08-3843-cv(L),

08-4007-cv(XAP)

United States Court of Appeals for the
Second Circuit

NIAGARA MOHAWK POWER CORPORATION,
Plaintiff-Appellant-Cross-Appellee,

– v. –

CHEVRON U.S.A. INC.,
Defendant-Appellee-Cross-Appellant,

– v. –

UNITED STATES STEEL CORPORATION, RICHARD B. SLOTE in his capacity as personal representative of the estate of EDWIN D. KING and PORTEC, INC.,
Defendants-Appellees-Cross-Appellees,

KING SERVICE, INC., RICHARD B. SLOTE and
LAWRENCE KING,
Defendants-Cross-Appellees,

COUNTY OF RENSSELAER and
THE COUNTY OF RENSSELAER SEWER DISTRICT NO. 1,
Third-Party-Defendants-Cross-Appellees,

CONSOLIDATED RAIL CORPORATION, AMERICAN PREMIER UNDERWRITERS, INC.,
THE FOUNDATION COMPANY and PITTSBURGH BUSINESS,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF OF THE UNITED STATES AS
AMICUS CURIAE SUPPORTING APPELLANT

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INTRODUCTION AND INTEREST OF THE UNITED STATES

This case involves a contaminated site – known as the Troy Water Street Site – located in Troy, New York. Since the late 1800s, the site has been used for various industrial activities such as a coke plant, a steel manufacturing plant, a manufactured gas plant, and a petroleum distribution facility, which have led to releases of hazardous substances subject to liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq*.

In 1992, Niagara Mohawk Power Corporation ("Niagara") entered into a settlement with the New York Department of Environmental Conservation ("DEC"), embodied in an administrative order on consent ("1992 Consent Order"), under which Niagara agreed to fund and conduct certain response activities at the site. In 2003, Niagara and DEC executed an amended administrative order on consent ("2003 Consent Order") under which Niagara again incurred costs.

Niagara brought suit against other potentially responsible parties ("PRPs") under CERCLA §§ 107(a)(4)(B) and 113(f)(3)(B), 42 U.S.C. §§ 9607(a)(4)(B) & 9613(f)(3)(B), seeking contribution for the costs it had incurred. The district court ultimately held that Niagara could not seek contribution under section 113(f)(3)(B). According to the district court, because the United States EPA

("EPA") had not delegated federal CERCLA settlement authority to DEC, the 2003 Consent Order could not form the basis of a section 113(f)(3)(B) contribution action. The court also held that Niagara did not have an action under section 107. Niagara has appealed.

The United States is participating as amicus curiae to address important issues surrounding the availability and nature of the action that PRPs can bring against one another under CERCLA §§ 107 and 113 and the correct interpretation of *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331 (2007) ("*ARC*"). The proper functioning of the CERCLA regime for cleaning up contaminated sites depends on an appropriate interpretation of the rights one PRP has against another under sections 107 and 113. The district court's ruling creates perverse incentives for private parties to refuse to settle with state environmental agencies and undertake cleanup activities. Furthermore, misapplication of these provisions could undermine the protection from contribution claims that section 113(f)(2), 42 U.S.C. § 9613(f)(2), gives to parties that have already settled with the government.

It is important that PRPs like Niagara that agree to engage in response activities in settlements with states have appropriate CERCLA claims for contribution against other PRPs. Otherwise, PRPs will decline to enter into administrative settlements and instead wait for the filing of civil actions to ensure

they can sue for contribution under section 113(f)(1).

ISSUES PRESENTED

This amicus brief addresses the following issues:

1. Whether Niagara, a PRP that incurred costs to clean up a contaminated site pursuant to an administrative consent order with DEC, has an action against other PRPs for contribution under CERCLA § 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B), even though EPA had not entered into an agreement with the state under CERCLA § 104(d)(1), 42 U.S.C. § 9604(d)(1), delegating federal settlement authority to the State.

2. Whether, assuming Niagara has an action for contribution under section 113(f)(3)(B), Niagara is foreclosed from pursuing an action against other PRPs under CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B).

3. Whether, assuming Niagara does not have an action for contribution under section 113(f)(3)(B), Niagara may seek contribution from other PRPs under section 107(a)(4)(B).

STATEMENT

A. Statutory Framework

Congress enacted CERCLA in 1980 in response to the serious environmental and health dangers posed by property contaminated by hazardous

substances. *See United States v. Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA, as amended by the Superfund Amendments and Re-authorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 ("SARA"), "both provides a mechanism for cleaning up hazardous-waste sites and imposes the costs of the cleanup on those responsible for the contamination," *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989) (citations omitted), *overruled on other grounds*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996).

Under CERCLA § 104, 42 U.S.C. § 9604, the President, acting primarily through the U.S. Environmental Protection Agency ("EPA"), *see* Exec. Order No. 12,580, 52 Fed. Reg. 2923-29 (Jan. 23, 1987), may clean up an environmentally contaminated site itself. Alternately, EPA may compel PRPs to cleanup a site under CERCLA § 106(a). 42 U.S.C. § 9606(a).

Section 107(a) of CERCLA lists four classes of liable parties, and section 107(a)(4) 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,

42 U.S.C. § 9607(a)(4)(A).

Because of the number and variety of contaminated sites across the country, states play a critical role in effectuating the purposes of CERCLA. Like the

federal government, a state or its agencies may directly clean up a site and then sue any PRP at the site to recover its costs. *Id.* § 9607(a)(4)(A). CERCLA § 104(d) also authorizes EPA to enter into "contracts or cooperative agreements with [a] State or political subdivision" to carry out response activities. *Id.* § 9604(d)(1)(A). Such cooperative agreements and contracts permit EPA to provide federal funding for state CERCLA activities, *see* 40 C.F.R. §§ 35.6015(a), 300.5, 300.515(a)(1), including enforcement efforts, *id.* § 35.6145, giving EPA an important avenue to further CERCLA's purposes without assuming the burdens of directly managing a site.

CERCLA also provides mechanisms for PRPs to share the costs of cleanup among themselves. CERCLA § 107(a)(4)(B) makes PRPs liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). The Supreme Court has held that PRPs that have engaged in voluntary cleanup activities may, in certain circumstances, sue other PRPs under section 107(a). *See ARC*, 127 S. Ct. at 2336.

In addition, section 113 explicitly provides PRPs the right to seek contribution from other PRPs at a site in two other circumstances. First, CERCLA § 113(f)(1) gives a right of contribution to PRPs during or after the filing of a suit under sections 106 or 107:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. . . . 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.

42 U.S.C. § 9613(f)(1). Second, section 113(f)(3)(B) gives a right of contribution to PRPs that have settled with a state or the United States:

> 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)].

Id. § 9613(f)(3)(B).

However, CERCLA § 113(f)(2) also limits the right of a PRP to seek contribution from a PRP that has already itself settled with the United State or a state:

> 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.

Id. § 9613(f)(2). Other provisions of CERCLA expressly limit contribution actions brought under section 113. For instance, section 113(f)(3)(C) provides that:

> In any action under this paragraph [§ 113(f)(3)], the rights of any person who has resolved its liability to the United States or a State shall be

subordinate to the rights of the United States or the State.

Id. § 9613(f)(3)(C).

B. The Supreme Court Decisions in *Cooper Industries* and *ARC*

Since 2004, the Supreme Court has issued two opinions construing CERCLA §§ 107(a) and 113(f).

In *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), the Supreme Court held that a PRP could only seek contribution under section 113(f)(1) during or following a civil action under section 106 or 107(a). 543 U.S. at 166.

In *ARC*, the Supreme Court held that a PRP that voluntarily incurred cleanup costs (and was not subject to a judicial or administrative order and had not entered into a settlement with the United States or a state), could bring an action against other PRPs under CERCLA § 107(a)(4)(B). 127 S. Ct. 2336.

C. Procedural Background

As noted, Niagara brought an action under sections 107(a)(4)(B) and 113(f)(3)(B) to seek contribution from other PRPs for costs it had incurred to remediate the Site. Currently on appeal are the district court's rulings that CERCLA provides Niagara with no causes of action against other PRPs. 436 F. Supp. 2d 398 (N.D.N.Y. 2006) ("*Niagara III*"); 565 F. Supp. 2d 399 (N.D.N.Y.

2008) ("*Niagara IV*") (declining to amend prior decision).[1]

Niagara relies solely on the 2003 Consent Order and not the 1992 Consent Order in seeking contribution under section 113(f)(3)(B). The district court granted summary judgment to the defendants on Niagara's section 113(f)(3)(B) claims for two separate reasons. First, the court ruled that the 2003 Consent Order was not properly part of the record. *Niagara III*, 436 F. Supp. 2d at 401. Second, the court ruled that the 2003 Consent Order was not a qualifying settlement under section 113(f)(3)(B) because EPA had not formally delegated settlement authority to DEC. *Id.* at 402. The district court also granted summary judgment to the defendants on Niagara's section 107(a)(4)(B) claim based on this Court's holding in *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998), that a PRP incurring costs under a consent order cannot sue other PRPs under section 107. *Niagara III*, 436 F. Supp. 2d at 403; *Niagara IV*, 565 F. Supp. 2d at 401-02.

SUMMARY OF ARGUMENT

Niagara may seek contribution under CERCLA § 113(f)(3)(B) because the 2003 Consent Order "resolved its liability to . . . a State for some or all of a

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[1] The district court issued two opinions prior to *Cooper Industries*, which this court remanded for further consideration. *See Niagara Mohawk Power Corp. v. Consol. Rail Corp.*, 291 F. Supp. 2d 105 (N.D.N.Y. 2003); *Niagara Mohawk Power Corp. v. Consol. Rail Corp.*, 306 F. Supp. 2d 282 (N.D.N.Y. 2004).

response action." 42 U.S.C. § 9613(f)(3)(B). Nothing in section 113(f)(3)(B) requires that a state receive a delegation of authority from the United States in order to enter into a qualifying settlement. The district court erred in interpreting section 104(d)(1)(A) as authorizing EPA to delegate to states the authority to settle CERCLA claims on behalf of the United States. In fact, section 104(d)(1)(A) deals exclusively with EPA's ability to fund state CERCLA activities. Furthermore, CERCLA § 107(a) gives states causes of action without the need for delegated power from EPA and nothing bars states from settling these claims in their own right.

Because the 2003 Consent Order is a qualifying settlement under section 113(f)(3)(B), Niagara is limited to seeking contribution under that section and cannot bring a claim under section 107(a)(4)(B). Otherwise, if PRPs could choose between bringing section 107 and section 113 claims, section 113 would be rendered meaningless, as PRPs would opt for section 107 to avoid the limitations of section 113. Furthermore, section 113(f)(3)(B) was enacted later than section 107(a)(4)(B) and precisely addresses contribution rights of a PRP settling with a state.

Alternatively, if this Court holds that Niagara lacks a section 113 action, then Niagara may bring a claim under section 107(a)(4)(B) that is in the nature of

contribution. Otherwise, Niagara would lack a remedy, contrary to Congressional intent.

ARGUMENT

I. The 2003 Consent Order Provides a Basis for Niagara to Seek Contribution Under Section 113(f)(3)(B)

A. Section 113(f)(3)(B) Does Not Require Prior Delegation of Settlement Authority to a State

The district court erred in ruling that Niagara's settlement with DEC did not "resolve[] its liability to the United States or a State" within the meaning of section 113(f)(3)(B) because EPA had not delegated to DEC authority to settle CERCLA claims on behalf of the United States. *See Niagara III*, 436 F. Supp. 2d at 402.[2] The district court ruling was based on the unpublished decision of another district court. *Id*. (citing *W.R. Grace & Co.-Conn. v. Zotos International, Inc.*, 2005 WL 1076117, at *4 (W.D.N.Y. May 3, 2005)).

Section 113(f)(3)(B) grants a right to seek contribution to a PRP that has "resolved its liability to the United States or a State for some or all of a response action or the costs of such action." 42 U.S.C. § 9613(f)(3)(B). It treats equally,

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[2] The district court's refusal to consider the 2003 Consent Order on the ground that it was untimely submitted is not the issue that prompted the United States' involvement as amicus. There does not, however, appear to have been a sound basis to exclude the 2003 Consent Order from the record.

without any distinction, settlements with either the "United States *or* a State." 42 U.S.C. § 9613(f)(3)(B) (emphasis added). By interpreting section 113(f)(3)(B) to require a state to have the authority to settle liability on behalf of the United States, the district court impermissibly read the words "or a state" out of the section, *see Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 328-29 (2d Cir. 2000); *Bedford Affiliates*, 156 F.3d at 424. Under the district court's interpretation, a settlement satisfying section 113(f)(3)(B) would necessarily resolve liability with both the state *and* the United States, *see W.R. Grace*, 2005 WL 1076117, at *4 ("[W]here a state receives such delegation [under section 104(d)(1)(A)], its actions taken pursuant to the cooperative agreement are on behalf of the Federal government."), rendering the "or a State" language a nullity. Furthermore, had Congress wanted to condition section 113(f)(3)(B), it could have provided that the section applied only to settlements with "the United States or a State delegated authority by the United States." The Court should not impose such a condition where Congress did not.

Furthermore, the fact that a state can settle certain CERCLA claims in its own right demonstrates the district court's error. Section 107(a)(4)(A) makes PRPs liable for "all costs of removal or remedial action incurred by . . . a State . . . not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A).

This Court has held that a state need not seek approval from the United States before it can clean up hazardous substances and file suit to recover costs from PRPs pursuant to section 107. *See New York v. Shore Realty Corp.*, 759 F.2d 1032, 1047-48 (2d Cir. 1985); *see also Wash. State Dep't of Transp. v. Natural Gas Co., Pacificorp*, 59 F.3d 793, 801 (9th Cir. 1995). Like any party with its own cause of action, a state can settle its own CERCLA claims. *See, e.g.*, *City Of Bangor v. Citizens Communications Co.*, 532 F.3d 70 (1st Cir. 2008) (approving consent decree with state); *United States v. Rohm & Haas Co.*, 721 F. Supp. 666 (D.N.J. 1989) (same).

The district court's error was rooted in a misunderstanding of CERCLA § 104(d)(1)(A). Relying on *W.R. Grace*, the district court held that DEC cannot settle CERCLA claims unless EPA delegates settlement authority under that section. *Niagara III*, 436 F. Supp. 2d at 402. But section 104(d)(1)(A) has nothing to do with delegating settlement authority, as EPA's CERCLA regulations make plain.[3/]

[3/] CERCLA § 113(a) provides for exclusive review of CERCLA regulations in the U.S. Court of Appeals for the D.C. Circuit. 42 U.S.C. § 9613(a). Furthermore, "[a]ny matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs." *Id*.

Section 104(d)(1)(A) authorizes the United States to enter into a "contract or cooperative agreement with [a] State" to carry out CERCLA activities. 42 U.S.C. § 9604(d)(1)(A). On its face, it does not address delegation to states of any sort of federal settlement authority. EPA regulations provide that contracts and cooperative agreements under section 104(d) are solely for the purpose of making financial and other assurances between EPA and states: "Section 104(d)(1) of CERCLA authorizes EPA to enter into cooperative agreements or contracts with a state . . . to carry out Fund-financed response actions . . . . EPA will use a cooperative agreement to transfer funds to those entities." 40 C.F.R. § 300.515(a)(1). The regulations explain that cooperative agreements provide funding to states that take the lead in response at a site, while contracts, termed "Superfund State Contracts," provide funding to states that participate in a supporting role. *Id.* §§ 35.6005, 300.500(b).

EPA's regulations define "cooperative agreement[s]" as "legal instrument[s] EPA uses to transfer money, property, services, or anything of value to a recipient to accomplish a public purpose in which substantial EPA involvement is anticipated during the performance of the project." 40 C.F.R. § 300.5; *see also id.* § 35.6015(a); § 300.515(a)(1). A "Superfund State Contract" is defined as "[a] joint, legally binding agreement between EPA and another party(ies) to obtain the

necessary assurances before an EPA-lead remedial action or any political subdivision-lead activities can begin at a site, and to ensure State or Indian Tribe involvement as required under CERCLA section 121(f)." *Id.* § 35.6015(a). Thus, EPA interprets section 104(d)(1)(A) to authorize provision of federal funding not delegation of federal authority.

The legislative history of SARA also reveals that section 104(d)(1)(A) provides for funding rather than the delegation of settlement authority. Both the House and Senate discussed that cooperative agreements permit states to receive funding. H. CONF. REP. 99-962, 194-95 (Oct. 3, 1986), *as reprinted in* 1986 U.S.C.C.A.N. 3276, 3287-88; SEN. REP. 99-11, 24-25 (Mar. 18, 1985). The Senate Report further stated that "[n]othing in section 104(d)(1) shall preclude the President from taking a separate enforcement action against those parties included in a State enforcement action." SEN. REP. 99-11, 25. This obviously reflects that Congress did not envision section 104(d)(1)(A) as providing states with a means to settle CERCLA claims on behalf of the federal government.

For these reasons, the district court erred in ruling that Niagara lacked a section 113(f)(3)(B) claim because EPA had not delegated federal settlement authority to DEC.

B. The 2003 Consent Order Settled "CERCLA Liability"

The 2003 Consent Order satisfies this Court's rule that a party must settle "CERCLA liability" to seek contribution under section 113(f)(3)(B). *Consol. Edison Co. v. UGI Utils., Inc.*, 423 F.3d 90, 95-96 (2d Cir. 2005). In *Consolidated Edison*, the Court held that a utility could not seek contribution under section 113(f)(3)(B) because its agreement with DEC settled only state law claims, *id.* at 96, and did nothing to resolve "liability for CERCLA claims." *Id.* at 96 n.7.[4/]

The 2003 Consent Order differs markedly from that involved in *Consolidated Edison* because it expressly releases claims under CERCLA. The

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[4/] The United States was not a party to *Consolidated Edison* and believes it was not correctly decided. Section 113(f)(3)(B) applies where a PRP "has resolved its liability to . . . a State for some or all of a response action or for some or all of the costs of such action." 42 U.S.C. § 9613(f)(3)(B). The settlement of federal and state law claims other than those provided by CERCLA fits within section 113(f)(3)(B) as long as the settlement involves a cleanup activity that qualifies as a "response action" within the meaning of CERCLA § 101(25), 42 U.S.C. § 9601(25). *See, e.g.*, *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1275 (3d Cir. 1993) ("[A] 'removal' is a removal whether it is undertaken pursuant to CERCLA or another statute."), *overruled on other grounds*, *United States v. E.I Dupont de Nemours & Co.*, 432 F.3d 161, 162-63 (3d Cir. 2005) (en banc); National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666, 8796 (Mar. 8, 1990) ("Of course, even if a party takes a cleanup action under an authority other than CERCLA (e.g., RCRA corrective action), it may have a right of cost recovery under CERCLA § 107 if the action was a necessary response to a release of hazardous substances, and was performed consistent with the NCP."). In any case, here, the 2003 Consent Order did release at least some of DEC's CERCLA claims.

2003 Consent Order provides that the acceptance by DEC of a report from Niagara that it had completed all agreed upon remedial activities

> shall [with certain immaterial exceptions] constitute a release and covenant not to sue for each and every claim, demand, remedy, or action whatsoever against Respondent . . . , which [DEC] has or may have pursuant to Article 27, Title 13 of the ECL *or pursuant to any other provision of State or Federal statutory or common law* involving or relating to investigative or remedial activities relative to or arising from the disposal of hazardous wastes or hazardous substances . . . .

2003 Consent Order, ¶ II.G, p. 7 (emphasis added). The 2003 Consent Order expressly memorializes the parties' understanding that it released CERCLA claims:

> To the extent authorized under 42 U.S.C. Section 9613, New York General Obligations Law § 15-108, and any other applicable law, *Respondent shall be deemed to have resolved its liability to the State for purposes of contribution protection provided by CERCLA Section 113(f)(2)* for "matters addressed" pursuant to and in accordance with this Order. . . . Furthermore, to the extent authorized under 42 U.S.C. Section 9613(f)(3)(B), by entering into this administrative settlement of liability, if any, for some or all of the response action and/or for some or all of the costs of such action, Respondent is entitled to seek contribution from any person except those who are entitled to contribution protection under 42 U.S.C. Section 9613(f)(2).

2003 Consent Order, ¶ XIV.I, p. 20 (emphasis added). Together, these provisions demonstrate that the 2003 Consent Order resolved "CERCLA liability" to the state.

That the 2003 Consent Order may reserve certain CERCLA claims is beside

the point. First, section 113(f)(3)(B) applies by its terms where a settlement resolves liability to the "United States or a State for *some or all* of a response action." 42 U.S.C. § 9613(f)(3)(B) (emphasis added). Second, CERCLA's provisions governing consent decrees reinforce the fact that a partial settlement can trigger section 113(f)(3)(B). Section 122(f)(6)(A) requires that in most circumstances consent decrees with the United States reserve "future liability resulting from the release or threatened release that is the subject of the covenant [not to sue] where such liability arises out of conditions which are unknown at the time the President certifies under paragraph (3) that remedial action has been completed at the facility concerned." 42 U.S.C. § 9622(f)(6)(A). As a matter of course, EPA reserves similar rights when it enters into administrative settlements. These consent decrees and administrative settlements clearly satisfy the requirements of section 113(f)(3)(B).

Finally, *Consolidated Edison* does not require that a settlement must resolve *all* CERCLA liability to satisfy section 113(f)(3)(B). In that case, the Court found that the agreement resolved *no* liability pursuant to CERCLA because the release and covenant not to sue applied only to non-CERCLA claims asserted under state law. As the 2003 Consent Order resolves liability for "some . . . of a response action," it provides Niagara with a basis for seeking contribution under section

113(f)(3)(B).

II. Because Niagara Entered into a Qualifying Settlement, It May Only Seek Contribution Under Section 113(f)(3)(B)

Because the 2003 Consent Order is a qualifying settlement under section 113(f)(3)(B), Niagara must bring its contribution claims under that section and not under section 107. This is particularly so because section 113(f)(3)(B) was enacted after section 107. It was included in the 1986 SARA amendments to CERCLA, whereas section 107 was enacted in 1980 in CERCLA itself. *See* Pub. L. No. 99-499, 100 Stat. 1613 (1986); Pub. L. No. 96-510, 94 Stat. 2767 (1980). "When Congress acts to amend a statute, [courts] presume it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995); *see also Am. Airlines, Inc. v. Remis Indus., Inc.*, 494 F.2d 196, 200 (2d Cir. 1974) ("If [an amendment] and the . . . unchanged portions of the original section cannot be harmonized, the new provisions should prevail as the latest declaration of the legislative will." (quoting 1A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 196 (4th ed. 1972)). Section 113(f)(3)(B) specifically addresses suits by PRPs that have settled with the government, but section 107 does not. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) ("A specific provision controls over one of more general application."). Therefore, section 113(f)(3)(B),

and not section 107(a)(4)(B), controls the claims of PRPs that fall within its ambit. To read the statute otherwise would fail to give force to Congress's will when it enacted section 113. *See Stone*, 514 U.S. at 397; *Gozlon-Peretz*, 498 U.S. at 407.

Furthermore, a claim under section 113(f)(3)(B) has several limitations that could be circumvented if PRPs were free to elect to proceed under section 107. In particular, they could evade section 113(g)'s more stringent time limits for filing suit, *see* 42 U.S.C. § 9613(g)(3), and the priority that section 113(f)(3)(C) gives to claims of the United States, 42 U.S.C. § 9613(f)(3)(C). Since Congress did not intend those restrictions to be superfluous, the statute must be read to distinguish between those PRPs that must proceed under the provisions of sections 113(f)(1) and 113(f)(3)(B) and those that can bring claims under section 107(a)(4)(B).[5/]

Accordingly, this Court and other Courts of Appeals have consistently held that PRPs that fall within section 113(f)(1) or 113(f)(3)(B) cannot bring stand-alone claims under section 107(a)(4)(B) instead.[6/] In *Bedford Affiliates*, this Court

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[5/] Because the section 107(a) claim of a PRP that incurred costs involuntarily is in the nature of contribution, *see infra* p. 28, section 113(f)(2) would still apply to such a suit. That section protects parties that settle with the government from all "claims for contribution regarding matters addressed in the settlement" without limitation. 42 U.S.C. § 9613(f)(2).

[6/] Some Courts of Appeals have held that section 107 provides the only cause of action for PRPs under CERCLA but that section 113 "governs and regulates" such claims. *See Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298,

sharply distinguished between section 107(a) and section 113(f), explaining that if the Court were "to permit a potentially responsible person to elect recovery under either § 107(a) or § 113(f)(1), § 113(f)(1) would be rendered meaningless." 156 F.3d at 424, *see also United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 101 (1st Cir. 1994). The First Circuit recognized that allowing PRPs to select between sections 107(a) and 113(f) would "follow a course that ineluctably produces judicial nullification of an entire SARA subsection." *Id.*; *see also ARC*, 459 F.3d 827, 832 (8th Cir. 2006) ("[T]o prevent § 107 from swallowing § 113, courts began directing traffic, . . . steer[ing] liable parties away from § 107 and requir[ing] them to use § 113."), *aff'd by* 127 S. Ct. 2331; *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1123 (3d Cir. 1997) ("Potentially responsible persons would quickly abandon section 113 in favor of the substantially more generous provisions of section 107. We will not read section 107 so broadly that section 113 ceases to have any meaningful application."); *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995) (stating that if PRPs were allowed to recover expenses under section 107(a), section 113(f) "would be rendered meaningless").

1302 (9th Cir. 1997), *overruling on other grounds recognized by on other grounds by Kotrous v. Goss-Jewett Co.*, 523 F.3d 924, 932 (9th Cir. 2008); *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 515-17 (10th Cir. 1991).

The Supreme Court's decisions in *Cooper* and *ARC* did not affect these courts' conclusions that a PRP that has or had a section 113 claim cannot instead bring a section 107 claim. *See Kotrous v. Goss-Jewett Co.*, 523 F.3d 924, 932 (9th Cir. 2008) (deciding after *Cooper* and *ARC* that "A PRP cannot choose its remedies"). These two decisions clarify who may bring actions under section 107(a) or 113(f), but do not undermine existing case law that a PRP cannot have actions under *both* sections 107 and 113.

In *Cooper*, the Supreme Court ruled that a PRP may not bring a claim under section 113(f)(1) except "during or following" a civil action under section 106 or 107. 543 U.S. at 165-66. It did not decide whether a PRP with a section 113 claim can also assert a section 107 claim. *Id.* at 169.

In *ARC*, because Atlantic Research had cleaned up its property in the absence of a section 106 or 107 action or settlement, it did not meet the requirements for an action under section 113(f)(1) or 113(f)(3)(B). The district court also found that it had no claim under section 107. *ARC*, 459 F.3d at 830. The Eighth Circuit reversed, reasoning that unless Atlantic Research had a section 107(a) claim, it would have no right to recover any of its cleanup costs from other liable parties, which would be "contrary to CERCLA's purpose . . . and [an] unjust outcome." 459 F.3d at 837. The Eighth Circuit stressed, however, that if Atlantic

Research had a section 113 claim, it would *not* also have a section 107 claim.

> [L]iable parties which have been subject to §§ 106 or 107 enforcement actions are still required to use § 113, thereby ensuring its continued vitality. . . . This resolution gives life to each of CERCLA's sections, and is consistent with CERCLA's goal of encouraging prompt and voluntary cleanup of contaminated sites.

Id. at 836-37 (citations omitted).

The Supreme Court affirmed the Eighth Circuit. The Supreme Court noted that "[t]he parties' dispute centers on what 'other person[s]' may sue under § 107(a)(4)(B)," 127 S. Ct. at 2335, and held that the language was broad enough to cover PRPs. *Id.* at 2336. But the Supreme Court did not hold that *all* PRPs have a cause of action against other PRPs under section 107. On the contrary, the Supreme Court considered only the availability of a section 107 claim to a PRP in Atlantic Research's situation (*i.e.*, a party not subject to an administrative order, enforcement action, or settlement, and thus one that had "voluntarily" incurred cleanup costs). *Id.* at 2336, 2339. The Supreme Court expressly declined to decide whether a section 107 cause of action would be available to PRPs in other situations, *i.e.* available to PRPs that would have section 113 actions during or following a civil action or because they settled with the government. *Id.* at 2338, n.6.

Congress would not logically have enacted a statute that establishes claims

for contribution for PRPs during or following a civil action under sections 106 and 107, 42 U.S.C. § 9613(f)(1), and PRPs that settle with the United States or a state, 42 U.S.C. § 9613(f)(3)(B), only to simultaneously allow claims to be brought independently under section 107.

Indeed, *ARC* strongly implies that a PRP lacks a section 107(a)(4)(B) remedy if it has or had a section 113(f) remedy. The Supreme Court stressed that section 107(a) and section 113(f) apply in distinct circumstances. *ARC*, 127 S. Ct. at 2338. Moreover, the Supreme Court cited with approval the Eighth Circuit's view that to harmonize sections 107(a) and 113(f) and to ensure the "vitality" of the latter, a PRP with a contribution claim pursuant to section 113(f) must use it, and cannot choose to use section 107(a) instead. *See id.* at 2335. Although it did not so hold, the tenor of the Supreme Court's opinion further indicates that it would not endorse a scheme that would allow a PRP to choose a section 107(a) claim to evade the statutory limitations of section 113(f). *See id.* at 2338-39 (discussing certain procedural circumstances and noting that no choice of remedies exists). Accordingly, PRPs that have, or at one time had, a claim pursuant to section 113(f) should not be allowed to bring a stand-alone section 107(a) claim against other PRPs.

In sum, because Niagara entered into a settlement that satisfied section

113(f)(3)(B), this Court should hold that Niagara can bring an action only under that section.

III. If Niagara Has No Section 113 Claim, It May Seek Contribution Under Section 107(a)

If this Court rules that Niagara lacks a section 113 claim, then the Court should also rule that Niagara does have a right to bring an action under section 107(a), but that such action is in the nature of contribution.

The district court, relying on this Court's 1998 decision in *Bedford Affiliates*, held that a PRP that involuntarily incurs cleanup costs based on a consent order that does not qualify under section 113(f)(3)(B) may not sue other PRPs pursuant to section 107(a). *Niagara III*, 436 F. Supp. 2d at 402-03. Thus, it held that Niagara had no claims to bring under CERCLA.

In *Bedford Affiliates*, this Court erroneously believed that PRPs only had contribution claims under section 113(f) and never had claims under section 107. 156 F.3d at 424. At that time, other Courts of Appeals agreed. *See e.g.*, *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997), *overruling recognized by Kotrous*, 523 F.3d at 927; *Cooper Indus.*, 312 F.3d 677 (5th Cir. 2002) (en banc), *reversed by* 543 U.S. 157. As a result, this Court prohibited PRPs from bringing stand-alone section 107(a) claims, reasoning that if it

permitted such claims, a "recovering liable party would readily abandon § 113(f)(1) suit in favor of the substantially more generous provisions of § 107(a)." 156 F.3d at 424. This Court "decline[d] to interpret § 107(a) so broadly that § 113(f)(1) would become a nullity." *Id.*

As discussed above, in *Cooper Industries* and *ARC*, the Supreme Court held that sometimes PRPs may pursue other PRPs under section 107(a)(4)(B) and lack section 113(f) claims. In *Cooper Industries*, the Court held that PRPs could not bring section 113(f)(1) claims in the absence of a civil action under CERCLA § 106 or 107. 543 U.S. at 168. Thereafter, in *ARC*, the Court confirmed that PRPs that engage in cleanup activities "voluntarily" can seek to recover their costs pursuant to section 107(a). 127 S. Ct. at 2338 n.6.

This case presents the question of the continuing viability of *Bedford Affiliates* to the extent that it would prevent PRPs outside of the circumstances covered by section 113(f) from pursuing claims under section 107(a). In three previous cases, this Court recognized (but did not decide) that *Bedford Affiliates* may not be good law in light of *Cooper Industries*. *See Schaefer v. Town of Victor*, 457 F.3d 188, 200-01 (2d Cir. 2006); *Consol. Edison Co.*, 423 F.3d at 101 n.12; *Syms v. Olin Corp.*, 408 F.3d 95, 106 n.8 (2d Cir. 2005).

A three-judge panel is "bound by a decision of a prior panel unless and until

its rationale is overruled, implicitly or expressly, by the Supreme Court or this court *en banc*." *BankBoston, N.A. v. Sokolowski*, 205 F.3d 532, 534-35 (2d Cir. 2000) (internal quotation marks and citation omitted). Here, *Cooper Industries* and *ARC* overruled the rationale of *Bedford Affiliates* to the extent that *Bedford Affiliates* held that a PRP subject to a consent order, but not meeting the requirements to proceed under section 113, cannot bring a section 107(a) action. *See Kotrous*, 523 F.3d at 927 (revisiting Ninth Circuit precedent), *E.I. Dupont De Nemours & Co. v. United States*, 508 F.3d 126, 132 (3d Cir. 2007) (revisiting Third Circuit precedent).

As this Court noted in *Consolidated Edison*, after *Cooper Industries*,

> [c]ertainly, it no longer makes sense to argue that permitting a potentially responsible person to sue under section 107(a) would render section 113(f)(1)'s statute of limitations meaningless because a party proceeding in the absence of a civil action no longer has the option of suing under section 113(f)(1).

423 F.3d at 101 n. 12; *see also Schaefer*, 457 F.3d at 200-02; *Syms*, 408 F.3d at 106 n.8. In addition, as this Court recognized in *Syms*, "[t]he 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," thwarting "CERCLA's stated purpose of 'induc[ing] such persons voluntarily to pursue appropriate environmental response actions with respect to

inactive hazardous waste sites.'" *Syms*, 408 F.3d at 106 n.8 (quoting H.R. REP. No. 96-1016(I), at 17 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 6119, 6120); *see also Consol. Edison*, 423 F.3d at 100 ("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."); *Schaefer*, 457 F.3d at 200.

This Court's decisions in *Schaefer*, *Consolidated Edison*, and *Syms* explain why *Bedford Affiliates* does not remain good law in light of *Cooper Industries* to the extent it prevents those PRPs that do not fall into the circumstances covered by 113(f) from pursuing claims under section 107(a). *Bedford Affiliates* was predicated on the sound and still-valid principle that CERCLA does not allow PRPs to freely select their remedies. *See* Section II, *supra.* This rationale does not apply, however, where a PRP cleaned up its property in the absence of a section 106 or 107 action (and so lacks a section 113(f)(1) claim) and has not entered into a qualifying settlement with the United States or a state (and so lacks a section 113(f)(3)(B) claim). Accordingly, this Court should hold either that *Bedford Affiliates* has been overruled or that it only applies to bar those PRPs that have or had a contribution claim under section 113(f) from proceeding under section 107.

By seeking the same relief under either sections 107(a)(4)(B) or 113(f)(3)(B), namely "to recover an equitable share of its costs," Niagara Opening Br. at 23 (Oct. 31, 2008), Niagara essentially concedes that its section 107(a) claim is in the nature of contribution. The Court, therefore, need not address the nature of a section 107(a) claim brought by a PRP that incurs costs involuntarily. In any case, under common law principles, Niagara's claim under section 107(a)(4)(B) is properly construed as a claim in the nature of contribution. *See Akzo Coating, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994) (describing the claim of a PRP subject to an EPA unilateral administrative order as "a quintessential claim for contribution"). Congress intended the courts to apply the common law to define the nature of liability under section 107(a). *See* 42 U.S.C. § 9607(a)(4)(B) (providing for cost recovery without defining nature of liability); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 806 (S.D. Ohio 1983). Under these principles, a private party engaging in cleanup activities under an administrative order has a claim in the nature of contribution when brought pursuant to section 107(a)(4)(B) because the party has effectively discharged the liability of all other PRPs for the cleanup activities undertaken. *Cf.* 18 Am. Jur. 2d § 11 ("As a rule, the right to contribution becomes complete and enforceable only upon a payment or its equivalent by the claimant discharging, satisfying, or

extinguishing the whole or more than his or her just and equitable share of the common obligation.”). Because under established common law principles a PRP engaging in “involuntary” cleanup activities has a claim in the nature of contribution, CERCLA § 113(f)(2), which applies to contribution claims generally, *see supra* n.5, would bar such a PRP from bringing a claim against another PRP that has already settled with the United States or a state.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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