmental entity to which a person is liable under this section for the recovery of costs . . . shall bring an action under this section for the recovery of such costs against the person liable promptly following his determination of any such costs.

H.R. 7020, 96th Cong. § 4(a) (proposed § 3071(c)), reprinted in 2 LEGIS. HIST., supra note 4, at 391, 441.
43 See, e.g., United States v. Mottolo, 605 F. Supp. 898, 909 (D.N.H. 1985) (finding based on an extensive analysis of CERCLA’s legislative history, which included deletion of a cost recovery statute of limitations provision, that neither a statute of limitation nor the doctrine of laches was applicable to the cost recovery suit before it). The House Judiciary Committee cited two orders in Mottolo in explaining why an express statute of limitations was needed. H.R. REP. No. 99-253, pt. 3,
found the most analogous statute to be 28 U.S.C. § 2415, which imposes a six-year limit on United States sovereign actions sounding in contract.\(^{44}\) Another, in a private cost recovery action against the Government, found analogous statutes of limitations in CERCLA section 112(d) and state statutes so as to conclude that it should apply a three-year statute, running from the date when the plaintiff incurred response costs and not tolled until the date when plaintiff discovered the identity of responsible parties.\(^{45}\) Others focused on the equitable nature of CERCLA cost recovery and found the equitable doctrine of laches applicable.\(^{46}\) Others found the doctrine of laches inapplicable to suits by the United States suing in its sovereign capacity.\(^{47}\) Some refused to decide whether a cost recovery action is equitable or legal and addressed the issue in an either/or manner.\(^{48}\) Some simply found that CERCLA provided no statute of limitations and Congress intended none.\(^{49}\) Confusion thus reigned in the district courts during the period in which amendments to the statute were being considered in the mid 1980s. By 1985, even the Government had to acknowledge that the “absence of an explicit statute of limitations has . . . led to some uncertainty concerning whether the existence of such a statute of limitations should be assumed under Federal law.”\(^{50}\)


In its proposed Superfund amendments bill in February 1985, the Government proposed a six-year cost recovery statute of limitations running from “the date of completion of the response action.”\(^{51}\) The Government explained, “[t]he six-year statute of limitations is the same as the period established by a clear line of cases involving the parallel provisions in section 311 of the Clean Water Act.”\(^{52}\) Clean Water Act section 311, which establishes liability for the cleanup of oil spills, contains no explicit statute of limitations.\(^{53}\) In 1985, the Government had argued successfully in some cases that a six-year “contract” statute of limitations applied rather than the three-year tort statute of limitations.\(^{54}\) The Government’s explanation to Congress was somewhat less than candid, however, in that it failed to acknowledge cases directly contrary to its position interpreting the Clean Water Act.\(^{55}\) However, by 1985 a few courts had adopted a CERCLA cost recovery analogy to section 311 on the statute of limitations issue and followed the Government’s alternative approach that the general statute of limitations for contract actions of six years applied.\(^{56}\)

In a hurried mark-up session in early 1985 shortly after the Government announced its Administration bill,\(^{57}\) the Senate Environment and Public Works Committee adopted many of the Administration’s enforcement provisions covering liability and related matters with little, if any, debate.\(^{58}\) In its Committee

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\(^{51}\) H.R. 1342, 99th Cong. § 206 (proposed CERCLA § 113(h)(1)).


\(^{56}\) See, e.g., United States v. Mottolo, 605 F. Supp. 898, 909 (D.N.H. 1985). In the 1980 compromise, the behind-the-scenes negotiators had been unable to agree on an explicit explanation for the strict liability standard under the new statute. Instead, they agreed to incorporate the standard of liability under the Clean Water Act, even though this standard was established through a series of judicial decisions rather than through statutory language. See 42 U.S.C. § 9601(32).

\(^{57}\) H.R. 1342, 99th Cong. § 206 (proposed CERCLA § 113(h)(1)).

\(^{58}\) S. 51, 99th Cong. § 131(b) (1985) (as reported from Senate Environment & Public Works Committee) (proposed CERCLA § 113(c)(1)(A) requiring cost recovery action to be commenced
bill the House Energy and Commerce Committee also adopted the Government’s statute of limitations language and parroted the Government’s testimony in its Committee Report, stating:

CERCLA currently includes no explicit statute of limitations for the filing of cost recovery actions under section 107. This amendment provides for the timely filing of cost recovery actions, to assure that evidence concerning liability and response costs is fresh and to provide a measure of finality to affected responsible parties.59

The Government’s proposed statute of limitations would not have limited the Government in a meaningful manner. Unlike the oil spill at issue under section 311, response actions under CERCLA frequently have no clear completion date. After a “pump and treat” system for contaminated groundwater is constructed, it may operate thereafter for many years, incurring operation and maintenance expenses.60 In explaining its proposed statute of limitations, the Government even “clarified” that it did not intend that the six-year period start until after its own operation and maintenance expenses had ceased, stating, “[f]or purposes of this section, the response action is regarded as completed upon completion of any operation and maintenance activities funded by the Federal government.”61


61 H.R. REP. NO. 99-253, pt. 1, at 138 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2902, 2920. Strangely, this Government testimony did not seem to contemplate delay of the “completion” date of reckoning for CERCLA plaintiffs other than itself. Ordinarily, operation and maintenance expenses are borne not by the federal government but rather by state and local government. See 42 U.S.C. § 9604(c)(3)(A) (providing that the President shall not provide for a remedial action “unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that . . . the State will assure all future maintenance of the removal and remedial actions provided for the expected life of such actions as determined by the President . . . .”); see also 42 U.S.C. § 9604(c)(3)(C) (requiring that
This Government proposal surely would have rendered the statute of limitations “a dead letter.”62 The main reason was that the commencement date of the statute required “completion” of the response action, a matter at least in part within the Government’s control.63 So long as the Government continued to incur costs associated with a cleanup, seemingly it could defer its date of reckoning with the courts while negotiating or not negotiating with PRPs as it so chose.64 Because other amendment provisions expressly precluded judicial review of response actions until the Government’s cost recovery action was filed, the usual putative defendant’s remedy of a declaratory judgment action would be unavailable, leaving the PRP helpless watching the costs rise for which he or she might be charged at some time in the future.65

In the House of Representatives, Superfund amendments had to negotiate a circuitous labyrinth in 1985, making stops at the Energy and Commerce, Judiciary, Public Works and Transportation, Ways and Means, and Merchant Marine and Fisheries Committees.66 The House Judiciary Committee changed the language of the statute of limitations from that found in the Administration’s and the House Energy and Commerce Committee bill to that presently found in section

62 Cf. United States v. Ambroid Co., 34 F. Supp. 2d 86, 88 (D. Mass. 1999) (“Although the court recognizes the important policies CERCLA was enacted to protect, treating the cleanups in this case as a single removal action would render the statute of limitations a dead letter.”).


64 See Superfund Improvement Act of 1985: Hearing on S.51 Before the S. Comm. on the Judiciary, 99th Cong. 116, 153-154 (1985) (statement of George Clemon Freeman, Jr.) (“the limitations provisions permit EPA to delay the day of judicial reckoning indefinitely without losing any ability to recover any of its costs, even costs incurred decades earlier.”); Anderson, supra note 20, at 120-122 (discussing the “never-ending” removal theory).

65 See, e.g., Wagner Seed Co. v. Daggett, 800 F.2d 310 (2d Cir. 1986) (pre-SARA case finding that CERCLA’s preclusion of pre-enforcement judicial review bars defendant’s declaratory judgment actions to review administrative orders).

113(g)(2). The statutory provision inherited many features of the earlier versions desired by the Government. For example, it contemplated that the Government could bring several cost recovery actions at the same site, declaring that “an action may be commenced under section [107]... for recovery of costs at any time after such costs have been incurred” and mandating that “the court shall enter a declaratory judgment on liability... that will be binding in any subsequent action... to recover... response costs or damages.” It expressly allowed for “[a] subsequent action or actions [under section 107] to recover further responses costs... at any time during the response action...”. This provision thus would have alleviated any Justice Department fears that the Government could not come back for more after an initial cost recovery action because of principles of res judicata. The provision also included a shorter companion three-year statute of limitations for contribution actions running from the date of judgment or settlement, which had been included in the Administration’s bill.

B. The Statutory Language

In other respects, however, the House Judiciary Committee’s cost recovery statute of limitations changed radically from the Administration’s bill. Instead of one six-year limitations period dating from the completion of the response action, the statute divided the “initial action for recovery of the costs referred to in section [107],” which the CERCLA plaintiff brings into two types: (1) “for a removal action” and (2) “for a remedial action.” The limitations period for a removal action ordinarily was to be “within 3 years after completion of the removal action,” while the limitations period for a remedial action ordinarily was to be

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69 Id.
70 See generally RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982) (establishing a “transactional” definition of the underlying claim or cause of action for claim preclusion purposes, considering whether facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage).
“within 6 years after initiation of physical on-site construction of the remedial action.” 74

CERCLA’s liability provision, section 107, permits the recovery of “costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe” and “any other necessary costs of response incurred by any other person.” 75 “Response” simply means both “removal” and “remedial action.” 76 “Removal” and “remedial action” in turn have very elaborate and detailed definitions under CERCLA. 77 In some respects, the two types of response actions overlap. For example, both types of response may include “provision of alternative water supplies” and can include “disposal” or “secure disposition” of hazardous substances. 78 “Removal” includes “temporary evacuation and housing of threatened individuals” and “remedial action” includes “permanent relocation of residents and businesses and community facilities.” 79 In other respects,

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74 42 U.S.C. §§ 9613(g)(A)-(B). The two types of response action are logically distinct based on the different circumstances under which each type of cleanup occurs. See Anderson, supra note 20, at 103 ("Removals have generally been thought of as short-term, interim actions to prevent imminent harm and to keep a release of contaminants from getting worse. Remedial action, on the other hand, refers to the permanent remedy for a site, which generally comprises long-term treatment or containment of hazardous substances."); U.S. Environmental Protection Agency, Removal Actions at Long-Term Cleanup Sites, http://www.epa.gov/superfund/programs/er/hazsubs/timecrit.htm (last visited Apr. 7, 2008) (referring to removal actions as addressing “serious immediate threats to the environment or to the people who live or work around these sites [that] may need to be taken care of before the long-term action is complete, or even underway”). The distinction between the two forms of response action originated in the Senate Environment and Public Works Committee in 1979. It explained the distinction in a committee report: “Remove” or “removal” is distinguished from “remedy” or “remedial action.” “Removal” refers to actions which must proceed without delay upon discovery of a release, discharge or disposal or threat thereof. In contrast, remedy or remedial action refers to potentially more costly, long-lasting response which may include the construction of major facilities and which often may be preceded by considerable study, investigation, planning and engineering before the appropriate actions can be determined. Such major construction may well mitigate the danger to public health, welfare or the environment. But they are not the type of action which is intended to be performed as removal, which refers to immediate response and whose application can be decided without significant delay. S. REP. NO. 96-848, 96th Cong., at 54 (1980), reprinted in 1 LEGIS. HIST., supra note 4, at 308, 361.

75 42 U.S.C. § 9607(a)(4)(A), (B).


79 42 U.S.C. §§ 9601(23), (24).
however, the statute deliberately treats the two types of response action quite differently. Except in emergency situations or where the President has determined that “continued response action is otherwise appropriate and consistent with the remedial action to be taken,” the statute prohibits continuation of any Fund-financed80 response action “after $2,000,000 has been obligated for response actions or 12 months has elapsed from the date of initial response to a release or threatened release of hazardous substances.”81 This is significant since Fund-financed remedial action may only be undertaken where a state provides a number of assurances, including payment of a cost-share of ten percent to fifty percent of the costs of the remedial action.82 Another serious limitation on “remedial actions” is found in the statute’s settlement section.83 That section expressly provides that agreements with any potentially responsible party to conduct “remedial action” shall be “entered in the appropriate United States district court as a consent decree.”84 This contrasts with agreements for removal actions, including agreements under which a PRP may conduct a remedial investigation and feasibility study (RI/FS), which may be entered by administrative order without involvement of the courts.85

The distinction between removal and remedial action in the statute of limitations therefore can be important for a variety of reasons.86 A CERCLA removal, which the Fund may finance in its entirety without a state cost share, can occur whenever an emergency requires immediate action.87 Although the statute requires a standard administrative process for removals,88 EPA may not even

80 CERCLA section 111 originally authorized the appropriation of over $13 billion to the Fund and established requirements for use of the Fund. 42 U.S.C. § 9611(a).
81 42 U.S.C. § 9604(c)(1)(C); see also 40 C.F.R. § 300.415(b)(5) (2007).
82 42 U.S.C. § 9604(c)(3).
85 42 U.S.C. § 9622(d)(3) (providing that the President “shall issue an order or enter into a decree” with respect to action under section 104(b) [dealing with RI/FSs]). Under limited circumstances, settlements compromising only claims for recovery of costs may also be compromised without judicial involvement. 42 U.S.C. § 9622(h). Even then, however, the agency is required to “request the Attorney General” to sue for recovery if the administrative agreement is not paid. 42 U.S.C. § 9622(h)(3).
86 See generally Anderson, supra note 20, at 105-22 (discussing distinction’s significance in national contingency plan, inclusion in national priorities list as prerequisite to action, pre-enforcement review, in addition to statute of limitations).
make available documents about the removal until sixty days after “initiation of on-site removal activity.” As EPA explained in the preamble to its 1990 National Contingency Plan, “the overriding task of emergency response teams during this critical period must be the undertaking of necessary stabilization, rather than administrative duties.” When a removal action is contemplated to last more than 120 days, however, the agency requires a formal community relations plan and a local information repository. EPA regional offices generally are authorized to conduct removals without the approval of headquarters when the estimated cost of the removal is less than $2 million. Because a removal action presumptively would be expected to last no more than a year, ordinarily the statute of limitations would begin to run within four years from the date of its commencement.

For remedial actions, on the other hand, initiation of physical on-site construction of a remedy occurs only after an elaborate administrative remedy selection process has run its course. As required by SARA, selection of a remedial action is a two-step process in which a proposed plan is first submitted for public comment and then the final remedy selection is made and justified. Like RI/FSs, remedial designs are “removals” within the meaning of CERCLA.

The “initiation of physical on-site construction” of a remedy follows the EPA’s selection of a remedy and the subsequent preparation of a remedial

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89 40 C.F.R. § 300.820(b).
91 40 C.F.R. § 300.415(n)(3).
93 That is to say, four years is the sum of the one year between commencement of the removal to its completion plus the three years permitted from the date of completion to the time when the statute of limitations period expires. See infra note 278 and accompanying text.
95 42 U.S.C. §§ 9613(k), 9617.
96 42 U.S.C. § 9601(23) (cross-reference § 9604(b)); OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. ENVT'L. PROT. AGENCY, INITIATION OF PRP-FINANCED REMEDIAL DESIGN IN ADVANCE OF CONSENT DEGREE ENTRY, DIRECTIVE NO. 9835.4-2A (Nov. 18, 1988), available at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/prpfin-condec-mem.pdf; but see Anderson, supra note 20, at 121 (“Interpretation of the limitations statute is further complicated by the RI/FS, which fits neither the remedial nor removal category perfectly.”).
Because of the elaborate decision-making framework in connection with remedial actions, a six-year statute of limitations running from the “initiation of physical on-site construction” is late in the process and very generous to the Government indeed.99 Nonetheless, the House Judiciary Committee amendments to the Government’s proposed statute of limitations mostly move in the direction of shortening or tightening of the statute and plainly address the possibility that the Government, left to its own devices, might continue a “response action” at a site for years and defer the date that it must “put up or shut up” about the recoverability of its expenses at that site.100 In its Committee Report, the House Judiciary Committee explains: “in general [cost recovery and damages] actions should be brought as early as EPA has the necessary information to do so.”101 There are two obvious areas of tightening. First, “initiation of physical on-site construction” may be years after identification of a site potentially needing remedial action but it surely is before “completion” of that remedial action and operation and maintenance of the completed remedy, as the Government had proposed in its “legislative history.”102 Second, three years from completion of a removal is shorter than the Government-proposed six years from completion.103

98 EPA describes the two-step process as follows:
Remedial Design (RD) is the phase in Superfund site cleanup where the technical specifications for cleanup remedies and technologies are designed. Remedial Action (RA) follows the remedial design phase and involves the actual construction or implementation phase of Superfund site cleanup. The RD/RA is based on the specifications described in the record of decision (ROD).

U.S. Environmental Protection Agency, Remedial Design/Remedial Action, supra note 94.


100 Anderson, supra note 20, at 117 (“Congress must have been reluctant to delay the start of the limitations period until the remedy was complete.”); but see id. at 150 (“It is difficult to imagine why Congress chose this complex limitations scheme.”).


102 See supra notes 51-56 and accompanying text.

103 See id. Professor Anderson has analyzed the reasoning behind this shorter period:
Congress chose a relatively short time period—three years. However . . . the limitations period does not begin to run until the removal is complete. Congress presumably chose to delay the removal action period on the assumption that removals would be relatively short in duration and would happen early in the life of a site. Because the emergency-type
Moreover, the amendment closes an obvious loophole in the statute, that EPA could grant itself authorization for “continued response action” at a site after the one-year or $2 million presumptive limits on removal were exceeded (and thereby defer its day of reckoning indefinitely). The statute provides that in the event such a “waiver” is made, the limitations period on the removal runs six years from the date of the waiver. Finally, for the sake of judicial efficiency where it is conducting a relatively continuous response action at a site, the statute provides that “if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action” for the remedial action brought within six years of initiation of construction.

III. JUDICIAL INTERPRETATION

A. Does SARA’s Statute of Limitations Apply Prospectively Only?

After SARA was enacted in 1986, the Government employed a novel strategy to avoid application of the statute of limitations with respect to its cost recovery claims. SARA states that its amendments “shall take effect on the enactment of
this Act.”107 That effective date was October 17, 1986.108 By 1986, the federal courts uniformly had held that CERCLA is intended to apply retroactively and sustained the constitutionality of that retroactive application.109 Notwithstanding this understanding, the Government argued that the statute of limitations added in SARA, unlike CERCLA’s liability provisions, should be applied prospectively only.110

The first district court to address the issue was in the context of a private cost recovery action in which the Government was not a party.111 This court took the position, which had been a minority view prior to SARA, that prior to the SARA amendments there was no applicable statute of limitations under CERCLA.112 It then cited an 1873 Supreme Court case, Sohn, which avoided retroactive application of a new statute of limitations to cut off pre-enactment claims for which there had been no limitations period because such construction would violate due process and “render it unconstitutional.”113 Under this nineteenth century approach, “the period will begin to run with respect to preexisting claims on the effective date of the statute.”114 For example, a CERCLA plaintiff would have three years from October 17, 1986, to bring a removal claim even though the removal action had been completed more than three years prior to the date of enactment of the SARA amendments.115 The district court opined that such claims “cannot be barred under our Constitution.”116

110 The Government has also successfully urged the courts to apply Section 106(b)(2), 42 U.S.C. § 9606(b)(2), which authorizes EPA to reimbursement persons who comply with an administrative cleanup order to seek reimbursement of their costs from the Fund, prospectively only. See, e.g., Wagner Seed Co. v. Bush, 946 F.2d 918 (D.C. Cir. 1991).
112 Id. at 704.
113 Id. (quoting Sohn v. Waterson, 84 U.S. (17 Wall) 596, 599 (1873)).
114 Id.
115 Even though a CERCLA plaintiff could have sued prior to the date of enactment at a site, presumably it would continue to be able to bring the action under the new statute of limitations using the trigger dates contained in the statute where they occurred after the date of enactment. For example, a plaintiff would able to sue to recover removal costs within three years of a post-SARA completion date. Prospective-only application of the statute means that a plaintiff had at least three years from October 17, 1986, to sue; it could have a longer time based on the application of the new limitations provisions. EPA would have preferred an even more plaintiff-oriented rule. See OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. ENVTL. PROT. AGENCY, SUPERFUND COST
After this decision, the Government persuaded several district courts that Congress did not intend retroactive application in cases where it was the plaintiff either. For example, one of the first district courts to consider the issue found that it would be “inconsistent” with CERCLA’s purposes if it interpreted the amendments “to bar claims which have accrued prior the enactment of § 9613(g).” To cut off the Government’s pre-enactment claims “would subvert Congress’ intent to hold responsible parties liable for environmental hazards.” Most subsequent courts simply cited these first cases in a conclusory fashion, indicating that “the limitations provision . . . operates prospectively only and has no retroactive application to claims accruing prior to its enactment in October 1986.” Under this approach, the Government convinced these courts that its claims were timely so long as they were filed within three years after October 17, 1986, without regard to the language of the statute of limitations. By its own

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116 Id.
117 As the Supreme Court has explained: The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact. Indeed, at common law a contrary rule applied to statutes that merely removed a burden on private rights by repealing a penal provision (whether criminal or civil); such repeals were understood to preclude punishment for acts antedating the repeal. Landgraf v. USI Film Prods., 511 U.S. 244, 270-71 (1996) (emphasis in original). Congress plainly has the constitutional authority to remove a restriction or liability if it chooses to do so expressly. Cf. 1 U.S.C. § 109 (2000) (restricting the effect of a repeal of a statute to release liability for past acts to instances where “the repealing [statute] shall so expressly provide”). “Even absent specific legislative authorization, application of new statutes after the events in suit is unquestionably proper in many situations.” Landgraf, 511 U.S. at 273. Even if a private party plaintiff may have a constitutional right to his or her cause of action, surely the Congress can restrain the Executive from pursuing a claim it previously had created.

119 Id. at 624.
121 See, e.g., United States v. Fairchild Indus., Inc., 766 F. Supp. at 415 (“As the shortest limitations time applicable to this § 107 action is three years, and both of these suits were filed within three years of the statute’s effective date, defendants’ limitations defense fails as a matter of law.”).
terms, however, the Government’s somewhat hypocritical use of the Sohn rule to avoid the new statute of limitations only worked for CERCLA claims brought within three to six years after the date of SARA’s enactment. After October 17, 1989, the Government finally had to confront the particulars of section 113(g)(2).

B. When is a Removal Action Complete?

Not surprisingly, the first decisions after SARA to address the particular terms of the statute of limitations focus on the precise meaning of “completion” in connection with the three-year period for removal actions.122 In United States v. Peterson Sand & Gravel, Inc.,123 EPA conducted no physical on-site removal, emergency or otherwise, but instead first brought a cost recovery action to recover costs incurred as a result of an environmental study at the site, the so-called remedial investigation and feasibility study (RI/FS).124 Peterson asserted that this removal action was completed on April 4, 1988, more than three years prior to the commencement of the lawsuit on September 13, 1991.125 In response, EPA asserted that the removal action comprising the RI/FS was not “completed” until EPA selected a remedy and issued its so-called record of decision (ROD) on September 14, 1988.126 In part, Peterson relied on an internal EPA policy memorandum dated June 12, 1987, which treated emergency removal actions as separate from RI/FS actions.127 The policy memorandum, Peterson claimed, implied that a “remedial investigation and feasibility study removal action was complete when the remedial investigation report was issued.”128 For its part, EPA relied primarily on an unreported decision which held that an RI/FS removal action was not complete “until the EPA formally determined that no further on-site activity was needed by issuing its decision.”129 This decision viewed an RI/FS and the subsequent ROD associated with it as a single “removal action” within the

125 824 F. Supp. at 753.
126 Id. at 753.
127 OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE (“OSWER”), U.S. ENVTL. PROT. AGENCY, COST RECOVERY ACTIONS/STATUTE OF LIMITATIONS, DIRECTIVE NO. 9832.9 (June 12, 1987) [hereinafter OSWER COST RECOVERY POLICY]. The fact that this memorandum is no longer available on EPA’s website, http://www.epa.gov, is telling.
128 824 F. Supp. at 753.
129 Id. at 754 (explaining United States v. Jack Allen, 1990 WL 339488 (W.D. Ark. 1990)).
meaning of CERCLA. After examining in detail the EPA’s decision making process regarding selection of a remedial action, the court concluded “that the issuance of the record of decision is an integral part of the remedial investigation and study process,” such that the action is not complete until the ROD is issued. By 1995, it was clear that at least in the absence of an allegation that EPA had “unnecessarily delayed” in its activities regarding a subsequent remedial action, a removal action at a site extends to through the RI/FS and the selection of a remedy.

Defendants in CERCLA cost recovery actions brought by plaintiffs other than the United States during this same period adopted a somewhat different approach in advocating early completion dates for the removal action about which they were being sued. In the Sixth Circuit decision Kelly v. E.I duPont de Nemours & Co., the State of Michigan sued to recover surface removal costs as well as the costs of an RI/FS. Defendants argued that the statute of limitations “contemplated that site cleanup could involve multiple removal actions, and that each such action should have its own limitations period.” As a result, they maintained that the

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130 Id. (explaining United States v. R.A. Corbett Transp., Inc., 785 F. Supp. 81, 82 (E.D. Tex. 1990)).
131 Id. at 755; see also United States v. Cantrell, 92 F. Supp. 2d 704, 716 (S.D. Ohio 2002) (removal action not complete until final site inspection, so action timely); United States v. Chromatex, Inc., 832 F. Supp. 900, 902-903 (M.D. Pa. 1993) (holding that an on-site removal action was not complete until ROD was filed because the monitoring, assessment, and evaluation of the release and threat of release “was clearly related to the assessment of the work that was previously done on-site.”); United States v. United Nuclear Corp., 814 F. Supp. 1552, 1562 (D.N.M. 1992) (“the statute of limitations did not begin to run until . . . the ROD was filed.”); United States v. Rohm & Hass Co., 790 F. Supp. 1255, 1255-66 (E.D. Pa. 1992) (in light of stipulation that EPA continues to monitor, assess and evaluate the release of hazardous substances and activities at the site, “it could not be said that complete ‘removal’ under CERCLA had occurred.”).
132 See, e.g., United States v. Davis, 882 F. Supp. 1217, 1226 (D.R.I. 1995) (“Clearly, the term removal (as defined by CERCLA), is not limited to on-site activity and includes the time needed to dispose of the removed material as well as the time needed to evaluate the need for further activity.”).
133 17 F.3d 836 (6th Cir. 1994).
134 Id. at 842. Professor Anderson has advocated a somewhat similar approach, explaining, “[t]he plain language of the limitations statute indicates that the time limit applies to “‘a removal action,”’ suggesting that the limitations period runs separately as to each removal action.” Anderson, supra note 20, at 118. This is ordinarily but not always correct. Section 113(g)(2)(A) only applies to the “initial” cost recovery action. If a court were to find (perhaps based on temporal separation) that there were multiple removal actions at a site, the plaintiff ordinary would have to sue within three years of completion of the first removal action in order to recover those first costs. So long as the removal did not exceed a year or two million dollars, the applicable limitations period would be three years dating from completion of the removal. If the removal action exceeded those limits, however, the period is six years from the date of the waiver, which could mean an earlier expiration date if the
limitations period to recover the costs of a discrete removal action completed in 1986 had expired even though a subsequent RI/FS and further drum removal occurred afterwards. Rejecting defendants’ position as having “no logical stopping place,” such that the removal of each separate drum could be characterized as a separate removal, the court noted that a “single appropriations action provided funding for both the physical removal and the RI/FS” and that “[b]oth activities started within days of each other, and evidence abounds that the two activities were interdependent.” It thus concluded that “all of the State’s removal activities comprised a single removal action.” The Fifth Circuit concluded in another case that three distinct phases of a cleanup implemented over a period of time spanning twelve years before suit was filed constituted a single removal action. The District of Massachusetts similarly concluded in the private cost recovery case before it in which “contamination was not removed in one single endeavor” that the limitations period did not begin to run “until all portions of the contamination are removed . . . .” Only then could the removal “be deemed completed.” In 1998, the Government even persuaded one district court to defer its day of reckoning at sites where both removal and RI/FS action had

removal action took an especially long time. Even where a plaintiff’s cost recovery action for a prior removal is barred by this statute of limitations, it could bring an action for a subsequent separate removal, so long as the cost recovery suit brought in connection with this second removal is commenced within three years of its completion in this “initial” cost recovery action. Once a plaintiff brings an initial cost recovery action and obtains a declaratory judgment on liability, that plaintiff may bring subsequent cost recovery actions within three years of completion of all cleanup at the site. 42 U.S.C. § 9613(g) (2000). Where both removal and remedial action are conducted at a site and the plaintiff brings suit within six years after the “initiation of physical onsite construction” of the remedial action, the period provided in 42 U.S.C. § 9613(g)(2)(B), then that plaintiff may benefit from the separate provision authorizing cost recovery for prior removals in the remedial action cost recovery suit, so long as the remedial action suit is brought within three years of the completion of the removal for which costs are sought. 42 U.S.C. § 9613(g)(2). Given the penchant of the courts to treat multiple actions at a site as a single multi-phase removal, the “waiver” provision is critical to prevent Professor Anderson’s problem of the “never-ending” removal. See supra note 64 and accompanying text; see also infra note 282.

135 17 F.3d at 839, 842.
136 Id. at 844; see also Anderson, supra note 20, at 120 (“Taken to the extreme, the individual action approach would start the limitations period separately for each drum removed from a site. Nevertheless, it is possible in many cases to identify discrete actions with ascertainable beginning and ending points.”).
137 17 F.3d at 844.
140 Id.
occurred to run not from the date of the ROD but from the even later completion of the remedy design.\textsuperscript{141}

By the end of the decade, it was clear that the courts had adopted the “broadest reasonable . . . interpretation” of when a CERCLA removal action could be deemed completed for statute of limitations purposes.\textsuperscript{142} In circumstances where removal action had been conducted in stages at a site, “the removal process is complete only after the very last drum of contaminated soil has been removed from the property.”\textsuperscript{143} Whether activities constituted a single removal action remained a question of fact as well as law for courts considering the “completion” issue. In the unusual circumstance where EPA has formally “closed out” a site, EPA risks rejection of the argument that it has not yet completed the removal, even where it undertakes additional removal action at the site.\textsuperscript{144} If EPA has transferred responsibility to the affected State for operation and maintenance after closing a site and otherwise treated two removal actions as separate, where two removal actions are not interdependent, or where it has not complied with the one-year time limitation on a removal required by the statute and EPA’s national contingency plan regulations, EPA risks a judicial determination that it has “failed to bring its recovery claim within three years of the completion of the first removal action.”\textsuperscript{145} Thus, in \textit{United States v. Ambroid Company}\textsuperscript{146} the Chief Judge for the


\textsuperscript{142} \textit{Id.} at 88 (explaining One Wheeler Road Assoc. v. Foxboro Co., 843 F. Supp. 792, 796 (D. Mass. 1994)).


\textsuperscript{144} \textit{Id.}

\textsuperscript{145} \textit{Id.}

\textsuperscript{146} \textit{Id.}
District of Massachusetts distinguished his colleague’s decision in *One Wheeler Road Associates v. Foxboro Company*, as well as many other decisions described above, and granted a motion for partial summary judgment against the Government on the completion issue. *Ambroid*, however, is easily distinguished on its facts in favor of a general rule that “[t]he statute of limitations only begins to run at the conclusion of the entire removal phase.”

### C. Has Physical Onsite Construction of a Remedial Action Been Initiated?

Aside from the complexities of determining whether “completion” of a removal has occurred, triggering the statute of limitations under section 113(g)(2)(A), the most vexing problems in interpreting that section in the courts probably have been determining whether cleanups should be characterized as removal or remedial actions. This is because the limitations period for a remedial action begins to run, not upon its completion, but rather upon its “initiation of physical onsite construction.” Defendants try to show that this trigger has been pulled even though removal action at the site is ongoing and therefore has not been completed. A complexity with this contention, of course, is that as a factual matter the very same activities at a site may be part of either a removal or a remedial action. Similarly, there is no prohibition in CERCLA against the conduct of both a removal and remedial action at the same site during the same time period. For example, if EPA’s activities under section 104(b) of the statute

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148 34 F. Supp. 2d at 91.
152 *See* 57 Fed. Reg. 34,742, 34,751 col.3 (Aug. 6, 1992) (preamble to proposed cost recovery rule stating, “[b]ecause of the complexity of the response process and the fact that several of these removal actions may be taken simultaneously or in sequence at a site, the completion of the removal
are properly characterized as “removal,” as CERCLA’s definitions provision indicates, it would almost always be the case that the removal would overlap the remedial action. This is because section 104(b) authorizes any studies which the President deems necessary or appropriate “to plan and direct response actions, to recover the costs thereof, and to enforce the provisions” of the Act. For example, when the Government sues to recover its costs during the course of a remedial action, it is also, by definition, incurring litigation costs for which it will also seek recovery.

Because of this overlap, at every site it is important to know whether there has been “initiation of physical on-site construction” of a remedial action. Whether or not removal action is ongoing at the site or completed, the statute of limitations on the remedial costs begins to run once this trigger has been pulled. A leading action for purposes of cost recovery may be difficult to ascertain.”)

See generally Luftig Memo, supra note 63, at 1 (“Approximately one third of the first 500 projects at NPL sites that have achieved construction completion have had some removal activity.”); id. at 4 n.3 (indicating that removal authority may be used “while the RI/FS and the final remedy is selected”); id. at 5 (approving the use of removal authority to address “hot spots,” control the source of contamination, or take other interim actions at sites where remedial authority is also being used).

For example, the costs of the cost recovery action and oversight occurring during or following the removal or remedial action are considered costs recoverable as “enforcement activities related thereto.” 42 U.S.C. § 9601(25); see B.F. Goodrich v. Betkoski, 99 F.3d 505, 527-28 (2d Cir. 1996), aff’d sub nom. Uniroyal Chem. Co. v. Town of Middlebury, 175 Fed. Appx. 473 (2d Cir. 2006).

If remedial action has been commenced at a site, the statute of limitations begins to run upon the initiation of physical onsite construction. If no remedial action is involved at the site, and the limitations on removal actions have not been waived, then the statute of limitations only begins to run upon the completion of the removal. Where removal action is ongoing at a site where remedial action is also involved, the Government must commence its initial cost recovery action within six years of initiation of physical onsite construction of the remedial action. If it does not, then the statute of limitations bars recovery of all response costs, whether they are removal or remedial costs, because the “initial action” has not been commenced in time to recover the remedial costs and for any prior removal costs at the site. That is why Section 113(g)(2), 42 U.S.C. § 9613(g)(2), refers to the “initial action for the recovery of the costs referred to in section 9607” instead of providing a separate sentence establishing separate limitations statutes for the two types of response actions. Without this structure, the Government would still be able to recover the costs of the ongoing removal so long as the action was brought within three years of completion, notwithstanding that the limitations period had expired on recovery of the costs of the remedial action. This makes no logical sense in light of the statute’s policy to require early cost recovery actions.
decision in this area is the Seventh Circuit’s opinion in United States v. Navistar International Transportation Corp. In that case, the Government argued that the initiation of physical onsite construction at a site comprising remedial action could not, as a matter of law, occur prior to EPA’s issuance of “its final written approval of the remedial design.” This approach would have eliminated the factual issue in litigation and made the trigger a matter completely within the administrative discretion of EPA. As EPA put it, it would “limit the inquiry of the on-site actions that may have initiated construction of the remedial action to those that occur after final design approval has been issued.” The Seventh Circuit, however, rejected the approach as lacking any support in the language of the statute or its legislative history. Unavoidably, therefore, the court had to confront the matter of whether the physical, on-site construction part of a remedial action had been initiated at the site, which is largely a question of fact. Looking to the particulars of the site in question, it concluded that the trigger had been pulled on the date when EPA’s contractor “began building [a clay] cap” at the site. Because the Government filed its initial cost recovery actions more than six years after that date, it concluded that “they are time barred.” Similarly, the district court in California v. Hyampom Lumber Co. concluded that installation

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159 152 F.3d 702 (7th Cir. 1998). See generally Brock Elliot Czeschin, Case Note, United States v. Navistar International Transportation Corp.: Seventh Circuit Bars Government’s CERCLA Claim Based on Violation of the Statute of Limitations, 10 Vill. Envtl. L.J. 399 (1999) (“This Note discusses the Seventh Circuit’s holding in Navistar in relation to other judicial opinions addressing similar statute of limitations issues under CERCLA.”).

160 152 F.3d at 712. 6

161 Id.

162 Id. (citing California ex rel. Cal. Dep’t of Toxic Substances Control v. Hyampom Lumber Co., 903 F. Supp. 1389, 1393 (E.D. Cal. 1995), which rejected a “similar argument that ‘remedial action’ may not occur to prior to administrative approval of the permanent remedy.”).

163 CERCLA’s statute of limitations is unusual in triggering the statute only upon the plaintiff’s response to an environmental problem rather than upon becoming aware of the problem and its cause. Cf. New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1124-25 (3d Cir. 1997) (discussing discovery rule and equitable tolling in context of § 9613(g)(3)); Warminster Twp. Mun. Auth. v. United States, 903 F. Supp. 847, 850-51 (E.D. Pa. 1995) (FTCA’s statute of limitations begins running at plaintiff’s discovery of the chemical contamination of its wells). In other contexts, courts have held that mere ongoing impact of past violations does not extend the period upon which a plaintiff must file an action. McDougal v. County of Imperial, 942 F.2d 668, 674-75 (9th Cir. 1991) (§ 1983 actions); Ward v. Caulk, 650 F.2d 1144, 1147 (9th Cir. 1981) (employment discrimination) (“A continuing violation is occasioned by continual unlawful acts, not by continual ill effects of an original violation.”).

164 152 F.3d at 713.

165 Id.

166 Hyampom, 903 F. Supp. at 1389.
of fences and utilities in preparation for excavation and removal of contaminated soil was “construction” which started the six-year limitations period.\textsuperscript{167}

Subsequent courts confronting this issue have referred to Hyampom’s “four-part” test to determine whether the section 113(g)(2)(B) trigger has been pulled: “First, it must be ‘physical.’ Second, it must have occurred ‘on-site.’ Third, the activity must be part of the ‘construction of the remedial action.’ Fourth and finally, in addition to possessing the above characteristics, the activity must constitute the ‘initiation’ of the remedial action.”\textsuperscript{168}

“Construction” does not include “those preliminary and tentative ‘physical on-site’ activities that while related to the remedial action, are not part of its ‘construction.”\textsuperscript{169} Inspection and sampling or the use of monitoring wells may be excluded.\textsuperscript{170} Awarding of the contract to begin construction does not in itself trigger the statute, even if EPA declares that “construction” has begun as a result of that award.\textsuperscript{171}

The third Hyampom factor is especially vexing. As described in the preceding section, the United States has a special incentive to treat all of its removal actions as one in order to delay the date of completion for recovering its earliest removal costs.\textsuperscript{172} If costs are too closely associated with the construction of the “remedial action,” there is a risk that a court might view them as part of the physical on-site remedial action so as to trigger the remedial action limitations upon their “initiation.”\textsuperscript{173} The statute thus might expire concerning what the Government

\textsuperscript{167} \textit{Id.} at 1391-94.


\textsuperscript{169} \textit{Id.} at 548; \textit{see also} \textit{United States v. Findett}, 220 F.3d 842, 848 (8th Cir. 2000) (site visits, soil and water sampling, engineering surveys, and determination of size and location of support pad cannot be characterized as physical on-site construction); \textit{United States v. Atl. Richfield (Arco)}, 147 F. Supp. 2d 614, 623 (S.D. Tex. 2001) (fencing, clearing, road improvement and platform and trailer placement were not “initiation of physical on-site construction of the remedial action.”). The \textit{Arco} court noted that the clearing consisted largely of brush removal and had “the site been cleared for assembling the incinerator . . . the activity would be less removed from the goal of the remedial action.” \textit{Id.} at 622.


\textsuperscript{171} \textit{United States v. Findett Corp.}, 220 F.3d 842, 848 (8th Cir. 2000); Braselman, 78 F. Supp. 2d at 549.

\textsuperscript{172} \textit{See supra} notes 142-149 and accompanying text.

characterizes administratively as removal costs earlier than the completion of cleanup at the site because of a judicial characterization of the costs as part of the remedial action. Recent courts have begun to rely on expert testimony to determine whether any particular cleanup activity undertaken at a site should be “considered part of the implementation of the permanent remedy.” Among the more confusing situations is where the selected final cleanup remedy for a site involves the complete removal of contaminated soil to an off-site disposal location. This penultimate remedial action “fits more closely with the plain meaning of the term ‘removal.’”

Determining the precise point at which “initiation” of the physical, on-site construction occurs also presents nice factual distinctions. Consider the Second Circuit’s recent decision in *Shaeffer v. Town of Victor*. There, even though EPA had not approved a remedial action plan or permanent closure of the landfill in question, after reviewing deposition testimony of the landfill operator the court held that the operator’s use of a newly-acquired crane to spread cover over a landfill constituted initiation of physical on-site construction triggering the statute of limitations, rendering untimely the cost recovery action commenced more than six years later. The circuit court expressly rejected any “bright-line” rule deferring to EPA characterizations of a cleanup because of the possibility of “intentional or negligent adjournment of the initiation of limitations period by delay of approval of the final remedial action plan.” It also sought to avoid the prospect of CERCLA plaintiff “strategic behavior to preclude the start of any limitations period.” Allowing such manipulation of the trigger date for the statute of limitations would allow the plaintiff “to circumvent the very reasons for having a statute of limitations.”

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174 See, e.g., Colorado v. Sunoco, Inc., 337 F.3d 1233, 1245 n.5 (10th Cir. 2003) (remanding case to district court questioning whether construction of a sludge disposal area should be characterized as a removal or remedial action for statute of limitations purposes); Cal. Dep’t of Toxic Substances Control v. Alco Pac., Inc., 308 F. Supp. 2d 1124, 1136 (C.D. Cal. 2004).
175 *Alco*, 308 F. Supp. 2d at 1137 (denying summary judgment to defendants of limitations issue after characterizing soil removal as “removal” rather than “remedial action.”).
176 457 F.3d 188 (2d Cir. 2006).
177 *Id.* at 203-04. The court also found the plaintiff’s action to recover removal costs untimely since the cost recovery for remedial action was untimely. *Id.* at 205 n.21.
178 *Id.* at 209. In 1992, EPA published a proposed cost recovery rule that would have defined “initiation of physical on-site construction” to be limited to “actions that occur after completion and approval of the remedial design” prepared in connection with the final remedial action at the site.” 57 Fed. Reg. 34,742 (Aug. 6, 1992) (proposed 40 C.F.R. § 308.30(b)).
179 *Shaeffer*, 457 F.3d at 209.
180 *Id.* at 210.
D. Is the Suit an “Initial” or a “Subsequent” Cost Recovery Action?

The CERCLA three-year statute of limitations on removal actions and the CERCLA six-year statute of limitations on remedial actions only apply to the “initial action” for the recovery of response costs.181 The provision envisions that the court “shall enter a declaratory judgment on liability for response costs . . . that will be binding on any subsequent action or actions to recover further response costs or damages.”182 The “subsequent action or actions under section [107] for further response costs at the . . . facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action.”183 Because the statute for a “subsequent” action runs from the date of completion rather than the date of “initiation,” the Government has at times sought to characterize its cost recovery suit as a “subsequent” suit to avoid the “initiation” trigger of section 113(g)(2)(B).184

A prime example of this approach is the Seventh Circuit’s Navistar case.185 There, the United States had sued SCA Services of Indiana, Inc. to clean up a Fort Wayne, Indiana site on the Maumee River in 1989.186 SCA filed a third-party complaint in the action naming Navistar and others in 1992.187 These third-party claims were settled, with the United States obtaining an order from the district court expressly reserving its rights against the third-party defendants to recover its oversight costs.188 The United States did so in 1996, suing for costs that were not covered by the SCA consent decree.189 When Navistar asserted the statute of limitations on the grounds that late 1996 was more than six years after the initiation of physical onsite construction at the site in early 1990, the district court

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182 Id.
183 Id.
184 The “subsequent” action provision clarifies that a plaintiff may not commence an action to recover past removal costs at a site where remedial action occurs unless the “initial action” is brought within six years of the initiation of the physical onsite construction of the remedy. To construe the statute otherwise would be to induce CERCLA plaintiffs to characterize any response action they may undertake as a removal action in order to avoid the remedial action bar intended to encourage prompt cost recovery action for expensive or lengthy cleanups. See infra notes 185-190, 280-281 and accompanying text.
186 Id. at 704.
187 Id. at 705.
188 Id.
189 Id.
held otherwise, reasoning that the suit was not an “initial action” but rather governed by the “subsequent action” statute of limitations.190

The Seventh Circuit reversed, agreeing with Navistar that the actions against it could not be “subsequent actions” because the Government had not previously asserted any claims against it in its action against SCA, in which Navistar had been a third-party defendant.191 The claims in the subsequent separate Government action against Navistar thus “were the first claims brought against these defendants . . . to recover response costs,” and therefore an “initial action” within the meaning of section 113(g).192 As noted above, the court went on to find the action barred under section 113(g)(2).193

The Eighth Circuit faced a somewhat similar, but in other respects contrasting, situation in United States v. Findett Corp.194 There the Government did sue Findett in 1990, but settled its claims in 1996 without obtaining the declaratory judgment on liability envisioned in section 113(g).195 The Government filed a subsequent action against Findett in 1997.196 Findett argued that the suit was barred by section 113(g)(2), while the Government argued that the settled suit was the “initial action” and so the suit was a “subsequent action” which had been properly filed within three years of completion of all response action.197 Rejecting Findett’s argument that the prior suit was not an “initial action” because of the absence of a declaratory judgment on its liability, the Eighth Circuit found the suit to be a timely filed “subsequent action.”198 Unlike the situation in Navistar, the Government had “properly asserted a legal claim against Findett, and the voluntary resolution of that claim without a declaration of liability rendered the suit no less an initial action than one with such a declaration.”199

Similar issues confronted the district court in Amland Properties Corp. v. Tri-Terminal Corp.200 in the context of a private cost recovery action. The owner of contaminated property brought a civil action against the previous landowner,

190 Id. at 706.
191 Navistar, 152 F.3d at 710.
192 Id.
193 Id. at 714; see supra notes 159-165 and accompanying text.
194 220 F.3d 842 (8th Cir. 2000).
196 Id. at 845.
196 Id.
197 Id. at 845-47.
198 Id. at 847.
199 Id. at 847.
who then filed third-party complaints against still earlier previous owners. The original plaintiff settled its claims against the original defendant and then sought leave to amend its complaint to assert claims against those previous owners. The previous owners asserted the statute of limitations defense, and plaintiff argued that the new claims related back to filing of the original complaint, pursuant to Fed. R. Civ. P. 15(c). Noting the plaintiff’s “gross delay in asserting its claims against the third-party defendants,” the district court determined the plaintiff “simply has no complaint” to amend since it had already settled its claims against the original defendants. It determined that insofar as the matter of whether to allow amendments of a complaint is discretionary, it “absolutely and resolutely declines to exercise its discretion so to do.” As a result, the plaintiff’s CERCLA claims against the third-party defendants were held to be time barred.

E. Do Separate Limitations Apply to Multiple Remedial Actions at a Site?

The removal situation induces plaintiffs to treat various cleanup tasks at a site as one “removal action” so that they can recover their costs for early tasks within the three years of the “completion” of the last tasks which comprise part of the removal. The remedial action situation produces the opposite incentive. Plaintiffs have an incentive to split their remedial activities into separate remedial activities to allow recovery of their costs within the three years of the last cleanup tasks completed.

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201 Id. at 1195.
202 Id.
203 Id.
204 Id.
206 Id. at 1195. The Tenth Circuit noted in a similar situation that the “problem” of the statute of limitations regarding the Government’s claims against third-party defendants in its cost recovery action existed because it “intentionally chose not to include them as parties to the initial action.” Colorado v. Sunoco, Inc., 337 F.3d 1233, 1242 n.2 (10th Cir. 2003).
207 See supra notes 123-149 and accompanying text. Interestingly, EPA initially rejected this approach in a 1987 memorandum interpreting the limitations statute to require the initial suit for recovery of removal costs to be brought within three years of the completion of the scope of work of the first removal action. See Anderson, supra note 20, at 121 (citing OSWER COST RECOVERY POLICY, supra note 127, at 2). Apparently, it changed its mind in the context where remedial action is planned at the site, by the time it proposed its preferred cost recovery rule. 57 Fed. Reg. 34,742, 34,751 (Aug. 6, 1992) (removal action not “complete” until remedial design finished). Because EPA never finalized the rule, the D.C. Circuit never got an opportunity to evaluate EPA’s later construction. See 42 U.S.C. § 9613(a) (giving the D.C. Circuit exclusive jurisdiction over rulemaking appeals). Professor Anderson, who was counsel for defendants in Kelley, appears to have pointed out the discrepancy for the benefit of the Sixth Circuit. See Kelley v. E.I. duPont de Nemours, 17 F.3d 836, 841 (6th Cir. 1994).
actions, so that they can recover the costs of the later activities even though recovery of the earlier activities are barred because initiated more than six years before the first cost recovery action was filed.\footnote{208}

The Tenth Circuit has taken an approach which clearly rejects such an argument as a matter of law. Before \textit{Colorado v. Sunoco, Inc.},\footnote{209} the United States and Colorado had filed a cost recovery action in 1996 against a number of defendants to clean up the Summitville Mine site but chose not to sue identified PRP A.O. Smith Corporation.\footnote{210} Six years later, in 2001, Colorado filed an action against Smith regarding the same site, and Smith asserted the statute of limitations.\footnote{211} The lower court ruled that Colorado’s action was untimely because the plaintiffs “had initiated physical construction of at least three remedial actions on the Site prior to January 2, 1995 (six years prior to the filing of the complaint).”\footnote{212} On appeal, Colorado argued “that multiple removal or remedial actions can be implemented at a single site, and the cost recovery statutes of limitation in CERCLA were intended by Congress to apply separately to each individual removal and/or remedial action.”\footnote{213} This would have permitted it to recover costs for later remedial actions even if the statute had expired on the earlier actions.

The Tenth Circuit adopted a “plain meaning” approach to the construction of section 113(g)(2) to reject Colorado’s interpretation. It focused on the language of subsection (B) which states that “if the remedial action is initiated within 3 years after completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.”\footnote{214} It concluded that use of the article “the” rather than “a” in the provision to modify the phrases “removal action” and “remedial action” indicated “there will be only

\footnote{208 The Government desired the “declaratory judgment” provision to avoid the application of the usual “transaction or occurrence” test regarding claim preclusion. \textit{Restatement of Judgments (Second)} § 24 (1982). Without such a provision, once a CERCLA cost recovery action went to judgment (even a judgment in favor of the United States), the United States might well have risked an inability to recover any further costs for the release or threat of release addressed in the earlier action.}
\footnote{209 337 F.3d 1233 (10th Cir. 2003); see Rypma, \textit{supra} note 23, at 645.}
\footnote{210 \textit{Sunoco}, 337 F.3d at 1238.}
\footnote{211 \textit{Id.}}
\footnote{212 \textit{Id. at 1240.}}
\footnote{213 \textit{Id. at 1240.}}
\footnote{214 \textit{Id. at 1241 (emphasis in original) (quoting 42 U.S.C. § 9613(g)(2)(B)).}}
one such ‘response action’ per facility or site.”215 If response activity occurs after the limitations period has run, the cost of that activity could only be recovered “if an initial cost recovery action for the site was timely filed and the subsequent action is filed no later than three years after cessation of all response activity at the site.”216 Determining that there was a genuine issue of material fact as to when activity at the sludge disposal area had occurred, it remanded the case to the district court to determine whether “the construction of the sludge disposal area was a ‘remedial’ action that triggered the running of the statute of limitations under § 9613(g)(2)(B).”217

Some district courts have followed this basic approach without reliance on the grammatical analysis. For example, the district court in California ex rel. California Department of Toxic Substances Control v. Celtor Chemical Corp.218 divided a complex multi-phase cleanup at the Celtor site within the boundaries of the Hoopa Valley Indian Reservation into a single “removal” phase from January 1983 through a ROD in September 1985 and a “remedial action” between October 1987 and September 1989.219

Yet, at least one district court after the Tenth Circuit’s Sunoco decision appeared unmoved by its grammatical analysis. Asked to revisit its own prior rulings permitting “compensation for operable units qualifying under the limitation even if the plaintiff is barred from seeking compensation for earlier operable units,” the district court of New Jersey stuck to its conclusion which “focused on the importance of distinct operable units and multiple RODs in response actions under CERCLA.”220 It expressly rejected the Tenth Circuit’s conclusion that “CERCLA’s cost recovery statute of limitations anticipates only

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215 Id. The Government used similar grammatical arguments in construing § 9607(a) to eviscerate any causation requirement regarding generator liability. See United States v. Monsanto Co., 858 F.2d 160, 169 (4th Cir. 1988) (construing the words “a” and “such”); Light, supra note 5, at 4 n.32 (discussing Government’s campaign for favorable judicial construction of CERCLA and noting that the district court’s opinion in Monsanto was “drafted by the government”).


217 Id. at 1246.

218 901 F. Supp. 1481 (N.D. Cal. 1995).

219 Id. at 1488.

220 United States v. Manzo, 2006 U.S. Dist. LEXIS 70860, *24 (D.N.J. Sept. 29, 2006); see also United States v. Monsanto Co., 182 F. Supp. 385, 402-03 (D.N.J. 2000). The EPA has always realized that courts might treat an operable unit as a separate action for cost recovery purposes. See OSWER COST RECOVERY STRATEGY, supra note 115, at 30 n.23 (“Where a site has more than one operable unit, cost recovery activities described in the remedial process should be conducted for each operable unit, where appropriate, since operable units may be held to be separate actions for purposes of cost recovery statute of limitations.”).
one removal action and one remedial action” per site.\footnote{221}{Manzo, 2006 U.S. Dist. LEXIS 70860, at *23.} Instead, it followed its prior “interpretation that the statute of limitations contemplates multiple actions and allows cost recovery for subsequent operable units even where recovery for the first operable unit is time-barred.”\footnote{222}{Id. at *25.} The court thus supported separation of remedial activities at the site into separate operable units, each having its own separate “initiation” for statute of limitations purposes.\footnote{223}{Id. at *25-27.}

\section*{F. What Limitations Apply to Private Cost Recovery and Contribution Actions?}

A final cluster of issues regarding CERCLA’s cost recovery statute of limitations revolves around the typical situation in which some parties have settled their CERCLA liabilities but others have not.\footnote{224}{See Light, supra note 5, at 13-14, 25, 32-35.} CERCLA expressly provides a separate statute of limitations for certain contribution actions, with the trigger for bringing such claims dating either from the date of judgment or the settlement of the original action against the contribution plaintiff.\footnote{225}{42 U.S.C. § 9613(g)(3) (2000).} The main interpretive problem is that this special contribution statute of limitations on its face only applies where there has been a “judgment” entered in the contribution action, “entry of a judicially approved settlement,” or after one of two limited types of administrative settlements with the United States.\footnote{226}{42 U.S.C. § 9613(g)(3)(A), (B).} It does not expressly cover the situation where one PRP seeks contribution from other PRPs after entering into an administrative consent order with the United States to remedy a site or where the United States issues a unilateral administrative order requiring cleanup by a PRP without filing a civil action against that PRP.\footnote{227}{See 42 U.S.C. § 9606(a); see also RSR Corp. v. Commercial Metals Co., 496 F.3d 552 (6th Cir. 2007). CERCLA contribution plaintiffs have even questioned the applicability of section 113(g)(3) in the context of contribution actions following the entry of a judicially approved settlement between the Government and the contribution plaintiff other than settlements under section 122(g) and (h). See generally 496 F.3d at 559 (The majority in a split panel found section 113(g)(3) applicable for all such “judicially approved settlements.”). But see 496 F.3d at 560, 563 (Clay, J. dissenting) (The dissent would have refused to bar the action “because there is no judgment and the consent decree does fall under § 9622(g) or § 9622(h).”).} Neither does it address the situation where a PRP voluntarily remedies a site, negotiates a private clean up agreement with some other PRPs, and then files an action in the nature of contribution against non-settling PRPs without having obtained a judgment from a
court regarding its claims against those with whom it negotiated the private cleanup agreement.

Until the United States Supreme Court decided *United States v. Atlantic Research Corp.*, there had been a division among the circuits over the availability of a CERCLA action to PRPs incurring response costs who had not been sued by the Government for cost recovery. The Supreme Court clarified that PRPs as well as volunteers could avail themselves of CERCLA section 107. Defendants wishing to reduce their judgment to reflect the PRP plaintiff’s own liability could then bring a “counterclaim for contribution” against the private PRP plaintiff under section 113(f). After *Atlantic Research*, it is clear that section 113(g)(2) applies to the PRP’s private cost recovery claims under section 107. Just how contribution claims related to the private cost recovery claim fit in CERCLA’s scheme is not as clear.

In *Sun Co. v. Browning-Ferris, Inc.*, the Tenth Circuit addressed the situation where EPA had issued an administrative order requiring cleanup without filing a lawsuit and that order recipient had sued other PRPs seeking contribution to its cleanup effort. Noting that section 113(g)(3) did not cover this situation, the court emphasized the language in section 113(g)(2) referring to actions “for recovery of the costs referred to in [section] 107,” rather than actions brought under section 107. It thus determined that because no section 106 or 107 had been filed that the action before it was “the ‘initial action’ for recovery of such [response] costs” within the meaning of section 113(g)(2). Other courts, citing the disincentives to cleanup that limitations on contribution actions might have, have refused to apply section 113(g)(2) in a contribution context.

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228 127 S. Ct. 2331 (2007).
229 *Id.* at 2334 (citing Consol. Edison Co. of N.Y. v. UGI Util., Inc. 423 F.3d 90 (2d Cir. 2005); Metro. Water Reclamation Dist. of Greater Chicago v. N. Am. Galvanizing & Coatings, Inc., 473 F.3d 824 (7th Cir. 2007); E.I. DuPont de Nemours & Co. v. United States, 460 F.3d 515 (3d Cir. 2006)).
230 *Id.* at 2335.
231 *Id.* at 2339.
232 *Id.* at 2337-38 (distinguishing cost recovery and contribution claims).
234 *Id.* at 1192 (emphasis in original).
235 *Id.* (emphasis in original).
236 See, e.g., Durham Mfg. v. Merriam Mfg. Co., 294 F. Supp. 2d 251, 276 (D. Conn. 2003) (“It was not until Merriam refused to participate in the ‘AOC that Durham could have known that it
In Geraghty & Miller, Inc. v. Conoco Inc., the State of Louisiana had required Conoco/Vista to put into place a groundwater assessment program. Conoco/Vista hired Geraghty & Miller (“G&M”) to do so but later began to suspect “potentially serious technical and physical deficiencies” in installed wells. The two parties then entered into an agreement to plug and abandon wells that they were to agree upon as being “suspect.” G&M subsequently filed a CERCLA cost recovery action against Conoco/Vista, the site owner, for G&M’s past and future response costs, and Conoco/Vista counterclaimed for contribution.

Among the legal issues addressed by the Fifth Circuit in that case was what statute of limitations, if any, applied to Conoco/Vista’s counterclaim for contribution. None of the three triggers for starting the contribution statute of limitations in section 113(g)(3) appeared to apply. Following the reasoning of the Tenth Circuit that “a contribution action is merely one type of cost recovery action,” the Fifth Circuit held “the statute of limitations found in CERCLA section 113(g)(2) applies to initial contribution actions such as this.” Otherwise, it reasoned that it would either have to conclude that the absence of an express provision for this situation in section 113(g)(3) either meant that no statute of limitations applied at all or that it would have to make one up by importing “another triggering event from federal common law.” Classifying Conoco/Vista’s claim as one for “removal action” within the meaning of section 113(g)(2)(A), it then found that “the statute of limitations does not bar Conoco/Vista’s counterclaim for CERCLA contribution.”

would incur more than its fair share of response costs for which it now seeks contribution from Merriam.”.

237 234 F.3d 917 (5th Cir. 2000).
238 Id. at 920-21.
239 Id. at 921.
240 Id.
241 Id. at 923-24.
242 Geraghty & Miller, 234 F.3d at 925 (following Sun Co. v. Browning-Ferris, Inc., 124 F.3d 1187, 1192 (10th Cir. 1997)).
244 Id. at 927.
IV. EVALUATION

A. Have the Courts Improperly Deferred to the Government’s Litigation Positions?

After some initial stumbling, over the past twenty years the lower federal courts have begun to find their way in navigating the parameters of CERCLA’s cost recovery statute of limitations added by SARA. The district courts got off to a poor start by accepting CERCLA plaintiffs’ arguments that the new statute was prospective only. Given federal courts had uniformly held “that CERCLA applies retroactively to pre-enactment acts,”246 their policy grounds for departing from that established principle to apply the statute of limitations prospectively only was thin and conclusory. In United States v. Moore,247 the district court opined that “[r]etrospective application of § 9613(g) would subvert Congress’ intent to hold responsible parties liable for environmental hazards.”248 It cited general legislative history in SARA indicating “[t]hat, due to inadequate resources and mismanagement, the EPA was unable to accomplish CERCLA’s intended purposes . . . [Thus] Congress sought to ameliorate these problems and hence allocated more funds for CERCLA clean-ups.”249 From this, it concluded, “[i]t is inconsistent with the accomplishment of these purposes to bar claims which have accrued prior the enactment of § 9613(g).”250 This amounts to little more than claiming that the Government needs the money so the statute should be interpreted to accomplish that end. The court does not explain, as it could not, why Congress had added any statute of limitations at all, given its rationale.

There is also considerable irony concerning the policy rationale for prospective only application of section 113(g) found in the first private cost recovery case to consider the issue, T&E Industries, Inc. v. Safety Light Corp.251 There, the New Jersey district court relied on the century-old Sohn rule that “to construe a limitation statute as absolutely barring all actions which had occurred more than the limited time before the statute was passed would render it

247 Id. at 622.
248 Id. at 626.
249 Id.
250 Id.
unconstitutional.”252 Having successfully argued that CERCLA was intended to impose strict, joint and several liability retroactively and sustaining such retroactive application against constitutional attack,253 one might have thought the Government might feel a bit sheepish about invoking the Constitution to preserve its pre-SARA claims. There is no evidence that this was so.254

The sort of conclusory policy reasoning found in United States v. Moore found its way into the first few cases construing the precise terms of section 113(g), mostly in cases attempting to determine when the “completion” of the “removal action” subject to the statute had occurred. In United States v. United Nuclear Corp.,255 for example, the court justified its deferral to the date of the record of decision on the grounds that “[c]ourts have interpreted the statute of limitations liberally in favor of EPA.”256 In the early 1990’s, some district courts

256 Id. at 1561; see also id. at 1563 (“In accord with the policy that statute of limitations are to be construed liberally in favor of the government (citation omitted) and the broad renumerative policies behind CERCLA, this Court finds that the statute of limitations did not begin to run until . . . the ROD was filed.”). In another interesting piece of irony, in support of its liberal construction of the statue “in favor of EPA,” the United Nuclear court cited the First Circuit’s sarcastic comment that “[t]he running of the statute of limitations is entirely within EPA’s control” and that “the government may take its own sweet time before suing . . . .” Id. at 1561 (citing Reardon v. United States, 947 F.2d 1509, 1519 (1st Cir. 1991)). The First Circuit struck down CERCLA’s lien provision as a violation of due process because of the absence of any guaranteed hearing or other procedural protections to challenge the lien at a meaningful time. The lien provision was unconstitutional precisely because of the ability of the Government to defer its day of reckoning “for a considerable time without an opportunity for a hearing.” Id. at 1562. The irony is that the Reardon case is being cited as supporting a construction in favor of permitting maximum delay of the date of “completion” triggering the statute of limitations. Subsequent courts have also cited Reardon in the same absurd way, probably demonstrating the penchant of district court to copy each other’s decision without reflection. See, e.g., United States v. Chromatex, Inc., 832 F. Supp. 900, 901, 902 (M.D. Pa. 1993) (praising the United Nuclear court for its “very thorough analysis” and subsequently citing Reardon in the same ironic way); Kelley v. E.I. duPont de Nemours & Co., 17 F.3d 836, 843 (6th Cir. 1994) (citing Reardon for the proposition that “CERCLA’s limitations periods are to be broadly construed”).
continued to cite pre-SARA cases for the broad conclusory proposition that “the statute of limitation must be strictly construed in favor of the government . . . so as to avoid limiting the liability of those responsible for cleanup costs beyond the limits expressly provided.”257 In 1994, the Sixth Circuit justified its conclusion that “Congress intended that the term ‘removal action’ be given a broad interpretation” on the policy grounds that “CERCLA has two overriding objectives—cleaning up hazardous waste, and doing so at the expense of those who created it.”258

Starting in the late 1990’s, however, circuit courts began to put an end to this “policy” approach, which amounted to the notion that the Government should not have its claims barred simply because it is the Government. Revisiting SARA’s legislative history in Navistar in 1998, the Seventh Circuit explained, “although we shall construe ambiguities in the statute in favor of the government in an effort to avoid frustrating the beneficial purposes of CERCLA, we must recognize that Congress has determined that those beneficial purposes are serviced by the timely filing of recovery actions.”259 The Tenth Circuit in 2003 carefully evaluated the Government’s claim that courts should defer to its interpretation of the statute as to whether a cleanup was a removal or remedial action for statute of limitations purposes.260 That court clearly rejected the federal government’s argument that language in the statute required courts to defer to EPA’s characterization of a cleanup as a removal or a remedial action as well as Colorado’s assertion that Chevron deference was owed EPA’s characterization.261 Instead, EPA’s characterization was only entitled to “some weight” hinging on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with


261 Id. at 1242-43.
earlier and later pronouncements, and all those factors which give it power to persuade.”262 In Schaefer v. Town of Victor in 2006,263 the Second Circuit went even further in the context of a private cost recovery action to note that the “special deference to the government in construing a limitations period is usually invoked in cases involving rights vested in the government acting ‘in its sovereign capacity.’”264 It went on to reject “bright-line” rules such as those the Government had advocated in Navistar.265

Even today, the occasional district court will point to earlier cases enunciating “a legislative policy favoring the United States’ interpretation of the statute of limitations.”266 Most lower federal courts, however, recently seem more prone to adopt traditional approaches similar to that of Justice Thomas in Atlantic Research and Cooper Industries, searching for statutory meaning independently with a special focus on the statutory text and traditional canons of statutory construction.267 Coherent construction of CERCLA’s statute of limitations provision requires that courts reexamine that text.268

262 Id. at 1243 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).
263 457 F.3d 188 (2d Cir. 2006).
264 Id. at 206 n.23 (citing E.I. DuPont De Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924)).
265 Id. at 207 (following Navistar). Navistar had rejected the Government’s proposed “bright-line” rule that initiation of physical on-site construction can never begin “until the EPA issues final, written approval of the remedial design for the site at issue.” United States v. Navistar, 152 F.3d 702, 711-12 (7th Cir. 1998).
267 See United States v. Atl. Research Corp., 127 S.Ct. 2331, 2336 (2007) (“Statutes must be ‘read as a whole.’” (quoting King v. St. Vincent’s Hosp., 502 U.S. 215, 221 (1991))); id. (“The Government’s interpretation makes little textual sense.”); id. at 2337 (“It is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render the entire provision a nullity.”); id. at 2339 (“Because the plain terms of § 107(a)(4)(B) allow a PRP to recover costs from other PRPs, the statute provides Atlantic Research with a cause of action.”); Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 165-66 (2004) (focusing on the text “during or following” in 42 U.S.C. § 9613(f), giving “may” its “natural meaning”); id. (“There is no reason why Congress would bother to specify conditions under which a person may bring a contribution claim, and at the same time allow contribution actions absent those conditions.”).
268 It is well established that opinions of a district court do not have stare decisis effect and are not precedents for other district courts. See, e.g., Midlock v. Apple Vacations W., Inc., 406 F.3d 453 (7th Cir. 2005). District court decisions do not establish the law of the circuit, nor even the law of the district. In re Executive Office of the President, 215 F.3d 20 (D.C. Cir. 2000); United States v. Cerceda, 172 F.3d 806 (11th Cir. 1999). In interpreting CERCLA, though, the district courts seem to have developed a sort of herd mentality in which they mindlessly follow the decisions of other district courts without re-examining legal issues de novo. See, e.g., supra note 120 and accompanying text. Because of this, it is especially important that the circuit courts and the United States Supreme Court do so, despite the Justice Department’s ability to pile up district court
B. How Does the Thus far Ignored “Waiver” Provision in the Statute of Limitations Work?

Remarkably, it appears that all of the decisions interpreting section 113(g) to date have ignored critical statutory language.269 This statutory language indicates the correct approach to the removal versus remedial action categorization problem with which the lower courts have struggled.270 The relevant language in section 113(g)(2)(A) provides that “cost recovery [claims] must be brought within 6 years after a determination to grant a waiver under section [104(c)(1)(C)] . . . for continued response action.”271

This provision makes the trigger date for a cost recovery action for a removal turn on the time and money expended on the cleanup. Once more than a year or more than two million dollars is expended on a removal, the Government is not authorized to continue the response action without the proper granting of the section 104(c)(1)(C) waiver.272 Where a waiver is granted, the statute of limitations at a site expires six years from the date the waiver is granted.273 For statute of limitations purposes, it does not matter in such cases when the removal is completed.274 Only where those thresholds are not exceeded does the limitations period run from the date of “completion” of the removal.275

“opinions” in its favor. A New Hampshire court’s opinion should not have undue weight because the Government chose to sue there first. Cf. discussion of United States v. Mottolo, supra notes 43-44, 46, 50, 56, 257 and accompanying text; see also supra note 215 (discussing Monsanto).269 The court in United States v. W.R. Grace & Co., 429 F.3d 1224, 1247-49 (9th Cir. 2005), has analyzed the waiver provision in order to determine whether a particular statutory exemption was so “arbitrary and capricious” so as to prevent the recovery of costs. The Ninth Circuit did not find EPA’s waiver in that case to be a clear error in judgment. Apparently, the only other discussion of the waiver provision appears in United States v. Amtreco, Inc., 809 F. Supp. 959, 970-71 (M.D. Ga. 1993), in which a defendant argued that the United States could not recover any costs of the removal incurred after six months, which was the time limit prior to the 1986 amendments. The defendant contended that the costs could not be recovered because they had been incurred contrary to § 9604(c). Noting that the time limit for the cleanup at bar, which took place after 1986, was one year rather than six months, it applied that one-year limit and found that because the cleanup had been completed in less than a year, the defense failed. Neither of these decisions involves the cost recovery statute of limitations.

270 See supra notes 150-180 and accompanying text.
272 See W.R. Grace & Co., 429 F.3d at 1248-49 (conditioning recovery of full costs of a removal above the statutory limits on the propriety of EPA’s waiver, including an evaluation of whether EPA’s documentation showed that the waiver was grounded in the statute’s “relevant factors.”).
273 See 42 U.S.C. §§ 9613(h), (g)(2); see also supra notes 104-106 and accompanying text.
274 See 42 U.S.C. § 9613(g)(2)(A). The provision states that the removal statute of limitations is “3 years after completion of the removal action, except that” it is to run “6 years after a determination to
What the courts have missed is that the Government ordinarily must sue (1) within three years of completion of the removal within the two statutory thresholds or (2) within six years of exceeding either of these thresholds. Accordingly, the policy of the statute is to force the Government to bring its first cost recovery action before a lengthy or expensive cleanup is completed. Where the Government is conducting both removal and remedial actions at a site, it has a choice. First, it may sue on the removal and seek a declaratory judgment on the PRP’s liability for future response costs, such as those that might be incurred in connection with a subsequent remedial action. This suit ordinarily must occur within four years from the commencement of the removal. Where there is a waiver, the suit seeking removal costs and declaratory relief must be brought within seven years from the commencement of the removal. Second, where the Government also initiates a remedial action at the same site, it may wait to commence suit until six years after it initiates construction of the remedy, so long as it sues within three years of completion of the removal. This ordinarily would grant a waiver.” Id. Thus, the exception substitutes for the “completion” provision where the waiver has been granted.

275 Id.

276 The only exception occurs at some sites where there are both removal and remedial actions. See infra notes 280-282 and accompanying text.

277 See 42 U.S.C. § 9613(g)(2).

278 Add the one year from commencement to completion of the removal plus the three years of the limitations period. See supra notes 68-69, 132 and accompanying text.

279 OFFICE OF EMERGENCY AND REMEDIAL RESPONSE, U.S. ENVTL. PROT. AGENCY, CONDUCTING NON-TIME-CRITICAL REMOVAL ACTIONS UNDER CERCLA (1993) (EPA/540/F-94/009), available at http://www.etec.energy.gov/library/SNAPEECA/ConductingNTCRAunderCERCLA(EPA).pdf (Add the one year from commencement of the removal to the time the waiver must be granted, which is six years from the date of this waiver to the expiration of the alternative limitations period). In a 1993 guidance which EPA published regarding non-time-critical removals, EPA claimed that the statute of limitations trigger would run from “the date of the last exemption.” Id. at 2 (emphasis added). This implies that EPA contemplated an ability to grant multiple exemptions under § 9604(c)(1)(C) as within its discretion. If the Agency really was able to do this, the statute of limitations would be entirely within the control of EPA. This self-serving interpretation of the provision is without merit.). Cf. 57 Fed. Reg. 34,742, 34,752 (proposed 40 C.F.R. § 308.30(a)) (proposing to define “completion of the removal action” for statute of limitation purposes to be the date of the last design report prepared by EPA preparatory to implementation of remedial construction activities at the site); see supra notes 177-179 and accompanying text. It would be inconsistent with the policies behind any statute of limitations to accept EPA’s preferred view that it may grant more than one waiver or create more than one remedial design and thereby delay the “initial” cost recovery action for a site.

280 42 U.S.C. § 9613(g)(2).
occur no later than ten years from the commencement of the earlier removal.\textsuperscript{281} Where a timely waiver of removal limitations is granted and removals may be continued at a site under section 104(c)(1)(C), conceivably the statute of limitations might expire as late as thirteen years after the commencement of the removal.\textsuperscript{282} Ten or thirteen years from the accrual of its initial cost recovery cause of action may be a long time, but the Government may not defer its cost recovery suit any further.\textsuperscript{283}

The statute of limitations will expire earlier than these outside limits in many cases. For example, EPA well knows at the outset of planning a removal of magnitude that the project will exceed the time and monetary limitations. Its internal guidance therefore often envisions combination of the initial removal approval with waiver of the statutory limits in a single Action Memorandum.\textsuperscript{284} In such cases, the statute of limitations runs six years from the date the removal

\textsuperscript{281} See id. (Add the one year from commencement to completion of the removal, plus the three-year hiatus until construction of the remedial action must be commenced, plus the six years before the remedial action suit must be commenced after initiation of construction.).

\textsuperscript{282} Id. (Add the one year maximum duration of the removal until the time limit on the removal has to be and is waived, plus six years after that determination, plus the six years within which the remedial action suit must be commenced after initiation of physical onsite construction. Read literally, the statute permits recovery of the removal costs in the remedial action suit so long as the remedial action suit is commenced “within 3 years after completion of the removal.”) Some might argue as a result of this language that the waiver exception does not prevent the “never-ending” removal problem because the Government might continue a removal indefinitely and then initiate remedial action at the site decades into the future seeking recovery of the earlier costs within six years of the initiation of construction of the remedial action. However, as discussed above, the “completion” trigger does not apply to a removal action once a waiver is granted. See supra notes 34-37 and accompanying text. The statutory intent obviously is to permit recovery of prior removal costs in the remedial action suit when the initiation of physical on-site construction of the remedial action occurred within the time period during which the removal action could have been commenced had there been no subsequent remedial action, normally three years from the completion of the removal.

To permit recovery of the costs of a removal action in the remedial action suit where a waiver was granted more than six years prior to the initiation of construction would be to eviscerate the “except that” clause and re-substitute a completion trigger for the recovery of those removal costs. This is therefore not a proper construction. Hence, thirteen years is the maximum length of time the Government conceivably may wait from the commencement of a removal action before bringing suit to recover the costs of that removal action.

\textsuperscript{283} See supra notes 9-20 and accompanying text.

action is originally approved prior to commencement (also the date of the waiver), which may be more than three years prior to completion of that removal. Since an RI/FS is considered a removal, that task alone may exceed the time and monetary limits at many sites. Also, in such situations the statute of limitations starts running during the fiscal year in which initial funds for the RI/FS are obligated, not when the RI/FS is completed.

Thus far, because judicial construction has not focused on this language in section 113(g)(2)(A), the Government has had a strong incentive to characterize a cleanup as a removal action on the theory that the statute of limitations only begins running upon completion of the action. The many cases in which it has argued for characterizing a cleanup as removal with the latest possible completion date testifies to this incentive. The policy behind the statute to encourage filing of the initial cost recovery action “as early as EPA has the necessary information to do so” will not be achieved until defendants, and courts, begin to inquire about the date of the waiver in cases where the Government seeks removal costs of more than two million dollars or seeks costs with respect to a removal which lasts more than a year. The courts’ deafening silence in addressing the waiver provision over the past two decades rivals the notorious work of John Cage. The courts

285 Id. at 3-277 n.10 (The date upon which the twelve-month limitation on the removal actions expires usually will be later than twelve months from the date of the waiver granting the exemption. EPA has explained, “[t]he 12-month clock starts when on-site removal action response activity begins (not when the contractor is authorized) and runs for 12 consecutive months, including time that passes between restarts.”) This probably means that EPA has exceeded the time and monetary limitations without obtaining a waiver under its own litigation-minded definition of “removal.”

286 Cf. Anderson, supra note 20, at 142 (noting that many RI/FS projects are costly and citing the case of United States v. Kramer, 757 F. Supp. 397, 406 (D.N.J. 1991), where there was one twenty-six-month RI/FS which had costs of over $2 million). Curiously, while advocating a conglomerate of removal and RI/FS activities into a single “removal action” in court, internally EPA does not combine the activities for purposes of calculating whether the time or monetary limits have been exceeded. EPA SUPERFUND REMOVAL PROCEDURES, supra note 284, at 3-277 n.10 (“CERCLA section 104(b) investigatory studies are not removal action response activities that count toward the 12-month time limit when they precede the initial start date.”).

287 See 42 U.S.C. § 9604(c)(1)(C) (The waiver provision speaks in terms of “obligation” of funds for a removal, suggesting that the obligation of funds is what counts with respect to the timing of a waiver.).

288 See supra notes 150-156 and accompanying text.

289 See supra notes 121-131, 141-144 and accompanying text.

290 See supra note 101 and accompanying text.

291 Miley v. Oppenheimer & Co., 637 F.2d 318, 323 (5th Cir. 1981) (“[T]he Fifth Circuit’s only churning composition has been a deafening silence, rivaling the notorious work of John Cage.”) (citing JOHN CAGE, 4’33” (pronounced “FOUR MINUTES AND THIRTY-THREE SECONDS) (1952) (a piano composition dedicated to the proposition that silence is music to the ears). Cf. Webster v.
must break their silence if PRPs are ever to be able to close their books on CERCLA cost recovery liability. 292 If they do not, at least in cases where no private party can bring a private cost recovery action, PRPs will continue to be waiting for Godot. 293

Reprod. Health Servs., 492 U.S. 490, 538 (1989) (deafening silence regarding constitutional protections state statute would jettison); Petenaude v. Equitable Life Assur. Soc’y of the U.S., 290 F.3d 1020, 1025 (9th Cir. 2002) (“‘deafening silence’ in legislative history”). 292 One might argue that EPA ought to require PRPs to obtain pre-approval of a removal action exceeding these limits in order for those costs to be considered recoverable “necessary costs of response consistent with the national contingency plan.” EPA, however, has long avoided any requirement that it “approve” or involve itself in private cleanups as a precondition to private cost recovery. Cf. 40 C.F.R. § 300.700(a), (b)(3) (2007); 50 Fed. Reg. 5862, 5870, col.3 (Feb. 12, 1985) (“[T]he lead agency does not have to . . . approve a response action for those costs to be recovered from a responsible party pursuant to CERCLA section 107.”). Nonetheless, where a response action has lasted more than a year or cost more than two million dollars it may be appropriate to presume in private cost recovery cases that the response action is a “remedial action” rather than a “removal.” Under such a presumption, where a statutory limit is exceeded the plaintiff would have to show by a preponderance of the evidence that it brought its initial cost recovery action within six years of exceeding the requisite one-year time or two million dollar monetary limit in order to avoid the “remedial action” statutory bar of six years from the initiation of physical onsite construction. Cf. United States v. Manzo., 182 F. Supp. 2d 385, 401 (D.N.J. 2003) (“[J]udicial presumptions traditionally applicable to the statutes of limitations should be considered.”). The Manzo court cited Kelley v. E.I duPont de Nemours, 17 F.3d 836, 842 (6th Cir. 1994), as “applying presumptions to CERCLA’s statute of limitations because of [perceived] statutory ambiguity.” Id.; see also Rypma, supra note 23, at 647 n.21 (same reading of Kelley). Cf. Cada v. Baxter Healthcare Corp., 920 F.2d 446, 453 (7th Cir. 1990) (where necessary information is gathered before statute of limitations has run, presumption should be that plaintiff could bring suit within the statutory period and should have done so). Even if the waiver provision were limited to Government cost recovery actions, however, it plays a significant role in alleviating the harshness of the statute’s preclusion of pre-enforcement judicial review. See supra notes 9-20 and accompanying text.

See SAMUEL BECKETT, WAITING FOR GODOT: A TRAGIC COMEDY IN TWO ACTS (1954) (A play in which the characters wait for a man (Godot) who never arrives); Normand Berlin, Traffic of Our Stage: Why Waiting for Godot?, MASS. REV., Autumn 1999 (It was originally written in French between 1948 and 1949 and has been called “the most significant English language play of the 20th century.”).