

08-3843-cv(L); 08-4007-cv(XAP)  
Niagara Mohawk v. Consolidated Rail

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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August Term, 2008

(Argued: June 9, 2009                      Decided: February 24, 2010)

Docket Nos. 08-3843-cv (L); 08-4007-cv (XAP)

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Niagara Mohawk Power Corporation,

*Plaintiff-Appellant-Cross-Appellee,*

-v.-

Chevron U.S.A., Inc.,

*Defendant-Appellee-Cross-Appellant,*

United States Steel Company, Richard B. Slote, in his  
capacity as personal representative of the estate of Edwin  
D. King, and Portec, Inc.,

*Defendants-Appellees-Cross-Appellees,*

King Services, Inc., Richard B. Slote, and Lawrence King,

*Defendant-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

1 Business,

2  
3 Defendants.  
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7  
8 Before:

9 CALABRESI, WESLEY, *Circuit Judges*, and VITALIANO,\* *District*  
10 *Judge*.  
11

12 Niagara Mohawk Power Corporation ("NiMo") commenced  
13 this action to recover costs pursuant to the Comprehensive  
14 Environmental Response, Compensation, and Liability Act of  
15 1980 ("CERCLA"), Pub. L. No. 96-510, 94 Stat. 2767, and the  
16 Superfund Amendments and Reauthorization Act of 1986, Pub.  
17 L. No. 99-499, 100 Stat. 1613, codified together at 42  
18 U.S.C. §§ 9601-75, from the defendants for cleanup of  
19 properties previously owned by NiMo and once either owned,  
20 leased, or used by the defendants. In this appeal, NiMo  
21 challenges orders of the United States District Court for  
22 the Northern District of New York (Hurd, J.) denying NiMo's  
23 motion for summary judgment, granting summary judgment in  
24 favor of the defendants, and denying NiMo's motion for  
25 reconsideration.

26 We are called upon to determine whether NiMo, as a  
27 potentially responsible party under CERCLA, can seek  
28 response and cleanup costs under either § 107(a)(4)(B) or  
29 § 113(f)(3)(B), after having settled its CERCLA liability  
30 with the New York State Department of Environmental  
31 Conservation ("DEC") but not with the Environmental  
32 Protection Agency ("EPA"), where the EPA has not expressly  
33 authorized the DEC to settle CERCLA liability relating to  
34 the property at issue. We hold that NiMo may seek  
35 contribution costs under § 113(f)(3)(B) because NiMo has  
36 settled with the DEC, but consequently NiMo may not seek  
37 reimbursement for response costs under § 107(a). We hold  
38 that the district court erred in granting summary judgment  
39 for the defendants because there are genuine issues of

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\* The Honorable Eric N. Vitaliano, of the United States District Court  
for the Eastern District of New York, sitting by designation.

1 material fact with regards to their respective liabilities.  
2 We hold that the district court erred by holding that NiMo  
3 did not comply with the National Contingency Plan. We hold  
4 that the district court erred in part by dismissing NiMo's  
5 New York Navigation Law claims. Finally, we hold that the  
6 district court erred in dismissing Chevron's third party  
7 action against the County of Rensselaer and others.

8 We affirm, however, the district court's dismissal of  
9 NiMo's state contribution, indemnity, and unjust enrichment  
10 claims because they are preempted by CERCLA.

11  
12 AFFIRMED in part and REVERSED in part.

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16 Robert V. Zener, Milissa A. Murray, Sandra P.  
17 Franco, Bingham McCutchen LLP, Washington, DC,  
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27 United States Steel Corporation.

28  
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30 Albany, NY, for Defendant-Appellee-Cross-  
31 Appellee Portec, Inc.

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38 WESLEY, Circuit Judge:

39 This case is yet another in a series of cases that  
40 attempt to chart the contours of liability of a potentially  
responsible party ("PRP") under §§ 107(a)(4)(B) and

1 113(f)(3)(B) for contribution towards, and payment of, costs  
2 resulting from the identification and cleanup of hazardous  
3 substances under the Comprehensive Environmental Response,  
4 Compensation, and Liability Act of 1980 ("CERCLA"), Pub. L.  
5 No. 96-510, 94 Stat. 2767, and the Superfund Amendments and  
6 Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499,  
7 100 Stat. 1613, codified together at 42 U.S.C. §§ 9601-75.  
8 We hold that the PRP seeking contribution in this case,  
9 Niagara Mohawk Power Corporation ("NiMo"), may seek  
10 contribution under § 113(f)(3)(B) from certain of the PRPs –  
11 Chevron U.S.A., Inc. ("Chevron"), United States Steel  
12 Corporation ("U.S. Steel"), Portec, Inc. ("Portec"), and  
13 Edwin D. King ("King") – because New York's Department of  
14 Environmental Conservation ("DEC") could agree to settle  
15 NiMo's CERCLA liability without express authorization by the  
16 Environmental Protection Agency ("EPA"). However, because  
17 NiMo incurred response costs as a result of a resolution of  
18 its CERCLA liability with the DEC, NiMo cannot seek recovery  
19 costs under § 107(a)(4)(B).

20 We also hold that the district court erred in granting  
21 summary judgment to U.S. Steel, Chevron, Portec, and King  
22 because there are genuine issues of material fact as to

1 their liability. The district court erred in finding that  
2 NiMo did not comply with the National Contingency Plan. We  
3 reverse in part the district court's dismissal of NiMo's  
4 Navigation Law contribution claim. We affirm the district  
5 court's dismissal of NiMo's state contribution,  
6 indemnification, and unjust enrichment claims as preempted  
7 under CERCLA. Finally, we reverse the district court's  
8 dismissal of Chevron's third-party action against the County  
9 of Rensselaer and others.

10 **I. BACKGROUND**

11 At the center of this dispute is a contaminated site in  
12 Troy, New York – known as the Water Street Site – that over  
13 the last 100 years has played host to various industrial  
14 activities including a coke<sup>1</sup> plant, a steel manufacturing  
15 facility, a manufactured gas plant, and a petroleum  
16 distribution facility. Each use led to the release or  
17 disposal of toxic substances, many subject to liability  
18 under CERCLA.

19 NiMo owned portions of the Water Street Site either  
20 directly or through a predecessor from 1922 until 1951.  
21 During this period, NiMo continued to operate a pre-existing

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<sup>1</sup> Coke is a residue of coal left after distillation.

1 manufactured gas plant on the Site. Coal tar, which  
2 contains hazardous substances covered by CERCLA, is a  
3 typical waste that results from the production of  
4 manufactured gas and has been found on the Site. By 1951,  
5 NiMo had conveyed most of its interest at the Site to  
6 Republic Steel, and today owns only a small parcel used as a  
7 natural gas regulator station.

8 In December of 1992, NiMo entered into an Order on  
9 Consent with the DEC that required NiMo to investigate  
10 twenty-one sites in New York that once had hosted  
11 manufactured gas plants to determine the nature and extent  
12 of the hazardous materials present. The purpose of the  
13 Order was to "control and/or remove residual [manufactured  
14 gas plant] waste sources." NiMo agreed to develop and  
15 implement plans for remediation of the pollution under the  
16 direction of the DEC. For each site, NiMo developed and  
17 implemented a Preliminary Site Assessment that provided data  
18 necessary for the DEC to determine whether the hazardous  
19 substances present on the site posed a threat to the public  
20 or the environment, and thus required remediation. Any site  
21 identified by the Preliminary Site Assessment as requiring  
22 comprehensive evaluation was then subject to a Remedial

1 Investigation conducted by NiMo, which consequently prepared  
2 a Feasibility Study. NiMo agreed to remediate sites the DEC  
3 deemed in need. In 2003, NiMo and the DEC executed an  
4 amended Order on Consent under which NiMo incurred  
5 additional costs while obtaining a specific release of  
6 CERCLA liability upon meeting certain conditions.

7 Both Orders included the Water Street Site. As NiMo  
8 learned, the hazardous byproducts of the commercial  
9 activities conducted on the Site lasted far longer than the  
10 industries themselves. For purposes of the assessments,  
11 reports, and remediation, the DEC divided the property into  
12 four parts, corresponding to historical ownership and  
13 property lines.<sup>2</sup>

14 In its Preliminary Site Assessment for Area 1, NiMo  
15 concluded that no remedial investigation or feasibility  
16 study need be done based on the few hazardous materials  
17 found. NiMo did take some action in Area 1, however; it  
18 removed some tar and continued to monitor Area 1 for any new  
19 tar leaks.

20 Investigation of Area 2 revealed significant

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<sup>2</sup> A map of the Water Street Site is provided at  
Appendix A.

1 contamination. In addition to hazardous materials in the  
2 soil and groundwater, NiMo discovered evidence of hazardous  
3 materials in the sediment of the Wynantskill Creek, which  
4 runs through Area 2. NiMo prepared a Final Feasibility  
5 Study Report evaluating remedial options for the area; the  
6 Report and its recommendations await a final DEC decision.

7 After its review of Area 3, NiMo requested that Area 3  
8 be deleted from the remediation plan because the only  
9 manufactured gas plant activity on Area 3 would not have  
10 produced hazardous materials. The DEC agreed only to  
11 postpone any investigation of Area 3, fearing that Area 3  
12 may have some contamination from nearby Hudson River  
13 deposits.

14 Area 4 had substantial contamination in its soil and  
15 sediments. The DEC approved a remediation plan that  
16 included excavation, placement of an impermeable cap over  
17 the area, certain use restrictions for the property, and  
18 future monitoring.

19 NiMo began this action on July 1, 1998,<sup>3</sup> seeking to  
20 recoup its CERCLA costs and seeking to recover under a

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<sup>3</sup> NiMo filed an amended complaint on May 26, 1999, adding defendants.



1 number of state law claims. Defendants counterclaimed and  
2 cross-claimed for contribution; the parties ultimately moved  
3 for summary judgment. In its first opinion in November of  
4 2003, the district court thoroughly recounted the  
5 complicated facts of the case and disposed of a number of  
6 matters. *Niagara Mohawk Power Corp. v. Consol. Rail Corp.*  
7 (*"Niagara I"*), 291 F. Supp. 2d 105 (N.D.N.Y. 2003). On  
8 November 7, 2003, the day after the district court's opinion  
9 in *Niagara I*, the 2003 Order of Consent was executed. That  
10 Order was "intended to supercede and replace" the 1992  
11 Consent Order. NiMo agreed to continue the remediation of  
12 the sites. Under the terms of the agreement, NiMo "resolved  
13 its liability to the State for purposes of contribution  
14 protection provided by CERCLA Section 113(f)(2)."

15 Over the next five years, the case came to our Court  
16 twice. Prior to our decisions in each appeal, the United  
17 States Supreme Court issued a major decision involving  
18 CERCLA issues that directly affected the appeal then before  
19 us and required us to remand the matter to the district  
20 court for reconsideration. This decision is the culmination

1 of the case's third visit to 500 Pearl Street.<sup>4</sup>

2 **II. CERCLA**

3 Enacted in response to New York's Love Canal disaster,<sup>5</sup>  
4 CERCLA was designed, in part, to "assur[e] that those  
5 responsible for any damage, environmental harm, or injury  
6 from chemical poisons bear the costs of their actions." S.  
7 Rep. No. 96-848, at 13 (1980). CERCLA, remedial in nature,  
8 is designed to encourage prompt and effective cleanup of  
9 hazardous waste sites. See *B.F. Goodrich Co. v. Murtha*, 958  
10 F.2d 1192, 1197-98 (2d Cir. 1992). CERCLA empowers the  
11 federal government and the states to initiate comprehensive

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<sup>4</sup> The Court is currently housed at the Moynihan Federal Courthouse at 500 Pearl Street, a "temporary" location of now some five years.

<sup>5</sup> In the late 1930s or early 1940s, the Hooker Chemical Company began dumping toxic waste in an abandoned canal near Niagara Falls. Michael H. Brown, *Love Canal and the Poisoning of America*, *The Atlantic Monthly*, Dec. 1979, at 33. In 1953, the canal was filled and sold to the city to provide land for a new elementary school and playground. *Id.* Families moved into the area, unaware that the large field behind their homes was teeming with toxic waste. *Id.* Despite evidence of contamination, it took until 1978 for New York State and the federal government to investigate the pervasive health problems affecting the residents and the deterioration of buildings around the Love Canal. S. Rep. No. 96-848, at 8-10 (1980). Ultimately, it was determined that thousands of tons of toxic waste contaminated the area around Niagara Falls, creating an "environmental ghetto[]" that then-President Carter declared a federal emergency. *Id.*

1 cleanups and to seek recovery of expenses associated with  
2 those cleanups. Somewhat like the common law of ultra-  
3 hazardous activities, property owners are strictly liable  
4 for the hazardous materials on their property, regardless of  
5 whether or not they deposited them there. See *New York v.*  
6 *Lashins Arcade Co.*, 91 F.3d 353, 359 (2d Cir. 1996); see  
7 also *Integrated Waste Servs., Inc. v. Akzo Nobel Salt, Inc.*,  
8 113 F.3d 296, 301-02 (2d Cir. 1996). Owners can escape  
9 liability only if the pollution results from an act of God  
10 or an act of war, or if the owners establish they are  
11 "innocent owners" under the statute. 42 U.S.C. § 9607(b);  
12 see also Michael B. Gerrard & Joel M. Gross, *Amending*  
13 *CERCLA: The Post-SARA Amendments to the Comprehensive*  
14 *Environmental Response, Compensation, and Liability Act* 54  
15 (2006).

16 CERCLA does provide property owners an avenue of  
17 reprieve; it allows them to seek reimbursement of their  
18 cleanup costs from others in the chain of title or from  
19 certain polluters – the so-called potentially responsible  
20 parties ("PRP"s).<sup>6</sup> 42 U.S.C. § 9607(a). This reprieve is

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<sup>6</sup> Under CERCLA, a potentially responsible party (PRP)  
is defined as:

1 available through three separate provisions, namely §§ 107,  
2 113(f)(1), and 113(f)(3)(B). Section 107 authorizes the  
3 United States, a state, or "any other person" to seek  
4 reimbursement for all removal or remedial costs<sup>7</sup> associated

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(1) the owner and operator of a vessel or a facility,  
(2) any person who at the time of disposal of any  
hazardous substance owned or operated any facility at  
which such hazardous substances were disposed of, (3)  
any person who by contract, agreement, or otherwise  
arranged for disposal or treatment, or arranged with a  
transporter for transport for disposal or treatment, of  
hazardous substances owned or possessed by such person,  
by any other party or entity, at any facility or  
incineration vessel owned or operated by another party  
or entity and containing such hazardous substances, and  
(4) any person who accepts or accepted any hazardous  
substances for transport to disposal or treatment  
facilities, incineration vessels or sites selected by  
such person, from which there is a release, or a  
threatened release which causes the incurrence of  
response costs, of a hazardous substance.

42 U.S.C. § 9607(a).

<sup>7</sup> "Removal" under CERCLA means:

[T]he cleanup or removal of released hazardous  
substances from the environment, such actions as may be  
necessary taken in the event of the threat of release  
of hazardous substances into the environment, such  
actions as may be necessary to monitor, assess, and  
evaluated the release or threat of release of hazardous  
substances, the disposal of removed material, or the  
taking of such other actions as may be necessary to  
prevent, minimize, or mitigate damages to the public  
health or welfare or to the environment, which may  
otherwise result from a release or threat of release.

42 U.S.C. § 9601(23).

1 with the hazardous materials on the property, provided that  
2 those actions are consistent with the National Contingency  
3 Plan – the federal government’s roadmap for responding to  
4 the release of hazardous substances. *Id.* § 9607(a)(4). The  
5 language “any other person” includes a PRP that voluntarily  
6 cleans the site. *See United States v. Atl. Research Corp.*,  
7 551 U.S. 128, 135-36 (2007). Section 113(f)(1) provides  
8 PRPs who have been sued under § 107 a right of contribution  
9 from other PRPs, including the plaintiff. *Id.* at 139.  
10 Section 113(f)(3)(B) also provides a right of contribution  
11 to PRPs that have settled their CERCLA liability with a  
12 state or the United States through either an administrative  
13 or judicially approved settlement. 42 U.S.C. §  
14 9613(f)(3)(B). In allocating the response costs among the  
15 parties, the statute instructs the court to use “such  
16 equitable factors as the court determines are appropriate.”

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“Remedial action[s]” mean:

[T]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

42 U.S.C. § 9601(24).

1     *Id.* § 9613(f)(1).

2             Section 107 allows for complete cost recovery under a  
3 joint and several liability scheme; one PRP can potentially  
4 be accountable for the entire amount expended to remove or  
5 remediate hazardous materials.<sup>8</sup> See *Schaefer v. Town of*  
6 *Victor*, 457 F.3d 188, 195 (2d Cir. 2006). When CERCLA was  
7 first enacted, this was the only remedy available. Courts  
8 struggled with whether PRPs (themselves liable for some of  
9 the cleanup) could invoke § 107 for contribution from other  
10 PRPs for their proportionate share of the costs as opposed  
11 to full cost recovery. See *Key Tronic Corp. v. United*  
12 *States*, 511 U.S. 809, 816 (1994). In the absence of express  
13 language, some courts filled in the obvious gap and  
14 recognized a common law right to contribution between PRPs.  
15 *Id.* Congress finally provided the express language  
16 necessary to authorize a contribution right under CERCLA

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<sup>8</sup> A number of courts, including ours, have noted that while § 107(a) permits recovery of all remedial costs, it does not preclude a defendant PRPs from asserting counterclaims (or cross-claims) for contribution under § 113(f)(1), effectively converting the § 107(a) action into an apportionment of liability among jointly and severally liable parties. See *Consol. Edison Co. of N.Y. v. UGI Util., Inc.*, 423 F.3d 90, 100 n.9 (2d Cir. 2005); see also *Atl. Research*, 551 U.S. at 140.

1 with the Superfund Amendments and Reauthorization Act of  
2 1986, adding § 113 to the statutory scheme. Pub. L. No. 99-  
3 499, 100 Stat. 1613, 1647-48.

4 Supreme Court jurisprudence exploring the nature of the  
5 relationship between these statutory provisions developed  
6 simultaneously with the district court's decisions in the  
7 case before us. After the district court's first decision,  
8 the Court issued the first of two opinions attempting to  
9 clarify the interaction between §§ 107 and 113. First, in  
10 2004, the Court determined that a private party who had not  
11 been sued under § 106 or § 107(a) could not assert a claim  
12 for contribution under § 113(f)(1) from other PRPs. *Cooper*  
13 *Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 160-61  
14 (2004). Looking to the text of § 113(f)(1), the Court  
15 concluded that contribution was only available "during or  
16 following" an action under § 106 or § 107. *Id.* at 165-66.  
17 The plaintiff had remediated the hazardous material  
18 voluntarily, without the judicial spur of § 106 or § 107,  
19 and thus was not eligible to sue other PRPs for  
20 contribution. *Id.* at 168. Because the parties had not  
21 briefed the issue, the Court expressly refused to decide  
22 whether the plaintiff could have sued under § 107. *Id.* at

1 169-70.

2 After *Cooper Industries*, we remanded *Niagara I* back to  
3 the district court for reconsideration in light of that  
4 decision. *Niagara Mohawk Power Corp. v. Consol. Rail Corp.*  
5 (*"Niagara II"*), 436 F. Supp. 2d 398, 399-400 (N.D.N.Y.  
6 2006). In *Niagara II*, NiMo correctly conceded that it could  
7 not proceed with a contribution claim under § 113(f)(1) – it  
8 had not been sued under § 106 or § 107(a). *Id.* at 400-01.  
9 NiMo argued, however, that it could seek contribution under  
10 § 113(f)(3)(B) because it had resolved its CERCLA liability  
11 in the 2003 Consent Order. *Id.* at 401. The district court  
12 disagreed. It concluded that because the DEC had not been  
13 granted authority to settle CERCLA claims by the EPA, the  
14 settlement did not qualify under § 113. *Id.* at 402. The  
15 district court viewed the consent orders as reaching only  
16 state law-based liability.<sup>9</sup>

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<sup>9</sup> The district court also ruled that NiMo could not invoke § 107(a) as a basis for its claims. *Niagara II*, 436 F. Supp. 2d at 403. The court relied on pre-*Cooper Industries* Circuit precedent, *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998), that had required settling PRPs to employ § 113(f). *Id.* That holding was abandoned – at least as to the inability of a settling PRP to use § 107(a) – by our decision in *W.R. Grace & Co. – Conn. v. Zotos Int'l, Inc.*, 559 F.3d 85, 90 (2d Cir. 2009). *W.R. Grace* was decided *after* the district court's decision in *Niagara II*.



1           After *Niagara II*, in 2007, the Supreme Court addressed  
2 the unanswered question from *Cooper Industries*. See *Atl.*  
3 *Research*, 551 U.S. at 131 (2007). The Court read “any other  
4 necessary costs of response incurred by *any other person*” in  
5 § 107(a)(4)(B) as authorizing claims against other PRPs by  
6 private parties that incurred response costs. *Id.* at 135-  
7 37. The Court differentiated joint and several liability  
8 claims under § 107 from contribution claims under § 113,  
9 identifying each as distinct “causes of action [available]  
10 to persons in different procedural circumstances.” *Id.* at  
11 139 (internal quotation marks omitted). Section 107, the  
12 Court explained, is available for parties that have incurred  
13 actual response costs, while § 113(f) is available for  
14 parties that have reimbursed those response costs to  
15 others.<sup>10</sup> *Id.*

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See *Niagara II*, 436 F. Supp. 2d at 398. As a result of the district court’s two rulings, NiMo was left with no federal right of contribution at all.

<sup>10</sup> The Court looked to the common law understanding of contribution in defining that term as used in § 113(f): “the tortfeasor’s right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault.” *Atl. Research*, 551 U.S. at 138 (quoting *Black’s Law Dictionary* 353 (8th ed. 2004)) (internal quotation marks omitted).

1           We remanded *Niagara II* in light of *Atlantic Research*.  
2           *Niagara Mohawk Power Corp. v. Consol. Rail Corp.* (“*Niagara*  
3           *III*”), 565 F. Supp. 2d 399, 400 (N.D.N.Y. 2008). The  
4           district court in *Niagara III* concluded that *Atlantic*  
5           *Research* necessitated no change in the court’s previous  
6           determinations and reaffirmed its prior rulings. *Id.* at  
7           403. Once again the case is before us.

8           **A.    Niagara’s Recovery Costs**

9           Pursuant to its agreement with the DEC, NiMo incurred  
10          costs to investigate and remediate the Water Street Site.  
11          NiMo sought repayment of those costs from the defendants  
12          under a theory that the defendants were PRPs as a result of  
13          their status as owners of portions of the site and also as a  
14          result of certain actions each took on their respective  
15          properties – storing leaking drums, demolition of industrial  
16          facilities, disposal of hazardous substances on site – all  
17          of which allegedly resulted in the presence of hazardous  
18          substances on the Water Street property.

19                    1.    2003 Consent Order

20          Before the district court, NiMo sought to recover the  
21          costs of its remediation efforts under § 107 or,  
22          alternatively, under § 113(f)(1). Following the first

1 remand, NiMo conceded that it was not entitled to seek  
2 contribution under § 113(f)(1) because it had not been  
3 subject to a civil action under § 106 or § 107. *Niagara II*,  
4 436 F. Supp. 2d at 401. However, NiMo argued it was  
5 entitled to contribution under § 113(f)(3)(B) because the  
6 2003 Consent Order qualified as an administrative  
7 settlement. *Id.* The court refused to consider the 2003  
8 Consent Order.<sup>11</sup> *Id.*

9 The parties argue quite vigorously over whether the  
10 2003 Consent Order is before us. Chevron and Portec stress  
11 that the district court's decision to not consider the 2003  
12 Consent Order was not an abuse of discretion and that our  
13 earlier refusal to add the Order to the record on appeal of  
14 *Niagara I* supports that view.

15 Chevron and Portec are right about the standard of  
16 review, but wrong about the result. We review a district  
17 court's decision whether to reopen the record to admit new  
18 evidence for abuse of discretion. *Matthew Bender & Co. v.*  
19 *W. Pub. Co.*, 158 F.3d 674, 679 (2d Cir. 1998). A district

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<sup>11</sup> Having dismissed NiMo's federal claims, the district court then declined to exercise supplemental jurisdiction over NiMo's unjust enrichment claims. *Niagara II*, 436 F. Supp. 2d at 403.

1 court has abused its discretion if its ruling is "based . .  
2 . on an erroneous view of the law or on a clearly erroneous  
3 assessment of the evidence, or [if the district court]  
4 rendered a decision that cannot be located within the range  
5 of permissible decisions." *In re Sims*, 534 F.3d 117, 132  
6 (2d Cir. 2008) (internal quotation marks and citations  
7 omitted). In our view the district court abused its  
8 discretion by failing to admit the 2003 Consent Order.

9 Upon our remand of *Niagara I* to the district court to  
10 reconsider its decision in light of *Cooper Industries*, NiMo  
11 attempted to admit the 2003 Consent Order by attaching the  
12 Order to an attorney's affidavit submitted to the district  
13 court with NiMo's brief on the effect of *Cooper Industries*  
14 on the case. The district court rejected the 2003 Consent  
15 Order as not part of the record and noted that no motion to  
16 supplement the record had been made. *Niagara II*, 436 F.  
17 Supp. 2d at 401. The district court added the following  
18 comments in a footnote: "The Amended Consent Order is an  
19 attachment to an attorney affidavit submitted in support of  
20 Niagara Mohawk's brief on remand, *but was not included (or*  
21 *for that matter mentioned) in any prior proceedings*, which  
22 have been ongoing since 1998. It is also noted that Niagara

1 Mohawk sought permission in the Second Circuit to supplement  
2 the record on appeal with the Amended Consent Order.

3 Permission was denied." *Id.* at 401 n.3 (emphasis added).

4 Our initial denial of NiMo's request to include the  
5 2003 Consent Order in the record of the first appeal makes  
6 sense to us; the Consent Order was not before the district  
7 court in *Niagara I.* See *Int'l Bus. Mach. Corp. v.*  
8 *Edelstein*, 526 F.2d 37, 44 (2d Cir. 1975) ("[A]bsent  
9 extraordinary circumstances, federal appellate courts will  
10 not consider rulings or evidence which are not part of the  
11 trial record."). That ruling was not premised on NiMo's  
12 mistake but on impossibility; the 2003 Consent Order could  
13 not have been before the district court as it had not been  
14 fully executed until after the district court's first  
15 decision. See *Niagara I.*, 291 F. Supp. 2d at 105; see also  
16 *Niagara II.*, 436 F. Supp. 2d at 401. But, in these  
17 circumstances, our conclusion with regard to what was before  
18 our court should not have been dispositive or, frankly, even  
19 considered by the district court when faced with the  
20 decision to admit the document on remand. As soon as the  
21 district court regained jurisdiction following the remand,  
22 NiMo attempted to admit the document with its first

1 submission. The district court's notation that the Order  
2 had not previously been included in the record is  
3 technically correct but overlooks the obvious – it could not  
4 have been a part of the record as it did not exist.  
5 Moreover, the district court's comment that the case had  
6 been on-going since 1998 was of no moment; NiMo presented  
7 the 2003 Consent Order at the first opportunity it had to do  
8 so. And, although NiMo did not make a formal motion to  
9 supplement the record, there is no evidence that any of the  
10 defendants made a formal motion to strike the document or  
11 even disputed its authenticity.<sup>12</sup> The district court  
12 penalized only NiMo for a trivial procedural shortcoming;  
13 this was error.

## 14 \_\_\_\_\_ **2. Section 113(f)(3)(B) Claims**

15 In our view, only § 113(f)(3)(B) provides the proper  
16 procedural mechanism for NiMo's claims. Under §  
17 113(f)(3)(B), a "person who has resolved its liability to

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<sup>12</sup> Even if the district court had not abused its discretion in failing to admit the 2003 Consent Order, we are empowered to take judicial notice of the 2003 Consent Order, as it is a public record. See, e.g., *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007). Thus, on multiple grounds, we conclude that the 2003 Consent Order is a part of the appellate record and may be considered in our analysis.

1 the United States or a state for some or all of a response  
2 action or for some or all of the costs of such action in an  
3 administrative or judicially approved settlement may seek  
4 contribution from any person who is not party to a  
5 settlement.” 42 U.S.C. § 113(f)(3)(B). As noted, the  
6 district court determined that this provision did not apply  
7 to NiMo because NiMo settled with the DEC, and the EPA had  
8 not formally delegated power to settle CERCLA claims to the  
9 DEC. *Niagara II*, 436 F. Supp. 2d at 402. In the district  
10 court’s view, the settlement did not resolve NiMo’s  
11 liability under CERCLA and thus, NiMo was not entitled to  
12 contribution. *Id.* at 404.

13 Some of our earlier cases could be mistaken for  
14 supporting the district court’s view. In *Consolidated*  
15 *Edison*, we held that a utility (“ConEd”) that entered into a  
16 “Voluntary Cleanup Agreement” with the DEC could not seek  
17 contribution from another PRP under § 113(f)(3)(B) because  
18 the Voluntary Cleanup Agreement by its terms only absolved  
19 ConEd of state liability and did not reference CERCLA.<sup>13</sup>

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<sup>13</sup> Under the Voluntary Cleanup Agreement, the DEC “release[d], covenant[ed] not to sue, and . . . fore[went] from bringing any action, proceeding, or suit pursuant to the [New York] Environmental Conservation Law, the Navigation Law or the State Finance Law, and from referring

1 *Consol. Edison Co. v. U.G.I. Util., Inc.*, 423 F.3d 90, 97  
2 (2d Cir. 2005). The Voluntary Cleanup Agreement indicated  
3 that DEC would “not take any enforcement action under . . .  
4 CERCLA,” but DEC promised to refrain from doing so only “to  
5 the extent that [the existing] contamination [at issue] is  
6 being addressed under the Agreement.” *Id.* at 97. The state  
7 agency also reserved the “right to take any investigatory or  
8 remedial action deemed necessary as a result of a  
9 significant threat resulting from the Existing Contamination  
10 or to exercise summary abatement powers.” *Id.* at 96-97. We  
11 held that the rights reserved by the DEC “[left] open the  
12 possibility that the [DEC] might still seek to hold ConEd  
13 liable under CERCLA” and therefore, because ConEd could  
14 still be sued under CERCLA, it was not entitled to bring an  
15 action under § 113(f)(3)(B).<sup>14</sup> *Id.* at 97.

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to the Attorney General any claim for recovery of costs incurred by the [DEC] . . . for the further investigation and remediation of the Site, based upon the release or threatened release of Covered Contamination.” *Consol. Edison*, 423 F.3d at 96.

<sup>14</sup> This Court noted but did not resolve the issue again in *Schaefer v. Town of Victor*, 457 F.3d 188, 202 n.19 (2d Cir. 2006) (“[W]e need not decide whether the . . . Consent Judgment [at issue] constitutes a judicially approved settlement . . .”).



1           In *W.R. Grace & Co.- Conn. v. Zotos Int'l, Inc.*, we  
2 held that a PRP could not bring an action for contribution  
3 against another PRP under § 113(f)(3)(B) based on its  
4 settlement with the DEC because the DEC settlement "ma[de]  
5 no reference to CERCLA, [and] establishe[d] that the DEC  
6 settled only its state law claims against [the PRP], leaving  
7 open the possibility that the DEC or the EPA could, at some  
8 future point, assert CERCLA or other claims." 559 F.3d 85,  
9 91 (2d Cir. 2009). Specifically, the consent order at issue  
10 provided that, "[i]f the [DEC] acknowledges that the  
11 implementation is complete . . . such acknowledgment shall  
12 constitute a full and complete satisfaction and release of  
13 each and every claim, demand, remedy or action whatsoever  
14 against [the PRP], its officers and directors, which the  
15 [DEC] has or may have as of the date of such acknowledgment  
16 pursuant to Article 27, Title 13, of the [New York  
17 Environmental Conservation Law] relative to or arising from  
18 the disposal of hazardous or industrial waste at the Site."  
19 *Id.*

20           In each case, the consent order at issue did not  
21 purport to resolve CERCLA liability and hence, in the  
22 panel's view, did not qualify as an administrative

1 settlement under § 113. But neither *Consolidated Edison* nor  
2 *W.R. Grace* held that the DEC was without authority to settle  
3 CERCLA claims nor did either case conclude that CERCLA  
4 settlement authority required explicit authorization from  
5 the EPA. See *W.R. Grace*, 559 F.3d at 90-91; *Consol. Edison*,  
6 423 F.3d at 95-97. Moreover, unlike the consent agreements  
7 in *Consolidated Edison* and *W.R. Grace*, the 2003 Consent  
8 Order specifically released NiMo from CERCLA liability. The  
9 2003 Consent Order released NiMo from liability under  
10 “[f]ederal statutory . . . law involving or relating to  
11 investigation or remedial activities relative to or arising  
12 from the disposal of hazardous wastes or hazardous  
13 substances . . . at the [Water Street Site]” and “resolved  
14 [NiMo’s] liability to the State for purposes of contribution  
15 protection provided by CERCLA Section 113(f)(2) [, 42 U.S.C.  
16 § 9613(f)(2)].” Under the 2003 Consent Order, the remedial  
17 activities performed by NiMo were consideration for “a  
18 release and covenant not to sue . . . which [DEC] has or may  
19 have pursuant to . . . State or Federal statutory or common  
20 law involving or relating to investigative or remedial  
21 activities relative to or arising from the disposal of  
22 hazardous wastes or hazardous substances.” Once NiMo

1 completed the Consent Order responsibilities, NiMo was  
2 "deemed to have resolved its liability to the State for  
3 purposes of contribution protection provided by CERCLA  
4 Section 113(f)(2)" and thus was "entitled to seek  
5 contribution." The 2003 Consent Order qualifies as an  
6 administrative settlement of liability for purposes of  
7 CERCLA pursuant to the plain text of § 113(f)(3)(B).

8 Our interpretation of the Consent Order fits squarely  
9 within the type of contribution claims contemplated by §  
10 113. The provisions of the statute come into play once NiMo  
11 resolved its liability to the "United States or a State."  
12 42 U.S.C. § 9613(f)(3)(B) (emphasis added). The statute  
13 does not require that the United States acquiesce in the  
14 administrative settlement – it does not read the "United  
15 States *and* a State." Nor does § 113(f)(3)(B) require that  
16 there be a federal delegation of settlement authority to a  
17 state – the statute does not say the "United States or a  
18 State *with the express authority of the United States.*" But  
19 the district court's interpretation of the statute would  
20 compel such a result. If Congress wanted to constrict the  
21 authority of state environmental agencies in settling CERCLA  
22 claims, it could have easily done so. Instead, Congress

1 chose the disjunctive and established a dual track for the  
2 resolution of CERCLA liability.

3 As the EPA's amicus brief points out, "[b]ecause of the  
4 number and variety of contaminated sites across the country,  
5 states play a critical role in effectuating the purposes of  
6 CERCLA."<sup>15</sup> Brief for United States as Amicus Curiae  
7 Supporting Appellant at 4, *Niagara Mohawk v. Consol. Rail*,  
8 Nos. 08-3843-cv; 08-4007-cv (2d Cir. 2009) That role is  
9 not only critical, it is autonomous. For instance, the EPA

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<sup>15</sup> The EPA brief understandably takes issue with our holding in *Consolidated Edison*.

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 § 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).

Brief for United States as Amicus Curiae Supporting Appellant at 15, *Niagara Mohawk v. Consol. Rail*, Nos. 08-3843-cv; 08-4007-cv (2d Cir. 2009) (emphasis added). While there is a great deal of force to this argument given the language of the statute, we need not resolve the *Consolidated Edison / W. R. Grace* problem as the language of the 2003 Order clearly encompasses CERCLA liability and our cases have never precluded the state agency from resolving CERCLA claims.

1 must coordinate with an affected state before deciding on an  
2 appropriate remedial action, and, under § 128, the EPA may  
3 award a grant to a state that has a response program that  
4 conforms to the requirements of CERCLA. 42 U.S.C. §§  
5 9604(c), 9628(a). The EPA is expressly authorized to enter  
6 into contracts or agreements with states to carry out CERCLA  
7 response actions. 40 C.F.R. § 300.515(a)(1).

8 Under CERCLA, states have causes of action independent  
9 from the federal government. For example, under § 107, a  
10 PRP is liable for clean up costs "incurred by the United  
11 States Government or a state." 42 U.S.C. § 9607(a)(4)(A).  
12 We have previously held that a state does not need the  
13 approval of the United States before it can remediate  
14 hazardous substances and sue PRPs under § 107. See *N.Y. v.*  
15 *Shore Realty Corp.*, 759 F.2d 1035, 1047-48 (2d Cir. 1985).  
16 CERCLA views the states as independent entities that do not  
17 require the EPA's express authorization before they can act.  
18 New York is empowered to settle a PRP's CERCLA liability.  
19 The 2003 Consent Order between NiMo and the DEC qualifies as  
20 "an administrative or judicially approved settlement" under  
21 § 113(f)(3)(B); NiMo is entitled to seek contribution under  
22 CERCLA.

1                   **3. Section 107(a) Claim**

2           NiMo contends that it may also have a claim under §  
3 107(a).<sup>16</sup> Section 107(a) claims are brought by federal or  
4 state agencies that have incurred response costs or PRPs who  
5 incur CERCLA clean up costs without judicial or  
6 administrative intervention.<sup>17</sup> See *Atl. Research*, 551 U.S.  
7 at 135. Section 113(f)(3)(B) claims seek proportionate  
8 reimbursement from other PRPs of cleanup costs for a PRP  
9 that has resolved its CERCLA liability for some or all of  
10 the costs of a response action through a judicial or agency-  
11 approved settlement. See 42 U.S.C. § 9613(f)(3)(B).  
12 Clearly, the two sections have differing restrictions and

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<sup>16</sup> While we normally would not consider an alternative basis for recovery once we have decided another section of a statute provides one, this is far from a normal case. Given the twists and turns the litigants and the law has experienced over the past eleven years, we think it time to address all of the parties' arguments.

<sup>17</sup> In *Atlantic Research*, the Supreme Court left open the question of when an action for cost recovery under § 107(a) may be available to a PRP that directly incurs clean up costs under some judicial or administrative compulsion. See *Atl. Research*, 551 U.S. at 139 n.6. We similarly do not decide whether a § 107(a) action could be pursued by a PRP that incurs clean up costs after engaging with the federal or a state government, but is not released from any CERCLA liability.

1 different purposes.<sup>18</sup> Moreover, § 113(f) was enacted by  
2 Congress as part of SARA to amend CERCLA for the purpose of  
3 codifying the contribution remedy that most courts had  
4 already read into the statute. It was designed to  
5 “clarif[y] and confirm . . . the right of a person held  
6 jointly and severally liable under CERCLA to seek  
7 contribution from other potentially liable parties, when the  
8 [PRP] believes that it has assumed a share of the cleanup or  
9 cost that may be greater than its equitable share under the  
10 circumstances.” H.R. Rep. No. 99-253(I), at 79 (1985).

11 NiMo’s claim fits squarely within the more specific  
12 requirements of § 113(f)(3)(B). NiMo acknowledged

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<sup>18</sup> To the extent that NiMo seeks recovery of its actual response costs and does not seek reimbursement from others for response costs it disproportionately paid to a third party, NiMo’s claims do not seem to fit the common law definition of contribution that the Supreme Court employed in defining the statutory term in *Atl. Research*. The *Atl. Research* Court, however, recognized that there could be an overlap of the *concepts* of cost recovery and contribution. *Atl. Research*, 551 U.S. at 139 n.6. NiMo was partially responsible for the contamination at the Water Street Site. It avoided a state or federal cleanup of the Site and a subsequent suit by New York or the United States under § 107(a) for reimbursement of those costs by entering into the Consent Orders. NiMo in essence financed the cleanup. While NiMo’s claims might fall within “the overlap” of the concepts of cost recovery and contribution recognized by *Atl. Research*, “concepts” do not alter the plain language of the statute in play here. NiMo’s claims clearly meet the more specific parameters of the terms of § 113(f)(3)(B).

1 responsibility and paid for response costs under the  
2 statute. NiMo settled its CERCLA liability with DEC by  
3 agreeing to identify and to remediate some of the hazardous  
4 substances present at the Water Street Site. NiMo presses a  
5 claim for a sharing of those costs with other PRPs  
6 consistent with § 113(f)(3)(B). The EPA in its amicus brief  
7 strongly argues that § 113(f)(3)(B) is the proper vessel for  
8 NiMo's contribution claims in light of its more specific  
9 requirements, the nature of NiMo's claims, and the amendment  
10 of the statute to provide the right of contribution. We  
11 agree. Congress recognized the need to add a contribution  
12 remedy for PRPs similarly situated to NiMo. To allow NiMo  
13 to proceed under § 107(a) would in effect nullify the SARA  
14 amendment and abrogate the requirements Congress placed on  
15 contribution claims under § 113.<sup>19</sup> "When Congress acts to  
16 amend a statute, [courts] presume it intends its amendment  
17 to have real and substantial effect." *Stone v. INS*, 514  
18 U.S. 386, 397 (1995).

### 19 **III. SUMMARY JUDGMENT**

20 In *Niagara I*, the district court denied NiMo's motion

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<sup>19</sup> Claims under § 107 do enjoy a six-year statute of limitations while claims under § 113 have a three-year statute of limitations. 42 U.S.C. § 9613(g).



1 for summary judgment with respect to King Service and  
2 granted summary judgment for U.S. Steel and Portec, and  
3 partial summary judgment for Chevron. *Niagara I*, 291 F.  
4 Supp. 2d at 140-41. The district court found that although  
5 King was the current owner of Area 2 – and failed to provide  
6 evidence that it engaged in the appropriate inquiry when it  
7 purchased the property in 1968 to qualify for the innocent  
8 owner defense under 42 U.S.C. § 9601(35)(B) – there was a  
9 genuine issue of material fact as to whether response costs  
10 incurred by NiMo were consistent with the National  
11 Contingency Plan. *Niagara I*, 291 F. Supp. 2d at 128.

12 With respect to U.S. Steel, the district court found  
13 that NiMo's expert testimony that U.S. Steel had released  
14 hazardous substances onto the Water Street Site during the  
15 time U.S. Steel owned the property prior to 1922 was  
16 speculative. *Id.* at 129. The district court concluded that  
17 NiMo had failed to raise a genuine issue of material fact as  
18 to whether hazardous substances were released when U.S.  
19 Steel owned the property. *Id.* at 130.

20 With respect to Chevron, the district court first  
21 determined that although the DEC had suspended its  
22 investigation of Area 3, which Chevron currently owns,

1 Chevron was a PRP because the entire Water Street Site,  
2 including Area 4 that Chevron had also owned, remained at  
3 issue in the case. *Id.* at 131. However, the district court  
4 found that NiMo had not provided any evidence to support its  
5 claim that Republic, Chevron's tenant on Area 4 when Chevron  
6 owned that portion of the property, had dispersed hazardous  
7 materials. *Id.* at 134. Therefore, the district court held  
8 Chevron was not liable for the cleanup of Area 4. *Id.*<sup>20</sup>  
9 The district court reserved decision for the damages phase  
10 on the degree to which Chevron would be liable for response  
11 costs. *Id.* at 133.

12 Portec never owned or occupied any part of the Water  
13 Street Site, but was Area 2's neighbor to the northeast.  
14 NiMo pursued costs from Portec because NiMo believed Portec  
15 deposited waste in the Wynantskill Creek that then traveled  
16 into Area 2. The district court first held that NiMo was  
17 required to show that it had, or would, incur cleanup costs  
18 as a result of the hazardous substances found on Portec's  
19 property. *Id.* at 135. In other words, the district court  
20 held that NiMo must prove a nexus between Portec's release

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<sup>20</sup> The district court dismissed Chevron's claims against the Rensselaer defendants as moot. *Niagara I*, 291 F. Supp. 2d at 135.

1 of hazardous substances and NiMo's cleanup costs. *Id.* at  
2 136. The district court found that NiMo had not provided  
3 evidence of causation. *Id.* at 137.

4 The district court dismissed NiMo's New York Navigation  
5 Law claim because NiMo, as a petroleum discharger, could not  
6 bring a claim under New York Navigation Law § 172(3). *Id.*  
7 The district court also held that NiMo could not bring a  
8 claim under New York Navigation Law § 176(8) because it had  
9 remediated only manufactured gas hazardous wastes and not  
10 petroleum. *Id.*

11 The district court ruled that NiMo's state law  
12 contribution and indemnification claims were preempted by  
13 CERCLA as to King and Chevron, and dismissed those claims as  
14 to the other defendants because the defendants were not  
15 subject to liability for damages for the same injury to  
16 property. *Id.* The district court then denied NiMo's motion  
17 for summary judgment on its unjust enrichment claim against  
18 King and Chevron because NiMo failed to prove that there was  
19 no genuine issue of material fact. *Id.* at 140. Finally,  
20 the district court held that NiMo's public nuisance claim  
21 was time barred by a three-year statute of limitations and  
22 that *Oliver Chevrolet, Inc. v. Mobil Oil Corp.*, 249 A.D.2d

1 793, 794-95 (3d Dep't 1998), did not counsel extending it.  
2 *Niagara I*, 291 F. Supp. 2d at 138.

3 NiMo, U.S. Steel, Portec, and the King defendants,<sup>21</sup>  
4 along with defendants not party to this appeal, moved under  
5 Federal Rule of Civil Procedure 54(b) for entry of final  
6 judgment. The district court granted summary judgment in  
7 favor of Portec, U.S. Steel, and Chevron – only with respect  
8 to Area 4 – on NiMo's CERCLA claims, and dismissed NiMo's  
9 state law claims. NiMo appealed. As noted above, in the  
10 ensuing years the case came to this Court on two occasions  
11 and on each visit we remanded the matter to the district  
12 court for reconsideration of an intervening ruling from the  
13 Supreme Court that gave greater definition to the statutory  
14 scheme for potentially responsible parties seeking recovery  
15 of response costs from other PRPs.

16 Following the second remand, the district court decided  
17 that NiMo's cleanup costs with regard to Chevron were not  
18 recoverable under CERCLA "because of the type of substances  
19 involved (asphalt, kerosene, naphtha, and naphthalene)."  
20 *Niagara III*, 565 F. Supp. 2d at 402. The district court

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<sup>21</sup> This includes King Service, Edwin King, Lawrence King, and Slote.

1 noted that pursuant to the 1992 and 2003 Consent Orders,  
2 NiMo was "responsible for removal and remediation of  
3 manufactured gas plant-related hazardous waste contamination  
4 only, that is, hazardous contamination caused by [NiMo]  
5 itself." *Id.* at 402-03. Thus all of NiMo's claims were  
6 dismissed by the district court. Again NiMo appealed.<sup>22</sup>

7 The standard is well known: summary judgment is  
8 appropriate when there exists no dispute of material fact.  
9 *See, e.g., Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d  
10 292, 300 (2d Cir. 2003). But the standard's utility  
11 functions only in the context of the statute that imposes or  
12 absolves a litigant from liability. All of the parties  
13 asked the district court to resolve the liability question  
14 as a matter of law. NiMo lost for a number of reasons  
15 expressed by the district court in its rulings that began in  
16 November of 2003 and culminated with the second remand  
17 decision now before us. We have already concluded that the  
18 district court erred in its conclusion that NiMo could not  
19 employ § 113(f)(3)(B), but that is not the end of the  
20 liability calculation.

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<sup>22</sup> We review the district court's summary judgment conclusions *de novo*. *See Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 326 (2d Cir. 2000).

1 CERCLA is a remedial statute; it reaches as far back  
2 into the past as necessary to identify both the hazardous  
3 wastes present at a site and those responsible for them  
4 under the statute. The logic is straightforward and simple  
5 – Congress wanted owners and polluters to identify and clean  
6 up all the hazardous waste they discover. To further this  
7 goal, Congress made past and present owners, and others,  
8 liable for the hazardous materials they contributed.

9 Recognizing, however, the practical difficulties of this  
10 statutory scheme, Congress also empowered the court through  
11 § 113 to use “such equitable factors *as the court determines*  
12 *are appropriate*” to reach a just result. 42 U.S.C. §  
13 9613(f)(1) (emphasis added).

14 Congress<sup>23</sup> noted examples of the factors that it thought  
15 courts should consider in apportioning costs:

---

<sup>23</sup> CERCLA was hastily enacted and was a combination of three other toxic waste and oil spill cleanup bills that had not passed. Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability (“Superfund”) Act of 1980*, 9 Colum. J. Envtl. L. 1, 1-2 (1982). CERCLA in its final form has scant legislative history. *Id.* at 1. Those interested in reviewing the history of CERCLA, then, often look to the history of the three other bills that informed the final product. *Id.* at 2; see also Committee on Environment and Public Works, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund)* at V-VII (1983).

1 (1) The ability of the party to demonstrate that his  
2 contribution to the release can be distinguished; (2)  
3 The amount of hazardous substance involved. Of course,  
4 a small quantity of highly toxic material, or above  
5 which releases or makes more dangerous another  
6 hazardous substance, would be a significant factor; (3)  
7 The degree of toxicity of the hazardous substance  
8 involved; (4) The degree of involvement of the person  
9 in the manufacture, treatment, transport, or disposal  
10 of the hazardous substance; and (5) The degree of  
11 cooperation between the person and the Federal, State,  
12 or local government in preventing harm to public health  
13 or the environment from occurring from a release. This  
14 includes efforts to mitigate damage after a release  
15 occurs.

16  
17 S. Rep. No. 96-848, at 345-46 (1980).

18 While these factors may seem relevant to a liability  
19 determination, CERCLA purposefully lowered the liability bar  
20 required to be a PRP. As we have observed previously:

21 The plain meaning of th[e statutory] language dictates  
22 that [a party seeking costs] need only prove: [ ] there  
23 was a release or threatened release, which [ ] caused  
24 incurrence of response costs, and [ ] that the  
25 defendant generated hazardous waste at the cleanup  
26 site. What is *not* required is that the government [or  
27 another authorized party] show that a specific  
28 defendant's waste caused incurrence of cleanup costs.

29  
30 *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721 (2d  
31 Cir. 1993) (emphasis in original).

32 This relaxed liability standard is appropriate when  
33 viewed in the context of the language of CERCLA. The  
34 statute focuses on two important goals: remediation of sites  
35 that present a clear and present danger to the health and

1 well-being of the communities in which they are located and  
2 identification of the source, or sources, of hazardous  
3 materials at sites that may have experienced commercial  
4 activity long ago (the record in this case alone dates back  
5 to the 1800s). Both goals suggest that caution is  
6 appropriate when evaluating a motion for summary judgment to  
7 dismiss a claim against a PRP in a CERCLA case. As we have  
8 noted, "Congress faced the unenviable choice of enacting a  
9 legislative scheme that would be somewhat unfair to  
10 generators of hazardous substances or one that would  
11 unfairly burden the taxpaying public . . . . [W]e think  
12 Congress imposed responsibility on generators of hazardous  
13 substances advisedly." *Alcan Aluminum*, 990 F.2d at 716-17.

14 Each hazardous waste site is unique in its combination  
15 of commercial activities, substances present, and history.  
16 In situations like the present case, the type of evidence,  
17 be it direct or circumstantial, and its quality, is to some  
18 degree impeded by the passage of time and the lack of  
19 business records reflecting the day-to-day operations of the  
20 industries then present at the Water Street Site. The  
21 available evidence of who did what at the relevant site is  
22 often dependent on inference. When determining CERCLA



1 liability, "there is nothing objectionable in basing  
2 findings solely on circumstantial evidence, especially where  
3 the passage of time has made direct evidence difficult or  
4 impossible to obtain." *Franklin County Convention*  
5 *Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d  
6 534, 547 (6th Cir. 2001).

7 In practice, courts generally bifurcate a CERCLA  
8 proceeding, determining liability in Phase I, and then  
9 apportioning recovery in Phase II. During Phase I, courts  
10 have engaged in a very limited liability inquiry. See *Alcan*  
11 *Aluminum*, 990 F.2d at 720. We have previously commented on  
12 the "breadth" of CERCLA, and have held even a minimal amount  
13 of hazardous waste brings a party under the purview of the  
14 statute as a PRP. *Id.* The traditional tort concept of  
15 causation plays little or no role in the liability scheme.  
16 A party seeking to establish liability under CERCLA need not  
17 even show a specific PRP's waste caused cleanup costs. *Id.*  
18 at 721. The First Circuit defines liability similarly: "To  
19 satisfy the causal element, it is usually enough to show  
20 that a defendant was a responsible party within the meaning  
21 of 9607(a); that cleanup efforts were undertaken because of  
22 the presence of one or more hazardous substances identified

1 in CERCLA; and that reasonable costs were expended during  
2 the operation." *Acushnet Co. v. Mohasco Corp.*, 191 F.3d 69,  
3 77 (1st Cir. 1999). The Ninth Circuit quite dramatically  
4 agrees, labeling CERCLA as a statute that allows "broad  
5 discretion" to impose liability on "anyone who disposes of  
6 just about anything." *A&W Smelter & Refiners, Inc. v.*  
7 *Clinton*, 146 F.3d 1107, 1110 (9th Cir. 1998).

8 It is in Phase II, when damages are apportioned, that  
9 the relative strength of the evidence of liability becomes a  
10 relevant factor. See, e.g., *PMC, Inc. v. Sherwin-Williams*  
11 *Co.*, 151 F.3d 610, 616 (7th Cir. 1998) (Posner, J.) (a PRP's  
12 "spills may have been too inconsequential to affect the cost  
13 of cleaning up significantly, and in that event a zero  
14 allocation . . . would be appropriate"). In pushing such  
15 concerns to Phase II, we admit, as we have in the past,  
16 that, in the context of CERCLA, "causation is being brought  
17 back into the case - through the backdoor, after being  
18 denied entry at the frontdoor - at the apportionment stage."  
19 *Alcan Aluminum*, 990 F.2d at 722. District courts are  
20 authorized to use their broad discretion under CERCLA to  
21 employ the equitable factors, including consideration of the  
22 quality of the evidence that lead to liability. See

1 *Goodrich Corp. v. Town of Middlebury*, 311 F.3d 154, 170 (2d  
2 Cir. 2002).

3 At the summary judgment stage, then, the analysis of a  
4 "genuine dispute of material fact" in the context of a § 113  
5 claim under CERCLA might seem limited and constrained. The  
6 party seeking contribution must, of course, establish that  
7 the defendants qualify as PRPs under the statute and must  
8 demonstrate that it is probable that the defendants  
9 discharged hazardous material. But the party seeking  
10 contribution need not establish the precise amount of  
11 hazardous material discharged or prove with certainty that a  
12 PRP defendant discharged the hazardous material to get their  
13 CERCLA claims past the summary judgment stage. By  
14 referencing "equitable factors," the statute requires  
15 district courts to consider the practical difficulties in  
16 these cases. Summary judgment is only proper when a  
17 defendant establishes it is not liable at all under CERCLA –  
18 namely, it is not a PRP under the statute, there is no  
19 plausible evidence that it discharged hazardous materials,  
20 or it is eligible for one of the three affirmative defenses  
21 available under § 107. See 42 U.S.C. § 9607(b).

22 Defenses of minimal involvement or limited proof of

1 responsibility do have a role in the CERCLA scheme; they  
2 come in to play during the damages phase when the court is  
3 charged with equitably apportioning the costs of the cleanup  
4 among the PRPs. That a party seeking contribution can only  
5 demonstrate a minimal amount of hazardous discharge from a  
6 particular PRP, or that the exact origin proportions are  
7 unknown, are the types of equitable factors a court should  
8 consider in the apportionment process.

9 Congress sought to further incentivize PRPs to pay for  
10 their role in the creation of a hazardous waste site  
11 regardless of when they polluted. *See Toxic Substances*  
12 *Control Act Amendments: Hearings Before the Subcommittee on*  
13 *Consumer Protection and Finance of the Committee on*  
14 *Interstate and Foreign Commerce, 95th Cong. 356 (1978). To*  
15 *that end, parties seeking contribution – by definition PRPs*  
16 *who have already been charged with liability and resolved*  
17 *their exposure or PRPs confronted with reimbursement claims*  
18 *in a § 107(a) action – must be granted sufficient*  
19 *opportunity to pursue other PRPs and have the costs of*  
20 *cleanup borne equitably with others liable under the*  
21 *statute.*

22 This summary judgment standard is in keeping with our

1 previous directive to liberally construe CERCLA in order to  
2 accomplish the congressional objectives. *W.R. Grace*, 559  
3 F.3d at 89. See generally Blake A. Watson, *Liberal*  
4 *Construction of CERCLA Under the Remedial Purpose Canon:*  
5 *Have the Lower Courts Taken a Good Thing Too Far?*, 20 Harv.  
6 *Envtl. L. Rev.* 199 (1996), reprinted in *Sutherland Statutes*  
7 *and Statutory Construction* § 65A:13 (Norman J. Singer & J.D.  
8 Shambie Singer, eds., 2009).

9 **A. Chevron**

10 In 1955, Chevron purchased Areas 3 and 4 of the Water  
11 Street Site from the Republic Steel Company, and leased an  
12 easement over Area 2 for above-ground pipelines originating  
13 from Area 3. Chevron used Area 3 for an asphalt terminal  
14 from approximately 1953 to 1998. Chevron is the current  
15 owner of Area 3 and the easement; it sold Area 4 to  
16 Rensselaer County in 1974. During the time when Chevron  
17 owned Area 4, Chevron leased the land back to Republic  
18 Steel.

19 Chevron argues that NiMo is only obligated to cleanup  
20 waste from manufactured gas production and, since Chevron  
21 was not in the business of manufacturing gas, Chevron cannot  
22 be liable for any of NiMo's costs. Chevron is correct that,

1 under the Consent Order, NiMo was responsible for  
2 remediating the waste specifically related to manufactured  
3 gas. But NiMo first had to investigate the site to identify  
4 all hazardous waste present. Investigation costs are  
5 recoverable as response costs under CERCLA. See 42 U.S.C. §  
6 9601(23). Thus, even if a PRP disposed of hazardous waste  
7 that was not related to manufactured gas, NiMo may pursue  
8 contribution for the PRP's share of the investigation costs.

9 The District Court originally held, in *Niagara I*, that  
10 "the CERCLA facility at issue here is the MGP facility," and  
11 that Chevron, as "a current owner of a portion of the former  
12 MGP facility . . . [was] a 'covered person' liable for  
13 response costs." *Niagara I*, 291 F. Supp. 2d at 131. We  
14 have no problem with that holding. But even if one treated  
15 the various areas as severable parts, we would reach the  
16 same conclusion.

17 For the easement over Area 2 and the entirety of Area  
18 3, Chevron qualifies as a PRP under the statute because  
19 Chevron is "the owner or operator" of Area 3 and the  
20 easement over Area 2. 42 U.S.C. § 9607(a)(1). With regard  
21 to the easement over Area 2, there is evidence that  
22 hazardous substances may have leaked from Chevron's pipes

1 and may have been released when Chevron moved asphalt and  
2 other substances from barges onto its dock and through the  
3 pipes. Chevron does not deny the evidence that there were  
4 spills at the dock and pipe leaks in the soil, but argues  
5 that its asphalt and petroleum products are not hazardous  
6 substances under CERCLA, and thus Chevron cannot be held  
7 liable for their discharge. Chevron is correct that  
8 petroleum products are expressly excluded from the  
9 definition of hazardous substances. 42 U.S.C. § 9601(14).  
10 But though asphalt is not a hazardous material *per se*, NiMo  
11 introduced evidence that this asphalt facility produced or  
12 used hazardous materials that may have been released with  
13 the asphalt. In response, Chevron produced evidence that  
14 the waste products from manufactured gas contain "different  
15 and greater amounts" of hazardous materials than asphalt.  
16 Whether the amount of hazardous materials deposited is  
17 minimal is an equitable consideration the court may note  
18 during the apportionment of costs. The evidence presented  
19 is sufficient to present a genuine issue of material fact to  
20 defeat Chevron's motion for summary judgment.

21 As for Area 3, there was evidence that, in the early  
22 1980s one of Chevron's railroad hoses ruptured and

1 discharged coal tar product into the ground. In 1987,  
2 Chevron discovered a pinhole leak of coal tar from a tank on  
3 its property. Chevron claims these are "microscopic  
4 incidents" and that it is entitled to summary judgment.  
5 Regardless of the characterization of these spills, NiMo has  
6 taken no remedial action and incurred no cost to investigate  
7 or cleanup Area 3. In fact, NiMo reported to the DEC that  
8 its preliminary research found no hazardous substances at  
9 Area 3 and that no further investigation was necessary. It  
10 would seem that in order for NiMo to recover costs, NiMo  
11 must prove first that it incurred them. *See United States*  
12 *v. Alcan Aluminum Corp.*, 315 F.3d 179, 184 (2d Cir. 2003).  
13 The district court correctly concluded that, at this stage  
14 of the cleanup process, NiMo cannot maintain a contribution  
15 claim against Chevron for Area 3.

16 Area 4 is more complicated. While Chevron owned Area  
17 4, it leased the property to Republic Steel. Though Chevron  
18 argues otherwise, Chevron may be liable as a PRP if Republic  
19 Steel disposed of any hazardous substances at the Site  
20 because Chevron owned the facility. 42 U.S.C. § 9607(a)(2).



1 In 1960, after animals<sup>24</sup> and people got stuck in the open  
2 tar pits and one pit caught fire, Republic Steel attempted  
3 to remediate the pits on Area 4 by covering them with  
4 "earthen material." Relative to the standards at the time,  
5 capping the tar pits was supposedly a state-of-the-art  
6 technique. NiMo, however, presented evidence that capping  
7 could spread contamination by creating pressure that forced  
8 the hazardous materials to surface at the sides of the site  
9 and mix with surface water.

10 Under CERCLA, "disposal" means "the discharge, deposit,  
11 injection, dumping, spilling, leaking, or placing of any . .  
12 . hazardous waste." 42 U.S.C. § 6903(3). NiMo argues that,  
13 by placing the caps, Republic Steel caused the tar from the  
14 pits to leak out into the surrounding area. NiMo claims  
15 leaking qualifies as disposal, and thus Chevron is liable  
16 because it owned Area 4 at the time of disposal of a  
17 hazardous substance. We agree. NiMo presented sufficient  
18 evidence to create a genuine issue of material fact as to  
19 whether the placement of the caps played a role in

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<sup>24</sup> There is particularly evocative testimony in the record about "the cow incident," when Chevron employees heard "something[] down south of the property bellowing" and discovered a cow "in the tar pit and she was almost up to the belly . . . all feet in."

1 redistributing the hazardous materials at Area 4.

2 In addition, the DEC noted that some of the hazardous  
3 materials found at Area 4 did not originate from NiMo's  
4 activity. This raises a question of fact as to whether  
5 Chevron or Republic Steel contributed other deposits, in  
6 addition to causing the leak in the pits.

7 **B. Portec**

8 Portec has never owned any of the land at the Water  
9 Street Site. However, between 1968 and 1997, Portec owned  
10 land to the northeast of Area 2, and used the land to house  
11 a rail-splitting plant that Portec operated from 1900 to  
12 1989. During the time in question, the Wynantskill Creek  
13 ran along the northern part of Portec's property, crossed  
14 Area 2, and emptied into the Hudson River.

15 From 1908 on, Portec was a member of the Wynantskill  
16 Improvement Association. At various points, Portec also  
17 served as the chair and, eventually, the sole member of the  
18 Association. The Wynantskill Improvement Association was a  
19 nonprofit organization designed to improve the Wynantskill  
20 Creek for milling purposes through a variety of methods,  
21 including regulating the flow of the water, connecting lakes  
22 and ponds to the Creek, and constructing dams. Portec is

1 the sole remaining member of the Association, and  
2 consequently, may hold title to a portion of the Wynantskill  
3 Creek.

4 NiMo argues that Portec is liable as a PRP because its  
5 membership in the Association renders Portec responsible for  
6 the activities of the Association as a whole. To NiMo, the  
7 Association's control of the Wynantskill Creek makes it  
8 liable for waste in the Creek. NiMo alternatively claims  
9 that Portec is liable for contribution because it permitted  
10 the disposal of hazardous materials on its property, those  
11 hazardous materials entered the Wynantskill Creek and,  
12 eventually, they contaminated Area 2. Portec counters that  
13 it is not liable under CERCLA because it never owned or  
14 operated any of the property at the Water Street Site, and  
15 that there is no legal basis for assigning CERCLA liability  
16 based on membership in a non-profit corporation. We need  
17 not reach the thorny issue of whether membership in such an  
18 association could result in CERCLA liability because we find  
19 that Portec is liable under a much simpler theory.

20 Under § 107(a)(2), a PRP may be liable under CERCLA if  
21 it "at the time of disposal of any hazardous substance . . .  
22 operated any facility at which such hazardous substances

1 were disposed of." 42 U.S.C. § 9607(a)(2). The definition  
2 of operator is very broad in the CERCLA context. See *United*  
3 *States v. Bestfoods*, 524 U.S. 51, 65-66 (1998). To be an  
4 operator under the statute, a person "must manage, direct,  
5 or conduct operations specifically related to pollution,  
6 that is, operations having to do with the leakage or  
7 disposal of hazardous waste." *Id.* at 66-67. Under this  
8 definition, Portec is a PRP under CERCLA because Portec  
9 "conducted operations specifically related to pollution" at  
10 the Wynantskill Creek. There is evidence that Portec's  
11 activities on its property resulted in hazardous waste  
12 deposits. Spent solvents and quench oils<sup>25</sup> were not  
13 properly removed from the plant. Underground pipes leaked  
14 fuel oil. Neighboring properties suffered spills. Soil  
15 sampling from the Portec property revealed a number of  
16 hazardous substances in the ground. More importantly for  
17 NiMo's purposes, there is evidence that these hazardous  
18 deposits made their way into the Wynantskill Creek and into  
19 the Hudson River. Portec used the Wynantskill Creek to  
20 discharge waste from its plant. Surface and ground water  
21 traveled across Portec's property into the Creek. The

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<sup>25</sup> Quench oil is oil used to cool heat-treated metal.

1 Creek, in turn, passed through Area 2 on its way to the  
2 Hudson.

3 During its travels across Area 2, the water in the  
4 Creek appears to have left behind hazardous materials.  
5 These hazardous materials, according to one of NiMo's  
6 experts, originated at the Portec Plant. In the planned  
7 remediation of Area 2, NiMo may have to cleanup this waste,  
8 along with the waste that NiMo itself deposited there.  
9 Thus, Portec operated a facility where hazardous waste was  
10 deposited and NiMo may have to clean that waste as part of  
11 its remediation plan for Area 2. This meets the necessary  
12 statutory elements to attach liability to Portec. Because  
13 Portec qualifies as a PRP under CERCLA, and because there is  
14 evidence in the record that Portec may have deposited  
15 hazardous materials that settled in Area 2, the district  
16 court erred in its grant of summary judgment to Portec.

17 **C. King**

18 In 1957, King Service, Inc. leased Area 2 from the  
19 then-owner and began operating a petroleum distribution  
20 facility. In a series of transactions between 1968 and  
21 1973, King purchased Area 2, save a bit of land where the  
22 Wynantskill Creek enters the Hudson River. King is the

1 current owner of Area 2.

2 NiMo presented undisputed evidence that there are  
3 hazardous wastes located on Area 2. King, as the current  
4 owner of the contaminated property, is indisputably liable  
5 as a PRP. See 42 U.S.C. § 9607(a)(1). The district court  
6 concluded the same, but ultimately dismissed the complaint  
7 as to King because the court incorrectly determined that  
8 NiMo did not qualify for contribution under § 113(f)(B)(3).  
9 The grant of summary judgment to King was improper.

10 **D. U.S. Steel**

11 U.S. Steel, or its predecessors, owned the Water Street  
12 Site from 1902 to 1922. U.S. Steel operated iron and steel  
13 manufacturing facilities at Areas 1 and 2. From 1907 to  
14 1922, U.S. Steel dismantled structures and equipment at an  
15 idle steel plant on Area 1. U.S. Steel also demolished the  
16 old Bessemer Steel Works that had been in use since the late  
17 1860s to convert iron to steel on Area 2. The demolition  
18 generated materials that U.S. Steel dumped, along with  
19 byproducts from its own iron and steel manufacturing, at a  
20 landfill it owned and operated at Area 4. As a result of  
21 U.S. Steel's dumping at Area 4, this area allegedly grew in  
22 acreage. NiMo seeks contribution from U.S. Steel as the

1 owner or operator of property who disposed of hazardous  
2 waste on its property, and as an arranger. 42 U.S.C. §  
3 9607(a)(2)-(3).<sup>26</sup> NiMo contends that U.S. Steel deposited  
4 hazardous waste from its demolition and industrial  
5 activities. U.S. Steel contends that NiMo's allegations are  
6 based on speculation and are without evidentiary basis.

7 CERCLA liability may be inferred from the totality of  
8 the circumstances as opposed to direct evidence. *Tosco*  
9 *Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 892 (10th Cir.  
10 2000). Because the relevant time period was from 1902 until  
11 1922, both NiMo and U.S. Steel were forced to rely primarily  
12 on circumstantial evidence resulting in a battle of experts.  
13 NiMo's experts concluded that U.S. Steel's activities  
14 resulted in the deposit of hazardous materials while U.S.  
15 Steel's experts concluded that its activities did not. The  
16 battle bespeaks of a dispute of material fact for purposes  
17 of CERCLA liability.

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<sup>26</sup> Under CERCLA, "arranger" is shorthand for "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." 42 U.S.C. § 9607(a)(3).

1 U.S. Steel was an owner of the property in question;  
2 there is evidence in the form of expert testimony, albeit  
3 disputed, that U.S. Steel caused hazardous deposits on the  
4 property. CERCLA does not require a smoking gun. The  
5 credibility of the experts, the type of evidence presented,  
6 the amount of hazardous waste involved, and the degree of  
7 U.S. Steel's involvement in the identified hazardous  
8 deposits are all relevant as equitable factors for the  
9 district court to use in apportioning response costs. At  
10 this stage, however, NiMo's claims against U.S. Steel  
11 survive summary judgment; U.S. Steel qualifies as an owner  
12 under § 107 and NiMo has presented evidence that hazardous  
13 deposits may have been generated and deposited at the site  
14 on U.S. Steel's watch.

15 **E. National Contingency Plan**

16 The district court determined that there was a genuine  
17 issue of material fact as to whether NiMo's cleanup efforts  
18 were consistent with the National Contingency Plan. We have  
19 never squarely addressed whether compliance with a state  
20 consent decree is sufficient to prove adherence to the  
21 National Contingency Plan.

22 Under § 107, a PRP is liable for cleanup costs



1 consistent with the national contingency plan. 42 U.S.C. §  
2 9607(a)(4)(A)-(B). The National Contingency Plan is  
3 essentially the federal government's toxic waste playbook,  
4 detailing the steps the government must take to identify,  
5 evaluate, and respond to hazardous substances in the  
6 environment. See 40 C.F.R. part 300; see also Travis  
7 Wagner, *The Complete Guide to the Hazardous Waste*  
8 *Regulations: RCRA, TSCA, HMTA, EPCRA, and Superfund*, 3d,  
9 326-27 (1999). Adherence to the plan is the gatekeeper to  
10 seeking reimbursement of response costs. Ultimately, the  
11 goal is "consistency and cohesiveness to response planning  
12 and actions." H. Rep. 96-1016, at 30 (1980).

13 Courts presume that actions undertaken by the federal,  
14 or a state, government are consistent with the National  
15 Contingency Plan. See, e.g., *City of Bangor v. Citizens*  
16 *Comm'ns Co.*, 532 F.3d 70, 91 (1st Cir. 2008). However,  
17 private parties that have responded to hazardous substances  
18 must establish compliance. *Id.* One way of establishing  
19 compliance with the national plan is to conduct a response  
20 under the monitoring, and with the ultimate approval, of the  
21 state's environmental agency. *Id.*; see also *NutraSweet Co.*  
22 *v. X-L Eng'g Co.*, 227 F.3d 776, 791 (7th Cir. 2000). This

1 is consistent with the state's power to settle CERCLA  
2 liability without the express approval of the EPA. It would  
3 be bizarre indeed if a PRP's settlement with a state  
4 entitled it to seek contribution under § 113(f)(B)(3), but  
5 its actions taken in executing that settlement disqualified  
6 the settlor from employing the statute to recoup a portion  
7 of its expenses.

8 NiMo's adherence to the DEC Consent Decree established  
9 its compliance with the National Contingency Plan. The  
10 district court's conclusion in this regard was error.

11 **VI. STATE LAW CLAIMS**

12 **A. New York Navigation Law Claims**

13 Under New York Navigation Law, anyone who has  
14 "discharged petroleum shall be strictly liable, without  
15 regard to fault, for all cleanup and removal costs and all  
16 direct and indirect damages." N.Y. Nav. L. § 181(1). This  
17 includes costs incurred from investigation and remediation  
18 of petroleum. *See, e.g., New York v. LVF Realty Co.*, 59  
19 A.D.3d 519, 521 (2d Dep't 2009). A party who shoulders the  
20 cleanup and removal costs and is not at fault for the  
21 petroleum discharge may pursue a claim against the actual  
22 polluters. N.Y. Nav. L. §§ 172(3), 181(5). NiMo brought

1 Navigation Law claims against the defendants for their  
2 discharge of petroleum. However, NiMo had also discharged  
3 petroleum at the Water Street Site. As the district court  
4 correctly concluded, under the language of § 181, NiMo  
5 cannot pursue claims against the defendants because NiMo is  
6 at fault for at least some of the petroleum discharge at the  
7 site.

8         However, there is an additional provision of New York  
9 Navigation Law that affords NiMo a cause of action. Under §  
10 176(8), "every person providing cleanup [or] removal of  
11 discharge of petroleum . . . shall be entitled to  
12 contribution from any other responsible party." N.Y. Nav.  
13 L. § 176(8). "Every person" is obviously inclusive and the  
14 language "other responsible party" indicates that the  
15 drafters were aware that "every person" could encompass a  
16 responsible party. NiMo is entitled to seek contribution  
17 for its response costs related to petroleum discharges.

18         We agree with the district court that NiMo did not  
19 incur any cleanup costs with respect to Area 3, however,  
20 NiMo – in complying with the Consent Order – incurred costs  
21 to cleanup Areas 1, 2, and 4. NiMo cleaned up a variety of  
22 materials, some of which contained petroleum and petroleum

1 products. There is a genuine issue of material fact as to  
2 the liability of the remaining defendants for contribution  
3 with regard to costs incurred by NiMo to cleanup and remove  
4 unlawfully discharged petroleum.

5 **B. Contribution, Indemnification, and Unjust**  
6 **Enrichment Claims**

7  
8 The district court dismissed NiMo's claims against King  
9 and Chevron for contribution under New York law, concluding  
10 that CERCLA preempted the state claims. *Niagara I*, 291 F.  
11 Supp. 2d at 137. The district court also dismissed NiMo's  
12 state law contribution claims against U.S. Steel and Portec  
13 because the district court had already determined that U.S.  
14 Steel and Portec were not liable for the remediation of the  
15 Water Street Site. *Id.*

16 CERCLA could preempt state law in one of three ways:  
17 (1) Congress expressly indicated that CERCLA preempts state  
18 law; (2) CERCLA is a comprehensive regulatory scheme such  
19 that it creates a reasonable inference that the state cannot  
20 supplement it; or (3) state law directly conflicts with  
21 CERCLA. *See Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S.  
22 272, 280-81 (1987). We have previously held that CERCLA  
23 does not expressly preempt applicable state law. *Marsh v.*

1     *Rosenbloom*, 499 F.3d 165, 177 (2d Cir. 2007). We have also  
2     concluded that CERCLA is not such a comprehensive scheme  
3     that it cannot be supplemented by state law. *Bedford*  
4     *Affiliates v. Sills*, 156 F.3d 416, 427 (2d Cir. 1998),  
5     *overruled on other grounds by W.R. Grace*, 559 F.3d at 90.  
6     That leaves only preemption by conflict, which exists when  
7     “compliance with both state and federal law is impossible,  
8     or when the state law stands as an obstacle to the  
9     accomplishment and execution of the full purposes and  
10    objectives of Congress.” *Pac. Capital Bank, N.A. v.*  
11    *Connecticut*, 542 F.3d 341, 351 (2d Cir. 2008) (quoting  
12    *United States v. Locke*, 529 U.S. 89, 109 (2000)) (internal  
13    quotation marks omitted).

14         CERCLA depends on a federal and state partnership to  
15    assist the national government in identifying and  
16    remediating hazardous wastes sites consistent with the  
17    National Contingency Plan. But while a state can settle a  
18    PRP’s CERCLA liability, that authorization does not compel  
19    the conclusion that Congress intended that parties who have  
20    settled their CERCLA liability should have both a federal  
21    and a state law based claim for recovery of the same  
22    response expenditures. CERCLA employs state agencies in

1 identifying and remediating hazardous waste sites while  
2 providing a federally defined settlement enticement.  
3 Congress created the statutory right to contribution in §  
4 113(f) in part to encourage settlements and further CERCLA's  
5 purpose as an impetus to efficient resolution of  
6 environmental hazards. See *Atl. Research*, 551 U.S. at 141;  
7 see also *Marsh*, 499 F.3d at 180. Section 113 is intended to  
8 standardize the statutory right of contribution and, in  
9 doing so, avoid the possibility of fifty different state  
10 statutory schemes that regulate the duties and obligations  
11 of non-settling PRPs who might be viewed as tortfeasors  
12 under the law of any particular state. Based on the text, §  
13 113 was intended to provide the only contribution avenue for  
14 parties with response costs incurred under CERCLA.<sup>27</sup> See 42  
15 U.S.C. § 9613(f)(3)(C) ("Any contribution action brought  
16 under this paragraph shall be governed by Federal law.").  
17 Thus we conclude that state law contribution claims for

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<sup>27</sup> Our cases — *Consolidated Edison* and *W.R. Grace* — have recognized that there are situations where a settlement with the DEC encompasses only state law based liability. We suspect that the United States, given the views it has expressed in its amicus brief, might view the matter differently. If any settlement with a state environmental agency qualifies as a state administrative settlement under CERCLA, it would seem that CERCLA has preempted the area of contribution claims that arise out of the settlement.

1 CERCLA response costs conflict with CERCLA contribution  
2 claims and therefore are preempted.<sup>28</sup>

3 NiMo makes no claims for cleanup costs outside of those  
4 it expended in compliance with the Consent Order and we have  
5 already determined that costs incurred pursuant to the  
6 Consent Order, as amended, fall within CERCLA. Because NiMo  
7 did not incur costs outside of CERCLA, NiMo has no grounds  
8 for contribution under New York law and we affirm the  
9 district court.

10 We are left then with NiMo's indemnification and unjust  
11 enrichment claims. We have previously concluded that state

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<sup>28</sup> We are not the first circuit to reach this result. See *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998) (Posner, J.); see also *In re Reading Co.*, 115 F.3d 1111, 1117 (3d Cir. 1997) *abrogated on other grounds by E.I. DuPont De Nemours & Co. v. United States*, 460 F.3d 515, 522 (3d Cir. 2006). More generally, our conclusion is in keeping with other courts' determinations that CERCLA is intended to be the exclusive scheme governing hazardous waste claims that fall within its purview. See, e.g., *Barnes ex rel. Estate of Barnes v. Koppers, Inc.*, 534 F.3d 357, 365 (5th Cir. 2008) (when the "conditions for CERCLA cleanup are satisfied," CERCLA's tolling provision preempts the state law tolling provision); *Fireman's Fund Ins. Co. v. City of Lodi, Cal.*, 302 F.3d 928, 946 (9th Cir. 2002) (if the defendant is found to be a PRP, CERCLA preempts the defendant's contribution protection provided by the local environmental and liability ordinance); *Town of Munster, Ind. v. Sherwin-Williams Co.*, 27 F.3d 1268, 1273 (7th Cir. 1994) (limiting "the defenses to liability under CERCLA to those enumerated in the statute" and barring equitable defenses).

1 law indemnification claims were preempted by CERCLA, a  
2 conclusion that we reiterate today. *Bedford Affiliates*, 156  
3 F.3d at 427.<sup>29</sup> We also hold that the state law claims for  
4 unjust enrichment are preempted for substantially the same  
5 reasons as detailed above – allowing unjust enrichment  
6 claims for CERCLA expenses would again circumvent the  
7 settlement scheme, as PRPs could seek recompense for a  
8 legally unjustifiable benefit outside the limitations and  
9 conditions of CERCLA.

### 10 **C. Public Nuisance**

11 The district court dismissed NiMo's claim for public  
12 nuisance as time barred. *Niagara I*, 291 F. Supp. 2d at 140.  
13 NiMo offers no argument to contest this ruling. Therefore,  
14 we affirm the district court.

### 15 **V. CHEVRON'S CROSS-APPEAL**

16 Chevron cross-appeals on several grounds. First,  
17 Chevron challenges the district court's *sua sponte*  
18 dismissal of Chevron's third-party action against Rensselaer  
19 County, which purchased Area 4 from Chevron in 1974. The  
20 district court reasoned that the third-party action was moot

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<sup>29</sup> Though *Bedford Affiliates* was overruled by *W.R. Grace*, the panel's decision that CERCLA preempts state indemnification claims remains undisturbed.



1 because the district court had absolved Chevron of liability  
2 for Area 4. *Id.* at 135. Chevron argues that, should we  
3 decide to reinstate NiMo's CERCLA contribution claims  
4 against Chevron for Area 4, then we should also reinstate  
5 Chevron's claim against Rensselaer County. We agree.  
6 Because we have reinstated NiMo's CERCLA contribution claims  
7 as to Area 4, we reinstate Chevron's claim against  
8 Rensselaer County.

9 Chevron also appeals the district court's dismissal of  
10 Portec and U.S. Steel from the case. As we have reversed  
11 the district court and reinstated NiMo's claims against both  
12 Portec and U.S. Steel, Chevron's cross-claims for  
13 contribution against Portec and U.S. Steel are also  
14 reinstated.

## 15 **VI. CONCLUSION**

16 We reverse the orders of the district court dismissing  
17 U.S. Steel, Chevron, Portec, and King Service from the  
18 litigation. There are genuine issues of material fact with  
19 respect to the defendants contribution liability to NiMo.

20 NiMo is entitled to bring a claim for contribution  
21 under § 113(f)(3)(B). A potentially responsible party's  
22 CERCLA liability settlement with a state qualifies the PRP

1 for contribution under § 113(f)(3)(B) and the state agency  
2 does not need express authorization for the settlement from  
3 the EPA. NiMo satisfied the requirements of the National  
4 Contingency Plan by settling its CERCLA liability with New  
5 York. Because NiMo resolved its CERCLA liability through an  
6 administrative settlement, it is not entitled to bring a  
7 claim under § 107(a)(4)(B).

8 We reverse the district court's dismissal of NiMo's  
9 claim for contribution under New York Navigation Law, and  
10 affirm the district court with respect to its dismissal of  
11 NiMo's remaining state law claims. We reinstate Chevron's  
12 third-party claims against Rensselaer County for  
13 consideration by the district court in light of our  
14 reinstating NiMo's claims against Chevron and we further  
15 reinstate Chevron's cross-claims for contribution against  
16 Portec and U.S. Steel.

17 The district court's orders of November 6, 2003, March  
18 11, 2004, June 28, 2006, and July 16, 2008 are hereby  
19 AFFIRMED in part and REVERSED in part.

20

APPENDIX A

