Preserving Claims to Recoup Response Costs during Brownfields Redevelopment

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I. Introduction

Notwithstanding a pair of recent United States Supreme Court cases, the contours of cost recovery and contribution under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA")[1] are still not well defined. Regardless which mechanism a Potentially Responsible Party ("PRP") ultimately uses to assert a claim to recoup response costs, there are important steps that should be taken during the brownfields process to ensure that costs can ultimately be recouped.

This paper explores the significance of four recent federal cases in the context of preserving the right to recoup response costs when approaching a brownfields project in Oklahoma. Although this paper focuses on Oklahoma's brownfields statutes and regulations, the lessons derived from the analysis of recent federal case law include overarching principles that will provide PRPs useful tools when considering whether to voluntarily remediate and redevelop real property. Specifically, this paper shows how a PRP might be able to insulate itself from future harm and preserve its ability to recoup response costs by entering into a consent order with a state environmental agency, in this case the Oklahoma Department of Environmental Quality ("DEQ"), and thereafter complying with the National Contingency Plan ("NCP").

Part II of this paper will explain CERCLA and the NCP in light of four recent federal cases which might have significant impacts on recoupment of response costs in the brownfields setting. Part III will lay out a hypothetical brownfields scenario under

[1] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601 – 9675 (2006)).

Oklahoma law, and will apply the most recent federal standards to the redevelopment decision-making process.

II. CERCLA, the CERCLA Cases Recently Decided by the United States Supreme Court and the Second Circuit Court of Appeals, and the NCP

A. CERCLA Sections 107 and 113

The United States Congress enacted CERCLA roughly thirty years ago in order to encourage the timely cleanup of hazardous waste sites and place the cost of that response on those responsible for creating or maintaining the hazardous condition.[2] While Congress apparently intended CERCLA to be comprehensive, the Act as enacted is not elegant.[3] In order to achieve its dual purposes, CERCLA creates several distinct provisions that authorize parties in "different procedural positions" to recoup response costs incurred in cleaning up contamination.[4]

First, Section 107(a) broadly permits certain types of parties to recover costs related to the cleanup and prevention of contamination[5], and imposes joint and several liability on PRPs.[6] More specifically, Section 107 authorizes the United States, a state, or "any other person" to seek reimbursement for all removal or remedial costs associated with the hazardous substances on the property, provided that those actions are consistent with the NCP.[7] Since the enactment of CERCLA, the scope of Section 107 – i.e., whether the statute allowed a PRP, in addition to the Government and certain private

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[2] *W.R. Grace & Co. – Conn. v. Zotos Int'l, Inc.*, 559 F.3d 85, 88 (2d Cir. 2009); *Atl. Research Corp. v. United States*, 459 F.3d 827, 830 (8th Cir. 2006), *aff'd*, 551 U.S. 128 (2007).
[3] *Zotos*, 559 F.3d at 88-89.
[4] *Id.* at 89.
[5] 42 U.S.C. §§ 9607(a)(1)-(4) (2006). *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004).
[6] *United States v. Atl. Research Corp.*, 551 U.S. 128, 140 n.7 (2007).
[7] *Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 120-21 (2d Cir. 2010).

parties, that had incurred response costs to recover costs from other PRPs – has been frequently litigated.[8] "More specifically, the question was whether a private party that had incurred response costs, ***but that had done so voluntarily*** and was not itself subject to suit, had a cause of action for cost recovery against other PRPs."[9] Recently, the United States Supreme Court has concluded that the language "any other person" ***does*** include a PRP that voluntarily cleans the site.[10] That holding makes intuitive sense because it furthers CERCLA's goal of promoting the expeditious cleanup and removal of hazardous waste via the voluntary cleanup of waste sites.[11] In other words, if PRPs could not recoup the costs of remediation and, as will be discussed below, insulate themselves from administrative penalties, then no PRP would proactively initiate the cleanup of a contaminated site in a manner that would foster the voluntary redevelopment and reuse of brownfield sites.[12]

In an attempt to resolve the litigation mentioned above concerning the scope of Section 107(a), Congress amended CERCLA with the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), adding Section 113 to the statutory scheme.[13] The express language of Section 113 authorizes PRPs to seek contribution from other PRPs.[14] Specifically, Section 113(f)(1) creates a contribution right for parties liable or

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[8] *Cooper Indus.*, 543 U.S. at 161.
[9] *Id.* (emphasis added).
[10] *Atl. Research Corp.*, 551 U.S. at 135-36.
[11] *See Zotos*, 559 F.3d at 95.
[12] *Cf.* 27A O.S.Supp.2009 § 2-15-102(A)(2); *Zotos*, 559 F.3d at 95.
[13] *Niagara Mohawk Power Corp.*, 596 F.3d at 121 (citing Pub. L. No. 99-499, 100 Stat. 1613, 1647-48).
[14] 42 U.S.C. § 9613 (2006); *Cooper Indus.* 543 U.S. at 162-63.

potentially liable under CERCLA, and Section 113(f)(3)(B) creates a contribution right for parties that have resolved their liability by settlement.[15]

Whatever the purpose of SARA, the United States Supreme Court determined in 2004 that a private party which has not been sued under CERCLA Sections 106 or 107 cannot assert a claim for contribution under § 113(f)(1) against other PRPs.[16] In other words, Section 113(f)(1) and Section 113(f)(3)(B) are available only to parties which have been sued for response costs, or which have resolved their CERCLA liability for response costs by means of settlement. As a result, a PRP who proactively initiates the cleanup of a contaminated site in a manner that would foster the voluntary redevelopment and reuse of the site cannot seek contribution from any other PRP. But, as discussed below, by voluntarily entering into an administrative settlement ***and then*** initiating the cleanup of a contaminated site, a PRP will be able to preserve its right to recoup the costs of remediation while also insulating itself from administrative penalties and CERCLA liability.

B. The United States Supreme Court Opinions in Cooper Industries *and* Atlantic Research Corp. *and the Second Circuit's Opinions in* Zotos *and* Niagara Mohawk Power Corp.

While federal courts have struggled since the 1980 enactment of CERCLA and 1986 enactment of SARA to interpret which subsection provides a PRP a cause of action in differing procedural and factual circumstances, two recent United States Supreme Court decisions have shed light on Section 107 and Section 113.[17] Prior to 2004, the federal courts had generally adhered to the standard that Section 107 was only available

[15] 42 U.S.C. § 9613 (2006); *Cooper Indus.* 543 U.S. at 163; *Zotos*, 559 F.3d at 89.
[16] *Cooper Indus.*, 543 U.S. at 160-61.
[17] *Zotos*, 559 F.3d at 89.

to innocent parties, but that Section 113 would be available to all PRPs to seek contribution.[18] Then, in its 2004 opinion in the case *Cooper Industries, Inc. v. Aviall Services, Inc.*, the United States Supreme Court held that private parties that had not yet been sued in a CERCLA administrative or cost-recovery action could not seek contribution under Section 113(f)(1).[19] Three years later, in a unanimous opinion in the case *Atlantic Research Corp. v. United States*, the Supreme Court held that Section 107(a) provides PRPs – and not just "innocent parties" – which had incurred response costs but had not yet been sued in a CERCLA administrative or cost-recovery action a cause of action to recover response costs against other PRPs.[20]

First, in *Cooper Industries*, Aviall purchased property from Cooper and several years later discovered contamination that had occurred during Cooper's ownership and also during Aviall's subsequent ownership.[21] Aviall informed the state environmental agency of the contamination, but – despite threatened enforcement action by the state agency – neither the state agency nor the Environmental Protection Agency ("EPA") ordered remediation of the site.[22] Undaunted, Aviall voluntarily remediated the site under the state agency's supervision, spending roughly ten years and millions of dollars in the process.[23] Aviall requested reimbursement from Cooper, but Cooper refused to pay and so Aviall filed a cost recovery action against Cooper in federal court.[24]

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[18] *See Zotos*, 559 F.3d at 89.
[19] 543 U.S. 157, 165-66 (2004).
[20] 551 U.S. 128, 135-36 (2007).
[21] *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 263 F.3d 134, 136 (5th Cir. 2001), *rev'd*, 312 F.3d 677 (5th Cir. 2002) (en banc), *rev'd*, 543 U.S. 157 (2004)
[22] *Cooper Indus.*, 543 U.S. at 164.
[23] *Id.*
[24] *Id.*

Aviall's complaint ultimately asserted a claim for cost recovery pursuant to Section 113(f)(1).[25] The district court awarded summary judgment to Cooper on the grounds that Aviall could not seek contribution under Section 113(f)(1) because Aviall had not been sued under CERCLA Sections 106 or 107.[26] A Fifth Circuit Court of Appeals panel affirmed the decision, but the Fifth Circuit reversed *en banc* on the grounds that Section 113 enabled any PRP to seek contribution from other PRPs regardless whether the claimant has been sued for response costs.[27] Looking to the text of Section 113(f)(1), the United States Supreme Court reaffirmed the district court's ruling that a claim for CERCLA contribution was only available "during or following" an action initiated under Sections 106 or 107.[28] Accordingly, a party that remediates hazardous substances voluntarily, without first coming under the thumb of Sections 106 or 107, cannot sue other PRPs for ***contribution*** of response costs.[29]

Naturally, the *Cooper Industries* opinion left PRPs wondering whether they could seek recovery – though not "contribution" – of voluntarily incurred response costs under Section 107. In *United States v. Atlantic Research Corp.*, the United States Supreme Court answered in the affirmative; but in doing so, the Supreme Court left a gaping hole in its guidance to future PRPs. Atlantic Research leased space in a facility owned by the United States, and its operations on the leased property resulted in soil and groundwater

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[25] *Id.* Aviall asserted that under Fifth Circuit precedent as it existed, a Section 113 claim was considered a type of Section 107 claim, so the assertion of a cost recovery claim under Section 113 was sufficient to implicate both cost recovery provisions.
[26] *Id.* at 165.
[27] *Id.*
[28] *Id.* at 165-66.
[29] *See Atl. Research Corp.*, 551 U.S. at 131 ("In this case, we must decide a question left open in *Cooper Industries*….").

contamination at the site.[30] Atlantic Research voluntarily investigated and cleaned up the contamination, incurring response costs in the process which it sought to recoup from the United States.[31] Atlantic Research and the government began to negotiate in an effort to resolve these financial matters, culminating in Atlantic Research filing a complaint against the United States in federal court.[32]

Foreclosed from contribution by the *Cooper Industries* opinion, Atlantic Research's complaint ultimately stated a claim for cost recovery pursuant to Section 107(a).[33] Nevertheless, the district court dismissed the claim on the grounds, essentially, that Section 107 actions are only available to "innocent" parties.[34] The Eighth Circuit Court of Appeals reversed the dismissal ostensibly on the grounds that Section 107(a)(4)(B) means what it says when it provides that "***any*** other person" can recover response costs as long as those costs are (1) incurred consistent with the NCP and (2) not incurred subject to a prior Section 106 or Section 107 action.[35] The United States Supreme Court unanimously affirmed on essentially the same grounds, holding that Section 107(a)(4)(B) authorizes claims by a private party against other PRPs for response costs.[36]

With its *Cooper Industries* and *Atlantic Research* opinions, the United States Supreme Court expressly differentiated the joint and several liability regime of Section

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[30] *Id.* at 133.
[31] *Atl. Research Corp. v. United States*, 459 F.3d 827, 829 (8th Cir. 2006), *aff'd*, 551 U.S. 128 (2007).
[32] *Id.*
[33] *Atl. Research Corp.*, 551 U.S. at 133.
[34] *Atl. Research Corp.*, 459 F.3d at 830.
[35] *See id.* at 835.
[36] *Atl. Research Corp.*, 551 U.S. at 135-37.

107 from the contribution scheme under Section 113.[37] PRPs that have "voluntarily" incurred response costs may utilize the broad liability standard in Section 107(a), while PRPs that have reimbursed response costs to others ***pursuant to claims under Section 106 and 107*** may seek contribution under Section 113(f).[38] That is well and good for a private party that endeavors to undertake a remediation effort without any assistance or cooperation from a state environmental agency or the EPA.

But where does that leave private parties who, for example, seek to utilize the Oklahoma Brownfields Voluntary Redevelopment Act, 27A Okla. Stat. §§ 2-15-101 through 2-15-110 ("Oklahoma Brownfields Act")? The Oklahoma Brownfields Act provides that DEQ "shall not assess against a[n Oklahoma Brownfields Act] participant administrative penalties or pursue civil actions associated with the pollution which is the subject of [a] consent order" for the remediation of a brownfields site.[39] Although the act is applicable to "participants"[40], for the sake of simplicity the term "PRP" will be used in

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[37] *Id.* at 139.
[38] *See id.*
[39] 27A O.S.Supp.2009 § 2-15-108(A)(1).
[40] The Oklahoma Brownfields Act defines "***participant***" as "any person who or entity which:

a. has acquired the ownership, operation, management, or control of a site through foreclosure or under the terms of a bona fide security interest in a mortgage or lien on, or an extension of credit for, a brownfields site and which forecloses on or receives an assignment or deed in lieu of foreclosure or other indicia of ownership and thereby becomes the owner of a brownfield,

b. possesses a written expression of an interest to purchase a brownfield and the ability to implement a brownfield redevelopment proposal,

c. is the legal owner in fee simple of a brownfield,

d. is a tenant on or lessee of the brownfield site, or

e. is undertaking the remediation of a brownfield site …."

this paper to denote a "participant" pursuant to the Oklahoma Brownfields Act that is also a PRP – *i.e.*, a "PRP-participant." The Act also prohibits the DEQ from subjecting the PRP's "lender, lessee, or successor or assign" to administrative penalties and civil liability [41] Moreover, the Act insulates a PRP from third-party claims alleging "civil liability regarding the pollution which was the subject of the consent order or certificate …."[42] So the Oklahoma Brownfields Act provides the participant with protection from both administrative penalties and civil liability from both DEQ and third-parties.

Although the Oklahoma Brownfields Act protects a PRP from penalties and liability, if the PRP cannot recoup the costs of remediation, then it will have less incentive to proactively initiate the cleanup of a contaminated site in a manner that would foster the voluntary redevelopment and reuse of brownfield sites. But can such a party preserve its right to recoup the costs of remediation it incurs subject to fulfilling its regulatory duties pursuant to a brownfields agreement? Worse yet, does participation in a brownfields project foreclose a party from seeking cost recovery under Section 107 or contribution under Section 113? The Oklahoma Brownfields Act does provide that the release of liability from administrative penalties and civil actions authorized by the Act shall not apply to any other PRP who has not participated in the voluntary remediation.[43] And the Act expressly states that, aside from the protections provided to the participant-PRP, the Act shall not "be construed to limit or negate any … person from pursuing or receiving legal or equitable relief from … any other person or legal entity causing or

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27A O.S.Supp.2009 § 2-15-103(1).
[41] 27A O.S.Supp.2009 § 2-15-108(A)(2).
[42] *Id.* § 2-15-108(C)(1).
[43] *Id.* § 2-15-108(D)(4).

contributing to the pollution."[44] But, as described above, the *Cooper Industries* and *Atlantic Research* opinions do not resolve the brownfields conundrum because they do not clearly delineate whether and how a PRP which voluntarily enters into a consent decree with DEQ can recoup response costs from other PRPs. If the participant-PRP cannot recoup those costs, then private parties, cities and towns, and states will all suffer and the state brownfields redevelopment program will be undermined by CERCLA. This would be a result that benefits no one.

The Oklahoma Brownfields Act requires that the PRP enter into a consent order with the state prior to performing remediation.[45] A state consent order for remediation does not appear on its face to be a Section 106 or Section 107 action by the state environmental agency, so contribution under Section 113(f) might not be available. On the other hand, can a PRP claim to "voluntarily" incur response costs if it incurs all of its response costs pursuant to a state consent order? Certainly, once a PRP enters into a consent order with the state, the PRP must perform remedial activities in order to comply with the consent order. In fact, the Oklahoma Brownfields Act expressly conditions its protections on the PRP being "in compliance with the consent order during remediation … and … in compliance with any post-certification conditions or requirements specified in the consent order."[46] In other words, the state effectively requires remediation in return for protection from administrative penalties and civil liability. In that context, is the remediation truly "voluntary"? The Supreme Court opinions do not provide reliable guidance.

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[44] *Id.* § 2-15-108(C)(2).
[45] *E.g.*, Okla. Admin. Code § 252:220-5-7.
[46] 27A O.S.Supp.2009 § 2-15-108(A)(1)(a)-(b).

The Second Circuit Court of Appeals has recently attempted to resolve the uncertainty engendered by the *Cooper Industries* and *Atlantic Research* opinions; and the lessons from the Second Circuit's opinions provide some important guidance for a PRP which seeks to (1) insulate itself from administrative penalties while (2) preserving its ability to recoup response costs pursuant to CERCLA. First, in *W.R. Grace & Co. – Conn. v. Zotos International, Inc.*, the Second Circuit held that (1) a consent order between a PRP and the state for environmental remediation that ***does not*** expressly provide for the resolution of CERCLA liability is not a "settlement" that unlocks a contribution claim pursuant to Section 113(f), but (2) the act of "voluntarily" entering into a consent order with the state to perform remediation is sufficient to "voluntarily" incur response costs for the purposes of Section 107(a)(4)(B) and *Atlantic Research.*[47] Then, in *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, the Second Circuit held that a consent order between a PRP and the state for environmental remediation that ***does*** expressly provide for the resolution of CERCLA liability ***is*** a "settlement" that unlocks a contribution claim pursuant to Section 113(f)(3)(B).[48] Pursuant to the Second Circuit's opinions, a PRP who performs brownfields remediation in accordance with a consent order can preserve its ability to recoup CERCLA response costs. As a result, for a PRP who seeks to preserve its right to recoup the costs of performing brownfields remediation, the lynchpin is compliance with the NCP – though, as will be discussed below, the dicta in the Second Circuit's opinions throws a new round of uncertainty into the cost-

[47] 559 F.3d 85 (2d Cir. 2009). *Zotos* was decided on March 9, 2009.
[48] 596 F.3d 112 (2d Cir. 2010). *Niagara Mohawk Power Corp.* was decided on February 24, 2010.

recoupment process by questioning whether strict compliance with the NCP is actually necessary.

In *W.R. Grace & Co. – Conn. v. Zotos International, Inc.*, W.R. Grace purchased a chemical landfill and learned that Zotos arranged for the disposal of wastes at the site.[49] After the purchase, the state environmental agency conducted a Phase I investigation, and subsequently W.R. Grace entered into an administrative order on consent ("AOC") to perform a Phase II.[50] For the purpose of analogizing to the Oklahoma Brownfields Act, compare the AOC for a Phase II in *Zotos* with the Oklahoma Memorandum of Agreement and Consent Order for Site Characterization ("MACO") process set out in Oklahoma Administrative Code Section 252:220-5-1. After the Phase II, W.R. Grace "cooperatively" entered into a second AOC with the state agency, and agreed to reimburse the agency for its previously incurred response costs while also promising to perform a remedial investigation and feasibility study ("RI/FS") and to remediate the landfill.[51] In return, the state environmental agency expressly agreed to release W.R. Grace from all claims arising under state environmental law pertaining to the landfill.[52]

W.R. Grace ultimately spent over $1 million on the remediation and associated costs, and sued Zotos for contribution under Section 113(f) or, alternatively, Section

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[49] 559 F.3d at 87.
[50] *Id.*
[51] *Zotos*, 559 F.3d at 87. *Cf.* Okla. Admin. Code §§ 252:220-5-3 (RI/FS) *through* 220-5-7.
[52] *Zotos*, 559 F.3d at 87. In what might be an important note, the Second Circuit points out that W.R. Grace only sued for response costs incurred pursuant to the second AOC. 559 F.3d at 87 n.1. Accordingly, as will be discussed below, for the purposes of the Oklahoma Brownfields Voluntary Redevelopment Act, the remediating party should consider including language in the MACO which preserves a right to recover response costs.

107(a)(4)(B).[53] After trial, the district court awarded judgment to Zotos on the grounds that W.R. Grace was neither a party to a civil suit nor a party to a settlement, and so had no basis to seek contribution.[54] While the Second Circuit agreed with the district court with respect to the Section 113 claim – *i.e.*, Grace could not seek contribution because, although it had resolved all liability with the state, it had not done so for costs incurred in compliance with CERCLA Sections 106 or 107 – it applied *Atlantic Research* and *Cooper Industries* to hold that a private party that has not yet been sued by the state or federal agency, but that had merely "voluntarily" entered into a cooperative agreement with either of those entities and as a result incurred response and remediation costs, could seek recovery of response and remediation costs under Section 107(a)(4).[55] This way, PRPs would not be discouraged from cooperating with environmental authorities to achieve a timely and effective cleanup under CERCLA. "The relevant inquiry with respect to section 107(a) is whether the party undertook the remedial actions without the need for the type of administrative or judicial action that would give rise to a contribution claim under section 113(f)."[56]

For the purposes of the redeveloping and reusing brownfields, the Second Circuit's justification for its holding might be more important than the narrow circumstances of the holding itself. The court explained its reasoning at length. W.R. Grace "saved the parties and the government litigation costs, and presumably also limited ongoing contamination by promptly remediating the site."[57] The court refused to put

[53] *Id.* at 88.
[54] *Id.*
[55] *Id.* at 93.
[56] *Id.* at 94.
[57] *Id.* at 94.

form over function.[58] After all, "CERCLA was established with the intent that the federal and state governments would cooperate in order to remediate environmental hazards expeditiously and appropriately."[59] Accordingly, courts must read CERCLA in a way that encourages parties to voluntarily enter agreements with the states to ensure a proper cleanup.[60] In other words, the Second Circuit confirmed that if a PRP cannot recover the often substantial costs for undertaking, *inter alia*, a brownfields redevelopment project, then administrative protection from penalties might not provide sufficient coercion to actually foster the voluntary redevelopment and reuse of brownfields.[61]

One year later, the Second Circuit handed down another opinion designed to promote the voluntary remediation of hazardous waste, and by extension the redevelopment and reuse of brownfields. In *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, the court not only reaffirmed its stance in *Zotos*, but also provided PRPs a means of insulating themselves from future CERCLA liability while preserving recoupment of response costs.[62] Niagara Mohawk owned an industrial site with a long history of hazardous substance releases; and over time conveyed most of the property to other entities, reserving only a small parcel for itself.[63] Eventually, Niagara Mohawk entered into a broad AOC with the state environmental agency providing for RI/FS and

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[58] *Id.* "Although Grace entered into a consent order with the state, that fact alone and the title of its agreement with DEC do not preclude it from bringing an action pursuant to section 107(a)."
[59] *Id.* at 95.
[60] *Id.*
[61] *Id.* "While potentially liable parties might still attempt to clean up a contaminated site, we see no practical or statutory purpose in discouraging parties from remediating contaminated sites in a manner that provides agency oversight of the remediation."
[62] 596 F.3d 112.
[63] *Id.* at 118.

remediation of the entire industrial site.[64] For the purpose, again, of analogizing to the Oklahoma Brownfields Act, compare Niagara Mohawk's actions to the RI/FS and related provisions in Oklahoma Administrative Code Sections 252:220-5-3 through 220-5-7. Several years later, Niagara Mohawk entered into an amended version of the AOC with the state environmental agency under which Niagara Mohawk "incurred additional costs while obtaining a specific release of CERCLA liability upon meeting certain conditions."[65] Specifically, the terms of the agreement asserted that Niagara Mohawk "***resolved its liability to the State for purposes of contribution protection provided by CERCLA Section 113(f)(2).***"[66] After submitting work plans to the state environmental agency detailing the planned remediation of various portions of the site – compare Niagara Mohawk's actions to Oklahoma Administrative Code Section 252:220-5-8, which requires a "workplan" – Niagara Mohawk sued several of the current property owners of the site to recoup its CERCLA costs.[67]

After more than a decade of district court rulings and reversals – during which the United States Supreme Court handed down both the *Cooper Industries* and *Atlantic Research* opinions – the district court effectively held that Niagara Mohawk could not seek contribution under Section 113 because the state environmental agency had not been granted authority to settle CERCLA claims by the EPA.[68] In other words, the consent orders with the state agency could only reach state law-based liability.[69] The Second Circuit Court of Appeals disagreed. First, the court held that the release of CERCLA

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[64] *Id.*
[65] *Id.* at 118-19.
[66] *Id.* at 119 (emphasis added).
[67] *Id.*
[68] *Id.* at 121-23.
[69] *Id.* at 122.

liability in the amended AOC was indeed a "settlement" as that term is intended in Section 113(f)(2).[70] Because the AOC between Niagara Mohawk and the state agency was a "settlement," not only did it protect Niagara Mohawk from CERCLA liability, but also it preserved Niagara Mohawk's ability to seek contribution for its response costs by means of Section 113(f)(3)(B).[71]

The Second Circuit's reasoning could be a major boon for the redevelopment and reuse of brownfields. Section 113(f)(3)(B) provides that a "person who has resolved its liability to the United States or a state for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement."[72] The district court did not think that a state administrative order could "settle" a PRP's CERCLA liability – *i.e.*, the AOC could not bind the EPA without the EPA's express permission.[73] On the

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[70] *Id.* at 125-26 (citing 42 U.S.C. § 9613(f)(2) (2006)).

[71] *Id.* at 126 (citing 42 U.S.C. § 9613(f)(3)(B) (2006)). *Cf. Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, No. 09-1814, -- F.3d --, 2010 WL 1427582, at *13-15 (3d Cir. Apr. 12, 2010). In *Niagara Mohawk Power Corp.*, the Second Circuit Court of Appeals implicitly held that a settling PRP is limited to a claim for contribution under Section 113(f), and cannot recover response costs pursuant to the joint and several liability scheme in Section 107(a). Subsequently, the Third Circuit Court of Appeals explicitly came to the same conclusion. In *Agere Systems*, the Third Circuit held that PRPs which signed consent decrees with the EPA obligating the PRPs to reimburse the government for CERCLA response costs were not entitled to pursue CERCLA cost recovery claims against non-settling PRPs. Instead, their sole avenue for relief was claim for contribution under Section 113(f). The court based its decision on the "polluter pays" principle, explaining that if a settling PRP could bring a cost recovery claim against a non-settling PRP, then the non-settling PRP could be apportioned an inequitable portion of the response costs. In other words, the non-settling PRP would be jointly and severally liable for all response costs, but could not seek contribution from the settling PRPs due to the contribution protection in Section 113(f)(2). The settling PRPs therefore could recover 100% of their costs from the non-settling PRP in contravention of the "polluter pays" principle.

[72] 42 U.S.C. § 9613(f)(3)(B) (2006).

[73] *Niagara Mohawk Power Corp.*, 596 F.3d at 124.

contrary, the Second Circuit pointed out that the text of Section 113(f)(3)(B) is in play once the PRP resolves its liability to the "United States ***or*** a State."[74] "The statute does not require that the United States acquiesce in the administrative settlement – it does not read the 'United States ***and*** a State.'"[75] Nor does the statute require a federal delegation of settlement authority to a state.[76] So a state environmental agency can resolve a PRP's CERCLA liability in a manner that binds the EPA, and even the EPA argues in favor of that resolution.[77] In other words, "CERCLA views the states as independent entities that do not require the EPA's express authorization before they can act."[78] Because a state environmental agency can bind the EPA to a release of CERCLA liability, a consent order for remediation between a PRP and the state can insulate the PRP from CERCLA liability while preserving the PRP's right to seek contribution for its response costs.[79]

The Second Circuit's opinions stand clearly in favor of brownfields development. Faced with environmental hazardous waste contamination on its land, a PRP need not wait for a lawsuit before attempting to remediate. Instead, the PRP can promptly enter into a consent order with a state environmental agency and clean up the site. By doing so the PRP can avoid additional contamination caused by delay, as well as save itself, other

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[74] *Id.* at 126 (emphasis in original).
[75] *Id.* (emphasis added).
[76] *Id.*
[77] *Id.* "As the EPA's amicus brief points out, '[b]ecause of the number and variety of contaminated sites across the country, states play a critical role in effectuating the purposes of CERCLA.' Brief for United States as Amicus Curiae Supporting Appellant at 4, *Niagara Mohawk v. Consol. Rail*, Nos. 08-3843-cv; 08-4007-cv (2d Cir.2009)[.] That role is not only critical, it is autonomous." According to the Second Circuit, the EPA further argues that compliance with a state consent order will satisfy a PRP's CERCLA liability ***regardless whether the consent order specifically releases the PRP from CERCLA liability***, as long as the settlement involves a cleanup activity that qualifies as a "response action" within the meaning of 42 U.S.C. § 9601(25) (2006).
[78] *Id.* at 127.
[79] *Id.*

potentially liable parties, and the state and federal governments cleanup costs. If the AOC does not provide a release from CERCLA liability, then the PRP can still be subject to further CERCLA liability but can also recover its response costs from other jointly and severally liable PRPs pursuant to Section 107(a)(4)(B).[80] On the other hand, if the AOC does provide a release from CERCLA liability, then the PRP will be insulated from further CERCLA liability and can seek contribution for its response costs from other PRPs pursuant to Section 113(f)(3)(B).[81] Either way, a proactive PRP can redevelop and reuse brownfields and preserve the right to recoup response costs ***as long as*** those costs are "not inconsistent with the national contingency plan."[82]

C. The National Contingency Plan

The National Contingency Plan is "the federal government's roadmap for responding to the release of hazardous substances."[83] Under CERCLA Section 107, a PRP is liable for cleanup costs consistent with the NCP.[84] "Adherence to the plan is the gatekeeper to seeking reimbursement of response costs."[85] According to the Second Circuit, courts presume that actions undertaken by the federal, or a state, government are consistent with the National Contingency Plan.[86] As a result, and because a state environmental agency can release a PRP from CERCLA liability without the EPA's express permission, in *Niagara Mohawk Power Corp.*, the Second Circuit held that

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[80] *W.R. Grace & Co. – Conn. v. Zotos Int'l, Inc.*, 559 F.3d 85, 88 (2d Cir. 2009).
[81] *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 120-21 (2d Cir. 2010).
[82] 42 U.S.C. § 9607(a)(4)(A).
[83] *Niagara Mohawk Power Corp.*, 596 F.3d at 136.
[84] *Id.* (citing 42 U.S.C. § 9607(a)(4) (2006)).
[85] *Id.*
[86] *Id.* (citing *City of Bangor v. Citizens Commc'ns Co.*, 532 F.3d 70, 91 (1st Cir. 2008)).

compliance with the NCP will be ***presumed*** if the PRP carries out the terms of the AOC with the ultimate approval of the state environmental agency.[87]

On the other hand, in *Cooper Industries* the plaintiff ***did*** perform remediation under the ***oversight*** of the state environmental agency, albeit not pursuant to a consent order; and the United States Supreme Court held that the remediating PRP could not seek contribution under Section 113(f)(1).[88] The *Cooper Industries* holding leaves open a possibility that the Second Circuit is wrong, and PRPs who have responded to hazardous substances must establish compliance with the NCP.[89] Without further guidance, a PRP engaging in a brownfields remediation must, in order to preserve a right to recoup its response costs, actually perform remediation consistent with the NCP regardless whether it will ultimately purse a cost recovery claim under Section 107 or a contribution claim under Section 113. In practice, doing so should not deviate materially from compliance with an administrative order.

The NCP sets out several provisions that PRPs should consider.[90] For example, the "public participation" requirement calls for an opportunity for public comment concerning the selection of the response action, and identifies a set of potentially

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[87] *Id.* at 137. (citing *City of Bangor*, 532 F.3d at 91, and *NutraSweet Co. v. X-L Eng'g Co.*, 227 F.3d 776, 791 (7th Cir. 2000)). "It would be bizarre indeed if a PRP's settlement with a state entitled it to seek contribution under § 113(f)(B)(3), but its actions taken in executing that settlement disqualified the settlor from employing the statute to recoup a portion of its expenses."

[88] *Cooper Indus.*, 543 U.S. at 164-66.

[89] *Id.* at 168 (refusing to address whether the remediating PRP – who could not recover under Section 113(f) – could recover response costs incurred consistent with the NCP under Section 107(a)(4)(B) because the courts below did not consider the PRP's Section 107 claim.)

[90] *See* 40 C.F.R. § 300.700(c)(3)(i) *and* (c)(5)-(7).

applicable NCP regulations.[91] In 1990, the EPA revised the standard for compliance with the NCP down from "strict" to "substantial compliance."[92] When the EPA shifted to a "substantial compliance" standard, it did so "to encourage private parties to perform voluntary cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination."[93]

So the NCP need not be mechanically applied, but failure to "substantially" comply with, for example, the public participation requirement is considered a material deviation from the NCP and is grounds for summary judgment.[94] The public participation requirement in turn requires community involvement during removal actions, during RI/FS, and during selection of the remedy.[95]

Taking community involvement during RI/FS as a specific example: Section 300.430(c) of the NCP applies to all remedial activities pursuant to CERCLA Sections 104 or 106, or settlements pursuant to Section 122.[96] The pertinent provisions of Section 300.430(c)(2) require a PRP, prior to commencing field work for the RI/FS, to (1) conduct community interviews; (2) prepare a formal "Community Relations Plan"; (3)

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[91] 40 C.F.R. § 300.700(c)(6).
[92] *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1514-15 (10th Cir. 1991); 40 C.F.R. § 300.700(c)(3)(i).
[93] 55 Fed. Reg. 8666, 8792-93 (1990).
[94] *Id.* at 8793. *See also Union Pac. R.R. Co. v. Reilly Indus., Inc.*, 215 F.3d 830, 835-36 (8th Cir. 2000).
[95] 40 C.F.R. § 300.700(c)(6). The potentially relevant public participation requirements are 40 C.F.R. § 300.415(n) (community relations during removal actions); § 300.430(c) (community relations during RI/FS); and § 430(f)(2), (3), and (6) (community relations during selection of the remedy).
[96] 40 C.F.R. § 300.430(c)(1).

establish a local information repository; and (4) inform the community of the availability of technical assistance grants.[97]

The first requirement involves "conducting interviews with local officials, community residents, public interest groups, or other interested or affected parties, as appropriate, to solicit their concerns and information needs, and to learn how and when citizens would like to be involved in the Superfund process."[98] The concept of "affected parties" broadly includes anyone who might be affected by a cleanup decision or have a "foreseeable" interest in commenting on the response action, and includes those whom the performing party might hold financially responsible.[99] A foreseeable party's opportunity to comment must be "meaningful" such that the party's views are actually considered before any final decisions are reached on key issues.[100] To ensure that all foreseeably affected parties have been contacted, the PRP may prefer simply to adhere to the NCP's public notice provisions.[101]

The second requirement calls for a formal community relations plan ("CRP") based on the community interviews and other relevant information that specifies the community relations activities that the PRP expects to undertake.[102] The purpose of the CRP is to (1) ensure the public appropriate opportunities for involvement in a wide variety of site-related decisions, including site analysis and characterization, alternatives

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[97] 40 C.F.R. § 300.430(c)(2)(i)-(iv).
[98] *Id.* § 430(c)(2)(i).
[99] *Aviall Servs., Inc. v. Cooper Indus., L.L.C.*, 572 F. Supp. 2d 676, 693-94 (N.D. Tex. 2008), *aff'd in part*, 2009 WL 498133 (Feb. 27, 2009) ("Because Aviall failed to provide foreseeably-affected parties with a meaningful opportunity to participate in the Love Field remedial investigation, it did not substantially comply with the NCP's public participation requirement.").
[100] *Id.* at 694.
[101] *Id.* (citing 55 Fed. Reg. at 8794).
[102] 40 C.F.R. § 300.430(c)(2)(ii).

analysis, and selection of the remedy; (2) determine, based on community interviews, the appropriate activities to ensure such public involvement; and (3) provide appropriate opportunities for the community to learn about the site.[103]

The third requirement is the establishment of a "local repository."[104] The information repository should contain a copy of the items made available to the public, including information that describes the technical assistance grants application process.[105] The lead agency must notify interested parties when the information repository is established.[106] The fourth requirement straight-forwardly requires the lead agency to notify the community of the availability of technical assistance grants.[107]

III. Preserving the Right to Recoup Costs under the Oklahoma Brownfields Redevelopment Act

Consider the situation of a hypothetical Alpha Corporation. A few years ago, Alpha acquired a Property from Beta in Oklahoma which Alpha intends to use as a warehouse. Alpha later learns that, at some point, the Property was used to store organic compounds, and that a property up-gradient in the industrial district where the Property is situated once housed railcars in storage. Alpha is concerned that it might incur state and federal environmental liabilities for any contamination discovered on the Property, but otherwise finds the Property suitable for the intended use as a warehouse. In addition, Alpha would like to construct additional storage capacity, but will need to finance the construction. Alpha worries that its bank will not provide access to financing due to the prospective environmental liabilities. Alpha is amenable to remediating the Property, but

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[103] *Id.* § 300.430(c)(2)(ii)(A)-(C).
[104] *Id.* § 300.430(c)(2)(iii).
[105] *Id.*
[106] *Id.*
[107] *Id.* § 300.430(c)(2)(iii).

worries that it will get stuck with the costs of remediation even though Alpha played no part in the contamination.

The Oklahoma Brownfields Act, 27A Okla. Stat. §§ 2-15-101 through 2-15-110, was enacted in 1996 to foster the voluntary redevelopment and reuse of contaminated properties by limiting liability of property owners and others for actions taken to remediate the contamination. As they currently exist, the DEQ's rules implementing the Act form a remediation program that is structured as a permitting process.[108] After meeting with the DEQ to discuss the Property, Alpha and the DEQ execute a Memorandum of Agreement and Consent Order ("MACO") for Site Characterization, which effectively enrolls Alpha into the Brownfields Program.[109] The MACO is Alpha's first opportunity to insulate itself from CERCLA liability and to preserve its ability to recoup the costs of remediation. The DEQ suggests that a PRP use the following language:

> Respondent agrees to conduct the site characterization in a manner not inconsistent with the National Contingency Plan (NCP), 40 C.F.R. § 300.400.[110]

But in light of the Second Circuit's opinion in *Niagara Mohawk Power Corp.*, something akin to the following additional language should be considered:

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[108] In 2009, the Oklahoma legislature amended the Brownfields Act to encourage cleanup and redevelopment of contaminated sites by clarifying that the Brownfields remediation program is ***not*** a permit process. 27A O.S.Supp.2009 § 2-15-103(3) and (4). As a result of legislative changes, the DEQ has proposed new regulations implementing the Brownfields Program. Rather than make extensive amendments to the current chapter of rules, OAC 252:220, the DEQ has proposed a new chapter, OAC 221. 27 Okla. Reg. 671-732 (Mar. 15, 2010).

[109] Okla. Admin. Code 252:220-5-1(a). Under the proposed Chapter 221, a MACO will no longer be a necessary preliminary step. Rather, the consent order for site characterization and the "subsequent" consent order for clean-up will be handled together at the beginning of the brownfields process. *See* 27 Okla. Reg. 671-732 (Mar. 15, 2010) (to be codified at Okla. Admin. Code §§ 252:221-3-1 and 221-3-3).

[110] Draft MACO (on file with author).

> This MACO is enforceable as a final order of the Executive Director of the DEQ, and as such constitutes an administrative settlement for purposes of 42 U.S.C. § 9613(f) which resolves Respondent's liability to the State for purposes of contribution protection provided by CERCLA, 42 U.S.C. 9613(f)(2).[111]

This language is consistent with that used in the consent order in *Niagara Mohawk Power Corp.* Originally, the MACO required Tier I application review and did not require public involvement.[112]

As the DEQ's regulations for implementing the Oklahoma Brownfields Act currently stand, Alpha's next steps will include actually submitting a Site Characterization, including *inter alia* a Quality Assurance Project Plan and Sampling and Analysis Plan and required site characterization reports.[113] With those reports as well as remedial option evaluations and site cleanup plans in place, Alpha can apply for a Certificate of Completion.[114] Originally, the regulations implementing the Act required Tier II applications for all Certificates under the Brownfields Program.[115] Accordingly, before Alpha could receive a Certificate of Completion, Alpha would have to publish notice of filing, publish notice of the draft Certificate and provide opportunity for public comment and public hearing, and conduct a public meeting if one was requested.[116] In other words, the Oklahoma Brownfields Act as implemented by the Oklahoma

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[111] *See Niagara Mohawk Power Corp.*, 596 F.3d at 119. *See also Chitayat v. Vanderbilt Assocs.*, No. 03-5314, 2010 WL 1049194, at *3 (E.D.N.Y. Mar. 22, 2010) (comparing the releases of liability under either CERCLA or state law for several cases including *Zotos* and *Niagara Mohawk Power Corp.*).
[112] Okla. Admin. Code § 252:4-7-61. *See* Okla. Admin. Code § 252:4 App'x C.
[113] *See* Okla. Admin. Code § 252:220-5-1(b)-(d).
[114] 27A O.S.Supp.2009 § 2-15-103(3); Okla. Admin Code §§ 220-3-1 and 220-3-2. If the DEQ believes that no remedial action will be necessary, Alpha can apply for a Certificate of No Action Necessary. 27A O.S.Supp.2009 § 2-15-103(4).
[115] Okla. Admin. Code § 252:4-7-62.
[116] *See, e.g.*, Okla. Admin. Code § 252:4 App'x C.

Administrative Code substantially complied with the NCP. As a result, simply going through the brownfields process would likely preserve Alpha's ability to recoup the costs of remediation, whether with protection from CERCLA liability in a contribution action pursuant to Section 113 or without protection in a cost recovery action pursuant to Section 107(a)(4)(B).

The Oklahoma Legislature recently revised the Oklahoma Brownfields Act to remove Certificates from the Tier II review process.[117] In other words, the requirements that currently mandate public participation with the Brownfields Program will no longer exist. In their place, DEQ has proposed a new set of public participation requirements designed to be less burdensome and less time-consuming for parties to remediate brownfields sites and receive liability protection.[118] Proposed Oklahoma Administrative Code Section 252:221-3-5 states that a PRP must make an approved brownfields remediation proposal "available for the public for review for 20 working days[]… at a convenient location"; and that the PRP "must place public notice in a newspaper of general circulation local to the site." If the DEQ receives a request for a public form ***and*** determines there is a significant degree of public interest in the brownfields proposal, then DEQ must schedule and hold a public forum.[119] The proposed new requirements appear to effectively eliminate a few of the current procedural hurdles that might deter enrollment in the brownfields program while preserving the likelihood of compliance with the NCP.[120]

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[117] *See* 27A O.S.Supp.2009 §§ 2-15-103(3) and (4).
[118] *See* 27 Okla. Reg. 671-732 (Mar. 15, 2010) (to be codified at Okla. Admin. Code §§ 252:221-3-5 and 221-3-6).
[119] *See* 27 Okla. Reg. 671-732 (Mar. 15, 2010) (to be codified at Okla. Admin. Code § 252:221-3-5).
[120] *Compare* 27 Okla. Reg. 671-732 (Mar. 15, 2010) (to be codified at Okla. Admin. Code § 252:221-3-5) *with* Okla. Admin. Code § 252:4 App'x C.

On the other hand, as discussed above, the *Cooper Industries* holding leaves open a possibility that PRPs who have responded to hazardous substances must establish substantial compliance with the NCP.[121] As a result, by declaring in the Oklahoma Brownfields Act that Certificates are not permits, the Oklahoma Legislature might have also obviated the presumption in *Niagara Mohawk Power Corp.* that compliance with a consent order for remediation can be presumed to equate to compliance with the NCP. So under the proposed new regulatory regime, Alpha might bear the burden of proactively working with DEQ to ensure compliance with the NCP in order preserve its ability to recoup response costs.

Finally, under the current rules implementing the Oklahoma Brownfields Act, once Alpha applies for a Certification of Completion and the DEQ has had an opportunity to review its submission, Alpha and the DEQ can enter into a Consent Order for Site Remediation.[122] This is a second and arguably more crucial opportunity for Alpha to insulate itself from CERCLA liability while preserving its ability to seek contribution pursuant to Section 113(f). As mentioned above in note 45, in an aside in *Zotos* the Second Circuit points out that W.R. Grace only sued for response costs incurred pursuant to the second consent order, which is roughly analogous to the Oklahoma Administrative Code's requirement of a Consent Order for Site Remediation.[123] Presumably, inserting a release from CERCLA liability into both the MACO for Site Characterization and the

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[121] *Id.* at 168 (refusing to address whether the remediating PRP – who could not recover under Section 113(f) – could recover response costs incurred consistent with the NCP under Section 107(a)(4)(B) because the courts below did not consider the PRP's Section 107 claim.)
[122] Okla. Admin. Code §§ 252:220-5-2 through 220-5-7.
[123] 559 F.3d at 87 n.1. *Cf.* Okla. Admin. Code § 252:220-5-7.

Consent Order for Site Remediation will preserve a broader spectrum of response costs for the purpose of a contribution action.[124]

Having applied for a Certificate and entered into a Consent Order for Site Remediation, Alpha then must submit a Work Plan, actually conduct the remediation of the Property, and submit a Final Report.[125] "Upon final inspection and approval of work, the DEQ shall issue a Certificate of Completion" to Alpha for the Property.[126] Afterward, Alpha must file the Certificate and submit a file-stamped copy to the DEQ.[127] The procedure described above is neither short nor simple, but if Alpha takes the necessary steps to go through the procedure in a way that complies with the NCP, then Alpha will (1) be insulated from CERCLA liability, (2) be insulated from DEQ-enforced liability, (3) improve the likelihood that it will be able to obtain financing that will enable it to increase the utility of its warehouse, and (4) preserve the right to seek contribution under Section 113 against any other non-settling PRP.

IV. Conclusion

The United States Supreme Court's recent opinions in *Cooper Industries* and *Atlantic Research* have significantly clarified which remedies are available to a given PRP under CERCLA, but left an important question unanswered: how does a PRP that voluntarily remediates a site pursuant to a consent order with a state environmental

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[124] *See id.* As discussed above at note 102, under the proposed revisions to the rules implementing the Oklahoma Brownfields Act in Chapter 221, Alpha will only enter into a single consent order with the DEQ for both site characterization and site remediation at the beginning of the brownfields process. *See* 27 Okla. Reg. 671-732 (Mar. 15, 2010) (to be codified at Okla. Admin. Code §§ 252:221-3-1 and 221-3-3). Accordingly, there will only be one opportunity to secure a release from CERCLA liability.
[125] Okla. Admin. Code §§ 252:220-5-8 and 220-5-9.
[126] Okla. Admin. Code §§ 252:220-7-2.
[127] Okla. Admin. Code §§ 252:220-7-3.

agency preserve its ability to recoup response costs. With its *Zotos* and *Niagara Mohawk Power Corp.* opinions, the Second Circuit Court of Appeals has largely answered that question. In doing so, the Second Circuit has also provided PRPs with a mechanism for insulating themselves from CERCLA liability while also preserving the ability to seek contribution pursuant to Section 113. The precedent set by the Second Circuit might be particularly useful to a PRP seeking to redevelop and reuse brownfields pursuant to the Oklahoma Brownfields Act. On the other hand, because the regulatory framework of the program is in flux, it will be the PRP's responsibility to preserve its right to recoup response costs by proactively engaging the DEQ so that all remediation is performed in a manner consistent with the National Contingency Plan. Ultimately, the combination of increased clarity in federal case law and an updated Brownfields Program will encourage the timely cleanup of hazardous waste sites and place the response costs on those responsible for creating or maintaining the hazardous condition