No. 20-382

In the Supreme Court of the United States

TERRITORY OF GUAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
JEAN E. WILLIAMS
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
VIVEK SURI
Assistant to the Solicitor General
JENNIFER SCHELLER NEUMANN
EVELYN YING
RACHEL HERON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

Section 113(f)(3)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), provides a cause of action for contribution to any "person who has resolved its liability to the United States or a State for some or all of a response action * * * in an administrative or judicially approved settlement." 42 U.S.C. 9613(f)(3)(B). The questions presented are as follows:

1. Whether a judicially approved settlement that resolves a claim brought under a law other than CERCLA can give rise to a contribution action under Section 113(f)(3)(B).

2. Whether a judicially approved settlement that conclusively establishes a person's legal obligation to perform response actions, but that disclaims any admission of liability, "resolves" the settling party's "liability" for "some or all of a response action" within the meaning of Section 113(f)(3)(B).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 950 F.3d 104. The opinion of the district court (Pet. App. 51a-97a) is reported at 341 F. Supp. 3d 74.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2020. A petition for rehearing was denied on May 13, 2020 (Pet. App. 98a-99a). The petition for a writ of certiorari was filed on September 16, 2020, and was granted on January 8, 2021. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-47a.

STATEMENT

A. Legal Background

1. Congress enacted and President Carter signed the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or the Act), Pub. L. No. 96-510, 94 Stat. 2767 (42 U.S.C. 9601 *et seq.*), to promote the timely cleanup of contaminated sites and to ensure that those responsible for the contamination pay for the cleanup. The Act uses the word "response" to refer to various actions to address hazardous substances, including monitoring the site, cleaning it up, removing and disposing of contaminants, and building permanent structures to prevent or contain future releases. 42 U.S.C. 9601(23)-(25). The Act makes certain broad classes of persons, known as potentially responsible parties or PRPs, strictly liable for response costs. 42 U.S.C. 9607(a).

The Act establishes (as relevant here) two mechanisms by which the United States and other persons may compel a PRP to perform or pay for a response action. The United States may sue PRPs under Section 106 to compel them to undertake response actions. 42 U.S.C. 9606(a). A person also may perform a response action and then sue PRPs under Section 107(a) to recover the "necessary costs of response." 42 U.S.C. 9607(a)(4)(B).

2. This case concerns the right of a PRP to obtain contribution. Contribution, in the sense relevant here, is a "tortfeasor's right to collect from joint tortfeasors when, and to the extent that, the tortfeasor has paid more than his or her proportionate share to the injured party." *Black's Law Dictionary* 416 (11th ed. 2019). At common law, tortfeasors originally had no right to contribution, but States began to recognize such a right in

the 20th century, sometimes by statute and sometimes by judicial decision. See *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 86-87 (1981). The recognition of that remedy rests on the view that, when many persons share responsibility for a tort, it is unfair to force one of them to bear the whole loss. See *id.* at 87-88.

As originally enacted, CERCLA did not create an express cause of action for contribution. See *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157, 161 (2004). In two cases decided soon after the Act's adoption, this Court declined to recognize implied or common-law contribution rights under other federal statutes. See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981); *Transport Workers*, *supra*.

After those decisions, Congress passed and President Reagan signed the Superfund Amendments and Reauthorization Act of 1986 (1986 Amendments), Pub. L. No. 99-499, 100 Stat. 1613. The 1986 Amendments created two express causes of action for contribution "to avoid problems that might otherwise arise due to the courts' reluctance to imply new private rights of action under federal statutes." H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. 3, at 20 (1985) (House Report). Under Section 113(f)(1), "[a]ny person may seek contribution from any other person who is liable or potentially liable under [Section 107(a)], during or following any civil action under [Section 106] or under [Section 107(a)]." 42 U.S.C. 9613(f)(1). And under Section 113(f)(3)(B), "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution

from any person who is not party to a settlement referred to in [Section 113(f)(2)]." 42 U.S.C. 9613(f)(3)(B). (The cross-referenced provision, Section 113(f)(2), immunizes a person from contribution claims if it resolves liability to the United States or a State in an administrative or judicially approved settlement.) Each of those causes of action is subject to a three-year statute of limitations, running from the date of the judgment or settlement. 42 U.S.C. 9613(g)(3).

The relevant provisions of Section 113(f) create a procedural right to file contribution claims in federal court, but they do not spell out all the substantive rules that govern such claims. Those clauses instead provide that contribution claims "shall be governed by Federal law," thus authorizing the federal courts to develop the applicable substantive rules as a matter of federal common law. 42 U.S.C. 9613(f)(1) and (3)(C). At common law, a contribution claim has two elements: (1) the contribution plaintiff and contribution defendant must share a common liability for the same injury, and (2) the contribution plaintiff must have paid more than its just share of the liability. See *Transport Workers*, 451 U.S. at 83.

B. Facts

1. Guam is an island in the west central Pacific Ocean, located about 3800 miles west of Hawaii. Spain ceded the island to the United States in 1898, after the Spanish-American War. Pet. App. 5a. For the next half century, the island remained under the jurisdiction of the United States Navy. *Ibid.* In 1950, Congress transferred jurisdiction from the Navy to a new civilian government. Organic Act of Guam, ch. 512, 64 Stat. 384.

This case concerns the Ordot Dump, a site in a ravine near the Lonfit River, approximately 2.5 miles south of

Hagåtña, the island's capital. Guam Department of Public Works, *Ordot Dump, Ordot-Chalan Pago, Guam: Environmental Data Summary Report* 3 (July 2005) (*Ordot Dump Report*). Guam alleges that the Navy began to use the site as a dump at some point before World War II. J.A. 66. Guam took over ownership and management of the dump after the enactment of the Guam Organic Act. Pet. App. 5a.

Guam continued to operate the dump for the next sixty years. Pet. App. 55a. During that period, Guam vastly expanded the dump, using it to store virtually all the industrial and municipal waste produced by the civilian population of the island. *United States* v. *Government of Guam*, No. 02-cv-22, 2008 WL 216918, at *1 (D. Guam Jan. 24, 2008). The site reached capacity in 1986, but Guam continued to use it as a dump for several decades more. *Ibid.* Under Guam's ownership, what began as a three-to-four-acre site grew to 40 to 50 acres. D. Ct. 5/15/18 Tr. 25; *Ordot Dump Report* 7. And "[w]hat was once a valley is now at least a 280-foot mountain of trash." *Guam*, 2008 WL 216918, at *1.

Guam failed to provide even rudimentary environmental safeguards at the dump, leaving it unlined at the bottom and uncapped at the top. *Guam*, 2008 WL 216918, at *1. Under Guam's ownership, the dump has had a long history of environmental problems. *Ibid.* The dump has acted "like a sponge, absorbing rain water and releasing it after it has percolated through the landfill and picked up contaminants." *Ibid.* It has attracted "flies, rodents, and other pests" and posed an "odor problem" for nearby residents. *United States* v. *Government of Guam*, No. 02-cv-22, 2008 WL 732796, at *2 (Mar. 17, 2008). The dump also averaged approximately one fire per year. See *Ordot Dump Report* 3.

2. Starting in 1986, the U.S. Environmental Protection Agency (EPA) issued a series of administrative orders under the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, directing Guam to stop further discharges of contaminants from the Ordot Dump, but Guam disregarded those orders for more than a decade. Pet. App. 56a. For example, EPA issued an order requiring cessation of discharges by 1987, but Guam "failed to comply." *Guam*, 2008 WL 732796, at *6. EPA issued another administrative order requiring cessation of discharges by 1992, but Guam "again failed to meet this deadline," despite receiving an extension. *Ibid.* In 1997, EPA ordered Guam to submit a proposal to build a cover that would stop discharges from the dump, but Guam's response "lacked the funding commitment to make the plan credible." *Ibid.*

In 2002, the United States sued Guam under the CWA. Pet. App. 130a-137a. In 2004, the parties settled the suit through a court-approved consent decree. *Id.* at 138a-173a.

The consent decree, which constituted a final judgment, required Guam to pay a civil penalty, close the dump, build a new municipal landfill to replace it, and take various steps designed to stop the discharge of contaminants from it. Pet. App. 141a-151a. The decree contained three additional provisions that are relevant to Guam's arguments here. It stated that the court was entering the decree "without any finding or admission of liability against or by the Government of Guam." *Id.* at 140a. It also stated that the decree does not "limit the ability of the United States to enforce any and all provisions of applicable federal laws and regulations for any violations unrelated to the claims in the Complaint" and that, "[e]xcept as specifically provided [t]herein,

the United States does not waive any rights or remedies available to it for any violation by the Government of Guam of federal and territorial laws and regulations." *Id.* at 166a. And it stated that "[e]ntry of this Consent Decree and compliance with the requirements [t]herein shall be in full settlement and satisfaction of the civil judicial claims * * * alleged in the Complaint." *Ibid.*

Guam did not comply with the decree. See *Guam*, 2008 WL 732796, at *6. Four years after the decree was adopted, the Ordot Dump remained in operation "with no realistic end in sight." *Id.* at *2. Guam had not even begun the process of building a new dump. *Id.* at *6. Finding Guam's "highly dysfunctional, largely mismanaged, overly bureaucratic, and politically charged solid waste system * * * beyond correction by conventional methods," the district court in Guam appointed a receiver to carry out Guam's obligations at Guam's expense. *Id.* at *1.

The receiver closed the dump in 2011. J.A. 67. In 2013, the receiver began to undertake additional steps to comply with the consent decree, such as capping the dump, installing ponds to store stormwater runoff, and building tanks to store water that leaches through the dump. J.A. 68.

C. Proceedings Below

1. Guam filed this suit in 2017, alleging that the United States is a PRP under CERCLA and that it is liable for some of the costs of complying with the 2004 consent decree. Pet. App. 59a-60a. Guam asserted two causes of action: a claim under Section 107(a) for cost recovery and an alternative claim under Section 113(f)(3)(B) for contribution. *Ibid.*

The United States moved to dismiss the complaint. Pet. App. 53a. The United States observed that a claim

for contribution under Section 113(f) is subject to a three-year statute of limitations, running from the date of the judgment or settlement. See 42 U.S.C. 9613(g)(3). Guam brought this case thirteen years after entry of the consent decree—ten years too late. Pet. App. 59a.

The United States also argued that Guam lacked a valid claim under Section 107(a). Pet. App. 53a. Where "a general authorization and a more limited, specific authorization exist side-by-side," the "terms of the specific authorization must be complied with." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012). In accordance with that principle, every court of appeals to consider the question has held that a PRP whose claim falls within the more specific Section 113(f) (authorizing suits for contribution) must sue under that provision rather than invoking the more general cost-recovery cause of action conferred by Section 107(a). See Gov't Br. in Opp. 3-4 (collecting cases). The United States argued that, because Guam's claim fell within Section 113(f), Guam could not evade the corresponding statute of limitations by bringing its suit under Section 107(a) instead. Pet. App. 53a.

The district court denied the motion to dismiss. Pet. App. 51a-97a. As relevant here, the court rejected the United States' premise that Guam's claim fell within Section 113(f). *Id.* at 67a-97a. The court observed that Section 113(f)(3)(B) provides a cause of action to any party that has "resolved its liability to the United States * * * for some or all of a response action." *Id.* at 69a (citation and emphasis omitted). The court concluded that "the 2004 Consent Decree did not resolve Guam's liability for the Ordot Landfill cleanup given the broad, open-ended reservation of rights, the plain non-

admissions of liability, and the conditional resolution of liability that that agreement contains." *Ibid.* At the United States' request, the court certified its order for interlocutory appeal under 28 U.S.C. 1292(b). Pet. App. 27a-50a.

2. The court of appeals accepted the certification, reversed the district court's denial of the United States' motion to dismiss, and remanded the case with instructions to dismiss the complaint. Pet. App. 1a-26a.

As relevant here, the court of appeals held that the 2004 consent decree gave rise to a potential claim for contribution under Section 113(f)(3)(B). Pet. App. 16a-24a. The court held that the decree fell within that provision even though it resolved only CWA claims, not CERCLA claims. *Id.* at 16a-18a. The court observed that "another provision of section 113 * * * expressly requires that a party first be sued under CERCLA * * * before pursuing contribution." *Id.* at 17a. The court concluded that, because "section 113(f)(3)(B) contains no such CERCLA-specific language," "a settlement agreement can trigger section 113(f)(3)(B) even if it never mentions CERCLA." *Id.* at 17a-18a.

The court of appeals also held that the 2004 consent decree had "resolved [Guam's] liability to the United States * * * for some or all of a response action." 42 U.S.C. 9613(f)(3)(B); see Pet. App. 18a-25a. The court explained that, in order to give rise to a potential claim for contribution, a consent decree must have "decided, determined, or settled, at least in part," a party's obligation to undertake some action that falls within CERCLA's definition of "response action." Pet. App. 19a (citations and emphasis omitted). The court concluded that EPA's 2002 suit "sought injunctive relief for

Guam to take action that qualified as a 'response action,'" and that the 2004 consent decree resolved that liability because it "released Guam from legal exposure for that claim in exchange for Guam's commitment to perform work that qualified as a 'response action.'" *Id.* at 21a.

SUMMARY OF ARGUMENT

1. The court of appeals correctly held that the contribution right conferred by Section 113(f)(3)(B) extends beyond settlements that resolve claims brought under CERCLA. Section 113(f)(3)(B) authorizes a person to seek contribution after it has "resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action." 42 U.S.C. 9613(f)(3)(B). The Act's definition of the term "response" includes actions taken under other laws, and many CERCLA provisions make clear that the term "liability for a response action" includes obligations incurred under other laws.

If Congress had intended to limit Section 113(f)(3)(B) to settlements that resolve CERCLA claims, it could easily have achieved that result by including the words "under this Act." Indeed, Congress used such limiting language in other provisions of the statute. Section 113(f)(3)(B) does not contain that limitation, however, and this Court should not narrow the provision's coverage by adding words that Congress left out.

The rest of the Act confirms that Section 113(f)(3)(B) means what it says. Congress designed CERCLA to work in conjunction with other federal and state laws to promote the cleanup of hazardous waste. The Act is replete with references to other federal laws, including the CWA, the statute under which the consent decree at

issue in this case was entered. Section 113(f)(3)(B)'s application to settlements of claims brought under other laws therefore is consonant with CERCLA's design.

2. The consent decree in this case "resolved" Guam's "liability" for some or all of a response action. A settlement resolves a person's liability for a response action (or response costs) if it definitively requires the person to perform (or pay for) that action. The consent decree in this case did just that. It definitively ordered Guam, on pain of stipulated penalties and potential contempt sanctions, to build a cover at the Ordot Dump, to build a system to divert surface water at the dump, and to monitor the site. Guam's own theory of the case—that it may sue the United States under Section 107(a) to recover "response" costs—rests on the premise that those actions fall within the Act's definition of "response."

It makes no difference that Guam refused to admit liability in the consent decree at issue here. Section 113(f)(3)(B) requires a resolution, not an admission. A person can resolve liability even while refusing to admit the legal or factual validity of the claims against it. It also makes no difference that the decree leaves open the possibility of future suits against Guam in certain circumstances. Section 113(f)(3)(B) requires resolution of liability "for *some* or all of a response action or for *some* or all of the costs of such action." 42 U.S.C. 9613(f)(3)(B) (emphasis added). The decree at issue in this case resolved Guam's liability for at least some of a response action. Under the plain language of Section 113(f)(3)(B), the possibility that the United States may sue Guam in the future for additional response actions, over and above the actions required by the decree, did not delay the running of the limitations period for Guam's current suit.

ARGUMENT

I. SECTION 113(f)(3)(B) COVERS SETTLEMENTS THAT RESOLVE CLAIMS BROUGHT UNDER OTHER LAWS

Guam contends that "a settlement must resolve liability under CERCLA to trigger Section 113(f)(3)(B)," Br. 14, and that the settlement at issue here is not covered because the EPA claims it resolved were brought under the CWA, see Br. 16-37. That argument is incorrect.

A. Settlements That Resolve Claims Brought Under Other Laws May Trigger Section 113(f)(3)(B)

Congress designed CERCLA to work in tandem with other federal and state laws to address the problem of contaminated waste. The Act is replete with provisions that apply to or interact with other statutes. Section 113(f)(3)(B) is one such provision. It authorizes claims for contribution after settlements that resolve liability for response actions, regardless of whether the settled claim arose under CERCLA or some other law.

1. Section 113(f)(3)(B)'s text covers settlements that resolve claims brought under other laws

Section 113(f)(3)(B) reads:

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

42 U.S.C. 9613(f)(3)(B). This case turns on the meaning of the phrase "liability * * * for * * * a response action." The term "response action" includes actions taken under laws other than CERCLA. A person incurs

"liability for a response action" when he becomes subject to a legally binding directive to take such an action, regardless of the statute under which that directive is imposed.

The Act's definition of "response" focuses on what a person does, not which law prompts her to do it. The Act defines "response" to include "removal" and "remedy." 42 U.S.C. 9601(25). "[R]emoval" includes short-term actions such as "cleanup or removal of released hazardous substances," "disposal of removed material," and steps to "monitor, assess, and evaluate the release or threat of release of hazardous substances." 42 U.S.C. 9601(23). And "remedy" refers to more "permanent" measures, such as providing "perimeter protection," building "dikes, trenches, or ditches," "dredging or excavations," "repair or replacement of leaking containers," and "collection of leachate and runoff." 42 U.S.C. 9601(24). Those definitions are not limited to measures undertaken for the specific purpose of complying with CERCLA. To the contrary, the definition of "removal" "includes" ("without being limited to") "emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act." 42 U.S.C. 9601(23). And the "hazardous substance[s]" that response actions are designed to address are themselves defined to include substances listed in other statutes, including the CWA. 42 U.S.C. 9601(14).

Other CERCLA provisions confirm that a person can perform, pay for, or incur liability for response actions (or its subsets, removal and remedy) under other federal or state laws. For example:

- A clause titled "Response under other law" allows the government, before invoking certain powers

under CERCLA, to consider whether it may "respond appropriately, under authority of a law other than this [Act]." 42 U.S.C. 9620(d)(2)(B) (emphasis omitted).

- One clause refers to "any liability or response authority under any Federal law"—"including" "this [Act]," the "Solid Waste Disposal Act," the "Federal Water Pollution Control Act," the "Toxic Substances Control Act," and the "Safe Drinking Water Act." 42 U.S.C. 9604(k)(12). The "Federal Water Pollution Control Act" is the formal name of the CWA. See 33 U.S.C. 1251 note.
- A subrogation clause provides that, if a person "pays compensation pursuant to this [Act] to any claimant" for certain damages or costs, it inherits "all rights, claims, and causes of action for such damages and *costs of removal* that the claimant has under this Act *or any other law*." 42 U.S.C. 9612(c)(2) (emphasis added).
- A clause preventing double recovery provides that a "person who receives compensation for removal costs * * * pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs * * * as provided in this [Act]." 42 U.S.C. 9614(b).
- A clause specifies that, in certain cases, a common carrier "shall be liable under other law * * * for * * * remedial action." 42 U.S.C. 9656(b).

Indeed, Guam's current suit rests on the premise that an action taken under a law other than CERCLA can qualify as a "response action." Guam has sued the United States under Section 107(a). See p. 7, *supra*.

The suit raises questions about the scope of Section 113(f)(3)(B) only because the lower courts have held (and Guam does not dispute) that Sections 107(a) and 113(f)(3)(B) are mutually exclusive. Guam's suit thus may proceed only if it falls *both* outside Section 113(f)(3)(B) *and* within Section 107(a). See p. 8, *supra*.

Guam's claim under Section 107(a) depends on the allegation that the expenditures it has incurred to comply with the 2004 consent decree, and that it seeks to recover here, constitute "necessary costs of response" under CERCLA, 42 U.S.C. 9607(a)(4)(B). Guam evidently perceives no inconsistency between that allegation and the fact that the EPA suit that ultimately produced the decree was brought under the CWA. Guam is correct that no such inconsistency exists, since the status of particular expenditures as "necessary costs of response" turns on the nature of the activities that the expenditures finance, not on the legal impetus behind those activities. The same principle, however, applies to the construction of Section 113(f)(3)(B). Guam's own theory of the case logically implies that the remedial actions for which it now seeks to recover its costs must qualify as "response action[s]" within the meaning of Section 113(f)(3)(B). See D. Ct. 5/15/18 Tr. 54-55 (district court's questioning of Guam on this point).

In short, the Act's definition of "response," other CERCLA provisions, and Guam's own theory of the case all show that the term "liability for a response action" includes a legally binding directive that is imposed pursuant to a law other than CERCLA, but that requires a party to undertake a "response action" as CERCLA uses that term. No sound basis exists to limit the phrase in the manner that Guam advocates.

2. Congress's failure to include the words "under this Act" or similar language in Section 113(f)(3)(B) confirms that the provision reaches settlements that resolve claims brought under other laws

A court engaged in statutory construction must not only "listen attentively to what a statute says," but also "listen attentively to what it does not say." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 536 (1947). The provision at issue here does not say that "a settlement must resolve liability *under CERCLA* to trigger Section 113(f)(3)(B)." Guam Br. 14 (emphasis added). It uses the general terms "liability," "response action," and "settlement," not narrower terms such as "liability under this Act," "response action under this Act," or "settlement under this Act." This Court should not narrow the provision's scope by adding limiting words that Congress left out. See *Lomax* v. *Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020).

Section 113(f)(3)(B)'s elaborate detail underscores that point. Section 113(f)(3)(B) sets out in meticulous terms the conditions that a person must satisfy before bringing a claim for contribution. The person must resolve its liability to the right kind of party ("to the United States or a State"); the liability must be for the right kind of relief ("for some or all of a response action or for some or all of the costs of such action"); and the liability must have been resolved in the right kind of settlement ("in an administrative or judicially approved settlement"). 42 U.S.C. 9613(f)(3)(B). Congress's enumeration of those requirements implies the absence of a further, unstated requirement that the settled liability arise under the Act. *Expressio unius est exclusio alterius*. See *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 844 (2018).

Reinforcing that conclusion, Section 113(f)(3)(B) as a whole bespeaks breadth. The clause's string of five "or's"—"resolved its liability to the United States *or* a State for some *or* all of a response action *or* for some *or* all of the costs of such action in an administrative *or* judicially approved settlement," 42 U.S.C. 9613(f)(3)(B) (emphasis added)—suggests that Congress meant the clause to apply to a wide range of settlements. So does the clause's applicability to settlements that resolve liability for just "some" of a response action or "some" of the costs of such action. What Congress made broad, a court should not seek to narrow.

Further, although this Court never "lightly assume[s] that Congress has omitted from its adopted text requirements that it nonetheless intends to apply," the Court's "reluctance is even greater" when "Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005); see *Russello* v. *United States*, 464 U.S. 16, 23 (1983). Other CERCLA provisions expressly limit the availability of contribution to claims arising under particular sources of law. The nearby Section 113(f)(1), for example, authorizes a person to seek contribution during or after "any civil action *under [Section 106] or under [Section 107(a)]*" of the Act. 42 U.S.C. 9613(f)(1) (emphasis added). And two clauses that govern certain administrative settlements provide that "[a] party who has resolved its liability to the United States *under this subsection* shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. 9622(g)(5) (emphasis added); see 42 U.S.C. 9622(h)(4) (similar). The contribution provision at issue here, by contrast, says nothing

about the source of law "under" which the settlement or liability arose.

Congress used the phrase "under this Act" eleven times across eight clauses in Section 113 alone. See 42 U.S.C. 9613(a), (b), (e), (g)(1) and (3)(A), (i) and (j)(1) and (2).[1] It also used the following terms in other CERCLA provisions:

- "liability under this [Act]" and "liability to the United States under this [Act]," 42 U.S.C. 9601(35)(D), 9622(c)(1) and (f)(1) and (2);
- "judicial action under this [Act]," 42 U.S.C. 9613(j)(1) and (2);
- "consent decree under this [Act]," 42 U.S.C. 9622(e)(6);
- "settlements * * * under this [Act]," 42 U.S.C. 9622(g)(6);
- "response action under this [Act]," 42 U.S.C. 9607(*l*)(2)(A), 9613(k)(2)(C), 9622(h)(1);
- "removal costs * * * pursuant to this [Act]" and "removal under this [Act]," 42 U.S.C. 9614(b), 9619(e)(1); and
- "remedial action under this [Act]" and "remedial actions undertaken pursuant to this [Act]," 42 U.S.C. 9604(j)(1), 9605(b), 9613(g)(1), 9619(e)(1).

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[1] Congress used the term "this Act," but the compilers of the U.S. Code have changed it to "this chapter." Compare CERCLA § 113(a), 94 Stat. 2795, with 42 U.S.C. 9613(a). The original text in the Statutes at Large takes precedence over the edited text in the Code. See *United States National Bank* v. *Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 448 (1993).

Several aspects of the Act make the contrast between those provisions and Section 113(f)(3)(B) particularly conspicuous. While the CERCLA provisions enumerated above use otherwise parallel language—"liability under this Act," "settlements under this Act," and "response action under this Act"—Section 113(f)(3)(B) refers to "liability," "settlement" and "response action" simpliciter. Many of the contrasting provisions also appear in the same section as Section 113(f)(3)(B). And the phrase "under this Act" appears multiple times in Section 113 and elsewhere in the statute. Those features make the contrast more noticeable, and hence more likely deliberate. See *Department of Homeland Security* v. *MacLean*, 574 U.S. 383, 392 (2015); *Jama*, 543 U.S. at 342.

3. The presumption against surplusage confirms that Section 113(f)(3)(B) covers settlements that resolve claims brought under other laws

A court should endeavor to give meaningful effect to all the words of a statute, avoiding readings that render particular statutory language superfluous. See *Republic of Sudan* v. *Harrison*, 139 S. Ct. 1048, 1058 (2019). And when a statute uses the word "or" to connect its antecedents and consequents—here, "liability to the United States *or* a State for some *or* all of a response action *or* for some *or* all of the costs of such action in an administrative *or* judicially approved settlement," 42 U.S.C. 9613(f)(3)(B) (emphasis added)—a court should presume that the statute was meant to reach every combination of its antecedents and consequents. See *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1141-1142 (2018).

Contrary to those principles, Guam's reading would render Section 113(f)(3)(B)'s reference to "judicially approved settlement[s]" largely redundant. The nearby Section 113(f)(1) allows a person to seek contribution "during or following any civil action under [Section 106] or under [Section 107(a)]." 42 U.S.C. 9613(f)(1). That clause independently authorizes contribution claims after the resolution of CERCLA civil actions, including CERCLA civil actions that end in judicially approved settlements. Section 113(f)(3)(B)'s reference to "judicially approved settlement[s]" will do meaningful additional work only if it reaches beyond settlements of CERCLA claims.

Guam's reading also would effectively negate Congress's decision to make the clause applicable to settlements that resolve liability to "a State" for "a response action." 42 U.S.C. 9613(f)(3)(B). Although the Act grants both the United States and States a right to recover response *costs*, see 42 U.S.C. 9607(a), it authorizes only the United States to sue to compel response *actions*, see 42 U.S.C. 9606(a). State claims to compel response actions therefore will necessarily arise under laws other than CERCLA.

On Guam's reading, the clause would also be inapplicable to an "administrative" settlement with a "State." 42 U.S.C. 9613(f)(3)(B). The Act prescribes procedures for administrative settlements with the United States, but not for administrative settlements with States. 42 U.S.C. 9622(g)-(h). Administrative settlements with States therefore will necessarily arise under laws other than CERCLA. The only way to give full effect to every word in the clause, and to every combination of the clause's nouns and adjectives, is to read it to cover settlements under other statutes.

4. The statutory context in which Section 113(f)(3)(B) appears confirms that the provision covers settlements that resolve claims brought under other laws

CERCLA is not an island entire of itself. Throughout the Act, "Congress clearly expressed its intent that CERCLA should work in conjunction with other federal and state hazardous waste laws"—and, for that matter, federal and state laws in general—"to solve this country's hazardous waste problem." *United States* v. *Colorado*, 990 F.2d 1565, 1575 (10th Cir. 1993), cert. denied, 510 U.S. 1092 (1994). The Act is replete with references to other statutes. The definition section alone refers to the "Safe Drinking Water Act," "Magnuson-Stevens Fishery Conservation and Management Act," "Solid Waste Disposal Act," "Clean Air Act," "Clean Water Act," "Toxic Substances Control Act," "Atomic Energy Act of 1954," "Farm Credit Act of 1971," "Alaska Native Claims Settlement Act," and "Disaster Relief and Emergency Assistance Act," among others. 42 U.S.C. 9601(7), (8), (10), (14), (20)(E)(i) and (H)(iv)(III), and (23).

Section 113 in particular addresses both CERCLA and other laws. 42 U.S.C. 9613. One clause concerns "the review of any regulation promulgated under [the Internal Revenue Code]." 42 U.S.C. 9613(c). Another addresses "litigation concerning any release of any hazardous substance * * * commenced prior to [the date the Act came into force]." 42 U.S.C. 9613(d). A third grants a right to intervene in "any action commenced under this [Act] or under the Solid Waste Disposal Act." 42 U.S.C. 9613(i). A fourth refers to "diversity" jurisdiction and jurisdiction "under State law." 42 U.S.C. 9613(h). And the next section bears the title "Relationship to other law." 42 U.S.C. 9614 (emphasis omitted).

Congress plainly had more than just CERCLA cases on its mind when drafting Section 113.

5. Additional considerations reinforce the conclusion that Section 113(f)(3)(B) covers settlements that resolve claims brought under other laws

Guam's reading of Section 113(f)(3)(B) would frustrate the provision's purposes. Congress enacted CERCLA to promote the timely cleanup of contaminated sites, see *Atlantic Richfield Co.* v. *Christian*, 140 S. Ct. 1335, 1345 (2020), and the Act acknowledges that settlements can "minimize litigation," "expedite effective remedial actions," and promote "the public interest," 42 U.S.C. 9622(a). Section 113(f)(3)(B) in particular serves "to encourage settlements." House Report Pt. 3, at 20. By allowing settling parties to claim contribution from non-settling parties, it provides a significant incentive to enter into settlements and helps avoid costly and time-consuming litigation that can delay cleanup. Pet. App. 13a.

In providing that incentive, Congress focused on what the settlement achieves: performance of a "response action" or payment of its "costs." 42 U.S.C. 9613(f)(3)(B). "Congress gave no indication that it matters whether the authority governing the settlement is CERCLA or something else. Its focus was, instead, on cleaning up hazardous waste sites." *ASARCO LLC* v. *Atlantic Richfield Co.*, 866 F.3d 1108, 1119 (9th Cir. 2017). "An interpretation that limits the contribution right under § 113(f)(3)(B) to CERCLA settlements would undercut private parties' incentive to settle," thus undermining the provision's evident purpose. *Ibid.*

Guam's reading also would upset a near consensus in the courts of appeals about Section 113(f)(3)(B)'s meaning. Four circuits have held, all through unanimous

panels and all in reliance on the statutory text, that Section 113(f)(3)(B) encompasses settlements that resolve claims brought under statutes other than CERCLA. See *Trinity Industries, Inc.* v. *Chicago Bridge & Iron Co.*, 735 F.3d 131, 136 (3d Cir. 2013); *Refined Metals Corp.* v. *NL Industries Inc.*, 937 F.3d 928, 932 (7th Cir. 2019); *ASARCO*, 866 F.3d at 1120 (9th Cir.); Pet. App. 17a. Only one court of appeals, the Second Circuit, has limited Section 113(f)(3)(B) to settlements that resolve CERCLA claims. *Consolidated Edison Co.* v. *UGI Utilities, Inc.*, 423 F.3d 90, 96 (2005), cert. denied, 551 U.S. 1130 (2007). The Second Circuit reached that conclusion based largely on the "legislative history," *ibid.*, but it later acknowledged that "there is a great deal of force" to the contrary view "given the language of the statute," *Niagara Mohawk Power Corp.* v. *Chevron U.S.A., Inc.*, 596 F.3d 112, 126 n.15 (2010).

Finally, Guam's approach would create uncertainty about which settlements fall within Section 113(f)(3)(B). Guam argues (Br. 16) that the provision does not extend to "non-CERCLA settlements," but the intended scope of that carveout is uncertain. It is unclear, for example, how Guam's theory would apply if the suit that prompted the settlement raised both CERCLA claims and non-CERCLA claims, or if the plaintiff raised only non-CERCLA claims, but agreed in the settlement to release the defendant from both CERCLA and non-CERCLA liability. In the latter scenario, it is unclear whether Guam would view it as necessary for the release to refer specifically to CERCLA liability, or whether it would be sufficient that the settlement provided a general release from liability. All of those questions have actually arisen in the Second Circuit, the only court of appeals that has limited Section 113(f)(3)(B)

along the lines Guam proposes. See *Niagara Mohawk*, 596 F.3d at 124-127; *W.R. Grace & Co.—Connecticut* v. *Zotos International, Inc.*, 559 F.3d 85, 90-91 (2d Cir. 2009). Guam's brief leaves these questions unanswered.

B. Guam's Contrary Arguments Lack Merit

Guam advances (Br. 16-37) a series of arguments in support of its view that Section 113(f)(3)(B) applies only to settlements that resolve CERCLA claims. Those arguments lack merit.

1. Guam misreads the statute

Guam argues that Section 113(f)(3)(B) applies only to settlements of CERCLA claims because "response action" is "a CERCLA-specific term." Br. 17 (citation omitted). But the term "response action" as used in CERCLA encompasses actions taken under other laws, see pp. 12-15, *supra*, and Guam identifies no textual support for its contrary assertion. As explained above (see pp. 14-15, *supra*), moreover, Guam's own legal theory assumes that the cleanup expenses it has incurred are "necessary costs of response" within the meaning of Section 107(a)(4)(B). Guam does not explain how the term "necessary costs of response" is less "CERCLA-specific" than the term "response action."

Guam observes (Br. 18) that the nearby Section 113(f)(1) authorizes a contribution claim only during or after civil actions under Section 106 or Section 107(a). Guam describes (Br. 19) paragraph (f)(1) as the "anchor" for the rest of the subsection and argues that its limitations implicitly carry over to paragraph (f)(3). That argument reflects a misunderstanding of the relationship between the two provisions.

Guam's interpretation disregards the textual differences between paragraphs (f)(1) and (f)(3). Paragraph

(f)(1) refers to the legal basis "under" which the civil action arises, while paragraph (f)(3) does not. Guam downplays (Br. 32) that textual difference, but "when Congress employs the same word, it normally means the same thing, when it employs different words, it usually means different things." Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *Benchmarks* 224 (1967) (footnote omitted); see *Roberts* v. *Sea-Land Services, Inc.*, 566 U.S. 93, 102 n.5 (2012).

Guam's interpretation is also at odds with subsection (f)'s structure. Paragraphs (f)(1) and (f)(3) appear under separate subheadings, with separate numbers and indentation. Copying words from paragraph (f)(1) and pasting them into the structurally discrete paragraph (f)(3) would violate the presumption that "[m]aterial within an indented subpart relates only to that subpart." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 22 (2012) (emphasis omitted); see *Jama*, 543 U.S. at 344.

Guam's reading also fails to explain subsection (f)'s inclusion of two separate sentences authorizing courts to develop federal common law to govern contribution claims. Paragraphs (f)(1) and (f)(3) separately specify that contribution claims under the two provisions "shall be governed by Federal law." 42 U.S.C. 9613(f)(1) and (3)(C). The repetition confirms that each paragraph sets out a discrete, self-contained contribution remedy.

Guam's reading also rests on the mistaken premise that paragraphs (f)(1) and (f)(3) share "a structural 'symmetry.'" Br. 19 (citation omitted). In fact, those paragraphs differ in multiple ways:

- Paragraph (f)(1) applies only to liability resulting from civil actions, not to liability that stems from

administrative proceedings. Paragraph (f)(3) applies to both judicially approved and administrative settlements.

- Paragraph (f)(1) authorizes contribution claims both during and after civil actions. Paragraph (f)(3) authorizes contribution claims only after a settlement is approved.
- Paragraph (f)(1) authorizes contribution claims during and after civil actions under Section 106 (which can be brought only by the United States) and civil actions under Section 107(a) (which can be brought by the United States, a State, an Indian tribe, or a private party). See 42 U.S.C. 9606, 9607(a). Paragraph (f)(3) allows contribution claims after resolution of liability to the United States or a State.

This Court has previously encountered—and rejected—arguments similar to Guam's. In *Loughrin* v. *United States*, 573 U.S. 351 (2014), the Court considered a two-clause provision of the federal bank-fraud statute; the first clause required intent to defraud a financial institution, but the second did not. See 18 U.S.C. 1344(2). The criminal defendant argued that the intent requirement applied to the second clause as well, but the Court rejected that interpretation as "counter-textual." *Loughrin*, 573 U.S. at 361. Similarly, in *Jama* v. *ICE*, *supra*, the Court considered a multi-clause immigration provision that authorized removal of noncitizens to various countries; one clause required the consent of the country of removal, but the others did not. 8 U.S.C. 1231(b)(2)(E). The noncitizen argued that *all* the clauses required the consent of the

country of removal, but the Court explained that "importing" the requirement from one clause to another would contravene the Act's text and structure. *Jama*, 543 U.S. at 342. So too here.

Paragraph (f)(1) authorizes contribution claims to be asserted only against a "person who is liable or potentially liable under [42 U.S.C.] 9607(a)," *i.e.*, under CERCLA's cost-recovery provision. 42 U.S.C. 9613(f)(1). Paragraph (f)(3)(B) imposes no similar limitation, but instead authorizes parties to qualifying settlements to seek contribution "from any person who is not party to a settlement referred to in paragraph (2)." 42 U.S.C. 9613(f)(3)(B). Guam nevertheless asserts (Br. 34) that contribution claims under paragraph (f)(3) likewise can be filed only against persons who are liable or potentially liable under CERCLA. That is incorrect. Where (as here) a person has reached a settlement with the United States or a State, and the agreement mandates the performance of conduct that constitutes a CERCLA "response action," that person may seek contribution from any defendant who shares responsibility for the relevant contamination and has not entered into its own settlement.[2]

In all events, even if the Court does not view paragraph (f)(3) as a pure stand-alone provision, Guam's ar-

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[2] Guam claims (Br. 22-23) that the United States took the contrary position in the court of appeals, but it takes a statement from the United States' brief out of context. The brief explained (Gov't C.A. Supp. Br. 10) that CERCLA waives the United States' sovereign immunity from suit and that, in order to establish the United States' liability under CERCLA, Guam would need to show that the United States is a PRP under Section 107. The brief did not concede that paragraph (f)(1)'s restrictions carry over to paragraph (f)(3).

gument in this case should be rejected. Guam's structural argument would suggest at most that paragraph (f)(1), the purported "anchor provision" (Br. 14), may provide guidance when paragraph (f)(3) contains a gap or is otherwise ambiguous. If (for example) paragraph (f)(3)(B) standing alone is viewed as ambiguous with respect to which persons can be sued for contribution (see p. 27, *supra*), a court could conclude based on paragraph (f)(1) that the only permissible defendants are persons who are liable or potentially liable under CERCLA. That approach would not suggest, however, that a court may invoke paragraph (f)(1) to override the explicit text of paragraph (f)(3).

Here, paragraph (f)(3) sets out the governing standard: the resolved liability must be "for some or all of a response action or some or all of the costs of such action." 42 U.S.C. 9613(f)(3)(B). The expenditures that Guam seeks to recoup are alleged to be "costs" of a "response action"—as Guam's own invocation of Section 107(a)(4)(B) logically implies. See pp. 14-15, *supra*. Paragraph (f)(1) cannot justify replacing that standard with the different requirement that the resolved liability arise under CERCLA.

2. The background principles that generally govern contribution claims do not support Guam's reading

Guam argues (Br. 20-24) that a claim for contribution presupposes the existence of a common liability, and that no such common liability can exist in Section 113(f)(3)(B) cases unless the contribution plaintiff and defendant are both liable *under CERCLA*. Guam is correct that contribution requires a "common liability," but wrong about what that requirement entails.

In tort law, two parties share a common liability, and thus may seek contribution from one another, if they

share a liability to a plaintiff "for the same injury." *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 87-88 (1981); see Restatement (Second) of Torts § 886A(1) (1979) ("for the same harm"). As multiple authorities explain, "[c]ommon liability exists when two or more actors are liable to an injured party for the same damages, even though their liability may rest on different grounds." *Guillard* v. *Niagara Machine & Tool Works*, 488 F.2d 20, 22 (8th Cir. 1973); accord, *e.g.*, 18 Cecily Fuhr, *Corpus Juris Secundum* § 15 (2021); Richard Rosen ed., *Settlement Agreements in Commercial Disputes: Negotiating, Drafting and Enforcement* § 12.02 (Supp. 2017); *Comparative Negligence Manual* § 9:2 (3d ed. 2020); 2 Barry A. Lindahl, *Modern Tort Law: Liability and Litigation* § 19:27 (2d ed. 2020); 1 Stuart M. Speiser et al., *The American Law of Torts* § 3:21 n.4 (2013); 3 Jacob A. Stein, *Stein on Personal Injury Damages* § 14:37 (3d ed. 2020). To take a textbook example, a drunk driver and a bar may share a common liability for a car accident, and thus seek contribution from each other, even if the driver's liability rests on negligence while the bar's rests on a dram shop act. See *Farmers Insurance Exchange* v. *Village of Hewitt*, 143 N.W.2d 230, 235 (Minn. 1966); see also *Chamberlain* v. *Carborundum Co.*, 485 F.2d 31, 34 (3d Cir. 1973) (liability under different common-law theories); *Southern Railway Co.* v. *Foote Mineral Co.*, 384 F.2d 224, 228 (6th Cir. 1967) (liability under statute and common law); *Zontelli Bros.* v. *Northern Pacific Railway Co.*, 263 F.2d 194, 198 (8th Cir. 1959) (liability under different statutes).

Under Guam's own theory of the case, the United States and Guam share a common liability for response

costs at the Ordot Dump. The 2004 consent decree requires Guam to take certain actions to prevent discharges from the dump. Guam argues that the United States shares responsibility for the dump's contaminated condition, and that CERCLA therefore requires the United States to pay a share of the costs for the remedial actions specified in the decree. Even if the liabilities of the two parties arise from different sources of law, they concern the same underlying harm. That is enough to establish common liability and to allow a potential claim for contribution.

3. The interplay between CERCLA and other federal regulatory schemes does not support Guam's reading

Guam argues (Br. 24-29) that reading Section 113(f)(3)(B) to cover settlements of claims brought under other federal and state laws would interfere with other federal remedial schemes and would undermine state autonomy. But accepting Guam's own theory would produce the same results. Guam brought this CERCLA suit to recover a portion of its costs of complying with the consent decree that settled EPA's CWA claims. Guam and the United States disagree only about *which* CERCLA provision—Section 113(f)(3)(B) or Section 107(a)—governs Guam's suit. Guam does not explain why allowing its suit to go forward under Section 107(a) would avoid the disruption that it associates with a suit under Section 113(f)(3)(B).

In any event, applying Section 113(f)(3)(B) as written would not displace remedies provided by other federal or state laws; any person that wishes to invoke those remedies remains free to do so. Section 113(f)(3)(B) supplements rather than supplants whatever remedies are available under other laws. And that

supplemental remedy is available only in narrowly defined circumstances, *i.e.*, when a settlement is "administrative or judicially approved," resolves liability "to the United States or a State," and imposes liability for a "response action" or for "the costs of such action." 42 U.S.C. 9613(f)(3)(B).

Guam argues (Br. 25) that reading Section 113(f)(3)(B) to allow even that modest supplement would "put that provision on an island of its own," because "[e]very other component of the remedial scheme is linked to the liability imposed by CERCLA." That description of the Act's remedial scheme is wrong. As shown, the Act includes numerous provisions that add to and interact with other laws. See pp. 13-14, 21, *supra*.

Guam also invokes (Br. 26) CERCLA's saving clause, which provides that nothing in the Act "shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law." 42 U.S.C. 9652(d). That clause is irrelevant here, because allowing a person to claim contribution after resolving its liability does not "affect or modify" the liability itself. In any event, consistent with the principle that the specific governs the general, this Court has refused to read CERCLA's general saving clause to override the Act's specific operative provisions. See *Christian*, 140 S. Ct. at 1355. Section 113(f)(3)(B) covers settlements under both CERCLA and other statutes; the more general saving clause cannot override or truncate that coverage.

Guam argues (Br. 27) that Section 113(f)(3)(B) should be construed as limited to CERCLA settlements so as not to "disrupt other regulatory regimes." But federal statutes often overlap with each other, see, *e.g.*, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47-51 (1974), and when they do, a court should ordinarily give

effect to both, reading one to preclude the other only if the two are "clearly incompatible," *Credit Suisse Securities (USA) LLC* v. *Billing*, 551 U.S. 264, 275 (2007). No such incompatibility is present here.

Guam and its amici also express concern that, if Section 113(f)(3)(B) applies to state-law settlements, it might preempt the States' own contribution remedies with respect to those settlements. See Guam Br. 27-28; States and Territories Amicus Br. 24-28. That argument is flawed. The question whether the Act provides a federal contribution remedy in circumstances like these is logically and analytically distinct from the question whether that federal remedy is exclusive. The United States *agrees* with Guam and its amici that Section 113(f)(3)(B) does not occupy the field, and that States retain the authority to provide their own contribution remedies, over and above the federal remedy.

In all events, concerns about potential preemption of state law in future cases should not drive the interpretation of federal law in this case. The Supremacy Clause makes federal law the supreme law of the land, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, Cl. 2. Courts therefore must give the federal statute "its natural meaning" and "let the chips fall where they may." *Kansas* v. *Garcia*, 140 S. Ct. 791, 807 (2020) (Thomas, J., concurring) (citation omitted). A court should not "distort federal law to accommodate conflicting state law." *PLIVA, Inc.* v. *Mensing*, 564 U.S. 604, 623 (2011) (plurality opinion).

4. Guam's remaining arguments lack merit

Invoking the Act's legislative history, Guam asserts (Br. 29-30) that Congress enacted Section 113(f)(3)(B) to authorize contribution in CERCLA cases, not in

cases arising under other statutes. Guam quotes (Br. 29) a House Energy and Commerce Committee report stating that Section 113(f) codifies a right of contribution "for persons alleged or held to be liable under section 106 or 107 of CERCLA." House Report Pt. 1, at 79. But as two courts of appeals have noted, "this passage refers to contribution claims under § 113(f)(1), not § 113(f)(3)(B)." *Trinity Industries*, 735 F.3d at 136 (citation omitted); see *ASARCO*, 866 F.3d at 1120. Guam also quotes (Br. 29-30) a House Judiciary Committee report that describes Section 113(f) as serving to encourage "[s]ettlement with the government under CERCLA." House Report Pt. 3, at 19. But the same report elsewhere states that the provision serves to encourage "settlements," without the qualifier "under CERCLA." *Id.* at 20. Consistent with the statutory text, the report thus indicates that Section 113(f) serves in part to encourage CERCLA settlements, but not that the provision is limited to such settlements.

Guam also argues (Br. 30-31) that the United States' reading of Section 113(f)(3)(B) deprives parties of "fair notice." But adopting the United States' interpretation of Section 113(f)(3)(B) would establish a clear and easily administered rule: if a settlement requires a person to undertake or pay the costs of a response action, it gives rise to a potential contribution claim, regardless of whether the claim that produced the settlement arose under CERCLA. It is Guam's reading that leads to uncertainty about Section 113(f)(3)(B)'s scope. See pp. 23-24, *supra*.

Finally, Guam invokes (Br. 20) the United States' brief in *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U.S. 157, 161 (2004). But that brief addressed the interpretation of Section 113(f)(1), not Section

113(f)(3)(B). In the first of the two passages that Guam cites, the United States argued that "Section 113(f)(1)'s" legislative history shows that "the object was to provide for contribution during or following a Section 106 or 107(a) action or after a CERCLA-based settlement." U.S. Amicus Br. at 23, *Cooper Industries*, *supra* (No. 02-1192). In the second passage, the government argued that "Section 113(f)(1)" allows "a responsible party that satisfies its CERCLA liability to the government, through settlement or judgment, [to] obtain contribution." *Id.* at 26. Those statements are consistent with the understanding that Section 113(f)(1) allows contribution claims after CERCLA suits that end in settlements. See p. 20, *supra*. Contrary to Guam's suggestion, the United States has long taken the position that Section 113(f)(3)(B) encompasses settlements that resolve claims brought under other laws. See, *e.g.*, U.S. Amicus Br. at 15 n.4, *Niagara Mohawk*, *supra* (No. 08-3843).

II. THE CONSENT DECREE IN THIS CASE GAVE RISE TO A POTENTIAL CONTRIBUTION CLAIM UNDER SECTION 113(f)(3)(B)

Guam also argues (Br. 37-49) that the consent decree in this case did not give rise to a potential claim for contribution because it did not resolve Guam's liability for a response action. That argument, too, is mistaken.

A. A Settlement "Resolves" A Person's "Liability" If It Settles The Person's Legal Obligations

1. Section 113(f)(3)(B) authorizes a person to seek contribution after it has "*resolved its liability* to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement." 42 U.S.C.

9613(f)(3)(B) (emphasis added). For purposes of that provision, a settlement resolves liability if it "decides with certainty and finality [the person's] obligations for at least some of its response actions or costs." *ASARCO*, 866 F.3d at 1125. The settlement need not, as Guam suggests (Br. 38-41), determine whether the legal claim against the settling party was valid.

The verb "resolve" has two closely related meanings. First, the verb can mean "to determine, settle, or decide upon (a point or matter regarding which there is doubt or dispute)," *Oxford English Dictionary* (3d ed. Mar. 2010); to "settle," *The Random House Dictionary of the English Language* 1639 (2d ed. 1987); and "to determine or decide; to settle," *Webster's New International Dictionary* 2122 (2d ed. 1934). For example: "The plea of *nolo contendere* resolved the bank-robbery charges." "[R]esolve" can also mean "[t]o answer (a question)," *Oxford English Dictionary*; "to deal with (a question, a matter of uncertainty)," *The Random House Dictionary of the English Language* 1639, and "[t]o answer or solve, as a question or problem," *Webster's New International Dictionary* 2122. For example: "The plea of *nolo contendere* did not resolve whether the defendant actually robbed the bank."

The noun "liability," too, has a range of meanings. Lawyers sometimes use the noun as a synonym for legal obligation. Dictionaries thus define "liability" as "[t]he quality, state, or condition of being legally obligated," *Black's Law Dictionary* 1097 (11th ed.); "every kind of legal obligation, responsibility, or duty," *Black's Law Dictionary* 823 (5th ed. 1979); and "[l]egal responsibility," *Ballentine's Law Dictionary* 732 (3d ed. 1969). But lawyers sometimes use the noun in a more specific way to refer to a legal obligation arising from a wrong.

Dictionaries thus also define "liability" or "liable" as "the bond of necessity that exists between the wrongdoer and the remedy of the wrong," *Black's Law Dictionary* 1097 (11th ed.) (citation omitted); the "[c]ondition of being bound to respond because a wrong has occurred," *Black's Law Dictionary* 824 (5th ed.); and "[t]he state or condition of a person after he has breached his contract or violated any obligation resting upon him," *Ballentine's Law Dictionary* 732.

The question in this case concerns the meaning of the whole phrase "resolved its liability," not the meaning of its component words. See *FCC* v. *AT&T Inc.*, 562 U.S. 397, 406 (2011). The phrase "resolved its liability" is most naturally read to mean "settled or determined its legal obligation"—not "answered the question whether the defendant committed a wrong." The latter reading might have been more plausible if Congress had said "resolved *the issue* of liability" or "resolved *the question* of liability," but that is not the phrase Congress used.

The context in which the phrase appears reinforces that inference. Section 113(f)(3)(B) allows a person to seek contribution after it has "resolved its liability * * * in * * * [a] *settlement*." 42 U.S.C. 9613(f)(3)(B) (emphasis added). The function of a settlement is to resolve the practical dispute over what actions the defendant must take, not to determine whether the plaintiff's legal claim is valid. Indeed, the whole point of settling ordinarily is to *avoid* the need to decide the claim's validity. A party thus "resolves its liability in a settlement" if the settlement fixes its legal obligations, whether or not the settlement addresses the validity of the plaintiff's legal claim.

The nature of the "liability" to be settled further supports that conclusion. Section 113(f)(3)(B) confers a

right to contribution on a person who has "resolved its liability * * * *for some or all of a response action or for some or all of the costs of such action*." 42 U.S.C. 9613(f)(3)(B) (emphasis added). The italicized language refers to the steps the defendant must take going forward, not to the prior conduct for which the defendant has been sued. That language confirms that it is the nature and scope of the defendant's prospective obligations, not its legal responsibility for prior contamination, that the settlement must "resolve."

Consistent with that understanding, the Court in *United States* v. *Atlantic Research Corp.*, 551 U.S. 128 (2007), explained that "Section 113(f)(3)(B) permits private parties to seek contribution after they have settled their liability with the Government." *Id.* at 132 n.1. The Court also stated that "settlement carries the inherent benefit of finally resolving liability." *Id.* at 141. The Court thus construed the term "resolved its liability" in Section 113(f)(3)(B) to mean "settled its liability."

That reading also fits with the background law of contribution. Tort law has long allowed contribution "in favor of one who [has] settle[d] the injured party's claim." Restatement (Second) of Torts App. § 886A Reporter's Note cmt. b (1982); see Restatement (Third) of Torts: Apportionment of Liability § 23(a) (2000). In the absence of clear evidence of contrary congressional intent, Section 113(f)(3)(B) should be read to reflect that rule, not to depart from it. A statute "is not to be construed as making any innovation upon the common law which it does not fairly express." *Shaw* v. *Railroad Co.*, 101 U.S. 557, 565 (1880); see *Peter* v. *NantKwest, Inc.*, 140 S. Ct. 365, 374 (2019).

Finally, that reading makes sense given the statute's purposes. Section 113(f)(3)(B) serves to encourage settlements to clean up contaminated sites. See p. 22, *supra*. The contribution remedy it provides also serves to avoid the inequity of forcing a single tortfeasor to bear an entire loss for which other tortfeasors share responsibility. See p. 3, *supra*. A settlement that orders a person to perform or pay for a response action directly implicates those purposes—it facilitates the cleanup that the law seeks to encourage, and it could produce an inequitable distribution of costs if no contribution remedy were available—whether or not it expresses any conclusion about the presence or absence of a prior statutory breach.

2. In defending its contrary reading, Guam argues (Br. 38-39) that the verb "resolve" connotes finality and conclusiveness. So it does, but Guam is wrong about what must be conclusively decided. The phrase "resolved its liability" requires a conclusive agreement about what a party must do, not a conclusive agreement about whether the plaintiff has a valid claim.

Equally mistaken is Guam's argument (Br. 39) that "there must be a preexisting liability for undertaking a response action or paying response costs separate and apart from the settlement itself." The verb "resolve" means "to determine, settle, or decide upon (*a point or matter regarding which there is doubt or dispute*)." *Oxford English Dictionary* (emphasis added). The phrase "resolved its liability" thus means that there was doubt or dispute about the liability before the settlement. But the language of Section 113(f)(3)(B)—"person who has resolved its liability to the United States or a State * * * in an administrative or judicially approved settlement,"

42 U.S.C. 9613(f)(3)(B)—makes clear that the settlement itself can "resolve" the "liability" and thereby eliminate that prior doubt. A person who seeks contribution in these circumstances need not show in addition that it actually committed a legal wrong, or that it would have been found liable if it had contested the charges to judgment.

Several considerations reinforce that reading. First, under background principles of contract law, a claim can provide consideration for a settlement even if the claim later "proves to be invalid," as long as the claim was "doubtful because of uncertainty as to the facts or the law" or the "surrendering party believe[d] that the claim * * * [could] be fairly determined to be valid." Restatement (Second) of Contracts § 74(1) (1981). More generally, contracts routinely have the effect of both creating new legal obligations and (simultaneously) defining the scope and contours of those duties. To be sure, Section 113(f)(3)(B) does not extend to contracts generally; it applies only to "an administrative or judicially approved settlement" with "the United States or a State." 42 U.S.C. 9613(f)(3)(B); see Guam Br. 40. But the contractual aspect of such settlements sheds light on how those agreements can "resolve" a settling party's "liability."

Second, under background principles of tort law, "[a] settlor need not prove that he would have been found liable to the plaintiff" in order to seek contribution. Restatement (Third) of Torts: Apportionment of Liability § 23, cmt. h. Third, elsewhere in its brief, Guam quotes a committee report stating that Section 113(f) codifies "an express 'right of contribution . . . for persons *alleged* or held to be liable.'" Guam Br. 29 (quoting House Report Pt. 1, at 79) (emphasis altered). Fourth, it would

make little sense to require a settling party who seeks contribution to show that it would have been found liable to the plaintiff, when the very point of a settlement is to avoid further litigation over that issue. Fifth, the purpose of the contribution right is to ensure that, when an adverse effect is caused by the combined actions of multiple tortfeasors, the resulting costs are not unfairly imposed on a single wrongdoer. That purpose is squarely implicated (indeed, implicated with particular force) if it is uncertain whether the party seeking contribution committed a wrong at all.

B. The 2004 Consent Decree Resolved Guam's Liability For At Least Some Of A Response Action

1. The consent decree in this case gave rise to a potential claim for contribution under Section 113(f)(3)(B). The decree requires Guam to take a variety of steps, including building a cover for the Ordot Dump, building a system to divert surface water at the dump, and monitoring the site. See Pet. App. 143a-151a. The case comes to this Court on the premise that at least some of those actions fall within the Act's definition of "response" (which includes "repair or replacement of leaking containers," "diversion," and "monitoring," 42 U.S.C. 9601(24)). Guam's own theory of the case—that it may sue the United States under Section 107(a) to recover "necessary costs of response," 42 U.S.C. 9607(a)(4)(B)—depends on the understanding that the actions required by the 2004 consent decree qualify as CERCLA "response[s]." See pp. 14-15, *supra*. Guam's complaint describes the actions as response actions. See J.A. 69-70. And the court of appeals held that, at a minimum, building a cover at the dump qualifies as a response action. See Pet. App. 22a. Although Guam now disputes

that fact-bound conclusion (Br. 36-37, 43 n.10), it forfeited that objection by failing to include it among the questions presented in its petition (Pet. ii). See Sup. Ct. R. 14.1(a), 24.1(a); *Wood* v. *Allen*, 558 U.S. 290, 304 (2010).

The consent decree "resolved" Guam's "liability" for those actions. Before the entry of the decree, Guam's legal obligation to perform those actions was open to doubt or dispute. After the decree, no room for doubt remained. The decree directed Guam to build a cover, build a system to divert surface water, and monitor the site, all on a timetable specified in the decree. See Pet. App. 142a-151a.

Those directives, moreover, were final and conclusive. A consent decree constitutes both a binding contract and a binding judicial judgment. See *Frew* v. *Hawkins*, 540 U.S. 431, 437 (2004). And a judgment of a court of law is inherently "final and conclusive upon the rights of the parties." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995) (citation omitted). The language of the decree in this case reinforces that understanding: it orders that Guam "shall" perform the specified actions; states that its provisions "shall apply and be binding upon the Government of Guam"; describes its directives as "requirements" and "obligations"; forbids modifications to the decree without "the written approval of the parties" and "the approval of the Court"; and fixes stipulated penalties for violating its commands. Pet. App. 140a, 142a, 152a-155a, 160a, 169a.

2. Contrary to Guam's contention (Br. 41), it makes no difference that the decree contains a non-admission clause, stating that the court has entered the decree "based on the pleadings, before taking testimony or ad-

judicating any issue of fact or law, and without any finding or admission of liability against or by the Government of Guam." Pet. App. 140a. The non-admission clause uses the term "admission of liability" to mean, roughly, "acknowledgment of wrongdoing or of the validity of the plaintiff's claim." See pp. 35-36, *supra* (discussing possible meanings of the word "liability"). The word "liability" draws meaning from the nearby word "admission," and an "admission" is a "statement in which someone admits that something is true or that he or she has done something wrong." *Black's Law Dictionary* 58 (11th ed.).

On that understanding, the non-admission clause is fully consistent with the holding below that the consent decree "resolved" Guam's "liability" within the meaning of Section 113(f)(3)(B). A person can resolve its liability (that is, settle its legal obligations going forward) even if it refuses to admit liability (that is, acknowledge the commission of a prior actionable wrong). "A person can agree to undertake actions to resolve a claim against it without admitting to the factual or legal truth purportedly underlying that claim." *Florida Power Corp.* v. *FirstEnergy Corp.*, 810 F.3d 996, 1017 (6th Cir. 2015) (Suhrheinrich, J., dissenting).

A contrary view would set the Act's provisions on a collision course. CERCLA encourages settlement by providing various benefits to settling parties. Under one set of provisions, a settling party that has "resolved" its liability (1) may file contribution claims against other parties and (2) enjoys immunity from other parties' contribution claims against it. See 42 U.S.C. 9613(f), 9622(g)(5) and (h)(4). Under a different set of provisions, a settling party's participation in the process of formulating a CERCLA settlement "shall

not be considered an admission of liability for any purpose," 42 U.S.C. 9622(d)(1)(B), and the government "may fashion a consent decree so that the entering of such decree and compliance with such decree * * * shall not be considered an admission of liability for any purpose," 42 U.S.C. 9622(d)(1)(C). On Guam's view, those two sets of benefits become mutually exclusive. If a party invokes the option to avoid admitting liability, it must forgo the benefits granted to those who have resolved their liability. That result would negate Congress's decision to make *both* sets of benefits available to settling parties, undermine Congress's objective of encouraging settlements, and violate the principle that "[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory," *Maracich* v. *Spears*, 570 U.S. 48, 68 (2013) (citation omitted).

Further, non-admission clauses are "customary" in consent decrees. *Maher* v. *Gagne*, 448 U.S. 122, 126 n.8 (1980). During the district-court proceedings in this case, Guam acknowledged that "it would be very unusual for a CERCLA settlement to announce or accept or expressly address liability" and that, "[o]rdinarily, there will be a statement of nonadmission of liability." D. Ct. 5/15/18 Tr. 52-53. On that view, few consent decrees would trigger either Section 113(f)(3)(B) or the six other CERCLA provisions that use the term "resolved its liability." 42 U.S.C. 9613(f)(2) and (3)(A)-(C), 9622(g)(5) and (12) and (h)(4). Such a result would violate the usual presumption that Congress means its enactments to have "real and substantial effect." *Stone* v. *INS*, 514 U.S. 386, 397 (1995).

Guam seeks (Br. 43-44) to distinguish the inclusion of an express non-admission clause from the mere ab-

sence of a concession of liability. But it would make little sense for the availability of a CERCLA contribution remedy to turn on that distinction. The clause in this case states that the court has entered the decree "without any finding or admission of liability." Pet. App. 140a. No sound basis exists to distinguish (1) a decree that lacks a finding or admission of liability from (2) a decree that *says* that it lacks a finding or admission of liability.

3. Contrary to Guam's contention (Br. 41-42), the decree's reservation-of-rights clause and conditional release also do not undermine the resolution of liability. The reservation-of-rights clause states: "Except as specifically provided herein, the United States does not waive any rights or remedies available to it for any violation by the Government of Guam of federal and territorial laws and regulations." Pet. App. 166a. The conditional release reads: "Entry of this Consent Decree *and compliance with the requirements herein* shall be in full settlement and satisfaction of the [United States'] civil judicial claims." *Ibid.* (emphasis added).

Section 113(f)(3)(B) allows a person to seek contribution if it has resolved its liability "to the United States *or* a State for some *or* all of a response action *or* for some *or* all of the costs of such action." 42 U.S.C. 9613(f)(3)(B). A settlement thus can give rise to a contribution claim if it resolves liability to the United States but not a State, to one State but not others, for response actions but not costs, for *a* response action but not other response actions, or for *some* of a response action but not all of it. The settlement must resolve something, but it need not resolve everything. The settlement here did resolve something: it settled Guam's legal obligation to build a cover, build a system to divert

surface water, and monitor the site. See pp. 40-41, *supra*.

The clauses that Guam invokes do not detract from that resolution. The reservation-of-rights clause preserves the United States' ability, in certain circumstances, to sue Guam to obtain further remedies beyond those granted by the consent decree. And the conditional release preserves the United States' ability to reassert its CWA claims if Guam does not fulfill its promises in the decree. The clauses thus allow the United States to go beyond the decree in some situations, but they do not diminish the obligations that the decree has already settled.

A contrary view would, again, cause Section 113(f)(3)(B) to contradict other parts of the Act. The Act requires CERCLA settlements to reserve the right to assert certain claims—namely, claims that arise out of "conditions which are unknown at the time [EPA] certifies * * * that remedial action has been completed." 42 U.S.C. 9622(f)(6)(A). The Act also provides that "[a]ny covenant not to sue" in a CERCLA settlement "shall be subject to the satisfactory performance by such party of its obligations under the agreement concerned." 42 U.S.C. 9622(f)(5). If a reservation of rights or a conditional release negated a resolution of liability, "it is unlikely that a [CERCLA] settlement agreement could *ever* resolve a party's liability." *ASARCO*, 866 F.3d at 1124.

III. ADOPTING GUAM'S READING WOULD DISTORT THE STATUTORY SCHEME

CERCLA establishes two potential avenues through which a person may recover cleanup costs: contribution actions under Section 113(f) and claims to recover costs under Section 107(a). See p. 2, *supra*. Under Guam's

reading, Guam and other parties with similar settlements could seek recovery of costs under Section 107(a) instead of contribution under Section 113(f)(3)(B). That approach would distort the statutory scheme and could produce harmful practical consequences.

Most significantly, adopting Guam's proposed rule could delay the timely cleanup of contaminated sites. The limitations period for Section 113(f)(3)(B) suits runs from the date of the judgment or settlement, 42 U.S.C. 9613(g)(3), but the limitations period for Section 107(a) claims runs, as relevant here, from the "initiation of physical on-site construction of the remedial action," 42 U.S.C. 9613(g)(2)(B). If a settling party could invoke Section 107(a), it could "choose when a limitation period to which it is subject begins to run" by deciding when to start on-site construction. *Refined Metals*, 937 F.3d at 933. It also could "drag out the process" of seeking funds from other parties. *Id.* at 932. In this very case, Guam brought suit 13 years after the consent decree was entered. See pp. 7-8, *supra*; see also *Refined Metals*, 937 F.3d at 932-933 (suit brought 19 years after consent decree). Those consequences would undermine one of the Act's core purposes: "ensur[ing] that the responsible parties get to the bargaining—and clean-up—table sooner rather than later." *RSR Corp.* v. *Commercial Metals Co.*, 496 F.3d 552, 558 (6th Cir. 2007); see House Report Pt. 1, at 80.

Sections 107(a) and 113(f)(3)(B) also have different recovery regimes. In Section 113(f)(3)(B) cases, courts allocate cleanup costs equitably, in proportion to the parties' respective shares of the responsibility. See *Atlantic Research*, 551 U.S. at 138. Guam argues (Br. 4), however, that if its suit is allowed to proceed under Sec-

tion 107(a), it could seek to impose joint and several liability on the United States—that is, to hold the United States liable for the entire cost of the cleanup, and thus to escape its own responsibility for contamination at the dump.

Perhaps sensing the unattractiveness of that result, Guam argued in the district court that the United States could "blunt that blow" by filing a contribution counterclaim under the Act's other contribution clause, Section 113(f)(1). D. Ct. 5/15/18 Tr. 16; see 42 U.S.C. 9613(f)(1) (authorizing contribution claims during or after civil actions under Section 107(a)). That argument simply highlights the pointlessness of Guam's distortion of the statute. Guam seemingly agrees that, in suits like this one, responsibility for cleanup costs should ultimately be allocated under contribution principles; its only evident purpose in identifying Section 107(a) as the basis for its own claim is to invoke that provision's longer statute of limitations.

* * * * *

Guam asserts that the decision below leads to "harsh" consequences, Br. 49 (citation omitted), but Guam overlooks its own responsibility for its predicament. Guam alleges that the Navy disposed of waste at the Ordot Dump decades ago, but since 1950, *Guam* has used the site as a dumping ground for municipal and industrial waste, converting "[w]hat was once a valley" into "a mountain of trash." *United States* v. *Government of Guam*, No. 02-cv-22, 2008 WL 216918, at *1 (D. Guam Jan. 24, 2008). For decades, Guam flouted federal environmental laws and missed deadlines set by EPA's administrative orders. *Ibid.* It then continued to miss deadlines for years after it entered into the 2004 consent decree. *Id.* at *2. Indeed, in 2008, the district court

in Guam appointed a receiver to carry out Guam's responsibilities, observing that "there has been an historical and present lack of commitment by the island's leaders in addressing this solid waste crisis." *United States* v. *Government of Guam*, No. 02-cv-22, 2008 WL 732796, at *1 (D. Guam Mar. 17, 2008).

If Guam wished to recover a portion of its costs of complying with the 2004 consent decree, it could have filed suit under Section 113(f)(3)(B) within the applicable three-year statute of limitations. Yet Guam missed that deadline too, and by more than a decade. There is nothing inequitable about requiring Guam to bear the legal consequences of its acts and omissions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General
JEAN E. WILLIAMS
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
VIVEK SURI
Assistant to the Solicitor General
JENNIFER SCHELLER NEUMANN
EVELYN YING
RACHEL HERON
Attorneys

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APPENDIX

1. 42 U.S.C. 9601 provides in pertinent part:

Definitions

For purpose of this subchapter—

* * * * *

(14) The term "hazardous substance" means (A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act [33 U.S.C. 1321(b)(2)(A)], (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act [33 U.S.C. 1317(a)], (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act [15 U.S.C. 2606]. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied

natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

* * * * *

(23) The terms "remove" or "removal" means[2] the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.].

(24) The terms "remedy" or "remedial action" means[2] those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances

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[2] So in original. Probably should be "mean".

so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

(25) The terms "respond" or "response" means[2] remove, removal, remedy, and remedial action;,[3] all

[3] So in original.

such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

* * * * *

(35)(D) Nothing in this paragraph shall affect the liability under this chapter of a defendant who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance which is the subject of the action relating to the facility.

* * * * *

2. 42 U.S.C. 9604 provides in pertinent part:

Response authorities

* * * * *

(j) Acquisition of property

(1) Authority

The President is authorized to acquire, by purchase, lease, condemnation, donation, or otherwise, any real property or any interest in real property that the President in his discretion determines is needed to conduct a remedial action under this chapter. There shall be no cause of action to compel the President to acquire any interest in real property under this chapter.

* * * * *

(k) Brownfields revitalization funding

* * * * *

(12) Effect on Federal laws

Nothing in this subsection affects any liability or response authority under any Federal law, including—

(A) this chapter (including the last sentence of section 9601(14) of this title);

(B) the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.);

(C) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.);

(D) the Toxic Substances Control Act (15 U.S.C. 2601 et seq.); and

(E) the Safe Drinking Water Act (42 U.S.C. 300f et seq.).

* * * * *

3. 42 U.S.C. 9605(b) provides:

National contingency plan

(b) Revision of plan

Not later than 18 months after the enactment of the Superfund Amendments and Reauthorization Act of 1986 [October 17, 1986], the President shall revise the National Contingency Plan to reflect the requirements of such amendments. The portion of such Plan known as "the National Hazardous Substance Response Plan" shall be revised to provide procedures and standards for remedial actions undertaken pursuant to this chapter which are consistent with amendments made by the Superfund Amendments and Reauthorization Act of 1986 relating to the selection of remedial action.

4. 42 U.S.C. 9606(a) provides:

Abatement actions

(a) Maintenance, jurisdiction, etc.

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

5. 42 U.S.C. 9607 provides in pertinent part:

Liability

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

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

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

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

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

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

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

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

* * * * *

(*l*) Federal lien

* * * * *

(2) Duration

The lien imposed by this subsection shall arise at the later of the following:

(A) The time costs are first incurred by the United States with respect to a response action under this chapter.

* * * * *

6. 42 U.S.C. 9612(c)(2) provides:

Claims procedure

(c) Subrogation rights; actions maintainable

(2) Any person, including the Fund, who pays compensation pursuant to this chapter to any claimant for damages or costs resulting from a release of a hazardous substance shall be subrogated to all rights, claims, and causes of action for such damages and costs of removal that the claimant has under this chapter or any other law.

7. 42 U.S.C. 9613 provides:

Civil proceedings

(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia

Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Jurisdiction; venue

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship

of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) Controversies or other matters resulting from tax collection or tax regulation review

The provisions of subsections (a) and (b) of this section shall not apply to any controversy or other matter resulting from the assessment of collection of any tax, as provided by subchapter II[1] of this chapter, or to the review of any regulation promulgated under title 26.

(d) Litigation commenced prior to December 11, 1980

No provision of this chapter shall be deemed or held to moot any litigation concerning any release of any hazardous substance, or any damages associated therewith, commenced prior to December 11, 1980.

(e) Nationwide service of process

In any action by the United States under this chapter, process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for the service of process.

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil

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[1] See References in text note below.

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

(2) Settlement

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

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in

an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) Period in which action may be brought

(1) Actions for natural resource damages

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel

or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.

(2) Actions for recovery of costs

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

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

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

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further

response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

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

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation

No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this subchapter more than 3 years after the date of payment of such claim.

(5) Actions to recover indemnification payments

Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 9619 of this title, an action under section 9607 of this title for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) Minors and incompetents

The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

(h) Timing of review

No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial

action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 9606(b)(2) of this title.

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

(i) Intervention

In any action commenced under this chapter or under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.] in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State shows that

the person's interest is adequately represented by existing parties.

(j) Judicial review

(1) Limitation

In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) Standard

In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

(3) Remedy

If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award (A) only the response costs or damages that are not inconsistent with the national contingency plan, and (B) such other relief as is consistent with the National Contingency Plan.

(4) Procedural errors

In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were

so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made.

(k) Administrative record and participation procedures

(1) Administrative record

The President shall establish an administrative record upon which the President shall base the selection of a response action. The administrative record shall be available to the public at or near the facility at issue. The President also may place duplicates of the administrative record at any other location.

(2) Participation procedures

(A) Removal action

The President shall promulgate regulations in accordance with chapter 5 of title 5 establishing procedures for the appropriate participation of interested persons in the development of the administrative record on which the President will base the selection of removal actions and on which judicial review of removal actions will be based.

(B) Remedial action

The President shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the President will base the selection of remedial actions and on which judicial review of remedial actions will be based. The procedures developed under this subparagraph shall include, at a minimum, each of the following:

(i) Notice to potentially affected persons and the public, which shall be accompanied by a brief analysis of the plan and alternative plans that were considered.

(ii) A reasonable opportunity to comment and provide information regarding the plan.

(iii) An opportunity for a public meeting in the affected area, in accordance with section 9617(a)(2) of this title (relating to public participation).

(iv) A response to each of the significant comments, criticisms, and new data submitted in written or oral presentations.

(v) A statement of the basis and purpose of the selected action.

For purposes of this subparagraph, the administrative record shall include all items developed and received under this subparagraph and all items described in the second sentence of section 9617(d) of this title. The President shall promulgate regulations in accordance with chapter 5 of title 5 to carry out the requirements of this subparagraph.

(C) Interim record

Until such regulations under subparagraphs (A) and (B) are promulgated, the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action, including procedures for the participation of interested parties and the public. The development of an administrative

record and the selection of response action under this chapter shall not include an adjudicatory hearing.

(D) Potentially responsible parties

The President shall make reasonable efforts to identify and notify potentially responsible parties as early as possible before selection of a response action. Nothing in this paragraph shall be construed to be a defense to liability.

(*l*) Notice of actions

Whenever any action is brought under this chapter in a court of the United States by a plaintiff other than the United States, the plaintiff shall provide a copy of the complaint to the Attorney General of the United States and to the Administrator of the Environmental Protection Agency.

8. 42 U.S.C. 9614(b) provides:

Relationship to other law

(b) Recovery under other State or Federal law of compensation for removal costs or damages, or payment of claims

Any person who receives compensation for removal costs or damages or claims pursuant to this chapter shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be pre-

cluded from receiving compensation for the same removal costs or damages or claims as provided in this chapter.

9. 42 U.S.C. 9619(e)(1) provides:

Response action contractors

(e) Definitions

For purposes of this section—

(1) Response action contract

The term "response action contract" means any written contract or agreement entered into by a response action contractor (as defined in paragraph (2)(A) of this subsection) with—

(A) the President;

(B) any Federal agency;

(C) a State or political subdivision which has entered into a contract or cooperative agreement in accordance with section 9604(d)(1) of this title; or

(D) any potentially responsible party carrying out an agreement under section 9606 or 9622 of this title;

to provide any remedial action under this chapter at a facility listed on the National Priorities List, or any removal under this chapter, with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from the facility or to

provide any evaluation, planning, engineering, surveying and mapping, design, construction, equipment, or any ancillary services thereto for such facility.

10. 42 U.S.C. 9620(d)(2)(B) provides:

Federal facilities

(d) Assessment and evaluation

(2) Application of criteria

(B) Response under other law

It shall be an appropriate factor to be taken into consideration for the purposes of section 9605(a)(8)(A) of this title that the head of the department, agency, or instrumentality that owns or operates a facility has arranged with the Administrator or appropriate State authorities to respond appropriately, under authority of a law other than this chapter, to a release or threatened release of a hazardous substance.

11. 42 U.S.C. 9622 provides:

Settlements

(a) Authority to enter into agreements

The President, in his discretion, may enter into an agreement with any person (including the owner or operator of the facility from which a release or substantial threat of release emanates, or any other potentially responsible person), to perform any response action (including any action described in section 9604(b) of this title) if the President determines that such action will be

done properly by such person. Whenever practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation. If the President decides not to use the procedures in this section, the President shall notify in writing potentially responsible parties at the facility of such decision and the reasons why use of the procedures is inappropriate. A decision of the President to use or not to use the procedures in this section is not subject to judicial review.

(b) Agreements with potentially responsible parties

(1) Mixed funding

An agreement under this section may provide that the President will reimburse the parties to the agreement from the Fund, with interest, for certain costs of actions under the agreement that the parties have agreed to perform but which the President has agreed to finance. In any case in which the President provides such reimbursement, the President shall make all reasonable efforts to recover the amount of such reimbursement under section 9607 of this title or under other relevant authorities.

(2) Reviewability

The President's decisions regarding the availability of fund financing under this subsection shall not be subject to judicial review under subsection (d).

(3) Retention of funds

If, as part of any agreement, the President will be carrying out any action and the parties will be paying amounts to the President, the President may, notwithstanding any other provision of law, retain and use such amounts for purposes of carrying out the agreement.

(4) Future obligation of Fund

In the case of a completed remedial action pursuant to an agreement described in paragraph (1), the Fund shall be subject to an obligation for subsequent remedial actions at the same facility but only to the extent that such subsequent actions are necessary by reason of the failure of the original remedial action. Such obligation shall be in a proportion equal to, but not exceeding, the proportion contributed by the Fund for the original remedial action. The Fund's obligation for such future remedial action may be met through Fund expenditures or through payment, following settlement or enforcement action, by parties who were not signatories to the original agreement.

(c) Effect of agreement

(1) Liability

Whenever the President has entered into an agreement under this section, the liability to the United States under this chapter of each party to the agreement, including any future liability to the United States, arising from the release or threatened release that is the subject of the agreement shall be limited as provided in the agreement pursuant to a covenant not to sue in accordance with subsection (f). A covenant not to sue may provide that future liability to

the United States of a settling potentially responsible party under the agreement may be limited to the same proportion as that established in the original settlement agreement. Nothing in this section shall limit or otherwise affect the authority of any court to review in the consent decree process under subsection (d) any covenant not to sue contained in an agreement under this section. In determining the extent to which the liability of parties to an agreement shall be limited pursuant to a covenant not to sue, the President shall be guided by the principle that a more complete covenant not to sue shall be provided for a more permanent remedy undertaken by such parties.

(2) Actions against other persons

If an agreement has been entered into under this section, the President may take any action under section 9606 of this title against any person who is not a party to the agreement, once the period for submitting a proposal under subsection (e)(2)(B) has expired. Nothing in this section shall be construed to affect either of the following:

(A) The liability of any person under section 9606 or 9607 of this title with respect to any costs or damages which are not included in the agreement.

(B) The authority of the President to maintain an action under this chapter against any person who is not a party to the agreement.

(d) Enforcement

(1) Cleanup agreements

(A) Consent decree

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

(B) Effect

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

(C) Structure

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

(2) Public participation

(A) Filing of proposed judgment

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

(B) Opportunity for comment

The Attorney General shall provide an opportunity to persons who are not named as parties to the action to comment on the proposed judgment before its entry by the court as a final judgment. The Attorney General shall consider, and file with the court, any written comments, views, or allegations relating to the proposed judgment. The Attorney General may withdraw or withhold its consent to the proposed judgment if the comments, views, and allegations concerning the judgment disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper, or inadequate.

(3) 9604(b) agreements

Whenever the President enters into an agreement under this section with any potentially responsible party with respect to action under section 9604(b) of this title, the President shall issue an order or enter

into a decree setting forth the obligations of such party. The United States district court for the district in which the release or threatened release occurs may enforce such order or decree.

(e) Special notice procedures

(1) Notice

Whenever the President determines that a period of negotiation under this subsection would facilitate an agreement with potentially responsible parties for taking response action (including any action described in section 9604(b) of this title) and would expedite remedial action, the President shall so notify all such parties and shall provide them with information concerning each of the following:

(A) The names and addresses of potentially responsible parties (including owners and operators and other persons referred to in section 9607(a) of this title), to the extent such information is available.

(B) To the extent such information is available, the volume and nature of substances contributed by each potentially responsible party identified at the facility.

(C) A ranking by volume of the substances at the facility, to the extent such information is available.

The President shall make the information referred to in this paragraph available in advance of notice under this paragraph upon the request of a potentially responsible party in accordance with procedures pro-

vided by the President. The provisions of subsection (e) of section 9604 of this title regarding protection of confidential information apply to information provided under this paragraph. Disclosure of information generated by the President under this section to persons other than the Congress, or any duly authorized Committee thereof, is subject to other privileges or protections provided by law, including (but not limited to) those applicable to attorney work product. Nothing contained in this paragraph or in other provisions of this chapter shall be construed, interpreted, or applied to diminish the required disclosure of information under other provisions of this or other Federal or State laws.

(2) Negotiation

(A) Moratorium

Except as provided in this subsection, the President may not commence action under section 9604(a) of this title or take any action under section 9606 of this title for 120 days after providing notice and information under this subsection with respect to such action. Except as provided in this subsection, the President may not commence a remedial investigation and feasibility study under section 9604(b) of this title for 90 days after providing notice and information under this subsection with respect to such action. The President may commence any additional studies or investigations authorized under section 9604(b) of this title, including remedial design, during the negotiation period.

(B) Proposals

Persons receiving notice and information under paragraph (1) of this subsection with respect to action under section 9606 of this title shall have 60 days from the date of receipt of such notice to make a proposal to the President for undertaking or financing the action under section 9606 of this title. Persons receiving notice and information under paragraph (1) of this subsection with respect to action under section 9604(b) of this title shall have 60 days from the date of receipt of such notice to make a proposal to the President for undertaking or financing the action under section 9604(b) of this title.

(C) Additional parties

If an additional potentially responsible party is identified during the negotiation period or after an agreement has been entered into under this subsection concerning a release or threatened release, the President may bring the additional party into the negotiation or enter into a separate agreement with such party.

(3) Preliminary allocation of responsibility

(A) In general

The President shall develop guidelines for preparing nonbinding preliminary allocations of responsibility. In developing these guidelines the President may include such factors as the President considers relevant, such as: volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, prece-

dential value, and inequities and aggravating factors. When it would expedite settlements under this section and remedial action, the President may, after completion of the remedial investigation and feasibility study, provide a nonbinding preliminary allocation of responsibility which allocates percentages of the total cost of response among potentially responsible parties at the facility.

(B) Collection of information

To collect information necessary or appropriate for performing the allocation under subparagraph (A) or for otherwise implementing this section, the President may by subpoena require the attendance and testimony of witnesses and the production of reports, papers, documents, answers to questions, and other information that the President deems necessary. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In the event of contumacy or failure or refusal of any person to obey any such subpoena, any district court of the United States in which venue is proper shall have jurisdiction to order any such person to comply with such subpoena. Any failure to obey such an order of the court is punishable by the court as a contempt thereof.

(C) Effect

The nonbinding preliminary allocation of responsibility shall not be admissible as evidence in any proceeding, and no court shall have jurisdiction to review the nonbinding preliminary alloca-

tion of responsibility. The nonbinding preliminary allocation of responsibility shall not constitute an apportionment or other statement on the divisibility of harm or causation.

(D) Costs

The costs incurred by the President in producing the nonbinding preliminary allocation of responsibility shall be reimbursed by the potentially responsible parties whose offer is accepted by the President. Where an offer under this section is not accepted, such costs shall be considered costs of response.

(E) Decision to reject offer

Where the President, in his discretion, has provided a nonbinding preliminary allocation of responsibility and the potentially responsible parties have made a substantial offer providing for response to the President which he rejects, the reasons for the rejection shall be provided in a written explanation. The President's decision to reject such an offer shall not be subject to judicial review.

(4) Failure to propose

If the President determines that a good faith proposal for undertaking or financing action under section 9606 of this title has not been submitted within 60 days of the provision of notice pursuant to this subsection, the President may thereafter commence action under section 9604(a) of this title or take an action against any person under section 9606 of this title. If the President determines that a good faith proposal for undertaking or financing action under

section 9604(b) of this title has not been submitted within 60 days after the provision of notice pursuant to this subsection, the President may thereafter commence action under section 9604(b) of this title.

(5) Significant threats

Nothing in this subsection shall limit the President's authority to undertake response or enforcement action regarding a significant threat to public health or the environment within the negotiation period established by this subsection.

(6) Inconsistent response action

When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this chapter, has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

(f) Covenant not to sue

(1) Discretionary covenants

The President may, in his discretion, provide any person with a covenant not to sue concerning any liability to the United States under this chapter, including future liability, resulting from a release or threatened release of a hazardous substance addressed by a remedial action, whether that action is onsite or offsite, if each of the following conditions is met:

(A) The covenant not to sue is in the public interest.

(B) The covenant not to sue would expedite response action consistent with the National Contingency Plan under section 9605 of this title.

(C) The person is in full compliance with a consent decree under section 9606 of this title (including a consent decree entered into in accordance with this section) for response to the release or threatened release concerned.

(D) The response action has been approved by the President.

(2) Special covenants not to sue

In the case of any person to whom the President is authorized under paragraph (1) of this subsection to provide a covenant not to sue, for the portion of remedial action—

(A) which involves the transport and secure disposition offsite of hazardous substances in a facility meeting the requirements of sections 6924(c), (d), (e), (f), (g), (m), (o), (p), (u), and (v) and 6925(c) of this title, where the President has rejected a proposed remedial action that is consistent with the National Contingency Plan that does not include such offsite disposition and has thereafter required offsite disposition; or

(B) which involves the treatment of hazardous substances so as to destroy, eliminate, or permanently immobilize the hazardous constituents of such substances, such that, in the judgment of the President, the substances no longer present any current or currently foreseeable future significant risk to public health, welfare or the environ-

ment, no byproduct of the treatment or destruction process presents any significant hazard to public health, welfare or the environment, and all byproducts are themselves treated, destroyed, or contained in a manner which assures that such byproducts do not present any current or currently foreseeable future significant risk to public health, welfare or the environment,

the President shall provide such person with a covenant not to sue with respect to future liability to the United States under this chapter for a future release or threatened release of hazardous substances from such facility, and a person provided such covenant not to sue shall not be liable to the United States under section 9606 or 9607 of this title with respect to such release or threatened release at a future time.

(3) Requirement that remedial action be completed

A covenant not to sue concerning future liability to the United States shall not take effect until the President certifies that remedial action has been completed in accordance with the requirements of this chapter at the facility that is the subject of such covenant.

(4) Factors

In assessing the appropriateness of a covenant not to sue under paragraph (1) and any condition to be included in a covenant not to sue under paragraph (1) or (2), the President shall consider whether the covenant or condition is in the public interest on the basis of such factors as the following:

(A) The effectiveness and reliability of the remedy, in light of the other alternative remedies considered for the facility concerned.

(B) The nature of the risks remaining at the facility.

(C) The extent to which performance standards are included in the order or decree.

(D) The extent to which the response action provides a complete remedy for the facility, including a reduction in the hazardous nature of the substances at the facility.

(E) The extent to which the technology used in the response action is demonstrated to be effective.

(F) Whether the Fund or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the facility.

(G) Whether the remedial action will be carried out, in whole or in significant part, by the responsible parties themselves.

(5) Satisfactory performance

Any covenant not to sue under this subsection shall be subject to the satisfactory performance by such party of its obligations under the agreement concerned.

(6) Additional condition for future liability

(A) Except for the portion of the remedial action which is subject to a covenant not to sue under para-

graph (2) or under subsection (g) (relating to de minimis settlements), a covenant not to sue a person concerning future liability to the United States shall include an exception to the covenant that allows the President to sue such person concerning future liability resulting from the release or threatened release that is the subject of the covenant where such liability arises out of conditions which are unknown at the time the President certifies under paragraph (3) that remedial action has been completed at the facility concerned.

(B) In extraordinary circumstances, the President may determine, after assessment of relevant factors such as those referred to in paragraph (4) and volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors, not to include the exception referred to in subparagraph (A) if other terms, conditions, or requirements of the agreement containing the covenant not to sue are sufficient to provide all reasonable assurances that public health and the environment will be protected from any future releases at or from the facility.

(C) The President is authorized to include any provisions allowing future enforcement action under section 9606 or 9607 of this title that in the discretion of the President are necessary and appropriate to assure protection of public health, welfare, and the environment.

(g) De minimis settlements

(1) Expedited final settlement

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

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

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

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

(B) The potentially responsible party—

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

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

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

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

(2) Covenant not to sue

The President may provide a covenant not to sue with respect to the facility concerned to any party who has entered into a settlement under this subsection unless such a covenant would be inconsistent with the public interest as determined under subsection (f).

(3) Expedited agreement

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

(4) Consent decree or administrative order

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

extend the time. The district court for the district in which the release or threatened release occurs may enforce any such administrative order.

(5) Effect of agreement

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

(6) Settlements with other potentially responsible parties

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

(7) Reduction in settlement amount based on limited ability to pay

(A) In general

The condition for settlement under this paragraph is that the potentially responsible party is a person who demonstrates to the President an inability or a limited ability to pay response costs.

(B) Considerations

In determining whether or not a demonstration is made under subparagraph (A) by a person, the President shall take into consideration the ability of the person to pay response costs and still main-

tain its basic business operations, including consideration of the overall financial condition of the person and demonstrable constraints on the ability of the person to raise revenues.

(C) Information

A person requesting settlement under this paragraph shall promptly provide the President with all relevant information needed to determine the ability of the person to pay response costs.

(D) Alternative payment methods

If the President determines that a person is unable to pay its total settlement amount at the time of settlement, the President shall consider such alternative payment methods as may be necessary or appropriate.

(8) Additional conditions for expedited settlements

(A) Waiver of claims

The President shall require, as a condition for settlement under this subsection, that a potentially responsible party waive all of the claims (including a claim for contribution under this chapter) that the party may have against other potentially responsible parties for response costs incurred with respect to the facility, unless the President determines that requiring a waiver would be unjust.

(B) Failure to comply

The President may decline to offer a settlement to a potentially responsible party under this sub-

section if the President determines that the potentially responsible party has failed to comply with any request for access or information or an administrative subpoena issued by the President under this chapter or has impeded or is impeding, through action or inaction, the performance of a response action with respect to the facility.

(C) Responsibility to provide information and access

A potentially responsible party that enters into a settlement under this subsection shall not be relieved of the responsibility to provide any information or access requested in accordance with subsection (e)(3)(B) or section 9604(e) of this title.

(9) Basis of determination

If the President determines that a potentially responsible party is not eligible for settlement under this subsection, the President shall provide the reasons for the determination in writing to the potentially responsible party that requested a settlement under this subsection.

(10) Notification

As soon as practicable after receipt of sufficient information to make a determination, the President shall notify any person that the President determines is eligible under paragraph (1) of the person's eligibility for an expedited settlement.

(11) No judicial review

A determination by the President under paragraph (7), (8), (9), or (10) shall not be subject to judicial review.

(12) Notice of settlement

After a settlement under this subsection becomes final with respect to a facility, the President shall promptly notify potentially responsible parties at the facility that have not resolved their liability to the United States of the settlement.

(h) Cost recovery settlement authority

(1) Authority to settle

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

(2) Use of arbitration

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

(3) Recovery of claims

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

(4) Claims for contribution

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

(i) Settlement procedures

(1) Publication in Federal Register

At least 30 days before any settlement (including any settlement arrived at through arbitration) may become final under subsection (h), or under subsection (g) in the case of a settlement embodied in an administrative order, the head of the department or agency which has jurisdiction over the proposed settlement shall publish in the Federal Register notice of the proposed settlement. The notice shall identify the facility concerned and the parties to the proposed settlement.

(2) Comment period

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

(3) Consideration of comments

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

(j) Natural resources

(1) Notification of trustee

Where a release or threatened release of any hazardous substance that is the subject of negotiations under this section may have resulted in damages to natural resources under the trusteeship of the United States, the President shall notify the Federal natural resource trustee of the negotiations and shall encourage the participation of such trustee in the negotiations.

(2) Covenant not to sue

An agreement under this section may contain a covenant not to sue under section 9607(a)(4)(C) of this title for damages to natural resources under the trusteeship of the United States resulting from the

release or threatened release of hazardous substances that is the subject of the agreement, but only if the Federal natural resource trustee has agreed in writing to such covenant. The Federal natural resource trustee may agree to such covenant if the potentially responsible party agrees to undertake appropriate actions necessary to protect and restore the natural resources damaged by such release or threatened release of hazardous substances.

(k) Section not applicable to vessels

The provisions of this section shall not apply to releases from a vessel.

(*l*) Civil penalties

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

(m) Applicability of general principles of law

In the case of consent decrees and other settlements under this section (including covenants not to sue), no provision of this chapter shall be construed to preclude or otherwise affect the applicability of general principles of law regarding the setting aside or modification of consent decrees or other settlements.

12. 42 U.S.C. 9652(d) provides:

Effective dates; savings provisions

(d) Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants. The provisions of this chapter shall not be considered, interpreted, or construed in any way as reflecting a determination, in part or whole, of policy regarding the inapplicability of strict liability, or strict liability doctrines, to activities relating to hazardous substances, pollutants, or contaminants or other such activities.

13. 42 U.S.C. 9656(b) provides:

Transportation of hazardous substances; listing as hazardous material; liability for release

(b) A common or contract carrier shall be liable under other law in lieu of section 9607 of this title for damages or remedial action resulting from the release of a hazardous substance during the course of transportation which commenced prior to the effective date of the listing and regulation of such substance as a hazardous material under chapter 51 of title 49, or for substances listed pursuant to subsection (a) of this section, prior to the effective date of such listing: *Provided, however*, That this subsection shall not apply where such a carrier can demonstrate that he did not have actual knowledge of the identity or nature of the substance released.