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CLEAN WATER ACT

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Roundtable on Trinity Industries Opinion

Roundtable: Cost Allocation After Trinity Industries

I. Summary of Decision

CERCLA; CONTRIBUTION; COST ALLOCATION; INDEMNIFICATION AGREEMENT; NECESSARY AND REASONABLE COSTS; CORPORATE PARENT LIABILITY; VEIL-PIERCING; OPERATOR LIABILITY

Trinity Industries, Inc. v. Greenlease Holding Company, Nos. 16-1994 & 16-2244 (3d Cir. Sept. 5, 2018)

Third Circuit Panel Vacates District Court's Allocation of CERCLA Cleanup Costs Because Division Was Based on Volume Instead of Cost of Removal

This decision reflects a successful challenge to a District Court's allocation of liability at a Superfund site in Greenville, Pennsylvania. After being held criminally liable for its waste handling practices at the facility, Trinity Industries, Inc. ("Trinity") cleaned up the property at a cost of $9 million and sued the former site owner (Greenlease Holding Company, or "Greenlease") for contribution. The District Court found Greenlease liable for 62% of the cleanup costs and Trinity liable for the remaining 38%. Both parties appealed. In this decision, a Third Circuit panel vacated the District Court's cost allocation and remanded for further proceedings. While praising the trial court's "admirably thorough opinion," the panel determined that the court had abused its discretion in two key ways:

- First, its methodology for calculating the parties' comparative contribution to the cleanup costs was flawed. For one thing, the court simply compared the relative volumes of waste contributed by both parties, with no consideration for the actual cost required to remediate different types of waste. The trial court also inexplicably treated measurements in square feet (a linear measure) as equivalent to measurements in cubic yards (a depth measurement) in calculating comparative volumes.

- Second, the trial court erred by granting certain equitable deductions to Greenlease in calculating its percentage of liability. First, the court determined that since an indemnification provision demonstrated an intent to shift liability, it reduced Greenlease's share of responsibility by 5%. However, the Third Circuit said it was error to base the adjustment on the "subjective intent" of one party when the indeminification agreement itself did not evidence a mutual intent to shift liability. Second, the District Court abused its discretion by awarding a 10% equitable deduction to Greenlease based on a presumed increase in property value following the cleanup, despite the fact that there was no evidence in the record of such an increase.

However, the court affirmed the District Court's opinion that Trinity's parent, Ampco, was not liable as an operator under the standard set forth in *United States v. Bestfoods*, 524 U. S. 51 (1998), and that Trinity did not establish a factual basis for veil-piercing to create owner liability. This was an important ruling since it affected recoverability.

1. Background

This contribution claim raised questions about the proper allocation of cleanup costs among former owners of a railcar manufacturing plant in Greenville, Pennsylvania. From 1910 until 1986, the facility was owned and operated by Greenlease, a subsidiary of Ampco-Pittsburgh Corp. ("Ampco"). It was purchased by Trinity Industries, Inc. ("Trinity") in 1986 and remained in operation until 2000. Trinity was charged with criminal liability for its waste handling practices and signed a plea-bargained consent decree requiring it to remediate the site. The remediation cost Trinity almost $9 million, and in this suit Trinity sought contribution from Greelease and Ampco.

Lead was the primary contaminant in issue, although there was a small amount of volatile organic chemicals and polychlorinated biphenyls (PCBs) in soils that required remediation. The District Court assigned responsibility in percentages to Greenlease or Trinity for each of the 45 Impact Areas. However, the experts and the Court did not separate cost of removal from volume in these areas.

After extensive analysis, the District Court allocated 62% of the total cleanup cost to Greenlease and 38% to Trinity. Both parties objected to the decision and filed cross-appeals. In this decision, the Third Circuit Court of Appeals addressed the issues raised by each party. For the reasons summarized below, a unanimous panel vacated the District Court's cost allocation and remanded the case for further consideration.

2. Greenlease's Appeal

Greenlease raised three primary issues in its appeal. First, it alleged that the Purchase Agree-

ment between it and Trinity precluded contribution after three years following the sale. Second, it argued that Trinity's cleanup costs were not all necessary or reasonable as required by CERCLA. Finally, it challenged the District Court's methodology in allocating the costs.

A. Trinity's Purchase Agreement

Trinity's Purchase Agreement ("Agreement") included a three-year mutual indemnification period respecting damages arising out of any violation of environmental laws during each party's respective period of ownership. Greenlease argued that any liability it might otherwise have for environmental cleanup beyond that period was waived. The court noted, however, that the Agreement did not suggest that the parties intended for Trinity to assume all of Greenlease's liabilities and obligations after that period. In fact, the Agreement included specific "non-assumption of liabilities" and "non-waiver of remedies" provisions that suggested any liability on Greenlease's part would continue indefinitely. The "non-assumption of liabilities" clause expressly stated that Trinity "denie[d] assumption . . . of any other liability, obligation or commitment of [Greenlease]." Likewise, the "non-waiver of remedies" clause provided that "[t]he rights and remedies herein provided . . . are not exclusive of any rights or remedies which the parties hereto may otherwise have at law or in equity."

The court noted that the "non-assumption of liabilities" and "non-waiver of remedies" clauses were "not time limited" and could therefore "be understood as specifically addressing the time period after the expiration of the contractual indemnities." Such an interpretation would not render the mutual indemnity provision meaningless, as Greenlease suggested, because the mutual indemnity "granted to each other certain contractual rights separate and distinct from any statutory, legal, or equitable rights or remedies." Greenlease's reliance on *Keywell Corp. v. Weinstein*, 33 F.3d 159 (2d Cir. 1994), was misplaced, as the contract in *Keywell* and the Agreement in this case were distinguishable. The contract in *Keywell* clearly limited any recovery from individual officers or directors of the seller after a two-year period. The Agreement in this case, by contrast, did "not demonstrate an unequivocal intent to shift liability away from Greenlease after the three-year contractual indemnification period."

B. Necessity and Reasonableness of Trinity's Cleanup Costs

Greenlease argued that the District Court erroneously allocated costs to it that were not necessary or reasonable because Trinity failed to maintain cost controls. Greenlease's specific allegations were that: (1) the consent decree under which Trinity conducted the cleanup "lacked meaningful cost control mechanisms;" (2) Trinity hired its environmental consultant without competitive bidding; and (3) Trinity paid its consultant on a "cost-plus" basis. The court rejected Greenlease's objections, concluding that the District Court did not act arbitrarily in finding Trinity's costs both necessary and reasonable.

The court explained that "[a] cost is considered 'necessary' and hence subject to shared liability if there is 'some nexus between [it] and an actual effort to respond to environmental contamina-

tion.'" A nexis is established if a cost is incurred in "response' to a hazardous release," and necessary response costs may include "a wide variety of investigative, removal, and remedial actions." The District Court performed a "detailed factual analysis" and concluded that Trinity's costs were justifiable. First, Trinity's cleanup was guided by the requirements of its consent decree with the Pennsylvania Department of Environmental Protection. Second, Trinity used statewide health standards to determine which areas required cleanup, and used site-specific standards to guide its decisions as to which areas could be remediated to a lesser extent. Evidence also showed that Trinity's environmental consultant was cost-conscious in determining the level of cleanup necessary in different areas of the site. In sum, the court concluded that:

> Trinity incurred [its cleanup] costs in furtherance of the Consent Decree. Although we need not, and do not, decide here whether costs incurred by a private party in compliance with a state consent decree are presumed reasonable under CERCLA, we note that similar costs incurred by a government party are presumed reasonable. . . . We will therefore affirm the District Court's determination that Trinity's response costs were necessary and reasonable.

C. District Court's Cost Allocation

Greenlease also objected to the methodology the District Court used to allocate costs. The primary criticism was that the District Court "relied on 'volumes and surface areas . . . as a proxy for the costs Trinity incurred at each impact area[.]'" Greenlease also pointed out that the District Court used disparate units of measure as though they were comparable to one another.

The Third Circuit panel agreed with both of Greenlease's objections and held that the District Court's methodology was "arbitrary" and "speculative." With respect to comparative costs, the District Court simply determined the percentage of contaminants each party was responsible for at each of the cleanup areas, while ignoring the fact that different contaminants called for different cleanup measures with different costs. In the end, the District Court had a well-crafted analysis of comparative contamination volumes, but it had little data about the actual costs each party was responsible for causing. Moreover, in measuring the comparative quantities of waste each party contributed, the District Court erroneously treated measurements in square feet as equivalent to measurements in cubic yards. For both of these reasons, the court concluded that the District Court abused its discretion in allocating costs.

3. Trinity's Cross-Appeal

Trinity also raised three issues in its appeal. First, it challenged the District Court's factual determination concerning responsibility for lead contamination throughout the site. Second, it

questioned the District Court's decision to grant Greenlease equitable deductions for the Purchase Agreement's indemnification provisions and the presumed increase in market value of the facility due to cleanup. Finally, it appealed the District Court's decision that Ampco was not liable for Greenlease's actions as an operator under the standard set forth in *United States v. Bestfoods*, 524 U. S. 51 (1998), and that Trinity did not establish a factual basis for veil-piercing to create owner liability.

A. Responsibility for Lead Contamination

Trinity disputed the District Court's decision not to allocate any liability to Greenlease to account for Greenlease's painting operations at the plant. Evidence suggested that releases of lead paint had likely seeped into the ground. However, while acknowledging the presence of contamination from lead paint, the District Court concluded that historic fill from construction activities over the life of the facility was "the source of lead contamination *that required remediation.*" The Court determined that any contamination by lead paint alone would not have required a cleanup.

The Third Circuit panel, on appeal, found "no abuse of discretion" in this aspect of the District Court's decision. It was based upon an extensive review of historical construction records and comparative soil analyses and thus represented an appropriate use of discretion.

B. Equitable Deductions For Greenlease

Trinity asserted that the District Court's 5% equitable deduction in favor of Greenlease based upon the indemnification provisions in the Purchase Agreement, and its 10% deduction to account for the facility's increased market value following cleanup, were "arbitrary and speculative." The panel agreed with both objections.

In granting the 5% reduction for indemnification, the District Court relied upon the Third Circuit's earlier decision in *Beazer East, Inc. v. Mead Corp.,* 412 F.3d 429 (3d Cir. 2005). That reliance, however, was misplaced. In *Beazer*, the District Court had determined that the clear intent of both parties was to shift CERCLA liability following the sale. Here, by contrast, the District Court found that there was no such mutual intent. It was therefore an abuse of discretion for the trial court to award an equitable deduction without explaining why it was fair to do so.

The 10% deduction for the purported increase in property value was also unwarranted. While increased value would be an appropriate factor to consider, there was no specific evidence in this case of the market values before and after cleanup. Without such evidence, the District Court's decision to award Greenlease a deduction was too speculative.

C. Ampco's Potential Liability

The court affirmed the District Court's determination that Ampco was neither directly nor indirectly liable for cleanup costs. Trinity had argued that Ampco was liable directly as an "opera-

tor," and indirectly under a veil-piercing theory.

With regard to Ampco's "operator" status, the court noted that, to be an operator, a party must "direct[] the workings of, manage[], or conduct[] operations specifically related to pollution" (quoting *U.S. v. Bestfoods,* 524 U.S. 51, 66-67 (1998)). In this case, Greenlease employees had been solely responsible for all day-to-day operations of the plant, including waste disposal and environmental compliance. Ampco's only involvement with respect to environmental matters was to provide Greenlease employees legal advice. The court therefore affirmed the District Court's conclusion that Ampco's involvement in day-to-day operations of the facility did not exceed "the normal relationship between parent and subsidiary" and did not make it liable as an operator (*id.* at 71).

The District Court's conclusion that Ampco was not derivatively liable as a corporate parent was also affirmed. Factors used to assess whether the veil should be pierced to find a corporate parent liable for the actions of a subsidiary include: (1) gross undercapitalization of the subsidiary; (2) failure to observe corporate formalities; (3) nonpayment of dividends; (4) insolvency of the subsidiary; (5) siphoning of funds from the subsidiary; (6) nonfunctioning of corporate officers or directors; (7) absence of corporate records; and (8) whether the subsidiary functions merely as a façade for the dominant stockholder.

Trinity argued that Greenlease was undercapitalized, having issued Ampco $50 million in dividends in the three years following the sale and leaving a reserve of only $250,000. The court found, however, that there was no evidence of undercapitalization during Greenlease's operation of the plant, and there was no indication of future liability when Greenlease issued its dividends to Ampco. As the court said, "at the time the dividends were issued Greenlease was a nonoperating company with no known liabilities."

There was also nothing unusual in Ampco's relationship with its subsidiary. Though there was limited duplication of officers or directors, Greenlease ran the facility, hired all employees, and operated with substantial autonomy except with respect to major decisions. The court also rejected Trinity's argument that Greenlease's corporate veil should be pierced under Pennsylvania law. "Pennsylvania law is . . . clear that courts are not to disregard the legal fiction of separate corporate entities if it would render 'the theory of the corporate entity . . . useless."

II. Comment by John M. Barkett

Trinity Industries v. Greenlease: Allocation Roulette Under CERCLA?

by John M. Barkett[1]

An appellate opinion vacating an allocation decision under CERCLA? A rare avis. But that's what happened in *Trinity Industries, Inc. et al. v. Greenlease Holding Company et al*., (3d Cir. Sept. 11, 2018). And it happened against the backdrop of a district court opinion that contained 484 Findings of Fact and 202 Conclusions of Law that allocated 45 "Impact Areas." *Trinity Indus. v. Greenlease Holding Co,* 173 F. Supp. 3d 108 (W.D. Pa. 2016). Whew!

If you have not read the decision yet, read the Reporter's summary of the 61-page slip opinion in this issue to understand all the "ins" and "outs" of the decision. You will need only a few facts to appreciate the perspective I offer below.

The case involved the remediation of a former railcar manufacturing facility in Greenville, Pennsylvania. Greenlease owned and operated what was called the "North Plant" from 1910-1986. Trinity purchased the facility from Greenlease and operated it until 2000. Trinity sold the property in 2004 and its buyer (Marstellar/Commerce Park) demolished remaining structures on the property. Trinity was later investigated by the Pennsylvania Department of Environmental Protection for improper disposal of hazardous waste. That investigation resulted in a plea agreement whereby Trinity paid a fine and investigative costs, and signed a Consent Decree to remediate the North Plant. Trinity repurchased the property to conduct the remediation. Two other entities played a role in the allocation. Marstellar/Commerce Park allegedly dumped hazardous chemicals and waste produced by its demolition activity. And from 1898 until sometime before 1910, a company called Shelby Steel Tube deposited "historic fill" on 11 acres of the North Plant. Lead was the primary contaminant in issue, although there was a small amount of volatile organic chemicals and polychlorinated biphenyls (PCBs) in soils that required remediation. Trinity spent about $9 million to address 45 "Impact Areas," and sought contribution from Greenlease under CERCLA and Pennsylvania's Hazardous Sites Cleanup Act.

In the Superfund world, $9 million would suggest a case that could be settled, unless the parties had polar opposite views of the allocation, or an outcome determinative legal question separated the parties. And, indeed, Trinity's expert (Gormley) and Greenlease's expert (Gerritsen) looked at the same facts but reached very different conclusions. Gormley opined that Greenlease should be allocated 99% of the response costs and Trinity, 1%. Gerritsen opined that Greenlease was responsible for only 13% of the contamination, "(d)espite Greenlease owning and operating at the North Plant for more than 75 years," 173 F. Supp. 3d at 153, and that Trinity should pick up the rest, including the shares of Marstellar/Commerce Park and Shelby Steel.

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1 John Barkett is a partner at Shook, Hardy & Bacon LLP in its Miami office. He has handled CERCLA matters since 1982, and has been conducting or facilitating Superfund allocations as a neutral in mediations, arbitrations, and a variety of other alternative dispute resolution processes for the past 20 years.

Why the discrepancy? Primarily it was because Gerritsen was of the view that (1) lead contamination in soils originated from Shelby Steel or in part from Trinity, and (2) Trinity's remediation contractor (Golder) spent too much money (couched in terms of reasonableness or necessity) because it established too low a cleanup standard.

And the legal issue? Well, there were two. As I mentioned, Trinity originally bought the property from Greenlease. As you might have guessed, there was an indemnity. The text of the indemnity is not important for my purposes except in one respect: Greenlease interpreted the indemnity as transferring pre-closing environmental liabilities to Trinity three years after the closing.

And that was important because after three years Greenlease divested itself of its assets and paid a large dividend to its parent company, Ampco, leaving Greenlease with an environmental reserve by 2009 of $282,500. Only Ampco could afford to pay a judgment larger than that. And that raised the second legal issue: was there parent liability either under an owner or operator theory? If not, the allocation presumably made no difference because Greenlease could not pay the judgment.

So there you have it. Very different opinions on allocation. A legal issue – an indemnity -- that potentially wiped out plaintiff's claim. A legal issue – whether Ampco was liable as a parent -- that affected recoverability. I assume there were settlement discussions. If that is right, based on the divergent expert allocation opinions, it appears that the parties decided to roll the dice on the indemnity and parent liability issues. Someone had to lose the bet.

Of course you know already that the district court rejected the indemnity argument or there would not have been a trial. It also rejected the parent liability argument.

As for the allocation, after citing to the Gore and Torres factors, the district court explained: "The most critical factor for the equitable allocation in this case is the extent to which each party is responsible for the contamination in each IA at the North Plant. This factor includes consideration whether there is a sound basis to distinguish the parties' contributions and the degree of involvement and care by the parties." 173 F. Supp. 3d at 227-28.

Because Trinity did not establish that Marstellar/Commerce Park or Shelby Steel was an orphan share, the court added that "as a matter of equity," it "will not allocate to Greenlease the costs incurred during the cleanup as a result of contamination that was not caused by Greenlease." 173 F. Supp. 3d at 218.

Then, in painstaking fashion, the district court assigned responsibility in percentages to Greenlease or Trinity for each of the 45 IAs. The court used a table prepared by Gormley that showed either the square feet or cubic yards that were addressed in each Impact Area by the following remedial activities:

> "Cap-In-Place, Asphalt Re-Surfacing, Metals;" "Concrete Demolition & Crushing;" "Excavate, Pre-Condition, & Off-Site Disposal, Metals;" "Excavate & On-Site Consolidation, Metals;" "Off-Site Disposal, Metals/VOCs/SVOCs;" "Excavate & Off-Site Disposal, PCBS;" "Placement of Geotextile;" "Backfill with Imported Clean Fill;" "Topsoil & Seedling;" "Placement of DGA;" and "Asphalt Capping."

178 F. Supp. 3d at 230. The court added the square feet or cubic yards in each Impact Area and multiplied the sum by the percentage assigned to Trinity or Greenlease for each Impacted Area. The court then summed the resulting products, and divided them by the total square feet plus cubic yards for all of the Impact Areas. The result? Trinity; 17%. Greenlease: 83%.

The court then reduced Greenlease's share for three reasons. First,

Marstellar/Commerce Park (Trinity's buyer) had left waste oil that Trinity remediated. However, Trinity did not establish the amount of response costs incurred for this response action. So the court reduced Greenlease's allocation by 6%.

Second, while the indemnity was found to have no legal force, the district court thought it had equitable force based on the district court's reading of *Beazer E. Inc. v. Mead Corp.*, 412 F. 3d 429 (3d Cir. 2005). The reduction here? 5%.

Finally, because Trinity enjoyed the benefit of a remediated property, the district court reduced Greenlease's share by another 10%.

The new result? Trinity: 38%. Greenlease 62%.

If you are Greenlease's decision maker, maybe that's not a bad result. Why challenge it on appeal? Maybe Greenlease felt it had no choice but to raise every issue on appeal because Trinity had to appeal the decision absolving Ampco of parent liability.

So, what happened on appeal? The Third Circuit agreed with the district court on the legal interpretation of the indemnity: Trinity was not barred by the purchase agreement from seeking contribution. It also rejected all of Greenlease's non-allocation arguments.

That left only Greenlease's allocation argument and Trinity's Ampco-parent liability argument.

Greenlease succeeded in arguing that the district court should not have combined units of area and units of volume to determine the site-wide allocation but instead should have used the costs associated with each remedial action in each Impact Area.

> [A] volumetric-centered approach is only appropriate where the evidence supports a finding that one standardized volumetric unit correlates with a standardized per unit measure of cost. That may often be the case when a CERCLA cleanup involves only one impact area, or when a cleanup involves one primary major remediation activity. But when, as here, an environmental cleanup involves many impact areas and remediation activities with varying costs, a volumetric-centered approach that fails to account for cost differences will very likely lead to an allocation that is inequitable because it is divorced from the record evidence and analytically unsound. When, as a hypothetical example, 100 units of material that costs $1 per unit to remediate are treated the same as 100 units of material that costs $10 per unit to remediate, the analysis will be hard to justify.

Is this a victory for Greenlease? Time will tell because the court of appeals also said the following:

> If the District Court was persuaded by Gormley's analytical approach, then, on remand, it should adhere to the cost allocation methodology he set forth in his expert report – a methodology that both experts relied upon in coming to their respective cost allocation estimates. That methodology will require the Court to conduct a separate cost allocation analysis for each major remediation activity. Much of the information needed for that is readily available in the record, but additional fact-finding by the District Court may be needed.

Remember the district court had already assigned percentages to Trinity and Greenlease for each Impact Area. The only question is how those percentages translate into actual costs for each IA. The court of appeals was not prepared to let square feet and cubic yards be used a surrogate for costs on the record before it.

But will proceedings on remand improve Greenlease's position? To try to answer that question, I assembled two tables that appear as Appendix I and Appendix II. I sorted the Impact Areas (IAs) by percentage shares assigned by the district court (and not challenged on appeal). I then added, separately, the square feet (SF) and cubic yards (CY) remediated in each IA based on the numbers used by the parties and the district court. I depict them in Appendix I in units and in Appendix II in percentages.

As is depicted in the Appendices, there are 17 IAs in which Greenlease received 100% responsibility. They represent 79.6% of the SF and 61.1% of the CY. It will not matter what the associated costs are for these IAs. Greenlease gets all of them.

There are two IAs where Greenlease received 97% of the responsibility and six IAs where Greenlease received 86%. Given these percentages Greenlease will receive the bulk of the associated costs.

Thus with responsibility for 86% (6 IAs), 97% (2 IAs) and 100% (17 IAs), Greenlease will receive the bulk of the costs for 66.5% (17 IAs) plus 3.8% (2 IAs) plus 10.4% (6 IAs), *or 80.7% of the remediated SF and 69.2% of the remediated CY*.

The parties essentially will split six more IAs with one IA going 48% to Trinity and 52% to Greenlease and five IAs being split 50%-50%. These six IAs represent 8.9% of the SF and 19.4% of the CYs.

Finally, Trinity received 100% responsibility for 14 IAs but they represent *only 10.3% of the SF and 11.4% of the CY*.

In short, the unit remediation cost for SF versus CY will certainly be different and may even vary for a particular remedial task, but it appears from these numbers that the allocation outcome will not be much different using costs, than originally determined by the district court using SF and CY. Moreover, the court of appeals gave the district court leeway to reopen the record if more cost information was needed but it may be that they will be primarily needed for the nine IAs where the percentages were other than 0-100%, 50-50%, or 100-0%.

As for the equitable reduction of 5% for the indemnity, the court of appeals reversed, explaining that to use an indemnity as an equitable allocation factor under *Beazer*, trial courts must "take into consideration 'the intent of the parties … [as] manifested by their actions and in the written agreement[.]'" 412 F. 3d at 447. Where an indemnity has no legal effect, a district must explain, the court of appeals held, why it is "appropriate" to still consider it as an equitable allocation factor:

> But when the intent resulting in the equitable deduction is not shared by both parties and appears contrary to provisions of the contract, a district court must explain why, as a matter of equity, it is nevertheless appropriate to award an equitable deduction. Because we view the District Court as having misapplied *Beazer*, we remand for it to take a fresh look at whether it is appropriate, on the record before the Court, to award Greenlease an equitable deduction premised on the contractual indemnification provisions.

With respect to the 10% benefit derived from having a remediated parcel of land, the court of appeals also reversed, holding that there had to be valuation evidence to support the use of "benefit" as an allocation factor.

> The problem with the District Court's 10% deduction, then, was not in the decision to consider the increased market value of the North Plant as an equitable factor but rather in the application of that factor without any record evidence concerning the North Plant's value. It is only appropriate to take increased value into consideration when there is evidence concerning an actual increase, such as proof of the fair market value of the property before and after the cleanup.

Once again, the court of appeals allowed the district court to reopen the record to receive before-and-after valuation evidence.

Trinity's success ended here, however. Trinity lost on the issue it cared most about: Ampco's parent liability. The court of appeals affirmed the district court's determinations that Ampco was not liable as an operator under the standard set forth in *United States v. Bestfoods*, 524 U. S. 51 (1998), and that Trinity did not establish a factual basis for veil-piercing to create owner liability.

If Greenlease is, in essence, judgment proof, we have probably heard the last of this case. However, if there are enough assets to continue the legal battle, we can all watch to see if the parties settle their differences or continue to roll the allocation dice on what is now a much narrower legal and equitable platform.

For Superfund practitioners, circuit court opinions on allocation do not come down that often, and they are more rare when there is a finding of an abuse of discretion by the district court in making an allocation determination. So the Third Circuit's opinion is mandatory reading for Superfund lawyers. What lessons can you take away from the case? Among them are these:

- Polar opposite expert allocation opinions will likely result in both expert opinions being rejected; advocacy always gives way to equity.

- An indemnity that has no legal force may still have equitable force if it is "appropriate" to do so. If the district court does issue another opinion in this case, there will be guidance on what "appropriate" means in this context.

- The North Plant presumably was worth more remediated than not remediated. But that intuitive determination was not sufficient for the court of appeals. When the increased value of land is being argued as a benefit impacting allocation, in the Third Circuit there must be evidence in the record sufficient to justify the benefit assigned.

- If your client is the "bank" for the site, and there is a liable nonparty, prove up its status as an orphan or your client may absorb 100% of the nonparty's share.
- In Superfund, allocation differences can consume the majority of a trial court's time, but all-or-nothing legal arguments need to be carefully evaluated in settlement discussions, or the time spent on allocation may be wasted..

Appendix I. Impact Areas Sorted by Percentage Responsibility Showing SF and CY

Trinity %	*Greenlease %*	*No. IAs*	**Square Feet Remediated**	*Cubic Yards Remediated*	*Trinity SF*	*Greenlease SF*	*Trinity CY*	*Greenlease CY*
0%	100%	17	**505327**	**15811**	0	505327	0	15811
3%	97%	2	**28528**	**1495**	856	27672	45	1450
14%	86%	6	**78792**	**6183**	11031	67761	866	5317
48%	52%	1	**3376**	**436**	1620	1756	209	227
50%	50%	5	**64834**	**6124**	32417	32417	3062	3062
100%	0%	14	**78512**	**3858**	78512	0	3858	0
	TOTALS	**45**	**759369**	**33907**	124436	634933	8040	25867

Appendix II. Impact Areas Sorted by Percentage Responsibility Showing SF and CY in Percentage Terms

Trinity %	*Greenlease %*	No. IAs	*Square Feet Remediated*	*Cubic Yards Remediated*	*Trinity SF*	*Greenlease SF*	*Trinity CY*	*Greenlease CY*
0%	100%	17	**66.5%**	**46.6%**	0.0%	79.6%	0.0%	61.1%
3%	97%	2	**3.8%**	**4.4%**	0.7%	4.4%	0.6%	5.6%
14%	86%	6	**10.4%**	**18.2%**	8.9%	10.7%	10.8%	20.6%
48%	52%	1	**0.4%**	**1.3%**	1.3%	0.3%	2.6%	0.9%
50%	50%	5	**8.5%**	**18.1%**	26.1%	5.1%	38.1%	11.8%
100%	0%	14	**10.3%**	**11.4%**	63.1%	0.0%	48.0%	0.0%
	TOTALS	**45**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**

III. Comment by Neil J. Cohen, Editor & Publisher

Editor's Note: **Allocation by Cost Can be Expensive**

On remand the District Court will be obliged to allocate liability on the basis of cost of removal. Lead was the primary contaminant in issue, although there were volatile organic chemicals and polychlorinated biphenyls (PCBs) in soils that required remediation. If the waste were homogeneous there would appear to be few problems estimating and allocating the costs of removal to each party. But what if the PCBs and volatile chemicals need to be specially separated, removed and disposed? A recent case summarized and published in this issue of the Reporter demonstrates just how complicated such a situation could be. In *LCCS Grp. v. A.N. Webber Logistics, Inc.*, No. 16 C 5827 (N.D. Ill. Sept. 19, 2018), a contribution case, the United States District Court for the Northern District of Illinois denied motions for summary judgment because material facts were in dispute. The court ruled that while CERCLA liability will not attach to a waste merely because it contains hazardous substances if the hazardous substances are "irreversibly bound"; however, if intervening force can allow release of the hazardous substance, there may be liability. Due to disputed facts regarding whether hazardous substances are genuinely "irreversibly bound," the court denied summary judgment to both Plaintiff and to the Defendant producer of the allegedly harmless waste.

Why weren't any of the cost of removal issues addressed by the District court? The problem was that the cost information was aggregated and not broken down by Impact Area or task within each Impact Area. Trinity had provided the Court with a spreadsheet showing square foot ("SF"} and cubic yards ("CY") for each remedial task but it did not translate those numbers into costs by Impact Area. The expert testimony was muddled on the relationship of the costs to the IAs. District Judge Conti may have reasoned that where 83% of the SF and CY combined ended up with Greenlease, and the cost information would probably would mirror the SF/CY total, there was no need to break it down further.

But on appeal, *Greenlease* objected to the methodology because the District Court "relied on 'volumes and surface areas . . . as a proxy for the costs Trinity incurred at each impact area" and the Court of Appeals agreed.

IV. Comment by Professor Eric DeGroff: Indemnity v. Release in Sales Agreements

The decision highlights the importance of planning and carefully drafting any agreement to sell or buy potentially contaminated property. Sellers, for example, should remember the difference between indemnity provisions and releases from liability. An indemnity can provide contractual rights in addition to those otherwise available at law or in equity, but its expiration will not relieve the seller of obligations under most environmental statutes. Even an "as-is" sale will generally not protect the seller from later enforcement actions by the government. If both parties are willing to shift potential cleanup costs to the buyer, a hold harmless provision or release from liability specifically addressing environmental responsibility is preferable. The key to shifting liability to the buyer is to clearly reflect in the purchase agreement the parties' mutual intent to do so.

From the buyer's perspective, a pre-sale audit would reduce the uncertainties, and the parties could determine whether any contamination should be remediated prior to sale or be reflected in the price. Due diligence by the buyer before the sale is also key to asserting an "innocent purchaser" defense if contamination is discovered later. Depending on the circumstances, an escrow deposit, a purchase money holdback, or the purchase of pollution legal liability ("PLL") insurance may also help the buyer address any pre-existing contamination that is unknown at the time of sale.

* * *

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Recent Decisions

CERCLA; CONTRIBUTION; COST RECOVERY; ADMINISTRATIVE SETTLEMENT; RESOLUTION OF CERCLA LIABILITY; STATUTE OF LIMITATIONS; DECLARATORY JUDGMENT

Brooklyn Union Gas Co. v. Exxon Mobil Corp., No. 17-CV-0045 (MKB) (ST) (E.D.N.Y. Sept. 10, 2018)

Federal Magistrate Recommends that CERCLA Liability Be Considered "Resolved" Upon Entry of Administrative Settlement, Thus Triggering Right to Seek Contribution Within CERCLA's Three-Year Statute of Limitations

This Report and Recommendation by a United States Magistrate Judge addresses the issue of when a party's CERCLA liability is resolved following entry of an administrative settlement with a state. The federal courts are split on this issue. The Seventh Circuit takes a "wait-and-see" approach in which – absent clear evidence of a contrary intent -- CERCLA liability is not considered "resolved" until the requirements of the settlement agreement have been fulfilled. By contrast, the Sixth and Ninth Circuits follow an "immediate determination" approach in which – absent clear language to the contrary – liability is considered resolved as soon as the Agreement is entered.

In this Report, the Magistrate recommended that the court follow the majority, "immediate determination" approach. Based upon that approach, the Plaintiff's contribution claim would be time barred. The settlement agreement in question had been signed over ten years earlier, and the three-year statute of limitations under § 113 would have long since run. Moreover, because Plaintiff had had an opportunity to seek contribution within CERCLA's three-year window, it could not now seek cost recovery for any expenses incurred under the terms of the Agreement. The recommendation, therefore, was that Plaintiff's contribution and cost recovery claims be dismissed, along with its claim for declaratory judgment.

I. Background

Plaintiff Brooklyn Union Gas Company, which does business as "National Grid," brought a claim for cost recovery, contribution, and declaratory judgment on January 4, 2017, against the United States, Exxon Mobil, Texaco, Chevron, and other defendants. Plaintiff alleged that the Defendants were liable under CERCLA for the disposal of hazardous substances at facilities adjacent to the Bushwick Inlet and the East River, in Brooklyn, New York (the "Bushwick Site," or Site"). The Bushwick Site was a center of industrial activities from the mid-1880s until 2014. Many of those activities involved the production and storage of petroleum or petroleum products.

In 2007, National Grid and the New York State Department of Environmental Conservation ("NYSDEC") entered into an Administrative Order on Consent ("AOC") that addressed a number of regional sites including the Bushwick Site. The AOC called for National Grid to investigate and develop remedial measures for manufactured gas plants that had operated at several of those locations. On May 25, 2018, Defendants moved to dismiss Plaintiff's CERCLA claims, asserting that its contribution claim under § 113 was time barred and that its cost recovery claim under § 107 was precluded because the § 113 claim had been available. The motions to dismiss were referred to Magistrate Judge Steven Tiscione, and in this opinion he recommended that the court: (1) dismiss the § 113 claim with prejudice; (2) dismiss the § 107 claim with leave to amend; and dismiss the claim for declaratory relief, also with leave to amend.

II. Plaintiff's § 113 Claim Was Time Barred

CERCLA allows a person who has "resolved its liability to . . . a State" for some or all of a response action or the attendant costs to seek contribution from any person who is not a party to the settlement. Once the right to seek contribution is triggered, CERCLA imposes a three-year statute of limitations for bringing such a claim. The statute begins to run when the settlement with the government is entered.

Defendants argued that the AOC resolved National Grid's liability to NYSDEC when it was executed in 2007, and that the statute of limitations began to run at that point. According to Defendants, the statute would have run by 2010 and the claim Plaintiff filed in 2017 would be time barred. Plaintiff argued that the AOC did not resolve its liability to the State because the company terminated the AOC before completing the performance it required. Since liability was not resolved, due to termination of the agreement, Plaintiff argued that CERCLA's statute of limitations was not triggered and the contribution claim was still available.

A. Split of Authority Regarding When CERCLA Liability is Resolved

The Magistrate observed that there is "consensus amongst the Circuits that a case-by-case analysis of the AOC's terms is required to determine whether an AOC sufficiently resolves liability to establish a CERCLA 113 claim." The Circuits are split, however, on the effect of executing or entering an AOC where a release of liability is conditioned on performance, as it was in this case. For some courts, an AOC can only resolve liability when the required performance is completed. This is particularly true "where the AOC has strong language conditioning liability on completed performance." "If performance is never completed, the liability is never resolved and a CERCLA 113 claim is never available." This approach has been followed by the Seventh Circuit and by one district court in the Second Circuit. The Magistrate referred to this understanding as a "wait-and-see" approach. He noted that, even under this approach, an AOC can resolve liability at the time it is executed if the Agreement's resolution language is sufficiently clear.

Other courts, including the Sixth and Ninth Circuits, have held "that an AOC either resolves or does not resolve liability immediately upon execution of the agreement based on the language of

the AOC, without considering post-execution performance." Even in these jurisdictions, however, courts "differ on when language is so conditional as to defeat resolution." This interpretation has been called an "immediate determination" approach.

The Second Circuit has not addressed this question, but the Magistrate found the approach taken by the Sixth and Ninth Circuits more persuasive and recommended that this court follow it. First, the plain language of § 113(g)(3)(b) provides that the three-year statute of limitations begins to run upon "*entry* of a judicially approved settlement" (emphasis added). Therefore, "under the Seventh Circuit's [wait-and-see] approach, a party's contribution action could accrue [according to the terms of the statute] *after* the statute of limitations had already expired" (emphasis in original). To construe the statute in this way creates an internal inconsistency.

Second, the Magistrate opined that determining whether liability has been resolved at the time of execution, rather than waiting for performance, "promotes certainty and finality." That, in turn, promotes CERCLA's goal of encouraging timely settlement by making settlement more attractive. It also "helps third parties to timely assess their potential liability for contribution actions," again promoting "early resolution . . . of such claims." For these reasons, the Magistrate recommended that the AOC be analyzed "at the time of execution, without considering post settlement performance."

B. The AOC's Language Reflected Clear Intent to Resolve Liability Upon Execution

The language of the AOC showed a clear intent to resolve Plaintiff's liability upon entry of the Agreement. The title itself -- "administrative settlement" – mirrored the language of § 113, and the AOC specifically stated that it "constitute[d] an administrative settlement within the meaning of CERCLA . . . § 113(f)(3)(B)." In addition, the language of the AOC was in the present and past tense, not the future tense. It stated, for example, that the AOC "*resolves* Respondent's liability to the State under . . . CERCLA." It provided that "Respondent *is entitled* to seek contribution under CERCLA." Elsewhere, it stated that "Respondent shall be deemed to *have resolved* its liability to the State for purposes of contribution protection." The fact that the AOC's Covenant Not to Sue was conditioned upon the State's approval of a final report did not negate this reading of the Agreement. As the court noted:

> If a covenant not to sue conditioned on completed performance negated resolution of liability, then it is unlikely that a settlement agreement could *ever* resolve a party's liability due to CERCLA's requirement that the President certify that remedial action has been completed before a covenant not to sue can be effective. . . . An agreement may "resolve[]" a PRP's liability once and for all without hobbling the government's ability to enforce its terms if the PRP reneges.

III. CERCLA § 107 Claim May Be Available for Sites Not Covered by AOC or Expenses Incurred After the AOC was Terminated

Courts have consistently ruled that a § 107 cost recovery claim "is not available when a party had a right of contribution under CERCLA 113 for those same costs." Case law is mixed, however, as to whether response costs outside an AOC can be recovered under § 107. In this case, a number of sites National Grid was remediating were outside the scope of the AOC. In addition, at one site that was covered by the AOC, National Grid continued to incur expenses after the AOC was terminated. Magistrate Tiscione did not address this question. Finding National Grid's § 107 claims insufficiently pled, he recommended that those claims be dismissed without prejudice.

IV. Declaratory Judgment Claim Dismissed

In a § 107 cost recovery claim, a court may enter a declaratory judgment on liability for future response costs or damages. A declaratory judgment, however, is available only for an "active cost recovery action." Because the Magistrate recommended dismissal of Plaintiff's § 107 claims, he also recommended dismissal of the declaratory action claim, with leave to amend.

Editor's Note: This opinion highlights the importance of timely filing of contribution claims following any settlement agreement that could be interpreted as resolving CERCLA liability. The federal courts are split on the issue of when liability is considered resolved, making it difficult to predict which approach a court may follow. Failure to file timely can result in the loss of any potential recovery under CERCLA for costs incurred under the terms of the agreement.

* * *

CERCLA; COST RECOVERY; CONTRIBUTION; TRIGGERING EVENT; CONTRIBUTION PROTECTION; COUNTERCLAIM; VOLUNTARY CLEANUP; SITE DELINEATION

Hobart Corp. v. Dayton Power & Light Co., No. 3:13-cv-115 (S.D. Ohio Aug. 20, 2018)

District Court Holds a PRP Defendant Cannot Counterclaim for Cost Recovery Under CERLCA § 107 for Voluntary Expenses Incurred in Cleaning Up a Site for which Plaintiff Has Contribution Protection

In this case, the court was called upon to determine the financial liability of two PRPs for cleanup of the South Dayton Dump and Landfill (the "Site"). Each of the two parties claimed preferential treatment. The plaintiff Hobart led the cleanup under the terms of a settlement with EPA and received contribution protection. It then sued Dayton Power & Light ("DP&L") and other PRPs for contribution under § 113. But DP&L had a strong counterclaim. It had performed voluntary cleanup on its own property adjacent to the landfill. Citing the Supreme Court's decision in *U.S. v. Atlantic Research Corp.*, 551 U.S. 128 (2007) ("*Atlantic Research*"), it countersued Hobart under § 107 for joint and several liability.

The court distinguished *Atlantic Research* and dismissed the counterclaim. It found that DP&L's property was part of the Site Hobart was cleaning up and determined that DP&L's voluntary cleanup efforts did not entitle it to the clear advantage of suing Hobart (and other PRPs) for joint and several liability. As between a party that had taken the lead in the cleanup effort and settled with the government, and one that had performed voluntary cleanup on a small portion of the site, the party with contribution protection prevailed. The court determined that Hobart had fulfilled Congress's intent by settling early and taking significant steps toward cleanup. DP&L was not without a remedy since it could still sue all the other PRPs at the Site for contribution under § 113.

I. Background

The South Dayton Dump and Landfill Site, in Moraine, Ohio, was a depository for municipal and industrial wastes for half a century. When environmental sampling in the early 2000s revealed the need for cleanup, Plaintiffs Hobart Corporation, Kelsey-Hayes Company, and NCR Corporation took the lead under the terms of a series of Administrative Settlement Agreements and Orders on Consent ("AOCs") executed in 2006, 2013 and 2016. In return for their early settlement with EPA, Plaintiffs were given contribution protection. Plaintiffs then sued Valley Asphalt, DP&L and numerous other defendants under CERCLA, seeking contribution for their costs.

A number of defendants filed counterclaims against the Plaintiffs, but most of those claims were dismissed by the court in or before August 2017. Valley Asphalt and DP&L were granted leave to amend their claims and asserted in their amended counterclaims the right to cost recovery under § 107. This decision addresses the amended counterclaims and Plaintiffs' motion to dismiss them. For the reasons summarized below, Plaintiffs' motion to dismiss DP&L's counterclaim was

granted in its entirety, and their motion to dismiss Valley Asphalt's counterclaim was granted in significant part.

II. Valley Asphalt's Amended Counterclaim

A. Counterclaim for Cleanup Costs

In 2013, EPA issued a Unilateral Administrative Order ("UAO") requiring Valley Asphalt to test for vapor intrusion and install a vapor abatement mitigation system on its own property. The Valley Asphalt plant was located directly adjacent to the landfill and was clearly part of the Site. Having already been sued by Plaintiffs in this litigation, Valley Asphalt filed a counterclaim for contribution under § 113(f) for the costs it incurred in complying with the UAO.

In its August 2017 decision, the court pointed out that Valley Asphalt's property was located within the boundaries of the Site, and that the 2013 AOC required Plaintiffs to do the same work throughout the Site that was demanded of Valley Asphalt in the UAO. Because the vapor intrusion issue was addressed in the AOC, the court held that Plaintiffs were entitled to contribution protection for Valley Asphalt's costs. In the amended counterclaim addressed in this decision, Valley Asphalt brought a cost recovery action for the same costs under CERCLA § 107. It also sought contribution from Plaintiffs under § 113(f) for the cost of identifying other PRPs.

Plaintiffs argued that their suit against Valley Asphalt constituted a triggering event under § 113(f)(1), making Valley Asphalt eligible to *seek* contribution. Valley Asphalt could not collect from Plaintiffs on a contribution counterclaim because of Plaintiffs' contribution protection. However, under Sixth Circuit precedent, Valley Asphalt's eligibility to bring a claim for contribution foreclosed any opportunity for cost recovery under § 107 (*see Hobart Corp. v. Waste Mgmt. of Ohio*, 758 F.3d 757 (6th Cir. 2014)). The court noted that Valley Asphalt could bring a contribution claim against the other PRP defendants, but it could not obtain contribution from the Plaintiffs and could not maintain a counterclaim against the Plaintiffs under § 107. Responding to Valley Asphalt's complaint that this result was unfair, the court noted that Plaintiffs had taken the lead in cleaning up the Site, and that this statutory result was intended by Congress to fulfill CERCLA's goal of encouraging timely settlement.

B. Costs of Identifying Additional PRPs

Valley Asphalt also sought cost recovery from the Plaintiffs under § 107 for the cost of identifying additional PRPs. That portion of Valley Asphalt's counterclaim was not dismissed. Those costs – if established – would be outside the scope of Plaintiffs' contribution protection. As of this writing, Valley Asphalt has not established any specific costs, but its right to recover such costs, if it can prove them, was not dismissed.

III. Dayton Power & Light's Amended Counterclaim

DP&L was in much the same position as Valley Asphalt. Having been sued by the Plaintiffs, its right to seek contribution had been triggered, but recovery against the Plaintiffs under § 113 was foreclosed by Plaintiffs' contribution protection. DP&L's rights under § 107 was less clear than Valley Asphalt's, however, because DP&L had incurred costs *voluntarily* to remediate its *own property*. The DP&L property is located across a road from the former landfill, and when the court considered the defendant's counterclaim in its August 2017 decision, the court mistakenly believed that DP&L's property lay outside the confines of the Site. DP&L had asserted in 2017 that its property had been polluted by contaminants "flowing *from* the site" and "*onto*" its property. Given those representations, the court framed the issue as whether DP&L should be allowed to recover costs voluntarily incurred on its own property lying outside the Site.

In its amended counterclaim, DP&L cited the Supreme Court's decision in *Atlantic Research* for the proposition that a PRP that incurs cleanup costs voluntarily may seek cost recovery under § 107. In the filings supporting its amended counterclaim, however, DP&L clarified that the "Site" had been broadly defined by EPA in the 2006 AOC to include the DP&L property, and that its property had been designated in the 2016 AOC as a part of "Operable Unit 2." With this new understanding, the court distinguished *Atlantic Research* from the current case. First, in *Atlantic Research*, the PRP that voluntarily cleaned its property had brought an initial claim, not a counterclaim against a PRP that had already received contribution protection. Second, the remediated property in *Atlantic Research* had not been the subject of a contribution claim. Explaining its rationale for dismissing DP&L's counterclaim in this decision, the court stated as follows:

> In *Atlantic Research*, the Supreme Court did hold that a PRP that has voluntarily incurred cleanup costs may bring a § 107(a) cost recovery action against other PRPs. . . . Nevertheless, *Atlantic Research* is factually distinguishable [from this case] in that it did not involve a PRP defendant asserting a § 107(a) *counterclaim* against a PRP plaintiff for response costs incurred at the same Site. The court has found no authority indicating that such a claim would be viable. . . . Once common liability has been established for contamination at the Site, the Court must equitably allocate all response costs among the PRPs (emphasis in original).

Editor's Note: This case highlights the important role that site delineation can play. Had DP&L's property been defined as a separate site it could have sued the other PRPS under 107 for any runoff to its site. The term "site" is not defined in CERCLA, and there are no precise rules dictating how the boundaries of a site are determined. EPA, however, has clarified that it has sole discretion to make that decision (*See* Environmental Protection Agency, *Clarifying the Definition of "Site" Under the National Priorities List*, Quick Reference Fact Sheet (May 1996) ("Fact Sheet").) Even a State agency can only recommend what it believes is an appropriate boundary

(*see, e.g.*, Memorandum from the Office of Land Quality, Indiana Dep't of Environmental Management, to EPA Region 5 (Sept. 19, 2017) (noting that EPA had overruled the state's recommendation of a smaller boundary map for the Riverside Groundwater Plume Site in Indianapolis).

Under EPA procedures, sites are determined on the basis of known or threatened releases, and typically include the entire area contaminated, not merely the boundaries of the source facility. "The boundaries of an NPL site are not tied to the boundaries of the property on which a facility is located" (Fact Sheet, p. 3). Moreover, "[t]he boundaries [of a site] can, and often do, change as further information on the extent and degree of contamination is obtained" or as cleanup progresses and contamination becomes less extensive. In this case, the 2006 AOC originally defined the South Dayton Dump and Landfill Site to "include[] nearby areas where hazardous substances, pollutants or contaminants have or may have come to be located." The initial site map clearly encompassed both Valley Asphalt and the DP&L facility as part of the "site." The fact that DP&L's property was part of the larger site for which the Plaintiffs had already received contribution protection was held by this court to foreclose DP&L's counterclaim under § 107.

This decision will likely serve as a disincentive for PRPs to conduct voluntary cleanup if their property is part of a larger site for which other PRPs have already been granted contribution protection. As this case stands, DP&L is precluded from recovering any of its voluntary costs from the Plaintiffs, who are likely the parties most responsible for contaminating DP&L's property.

Justice Thomas, writing for the Supreme Court in *Atlantic Research*, seems to have foreseen the question raised by this case. In *dictum*, at the end of the *Atlantic Research* opinion, he addressed the effect of a PRP's recovery under § 107 on CERCLA's contribution bar. He suggested that allowing a party to recover costs under § 107 would "not eviscerate the settlement bar set forth in § 113(f)(2)."

* * *

COMPREHENSIVE ENVIRONMENTAL, RESPONSE, COMPENSATION, AND LIABILITY ACT, HAZARDOUS SUBSTANCE; RESIN; UNSATURATED POLYESTER RESINS; ANHYDRIDE; STYRENE; LIST OF LISTS; SUMMARY JUDGMENT; CURE; INERT; POTENTIALLY RESPONSIBLE PARTY; ARRANGER; POSSESSION

LCCS Grp. v. A.N. Webber Logistics, Inc., No. 16 C 5827 (N.D. Ill. Sept. 19, 2018).

CERCLA Liability Does Not Attach if a Solid Waste Contains Hazardous Substances that are "Irreversibly Bound" to It but It May Attach if the Hazardous Substances can Be Released by an Intervening Force

In a CERCLA contribution action in which two defendants attempted to escape liability, the United States District Court for the Northern District of Illinois denied motions for summary judgment because material facts are in dispute. Notably, the court ruled that while CERCLA liability will not attach to a waste merely because it contains hazardous substances as a raw material if the hazardous substances are "irreversibly bound" but that if intervening force can possibly allow release of the hazardous substance, there may be liability. Due to disputed facts regarding whether hazardous substances are genuinely "irreversibly bound," the court denied summary judgment in this litigation to both Plaintiff and to the Defendant producer of the allegedly harmless waste. Also, lack of sufficient facts prompted the court to deny summary judgment to another Defendant that possessed hazardous jet fuel but claims the U.S. Department of Defense (DOD) arranged for its disposal at the Superfund site.

Background

LCCS Group is a legal entity comprised of signatories to an agreement with the Environmental Protection Agency (EPA) under which the LCCS Group agreed to pay remediation costs to clean up the Lake Calumet Cluster Superfund Site (Cluster Site). In this suit, the LCCS Group is attempting to increase the group to include Interplastic Corp. and Central Michigan Railway by seeking contribution under CERCLA § 107(a)(3)-(4) and declaratory judgment regarding their liability under CERCLA § 113(g)(2).

Interplastic's involvement in this case arose from a single delivery to the Cluster Site consisting of fifty drums of "waste resin." Although the exact composition of the waste resin is not known, all resins produced by Interplastic at that time were unsaturated polyester resins (UPRs) featuring anhydride and styrene as raw materials. In their raw forms, both of those materials appear on EPA's "List of Lists," a non-exclusive list of substances deemed "hazardous" for purposes of establishing CERCLA liability. All UPRs are thermoset polymers designed to undergo a chemical reaction known as "curing" that transforms the formerly liquid material into a solid. Interplastic maintains that once thermoset polymers solidify, they cannot break down into their constituent parts. Although Plaintiff in this case appears to admit this fact by not objecting directly to Interplastic's claim of irreversibility, it also appears to dispute the claim by noting that Interplastic acknowledges that intervening forces could effect breakdown of the UPCs at the Cluster Site.

Interplastic always sold the UPRs in liquid form, as this form is what is usable to the customer. To enhance the product's viability, Interplastic added inhibitors to delay solidification of the UPRs, extending their shelf life. "Waste resin" was unusable material produced when the manufacturing process went awry, resulting in an inappropriate level of inhibitor in the batch, making the UPRs unsuitable for sale. When this happened, Interplastic would treat the resin on-side, placing it in a "hot-box" to polymerize it, causing the waste to solidify. On rare occasions, when the waste resin would not cure fully even with the "hot box" treatment, Interplastic would ship the waste resin for off-site disposal, just as the waste at issue in this case was sent to the Cluster Site.

The other new potentially responsible party (PRP) sued in this case is Central Michigan Railway (Central Michigan), the corporate successor to Lakeshore Terminal & Pipeline Co., which Plaintiff contends arranged for a third party to deliver 2,800 gallons of flammable jet fuel waste to the Cluster Site. The manifest for the waste shipment identified Lakeshore as the waste's generator. Although Central Michigan concedes that it stored the jet fuel waste in a tank on its premises, it claims it never owned the fuel or arranged for its disposal. Instead, it claims that it merely stored the fuel for the DOD and that DOD arranged with the transporter to deliver the waste to the Cluster Site.

Both Interplastic and Central Michigan filed motions for summary judgment, contending they could not be liable under CERCLA. Plaintiff cross-moved for summary judgment against Interplastic. The court addressed each company individually, ultimately denying all summary judgment motions due to lack of sufficient facts.

Summary Judgment Regarding Liability of Interplastic Was Denied Because Factual Questions Remain Regarding Whether Hazardous Substances Contained in UPRs are "Irreversibly Bound" Beyond Ability to Be Released by an Intervening Force

Plaintiff claimed Interplastic is a potentially responsible party (PRP) because it arranged for disposal of the fifty drums of waste resin containing hazardous substances. Interplastic contends that because the waste resin had irreversibly solidified, rendering it inert, it was not a "hazardous substance" under CERCLA. Noting that "hazardous" has a broad meaning under CERCLA, the court observed that while the List of Lists does not contain resin, waste resin, polyester resin, or UPRs, it contains two substances used as raw materials for Interplastic's UPRs: styrene and maleic anhydride. Thus, the heart of the dispute centers around whether use of a hazardous substance, alone, automatically makes the resulting end product a hazardous substance. Plaintiff claims that because hazardous substances are used as raw materials, the UPRs "contain" hazardous substances, making the UPRs themselves hazardous. Interplastic, on the other hand, argues that the raw building blocks cannot create liability when the resulting end products are inert.

The court reviewed similar cases from the Second Circuit and the District of Delaware but noted that neither case was squarely on point for the current situation. Although Plaintiff relied on *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 515-16 (2d Cir. 1996), in which the Second Circuit noted that the presence of listed substances "*in any form*" was sufficient to trigger CERCLA liability,

the waste dumped in that case contained hazardous substances "in separate identifiable forms." Interplastic relied primarily on *United States v. New Castle County*, 769 F. Supp. 591, 594-95 (D. Del. 1991), which hazardous substances used to produce polyvinyl chloride resin (PVC), a substance *not* listed as hazardous and that is solid and stable under normal conditions. Although one of PVC's integral ingredients, vinyl chloride, is a CERCLA-defined hazardous substance, it was established that PVC neither depolymerizes nor decomposes under normal landfill conditions, so it was undisputed that the previously-hazardous vinyl chloride was permanently bound within the PVC and could not be released. However, parties in that case also agreed that PVC contains trace amounts of *unreacted* vinyl chloride which could be freed if the PVC were heated in a vacuum. These traces of unreacted vinyl chloride were the basis of the argument regarding whether the waste PVC could be considered to contain hazardous substances. *Id.* In *New Castle*, the District of Delaware ruled that when a defendant's waste is a non-hazardous substance, a plaintiff must show that the waste is "capable of generating or releasing a hazardous substance at the site in order to show that the defendant's waste 'contains' a hazardous substance" in order to establish CERCLA liability. *Id.* at 597-98.

This Court concluded that CERCLA liability does *not* attach when a disposed-of waste is not itself a hazardous substance but contains hazardous materials that are "irreversibly bound within the waste." However, liability can arise if separating out those hazardous substances is at all possible, even the separation requires an intervening force.

Despite Interplastic's claim that it cannot be liable because its polymerized resin permanently binds the components and no intervening force can create separation, this Court ruled that Interplastic cannot prevail at summary judgment for two reasons. First, the parties dispute whether the UPRs genuinely remain permanently cured once polymerized. Second, the record is unclear regarding whether the specific waste resin deposited at the Cluster Site was fully cured. Interplastic says that all UPRs eventually cure, but it also noted that when a batch of UPRs "failed to cure" it would contract to have that "waste *liquid* resin" disposed of. Also, the court observed that if all UPRs eventually would self-harden on their own, it seems "puzzling" that Interplastic would to go to the trouble of arranging for off-site disposal.

Ultimately, the court denied summary judgment to both Plaintiff and Interplastic noting the need to resolve questions of disputed material facts: (1) whether fully-cured UPRs are unalterably polymerized, even upon introduction of an intervening force; and (2) if so, whether the Interplastic resins disposed of at this Site were fully cured or only partially cured.

Due to Factual Questions Regarding What Entity Arranged for Disposal of Waste Jet Fuel, the Court Denied Central Michigan's Motion for Summary Judgment

Central Michigan's motion for summary judgment challenged its status as an "arranger" for disposal of waste at the Cluster Site. "Arranger" liability requires proof that the defendant (1) owned or possessed (2) hazardous substances and (3) "arranged" for transport of the material for disposal or treatment at a CERCLA-defined facility. 42 U.S.C. § 9607(a)(3). In simple terms, an

"arranger" takes "intentional steps to dispose of a hazardous substance." *Burlington N. & Santa Fe Ry. v. United States*, 446 U.S. 599, 611 (2009).

Despite Central Michigan's claim that it never *owned* the jet fuel at issue in this dispute, the court ruled that because the fuel was stored in tanks on the property owned by Central Michigan, it could not reasonably claim that it (or its corporate predecessor, Lakeshore) *possessed* the fuel. Both parties agree that the fuel contains hazardous substances. Thus, Central Michigan's attempt to escape liability is based upon its claim that the decision-making and logistics related to the fuel's transportation and disposal was handled entirely by DOD. Although Central Michigan cites various communications between DOD, Lakeshore, and the transporter that reference governing regulations as proof that DOD made the disposal arrangements, the communications lacked specificity regarding what entity made the disposal arrangements. It was unclear whether the communications demonstrate that DOD made disposal arrangements or was merely highlighting responsibilities regarding proper disposal. The court observed that while it is possible DOD may have arranged for the fuel disposal, based on the existing record, these arrangements also could possibly have been made by Lakeshore. Thus, the court denied Central Michigan's motion for summary judgment due to lack of clarity regarding what entity arranged for the fuel disposal.

* * *

CERCLA; PENNSYLVANIA LAW; STRICT LIABILITY; LANDOWNER LIABILITY

Pennsylvania Department of Environmental Protection v. Trainer Custom Chemical, LLC, No. 17-2607 (3d Cir. Oct. 5, 2018)

Third Circuit Holds Current Land Owner Is Strictly Liable for All Remediation Costs Even Though Disposal and Cleanup Occurred Prior to Ownership

In a suit brought by the State of Pennsylvania, the 3d Circuit held that the meaning of "all costs" in § 107(a) includes remediation costs incurred before and after land ownership. The District Court drew a temporal line, holding one party liable under CERCLA and Pennsylvania law only for the response costs incurred after it bought the Site but not for the remediation costs that arose before. The District Court based its decision on *California Department of Toxic Substances Control v. Hearthside Residential Corp.*, 613 F.3d 910 (9th Cir. 2010), but, according to the third Circuit, that decision gives no guidance as to the meaning of "all costs." According to the Circuit court:

The *Hearthside* court addressed which of two entities was a current owner of a property for purposes of § 107(a)(1). 613 F.3d at 911-12. One was a corporation that had owned the property while all cleanup costs were incurred, and the other was the state's land commission that owned the property at the time the lawsuit was filed but not at any time when costs had been incurred. The court held that an owner of a property at the time cleanup costs are incurred cannot avoid liability for such costs by selling the property prior to the filing or initiation of a response action by the government and, therefore, that the party who owned the property at issue at the time the cleanup costs were incurred was a responsible party. *Hearthside* does not stand for the proposition that it is permissible to temporally partition § 107(a)(1) liability with respect to cleanup costs. Here, because Trainer "[did] not dispute that [it], as the owner and operator of the Site, [was] a responsible party under CERCLA[,]"*see supra* Section III, there was no need to turn to *Hearthside* to determine again whether Trainer was a current owner of the Site…. And because we conclude that Trainer is liable under CERCLA, we also conclude that it is liable under HSCA (Pennsylvania law).

* * *

COMPREHENSIVE ENVIRONMENTAL, RESPONSE, COMPENSATION, AND LIABILITY ACT; LEAD AND ZINC SMELTER; HEAVY METALS; HAZARDOUS SUBSTANCES; UPPER COLUMBIA RIVER; TRIBES; EXTRATERRITORIALITY; POTENTIALLY RESPONSIBLE PARTY; LITIGATION EXPENSES; RESPONSE COSTS; ATTORNEY'S FEES; JOINT AND SEVERAL LIABILITY; DIVISIBILITY DEFENSE; APPORTIONMENT; DIVISBILITY

Pakootas v. Teck Cominco Metals, Ltd., No. 16-35742 (9th Cir. Sept. 14, 2018).

Investigatory Costs are Recoverable as Removal Costs, Even if Such Costs Have a Dual Purpose of Helping Litigation; Governments May Recover Attorney's Fees as Part of Enforcement

In a CERCLA civil suit seeking to recover costs of responding to pollutant caused by waste dumped into the Upper Columbia River by a Canadian lead and zinc smelter, the Ninth Circuit affirmed the district court's award of response costs and summary judgment denying the smelter's divisibility defense. Investigatory costs are recoverable response costs, even though they served the dual purpose of advancing the litigation and acquiring data about the extent of contamination, and attorney's fees are recoverable by the plaintiff Indian tribes as part of enforcement costs. The smelter's divisibility defense failed because it presented data only about its contamination rather than all site contamination, thus failing to demonstrate that the harm is capable of apportionment when possible interaction between types of contamination is considered. It also failed to consider the impact of environmental hot-spots as would be necessary to show that the harm can be divisible.

Background

This appeal is the latest development in a decades-long dispute related to liability of Teck Metals for dumping several million tons of industrial waste into the Columbia River, which begins in Canada, running through British Columbia and then bending south and entering the United States in Washington. This case concerns the Upper Columbia River, a 150-mile stretch between the Canadian border and the Grand Coulee Dam. The Upper Columbia is highly significant for the Confederated Tribes of the Colville Reservation: historically, the tribes relied on the river's plentiful fish for survival, and they still have cultural traditions focused on the river and continue to use if for fishing and recreation.

Teck Metals (formerly Teck Cominco Metals) operates the world's largest lead and zinc smelter in Trail, British Columbia about ten miles upstream of the U.S. border. For nearly a century, the Upper Columbia has been fouled by Teck's toxic waste. For a 65-year period, Teck discharged almost 10 million tons waste slag containing impurities from the smelting process directly into the free-flowing Columbia River. It used contaminated effluent to wash the debris into the river. The solid and liquid wastes contained roughly 800 million pounds of heavy metals plus smaller amounts of other hazardous substances. The waste came to rest on the riverbed and banks down-

stream as the water becomes calmer near the Lake Roosevelt, the reservoir created by the Grand Coulee Dam.

In 1999, the Colville Tries petitioned the U.S. Environmental Protection Agency (EPA) to assess threats posed by the contamination in the Upper Columbia River. After completing its preliminary assessment, EPA issued a unilateral administrative order against Teck directing it to perform a remedial investigation and feasibility study (RI/FS) of the site under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Although Teck disputed whether it was subject to CERCLA, at that point, EPA chose not to enforce the order. The Colville Tribes then tried to enforce the EPA order using a CERCLA citizen suit; the State of Washington joined as a plaintiff-intervenor.

Teck moved to dismiss the action, arguing primarily that CERCLA does not apply extraterritorially to its activities in Canada. The district court denied Teck's motion to dismiss and certified the issues for immediate appeal. While the appeal was pending, Teck and EPA entered a settlement agreement withdrawing EPA's order and committing Teck to fund and conduct an RI/FS modeled on CERCLA requirements. Although the required study was aimed to investigate the extent of contamination, provide information for EPA's risk assessment, and evaluate potential remedial alternatives, it was silent as to Teck's responsibility to cleaning up the site. In 2006, the Ninth Circuit affirmed the district court's denial of Teck's motion to dismiss the citizen suit. *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1082 (9th Cir. 2006) (*Pakootas I*). The court held that the suit did not involve an extraterritorial application of CERCLA because Teck's pollution had "come to be located" in the United States. It also held that the compliant stated a claim for relief because the actual or threatened release of hazardous substances could subject Teck to "arranger" liability under CERCLA.

On remand, the Tribes and State filed amended complaints seeking cost recovery, natural resource damages, and related declaratory relief under CERCLA. The litigation was trifurcated into three sequential phases to determine (1) whether Teck is liable as a potentially responsible party (PRP); (2) Teck's liability for response costs; and (3) Teck's liability for natural resource damages. After dismissing a Teck attempt to advance a divisibility defense on summary judgment, in trial Phase I, the district court concluded that Teck was jointly and severally liable to the Tribes and the State as an "arranger" under CERCLA § 107(a)(3). In Phase II, the State settled its claim for past response costs, but the Tribes proceeded to trial. The district court entered judgment, awarding the Tribes almost $3.4 million for investigative expenses incurred through December 2013, almost $4.9 million for attorney's fees through that date, and $344,300 as prejudgment interest. In this opinion, the Ninth Circuit addresses Teck's appeals from the district court's summary judgment order and partial judgment on the first two phases of trial.

The Ninth Circuit Has Jurisdiction Over the Appeal Because It is Reviewing a Partial Final Judgment and Teck's Use of the Columbia River for Waste Disposal Subjects it to Personal Jurisdiction in Washington

Teck challenged the Ninth Circuit's jurisdiction to review this partial summary judgment on two grounds. First, it argued that appellate review would be inappropriate before final judgment on all types of response costs (i.e., both response costs and the natural resource damages claim that will be the focus of Phase III). Teck also claimed it should not be subject to personal jurisdiction in Washington.

A final judgment is required prior to appellate review, but the law is somewhat unclear about what constitutes an individual claim that can become a final judgment. Separate claims can arise out of the same basic occurrence and can have overlapping facts. The Tribes' for response costs and for natural resource damages present multiple claims because each of these claims requires some factual showing not required by the other. Response cost and natural resource damage claims are alike in that both require proof that the defendant is a PRP, the site is a "facility" under CERCLA, and there release or threatened release of hazardous substances. However, the remaining requirements differ: a government's claim for response costs requires it to show that (1) it has incurred response costs (2) that are not inconsistent with the national contingency plan. On the other hand, a natural resource damages claim requires (1) injury to natural resources under the plaintiff's trusteeship and (2) that the injury resulted from the release or threatened release of the hazardous substances. CERCLA's statutory language also shows that these claims are separate, as the statute imposes different limitations periods for response cost claims and for natural resource damage claims. Given the lengthy duration of this litigation and CERCLA's goal of ensuring prompt payment by polluters, the district court's choice to issue a partial summary judgment for response costs was not an abuse of discretion.

Teck also challenged the district court's exercise of personal jurisdiction, objecting to the district court's use of the so-called "effects" test of *Calder v. Jones*, 465 U.S. 783 (1984), and also claiming that even if used, the required standard was not satisfied. Although another test may be used for contracts cases, the *Calder* case is appropriate, as it is the standard use for torts cases. Because CERCLA liability evolved largely from common law nuisance and liability for toxic tort typically is evaluated using the *Calder* test, the Ninth Circuit affirmed the district court's use of this analysis.

Under the *Calder* test, the defendant must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state. Teck challenged the "expressly aimed" requirement, claiming that its activities were not expressly aimed at Washington. The court noted, however, that it had "no difficulty" concluding that Teck expressly aimed its waste at Washington. Teck's leadership knew the Columbia River carried the waste away from the smelter and yet continued discharging tons of waste into the river, knowing that that much of it traveled downstream into Washington. Teck knew that its slag had been found on beaches of the Columbia River south of the United States border as early as the 1930s; by the 1980s Teck's internal documents recognized that its waste was negatively impacting

Washington's aquatic ecosystem; and by the early 1990s, Teck's management acknowledged that the company was "in effect dumping waste into another country." Rejecting Teck's claim that its waste was aimed only at the river and not at Washington, the court noted that "there would be no fair play and no substantial justice if Teck could avoid suit in the place where it deliberately sent its toxic waste."

Award of Investigatory Costs and Attorney's Fees Affirmed: Investigatory Costs Are Recoverable as Costs of Removal, Even If Incurred for Dual Purposes of Supporting Cleanup and Litigation, and Attorney's Fees Are Available to Governmental Entities

Teck challenged the district court's response costs award. As explained below, the Ninth Circuit affirmed both of these awards, ruling that the investigation expenses were recoverable as part of a "removal" action and characterizing the attorney's expenses as "enforcement activities."

CERCLA § 107(a)(4)(A) provides that a PRP is liable for "all costs of removal or remedial action" incurred by the U.S. government, a state government, or an Indian tribe. "Removal" is defined to include "the cleanup or removal" of hazardous substances, assessment of release or threatened release of hazardous substances into the environment, and taking of actions necessary to prevent, minimize or mitigate damage that may otherwise result from a release of hazardous substances. § 101(23). The definition is construed expansively to promote CERCLA goals, and the Ninth Circuit held that the definition of "removal" reaches "all acts" that are "not an unreasonable means" of furthering the enumerated goals.

Efforts to identify PRPs also are recoverable costs of removal. *Key Tronic Corp. v. United States*, 511 U.S. 809, 820 (1994) (attorney efforts to search for other parties are recoverable "response" costs due to the relationship to enforcement activities, and such efforts are distinct from litigation expenses). Tracking down other polluters increases the probability that a cleanup will be effective and promotes the CERCLA goal of minimizing or mitigating damage to public health or the environment. Furthermore, it also promotes the statute's goal of ensuring polluters pay for the messes they create.

The Tribes' investigatory efforts were "not an unreasonable means" of furthering at least three CERCLA purposes. First, the studies focused on location and migration of materials containing hazardous substances. Second, the experts studied whether the slag and effluent-contaminated sediment at the site leach contaminants into the environment. Third, the experts traced origins of the slag and sediment metals at the Site, showing that the wastes at the Site match the Teck smelter's isotopic and geochemical "fingerprint."

Teck argued that investigatory costs should not be recoverable because they were entirely "litigation-related," but the Ninth Circuit rejected this reasoning. In addition to noting that the out-of-circuit cases relied upon by Teck were factually distinguishable, the court emphasized that because the Colville Tribes brought their cost recovery action as a sovereign, they are entitled to "all" rather than merely "necessary" costs of response. Even when considering the scope of "necessary" costs, the court observed that there is no requirement for a nexus solely between recoverable costs

and clean-up activities. Observing that many, if not most, CERCLA plaintiffs consider both remediation cost recovery as they study site contamination, the court ruled that otherwise recoverable investigation costs do not suddenly become unrecoverable simply because the information is used to prove a PRP's liability. Thus, the Ninth Circuit affirmed the district court's award of all investigatory costs, noting that the investigatory expenses are costs of removal even though the activities had a double purpose supporting both cleanup and litigation efforts.

The Ninth Circuit also affirmed the award of attorney's fees and costs. The Superfund Amendments and Reauthorization Act (SARA) modified the definition of "response" to include enforcement activities, and EPA information supplied as part of the legislative process clearly included litigation costs within the scope of what it considers enforcement activities. Although the Supreme Court ruling in *Key Tronic* noted that private litigation expenses are not recoverable, it left open the question of whether a *government* can recover its attorney fees. In *United States v. Chapman*, 146, F.3d 1166, 1174-75 (9th Cir. 1998), the Ninth Circuit ruled that the government's ability to recover "all costs" gives it very broad recovery rights and that enforcement activities include attorney's fees. Because *Chapman* applies to all governmental entities listed in CERCLA, it applies equally to the Colville Tribes' efforts to enforce CERCLA against Teck.

Although Teck made several so-called "novel" challenges to the attorney's fee awards, the court rejected each challenge. First, the court ruled that the Colville Tribes clearly have enforcement authority to pursue this cost recovery, as CERCLA does not require the federal government to explicitly "delegate" enforcement authority to the Tribes. Furthermore, the attorney's fees are sufficiently "related to" response action at the site, as the investigatory studies were conducted during the course of litigation. Finally, in response to Teck's challenge of attorney's fees associated with the declaratory judgment claim, the court noted that any court awarding response costs in a § 107(a) claim must enter a declaratory judgment.

The Ninth Circuit also upheld the reasonableness of the $4.86 million attorney's fee award, despite Teck's objection that it exceeds the $3.39 awarded for investigatory costs. The declaratory judgment that CERCLA § 107(a) always requires in association with an award of response costs confers significant value, as it establishes continuing liability on the part of the defendant, making the ratio of attorney's fees to response costs a poor indicator of whether the attorney's fees are reasonable. After considering and rejecting Teck's arguments, the court affirmed the district court's award of attorney's fees.

Teck's Attempted Divisibility Defense Failed Primarily Due to Its Failure to Account for All Pollutants at the Site

Finally, the court review the district court's grant of summary judgment rejecting Teck's divisibility defense. CERCLA liability generally is joint and several, except in rare cases in which the environmental harm is divisible. Divisibility analysis involves two steps. First, the defendant must show that the environmental harm is theoretically capable of apportionment. Then, if the harm theoretically can be apportioned, the factual record must provide a "reasonable basis" on which to

divide the liability.

Although the defendant generally has the burden to demonstrate divisibility, in this situation, the district court granted summary judgment to plaintiffs, ruling that there is insufficient evidence supporting Teck's defense to create a genuine issue of material fact. Therefore, Teck argued that its burden of production was limited to the need to produce evidence related to specific pollutants it was alleged to have contributed, but the court rejected this narrow view, noting that the complaint had a broad focus, as it encompasses harm caused by *all* of the hazardous substances released or threatened to be released at the Site. The focus of Teck's expert testimony and argument was limited only to the six hazardous substances alleged to have originated from its smelter. This narrow focus was fatal to Teck's attempt to assert a divisibility defense.

At the first step of apportionment analysis, the court emphasized need to understand fully the overall "nature" of the harm to determine whether that harm is theoretically capable of apportionment. This analysis requires consideration of factors beyond just contribution of a particular defendant to evaluate the *effect* of the defendant's waste on the environment. A careful consideration of the synergistic impact of all pollutants is key to this analysis. In addition to the six heavy metals Teck acknowledges are associated with its slag, the Site has been evaluated for 199 contaminants of concern. Teck's divisibility expert ignored any potential interaction of the metals connected with Teck's slag with other pollutants at the site. The potential for chemical interaction and impacts of accumulation of various types of pollutants are particularly important here, because the most likely remedy at the Site will involve cleaning some but not all of the contaminants. Once the issue of potential mixing of Teck's metals with other pollutants arose, Teck was required to rebut the presumption that pollutant hotspots may present overall harm that is greater than sum of the individual pollutants. Thus, due to Teck's failure to account for all of the harm at the Site, the court ruled that it cannot prove that the harm is divisible.

Furthermore, Teck did not demonstrate a reasonable basis for determining the contribution of each cause to the single harm. All of Teck's expert's apportionment methods were variants of a volumetric approach, but the court observed that the record undercuts the reasonableness of using a volumetric approach. First, the record clearly reflects that geographic factors affect the river's contamination, establishing certain hotspots that will require varying remediation needs. Thus, any proxy for harm that did not account for geography cannot be reasonable. Second, a consideration of when wastes entered the river must be considered, something omitted from Teck's proposed volumetric approaches. Again, the court observed the likely existence of other independent factors that could affect the environmental harm and thus should have been considered.

Although the court noted that Teck would not have been required to rush the RI/FS and document fully every contaminant at the site to survive summary judgment, it was required to "comprehensively and persuasively address the effects of its waste," to develop an apportionment method that a rational trier of fact could find reasonable. Because it failed to do so, the court affirmed the district court's judgment holding Teck jointly and severally liable for the Colville Tribes' costs of response.

* * *

CLEAN AIR ACT; COMMERCE CLAUSE; FUEL STANDARDS

Am. Fuel & Petrochemical Mfrs. v. O'Keeffe, No. 15-35834 (9th Cir. Sept. 7, 2018)

Ninth Circuit Uphold's Oregon's Greenhouse Gas Emission Standards

The following summary was prepared by the Court.

The panel affirmed the district court's dismissal of a complaint challenging Oregon's Clean Fuels Program, which regulates the production and sale of transportation fuels based on greenhouse gas emissions.

Plaintiffs, the American Fuel and Petrochemical Manufacturers, American Trucking Associations, and Consumer Energy Alliance, alleged that the Oregon Program violated the Commerce Clause and was preempted by § 211(c) of the Clean Air Act.

Addressing the Commerce Clause claim, the panel held that plaintiffs' assertion that the Oregon Program facially discriminates against out-of-state fuels by assigning petroleum and Midwest ethanol higher carbon intensities than Oregon biofuels was squarely controlled by *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1081 (9th Cir. 2013). The panel held that like the California Low Carbon Fuel Standard at issue in *Rocky Mountain*, the Oregon Program discriminated against fuels based on lifecycle greenhouse gas emissions, not state of origin.

The panel held that the complaint failed to plausibly allege that the Oregon Program was discriminatory in purpose. The panel held that none of the alleged discriminatory statements cited by plaintiffs undermined the Oregon Program's stated purpose of reducing greenhouse gas emissions. The panel rejected plaintiff's claim that that the Oregon Program's assignment of carbon intensity credits and deficits effectuated a discriminatory effect. The panel also rejected the claim that the Oregon Program violates the Commerce Clause and principles of interstate federalism by attempting to control commerce occurring outside the boundaries of the state.

Addressing the preemption claim, the panel held that the Environmental Protection Agency's decision not to regulate methane under § 211(k) of the Clean Air Act was not a finding that regulating methane's contributions to greenhouse gas emissions was unnecessary, and thus the decision not to regulate was not preemptive under § 211(c)(4)(A)(i).

Dissenting, Judge N.R. Smith stated that he could not dismiss plaintiffs' claim alleging that the practical effect of the Oregon Program impermissibly favored in-state interests at the expense of out-of-state interests.

* * *

CLEAN AIR ACT; 2013 STANDARDS FOR COMMERCIAL AND INDUSTRIAL SOLID WASTE INCINERATORS; 2005 STANDARDS FOR OTHER TYPES OF SOLID WASTE INCINERATORS

Sierra Club v. Wheeler, No. 16-2461 (TJK) (D.D.C. Sept. 14, 2018)

Clean Air Act Did Not Impose Nondiscretionary Duties on EPA to Implement Federal Plan for 2013 CISWI Standards for Solid Waste Incinerators; Sierra Club Partially Successful in Getting EPA to Review and Revise 2005 OSWI Incinerator Standards

In a citizen suit under the Clean Air Act, the Sierra Club was unsuccessful in arguing that the Environmental Protection Agency had a nondiscretionary duty to develop, implement, and enforce a federal implementation plan for the 2013 standards for commercial and industrial solid waste incinerators. Interpreting Section 129(b)(3) of the Act, District Judge Kelly rejected the Sierra Club's view that the statute required EPA to develop, implement and enforce a federal plan within two years after EPA promulgated the relevant guidelines. Instead, the court agreed with EPA that the statute did not establish a date-certain, nondiscretionary deadline to create a federal implementation plan. Thus, Section 129(b)(3) required EPA to develop a plan only for those incinerators in states that did not submit an approvable SIP within two years.

Turning to the 2005 OSWI standards for noncommercial/industrial incinerators, the court noted there was no dispute that Section 129(a)(5) of the Act created a date-certain, nondiscretionary duty for the EPA, every five years, to review and revise those standards. The real dispute was when EPA had to begin the work. While holding that EPA failed to demonstrate that it would be impossible to begin this work until March 2020, the court also was unwilling to accept Sierra Club's position that work should begin as of the date of the court's ruling. Thus, the court concluded that it would order EPA to begin work on the proposed rulemaking on March 1, 2019, require EPA to publish a notice of a proposed rulemaking by August 31, 2020, and promulgate a final rule by May 31, 2021.

BACKGROUND

The Environmental Protection Agency promulgated guidelines under the Clean Air Act (CAA) for both "commercial or industrial" solid waste incineration (CISWI) units and "other categories" of solid waste (OSWI) units pursuant to Section 129, added by the 1990 amendments to the CAA.

The CISWI standards were promulgated on February 7, 2013. In response, many states failed to submit either an approvable State Implementation Plan (SIP) or a negative declaration to the EPA. On January 11, 2017, the Administrator published for comment a proposed federal implementation plan (FIP). EPA asserted it has been forced to suspend work on the proposed plan until March 2020 at the earliest because of the need to comply with other court-ordered deadlines.

In 2005, EPA promulgated the OSWI standards. Similarly, some states failed to submit either

an approvable SIP or a negative declaration. In December 2006, EPA released for comment an FIP for these standards. EPA has never finalized the plan, and has not reviewed and revised the 2005 OSWI standards every five years as required by law.

On December 16, 2016, Sierra Club filed the present suit under the CAA's citizen suit provision. The complaint alleged that EPA has failed to comply with three nondiscretionary duties under Section 129: (1) to develop, implement and enforce an FIP for the 2013 CISWI standards; (2) to develop, implement and enforce an FIP for the 2005 OSWI Standards; and (3) to review and revise the 2005 OSWI Standards. The complaint asserted that each of these constituted a failure to perform a nondiscretionary act or duty within the meaning of 42 U.S.C. § 7604(a)(2).

Sierra Club moved for summary judgment. It contended that because these duties and corresponding deadlines were not discretionary, the court should order EPA to perform them. It proposed a series of deadlines for compliance.

EPA cross-moved for summary judgment. It argued that Section 129(b)(3) did not impose a nondiscretionary duty to finalize federal implementation plans for the 2013 CISWI standards and the 2005 OSWI standards. It also contended that for any deadlines the court determined were nondiscretionary, the agency could not begin working to meet them until at least March 2020 because its efforts to meet other court-ordered deadlines have deprived it of sufficient resources.

SECTION 129(b)(3) DOES NOT IMPOSE A NONDISCRETIONARY TWO-YEAR DEADLINE FOR EPA'S FEDERAL IMPLEMENTATION PLANS

The citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604(a)(2), authorized private plaintiffs to sue the Administrator for failure to perform any act or duty that was not discretionary. Thus, the court had jurisdiction, based on a waiver of sovereign immunity, only if the EPA has failed to fulfill a nondiscretionary duty.

The D.C. Circuit has held that, "in order to impose a clear-cut nondiscretionary duty, … a duty of timeliness must 'categorically mandate' that all specified action be taken by a date-certain deadline." According to the D.C. Circuit, "it is highly improbable that a deadline will ever be nondiscretionary, i.e., clear-cut, if it exists only by reason of an inference drawn from the overall statutory framework."

The parties differed as to whether Section 129(b)(3) created a clear-cut, nondiscretionary duty for EPA to finalize an FIP. It stated that the EPA "shall develop, implement and enforce a plan … in any stated which has not submitted an approvable plan… within 2 years after the date on which the Administrator promulgated the relevant guidelines."

The Sierra Club contended the statute required the EPA to implement a plan "within 2 years" after the EPA promulgates the relevant guidelines. In the EPA's view, however, the EPA must "develop" a federal plan to cover all units in those states that have not submitted an "approvable plan" within two years of the promulgation of the relevant guidelines. Thus, the statute simply required

that the EPA "shall develop" a plan, but does not say precisely when.

The EPA had the better argument. An important rule of statutory construction, the rule of last antecedent, helped tip the scales in EPA"s favor. This rule provided that a limiting clause ordinarily should be read as modifying only the noun or phrase that it immediately follows.

Under the rule, the phrase "within 2 years after the date on which the Administrator promulgated the relevant guidelines" modified the phrase that immediately preceded it. Thus, Section 129(b)(3) provided that the Administrator "shall develop, implement and enforce" a plan only for those incinerators located in states that did not submit an "approvable plan" within two years. Read this way, the statute did not impose a "clear-cut" "date-certain" deadline to develop a federal plan.

Other provisions of Section 129—in particular, the timing of the process by which states had to resubmit revised SIP's—supported this reading. Section 129 provided that after a state submitted its implementation plan—which each state had to do not later than one year after EPA promulgated the relevant guidelines—the Administrator had to provide a written decision on that plan within 180 days; then, the state was permitted to "modify and resubmit a plan which has been disapproved."

Thus, the statute allowed for the possibility that two years after the promulgation date, a state only recently may have resubmitted a modified plan for EPA's approval. In light of that possibility, it would be surprising for Section 129 to mandate that the Administrator "develop, implement and enforce" a federal implementation plan, all within two years of the date the guidelines were promulgated.

Sierra Club argued that the Section 129's general purpose of reducing pollution from incinerators was better served by reading the statute to require EPA to create a "backstop" within two years of promulgation of the guidelines for states that did not create a plan. But the D.C. Circuit has instructed that "the task of statutory interpretation cannot not be reduced to a mechanical choice in which the interpretation that would advance the statute's general purposes to a greater extent must always prevail."

In any event, as the EPA has acknowledged, even under its reading, the agency was required to produce a federal plan that would assure every incinerator subject to it was in compliance within five years after it promulgated the guidelines. Therefore, the ultimate deadline for pollution reduction would be the same under either party's interpretation.

Sierra Club contended that, because Section 129(b)(2) provided that incinerators subject to SIPs had three years to come into compliance, its interpretation made sense insofar as it would give incinerators subject to the federal plan the same three years. But Sierra Club mischaracterized the requirements for state plans.

The statute contemplated that units subject to state plans may have to achieve compliance in less than three years. Thus, EPA's interpretation, which could require incinerators subject to a

federal plan to come into compliance in less than three years, was entirely consistent with the state plan regime. Moreover, that this provision implicitly anticipated that EPA may approve state plans more than two years after guidelines were promulgated, further undermined Sierra Club's argument that the statute required the EPA to completely implement a federal plan by the same date.

Sierra Club asserted that the EPA interpretation would leave to absurd results because EPA could promulgate a federal plan one day before the five-year deadline, making it impossible for incinerators subject to that plan to be in compliance in a timely manner. But under EPA's reading, a federal plan still had to "assure that each unit subject to the plan is in compliance with all provisions of the guidelines not later than 5 years after the date the relevant guidelines are promulgated" under Section 129(b)(3). If, as Sierra Club suggested, EPA released a federal plan the day before the five-year deadline, that would hardly seem to fulfill the statutory mandate.

Sierra Club pointed to a number of instances in which the EPA, in its rulemaking, has described Section 129 as requiring it to finalize a federal plan within two years. At times, Sierra Club has argued that these prior statements mean that EPA should not receive *Chevron* deference for its interpretation. But EPA has not claimed its current interpretation should receive *Chevron* deference.

At other times, Sierra Club has argued that EPA's prior statements in the Federal Register should be entitled to *Chevron* deference. But those statements were not entitled to such deference. For such deference, the agency must have acted pursuant to delegated authority to make law and with the intent to act with the force of law. The cited statements were merely made in passing. Even if the statements did have the force of law, Sierra Club still failed to show that the statements were entitled to *Chevron* deference.

EPA'S COMPLIANCE DEADLINE FOR REVIEWING AND REVISING 2005 OSWI STANDARDS

The parties agreed that 42 U.S.C. § 7429(a)(5) created a date-certain, nondiscretionary duty that, every five years, "the Administrator shall review and … revise such standards and requirements." The parties also agreed that the EPA failed to comply with that duty for the 2005 OSWI standards.

Under 42 U.S.C. § 7604(a), the district courts were empowered to order the EPA to perform a mandated act or duty and to compel nondiscretionary agency action unreasonably delayed. The D.C. Circuit has held that this provision permits district courts to exercise their equity powers to set enforceable deadlines both of an ultimate and an intermediate nature.

While district courts had broad discretion to set deadlines for compliance, that discretion did not embrace enforcement through contempt of a party's duty when compliance was impossible. But an agency had a heavy burden to show that the ordered requirements were impossible to meet, or that it was unable to comply with a particular remedial timeline.

Both sides agreed that a timeframe of eighteen months was appropriate to publish a proposed notice of rulemaking. And while the Sierra Club argued a final rule could be implemented six months after the proposed rule (for a total of 24 months), EPA asserted it would need twelve months (for a total of 30 months).

The primary disagreement between the parties was not the time it would take to complete rulemaking, however. Rather, it was when that rulemaking should begin. Sierra Club contended it should begin as of the date of the court's ruling, whereas EPA argued it could not begin the work until March 2020.

EPA has failed to demonstrate that it would be "impossible" to begin working on the project until March 2020. It was true that EPA, and in particular its Sector Policies and Programs Division (SPPD), was currently obligated to comply with a number of court-ordered deadlines, most notably the outstanding "residual risk and technology rulemakings" (RTRs). But there were several reasons to reject EPA's claim it could not begin work until March 2020.

First, by EPA's own admission, there were some SPPD resources currently committed to tasks such as responding to FOIA requests and "stakeholder outreach" that could be deployed to assist with reviewing and revising the 2005 OSWI standards. Second, Sierra Club has presented significant evidence that EPA, including SPPD, was engaging in a number of other discretionary activities, and the resources allocated to these efforts could be devoted to the 2005 OSWI standards work. Third, Sierra Club was correct that EPA could detail employees from other divisions to SPPD, or possibly hire contractors, to help meet the deadlines.

At the same time, however, the impossibly compressed deadlines suggested by Sierra Club had to be rejected. In light of all of the ongoing court-ordered deadlines that SPPD was responsible for meeting between now and 2020, it would be impossible for EPA to begin the 2005 OSWI work immediately on the timeframe urged by Sierra Club.

Instead, EPA will be ordered to work on the proposed rulemaking on March 1, 2019. This window will give the agency time to properly plan the execution of the project. EPA also will be required to publish a notice of proposed rulemaking by August 31, 2020, 18 months from the start of the project. Finally, EPA will be ordered to promulgate a final rule by May 31, 2021, 21 months from the start of the project.

* * *

CLEAN WATER ACT; RESOURCE CONSERVATION AND RECOVERY ACT; SEWAGE FLOWS ACROSS BORDER INTO UNITED STATES; FLOOD CONTROL CONVEYANCE; NPDES PERMITS; MOTION TO DISMISS; STANDING; FAIRLY TRACEABLE; REDRESSABILITY; FLOOD CONVEYANCE; WASTEWATER COLLECTOR; MEANINGFULLY DISTINCT WATERS; TRIBUTARIES; WATER TRANSFER RULE; DISCHARGE; TRANSBOUNDARY FLOWS; CONTRIBUTION; CAUSATION

City of Imperial Beach v. U.S. Int'l Boundary & Water Comm'n, No. 18cv457 JM (JMA) (S.D. Cal. Aug. 29, 2018).

Although Governing Federal Agency and Operator of Wastewater Treatment Plant Treating Sewage Flowing from Mexico into the United States Escape RCRA Liability, they Must Defend Claims Alleging Clean Water Act Violations

In a citizen suit filed by municipalities attempting to address pollution from discharges of untreated sewage entering the United States from Mexico, Clean Water Act (CWA) claims survived efforts by the U.S. agency governing transboundary issues and the wastewater treatment plant operator to have the case dismissed, although claims based on the Resource Conservation and Recovery Act (RCRA) were dismissed. Many specific decisions were based on lack of sufficient facts at this point in the litigation but the court made the following rulings that will govern future progress of this case and other situations related to flow of polluted waters:

- Plaintiffs can establish standing over operators of a wastewater treatment plant responsible for treating pollution entering the United States from a foreign country even though the treatment plant operator did not cause the pollution entering the country. The plant operator has control over and responsibility for waters that have entered its facilities. Therefore, pollution caused by overflows from the system are fairly traceable to the plant operator's failure to properly implement the spill prevention and response plan. Also, proper implementation of the spill control and response plan would mitigate pollution, making the injury redressable by this litigation, even though governmental action would be needed to prevent the pollution from entering the country.

- Flow of pollutants from a flood control conveyance into a river channel is not a discharge of pollutants unless there is a "meaningful distinction" between the channels. A transfer of pollutants between two parts of the same waterbody is not a discharge of pollutants because nothing is added. Similarly, the Supreme Court ruled that flow from a concrete storm water channel built for flood control into downstream navigable waters was not a discharge because the concrete channel and unimproved channel were not meaningfully distinct.

- A flood control conveyance may potentially be considered a tributary of the receiving waterbody, making the flood control conveyance itself a water of the United States, such that movement from the flood control conveyance into the receiving waterbody is not a "discharge" into waters of the United States that can produce a CWA violation.

- The Water Transfer Rule exempts activities conveying or connecting waters of the United States, provided the transferred water is not subjected to intervening industrial, municipal, or commercial use. The arrival of polluted water from a foreign country arguably could impact application of the Water Transfer Rule. However, this situation lacked sufficient factual development at this point for the court to grant a motion to dismiss based upon the Rule or to develop how the application of the Rule might be impacted.

- Although the Permit defines multiple types of transboundary flows, because any of these types of flows can be a "discharge," releases caused by flows that exceed the Plant's capacity can violate the Permit's restriction against discharge of pollutants other than at the one outfall authorized by the Permit.

- Even if Mexican waste arguably presents an endangerment to health or the environment, simply allowing the waste to escape from a flood control conveyance or to flow past a Plant that lacks capacity to treat the waste is insufficient to establish RCRA liability, because passive transportation does not establish contribution to the endangerment.

Background

This case involves efforts by two California municipalities to address flow of polluted wastewater from Mexico into San Diego County. The International Boundary & Water Commission – U.S. Section (USIBWC) is a U.S. government agency charged with addressing transboundary issues arising out of agreements between the United States and Mexico, including those addressing national ownership of waters, sanitation, water quality, and flood control in the border region. The South Bay International Wastewater Treatment Plant (South Bay Plant), is a wastewater treatment plant located in the Tijuana River Valley in the City of San Diego. This Plant was built to treat sewage that flows across the border from Mexico into the United States because the volume exceeds capacity of Mexican wastewater treatment facilities. USIBWC owns the South Bay Plant and Veolia operates it under contact with USIBWC. The South Bay Plant and its associated facilities are regulated by an NPDES Permit that authorizes pollutant discharges only at the South Bay Ocean Outfall and only after such pollutants have gone through secondary treatment at the South Bay Plant. All other discharges are prohibited. The primary influent to the South Bay Plant is sewage from Mexico.

Water crosses the border into the United States at six discernable locations, mostly at various canyons. USIBWC owns and Veolia operates "canyon collectors" at most of these locations, and these collectors are among the facilities operated under and subject to the South Bay Plant NPDES Permit. The collectors collect and direct wastewater into a shallow detention basin regulated by a valve. When the valve is open, water in the detention basin is accepted into a pipe system and conveyed to the South Bay Plant for treatment but when the valve is closed, the water cannot drain into the treatment system and instead overflows the detention basin, traveling into the downstream drainages. Plaintiffs in this case, the City of Imperial Beach and City of Chula Vista, claim that

the downstream waters receiving these drainages of untreated sewage are either "navigable" in the traditional sense or are tributaries to rivers ultimately leading to the Pacific Ocean.

In 1978, USIBWC build a flood control conveyance to capture water from the Tijuana River as it crosses the border from Mexico into the United States. This discrete, concrete-lined conveyance with banked sides begins at the U.S. border and directs water, sewage, and other wastes into an area of the Tijuana River Valley west of the historical course of the Tijuana River, where the river did not previously flow. At the end of the flood control conveyance, the contents are discharged into a relatively undeveloped portion of the valley. According to Plaintiffs, these discharges have carved a new water channel, known as the "New Tijuana River," which eventually flows into the historical Tijuana River about a mile downstream. The flood control conveyance is not subject to the NPDES Permit, and Veolia is not involved in its operation. Plaintiffs allege that USIBWC routinely discharges a substantial portion of the wastes captured from Mexico through the flood control conveyance. Although USIBWC recently built a temporary earthen berm at the border to reduce the volume of flow from Mexico into the conveyance, Plaintiffs note that the berm is not designed to protect against high volume flows and could wash out with even slight precipitation.

On March 2, 2018, Plaintiffs filed a citizen suit against USIBWC and Veolia. Plaintiffs alleged there causes of action: (1) an allegation against USIBWC claiming CWA violations due to the unpermitted discharges from the flood control conveyances; (2) allegations against both Defendants based on discharges from the canyon collectors that Plaintiffs claim violate the NPDES Permit; and (3) and allegations against both Defendants alleging RCRA violations. On June 12, 2018, both USIBWC and Veolia filed motions to dismiss. USIBWC's motion to dismiss was based on alleged failure to state a claim, and Veolia alleged both failure to state a claim that Plaintiffs lack standing to sue it.

Plaintiffs Have Standing to Sue Wastewater Treatment Plant Operator for Spills of Sewage Entering the United States from a Foreign Country Because the Pollution is Fairly Traceable to Operator's Failure to Implement a Spill Prevention and Response Plan and Proper Response Would Redress the Problem by Mitigating Injury by Reducing the Amount of Pollutants Discharged

Standing under Article III of the U.S. Constitution requires a plaintiff to demonstrate (1) an injury that is (2) fairly traceable to defendant's challenged conduct and (3) likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Although the operator of the U.S. wastewater treatment plant may not *cause* cross-border pollution, it is responsible for compliance with the NPDES Permit governing the treatment plant and its associated facilities. When the wastewater overflows collectors and enters receiving waterbodies, the resulting pollution is fairly traceable to the treatment plant operator's failure to develop and appropriately implement the spill prevention and control plan associated with the NPDES permit. Thus, because the canyon collectors designed to deliver wastewater entering the United States from Mexico are part of the facilities covered by the NDPES permit for the South Bay Plant, overflows that are discharged to the river and ocean are fairly traceable to Veolia's conduct as treatment plant operator,

even though Veolia did not produce the sewage.

The redressability requirement for Article III standing requires that it be "likely" rather than merely "speculative" that a favorable decision will redress the injury. *Id.* at 561. This requirement is not satisfied if redressing the problem requires unfettered choices by independent actors not before the court. *Asarco Inc. v. Kadish*, 490 U.S. 605, 615 (1989). However, a plaintiff typically can satisfy the redressability requirement by alleging a continuing violation. *NRDC v. Sw. Marine, Inc.*, 236 F.3d 985, 995 (9th Cir. 2000).

Ending the flow of polluted water into the United States arguably would require government funding and development of new or improved infrastructure, likely requiring approval by Congress, an independent actor. However, the operator of the wastewater treatment system has control over what happens to the polluted water once it is collected within the system. Repeated failure to contain and clean up the wastewater in accordance with the prevention and response plan, therefore, constitutes a continuing violation. Thus, even though granting relief against a wastewater treatment plant operator like Veolia would not end the flow of polluted water into the United States, it will mitigate injury by reducing the quantity of untreated wastewater entering receiving waters. Therefore, Plaintiffs have standing to sue Veolia, the wastewater treatment plant operator.

Flow of Pollutants from a Flood Control Conveyance into the Receiving Waterbody May Not Be Considered a "Discharge" Under the CWA if the Flood Control Conveyance is a Tributary of the Receiving Waterbody or there is No Meaningful Distinction between the Conveyance and the Receiving Water

The first cause of action alleged CWA violations for discharge of pollutants from the flood control conveyance without an NDPES permit. To establish a CWA violation, Plaintiffs must allege that USIBWC (1) discharged (2) a pollutant (3) to navigable waters (4) from a point source. A point source does not need to be the origin of a pollutant; it only needs to convey the pollutant into navigable waters. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004). Thus, the dispute in this case centers on whether the flow of polluted waters through and out of the flood control conveyance is a "discharge" under the CWA.

The court initially explained governing Supreme Court principles as it focused on whether there is a meaningful distinction between waters in the flood conveyance, the flow from the end of the conveyance into the New Tijuana River, and the historical Tijuana River. A transfer of pollutants between two parts of the same waterbody is not a discharge of pollutants because nothing is added. *Id.* at 109. Similarly, the Supreme Court has ruled that flow from a concrete storm water channel built for flood control into downstream navigable waters was not a discharge because the concrete channel and unimproved channel were not meaningfully distinct. *Los Angeles Cty. Flood Control Dist. v. NRDC*, 568 U.S. 78, 83 (2013).

USIBWC initially argued that the so-called "New Tijuana River" does not exist outside the complaint for this litigation. However, the court noted that it must accept well-pleaded facts and

construe pleadings in the light most favorable to the nonmoving party on a motion to dismiss. Because Plaintiffs alleged that there is no natural or historical hydrological connection between the New Tijuana River and the Tijuana River, the court chose to accept the existence of the New Tijuana River as a separate water body at this litigation stage.

USIBWC next argued that because the Tijuana River created and is the sole source of the New Tijuana River, there is no meaningful distinction between the waterbodies. To counter Plaintiffs' argument that the flood control conveyance introduces pollutants coming from Mexico into United States waters for the first time, USIBWC characterizes the flood control conveyance itself as a water of the United States, specifically, a tributary of both Tijuana Rivers, the estuary, and Pacific Ocean. USIBWC analogized this flood control conveyance to an irrigation canal, which would be considered waters of the United States as a tributary of the stream with which it exchanges water. Observing that all cases relied upon by both parties involved situations with a fully developed record following discovery, the court ruled that a factual determination regarding whether this flood control conveyance and New Tijuana River are distinct relates to whether the conveyance is a tributary, a decision that is premature based on the current record.

Finally, USIBWC also argued that even if the New Tijuana River and the Tijuana River are meaningfully distinct, no NPDES permit is required due to the Water Transfer Rule. Under this rule, no permit is required for a "water transfer," which is an activity that conveys or connects waters of the United States without subjecting the transferred water to any intervening industrial, municipal, or commercial use. 40 C.F.R. 122.3(i). The court observed that the border complicates application of this rule, because Plaintiffs argue that the flood control conveyance adds pollutants from Mexican waters into waters of the United States. USIBWC, however, reiterated its argument that the flood control conveyance is simply a tributary. Ultimately, the court denied USIBWC's motion to dismiss this cause of action, noting the need for factual development to determine whether the flood control conveyance and New Tijuana River are meaningfully distinct or whether the conveyance is a tributary.

All Types of Transboundary Flows Potentially Can Be "Discharges" That Violate the NPDES Permit

The second cause of action, filed against both Defendants, alleges that Defendants discharge pollutants from the canyon collectors in violation of the CWA and NPDES Permit. Defendants' initial basis for requesting a dismissal of this cause of action is based on the allegation that these overflows are not "discharges" under the CWA because the canyon collectors are tributaries flowing into natural drainages. Once again, the court noted the lack of sufficient factual development to resolve the tributary question.

Defendants also argue that canyon collector flow that is not directed to the South Bay Plant for treatment does not violate terms of the NPDES Permit. The Permit defines transboundary flows such as those entering the canyon collectors as "wastewater and other flows crossing the international border from Mexico into the United States." Although the Permit recognizes six different categories for dry weather transboundary flows, it does not address such flows during wet weather

events.

Defendants claim that overflows from the canyon collectors should be considered as "Flow Event Type A," defined in the Permit as a dry weather flow through a conveyance structure *not* diverted into the canyon collector system or treatment. Because the Permit's definition for this flow category does not use the word "discharge," Defendants claim the flow of wastewater that bypasses the Plant because the collectors are full are not "discharges" and thus do not constitute a Permit violation. As a contrast, Defendants note that the definition for a Facilities Spill Event is a "*discharge*" of wastewater to the environment from the facilities, including the canyon collector systems.

The Permit prohibits discharges of waste from any location other than the South Bay Ocean Outfall and notes that this prohibition "applies to any dry weather discharge of waste overflowing the canyon collectors." Defendants claim that the canyon collector overflows at issue, in this case should be categorized as Flow Event Type A and that's because the word "discharge" does not appear in the definition of this term, this type of release is not subject to the prohibition against "discharges" other than at the Ocean Outfall. Plaintiffs, on the other hand, argue that the Permit's prohibition does encompass Flow Event Type A.

The court focused on a different portion of the Permit, noting that the flow categories are linked primarily to reporting and notification requirements. It observed that the Permit uses the term "discharge" to apply to water movement in any flow category. Thus, the court ruled that even if these flows bypassing full canyon collectors leading to the Plant were to be classified as Flow Event Type A, they can be a "discharge" that violates the permit. Because Plaintiffs adequately allege discharge from a location other than the permitted South Bay Ocean Outfall, the court denied Defendants' motion to dismiss this cause of action.

Passive Transportation of Mexican Waste Is Insufficient to Show Establish RCRA Liability Because Defendants Have Not Been Shown to Have Contributed to Any Endangerment to Health or the Environment Potentially Linked to the Waste

The third cause of action alleges that Defendants violated RCRA, which allows citizen suits against any person "who has contributed or who is contributing" to activity related to solid or hazardous waste that can "present an imminent and substantial endangerment to health or the environment." 42 U.S.C. 6972(a)(a)(B). "Contribution" requires that a defendant be "actively involved in or have some degree of control over" the waste disposal process. *Hinds Invs., L.P. v. Angioli*, 654 F.3d 846, 851 (9th Cir. 2011). Because "contribution" must be linked to the possibility of imminent and substantial endangerment, the court addressed contribution and causation together.

Because the waste originates in Mexico, the Defendants did not create the waste or have an active role related to it. Rather, Defendants' involvement with the waste primarily is passive transportation rather than a cause of any endangerment posed by the waste. To the extent USIBWC arguably transports waste through the flood conveyance system, any such transportation is passive

in nature, with no active handling or treatment of this wastewater. Although Defendants actively transport, handle, and treat waster that actually *enters* the South Bay Plant from the canyon collectors, they cannot actively control the wastewater beyond the limitations of the current infrastructure. Thus, with respect to any waste that flows *past* the Plant because it exceeds the Plant's capacity, Defendants' involvement is limited to passive transportation. Furthermore, the court observed that wastewater not detained by the canyon collectors, like water not detained in the flood control conveyance, would flow into the Tijuana River Valley and to the Pacific Ocean regardless of Defendants' actions. Thus, the complaint did not adequately allege that Defendants contributed to any endangerment caused by the waste from Mexico. Accordingly, the court dismissed the RCRA claim against both Defendants, although it allowed Plaintiffs leave to file an amended complaint.

* * *

CLEAN WATER ACT; GROUNDWATER; POINT SOURCE; RCRA; CORRECTIVE ACTION PLAN; CITIZENS SUIT

Kentucky Waterways Alliance v. Kentucky Utilities Co., No.18-5115 (6th Cir. Sep. 24, 2018) and *Tennessee Clean Water Network v. TVA*, No. 17-6155 (6th Cir. Sep. 24, 2018)

Sixth Circuit Holds that Discharges from Unlined Coal Ash Ponds to Navigable Waters, Via Groundwater, Are Regulated Under RCRA Rather Than the Clean Water Act, Thus Creating a Split of Authority Among the Circuits

Two recent decisions by the Sixth Circuit have created a split among the circuit courts as to whether groundwater may be subject to the Clean Water Act ("CWA"). In both cases, unlined coal ash ponds at electric-power plants leaked pollutants into underlying groundwater aquifers, and those pollutants were discharging via the groundwater into adjacent lakes. Environmental groups brought citizen suits against both plants, asserting that the plants were discharging contaminants into navigable waters without a permit.

Both the Fourth and Ninth Circuits addressed the same issue earlier this year, and both circuits held that an indirect discharge from a point source into navigable water, by way of groundwater, is subject to CWA regulation. The Fourth Circuit added the caveat that the groundwater must have a "direct hydrological connection" to the navigable water in question. In the opinions summarized below – both of which were issued on September 24 by a divided three-judge panel -- the Sixth Circuit held that the discharges were subject to RCRA regulation, but were not subject regulation under the CWA. The majority flatly rejected the notion that groundwater itself can be a point

source. It also rejected the plaintiffs' argument that the coal ash ponds were point sources, reasoning that the ponds were not "conveyances."

The *Kentucky Waterways* suit raised two additional claims that the plaintiffs in *Tennessee Clean Water Network* did not assert. First, the *Kentucky Waterways* plaintiffs argued that, even if the CWA requires a direct discharge into a navigable water, the groundwater itself could be a point source. The Sixth Circuit majority flatly rejected that claim. Second, the plaintiffs in *Kentucky Waterways* asserted a claim under RCRA's citizen suit provision in addition to their claim under the CWA. The panel unanimously held that the district court's dismissal of this claim was erroneous. All agreed that the defendant's storage of coal ash was regulated under RCRA and that the administrative actions the state agency had taken at that time did not preclude plaintiffs' claim under RCRA's "diligent enforcement bar." The state had not taken any of the enforcement actions listed as bars to citizen suits in RCRA § 7002(b)(2)(C).

The panel's analysis, and the split its holdings create, raise significant questions about the intersection of RCRA and the CWA. One would expect the Supreme Court to take this issue up at some point.

I. Background

Environmental groups brought separate citizen suits against coal-fired electric power plants in Tennessee and Kentucky, claiming violations of the Clean Water Act. In both cases, contaminants including selenium had been leaking from the plants' unlined coal ash ponds into adjacent waterways via groundwater. A divided Sixth Circuit Court of Appeals held in these decisions that the leakage was subject to RCRA regulation, and thus did not violate the CWA.

II. Kentucky Waterways Alliance v. Kentucky Utilities Co.

Kentucky Utilities Company ("KU") operates the E.W. Brown Generating Station near Harrodsburg, Kentucky. The Station is adjacent to Herrington Lake, which was created by damming a portion of the Dix River. Coal ash is sluiced from the plant into one of two settling ponds next to the facility. One of the ponds covers almost 30 acres and the other covers 114 acres. The ponds are both unlined and lie between the plant and the Lake. KU has NPDES permits covering discharges of waste water into Herrington Lake from the ponds. State authorities, however, have found that the ponds are also leaking contaminants into the groundwater, and that the groundwater is carrying those contaminants into the Lake.

In 2011, KU decided to de-water the larger pond and convert it to a dry landfill. Between that time and April 2017, the Kentucky Department of Environmental Protection ("KDEP") issued multiple permits for construction and operation of the landfill, but required KU to conduct an extensive Corrective Action Plan to address the pollution discussed in this case. KDEP and KU also entered an "Agreed Order" to address the causes of a Notice of Violation issued to the company

in January 2017. Dissatisfied with the progress KU and KDEP were making, however, plaintiffs Sierra Club and Kentucky Waterways Alliance filed suit under both the CWA and RCRA on July 27, 2017. The district court quickly dismissed both claims, holding that the CWA did not regulate the leakage of contaminants through groundwater, and finding that the court lacked subject matter jurisdiction under RCRA because KDEP was already addressing the RCRA issues. For the reasons summarized below, the Sixth Circuit affirmed the lower court's dismissal of the CWA claim but reversed its dismissal of the RCRA action.

A. The Clean Water Act Does Not Extend to Pollution that Reaches Surface Water Via Groundwater

1. Groundwater is Not a Point Source

Plaintiffs suggested two theories as to why the leakage of contaminants from KU's coal ash ponds should be considered an unpermitted discharge under the NPDES program. First, they asserted that groundwater itself can be a point source. A divided panel affirmed the trial court's dismissal of this argument based upon the CWA's "text and statutory context." The majority emphasized that "the CWA regulates parties that pollute navigable waters" only "where [the] pollution comes from a point source.'" Statutory definitions, in turn, limit the term "point source" to "discernible, confined and discreet conveyance[s]." The majority reasoned that "groundwater may indeed be a 'conveyance' in that it carries pollutants," but groundwater is "not 'discernible,' 'confined' or 'discreet.'" Instead, by its very nature, groundwater is diffuse, pulled by gravity along an imprecise and dispersed pathway. The CWA's text therefore "forecloses [any] argument that groundwater is a point source."

2. The Sixth Circuit Majority Rejected the Claim that an Indirect Discharge from a Point Source Through Groundwater is Regulated Under the CWA

Plaintiffs argued, in the alternative, that the CWA regulates pollutants that "travel from a point source [the coal ash ponds] through a nonpoint source [groundwater] en route to navigable waters." The panel rejected this position based upon its reading of the CWA's text. The majority reasoned that the "heart of the CWA's regulatory power" consists of the "effluent limitations" with which regulated parties must comply. The caps on quantities of pollutants that may be discharged under those effluent limitations pertain to pollutants that are discharged *"from"* a point source *"into"* navigable waters. Accordingly, the NPDES program regulates only those pollutants that pass "directly" from a point source, not those that pass through "intermediary, [nonpoint source] mediums."

> [T]he CWA requires two things in order for pollution to qualify as a "discharge of a pollutant": (1) the pollutant must make its way to a navigable water (2) by virtue of a point-source conveyance. Under the facts in this case, KU is discharging pollutants into the groundwater and the groundwater is adding pollutants to Herrington Lake. But groundwater is not a point source. Thus, when the pollutants are discharged to the lake, they are not coming *from* a point source . . . .

The majority opined that, even if the "hydrological connection" theory adopted by the Fourth Circuit were valid, there would still have to be a point source in order to have a discharge regulated under the NPDES program. Under the hydrological connection theory, an indirect discharge through groundwater would be subject to CWA regulation if there were a "direct hydrological connection" between the point source and the navigable water. The majority rejected this argument on the basis that the coal ash ponds were not point sources. "A point source, by definition, is a 'conveyance.' Coal ash ponds are not conveyances [because] they do not 'take or carry [pollutants] from one place to another.'"

The majority found plaintiffs' reliance on *Rapanos v. U.S.*, 547 U.S. 715 (2006), to be misplaced. In that case, the Supreme Court held that point-source-to-point-source conveyance of pollutants is subject to regulation under the CWA. The panel found the point-source-to-nonpoint-source pollution in this case distinguishable from *Rapanos*. The majority also rejected the notion that the CWA's stated purpose of protecting the nation's waters mandated a finding that the discharges in question were covered by the CWA. The panel reasoned that Congress seldom pursues statutory goals "at all cost," and in this case the statute clearly imposes certain limits on its own reach.

B. The Discharges in Question Should be Addressed Under RCRA

Plaintiffs' complaint also included a charge under RCRA. The panel overruled the trial court's holding that this count was foreclosed by RCRA's "diligent prosecution bar." Although KDEP was taking administrative actions to address the pollution at issue, the court opined that RCRA citizen suits are barred only if EPA or a state "has filed one of . . . three types of actions." Those actions, listed in RCRA § 7002(b)(2)(C), are limited to: (1) an action under RCRA § 7002(b)(1)(B) to address an imminent and substantial endangerment; (2) a state or federal cleanup that is already underway under CERCLA § 104; or (3) incurrence of costs by EPA or a state to initiate a RI/FS. If these are the only types of actions that preclude a citizen suit, then the district court had jurisdiction to hear the case. In fact, the failure to consider this issue under RCRA – in the majority's opinion – threatened to undermine EPA's new CCR regulation.

III. Tennessee Clean Water Network v. TVA

The Sixth Circuit panel addressed many of the same issues in *Tennessee Clean Water Network v. TVA*. The TVA's Gallatin Fossil Plant lies adjacent to a section of the Cumberland River known as Old Hickory Lake. Like the plaintiffs in *Kentucky Waterways*, the plaintiff in this case charged the TVA with violations of the CWA because of the leakage of pollutants into Old Hickory Lake.

The Tennessee Clean Water Network did not argue that groundwater itself was a point source, but it did assert the same "hydrological connection" theory that the panel addressed in *Kentucky Waterways*. While acknowledging the serious nature of the environmental threat, the majority again rejected that position:

> As the district court rightly concluded, "an unlined [coal] ash waste pond in karst terrain immediately adjacent to a river" that leaks pollutants into the groundwater is a major environmental problem . . . . But the CWA is not the proper legal tool of correction. Fortunately, other environmental laws have been enacted to remedy these concerns. For these reasons, as well as those articulated in *Kentucky Waterways*, we REVERSE the judgment of the district court imposing CWA liability on TVA.

Editor's Note: Judge Eric Clay offered a well-reasoned dissent in both decisions. The problem, as he saw it, was that the majority's approach would allow "a polluter [to] escape liability under the Clean Water Act by moving its drainage pipes a few feet from the riverbank." Finding the reasoning of the Fourth and Ninth Circuits more persuasive (*see Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018) and *Hawaii Wildlife Fund v. Cty. Of Maui*, 886 F.3d 737 (9th Cir. 2018)), Judge Clay characterized the majority's approach as "opening a gaping regulatory loophole."

While Judge Clay's opinion is forceful and thought-provoking, it is not entirely persuasive in two respects. First, to regulate the discharges in question under RCRA rather than the CWA does not necessarily create a regulatory "loophole", as he suggests. It simply places the intersection of RCRA and the CWA at a different point than some would prefer. One can argue that EPA has done too little to address this issue under RCRA. But that does not make RCRA an inadequate regulatory tool – and if federal authorities fail to resolve what everyone recognizes as a serious environmental concern, the states are free to regulate more stringently under RCRA.

Second, Judge Clay's reference to EPA's construction of RCRA as reflected in its 1980 regulations presumes too much. No one questions that the agency meant to regulate CCRs under both statutes. But where the two regulatory regimes meet still depends on how the term "point source" is defined.

The Supreme Court has generally followed a straightforward textual approach in construing and applying environmental statutes. If it continues that trend, it would not be surprising to see the Sixth Circuit's approach in these cases affirmed, assuming the court decides to take up the issue and resolve the current circuit split.

* * *

CWA; RCRA; Point Source; Conveyance; Citizen Suit

Sierra Club v. Virginia Electric & Power Co., No. 17-1895 (4th Cir. Sept. 12, 2018).

Fourth Circuit Reverses Trial Court, Finding Coal Ash Piles and Settling Ponds Are Not Conveyances of Pollutants and Thus Not "Point Sources" Under the CWA

Reversing the district court judge below, a panel of the United States Court of Appeals for the Fourth Circuit ruled that a coal ash landfill and settling ponds are not "point sources" within the meaning of the Clean Water Act (CWA). The appeals court concluded that to be a "point source," there must be a conveyance to transport the pollutant. Here, the court found, natural processes rather than a conveyance resulted in the leaching of arsenic from the piles and settling pond into navigable waters. The court asserted that the Resource Conservation and Recovery Act (RCRA), not the CWA, might furnish plaintiffs a remedy here. On a cross-appeal, the appeals court also affirmed the trial court's dismissal of alleged permit violations based on the same factual underpinnings.

Background

The CWA prohibits the "discharge of any pollutant by any person" into navigable waters from a point source. Section 1311(a). A "point source" is "any discernible, confined and discrete conveyance…from which pollutants are or may be discharged." Section 1362(14). Section 1311(a) also provides for the issuance of permits authorizing the discharge of pollutants with specified effluent standards. EPA shares regulatory authority with the States. Since EPA approved Virginia's program, the Virginia Department of Environmental Quality ("VDEQ") operated the permitting program for both EPA and Virginia. Similarly, VDEQ administers a program under RCRA regulating the storage, treatment, and disposal of solid waste, including coal ash sites.

Dominion Energy (a/k/a Virginia Electric & Power Company) operated a coal-fired power plant in Chesapeake, Virginia for over 60 years. Dominion stored coal ash on a landfill and in settling ponds pursuant to permits issued by VDEQ under the CWA and RCRA. In 2002, Dominion notified VDEQ that it was detecting arsenic in groundwater at levels that exceeded Virginia's groundwater standards and began putting in place a corrective action plan, which VDEQ approved in 2008 and incorporated into Dominion's solid-waste RCRA permit in 2011. But in 2014, Dominion closed the Chesapeake plant and began making arrangements with VDEQ to close the landfill and settling ponds. By October 2015, Dominion finished depositing coal ash on the site. In early 2016, Dominion submitted a closure plan for its landfill and a post-closure plan for its settling ponds to VDEQ for inclusion in its CWA discharge permit.

The Sierra Club filed a citizen suit under the CWA in March 2015, alleging Dominion violated 33 U.S.C. Section 1311(a) by having discharged arsenic, a pollutant, into Elizabeth River and Deep Creek, navigable waters, without authorization. In a bench trial, the district court judge ruled that arsenic was, in fact, being leached from the landfill and settling ponds, which it found to be point sources, polluting the groundwater that had a "direct hydrological connection" to navigable waters. The judge concluded that "Dominion built the [coal ash] piles and ponds to concentrate coal ash, and its constituent pollutants, in one location" and that the "one location channels and conveys arsenic directly into the groundwater, and thence into the surface waters." The judge, however, deferred to VDEQ's interpretation of two conditions in the CWA discharge permit and rejected the Sierra Club's claims that Dominion breached those conditions. Dominion appealed the determination that the hydrological connection via groundwater met the CWA's requirement of "navigable waters." It also challenged the judge's conclusion that the landfill and settling ponds were "point sources." For its part, Sierra Club cross-appealed from the adverse rulings on breach of the discharge permit conditions.

Reasoning

The appeals court quickly dispensed with Dominion's contention that the arsenic discharge did not implicate navigable waters. It noted that in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3rd 637, 651 (4th Cir. 2018), the Fourth Circuit recently held that the addition of a pollutant via groundwater into navigable waters can violate Section 1311(a) if there is "a direct hydrological connection between [the] ground water and navigable waters." The district court here found such a connection and the Fourth Circuit affirmed that finding.

However, the appeals court did not agree with the trial court that the coal ash piles and settling ponds were point sources for CWA purposes that conveyed the arsenic into navigable waters. The court observed that "'Conveyance' is a well-understood term; it requires a channel or medium – i.e., a facility – for the movement of something from one place to another." Absent a conveyance, the court found, "the discharge would not be regulated by the Clean Water Act, though it might be by the RCRA, which covers and regulates the storage of solid waste, including coal ash, and its effect on groundwater."

The panel wrote:

> Here, the arsenic was found to have leached from static accumulations of coal ash on the initiative of rainwater or groundwater, thereby polluting the groundwater and ultimately navigable waters. In this context, the landfill and ponds were not created to convey anything and did no function in that manner; they certainly were not discrete conveyances, such as would be a pipe or channel, for example. Indeed, the actual means of conveyance of the arsenic was the rainwater and groundwater flowing *diffusely* through the soil. The diffuse seepage, moreover, was a generalized, site-wide condition that allowed rainwater to distribute the leached arsenic widely into the groundwater of the entire peninsula. Thus, the landfill and settling ponds could not be characterized as discrete "points," nor did they function as conveyances. Rather, they were, like the rest of the soil at the site, static recipients of the precipitation and groundwater that flowed through them. Accordingly, we conclude that the court erred in finding that the landfill and ponds were point sources as defined in the Clean Water Act.

The panel added that in regulating point source discharges, Congress meant to target measurable discharges of pollutants, as reflected both in the definition of "point source" and in the CWA's effluent enforcement scheme, which restricts "quantities, rates, and concentrations" of pollutants discharged into navigable waters.

> When a source works affirmatively to *convey* a pollutant, the concentration of the pollutant and the rate at which it is discharged by that conveyance *can be measured*. But when the alleged discharge is diffuse and not the produce of a discrete conveyance, the task is virtually impossible. Tellingly, the district court in this case concluded candidly that it could not "determine how much groundwater reaches the surface waters, or how much arsenic goes from the [plant site] to the surrounding waters. It could be a few grams each day, or a much larger amount." Such indiscriminate and dispersed percolation indicates the absence of any facility constituting a discernible, confined, and discrete conveyance. Moreover, it indicates circumstances that are incompatible with the effluent limitation scheme that lies at the heart of the Clean Water Act.

The panel noted that RCRA governs coal ash as a nonhazardous waste and, under 2016 amendments, Congress requires operators of coal ash landfills, surface impoundments and similar facilities to obtain permits for disposal of coal combustion residuals.

> In this case, the district court blurred two distinct forms of discharge that are separately regulated by Congress – diffuse discharges from solid waste and discharges from a point source – and concluded that any discharge from an identifiable source of coal ash, even that resulting from precipitation and groundwater seepage, is regulated by the Clean Water Act. But by concluding that the point-source requirement was satisfied by the pile or pond containing coal ash through which the water seeps, the court revealed a misunderstanding of the distinctions Congress

> made between the Clean Water Act and the RCRA. In describing how precipitation falls through the coal ash and percolates into the groundwater via the soil, the court identified a process that does not employ a discrete conveyance at all. The only "conveying" action referred to by the district court was that of the non-polluted water moving through static piles of coal ash and carrying arsenic into the soil. The water, as Sierra Club concedes, cannot itself be the requisite point source. Perhaps recognizing its need for finding a facility of conveyance, the court attempted abstractly to construct one, stating: "Dominion built the piles and ponds to concentrate coal ash, and its constituent pollutants, in one location," and "[t]hat one location channels and conveys arsenic directly into the groundwater." The movement of pollutants, however, was not a function of the coal ash piles or ponds, but rather the result of a natural process of "precipitation percolat[ing] through the soil to the groundwater." And that groundwater pollution from solid waste falls squarely within the regulatory scope of the RCRA. By contrast, the coal ash piles and ponds, from which the arsenic diffusely seeped, can hardly be construed as discernible, confined, or discrete conveyances, as required by the Clean Water Act.

The panel rejected the Sierra Club argument that the settling ponds were "containers," a facility expressly included as a point source. "Sierra Club would have us read the critical, limiting word 'conveyance' out of the definition." The court concluded that "the diffuse seepage of water through the ponds into the soil and groundwater does not make the pond a conveyance any more than it makes the landfill or soil generally a conveyance." The court found that the cases cited by Sierra Club all involved conveyances, even where the source of the pollutant regulated by the CWA was a spoil or refuse pile as in *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (4th Cir. 1980). The panel read *Abston* to require "that the facilities that actually transport the pollutant must be point sources – giving as examples, "ditches, gullies and similar conveyances."

Editor's note: Seth Jaffee in his Law and the Environment blog notes that although the panel's understanding of "conveyance" "makes a certain amount of sense… the court itself noted:

> The definition includes, 'but [is] not limited to[,] any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, ***concentrated animal feeding operation***, or vessel or other floating craft.' (My emphasis.) I haven't reviewed the briefs and I don't know if it was argued, but if I were the Sierra Club attorney in this case, I would certainly have noted that a concentrated animal feeding operation, included by statute in the definition of a point source, would not constitute a point source under the 4th Circuit's approach of focusing on a traditional understanding of the meaning of the word 'conveyance.' This case is not likely to be a one-off and I'll be interested to see if other courts take a similarly narrow view of the "conveyance" language in the statute." http://www.lawandenvironment.com/2018/09/14/a-leaking-settling-pond-is-not-a-point-source/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+LawAndEnvironment+%28Law+and+the+Environment%29

Also worth considering: The panel affirmed the dismissal of the alleged permit violations by Dominion. At trial VDEQ had rejected Sierra Club's assertion that "state waters" as used in the permits included groundwater, not just navigable waters, and the trial court deferred to VDEQ's interpretation. The appeals court panel agreed with that ruling but chastised the trial court for not providing more support for its "decision to defer, especially since Sierra Club argued that the VDEQ's position was not supported by the plain language of the permits…" Plain language apparently matters, unless it doesn't. Regarding Condition II.R, which prohibits "any pollutant from… entering state waters," the panel concluded that the "literal meaning" "would subsume all the other permit conditions," and so here it rejected the literal, plain language. The panel noted that VDEQ "consistently interpreted Condition II.R to apply only to point-source discharges to surface waters." It termed as "boilerplate" a Condition to address "the solids and sludges physically stored on site without appropriate storm water control, which could "result[] in a discharge or potential discharge" to surface waters. Yet, realistically, how different are solids and sludges stored without adequate storm water protection from arsenic that is exposed to natural processes, and seepage from a landfill and settling ponds?

* * *

CLEAN WATER ACT

TX v. EPA, No. 3:15-CV-00162, (S.D.Tx, Sept. 12, 2018)

Texas Federal Court Temporarily Enjoins EPA's Waters of the United States Rule Until Definition of "Navigable Water" Is Finally Determined; Injunction Only Applies to Texas, Louisiana, and Mississippi

A Texas District Court granted a preliminary injunction barring implementation of the U.S. Environmental Protection agency's (EPA) Clean Water Rule. The Court found that the Rule lacks clarity about what constitutes a "navigable water" under the Clean Water Act. "[U]ntil that question can ultimately be answered, a stay provides much needed governmental, administrative, and economic stability," the Court reasoned.

As Judge George Hanks Jr., writing for the Court explained:

> Were the Court not to temporarily enjoin the Rule now, it risks asking the states, their governmental subdivisions, and their citizens to expend valuable resources and time operationalizing a rule that

> may not survive judicial review. Accordingly, the Court has decided to avoid the harmful effects of a truncated implementation, and enjoin the Rule's effectiveness until a permanent decision regarding the Rule's constitutionality can be made. Determining which governmental bodies have jurisdiction over our nations waters is an important task, and one that this Court is unwilling to do without full discovery and briefing on the matter.

For these reasons, the Court held that a preliminary injunction was warranted in this case. Importantly, the injunction only applies to Texas, Louisiana and Mississippi. The Court declined to issue an injunction nation-wide because there was insufficient evidence to establish whether implementation of the Rule presents an irreparable harm to those states not a party to the litigation.

* * *

CITIAZEN SUITS; TOXIC TORTS; GROUNDWATER CONTAMINATION; CWA; RCRA;POINT SOURCE; ONGOING ENFORCEMENT

Toxics Action Ctr. v. Casella Waste Sys. No. 4:17-cv-40089 *(D. Mass.* September 30, 2018)

District Court Dismisses CWA Citizen Complaint Alleging Landfill Caused Groundwater Contamination of Drinking Water Wells Because Landfill is Not a Point Source; RCRA Allegation Also Dismissed Due to Ongoing State Enforcement

In a case alleging a landfill caused groundwater contamination that polluted drinking water aquifers the District Court held:

A. CWA Claim

"Recently, the Fourth Circuit provided detailed guidance in finding that a landfill and settling pond did not constitute point sources as that term is defined under the CWA . See *Sierra Club v. Virginia Electric et al, 2018 WL 4343513*, *1 (4th Cir. 2018).

The Court focused on the language of the CWA itself, that defines a point source as a "discernable, confined and discrete conveyance," finding that "the landfill and ponds were not created to convey anything and did not function in that manner ... Indeed, the actual means of conveyance

of the arsenic was the rainwater and groundwater flowing diffusely through the soil ... Thus, the landfill and settling ponds could not be characterized as discrete 'points,' nor did they function as conveyances….

Following Sierra Club 's guidance, I find that the Landfill here is not a point source under the terms of the CWA . Plaintiffs' basis for jurisdiction under the CWA stems from contaminants that allegedly flow from the Landfill, either to the Wetland or the Charlton or Sturbridge Aquifers. "[T] hat simple, causal link does not fulfill the Clean Water Act's requirement that the discharge be from a point source." *Sierra Club*, 2018 WL 4343513 at *5 (emphasis in original), "that is, a discrete, not that manner ... Indeed, the actual means of conveyance of the arsenic was the rainwater and groundwater flowing diffusely through the soil ... Thus, the landfill and settling ponds could not be characterized as discrete 'points,' nor did they function as conveyances…"

B. RCRA Claim

The court addressed the RCRA claim as follows:

"MassDEP has undertaken several enforcement actions related to the Landfill, including enforcement directly related to the alleged discharge of contaminants to groundwater — the central issue in the Amended Complaint. MassDEP's enforcement includes: the May 2014 UAO, resulting the filing of a Complaint in Superior Court and a Consent Judgment; the December 2016 Administrative Consent Order With Penalty ("ACOP"); and the April 2017 Administrative Consent Order. MassDEP acted pursuant to its authority under comparable state laws comparable to the CWA. Most importantly, the Waterline ACO was for the express purpose of addressing the alleged contamination to groundwater. Further, in anticipation of the closure of the Landfill, MassDEP has ordered Defendants to perform an assessment of the "full nature and extent of contamination emanating from the Landfill" including an Initial Site Assessment, a Comprehensive Site Assessment, and a Correction Action Alternative Analysis. Together, MassDEP's orders, along with its ongoing oversight of the closure of the Landfill, create a comprehensive enforcement scheme, comparable to any federal CWA enforcement, to address alleged groundwater pollution from the Landfill, adjacent wetlands and private water systems.

The focus here is on whether corrective action is already taken and is being diligently pursued on the issue of pollutants leaching out of the landfill and potentially into wetlands and aquifers, and based on the record, I find that MassDEP is already action to correct those violations. Accordingly, any additional action by this Court would be duplicative and unnecessary."

* * *

COMMERCE CLAUSE; FEDERAL POWER ACT

Electric Power Supply Ass'n. v. Star, Nos. 17-2433 & 17-2445, (7th Cir. Sept. 13, 2018)

Seventh Circuit Upholds Illinois ZEC Program for Struggling Nuclear Units

Provided Courtesy of the Law and the Environment Blog Published by Foley Hoag, LLP

By Seth Jaffe

On September 13, 2018, the Court of Appeals for the Seventh Circuit affirmed the trial court's dismissal of claims that the zero-emission credit (ZEC) program enacted by the Illinois legislature in 2016 violated the U.S. Constitution's dormant Commerce Clause and was preempted by the Federal Power Act. The Court took the unusual step of requesting an amicus brief from the Federal Energy Regulatory Commission (FERC). FERC and the Department of Justice jointly filed a brief in response, arguing that the Illinois' program neither interferes with interstate auctions nor is otherwise preempted by federal law. Once FERC weighed in on the side of Illinois, a result in favor of the State was a likely conclusion.

Similar to the framework used for or "RECs," Illinois' ZEC program directs state regulators, based on defined criteria, to select certain nuclear plants to generate ZECs and then requires utilities to purchase those ZECs for a predetermined purchase price. The state-developed ZEC price is derived from the social cost of carbon, but is adjusted based on an index tied to wholesale power prices. The Electric Power Supply Association (EPSA), the national trade association comprised of many of the large, non-nuclear competitive power producers in the U.S., brought suit. The lower court dismissed those claims and the appeal ensued.

The crux of EPSA's preemption argument rested on the premise that: (1) by propping up uneconomic nuclear units with ZECs, the state's program impermissibly altered the total supply within the wholesale market, thus decreasing the amount ultimately paid to all generators in the annual capacity auction; and (2) that because the ZEC payments are made in connection with energy sales in the wholesale markets, over which FERC has exclusive jurisdiction, states may not interfere with that regulation. The court, however, rejected EPSA's preemption argument, concluding instead that, "a state policy that affects price only by increasing the quantity of power available for sale is not preempted by federal law." In reaching this result, the court distinguished the Illinois law from the state program rejected by the U.S. Supreme Court in *Hughes v. Talen Energy Marketing.* In upholding the ZEC program, the Seventh Circuit joined the Second Circuit in *Klee*, along with the Third Circuit's pre-*Hughes* decision in *Solomon*, to rule that federal law does not preempt state policies that provide incentives to new or existing capacity.

Nor, according to the court, was the fact that the Illinois law tied the price for ZECs to capacity prices in FERC-regulated auctions a fatal flaw. Unlike the state program rejected in *Hughes,* which incentivized new natural gas-fired generation facility by "tethering" state contract payments to the unit's participation in the federally-regulated wholesale market auction, the receipt of the ZEC is

not dependent on wholesale market participation. Moreover, because, under the Illinois' statute, every producer of power receives the same price for the ZEC, it did not impermissibly intrude on federal jurisdiction over the markets, even if that price may adjust based on market auction rates. The Court determined that, "'[S]o long as a State does not condition payment of funds on capacity clearing the [interstate] auction, the State's program [does] not suffer from the fatal defect that renders Maryland's program unacceptable.'"

Neither was the court swayed by EPSA's argument that the Illinois' program violated the Constitution's dormant Commerce Clause. The Court stated that the "Commerce Clause does not 'cut the States off from legislating on all subjects…[just because] the legislation might indirectly affect the commerce of the country.'" Instead, the court determined that the Federal Power Act calls for a balancing of federal and state interests with respect to the regulation of electricity. Because the ZEC program did not overtly discriminate against out-of-state power producers, and the effects of the statute would be felt wherever power is used, the court concluded that the statute did not violate the dormant Commerce Clause.

The effect of the Seventh Circuit's decision should not be underestimated. One day following the release of the Seventh Circuit's decision, the Ninth Circuit determined that Oregon's low-carbon fuel standard did not unconstitutionally favor in-state versus out-of-state power producers. So far, every decision since *Hughes* has distinguished *Hughes*and upheld such state regulatory programs.

Moreover, while not binding, the decision will likely play heavily into the case currently pending before the Second Circuit evaluating New York's ZEC program. While EPSA has not announced whether it will appeal the Seventh Circuit's decision to the U.S Supreme Court, given FERC's participation in the proceeding, and the fact that that the impact of state-sponsored programs can be mitigated through changes to the wholesale market rules, any appeal will face an uphill battle. Indeed, the more interesting developments from the Seventh Circuit's decision will not likely come from the federal courts, but will be what, if any, market reforms related to price formation FERC will institute as a result.

* * *

STATE REGULATION; LAND USE PLANNING; PREEMPTION

Bohmker v. Oregon, No. 16-35262 (Ninth Cir. Sept. 12, 2018)

Ninth Circuit Holds Oregon's Prohibition of the Use of Mining Equipment on Federal Land to Protect Salmon was not Preempted by Federal Law

The following summary was prepared by the Court.

Affirming the district court's summary judgment in favor of defendants, the panel held that mining restrictions set forth in Oregon Senate Bill 3 are not preempted by federal law.

To protect threatened fish populations, Senate Bill 3 prohibits the use of motorized mining equipment in rivers and streams containing essential salmon habitat. The restrictions apply throughout the state, including on rivers and streams located on federal lands. Plaintiffs have mining claims on federal land in Oregon.

Assuming without deciding that federal law preempts the extension of state land use plans onto unpatented mining claims on federal land, the panel held that Senate Bill 3 is not preempted because it constitutes an environmental regulation, not a state land use planning law. In addition, Senate Bill 3 does not stand as an obstacle to the accomplishment of the full purposes and objectives of Congress. The panel concluded that reasonable state environmental restrictions such as those found in Senate Bill 3 are consistent with, rather than at odds with, the purposes of federal mining and land use laws. The panel held that Senate Bill 3 therefore is neither field preempted nor conflict preempted.

Dissenting, Judge N.R. Smith wrote that the National Forest Management Act and the Federal Land Policy and Management Act occupy the field of land use planning regulation on federal lands. He wrote that because the permanent ban on motorized mining in Oregon Senate Bill 3 does not identify the environmental standard to be achieved but instead restricts a particular use of federal land, it must be deemed a land use regulation preempted by federal law.

* * *

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 16-1994 & 16-2244

TRINITY INDUSTRIES, INC.;
TRINITY INDUSTRIES RAILCAR CORPORATION
Appellants in No. 16-2244

v.

GREENLEASE HOLDING COMPANY;
AMPCO-PITTSBURGH CORPORATION

Greenlease Holding Company,
Appellant in No. 16-1994

On Appeal from the United States District Court
for the Western District of Pennsylvania
(W.D. Pa. No. 2-08-cv-01498)
District Judge: Hon. Joy Flowers Conti

Argued
September 5,

Before: CHAGARES, JORDAN, DIMAN, *Circuit Judges.*

(Filed: September)

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OPINION OF THE COURT

JORDAN, *Circuit Judge*.

This is a dispute about the proper allocation of costs to remediate a contaminated manufacturing site in Greenville, Pennsylvania. From 1910 until 1986, Greenlease Holding Co. ("Greenlease"),[1] a subsidiary of the Ampco-Pittsburgh Corporation ("Ampco"), owned the site and operated railcar manufacturing facilities there. Trinity Industries, Inc. and its wholly-owned subsidiary, Trinity Industries Railcar Co. (together referred to as "Trinity"), acquired the site from Greenlease in 1986 and continued to manufacture railcars there until 2000. An investigation by the Commonwealth of Pennsylvania into Trinity's waste disposal activities resulted in a criminal prosecution and eventual plea-bargained consent decree which required, in relevant part, that Trinity remediate the contaminated land. That effort cost Trinity nearly $9 million.

This appeal arises out of the District Court's determination that, under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*, ("CERCLA"), and Pennsylvania's Hazardous Sites Cleanup Act, 35 Pa. Stat. § 6020.101 *et seq*., ("HSCA"), Trinity is entitled to contribution from Greenlease for

[1] Greenlease was known first as the Greenville Metal Products Company and then as the Greenville Steel Car Company. For purposes of this opinion, we refer to all Greenlease and Greenville entities as "Greenlease."

remediation costs. After eight yea ation, and having sorted through a century of histo ords, the District Court allocated 62% of the total c sts to Greenlease and the remainder to Trinity. The led cross-appeals challenging a number of the Distric rulings, including its ultimate allocation of cleanup r the reasons that follow, we will affirm the District re-trial rulings on dispositive motions; we will v cost allocation determination; and we will rema ther proceedings consistent with this opinion.

I. FACTUAL BACKGROU

The site in question, known ties as the "North Plant," is a tract of land that was u anufacturing site by a succession of companies. Gre nd Trinity also, at different times, operated facilities rby tract of land called the "South Plant," though th y does not figure prominently in this appeal. Over footprint of the North Plant grew from eleven t our acres. That industrial development, as well many years of manufacturing activity that occurre sulted in multiple releases of hazardous materials – lead – into the ground.

A. The North Plant – 189

From at least 1898 until sor fore Greenlease's acquisition of the North Plant in nelby Steel Tube

[2] The facts recounted here from the District Court's post-trial findings of fact acts in the record that are undisputed.

Company owned and operated a steel tube factory on eleven acres of land that is now part of the North Plant. Over the course of its ownership, Shelby Steel deposited historic fill as it was constructing its manufacturing facilities. According to the District Court, "[h]istoric fill is 'a soil mixed with various non-native materials, including construction demolition debris, concrete, asphalt, or it could be industrial materials such as slag or ash.'" (App. at 186.) Unfortunately, historic fill often contains lead and other contaminants.

Greenlease began its manufacturing activities at the North Plant soon after acquiring the property. Between 1911 and 1922, it significantly expanded the North Plant to support its growing business of building and repairing railcars. During that expansion, Greenlease used historic fill in the foundations supporting the new structures and rail lines. Operations at the North Plant included two shops to paint the railcars, and Greenlease used a variety of toxic chemicals and lead paint during the painting process, without doing anything meaningful to collect or contain the runoff.

B. Relationship Between Greenlease and Ampco

In 1983, Ampco acquired Greenlease,[3] but their relationship predated that acquisition. They had had three overlapping board members since 1979 and continued to do so until 1986. Other than those three shared board members and

[3] Greenlease's stock was first acquired in 1937 by another company, the Pittsburgh Forging Co. Ampco then acquired all of the stock of the Pittsburgh Forging Co., and, through a series of transactions, became the sole shareholder of Greenlease.

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C. Trinity's Acquisition of the North Plant

In 1986, Ampco authorized the Greenlease board of directors to sell the North Plant to Trinity. The Purchase and Sale Agreement between Trinity and Greenlease (the "Agreement") included a clause declaring that Greenlease "makes no representation or warranty regarding compliance with the Environmental Protection Act, any other environmental laws or regulations or any hazardous waste laws or regulations (collectively, 'Environmental Laws')." (App. at 199.) Mutual indemnification provisions specific to environmental liabilities provided, in pertinent part:

> [Greenlease] agrees to indemnify and hold harmless [Trinity] against Damages arising out of or related to violations of Environmental Laws, which were caused by [Greenlease] or its predecessors in title to the assets at the [North Plant] on or prior to the date of Closing. [Trinity] agrees to indemnify and hold harmless [Greenlease] against Damages arising out of or related to violations of Environmental Laws, which are caused by [Trinity] or its successors in title to the assets at the [North Plant] after the date of the Closing. It is the intention of the parties that liability under this Section for any condition that is caused by the acts of [Greenlease] or its predecessors in title to the assets prior to the date of the Closing and by the acts of [Trinity] or its successors in title to the assets after the date of Closing shall be allocated between the parties in a just manner taking into account degree of fault, per
> other relevant factors.

(App. at 61 (some alterations in ori
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of the property sale. The Agree
Trinity "has not assumed, and ex
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the Agreement provided that "[t]he
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or in equity." (App. at 62.)

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Greenlease's books when Trinity sued Greenlease and Ampco.[4]

D. The North Plant – 1987 to 2004

After purchasing the North Plant, Trinity continued the manufacture of railcars there. In one of the paint shops, it installed concrete floors and used tar paper to capture paint drippage. Beginning in late 1987, it implemented a policy preventing the use of metal-containing paints at the North Plant. In 1994, Trinity removed the second paint shop, excavated the old dirt floors, and dumped the soil onto a field at the South Plant. Trinity then erected a new paint shop at the North Plant.

Six years later, in 2000, Trinity ceased the North Plant operations. It sold the property in 2004 to a third-party (the "Buyer"). In connection with that sale, Trinity did not conduct an environmental assessment to determine whether the soil was contaminated, and it prohibited the Buyer from performing such testing without its consent. The Buyer demolished almost all of the existing buildings at the North Plant to sell the scrap steel for profit. Trinity maintains that, at some point, the Buyer dumped onto the North Plant property hazardous chemicals and waste that had been produced by the demolition of the North Plant buildings, exacerbating the pre-existing environmental harm.

[4] In 2008, that reserve was $150,000, and in 2009, it was $282,500.

E. The Commonwealth's gation and the Consent Decree

In 2004, the Commonwe 'ennsylvania and PADEP began an investigation into ıs that Trinity had improperly disposed of hazardous the North Plant. The Commonwealth filed a crimin nt against Trinity in 2006, raising three felony cou ght misdemeanor counts related to the illegal handlin osal of hazardous waste. Trinity entered into a ement with the Commonwealth that required the t of investigative costs, payment of a fine, cor to a nonprofit organization, and, pursuant to a co ree authorized by PADEP (the "Consent Decre remediation of environmental contamination.

The Consent Decree stated r investigation of the North Plant was "necessary to ify the nature and extent of the release of hazard tances at and/or potentially migrating from the Nort and to determine the Response Actions necessary t ıte the hazardous substances at and/or potentially n from [the North] Plant." (App. at 513.) The was governed by Pennsylvania's Land Recycli Environmental Remediation Standards Act, 35 P 6026.101 *et seq.*, commonly known as "Act 2," and ated investigation was not limited to the time during rinity owned and operated the North Plant.

Trinity was on a short lea ıs ordered to get approval from PADEP before it t 'significant step" pertaining to the property, and it ired to submit to PADEP "an investigation wor a supplemental

investigation work plan, a notice of intent to remediate, a remedial investigation report, a proposed cleanup work plan, a supplemental cleanup work plan, and a final report." (App. at 213-14.) Those additional mandates increased the difficulty and expense of the remediation project. The remediation efforts were also affected by the fact that "[t]he North Plant was a 'high profile, high visibility location'" and is bordered by residential communities on three sides. (App. at 218 (citation omitted).)

PADEP approved Trinity's remedial investigation work plan in 2007. Trinity later sent Greenlease a pre-suit notice describing the contamination and its legal position that Greenlease had contributed to the pollution.

F. Trinity's Cleanup of the North Plant

To perform the necessary cleanup, Trinity had to buy back the North Plant. It then selected Golder Associates, Inc. ("Golder") to perform, direct, and supervise the cleanup operations. PADEP approved that selection. Trinity did not employ a competitive bidding process to select Golder because it had been impressed by Golder's cleanup operations at several other sites and because the Consent Decree's deadlines created an urgency to get a remediation consultant in place as soon as possible. Trinity and Golder agreed to an "open billing" process that provided Golder would be paid only for the work it ultimately needed to perform. (App. at 218-19.) Billing was on a "cost plus 10 percent" basis, which gave Golder a ten percent markup on the expenses it incurred. (App. at 219.)

Golder's cleanup efforts r to first identify areas of the property that were rn. It analyzed available historical information c construction and manufacturing activities that had ace at the North Plant. It then conducted soil sampl her identify areas requiring remediation. Golder ul ivided the North Plant into twenty impact areas red remediation. Thirteen of the twenty impac were primarily contaminated by lead. The rem pact areas were primarily contaminated by volatil i-volatile organic compounds and a variety of other h ubstances. Major remediation activities included ex ontaminated soil, refilling excavated areas with c erial, chemically treating contaminated soil, trans xcavated soil to appropriate landfills, and placing a s over parts of the North Plant. In total, Golder dispos oximately 39,000 tons of soil off-site and capped ab tons of soil with asphalt.

Those efforts cost nearly 0 and made the property usable again. Parts of th lant with asphalt caps are suitable for use as a pa Other areas are suitable for industrial or commerc There is ongoing work at the North Plant to ensure fety mechanisms created as part of the environmen ation continue to function.[5]

[5] According to the District dings of fact, the work includes maintaining the a s and continued ground water monitoring.

II. PROCEDURAL HISTORY

Invoking federal and state laws, Trinity filed a complaint against Greenlease and Ampco in 2008 to defray the North Plant remediation costs. More specifically, Trinity sought cost recovery under CERCLA pursuant to 42 U.S.C. § 9607, cost recovery under the Resource Conservation and Recovery Act ("RCRA") pursuant to 42 U.S.C. § 6972(a)(1)(B), and contribution under CERCLA pursuant to 42 U.S.C. §§ 9613(f)(1) and 9613(f)(3)(B). It also brought cost recovery and contribution claims under the HSCA, as well as state common law claims for contribution and negligence *per se*.

A. Pre-Trial Motions and Rulings

Trinity's claims against Ampco were premised on Ampco's alleged direct or derivative liability for Greenlease's conduct at the North Plant. Upon cross motions for summary judgment on that issue, the District Court concluded that Ampco was not directly or derivatively liable for pollution at the North Plant.

Greenlease also moved for judgment on the pleadings, arguing that Trinity's claims were barred by the indemnification provisions of their Agreement. It claimed that once the mutual indemnities expired, neither party was entitled to seek compensation from the other. The District Court rejected that argument, ruling that the existence and expiration of the indemnification provisions did not prevent Trinity from seeking other remedies available at law or in equity.

Greenlease and Trinity lat
summary judgment on Trinity's CE
common law claims. The Dist
summary judgment for Trinity, hol
Greenlease was a potentially
CERCLA and the HSCA. It also
motion in part, granting it sum
Trinity's claims other than those
U.S.C. § 9613(f)(3)(B) and 35 Pa.
litigation proceeded to a bench tria
allocation of cleanup costs betwee

Prior to trial, Trinity tried
with its cleanup of the South Pl
concluded that Trinity was not ent
Greenlease had never owned or
disposed of any hazardous waste a

B. The Parties' Cost Alloc

Trinity's and Greenlease's
District Court with a proposal for
cleanup costs between the parties.
Gormley, Jr., relied on available
identify three sources of contami
volatile chemicals used in manufa
dispersions caused by painting;
construction. He then emplo
information to assign each party a
for the contamination found withi
Gormley analyzed the major r
associated costs required to clean
arrive at a total cost allocation

ross motions for
CRA, HSCA, and
t granted partial
matter of law that
e person under
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gment on all of
ibution under 42
0.705(c)(2). The
nine the equitable
es.

costs associated
ne District Court
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Plant.

posals

ach provided the
able allocation of
expert, Joseph B.
l information to
the North Plant:
erations; general
ric fill used for
same historical
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pact area. Next,
n activities and
impact area. To
ajor remediation

activities, he multiplied the percentage of responsibility for each specific impact area by the major remediation activity costs in that specific area and added those results together. That produced an overall percentage allocation. Gormley applied that same overall percentage to general project costs not tied to any specific impact area. Ultimately, he allocated 99% of the costs to Greenlease and 1% to Trinity.

Not surprisingly, Greenlease's expert, Steven Gerritsen, proposed a very different cost allocation. He concluded that most of the lead present at the North Plant was caused by the use of historic fill rather than Greenlease's operations at the facility. He calculated that Greenlease was responsible for depositing fill on only 2.8 acres of the thirty-four acre North Plant. He opined that the rest of the fill predated Greenlease's purchase of the property and was thus not Greenlease's responsibility. Gerristen also suggested that much of Golder's work was unreasonable and unnecessary and thus that Trinity had spent more money than it should have to perform the cleanup. Gerristen ultimately concluded that Greenlease should be allocated only 12-13% of the cleanup costs.

C. The District Court's Cost Allocation Opinion

In an admirably thorough opinion, the District Court endeavored to make sense of the extensive record, including the competing expert contentions. It first concluded that Greenlease was not responsible for any of the contamination attributable to Shelby Steel or any other non-party because Trinity had failed to show that those parties were "unknown, insolvent, or otherwise immune from suit."[6] (App. at 351.)

[6] A court may equitably allocate among the parties

The Court, however, rejected Gr s contention that Golder incurred unreasonable c ive costs when performing its cleanup at the North

To assign each party a perc responsibility for the contamination within each imp he District Court relied heavily on historic maps ar tics of the North Plant. For many impact areas urt agreed with Greenlease that the lead contami uld be attributed solely to Shelby Steel's use of histo l therefore should not be a source of liability for Gr For other impact areas, the Court found that Greenle esponsible for the deposit of historic fill, or was solel ible for the use of volatile chemicals, and that Green uld thus bear full responsibility for the pollution. emaining impact areas, the District Court split respor etween the parties based on the number of years that e wned the property or on various other consideration known use of a specific chemical contaminant.

After determining the per of responsibility within each impact area, the Dis t considered the major remediation activities that to each impact area

before it the share of hazardous was ination belonging to responsible third-party entities r it (such allocated amounts being known as "orphan sl ut it can typically only do so if such orphan shares entities that are unknown, insolvent, or immune fr *ee Litgo N.J. Inc.* *v. Comm'r N.J. Dep't of Envtl. Pro* l 369, 380 n.4 (3d Cir. 2013) (permitting equitable a of orphan shares among liable parties at the court's c . As found by the District Court, that is not the case h

to determine an overall allocation of cost. Though it purported to follow Gormley's methodology, the Court departed from it in an important respect: Gormley's methodology accounted for the fact that different remediation activities cost different amounts of money, whereas the District Court's methodology did not. To arrive at its cost allocation, the Court multiplied the percentage of responsibility it attributed to Greenlease by the square footage or cubic yardage involved in each remediation activity. The District Court then added the results and divided by the total square footage and cubic yardage for all remediation activities at the North Plant to arrive at the overall cost allocation percentage. By those calculations, it concluded that Greenlease was responsible for 83% of the total costs, while Trinity was responsible for 17%.

The District Court then considered a variety of equitable factors to ensure the fairness of the overall cost allocation. It ultimately reduced Greenlease's percentage of responsibility, based on three equitable factors.

First, it found that at least a portion of Trinity's remediation costs were attributable to the actions of the third-party Buyer and, in particular, the Buyer's decision to demolish buildings at the North Plant. The Court said that Trinity failed to "specify the amount of response costs it incurred to remediate the waste left at the North Plant by [the Buyer]." (App. at 380.) Therefore, "there [was] an equitable need to reduce Greenlease's percentage of responsibility for response costs to reflect an amount attributable to [the Buyer]." (App. at 380.) Accordingly, the Court reduced Greenlease's responsibility by 6%.

Second, it concluded th xistence of the indemnification provisions demons parties' intent to shift liability, so it further redu lease's share of responsibility by 5%.

Third, it recognized that the alue of the North Plant had increased as a result of on since the land was now suitable for some comme lustrial uses. The Court concluded that an addi % reduction in Greenlease's responsibility was ap o account for that increased market value that would Trinity.

After accounting for those deductions, the District Court determined that Gre as responsible for 62% of "all response costs incurre Trinity … for the cleanup at the North Plant[.]" (Ap 39.)

III. DISCUSSION[7]

A. Statutory Background

Congress enacted CERCL "to promote the timely cleanup of hazardous waste to ensure that the costs of such cleanup efforts were those responsible for the contamination." *Burlingt* *Santa Fe Ry. v. United States*, 556 U.S. 599, 602 nternal quotation

[7] The District Court had n over Trinity's federal law claims under 42 U.S.C.) and 9613(b) and 28 U.S.C. § 1331. It had supp jurisdiction over Trinity's state law claims under 28 1367. We have jurisdiction pursuant to 28 U.S.C. §

marks and citation omitted). Under CERCLA, a party who has paid for environmental remediation may seek to hold other potentially responsible parties ("PRPs") liable through the cost recovery mechanisms of § 107(a) or the contribution mechanisms of § 113(f) of that statute.[8] *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 216-18 (3d Cir. 2010). The remedies under those two provisions are distinct. *Id.* at 217 (citing *United States v. Atl. Research Corp.*, 551 U.S. 128, 138 (2007)). While § 107(a) authorizes complete cost recovery under a joint and several liability theory, § 113(f) permits a party to seek contribution from other PRPs following a CERCLA suit brought by a governmental authority against that first party, or after that party has resolved its "liability to the United States or an individual State through an administratively or judicially approved settlement." *Id.* Pennsylvania, meanwhile, enacted the HSCA in 1988 to provide additional statutory tools to deal with the improper disposal of hazardous waste within the Commonwealth. 35 Pa. Stat. § 6020.102; *Gen. Elec. Envtl. Servs., Inc. v. Envirotech Corp.*, 763 F. Supp. 113, 115 (M.D. Pa. 1991).

Although Trinity initially sought both cost recovery and contribution from Greenlease, the only claims remaining on appeal are claims for contribution pursuant to CERCLA subsection § 113(f)(3)(B), and the analogous section of the HSCA, 35 Pa. Stat. § 6020.705(c)(2). *See also Trinity Indus., Inc. v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 136 (3d Cir. 2013) (holding that a party who enters into a consent decree under state law is entitled to seek contribution under § 113(f)(3)(B)). Because a party's "liability under the HSCA

[8] As cited earlier, those sections of CERCLA are codified at 42 U.S.C. §§ 9607(a) and 9613(f), respectively.

mirrors liability under CERCLA" :ost recovery and
contribution provisions in HSCA ially identical to
those in CERCLA," *Agere Sys.,* F.3d at 236, our
resolution of Trinity's claim for cc under CERCLA
is determinative of its companion H m.

B. Greenlease's Appeal

Greenlease raises three prim on appeal. First,
it appeals the District Court's nation that the
indemnification provisions of the it between it and
Trinity do not preclude Trinity fror contribution. We
will affirm because the language Agreement better
supports the District Court's concl cond, Greenlease
appeals the ruling that the costs Tri Golder incurred in
cleaning up the North Plant were a ry and reasonable
under CERCLA. We will affirm b se costs have the
requisite nexus to remedying envir harm at the North
Plant and because the record doe port Greenlease's
contention that Trinity incurred e costs. Third,
Greenlease challenges the overall cation ordered by
the District Court. We agree with e that the Court's
cost allocation analysis was flaw ve will therefore
vacate the judgment and remand fc proceedings.

1. The Agreement's cation Provisions Do Not Precluc y from Seeking Contribution fron se.

Greenlease argues that, at t sion of the three-
year mutual indemnification peric in its Agreement
with Trinity, the parties were rele n any subsequent
statutory or common law respc to one another.

Greenlease thus asserts that it was error to deny its motion for judgment on the pleadings. Our review of a motion for judgment on the pleadings is plenary. *Caprio v. Healthcare Revenue Recovery Grp., LLC*, 709 F.3d 142, 146 (3d Cir. 2013). Such a motion should not be granted unless the moving party has established that there is no material issue of fact to resolve, and that it is entitled to judgment as a matter of law. *Rosenau v. Unifund Corp.*, 539 F.3d 218, 221 (3d Cir. 2008). We also exercise plenary review over questions of contract interpretation. *Great Am. Ins. Co. v. Norwin Sch. Dist.*, 544 F.3d 229, 243 (3d Cir. 2008).

CERCLA allows parties to utilize indemnification agreements "to shift the ultimate financial loss" for environmental cleanup costs. *Hatco Corp. v. W.R. Grace & Co. Conn.*, 59 F.3d 400, 404 (3d Cir. 1995). The statute says plainly that it does not "bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section." 42 U.S.C. § 9607(e)(1). Whether the expiration of the indemnification provisions at issue here effectively shifted all financial burden for CERCLA cleanup costs to Trinity thus turns on the proper interpretation of the Agreement. "[A]greements among private parties … addressing the allocation of responsibility for CERCLA claims are to be interpreted by incorporating state … law." *Hatco*, 59 F.3d at 405. Here, that means Pennsylvania law.

When a contract is clear and unambiguous, Pennsylvania binds the parties to the intent contained within the writing itself. *Wert v. Manorcare of Carlisle PA, LLC*, 124 A.3d 1248, 1259 (Pa. 2015). "The whole instrument must be taken together in arriving at contractual intent." *Great Am. Ins.*, 544 F.3d at 243 (quoting *Murphy v. Duquesne Univ. of the*

Holy Ghost, 777 A.2d 418, 429 (Pa
interpret one provision of the cont
different provision of it, *Capek v. L*
(Pa. 2001), and "when specific o
conflict with broader or more g
provisions are more likely to reflec
Musko v. Musko, 697 A.2d 255
interpretive rules lead us to concl
issue reserved Trinity's right t
Greenlease for environmental clea

The Agreement's indemnifi
relevant part, that each party ind
"[d]amages arising out of or
Environmental Laws" and that liab
would be "allocated between the
taking into account degree of fau
other relevant factors." (App. at 5
mutual indemnification expired
Agreement did not, however, conta
parties' intent that Trinity would
obligations and liabilities after that
the Agreement contained expl
liabilities" and "non-waiver of ren
assumption of liabilities" clause pr
assumed, and expressly denies assu
liability, obligation or commitment
as set forth above or otherwise e
(App. at 567.) It is reading far toc
other liability" to think they mean
environmental liability was the one
Trinity to be stuck with. More
remedies" clause plainly provid

Courts are not to
way that annuls a
A.2d 1047, 1050
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It is true that the
ee years. The
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l of Greenlease's
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n-assumption of
auses. The "non-
t Trinity "has not
reby of, any other
nlease] other than
set forth herein."
o the words "any
prominent risk of
parties meant for
"non-waiver of
[t]he rights and

remedies herein provided are cumulative and are not exclusive of any rights or remedies which the parties hereto may otherwise have at law or in equity." (App. at 612-13.) The express language of the contract, therefore, provides both that Trinity did not assume any of Greenlease's liabilities or obligations following the three-year mutual indemnification period, and that Trinity did not waive its statutory rights under CERCLA and the HSCA to seek contribution from Greenlease. In short, while the contractual right to indemnification ended, all other rights remained.

Greenlease's three primary arguments to the contrary do not persuade us. First, Greenlease argues that the indemnification provision should control our interpretation of the entire Agreement because it is more specific than the "non-waiver of remedies" clause. That reasoning, however, puts too high a premium on specificity. Yes, the contractual indemnity is specific. But the non-assumption of liabilities and non-waiver of remedies provisions are plain enough for us to discern the intent of the parties, and that intent was to preserve non-contractual rights. Besides, there is a sense in which the indemnification language is not more specific than the other relevant provisions: it does not address the parties' liabilities after the first three years following the sale. The "non-assumption of liabilities" and "non-waiver of remedies" clauses do. They are not time limited and therefore can be understood as specifically addressing the time period after the expiration of the contractual indemnities. We will not construe the indemnification provision to cover time periods that, by the plain language of the contract, it does not cover. *See Jacobs Constructors, Inc. v. NPS Energy Servs., Inc.*, 264 F.3d 365, 373 (3d Cir. 2001) ("[B]ecause the nature and purpose of any indemnity agreement involves the shifting and voluntary

assumption of legal obligations, to be narrowly construed.").

Second, Greenlease argues t ng Trinity to seek contribution against it pursuant "non-waiver of remedies" clause "renders the ıental indemnity provision meaningless[.]" (Green ; Br. at 36.) But that argument again ignores the cri hat the parties, by agreeing to the three-year mutual ication provision, granted to each other certain cont ghts separate and distinct from any statutory, leg uitable rights or remedies. The "non-waiver of re lause is perfectly clear in that regard, reserving to es "any rights or remedies which the parties … may have at law or in equity." (App. at 613.) As the D ırt concluded, the contractual remedies created by th fication provision were, by the terms of the Agreen ıulative" and not "exclusive" of the remedies availab r in equity. (App. at 66, 613.) Greenlease could hav ed for a provision in the Agreement whereby Trinity ve assumed all of Greenlease's obligations and following the expiration of the three-year indem provision. But it did not.

Third, Greenlease relies o *l Corporation v. Weinstein*, 33 F.3d 159 (2d Cir. 199 sion by the United States Court of Appeals for the Se cuit, to argue that all CERCLA and HSCA liability a ılly transferred to Trinity after the expiration o ree-year mutual indemnification provision. The ıough, important differences between the contract a *Keywell* and the Agreement here that are sufficient t at case inapposite. The corporate plaintiff in *Keywell* s ecover CERCLA

cleanup costs from two individual defendants, who had been officers of the corporation that sold the relevant piece of land to the plaintiff. *Id.* at 160. The purchase agreement for the land included a two-year indemnification provision guaranteeing to hold the plaintiff harmless for any damages arising out of "any breach of warranty or representation" by the selling entity "or its management stockholders" and for "any liabilities or obligations of [s]eller" not explicitly listed in the purchase agreement. *Id.* at 162. The plaintiff then entered into a separate thirty-year indemnification agreement with the corporate seller that guaranteed to hold the plaintiff harmless for any damages that "arose or existed" prior to the purchase agreement. *Id.* Importantly, that thirty-year indemnification agreement stated that only the corporate entity would be held to the longer indemnification period, not its individual officers. *Id.* Furthermore, prior to seeking to recover CERCLA cleanup costs from the individual defendants, the plaintiff had entered into yet another contract, this last one "unconditionally releas[ing]" the corporate entity's former "Management Group," which included the individual defendants, from any claims the plaintiff might have had under the purchase agreement. *Id.* On that set of facts, the Second Circuit held that the plaintiff could not recover CERCLA cleanup costs from the individual defendants because the relevant contractual documents unequivocally expressed the parties' intent to shift any and all liability away from the individual officers of the corporate entity after the initial two-year indemnification period. *Id.* at 166.

In contrast, the Agreement between Trinity and Greenlease does not demonstrate an unequivocal intent to shift liability away from Greenlease after the three-year contractual indemnification period expired. On the contrary, rather than

releasing Greenlease from liability
Trinity did not assume any of
obligations, unless otherwise ex
Agreement. Greenlease's relianc
misplaced, and we will affirm th
judgment on the pleadings.

2. The Costs
Necessary a

Greenlease next argues
impermissibly allocated to it costs
incurred by failing to impose cost
work at the North Plant. We review
findings for clear error, but review
CERCLA. *Agere Sys., Inc.*, 602 F.

A plaintiff can obtain conti
§ 113(f)(3)(B) of CERCLA only if
facie case of liability under § 107
PPG Indus., Inc., 197 F.3d 96, 104
requires Trinity to demonstrate th
North Plant is a facility; second,
third, that "the release or threater
substance has occurred"; and fo
"necessary response costs consi
Contingency Plan.]"[9] *Chevron M*

[9] The National Contingen
standards governing environm
including "'methods and crite
appropriate extent of removal, ren
42 U.S.C. § 9605(a)(3), and 'mear

ement states that
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District Court
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v. United States,

provides a set of
anup activities,
determining the
other measures,'
ring that remedial

863 F.3d 1261, 1269 (10th Cir. 2017) (internal quotation marks and citation omitted). Greenlease does not dispute the District Court's conclusions on the first three points. It only argues that the District Court erred by determining, as a legal matter, that Trinity's response costs were *per se* necessary because they were undertaken in compliance with the Consent Decree. That argument, however, even if it had merit, is irrelevant, since the record is clear that Trinity's response costs were in fact necessary under CERCLA. We thus need not address whether response costs undertaken in compliance with a consent decree should be considered necessary *per se*.

A cost is considered "necessary" and hence subject to shared liability if there is "some nexus between [it] and an actual effort to respond to environmental contamination."[10]

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action measures are cost-effective.' [42 U.S.C.] § 9605(a)(7)." *United States v. E.I. Dupont De Nemours & Co. Inc.*, 432 F.3d 161, 168 (3d Cir. 2005) (en banc).

[10] The case law that has developed around CERCLA has interpreted the term "necessary" to refer to a more elastic concept than how the word is typically understood. For example, CERCLA case law defines a "necessary" cost as one that has some "nexus" to the cleanup of environmental harm, not as a cost without which the cleanup would not have been possible. *Compare Young v. United States*, 394 F.3d 858, 863 (10th Cir. 2005) (interpreting the term "necessary cost" in the CERCLA context to refer to a cost that has a "nexus" to an environmental cleanup), *with* NECESSARY, Black's Law Dictionary (10th ed. 2014) (defining "necessary" as something "[t]hat is needed for some purpose or reason; essential"). We have undertaken our analysis of what costs were or were not necessary in this case in light of CERCLA precedent. Our

Young v. United States, 394 F.3d 8 0th Cir. 2005); *cf.* *Black Horse Lane Assoc., L.P. v. L* . *Corp.*, 228 F.3d 275, 297 (3d Cir. 2000) (determir plaintiff did not meet its burden to demonstrate tl ty of a response action because it "did not relate t edial or response action at the" relevant site). It r n other words, a response cost, and CERCLA broad a "response" to a hazardous release to include a wi of investigative, removal, and remedial actions. *See* § 9601(23)-(25) (providing a non-exhaustive list o e" actions); *W.R.* *Grace & Co.-Conn. v. Zotos Int'l, I* 3d 85, 92 (2d Cir. 2009) (noting that "response costs a y construed under CERCLA"). The District Court' factual findings make clear that there was a nexus the costs Trinity incurred and its effort to inves d remediate the contamination at the North Plant.

The cleanup activities at the nt were guided by the Consent Decree's requireme those efforts be undertaken pursuant to the dictate sylvania's Act 2. That statute requires that remedia ities meet one of three standards: a backgrou lard comparing contaminated areas to unaffected niform statewide health standard set by a state agenc differs depending on whether the site is meant for res commercial use; or a site-specific standard "base site-specific risk assessment so that any substantial r probable future risk to human health and the en is eliminated or reduced" so that the site could be accordance with its "present or currently planned f .]" (App. at 212

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opinion does not address how the t essary" should be interpreted in contexts outside of C

(citing 35 Pa. Stat. § 6026.301(a)).) Trinity used the statewide health standard to determine which areas required "some type of response action" and then used the site-specific standard to guide the actual "soil cleanup."[11] (App. at 223.) It did not use the background standard.

During the investigation phase of Trinity's cleanup activities, its consultant Golder used soil sampling to determine the areas of concern requiring remediation. That necessitated the establishment of a "standard action level," which is the numerical threshold for determining when soil is contaminated to an extent requiring treatment. For example, to determine whether areas contaminated by lead – the primary contaminant of concern – required treatment, Golder originally selected a standard action level of 1000 milligrams of lead per kilogram of soil. That was not a random choice. It selected that standard because it had observed that, at a threshold level of 1500 mg/kg, some soil samples passed toxicity testing, while others failed. At the more exacting 1000 mg/kg level, Golder was confident that it would catch all of the soil requiring remediation.

But Golder was also cost conscious on that point. The selection of an accurate standard was important because failure to adequately remove all of the contaminated soil would require Golder to put in place more costly hazardous waste caps that could leave the land unusable. It initially chose the 1000 mg/kg standard for the reasons just noted, but when, during the cleanup process, it discovered that a significant

[11] The site-specific standard also required Trinity and Golder to engage the local community and to accept public comments about the cleanup efforts.

amount of soil exceeded the 1000 still safely remain in place because anyway as part of the approved conducted a "site characterization s there was a more appropriate star 234-35). Golder settled on a 250(that was approved by PADEP. establishes an appropriate cost sens Golder's (and hence Trinity's) in purpose of remedying environment

The same is true with rega undertook to remediate the contan primary response actions: firs contaminated soil and placing an second, excavating and chemically to render it nonhazardous and then the remediated area; and third, trar to an appropriate landfill.[12] Gold allowed it to use simple asphalt c areas, as opposed to what are calle C of RCRA regulates the precise m waste cap is put in place and n maintaining a cap in compliance

[12] Certain contaminated soi treatment that rendered it nonhaz amenable to such treatment and re disposal. The soil that was ch transported to a nonhazardous wast four times cheaper than disposal at The soil remaining hazardous ha hazardous waste landfill.

andard yet could ing to "be capped (App. at 234), it etermine whether on level (App. at million standard cord accordingly l a nexus between e efforts and the

activities Golder eas. It used three y consolidating ap atop that soil; contaminated soil n asphalt cap over contaminated soil excavation efforts ver the excavated C caps. Subtitle which a hazardous . Installing and btitle C is more

nable to chemical her soil was not azardous prior to treated could be which was two to us waste landfill. transported to a

difficult, complex, and expensive than installing and maintaining a simple asphalt cap. The District Court found that use of a Subtitle C cap would have made the North Plant site look like a "landfill," would not have been "consistent with the residential character of Greenville," (App. at 241), and would have rendered much of the North Plant unusable for any purpose. Those factual findings reinforce that Golder's activities had the required nexus to the stated purpose of remedying environmental harms. The response costs Trinity incurred were therefore necessary under CERCLA.

Although Greenlease is correct that "[t]he cleanup at the North Plant was more difficult, inclusive, and expensive because it was done pursuant to the consent order and with oversight by … PADEP," (App. at 225), we do not agree that those extra costs were consequently unnecessary. The Consent Decree required compliance with state environmental standards. To ensure that those statutory requirements were met, Trinity and Golder had to get PADEP's approval for each step of the cleanup. The costs incurred to comply with the Consent Decree were thus aimed directly at satisfying state environmental standards and are appropriately classified as "necessary to the containment and cleanup of hazardous releases." *Redland Soccer Club, Inc. v. Dep't of Army of U.S.*, 55 F.3d 827, 850 (3d Cir. 1995) (citation omitted).

A clearer way to understand Greenlease's contentions is to see them as challenging the reasonableness of Trinity's expenditures, not their necessity. Greenlease does not point to any specific activity that was not "necessary." Rather, it complains that Trinity incurred excessive costs because the Consent Decree lacked meaningful cost control mechanisms, because Trinity hired Golder without competitive bidding, and

because Trinity agreed to a "cost
with Golder. Those arguments fa
they do not address necessity, as th
context of CERCLA.

Greenlease's arguments fall
Court's factual findings that we
some detail. Greenlease does not p
demonstrating how any of those fa
excessive spending. In contrast, a
and Golder worked together "to try
reasonable costs," (App. at 218), a
reduce the amount of work [Trinity
the" Consent Decree (App. at 225).
expert testimony that the billing
"contributed to the cost efficiency
North Plant" and "prevented
[Trinity.]" (App. at 219-20.) Greer
reason to disagree with that assessr

[13] Even if Greenlease's ar
matter were in equipoise, we migl
the District Court's finding that the
reasonable. That is because Trin
furtherance of the Consent Decree.
do not, decide here whether costs ir
compliance with a state conse
reasonable under CERCLA, we not
by a government party are presume
it is black letter CERCLA law t
actions are not inconsistent with
Plan, its costs are presumed reason
at 178, and are recoverable a

ling arrangement
precisely because
t is applied in the

ght of the District
ady recounted in
y record evidence
d in unreasonably
urt found, Trinity
costs or pay only
with PADEP "to
lo to comply with
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used by Trinity
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om up-charging
given us no sound

ad merit, and the
nclined to affirm
ity incurred were
ed those costs in
we need not, and
a private party in
e are presumed
ilar costs incurred
ole. For example,
a government's
nal Contingency
Dupont, 432 F.3d
RPs, 42 U.S.C.

We will therefore affirm the District Court's determination that Trinity's response costs were necessary and reasonable.

3. The District Court Erred in Allocating Costs Between Trinity and Greenlease.

Greenlease argues that the District Court used a purely speculative methodology, different from the methodology proposed by Trinity's expert witness Gormley to allocate costs between the parties.[14] In particular, the criticism is that the District Court relied on "volumes and surface areas … as a proxy for the costs Trinity incurred at each impact area[.]" (Green. Opening Br. at 22.) Greenlease contends that that methodology was arbitrary because it failed to account for the reality that different units of measure are not interchangeable and because volumetric data cannot reliably serve as a proxy for costs when some remediation activities cost more than

§ 9607(a)(4)(A). Since compliance with a consent decree entered pursuant to state law "establishe[s] … compliance with the National Contingency Plan," *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 137 (2d Cir. 2010), costs incurred by a government party in compliance with such a decree should be presumed reasonable. There may be a related principle warranting a similar presumption in a context like this.

[14] Greenlease's expert incorporated Gormley's cost allocation methodology into his own cost allocation analysis, so Gormley's methodology was the only one presented to the District Court.

others. According to Greenlease, tl
to resort to a methodology based
because Trinity failed to pre
documenting how much it cost to u
remediation activities within each
position is thus that the Distric
methodology cannot stand, given tl
actual costs in its analysis. We agr
deviated from the methodology pr
arrived at a speculative cost allocat
be corrected.

CERCLA provides PRPs wi
remediation expenses. *Atl. Resear*
A district court "may allocate re
parties using such equitable factors
appropriate." 42 U.S.C. § 9613(f
command mathematical precisen
finding damages. Instead, all that
facts ... be introduced so that a cour
estimate without speculation or c
WATS, Inc., 238 F.3d 497, 515 (3
original) (internal quotation marks
review an allocation of CERCL
discretion. *Agere Sys., Inc.*, 602 F
abuses its discretion when its decisi
erroneous finding of fact, an erra
improper application of law to fact

The parties and their expe
District Court in an unenviable po
staked out extreme positions on co
expert Gormley opining that G

Court was forced
netric data alone
ficient evidence
each of the major
ea. Greenlease's
cost allocation
failure to include
Court materially
Gormley and so
odology that must

o contribution for
551 U.S. at 138.
sts among liable
urt determines are
]he law does not
the evidence in
l is that sufficient
e at an intelligent
." *Scully v. US*
)1) (alterations in
ons omitted). We
es for abuse of
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ls "upon a clearly
ion of law or an
ation omitted).

case placed the
ach of the parties
on, with Trinity's
should be held

responsible for 99% of all cleanup costs and Greenlease's expert opining that, despite Greenlease's 76 years of building and manufacturing activity at the North Plant, Trinity should be held responsible for nearly 90% of all cleanup costs. The record became even more difficult to sort out when, on direct examination, Gormley gave testimony that was unclear at best and departed from the methodology contained in his expert report. Although we commend the District Court's painstaking effort to analyze nearly a century of building and manufacturing activity by multiple parties to allocate costs equitably between Greenlease and Trinity, the attempt to untangle the evidentiary knot presented by the parties fell short.

Before addressing the District Court's cost allocation methodology, we begin with the methodology that Gormley proposed in his expert report and explained somewhat at trial. Gormley's report presented a six-step approach to allocating costs. First, using "historical information and investigation findings," Gormley assigned a percentage of responsibility to each party for contamination in each area of concern, (D.I. 285-2 at 10), and he applied those percentages to the impact areas within each area of concern. He documented that step in Tables 4-1 and 6-2. Second, he calculated the quantity of material in each impact area that was subject to specific major remediation activities. That step was documented in Table 6-2. Third, he multiplied the estimated quantities of material used for (or remediated by) major remediation activities by each party's percentage of responsibility for contaminating each impact area. Fourth, he summed results from step three to develop Trinity's and Greenlease's respective responsibility percentages "for each major remediation activity[.]" (*Id.*) Fifth, he multiplied the percentage of responsibility for each

major remediation activity by the c
determine how to allocate the costs
totaled how much in costs each
across all major remediation acti
percent cost allocation for the ma
(D.I. 285-2 at 10.) Steps five an
Table 7-1. The report opined
calculated at step six could be us
construction costs" (i.e., costs that
wide basis that were not tied to a sp
both parties. Gormley's exp
methodology as a single analysis w

Gormley's testimony at tri
otherwise straightforward methodo
his methodology as a "three-stage p
Stage 1, termed the "AOC-by-AO
involved creating a percentage allo
of concern; stage 2, termed t
allocation," involved creating a per
impact area; and stage 3, ter
allocation," involved creating a s
major remediation activity. (D.I.
counsel, in a perhaps confusingly
asked if each stage was meant "to
the other stages, (D.I. 340 at 111), b
been asking if each "stage" wa
methodology that could be used to
to steps in a single methodology. I

[15] While the report did not
the six discrete steps we describe h
steps, and identifying them separat

h such activity to
Finally, Gormley
s responsible for
calculate a total
iation activities."
e documented in
final percentage
cate the "general
rred on a project-
act area) between
t presented his
le steps.[15]

ver, muddied his
rial, he described
(D.I. 340 at 108.)
ntage allocation,"
cific to each area
y-IA percentage
llocation for each
ajor remediation
location for each
)8-11.) Trinity's
set of questions,
ılly exclusive" of
ıe appears to have
rate and distinct
costs, as opposed
onfusing answer,

methodology into
have each of the
believe, helpful.

Gormley stated that the three stages "weren't supposed to be mutually exclusive," and he went on to testify that "[t]he first [stage] could be taken on its own," but that the second and third stages built on the first stage. (D.I. 340 at 111.) He ultimately agreed with Trinity's counsel, however, that each of his three stages "could be used by someone who was trying to develop their own logical or fair means to allocate responsibility for the contamination at the North Plant[.]" (D.I. 340 at 111.) Gormley's testimony departed from his expert report in a crucial way – his report made clear that each step in the methodology built on those that came before it, and that they were not independent means to come up with a cost allocation. His testimony, however, was less than clear as to whether the "stages" of his methodology were each independent analytical means to allocate costs or steps that built on one another.

Led by the unclear testimony, the District Court chose Gormley's "stage 3" – divorced from the analytical foundations for that stage in the earlier steps of Gormley's analysis – to guide its cost allocation analysis.[16] That at least

[16] The District Court interpreted Gormley's trial testimony as establishing that "[e]ach of the three methods used by [him] could be used on its own—without considering the other two methods—to allocate responsibility for the contamination at the North Plant." (App. at 249.) Although that conclusion was understandable based on Gormley's testimony, it was mistaken. While Gormley agreed that "someone who was trying to develop their own logical or fair means to allocate responsibility" could incorporate any one of his stages into an allocation methodology, (D.I. 340 at 111), he never testified that someone could separate out one stage, and then use that stage's allocation methodology alone to allocate

appears to have been the Court's a
allocation analysis, "Overall All
based upon Major Remediation
"determined an overall allocation b
major remediation activity in each
listed the major remediation activi
calculation"; and it cited Table 7-
to Gormley's stage 3 – whe
determination. (App. at 375-77.) T
materially deviated from Gor
remediation activity allocation me
on the quantity of material involv
activities, without distinguishin
without regard to cost. That was d
confirming "that a central feature
in [Table] 7-1 is [the] notion of th
33.)

The District Court's allocati
in four steps. First, it made its
regarding the percentage of respo
contamination in each specific i
totaled, for each impact area, the
remediated by major remediatio
analysis did not differentiate betw
For example, it treated placing aspl

all cleanup costs for remediating
Plant.

[17] We find no error in the
findings with regard to the cont
impact area.

ecause it titled its
of Responsibility
it stated that it
the extent of each
ea]"; it explicitly
nsidered … in its
le corresponding
g its allocation
t Court, however,
uggested major
by focusing only
ajor remediation
n activities and
mley's testimony
lysis … reflected
s[.]" (D.I. 341 at

dology proceeded
al determinations
ch party bore for
a.[17] Second, it
material used or
s. The Court's
diation activities.
nd placing topsoil

tion at the North

nderlying factual
in each specific

as functionally the same for its cost allocation analysis despite the fact that those two activities' costs vary significantly. Third, it multiplied, on an impact area-specific basis, each party's percentage of responsibility for contamination with the total quantity of material used or remediated. Fourth, it used the resulting numbers to determine the percentage of material, in total, for which each party was responsible. That calculation led the Court to attribute to Greenlease 83% of responsibility for the contamination of the North Plant and to Trinity 17%. The Court, citing Gormley's testimony and expert report, used those percentages to allocate "all response costs …, including responsibility investigation, removal and remedial past costs incurred through February 2015, for general construction costs, … and future construction costs for ongoing operations and maintenance work." (App. at 377 (emphasis omitted).) Those percentages, however, were too speculative for two reasons. First, the Court's methodology failed to differentiate between different remediation activities and their varied costs, and, second, the methodology, as applied, treated data measured in square feet as equivalent to data measured in cubic yards.

Although the District Court's reliance on volumetric data as the key factor in allocating response costs is not without support in our case law, its use here was flawed.[18] In *Agere Systems, Inc. v. Advanced Environmental Technology Corporation*, we endorsed a volumetric-centered approach to

[18] Although we determine that the District Court erred in utilizing the cost allocation methodology that it did, the Court's use of volumetric data and a focus on major remediation activity as a means to determine the allocation of response costs was reasonable and within the Court's discretion.

allocating CERCLA costs becau
allocation likely reflect[ed] the do
F.3d at 236. We clarify here that
approach is only appropriate whe
finding that one standardized volu
standardized per unit measure of c
case when a CERCLA cleanup inv
or when a cleanup involves one
activity. But when, as here, an envi
many impact areas and remediati
costs, a volumetric-centered appro
cost differences will very likely l
inequitable because it is divorced fr
analytically unsound. When, as a
units of material that costs $1 per u
the same as 100 units of material
remediate, the analysis will be harc

That kind of error occurred
when the District Court treated co
measurement as equal. It added
square feet – a unit of surface are
cubic yards – a unit of volume. Pe
was, as Greenlease contends, li
oranges."[19] (Green. Opening B

[19] "Cubic measures and
fundamentally different things. A
three-dimensional unit of volume
height. A square measure is alway
area: length times width." Chris
Square Feet Conversion, SCIEI

ıt case, "volume
ıts" at issue. 602
lumetric-centered
dence supports a
correlates with a
may often be the
one impact area,
ıajor remediation
cleanup involves
ies with varying
ıils to account for
allocation that is
ord evidence and
cal example, 100
ıediate are treated
s $10 per unit to
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was compounded
distinct units of
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data measured in
such a calculation
aring "apples to
) Without pure

easures represent
asure is always a
mes width times
mensional unit of
Cubic Yards to
Mar. 13, 2018),

speculation as to the depths at issue for the square footage measurements, or record evidence establishing those depths, it would not have been possible for the District Court to equate cubic yards to square feet. The Court's findings of fact and conclusions of law do not reflect any such analysis.

Those problematic deviations from Gormley's methodology compel us to conclude that there was an abuse of discretion and that we must vacate the District Court's judgment as to the allocation of costs between Greenlease and Trinity. If the District Court was persuaded by Gormley's analytical approach, then, on remand, it should adhere to the cost allocation methodology he set forth in his expert report – a methodology that both experts relied upon in coming to their respective cost allocation estimates. That methodology will require the Court to conduct a separate cost allocation analysis for each major remediation activity. Much of the information needed for that is readily available in the record, but additional fact-finding by the District Court may be needed.[20]

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https://sciencing.com/cubic-yards-square-feet-conversion-8641439.html (last visited Aug. 21, 2018).

[20] We reiterate that any cost allocation methodology must differentiate between major remediation activities and account for the varying costs across those activities. Exactitude is not required. Indeed, at this late date it is probably not even possible. It is enough for the Court to make a reasonable estimate of costs based on an appropriate record. *See Scully*, 238 F.3d at 515 (explaining that the law only requires that district courts "arrive at an intelligent estimate" of CERCLA damages "without speculation or conjecture"; it does

To apply Gormley's method Court must use volumetric and remediation activities. For every then, the Court should calculate ho party was responsible for. It can breakdown to the total cost of that s Plant. Once it assigns each party major remediation activity, the Cc parties' respective shares of costs t the Court can calculate the ove determining an equitable alloc Greenlease and Trinity. The Dis exercise its discretion to adjust th the guidance provided herein. It record, should it determine that it is out the kind of analysis we have de

C. Trinity's Cross-Appeal

Trinity raises three primary First, it appeals the District Court

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not require courts to arrive at a "r figure (citations omitted)).

[21] Because we must remand whether Trinity met its burden to p the Court chooses to reopen th encourage it to permit the parties South Plant costs were impermissi prior allocation of costs at the Nor the parties to introduce evidence qu in remediating contamination caus

perly, the District
specific to the
ediation activity,
that activity each
y that percentage
tivity at the North
ocation for every
e able to add the
From those totals,
ntages to use in
costs between
t remains free to
ntages, subject to
ee to reopen the
y to do so to carry

its cross-appeal.
determination of

cal[ly] precise[]"

we do not address
ges. However, if
on remand, we
ss whether some
led in the Court's
It may also allow
the costs incurred
l parties.

responsibility for the lead contamination at the North Plant. We will affirm because we cannot say that the Court abused its discretion, given the evidentiary record before it. Second, Trinity challenges the District Court's decision to grant Greenlease equitable deductions to account for the Agreement's indemnification provisions and for the purported increase in value of the North Plant following the cleanup. We agree that the District Court erred in the manner in which it applied those equitable deductions. We emphasize, however, that the District Court is free on remand to apply equitable deductions in accordance with the principles discussed in this opinion. Third, Trinity appeals the District Court's determination that Ampco is not liable for the conduct of Greenlease. We will affirm on that point because Trinity cannot demonstrate that Ampco is either directly or derivatively liable for Greenlease's conduct at the North Plant.

1. The District Court's Allocation of Responsibility for Lead Contamination was Not an Abuse of Discretion.

Trinity challenges the District Court's determination that Greenlease's painting operations did not contribute to lead contamination requiring remediation. It contends that it is undisputed that Greenlease's painting operations at the North Plant resulted in lead runoff seeping into the ground. We review an allocation of CERCLA damages for abuse of discretion. *Agere Sys., Inc.*, 602 F.3d at 216. Given the evidence and expert testimony in the record supporting the District Court's determination, we do not agree that there was an abuse of discretion.

The District Court did
"disregard the co-contributing ef
paint releases." (Trinity Opening
Court explained, it found that the
North Plant by various parties ove
of the lead contamination *that requ*
at 402.) In other words, the Dis
contamination by lead paint alone
contamination requiring remedi
incorporated "the overall percenta
lead contamination *that required r*
cost allocation analysis. (App. at 4

The District Court's findin
lead paint was the source of th
remediation was adequately suppo
Gerritsen. He supported his co
samples and observing no cor
operations and lead contamination.
expert observed that lead exceedi
consistently present in historic fill
Trinity's expert reached a diffe
conducting an analysis of soil sam
District Court was entitled to b
analysis, as it had adequate supp
United States v. Allegheny Ludlum
(3d Cir. 2004) ("[W]hen prese
conflicting expert opinions, a dist
credit one over the other."). Acc
conclusion that Greenlease's paint
lead contamination requiring reme

Trinity suggests,
Greenlease's lead
.) Rather, as the
ill utilized at the
s was "the source
diation[.]" (App.
t found that any
t have resulted in
The Court then
onsibility for the
n" in its equitable

toric fill and not
ination requiring
eenlease's expert
by studying soil
etween painting
ılar, Greenlease's
P standards was
native soil. That
usion – without
f no import. The
eenlease's expert
admissible. *See*
66 F.3d 164, 184
two sound but
has discretion to
ve will affirm the
s did not result in

2. The District Court Abused Its Discretion When Granting Equitable Deductions Premised on the Indemnification Provisions and the Purported Increased Value of the North Plant.

CERCLA grants trial courts broad discretion to "allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). "Congress intended to grant the district courts significant flexibility in determining equitable allocations of response costs, without requiring the courts to prioritize, much less consider, any specific factor." *Beazer E., Inc. v. Mead Corp.*, 412 F.3d 429, 446 (3d Cir. 2005). However, "[w]e do not simply 'rubber-stamp' a district court's equitable allocation[.]" *Lockheed Martin Corp. v. United States*, 833 F.3d 225, 234 (D.C. Cir. 2016) (citation omitted). Rather, we review the equitable allocation of environmental cleanup costs for abuse of discretion. *Agere Sys., Inc.*, 602 F.3d at 216; *Beazer*, 412 F.3d at 445 n.18.

Trinity argues that the District Court's 5% equitable deduction in favor of Greenlease due to the contractual indemnification provisions, and its 10% equitable deduction in favor of Greenlease due to the purported increased value of the North Plant, were improper. We agree, and so too does Greenlease, which acknowledges that the District Court's "percentage reductions were completely arbitrary and speculative." (Green. Opening Br. at 24.) The District Court abused its discretion when it applied the 5% equitable deduction because it erroneously interpreted our precedent. It also abused its discretion when it applied the 10% equitable

deduction because it failed to exp
figure, and we can discern no basis

i. *The 5% I*
Deduction

The District Court relied on
Inc. v. Mead Corporation when it
Agreement's indemnification
Greenlease's percentage of respons
that "it would be error" to not incor
manifested by the three-year lir
provisions, into its equitable allo
reached that conclusion because, in
error for a district court to fail t
parties' *mutual* intent when enteri
equitable allocation. 412 F.3d at 4
court had failed to give "signifi
parties' intent when equitably allo
despite finding that *both* partie
defendant-seller "would not bear
following the … sale," *id.* at 44
reasoned that, because the co
"demonstrate[] a clear and unambi
CERCLA liability," as required by
parties' intent to shift liability shou
the "polluter pays" principle emb
447-48. We said that the district c
interpretation of the contract did
giving, as a matter of equity, signi
intent of the parties, which [was]
and in the written agreement[.]" *Id.*

it arrived at that
gure in the record.

ation Provisions

on in *Beazer East,*
consideration the
is to reduce
5%. It concluded
parties' intent, as
indemnification
App. at 383.) It
ve held that it was
rate the relevant
act as part of its
t case, the district
ideration" to the
RCLA costs, *id.*,
ntended that the
onmental liability
district court had
issue did not
ent to transfer all
ant state law, the
ordinate factor to
CERCLA. *Id.* at
because the legal
nt the court from
sideration to "the
d by their actions

Critical to our holding in *Beazer* was the fact that the district court had determined that both parties expressed a mutual intent to shift CERCLA liabilities following the relevant sale. It was only a nuanced application of state contract law that prevented the parties' mutual intent from being enforced as a matter of law. Therefore, in that case, equity demanded that the district court give significant consideration to the parties' shared intent. Here, in contrast, the District Court's findings make clear that there was no mutual intent, as expressed by the written agreement or by the actions of both parties, to shift CERCLA liability following the sale of the North Plant. It was, at most, only Greenlease's subjective intent to shed all CERCLA liability following the expiration of the three-year indemnification period. A party's subjective intent to avoid liability, which contradicts the agreement at issue, should not be given significant consideration when equitably allocating environmental cleanup costs. Because it appears that the District Court here mistook *Beazer* to permit Greenlease's subjective intent to be given substantial weight, its 5% equitable deduction in favor of Greenlease was an abuse of discretion.

Nothing we have said here should be interpreted as altering the principle set out in *Beazer* that, as a matter of equity, trial courts can take into consideration "the intent of the parties … [as] manifested by their actions and in the written agreement[.]" *Id.* at 447. But when the intent resulting in the equitable deduction is not shared by both parties and appears contrary to provisions of the contract, a district court must explain why, as a matter of equity, it is nevertheless appropriate to award an equitable deduction. Because we view the District Court as having misapplied *Beazer*, we remand for it to take a fresh look at whether it is appropriate, on the record before the

Court, to award Greenlease an eq
on the contractual indemnification

ii. *The 10% Deduction*

The District Court conclu
deduction in favor of Greenlease v
North Plant's value had increased
transformed the site from being un
purpose to being usable as a site
industrial purposes. Although w
Court's identification of the increa
site as an appropriate equitable
allocating cleanup costs, we canno
of that principle here because the
evidence concerning the fair mark
either before or after the remediati

If a landowner successfull
others for environmental cleanup
likely be required to share the bene
brought about by the cleanup. C
increased market value of a
consideration when allocating resp
N.J. Inc. v. Comm'r N.J. Dep't of
387 (3d Cir. 2013) (discussing
remediated land); *Minyard Enters.,*
Co., 184 F.3d 373, 387 (4th Cir. 19
to take into consideration "the fa
appreciate following its remediatic
v. Col. & E. R.R. Co., 944 F. Supp
1996) (concluding that "it would

duction premised
s.

Value Increase

a 10% equitable
priate because the
remediation work
or any productive
e commercial or
with the District
of a remediated
consider when
ith its application
l not contain any
f the North Plant,

ontribution from
at owner should
increase in value
e thus taken the
d property into
s. *See, e.g.*, *Litgo*
t., 725 F.3d 369,
reased value of
Chem. & Solvent
ting a lower court
e [p]roperty may
nland Indus., Inc.
500-01 (D. Colo.
able" not to take

into account the fact that the former owner "garner[s] no tangible benefit from the cleanup of land it no longer owns"). Limiting a party's ability to benefit from an economic windfall comports with "CERCLA's general policy against double recovery[.]" *Litgo*, 725 F.3d at 391.

The problem with the District Court's 10% deduction, then, was not in the decision to consider the increased market value of the North Plant as an equitable factor but rather in the application of that factor without any record evidence concerning the North Plant's value. It is only appropriate to take increased value into consideration when there is evidence concerning an actual increase, such as proof of the fair market value of the property before and after the cleanup. *See N.Y. State Elec. & Gas Corp. v. FirstEnergy Corp.*, 766 F.3d 212, 239 (2d Cir. 2014) (refusing to take into consideration "the economic benefit of the cleanup" because the party seeking the equitable deduction "fail[ed] to offer evidence about any increase in the value of the land"). Because the District Court may reopen the record for purposes already discussed, *see supra* subsection III.B.3, it may also receive additional evidence concerning the fair market value of the North Plant site, both before and after the remediation activities, to allow it to come to a reasoned percentage reduction premised on the increased fair market value, if any, of the North Plant site.

3. The District Court Did Not Err in Deciding that Ampco Is Neither Directly Nor Derivatively Liable for the Contamination at the North Plant.

Trinity argues that the District Court erred in determining that Ampco was not liable for Greenlease's share

of environmental cleanup costs. evidence it presented demonstrated fact that were sufficient to entitle it Ampco's liability. It advances two support its position that Ampco Greenlease's conduct at the No contends that Ampco is directly under CERCLA as an "operator" o it asserts that, under a veil-pi derivatively liable for Greenlease Plant. Direct and derivative lia distinct bases for holding a pa environmental cleanup costs resu conduct. *United States v. Bestf* (1998).

We review the District C judgment de novo. *Shelton v. Blea* Cir. 2015). Summary judgment i drawing all reasonable inferences party, there exists "no genuine disp *Shuker v. Smith & Nephew, PLC*, 2018) (quoting Fed. R. Civ. P. independent assessment of the reco the District Court that Ampco is conduct at the North Plant, and w grant of summary judgment in favo

i. *Ampco Is Greenleas for Contan*

nity sees it, the issues of material on the question of elated theories to responsible for . First, Trinity ause it qualifies th Plant. Second, eory, Ampco is ion of the North two analytically mpany liable for n a subsidiary's U.S. 51, 67-68

ant of summary F.3d 554, 559 (3d iate only if, after f the non-moving ny material fact." 760, 770 (3d Cir. After our own ce, we agree with for Greenlease's refore affirm the co.

ectly Liable for of Responsibility t the North Plant.

CERCLA holds an "operator" of a facility "directly liable for the costs of cleaning up the pollution." *Bestfoods*, 524 U.S. at 65. Direct liability attaches to a parent company whose subsidiary owns a facility only if the "act of operating a corporate subsidiary's facility is done on behalf of a parent corporation[.]" *Id.* The term "operate" is read according to its "ordinary or natural meaning" to refer to "someone who directs the workings of, manages, or conducts the affairs of a facility." *Id.* at 66 (citation omitted). To be directly liable, "an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id.* at 66-67. Whether Ampco is directly liable, therefore, must be based on its "participation in the activities of the" North Plant. *Id.* at 68. Trinity cannot hold Ampco liable for the environmental cleanup costs merely by showing that "dual officers and directors made policy decisions and supervised activities at the facility." *Id.* at 69-70. Direct liability will only exist if there is evidence that Ampco managed the day-to-day activities of the North Plant in a manner that exceeds "the interference that stems from the normal relationship between parent and subsidiary." *Id.* at 71. As the Supreme Court instructed in *United States v. Bestfoods*, the relevant inquiry for direct liability focuses on the relationship between the parent entity and the polluting facility, not the parent's relationship to its subsidiary. *Id.* at 68.

The District Court rightly determined that the record here would not permit a reasonable fact-finder to conclude that Ampco's involvement in the day-to-day operations of the North Plant exceeded "the normal relationship between parent and subsidiary," *id.* at 71, in a manner that would support

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with the parent's investor status, such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability."[22] 524 U.S. at 72 (citation omitted). That the policies Ampco advised on may have included environmental issues does not, on this record, change the calculus.

Accordingly, we agree with the District Court's conclusion that Ampco's actions with respect to the North Plant did not fall outside the bounds of typical "parental oversight of a subsidiary's facility," *id.*, and hence are not a basis for direct liability.

[22] Trinity argues that "substantial factual similarities" between *Bestfoods* and the facts here support its argument that Ampco is directly liable for Greenlease's operation of the North Plant. (Trinity Opening Br. at 78.) It contends that "[e]very fact referenced by the Supreme Court in *Bestfoods* has a parallel in this case." (Trinity Reply Br. at 20.) We disagree. In *Bestfoods*, the Supreme Court vacated a judgment in favor of a parent corporation because one of its employees "played a conspicuous part in dealing with the toxic risks emanating from the operation of the [subsidiary's] plant." 524 U.S. at 72. Here, by contrast, Trinity has not pointed to record evidence that any officer, director, or employee of Ampco played a significant, let alone conspicuous, role in the operation of the North Plant.

ii. *Ampco Is … atively Liable for Greenleas… of Responsibility.*

A parent corporation can … erivatively liable under CERCLA for its subsidiary' … "only when[] the corporate veil may be pierced[.]" *I…* …nd "the corporate veil may be pierced" only in extrao… …cumstances, such as when "the corporate form woul… …se be misused to accomplish certain wrongful purp… *d.* at 62; *see also Wedner v. Unemp't Comp. Bd. of …* 96 A.2d 792, 794 (Pa. 1972) ("The corporate enti… …sonality will be disregarded [o]nly when the entit… to defeat public convenience, justify wrong, prote… …r defend crime." (citation omitted)). In such circur… the law permits a subsidiary to be deemed an "alter e… parent so that the parent can be held liable for the… …f its subsidiary. *Pearson v. Component Tech. Corp.* … 471, 484 (3d Cir. 2001). Piercing the corporate veil … …l exception to the "general principle of corporate la… …ingrained in our economic and legal systems that a … …poration … is not liable for the acts of its subsidiarie… *…oods*, 524 U.S. at 61 (internal quotation marks and … …mitted); *see also Lumax Indus., Inc. v. Aultman*, 66… 3, 895 (Pa. 1995) ("[T]here is a strong presumptio… …nsylvania against piercing the corporate veil.").

Trinity seeks to use both fe… and state law to pierce the corporate veil. The fed… …rinciples we have articulated for when a subsidiary i… …n alter ego of its parent are substantially similar to… …iples set forth in Pennsylvania case law. Our anal… …th, therefore, can largely proceed in tandem, thoug… specifically note Trinity's state law-specific argum… …der either theory,

Trinity has failed to adduce sufficient evidence to create a triable issue of fact.

We have identified several factors helpful in determining whether, as a matter of federal common law, a subsidiary is merely an alter ego of its parent. Those factors include "gross undercapitalization, failure to observe corporate formalities, nonpayment of dividends, insolvency of [subsidiary] corporation, siphoning of funds from the [subsidiary] corporation by the dominant stockholder, nonfunctioning of officers and directors, absence of corporate records, and whether the corporation is merely a façade for the operations of the dominant stockholder." *Pearson*, 247 F.3d at 484-85.[23] No single factor is dispositive, and we consider whether veil piercing is appropriate in light of the totality of the circumstances. *Cf. Trs. of Nat'l Elevator Indus. Pension, Health Benefit & Educ. Funds v. Lutyk*, 332 F.3d 188, 194 (3d Cir. 2003) (explaining that the alter ego test factors do not comprise "a rigid test"); *Am. Bell Inc. v. Fed'n of Tel. Workers of Pa.*, 736 F.2d 879, 887 (3d Cir. 1984) (requiring "specific, unusual circumstances" before piercing the corporate veil (citation omitted)).[24]

[23] Factors considered by Pennsylvania state courts include "undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs and use of the corporate form to perpetrate a fraud." *Lumax*, 669 A.2d at 895.

[24] *See also Advanced Tel. Sys., Inc. v. Com-Net Prof'l Mobile Radio, LLC*, 846 A.2d 1264, 1281 (Pa. Super. Ct. 2004) (looking to the "totality of circumstances" when conducting corporate veil piercing analysis).

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Pearson, 247 F.3d at 485. "[
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1994)).[26]

[25] *See also E. Minerals &*
F.3d 330, 333 n.6 (3d Cir. 2000) (e
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Trinity appears to agree that most of the traditional factors we look to when determining whether to pierce the corporate veil are either inapplicable to this case or favor Ampco. Its primary arguments for piercing the corporate veil are that "Greenlease became undercapitalized when Ampco

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convincing standard when the plaintiff does not allege fraud, and that Pennsylvania applies a preponderance of the evidence standard to its alter-ego analysis.

First, Trinity is incorrect as a matter of law that "under no circumstances" is a clear and convincing standard "appropriate for summary judgment purposes." (Trinity Opening Br. at 68.) "[T]he determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "Consequently, where the clear and convincing evidence standard applies, the trial judge [at summary judgment] must inquire whether the evidence presented is such that a jury applying that evidentiary standard could find only for one side." *Justofin v. Metro. Life Ins. Co.*, 372 F.3d 517, 522 (3d Cir. 2004). Second, our precedent is clear, as a matter of federal common law in this Circuit, that "[b]ecause alter ego is akin to and has elements of fraud theory, … it … must be shown by clear and convincing evidence." *Lutyk*, 332 F.3d at 192 (citation omitted). Trinity has not presented any compelling argument to revisit that longstanding proposition. Third, we do not need to address the standard of proof we think Pennsylvania applies to its alter-ego analysis because, whether we apply a preponderance of the evidence standard or a clear and convincing evidence standard to the state law analysis, our ultimate conclusion is the same – no reasonable fact-finder could justify piercing the corporate veil on this record.

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b. Greenlease and Ampco's Relationship Was a Typical Parent-Subsidiary Relationship.

Trinity emphasizes that there was significant overlap between the boards of Ampco and Greenlease and argues that Ampco dominated Greenlease to an unusual extent. But "duplication of some or all of the directors or executive officers" is not fatal to maintaining legally distinct corporate forms. *Bestfoods*, 524 U.S. at 62 (citation omitted); *see also Am. Bell*, 736 F.2d at 887 (noting that "there must be specific, unusual circumstances" to justify veil piercing, and mere control and participation in management is inadequate). Greenlease ran the North Plant and hired all of the employees on the ground. Although Ampco was required to approve large decisions, Greenlease generally functioned with autonomy on decisions concerning manufacturing, environmental compliance, and disposal of waste. We have already said and now repeat that the District Court rightly determined that the record simply does not support Trinity's position that Greenlease's relationship with Ampco was materially different than a normal parent-subsidiary relationship.

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subsidiary. The record is devoid of evidence that Ampco misused separate corporate entities for some nefarious purpose. To pierce the corporate veil would thus fly in the face of Pennsylvania's "strong presumption … against piercing the corporate veil." *Lumax*, 669 A.2d at 895.

d. Public Policy Considerations Do Not Favor Trinity.

Finally, Trinity argues that the District Court failed to consider public policy justifications for piercing the corporate veil to ensure that the "polluter pays." (Trinity Opening Br. at 74.) As discussed above, however, both federal and Pennsylvania law favor maintaining the legal fiction of separate corporate entities. Because the evidence does not suggest that there was fraud or an attempt to use a corporate façade as an alter ego, public policy first favors upholding the integrity of the corporate form. Trinity has not presented any public policy consideration sufficiently compelling to overcome the strong presumption against veil piercing.

IV. CONCLUSION

For the foregoing reasons, we will affirm in part but will vacate the District Court's cost allocation determination and remand for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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THE BROOKLYN UNION GAS COMPANY,

Plaintiff,

-against-

EXXON MOBIL CORPORATION,
UNITED STATES OF AMERICA,
PARAGON OIL INC./TEXACO, INC.,
BAYSIDE FUEL OIL DEPOT CO.,
IRON MOUNTAIN, INC.,
CITY OF NEW YORK,
MOTIVA ENTERPRISES LLC,
BUCKEYE PARTNERS, L.P.,
SUNOCO, INC. (R&M),
CHEVRON U.S.A. INC.,
19 KENT ACQUISITION LLC,
NORTH 12TH ASSOCIATES LLC,
35 KENT AVE LLC,
NEW 10TH STREET LLC, and
PATTI 3 LLC,

Defendants.
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REPORT AND RECOMMENDATION

17-CV-0045 (MKB) (ST)

TISCIONE, United States Magistrate Judge:

On January 4, 2016, Plaintiff The Brooklyn Union Gas Co. d/b/a National Grid NY ("National Grid", "Plaintiff") brought this action against Defendants Exxon Mobil Corporation ("Exxon"); the United States of America ("United States" or "U.S."); Texaco, Inc. ("Texaco"); Bayside Fuel Oil Depot Co. ("Bayside"); Iron Mountain, Inc. ("Iron Mountain"); City of New York; Motiva Enterprises LLC ("Motiva"); Buckeye Partners, L.P. ("Buckeye"); Sunoco, Inc. (R&M) ("Sunoco"); Chevron U.S.A. Inc. ("Chevron"); 19 Kent Acquisition LLC ("19 Kent"); North 12th Associates LLC ("North 12"); 35 Kent Ave LLC ("35 Kent"); New 10th Street LLC ("New 10"); and Patti 3 LLC ("Patti 3") (collectively "Defendants") for cost recovery arising out

of the disposal, release, and/or threatened release of hazardous substances into the environment at current and historical facilities owned and/or operated by Defendants adjacent to the Bushwick Inlet and the East River in Brooklyn, New York (the "Bushwick Site" or the "Site"). Dkt. No. 1 at 2[1] ("Compl." or the "Complaint"). National Grid filed an Amended Complaint on April 11, 2017. Dkt. No. 75 ("Am. Compl."). The Amended Complaint asserts causes of action under Section 107(a) (for recovery of response costs, "CERCLA 107") and Section 113(f)(3)(B) (for contribution, "CERCLA 113") of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* ("CERCLA"), 42 U.S.C. §§ 9607(a), 9613 (f)(3)(B), the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, and the New York Navigation Law, N.Y. Nav. Law §§ 170 – 197. Am. Compl. ¶¶ 20-21. On May 25, 2017, Defendants moved to dismiss the CERCLA claims and the dependent Declaratory Judgment Act claim in the Amended Complaint. Dkt. No. 109 at 33 ("Mot. to Dismiss Mem."); *see also* Dkt. No 111 ("Patti 3 Supp. Mem."); Dkt. No. 106-1 at 6 ("U.S. Supp. Mem."); Dkt. No 115 ("Motiva Supp. Mem."). On April 5, 2018, the Honorable Margo K. Brodie referred Defendants' Motion to Dismiss to me for a report and recommendation. For the reasons described below, I respectfully recommend that Defendants' motion to dismiss the Amended Complaint be granted for the CERCLA 113 claim with prejudice. I also recommend granting Defendants' motion with respect to the CERCLA 107 claim and the dependent Declaratory Judgment claim with leave to amend.

[1] Pages are ECF pages unless otherwise indicated.

I. BACKGROUND[2]

National Grid seeks to recover for past and future costs relating to the environmental investigation, remediation, and monitoring of the Bushwick Site, the swath of Brooklyn adjacent to the East River and the Bushwick Inlet. Am. Compl. ¶¶ 1, 21, 46. This land was the site of multiple industrial activities from the mid-1800s until as late as 2014. *Id.* ¶¶ 25, 113. These industrial activities included a facility operated by Defendant United States that extracted toluol from oil and gas operations (*id.* ¶¶ 87-90), an oil refinery and cannery owned and operated by Defendant Exxon (*id.* ¶¶ 68-86), petroleum storage facilities owned and operated by Defendant Texaco and also owned by Defendant Motiva (*id.* ¶¶ 91-92, 112-115), petroleum storage and distribution facilities owned and operated by Defendant Bayside (*id.* ¶¶ 93-105), a storage facility operated by Defendant Iron Mountain (*id.* ¶¶ 106-108), a petroleum bulk storage facility owned and operated by Defendant City of New York (*id.* ¶¶ 109-111), an oil pipeline owned and operated by Defendant Buckeye (*id.* ¶¶ 116-120), petroleum bulk storage and transportation operated by Defendant Sunoco (*id.* ¶¶ 121-123), an oil truck repair shop and oil truck parking facility owned and operated by Defendant Chevron (*id.* ¶¶ 124-126), and a manufactured gas plant ("MGP") operated by Defendant Exxon (*id.* ¶¶ 2, 127-135). Land and facilities at the Site have changed hands since the 1800s, but all Defendants have either owned or operated land or facilities on site. *Id.* ¶¶ 46-67.

Plaintiff alleges that, as a result of these industrial operations, the above-recited Defendants have discharged and released numerous solid wastes and hazardous substances at the Site, some of which came into contact with, or became entrained with, gasoline and other

[2] Generally, a court's review on a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure "is limited to the facts as asserted within the four corners of the complaint, the documents attached to the complaint as exhibits, and any documents incorporated…by reference." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007); *accord Wilson v. Kellogg Co.*, 628 F. App'x 59, 60 (2d Cir. 2016) (summary order).

petroleum products released at the Site. *Id.* ¶¶ 3-14. Other defendants are listed as being owners of "parcel[s] of land on the Site that [are] contaminated with hazardous substances. *Id.* ¶¶ 15-19 (naming 19 Kent, North 12, 35 Kent, New 10, and Patti 3).

In 2007, National Grid and the New York State Department of Environmental Conservation ("NYSDEC") entered into an agreement ("Administrative Order on Consent" or "AOC") allowing for the investigation and potential remediation of numerous MGPs, and in August 2007, National Grid and NYSDEC entered into a Modification of the AOC that added certain sites, including parts of the Bushwick Site, to the scope of the agreement. *Id.* ¶¶ 136-138; Dkt. No 110-2 ("Feb. 2007 AOC"); Dkt. No 110-3 ("Modification") (collectively the "AOC").[3] Specifically, the Modification added the Williamsburg MGP and the Wythe Avenue Holder Station sites, both listed as being part of the Bushwick Site in the Amended Complaint. Modification at 4; Am. Compl. ¶¶ 47, 50.

National Grid worked with NYSDEC to develop an Interim Remedial Measure ("IRM") plan for the Williamsburg MGP site. Am. Compl. ¶ 139. Plaintiff alleges that "Prior to NYSDEC's approval of a final Remedial Design/Remedial Action Work Plan, National Grid exercised its right to terminate the Williamsburg MGP from the AOC." *Id.* ¶ 140.

On January 4, 2017, National Grid filed its initial Complaint commencing the instant action. Compl. Following pre-motion conferences held on February 16, and March 21, 2017, National Grid filed an Amended Complaint. Am. Compl. at 1. Defendants now seek to dismiss the CERCLA claims in the Amended Complaint for failure to state a claim under Rule 12(b)(6). Mot. to Dismiss Mem. at 6 (citing Fed. R. Civ. P. 12(b)(6)); *see also* Patti 3 Supp. Mem.; U.S.

[3] Both agreements are incorporated into the Amended Complaint by reference. Am. Compl. ¶¶ 136, 138; *see, e.g., Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004) (documents are incorporated by reference into the complaint where "complaint explicitly refers to and relies upon…the documents").

Supp. Mem.; Motiva Supp. Mem. Defendants argue that National Grid's CERCLA 113 claim is time barred[4] and that Plaintiff's CERCLA 107 claim is precluded because the CERCLA 113 claim was available to Plaintiff instead. Mot. to Dismiss Mem. at 7.

II. DISCUSSION

A. Legal Standards

Upon a motion to dismiss, a court must determine whether a complaint states a legally cognizable claim by making allegations that, if true, would show that the plaintiff is entitled to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570); *Sarmiento v. United States*, 678 F.3d 147, 152 (2d Cir. 2012). Rule 8 of the Federal Rules of Civil Procedure does not require detailed factual allegations, but "[a] pleading that offers 'labels and conclusions' or 'formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555, 557). A complaint may plausibly entitle a plaintiff to relief when there is "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

There are "[t]wo working principles" that guide analysis of a motion to dismiss: "First, the court must accept all factual allegations as true and draw all reasonable inferences in favor of the non-moving party," and "[s]econd, only a complaint that states a plausible claim for relief

[4] "Where the dates in a complaint show that an action is barred by a statute of limitations, a defendant may raise the affirmative defense …. as a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted." *Ghartey v. St. John's Queens Hosp.*, 869 F.2d 160, 162 (2d Cir. 1989).

survives a motion to dismiss, and this determination is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Snyder v. Perry*, No. 14-cv-2090 (CBA)(RER), 2015 WL 1262591, at *4 (E.D.N.Y. Feb. 4, 2015) (quoting *Iqbal*, 556 U.S. at 678, 679), *adopted in part by*, 2015 WL 1262591 (E.D.N.Y. Mar. 18, 2015).

B. Documents Considered

In deciding on a motion to dismiss for failure to state a claim, a court's "consideration is generally limited to the facts as presented within the four corners of the complaint, to documents attached to the complaint, or to documents incorporated within the complaint by reference." *Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768, 776 (2d Cir. 2002). "In addition, this Court recognizes a narrow exception allowing a court to consider 'a document upon which [the complaint] ***solely*** relies and which is ***integral to the complaint***.'" *Williams v. Time Warner Inc.*, 440 F. App'x 7, 9 (2d Cir. 2011) (emphasis in original) (quoting *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007)). Finally, a court can take judicial notice of "a fact that is not subject to reasonable dispute" if "it … can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

Defendants attach almost 700 pages of exhibits to their Motion to Dismiss and Reply (*see* Dkt. Nos. 110-3 to -14; Dkt. No 114-2 to -3), arguing that the factual information in those exhibits is proper for a 12(b)(6) motion. Dkt. No. 113 ("Def.'s Reply") at 17-19. This Court will consider the attached February 2007 AOC and Modification because those were incorporated into the Amended Complaint by reference. Am. Compl. ¶¶ 136, 138; *see, e.g., Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004) (documents are incorporated by reference into the complaint where "complaint explicitly refers to and relies upon…the documents").

Defendants argue that this Court can take judicial notice of the remaining information in the exhibits. Def.'s Reply at 13. But "[i]n the motion to dismiss context, however, a court should generally take judicial notice 'to determine what statements [the documents] contain… not for the truth of the matters asserted.'" *Schubert v. City of Rye*, 775 F. Supp. 2d 689, 698 (S.D.N.Y. 2011) (quoting *Kramer v. Time Warner Inc.,* 937 F.2d 767, 774 (2d Cir.1991)); *see also Moukengeschaie v. Eltman, Eltman & Cooper, P.C.*, No. 14-CV-7539 (MKB), 2016 WL 1274541, at *13 n.13 (E.D.N.Y. Mar. 31, 2016) ("[O]n a motion to dismiss, the court may only take judicial notice 'to establish the existence of the [statements in the document], not for the truth of the facts asserted' therein" (quoting *Glob. Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006)). Thus, this Court cannot accept for their truth statements made by National Grid or NYSDEC in the attached website printouts, correspondences, and state court complaint. *See, e.g.,* Mot. to Dismiss Mem. at 13 ("According to National Grid's website, as of May 25, 2017, site restoration was underway for the NAPL recovery well component of the IRM."); Def.'s Reply at 16-17 ("[A] February 16, 2017 email from a NYSDEC attorney to National Grid's attorney, stat[es] the Department's unequivocal view that the conditions required for the termination of a site from the 2007 Order and Settlement 'have never been met….'"). It is not possible to assert that these documents contain statements "from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2); *see, e.g., Acquest Holdings, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 217 F. Supp. 3d 678, 684 n.1 (W.D.N.Y. 2016) ("It is not apparent that the Police Report contains facts that are common knowledge or derived from an unimpeachable source."). Furthermore, no reasonable notice was provided to Plaintiff for the Court to convert the Motion to Dismiss to one for summary judgment and consider the extraneous factual information in the attached exhibits. Fed. R. Civ. P. 12(d) ("All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.").

Thus, the Court will not consider any Defendant exhibits beyond the February 2007 AOC and Modification (collectively, the "AOC") for this Report and Recommendation.

C. CERCLA Claims Should be Dismissed

CERCLA is a comprehensive federal statute "designed to encourage prompt and effective cleanup of hazardous waste sites." *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 120 (2d Cir. 2010). It "empowers the federal government and the states to initiate comprehensive cleanups and to seek recovery of expenses associated with those cleanups." *Id.* Under CERCLA, "property owners are strictly liable for the hazardous materials on their property, regardless of whether or not they deposited them there." *Id.* Those owners are then "allow[ed] to seek reimbursement of their cleanup costs from others in the chain of title or from certain polluters—the so-called potentially responsible parties ('PRP's)." *Id.*

CERCLA 107 "authorizes the United States, a state, or 'any other person' to seek reimbursement for all removal or remedial costs associated with the hazardous materials on the property." *Id.* at 120–21 (citing 42 U.S.C. § 9607(a)). CERCLA 113 "provides a right of contribution [against third parties] to PRPs that have settled their CERCLA liability with a state or the United States through … an administrative … settlement." *Id.* at 121 (citing 42 U.S.C. § 9613(f)(3)(B)). CERCLA also protects those PRPs who have settled with the government from "claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2). This scheme was created to ensure "swift and effective response to hazardous waste sites" (*Anspec Co., Inc. v. Johnson Controls, Inc.,* 922 F.2d 1240, 1247 (6th Cir.1991)), by encouraging the government and "and potentially responsible parties to launch clean-up efforts first, then recover the costs from other responsible parties later—through settlements, consent

decrees and, if need be, judgments." *RSR Corp. v. Commercial Metals Co.*, 496 F.3d 552, 555 (6th Cir. 2007).

a. CERCLA 113 Claim is Time Barred

CERCLA 113 allows "[a] person who has resolved its liability to… a State for some or all of a response action or for some or all of the costs of such action in an administrative …settlement" to "seek contribution from any person who is not a party to [the] settlement." 42 U.S.C.A. § 9613(f)(3)(B). CERCLA also imposes a 3-year statute of limitations ("SOL") "after…entry of a…settlement with respect to such costs or damages." 42 U.S.C.A. § 9613(g)(3)(B); *see Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004) ("Section 113(g)(3)…provides …[a] 3–year limitations period[] for contribution actions …beginning at the date of [administrative or judicially approved] settlement, § 113(g)(3)(B)."); *New York v. Solvent Chem. Co.*, 664 F.3d 22, 26 (2d Cir. 2011) ("[T]here is a short statute of limitations for a CERCLA contribution claim …[under] 42 U.S.C. § 9613(g)(3) …three year[s from] …entry of administrative order….").

Defendants argue that the AOC resolved National Grid's liability to NYSDEC when it was executed in 2007, providing Plaintiff with an immediate right to contribution under CERCLA 113. Mot. to Dismiss Mem. at 23-26. Consequently, Defendants contend, the statute of limitations for the AOC was triggered in 2007 and expired 3 years later in 2010, barring Plaintiff's CERCLA 113 claim. *Id.* at 26. Plaintiff counters that the AOC never resolved its liability with NYSDEC because National Grid terminated the AOC, under the AOC's Termination Clause, before completing its performance. Dkt. No. 112 ("Pl.'s Opp'n") at 17-18. Plaintiff also alleges that, since no liability was resolved, the statute of limitations for the CERCLA 113 was not triggered and the claim is thus not time barred. *Id.* at 19.

i. AOC Resolution of Liability Language[5]

There are several relevant clauses in the AOC related to National Grid's lability. The AOC is entitled "Order on Consent and Administrative Settlement." Feb. 2007 AOC at 1 (Title). The Order explicitly states that it "constitutes an administrative settlement within the meaning of CERCLA …§ 113(f)(3)(B)" and that it "resolves Respondent's liability to the State under …CERCLA …to the extent set forth herein." Feb. 2007 AOC at 1 (Whereas para. 1.C). In particular, the agreement has a Resolution Clause that states in relevant part:

> Respondent ***shall be deemed to have resolved its liability to the State*** for purposes of contribution protection provided by CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2) for 'matters addressed' pursuant to and in accordance with this Order & Settlement Agreement. 'Matters addressed' in this Order & Settlement Agreement shall mean all response actions taken by Respondent to implement this Order & Settlement Agreement for the Sites and all response costs incurred and to be incurred by any person or party in connection with the work performed under this Order & Settlement Agreement, which costs have been paid by Respondent…. Furthermore, to the extent authorized under CERCLA § 113(f)(3)(B), 42 U.S.C. Section 9613(f)(3)(B), by entering into this administrative settlement of liability, if any, for some or all of the response action and/or for some or all of the costs of such action, ***Respondent is entitled to seek contribution under CERCLA*** from any person except those who are entitled to contribution protection under CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2).

Id. at 21-22 (Section XIV.I).[6]

The AOC specifies that the agreement does not constitute "an admission or finding of liability, fault, wrongdoing, or violation of any law, regulation, permit, order, requirement, or standard of care of any kind whatsoever." *Id.* at 4 (Whereas para. 6.B).

[5] The Modification primarily adds more MGP sites to the Order and does not disturb the relevant liability language in the February 2007 AOC. *See* Modification at 2 (Whereas para. 4A).
[6] Emphasis is added unless otherwise specified.

The AOC has a conditional Release and Covenant Not to Sue ("Covenant Not to Sue"), specifying:

> ***Upon…the Department's***[7] ***approval*** of either the RD/RA Work Plan final report or an IRM Work Plan ***final report*** evidencing that no further remedial action (other than site management activities) is required to meet the goals of the Remedial Program for a Site, …***such acceptance shall constitute a release and covenant not to sue with respect to the Site*** for each and every claim, demand, remedy, or action whatsoever against Respondent… which the Department has or may have …pursuant to any other provision of State or Federal statutory or common law, including but not limited to § 107(a) of CERCLA, 42 U.S.C. § 9607(a), involving or relating to investigative or remedial activities relative to or arising from the disposal of hazardous wastes…at the Site….

Id. at 8-9 (Section II.G). There is also a Reopening clause within the Covenant:

> [P]rovided, however, that the Department specifically reserves all of its rights concerning, and any such release and covenant not to sue shall not extend to any further investigation or remediation the Department deems necessary due to newly discovered environmental conditions on-Site or off-Site which are related to the disposal of hazardous wastes at the Site and which indicate that the Remedial Program is not protective of public health and/or the environment.

Id. at 9 (Section II.G). The release also specifies that "[n]othing herein shall be construed as barring, diminishing, adjudicating, or in any way affecting any legal or equitable rights or claims, actions, suits, causes of action, or demands whatsoever that…Respondent may have against anyone other than the Department, including but not limited to rights of contribution under § 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B)…." *Id.*

Finally, the AOC contains a Termination Clause:

> This Order & Settlement Agreement ***will terminate with respect to a Site*** upon the earlier of the following events:

[7] "Department" is the NYSDEC. Feb. 2007 AOC at 1 (Whereas para. 1.A)

> 1. Respondent's election to terminate with respect to a Site …so long as such election is made prior to the Department's approval of the RD/RA Work Plan for that Site. …[P]rovided, however, that if there are one or more Work Plan(s) with respect to such Site for which a final report has not been approved at the time of Respondent's notification of its election to terminate … Respondent shall promptly complete the activities required by such previously approved Work Plan(s)consistent with the schedules contained therein.…; or
>
> 2. the Department's written determination that Respondent has completed all phases of the Remedial Program (including site management) for all the Sites….

Id. at 18 (Section XIII.A). However, the Termination Clause also explains that "neither this Order & Settlement Agreement nor its termination shall affect any liability of Respondent may have for remediation of the Site and/or for payment of State Costs, including implementation of removal and remedial actions, interest, enforcement, and any and all other response costs as defined under CERCLA." *Id.* (Section XIII.C).

ii. Split in Authority Regarding Resolution of Liability

There appears to be a consensus amongst the Circuits that a case-by-case analysis of the AOC's terms is required to determine whether an AOC sufficiently resolves liability to establish a CERCLA 113 claim. *See Niagara Mohawk*, 596 F.3d at 125 (looking at particular AOC language to determine whether the order "released NiMo from CERCLA liability"); *Asarco LLC v. Atl. Richfield Co.*, 866 F.3d 1108, 1125 (9th Cir. 2017) ("Whether this test is met depends on a case-by-case analysis of a particular agreement's terms."); *Bernstein v. Bankert*, 733 F.3d 190, 213 (7th Cir. 2013) ("Whether or not liability is resolved through a settlement simply is not the sort of question which can or should be decided by universal rule."); *Fla. Power Corp. v. FirstEnergy Corp.*, 810 F.3d 996, 1001 (6th Cir. 2015) ("To determine whether the agreement resolves a PRP's liability, we look to the specific terms of the agreement."). The Circuits do not

agree, however, on the effect of an AOC where release in liability is conditional on performance. Specifically, there is no consensus about whether the conditional language means that (1) liability is only resolved when the AOC conditions have been met, or (2) that liability is either resolved or not resolved at execution of the AOC and subsequent performance is irrelevant.

The Second Circuit has not directly addressed at what point in time an administrative settlement with conditional release provisions resolves a person's liability. Although Defendants cite *Niagara Mohawk* for the holding that "resolution of liability [i]s effective upon the execution of the Consent Order" (Mot. to Dismiss Mem. at 23-24), this particular point was not squarely before that Court. *See Niagara Mohawk*, 596 F.3d at 126. In contrast to the present action, the Second Circuit in *Niagara Mohawk* was simply trying to decide whether a consent order ***ever*** resolved a plaintiff's liability, not ***when***. *See id.* at 127 ("The 2003 Consent Order between NiMo and the DEC qualifies as 'an administrative or judicially approved settlement' under § 113(f)(3)(B); NiMo is entitled to seek contribution under CERCLA."). Thus, this Court must turn to persuasive authority to decide whether and when the AOC resolved National Grid's liability to the NYSDEC.

There appear to be two schools of thought on how to treat an AOC where release from liability is conditioned on performance, as is the case here. For some courts, especially where the AOC has strong language conditioning liability on completed performance, the AOC can only resolve liability at the time the required performance is actually completed. For this wait-and-see approach, if performance is never completed, the liability is never resolved and a CERCLA 113 claim is never available. [8] This approach was adopted by one district court case in

[8] This approach does not necessarily eliminate the possibility that an AOC can resolve liability at the time of execution. If the AOC resolution language is sufficiently certain, it can be deemed to have resolved liability immediately. *See Bernstein v. Bankert*, 733 F.3d 190, 213 (7th Cir. 2013) ("Of course, if the EPA had included an immediately effective promise not to sue as consideration for entering into the agreement, the situation would be

this Circuit as well as by the Seventh Circuit. *DMJ Assocs., L.L.C. v. Capasso*, 181 F. Supp. 3d 162, 168 (E.D.N.Y. 2016) (no contribution claim under CERCLA 113 when "th[e] termination [of the AOC] occurred before the parties could fulfill all of their obligations set forth in the AOC"); *Bernstein*, 733 F.3d at 204 ("By the terms of the AOC, when the Non–Premium Respondents completed performance of their obligations under the 1999 AOC ….[they] had 'resolved [their] liability to the United States….' through an administrative settlement, thus satisfying the prerequisites for a contribution action pursuant to 42 U.S.C. § 9613(f)(3)(B).").

Other courts, for example the Ninth and Sixth Circuits, have decided that an AOC either resolves or does not resolve liability immediately upon execution of the agreement based on the language of the AOC, without considering post-execution performance. *See Asarco*, 866 F.3d at 1126; *Fla. Power Corp.*, 810 F.3d at 1008. Courts with this immediate determination approach still differ on when language is so conditional as to defeat resolution. *Compare Asarco*, 866 F.3d at 1124 ("Nor do we agree—as the court held in *Bernstein*—that a release from liability conditioned on completed performance defeats 'resolution.'" (citing *Bernstein*, 733 F.3d 190)) *with Fla. Power Corp.*, 810 F.3d at 1008 ("In other words… [with] 'a conditional promise to release from liability if and when performance was completed' …. the effect … is no resolution of liability." (quoting *Bernstein*, 733 F.3d at 213)). Nevertheless, the general approach of the Ninth and Sixth Circuits to determine the resolution of liability as of the date of settlement appears to align better with CERCLA's statutory scheme and its underlying policies.

First, the wait-and-see approach allows a CERCLA 113 claim to potentially arise after performance is completed. This is anomalous with the CERCLA SOL provision, which is

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different.").

triggered, by its own terms, at the date of ***entry*** of a settlement. *See* 42 U.S.C. § 9613(g)(3)(B) (imposing a 3-year statute of limitations "after…***entry*** of a…settlement"); *HLP Properties, LLC v. Consol. Edison Co. of New York*, No. 14 CIV. 01383 LGS, 2014 WL 6604741, at *6 (S.D.N.Y. Nov. 21, 2014) ("Where there is an administrative settlement resolving CERCLA liability, the statute of limitations is triggered on the date the settlement is entered into."). "Thus, under the Seventh Circuit's [wait-and-see] approach, a party's contribution action could accrue ***after*** the statute of limitations had already expired." *Asarco*, 866 F.3d at 1125 n.8. Consequently, this approach results in internal inconsistencies within the statute.

A number of courts have recognized the importance of having consistency between the accrual date of a CERCLA 113 claim and the triggering of the SOL. *Chitayat v. Vanderbilt Assocs.*, 702 F. Supp. 2d 69, 83 (E.D.N.Y. 2010) ("Such a conclusion comports with the rule under federal common law that it is the discovery of the injury which triggers the statute of limitations. Here, Chitayat would have discovered his 'injury' no later than the date he entered into the Consent Order."); *Cooper Indus.*, 543 U.S. at 167 (analyzing contribution claims in the context of "the whole of § 113"); *RSR Corp.*, 496 F.3d at 558 ("And even if the covenant regarding future response costs did not take effect until the remedial action was complete, the statute of limitations for contribution actions runs from the 'entry' of the settlement, 42 U.S.C. § 9613(g)(3)(B), not from the date that each provision of that settlement takes effect."); *Fla. Power Corp.,* 810 F.3d at 1001 ("[T]o trigger the statute of limitations, an agreement must constitute an 'administrative or judicially approved settlement' within the meaning of § 113(f)(3)(B)."). This consistency is especially relevant in this case because Plaintiff appears to be claiming contribution under CERCLA 113 while simultaneously arguing that the SOL has not been

triggered for that claim. Pl.'s Opp'n at 17-18. This type of anomalous situation, if possible, should be avoided.

Second, the immediate determination approach promotes certainty and finality. Providing clarity as to a party's liability at the time they enter an agreement incentivizes the use of such settlements, "encourage[ing] prompt and effective cleanup of hazardous waste sites." *Niagara Mohawk*, 596 F.3d at 120; *cf. Asarco*, 866 F.3d at 1119 ("Granting a settling party a right to contribution from non-settling PRPs provides a strong incentive to settle and initiate cleanup."). Furthermore, the immediate determination approach helps third parties to timely assess their potential liability for contribution actions, leading to early resolution (or definitive foreclosure) of such claims. *See RSR Corp.*, 496 F.3d 552, 559 ("Early contribution actions 'ha[ve] the effect of bringing all … responsible parties to the bargaining table at an early date.'" (quoting H.R. Rep. No. 253, pt. I, at 80)); *id.* ("The principal purpose of limitations periods in th[e contributions] setting is to ensure that the responsible parties get to the bargaining-and clean-up-table sooner rather than later."). Again, this is particularly relevant here, where almost nine years had passed after the execution of the AOC before Plaintiff brought contribution claims against third parties.

I thus recommend analyzing the AOC in this case based on the parties' intent at the time of execution, without considering post settlement performance. *See Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 768 (6th Cir. 2014) ("In determining whether the ASAOC resolves some of Appellants' liability, we interpret the settlement agreement as a contract according to state-law [contract] principles.").

iii. AOC Resolved Plaintiff's Liability and Triggered SOL

The intent of the parties to the AOC can be determined from the language of the agreement. *Nichols v. Nichols*, 306 N.Y. 490, 496 (1954) ("The first and best rule of construction of every contract, … is that, when the terms of a written contract are clear and unambiguous, the intent of the parties must be found therein."). The AOC language indicates that National Grid and NYSDEC intended to immediately resolve their CERCLA 113 liability upon execution.

The AOC title contains the words "administrative settlement," mirroring the language of CERCLA 113. *See Fla. Power Corp.*, 810 F.3d at 1004 ("We explained that this provision expressed the parties' intent to resolve some of the plaintiffs' liability because the parties expressly designated the agreement as an 'administrative settlement….'" (citing *Hobart Corp.*, 758 F.3d at 769)). In fact, the AOC states that it "constitutes an administrative settlement within the meaning of CERCLA… § 113(f)(3)(B)." Feb. 2007 AOC at 1 (Whereas para. 1.C). Furthermore, the AOC states, ***in the present tense*** that it "resolves Respondent's liability to the State under…CERCLA… to the extent set forth herein." Feb. 2007 AOC at 1 (Whereas para. 1.C). The Resolution Clause reiterates this sentiment: "Respondent shall be deemed to ***have resolved*** its liability to the State for purposes of contribution protection provided by CERCLA" and "Respondent ***is entitled*** to seek contribution under CERCLA." *Id.* at 21-22 (Section XIV.I). This language provides strong indication that the parties intended the AOC to immediately resolve National Grid's liability for purposes of CERCLA. *See Chitayat*, 702 F. Supp. 2d at 80–81 (finding CERCLA 113 claim to exist where, *inter alia*, "Chitayat's Consent Order with the DEC …specifically refer[s] to the resolution of Chitayat's CERCLA liability"); *HLP Properties*, 2014 WL 6604741, at *5 (same holding where "the [Agreement] expressly releases the BCA Plaintiffs from liability under CERCLA"); *Hobart Corp.*, 758 F.3d at 769 (parties intended to

resolve their liability where "[n]ot only d[id] th[e AOC]… explicitly state that Appellants have resolved their liability, but it also cite[d] the specific section of CERCLA at issue").

Other aspects of the AOC do not negate this intent. The fact that National Grid does not admit liability in the AOC is inconclusive. Feb. 2007 AOC at 4 (Whereas para. 6.B). "Congress' intent in enacting § 113(f)(3)(B) was to encourage prompt settlements that establish PRPs' cleanup obligations with certainty and finality." *Asarco*, 866 F.3d at 1125. "A PRP's refusal to concede liability does not frustrate this objective so long as the PRP commits to taking action." *Id.* In fact, "requiring a PRP to concede liability may discourage PRPs from entering into settlements because doing so could open the PRP to additional legal exposure." *Id.*

The fact that the AOC's Covenant Not to Sue is conditioned "[u]pon… the Department's approval… of [a] final report" is also not dispositive. Feb. 2007 AOC at 8. First, the effect of this covenant is explicitly limited by the AOC: "[n]othing herein shall be construed as barring, diminishing, adjudicating, or in any way affecting any legal or equitable rights or claims, actions, suits, causes of action, or demands whatsoever that…Respondent may have against anyone other than the Department, including but not limited to rights of contribution under § 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B)…." *Id.* at 9 (Section II.G). Second, despite conditioning the release on future performance, the AOC otherwise indicates that National Grid intended to make an immediate promise to perform future remediation by signing the agreement. *See, e.g., id.* at 21-22 (Section XIV.I) ("Matters addressed' in this Order & Settlement Agreement shall mean … all response costs incurred ***and to be incurred*** …, which costs have been paid by Respondent…."). "A promise of future performance in an agreement [in exchange for a covenant not to sue] suffices to constitute resolution of liability" even where the agreement "include[s] a covenant not to sue conditioned on a Certification of Completion." *Asarco*, 866

F.3d at 1124 (citing *RSR Corp.*, 496 F.3d 552); *Fla. Power Corp.*, 810 F.3d at 1012) (Suhrheinrich, J., dissenting) ("RSR and the EPA exchanged promises of future performance that created an enforceable, bilateral contract…."). Third, "[i]f a covenant not to sue conditioned on completed performance negated resolution of liability, then it is unlikely that a settlement agreement could ***ever*** resolve a party's liability"[9] due to CERCLA's requirement that the President certify that remedial action has been completed before a covenant not to sue can be effective. *Asarco*, 866 F.3d at 1124 (citing 42 U.S.C. § 9622(f)(3)). Nullifying parties' ability to settle CERCLA claims is contrary to Congressional intent in providing a contribution remedy in the first place. *Id.* at 1125. Thus, as a practical matter, "[a]n agreement may 'resolve[ ]' a PRP's liability once and for all without hobbling the government's ability to enforce its terms if the PRP reneges." *Id.* at 1124. Fourth, two district courts in this Circuit have held that such conditional language does not negate resolution of liability. *Chitayat*, 702 F. Supp. 2d at 81 (finding immediate resolution of liability even where release was "contingent upon years of Compliance"); *HLP Properties*, 2014 WL 6604741, at *5, *6 ("[A]greements providing for future resolution of CERCLA liability [still] constitute administrative settlements for purposes of § 113" that trigger SOL "on the date the settlement is entered into.").

By the same logic, the Reopening Clause does not undermine the parties' intent to resolve liability at entry of settlement. The Reopening Clause allows NYSDEC to request further remediation on the covered sites to protect public health or the environment. Feb. 2007

[9] Furthermore, focusing on the conditionality of the covenant not to sue may not be a logical way to assess resolution of liability because covenants not to sue are always conditional—the government can always sue for breach of contract if a PRP fails to perform its obligations under the AOC. *See Fla. Power Corp. v. FirstEnergy Corp.*, 810 F.3d 996, 1019 n. 10 (6th Cir. 2015) (Suhrheinrich, J., dissenting). "[E]ven a[n] unconditional covenant not to sue arguably resolves liability to the same extent as a fully conditional covenant not to sue, since both terms still allow the EPA to sue…[either for breach of contract or for breach of the AOC] in the event of non-performance." *Id.*

AOC at 9 (Section II.G). Yet, the effect of the Reopening Clause is expressly limited by the same language as the Covenant Not to Sue. *Id.* ("[n]othing herein shall be construed as … in any way affecting any legal or equitable rights or claims…that…Respondent may have against anyone …, including but not limited to rights of contribution under § 113(f)(3)(B) of CERCLA…."). In addition, a district court in the Second Circuit has found that the existence of a similar Reopening Clause in an AOC does not "preclude… Plaintiff[] from seeking contribution to the extent that at least some, if not most, of [its] CERCLA liability has been resolved by the [AOC]." *New York v. Town of Clarkstown*, 95 F. Supp. 3d 660, 676 (S.D.N.Y. 2015); *see also Fla. Power Corp.,* 810 F.3d at 1016 (Suhrheinrich, J., dissenting) ("[T]his reserved authority [to order parts of clean-up not addressed by agreement] should not affect the agreement's status as an administrative settlement because 42 U.S.C. § 9613(f)(3)(B) requires only a resolution of liability for 'some' of a response action."). Thus, " [t]he [AOC] resolves … liability with regard to the 'Matters Addressed' and provides … contribution protection for those matters." *Town of Clarkstown*, 95 F. Supp. 3d at 676; *cf. Asarco*, 866 F.3d at 1126 (no resolution where "the [agreement] did not just leave open ***some*** of the United States' enforcement options, it preserved all of them"). Finally, public policy considerations indicate that the government should be able to settle with private parties under CERCLA while still being able to reopen sites to protect public health or the environment. *Cf. Asarco*, 866 F.3d at 1124 ("An agreement may 'resolve[ ]' a PRP's liability once and for all without hobbling the government's ability to enforce its terms if the PRP reneges."). In sum, it would defy logic to allow the Reopener Clause to undermine the resolution of liability in this case.

Likewise, the AOC's Termination Clause does not affect the resolution of liability. The AOC explains that "neither this Order & Settlement Agreement ***nor its termination shall affect***

any liability of Respondent may have for remediation of the Site and/or for payment of State Costs, including implementation of removal and remedial actions, interest, enforcement, and any and all other response costs as defined under CERCLA." Feb. 2007 AOC at 18 (Section XIII.C). Thus, the AOC explicitly indicates that the parties did not intend the Termination Clause to affect National Grid's liability with respect to the AOC.[10] Therefore, the AOC resolved at least some of National Grid's liability, rendering a contribution claim available. *See Town of Clarkstown*, 95 F. Supp. 3d at 676; *see also HLP Properties*, 2014 WL 6604741, at *5 (finding the fact that "Plaintiffs here may terminate the agreement at any time without consequence" irrelevant to "[t]he …determin[ation of] whether an agreement qualifies as an administrative settlement for purposes of § 113").

Because the intent of the parties was to resolve National Grid's liability at the execution of the AOC, Plaintiff had a claim for contribution under CERCLA 113 in 2007. That claim thus expired after 3 years under the statute of limitations and is now time barred. *See Fla. Power Corp.*, 810 F.3d at 1001 ("[T]o trigger the statute of limitations, an agreement must constitute an 'administrative or judicially approved settlement' within the meaning of § 113(f)(3)(B)."). The Court sees no manner in which Plaintiff could amend the CERCLA 113 claim that would survive dismissal. *See Hayden v. Cnty. of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999) ("[W]here the plaintiff is unable to demonstrate that he would be able to amend his complaint in a manner which would survive dismissal, opportunity to replead is rightfully denied."). Leave to amend would be futile. *See Harrison v. New York*, 95 F. Supp. 3d 293, 305–06 (E.D.N.Y. 2015) ("Leave to amend is

[10] Plaintiff's reference to *DMJ Assocs.* is thus not persuasive because no such limiting language was considered in that case. *See DMJ Assocs., L.L.C. v. Capasso*, 181 F. Supp. 3d 162, 168 (E.D.N.Y. 2016) ("[T]his termination occurred before the parties could fulfill all of their obligations set forth in the AOC…. Accordingly, the TPPs cannot assert a contribution claim under § 113(f)(3)(B)….").

often futile when a claim is dismissed based on… the expiration of the statute of limitations….").

Accordingly, I recommend dismissing Plaintiff's CERCLA 113 claim with prejudice.

b. CERCLA 107 Claims Should be Dismissed as Insufficiently Pled

To establish a prima facie case under CERCLA 107, a plaintiff must show that

> (1) the defendants fall within one or more of the four classes of responsible persons described in CERCLA § 107(a); (2) the site is a "facility" as defined in CERCLA; (3) a release or threatened release of a hazardous substance has occurred, (4) the release or threatened release has caused the plaintiff to incur response costs; and (5) the costs and response actions conform to the national contingency plan set up by CERCLA.

SRSNE Site Grp. v. Advance Coatings Co., No. 3:12-CV-00443 (VLB), 2015 WL 13639165, at *3 (D. Conn. Mar. 27, 2015). Responsible persons under CERCLA § 107(a) include "the owner and operator of a vessel or a facility" or "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(1), (2). A "facility" can be "any building, structure, installation, equipment, pipe or pipeline" or "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9).

A CERCLA 107 claim is not available when a party had a right of contribution under CECRLA 113 for those same costs. The Second Circuit has recognized that allowing a party to proceed under CERCLA 107 would "in effect nullify" Congressional intent of creating a distinct contribution remedy under CERCLA 113. *Niagara Mohawk*, 596 F.3d at 128. Other Circuits have come to the same conclusion. *Hobart Corp.*, 758 F.3d at 767 ("[I]t is sensible and consistent with the text to read § 113(f)'s enabling language to mean that if a party is able to bring a contribution action, it must do so under § 113(f), rather than § 107(a)."); *Bernstein*, 733

F.3d at 206 ("[W]e agree with our sister circuits that a plaintiff is limited to a contribution remedy when one is available.").

Case law is more mixed about whether response costs incurred outside of an administrative settlement can be recovered under CERCLA 107. The Second Circuit has not addressed the issue. *See Niagara Mohawk*, 596 F.3d at 127 n.17 ("We…do not decide whether a § 107(a) action could be pursued by a PRP that incurs clean up costs after engaging with the federal or a state government…."). The district courts in this Circuit appear to be split on the issue. *Compare HLP Properties*, 2014 WL 6604741, at *5 ("Because…Plaintiffs are eligible to proceed under § 113, they are not permitted to proceed under § 107, even if certain costs might be recoverable only under that provision.") *with Next Millennium Realty, L.L.C. v. Adchem Corp.*, No. CV 03-5985 (ARL), 2015 WL 11090419, at *25–26 (E.D.N.Y. Mar. 31, 2015), *aff'd*, 690 F. App'x 710 (2d Cir. 2017) ("[B]ecause Plaintiffs may have incurred costs beyond what the Consent Order requires and beyond what they could recover as contribution under § 113, the Court declines to dismiss Plaintiffs' § 107 claim at this juncture.").

This Court will assume without deciding that Plaintiff is not barred from pursuing a CERCLA 107 claim to the extent it does not overlap with its CERCLA 113 claim under the AOC. *See Whittaker Corp. v. United States*, 825 F.3d 1002, 1009 (9th Cir. 2016) ("The two other circuits [Seventh and Third] to have considered the question have held that, even where one of the statutory triggers for a contribution claim has occurred for certain expenses at a site, a party may still bring a cost recovery action for its other expenses."). The Amended Complaint states that "[a]s a result of the releases at and near the Bushwick Site, the Plaintiff has incurred and ***will continue to incur*** substantial response costs in taking actions to investigate, remediate, and monitor the hazardous substances, and to restore the Bushwick Site." Am. Compl. at ¶ 149.

Thus, in theory, Plaintiff can pursue a CERCLA 107 claim for any expenses incurred on the Bushwick Site for sites not covered by the AOC. Plaintiff can also pursue a claim for expenses, if any, incurred on the Williamsburg MGP after termination of that site from the AOC. As detailed below, however, Plaintiff has failed to sufficiently plead either claim under CERCLA 107.

i. CERCLA 107 Claim for Sites Not Under AOC

Plaintiff's CERCLA 107 claim for sites not covered by the AOC is insufficiently pled. Plaintiff has failed to sufficiently plead that the Bushwick Site constitutes a "facility" under CERCLA 107. The Amended Complaint lists the various contaminants that have been disposed on the Bushwick Site and the various parties that owned or operated parts of the Bushwick Site at different points in time. This Court has found no authority, however, that treats an area containing various structures that were never under common ownership or control and that does not involve contamination by a single contaminant as a single "facility." *See New York v. Gen. Elec. Co*., No. 1:14-CV-747 (CFH), 2017 WL 1239638, at *21 (N.D.N.Y. Mar. 31, 2017) (not considering two sites a single "facility" despite a "a common source of contamination" where "[t]he properties were not operated as a single unit together" and "did not have a common owner at the time of the contamination"); *Alprof Realty LLC v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, No. 09-CV-5190 (CBA) (RER), 2012 U.S. Dist. LEXIS 131046, at *24 (E.D.N.Y. Sep. 12, 2012) ("The cases cited…do not establish that a CERCLA facility must always be defined to include the entire area of contamination, and they particularly do not stand for the proposition that an unrelated neighboring property onto which contamination spreads becomes part of the CERCLA facility."); *cf. Yankee Gas Servs. Co. v. UGI Utilities, Inc.*, 616 F. Supp. 2d 228, 270–71 (D. Conn. 2009) ("[A] site with a single source

of pollution is almost always considered one 'facility' within the meaning of CERCLA and is generally not divisible absent extraordinary circumstances.").

Furthermore, it would be illogical to consider the Bushwick Site a single facility given the posture of this case. Plaintiff can no longer recover costs incurred for sites under the AOC, as explained *supra*. Therefore, only certain parts of the Bushwick Site are even theoretically eligible for a CERCLA 107 claim.[11] The Amended Complaint thus needed to specify which structures on the Bushwick Site eligible for a CERCLA 107 claim constitute separate "facilities."[12] The Amended Complaint does not do so. It only alleges, in conclusory terms, that "[t]he Bushwick Site is a 'facility' within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9)." Am. Compl. ¶ 145. Although the word "facility" appears colloquially numerous times in the Amended Complaint (*see, e.g.,* Am. Compl. ¶ 9, 43), that does not necessarily establish that a site constitutes a facility under CERCLA. Again, courts look for some nexus between different structures, such as a single contaminant or common ownership, in order to consider them part of the same facility. This Court will not speculate as to which parts of the Bushwick Site not under the AOC meet these requirements. *See McGregor v. Indus. Excess Landfill, Inc.*, 856 F.2d 39, 43 (6th Cir. 1988) (A court is not "required to presume facts that would turn plaintiffs' apparently frivolous claim under Section 107 of CERCLA into a substantial one.").

Moreover, "in order to recover their response costs," National Grid should have alleged "that there has been a release of … Contaminants at Defendants' 'respective facilities.'" *See Roosevelt Irr. Dist. v. Salt River Project Agr. Imp. & Power Dist*., 39 F. Supp. 3d 1059, 1067 (D.

[11] For example, Plaintiff has not alleged that the Wythe Street Holder Station has been terminated from the AOC. *See* Modification at 2. Thus, that portion of the Bushwick Site is not eligible for a CERCLA 107 action.
[12] It is unlikely that Plaintiff can properly plead that the all portions of the Bushwick Site not under the AOC are a single "facility" given the disparate ownership and sources of contamination in the various portions of the Site.

Ariz. 2014). It is difficult to assess whether National Grid has pled that "a release or threatened release of a hazardous substance has occurred" for each facility given the lack of a proper designation of what constitutes each "facility." *SRSNE Site Grp.*, 2015 WL 13639165, at *3. For instance, if Block 2279 is treated as a separate "facility," then the Amended Complaint only pleads that it was "the site of the former Eagle Oil Works," that "Patti 3 owns a portion of Block 2279," and that "Defendant Exxon formerly operated on Block 2279." Am. Compl. ¶ 51, 66. There is no allegation of a release of a hazardous substance as required for a CERCLA 107 claim.

The Amended Complaint also contains no allegations to support the requirement that costs incurred at sites outside of those in the AOC are "necessary costs of response … consistent with the national contingency plan." 42 U.S.C. 9706(a)(4)(B). "Costs are 'necessary' if incurred in response to a threat to human health or the environment." *Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 703 (6th Cir. 2006). The Amended Complaint alleges that *all* the costs incurred on the Bushwick Site "qualify as costs of response within the meaning of CERCLA and are necessary and consistent with the National Contingency Plan. 42 U.S.C. § 9601(25); 42 U.S.C. § 9605." Am. Compl. ¶ 150. It also states that "[d]uring the period that Defendants owned, managed, directed, and controlled enterprises at or near the Bushwick Site, hazardous substances were released into the environment and/or remain a threat to the environment." Am. Compl. ¶ 157. Such conclusory language is insufficient to meet the pleading standards under *Twombly/Iqbal*. *See Iqbal*, 556 U.S. at 678 ("A pleading that offers 'labels and conclusions' or 'formulaic recitation of the elements of a cause of action will not do.'" (quoting *Twombly*, 550 U.S. at 555, 557)); *see also J & P Dickey Real Estate Family Ltd. P'ship v. Northrop Grumman Guidance & Elecs. Co.*, No. 2:11CV37, 2012 WL 925015, at *5 (W.D.N.C. Mar. 19, 2012)

(dismissing a CERCLA 107 claim where "[t]he Complaint contain[ed] no factual allegations supporting the claim that the soil and water testing and surveillance are consistent with the National Contingency Plan."). Factual detail was, in particular, necessary here, where the Bushwick Site cannot be properly treated as a single facility and the costs eligible for CERCLA 107 recovery were not incurred under the supervision of a government body responsible for environmental cleanup, such as the NYSDEC.

Therefore, Plaintiff has failed to sufficiently plead a CERCLA 107 claim for sites not under the AOC.

ii. Williamsburg MGP Expenses Incurred After Termination

In its opposition papers, Plaintiff argues that it is not precluded "from seeking ***different*** expenses under CERCLA §§ 107 and 113" because "National Grid incurred costs pursuant to the AOC and has continued to incur response costs ***after*** terminating the AOC." Pl.'s Opp'n at 15 (first emphasis in original). In particular, Plaintiff seems to imply that its costs "incurred with an administrative agreement that (like the AOC with respect to the Williamsburg MGP) was later terminated" could be recovered under CERCLA 107. *Id.*

To the extent Plaintiff is attempting to recover costs incurred at the Williamsburg MGP under CERCLA 107 after the termination of that site from the AOC, Plaintiff's claim should be dismissed as insufficiently pled. The Amended Complaint, in combination with the integrated AOC, likely contains enough information to establish that the Williamsburg MGP was a facility that was owned and/or operated by a subset of Defendants who released hazardous substances at the site. *See, e.g.,* Am. Compl. ¶ 6, 52, 61, 75, 124, 127-135; Feb. 2007 AOC at 4 (each Site under the AOC is a "facility" under CERCLA); *id.* at 5 (alleging compliance with National

Contingency Plan); *see also SRSNE Site Grp.*, 2015 WL 13639165, at *3 (listing elements of CERCLA 107 claim).

Plaintiff did not plead, however, that it continued to incur costs at the Williamsburg MGP ***after*** the site was terminated under the AOC. Costs, if any, incurred after termination are the only costs eligible for a CERCLA 107 claim for this site, as detailed *supra*. Plaintiff's statements regarding such costs in its opposition papers cannot compensate for a lack of pleading in the Amended Complaint. "It is long-standing precedent in this circuit that parties cannot amend their pleadings through issues raised solely in their briefs." *Fadem v. Ford Motor Co.*, 352 F. Supp. 2d 501, 516 (S.D.N.Y.), *aff'd,* 157 F. App'x 398 (2d Cir. 2005). Therefore, Plaintiff has failed to sufficiently plead a CERCLA 107 claim for costs incurred at the Williamsburg MGP after the AOC was terminated.[13]

In sum, Plaintiff has failed to sufficiently plead either claim under CERCLA 107. This Court recommends dismissing all of Plaintiff's CERCLA 107 claims with leave to amend. *See* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend a pleading] when justice so requires.").

D. Declaratory Judgment Act Claim Should be Dismissed

"Plaintiff [also] seeks a declaration [under 42 U.S.C. § 9613(g)(2)(B)] that Defendants are liable to Plaintiff for [CERCLA 107] response costs." Am. Compl. ¶ 160. In a CERCLA 107 action, a court can "enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages." 42 U.S.C. § 9613(g)(2)(B). However, "[d]eclaratory relief under § 9613(g)(2) is only

[13] This Court notes that whether Plaintiff met all the prerequisites in order to properly terminate the AOC with respect to the Williamsburg MGP is a factual question that cannot properly be resolved in a motion to dismiss. *See Arden Way Assocs. v. Boesky*, 664 F. Supp. 855, 857 (S.D.N.Y. 1987) ("Fed.R.Civ.P. 12(b)(6) is not an appropriate vehicle by which to decide what fundamentally are factual disputes.").

available in connection with an active cost recovery action [under CERCLA 107]." *Mercury Mall Assocs., Inc. v. Nick's Mkt., Inc.*, 368 F. Supp. 2d 513, 520 (E.D. Va. 2005). Accordingly, because I recommend dismissal of Plaintiff's CERCLA 107 claims, I recommend that the Declaratory Judgment Act claim be dismissed as well. Leave to amend may be appropriate in the future if Plaintiff properly alleges a viable CERCLA 107 claim.

III. CONCLUSION

For the foregoing reasons, I respectfully recommend that the Court grant Defendants' motion to dismiss the Amended Complaint for the CERCLA 113 claim with prejudice. I also recommend granting Defendants' motion with respect to the CERCLA 107 claim and the dependent Declaratory Judgment claim, with leave to amend.

IV. OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b)(2) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report and Recommendation to file written objections. Failure to file timely objections shall constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. *See Marcella v. Capital Dist. Physicians' Health Plan, Inc.*, 293 F.3d 42, 46 (2d Cir. 2002); *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989); *see also Thomas v. Arn*, 474 U.S. 140 (1985).

SO ORDERED.

/s/
Steven L. Tiscione
United States Magistrate Judge
Eastern District of New York

Dated: Brooklyn, New York
September 10, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

HOBART CORPORATION, *et al.*, Plaintiffs,	:	
v.	:	Case No. 3:13-cv-115
THE DAYTON POWER & LIGHT COMPANY, *et al.*, Defendants.	:	JUDGE WALTER H. RICE

DECISION AND ENTRY SUSTAINING IN PART AND OVERRULING IN PART PLAINTIFFS' MOTION TO DISMISS DEFENDANT VALLEY ASPHALT CORPORATION'S AMENDED COUNTERCLAIM (DOC. #794); SUSTAINING PLAINTIFFS' MOTION TO DISMISS DEFENDANT THE DAYTON POWER & LIGHT COMPANY'S AMENDED COUNTERCLAIM (DOC. #798)

This matter is currently before the Court on Plaintiffs' Motion to Dismiss Defendant Valley Asphalt Corporation's Amended Counterclaim, Doc. #794, and Plaintiffs' Motion to Dismiss Defendant The Dayton Power & Light Company's Amended Counterclaim, Doc. #798.

I. Background and Procedural History

Plaintiffs, Hobart Corporation, Kelsey-Hayes Company and NCR Corporation, filed suit against numerous defendants under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), as amended, 42 U.S.C. § 9601 *et seq.*, seeking contribution for response costs incurred in

connection with the South Dayton Dump and Landfill Site ("the Site"). The response costs arose out of two Administrative Settlement Agreements and Orders on Consent ("ASAOCs"), executed in 2013 and 2016 between Plaintiffs and the United States Environmental Protection Agency ("EPA").

Many of the defendants filed counterclaims. On August 29, 2017, the Court issued a Decision and Entry Sustaining in Part and Overruling in Part Plaintiffs' Motion to Dismiss Counterclaims to Fifth Amended Complaint. Doc. #774. With respect to the Counterclaims of all Defendants, the Court: (1) dismissed all claims seeking indemnification; (2) permitted Defendants to proceed on their counterclaims for contribution for the cost of identifying other potentially responsible parties ("PRPs")[1]; and (3) dismissed all claims for contribution for future response costs. *Id.*

The Court also dismissed Counterclaims filed by Defendants Valley Asphalt Corporation ("Valley Asphalt") and The Dayton Power & Light Company ("DP&L"), who alleged that they incurred certain response costs as a result of releases of hazardous substances from the Site onto their own properties. They sought contribution and/or indemnification from Plaintiffs under 42 U.S.C. §§ 9607(a) and § 9713(f). Although the Court held that these two defendants had failed to state a claim upon which relief can be granted, it gave them leave to file Amended Counterclaims to cure the cited deficiencies. Doc. #774.

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[1] A potentially responsible party or "PRP" is one who falls within one or more of the four categories of persons who may be held liable for response costs under CERCLA. *See* 42 U.S.C. § 9607(a).

On October 5, 2017, Valley Asphalt and DP&L each filed an Amended Counterclaim, Docs. ##787, 788. Plaintiffs have moved to dismiss both Amended Counterclaims, Docs. ##794, 798, arguing that Defendants have still failed to state a claim upon which relief can be granted.

II. Fed. R. Civ. P. 12(b)(6)

Federal Rule of Civil Procedure 8(a) provides that a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The pleading must provide the opposing party with "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

Federal Rule of Civil Procedure 12(b)(6) allows a party to move for dismissal of a claim on the basis that it "fail[s] to state a claim upon which relief can be granted." The moving party bears the burden of showing that the opposing party has failed to adequately state a claim for relief. *DirecTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007) (citing *Carver v. Bunch*, 946 F.2d 451, 454-55 (6th Cir. 1991)). The purpose of a motion to dismiss under Rule 12(b)(6) "is to allow a [party] to test whether, as a matter of law, the [opposing party] is entitled to legal relief even if everything alleged in the [claim] is true." *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). In ruling on a 12(b)(6) motion, a court must construe the pleading in the light most favorable to the non-moving party, accept its

allegations as true, and draw all reasonable inferences in favor of the non-moving party. *Handy-Clay v. City of Memphis,* 695 F.3d 531, 538 (6th Cir. 2012).

Nevertheless, to survive a motion to dismiss under Rule 12(b)(6), the pleading must contain "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Unless the facts alleged show that the claim crosses "the line from conceivable to plausible, [the] complaint must be dismissed." *Id.* Although this standard does not require "detailed factual allegations," it does require more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Id.* at 555. "Rule 8 . . . does not unlock the doors of discovery for a [party] armed with nothing more than conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). Legal conclusions "must be supported by factual allegations" that give rise to an inference that the opposing party is, in fact, liable for the misconduct alleged. *Id.* at 679.

III. CERCLA Remedies

The Court starts with a brief review of remedies available under CERCLA. Section 106 of the statute sets forth remedies available to the United States to abate imminent dangers to public health or welfare or the environment because of an actual or threatened release of a hazardous substance. 42 U.S.C. § 9606(a) ("Section 106").

CERCLA also provides two distinct avenues for *private parties* to recover costs incurred in cleaning up contaminated sites. *United States v. Atl. Research Corp.*, 551 U.S. 128, 131 (2007). Those remedies are set forth in 42 U.S.C. §§ 9607 ("Section 107") and 9613 ("Section 113"). Under § 107, a private party who has voluntarily incurred cleanup costs may recover "necessary costs of response" if those costs are "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). Liability under § 107(a) is joint and several. *See Atl. Research*, 551 U.S. at 140 n.7 (assuming this issue without deciding).

Section 113 provides 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) of this title." 42 U.S.C. § 9613(f)(1). "[A] PRP's right to contribution under § 113(f)(1) is contingent upon an inequitable distribution of common liability among liable parties." *Atl. Research*, 551 U.S. at 139. "Section 113(f)(1) authorizes a contribution action to PRPs with common liability stemming from an action instituted under § 106 or § 107(a)." *Id.* Accordingly, a party that is sued under § 106 or § 107 "may seek contribution from other PRPs under § 113(f)(1), so that the recovery costs can be distributed in an equitable fashion." *Hobart Corp. v. Waste Mgmt. of Ohio*, 758 F.3d 757, 762 (6th Cir. 2014) (footnote omitted).

Section 113 also provides that "a person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall

not be liable for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2). However, a person who has resolved its liability to the Government for some or all of a response action may seek contribution from any person who is not a party to the administrative or judicially approved settlement. 42 U.S.C. § 9613(f)(3)(B).

An initial action for cost recovery under § 107(a) is subject to a three-year or a six-year statute of limitations, depending on the circumstances. 42 U.S.C. § 9613(g)(2). All contribution claims brought under § 113(f) are subject to a three-year statute of limitations. 42 U.S.C. § 9613(g)(3).

As a general rule, the remedies set forth in § 107(a)(4)(B) and § 113(f) are mutually exclusive. *Hobart*, 758 F.3d at 766. The Sixth Circuit explained that "costs incurred voluntarily are recoverable only by way of § 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under § 113(f)." *Id.* (quoting *Atl. Research*, 551 U.S. at 139-40 n.6).

In *Atlantic Research*, the Court expressly left open the question of whether a PRP who incurs costs *involuntarily* may recover those compelled costs under § 113(f), § 107(a), or both. 551 U.S. at 139 n.6.[2] The Sixth Circuit, however, addressed this unresolved question in *Hobart*. The court concluded that the plaintiffs-appellants, who had incurred response costs only because they were

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[2] The Supreme Court also left open the question of whether "§ 107(a) contains an additional implied right to contribution for PRPs who are not eligible for relief under § 113(f)." *Atl. Research*, 551 U.S. at 141 n.8.

obligated to do so under the ASAOCs, "must proceed under § 113(f) if they meet one of that section's statutory triggers." 758 F.3d at 767. As discussed above, a private party may file a contribution claim under § 113(f): (1) "during or following any civil action" under §§ 106 or 107(a), *see* 42 U.S.C. § 9613(f)(1); or (2) after resolving its liability to the Government in an "administrative or judicially approved settlement[,]" *see* 42 U.S.C. § 9613(f)(3)(B).[3]

With these legal principles in mind, the Court turns to the pending motions.

IV. Plaintiffs' Motion to Dismiss Defendant Valley Asphalt Corporation's Amended Counterclaim (Doc. #794)

In 2013, the EPA issued a Unilateral Administrative Order ("UAO") under § 106(a), directing Valley Asphalt Corporation to test for vapor intrusion and, if necessary, install a vapor abatement mitigation system on its own property. After being named as a defendant in this lawsuit, Valley Asphalt filed a § 113(f) counterclaim, seeking contribution from Plaintiffs for costs incurred in connection with that UAO.

In its August 29, 2017, Decision and Entry, the Court noted that Valley Asphalt's property is within the boundaries of the Site, and the 2013 ASAOC required Plaintiffs to do this same work Site-wide. Because this was a matter addressed in the ASAOC, Plaintiffs were entitled to contribution protection, under

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[3] In *Hobart*, the Sixth Circuit held that, because the ASAOC was an "administrative settlement" within the meaning of § 113(f)(3)(B), plaintiffs-appellants were precluded from bringing a § 107(a)(4)(B) cost-recovery action. 758 F.3d at 769.

§ 113(f)(2), for vapor testing and mitigation efforts on Valley Asphalt's property. The Court held that, to the extent that Valley Asphalt sought contribution from Plaintiffs under § 113(f), the Counterclaim was devoid of factual allegations giving rise to an inference that any of the response costs stemming from the UAO were outside the scope of Plaintiffs' contribution protection. Doc. #774, PageID##21323-24.

In its Amended Counterclaim, Valley Asphalt now seeks to recover those same UAO costs *under § 107(a)*. It also still seeks contribution from Plaintiffs under § 113(f) for the costs of identifying other potentially responsible parties.[4] The Amended Counterclaim alleges, in relevant part, as follows:

> 2. The S. Dayton Dump and Landfill Site ("Site") is a "facility" within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
>
> 3. On information and belief, Plaintiffs are liable persons at the Site under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a) because they arranged for disposal and/or treatment of hazardous substances at the Site and/or accepted hazardous substance for transport to the Site.
>
> 4. On information and belief, there has been a release and a threatened release of hazardous substances from the Site onto Valley Asphalt's property.
>
> 5. As a direct and proximate result of the release and the threatened release from the Site, Valley Asphalt has incurred costs in excess of $220,000 and continues to incur substantial and necessary costs of response in compliance with the terms of a March 2013 Unilateral Administrative Order ("2013 UAO") issued by the United States Environmental Protection Agency ("USEPA") under CERCLA § 106(a), 42 U.S.C. § 9606(a), attached hereto as Exhibit A, including but not

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[4] Given that the cost of identifying PRPs is outside the scope of Plaintiffs' contribution protection, the Court has permitted Defendants to proceed with this portion of their § 113(f) Counterclaims. Doc. #744, PageID##21313-14.

> limited to sampling and testing, demolition of buildings and installation of a sub-slab vapor mitigation system.
>
> 6. The response action required by the 2013 UAO is ongoing.
>
> 7. Because Valley Asphalt carried out its response action in compliance with the terms of the 2013 UAO, all costs incurred under the 2013 UAO were and are consistent with the National Contingency Plan pursuant to 40 C.F.R. § 300.700(c)(3)(ii).
>
> 8. Under CERCLA Section 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B), Valley Asphalt is entitled to cost recovery from each Plaintiff for response costs incurred in connection with the 2013 UAO.
>
> 9. If, and to the extent that Valley Asphalt is adjudged to be a liable person at the S. Dayton Dump and Landfill Site under Section 107(a) of CERCLA, 42 U.S.C. §9607(a), in this action, Valley Asphalt is entitled to contribution and/or indemnification from Plaintiffs pursuant to Section 107(a)(4)(B) and contribution pursuant to Section 113(f)(1) of CERCLA for the costs of identifying other potentially responsible parties.

Doc. #787, PageID##21699-700.

In their Motion to Dismiss Valley Asphalt's Amended Counterclaim, Plaintiffs argue that: (A) because Valley Asphalt satisfies one or more of the "statutory triggers" needed to bring a counterclaim for contribution under § 113(f), it is prohibited from bringing a cost recovery counterclaim under § 107(a); and (B) Valley Asphalt has not adequately alleged that it incurred any costs of identifying other potentially responsible parties.

A. Availability of a § 107(a) Cost Recovery Claim

The Court turns first to Plaintiffs' argument that, because Valley Asphalt is eligible to bring a contribution action under § 113(f), it cannot bring a cost recovery claim under § 107(a). As discussed above, the Sixth Circuit has held that

"PRPs must proceed under § 113(f) if they meet one of that section's statutory triggers." *Hobart*, 758 F.3d at 767. Those "statutory triggers" are set forth in §§ 113(f)(1) and (f)(3)(B). A private party may bring a contribution claim: (a) during or following any civil action under § 106 or § 107 of ERISA, *see* 42 U.S.C. § 9613(f)(1); or (b) after resolving "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 any such action in an administrative or judicially approved settlement," *see* 42 U.S.C. § 9613 (f)(3)(B).

The UAO at issue here specifically states that it does not constitute "a satisfaction of or release from any claim or cause of action" the United States may have against Valley Asphalt. Doc. #787, PageID#21620. Accordingly, because the UAO does not constitute an "administrative or judicially approved settlement," Valley Asphalt cannot pursue a contribution counterclaim under § 113(f)(3)(B).

Therefore, the only relevant question is whether Valley Asphalt can pursue a contribution counterclaim under § 113(f)(1). Such a claim is available "during or following any civil action" under § 106 or § 107(a). 42 U.S.C. § 9613(f)(1). Plaintiffs maintain that Valley Asphalt meets the statutory trigger under § 106 by virtue of the UAO, and also meets the statutory trigger under § 107(a) by virtue of having been named a defendant in this lawsuit. The Court will discuss each of these in turn.

1. Section 106

Citing *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1997), Plaintiffs first argue that Valley Asphalt's § 106 UAO gives rise to a contribution claim under § 113(f)(1). In *Centerior*, the plaintiffs, who incurred $9.5 million in costs related to a UAO issued by the EPA, sought recovery under § 107(a). The court held that "[c]laims by PRPs . . . seeking costs from other PRPs are necessarily actions for contribution, and are therefore governed by the mechanisms set forth in § 113(f)." *Id.* at 350. The court noted that the plaintiffs' claim was a "'quintessential' action for contribution." *Id.* at 351. The court concluded that a party who is itself a PRP and is compelled to clean up a hazardous waste site is limited to an action for contribution under § 113(f) and cannot bring a § 107 cost recovery action against other PRPs. *Id.* at 356.

Factually, this case appears to be directly on point. As in *Centerior*, Valley Asphalt, a PRP, incurred response costs pursuant to a UAO and now seeks to recover those costs from other PRPs, including Plaintiffs. Accordingly, if *Centerior* is still good law, Valley Asphalt would be entitled to bring a § 113(f)(1) claim for contribution, and would be precluded from bringing a cost recovery claim under § 107(a).

Valley Asphalt, however, argues that *Centerior* is no longer good law. To the extent that *Centerior* holds that one PRP can *never* bring a § 107(a) cost recovery action against another PRP, the Court agrees. In *Atlantic Research*, the Supreme Court held that "the plain language of [§ 107(a)(4)(B)] authorizes cost-

recovery actions by any private party, *including PRPs*." 551 U.S. at 136 (emphasis added). *See also ITT Indus., Inc. v. BorgWarner, Inc.*, 506 F.3d 452, 457-58 (6th Cir. 2007) (noting that, post-*Atlantic Research*, *Centerior* does not necessarily bar a PRP from bringing a cost recovery claim under § 107(a)); *Ford Motor Co. v. Mich. Consol. Gas Co.*, 993 F. Supp. 2d 693, 702 (E.D. Mich. 2014) (noting that *Centerior*'s holding, that cost recovery actions brought by PRPs are actions for contribution, governed by § 113(f), did not survive *Atlantic Research*).

Whether a PRP can bring a §107(a) cost recovery claim depends on the "circumstances leading up to the action, not the identity of the parties." *ITT Indus.*, 506 F.3d at 458. As previously noted, the Supreme Court has stated that "costs incurred *voluntarily* are recoverable only by way of § 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under § 113(f)." *Atlantic Research*, 551 U.S. at 139 n.6 (emphasis added). The Court expressly left open the question of whether a PRP who sustains costs *involuntarily* may recover those compelled costs under § 107(a), § 113(f), or both. *Id.* However, in *Hobart*, the Sixth Circuit held that a PRP who meets one of the statutory triggers set forth in § 113(f) is precluded from bringing a § 107(a) cost recovery claim. *Hobart*, 758 F.3d at 767.

Accordingly, if the UAO constitutes a "civil action" under § 106, then Valley Asphalt has a contribution claim under § 113(f) and is prohibited from pursuing a § 107(a) cost recovery claim. Courts, however, are split on the question of whether a UAO constitutes a "civil action" under § 106. The Supreme Court has

not yet decided this issue. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168 n.5 (2004).

Among the lower courts, most have held that a UAO does not constitute a "civil action" for purposes of § 113(f). *See Diamond X Ranch, LLC v. Atl. Richfield Co.*, No. 3:13-cv-00570, 2016 U.S. Dist. LEXIS 114799, at **18-19 (D. Nev. Aug. 26, 2016) (collecting cases); *Raytheon Aircraft Co. v. U.S.*, 435 F. Supp. 2d 1136, 1142 (D. Kan. 2006) (concluding that a UAO is not a "civil action" for purposes of § 113(f)); *Pharmacia Corp. v. Clayton Chem. Acquisition LLC*, 382 F. Supp. 2d 1079, 1088-89 (S.D. Ill. 2005) (same); *Emhart Indus., Inc. v. New England Container Co.*, 478 F. Supp. 2d 199, 203 (D.R.I. 2007) (holding that "§ 113(f)(1) is unavailable for parties who are merely subject to administrative orders").

A few lower courts, however, have held that a UAO does constitute a "civil action" under § 106, giving rise to a § 113(f)(1) contribution claim. *See Carrier Corp. v. Piper*, 460 F. Supp. 2d 827, 841 (W.D. Tenn. 2006) ("the Court finds that a UAO falls within the requirement of a 'civil action' under § 113(f)(1)"); *PCS Nitrogen, Inc. v. Ross Dev. Corp.*, 104 F. Supp. 3d 729, 742 (D.S.C. 2015) (same). The Sixth Circuit's holding in *Centerior*, that a UAO requiring cleanup by a PRP gives rise to a claim of contribution under § 113(f)(1), 153 F.3d at 351-52, appears to adhere to this minority view.

The Court need not determine whether this particular holding in *Centerior* is still good law. As explained below, regardless of whether the UAO constitutes a

"civil action" under § 106, Valley Asphalt is entitled to bring a § 113(f)(1) contribution claim by virtue of the fact that it has been sued in the instant action.

2. Section 107(a)

Valley Asphalt is entitled to seek contribution from another PRP "during or following any civil action" under § 107(a). *See* 42 U.S.C. § 9613(f). Given that Plaintiffs have sued Valley Asphalt for cost recovery at the Site under § 107(a), and for contribution under § 113(f)(3)(B), the statutory trigger has been met.

As explained in greater detail below, it does not matter that the Court has dismissed Plaintiffs' § 107(a) cost recovery claims. The elements of a § 113(f) contribution claim, and the relevant defenses, are based on the requirements set forth in § 107(a). *See ITT Indus.*, 506 F.3d at 458. Accordingly, the language "during or following any civil action under . . . section 9607(a) of this title" must be construed to include § 113(f) contribution claims.[5] Because Valley Asphalt is eligible to bring a claim for contribution under § 113(f), it cannot bring a claim for cost recovery under § 107(a). *Hobart*, 758 F.3d at 767.

3. Equitable Considerations

Valley Asphalt argues that this outcome is unfair because, even though it is *eligible* to bring a § 113(f) counterclaim against Plaintiffs, *recovery* is barred by virtue of the contribution protections provided to Plaintiffs in the ASAOCs. Valley

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[5] Although a defendant sued for contribution under § 113(f) may file contribution cross-claims against co-defendants and counterclaims against Plaintiffs, such claims are largely redundant, given that the Court is already charged with equitably allocating response costs among all liable parties. *See* 42 U.S.C. § 9613(f)(1).

Asphalt maintains that, under the circumstances presented here, the Court should allow it to pursue a cost recovery claim against Plaintiffs under § 107(a). The Court disagrees.

Although Valley Asphalt cannot *recover* from Plaintiffs under § 113(f), this does not justify allowing Valley Asphalt to pursue a § 107(a) cost recovery counterclaim against them. The fact that Valley Asphalt is left without a viable remedy against Plaintiffs,[6] and that Valley Asphalt and other defendants may have to shoulder a disproportionate share of costs associated with the UAO, is of little or no legal import.

Plaintiffs have taken responsibility for the cleanup of the Site and have settled their claims with the EPA. Their actions fulfill CERCLA's goal of promoting timely cleanup of hazardous waste sites. *Kalamazoo River Study Grp. v. Menasha Corp.*, 228 F.3d 648, 657 (6th Cir. 2000). To allow Valley Asphalt to now pursue a § 107(a) cost recovery counterclaim against Plaintiffs would discourage settlement. As previously noted, under § 113(f), a PRP is liable only for its equitable share of the cleanup costs. In contrast, under § 107(a), PRPs are jointly and severally liable. To subject Plaintiffs to joint and several liability for the costs that Valley Asphalt incurred pursuant to the UAO would be unfair, given that Plaintiffs have only a § 113(f) claim against Valley Asphalt.

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[6] It is undisputed that Valley Asphalt may bring a § 113(f) cross-claim for contribution against the other PRP defendants in this case.

4. Conclusion

Given that Valley Asphalt has satisfied at least one of the statutory triggers for bringing a contribution action under § 113(f), it cannot bring a cost recovery claim under § 107(a). The fact that Valley Asphalt will not be able to recover from Plaintiffs on the § 113(f) counterclaim does not warrant a different result. Accordingly, to the extent that Valley Asphalt seeks cost recovery against Plaintiffs under § 107(a), it has failed to state a claim upon which relief can be granted. The Court therefore SUSTAINS Plaintiffs' motion to dismiss this portion of the Amended Counterclaim.

B. Costs of Identifying Other Potentially Responsible Parties

In its August 29, 2017, Decision and Entry, the Court held that Plaintiffs are not entitled to contribution protection for the cost of identifying other PRPs, because these costs fall outside the scope of the work required by the ASAOCs. Accordingly, it allowed Defendants to proceed on these particular counterclaims for contribution. Doc. #774, PageID##21313-14.

Valley Asphalt has reasserted this counterclaim in paragraph 9 of its Amended Counterclaim. Plaintiffs argue that the counterclaim is insufficiently pled because Valley Asphalt does not allege that it has incurred any costs of identifying other PRPs. It simply alleges that, if it is adjudged liable for such costs, it is entitled to contribution from Plaintiffs.

This, however, is no different than the counterclaims asserted by numerous other Defendants in this case. For the reasons set forth in the August 29, 2017,

Decision and Entry, the Court OVERRULES Plaintiffs' motion to dismiss this portion of Valley Asphalt's Amended Counterclaim.

V. Plaintiffs' Motion to Dismiss Defendant The Dayton Power & Light Company's Amended Counterclaim (Doc. #798)

Before turning to the merits of Plaintiffs' Motion to Dismiss Defendant DP&L's Amended Counterclaim, a brief recap of the procedural history of this claim is warranted. DP&L previously sought contribution and/or indemnification from Plaintiffs under §§ 107(a)(4)(B) and 113(f)(1) for costs it voluntarily incurred in connection with contamination at the Site. Doc. #437, PageID##6507-08. Plaintiffs moved to dismiss the counterclaims, arguing that they were entitled to contribution protection on the § 113(f) claims, and that DP&L's allegations on the § 107(a) claim were not specific enough to be able to determine whether any of the costs incurred fell outside the scope of contribution protection. Doc. #473.

In response, DP&L argued that its § 107(a) counterclaim was not precluded by Plaintiffs' alleged § 113(f) contribution protection. Citing *United States v. Atlantic Research Corp.*, 551 U.S. 128, 139, 141 (2007), DP&L argued that, as a private party that had itself incurred cleanup costs, it had a viable cost recovery claim under § 107(a), and that the contribution protection afforded in the ASAOCs did not protect Plaintiffs from liability on a § 107(a) claim. Doc. #490, PageID##6998-99. Plaintiffs noted, however, that *Atlantic Research* did not hold

"that a defendant in a CERCLA § 113 contribution claim may bring a § 107(a) counterclaim for costs incurred at the same site." Doc. #508, PageID#7138.

In its August 29, 2017, Decision and Entry, the Court dismissed DP&L's counterclaim. It held that, to the extent that DP&L sought contribution under § 113(f), Plaintiffs were entitled to contribution protection for all work required by the ASAOCs, which included testing on DP&L's property. Doc. #774, PageID#21321.

With respect to DP&L's counterclaim under § 107(a)(4)(B), the Court stated that "[t]o the extent that DP&L seeks to recover response costs incurred on its own property as a result of a release or threatened release of hazardous substances *from* the Site, for which Plaintiffs are partially to blame, Plaintiffs may not be entitled to contribution protection." Doc. #774, PageID##21321-22.[7] It agreed with Plaintiffs, however, that DP&L's Counterclaim did not contain enough specific information about the costs it was seeking to recover, making it impossible to determine whether those costs fell outside the scope of Plaintiffs' contribution

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[7] In so stating, the Court was under the mistaken impression that DP&L's property was adjacent to the Site but was not part of the Site itself. Plaintiffs have now pointed out that the "Site" was broadly defined in the 2006 ASAOC to include "nearby areas where hazardous substances, pollutants or contaminants have or may have come to be located from the Site." Doc. #1-1, PageID#26 in *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, Case No. 3:10-cv-195 (S.D. Ohio). Moreover, DP&L admits in its Amended Counterclaim, Doc. #788, that its property is included in the 2016 ASAOC's definition of "Operable Unit 2," *i.e.*, "all areas and media of the Site where Site-related hazardous substances, pollutants or contaminants have come to be located outside of OU1, including but not limited to: surface and subsurface soil, groundwater, landfill gas/soil vapor, surface water, sediment and air." *See* Doc. #414-1, PageID#6209. Accordingly, it appears that DP&L's property is actually part of the Site.

protection. The Court gave DP&L leave to file an Amended Counterclaim to cure these deficiencies. *Id.* at PageID#21322.

In its Amended Counterclaim, DP&L abandoned its § 113(f) contribution claim. The Amended Counterclaim seeks only cost recovery under § 107(a)(4)(B). It states, in relevant part, as follows:

> 4. These Counterclaims and Crossclaims concern the Site defined in paragraph 2 of the Sixth Amended Complaint ("the Site").
>
> 5. The Site is a "facility" as that term is defined in 42 U.S.C. § 9601(9).
>
> 6. "Operable Unit Two" or "OU2" is defined in the 2016 Administrative Settlement and Order on Consent ("2016 ASAOC") as "all areas and media of the Site where Site-related hazardous substances, pollutants or contaminants have come to be located outside of OU1, including but not limited to: surface and subsurface soil, groundwater, landfill gas/soil vapor, surface water, sediment and air."
>
> 7. According to the 2016 ASAOC, the DP&L property located at 1900 Dryden Road, Dayton, Ohio is part of OU2.
>
> 8. Upon information and belief, there has been both a release and a threatened release of one or more hazardous substances from the Site.
>
> 9. As the direct and proximate result of the release and threatened release from the Site, DP&L has incurred substantial and necessary costs of response that are consistent with the NCP including, without limitation, costs associated with ground water sampling, ground water monitoring, industrial hygiene air monitoring, lab results, and consultant's expenses, among others.
>
> 10. These costs were incurred between 2009 and the present and are related to the contamination emanating from the Site.

11. Specifically, DP&L incurred response costs associated with Vertical Aquifer Sampling conducted at the DP&L property between fall and winter 2009.

12. Testing conducted by DP&L and its agents was performed in conjunction with suspected groundwater contamination emanating from the Site, and possibly contaminating the DP&L property.

13. DP&L consultants collected groundwater samples between September 2009 and December 2009 which were submitted to a laboratory for detection of volatile organic compounds.

14. Notably, Plaintiffs' Sixth Amended Complaint alleges that the DP&L property may be a source of contamination for the Site. In response, DP&L incurred costs associated with determining: (a) whether or not contamination existed in the groundwater surrounding the DP&L property, and (b) the source of that contamination, namely whether or not it originated with and was emanating from the Site.

15. These samples were also used to determine the depth of contamination associated with volatile organic compounds and potential contamination of the DP&L property.

16. Moreover, in September 2012, DP&L engaged Helix Environmental, Inc. to perform industrial hygiene air monitoring for suspected vapor intrusion air contaminants at the DPL property.

17. The objective of this monitoring was to document potential employee exposures to air contaminants emanating from the Site, including methane and trichloroethylene.

18. Subsequent monitoring took place on September 25, 2012, September 27, 2012 and December 10, 2012, including air sampling results, analytical procedures, sample data sheets, and analytical laboratory reports.

19. Upon information and belief, each of the Plaintiffs and Co-Defendants (collectively "Counterclaim Defendants"), is an owner, operator, arranger, and/or transporter of hazardous substances that were ultimately disposed of at the Site.

20. DP&L is entitled to cost recovery from the Counterclaim Defendants pursuant to Section 107(a)(4)(B) of CERCLA for the

> above-referenced costs incurred by DP&L in connection with the contamination at the Site.
>
> 21. If and to the extent that DP&L is held liable in this action – which alleged liability it expressly denies – then DP&L is entitled to recovery of costs and/or indemnification from the Counterclaim Defendants pursuant to Section 107(a)(4)(B) of CERCLA.

Doc. #788, PageID##21628-30.

In their Motion to Dismiss the Amended Counterclaim, Plaintiffs once again argue that, as a named defendant in this lawsuit, DP&L is entitled to bring a claim for contribution under § 113(f), and is therefore precluded from bringing a § 107(a)(4)(B) counterclaim to recover costs it has allegedly incurred at the same Site. *See Hobart*, 758 F.3d at 767.

In previously granting DP&L leave to amend its Counterclaim to cure certain pleading deficiencies with respect to the § 107(a) claim, the Court implicitly rejected this argument. On further reflection and research, however, the Court concludes that Plaintiffs are correct, and that DP&L's amendments can do nothing to cure this fatal flaw.

As previously noted, one PRP may seek contribution under § 113(f)(1) from another PRP "during or following any civil action . . . under section [107(a)] of this title." 42 U.S.C. § 9613(f)(1). DP&L argues that, because the Court has dismissed Plaintiffs' § 107(a) claim, there is no "civil action . . . under section [107(a)] of this title" to trigger DP&L's right to bring a § 113(f) counterclaim for contribution. DP&L maintains that, because that statutory trigger has not been met, it is entitled to bring a § 107(a) counterclaim for cost recovery.

The Court rejects this argument. As discussed in connection with Valley Asphalt's Amended Counterclaim, the language "during or following any civil action under section 107(a)" must be interpreted to include civil actions under § 113(f) because, as Plaintiffs note, in order to recover on a § 113(f) claim for contribution, they must first prove that Defendants are liable or potentially liable under § 107(a). *See Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 656 (6th Cir. 2000) (noting that § 107 establishes the basis and elements of liability on a § 113(f) claim).

Accordingly, the fact that the Court has dismissed Plaintiffs' § 107(a) claim is of no import. Section 113(f) contribution claims qualify as a "civil action" under § 107, thereby triggering DP&L's ability to seek contribution from other PRPs under § 113(f), even before common liability for contamination at the Site has been established. *See Atl. Research*, 551 U.S. at 139-39 ("§ 113(f) permits suit before or after the establishment of common liability.").

Because DP&L is eligible to bring a § 113(f) contribution claim against other PRPs, this is its only possible avenue of recovery. *See Hobart*, 758 F.3d at 767 ("a PRP, eligible to bring a contribution action, can bring only a contribution action"). *See also Whittaker Corp. v. U.S.* 825 F.3d 1002, 1007 (9th Cir. 2016) ("a party who *may* bring a contribution action for certain expenses *must* use the contribution action, even if a cost recovery action would otherwise be available.") (emphasis in original).

In *Atlantic Research*, the Supreme Court did hold that a PRP that has voluntarily incurred cleanup costs may bring a § 107(a) cost recovery action against other PRPs. 551 U.S. at 139. Nevertheless, *Atlantic Research* is factually distinguishable in that it did not involve a PRP defendant asserting a § 107(a) *counterclaim* against a PRP plaintiff for response costs incurred at the same Site. The Court has found no authority indicating that such a claim would be viable.

Because DP&L is eligible to seek contribution from all other PRPs under § 113(f)(1), it cannot pursue a § 107(a) cost recovery action against them. *Hobart*, 758 F.3d at 767. This is true even for response costs incurred by DP&L that may fall outside the scope of Plaintiffs' contribution protection. Those response costs must also be pursued under § 113(f). Once common liability has been established for contamination at the Site, the Court must equitably allocate all response costs among the PRPs.

Moreover, as discussed above, due to the contribution protection available to Plaintiffs under the ASAOCs, DP&L may be forced to shoulder a disproportionate share of its own response costs. Nevertheless, this does not warrant allowing DP&L to pursue a § 107(a) counterclaim, which would subject Plaintiffs to joint and several liability.

Given the Court's finding that DP&L cannot pursue a § 107(a) counterclaim against Plaintiffs, it need not address the other grounds for dismissal asserted by Plaintiffs, including whether the response costs incurred by DP&L were "necessary" or whether they are consistent with the National Contingency Plan.

For the reasons set forth above, the Court finds that DP&L's amended allegations are still insufficient to state a plausible claim for relief against Plaintiffs. Accordingly, the Court SUSTAINS Plaintiffs' Motion to Dismiss DP&L's Amended Counterclaim, Doc. #798.

VI. Conclusion

For the reasons stated above, the Court SUSTAINS IN PART and OVERRULES IN PART Plaintiffs' Motion to Dismiss Defendant Valley Asphalt Corporation's Amended Counterclaim, Doc. #794, and SUSTAINS Plaintiffs' Motion to Dismiss Defendant The Dayton Power and Light Company's Amended Counterclaim, Doc. #798.

Date: August 20, 2018

WALTER H. RICE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LCCS GROUP, **Plaintiff,** **v.** **A.N. WEBBER LOGISTICS, INC., *et al.*,** **Defendants.**	**Case No. 16 C 5827** **Judge Harry D. Leinenweber**

MEMORANDUM OPINION AND ORDER

Defendants Interplastic Corporation and Central Michigan Railway bring separate Motions for Summary Judgment. (Dtks. 305, 310.) Plaintiff Lake Calumet Cluster Site Group ("LCCS Group") cross-moves for summary judgment only as to liability and only against Interplastic. (Dkt. 309.) For the reasons stated herein, all three Motions are denied.

I. BACKGROUND

LCCS Group is a legal entity comprising signatories to an agreement with the United States Environment Protection Agency (the "EPA"). (Pl.'s Resp. to Interplastic's Statement of Facts ("Interplastic SOF") ¶ 1, Dkt. 313-1.) Said agreement obligates the LCCS Group to pay the remediation costs to clean up a Superfund site referred to as the Lake Calumet Cluster Site ("the Cluster Site"). (*Id.* ¶¶ 2-4.) Eager to reduce the apportionment of

liability for that cleanup among its members, the LCCS Group seeks in this suit to add additional parties to its number, including Interplastic and Central Michigan. (*See generally* Compl., Dkt. 1.) In this vein, the LCCS Group seeks those parties' contribution under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a)(3)-(4), and declaratory judgment as to the liability of those parties, *see* 42 U.S.C. § 9613(g)(2). (Compl. ¶¶ 482-507.)

A. Interplastic Corporation.

Interplastic's role in this case arose from a single delivery to the Cluster Site: an August 6, 1979, load of fifty drums of "waste resin" shipped from Interplastic's facility in Minneapolis. (Interplastic SOF ¶¶ 25-28.) The exact components of that resin are unknown, but the only resins Interplastic produced at that time were unsaturated polyester resins ("UPRs"). (*Id.* ¶ 10.) All of the UPRs Interplastic produced during the relevant time period contained anhydride and styrene as raw materials. (*Id.* ¶ 11.) Some of those UPRs also included as raw materials one or more of the following: adipic acid, diethylene glycol, ethylene glycol, fumaric acid, methyl methacrylate, and phthalic anhydride. (*Id.* ¶ 12.) In their raw forms, each of those materials appears on the EPA's "List of Lists," a non-exclusive enumeration of substances deemed "hazardous" for the purposes of determining CERCLA liability. (*Id.* ¶ 13.)

All UPRs are thermoset polymers. (*Id.* ¶ 17.) Thermoset polymers are designed to undergo a chemical reaction known as curing which transforms the polymers (presumably originally in a liquid state) into solids. (*Id.* ¶ 18.) Interplastic maintains that once thermoset polymers solidify, they cannot break down into their constituent parts. (*Id.* ¶ 18.) Plaintiff at once seems to admit to this fact (*see id.* (objecting not to the *content* of Interplastic's claim of irreversibility but merely to the claim's *materiality*)) and also dispute it (*see id.* ¶ 17 (contending that Interplastic's assertions as to the irreversibility of polymerization do not account for intervening forces which could effect a breakdown of the UPRs at the Cluster Site)). To any extent, Interplastic also contends that all UPRs inevitably cure into solids; Plaintiff dispute this as well. (*Id.* ¶ 20.)

Interplastic sold the UPRs it produced in liquid form — the form usable to the customer. (*Id.* ¶ 19.) To enhance the viability of its product, Interplastic added inhibitors to the UPRs it distributed to delay their solidification and extend their shelf life. (*Id.*) But when Interplastic's manufacturing process went awry, resulting in unusable "waste resin," Interplastic added a "significantly lower" volume of inhibitors to the batch, recognizing it was unsuitable for sale. (*Id.* ¶ 20.) Interplastic treated its waste resin on-site in Minneapolis by placing it in a "hot box" and polymerizing it, causing the waste resin to solidify.

(*Id.* ¶ 24.) On rare occasion, the waste resin would not fully cure even after "hot box" treatment. (*Id.* ¶ 16.) In such instances, Interplastic contracted to have that resin transported for off-site disposal. (*Id.*) The fifty barrels of waste resin delivered to the Cluster Site in 1979 appear to have been the object of such an arrangement. (*See* Interplastic's Resp. to Pl.'s Facts ¶ 15, Dkt. 316; LCCS Interplastic Site Records, Ex. D to Pl.'s Mot. for Summ. J., Dkt. 309-8.) Though the parties dispute whether Interplastic manufactured the waste resin contained in those barrels, the uncontested documentation indicates that the barrels originated with Interplastic. (*See* Dkt. 309-8.)

B. Central Michigan Railway.

Central Michigan is the corporate successor to Lakeshore Terminal & Pipeline Company, which Plaintiff contends arranged for a third-party entity called Inland Waters to deliver 2,800 gallons of flammable jet fuel waste from Lakeshore to the Cluster Site on June 24, 1982. (Pl.'s Resp. to Cent. Mich.'s Statement of Facts ("Mich. SOF Resp.") ¶ 5, Dkt. 314-1; Cent. Mich.'s Reply to Pl.'s Statement of Additional Facts ("Mich. SOF Reply") ¶¶ 2-3, Dkt. 323-2.) The waste disposal manifest describing that shipment lists Lakeshore as the waste's "generator." (Manifest, Ex. F to Cent. Mich.'s Mem. in Supp. of Summ. J., Dkt. 306-1.) Central Michigan concedes that it stored that jet fuel waste in a tank on its premises yet maintains it neither owned the fuel nor arranged for

its disposal. (Mich. SOF Resp. ¶¶ 6-8.) Rather, according to Central Michigan, the U.S. Department of Defense owned that fuel, Central Michigan merely stored it on DOD's behalf, and it was DOD that contracted with Inland Waters for the fuel waste's removal to the Cluster Site. (*Id.* ¶¶ 6-10.)

II. DISCUSSION

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Zaya v. Sood*, 836 F.3d 800, 804 (7th Cir. 2016) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). When evaluating summary judgment motions, courts must view the facts and draw reasonable inferences in the light most favorable to the nonmovant. *Scott v. Harris*, 550 U.S. 372, 378 (2007). But the nonmovant "is only entitled to the benefit of inferences supported by admissible evidence, not those 'supported by only speculation or conjecture.'" *Grant v. Trustees of Ind. Univ.*, 870 F.3d 562, 568 (7th Cir. 2017).

The dispute at bar concerns CERCLA, which Congress enacted to "promote the 'timely cleanup of hazardous waste sites' and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." *Burlington N. & Santa Fe. Ry.*

Co. v. United States, 556 U.S. 599, 602 (2009) (citations omitted). To establish liability under CERCLA § 107(a), the plaintiff must show: (1) the site in question is a "facility" as defined in § 101(9); (2) the defendant is a responsible person under § 107(a); (3) a release or a threatened release of a hazardous substance has occurred; and (4) the release or the threatened release has caused the plaintiff to incur response costs. *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 (7th Cir. 1994) (citations omitted). There are four classes of "responsible persons": "the current owners and operators of the cleanup site; the owners and operators at the time that the hazardous substance was disposed; parties that 'arranged for' disposal of the substance; and parties that accepted the substance for transportation to a disposal site of their choosing." *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 689 (7th Cir. 2014) (citing 42 U.S.C. § 9607(a)).

Though ultimately not central to the disposition of the motions at bar, the above-recited causation element generates some consternation among the parties. For the sake of completeness, the Court briefly notes its views on the subject. As far as causation is concerned, CERCLA requires only that a plaintiff show that a hazardous substance was released and that said release caused the plaintiff to incur response costs. *See Envtl. Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 506 (7th Cir. 1992); *see*

also 42 U.S.C. § 9607(a). "[N]othing in the language of CERCLA requires plaintiff to prove that defendant *caused the particular release* that caused plaintiff to incur costs." *Premium Plastics v. LaSalle Nat. Bank*, 904 F. Supp. 809, 815 (N.D. Ill. 1995) (emphasis added) (citing *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 264 (3d Cir. 1992)). Interplastic argues that this rule applies only when the plaintiff is the United States government, as opposed to a private party. The Eighth Circuit supports that view, *see Freeport-McMoran Res. Partners Ltd. P'ship v. B-B Paint Corp.*, 56 F. Supp. 2d 823, 842 (E.D. Mich. 1999) (citing *Farmland Indus. v. Morrison-Quirk Grain Corp.*, 987 F.2d 1335 (8th Cir. 1993)), but it occupies a minority position. Other courts, including the courts of appeals for the First, Second, Third, and Fourth Circuits, believe otherwise, *see Premium Plastics*, 904 F. Supp. at 814 (collecting cases), as do courts in this District, *see id.*; *Am. Nat. Bank & Tr. Co. of Chi. v. Harcros Chems., Inc.*, No. 95 C 3750, 1997 WL 281295, at *10 (N.D. Ill. May 20, 1997) (rejecting heightened causal connection requirement for claims pursued by private party); *see also Farmland Indus., Inc. v. Colo. & E. R. Co.*, 922 F. Supp. 437, 440 (D. Colo. 1996) (same). The Court agrees with these decisions and disagrees with the distinction Interplastic advances. "Liability [under CERCLA] is imposed when a party is found to have a statutorily defined 'connection' with the facility; that connection makes the party

responsible regardless of causation." *United States v. Capital Tax Corp.*, 545 F.3d 525, 530 (7th Cir. 2008) (citation omitted).

Turning to the parties' motions: Both Interplastic and Central Michigan move for summary judgment, contending that neither of them can be held liable under CERCLA as a matter of law. Plaintiff cross-moves for summary judgment as to liability against only Interplastic. The Court turns first to the dueling motions concerning Interplastic before addressing the motion by Central Michigan.

A. Interplastic and Plaintiff's Cross-Motions for Summary Judgment

Plaintiff contends that Interplastic arranged for the disposal of the fifty drums of waste resin at the Lake Calumet Cluster Site and so is a potentially responsible party ("PRP") under CERCLA. *See* 42 U.S.C. § 9607(a)(3) (setting forth PRP liability for "arrangers"). In moving for summary judgment, Interplastic does not dispute that it "arranged for [the] disposal" of the waste resin. Instead, Interplastic contends that the waste resin it arranged for disposal had irreversibly solidified, rendering it inert and thus beyond the scope of those substances deemed "hazardous" under CERCLA.

"Hazardous" has a broad meaning within CERCLA, comprising:

> (A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act [33 U.S.C.A. § 1321(b)(2)(A)], (B) any element, compound, mixture, solution, or substance designated

> pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act [33 U.S.C.A. § 1317(a)], (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act [15 U.S.C.A. § 2606]. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

42 U.S.C § 9601(14). In accordance with Section 9602, the EPA has promulgated a list of substances it deems "hazardous." 42 U.S.C. § 9602. That so-called "List of Lists" appears at 40 C.F.R. § 302.4 and does not contain resin, waste resin, polyester resin, or USPs. And yet, the List does contain both styrene and maleic anhydride—two substances Interplastic admits it used as raw materials in its USPs. *See id.* Herein lies the heart of the parties' dispute. Plaintiffs contend that because Interplastic's USPs "contained" hazardous materials, the USPs were themselves hazardous under CERCLA. Interplastic disagrees, arguing that the

elemental and non-removable building blocks of its products cannot expose them to liability.

Plaintiff's argument relies heavily on *B.F. Goodrich v. Betkoski*, 99 F.3d 505 (2d Cir. 1996), *overruled on other grounds as recognized in New York State Electric & Gas Corp. v. FirstEnergy Corp.*, 766 F.3d 212, 220 (2d Cir. 2014), in which the Second Circuit explained that "[l]iability under CERCLA depends only on the presence *in any form* of listed hazardous substances," and, as such, "it makes no difference [if] the specific wastes disposed of . . . [are] not themselves listed as hazardous substances" so long as their component parts are so listed. *Id.* at 515-16 (emphasis added) (citation and internal quotation marks omitted); *accord La.-Pacific Corp. v. ASARCO Inc.*, 24 F.3d 1565, 1573 (9th Cir. 1994) (holding that even if a product is not specifically listed as a hazardous substance, it qualifies if its components include hazardous substances). But as Interplastic points out, the PRP in *Betoski* "was accused of dumping waste that contained hazardous substances *in separable, identifiable forms*." 99 F.3d at 516 (emphasis added). The matter before the Second Circuit was thus afield of the issue relevant here, where Interplastic contends the once-harmful components of its waste resin had chemically changed into a new, inert substance. Indeed, the *Betkoski* opinion recognized as much: The alleged PRPs in that case cautioned that the court's view would "lead to CERCLA liability if a discarded

object had any EPA listed hazardous substance in its chemical genealogy, whether or not the chemical component's characteristics had been unalterably changed in the manufacturing process"; the court rejoined simply that "[e]ven if this objection is sound in theory, it is not relevant." *Id.* The Second Circuit considered allegations concerning waste containing separable, identifiable hazardous substances, and it clearly limited its holding accordingly. *Id.*

Given that *Betkoski* did not consider the theory advanced here, Interplastic contends the Court should look instead to *United States v. New Castle County*, 769 F. Supp. 591 (D. Del. 1991). The material considered there was polyvinyl chloride resin, or "PVC," a staple component in many plastic products. *Id.* at 594-95. Like Interplastic's waste resin, PVC is a solid at STP—chemistry shorthand for standard temperature and pressure in normal conditions at sea level—and is not defined as a hazardous substance under CERCLA. *Id.* at 595-96. However, vinyl chloride—one of PVC's integral ingredients—*is* a CERCLA-defined hazardous substance. *Id.* Much like here, the question before the court was whether CERCLA liability attaches when a defendant disposes of a waste that contains a hazardous substance. *Id.*

However, *New Castle County* diverges from the current case in one respect. The parties in that case agreed that PVC neither depolymerizes nor decomposes under normal landfill conditions, so

it was undisputed that the previously-hazardous vinyl chloride was permanently bound within the PVC and could not be the hook for liability. *Id.* at 597. However, the parties also agreed that PVC contains trace amounts of *unreacted* vinyl chloride, which could, if heated in a vacuum, be freed from the PVC. *Id.* Those unreacted traces were the sole object of contention in the case. The court held that when a defendant's waste is a non-hazardous substance, the plaintiff must show the waste "is *capable* of generating or releasing a hazardous substance at the site in order to show that the defendant's waste 'contains' a hazardous substance" under CERCLA. *Id.* The plaintiffs failed to make that showing, so the court refused to find liability. *Id.* at 598.

The *Betkoski* court did not find *New Castle County* persuasive, *see* 99 F.3d at 517, and yet *Betkoski* acknowledged that when a hazardous substance is used only in a non-releasable form in the manufacturing of a product, it might "scientifically be impossible" for the plaintiff to show the required "threatened release," *id.* at 516. *Betkoski* cautioned, however, that scientific impossibility is a high bar—hazardous substances releasable only upon the introduction of an intervening force still suffice for CERCLA liability. *Id.* (remarking that district court acted contrary to precedent in finding no liability where the hazardous substance could be released only by an intervening force).

Against this backdrop, this Court concludes that when the disposed-of waste is not itself a hazardous substance and the waste contains hazardous substances which are irreversibly bound within the waste, a CERCLA plaintiff cannot make out its *prima facie* case. But if separating out those hazardous substances is at all possible, even only upon the intrusion of an intervening force, then the defendant may be susceptible to liability. *Id.* at 516; *see Pfohl Bros. Landfill Site Steering Comm. v. Allied Waste Sys., Inc.*, 255 F. Supp. 2d 134, 155 (W.D.N.Y. 2003) (stating that to establish liability, "independent releasability of the substance, *i.e.*, without effect of an intervening force, need not be established"); *but cf. United States v. Serafini*, 750 F. Supp. 168, 170-71 (M.D. Pa. 1990) (holding that the defendant could not be held liable under CERCLA for depositing waste which, although not itself a hazardous substance, could release hazardous substances when burned). The questions related to the actual occurrence of and results from such intervening forces are relegated to the apportionment of liability and have nothing to do with determining liability in the first instance. *See Betkoski*, 99 F.3d at 516.

Interplastic contends its waste resin provides no basis for liability. It argues that because polymerized resin permanently binds together its composite elements, no intervening force of any strength or kind can release its hazardous components and so

Plaintiff cannot establish the *prima facie* element of threatened release. This argument fails in two respects. First, it ignores the parties' dispute over whether UPRs remain permanently cured once polymerized. And second, the argument ignores that to win on summary judgment, Interplastic must prove not only the polymerization's irreversibility, but also that the particular waste resin Interplastic arranged for disposal was fully cured (and thus immutably non-hazardous) as opposed to partially cured (and thus potentially still hazardous, *i.e.*, by "containing" a hazardous substance).

The record is unclear on this last point. These are the competing facts: Interplastic says that all UPRs eventually cure, but Interplastic also contends that whenever a batch of its UPR failed to "fully cure," Interplastic contracted to have that waste "*liquid* resin" disposed of. (Interplastic SOF ¶¶ 16, 20.) Interplastic also contends that because waste resin contains significantly less inhibitor volume than consumer-worthy resin, waste resin "could cure as quickly as a matter of hours, and typically within several days." (*Id.* ¶ 20.) This is puzzling. If waste, liquid resin self-hardens within a matter of days, why would Interplastic go to the trouble of arranging for its off-site disposal?

This puzzle aside, two questions of disputed, material fact preclude summary judgment to either party: (1) whether fully-cured

UPRs are unalterably polymerized, even upon the introduction of an intervening force, and (2) if so, whether Interplastic arranged for the disposal of fully-cured, as opposed to partially-cured, resins. *See B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1201 (2d Cir. 1992) ("When a mixture or waste solution contains hazardous substances, that mixture is itself hazardous for purposes of determining CERCLA liability.").

On the current record, neither Plaintiff nor Interplastic is entitled to judgment as a matter of law. A reasonable jury could find in either's favor on the two key questions. Accordingly, both motions for summary judgment are denied.

B. Central Michigan's Motion for Summary Judgment.

As with the Interplastic-related motions, the central dispute in this final motion is whether Central Michigan qualifies as an "arranger" and is thus a responsible person under CERCLA. Ultimately, Central Michigan fails to prove as a matter of law that it does not so qualify, so the Court cannot grant summary judgment in its favor.

To show that Central Michigan is an "arranger," Plaintiff must show that Central Michigan: (1) owned or possessed (2) hazardous substances and (3) by contract, agreement, or otherwise, arranged for disposal or treatment, or arranged for transport for disposal or treatment, of those substances at the CERCLA-defined facility. *Carolina Power & Light Co. v. Alcan Aluminum Corp.*, 921

F. Supp. 2d 488, 496 (E.D.N.C. 2013) (citation omitted), *aff'd sub nom. Consolidation Coal Co. v. Ga. Power Co.*, 781 F.3d 129 (4th Cir. 2015); *see* 42 U.S.C. § 9607(a)(3). In more simple terms, the Supreme Court has defined "arranger" by its ordinary meaning: an entity that takes "intentional steps to dispose of a hazardous substance." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 611 (2009) (citing *United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1231 (6th Cir. 1996)).

Plaintiff clears the first hurdle with ease. Central Michigan maintains that DOD, and not it, owned the jet fuel. But this quibble over legal title avails Central Michigan of nothing. Central Michigan cannot reasonably contend it did not *possess* the fuel, which is all the statute requires. 42 U.S.C. § 9607(a)(3). Central Michigan stored the jet fuel in tanks on its property. That suffices to establish possession. *Cf. GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433, 448 (6th Cir. 2004) (collecting cases and observing that even constructive possession (*i.e.*, control over the hazardous substance) "may suffice where literal ownership or possession falls short").

The Court has little to say about the second element, *i.e.*, whether the fuel waste was hazardous. Neither party's statements of material facts stake a claim as to the hazardousness of the waste, but both parties refer to the fuel waste as a hazardous substance in their briefing. (*See* Pl.'s Resp. to Cent. Mich.'s

Mot. for Summ. J. 1, Dkt. 314 ("Central Michigan . . . does not dispute that the waste contained hazardous substances."); Cent. Mich.'s Reply in Supp. of Summ. J. 8, Dkt. 323 (referring to the disposed-of fuel waste as a "hazardous substance").) There appears to be no dispute between the parties on this score.

As for the final element, whether Plaintiff actually arranged for the waste's disposal: Central Michigan says it is free from liability because all of the decision-making and logistics related to the fuel's transportation and removal were handled exclusively by DOD. Central Michigan points to a few exhibits in support of that contention, but none is very persuasive. Central Michigan contends that a June 30, 1982, letter from Lakeshore's manager to DOD showcases Lakeshore taking responsibility for the fuel waste disposal. (*See* Ex. E, Dkt. 306-1.) This is one reasonable reading of the letter. Another is that as owner of the tanks, Lakeshore simply used this letter to report back to DOD concerning the work DOD-retained contractors completed on-site. (*See id.* (recounting simply that the fuel waste "was taken to a disposal site in Chicago").) The other set of exhibits are internal DOD memoranda from 1981 in which DOD recites the then-newly unveiled EPA regulations concerning the disposal of the type of waste held in Central Michigan's tanks. (*See* Exs. C-D, Dkt. 306-1.) Central Michigan argues that these memos are proof of DOD's responsibility not simply for some unrelated wastes in its control but rather

specifically for the fuel waste initially held by Central Michigan. This conjecture is a leap too far; it is not supported by the memos themselves nor by any supporting documentation.

Clearly, *someone* arranged for Inland Water to dispose of the fuel waste at the Cluster Site. It might have been DOD; it might have been Central Michigan (as Lakeshore). But either is possible from the present record. Plaintiff suggests that the fuel-storage agreement between DOD and Lakeshore might elucidate those parties' responsibilities vis-à-vis disposal. But that agreement, if one exists, is not before the Court now. On this record, a reasonable jury could conclude that either Lakeshore or DOD arranged for the waste disposal, so summary judgment is not appropriate.

III. CONCLUSION

For the reasons stated herein, Interplastic's Motion for Summary Judgment (Dkt. 310), Central Michigan's Motion for Summary Judgment (Dkt. 305), and Plaintiff's Motion for Summary Judgment (Dkt. 309) are all denied.

IT IS SO ORDERED.

Harry D. Leinenweber, Judge
United States District Court

Dated: 9/19/2018

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 17-2607

_____

PENNSYLVANIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
Appellant

v.

TRAINER CUSTOM CHEMICAL, LLC;
JAMES HALKIAS; JEREMY HUNTER

_____

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-15-cv-01232)
District Judge: Hon. Eduardo C. Robreno

_____

Argued
July 16, 2018

Before: JORDAN, SHWARTZ, and KRAUSE, *Circuit Judges*

(Filed: October 5, 2018)

_____

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OPINION OF THE COURT

JORDAN, *Circuit Judge*.

We are asked in this interlocutory appeal to decide whether the owner of a piece of land is liable for the costs of

an environmental cleanup that took place there before the owner acquired it. Our answer is yes.

Trainer Custom Chemical, LLC ("Trainer") acquired a property known as the Stoney Creek Site (the "Site") for $20,000, after Pennsylvania's Department of Environmental Protection ("PADEP") had already incurred over $818,000 in environmental cleanup costs at the Site. The cleanup costs continued to mount following Trainer's acquisition of the property, both because of pre-existing pollution and because buildings on the Site were demolished by one or both of Trainer's principals, Jeremy Hunter and James Halkias, which caused further contamination.

PADEP sued Trainer, Hunter, and Halkias for violations of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-28,[1] and Pennsylvania's Hazardous Sites Cleanup Act ("HSCA"), 35 Pa. Stat. §§ 6020.101-.1305, and sought to recover all of its response costs related to the Site, regardless of when those costs arose. At summary judgment, the District Court drew a temporal line, holding Trainer liable under both statutes for the response costs incurred after Trainer took ownership of the Site but not for the costs that arose before. Although the Court directed the parties to proceed to trial on damages, PADEP disagreed with the temporal distinction drawn by the Court and filed this interlocutory appeal.

[1] CERCLA § 1 et seq. is codified at 42 U.S.C. § 9601 et seq.

We conclude that a current owner of real property is liable under both CERCLA and HSCA for all response costs in an environmental cleanup, including costs incurred before the owner acquired the property. Accordingly, we will affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

A. Facts

1. The Site Before Trainer Acquired It

The Site is located in Trainer Borough, Delaware County, Pennsylvania. In 2007, it was owned by Stoney Creek Technologies ("SCT"), which primarily used it for making corrosion inhibitors, fuel additives, and oil additives. Buildings and equipment used in creating SCT's products were located on the Site, including a laboratory and a water treatment facility. SCT also kept various hazardous substances at the Site, including about three million gallons of flammable or combustible chemicals that posed a threat of release, and over seventeen million pounds of other chemical inventory, which included flammable, combustible, and corrosive chemicals.

PADEP investigated the environmental risk at the Site and determined in 2007 that "there is a release or threat of release of hazardous substances or contaminants, which presents a substantial danger to human health or the environment[.]" (App. at 34.) Accordingly, PADEP and the

United States Environmental Protection Agency ("EPA") initiated removal actions.[2]

SCT was in financial trouble and could not afford the expenses involved in the cleanup. One such expense was for the electricity to power pollution control and security equipment, including a vaporized nitrogen system. The nitrogen system was necessary to minimize the threat of fire posed by the flammable and combustible chemicals on the Site. Due to lack of payment, the power company was going to shut off the electricity to the Site, so PADEP assumed responsibility for paying the electrical bills.

2. Trainer's Acquisition of the Site

The same financial straits that had apparently led SCT to fall behind in paying for electricity also led it to become delinquent in paying real estate taxes. Consequently, the Tax Claim Bureau of Delaware County forced a sale of the Site. In what was evidently a coordinated effort, Hunter and

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[2] Generally, "removal actions are short term responses to a release or threat of release while remedial actions involve long term remedies." *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 293 (3d Cir. 2000) (citation omitted). "The statute defines 'response' as 'remove, removal, remedy, and remedial action[.]'" *Id.* at 292 (quoting 42 U.S.C. § 9601(25)). The record contains some inconsistency as to when removal actions at the Site began. For example, one report indicates that the EPA began its response in October 2008. Nevertheless, it is undisputed that removal actions commenced before Trainer became the owner of the Site.

Halkias purchased the property and put its title in Trainer's name. Hunter signed the purchase agreement, the recitals of which plainly stated that the Site had ongoing "environmental issues ... [and] environmental remediation." (App. at 53.) Despite that warning, on October 4, 2012, Halkias tendered a cashier's check for $20,000 and a handwritten note indicating that the deed to the property should be made out to Trainer Custom Chemical LLC. The next day, Halkias and Hunter officially formed Trainer Custom Chemical LLC by filing a Certificate of Organization with the Pennsylvania Department of State. On October 9, 2012, the deed to the Site was executed and put in Trainer's name.

3. The Site After Trainer Acquired It

The EPA and PADEP completed their removal actions at the Site on December 12, 2012.[3] But that was not the end of the problems there. After Trainer acquired the Site, either Hunter or Halkias or both – they point the finger of blame at each other – demolished many of the Site's structures. Regardless of who was responsible, it is undisputed that metals and other salvageable materials reclaimed from the Site were sold for at least $875,000 to JK Myers Contracting, a business that Halkias had registered with the Pennsylvania Corporations Bureau in April 2012.

[3] There is some ambiguity in the record on the date of completion. PADEP's reply brief notes December 10, 2012 as the date of completion, but an EPA website referenced in the briefing indicates the date to be May 2, 2013. The discrepancy is immaterial to this case.

In June 2014, PADEP received two reports assessing environmental concerns at the Site. One noted that "[t]he []EPA has acknowledged that hazards still exist at the Site[.]" (App. at 61.) The report further said that, during a recent visit to the Site, PADEP "observed active demolition activities being conducted on several structures throughout the Site[,]" and "[s]everal storage tanks were observed to be cut open and unknown contents were noted to be spilling onto the ground." (App. at 62.) The other report indicated that buildings on the Site had asbestos-containing materials that needed to be removed before demolition.

B. Procedural History

PADEP sued Trainer, Halkias, and Hunter under CERCLA and HSCA to recover the costs incurred in cleaning up the Site. The complaint was in six counts: separate ones against each of the three defendants under CERCLA § 107(a), 42 U.S.C. § 9607(a), and, again, separate ones against each of them under HSCA §§ 701 and 702, 35 Pa. Stat. §§ 6020.701, 6020.702.

Eventually, PADEP moved for summary judgment, arguing that the defendants should be jointly and severally liable for all of the environmental response costs. In total, those costs were $932,580.12, through November 2015. The most significant charges were payments for electricity amounting to $818,730.50 through June 2009, before Trainer acquired the Site. PADEP also bore other response costs after Trainer took ownership.

The District Court granted summary judgment in part and denied it in part. The Court noted that PADEP's claims

against Halkias and Hunter were based on a theory of piercing Trainer's corporate veil, so the initial question it sought to answer, and the question before us in this interlocutory appeal, is whether Trainer was liable for violations of CERCLA and HSCA. With respect to CERCLA liability, "the Court [held] [Trainer] liable for any response costs incurred after [Trainer] took ownership of the Site, but not for costs incurred beforehand." (App. at 99-100.) As to CERCLA damages, it denied summary judgment because there was a genuine dispute of material fact concerning the amount of damages for which Trainer was liable. The Court reached the same conclusions with respect to HSCA liability and damages.

PADEP disagreed with the District Court's decision to grant summary judgment only in part. It sought an order certifying for interlocutory appeal the issue of whether federal and Pennsylvania law "make an owner liable for response actions and response costs attributable to an identified release of hazardous substances which continues at the time of that person's ownership, regardless of when such actions or response costs were taken or incurred." (App. at 114-15.) The District Court granted certification, and PADEP then petitioned us for permission to appeal, which we gave pursuant to 28 U.S.C. § 1292(b).

II. STATUTORY BACKGROUND

A. CERCLA

"Congress enacted CERCLA 'to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for

the contamination.'" *Litgo N.J. Inc. v. Comm'r N.J. Dep't of Envtl. Prot.*, 725 F.3d 369, 378 (3d Cir. 2013) (quoting *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009)). Section 107(a)(4)(A) of CERCLA gives states "the right to recover costs incurred in cleaning up a waste site from 'potentially responsible parties' (PRPs)—four broad classes of persons who may be held strictly liable for releases of hazardous substances that occur at a facility." *Litgo N.J. Inc.*, 725 F.3d at 378. Those four classes of PRPs are: the owner or operator of a facility, 42 U.S.C. § 9607(a)(1); anyone who owned or operated the facility when there was a disposal of a hazardous substance, *id.* § 9607(a)(2); anyone who arranged for the disposal or treatment, or arranged for the transport for disposal or treatment, of hazardous substances at the facility, *id.* § 9607(a)(3); and anyone who accepted hazardous substances for transport to sites selected by such persons, *id.* § 9607(a)(4). *United States v. CDMG Realty Co.*, 96 F.3d 706, 713 (3d Cir. 1996). "Once an entity is identified as a PRP, it may be compelled to ... reimburse the [g]overnment for ... past and future response costs." *Burlington*, 556 U.S. at 609.

Our focus here is on the first category of PRPs: "the owner ... of ... a facility[.]" 42 U.S.C. § 9607(a)(1); *accord United States v. Nicolet, Inc.*, 857 F.2d 202, 210 (3d Cir. 1988). We refer to that category of PRP in this appeal as simply the "owner," or, more particularly, the "current owner."[4] *CDMG Realty Co.*, 96 F.3d at 713.

[4] While CERCLA does not use the word "current" as a modifier for "owner," we have held that § 107(a)(1) includes "current owners" as potentially responsible parties.

In § 107 cost recovery actions, summary judgment on the issue of liability may be appropriate "even when genuine issues of material fact remain as to ... damages." *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 720 (2d Cir. 1993) ("*Alcan 1993*"). Defendants may be held jointly and severally liable in a cost recovery action, *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268 (3d Cir. 1992) ("*Alcan-Butler*"), but they can also seek to limit that liability by demonstrating that the contamination "is divisible and reasonably capable of apportionment[,]" *id.* at 269; *accord Alcan 1993*, 990 F.2d at 721-23.[5]

See, e.g., *Litgo*, 725 F.3d at 381*; CDMG Realty Co.* 96 F.3d at 713. And although the statute uses the language "owner and operator[,]" stated in the conjunctive, many courts have concluded that the language should be read in the disjunctive. *See e.g.*, *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 328 (2d Cir. 2000) ("It is settled in this circuit that owner and operator liability should be treated separately."); *Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Tr.*, 32 F.3d 1364, 1367 (9th Cir. 1994) ("Like other courts, we read these categories [of 'owner' and 'operator'] in the disjunctive."). We too have described § 107(a)(1) in disjunctive language. *See CDMG Realty Co.*, 96 F.3d at 713 (stating a "current owner or operator of a facility" is a PRP).

[5] There is some disagreement in the case law over whether divisibility is properly addressed at the liability phase or damages phase of a cost recovery action. We have said that it is best to resolve a divisibility inquiry "at the initial liability phase" because "it involves precisely relative degrees of *liability*[,]" *Alcan-Butler*, 964 F.2d at 270 n.29, but the

B. HSCA

HSCA is Pennsylvania's state law counterpart to CERCLA. *Cf. In re Joshua Hill, Inc.*, 294 F.3d 482, 489-91 (3d Cir. 2002) (supporting analysis of HSCA claims by relying on analogous CERCLA provisions). Like CERCLA, HSCA defines classes of persons who are legally liable for a release or threatened release of hazardous substances, and the owner of a contaminated site is one such person. 35 Pa. Stat. § 6020.701(a). A current owner is strictly liable for environmental response costs, including those incurred by the Commonwealth of Pennsylvania. *Id.* § 6020.702(a). Although CERCLA and HSCA have differences, there are instances in which "liability under ... HSCA mirrors liability under CERCLA" because "§ 702(a) of ... HSCA mirrors § 107(a) of CERCLA." *Agere Sys., Inc. v. Adv. Envtl. Tech. Corp.*, 602 F.3d 204, 236 (3d Cir. 2010). In this matter, no one asserts that owner liability under CERCLA § 107(a) and under HSCA §§ 701 and 702 is anything other than

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Second Circuit has questioned that approach, *see Alcan 1993*, 990 F.2d at 723 (stating that approach "may be contrary to the statutory dictates of CERCLA" and instead leaving the choice of when to address divisibility "to the sound discretion of the trial court"). We do not attempt to resolve that disagreement now, however, because no party raised it before the District Court or to us on appeal. We simply note that nothing we say here with respect to current owner liability under § 107(a)(1) is meant to change our precedent addressing divisibility in a § 107 cost recovery action.

practically the same for all relevant purposes.[6] Therefore, our resolution of Trainer's liability under CERCLA also decides Trainer's liability under HSCA.

III. DISCUSSION[7]

At the outset, we note that all parties and the District Court agree that Trainer is the owner of the Site and, pursuant to CERCLA § 107(a)(1), is at least liable for environmental

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[6] Our decision today does not imply that relevant distinctions may not emerge in other cases, but no relevant difference has been suggested to us here.

[7] The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1367. We have jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292(b). "The scope of our review in a permitted interlocutory appeal is limited to questions of law raised by the underlying order. We are not limited to answering the questions certified, however, and may address any issue necessary to decide the appeal." *Bartnicki v. Vopper*, 200 F.3d 109, 114 (3d Cir. 1999).

"We review the grant or denial of a motion for summary judgment de novo," *id.*, and "apply[] the same standard employed by the district court[,]" *Trinity Indus., Inc. v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 134 (3d Cir. 2013). "Summary judgment is appropriate only if, after drawing all reasonable inferences in favor of the non-moving party," which in this case is Trainer, "there exists 'no genuine dispute as to any material fact.'" *Trinity Indus., Inc. v. Greenlease Holding Co.*, --- F.3d ---, No. 16-1994, 2018 WL 4324261, at *19 (3d Cir. Sept. 11, 2018) (citation omitted).

response costs incurred after it took ownership**.** Taking that concession as our starting point, our task is to decide whether the meaning of "all costs" in § 107(a) includes response costs incurred before Trainer acquired the Site. We conclude that, given the structure and text of CERCLA, a current owner under § 107(a)(1) is indeed liable for all response costs, whether incurred before or after acquiring the property.

"Statutory interpretation, as we always say, begins with the text." *Rotkiske v. Klemm*, 890 F.3d 422, 424-25 (3d Cir. 2018) (en banc) (quoting *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016)). We derive the "legislative intent of Congress ... from the language and structure of the statute itself[.]" *United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997). We therefore begin our analysis by looking at the text of the CERCLA provision that makes a current owner liable for response costs and then consider that provision's place within the larger framework of the statute.

Section 107(a) provides that "the owner ... of ... a facility ... shall be liable for ... all costs of removal or remedial action incurred by ... a State ... not inconsistent with the national contingency plan[.]" 42 U.S.C. § 9607(a); *accord Nicolet*, 857 F.2d at 210. That is a statement of remarkable breadth, but a statute may be broad in scope and still be quite clear. *See In re Phila. Newspapers, LLC*, 599 F.3d 298, 310 (3d Cir. 2010), *as amended* (May 7, 2010). The term "all costs" means just that; it does not distinguish between costs that were incurred before ownership and those incurred afterwards. Because there is no such distinction, there is no temporal limitation on the liability for costs. If Congress had intended for "all costs" to mean anything less than "all," we assume it would have so specified. The plain

text thus leads us to conclude that the words "all costs" include costs incurred before ownership and costs incurred after ownership.

The structure of CERCLA, as amended, reinforces that reading of the statute. "The Supreme Court has stated consistently that the text of a statute must be considered in the larger context or structure of the statute in which it is found." *United States v. Tupone*, 442 F.3d 145, 151 (3d Cir. 2006). And "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (citation omitted). CERCLA already provides a number of potential limits on PRP liability. There are statutes of limitations for § 107 cost recovery actions, 42 U.S.C. § 9613(g)(2),[8] the innocent owner defense to § 107(a) liability, *id.* §§ 9601(35)(A), 9607(b)(3); *CDMG Realty Co.*, 96 F.3d at 716 & n.6,[9] and the bona fide prospective

[8] An initial cost recovery action under § 107 "must be commenced ... for a removal action, within 3 years after completion of the removal action, ... and ... for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action[.]" 42 U.S.C. § 9613(g)(2).

[9] "To establish the innocent owner defense, the defendant must show that 'the real property on which the facility is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility' and that '[a]t the time the defendant acquired the facility the defendant did not know and had no reason to

purchaser defense to § 107(a)(1) current owner liability, 42 U.S.C. §§ 9601(40), 9607(r).[10] We therefore decline to read an additional limitation into the statute by imposing a new temporal frame on the meaning of "all" in the term "all costs."

Moreover, the provision in CERCLA for contribution actions, § 113(f), also supports reading "all costs" to include costs incurred before a current owner acquired a property. *Id.* § 9613(f). Through § 113(f), response costs can be reassigned to a more culpable party. *Id.*; *see Litgo N.J. Inc.*, 725 F.3d at 383 ("After identifying PRPs, courts allocate response costs based on equitable factors."). When

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know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.'" *CDMG Realty Co.*, 96 F.3d at 716 & n.6 (alteration in original) (citing 42 U.S.C. §§ 9601(35)(A), 9607(b)(3)).

[10] A bona fide prospective purchaser is one who, among other things, has "made all appropriate inquiries into the previous ownership and uses of the facility" and "exercises appropriate care with respect to hazardous substances found at the facility[.]" 42 U.S.C. § 9601(40). Such a purchaser "shall not be liable" as "an owner or operator of a facility" under § 107(a)(1) "as long as [it] does not impede the performance of a response action or natural resource restoration." *Id.* § 9607(r)(1). The statute further provides that, even if a new owner qualifies as a bona fide prospective purchaser, the new owner would not be entitled to a windfall profit. *Id.* § 9607(r)(2)-(3).

apportioning cleanup costs, courts consistently pay attention to who has participated in response efforts without slowing or interfering with that process. *See, e.g.*, *id.* at 383, 388-89 (citing cases when cooperative PRP current owners were apportioned 0%, 5%, and 10% of remediation costs). Thus, when a PRP must bear "more than its fair share" of cleanup costs resulting from a § 107 cost recovery action, it can seek a more equitable distribution of those costs through a contribution action against other PRPs. *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1506-08 (6th Cir. 1989).

Finally, the Small Business Liability Relief and Brownfields Revitalization Act of 2002, Pub. L. No. 107-118, 115 Stat. 2356 (codified at 42 U.S.C. §§ 9601, 9607), provides logical support for the conclusion that a current owner is liable for response costs incurred before the change in ownership of the property.[11] As just noted, *see supra* note 8, Congress added a provision from that Act – the bona fide prospective purchaser defense – to CERCLA to allow a prospective purchaser to be exempted from § 107(a)(1) liability, if that purchaser, among other requirements, "made all appropriate inquiries into the previous ownership and uses of the facility" and "exercise[d] appropriate care with respect to hazardous substances found at the facility[.]" 42 U.S.C. § 9601(40). But that defense is limited because even a careful prospective purchaser is not totally off the hook – the amendment allows the United States to obtain a lien on the property for its "unrecovered response costs." *Id.*

[11] The District Court noted in its order certifying the interlocutory appeal that the bona fide prospective purchaser defense "might support [PADEP]'s position." (App. at 157 (emphasis omitted).)

§ 9607(r)(2). No one has invoked the defense here, and, in any event, it allows only the United States to obtain a lien, while in this instance Pennsylvania is the one seeking to recover response costs. Nevertheless, that provision, by its very existence, indicates that Congress contemplated scenarios in which a current owner could be liable for response costs incurred before ownership transferred.

Therefore, based on CERCLA's text and structure, the meaning of "all costs" in § 107(a) includes costs incurred both before and after a current owner acquired the property.[12]

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[12] The District Court concluded otherwise based on *California Department of Toxic Substances Control v. Hearthside Residential Corp.*, 613 F.3d 910 (9th Cir. 2010), but that decision gives no guidance as to the meaning of "all costs" in § 107(a). Rather, the *Hearthside* court addressed which of two entities was a current owner of a property for purposes of § 107(a)(1). 613 F.3d at 911-12. One was a corporation that had owned the property while all cleanup costs were incurred, and the other was the state's land commission that owned the property at the time the lawsuit was filed but not at any time when costs had been incurred. *Id.* at 912. The court held that an owner of a property at the time cleanup costs are incurred cannot avoid liability for such costs by selling the property prior to the filing or initiation of a response action by the government and, therefore, that the party who owned the property at issue at the time the cleanup costs were incurred was a responsible party. *Id.* at 911, 916. *Hearthside* does not stand for the proposition that it is permissible to temporally partition § 107(a)(1) liability with respect to cleanup costs. Here, because Trainer "[did] not dispute that [it], as the owner and operator of the Site, [was] a

As mentioned at the outset, that means that Trainer is liable for the removal costs at the Site regardless of when those costs were incurred. And because we conclude that Trainer is liable under CERCLA, we also conclude that it is liable under HSCA. *See supra* Section II.B.[13]

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responsible party under CERCLA[,]" (App. at 94); *see supra* Section III, there was no need to turn to *Hearthside* to determine again whether Trainer was a current owner of the Site.

[13] Specifically, as under CERCLA, there is no ambiguity under HSCA that Trainer is liable for all response costs, including those incurred prior to its ownership. First, Trainer is a "responsible person" because it "own[ed] or operate[d] the site" (1) "when a hazardous substance [wa]s placed or [came] to be located in or on the site," **§** 6020.701(a)(1)(i), or (2) "during the time of the release or threatened release," *id.* **§** 60020.701(a)(1)(iii). There were hazardous substances located on the site at the time Trainer took ownership and there has been a release or threatened release since that time. Second, a responsible person is "strictly liable for response costs and damages which result from the release or threatened release of hazardous substances," *id.* § 6020.702(a), which includes "[r]easonable and necessary or appropriate costs of remedial response incurred by the United States [or] the Commonwealth." *id.* § 6020.702(a)(2). Here, PADEP has incurred "[r]easonable and necessary or appropriate costs of remedial response," *id.* § 6020.702(a)(2), resulting from the release or threatened release. Third, exceptions to responsible party status do not apply because at least one of the defendants knew or had reason to know "a hazardous substance which is the subject

Nothing in our decision today regarding liability for "all costs" is meant to affect established precedent concerning CERCLA damages. How exactly damages are assessed against or apportioned among PRPs in any particular case is a matter to be decided according to existing statutory and decisional law.

IV. CONCLUSION

For the foregoing reasons, we will affirm in part, vacate in part, and remand for further proceedings. We will affirm the District Court's order that Trainer is liable under CERCLA and HSCA for PADEP's response costs incurred after it acquired the Site, but we will vacate the District Court's order with respect to Trainer's liability for PADEP's response costs incurred before acquisition of the Site. Given that disposition, we do not need to address the remaining aspects of the District Court's decision. The matter is remanded for further proceedings consistent with this opinion.

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of the release or threatened release was disposed of on, in, or at the site." *id.*§ 6020.701(b)(vi)(A).

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Coville Reservation; CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, *Plaintiffs-Appellees*, STATE OF WASHINGTON, *Intervenor-Plaintiff-Appellee*, v. TECK COMINCO METALS, LTD., a Canadian corporation, *Defendant-Appellant.*	No. 16-35742 D.C. No. 2:04-cv-00256-LRS OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Lonny R. Suko, District Judge, Presiding

Argued and Submitted February 5, 2018
Seattle, Washington

Filed September 14, 2018

Before: Ronald M. Gould and Richard A. Paez, Circuit Judges, and Michael J. McShane,* District Judge.

Opinion by Judge Gould

SUMMARY**

Environmental Law

The panel affirmed the district court's judgment, after two phases of a trifurcated bench trial, in favor of plaintiffs in an action under the Comprehensive Environmental Response, Compensation, and Liability Act.

The district court dismissed defendant Teck Cominco Metals' divisibility defense to joint and several liability on summary judgment. At Phase I of the trifurcated trial, the district court held that Teck was liable as an "arranger" under CERCLA § 107(a)(3). At Phase II, the district court found Teck liable for more than $8.25 million of plaintiff Colville Tribes' response costs. The district court then certified this appeal by entering partial judgment under Federal Rule of Civil Procedure 54(b).

The panel held that it had jurisdiction to entertain the appeal. The panel concluded that Rule 54(b) authorized the district court to certify the appeal because the district court

* The Honorable Michael J. McShane, United States District Judge for the District of Oregon, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

rendered an ultimate disposition of an individual claim by ruling on Colville Tribes' response costs claim, which was separable from the Tribes' claim for natural resource damages. The panel held that the district court's Rule 54(b) certification was not an abuse of discretion.

The panel held that the district court properly exercised personal jurisdiction over Teck, operator of a lead and zinc smelter in British Columbia. The panel applied the *Calder* "effects" test because the claims for recovery of response costs and natural resource damages were akin to a tort claim. The panel held that, under the *Calder* test, Teck purposefully directed its activities toward Washington State.

The panel held that the district court properly awarded the Colville Tribes their investigation costs incurred in establishing Teck's liability. CERCLA § 107(a)(4)(A) provides that a potentially responsible party, or PRP, is liable for "all costs of removal or remedial action." The panel held that investigations by the Tribes' expert consultants qualified as recoverable costs of removal, even though many of these activities played double duty supporting both cleanup and litigation efforts.

The panel held that § 107(a)(4)(A) also allowed the Tribes to recover their attorneys' fees as part of their response costs. The panel held that the district court did not abuse its discretion in setting the amount of attorneys' fees.

The panel affirmed the district court's grant of summary judgment rejecting Teck's divisibility defense to joint and several liability. The panel concluded that there was no triable issue whether Teck had sufficient evidence to prove the defense, which requires a showing that the environmental harm is theoretically capable of

apportionment and that the record provides a reasonable basis on which to apportion liability.

COUNSEL

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Andrew Arthur Fitz (argued), Senior Counsel; Robert W. Ferguson, Attorney General; Kelly T. Wood, Assistant Attorney General; Office of the Washington Attorney General, Olympia, Washington; Intervenor-Plaintiff-Appellee.

OPINION

GOULD, Circuit Judge:

This appeal is the latest chapter in a multi-decade dispute centered on Teck Metals' liability for dumping several million tons of industrial waste into the Columbia River. Since we last heard an interlocutory appeal in this case, the district court dismissed Teck's divisibility defense to joint and several liability on summary judgment. At Phase I of the trifurcated bench trial, the court held that Teck was a liable party under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). At Phase II, the court found Teck liable for more than $8.25 million of the Confederated Tribes of the Colville Reservation's response costs. The district court then certified this appeal by entering partial judgment under Federal Rule of Civil Procedure 54(b). We conclude that we have jurisdiction, and we affirm.

I

The Columbia River, the fourth-largest river in North America, begins its 1,200-mile journey to the sea from its headwaters in the Canadian Rockies. The River charts a northwest course in British Columbia before bending south toward Washington. It then widens and forms the Arrow Lakes reservoir until, thirty miles before the international border, it reaches the Hugh Keenleyside Dam. After passing through the dam's outlet, the River is free-flowing until south of the border near Northport, Washington. There it again starts to slow and pool at the uppermost reaches of Lake Roosevelt, the massive reservoir impounded behind the Grand Coulee Dam. This case concerns the more than 150-mile stretch of river between the Canadian border and

the Grand Coulee Dam, known as the Upper Columbia River.

From time immemorial, the Upper Columbia River has held great significance to the Confederated Tribes of the Colville Reservation. These tribes historically depended on the River's plentiful fish for their survival and gave the River a central role in their cultural traditions.[1] And the Colville Tribes continue to use the Upper Columbia River to this day for fishing and recreation. Under the applicable treaties, the Tribes retain fishing rights in the River up to the Canadian border. *See Okanogan Highlands All. v. Williams*, 236 F.3d 468, 478 (9th Cir. 2000) (citing *Antoine v. Washington*, 420 U.S. 194, 196 n.4 (1975)). Those treaties draw the Colville Reservation's eastern and southern boundaries "in the middle of the channel of the Columbia River." Act of July 1, 1892, ch. 140, § 1, 27 Stat. 62, 62–63. The Tribes claim equitable title to the riverbed on their side of the channel, and the United States has long supported this claim. *See Confederated Tribes of Colville Reservation v. United States*, 964 F.2d 1102, 1105 n.7 (Fed. Cir. 1992); *Opinion on the Boundaries of and Status of Title to Certain Lands Within the Colville and Spokane Indian Reservations*, 84 Interior Dec. 72, 75–80, 1977 WL 28859, at *3–5.

For nearly a century, however, the Upper Columbia River has been fouled by Teck Metals' toxic waste.[2] Teck operates the world's largest lead and zinc smelter in Trail, British Columbia, just ten miles upstream of the U.S. border.

[1] *See generally* U.S. EPA, *Upper Columbia River Expanded Site Inspection Report Northeast Washington*, app. A (Petition for Assessment of Release), https://nepis.epa.gov/Exe/ZyPURL.cgi?Docke y=P100MFOQ.TXT.

[2] Teck was previously named Teck Cominco Metals.

During smelting, lead or zinc ore is heated to a molten state, during which the desired metal is separated from impurities in the raw ore. These impurities cool to form glassy, granular slag. Between 1930 and 1995, Teck discharged about 400 tons of slag daily—an estimated 9.97 million tons in total—directly into the free-flowing Columbia River. Teck washed this debris into the river using untold gallons of contaminated effluent. These solid and liquid wastes contained roughly 400,000 tons (800 million pounds) of the heavy metals arsenic, cadmium, copper, lead, mercury, and zinc, in addition to lesser amounts of other hazardous substances.[3]

At least 8.7 million tons of the Trail smelter's slag and nearly all of the dissolved and particulate-bound metals in its effluent made the short trip downstream into the United States. Upon reaching the calmer waters of Lake Roosevelt, Teck's smelting byproducts came to rest on the riverbed and banks, with larger detritus settling upstream and smaller particles settling downstream near the Grand Coulee Dam.[4]

[3] Teck's slag contained 255,000 tons of zinc (510 million pounds) and 7,300 tons of lead (14.6 million pounds). Teck's effluent contained an additional 108,000 tons of zinc (216 million pounds), 22,000 tons of lead (44 million pounds), 1,700 tons of cadmium (3.4 million pounds), 270 tons of arsenic (540,000 pounds), and 200 tons of mercury (400,000 pounds). The district court did not make a finding on how much copper Teck dumped into the river, but Teck previously conceded that about 29,000 tons (58 million pounds) reached the Upper Columbia River.

[4] Black Sand Beach, for instance, is named after the sand-like slag deposits that have accumulated on the riverbank near Northport, Washington. *See* URS Corp., *Completion Report & Performance Monitoring Plan: Black Sand Beach Project* § 2.2 (2011), https://fortress.wa.gov/ecy/gsp/DocViewer.ashx?did=3783.

Once settled, these wastes began to break down and release hazardous substances into the River's waters and sediment.

In 1999, the Colville Tribes petitioned the U.S. Environmental Protection Agency to assess the threats posed by the contamination of the Upper Columbia River Site. Two years later the Tribes and EPA signed an intergovernmental agreement coordinating a site investigation and assessment. After completing its preliminary assessment, EPA issued a unilateral administrative order against Teck. The order directed Teck to perform a remedial investigation and feasibility study ("RI/FS") of the Site under CERCLA. Teck disputed whether it was subject to CERCLA, however, and EPA decided not to enforce the order during negotiations with the company.

The Colville Tribes then tried to enforce EPA's order by funding a CERCLA citizen suit by two of their tribal government officials in 2004. These plaintiffs were later joined by the State of Washington as a plaintiff-intervenor and eventually by the Colville Tribes as a co-plaintiff.

Teck moved to dismiss the action. It primarily argued that CERCLA does not apply extraterritorially to its activities and that it cannot be held liable as a person who "arranged for disposal" of hazardous substances. The district court denied this motion to dismiss and certified the issues for immediate appeal under 28 U.S.C. § 1292(b).

While the appeal was pending, Teck and EPA entered a settlement agreement withdrawing EPA's order and committing Teck to fund and conduct an RI/FS modeled on CERCLA's requirements. The study aims to investigate the extent of contamination at the Site, to provide information for EPA's assessment of the risk to human health and the

environment, and to evaluate potential remedial alternatives. But the settlement agreement is silent as to Teck's responsibility for cleaning up the Site.

We accepted Teck's interlocutory appeal and affirmed the district court's denial of the motion to dismiss. *See Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1082 (9th Cir. 2006) (*Pakootas I*). We held that the suit did not involve an extraterritorial application of CERCLA because Teck's pollution had "come to be located" in the United States. *Id.* at 1074 (quoting 42 U.S.C. § 9601(9)). We also held that the complaint had stated a claim for relief because the actual or threatened release of hazardous substances at the Site could subject Teck to "arranger" liability under CERCLA. *Id.* at 1082 (citing 42 U.S.C. § 9607(a)(3)).

On remand, the Tribes and the State each filed amended complaints seeking cost recovery, natural resource damages, and related declaratory relief under CERCLA.[5] Litigation was ultimately trifurcated into three phases to sequentially determine: (1) whether Teck is liable as a potentially responsible party ("PRP"); (2) Teck's liability for response costs; and (3) Teck's liability for natural resource damages.

Before the first bench trial, the Tribes and the State moved for partial summary judgment on Teck's divisibility defense. The district court granted the motions and dismissed the defense, concluding that Teck did not present enough evidence to create a genuine issue of fact as to whether the environmental harm to the Upper Columbia

[5] The individual plaintiffs' claims were subsequently dismissed and judgment was entered against them, which we affirmed on appeal. *Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1225 (9th Cir. 2011) (*Pakootas II*).

River was theoretically capable of apportionment or whether there was a reasonable basis for apportioning Teck's share of liability.

In Phase I of trial, the district court concluded that Teck was liable as an arranger under CERCLA section 107(a)(3), 42 U.S.C. § 9607(a)(3). In doing so, the court rejected Teck's argument that Washington courts lack personal jurisdiction over the company. The district court then held that without its divisibility defense, Teck was jointly and severally liable to the Tribes and the State under section 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A).[6]

In Phase II, the State settled its claim for past response costs while the Tribes proceeded to trial. The district court found in favor of the Tribes and awarded them $3,394,194.43 in investigative expenses incurred through December 31, 2013, $4,859,482.22 in attorney's fees up to that date, and $344,300.00 in prejudgment interest. The court then directed the entry of judgment on Teck's liability for these response costs under Federal Rule of Civil Procedure 54(b).

Teck now appeals from the district court's summary judgment order and partial judgment on the first two phases of trial.

[6] After the Phase I bench trial, the Tribes and the State filed amended complaints adding allegations that the Trail smelter's air emissions also resulted in the discharge of hazardous substances at the Site. The district court denied the motion to strike those allegations, but we reversed on appeal. *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 986 (9th Cir. 2016) (*Pakootas III*).

II

We first consider whether we have jurisdiction to entertain this appeal.

A

Teck contends, as an initial matter, that Rule 54(b) did not authorize the district court to certify this appeal by entering partial final judgment. Rule 54(b) allows a district court in appropriate circumstances to enter judgment on one or more claims while others remain unadjudicated.[7] To do so, the district court first must render "an ultimate disposition of an individual claim." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7 (1980) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956)). The court then must find that there is no just reason for delaying judgment on this claim. *Id.* at 8.

According to Teck, the district court had to await the conclusion of this entire multi-decade litigation before entering judgment on the Tribes' response costs claim. Teck reasons that the Tribes actually raise a single CERCLA claim—for arranger liability—with multiple remedies: recovery of response costs and natural resource damages.

What constitutes an individual "claim" is not well defined in our law. The Supreme Court has expressly declined to "attempt any definitive resolution of the meaning of" the term, *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737,

[7] In relevant part, the Rule provides: "When an action presents more than one claim for relief . . . , the court may direct entry of a final judgment as to one or more, but fewer than all, claims . . . only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b).

743 n.4 (1976), and its "judicial crumbs have failed to lead the circuit courts to a consensus as to the handling of this confusing area of law," *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 741 (5th Cir. 2000). In this circuit, we have often tried to avoid this jurisprudential quagmire by employing a "pragmatic approach." *Cont'l Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987); *cf.* 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3914.7 (2d ed. 2018) ("[T]he policies underlying Rule 54(b) are not well served, and certainly are not well explained, by reliance on efforts to define a claim.").

At the doctrine's outer edges, however, our cases have given some guidance. Rule 54(b)'s use of the word "claim" at minimum refers to "a set of facts giving rise to legal rights in the claimant." *CMAX, Inc. v. Drewry Photocolor Corp.*, 295 F.2d 695, 697 (9th Cir. 1961). Multiple claims can thus exist if a case joins multiple sets of facts. *See, e.g.*, *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1316 (9th Cir. 1979). Conversely, only one claim is presented when "a single set of facts giv[es] rise to a legal right of recovery under several different remedies." *Ariz. State Carpenters Pension Tr. Fund v. Miller*, 938 F.2d 1038, 1040 (9th Cir. 1991).

In *Arizona State Carpenters Pension Trust Fund*, for example, we identified a single claim under Rule 54(b) because a single set of facts gave rise to both a count for punitive damages and a count for compensatory damages. *Id.* The plaintiff's count for punitive damages required all the same facts as its count for compensatory damages, plus additional proof of an aggravating factor. *Id.* Because the showing required for punitive damages completely

encompassed that required for compensatory damages, we considered these counts to be an indivisible claim for Rule 54(b)'s purposes. *See id.* We thus forbade the immediate appeal of a ruling dismissing only the punitive damages claim, which necessarily would have become moot if the lesser-included count for compensatory damages later failed as well. *See id.*

Nevertheless, a challenger "cannot successfully attack the court's finding of multiple claims merely by showing that some facts are common to all of its theories of recovery." *Purdy Mobile Homes*, 594 F.2d at 1316 (internal quotation marks omitted). Claims with partially "overlapping facts" are not "foreclosed from being separate for purposes of Rule 54(b)." *Wood v. GCC Bend, LLC*, 422 F.3d 873, 881 (9th Cir. 2005). Instead, a district court can enter final judgment on a claim even if it is not "separate from and independent of the remaining claims." *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797 (9th Cir. 1991) (quoting *Sheehan v. Atlanta Int'l Ins. Co.*, 812 F.2d 465, 468 (9th Cir. 1987)). And such a judgment is permissible even if the claim "arises out of the same transaction and occurrence as pending claims." *Cold Metal Process Co. v. United Eng'g & Foundry Co.*, 351 U.S. 445, 452 (1956).

Here, the Colville Tribes' counts for response costs and for natural resource damages present multiple claims because each requires a factual showing not required by the other. *See Purdy Mobile Homes*, 594 F.2d at 1316; *cf. also Blockburger v. United States*, 284 U.S. 299, 304 (1932) (holding that for the purposes of the Double Jeopardy Clause, "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires

proof of a fact which the other does not").[8] Both response cost and natural resource damages claims require proof that (1) the defendant falls within one of the four classes of PRPs listed in section 107(a), 42 U.S.C. § 9607(a); (2) the site on which hazardous substances are found is a "facility" within the meaning of section 101(9), *id.* § 9601(9); and (3) a "release" or "threatened release" of a hazardous substance from the facility has occurred. *See id.* § 9607(a); *Pakootas III*, 830 F.3d at 981. But a government's claim for response costs must also show that (4) the government has incurred costs responding to the release or threatened release; and (5) those costs are "not inconsistent with the national contingency plan," which is assumed to be the case absent a defendant's proof to the contrary. 42 U.S.C. § 9607(a)(4), (4)(A). By contrast, a claim for natural resource damages instead must show that (4) natural resources under the plaintiff's trusteeship have been injured and (5) the injury to natural resources "result[ed] from" the release or threatened release of the hazardous substance. 42 U.S.C. § 9607(a)(4)(C); *Pakootas III*, 830 F.3d at 981 n.4. The text of CERCLA elsewhere suggests the conclusion that these two claims are distinct, describing them as separate "[a]ctions for recovery of costs" and "[a]ctions for natural resource damages," and imposing different limitations periods in which those actions may be brought. 42 U.S.C. § 9613(g)(1)–(2).

[8] *See also Samaad v. City of Dallas*, 940 F.2d 925, 931 n.10 (5th Cir. 1991) (noting that our approach in *Purdy Mobile Homes* "bears a striking similarity to that employed in the double jeopardy context" under *Blockburger*), *abrogated on other grounds by Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 728 (2010).

In situations like this, where a suit involves multiple claims, we leave it to the district court, as "dispatcher," *Curtiss-Wright*, 446 U.S. at 8 (quoting *Sears, Roebuck & Co.*, 351 U.S. at 435), to evaluate the "interrelationship of the claims" and determine in the first instance "whether the claims under review [are] separable from the others remaining to be adjudicated." *Id.* at 8, 10. In doing so, "a district court must take into account judicial administrative interests as well as the equities involved." *Id.* at 8. We review the district court's decision to enter final judgment under Rule 54(b) for abuse of discretion. *See id*.

Although no party disputes the district court's exercise of discretion in this case, we must review it to satisfy ourselves that we have subject matter jurisdiction to hear this appeal. *See Sheehan*, 812 F.2d at 468. Having done so, we conclude that there was no abuse of discretion. This is a complex case that has been ongoing for fourteen years, and the entry of partial judgment against Teck would help ensure that a responsible party promptly pays for the contamination of the Upper Columbia River, advancing CERCLA's goals and easing the Tribes' burden of financing the litigation effort. *See Wood*, 422 F.3d at 882. We hold that the district court's Rule 54(b) certification here was appropriate.

B

Teck also raises two challenges to the district court's exercise of personal jurisdiction over the company. First, Teck argues that the district court should not have applied the so-called "effects" test of *Calder v. Jones*, 465 U.S. 783 (1984). In the alternative, Teck argues that the *Calder* test was not satisfied because the Trail smelter's discharges into the Columbia River were not expressly aimed at Washington.

We assess specific personal jurisdiction using a three-prong test. *See Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1205–06 (9th Cir. 2006) (en banc). Under the first prong, the Colville Tribes must show either that Teck purposefully availed itself of the privilege of conducting activities in Washington, or that it purposefully directed its activities toward Washington. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). A "purposeful availment" analysis is used for cases sounding in contract. *Id.* By contrast, a "purposeful direction" analysis under *Calder* "is most often used in suits sounding in tort." *Id.* at 802–03.

The *Calder* test plainly applies here. Claims for recovery of response costs and natural resource damages are "more akin to a tort claim than a contract claim." *Ziegler v. Indian River Cty.*, 64 F.3d 470, 474 (9th Cir. 1995); *see also E.I. Du Pont de Nemours & Co. v. United States*, 365 F.3d 1367, 1373 (Fed. Cir. 2004) ("CERCLA evolved from the doctrine of common law nuisance."). Besides, CERCLA liability for toxic pollution is much closer to the traditional domain of common law torts than several of the other areas in which we have applied *Calder*'s effects test. *See, e.g.*, *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010) (copyright infringement); *Yahoo! Inc.*, 433 F.3d at 1206 (foreign court order enforcement); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998) (trademark dilution).

We construe *Calder* as imposing three requirements: "the defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Yahoo!*, 433 F.3d at 1206

(alteration in original) (quoting *Schwarzenegger*, 374 F.3d at 803).

Teck argues only that its waste disposal activities were not "expressly aimed" at Washington. Express aiming is an ill-defined concept that we have taken to mean "something more" than "a foreign act with foreseeable effects in the forum state." *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000).

Calder illustrates this point. In that case, a California actress sued two National Enquirer employees for an allegedly defamatory article published in the magazine. The article had been written and edited in Florida but the magazine was distributed nationally, with its largest market in California. The Supreme Court upheld the exercise of personal jurisdiction in California because the allegations of libel did not concern "mere untargeted negligence" with foreseeable effects there; rather, the defendants' "intentional, and allegedly tortious, actions were expressly aimed" at the state. 465 U.S. at 789. Those actions simply involved writing and editing an article about a person in California, an article that the defendants knew would be circulated and cause reputational injury in that forum. *Id.* at 789–90. Under those circumstances, the defendants should "reasonably anticipate being haled into court there" to answer for their tortious behavior. *Id.* at 790 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). That was true even though the defendants were not personally responsible for the circulation of their article in California. *Id.* at 789–90.

We have no difficulty concluding that Teck expressly aimed its waste at the State of Washington. The district court found ample evidence that Teck's leadership knew the Columbia River carried waste away from the smelter, and

that much of this waste travelled downstream into Washington, yet Teck continued to discharge hundreds of tons of waste into the river every day. It is inconceivable that Teck did not know that its waste was aimed at the State of Washington when Teck deposited it into the powerful Columbia River just miles upstream of the border. As early as the 1930s, Teck knew that its slag had been found on the beaches of the Columbia River south of the United States border. By the 1980s, Teck's internal documents recognized that its waste was having negative effects on Washington's aquatic ecosystem. And by the early 1990s, Teck's management acknowledged that the company was "in effect dumping waste into another country," using the Upper Columbia River as a "free" and "convenient disposal facility." But still Teck, over and over again, on a daily basis for decades, dumped its waste into the river until it modernized its furnace in the mid-1990s.

It is no defense that Teck's wastewater outfalls were aimed only at the Columbia River, which in turn was aimed at Washington. Rivers are nature's conveyor belts. Teck simply made use of the river's natural transport system throughout the 1900s, much like lumberjacks of that period who would roll timber into a stream to start a log drive. Without this transport system, Teck would have soon been inundated by the massive quantities of waste it produced—which, it bears repeating, averaged some 400 tons per day. Teck's connection with Washington was not "random," "fortuitous," or "attenuated," *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (internal quotation marks omitted), nor would the maintenance of this suit offend "traditional conception[s] of fair play and substantial justice," *id.* at 464 (alteration in original) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)). To the contrary, there would be no fair play and no substantial

justice if Teck could avoid suit in the place where it deliberately sent its toxic waste. We hold that personal jurisdiction over Teck exists in Washington.

III

Satisfied that we have jurisdiction, we now turn to Teck's argument that CERCLA does not allow the Colville Tribes to recover their costs of establishing Teck's liability. The district court awarded the Tribes more than $8.25 million in costs incurred through December 31, 2013, consisting of about $3.39 million in investigation expenses plus $4.86 million in attorney's fees and costs. The court deemed the Tribes' investigation to be recoverable as part of a "removal" action, and characterized their attorney's efforts as "enforcement activities." We consider each part of the district court's award below, reviewing its findings of fact for clear error and its conclusions of law *de novo*. *Kirola v. City & Cty. of San Francisco*, 860 F.3d 1164, 1174 (9th Cir. 2017).

A

We first review the district court's award of the Colville Tribes' investigation costs.

1

Section 107(a)(4)(A) of CERCLA provides that a PRP is liable for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A). At its core, a "removal" action is defined as "the cleanup or removal" of hazardous

substances from the environment.[9] *Id*. § 9601(23). No less important, however, are several associated activities described by the statutory definition.[10] This case concerns two defined categories of related activities: such efforts "as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances," and "as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment." *Id.*

Cleanup-adjacent activities face a low bar to satisfying these definitions of "removal." *See United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1238 (9th Cir. 2005) ("The definition of 'removal' is written in sweeping terms."). Section 101(23) covers all activities "as may be necessary" to advance certain threat assessment or abatement goals. This permissive language means qualifying activities need not be performed with the *intent* of achieving the statutory goals; need not be absolutely *necessary* to achieve those goals; and need not *actually* achieve those goals. Rather,

[9] To clarify our terminology, we note that "Congress intended that there generally will be only one removal action," of which different activities are just a part. *Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 843 (6th Cir. 1994); *see also* Brian Block, *Remediating CERCLA's Polluted Statute of Limitations*, 13 Rutgers J.L. & Pub. Pol'y 388, 400 (2016) (collecting cases).

[10] Section 101(23) defines "removal" as "[1] the cleanup or removal of released hazardous substances from the environment, [2] such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, [3] such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, [4] the disposal of removed material, or [5] the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release." 42 U.S.C. § 9601(23).

taking a cue from the D.C. Circuit's construction of "as may be necessary" in the Communications Act of 1934, we hold that the definitions of "removal" reach all acts that "are not an unreasonable means" of furthering section 101(23)'s enumerated ends. *Cellco P'ship v. FCC*, 357 F.3d 88, 91 (D.C. Cir. 2004) (quoting *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 796 (1978)).

2

The district court concluded that the investigations by the Tribes' expert consultants qualify as recoverable costs of removal. To begin with, the Tribes hired an environmental consultant, Environment International, to plan and implement a study of the Upper Columbia River Site. This consultant collected multiple sediment and pore water samples and sent those samples to independent labs for testing. An environmental engineering firm, LimnoTech, then compiled the resulting data into a comprehensive database and analyzed the data. The Tribes also employed several subject-matter experts, such as a geochemist and a metallurgist, to review the data. Finally, the Tribes retained a hydrology firm, Northwest Hydraulic Consultants, to sample and analyze upstream sediment cores from the Canadian reach of the Columbia River.

We agree with the district court that the Tribes' data collection and analysis efforts were not an unreasonable means of furthering at least three distinct purposes embraced by CERCLA.

First, the expert consultants investigated the presence and movement of toxic wastes at the Site. We have held that section 101(23) encompasses such studies into the location and migration of materials containing hazardous substances. *See Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887,

889, 892 (9th Cir. 1986) (allowing cost recovery for "testing . . . of the migration of slag particles" as an action that "may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances").

Second, the Tribes' experts tested whether the slag and effluent-contaminated sediment found at the Site leach contaminants into the environment. Section 101(23) on its face covers "asses[ing] . . . [the] threat of release of hazardous substances." 42 U.S.C. § 9601(23); *see also Wickland*, 793 F.2d at 889, 892 (allowing cost recovery for "conduct[ing] tests to evaluate the hazard posed by the slag"); *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 840 F.2d 691, 692–93, 695 (9th Cir. 1988) (same).

And third, the experts traced the origins of the slag and sediment metals found at the Site. Teck has maintained before and throughout this litigation that many other sources, including other smelters, are to blame for the Upper Columbia River's pollution. The Tribes commissioned a study investigating this claim, but the results show that the wastes match the Trail smelter's isotopic and geochemical "fingerprint."

Efforts to identify the parties responsible for the disposal of toxic wastes at a site are likewise recoverable costs of removal. In *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), the Supreme Court considered whether a PRP could recover fees for work performed by an attorney in searching for other parties that had used a site for hazardous waste disposal. *Id.* at 820. The Court held that "[t]hese kinds of activities are recoverable costs of response clearly` distinguishable from litigation expenses." *Id.* Indeed, searches for pollution sources are often conducted by non-lawyers, such as "engineers, chemists, private investigators,

or other professionals"—much like the Tribes' experts here. *Id.*

Key Tronic appears to have rested its holding on yet another statutory definition, section 101(25). *See id.* at 813, 816–20. That provision defines removal and remedial actions collectively as "response" actions, and then defines all "response" actions to "include enforcement activities related thereto." 42 U.S.C. § 9601(25). The Court in *Key Tronic* noted that the search in that case had prompted EPA to initiate an administrative enforcement action against another party that had been identified as disposing of wastes at the site. *Id.* at 820. The Court also found it significant that "[t]racking down other responsible solvent polluters increases the probability that a cleanup will be effective and get paid for." *Id.* Although *Key Tronic* did not discuss section 101(23)'s definition of "removal," the benefit of making an effective cleanup more likely also falls within the scope of actions identified by the district court that "may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment." Similarly, uncovering evidence that a party is responsible for hazardous waste puts pressure on that party voluntarily to clean up its pollution, which would also advance the goals of that provision. *Cf. E.I. DuPont de Nemours & Co. v. United States*, 508 F.3d 126, 135 (3d Cir. 2007) ("Voluntary cleanups are vital to fulfilling CERCLA's purpose."). And under both provisions, CERCLA's broad remedial purpose "supports a liberal interpretation of recoverable costs" to ensure that polluters pay for the messes they create—including the difficulties of identifying them in the first place. *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1503 (6th Cir. 1989) (quoting *United States v. Northernaire Plating Co.*, 685 F. Supp. 1410, 1419 (W.D. Mich. 1988)).

3

Teck opposes the district court's conclusion, arguing that the Tribes' studies implicitly fall out of the statutory definitions of "removal" because they are all "litigation-related." To be sure, the studies were commissioned after the Tribes joined this litigation; they were undertaken to help prove Teck's liability; and many of them were presented to the district court in Phase I of trial.

Teck's argument relies on a pair of decisions from the Third Circuit. In *Redland Soccer Club, Inc. v. Dep't of Army of U.S.*, 55 F.3d 827 (3d Cir. 1995), the court held that when evaluating the "necessary" costs of response under section 107(a)(4)(B), it looks to "[t]he heart of the[] definitions of removal and remedy" and considers whether the costs are "necessary to the containment and cleanup of hazardous releases." *Id.* at 850 (quoting *United States v. Hardage*, 982 F.2d 1436, 1448 (10th Cir. 1992)). The court then applied this rule in *Black Horse Lane Assoc., L.P. v. Dow Chemical Corp.*, 228 F.3d 275 (3d Cir. 2000), where it held that "private parties may not recoup litigation-related expenses in an action to recover response costs pursuant to section 107(a)(4)(B)." *Id.* at 294. As Teck points out, the court noted that the work at issue did not "play[] any role in the containment and cleanup of the Property," which meant it was not "necessary." *Id.* at 297.

We conclude that those out-of-circuit cases are not persuasive here. The Colville Tribes bring their cost recovery action as a sovereign under section 107(a)(4)(A), so they are entitled to "all costs" rather than merely the "necessary" costs of response. *Compare* 42 U.S.C.

§ 9607(a)(4)(A), *with id.* § 9607(a)(4)(B).[11] And even if the latter standard were applicable, we have never interpreted the term "necessary" as requiring a nexus solely between recoverable costs and on-site cleanup activities. *See Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 871 (9th Cir. 2001) (en banc) (holding that a response action is necessary if it responds to "an actual and real threat to human health or the environment"). We instead read CERCLA's cost recovery provisions as making no distinction between cleanup and investigatory costs. *Wickland*, 792 F.2d at 892. Neither case cited by Teck speaks to the issue presented—whether an activity that would *otherwise* qualify as removal is disqualified by virtue of having a connection to litigation. *See Black Horse Lane*, 228 F.3d at 298 & n.13 (concluding that "the removal definition . . . exclud[es] the sort of 'oversight' costs" sought by plaintiff); *Redland Soccer Club*, 55 F.3d at 850 (concluding that plaintiffs' health risk assessment costs are not "'response costs' under any of the[] definitions" of "removal" and "remedial").

Seeing no supportive authorities on point, we decline to adopt Teck's reading of "removal" as implicitly excluding activities that have a connection to litigation. By its terms, the statute gives no weight to the timing, purpose, or ultimate use of covered activities. *See* 42 U.S.C. § 9601(23), (25). A plaintiff's ongoing response action may complicate recovery, but those costs remain recoverable at trial. *See Johnson v. James Langley Operating Co.*, 226 F.3d 957, 963

[11] For this reason, we need not decide whether the Tribes' cost of fingerprinting wastes at the Site was "necessary" in light of the study yielding a "duplicative identification" of Teck as a polluter. *Syms v. Olin Corp.*, 408 F.3d 95, 104 (2d Cir. 2005). But in any case, we cannot fault the Tribes for paying to learn that Teck disposed of these wastes when Teck disputed that the wastes could be traced back to the company rather than to a number of other potential pollution sources.

(8th Cir. 2000) ("[P]laintiffs' response costs in this case are not transformed into litigation costs merely by their timing with respect to their initiation of this action."); *Matter of Bell Petroleum Servs., Inc.*, 3 F.3d 889, 908 (5th Cir. 1993) ("With respect to costs, if any, incurred after the complaint was filed, prejudgment interest should be assessed on those costs from the date of the expenditures."). Further, a plaintiff's intent to use the fruits of an investigation in litigation does not excise that activity from the statutory definitions of removal. *See Johnson*, 226 F.3d at 963 ("[T]he motives of the . . . party attempting to recoup response costs . . . are irrelevant." (quoting *Gen. Elec. Co. v. Litton Indus. Automation Sys., Inc*, 920 F.2d 1415, 1418 (8th Cir. 1990), *abrogated on other grounds by Key Tronic Corp.*, 511 U.S. 809); *cf. Carson Harbor*, 270 F.3d at 872 (holding that self-serving "ulterior motive[s]" should be disregarded when determining whether response costs are necessary because "[t]o hold otherwise would result in a disincentive for cleanup"). Many, if not most, CERCLA plaintiffs study the contamination at a site with an eye to potential litigation, and it would make little sense to provide these costs only to parties that are disinclined to file suit. Finally, recoverable investigation costs do not transform into unrecoverable costs if the information obtained is later used to help prove a PRP's liability. *See Vill. of Milford v. K-H Holding Corp.*, 390 F.3d 926, 935–36 (6th Cir. 2004) (holding that the plaintiff could recover from the defendant the costs of identifying it as a PRP). Indeed, we would turn *Key Tronic*'s reasoning on its head if we read that opinion as making a defendant liable for all PRP search costs *except* the cost of identifying that defendant once that evidence is used in the plaintiff's case in chief. *See* 511 U.S. at 820 (lauding the plaintiff's investigation for "uncovering the [defendant's] disposal of wastes at the site").

We instead determine whether an activity amounts to "removal" by comparing the actions taken to the categories defined by statute. *See, e.g.*, *W.R. Grace & Co.*, 429 F.3d at 1246–47; *Hanford Downwinders Coal., Inc. v. Dowdle*, 71 F.3d 1469, 1477–79 (9th Cir. 1995); *Durfey v. E.I. DuPont De Nemours & Co.*, 59 F.3d 121, 124–26 (9th Cir. 1995). The statutory language—not extra-textual factors—is controlling.

We conclude that the district court properly awarded the Colville Tribes all investigation expenses as costs of removal, even though many of these activities played double duty supporting both cleanup and litigation efforts.[12]

B

We next consider the district court's award of the Colville Tribes' attorney's fees.

1

Shortly after CERCLA was enacted, several district courts interpreted section 107(a)(4)(A) to mean that the United States could recover its attorney's fees for successfully bringing a response costs action. *See, e.g.*, *United States v. Ne. Pharm. & Chem. Co.* (*NEPACCO*), 579 F. Supp. 823, 851 (W.D. Mo. 1984), *aff'd in part and*

[12] We need not decide whether the Tribe's removal costs are "inconsistent with the national contingency plan" because Teck forfeited this argument by not raising it on appeal. 42 U.S.C. § 9607(a)(4)(A). Also, we decline to consider Teck's assertion that the district court "went beyond the evidence" in calculating the amount of the Tribes' removal costs because Teck neither raised this issue in its opening brief, *see United States v. Kelly*, 874 F.3d 1037, 1051 n.9 (9th Cir. 2017), nor provided a sufficient record on which to review this claim, *see* Fed. R. App. P. 10(b)(2); *In re O'Brien*, 312 F.3d 1135, 1137 (9th Cir. 2002).

rev'd in part on other grounds, 810 F.2d 726 (8th Cir. 1986); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 186 (W.D. Mo. 1985); *United States v. S.C. Recycling & Disposal, Inc.* (*SCRDI*), 653 F. Supp. 984, 1009 (D.S.C. 1984), *aff'd in part and vacated in part on other grounds sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988).

In early 1985, Congress began considering legislation that would become the Superfund Amendments and Reauthorization Act ("SARA"). During Congress's deliberations, EPA submitted information to the hearing record accounting for the costs of its "enforcement activities," a term the agency defined as including "litigation costs," "identification of responsible parties" through "records review" and "field investigations," and several other line items. *Reauthorization of Superfund: Hearings Before the Subcomm. on Water Res. of the H. Comm. on Pub. Works and Transp.*, 99th Cong. 666–67 (1985) (statement of Lee M. Thomas, Administrator, Envtl. Protection Agency). At the time, some of those cases providing the government its attorney's fees were still pending on appeal. *See Monsanto*, 858 F.2d 160 (4th Cir. 1988); *NEPACCO*, 810 F.2d 726 (8th Cir. 1986).

To ensure that these types of expenses could be recovered, Congress amended section 101(25)'s definition of "response" to add the following clause: "all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." Pub. L. No. 99-499, § 101, 100 Stat. 1613, 1615 (1986) (codified at 42 U.S.C. § 9601(25)). SARA's Conference Committee Report summarizes the amendment as "clarif[ying] and confirm[ing] that such costs are recoverable from responsible parties, as removal or remedial costs under

section 107." H.R. Conf. Rep. 99-962, at 185 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3278.

The Supreme Court in *Key Tronic* considered whether, in light of SARA's "enforcement activities" amendment, "attorney's fees are 'necessary costs of response' within the meaning of § 107(a)(4)(B)." 511 U.S. at 811. Specifically, the case concerned whether "a private action under § 107 is one of the enforcement activities covered by that definition [such] that fees should therefore be available in private litigation as well as in government actions." *Id.* at 818. The Court answered this question in the negative. *Id.* at 818–19. Given the subject of the appeal, however, the Court offered "no comment" on whether a government could recover its attorney's fees in a "government enforcement action" under section 107(a)(4)(A). *Id.* at 817, 819. Dissenting in part, Justice Scalia, joined by Justices Blackmun and Thomas, urged that the phrase "enforcement activities" is best understood "to cover the attorney's fees incurred by both the government and private plaintiffs successfully seeking cost recovery" under either subparagraph. *Id.* at 824 (Scalia, J., dissenting).

We confronted the question whether section 107(a)(4)(A) allows the federal government to recover its attorney's fees in *United States v. Chapman*, 146 F.3d 1166 (9th Cir. 1998). There we held that CERCLA sufficiently "evinces an intent" to provide the government its reasonable attorney's fees. *Id.* at 1175–76 (quoting *Key Tronic*, 511 U.S. at 815). We reasoned that section 107(a)(4)(A)'s use of the term "all costs" gives the government "very broad cost recovery rights" standing alone. *Id.* at 1174 (quoting *NEPACCO*, 579 F. Supp. at 850). And we concluded that Congress need not "incant the magic phrase 'attorney's fees'" where it has "explicitly authorized the recovery of

costs of 'enforcement activities,'" *id.* at 1175 (quoting *Key Tronic*, 511 U.S. at 823 (Scalia, J., dissenting)), because "enforcement activities naturally include attorney fees," *id.* (quoting and citing *Key Tronic*, 511 U.S. at 823 (Scalia, J., dissenting)). We also noted that CERCLA generally must be construed liberally to accomplish its dual goals of promptly cleaning up hazardous waste sites and making polluters, rather than society as a whole, pay. *See id.* Awarding the government its attorney's fees furthers these goals by encouraging responsible parties proactively to clean up pollution, accept responsibility for cleanup costs, and stop running up the government's expenses. *Id.* at 1175–76.

We have since observed that *Chapman*'s holding applies equally to all of the governmental entities listed in section 107(a)(4)(A). *See Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 953 (9th Cir. 2002). By its terms, that provision makes no distinction between "the United States Government or a State or an Indian tribe." 42 U.S.C. § 9607(a)(4)(A). Each of these sovereigns is entitled to "all costs" of a response action, including related "enforcement activities." *See Reardon v. United States*, 947 F.2d 1509, 1514 (1st Cir. 1991) (en banc) ("We cannot give the definition [in section 101(25)] inconsistent readings within the statute."). It follows that section 107(a)(4)(A) "permits the United States Government or a State or an Indian tribe to recover all 'reasonable attorney fees' 'attributable to the litigation as a part of its response costs' if it is the 'prevailing party.'" *Fireman's Fund*, 302 F.3d at 953 (quoting *Chapman*, 146 F.3d at 1175–76).

2

Teck contends that *Chapman* does not apply here because its holding is tied to the specific facts of that case. In *Chapman*, EPA ordered the defendant to remove

hazardous substances from the site, and when the defendant failed to comply, EPA itself initiated a response action. 146 F.3d at 1168–69. EPA then requested repayment for its response costs, and only after the defendant refused to pay did the United States bring a response costs action. *Id.* at 1169. Teck maintains that the Tribes' response costs action is distinguishable because it is "not premised on a refused order or a refusal to fund response costs."

We disagree. Neither background fact identified by Teck was material to the outcome in *Chapman*. *See id.* at 1173–76. Litigation may not be necessary if a defendant is cooperative, but CERCLA does not limit a government's recovery of attorney's fees just to those response costs actions that are absolutely unavoidable. And we follow the other circuits that have considered this issue, which have held that a government's response costs action amounts to an "enforcement activit[y]" without so much as mentioning a requirement that there first be a disobeyed cleanup order or an unsuccessful repayment negotiation. *See United States v. Dico, Inc.*, 266 F.3d 864, 878 (8th Cir. 2001); *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 528, 530 (2d Cir. 1996), *overruled on other grounds by United States v. Bestfoods*, 524 U.S. 51 (1998); *see also Reardon*, 947 F.2d at 1514 ("[I]f 'enforcement activities' in § 9601(25) is interpreted to exclude the expenses of cost recovery actions, this would have the effect of denying the government significant amounts of attorney's fees—which was certainly not the intent of Congress.").

Because this case is squarely governed by *Chapman*, we conclude that the Colville Tribes are entitled to collect their reasonable attorney's fees for prevailing in their response costs action against Teck. *See* 146 F.3d at 1176; *see also Fireman's Fund*, 302 F.3d at 953.

3

Teck also tries to evade the significance of *Chapman* by raising several novel challenges to the district court's award of attorney's fees.

First, Teck asserts that the Tribes do not have the requisite "enforcement authority" to recover the costs of any enforcement activities connected with the Upper Columbia River Site. Teck reasons that the Tribes lack the response authority bestowed on the federal government by section 104, 42 U.S.C. § 9604, which Teck claims that EPA can—but here did not—"delegate" to a state, political subdivision, or Indian tribe under section 104(d)(1)(A), *id.* § 9604(d)(1)(A). But this provision is irrelevant. Section 104(d)(1)(A) does not address delegation at all; it simply "authorizes EPA to enter into cooperative agreements or contracts with a state, political subdivision, or a federally recognized Indian tribe to carry out [Superfund]-financed response actions." 40 C.F.R. § 300.515(a)(1). EPA's regulations explain that the agency "use[s] a cooperative agreement to transfer funds"—not federal authority—"to those entities to undertake Fund-financed response activities." *Id.* And in any event, the enforcement authority at issue is whether the Tribes can bring a lawsuit to recover their response costs. As Teck conceded at oral argument, the Tribes "clearly can bring a claim for recovery of response costs" under section 107(a)(4)(A), so they have all the authority needed to "enforce [this] liability provision." *Reardon*, 947 F.2d at 1512–13; *see also Washington State Dep't of Transp. v. Washington Nat. Gas Co., Pacificorp*, 59 F.3d 793, 801 (9th Cir. 1995) ("States [and tribes] need not obtain EPA authorization to clean up hazardous waste sites and recover costs from potentially responsible parties.").

Teck next contends that the Tribes cannot recover their attorney's fees because this case is not "related to" any response action at the Site, as required by section 101(25). In another statutory context, the Supreme Court has explained that the "ordinary meaning of [the] words 'related to' is a broad one," meaning "having a connection with or reference to," though that breadth "does not mean the sky is the limit." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013) (alterations omitted) (quoting *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008)). Adopting that standard here, we conclude that an enforcement activity falls outside of section 101(25) only if it has an inadequate connection with an existing or potential response action at a given site. Although some enforcement activities can be conducted only after a response action has begun, some can be conducted beforehand. For instance, a cash-strapped property owner may wish to locate solvent polluters to split the tab before incurring response costs, and EPA may well review and approve a party's cleanup plans before any response activities are conducted. *See, e.g.*, *Key Tronic*, 511 U.S. at 820 (covering PRP searches); *United States v. E.I. Dupont De Nemours & Co. Inc.*, 432 F.3d 161, 163, 173 (3d Cir. 2005) (en banc) (covering EPA's review, approval, and monitoring of proposed cleanup activities). Nothing in section 101(25)'s text or the case law interpreting it requires one activity to come before the other for them to be related. The Tribes have conducted investigative activities during the course of this litigation, so the district court correctly held that this response costs suit is "related to" a response action at the Site.

Last, Teck takes issue with the attorney's fees associated with the Tribes' declaratory judgment claim. CERCLA provides that any court awarding response costs in a section 107(a) action "shall enter a declaratory judgment on liability

for response costs . . . that will be binding on any subsequent action or actions to recover further response costs." 42 U.S.C. § 9613(g)(2). As a result, the declaration of Teck's liability for future response costs is simply an additional form of relief that the Tribes obtained through the same efforts underlying their successful response costs action. *See City of Colton v. Am. Promotional Events, Inc.-W.*, 614 F.3d 998, 1007 (9th Cir. 2010). Teck responds that declaratory relief did not need to be granted to compel Teck to fund a response action, but this mandatory relief does not require a showing of necessity. Regardless of whether future response costs are speculative—or even, as Teck insists, affirmatively unlikely—CERCLA requires that a successful plaintiff in a section 107(a) action be awarded both response costs and declaratory relief. *See* 42 U.S.C. § 9613(g)(2).

4

Teck also challenges the reasonableness of the attorney's fees award under the standard set forth in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Teck contends that if we agree that the Tribes were not entitled to any costs of removal, then we should conclude that the district court misjudged the degree of the Tribes' success. But we do not agree with Teck's premise, so we reject its conclusion. The district court did not abuse its discretion in finding the $4.86 million attorney's fees award to be reasonably proportionate to the properly awarded $3.39 million for investigation expenses. *See Webb v. Ada Cty.*, 285 F.3d 829, 837 (9th Cir. 2002). The ratio between attorney's fees and the degree of success obtained is also reasonable when one considers that the Tribes earned a valuable declaratory judgment, which "confer[s] substantial benefits not measured by the amount of damages awarded." *Hyde v. Small*, 123 F.3d 583, 584 (7th Cir. 1997); *see also In re Dant*

& Russell, Inc., 951 F.2d 246, 249–50 (9th Cir. 1991) (noting that CERCLA plaintiffs often "spend some money responding to an environmental hazard" and then bring a response cost action to recover their "initial outlays" and to obtain "a declaration that the responsible party will have continuing liability for the cost of finishing the job").

In sum, we conclude that the district court properly awarded the Colville Tribes their attorney's fees, and we do not disturb the finding that approximately $4.86 million is a reasonable award in this case.

IV

The final question presented is whether the district court erred in granting summary judgment on Teck's divisibility defense to joint and several liability.[13]

We review the district court's grant of summary judgment *de novo*, and we may affirm on any basis supported by the record. *Kohler v. Bed Bath & Beyond of California, LLC*, 780 F.3d 1260, 1263 (9th Cir. 2015). Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there is "no genuine dispute as to any material fact," Fed. R. Civ. P. 56(a), and whether the district court correctly applied the relevant substantive law, *see Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc).

[13] Teck's closing renews its past contentions that this case presents an extraterritorial application of CERCLA and that Teck cannot be held liable as an "arranger" under section 107(a)(3), 42 U.S.C. § 9607(a)(3). We rejected these very arguments more than a decade ago in *Pakootas I*, 452 F.3d at 1082, and we are bound by that opinion as the law of the case. *See Old Pers. v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002).

A

The district court granted summary judgment on Teck's divisibility defense on the ground that Teck did not have enough evidence to establish the defense. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In opposing the motions for summary judgment, Teck relied almost exclusively on the declaration and report prepared by its divisibility expert, Dr. Mark Johns.

Dr. Johns's report set out to estimate the contributions from all of the sources of six heavy metals—arsenic, cadmium, copper, lead, mercury, and zinc—that are found in the Upper Columbia River and that allegedly originated from Teck's smelter. The report began by cataloging many potential pollution sources dating back to the nineteenth century. These sources throughout the River's watershed include 487 mines, eight mills, six smelters, several municipal wastewater treatment plants and industrial operations, urban runoff from the City of Spokane, natural erosion, and landslides. The materials containing heavy metals could range from waste rock and tailings to particles carried by rainwater, mine water seepage, and liquid effluent; from finely eroded soils to large masses of clay and rock. The report concluded that Teck's slag is concentrated near the U.S.-Canada border and is not found more than 45 miles downriver. By contrast, one smelter dumped slag into the Upper Columbia River a few miles south of the border; other smelter slag, mine waste, and soil erosion could have reached the River at more than ten confluences with its tributaries; some wastewater treatment plants and industrial sources discharged liquid effluent to the River north of the international border; the Spokane River contributed waste from mining, smelting, wastewater treatment plants, industrial sources, and urban runoff about

100 miles south of the border; and landslides occurred on the banks of Lake Roosevelt as far as 150 miles downriver.

The report then identified two methods for apportioning liability for the River's pollution, and Dr. Johns's declaration identified a third possible method not set forth in his report but identified at his deposition.

The primary apportionment method employed a "metals loading approach." This approach was based on the premise that "[t]he harm in this case is the extent of sediment contamination by hazardous substances released at the Site." To calculate the release of hazardous substances from Teck's wastes, Dr. Johns credited a study by another one of Teck's experts concluding that "no verifiable amount of hazardous substances were measured leaching from Teck's slag" and that no dissolved metals from Teck's effluent were even found at the Site. Dr. Johns then expressed his opinion that because he believed Teck's wastes are harmless, Teck should be apportioned 0% of the liability for the Upper Columbia River's contamination.

As an alternative, Dr. Johns conducted a "flux" apportionment analysis. Unlike the primary apportionment method, this analysis assumed that the relevant harm is contamination of the River's "surface water." Dr. Johns evaluated the six heavy metals' net flux from contaminated sediment into overlying water. This analysis assumed that the "diffusion boundary layer to the sediment-water interface" was limited to the top five centimeters of sediment. Dr. Johns then estimated the mass of Teck's slag present in this top portion of sediment in the northernmost 45 miles of the Site. Using a "theoretical" release rate for zinc—the only metal "measured to even theoretically release from slag"—Dr. Johns calculated a maximum daily release rate for Teck's slag. He compared this rate against the zinc

flux rate for all remaining sediment in this area, as estimated by another one of Teck's experts, and concluded that Teck should be apportioned a 0.05% share of liability.

Finally, Dr. Johns testified about a potential mass-based approach to account for Teck's share of metals found at the Upper Columbia River Site. This approach assumed that any "placement of hazardous substances" into the Site is the relevant harm. Dr. Johns estimated the mass of metals found in Teck's slag and materials from other sources at the Site, but he ultimately did not use this method to determine Teck's portion of liability.

B

The threshold issue on appeal is how to review divisibility evidence on summary judgment.

1

CERCLA liability is ordinarily joint and several, except in the rare cases where the environmental harm to a site is shown to be divisible. *United States v. Coeur d'Alenes Co.*, 767 F.3d 873, 875 (9th Cir. 2014); *see also* Martha L. Judy, *Coming Full CERCLA: Why* Burlington Northern *Is Not the Sword of Damocles for Joint and Several Liability*, 44 New Eng. L. Rev. 249, 283 (2010) (counting only four decisions finding divisibility out of 160 cases).

In *Burlington Northern*, the Supreme Court confirmed that "'[t]he universal starting point for divisibility of harm analyses in CERCLA cases' is § 433A of the Restatement (Second) of Torts." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614 (2009) (*Burlington Northern II*) (quoting *United States v. Hercules, Inc.*, 247 F.3d 706, 717 (8th Cir. 2001)). Under the Restatement,

"when two or more persons acting independently cause a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused." *Id.* (quoting *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983)) (alteration omitted). "But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm." *Id.* (quoting *Chem-Dyne*, 572 F. Supp. at 810).

The divisibility analysis involves two steps. First, the court considers whether the environmental harm is theoretically capable of apportionment. *See* Restatement (Second) of Torts § 434 cmt. *d*. This is primarily a question of law. *See United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 942 (9th Cir. 2008) (*Burlington Northern I*), *rev'd on other grounds*, 556 U.S. 599 (2009); *United States v. NCR Corp.*, 688 F.3d 833, 838 (7th Cir. 2012); *Hercules*, 247 F.3d at 718; *Bell Petroleum*, 3 F.3d at 896. Underlying this question, however, are certain embedded factual questions that must necessarily be answered, such as "what type of pollution is at issue, who contributed to that pollution, how the pollutant presents itself in the environment after discharge, and similar questions." *NCR*, 688 F.3d at 838. Second, if the harm is theoretically capable of apportionment, the fact-finder determines whether the record provides a "reasonable basis" on which to apportion liability, which is purely a question of fact. Restatement (Second) of Torts §§ 433A(1)(b), 434 cmt. *d*; *see also Burlington Northern II*, 566 U.S. at 615; *NCR*, 688 F.3d at 838; *Hercules*, 247 F.3d at 718; *Bell Petroleum*, 3 F.3d at 896.

At both steps, the defendant asserting the divisibility defense bears the burden of proof. *See* Restatement (Second) of Torts § 433B(2); *see also Burlington Northern II*, 556 U.S. at 614; *NCR*, 688 F.3d at 838. This burden is "substantial" because the divisibility analysis is "intensely factual." *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 269 (3d Cir. 1992) (*Alcan-Butler*). The necessary showing requires a "fact-intensive, site-specific" assessment, *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 182 (4th Cir. 2013), generating "concrete and specific" evidence, *Hercules*, 247 F.3d at 718. But that is not to say that the defendant's proof must rise to the level of absolute certainty. *See Burlington Northern II*, 556 U.S. at 618. Rather, the defendant must show by a preponderance of the evidence—including all logical inferences, assumptions, and approximations—that there is a reasonable basis on which to apportion the liability for a divisible harm. *See* Restatement (Second) of Torts § 433A cmt. *d*; *see also, e.g.*, *Hercules*, 247 F.3d at 719; *Bell Petroleum*, 3 F.3d at 904 n.19.

2

In the context of a motion for summary judgment, however, the burdens operate somewhat differently. Teck's answer pleaded divisibility as an affirmative defense for which Teck would bear the burden of proof at trial.[14] To defeat this affirmative defense on summary judgment, the Colville Tribes and the State of Washington took on both the

[14] The Tribes rightly note that "affirmative defense" is something of a misnomer because divisibility is only a partial defense to liability. But for the purposes of Federal Rule of Civil Procedure 8(c)(1), even a partial defense that introduces new matter into a case must be pleaded affirmatively. 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1273 (3d ed. 2018).

initial burden of production and the ultimate burden of persuasion. *See Nissan Fire & Marine Ins. Co. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Their burden of production required them to show that Teck did not have sufficient evidence to prove its defense at trial. *See id.* If they carried this burden of production, then Teck had to produce enough evidence in support of its defense to create a genuine issue of material fact. *See id.* at 1103. The Tribes' and the State's burden of persuasion on their motions required them to persuade the court that despite Teck's evidence, there was no genuine issue of material fact for trial. *See id.* at 1102.

Here, the Tribes and the State pointed to an absence of evidence sufficient to support either step of Teck's divisibility defense. Teck then had to furnish all evidence necessary to show both that the harm is theoretically capable of apportionment and that there is a reasonable basis for apportioning liability. *See, e.g.*, *Chem-Dyne*, 572 F. Supp. at 811. Specifically, Teck had to submit "evidence of the appropriate dividend and divisor"—the overall harm, and Teck's apportioned share. Steve C. Gold, *Dis-Jointed? Several Approaches to Divisibility After Burlington Northern*, 11 Vt. J. Envtl. L. 307, 332 (2009). The Tribes and the State bore the burden of persuading the court that this evidence was inadequate.

3

Teck counters that the first question on the motions for summary judgment is whether the alleged harm could be divided "under any set of facts," which would mean Teck had no burden of production on the overall harm.

We disagree. Even on a Rule 12(b)(6) motion to dismiss—that is, *before* discovery—a non-moving party is

held to more than an "any set of facts" standard. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007). It is not the court's job to envision hypothetical scenarios in which a mix of pollution from multiple sources could potentially be divisible. Rather than relying on judicial imagination, Teck was required to "make a showing sufficient to establish the existence of an element essential to" its divisibility defense: that the harm is theoretically capable of division. *Celotex*, 477 U.S. at 322.

4

Teck then argues that, at most, its burden of production extended only to addressing the harm from the specific pollutants that Teck is alleged to have contributed to the Site. In the operative complaints, the Tribes and the State sought "the costs of remedial or removal actions, natural resource damage assessment costs, and natural resource damages that [plaintiffs] have incurred and will continue to incur at the Upper Columbia River and Lake Roosevelt where hazardous substances have come to be located." The district court read these pleadings as alleging a harm caused by "all of the hazardous substances released or threatened to be released from the Site, from whatever source." But in Teck's view, the harm pleaded is impliedly limited to the six hazardous substances alleged to have originated from the Trail smelter, so Teck contends that it can disregard all other types of pollution found with its wastes at the Site.

The environmental harm in this case is not so limited. Section 107(a) imposes strict liability on all PRPs, even if those persons are in fact not responsible for any pollution at all. *United States v. Atl. Research Corp.*, 551 U.S. 128, 136 (2007). That is because "Congress has . . . allocated the burden of disproving causation to the defendant who profited from the generation and inexpensive disposal of hazardous

waste." *Monsanto*, 858 F.2d at 170. It certainly is not always an easy task to determine the entire extent of contamination at a site. *See NCR*, 688 F.3d at 841. The Restatement makes clear, however, that "[a]s between the proved tortfeasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm should fall upon the former." Restatement (Second) of Torts § 433B cmt. *d*.

In line with CERCLA's pleading requirements, the complaints here identified six of Teck's pollutants just to establish the company's liability. The complaints cannot be fairly read as needlessly narrowing this suit to recovery for harm caused solely by those pollutants. As a result, Teck was required to produce evidence showing divisibility of the entire harm caused by Teck's wastes combined with all other River pollution—not just the harm from sources of Teck's six metals alone.[15]

C

With the standards of review thus established, we turn to evaluating the evidence submitted on summary judgment.

1

The district court primarily granted summary judgment on the ground that Teck did not have enough evidence to show that the harm at issue is theoretically capable of apportionment. The court reasoned that Teck's evidence

[15] Teck does not contend, nor does the record reflect, that Teck's heavy metals formed an area of pollution that was distinct from areas with non-metal pollutants. And that would be an argument for apportioning liability based on distinct harms, not a single divisible harm. *See* Restatement (Second) of Torts § 433A(1).

could not establish divisibility because it failed to account for the entire harm at the Site. Reviewing the parties' submissions *de novo*, we agree that there was no genuine dispute of fact for trial on the question whether the harm to the Upper Columbia River is theoretically capable of apportionment.

At the first step of the divisibility analysis, a court cannot say whether a harm "is, by nature, too unified for apportionment" without knowing certain details about the "nature" of the harm. *Burlington Northern I*, 520 F.3d at 942, *rev'd on other grounds*, 556 U.S. 599 (2009); *see also Bell Petroleum*, 3 F.3d at 895 ("The nature of the harm is the key factor in determining whether apportionment is appropriate."). As one commentator has explained: "Even if a party's waste stream can be separately accounted for, its effect on the site and on other parties' wastes at the site must also be taken into account." William C. Tucker, *All Is Number: Mathematics, Divisibility and Apportionment Under* Burlington Northern, 22 Fordham Envtl. L. Rev. 311, 316 (2011). That is, "a defendant must take into account a number of factors relating not just to the contribution of a particular defendant *to* the harm, but also to the *effect* of that defendant's waste on the environment." *Id.* Those factors generally include when the pollution was discharged to a site, where the pollutants are found, how the pollutants are presented in the environment, and what are the substances' chemical and physical properties. *See NCR*, 688 F.3d at 838. Chief among the relevant properties are "the relative toxicity, migratory potential, degree of migration, and synergistic capacities of the hazardous substances at the site." *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993) (*Alcan-PAS*).

Teck's divisibility expert identified hundreds of heavy metal sources that may have contributed to Upper Columbia River's pollution throughout its watershed over the course of more than a century. At Teck's direction, however, Dr. Johns expressly curtailed his divisibility analysis to the six hazardous substances allegedly "attributable to Teck." But Teck did not claim that these were the only pollutants found at the Site.

Both the Tribes and the State pointed out this deficiency in their motions for summary judgment. The Tribes cited evidence of the Site containing the hazardous substances antimony, beryllium, chromium, nickel, radon, selenium, thallium, 2,3,7,8-tetrachlorodibenzo-pdioxin, polycyclic aromatic hydrocarbons ("PAHs"), polychlorinated biphenyls ("PCBs"), and DDTs. And one of the State's experts submitted a declaration stating that EPA was evaluating the Site for around 199 contaminants of concern, including PAHs, PCBs, dioxins and furans, and pesticides. This declaration further showed that sediment samples found Teck's metals physically mixed with other hazardous substances in the northern stretches of the Site. Zinc, for example, "was detected with other metals like antimony, arsenic, cadmium, copper, mercury, and lead, and also in several instances with up to 14 reported organic PAH chemicals present, as well as less frequently with pesticides like 2,4-DDT, 4,4 DDE, and 4,4-DDT."

Despite this evidence, Teck's opposition to the motions for summary judgment continued to rely on Dr. Johns's limited analysis. Teck reiterated its assumption that the Site's harm was solely traceable to the specific metals that Teck discharged. While conceding that its slag was "co-located" with "other slag and tailings," Teck made no mention of its pollutants being found alongside non-metal

pollutants. And Teck relied on Dr. Johns's view that if Teck's slag "is not leaching," as he believed, then "the location of the slag in sediment is irrelevant to the apportionment analysis."

On these points Teck erred. At the outset, Teck repeatedly misapprehended the harm here. For the purpose of apportioning CERCLA liability, the relevant "harm" is the entirety of contamination at a site that has caused or foreseeably could cause a party to incur response costs, suffer natural resource damages, or sustain other types of damages cognizable under section 107(a)(4). *See, e.g.*, *Burlington Northern II*, 556 U.S. at 618 (suggesting that the harm is "the overall site contamination requiring remediation" in a response cost action); *NCR*, 688 F.3d at 840–41 ("[T]he underlying harm caused [is] the creation of a hazardous, polluted condition . . . ."); *Burlington Northern I*, 520 F.3d at 939 (holding that each share of liability for the harm is "the contamination traceable to each defendant"), *rev'd on other grounds*, 556 U.S. 599 (2009); *Chem-Nuclear Sys., Inc. v. Bush*, 292 F.3d 254, 259 (D.C. Cir. 2002) ("[T]he harm at issue was the release or threatened release of hazardous substances into groundwater . . . ." (internal quotation marks omitted)).

Dr. Johns instead based his apportionment methods on three inconsistent notions of the Site's harm: (1) "the extent of sediment contamination by hazardous substances released at the Site"; (2) "harm [to] the river," namely "the surface water"; and (3) "the placement of hazardous substances" at the Site. Dr. Johns's first and second measures of the harm are incomplete because they look only to the actual releases of hazardous substances from toxic wastes at the Site, ignoring the fact that wastes with a "*threatened* release of hazardous substances" are likewise contamination that could

give rise to response costs. *Chem-Nuclear Sys.*, 292 F.3d at 259 (emphasis added); *see also* 42 U.S.C. § 9607(a)(4). Further, the second measure excludes contamination deeper than five centimeters, even though remedial activities like dredging would obviously need to excavate these materials too. Only Dr. Johns's third apportionment method—the approach that he sketched briefly in his deposition rather than outlining in his detailed report—correctly recognized that the presence of contaminants throughout the Site is the relevant harm.

More importantly, all of Dr. Johns's analysis overlooked the fact that "the mixing of the wastes raises an issue as to the divisibility of the harm." *Chem-Dyne*, 572 F. Supp. at 811. Mixing of pollutants "is not synonymous with indivisible harm," *Alcan-PAS*, 990 F.2d at 722, but it does create a rebuttable presumption of such harm, *see id.*; *see also Monsanto*, 858 F.2d at 172; *Chem-Dyne*, 572 F. Supp. at 811. The State put this presumption at issue by submitting evidence of Teck's metals being found with unrelated pollutants, yet Teck chose not to address the potential for synergistic harm from these pollution hotspots.

Teck responds that the only relevant synergistic effects are from substances that are chemically commingled, not just physically interspersed. To that end, Dr. Johns opined that Teck's slag cannot chemically interact with other substances based on his understanding that the slag does not leach pollutants.

We are not persuaded. Even if pollutants do not chemically interact, their physical aggregation can cause disproportionate harm that is not linearly correlated with the amount of pollution attributable to each source. In *Monsanto*, a key case addressing chemical commingling, the Fourth Circuit explained: "Common sense counsels that a

million gallons of certain substances could be mixed together without significant consequences, whereas a few pints of others improperly mixed could result in disastrous consequences." 858 F.2d at 172. Also common sense, however, is the old adage that sometimes dilution is the solution to pollution. *See, e.g.*, Carol M. Browner, *Environmental Protection: Meeting the Challenges of the Twenty-First Century*, 25 Harv. Envtl. L. Rev. 329, 331 (2001). For example, "[i]f several defendants independently pollute a stream, the impurities traceable to each may be negligible and harmless, but all together may render the water entirely unfit for use." W. Keeton et al., *Prosser and Keeton on Law of Torts* § 52, p. 354 (5th ed. 1984). The Second Circuit thus allowed a PRP to be apportioned no liability if "its pollutants did not contribute more than background contamination and also cannot concentrate," provided that there were no EPA thresholds below those ambient contaminant levels. *Alcan-PAS*, 990 F.2d at 722. And the Third Circuit has held that "the fact that a single generator's waste would not in itself justify a response is irrelevant . . . , as this would permit a generator to escape liability where the amount of harm it engendered to the environment was minimal, though it was significant when added to other generators' waste." *Alcan-Butler*, 964 F.2d at 264.

Without knowing more about the accumulation of Teck's wastes with unrelated pollutants, with like materials, and by themselves, a court could not tell whether "their presence is harmful and the River must be cleaned." *NCR*, 688 F.3d at 840. That question is particularly important here because the most likely remedy for the Site will involve cleaning up some, but not all, of the contaminants in the 150-mile long stretch of river. *See* 40 C.F.R. § 300.430(f)(1)(ii)(D) (requiring EPA to select a cost-

effective remedy). More intensive remediation will no doubt be prioritized where the level of contamination, and the accompanying danger, is the greatest.

In conclusion, once the State identified mixing of Teck's metals with non-metal pollutants, Teck was required to rebut the presumption that these pollution hotspots caused greater harm than the sum of the individual pollutants, each of which may be so widely dispersed as to be harmless on its own. Teck did not carry its burden of showing that the harm is theoretically capable of apportionment by simply "considering the effects of its waste in isolation from the other contaminants at a site." *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 187 (2d Cir. 2003) (*Alcan-Consolidated*).

On a related issue concerning the significance of the buildup of slag, we again reject Teck's contentions. Contrary to Dr. Johns's mistaken assumption, the buildup of Teck's slag with other metal-bearing slag or tailings and even on its own affects the extent of the harm. Disproportionate harm can occur whether or not the slag actively leaches pollutants because, as mentioned, the mere *threat* of leaching can prompt a response action, and the accumulation of materials that pose a potential risk makes a response action more likely. *See* 42 U.S.C. § 9607(a)(4); *Chem-Nuclear Sys.*, 292 F.3d at 259. Teck responds that Dr. Johns's declaration at least creates a disputed issue of fact on this point that precludes summary judgment, but in light of the statutory scheme, no rational trier of fact could believe this unsupported assumption that the distribution of the slag is irrelevant. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). And because Teck's slag itself contains a mixture of pollutants, Teck also had to proffer evidence that the clustering of these pollutants did

not create disproportionate environmental harm. No reasonable factfinder could otherwise assume, as Dr. Johns's apportionment methods require, that rocks and sand from landslides and erosion, for example, are candidates for remediation on par with Teck's toxic slag. *See id.*

Finally, because the divisibility of the Upper Columbia River's contamination turns on the specific facts of that contamination, Teck is also mistaken in arguing that river pollution is categorically divisible under the Restatement. *See NCR*, 688 F.3d at 838. Besides, the Restatement provides dueling examples of river pollution, and the types of harm for which section 107(a) provides damages—and which the Tribes seek—are more akin to the illustration of an indivisible harm than a divisible harm. *Compare* Restatement (Second) of Torts § 433A cmt. *i*, illus. 15 (river pollution poisoning animals is indivisible), *with id.* cmt. *d*, illus. 5 (river pollution depriving a riparian owner of the use of water for industrial purposes is divisible). The Seventh Circuit reached the same conclusion in *NCR*, writing: "The problem here is not that downstream factories were prevented from using the [river] for some period, but that wholly apart from water usage, a toxic chemical in the water causes significant and widespread health problems in both animals and in humans." 688 F.3d at 842.

We hold that Teck did not make a sufficient showing to establish that liability for environmental harm to the Site is theoretically capable of apportionment. We fully agree with the district court that "because [Teck] has failed to account for all of the harm at the [Upper Columbia River] Site, it cannot prove that harm is divisible." And to borrow the apt words of *Alcan-Consolidated*, a case involving a defendant-appellant not carrying its burden of production at trial rather than on a motion for summary judgment,

> appellant did not satisfy its substantial burden with respect to divisibility because it failed to address the totality of the impact of its waste at [the Site]; it ignored the likelihood that the cumulative impact of its waste [mixture] exceeded the impact of the [mixture's] constituents considered individually, and neglected to account for the [mixture's] . . . physical interaction with other hazardous substances already at the site.

315 F.3d at 187. Although Teck must only produce evidence sufficient to create a genuine issue of material fact at the summary judgment stage, for the reasons stated above, it has not done so here.

2

As an additional ground for summary judgment, the Tribes and the State argued that Teck did not have enough evidence to show a reasonable basis for apportioning liability. The district court briefly considered this argument and again sided with the plaintiffs on the ground that Teck did not show that the chosen proxy—volume of hazardous substances deposited in the Upper Columbia River—was proportional to the environmental harm. We agree that the lack of a reasonable factual basis for apportioning Teck's liability provides yet another reason for upholding the district court's grant of summary judgment on Teck's divisibility defense.

A defendant asserting a divisibility defense must show that "there is a reasonable basis for determining the contribution of each cause to a single harm." *Burlington Northern II*, 556 U.S. at 614 (quoting Restatement (Second) of Torts § 433A(1)(b)). What is reasonable in one case may

not be in another, so apportionment methods "vary tremendously depending on the facts and circumstances of each case." *Hercules*, 247 F.3d at 717. Still, the basis for apportionment may rely on the "simplest of considerations," most commonly volumetric, chronological, or geographic factors. *Burlington Northern II*, 556 U.S. at 617–18 (quoting *Burlington Northern I*, 520 F.3d at 943). The only requirement is that the record must support a "reasonable assumption that the respective harm done is proportionate to" the factor chosen to approximate a party's responsibility. *Bell Petroleum*, 3 F.3d at 896, 903 (quoting Restatement (Second) of Torts § 433A cmt. *d*).

Here, no rational trier of fact could find that Teck has provided a reasonable basis for apportionment. All three of Dr. Johns's apportionment methods are variants of a volumetric approach in that they are premised on an estimate of the mass of pollutants at the Site. But as the Fourth Circuit has noted, "[v]olumetric contributions provide a reasonable basis for apportioning liability only if it can be reasonably assumed, or it has been demonstrated, that independent factors had no substantial effect on the harm to the environment." *Monsanto*, 858 F.2d at 172 n.27. Teck "presented no evidence, however, showing a relationship between waste volume . . . and the harm at the site." *Id.* at 172. Instead, the available record undercuts the reasonableness of Teck's assuming a proportional relationship between waste volume alone and the Site's contamination, for two main reasons.

First, as the Tribes point out, Teck's evidence shows that geographic factors clearly affected the river's contamination throughout this massive site. The Trail smelter's pollution entered the Upper Columbia River at the international border and, according to Dr. Johns, Teck's slag deposits extend only

45 river miles south. But Dr. Johns accounted for the potential contribution of metals from sources as far as 150 miles downriver, many of which were concentrated at more than ten different confluences between the River and its tributaries. Further, conditions varied greatly throughout the Site; the River is free flowing close to the Canadian border, causing less sediment to accumulate, but it eventually slows and forms Lake Roosevelt, preserving more sediment. As discussed above, these differences in pollution hotspots will doubtless entail varying remediation needs and injuries to the natural environment. *See Hercules*, 247 F.3d at 717. But even if the harm from those hotspots is capable of division, the fact that contamination strongly correlates with geography means that this is an independent factor that substantially affects the environmental harm at issue. Any proxy for the harm that did not account for geography thus could not be found reasonable.

Second, Teck's evidence also shows that the passage of time could have a substantial impact on the river's contamination given the long time period under consideration. Dr. Johns accounted for materials deposited into the Columbia River from the late 1800s through the present. He testified in his deposition that over time, the accumulation of new sediment could bury old contaminants, and in his declaration he said that remediation is not needed if contaminants are buried beneath at least five centimeters of sediment. Further, Dr. Johns acknowledged that over time, slag may slowly release—and thus lose—hazardous substances to the surrounding environment. The upshot is that older wastes may present less of a need for cleanup than more recently disposed wastes. On this record, no reasonable fact-finder could assume that the time at which wastes entered the River is irrelevant to determining the extent of harmful contamination at the Site.

Other independent factors could also affect the environmental harm here, but were similarly ignored by Teck. To take a ready example, some pollutants in the Upper Columbia River may be more toxic than others, like lead compared to zinc. And pollutants may have different migratory potentials based on the media in which they are deposited, such as glassy slag, powdery tailings, or suspended particulates. *See Monsanto*, 858 F.2d at 173 n.26; *see also, e.g.*, *United States v. Manzo*, 279 F. Supp. 2d 558, 572–73 (D.N.J. 2003) (rejecting a volumetric apportionment theory where the defendants did not account for relative toxicity and migratory potential).

Absent evidence of how these factors affected the contamination of the Site, any apportionment would have been arbitrary. The district court properly "refused to make an arbitrary apportionment for its own sake." *Burlington Northern II*, 556 U.S. at 614–15 (quoting Restatement (Second) of Torts § 433A cmt. *i*). But Teck of course can always bring a contribution action under section 113(f), 42 U.S.C. § 9613(f), against other pollution sources it identified, which "mitigates any inequity arising from the unavailability of apportionment." *PCS Nitrogen*, 714 F.3d at 182.

In holding that Teck did not carry its burden of production, we do not mean to suggest that Teck had to rush the ongoing RI/FS and exhaustively document every contaminant at the Site to save its divisibility defense from summary judgment. That was not required. What was required, however, was that Teck survey the Site, "comprehensively and persuasively address the effects of its waste," and come up with an apportionment method that a rational trier of fact could find reasonable. *Alcan-Consolidated*, 315 F.3d at 187. Teck did not do so here.

V

For the foregoing reasons, we affirm the district court's judgment holding Teck jointly and severally liable for the Colville Tribes' costs of response.

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS; AMERICAN TRUCKING ASSOCIATIONS, INC., a trade association; CONSUMER ENERGY ALLIANCE, a trade association,

Plaintiffs-Appellants,

v.

JANE O'KEEFFE; ED ARMSTRONG; MORGAN RIDER; COLLEEN JOHNSON; MELINDA EDEN; DICK PEDERSEN; JONI HAMMOND; WENDY WILES; DAVID COLLIER; JEFFREY STOCUM; CORY-ANN WIND; LYDIA EMER; LEAH FELDON; GREG ALDRICH; and SUE LANGSTON, in their official capacities as officers and employees of the Oregon Department of Environmental Quality; ELLEN F. ROSENBLUM, in her official capacity as Attorney General of the State of Oregon; KATE BROWN, in her official capacity as Governor of the State of Oregon,

Defendants-Appellees,

No. 15-35834

D.C. No. 3:15-cv-00467-AA

OPINION

CALIFORNIA AIR RESOURCES BOARD; STATE OF WASHINGTON; OREGON ENVIRONMENTAL COUNCIL; SIERRA CLUB; NATURAL RESOURCES DEFENSE COUNCIL; ENVIRONMENTAL DEFENSE FUND; CLIMATE SOLUTIONS,
Intervenor-Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted March 6, 2018
Portland, Oregon

Filed September 7, 2018

Before: Raymond C. Fisher, N. Randy Smith, and Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Hurwitz;
Dissent by Judge N.R. Smith

SUMMARY*

Civil Rights

The panel affirmed the district court's dismissal of a complaint challenging Oregon's Clean Fuels Program, which regulates the production and sale of transportation fuels based on greenhouse gas emissions.

Plaintiffs, the American Fuel and Petrochemical Manufacturers, American Trucking Associations, and Consumer Energy Alliance, alleged that the Oregon Program violated the Commerce Clause and was preempted by § 211(c) of the Clean Air Act.

Addressing the Commerce Clause claim, the panel held that plaintiffs' assertion that the Oregon Program facially discriminates against out-of-state fuels by assigning petroleum and Midwest ethanol higher carbon intensities than Oregon biofuels was squarely controlled by *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1081 (9th Cir. 2013). The panel held that like the California Low Carbon Fuel Standard at issue in *Rocky Mountain*, the Oregon Program discriminated against fuels based on lifecycle greenhouse gas emissions, not state of origin.

The panel held that the complaint failed to plausibly allege that the Oregon Program was discriminatory in purpose. The panel held that none of the alleged discriminatory statements cited by plaintiffs undermined the

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Oregon Program's stated purpose of reducing greenhouse gas emissions. The panel rejected plaintiff's claim that that the Oregon Program's assignment of carbon intensity credits and deficits effectuated a discriminatory effect. The panel also rejected the claim that the Oregon Program violates the Commerce Clause and principles of interstate federalism by attempting to control commerce occurring outside the boundaries of the state.

Addressing the preemption claim, the panel held that the Environmental Protection Agency's decision not to regulate methane under § 211(k) of the Clean Air Act was not a finding that regulating methane's contributions to greenhouse gas emissions was unnecessary, and thus the decision not to regulate was not preemptive under § 211(c)(4)(A)(i).

Dissenting, Judge N.R. Smith stated that he could not dismiss plaintiffs' claim alleging that the practical effect of the Oregon Program impermissibly favored in-state interests at the expense of out-of-state interests.

COUNSEL

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Amanda W. Goodin and Patti A. Goldman, Earthjustice, Seattle, Washington; David Pettit, Natural Resources Defense Council, Santa Monica, California; Joanne Spalding, Sierra Club, Oakland, California; Sean H. Donahue, Donahue & Goldberg LLP, Washington, D.C.; for Intervenor-Defendants-Appellees Oregon Environmental Council, Sierra Club, Natural Resources Defense Council, Environmental Defense Fund, and Climate Solutions.

Margaret Elaine Meckenstock (argued), Deputy Attorney General; Gavin G. McCabe, Supervising Deputy Attorney General; Robert W. Byrne, Senior Assistant Attorney General; Office of the Attorney General, Oakland, California; Thomas J. Young, Senior Counsel; Robert W. Ferguson, Attorney General; Office of the Attorney General, Olympia, Washington; for Intervenor-Defendants-Appellees California Air Resources Board and State of Washington.

OPINION

HURWITZ, Circuit Judge:

This case requires us to decide whether an Oregon program regulating the production and sale of transportation fuels based on greenhouse gas emissions violates the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, or is preempted by § 211(c) of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401, 7545. The district court dismissed a complaint challenging the Oregon program. We affirm.

I. Background

A. The Oregon Program

In 2007, the Oregon legislature found that "[g]lobal warming poses a serious threat to the economic well-being, public health, natural resources and environment of Oregon," and identified "a need to . . . take necessary action to begin reducing greenhouse gas emissions." Or. Rev. Stat. § 468A.200(3), (7). The legislature accordingly created the Oregon Clean Fuels Program (the "Oregon program") and instructed the Oregon Environmental Quality Commission ("OEQC") to adopt rules to decrease lifecycle greenhouse gas emissions from transportation fuels produced in or imported into Oregon. Or. Rev. Stat. §§ 468A.266–268. Between 2010 and 2015, the OEQC promulgated rules designed to reduce greenhouse gas emissions from use and production of transportation fuels in Oregon to at least 10%

lower than 2010 levels by 2025. *See* Or. Admin. R. 340-253-0000-8100.[1]

Under these rules, a regulated party must keep the average carbon intensity[2] of all transportation fuels used in Oregon below an annual limit. *See id.* 340-253-0100(6), -8010, -8020. The annual carbon intensity limits become more stringent annually through 2025. *See id*.[3]

A fuel with a carbon intensity below the limit generates a credit, and one with a carbon intensity above the limit generates a deficit. *See id.* 340-253-0040(30), (35), -1000(5). Regulated parties must generate carbon intensity "credits" greater than or equal to their "deficits" on an annual basis. Regulated parties can buy or sell credits, store them for future use, or use them to offset immediate deficits. Thus, a "regulated party may demonstrate compliance in each compliance period either by producing or importing fuel that in the aggregate meets the standard or by obtaining sufficient credits to offset the deficits it has incurred for such fuel produced or imported into Oregon." *Id.* 340-253-0100(6).

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[1] The regulations were incorporated by reference into American Fuel's complaint. The parties have also included the regulations in motions for judicial notice, Dkt. 13, 37, 52, which we **GRANT.**

[2] "'Carbon intensity' or 'CI' means the amount of lifecycle greenhouse gas emissions per unit of energy of fuel expressed in grams of carbon dioxide equivalent per megajoule (gCO2e/MJ)." Or. Admin. R. 340-253-0040(20).

[3] Regulated fuel importers or producers must (1) register with the Oregon Department of Environmental Quality ("ODEQ") and (2) report the volumes and carbon intensities of their transportation fuels. Or. Admin. R. 340-253-0100.

The cumulative carbon intensity value attributed to the lifecycle of a particular type of fuel is called a "pathway." *Id.* 340-253-0040(46) ("'Fuel pathway' means a detailed description of all stages of fuel production and use for any particular transportation fuel, including feedstock generation or extraction, production, distribution, and combustion of the fuel by the consumer. The fuel pathway is used to calculate the carbon intensity of each transportation fuel."); *see also Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1081 (9th Cir. 2013) (noting a similar definition in California's Low Carbon Fuel Standard ("LCFS")). The first phase of Oregon rules provided tables with default pathways for various fuels, "including feedstock generation or extraction, production, distribution, and combustion of the fuel by the consumer." Or. Admin. R. 340-253-0040(46), -0400(1). During this phase, regulated parties could either use the default pathways, or seek approval for individualized pathways. *Id.* 340-253-0400(3), -0450.

The second phase of the Oregon rules introduced a scientific modeling tool called OR-GREET, based on "the Greenhouse gases, Regulated Emissions, and Energy in Transportation (GREET) model developed by Argonne National Laboratory" to calculate individualized pathways for non-petroleum fuels. *Id.* 340-253-0040(67), -0400(1); *see also Rocky Mountain*, 730 F.3d at 1080–84 (describing California LCFS, which also uses GREET modeling tools). The OR-GREET employs a "lifecycle analysis" to determine total carbon intensity, which includes emissions from the production, storage, transportation, and use of the fuels, thus accounting for "all stages of fuel production." Or. Admin. R. 340-253-0040(46). The lifecycle analysis allows a state to account for "the climate-change benefits of biofuels such as ethanol, which mostly come before combustion." *Rocky Mountain*, 730 F.3d at 1081. Lifecycle analysis also allows

for an accurate comparison of the carbon effects of fuels produced using different production methods and source materials. *See id.* ("An accurate comparison is possible only when it is based on the entire lifecycle emissions of each fuel pathway.").

Producers and importers of ethanols and biodiesels can obtain carbon intensity scores in one of three ways. If a fuel has been assigned a carbon intensity score under the California LCFS, a regulated party can have that value adjusted for use in Oregon. Or. Admin. R. 340-253-0400(4)(a). Regulated parties can also use individualized carbon intensity scores calculated using the OR-GREET modeling tool. *Id.* 340-253-0500. If it is not possible to obtain an individualized value, a regulated party may also use a default pathway to report carbon intensity. *See id.* 340-253-0450.[4] "Thus fuel producers can take advantage of default and individualized carbon intensity values, and choose what is most advantageous." *Rocky Mountain*, 730 F.3d at 1082.

Because of the uniquely harmful environmental effects of petroleum-based fuels, importers of petroleum-based gasoline and diesel—unlike producers and importers of other fuels—are required to use average carbon intensity pathways, based on the average carbon-intensity values of such fuels in Oregon.[5] Or. Admin R. 340-253-0400(3)(a).

[4] The second phase of rules provides two default ethanol pathways—Midwest and Oregon averages—which assume production using the same inputs but different energy sources. Or. Admin. R. 340-253-8030, tbl. 3. These pathways are used only until an individual pathway is approved. *Id.* 340-253-0400(4)(b), -0450(3).

[5] *See Rocky Mountain*, 730 F.3d at 1084 ("Crude oil presents different climate challenges from ethanol and other biofuels. Corn and

This requirement was designed to promote the use and development of alternative fuels, because reliance solely on petroleum-based fuels would make targeted emissions reductions unattainable. *See Rocky Mountain*, 730 F.3d at 1085 ("No matter how efficiently crude oil is extracted and refined, it cannot supply [the targeted] level of reduction. To meet California's ambitious goals, the development and use of alternative fuels must be encouraged.").

B. Procedural Background

In March 2015, the American Fuel and Petrochemical Manufacturers, American Trucking Associations, and Consumer Energy Alliance (collectively, "American Fuel") filed this action against officials of the ODEQ and OEQC (the "Oregon defendants"), alleging that the Program violated the Commerce Clause and was preempted by § 211(c) of the CAA.[6] The district court granted motions to

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sugarcane absorb carbon dioxide as they grow, offsetting emissions released when ethanol is burned. By contrast, the carbon in crude oil makes a one-way trip from the Earth's crust to the atmosphere. For crude oil and its derivatives, emissions from combustion are largely fixed, but emissions from production vary significantly. As older, easily accessible sources of crude are exhausted, they are replaced by newer sources that require more energy to extract and refine, yielding a higher carbon intensity than conventional crude oil.").

[6] The plaintiffs are national trade associations. American Fuel's members include nearly all United States refiners and petrochemical manufacturers, and sell transportation fuels throughout Oregon. A number of American Fuel's members produce and sell gasoline, diesel, and ethanol used as transportation fuels in Oregon, and several import such gasoline, diesel, and ethanol into Oregon. Members of the American Trucking Association purchase transportation fuels in Oregon for use in Oregon. The Consumer Energy Alliance's members include industrial consumers and producers of gasoline, diesel, and ethanol.

intervene by several conservation organizations (the "Conservation Intervenors"),[7] the California Air Resource Board, and the State of Washington (the "State Intervenors"). The Oregon defendants moved to dismiss the complaint for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6), and the State Intervenors moved for judgment on the pleadings under Rule 12(c). The district court granted both motions, finding American Fuel's claims "largely barred" by this court's decision in *Rocky Mountain* about a virtually identical California program. The district court also concluded that the Oregon program did not discriminate in purpose or effect against out-of-state ethanol and was not preempted by the CAA.

We review the district court's judgment de novo, taking well-pleaded allegations of material fact as true and construing the complaint in the light most favorable to American Fuel. *AlliedSignal, Inc. v. City of Phoenix*, 182 F.3d 692, 695 (9th Cir. 1999).

II. The Commerce Clause

The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3. Despite its textual focus solely on congressional power, the Clause also "has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys., Inc. v. Dep't*

[7] The Conservation Intervenors are the Oregon Environmental Council, the Sierra Club, the Environmental Defense Fund, Climate Solutions, and the Natural Resources Defense Council.

of Envtl. Quality of State of Or., 511 U.S. 93, 98 (1994). This so-called "dormant" Commerce Clause is "driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Dep't. of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988)); *see also South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018) (noting that the Commerce Clause was enacted to combat "the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States" (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979)).

But, courts considering dormant Commerce Clause challenges must "respect a cross-purpose as well, for the Framers' distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy." *Davis*, 553 U.S. at 338. Thus, we must uphold a nondiscriminatory law against a dormant Commerce Clause challenge "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

In *Rocky Mountain*, we considered a challenge to the California LCFS, on which the district court accurately noted the Oregon program was modeled and to which it is analogous in all relevant respects. As in the Oregon program, parties regulated under the LCFS generate credits or deficits based on their carbon intensity scores, which are calculated through a GREET modeling tool. *Rocky Mountain*, 730 F.3d at 1080–82. In *Rocky Mountain*, we largely upheld the LCFS against a Commerce Clause challenge, remanding for further proceedings on an issue not

addressed by the district court: whether the LCFS discriminated against out-of-state ethanol in purpose or effect. *Id.* at 1078.[8]

We thus begin from the premise established in *Rocky Mountain*: state regulation violates the dormant Commerce Clause if it discriminates against out-of-state economic interests (in either purpose or effect) or if it regulates conduct occurring entirely outside of a state's borders. *Id.* at 1087, 1101–02. In contrast, we will uphold regulations that accord all fuels "the substantially evenhanded treatment demanded by the Commerce Clause." *Id.* at 1094 (quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 332 (1977)).

A. Discrimination

i. Facial Discrimination

American Fuel's claim that the Program facially discriminates against out-of-state fuels by assigning petroleum and Midwest ethanol higher carbon intensities

[8] On remand, the district court concluded that the Program did not discriminate in purpose or effect against out-of-state petroleum. *Rocky Mountain Farmers Union v. Goldstene*, No. 1:09-cv-02234, 2014 WL 7004725, at *14–15 (E.D. Cal. Dec. 11, 2014). The court later held that the Program did not purposefully discriminate against out-of-state ethanol, but, because of changes in the manner in which California calculated its carbon intensity scores, twice denied motions to dismiss the claim that the Program had a discriminatory effect on out-of-state ethanol. *Rocky Mountain Farmers Union v. Corey*, 258 F. Supp. 3d 1134, 1158, 1163 (E.D. Cal. 2017); Memorandum Decision and Order, *Rocky Mountain Farmers Union v. Corey*, No. 1:09-cv-02234-LJO-BAM (E.D. Cal. Aug. 3, 2015), ECF No. 343. These subsequent denials are discussed in greater depth in Part II(A)(iii)(a), *infra*. The plaintiffs voluntarily dismissed their remaining claims and filed an appeal, which is pending in this court.

than Oregon biofuels is squarely controlled by *Rocky Mountain*. Like its California counterpart, the Oregon program discriminates against fuels based on lifecycle greenhouse gas emissions, not state of origin. *See Rocky Mountain*, 730 F.3d at 1090.

A state may not discriminate "against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626–27 (1978). But, the Oregon program distinguishes among fuels not on the basis of origin, but rather on carbon intensity. Out-of-state fuels are not necessarily disfavored: when the complaint was filed, the Program assigned twelve out-of-state ethanols, including five Midwest ethanols, lower carbon intensities than those assigned to Oregon biofuels.[9] The fact that the Program labels fuels by state of origin does not render it discriminatory, as these labels are not the basis for any differential treatment. *See Rocky Mountain*, 730 F.3d at 1097 ("California's reasonable decision to use regional categories in its default pathways . . . does not transform its evenhanded treatment of fuels based on their carbon intensities into forbidden discrimination.").

ii. Discriminatory Purpose

Citing statements by former Oregon Governor John Kitzhaber and various Oregon legislators, American Fuel next alleges that the Oregon program was enacted with the

[9] More recent carbon intensity scores—including those submitted with American Fuel's motion for judicial notice—also make plain that out-of-state fuels are not systematically disfavored. *See* Or. Admin. R. 340-253-8030, -8040.

intent to "foster Oregon biofuels production at the expense of existing out-of-state fuel producers." But, the stated purpose of the Program is simply to "reduce Oregon's contribution to the global levels of greenhouse gas emissions and the impacts of those emissions in Oregon"—in particular, to "reduce the amount of lifecycle greenhouse gas emissions per unit of energy by a minimum of 10 percent below 2010 levels by 2025." Or. Admin. R. 340-253-0000(1), (2). "We will 'assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation.'" *Rocky Mountain*, 730 F.3d at 1097–98 (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981)).

The district court did not err in finding that the statements by Oregon public officials cited in American Fuel's complaint do not demonstrate that the objectives identified by the legislature were not the true goals of the Program. Even construing the allegations in the complaint in the light most favorable to American Fuel, the statements cited, "do not plausibly relate to a discriminatory design and are 'easily understood, in context, as economic defense of a [regulation] genuinely proposed for environmental reasons.'" *Id.* at 1100 n.13 (alteration in original) (quoting *Clover Leaf Creamery Co.*, 449 U.S. at 463 n.7). The statements of the Oregon officials are no more probative of a discriminatory or protectionist purpose than the statements by California state officials we found insufficient to establish discriminatory purpose in *Rocky Mountain*. *Id.*[10]

[10] *Compare* Mem. in Supp. of Mot. Summ. J., *Rocky Mountain Farmers Union v. Goldstene*, No. 1:09-cv-02234-LJO-BAM (E.D. Cal.

None of the statements cited by American Fuel undermines the Oregon program's stated purpose. One of the allegedly discriminatory statements of former Governor Kitzhaber, for example, explicitly attributed the Program's favorable treatment of biofuels to the fact that "natural gas transmissions and generation emit 50 percent less greenhouse gas than burning coal." *See generally Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007))).

Our federal system recognizes "each State's freedom to 'serve as a laboratory; and try novel social and economic

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Nov. 1, 2010), ECF No. 112 (quoting remarks by California state officials promoting the benefits of the LCFS, including the prospect that the program would "keep more money in the State" and "ensure that a significant portion of the biofuels used in the LCFS are produced in California"), *with* Compl., *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, No. 3:15-cv-00467-AA (D. Or. March 23, 2015), ECF No. 1 (citing statements by former Governor Kitzhaber that the Oregon program would "provide important economic benefits to Oregon's economy" and "keep capital circulating in our region through local sourcing and supply chains while reducing our dependence on carbon-intensive fuels." (quoting J. Kitzhaber, *10-Year Energy Action Plan 37* (Dec. 14, 2012))).

American Fuel also cites a statement from an advisory committee member that the LCFS "will create net jobs, make net improvements for household income, and be beneficial for Oregon's Gross State Product." *See* Advisory Final Report, Appx. A, Summary of Advisory Committee Input at 142 (2010), http://library.state.or.us/repository/2011/20110208 1424462/appendixA.pdf. These statements merely represent feedback and recommendations from stakeholders consulted during the rulemaking process; under the same subheading, another committee member offered the critique that "more can be done to incentivize low carbon fuels within the state." *Id.*

experiments.'" *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting)). This freedom would be meaningless if officials could not promote the economic benefits of these experiments to their states without running afoul of the Commerce Clause. For this reason, regulations "justified by a valid factor unrelated to economic protectionism" are permissible, even if they benefit a state's economy. *New Energy Co.*, 486 U.S. at 274.

It is well settled that the states have a legitimate interest in combating the adverse effects of climate change on their residents. *Massachusetts v. EPA*, 549 U.S. 497, 522–23 (2007). "Air pollution prevention falls under the broad police powers of the states, which include the power to protect the health of citizens in the state." *Exxon Mobil Corp. v. U.S. Envtl. Prot. Agency*, 217 F.3d 1246, 1255 (9th Cir. 2000). The complaint does not allege that the Oregon program was enacted for the purpose of supporting a uniquely local industry. *Cf. Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) (finding a discriminatory purpose behind tax exemptions for two liquors produced in Hawaii because it was "undisputed that the purpose of the exemption was to aid Hawaiian industry"). The district court therefore correctly rejected the argument that the complaint plausibly alleged that the Program was discriminatory in purpose.

iii. Discriminatory Effect

A facially neutral statute can violate the Commerce Clause if it effectuates "differential treatment of in-state and out-of-state interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc.*, 511 U.S. at 99. But, even assuming that the in-state and out-of-state fuels at issue in this case are similarly situated, American Fuel's complaint

does not state a claim based on discriminatory effects. *See Rocky Mountain*, 730 F.3d at 1089 ("All factors that affect carbon intensity are critical to determining whether the Fuel Standard gives equal treatment to similarly situated fuels.").

a. Burdens on Out-of-State Fuels

American Fuel argues that the Program's assignment of credits and deficits creates an impermissible burden on producers or importers of petroleum and Midwest ethanols, who must purchase credits, and provides an impermissible benefit to Oregon biofuel producers, who can generate and can sell credits. The argument fails. On its face, the Oregon program assigns credits and deficits to fuels evenhandedly based on a "reason, apart from [their] origin": carbon intensity. *Or. Waste Sys., Inc.*, 511 U.S. at 101 n.5. The number of credits assigned to fuels does not depend on their state of origin. *See also Rocky Mountain*, 730 F.3d at 1089 (finding no discrimination under the LCFS, which "does not base its treatment on a fuel's origin but on its carbon intensity").

And, American Fuel has not plausibly alleged that the application of these neutral criteria has a discriminatory effect. Many out-of-state producers generate credits, and several fare better in this respect than Oregon producers of the same fuels. Indeed, even factoring in transportation emissions does not neatly divide in-state and out-of-state producers, because "[t]ransportation emissions reflect a combination of: (1) distance traveled . . . ; (2) total mass and volume transported; and (3) efficiency of the method of transport." *Id.* at 1083; *see, e.g.*, State of Or. Dep't of Envtl. Quality, Oregon-Approved Carbon Intensity Values for 2016 (2016) (hereinafter "ODEQ 2016 Report") (assigning lower carbon-intensity scores to renewable diesels and biofuels from Arkansas, Louisiana, Texas, South Korea,

China, and Canada than to Oregon biofuels, and lower carbon-intensity scores to numerous out-of-state ethanols than to Oregon-produced ethanols); Or. Admin. R. 340-253-8030, -8040. Given its scoring system, the Program does not require or even incentivize "an out-of-state operator to become a resident in order to compete on equal terms." *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963).

Under the Oregon program, producers of higher carbon-intensity fuels are disfavored relative to *all* lower carbon-intensity fuels, including those produced outside of Oregon. This is plainly permissible. A state "may regulate with reference to local harms, structuring its internal markets to set incentives for firms to produce less harmful products for sale" within its borders. *Rocky Mountain*, 730 F.3d at 1104; *see also Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978) (holding that "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another"). The Commerce Clause "protects the interstate market, not particular interstate firms." *Exxon Corp.*, 437 U.S. at 127.

American Fuel alleges that "to compete in the Oregon market, producers of high carbon-intensity fuels must change the manner in which they produce and transport fuels to obtain lower carbon-intensity scores to avoid the commercial disadvantage placed on their higher carbon-intensity fuels." But this allegation merely affirms that the Program targets differences in production methods that affect greenhouse gas emissions "based on the real risks posed by different sources of generation," something we have squarely held "is not a dormant Commerce Clause violation." *Rocky Mountain*, 730 F.3d at 1092.

This is because the OR-GREET model considers in its calculation of carbon intensities emissions from the growth of inputs into the production of fuels, such as corn; efficiency of production, including electricity or fuel used for energy; milling processes; conversion of land for production; and transportation of fuels and feedstock into its calculations of carbon intensities. *See id.* at 1082–83 (upholding use of analogous GREET model in regulation in California). Accordingly, carbon intensity scores for ethanol vary widely under the Oregon program, ranging in January 2016 from 7.49 (Brazilian sugarcane ethanol) to as high as 98.59 (Midwest coal ethanol). *See* State of Or. Dep't of Envtl. Quality, Oregon-Approved Carbon Intensity Values for 2016 (2016). But, some of the lowest carbon intensity scores are also assigned to Midwest producers. *See id.* at 8–11 (assigning values to Midwest ethanols ETHC036, ETHC056, ETCH073-75, and ETHC089-90 lower than the value of Oregon ethanol). "The dormant Commerce Clause does not require [a state] to ignore the real differences in carbon intensity among out-of-state ethanol pathways," including emissions from transporting fuels and other "important contributors to GHG emissions." *Rocky Mountain*, 730 F.3d at 1088, 1093.

Nor does the Oregon program eliminate a competitive advantage that producers of higher carbon-intensity fuels have earned. *Cf. Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 351 (1977) (striking down a North Carolina regulation that had "the effect of stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system"). A state may favor environmentally friendly production methods over others with more harmful effects. *See Clover Leaf Creamery Co.*, 449 U.S. at 473. And, "[a]ccess to cheap electricity is an

advantage, but it was not 'earned' . . . simply because ethanol producers built their plants near coal-fired power plants and imposed the hidden costs of GHG emissions on others." *Rocky Mountain*, 730 F.3d at 1092; *see id.* at 1091–92 ("Drawing electricity from the coal-fired grid might be the easiest and cheapest way to power an ethanol plant. But the dormant Commerce Clause does not guarantee that ethanol producers may compete on the terms they find most convenient."); *see also Exxon Corp.*, 437 U.S. at 127 (holding that the Commerce Clause does not protect "the particular structure or methods of operation in a retail market").

On remand, the *Rocky Mountain* district court held that American Fuel had plausibly alleged a discriminatory effect on out-of-state ethanol in California from the California program. *Rocky Mountain Farmers Union*, 258 F. Supp. 3d at 1163; Mem. Decision & Order, *Rocky Mountain Farmers Union v. Corey*, No. 1:09-cv-02234-LJO-BAM (E.D. Cal. Aug. 3, 2015), ECF No. 343. But, that finding is of no aid to American Fuel here, as it was based on an allegation that California had changed the way it calculated carbon intensity scores so as to "assign artificially lower CI scores to California-produced ethanol while assigning artificially higher CI scores to ethanol produced elsewhere, particularly in the Midwest." *Rocky Mountain Farmers Union*, 258 F. Supp. 3d at 1159. There is no allegation of a similar change here. Nothing in the complaint in this case suggests that Midwest ethanol's scores are "artificially" high—only that they are higher than the scores of fuels that generate lower greenhouse gas emissions.

b. In-State Benefits

American Fuel also alleges that the Program impermissibly benefits in-state entities because Oregon

biofuels producers can generate credits. But, any benefits conferred on Oregon biofuels producers arise from the relatively low carbon intensity of their products. The Program assigns lower carbon intensity scores to *all* biofuels (regardless of state of origin) in comparison to other fuels because of their lower greenhouse gas emissions. *See, e.g.*, ODEQ 2016 Report; Or. Admin. R. 340-253-8030, -8040. Such factors "are not discriminatory because they reflect the reality of assessing and attempting to limit GHG emissions." *Rocky Mountain*, 730 F.3d at 1093.

And, biofuels are not a "uniquely local industry" to Oregon. *Id.* at 1100; *cf. Bacchus*, 468 U.S. at 271 (finding the effect of a tax exemption "clearly discriminatory, in that it applies only to locally produced beverages"). As the district court explained, some of the fuels "most desirable from a carbon intensity standpoint" are out-of-state biofuels. Judgment, *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, No. 3:15-cv-00467-AA (D. Or. March 23, 2015), ECF No. 72. The Program thus does not favor in-state biofuels over similar out-of-state biofuels, which renders this case fully distinguishable from *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 188 (1994), upon which the dissent relies. In that case, a Massachusetts tax on in-state and out-of-state milk dealers was used to fund a subsidy exclusively for in-state milk producers. *See* 512 U.S. at 190–91. Under the structure of the Oregon Program, however, out-of-state producers are able to—and do—generate credits and thus share in the Program's benefits. As the district court noted, the Program "rewards all investment in innovative fuel production, irrespective of where that innovation occurs." *See* ODEQ 2016 Report. In contrast, the subsidies at issue in *West Lynn Creamery* were distributed explicitly and exclusively to in-state producers based on geography alone. *See* 512 U.S. at 190–91, 196–97.

Thus, the pleadings do not provide a plausible basis from which to infer that the Program will shift market shares to *in-state biofuel producers*, as opposed to biofuel producers in general. *See Exxon Corp*., 437 U.S. at 126 (holding that a law did not discriminate against out-of-state refiners because "in-state independent dealers will have no competitive advantage over out-of-state dealers"); *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1231–32 (9th Cir. 2010). The fact that some burdens of Oregon's program "fall[] on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp.*, 437 U.S. at 126.[11]

c. *Pike* Analysis

"A nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry." *Clover Leaf Creamery Co.*, 449 U.S. at 474. Such a regulation "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. Although American Fuel alleges that the Program "imposes economic and administrative burdens on regulated parties" because importers of petroleum-based gasoline and diesel "must either change the composition of

[11] The fact that Oregon does not have a petroleum industry that is burdened under the Program does not support American Fuel's discrimination claims. We have previously upheld, for example, an Arizona regulation that could shift market share away from large wineries even though the state had only one large winery that would be burdened under the regulation. *See Black Star Farms*, 600 F.3d at 1227–29. The regulations show that the Program "'regulates evenhandedly' . . . without regard" to a regulated party's origin. *Clover Leaf Creamery Co.*, 449 U.S. at 471–72.

the fuel they import or purchase credits," it fails to plausibly allege that this burden is "'clearly excessive' in light of the substantial state interest" in mitigating the environmental effects of greenhouse gas emissions from transportation fuels. *Clover Leaf Creamery Co.*, 449 U.S. at 473.

B. Extraterritorial Effect

The dormant Commerce Clause also prohibits a state from regulating conduct that "takes place wholly outside of the State's borders." *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015) (en banc) (quoting *Healy v. Beer Inst*., 491 U.S. 324, 336 (1989)). American Fuel alleged that the Oregon program violates the Commerce Clause and "principles of interstate federalism" by attempting to control "commerce occurring wholly outside the boundaries" of the state. *Healy*, 491 U.S. at 336. But, these claims are squarely barred by *Rocky Mountain. See* 730 F.3d at 1101 ("Firms in any location may elect to respond to the incentives provided by the Fuel Standard if they wish to gain market share in California, but no firm must meet a particular carbon intensity standard, and no jurisdiction need adopt a particular regulatory standard for its producers to gain access to California."). Like the LCFS, the Program expressly applies only to fuels sold in, imported to, or exported from Oregon. Or. Admin. R. 340-253-0100(1).

American Fuel contends that its claim based on principles of interstate federalism raises issues not considered in *Rocky Mountain*. However, as the district court correctly noted, "irrespective of its constitutional basis, any such claim is necessarily contingent upon a finding that the Oregon program regulates and attempts to control conduct that occurs in other states." *See Rocky Mountain Farmers Union*, 2014 WL 7004725, at *13–14 (denying

leave to amend on remand to add claim alleging that the LCFS was unconstitutional under principles of interstate federalism because claim was based on same premise as an extraterritorial legislation claim). Because the Program does not legislate extraterritorially, American Fuel's claim fails no matter how its constitutional claim is labelled.

C. Preemption

Finally, American Fuel alleges that the Oregon program is preempted by § 211 of the CAA. That Act recognizes that "air pollution control at its source is the primary responsibility of States and local governments," 42 U.S.C. § 7401(a)(3), but preempts state regulation of a fuel or fuel component if the EPA Administrator has declared regulation unnecessary:

> Except as otherwise provided in subparagraph (B) or (C), no State (or political subdivision thereof) may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine—
>
> (i) if the Administrator has found that no control or prohibition of the characteristic or component of a fuel or fuel additive under paragraph (1) is necessary and has published his finding in the Federal Register . . . .

42 U.S.C. § 7545(c)(4)(A).

American Fuel contends that the EPA has found regulation of methane is unnecessary because it excluded methane from the definition of volatile organic compounds under § 211(k) of the CAA in light of its low reactivity. *See* 40 C.F.R. pt. 80 (1994); 42 U.S.C. § 7545(k). The CAA, however, makes plain that the administrator must find that "no control or prohibition . . . under" § 211(c) is necessary in order to effect preemption. The EPA's decision not to regulate methane under § 211(k) is not a finding that regulating methane's contributions to greenhouse gas emissions is unnecessary, and thus is not preemptive under § 211(c)(4)(A)(i).

III. Conclusion

For the reasons above, we **AFFIRM** the judgment of the district court.

N.R. SMITH, Circuit Judge, dissenting:

I cannot agree to dismiss American Fuel's claim,[1] alleging that the practical effect of Oregon's Clean Fuels Program (the "Oregon program") impermissibly favors in-state interests at the expense of out-of-state interests.

I.

Where "a statute discriminates against out-of-state entities . . . in its practical effect, it is unconstitutional unless it 'serves a legitimate local purpose, and this purpose could not be served as well by available nondiscriminatory means.'" *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013) (quoting *Maine v. Taylor*, 477 U.S. 131, 138 (1986)).

In *Rocky Mountain*, we followed the Supreme Court's decision in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994). *See* 730 F.3d 1098–1100. There the Supreme Court struck down as "clearly unconstitutional" a facially neutral state pricing order that imposed a tax on all milk produced for consumption in Massachusetts while also providing a subsidy "exclusively to Massachusetts dairy farmers" that "entirely (indeed more than) offset" the tax for in-state producers. *W. Lynn Creamery*, 512 U.S. at 194. By increasing the competitiveness of in-state industry at the

[1] I agree with the majority that *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), resolved many of the issues presented in this case. Nonetheless, although bound by our circuit precedent, I continue to believe that the incorporation of location and distance data into the calculation of carbon intensity values is facially discriminatory under the Supreme Court's Commerce Clause analysis. *See Rocky Mountain Farmers Union v. Corey*, 740 F.3d 507, 515–16 (9th Cir. 2014) (M. Smith dissenting from denial of rehearing en banc).

expense of out-of-state industry, Massachusetts "neutraliz[ed] advantages belonging to the place of origin." *Id.* at 196 (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935)). The Supreme Court explained that

> [n]ondiscriminatory measures, like the evenhanded tax at issue here, are generally upheld, in spite of any adverse effects on interstate commerce, in part because the existence of major in-state interests adversely affected is a powerful safeguard against legislative abuse. . . . However, when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy.

Id. at 200 (original alterations and internal quotation marks omitted).

In *Rocky Mountain*, we applied the West Lynn Creamery Rule in evaluating the constitutionality of California's clean fuels program (which the Oregon law models). 730 F.3d at 1098–1100. There we determined that the California law burdened more in-state industry than it benefitted. *See id.* at 1099. Importantly, that conclusion was necessary to our decision that California's law did not violate the principles in *West Lynn Creamery*. *See id.* at 1098–1100.

In its opinion the majority fails to grapple with the Oregon program's *West Lynn Creamery* problem. That decision causes them to err as is shown below.

II.

Again, to state a plausible claim for discrimination, American Fuel must allege that (A) the Oregon program discriminates against out-of-state interests in its practical effect, and (B) Oregon's legitimate interest in reducing global warming could be addressed by non-discriminatory means.

Further, as an initial matter in evaluating American Fuel's claim, this case is distinguished from *Rocky Mountain* because it comes before us on a motion to dismiss, not summary judgment. The evidentiary record has not been developed in discovery. Thus, we must take all factual allegations and reasonable inferences therefrom in the light most favorable to American Fuel. *See Adams v. U.S. Forest Serv.*, 671 F.3d 1138, 1142–43 (9th Cir. 2012).

A.

American Fuel's pleadings plausibly allege that Oregon's program discriminates in its practical effect. First, Oregon's program assigns a carbon intensity[2] to all transportation fuels produced for in-state consumption. The program then sets a maximum carbon intensity value. Fuels with a carbon intensity level above the maximum allowed carbon intensity value generate deficits and fuels with intensity levels below this value generate credits. Oregon also requires producers with deficits to off-set those deficits by purchasing credits from competing fuel producers that have generated credits under the law.

[2] The Carbon intensity value is based on a formula aimed at assessing the carbon footprint of each fuel from production through its ultimate consumption.

As American Fuel alleges, the discrimination arises from Oregon's decision to draw the maximum allowed carbon intensity value in such a manner that *all in-state* fuel producers generate credits and only out-of-state fuel producers generate deficits. As a practical matter, this not only exempts in-state entities from any burden under the law (to remedy deficits by purchasing credits from competitors), but it also affords them an additional subsidy in the form of valuable carbon credits. By contrast, out-of-state regulated entities, including American Fuel, generate deficits and experience the full impact of the law.[3]

Thus, like the tax and subsidy in *West Lynn Creamery*, Oregon's program discriminates in its practical effect. *See* 512 U.S. at 200. Out-of-state entities bear the full brunt of the law's burden, even though all fuel producers (including in-state entities) contribute to greenhouse gas emissions (and consequently global warming). At the same time, in-state entities not only avoid the burden of the law, they also receive a subsidy from the out-of-state entities in the sale of their valuable credits. Thus, American Fuel plausibly alleges that the Oregon program discriminates in its practical effect.

B.

It is also plausible that there are nondiscriminatory means of advancing Oregon's legitimate interest in combating global warming. *See Rocky Mountain*, 730 F.3d at 1087, 1106 (identifying legitimate state interests in addressing global warming). To state a plausible claim, it is

[3] As the majority is quick to note, there are some out-of-state entities that also generate credits. But the Commerce Clause problem emphasized in the *West Lynn Creamery* analysis was the uniform absence of an in-state burden—not the presence of a uniform burden on out-of-state interests. *See* 512 U.S. at 200.

unnecessary to identify every "available nondiscriminatory means" of accomplishing the goal of reducing greenhouse gases. *See id.* at 1087 (quoting *Taylor*, 477 U.S. at 138). However, it is easy to suggest one plausible example. Oregon could simply adopt a per unit tax on carbon intensity. Such a tax would discourage use of carbon intense fuels without artificially shielding in-state interests from any responsibility for their contributions to greenhouse gas emissions. The availability of nondiscriminatory means of addressing global warming plausibly establishes that the discriminatory effect of Oregon's law violates the Commerce Clause.

III.

There is no doubt American Fuel alleges a plausible claim. Taken together, the discriminatory practical effect of Oregon's program and the availability of nondiscriminatory alternatives plainly state a claim under the Commerce Clause that ought to survive a motion to dismiss.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIERRA CLUB,

Plaintiff,

v.

ANDREW WHEELER,

Defendant.

Civil Action No. 16-2461 (TJK)

MEMORANDUM OPINION

The Clean Air Act requires the Environmental Protection Agency ("EPA" or the "agency") to develop guidelines to regulate solid waste incinerators. It also provides a private right of action to sue EPA to enforce the law's statutory duties that are nondiscretionary. 42 U.S.C. § 7604(a)(2). Plaintiff Sierra Club brings this lawsuit to compel EPA to comply with three duties related to these guidelines that it asserts are nondiscretionary. Before the Court are the parties' cross-motions for summary judgment. ECF No. 12; ECF No. 13.[1] For the reasons explained below, the Court concludes that two of the duties at issue are not nondiscretionary. Therefore, they may not be enforced through the private right of action invoked by Sierra Club, and claims related to them must be dismissed for lack of subject matter jurisdiction. With respect to the third duty, which the parties agree is nondiscretionary, the Court will order a schedule that establishes deadlines for EPA's compliance that fall between those proposed by the parties. Thus, the Court will grant in part and deny in part Sierra Club's Motion for Summary

[1] In evaluating these motions, the Court considered all relevant filings including, but not limited to, the following: ECF No. 1 ("Compl."); ECF No. 10 ("Ans."); ECF No. 12 at 4-7 ("Pl.'s SoMF"); *id.* at 8-46 ("Pl.'s MSJ Br."); ECF No. 13-3 ("Def.'s SoMF"); ECF No. 13-4 ("Def.'s MSJ Br."); ECF No. 15 at 1-5 ("Pl.'s Resp. SoMF"); *id.* at 6-37 ("Pl.'s Opp."); ECF No. 17 ("Def.'s Reply"); ECF No. 17-1 ("Def.'s Am. SoMF"); ECF No. 18-2; ECF Nos. 19-23.

Judgment (ECF No. 12), and grant in part and deny in part Defendant's Cross-Motion for Summary Judgment (ECF No. 13). The Court will also deny Sierra Club's Motion for Leave to File a Surreply (ECF No. 18).

I. Background

A. Statutory Background

In 1963, Congress enacted the Clean Air Act ("CAA"), 42 U.S.C. § 7401, *et seq.*, "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." *Id.* § 7401(b)(1). Recognizing that the law was "work[ing] poorly," S. Rep. No. 101-228, at 128 (1989), Congress passed the Clean Air Act Amendments of 1990, creating an "aggressive regime of new control requirements" to address air pollution problems. *Blue Ridge Envtl. Def. League v. Pruitt*, 261 F. Supp. 3d 53, 56 (D.D.C. 2017) (quoting *Cal. Cmtys. Against Toxics v. Pruitt*, 241 F. Supp. 3d 199, 200 (D.D.C. 2017)).

The 1990 amendments added Section 129 to the CAA. *Nat. Res. Def. Council ("NRDC") v. EPA*, 489 F.3d 1250, 1255 (D.C. Cir. 2007). Section 129 provides that the Administrator of EPA (the "Administrator") "shall establish performance standards and other requirements . . . for solid waste incineration units." 42 U.S.C. § 7429(a)(1)(A). A "solid waste incineration unit" is defined, with qualifications not relevant here, as "a distinct operating unit of any facility which combusts any solid waste material from commercial or industrial establishments or the general public." *Id.* § 7429(g)(1).

Section 129 requires the Administrator to establish performance standards and other requirements applicable to both (1) "commercial or industrial" solid waste incineration units ("CISWI" units) and (2) "other categories" of solid waste incineration units ("OSWI" units). *Id.* § 7429(a)(1)(D)-(E). These standards and other requirements include "guidelines . . . and other

requirements applicable to existing units" of both types of incinerators. *Id.* § 7429(a)(1)(A); *see also id.* § 7429(b)(1). Once the Administrator promulgates guidelines for existing units, the law requires that a plan be developed and implemented to enforce them. Reflecting the CAA's "'core principle' of cooperative federalism," *Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 156 (D.C. Cir. 2015) (quoting *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1602 n.14 (2014)), Section 129 establishes a framework that gives each state the opportunity to create a state implementation plan ("SIP" or "state plan") and, for those states that fail to do so, requires the federal government to create a federal implementation plan ("FIP" or "federal plan"). The relevant portion of the statute provides in full:

> (2) State plans
>
> Not later than 1 year after the Administrator promulgates guidelines for a category of solid waste incineration units, each State in which units in the category are operating shall submit to the Administrator a plan to implement and enforce the guidelines with respect to such units. The State plan shall be at least as protective as the guidelines promulgated by the Administrator and shall provide that each unit subject to the guidelines shall be in compliance with all requirements of this section not later than 3 years after the State plan is approved by the Administrator but not later than 5 years after the guidelines were promulgated. The Administrator shall approve or disapprove any State plan within 180 days of the submission, and if a plan is disapproved, the Administrator shall state the reasons for disapproval in writing. Any State may modify and resubmit a plan which has been disapproved by the Administrator.
>
> (3) Federal plan
>
> The Administrator shall develop, implement and enforce a plan for existing solid waste incineration units within any category located in any State which has not submitted an approvable plan under this subsection with respect to units in such category within 2 years after the date on which the Administrator promulgated the relevant guidelines. Such plan shall assure that each unit subject to the plan is in compliance with all provisions of the guidelines not later than 5 years after the date the relevant guidelines are promulgated.

42 U.S.C. § 7429(b)(2)-(3). If a state does not have any existing CISWI or OSWI units in its state, it must submit a "negative declaration" saying so to EPA. *See* 40 C.F.R. § 60.2510 (CISWI); *id.* § 60.2982 (OSWI).

In addition, EPA must review and revise the performance standards and other requirements it promulgates under Section 129 every five years. Specifically, Section 129 states that "[n]ot later than 5 years following the initial promulgation of any performance standards and other requirements . . . applicable to a category of solid waste incineration units, and at 5 year intervals thereafter, the Administrator shall review, and in accordance with [§§ 7429 and 7411], . . . revise such standards and requirements." 42 U.S.C. § 7429(a)(5).

Finally, the CAA includes a "citizen suit" provision, which authorizes any person to file suit "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." *Id.* § 7604(a)(2). The district court is authorized "to order the Administrator to perform such act or duty." *Id.* § 7604(a).

B. Factual Background

The parties generally agree on the facts relevant to their dispute. In short, EPA has promulgated guidelines for existing CISWI and OWSI units pursuant to Section 129; many states have failed to submit implementation plans or negative declarations to EPA; and EPA has not finalized corresponding federal implementation plans. *See* Pl.'s SoMF; Def.'s SoMF; Pl.'s Resp. SoMF; Def.'s Am. SoMF. Moreover, the parties agree that EPA has not reviewed and revised the 2005 OSWI Standards every five years, as required by law. *See* Pl.'s MSJ Br. at 12; Def.'s MSJ Br. at 6, 9, 17; 42 U.S.C. § 7429(a)(5).

1. CISWI Standards

On February 7, 2013, EPA promulgated final amended emission standards for CISWI units (the "2013 CISWI Standards"). Commercial and Industrial Solid Waste Incineration Units: Reconsideration and Final Amendments; Non-Hazardous Secondary Materials That Are Solid Waste, 78 Fed. Reg. 9112 (Feb. 7, 2013); *see also* Pl.'s SoMF ¶ 4; Def.'s Am. SoMF ¶¶ 25-26.

In response to these standards, many states have failed to submit either an approvable SIP or a negative declaration to EPA. Pl.'s SoMF ¶ 5; Pl.'s MSJ Br. at 8 & n.2; Def.'s SoMF at 1. On January 11, 2017, the Administrator published for comment a proposed federal implementation plan for the 2013 CISWI Standards. Federal Plan Requirements for Commercial and Industrial Solid Waste Incineration Units, 82 Fed. Reg. 3554 (Jan. 11, 2017); Pl.'s SoMF ¶ 6. That FIP has not been finalized. *See* Compl. ¶ 46(c); Ans. ¶ 46(c). EPA asserts that it has been "forced to suspend its work on the proposed plan until March 2020 at the earliest" because it must comply with other court-ordered deadlines. Def.'s MSJ Br. at 5.

2. OSWI Standards

In 2005, EPA promulgated OSWI standards (the "2005 OSWI Standards"). Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Other Solid Waste Incineration Units, 70 Fed. Reg. 74,870 (Dec. 16, 2005); Pl.'s SoMF ¶ 9. Similarly, some states have failed to submit either an approvable SIP or a negative declaration for these standards. Pl.'s SoMF ¶ 10; Pl.'s MSJ Br. at 11 & n.4; Def.'s SoMF at 1. In December 2006, EPA released for comment a FIP for these standards. Federal Plan Requirements for Other Solid Waste Incineration Units Constructed on or Before December 9, 2004, 71 Fed. Reg. 75,816 (Dec. 18, 2006). Again, however, EPA has not finalized that plan, which is now more than a decade old. Pl.'s MSJ Br. at 11-12; Def.'s MSJ Br. at 6. In addition, EPA has not reviewed and

revised the 2005 OSWI Standards every five years, as required by law. *See* Pl.'s MSJ Br. at 12; Def.'s MSJ Br. at 6, 9, 17; 42 U.S.C. § 7429(a)(5).

C. Procedural Background

On December 16, 2016, Sierra Club filed the instant lawsuit under the CAA's "citizen suit" provision, which authorizes the district court to compel the Administrator to perform certain nondiscretionary acts or duties that he has failed to perform. *See* 42 U.S.C. § 7604(a).[2] The complaint alleges that EPA has failed to comply with three nondiscretionary duties under Section 129: to (1) develop, implement and enforce a federal implementation plan for the 2013 CISWI Standards; (2) develop, implement and enforce a federal implementation plan for the 2005 OSWI Standards; and (3) review and revise the 2005 OSWI Standards. *See* Compl. ¶ 1 (citing 42 U.S.C. § 7429(a)(5), (b)(3)). The complaint requests that the Court declare each of these failures a failure to perform a nondiscretionary act or duty within the meaning of § 7604(a)(2), and order EPA to comply with the law in accordance with "expeditious deadline[s] specified by this Court." *Id.* ¶ 69.

In September 2017, Sierra Club moved for summary judgment. ECF No. 12. In short, it argues that because the duties (and corresponding deadlines) it identified are "not discretionary," 42 U.S.C. § 7604(a)(2), the Court should order EPA to perform them. *See* Pl.'s MSJ Br. at 1, 31. Sierra Club proposes the following timeframes for compliance:

[2] The CAA also provides a private right of action to enforce "agency action unreasonably delayed." 42 U.S.C. § 7604(a). Sierra Club does not assert an "unreasonably delayed" claim here.

Action	Deadline for Proposed Action	Deadline for Final Action
Create FIP for 2013 CISWI Standards	N/A	Promulgate final rule within six months
Create FIP for 2005 OSWI Standards	Issue new proposal within six months	Promulgate final rule within 12 months
Review and Revise 2005 OSWI Standards	Publish notice of proposed rulemaking within 18 months	Promulgate final rule within 24 months

See id. at 28 tbl.A.

EPA then cross-moved for summary judgment. ECF No. 13. It advances two primary arguments. First, it argues that Section 129(b)(3) does not impose a nondiscretionary duty on EPA to finalize federal implementation plans for the 2013 CISWI Standards and the 2005 OSWI Standards. Def.'s MSJ Br. at 11-12. As such, it argues that this Court does not have subject matter jurisdiction over the two FIP claims because the United States has not waived its sovereign immunity from suit. *Id.* at 9-13. (As already noted, the agency does not dispute that it has a nondiscretionary duty to review and revise the 2005 OSWI Standards. *Id.* at 9.)

Second, EPA argues that for any deadlines the Court concludes are nondiscretionary, the agency cannot begin working to meet them until at least March 2020 because its efforts to meet other court-ordered deadlines have deprived it of sufficient resources. *Id.* at 13-16. Specifically, EPA points out that its Sector Policies and Programs Division ("SPPD"), which is responsible for these projects, is already working on 33 overdue "residual risk and technology rulemakings" ("RTRs"). *Id.* at 14-15 (citing ECF No. 13-4 at Ex. A ("Tsirigotis Aff.") ¶¶ 2, 4, 7, 12-13). The bulk of the deadlines for these projects "fall between March 2020 and June 2020," and SPPD has purportedly had to "shift all available personnel over to those projects to ensure that th[ose] deadlines can be met." *Id.* Moreover, since summary judgment briefing concluded in this case, Judge Kentaji Brown Jackson has ordered EPA to complete another nine RTRs in the next few

years. *See Cmty. In-Power & Dev. Ass'n, Inc. v. Pruitt*, 304 F. Supp. 3d 212, 225 (D.D.C. 2018). In addition to these RTRs, EPA asserts that SPPD is also responsible for meeting a number of other deadlines for projects mandated by the CAA or court order. Def.'s MSJ Br. at 15. In light of these other deadlines, EPA proposes that, if the Court agrees with Sierra Club that all the duties at issue under Section 129 are nondiscretionary, it should compel performance by the following dates:

Action	Deadline for Proposed Action	Deadline for Final Action
Create FIP for 2013 CISWI Standards	N/A	Promulgate final rule by September 16, 2020
Create FIP for 2005 OSWI Standards	Issue new proposal by March 16, 2021	Promulgate final rule by January 11, 2022
Review and Revise 2005 OSWI Standards	Publish notice of proposed rulemaking by September 16, 2021	Promulgate final rule by September 15, 2022

See Def.'s MSJ Br. at 16-17; Tsirigotis Aff. ¶ 8.

After the cross-motions for summary judgment were fully briefed, Sierra Club filed two documents styled as "Notice[s] of Additional Evidence," claiming that EPA as a whole and SPPD in particular are undertaking a number of nondiscretionary activities that belie EPA's claims that it does not have sufficient resources available to meet Sierra Club's proposed deadlines. *See* ECF Nos. 21, 23.

On July 17, 2018, the Court held oral argument on parties' dispositive motions.

II. Legal Standard

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The law presumes that "a cause lies outside [the Court's] limited jurisdiction" unless the party asserting jurisdiction establishes otherwise. *Id.* "[C]ourts

. . . have an independent obligation to determine whether subject-matter jurisdiction exists . . . ." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 501 (2006).

Under Rule 56, a court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Summary judgment is appropriately granted when, viewing the evidence in the light most favorable to the non-movants and drawing all reasonable inferences accordingly, no reasonable jury could reach a verdict in their favor." *Lopez v. Council on Am.-Islamic Relations Action Network, Inc.*, 826 F.3d 492, 496 (D.C. Cir. 2016). Courts "are not to make credibility determinations or weigh the evidence." *Id.* (quoting *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006)). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* (alteration in original) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). "The movant bears the initial burden of demonstrating that there is no genuine issue of material fact." *Montgomery v. Risen*, 875 F.3d 709, 713 (D.C. Cir. 2017). "In response, the non-movant must identify specific facts in the record to demonstrate the existence of a genuine issue." *Id.*

III. Analysis

This case requires the Court to: (1) decide whether Section 129(b)(3) of the CAA imposes nondiscretionary duties on the Administrator to finalize federal implementation plans for the 2013 CISWI Standards and the 2005 OSWI Standards, such that the Court has subject matter jurisdiction; and (2) establish appropriate deadlines for EPA's compliance with any duties imposed by Section 129 that the Court determines are nondiscretionary, and for which the CAA's deadlines have passed. The Court concludes that the two duties referenced above are not nondiscretionary, and Sierra Club's claims based on those duties must be dismissed for lack of

subject matter jurisdiction. The Court will also establish a schedule for compliance with the EPA's duty to review and revise the 2005 OSWI Standards, which the parties agree is nondiscretionary, as set forth below.

A. Whether Section 129(b)(3) Imposes a Nondiscretionary Two-Year Deadline for EPA's Federal Implementation Plans, Thereby Providing this Court Subject Matter Jurisdiction

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Here, Sierra Club relies on the "citizen suit provision of the Clean Air Act as the waiver of sovereign immunity and the source of this Court's jurisdiction." *Friends of the Earth v. EPA*, 934 F. Supp. 2d 40, 46 (D.D.C. 2013) (citation omitted). This provision authorizes private plaintiffs to sue the Administrator for "failure . . . to perform any act or duty under this chapter which is not discretionary with the Administrator." 42 U.S.C. § 7604(a)(2). "The court has jurisdiction only if the EPA has failed to fulfill a nondiscretionary duty." *Defs. of Wildlife v. Jackson*, 284 F.R.D. 1, 4 (D.D.C. 2012) (citing *Sierra Club v. EPA*, 475 F. Supp. 2d 29, 31 (D.D.C. 2007)), *aff'd in part, appeal dismissed in part*, 714 F.3d 1317 (D.C. Cir. 2013).[3]

The D.C. Circuit has held that "[i]n order to impose a clear-cut nondiscretionary duty, . . . a duty of timeliness must 'categorically mandat[e]' that *all* specified action be taken by a date-certain deadline." *Thomas*, 828 F.2d at 791 (second alteration in original). The CAA "imposes

[3] As EPA notes, waivers of sovereign immunity must be construed narrowly. *See, e.g.*, *Lane v. Pena*, 518 U.S. 187, 192, 195 (1996). In this case, "the Court must construe the waiver provision in [42 U.S.C. § 7604(a)] narrowly, but not the substantive provision in the Clean Air Act that outlines the agency's duties." *Friends of the Earth*, 934 F. Supp. 2d at 47 n.1. D.C. Circuit precedent already effectively incorporates this axiom by requiring that a nondiscretionary duty under this waiver provision be "clear-cut" and "categorically mandate" that "all specified action" be taken by a "date-certain" deadline. *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987), *superseded by statute on other grounds as recognized in Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 553 n.6 (D.C. Cir. 2015). Otherwise, it has little bearing on the Court's analysis.

'a nondiscretionary duty . . . only when [its] provision[s] set[] bright-line, date-specific deadlines for specified action.'" *Defs. of Wildlife*, 284 F.R.D. at 4 (alterations in original) (quoting *Raymond Proffitt Found. v. EPA*, 930 F. Supp. 1088, 1098 (E.D. Pa. 1996)). "A nondiscretionary duty must be 'clear-cut' in addition to being mandatory." *City of Dover v. EPA*, 956 F. Supp. 2d 272, 282 (D.D.C.) (citing *Thomas*, 828 F.2d at 791), *reconsidered in part on other grounds*, 40 F. Supp. 3d 1 (D.D.C. 2013). And "it is highly improbable that a deadline will ever be nondiscretionary, i.e. clear-cut, if it exists only by reason of an inference drawn from the overall statutory framework." *Thomas*, 828 F.2d at 791.

Here, the parties differ about whether the following language in the CAA—which governs the federal implementation plans for CISWI and OSWI standards—creates a clear-cut, nondiscretionary duty for EPA to finalize such a plan:

> The Administrator shall develop, implement and enforce a plan for existing solid waste incineration units within any category located in any State which has not submitted an approvable plan under this subsection with respect to units in such category *within 2 years after the date on which the Administrator promulgated the relevant guidelines*. Such plan shall assure that each unit subject to the plan is in compliance with all provisions of the guidelines not later than 5 years after the date the relevant guidelines are promulgated.

42 U.S.C. § 7429(b)(3) (emphasis added).

In Sierra Club's view, the statute requires the Administrator to "develop, implement and enforce" a federal implementation plan "within 2 years" after EPA promulgates the relevant guidelines. *See* Pl.'s MSJ Br. at 20-22; Pl.'s Opp. at 4-11. Thus, under its reading, the statute imposes a nondiscretionary, date-certain deadline for the FIP.

EPA interprets the statute differently. In its view, the phrase "within 2 years after the date on which the Administrator promulgated the relevant guidelines" modifies the phrase that directly precedes it: "within any category located in any State which has not submitted an

approvable plan under this subsection with respect to units in such category." *See* Def.'s MSJ Br. at 11-13. In other words, the statute requires that the Administrator "shall develop" a federal plan, and that plan must cover all units in those states that have not submitted an "approvable plan" within two years of EPA's promulgation of the relevant guidelines. *See id.* Under this reading, the statute does not establish a date-certain, nondiscretionary deadline to create a federal implementation plan because the statute simply says that the Administrator "shall develop" a plan—it does not say precisely when. Nonetheless, although the statute does not contain a date-certain deadline for developing the FIP, it *does* require that it "shall assure that each unit subject to the plan is in compliance with all provisions of the guidelines not later than 5 years after the date the relevant guidelines are promulgated." 42 U.S.C. § 7429(b)(3).

In the Court's judgment, EPA has the better of the argument. "As in all statutory construction cases, [the Court] begin[s] with the language of the statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). An important tool of statutory construction, the rule of last antecedent, helps tips the scale in EPA's favor. This rule is "one of the simplest canons of statutory construction." *United States v. Pritchett*, 470 F.2d 455, 459 n.9 (D.C. Cir. 1972) (quoting *United States ex rel. Santarelli v. Hughes*, 116 F.2d 613, 616 (3d Cir. 1940)). It provides that "a limiting clause or phrase . . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). Under this rule, the phrase "within 2 years after the date on which the Administrator promulgated the relevant guidelines" modifies the phrase that immediately precedes it. Thus, Section 129(b)(3) provides that the Administrator "shall develop, implement and enforce" a plan only for those incinerators located in states that do not submit an "approvable plan" within two years.

Read this way, the statute does not impose a "clear-cut," "categorical[]," "date-certain" deadline to develop a federal plan. *Thomas*, 828 F.2d at 791.

To be sure, the rule of last antecedent "is not an absolute and can assuredly be overcome by other indicia of meaning." *Hays v. Sebelius*, 589 F.3d 1279, 1281 (D.C. Cir. 2009) (quoting *Barnhart*, 540 U.S. at 26). But other provisions of the statute—in particular, the timing of the process by which states may resubmit revised state implementation plans to EPA—support EPA's reading, as opposed to Sierra Club's. Section 129 provides that after a state submits its implementation plan—which each state must do not later than one year after EPA promulgates the relevant guidelines—the Administrator must provide a written decision on that plan within 180 days; then, the state is permitted to "modify and resubmit a plan which has been disapproved." 42 U.S.C. § 7429(b)(2). Thus, the statute allows for the possibility that two years after the promulgation date, a state may have only recently resubmitted a modified plan for EPA's approval. In light of that possibility, it would be surprising for Section 129 to mandate that the Administrator "develop, implement *and enforce*" a federal implementation plan, all within two years of the date the guidelines were promulgated. *Id.* § 7429(b)(3) (emphasis added). That would hardly provide the states sufficient opportunity to develop their own plans, as the statute allows. And at that point, under the process set forth in the statute, EPA might well not even know the set of states that would need to be covered by the federal plan. In contrast, even assuming the Administrator did not make a decision on each revised state plan that had been resubmitted until sometime after the two-year mark, he *would* be able to retroactively determine which states had submitted "approvable" plans by then, as EPA's reading would require.

Sierra Club nonetheless argues that the purpose and overall structure of the statute suggest that it imposes a nondiscretionary two-year deadline on the agency to finalize a federal implementation plan. But none of its arguments carry the day.

First, Sierra Club argues that Section 129's general purpose of reducing pollution from incinerators is better served by reading the statute to require EPA to create a "backstop" within two years of the promulgation of the relevant guidelines for states that do not create an implementation plan. Pl.'s Opp. at 5. But "[t]he task of statutory interpretation cannot be reduced to a mechanical choice in which the interpretation that would advance the statute's general purposes to a greater extent must always prevail . . . ." *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 495 (D.C. Cir. 2004). And in any event, as EPA acknowledged at oral argument, even under its reading, the agency is required to produce a federal implementation plan that would assure every incineration unit subject to it is in compliance within five years after it promulgated the relevant guidelines. *See* 42 U.S.C. § 7429(b)(3). Therefore, the ultimate deadline for pollution reduction under the law would be the same under either party's interpretation.

Next, Sierra Club argues that, because Section 129(b)(2) provides that incinerators subject to state implementation plans have three years to come into compliance, its interpretation makes sense insofar as it would give incinerators subject to the federal implementation plan the same three years to do so. Pl.'s Opp. at 5. But Sierra Club mischaracterizes the statute's requirements for state plans. Section 129(b)(2) provides that a state plan "shall provide that each unit subject to the guidelines shall be in compliance . . . not later than 3 years after the State plan is approved by the Administrator *but not later than 5 years after the guidelines were promulgated*." 42 U.S.C. § 7429(b)(2) (emphasis added). Therefore, the statute contemplates

that incinerators subject to a state plan may have to achieve compliance in less than three years. For instance, if a state implementation plan were approved three years after the guidelines were promulgated, incinerators subject to that plan would have only two years to do so. Thus, EPA's interpretation of the statute, which could require incinerators subject to a federal implementation plan to come into compliance in less than three years, is entirely consistent with the state implementation plan regime. Moreover, that this provision implicitly anticipates that EPA may approve state implementation plans more than two years after it promulgates the relevant guidelines further undermines Sierra Club's argument that the statute requires the Administrator to completely "develop, implement and enforce" a federal implementation plan by that same date.

Sierra Club also argues that EPA's interpretation of the statute would lead to "absurd results" because EPA could promulgate a federal plan one day before the five-year deadline, making it impossible for incinerators subject to that plan to be compliance in a timely manner. Pl.'s Opp. at 7-8. But EPA's reading would not result in an absurdity, when the relevant provisions are considered together in their entirety. As already explained, even under EPA's interpretation, a federal implementation plan must still "assure that each unit subject to the plan is in compliance with all provisions of the guidelines not later than 5 years after the date the relevant guidelines are promulgated." 42 U.S.C. § 7429(b)(3). If, as in Sierra Club's hypothetical, EPA released a federal plan the day before the five-year deadline, that would hardly seem to fulfill that statutory mandate.

Next, Sierra Club argues that EPA previously endorsed its preferred reading of the statute. Specifically, it points to a number of instances where EPA has, in a rulemaking, described Section 129 as requiring it to finalize a FIP within two years. Pl.'s Opp. at 9-10 (citing

68 Fed. Reg. 57,518, 57,518 (Oct. 3, 2003); 81 Fed. Reg. 26,040, 26,041 (Apr. 29, 2016); 82 Fed. Reg. 3554, 3556-57 (Jan. 11, 2017)). Sierra Club then attempts to leverage the language in these rulemakings in two different ways. At times, it argues that that these prior statements mean that EPA should not receive *Chevron* deference for the interpretation of the statute it advances in its motion papers. *See, e.g.*, Pl.'s Opp. at 9-10. But EPA admits that it "has neither presented nor sought deference for an [a]gency construction of CAA section 7429(b)(3)." Def.'s Reply at 8. Because EPA has not argued that its current interpretation receives *Chevron* deference, the Court need not consider such an argument.

At other times, Sierra Club argues that EPA's prior statements in the Federal Register should themselves be entitled to *Chevron* deference. Pl.'s Opp. at 9 ("The only interpretation of § 7429(b) that deserves deference is the one EPA has advanced in its past rulemakings, which is the one Sierra Club now seeks to enforce."). But on the record here, EPA's statements in the Federal Register are not entitled to such deference. "For *Chevron* to govern, the agency must have 'acted pursuant to congressionally delegated authority to make law *and with the intent to act with the force of law*.'" *Amgen Inc. v. Hargan*, 285 F. Supp. 3d 351, 365 (D.D.C. 2018) (emphasis added) (quoting *Safari Club Int'l v. Zinke*, 878 F.3d 316, 326 (D.C. Cir. 2017)). "[P]ublication in the federal register is not in itself sufficient to constitute an agency's intent that its pronouncement have the force of law . . . ." *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 467 (D.C. Cir. 2007). Only when that publication "reflects a deliberating agency's self-binding choice, as well as a declaration of policy," is it "evidence of a *Chevron*-worthy interpretation." *Id*. Here, the agency statements that Sierra Club cites were merely made in passing. *See* 68 Fed. Reg. at 57,518, 57,522; 81 Fed. Reg. at 26,041, 26,044; 82

Fed. Reg. at 3556-57. These brief, informal statements hardly reflect a "self-binding choice" by the agency or a "declaration of policy." *Kempthorne*, 492 F.3d at 467.[4]

Finally, even if these statements did have the force of law, Sierra Club has still failed to demonstrate that they would be entitled to *Chevron* deference. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9. Here, the last antecedent rule, a "grammatical rule that has also become a [canon] of statutory construction," *Bellino v. JPMorgan Chase Bank, N.A.*, No. 14-cv-3139, 2015 WL 4006242, at *4 (S.D.N.Y. June 29, 2015), was "more than up to the job of solving today's interpretive puzzle," *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018). And, as discussed, the conclusion to which it points is consistent with other provisions of the statute that establish a timeline for states to resubmit their state implementation plans to EPA for approval, 42 U.S.C. § 7429(b)(2).

[4] Sierra Club also argues 40 C.F.R. § 60.27(c)-(d) supports its reading of Section 129. Pl.'s Opp. at 10-11. But as Sierra Club acknowledges, 40 C.F.R. § 60.27 was promulgated to implement a different section of the Clean Air Act. *See* 40 Fed. Reg. 53,339, 53,340 (Nov. 17, 1975) (implementing CAA Section 111). That is clear from the text of the regulation, which includes a number of deadlines inconsistent with Section 129(b). For instance, 40 C.F.R. § 60.27(b) says the Administrator will approve or disapprove a state plan within four months. By contrast, Section 129(b)(2) gives the Administrator six months to respond to initial plans submitted by the states. *See* 42 U.S.C. § 7429(b)(2). Thus, this regulation has no bearing on the proper interpretation of Section 129. Sierra Club also suggests that, regardless of the text of the regulation, EPA has adopted the position that it sheds light on the meaning of Section 129. Pl.'s Opp. at 11 (citing 81 Fed. Reg. at 26,041; 82 Fed. Reg. at 3556-57). This argument fails for two reasons. First, the reference to 40 C.F.R. § 60.27(c)-(d) in these Federal Register notices is best understood as referencing the section it pertains to, Section 111, not Section 129. Second, as explained below, the meaning of Section 129 can be determined using "traditional tools of statutory construction," *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 n.9 (1984), so there is no need to resort to whether EPA has purportedly interpreted Section 129 through a regulation implementing a different section of the CAA.

In sum, when analyzed using traditional tools of statutory interpretation, the statute does not establish a two-year deadline for EPA to "develop, implement and enforce" FIPs, let alone one that is "clear-cut." Therefore, Sierra Club has not shown that the statute creates a nondiscretionary duty as required by the citizen suit provision, 42 U.S.C. § 7604(a), and the Court must dismiss these claims for lack of subject matter jurisdiction. *Defs. of Wildlife*, 284 F.R.D. at 4.[5]

B. EPA's Compliance Deadline for Reviewing and Revising its 2005 OSWI Standards

Having determined that Section 129(b) does not create a nondiscretionary duty on EPA to create federal implementation plans for the 2013 CISWI or 2005 OSWI Standards, the Court turns to Section 129's requirement to review and revise the 2005 OSWI Standards. The parties agree that 42 U.S.C. § 7429(a)(5) creates a date-certain, nondiscretionary duty that, every 5 years, "the Administrator shall review[] and . . . revise such standards and requirements." The

[5] Sierra Club argues that even if the CAA does not provide this Court subject matter jurisdiction, the Administrative Procedure Act provides an alternative basis for jurisdiction. *See* Pl.'s Opp. at 3-4 & n.2. As an initial matter, because Sierra Club raised this argument in its opposition to EPA's motion for summary judgment, *id.*, the Court will deny Sierra Club's motion for leave to file a surreply, ECF No. 18. A "surreply is not a vehicle for rehashing arguments that have already been raised and briefed by the parties." *Crummey v. Soc. Sec. Admin.*, 794 F. Supp. 2d 46, 63 (D.D.C. 2011), *aff'd*, No. 11-5231, 2012 WL 556317 (D.C. Cir. Feb. 6, 2012). Turning to the argument itself, there is no doubt that "[t]he APA's waiver of sovereign immunity applies to any suit whether under the APA or not." *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996). But the waiver provision in the APA is explicitly limited. It does not "affect[] other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. § 702. Nor does it "confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Id.* Thus, the APA's waiver provision "does not provide a back door for plaintiffs to raise claims *pursuant* to other statutes . . . which disallow such claims." *All. to Save Mattaponi v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 1, 6 n.3 (D.D.C. 2007). Because the Court concludes that Section 129(b)(3) of the CAA does not create a nondiscretionary duty on EPA to implement a FIP, and therefore, the CAA does not provide subject matter jurisdiction for this Court to hear claims based on this alleged duty, Sierra Club cannot rely on the APA as an alternative vehicle to provide subject matter jurisdiction in this case. *Friends of the Earth*, 934 F. Supp. 2d at 46-47.

parties also agree that EPA has failed to comply with that duty for the 2005 OSWI Standards. Pl.'s MSJ Br. at 12; Def.'s MSJ at 6, 9, 17. Thus, the Court must establish the appropriate deadline for compliance.

The CAA "empowers district courts to 'order [the EPA] to perform' a mandated act or duty and to 'compel [non-discretionary] agency action unreasonably delayed[.]'" *Cmty. In-Power & Dev. Ass'n, Inc. v. Pruitt*, 304 F. Supp. 3d 212, 219 (D.D.C. 2018) (alterations in original) (quoting 42 U.S.C. § 7604(a)). "The D.C. Circuit has held that this provision permits district courts to exercise their equity powers 'to set enforceable deadlines both of an ultimate and an intermediate nature.'" *Blue Ridge Envtl. Def. League v. Pruitt*, 261 F. Supp. 3d 53, 59 (D.D.C. 2017) (quoting *NRDC v. Train*, 510 F.2d 692, 705 (D.C. Cir. 1974)). "While district courts have broad discretion to set deadlines for compliance, '[t]he sound discretion of an equity court does not embrace enforcement through contempt of a party's duty to comply with an order that calls him to do an impossibility.'" *Id.* (quoting *Train*, 510 F.2d at 713). "But an agency has a 'heavy burden to demonstrate' that the ordered requirements are impossible to meet, or that it is unable to comply with a particular remedial timeline." *Cmty. In-Power*, 304 F. Supp. 3d at 219 (quoting *Ala. Power Co. v. Costle*, 636 F.2d 323, 359 (D.C. Cir. 1979)). "That burden is especially heavy where 'the agency has failed to demonstrate any diligence whatever in discharging its statutory duty to promulgate regulations and has in fact ignored that duty for several years.'" *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 53 (D.D.C. 2006) (quoting *Sierra Club v. Thomas*, 658 F. Supp. 165, 172 (N.D. Cal. 1987)). Indeed, "the district court must scrutinize carefully claims of impossibility, and 'separate justifications grounded in the purposes of the Act from the footdragging efforts of a delinquent agency.'" *Id.* (quoting *Train*, 510 F.2d at 713).

On the other hand, "[n]otwithstanding the heavy burden that an agency bears to prove its inability to comply with deadlines imposed by a statute that mandates certain agency obligations, . . . a court must be mindful of the 'budgetary commitments and manpower demands [that are] required[,]' and thus avoid imposing deadlines that 'are beyond the agency's capacity or would unduly jeopardize the implementation of other essential programs.'" *Cmty. In-Power*, 304 F. Supp. 3d at 220 (alterations, except first, in original) (quoting *Train*, 510 F.2d at 712).

Here, the Court must determine the timeline on which it will order EPA to review and revise the 2005 OSWI Standards. The parties have similar views on how long that process should take, once it is begun. Both agree a timeframe of 18 months is appropriate to publish a proposed notice of rulemaking. *See* Pl.'s MSJ Br. at 28 tbl.A; Def.'s MSJ Br. at 16-17; Tsirigotis Aff. ¶ 8. And while Sierra Club argues a final rule can be implemented six months after the proposed rule (for a total of 24 months), EPA argues it will need 12 months (for a total of 30 months). Pl.'s MSJ Br. at 28 tbl.A; Def.'s MSJ Br. at 16-17; Tsirigotis Aff. ¶ 8. Of the extra six months that EPA estimates that it will need to finalize the rule, three are devoted to OMB review. Pl.'s Opp. at 20 (citing Tsirigotis Aff. ¶ 21(f)). But as discussed at oral argument, the parties agree that OMB review is not legally required to review and revise the 2005 OWSI Standards.

The primary disagreement between the parties, then, is not the time it will take to complete the required rulemaking, but when work on that rulemaking should begin. Sierra Club argues it should begin as of the date of this Opinion, whereas EPA argues that it cannot begin to work on it until March 2020. *See* Pl.'s MSJ Br. at 28 tbl.A; Def.'s MSJ Br. at 16-17.

The Court concludes that EPA has failed to demonstrate that it would be "impossible" to begin working on this project until March 2020. The Court is well aware that EPA, and in

particular SPPD, is currently obligated to comply with a number of court-ordered deadlines, most notably the outstanding RTRs. *See, e.g.*, *Cmty. In-Power*, 304 F. Supp. 3d at 225; *Blue Ridge Envtl*., 261 F. Supp. 3d 53 at 62; *Cal. Cmtys.*, 241 F. Supp. 3d at 207. But the Court nevertheless rejects its claim that it cannot begin work until March 2020 for a number of reasons. First, by the agency's own admission, there are some SPPD resources currently committed to tasks such as responding to FOIA requests and "stakeholder outreach" that, in the Court's view, could be deployed to assist with reviewing and revising the 2005 OSWI Standards. *See* Tsirigotis Aff. ¶ 15. Second, Sierra Club has presented significant evidence that EPA, including SPPD, is engaging in a number of other discretionary activities. *See* Pl.'s Opp. at 13-16; ECF No. 21; ECF No. 23. Again, resources being allocated to these efforts could be devoted to reviewing and revising the 2005 OSWI Standards. Third, the Court agrees with Sierra Club that EPA could detail employees from other divisions to SPPD (or potentially hire contractors) to help meet these deadlines. *See* Pl.'s Opp. at 16-18. "[S]hifting resources in response to statutory requirements and court orders is commonplace for EPA." *Sierra Club*, 444 F. Supp. 2d at 54 (citation omitted). And while employees new to SPPD may not have as much expertise or experience as permanent SPPD staff, their assistance could nevertheless help.

At the same time, although "this Court will not accede to the agency's proposed timeline, . . . it will also reject the impossibly compressed deadlines that Plaintiff[] suggest[s]." *Cmty. In-Power*, 304 F. Supp. 3d at 225. "[C]ourts should not demand a deadline for agency compliance that is impossible or infeasible." *Sierra Club v. McCarthy*, No. 15-cv-1165, 2016 WL 1055120, at *3 (N.D. Cal. Mar. 15, 2016). In light of all of the ongoing court-ordered deadlines that SPPD is responsible for meeting between now and 2020, the Court concludes that it would be

impossible for EPA to review and revise the 2005 OSWI Standards beginning immediately, on the timeframe Sierra Club requested.

Instead, the Court will order EPA to begin work on the proposed rulemaking for reviewing and revising the 2005 OSWI Standards on March 1, 2019. As in *Community In-Power*, where Judge Jackson did not order the agency to begin the overdue rulemaking immediately, 304 F. Supp. 3d at 225, this window will give the agency time to properly plan the execution of this project. The Court will also require EPA to publish a notice of a proposed rulemaking by August 31, 2020, 18 months from the start of the project. And last, the Court will order EPA to promulgate a final rule by May 31, 2021, 27 months from the start of the project. Although the "Court defers to the agency's assessment of the technical nuances involved in promulgating these . . . rules," *Blue Ridge Envtl.*, 261 F. Supp. 3d at 60, it concludes that the three months EPA has budgeted for OMB review should be excluded from the time allotted to complete the final rule. OMB reviews are "completely discretionary," *Cmty. In-Power*, 304 F. Supp. 3d at 223, notwithstanding the fact that they may well be good policy in circumstances when EPA is not so far behind schedule in meeting its obligations under the law.

IV. Conclusion

For all of the above reasons, the Court will, in a separate Order, dismiss for lack of subject matter jurisdiction Sierra Club's claims that 42 U.S.C. § 7429(b)(3) imposes nondiscretionary duties on EPA to "develop, implement and enforce" federal implementation plans for the 2013 CISWI Standards and the 2005 OSWI Standards; and will otherwise, consistent with this Opinion, grant in part and deny in part Plaintiff's Motion for Summary

Judgment, ECF No. 12; grant in part and deny in part Defendant's Motion for Summary Judgment, ECF No. 13; and deny Plaintiff's Motion for Leave to File a Surreply, ECF No. 18.

/s/ Timothy J. Kelly
TIMOTHY J. KELLY
United States District Judge

Date: September 14, 2018

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CITY OF IMPERIAL BEACH, a municipal corporation, SAN DIEGO UNIFIED PORT DISTRICT, a public corporation, and CITY OF CHULA VISTA, a municipal corporation,

Plaintiffs,

v.

THE INTERNATIONAL BOUNDARY & WATER COMMISSION-UNITED STATES SECTION, an agency of the United States, and VEOLIA WATER NORTH AMERICA - WEST, LLC,

Defendants.

Case No.: 18cv457 JM (JMA)

ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTIONS TO DISMISS

On June 12, 2018, Defendants The International Boundary & Water Commission – United States Section ("USIBWC") and Veolia Water North America – West, LLC ("Veolia") (collectively, "Defendants") filed separate motions to dismiss. (Doc. Nos. 15, 17.) Plaintiffs the City of Imperial Beach, San Diego Unified Port District, and the City of Chula Vista (collectively, "Plaintiffs") oppose the motions. (Doc. No. 20.) Having carefully considered the matters presented, the court record, and the arguments of counsel, the court denies Veolia's motion to dismiss for lack of standing, denies Defendants'

motions to dismiss Plaintiffs' first and second causes of action, and grants Defendants' motions to dismiss Plaintiffs' third cause of action with leave to amend.

BACKGROUND[1]

I. The Parties

A. Plaintiffs

The City of Imperial Beach is a California General Law City and municipal corporation, duty organized and existing by virtue of the laws of the State of California. The San Diego Unified Port District is a public entity created by the San Diego Unified Port District Act, California Harbors & Navigation Code, Appendix 1, § 1 et seq. The City of Chula Vista is a California Charter City and municipal corporation, duly organized and existing under the laws of the State of California and the Charter of the City of Chula Vista.

B. Defendants

The USIBWC is an agency and instrumentality of the United States government charged with addressing transboundary issues arising out of agreements between the United States and Mexico, including the Treaty of February 3, 1944, for the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande ("1944 Treaty"). Veolia is a limited liability company incorporated in Delaware and headquartered in Massachusetts. Veolia contracts with USIBWC to operate and maintain the South Bay International Wastewater Treatment Plant ("South Bay Plant") and its associated facilities.

II. The International Boundary and Water Commission

The International Boundary and Water Commission ("Commission") is a bi-national body comprised of USIBWC and the Comisión Internacional de Límites y Aguas ("CILA") in Mexico. Both sections of the Commission exercise the rights and obligations of their governments under the 1944 Treaty. Under the 1944 Treaty,

> Neither Section [USIBWC or CILA] shall assume jurisdiction or control over works located within the limits of the country of the other without the

[1] The facts in this section are drawn from the relevant complaints and submissions from the parties, and, at this stage, are taken as true to the extent they are well pleaded.

> express consent of the Government of the latter. The works constructed, acquired or used in fulfillment of the provisions of this Treaty and located wholly within the territorial limits of either country, although these works may be international in character, shall remain, except as herein otherwise specifically provided, under the exclusive jurisdiction and control of the Section of the Commission in whose country the works may be situated.

(Doc. No. 16-1 ("1944 Treaty") Art. 2.)[2]

III. South Bay Plant

Decisions of the Commission are recorded in Minutes. In 1990, the Commission entered into an agreement known as Minute 283 to address the border sanitation problem in San Diego, California, and Tijuana, Baja California. (Doc. No. 16-2 ("Minute 283").) Among other things, Minute 283 led to the construction of the South Bay Plant.

The South Bay Plant is located in the Tijuana River Valley in the City of San Diego, San Diego County, California. The South Bay Plant was designed to handle 25 million gallons per day, based on a 30-day average, "to treat sewage generated in excess of the

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[2] In general, the court may not consider material other than the facts alleged in the complaint when deciding a motion to dismiss. Anderson v. Angelone, 86 F.3d 932, 934 (9th Cir. 1996) ("A motion to dismiss . . . must be treated as a motion for summary judgment . . . if either party . . . submits materials outside the pleadings in support or opposition to the motion, and if the district court relies on those materials."). However, "[t]here are two exceptions to this rule: the incorporation-by-reference doctrine, and judicial notice under Federal Rule of Evidence 201." Khoja v. Orexigen Therapeutics, Inc., 2018 WL 3826298, at *6 (9th Cir. Aug. 13, 2018). Federal Rule of Evidence 201 provides that courts may take judicial notice of facts that are not subject to reasonable dispute because they are generally known or are capable of accurate and ready determination. See Fed. R. Evid. 201(b). The court may take notice of such facts on its own, and "must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c). Accordingly, a court "may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment." Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001).

USIBWC requests the court take judicial notice of the 1944 Treaty, Treaty Minute 283, and a particular report of the House of Representatives. (Doc. No. 16.) These items are appropriate for judicial notice because they are matters of public record. The parties do not dispute their authenticity and the documents do not contain disputed facts. Accordingly, the court grants USIBWC's request for judicial notice.

capacity" of facilities in Mexico. (Minute 283 at 4.) USIBWC owns the South Bay Plant and Veolia operates it. The South Bay Plant and its associated facilities are subject to the terms of National Pollution and Discharge Elimination System ("NPDES") permit CA0108929 (the "NPDES Permit"). The NPDES Permit authorizes discharges of pollutants at the South Bay Ocean Outfall only, and only after such pollutants have gone through secondary treatment at the South Bay Plant. All other discharges are prohibited.

The primary influent to the South Bay Plant is sewage from Mexico. (Doc. No. 13 ("FAC") ¶ 58.) While a CILA Diversion exists in Mexico to divert flows in the Mexican Tijuana River into the transboundary sewage system, it "frequently malfunctions, allowing sewage to flow past the Diversion and across the U.S./Mexico Border." (FAC ¶ 59.)

A. Canyon Collectors

Water that crosses the border into the United States from Mexico west of the flood control conveyance does so at six discernible locations: Yogurt Canyon, Goat Canyon, Smuggler's Gulch, Canyon Del Sol, Silva Drain, and Stewart's Drain. USIBWC owns and Veolia operates canyon collectors at all locations except for Yogurt Canyon.

The canyon collectors are among the facilities that operate under and are subject to the South Bay Plant NPDES Permit. They are "designed to capture and detain polluted wastewater the moment it crosses the U.S./Mexico Border into the United States." (FAC ¶ 65.) Each concrete collector abuts the border and spans the opening of one of the drainage points. The canyon collectors collect and direct wastewater into a shallow detention basin. Wastewater in the detention basin is then directed to a screened drain inlet ("collector inlet") regulated by a valve. When open, the water in the detention basin is accepted into a pipe system and conveyed to the South Bay Plant for treatment and eventual discharge at the South Bay Ocean Outfall. When closed, the water cannot drain into the treatment system, and instead overflows the detention basin and travels into the downstream drainages.

According to Plaintiffs, the downstream waters that receive canyon collector overflow are either "navigable" in the traditional sense or are tributaries to the New Tijuana

River or the Historical Tijuana River, and ultimately the Tijuana River Estuary and the Pacific Ocean. The pollutants and hazardous wastes "from Mexican waters," (FAC ¶ 75), "substantially impact downstream water quality," (FAC ¶ 66).

IV. Flood Control Conveyance

In 1978, USIBWC constructed a flood control conveyance designed to capture as much as 135,000 cubic feet of water per second from the Tijuana River as it crosses the border from Mexico into the United States. (FAC ¶ 43.) The flood control conveyance is a discrete, concrete-lined conveyance with banked sides that begins at the United States border with Mexico. It directs water, sewage, and other wastes into an area of the Tijuana River Valley west of the historical course of the Tijuana River, in which the Tijuana River had not previously flowed. In doing so, Plaintiffs allege that USIBWC "significantly upended the natural hydrology of the Tijuana River Valley." (Id.) At the terminus of the flood control conveyance, its contents are released into a largely undeveloped area of the Tijuana River Valley. According to Plaintiffs, "[t]hese discharges have carved a new river channel, the New Tijuana River, downstream of the USIBWC Flood Control Conveyance." (Id. ¶ 45.) The New Tijuana River flows into the "Historical Tijuana River" approximately one mile downstream of the flood control conveyance's terminus.

The flood control conveyance is not subject to the NPDES Permit, and Veolia is not involved in its operation. Plaintiffs allege that USIBWC routinely and frequently discharges a substantial portion, if not all, of the pollutants and solid and/or hazardous wastes that it captures from the Mexican portion of the Tijuana River and conveys through the flood control conveyance.

USIBWC recently constructed a temporary earthen berm at the border between the United States and Mexico to reduce the volume of flow into the flood control conveyance from the Tijuana River in Mexico, redirecting those flows south into the CILA Diversion. However, Plaintiffs note that the berm is not designed to protect against high volume flows and may wash out with even the slightest amount of precipitation. (FAC ¶ 62.)

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V. Procedural Background

On September 27, 2017, Plaintiffs notified Defendants of their intent to sue over Tijuana Valley pollution discharges, as required under the Clean Water Act ("CWA"). 33 U.S.C. § 1365(b). On March 2, 2018, Plaintiffs initiated this action against Defendants. (Doc. No. 1.) The operative First Amended Complaint ("FAC") alleges three causes of action: (1) against USIBWC, discharges of pollutants from the flood control conveyance without a NPDES permit in violation of the CWA, 33 U.S.C. §§ 1311(a), 1342; (2) against both Defendants, discharges of pollutants from the canyon collectors in violation of the CWA and the NPDES Permit; and (3) against both Defendants, contribution to an imminent and substantial endangerment in violation of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B). (Doc. No. 13.)

On June 12, 2018, USIBWC moved to dismiss the FAC for failure to state a claim. (Doc. No. 15.) That same day, Veolia moved to dismiss the FAC for failure to state a claim and for lack of standing. (Doc. No. 17.) The court permitted Plaintiffs to file a single opposition brief addressing both motions.

LEGAL STANDARDS

I. Rule 12(b)(1) – Lack of Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998). As the party putting the claims before the court, Plaintiffs bear the burden of establishing jurisdiction. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

There is no subject matter jurisdiction without standing, and the "irreducible constitutional minimum" of standing consists of three elements. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). A plaintiff must have (1) suffered an injury in fact, (2) which is fairly traceable to the challenged conduct of the defendant, and (3) which is

likely to be redressed by a favorable judicial decision. Id. at 560–61.

A party may make either a facial or factual attack on subject matter jurisdiction. See, e.g., Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003). In resolving a facial challenge, the court considers whether "the allegations contained in [the] complaint are insufficient on their face to invoke federal jurisdiction." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). The court must accept the allegations as true and must draw all reasonable inferences in the plaintiff's favor. Wolfe v. Strankman, 392 F.3d 358 (9th Cir. 2004). In resolving a factual challenge, the court may consider evidence outside the complaint and ordinarily "need not presume the truthfulness of the plaintiff's allegations." Safe Air for Everyone, 373 F.3d at 1039. "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." Id. At the motion to dismiss stage, standing is demonstrated by allegations of "specific facts plausibly explaining" why the requirements are met. Barnum Timber Co. v. EPA, 633 F.3d 894, 899 (9th Cir. 2011).

II. Rule 12(b)(6) – Failure to State a Claim

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) challenges the legal sufficiency of the pleadings. To overcome such a motion, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Facts merely consistent with a defendant's liability are insufficient to survive a motion to dismiss because they establish only that the allegations are possible rather than plausible. Id. at 678–79. The court must accept as true the facts alleged in a well-pleaded complaint, but mere legal conclusions are not entitled to an assumption of truth. Id. The court must construe the pleading in the light most favorable to the non-moving party.

Concha v. London, 62 F.3d 1493, 1500 (9th Cir. 1995).

DISCUSSION

I. Standing

Veolia challenges Plaintiffs' Article III standing to sue it. To establish standing, and thus the court's subject matter jurisdiction, a plaintiff must have (1) suffered an injury in fact, (2) which is fairly traceable to the challenged conduct of the defendant, and (3) which is likely to be redressed by a favorable judicial decision. Lujan, 504 U.S. at 560–61. At issue are the last two elements.

A. Traceability

The traceability element of Article III standing requires a causal connection between the injury and the complained of conduct. Accordingly, Plaintiffs must show that the injury is fairly traceable to Veolia's alleged misconduct, and not the result of misconduct of some third party not before the court. See Lujan, 504 U.S. at 560–61. Standing does not require the defendant's action to be the sole source of injury. Washington Envtl. Council v. Bellon, 732 F.3d 1131, 1142 (9th Cir. 2013). In sum, "[t]he causal connection put forward for standing purposes cannot be too speculative, or rely on conjecture about the behavior of other parties, but need not be so airtight at this stage of the litigation as to demonstrate that the plaintiffs would succeed on the merits." Ecological Rights Found. v. Pac. Lumber Co., 230 F.3d 1141, 1152 (9th Cir. 2000).

Here, Veolia argues that the allegations in the FAC fail to demonstrate how Veolia did anything to cause the problem of cross-border pollution when its operation of USIBWC's wastewater treatment facilities does not produce, add to, or exacerbate the pollution that originates in Mexico. (Doc. No. 17-1 at 11.) In the FAC, Plaintiffs allege that Veolia has contracted to operate and maintain the South Bay Plant and its associated facilities. (FAC ¶ 57.) Those facilities include the five canyon collectors. (FAC ¶ 63.) When the collector inlets are closed, which is controlled by USIBWC and Veolia, or the volume of flow exceeds the detention basin's capacity, water in the detention basin cannot travel to the treatment system, and instead overflows into the downstream drainages. (FAC

¶ 65.) According to Plaintiffs, Veolia

> controls whether additional measures are implemented to contain high-volume flows in the canyon collectors, such as by placing sandbags to increase their detention capacity; whether overflow is halted, such as by cleaning debris from a collector inlet or turning off a pump or closing a valve; and whether canyon collector discharges are contained in a localized area and cleaned up. Veolia has failed to contain and clean up such discharges as required by the NPDES Permit, thereby causing the presence of pollutants and/or solid and hazardous wastes in the Tijuana River Valley.

(FAC ¶ 79.)

Under the NPDES Permit, the "Discharger" is required to prepare and submit a Spill and Transboundary Wastewater Flow Prevention and Response Plan ("Prevention/Response Plan"). (Doc. No. 15-2 ("NPDES Permit") at 16.)[3] The Prevention/Response Plan is required to incorporate procedures for containment of spills or transboundary wastewater flows, as well as procedures for cleaning up such spills and flows. (NPDES Permit at 20.)

Although Veolia is not the source of the pollution, the NPDES Permit under which it operates does require Veolia to work to contain and clean up wastewater that comes into

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[3] On a motion to dismiss, the court may also consider documents apart from the pleadings based on the incorporation-by-reference doctrine. Incorporation by reference "is a judicially created doctrine that treats certain documents as though they are part of the complaint itself." Khoja, 2018 WL 3826298, at *9. Under this doctrine, the court may consider extrinsic documents when "the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document." Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005). Here, Plaintiffs' second cause of action alleges discharges in violation of the NPDES Permit for the South Bay Plant. (FAC ¶¶ 107–16.) Determining whether USIBWC and Veolia have violated the terms of the NPDES Permit requires the court to examine the contents of the NPDES Permit. Defendants each attached a copy of the NPDES Permit to their respective motions to dismiss, and no party disputes its authenticity. Therefore, the court may consider the contents of the NPDES Permit without converting the motions into motions for summary judgment under the incorporation-by-reference doctrine.

the canyon collectors from Mexico. Failure to do so, as Plaintiffs allege, contributes to the amount of wastewater that makes its way into the Tijuana River Valley and, eventually, the Pacific Ocean. Therefore, Plaintiffs have sufficiently alleged traceability at this stage of proceedings. See Washington Envtl. Council v. Bellon, 732 F.3d at 1142 ("Nor does standing require the defendant's action to be the sole source of injury.").

B. Redressability

To satisfy the final element of Article III standing, it "must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Lujan, 504 U.S. at 561 (internal citation omitted). Redressability "analyzes the connection between the alleged injury and requested judicial relief." Washington Envtl. Council v. Bellon, 732 F.3d at 1146. "Redressability does not require certainty, but only a substantial likelihood that the injury will be redressed by a favorable judicial decision." Id. This element is not met when redress "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." Asarco Inc. v. Kadish, 490 U.S. 605, 615 (1989). "A plaintiff who seeks injunctive relief satisfies the requirement of redressability by alleging a continuing violation or the imminence of a future violation of an applicable statute or standard." Nat. Res. Def. Council v. Sw. Marine, Inc., 236 F.3d 985, 995 (9th Cir. 2000).

Veolia argues that because the "primary causes of the alleged discharges are inadequate facilities in the United States and problems with Mexican wastewater facilities, [ ] nothing short of the United States and Mexican governments funding and building new infrastructure and upgrading existing infrastructure will eliminate the pollution problem." (Doc. No. 17-1 at 12.) As a contract operator, Veolia has no duty to fund or build new or upgraded infrastructure. Furthermore, the necessary funds would require approval by Congress, an independent actor not before the court that exercises broad discretion regarding the appropriation of funds.

Plaintiffs argue that Veolia's argument conflates control over what flows into the

canyon collectors with control over what happens to the waters after they are collected and detained by the system. The FAC alleges that Veolia's failure to remove debris and contain or clean up wastewater overflow pursuant to the Prevention/Response Plan contributes to the amount of pollution in the Tijuana River Valley. (FAC ¶ 79.)

Veolia's alleged failure to contain and clean up wastewater according to the Prevention/Response Plan constitutes a continuing violation of the NPDES Permit. Plaintiffs seek injunctive relief and civil penalties.

Thus, although any relief the court would grant Plaintiffs with respect to their claims against Veolia would not end the flow of polluted water from Mexico into the United States, it would mitigate injury to Plaintiffs by reducing the quantity of wastewater that ends up in the Tijuana River Valley and Pacific Ocean. Accordingly, Plaintiffs have demonstrated that they have Article III standing to sue Veolia under the CWA and RCRA. Therefore, the court denies Veolia's motion to dismiss for lack of standing.

II. Flood Control Conveyance

Plaintiffs' first cause of action is against USIBWC for discharge of pollutants from the flood control conveyance without a NPDES permit in violation of the CWA. (FAC ¶¶ 95–106.)

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA prohibits the "discharge of any pollutants." CWA § 301(a), 33 U.S.C. § 1311(a). Under the CWA, a "discharge of pollutants" is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "Navigable waters" are "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). A point source "need not be the original source of the pollutant; it need only convey the pollutant" to waters of the United States. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 105 (2004).

Thus, to establish a violation of the CWA, Plaintiffs must adequately allege that USIBWC (1) discharged (2) a pollutant (3) to navigable waters (4) from a point source. In dispute is whether the flow of polluted water through and out of the flood control conveyance qualifies as a discharge under the CWA.

A. Whether the Waters Are Meaningfully Distinct

USIBWC argues that the movement of water through the flood control conveyance into the river is a conveyance within a single waterway, and thus not a discharge.

The Supreme Court held in Miccosukee that the transfer of polluted water between "two parts of the same water body," i.e., water bodies that are not meaningfully distinct, does not constitute a discharge of pollutants under the CWA because nothing is being added. Miccosukee, 541 U.S. at 109. "[I]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." Id. at 110 (quoting Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 492 (2d Cir. 2001), adhered to on reconsideration, 451 F.3d 77 (2d Cir. 2006)).

The same concept applies when an improved portion of a navigable waterway flows into an unimproved portion of the same waterway. In Los Angeles Cty. Flood Control Dist. v. Nat. Res. Def. Council, Inc., 568 U.S. 78 (2013), the Los Angeles County Flood Control District ("District") operated a municipal separate storm sewer system , a drainage system that collected, transported, and discharged storm water. The District obtained a NPDES permit to discharge the storm water, which was often heavily polluted, into navigable waters. Id. at 80–81. Monitoring stations for the Los Angeles and San Gabriel Rivers, located in concrete channels constructed for flood-control purposes, regularly detected polluted water. Accordingly, the defendants brought suit under the CWA, alleging the water-quality measurements from those monitoring stations demonstrated the District was violating the terms of its permit. Id. at 81. The Ninth Circuit held "that a discharge of pollutants occurred under the CWA when the polluted water detected at the monitoring stations 'flowed out of the concrete channels' and entered downstream portions of the

waterways lacking concrete linings. Because the District exercises control over the concrete-lined portions of the rivers, the Court of Appeals held, the District is liable for the discharges that, in the appellate court's view, occur when water exits those concrete channels." Id. at 82 (internal citation omitted). The Supreme Court reversed because the improved and unimproved portions were not meaningfully distinct waterways. Accordingly, the Supreme Court held "the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the CWA." Id. at 83.

First, USIBWC argues that the "New Tijuana River" does not exist outside of the FAC, and instead there is only one Tijuana River, not two distinct water bodies. The New Tijuana River is not referenced in the notice of intent to sue letter ("NOI") nor the original complaint filed by Plaintiffs. However, Plaintiffs allege in the FAC that there is no natural or historical hydrological connection between the New Tijuana River and the Tijuana River. But for the flood control conveyance, the New Tijuana River would not exist. Because the court accepts as true all well-pleaded facts and construes the pleadings in the light most favorable to the nonmoving party on a motion to dismiss, the court accepts the existence of the New Tijuana River as a separate water body at this stage.

Second, USIBWC argues that there is no meaningful distinction between the New Tijuana River and the Tijuana River. "Because the Tijuana River both created, and is the sole source of, the 'New Tijuana River,' the waters of the former and the latter are in every sense the same." (Doc. No. 22 at 3.) While this argument is logical and somewhat compelling, the border complicates matters. Plaintiffs argue because the polluted water in the flood control conveyance comes from a body of water in Mexico, it introduces pollutants into the waters of the United States for the first time, thereby adding pollutants in violation of the CWA. The parties could not identify any case, and the court is aware of none, in which a court addressed a CWA claim in which polluted water enters the United States from another country.

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To deal with this issue, USIBWC argues the flood control conveyance itself is a water of the United States, and thus movement of water between it and the New Tijuana River is the flow of water between the same domestic waterway. This line of argument focuses solely on waters in the United States. USIBWC argues the flood control conveyance is a tributary of the New Tijuana River, Historical Tijuana River, Tijuana River Estuary, and Pacific Ocean. See Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 533 (9th Cir. 2001) ("A stream which contributes its flow to a larger stream or other body of water is a tributary.") (internal citation and quotation omitted). In Headwaters, the Ninth Circuit determined that irrigation canals were waters of the United States because they were tributaries to the streams with which they exchanged water. Id.

Notably, the cases cited by the parties were decided within the context of summary judgment, where either the factual record had been developed through discovery, Los Angeles Cty. Flood Control Dist., 568 U.S. 78, or the case recognized the need for future development of the record, Miccosukee, 541 U.S. at 99 ("we vacate and remand for further development of the factual record"). The court finds that the factual determination of whether the flood control conveyance and the New Tijuana River are meaningfully distinct, which would include determining whether the flood control conveyance is a tributary under the Clean Water Act, cannot be made based on the record currently before the court.

B. Water Transfer Rule

Even if the New Tijuana River is meaningfully distinct from the Tijuana River, USIBWC argues that no NPDES permit is required under the Water Transfer Rule.

Certain discharges do not require a NPDES permit, such as discharges from a water transfer. 40 C.F.R. § 122.3(i). This exception is called the Water Transfer Rule. "Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." Id. (emphasis added). However, as above, the portion of the Tijuana River in Mexico complicates the application of the Water Transfer Rule here.

Plaintiffs argue that because the flood control conveyance adds pollutants from waters of Mexico into waters of the United States, the Water Transfer Rule does not apply. In response, USIBWC reiterates its argument that the flood control conveyance is a tributary, and thus a water of the United States itself. As a result, USIBWC argues, the Water Transfer Rule would have to apply if the flood control conveyance and the New Tijuana River were meaningfully distinct.

At this stage of the proceedings, the factual record has not been developed to allow the court to rule on whether the flood control conveyance and New Tijuana River are meaningfully distinct or whether the flood control conveyance is a tributary. Accordingly, the court denies USIBWC's motion to dismiss Plaintiffs' first cause of action.

III. Canyon Collectors

Plaintiffs' second cause of action, against both Defendants, alleges Defendants discharge pollutants from the canyon collectors in violation of the CWA and the NPDES Permit for the South Bay Plant. (FAC ¶¶ 107–16.) Defendants argue the water that flows past the canyon collectors are not discharges under the CWA or the NPDES Permit.

Despite the general prohibition on the discharge of pollutants, the CWA also establishes a permit system that authorizes the discharge of some pollutants—the NPDES. 33 U.S.C. § 1342. Under the NPDES, the Environmental Protection Agency and approved states may issue permits for the discharge of pollutants that meet certain requirements. NPDES permits "place limits on the type and quantity of pollutants that can be released into the Nation's waters." Miccosukee, 541 U.S. at 102. The NPDES Permit applies to discharges from the South Bay Plant and its facilities, which include the five canyon collectors.

A. Discharges Under the CWA Generally

As Plaintiffs allege in the FAC, when the collector inlets of the canyon collectors are closed, "water in the detention basin cannot drain into the conveyance and treatment system, and instead overflows the detention basin and discharges into the downstream drainages." (FAC ¶ 65.) "The downstream waters that receive canyon collector discharges

are either 'navigable' in the traditional sense of the word or are tributaries to the New Tijuana River or the Historical Tijuana River, and ultimately the Estuary and the Pacific Ocean." (FAC ¶ 66.)

Defendants argue that the movement of water described in the FAC is not a discharge that requires a NPDES permit or violates the CWA because the canyon collectors are tributaries that flow into natural drainages. See Los Angeles Cty. Flood Control Dist., 568 U.S. at 83 ("the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the CWA."). However, as discussed above, making such a determination is a factual question not appropriate for determination on a motion to dismiss.

B. Discharges Under the NPDES Permit for the South Bay Plant

Defendants also argue that Plaintiffs' second cause of action fails because the movement of water in the canyon collectors that is not collected for treatment does not violate the terms of the NPDES Permit.

"Although the NPDES permitting scheme can be complex, a court's task in interpreting and enforcing an NPDES permit is not—NPDES permits are treated like any other contract." Nat. Res. Def. Council, Inc. v. Cty. of Los Angeles, 725 F.3d 1194, 1204 (9th Cir. 2013). The court must read the NPDES Permit as a whole and "give effect to every word or term employed by the parties and reject none as meaningless or surplusage." In re Crystal Properties, Ltd., L.P., 268 F.3d 743, 748 (9th Cir. 2001).

The NPDES Permit prohibits the discharge of waste to any location other than the South Bay Ocean Outfall. (NPDES Permit at 4.) Transboundary flows are defined as "[w]astewater and other flows that cross the international border from Mexico into the United States." (NPDES Permit at A-10.) The NPDES Permit does not address transboundary flows during wet weather events. For dry weather transboundary flows, the NPDES Permit recognizes different categories. A Facilities Spill Event is a "discharge of treated or untreated wastewater or other material to the environment that occurs from the Discharger's Facilities, including . . . the five canyon collector systems." (NPDES Permit

at 15 (emphasis added).) A Flow Event Type A is a "dry weather transboundary treated or untreated wastewater or other flow through a conveyance structure . . . and not diverted into the canyon collector system for treatment at the" South Bay Plant. (Id. (emphasis added).)

Defendants argue the wastewater that flows past the canyon collectors when the collector exceeds capacity is a Flow Event Type A. Because the permit's definition for a Flow Event Type A does not contain the word "discharge," whereas a Facilities Spill Event does, Defendants argue it does not qualify as a discharge under the NPDES Permit. However, the permit states that its prohibition on discharges of waste to any location other than the South Bay Ocean Outfall "applies to any dry weather discharge of waste overflowing the canyon collectors," which Plaintiffs argue includes Flow Events Type A. (NPDES Permit at F-36 (emphasis added).) Both Veolia and USIBWC argue that Plaintiffs' interpretation of the NPDES Permit at F-36 would swallow the distinction between a Facilities Spill Event and a Flow Event Type A. USIBWC would have the court read the phrase "any dry weather discharge of waste overflowing the canyon collectors" to mean a Facilities Spill Event only.

At oral argument, the court directed the parties' attention to another section of the NPDES Permit that references Facilities Spill Events, Flow Events Type A, and discharges. Page 26 of the NPDES Permit contains a list of notification and reporting requirements. It states that "Facilities Spill Events and Flow Events Types A and B . . . shall be categorized for notification and reporting purposes" into six different categories. (NPDES Permit at 26.) The description of each of those six categories uses the term "discharge" to describe the movement of water. Because this list is for both Facilities Spill Events and Flow Events Type A, it suggests that both events are discharges. The distinction between the two events then would depend on where the wastewater is located in the treatment system. A Facilities Spill Event includes wastewater that has been diverted into the canyon collector system, whereas a Flow Event Type A is "not diverted into the canyon collector system for treatment." (NPDES Permit at 15.) Although USIBWC argues that the use of "discharge"

in this section of the NPDES Permit is in a generic sense, there is no evidence within the permit that "discharge" is used generically in some sections but specifically in others. Consequently, it appears from the NPDES Permit that a Flow Event Type A can be a discharge that violates the terms of the permit.

Based on the court's reading of the NPDES Permit, Plaintiffs adequately allege in the FAC that Defendants discharge water from a location other than the South Bay Ocean Outfall, thereby violating the terms of the NPDES Permit. Accordingly, the court denies Defendants' motions to dismiss Plaintiffs' second cause of action.

IV. RCRA Claim

Plaintiffs' third cause of action, asserted against both Defendants, is for violation of the RCRA. (FAC ¶¶ 117–26.)

The RCRA "is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." Meghrig v. KFC W., Inc., 516 U.S. 479, 483 (1996). Its primary purpose is "to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" Id. (quoting 42 U.S.C. § 6902(b)). The RCRA permits citizen suits against "any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B).

The Ninth Circuit has held that "contribution" requires "that a defendant be actively involved in or have some degree of control over the waste disposal process to be liable under RCRA." Hinds Investments, L.P. v. Angioli, 654 F.3d 846, 851 (9th Cir. 2011). "Handling the waste, storing it, treating it, transporting it, and disposing of it are all active functions with a direct connection to the waste itself." Id. While the parties, in their papers and at oral argument, discussed causation separately from contribution, the court views causation as a part of the contribution element. See California Dep't of Toxic Substances

Control v. Interstate Non-Ferrous Corp., 298 F. Supp. 2d 930, 979 (E.D. Cal. 2003) ("To be liable under RCRA, [a defendant's] 'contribution' must be causally connected to the possibility of an 'imminent and substantial endangerment.'"). Accordingly, the court will address contribution and causation together.

A. Mexico's Wastewater Collection and Treatment System

Plaintiffs allege that USIBWC has violated the RCRA because it "has contributed and continues to contribute to the design, construction, operation, maintenance, and monitoring of the transnational wastewater collection and treatment system that originates in Mexico . . . causing sewage and other solid and/or hazardous waste to enter the United States and discharge from the USIBWC Flood Control Conveyance." (FAC ¶ 121 (emphasis added).)

USIBWC argues that it cannot be held liable under the RCRA for the state of water treatment systems in Mexico because it is not actively involved in and does not have any degree of control over those systems. Under the 1944 Treaty, "[n]either Section [USIBWC or CILA] shall assume jurisdiction or control over works located within the limits of the country of the other without the express consent of the Government of the latter." (1944 Treaty Art. 2.) Plaintiffs do not allege in the FAC that Mexico has granted USIBWC control over the treatment plant in Tijuana. Under Minute 283, the operation and maintenance of the treatment plant in Tijuana "shall be charged to Mexico," not USIBWC. (Minute 283 at 5 ¶ 3.)

Plaintiffs did not contest or otherwise address this argument in their opposition brief or at oral argument. Therefore, the court grants USIBWC's motion to dismiss Plaintiffs' third cause of action as it relates to any treatment systems in Mexico.

B. Flood Control Conveyance, Canyon Collectors, and Other Infrastructure

Plaintiffs allege that Defendants "have systematically and routinely contributed to the past and/or present handling, storage, treatment, transport, and/or disposal of hazardous and/or solid wastes in the Tijuana River Valley . . . through operating, maintaining, and/or controlling the USIBWC Flood Control Conveyance, canyon collectors, and other

infrastructure." (FAC ¶ 120.) Defendants argue that they do not contribute to the pollution within the meaning of the RCRA because the polluted waters originate in Mexico and flow into the United States by gravity, unaided by USIBWC or Veolia.

1. Flood Control Conveyance

Plaintiffs argue that USIBWC handles waste in the flood control conveyance by actively capturing polluted water from the Tijuana River in Mexico and transporting it approximately nine-tenths of a mile for disposal at the New Tijuana River. Additionally, USIBWC handles waste in the flood control conveyance by constructing berms from waste-laden sediment to temporarily block the entrance. (FAC ¶ 62.) Through the construction of the berms, Plaintiffs argue the USIBWC exerts some level of control over the amount of wastewater that flows into and out of the flood control conveyance.

USIBWC asserts that Plaintiffs' argument falsely equates USIBWC's control over its infrastructure with control over waste that passes through that infrastructure. The flood control structure does not enable USIBWC to remove pollutants from the water that passes through it, and USIBWC does not exert any control over waste that enters the Tijuana River in Mexico and flows across the border.

At best, USIBWC transports waste through the flood control conveyance. However, that transportation is passive in nature, merely permitting the waste from Mexico to flow through the system. The FAC does not allege that USIBWC is in any way the source of the wastewater that eventually travels into and through the flood control conveyance. Nor does the FAC alleged that USIBWC actively handles or treats any wastewater in the flood control conveyance. As a result, Plaintiffs have not adequately alleged that USIBWC plays a "more active role with a more direct connection to the waste" that flows through the flood control conveyance. See Hinds, 654 F.3d at 851.

2. Canyon Collectors

Defendants argue that neither USIBWC nor Veolia exercise control over waste that flows through the canyon collectors but is not diverted to one of the drains for treatment at the South Bay Plant. The South Bay Plant has a capacity limited to 25 million gallons per

day, and the NPDES Permit sets the effluent limit at the same. (NPDES Permit at 5.) Defendants actively transport, handle, and treat the water that enters the canyon collectors' drains and is pumped to the South Bay Plant. However, Defendants cannot actively control wastewater beyond the limitations of the current infrastructure. As with the flood control conveyance, the transportation between the border and the drainage points past the canyon collectors involves passive, not active, transportation.

In a section of the opposition brief addressing standing, Plaintiffs themselves note the "critical distinction between controlling what flows *into* the Canyon Collector systems (over which Veolia has no control), and what happens to the waters *after* they are collected and detained by the system." (Doc. No. 20 at 32 (italics in original, underlined emphasis added).) Wastewater that is not detained by the canyon collectors, like the wastewater that is never detained in the flood control conveyance, would flow into the Tijuana River Valley and make its way to the Pacific Ocean regardless of Defendants' actions. Cf. Zands v. Nelson, 797 F. Supp. 805, 810 (S.D. Cal. 1992) ("Indeed, this interpretation does no more than hold defendants responsible for gasoline that would not have been brought onto the property but for the presence of a gas station."). Therefore, contribution has not been alleged sufficiently to state a claim for relief under the RCRA.

Accordingly, the court grants Defendants' motions to dismiss Plaintiffs' third cause of action with leave to amend.

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CONCLUSION

For the foregoing reasons, the court denies in part and grants in part Defendants' motions to dismiss. The court denies Veolia's motion to dismiss for lack of standing, denies Veolia's motion to dismiss Plaintiffs' CWA claim, and grants Veolia's motion to dismiss Plaintiffs' RCRA claim with leave to amend. The court denies USIBWC's motion to dismiss Plaintiffs' CWA claims, and grants USIBWC's motion to dismiss Plaintiffs' RCRA claim with leave to amend. Plaintiffs may file an amended complaint within 14 days of the entry of this order.

IT IS SO ORDERED.

DATED: August 29, 2018

JEFFREY T. MILLER
United States District Judge

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0213p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KENTUCKY WATERWAYS ALLIANCE; SIERRA CLUB,
Plaintiffs-Appellants,

v.

KENTUCKY UTILITIES COMPANY,
Defendant-Appellee.

No. 18-5115

Appeal from the United States District Court
for the Eastern District of Kentucky at Lexington.
No. 5:17-cv-00292—Danny C. Reeves, District Judge.

Argued: August 2, 2018

Decided and Filed: September 24, 2018

Before: SUHRHEINRICH, CLAY, and GIBBONS, Circuit Judges.

COUNSEL

ARGUED: Thomas Cmar, EARTHJUSTICE, Oak Park, Illinois, for Appellants. Paul D. Clement, KIRKLAND & ELLIS LLP, Washington, D.C., for Appellee. **ON BRIEF:** Thomas Cmar, EARTHJUSTICE, Oak Park, Illinois, Benjamin Locke, EARTHJUSTICE, Philadelphia, Pennsylvania, Joe F. Childers, JOE F. CHILDERS & ASSOCIATES, Lexington, Kentucky, Matthew E. Miller, SIERRA CLUB, Washington, D.C., for Appellants. Paul D. Clement, Erin E. Murphy, KIRKLAND & ELLIS LLP, Washington, D.C., John C. Bender, DINSMORE & SHOHL LLP, Lexington, Kentucky, F. William Brownell, Eric J. Murdock, HUNTON ANDREWS KURTH LLP, Washington, D.C., Robert M. Rolfe, HUNTON ANDREWS KURTH LLP, Richmond, Virginia, Nash E. Long, III, Brent A. Rosser, HUNTON ANDREWS KURTH LLP, Charlotte, North Carolina, J. Gregory Cornett, Robert J. Ehrler, LG&E AND KU ENERGY LLC, Louisville, Kentucky, Sheryl G. Snyder, FROST BROWN TODD LLC, Louisville, Kentucky, for Appellee. Erin M. Palmer, OFFICE OF THE ATTORNEY GENERAL OF ALABAMA, Montgomery, Alabama, Thomas A. Lorenzen, CROWELL & MORING LLP, Washington, D.C., for Amici Curiae.

SUHRHEINRICH, J., delivered the opinion of the court in which GIBBONS, J., joined, and CLAY, J., joined in part. CLAY, J. (pp. 20–29), delivered a separate opinion concurring in part and dissenting in part.

OPINION

SUHRHEINRICH, Circuit Judge. Pollutants can find their way into bodies of water in a variety of ways. Sometimes they travel by air and settle into lakes, rivers, oceans, and the like. Sometimes pipes dump pollutants directly into those waters. In this case, we consider pollution that reaches surface waters by way of subsurface water, or groundwater.

Appellee-Defendant Kentucky Utilities Company ("KU") burns coal to produce energy. It then stores the leftover coal ash in two man-made ponds. The plaintiffs here, two environmental conservation groups, contend that the chemicals in the coal ash are contaminating the surrounding groundwater, which in turn contaminates a nearby lake. They say that this conduct violates two separate federal statutes: the Clean Water Act ("CWA") and the Resource Conservation and Recovery Act ("RCRA").

With their first argument, we disagree. The CWA does not extend liability to pollution that reaches surface waters via groundwater. But RCRA does govern this conduct, and because the plaintiffs have met the statutory rigors needed to bring such a claim, the district court must hear it. We affirm in part and reverse in part.

I. BACKGROUND

A. Statutory Framework

We are tasked with interpreting two federal statutes in this case: the CWA and RCRA. As such, some background information on each statute is a helpful starting point.

CWA. Congress passed the CWA in 1972 with the stated purpose of "restor[ing] and maintain[ing] the . . . Nation's waters." 33 U.S.C. § 1251(a). To promote that goal, the CWA forbids all unpermitted polluting of navigable waters. *Id.* §§ 1311(a), 1342(a). In that sense, the

statutory scheme is relatively straightforward: get a permit or do not pollute. Those permits are issued pursuant to the statute's National Pollutant Discharge Elimination System ("NPDES"). *Id.* § 1342. An NPDES permit is required in order to "discharge . . . any pollutant." *Id.* § 1311(a). The discharge of a pollutant is defined as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A). Navigable waters are broadly defined as "the waters of the United States." *Id.* § 1362(7). And a point source is a "discernible, confined and discrete conveyance." *Id.* § 1362(14). Thus, in order to add a pollutant to the waters of the United States via a conveyance, a permit must first be issued.

Congress enacted this program as a major overhaul to the CWA's predecessors, the 1948 Federal Water Pollution Control Act and the Water Quality Act of 1965. Under those two statutes, liability arose when pollutants in a given body of water exceeded certain levels. Once excess pollution was detected, enforcement authorities had to trace the pollution back to its source. Trouble was, tracing those excess levels back to a particular defendant's actions proved all but impossible—only one prosecution was levied under that regime. *See* S. Rep. No. 92-414 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3672 ("The record shows an almost total lack of enforcement. Under this procedure, only one case has reached the courts in more than two decades."). To remedy that problem, Congress changed its focus from the receiving water to the discharging source. *Id.* at 3675 ("Under [the CWA] the basis of pollution prevention and elimination will be the application of effluent limitations. Water quality will be a measure of program effectiveness and performance, not a means of elimination and enforcement. . . . With effluent limits, the [EPA] . . . need not search for a precise link between pollution and water quality.").

Alongside the CWA's broad proscriptions, Congress also sought to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). Congress achieved that goal in a few ways. For example, the CWA allows states to administer the federal NPDES permitting program, provided their regulations are at least as

stringent as the federal limitations.[1] *See id.* § 1342(b)-(d). But perhaps most notably, the CWA draws a line between point-source pollution, as described above, and nonpoint-source pollution. *Id.* § 1362(12), (14). Point-source pollution is subject to the NPDES requirements, and thus, to federal regulation under the CWA. But all other forms of pollution are considered nonpoint-source pollution and are within the regulatory ambit of the states. *See id.* §§ 1314(f), 1362(12); *see also Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 588 (6th Cir. 1988) (noting that, as compared to point-source pollution, "pollution arising from nonpoint sources is to be dealt with differently, specifically through the device of areawide waste treatment management by the states" (quoting *U.S. ex rel. Tenn. Valley Auth. v. Tenn. Water Quality Control Bd.*, 717 F.2d 992, 999 (6th Cir. 1983))). Similarly, federal regulation under the CWA only extends to pollutants discharged into navigable waters, 33 U.S.C. § 1362(12), leaving the states to regulate all pollution of non-navigable waters.

As a means of enforcement, the CWA gives the EPA the power to issue orders and bring civil and criminal actions against those in violation of its provisions. *Id.* § 1319(a)-(c). Moreover, the CWA allows for private citizens to file civil actions against violators, provided they give the EPA, the relevant state, and the alleged wrongdoer sixty-days' notice prior to filing the lawsuit. *Id.* § 1365(a)-(b).

RCRA. Enacted four years after the CWA, RCRA is designed to "promote the protection of health and the environment and to conserve valuable material and energy resources." 42 U.S.C. § 6902(a). Like the CWA, RCRA embodies principles of cooperative federalism. The states are central to RCRA's operation, and the federal government "provid[es] technical and financial assistance to State and local governments . . . for the development of solid waste management plans." *Id.* § 6902(a)(1); §6926(b). As the text makes clear, RCRA is concerned with solid waste management, unlike the CWA, which concerns itself with water pollution. As such, the regulatory reach of RCRA begins and ends with solid waste, and the statute expressly excludes "industrial discharges which are point sources subject to [NPDES] permits under [the CWA]." *Id.* § 6903(27). So while coal ash is stored and treated in the coal ash ponds, RCRA

[1]Forty-six states, including Kentucky, have taken advantage of this provision and administer the NPDES permitting program. *See* 80 Fed. Reg. 37,054, 37,059 (June 29, 2015).

governs; once the ash pond wastewater is discharged by way of a point source to navigable waters, the CWA kicks in. And when a discharge requires an NPDES permit, it is expressly excluded from RCRA's coverage.

In order to meet its objectives, RCRA encourages states to develop plans to manage solid waste. *Id.* § 6907. Specifically, RCRA requires the EPA to promulgate guidelines for solid waste disposal facilities that would help "protect[] . . . the quality of ground waters and surface waters from leachates." *Id.* § 6907(a)(2).

Similar to the CWA, RCRA allows the EPA and relevant state agencies to enforce the statute via civil or criminal actions. *Id.* § 6928(a), (d), (g), §6926(b). The statute also permits citizen suits. *Id.* § 6972(a). A private citizen may sue "any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." *Id.* § 6972(a)(1)(B).[2] In order to bring such a suit, the suing party must provide ninety-days' notice to the EPA, the relevant state, and the alleged wrongdoer. *Id.* § 6972(b)(2)(A).

As part of its rulemaking authority under RCRA, the EPA promulgated a formal rule in 2015 addressing disposal of coal combustion residuals from electric utilities that has been dubbed the "CCR Rule." *See* 80 Fed. Reg. 21,302 (Apr. 17, 2015). The CCR Rule specifically addresses the "disposal of coal [ash] as solid waste under [RCRA]." *Id.* at 21,302. To that end, "[t]he rule requires any existing unlined CCR surface impoundment that is contaminating groundwater above a regulated constituent's groundwater protection standard to stop receiving CCR and either retrofit or close." *Id.* The rule then establishes minimum criteria for coal ash surface impoundments and requires groundwater monitoring, as well as corrective actions where groundwater contamination exceeds accepted levels. *See id.* at 21,396-408; *see also* 40 C.F.R. §§ 257.91, 257.95, 257.98.

[2]Under 42 U.S.C. §6972(a)(1)(A), private citizens may also bring a civil action against any party in violation of a RCRA regulation or permit issued under RCRA – a claim plaintiffs did not bring here.

B. Factual Overview

KU operates the E.W. Brown Generating Station ("E.W. Brown"). E.W. Brown is a coal-burning power plant in Kentucky. Like all similar power plants, E.W. Brown burns coal in order to heat large amounts of water. The water turns into high-pressure steam and is funneled through pipes to a series of turbines connected to generators. The steam's pressure causes the turbines to spin, which, in turn, causes the generators to produce electricity. The steam passes through the turbines where more water is piped in to cool it and convert it back into condensed water. The condensed water then returns back to the start to repeat this cycle. Just as it sounds, the process uses a lot of water—both for power generation and to cool and condense steam. Water is also used to treat the coal waste generated from this process. As a result, most coal-burning power plants sit near bodies of water from which they draw for their power generation.

E.W. Brown is one such plant. It is located West of Kentucky's Dix River and adjacent to Herrington Lake, which was created by damming a portion of the Dix River. Herrington Lake is a large man-made lake, with a 4.6 square-mile footprint and a 35-mile span. It is a popular recreation destination for Kentucky residents. Since 1957, E.W. Brown has taken water from Herrington Lake in order to generate power for nearby residents.

The problem with burning coal to produce power is that the process also produces ash, or "coal combustion residuals" (commonly referred to as "CCRs"). Two forms of ash are generated by burning coal: (1) light-weight ash known as "fly ash" that is carried through the smokestacks and discharged into the air;[3] and (2) heavier particles known as "bottom ash" that remain at the base of the smokestacks. The bottom ash needs to be removed and disposed of in order to create room for new coal to be burned in the furnaces.

To dispose of coal ash, KU uses a "sluice" system—it combines the ash with lots of water and pipes that wastewater into man-made ponds nearby.[4] Once discharged into those ponds, the ash sinks into the banks and the bottoms of the ponds, where it is intended to remain

[3]Fly ash is otherwise regulated and not directly implicated in this lawsuit.

[4]The two ash ponds are designed to discharge wastewater into Herrington Lake (by way of one of its nearby inlets, "Curds Inlet"). Those discharges are covered by NPDES permits and are not the subject of this litigation.

permanently. KU has constructed two ash ponds at E.W. Brown, unceremoniously titled the "Main Ash Pond" and the "Auxiliary Ash Pond." The Main Ash Pond has twice been expanded since it was opened and currently stretches 114 acres. It is estimated to house six million cubic yards of coal ash. The Auxiliary Ash Pond was first constructed as a temporary reservoir while KU expanded the Main Ash Pond. It covers 29.9 acres.

The plaintiffs, two environmental groups: Sierra Club and Kentucky Waterways Alliance (collectively "Plaintiffs"), contend that groundwater flows cause the ash ponds to release pollutants into Herrington Lake.

Some background on groundwater and its flow is necessary. Groundwater is subsurface water that tends to migrate from high elevation to low elevation. Different subsurface materials allow passage of groundwater at different rates and in different volumes. For example, groundwater can hardly flow through clay, whereas it may pass quickly through fractured rock. Those types of terrain that facilitate groundwater movement—like fractured rock—are known as "aquifers," whereas relatively impermeable terrain—like clay—is known as an "aquitard."

Plaintiffs' concern is that the ash ponds are contaminating the nearby groundwater and that this groundwater flows into Herrington Lake, causing excess pollution. The problem is exacerbated, they say, by the fact that the ash ponds sit on top of an aquifer. Specifically, the two ash ponds were built on top of karst terrain. Karst is created when a highly-soluble subsurface rock, often limestone, erodes. This creates a series of caverns, sinkholes, tunnels, and paths. Plaintiffs argue that because the ash ponds sit atop karst terrain, the groundwater flows through it more quickly and more abundantly, thus increasing the rate of pollution into Herrington Lake.

Coal ash can pollute water with a number of different chemicals including, but not limited to, arsenic, lead, calcium, and boron. What caught Plaintiffs' attention in this case was another of those chemicals: selenium. Plaintiffs hired an ecotoxicology expert to test the water near E.W. Brown and he discovered elevated selenium levels in Herrington Lake and in the groundwater surrounding the coal ash ponds. He also found that the fish in Herrington Lake were already being harmed by the selenium levels. While selenium is healthy (indeed,

necessary) in certain small amounts, too much of it can become extremely toxic for fish. Excess selenium accumulates in fish tissue, where it is passed to offspring through a parent's eggs. This can kill developing fish before they hatch or lead to deformities such as misshapen bones once they hatch Those deformities are often lethal. In short, selenium poisoning poses a critical problem for aquatic wildlife.

C. Regulatory Overview

In 2011, KU decided to convert its Main Ash Pond into a dry landfill. It submitted its application to do so to the Kentucky Department of Environmental Protection ("KDEP") in August 2011. KDEP required KU to monitor the groundwater surrounding the Main Ash Pond before it would issue a landfill permit. In 2013, KU submitted a report based on its testing that showed increased levels of certain chemicals in nearby areas. After reviewing the report, KDEP issued KU a permit to build the landfill, but it withheld the permit KU needed to operate it. To earn the operation permit, KDEP required KU to submit another plan outlining the actions it planned to take to treat contaminated groundwater and prevent further contamination. KU submitted that plan in February 2015 and, over Plaintiffs' objections, KDEP issued KU an operating permit for the landfill.

Displeased with that outcome, Plaintiffs notified the relevant parties that they intended to sue KU under both the CWA and RCRA. KDEP reviewed Plaintiffs' notice and their corresponding groundwater studies and determined that KU was in violation of its water pollution limits. It issued a Notice of Violation to that effect in January 2017. Kentucky's Energy and Environment Cabinet (the "Cabinet") and KU then entered into an "Agreed Order" in an effort to address the pollution problem. As required by the Agreed Order, KU submitted a "Corrective Action Plan" ("CAP") in April 2017. It outlined extensive monitoring that KU was required to conduct in order to track the progress of the pollution coming from the coal ash ponds. If those studies indicated that the pollution was not improving, the CAP contemplated additional remedial measures.

Unsatisfied, Plaintiffs filed their federal lawsuit in the Eastern District of Kentucky in July 2017. The district court dismissed both of Plaintiffs' claims. First, it rejected Plaintiffs'

legal contention that the CWA covers pollution of this sort. Second, it held that Plaintiffs lacked standing on their RCRA claim because it could not redress a claim that was already being remedied by Kentucky's regulatory agencies. Since it concluded that Plaintiffs lacked standing, the district court held that it did not have jurisdiction to hear their claim.

II. ANALYSIS

We review the district court's order granting KU's motion to dismiss de novo. *U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 597 (6th Cir. 2013). Plaintiffs' complaint may only proceed if it alleges "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

A. CWA Claim

A CWA claim comes to life when five elements are present: "(1) a *pollutant* must be (2) *added* (3) *to navigable waters* (4) *from* (5) *a point source*." *Consumers Power Co.*, 862 F.2d at 583 (quoting *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982)). In order for groundwater pollution that ultimately affects surface waters to fall within the scope of the CWA, it must fit within those five elements. Plaintiffs offer two theories as to why their claim does.

First, they argue that groundwater is a point source that deposits pollutants into Herrington Lake. This theory treats groundwater as if it were a pipe through which pollutants travel. Plaintiffs also argue that the karst terrain that carries the groundwater is a point source in that it amounts to a network of conduits through which pollutants flow. We refer to this theory as the "point source" theory.

Next, Plaintiffs adopt the so-called "hydrological connection" theory.[5] Under this approach, groundwater is not considered a point source, but rather a medium through which

[5]This theory has also been referred to as the "conduit" theory. See, e.g., Damien Schiff, Keeping the Clean Water Act Cooperatively Federal—or, Why the Clean Water Act Does Not Directly Regulate Groundwater Pollution, 42 Wm. & Mary Envtl. L. & Pol'y Rev. 447, 467-68 (2018).

pollutants pass before being discharged into navigable waters. The point sources under this theory, as Plaintiffs argue, are the coal ash ponds themselves.

We reject both theories; the CWA does not extend its reach to this form of pollution. The text and statutory context of the CWA make that clear. In so holding, we disagree with the decisions from our sister circuits in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018), and *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737 (9th Cir. 2018).[6]

Text. To resolve this issue, the CWA's text is both a helpful starting place and a mandatory one. *See Mich. Flyer LLC v. Wayne Cty. Airport Auth.*, 860 F.3d 425, 428 (6th Cir. 2017). As noted, the CWA regulates parties that pollute navigable waters where that pollution comes from a "point source." 33 U.S.C. §§ 1311(a), 1362(12). A point source, in turn, is a "discernible, confined and discrete conveyance." *Id.* § 1362(14). Thus, for pollution to be governed by the CWA, it must have traveled through a conveyance, and that conveyance must have been discernable, confined, and discrete.

Plaintiffs' point source theory fails because neither groundwater nor the karst through which it travels is a point source under these definitions. While groundwater may indeed be a "conveyance" in that it carries pollutants, *see Convey*, Webster's Third New International Dictionary, Unabridged. 2018.. Web. 21 Aug. 2018 ("[T]o bear from one place to another"; "[T]o transfer or deliver"), it is not "discernible," "confined" or "discrete." To be discernible, groundwater must be capable of being "recognize[d] or identif[ied] as separate or distinct." *Discern*, Webster's Third New International Dictionary, Unabridged. 2018.. Web. 22 Aug. 2018. Similarly, it must be discrete, meaning it must "constitut[e] a separate entity" or "consist[] of distinct . . . elements," *Discrete*, Webster's Third New International Dictionary, Unabridged. 2018.. Web. 22 Aug. 2018, and it must be confined, meaning "limited to a particular location," *Confined*, Webster's Third New International Dictionary, Unabridged. 2018.. Web. 22 Aug. 2018. But groundwater is none of those things. By its very nature, groundwater is a "diffuse

[6]The Second Circuit also heard argument on this issue recently. *26 Crown St. Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, No 17-2426 (2d Cir. Apr. 18, 2018), ECF No. 165. The court subsequently issued a six-month stay pending settlement talks. *Id.* at ECF No. 176.

medium" that seeps in all directions, guided only by the general pull of gravity. *See 26 Crown St. Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, No. 3:15-CV-1439, 2017 WL 2960506, at *8 (D. Conn. July 11, 2017). Thus, it is neither confined nor discrete. And while dye traces can roughly and occasionally track the flow of groundwater, they do not render groundwater "discernible." Indeed, Plaintiffs' own expert explained that when he injected dyes into three different locations from the Main Ash Pond in 2012, only one was recovered. One cannot look at groundwater and discern its precise contours as can be done with traditional point sources like pipes, ditches, or tunnels. 33 U.S.C. § 1362(14). For that reason, the CWA's text forecloses an argument that groundwater is a point source.

Plaintiffs' spin-off argument—that the karst underlying the coal ash ponds is a point source—fares no better. They contend that the soluble rock has given way to subsurface conduits and pipes, making the groundwater system discernible, confined, and discrete. But this argument still treats the groundwater system as the point source. All that differs between groundwater in the more traditional sense and groundwater in this case is the terrain through which it passes. As noted, some terrain allows for speedier groundwater flow (like karst); some is less conducive (like clay). The only difference is expediency. That groundwater may move more quickly through karst does not change that it is neither discernable, discrete, nor confined. *See* 33 U.S.C. § 1362(14).[7] Accordingly, the CWA's text does not support the argument that either groundwater or the karst that carries it is a point source.

The CWA's text also forecloses the hydrological connection theory. The backbone of Plaintiffs' argument in favor of the hydrological connection theory is that the relevant CWA provision does not contain the word "directly." Because it only prohibits the discharge of pollutants "to navigable waters from any point source," *id.* § 1362(12)(A), they argue that the CWA allows for pollutants to travel from a point source *through* nonpoint sources en route to navigable waters. The CWA's text suggests otherwise.

First, the guidelines by which a CWA-regulated party must abide—the heart of the CWA's regulatory power—are known as "effluent limitations." *Id.* § 1362(11); §1314(b).

[7]Indeed, in Plaintiffs' comments in opposition to KU's landfill permit, they pointed out that karst-related groundwater flows are "unpredictable."

These are caps on the quantities of pollutants that may be discharged from a point source and are prescribed on an industry-by-industry basis. *See id.* § 1314(b). The CWA defines effluent limitations as restrictions on the amount of pollutants that may be "discharged from point sources *into* navigable waters." *Id.* § 1362(11) (emphasis added). The term "into" indicates directness. It refers to a point of *entry*. *See Into*, Webster Third New International Dictionary, Unabridged. 2018.. Web.21 Aug. 2018 ("[E]ntry, introduction, insertion."); *Into*, Oxford English Dictionary (2d ed. 1989) ("Expressing motion to a position within a space or thing: To point within the limits of; to the interior of; *so as to enter*.") (emphasis added). Thus, for a point source to discharge *into* navigable waters, it must dump *directly* into those navigable waters—the phrase "into" leaves no room for intermediary mediums to carry the pollutants.

Moreover, the CWA addresses only pollutants that are added "*to* navigable waters *from* any point source." 33 U.S.C. § 1362(12)(A) (emphasis added). Accordingly, the CWA requires two things in order for pollution to qualify as a "discharge of a pollutant": (1) the pollutant must make its way to a navigable water (2) by virtue of a point-source conveyance. Under the facts of this case, KU is discharging pollutants into the groundwater and the groundwater is adding pollutants to Herrington Lake. But groundwater is not a point source. Thus, when the pollutants are discharged to the lake, they are not coming *from* a point source; they are coming from groundwater, which is a nonpoint-source conveyance. The CWA has no say over that conduct.[8]

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[8]It bears noting that even if there were some legal basis for the hydrological connection theory, Plaintiffs would still be required to identify a point source. Here, they contend that the coal ash ponds are point sources. We doubt the correctness of that position. A point source, by definition, is a "conveyance." 33 U.S.C. § 1362(14). Coal ash ponds are not conveyances—they do not "take or carry [pollutants] from one place to another." *Convey*, American Heritage Dictionary; *see also Convey*, Merriam-Webster Dictionary ("[T]o bear from one place to another."); *Convey*, Oxford English Dictionary ("To transport, carry, take from one place to another."). In fact, ash ponds are quite the opposite; they are designed to *store* coal ash in place.

The Fourth Circuit recently reached the same conclusion, rejecting Sierra Club's argument that Dominion Energy's landfill and settling ponds served as point sources because they allow arsenic from coal ash to leach into the groundwater and then to navigable waters. *See Sierra Club v. Va. Elec. & Power Co.*, No. 17-1952, --- F.3d ---, 2018 WL 4343513 (4th Cir. Sept. 12, 2018):

> We conclude that while arsenic from the coal ash stored on Dominion's site was found to have reached navigable waters—having been leached from the coal ash by rainwater and groundwater and ultimately carried by groundwater into navigable waters—that simple causal link does not fulfill the Clean Water Act's requirement that the discharge be from a point source. By its carefully defined terms, the Clean Water Act limits its regulation under § 1311(a) to discharges from "*any discernible, confined and discrete conveyance*." 33 U.S.C. § 1362(14) (emphasis added). The definition includes, "but [is] not limited to[,] any pipe, ditch, channel, tunnel,

Often, proponents of the hydrological connection theory turn to *Rapanos v. United States*, 547 U.S. 715 (2006) in support of their position. *See, e.g.*, *Upstate Forever*, 887 F.3d at 650; *Hawai'i Wildlife Fund*, 886 F.3d at 748. In *Rapanos*, the Supreme Court noted that "[t]he [CWA] does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" *Rapanos*, 547 U.S. at 743 (plurality opinion) (quoting 33 U.S.C. § 1362(12)(A)). Plaintiffs rely on this quote in

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> conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft." *Id.*; *see also Consol. Coal Co. v. Costle*, 604 F.2d 239, 249–50 (4th Cir. 1979), *rev'd in part sub nom*. *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 101 S.Ct. 295, 66 L.Ed.2d 268 (1980) (finding that "discharges which are pumped, siphoned or drained" fall within the definition of discharges from a "point source"); *Appalachian Power*, 545 F.2d at 1373 (concluding that "point source" pollution does not include "unchanneled and uncollected surface waters"). At its core, the Act's definition makes clear that some facility must be involved that functions as a discrete, not generalized, "conveyance."
>
> "Conveyance" is a well-understood term; it requires a channel or medium—i.e., a facility—for the movement of something from one place to another. *See Webster's Third New International Dictionary* 499 (1961); *The American Heritage Dictionary of the English Language* 291–92 (1976); *see also S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105, 124 S.Ct. 1537, 158 L.Ed.2d 264 (2004) ("[A] point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters' " (emphasis added)). If no such conveyance produces the discharge at issue, the discharge would not be regulated by the Clean Water Act, though it might be by the RCRA, which covers and regulates the storage of solid waste, including coal ash, and its effect on groundwater.

2018 WL 4343513, at *5. The court felt that

> [t]his understanding of the Clean Water Act's point-source requirement is consistent with the larger scheme of pollution regulation enacted by Congress. In regulating discharges of pollutants from point sources, Congress clearly intended to target the *measurable* discharge of pollutants. Not only is this revealed by the definitional text of "point source," but it is also manifested in the effluent limitation enforcement scheme that the Clean Water Act employs. The National Pollutant Discharge Elimination System Program and § 1311's enforcement scheme specifically rely on "effluent limitation[s]"—restrictions on the "quantities, rates, and concentrations" of pollutants discharged into navigable waters. 33 U.S.C. § 1362(11) (defining "effluent limitation"). And state-federal permitting programs under the Clean Water Act apply these precise, numeric limitations to discrete outfalls and other "point sources," *see [EPA v. California ex rel. Res. Control Bd*., 426 U.S. [200,] 205–08 . . . (1976), at which compliance can be readily monitored. When a source works affirmatively to *convey* a pollutant, the concentration of the pollutant and the rate at which it is discharged by that conveyance *can be measured*. But when the alleged discharge is diffuse and not the product of a discrete conveyance, that task is virtually impossible.

Id. at *6.

support of their position. But the quote has been taken out of context in an effort to expand the scope of the CWA well beyond what the *Rapanos* Court envisioned.[9]

The courts and litigants to have relied on *Rapanos* in support of the hydrological connection theory have erred for a number of reasons. Not the least of which is that *Rapanos* is not binding here: it is a four-justice plurality opinion answering an entirely different legal question. *See id.* at 739 (concluding that certain wetlands and intermittent streams did not themselves fall within the CWA's definition of navigable waters). In any event, when Justice Scalia pointed out the absence of the word "directly" from § 1362(12)(A), he did so to explain that pollutants which travel through multiple *point sources* before discharging into navigable waters are still covered by the CWA. *Id.* at 743 ("[T]he discharge into intermittent channels of any pollutant that naturally washes downstream likely violates [the CWA], even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." (emphasis omitted)). Justice Scalia's reference to "conveyances"—the CWA's definition of a point source—reveals his true concern. He sought to make clear that intermediary point sources do not break the chain of CWA liability; the opinion says nothing of point-source-to-nonpoint-source dumping like that at issue here. And the facts in *Rapanos* confirm this to be true. The three wetlands that the Supreme Court defined out of the CWA in *Rapanos* were all linked to navigable waters by multiple different point sources (drains, ditches, creeks, and the like). *Id.* at 729-30. Thus, our holding today does not stand in conflict with the *Rapanos* plurality.

Context. This reading is strengthened in light of the CWA's other provisions and corresponding federal environmental laws. Invariably, courts that have adopted the hydrological connection theory rely heavily on the CWA's stated purpose of "restor[ing] and maintain[ing] . . . the Nation's waters." 33 U.S.C. § 1251(a); *see, e.g.*, *Upstate Forever*, 887 F.3d at 652 (reiterating this purpose and holding that rejecting the hydrological connection theory "would greatly undermine the purpose of the [CWA]"); *Hernandez v. Esso Standard Oil Co.*, 599 F. Supp. 2d 175, 180 (D.P.R. 2009) (adopting the hydrological connection theory on the

[9]Indeed, *Rapanos* itself *limited* the scope of the CWA by interpreting the phrase "navigable waters" narrowly. 547 U.S. at 757.

"simple and persuasive" rationale that "since the goal of the CWA is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation by NPDES permit" (quoting *Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994))). But such outsized reliance on § 1251(a) is misguided.

First, protecting navigable waters is only one of the CWA's expressly stated purposes. Just after declaring its intent to protect the "Nation's waters," the CWA makes clear that it is also designed to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). For that reason, the CWA envisions significant state involvement in environmental regulation. That is why states are authorized to administer the NPDES permitting regime themselves. *Id.* § 1342(b). It is also why the CWA leaves all forms of nonpoint-source pollution to state regulation. *Id.* §§ 1311(a), 1362(12); *see also Consumers Power Co.*, 862 F.2d at 588. Those decisions that base their reasoning on the statute's stated purpose of protecting the nation's waters fail to recognize the CWA's corresponding purpose of fostering cooperative federalism.

Second, turning to a statute's purpose is a "last resort of extravagant interpretation," because Congress does not "pursue[] its purpose at all costs." *Rapanos*, 547 U.S. at 752 (plurality opinion). It is true that Congress sought to protect navigable waters with the CWA. 33 U.S.C. § 1251(a). But it also imposed several textual limitations on the means used to reach that goal. Had it wished to do so, Congress could have prohibited *all* unpermitted discharges of *all* pollutants to *all* waters. But it did not go so far. Instead, Congress chose to prohibit only the discharge of pollutants to "*navigable* waters from any *point source*." 33 U.S.C. § 1362(12)(A) (emphasis added). Thus, Congress did not pursue its stated goal "at all costs," because the CWA precludes federal regulation over non-navigable-water pollution and over nonpoint-source pollution. And the CWA's backdrop illustrates why Congress decided to develop this point-source framework. Under the Federal Water Pollution Control Act and the Water Quality Act (the CWA's predecessors), enforcement failed—federal authorities were unable to trace pollution back to polluters. *See* S. Rep. No. 92-414 (1971), *as reprinted in* 1972 U.S.C.C.A.N.

3668, 3672. In response, Congress revamped the water pollution laws to focus on polluters (through the point-source requirement), rather than pollution. It left the rest to the states.

In addition to the CWA's stated purposes, other environmental statutes demonstrate why adopting either of Plaintiffs' theories of liability would be untenable. Specifically, RCRA is designed to work in tandem with other federal environmental protection laws, including the CWA. *See* 42 U.S.C. § 6905(b) ("The [EPA] shall integrate all provisions of [RCRA] for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of . . . [the CWA]."). For that reason, RCRA and the CWA should be read as complementary statutes, each addressed at regulating different potential environmental hazards. *Cf. Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972) (statutes that "pertain to the same subject" may be treated "as if they were one law," because "whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject" (quoting *United States v. Freeman*, 44 U.S. (3 How.) 556, 564 (1845))).

Reading the CWA to cover groundwater pollution like that at issue in this case would upend the existing regulatory framework. RCRA explicitly exempts from its coverage any pollution that is subject to CWA regulation. 42 U.S.C. § 6903(27). In that way, RCRA and the CWA are mutually exclusive—if certain conduct is regulated under the CWA and requires an NPDES permit, RCRA does not apply. Were we to read the CWA to cover KU's conduct here, KU's coal ash treatment and storage practices would be exempted from RCRA's coverage. But coal ash is solid waste, and RCRA is specifically designed to cover solid waste. *See id.* § 6902(a)(1). Reading the CWA so as to remove solid waste management practices from RCRA's coverage is thus problematic.

What is more problematic, though, is the fact that, pursuant to RCRA, the EPA has issued a formal rule that specifically covers coal ash storage and treatment. *See* 80 Fed. Reg. 21,302 (Apr. 17, 2015) (the "CCR Rule"). The CCR Rule was designed to regulate, among other things, coal ash ponds. *Id.* at 21,303. Yet because the EPA issued the CCR Rule under RCRA, reading the CWA to cover coal ash ponds would gut the rule. Adopting Plaintiffs' reading of the CWA would mean that any coal ash pond with a hydrological connection to a navigable water would require an NPDES permit, thus removing it from RCRA's coverage and, with it, the CCR Rule.

Almost all coal ash ponds sit near navigable waterways because of the large amounts of water needed to operate coal-fired power plants. For this reason, adopting Plaintiffs' interpretation of the CWA would leave the CCR Rule virtually useless. We decline to interpret the CWA in a way that would effectively nullify the CCR Rule and large portions of RCRA. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, 181-86 (rev. 6th ed. 2000))).

Our task is "not merely [to find] a reasonable interpretation, but the best one." *United States v. Zabawa*, 719 F.3d 555, 560 (6th Cir. 2013). Reading the CWA to extend liability to groundwater pollution is not the best one. For that reason, we reject both of Plaintiffs' theories of liability and affirm the district court's dismissal.[10]

B. RCRA Claim

As discussed, the proper federal channel for Plaintiffs' complaint is RCRA. Fortunately for Plaintiffs, their complaint also alleges a RCRA violation. But unfortunately for them, the district court concluded that it lacked jurisdiction to hear that claim. Its reasoning was straightforward—it believed that the state had already implemented a plan designed to address the conduct about which Plaintiffs complained and thus it could not issue separate relief. In other words, the district court perceived that it could not redress the Plaintiffs' problems. Without a redressable claim, Plaintiffs lacked Article III standing, and the district court lacked jurisdiction. On appeal, KU urges us to affirm either because the district court lacked jurisdiction or because abstention was proper.

The motivation behind the district court's decision was sound: states are typically left to regulate their own environments and federal environmental regulatory statutes typically make

[10]While we do not rely on it in reaching this conclusion, the CWA's legislative history suggests that Congress was at least aware of the connection between groundwater and surface water pollution but nevertheless chose not to regulate groundwater directly. In support of a CWA amendment which would directly regulate groundwater, Representative Aspin noted: "If we do not stop pollution of ground waters through seepage and other means, ground water gets into navigable waters, and to control only navigable water and not ground water makes no sense at all." 118 Cong. Rec. 10,666 (1972) (remarks of Rep. Aspin). The House rejected that amendment. 118 Cong. Rec. 10,669 (1972). The Senate rejected several similar amendments. *See* S. Rep. No. 92-414 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3739.

room for state regulation. *See, e.g.*, 42 U.S.C. § 6902(a)(7) (one of RCRA's purposes is to create a "Federal-State partnership" wherein the EPA will "give a high priority to assisting and cooperating with States in obtaining full authorization of State programs"), §6926(b). Since Kentucky was regulating the challenged conduct under Kentucky law (albeit administratively), *see* Ky. Rev. Stat. § 224.70-110, the federal district court felt it was inappropriate to intervene. While we recognize that concern, the district court erred in concluding that it lacked jurisdiction because of it.

Plaintiffs filed their RCRA suit under 42 U.S.C. § 6972(a)(1)(B). To bring a claim under that section, a plaintiff must allege that a defendant's conduct presents "an imminent and substantial endangerment to health or the environment." *Id.* A number of procedural requirements also apply to a citizen suit under § 6972(a)(1)(B). The plaintiff must notify the EPA, the relevant state, and the alleged wrongdoer at least ninety days before filing suit. *Id.* § 6972(b)(2)(A). This gives the EPA and the state the opportunity to respond to the problem before allowing the citizen suit to commence. And if the state or EPA takes action in one of three statutorily prescribed ways, a citizen is barred from pursuing a RCRA citizen suit. *Id.* § 6972(b)(2)(C) (the "diligent prosecution bar"). Provided a plaintiff meets RCRA's procedural requirements and the EPA or state does not take action, the citizen suit can proceed.

Here, Plaintiffs have met the strictures of RCRA's citizen-suit provision. They have alleged (and supported) an imminent and substantial threat to the environment they have provided the EPA and Kentucky ninety days to respond to those allegations, and neither the EPA nor Kentucky has filed one of the three types of actions that would preclude the citizen groups from proceeding with their federal lawsuit, *see id*. Thus, the district court had jurisdiction to hear Plaintiffs' RCRA claim and erred in holding otherwise.

As the district court recognized, this case looks like a strong contender for *Burford* abstention at first glance. *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Burford* instructs federal courts to avoid hearing cases where doing so would interfere with a state's regulatory efforts. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989). Here, Kentucky is actively regulating the problems Plaintiffs are worried about through the Agreed Order, and *Burford* might counsel federal courts against second-guessing the State's

decisions on that score. But applying *Burford* abstention here would be akin to grafting a new provision onto RCRA's diligent prosecution bar. Were we to abstain, we would effectively add a new component to that bar precluding citizen suits where a state is already trying to remedy the problem, regardless of the regulatory mechanism it is using. *See, e.g.*, *Chico Serv. Station, Inc. v. Sol Puerto Rico Ltd.*, 633 F.3d 20, 31 (1st Cir. 2011) ("To abstain in situations other than those identified in the statute . . . threatens an 'end run around RCRA.'" (quoting *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 619 (7th Cir. 1998))). Doing so would substitute our own judgment about the appropriate balance of state and federal interests for the *ex-ante* determination that Congress made regarding this balance when it enacted RCRA. *See* 42 U.S.C. § 6972(b)(2)(A)–(F); *Chico Serv. Station, Inc.*, 633 F.3d at 31. We cannot endorse such an approach.

Because Plaintiffs have met the requirements needed to pursue a RCRA citizen suit, and because *Burford* abstention is inappropriate where Congress has already considered which state actions should preclude federal intervention, the district court erred in holding that it lacked jurisdiction. The federal courts have jurisdiction over this RCRA claim and thus they must exercise it. *See Colo. River Watch Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them"). Accordingly, we reverse the district court's dismissal of Plaintiffs' RCRA suit for want of jurisdiction and remand for further proceedings.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's dismissal of Plaintiffs' CWA suit. The CWA does not impose liability on surface water pollution that comes by way of groundwater. However, we REVERSE the district court's dismissal of Plaintiffs' RCRA claim. Plaintiffs have met the statutory requirements to bring that suit, and the district court must entertain it. The case is REMANDED for further proceedings on that claim.

CONCURRING IN PART AND DISSENTING IN PART

CLAY, Circuit Judge, concurring in part and dissenting in part. Can a polluter escape liability under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251–1387, by moving its drainage pipes a few feet from the riverbank? The Fourth and Ninth Circuits have said no. In two cases today,[1] the majority says yes. Because the majority's conclusion is contrary to the plain text and history of the CWA, I respectfully dissent from the majority's conclusion that Plaintiffs' CWA claim was properly dismissed. Meanwhile, I concur in the majority's determination that the district court erred by dismissing Plaintiffs' claim under the Resource Conservation and Recovery Act ("RCRA").

Plaintiffs have invoked the citizen-suit provision of the CWA, which provides that "any citizen may commence a civil action . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter[.]" 33 U.S.C. § 1365(a). "For purposes of this section, the term 'effluent standard or limitation under this chapter' means," among other possibilities, "an unlawful act under subsection (a) of section 1311 of this title." § 1365(f). In turn, § 1311(a) prohibits "the discharge of any pollutant by any person[.]"

The broad sweep of a defendant's potential CWA liability is limited in two ways. First, Congress included a list of exceptions in § 1311(a) itself: the discharge of a pollutant is unlawful "[e]xcept in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title." Second, Congress gave the phrase "discharge of a pollutant" a very specific definition: it means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). Taken together, Congress thus authorized citizen suits to prevent the "addition of any pollutant to navigable waters from any point source," *see* § 1362(12)(A), but if a listed statutory exception applies, *see* § 1311(a).

The majority argues that this standard cannot be satisfied when, as here, pollution travels briefly through groundwater before reaching a navigable water. Plaintiffs counter that such an

[1]The other case is Case No. 17-6155, *Tennessee Clean Water Network v. Tennessee Valley Authority*.

exception has no statutory basis and would allow polluters to shirk their CWA obligations by placing their underground drainage pipes a few feet away from the shoreline. This case could have profound implications for those in this Circuit who would pollute our Nation's waters. And the issue is novel. This Court has never before considered whether the CWA applies in this context.

However, the Fourth and Ninth Circuits have. Both courts determined that a short journey through groundwater does not defeat CWA liability. *See Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 649–51 (4th Cir. 2018); *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 745–49 (9th Cir. 2018). The Second Circuit reached a similar conclusion where the pollutants traveled briefly through fields (which are not necessarily point sources) and through the air. *See Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 118–19 (2d Cir. 1994) (fields); *Peconic Baykeeper, Inc. v. Suffolk Cty.*, 600 F.3d 180, 188–89 (2d Cir. 2010) (air). Until today, no Circuit had come out the other way. The reason is simple: the CWA does not require a plaintiff to show that a defendant discharged a pollutant from a point source *directly* into navigable waters; a plaintiff must simply show that the defendant "add[ed] . . . any pollutant *to* navigable waters *from* any point source." *See* §§ 1362(12)(A) (emphases added), 1365(a), 1311(a); *Upstate Forever*, 887 F.3d at 650; *Hawai'i Wildlife Fund*, 886 F.3d at 749.

The Supreme Court addressed this precise issue in *Rapanos v. United States*, 547 U.S. 715 (2006). There, Justice Scalia's plurality opinion was explicit:

> The Act does not forbid the "addition of any pollutant *directly* to navigable waters from any point source," but rather the "addition of any pollutant *to* navigable waters." [33 U.S.C.] § 1362(12)(A) (emphasis added); § 1311(a). Thus, from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between. *United States v. Velsicol Chemical Corp.*, 438 F. Supp. 945, 946–947 (W.D.Tenn. 1976) (a municipal sewer system separated the "point source" and covered navigable waters). See also *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1137, 1141 (C.A.10 2005) (2.5 miles of tunnel separated the "point source" and "navigable waters").

Id. at 743 (plurality opinion) (emphasis in original). True, Justice Scalia's plurality opinion is not binding. But no Justice challenged this aspect of the opinion, and for good reason: the statutory text unambiguously supports it.

Further, applying the CWA to point-source pollution traveling briefly through groundwater before reaching a navigable water promotes the CWA's primary purpose, which is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). By contrast, the majority's approach defeats the CWA's purpose by opening a gaping regulatory loophole: polluters can avoid CWA liability by discharging their pollutants into groundwater, even if that groundwater flows immediately into a nearby navigable water. This exception has no textual or logical foundation. As one district court observed,

> it would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via the groundwater.

See N. Cal. River Watch v. Mercer Fraser Co., No. C-04-4620 SC, 2005 WL 2122052, at *2 (N.D. Cal. Sept. 1, 2005). In addition, this exception has no apparent limits. Based on the majority's logic, polluters are free to add pollutants to navigable waters so long as the pollutants travel through any kind of intermediate medium—for example through groundwater, across fields, or through the air. This would seem to give polluters free rein to discharge pollutants from a sprinkler system suspended above Lake Michigan. After all, pollutants launched from such a sprinkler system would travel "in all directions, guided only by the general pull of gravity." *See* Maj. Op. at 11. According to the majority, this would defeat CWA liability.[2]

[2]The majority declines to reverse the district court's other finding that a coal ash pond is a point source under the CWA, but suggests disagreement in a footnote. The CWA defines "point source" as "any discernible, confined and discrete conveyance," including "any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The majority cites a recent Fourth Circuit case, *Sierra Club v. Va. Elec. & Power Co.*, No. 17-1952, --- F.3d ---, 2018 WL 4343513 (4th Cir. Sept. 12, 2018), which held that a coal ash pond is not a point source because it was a "static recipient[] of the precipitation and groundwater that flowed through [it]." 2018 WL 4343513 at *6. Looking at the text of the CWA, however, shows that, *inter alia*, "ditch[es], well[s], container[s]," and "vessel[s]" are included in the definition. 33 U.S.C. § 1362(14). The canon of *ejusdem generis* states that "the general term must take its meaning from the specific terms with which it appears." *Retail Ventures, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 691 F.3d 821, 833 (6th Cir. 2012). The common

I have a very different view. In cases where, as here, a plaintiff alleges that a defendant is polluting navigable waters through a complex pathway, the court should require the plaintiff to prove the existence of pollutants in the navigable waters and to persuade the factfinder that the defendant's point source is to blame—that the defendant is unlawfully "add[ing] . . . any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). The more complex the pathway, the more difficult the proof. Where these cases are plausibly pleaded, they should be decided on the facts.

Instead, the majority holds that a plaintiff may never—as a matter of law—prove that a defendant has unlawfully added pollutants to navigable waterways via groundwater. For its textual argument, the majority refers us to the term "effluent limitations." This term, the majority says, is defined as "restrictions on the amount of pollutants that may be 'discharged from point sources *into* navigable waters.'" Maj. Op. at 12 (quoting with emphasis 3 U.S.C. § 1362(11)). Seizing on the word "into"—which denotes "entry, introduction, insertion"—the majority concludes that the effluent-limitation definition implicitly creates an element of "directness." In other words, the majority reasons, "for a point source to discharge *into* navigable waters, it must dump *directly* into those navigable waters[.]" *Id.* (emphasis in original).

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denominator between wells, containers, ditches, and vessels is that each is a man-made, defined area where liquid collects. The canon of *ejusdem generis* thus suggests that man-made coal ash ponds are included in this definition. The Fourth Circuit instead cites a dictionary definition of "conveyance" as "a facility—for the movement of something from one place to another" without explaining how items like wells, containers, and vessels fit this definition. *Va. Elec. & Power Co.*, 2018 WL 4343513, at *5 (quoting *Webster's Third New International Dictionary* 499 (1961)). The Fourth Circuit suggests that a container can be a point source only if it is in the act of conveying something, 2018 WL 4343513, at *7, ignoring that the statutory definition includes "*any* … container … from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added).

The Fourth Circuit's approach is further misguided in that it conflicts with the broad interpretation that federal courts have traditionally given to the phrase "point source." *See, e.g.*, *Simsbury-Avon Pres. Club, Inc. v. Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2d Cir. 2009) (quoting *Dague v. City of Burlington,* 935 F.2d 1343, 1354–55 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992)) ("[T]he definition of a point source is to be broadly interpreted."); *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 955 (9th Cir. 2002) (quoting *Dague,* 935 F.2d at 1354–55); *Cmty. Ass'n for Restoration of Env't (CARE) v. Sid Koopman Dairy*, 54 F. Supp. 2d 976, 980 (E.D. Wash. 1999) (citing *Dague,* 935 F.2d at 1354–55); *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 444 (M.D. N.C. 2015) (quoting *Dague,* 935 F.2d at 1354–55); *see United States v. Earth Scis., Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) ("[T]he concept of a point source was designed to further [the CWA's regulatory] scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States."). By embracing a restrictive definition of what constitutes a point source, the Fourth Circuit jettisons these long-standing principles.

The majority is way off the rails. First of all, "Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626–27 (2018) (quoting *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)). The majority should heed this commonsense advice. Congress did not hide a massive regulatory loophole in its use of the word "into."

But more importantly, the majority's quoted definition of "effluent limitation" from § 1362(11)—the supposed origin of the loophole—is not relevant to this case. The citizen-suit provision uses the term "effluent standard or limitation"—not the term "effluent limitation." *See* 33 U.S.C. § 1365(f). As the majority itself argues, minor distinctions in statutory language sometimes matter. This one does. The phrase "effluent standard or limitation" is a term of art and is wholly distinct from the term "effluent limitation." This conclusion is supported not by tea leaves or a carefully selected dictionary, but rather by the CWA itself. The citizen-suit provision of the CWA provides that "effluent standard or limitation" means, among other things, "an unlawful act under subsection (a) of section 1311 of this title." 33 U.S.C. § 1365(a). Turning to § 1311(a), we find that, absent certain exceptions, "the discharge of any pollutant by any person shall be unlawful," § 1311(a), and the "discharge of a pollutant" means "any addition of any pollutant *to* navigable waters from any point source," § 1362(12)(A) (emphasis added). Thus, even assuming the majority correctly parses the definition of "into"—a dubious proposition at best—the word "into" is not contained in any of the statutory provisions at issue. Rather, we find the word "to," which does not even arguably suggest a requirement of directness; the word "to" merely "indicate[s] movement or an action or condition suggestive of movement toward a place, person, or thing reached." *To*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/to.

It is therefore entirely unclear why the majority relies on the definition of "effluent limitation." That definition is simply irrelevant to this lawsuit. As a result, the majority's criticisms of the approach taken by the Fourth and Ninth Circuits miss the mark. Indeed, the Fourth Circuit analyzed the correct statutory text when it rejected the argument that the citizen-suit provision requires directness:

> [t]he plain language of the CWA requires only that a discharge come "from" a "point source." *See* 33 U.S.C. § 1362(12)(A). Just as the CWA's definition of a discharge of a pollutant does not require a discharge directly to navigable waters, *Rapanos*, 547 U.S. at 743, 126 S.Ct. 2208, neither does the Act require a discharge directly from a point source, *see* 33 U.S.C. § 1362(12)(A). The word "from" indicates "a starting point: as (1) a point or place where an actual physical movement . . . *has its beginning*." Webster's Third New International Dictionary 913 (Philip Babcock Gove et al. eds., 2002) (emphasis added); *see also* The American Heritage Dictionary of the English Language 729 (3d ed. 1992) (noting "from" indicates a "starting point" or "cause"). Under this plain meaning, a point source is the starting point or cause of a discharge under the CWA, but that starting point need not also convey the discharge directly to navigable waters.

Upstate Forever, 887 F.3d at 650 (footnote omitted). In short, if the majority would like to add a "directness" requirement to § 1311, it must fight the statutory text to get there.

In addition, the majority fails to meaningfully distinguish Justice Scalia's concurrence in *Rapanos*, which made clear that the CWA applies to indirect pollution. It is true that *Rapanos* dealt with different facts. But it is irrelevant that the pollution in *Rapanos* traveled through point sources before reaching a navigable water, whereas the pollution in this case allegedly traveled through groundwater, which, according to the majority, is not a point source. In both cases, the legal issue is the same: whether the CWA applies to pollution that travels from a point source to navigable waters through a complex pathway. *See Rapanos*, 547 U.S. at 745 (asking whether "the contaminant-laden waters ultimately reach covered waters"). Indeed, Justice Scalia favorably cited the Second Circuit's discussion in *Concerned Area Residents for the Environment*. *Rapanos*, 547 U.S. at 744. In that case, pollutants traveled across fields—which "were not necessarily point sources themselves"—before reaching navigable waters. *Hawai'i Wildlife Fund*, 886 F.3d at 748. Given the Supreme Court plurality's endorsement of the Second Circuit's approach, the majority's attempt to distinguish *Rapanos* collapses.

Next, the majority warns that imposing liability would upset the cooperative federalism embodied by the CWA. On this view, the states alone are responsible for regulating pollution of groundwater, even if that pollution later travels to a navigable water. Wrong again. To be sure, the CWA recognizes the "primary responsibilities and rights of States" to regulate groundwater pollution. 33 U.S.C. § 1251(b). But imposing liability in this case would not marginalize the states. To the contrary, the district court in today's companion case made clear that disputes like

this one do *not* involve regulating groundwater. *See Tennessee Clean Water Network*, 273 F. Supp. 3d at 826 ("The Court agrees with those courts that view the issue not as whether the CWA regulates the discharge of pollutants into groundwater itself but rather whether the CWA regulates the discharge of pollutants to navigable waters via groundwater." (quotation marks, alteration, and citation omitted)). Instead, the district court explained that the issue is the regulation of navigable water *via* groundwater. *Id.* This distinction was also clear to the Fourth and Ninth Circuits. *See Upstate Forever*, 887 F.3d at 652 ("We do not hold that the CWA covers discharges to ground water itself. Instead, we hold only that an alleged discharge of pollutants, reaching navigable waters . . . by means of ground water with a direct hydrological connection to such navigable waters, falls within the scope of the CWA."); *Hawai'i Wildlife Fund*, 886 F.3d at 749 ("[T]he County's concessions conclusively establish that pollutants discharged from all four wells emerged at discrete points in the Pacific Ocean . . . . We leave for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA."). Accordingly, if Plaintiffs successfully prove the allegations in their complaint, imposing liability in this case would fit perfectly with the CWA's stated purpose: to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

Finally, the majority offers a narrow reading of the CWA because, in its view, a more inclusive reading would render "virtually useless" the Coal Combustion Residuals ("CCR") Rule under RCRA. Maj. Op. at 17. The majority notes that if a polluter's conduct is regulated through a CWA permit, then RCRA does not also apply. The majority therefore suggests that a straightforward reading of the CWA is incompatible with RCRA. The majority would gut the former statute to save the latter.

But the EPA has already dismissed the majority's concern. Indeed, the EPA issued federal regulations on this issue many decades ago. The EPA's interpretation is that the industrial discharge of waste such as CCR is subject to regulation under both RCRA and the CWA: RCRA regulates the way polluters store CCR, and the CWA kicks in the moment CCR enters a navigable waterway. *See* 40 C.F.R. § 261.4(a)(2). The EPA first articulated this approach in a set of regulations from 1980, which provide that "[i]ndustrial wastewater

discharges that are point source discharges subject to regulation under section 402 of the Clean Water Act" "are not solid wastes for the purpose of" the RCRA exclusion. 40 C.F.R. § 261.4(a)(2). This exclusion, the regulation explains, "applies only to the *actual point source discharge*. It does not exclude industrial wastewaters while they are being collected, stored or treated before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment." § 261.4(a)(2) (comment) (emphasis added). Thus, under the EPA's reading, a polluter can be liable under RCRA for improperly storing CCR—even if the CCR never enters a navigable waterway. *See id.* Conversely, a polluter can be liable under the CWA for adding CCR to a navigable waterway—even if the polluter's storage methods comport with RCRA. *See id.* And of course, a polluter can be liable under both statutes if the polluter both improperly stores CCR and discharges it to a navigable waterway. *See id.*

The EPA settled any doubts on this matter by publishing a detailed description of its rationale in the Federal Register. *See* 45 Fed. Reg. 33098. The EPA explained that 40 C.F.R. § 261.4(a)(2) reflects the EPA's interpretation that regulation of a polluter's discharge of industrial waste to a navigable waterway pursuant to the CWA does *not* trigger the 42 U.S.C. § 6903(27) exclusion and therefore does *not* exempt that polluter's storage of CCR from regulation under RCRA:

> The obvious purpose of the industrial point source discharge exclusion in Section 1004(27) was to avoid duplicative regulation of point source discharges under RCRA and the Clean Water Act. Without such a provision, the discharge of wastewater into navigable waters would be "disposal" of solid waste, and potentially subject to regulation under both the Clean Water Act and Subtitle C [of RCRA]. These considerations do not apply to industrial wastewaters prior to discharge since most of the environmental hazards posed by wastewaters in treatment and holding facilities—primarily groundwater contamination—cannot be controlled under the Clean Water Act or other EPA statutes.
>
> Had Congress intended to exempt industrial wastewaters in storage and treatment facilities from all RCRA requirements, it seems unlikely that the House Report on RCRA would have cited, as justification for the development of a national hazardous waste management program, numerous damage incidents which appear to have involved leakage or overflow from industrial wastewater impoundments. *See, e.g.*, H.R. Rep. at 21. Nor would Congress have used the term "discharge" in Section 1004(27). This is a term of art under the Clean Water Act (Section 504(12)) and refers only to the "addition of any pollutant to navigable waters", not to industrial wastewaters prior to and during treatment.

> Since the comment period closed on EPA's regulations, both Houses of Congress have passed amendments to RCRA which are designed to provide EPA with more flexibility under Subtitle C in setting standards for and issuing permits to existing facilities which treat or store hazardous wastewater. *See* Section 3(a)(2) of H.R. 3994 and Section 7 of S.1156. *See also* S. Rep. No. 96-173, 96th Cong., 1st Sess. 3 (1979); Cong. Rec. S6819, June 4, 1979 (daily ed.); Cong. Rec. H1094–1096, February 20, 1980 (daily ed.). These proposed amendments and the accompanying legislative history should lay to rest any question of whether Congress intended industrial wastewaters in holding or treatment facilities to be regulated as "solid waste" under RCRA.

45 Fed. Reg. 33098. Congress ratified the EPA's interpretation when it enacted amendments to RCRA, which the EPA said would "lay to rest" any concerns about whether industrial wastes like CCR are subject to regulation under both RCRA (in terms of their storage and treatment) and the CWA (in terms of their discharge to navigable waters). *Id.*; *see* Public Law 96-482. From this history, and from the text of the statutes, we can surmise that Congress intended to delegate to the EPA the power "to speak with the force of law" on this aspect of the interplay between RCRA and the CWA. *See United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). Exercising this authority, the EPA reached an interpretation that is different from—and incompatible with—that of the majority.

Contravening bedrock principles of administrative law, the majority bulldozes the EPA's interpretation of its own statutory authority without even discussing the possibility of deference. But "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

> In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. 467 U.S., at 865–866, 104 S.Ct. 2778. If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005). The EPA says that imposing CWA liability for the discharge of CCR to navigable waterways does not eliminate the possibility of RCRA liability for the storage and treatment of CCR. The majority suggests the exact opposite. Unfortunately for the majority, but fortunately for those who enjoy clean water, the majority lacks the authority to override longstanding EPA regulations on a whim. *See id.*

For all these reasons, I believe the CWA clearly applies to the allegations in this case. Accordingly, I would join our sister circuits in holding that the CWA prohibits all pollution that reaches navigable waters "by means of ground water with a direct hydrological connection to such navigable waters[.]" *Upstate Forever*, 887 F.3d at 652; *see Hawai'i Wildlife Fund*, 886 F.3d at 745–49. Under this standard, Plaintiffs have stated a valid claim that Kentucky Utility Company's unpermitted leaks are unlawful. Because the majority holds otherwise, I respectfully dissent in part. I agree with the majority's opinion only insofar as the majority finds that the district court erred by dismissing Plaintiffs' RCRA claim.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0214p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TENNESSEE CLEAN WATER NETWORK; TENNESSEE SCENIC RIVERS ASSOCIATION,

Plaintiffs-Appellees,

v.

TENNESSEE VALLEY AUTHORITY,

Defendant - Appellant.

No. 17-6155

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 3:15-cv-00424—Waverly D. Crenshaw Jr., District Judge.

Argued: August 2, 2018

Decided and Filed: September 24, 2018

Before: SUHRHEINRICH, CLAY, and GIBBONS, Circuit Judges.

COUNSEL

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SUHRHEINRICH, J., delivered the opinion of the court in which GIBBONS, J., joined. CLAY, J. (pp. 17–27), delivered a separate dissenting opinion.

OPINION

SUHRHEINRICH, Circuit Judge.

I. INTRODUCTION

Defendant Tennessee Valley Authority ("TVA" or "Defendant") operates a coal-fired electricity-generating plant, the Gallatin Fossil Plant ("Gallatin plant"), on a part of the Cumberland River known as Old Hickory Lake, a popular recreation spot. The Gallatin plant generates wanted electricity (which it supplies to approximately 565,000 households in the greater Nashville area), as well as unwanted waste byproducts, in particular coal combustion residuals ("CCRs") or coal ash. The plant disposes of the coal ash by "sluicing" (mixing with lots of water) and allowing the coal ash solids to settle in a series of unlined man-made coal ash ponds adjacent to the river. The Gallatin plant has a permit to discharge some of this coal combustion wastewater, which contains heavy metals and other pollutants, into the river through a pipe, known as Outfall 001. Other wastewater is allegedly discharged through leaks from the ponds through the groundwater into the Cumberland River, a waterway protected by the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq*. The CWA indisputably regulates the first type of discharge. The issue on appeal is whether the CWA also regulates the latter type of discharge.

After a bench trial, the district court found that TVA violated the CWA because its coal ash ponds at the Gallatin plant leaks pollutants through groundwater that is "hydrologically

connected" to the Cumberland River without a permit. This theory of liability has been labeled the "hydrological connection theory" by the Federal Environmental Protection Agency ("EPA"). As explained in the companion decision also issued today, *Kentucky Waterways All., v. Kentucky Utilities Co.*, No. 18-5115, --- F. 3d ---, (6th Cir. -- , 2018) ("*Kentucky Waterways*"), we find no support for this theory in either the text or the history of the CWA and related environmental laws. We therefore hold that the district court erred in granting relief under the CWA.

II. BACKGROUND

A. Statutory Background

Some background on the CWA is helpful. As explained in *Kentucky Waterways,* Congress passed the CWA in 1972 with the stated purpose of "restor[ing] and maintain[ing] the . . . Nation's waters." 33 U.S.C. § 1251(a). To that end, the CWA requires a permit to "discharge . . . any pollutant." *Id.* §§ 1311(a), 1342(a). The discharge of a pollutant is defined as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A). Navigable waters are broadly defined as "the waters of the United States." *Id.* § 1362(7). And a point source is a "discernible, confined and discrete conveyance." *Id.* § 1362(14). These permits are issued pursuant to the CWA's National Pollutant Discharge Elimination System ("NPDES"). *Id*. §1342. Therefore, in order to add a pollutant to the waters of the United States via a conveyance, an NPDES permit is required.

The CWA overhauled the 1948 Federal Water Pollution Control Act and the Water Quality Act of 1965 by shifting the focal point of liability from measuring excess pollution levels in the receiving water to capping effluent limitations from a discharging source. *See* S. Rep. No. 92-414 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3675 ("Under [the CWA] the basis of pollution prevention and elimination will be the application of effluent limitations. Water quality will be a measure of program effectiveness and performance, not a means of elimination and enforcement. . . . With effluent limits, the [EPA] . . . need not search for a precise link between pollution and water quality.").

With the CWA, Congress also sought to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the

development and use . . . of land and water resources." 33 U.S.C. § 1251(b). The CWA accomplishes this by allowing the states to administer the CWA's NPDES permitting program themselves, provided their regulations are at least as stringent as the federal limitations, *id.* § 1342(b)-(d), and most notably, by drawing a line between point-source pollution and nonpoint-source pollution, *id.* § 1362(12),(14). Point-source pollution is subject to the NPDES requirements, and thus, to federal regulation under the CWA. But all other forms of pollution are considered nonpoint-source pollution and are within the states' regulatory domain. *See id.* §§ 1314(f), 1362(12); *see also Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 588 (6th Cir. 1988). Similarly, the CWA is restricted to regulation of pollutants discharged into navigable waters, *id.* § 1362(12), leaving the states to regulate pollution of non-navigable waters.

The EPA has the power under the CWA to issue orders and to bring civil and criminal actions against those in violation of its provisions. *Id.* § 1319(a)-(c). The CWA also allows private citizens to file civil actions against violators, provided they give the EPA, the relevant state, and the alleged wrongdoer sixty-days' notice prior to filing the lawsuit. *Id.* § 1365(a)-(b); *see Sierra Club v. Hamilton Cty. Bd. of Cty. Comm'rs*, 504 F.3d 634, 637 (6th Cir. 2007) (noting private citizen suits "provide a second level of enforcement" and serve as a check on state and federal governments, who bear the primary enforcement responsibility for prosecuting CWA violations).

We have held that a CWA claim has five elements: "(1) a *pollutant* must be (2) *added* (3) *to navigable waters* (4) *from* (5) *a point source*." *Consumers Power Co.*, 862 F.2d 580 at 583 (quoting *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982)).

B. Factual Background

As noted, the Gallatin plant is adjacent to the Cumberland River, a "water[] of the United States." 33 U.S.C. § 1362(7). TVA has two coal ash ponds or impoundments at the Gallatin plant: the Non-Registered Site ("NRS") and the Ash Pond Complex ("Complex"). The NRS is closed, and the Complex is in the process of being closed.

1. The NRS

From 1956 to 1970, the Gallatin plant sluiced CCRs to the NRS, an unlined 65-acre site along the western edge of the river. The NRS is situated atop alluvium (loose soil, silt, clay). By 1973, TVA had dewatered the NRS. TVA closed the NRS in 1998, pursuant to the State of Tennessee's solid waste program. For this reason the NRS does not have an NPDES permit. Instead, the Tennessee Department of Environment and Conservation ("TDEC") regulates the "closed dry ash disposal area" according to its solid waste landfill standards, which include ongoing groundwater monitoring. *See* Tenn. Code Ann. § 68-211 *et seq*. Approximately 2.3 million cubic yards of coal ash are stored at the NRS.

Based on expert testimony from both sides, the district court found that "it does appear more likely than not that some portions of [the NRS as well as the Complex] penetrate the water table." The court concluded that the NRS is contaminated; that it leaked historically; that there was "no evidence to suggest that the 'closure' of the site . . . wholly stopped the leaking."

2. The Complex

After 1970, TVA began treating its CCR in a series of unlined ponds, collectively known as the Complex. The ponds, which cover roughly 476 acres, treat sluiced wastewater by allowing CCRs to settle before releasing wastewater to the Cumberland River through Outfall 001. Approximately 11.5 million cubic yards of coal ash are stored at the Complex today. The parties agree that the Complex sits atop karst terrain, a landscape characterized by underground sinkholes, fissures, and caves caused by water-dissolving limestone. *See* 40 C.F.R. § 257.53. Groundwater flows easily through the factures and other conduits created by the dissolved rock.

Historically, the Complex leaked significant amounts of pollutants into the river. Between 1970 and 1978, approximately 27 billion gallons of coal ash wastewater flowed directly from the Complex into the karst aquifer and then into the Cumberland River. The district court found it "beyond dispute that sinkholes have been recently discovered in the area[] of the Gallatin plant site" and would likely continue to form, given the nature of karst terrain. Thus, the court concluded that "[i]t is simply implausible, based on the evidence before the Court, that the

Complex has not continued to, and will not continue to, suffer at least some leaking through karst features."

3. The Permit

In 1976, the EPA issued an NPDES permit authorizing the Gallatin plant to discharge wastewater from the Complex to the Cumberland River through Outfall 001. Today, TDEC issues and oversees the federal permitting process for the Gallatin plant.[1]

TDEC issued the permit in question ("Permit") on June 26, 2012,[2] after a public comment period. See 40 C.F.R. § 124.8 (requiring the EPA or state authority to issue a fact sheet for every draft permit setting forth "the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit"); Tenn. Comp. R. & Regs. 0400-40-05-.06 ("Notice and Public Participation"). The Permit establishes effluent limitations, as well as monitoring and reporting requirements for certain pollutants within the wastewater.

Two additional provisions of the Permit are relevant to this lawsuit: (1) the "removed-substances" provision, which prohibits "[s]ludge or any other material removed by any treatment works" from causing "pollution of any surface or subsurface waters," and (2) the "sanitary-sewer overflow" provision, which prohibits the "discharge to land or water of wastes from any portion of the . . . treatment system other than through permitted outfalls."

On August 21, 2014 (JX 248), and again on, April 25, 2016 (JX 249, 250), TDEC deemed TVA in compliance with the Permit.

4. Procedural History

Plaintiffs, two Tennessee conservation groups whose members use and enjoy Old Hickory Lake, saw the matter differently. Dissatisfied with the State of Tennessee's

[1]The EPA delegated its permitting authority to TDEC in 1986. TDEC issued its first NPDES permit to TVA for the Gallatin plant, in 1993.

[2]The Permit expired on May 31, 2017, and was administratively continued until a new permit was issued. On May 1, 2018, TDEC issued a renewed NPDES Permit for the Gallatin plant. It became effective June 1, 2018, and is valid for five years.

enforcement efforts, they brought this CWA citizen suit on April 14, 2015, under to 33 U.S.C. § 1365, alleging that TVA violated the CWA and the Permit based on flows from the NRS and the Complex through hydrologically connected groundwater to the Cumberland River.[3]

On August 4, 2017, the district court entered judgment for Plaintiffs following a bench trial. First, the court ruled as a matter of law that the CWA applies to discharges of pollutants from a point source through hydrologically connected groundwater to navigable waters where the connection is "direct, immediate, and can generally be traced." The district court held that the NRS is a point source because it "channel[s] the flow of pollutants . . . by forming a discrete, unlined concentration of coal ash," and that the Complex is also a point source because it is "a series of discernible, confined, and discrete ponds that receive wastewater, treat that wastewater, and ultimately convey it to the Cumberland River."

The court then found as a matter of fact that both the NRS and the Complex are hydrologically connected to the Cumberland River by groundwater. As to the NRS, the court held that "[f]aced with an impoundment that has leaked in the past and no evidence of any reason that it would have stopped leaking, the Court has no choice but to conclude that the [NRS] has continued to and will continue to leak coal ash waste into the Cumberland River, through rainwater vertically penetrating the Site, groundwater laterally penetrating the Site, or both."

The district court similarly found that historical evidence established that the Complex leaked. The court stated that "none of the science presented was capable of definitively identifying when the relevant pollutants entered the water," and that the record was "silent with regard to detailed, credible evidence of whether the undisputed historical leakage is capable of justifying pollutant concentrations in the amounts observed today." However, the court decided that "[o]n balance . . . the evidence preponderates toward concluding that the discharges from the

[3]On January 7, 2015, the State of Tennessee filed an original enforcement action under applicable state statutes, the Tennessee Solid Waste Disposal Act and the Tennessee Water Quality Control Act, in state court. *See State of Tenn, et al. v. TVA*, No. 15-0023-IV (Davidson Cty. Chanc. Ct. Jan. 7, 2015). Plaintiffs intervened in that action. The state action remains pending, although TVA removed it to federal court in August 2017. *See Slate ex rel. Slatery v. TVA*, No. 3:17-cv-01139, ECF No. 1 (M.D. Tenn. Aug. 19, 2017).

In the present case the district court applied CWA's diligent prosecution bar, *see* 33 U.S.C. § 1365(b)(1)(B), and limited the trial's scope to the allegations it deemed non-overlapping with the state enforcement action.

. . . Complex are either ongoing or intermittent and recurring." The court therefore held that "the unanimous expert testimony is that sinkholes and other drainage features in karst terrain are not mere relics of some past geological event. Rather, the physical properties of the terrain itself make such areas prone to the continued development of ever newer sinkholes or other karst features." Thus, based on the contaminants flowing from the NRS and the Complex, the court found TVA to be in violation of the CWA. The district court further concluded that karst-related leakage from the Complex violated the Permit's removed-substances and sanitary-sewer overflow provisions.

As a remedy the court ordered TVA to "fully excavate" the coal ash in the Complex and the NRS (13.8 million cubic yards in total) and relocate it to a lined facility, rejecting TVA's proposal to dewater and put a cap on the unlined impoundments ("closure-in-place").[4] Although acknowledging that the burden of closure-by-removal "may be great," the court felt that it was "the only adequate resolution to an untenable situation that has gone on for far too long." Because of the costs associated with the injunctive remedy, the court did not assess civil penalties against TVA.

TVA appeals, arguing that the district court (1) erred in holding that the CWA's prohibition of unpermitted point source discharges applies to pollutants that migrate through groundwater to navigable waters; (2) lacked authority to override the TDEC's regulatory decision not to impose NPDES liability for seepage and leakage of coal ash leachate through groundwater at the Gallatin plant in the Permit; and (3) abused its discretion in ordering complete excavation and relocation of the 13.8 million cubic yards of coal ash stored at the Gallatin plant.

III. ANALYSIS

We review a district court's decision to grant a permanent injunction "under several distinct standards." *S. Cent. Power Co. v. Int'l Bhd. of Elec. Workers, Local Union 2359*, 186

[4]Closure-in-place involves dewatering an impoundment and capping it with a geosynthetic liner, borrow material, soil, and vegetation to prevent water from flowing into and through it. Closure-by-removal involves dewatering the CCR, excavating it, drying it sufficiently to move it, and then moving it to a permitted and lined landfill. A third option, "on-site closure," strikes a middle ground: it requires removal to a lined impoundment at the same location.

F.3d 733, 737 (6th Cir. 1999). "Factual findings are reviewed under the clearly erroneous standard, legal conclusions are reviewed *de novo*, and the scope of injunctive relief is reviewed for abuse of discretion." *Id.* As always, review of statutory construction is de novo. *Bowling Green v. Martin Land. Dev. Co.*, 561 F.3d 556, 558 (6th Cir. 2009).

A. Discharges from the NRS and the Complex

TVA first challenges the district court's ruling "that a cause of action based on an unauthorized point source discharge may be brought under the CWA based on discharges through groundwater, if the hydrologic connection between the source of the pollutants and navigable waters is direct, immediate, and can generally be traced." TVA contends that the district court impermissibly expanded CWA liability beyond what Congress authorized, and created an unnecessary conflict with regulation of coal ash under the Resource Conservation and Recovery Act, ("RCRA"), 42 U.S.C. § 6901 *et seq*., and the CCR Rule, promulgated under RCRA, 80 Fed. Reg. 21,302 (Apr. 17, 2015).

1. Text and Structure of the CWA

TVA claims that the text and structure of the CWA demonstrate that the phrase "discharge of pollutants" excludes the migration of pollutants through groundwater. Plaintiffs maintain that the district court correctly concluded that the NRS and the Complex are point sources that add coal ash pollutants to the Cumberland River through groundwater with a direct hydrologic connection to the Cumberland River.[5] In finding TVA in violation of the CWA, the district court made two legal conclusions: first, that coal ash ponds are "point sources"; and second, that surface water pollution via hydrologically connected groundwater is actionable under the CWA. Because we conclude that the hydrological connection theory is not a valid theory of liability, we reverse the district court's finding of liability here.[6]

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[5]Unlike the plaintiffs in *Kentucky Waterways*, Plaintiffs here do not argue that groundwater itself is a point source.

[6]Although we do not base our decision today on TVA's first argument, we note that the Fourth Circuit recently held that a landfill and settling pond did not serve as point sources simply because they allowed arsenic from coal ash to leach into groundwater and then to navigable waters. *See Sierra Club v. Va. Elec. & Power Co.*, No. 17-1952, --- F.3d ---, 2018 WL 4343513 (4th Cir. Sept. 12, 2018):

As we explain in *Kentucky Waterways*,[7]

> [t]he backbone of [the] argument in favor of the hydrological connection theory is that the relevant CWA provision does not contain the word "directly." Because it only prohibits the discharge of pollutants "to navigable waters from any point source," 33 U.S.C. § 1362(12)(A), [proponents] argue that the CWA allows for

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> We conclude that while arsenic from the coal ash stored on Dominion's site was found to have reached navigable waters—having been leached from the coal ash by rainwater and groundwater and ultimately carried by groundwater into navigable waters—that simple causal link does not fulfill the Clean Water Act's requirement that the discharge be from a point source. By its carefully defined terms, the Clean Water Act limits its regulation under § 1311(a) to discharges from "*any discernible, confined and discrete conveyance*." 33 U.S.C. § 1362(14) (emphasis added). The definition includes, "but [is] not limited to[,] any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft." *Id.*; *see also Consol. Coal Co. v. Costle*, 604 F.2d 239, 249–50 (4th Cir. 1979), *rev'd in part sub nom. EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 101 S.Ct. 295, 66 L.Ed.2d 268 (1980) (finding that "discharges which are pumped, siphoned or drained" fall within the definition of discharges from a "point source"); *Appalachian Power*, 545 F.2d at 1373 (concluding that "point source" pollution does not include "unchanneled and uncollected surface waters"). At its core, the Act's definition makes clear that some facility must be involved that functions as a discrete, not generalized, "conveyance."
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> "Conveyance" is a well-understood term; it requires a channel or medium—i.e., a facility—for the movement of something from one place to another. *See Webster's Third New International Dictionary* 499 (1961); *The American Heritage Dictionary of the English Language* 291–92 (1976); *see also S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105, 124 S.Ct. 1537, 158 L.Ed.2d 264 (2004) ("[A] point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters' " (emphasis added)). If no such conveyance produces the discharge at issue, the discharge would not be regulated by the Clean Water Act, though it might be by the RCRA, which covers and regulates the storage of solid waste, including coal ash, and its effect on groundwater.

2018 WL 4343513, at *5. The court felt that

> [t]his understanding of the Clean Water Act's point-source requirement is consistent with the larger scheme of pollution regulation enacted by Congress. In regulating discharges of pollutants from point sources, Congress clearly intended to target the *measurable* discharge of pollutants. Not only is this revealed by the definitional text of "point source," but it is also manifested in the effluent limitation enforcement scheme that the Clean Water Act employs. The National Pollutant Discharge Elimination System Program and § 1311's enforcement scheme specifically rely on "effluent limitation[s]"—restrictions on the "quantities, rates, and concentrations" of pollutants discharged into navigable waters. 33 U.S.C. § 1362(11) (defining "effluent limitation"). And state-federal permitting programs under the Clean Water Act apply these precise, numeric limitations to discrete outfalls and other "point sources," *see [EPA v. California ex rel. Res. Control Bd*., 426 U.S. [200,] 205–08 . . . (1976), at which compliance can be readily monitored. When a source works affirmatively to *convey* a pollutant, the concentration of the pollutant and the rate at which it is discharged by that conveyance *can be measured*. But when the alleged discharge is diffuse and not the product of a discrete conveyance, that task is virtually impossible.

Id. at *6.

[7]In *Kentucky Waterways*, the district court dismissed the plaintiffs' CWA claim, rejecting their argument that pollution via hydrologically connected groundwater could support CWA liability.

> pollutants to travel from a point source *through* nonpoint sources en route to navigable waters. The CWA's text suggests otherwise.
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> First, the guidelines by which a CWA-regulated party must abide—the heart of the CWA's regulatory power—are known as "effluent limitations." 33 U.S.C. § 1362(11); §1314(b) These are caps on the quantities of pollutants that may be discharged from a point source and are prescribed on an industry-by-industry basis. *See* 33 U.S.C. § 1314(b). The CWA defines effluent limitations as restrictions on the amount of pollutants that may be "discharged from point sources *into* navigable waters." *Id.* § 1362(11) (emphasis added). The term "into" indicates directness. It refers to a point of *entry*. *See Into*, Webster's Third New International Dictionary, Unabridged. 2018.. Web. 22 Aug. 2018. ("[E]ntry, introduction, insertion."); *Into*, Oxford English Dictionary (2d ed. 1989) ("Expressing motion to a position within a space or thing: To point within the limits of; to the interior of; *so as to enter*.") (emphasis added). Thus, for a point source to discharge *into* navigable waters, it must dump *directly* into those navigable waters—the phrase "into" leaves no room for intermediary mediums to carry the pollutants.
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> Moreover, the CWA addresses only pollutants that are added "*to* navigable waters *from* any point source." 33 U.S.C. § 1362(12) (emphasis added). Accordingly, the CWA requires two things in order for pollution to qualify as a "discharge of a pollutant": (1) the pollutant must make its way to a navigable water (2) by virtue of a point-source conveyance.

Id. at ---.

Like the defendant utility company in *Kentucky Waterways,* TVA "is discharging pollutants into the groundwater and the groundwater is adding pollutants to" the Cumberland River. *Id.* "But groundwater is not a point source. Thus, when the pollutants are discharged to the river, they are not coming *from* a point source; they are coming from groundwater which is a nonpoint-source conveyance. The CWA has no say over that conduct." *Id.* For this reason, any alleged leakages into the groundwater are not a violation of the CWA.

Also similar to the plaintiffs in *Kentucky Waterways Alliance*, Plaintiffs here rely on Justice Scalia's statement in *Rapanos v. United States*, 547 U.S. 715 (2006) that "[t]he [CWA] does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the addition of any pollutant *to* navigable waters.'" *Id.* at 743 (plurality opinion) (quoting 33 U.S.C. § 1362(12)(A)). But, as we discuss in *Kentucky Waterways*, that quote has been taken out of context, and the courts and litigants that rely on it in support of the hydrological connection theory

> have erred for a number of reasons. Not the least of which is that *Rapanos* is not binding here: it is a four-justice plurality opinion answering an entirely different legal question. *See id.* at 739 (concluding that certain wetlands and intermittent streams did not themselves fall within the CWA's definition of navigable waters). In any event, when Justice Scalia pointed out the absence of the word "directly" from § 1362(12)(A), he did so to explain that pollutants which travel through multiple *point sources* before discharging into navigable waters are still covered by the CWA. *Id.* at 743 ("[T]he discharge into intermittent channels of any pollutant that naturally washes downstream likely violates [the CWA], even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between. (emphasis omitted)). Justice Scalia's reference to "conveyances"—the CWA's definition of a point source—reveals his true concern. He sought to make clear that intermediary point sources do not break the chain of CWA liability; the opinion says nothing of point-source-to-nonpoint-source dumping like that at issue here. And the facts in *Rapanos* confirm this to be true. The three wetlands that the Supreme Court defined out of the CWA in *Rapanos* were all linked to navigable waters by multiple different point sources (drains, ditches, creeks, and the like). *Id.* at 729-30. Thus, our holding today does not stand in conflict with the *Rapanos* plurality.

Ky. Waterways All., --- F.3d ---, No. 18-5115, at ---. We further concluded that the CWA's other provisions and corresponding federal environmental laws strengthened this reading, which brings us to TVA's next argument—that the district court's hydrological connection holding directly conflicts with RCRA and the CCR Rule.

2. Statutory Context

Along with protecting the "Nation's waters," the CWA also protects the primary rights and responsibilities of the States to regulate pollution. 33 U.S.C. § 1251(a), (b). Congress specifically designed other environmental statutes to partner with the CWA:

> RCRA is designed to work in tandem with other federal environmental protection laws, including the CWA. *See* 42 U.S.C. § 6905(b) ("The [EPA] shall integrate all provisions of [RCRA] for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of . . . [the CWA]."). For that reason, RCRA and the CWA should be read as complementary statutes, each addressed at regulating different potential environmental hazards. *Cf. Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972) (statutes that "pertain to the same subject" may be treated "as if they were one law," because "whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject").

Ky. Waterways All., --- F.3d ---, No. 18-5115, at ---. Moreover, allowing the CWA to cover pollution of this sort would disrupt the existing regulatory framework. Because "RCRA explicitly exempts from its coverage any pollution that is subject to CWA regulation," *id*., 42 U.S.C. §6903 (27), reading the CWA in this way would remove coal ash treatment and storage practices from RCRA's coverage. "But coal ash is solid waste, and RCRA is specifically designed to cover solid waste." *Id*. Thus, the proposed CWA reading would be "problematic." *Id.*

Even "more problematic"

> is the fact that, pursuant to RCRA, the EPA has issued a formal rule that specifically covers coal ash storage and treatment. *See* 80 Fed. Reg. 21,302 (Apr. 17, 2015) (the "CCR Rule"). The CCR Rule was designed to regulate, among other things, coal ash ponds. *Id*. at 21,303. Yet because the EPA issued the CCR Rule under RCRA, reading the CWA to cover coal ash ponds would gut the rule. Adopting Plaintiffs' reading of the CWA would mean that any coal ash pond with a hydrological connection to a navigable water would require an NPDES permit, thus removing it from RCRA's coverage and with it, the CCR Rule. Almost all coal ash ponds sit near navigable waterways because of the large amounts of water needed to operate coal-fired power plants. As such, adopting Plaintiffs' interpretation of the CWA would leave the CCR Rule virtually useless. We decline to interpret the CWA in a way that would effectively nullify the CCR Rule and large portions of RCRA.

Id., --- F.3d ---, No. 18-5115, at --- (citation omitted).

The CCR Rule "specifically addresses the 'disposal of coal [ash] as solid waste under [RCRA]." *Id*. at ---, (quoting 80 Fed. Reg. at 21,302). The CCR Rule therefore "requires any existing unlined CCR surface impoundment that is contaminating groundwater above a regulated constituent's groundwater protection standard to stop receiving CCR and either retrofit or close." *Id*. (quoting 80 Fed. Reg. at 21,302). The rule also establishes minimum criteria for CCR surface impoundments, requires groundwater monitoring, and further demands corrective action where groundwater contamination exceeds accepted levels. *Id.* (citing 80 Fed. Reg. at 21,396-408). In other words, the CCR Rule, not the CWA, is the framework envisioned by Congress (by delegating rulemaking authority to the EPA through RCRA) to address the problem of groundwater contamination caused by coal ash impoundments.

For these reasons, we hold that the district court erred in adopting Plaintiffs' theory that the CWA prohibits discharges of pollutants through groundwater that is hydrologically connected to navigable waters.

B. Removed-Substances and Sanitary-Sewer Overflow Provisions

Because the district court also held that TVA violated the CWA based on two other provisions of the Permit, our inquiry is not yet at an end. TVA challenges the district court's holdings that TVA violated the Permit's removed-substances and sanitary-sewer overflow provisions based on Plaintiffs' demonstration of unauthorized discharges of coal ash from the Complex. NPDES permits are interpreted like contracts. *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty.*, 268 F.3d 255, 269 (4th Cir. 2001).

1. Removed-Substances Provision

The removed-substances provision is found in Part I of the Permit, which sets forth "Effluent Limitations and Monitoring Requirements." It provides that "TVA Gallatin Fossil Plant is authorized to discharge" enumerated pollutants "through Outfall 001," including "ash transport water" and "ash sluice water leakage." These discharges are "limited and monitored by the permittee" according to specified "parameters," limitations on quantities, rates, and concentrations of specified chemicals. Part I.A(c) by its terms, is an "[a]dditional monitoring requirement[] and condition[]applicable to Outfalls 001, 002, and 004." It states that "[s]ludge or any other material removed by any treatment works must be disposed of in a manner, which prevents its entrance into or pollution of any surface or subsurface waters."

Noting that some of the ash waste produced as a result of the sluicing process escapes to the Cumberland River, the district court held simply that "Plaintiffs' demonstration of unauthorized discharges from the Ash Pond Complex" established "a violation of the facial terms of Part I.A(c)." But karst-related leaks are not discharges from "Outfalls 001, 002, and 004." Thus, this provision simply does not apply, and was therefore not violated by the conduct at issue in this case.

2. Sanitary-Sewer Overflow Provision

The sanitary-sewer overflow provision, found in Part II of the Permit, prohibits "the discharge to land or water of wastes from any portion of the collection, transmission, or treatment system other than through permitted outfalls." The district court held that, "[a]s with [the removed-substances provision], this allegation is resolved by Plaintiffs' demonstration that TVA improperly discharged coal ash waste through leaks to the . . . Complex."

But this provision also cannot be reasonably read to cover karst-related leaks. While the Permit does not define sewage, it treats it as a distinct type of "Pollutant" distinct from "industrial wastes, or other wastes." *See* 33 U.S.C. §1362(6) (defining "pollutant" as including "sewage" as well as "chemical wastes"). This distinction is consistent with the EPA definition of sanitary-sewer overflow as involving "[a]n untreated or partially treated *sewage* release from a sanitary sewer system." The EPA's NPDES Permit Writers' Manual states that "occasional, unintentional spills of raw sewage from municipal sanitary sewers occur in almost every system. Such types of releases are called sanitary sewer overflows (SSOs)." The district court, by treating coal ash wastewater as a sanitary-sewer overflow, ignored the plain meaning of sewage. Further, the Permit treats these types of pollutants differently. Industrial wastes like "discharge ash transport water" and "ash sluice water leakage" are authorized with limitations while "Sanitary Sewer Overflows are prohibited." Thus, karst-related leakage cannot be a violation of this provision.

Because the plain language of these two provisions does not apply to karst-related discharges from the Complex, there is no violation of the Permit. Neither provision supports the district court's injunction. Given this conclusion, we need not address TVA's arguments that that the collateral attack and permit shield doctrines shield it from liability.

C. Injunctive Relief

Without CWA liability, the district court's injunction has no foundation. Its imposition was therefore an abuse of discretion.

IV. CONCLUSION

As the district court rightly concluded, "an unlined [coal] ash waste pond in karst terrain immediately adjacent to a river" that leaks pollutants into the groundwater is a major environmental problem that the Permit does not adequately address. But the CWA is not the proper legal tool of correction. Fortunately, other environmental laws have been enacted to remedy these concerns. For these reasons, as well as those articulated in *Kentucky Waterways*, we REVERSE the judgment of the district court imposing CWA liability on TVA.

DISSENT

CLAY, Circuit Judge, dissenting. Can a polluter escape liability under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251–1387, by moving its drainage pipes a few feet from the riverbank? The Fourth and Ninth Circuits have said no. In two cases today,[1] the majority says yes. Because the majority's conclusion is contrary to the plain text and history of the CWA, and because I disagree with the majority's analysis of the permit's Sanitary Sewer Overflow provision, I respectfully dissent from the majority's position as to these issues.

I. Scope of the Clean Water Act

Plaintiffs have invoked the CWA's citizen-suit provision, which provides that "any citizen may commence a civil action . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter[.]" 33 U.S.C. § 1365(a). "For purposes of this section, the term 'effluent standard or limitation under this chapter' means," among other possibilities, "an unlawful act under subsection (a) of section 1311 of this title." § 1365(f). In turn, § 1311(a) prohibits "the discharge of any pollutant by any person[.]"

The broad sweep of a defendant's potential CWA liability is limited in two ways. First, Congress included a list of exceptions in § 1311(a) itself: the discharge of a pollutant is unlawful "[e]xcept in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title." Second, Congress gave the phrase "discharge of a pollutant" a very specific definition: it means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). Taken together, Congress thus authorized citizen suits to prevent the "addition of any pollutant to navigable waters from any point source," *see* § 1362(12)(A), but if a listed statutory exception applies, *see* § 1311(a).

The majority argues that this standard cannot be satisfied when, as here, pollution travels briefly through groundwater before reaching a navigable water. Plaintiffs counter that such an

[1]The other case is Case No. 18-5115, *Kentucky Waterways Alliance, et al. v. Kentucky Utilities Co.*

exception has no statutory basis and would allow polluters to shirk their CWA obligations by placing their underground drainage pipes a few feet away from the shoreline. This case could have profound implications for those in this Circuit who would pollute our Nation's waters. And the issue is novel. This Court has never before considered whether the CWA applies in this context.

However, the Fourth and Ninth Circuits have. Both courts determined that a short journey through groundwater does not defeat CWA liability. *See Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 649–51 (4th Cir. 2018); *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 745–49 (9th Cir. 2018). The Second Circuit reached a similar conclusion where the pollutants traveled briefly through fields (which are not necessarily point sources) and through the air. *See Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 118–19 (2d Cir. 1994) (fields); *Peconic Baykeeper, Inc. v. Suffolk Cty.*, 600 F.3d 180, 188–89 (2d Cir. 2010) (air). Until today, no Circuit had come out the other way. The reason is simple: the CWA does not require a plaintiff to show that a defendant discharged a pollutant from a point source *directly* into navigable waters; a plaintiff must simply show that the defendant "add[ed] . . . any pollutant *to* navigable waters *from* any point source." *See* §§ 1362(12)(A) (emphases added), 1365(a), 1311(a); *Upstate Forever*, 887 F.3d at 650; *Hawai'i Wildlife Fund*, 886 F.3d at 749.

The Supreme Court addressed this precise issue in *Rapanos v. United States*, 547 U.S. 715 (2006). There, Justice Scalia's plurality opinion was explicit:

> The Act does not forbid the "addition of any pollutant *directly* to navigable waters from any point source," but rather the "addition of any pollutant *to* navigable waters." [33 U.S.C.] § 1362(12)(A) (emphasis added); § 1311(a). Thus, from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between. *United States v. Velsicol Chemical Corp.*, 438 F. Supp. 945, 946–947 (W.D.Tenn. 1976) (a municipal sewer system separated the "point source" and covered navigable waters). See also *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1137, 1141 (C.A.10 2005) (2.5 miles of tunnel separated the "point source" and "navigable waters").

Id. at 743 (plurality opinion) (emphasis in original). True, Justice Scalia's plurality opinion is not binding. But no Justice challenged this aspect of the opinion, and for good reason: the statutory text unambiguously supports it.

Further, applying the CWA to point-source pollution traveling briefly through groundwater before reaching a navigable water promotes the CWA's primary purpose, which is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). By contrast, the majority's approach defeats the CWA's purpose by opening a gaping regulatory loophole: polluters can avoid CWA liability by discharging their pollutants into groundwater, even if that groundwater flows immediately into a nearby navigable water. This exception has no textual or logical foundation. As one district court observed,

> it would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via the groundwater.

See N. Cal. River Watch v. Mercer Fraser Co., No. C-04-4620 SC, 2005 WL 2122052, at *2 (N.D. Cal. Sept. 1, 2005). In addition, this exception has no apparent limits. Based on the majority's logic, polluters are free to add pollutants to navigable waters so long as the pollutants travel through any kind of intermediate medium—for example through groundwater, across fields, or through the air. This would seem to give polluters free rein to discharge pollutants from a sprinkler system suspended above Lake Michigan. After all, pollutants launched from such a sprinkler system would travel "in all directions, guided only by the general pull of gravity." *Kentucky Waterways Alliance*, 18-5115 at 11. According to the majority, this would defeat CWA liability.[2]

[2]The majority declines to reverse the district court's other finding that a coal ash pond is a point source under the CWA, but suggests disagreement in a footnote. The CWA defines "point source" as "any discernible, confined and discrete conveyance," including "any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The majority cites a recent Fourth Circuit case, *Sierra Club v. Va. Elec. & Power Co.*, No. 17-1952, --- F.3d ---, 2018 WL 4343513 (4th Cir. Sept. 12, 2018), which held that a coal ash pond is not a point source because it was a "static recipient[] of the precipitation and groundwater that flowed through [it]." 2018 WL 4343513 at *6. Looking at the text of the CWA, however, shows that, *inter alia*, "ditch[es], well[s], container[s]," and "vessel[s]" are included in the definition. 33 U.S.C. § 1362(14). The canon of

I have a very different view. In cases where, as here, a plaintiff alleges that a defendant is polluting navigable waters through a complex pathway, the court should require the plaintiff to prove the existence of pollutants in the navigable waters and to persuade the factfinder that the defendant's point source is to blame—that the defendant is unlawfully "add[ing] . . . any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). The more complex the pathway, the more difficult the proof. Where these cases are plausibly pleaded, they should be decided on the facts.

Instead, the majority holds that a plaintiff may never—as a matter of law—prove that a defendant has unlawfully added pollutants to navigable waterways via groundwater. For its textual argument, the majority refers us to the term "effluent limitations." This term, the majority says, is defined as "restrictions on the amount of pollutants that may be 'discharged from point sources *into* navigable waters.'" Maj. Op. at 11 (quoting with emphasis 3 U.S.C. § 1362(11)). Seizing on the word "into"—which denotes "entry, introduction, insertion"—the majority concludes that the effluent-limitation definition implicitly creates an element of "directness." In other words, the majority reasons, "for a point source to discharge *into*

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ejusdem generis states that "the general term must take its meaning from the specific terms with which it appears." *Retail Ventures, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 691 F.3d 821, 833 (6th Cir. 2012). The common denominator between wells, containers, ditches, and vessels is that each is a man-made, defined area where liquid collects. The canon of *ejusdem generis* thus suggests that man-made coal ash ponds are included in this definition. The Fourth Circuit instead cites a dictionary definition of "conveyance" as "a facility—for the movement of something from one place to another" without explaining how items like wells, containers, and vessels fit this definition. *Va. Elec. & Power Co.*, 2018 WL 4343513, at *5 (quoting *Webster's Third New International Dictionary* 499 (1961)). The Fourth Circuit suggests that a container can be a point source only if it is in the act of conveying something, 2018 WL 4343513, at *7, ignoring that the statutory definition includes "*any* … container … from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added).

The Fourth Circuit's approach is further misguided in that it conflicts with the broad interpretation that federal courts have traditionally given to the phrase "point source." *See, e.g.*, *Simsbury-Avon Pres. Club, Inc. v. Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2d Cir. 2009) (quoting *Dague v. City of Burlington,* 935 F.2d 1343, 1354–55 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992)) ("[T]he definition of a point source is to be broadly interpreted."); *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 955 (9th Cir. 2002) (quoting *Dague,* 935 F.2d at 1354–55); *Cmty. Ass'n for Restoration of Env't (CARE) v. Sid Koopman Dairy*, 54 F. Supp. 2d 976, 980 (E.D. Wash. 1999) (citing *Dague,* 935 F.2d at 1354–55); *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 444 (M.D. N.C. 2015) (quoting *Dague,* 935 F.2d at 1354–55); *see United States v. Earth Scis., Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) ("[T]he concept of a point source was designed to further [the CWA's regulatory] scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States."). By embracing a restrictive definition of what constitutes a point source, the Fourth Circuit jettisons these long-standing principles.

navigable waters, it must dump *directly* into those navigable waters[.]" *Id.* (emphasis in original).

The majority is way off the rails. First of all, "Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626–27 (2018) (quoting *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)). The majority should heed this commonsense advice. Congress did not hide a massive regulatory loophole in its use of the word "into."

But more importantly, the majority's quoted definition of "effluent limitation" from § 1362(11)—the supposed origin of the loophole—is not relevant to this case. The citizen-suit provision uses the term "effluent standard or limitation"—not the term "effluent limitation." *See* 33 U.S.C. § 1365(f). As the majority itself argues, minor distinctions in statutory language sometimes matter. This one does. The phrase "effluent standard or limitation" is a term of art and is wholly distinct from the term "effluent limitation." This conclusion is supported not by tea leaves or a carefully selected dictionary, but rather by the CWA itself. The citizen-suit provision of the CWA provides that "effluent standard or limitation" means, among other things, "an unlawful act under subsection (a) of section 1311 of this title." 33 U.S.C. § 1365(a). Turning to § 1311(a), we find that, absent certain exceptions, "the discharge of any pollutant by any person shall be unlawful," § 1311(a), and the "discharge of a pollutant" means "any addition of any pollutant *to* navigable waters from any point source," § 1362(12)(A) (emphasis added). Thus, even assuming the majority correctly parses the definition of "into"—a dubious proposition at best—the word "into" is not contained in any of the statutory provisions at issue. Rather, we find the word "to," which does not even arguably suggest a requirement of directness; the word "to" merely "indicate[s] movement or an action or condition suggestive of movement toward a place, person, or thing reached." *To*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/to.

It is therefore entirely unclear why the majority relies on the definition of "effluent limitation." That definition is simply irrelevant to this lawsuit. As a result, the majority's criticisms of the approach taken by the Fourth and Ninth Circuits miss the mark. Indeed, the

Fourth Circuit analyzed the correct statutory text when it rejected the argument that the citizen-suit provision requires directness:

> [t]he plain language of the CWA requires only that a discharge come "from" a "point source." *See* 33 U.S.C. § 1362(12)(A). Just as the CWA's definition of a discharge of a pollutant does not require a discharge directly to navigable waters, *Rapanos*, 547 U.S. at 743, 126 S.Ct. 2208, neither does the Act require a discharge directly from a point source, *see* 33 U.S.C. § 1362(12)(A). The word "from" indicates "a starting point: as (1) a point or place where an actual physical movement . . . *has its beginning*." Webster's Third New International Dictionary 913 (Philip Babcock Gove et al. eds., 2002) (emphasis added); *see also* The American Heritage Dictionary of the English Language 729 (3d ed. 1992) (noting "from" indicates a "starting point" or "cause"). Under this plain meaning, a point source is the starting point or cause of a discharge under the CWA, but that starting point need not also convey the discharge directly to navigable waters.

Upstate Forever, 887 F.3d at 650 (footnote omitted). In short, if the majority would like to add a "directness" requirement to § 1311, it must fight the statutory text to get there.

In addition, the majority fails to meaningfully distinguish Justice Scalia's concurrence in *Rapanos*, which made clear that the CWA applies to indirect pollution. It is true that *Rapanos* dealt with different facts. But it is irrelevant that the pollution in *Rapanos* traveled through point sources before reaching a navigable water, whereas the pollution in this case traveled through groundwater, which, according to the majority, is not a point source. In both cases, the legal issue is the same: whether the CWA applies to pollution that travels from a point source to navigable waters through a complex pathway. *See Rapanos*, 547 U.S. at 745 (asking whether "the contaminant-laden waters ultimately reach covered waters"). Indeed, Justice Scalia favorably cited the Second Circuit's discussion in *Concerned Area Residents for the Environment*. *Rapanos*, 547 U.S. at 744. In that case, pollutants traveled across fields—which "were not necessarily point sources themselves"—before reaching navigable waters. *Hawai'i Wildlife Fund*, 886 F.3d at 748. Given the Supreme Court plurality's endorsement of the Second Circuit's approach, the majority's attempt to distinguish *Rapanos* collapses.

Next, the majority warns that imposing liability would upset the cooperative federalism embodied by the CWA. On this view, the states alone are responsible for regulating pollution of groundwater, even if that pollution later travels to a navigable water. Wrong again. To be sure,

the CWA recognizes the "primary responsibilities and rights of States" to regulate groundwater pollution. 33 U.S.C. § 1251(b). But imposing liability in this case would not marginalize the states. To the contrary, the district court made clear that it was *not* regulating the pollution of groundwater itself. *See Tennessee Clean Water Network*, 273 F. Supp. 3d at 826 ("The Court agrees with those courts that view the issue not as whether the CWA regulates the discharge of pollutants into groundwater itself but rather whether the CWA regulates the discharge of pollutants to navigable waters via groundwater." (quotation marks, alteration, and citation omitted)). Instead, the district court was addressing pollution of a navigable water—specifically, the Cumberland River—via groundwater. This distinction was clear to the Fourth and Ninth Circuits. *See Upstate Forever*, 887 F.3d at 652 ("We do not hold that the CWA covers discharges to ground water itself. Instead, we hold only that an alleged discharge of pollutants, reaching navigable waters . . . by means of ground water with a direct hydrological connection to such navigable waters, falls within the scope of the CWA."); *Hawai'i Wildlife Fund*, 886 F.3d at 749 ("[T]he County's concessions conclusively establish that pollutants discharged from all four wells emerged at discrete points in the Pacific Ocean . . . . We leave for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA."). Accordingly, imposing liability in this case fits perfectly with the CWA's stated purpose: to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

Finally, the majority offers a narrow reading of the CWA because, in its view, a more inclusive reading would render "virtually useless" the Coal Combustion Residuals ("CCR") Rule under the Resource Conservation and Recovery Act ("RCRA"). Maj. Op. at 13. The majority notes that if a polluter's conduct is regulated through a CWA permit, then RCRA does not also apply. The majority therefore suggests that a straightforward reading of the CWA is incompatible with RCRA. The majority would gut the former statute to save the latter.

But the EPA has already dismissed the majority's concern. Indeed, the EPA issued federal regulations on this issue many decades ago. The EPA's interpretation is that the industrial discharge of waste such as CCR is subject to regulation under both RCRA and the CWA: RCRA regulates the way polluters store CCR, and the CWA kicks in the moment CCR

enters a navigable waterway. *See* 40 C.F.R. § 261.4(a)(2). The EPA first articulated this approach in a set of regulations from 1980, which provide that "[i]ndustrial wastewater discharges that are point source discharges subject to regulation under section 402 of the Clean Water Act" "are not solid wastes for the purpose of" the RCRA exclusion. 40 C.F.R. § 261.4(a)(2). This exclusion, the regulation explains, "applies only to the *actual point source discharge*. It does not exclude industrial wastewaters while they are being collected, stored or treated before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment." § 261.4(a)(2) (comment) (emphasis added). Thus, under the EPA's reading, a polluter can be liable under RCRA for improperly storing CCR—even if the CCR never enters a navigable waterway. *See id.* Conversely, a polluter can be liable under the CWA for adding CCR to a navigable waterway—even if the polluter's storage methods comport with RCRA. *See id.* And of course, a polluter can be liable under both statutes if the polluter both improperly stores CCR and discharges it to a navigable waterway. *See id.*

The EPA settled any doubts on this matter by publishing a detailed description of its rationale in the Federal Register. *See* 45 Fed. Reg. 33098. The EPA explained that 40 C.F.R. § 261.4(a)(2) reflects the EPA's interpretation that regulation of a polluter's discharge of industrial waste to a navigable waterway pursuant to the CWA does *not* trigger the 42 U.S.C. § 6903(27) exclusion and therefore does *not* exempt that polluter's storage of CCR from regulation under RCRA:

> The obvious purpose of the industrial point source discharge exclusion in Section 1004(27) was to avoid duplicative regulation of point source discharges under RCRA and the Clean Water Act. Without such a provision, the discharge of wastewater into navigable waters would be "disposal" of solid waste, and potentially subject to regulation under both the Clean Water Act and Subtitle C [of RCRA]. These considerations do not apply to industrial wastewaters prior to discharge since most of the environmental hazards posed by wastewaters in treatment and holding facilities—primarily groundwater contamination—cannot be controlled under the Clean Water Act or other EPA statutes.
>
> Had Congress intended to exempt industrial wastewaters in storage and treatment facilities from all RCRA requirements, it seems unlikely that the House Report on RCRA would have cited, as justification for the development of a national hazardous waste management program, numerous damage incidents which appear to have involved leakage or overflow from industrial wastewater impoundments. *See, e.g.*, H.R. Rep. at 21. Nor would Congress have used the term "discharge" in

> Section 1004(27). This is a term of art under the Clean Water Act (Section 504(12)) and refers only to the "addition of any pollutant to navigable waters", not to industrial wastewaters prior to and during treatment.
>
> Since the comment period closed on EPA's regulations, both Houses of Congress have passed amendments to RCRA which are designed to provide EPA with more flexibility under Subtitle C in setting standards for and issuing permits to existing facilities which treat or store hazardous wastewater. *See* Section 3(a)(2) of H.R. 3994 and Section 7 of S.1156. *See also* S. Rep. No. 96-173, 96th Cong., 1st Sess. 3 (1979); Cong. Rec. S6819, June 4, 1979 (daily ed.); Cong. Rec. H1094–1096, February 20, 1980 (daily ed.). These proposed amendments and the accompanying legislative history should lay to rest any question of whether Congress intended industrial wastewaters in holding or treatment facilities to be regulated as "solid waste" under RCRA.

45 Fed. Reg. 33098. Congress ratified the EPA's interpretation when it enacted amendments to RCRA, which the EPA said would "lay to rest" any concerns about whether industrial wastes like CCR are subject to regulation under both RCRA (in terms of their storage and treatment) and the CWA (in terms of their discharge to navigable waters). *Id.*; *see* Public Law 96-482. From this history, and from the text of the statutes, we can surmise that Congress intended to delegate to the EPA the power "to speak with the force of law" on this aspect of the interplay between RCRA and the CWA. *See United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). Exercising this authority, the EPA reached an interpretation that is different from—and incompatible with—that of the majority.

Contravening bedrock principles of administrative law, the majority bulldozes the EPA's interpretation of its own statutory authority without even discussing the possibility of deference. But "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

> In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. 467 U.S., at 865–866, 104 S.Ct. 2778. If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal

> court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005). The EPA says that imposing CWA liability for the discharge of CCR to navigable waterways does not eliminate the possibility of RCRA liability for the storage and treatment of CCR. The majority suggests the exact opposite. Unfortunately for the majority, but fortunately for those who enjoy clean water, the majority lacks the authority to override longstanding EPA regulations on a whim. *See id.*

For all these reasons, I believe the CWA clearly applies to the pollution in this case. Accordingly, I would join our sister circuits in holding that the CWA prohibits all pollution that reaches navigable waters "by means of ground water with a direct hydrological connection to such navigable waters[.]" *Upstate Forever*, 887 F.3d at 652; *see Hawai'i Wildlife Fund*, 886 F.3d at 745–49. Under this standard, the unpermitted leaks from NRS and Complex are clearly unlawful.

II. The Permit's Sanitary Sewer Overflow Provision

The permit prohibits "Sanitary Sewer Overflows," which it defines as "the discharge to land or water of wastes from any portion of the collection, transmission, or treatment system other than through permitted outfalls." (R. 1-2, permit, PageID# 79.) The district court found, and TVA no longer disputes, that the Complex discharges coal ash waste to groundwater through its unlined, leaking sides and bottoms. These discharges are not authorized by the permit. Therefore, Plaintiffs have proven a permit violation.

The majority avoids this result by overcomplicating the issue. Ignoring the plain text of the permit, the majority instead champions the EPA's standard definition of "Sanitary Sewer Overflow," which is narrow and arguably saves TVA from liability. This reasoning is perplexing. The EPA's definition should play no role in the legal analysis here because the permit itself defines "Sanitary Sewer Overflow." Indeed, TVA's permit expert conceded in the district court that the permit's definition is broader than the EPA's definition. Accordingly, this Court should apply the plain text of the permit's definition, as it would apply the plain text of

any contract. This Court has no plausible authority or reason to substitute a definition provided in the permit with one drafted in a different context by a nonparty who has no relation to this case.

Further, the EPA's standard definition makes little sense in this context. As the majority recognizes, that definition applies only to sewage from sanitary sewer systems. But a coal ash pond is not a "sanitary sewer system." It does not contain "sewage." Consequently, interpreting the Sanitary Sewer Overflow provision to regulate sewage alone would render the provision meaningless. This Court should avoid such an interpretation, especially when the permit itself provides a definition that does not trigger any such concerns. *See Gallo v. Moen Inc.*, 813 F.3d 265, 273 (6th Cir. 2016) (noting the general rule that "courts should interpret contracts to avoid superfluous words").

For these reasons, I would hold that the district court correctly ruled that the Complex's karst-related leaks violate the sanitary-sewer provision.

Conclusion

As set forth above, I believe that the CWA applies to TVA's indirect pollution of navigable waters and that TVA violated the permit's Sanitary Sewer Overflow provision. Because the majority disagrees as to both issues, I respectfully dissent.

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1895

SIERRA CLUB,

Plaintiff - Appellee,

v.

VIRGINIA ELECTRIC & POWER COMPANY, f/k/a Dominion Virginia Power, d/b/a Dominion Energy Virginia,

Defendant - Appellant,

and

VIRGINIA CHAMBER OF COMMERCE, VIRGINIA MANUFACTURERS ASSOCIATION, EDISON ELECTRIC INSTITUTE, UTILITY WATER ACT GROUP, AND UTILITY SOLID WASTE ACTIVITIES GROUP,

Amici Supporting Appellant,

WATERKEEPER ALLIANCE, INCORPORATED; CAPE FEAR RIVER WATCH; CATAWBA RIVERKEEPER FOUNDATION; COASTAL CAROLINA RIVER WATCH; CONGAREE RIVERKEEPER, INC.; EDISTO RIVERKEEPER; HAW RIVER ASSEMBLY; MIDSHORE RIVERKEEPER CONSERVANCY, INC.; MOUNTAINTRUE; POTOMAC RIVERKEEPER NETWORK, INC.; SASSAFRAS RIVER ASSOCIATION, INC.; SOUND RIVERS, INC.; VIRGINIA EASTERN SHOREKEEPER, INC.; WEST VIRGINIA RIVERS COALITION; WINYAH RIVERS FOUNDATION, INC.; YADKIN RIVERKEEPER, INC.; CITY OF CHESAPEAKE,

Amici Supporting Appellee.

No. 17-1952

SIERRA CLUB,

Plaintiff - Appellant,

v.

VIRGINIA ELECTRIC & POWER COMPANY, f/k/a Dominion Virginia Power, d/b/a Dominion Energy Virginia,

Defendant - Appellee.

VIRGINIA CHAMBER OF COMMERCE; VIRGINIA MANUFACTURERS ASSOCIATION; EDISON ELECTRIC INSTITUTE; UTILITY WATER ACT GROUP; UTILITY SOLID WASTE ACTIVITIES GROUP,

Amici Supporting Appellee,

WATERKEEPER ALLIANCE, INCORPORATED; CAPE FEAR RIVER WATCH; CATAWBA RIVERKEEPER FOUNDATION; COASTAL CAROLINA RIVER WATCH; CONGAREE RIVERKEEPER, INC.; EDISTO RIVERKEEPER; HAW RIVER ASSEMBLY; MIDSHORE RIVERKEEPER CONSERVANCY, INC.; MOUNTAINTRUE; POTOMAC RIVERKEEPER NETWORK, INC.; SASSAFRAS RIVER ASSOCIATION, INC.; SOUND RIVERS, INC.; VIRGINIA EASTERN SHOREKEEPER, INC.; WEST VIRGINIA RIVERS COALITION; WINYAH RIVERS FOUNDATION, INC.; YADKIN RIVERKEEPER, INC.; CITY OF CHESAPEAKE,

Amici Supporting Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. Gibney, Jr., District Judge. (2:15-cv-00112-JAG-RJK)

Argued: March 21, 2018 Decided: September 12, 2018

Before NIEMEYER and THACKER, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed in part and reversed in part by published opinion. Judge Niemeyer wrote the opinion, in which Judge Thacker and Senior Judge Traxler joined.

ARGUED: Jeffrey A. Lamken, MOLOLAMKEN LLP, Washington, D.C., for Appellant/Cross-Appellee. Frank S. Holleman, III, SOUTHERN ENVIRONMENTAL LAW CENTER, Chapel Hill, North Carolina, for Appellee/Cross-Appellant. **ON BRIEF:** Brooks M. Smith, Dabney J. Carr, IV, TROUTMAN SANDERS LLP, Richmond, Virginia; Robert K. Kry, James A. Barta, Washington, D.C., Ekta R. Dharia, MOLOLAMKEN LLP, New York, New York, for Appellant/Cross-Appellee. Deborah M. Murray, Nathaniel H. Benforado, Charlottesville, Virginia, Christopher J. Bowers, SOUTHERN ENVIRONMENTAL LAW CENTER, Atlanta, Georgia, for Appellee/Cross-Appellant. Kristy A.N. Bulleit, Washington, D.C., Michael R. Shebelskie, HUNTON ANDREWS KURTH LLP, Richmond, Virginia, for Amici Virginia Chamber of Commerce, Virginia Manufacturers Association, Edison Electric Institute, and Utility Water Act Group. Douglas H. Green, John F. Cooney, Margaret K. Fawal, VENABLE LLP, Washington, D.C., for Amicus Utility Solid Waste Activities Group. Reed W. Super, Nicholas W. Tapert, SUPER LAW GROUP, LLC, New York, New York, for Amici Waterkeeper Alliance, Inc., Cape Fear River Watch, Inc., Catawba Riverkeeping Foundation, Inc., Coastal Carolina River Watch, Congaree Riverkeeper, Inc., Edisto Riverkeeper, Haw River Assembly, Midshore Riverkeeper Conservancy, Inc., MountainTrue, Potomac Riverkeeper Network, Inc., Sassafras River Association, Inc., Sound Rivers, Inc., Virginia Eastern Shorekeeper, Inc., West Virginia Rivers Coalition, Winyah Rivers Foundation, Inc., and Yadkin Riverkeeper, Inc. Jan L. Proctor, City Attorney, Ellen F. Bergren, Assistant City Attorney, Ryan C. Samuel, Assistant City Attorney, OFFICE OF THE CITY ATTORNEY, Chesapeake, Virginia, for Amicus City of Chesapeake.

NIEMEYER, Circuit Judge:

For over 60 years, Virginia Electric & Power Company, d/b/a Dominion Energy Virginia ("Dominion"), operated a coal-fired power plant in Chesapeake, Virginia, that produced coal ash as a by-product of the coal combustion. Pursuant to permits issued by the Virginia Department of Environmental Quality ("VDEQ") under the Clean Water Act and the Resource Conservation and Recovery Act, Dominion stored the coal ash on site in a landfill and in settling ponds.

Through groundwater monitoring that was required by the VDEQ permits, Dominion began in 2002 to detect arsenic in the groundwater at levels that exceeded Virginia's groundwater quality standards. Arsenic leaches from coal ash when water passes through it. As required, Dominion notified the VDEQ and began developing and implementing a corrective action plan with the VDEQ to mitigate the pollution. The VDEQ approved the plan in 2008. In 2014, Dominion closed its Chesapeake plant and began making arrangements with the VDEQ to close the landfill and settling ponds.

In March 2015, Sierra Club commenced this action against Dominion under the citizen-suit provision of the Clean Water Act, alleging that Dominion was violating 33 U.S.C. § 1311(a), which prohibits the unauthorized "discharge of any pollutant" into navigable waters. Under the Act, the discharge of a pollutant is defined to mean the "addition of any pollutant to navigable waters from any point source." *Id*. § 1362(12). According to Sierra Club's complaint, the landfill and settling ponds qualified as point sources from which arsenic seeped, polluting the groundwater around Dominion's plant and ultimately the navigable waters of the nearby Elizabeth River and Deep Creek.

Based on these same allegations, Sierra Club also claimed that Dominion was violating two conditions of its Clean Water Act discharge permit.

Following a bench trial, the district court found that rainwater and groundwater were indeed leaching arsenic from the coal ash in the landfill and settling ponds, polluting the groundwater, which carried the arsenic into navigable waters. And because the court determined that the landfill and settling ponds constituted "point sources" as defined by the Act, it found Dominion liable for ongoing violations of § 1311(a). The court, however, deferred to the VDEQ's understanding that the two conditions in Dominion's discharge permit identified in Sierra Club's complaint did not cover the groundwater contamination at issue and ruled against Sierra Club on the claims alleging breach of those conditions. Dominion appealed, and Sierra Club cross-appealed.

Because we conclude that the landfill and settling ponds on the Chesapeake site do not constitute "point sources" as that term is defined in the Clean Water Act, we reverse the district court's ruling that Dominion was liable under § 1311(a) of the Act. We agree, however, with the district court's conclusion that the conditions in Dominion's discharge permit did not regulate the groundwater contamination at issue and affirm on those claims.

I

The Clean Water Act was enacted in 1972 with the stated objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To those ends, the Act prohibits the "discharge of any pollutant by any

person" into navigable waters unless otherwise authorized by the Act. *Id*. § 1311(a). The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." *Id*. § 1362(12). And "point source" is defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." *Id*. § 1362(14). Accordingly, the addition of pollutants to navigable waters from *nonpoint sources* does not violate § 1311(a). *See Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) ("Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the [Clean Water] Act to regulate only the former").

As recognized in § 1311(a), the Act does provide for the issuance of permits authorizing the discharge of pollutants into navigable waters in compliance with specified effluent standards. In 50 U.S.C. § 1342(a), the Act established the National Pollutant Discharge Elimination System, under which the EPA may "issue a permit for the discharge of any pollutant" provided that the authorized discharge complies with the effluent standards specified in the permit or otherwise imposed by the Act. Through that System, the EPA also shares regulatory authority with the States, and a State can elect to establish its own permit program, subject to the EPA's approval. *Id*. § 1342(b)–(c); *see EPA v. California ex rel. State Water Res. Control Bd*., 426 U.S. 200, 205–08 (1976). When a State elects to establish its own program, the EPA suspends its federal permit program and defers to the State's, allowing the state discharge permit to authorize effluent discharges under both state and federal law.

While § 1311(a)'s prohibitive scope is limited to the discharge of pollutants from point sources, pollution from the storage of solid waste, such as coal ash, is regulated by the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et. seq*. The RCRA "is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996). The Act distinguishes between hazardous and nonhazardous solid waste, and although hazardous waste facilities are subject to direct federal oversight, the nonhazardous waste facilities, such as those created to store coal ash, remain "primarily the function of State, regional, and local agencies" with the "financial and technical assistance and leadership" of federal authorities. 42 U.S.C. § 6901(a)(4). Nonetheless, the EPA has specifically promulgated "minimum national criteria" governing the design, management, and closure of facilities storing coal combustion residuals like coal ash. *See* 40 C.F.R. §§ 257.50–257.107. These facilities are required to obtain a permit either directly from the EPA or from an EPA-approved state program that mandates compliance with the minimum national criteria, as well as any other conditions imposed by the issuing state agency. 42 U.S.C. § 6945(d).

Virginia has elected to implement permitting programs under both the Clean Water Act and the RCRA. The VDEQ administers an EPA-approved program under the Clean Water Act for the issuance of permits covering the "[d]ischarge into state waters [of] sewage, industrial wastes, other wastes, or any noxious or deleterious substances." Va. Code Ann. § 62.1-44.5. And it administers a program under the RCRA regulating the storage, treatment, and disposal of solid waste through its Waste Management Act,

Va. Code Ann. § 10.1-1400 *et. seq*. Operators of landfills or other facilities for the storage or treatment of coal combustion residuals must obtain a permit from the VDEQ that incorporates existing EPA regulations, including the minimum national criteria for coal ash sites. *See* Va. Code Ann. § 10.1-1408.1; 9 Va. Admin. Code §§ 20-81-800, 20-81-810.

II

From 1953 until 2014, Dominion operated a coal-fired power plant at its Chesapeake site, which is situated on a peninsula surrounded by the Elizabeth River to the east, Deep Creek to the south, and a man-made cooling channel to the west — all navigable waters.

While in operation, the Chesapeake plant generated large amounts of coal ash that Dominion stored on site. Coal ash was pumped as part of a slurry into settling ponds, and once the ash settled, the water was discharged into the nearby navigable waters, as authorized by a discharge permit issued by the VDEQ. Also, pursuant to a RCRA solid-waste permit issued by the VDEQ, Dominion stored dry coal ash in a landfill on the Chesapeake site. As a condition of this permit, Dominion was required to monitor the groundwater on the peninsula, and thus Dominion installed a system of wells around the edge of the peninsula that it used to conduct groundwater tests. The results of those tests were routinely submitted to the VDEQ for review.

Beginning in 2002, Dominion's tests revealed that the level of arsenic in the groundwater on the peninsula exceeded state groundwater protection standards. As

required by its RCRA solid-waste permit, Dominion developed and implemented a corrective plan that it submitted to the VDEQ for public comment and agency review. The VDEQ approved the plan in 2008, and it was incorporated into Dominion's RCRA solid-waste permit in 2011.

In 2014, Dominion ceased operations at the Chesapeake plant, and by October 2015, it finished depositing coal ash on the site. In early 2016, Dominion submitted a permanent landfill closure plan and post-closure care plan to the VDEQ to be incorporated into its RCRA solid-waste permit. Dominion also submitted a closure plan and post-closure care plan for its settling ponds to the VDEQ for inclusion in its Clean Water Act discharge permit.

Sierra Club commenced this action in March 2015 against Dominion under the Clean Water Act's citizen-suit provision, 33 U.S.C. § 1365. The complaint alleged three ongoing violations of the Act. *First*, in Count One, it claimed that the seepage of arsenic from the coal ash into the nearby Elizabeth River and Deep Creek was violating § 1311(a)'s general prohibition against the unauthorized discharge of a pollutant from a point source into navigable waters. It asserted in particular that the coal ash storage facilities were point sources and that arsenic leached from them into the groundwater, which was "hydrologically connected" to the Elizabeth River and Deep Creek, thereby carrying arsenic to navigable waters. *Second*, in Count Two, it claimed that based on the same allegations, Dominion was violating Condition II.R of its Clean Water Act discharge permit. *Finally*, in Count Three, it claimed, again based on the same factual allegations, that Dominion was violating Condition II.F of its discharge permit. For

relief, Sierra Club requested comprehensive injunctive relief, as well as the assessment of civil penalties.

Following a bench trial, the district court found that Dominion was violating § 1311(a), as alleged in Count One, but that it was not violating the two conditions, as alleged in Counts Two and Three. The district court rejected Dominion's argument that § 1311(a) of the Clean Water Act did not cover the seepage of arsenic from coal ash into the groundwater, concluding that the Act did indeed cover discharges into groundwater that had a "direct hydrological connection" to navigable waters such that the pollutant would reach navigable waters through the groundwater. And it found as fact that arsenic was reaching the Elizabeth River, Deep Creek, and the cooling channel in that manner. The court also rejected Dominion's argument that the landfill and settling ponds were not point sources because they were not conveyances. It stated, "Dominion built the [coal ash] piles and ponds to concentrate coal ash, and its constituent pollutants, in one location," and that that "one location channels and conveys arsenic directly into the groundwater and thence into the surfacewaters." As to Counts Two and Three, however, the district court deferred to the VDEQ's determination that the discharge permit did not govern the seepage of pollutants into groundwater at the Chesapeake site. For relief, the court entered a limited injunction requiring Dominion to implement a plan in coordination with the VDEQ to address the pollution, and it declined to impose civil penalties.

From the district court's orders, Dominion filed this appeal challenging the court's conclusions (1) that the Clean Water Act regulates discharges into navigable waters

through hydrologically connected groundwater and (2) that the coal ash piles and ponds constitute "point sources" under the Clean Water Act. Sierra Club cross-appealed, arguing that the district court wrongly deferred to the VDEQ's interpretation of the permit conditions contrary to the plain terms of those conditions. It also challenges the limited injunctive relief granted and the court's failure to award civil penalties.

III

Dominion contends first that the district court erred in concluding that the discharge of pollutants into groundwater that is hydrologically connected to navigable waters is regulated by the Clean Water Act, 33 U.S.C. §§ 1311(a), 1362(12) (prohibiting the "discharge of any pollutant" and defining discharge of a pollutant as the addition of a pollutant "to navigable waters from any point source"). It argues that § 1311(a) only regulates discharges directly into navigable waters, not discharges into groundwater that is connected to navigable waters.

That issue was recently addressed by us in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018), where we held that the addition of a pollutant into navigable waters *via groundwater* can violate § 1311(a) if the plaintiff can show "a direct hydrological connection between [the] ground water and navigable waters." *Id*. at 651. In this case, the district court likewise concluded that "[t]he [Clean Water Act] regulates the discharge of arsenic into navigable surface waters through hydrologically connected groundwater," *i.e.*, "[w]here the facts show a direct hydrological connection between ground water and surface water." It then found as fact

that the arsenic from the coal ash was seeping "directly into the groundwater and, from there, directly into the surface water."

As Dominion does not challenge the district court's factual findings on appeal, we apply *Upstate Forever* and thus reject Dominion's argument, affirming the district court on this point.

IV

Dominion also contends that the district court erred in concluding that the landfill and each of the settling ponds constituted a "point source," as required to find it liable under § 1311(a) of the Clean Water Act. Dominion argues that the landfill and settling ponds, rather than satisfying the statutory definition of "point source" as a "discernible, confined and discrete conveyance," 33 U.S.C. § 1362(14), are actually "stationary feature[s] of the landscape through which rainwater or groundwater can move diffusely," resulting in a type of discharge that the Clean Water Act does not regulate. It also notes that the regulation of this type of discharge is covered by the RCRA, which regulates the treatment and storage of solid waste like coal ash and its effects on surface waters and groundwaters.

In addressing the "point source" requirement of the Clean Water Act, the district court was satisfied that the landfill and ponds were point sources because the rainwater and groundwater seeped *through the coal ash*, leaching arsenic into groundwater and ultimately into navigable waters. Describing that process in detail, the court stated that "precipitation percolates through the soil to the groundwater," which "moves freely

through the sediment" and then "discharges to [the] surface water." The court acknowledged, however, that it could not "determine how much groundwater reaches the surface waters, or how much arsenic goes from the [site] to the surrounding waters." It added that "[a]ll tests of the surface waters surrounding the [site] have been well below the water quality criteria for arsenic" and that there were no "human health or environmental concerns around the [site]." Explaining specifically how these "coal ash piles," as the court called them, were "point sources," the court stated:

> In determining whether a conveyance is a point source, "the ultimate question is whether pollutants were discharged from discernible, confined and discrete conveyance[s] either by gravitational or nongravitational means." *Ohio Valley Envtl. Coal., Inc. v. Hernshaw Partners, LLC*, 984 F. Supp. 2d 589, 599 (S.D. W. Va. 2013) . . . .
>
> The Coal Ash Piles do precisely that. Dominion built the piles and ponds to concentrate coal ash, and its constituent pollutants, in one location. That one location channels and conveys arsenic directly into the groundwater and thence into the surface waters. Essentially, they are discrete mechanisms that convey pollutants from the old power plant to the river.

It stated in summary, "the Court finds that each of the Coal Ash Piles constitutes a point source because they are discrete conveyances of pollutants discharged into surface waters."

Put simply, therefore, the question presented is whether the landfill and settling ponds serve as "point sources" because they allow precipitation to percolate through them to the groundwater, which then carries arsenic to navigable waters.

We conclude that while arsenic from the coal ash stored on Dominion's site was found to have reached navigable waters — having been leached from the coal ash by rainwater and groundwater and ultimately carried by groundwater into navigable waters

— that simple causal link does not fulfill the Clean Water Act's requirement that the discharge be *from a point source*. By its carefully defined terms, the Clean Water Act limits its regulation under § 1311(a) to discharges from "any *discernible, confined and discrete conveyance*." 33 U.S.C. § 1362(14) (emphasis added). The definition includes, "but [is] not limited to[,] any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft." *Id*.; *see also Consol. Coal Co. v. Costle*, 604 F.2d 239, 249–50 (4th Cir. 1979), *rev'd in part sub nom. EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980) (finding that "discharges which are pumped, siphoned or drained" fall within the definition of discharges from a "point source"); *Appalachian Power*, 545 F.2d at 1373 (concluding that "point source" pollution does not include "unchanneled and uncollected surface waters"). At its core, the Act's definition makes clear that some facility must be involved that functions as a discrete, not generalized, "conveyance."

"Conveyance" is a well-understood term; it requires a channel or medium — *i.e.*, a facility — for the movement of something from one place to another. *See Webster's Third New International Dictionary* 499 (1961); *The American Heritage Dictionary of the English Language* 291–92 (1976); *see also S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) ("[A] point source need not be the original source of the pollutant; it need only *convey* the pollutant to 'navigable waters'" (emphasis added)). If no such *conveyance* produces the discharge at issue, the discharge would not be regulated by the Clean Water Act, though it might be by the RCRA, which covers and regulates the storage of solid waste, including coal ash, and its effect on groundwater.

Here, the arsenic was found to have leached from static accumulations of coal ash on the initiative of rainwater or groundwater, thereby polluting the groundwater and ultimately navigable waters. In this context, the landfill and ponds were not created to convey anything and did not function in that manner; they certainly were not discrete conveyances, such as would be a pipe or channel, for example. Indeed, the actual means of conveyance of the arsenic was the rainwater and groundwater flowing *diffusely* through the soil. This diffuse seepage, moreover, was a generalized, site-wide condition that allowed rainwater to distribute the leached arsenic widely into the groundwater of the entire peninsula. Thus, the landfill and settling ponds could not be characterized as discrete "points," nor did they function as conveyances. Rather, they were, like the rest of the soil at the site, static recipients of the precipitation and groundwater that flowed through them. Accordingly, we conclude that the court erred in finding that the landfill and ponds were point sources as defined in the Clean Water Act.

This understanding of the Clean Water Act's point-source requirement is consistent with the larger scheme of pollution regulation enacted by Congress. In regulating discharges of pollutants from point sources, Congress clearly intended to target the *measurable* discharge of pollutants. Not only is this revealed by the definitional text of "point source," but it is also manifested in the effluent limitation enforcement scheme that the Clean Water Act employs. The National Pollutant Discharge Elimination System Program and § 1311's enforcement scheme specifically rely on "effluent limitation[s]" — restrictions on the "quantities, rates, and concentrations" of pollutants discharged into navigable waters. 33 U.S.C. § 1362(11) (defining "effluent limitation"). And state-

federal permitting programs under the Clean Water Act apply these precise, numeric limitations to discrete outfalls and other "point sources," *see California ex rel. Res. Control Bd.*, 426 U.S. at 205–08, at which compliance can be readily monitored. When a source works affirmatively to *convey* a pollutant, the concentration of the pollutant and the rate at which it is discharged by that conveyance *can be measured*. But when the alleged discharge is diffuse and not the product of a discrete conveyance, that task is virtually impossible. Tellingly, the district court in this case concluded candidly that it could not "determine how much groundwater reaches the surface waters, or how much arsenic goes from the [plant site] to the surrounding waters. It could be a few grams each day, or a much larger amount." Such indeterminate and dispersed percolation indicates the absence of any facility constituting a discernible, confined, and discrete conveyance. Moreover, it indicates circumstances that are incompatible with the effluent limitation scheme that lies at the heart of the Clean Water Act.

Of course, the fact that such pollution falls outside the scope of the Clean Water Act's regulation does not mean that it slips through the regulatory cracks. To the contrary, the EPA classifies coal ash and other coal combustion residuals as nonhazardous waste governed by the RCRA, *see* 40 C.F.R. §§ 257.50, 257.53, and it has issued regulations pursuant to the RCRA imposing specific guidelines for the construction, management, and ultimate closure of coal ash sites, including, notably, obligations to monitor groundwater quality and undertake any necessary corrective action, *see* 40 C.F.R. §§ 257.90–257.98. In 2016, Congress amended the RCRA specifically to require that operators of coal ash landfills, surface impoundments, and

similar facilities obtain permits incorporating the EPA's regulations pertaining to the disposal of coal combustion residuals. *See* 42 U.S.C. § 6945(d). And Virginia operates just such a program. *See* Va. Code Ann. § 10.1-1408.1; 9 Va. Admin. Code §§ 20-81-800, 20-81-810.

In this case, the district court blurred two distinct forms of discharge that are separately regulated by Congress — diffuse discharges from solid waste and discharges from a point source — and concluded that any discharge from an identifiable source of coal ash, even that resulting from precipitation and groundwater seepage, is regulated by the Clean Water Act. But by concluding that the point-source requirement was satisfied by the pile or pond containing coal ash through which the water seeps, the court revealed a misunderstanding of the distinctions Congress made between the Clean Water Act and the RCRA. In describing how precipitation falls through the coal ash and percolates into the groundwater via the soil, the court identified a process that does not employ a discrete conveyance at all. The only "conveying" action referred to by the district court was that of the non-polluted water moving through static piles of coal ash and carrying arsenic into the soil. That water, as Sierra Club concedes, cannot itself be the requisite point source. Perhaps recognizing its need for finding a facility of conveyance, the court attempted abstractly to construct one, stating: "Dominion built the piles and ponds to concentrate coal ash, and its constituent pollutants, in one location," and "[t]hat one location channels and conveys arsenic directly into the groundwater." That movement of pollutants, however, was not a function of the coal ash piles or ponds, but rather the result of a natural process of "precipitation percolat[ing] through the soil to the groundwater."

And that groundwater pollution from solid waste falls squarely within the regulatory scope of the RCRA. By contrast, the coal ash piles and ponds, from which arsenic diffusely seeped, can hardly be construed as discernible, confined, or discrete conveyances, as required by the Clean Water Act.

Sierra Club nonetheless maintains that at least the settling ponds were point sources because they were "containers," one of the facilities included as examples in the definition of point source. *See* 33 U.S.C. § 1362(14). But in so arguing, Sierra Club would have us read the critical, limiting word "conveyance" out of the definition. Regardless of whether a source is a pond or some other type of container, the source must still be functioning *as a conveyance* of the pollutant into navigable waters to qualify as a point source. In this case, the diffuse seepage of water through the ponds into the soil and groundwater does not make the pond a conveyance any more than it makes the landfill or soil generally a conveyance.

Sierra Club also seeks to support the district court's conclusion by pointing to several decisions from other courts, but they provide it with little assistance. In *United States v. Earth Sciences, Inc.*, for example, the court addressed overflows from a contaminated-water collection system, described by the court as a "closed *circulating* system," which involved the repeated spray, collection, and then pumping of a contaminated solution through the system — *i.e.*, a system of conveyances. 599 F.2d 368, 374 (10th Cir. 1979) (emphasis added). As such, when that system "fail[ed] because of flaws in the construction or inadequate size to handle the fluids utilized, with resulting discharge, . . . the escape of liquid from the confined system [was] from a point source."

Id. In other words, in the process of *conveying* this contaminated liquid through the system, the liquid escaped. Likewise, in *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980), the court, while recognizing that the *source* of a pollutant regulated by § 1311(a) might be a spoil or refuse pile, noted that the facilities that actually transport the pollutant must be *point sources* — giving as examples, "ditches, gullies and similar conveyances." Rather than confirming the district court's conclusion, these cases undermine it, clearly identifying as point sources facilities, functioning as conveyances, from which the contaminant was discharged. The passive coal ash piles and ponds here are hardly analogous.

For the reasons given, we reverse the district court's ruling that Dominion violated § 1311(a) of the Clean Water Act.

V

On its cross-appeal, Sierra Club contends that the district court erred in ruling that Dominion did not violate general Conditions II.F and II.R to the Clean Water Act discharge permit issued by the VDEQ. Sierra Club argues that the same factual findings used by the district court to conclude that Dominion violated the Clean Water Act required the court to conclude that Dominion also violated the Conditions. In determining otherwise, according to Sierra Club, the district court disregarded the Conditions' clear language. More particularly, Sierra Club argues that the term "state waters," as used in both Conditions, is broader than the coverage of the Clean Water Act because Virginia Code § 62.1-44.3 defines "state waters" to include "all water, on the

surface and under the ground." It thus contends that contamination of the groundwater alone violates the Conditions — contamination that the court found as fact in ruling on the Clean Water Act claim. It argues further that even if "state waters" do not include groundwater, the same discharges to navigable waters via hydrologically-connected groundwater identified by the district court should suffice to show a violation of the permit Conditions.

At trial, however, the VDEQ made clear that it did not consider the Clean Water Act discharge permits to cover groundwater contamination and that they only covered discharges from point sources into navigable waters, as stated in the Clean Water Act. Ruling in Dominion's favor, the district court stated that because the VDEQ "believes that [Dominion's] permits do not apply to groundwater, and therefore has found no violations," it was "defer[ring] to the [VDEQ's] decision finding Dominion in compliance."

While we might have wished for more explanation from the district court in support of its decision to defer, especially since Sierra Club argued that the VDEQ's position was not supported by the plain language of the permits, we agree with both the VDEQ and Dominion that the subject Conditions must be read in context to give them their appropriate meaning and scope.

The text of Condition II.F reads that "[e]xcept in compliance with this permit," "it shall be unlawful for any person to . . . [*d*]*ischarge into state waters* sewage, industrial wastes, other wastes, or any noxious or deleterious substances." (Emphasis added). In the context of the Clean Water Act, the phrase "discharge into state waters" has a

particular meaning, and the VDEQ regulations recognize this, defining "discharge" to mean the addition of pollutants "from any *point source*." 9 Va. Admin. Code § 25-31-10 (emphasis added). Condition II.F thus operates as the Commonwealth's counterpart to the permit's expressly authorized discharges, reiterating 33 U.S.C. § 1311(a)'s prohibition against discharges from a point source not otherwise authorized by permit. Because we have concluded that arsenic seeping into the groundwater from the coal ash piles and ponds does not constitute a point-source discharge, we agree with the VDEQ that Dominion was also not violating Condition II.F.

Condition II.R must be understood in the same way. Like Condition II.F, Condition II.R is a general provision appended to all Clean Water Act discharge permits issued by the VDEQ. It provides that "[s]olids, sludges or other pollutants removed in the course of treatment or management of pollutants shall be disposed of in a manner so as to prevent any pollutant from such materials from entering state waters." While that language may appear to be broader than Condition II.F, insofar as it seems to prohibit "any pollutant from . . . *entering* state waters" (emphasis added), it nonetheless remains a condition limited in scope by its context in the Clean Water Act permit, which is specifically issued to regulate "discharges" into state waters. Were this selected language in Condition II.R to be given its literal meaning, it would subsume all the other permit conditions, as well as the substantive terms of the permit itself, which clearly authorize specified discharges. As one example, Condition I.D.7 states that all materials used in and by-products resulting from the facility's operation, including "industrial wastes," must be "handled, disposed of and/or stored in such a manner so as not to permit a

discharge of such product, materials, industrial wastes and/or other wastes to State waters, except as expressly authorized." The VDEQ confirmed at trial that the coal ash stored in the landfill and ponds is "industrial waste" governed by this Condition. It would make little sense for the VDEQ to include this Condition, which, unlike Condition II.R, is particularized to the Chesapeake site, if Condition II.R were to nullify it by prohibiting any removed pollutant from any source and in any amount from reaching groundwater or surface water — as Sierra Club seeks to have us read it.

Moreover, the VDEQ has over the years consistently interpreted Condition II.R to apply only to point-source discharges to surface waters. It explained that the Condition is one of several boilerplate provisions that it appends to all discharge permits it issues, and that the Condition is included specifically to address the solids and sludges physically stored on site without appropriate storm water control, which could "result[] in a discharge or potential discharge" to surface waters. Dominion too stated that this was its understanding of II.R's scope and that this had been its understanding since the VDEQ first began issuing discharge permits to it. In addition, the VDEQ has never found Dominion to be in violation of the Condition, even when it knew, prior to issuing Dominion's most recent discharge permit, that groundwater monitoring reports indicated that arsenic was leaching into the groundwater. Thus, both parties to the permit shared an understanding of what the permit says and how it is to be enforced. *See* Restatement (Second) of Contracts § 201 cmt. c (1981) ("[T]he primary search is for a common meaning of the parties, not a meaning imposed on them by the law"); *Ohio Valley Envtl.*

Coal. v. Fola Coal Co., LLC, 845 F.3d 133, 138 (4th Cir. 2017) (construing Clean Water Act permits as contracts would be construed).

Finally, our interpretation is confirmed when we consider the scope of the permit in its broader regulatory context. In addition to its discharge permit under the Clean Water Act, Dominion manages the Chesapeake site pursuant to a solid-waste permit under the RCRA and Virginia's Solid Waste Management laws. That permit and those laws authorized Dominion to store coal ash on the Chesapeake site, provided that Dominion complied with stated conditions and restrictions. Notably, Dominion was required to monitor the groundwater at the site, and in 2002 when it reported finding arsenic levels in the groundwater that exceeded Virginia's standards, it and the VDEQ developed a corrective action plan for the site in the context of the solid-waste permit *under the RCRA*. In addition, the VDEQ made clear throughout trial in this case that it continues to address the groundwater pollution, not through enforcement of the Clean Water Act discharge permit, but through enforcement of the solid-waste permit issued under the RCRA and Virginia's Solid Waste Management laws. It would thus upend this regulatory scheme to read a single, general condition included in Dominion's Clean Water Act discharge permit to cover conduct explicitly addressed elsewhere. If Sierra Club were intent on challenging the efforts of Dominion and the VDEQ in managing the coal ash storage, it could have sought to employ the RCRA's citizen-suit provision, 42 U.S.C. § 6972, to do so.

* * *

For the reasons given, we reverse the district court's conclusion that Dominion violated the Clean Water Act, and we affirm its ruling that Dominion did not violate the two Conditions of its Clean Water Act discharge permit issued by the VDEQ.

AFFIRMED IN PART AND
REVERSED IN PART

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

STATE OF TEXAS, *et al*,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 3:15-CV-00162
	§	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al*,	§	
	§	
	§	
Defendants.	§	

ORDER

Pending before the Court is Plaintiffs' Motion for a Preliminary Injunction. (Dkt. 79). Having read the briefs in support of this motion, the response, and the reply, this Court hereby **ORDERS** that the motion is **GRANTED** and that the "Clean Water Rule: Definition of 'Waters of the United States'" (the "Rule"), 80 Fed. Reg. 37,054 (June 29, 2015), be enjoined temporarily as to Texas, Louisiana, and Mississippi until this case is finally resolved.

In order to obtain a preliminary injunction, the applicant must demonstrate: (1) a substantial likelihood that it will prevail on the merits, (2) a substantial threat that it will suffer irreparable injury if the injunction is not granted, (3) that its threatened injury outweighs the threatened harm to the party whom it seeks to enjoin, and (4) that granting the preliminary injunction is in the public's interest. *PCI Transp., Inc. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005). While each of these factors must be met in order for a preliminary injunction to be granted, a stronger showing of one factor can compensate for a weaker showing of another. *State of Texas v. Seatrain Int'l, S.A.*, 518 F.2d 175, 180 (5th Cir. 1975) ("[A]s we have noted, none of the four prerequisites [for a preliminary injunction] has a fixed quantitative value. Rather, a sliding scale is utilized, which takes into account the intensity of each in a given calculus."); *see also Siff v. State Democratic Executive Comm.*, 500 F.2d 1307, 1309 (5th Cir. 1974).

Here, the applicant States have made a sufficient showing that a preliminary injunction should be granted in this case. At this early stage in the proceedings, the strength of the States' case should not be overstated. While the Court does believe that each of the above listed factors for a preliminary injunction have been met, it is the fourth factor pertaining to the public's interest in this matter that tipped the balance in favor of granting an injunction—and did so to an overwhelming degree.

As both the Plaintiff and the Defendant have pointed out, clarification regarding what is, and what is not, a navigable water under the Clean Water Act is long overdue. *See United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) (holding that Justice Kennedy's concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006), provided the controlling test for what is a navigable water under the Clean Water Act); *cf. United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009) (approving of the use of the plurality's opinion and the Kennedy opinion in *Rapanos* as the controlling test for determining what is a navigable water); *cf. also United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) (applying pre-R*apanos* Circuit precedent because it could not discern clear direction from *Rapanos*). And, until that question can ultimately be answered, a stay provides much needed governmental, administrative, and economic stability.

Were the Court not to temporarily enjoin the Rule now, it risks asking the states, their governmental subdivisions, and their citizens to expend valuable resources and time operationalizing a rule that may not survive judicial review. *See* Dkt. 79, Exh. 1 at p. 3 (implementation of the rule "would require TxDOT to spend significant time and taxpayer resources attempting to determine how [the United States Army Corps of Engineers] will interpret and implement the Rule."); *see also* Dkt. 79, Exh. 3 at p. 2 (implementation of the rule will cause a reduction in the production and refinement of oil and gas resources); *see also* Dkt. 93, Exh. 8 at p. 3 (implementation of the rule will make it harder for agricultural producers to operate their business). Accordingly, the Court has decided to avoid the harmful effects of a truncated implementation, and enjoin the Rule's

effectiveness until a permanent decision regarding the Rule's constitutionality can be made. Determining which governmental bodies have jurisdiction over our nations waters is an important task, and one that this Court is unwilling to do without full discovery and briefing on the matter.

Finally, after additional review, the Court finds it inappropriate to issue a nationwide preliminary injunction in this case. An extraordinary remedy, a preliminary injunction should only be granted nationwide when it is clear and unambiguous that the harm threatened is one of a national character. Here, the evidence before the Court is insufficient to establish whether implementation of the Rule presents an irreparable harm to those States not a party to this litigation. Accordingly, the Court declines to enjoin the Rule nationwide at this time. This ruling is without prejudice to the Court's reconsideration of this issue based on future decisions and developments in this case.

SIGNED at Galveston, Texas, this 12th day of September, 2018.

George C. Hanks Jr.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

TOXICS ACTION CENTER, INC. *et al*, Plaintiffs,	)	
v.	)	CIVIL ACTION No. 4:17-cv-40089
CASELLA WASTE SYSTEMS, INC., SOUTHBRIDGE RECYCLING & DISPOSAL PARK, INC. and THE TOWN OF SOUTHBRIDGE Defandants	)	

MEMORANDUM OF DECISION AND ORDER ON DEFENANT ON DEFENDANTS' CASELLA WASTE SYSTEMS AND SOUTHBRIDGE RECYCLING AND THE TOWN OF SOUTHBRIDGE'S MOTIONS TO DISMISS
September 30, 2018

HILLMAN, DJ.

Introduction

This action is brought by two sets of Plaintiffs: (a) Two non-profit environmental organizations, Toxics Action Center, Inc. ("Toxics Action") and Environment America, Inc. d/b/a Environment Massachusetts ("Environment Massachusetts") (collectively, the "Group Plaintiffs"); and (b) Ninety-nine individuals who reside or recently resided near the Landfill in Charlton (the "Individual Plaintiffs"). Plaintiffs bring this action under the citizen suit provisions of two federal environmental statutes, the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* ("RCRA"), and the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq*. ("Clean Water Act," or "CWA"). The RCRA claim, which is brought both by the Group Plaintiffs and the Individual Plaintiffs, alleges that Defendants have contributed and are

contributing to an imminent and substantial endangerment to human health and the environment within the meaning of Section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B). The CWA claim, brought solely by the Group Plaintiffs, alleges that Defendants are discharging pollutants to waters of the United States without National Pollutant Discharge Elimination System ("NPDES") Permit authorization, in violation of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342. The Individual Plaintiffs bring several supplemental state law claims, which will not be addressed in this memorandum: a statutory claim under the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, M.G.L. c. 21E ("c. 21E"), and common law claims of nuisance, trespass, and unjust enrichment.

Defendants Casella Waste Systems, Inc. and Southbridge Recycling and Disposal Park, Inc. ("SRDP Defendants") and the Town of Southbridge ("the Town") (collectively, "the Defendants") move to dismiss claims alleged against them under the Clean Water Act (by Group Plaintiffs only) and the Resource Conservation and Recovery Act (by Group Plaintiffs and Individual Plaintiffs). Both contend that this Court lacks subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) to adjudicate the Clean Water Act (Count 1) and Resource Conservation and Recovery Act (Count 2) claims. Defendants also argue that the allegations fail to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6).

This Memorandum of Decision and Order addresses Defendants' motions to dismiss Counts I and II (Docket Nos. 44 and 46). For the reasons set forth below, those motions are *granted*.

Facts

The Town of Southbridge established and operated the Landfill on Town property beginning in 1981 and has continuously owned the Landfill. The Town constructed and operated

Phases I, II and III of the Landfill. In 1996, the Town contracted with Wood Recycling, Inc. ("WRI") to operate the Town Landfill on behalf of the Town. WRI designed, engineered and constructed subsequent Phases IV, V, VI and 7.1A. In 2003, CWSI purchased WRI. As a condition of purchase, CWSI entered into a settlement with the Massachusetts Department of Environmental Protection ("MassDEP") and the Attorney General, addressing alleged prior WRI violations for which CWSI had no involvement. Casella subsequently changed the name of WRI to Southbridge Recycling & Disposal Park, Inc. ("SRDP").

The Landfill contains approximately 51 acres of waste disposal space and is divided into multiple units, or cells, that have been constructed sequentially over time, beginning in approximately 1981. Each Landfill cell is a unit formed out of either compacted subgrade (for Phases I and II) or synthetic liners (for Phases III through VII) into which waste is deposited. Phases IIIC through VII of the Landfill incorporate leachate collection systems that are intended to direct liquid that has passed through solid waste (*i.e.*, leachate) to a network of channels, pipes, and/or pumps that transport the leachate to holding tanks or ponds. The Landfill is bordered by a network of wetlands on its southwestern, western, northwestern, and eastern sides. The wetland to the west of the Landfill is referred to as "Wetland A"; the wetland to the northwest of the Landfill, "Wetland Z"; and the wetland to the east of the Landfill, "Wetland I." Casella, SRDP, and their consultants collect quarterly samples both from groundwater monitoring wells located around the Landfill and from surface water monitoring locations in Wetlands A and I.

Between November 2011 and September 2017, Defendants and their consultants have identified elevated concentrations of several pollutants in groundwater monitoring wells at the

Landfill.[1] Between November 2011 and September 2017, samples from surface water monitoring locations in Wetland A and Wetland I have contained elevated concentrations of similar pollutants have been detected at surface water monitoring locations in these wetlands in concentrations that exceed applicable Water Quality Standards or ORSGs. [2] Plainitffs allege that groundwater flowing west/northwest through Landfill cells carries pollutants from the Landfill into Wetlands A and Z, and that groundwater flowing east through Landfill cells carries pollutants from the Landfill into Wetland I.

Plaintiffs allege that pollutants released by the Landfill to groundwater also enter bedrock fractures that transport these pollutants to drinking water aquifers in the area of No. Ten Schoolhouse Road, Berry Corner Road, H Foote Road, Eleanor Lane, Sawmill Circle, and Hill Road in Charlton (the "Charlton Aquifers") and to drinking water aquifers in the area of McGilpin Road, Fiske Hill Road, Old Farms Road, Apple Hill Road, and Summit Ridge in Sturbridge (the "Sturbridge Aquifers").

Thirty one of the residential wells of the Individual Plaintiffs that draw from the Charlton Aquifers have been found to contain some level of 1,4-dioxane, TCE, chlorobenzene, 1,1-DCA, 1,1-DCE, cis- 1,2-DCE, toluene, chloroform, benzene, naphthalene, lead, and/or arsenic since 2013. At least 14 of these wells have been found to contain concentrations of 1,4-dioxane, TCE, 1,1-DCE, arsenic and/or lead that exceed the applicable limits. Plaintiffs' allege that because the Landfill is the only known source of the above-listed chemicals found in the Charlton residential wells, this demonstrates that the Landfill is the source of this contamination.

[1] These include iron; 1,4-dioxane; lead; and arsenic. Certain pollutants, including iron, 1,4-dioxane, lead, arsenic, manganese, sulfate, and TDS have been found in the Landfill's groundwater monitoring wells at concentrations that exceed applicable Massachusetts Primary Maximum Contaminant Levels ("MMCLs"), Secondary Maximum Contaminant Levels ("SMCLs"), or Office of Research and Standards Guidelines ("ORSGs")

[2] These include iron, 1,4-dioxane, lead, arsenic, manganese, copper, barium, sulfate, and TDS. Iron, 1,4-dioxane, and lead.

Beginning in January 2017, DEP and/or consultants retained by DEP have collected samples from 44 residential wells on McGilpin Road and Fiske Hill Road in Sturbridge and tested those samples for the presence of pollutants. 43 out of the 44 residential wells sampled have been found to contain lead and/or 1,4-dioxane. At least 27 of these wells have been found to contain lead in concentrations that exceed the applicable limits. Plaintiffs' allege that because the Landfill is the only known source of the above-listed chemicals found in the Sturbridge residential wells, this demonstrates that the Landfill is the source of this contamination.

The water testing data upon which the Plaintiffs' Amended Complaint relies is largely the result of testing performed by Casella/SRDP in Charlton, as required by MassDEP, and by MassDEP itself in Sturbridge. This testing is designed to identify the extent of any groundwater contamination and what further remedial measures may be necessary. Since 2002, SRDP has conducted a residential well monitoring program. In 2015, in response to detected groundwater contamination in some residential wells, SRDP began providing bottled water to certain residents and/or installed Point of Entry Treatment ("POET") systems at affected homes. Defendants are providing residents with bottled water and/or filtration systems in Charlton and MassDEP is providing bottled water to certain residents in Sturbridge.

Plaintiffs allege that the presence of elevated concentrations of the pollutants fournd in the Landfill's groundwater monitoring wells and the Wetlands, together with the groundwater flow analyses performed by Defendants' consultants, demonstrate that Landfill cells are adding these pollutants to Wetlands A, Z. Plaintiffs further allege facts that show the presence of these same pollutants in the Landfill's groundwater monitoring wells demonstrate that the Landfill is the source of this contamination and that the pollutants are leaching from Landfill cells into

groundwater and entering bedrock fractures that then convey the pollutants to the Sturbridge and Charlton residential wells.

Since 1996, WRI/SRDP has played a direct role in managing and funding the Landfill's operations and pollution control activities. Its operational role includes the management and disposal of solid waste, groundwater well installation and monitoring, maintenance and operation of a leachate collection system, and provision of services incidental to pollution control. Since purchasing WRI in 2003, Casella has played a direct role alongside SRDP in managing and funding the Landfill's operations and pollution control activities. Its operational role includes direct management of the Landfill's groundwater monitoring work. WRI/SRDP designed, permitted, constructed and completed Phases IV-VII with State-approved designs, including leachate collection systems, synthetic liners and monitoring systems.

On April 24, 2017, the Towns of Southbridge and Charlton, and MassDEP entered into an Administrative Consent Order ("Waterline ACO"). The Waterline ACO is the result of MassDEP's enforcement authority under M.G.L. c. 111, §§ 150A and 150A1/2 (Solid Waste Disposal Facilities); M.G.L. c. 21E and the Massachusetts Contingency Plan (310 CMR 40.0000); and M.G.L. 111, § 160 (Examination of Water Supply). Under the Waterline ACO, the Town and Defendants entered into a binding agreement to address the well contamination that is the subject of the Amended Complaint. The $10 million waterline will connect affected residents in Charlton to Southbridge's public water system. On May 9, 2014, MassDEP issued a Unilateral Administrative Order ("UAO") related to a soil stockpile at the Landfill that became unstable and fell into the banks of a stream in Charlton damaging adjacent wetlands. MassDEP subsequently filed suit in the Suffolk Superior Court entering into a Consent Judgment with

Casella/SRDP with a $200,000 civil penalty and payment of $20,000 for water testing equipment for the Town of Charlton.

In December 2016, MassDEP and SRDP entered into an Administrative Consent Order with Penalty ("December 2016 ACOP") for SRDP's alleged violation of solid waste, wetlands and air pollution control regulations at the Landfill, including the alleged discharge of leachate to groundwater. SRDP agreed to address the issues identified by MassDEP. MassDEP assessed a penalty against SRDP of $91,831.70, $24,331.70 of which will be paid to the Commonwealth. The remaining monies were directed to fund a Supplemental Environmental Project on the Quinebaug River. On August 3, 2017, Casella/SRDP informed the Town that it planned to cease operation of the Landfill in 2018 and proceed to "cap and close" the Landfill. On October 31, 2017, MassDEP made a formal demand to Defendants in connection with the closure of the Landfill:

> [R]equiring assessment of the full nature and extent of contamination emanating from the Landfill pursuant to 310 CMR 19.132(2)(k). The assessment should include an Initial Site Assessment ("ISA"), Comprehensive Site Assessment ("CSA"), and a Correction Action Alternative Analysis ("CAAA") under 310 CMR 19.150, in order to develop a Corrective Action Design ("CAD"). MassDEP anticipated that the CAD would include potential remedial actions at the Landfill.

In May 2017, SRDP entered into a binding commitment with MassDEP, set forth in an Administrative Consent Order ("2017 Consent Order"), to fund $5 million towards a $10 million waterline to service homes in the vicinity of the Landfill with a municipal water supply.

Standard of Review

On a Rule 12(b)(6) motion to dismiss, the Court "must assume the truth of all well-plead[ed] facts and give plaintiff the benefit of all reasonable inferences therefrom." *Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 5 (1st Cir. 2007) (citing *Rogan v. Menino*, 175 F.3d 75, 77 (1st Cir. 1999)). To survive a motion to dismiss, the plaintiff must state a claim that is

plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). That is, "[f]actual allegations must be enough to raise a right to relief above the speculative level ... on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 555, 127 S.Ct. 1955 (internal citations omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955). Dismissal is appropriate if plaintiff's well-pleaded facts do not "possess enough heft to show that plaintiff is entitled to relief." *Ruiz Rivera v. Pfizer Pharm., LLC*, 521 F.3d 76, 84 (1st Cir. 2008) (internal quotations and original alterations omitted). "The relevant inquiry focuses on the reasonableness of the inference of liability that the plaintiff is asking the court to draw from the facts alleged in the complaint." *Ocasio-Hernàndez v. Fortuño-Burset,* 640 F.3d 1, 13 (1st Cir. 2011).

The same plausibility principles that govern a motion to dismiss pursuant to Rule 12(b)(6) apply with equal force to the evaluation of the Court's subject matter jurisdiction pursuant to Rule 12(b)(1). *26 Crown Associates, LLC v. Greater New Haven Regl. Water Pollution Control Auth.,* 2017 WL 2960506, at *4 (D. Conn. July 11, 2017)

The Clean Water Act (Navigable Waters, Point Source, NPDES)

The Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("CWA" or "the Act"), was enacted in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The elimination of the discharge of pollutants into navigable waters is the CWA's primary focus. 33 U.S.C. § 1251(a)(1)-(7). As such, the CWA renders unlawful "the discharge of any pollutant by any person," except under specific circumstances. 33 U.S.C. § 1311(a).

Under the CWA, "pollution" is defined as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19). A "discharge of a pollutant" is broadly defined to include, *inter alia*, "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "Navigable waters" are defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). A "point source" includes "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

Section 309(g)(6)(A)(ii) of the CWA bars citizen suits seeking civil penalties when the state has commenced and is diligently prosecuting an action under state law comparable to § 309(g)(6)(A). 33 U.S.C. § 1319(g)(6)(A)(ii). Subsection (iii) bars such claims when the state has issued a final order not subject to further judicial review and the violator has paid a penalty under § 309, or comparable state law. 33 U.S.C. § 1319(g)(6)(A)(iii).

Plaintiffs must allege sufficient facts to support their claim that Defendants are "(1) discharg[ing] (2) a pollutant (3) into navigable waters (4) from a point source (5) without a permit." *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1142 (10th Cir. 2005). The Supreme Court has considered the extent to which tributaries to interstate waters are considered "navigable waters" to which the CWA applies. *Rapanos v. United States*, 547 U.S. 715 (U.S. 2006). Under the *Rapanos* plurality's test, "relatively permanent, standing or flowing bodies of water" which are tributary to interstate waters are "waters of the United States," whereas "ordinarily dry channels through which water occasionally or intermittently flows" are not, irrespective of their contribution to interstate waters. *Id*. at 732-33. In a concurring opinion,

Justice Kennedy established an alternative formulation, whereby waters must possess a significant nexus with the "chemical, physical, and biological integrity" of navigable-in-fact waters to fall under CWA jurisdiction. *Id*. at 780. (Kennedy, J., concurring). The First Circuit has held that either of these two tests may be employed to establish CWA jurisdiction. *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006).

Here, Plaintiffs allege that the pollutants released by the Landfill travel through hydrologically connected groundwater before reaching the Wetlands and the drinking water aquifers and ultimately, residential wells, and that forms the basis for CWA jurisdiction. The First Circuit has not addressed whether a discharge of a pollutant that moves through ground water before reaching navigable waters may constitute a discharge of a pollutant, within the meaning of the CWA. Because, as discussed below, a landfill is not a point source within the meaning of the CWA, this Court will not reach the issue of whether the CWA extends liability to surface water that is polluted via hydrologically connected groundwater. Two recent Sixth Circuit Court cases have determined that the CWA does not extend liability to pollution that reaches surface waters via groundwater, either under a point source theory or like the Plaintiffs' try to assert here, the hydrological connection theory.[3]

[3] In Kentucky Waterways, the Sixth Circuit upheld the district court's dismissal of Clean Water Act ("CWA") claims brought by two plaintiff groups regarding coal ash stored in two man-made ponds, and separately reversed dismissal of plaintiffs' RCRA claims. As to the CWA claims, the Court unambiguously held that "[t]he CWA does not extend liability to pollution that reaches surface waters via groundwater." Id. at *1.

The Court went on to explain that the plaintiff groups in the case, and the few other Circuit Courts that had ruled in favor of hydrologically connected groundwater, had not correctly followed the text, purpose and legislative history of the CWA.

> First, they argue that groundwater is a point source that deposits pollutants into Herrington Lake. This theory treats groundwater as if it were a pipe through which pollutants travel. Plaintiffs also argue that the karst terrain that carries the groundwater is a point source in that it amounts to a network of conduits through which pollutants flow. We refer to this theory as the "point source" theory.
>
> Next, Plaintiffs adopt the so-called "hydrological connection" theory. Under this approach, groundwater is not considered a point source, but rather a medium through which pollutants pass before being discharged

Recently, the Fourth Circuit provided detailed guidance in finding that a landfill and settling pond did not constitute point sources as that term is defined under the CWA. *See Sierra Club v. Virginia Electric et al*, 2018 WL 4343513, *1 (4th Cir. 2018).[4] The Court focused on the language of the CWA itself, that defines a point source as a "discernable, confined and discrete conveyance," finding that "the landfill and ponds were not created to convey anything and did not function in that manner … Indeed, the actual means of conveyance of the arsenic was the rainwater and groundwater flowing diffusely through the soil … Thus, the landfill and settling ponds could not be characterized as discrete 'points,' nor did they function as conveyances." *Id*. at *6. The Court focused on the meaning of terms "conveyance" and "convey," which it held that a landfill does not, nor was it intended to do. "Regardless of whether a source is a pond or some other type of container, the source must still be functioning as a conveyance of the pollutant into navigable waters to qualify as a point source. In this case, the diffuse seepage of water through the ponds into the soil and groundwater does not make the pond a conveyance any more than it makes the landfill or soil generally a conveyance." *Id*. at *7. The Court went on to hold that the Act's definition makes clear that some facility must be involved that functions as a discrete, not generalized, "conveyance." *Id*. at *5.

> into navigable waters. The point sources under this theory, as Plaintiffs argue, are the coal ash ponds themselves.
>
> We reject both theories; the CWA does not extend its reach to this form of pollution. The text and statutory context of the CWA make that clear. In so holding, we disagree with the decisions from our sister circuits in Upstate Forever v. Kinder Morgan Energy Partners, L.P., 887 F.3d 637 (4th Cir. 2018), and Hawai'i Wildlife Fund v. Cty. of Maui, 886 F.3d 737 (9th Cir. 2018).

See Kentucky Waterways Alliance v. Kentucky Utilities Co., No. 18-5115, 2018 WL 4559315 at *5 (6th Cir. 2018). See also, *Tennessee Clean Water Network v. Tennessee Valley Authority*, 2018 WL 4559103 (6th 2018) (companion case to Kentucky Waterways, holding coal ash pond not a point source and hydrologically connected groundwater not basis for CWA jurisdiction).

[4] Both recent aforementioned Sixth Circuit cases, *Kentucky Waterways* and *Tennessee Clean Water,* favorably referred to the *Sierra Club* Court's holding that coal ash ponds and landfills were not point sources under the CWA.

Following *Sierra Club*'s guidance, I find that the Landfill here is not a point source under the terms of the CWA. Plaintiffs' basis for jurisdiction under the CWA stems from contaminants that allegedly flow from the Landfill, either to the Wetland or the Charlton or Sturbridge Aquifers. "[T]hat simple, causal link does not fulfill the Clean Water Act's requirement that the discharge be *from a point source*." *Sierra Club,* 2018 WL 4343513 at *5 (emphasis in original), "that is, a discrete, not generalized, conveyance." *Id*.

Resource Conservation and Recovery Act

Defendants argue that there is no imminent or substantial "endangerment" to support a claim under the Resource Conservation and Recovery Act. In the alternative, they contend, given the extensive remedial efforts already undertaken and committed to be taken, there is no "necessary" additional action for the Court to consider. Plaintiffs contend that the MassDEP has not taken enforcement actions to address the CWA violations in this suit and that continuing releases of certain substances from the Landfill present a "reasonable prospect of serious potential harm to individuals who rely on these aquifers for their water supply."

The RCRA "is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483, 116 S.Ct. 1251 (1996). The Act distinguishes between hazardous and nonhazardous solid waste, and although hazardous waste facilities are subject to direct federal oversight, the nonhazardous waste facilities, such as those created to store coal ash, remain "primarily the function of State, regional, and local agencies" with the "financial and technical assistance and leadership" of federal authorities.42 U.S.C. § 6901(a)(4). Hence, RCRA anticipates that federal, state, and local governments will work cooperatively to ensure the safe and environmentally appropriate management of solid waste, and the statute's objectives expressly include

establishment of "a viable Federal-State partnership" to "promote the protection of health and the environment and to conserve valuable material and energy resources." *Id.* § 6902(a)(7), (a); *see AES Puerto Rico, L.P. v. Trujillo-Panisse*, 857 F.3d 101, 103 (1st Cir. 2017)

MassDEP has undertaken several enforcement actions related to the Landfill, including enforcement directly related to the alleged discharge of contaminants to groundwater – the central issue in the Amended Complaint. MassDEP's enforcement includes: the May 2014 UAO, resulting the filing of a Complaint in Superior Court and a Consent Judgment; the December 2016 Administrative Consent Order With Penalty ("ACOP"); and the April 2017 Administrative Consent Order (the "Waterline ACO;" id. at Exhibit A). MassDEP acted pursuant to its authority under comparable state laws comparable to the CWA. Most importantly, the Waterline ACO was for the express purpose of addressing the alleged contamination to groundwater. Further, in anticipation of the closure of the Landfill, MassDEP has ordered Defendants to perform an assessment of the "full nature and extent of contamination emanating from the Landfill" including an Initial Site Assessment, a Comprehensive Site Assessment, and a Correction Action Alternative Analysis. Together, MassDEP's orders, along with its ongoing oversight of the closure of the Landfill, create a comprehensive enforcement scheme, comparable to any federal CWA enforcement, to address alleged groundwater pollution from the Landfill, adjacent wetlands and private water systems.

The focus here is on whether corrective action is already taken and is being diligently pursued on the issue of pollutants leaching out of the landfill and potentially into wetlands and aquifers, and based on the record, I find that MassDEP is already action to correct those violations. Accordingly, any additional action by this Court would be duplicative and unnecessary. *See Scituate*, 949 F.2d at 555-556.

State Law Claims

Having disposed of the federal questions in the case, the Court must determine whether to exercise supplemental jurisdiction over the remaining state-law claims. "The district courts may decline to exercise supplemental jurisdiction over a claim" if "the district court has dismissed all claims over which it has original jurisdiction." *Id.* § 1367(c)(3); *Uphoff Figueroa v. Alejandro*, 597 F.3d 423, 431 n.10 (1st Cir. 2010). The decision "is a 'pragmatic and case-specific' one" that is committed to the district court's discretion; the court "must take into account considerations of judicial economy, convenience, fairness to the litigants, and comity." *Delgado v. Pawtucket Police Dep't*, 668 F.3d 42, 48 (1st Cir. 2012) (quoting *Roche v. John Hancokc Mut. Life Ins. Co.*, 81 F.3d 249, 257 (1st Cir. 1996)). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988). Having concluded that Plaintiffs' federal claims must be dismissed, I will decline to exercise supplemental jurisdiction over plaintiffs' remaining state law claims.

Conclusion

For the reasons set forth above, Defendants Casella and SRDP's Motion for Summary Judgment (Docket No. 44) and the Town of Southbridge's Motion for Summary Judgment (Docket No. 46) is **granted as to Counts I and II**. Defendants' Leave to File Notice of Supplemental Authority (Docket No. 72) is **denied** as moot and this case is **remanded** to the Worcester Superior Court, Department of the Trial Court of Massachusetts.

SO ORDERED.

/s/ Timothy S. Hillman
TIMOTHY S. HILLMAN
UNITED STATES DISTRICT JUDGE

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 17-2433 & 17-2445

ELECTRIC POWER SUPPLY ASSOCIATION, *et al.*,

Plaintiffs-Appellants,

v.

ANTHONY M. STAR, Director of the Illinois Power Agency, *et al.*,

Defendants-Appellees.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 17 CV 1163 and 17 CV 1164 — **Manish S. Shah**, *Judge*.

ARGUED JANUARY 3, 2018 — DECIDED SEPTEMBER 13, 2018

Before EASTERBROOK and SYKES, *Circuit Judges*, and REAGAN, *District Judge*[*]

EASTERBROOK, *Circuit Judge*. Regional transmission organizations manage the interstate grid for electricity. See, e.g., *Benton County Wind Farm LLC v. Duke Energy Indiana, Inc.*,

[*] Of the Southern District of Illinois, sitting by designation.

843 F.3d 298 (7th Cir. 2016); *MISO Transmission Owners v. FERC*, 819 F.3d 329 (7th Cir. 2016). Midcontinent Independent System Operator (MISO) and PJM Interconnection handle the grid in and around the Midwest. Many large generators of electricity sell most if not all of their power through auctions conducted by regional organizations, which are regulated by the Federal Energy Regulatory Commission. States must not interfere with these auctions. *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016).

Illinois has enacted legislation subsidizing some of the state's nuclear generation facilities, which the state fears will close. 20 ILCS 3855/1-75(d-5). These favored producers receive what the state calls "zero emission credits" or ZECs. (We call them credits.) Generators that use coal or gas to produce power must purchase these credits from the recipients at a price set by the state. The price of each credit is $16.50 per megawatt-hour, a number Illinois derived from a federal working group's calculation of the social cost of carbon emissions. (Coal and gas plants emit carbon dioxide; nuclear, wind, solar, and hydro plants don't.) The price per credit falls if a "market price index" exceeds $31.40 per megawatt-hour. Illinois derives this index from the annual average energy prices in the auction conducted by PJM and the prices in two of the state's regional energy markets. The adjustment is designed "to ensure that the procurement [of electricity] remains affordable to retail customers … if electricity prices increase". 20 ILCS 3855/1-75(d-5)(1)(B).

Plaintiffs (an association representing electricity producers, plus several municipalities) contend that the price-adjustment aspect of the state's system leads to preemption by the Federal Power Act because it impinges on the FERC's

regulatory authority. They concede that a state may take many steps that affect the price of power. It may levy a tax on carbon emissions. It may tax the assets and incomes of power producers. It may use tax revenues to subsidize some or all generators of power. It may create a cap-and-trade system under which every firm that emits carbon must buy credits in a market (firms that emit less carbon, or none, will be the sellers). As plaintiffs see matters, although such systems *affect* the price in the PJM and MISO auctions, they do not *regulate* that price. But the zero-emission-credit system, plaintiffs insist, indirectly regulates the auction by using average auction prices as a component in a formula that affects the cost of a credit. The district judge did not agree with this argument and granted summary judgment to the defendants. 2017 U.S. Dist. LEXIS 109368 (N.D. Ill. July 14, 2017).

The parties' briefs address a number of procedural questions. These include whether a claim of preemption may be presented directly under the Supremacy Clause of the Constitution and whether relief under the theory of *Ex parte Young*, 209 U.S. 123 (1908), would be appropriate against the state defendants in light of remedies potentially available under the Federal Power Act. See *Armstrong v. Exceptional Child Center*, 135 S. Ct. 1378 (2015); *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002). But none of the procedural disputes concerns subject-matter jurisdiction, which rests on both 28 U.S.C. §1331 (federal-question jurisdiction) and 16 U.S.C. §825p (authorizing suits in equity to enforce the Federal Power Act). Because the district court's jurisdiction is secure, we can go straight to the merits—for, if we decide that federal law does not preempt the state statute, none of the procedural issues matters.

At oral argument we expressed concern that the Federal Energy Regulatory Commission had not decided whether Illinois has interfered with its authority over auctions for interstate power. After receiving submissions from the litigants addressing the possibility of invoking the doctrine of primary jurisdiction (another non-jurisdictional doctrine, despite its name) and waiting for the FERC to act on petitions pending before it, we decided to ask the agency to give us its views as an *amicus curiae*. The Commission and the United States then filed a joint brief concluding that Illinois' program does not interfere with interstate auctions and is not otherwise preempted. More briefs from the parties followed, and the appeals are at last ready for decision.

The Federal Power Act divides regulatory authority between states and the FERC. The Commission regulates the sale of electricity in interstate commerce (including auctions conducted by regional organizations), while states regulate local distribution plus the facilities used to generate power. 16 U.S.C. §824(b)(1). This allocation leads to conflict, because what states do in the exercise of their powers affects interstate sales, just as what the FERC does in the exercise of its powers affects the need for and economic feasibility of plants over which the states possess authority. For decades the Supreme Court has attempted to confine both the Commission and the states to their proper roles, while acknowledging that each use of authorized power necessarily affects tasks that have been assigned elsewhere. See, e.g., *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205 (1964); *FERC v. Electric Power Supply Association*, 136 S. Ct. 760 (2016).

Hughes, the most recent of these decisions, draws a line between state laws whose effect depends on a utility's participation in an interstate auction (forbidden) and state laws that do not so depend but that may affect auctions (allowed). 136 S. Ct. at 1297. The FERC has a policy that offers some price protection to new producers for the first three years of their participation in an auction. Maryland, concluding that three years is too short to encourage the addition of generation capacity, asked the Commission to increase the price-protection window to a decade. It declined. Maryland then decided to create price protection on its own by requiring older utilities to sign 20-year contracts with new entrants guaranteeing them a price floor, provided they sold their power in FERC-regulated auctions. As long as an entrant bid a price low enough to prevail in an auction, other producers had to make up the difference between that price and the guarantee. Because it is always possible to sell power in an auction by making a sufficiently low bid (PJM allows even negative bids, under which a producer offers to pay customers to take power off its hands), the Maryland system effectively allocated to new entrants a long-term right of first sale in the auction and in the process depressed the price that other producers would receive. This feature—that the subsidy depended on selling power in the interstate auction—is what led the Justices to conclude that Maryland had transgressed a domain reserved to the FERC.

The Court stressed that its decision covers only state rules that depend on participating in the interstate auction, stating: "States, of course, may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain." *Hughes*, 136 S. Ct. at 1298. "Nothing in this opinion should be read to foreclose

[states] from encouraging production of new or clean generation through measures 'untethered to a generator's wholesale market participation.'" *Id*. at 1299. And that's what Illinois has done. To receive a credit, a firm must *generate* power, but how it sells that power is up to it. It can sell the power in an interstate auction but need not do so. It may choose instead to sell power through bilateral contracts with users (such as industrial plants) or local distribution companies that transmit the power to residences.

If a producer does offer power to an interstate auction, the value of a credit does not depend on its bid. True, the outcome of all PJM auctions, averaged over a year, may affect the value of a credit (if the average exceeds $31.40), but what (indeed, whether) a producer bids in the interstate auction does not determine the amount it receives. Every successful bidder in an interstate auction receives the price of the highest bid that clears the market. *Hughes*, 136 S. Ct. at 1293. The owner of a credit receives that market-clearing price, with none of the adjustments that Maryland law required. The zero-emissions credit system can influence the auction price only indirectly, by keeping active a generation facility that otherwise might close and by raising the costs that carbon-releasing producers incur to do business. A larger supply of electricity means a lower market-clearing price, holding demand constant. But because states retain authority over power generation, a state policy that affects price only by increasing the quantity of power available for sale is not preempted by federal law. "So long as a State does not condition payment of funds on capacity clearing the [interstate] auction, the State's program [does] not suffer from the fatal defect that renders Maryland's program unacceptable." *Id*. at 1299.

This does not imply that PJM, MISO, and the Commission are unconcerned about the effect of state programs designed to subsidize producers of electricity. PJM has asked the Commission to approve changes to its auction design in order to improve the system's price-discovery and output-allocation effects in the wake of laws such as the one Illinois enacted. Recently the FERC declined to approve PJM's proposal and opened a new proceeding so that the Commission may determine for itself what changes, if any, should be made to auctions for interstate sales of electricity. *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶61,236 (June 29, 2018). Plaintiffs insist that the need to revamp the auction system shows that the Illinois statute must be preempted.

But that's not what the Commission said. Instead of deeming state systems such as Illinois' to be forbidden, the Commission has taken them as givens and set out to make the best of the situation they produce. It wrote: "We emphasize that an expanded [Minimum Offer Price Rule] in no way divests the states in the PJM region of their jurisdiction over generation facilities. States may continue to support their preferred types of resources in pursuit of state policy goals." Order at ¶158. As the Supreme Court remarked in *Hughes*, the exercise of powers reserved to the states under §824(b)(1) affects interstate sales. Those effects do not lead to preemption; they are instead an inevitable consequence of a system in which power is shared between state and national governments. Once the Commission reaches a final decision in the ongoing proceeding, the adequacy of its adjustments will be subject to judicial review; the need to make adjustments in light of states' exercise of their lawful powers does not diminish the scope of those powers.

A few words about the Constitution and we are done. Plaintiffs invoke the dormant Commerce Clause and its rule that states may not discriminate against interstate transactions. See, e.g., *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330 (2007). Plaintiffs observe that the credits are bound to help some Illinois firms and contend that this condemns them. But this amounts to saying that the powers reserved to the states by §824(b)(1) are denied to the states by the Constitution, because state regulatory authority is limited to the state's territory. On this view, whenever Illinois, or any other state, takes some step that will increase or reduce the state's aggregate generation capacity, or affect the price of energy, then the state policy is invalid. That can't be right; it would be the end of federalism. The Commerce Clause does not "cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, [just because] the legislation might indirectly affect the commerce of the country." *General Motors Corp. v. Tracy*, 519 U.S. 278, 306 (1997).

The commerce power belongs to Congress; the Supreme Court treats silence by Congress as preventing discriminatory state legislation. Yet Congress has not been silent about electricity: it provided in §824(b)(1) that states may regulate local generation. In *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946), the Court rejected a constitutional challenge to a statute that permits states to close their borders to insurance written in other states—a statute that even permits states to supersede national legislation on the topic of insurance. Section 824(b)(1) does not go that far; it does not authorize express discrimination. But it does mean that the balancing approach of decisions such as *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which ask whether a state's interest

is strong enough to justify an interstate effect, does not apply to a state's regulation of electric capacity or a cross-subsidy between carbon-emitting generation and carbon-free generation.

Illinois has not engaged in any discrimination beyond what is required by the rule that a state must regulate within its borders. All carbon-emitting plants in Illinois need to buy credits. The subsidy's recipients are in Illinois; so are the payors. The price effect of the statute is felt wherever the power is used. All power (from inside and outside Illinois) goes for the same price in an interstate auction. The cross-subsidy among producers may injure investors in carbon-releasing plants, but only those plants in Illinois (for the state's regulatory power stops at the border). The combination of §824(b)(1) and the absence of overt discrimination defeats any constitutional challenge to the state's legislation.

AFFIRMED

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSHUA CALEB BOHMKER; LARRY COON; WALTER R. EVENS; GALICE MINING DISTRICT; JASON GILL; MICHAEL HUNTER; MICHAEL P. LOVETT; JOEL GROTHE; MILLENNIUM DIGGERS; WILLAMETTE VALLEY MINERS; DON VAN ORMAN; J.O.G. MINING LLC, *Plaintiffs-Appellants*, v. STATE OF OREGON; ELLEN ROSENBLUM, in her official capacity as the Attorney General of the State of Oregon; MARY ABRAMS, in her official capacity as the Director of the Oregon Department of State Lands, *Defendants-Appellees*, ROGUE RIVERKEEPER; PACIFIC COAST FEDERATION OF FISHERMAN'S ASSOCIATIONS; INSTITUTE FOR FISHERIES RESOURCES; OREGON COAST ALLIANCE; CASCADIA WILDLANDS; NATIVE FISH	No. 16-35262 D.C. No. 1:15-cv-01975-CL OPINION

SOCIETY; CENTER FOR BIOLOGICAL DIVERSITY,
Intervenor-Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
Mark D. Clarke, Magistrate Judge, Presiding

Argued and Submitted March 8, 2018
Portland, Oregon

Filed September 12, 2018

Before: Raymond C. Fisher, N. Randy Smith and Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Fisher;
Dissent by Judge N.R. Smith

SUMMARY*

Mining Law / Preemption

Affirming the district court's summary judgment in favor of defendants, the panel held that mining restrictions set forth in Oregon Senate Bill 3 are not preempted by federal law.

To protect threatened fish populations, Senate Bill 3 prohibits the use of motorized mining equipment in rivers and streams containing essential salmon habitat. The restrictions apply throughout the state, including on rivers and streams located on federal lands. Plaintiffs have mining claims on federal land in Oregon.

Assuming without deciding that federal law preempts the extension of state land use plans onto unpatented mining claims on federal land, the panel held that Senate Bill 3 is not preempted because it constitutes an environmental regulation, not a state land use planning law. In addition, Senate Bill 3 does not stand as an obstacle to the accomplishment of the full purposes and objectives of Congress. The panel concluded that reasonable state environmental restrictions such as those found in Senate Bill 3 are consistent with, rather than at odds with, the purposes of federal mining and land use laws. The panel held that Senate Bill 3 therefore is neither field preempted nor conflict preempted.

Dissenting, Judge N.R. Smith wrote that the National Forest Management Act and the Federal Land Policy and

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Management Act occupy the field of land use planning regulation on federal lands. He wrote that because the permanent ban on motorized mining in Oregon Senate Bill 3 does not identify the environmental standard to be achieved but instead restricts a particular use of federal land, it must be deemed a land use regulation preempted by federal law.

COUNSEL

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Nicholas Stevens Bryner and Sean B. Hecht, UCLA School of Law, Los Angeles, California; Eric Biber, UC Berkeley School of Law, Berkeley, California; for Amici Curiae Western Public Land Law Professors.

OPINION

FISHER, Circuit Judge:

To protect threatened fish populations, Oregon prohibits the use of motorized mining equipment in rivers and streams containing essential salmon habitat. The restrictions, adopted into law as Senate Bill 3, apply throughout the state, including on rivers and streams located on federal lands. The district court concluded the restrictions are not preempted by federal law, and we agree. Assuming without deciding that federal law preempts the extension of state land use plans onto unpatented mining claims on federal lands, Senate Bill 3 is not preempted, because it constitutes an environmental regulation, not a state land use planning law. Senate Bill 3, moreover, does not stand as an obstacle to the accomplishment of the full purposes and objectives of Congress. As the United States points out in its amicus brief opposing the plaintiffs' preemption challenge, reasonable environmental restrictions such as those found in Senate Bill 3 are consistent with, rather than at odds with, the purposes of federal mining and land use laws. *See Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 588–89 (1987) (rejecting the proposition that federal law preempts the application of reasonable state environmental regulations to the operation of unpatented mining claims on federal lands).

BACKGROUND

The Oregon legislature adopted Senate Bill 838 in 2013. The Bill's legislative findings recognize both the state's rich tradition of small scale prospecting and mining and its

environmental interest in protecting water quality and fish habitat. The findings state:

> (1) Prospecting, small scale mining and recreational mining are part of the unique heritage of the State of Oregon.
>
> (2) Prospecting, small scale mining and recreational mining provide economic benefits to the State of Oregon and local communities and support tourism, small businesses and recreational opportunities, all of which are economic drivers in Oregon's rural communities.
>
> (3) Exploration of potential mine sites is necessary to discover the minerals that underlie the surface and inherently involves natural resource disturbance.
>
> (4) Mining that uses motorized equipment in the beds and banks of the rivers of Oregon can pose significant risks to Oregon's natural resources, including fish and other wildlife, riparian areas, water quality, the investments of this state in habitat enhancement and areas of cultural significance to Indian tribes.
>
> (5) Between 2007 and 2013, mining that uses motorized equipment in the beds and banks of the rivers of Oregon increased significantly, raising concerns about the cumulative environmental impacts.

> (6) The regulatory system related to mining that uses motorized equipment in the beds and banks of the rivers of Oregon should be efficient and structured to best protect environmental values.

2013 Or. Laws ch. 783, § 1.

Consistent with these findings, the law imposed a five-year moratorium, beginning in 2016, on motorized mining techniques in areas designated as essential fish habit:

> A moratorium is imposed until January 2, 2021, on mining that uses any form of motorized equipment for the purpose of extracting gold, silver or any other precious metal from placer deposits of the beds or banks of the waters of this state, as defined in ORS 196.800, or from other placer deposits, that results in the removal or disturbance of streamside vegetation in a manner that may impact water quality. The moratorium applies up to the line of ordinary high water, as defined in ORS 274.005, and 100 yards upland perpendicular to the line of ordinary high water that is located above the lowest extent of the spawning habitat in any river and tributary thereof in this state containing essential indigenous anadromous salmonid habitat, as defined in ORS 196.810, or naturally reproducing populations of bull trout, except in areas that do not support populations of anadromous salmonids or natural reproducing populations of bull trout

> due to a naturally occurring or lawfully placed physical barrier to fish passage.

Id. § 2(1). "'Essential indigenous anadromous salmonid habitat' means the habitat that is necessary to prevent the depletion of indigenous anadromous salmonid species during their life history stages of spawning and rearing." Or. Rev. Stat. § 196.810(1)(g)(B).

The plaintiffs filed this action in October 2015, three months before the moratorium was to take effect. The 12 plaintiffs have mining claims on federal lands in Oregon and use a form of motorized mining known as suction dredge mining to search for and extract gold deposits from rivers and streams.[1] The plaintiffs alleged that many of their mining claims were located in "essential indigenous anadromous salmonid habitat" and that the moratorium on motorized mining imposed by Senate Bill 838 would prevent them from mining these claims. They argued that Senate Bill 838 was preempted by federal law because it "interfere[d] with the federal purpose of fostering and encouraging mineral development on federal property, and st[ood] as an obstacle

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[1] Suction dredging is

> a technique used by miners to remove matter from the bottom of waterways, extract minerals, and return the residue to the water. A high-powered suction hose vacuums loose material from the bottom of a streambed. Heavier matter, including gold, is separated at the surface by passage through a floating sluice box, and the excess water, sand, and gravel is discharged back into the waterway.

People v. Rinehart, 377 P.3d 818, 820 (Cal. 2016).

to the accomplishment and execution of the purposes and objectives of Congress." Compl. ¶ 49. The plaintiffs sought an injunction restraining the state from enforcing Senate Bill 838 and a declaration that the Bill was preempted by federal law. Compl. 14.

The district court granted the state's motion for summary judgment, ruling that, because Senate Bill 838 was a reasonable environmental regulation, it was not preempted. After the court entered judgment in favor of the state, the plaintiffs timely appealed.

After briefing in this court was completed, the Oregon legislature adopted Senate Bill 3. Senate Bill 3 repealed the moratorium imposed by Senate Bill 838 and imposed a permanent restriction on the use of motorized mining equipment in waters designated as essential indigenous anadromous salmonid habitat. It states:

> In order to protect indigenous anadromous salmonids and habitat essential to the recovery and conservation of Pacific lamprey, motorized in-stream placer mining may not be permitted to occur up to the line of ordinary high water in any river in this state containing essential indigenous anadromous salmonid habitat, from the lowest extent of essential indigenous anadromous salmonid habitat to the highest extent of essential indigenous anadromous salmonid habitat.

2017 Or. Laws ch. 300, § 4(2). Although the restrictions imposed by Senate Bill 3 differ in some respects from those in Senate Bill 838, both laws prohibit motorized mining in

rivers and streams designated as essential salmon habitat.[2] The parties therefore agree that the adoption of Senate Bill 3 does not moot this appeal. *See Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 & n.3 (1993) (holding that the repeal of a challenged ordinance and its replacement with a different ordinance did not render the plaintiff's claims moot where the ordinance had not been "sufficiently altered so as to present a substantially different controversy from the one the District Court originally decided" and the two ordinances "disadvantage[d] [the plaintiff] in the same fundamental way"). The parties also agree that we should treat this appeal as a challenge to Senate Bill 3. We now proceed to do so.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291. Because at least some of the plaintiffs have standing to pursue this appeal, we need not address the standing of additional plaintiffs. *See Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 523 (9th Cir. 2009) ("As a general rule, in an injunctive case this court need not address standing of each plaintiff if it concludes that one plaintiff has standing.").[3] Our review is de novo. *See*

[2] Unlike Senate Bill 838, for example, Senate Bill 3 does not prohibit motorized mining in bull trout habitat. In addition, although the moratorium imposed by Senate Bill 838 extended to mining in areas up to 100 yards from waterways, the restrictions on motorized mining in Senate Bill 3 apply only within rivers and streams themselves.

[3] We therefore need not address whether plaintiffs Galice Mining District, Millennium Diggers and Willamette Valley Miners have established standing, either in their own right or on behalf of their members. *See Associated Gen. Contractors of Am., San Diego Chapter,*

Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 777 (9th Cir. 2014) (en banc) (grant or denial of summary judgment); *Ting v. AT&T*, 319 F.3d 1126, 1135 (9th Cir. 2003) (federal preemption).

DISCUSSION

A. Background Legal Principles

1. Federal Laws Governing Mining on Federal Lands

We begin with an overview of the federal laws respecting mining on federal lands. We consider only those laws the parties have identified as relevant to the preemption issues presented in this appeal.

"Historically, the Federal mining law has been designed to encourage individual prospecting, exploration, and development of the public domain." H.R. Rep. No. 84-730 (1955), *as reprinted in* 1955 U.S.C.C.A.N. 2474, 2476. "Under these laws, prospectors may go out on the public domain not otherwise withdrawn, locate a mining claim, search out its mineral wealth and, if discovery of mineral is made, can then obtain a patent." *Id.*

The Mining Act of 1872, 17 Stat. 91, for example, provides that:

Inc. v. Cal. Dep't of Transp., 713 F.3d 1187, 1194 (9th Cir. 2013) (explaining that, to establish associational standing, a plaintiff must provide specific allegations showing that at least one identified member has suffered or would suffer harm).

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be *free and open to exploration and purchase*, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, *under regulations prescribed by law*, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

30 U.S.C. § 22 (emphasis added). Under this Act, prospectors could acquire unpatented mining claims by discovering valuable mineral resources on federal lands, marking the location of their claims and recording their claims in accordance with state law:

> Rights to mineral lands, owned by the United States, are initiated by prospecting, that is, searching for minerals thereon, and, upon the discovery of mineral, by locating the lands upon which such discovery has been made, or lands which the prospector believes to be valuable for minerals. A location is made by staking the corners of the claim, posting a notice of location thereon, and complying with the State laws regarding the recording of the location in the county recorder's office, discovery work, etc.

H.R. Rep. No. 84-730, 1955 U.S.C.C.A.N. at 2477.

Once the prospector staked out a claim, "the locator, without further requirement under Federal law, as of that moment, acquire[d] the immediate right to exclusive possession, control, and use of the land within the corners of his location stakes." *Id.* at 2478. As the Mining Act explains:

> The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, *shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations*, and of all veins, lodes, and ledges throughout their entire depth . . . .

30 U.S.C. § 26 (emphasis added). To protect this right to exclusive possession, a locator annually must perform $100 worth of labor or carry out improvements worth $100 in value. *See id.* § 28.

The locator of an unpatented mining claim either "may remove the minerals from the land without first proceeding to patent," H.R. Rep. No. 84-730, 1955 U.S.C.C.A.N. at 2478, or may obtain a patent by, inter alia, filing an application under oath, showing that $500 worth of labor has been expended or improvements made with respect to the claim and making a payment to the proper officer of $5 per acre, *see* 30 U.S.C. § 29. Although "[a]n 'unpatented' claim is a

possessory interest in a particular area solely for the purpose of mining," the owner of a patented claim "gets a fee simple interest from the United States." *Clouser v. Espy*, 42 F.3d 1522, 1525 n.2 (9th Cir. 1994). The mining claims at issue in this case are unpatented.

By 1955, Congress had become increasingly aware of "abuses under the general mining laws by those persons who locate[d] mining claims on public lands for purposes other than that of legitimate mining activity." H.R. Rep. No. 84-730, 1955 U.S.C.C.A.N. at 2478. Sham claims, for example, "could be used for selling timber from national forests, or obtaining free residential or agricultural land." *United States v. Shumway*, 199 F.3d 1093, 1101 (9th Cir. 1999) (citing *United States v. Curtis Nev. Mines, Inc.*, 611 F.2d 1277, 1282 (9th Cir. 1980)). Congress was also concerned that according the holders of unpatented mining claims exclusive surface rights prevented the "efficient management and administration of the surface resources of the public lands." H.R. Rep. No. 84-730, 1955 U.S.C.C.A.N. at 2474. Mining locations made under existing law, for example,

> frequently block[ed] access: to water needed in grazing use of the national forests or other public lands; to valuable recreational areas; to agents of the Federal Government desiring to reach adjacent lands for purposes of managing wild-game habitat or improving fishing streams so as to thwart the public harvest and proper management of fish and game resources on the public lands generally, both on the located lands and on adjacent lands.

Id. at 2478–79.

To address these concerns, Congress adopted the Surface Resources and Multiple Use Act of 1955, Pub. L. No. 84-167, 69 Stat. 367 (1955). This law prohibits the location of any mining claim for purposes other than mining, *see* 30 U.S.C. § 612(a), and reserves in the United States – rather than granting to locators – the right to manage the surface resources of unpatented mining claims located after 1955, subject to the important proviso that "any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto," *id.* § 612(b). The law states:

> Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: Provided, however, *That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably*

> *incident thereto*: Provided further, That if at any time the locator requires more timber for his mining operations than is available to him from the claim after disposition of timber therefrom by the United States, subsequent to the location of the claim, he shall be entitled, free of charge, to be supplied with timber for such requirements from the nearest timber administered by the disposing agency which is ready for harvesting under the rules and regulations of that agency and which is substantially equivalent in kind and quantity to the timber estimated by the disposing agency to have been disposed of from the claim: Provided further, *That nothing in this subchapter and sections 601 and 603 of this title shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim*.

Id. § 612(b) (emphasis added). The legislation sought to "encourage mining activity on . . . public lands compatible with utilization, management, and conservation of surface resources such as water, soil, grass, timber, parks, monuments, recreation areas, fish, wildlife, and waterfowl." H.R. Rep. No. 84-730, 1955 U.S.C.C.A.N. at 2475.

In 1970, Congress adopted the Mining and Minerals Policy Act of 1970, Pub. L. No. 91-631, 84 Stat. 1876 (1970). This law declares it the policy of the United States to foster the development of an "economically sound and stable domestic mining" industry, but subject to "environmental needs," 30 U.S.C. § 21a, making clear that "Congress did not, and does not, intend mining to be pursued at all costs," *Rinehart*, 377 P.3d at 825. It states:

> The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals *to help assure satisfaction* of industrial, security and *environmental needs*, (3) mining, mineral, and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of our natural and reclaimable mineral resources, and (4) *the study and development of methods* for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, *so as to lessen any adverse impact of mineral extraction and processing upon the physical environment* that may result from mining or mineral activities.

30 U.S.C. § 21a (emphasis added).[4]

2. Federal Laws Governing National Forests

The Organic Administration Act, 30 Stat. 11, 35–36 (1897), provides that nothing in 16 U.S.C. §§ 473–82 and 551 "shall . . . prohibit any person from entering upon . . . national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof." 16 U.S.C. § 478. It also provides, however, that "[s]uch persons must comply with the rules and regulations covering such national forests." *Id.* The Organic Act, moreover, requires the Secretary of Agriculture to "make provisions for the protection against destruction by fire and depredations upon the public forests and national forests," and it authorizes the Secretary to "make such rules and regulations" regarding "occupancy and use" as may be necessary "to preserve the forests thereon from destruction." *Id.* § 551.

Under this rulemaking authority, the U.S. Forest Service has promulgated rules regulating mining on national forest lands. These regulations require mining operators to comply with applicable federal and state air quality standards, water quality standards and standards for the disposal and treatment of solid wastes. *See* 36 C.F.R. § 228.8(a)–(c).

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[4] In 1977, Congress adopted the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (1977). In relevant part, this law allows the governor of a state to ask the Secretary of the Interior to designate lands as unsuitable for mining on the ground that "mining operations would have an adverse impact on lands used primarily for residential or related purposes." 30 U.S.C. § 1281(a)–(b). The plaintiffs do not suggest this provision presented an option for Oregon here.

The Multiple-Use and Sustained-Yield Act of 1960, Pub. L. No. 86-517, 74 Stat. 215 (1960), directs the Secretary of Agriculture "to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield." 16 U.S.C. § 529. After declaring it "the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes," the Act states that "[n]othing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests." *Id.* § 528. It further states that "[n]othing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests." *Id.*

The National Forest Management Act of 1976 (NFMA), Pub. L. No. 94-588, 90 Stat. 2949 (1976), requires the Secretary of Agriculture to "develop . . . land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies." 16 U.S.C. § 1604(a). In developing such plans, the Secretary shall assure that they "provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960." *Id.* § 1604(e)(1).

In addition, federal lands, including those falling outside national forests, are governed by the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2743 (1976). FLPMA requires the Secretary of the Interior to develop land use plans for public lands, *see* 43 U.S.C. § 1712(a), and to "manage the public lands under

principles of multiple use and sustained yield," *id.* § 1732(a). FLPMA directs that, "[i]n managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." *Id.* § 1732(b). This "unnecessary or undue degradation" mandate applies not only to land use generally but also to the regulation of mining operations in particular. *See id.* (providing that nothing in FLPMA, *other than* the provision establishing the "unnecessary or undue degradation" standard, "shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress"). FLPMA further provides that "nothing in this Act shall be construed as . . . enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife." *Id.*

Under FLPMA, the Bureau of Land Management (BLM) has issued regulations requiring mining operators to "comply with applicable Federal and state" air quality standards, water quality standards and standards for the disposal and treatment of solid wastes. 43 C.F.R. § 3809.420(b)(4)–(6). Another BLM regulation requires mining operators to comply with state environmental regulations that do not conflict with federal law: "If State laws or regulations conflict with this subpart regarding operations on public lands, you must follow the requirements of this subpart. However, there is no conflict if the State law or regulation requires a higher standard of protection for public lands than this subpart." *Id.* § 3809.3.

3. Overview of Applicable Federal Laws

The foregoing laws, in the aggregate, reflect Congress' intent to foster a productive mining industry but also its intent to protect the environment. These laws declare many federal lands "free and open" to exploration, 30 U.S.C. § 22, preclude the United States from using the surface area of certain mining claims in a manner that would "endanger or materially interfere" with the underlying mining claims, *id.* § 612(b), declare it to be the policy of the United States to foster "the development of economically sound and stable domestic mining . . . industries," *id.* § 21a, and preserve a role for prospecting and mining in national forests, *see* 16 U.S.C. §§ 478, 528. At the same time, these laws require miners to comply with state laws, *see* 30 U.S.C. § 22, including state environmental laws, *see, e.g.*, 36 C.F.R. § 228.8; 43 C.F.R. §§ 3809.3, 3809.420(b), declare it the policy of the United States to assure that mining satisfies the nation's "environmental needs," 30 U.S.C. § 21a, require the Secretary of Agriculture to protect national forests from "depredations" and "destruction," 16 U.S.C. § 551, require the Secretary of the Interior to protect public lands from "unnecessary or undue degradation," 43 U.S.C. § 1732(b), and recognize the states' broad authority to manage fish and wildlife, *see* 16 U.S.C. § 528; 43 U.S.C. § 1732(b). In light of these provisions, it is common ground among the parties that the holders of unpatented mining claims do not have an "unfettered" right to explore and mine federal lands, unencumbered by federal and state environmental regulation. Nor does anyone argue that states' environmental regulatory authority in this area is unbounded. Congress plainly intended to draw a line between these two extremes.

4. The Granite Rock *Decision*

The Supreme Court addressed this line drawing in *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987). After the Granite Rock Company secured unpatented mining claims on national forest land and the Forest Service approved the company's plan of operations for the removal of limestone, the California Coastal Commission instructed the company to apply for a permit under the California Coastal Act, which prohibits any development, including mining, in the state's coastal zone without a permit. *See id.* at 575–76. The company sued to enjoin the enforcement of the permit requirement, arguing federal preemption. *See id.* at 577.

The Supreme Court rejected the company's claims. The Court began by observing that

> [S]tate law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Id. at 581 (alteration in original) (citations omitted) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)).

The Court next summarily rejected the proposition that the Mining Act of 1872 demonstrates an intent to preempt any state environmental regulation on federal lands. As the Court explained, "Granite Rock concedes that the Mining Act of 1872, as originally passed, expressed no legislative intent on the as yet rarely contemplated subject of environmental regulation." *Id.* at 582.

Next, the Court rejected Granite Rock's argument that "the Federal Government's environmental regulation of unpatented mining claims in national forests demonstrates an intent to pre-empt any state regulation." *Id.* at 581–82. The Court concluded that

> the Forest Service regulations that Granite Rock alleges pre-empt any state permit requirement not only are devoid of any expression of intent to pre-empt state law, but rather appear to assume that those submitting plans of operations will comply with state laws. . . . It is impossible to divine from these regulations, which *expressly contemplate coincident compliance with state law as well as with federal law*, an intention to pre-empt all state regulation of unpatented mining claims in national forests.

Id. at 583–84 (emphasis added) (citing 36 C.F.R. §§ 228.5(b), 228.8(a)–(c), (h)). The Court added that "[n]either Granite Rock nor the United States contends that these Forest Service regulations are inconsistent with their authorizing statutes." *Id.* at 584.

The Court then turned to Granite Rock's argument that "federal land management statutes demonstrate a legislative intent to limit States to a purely advisory role in federal land management decisions, and that the Coastal Commission permit requirement is therefore pre-empted as an impermissible state land use regulation." *Id.* The Court assumed arguendo that "the combination of the NFMA and the FLPMA pre-empts the extension of state land use plans onto unpatented mining claims in national forest lands." *Id.* at 585. But even under this assumption, the Court held that only "state land use plans" would be preempted, not state "environmental regulation." *Id.* at 585–86.

The Court did not define the terms "land use planning" and "environmental regulation," but it offered some guidance as to the distinction between the two:

> The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable. However, the core activity described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits. Congress has

> indicated its understanding of land use planning and environmental regulation as distinct activities.

Id. at 587.

The Court suggested that a state's decision to "prohibit" or "ban" mining would constitute land use planning, and hence would be preempted. *See id.* at 586–87. It further intimated that a law would be preempted if, although couched as environmental regulation, its "true purpose" was to prohibit mining. *Id.* at 588. At bottom, however, the Court made clear that "reasonable state environmental regulation is not pre-empted." *Id.* at 589; *see also id.* at 593.

B. The Plaintiffs' Arguments

The plaintiffs argue: (1) Senate Bill 3 is field preempted because it constitutes state "land use planning" under *Granite Rock*; (2) Senate Bill 3 is conflict preempted because it is "prohibitory, not regulatory, in its fundamental character," *S.D. Mining Ass'n v. Lawrence County*, 155 F.3d 1005, 1011 (8th Cir. 1998); (3) Senate Bill 3 is conflict preempted because it does not constitute "reasonable state environmental regulation"; and (4) genuine issues of material fact preclude the entry of summary judgment in favor of the state. We address these arguments in turn.

1. Field Preemption: The Plaintiffs' Argument That Senate Bill 3 Constitutes State Land Use Planning

Granite Rock assumed without deciding that "the combination of the NFMA and the FLPMA pre-empts the extension of state land use plans onto unpatented mining

claims in national forest lands." 480 U.S. at 585. We make the same assumption here.[5] But like the Supreme Court in *Granite Rock*, we reject the plaintiffs' preemption claim. Senate Bill 3 is an environmental regulation rather than a land use planning law. It does not choose or mandate land uses, has an express environmental purpose of protecting sensitive fish habitat, is not part of Oregon's land use system and is carefully and reasonably tailored to achieve its environmental purpose without unduly interfering with mining operations. Senate Bill 3 is precisely the kind of reasonable state environmental regulation that the Supreme Court recognized in *Granite Rock* properly supplements rather than displaces federal land use planning decisions. To be sure, by restricting motorized suction dredge mining in rivers and streams designated as essential habitat for threatened salmonids, Senate Bill 3 will adversely impact the ability of some miners to extract gold deposits from their mining claims. But these impacts are the unavoidable consequences of a federal scheme that seeks to foster both the development of valuable mineral resources and proper stewardship and protection of the nation's natural resources.

The plaintiffs do not argue that Senate Bill 3 becomes a land use law under *Granite Rock* simply because it may render some of their mining claims commercially

[5] We view the application of this assumption, as do the parties, as a question of field preemption rather than conflict preemption. But, even if we were to view it as a question of conflict preemption, we would find no conflict, because Senate Bill 3 is not a land use law.

impracticable.[6] We agree with the United States that the preemption inquiry does not turn on profitability:

> To be sure, there will be miners (including some Plaintiffs) who cannot profitably extract certain minerals from their mining claims without the use of motorized equipment in the water. But . . . specific limitations on specific mining methods or activities have long been part of the business of mining. A State law cannot be deemed preempted solely on the basis that the cost of mining in compliance with the law makes a particular miner unable to profit from a particular mining claim.

Brief of the United States as Amicus Curiae 26–27. Because "[v]irtually all forms of . . . regulation of mining claims – for instance, limiting the permissible methods of mining and prospecting in order to reduce incidental environmental damage – will result in increased operating costs," *Clouser*,

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[6] The dissent contends the plaintiffs have made a commercial impracticability argument. Dissent 68. We have, however, carefully reviewed their opening and reply briefs on appeal, and no such argument exists there. The plaintiffs argue Senate Bill 3 is preempted because it prohibits mining, not because it renders their claims unprofitable. As the plaintiffs make clear, "[t]his appeal is not about profitability, but about prohibition." Reply Br. 41. The plaintiffs have therefore waived the argument. *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) ("[W]e will not consider any claims that were not actually argued in appellant's opening brief."); *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[A]rguments not raised by a party in its opening brief are deemed waived."); *Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994) ("We will not manufacture arguments for an appellant . . . ."). This rule applies with particular force where, as here, the plaintiffs have expressly disclaimed the argument in question.

42 F.3d at 1530, virtually every environmental regulation will render at least some mining claims commercially impracticable, and virtually every environmental regulation would therefore be preempted under a commercial impracticability test, a proposition that is impossible to reconcile with *Granite Rock*'s central holding that "reasonable state environmental regulation is *not* pre-empted," *Granite Rock*, 480 U.S. at 589 (emphasis added). A commercial impracticability theory, moreover, would require the preemption analysis to turn on each miner's individual financial circumstances: the law would be preempted as to some miners but not as to others. Indeed, a commercial impracticability test would give the greatest protection to the least profitable mining operations, and it would handcuff regulators from restricting even the most environmentally destructive mining methods. So long as a particularly destructive method of mining – such as blasting – presented the only commercially practicable means of extracting minerals, regulators would be barred from restricting that practice. We do not read *Granite Rock* as supporting that result. As the California Supreme Court has explained, federal law does not show that Congress "viewed mining as the highest and best use of federal land wherever minerals were found." *Rinehart*, 377 P.3d at 830.

Rather, the plaintiffs contend that Senate Bill 3 constitutes a state land use planning law because it "prohibits" a particular "use" of the land (motorized mining methods) in particular "zones" (rivers and streams designated as essential salmonid habitat). The plaintiffs base this argument on language in *Granite Rock* explaining that

> the core activity described by [environmental regulation and land use planning] is

> undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits.

480 U.S. at 587. The plaintiffs argue Senate Bill 3 is state land use planning under this language because (1) it chooses particular uses of the land and (2) does not prescribe limits on environmental damage by, for example, promulgating a pollution standard.

We disagree. First, Senate Bill 3 does not "choose[]" or "mandate particular uses of the land." *Id.* It simply restricts one method of mining.[7]

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[7] Like the permit requirement in *Granite Rock*, moreover, Senate Bill 3 is not a "ban" or "prohibition" on mining. *See* 480 U.S. at 586–87. Senate Bill 3 does not prohibit the plaintiffs' mining operations. Many of the plaintiffs engage in upland mining, mine in rivers and streams that are not designated as essential habitat or use non-motorized mining methods such as gold panning. Plaintiff Larry Coon, for example, did not testify that all of his mining claims are located in essential salmon habitat, and he contends only that the legislation will significantly limit his mining operations, not eliminate them. Coon decl. ¶¶ 2, 5. Only half of plaintiff Millennium Diggers' mining claims are located within essential salmon habitat. Darnell decl. ¶ 4. Some of its members, moreover, "utilize non-motorized techniques, such as gold panning." *Id.* ¶ 3. Plaintiff Jason Gill's mining operations occur between 50 and 300 feet from a creek. Gill decl. ¶¶ 3–4. These operations would not be affected by Senate Bill 3, which applies solely to in-stream mining. The deposits associated with plaintiff Joel Grothe's claim fall not only within the creek bottom but also within 100 yards of the creek. Grothe decl. ¶ 7. Only some of plaintiff Willamette Valley Miners' mining claims are located in essential salmon habitat. Hunter decl. ¶ 9. Its members' mining, moreover, includes "non-

Second, Senate Bill 3 does not constitute land use planning simply because it prohibits a particular mining method rather than "prescrib[ing] limits" on environmental damage by adopting a pollution standard. *Granite Rock* does not hold that only standards, not restrictions on activities, are permissible environmental regulation. On the contrary, *Granite Rock* says only that "environmental regulation, *at its core*, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." 480 U.S. at 587 (emphasis added).[8] It does not purport to define the entire universe of environmental regulation as consisting solely of limit-prescribing standards. That formalistic approach ignores the practical reality that environmental regulation may take several forms, and it would make no sense, given that regulations imposing pollution standards can

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motorized techniques, such as gold panning." *Id.* ¶ 8. Plaintiff Michael Lovett testified that Senate Bill 3 would significantly limit his mining operations, but not that it would eliminate them. Lovett decl. ¶ 4. We take seriously the plaintiffs' contentions that Senate Bill 3 will seriously impact their mining operations with respect to at least some of their mining claims. But the plaintiffs' own declarations make clear that Senate Bill 3 is not a ban on mining.

[8] The dissenting opinion characterizes us as treating this language as "non-binding dicta (Dissent 58 n.2)," but that is not the case. In addition, the dissent's theory that a distinction between regulations dictating "uses" and regulations dictating "standards" would provide a "clear line between land use planning and environmental regulation" (Dissent 58) eludes us. Would a regulation limiting the size of suction dredge hoses prohibit a "use" (of larger hoses) or prescribe a "standard" (on the size of the hose and, consequently, the volume of material to be dredged)? Would a regulation limiting the size of the vehicles miners could use to reach their claims prohibit a "use" (of heavy vehicles) or prescribe a "standard" (on the weight of vehicles and the resulting damage to the surface of the forest)?

impact mining operations every bit or even more than regulations restricting particular mining methods. The plaintiffs concede, for example, that "Oregon's water quality standard for turbidity" constitutes a permissible, non-preempted "environmental regulation" under *Granite Rock*. A stringent turbidity standard, however, might have a greater adverse impact on the plaintiffs' mining operations than Senate Bill 3's targeted restrictions on motorized mining.

Senate Bill 3 also is not part of Oregon's extensive and distinct land use system. That system requires the development of comprehensive plans by local governments, implemented through zoning, and reviewed by the Oregon Land Conservation and Development Commission. Those decisions, in turn, are reviewed by a State Land Use Board of Appeals, which has developed significant land use case law. *See generally* Or. Rev. Stat. §§ 197.005–197.860, 215.010–215.990. Senate Bill 3 stands apart from that regime.

The plaintiffs' argument, moreover, overlooks Senate Bill 3's obvious and important environmental purpose.[9] The Oregon legislature adopted Senate Bill 3's restrictions on motorized mining "[i]n order to protect indigenous anadromous salmonids and habitat essential to the recovery

[9] Although the plaintiffs contend Oregon's purpose in adopting Senate Bill 3 is irrelevant to the preemption analysis, our case law is to the contrary. *See Puente Ariz. v. Arpaio*, 821 F.3d 1098, 1106 n.8 (9th Cir. 2016) (rejecting the proposition "that the state's purpose in passing a statute is not relevant to our preemption analysis, as both this court and the Supreme Court have analyzed purpose in preemption cases"). In *Granite Rock*, moreover, the Supreme Court expressly considered whether the state's "true purpose in enforcing a permit requirement [was] to prohibit [the plaintiff's] mining entirely." *Granite Rock*, 480 U.S. at 588.

and conservation of Pacific lamprey." 2017 Or. Laws ch. 300, § 4(2). "'Essential indigenous anadromous salmonid habitat' means the habitat that is necessary to prevent the depletion of indigenous anadromous salmonid species during their life history stages of spawning and rearing." Or. Rev. Stat. § 196.810(1)(g)(B). "'Indigenous anadromous salmonid' means chum, sockeye, Chinook and Coho salmon, and steelhead and cutthroat trout, that are members of the family Salmonidae and are listed as sensitive, threatened or endangered by a state or federal authority." *Id.* § 196.810(1)(g)(C).

Similarly, in Senate Bill 838, the legislature found that "[m]ining that uses motorized equipment in the beds and banks of the rivers of Oregon can pose significant risks to Oregon's natural resources, including fish and other wildlife, riparian areas, water quality, the investments of this state in habitat enhancement and areas of cultural significance to Indian tribes." 2013 Or. Laws ch. 783, § 1(4). The legislature found that, "[b]etween 2007 and 2013, mining that uses motorized equipment in the beds and banks of the rivers of Oregon increased significantly, raising concerns about the cumulative environmental impacts." *Id.* § 1(5). It found that "[t]he regulatory system related to mining that uses motorized equipment in the beds and banks of the rivers of Oregon should be efficient and structured to best protect environmental values." *Id.* § 1(6).

The plaintiffs' attempts to cast doubt on Senate Bill 3's environmental purpose are unconvincing. They contend that Senate Bill 3's restrictions were not "required to advance any *bona fide* environmental interest of the State of Oregon" and instead were "primarily motivated by objections from other

users of the waterways." Their evidence, however, fails to substantiate these broad claims.

They rely, first, on two Oregon statutes, but neither one undermines the Oregon legislature's determination that restrictions on motorized mining are necessary to protect fish habitat. The first of these statutes, former Or. Rev. Stat. § 517.123(3), adopted in 1999, simply found that "prospecting, small scale mining and recreational mining . . . [c]an be conducted in a manner that is not harmful and may be beneficial to fish habitat and fish propagation." 1999 Or. Laws ch. 354, § 2(3). There is, of course, no inconsistency between the general finding that small scale mining *can be* conducted in a non-harmful manner and Senate Bill 3's conclusion that it was necessary, "[i]n order to protect indigenous anadromous salmonids and habitat essential to the recovery and conservation of Pacific lamprey," to restrict one particular type of small scale mining – "motorized in-stream placer mining" – in certain environmentally sensitive areas. 2017 Or. Laws ch. 300, § 4(2). In any event, the Oregon legislature repealed the 1999 finding in 2013, noting a "significant[]" increase in motorized mining between 2007 and 2013 that "pose[d] significant risks to Oregon's natural resources, including fish and other wildlife." 2013 Or. Laws ch. 783, §§ 1(4)–(5), 10. The 1999 finding, therefore, does nothing to undermine Senate Bill 3's avowed and self-evident environmental purpose.

The second statute upon which the plaintiffs rely, Or. Rev. Stat. § 517.005, says only that

> Technological advances in the mining industry, coupled with reclamation efforts, have greatly reduced the environmental

> impacts of mining operations. The size and scope of modern operations is such that the operations do not cause interference with other natural resource uses, particularly in an area as vast as eastern Oregon.

Or. Rev. Stat. § 517.005(4). Because this provision pertains to mining generally, and not to the particular environmental concerns addressed by Senate Bill 3, it too does nothing to undermine the validity of Senate Bill 3's stated environmental purpose.

Beyond these two statutes, the plaintiffs' evidence regarding Senate Bill 3's purpose consists solely of a single statement in the record by plaintiff Michael Hunter. Hunter testified that, "[i]n [the Willamette Valley Miners'] experience, the State of Oregon regulates in utter disregard to the National interest in mineral development, instead seeking to placate other user groups who resent, and desire to eliminate the presence of miners on public lands." Hunter decl. ¶ 12. Even granting this statement may reflect Hunter's sincere personal opinion, it is wholly lacking in the specific factual support that would be needed to create a genuine issue of material fact as to Senate Bill 3's purpose. *See FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997) (as amended) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact.").

In sum, because Senate Bill 3 has a clear environmental purpose, is tailored to that purpose, and does not prohibit mining, choose land uses or fall within Oregon's distinct land use planning system, we hold that it is an environmental regulation rather than a state land use planning law. Thus,

even assuming for purposes of our analysis that federal law preempts the extension of state land use plans on federal lands, Senate Bill 3 is not preempted.

Our dissenting colleague takes the view that *any* state environmental regulation – whether in the form of a "use" restriction or a "standard" – constitutes a "de facto land use regulation preempted by federal law" whenever it renders regulated mining claims commercially impracticable. Dissent 70–71. Where a conflict exists between regulated mining claims and a need to protect the environment, the mining claims must always take precedence.

The dissent assures us that a commercial practicability test would not undermine environmental protection because it would affect only *state* regulation, not *federal* regulation. Dissent 69 ("Even if federal law preempts Oregon's attempt to apply Senate Bill 3 to federal lands, the miners must still comply with all environmental laws and standards imposed expressly by federal statutes and regulations."). But this is not how environmental protection on federal lands is achieved. As *Granite Rock* recognizes, the federal scheme relies on *the states* to provide environmental regulation of mining claims on federal lands. Because federal law "expressly contemplate[s] coincident compliance with state as well as with federal law," *Granite Rock*, 480 U.S. at 584, "reasonable state environmental regulation is not pre-empted," *id.* at 589. That is why the U.S. Departments of Agriculture and the Interior, which are the federal agencies charged with management and environmental protection of the federal lands impacted by Senate Bill 3, have joined this case on the side of Oregon, urging us to uphold Senate Bill 3 against the plaintiffs' preemption challenge.

Under the dissent's commercial impracticability test, even a patently destructive method of mining would be permitted as long as it represented the only commercially viable means of extracting minerals from the ground, irrespective of the havoc it would wreak on wildlife and habitat. This is the mining "at all costs" approach that the plaintiffs expressly disclaim. Reply Br. 29. We can find no support for that approach in federal mining law or case law. On the contrary, federal mining law, *see, e.g.*, 30 U.S.C. § 21a, the Supreme Court and the United States as amicus curiae all agree that mining must be pursued consistent with environmental needs, not irrespective of environmental cost. That is why "reasonable state environmental regulation is not pre-empted." *Granite Rock*, 480 U.S. at 589. We respectfully decline the dissent's suggestion to hold that reasonable state environmental regulation is preempted merely because it renders regulated mining claims unprofitable. That approach cannot be reconciled with the balance Congress has sought to achieve.

2. Conflict Preemption: The Plaintiffs' Argument That Senate Bill 3 Is Preempted Because It Is "Prohibitory" Rather Than "Regulatory"

We next consider the plaintiffs' contention that Senate Bill 3 is conflict preempted because it is "prohibitory" rather than "regulatory" in its fundamental character. There is, of course, some overlap between this argument and the field preemption argument we have just addressed. In both instances, the plaintiffs contend Senate Bill 3 is preempted because it *prohibits* a particular mining method rather than merely subjecting that mining method to an environmental standard. Despite these similarities, however, we treat the two arguments as distinct. The plaintiffs' field preemption

argument is based on *Granite Rock*'s distinction between land use planning on the one hand and environmental regulation on the other. By contrast, their current argument – finding a distinction between "prohibitory" and "regulatory" state environmental regulation and deeming the former conflict preempted – is largely based on *South Dakota Mining Association v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998).

In *South Dakota Mining*, county voters approved an ordinance that amended the county's zoning laws to prohibit the issuance of new or amended permits for surface metal mining in the 40,000-acre Spearfish Canyon Area, 90 percent of which fell within a national forest. *See id.* at 1006–07. The plaintiffs argued the ordinance was preempted because it stood as an obstacle to the accomplishment of the full purposes and objectives of Congress embodied in the Mining Act of 1872. *See id.* at 1009.

"To determine the purposes and objectives that are embodied in the Mining Act," the Eighth Circuit considered the language of the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a, and the Mining Act itself, 30 U.S.C. § 22. As noted, § 21a states:

> The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals

> and minerals to help assure satisfaction of industrial, security and environmental needs, (3) mining, mineral, and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of our natural and reclaimable mineral resources, and (4) the study and development of methods for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, so as to lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities.

30 U.S.C. § 21a. The Mining Act, in turn, states:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Id. § 22. In light of these statutes, the Eighth Circuit concluded the Mining Act embodies several congressional purposes, including

> the encouragement of exploration for and mining of valuable minerals located on federal lands, providing federal regulation of mining to protect the physical environment while allowing the efficient and economical extraction and use of minerals, and allowing state and local regulation of mining so long as such regulation is consistent with federal mining law.

South Dakota Mining, 155 F.3d at 1010.

The Eighth Circuit next considered whether the challenged ordinance stood as an obstacle to these purposes and objectives. At the outset, the court observed that, because surface metal mining was the only practical way to "actually mine the valuable mineral deposits located on federal land in the area," the ordinance was "a de facto ban on mining in the area." *Id.* at 1011. The court then held that, as a de facto ban on mining, the ordinance was preempted:

> The ordinance's de facto ban on mining on federal land acts as a clear obstacle to the accomplishment of the Congressional purposes and objectives embodied in the Mining Act. Congress has encouraged exploration and mining of valuable mineral deposits located on federal land and has granted certain rights to those who discover such minerals. Federal law also encourages the economical extraction and use of these minerals. The Lawrence County ordinance completely frustrates the accomplishment of these federally encouraged activities. A local

> government cannot prohibit a lawful use of the sovereign's land that the superior sovereign itself permits and encourages. To do so offends both the Property Clause and the Supremacy Clause of the federal Constitution. *The ordinance is prohibitory, not regulatory, in its fundamental character*. The district court correctly ruled that the ordinance was preempted.

Id. (emphasis added).

The plaintiffs discern from *South Dakota Mining*, and from federal statutes governing mining, a general principle that state environmental regulations are preempted, categorically, whenever they are "prohibitory" rather than "regulatory" in their "fundamental character." "Even prohibitions on the use of particular mining methods," they say, "create an obstacle to the full accomplishment of Congressional purposes." We disagree.

Like the United States, "[w]e would agree that were a state to completely prohibit all mining activity on federal lands, federal mining law would preempt the ban." Brief of the United States as Amicus Curiae 21. We cannot agree with the plaintiffs, however, that conflict preemption in this area turns on whether a state environmental regulation could be viewed as "prohibitory" or "regulatory" in its "fundamental character." For one thing, as the government explains, the distinction likely would be unworkable:

> It is unclear how this Court would determine whether [Senate Bill 3] is "prohibitory . . . in its fundamental character." *South Dakota*

> *Mining*, 155 F.3d at 1005. Certainly it prohibits some very specific types of mining activity in very specific places . . . , but in the process of identifying where its prohibitions apply it seems "regulatory" in nature. In a sense, [Senate Bill 3] is both regulatory and prohibitory, but whether that makes it preempted is a question to be answered by long-established preemption law. Regardless of whether a state regulatory prohibition is considered "prohibitory" or "regulatory," it is permissible so long as it does not pose an obstacle to Congressional purposes or make compliance with federal law physically impossible.

Id. at 22.[10]

We are not persuaded, moreover, that federal statutes governing mining evince a congressional purpose to preempt, categorically, state environmental regulations that are "prohibitory" in their "fundamental character."[11] The Mining Act of 1872, upon which the plaintiffs heavily rely, states

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[10] We have drawn a distinction between "regulatory" and "prohibitory" laws in other contexts, but those analyses are not helpful here. *E.g.*, *United States v. Dotson*, 615 F.3d 1162, 1168 (9th Cir. 2010) (Assimilative Crimes Act).

[11] This conclusion is a consistent with a leading treatise on mining law. *See* 5 American Law of Mining § 174.04[2][c] (2d ed. 2018) (noting that "state law requirements prohibiting a federally authorized activity on federal land are less likely to be upheld," but "the *Granite Rock* decision indicates that state law requirements that can be harmonized with federal regulations may be enforceable").

only that "all valuable mineral deposits in lands belonging to the United States. . . shall be free and open to exploration and purchase." 30 U.S.C. § 22. The plaintiffs contend that this statute's "free and open" language "create[s] a Congressional mining objective inconsistent with state-law based prohibitions of mining activity." But the Mining Act expressly incorporates state regulation of mining activity, stating that exploration authorized by the statute must occur "under regulations prescribed by law." *Id.*[12] Nothing in the

[12] Although the phrase "under regulations prescribed by law" applies to state as well as federal law – a conclusion that follows from § 22's later reference to "laws of the United States," s*ee Corley v. United States*, 556 U.S. 303, 315 (2009) – the plaintiffs suggest it incorporates only state property law, not state environmental law, pointing out that a separate provision of the Mining Act incorporates state law only with respect to possessory title. *See* 30 U.S.C. § 26 (granting rights of possession and enjoyment to locators who "comply with the laws of the United States, and with *State*, territorial, and local *regulations not in conflict with the laws of the United States governing their possessory title*" (emphasis added)). But there is nothing surprising in the fact that § 26, a provision addressing possessory title, refers only to state laws respecting title. This tells us nothing about the scope of the state law incorporated by § 22, which deals with the much broader subject of making federal lands free and open to exploration. Indeed, that § 26 expressly limits the incorporation of state law to laws respecting "possessory title," and § 22 does not, supports the conclusion that the scope of state laws incorporated by § 22 is *not* limited to those respecting title. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))); *see also Rinehart*, 377 P.3d at 824 (explaining that § 22's "express acknowledgement[] of the application of state and local law to federal mining claims suggest[s] an apparent willingness on the part of Congress to let federal and state regulation broadly coexist").

Mining Act suggests a categorical distinction between "prohibitory" and "regulatory" state laws.

We likewise find no support for the plaintiffs' position in the Surface Resources and Multiple Use Act of 1955. This law gives the United States the right to manage surface resources on unpatented mining claims, subject to the important proviso that "any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to *endanger or materially interfere* with prospecting, mining or processing operations or uses reasonably incident thereto." 30 U.S.C. § 612(b) (emphasis added). As with the Mining Act of 1872, nothing in this law suggests Congress intended to draw a distinction between "prohibitory" and "regulatory" measures. We have, moreover, already held that this law *permits* environmental regulations, such as Senate Bill 3, that prohibit the use of particular mining methods. *See United States v. Richardson*, 599 F.2d 290, 291, 295 (9th Cir. 1979) (holding the Forest Service could, without running afoul of § 612(b), require the locators of unpatented mining claims on national forest lands to use nondestructive methods of prospecting, where the

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The plaintiffs' reliance on 30 U.S.C. § 28 is similarly unpersuasive. That provision requires locators to perform annual work on their unpatented claims to maintain their exclusive rights. *See* 30 U.S.C. § 28. Nothing in Senate Bill 3 precludes miners from performing work on or making improvements to their claims, and to the extent miners elect not to perform work because state environmental regulation makes working or improving their claims unprofitable, that scenario is as likely to arise from a "regulatory" measure as it is from a "prohibitory" one.

locators' utilization of blasting and bulldozing was destructive to the surface resources).[13]

The plaintiffs' argument similarly finds no support in the Mining and Minerals Policy Act of 1970. Under this law:

> The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and *environmental needs*, (3) mining, mineral, and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of our natural and reclaimable mineral resources,

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[13] We also find nothing in the 1955 law to suggest Congress intended to limit state environmental regulation. On its face, § 612(b) imposes limits on only the federal government, not states, and it expressly preserves state water quality controls:

> [N]othing in this subchapter . . . shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.

30 U.S.C. § 612(b).

> and (4) the study and development of methods for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, so as to *lessen any adverse impact of mineral extraction and processing upon the physical environment* that may result from mining or mineral activities.

30 U.S.C. § 21a (emphasis added).

The plaintiffs read this statutory language to suggest that Congress intended to meet the nation's environmental needs solely through the process of reclamation, not through regulation of mining itself. This reading, however, lacks any basis in the statutory text or in case law. The plaintiffs alternatively look to the statute's reference to "lessen[ing]" adverse environmental impacts. They contend "[l]essening impact is a regulatory action," distinct from prohibiting mining activities. We again disagree. The statute's reference to lessening impacts relates solely to reclamation. In any event, regulators can lessen impacts through either "prohibitory" or "regulatory" action. *E.g.*, *Richardson*, 599 F.2d at 295.

The plaintiffs' reliance on the Surface Mining Control and Reclamation Act of 1977 is equally flawed. This law allows a state to ask the Secretary of the Interior to declare residential areas unsuitable for mining. *See* 30 U.S.C. § 1281. The plaintiffs contend that "Congress' provision of this and other federal processes for resolving state/federal conflict over mining on federal land is utterly inconsistent with any Congressional intent to allow states to simply prohibit the mining themselves." We agree, of course, that states cannot simply prohibit mining on federal lands. But

nothing in § 1281 suggests Congress intended to preempt environmental regulations prohibiting particular mining methods in specified, environmentally sensitive areas.

The plaintiffs' reliance on federal land management statutes suffers from similar problems. The Supreme Court has examined these statutes and concluded that Congress did not intend by these laws to preempt reasonable state environmental regulation. *See Granite Rock*, 480 U.S. at 582–93. Nothing in these statutes, moreover, suggests a distinction between "prohibitory" and "regulatory" state environmental regulation.

In sum, the plaintiffs' proposed distinction between regulations that are "prohibitory" or "regulatory" in their "fundamental character" is neither workable nor grounded in the federal statutes upon which the plaintiffs rely. We find in these statutes no indication that Congress intended to preempt state environmental regulation merely because it might be viewed as "prohibitory." We therefore reject the plaintiffs' contention that Senate Bill 3 stands as an obstacle to the accomplishment of the full purposes and objectives of Congress merely because it "prohibits" a particular method of mining in the portions of rivers and streams containing essential habitat for threatened and endangered salmonids.[14]

[14] This conclusion is consistent with the California Supreme Court's recent decision in *Rinehart*, 377 P.3d 818, *cert. denied sub nom. Rinehart v. California*, 138 S. Ct. 635 (2018). In rejecting a conflict preemption challenge to a California law prohibiting suction dredge mining in order to protect endangered coho salmon habitats, *Rinehart* concluded that "[t]he federal statutory scheme does not prevent states from restricting the use of particular mining techniques based on their assessment of the collateral consequences for other resources." *Id.* at 829.

This conclusion does not place us at odds with *South Dakota Mining*. Although the Eighth Circuit drew a distinction between "prohibitory" and "regulatory" measures, it did so in the context of a county ordinance amounting to a "de facto ban on mining" that applied broadly and indiscriminately to federal lands within the county. 155 F.3d at 1011. The ordinance at issue effectively prohibited mining, covered 40,000 acres, targeted federal lands (90 percent of the land affected by the ban was in a national forest), lacked any environmental purpose and was part of the county's zoning law. Senate Bill 3, by contrast, is not part of Oregon's zoning law, is not a de facto ban on mining, has an express environmental purpose, does not single out federal land and carefully targets only designated essential salmonid habitat. Whereas the ordinance in *South Dakota Mining* was an attempt by county voters to overrule federal land use decisions, Senate Bill 3 complements those decisions by playing the traditional role served by state environmental regulation. *See, e.g.*, 36 C.F.R. § 228.8(a)–(c); 43 C.F.R. §§ 3809.3, 3809.420(b)(4)–(6). Were Senate Bill 3 an encroachment on federal land use decisions, we would expect the United States to say so. The United States, however, takes the position that Senate Bill 3 "is not preempted by federal law." Brief of the United States as Amicus Curiae 28.[15]

The plaintiffs' reliance on *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984), *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), *Brubaker v. Board of County*

[15] The United States' amicus brief is filed on behalf of the U.S. Department of the Interior, the U.S. Department of Agriculture and the U.S. Department of Justice's Environment and Natural Resources Division.

Commissioners, El Paso County, 652 P.2d 1050 (Colo. 1982), *State ex rel. Andrus v. Click*, 554 P.2d 969 (Idaho 1976), and *Elliott v. Oregon International Mining Co.*, 654 P.2d 663 (Or. Ct. App. 1982), does not require a different conclusion. Each case predates the Supreme Court's holding in *Granite Rock* that reasonable state environmental regulation is not preempted by federal law. *See Granite Rock*, 480 U.S. at 589; *Rinehart*, 377 P.3d at 829. Similar to *South Dakota Mining*, moreover, most of these cases involved improper attempts by local governments to displace, rather than supplement, federal land use decisions. *See Ventura County*, 601 F.2d at 1084–85 (precluding the county from applying "land use planning controls" "in an attempt to substitute its judgment for that of Congress"); *Brubaker*, 652 P.2d at 1059 ("This is not denial of a permit because of failure to comply with reasonable regulations supplementing the federal mining laws, but reflects simply a policy judgment as to the appropriate use of the land."); *Elliott*, 654 P.2d at 665, 668 (barring the application of county zoning laws prohibiting mining because they did "not simply supplement federal mining law"). In addition, *Ventura County* involved the Mineral Lands Leasing Act of 1920, not the laws at issue here, and, in contrast to the case before us, the drilling operations at issue in *Ventura County* were subject to "detailed [federal] supervision" and an "extensive federal scheme reflecting concern for the local environment." 601 F.2d at 1084.

3. Conflict Preemption: The Plaintiffs' Argument That Senate Bill 3 Does Not Constitute Reasonable Environmental Regulation

We have consistently held that Congress intended to permit reasonable environmental regulation of mining claims

on federal lands. In *United States v. Weiss*, 642 F.2d 296 (9th Cir. 1981), for example, after considering the purposes underlying the Mining Act of 1872 and the Organic Act of 1897, including 16 U.S.C. §§ 475, 478 and 551, we concluded:

> The Secretary of Agriculture has been given the responsibility and the power to maintain and protect our national forests and the lands therein. While prospecting, locating, and developing of mineral resources in the national forests may not be prohibited nor so unreasonably circumscribed as to amount to a prohibition, the Secretary may adopt reasonable rules and regulations which do not impermissibly encroach upon the right to the use and enjoyment of placer claims for mining purposes.

642 F.2d at 299. In *United States v. Shumway*, 199 F.3d 1093 (9th Cir. 1999), where we considered not only the Mining Act and the Organic Act but also the "endanger or materially interfere" standard embodied in 30 U.S.C. § 612(b), we once again held that "the Forest Service may regulate use of National Forest lands by holders of unpatented mining claims . . . to the extent that the regulations are 'reasonable' and do not impermissibly encroach on legitimate uses incident to mining and mill site claims." 199 F.3d at 1107.

Congress, moreover, clearly intended reasonable *state* environmental regulation to govern mining on federal lands. In *Granite Rock*, the Supreme Court held that "reasonable state environmental regulation is not pre-empted." 480 U.S. at 589; *see also id.* at 593. The plaintiffs do not dispute that

a reasonableness standard applies here, but they argue that Senate Bill 3 is preempted because it constitutes an *unreasonable* environmental regulation.

The plaintiffs' arguments regarding unreasonableness echo those we have already considered. They contend Senate Bill 3 is an unreasonable regulation because it *prohibits* a particular method of mining in designated habitat, rather than subjecting that mining to a "prescribed limit" or pollution standard, and because it allegedly was "enacted for reasons expressly beyond protection of the environment." We have already addressed these arguments. The preemption analysis does not turn on a formalistic distinction between "prohibitory" and "regulatory" measures, and the plaintiffs' evidence does not create a genuine dispute as to Senate Bill 3's important environmental purpose. We recognize that unreasonable, excessive or pretextual state environmental regulation that unnecessarily interferes with development of mineral resources on federal land may stand as an obstacle to the accomplishment of the full purposes and objectives of Congress. We agree with the United States, however, that in this case that line has not been crossed. As the government explains, "[a] state law such as [Senate Bill 3] that is clearly intended to protect the natural environment by prohibiting the use of particular mining methods or equipment in carefully[] designated locations is not so at odds with Congress's purposes that it is preempted by federal law." Brief of the United States as Amicus Curiae 2–3.

4. The Plaintiffs' Argument That Genuine Issues of Material Fact Preclude Summary Judgment

The plaintiffs argue that genuine issues of material fact preclude summary judgment in favor of the state. For

purposes of our de novo review of the summary judgment record, however, we have viewed the evidence in the light most favorable to the plaintiffs, and we have assumed – solely for purposes of determining whether Oregon is entitled to judgment as a matter of law – that Senate Bill 3 will have a significant adverse impact on the mining operations of the plaintiffs, making it effectively impossible for at least some of them to recover the valuable mineral deposits present on their claims. The only material dispute is whether, assuming these facts, Senate Bill 3 is preempted. Because that issue is one of law, summary judgment is appropriate. *See Inland Empire Chapter of Associated Gen. Contractors of Am. v. Dear*, 77 F.3d 296, 299 (9th Cir. 1996) (holding a "finding of no preemption is a legal question").[16]

CONCLUSION

The district court properly rejected the plaintiffs' preemption claims. We hold that Senate Bill 3 is not preempted by federal law. The judgment of the district court is therefore affirmed.

AFFIRMED.

[16] Contrary to the dissent, we do not today question the validity of as-applied preemption challenges. Dissent 66 & n.7.

N.R. SMITH, Circuit Judge, dissenting:

The National Forest Management Act of 1976 (NFMA), Pub. L. No. 94-588, 90 Stat. 2949 (1976), and the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2743 (1976), occupy the field of land use planning regulation on federal lands. Because the permanent ban on motorized mining in Oregon Senate Bill 3 does not identify an environmental standard to be achieved but instead restricts a particular use of federal land, it must be deemed a land use regulation preempted by federal law. *See Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 586–88 (1987). Therefore, I must dissent.

I.

Although technically an open question, there is little dispute that Congress has occupied the field of land use planning on federal lands through its enactment of NFMA and FLPMA.[1] *See id.* at 585 ("For purposes of this discussion and without deciding this issue, we may assume that the combination of the NFMA and the FLPMA pre-empts the extension of state land use plans onto unpatented mining claims in national forest lands."); *id.* at 612–13 (Scalia, J., dissenting) ("The Court is willing to assume that California lacks such authority on account of [NFMA] and [FLPMA]. I believe that assumption is correct.").

Field preemption arises when "federal law so thoroughly occupies a legislative field as to make reasonable the

[1] The majority (like the court in *Granite Rock*) assumes this point without deciding it. I address the merits of the issue because it is necessary to my determination that federal law preempts Senate Bill 3.

inference that Congress left no room for the States to supplement it." *Nat'l Fed'n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 733 (9th Cir. 2016) (internal quotation marks omitted) (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992)). "The essential field preemption inquiry is whether the density and detail of federal regulation merits the inference that any state regulation within the same field will necessarily interfere with the federal regulatory scheme." *Id.* at 734. To make this determination, our cases require first "delineat[ing] the pertinent regulatory field." *Id.* We have "emphasized the importance of delineating the pertinent area of regulation with specificity before proceeding with the field preemption inquiry." *Id.* Here the pertinent field involves any land use regulation of federal lands.

The next step in our analysis requires us to "survey the scope of the federal regulation within th[is] field." *Id.* Here, the relevant statutes are NFMA and FLPMA. Taken together, these statutes establish a comprehensive regulatory regime for land use planning on federal lands, including the role of states in the planning process. First, NFMA vests the authority to enact federal land use plans with respect to forest service lands in the Secretary of Agriculture, and FLPMA vests the authority to enact federal land use plans with respect to all other federal land in the Secretary of the Interior. 16 U.S.C. § 1604(a) ("[T]he Secretary [of Agriculture] shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System . . . ."); 43 U.S.C. § 1712(a) ("The Secretary [of the Interior] shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands. Land use plans shall be developed for the public lands regardless of whether such

lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses.").

Second, NFMA and FLPMA expressly designate the level of state participation contemplated by federal law. *See* 16 U.S.C. § 1604(a); 43 U.S.C. § 1712(c)(9). NFMA requires "coordin[ation] with the land and resource management planning processes of State and local governments and other Federal agencies." 16 U.S.C. § 1604(a). FLPMA requires similar coordination with states, but the requirement is limited "to the extent consistent with the laws governing the administration of public lands." 43 U.S.C. § 1712(c)(9). Moreover, FLPMA directs that the Secretary of the Interior

> shall, *to the extent he finds practical*, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, *to the extent practical*, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands.

Id. (emphasis added). As Justice Scalia noted in *Granite Rock*, agreeing (in his dissent) with the majority's assumption of preemption, these "requirements would be superfluous,

and the limitation upon federal accommodation meaningless, if the States were meant to have independent land use authority over federal lands." 480 U.S. at 613 (Scalia, J., dissenting).

Thus, the combination of NFMA and FLPMA occupy the field of land use regulation on federal lands. Accordingly, federal law preempts the extension of any state land use planning regulation or ordinance onto federal lands. *Arizona v. United States*, 567 U.S. 387, 401 (2012) ("Where Congress occupies an entire field . . . even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.").

II.

Assuming that NFMA and FLPMA occupied the field of federal land use regulation, *Granite Rock* identified the legal framework for determining whether state environmental regulation impermissibly enters the congressionally occupied field of federal land use planning. First, the Court identified the dividing line between environmental regulation and land use planning. "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *Granite Rock*, 480 U.S. at 587. The Court also made clear that the inquiry requires examination not simply of the text of the law, but of its practical effect. "The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental

regulation so severe that a particular land use would become commercially impracticable." *Id.*

The plaintiff miners and mining organizations (collectively "the miners") challenge Senate Bill 3 on both grounds. They assert that Senate Bill 3 impermissibly (A) identifies a particular use of the land that is prohibited without reference to an identifiable environmental standard and (B) renders mining within the identified zones impracticable. Both arguments have merit.

A.

Granite Rock instructs that "environmental regulation, at its core, . . . requires only that, *however the land is used*, damage to the environment is *kept within prescribed limits*." *Id.* (emphasis added) By contrast land use regulation identifies or restricts "particular uses" of land. *Id.*

A brief review of the text of Senate Bill 3 reveals its true character as a land use regulation. The operative language reads "motorized in-stream placer mining may not be permitted to occur up to the line of ordinary high water in any river in this state containing essential indigenous anadromous salmonid habitat, from the lowest extent of essential indigenous anadromous salmonid habitat to the highest extent of essential indigenous anadromous salmonid habitat." 2017 Or. Laws ch. 300, § 4(2). The operative language identifies particular tracts of land and prohibits a particular use of these lands. The operative language does not identify a "prescribed limit[]" on "damage to the environment" that must be avoided "however the land is used." *Granite Rock*, 480 U.S. at 587. Accordingly, federal law preempts Senate

Bill 3 as an improper attempt to extend a state land use regulation onto federal land.

The majority disagrees for four reasons: (1) Senate Bill 3 permits non-motorized mining, (2) it is not located in the land use section of the Oregon state code, (3) it has an environmental purpose, and (4) it is reasonably tailored to accomplish the environmental purpose without unduly interfering with mining operations. The majority's arguments lack merit for the reasons set forth below.

1.

The majority first asserts (without any citation or authority) that, because Senate Bill 3 restricts only one type of mining, it is not a land use planning regulation. The majority's analysis not only conflicts with Supreme Court precedent in *Granite Rock*, but it also erases any clear line between land use planning and environmental regulation.

The majority criticizes the *Granite Rock* principle that environmental regulation "at its core" "prescribe[s] limits" on "damage to the environment" ("however the land is used"). *Granite Rock*, 480 U.S. at 587.[2] To the majority, this

[2] The majority goes so far as to assert that the *Granite Rock* standard is somehow non-binding dicta. *See* Maj. at 31 ("*Granite Rock* does not hold that only standards, not restrictions on activities, are permissible environmental regulation."). *Granite Rock* fully analyzed the distinction between environmental regulation and land use planning, and the framework it announced was necessary to its holding. 480 U.S. at 585–89. Because the court assumed that land use planning regulation was preempted, it was necessary to decide whether California's permitting system was a land use planning regulation or an environmental regulation. *Id.* at 586. The Court applied the *Granite Rock* framework and determined

distinction is "formalistic" and "make[s] no sense." Maj. at 31. Yet, a line must be drawn, because "Congress has indicated its understanding of land use planning and environmental regulation as distinct activities." *Granite Rock*, 480 U.S. at 587.

Far from being nonsense, the formalism of the *Granite Rock* line makes it clear and easy to apply in deciding facial challenges to state environmental laws.[3] Moreover, the majority offers no alternative standard for drawing a line between environmental regulation (not ordinarily preempted) and land use regulation (always preempted). Without a standard, the majority has no basis to reject the miners' challenge.

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that California's permit system was a means of identifying environmental standards to be applied to the mining operation, not an attempt to regulate particular uses of the land at issue. *See id.* at 586 ("While the [California law] gives land use as well as environmental regulatory authority to the Coastal Commission, *the state statute also gives the Coastal Commission the ability to limit the requirements it will place on the permit*. . . . Since the state statute does not detail exactly what *state standards* will and will not apply in connection with various federal activities, the statute must be understood to allow the Coastal Commission *to limit the regulations* it will impose in those circumstances." (emphasis added)). This is plainly sufficient to bind our decision here. *Cf. Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004) ("[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." (citation omitted)).

[3] The suction hose size and vehicle weight hypotheticals raised by the majority are not difficult cases under the clear line drawn in *Granite Rock*. Neither regulation identifies an *environmental* standard to be achieved.

Specifically, the majority's suggestion that the law is permissible because it regulates only one means of mining begs the question of the appropriate level of generality at which a law must prohibit a particular use to be deemed a land use planning regulation. Does land use planning involve only broad categories of uses, for example commercial versus noncommercial uses? Or can land use planning also include dividing tracts for commercial fishing from those for commercial mining? Would a law prohibiting the use of any mining tools (motorized or not) within identified zones amount to environmental regulation or land use planning? What if the law also required miners to tie one hand behind their backs? The majority's bare assertion that prohibiting a type of mining does not amount to regulating "particular uses for the land" fails to articulate a meaningful standard and flies in the face of framework set forth in *Granite Rock*. 480 U.S. at 587.[4]

The premise of the majority's insistence that the *Granite Rock* line is nonsense also lacks merit. *See* Maj. at 31. In

[4] The majority notes that many of the miners are still able to mine other portions of their claims or are still permitted to mine by hand in the zones covered by the law. I know of no authority for the proposition that a law ceases to be a land use plan simply because it governs only a subset of land, and not all land. Indeed, most land use plans divide land into different zones prescribing a different set of permissible uses for each zone. Accordingly, the fact that some miners have in-stream as well as out-of-stream operations (or operations inside and outside of essential salmonid habitat) matters not at all in our determination of whether Senate Bill 3 is a land use regulation. Likewise, the fact that the law permits mining by hand does not mean its prohibition on motorized mining is not a land use ordinance. Land use plans regulate particular uses all the time. For example, a land use plan might specify that within a residential neighborhood in-home businesses are permitted, but office buildings are not.

addition to being clear, the line drawn in *Granite Rock* serves important functions. For example, standards identify an environmental end to be achieved and offer a means of measuring the degree to which a particular use conflicts with an environmental objective. They are also facially neutral towards varying uses of the land. The majority is right that environmental regulations certainly *can* impact mining practicability. But the Supreme Court made clear that this impact matters only in the exceptional circumstance where an environmental standard is "so severe" as to render any mining within an identified zone "commercially impracticable." *See Granite Rock*, 480 U.S. at 587. The possibility of a narrow exception, does not eliminate the value of the general rule. I address this narrow exception in greater detail in Part II.B.

The Supreme Court meaningfully considered the difficult issue of how to discern land use regulations from environmental ones. The majority errs in failing to follow its instruction. Applying the *Granite Rock* framework here, Senate Bill 3 is a land use regulation that is preempted as applied to federal lands.

2.

The majority next asserts that Senate Bill 3 is not a land use regulation, because it is codified outside the sections of the Oregon Code governing land use planning. However, I know of no canon of construction (and the majority cites none) that suggests that a law's placement within the code can override the substantive import of its text. Further, there are other Oregon land use statutes outside the code sections the majority identifies. *See, e.g.*, Or. Rev. Stat. § 390.250 (authorizing land use planning "to promote the public scenic, park and recreational use of lands along Bear Creek"); Or.

Rev. Stat.§ 390.308 (authorizing land use planning to complete the "Oregon Coast Trail"); Or. Rev. Stat. § 390.112 ("The State Parks and Recreation Department shall propose to the State Parks and Recreation Commission additional criteria for the acquisition and development of new historic sites, parks and recreation areas.").

3.

The majority next asserts that Senate Bill 3 is an environmental regulation because of its "obvious and important environmental purpose." Maj. at 32. To be sure, the prefatory language in Senate Bill 3 identifies an environmental purpose "to protect indigenous anadromous salmonids and habitat essential to the recovery and conservation of Pacific lamprey." 2017 Or. Laws ch. 300, § 4(2).[5] But many land use plans have environmental

[5] The majority also cites legislative findings that "[m]ining that uses motorized equipment in the beds and banks of the rivers of Oregon can pose significant risks to Oregon's natural resources, including fish and other wildlife, riparian areas, water quality, the investments of this state in habitat enhancement and areas of cultural significance to Indian tribes." 2013 Or. Laws ch. 783, § 1(4). Maj. at 33. Yet there is little substance to this finding. The legislature identified only the possibility of environmental harm because it used the language "*can* pose significant risks." *Id.* (emphasis added). Almost anything "can pose significant risks" to the environment. Nothing in these findings suggests that any form of motorized mining *necessarily* causes an adverse effect on wildlife resources. Like the prefatory language in Senate Bill 3, this language does not purport to identify an environmental standard to be achieved. The same is true for the majority's other citations to Oregon law. *See* Maj. at 32.

purposes as well.[6] Systems of national parks, state parks, and designated wilderness areas are prime examples of land use planning aimed at accomplishing obvious and important environmental purposes.

Here, the means of accomplishing the environmental purpose undisputedly prohibit a particular use of the land, without reference to an environmental standard to be achieved. Unlike the permit system in *Granite Rock*, this law does not involve a flexible regime that "must be understood to allow [Oregon] to limit the regulations it will impose" in a manner consistent with allowing permissible federal mining to continue. *See Granite Rock*, 480 U.S. at 586.

In contrast to Senate Bill 3, the federal regulations governing mining on public lands cited by the majority are good examples of standards based environmental regulation. Maj. at 22. Each identifies environmental standards to be achieved, rather than particular uses to be prohibited. *See, e.g.*, 36 C.F.R. § 228.8 (identifying federal and state air, water, and solid waste standards that must be complied with and requiring operators to "take all *practicable* measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations" (emphasis added)); 43 C.F.R. § 3809.3 (requiring operators to follow "a higher *standard*" under state law if one has been enacted (emphasis added)); 43 C.F.R. § 3809.420(b) (identifying federal and state air, water, and solid waste standards that must be complied with

[6] As the majority notes, purpose is certainly relevant to our preemption analysis. *See* Maj. at 32 n.9. But nothing in our cases suggests that a genuine purpose can innoculate a law that substantively intrudes on a field preempted by Congress. The majority's emphasis on purpose proves too little.

and requiring operators to "take such action *as may be needed to prevent adverse impacts* to threatened or endangered species, and their habitat which may be affected by operations" (emphasis added)).

Simply, the environmental purpose behind Senate Bill 3 does not identify an environmental standard. Indeed, nothing in the law's text (or the record in this case) indicates that motorized mining—in any form or at any scale—necessarily causes harm to indigenous anadromous salmonids or Pacific lamprey. On its face, Senate Bill 3 would prohibit a motorized mining operation irrespective of the miner's compliance with all state and federal environmental standards, including the federal Endangered Species Act, National Environmental Policy Act, and Clean Water Act. This remains true, even if federal (or state) environmental review determines that the net effect of a motorized-mining operation is positive for anadromous salmonids and Pacific lamprey. Senate Bill 3 simply mandates that—irrespective of the *actual* environmental impact—motorized mining is a prohibited use of land in the identified zones. Congress has preempted this type of intrusion into the field of federal land use planning.

4.

Lastly, the majority persistently makes the bare assertion that federal law does not preempt Senate Bill 3, because it is "tailored to" its environmental purpose. *See* Maj. at 27 (asserting (without elaboration) that the law is "tailored to achieve its environmental purpose without unduly interfering with mining operations"); Maj. at 35 (concluding that Senate Bill 3 "is tailored" to its environmental purpose). The majority cites no legal authority (and I am aware of none) for

the proposition that federal preemption analysis includes an assessment of the fit between the substance of a state law and its stated purpose.

Further, the majority fails to explain how it reaches its reasonably tailored conclusion. As to the merits of the majority's conclusion that the law is reasonably tailored, I have my doubts. First, the parties have not argued the issue one way or the other.

Second, the tailoring issue necessarily turns on facts that are disputed or not in evidence, including the extent to which motorized mining negatively impacts fish habitat and whether there are some means of motorized mining that would not adversely impact fish habitat. A tailoring analysis would involve actually assessing the degree to which a law advances its stated purpose (i.e. the state's interest). *Cf., e.g.*, *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1178 (9th Cir. 2018) (discussing narrow tailoring as an analysis focused on the degree of fit between ends and means). Yet, the majority appears to use the laws' stated purpose as the premise for its reasonable tailoring conclusion. Good intentions are never enough to establish that a law is properly tailored. *Cf. id.* (striking down a commercial speech restriction because there were alternatives that "would restrict less speech and would more directly advance California's asserted interest in preventing consumer deception").

It remains unclear to me how a tailoring analysis aids us in deciding the preemption question. But to the extent the inquiry is relevant, the obvious and less restrictive regulation here would be to simply require that mining activity in essential habitat areas be conducted in a manner that does not adversely affect fish habitat—thus prohibiting non-motorized

mining adverse to fish populations and permitting motorized mining that can be conducted consistent with requirement to preserve essential habitat.

B.

Federal law not only preempts Senate Bill 3 on its face, but the miners also identified disputed issues of material fact precluding summary judgment on their *Granite Rock* as-applied preemption challenge. Contrary to the majority's suggestion, Maj. at 50, the law recognizes as-applied preemption challenges that turn on the effect in operation of the allegedly preempted state law. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105 (1992) ("Although 'part of the pre-empted field is defined by reference to the purpose of the state law in question, . . . another part of the field is defined by the state law's actual effect.'" (alterations in original) (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 84 (1990))); *id.* ("In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law.").[7]

[7] Many other cases recognize as-applied preemption challenges. *See, e.g.*, *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943–45 (2016) (identifying factual issues like the "'acute, albeit indirect, economic effects' of [a] state law" as one mechanism for showing a state law is preempted by ERISA (citation omitted)); *Adrian & Blissfield R.R. Co. v. Vill. of Blissfield*, 550 F.3d 533, 540 (6th Cir. 2008) (identifying circumstances for proving a law is "preempted *as applied*" and "requir[ing] a factual assessment" (emphasis in original, internal quotation marks and citations omitted)); *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332 (5th Cir. 2008) (same). *Compare Puente Arizona v. Arpaio*, 821 F.3d 1098, 1110 (9th Cir. 2016) (remanding a case for consideration of the as-applied preemption challenge), *with Puente Arizona v. Arpaio*, No. CV-14-01356-PHX-DGC, 2016 WL 6873294, at

Granite Rock expressly recognized this possibility in the context of state environmental regulation versus land use planning. 480 U.S. at 587. As the court noted, "[t]he line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable." *Id.* The Court went on to endorse "*reasonable* state environmental regulation" as not preempted by federal law. *Id.* at 589. Whether dicta or holding, these statements by the Supreme Court reach the correct conclusion. Because Congress has occupied the field of land use planning, federal law preempts any environmental regulation that (when applied to federal land) has the effect of prohibiting (for all practical purposes) a particular land use in the regulated zone. To hold otherwise would allow an end-run around federal preemption.

Here, the miners contend that mining without motors is (if not impossible) entirely impracticable within the in-stream zones governed by Senate Bill 3. Thus, they argue the law has the effect of prohibiting mining within the regulated area. At oral argument, the State essentially conceded this fact. United States Court of Appeals for the Ninth Circuit, *16-35262 Joshua Bohmker v. State of Oregon*, YouTube (Mar. 8, 2018), https://youtu.be/IrC_pz9CNh4, at 21:09 to 21:15, 24:00 to 25:00 (acknowledging that Senate Bill 3 effectively prohibits mining in the in-stream areas governed by the law). Thus, the miners argue that entry of summary judgment is inappropriate.

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*7–13 (D. Ariz. Nov. 22, 2016) (conducting an as-applied preemption analysis and concluding that the law was field preempted as applied to a narrow set of prohibited conduct).

The majority suggests that the miners waived this challenge because they "do not argue that Senate Bill 3 is preempted simply because it may render some of their mining claims commercially impracticable." Maj. at 27–28. Come on. That cannot be the basis for our decision. The record amply establishes that the miners have consistently raised both a facial and as-applied challenge to Senate Bill 3 before the district court and on appeal. Excerpts of R. at 102, 106-07, 118, 121, 124, 130, 135, 143, 150 (identifying declaration testimony by the miners regarding the impact of the law on practicability of mining in the zones governed by Senate Bill 3 that was provided to the district court in opposition to summary judgment); Excerpts of R. at 21–23 (identifying the district court's rejection of the miners' *Granite Rock* commercial impracticability standard); Appellants' Opening Br. at 45–48 (identifying *Granite Rock* commercial impracticability standard and asserting the Oregon law is not a reasonable environmental regulation); Appellants' Opening Br. at 52–57 (identifying the record evidence establishing disputed issues of material fact regarding the impact of the Oregon law on the practicability of mining in the regulated zones); United States Court of Appeals for the Ninth Circuit, *16-35262 Joshua Bohmker v. State of Oregon*, YouTube (Mar. 8, 2018), https://youtu.be/IrC_pz9CNh4, at 8:30 to 17:30 (identifying the argument by the miners' counsel that the practicability of mining is an alternative basis for the court to conclude under *Granite Rock* that federal law preempts Senate Bill 3).[8]

[8] The majority doubles down on its erroneous conclusion that the miners have waived an as-applied challenge to Senate Bill 3. In support of its conclusion, the majority cites a single line in the miners' reply stating that "[t]his appeal is not about profitability, but about prohibition." Maj. at 28 n.6 (citing Reply Br. at 41). Nothing in the quoted language

The majority next rejects the merits of an as-applied theory of preemption, asserting that considerations of commercial practicability would endanger every environmental regulation. Not so.

We are presented with a narrow but important issue of preemption. Even if federal law preempts Oregon's attempt to apply Senate Bill 3 to federal lands, the miners must still comply with all environmental laws and standards imposed expressly by federal statutes and regulations. The *Granite Rock* practicability exception does not apply to federal regulation. *Cf., e.g.*, *Clouser v. Espy*, 42 F.3d 1522, 1530 (9th Cir. 1994) (affirming forest service access regulation that diminished value of mining claims). Moreover, Oregon remains free to coordinate its land use plans with the relevant federal agencies in seeking an outright federal prohibition on mining within essential habitat on federal lands. Oregon may also amend its statute to incorporate an environmental standard to require mining activity in essential habitat be conducted in a manner that avoids damage to fish habitat. In short, a win for the miners is not likely to lead to environmental disaster as the majority portends.

Second, commercial practicability is a judicially manageable standard. "[V]irtually every environmental regulation" is not at risk. *See* Maj. at 28–29. Contrary to the

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forecloses the argument that Senate Bill 3 *effectively* functions as a prohibition in the regulated zones. Waiver requires an "intentional relinquishment of a known right." *E.g.*, *Oelbermann v. Toyo Kisen Kabushiki Kaisha*, 3 F.2d 5, 5 (9th Cir. 1925) (citation omitted). The miners have consistently argued that Senate Bill 3 makes it effectively impossible to remove minerals from their claims. In concluding that the issue is waived, the majority simply ignores the substantial briefing and argument cited above.

majority's assertion, nothing in *Granite Rock* suggests a case-by-case, miner-by-miner assessment of commercial practicability. Rather, *Granite Rock* suggests an approach focused on the overall effect of the state regulation on mining practicability. *See Granite Rock*, 480 U.S. at 586–89.

The exception applies only where the regulation's effect is "so severe" that it renders mining on the regulated lands "commercially impracticable" as a general matter. The finances or circumstances of individual miners are not relevant to the analysis. A court simply examines the effect of the regulation on the scope of commercial mining operations that could permissibly be employed in the absence of the regulation. Where a state environmental regulation eliminates all previously permissible means of commercial mining on federal land, it runs afoul of the *Granite Rock* exception. If viable means of commercial mining remain available in most (if not all) tracts of land governed by the regulation, it falls within the general rule that "reasonable state environmental regulation is not pre-empted . . . ." *Id.* at 589.

Here, the miners identified sufficient factual support for the proposition that Senate Bill 3 renders mining commercially impracticable within the areas regulated by the statute. I cannot agree with the majority's assertion that Senate Bill 3 is not a de facto ban on mining because it allows non-motorized mining (i.e. panning for gold by hand). This would be similar to saying to a man that he is not prohibited from building a house on his property, he is only prohibited from using any power tools, trucks, or other motorized equipment in doing so. In an imaginary world, it is certainly still possible that over the course of his life he could dig the foundation, mix the concrete, haul the lumber, and construct

a house eventually. Nonetheless, such a law would render the man's right to build a house a nullity. If the miners proved impracticability on remand, I would conclude that the Oregon law is a de facto land use regulation preempted by federal law.

III.

In short, there are two alternative grounds to reverse the district court. First, the miners are entitled to summary judgment because federal law preempts Oregon's impermissible attempt to regulate particular uses of federal land under Senate Bill 3. Alternatively, I would recognize the as-applied theory for establishing preemption outlined in *Granite Rock*. Federal law preempts environmental regulation that is so severe that it operates as a de facto land use plan by rendering a particular use of the regulated land utterly impracticable. The miners put on sufficient evidence to establish at least a genuine issue for trial on this theory. Accordingly, I respectfully dissent from the majority's decision to affirm summary judgment in favor of the State of Oregon.