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SETTLEMENTS AS AN INCENTIVE TO PROCURE HAZARDOUS WASTE SITE CLEANUP: THE THIRD CIRCUIT AND A BROAD READING OF CERCLA §113(f)(3)(B)

Stephen F. Soltis*

I. INTRODUCTION

During its haste to establish itself as a prominent industrial power, the United States lacked the enforcement power necessary to protect its environmental assets and natural resources. Industrial centers were left largely unchecked for the majority of the twentieth century and the pollutants remaining on these sites produced a lasting negative impact for generations. The Love Canal is the most famous instance of these industrial sites polluting without regard for the natural resources surrounding them. In 1980, Congress enacted the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) to facilitate the cleanup of these sites.¹

There are three provisions in CERCLA that keep the Superfund—a federal program created to fund the cleanup of hazardous waste—at a sustainable level. Each provision entails the liability of potentially responsible parties. First, an action filed pursuant to §107(a) allows an entity that has incurred response costs consistent with the NCP to sue for restitution of those costs from potentially responsible parties² Next, a §113(f)(1) action allows a potentially responsible party to sue another party for contribution, but only if a suit was brought against the first potentially responsible party.³ Finally, under §113(f)(3)(B), a potentially responsible party can settle with the state or federal government. Subsequently, the

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settling party can file a contribution suit against other potentially responsible parties.4

This note addresses the discrepancy between circuits in the timing of a contribution suit brought under § 113(f)(3)(B) after a potentially responsible party has settled its state law liability claims. This note will propose that allowing a potentially responsible party to bring a contribution suit whenever that party has settled a state or federal liability claim is the interpretation most consistent with the intent of CERCLA.

First, this note will look at the history and text of CERCLA provisions that create causes of action for response cost recovery. Moreover, this note will establish a basic understanding of the current law concerning contribution actions available to potentially responsible parties as delineated by circuit court decisions and the United States Supreme Court decision concerning contribution actions under CERCLA § 107(a).

Second, this note will discuss the friction-creating cases, Consolidated Edison5 and Trinity.6 That section will analyze the distinguishing traits of each case and the reasoning used by the Second Circuit in Consolidated Edison and by the Third Circuit in Trinity. The note will review how district courts across the nation apply the Second Circuit’s decision in Consolidated Edison, and the points of disagreement between the district courts and the Second Circuit.

Following this analysis, this note will propose and support the conclusion that the Third Circuit’s interpretation of § 113(f)(3)(B) is the most logical and legally sound choice for courts to use in future decisions. District courts should adopt the Third Circuit’s reasoning and allow potentially responsible parties to seek contribution after settling state law liability. This rule conforms more closely to the original intent of Congress in enacting CERCLA, and provides courts and litigants a more definitive rule to determine liability.

5 Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc., 423 F.3d 90 (2d Cir. 2005).
II. POTENTIALLY RESPONSIBLE PARTY CONTRIBUTION UNDER CERCLA

There are three provisions that allow a potentially responsible party to seek contribution under CERCLA: §§ 107(a), 113(f)(1), and 113(f)(3)(B). A basic understanding of these provisions is necessary to demonstrate Congressional intent.

Potentially responsible parties filed an enormous amount of suits after CERCLA was enacted in an attempt to use § 107 to recover response costs from other parties. Often, the potentially responsible parties seeking contribution had engaged in voluntary cleanup and would file these actions to recover cleanup costs. Although the original language of CERCLA did not mention a right of contribution, a number of courts found federal common law created an implied right to contribution. However, this stance was controversial at the time because the Supreme Court issued two decisions stating that federal statutes did not include implied common law rights to contribution.

Congress enacted the Superfund Amendments and Reauthorization Act (SARA) of 1986 with the intent of creating an explicit right for potentially responsible parties to seek contribution. Prior to the SARA amendments in 1986, courts used § 107(a)(4)(B) to imply a right of contribution for private parties. The SARA amendments changed that position by adding § 113, which explicitly stated that a potentially responsible party may seek contribution. SARA codified this right of contribution into CERCLA § 113(f)(1).

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8 Id.
11 Id.
12 Id. at 161.
13 Cooper Indus., Inc., 543 U.S. at 162-63.
Within the SARA amendments of 1986 was a congressionally created cause of action allowing potentially responsible parties to seek contribution under § 113(f)(1) after the party took action to clean up sites "contaminated by hazardous substances." Section 113(f)(1) pertinently states that, "[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a)."

The United States Supreme Court specified in Cooper Industries Inc. v. Aviall that a potentially responsible party could not seek contribution under § 113(f)(1) until that party had been sued under § 107(a). The litigants in Cooper Industries were two companies that had contaminated properties in Texas. Aviall Services informed the State of the contamination and voluntarily undertook the cleanup of the sites. Then Aviall attempted to obtain contribution from Cooper Industries under CERCLA §§ 107(a) and 113(f)(1). Aviall voluntarily dismissed its § 107(a) claim but continued to seek contribution under § 113(f)(1). Justice Thomas, writing for the Court, dismissed this claim by stating that the enabling clause of § 113(f)(1) requires that a potentially responsible party be the subject of to suit before it may seek contribution. Justice Thomas reasoned that Congress would not have included the "during or following" provision in the amendments if it had intended for a potentially responsible party to be able to file for contribution prior to the initiation of a cost recovery action against it.

Cooper Industries argued that the "saving clause" of § 113(f)(1) enables a potentially responsible party to bring a contribution claim.

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14 Id. at 160.
16 Cooper Indus., Inc., 543 U.S. at 166.
17 Id. at 163.
18 Id. at 164.
19 Id.
20 Id. at 165.
21 Id. at 164-65.
22 Cooper Indus., Inc., 543 U.S. at 166.
without a suit having been brought against it. The saving clause states, "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or 9607 of this title." The Court concluded that this saving clause only clarifies that § 113(f)(1) does not interfere with any other right of contribution not contained in § 113(f)(1). The clause only "rebuts any presumption that the express right of contribution provided by the enabling clause is the exclusive cause of action available to a potentially responsible party." Justice Thomas continued that the clause itself does not grant a potentially responsible party a new cause of action existing outside the scope of § 113(f)(1).

The SARA Amendments also codified in § 113(f)(3)(B) the ability of a potentially responsible party to settle with the any state or the United States itself, and then seek contribution from a non-settling party. Section 113(f)(3)(B) states that:

A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in [§ 113(f)(2)].

A potentially responsible party that is attempting to settle and seek contribution must first ensure that the judiciary or an administrative agency approves the settlement. Once approved, these settlements release the settling party from any future actions for contribution. However, parties

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23 Id.
25 Cooper Indus., Inc., 543 U.S. at 166.
26 Id. at 166-67.
27 Id. at 167.
29 Id.
30 Cooper Indus., Inc., 543 U.S. at 167.
not involved in the initial settlement are still exposed to contribution liability.

The three provisions discussed above provide a potentially responsible party with distinct options in terms of recovering cleanup costs. Section 107(a) creates a right to recover costs in some situations. Sections 113(f)(1) and 113(f)(3)(B) allow for a potentially responsible party to seek contribution after either a civil suit is brought or a settlement is reached, respectively. The Court in Cooper Industries settled that before a § 113(f)(1) claim may be brought, a potentially responsible party must have been sued under § 107(a). However, there exists a conflict among the federal courts as to when, exactly, a potentially responsible party may bring an action under § 113(f)(3)(B). The issue in the cases center on whether a potentially responsible party has to settle CERCLA liability with the federal government, or whether settling state law liability is sufficient to create a cause of action for contribution.

III. CASES INVOLVING CERCLA §113(F)(3)(B)

The United States Supreme Court has not directly addressed the § 113(f)(3)(B) question of whether settlement is sufficient to trigger contribution. This question was left largely unsettled until 2005, when the Second Circuit addressed the issue head on in Consolidated Edison Co. of N.Y., Inc. v. UGI Util., Inc. In Consolidated Edison (ConEd), the appellant ConEd entered into a "Voluntary Cleanup Agreement" (VCA) in an effort to clean up over 100 sites. The appellant filed a cost recovery action under § 107(a). The trial court initially dismissed the claim, and while appeal was pending, the Supreme Court rendered its Cooper Industries decision.

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32 Cooper Indus., Inc., 543 U.S. at 163.
33 Id.
34 Id. at 166.
36 Consol. Edison Co. of N.Y., Inc. v. UGI Utilities, Inc., 423 F.3d 90 (2d Cir. 2005).
37 Id. at 93.
38 Id.
39 Id. at 93-94.
Since the appellant did not bring its action as part of a prior civil suit, it could not bring the contribution claim under § 113(f)(1).\textsuperscript{40}

The appellant argued that the VCA qualified as an administrative settlement and released it from liability under state environmental laws,\textsuperscript{41} and claimed it could seek contribution from other potentially responsible parties because the VCA met CERCLA's requirements.\textsuperscript{42} The Second Circuit did not accept this interpretation of the statute.\textsuperscript{43}

The court reasoned that § 113(f)(3)(B) creates a right to contribution only when federal CERCLA liability has been resolved.\textsuperscript{44} The court distinguished CERCLA claims from broader categories of claims, and held that the resolution of liability of these broader state law claims was not sufficient to create a cause of action for contribution.\textsuperscript{45} The court focused on the resolution of liability for response actions as a prerequisite for § 113(f)(3)(B).\textsuperscript{46} According to the Second Circuit, response actions are specific to CERCLA and describe "an action to clean up a site or minimize the release of contaminants in the future."\textsuperscript{47} Using this interpretation of response action costs, the court reasoned that CERCLA must intend that a potentially responsible party has to settle its CERCLA liability before it can bring a contribution action.\textsuperscript{48}

The court supported this reasoning by reference to the legislative history behind the SARA amendments. The court noted that Congress did not intend "to meddle with the contribution rules governing settlement of non-CERCLA claims."\textsuperscript{49} Since the House Committee on Energy and Commerce report sought to clarify that §113 applies only to CERCLA liability, the court believed that § 113(f)(3)(B) claims could only be brought

\textsuperscript{40} Id. at 94.
\textsuperscript{41} Id. at 95.
\textsuperscript{42} Consol. Edison Co. of N.Y., Inc., 423 F.3d at 95.
\textsuperscript{43} Id. at 97.
\textsuperscript{44} Id. at 95.
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 95-96.
\textsuperscript{47} Id.
\textsuperscript{48} Consol. Edison Co. of N.Y., Inc., 423 F.3d at 95-96.
once CERCLA, rather than state law, liability had been resolved.\textsuperscript{50} Next, the court turned to the question of whether the appellant had resolved its CERCLA liability through the Voluntary Cleanup Agreement.\textsuperscript{51}

In determining whether the appellant had met this standard, the court focused on the Voluntary Cleanup Agreement.\textsuperscript{52} The VCA, according to the court, only resolved the appellant's liability to the state.\textsuperscript{53} The VCA included an exception that would allow the state to seek CERCLA liability against Consolidated Edison (Con Ed).\textsuperscript{54} The VCA was only valid during the cleanup, and it left open the possibility that the state could seek a CERCLA claim against Con Ed after the VCA expired.\textsuperscript{55} The court reasoned that, because the VCA resolved Con Ed of its state law liability but made no mention of CERCLA liability release, Con Ed could not sustain a suit brought under § 113(f)(3)(B).\textsuperscript{56}

Following \textit{Consolidated Edison}, the Second Circuit reaffirmed its ruling regarding § 113(f)(3)(B) in \textit{W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc.}\textsuperscript{57} In \textit{W.R. Grace}, the plaintiff, W.R. Grace & Co., brought a contribution action under §113(f) to recover costs incurred in a response action.\textsuperscript{58} The Second Circuit in \textit{W.R. Grace} was dealing with an administrative order on consent between W.R. Grace and the New York Department of Environmental Conservation (DEC).\textsuperscript{59} As part of the consent order, W.R Grace was responsible for repaying roughly \$20,000 for response costs incurred by the state. Also, as part of the consent order, W.R. Grace did not admit to any liability and secured a release from any claims arising from New York state law.\textsuperscript{60}

\textsuperscript{50} \textit{Id.} (citing \textit{W.R. Grace & Co.--Conn. v. Zotos Int'l., Inc., 98-CV-8388(F), 2005 WL 1076117 (W.D.N.Y. 2005) aff'd in part, rev'd in part, 559 F.3d 85 (2d Cir. 2009)).
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Consol. Edison Co. of N.Y., Inc., 423 F.3d at 96-97.}
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id. at 97.}
\textsuperscript{57} \textit{W.R. Grace & Co.--Conn. v. Zotos Int'l., Inc., 559 F.3d 85 (2d Cir. 2009).}
\textsuperscript{58} \textit{Id. at 86.}
\textsuperscript{59} \textit{Id. at 87.}
\textsuperscript{60} \textit{Id.}
Once W.R. Grace entered into this consent order with the state, it filed an action against defendant Zotos under § 113(f) of CERCLA. Discussing W.R. Grace's right to seek contribution from Zotos, the Second Circuit reaffirmed its holding in *Consolidated Edison* by stating that "only when liability for CERCLA claims, rather than some broader category of legal claims, is resolved does section 113(f)(3)(B) create a right to contribution." The court concluded that the consent order did not qualify as settlement of CERCLA liability. The language in the consent order did not absolve W. R. Grace of its CERCLA liability. The DEC was only settling with W.R. Grace regarding the state law claims that existed against the company.

The Second Circuit viewed the consent order in the same manner as it did the VCA in *Consolidated Edison*. In the Second Circuit's opinion, neither of these agreements between the respective parties and the states were sufficient to trigger the right to contribution under § 113(f)(3)(B). The court in both *Consolidated Edison* and *W.R. Grace* believed that, because the settling parties were still subject to potential CERCLA liability, they were not entitled to bring actions under § 113(f)(3)(B). Settling with the state was not sufficient, thus creating an environment where only federal settlements would suffice to sustain a § 113(f)(3)(B) action.

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61 *Id.* at 88.
62 *Id.* at 90 (quoting *Consol. Edison Co. of N.Y., Inc. v. UGI Util., Inc.*, 423 F.3d 90, 95 (2d Cir. 2005)).
63 *W.R. Grace & Co. v. Conn.*, 559 F.3d at 91.
64 *Id.*
65 *Id.*
66 *Id.*
67 *Id.*
68 *W.R. Grace & Co.*, 559 F.3d at 91; *Consol. Edison Co. of N.Y., Inc. v. UGI Utilities, Inc.*, 423 F.3d 90, 95 (2d Cir. 2005).
69 *W.R. Grace & Co.*, 559 F.3d at 91; *Consol. Edison Co. of N.Y., Inc.*, 423 F.3d at 95.
IV. THE THIRD CIRCUIT WEIGHS IN ON THE DEBATE

Before 2013, district courts typically followed the Second Circuit’s interpretation of § 113(f)(3)(B). However, in 2013, a § 113(f)(3)(B) action came before the Third Circuit and the Second Circuit’s ruling came under fire.

In Trinity Industries, Inc. v. Chi. Bridge & Iron Co., the Third Circuit faced a situation very similar to those in Consolidated Edison and W.R. Grace. In Trinity, the settling party owned a railcar manufacturing facility; Defendant, Chicago Bridge & Iron Co., previously owned and operated that facility. During Chicago Bridge’s ownership, it constructed "a facility for the manufacture of steel products such as storage tanks, pressure vessels, water towers, and bridge components." Trinity claimed that Chicago Bridge qualified as a responsible party for a portion of the contamination on the site.

The consent order involved in the case established Trinity as a potentially responsible party for release of hazardous substances at the cleanup site. The court noted that nothing in the order “shall constitute or be construed as a release or covenant not to sue’ parties not named in the Consent Order.” Through the consent order, Trinity retained the right to sue or seek relief from any party not contained in the consent order. This effectively gave Trinity the right to seek contribution from other potentially responsible parties after it had settled its liability with the State.

The Third Circuit believed that the release of state law liability established by the consent order was sufficient to create a cause of action.

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71 See Trinity Indus., Inc. v. Chi. Bridge & Iron Co., 735 F.3d 131, 135-38 (3d Cir. 2013) (holding that the owner could seek contribution under CERCLA).
72 See id. at 133.
73 Id.
74 Id. at 134.
75 Id.
76 Id.
77 Trinity Indus., Inc., 735 F.3d at 134
78 Id.
79 Id.
under § 113(f)(3)(B). The court held that a settlement of any liability with the United States or a state for a response action is sufficient to initiate and maintain a § 113(f)(3)(B) action. The court noted that a response action and settlement could be initiated under state law in order for a potentially responsible party to maintain a contribution claim under § 113(f)(3)(B).

However, the state statutes involved in *Trinity Industries* were similar to CERCLA in their liability regimes. The Pennsylvania Hazardous Sites Cleanup Act (HSCA) closely mirrors CERCLA. HSCA establishes a fund for cleanup expenditures, establishes classes of responsible parties, and allows for contribution among responsible parties. The court affirmed that "liability [under CERCLA] is neither greater not lesser under the HSCA...Indeed, the cost recovery and contribution provisions in HSCA are virtually identical to those in CERCLA."

Since the state statutory framework was similar in structure and substance to CERCLA, it is logical to assume that a consent order issued under the substantive law of HSCA would also likely resolve CERCLA liability. If the consent order is capable of resolving liability under CERCLA, then it would be a settlement sufficiently releasing the potentially responsible party of liability such that the party could file and maintain a § 113(f)(3)(B) claim.

The divergent rules between the Second and Third Circuits create a conflict that affects the substantive rights of potentially responsible parties. Depending on which rule a district court uses in determining the viability of a § 113(f)(3)(B) claim, the party would either have to settle and resolve its CERCLA liability with the federal government or state, or resolve its liability for either state law claims or federal claims. This distinction greatly

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80 *Id.* at 136.
81 *Id.* ("The statutory language of § 113(f)(3)(B) requires only the existence of a settlement resolving liability to the United States or a state 'for some or all of a response action.'").
82 *Id.*
83 35 PA. CONS. STAT. ANN. § 6020.901 (West 2013).
84 35 PA. CONS. STAT. ANN. § 6020.701 (West 2013).
85 35 PA. CONS. STAT. ANN. § 6020.705 (West 2013).
86 *Trinity Indus., Inc.*, 735 F.3d at 137 (quoting *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 236 (3d Cir. 2010)).
affects the potentially parties' willingness to settle, and subsequently affects the ability of state governments to remedy these hazardous sites.

V. THE THIRD CIRCUIT'S RULE CORRECTLY ALLOWS FOR STATE LAW SETTLEMENTS TO TRIGGER A CERCLA CONTRIBUTION ACTION

The key words in § 113(f)(3)(B) are 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..." Accordingly, these qualifiers demonstrate that the original intent of the Superfund Amendments and Reauthorization Act of 1986 was to allow a wider array of resolutions to trigger contribution. The Third Circuit correctly held that a settlement of state law liability is sufficient to trigger a right of contribution; the court correctly noted that the Second Circuit misinterpreted legislative history, and the court correctly adopted the rule in Trinity Industries that is in line with CERCLA's primary goals.

A. Proposal for a Liberal Reading of § 113(f)(3)(B)

A liberal reading of § 113(f)(3)(B) would allow states to settle the liability of potentially responsible parties, thereby providing a more efficient remedy of hazardous sites. As an incentive for settling with the state and agreeing to begin cleanup, a potentially responsible party should be able to seek contribution from other parties once its liability for any response cost is settled.

The Third Circuit's ruling from Trinity Industries is not limited to statutes that mirror CERCLA, but applies to all settlements between a state and potentially responsible party when the party is settling its liability for response actions. CERCLA's intention for states to quickly provide response actions to hazardous sites "play[s] a critical role in effectuating the

purposes of CERCLA. If the states are to achieve their maximum potential within the CERCLA framework, they must have the power to incentivize potentially responsible parties. A settlement of the parties’ state law liability is a powerful incentive, especially when that settlement allows the party to recover some cleanup costs through a contribution action.

B. District Courts Would be Well Served by a Clear Rule that Allows a Contribution Action to Commence Upon the Settlement of any Potentially Responsible Party Liability

In Cooper, the Supreme Court clarified that in order to maintain a contribution action, a potentially responsible party must satisfy either §113(f)(1) or §113(f)(3)(B). In Consolidated Edison and its progeny, the Second Circuit noted that the statutory language of CERCLA §113(f)(3)(B) requires that a “response action” be commenced prior to a contribution action being filed. The Second Circuit reasoned that a “response action” is a term unique to CERCLA. Therefore, Congress must have intended for a potentially responsible party to settle costs related to CERCLA-specific actions before that party could seek contribution from other parties.

Multiple states, however, have “response actions” written into statutes similar to CERCLA. These states range from Alaska, to New Jersey, to South Carolina, and Kentucky. The Third Circuit correctly noted that Congress could easily write into the statute a provision limiting settlement to only CERCLA-based claims. By leaving this provision out of the statute, Congress left the ability of potentially responsible parties to settle

88 Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 126 (2d Cir. 2010) (quoting Brief for United States as Amicus Curiae Supporting Appellant at 4, Niagara Mohawk v. Consol. Rail, No. 08-3843-cv; 08-4007-cv (2d Cir. 2009)).
90 Id. at 95-6.
91 ALASKA STAT. § 46.03.825(a) (2013).
95 Trinity Indus., Inc., 735 F.3d at 136.
relatively broad. This runs contrary to the holding of the Second Circuit in *Consolidated Edison* and *W.R. Grace*.

District courts largely accepted the Second Circuit's ruling that a potentially responsible party must specifically resolve CERCLA liability before filing a contribution claim. That is, district courts allowed a party to file for contribution only after settling CERCLA liability with a federal agency.

However, in 2006, the court in the Western District of New York broke from this trend. Prior to *Trinity*, the district court in *Seneca Meadows, Inc. v. ECI Liquidating, Inc.* distinguished the agreement in that case from the agreement found in *Consolidated Edison* and *W.R. Grace*. The court in *Seneca Meadows* ruled that states can release a potentially responsible party from CERCLA liability without a clear EPA mandate granting such authority. Acting pursuant to this release authority, New York entered into a consent order with the party in *Seneca Meadows*, and the district court determined that this order was sufficient to trigger a contribution claim.

*Seneca Meadows* is a prime example of why the Third Circuit's rule is preferable. The court in *Seneca Meadows* differentiated *Consolidated Edison* because the agreement involved in *Seneca Meadows* between the state and potentially responsible party resolved CERCLA liability. Adopting the rule of *Trinity Industries* allows a potentially responsible party to seek contribution once it reaches a settlement with a State or federal agency, would clarify parties' rights and allow parties to accurately and quickly determine their ability to recoup response costs.

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100 *Id.* at 287.
101 *Id.* at 290-91.
102 *Id.* at 287.
Where the Second Circuit and district courts believe that potentially responsible parties have to settle for CERCLA-specific claims, the language of the statute leaves open the possibility for parties to resolve their liability for what the Second Circuit deemed a "broader category of claims." In doing so, Congress made it easier for parties to settle. This ease in settling equates to a faster contribution action, thereby increasing the flow of money to remediation of the CERCLA site.

Clearly, a potentially responsible party that settles its liability under these state laws should be able to seek contribution from other parties that were responsible for contaminating the site. The prohibition against broader categories of claims appears to forbid any contribution action if the only settlement deals with state law claims. This reading is too restrictive, and the district court in Seneca Meadows was cognizant of the error in this interpretation. The court in Seneca Meadows recognized that, when state law settlement is almost identical to settlement with the EPA or federal government, the potentially responsible party should be able to obtain contribution for remediation.

The court in Trinity adopted this approach by allowing Trinity Industries to file a contribution claim after settling state liability. Trinity settled its liability based upon Pennsylvania statutes that closely mirror CERCLA. However, courts that do not wish to follow the broader settlement authority found in Trinity Industries may contend that the state statute at issue was HSCA, which closely mirrors CERCLA. Since Trinity settled liability identical to the liability found in CERCLA it had, in essence, settled its CERCLA liability.

Opponents of the Third Circuit's rule would liken this to the settlement found in Seneca Meadows. However, the Third Circuit's ruling does not limit itself to situations where only CERCLA-type statutes are involved. All that is required is for the potentially responsible party to settle

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103 Consol. Edison Co. of N.Y., Inc., 423 F.3d at 95.
104 Seneca Meadows, Inc. 427 F. Supp. 2d at 286.
105 Trinity Indus., Inc., 735 F.3d at 136.
106 Id. at 137.
107 Id.
its liability to the state for response costs.\textsuperscript{108} State statutes may contain provisions for response costs similar to CERCLA, or states may have regulatory and remediation statutes that create liability for response costs unlike those found in CERCLA.\textsuperscript{109} Courts should have wide latitude in allowing parties to settle with states in these circumstances. By allowing parties to settle state law claims, the states can promote a faster and more economically efficient remediation and cleanup of hazardous material sites.

C. The Second Circuit has Shown a Willingness to Retreat from its Rigid Interpretation of CERCLA

The Second Circuit, based on \textit{Consolidated Edison} and \textit{W.R. Grace}, would likely oppose such a liberal reading of § 113(f)(3)(B). However, the court signaled that it may be willing to retreat from its original position in \textit{Consolidated Edison} and \textit{W.R. Grace}. In 2010, the court decided \textit{Niagara Mohawk Power Corp v. Chevron U.S.A., Inc.}\textsuperscript{110} In \textit{Niagara Mohawk}, the court stated that the plaintiff, Niagara Mohawk Power Corp., was able to file a contribution action after settling with the state Department of Environmental Conservation (DEC), even though the DEC did not have express authority from the EPA to settle claims.\textsuperscript{111}

The \textit{Niagara Mohawk} court dealt with facts similar to \textit{Trinity Industries}. The potentially responsible party seeking to file a contribution claim entered into a consent order with the state's DEC.\textsuperscript{112} The difference between the two cases is that the consent order in \textit{Trinity Industries} resolved the party's state law liability, \textsuperscript{113} whereas the consent order in \textit{Niagara Mohawk} settled state law and CERCLA liability.\textsuperscript{114}

\textsuperscript{108} \textit{Id.} at 136.
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Niagara Mohawk Power Corp.}, 596 F.3d 112.
\textsuperscript{111} \textit{Id.} at 127.
\textsuperscript{112} \textit{Id.} at 125.
\textsuperscript{113} \textit{Trinity Indus., Inc.}, 735 F.3d at 136.
\textsuperscript{114} \textit{Niagara Mohawk}, 596 F.3d at 125.
The Second Circuit clarified that its holding in *Niagara Mohawk* did not substantially differ from *Con Ed* and *W.R. Grace*. The court claimed that in the preceding cases involving § 113(f)(3)(B), the consent orders made no mention of CERCLA liability. *Niagara Mohawk*'s settlement with the DEC clearly mentions CERCLA. The consent order agrees to provide *Niagara Mohawk* a "release and covenant not to sue...which [DEC] has or may have pursuant to... State or Federal statutory or common law involving or relating to investigative or remedial activities..."  

The consent order at issue in *Niagara Mohawk* differed from the agreements found in *Consolidated Edison*, *W.R. Grace*, and *Trinity Industries*. The consent orders (or in *Con Ed*, the Voluntary Cleanup Agreement) at issue in those cases resolved the liability of the potentially responsible party with the state agency in charge rather than any liability contained within CERCLA. Proponents of the *Consolidated Edison* rule would claim that Trinity Industries' failure to settle CERCLA liability bars it from seeking contribution. Alternatively, proponents of the *Con Ed* rule may claim the consent order in *Trinity Industries* dealt with a CERCLA-based state statute and therefore, a settlement under that statutory framework would be the equivalent of a consent order that specifically released the potentially responsible party from CERCLA liability.

However, the *Trinity Industries* rule is not so narrow, and a more expansive interpretation is best suited to meet CERCLA's goals. While the consent order in *Trinity Industries* did involve the state equivalents of CERCLA, the Third Circuit's holding that a release from liability from the state or federal governments demonstrates that the court was dealing with the broader categories of liability mentioned by the Second Circuit in *Con Ed*.

The EPA, in its brief to the court in *Niagara Mohawk*, explained that the states "play a critical role in effectuating the purposes of CERCLA,"

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115 *Id.*
116 *Id.*
117 *Id.*
118 *Id.* at 126.
because sites that meet the criteria for CERCLA vary greatly in types of contamination and number in the multitudes.\textsuperscript{119} The Third Circuit’s reading of § 113(f)(3)(B), and its allowance of state liability resolution to trigger contribution, gives the states greater power and influence in cleanup and efficient burden-distribution.

\textbf{D. Textual and Legislative Support}

In both \textit{Consolidated Edison} and \textit{W.R. Grace}, the Second Circuit focused on the text of CERCLA § 113(f)(3)(B). This provision states that a potentially responsible party must settle its liability for a “response action.”\textsuperscript{120} Noting that this phrase is unique to CERCLA, the Second Circuit believed that a party must settle liability under CERCLA for response actions.\textsuperscript{121} The holding of \textit{Niagara Mohawk}, while appearing to be a retreat from this position, actually reinforced this rule. The Second Circuit allowed a potentially responsible party to seek contribution once that party is no longer liable under CERCLA.\textsuperscript{122} While states can grant releases of liability, as in \textit{Niagara Mohawk}, they are still limited by the requirement that they have the authority to release CERCLA liability.

If the EPA has not delegated this authority to the state, then the potentially responsible party has less incentive to settle with the state. Settling with the state for removal will not allow the party to begin a contribution action, thereby relegating all response costs to the settling party. This restriction provides less of an incentive for parties to settle, and increases their willingness to be subject to a § 107(a) action. Only after a § 107(a) action commences can the party seek contribution.\textsuperscript{123} This line of analysis runs contrary to CERCLA’s intent to clean up hazardous waste sites.

\textsuperscript{119} \textit{Id.} at 126 (citing Brief for the United States as Amicus Curiae Supporting Appellant, \textit{supra} note 89).
\textsuperscript{121} \textit{Consol. Edison Co. of N.Y., Inc.}, 423 F.3d at 95.
\textsuperscript{122} \textit{Niagara Mohawk Power Corp.}, 596 F.3d at 126.
\textsuperscript{123} \textit{Cooper Indus., Inc. v. Aviall Services, Inc.}, 543 U.S. 157, 165-66 (2004).
In addition to statutory language, the court in Consolidated Edison cited legislative materials in support of its position. Specifically, the court pointed to a House Committee Report that accompanied the Superfund Amendments and Reauthorization Act of 1986.\(^\text{124}\) Consolidated Edison used the legislative history of §113 of CERCLA to justify the statement that "section 113 clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties."\(^\text{125}\) The Second Circuit read this report to mean that settlements occurring "under CERCLA" are applicable to §§ 113(f)(1) and 113(f)(3)(B).\(^\text{126}\)

The court in Trinity Industries properly adopted the reading of CERCLA § 113(f)(3)(B). Section 113(f)(3)(B) does not specifically provide that liability under CERCLA is the criteria for contribution. The liability the potentially responsible party is settling must only be for a response action. CERCLA defines a "response" broadly by referencing terms including: "remove, removal, remedy, and remedial action."\(^\text{127}\) CERCLA further states that a "removal action" equates to "the cleanup or removal of hazardous substances from the environment."\(^\text{128}\) A party wishing to settle should only be required to settle its liability with the state for its responsibility in removing or cleaning up the hazardous waste.

The Third Circuit also correctly identified the court's misinterpretation of the House Committee Report in Consolidated Edison. The section used by the court in Consolidated Edison is in reference to § 113(f)(1) claims.\(^\text{129}\) It deals only with a civil action where a potentially responsible party could be jointly or severally liable.\(^\text{130}\) Only § 113(f)(1) discusses civil actions under § 107(a) and joint and several liability.

\(^{124}\) Consolid. Edison Co. of N.Y., 423 F.3d at 96.

\(^{125}\) Id. (citing H.R. REP. No. 99-253, pt. 1, at 79 (1985)).

\(^{126}\) Id.


\(^{129}\) Trinity Indus., Inc., 735 F.3d at 136.

\(^{130}\) Id.
The House Committee Report supports the use of the rule in *Trinity Industries*. The legislative history of § 113(f)(3)(B) shows that Congress intended for §113 to encourage settlement and cleanup. A rule that allows parties to settle state law claims would inevitably lead to faster cleanups. It is likely that states would be more receptive and proactive in seeking out potentially responsible parties to settle. CERCLA-qualified sites that are in need of a response action lie within the boundaries of states. Therefore, a state has a greater incentive than the federal government to quickly settle liability with a party. The faster the party settles, the quicker the state will see a cleanup of the site. The Report notes that private parties who have the added incentive of a contribution action may be more willing to settle.

A settling party assumes all or some of the cleanup cost of the site. The likelihood of reimbursement for that party's cost is a strong incentive for a potentially responsible party to settle. It is likely that the party is liable for the cleanup under state law, as well as federal law. This potential liability creates an incentive for the party to proactively settle liability with the state or federal government. If the party settles liability for response actions before other parties, that party has the advantage of recouping some costs through contribution actions. By allowing parties to settle response action liability with state or federal agencies, the courts would be offering them a broader opportunity to settle their liability, and recoup some costs from other parties. This interpretation fits squarely within the language of the statute, as § 133(f)(3)(B) disjunctively allows settlement with state or federal agencies.

Courts should allow parties to begin contribution actions after settling a broader array of state law liability claims regarding response actions because this broader choice would increase settlement initiative through the possibility of contribution, which would then produce more rapid response actions. These rapid response actions lie at the heart of CERCLA's purpose.

132 See id. at 80.
133 Id.
E. Trinity Industries Best Fits the Purpose and Goal of CERCLA

A rule that best fits within CERCLA's intent is one that allows parties to seek contribution after settling state or federal response action liability, without the prerequisite that the party settles CERCLA liability.

The threat posed by roughly 50,000 hazardous waste sites around the country drove CERCLA's enactment. However, relying on state and federal bureaucracies may be time-consuming and expensive. Private parties have a financial incentive to perform the site cleanup at a quicker rate and more efficiently than state or federal governments. Private parties that are responsible for site cleanup and remediation would likely spend less for the cleanup as compared to similar actions controlled by state or federal governments. Relying on the efficiency of private parties to spearhead response actions is one of the primary goals of CERCLA's operation. CERCLA seeks to "encourage private persons to assume the financial responsibility of cleanup by allowing them to seek recovery from others."

This language demonstrates that CERCLA intends for courts to allow and encourage private parties to take responsibility for response actions. Private parties that take the lead in site cleanup and remediation or removal mitigate hazardous waste within a shorter timeframe than if conducted by governmental agencies. Private parties are subject to competitive markets, and the faster parties can clean a site and move on, the faster they can channel their resources into other endeavors.

The rule that the Trinity Industries Court used is best suited to encourage private parties to take responsibility. The state or federal government undoubtedly would prefer to clean up CERCLA sites quickly. The courts have acknowledged that states are the primary actors when it

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136 Id. at 80.
comes to CERCLA sites. If a state intends to quickly and efficiently remedy these sites, they will certainly benefit from private parties taking initiative on these cleanups. For states to accomplish this goal, they would be best served by entering into settlements or consent orders with parties. By entering into a settlement, the state will mitigate the presence of hazardous substances. However, the problem for the state lies in encouraging a party to settle rather than waiting for a recovery action to be filed.

The rule in Trinity Industries that allowed potentially responsible parties to seek contribution after settling response action liability is the states' best incentive to offer. A state will show that the party will be strictly liable, and by settling, the party will be able to control its costs more efficiently than through litigation. If parties have the added incentive of seeking contribution, then states will have greater ability to encourage them to begin cleanup. The states will not always have specific authorization from the EPA to settle CERCLA liability, but they should not be hampered by this limitation. A party that settles its response action liability with a state will likely resolve its liability with CERCLA as well. However, making it a condition precedent to contribution under § 113(f)(3)(B) that the potentially responsible party must settle its CERCLA liability runs counter to CERCLA's goal of "encourag[ing] private persons to assume the financial responsibility of cleanup by allowing them to seek recovery from others."

While proponents of the rule in Consolidated Edison may argue that settling only state law claims will leave potentially responsible parties open to CERCLA liability down the road, the party must still settle for liability relating to a response action. Response actions for states are similar to the response actions required by CERCLA and, as in Trinity Industries, the response actions that the party is settling with the state are identical to CERCLA response actions. Therefore, the party would likely not be

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137 Niagara Mohawk Power Corp., 596 F.3d at 126.
139 Id. at 80.
140 Trinity Indus., Inc., 735 F.3d at 137.
liable under CERCLA if it meets the obligation of the settlement or consent order.

VI. CONCLUSION

The United States was a nation of industrial polluters for much of the twentieth century. It was only during the latter half of the century that the government began to focus on protecting the natural and human environment. In an effort to restore industrial sites to healthier and more environmentally-friendly locations, the federal government enacted the Comprehensive Environmental Response Compensation Liability Act, which provides several ways for the federal government to ensure cleanup of these sites.

While case law is settled regarding CERCLA § 107(a) and § 113(f)(1), the Supreme Court has yet to address exactly when a potentially responsible party settles its liability and can commence an action for contribution under § 113(f)(3)(B). Until the seminal cases of Consolidated Edison and W.R. Grace, the federal circuit courts left this provision of CERCLA largely untouched. These cases favor a strict interpretation of § 113(f)(3)(B) by allowing only potentially responsible parties that have settled their CERCLA response action liability to initiate contribution claims.141 District courts largely follow this interpretation of § 113(f)(3)(B).

However, Trinity Industries should move away from CERCLA-specific settlement and toward a broader range of state law settlements sufficient to create a cause of action for contribution. The disjunctive “or” used in § 113(f)(3)(B) provides textual support for this conclusion in CERCLA itself.142 Further textual support comes from the very meaning of “response action” having a broad interpretation.143 The legislative history of § 113 further demonstrates that the statute and SARA amendments are designed to encourage private parties to participate in response actions. A

reading of § 113(f)(3)(B) that allows potentially responsible parties to settle with states for response actions increases the opportunities for potentially responsible parties to settle and engage in a more efficient remediation process. Finally, the reading of § 113(f)(3)(B) in *Trinity Industries* most closely aligns with the original intent and purpose of CERCLA. Allowing potentially responsible parties to settle with states for response costs not directly under CERCLA increases incentives to settle, which in turn increases response action timing.

CERCLA is a complex and important statute that affects every state and results in the expenditure of hundreds of millions of dollars. A rule that allows potentially responsible parties to settle response costs based on state liability ensures continued adherence to CERCLA and its central purpose of removing hazardous waste, and thus, the sites that negatively affect the natural and human environment will be cleaned up more quickly and efficiently.

144 See H.R. REP. NO. 99-253, pt. 1, at 63-64.