OVERVIEW AND UPDATE OF CERCLA

— prepared for —

BAR ASSOCIATION OF ERIE COUNTY

ENVIRONMENTAL LAW UPDATE 2005

October 22, 2005

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[1] The author would like to thank Elsa J. Schmidt for her assistance in the preparation of these materials.

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CERCLA is a "broad remedial statute" with two general purposes: to facilitate cleanups of hazardous waste sites, and to ensure that those responsible for creating the hazardous conditions pay the costs associated with those cleanups.[2] It seeks to accomplish these purposes through the imposition of strict, joint and several liability, the encouragement of settlement arrangements,[3] and the provision of funding to the state and federal governments for cleanups.[4] As a remedial statute, CERCLA should be construed liberally to give effect to its purposes.[5]

A. Liability (Sections 107(a) and 113(f))

In order to establish the liability of a defendant under CERCLA, a plaintiff must demonstrate that

(1) the site in question is a "facility" as defined in Section 101(9) of CERCLA;
(2) a release or threatened release of a hazardous substance has occurred at the facility;
(3) the defendant is a "responsible person" under Section 107(a) of CERCLA;
(4) the plaintiff has incurred costs in responding to the release or threat of release ("response costs"); and
(5) the response costs that were incurred were not inconsistent with the National Contingency Plan ("NCP"), 40 C.F.R. Part 300.[6]

These elements are identical for the establishment of a *prima facie* case for either cost recovery under CERCLA Section 107(a) or contribution under Section 113(f).[7] Liability under Section 107(a) is strict and joint and several,[8] whereas liability under Section 113(f) is several.[9]

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[2] *State v. Moulds Holding Corp.*, 196 F. Supp. 2d 210, 214 (N.D.N.Y. 2002).

[3] *State v. Moulds Holding Corp.*, 196 F. Supp. 2d 210, 216 (N.D.N.Y. 2002) ("the burden of proving what portion of harm is attributable to defendants under § 113 will fall to [the defendant], instead of the State. That is, however, the price paid by non-settling PRPs in similar situations. It is through this harsh result that courts have attempted to encourage settlement of environmental claims").

[4] *State v. Moulds Holding Corp.*, 196 F. Supp. 2d 210, 214-15 (N.D.N.Y. 2002).

[5] *State v. Moulds Holding Corp.*, 196 F. Supp. 2d 210, 214 (N.D.N.Y. 2002).

[6] *Goodrich Corp. v. Town of Middlesbury*, 311 F.3d 154, 168 (2d Cir. 2002); *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160, 163 (2d Cir. 1999); *Prisco v. A & D Carting Corp.*, 168 F.3d 593, 602-03 (2d Cir. 1999)).

[7] *Buffalo Color Corp. v. AlliedSignal, Inc.*, 139 F. Supp. 2d 409, 415-16 (W.D.N.Y. 2001) ("The elements of an action under Section 113(f)(1) of CERCLA are the same as those under Section 107(a)"); *Solvent Chem. Co. v. E.I. DuPont de Nemours & Co.*, 242 F. Supp. 2d 196, 207 (W.D.N.Y. 2002) ("In order to make out a *prima facie* claim for CERCLA liability, a plaintiff suing under either Section 107(a) or Section 113(f)(1) must establish" those five elements); *Benderson Dev. Co. v. Neumade Prods. Corp.*, No. 98-CV-0241Sr, 2005 U.S. Dist. LEXIS 14943, *33-34 (W.D.N.Y. June 13, 2005) ("To establish entitlement to contribution [under Section 113(f)(3)(B)] as a matter of law, plaintiff must demonstrate" those five elements).

[8] *AMW Materials Testing, Inc. v. Town of Babylon*, 348 F. Supp. 2d 4 (E.D.N.Y. 2004) ("Potentially responsible persons are held strictly liable for cleanup costs incurred by any other person") (citing *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 514 (2d Cir. 1996); *State v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985)); *State v. Moulds Holding Corp.*, 196 F. Supp. 2d 210, 214 (N.D.N.Y. 2002) ("Liability under § 107(a) is joint and several. Thus, should the State be allowed to recover under § 107(a), it would be entitled to recover from [the defendant] all of its response costs incurred"); *United States v. AlliedSignal, Inc.*, No. 3: 97-CV-0436, 2001 U.S. Dist. LEXIS 24664, *6 (N.D.N.Y. Mar. 20, 2001) ("It is settled in this Circuit that liability under CERCLA is joint and several, unless potentially responsible parties can prove that the harm is divisible") (citing *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993)) (internal alterations omitted).

[9] *State v. Moulds Holding Corp.*, 196 F. Supp. 2d 210, 214 (N.D.N.Y. 2002) ("Liability under § 113(f) is several. Each party must pay only for the amount of waste it contributed to the site").

In a liability determination under Section 107(a), the issue of causation (*i.e.*, whose hazardous substances actually came to be located at the site) is irrelevant.[10] In other words, a plaintiff need not establish a direct causal link between a specific defendant's waste and the response costs it has incurred in order to establish the liability of a defendant in an action for cost recovery or contribution under CERCLA.[11] Similarly, "the 'quantity and concentration' of a hazardous substance that has been disposed of or otherwise released 'is not a factor'" in a liability determination.[12]

i. Facility

CERCLA defines a "facility" as

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but [the term "facility"] does not include any consumer product in consumer use or any vessel.[13]

The scope of the term "facility" has been discussed recently in cases where a large parcel of property may actually be comprised of more than one smaller parcels, each of which may be contaminated to greater or lesser degrees than the others. In such a case, the Northern District of New York has stated that

> Separate parcels should be considered as a single facility if they "'cannot be reasonably or naturally divided into multiple parts or functional units.'" . . .

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[10] *Benderson Dev. Co. v. Neumade Prods. Corp.*, No. 98-CV-0241Sr, 2005 U.S. Dist. LEXIS 14943, *35 (W.D.N.Y. June 13, 2005) ("Because CERCLA imposes strict liability, there is no causation requirement"); *Solvent Chem. Co. v. E.I. DuPont de Nemours & Co.*, No. 01-CV-425C(SC), 2005 U.S. Dist. LEXIS 16573, *22 (W.D.N.Y. June 27, 2005) (the issue of causation "is simply not a relevant consideration"); *Elementis Chems., Inc. v. T H Agric. & Nutrition, LLC*, 373 F. Supp. 2d 257, 264 (S.D.N.Y. 2005) ("it is not a defense that the particular hazardous substance attributable to a specific defendant is not linked to the plaintiff's response costs"); *Niagara Mohawk Power Corp. v. Consol. Rail Corp.*, 291 F. Supp. 2d 105, 119 (N.D.N.Y. 2003) ("No showing that 'a specific defendant's waste caused the incurrence of cleanup costs' is required in order to impose strict liability"); *cf. Solvent Chem. Co. v. E.I. DuPont de Nemours & Co.*, No. 01-CV-425C(SC), 2005 U.S. Dist. LEXIS 16573, *22 (June 27, 2005) ("the issue of causation may become a relevant consideration at the apportionment stage of the proceedings"); *Solvent Chem. Co. v. E.I. DuPont de Nemours & Co.*, 242 F. Supp. 2d 196, 214 (W.D.N.Y. 2002) ("Although a plaintiff is not required to plead causation as an element of a claim for contribution under CERCLA, . . . causation still remains an issue with which [a plaintiff] must contend in the allocation stage of the proceedings. If [a defendant] can show, for example, that the hazardous substances that allegedly migrated from its facility to the [site] did not cause any contamination and response costs that could be attributed to it, [that defendant] would have a viable defense") (footnote omitted).

[11] *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 184 (2d Cir. 2003) ("The government is not required to show that a specific defendant's waste caused the incurrence of cleanup costs in order for strict liability to attach to that defendant"); *Solvent Chem. Co. v. E.I. DuPont de Nemours & Co.*, No. 01-CV-425C(SC), 2005 U.S. Dist. LEXIS 16573, *22 (W.D.N.Y. June 27, 2005); *Benderson Dev. Co. v. Neumade Prods. Corp.*, No. 98-CV-0241Sr, 2005 U.S. Dist. LEXIS 14943, *35 (W.D.N.Y. June 13, 2005) ("[I]t is not required that the plaintiff show that a specific defendant's waste caused incurrence of clean-up costs") (internal alterations and quotations omitted).

[12] *Elementis Chems., Inc. v. T H Agric. & Nutrition, LLC*, 373 F. Supp. 2d 257, 264 (S.D.N.Y. 2005); *United States v. 175 Inwood Assocs., LLP*, 330 F. Supp. 2d 213, 222 (E.D.N.Y. 2004) (CERCLA "'on its face applies to "any" hazardous substance, and it does not impose quantitative requirements'") (quoting *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 720 (2d Cir. 1993)); *State v. Moulds Holding Corp.*, 196 F. Supp. 2d 210, 214 (N.D.N.Y. 2002) ("Quantity or concentration is not a factor for the Court to consider").

[13] 42 U.S.C.S. § 9601(9) (Law. Co-op. 2005).

Similarly, where parcels are naturally divisible into parts or functional units, they should not be considered as a single facility.[14]

2. Release or Threatened Release

CERCLA defines a "release" as

> any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant).[15]

The Western District has stated that

> a CERCLA defendant who disposes of a CERCLA hazardous substance that is not independently releasable when the waste is dumped may still be liable under [CERCLA], even if the amount of the CERCLA hazardous substance disposed of is 'minuscule' or 'nominal' as if 'Congress had wanted to distinguish liability on the bases of quantity, it would have so provided.' Nor must independent releasability of the substance, *i.e.*, without the effect of an intervening force, be established. In other words, the mere presence of waste containing any quantity of any CERCLA hazardous substance is sufficient to impose CERCLA liability based on a release or threatened release of a CERCLA hazardous substance requiring response costs.'"[16]

3. Hazardous Substance

CERCLA defines "hazardous substance" by reference to several other federal environmental statutes (*viz.*, the Federal Water Pollution Control Act, the Solid Waste Disposal Act, the Clean Air Act, and the Toxic Substances Control Act).[17] The Western District has stated that

> provided a mixture or waste solution contains any CERCLA hazardous substance, the mixture itself is hazardous for purposes of determining CERCLA liability. Liability under CERCLA depends only on the presence in any form of listed

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[14] *Niagara Mohawk Power Corp. v. Consol. Rail Corp.*, 291 F. Supp. 2d 105, 125 (N.D.N.Y. 2003) (citing *United States v. 150 Acres of Land*, 204 F.3d 698, 709 (6th Cir. 2000) (quoting *United States v. Township of Brighton*, 153 F.3d 307, 313 (6th Cir. 1998))).

[15] 42 U.S.C.S. § 9601(22) (Law. Co-op. 2005).

[16] *Pfohl Bros. Landfill Site Steering Comm. v. Browning-Ferris Indus. of N.Y., Inc.*, No. 95-CV-956A(F), 2004 U.S. Dist. LEXIS 28367, *53-54 (W.D.N.Y. Jan. 30, 2004) (citing *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 515-17 (2d Cir. 1996)) (internal citations omitted); *Goodrich Corp. v. Middlesbury*, 311 F.3d 154, 168 (2d Cir. 2002) ("as we first explained in *Murtha*, 'when a mixture or waste solution contains hazardous substances that mixture is itself hazardous for purposes of determining CERCLA liability ").

[17] 42 U.S.C.S. § 9601(14) (Law. Co-op. 2005).

hazardous substances.[18]

CERCLA specifically excludes petroleum and natural gas from its definition of "hazardous substance":

> 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 . . . this paragraph, and the term does not include natural gas, natural gas liquids, liquified natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).[19]

Accordingly, courts have held that

> 'petroleum' includes hazardous substances normally found in refined petroleum fractions but does not include either hazardous substances found at levels which exceed those normally found in such fractions or substances not normally found in such fractions. Moreover, hazardous substances which are added to petroleum or which increase in concentration solely as a result of contamination of the petroleum during use are not part of the 'petroleum' and thus are not excluded from CERCLA under the exclusion. . . . [S]ome petroleum waste falls outside CERCLA's petroleum exclusion because contaminants present in the wastes are not indigenous to petroleum or refined petroleum products, or are present at elevated levels.[20]

4. Covered Persons (Section 107(a))

Section 107(a) of CERCLA enumerates four classes of parties, often called potentially responsible parties/persons or "PRPs," and provides that they "shall be liable for," among other things, "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"[21] as well as "any other necessary costs of response incurred by any other person consistent with the national contingency plan."[22] The four classes of parties enumerated in Section 107(a) are:

(1) *Current Owners/Operators*: current owners and operators of a facility;
(2) *Former Owners/Operators*: those who owned or operated a facility at the time hazardous substances were disposed of there;
(3) *Arrangers*: those who arranged for the disposal, treatment, or transport for

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[18] *Pfohl Bros. Landfill Site Steering Comm. v. Browning-Ferris Indus. of N.Y., Inc.*, No. 95-CV-956A(F), 2004 U.S. Dist. LEXIS 28367, *53-54 (W.D.N.Y. Jan. 30, 2004) (citing *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 515-16 (2d Cir. 1996)) (internal citations and quotations omitted).

[19] 42 U.S.C.S. § 9601(14) (Law. Co-op. 2005).

[20] *Aces & Eights Realty, LLC v. Hartman*, No. 02-CV-6032 CJS, 2002 U.S. Dist. LEXIS 22647, *21-22 (W.D.N.Y. Oct. 21, 2003) (internal citations and emphases omitted).

[21] 42 U.S.C.S. § 9607(a)(4)(A) (Law. Co-op. 2005).

[22] 42 U.S.C.S. § 9607(a)(4)(B) (Law. Co-op. 2005).

disposal or treatment of hazardous substances at a facility; and

(4) *Transporters*: those who accepted hazardous substances for transport to a site chosen by themselves.

The Second Circuit recently stated that the terms "potentially responsible person" and "PRP," which do not appear anywhere in the text of either Section 107 or 113(f) of CERCLA, strike the Court as "vague and imprecise because, when no action has been filed nor fact-finding conducted, *any* person is *conceivably* a responsible party under CERCLA."[23] The Court further stated that such terms "may be read to confer on a party that has not been held liable a legal status that it should not bear," and suggested an alternative designation, which it believed to be more precise: "a party that, if sued, would be held liable under Section 107(a)."[24]

a. The Current Owner/Operator (Section 107(a)(1))

"A party's status as a present owner and operator is determined at the time a claim accrues, when there is a release or threat of release and costs are incurred."[25] "Second Circuit case law appears to indicate that being a present owner *or* operator is sufficient for § 107(a) liability; both owning *and* operating a facility is not necessary."[26] "It is well settled . . . that owner and operator liability should be treated separately."[27]

Owner and operator liability are strict and those classes are fairly inclusive. For example, it remains good law in the Second Circuit that "an individual may be held liable as an 'owner or operator' even if he did not actively participate in the management of the site or contribute to the release of the hazardous substances."[28] Owner and operator liability may be extended to government entities, but the government's mere regulatory oversight is insufficient to accord the government operator status.[29]

The Supreme Court has stated that "[u]nder CERCLA, an operator is simply someone

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[23] *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, No. 04-CV-2409, 2005 U.S. App. LEXIS 19477, *18 n.8 (2d Cir. Sept. 9, 2005).

[24] *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, No. 04-CV-2409, 2005 U.S. App. LEXIS 19477, *18 n.8 (2d Cir. Sept. 9, 2005).

[25] *Elementis Chems., Inc. v. T H Agric. & Nutrition, LLC*, 373 F. Supp. 2d 257, 268-69 (S.D.N.Y. 2005).

[26] *Elementis Chems., Inc. v. T H Agric. & Nutrition, LLC*, 373 F. Supp. 2d 257, 268 n.8 (S.D.N.Y. 2005).

[27] *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 328 (2d. Cir), *cert. denied*, 531 U.S. 979 (2000) (cited in *State v. Westwood-Squibb Pharm. Co.*, No. 90-CV-1324C, 2004 U.S. Dist. LEXIS 13841, *80 (W.D.N.Y. May 25, 2004)).

[28] *See United States v. 175 Inwood Assocs., LLP*, 330 F. Supp. 2d 213, 222-223 (E.D.N.Y. 2004) (citing *State v. Shore Realty Corp.*, 759 F.2d 1032, 1044-45 (2d Cir. 1985)).

[29] *AMW Materials Testing, Inc. v. Town of Babylon*, 348 F. Supp. 2d 4, 13 (E.D.N.Y. 2004) ("The actions of a Government entity at a site may give rise to operator liability. 'CERCLA expressly includes municipalities, states, and other political subdivisions within its definition of persons who can incur such liability under § 9607.' State and local governments are held to the strict liability standard in the same manner as any other potentially responsible party. However, if the Government has acquired ownership or control of the facility involuntarily, as a result of its sovereign function, or the entity was responding to an emergency caused by the release of hazardous substances from a facility owned by another party, the State or local government is only liable for gross negligence or willful misconduct").

who directs the working of, manages, or conducts the affairs of a facility."[30] "An operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."[31] "Any person who operates a polluting facility is directly liable for the costs of cleaning up the pollution."[32] "It is well-settled that both current operators of a facility and operators at the time of release are responsible parties regardless of who caused the release of hazardous substances."[33]

b. The Prior Owner/Operator (Section 107(a)(2))

Section 107(a)(2) imposes liability upon "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."[34]

Courts have paid considerable attention to the definition of "disposal," especially in cases involving the gradual underground spreading of contaminants which is often referred to as "passive migration." By reference to RCRA's definition of disposal, Section 101 of CERCLA defines the term "disposal" as

> the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste may enter the environment or be emitted into the air or discharged into any waters, including ground waters.[35]

The Second Circuit has determined that passive migration of contaminated runoff across a property line, so long as it does not pass into or out of a containment,[36] does not constitute 'disposal' for the purpose of imposing CERCLA liability[37] because acts of discharge, deposit, injection, dumping, spilling, and placing (*i.e.*, all kinds of "disposal" except leaking) are all set in motion by human agency.[38] "If a person merely controlled a site on which hazardous chemicals have spread without that person's fault, that person is not a polluter and is not one upon whom

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[30] *See Consol. Edison Co. of NY, Inc. v. UGI Utils., Inc.*, 310 F. Supp. 2d 592, 603 (S.D.N.Y. 2004) (citing *United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998)), *rev'd in part on other grounds*, No. 04-CV-2409, 2005 U.S. App. LEXIS 19477 (2d Cir. Sept. 9, 2005).

[31] *AMW Materials Testing, Inc. v. Town of Babylon*, 348 F. Supp. 2d 4, (E.D.N.Y. 2004) (quoting *United States v. Bestfoods*, 524 U.S. 51, 65 (1998)).

[32] *AMW Materials Testing, Inc. v. Town of Babylon*, 348 F. Supp. 2d 4, (E.D.N.Y. 2004) (quoting *United States v. Bestfoods*, 524 U.S. 51, 65 (1998)).

[33] *AMW Materials Testing, Inc. v. Town of Babylon*, 348 F. Supp. 2d 4, (E.D.N.Y. 2004) (citing *State v. Nat'l Servs. Indus., Inc.*, 352 F.3d 682, 684 (2d Cir. 2003)).

[34] 42 U.S.C.S. § 9607(a)(2) (Law. Co-op. 2005).

[35] 42 U.S.C.S. § 9601(29) (Law. Co-op. 2005); 42 U.S.C.S. § 6903(3) (Law. Co-op. 2005).

[36] A property line itself is not a containment, and the passive flow over and through land is not a leakage. *Niagara Mohawk Power Corp. v. Jones Chem., Inc.*, 315 F.3d 171, 178-79 (2d Cir. 2003).

[37] *Niagara Mohawk Power Corp. v. Jones Chem., Inc.*, 315 F.3d 171, 178 (2d Cir. 2003); *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351 (2d Cir. 1997); *Solvent Chem. Co. v. E.I. DuPont de Nemours & Co.*, No. 01-CV-425C(Sc), 2005 U.S. Dist. LEXIS 16573, *20-21 (W.D.N.Y. June 27, 2005).

[38] *Niagara Mohawk Power Corp. v. Jones Chem., Inc.*, 315 F.3d 171, 178 (2d Cir. 2003).

CERCLA aims to impose liability."[39] The Second Circuit left open the possibility that leaking of a hazardous substance into or out of a containment may constitute a sort of "disposal" by passive migration.[40]

c. The Arranger (Section 107(a)(3))

"Arranger liability may be exemplified by whether the party assumed responsibility for determining the waste's fate."[41] For the purposes of CERCLA "arranger liability," "there must be some nexus between the [PRP] and the disposal, but this does not necessarily mean that arranger liability cannot attach to parties that do not have active involvement regarding the timing, manner or location of disposal."[42] "Thus, the rule governing arranger liability in this circuit is, 'if a party merely sells a product, without additional evidence that the transaction includes an "arrangement" for the ultimate disposal of a hazardous substance, CERCLA liability will not be imposed.'"[43] In determinations of whether an "arrangement" for disposal of a hazardous substance exists, courts have assessed the nature of the transactions between the parties; specifically,

> [1] the party's knowledge of and control over the disposal, ownership of the hazardous substance at the time of disposal, and the intent of the party; [2] the purpose and inevitable consequences of the transaction and whether the product had value on the market; [3] whether the substance had a productive use or was more properly characterized as waste to be gotten rid of; [4] whether the substance was manufactured as a principal business product or a by-product, and whether, before or after the transaction in issue, the seller disposed of the substance as waste; and [5] whether an already used product which has further usefulness is being sold for the same use for which it was manufactured.[44]

Similarly, courts consider

> the intent of the parties to the contract as to whether the materials were to be reused entirely or reclaimed and then reused, the value of the materials sold, the usefulness of the materials in the condition in which they were sold, and the state of the product at the time of transferal [*i.e.*, whether the hazardous material was contained or

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[39] *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 113 (E.D.N.Y. 2001) (quoting *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 358-59 (2d Cir. 1997)); *but see Niagara Mohawk Power Corp. v. Consol. Rail Corp.*, 291 F. Supp. 2d 105, 125-26, 131 (N.D.N.Y. 2003) (citing *City of Portland v. Boeing Co.*, 179 F. Supp. 2d 1990, 1201 (D. Or. 2001) ("The fact that Plaintiff owns property contaminated by other sources does not make it a liable party") but stating that "[w]hile it may seem inequitable to assign strict liability to an owner of land (even if such owner did not dispose of hazardous waste) upon which, along with other parcels of land, a previous owner operated a facility that created large amounts of hazardous waste and who disposed of the waste upon other portions of the facility, that is exactly how CERCLA is designed").

[40] *Niagara Mohawk Power Corp. v. Jones Chem., Inc.*, 315 F.3d 171, 178 (2d Cir. 2003).

[41] *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 111 (E.D.N.Y. 2001) (internal quotations omitted).

[42] *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 111 (E.D.N.Y. 2001) (internal quotations omitted).

[43] *State v. Solvent Chem. Co.*, 218 F. Supp. 2d 319, 337 (W.D.N.Y. 2002).

[44] *State v. Solvent Chem. Co.*, 218 F. Supp. 2d 319, 337 (W.D.N.Y. 2002) (quoting *United States v. Am. Cyanamid Co.*, No. 2:93-CV-0654, 1997 U.S. Dist. LEXIS 4413, *16-17 (S.D. W.Va., 1997)).

leaking/loose].[45]

d. The Transporter (Section 107(a)(4))

In *Pfohl Bros. Landfill Site Steering Comm. v. Browning-Ferris Indus. of N.Y., Inc.*,[46] the Western District stated that

> CERCLA provides for the imposition of CERCLA liability only on those transporters who 'selected' the site into which the CERCLA hazardous substances were deposited. Although CERCLA does not define the word 'selected,' the Second Circuit has held that a 'transporter is properly liable under the Act when it ultimately selects the disposal facility or when its active participation in the decision amounted to 'substantial input into which facility was ultimately chosen.' . . . The Second Circuit continued
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> > this view accords with the Act's language and purpose. First, a transporter can be said to select a facility or site when it helps the generator choose a disposal facility by recommending a facility or set of facilities. Second, a transporter who plays an active role in choosing the disposal facility is obviously more culpable and responsible for the resultant harm than a transporter who simply does the bidding of a given generator; the latter has a more attenuated connection to the harm. An 'active participation' standard recognizes the often significant role played by transporters in choosing the disposal site.[47]

5. Necessary Costs of Response

A response is only "necessary" within the meaning of CERCLA if "it addresses a threat to human health or the environment posed by a hazardous substance."[48] The word "necessary" refers more to the actions undertaken than the costs incurred; *i.e.*, it is the actions which have resulted in the costs, and not the costs themselves, which must be "necessary."[49] Recently in the Second Circuit, discussions about the necessity of response costs have centered on attorneys'

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[45] *State v. Solvent Chem. Co.*, 218 F. Supp. 2d 319, 337 (W.D.N.Y. 2002) (quoting *Pneumo Abex Corp. v. High Point*, 142 F.3d 769, 775 (4th Cir. 1998)).

[46] *Pfohl Bros. Landfill Site Steering Comm. v. Browning-Ferris Indus. of N.Y., Inc.*, No. 95-CV-956A(F), 2004 U.S. Dist. LEXIS 28367 (W.D.N.Y. Jan. 30, 2004)

[47] *Pfohl Bros. Landfill Site Steering Comm. v. Browning-Ferris Indus. of N.Y., Inc.*, No. 95-CV-956A(F), 2004 U.S. Dist. LEXIS 28367, *60-63 (W.D.N.Y. Jan. 30, 2004) (quoting *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 521 (2d Cir. 1996)).

[48] *Syms v. Olin Corp.*, 408 F.3d 95, 103 (2d Cir. 2005); *Fairchild Holding Corp. v. Revere Copper & Brass, Inc.*, 291 B.R. 29, 32 (S.D.N.Y. 2003) ("Costs are 'necessary' only if incurred in response to a threat to the public health or the environment") (citing *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 669-70 (5th Cir. 1989)).

[49] *United States v. E.I. DuPont de Nemours & Co.*, 341 F. Supp. 2d 215, 243 (W.D.N.Y. 2004) (stating that the definitions of "removal" and "remedial" "reference *actions* that may be necessary to respond to a hazardous waste site. There is no express or implied requirement that particular *costs* be necessary").

fees, property damages, arbitrary and capricious administrative remedies, and/or private health monitoring.

As a general rule, the term "necessary costs of response" in the CERCLA context does not include attorneys' fees incurred solely in preparation for litigation or settlement, but may include attorneys' fees that "'significantly benefitted the entire cleanup effort and served a statutory purpose apart from the reallocation of costs.'"[50] For example, payments to attorneys for efforts associated with identifying other PRPs may be recoverable, because "tracking down other polluters benefits overall clean-up efforts in a way that litigation to apportion costs does not."[51] Legal negotiations for site access have failed to qualify as necessary response costs where the counsel was "primarily protecting [the PRP's] interests as a defendant in the proceedings that established the extent of its liability."[52] However, the distinction between litigation and non-litigation costs does not apply to claims for enforcement costs by the federal government; those enforcement costs are recoverable under CERCLA.[53]

Similarly, costs "incurred to repair damage caused by clean-up crews are not usually recoverable under CERCLA" because they are not deemed "necessary."[54] If the clean-up is finished, the threat to human health or the environment requisite to a finding that costs are "necessary" under CERCLA has abated, and any "repair of damage caused during clean-up of contamination gives rise to an ordinary tort action [for property damage], not a cost recovery action under CERCLA."[55]

The Southern District has stated that "costs incurred to implement an 'arbitrary and capricious' administrative remedy may not be recovered under CERCLA."[56]

The Second Circuit has explained that to "monitor," as that term is used in CERCLA's

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[50] *Goodrich Corp. v. Town of Middlesbury*, 311 F.3d 154, 174 (2d Cir. 2002); *Key Tronic Corp. v. United States*, 511 U.S. 809, 820 (1994).

[51] *Key Tronic Corp. v. United States*, 511 U.S. 809, 820 (1994); *cf. Syms v. Olin Corp.*, 408 F.3d 95, 104 (2d Cir. 2005) ("the government was already aware of [the PRP identified by the plaintiff], and there is no evidence in the record that [Plaintiff's] duplicative identification . . . significantly benefited the overall clean-up effort); *see also Solvent Chem. Co. v. E.I. DuPont de Nemours & Co.*, 242 F. Supp. 2d 196, 211 (W.D.N.Y. 2002) (stating that not "all payments that happen to be made to a lawyer are unrecoverable expenses under CERCLA. On the contrary, some lawyers' work that is closely tied to the actual cleanup may constitute a necessary cost of response in and of itself under the terms of § 107(a)(4)(B)"); *In re Town of Amenia*, 200 F.R.D. 200, 203 (S.D.N.Y. 2001) ("Attorneys' fees are not 'necessary costs of response' within the meaning of CERCLA . . . Although costs associated with identifying other potentially responsible parties are recoverable under CERCLA, it would be premature to bring such a suit . . . when that identification is still proceeding and when the clean-up costs . . . have not even begun to be established").

[52] *Key Tronic Corp. v. United States*, 511 U.S. 809, 820 (1994); *Syms v. Olin Corp.*, 408 F.3d 95, 104 (2d Cir. 2005) (quoting *Key Tronic*).

[53] *United States v. E.I. DuPont de Nemours & Co.*, 341 F. Supp. 2d 215 (W.D.N.Y. 2004) ("In sum, this Court finds that *Betkoski* stands for the proposition that the *Key Tronic* distinction between the recoverability of litigation and non-litigation costs does not apply to claims for enforcement costs brought by the federal government. As such, the DOJ's enforcement costs incurred in connection with Necco Park litigation are recoverable under CERCLA") (citing *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 528 (2d Cir. 1996) (holding that "the government's recoverable response costs properly include not only the obvious costs of remediation, but also include, *inter alia*, attorneys' fees, indirect administrative costs, studies conducted for remediation, and even prejudgment interest")).

[54] *Syms v. Olin Corp.*, 408 F.3d 95, 103 (2d Cir. 2005) (citing *Bello v. Barden Corp.*, 180 F. Supp. 2d 300, 309 (D. Conn. 2002)).

[55] *Syms v. Olin Corp.*, 408 F.3d 95, 103-04 (2d Cir. 2005).

[56] *Fairchild Holding Corp. v. Revere Copper & Brass, Inc.*, 291 B.R. 29, 32 (S.D.N.Y. 2003) (citing *Wash. State Dep't of Transp. v. Wash. Natural Gas Co., Pacificorp*, 59 F.3d 793, 802 (9th Cir. 1995); *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 904-06 (5th Cir. 1993)).

definition of "removal,"[57] means to monitor "as necessary to prevent contact with hazardous substances, not . . . to detect future disease based on prior exposure to hazardous substances," and therefore the "private monitoring of an individual's health is not a valid response cost under CERCLA."[58]

6. Compliance with the National Contingency Plan

The NCP, found at 40 C.F.R. Part 300, "guides federal and state response activities and provides the organizational structure and procedure for preparing for and responding to releases of hazardous substances. . . . It also identifies methods for investigating the environmental and health problems resulting from a release or threatened release and criteria for determining the appropriate extent of response activities."[59] "[C]onsistency with the NCP is a peculiarly fact intensive question that can normally only be determined at trial, or at least after a full pretrial record has been prepared."[60] "When resolving allegations of inconsistency with the [NCP], courts look to the version of the NCP that was in effect at the time the [party] took the response action at issue."[61]

Even if a particular response action selected is unavailable under CERCLA, it is not necessarily inconsistent with the NCP.[62]

Where a state is seeking recovery of response costs under Section 107(a), consistency with the NCP is presumed, and the burden shifts to the defendant to show inconsistency by demonstrating that the plaintiff acted in an arbitrary and capricious manner in choosing the particular response action. "Courts apply the arbitrary and capricious standard of review because determining the appropriate removal and remedial action involves specialized knowledge and expertise, and therefore the choice of a particular cleanup method is a matter within the discretion of the DEC."[63]

Where a private party is seeking recovery of response costs under Section 107(a), consistency with the NCP depends on whether "the action, when evaluated as a whole, is in substantial compliance with the applicable requirements in [40 C.F.R. § 300.700(c)(5) & (6),

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[57] *see* 42 U.S.C.S. § 9601(23) (Law. Co-op. 2005) (definition of "removal" includes "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")

[58] *Syms v. Olin Corp.*, 408 F.3d 95, 105 (2d Cir. 2005) (citing *Price v. United States Navy*, 39 F.3d 1011, 1015-17 (9th Cir. 1994); *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1537 (10th Cir. 1992)).

[59] *State v. Green*, No. 01-CV-196A, 2004 U.S. Dist. LEXIS 11624, *23 (W.D.N.Y. June 18, 2004) (internal quotations and alterations omitted).

[60] *Buffalo Color Corp. v. AlliedSignal, Inc.*, 139 F. Supp. 2d 409, 418 (W.D.N.Y. 2001).

[61] *United States v. E.I. DuPont de Nemours & Co.*, 341 F. Supp. 2d 215, 233 (W.D.N.Y. 2004).

[62] *United States v. E.I. DuPont de Nemours & Co.*, 341 F. Supp. 2d 215, 236 (W.D.N.Y. 2004) ("while the particular response action selected by EPA in this case [use of RCRA response authority] may have been *unavailable* under CERCLA, that does not mean that it was necessarily *inconsistent* with the NCP").

[63] *State v. Green*, No. 01-CV-196A, 2004 U.S. Dist. LEXIS 11624, *24 (W.D.N.Y. June 18, 2004) (internal quotations omitted).

setting forth provisions potentially applicable to private party response actions], and results in a CERCLA-quality cleanup."[64]

The NCP requires, among other things, procedures that provide an opportunity for public comment. The Second Circuit has said that "where a state agency responsible for overseeing remediation of hazardous wastes gives comprehensive input, and the private parties involved act pursuant to those instructions, the state participation may fulfill the public participation requirement."[65]

B. Divisibility of Harm

"Although joint and several liability is generally imposed in CERCLA cases, it is not mandatory,[66] and there is an exception which may be made based upon the common law doctrine of divisibility of harm.[67] If a PRP can prove divisibility, it will avoid joint and several liability and will be held liable only for that harm which the court finds was caused by that PRP.[68] "A defendant advancing a divisibility defense under CERCLA must prove either (1) that there are distinct harms or (2) that there is a reasonable basis for determining the contribution of each cause to a single harm (a so-called 'divisible harm')."[69] The defendant bears this substantial burden.[70] "CERCLA's joint and several liability rule is tough on defendants because Congress had well in mind that persons who dump or store hazardous waste sometimes cannot be located or may be deceased or judgement-proof."[71]

The inquiry as to divisibility of harm under Section 107(a) is guided by principles of causation alone, without regard for equitable considerations.[72] Specifically,

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[64] 40 C.F.R. § 300.700(c)(3).

[65] *Bedford Affiliates v. Sills*, 156 F.3d 416, 428 (2d Cir. 1998) (quoted in *Benderson Dev. Co. v. Neumade Prods. Corp.*, No. 98-CV-0241Sr, 2005 U.S. Dist. LEXIS 14943, *41-42 (W.D.N.Y. June 13, 2005) (finding involvement of DEC representative sufficient to satisfy the public participation guidelines of the NCP)).

[66] *United States v. Agway, Inc.*, 193 F. Supp. 2d 545, 547 (N.D.N.Y. 2002) (citing *United States v. Broderick Inv. Co.*, 862 F. Supp. 272, 276 (D. Colo. 1994)).

[67] *United States v. Agway, Inc.*, 193 F. Supp. 2d 545, 547 (N.D.N.Y. 2002) (citing *United States v. Broderick Inv. Co.*, 862 F. Supp. 272, 276 (D. Colo. 1994)); *see also United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 184 (2d Cir. 2003) ("courts have added a 'common law gloss' to the statutory framework of CERCLA").

[68] *Goodrich Corp. v. Middlesbury*, 311 F.3d 154, 170 (2d Cir. 2002) ("Upon such a showing, the party will be held liable only for the harm the court finds it caused").

[69] *United States v. Agway, Inc.*, 193 F. Supp. 2d 545, 548 (N.D.N.Y. 2002); *see also United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 184 (2d Cir. 2003) (Defendant "bears the ultimate burden of establishing a reasonable basis for apportioning liability and . . . the government has no burden of proof with respect to what caused the release of hazardous waste and triggered response costs").

[70] *Niagara Mohawk Power Corp. v. Consol. Rail Corp.*, 291 F. Supp. 2d 105, 119 (N.D.N.Y. 2003) ("The defendant bears the burden of establishing divisibility of harm"); *United States v. Agway, Inc.*, 193 F. Supp. 2d 545, 548 (N.D.N.Y. 2002) (a "defendant asserting a divisibility defense has the burden of proof as to that defense, and its burden is substantial") (internal quotations omitted); *United States v. AlliedSignal, Inc.*, No. 3: 97-CV-0436, 2001 U.S. Dist. LEXIS 24664, *12 (N.D.N.Y. Mar. 20, 2001) ("Alliedsignal faces a substantial burden in proving that there is a reasonable basis on which to apportion the harm at the [site]") (citing *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 269 (3d Cir. 1992)).

[71] *United States v. Agway, Inc.*, 193 F. Supp. 2d 545, 548 (N.D.N.Y. 2002) (internal quotations omitted).

[72] *Goodrich Corp. v. Middlesbury*, 311 F.3d 154, 170 (2d Cir. 2002) ("unlike allocation of response costs under § 113(f), § 107(a)'s 'divisibility of harm inquiry . . . is guided not by equity . . . but by principles of causation alone'").

> [t]o determine whether joint and several liability is appropriate under the circumstances, courts rely upon common law principles and in doing so have turned to the Restatement (Second) of Torts for guidance. . . . Section 433A of the Restatement provides that
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> > (1) Damages for harm are to be apportioned among two or more causes where (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm. (2) Damages for any other harm cannot be apportioned among two or more causes.
>
> Similarly, Section 881 of the Restatement sets forth the affirmative defense based upon the divisibility of harm rule in Section 433A:
>
> > If two or more persons, acting independently, tortiously cause distinct harms or a single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused.[73]

For example, a defendant may show that the harm is capable of being divided among its various causes by presenting evidence of relative toxicity, migratory potential, degree of migration, or 'synergistic capacities' of the hazardous substances at issue.[74] Single harms may be "treated as divisible in terms of degree, based on the relative quantities of waste discharged. Divisibility of this type may be provable even where wastes have become cross-contaminated and commingled, for 'commingling is not synonymous with indivisible harm.'"[75]

In a CERCLA divisibility-of-harm inquiry, it is necessary to consider the totality of the effects of a hazardous substance in terms of cumulative impacts. For example, in *United States v. Alcan Aluminum Corporation,*[76] the Second Circuit found that Alcan

> did not satisfy its substantial burden with respect to divisibility because it failed to address the totality of the impact of its waste at each of the sites; it ignored the likelihood that the cumulative impact of its waste emulsion exceeded the impact of the emulsion's constituents considered individually, and neglected to account for the emulsion's chemical and physical interaction with other hazardous substances already at the site.[77]

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[73] *United States v. Agway, Inc.*, 193 F. Supp. 2d 545, 548 & n.5 (N.D.N.Y. 2002); *see also United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 185 (2d Cir. 2003) (discussing Restatement (Second) of Torts § 433A).

[74] *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 185 (2d Cir. 2003); *United States v. Agway, Inc.*, 193 F. Supp. 2d 545, 548 (N.D.N.Y. 2002).

[75] *United States v. Agway, Inc.*, 193 F. Supp. 2d 545, 548-49 (N.D.N.Y. 2002) (internal quotations omitted).

[76] *United States v. Alcan Aluminum Corp.*, 315 F.3d 179 (2d Cir. 2003)

[77] *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 187 (2d Cir. 2003).

C. Affirmative Defenses (Section 107(b))

"A strong majority of courts have held that liability under CERCLA [Section 107(a)] is subject only to the affirmative defenses enumerated" in Section 107(b).[78] "Once a plaintiff makes a prima facie showing, a defendant may avoid liability only if it establishes by a preponderance of the evidence that the release or threatened release was caused by an act of God, an act of war, certain acts or omissions of third parties other than those with whom the defendant has a contractual relationship, or a combination of these reasons."[79] "In essence, an affirmative defense under § 107(b) requires the defendant to establish that neither he nor anyone with whom he had a significant contractual or agency relationship had anything to do with causing the release of hazardous substances in question."[80] If the plaintiff can establish each of the prima facie elements on undisputed facts, and the defendant is unable to demonstrate by a preponderance of the evidence that an affirmative defense applies, summary judgment on liability is appropriate."[81]

Section 107(b)(3) provides the "third-party action" defense. To avail itself of the third-party action defense, a defendant must show that it (1) exercised due care with respect to all hazardous substances concerned under all relevant circumstances, and (2) took precautions against foreseeable acts or omissions of third persons and all reasonably foreseeable consequences.[82] The third-party action defense excludes from its application an owner who did not cause contamination but who was in a contractual relationship with a person who contributed to the contamination where, at least in the Second Circuit, that contribution was related to the contractual relationship. This is often referred to as the "contractual relationship exclusion." A "contractual relationship" may include "instruments transferring title or possession."[83] The Second Circuit currently uses a test from *Westwood Pharms., Inc. v. Nat'l Fuel Gas Distrib.*

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[78] *Buffalo Color Corp. v. AlliedSignal, Inc.*, 139 F. Supp. 2d 409, 426 (W.D.N.Y. 2001) (quoting *Thaler v. PRB Metal Prods., Inc.*, 815 F. Supp. 99, 101 (E.D.N.Y. 1993) (citing cases)); *see also United States v. 175 Inwood Assocs. LLP*, 330 F. Supp. 2d 213 (E.D.N.Y. 2004) ("Courts have opined that affirmative defenses beyond those explicitly set forth in [Section] 107(b) are barred. . . . Other courts have indicated that certain unenumerated affirmative defenses are available to CERCLA defendants") (citations omitted).

[79] *Benderson Dev. Co. v. Neumade Prods. Corp.*, No. 98-CV-0241Sr, 2005 U.S. Dist. LEXIS 14943, *35 (W.D.N.Y. June 13, 2005) (citing 42 U.S.C. § 9607(b)); *State v. Green*, No. 01-CV-196A, 2004 U.S. Dist. LEXIS 11624, *26 (W.D.N.Y. June 18, 2004) ("these affirmative defenses are only available if the defendants can show that the 'release or threat of release of a hazardous substance and the damage resulting therefrom were caused *solely* by" the act of god, act of war, or third party action) (emphasis in original); *Elementis Chems., Inc. v. T H Agric. & Nutrition, LLC*, 373 F. Supp. 2d 257, 264 (S.D.N.Y. 2005) ("Once a defendant is established to be within a § 107(a) category and the other four requirements are met, the only exception to CERCLA's strict-liability rule is the affirmative defense laid out in section 107(b)").

[80] *Elementis Chems., Inc. v. T H Agric. & Nutrition, LLC*, 373 F. Supp. 2d 257, 265 (S.D.N.Y. 2005).

[81] *Benderson Dev. Co. v. Neumade Prods. Corp.*, No. 98-CV-0241Sr, 2005 U.S. Dist. LEXIS 14943, *35 (W.D.N.Y. June 13, 2005) (citing *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721 (2d Cir. 1993)).

[82] *State v. Green*, No. 01-CV-196A, 2004 U.S. Dist. LEXIS 11624, *26 (W.D.N.Y. June 18, 2004); *accord Niagara Mohawk Power Corp. v. Consol. Rail Corp.*, 291 F. Supp. 2d 105, 119 (N.D.N.Y. 2003).

[83] 42 U.S.C.S. § 9601(35)(A) (Law. Co-op. 2005); *see also* Jeff Civins, Mary Mendoza, & Christine Fernandez, *The Third Party and Transaction-Related Defenses of CERCLA: An Overview*, 7/1 A.B.A. Envtl. Litig. & Toxic Torts Comm. Newsletter 3, 5-7 (July 2005) (citing *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001) (reading SARA as "clarifying" that one who buys property from a polluting owner cannot present a third party defense); *United States v. CDMG Realty Co.*, 96 F.3d 706, 716 (3d Cir. 1996) (noting that the third party defense "is generally not available if the third party causing the release is in the chain of title with the defendant"); *United States v. 150 Acres of Land*, 204 F.3d 698, 704 (6th Cir. 2000) ("Present owners who acquired their interests by land contracts, deeds, or other instruments transferring title or possession, and *not* by inheritance or bequest, must also have undertaken 'all appropriate inquiry' when they acquired the property to avoid liability")).

Corp.[84] to decide if there is a "contractual relationship" for purposes of Section 107(b)(3). In *Westwood*, the Second Circuit stated that a landowner is only precluded from raising the third-party defense if (1) "the contract between the landowner and the third party somehow is connected with the handling of hazardous substances," or (2) "the contract allows the landowner to exert some control over the third party's actions so that the landowner can fairly be held liable for the release or threatened release of hazardous substances caused solely by the actions of the third party."[85] The innocent purchaser defense requiring "all appropriate inquiry" by a potential purchaser is available as an exception to the contractual relationship exclusion. That is, a contractual relationship may not preclude the defense if the property was acquired by the defendant "after the disposal or placement of the hazardous substance on, in, or at the facility,"[86] and either "[t]he defendant acquired the facility by inheritance or bequest"[87] or "at the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance . . . was disposed of on, in, or at the facility."[88]

D. Cost Recovery (Section 107(a))

Until recently, cost recovery actions under Section 107(a) were generally brought by governments against PRPs, and issues under Section 107 were limited to whether the government's costs were recoverable or not.

For example, double recoveries of response costs are not permitted under CERCLA.[89] Also, CERCLA does not permit recoveries of anticipated response costs. The "proper remedy for future response costs is not a present lump-sum payment of anticipated expenses but instead a declaratory judgment award dividing future response costs among responsible parties."[90] Section 113(g)(2) states that

> 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.[91]

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[84] *Westwood Pharms., Inc. v. Nat'l Fuel Gas Distrib. Corp.*, 964 F.2d 85, 89 (2d Cir. 1992)

[85] *Westwood Pharms., Inc. v. Nat'l Fuel Gas Distrib. Corp.*, 964 F.2d 85, 89 (2d Cir. 1992) (stating that a "contractual relationship exists if the defendant is the landowner and the lease allows some control over the use of the land or expressly concerns the disposal of hazardous substances"); *see also United States v. 175 Inwood Assocs., LLP*, 330 F. Supp. 2d 213 (E.D.N.Y. 2004) and *Emerson Enters., LLC v. Kenneth Crosby Acquisition Corp.*, No. 03-CV-6530, 2004 U.S. Dist. LEXIS 12245 (W.D.N.Y. June 23, 2004) (cases applying *Westwood* test).

[86] 42 U.S.C.S. § 9601(35)(A) (Law. Co-op. 2005).

[87] 42 U.S.C.S. § 9601(35)(A)(iii) (Law. Co-op. 2005).

[88] 42 U.S.C.S. § 9601(35)(A)(i) (Law. Co-op. 2005).

[89] *Solvent Chem. Co. v. E.I. DuPont de Nemours & Co.*, 242 F. Supp. 2d 196, 211 (W.D.N.Y. 2002) ("Clearly, the import of the case law is that plaintiffs cannot recover twice, under separate statutes, for the same injury. . . . If they can recover costs under CERCLA, then the state law claim is preempted. However, there may be additional areas not covered by CERCLA where a state law claim would not be duplicative"); *State v. Moulds Holding Corp.*, 196 F. Supp. 2d 210, 219 (N.D.N.Y. 2002) ("CERCLA as a whole does not expressly preempt state law. There are, however, instances where, because of a conflict with the CERCLA scheme, various state law claims are pre-empted. This includes claims that would permit a double recovery. In order to maintain the state law causes of action, the State must be seeking to recover damages that are not recoverable under CERCLA").

[90] *Goodrich Corp. v. Town of Middlesbury*, 311 F.3d 154, 175 (2d Cir. 2002).

[91] 42 U.S.C.S. § 9613(g)(2) (Law. Co-op. 2005).

Congress included the language of Section 113(g)(2) to "ensure that a responsible party's liability, once established, would not have to be relitigated. . . . The entry of a declaratory judgment as to liability is mandatory. The fact that future costs are somewhat speculative is no bar to a present declaration of liability."[92]

Since 1988, Second Circuit precedent was clear that a PRP could not bring a CERCLA cost recovery action under Section 107(a), but rather was limited to an action for contribution under Sections 113(f)(1) and/or 113(f)(3)(B). In *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*,[93] the Second Circuit recalled the history of cost recovery actions:

> After CERCLA's enactment in 1980 but before section 113(f)(1) was enacted, certain courts held that section 107(a) permitted certain private parties that, if sued, would be held liable under section 107(a) – often called [PRPs] – to sue other parties to recover response costs incurred voluntarily. Section 107(a) does not, however, grant to parties against whom liability has been imposed any express right to sue other parties for contribution. . . . Despite the omission of express contribution language, certain courts had held, before the enactment of section 113(f)(1), that CERCLA did in fact establish contribution rights.[94]

In 1986, CERCLA was amended by SARA, and Section 113 was added. The Second Circuit interpreted the amendments in *Bedford Affiliates v. Sills*:[95]

> The language of CERCLA suggests Congress planned that an innocent party be able to sue for full recovery of its costs, *i.e.*, indemnity under § 107(a), while a party that is itself liable may recover only those costs exceeding its pro rata share of the entire cleanup expenditure, *i.e.*, contribution under [§ 113(f)].[96]

The *Bedford* decision remained strong precedent until December of 2004, when the Supreme Court decided *Cooper Indus., Inc. v. Aviall Servs., Inc.*[97] In May of 2005, in *Syms v. Olin Corp.*,[98] the Second Circuit stated:

> We held in *Bedford Affiliates* that a plaintiff who is also a PRP may not bring a cost recovery action under § 107(a) and is instead limited to suing for contribution under § 113. . . .

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[92] *State v. Green*, No. 04-CV-4070, 2005 U.S. App. LEXIS 17527, *29-30 (2d Cir. Aug. 18, 2005) (citing *Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 844 (6th Cir. 1994); *United States v. USX Corp.*, 68 F.3d 811, 819 n.17 (3d Cir. 1995) ("Essentially, [§ 113(g)(2)] mandates collateral estoppel effect to a liability determination)).

[93] *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, No. 04-CV-2409, 2005 U.S. App. LEXIS 19477 (2d Cir. Sept. 9, 2005)

[94] *Consol. Edison Co. of N.Y., Inc. v. UGI Utils.*, Inc., No. 04-CV-2409, 2005 U.S. App. LEXIS 19477, *17-18 (2d Cir. Sept. 9, 2005).

[95] *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998)

[96] *Bedford Affiliates v. Sills*, 156 F.3d 416, 424 (2d Cir. 1998)

[97] *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004)

[98] *Syms v. Olin Corp.*, 408 F.3d 95 (2d Cir. 2005)

> n.8: *Bedford Affiliates* expressed concern that § 113(f) would be rendered superfluous if PRPs could choose whether to bring suit under § 107(a) or § 113(f), because PRPs would always choose to proceed under § 107(a), which provides a more generous statute of limitations in certain circumstances [*compare* Section 113(g)(2) *with* Section 113(g)(3)], and provides for joint and several liability unless a defendant proves the harm is divisible. . . . Together, *Cooper Industries* and *Bedford Affiliates* leave a PRP with no mechanism for recovering response costs until proceedings are brought against the PRP. This might discourage PRPs from voluntarily initiating clean-up, contrary to CERCLA's stated purpose of 'inducing such persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites.' . . . This is because if a PRP remediates a facility on its own initiative, it reduces the likelihood that it will be sued under [Section] 106 or [Section] 107(a), and thereby jeopardizes its opportunity to seek contribution under [Section] 113(f) from other PRPs. The combination of *Cooper Industries* and *Bedford Affiliates*, if the latter remains unaltered, would create a perverse incentive for PRPs to wait until they are sued before incurring response costs.[99]

In June of 2005, the Western District, in *Benderson Dev. Co. v. Neumade Prods. Corp.*[100] stated that

> Although the dissent in *Cooper Industries v. Aviall Services* recently challenged [*Bedford*'s] interpretation of the statute, the United States Supreme Court expressly declined to consider whether decisions 'holding that a private party that is itself a [PRP] may not pursue a § 107(a) action against other [PRPs] for joint and several liability' are correct. . . . It is this Court's opinion that *Bedford Affiliates* remains controlling precedent in this circuit.[101]

Most recently, the Second Circuit considered the issue in *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*[102]:

> Given that section 107(a) is distinct and independent from section 113(f)(1), and that section 113(f)(1)'s remedies are not available to a person in the absence of a civil action as specified in that section, determining whether a party in Con Ed's

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[99] *Syms v. Olin Corp.*, 408 F.3d 95, 106 (2d Cir. 2005).

[100] *Benderson Dev. Co. v. Neumade Prods. Corp.*, No. 98-CV-0241Sr, 2005 U.S. Dist. LEXIS 14943 (W.D.N.Y. June 13, 2005).

[101] *Benderson Dev. Co. v. Neumade Prods. Corp.*, No. 98-CV-0241Sr, 2005 U.S. Dist. LEXIS 14943, *29-31 (W.D.N.Y. June 13, 2005).

[102] *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, No. 04-CV-2409, 2005 U.S. App. LEXIS 19477 (2d Cir. Sept. 9, 2005).

> circumstances may sue under section 107(a) is easily resolved based on that section's plain language. Section 107(a) makes parties liable for the government's remedial and removal costs and for 'any other necessary costs of response incurred by any other person consistent with the national contingency plan.' . . . Unlike some other courts, we find no basis for reading into this language a distinction between so-called 'innocent' parties and parties that, if sued, would be held liable under section 107(a). Section 107(a) makes its cost recovery remedy available, in quite simple language, to *any* person that has incurred necessary costs of response, and nowhere does the plain language of section 107(a) require that the party seeking necessary costs of response be innocent of wrongdoing.
>
> > n.9: Some might argue that a person who, if sued, would be partly liable for necessary costs of response may be unjustly enriched if allowed under section 107(a) to recover 100 percent of its costs from other persons. This fear seems misplaced. While we express no opinion as to the efficacy of such a procedure, there appears to be no bar precluding a person sued under section 107(a) from bringing a counterclaim under section 113(f)(1) for offsetting contribution against the plaintiff volunteer who, if sued, would be liable under section 107(a).
>
> Moreover, we believe we would be impermissibly discouraging voluntary cleanup were we to read section 107(a) to preclude parties that, if sued, would be held liable under section 107(a) from recovering necessary response costs. Were this economic disincentive in place, such parties would likely wait until they are sued to commence cleaning up any site for which they are not exclusively responsible because of their inability to be reimbursed for cleanup expenditures in the absence of a suit. This would undercut one of CERCLA's main goals, 'encouraging private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others.' For this reason, we hold that section 107(a) permits a party that has not been sued or made to participate in an administrative proceeding, but that, if sued, would be held liable under section 107(a), to recover necessary response costs incurred voluntarily, not under a court or administrative order or judgment.[103]

In the last sentence of the above-quoted material from *Consol. Edison*, the Second Circuit narrowly escaped overruling its earlier decision in *Bedford Affiliates* by distinguishing between the voluntary cleanup in *Consol. Edison* and the cleanup pursuant to a Consent Order in *Bedford Affiliates.* An emerging issue is whether, when a party expends funds for cleanup solely due to the imposition of liability through an administrative consent order, it has or has not incurred "necessary costs of response" within the meaning of Section 107(a). The Second Circuit in *Consol. Edison* stated that

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[103] *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, No. 04-CV-2409, 2005 U.S. App. LEXIS 19477, *23-26 (2d Cir. Sept. 9, 2005).

If a party expends funds out of obligation under an administrative or court order or final judgment, its liability may be 'similar to that of a tort feasor's liability for the doctor's bills of the injured party. Payment by the tort feasor does not mean it has incurred doctor's bills itself.

> n.13: We note, however, that even decisions stating that the imposition of liability may create expenditures that are not costs of response have confined their holding to liability imposed through court proceedings. [*United States v.*] *Taylor*[, 909 F. Supp. 355 (M.D.N.C. 1995)] held that a party subjected to a court-approved settlement or judgment was limited to the contribution remedy, but also stated that a party implementing response or remedial activity under an administrative order incurs "necessary costs of response" under section 107(a). . . . If expenditures under an administrative order *are* costs of response, then *Bedford Affiliates* [*v. Sills*, 156 F.3d 416 (2d Cir. 1998) (holding that a party that has incurred or is incurring expenditures under a consent order with a government agency and has been found partially liable under Section 113(f)(1) may not seek to recoup those expenditures under Section 107(a)] would apparently require revisiting. We need not and do not decide these questions here.

. . .

Our holding here – that a party that has not been sued or made to participate in an administrative proceeding, but, if sued, would itself be liable under section 107(a), may still recover necessary response costs incurred voluntarily, not under a court or administrative order or judgment – does not conflict with *Bedford Affiliates*.[104]

E. Contribution (Section 113(f))

Defendants are given an opportunity to seek contribution from those parties it believes are responsible for the contamination of the site in question by commencing a separate contribution action against them under Section 113(f)(1) or 113(f)(3)(B) of CERCLA for at least two reasons. First, contribution is available to PRPs because CERCLA does not require that the State sue all PRPs in a cost recovery action.[105] Therefore, the jointly and severally liable defendants have a claim in equity for contribution to offset the costs incurred by the amount which is not fairly attributable to them. Second, as has become important since recent developments in the case law,[106] since a PRP who has volunteered to clean up a site would be

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[104] *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, No. 04-CV-2409, 2005 U.S. App. LEXIS 19477, *28-30 & n.13 (2d Cir. Sept. 9, 2005) (internal quotations and citations omitted).

[105] *State v. Longboat, Inc.*, 140 F. Supp. 2d 174 (N.D.N.Y. 2001) (citing *United States v. Consolidation Coal Co.*, No. 89-CV-2124, 1991 U.S. Dist. LEXIS 15229 (W.D. Pa. July 5, 1991).

[106] *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, No. 04-CV-2409, 2005 U.S. App. LEXIS 19477, *24 n.9 (2d Cir. Sept. 9, 2005) ("Some might argue that a person who, if sued, would be partly liable for necessary costs of response may be unjustly enriched if allowed under section 107(a) to recover 100 percent of its costs from other persons. This fear seems misplaced. While we express no opinion as to the

unjustly enriched if allowed to recover 100% of its costs under Section 107(a), an unjustly enriched volunteer should be open to counterclaims for offsetting contribution subsequently brought against it under Section 113(f)(1) by other non-volunteer PRPs (*i.e.*, those sued under Section 107(a)).

1. Two Separate Avenues (Sections 113(f)(1) and 113(f)(3)(B))

Section 113(f) provides two mechanisms by which a PRP may seek contribution from other PRPs for costs incurred in a CERCLA response action. Contribution under Section 113(f)(1) is available to a person who has been subject either to a private cost-recovery action under Section 107(a) or a federal abatement action under Section 106. Contribution under Section 113(f)(3)(B) is available to a person who has settled its CERCLA liability to the United States or a State.

a. Section 113(f)(1)

Section 113(f)(1) states that "any 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)."[107] On December 13, 2004, the Supreme Court shook the world of CERCLA litigation with its decision in *Cooper Indus., Inc. v. Aviall Servs., Inc*.[108]

Before *Cooper*, PRPs were allowed to maintain contribution actions under Section 113(f)(1) regardless of whether or not those actions were brought "during or following" a civil action under Section 106 or 107(a). For example, in *Pfohl Bros. Landfill Site Steering Comm. v. Allied Waste Sys., Inc.*,[109] the Western District stated:

> No requirement for a precedent § 106 or § 107(a) action is stated by the court to be among the required elements for a contribution action pursuant to § 113(f)(1). . . . Thus, this court finds that commencement of a § 106 or § 107(a) action for response costs against a PRP seeking contribution from other PRPs pursuant to § 113(f)(1) is not a necessary prerequisite to such contribution claim and that the absence of such response cost recovery actions is not a bar to a § 113(f)(1) action.[110]

Similarly, in *Niagara Mohawk Power Corp. v. Consol. Rail Corp.*,[111] the Northern District stated that the Fifth Circuit in *Aviall Servs., Inc. v. Cooper Indus., Inc.*[112]

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efficacy of such a procedure, there appears to be no bar precluding a person sued under section 107(a) from bringing a counterclaim under section 113(f)(1) for offsetting contribution against the plaintiff volunteer who, if sued, would be liable under section 107(a)").

[107] 42 U.S.C.S. § 9613(f)(1) (Law. Co-op. 2005).

[108] *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 125 S. Ct. 577 (2004).

[109] *Pfohl Bros. Landfill Site Steering Comm. v. Allied Waste Sys., Inc.*, 255 F. Supp. 2d 134 (W.D.N.Y. 2002).

[110] *Pfohl Bros. Landfill Site Steering Comm. v. Allied Waste Sys., Inc*., 255 F. Supp. 2d 134, 151 (W.D.N.Y. 2002) (citing *Bedford Affiliates v. Sills*, 156 F.3d 416, 427 (2d Cir. 1998)).

[111] *Niagara Mohawk Power Corp. v. Consol. Rail Corp.*, 291 F. Supp. 2d 105 (N.D.N.Y. 2003).

[112] *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677 (5th Cir. 2002) (en banc)

> reached the correct conclusion, in light of the case law developed prior to passage of section 9613, the statutory language, and the legislative history. . . . Given this backdrop, it must be concluded that a PRP may bring a contribution action at any time, without regard to whether it has been or is subject to a direct cost recovery action.[113]

In *Cooper*, the Supreme Court essentially reversed two decades of precedent when it clarified that the natural meaning of the language of Section 113(f)(1) indicated that contribution under that section is available *only* during or following a civil action under Section 106 or 107(a):

> The first sentence [of Section 113(f)(1)], the enabling clause that establishes the right of contribution, provides: 'Any person *may* seek contribution . . . *during or following* any civil action under *section 9606* of this title or under *section 9607(a)* of this title. . . . First, . . . the natural meaning of "may" in the context of the enabling clause is that it authorizes certain contribution actions – ones that satisfy the subsequent specified condition – and no others. . . . Second, . . . if § 113(f)(1) were read to authorize contribution actions at any time, regardless of the existence of a § 106 or § 107(a) civil action, then Congress need not have included the explicit "during or following" condition. In other words, Aviall's reading would render part of the statute entirely superfluous, something we are loath to do. . . . Likewise, if § 113(f)(1) authorizes contribution actions at any time, § 113(f)(3)(B), which permits contribution actions after settlement, is equally superfluous. . . . [Third, the] last sentence of § 113(f)(1), the saving clause [("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")] does not change our conclusion. . . . The sentence . . . does not itself establish a cause of action; nor does it expand § 113(f)(1) to authorize contribution actions not brought "during or following" a § 106 or § 107(a) civil action; nor does it specify what causes of action for contribution, if any, exist outside § 113(f)(1). . . . [Finally, our] conclusion follows not simply from § 113(f)(1) itself, but also from the whole of § 113. . . . Notably absent from § 113(g)(3)[(A) and (B), providing limitations periods corresponding to contribution actions under § 113(f)(1) and § 113(f)(3)(B), respectively] is any provision for starting the limitations period if a judgment or settlement never occurs, as is the case with a purely voluntary cleanup. The lack of such a provision supports the conclusion that, to assert a contribution claim under § 113(f), a party must satisfy the conditions of either § 113(f)(1) or § 113(f)(3)(B).[114]

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[113] *Niagara Mohawk Power Corp. v. Consol. Rail Corp.*, 291 F. Supp. 2d 105, 124 (N.D.N.Y. 2003) (citing *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677, 681 (5th Cir. 2002) (en banc); *1325 "G" Street Assocs., SP v. Rockwood Pigments NA, Inc.*, 235 F. Supp. 2d 458, 464 (D. Md. 2002); *Ninth Ave. Remedial Group v. Allis Chalmers Corp.*, 974 F. Supp. 684, 691 (N.D. Ind. 1997); *Johnson County Airport Comm'n v. Parsonitt Co.*, 916 F. Supp. 1090, 1095 (D. Kan. 1996); *Mathis v. Velsicol Chem. Corp.*, 786 F. Supp. 971, 975-76 (N.D. Ga. 1991); *Alloy Briquetting Corp. v. Niagara Vest, Inc.*, 756 F. Supp. 713, 718 (W.D.N.Y. 1991); *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 924-25 (5th Cir. 2000); *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1192-93 (10th Cir. 1997); *Coastline Terminals, Inc. v. USX Corp.*, 156 F. Supp. 2d 203, 208 (D. Conn. 2001)).

[114] *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 125 S. Ct. 577, 583-84 (2004).

b. Section 113(f)(3)(B)

Section 113(f)(3)(B) states that "[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), which provides for contribution protection]."[115] Since *Cooper*, the release provisions of administrative or judicially approved settlements have become crucial to actions for contribution under Section 113(f)(3)(B). The Second Circuit recently stated that the courts "look to state law when interpreting agreements shifting CERCLA liability. New York law requires that a release contain an 'explicit, unequivocal statement of a present promise to release [a] defendant from liability."[116] The Second Circuit case law has evolved rapidly since *Cooper* to define that which constitutes a settlement of CERCLA liability for purposes of Section 113(f)(3)(B). In *W.R. Grace & Co. - Conn. v. Zotos Int'l, Inc.*, a consent order issued by the New York State Department of Environmental Conservation (DEC) provided in part that

> If the [DEC] acknowledges that the implementation is complete and in accordance with the Approved Remedial Design, then . . . such acknowledgment shall constitute a full and complete satisfaction and release of each and every claim, demand, remedy or action whatsoever against Respondent . . . which the Department has or may have as of the date of such acknowledgment *pursuant to Article 27, Title 13, of the [New York Environmental Conservation Law] relative to or arising from the disposal of hazardous waste at the Site*.[117]

The Western District ruled that the consent order, which only provided a release of liability under the New York State Environmental Conservation Law and made no reference to a release of federal CERCLA liability, did not constitute an administrative settlement within the meaning of Section 113(f)(3)(B).

Thereafter, in *Seneca Meadows, Inc. v. ECI Liquidating, Inc.*, a consent order issued by the DEC provided in part that

> Upon the Department's approval of a final report evidencing that no further remedial action . . . is required to meet the goals of the Remedial Program . . . then . . . such acceptance shall constitute a release and covenant not to sue for each and every claim, demand, remedy, or action whatsoever against Respondent . . . which the Department has or may have *pursuant to Article 28, Title 13 of the [New York Environmental Conservation Law] or pursuant to any other provision of statutory*

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[115] 42 U.S.C.S. § 9613(f)(3)(B) (Law. Co-op. 2005).

[116] *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, No. 04-CV-2409, 2005 U.S. App. LEXIS 19553, *8-9 (2d Cir. Sept. 9, 2005).

[117] *W.R. Grace & Co. - Conn. v. Zotos Int'l, Inc.*, No. 98-CV-838S(F), 2005 U.S. Dist. LEXIS 8755, *22-23 (W.D.N.Y. May 3, 2005) (emphasis added).

> *or common law involving or relating to investigative or remedial activities relative to or arising from the disposal of hazardous wastes . . . at the Site*.[118]

The Western District ruled from the bench that the consent order, which provided not only a release of liability under the New York State Environmental Conservation Law but also a more general release of liability, did constitute an administrative settlement within the meaning of Section 113(f)(3)(B) and so entitled the plaintiffs to bring a contribution action.[119]

In *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*,[120] the Release and Covenant Not to Sue of a Voluntary Cleanup Agreement issued by the DEC stated that the DEC

> releases, covenants not to sue, and shall forebear from bringing any action, proceedings, or suit pursuant to the [New York] Environmental Conservation Law, the Navigation Law or the State Finance Law, and from referring to the Attorney General any claim for recovery of costs incurred by the Department . . . for the further investigation and remediation of the Site, based upon the release or threatened release of Covered Contamination.[121]

The Second Circuit held that this language made "clear . . . that the only liability that might some day be resolved under the Voluntary Cleanup Agreement is liability for state law – not CERCLA – claims."[122] That case explains that the Second Circuit "read[s] section 113(f)(3)(B) to create a contribution right only when liability for CERCLA claims, rather than some broader category of legal claims, is resolved" and that the Court "believe[s] section 113(f)(3)(B) does not permit contribution actions based on the resolution of liability for state law – but not CERCLA – claims."[123]

2. Contribution Protection (Section 113(f)(2))

Section 113(f)(2) provides that

> 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.[124]

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[118] Consent Order dated December 14, 2004 (attached as Exhibit C to Sanoff Affidavit filed April 5, 2005) at 6, *Seneca Meadows, Inc. v. ECI Liquidating, Inc.*, No. 95-CV-6400 (W.D.N.Y.) (emphasis added).

[119] *Seneca Meadows*, No. 95-CV-6400 (W.D.N.Y. May 10, 2005) (Hearing and Ruling).

[120] *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, No. 04-CV-2409, 2005 U.S. App. LEXIS 19477 (2d Cir. Sept. 9, 2005)

[121] *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, No. 04-CV-2409, 2005 U.S. App. LEXIS 19477, *14 (2d Cir. Sept. 9, 2005).

[122] *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, No. 04-CV-2409, 2005 U.S. App. LEXIS 19477, *14 (2d Cir. Sept. 9, 2005).

[123] *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, No. 04-CV-2409, 2005 U.S. App. LEXIS 19477, *12 (2d Cir. Sept. 9, 2005).

[124] 42 U.S.C.S. § 9613(f)(2) (Law. Co-op. 2005).

"The approval of a CERCLA consent decree results in contribution protection to the settling party, and it affects the rights of potentially responsible parties who are not signatories to the decree. The scope of the matters addressed in the decree determines the extent of the contribution protection granted."[125] A plaintiff may seek contribution from a defendant which has already settled its liability to the United States or a State to the extent that the plaintiff's claim against that defendant can be separated from the matters addressed in the settlement.[126] As the case law has developed to allow a volunteer in the Second Circuit to seek cost recovery under Section 107(a) from other PRPs,[127] a PRP that settles its CERCLA liability has a defense to a cost recovery action brought by a volunteer under Section 107(a), just as it has a defense to a contribution action under Section 113(f) relative to the matters addressed in the settlement.

F. Allocation (Section 113(f))

The allocation of response costs under Section 113(f) is an "equitable determination based on the district court's discretionary selection of the appropriate equitable factors in a given case."[128] "Section 113(f)'s expansive language affords a district court broad discretion to balance the equities in the interests of justice."[129] The allocation phase[130] affords a defendant the opportunity to assert affirmative defenses which are not listed among those defenses to liability permitted under Section 107(b).[131]

It is possible for PRP groups to allocate costs among themselves, outside the courts. "The Second Circuit has joined other Circuits in interpreting Section 107(e)(1) of CERCLA to allow private parties to contract with each other concerning indemnification and contribution, with the caveat that, notwithstanding the terms of such contracts, all responsible parties remain fully liable to the government. In other words, responsible parties can allocate CERCLA response costs among themselves while remaining jointly and severally liable to the government for cleanup."[132]

In the exercise of their broad powers of discretion, courts have weighed a variety of

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[125] *Solvent Chem. Co. v. E.I. DuPont de Nemours & Co.*, No. 01-CV-425C(SC), 2005 U.S. Dist. LEXIS 16573, *24-25 (W.D.N.Y. June 27, 2005).

[126] *See Benderson Dev. Co. v. Neumade Prods. Corp.*, No. 98-CV-0241Sr, 2005 U.S. Dist. LEXIS 14943, *33 (W.D.N.Y. June 13, 2005) ("Benderson may seek contribution from Neumade to the extent that its claim against Neumade can be separated from the matters addressed in Neumade's Order on Consent with the NYSDEC").

[127] *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, No. 04-CV-2409, 2005 U.S. App. LEXIS 19477, *23-26 (2d Cir. Sept. 9, 2005).

[128] *Goodrich Corp. v. Town of Middlesbury*, 311 F.3d 154, 170 (2d Cir. 2002).

[129] *Goodrich Corp. v. Town of Middlesbury*, 311 F.3d 154, 168-69 (2d Cir. 2002).

[130] *See Goodrich Corp. v. Town of Middlesbury*, 311 F.3d 154, 168 (2d Cir. 2002) (CERCLA "envisions a two-part inquiry: First, the court must determine whether the defendant is "liable" under CERCLA § 107(a); Second, the court must allocate response costs among liable parties in an equitable manner. The party seeking contribution bears the burden of proof at both prongs of the court's inquiry").

[131] *Buffalo Color Corp. v. AlliedSignal, Inc.*, 139 F. Supp. 2d 409, 426 (W.D.N.Y. 2001) ("to the extent that AlliedSignal's answer asserts affirmative defenses other than those set forth at [Section 107(b)], they do not serve as defenses to liability and fail as a matter of law. This conclusion, however, does not result in those defenses being stricken. A number of these defenses may be raised during the contribution phase of the litigation") (internal quotations omitted).

[132] *Buffalo Color Corp. v. AlliedSignal, Inc.*, 139 F. Supp. 2d 409, 419 (W.D.N.Y. 2001).

factors in determining equitable shares of costs. Determining which factors to be applied in the equitable allocation process is case-specific and "no exhaustive list of criteria need or should be formulated."[133] There are "various methods of apportionment of harm, depending upon the facts at the particular site that are capable of proof."[134] "In any given case, a court may consider several factors, a few factors, or only one determining factor . . . depending on the totality of the circumstances presented to the court.'"[135]

Many allocation schemes involve a tabulation based largely on the amount of waste that has come to be located at the site or that has been released at the site, with adjustments made based on equitable factors such as toxicity, involvement, care and/or cooperation with the government. These types of allocations are described as "waste-in" (or "volumetric") allocations.[136] The "waste-in" analysis is often applied in cases involving landfill sites, where all the waste is placed in the ground and each entity's waste has necessarily contributed to the remedy.[137]

Beyond volumetric analysis, many courts have considered a list of potentially relevant equitable considerations known as the "Gore factors." The "Gore factors" include:

> (1) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished; (2) the amount of the hazardous waste involved; (3) the degree of toxicity of the hazardous waste involved; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (6) the degree of

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[133] *United States v. Alcan Aluminum Corp.*, No. 87-CV-920, 1991 U.S. Dist. LEXIS 18721, *11 (N.D.N.Y. December 27, 1991) (quoting *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 572 (6th Cir. 1991)); *see also State v. Westwood-Squibb Pharm. Co.*, No. 90-CV-1324C, 2004 U.S. Dist. LEXIS 13841, *66 (W.D.N.Y. May 25, 2004) ("In a nutshell, allocation is a highly fact-intensive process that depends upon the particular circumstances of each case") (citing *United States v. Davis*, 31 F. Supp. 2d 45, 63 (D.R.I. 1998)).

[134] *Washington v. United States*, 922 F. Supp. 421, 426 (W.D. Wash. 1996).

[135] *State v. Westwood-Squibb Pharm. Co.*, No. 90-CV-1324C, 2004 U.S. Dist. LEXIS 13841, *66-67 (W.D.N.Y. May 25, 2004) (quoting *Envtl. Transp. Sys. Inc. v. ENSCO, Inc.*, 969 F.2d 503, 509 (7th Cir. 1992)); *see also United States v. Shell Oil Co.*, 294 F.3d 1045, 1060 (9th Cir. 2002) (Section 113(f)(1) "gives district courts discretion to decide what factors ought to be considered, as well as the duty to allocate costs according to those factors") (quoting *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1187 (9th Cir. 2000)).

[136] *Chesapeake & Potomac Tel. Co. of Va. v. Peck Iron & Metal Co.*, 814 F. Supp. 1269, 1279 (E.D. Va. 1992) ("volumetric contributions can, in appropriate circumstances, provide a reasonable basis for apportioning liability"); *State v. Moulds Holding Corp.*, 196 F. Supp. 2d 210, 214 (N.D.N.Y. 2002) ("under § 113(f) . . . [e]ach party must pay only for the amount of waste it contributed to the site. . . . The Court is also permitted to consider equitable factors") (internal citation omitted); *United States v. Vertac Chem. Corp.*, 79 F. Supp. 2d 1034, 1038 (E.D. Ark. 1999) ("volumetrics is the most significant factor and should be the starting point at which to assess each party's contribution"); *but see United States v. Agway, Inc.*, 193 F. Supp. 2d 545, 549 (N.D.N.Y. 2002) ("Volumetric contributions provide a reasonable basis for apportioning liability only if it can be reasonably assumed, or it has been demonstrated, that independent factors had no substantial effect on the harm to the environment.")(internal quotations and emphasis omitted).

[137] *See United States v. Davis*, 31 F. Supp. 2d 45, 67 (D.R.I. 1998), *aff'd*, 261 F.3d 1 (1st Cir. 2001) (where hazardous waste at site was commingled into "an essentially homogenous 'witches' brew,' . . . the fairest, and most practical, measure of relative responsibility [was] the quantity or volume of hazardous waste attributable to each party"); *Goodrich Corp. v. Town of Middlesbury*, 311 F.3d 154, 171 (2d Cir. 2002) (upheld the district court's ruling which "cited the volume of waste disposed of by the parties as an equitable factor" and used the "findings on the parties' respective waste volumes as the starting point" for its allocation); *United States v. Alcan Aluminum Corp.*, No. 87-CV-920, 1991 U.S. Dist. LEXIS 18721, *3 (N.D.N.Y. Dec. 27, 1991) ("the court concludes that the relevant factors in this 'fair share' determination [include] the volume of waste deposited at the site"), *rev'd in part on other grounds*, 990 F.2d 711, 725 (2d Cir. 1993).

> cooperation by the parties with the Federal, State or local officials to prevent any harm to the public health or the environment.[138]

In short, the "Gore factors" are (1) divisibility, (2) amount, (3) toxicity, (4) involvement, (5) care, and (6) cooperation. While the "Gore factors" may provide a convenient starting point for an analysis of equitable factors to be considered in an allocation inquiry, this list of factors is neither exclusive nor exhaustive.[139] In allocating costs under CERCLA, a court may also consider a party's state of mind,[140] knowledge,[141] relative fault,[142] financial resources,[143] common law obligation,[144] and economic benefit.[145] Also, a court may exercise its discretion to consider the Gore factors in the equitable allocation process, but is not statutorily mandated to do so.[146]

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[138] *State v. Solvent Chem. Co.*, 214 F.R.D. 106, 109 n.1 (W.D.N.Y. 2003) (citing *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 326 n4 (7th Cir. 1994)); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 354 (6th Cir. 1998) (citations omitted).

[139] *United States v. Colo. & E. R.R. Co.*, 50 F.3d 1530, 1536 n.5 (10th Cir. 1995).

[140] *See United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 572-73 (6th Cir. 1991) ("The court may consider the state of mind of the parties . . . [where] deemed appropriate to balance the equities in the totality of the circumstances"); *Farmland Indus. v. Colo. & E. R.R.*, 944 F. Supp. 1492, 1499 (D. Colo. 1996) (in ruling for the plaintiff, considering the "difference in mindset [of the parties] apparent during remediation," stating that the plaintiff's mindset was to remedy the contamination, while the defendant's mindset was to "avoid any responsibility for the cleanup").

[141] *See Weyerhaeuser Co. v. Koppers Co.*, 771 F. Supp. 1420, 1427 (D. Md. 1991) ("[w]here one PRP's "operations were the sole cause of the environmental damage," holding that such a PRP "must be allocated the lion's share of the responsibility" but that other PRPs may be allocated a share of the expenses if they "knew of and acquiesced in" the contaminating activities).

[142] *See United States v. Monsanto Co.*, 858 F.2d 160, 173 n.28 (4th Cir. 1988) ("the language of CERCLA's . . . contribution provisions reveals Congress' concern that the relative culpability of each responsible party be considered in determining the proportionate share of costs each must bear"); *Envtl. Transp. Sys. v. Ensco, Inc.*, 969 F.2d 503, 509 (7th Cir. 1992) (stating that "[r]elative fault is one factor that can be considered in making an equitable determination under section 9613(f)" and holding the party at relative fault responsible for all cleanup costs); *Farmland Indus. v. Colo. & E. R.R.*, 944 F. Supp. 1492, 1499 (D. Colo. 1996) (considering, where neither party caused the initial contamination, the defendant's relative fault (*i.e.*, failure to fix the problem or to give timely access to others to do so, which necessitated additional cleanup) as against the plaintiff's relative faultlessness, and allocating 85% of the plaintiff's response costs to the defendant).

[143] *See United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 572-73 (6th Cir. 1991) ("The court may consider . . . the parties[']economic status . . . [where] deemed appropriate to balance the equities in the totality of the circumstances"); *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1206 (2d Cir. 1992) ("an array of equitable factors may be considered in [the] allocation process, including . . . the financial resources of the parties involved"), *overruled on other grounds*, *State v. Nat'l Servs. Indus., Inc.*, 352 F.3d 682 (2d Cir. 2003); *United States v. Davis*, 31 F. Supp. 2d 45, 67 (D.R.I. 1998) ("Because it is doubtful that the [owner/operator defendants] will be able to pay in full that portion of the response costs attributable to all of the hazardous wastes for which they are accountable; and, because the generator defendants are in a far better position to absorb the response costs attributable to the hazardous wastes that they produced, the Court allocates all of those costs to the generator defendants"), *aff'd*, 261 F.3d 1 (1st Cir. 2001).

[144] *See Farmland Indus. v. Colo. & E. R.R.*, 944 F. Supp. 1492, 1500 (D. Colo. 1996) ("Under common law theories of nuisance and trespass, a property owner has a duty to exercise reasonable care to prevent activities and conditions on its property that might injure others"); *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 549 (6th Cir. 2001) (in the equitable apportionment of CERCLA liability under § 113(f), "a court may take into account more varying circumstances than common law contribution") (internal quotation omitted).

[145] *See United States v. Vertac Chem. Corp.*, 79 F. Supp. 2d 1034, 1039 (E.D. Ark. 1999) (finding that it was not inequitable to allocate a larger percentage of costs to defendant who arranged for production of hazardous materials and derived an economic benefit from that production); *United States v. Davis*, 31 F. Supp. 2d 45, 66 (D.R.I. 1998) ("Fairness suggests that parties deriving greater benefit from disposal of hazardous waste should bear a greater portion of the responsibility for mitigating its adverse effects"). Also, benefits received by parties as a result of the cleanup may be considered by the court in the allocation process. *See Farmland Indus. v. Colo. & E. R.R.*, 944 F. Supp. 1492, 1499-1501 (D. Colo. 1996) (stating that it "would be inequitable not to allocate significant additional remedial costs" to the owners of the parcels where the EPA had deleted the site from the National Priorities List, and "the value of the . . . [p]arcels increased by more than $600,000 as a result of the cleanup").

[146] *United States v. Consolidation Coal Co.*, 184 F. Supp. 2d 723, 744 n.21 (S.D. Ohio 2002) ("Use of the Gore factors is not required for at least two reasons. First, the plain language of Section 113 provides that the Court may consider 'such factors as the court determines are appropriate.' 42 U.S.C. Section 9613(f)(1). Second, the Gore factors were considered by Congress but were not included in the final bill"), *vacated in part on other grounds*, 345 F.3d 409 (6th Cir. 2003).

In recent years, the evolution of the case law regarding successor liability has been of particular interest in CERCLA allocations. Successor liability is a very important issue in CERCLA cases as the liability of a defunct corporation becomes an "orphan share"[147] to be distributed among the remaining viable PRPs.[148] It is certainly understandable, then, that the viable PRPs would have a substantial interest in proving the liability of another viable party with whom they might share cleanup costs, based upon the status of that party as a successor to a defunct PRP.[149] The viable PRPs will call upon the theory of successor liability to bring another viable party into the allocation process in order to share the burden of a potentially huge orphan share.[150]

The Second Circuit, in its 2003 *National Services*[151] decision, held that in the CERCLA context, the substantial continuity test for successor liability which was adopted by the Second Circuit in the 1996 *Betkoski*[152] decision was no longer good law since the Supreme Court's 1998 decision in *Bestfoods*.[153] The substantial continuity test (a/k/a the "continuity of enterprise" test) "focuses on the continuity of the business: Whether the successor maintains the same business, with the same employees doing the same jobs, under the same supervisors, working conditions, and production processes, and produces the same products for the same customers."[154] This test was adopted because its flexible standard lent itself to the advancement of CERCLA's primary goals. In *National Services*, the Second Circuit stated that the test was not well established enough to constitute common law, and since the Supreme Court in *Bestfoods* dictated that the common law must govern, the substantial continuity test was found inapplicable. Specifically, the Court in *National Services* stated:

> In considering the substantial continuity test, we take from *Bestfoods* the principle that when determining whether liability under CERCLA passes from one corporation to another, we must apply common law rules and not create CERCLA-specific rules.

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[147] "An 'orphan share' is that portion of response cost liability for which no known and solvent party amenable to suit bears responsibility. The mere fact that a party is not before the Court does not make its share of liability an 'orphan share.'" *United States v. Davis*, 31 F. Supp. 2d 45, 68 (D.R.I. 1998) (citations omitted).

[148] Liability for the "orphan shares" is allocated in the same manner as those shares of the identified PRPs. *State v. Westwood-Squibb Pharm. Co.*, No. 90-CV-1324C, 2004 U.S. Dist. LEXIS 13841, *67 n.13 (W.D.N.Y. May 25, 2004) ("As with other response costs, orphan shares are properly allocated among the viable liable parties as equity dictates"); *Raytheon Constructors v. ASARCO, Inc.*, No. 96 N 2072, 1998 U.S. Dist. LEXIS 21815, *31 (D. Colo. April 17, 1998) ("Under CERCLA's contribution statute, 'the cost of orphan shares is distributed equitably among all PRPs . . . just as cleanup costs are'") (quoting *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1302 (9th Cir. 1996)), *rev'd on other grounds*, 368 F.3d 1214 (10th Cir. 2003).

[149] *See Charter Township v. Am. Cyanamid Co.*, 898 F. Supp. 506, 509 (W.D. Mich. 1995) ("Equity and fairness dictate that the shares that would have been attributed to parties that are now insolvent should be apportioned among all of the solvent PRPs"); *see also Charter Township v. Am. Cyanamid Co.*, 898 F. Supp. 506, 508 (W.D. Mich. 1995) (orphan shares are "attributable to bankrupt or financially insolvent PRPs," but "shares attributable to solvent PRPs that are not parties in this case cannot be considered 'orphan shares'").

[150] While parties are initially held jointly and severally liable for the orphan shares, "the district court pursuant to its § 113(f) authority may apportion the amount of the orphan shares among the parties." *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 354 n.12 (6th Cir. 1998); *see also United States v. Kramer*, 953 F. Supp. 592, 601 (D.N.J. 1997) ("There is no reason in law or equity to rule out the notion that consideration may be given to equitable apportionment of the 'orphan share' among all responsible parties").

[151] *State v. Nat'l Servs. Indus., Inc.*, 352 F.3d 682 (2d Cir. 2003).

[152] *B.F. Goodrich v. Betkoski*, 99 F.3d 505 (2d Cir. 1996)

[153] *United States v. Bestfoods*, 524 U.S. 51 (1998)

[154] *State v. Nat'l Servs. Indus., Inc.*, 352 F.3d 682, 685 (2d Cir. 2003).

Because the substantial continuity test adopted in *Betkoski* departs from the common law rules of successor liability, *Betkoski* is no longer good law.[155]

Since *National Services*, the test for determining successor liability has once again been based on the traditional common law rule that "a corporation acquiring the assets of another corporation only takes on its liabilities if any of the following apply: [1] the successor expressly or impliedly agrees to assume them; [2] the transaction may be viewed as a de facto merger or consolidation; [3] the successor is the 'mere continuation' of the predecessor; or [4] the transaction is fraudulent."[156]

G. Statutes of Limitations (Section 113(g))

In Section 113(g), CERCLA provides statutes of limitations applicable to actions for natural resource damages under Section 107(a)(4)(C) and (f)(1) (three years from the date of discovery of the loss and its connection with the release in question or from the date on which regulations are promulgated under Section 301(c) [42 U.S.C. § 9651(c)], whichever is later[157]); cost recovery under Section 107(a) (generally, for removal actions, three years from the date of completion of the removal action,[158] and for remedial actions, six years from initiation of physical on-site construction of the remedial action[159]); actions for contribution under Section 113(f)(1) (three years from the date of judgment[160]); and actions for contribution under Section 113(f)(3)(B) (three years from the date of settlement[161]).

In a cost recovery action under Section 107, the court is directed to "enter a declaratory judgment on liability for response costs which will be binding on any subsequent action or actions to recover further response costs or damages."[162] Any subsequent action to enforce the declaratory judgment is subject to a three-year statute of limitations which accrues with the date of the completion of all response action.[163]

Cooper[164] and *Con Ed*[165] combine to influence the direction of the law relating to statutes of limitations under CERCLA in the Second Circuit, and warrant the reevaluation of prior decisions in this area. *Cooper* eliminates the possibility of a contribution action under Section

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[155] *State v. Nat'l Servs. Indus., Inc.*, 352 F.3d 682, 685 (2d Cir. 2003).

[156] *State v. Nat'l Servs. Indus., Inc.*, 352 F.3d 682, 685 (2d Cir. 2003); *see also Pfohl Bros. Landfill Site Steering Comm. v. Browning-Ferris Indus. of N.Y., Inc.*, No. 95-CV-956A(F), 2004 U.S. Dist. LEXIS 28637, *30] (W.D.N.Y. Jan. 30, 2004) (considering successor liabiliity issues according to the common law as directed in *Nat'l Servs.*).

[157] 42 U.S.C.S. § 9613(g)(1) (Law. Co-op. 2005).

[158] 42 U.S.C.S. 9613(g)(2)(A) (Law. Co-op. 2005).

[159] 42 U.S.C.S. § 9613(g)(2)(B) (Law. Co-op. 2005).

[160] 42 U.S.C.S. § 9613(g)(3)(A) (Law. Co-op. 2005).

[161] 42 U.S.C.S. § 9613(g)(3)(B) (Law. Co-op. 2005).

[162] 42 U.S.C.S. § 9613(g)(2) (Law. Co-op. 2005).

[163] 42 U.S.C.S. § 9613(g)(2) (Law. Co-op. 2005).

[164] *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004).

[165] *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, No. 04-CV-2409, 2005 U.S. App. LEXIS 19477 (2d Cir. Sept. 9, 2005).

113(f)(1) brought by a volunteer or by a party that has not been sued but that, if sued, would be held liable under Section 106 or Section 107(a). Therefore, any debate over whether the three-year limitations period of Section 113(g)(3) (applicable to certain contribution actions under Section 113(f)) or the six-year limitations period of Section 113(g)(2) (applicable to "initial" actions for cost recovery under Section 107(a)) applies to such actions[166] would appear to be resolved. The rationale of *Bedford Affiliates*[167] (*i.e.*, that actions under Section 107(a) are only available to innocent parties because otherwise the shorter statute of limitations in Section 113(g)(3) would become meaningless) falls away, as volunteers appear only to have a Section 107(a) action governed by Section 113(g)(2)'s six-year statute, while those seeking contribution are left with the statutes of limitations applicable to contribution actions, such as those contained in Sections 113(g)(3)(A) (three years from judgment) and 113(g)(3)(B) (three years from settlement with the United States). After *Con Ed*, there are no parties who have a choice between an action under Section 107 and an action under Section 113.

Today, a volunteer is no longer permitted to bring an action for contribution under Section 113(f)(1),[168] but is, in the Second Circuit, permitted to bring an action for cost recovery under Section 107(a),[169] subject to the six-year limitations period provided in Section 113(g)(2). A party that has been sued under Section 106 or 107(a) is limited to a cause of action for contribution under Section 113(f)(1) and the corresponding three-year limitations period of Section 113(g)(3)(A), and cannot bring an action under Section 107(a) because its action is not an "initial action" for recovery of costs. A party that has settled its liability with the United States is limited to a cause of action for contribution under Section 113(f)(3)(B) and the corresponding three-year limitations period of Section 113(g)(3)(B). Were a party that has settled its liability to the United States able to bring an action for cost recovery under Section 107(a), such an action could lead to the unjust enrichment of that party, primarily because a cost recovery defendant would be unable to interpose a counterclaim under Section 113(f)(1) based on the contribution protection afforded the settling party pursuant to Section 113(f)(2). Also, as articulated in *Con Ed*, payments made solely as a result of liability imposed by a judicial determination or administrative order may not be "response costs."[170]

A more complex issue relates to the statute of limitations applicable to a plaintiff that has

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[166] *See W.R. Grace & Co. - Conn. v. Zotos Int'l, Inc.*, No. 98-CV-838S(F), 2000 U.S. Dist. LEXIS 18091, *13-16 (W.D.N.Y. Nov. 2, 2000) (refusing to adopt the rationale that where none of the triggering events described in Section 113(g)(3) has occurred a contribution action is an "initial action" for cost recovery under section 107(a) subject to section 113(g)(2)'s six-year statute, and stating that "[i]f a gap exists in the statute of limitations for CERCLA actions under § 113(f)(1), it is one to be resolved by Congress") (citing *Sun Co., Inc. (R&M) v. Browning-Ferris Inc.*, 124 F.3d 1187 (10th Cir. 1997), *cert. denied*, 522 U.S. 1113 (1998) (applying the six-year statute to an action under Section 113(f)(1)), and following *Reichhold Chems., Inc. v. Textron, Inc.*, 888 F. Supp. 1116, 1125 (N.D. Fla. 1995) (holding that no statute applies in such instances)).

[167] *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998).

[168] *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004).

[169] *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, No. 04-CV-2409, 2005 U.S. App. LEXIS 19477, *24 (2d Cir. Sept. 9, 2005) ("Section 107(a) makes its cost recovery remedy available, in quite simple language, to any person that has incurred necessary costs of response").

[170] *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, No. 04-CV-2409, 2005 U.S. App. LEXIS 19477, *27-28 (2d Cir. Sept. 9, 2005) ("It may be that when a party expends funds for cleanup solely due to the imposition of liability through a final administrative order, it has not, in fact, incurred 'necessary costs of response' within the meaning of section 107(a)").

settled its CERCLA liability with a state and seeks contribution pursuant to Section 113(f)(3)(B). Since Section 113(g)(3) references settlements with the United States under Sections 122(g) (de minimis settlements) and 122(h) (cost recovery settlements), and since those sections refer only to settlements with the United States and not to settlements with a state, it appears that no statute of limitations is provided for contribution actions under Section 113(f)(3)(B) which are based on settlements with a state. This absence from CERCLA of an applicable statute of limitations period has been cited by defendants in contribution actions as evidence that a settlement with a state does not give rise to a cause of action in contribution under Section 113(f)(3)(B). The argument is that since *Cooper* cited the absence of a corresponding statute of limitations in Section 113(g)(3) as further support for its reading of the natural meaning of Section 113(f)(1),[171] the absence from CERCLA of a statute of limitations which would correspond to a settlement with a state must mean that such a settlement does not give rise to a cause of action for contribution under Section 113(f)(3)(B).

The plaintiffs' responding argument looks to the primary ground on which the *Cooper* decision is based – the natural meaning of the statute. The natural meaning of Section 113(f)(3)(B) could not be more clear: "[A] person who has resolved its liability to the United States or a State . . . in an administrative or judicially approved settlement may seek contribution."[172]

The broader argument adopted at least in dicta in the recent *Grace v. Zotos*[173] decision is that the State does not have the authority to settle CERCLA liability in the absence of a delegation of authority in the type of cooperative agreement between the EPA and a state provided for in Section 104(d).[174] Such a delegation of authority would allow a state agency to step into the EPA's shoes to settle claims of the United States and would even permit a state to obtain funds from the Federal Superfund.[175] The response to this argument has been that a state has a cause of action on its own behalf under Section 107(a), as does any person that has incurred necessary costs of response under Section 107(a). As a state may sue, it may also settle, and a cooperative agreement with the EPA need not be in place in order for a party to

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[171] *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 125 S. Ct. 577, 584 (2004) ("Notably absent from § 113(g)(3) is any provision for starting the limitations period if a judgment or settlement never occurs, as is the case with a purely voluntary cleanup. The lack of such a provision supports the conclusion that, to assert a contribution claim under § 113(f), a party must satisfy the conditions of either § 113(f)(1) or § 113(f)(3)(B)").

[172] 42 U.S.C.S. § 9613(f)(3)(B) (Law. Co-op. 2005).

[173] *W.R. Grace & Co. – Conn v. Zotos Int'l, Inc.*, No. 98-CV-838S(F), 2005 U.S. Dist. LEXIS 8755, *14 ("a State that wishes to carry out actions authorized by CERCLA must make application to, and enter into a contract or cooperative agreement with, the EPA. Absent an express delegation by the EPA, a state has no CERCLA authority. However, where a state receives such delegation, its actions taken pursuant to the cooperative agreement are on behalf of the Federal government").

[174] *See* 42 U.S.C.S. § 9604(d)(1) (Law. Co-op. 2005) ("If the President determines that the State . . . has the capability to carry out any or all of such actions in accordance with the criteria and priorities established pursuant to section 105(a)(8) and to carry out related enforcement actions, the President may enter into a contract or cooperative agreement with the State . . . to carry out such actions").

[175] *See* Memorandum of Law of Amicus Curiae State of New York by Eliot Spitzer, Attorney General of the State of New York filed Aug. 22, 2005 at 5-10, *Pfohl Bros. Landfill Site Steering Comm. v. Browning-Ferris Indus. of N.Y., Inc.*, No. 95-CV-0956A(F) (W.D.N.Y.).

settle its CERCLA liability to a state.[176]

Perhaps the most interesting argument that has been raised by defendants in the Section 113(f)(3)(B) state settlement debate relates to the procedural requirements for a settlement with the United States set forth in Sections 122(g) (de minimis settlements) and 112(h) (cost recovery settlements). These sections provide detailed procedural requirements related to settlements with the United States. The most significant of these procedures is the requirement that the proposed settlement be published in the Federal Register.[177]

The defendants' argument poses the question: How can it be that the procedural requirements for a settlement with the United States are so rigorous and the procedural requirements for a settlement with a state are completely absent from the legislation?

I would offer the response that this is an example of federalism. We should not be surprised that Congress has not legislated the procedural requirements applicable to a settlement between a party and a state concerning a State-financed clean-up, as Congress has no authority to promulgate such requirements. The procedures prescribed for settlements with the United States are put in place by Congress in compliance with its constitutional duty to afford due process to affected parties. States have their own independent constitutional obligation to afford such parties due process. It is the most basic tenet of state sovereignty that states promulgate their own regulations and determine how they will provide that due process.[178] If a state legislature fails to provide the appropriate measure of due process, that is an issue to be addressed first by the state judiciary and ultimately by the Supreme Court of the United States; but that is a completely separate issue from whether a cause of action exists under Section 113(f)(3)(B). A failure of Congress to dictate to a state how it should go about settling CERCLA liability is not evidence that the state cannot enter into such settlements. The types of public participation required by New York State represent the state's attempt to provide the proper measure of due process, and to the extent that the State's requirements are perceived to be deficient, the appropriate procedural remedy is a due process challenge to those requirements. The suggestion that the absence of such requirements in the federal legislation indicates that a state cannot settle its liability without the participation of the EPA confuses federalism with preemption.

This is consistent with Second Circuit interpretations of actions under CERCLA § 309

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[176] *See State v. Shore Realty Corp.*, 759 F.2d 1032, 1047-48 (2d Cir. 1985) ("EPA designed the regulatory scheme -- the NCP -- focusing on federal and joint federal-state efforts. . . . Congress envisioned states' using their own resources for cleanup and recovering those costs from polluters under section 9607(a) (4) (A). We read section 9607(a) (4) (A)'s requirement of consistency with the NCP to mean that states cannot recover costs inconsistent with the response methods outlined in the NCP. . . . Moreover, the NCP itself recognizes a role for states in compelling 'potentially responsible parties' to undertake response actions independent of EPA and without seeking reimbursement from Superfund. . . . Thus, the NCP's requirements concerning collaboration in a joint federal-state cleanup effort are inapplicable where the State is acting on its own") (citations omitted).

[177] 42 U.S.C.S. § 9622(i) (Law. Co-op. 2005).

[178] *See State v. United States*, 505 U.S. 144, 161 (1992) ("Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program") (internal quotation omitted).

(42 U.S.C. § 9658).[179] That section supplies a modification (namely, uniform accrual upon the Federally Required Commencement Date, or "FRCD," the date on which the plaintiff first knew or reasonably should have known that the damages in question were caused by a hazardous substance) to State statutes of limitations which otherwise govern actions under State law for damages from exposure to hazardous substances.[180] The Second Circuit has found it "undisputably clear that Congress intended, in the cases to which [42 U.S.C.] § 9658 applies, that the FRCD pre-empt[s] state law accrual rules if, under those rules, accrual would occur earlier than the date on which the cause of the personal injury was, or reasonably should have been, known to be the hazardous substance."[181] However, "New York law still controls with respect to the length of the limitations period"[182] in actions under State law for damages from exposure to hazardous substances.

Section 309 provides an example of how Congress, armed with a compelling interest, can step into an area such as the statutes of limitations periods applicable to common law tort actions generally governed by state law. It does so carefully and in a limited way, acting only as necessary in order that the Federal interest be protected. The States are well equipped to carry out their constitutional function of providing due process in connection with settlements under Section 113(f)(3)(B), and Congress cannot usurp the legislative function of the States in the absence of such a compelling interest.

It is difficult to predict the limitations period and the accrual date that a court would apply to a cause of action under Section 113(f)(3)(B) based on a settlement of CERCLA liability with a state. The circuits have split on the determination of the applicable statute of limitations under similar circumstances.[183] First, it has been suggested that, following the plain language of Section 113(g)(3), no statute of limitations applies.[184] This approach has been criticized based on the apparent necessity of an applicable and determinate statute of limitations.[185] Second, it has been suggested that the six-year limitations period set forth in Section 113(g)(2) for cost

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[179] 42 U.S.C.S. § 9658(a)(1) (Law. Co-op. 2005) ("In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute").

[180] 42 U.S.C.S. § 9658(a)(1) (Law. Co-op. 2005).

[181] *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 215 (2d Cir. 2002).

[182] *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 215 (2d Cir. 2002); *see also* 42 U.S.C.S. § 9658(a)(2) (Law. Co-op. 2005) ("Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility").

[183] *City of Merced v. R.A. Fields*, 997 F. Supp. 1326, 1334 (E.D. Cal. 1998) ("the Circuit Courts of Appeals are split on the appropriate statute of limitations to apply").

[184] *See W.R. Grace & Co. - Conn. v. Zotos Int'l, Inc.*, No. 98-CV-838S(F), 2000 U.S. Dist. LEXIS 18091, *14 (W.D.N.Y. Nov. 2, 2000) ("in the absence of any statute of limitations [under Section 113(g)(3)] . . . , no statute of limitations applies").

[185] *See Geraghty & Miller, Inc. v. Conoco Inc.*, 234 F.3d 917, 925 (5th Cir. 2000) ("if we were to . . . apply section 113(g)(3) [so that] the statute of limitations would be indefinite because a triggering event might never occur, [t]his result would undermine the certainty that statutes of limitations are designed to further"); *GE v. Am. Annuity Group, Inc.*, 137 F. Supp. 2d 1, 7 (D.N.H. 2001) (stating that such an approach "is plausible if the subsection is construed in isolation, but makes little sense when the text of CERCLA is construed as a whole" and "would produce absurd results in which cost recovery claims brought by innocent parties and certain contribution claims brought by PRPs would be subject to strict statutes of limitations but contribution claims brought by other PRPs could be delayed indefinitely").

recovery actions should apply.[186] This approach has found support in the view that CERCLA "expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107,"[187] and since the Supreme Court expressly rejected that view in *Cooper*,[188] this approach now likely lacks support. Third, it has been suggested that the three-year limitations period set forth in Section 113(g)(3) should apply and an accrual date be determined by reference to federal common law.[189] On this issue, I would offer the possibility that, just as Congress should be understood to be legislating in accordance with a notion of cooperative federalism in sections 113 and 122, the federal court should be permitted to borrow a statute of limitations from state law.[190] In this case, the applicable statute would be the state statute of limitations for contribution, which, in New York, is a six-year limitations period, accruing with the payment of more than the party's equitable share of response costs.

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[186] *See Cytec Indus., Inc. v. B.F. Goodrich Co.*, 232 F. Supp. 2d 821, 831 (S.D. Ohio 2002) ("a contribution action is really a cost-recovery action instituted by a PRP") (citing *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 11[91-] 92 (10th Cir. 1997) ("§ 113(f) did not create a new cause of action, nor did it create any new liabilities. . . . '[B]ecause § 113(f) incorporates the liability provisions of § 107, . . . a § 113(f) action for contribution is an action under § 107'")); *see also City of Merced v. R.A. Fields*, 997 F. Supp. 1326, 1334 (E.D. Cal. 1998) ("The . . . rationale is as follows. A Section 113(f) contribution action is an action under Section 107. Therefore, by definition, contribution actions are cost-recovery actions").

[187] *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994); *GE v. Am. Annuity Group, Inc.*, 137 F. Supp. 2d 1, 3 (D.N.H. 2001) ("courts interpreting CERCLA have routinely recognized that PRPs have an implied right to contribution based upon [Section 107]") (citing *Key Tronic*, 511 U.S. at 816 n.7).

[188] *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 125 S. Ct. 577, 582 (2004) ("after SARA, CERCLA provided for a right to cost recovery in certain circumstances, § 107(a), and separate rights to contribution in other circumstances, §§ 113(f)(1), 113(f)(3)(B)").

[189] *See City of Merced v. R.A. Fields*, 997 F. Supp. 1326, 1334-35 (E.D. Cal. 1998) (citing *Sun Co., Inc. v. Browning-Ferris, Inc.*, 919 F. Supp. 1523 (N.D. Okla. 1996), *rev'd in pertinent part*, 124 F.3d 1187 (10th Cir. 1997)).

[190] *See In re Hillard Dev. Corp.*, 238 B.R. 857, 871 (Bankr. S.D. Fla. 1999) (citing *DelCostello v. Int'l Bro. of Teamsters*, 462 U.S. 151, 159 n.13 (1983) ("with respect to federal causes of action, courts borrow state law 'as a matter of interstitial fashioning of remedial details under the respective substantive federal statutes, and not because the Rules of Decision Act or the Erie doctrine requires it'")).