

No. 39699-8II

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

PACIFICORP ENVIRONMENTAL REMEDIATION COMPANY, A
DELAWARE CORPORATION, AND PUGET SOUND ENERGY, A
WASHINGTON CORPORATION,

Plaintiffs/Respondents,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, A
DEPARTMENT OF THE STATE OF WASHINGTON

Defendant/Appellant.

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I. INTRODUCTION

In 1986, during construction of the SR 705 Tacoma Spur, the Washington State Department of Transportation (“DOT”) installed a pipeline that discharged coal tar pollution to the Thea Foss Waterway (“Waterway”), in Tacoma, Washington which is a portion of the Commencement Bay Superfund. DOT allowed this pipe to continue to discharge pollution to the Waterway for at least 17 years, long after it recognized the pipe was polluting the Waterway.

DOT, although clearly liable for this contamination, refused to participate with the U.S. Environmental Protection Agency (“EPA”) and the Washington State Department of Ecology with respect to the cleanup of the Waterway. DOT defied repeated requests from EPA and Ecology even to stop its on-going pollution. It was not until 2003 that DOT, spending less than \$50,000, finally severed the pipe that discharged the pollution to the Waterway.

At the request of EPA and Ecology, the Respondent Utilities PacifiCorp Environmental Remediation Co. (“PERCO”) and Puget Sound Energy (“PSE”) (collectively the “Utilities”), along with the City of Tacoma, agreed to perform the cleanup of the Waterway.

The Utilities also entered into settlements with virtually all of the other viable parties that had been identified as responsible for the site (approximately 75 other parties). Those settlements were conditioned on the Utilities performance, and were done in exchange for cash contributions and assignment of most of the settling parties' contribution rights.

The Utilities and the City of Tacoma then entered into Federal Consent Decrees, assuming the risks and obligations of performing a remediation to EPA's satisfaction, and cleaned up the Waterway. The total cost of this cleanup, at the time of trial, exceeded \$116 million.

The Utilities have brought this action asserting their own contribution rights of the City's and the contribution rights of the majority of parties that paid to clean up the Waterway.

DOT has steadfastly refused to accept responsibility for its actions. At trial, DOT argued that the pollution that it discharged to the Waterway could not accurately be quantified because it is so intermixed with other similar pollution. DOT claimed, therefore, it should not be held liable. The trial court, having found DOT liable for discharging pollution to the Waterway, equitably allocated \$6 Million in past remediation costs to

DOT, plus 2% of all future costs that will be incurred in monitoring and maintaining the remediation of the Waterway.

II. RESPONDENTS' STATEMENT OF THE ISSUES

1. Should this Court affirm the trial court's decision to grant partial summary judgment on DOT's liability under the Model Toxics Control Act ("MTCA"), Chapter 70.105D RCW?
2. Are the trial court's findings and conclusions that DOT is liable as an "owner or operator" and "arranger" for disposal under RCW 70.105D.040(1) supported by substantial evidence?
3. Are the trial court's findings and conclusions that DOT's SR 509 construction caused a "release of hazardous substances" to the Waterway the result of the trial court's abuse of discretion?
4. Is the trial court's allocation of \$6 million in cleanup costs plus two percent of future costs to DOT the result of an abuse of discretion?

III. STATEMENT OF THE CASE

A. Factual History

1. History of the Parties

The Utilities are successors to the previous owners and operators of a Manufactured Gas Plant ("MGP") that operated at 24th and A Street in Tacoma, Washington between 1884 and 1924. RP 89, 103-104. The

Utilities' sole basis for liability with respect to the Waterway is that DOT discharged coal tar contamination from the MGP site to the Waterway.

Ex. 94, pg. 4.

To produce manufactured gas, coal was essentially steam cooked and the gases collected and used much like natural gas is today. RP 90-91. The process of producing gas also produced coal tar, which contains hazardous substances. RP 91. Coal tar contains polyaromatic hydrocarbons "(PAHs)". Ex. 29, pg. 2-3; 99. PAHs are hazardous substances, and are one of the substances that drove the cleanup of the Waterway. RCW 70.105D.020(10)(d); Ex. 99.

EPA established sediment quality objectives ("SQOs") for the Waterway in its 1989 Commencement Bay Nearshore/Tideflats Record of Decision (the "ROD"). Ex. 84 at Table 13. The SQOs were created to ensure the health of marine organisms. Ex. 84; RP 354-355. Subsequently, the State of Washington adopted the SQOs set for the Waterway as more general, state-wide minimum cleanup standards for marine environments. *See* WAC 173-204-320.

When the MGP was shut down in 1924, coal tar remained buried on the site. Ex. 94, pg. 2. It is undisputed, however, that the coal tar

posed no threat to human health or the environment until DOT undertook to excavate the MGP site to build SR 705.¹

2. DOT's Installation of the DA-1 Line Caused Release of Hazardous Substances to the Waterway

DOT acquired the MGP property in the early 1980s to build SR705 through downtown Tacoma. Ex. 21. When DOT encountered the MGP contamination, instead of performing an investigation and cleanup of all of the hazardous substances at the site, DOT sought to avoid any delay to its construction schedule. Ex. 94, pg. 4, 7. In 1985, DOT negotiated a deal with Ecology to dispose only of those contaminated materials it had to excavate from the MGP site in order to build its highway. Ex. 38 (“i.e., removal of only that material disturbed by construction activity vs. total removal of all contaminated material within State right-of-way”); RP 633-635; 806-808.

¹ DOT sued the Utilities under CERCLA seeking to recover the costs incurred in disposing of the contaminated material from the MGP site. Ex. 94. The U.S. District Court for the Western District of Washington found that the site posed no risk so long as it was undisturbed, that DOT's primary motivation for excavating on the site was its highway project, that DOT failed to notify the Utilities of the discovery of hazardous substances and failed to comply with the various federal regulations regarding conducting a cleanup of the site. *Id.* at 4, 7. The court also found that DOT failed to conduct an adequate investigation of the site and that DOT's desire to finish its highway project on time resulted in the most expedient means of dealing with the contamination. *Id.* This ruling was upheld on appeal. *WSDOT v. Washington Natural Gas Company, et al.*, 59 F.3d 793 (9th Cir. 1995).

In 1985 and 1986, DOT excavated the MGP site and removed the coal tar it excavated—but, other coal tar contamination was intentionally left in place. Ex. 91, pg. 2; RP 632-635. Ecology never intended for this work to be a final cleanup of the site a fact that DOT admits. Ex. 91, pg. 2; 95, ¶ 7; RP 634-635. As part of the deal it cut with Ecology, DOT agreed that, after construction, it would monitor the PAH-contaminated groundwater on the site to ensure it was not polluting the Waterway. Ex. 38; 72; 277; RP 807-808.

In 1986, with full knowledge that groundwater on the site was contaminated with hazardous substances, DOT constructed a groundwater collection system to capture the groundwater from the MGP site and dispose of it into the Waterway. Ex. 32; 39, pg. 5; 957; 960; 961; 963; RP 641, 786,797-99, 808. DOT's groundwater collection system consisted of 1,256 feet of eight inch perforated pipe in trenches surrounded by drain rock. RP 787; Ex. 925. This type of system is commonly referred to as a French drain. Ex. 7. This collection system, and the pipeline connecting it to the City of Tacoma's stormwater discharge to the Waterway, was referred to by all parties as the DA-1 Line. Ex. 93; RP 239:14-18.

DOT created a collection system that covered a quarter of an acre, directly under the area where the MGP existed and the coal tar contamination was found. Ex. 925; RP 641, 804-805. In fact, when installing the DA-1 Line, DOT's contractor encountered a "considerable amount of coal tar" and "oily silt." Ex. 957; 960; 961; 963. In one day, for example, approximately 20 truckloads of tar was stockpiled by noon. Ex. 960; RP 792. Nevertheless, DOT installed a pipeline that discharged the pollution collected by this system to the Waterway. Ex. 7; 90; 92; 93; 117; RP 640-648, 656-658.

While the installation of the DA-1 Line might be explained as mere negligence of a large and bureaucratic organization, by 1989, DOT knew that the DA-1 system was capturing significant amounts of PAHs and that it was polluting the Waterway. Ex. 70; 71; 73; 80, 82; 83; RP 896-898, 900-901. The DA-1 Line was removing so much groundwater from the MGP site that there was not sufficient water left to take samples from the monitoring wells on the site. Ex. 71. When Ecology became aware of the existence of the DA-1 Line, it asked DOT to sample the outflow from the DA-1 Line to determine the impact to the Waterway. Ex. 73; 74.

About this time, EPA was working with Ecology in the early stages of the Waterway environmental investigation and had determined that DOT was liable for polluting the Waterway. Ex. 81. EPA sent DOT a notice in 1989 informing DOT that it was a potentially responsible party (“PRP”) under CERCLA for the Commencement Bay Superfund Site. *Id.* DOT disputed EPA’s conclusion, and EPA’s jurisdiction. Ex. 85. DOT appealed EPA’s determination to the U.S. Court of Appeals for the DC Circuit, *see WSDOT vs. U.S. EPA*, 917 F.2d 1309 (D.C. Cir. 1990), and ultimately to the Supreme Court, which denied certiorari, *WSDOT v. U.S. EPA*, 501 U.S. 1230, 111 S. Ct. 2851 (1991).

By this time, EPA and Ecology were also busy setting (1) standards for discharges of PAHs and other chemicals of concern and (2) clean up objectives for the Waterway. Ex. 81. By April 1989, DOT’s environmental consultant advised DOT of EPA’s activities, and told DOT that EPA’s actions were likely to “significantly impact DOT at the [MGP] Site, especially the DA-1 Line drain.” Ex. 80; RP 452. Thus, with knowledge that its pipeline was polluting the Waterway and with knowledge that EPA would hold it responsible, DOT nevertheless elected to take no action and allowed the pipeline to continue to pollute the Waterway. Ex. 277.

By July 1989, DOT's environmental contractor reported high concentrations of PAHs in sampling collected from the stormwater catch connected to the DA-1 Line. Ex. 82, pg. 6; RP 896-898, 912-913. At this time, DOT itself candidly concluded that samples from the outfalls into the Waterway "show significant contamination which ends up as a pollutant in the City Waterway" but ignored its environmental consultant's recommendation to plug the DA-1 Line system to stop the contamination. Ex. 83; RP 897-898. Ignoring the problem appeared to work, as nothing happened for 3 years (other than the pollution of the Waterway continuing). Ex. 277; RP 898-899.

Then, in May of 1992, an inspector from Ecology, Marv Coleman, rediscovered the problem when he noticed the smell of coal tar emanating from the DA-1 Line catch basins while driving by the catch basins. RP 629-630. Mr. Coleman sampled material from one catch basin that was connected to the DA-1 Line. Ex. 90; 91; 92; RP 602-603, 629-639. The material that had seeped into the catch basin from the DA-1 Line contained PAHs at a concentration of 1,366,000 ug/kg, leading Ecology to conclude that "free coal tar is entering the storm water system" that was

draining into the Waterway.² Ex. 92; 93; RP 638-641. Ecology considered this discharge to be “an emergency situation.” Ex. 92; RP 637-640. DOT employees were notified and inspected the catch basin leading them to record that there was about two feet of sludge in the catch basin that was “heavily contaminated with coal tar.” Ex. 90; RP 602-607. DOT’s attorneys admitted that this contamination was being discharged to the Waterway. Ex. 95, ¶ 4; RP 116. Nevertheless, DOT took no action to stop the pollution from flowing into the Waterway.

Mr. Coleman testified about test pits dug along the DA-1 Line in 1993 as part of Ecology’s investigation, and how the porous bedding material (gravel) around the perforated pipes, which was designed to collect groundwater, was instead collecting free flowing tar. RP 645-646. Mr. Coleman estimated that there were hundreds of gallons of free tar in the DA-1 Line area, and that after seeing the consistency of the coal tar present he had no doubt it was flowing through the pipes and into the Waterway. RP 647-48. He also testified that after these test pits were excavated, the coal tar containing material was put back in the holes and the road was paved over to await a final remedy. RP 648. That coal tar

² The EPA’s cleanup goal for PAH was 17,000 ug/kg. This limit also applied to sources discharging to the Waterway. Ex. 84, pg. 97.

containing material is still there today, to the extent it has not escaped through the DA-1 Line.

The City of Tacoma tried to stop the flow of coal tar to the Waterway by sealing a catch basin and plugging the inlet to another basin. RP 643, 656-659. Those efforts did not work. RP 658-660. In 1994, a subsequent inspection by the City's environmental consultant, revealed that coal tar was still migrating through the gravel trenches and entering the stormwater system and discovered another drain line that had not been plugged. Ex. 103, pg. 6-17.

In 1995, DOT considered cutting off the pipeline that discharged the pollution to the Waterway, but elected instead to attempt to fix the system during the new construction work it was doing for the SR 509 bridge project. Ex. 124; RP 539. DOT informed Ecology that it did not want to spend any more money. Ex. 142; RP 661-665. Ecology was unhappy with DOT's efforts, and concluded that DOT's construction activities had exacerbated problems at the site. Ex. 142; RP 664-665.

Ecology still detected coal tar odors near these catch basins in 1998. Ex. 199; RP 665-667. By 1999 Ecology still considered the DA-1 system to be a significant source of contamination to the Waterway. RP 672. Notably, DOT never disputed this conclusion. DOT's failure to

resolve the DA-1 Line issues not only resulted in more and more PAHs polluting the Waterway, but also held up progress on Ecology's remediation schedule of upland sites which was a prerequisite to EPA's cleanup of the Waterway. Ex. 230; 252; 258; 260; RP 673-678, 698-699, 723-725, 745-746, 748-757. By 2002, it appeared to EPA and Ecology that the DA-1 Line was the only remaining source of PAH contamination into the Waterway. Ex. 258; RP 751. Yet EPA could not get a commitment from DOT that the drainage system would be cut off by March 31, 2003. Ex. 252; 254; 257; 258; 277; RP 674-678, 746, 748-751, 754. EPA could not begin in-water sediment cleanup until all sources of contamination were cut off. Ex. 252; RP 674-678, 746, 748. EPA and Ecology officials eventually decided to direct the issue to upper level management in order to force DOT into action. Ex. 252; 254; 257; 258; 277; RP 674-678, 749-751, 754.

In 2000, some employees within DOT clearly recognized the urgency and import of EPA's concerns and the need to stop the pollution. Ex. 221. Yet it took DOT three more years to sever the pipe so that the DA-1 Line was completely cut off from discharging to the Waterway in 2003. Ex. 261; 277; RP 616, 701-703, 909-912.

3. Releases of Hazardous Substances Also Occurred During SR 509 Construction.

DOT built the SR 509 Bridge that traverses the Waterway. To support the Bridge, concrete piers were excavated into and poured on the bank of the Waterway and in the bottom Waterway. RP 821-823, 832-833. These piers were placed in locations that were known to be contaminated with coal tar to varying degrees. Ex. 833, pg. 2-3; RP 583, 817-818.

Because this area was known to be contaminated, DOT entered an agreed order with Ecology regarding the removal of hazardous material for the SR 509 construction. Ex. 833. But, at the outset, DOT violated this order by failing to provide notice to Ecology before starting construction within the boundaries of the site. Ex. 277; RP 692-693. Ecology expressed frustration with DOT's entire "lack of front-end planning . . . to identify potentially contaminated sites before construction." Ex. 134; RP 583-586, 591.

Ecology was also frustrated at DOT's inability "to respond to contamination when it was found . . . and the behavior and actions of [DOT] contractors who failed to take hazardous contamination handling

very seriously.” Ex. 134; RP 585-586. EPA also expressed frustration with DOT’s lack of coordination on the project. Ex. 129; RP 589-591.

To build the piers, DOT drove 8 foot diameter hollow steel pipes called caissons into the sediment of the Waterway to support the bridge piers. RP 821-823, 832-833. DOT knew that the material that had to be excavated from inside the caissons was contaminated with coal tar. RP 833-834. A photograph taken at the time of construction shows a work bridge that was constructed and used as the work area for removal of the coal tar contaminated material from the caissons. Ex. 139; RP 825, 835-836. The open tops of the caissons are visible at the end of the work bridge’s decking, along with green rebar cages on the deck that were later placed inside the caissons. Ex. 139.

To excavate the material from the caisson, a crane on the bridge would lower an auger into the caisson, drill down until the auger was loaded with soil and coal tar and lift out the contaminated material. RP 821-823, 833, 838-842. The crane would swing the material to a storage area adjacent to the work platform along the edge of the Waterway. On cross examination, DOT’s project engineer reluctantly admitted while looking at the photo of the bridge deck that the bucket or augur that removed the contaminated materials would have had to swing over the

Waterway to place that material in the holding area. Ex. 139; RP 841-843. This obviously provided an opportunity for the contaminated dirt and water to fall or drain into the Waterway. He also admitted that excavated material that fell on the bridge deck could then fall into the Waterway. RP 843-844. DOT's contractor performed this work, and DOT admitted having numerous difficulties over the contractor's environmental practices. RP 838. For example, the contractor failed to place tarps down on the work bridge, even though it was required to do so to prevent contaminated material from flowing through to the Waterway. RP 835-836.

Also as part of SR 509 construction, DOT built a stormwater retention pond precipitously close to an older underground fuel oil line. Ex. 277; CP 458, 464. Ecology did not authorize the DOT contractor to pump water from this specific pond. CP 462. In fact, by the time the DOT contractor was directed to cease pumping, an estimated 40 to 60 gallons of petroleum-type product had contaminated parts of the Waterway. CP 467-468.

B. Procedural History

The court granted the Utilities' motion for summary judgment, finding DOT liable under MTCA "with respect to the Utilities' claims

derived from releases associated with DOT's DA-1 Line drainage system." CP 1724-26. The Utilities claimed DOT was liable under MTCA as an "owner or operator" and as an "arranger." CP 2033-36. After a three and a half week bench trial the court issued a memorandum opinion, awarding the Utilities a six million dollar judgment against DOT, as well as a declaratory judgment for 2% of all future costs incurred by Plaintiffs and their assignors in monitoring and maintaining the Waterway remedy. CP 1783-93; CP 1880-82; CP 1845-46. The court also awarded reasonable attorneys' fees and expenses as required under RCW 70.105D.080, in the amount of \$1,613,737.94. CP 1881. DOT moved for reconsideration of the Court's ruling in its memorandum opinion. CP 1826-27. DOT's motion was denied. *Id.*

IV. STANDARDS OF REVIEW

A. Summary Judgment on DOT's Liability

A grant of summary judgment is reviewed de novo. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriately granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The reviewing court may affirm the trial court's grant of summary judgment upon any theory established by the pleadings and

supported by the proof, even if the trial court did not consider it. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989). The court's summary judgment finding that DOT is liable under MTCA for releases from the DA-1 Line is subject to de novo review.

B. Findings and Conclusions Supporting Equitable Allocation

The Washington Supreme Court has held that “[o]n appeal, the findings and conclusions of the trial court [acting in equity] are entitled to great weight and will not be disturbed unless an abuse of discretion patently appears.” *Lorang v. Lorang*, 42 Wn.2d 539, 541, 256 P.2d 481 (1953); *see also Willener v. Sweeting*, 107 Wn.2d 388, 397, 730 P.2d 45 (1986) (trial court's decision to award equitable remedy of rescission reviewed for abuse of discretion); *In re Yakima River Drainage Basin*, 112 Wn. App. 729, 748, 51 P.3d 800 (2002) (“We review a trial court's application of equity for an abuse of discretion.”).

This standard applies in MTCA cases when reviewing a trial court's equitable allocation proceeding. *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 139, 144 P.3d 1185 (2006) (applying abuse of discretion standard when reviewing equitable allocation); *Dash Point Village Assoc. v. Exxon Corp.*, 86 Wn. App. 596, 607-608, 937 P.2d 1148

(1997) (holding that trial court properly exercised discretion when considering equitable allocation).

V. ARGUMENT

The Model Toxics Control Act, was adopted by voter initiative in 1989 to “make polluters pay.” CP 567-68. To further the goal of the expeditious cleanup of hazardous waste, statutorily responsible parties are strictly liable for the remedial action costs associated with investigation and remediation. RCW 70.105D.010(5), .040(2); *City of Seattle v. Washington State Dep’t. of Transp.(WSDOT)*, 98 Wn. App. 165, 169-170, 989 P.2d 1164 (1999) (“*Seattle City Light I*”).

Washington courts “broadly interpret” and “liberally construe” MTCA to “effectuate the policies and purposes of the act.” *Dash Point*, 86 Wn. App. at 609; RCW 70.105D.910.

MTCA is modeled after the federal Comprehensive Environmental Response Compensation and Recovery Act (CERCLA). Thus, “federal cases interpreting similar language in CERCLA are persuasive, albeit not controlling, authority.” *Seattle City Light I*, 98 Wn. App. at 169-170 (citing *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992)).

The broad sweep of MTCA's liability regime identifies five categories of parties who are liable for the costs of remediating hazardous waste sites. The relevant ones for this appeal are:

(a) The owner or operator of the facility;

(b) Any person who owned or operated the facility at the time of disposal or release of the hazardous substances;

(c) Any person who owned or possessed a hazardous substance and who by contract, agreement, or otherwise arranged for disposal or treatment of the hazardous substance at the facility, or arranged with a transporter for transport for disposal or treatment of the hazardous substances at the facility, or otherwise generated hazardous wastes disposed of or treated at the facility

...

RCW 70.105D.040(1)(a)-(c). Under MTCA, a past or present owner or operator is liable for the cleanup and damages to the environment caused by the release of toxic substances. *Dash Point*, 86 Wn. App. at 599 (citing RCW 70.105D.040(1)(b); 040(2)). An arranger is liable for damages resulting from intentional and unintentional disposal. *Seattle City Light I*, 98 Wn. App. at 172-174; *Modern Sewer Corp., et al. v. Nelson Distributing, Inc.*, 125 Wn. App. 564, 568-573, 109 P.3d 11 (2005). For

MTCA contribution actions recovery is based on such equitable factors as the court determines are appropriate. RCW 70.105D.080.

A. Summary Judgment on Liability Was Proper

DOT was found to be a liable party under MTCA due to the releases of hazardous substances to the Waterway from the DA-1 Line. The undisputed evidence presented on summary judgment established that: (1) DOT admitted that it was an “owner or operator” of the DA-1 Line; (2) DOT admitted that the DA-1 Line collected PAH contaminants from the former MGP site; (3) DOT admitted that the DA-1 Line and related drainage system discharged PAHs to the Waterway; and (4) the Utilities had incurred recoverable response costs.

There is no dispute that DOT is the “owner or operator” of the DA-1 Line system. DOT, in an Agreed Order with the Department of Ecology, specifically admitted that:

WSDOT owns portions of the storm drainage system consisting of french drain structures beneath the street on-grade known as the DA-1 Line, and connections to the city of Tacoma (“City”) owned storm system.

CP 2215. *See also WSDOT v. EPA*, 917 F.2d 1309 (1990) (identifying DOT as an owner of the Tacoma Spur property that is part of the Commencement Bay Superfund site.)

There was no dispute that the DA-1 Line collected PAH contaminants that DOT had left behind when it built the 705 spur to downtown Tacoma.

[T]he work done [at the site] was never intended to be a final cleanup. Everyone knew that more contamination remained in areas outside the excavation area.

Ex. 95, pg 3.

Nor was there any dispute that DOT's failure to do a complete cleanup of the coal gas site led to PAH contamination entering the drain system.

The storm drain system is only contaminated because of the extent of contamination... that was not addressed in the cleanup done during construction.

Id., pg. 2, paragraph 7. DOT knew as early as 1989 that the DA-1 Line was collecting coal tar contaminants.

PAH constituents were detected in samples from down gradient wells MW-1, MW-3, MW-4, and the DA-1 Line. MW-3 and the DA-1 Line contained the highest levels of PAH constituents.

Ex. 82, pg. 6. Samples of the contamination were taken at various times by the City and Ecology throughout the 1990s. Ex. 92; 93; 99; 847; RP 638-641. Information about these samples was shared with DOT. Ex. 93; 96.

Nor was there any dispute that PAH contamination from the DA-1 Line discharged to the Waterway. DOT's Olympic Region Environmental Manager, Ken Stone, admitted this in a letter to Ecology:

The City of Tacoma and the Washington State Department of Transportation (WSDOT) have had discussions to consider potential remediation measures to halt migration of coal tar contamination to the Thea Foss Waterway via WSDOT and City of Tacoma storm sewer systems in the vicinity of this site....

While we have identified several items which require evaluation and substantiation in developing this design alternative, we feel it the best solution for halting further migration of coal tar contamination to the Thea Foss Waterway via existing storm sewer systems for South A Street....

Ex. 209 (emphasis added).

Even DOT's expert at trial, Helder Costa, admitted that PAHs from the DA-1 Line were deposited in the Waterway.

Q....You don't dispute that there were PAH materials sourced from the coal gas site that got into the DA-1 Line, do you?

A. Actually I don't dispute that. I presume they did get in, based on the reports that I have read and so forth, yes.

....

Q. You don't dispute that the materials that got into the DA-1 Line drain system ultimately ended up passing through 8 the intervening storm sewers and into the Thea Foss Waterway, do you?

A. I don't dispute that. In fact, during my deposition I testified that I would expect that some material would have.

RP 1294:1-5, 1297:6-11.

DOT's only challenge to the trial court's summary judgment ruling is to claim that "inferences were not drawn in favor of Transportation" regarding whether the DA-1 Line releases caused the Utilities to incur response costs. In particular, DOT claims that one of the Utilities' experts, Matthew Dalton, had made statements in written reports in the 1990s to the effect that PAHs from the DA-1 Line had not affected the Waterway contamination. Opening Brief at 16, 37-38, 40. DOT made this very argument on summary judgment, and the trial court properly rejected it, for two key reasons:

First, Mr. Dalton's reports did not say that no PAHs from the DA-1 Line reached the Waterway, as DOT has intimated. Instead, in the late

1990s, Mr. Dalton reported that, at that time, there appeared to be only a limited impact in the Waterway from ongoing DA-1 Line PAH discharges.

Mr. Dalton's report stated, for example:

[w]hile the DA-1 Line may have caused the release of oily material containing PAHs to the head of the Thea Foss, the releases do not appear to have substantially impacted bottom sediment quality.

CP 1406. Mr. Dalton's reports from the late 1990s were very frank about DA-1 Line discharges reaching the Waterway. Ex. 815, pg. 9 ("PAH Concentration Trends in Recent Sediment Have Been Impacted By the DA-1 Area"), *id.*, pg 10 ("Concentrations of detected PAHs are higher in the West Twin outfall samples "which is to be expected with inputs into the West Twin 96" outfall from the DA-1 area."), *id.* ("Data from the 1986 to 1988 SPM sampling summarized in Table 3 of the Twin 96 outfalls support the finding that the DA-line area was contributing PAHs to Thea Foss sediment."), Ex. 830 (identifying "DA-1" drainage line as an "upland source.").

Second, as the trial court properly recognized, the undisputed fact of PAH discharges from the DA-1 Line was sufficient to establish DOT's liability. The question of the degree to which the PAHs from the DA-1 Line caused or contributed to the costs of cleaning up the Waterway is not

a matter of liability determination, but is properly a matter for consideration in awarding contribution. *See Seattle Light I*, 98 Wn. App. at 172 (“[w]hile the degree of the hazard may be relevant to the question of cost allocation ... it is irrelevant to liability.”); Subsection 5.D. *infra*. As this Court has recognized, no minimum level of hazardous substance is necessary to trigger MTCA liability. *Id.* (citing *A&W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1110-11 (9th Cir. 1998) (rejecting de minimus defense)). This Court merely requires that Defendant’s release contribute to a threat or potential threat to human health or the environment. *Id.* at 176. DOT has never disputed that PAHs were a threat to human health or the environment.

B. DOT Arranged for Disposal of Coal Tar Materials

1. DOT’s System Was Designed to Dispose of Waste Water

Stormwater is, by definition, waste water under Washington law. Chapter 90.48 RCW. The DA-1 Line system and stormwater pipelines were designed and intended by DOT to discharge stormwater and contaminated groundwater to the Waterway. RP 785-789, 1089:3-7; Ex. 925. There is no dispute that even before the DA-1 Line was installed, DOT knew the groundwater in the site area was contaminated. RP 808.

DOT knew since at least 1989 that it was disposing of this polluted groundwater into the Waterway. CP 141-145, 160, 162, 476-478, 480-482.

2. Arranger Liability Under MTCA Does Not Require Intent

A party may be liable under MTCA as an arranger for both intentional and unintentional disposal. *See Modern Sewer*, 125 Wn. App. at 572-574 (“[t]he term “disposal” as used in MTCA’s “arranger” liability provision encompasses intentional as well as unintentional disposal.”); *Seattle City Light I*, 98 Wn. App. at 173 (“[t]he trial court correctly reasoned that the MTCA does not require a plaintiff to prove that the defendant had the specific intent to dispose of a hazardous substance”).

DOT has previously been held liable as an arranger for an unintentional disposal:

Because the MTCA is a strict liability law, it would be incongruous to allow a defendant to escape liability by showing that it did not intend to dispose of a hazardous substance. Such reasoning applied to a case such as this would discourage companies from carefully tracking their hazardous substances, contrary to the intent and purpose of the MTCA.

Seattle City Light I, 98 Wn. App. at 173.

The question for arranger liability is not whether DOT's actions were "evidence of an objective intent to dispose of hazardous substances." Opening Brief at 24. The question is whether DOT possessed hazardous substances, including petroleum products, and whether it arranged for disposal (whether intentionally or not) at the Waterway. RCW 70.105D.040(1)(c).

DOT has suggested that a recent U.S. Supreme Court ruling on the question of arranger liability under CERCLA, which imputes an "intent" requirement into the statute, should now govern the interpretation of MTCA. *See Burlington Northern and Santa Fe Railway Co., et al., v. U.S.*, 129 S. Ct. 1870, 1880 (2009). Adopting such a rule would be contrary to well-settled law under MTCA, and would, without any statutory authority, introduce a mens rea component into a strict liability statutory scheme. *See* RCW 70.105 D.040(2) ("[e]ach person who is liable under this section is strictly liable ..."). "[U]nlike CERCLA, Washington's MTCA explicitly creates a scheme of strict liability and joint and several liability..." *Seattle City Light I*, 98 Wn. App. at 170. Notably, this strict liability language is absent from the parallel provision in CERCLA. 42 USC §9607(a)(4).

3. Even If Intent Were Required, DOT Had the Necessary Intent

The record establishes that DOT knowingly, and intentionally, piped contaminants that it actually and constructively possessed from the DA-1 Line and 509 into the Waterway.

Beginning in 1986, DOT disposed of coal tar contamination present on its property beneath the SR 705 project via the DA-1 Line drainage system to the head of the Waterway. CP 141-145, 160, 162, 476-478, 480-482.

DOT installed the DA-1 Line collection system in an area it knew was contaminated by coal tar, creating the only pathway to the Waterway for the PAHs. Ex. 19, pg. 4; 20, pg. 4; 29, pg. 5-7. By design, the DA-1 Line channeled PAHs directly into the Waterway. RP 647:1-4 (“there was quite porous bedding material around the french drain because the whole purpose of that was to allow the water to flow through something that was porous to get through the french drains.”); RP 648:17-20.

C. DOT is an Owner or Operator of the “Facility”

MTCA imposes liability on the “owner or operator of the facility” and also on “[a]ny person who owned or operated the facility at the time of disposal or release of the hazardous substances.” RCW

70.105D.040(1)(a),(b). The “facility” at issue in this case is defined as the “site or area where a hazardous substance...has been deposited, stored, disposed of, or placed, or other come to be located.” RCW

70.105D.040(20)(4)(b). The property on which the DA-1 line collected the coal tar is expressly part of the “site” for purposes of the Consent Decree., as is the SR 529 right of way and bridge. Ex. 264, pg. 18 and Appendix C at C15-16 (includes the Tacoma Spur property owned and operated by DOT); 811, pg. 15.

While the DA-1 Line and the SR 509 right of way are both “facilities” independently, under RCW 70.106D.020 (4)(a) these individual facilities are also part of the larger facility that includes the Waterway because, due to the actions of DOT and others, hazardous substances from the DA-1 Line and the SR 509 “came to be located” in the Waterway. RCW 70.106D.020 (4)(b).

DOT does not have to own or operate the entire facility to be liable. This site was over 118 acres of contaminated lands. Ex. 264, pg. 15. Under MTCA, an “owner or operator” is “Any person with any ownership interest in the facility or who exercised any control over the facility ...”. RCW 70.106D.020(17)(a) (emphasis added). DOT admits that it was the owner and the operator of the DA-1 Line (located on the

MGP/Tacoma Spur property) and the SR 509 right-of-way. Ex. 100, *see infra*. As such DOT had some ownership interest in the geographically larger facility and exercised control over a portion of the facility. That “facility” is not bounded by a single address or real property definition. It is defined to include an area where the PAHs were deposited and where those PAHs came to be located (the Waterway). *See New York v. Westwood-Squibb Pharm. Co.*, 138 F. Supp.2d 372, 382-83 (W.D. N.Y. 2000) (finding that creek adjacent to former MGP property was part of same CERCLA facility because there was a common source of contamination, therefore holding the owner of the MGP property liable; “contamination of the Westwood Property ultimately caused contamination of the Creek Property. As such, the Westwood Property and the Creek Property are part of the same CERCLA facility.”); *Akzo Coatings, Inc. v. Aigner Corp.*, 960 F. Supp. 1354, 1358 (N.D. Ind. 1996), judgment *aff’d* in part, *vacated* in part on other grounds, 197 F.3d 302 (7th Cir. 1999) (“[parties] argue that because the Site can be divided into five distinct geographic areas, each area is a distinct facility, but ‘what matters for purposes of defining the scope of facility is where the hazardous substances were ‘deposited, stored, disposed of, ... or [have] otherwise come to be located’; court concluded areas constituted one CERCLA

facility”) (internal citation omitted); *Southern Pacific Transp. Co. v. Voluntary Purchasing Groups Inc.*, 1997 WL 457510, at *5 (N.D. Tex. 1997) (reporting decision in which court held that, although site contained several pieces of property owned by different parties, and EPA had entered into three separate administrative orders with respect to site cleanup, entire site should constitute one facility; court also noted that CERCLA facilities are not defined according to private property lines).

DOT exercised continued dominion and control over the DA-1 Line, and had the authority to cut off the DA-1 Line. But, failed to do so until 2003, over a decade after it first learned the system was a source of contamination to the Waterway. Ex. 80, 83; 90; 117; 202; 208; 209; 210; 253; 254; 258; 260; 261; 277; *see Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341 (9th Cir. 1992) (operator liability attaches when defendant had authority to control the cause of the contamination).

DOT has identified itself on multiple occasions as the “owner or operator” of SR 509 to EPA and Ecology, including in response to EPA’s requests for information relating to the Site, which was signed by a DOT official under penalty of perjury. Ex. 308 (“WSDOT, as an agency of the State of Washington, owns the right-of-way for ... Interstate 705, State

Route (SR) 509 ...) (emphasis added); RP 28:12-13 (04/24/09 Hearing), (counsel for DOT stating conclusions of law should state operator liability).

As with the DA-1 Line, DOT exercised control over SR 509 by designing and building it and related facilities, like the stormwater detention pond. Ex. 115; 119; 152; 153; 154; 164; 186; RP 695:20-25, 696:1-4, 696:23-25, 697:1-4, 697:11-14. DOT knew that its construction activities would disturb contaminated sediments in the Waterway. Ex. 115; CP 1833 (FF D.2); RP 583, 817-818, 833-834. The court considered precautions DOT took during construction when weighing the equitable factors for allocation (CP 1841 (CL B.5.d.)), but still correctly found DOT liable as an owner or operator of SR 509 bridge. CP 1833 (FF D.4), 1838 (CL A.5, 6.).

Because DOT was an “owner or operator” of these facilities at the time of a release of hazardous substances from the facilities, DOT’s liability extends to “any site or area where a hazardous substance . . . has . . . come to be located.” RCW 70.105D.020(5)(b). Here, contamination was discharged directly from SR 509 right-of-way and the DA-1 Line, and “came to be located” in the Waterway.

D. MTCA Contains No Causation Requirement and No Requirement that Plaintiffs Prove a Fractional Share

DOT does not and cannot deny that its DA-1 Line collected hundreds of gallons of PAHs from the MGP site and discharged those PAHs into the Waterway.³ DOT does not and cannot deny that PAHs in the Waterway sediments exceeded the cleanup standards set by EPA and Ecology. Instead, DOT argues that while the evidence indicated that PAHs from the DA-1 Line mixed with PAHs from stormwater and, as a result the concentrations of PAHs in the sediments increased, it is impossible to determine “which contaminant source caused the increase in Waterway sediment PAH.” Opening Brief at 40. Even if true, this is not a defense to MTCA’s strict liability. In fact, courts hold that once the plaintiff has established that a defendant disposed of a hazardous substance on the site of the type that required cleanup, the burden of proof shifted to the defendant to prove the waste disposed of did not cause cleanup costs. *U.S. v. Davis*, 261 F.3d 1, 44 (1st Cir. 2001); *City of Moses Lake v. U.S.*, 458 F. Supp.2d 1198, 1237-38 (E.D. Wash. 2006). In a multi-party site like the Waterway, there can be no expectation that each

³ In fact, the only witness to testify about witnessing the excavation of the DA-1 Line was an inspector from Ecology that testified that it contained hundreds of gallons of liquid tar as late as 1993 and that he had no doubt it was discharging the liquid tar to the Waterway. RP 695-96.

hazardous substances released in the Waterway over decades will be scientifically traced to a particular source. *See Amoco Oil Co. v. Borden, Inc.* 889 F.2 664, 670 n.8 (5th Cir. 1989) (In cases involving multiple sources of contamination, a plaintiff need not prove a specific causal link between costs incurred and an individual defendant's release.); *see also Tosco Corp v. Koch Indus. Inc.*, 216 F.3d 886, 891 (10th Cir. 2000). This shifting of the burden is expressly reflected in this court's holding in *Seattle City Light I* where the court stated DOT may avoid liability in a contribution action "if it demonstrates that its share of hazardous substances deposited at the site [were no more than background and] cannot concentrate with other wastes to produce higher amounts. 98 Wn. App at 178 (emphasis added); *Acushnet v. Mohasco Corp.*, 191 F.3d 69, 79 (1st Cir. 1999).

MTCA does not impose any requirement that a plaintiff prove the defendant's release "independently threatened human health." Opening Brief at 43 (emphasis added). A party need only "demonstrate that the defendant's hazardous substance contributed to a threat or potential threat to human health or the environment." *Seattle City Light I*, 98 Wn. App. at 176 (emphasis added); *Acushnet*, 191 F.3d at 77. This is precisely what the Utilities proved. DOT contributed PAHs to the Waterway. PAHs in

the Waterway posed a threat to human health or the environment. The PAHs DOT contributed combined with PAHs from other sources to significantly exceed the cleanup levels set by EPA. The Utilities proved that in 1995 and 1996 there was a significant increase in PAH contamination in the Waterway.

The Utilities' expert, Matthew Dalton, established that DOT's contribution of PAH contamination to the Waterway led to exceedances of the SQOs and, therefore, posed a threat to the environment. Ex. 300; 303; RP 306-314, 348-352.

The Utilities proved not only that this increase coincided with the operation of the DA-1 Line, the Utilities also proved the DA-1 Line was a significant source of highly concentrated PAHs.

Ecology's Marv Coleman was the only witness that testified about Ecology's investigation and excavation of the DA-1 Line. He testified that he estimated from the excavation that the DA-1 line contained hundreds of gallons of liquid tar and that as the backhoe dug the trench, liquid tar would run in from the sides of the excavation. He also testified that based upon his observations of the viscosity of the liquid tar he had no doubt this liquid tar was being discharged to the Waterway. RP 647-48.

This evidence combined with the Utilities expert testimony that PAH

concentrations in the Waterway did result from the DA-1 Line discharges and contamination due to DOT's SR 509 construction activities supports the trial court's conclusions that DOT's releases increased the amount of PAHs in the sediments. CP 1831-32 (FF C.5-14), CP 1833 (FF D.4), 1836 (FF I.6), CP 1837-38 (FF I.17, 20); CP 1840-41 (CL B.2-4); Ex. 300; 303; RP 305-314, 326-329, 348-352, 459-461.

Once the court determined DOT was liable under RCW 70.105D.040, it then decides DOT's fair share of the remediation costs based on such equitable factors as the court determines are appropriate. RCW 70.105D.080. The statute contains no requirement for determination of "fractional shares." This is, in part, because "[i]n many cases (if not most), it is extremely difficult to dissect the waste and associated cleanup costs." *Seattle City Light I*, 98 Wn. App. at 175-76.

DOT claims that the trial court's award of remedial action costs was based "on a bare showing of liability," and that the court improperly shifted the burden of proof to DOT to disprove its contributions. Opening Brief at 46, 47. Had the trial court actually done so, it would have been within its discretion. *Seattle City Light I*, 98 Wn. App. at 178 (DOT can avoid liability by proving its discharges does not concentrate with other wastes to exceed cleanup levels); *Acushnet*, 191 F.3d at 77.

The court did not, however, need to shift the burden of proof to reach its result. At trial, DOT's made a calculated decision to only argue that the Utilities' experts could not precisely determine what fraction of the PAHs in sediments came from the DA-1 Line. DOT's own expert testified he was not asked to attempt an allocation, only to argue that the PAHs could have come from stormwater. RP 1309-1313. The Utilities' expert testified that only 200 gallons of the coal tar from the DA-1 Line discharged into the Waterway would account for the PAH concentrations above the cleanup objectives set by EPA. Ex. 315, Figure 5; RP 1506-1509. He also testified the DA-1 Line could have conveyed 3,000 gallons of coal tar material into the Waterway. RP 1508-1509. None of this was contested by DOT and this testimony combined with the evidence of the magnitude of coal tar present in the DA-1 Line during Ecology's 1993 investigation supports the trial court's judgment. DOT cannot establish that the trial court abused its discretion.

E. DOT Was a Recalcitrant Polluter.

DOT allowed the DA-1 Line to contributed PAHs to the Waterway for 17 years. CP 1832 (FF II.C. 12); RP 900-901. This fact is literally criminal. Every single day DOT knowingly allowed the DA-1 Line discharges to pollute the Waterway was a separate crime under Section

301(a) of the Clean Water Act. 33 U.S.C. § 1319(c).⁴ DOT refused to accept responsibility for its actions and failed to participate in the cleanup of the Waterway when requested by EPA and Ecology. This left the Utilities and their assignors to literally clean up the mess made by DOT. The only liability of the Utilities with respect to the Waterway is the vicarious liability resulting from DOT's movement of the coal tar from the MGP site to the Waterway. RP 469; Ex. 94.

In summary, substantial evidence in the record establishes:

- In 1986, with full knowledge that groundwater on the MGP site was contaminated with hazardous substances, DOT designed and constructed a collection system for the purpose of capturing the groundwater from the site and discharging it to the Foss Waterway. Ex. 32; 39, pg. 5; 957; 960; 961; 963; RP 797-98.
- In 1988, DOT knew that the DA-1 Line was likely removing contaminated water from the MGP site and discharging pollution to the Waterway. Ex. 70; 71; 73.

⁴ Section 301(a) of the Clean Water Act ("Act") prohibits "the discharge of any pollutant." 33 U.S.C. § 1311. The Act defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source . . ." *Id.* at § 1362(12). EPA's regulations further define "discharge of a pollutant" to include "addition of pollutants into waters of the United States" from "pipes, sewers or other conveyances owned by a State . . . which do not lead to a treatment works." 40 C.F.R. § 122.2. By definition, a "point source" includes "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, [or] well . . . from which pollutants are or may be discharged." *Id.* at § 1362 (14). DOT knew that the DA-1 line was conveying contamination to the Waterway. Yet, DOT knowingly allowed that contamination to continue. Accordingly, DOT "knowingly" violated the CWA on thousands of occasions between 1989 and 2003. *See, e.g.*, 33 U.S.C. § 1319(c); *U.S. v. Technic Servs., Inc.*, 314 F.3d 1031, 1042 (9th Cir. 2002) (explaining that a "knowing" violation of the CWA merely requires the defendant to knowingly discharge pollutants into navigable waters).

- By 1989, DOT knew sampling from the DA-1 Line showed high levels of PAH contamination. Ex. 82, pg. 6; RP 896-898.
- In 1989, DOT's environmental contractor told DOT that Ecology and EPA were setting PAH standards for the Waterway that were going to significantly impact DOT with respect to the MGP site, "especially the DA-1 line drain." Ex. 80; RP 452. DOT took no action.
- In July 1989 DOT itself concluded that samples from the outfalls into the Waterway "show significant contamination which ends up as a pollutant in the City Waterway" and that DOT's own environmental consultant had recommended plugging the DA-1 Line system to stop the contamination. Ex. 83; RP 897-898. DOT took no action. RP 898-899.
- In November of 1989 DOT responded to EPA's notice letter with a lawsuit. *WSDOT v. U.S. EPA*, 917 F.2d 1309 (D.C. Cir. 1990) *cert. denied* 501 U.S. 1230, 111 S.Ct. 2851 (1991).
- In May 1992, Ecology independently concluded that "free coal tar is entering the storm water system" and that the DA-1 Line was discharging PAHs to the Waterway. Ex. 92; 93; RP 638-41. DOT's own employees inspected the catch basin and confirmed that there was about two feet of sludge in the catch basin that was "heavily contaminated with coal tar." Ex. 90; RP 602-607. DOT's legal counsel even admitted that contamination from the site was being discharged to the Waterway. Ex. 95 at ¶ 4; RP 116. Yet, DOT, the owner of the DA-1 Line and the owner of the MGP site took no action to stop the pollution.
- In 1994, an inspection by Black & Veatch revealed that coal tar was still migrating through the gravel trenches and entering the stormwater system. One pipe on the DA-1 Line was still not plugged at this time. Ex. 103, pg. 6-17.
- In 1995, DOT told Ecology it would not spend any additional money on the site. Ex. 142; RP 661-665. Ecology concluded at

that time that DOT's SR 509 construction was exacerbating problems at the site. Ex. 142; RP 664-65.

- By 1999, DOT's inaction in resolving the DA-1 Line issues was holding up progress on the remediation schedule of upland sites and frustrating EPA and Ecology. Ex. 230; 252; 258; 260; RP 673-678, 698-699, 723-725, 745-746, 748-757.
- In 2000, some DOT employees recognized the urgency of the issue, but still the DA-1 Line continued to pollute the Waterway. Ex. 221; RP 616.
- DOT finally cut off the DA-1 Line in 2003. Ex. 261; RP 701-703, 909-912.

DOT apparently rationalized its refusal to stop the DA-1 Line pollution with the excuse that it spent \$5 million to dispose of material it excavated from the MGP site to build a freeway. Actually, because the Tacoma Spur is part of the Interstate Highway system, the federal government funded 90% of the costs of this work. RP 808-09. DOT was building a freeway; it was not initiating an environmental cleanup. Ex. 94. Even DOT admits that its excavation to build the spur was never intended to remediate the site. Ex. 91; 94; 95; RP 634-635. Had DOT done an environmental investigation and cleanup, the DA-1 Line would not have collected hundreds of gallons of coal tar from the site and discharged PAHs to the Waterway for 17 years. DOT spent \$5 million building a freeway and as a result polluted the Waterway with thousands of gallons

of coal tar. This does not exactly justify DOT's decision to not stop its pipeline from polluting the Waterway.

DOT's inaction not only resulted in hazardous material continuing to flow into the Waterway through the DA-1 system for 17 years, it also became a significant barrier to EPA's in-water sediment cleanup. Ex. 252; RP 674-678, 746, 748, 771-773. Kris Flint, EPA's remedial project manager for source control at the Waterway, explained the extreme difficulty of working with DOT in attempting to achieve the final source control for the Waterway.

It wasn't until the middle of March [2003] that Department of Transportation managed to get act there and get the problem addressed. This is after three years of promising to come to meetings and not making them all, caring – you know making dates to go in field with the City and then not making the date, and it has been one delay after another without a lot of good explanation, and it was extremely tense because that was a major milestone for us for any of us to go forward with remediation of the waterway.

RP 748-749.

EPA could not begin the in-water sediment remediation until all sources of contamination were under control. RP 675, 724-725, 748-749, 752-753. Source control is a critical component of any remediation

project because there is no sense in proceeding with cleanup if the site will only be recontaminated. RP 737, 752-753. Because DOT officials did not respond to repeated requests for confirmation that the DA-1 Line would be cut off by March 31, 2003, EPA and Ecology officials eventually decided to direct the issue to upper level management in order to force DOT into action. Ex. 252; 254; 257; 258; 277; RP 674-678, 749-751, 754.

DOT finally cut off the DA-1 system in April 2003 at a cost of less than \$50,000. Ex. 252; 253; 258; 261; RP 701, 703, 752, 901-902. There was no reason why this could not have been done in 1987. With each day DOT delayed this inexpensive fix, coal tar continued to flow into the Waterway. DOT environmental manager, Jeff Sawyer, admitted that, in 1992 when he learned the DA-1 Line was contaminated with coal tar, he had no doubt that coal tar was discharging into the Waterway RP 900-901 and that DOT could have stopped the pollution earlier. RP 911-12. Even Mr. Sawyer thought that the DA-1 Line continued to pollute the Waterway for an unreasonable amount of time. RP 911-912.

F. Substantial Expert Testimony Demonstrated That DA-1 Line Discharges Contributed to Contamination.

The Utilities' expert witness, Matthew Dalton, testified to numerous lines of evidence supporting his opinion that the DA-1 Line was

substantially responsible for PAH contamination in the Waterway. First, he examined changes in PAH contamination, as measured in samples taken from Waterway sediments, from the early 1980s through the present. Ex. 300; RP 307-314, 363-364. He used samples taken in the 1980s, before the DA-1 system began operating, as a baseline against which to compare samples from the mid-1990s, when the DA-1 system was discharging coal tar to the Waterway. *Id.* Based on this analysis, Mr. Dalton concluded that there had been a significant increase in PAH contamination in the Waterway since the DA-1 system was installed. *Id.*

Mr. Dalton also examined samples taken very recently, in the late 2000s, since the Waterway was remediated and after the DA-1 Line was cut off. Ex. 300; RP 307-314, 363-364. Significantly, these samples showed contaminant levels that were strikingly parallel to the levels from the early 1980s, before the DA-1 Line was installed. *Id.* And, importantly, neither the early 1980s samples nor the late 2000s samples exceeded EPA's sediment quality standards for PAHs. *Id.* In short, there was a remarkable, 300% upward spike in PAH contamination at the head of the Waterway that began shortly after the DA-1 Line was installed, and that ceased shortly after the DA-1 Line was cut off. RP 548.

Mr. Dalton also examined the correlation between BEHP contamination and PAH contamination in those same sediments. RP 376-381. BEHP is a common contaminant in stormwater. Mr. Dalton determined that there is, in general, a remarkably close correlation between PAH and BEHP contamination in most stormwater, and most sediment samples associated with the Thea Foss. *Id.* The sole exception to this rule is for the sediment areas most directly affected by discharges from the DA-1 Line during the 1990s. *Id.* For those areas, the PAH – BEHP correlation works for samples taken in the 1980s and the 2000s. *Id.* But there is a much higher ratio of PAH to BEHP in the samples taken during the 1990s, indicating an anomalous source of PAHs at that time. *Id.* Mr. Dalton’s analysis of PAH / BEHP correlations was published in peer reviewed literature, and was relied upon by EPA in its work on completing the Waterway remedy. *Id.*; RP 550-552.

Having determined that there had been a significant fluctuation in the PAH contamination in the Waterway, Mr. Dalton developed a conceptual model for explaining the sources of the changes. RP 296-299. This a standard deductive tool used at contaminated sites by EPA and required of practitioners in the environmental field. *Id.* Notably, DOT’s expert failed to perform any such analysis. RP 1290-1293.

In preparing his conceptual model, Mr. Dalton considered a huge volume of information about the history of the operations of the MGP facility, and the pathways that could have deposited coal tar in the Waterway. RP 368-370. Both he, and all of the regulatory agencies involved, agreed that the only possible pathway from the MGP site to the waterway was through the DA-1 Line. *Id.* He also examined an enormous volume of information regarding the history of industrial, commercial, and automotive operations around the Waterway. RP 418. In doing so, he was unable to identify any credible source for the increases in PAHs concentrations in the Waterway sediments during the 1990s other than the DA-1 Line and construction activities at the 509 bridge which disturbed and re-mobilized pre-existing contamination. RP 547-551.

Mr. Dalton also considered and examined whether airborne sources of PAH, by way of from fall-out of combustion particulates, could have caused the 300% increase in PAH contamination. RP 371-375. Instead, what he discovered was that airborne particulate concentrations had decreased significantly during the 1990s, at precisely the time that PAHs were accelerating in the Waterway so rapidly. *Id.* This was not a particularly surprising outcome, as Tacoma saw a significant decrease in industrial activity during the 1990s. *Id.* He also considered whether

increases in traffic volume could have caused the spike in contamination, but discovered that the development patterns in the relevant areas of Tacoma were virtually unchanged since the early 1980s, and that there had only been a 40% increase in traffic on the nearby stretch of I-5 during the relevant time period. *Id.* He also determined that even if these sources might have made some contribution to the dramatic increase in PAH levels in the 1990s, they could not explain the dramatic decline in PAH contamination since.

In terms of percentages, Mr. Dalton concluded that the DA-1 system accounted for 68.6 percent of the PAHs in Waterway sediment. RP 350. This conclusion was well supported by standard, accepted, reliable scientific methods, including those which were used by EPA as the foundation for its decision making and actions in supervising the Waterway remedy. RP 550-552. The remaining percentage was attributable to stormwater sources.

DOT's own expert, Helder Costa, concluded that the increase of PAHs in the Waterway were due in part to the DA-1 Line. RP 1238. Mr. Costa said:

Q. You don't dispute that the materials that got into the DA-1 line drain system ultimately ended up passing

through the intervening storm sewers and into the Thea Foss Waterway, do you?

A. I don't dispute that. In fact, during my deposition I testified that I would expect that some material would have.

RP 1297. He never testified that the DA-1 Line was not the cause of PAH contamination to the Waterway. Mr. Costa merely testified that the area of sediment affected by the DA-1 Line was not as extensive an area as delineated by the Utilities' expert.

Costa's testimony, as well as that of the Utilities' expert, demonstrates the difficulty in distinguishing between, and quantifying the sources of PAH contamination. CP 1837, ¶ 19. But, it is certain that the DA-1 Line released hundreds of gallons of liquid tar containing PAHs in the Waterway and that those releases contributed to elevated contamination in Waterway sediments. RP 1297.

G. Substantial Evidence Demonstrated That Construction of the SR 509 Bridge Produced Releases.

On October 21, 1995, a significant oily discharge was released from a temporary DOT stormwater retention pond that was part of the construction of the 509 bridge. Ex. 277; CP 450. It was built precipitously close to an old underground fuel oil line that had leaked large quantities of petroleum into the soil. CP 457-461, 463, pg. 14-18. This oil flowed into DOT's stormwater ponds and was illegally pumped

into the Waterway. On previous occasions, Ecology had given limited authorization for DOT's contractor to pump water from these ponds to the waterway, but only "[i]f it was clean". CP 458-459.

Ecology did not authorize the contractor to pump this oily waste water from the pond. CP 462, pg. 11-13. By the time the U.S. Coast Guard directed the contractor to cease pumping, "an estimated 40 to 60 gallons of petroleum type product contaminated the City Marina, Paul's Marina . . . , shoreline, piling[s], [and] maybe other[s]." CP 467-468. According to one employee, "the docks and slips may have contained some of this [contamination], but the oil sheen goes quite a ways to the north." *Id.* Another noted,

The group of us then walked down along the docks and slips. [We] [c]ould see (by flashlight) the oil sheen on the water, and some glops of junk on [a] piling and along the shore line. . . . Before you know it everybody in [the] Thea Foss Waterway was impacted by this.

Id. This discharge was illegal.

Q: So is it an unlawful act for an agency or a private party to make a discharge like that without a water quality modification in hand?

A: Well, with or without a water quality modification, it's illegal to discharge pollutants into the waterway.

CP 461-462. DOT was issued Notices of Violation, and fined by Ecology.

CP 463, pg. 3-6.

In addition to release from the stormwater pond, DOT's contractors excavated the piers for the bridge into heavily contaminated soils, drove caissons into the contaminated sediment of the Waterway, and then used augurs to remove the contaminated material. Ex. 139; RP 459-461, 821-823, 832-836, 838-842. DOT's project engineer, Dean Moberg, admitted that the augur had to have swung over the Waterway when moving the contaminated material to the holding area. Ex. 139; RP 841-843. The re-mobilized and re-distributed contaminants were released into the Waterway during this process as the wet material on the flutes of the auger spilled onto an improperly maintained construction deck and into the Waterway. RP 521, 837-842. Photograph evidence offered at trial confirmed this testimony. Ex. 139. And DOT's contractor that performed this work had a record of not observing proper environmental practices. RP 835-836, 838.

Mr. Dalton presented evidence that the significant increase in PAH contamination in the Waterway observed in 1995 and 1996 originated, in

part, from activities at 509 construction site (the Standard Chemical site) and was most likely caused by releases produced during DOT's bridge construction. RP 326-329, 459-461.

A party that exacerbates pre-existing contamination at a site is subject to operator liability. *See Kaiser*, 976 F.2d at 1342. In *Kaiser Aluminum*, the Ninth Circuit held that allegations that a party had excavated contaminated soil, hauled the soil away from the excavation site, and spread it over uncontaminated portions of property were sufficient to support a claim that the party "disposed of" a hazardous substance under 9607(a)(2). *Id.* "[D]isposal giving rise to liability is not limited to the initial introduction of hazardous substance at a facility." *Id.* at 1343. A party can be responsible for disposal by moving, dispersing or releasing hazardous substances that had previously been introduced to a Site. *Id.* at 1342-43; *see also U.S. v. Honeywell Int'l, Inc.*, 542 F. Supp.2d 1188, 1199 (E.D. Cal. 2008) (grading, excavation and trenching of property contaminated with arsenic-loaded mine tailings amounted to disposal); *Lewis Operating Corp. v. U.S.*, 533 F. Supp.2d 1041, 1046 (C.D. Cal. 2007) ("[I]f a landowner actively spreads contaminated soil from one are of a development site to another, as was done here, that landowner has "released" contaminants onto the land"); *Redwing*

Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1512 (11th Cir. 1996) (CERCLA “disposal” includes a party’s dispersal of contaminated soil during the excavation and grading of a construction site).

DOT appears to be arguing that it exercised “utmost care” with respect to the handling of contaminated materials during the construction of the 509 bridge, and is therefore entitled to a defense to liability under RCW 70.105D.040(3)(a)(iii), the “action of third party” defense. If so, DOT is mistaken in two respects.

First, the third party defense is available only to parties who are not in privity with the party that caused the release. *See* RCW 70.105D.040(3)(a)(iii). The defense applies only to the “act or omission of a third party (including but not limited to a trespasser) other than ... an employee or agent of the person asserting the defense...” *Id.* (emphasis added). Here, the party causing the release was DOT which directed, and its contractors which implemented the construction—thus precluding application of the defense.

Second, even if the defense was applicable, DOT never offered evidence of “utmost care.” Nor did the trial court conclude that DOT had exercised “utmost care.”

H. DOT Was Properly Assessed 2% of Future Liability.

The Utilities sought a declaratory judgment against DOT to recover DOT's fair, equitable contribution to the future costs of the site remedy. Those future costs include the costs of meeting obligations for long term monitoring and maintenance of the remedy to be incurred by the City of Tacoma and the Utilities under the Consent Decrees. Ex. 974; RP 1122-24.

MTCA authorizes declaratory judgments:

a person may bring a private right of action, including a claim for contribution or for declaratory relief, against any other person liable under RCW 70.105D.040 for the recovery of remedial action costs.

RCW 70.105D.080. The Utilities are jointly and severally liable with the City of Tacoma for the costs of the future remedy for the entire Waterway. Ex. 264, pg. 10; 811, pg. 8; RP 1116-18. The Utilities hold the contribution rights for all future costs, as those rights were transferred by the City of Tacoma to the Utilities.

The Utilities asked the trial court to make an equitable allocation of future costs to DOT, just as they requested an equitable allocation of past costs. The trial court thoroughly considered the facts and the relevant equitable factors, and made the reasonable determination of awarding a

2% share of all future costs against DOT. CP 1840-1843. The Utilities experts testified that the DA-1 Line impacted not only the Utilities work area but also the work area of the City of Tacoma. Ex. 302; 304; RP 362-368. While the impact of the DA-1 Line and the SR 509 contamination was not as significant in the City of Tacoma's work area, that fact is reflected in the court's judgment. The trial court's equitable award of \$6 million in past cost recovery represents approximately 5.2% of the \$116 million costs to date of the remedy. Ex. 288; RP 949. Thus, the Court's 2% award of future costs reflects a lesser award for future costs.

DOT complains that the Court failed to apportion its award between the Utilities' and the City's claims. But, DOT offers no reason why the Court should have made such a distinction, especially given the unitary ownership of the claims and the joint and several nature of the liability.

More importantly, however, DOT has offered no evidence of an abuse of discretion in the Court's award. The Court considered the equitable factors it determined were appropriate, and made a reasonable award.

I. DOT Offered No Evidence for Insurance Offset.

The Utilities established that their out-of-pocket costs for cleanup of the Waterway were \$12.3 million. RP 943-950; Ex. 288 They established that out-of-pocket costs for the City work area totaled \$96.6 million. RP 943-950; Ex. 288. The Utilities also showed that DOT was a liable party, and that it had made no contribution to the costs of the Foss remedy. This case is not similar to *Basic Management, Inc. v. U.S.*, 569 F. Supp 2d 1106 (D. Nev. 2008). There the court was interpreting CERCLA § 114 which has no counterpart in MTCA. That section limits double recovery. DOT has proffered no evidence of double recovery by the Utilities or their assigns. In *Basic Management* the plaintiffs insurance company had paid all of the remedial costs and plaintiffs had no out of pocket expenses. *Id.* The opposite is true here, City of Tacoma and the Utilities incurred all of the remedial action costs. RP 943-45.

The Utilities and some of their assignors did receive payments from insurance companies. The trial court considered this evidence in rendering its decision. CP 2335-2337; RP 208-210, 215-221; Ex. 1028; 1030A.

Steve Secrist of PSE testified that because of an accounting order between PSE and the Washington Utilities and Transportation

Commission (“UTC”) PSE is required to pursue insurance and third party claims on all sites that it is remediating. RP 208-210. If any money is received, then it is placed in one large “bucket” of funds, but it is not possible to allocate it to individual sites. Ex. 1028; RP 209, 215-221.

Using its quarterly reports to the UTC, PSE presented evidence of its “big bucket” of insurance funds, which, at the time of trial, had a balance of \$67 million for all of PSE’s existing and unknown sites where its predecessors had operations. Ex. 1028; RP 219-221. The insurance proceeds are not allocated to individual sites. Ex. 1028; 1030A; RP 276-280. At the time of trial, PSE’s expenses on all of its sites exceeded insurance proceeds collected by over \$48 million and, PSE still has future sites to address. RP 221.

Similarly, PERCO provided information to DOT on the aggregate of insurance proceeds it has collected from global settlements with its insureds for all environmental sites. CP 2335-2337 The evidence showed that the settlements PERCO received did not come close to covering the amount PERCO had already spent on its environmental liabilities. PERCO had already spent \$12,830,483 more at its environmental sites than it recovered from its insurers. *Id.* The evidence showed PERCO’s individual out of pocket costs for the Waterway exceeded \$ 10,571,324.

Ex. 288; RP 944. The court was careful to only allocate to DOT its fair share of liability. DOT cannot show why, in equity, it should be entitled to recover insurance proceeds from other parties insurers when it acted knowingly in pollution the Waterway for over a decade.

There is no evidence that DOT is paying for any costs that were paid for by insurance. Furthermore, the burden is on DOT to prove the allocation, if at all possible, of insurance proceeds among various settled liabilities. See *Puget Sound Energy, Inc. v. Alba General Ins. Co.*, 149 Wn.2d 135, 141-143, 68 P.3d 1061 (2003); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 673-674, 15 P.3d 115 (2000). The court considered this evidence in reaching its equitable allocation and DOT cannot demonstrate and has not even argued that the court abused its discretion .

J. Trial Court Made All Necessary Findings.

The trial court found DOT liable on summary judgment for the contamination in the Waterway. Once it made that finding, the court's principal task was to determine an equitable award of contribution.

Taliesen, 135 Wn. App. at 139; RCW 70.105D.080.

DOT apparently claims that the trial court erred in failing to make additional findings beyond its foundational finding of liability. In

particular, DOT appears to claim that the court erred in failing to make findings regarding the quantity and toxicity of the wastes each party contributed to the Waterway. Opening Brief at 45. In fact, the court did, in fact, make findings on both toxicity and amount of wastes discharged. CP 1840-41.

MTCA states: “Recovery shall be based on such equitable factors as the court determines are appropriate.” RCW 70.105D.080. This court reviews for an abuse of discretion. *Taliesen*, 135 Wn. App. At 139; *Lorang*, 42 Wn.2d at 541.

Similarly, DOT appears to claim that the trial court erred in basing its award on a finding of joint and several liability, but offers no reason for why such a finding would be in error. Opening Brief at 47. DOT was liable. Liability under MTCA is strict and joint and several. RCW 70.105D.040(2). Contribution awards, however, are based on an equitable consideration of relevant factors, and are awarded severally. RCW 70.105D.080. The trial court’s award was for DOT’s several equitable share of the remediation costs. The court did not award the Utilities the opportunity to recover ALL of their costs, as would have been the case in a joint and several liability award. The Utilities ended up bearing a larger

share of the remediation costs than DOT even though DOT was the entity responsible for discharging the MGP contamination to the Waterway.

K. Award to Utilities of Attorneys Fees' Was Proper.

The prevailing party in an action under RCW 70.105D.080 is entitled to recover reasonable attorneys' fees and expenses incurred at trial and on appeal. RCW 70.105D.080 ("Remedial action costs shall include reasonable attorneys' fees and expenses.") (emphasis added). The Utilities prevailed. The trial court's award of fees and costs was proper.

DOT has not challenged the reasonableness, or the amount of the award. Opening Brief at 55. DOT's sole claim is that it should have been the prevailing party. *Id.*

The court did not err in finding the Utilities to be the prevailing parties. As discussed above, the court's findings on DOT's liability on summary judgment was proper. The court's findings on releases from SR 509 construction are supported by substantial evidence. The court did not abuse its discretion in its equitable award of remedial action costs.

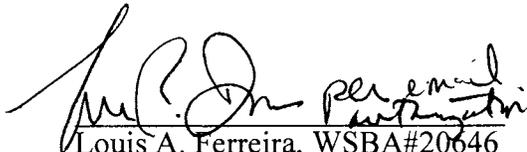
The Utilities ask that the Court uphold the award of attorneys' fees and expenses, and grant a further award of the Utilities' attorneys' fees and costs incurred in defending this case on appeal.

VI. CONCLUSION

For all the reasons discussed in this brief, the Utilities respectfully request that this Court affirm the trial court's decision, and further award the Utilities their attorneys' fees and costs incurred to defend this decision on appeal.

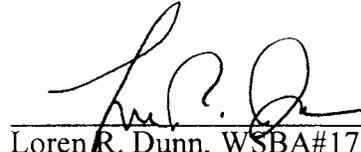
RESPECTFULLY SUBMITTED this 1st day of June, 2010.

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CERTIFICATE OF MAILING

I, _____, do hereby certify that I am a citizen of the United States of America, over 18 years of age and am competent to be a witness herein. On June 1st, 2010, emailed a true and correct copy of this PACIFICORP ENVIRONMENTAL REMEDIATION COMPANY'S RESPONSE TO APPELLANT WASHINGTON STATE DEPARTMENT OF TRANSPORTATION'S OPENING BRIEF and this CERTIFICATE OF MAILING in the above-entitled case, addressed to the following:

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☞ Only the Westlaw citation is currently available.

United States District Court, N.D. Texas.
SOUTHERN PACIFIC TRANSPORTATION
COMPANY and ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY Plaintiffs,
v.
VOLUNTARY PURCHASING GROUPS INC., et
al. Defendants,
v.
ASARCO, INC., et al. Third-Party Defendants.
No. CIV. A.3:94-CV-2477-.

Aug. 7, 1997.

MEMORANDUM OPINION AND ORDER

SANDERS, Senior District Judge.

*1 This is a case under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9607 and 9613(f), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA). Plaintiffs, Southern Pacific Transportation Company (SoPac) and its subsidiary St. Louis Southwestern Railway Company (SSW)-collectively the "Railroads"-brought this suit seeking to recover and apportion liability for response costs they incurred due to arsenic contamination on a parcel of SSW property in Commerce, Texas. Defendants Voluntary Purchasing Groups, Inc. (VPG), Bonny Corporation, and Meridian Housing Company (formerly known as Universal Chemical Company)-collectively the "VPG Parties"-filed a counterclaim against the Railroads under CERCLA Sections 107(a) and 113(f), 42 U.S.C. §§ 9607, 9613(f), seeking to recover their own response costs pertaining to various properties in Commerce. The case is currently before the Court on the VPG Parties' Motion for Partial Summary Judgment on Liability as to their counterclaim, filed June 7, 1996. By this motion, the VPG Parties seek a preliminary determination that SSW is liable on the counterclaim. Although numerous other Defendants and Third-Party Defendants are named in this suit, the instant motion directly involves only the Railroads and the VPG Parties.

Factual Background

Various separately owned parcels of property in Commerce are contaminated with arsenic, including several contiguous commercial properties, an intermittent stream known as Sayle Creek, and approximately 97 nearby residential properties. All of these parcels have been the subject of administrative orders by the State of Texas and the Environmental Protection Agency (EPA). At least a portion of the area has been designated as a Superfund site. Over time, the parties and the EPA have used different, and sometime inconsistent, nomenclature to identify the various parcels and groups of parcels that are contaminated. The Court will refer to the entire contaminated area as the "Commerce Site."

A. The Hi-Yield Chemical Plant Property

At the heart of the Commerce Site is a piece of property originally owned by Lamar Cotton Oil Company and operated as a chemical plant. In 1951, Lamar transferred a portion of this property to Hi-Yield Chemical Company, which manufactured pesticides, arsenic acid, and monosodium methane arsenate. The arsenic compounds produced at the Hi-Yield plant were used in the drying and processing of harvested cotton. Through a series of mergers and transfers, the Hi-Yield plant came to be owned by Universal Chemical Company, the predecessor-in-interest of Defendant Meridian Housing. In 1968, Universal conveyed at least a portion of the plant property to Defendant VPG, which continued to operate the chemical plant through approximately 1971, when it was closed pursuant to an agreement with the Texas Water Quality Board. As a result of additional lease and sale transactions, the chemical plant property was owned briefly in 1978 by Defendant Bonny Corporation, a VPG subsidiary. The former Hi-Yield property was next conveyed to H. Lee and Betty Jane Cain, who used it to operate their furniture business. Finally, in 1989, the Cains conveyed the unimproved portions of the plant property back to VPG. Thus, each of the VPG Parties has owned or operated the chemical plant property, at least briefly, and VPG currently owns a portion of that property. It is undisputed that the former Hi-Yield property is contami-

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nated with arsenic.

B. The Railroads

*2 Since 1894, the SSW has owned a relatively narrow parcel of land adjoining the former Hi-Yield plant property on its southwest side. SSW's rail lines were used to transport materials, including arsenic compounds, into and out of the chemical plant. Over time, SSW entered into license agreements with the various owners of the plant for use and maintenance of the tracks serving the plant. Additionally, beginning in the mid-1960s, SSW leased a portion of its property to successive plant owners for use as a general working and employee parking area. Also in the 1960s, SSW approved the construction of two unloading pits underneath its tracks to facilitate the unloading of arsenic from rail cars. It is alleged that arsenic was discharged into the environment during unloading operations. Whether the unloading pits were located on SSW property or property pertaining to the plant is disputed. However, it is clear that SSW approved the design and actual installation of the unloading pits. It appears that plant, rather than railroad, employees were responsible for the actual unloading of arsenic compounds.

The VPG Parties also allege that SSW delivered arsenic to the plant in leaking rail cars, that SSW caused spillage of arsenic during switching and unloading activities, and that arsenic accumulated on the tracks. The VPG Parties maintain that SSW disposed of accumulated arsenic dust on Railroad property and that arsenic from SSW property washed into Sayle Creek and onto VPG's property.

C. The Cotton Gins

Nearby the chemical plant, two cotton gins were operated by various owners from 1899 through the 1970s. The cotton-gin parcels are themselves contaminated and it is alleged that the gins contributed to the arsenic contamination at the remainder of the Commerce Site. Apparently, because cotton is commonly treated with arsenic-based pesticides, the burning of non-usable portions of the cotton plant can release arsenic into the environment. Although various owners of the cotton gins are Defendants in this suit, they are not implicated in the current motion.

D. Clean-up Costs

Both the VPG Parties and the Railroads claim to have incurred response costs on their respective properties at the Commerce Site in connection with EPA orders. The VPG Parties also claim to have incurred response costs for clean-up of the contaminated residential properties and Sayle Creek, which originates near the chemical plant.

Procedural Background and the Instant Motion

This case was filed by the Railroads on November 18, 1994, seeking to recover under Section 107(a) their response costs incurred in connection with the Commerce Site. The Railroads also brought a claim for contribution under Section 113(f) of CERCLA, along with related and ancillary claims. The VPG Parties filed counterclaims against the Railroads, also seeking cost recovery under Section 107(a) and contribution under 113(f) for expenses VPG has incurred in connection with the Commerce Site.

*3 By an order dated November 14, 1995, the Court bifurcated the trial of this case into two phases. The first phase is to determine each party's liability under CERCLA and each party's allocable share of response costs. The second phase of the trial will determine damages.

On June 7, 1996, the VPG Parties filed their Motion for Partial Summary Judgment on Liability. The Motion seeks summary judgment on the issue of SSW's liability under CERCLA. The Motion states that the VPG Parties are not currently seeking an allocation of liability or a determination of whether the parties should be held jointly and severally liable. Nor does the Motion seek a determination or allocation of the amount of response costs. Thus, the Motion seeks summary judgment on only one of the issues that must be determined in the liability phase of this case.

On June 27, 1996, VPG filed its suggestion of bankruptcy in this Court. On July 22, 1996, the Court stayed the case as to all parties in light of the VPG bankruptcy. The Court specifically stayed all action on the VPG Parties' Motion for Partial Summary Judgment. VPG's Chapter 11 bankruptcy proceeding, *In re Voluntary Purchasing Groups, Inc.*, Case No. 96-31549, is pending in the United States Bankruptcy Court for the Eastern District of Texas before U.S. Bankruptcy Judge Donald R. Sharp. On December

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19, 1996, Judge Sharp lifted the automatic bankruptcy stay for the limited purpose of allowing the VPG Parties' Motion for Summary Judgment to be resolved. This Court set a schedule for completion of briefing on the Motion. The Railroads filed their response brief on January 16, 1997, and the VPG Parties filed their reply on January 30, 1997.

Analysis

As stated previously, the VPG Parties have moved for summary judgment establishing SSW's liability under CERCLA Section 107 for response costs VPG has incurred and will incur at the Commerce Site. In addition or in the alternative, the VPG Parties seek summary judgment establishing that SSW is liable for contribution under Section 113(f).

A. The Relationship of Section 107 and Section 113(f)

Section 107 and Section 113(f) are distinct yet inter-related provisions of CERCLA. Section 107 allows a party who has spent money cleaning up environmental contamination to bring a cost recovery action to recoup its clean-up expenses from all persons responsible for the release of a hazardous substance. Section 107(a) establishes four classes of persons who are strictly liable for response costs, that is, who are liable without regard to fault. In a cost recovery action under Section 107, the court may impose joint and several liability where an environmental harm is indivisible; however, joint and several liability is not mandatory. *In re Bell Petroleum Servs.*, 3 F.3d 889, 895 (5th Cir.1993). Rather, as the Fifth Circuit has indicated, federal courts will impose joint and several liability only in appropriate cases by applying common-law principles as expressed in the Restatement (Second) of Torts. *Id.* at 901.

*4 While Section 107 determines who is liable under CERCLA, Section 113(f) creates a mechanism for apportioning liability among parties found to be responsible. See *Town of Munster v. Sherwin-Williams Co.*, 27 F.3d 1268, 1270 (7th Cir.1994); *Akzo Coutings v. Aigner Corp.*, 960 F.Supp. 1354, 1356-57 (N.D.Ind.1996). Section 113(f) of CERCLA was added by the SARA amendments of 1986, and was intended to mitigate the harsh effects of joint and several liability by allowing potentially responsible parties (PRPs) who believe they have assumed more than their equitable share of response costs to seek

contribution from other PRPs. See *OHM Remediation Servs. v. Evans Cooperage Co.*, No. 96-30714, slip op. at 4209 (5th Cir. July 22, 1997) (West). Under Section 113(f), the court may allocate response costs among liable parties using such equitable factors as the court deems appropriate. *Id.*; 42 U.S.C. § 9613(f). Of course, contribution is only available among parties determined to be jointly and severally liable. *In re Bell*, 3 F.3d at 899 n. 10. Therefore, a court in a CERCLA case only reaches questions of contribution under Section 113(f) after joint and several liability of the parties has been established. Thus, contribution claims under Section 113(f) are derivative of and necessarily related to liability determinations under Section 107. See *OHM Remediation*, slip op. at 4208.

B. The Determination Sought by the VPG Parties' Motion

The VPG Parties' counterclaim is plead alternatively as both a cost recovery action under Section 107 and a contribution claim under Section 113(f). The VPG Parties' Motion seeks summary judgment only on the issue of SSW's liability. The Fifth Circuit has endorsed the use of bifurcation and, when appropriate, summary judgment to progressively narrow the issues in complex CERCLA cases. *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667-68 (5th Cir.1989).

The VPG Parties' assert that no genuine fact issues exist as to whether SSW is within the class of persons who are strictly liable under Section 107. At this point, the VPG Parties seek only a determination that SSW is liable for clean-up costs under CERCLA without a ruling as to whether their claim is for full cost recovery or for contribution only. The Railroads maintain that, before considering summary judgment as to liability, the Court must determine whether the VPG Parties' counterclaim is a cost recovery action under Section 107 or a contribution claim under 113(f). Furthermore, the Railroads argue that the VPG Parties are restricted to a 113(f) contribution action since they are themselves potentially responsible parties under CERCLA. The Fifth Circuit has recently declined to take a position as to whether a PRP under CERCLA may pursue a Section 107 claim as well as a 113(f) contribution claim. *OHM Remediation*, slip op. at 4210 n. 1.

The VPG Parties suggest that the Court need not determine at this time whether their counterclaim con-

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stitutes a cost recovery or a contribution claim because the threshold elements of liability are identical under both sections of the statute. The elements that a party must demonstrate to establish a prima facie case of liability under Section 107 or Section 113(f) are that:

- *5 1. the site in question is a "facility" as defined in CERCLA Section 101(9), 42 U.S.C. § 9601(9);
- 2. the party against whom liability is sought to be established is a "covered person" under Section 107(a);
- 3. a release or threatened release of a hazardous substance has occurred; and
- 4. the release or threatened release has caused the complaining party to incur response costs consistent with the EPA's National Contingency Plan (NCP).

Amoco Oil, 889 F.2d at 668; Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1496-97 (11th Cir.1996) ("The elements of a claim under both sections are the same."). If a moving party establishes each of these elements and the opposing party is unable to establish the applicability of one of the defenses listed in Section 107(b), the moving party is entitled to summary judgment on the liability issue. Amoco, 889 F.2d at 668; Farmland Indus., Inc. v. Colorado & E. R.R. Co., 922 F.Supp. 437, 440-41 (D.Colo.1996). Since the elements of liability are the same, the Court concludes that the issue of SSW's liability can be determined without deciding whether the VPG Parties' counterclaim is for full cost recovery or contribution alone.

C. Determination of SSW's Liability

1. SSW is an "Owner" of a "Facility" Within the Meaning of CERCLA

The VPG Parties seek to hold SSW liable under Section 107(a)(1) as the current "owner" of a CERCLA "facility." CERCLA defines "facility" broadly as:

(A) any building, structure, installation, equipment, pipe or pipeline ..., well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) 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). The summary judgment evidence establishes that a hazardous substance, arsenic, has come to be located on the entire Commerce Site—that is, at the location of the former Hi-Yield chemical plant, on the adjacent Railroad property, at the cotton gins, in Sayle Creek, and in the nearby residential areas. Under the broad statutory definition, the presence of arsenic in these locations is sufficient to establish that the entire Commerce Site is a "facility" within the meaning of CERCLA. See Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1572-73 (5th Cir.1988). Furthermore, it is undisputed that SSW currently owns—and in fact has owned for more than a century—property at the contaminated Commerce Site. As a current owner of part of the Commerce facility, SSW is a covered person under Section 107(a)(1).

The Railroads suggest that it is improper to conclude that the various properties surrounding the former Hi-Yield chemical plant constitute a single CERCLA "facility." The Railroads point out that not only are the various parcels separately owned, but that the EPA has entered into at least three separate Administrative Orders on Consent (AOCs) for clean-up of: 1) the plant property and Sayle Creek, 2) the residential properties, and 3) SSW's property. The Railroads suggest that each of these three areas should be treated as a separate "facility" for purposes of determining CERCLA liability. The Court disagrees. The entirety of the Commerce Site is similarly contaminated with arsenic. The EPA suspects that this contamination is a result of the long-time operation of the chemical plant, the railroad line, and the cotton gins. Over time, SSW and the owners of the chemical plant integrated their operations to varying degrees. Although the EPA has entered into separate administrative orders concerning different parcels, the Agency has concluded that the entire area constitutes one CERCLA "facility." (VPG Ex. A, B). The relevant "facility" for purposes of this CERCLA case need not be defined in terms of legal property boundaries. United States v. Rohm & Haas Co., 2 F.3d 1265, 1279-80 (3d Cir.1993) (rehearing en banc denied) ("A current owner of a facility may be liable under § 107 without regard to whether it is the sole owner or one of several owners."); ^{ENL} Massachusetts

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v. Blackstone Valley Elec. Co., 808 F.Supp. 912, 916 (D.Mass.1992); see also *United States v. Stringfellow*, 661 F.Supp. 1053, 1059 (C.D.Cal.1987) (“[N]othing in the statute or case law [indicates] that a ‘facility’ must be defined by or be coextensive with an owner’s property lines.”). In light of all these circumstances, the Court concludes that the entire Commerce Site should be treated as a single “facility” in this litigation.

FN1. The Fifth Circuit has recently expressed disagreement with an unrelated aspect of the Third Circuit’s opinion in *Rohm & Haas Co.* See *United States v. Lowe*, No. 96-20817, 1997 WL 398731 (5th Cir. July 31, 1997).

*6 The Railroads suggest that it is unfair to hold them liable for response costs for the entire Commerce Site based on their ownership of only one parcel. However, while this fairness concern may be relevant in a future apportionment or contribution phase of the case, it is not relevant to the initial determination of liability under Section 107(a). See *Rohm & Haas Co.*, 2 F.3d at 1279-80; *Akzo Coatings, Inc. v. Aigner Corp.*, 960 F.Supp. 1354, 1359 (N.D.Ind.1996).

For the reasons explained above, the Court concludes that SSW is an “owner” of a “facility.” Therefore, the first two elements of CERCLA liability have been established.

2. A Release of a Hazardous Substance Has Occurred

The third element of liability under CERCLA is that a release or threatened release of a hazardous substance has occurred. CERCLA defines “release” as “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.” 42 U.S.C. § 9601(22). The definition of “release” is to be construed broadly. *Amoco Oil*, 889 F.2d at 669.

It is undisputed that arsenic is a hazardous substance under CERCLA. It is further undisputed, and the summary judgment evidence establishes, that arsenic has come to be located throughout the Commerce Site, including on the SSW property, on the chemical plant property, in Sayle Creek, and at the residential properties. Therefore, the Court concludes that there

is no genuine issue of fact as to whether a “release” of arsenic has occurred for purposes of establishing SSW’s liability.

3. Response Costs Have Been Incurred

The final element that the VPG Parties must demonstrate in order to establish SSW’s liability is that the release of arsenic has caused them to incur response costs consistent with the NCP. As evidence of such expenditures, the VPG Parties submit the affidavit of VPG’s chief executive officer testifying that his company has incurred more than \$5,000,000.00 in response costs in connection with two EPA administrative orders. (VPG Ex. JJ).

The Railroads respond by arguing that a mere showing of expenditures by VPG in response to a release is insufficient to establish SSW’s liability. Rather, the Railroads maintain that in order to establish that SSW is liable, the VPG Parties must demonstrate that their response cost were incurred as a result of a release from SSW property. The Court disagrees. The Railroads’ suggestion that, in order to be recoverable, response costs must be traceable to a release from a particular parcel of land would require a CERCLA plaintiff to make a rigorous showing of causation before liability could be imposed on a current owner of a facility. However, courts have held repeatedly that proof of causation is not required to establish liability under Section 107(a) of CERCLA. *In re Bell*, 3 F.3d 889, 893 n. 4 (5th Cir.1993); *Amoco Oil*, 889 F.2d at 670 n. 8; *Westfarm Assocs. L.P. v. Washington Suburban Sanitary Comm’n*, 66 F.3d 669, 681 (4th Cir.1995), cert. denied, 517 U.S. 1103, 116 S.Ct. 1318, 134 L.Ed.2d 471 (1996); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044-45 (2d Cir.1985); *Elf Atochem North America, Inc. v. United States*, 833 F.Supp. 488, 494 (E.D.Pa.1993). The Railroads assert that *Amoco* and *Bell*, the two leading Fifth Circuit cases rejecting a causation requirement, are distinguishable because they involve liability as a “generator” under Section 107(a)(3), as opposed to “owner” liability under Section 107(a)(1). This suggested distinction is unpersuasive. The above-cited courts have rejected a causation requirement variously under Sections 107(a)(1), (2), and (3). Moreover, in *Amoco Oil*, the Fifth Circuit approvingly cited *Shore Realty*, in which the Second Circuit rejected a causation requirement in an “owner” case under Section 107(a)(1). *Amoco Oil*, 889 F.2d at 670

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n. 8.

*7 The Court has previously determined that the relevant “facility” in this case should be defined to include the property owned by SSW. The summary judgment evidence establishes that there has been a release of a hazardous substance at the facility and that VPG has incurred response costs. No further showing of causation tracing these costs to a release from a particular parcel is required to establish SSW’s liability under Section 107(a)(1). However, the Railroads correctly point out that the summary judgment evidence relating to response costs involves only costs incurred by VPG, not its affiliates. There is no summary judgment evidence to establish that either Bonny Corporation or Meridian Housing has incurred response costs. Therefore, Bonny and Meridian are not entitled to entry of summary judgment as to liability against SSW.

D. SSW’s Affirmative Defenses

The Railroads further argue that summary judgment is inappropriate because fact issues exist in connection with two affirmative defenses asserted by SSW.

1. Statutory Defense Under Section 107(b)(3)

The Railroads’ initially argue that summary judgment is inappropriate because fact issues exist surrounding SSW’s assertion of the “third-party defense” under Section 107(b)(3) of CERCLA. That Section provides that a responsible party under Section 107(a) shall not be liable if it can establish by a preponderance of the evidence that the release of hazardous substances was caused solely by “an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant” 42 U.S.C. § 9607(b)(3). To establish this defense, the responsible party must also demonstrate that it exercised due care and “took reasonable precautions against foreseeable acts or omissions of any such third party.” *Id.* Sometimes called the “innocent landowner defense,” Section 107(b)(3) creates “a limited affirmative defense based on the complete absence of causation.” *United States v. Monsanto Co.*, 858 F.2d 160, 168 (4th Cir.1988), cert. denied, 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989). The elements of this defense are: 1) that an-

other party was the “sole cause” of the release and resulting damages; 2) that the third party did not cause the release in connection with a contractual or agency relationship with the defendant; and 3) that the defendant exercised due care and guarded against the foreseeable acts and omissions of the third party. *Westfarm Assocs.*, 66 F.3d at 682. Here, in order to forestall summary judgment on liability, the burden is on SSW to present evidence creating a fact issue as to the elements of its affirmative defense.

The Railroads have submitted summary judgment evidence that: 1) chemical manufacturers, not SSW, owned the rail cars in which arsenic was transported to the Commerce Site; 2) SSW employees did not engage in loading or unloading of arsenic; 3) SSW did not own or operate the unloading pits; and 4) SSW employees did not handle the arsenic inside the cars. The Railroads maintain that chemical plant employees conducted all activities involving the loading and unloading of arsenic, including operation of the unloading pits. Although this evidence tends to indicate that SSW may not have dealt directly with arsenic at the Commerce Site, the record also establishes that SSW had various contractual arrangements with the VPG Parties and their predecessors-in-interest, who apparently did the actual loading and unloading. These arrangements contemplated operations involving arsenic at the Commerce Site. Moreover, there is no summary judgment evidence to indicate that other third parties caused the releases at the Commerce Site or that such parties had no contractual relationship with SSW. Finally, the summary judgment evidence establishes that arsenic accumulated on SSW’s tracks in recognizable quantities. Even assuming the involvement of an unrelated third party, the Railroads have not presented evidence or argument tending to show that SSW exercised due care to prevent foreseeable conduct of the unspecified third parties which caused such contamination.

*8 In sum, the Railroads have not met their burden of presenting summary judgment evidence demonstrating that a genuine issue of material fact exists as to their affirmative defense under Section 107(b)(3). Therefore, the assertion of this defense does not preclude entry of summary judgment as to liability.

2. Contractual Release

As an additional affirmative defense, the Railroads

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assert that SSW cannot be liable to VPG under CERCLA because Universal Chemical Company, VPG's predecessor-in-interest, executed a general release in favor of SSW as part of an earlier transaction.^{FN2} On November 1, 1964, SSW leased a 69,848 square-foot lot adjoining the chemical plant to Universal. The leased lot was used by Universal to manufacture monosodium methane arsenate and as employee parking. The lease contained a covenant that Universal would maintain the premises "in a clean, safe and presentable condition." (Railroads' Ex. 34). The lease further provided that Universal agreed to "release and indemnify [[SSW] from all liability, cost and expense arising from the breach by [[Universal] of any of the provisions of this lease." SSW maintains that, by virtue of this provision, the VPG Parties have released SSW from all claims, including CERCLA liability, arising out of the failure of Universal and VPG to keep the leased lot clean and safe.

^{FN2}. The Railroads did not originally plead the affirmative defense of release; however, by an order dated today, the Court granted the Railroads' Motion for Leave to file their First Amended Answer asserting this defense.

The Railroads and the VPG Parties agree that CERCLA permits private parties to contractually transfer financial responsibility amongst themselves by means of releases or indemnification agreements. See *Joslyn Mfg. Co. v. Koppers Co., Inc.*, 40 F.3d 750, 754 (5th Cir.1994). Such agreements, if broadly worded, may be sufficient to release or grant indemnity against CERCLA liability even though the agreements were entered into prior to the passage of CERCLA. *Id.* at 754-55. The parties further agree that state law governs the construction of release and indemnification contracts involving CERCLA liability, unless a particular state rule would conflict with the objectives of CERCLA. *Fisher Dev. Co. v. Boise Cascade Corp.*, 37 F.3d 104, 109 (3d Cir.1994) (citing authority from four other Courts of Appeals).

Looking to Texas law on releases, the VPG Parties argue that the language in the 1964 release is ineffective as a matter of law to release SSW from strict liability under CERCLA. Expanding a principle it has applied in other areas, the Texas Supreme Court has held that, in order to cover strict statutory liability, an indemnity agreement must expressly state the parties'

intent to encompass such claims within the coverage of the indemnity. *Houston Lighting & Power Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 890 S.W.2d 455 (Tex.1994). *Houston Lighting & Power* dealt only with indemnity contracts, and no Texas court has yet applied this "express intent" rule to releases of strict liability claims. However, in considering the analogous "express negligence" rule from which the "express intent" rule evolved, the Texas Supreme Court concluded that there is no basis for distinguishing between indemnity and release contracts with respect to the level of specificity required to relieve a party from liability for its own negligence. *Dresser Industries, Inc. v. Page Petrol, Inc.*, 853 S.W.2d 505, 508-09 (Tex.1993). Similarly, this Court sees no reason to require a different level of specificity in order to transfer the risk of strict liability by means of a release rather than by means of an indemnity. The Court concludes that the "express intent" rule of *Houston Lighting & Power* applies to prospective releases of statutory strict liability, as well as to indemnity agreements. In other words, in order to relieve a party in advance of strict liability created by statute, a release contract must expressly state the parties' intent to cover such claims.

*9 Since the release clause in the SSW-Universal Chemical lease does not expressly release SSW from strict liability claims, under Texas law that clause is not effective to release SSW from VPG claims under CERCLA.^{FN3} Therefore, SSW's affirmative defense based on the release fails as a matter of law and does not create a fact issue that would preclude entry of summary judgment as to liability.

^{FN3}. Application of the state-law "express intent" rule to releases of CERCLA liability does not conflict with the policy objectives of CERCLA to facilitate the prompt clean-up of hazardous wastes and to shift the cost of environmental response to those who benefitted from dealing with the wastes. See *OHM Remediation*, slip op. at 4205.

Conclusion

Because there are no genuine issues of material fact with respect to the elements of liability under Section 107 or SSW's affirmative defenses, summary judgment is GRANTED in favor of Voluntary Purchasing Groups, Inc. on the issue of the St. Louis Southwest-

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ern Railway Company's liability under CERCLA. Issues of allocation, the appropriateness of joint and several liability, damages, and whether VPG is limited to a claim for contribution are left for another day.

SO ORDERED.

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