REMEDIATING CERCLA'S POLLUTED STATUTE OF LIMITATIONS

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There is perhaps no piece of enacted legislation that is shown greater contempt on a consistent basis by those tasked with its interpretation than is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund).[1] In almost any opinion that requires interpretation of CERCLA, it is highly probable that the judge will inject his or her own unique words of disdain for the frustratingly confusing statute. For instance, Judge Young sitting in the District of Massachusetts explained that he could not "forbear remarking on the difficulty of being left compassless on the trackless wastes of CERCLA."[2] In fact, as Judge McKeown on the Ninth Circuit noted, "It has become de rigueur to criticize CERCLA as a hastily passed statute that is far from a paragon of legislative clarity."[3] Accordingly, the failure of a federal appeals court to properly interpret one of CERCLA's key provisions should come as no surprise. And it should be equally as unsurprising, though possibly disconcerting, that a

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[1] Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601–9675 (2012)).

[2] In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution, 716 F. Supp. 676, 681 n.6 (D. Mass. 1989).

[3] United States v. W.R. Grace & Co., 429 F.3d 1224, 1238 (9th Cir. 2005).

portion of this same provision was drafted in a manner so flawed as to make it self-defeating in certain circumstances.

This article examines the Third Circuit's opinion in *Agere Systems, Inc. v. Advanced Environmental Technology Corp.*,[4] which wrongly tied only those "removal action" costs approved in an EPA "consistency waiver" document to the six-year statute of limitations found in the latter clause of subsection 9613(g)(2)(A). The clause applies only when the Environmental Protection Agency ("EPA" or "Agency") issues a "consistency waiver" in order to extend and/or enlarge the "removal action" phase of a site cleanup.[5] The court's approach created two "removal actions" at a single Superfund site, contradicting nearly uniform case law interpreting CERCLA as having a maximum of only one limitations period running at each site.[6] Because "consistency waiver" jurisprudence is wholly undeveloped, it is vital to quickly make the course correction that this article suggests in order to preserve congressional intent and prevent the government from using subsection 9613(g)(2)(A) to recover time-barred removal costs.

As a preface to the examination of *Agere Systems*, this article first dissects a critical drafting error in subsection 9613(g)(2)(B) of the statute of limitations. Plainly stated, the second clause of subsection 9613(g)(2)(B) renders the six year statute of limitation in subsection 9613(g)(2)(A) meaningless at a site where: 1) the EPA grants a "consistency waiver," and 2) the "removal action" is completed more than three years after the date of the grant.[7] Essentially, a literal reading of subsection 9613(g)(2)(B) creates a gaping loophole that could be exploited by the government in order to defer its initial cost recovery suit as long as it wishes. To close this loophole, this article proposes

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[4] 602 F.3d 204 (3d Cir.), *cert. denied sub nom.*, Carpenter Tech. Corp. v. Agere Sys. Inc., 562 U.S. 1062 (2010).

[5] *See* 42 U.S.C. §§ 9604(c)(1)(C), 9613(g)(2)(A) (2012). Although the term 'consistency waiver' is not used by CERCLA, this term has become common parlance to describe the 'waiver under section 9604(c)(1)(C).' *See infra*, text accompanying notes 20 through 25.

[6] *See*, *e.g.*, Kelley v. E.I. DuPont de Nemours & Co., 17 F.3d 836, 843 (6th Cir. 1994).

[7] *See* Alfred R. Light, *CERCLA's Cost Recovery Statute of Limitations: Closing the Books or Waiting for Godot?*, 16 SE. ENVTL. L.J. 245, 287 n.282 (2008).

a construction of the provision that finds support from a leading commentator in the field,[8] and which was implicitly adopted by the Third Circuit in *Agere Systems*.[9] Because "consistency waivers" play an important role in site cleanup, remediating both the contaminated portion of the Third Circuit's contaminated holding and CERCLA's polluted statute of limitations should be a high priority.

I. SARA GIVES BIRTH TO TWINS

Recognizing the shortcomings of CERCLA as originally enacted in 1980, Congress amended the statute only six years later via the Superfund Amendments and Reauthorization Act of 1986 (SARA),[10] itself not a "paradigm of clarity."[11] In general, SARA increased the size of the Superfund trust fund and attempted to bolster the effectiveness of CERCLA as a tool to clean up contaminated sites.[12] Its faults aside for the moment, SARA added two highly significant, but to date, largely unexamined provisions to CERCLA that are of particular importance to both the contamination cleanup timeline and the timeline to file suit to recover removal action costs. The functions of these provisions, however, are best conceptualized with the CERCLA scheme first set forth as background.

Generally speaking, CERCLA envisions a one-step, or at most, two-step cleanup process. The National Contingency Plan (NCP), sometimes referred to as "the federal government's roadmap for responding to the release of hazardous

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[8] *See id.*

[9] 602 F.3d at 221 n.28.

[10] Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. §§ 9601–9675 (2012)).

[11] VALERIE M. FOGLEMAN, HAZARDOUS WASTE CLEANUP, LIABILITY, AND LITIGATION 5 (1992); *see also* In re Acushnet River & New Bedford Harbor Proceedings, 716 F. Supp. at 681 n.6 (D. Mass. 1989) (noting the court's incredulity that CERCLA is still indecipherable even after its amendment).

[12] *The Superfund Amendments and Reauthorization Act (SARA)*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/superfund/superfund-amendments-and-reauthorization-act-sara (last updated Sept. 30, 2015).

substances,"[13] is the compendium of regulations that outlines the process of embarking on both steps.[14] In responding to a release or threat of release of hazardous substances, either the government or private party first performs a "removal action[]," and may then need to perform a "remedial action," but both actions are generally intended to reduce the hazard posed.[15] Often overlapping in the type of activities performed, the main distinctions between removal and remedial actions are temporal, procedural, and the ultimate objective.[16] Importantly, only those sites included on the National Priorities List (NPL)—those sites that are the most hazardous—may undergo a remedial action.[17]

The lynchpin of CERCLA, however, is section 9607(a), which permits the federal government or a private party to sue four categories of potentially liable parties to recover response costs that are incurred during performance of removal and remedial actions.[18] Additionally, liable parties may recover cleanup costs from other liable parties by way of a suit for contribution under section 9613(f), but only if those other parties share "common liability" for an action brought under sections 9606 or 9607.[19] With this CERCLA scheme as a foundation, SARA's twin additions are now brought into focus.

SARA's first addition was subsection 9604(c)(1)(C), which gives the EPA the authority to issue what has come to be known as either a "consistency waiver" or "consistency

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[13] Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 121 (2d Cir. 2010).

[14] *See* 40 C.F.R. pt. 300 (2014); *see also* United States v. W.R. Grace & Co., 429 F.3d at 1242-43.

[15] *See* 42 U.S.C. § 9601(23)–(24) (2012).

[16] *See W.R. Grace & Co.*, 429 F.3d at 1241; *see also* New York v. Next Millenium Realty, LLC, 732 F.3d 117, 124-25 (2d Cir. 2013) (noting removal actions "respond to immediate threats to public health" while remedial actions effectuate a more permanent cleanup).

[17] 40 C.F.R. § 300.425(b)(1),(c)1-3 (2014).

[18] United States v. Atl. Res. Corp., 551 U.S. 128, 131-32, 139 (2007) (confirming private parties may pursue section 9607 cost recovery claims in certain procedural circumstances).

[19] *Id.* at 138-39.

exemption," which permits the agency to exceed the statute's default monetary and temporal limitations on Superfund-financed "removal actions."[20] Per SARA, a "removal action[]" must cease after $2 million is obligated for the removal or twelve months elapses from the date removal activities commenced at the site,[21] whereas the original version of CERCLA used the figures of $1 million or six months, respectively.[22] The addition of subsection 9604(c)(1)(C) and the relaxation of both limits on removal actions were a response to the gross impracticalities and cost-inefficiency created by the original statutory constraints on EPA removal actions.[23]

Significantly, only Superfund-financed removal actions, and not those removal actions financed by other parties, are subject to both limitations.[24] The EPA can grant a waiver of

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[20] Pub. L. No. 99-499, § 104, 100 Stat. 1613, 1617-19 (1986); *see also* OFF. OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROT. AGENCY, SUPERFUND REMOVAL GUIDANCE FOR PREPARING ACTION MEMORANDA 6, 29, 32 (2009), http://www.epa.gov/sites/production/files/2014-02/documents/superfund_removal_guide_for_preparing_action_memo.pdf [hereinafter ACTION MEMORANDA GUIDANCE].

[21] 40 C.F.R. § 300.415(b)(5) (2012) (NCP provision).

[22] *Compare* Pub. L. No. 96-510, § 104(c)(1)(B), 94 Stat. 2767, 2775 (1980) ($1 million/six months), *with* 42 U.S.C. § 9604(c)(1)(C) (2010) ($2 million/twelve months). The Conference Report for SARA also explains the change. *See* H.R. REP. NO. 99-962, at 191 (1986) (Conf. Rep.).

[23] *See* H.R. REP. NO. 99-253, pt. 1, at 68 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 1985 WL 25943; 132 CONG. REC. S14895-02 (1986) (statement of Sen. Robert Stafford), 1986 WL 788210. Guidance promulgated by the EPA explains that, coupled with other new provisions, the "consistency exemption" is:

> [I]ntended to promote and enhance efficiency and continuity in the Superfund program as a whole. . . . The "consistency" exemption promotes efficiency by allowing removals to exceed the statutory limits for time and cost when to do so will result in lower overall cleanup cost as well as enhanced protection of public health and the environment.

OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. ENVTL. PROT. AGENCY, DIRECTIVE 9360.0-12A, FINAL GUIDANCE ON IMPLEMENTATION OF THE "CONSISTENCY" EXEMPTION TO THE STATUTORY LIMITS ON REMOVAL ACTIONS 2-3 (1989), https://semspub.epa.gov/work/11/174424.pdf [hereinafter "CONSISTENCY" EXEMPTION GUIDANCE].

[24] Pennsylvania v. Beazer E., Inc., No. 09-1123, 2011 WL 4527356, at *2 (W.D. Pa. Sept. 28, 2011); 42 U.S.C. § 9604(c)(1)(C); 40 C.F.R. § 300.415(b)(5).

either limitation only when "continued response action is otherwise appropriate and consistent with the remedial action to be taken," [25] hence the term "consistency waiver." Consequently, only when a site is on the NPL or proposed to be placed on the NPL, can the EPA grant a "consistency waiver,"[26] as it would be highly suspect if a site did not qualify for a "remedial action" under NCP subsection 300.425(b)(1),[27] yet the EPA deemed the continued removal action "appropriate and consistent with the remedial action to be taken."[28] With the passage of SARA, Congress also sought to address the unanswered question of how long the government (or a private party) has to file suit for cost recovery under section 9607, including those instances where the EPA grants the new "consistency waiver."

SARA's second addition was a statute of limitations for section 9607(a) suits to recover response costs, as Congress recognized one of the headaches that CERCLA was causing the

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[25] 42 U.S.C. § 9604(c)(1)(C); 40 C.F.R. § 300.415(b)(5)(ii).

[26] National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666-01, 8694 (Mar. 8, 1990) (adopting "consistency waiver" rule codified at 40 C.F.R. § 300.415(b)(5)(ii)); *accord* "CONSISTENCY" EXEMPTION GUIDANCE, *supra* note 23, at 4; ACTION MEMORANDA GUIDANCE, *supra* note 20, at 32 n.17.

[27] "Only those releases included on the NPL shall be considered eligible for Fund-financed remedial action." 40 C.F.R. § 300.425(b)(1) (2011).

[28] 42 U.S.C. § 9604(c)(1)(C); 40 C.F.R § 300.415(b)(5)(ii). Despite this statutory and regulatory language, EPA guidance suggests that "consistency waivers" may "rarely" be granted at non-NPL sites on a "case-by-case basis." "CONSISTENCY" EXEMPTION GUIDANCE, *supra* note 23, at 4; *see also* ACTION MEMORANDA GUIDANCE, *supra* note 20, at 32 n.17 ("This exemption is generally only for use at proposed and final NPL sites. The limited situations where use of the exemption is appropriate for non-NPL sites will be determined . . . on a case-by-case basis."). Likewise, when the EPA adopted 40 C.F.R. § 300.415(b)(5)(ii), it commented that it "expects to use the exemption primarily for proposed and final NPL sites, and only rarely for non-NPL sites." National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. at 8694; *see also* National Oil and Hazardous Substances Pollution Contingency Plan, 53 Fed. Reg. 51,394, 51,410 (proposed Dec. 21, 1988) (to be codified at 40 C.F.R. § 300.415(b)(5)(ii)) (explaining use at proposed and final NPL sites only in "rare circumstances" and expounding on such possible circumstances). Nonetheless, evaluation of the propriety of granting a "consistency waiver" at a site that is neither on the NPL nor proposed to be placed on the NPL is beyond the scope of this article.

judiciary in its early years.[29] Prior to SARA's addition of statute of limitations subsection 9613(g)(2), it was often disputed at what point a suit for response costs by the government was time-barred. Unfortunately for potentially liable parties pre-SARA, courts interpreted CERCLA as completely absent any express limitations period for section 9607(a) suits.[30] Parsing the now-superseded limitations language of original section 9612(d), courts invariably found the section applicable only to claims against the trust fund and natural resources damages;[31] one notable example is the holding in *United States v. Mottolo*,[32] which came out of the United States District Court for the District of New Hampshire. In fact, the House Committee on the Judiciary, which added what ended up being the current statute of limitations provision, explicitly cited the *Mottolo* decision in its rationale for adding a statute of limitations to recovery of response costs under section 9607(a).[33]

Current subsections 9613(g)(2)(A)–(B) contain two separate limitations periods governing initial suits for recovery of "removal action" costs, and a different limitations period governing initial suits for recovery of "remedial action" costs.[34] Further, under subsection 9613(g)(2)(B), if a certain condition is met—a condition revealed in the next section as misdrafted—removal action costs can also be recovered in a suit for remedial action costs.[35] The relevant part of subsection 9613(g)(2) reads:

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[29] Pub. L. No. 99-499, § 113, 100 Stat. 1613, 1647 (codified as amended at 42 U.S.C. § 9613(g)(2)).

[30] FOGLEMAN, *supra* note 11, at 235 (citing, among others, United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985)); *accord* H.R. REP. NO. 99-253, pt. 1, at 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 1985 WL 25943.

[31] *E.g.*, United States v. Dickerson, 640 F. Supp. 448, 451 (D. Md. 1986) (citing 42 U.S.C. § 9612(d) (1982), *amended by* 42 U.S.C. § 9612(d) (2010)).

[32] 605 F. Supp. 898.

[33] H.R. REP. NO. 99-253, pt. 3, at 21 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 1985 WL 25941.

[34] 42 U.S.C. § 9613(g)(2)(A)–(B).

[35] *See id.* § 9613(g)(2)(B).

> (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—
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> > (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
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> > (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.

By the terms of subsection 9613(g)(2)(A), the default statute of limitations for an initial suit to recover removal costs is three years after "completion of the removal action" (henceforth referred to as the "completion trigger"),[36] whereas if the EPA grants a "consistency waiver" during the removal, the second clause of subsection 9613(g)(2)(A) prevents the EPA from bringing its initial suit more than six years from the date of the grant.[37] In other words, the "completion trigger" is inapplicable when a "consistency waiver" is granted.[38] In sum, SARA's twins allow the EPA to issue a "consistency waiver" to continue a removal, but then limit the period in which the government can sue to recover the cost of the removal by eliminating the "completion trigger" for the statute of limitations.

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[36] Light, *supra* note 7, at 287 n.282.

[37] *See* United States v. Horne, No. 05-0497-CV-W-NKL, 2006 WL 2506447, at *2 (W.D. Mo. Aug. 29, 2006).

[38] Agere Sys., 602 F.3d at 221 n.28.

II. CERCLA, WE HAVE A PROBLEM

There is a crippling problem with CERCLA's statute of limitations, however. It is the latter clause of subsection 9613(g)(2)(B), which begins with the words "except that." This latter clause allows removal action costs to be recovered in a suit for remedial action costs, so long as the "remedial action is initiated within 3 years after the *completion of the removal action*"; the limitations period is thereby extended for another six years if the condition is fulfilled.[39] The problem is that where: 1) the EPA grants a "consistency waiver," and 2) the removal action is completed more than three years after the waiver was granted, the "completion trigger" in subsection 9613(g)(2)(B) renders the six-year statute of limitations in subsection 9613(g)(2)(A) meaningless if applied exactly as drafted.[40] In other words, removal costs that are time-barred by the six-year limitations period in subsection 9613(g)(2)(A) can be resurrected if "physical on-site construction of the remedial action" is initiated after that six-year limitations period runs, so long as it is within three years after completion of the removal action. Such a possibility is subject to abuse, and does not comport with Congress' implicit intent to allow an extension of the limitations period only when initiation of the remedial action occurs during the same period in which the initial suit for removal costs had to be brought.[41]

The statutory defect is best understood through illustration. Consider the following situation: at the Blackacre Superfund site, 1) the on-site removal action commences on January 1, 2013, 2) twelve months later on January 1, 2014, the required "consistency waiver" is granted to continue the removal action, 3) completion of the removal action occurs on January 1, 2021, 4) initiation of physical on-site construction of the remedial action occurs on January 1, 2024, and 5) the government files its initial suit in 2028. In this illustration, the six-year statute of limitations in subsection 9613(g)(2)(A) ran on January 1, 2020 to recover removal action costs. Yet, under a

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[39] 42 U.S.C. § 9613(g)(2)(B) (emphasis added).

[40] *See* Light, *supra* note 7, at 287 n.282.

[41] *Id.*

literal reading of subsection 9613(g)(2)(B), because the remedial action was initiated on January 1, 2024, which is within three years after the removal action was completed (but four years after the six-year limitations period expired), the government can recover removal costs in a remedial action cost suit until January 1, 2030. Hence, the government circumvented the six-year statute of limitations in subsection 9613(g)(2)(A) by using subsection 9613(g)(2)(B) to gain an additional four years (January 1, 2020 to January 1, 2024) to initiate remedial construction, and in turn, received an additional six years to file its initial suit.

By necessary implication, where a removal action is completed in three or fewer years from the date the "consistency waiver" was granted, the clause is not subject to exploitation. Under such a circumstance, the math is such that the remedial action has to be initiated prior to the expiration of the six-year limitations period of subsection 9613(g)(2)(A) *anyway* in order to lump the removal action costs into the remedial action suit, thereby preventing the nullification of subsection 9613(g)(2)(A). Again, an illustration is helpful. Consider the following situation: at the Whiteacre Superfund site, 1) the on-site removal action commences on January 1, 2013, 2) twelve months later on January 1, 2014, the required "consistency waiver" is granted to continue the removal action, 3) completion of the removal action occurs three years later on January 1, 2017, and 4) initiation of physical on-site construction of the remedial action occurs three years later on January 1, 2020. In this illustration, the six-year statute of limitations ran on January 1, 2020, the same date that the three year period to initiate construction of the remedial action after completion of the removal expired. Hence, no end-run around subsection 9613(g)(2)(B) occurs.

The ability to execute an end-run around subsection 9613(g)(2)(A) surely could not have been intended by Congress. A literal reading of subsection 9613(g)(2)(B) violates the fundamental principle of statutory interpretation requiring a statute to be read in a manner "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy

another."[42] Indeed, the violation removes the leash that prevents the government from embarking on "a lengthy or expensive cleanup" before bringing an initial suit.[43] Likewise, it interferes with Congress' intent "to protect [potentially responsible parties] and the courts from stale claims."[44]

The report issued by the House Committee on the Judiciary further reveals that the basic intent behind allowing removal costs to be recovered in a suit for remedial costs is to avoid "mandat[ing] separate cost recovery actions for removal and remedial action."[45] Admittedly, that excerpt finishes, "so long as they follow each other within a three year time period."[46] Nonetheless, the key conclusion to be drawn from the Judiciary Committee report is that Congress provided the government an avenue to bring a single initial cost recovery claim, so long as it did not lollygag its way to initiation of the remedial action. Therefore, Congress crafted the statute of limitations to incentivize quicker action. It would appear, then, that Congress simply failed to play out the possible mathematical scenarios in its blanket use of a "completion trigger" in the latter clause of subsection 9613(g)(2)(B). In conclusion, because "literal application" of subsection 9613(g)(2)(B) "will produce a result demonstrably at odds with the intentions of its drafters," the subsection's plain language cannot control.[47]

The question, therefore, is the following: to avoid rendering subsection 9613(g)(2)(A) impotent, what is the proper construction of subsection 9613(g)(2)(B) when the EPA grants a subsection 9604(c)(1)(C) "consistency waiver." In other words,

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[42] 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:6, at 231-42 (7th ed. 2007) (citations omitted).
[43] Light, *supra* note 7, at 286.

[44] Jerry L. Anderson, *Removal or Remedial? The Myth of CERCLA's Two-Response System*, 18 COLUM. J. ENVTL. L. 103, 120 (1993). SARA's legislative history expressly explains that the addition of a statute of limitations to CERCLA is intended to ensure timely filing of cost recovery actions, freshness of evidence, and finality for parties. H.R. REP. NO. 99-253, pt. 1, at 79, *reprinted in* 1986 U.S.C.C.A.N. 2835, 1985 WL 25943.
[45] H.R. REP. NO. 99-253, pt. 3, at 21 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 1985 WL 25941.

[46] *Id.*

[47] *See* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989).

when a "consistency waiver" is granted, at what point does the statute of limitations prevent the government from recovering removal action costs in an initial suit for remedial action costs? A statutory construction exists that remains faithful to congressional intent, though it requires courts to perform a little "judicial surgery,"—to borrow a phrase oft used by the Supreme Court of New Jersey, though slightly out of context.[48]

Subsection 9613(g)(2)(B) should be interpreted to allow recovery of removal action costs in a remedial action cost suit if "physical on-site construction of the remedial action" commences within three years after the removal action is completed, but absolutely no more than six years after the date that the "consistency waiver" was granted.[49] Practically speaking, this construction will prevent the EPA from reviving removal action costs that are already time-barred by the six-year limitations period in subsection 9613(g)(2)(A) simply by initiating remedial action construction at some arbitrary point in the future. Hence, this interpretation prevents "completion trigger" from nullifying the six-year "consistency waiver" statute of limitations in subsection 9613(g)(2)(A), "re-leashes" the government, and avoids litigation of stale claims. In fact, this proposed interpretation allows the statute to operate exactly as written in situations where the removal action was completed in three years or fewer from the date that the "consistency waiver" was granted (as in the Whiteacre Superfund site example, *supra*).

To recap, so as not to frustrate the intent of SARA, if the government initiates "physical on-site construction of the remedial action" more than six years after it granted a "consistency waiver" under subsection 9604(c)(1)(C), the removal costs in an initial remedial action suit should always be time-barred.[50] An attempt to the contrary should immediately be red-flagged for a statute of limitations defense and argued accordingly. The proposed statutory construction is equally

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[48] *E.g.*, In re Kimber Petroleum Corp., 539 A.2d 1181, 1188 (N.J. 1988) (operating on the New Jersey Spill Act); *see also* Justice Stewart G. Pollock, Brennan Lecture, *The Art of Judging*, 71 N.Y.U. L. Rev. 591, 599 & n.41 (1996).

[49] *See* Light, *supra* note 7, at 287 n.282.

[50] *See id.*

applicable in claims for contribution, as will be illustrated by the forthcoming discussion of *Agere Systems*. Given this framework, the very latest the statute of limitations will expire to recover removal costs is thirteen years total from the date the removal begins.[51] Inevitably, the mis-drafting of the statute of limitations in SARA will require the judiciary's attention in the appropriate case.

III. THERE CAN [USUALLY] BE ONLY ONE . . . REMOVAL ACTION

Before wading into the *Agere Systems* decision, it is crucial to establish whether there can be more than one removal action, and thus more than one limitations period running, at a single site. When posed the question, appeals and district courts are nearly unanimous in holding that "Congress intended that there generally will be only one removal action."[52] The general rule is based not only on the precise words of the statutory text,[53] but on the principle that statutes of limitations receive liberal construction in favor of the government.[54] Normally, the government favors one limitations period per site so that the completion of a single discrete action during the removal, for example hauling waste drums offsite, does not trigger the clock on the limitations period.[55] Likewise, the running of multiple

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[51] *Id.* This maximum is arrived at by the following calculation: twelve months under subsection 9604(c)(1)(C), plus a maximum of six years under subsection 9613(g)(2)(A), plus a maximum of six years under subsection 9613(g)(2)(B). *Id.*

[52] Kelley v. E.I. DuPont de Nemours & Co., 17 F.3d 836, 843 (6th Cir. 1994); *accord* United States v. W.R. Grace & Co., 429 F.3d 1224, 1231 n.9 (9th Cir. 2005); N.Y. State Elec. & Gas Corp. v. FirstEnergy Corp., 766 F.3d 212, 235 (2d Cir. 2014); Colorado v. Sunoco, Inc., 337 F.3d 1233, 1241 (10th Cir. 2003); Cal. Dep't of Toxic Substances v. Alco Pac., 308 F. Supp. 2d 1124, 1133 (C.D. Cal. 2004); Sherwin-Williams Co. v. ARTRA Group, Inc., 125 F. Supp. 2d 739, 747 (D. Md. 2001); Nutrasweet Co. v. X-L Eng'g Corp., 926 F. Supp. 767, 770 (N.D. Ill. 1996); United States v. R.A. Corbett Transp., Inc., 785 F. Supp. 81, 82 (E.D. Tex. 1990).

[53] *Sunoco*, 337 F.3d at 1241-42.

[54] *E.g.*, United States v. Chromatex, Inc., 832 F. Supp. 900, 902 (M.D. Pa. 1993), *aff'd*, 39 F.3d 1171 (3d Cir. 1994) (unpublished table decision).

[55] *See Kelley*, 17 F.3d at 843.

limitations periods at a single site is confusing and likely to hinder full cost recovery for the government.[56]

Until the Third Circuit's *Agere Systems* decision in 2010—explained *infra* Part IV—there existed only two discernible exceptions to the universally held rule that there can be only one removal action per site. The first and most recognized exception is the district court decision in *United States v. Ambroid Co.*,[57] which is so unique that it is confined purely to the facts of the case. In *Ambroid*, the court held that "[t]he totality of the unusual circumstances involved" at the site required a finding of two separate removal actions to avoid rendering the statute of limitations a "dead letter."[58] Unless very similar circumstances arise at another site, the *Ambroid* exception can be regarded as a one-off outlier in CERCLA statute of limitations jurisprudence. Other courts share this view.[59]

The second exception is embodied by *United States v. Manzo*, where the United States District Court for the District of New Jersey allowed a separate limitations period to attach to each of the site's EPA-designated "operable units."[60] Though the focus of *Manzo* was remedial cost recovery vis-à-vis "operable units," in passing, the court broke the removal action down by "operable unit" as an extension of its division of the remedial action into the same.[61] This division is based on deference to the NCP framework that encourages partition of a

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[56] *See id.*

[57] 34 F. Supp. 2d 86 (D. Mass. 1999).

[58] *Id.* at 88.

[59] *See, e.g.*, Cal. Dep't of Toxic Substances v. Alco Pac., 308 F. Supp. 2d 1124, 1132 (C.D. Cal. 2004). In fact, the principle that there can be only a single removal action was adhered to five years before *Ambroid* by the same court. One Wheeler Rd. Assocs. v. Foxboro Co., 843 F. Supp. 792, 796 (D. Mass. 1994).

[60] *See* 182 F. Supp. 2d 385, 403 n.15 (D.N.J. 2000); *see also* Valbruna Slater Steel Corp. v. Joslyn Mfg. Co., No. 1:10-CV-044 JD, 2013 WL 1182985, at *10-13 (N.D. Ind. Mar. 21, 2013).

[61] *See* 182 F. Supp. 2d at 403 n.15.

single site into separate units to facilitate an efficient cleanup.[62] In turn, where the EPA voluntarily dissects the site into "operable units," it is not caught off-guard by separate limitations periods. Still, it is far from clear whether courts are willing to breathe life into an "operable unit" exception for removals.[63]

Accordingly, the takeaway from existing case law is that there can be only one removal action and one limitations period per site. In circuits where the law is unsettled, however, it is conceivable that a court will accept a separate limitations period at each EPA-designated "operable unit."

IV. *AGERE SYSTEMS*: TWO ERRORS ON THE SAME PLAY

Federal case law addressing the interplay between "consistency waivers" and the statute of limitations is nearly non-existent. As of the date this article was authored, such jurisprudence consists only of the Third Circuit's decision in *Agere Systems*., and an unpublished case out of the Western District of Missouri, *United States v. Horne*. The opinion in *Horne* is essentially useful only for its accurate explanation that the day a "consistency waiver" is granted, the six-year

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[62] *Id.* at 402. The NCP defines an "operable unit" as "a discrete action that comprises an incremental step toward comprehensively addressing site problems," which "manages migration, or eliminates or mitigates a release, threat of a release, or pathway of exposure." 40 C.F.R. § 300.5 (2014). The NCP further explains that division into operable units is based on "the complexity of the problems associated with the site," and, more precisely, can be based on "geographical portions of a site, specific site problems, or initial phases of an action, or may consist of any set of actions performed over time or any actions that are concurrent but located in different parts of a site." *Id.* Moreover, the NCP specifically defines the role of "operable units" in the entire remedial process. *Id.* § 300.430; *see also* United States v. Fort James Operating Co., 313 F. Supp. 2d 902, 907 n.3 (E.D. Wis. 2004). As *Manzo* points out, the legislative history to SARA reveals that Congress recognized that a cleanup can proceed in "distinct and separable phases." H.R. Rep. No. 99-962, at 224 (1986) (Conf. Rep.).

[63] *But see* Bernstein v. Bankert, 733 F.3d 190, 215 (7th Cir. 2013) (citing *Manzo*, 182 F. Supp. 2d 385) (explaining that removal actions "need not be treated as an indivisible whole" for purposes of differentiating section 107 cost recovery and section 113 contribution claims.), *cert. denied*, 134 S. Ct. 1024 (2014).

limitations period to institute an initial removal cost recovery suit is triggered.[64] The only other published "consistency waiver" jurisprudence, *United States v. W.R. Grace & Co.* out of the Ninth Circuit, concerns whether the decision to issue a waiver was "arbitrary and capricious" under Administrative Procedure Act section 706(2).[65] Therefore, the outstanding piece of "consistency waiver" jurisprudence is *Agere Systems*, which, as the forthcoming discussion will demonstrate, improperly divided the removal action in two, but properly prevented nullification of the latter clause of subsection 9613(g)(2)(A).

The story of the site at issue in *Agere Systems*, Boarhead Farms ("Boarhead" or "the site"), is familiar. Years of toxic waste disposal by multiple parties dating back to the 1970s created contamination in need of a cleanup.[66] In 1989, Boarhead was added to the NPL, and shortly thereafter, the EPA conducted several removal action activities.[67] On June 29, 1992, the EPA initiated its removal action in order to first dispose of approximately 2,500 buried drums, and this removal activity lasted until late 1993.[68] After initial funding for the drum removal was approved earlier in the year, on September 4, 1992, the EPA approved total funding of up to $8.1 million, and thus issued a "consistency waiver" so that it could breach the $2

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[64] 2006 WL 2506447, at *6-7. In *Horne*, the court found that EPA actually requested a separate "emergency exemption." *Id.* at *9; *see generally* 42 U.S.C. § 9604(c)(1)(A) (2012) (emergency exemption); 40 C.F.R. § 300.415(b)(5)(i) (2014) (corresponding NCP provision).

[65] *See* 429 F.3d at 1247-49.
[66] *Agere Sys.*, 602 F.3d at 210-11.

[67] *Id.* at 211.

[68] *Id.* *See also* ENVTL. PROT. AGENCY, REG. III, FED. ON-SCENE COORDINATOR'S REPORT FOR BOARHEAD FARMS NPL SITE ii, 12, 15 (1993) [hereinafter OSC REPORT], (on file with author). In short, an "On-Scene Coordinator's Report" such as the one issued for Boarhead Farms, is a report issued periodically by the "On-Scene Coordinator" assigned to a particular contaminated site; it documents the history of actions taken at the site, provides updates on the progression of cleanup, and identifies issues. *See generally* 40 C.F.R. § 300.165 (2014) (explaining required contents of an "OSC report"); United States v. Allied Battery Co., Nos. CV-98-N-0446-S & CV-98-N-2561-S, 2000 WL 34335806, at *9 (N.D. Ala. Jan. 14, 2000) (explaining purpose of OSC reports).

million threshold.[69] Only about $4.3 million was actually expended on the drum removal.[70] After drum removal was completed, removal action activities continued at Boarhead and a Record of Decision (ROD) was issued by the EPA on November 18, 1998, which divided Boarhead up into two operable units, "OU1" and "OU2," for remediation.[71]

After filing its complaint and consent decree for OU1 remedial work a year earlier, on December 6, 2001, the EPA simultaneously filed a complaint under section 9607 against various responsible parties, and a consent decree in district court for OU2.[72] Pursuant to the consent decree and accompanying administrative order, the parties had to do the remedial work for OU2, reimburse the EPA for $7 million worth of past "removal action" costs incurred prior to July 2000, and reimburse EPA for future OU2 costs.[73] The EPA had actually incurred approximately $14 million in removal costs, but settled for the $7 million.[74] Carpenter Technology Corporation ("Carpenter") was not named in either suit by the EPA, although Carpenter did receive an offer from the EPA to resolve its liability but refused to do so.[75] At this point, it is beneficial to pause and take stock of the relevant dates and costs: 1) the EPA granted a "consistency waiver" on September 4, 1992, and filed the OU2 suit on December 6, 2001, 2) the EPA incurred approximately $14 million total in removal costs, 3) $4.3 million of that sum was spent on the drum removal activities, and 4) the parties to the consent decree settled with the EPA for a total of $7 million in removal costs.

Predictably, the settling parties brought both section 9607 cost recovery and section 9613(f) contribution claims

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[69] *Agere Sys.*, 603 F.3d at 221 n.28; *see also* OSC REPORT, *supra* note 67, at 16, A157-67 (Boarhead Farms' "consistency waiver").

[70] *Agere Sys.*, 602 F.3d at 221 n.28.

[71] *Id.* at 211-12.

[72] *Id.* at 212.

[73] *Id.* at 213.

[74] *Id.* at 221 n.28.

[75] *Id.* at 212-13.

against other potentially liable parties, including Carpenter, to recover Boarhead cleanup costs incurred pursuant to the consent decree terms.[76] However, the settling parties had only a subsection 9613(f)(3)(B) contribution claim against Carpenter for past removal costs because they had been sued and resolved their liability to the United States.[77] By the time the bench trial commenced, Carpenter was the only defendant.[78] The district court found Carpenter liable, and its share of total liability to be 80% of costs already incurred at Boarhead, including the $7 million in removal action costs, as well as 80% of all future costs incurred by the plaintiffs.[79]

Carpenter appealed, arguing among other things, that the settling parties were barred from seeking contribution for the $7 million in removal costs because when the EPA filed the OU2 suit on December 6, 2001, the statute of limitations had already run, meaning Carpenter did not share "common liability" with the settling parties.[80] Specifically, Carpenter argued that the EPA filed its OU2 suit on December 6, 2001, more than three years after the "removal action" was completed; Carpenter suggested that the EPA's ROD issuance on November 18, 1998, marked the removal's completion.[81] After first noting that the district court found there to be only one "removal action" at Boarhead, the Third Circuit then explained that it must remand

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[76] *Agere Sys.*, 602 F.3d at 213-14.

[77] *Id.* at 227-29. Thus far, all federal circuit courts of appeals decisions post-*Atlantic Research* have concluded that parties to a consent decree that resolves their liability to the United States are limited to pursuing only contribution actions under section 113(f)(3)(B). Hobart Corp. v. Waste Mgmt. of Ohio, 758 F.3d 757, 768 (6th Cir. 2014) (explaining unanimity of sister circuits and concurring); AVX Corp. v. United States, 518 F. App'x 130, 135 n.3 (4th Cir. 2013) (acknowledging unanimity of sister circuits and implying agreement if it had reached the issue); *see also* Christopher D. Thomas, *Tomorrow's News Today: The Future of Superfund Litigation*, 46 ARIZ. ST. L.J. 537, 548 & n.64 (2014) (explaining rule of law and surveying circuits).

[78] *Agere Sys.*, 602 F.3d at 214.

[79] *Id.* at 215-16.

[80] *Id.* at 219.

[81] *Id.* at 220; *see* 42 U.S.C. § 9613(g)(2)(A) (2012).

because the district court made an equivocal factual finding concerning the dispositive date of the removal action's completion.[82] More precisely, the district court was equivocal about whether the removal ended when the ROD was issued on November 18, 1998, or was continuing as of September 28, 2000—i.e. the December 6, 2001 suit was or was not brought within three years of completion.[83] The panel then explained that even should it be determined that the 1998 date was correct, the suit could have been timely under subsection 9613(g)(2)(B) if the "remedial action" was initiated within three years of the completion of the "removal action."[84] *Agere's* footnote twenty-eight reveals, however, that the date of the removal's completion is irrelevant, and the holding thus wrong.

The Third Circuit's remand allowing plaintiffs to recover the $7 million under either condition runs counter to near-unanimous "single removal action" jurisprudence.[85] Tucked in a footnote, the court, for the first time, discloses that the EPA granted a "consistency waiver" for Boarhead.[86] Initially, the court correctly explained that "the EPA must bring its suit within six years of the grant of a consistency waiver, regardless of when its removal action is completed."[87] However, the court then wrongly deviated by separating, for statute of limitations purposes, the $4.3 million worth of 1992 drum removal activities approved in the "consistency waiver" document from the entire "removal action."[88] For all intents and purposes, this created two removal actions, which directly contradicts the

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[82] *Agere Sys.*, 602 F.3d at 220-21.
[83] *Id.*

[84] *Id.* at 222-23.

[85] Yankee Gas Servs. Co. v. UGI Utils., Inc., 616 F. Supp. 2d 228, 270 (D. Conn. 2009) (citing Colorado v. Sunoco, Inc., 337 F.3d 1233, 1241 (10th Cir. 2003); Kelley v. E.I. DuPont de Nemours & Co., 17 F.3d 836, 844 (6th Cir. 1994)). The Second Circuit noted the contrary holding in *Manzo* and *Ambroid*. N.Y. State Elec. & Gas Corp. v. FirstEnergy Corp., 766 F.3d 212, 235-36 (2d Cir. 2014) (citing 182 F. Supp. 2d at 399-404; 34 F. Supp. 2d at 88).

[86] *Agere Sys.*, 602 F.3d at 221 n.28.

[87] *Id.*

[88] *Id.*

panel's affirmance of the district court's finding that only one removal action took place.[89] More importantly, the creation of two removal actions at a single site runs counter to mainstream jurisprudence.[90] A close reading reveals that this error of law was actually the product of Carpenter's "conce[ssion] that the EPA's 1992 consistency waiver only applied to one specific remedial [sic] action . . . ."[91]

By separating out the drum removal activities based on Carpenter's concession, the panel held that only the $4.3 million was time-barred under the six-year statute of limitations in subsection 9613(g)(2)(A), while the "approximately $10 million" in the EPA's non-drum related removal costs were not time-barred.[92] Therefore, because the EPA settled for $7.4 million, and approximately $10 million was found not to be time-barred by subsection 113(g)(2)(A), the $7.4 million was recoverable by the EPA at the time the OU2 suit was filed, meaning Carpenter indeed shared "common liability" with the plaintiffs.[93] Unfortunately for the undeveloped body of "consistency waiver" jurisprudence, the concession resulted in an improper holding. Instead, all $7.4 million in settled removal costs should have been time-barred six years after the grant of the "consistency waiver" (on Sept. 5, 1998) because not only did the district court find there to be one removal action, existing case law demanded that result. In sum, the concession produced the first piece of bad "consistency waiver" case law.

The Third Circuit then compounded the error by alternatively permitting the plaintiffs to obtain contribution via subsection 9613(g)(2)(B) for the $7.4 million in removal costs if the facts on remand showed that the "remedial action" was

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[89] *Id.* at 220.

[90] *See, e.g.*, *Kelley*, 17 F.3d at 843 (holding only one removal action possible); *Sunoco*, 337 F.3d at 1241 (same).

[91] *Agere Sys.*, 602 F.3d at 221 n.28; *see also* Brief of Appellant Carpenter Technology at 24, *Agere Sys.*, 602 F.3d 204 (No. 09-1814) (conceding this interpretation). The panel clearly meant "removal" and not "remedial" in describing Carpenter's concession.

[92] *Agere Sys.*, 602 F.3d at 221 n.28 (emphasis added) ($14 million total minus $4.3 million equals approximately $10 million).

[93] *Id.*

initiated "within three years after the completion of the removal action."[94] Proceeding on the erroneous proposition that only $4.3 million was time-barred as of September 5, 1998, the panel held that should the district court first find that the date of completion time bars contribution for the remainder of the removal costs under subsection 9613(g)(2)(A), it must then determine whether the EPA initiated the "remedial action" within three years of the completion date; if so, the limitations period would thereby be extended another six years pursuant to subsection 9613(g)(2)(B)—i.e. the suit would be timely.[95] The division of the removal into two resulted in this second avenue for contribution that would not have existed under the general "single removal action" rule.

Despite its error creating an improper premise, the Third Circuit impliedly adopted the interpretation of CERCLA's statute of limitations advocated for in Section II. Whether for lack of argument by the plaintiffs or otherwise, the panel did not entertain the possibility that the time-barred $4.3 million could be recovered under the extended limitations period in subsection 9613(g)(2)(B).[96] In other words, the panel held that once six years passed from the grant of the Boarhead "consistency waiver," the $4.3 million in removal action costs was forever time-barred regardless of when the EPA initiated construction of the remedy. The opposite holding would have rendered meaningless the six-year limitations period in subsection 9613(g)(2)(A), thus inviting government exploitation at the expense of potentially liable parties.[97] Hence, the interpretation of subsection 9613(g)(2)(B) in *Agere Systems* is proper and should be extracted for application in future cost recovery and contribution cases. This useful piece of jurisprudence aside, because all $7.4 million in removal costs should have been barred six years after the waiver was granted, permitting an avenue for contribution for *any* of the removal action costs via subsection 9613(g)(2)(B) was the Third Circuit's second error in the case.

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[94] *Id.* at 222 (footnote omitted); *see* 42 U.S.C. § 9613(g)(2)(B).

[95] *Agere Sys.*, 602 F.3d at 224.

[96] *See id.* at 220-24.

[97] *See* Light, *supra* note 7, at 287 n.282.

V. FINAL TALLY

Inevitably, there will exist a Superfund site where: a "consistency waiver" is issued during the removal action, the initial cost recovery suit is filed more than six years after the date of the waiver grant, and it is argued that removal action costs can be recovered under subsection 9613(g)(2)(B)'s extended limitations period (or a related sequence of events implicating contribution such as that in *Agere Systems*). When a court is confronted with that situation, it must not overlook Congress' drafting error by reimporting the "completion trigger" to nullify subsection 9613(g)(2)(A)'s six-year statute of limitations, and thus contravene congressional intent.[98] Of course, Congress itself could make a quick fix via legislation. But in light of Congress' less-than-breakneck pace of bill passage, courts will need to conduct "judicial surgery" in the meantime. Confronted with the issue, courts should interpret subsection 9613(g)(2)(B) to allow recovery of removal action costs in a remedial action cost suit if "physical on-site construction of the remedial action" commences within three years after the removal action is completed, but absolutely no more than six years after the date that the "consistency waiver" was granted.[99] This thwarts exploitation of a patent loophole, and keeps judicial rewriting to the minimum.

As for *Agere Systems*, courts should regard the Third Circuit's creation of two removal actions at a single site (not delineated by "operable units") as an almost accidental hiccup in statute of limitation jurisprudence. Subsection 9613(g)(2)(A) does not attach its six-year statute of limitations to *only* those removal costs approved in the "consistency waiver" document.[100] Conversely, in light of *Kelley* and its progeny, that limitations period attaches to *all* removal costs because there can be only one removal action. Future courts staring down a "consistency waiver" situation should not hesitate to diverge from *Agere Systems* on this key point. Notably however, even though it proceeded on this faulty initial premise, the Third

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[98] *See* Anderson, *supra* note 44, at 119-20; Light, *supra* note 7, at 286.

[99] Light, *supra* note 7, at 287 n.282.

[100] For an example of a "consistency waiver" document, see OSC REPORT, *supra* note 67, at A157-67, https://loggerhead.epa.gov/arweb/public/pdf/99202.pdf.

Circuit correctly did not permit an end-run around the six-year limitations period in subsection 9613(g)(2)(A). This facet of *Agere Systems* should be followed as a proper and successful "judicial surgery."

Given all of the foregoing, perhaps it should be mandatory "to criticize CERCLA as a hastily passed statute that is far from a paragon of legislative clarity."[101] Still, rather than leaving both courts and practitioners alike "compassless on the trackless wastes of CERCLA,"[102] this article sought to shed light on two problems at their infancy before they blossom into uncontrollable teenagers.

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[101] United States v. W.R. Grace & Co., 429 F.3d 1224, 1238 (9th Cir. 2005).

[102] In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution, 716 F. Supp. 676, 681 n.6 (D. Mass. 1989).