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Does CERCLA Preempt New York State Law Claims for Cost Recovery and Contribution?

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I. INTRODUCTION

In the nineteenth and early twentieth centuries, the manufacture of gas created dangerous and contaminating byproducts.¹ The raw coal and oil used to make gas produced, among other things, tar and heavy metals that were often released into the soil and groundwater near the manufacturing plants.² In the early twenty-first century, one gas company, New York State Electric and Gas Corp. (“NYSEG”), took responsibility for the environmental mess and spent over twenty-five million dollars cleaning up contamination on its various production sites.³ The NYSEG was not the only party to blame for the contamination and it expected to recover part of its costs from other gas companies that had polluted the sites.⁴ In the end, however, NYSEG was stuck with the entire bill.⁵ NYSEG was unable to bring state claims against the other responsible parties because a New York district court found state claims to be preempted by the federal Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”).⁶

Is it fair that a New York company that provided a much-needed and expensive service by cleaning up state land was not permitted to avail itself of New York law and bring state claims to recover its expenditures, when others were partially responsible? What company would voluntarily perform these costly but necessary cleanups if it would ultimately be responsible for the entire cost despite its liability for only a portion of the damage?

This note asserts that CERCLA should not preempt all New York state claims brought by plaintiffs that have performed cleanups of hazardous waste for cost recovery or contribution. The various “savings clauses”⁷ throughout CERCLA and New York federal district court rulings interpreting the legislation show that Congress did not intend to preempt all state claims. State claims that are not in conflict with CERCLA—those that do not disrupt the federal contribution scheme laid out in section 113(f) or allow for double recovery under state and federal law—should be allowed to stand alongside CERCLA claims.⁸ New York state causes of

1. N.Y. State Elec. & Gas Corp. v. FirstEnergy Corp., No. 3:03-CV-0438, 2007 U.S. Dist. LEXIS 35141, at *3 (N.D.N.Y. May 11, 2007).

2. *See id.*

3. *See id.* at *3–4.

4. *See id.* at *4–6.

5. *See id.* at *40.

6. *Id.*

7. The “savings clauses” in CERCLA legislation operate to specifically disclaim preemption of state laws regulating hazardous substances. *See* Downey Brand Attorneys LLP, 030701_CERCLA, http://www.downeybrand.com/publications/articles/030701_CERCLA.php (last visited Oct. 29, 2009). Congress intended, with the inclusion of the “savings clauses,” to leave room for states to create laws that supplement CERCLA so long as they do not interfere with the federal government’s objectives. *See id.*

8. The federal contribution scheme laid out in section 113(f) encourages responsible parties to admit their liability and agree to a cost settlement with the government. *See* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9613(f)(2) (2006). Under section 113(f), a party that enters

action that allow for relief that is unavailable under or supplemental to the federal system should be available to plaintiffs who clean up hazardous waste.

Part II, section A, of this note describes the environmental catastrophes that led to the development of CERCLA and the federal Superfund program that finances and enforces the cleanup of hazardous waste sites. Part II, section B, examines both the government's "Enforcement First" policy that asks the parties responsible for the hazardous waste to finance the cleanup and the types of costs that are recoverable under CERCLA claims. Part III describes the federal legislation and interpretive case law that regulates who may sue for cost recovery or contribution and under what circumstances they may do so. Part III also stresses the importance to parties that have financed cleanups of determining whether state causes of action exist as alternative routes to federal recovery. Part IV of this note analyzes the savings clauses built into CERCLA. Part V discusses several New York federal district court cases that considered the issue of whether CERCLA preempts state claims for cost recovery and contribution. Part V also refutes the idea that state causes of action always disrupt the federal settlement scheme in CERCLA section 113(f) or allow for double recovery under state and federal law. Finally, Part VI argues that both congressional intent and sound policy support federal preemption of only those state claims that interfere with the federal settlement scheme or allow for double recovery.

II. HISTORY

A. The Emergence of CERCLA and the Superfund Program

Several major environmental catastrophes led to the enactment of CERCLA. One of the most widely known is the Love Canal disaster. In the early 1900s, a man named William Love dug a canal between the upper and lower Niagara Rivers in an effort to generate cheap energy.⁹ The project flopped, and the canal was turned into an industrial chemical dumpsite.¹⁰ From 1942 to 1953, the Hooker Chemical Company dumped over 20,000 tons of chemical waste into the abandoned canal.¹¹ In 1953, Hooker Chemical covered the canal, which was completely filled with chemical waste, and sold the land to the Niagara Falls School Board for one dollar.¹² In the

into a settlement agreement with the government gains not only the right to sue other responsible parties to recover its costs but also protection from subsequent contribution actions brought against it for matters addressed in the settlement. *See id.*; *see also* LAWRENCE SCHNAPF, *MANAGING ENVIRONMENTAL LIABILITY: BUSINESS TRANSACTIONS AND BROWNFIELD REDEVELOPMENT*, 5-124 (Juris Publ'g, Inc. 2008).

9. *See* Eckardt C. Beck, *The Love Canal Tragedy*, EPA J. (Jan. 1979), *available at* <http://www.epa.gov/history/topics/lovecanal/01.html>.

10. *Id.*

11. Press Release, U.S. Dep't of Justice and U.S. Env'tl. Prot. Agency, Occidental to Pay \$129 Million in Love Canal Settlement (Dec. 21, 1995), *available at* <http://www.google.com/search?client=safari&rls=en&q=epa&ie=UTF-8&oe=UTF-8>.

12. Beck, *supra* note 9.

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late 1950s, an elementary school and several residential neighborhoods were built on top of the filled-in canal.¹³

Lois Gibbs and her husband were among the many young parents seeking a nice, working-class neighborhood in which to raise their children when they moved to the Love Canal area.¹⁴ Like many of their new neighbors, the Gibbs children often fell ill. Children in the area experienced frequent asthma problems and urinary tract infections and suffered from epilepsy, birth defects, liver problems, and suppressed immune systems.¹⁵

The illnesses were found to be a direct result of exposure to the chemical waste on which the Love Canal community was built.¹⁶ Then-Governor of New York Hugh Carey decided the state would purchase the homes in the area¹⁷ and close the local school.¹⁸ President Jimmy Carter declared the Love Canal a federal disaster area in 1978, and over 900 families were relocated.¹⁹

In response to this and other environmental disasters, in 1980, Congress passed CERCLA, which created a “federal mechanism for expeditiously cleaning up hazardous waste sites.”²⁰ Under CERCLA, the Environmental Protection Agency (“EPA”) was directed to compile a list of contaminated sites, finance the cleanup of those sites using the \$1.6 billion Superfund trust, and identify parties that should be held liable for cleanup costs.²¹ Overall, it “gave the federal government broad authority to regulate hazardous substances, to respond to hazardous substance emergencies, and to develop long-term solutions for the Nation’s most serious hazardous waste problems.”²² The law created a tax on the chemical and petroleum industries, the

13. *Id.*; Lauren Brois, *Lois Gibbs: Bringing the Love Canal to New Paltz*, NEW PALTZ ORACLE, Nov. 15, 2007, <http://www.newpaltz.edu/oracle/article.cfm?Id.=3396>.

14. *Id.*

15. *Id.*; Jenny Rizzo, *On the 30th Anniversary of Toxic Nightmare, Former Love Canal Residents Ask State to Do More*, WKBW, Aug. 1, 2008, <http://www.wkbw.com/news/local/26200084.html>; Beck, *supra* note 9.

16. *See* Beck, *supra* note 9; Jenny Rizzo, *30 Year Anniversary of Love Canal: Missed Opportunities*, Aug. 3, 2008, *available at* <http://www.wkbw.com/news/local/26223299.html>. That there was a problem was increasingly clear. Indeed, residents reported that they could actually see the waste oozing up from the ground and into their homes. *Id.*

17. Beck, *supra* note 9.

18. NEW YORK STATE DEPARTMENT OF HEALTH, LOVE CANAL: A SPECIAL REPORT TO THE GOVERNOR & LEGISLATURE: APRIL 1981, *available at* http://www.health.state.ny.us/environmental/investigations/love_canal/lcreport.htm#relocation.

19. *Id.*; *see also* U.S. ENVTL. PROT. AGENCY, RCRA ORIENTATION MANUAL VI-10 (2008), *available at* <http://www.epa.gov/osw/inforesources/pubs/orientat/rom.pdf>.

20. SCHNAPF, *supra* note 8, at 5-1. *See* U.S. ENVTL. PROT. AGENCY, CERCLA Overview, <http://epa.gov/superfund/policy/cercla.htm> (last visited June 3, 2009); U.S. ENVTL. PROT. AGENCY, Basic Information, <http://www.epa.gov/superfund/about.htm> (last visited June 3, 2009).

21. SCHNAPF, *supra* note 8, at 5-1.

22. Environment, Health and Safety Online, CERCLA: Purpose and Organization, <http://www.ehso.com/superfund.php> (last visited Jan. 16, 2010). *See* SCHNAPF, *supra* note 8, at 5-1.

proceeds of which went to the Superfund trust for conducting cleanups of hazardous waste sites.²³

CERCLA initiatives progressed slowly, and Congress decided to dramatically expand the program in 1986 with the passage of the Superfund Amendments and Reauthorization Act (“SARA”).²⁴ These amendments increased state involvement as well as the focus on human health problems caused by hazardous waste, and provided new enforcement and settlement tools.²⁵ Most significantly, Congress increased the Superfund trust to \$8.5 billion, giving the EPA substantially more resources to clean up environmental waste sites.²⁶

B. CERCLA’s “Enforcement First” Policy

As amended, CERCLA gives the federal government broad remedial power to deal with hazardous waste. One of the EPA’s main goals under CERCLA, its “Enforcement First” policy,²⁷ is to identify those responsible for the hazardous waste and charge them with the cleanup costs of contaminated sites. The EPA can order these potentially responsible parties (“PRPs”)²⁸ to clean up the sites, or it can negotiate

23. See CERCLA: Purpose and Organization, *supra* note 22; See also CERCLA Overview, *supra* note 20; SCHNAPF, *supra* note 8, at 5-1.

24. SCHNAPF, *supra* note 8, at 5-1.

25. See *id.*

26. *Id.* U.S. Env’tl. Prot. Agency, SARA Overview (2007), <http://www.epa.gov/superfund/policy/sara.htm>. The toxic waste in the Love Canal area, discussed earlier, was cleaned up using Superfund money, and the federal government was subsequently reimbursed through a settlement by the responsible chemical corporation. Press Release, U.S. Env’tl. Prot. Agency, Occidental to Pay \$129 Million in Love Canal Settlement (Dec. 21, 1995), available at http://www.usdoj.gov/opa/pr/Pre_96/December95/638.txt.html. The Love Canal was not de-listed from the Superfund program until 2004, evidencing the magnitude of the cleanup project. See *Delisting Love Canal*, N.Y. TIMES, Mar. 22, 2004, at A22, available at <http://www.nytimes.com/2004/03/22/opinion/delisting-love-canal.html?scp=1&sq=Delisting%20Love%20Canal&st=cse> (explaining that “Delisting Love Canal is a way of saying that the area is clean, the event over, history done, though the agency has promised to monitor the site and intervene with additional cleanup if necessary”).

27. See Memorandum from John Peter Suarez, Assistant Adm’r, Office of Enforcement and Compliance Assurance, and Marianne Lamont Horinko, Assistant Adm’r, Office of Solid Waste and Emergency Response, on Enforcement First for Remedial Action at Superfund Sites, to Reg’l Adm’rs (Sept. 20, 2002), available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/enffirst-mem.pdf>; Finding PRPs, Compliance and Enforcement, U.S. EPA, *Finding Potentially Responsible Parties* (July 27, 2007), <http://www.epa.gov/compliance/cleanup/superfund/find.html>. See generally CERCLA: Purpose and Organization, *supra* note 22.

28. Only PRPs face CERCLA liability. The CERCLA recognizes four classes of PRPs:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal

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settlements with PRPs to fund the cleanup and take legal action against them if they fail to do so.²⁹ If the government finances a cleanup using the Superfund, it can later sue the PRPs to recover the costs under section 107(a)(4).³⁰

In brief, the EPA's policy is to reserve Superfund money for the cleanup of contamination that cannot be attributed to specific parties at the time of cleanup of the contaminated site. When a polluter can be identified, the EPA's stance is that the polluter should either finance the cleanup when the cleanup remains to be done, or, should reimburse the Superfund for the costs of cleanup already incurred.³¹ This policy promotes a "polluter pays" principle and conserves the resources of the Superfund to clean up contaminated sites for which no viable PRP can be located.³²

One consequence of the EPA's Enforcement First policy is that the party that enters into a cleanup agreement with the EPA may not be the only party liable for the contamination. The financing party can attempt to recoup portions of the cleanup costs from other PRPs through CERCLA liability claims. CERCLA, however, only allows for recovery of the response costs outlined in the National Oil and Hazardous Substances Pollution Contingency Plan, more commonly known as the National Contingency Plan ("NCP").³³

The United States first developed the NCP in 1968 after an oil tanker spilled more than thirty-seven million gallons of crude oil into waters off the coast of England.³⁴ The plan provided the first set of guidelines and procedures that were used to report and respond to any release or threatened release of oil or hazardous substances.³⁵ After CERCLA was passed in 1980, the NCP was broadened to include a framework for responding to hazardous substance spills as well as oil spills, and

or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and (D) the costs of any health assessment or health effects study carried out under section 104(i) [42 USCS § 9604(i)].

42 U.S.C. § 9607(a) (2006).

29. See Memorandum, Enforcement First for Remedial Action at Superfund Sites, *supra* note 27.
30. 42 U.S.C. § 9607(a)(4). This provision allows both government and private parties that have contributed to a cleanup to bring cost recovery actions against parties partially or wholly responsible for hazardous waste.
31. Memorandum, Enforcement First for Remedial Action at Superfund Sites, *supra* note 27.
32. *Id.*
33. Protection of Environment, 40 C.F.R. § 300.1 (2008).
34. This was the now infamous Torrey Canyon tanker. See U.S. Env'tl. Prot. Agency, National Oil and Hazardous Substances Pollution Contingency Plan Overview, <http://www.epa.gov/emergencies/content/lawsregs/ncpover.htm> (last visited Jan. 16, 2010).
35. SCHNAPF, *supra* note 8, at 5-37; CERCLA: Purpose and Organization, *supra* note 22.

provide for emergency removal actions of hazardous waste.³⁶ Its stated purpose is to “provide the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants.”³⁷ Overall, the NCP outlines the steps the government must take in cleaning up hazardous waste and is the “primary regulation of the Superfund program.”³⁸

Additionally, the NCP specifies which types of costs a party may recover under a federal action from other responsible parties. Recoverable costs are limited to “necessary” response costs that are “consistent” with the NCP,³⁹ meaning that in order for a party to recover its costs, its response action must be in “substantial compliance” with NCP procedural requirements and result in a “CERCLA-quality cleanup.”⁴⁰ Some common examples of costs that courts have awarded to plaintiffs under CERCLA actions include “expenses for site investigations, . . . well plugging, site maintenance, and providing alternative water supplies.”⁴¹

III. PROBLEM

Sometimes, a party may pay for cleanup activities that are not “consistent” with the NCP, and are therefore not recoverable under federal CERCLA claims. A private party may not know what costs will later be found “consistent” with the NCP before the cleanup takes place. Because CERCLA fails to define the term, there has been a great deal of litigation as to what costs are in fact “necessary,” and the burden falls on the private plaintiff to prove consistency with the NCP.⁴² Further, the NCP does not provide for personal injury claims or private property damage.⁴³ These and other costs found to be inconsistent with the NCP may, however, be recoverable under state law.

A party incurring cleanup costs can attempt to recoup some or all of the costs from other PRPs under two different CERCLA claims. Although in its original form CERCLA did not contain an express right of contribution among PRPs,⁴⁴ in the early years of CERCLA litigation several courts found an implied private right of action for parties seeking reimbursement of their cleanup costs under section 107(a)(4)(B).⁴⁵ In

36. U.S. Env'tl. Prot. Agency, National Oil and Hazardous Substances Pollution Contingency Plan Overview, *supra* note 34.

37. 40 C.F.R. § 300.1.

38. U.S. Env'tl. Prot. Agency, Frequently Asked Questions, “What is the National Contingency Plan (NCP)?,” http://epa.custhelp.com/cgi-bin/epa.cfg/php/enduser/std_alp.php (last visited Jan. 16, 2010).

39. *See* 40 C.F.R. § 300.700(c)(2).

40. 40 C.F.R. § 300.700(c)(3)(i); *see infra* notes 136–42 and accompanying text.

41. *See* SCHNAPF, *supra* note 8, at 5–45.

42. *See id.* at 5–45 to –46.

43. *See id.* at 5–44.

44. *Id.* at 5–93.

45. *Id.*; *see also* Cooper Indus., Inc. v. Aviall Servs. Inc., 543 U.S. 157, 162 (2004).

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1986, Congress added section 113(f)(1) to CERCLA, which created an express right of contribution.⁴⁶

A section 107(a)(4)⁴⁷ private cost recovery action and a section 113(f)(1)⁴⁸ contribution action are significantly different claims. A successful section 107(a)(4)(B) claim results in joint- and several-indemnity liability.⁴⁹ Thus under section 107(a)(4), a plaintiff may seek to recover the entirety of its response costs from the defendant. A section 107(a)(4) judgment, therefore, can result in a one hundred percent shifting of the costs of the cleanup from the party that initially financed it to the party found liable under 107(a)(4).⁵⁰ Conversely, under section 113(f)(1), liability is several, meaning that a court may allocate liability among PRPs according to the court's opinion of the proportionality of blame among the PRPs.⁵¹

46. SCHNAPF, *supra* note 8, at 5-93. Plaintiffs bringing a section 113(f) action have a right to contribution from other PRPs that is several, not joint, allowing courts to apportion liability among PRPs using equitable factors. In other words, a right of contribution allows a suing party to collect contribution from other responsible parties in accordance with their equitable share of the blame. *Id.* at 5-93 to -94. In *Cooper Industries*, the Supreme Court succinctly stated, “[i]n short, 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).” 543 U.S. at 163.

47. 42 U.S.C. § 9607(a)(4)(B) (2006). Section 9607 states:

(a) Covered persons; scope; recoverable costs and damages; interest rate; “comparable maturity” date. Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section

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

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

Id.

48. 42 U.S.C. § 9613(f)(1). Section 9613 states:

(f) Contribution.

(1) Contribution. Any person may seek contribution from any other person who is liable or potentially liable under section 107(a) [42 USC § 9607(a)], during or following any civil action under section 106 [42 USC § 9606] or under section 107(a) [42 USC § 9607(a)]. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107 [42 USC § 9606 or 9607].

Id.

49. SCHNAPF, *supra* note 8, at 5-93.

50. *Id.*

51. *Id.* at 5-94.

Initially, federal courts disagreed about the circumstances under which plaintiffs could sue under each cause of action.⁵² Specifically, courts grappled with the question of whether the addition of an express cause of action for several liability in section 113(f)(1) preempted the section 107(a)(4) implied cause of action for complete indemnity. Some courts held that the section 107(a)(4) claim of complete indemnity had been swallowed by the claim of several liability in section 113(f)(1),⁵³ while other courts held that each section provided a distinct cause of action.⁵⁴

With the development of voluntary cleanup agreements in the mid-1990s came many section 113(f)(1) actions seeking recovery for response costs from other PRPs after a voluntary cleanup.⁵⁵ Most courts agreed that only “innocent parties” that had not been sued by the government under CERCLA sections 106 or 107, and thus were not potentially or actually liable to the government, could bring section 107(a)(4) cost recovery actions.⁵⁶

The issue was ultimately resolved in 2004 when the Supreme Court, in *Cooper Industries v. Aviall Services, Inc.*, limited the right of contribution under section 113(f) for many PRPs.⁵⁷ Cooper Industries (“Cooper”) had sold several aircraft engine maintenance sites in Texas to Aviall in 1981.⁵⁸ Years later, Aviall discovered that both it and Cooper had contaminated the sites with petroleum and other hazardous substances that leaked into the ground through underground storage tank spills.⁵⁹ Aviall entered into a voluntary cleanup program with the state in order to avoid an enforcement action, and cleaned up the properties under state supervision.⁶⁰ Aviall subsequently brought an action against Cooper to recover Cooper’s share of the response costs.⁶¹

Writing for the majority, Justice Thomas stated that a plaintiff could only bring a section 113(f)(1) contribution action “during or following” its involvement in a civil enforcement action brought by the government.⁶² In other words, a plaintiff cannot bring a section 113(f)(1) suit against another party unless the party seeking contribution has first been sued by the government under sections 106 or 107 or has entered into an

52. *Id.*

53. *Id.* (citing *Sun Company v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997)).

54. *Id.* (citing *United States v. SCA Servs. of Indiana, Inc.*, 849 F. Supp. 1264 (N.D. Ind. 1994); *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal, Co.*, 814 F. Supp. 1269 (E.D. Va. 1992)).

55. SCHNAPF, *supra* note 8, at 5-95.

56. *Id.* at 5-96.

57. 543 U.S. 157 (2004).

58. *Id.* at 163.

59. *Id.* at 163-64.

60. *Id.* at 164.

61. *Id.*

62. *Id.* at 166.

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administrative or judicially approved settlement under section 113(f)(2),⁶³ resolving its liability to the government.⁶⁴ However, the Court left open the issue of whether section 107 was similarly limited or whether it allowed all PRPs to sue for cost recovery.

A year later, the Court of Appeals for the Second Circuit addressed that question in *Consolidated Edison Co. of New York, Inc. v. UGI Utils., Inc.*, when it allowed a party that conducted a voluntary cleanup to bring a section 107 action.⁶⁵ The New York State Department of Environmental Conservation (“NYDEC”) had approached Consolidated Edison (“Con Ed”) about cleaning up contamination on properties where it or its predecessors had owned manufactured gas plants.⁶⁶ Con Ed entered into a voluntary agreement with NYDEC to clean up more than one hundred of these sites.⁶⁷ Prior to entering into the voluntary agreement, Con Ed brought suit under section 113(f)(1) against UGI, a corporation that Con Ed alleged owned and operated ten of the sites in question, to recover costs it had incurred and would incur in cleaning up those properties.⁶⁸ The court examined whether the voluntary cleanup agreement was an administrative settlement, which would allow Con Ed to bring an action under section 113(f)(3),⁶⁹ and, if not, whether Con Ed could nonetheless maintain a section 107(a)(4)(B) claim against UGI.⁷⁰

The Second Circuit found that the voluntary cleanup agreement was not a settlement agreement under section 113(f) because it did not resolve CERCLA liability.⁷¹ But the court ruled that Con Ed could still recover under section 107(a) for “necessary response costs incurred voluntarily, not under a court or administrative

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63. 42 U.S.C. § 9613(f)(2) (2006). Under this provision, a party that has resolved its liability with the government through an administrative or judicially approved settlement agreement may not be sued again for the same costs in a federal contribution action. *Id.* Under section 113(f)(3), settling parties may bring contribution claims against non-settling parties. 42 U.S.C. § 9613(f)(3).
64. *Cooper Indus., Inc. v. Avaiil Servs., Inc.*, 543 U.S. 157, 166 (2004).
65. 423 F.3d 90 (2d Cir. 2005).
66. *See id.* at 93.
67. *Id.*
68. *Id.* at 93–94; *see* SCHNAPF, *supra* note 8, at 5–98.
69. Section 113(f)(3)(B) states that a party that “has resolved its [federal] liability . . . in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement.” 42 U.S.C. § 9613(f)(3)(B) (2006). In other words, in order to encourage parties to admit liability and expedite cleanup projects, a party’s right to seek contribution from other PRPs under section 113(f)(3) attaches only once the party has settled its own liability with the government and promises to pay its portion of the cleanup costs. *See* SCHNAPF, *supra* note 8, at 5–101. In *Consolidated Edison*, the court had to determine whether the voluntary cleanup agreement was an administrative settlement that resolved CERCLA liability under section 113(f)(3), and whether Con Ed could properly bring a contribution suit against UGI. *See Consolidated Edison*, 423 F.3d at 95–96.
70. *Consolidated Edison*, 423 F.3d at 97; *see* SCHNAPF, *supra* note 8, at 5–98 to –99.
71. *Consolidated Edison*, 423 F.3d at 97. There is a comprehensive line of cases interpreting section 113(f)(3)(B) and what constitutes an “administrative settlement.” *See* SCHNAPF, *supra* note 8, at 5–104. Before *Cooper Indus.*, many courts held that an agreement must satisfy the procedural and due process requirements of the CERCLA provision, section 122, governing settlements. *Id.* Since this issue was not before the Supreme Court in *Cooper Industries*, there is still no clear consensus on whether a party who has entered

order or judgment,” even if Con Ed would have been liable for those expenses had it been sued by the government under that same section.⁷² The court reasoned that prohibiting section 107(a)(4) recovery in such situations would discourage voluntary cleanups.⁷³ The court also recognized that although allowing a party to bring a section 107(a) action for voluntary cleanup could result in complete indemnification of a party that may actually be liable for some of the costs, a defending party could still bring a section 113(f)(1) counterclaim to offset the contribution owed.⁷⁴

Shortly after the Second Circuit found an implied right of contribution under section 107(a)(4), the Seventh and Eighth Circuits found such a right as well.⁷⁵ However, the Third Circuit rejected the existence of any implied right.⁷⁶ When the issue came before the Supreme Court in *United States v. Atlantic Research Corp.*, the Court affirmed the Eighth Circuit’s interpretation and ruled that a PRP that has performed a voluntary cleanup may seek cost recovery under section 107(a)(4)(B).⁷⁷

In *Atlantic Research Corp.*, the company (“Atlantic”) leased a facility owned and operated by the U.S. Department of Defense, at which it retrofitted rocket motors and sprayed engines with high-pressure water hoses.⁷⁸ Over time, the water contaminated the soil and groundwater.⁷⁹ Atlantic cleaned up the hazardous contamination and then brought suit against the U.S. government under both sections 107(a)(4) and 113(f)(1).⁸⁰

into an agreement with a state or federal environmental agency may bring section 113(f) contribution claims. *Id.*

72. *Consolidated Edison*, 423 F.3d at 100.

73. *Id.* The Second Circuit stated, “[w]ere 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.” *Id.*

74. *Id.* at 100 n.9; see SCHNAPF, *supra* note 8, at 5-99. In other words, because liability under section 107(a) is joint and several, a plaintiff suing under that section can seek to recover the entirety of its response costs from a defendant even if it is actually responsible for some of the costs. *Id.* In order to prevent such a plaintiff’s unjust enrichment, the Second Circuit reasoned that the defendant sued under section 107(a) was not barred from then bringing its own section 113(f)(1) counterclaim against the plaintiff for contribution to offset the inequitable judgment. *Id.*

75. See SCHNAPF, *supra* note 8, at 5-99 (citing *Consolidated Edison*, 423 F.3d at 92; *Metropolitan Water Reclamation Dist. of Greater Chicago v. North American Galvanizing & Coatings, Inc.*, 473 F.3d 824 (7th Cir. 2007); *United States v. Atlantic Research Corp.*, 459 F.3d 827 (8th Cir. 2006)).

76. See SCHNAPF, *supra* note 8, at 5-99 (citing *E.I. Dupont de Numours & Co. v. United States*, 460 F.3d 515 (3d Cir. 2006)).

77. 551 U.S. 128 (2007).

78. *Id.* at 133.

79. *Id.*; see also Richard Porter, *Shifting the Costs of Environmental Housekeeping: An Additional Way to Receive Contribution for Contaminated Site Cleanup*, 27-1 AM. BANKR. INST. J. 42, 42 (2008).

80. *Atlantic Research Corp.*, 551 U.S. at 133.

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The issue in *Atlantic Research Corp.* was whether the meaning of the phrase “any other person”⁸¹ in section 107(a)(4)(B) created a claim for “innocent” parties—those without any potential liability to the government.⁸² Like the plaintiff in *Consolidated Edison*, Atlantic performed its cleanup voluntarily, not under a recognized CERCLA settlement agreement with the government.⁸³ The Court ruled that section 107 created a separate cost recovery action, one distinct from a section 113(f)(1) right of contribution.⁸⁴ While section 113(f)(1) involves an action for contribution among PRPs with common liability, section 107 involves a cost recovery action for PRPs that have voluntarily incurred cleanup costs.⁸⁵ The Court held that Atlantic was allowed to sue the U.S. government to recover its voluntary cleanup costs under section 107.⁸⁶

Following the trend set by the Second Circuit in *Consolidated Edison*, the Supreme Court announced an important rule in *Atlantic Research Corp.*: Parties that have performed cleanups may only sue for contribution from other PRPs under section 113(f)(1) if the party seeking contribution was first sued by the government, whereas only “innocent” parties, those whose cleanup was voluntary, can sue for indemnification under section 107(a)(4)(B).⁸⁷ Thus, the Supreme Court first narrowed the right of contribution in *Cooper Industries*, and then provided an alternative avenue of relief under CERCLA in *Atlantic Research Corp.*⁸⁸

Clearly, federal routes to recovery are restricted—only certain plaintiffs can sue for certain types of relief, and the only relief available at all is for cleanup costs consistent with the NCP. Additionally, *Atlantic Research Corp.* left open the question of whether parties who have entered into consent decrees,⁸⁹ or parties ordered by the EPA to respond to section 106(a) unilateral cleanup orders,⁹⁰ may sue under sections 107(a)(4)

81. Section 107(a)(4)(B) in full refers to “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) (2006).

82. *Id.*; see Michael H. Reed, *Toxins-Are-Us: Supreme Court’s Recent CERCLA Decision Could Affect Bankruptcy Cases*, 26-8 AM. BANKR. INST. J. 40, 40 (2007).

83. *Atlantic Research Corp.*, 551 U.S. at 133.

84. *Id.* at 138; see also SCHNAPF, *supra* note 8, at 5-100.

85. *Atlantic Research Corp.*, 551 U.S. at 138-39; SCHNAPF, *supra* note 8, at 5-100; Porter, *supra* note 79, at 42-43.

86. *Atlantic Research Corp.*, 551 U.S. at 141.

87. *See id.* at 138-40.

88. *See* Porter, *supra* note 79, at 42-43.

89. Consent decrees are court-approved legal agreements between the federal government and PRPs mandating cleanups. U.S. Envtl. Prot. Agency, Types of Superfund Settlements, <http://www.epa.gov/oecaerth/cleanup/superfund/neg-type.html#aoc> (last visited Jan. 8, 2010).

90. If the PRP does not agree to perform cleanup work or refuses to perform work agreed to in an earlier settlement agreement, the EPA can order the PRP to perform cleanup work through a Unilateral Administrative Order (UAO). U.S. Envtl. Prot. Agency, Superfund Unilateral Orders, <http://www.epa.gov/compliance/cleanup/superfund/orders.html> (last visited Jan. 8, 2010). The EPA “can issue a UAO when it finds there may be an imminent and substantial endangerment to the public health or the environment.” *Id.*

or 113(f)(1).⁹¹ In such situations, a party is invited or ordered to finance a cleanup, and that party's response costs are compelled by the government—they are neither “voluntary” nor paid as judgments in sections 106 or 107(a)(4) enforcement actions. Thus, *Atlantic Research Corp.* provided some answers as to what types of claims PRPs could bring, but it did not provide all the answers.⁹²

IV. THE ROLE OF SAVINGS CLAUSES IN PREEMPTION

Congress is permitted to use CERCLA to preempt state law if it chooses to do so.⁹³ There are three ways in which federal statutes can preempt state laws. First, there is “express preemption,” whereby Congress expressly states its intention to preempt state law in a given area.⁹⁴ Second, there is “field preemption,” where the federal scheme is “sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation”⁹⁵ in a particular policy area. Lastly, there is “conflict preemption,” where state law is preempted only to the extent that it conflicts with federal law, and where “compliance with both federal and state regulations is a physical impossibility.”⁹⁶

New York courts agree that state claims for recovery of cleanup costs are not preempted by express or field preemption. The controversy surrounds the issue of whether state claims are in direct conflict with federal CERCLA provisions and

91. The Court expressly chose not to answer this question. In describing how a party may recover costs incurred under a consent decree, the court commented:

In such a case, the PRP does not incur costs voluntarily but does not reimburse the costs of another party. We do not decide whether these compelled costs of response are recoverable under § 113(f), § 107(a), or both. For our purposes, it suffices to demonstrate that costs incurred voluntarily are recoverable only by way of § 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under § 113(f). Thus, at a minimum, neither remedy swallows the other.

Atlantic Research Corp., 551 U.S. at 139 n.6.

92. See Winston & Strawn LLP, *Supreme Court Allows CERCLA PRPs to Sue For Cost Recovery After Voluntary Cleanup*, ENVTL. PRAC., June 2007, http://www.winston.com/siteFiles/publications/US_AtlancticResearchCorp.pdf. Relegated to a footnote in *Atlantic Research Corp.*, consent decrees and section 106 cleanup orders are common. *Id.* at 2. By not rendering a decision as to whether these costs are recoverable under sections 107(a) or 113(f), many PRPs “will therefore be faced with substantial uncertainty, not only as to which cause of action they can assert, but when they must assert it, because Sections 107(a) and Section 113(f) have different statutory limitations periods.” *Id.*
93. See U.S. CONST. art. VI, cl. 2 (stating that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”).
94. See *Bedford Affiliates v. Sills*, 156 F.3d 416, 426 (2d Cir. 1998); *New York v. Ametek*, 473 F. Supp. 2d 432, 433 (S.D.N.Y. 2007); *New York State Elec. & Gas Corp. v. FirstEnergy Corp.*, No. 3:03-CV-0438, 2007 U.S. Dist. LEXIS 35141, at *1 (N.D.N.Y. May 11, 2007).
95. *Bedford*, 156 F.3d at 426 (quoting *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)).
96. *Id.* (quoting *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)).

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should therefore be preempted.⁹⁷ Based on CERCLA's statutory language and the various rulings of New York federal district courts, it is clear that not all state claims should be preempted. Only state claims that interfere with the federal contribution scheme or allow for double recovery under federal and state laws are in conflict with CERCLA. State claims that allow for recovery unavailable under or supplemental to federal law should not be preempted.

Congressional intent is the most important factor in determining whether a federal statute preempts state law.⁹⁸ Statutory language is a prime indicator of congressional intent, and "savings clauses" sprinkled throughout CERCLA indicate that Congress did not intend for federal law to preempt all state law claims in this area.⁹⁹ In fact, Congress repeatedly included reminders in CERCLA that federal actions are not the only claims available to plaintiffs who have financed environmental cleanups.

The language of section 113(f)(1) states that "[n]othing 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 106 or section 107."¹⁰⁰ This section deals with contribution actions brought by a PRP after it has been sued by the government, and indicates that the section was not intended to affect other state or federal actions brought by private parties that have not been sued under sections 106 or 107. Therefore, when a party is innocent in the eyes of the government, CERCLA should not preempt any state claims a plaintiff may bring for cost recovery or contribution unless the state claims allow for double recovery.

Most notable is the federal commencement rule, which sets a statute of limitations on state law actions for exposure to hazardous substances in section 309(a).¹⁰¹ Subsection (a)(1) deals with exceptions to state statutes.¹⁰² This section states that if a state action for personal injury or property damage has a statute of limitations with a commencement date earlier than the federally required commencement date, the federal date controls.¹⁰³ This indicates that when Congress wants to preempt state hazardous waste cleanup laws, it does so explicitly. Not only does CERCLA lack language expressly preempting all state law claims for cost recovery, the savings

97. See *Bedford Affiliates*, 156 F.3d at 426; *Ametek*, 473 F. Supp. 2d at 433–34; *N.Y. State Elec. & Gas*, 2007 U.S. Dist. LEXIS at *31–33.

98. See, e.g., *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137–38 (1990); *State v. Hickey's Carting, Inc.*, 380 F. Supp. 2d 108, 111 (E.D.N.Y. 2005).

99. See, e.g., *Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 127 (3d Cir. 1991) (stating "Congress did not intend for CERCLA remedies to preempt complementary state remedies").

100. 42 U.S.C. § 9613(f)(1) (2006).

101. See 42 U.S.C. § 9658(a)(1) (2006).

102. *Id.*

103. *Id.*; Downey Brand Attorneys LLP, CERCLA article, http://www.downeybrand.com/publications/articles/041214_cercla.php (last visited Jan. 8, 2010).

clauses in CERCLA demonstrate that Congress specifically intended to allow state law remedies to exist alongside the federal cost-recovery scheme.¹⁰⁴

V. NY CASE LAW: CERCLA DOES NOT PREEMPT ALL STATE CLAIMS FOR RECOVERY

A. *Disturbing the Federal Scheme in CERCLA Section 113(f)*

Several cases address the validity of New York state common law and statutory claims for recovery of costs expended in financing an environmental cleanup. One conclusion clearly emerges from the cases decided by New York's district courts: state claims that do not disturb the federal contribution scheme in section 113(f) should not be preempted by CERCLA.

Bedford Affiliates v. Sills was the first New York case to address the issue of whether a plaintiff who had financed a cleanup of hazardous waste could bring both CERCLA and state claims against defendants who may also be responsible for the waste.¹⁰⁵ In that case, the plaintiff, Bedford, a general partnership, leased property in New York to corporations that constructed and operated dry-cleaning businesses.¹⁰⁶ Later, Bedford, under a consent order with NYDEC, cleaned up its property that the lessees had contaminated with hazardous dry-cleaning solvents.¹⁰⁷ Plaintiff then brought claims against the lessees for cost recovery under CERCLA section 107(a)(4), and for contribution under section 113(f)(1), as well as state common law claims for restitution and indemnification.¹⁰⁸

The Second Circuit found that Bedford's state claims were preempted by section 113(f)(1) and dismissed them.¹⁰⁹ In the Second Circuit's view, Congress had created section 113(f)(1) as an express right of contribution in order to expedite the resolution of environmental claims.¹¹⁰ The court stated that Congress had incorporated incentives into the statute for parties responsible for cleanups to settle their claims, and disincentives for such parties to refuse settlement.¹¹¹ The court noted that PRPs who settle with the government gain immunity from other contribution suits asserted against them under section 113(f)(2), and retain the right to bring contribution actions against non-settling parties under section 113(f)(3).¹¹² In addition, non-settling parties may not seek contribution from settling parties, and may face

104. The Second Circuit agreed, stating that CERCLA does not "prevent the states from enacting laws to supplement federal measures relating to the cleanup of such wastes." *Bedford Affiliates*, 156 F.3d at 426-27.

105. *See id.* at 419.

106. *Id.* at 420.

107. *Id.* at 421-22.

108. *Id.* at 422.

109. *Id.* at 427.

110. *Bedford Affiliates*, 156 F.3d at 427.

111. *Id.*

112. *Id.*

disproportionate liability.¹¹³ In the words of the Second Circuit, “it can easily be seen that instituting common law restitution and indemnification actions in state court would bypass this carefully crafted settlement system, creating an actual conflict therefore between CERCLA and state common law causes of action. Consequently, CERCLA preempts the state law remedies of restitution and indemnification.”¹¹⁴

More recently, in 2007 the United States District Court for the Northern District of New York held that CERCLA preempted state law contribution claims by way of conflict preemption in *New York State Electric and Gas Corp. v. FirstEnergy Corp.*¹¹⁵ Pursuant to a consent order from NYDEC, the New York State Electric and Gas Corp. (“NYSEGC”) cleaned up its sites that had been contaminated by the manufacture of gasoline.¹¹⁶ It then brought contribution claims under both CERCLA section 113(f)(1) and New York civil statute section 1401 to recover cleanup costs from FirstEnergy, a corporate successor to the properties that may have also contaminated the land.¹¹⁷ The court found that the state contribution claim was preempted by CERCLA because the contribution scheme outlined in section 113(f)(1) may be undercut by state law and because of the possibility of double recovery. The court recognized the viability of contribution claims brought by PRPs who have previously been sued in a civil action under section 113(f)(1) and PRPs that have resolved their liability through administrative or judicially approved settlement under 113(f)(3)(B), as well as cost recovery claims by parties against other PRPs that voluntarily cleaned sites under section 107(a)(4).¹¹⁸ The court found that section 1401 contribution claims may provide recovery inconsistent with the CERCLA scheme and “would potentially undermine this scheme and permit recovery of duplicate

113. *Id.* This may occur because the amount recoverable from non-settling parties is reduced only by the amount of settlement and is not limited to their share of the damages. *Id.* (citing CERCLA § 113(f)(2)).

114. *Id.*; see also *In re Reading Co.*, 115 F.3d 1111, 1119 (3d Cir. 1997). In *In re Reading Co.*, the court described the federal settlement scheme in section 113(f)(1) as follows:

The first part of the system grants protection from contribution actions to settling parties for actions arising from ‘matters addressed’ in a consent decree. The second part limits the settlement’s effect to a reduction in the aggregate liability of the remaining PRPs. Because settlement reduces the total amount recoverable from the remaining, non-settling parties only by the amount of settlement, non-settling PRPs remain liable for the balance of the aggregate environmental liability. Consequently, PRPs who choose to settle gain protection from contribution, enjoy favorable settlement terms, and retain the ability to seek contribution from other defendants. PRPs, who choose not to settle, are barred from seeking contribution from the settling PRPs and thus face potentially disproportionate liability. This system gives the United States obvious and important leverage to encourage quick and effective resolution of environmental disputes.

Id.

115. No. 3:03-CV-0438, 2007 U.S. Dist. LEXIS 35141, at *3.

116. *Id.* at *3–4.

117. *Id.* at *6–7.

118. See *id.* at *36.

damages, or contribution where none is available under CERCLA,” and therefore ruled that the state claim was precluded by conflict preemption.¹¹⁹

Conversely, in *State v. Ametek, Inc.*, decided just a few months before *FirstEnergy*, the United States District Court for the Southern District of New York found that the plaintiff’s state law claims were not preempted by CERCLA.¹²⁰ In *Ametek*, the state brought both CERCLA section 107 claims and state claims of restitution and public nuisance to recover costs incurred in response to the release of hazardous substances at a state compost site.¹²¹ The defendant filed a motion to dismiss the state’s claims on the ground that they were automatically preempted by CERCLA.¹²²

The *Ametek* court denied the defendant’s motion and stated that the defendant could not rely on the preemption found in *Bedford* because, unlike the plaintiff in *Bedford* who sued under 113(f)(1), the *Ametek* plaintiff sued under section 107(a)(4).¹²³ In the words of the court, “the *Bedford Affiliates* Court’s concerns are not implicated in actions for recovery brought under section 107.”¹²⁴

The United States District Court for the Eastern District of New York reached the same conclusion in *State v. Hickey’s Carting, Inc.*¹²⁵ After cleaning up hazardous waste at a state landfill, the state brought claims against Hickey’s Carting and others under section 107(a)(4), as well as under state common law theories of unjust enrichment, subrogation, and implied indemnity for recovery of its response costs.¹²⁶ Like the court in *Ametek*, the Eastern District noted that the reasoning behind *Bedford* did not apply to the section 107(a) claim brought by the state in that case.¹²⁷ In *Hickey’s Carting, Inc.*, the parties involved were not PRPs with government claims to settle, but “innocent” parties with no prior liability to the government. Thus, the court held that because settlements between the government and a PRP “are intended to resolve a PRP’s liability to the government and usually contain releases and covenants not to sue for costs arising out of the same hazardous waste cleanup” there was no fear that the government would, after settling with a PRP, sue the same party under common law.¹²⁸ The court denied the defendant’s motion to dismiss the state claims, finding that the state claims were not preempted by CERCLA.¹²⁹

119. *Id.* at *36–37.

120. *State v. Ametek, Inc.*, 473 F. Supp. 2d 432, 433 (S.D.N.Y. 2007).

121. *Id.*

122. *Id.*

123. *Id.* at 434.

124. *Id.*

125. 380 F. Supp. 2d 108 (E.D.N.Y. 2005).

126. *Id.* at 110–11.

127. *See id.* at 113.

128. *Id.*

129. *Id.* at 121.

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Because only parties that have performed voluntary cleanups bring section 107(a) cost recovery claims, there is no danger of state actions for recovery disrupting the federal settlement scheme designed to compel parties to settle with the federal government. Other state claims for contribution that do not disrupt the scheme created under section 113(f)(1) should also not be preempted by that section.

B. Double Recovery

Congress made clear in CERCLA that plaintiffs could not recover compensation for the same cleanup costs under both state law and under section 114(b).¹³⁰ Through this provision, Congress implicitly allows state claims by limiting recovery under state law to amounts not recovered under federal law. Implied is the notion that so long as state and federal recovery do not overlap, CERCLA does not preclude a plaintiff's recovery under both state and federal causes of action.¹³¹

Perhaps Congress decided to allow supplemental recovery under state claims because the federal statutes severely limit the costs a plaintiff may recover from other responsible parties. Under section 107(a)(4), PRPs are liable only for four categories of costs.¹³² These are: (a) costs of removal of hazardous waste or remedial action taken by the state that are not consistent with the NCP, (b) other response costs incurred by any other person consistent with the NCP, (c) natural resource damage, and (d) costs of health studies or assessments conducted pursuant to section 104(i).¹³³

Essentially, the only costs a private party can recover are those "consistent" with the NCP under section 107(a)(4)(B).¹³⁴ Similarly, under section 113(f)(1), parties can only collect contribution for response costs covered under the NCP.¹³⁵ The NCP defines "consistent" response costs as those considered "necessary"¹³⁶ when the response action, evaluated as a whole, is in "substantial compliance" with certain procedural requirements of the NCP and "results in a CERCLA-quality cleanup."¹³⁷

130. See 42 U.S.C. § 9614(b) (2006). Section 9614(b) explicitly precludes double recovery, stating:

Any person who receives compensation for removal costs or damages or claims pursuant to this Act shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this Act.

Id.

131. See *id.*

132. 42 U.S.C. § 9607(a)(4).

133. *Id.*

134. 42 U.S.C. § 9607(a)(4)(B).

135. 42 U.S.C. § 9613(f)(1); see SCHNAPP, *supra* note 8, at 5-78.

136. 40 C.F.R. § 300.700(c)(2) (2008).

137. 40 C.F.R. § 300.700(c)(3)(i).

A government plaintiff, on the other hand, may recover “all response costs” it incurred that are “not inconsistent with the NCP.”¹³⁸

The NCP thus narrows the types of response costs that private parties may recover under federal law. Courts generally do not find PRPs liable under CERCLA for personal injury, property damage, or medical monitoring costs.¹³⁹ State common law claims like nuisance, indemnification, and unjust enrichment are also not usually found to be “consistent” response costs under the NCP.¹⁴⁰ Indeed, federal recovery for private parties is very restricted; they may “only recover their costs incurred in response to releases of hazardous substances.”¹⁴¹

Private plaintiffs have the added burden of establishing consistency with the NCP.¹⁴² This may be difficult because CERCLA fails to clearly define what recoverable “response costs” are.¹⁴³ Instead, CERCLA offers a broad definition for two types of “responses,” which take the forms of “removal” and “remedial” actions.¹⁴⁴ A removal action is one that is “necessary to prevent, minimize, or mitigate damages to the public health or welfare as to the environment.”¹⁴⁵ A remedial action is taken to “prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.”¹⁴⁶ But these vague definitions provide little help to plaintiffs who must prove that their response costs fall into one of these categories in order to recover these costs under federal law.

CERCLA legislation deals with cleaning up hazardous waste and its provisions provide claims for recovery of cleanup costs. Defendants should not be allowed to use CERCLA as a shield against state claims that are unrelated to the cleanup process and provide supplemental recovery. State claims for property damage or nuisance, for example, do not interfere with cleanup activities or the federal recovery system¹⁴⁷ and

138. 40 C.F.R. § 300.700(c)(1); SCHNAPF, *supra* note 8, at 5-78.

139. New York Virtual Environment Law Center, Superfunds (CERCLA & State Superfund), 28, <http://www.nyenvlaw.com/Data/Documents/Chapter%208.pdf> (last visited Jan. 8, 2010); *see also* SCHNAPF, *supra* note 8, at 5-44 to -46. “It is important to note that CERCLA does not provide a remedy to recovery for private property damage or personal injury claims.” *Id.* at 5-44.

140. *See* State v. Hickey’s Carting, Inc., 380 F. Supp. 2d 108, 116-19 (2005) (discussing how state claims that do not conflict with CERCLA’s NCP requirements, meaning claims that allow recovery for costs inconsistent with the NCP, should not be preempted by CERCLA).

141. SCHNAPF, *supra* note 8, at 5-44.

142. *Id.* at 5-50.

143. *See id.* at 5-45.

144. 42 U.S.C. § 9601(25) (2006).

145. 42 U.S.C. § 9601(23).

146. 42 U.S.C. § 9601(24).

147. A recent interesting case supporting this theory is *Sher v. Raytheon Co.*, No. 8:08-cv-889-T-26TGW, 2008 U.S. Dist. LEXIS 74998 (M.D. Fla. July 14, 2008). The residential property owners brought state claims of trespass, private nuisance, unjust enrichment, strict liability, negligence, and medical monitoring for toxic groundwater contamination the defendant produced at the site. *Id.* at *3-4. The defendant had already begun cleanup planning with the Florida Department of Environmental

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should be considered outside the realm of CERCLA in order to encourage the cleanup of New York's land for reuse and redevelopment by ensuring that parties are able to bring state actions for recovery of costs not actionable under CERCLA. New York should encourage private parties to clean up state land by allowing them to bring state claims for damages not considered "necessary" and "consistent" with the NCP and therefore not recoverable under either sections 107(a)(4)(B) or 113(f)(1).

New York courts that have allowed plaintiffs to bring both CERCLA and state recovery claims have noted that double recovery is not possible. In *Ametek*, for example, the court pointed out that the plaintiff's different actions would not lead to double recovery under federal and state law.¹⁴⁸ The court noted that "the set of damages recoverable by the State under [section] 107(a) are not identical to the set of damages recoverable under state law."¹⁴⁹ The *Ametek* court allowed the state claims because they could provide recovery to the plaintiff that was either not available under CERCLA or supplemental to the federal recovery.¹⁵⁰

The court in *Hickey's Carting* similarly dispelled the double-recovery argument for preemption of state claims.¹⁵¹ The court noted that state and federal claims may have different elements, creating the possibility that a plaintiff could make out a successful case for a state claim but fail to satisfy each element of the federal cause of action.¹⁵² In that case, a plaintiff would be prejudiced if it were unable to recover costs under the state claim due to a dismissal on preemption grounds.¹⁵³ In denying the defendants' motion to dismiss the state claims, the court agreed with the plaintiff's argument that it would be "premature to say at this juncture that the state claims conflict . . . when there has been, as of yet, no recovery to be duplicated and there remains the potential that Plaintiff may not be able to recover all of its costs from each cause of action."¹⁵⁴

In sum, only certain state claims are preempted by CERCLA—those that interfere with the federal settlement scheme in section 113(f) or allow for double recovery under state and federal law. New York courts should allow plaintiffs to

Protection ("FDEP") and argued that under the "doctrine of primary jurisdiction" the FDEP should decide its liability to the plaintiffs. *Id.* at *4. The doctrine of primary jurisdiction applies in situations "where the expertise of an administrative body would benefit the courts in deciding a particular issue or dispute because the dispute requires the exercise of knowledge gained outside the realm of a judge's experience." *Id.* at *8-9. See generally Catherine T. Struve, *Greater and Lesser Powers of Tort Reform: The Primary Jurisdiction Doctrine and State-Law Claims Concerning FDA-Approved Products*, 93 CORNELL L. REV. 1039, 1043-44 (2008). In *Sher*, however, the court refused to apply the doctrine, ruling that the plaintiff's state claims were not interfering with the enforcement of Florida's pollution laws. See *Sher*, 2008 U.S. Dist. LEXIS 74998, at *12.

148. See *Ametek*, 473 F. Supp. 2d at 434.

149. *Id.*

150. See *id.*

151. See *Hickey's Carting*, 380 F. Supp. 2d at 115.

152. See *id.* at 115.

153. See *id.* at 114.

154. *Id.* at 115.

recover costs not available under CERCLA or supplemental to CERCLA remedies under state causes of action in order to encourage private environmental cleanups of state land.

VI. CONCLUSION

The administration of environmental cleanups is an important area of the law, and if it had intended to, Congress could have manifested a clear intent to usurp all law-making decisions from the states in this area. But Congress did not evidence such intent. Instead, Congress drafted CERCLA to specifically allow state claims as alternative and supplemental routes of recovery for parties that have performed cleanup activities. State claims that do not interfere with the federal settlement scheme in section 113(f)(1)—meaning claims that do not discourage PRPs from settling their liability with the government and do not allow for double recovery under state and federal law—should not be preempted by CERCLA.

The policy allowing a party to take advantage of a state's law when it provides a significant service to the state is sound. When the NYSEGC performed its civic duty and cleaned up the dangerous contamination caused by its manufacture of gas, it should have been allowed to bring state claims that were unavailable under federal law to recover expenditures from other PRPs. Allowing a party to bring both state and federal recovery claims would encourage large corporations like the NYSEGC, as well as smaller entities, to clean up New York's land, making it safer for residents and viable for new uses. New York courts should embrace a policy of promoting environmental cleanups by opening the door to state claims as alternative routes of recovery to federal claims. Otherwise, innocent parties—namely, taxpayers—end up incurring the costs of cleanups performed with Superfund money. A non-preemption interpretation rewards parties who do the right thing and puts those who abandon contaminated property at risk for future liability.