

NO. 39699-8-II

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

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PACIFICORP ENVIRONMENTAL REMEDIATION COMPANY, a  
Delaware corporation; and PUGET SOUND ENERGY, a Washington  
corporation,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, a  
department of the State of Washington,

Appellant.

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**APPELLANT WASHINGTON STATE DEPARTMENT OF  
TRANSPORTATION'S REPLY BRIEF**

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## I. INTRODUCTION

Rather than acknowledge that they presented no credible evidence identifying the actual sediment contamination source, the two large corporate plaintiffs have chosen instead to characterize public employees as lazy criminals. However, PacifiCorp Environmental Remediation Company's (PacifiCorp) and Puget Sound Energy's (PSE; together "the Utilities") case relies wholly on two facts: coal tar was observed in the South A Street catch basin and the sediment polycyclic aromatic hydrocarbons (PAH) concentration increased during the time that the drain was in service. The Washington State Department of Transportation (Transportation) overcame this coincidence with scientific evidence that the increase in sediment PAH concentration was caused by stormwater contaminants and not by coal tar. Without evidence that the sediment was contaminated by the South A Street drains, the Utilities' discourse about Transportation's evil nature simply obscures the fact that they presented no evidence on the central issue in the case—where the increased PAH in the sediment came from.

This case is not about contamination at South A Street; the Utilities successfully prevented Transportation from introducing evidence of what it spent cleaning up the Utilities' coal tar from South A Street. Rather, as the Utilities insisted, it was about the cleanup of the *Waterway sediment*.

So the only question here is whether the Waterway sediment was contaminated with coal tar from the South A Street drain. The Utilities relied on an unqualified expert to argue that the sediment had coal tar characteristics. The trial court disregarded his testimony because it failed the *Frye* test.<sup>1</sup> That left Transportation's expert testimony as the only scientific evidence that established the nature of the sediment PAH contamination and its source. Transportation's expert testified that the increase in sediment PAH concentration was due to stormwater, not coal tar. Without evidence proving that coal tar from the drains increased the sediment PAH concentration, the Utilities' descriptions of coal tar in the upland drains, along with their attacks on Transportation employees, are irrelevant. The Utilities have not demonstrated that the trial court's conclusions that Transportation released coal tar to the Waterway and increased sediment PAH are supported by the record.

Despite generating the coal tar and despite receiving complete reimbursement for costs they did not cause, the Utilities sought even more tax money from Transportation, which had already spent millions to cleanup the coal tar abandoned by the Utilities and their predecessors. Utilities believe that they should be reimbursed for 100 percent of their costs, which effectively is what this judgment does.

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<sup>1</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *Reese v. Stroh*, 128 Wn.2d 300, 306, 907 P.2d 282 (1995).

## II. ARGUMENT

### A. The Utilities Have Misrepresented Significant Facts

A number of facts that are central to the Utilities' response are incorrect and contrary to the trial court record. The Utilities did not challenge any of the trial court's findings and conclusions.

1. The Utilities falsely characterized the testimony of Transportation's expert, Helder Costa, at pages 46-47 of their amended response when they stated that he "concluded that the increase of PAHs in the Waterway were due in part to the DA-1 Line" and "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." At RP 1238, the citation for these statements, Mr. Costa was actually testifying regarding an area affected by the "west bank" coal tar seeps, also known as the "Standard Chemical Area," and not about the drains or outfalls. Report of Proceedings (RP) at 1232:16–1238:25.

2. The Utilities cite to construction records to argue that Transportation did not completely remove contamination from South A Street before installing any drains. Amended Brief of Respondents (Response) at 6-7. This implication that Transportation encountered this material while putting in the drain system is completely false. The construction records cited refer to *excavation for the street*. Brian Ziegler,

the assistant project engineer, explained that the term “DA-1” was used in the construction records to refer to the center line of the new street, which connected Dock Street and A Street. RP at 784:1-12. He also described the considerable amount of excavation needed to build the street. RP at 784:16-785:1. The drains were installed after the street excavation was complete. RP at 786:20-787:11. Mr. Ziegler stated that no tar or contaminated soil was found while the contractor was installing the drains. RP at 798:24–799:4. The Utilities presented no evidence to the contrary. The trial court found that the drains were installed in clean soil. Clerk’s Papers (CP) at 1831.

3. The South A Street French drain had no “third drain.” The “third drain” on the plan sheet is actually the center line of the street, not another drain. RP at 784:1-12, 798:14-17; Ex. 925. There was no testimony to the contrary.

4. The Utilities rely on an “expert’s” testimony regarding the volume of material the drains could have conveyed. Response at 37-38. The “expert” relied on is Raleigh Farlow, the witness to whose testimony the court specifically gave “no weight.” CP at 1837.

5. Coal tar was indeed one of the hazardous substances that drove the Waterway cleanup—a many-feet-thick layer of coal tar under the Waterway bed, caused by the Utilities’ and their predecessor’s operations

at the gas plant site, as well as from the operations of a company located on the Waterway bank at which the Utilities' predecessors disposed of their waste coal tar. Ex. 1035; RP at 460:18-23; RP at 925:22-25. In addition to the vast depth of coal tar, there were areas in which this coal tar "seeped" to the surface, either under the water or on the Waterway's west bank. RP at 326:15-327:4.

6. The trial court's conclusion that Transportation caused releases of hazardous substances during the SR 509 construction was not based on the discharge of petroleum-contaminated water from the D Street detention pond. The court found that the Utilities had failed to meet their burden of proof on this issue. CP at 1833.

**B. The Utilities Have Applied Incorrect Legal Standards**

The Utilities incorrectly argue that this court's review is limited to the abuse of discretion standard. This court is not merely reviewing a discretionary decision since this case was about more than the amount of an equitable allocation.

Transportation challenged numerous findings and conclusions, as well as decisions on summary judgment. The trial court made—or in some cases failed to make—decisions about the legal standards governing a Model Toxics Control Act (MTCA) contribution action. Like all issues of law, those decisions are reviewed *de novo*. *Hegwine v. Longview Fibre*

*Co., Inc.*, 162 Wn.2d 340, 353, 172 P.3d 688 (2007); *Rasmussen v. Bendotti*, 107 Wn. App. 947, 954-44, 29 P.3d 56 (2001). The trial court's true factual findings are reviewed for substantial evidence. *Hegwine*, 162 Wn.2d at 353. The trial court's summary judgment, conclusions of law, and determination that the findings justify the conclusions are all reviewed de novo. *Heg v. Alldredge*, 157 Wn.2d 154, 160, 137 P.3d 9, 12 (2006); *Hegwine*, 162 Wn.2d at 353; *Rasmussen*, 107 Wn. App. at 954-55, 957. The Utilities have not pointed out any case law contrary to these standards.

Contrary to their position below, the Utilities now argue that Transportation is jointly and severally liable. MTCA also authorizes private actions for contribution among jointly and severally liable parties, but makes those parties only severally liable to each other. RCW 70.105D.080; *Union Station Assoc., LLC v. Puget Sound Energy, Inc.*, 238 F. Supp. 2d 1218, 1226 (W.D. Wash. 2002). Utilities must prove Transportation's individual liability to recover, and the burden of distinguishing fault never shifts to Transportation.

Most significantly, Utilities ignore or misapply the elements Division Two requires for recovery of costs in a MTCA contribution action by claiming the trial court properly allocated costs upon a showing of any release, contrary to RCW 70.105D.080 and *City of Seattle v.*

*Washington State Dep't of Transp.*, 98 Wn. App. 165, 175-76, 989 P.2d 1164 (1999) (*Seattle City Light I*). As detailed in Transportation's Opening Brief, a contribution plaintiff must prove (1) a release (2) that caused the need for remedial action (3) by specifically contributing to a threat to health or the environment, proved with evidence such as the quantity or toxicity of the release (4) as compared to other releases to establish the defendant's base share before the trial court can equitably allocate costs between or among the parties. Specific findings for each element are essential, but in this case, the trial court found that Utilities had failed to prove the size of Transportation's release.

Given the inadequate findings, the Utilities try to shift to Transportation the burden of proving the specific nature of Transportation's release. But *Seattle City Light I* placed the burden of proof where it belongs: on the contribution plaintiff. 98 Wn. App. at 175-76. Because the equitable factors can include such proof from a defendant—*after* plaintiffs have first met their burden—Division Two allowed such proof as an “alternative basis” for its holding. *Seattle City Light I*, 98 Wn. App. at 178. But the alternative holding was dicta, as the plaintiffs in that case had failed to meet their burden set forth earlier in the decision. The binding holding is that the plaintiff cannot recover without

proving the release constituted a threat to health or the environment.

*Seattle City Light I*, 98 Wn. App. at 175, 176.

**C. The Only Evidence of What the Sediment PAH Was and Its Source Showed It Came From Stormwater and Not Coal Tar**

It was not enough for the Utilities to show that a plume of their coal tar migrated into the drains. As they vehemently asserted, this case was about Waterway cleanup, not about drain cleanup. The question was whether the coal tar in the drains reached the Waterway sediment, where the Utilities performed their cleanup. The only evidence that could show whether or not this happened was Mr. Costa's testimony.

The Eastern District of Washington explained that the plaintiff must prove:

[T]hat the contaminants which were once in the custody [control] of the defendant could have traveled onto the plaintiff's land, and that subsequent contaminants (*chemically similar to the contaminants once existing in defendant's custody*) on the plaintiff's land caused the plaintiff to incur cleanup costs.

*City of Moses Lake v. United States*, 458 F. Supp. 2d 1198, 1237-38 (E.D.

Wash. 2006) (quoting *Westfarm Associates Ltd. Partnership v.*

*Washington Suburban Sanitary Comm'n*, 66 F.3d 669, 681 (4th Cir.

1995)) (emphasis added).<sup>2</sup> Here, the Utilities had to prove that the contaminants found at the Waterway were “chemically similar to the contaminants once existing in defendant’s custody.” PAH is not a single compound; it is a class made up of dozens of compounds. Exs. 1053, 311. Mr. Costa described how PAH sources may be distinguished because in different sources, such as coal tar or stormwater, these individual compounds are present in different proportions to one another. RP at 1206:18-24; RP at 1208:20-1209:9. Mr. Costa demonstrated through the only valid scientific testimony that the PAH source for the sediment contamination was stormwater and not coal tar. Thus the sediment contamination was not “chemically similar” to the coal tar in the storm drain and French drain. The Utilities failed to prove causation.

Mr. Costa noted specifically that the core samples in the Waterway, which represented years of sediment deposition, looked “increasingly like stormwater.” RP at 1288:12-13; RP at 1647:3-17. He also stated that “the material in the head of the Thea Foss looked less like coal tar contamination in the mid ’90s than it did in the mid ’80s.” RP at 1289:8-11. He summarized:

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<sup>2</sup> Federal cases interpreting CERCLA are persuasive authority for interpreting similar statutory language in MTCA. *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 432, 427, 833 P.2d 375 (1992); *City of Seattle v. Washington State Dep’t of Transp.*, 98 Wn. App. 165, 172-73, 989 P.2d 1164 (1999) (*Seattle City Light I*).

I think a combination of a regional effect evidenced in the flouranthene-to-pyrene ratios, evidenced in the weathering characteristics, all point towards a predominant stormwater influence in increasing concentrations in the head of the waterway.

RP at 1288:22–1289:1. When asked if his analysis provided any way to allocate any cleanup costs to Transportation, he responded:

Well, as I understand it, the basis for the allocation is that the DA-1 line was responsible for some of it. The lines of evidence that I've just summarized would suggest otherwise. The material in the head of the Thea Foss looked less like coal tar contamination in the mid '90s than it did in the mid '80s. That would be a negative allocation. That's not allocatable.

RP at 1289:5-11.

The Utilities have not cited to any testimony that contradicts the analytical methods that Mr. Costa used or the data or information that he relied on, or the conclusions that he drew from that data. They rely solely on one response in cross-examination, in which he answered that some coal tar material could have travelled through the storm drain system. However, in more than two full days of testimony, Mr. Costa clearly explained the basis for his opinion that regardless of what was in the drain system, there was no evidence that it had had any impact on the Waterway *sediment*, which was where the cleanup was performed.

The Second Circuit held that a similar cross-examination response was not even sufficient to oppose summary judgment:

An honest witness who testifies that he knows of no oil spills or discharges at a large oil storage facility may when pressed on cross-examination allow for the metaphysical possibility that such spills might have occurred or the likelihood that a drop here and there can have escaped. Speculation by a witness as to possibilities that the witness is not in a position absolutely to foreclose is not an admission that creates a genuine dispute of fact concerning an otherwise unequivocal denial.

*Niagara Mohawk Power Corp. v. Jones Chemical, Inc.*, 315 F.3d 171, 176 (2d Cir. 2003). If this type of answer is not sufficient to raise a genuine issue of material fact, then it certainly is not sufficient to prove a plaintiff's case at trial. Mr. Costa's speculation about a possibility that he could not absolutely foreclose does not overcome the fact that his was the only evidence analyzing the source of the sediment contamination, and characterized it as stormwater.

Mr. Costa's conclusions were actually the same as those drawn by the Utilities' hydrogeologist, Matthew Dalton, in his previous role as the Utilities' consultant during site cleanup. Although Mr. Dalton originally noted that the increase in PAH contamination coincided with the installation of the South A Street drains, his subsequent analysis and conclusions in 2000 were consistent with Mr. Costa's—the Waterway sediment was being contaminated by stormwater. Ex. 835, at 5-6. This report states:

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

Ex. 835, at 5-6; RP at 534:15-18. Mr. Dalton based this conclusion on his observation that there was an “overall similarity in concentrations of various stormwater contaminants” throughout the head of the Waterway. He also relied on the fact that the “sediment trap” sampling data from both of the stormwater outfalls at the head of the Waterway was similar, even though only one could have been impacted by the South A Street drains. Ex. 835, at 5-6; RP at 534:18–535:4. Mr. Dalton admitted that this conclusion was based on data available in 1999, and that the South A Street drain still contained coal tar at that time. RP at 535:12-14. Contrary to the Utilities’ argument, this report does not say it was evaluating only “current” impacts.

Mr. Dalton went on to state that “[t]he quality of the stormwater sediment creates a PAH (or other stormwater sediment contaminant) ‘background’ for the head of the waterway.” Ex. 835, at 7; RP at 535:19-25. He further concluded that regarding the bank seep, “[i]f other sources are contributing substantial contamination to bottom sediment, PAH concentrations of bottom sediment should be substantially higher than the background created by stormwater discharges.” Ex. 835, at 7;

RP at 536:3-6. Mr. Dalton admitted that the same would be true if the sediment had been impacted by the coal tar from the “DA-1” line. RP at 536:7-12. He also admitted that if coal tar from the DA-1 line had traveled through the sewer system to the West Twin stormwater outfall, it would have been present at a particular storm sewer sampling point. However, he acknowledged that particular sampling point had a lower PAH level than sampling areas that were outside the path of the DA-1 discharge. RP at 536:17-23; RP at 503:11-12.

Mr. Dalton had earlier concluded in a 1999 report that “[t]he data indicate that surface sediment concentrations throughout most of the head of Thea Foss are associated with stormwater discharges.” RP at 543:13-15; Ex. 830, at 8. This was based on his observation that PAH levels near the outfall receiving drainage from South A Street were actually lower than those around another outfall that could not have been affected by the South A Street discharge. Ex. 830, at 11-12.

To support the change in his opinion at trial, Mr. Dalton testified that he had observed a correlation between the level of PAH and the level of another stormwater contaminant, phthalate (or BEHP). RP at 379:18-21. However, this evidence failed the *Frye* test; Mr. Dalton admitted that no one else had ever used this theory to identify a contamination source, and that the only thing close to a publication of it

was his own submission of a similar topic to a conference. RP at 503:13-504:9. Thus, there was no evidence in testimony or in peer-reviewed literature that his theory was generally accepted by the scientific community.

More significantly, Mr. Dalton admitted that in the one relevant sampling location, his theory did not support his conclusion that the coal tar from the South A Street drains was entering the Waterway. Mr. Dalton tried to impeach his own previous report saying that when he concluded that the “DA-1 line” was not impacting the Waterway, he was relying on the wrong sampling location. RP at 464:21-25. However, when shown the results from the correct sample location, he admitted that the sample showed “enrichment with BEHP” (phthalate), and not with PAH. RP at 497:1-498:17. If it were impacted by coal tar, Mr. Dalton stated that it should have been “enriched with PAH.” RP at 379:18-21.

The trial court made no findings on whether Mr. Dalton’s novel theory passed *Frye*. Since there is no trial court finding and the only evidence shows that Mr. Dalton’s theory is not accepted by the scientific community, it cannot form the basis for a decision by this court.

Mr. Costa’s analysis was thus the only evidence before the court on the source of the sediment PAH that was actually based on analysis of the sediment test results themselves, not conjecture about where

contamination in the drain system might have gone. Based on this evidence, and the complete lack of scientific evidence from the Utilities characterizing the source of contamination, the trial court's findings that Transportation was responsible for the contamination were clear error.

**D. Transportation is Not Liable as an "Owner or Operator"**

**1. The street drainage system is not the "facility" at issue in this case.**

Courts addressing the extent of the "facility" have relied on whether the contaminated property in question is part of the same operation. One district court concluded:

This court concludes that usually, although perhaps not always, the definition of facility will be the entire site or area, including single or contiguous properties, *where hazardous wastes have been deposited as part of the same operation or management.*

*Cytec Industries, Inc. v. B.F. Goodrich Co.*, 232 F. Supp. 2d 821, 836 (S.D. Ohio 2002) (emphasis added) (property owned and operated by the same company as a single facility). There is no dispute that the highways and drains are not contiguous to the Waterway, and not part of the same "operation or management" as the Waterway. The cases relied on by the Utilities all involve sites that are part of the same operation or that are contiguous, and therefore they are not analogous to this case. *New York v. Westwood-Squibb Pharm. Co.*, 138 F. Supp. 2d 372, 382-83 (W.D.N.Y.

2000) (creek adjoined gas plant property, and plant was sole source of contamination to creek); *Azko Coatings, Inc. v. Aigner Corp.*, 960 F. Supp. 1354, 1358 (N.D. Ind. 1996) (site was all one hazardous waste dump operation); *Southern Pacific Transp. Co. v. Voluntary Purchasing Groups, Inc.*, 1997 WL 457510, at \*5 (N.D. Tex. 1997) (entire site was contaminated with arsenic, costs at issue pertained to entire site).

The exact issue before this court was addressed in *City of Bangor v. Citizens Communications Company*, No. Civ. 02-183-B-S, 2004 WL 483201 (D. Me. Mar. 11, 2004) (copy attached). The City of Bangor filed a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) action against Citizens to recover costs incurred by the City to clean up the Penobscot River. The river was contaminated when tar flowed from a former manufactured gas plant, through a sewer that passed through other parcels of property, and into the river from a sewer outfall. Citizens contended that the “facility” was not only the river, but also the former gas plant site and the intervening land through which the sewer passed. The court disagreed, holding that “there appears to be incorporated into [CERCLA’s] concept of facility ownership and understanding that *ownership pertains to the facility where response costs are being expended.*” *Id.* at \*7 (emphasis added). Pointing out that the City limited its case to only the costs associated only with the Penobscot

River, the Court held that the “facility” was the river. Although the former gas plant site and intervening land through which the sewer passed might meet the definition of “facility,” the Court rejected the notion that any facility causally connected to the deposition of hazardous substances at the facility where response costs are being expended should be included. Therefore, the City’s prior ownership of the gas plant site and the sewer did not provide a basis for liability.

The facts of *City of Bangor* are nearly identical to the facts in this case. The Utilities limited their MTCA action to recover costs associated with the Waterway, not costs associated with the former gas plant property or the highways. The Utilities successfully moved to strike Transportation’s evidence of the costs it incurred cleaning up the former gas plant property. The Utilities asserted over and over again that their costs, and their case, were limited to the Waterway. RP at 12:7 (“This is about the waterway.”); RP at 12:3-14:25. Based on the facts alleged by the Utilities, it was the Waterway where the hazardous substances were disposed of and where the Utilities concentrated their cleanup efforts. Accordingly, the “facility” in this action is the Thea Foss Waterway.

Although the South A Street property would meet the definition of “facility” in MTCA, it is not the facility at issue in this lawsuit. The Utilities did not concentrate any cleanup efforts or incur any response

costs with regard to the South A Street property, SR 705, or SR 509. Rather, Transportation did that on its own. Transportation's costs in those efforts were excluded from this case on Utilities' motion. The court erred in concluding that the SR 705 property, South A Street, or the SR 509 bridge were the "facilities" in this action.

**2. Transportation is not the "owner" of the facility.**

Transportation did not own or operate the Waterway. Even if the relevant "facility" were SR 705 or SR 509, Transportation is not the owner of that property; the State of Washington is, and the Utilities did not sue the State. The trial court ruled on summary judgment that Transportation is not liable as an "owner" of a facility. CP at 1718-20, 1829.

Also, the Utilities cannot overcome the language of RCW 47.12.010, which authorizes Transportation to acquire property in the name of the State. *See, e.g., Deaconess Hospital v. Washington State Highway Comm'n*, 66 Wn.2d 378, 398, 403 P.2d 54 (1965) (highway property was acquired on behalf of State, therefore State was real party in interest). Nor have they provided any evidence that would overcome the language of a deed. *See* Ex. 21 (transfer of property from PSE predecessor Washington Natural Gas Company to State of Washington).

**E. Transportation Did Not Arrange for Disposal of Hazardous Substances**

The French drain system existed for the purpose of removing *water* from the highway, not for removing hazardous substances from the highway and disposing of them. The excess groundwater needed to be removed because it would have damaged the roadway. Because Transportation did not install the system for the purpose of disposing of hazardous substances, it should not be an arranger for disposal.

The trial court found that Transportation “did not intentionally transport this waste, but attempted to manage the hazardous substance as a result of encountering it during construction projects.” CP at 1841.

The decisions in *Modern Sewer Corporation* and *Seattle City Light I* were decided before the United States Supreme Court’s decision in *Burlington Northern. Modern Sewer Corp. v. Nelson Distributing, Inc.*, 125 Wn. App. 564, 109 P.3d 11 (2005). Both decisions were based on whether the definition of “dispose” required intentional action. However, *Burlington Northern* analyzed whether “arrange” requires some intentional action. “In common parlance, the word ‘arrange’ implies action directed to a specific purpose.” *Burlington Northern and Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870, 1879 (2009). The Court looked not at the defendant’s subjective intent, but rather at whether its

actions were evidence of an intent to arrange for disposal of a hazardous substance. *Id.* at 1879-80. Under this same standard, the actions taken in *Modern Sewer Corporation* and *Seattle City Light I* likely would still have been considered arrangements for disposal, based on the actions taken by the defendants. Application of the standard in *Burlington Northern* to the facts of this case is not inconsistent with these decisions.

Transportation's actions in (1) removing all contaminated materials under Department of Ecology supervision before installing the drains; (2) after the coal tar infiltrated the drains, working with the City of Tacoma and the Department of Ecology to solve the contamination problem while still keeping the street open to traffic; (3) removing the French drains and replacing part of the storm drain; and (4) developing additional solutions while keeping the street open are not evidence of an intent to arrange for disposal of hazardous substances.

**F. No Substantial Evidence Supports the Conclusion That the SR 509 Project Caused a Release of Hazardous Substances**

In its Opening Brief, Transportation demonstrated that no evidence, let alone substantial evidence, supported the trial court's ultimate finding of fact that construction of the SR 509 bridge caused a release of coal tar to the Waterway. In their Response, the Utilities rely on

Dean Moberg's cross-examination and evidence that oil escaped from a stormwater retention pond.

As previously summarized in the Opening Brief, Mr. Moberg consistently testified that multiple safeguards prevented coal tar releases to the Waterway during SR 509 construction. On cross-examination, he also "admitted" the theoretical possibility of some insignificant release. *See, e.g.,* RP at 842-44. Such testimony is neither an admission nor substantial evidence that a release occurred. *Niagara Mohawk Power Corp. v. Jones Chemical, Inc.*, 315 F.3d 171, 176 (2d Cir. 2003).

At trial, Utilities tried to establish liability with evidence of the release from the D Street retention pond, but the trial court found they "did not present sufficient evidence for the court to allocate any costs to Defendant for Defendant's acts relating to the stormwater retention pond." CP at 1833. Moreover, the material released from the pond was fuel oil, not the coal tar purportedly released into the Waterway sediments. This cannot be used to support the trial court's conclusion that the construction caused a release of coal tar.

**G. The Utilities Were Compensated for All of Their Expenditures Through Collateral Payments And Were Not Equitably Entitled to More**

Plaintiffs sued Transportation for *contribution*. CP at 4, 8; RCW 70.105D.080. The judgment must therefore be reversed because

plaintiffs have not proved that they (and their assignors) paid excess cleanup costs that (1) were not their own fair share and (2) were not already reimbursed by a third party. Reversal on this basis would render the remaining issues moot. Plaintiffs claim they are entitled to reimbursement for all costs, but fail to account for reimbursement from non-insurers, and attempt to shift their burden as contribution plaintiffs to defendant Transportation.

A contribution plaintiff is itself liable and can recover from its fellow liable parties only when it has actually paid their damages without being reimbursed. These general contribution principles, while applied in CERCLA cases, are not the product of CERCLA's statutory language. *See, e.g., Kottler v. State*, 136 Wn.2d 437, 442, 963 P.2d 834 (1998);<sup>3</sup> *Friedland v. TIC-The Indus. Co.*, 566 F.3d 1203, 1206-7, 1207 n.3 (10th Cir. 2009); *Basic Mgmt., Inc. v. United States*, 569 F. Supp. 2d 1106, 1123-24 (D. Nev. 2008); *Vine Street, LLC v. Keeling*, 460 F. Supp. 2d 728, 764-66 (E.D. Tex. 2006). As the *Basic Mgmt.* court explained:

[Contribution] Plaintiffs can only receive reimbursement for the costs they expended *beyond their share* of actual responsibility for the environmental damage. There is an actual dollar amount associated with those costs, and in this case, almost all of those costs have been paid . . . . Allowing Plaintiffs to recover those costs "again" from

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<sup>3</sup> A liable party can be reimbursed only when that party has paid the damages owed by another liable party, 136 Wn.2d at 442, not for the damages it caused.

Defendants would in essence allow Plaintiffs to profit from their own and prior contamination of the site . . . .

569 F. Supp. 2d at 1124 (emphasis added).

The Utilities incorrectly claim that the federal cases are inapplicable because they rely on CERCLA's 42 U.S.C. § 9614 barring recovery when a party has already received compensation "pursuant to any other Federal or State law."<sup>4</sup> The Utilities argue that they can recover twice because the state MTCA statute does not prohibit it. The federal cases, however, rely on general contribution and equitable principles to bar recovery when a contribution plaintiff has already been reimbursed for any *excess* costs it had to pay. *Friedland*, 566 F.3d. at 1206-07, 1207 n.3; *Basic Mgmt.*, 569 F. Supp. 2d at 1123-24;<sup>5</sup> *Vine Street*, 460 F. Supp. 2d at 764-66.<sup>6</sup>

The plaintiffs continue to incorrectly assert that they are entitled to contribution from Transportation if they or their assignors were not fully reimbursed for *all* cleanup costs—even for their own fair shares. Whether the Utilities and their assignors have not been reimbursed for all cleanup

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<sup>4</sup> Arguably, 42 U.S.C. § 9614 doesn't even bar recovery that duplicates insurance reimbursements. An unpublished federal case so held but nevertheless concluded that equity prohibited a contribution plaintiff from recovering excess costs for which insurers had already paid. *Raytheon Aircraft Co. v. United States*, 2007 WL 4300221 at \*3-5, 66 Env't Rep. Cas. (BNA) 1758, (D. Kan. 2007).

<sup>5</sup> *Basic Mgmt.* barred recovery on the basis of *both* 42 U.S.C. § 9614 and general contribution and equitable principles. 569 F. Supp. 2d at 1122-24, 1125.

<sup>6</sup> *Vine Street* referenced 42 U.S.C. § 9614 but relied on general equitable and contribution principles. 460 F. Supp. 2d at 764-66.

costs is irrelevant. As contribution plaintiffs, the Utilities must prove that they and/or their assignors paid cleanup costs caused by other parties *and* that they had not been reimbursed for those “excess” costs. The trial court did not make those findings; without them, Transportation’s liability is irrelevant.

The Utilities made no effort to meet their burden, and the available evidence demonstrates they cannot. According to the Utilities’ own evidence, the total cleanup costs, including some future costs, are approximately \$116 million. Ex. 288. Two liable but non-assigning parties together paid approximately \$7 million of those costs, reducing the amount paid by the Utilities and assignors to \$109 million. CP at 1777-78; sealed “Stipulation re: Collateral Contribution from BNSF” filed 12-04-08. According to Utilities’ evidence, non-paying parties were responsible for one third of this amount, \$36.33 million. *See* RP at 1038, 1047-48, 1059.

But before the Utilities filed suit seeking contribution to reimburse the \$36.33 million in excess costs, third parties paid all of those costs. The City of Tacoma (an assigning party) received insurance payments totaling \$11.8 million. CP at 1780. Ecology contributed \$24.7 million. CP at 1780. Other assigning parties received insurance payments totaling

approximately \$4.5 million.<sup>7</sup> Sealed “Stipulation to Admission of Aggregate Assigning Party Insurance Evidence” filed 12-4-08; Sealed Exs. 1049, 1049A; RP at 1870.

By themselves, *without* counting the additional insurance payments to Utilities, these reimbursements<sup>8</sup> total more than \$41 million, exceeding the excess costs paid by Utilities and their assignors. Because they are not entitled to recover the costs for which they and their assignors are responsible, Plaintiffs have failed to prove that they are entitled to contribution.

Each Utility had incurred and will continue to incur environmental cleanup costs at a large number of sites, including those incurred at the Thea Foss site. Each Utility also had received insurance payments collectively reimbursing each Utility for some, but not all, of the past and future cleanup costs at those sites. As noted in their Response Brief, the Utilities refuse to allocate any of the millions in insurance payments to the costs incurred at any particular cleanup site. But Plaintiff PSE has been reimbursed for 58 percent of its total cleanup costs at all of its cleanup sites (including Thea Foss). *See* Ex. 1028, at 8-9; Ex. 1030A; RP at 1870.

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<sup>7</sup> Contrary to the assertion at pages 54-55 of the Response Brief, the trial court did not consider this \$4.5 million of reimbursing payments. CP at 1842-43.

<sup>8</sup> In their Response Brief, Utilities ignore these reimbursements to dispute the extent of their own insurance payments. However, any collateral payment reimbursing joint and several costs, whether from insurers or another source, reduces the amount a contribution plaintiff can recover. *Friedland*, 566 F.3d at 1208 n.4.

And Plaintiff PacifiCorp has been reimbursed for 69 percent of its total cleanup costs at all of its cleanup sites (including Thea Foss). “Stipulation re: Insurance Evidence” filed 11-25-08; RP at 1870.

PSE can equitably be attributed insurance reimbursement for 58 percent of its Thea Foss costs, approximately \$2.4 million. *See* Ex. 288, at CD 1000614. And PacifiCorp can equitably be attributed insurance reimbursement for 69 percent of its Thea Foss costs, approximately \$7.7 million. *See* Ex. 288, at CD 1000614. Insurance payments to Utilities therefore total more than \$10 million. Total collateral payments to Plaintiffs and their assignors total more than \$51 million. This dwarfs the \$36.33 million that Plaintiffs and assignors paid for cleanup costs they did not cause. Plaintiffs have failed to prove that they incurred any costs caused by other liable parties for which they were not reimbursed prior to trial.

Plaintiff Utilities argue that *none* of the money they have received from insurance companies can be considered. Because they choose not to allocate the individual insurance payments to particular cleanup sites, they can argue that, for any particular site (such as Thea Foss), none of the millions in insurance payments reimburse them for costs incurred at that site. Relying on cases like *Puget Sound Energy, Inc. v. Alba General*

*Insurance Company*, the Utilities claim Transportation must prove allocation. 149 Wn.2d 135, 68 P.3d 1061 (2003).

The Utilities are wrong. The *Alba* court properly placed the allocation burden on the defendant insurance companies because those companies were trying to avoid paying benefits they had contracted to pay. But here, Transportation has no contractual obligation to the Utilities. The Utilities are contribution plaintiffs who must prove that they have incurred *unreimbursed* excess costs. To do so, they must show how they have allocated insurance payments that reimburse them for costs at sites that include the one for which they seek contribution. The burden is logically and legally on them, not on Transportation.<sup>9</sup> *Friedland*, 566 F.3d at 1210-11.

Second, the Utilities are wrong—and *Alba* is inapplicable—because MTCA requires an equitable distribution of cleanup costs. In an equitable distribution of environmental cleanup costs, the court must avoid compensating the plaintiff twice for any excess costs. *Friedland*, 566 F.3d at 1207-08, 1208 n.4, 1209 n.5. When a contribution plaintiff refuses to

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<sup>9</sup> If Transportation were jointly and severally liable to the Utilities, then proof of any release would make Transportation liable for all the cleanup costs. The burden would then shift to Transportation to prove otherwise. But in this contribution action, Transportation is liable only for the costs it caused. The Utilities can only recover from Transportation if it caused cleanup costs, the Utilities paid them, and no one has reimbursed the Utilities for Transportation's costs. Because Transportation is not liable at all without such proof, the burden is on the plaintiff.

allocate insurance payments to particular environmental sites, a court can still exercise its equitable powers to offset recovery based on some percentage of the insurance payment. Doing otherwise allows the contribution plaintiff to collect twice—once from the insurance company and once from the defendant. The court’s allowance of double recovery was inequitable and was in error.

### III. CONCLUSION

For the foregoing reasons, defendant Transportation requests that the court reverse the trial court’s judgment.

RESPECTFULLY SUBMITTED this 2nd day of July, 2010.

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**H**Only the Westlaw citation is currently available.

United States District Court,  
 D. Maine.  
 CITY OF BANGOR, Plaintiff,  
 v.  
 CITIZENS COMMUNICATIONS COMPANY, De-  
 fendant and Third-Party Plaintiff,  
 v.  
 BARRETT PAVING MATERIALS, INC., et al.,  
 Third-Party Defendants  
**No. Civ. 02-183-B-S.**

March 11, 2004.

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RECOMMENDED DECISION ON CITIZENS  
COMMUNICATIONS COMPANY'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT AND ORDER  
ON MOTION TO DEEM FACTS ADMITTED

KRAVCHUK, Magistrate J.

\*1 The City of Bangor has filed suit against Citizens Communications Company seeking, among other relief, (1) a judgment ordering Citizens to "pay all of the costs" incurred by the City to date in association with its ongoing, voluntary "investigation, corrective action and other response actions" to remediate hazardous substances associated with a certain tar slick on the bottom of the Penobscot River and (2) a declaration that Citizens is "jointly and severally liable for all future response costs the City incurs in connection with" the same. These requests are set forth in the first two counts of the City's Second Amended Complaint (Docket No. 175) and are premised on sections 107 and 113(g)(2) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9607, 9613(g)(2). In the alternative, the City has requested, in its third and fourth counts, an order that Citizens pay an equitable share of past, present and future environmental response costs pursuant to CERCLA § 113(f) & (g), 42 U.S.C. § 9613(f), (g). Citizens moves for summary judgment only against counts one and two, contending that the

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City is itself potentially responsible for the tar slick and, therefore, is barred from pursuing full recovery of its costs as a matter of law. I recommend that the Court grant the motion by finding that no genuine issue of material fact exists but that the City is itself potentially responsible for the tar slick and therefore, as a matter of law, may not obtain a judgment that imposes liability on Citizens for *all* of the City's costs, reserving for a later date the question of whether a lesser remedy might be available to the City under CERCLA § 107.<sup>FN1</sup>

FN1. For reasons that will become apparent herein and in the companion Recommended Decision on the Army Corp of Engineers's motion for judgment on the third-party claims, this issue concerns much more than just the scope of the City's damages, particularly insofar as the third-party defendants are concerned.

#### Facts <sup>FN2</sup>

FN2. The factual statement recited herein is drawn from the parties' Local Rule 56 statements of material facts in accordance with the Local Rule. The factual statement construes the available evidence in the light most favorable to the non-movants and resolves all reasonable inferences in their favor. *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 276 (1st Cir.2003).

With its CERCLA claims the City of Bangor seeks to impose on Citizens Communications Company "all of the costs the City has incurred [and will incur] in connection with investigation, corrective action, and other response costs associated with releases of hazardous substances at the tar slick in the Penobscot River." (Second Amended Complaint, prayers for relief, at 9-10 & 11.) The tar slick at issue, according to the complaint, "begin[s] at the outfall of [an] Old Stone Sewer flowing from [a former manufactured gas plant] Site and extend[s] at least 1,500 feet downstream." (*Id.*, ¶ 22.) To date, the City has incurred "at least \$1,000,000.00 in investigating the tar slick." (Docket No. 206, ¶ 15.)

Citizens is the successor of a series of corporate entities that owned and operated the gas plant beginning in

approximately 1852 and continuing through 1963. (Docket No. 206, ¶¶ 1, 25-27; Docket No. 227, ¶¶ 25-27.) In 1852, the City assented to the operation of the plant by the Bangor Gas Light Company, on condition that the company "construct, maintain and use a covered drain, extending from their works to the Penobscot River to below low water mark, of sufficient capacity to carry off all the residuum of filth of said works." (Docket No. 206, ¶ 2, Ex. 1.)<sup>FN3</sup> There is no indication that the company constructed such a drain. Rather, in 1860 the company requested that the City construct-and the City undertook to have constructed-a "public sewer" for this purpose. (Docket No. 181, ¶ 8; Docket No. 227, ¶ 2, Exs. 3, 4 & 5.)<sup>FN4</sup> Four decades later, in 1901, the company complained to the City of damage to its property as a consequence of the City's connection of a public sewer system to the company's "private drain," in effect characterizing at least a portion of the sewer (commonly described as the "Old Stone Sewer" or the "Davis Brook Sewer")<sup>FN5</sup> as the company's private property (Docket No. 206, ¶ 3 Additional) and further revealing that sometime between 1860 and 1901 the outflow of the sewer began discharging wastewater originating not only from the gas plant, but also from a broader municipal sewer system. (Docket No. 181, ¶¶ 6, 9 & Ex. 12 at 135 (Deposition testimony of the City's expert witness, James Ring).) The City's expert witnesses opine that the sewer was the conduit through which the company discharged tar-laden wastewater, based on, among other things, the presence of the tar plume or slick in the Penobscot River that appears to originate at the outfall of the Old Stone Sewer and a trail of tar deposits in the soil underneath the sewer that can be traced back to the "former tar water separator tank" of the former gas plant. (Docket No. 206, ¶¶ 4-12 Additional.) It is undisputed that tar is classified as a "hazardous substance" for purposes of CERCLA. (*Id.*, ¶ 9 Additional; Docket No. 227, ¶ 9.) It is also undisputed that tar is a byproduct of manufactured gas operations. (Docket No. 206, ¶ 16 Additional; Docket No. 227, ¶ 16.)

FN3. The entire 1852 "Resolve" of the "Common Council" of the City of Bangor reads as follows:

A Resolve granting the assent of the City Council to the location of the works of the Gas Light Company. Resolved, that the assent of the City Council of said city, be

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and is hereby given to the Bangor Gas Light Company to erect, establish and continue, proper and sufficient works for the manufacture of Gas, upon the lot of land in and adjoining “[unknown] Brick Yard” in said City, in the rear of Main Street, recently purchased by said Company for that purpose. And also to lay down in and through any of the Streets of said City, such pipes for the conveyance of Gas as may be necessary for carrying into effect the objects of the Incorporation of said Company, Subject to the restrictions and provisions contained in the Charter of said Company and to all the By Laws and ordinances of the City. Provided however, and this assent is upon condition that, said Company shall construct, maintain and use a covered drain, extending from their works to the Penobscot River to below low water mark, of sufficient capacity to carry off all the residuum of filth of said works. Provided further, that in laying their pipes through the streets and sidewalks, they shall replace the each and sidewalks in as good condition as they found them, and to the acceptance of the Mayor of the City.

FN4. On July 9, 1860, the Bangor Board of Aldermen “met according to adjournment” and passed the following:

“ORDERED, That the Mayor and Aldermen deem it necessary for public convenience and health, that a public Drain or Sewer be laid out and constructed as recommended in the Report of the Committee to whom was referred the petition of the Bangor Gas Light Company, and that notice be given agreeably to law, to all persons interested in the premises which said Sewer will cross to be heard in damages. Passed:

The Mayor and Aldermen thereupon issued the following notice and ca[u]sed the same to be posted up and published according to law:

“The undersigned, Mayor and Aldermen of the City of Bangor, hereby give notice, that

in pursuance of a petition of the Bangor Gas Light Company, dated May 7, 1860, and in pursuance of a report of a Committee of the Board of Mayor and Aldermen, to whom was referred said petition, and [illegible].”

On the same day, Mayor Stetson made the following order:

Ordered that the Mayor & Aldermen deem it necessary for public convenience & health, that a public drain or sewer be laid out & constructed as recommended in the report of the Committee to whom was referred the Petition of the Said Gas Light Company & that notice be given ... to all persons interest[ed] in the premises, which said Sewer will cross, to be heard in damages.

(Docket No. 227, Ex. 4.) The Mayor further ordered on August 6, 1860:

“That the Mayor and Alderman Leighton be a Committee to employ some competent Engineer to survey & return a plan for a public Sewer from the vicinity of the Gas Works to tide water, at the Rail Road Wharf, as prayed for, by said Gas Company.

(*Id.*, Ex. 5.)

FN5. The parties sometimes refer to a physical drain installation existing down grade from the gas plant and extending into the River as the “Davis Brook Sewer” or the “Old Stone Sewer.” It appears that the earliest drainage installation involved a full or partial enclosure of an existing, natural drainage route (Davis Brook) with stone. (See Docket No. 181, ¶ 6; Docket No. 206, ¶ 6, ¶ 2 Additional.)

\*2 The former gas plant property is not adjacent to the Penobscot River, but is roughly 1000 feet away, with the Main Street of Bangor running between the property and the River. (Docket No. 206, ¶ 17 Additional; Docket No. 227, ¶ 17.) In 1978 the City acquired the

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parcel on which the gas plant operated and sold the parcel in 1995, after demolishing the remaining fixtures and “addressing” contamination at the parcel. (Docket No. 181, ¶¶ 10, 11; Docket No. 206, ¶ 21 Additional.) This parcel and an adjacent parcel, now known as the Second Street Park, were acquired by the City under a community development program that authorized the City to exercise its development powers to acquire property by purchase or by eminent domain. (Docket No. 206, ¶ 19 Additional.) The City currently owns substantial riverfront property on the opposite side of Main Street along the Penobscot River (the riverfront property), including that location along the banks where the Old Stone Sewer discharged into the River. (Docket No. 181, ¶ 1.) The City's title in this property extends to the mean low water mark. (*Id.*, ¶ 2.) Tar produced at the gas plant is currently present in the inter-tidal zone of the riverfront property. (Docket No. 181, ¶ 4; Docket No. 206, ¶ 14 Additional.)

The Maine Department of Environmental Protection (MDEP) has certified its approval of completions of Voluntary Remedial Action Plans for the former gas plant property, the Second Street Park, and the portion of the City's riverfront property upland of the inter-tidal zone. (*Id.*, ¶ 24 Additional.) Both the MDEP and the United States Environmental Protection Agency (EPA) have opined that contamination at the former gas plant property is no longer discharging into the River. (*Id.*, ¶¶ 21-22 Additional.)

#### The City's Motion to Deem Facts Admitted

The City has filed a motion captioned “Motion to Deem Facts Admitted Pursuant to Local Rule 56(e), for Failure to Controvert Plaintiff's Statement of Additional Facts.” (Docket No. 249.) With this motion, the City seeks to have the Court treat several of its statements of additional material fact as “admitted by Citizens for all purposes in this litigation.” (*Id.* at 2.) In particular, the City refers to its additional statements numbered 1, 3-8, 10-16 and 28. In reply to many, but not all, of these additional statements, Citizens's offered a denial, followed by a statement to the effect that the City's additional statement is immaterial to the issues presented in Citizens's motion for partial summary judgment. Citizens's denials are not backed up with record citation. (Docket No. 227, ¶¶ 4-8, 10-12, and 15.) In other instances, Citizens has admitted, partially admitted, or qualified the City's

statements without record citation. (*Id.* ¶¶ 1, 13-14, 16.) In two instances, Citizens has qualified the City's statements by referring the Court to the record citation offered by the City (¶ 3), and by criticizing the terminology used by the City to characterize the legal ramifications of certain facts (¶ 28). According to the City, Citizens's “refusal to admit facts that it does not properly dispute serves to waste the parties resources as well as the limited resources of the court, and threatens additional unjust delay in this litigation.” (Docket No. 249 at 1.)

\*3 Nowhere in the City's motion is there a reference to Federal Rule 56(d), as opposed to Local Rule 56(e). Federal Rule 56(d) authorizes the Court, in cases not fully adjudicated on motion, “at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel” to make “an order specifying the facts that appear without substantial controversy” and to deem such facts established for purposes of trial. Although the Court might be inclined to engage in such an investigation, I am not inclined to engage in that process for purposes of a trial that I will not be conducting, nor does the present motion for partial summary judgment appear to be the appropriate context for the Court to establish what facts “appear without substantial controversy.” With the exception of one statement of fact pertaining to Citizens's “corporate history,” the City's statement of additional material facts sets forth factual assertions that are not easy to assess without the aid of expert testimony. Moreover, many of the factual statements offered by the City, although helping to explain the basis for the City's claims against Citizens, are not material to the narrow legal question raised by this motion for partial summary judgment on the claims for “full recovery” pursuant to CERCLA § 107. Thus, it would be entirely unproductive for the Court to sift through statements of material facts and record citations that, ultimately, would not be material to the determination of the narrowly-focused partial summary judgment motion that is before it. Finally, I observe that the discovery deadline for the City has been repeatedly extended and remained open throughout the pendency of this motion.<sup>FN6</sup> I can see no good reason why the City could not have pursued the admissions it wants through the normal channel: Rule 36. The motion to deem facts admitted “for all purposes” is DENIED.<sup>FN7</sup>

<sup>FN6</sup>. The deadline for the City and Citizens

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to complete discovery on the complaint was February 23, 2004. (Report of Tel. Conf., Order on Misc. Mots. and Am. Sched. Order, Docket No. 200, at 3.) The City filed its motion to deem facts admitted for all purposes on December 19, 2003.

FN7. Although I deny the motion to deem facts admitted “for all purposes,” it will be evident to the parties that I have credited some of the City’s statements of additional material facts for purposes of Citizens’s motion for partial summary judgment, to the extent I have deemed those statements to be both relevant to my discussion and “supported by a record citation.” D. Me. Loc. R. 56(c).

#### Summary Judgment Discussion

Summary judgment is warranted only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c); United States Steel v. M. DeMatteo Constr. Co., 315 F.3d 43, 48 (1st Cir.2002). According to Citizens, it is entitled to summary judgment on the first two counts of the City’s complaint because the City is a potentially responsible party when it comes to the tar slick and, as such, cannot maintain claims for a full recovery of its response costs as a matter of law.

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1995 & Supp.2003), is a “comprehensive statute” that “was enacted in response to the serious environmental and health risks posed by industrial pollution.” United States v. Bestfoods, 524 U.S. 51, 55, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998). “It is ... designed to protect and preserve public health and the environment.” United States v. Kayser-Roth Corp., 910 F.2d 24, 25 (1st Cir.1990). In addition to providing a mechanism for the federal government to clean up hazardous-waste sites, CERCLA incorporates civil action provisions that enable local governments and private parties who undertake cleanups to “impose[ ] the costs of cleanup on those responsible for the contamination.” Pennsylvania v. Union Gas Co., 491 U.S. 1, 7, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989); see also 42

U.S.C. §§ 9607, 9613(f). Importantly, CERCLA’s definitional provisions make it clear that local governments are liable along with everyone else for cleanup costs recoverable under CERCLA. 42 U.S.C. § 9601(20)(D). “The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to [pay for] the costs of clean-up.” *Id.*, at 21 (plurality opinion of Brennan, J., quoted with approval in Bestfoods, 524 U.S. at 56 n. 1).

\*4 According to the First Circuit Court of Appeals, CERCLA provides two “actions,” or remedies, by which the costs of responding to hazardous-waste contamination can be reallocated among private parties in litigation: “actions for recovery of costs” and “actions for contribution.” United Tech. Corp. v. Browning-Ferris Indus., 33 F.3d 96, 99 (1st Cir.1994), cert. denied, 513 U.S. 1183, 115 S.Ct. 1176, 130 L.Ed.2d 1128 (1995) (“UTC”). Actions for recovery of costs are available only to “innocent parties that have undertaken cleanups.” *Id.* Actions for recovery of costs enable an innocent party that engages in a clean-up “to recoup the whole of [its] expenditures” from any non-innocent party. *Id.* at 100. Actions for contribution, on the other hand, enable a non-innocent party to recover only “that portion of his expenditures which exceeds its pro rata share of the overall liability.” *Id.* (referring to CERCLA’s § 113(f) remedy). Whether a CERCLA plaintiff is “innocent” depends on whether that party is itself potentially liable for environmental contamination under CERCLA § 107. The label customarily used by courts and counsel to describe a non-innocent plaintiff is “potentially responsible party” or “PRP.” As a matter of law, PRPs are precluded from pursuing a “full recovery” under § 107(a) and must make do with contribution, or equitable apportionment, in accordance with CERCLA § 107(a)(4)(B) and/or § 113(f), 42 U.S.C. § 9613(f). *Id.* at 99-101; Dico, Inc. v. Chem. Co., 340 F.3d 525, 530 (8th Cir.2003) (collecting circuit court precedents).<sup>FN8</sup>

FN8. It is sometimes said that a PRP cannot pursue a § 107(a) claim, only a § 113(f) claim. Actually, “any person may seek to recover costs under § 107(a), but ... it is the nature of the action which determines whether the action will be governed exclusively by § 107(a) or by § 113(f) as well.” Centerior Serv. Co. v. Acme Scrap Iron &

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Metal Corp., 153 F.3d 344, 353 (6th Cir.1998) (citing UTC, 33 F.3d at 101).

CERCLA § 107 provides the standard for CERCLA liability. Section 107(a) sets forth four categories of “covered persons” who are liable for hazardous-waste releases and the associated costs and damages. The four categories are:

- (1) “owner and operator of a vessel or facility”;
- (2) “any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of”;
- (3) “any person who by contract, agreement, or otherwise arranged for disposal ... of hazardous substances”;
- (4) “any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities ... from which there is a release, or a threatened release which causes the incurrence of response costs.”

42 U.S.C. § 9607(a)(1)-(4). Importantly, the subsection (a)(4) phrase “from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance” is generally understood to modify paragraphs (1) through (3), as well as paragraph (4). Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 934-35 & n. 7 (8th Cir.1995) (citing State of New York v. Shore Realty Co., 759 F.2d 1032, 1043 n. 16 (2d Cir.1985)).<sup>FN9</sup> Those parties falling within one of the four categories set out in § 107(a) “shall be liable for [*inter alia*] all costs of removal or remedial action incurred by ... a State<sup>FN10</sup> ... not inconsistent with the national contingency plan,” and “any other costs of response incurred by any other person consistent with the national contingency plan.” 42 U.S.C. §§ 9607(a)(4)(A) & (B).

FN9. According to the Second and Eighth Circuit Courts of Appeals, the clause was meant to appear on a separate line from subsection (4) but did not on account of a printer's error. Control Data Corp., 53 F.3d at 934 n. 7; Shore Realty, 759 F.2d at 1043 n. 16.

FN10. There is an open question whether municipalities automatically qualify as states for purposes of § 107(a)(4)(A), but the weight of authority suggests they do not. Fireman's Fund Ins. Co. v. City of Lodi, 296 F.Supp.2d 1197, 1215 n. 33 (E.D.Cal.2003); City of New York v. Chemical Waste Disposal Corp., 836 F.Supp. 968, 977 (E.D.N.Y.1993); Rockaway v. Klockner & Klockner, 811 F.Supp. 1039, 1048 (D.N.J.1993). The more likely source of a municipality's cause of action is under § 107(a)(4)(B), which imposes liability on polluters for response costs incurred by “any other person.”

\*5 The national contingency plan is a series of regulations, promulgated by the [EPA], that establish the procedures and standards for government and voluntary response actions to hazardous substances. Those regulations provide that a remedial action is consistent with the national contingency plan if it results in a “CERCLA quality cleanup.” 40 C.F.R. § 300.700(c)(3)(ii). A “CERCLA-quality cleanup,” in turn, is defined as a cleanup that is “protective of human health and the environment ... and ... cost effective.” 55 Fed.Reg. 8666, 8793 (1990).

Blasland, Bouck & Lee, Inc. v. City of N. Miami, 283 F.3d 1286, 1295 (11th Cir.2002). Despite this relatively unqualified indication that those parties associated with hazardous waste contamination are “liable” to those parties who clean it up, the courts have superimposed sluiceways to channel CERCLA plaintiffs, the gates to which will open or close depending on the plaintiff's ability to meet certain criteria, the most important of which is “innocence.” Which gate opens has a direct impact on the burden of proof the plaintiff must carry and what reward it might attain for its cleanup activities. The sluiceway every plaintiff wants to ride readily admits only those plaintiffs who are “innocent” of contamination, that is, those plaintiffs who are not themselves PRPs. UTC, 33 F.3d at 99-100. Assuming their response costs were incurred consistent with the national plan, these plaintiffs can obtain a judgment imposing strict and “full” liability for response costs on a defendant polluter based on a relatively simple showing that one of the four § 107(a) categories describes that defendant. Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 348

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(6th Cir.1998). It is unclear whether a “non-innocent” plaintiff can ever gain access to this sluiceway because courts have characterized § 107’s remedy as a “full recovery,” something that plaintiffs falling within any one of the four categories of PRP defined in § 107(a) paragraphs (1) through (4) are not entitled to unless they can prove that one of the three statutory defenses are applicable.<sup>FN11</sup> See, e.g., *UTC*, 33 F.3d at 100 (“‘Actions for recovery of costs,’ suggests full recovery; and it is sensible to assume that Congress intended only innocent parties—not parties who were themselves liable—to be permitted to recoup the whole of their expenditures.”). Instead, courts seem generally inclined to channel non-innocent plaintiffs down a second sluiceway, one that leads to CERCLA § 113(f), 42 U.S.C. § 9613(f). Section 113(f) permits “[a]ny person [to] seek contribution from any other person who is liable or potentially liable under section 9607(a) ... during or following any civil action under section 9606 ... or under section 9607(a).” But a potential problem arises with this approach, because not all PRP-plaintiffs<sup>FN12</sup> who incur response costs do so in response to a “civil action.” Some PRP-plaintiffs incur response costs voluntarily, or at least independent of administrative enforcement or other civil action. Thus, they are not seeking contribution “during or following any civil action under section 9606 ... or under section 9607(a).” *Id.*, § 9613(f). The courts appear to be divided about whether these “volunteer” PRP plaintiffs should be sluiced:

FN11. These are the so-called act of God, act of war, and third-party defenses found at § 107(b)(1)-(3). The City raises the § 107(b)(3) third-party defense, discussed below in sections 1 and 3 of this Recommended Decision.

FN12. A § 113(f) claim may also be utilized by, and perhaps was created for, a CERCLA defendant to cross-claim against co-defendants or to launch a third-party action against PRPs not named by the CERCLA plaintiff in its first-party action.

\*6 (1) Through § 113(f), regardless of the “during or following” language and based on the § 113(f) “savings clause” that “[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under

section 106 or section 107” and a liberal construction of what constitutes a “contribution” action, see *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677 (5th Cir.2002) (en banc) (Barksdale, Garza and Smitt, JJ., dissenting), cert. granted, --- U.S. ---, 124 S.Ct. 981, 157 L.Ed.2d 811 (2004);

(2) Through § 107(a)(4)(B), albeit without the availability of “full recovery” and with the additional burden of proving up what proportional share of the plaintiff’s response costs should be imposed on the defendant, cf. *UTC*, 33 F.3d at 99 n. 8 (“It is possible that, although falling outside the statutory parameters established for an express cause of action for contribution, ... a PRP who spontaneously initiates a cleanup without governmental prodding might be able to pursue an implied right of action for contribution under 42 U.S.C. § 9607(c).”);<sup>FN13</sup> or

FN13. The First Circuit’s citation to authority in *UTC* reads as follows:

See *Key Tronic Corp. v. United States*, 511 U.S. 809, 114 S.Ct. 1960, 1966, 128 L.Ed.2d 797 (1994) (explaining that CERCLA now “expressly authorizes a cause of action for contribution in [§ 9613] and impliedly authorizes a similar and some what overlapping remedy in [§ 9607]”); cf. *In re Hemingway Transp., Inc.*, 993 F.2d 915, 931 (1st Cir.) (stating in dictum that “in the event the private-action plaintiff itself is potentially ‘liable’ to the EPA for response costs, and thus is akin to a joint ‘tortfeasor,’ section 9607(a)(4)(B) serves as the pre-enforcement analog to the ‘impleader’ contribution action permitted under section 9613(f)”, cert. denied, 510 U.S. 914, 114 S.Ct. 303, 126 L.Ed.2d 251 (1993).

*UTC*, 33 F.3d at 99 n. 8 (emphasis added). See also *City of Fresno v. NL Indus., Inc.*, No. 93-5091, 1995 WL 641983, \*2, 1995 U.S. Dist. LEXIS 15534, \*10-14 (E.D.Cal. July 9, 1995) (collecting cases that address “the issue of whether an action brought by one PRP against another must be characterized as one for contribution under § 113”).

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(3) Down the drain, *see E.I. Du Pont De Nemours and Co. v. United States*, 297 F.Supp.2d 740, 750-53 (D.N.J. Jan.5, 2004) (holding that Congress did away with any judicially recognized “contribution” action under § 107 when it created § 113(f), that a PRP who voluntarily incurs response costs cannot maintain an action for mere “recoupment or reimbursement,” that “a contribution action requires two parties who are jointly and severally liable to some third-party,” that the contribution claimant was compelled to incur the costs in question, and that the contribution claimant has discharged the entire underlying claim).

In sum, if Citizens can establish, for purposes of summary judgment, that the City is a PRP, then pursuant to UTC, the City cannot obtain a “full recovery” under CERCLA § 107(a) as a matter of law, but may be able preserve some form of § 107(a)(4)(B) claim for contribution or a similar equitable remedy.<sup>FN14</sup> *UTC*, 33 F.3d at 99, *cert. denied*, 513 U.S. 1183, 115 S.Ct. 1176, 130 L.Ed.2d 1128. According to Citizens, the City is a PRP because it is liable (1) as an owner of the contaminated riverfront property through which tar migrated and continues to migrate on its way to the River, (2) as a former owner of the gas plant, (3) as an operator of the sewer lines through which tar was allegedly discharged into the Penobscot River and (4) as an arranger of disposal by virtue of its involvement in the establishment and creation of the sewer in the mid-1800s. (Citizens's Mot. Partial Summ. J., Docket No. 176, at 8-12.)

<sup>FN14</sup>. *See* footnote 13, *supra*. The First Circuit Court of Appeals's characterization of the § 107(a) remedy as providing a “full recovery” appears to be based on the § 107(a)(4)(A) language, “shall be liable for ... all costs.” But this language is used in conjunction with liability to the United States, a state or an Indian tribe. By contrast, § 107(a)(4)(B) describes liability for “any other necessary costs of response incurred by any other person.” 42 U.S.C. § 9607(a)(4)(B) (emphasis added).

Currently before the Supreme Court is the question, not raised by the parties herein, of whether a polluter who incurs response costs voluntarily, *i.e.*, in the absence of a civil action or enforcement proceeding by the United States or a state, *see* 42 U.S.C.

§§ 106 & 107(a)(4)(A), has standing to pursue a contribution remedy pursuant to § 113(f), the remedy requested by the City in its third and fourth counts. The countervailing arguments are thoroughly set forth in *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677 (5th Cir.2002) (en banc) (Barksdale, Garza and Smitt, JJ., dissenting), *cert. granted*, --- U.S. ---, 124 S.Ct. 981, 157 L.Ed.2d 811 (2004) and in *E.I. Du Pont De Nemours and Co. v. United States*, 297 F.Supp.2d 740 (D.N.J. Jan.5, 2004) (presenting an alternative to the two positions set forth in *Aviall* ). This issue focuses on the nature of a contribution action as one in which the contribution plaintiff has already extinguished the contribution defendant's liability and on the limiting temporal language used by Congress in section 113(f):

Any person may seek contribution from any other person who is liable or potentially liable under section 107(a) [42 USCS § 9607(a) ], *during or following* any civil action under section 106 [42 USCS § 9606] or under section 107(a) [42 USCS § 9607(a) ].

42 U.S.C. § 9613(f) (emphasis added). *See also Aviall*, 312 F.3d at 682-83 (discussing precedents indicating that “prior government involvement [is] not a prerequisite to recoupment of § 107 response costs by one group of PRPs against other PRPs”); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301-02 (9th Cir.1997) (holding that “only a claim for contribution lies between PRPs,” observing that section 113(f) governs where one PRP brings a section 107 action against another PRP, and citing cases).

On a related note, I have some concern as to whether section 107(a) really authorizes even an “innocent” private party plaintiff to obtain prospective relief, *i.e.*, a declaration as to a defendant's future liability when the plaintiff has not already completed, or even started, cleaning up the contamination at issue. I raise this concern

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because the City is asking the Court to, among other things, make an allocation of costs that have yet to be expended and therefore cannot necessarily presently be evaluated as both “necessary” and “consistent with the national contingency plan.” 42 U.S.C. § 9607(a)(4)(B).

In any event, if this Court agrees with the recommendation contained herein, that the City is itself also potentially responsible for the tar slick and therefore cannot obtain a “full recovery” in its first two counts, and if the Supreme Court holds that a polluter who voluntarily incurs response costs cannot maintain a claim for contribution against fellow polluters pursuant to section 113(f), then it would seem that the CERCLA component of this litigation would be concluded.

*1. The City's ownership of the riverfront property (§ 107(a)(1)).*

Pursuant to CERCLA § 101, “[t]he term ‘owner or operator’ means ... in the case of an onshore facility ... any person owning or operating such facility.” 42 U.S.C. § 9601(20)(A). “Facility” is defined as “(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer ... ) ... or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.” *Id.* § 9601(9).

\*7 Citizens argues that the tar slick in the River, the City's riverfront property, the former gas plant site and the intervening land through which the sewer passed must be understood as one unified facility for purposes of CERCLA. So understood, says Citizens, the City is potentially liable as an owner because it is the current owner of the riverfront property, part of the facility.<sup>FN15</sup> However, the City has limited its CERCLA action to recover costs associated only with the River “facility.” In its Second Amended Complaint, the City's § 107 “prayers for relief” all seek an order that Citizens pay the response costs the City has “incurred in connection with investigation, corrective action, and other response actions associated with releases of hazardous substances at the tar slick in the Penobscot River.” (Docket No. 175 at 9-10 & 11.) Furthermore, in opposition to summary judgment, the City asseve-

rates that “the ‘facility’ properly before the court under section 107 is Dunnett's Cove in the Penobscot River,” evidencing the limitation the City has placed on its cause of action. (Docket No. 205 at 9.)

FN15. In Citizen's own words. “While the City's Second Amended Complaint ... characterize[s] only the Penobscot River as a facility, based on the City's allegation that the [former gas plant] was the source and the Old Stone Sewer the conduit ... those areas also constitute parts of the ‘facility’ in question.” (Docket No. 176 at 7-8.)

As with all things CERCLA, the facility issue is puzzling. On the one hand, at least one Court of Appeals has suggested that “the bounds of a facility should be defined at least in part by the bounds of the contamination.” *United States v. Township of Brighton*, 153 F.3d 307, 313 (6th Cir.1998). See also *Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 191 F.3d 409, 417 (4th Cir.1999) (observing that a contrary approach might be illogical when taken to the extreme because it “would mean that each barrel in a landfill is a separate facility—a proposition ... aptly described as ridiculous.”) (quotation marks and citation omitted). On the other hand, a facility is a location “from which there is a release, or a threatened release which causes the incurrence of response costs ... consistent with the national contingency plan.” 42 U.S.C. § 9607(a); Control Data Corp., 53 F.3d at 934-35 & n. 7 (concerning the manner in which qualifying language in § 107(a)(4) modifies all four liability provisions of § 107(a)); *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 871 (9th Cir.2001) (“Remediation costs are recoverable under CERCLA only if ‘necessary.’ It is generally agreed that this standard requires that an actual and real threat to human health or the environment exist before initiating a response action.”), *cert. denied*, 535 U.S. 971, 122 S.Ct. 1437, 152 L.Ed.2d 381 (2002); *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 743 (8th Cir.1986) (“In the present case ... the place where the hazardous substances were disposed of and where the government has concentrated its cleanup efforts is the Denney farm site, not the [originating] NEPACCO plant. [Thus,] [t]he Denney farm site is the ‘facility.’”). Thus, there appears to be incorporated into § 107(a)(1)'s concept of facility ownership an understanding that ownership pertains to the facility where response costs are being expended, not ownership of

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any facility causally connected to the deposition of hazardous substances at the facility where response costs are being expended.<sup>FN16</sup> Thus the City's prior ownership of the Gas Plant site and even the sewer (if indeed it ever did own the sewer through which the tar passed) do not provide a basis for § 107(a)(1) liability.

FN16. Of course, what is sauce for the goose is sauce for the gander. If this rationale is credited by the Court, as the City advocates, then the City cannot establish, in its case-in-chief, § 107(a) liability on the part of Citizens based solely on Citizens's (and its predecessors) ownership of the former gas plant.

\*8 In this case, the available summary judgment facts, construed most favorably to the City, support a finding that the River and the upland riverfront property have come to be distinct depositories of the former gas plant's tar, with only the River, including the inter-tidal zone, requiring the expenditure of response costs. The summary judgment record is otherwise undeveloped with respect to whether the riverfront property outside of its inter-tidal zone is presently a facility that releases or threatens the release of hazardous materials into the River, or elsewhere, so as to justify the incurrence of response costs consistent with the national contingency plan.<sup>FN17</sup> However, the City concedes in its memorandum that it holds an ownership interest in the inter-tidal zone and that "the inter-tidal zone ... is part of the 'facility.'" (Docket No. 205 at 15). Thus, under its own version of the facts the City clearly meets the definitional language of § 107(a)(1) in that it is the owner of a portion of the facility in question. This makes the City a PRP, unless it can establish a defense to liability under § 107(b).

FN17. The evidence that is properly before the Court suggests that both the MDEP and the EPA have opined that contamination at the former gas plant site is no longer migrating into the River. It is also worth noting that subterranean migration of tar, in and of itself, would not necessarily generate CERCLA liability on the part of the City, as is discussed below in section 2.

The City maintains that its § 107(a)(1) liability is negated by the § 107(b)(3) third-party defense, 42 U.S.C. § 9607(b)(3), because the release of hazardous

substances there did not occur in connection with a "contractual relationship" between the City and any party that discharged the waste in question. The City's focus on the "contractual relationship" issue is a red herring. For purposes of the application of the third-party defense in this case, the question is simply this: Has the City produced facts that could support a finding by a preponderance of the evidence that the release or threat of release of a hazardous substance at the riverfront property's inter-tidal zone was "caused solely by ... an act or omission of a third party?" 42 U.S.C. § 9607(b)(3). The answer to this question is "no" and is addressed below in section 3, where I discuss the legal significance of the City's past sewer activities.

Even if the City's third-party defense did turn in some way on § 107(b)(3)'s "contractual relationship" concept, that concept is defined in § 101(35)(A) to include land contracts and deeds, unless (1) the party acquired the property "after the disposal or placement of the hazardous substance on, in, or at the facility," and (2) at least one of three other circumstances is "established by a preponderance of the evidence." 42 U.S.C. § 9601(35)(A). With respect to the riverfront property,<sup>FN18</sup> the additional circumstance that the City points to requires proof that "[a]t the time the [City] acquired the facility the [City] did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility." 42 U.S.C. § 9601(35)(A)(i). According to the City, it is an "innocent purchaser" and "innocent owner" of the riverfront property because it acquired the property after the placement of hazardous substances there and "because it acquired the [property] after the DEP had certified the VRAP clean-up of that parcel."<sup>FN19</sup> (Docket No. 176 at 16.) These arguments bear little resemblance to the statutory test, which concerns a purchaser's *knowledge* of the past disposal of hazardous substances at the facility and the City does not cite any authority supporting this kind of deviation from the statute. For obvious reasons, the City has not attempted to disavow knowledge on its part of disposals "on, in, or at" the riverfront property. The one case cited by the City, *New York v. Lashins Arcade Co.*, 91 F.3d 353 (2nd Cir.1996), supports the proposition that the mere conveyance of contaminated property is not the kind of "contractual relationship" that precludes the acquiring landowner from raising the third-party defense unless the contract related in some way to hazardous substances or otherwise exerted control

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over a past owner's activities. *Id.* at 360 (citing *Westwood Pharms., Inc. v. Nat'l Fuel Gas Distrib. Corp.*, 964 F.2d 85, 91-92 (2d Cir.1992)). However, resolution of the appeal in *Lashins* “turn [ed] upon the validity of the district court's ruling that *Lashins* was entitled to summary judgment on the question whether *Lashins* ‘exercised due care with respect to the hazardous substance concerned ... in the light of all relevant facts and circumstances’ within the meaning of § 9607(b)(3).” *Id.* at 360-61. Because *Lashins*'s only connection to the facility came after the discharge of hazardous waste there and because the EPA and New York State Department of Environmental Conservation were already overseeing an approved “Remedial Investigation/Feasibility Study of the facility the court concluded that *Lashins* could be deemed to have exercised due care. *Id.* at 362 (“[T]he cases cited by New York do not require the negation of *Lashins*' ‘due care’ defense. None involved a defendant who played *no role* in the events that led to the hazardous waste problem and came on the scene after public authorities were well along in a program of investigation and remediation.”) (emphasis added). As discussed below in section 3, the City played an important role in connection with the discharge of hazardous substances at the facility.

FN18. The City also argues that the facts pertaining to its acquisition of the Second Street Park and the gas plant property through a process akin to the exercise of eminent domain powers also implicate § 101(35)(A). Were this case directed at releases on those properties, I would address these arguments, but because the “facility” under consideration is narrowly construed as the River, including the inter-tidal zone, the method by which the City acquired the Park and the gas plant properties is irrelevant.

FN19. In its statement of material facts, the City indicates that the VRAP certification only applies to that portion of the riverfront property that is upland of the inter-tidal zone (Docket No. 206, ¶ 24), but the City's title extends to the mean low water mark. (Docket No. 206, ¶ 2.)

2. *The City's prior ownership of the gas plant (§ 107(a)(2)).*

\*9 The City owned the former gas plant site from 1978 to 1995. According to Citizens, “ ‘The continuing spread and migration of Hazardous Substances’ was occurring on the ... property before the City purchased it.” (Docket No. 227, ¶ 12.) According to Citizens, this makes the City liable as a “ ‘person who at the time of disposal of any hazardous substance owned or operated’ a facility .” (Docket No. 176 at 11 (citing § 107(a)(2)).) Thus, Citizens's argument is that the passive <sup>FN20</sup> spread and migration of hazardous substances deposited by a former owner constitutes “disposal” for purposes of determining a subsequent owner's liability under § 107(a)(2). In response, the City appropriately takes Citizens to task for asking the Court to infer the existence of post-1978 migration based on an assertion of pre-1978 migration. (Docket No. 205 at 19.) Drawing such inferences for a movant is not appropriate in the summary judgment context. The City then argues that, even if passive migration of hazardous substances did take place during its ownership of the gas plant parcel, passive migration is not “disposal” as a matter of law. (*Id.* at 19-20.)

FN20. The evidence cited in support of Citizens's statement concerning the continuing spread and migration of hazardous substances is an interrogatory answer provided by the City. The City's interrogatory answer does not indicate that any affirmative disposal activities took place at the site during the City's ownership. In its memorandum of law Citizens relates what “appears” to be other evidence of leaks and spills from a storage tank on the property during the City's ownership, but the evidence it points to was never incorporated into Citizens's statement of material facts. On this record, I find that there is no evidence, for purposes of summary judgment, of any leak or spill during the City's ownership that contributed to the presence of hazardous substances in the soil or water beneath the former gas plant site. I also observe that, even if this evidence were credited, there is no evidence that any leak or spill that might have occurred at the former gas plant site during the City's ownership and cleanup of the site contributed to the inurrence of any of the response costs associated with the tar slick in the Penobscot River, the “releasing” facility that this suit is directed toward.

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CERCLA's definition of "disposal" incorporates by reference the definition provided in the Resource Conservation and Recovery Act, 42 U.S.C. § 9601(29). That definition states:

The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3). Although the definition describes two potentially "passive" agencies of disposal in the terms "spilling" and "leaking," see Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 844-45 (4th Cir.1992) (holding that passive spilling and leaking from underground storage tanks constituted disposal), all of the terms nevertheless suggest some new introduction of hazardous substances to the environment. The summary judgment record that is before the Court does not contain evidence of hazardous substances being placed into or on any land or water at the parcel during the City's ownership of it. Because Citizens has not properly produced evidence of a "disposal" during the City's ownership of the former gas plant site, there is no basis in the summary judgment record for finding the City potentially responsible for the tar slick pursuant to § 107(a)(2)'s ownership language. Furthermore, the City correctly states that passive migration would not constitute "disposal," even if there were clear evidence that passive migration was occurring during this time-frame. See Carson Harbor, 270 F.3d at 874-79 (discussing several circuit precedents consistent with this conclusion and holding "that the gradual passive migration of contamination through the soil that allegedly took place during [a prior owner's] ownership was not a 'discharge, deposit, injection, dumping, spilling, leaking, or placing' and, therefore, was not a 'disposal' within the meaning of § 9607(a)(2)").<sup>FN21</sup>

<sup>FN21</sup>. The Carson Harbor Court articulated several additional reasons for its holding, including effectuation of the statutory purpose that "responsible" persons pay for cleanups and the desire to ensure internal consistency within CERCLA. Carson Harbor, 270 F.3d at 880-84.

3. *The City's "operation" of the sewer line or "arrangement" of disposals vis-à-vis the sewer line (§ 107(a)(2) or (3)).*

\*10 Ultimately, Citizens's motion turns on the legal significance of one undisputed fact: that the City constructed or otherwise attended to the construction of a sewer to transport the gas plant's "residuum of filth" to the Penobscot River. Citizens argues that this fact makes the City a PRP because the City was an "operator" of the hazardous-substance-releasing sewer facility at the time of disposal and an "arranger" of the hazardous-substance disposal.<sup>FN22</sup> (Docket No. 176 at 9-11.) The City disavows this contention, arguing that "[c]ourts have uniformly rejected claims that local governments may be held liable under CERCLA for mere construction or routine maintenance of a sewer system, absent some showing that the municipality had knowledge that the effluent contained hazardous substances and issued a permit or otherwise participated in the discharge of the hazardous substances." (Docket No. 205 at 10.)

<sup>FN22</sup>. Citizens's argument that the City has "arranger" status is found in a footnote in its primary memorandum. It appears to have been offered to cover all the bases, although Citizens does not argue that the City qualifies as a person "who accepted any hazardous substances for transport to disposal" under section 107(a)(4). (Docket No. 176 at 11 n. 12.). "Arranger" status most commonly relates to "generators of waste" and there is no evidence in the summary judgment record that the City generated any of the tar residue. However, there are a number of cases that address the issues surrounding non-generator liability pursuant to § 107(a)(3). See William B. Johnson, Annotation, Arranger Liability of Nongenerators Pursuant to § 107(a)(3) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. 9607(a)(3)), 132 A.L.R. Fed. 77, 103-04 (1996). The City's predicament is certainly novel, but could well fall within the general category.

Pursuant to § 107(a)(2), CERCLA liability attaches to "any person who at the time of disposal of any hazardous substance owned or operated any facility at

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which such hazardous substances were disposed of.” 42 U.S.C. § 9607(a)(2). The definition of “facility” includes any “pipe or pipeline” or “ditch.” *Id.* § 9601(9). The definition of “operator” is tautological: “any person ... operating such facility.” *Id.*, § 9601(20)(A). In *United States v. Bestfoods*, 524 U.S. 51, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998), the Supreme Court held that “an operator must manage, direct or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste.” *Id.* at 66.

The Nineteenth Century installation of the so-called Old Stone Sewer or Davis Brook Sewer in this case constituted an “operation,” and it is apparent that the installation had to do with the disposal of hazardous waste. The language of § 107(a)(2) is considerably broader than the language of § 107(a)(1); § 107(a)(2) concerns “any person” operating “any facility” where and when the subject hazardous waste is disposed of. Thus, owner/operator status under § 107(a)(2) is not restricted to ownership or operation of the facility at which response costs are being incurred, but turns on where and how the hazardous substances at issue were disposed of. Here, the City’s theory of the case prevents the City from denying that the sewer was “a” facility at which the hazardous substances at issue were disposed. The only conceptual obstacle raised by the City is, essentially, that a sewer functions passively, therefore the City did not really “operate” it. But this reasoning is strained, because the sewer came to be as a consequence of the City’s exercise of the power of eminent domain. Such an exercise would seem to rise to the level of operation, for the sewer facility could not have operated but for its installation.

The arranger argument is also attractive, and does not suffer from similar conceptual problems. Pursuant to § 107(a)(3), liability attaches to “any person who by contract, agreement, or otherwise arranged for disposal ... of hazardous substances owned or possessed ... by any other party or entity, at any facility ... owned or operated by another party or entity and containing such hazardous substances.” 42 U.S.C. § 9607(a)(3). Although this language is perhaps most often utilized to impose liability on the generators of hazardous waste when their generating facility is remote from the disposal facility,<sup>FN23</sup> see, e.g., *Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, there is no logical reason why this expansive language does not extend to the circumstances of this case. “[C]ourts have concluded

that a liberal judicial interpretation [of § 107(a)(3)’s “arranged for” language] is consistent with CERCLA’s ‘overwhelmingly remedial’ statutory scheme.” *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 & n. 8 (8th Cir.1989) (discussing how Congress’s adoption of the language, “arranged for,” rather than the competing language, “caused or contributed to,” is “consistent with the imposition of strict liability”). Here the City exercised its power of eminent domain to arrange for the installation of a sewer to drain hazardous substances from the former gas plant facility into the Penobscot River facility (*i.e.*, it “otherwise arranged for disposal”).

FN23. Note that persons who transport hazardous wastes from a generator facility to a disposal facility are generally considered not subject to section 107(a)(3) “arranger” liability where the transporter “ha[s] not selected the disposal site.” *United States v. Davis*, 1 F.Supp.2d 125, 130-31 (D.R.I.1998) (discussing cases and citing Johnson, *supra*, note 22, at 103-104).

\*11 Nothing in the cases cited by the City suggests that it is immune from liability for such sewer activities. The leading case on state agency or municipal liability under CERCLA for sewer operations is *Westfarm Assocs. Ltd. Partnership v. Washington Suburban Sanitary Comm’n.*, 66 F.3d 669 (4th Cir.1995), cert. denied, 517 U.S. 1103, 116 S.Ct. 1318, 134 L.Ed.2d 471 (1996). In *Westfarm*, the Fourth Circuit Court of Appeals reviewed a summary judgment determination that the Washington Suburban Sanitary Commission (WSSC) was liable for response costs based on releases (leaks) from a poorly constructed or maintained sewer line. *Id.* at 673. Although the basis for § 107 liability was WSSC’s present ownership of the facility at issue, among the issues squarely addressed on appeal was WSSC’s “most prominent” contention: that public policy required the Court to recognize an exemption for sewer operators “from [CERCLA] liability for damage caused by wastes dumped in the sewers by third parties.” *Id.* The Court considered the contention and rejected it, observing that CERCLA was clearly intended to impose legal obligations on both public and private entities, including liability for cleaning up environmental contamination. *Id.* at 678. As for crafting a public policy exception, the *Westfarm* Court concluded, “While the public policy arguments raised

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by WSSC may be meritorious, we can only presume that those arguments were weighed and rejected by Congress when it enacted CERCLA without including a broad exemption for state and local governments or their [publicly owned treatment works].” *Id.* at 680, *cert. denied*, 517 U.S. 1103, 116 S.Ct. 1318, 134 L.Ed.2d 471 (1996). Also persuasive is *Unites States v. Union Corp.*, 277 F.Supp.2d 478 (E.D.Penn.2003), in which the District Court for the Eastern District of Pennsylvania concluded that the City of Philadelphia would be a potentially responsible party under CERCLA if its combined stormwater/sanitary sewer outfall “released contaminants into the mudflat” (a part of the contaminated site at issue in the case). *Id.* at 488. See also *Carson Harbor Village, Ltd. v. Unocal Corp.*, 287 F.Supp.2d 1118, 1194 (C.D.Cal.2003) (declining to find municipal defendant liable as operator based merely on evidence that they “regulated and maintained [a] storm drain system leading to the [contaminated] property” in the absence of evidence that they did “anything more than ‘stand by and fail to prevent the contamination.’ ”) (quoting *Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Living Trust*, 32 F.3d 1364, 1368 (9th Cir.1994)).

In my assessment, the City of Bangor qualifies as a PRP with respect to the tar slick facility not only because it owns the inter-tidal zone, but also by virtue of its Nineteenth Century connection (quite literally) to the disposal of hazardous substances from the former gas plant into the Penobscot River. The summary judgment facts make it apparent that the City exercised its powers of eminent domain to effectuate or facilitate the construction in the middle part of the Nineteenth Century of an enclosed sewer drain that was installed specifically for the purpose of carrying away the waste of the private company that owned and operated the former gas plant. Not only did the City thereby facilitate the alleged 100-plus years of hazardous waste disposal of which it now complains, but it also designated the Penobscot River as the appropriate disposal facility. As a consequence, the City would be potentially liable for the tar slick in a suit commenced by the United States or an innocent party who performed a clean up because the City exercised control over the sewer installation, an “operation” specifically related to pollution and an “arrange [ment] for disposal”<sup>FN24</sup> or ... for transport<sup>FN25</sup> for disposal” of hazardous substances from the generating facility directly to the River facility. 42 U.S.C. § 107(a)(3). This is more than standing by and failing to prevent contamination, as described in *Carson Har-*

*bor*. This is contribution toward contamination on par with that present in *Westfarm* and implicates CERCLA's strict liability regime. And although the activity seems rather stale, dating as it does to the mid-Nineteenth Century, there is no bar to the imposition of retroactive liability under CERCLA. “CERCLA by its terms has unlimited retroactivity. Indeed, every court of appeals to consider the question has concluded that Congress intended CERCLA to apply retroactively.” *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1351 (Fed.Cir.2001) (citing *Northeastern Pharm. & Chem. Co.*, 810 F.2d at 732 and *United States v. Monsanto*, 858 F.2d 160, 174 (4th Cir.1988)). It seems beyond peradventure that the City would be a PRP under § 107 if it arranged today for the installation of a pipeline to discharge a manufacturer's hazardous waste directly into the Penobscot River in order to obtain public utilities for the benefit of its citizens. Such direct arrangement of and contribution toward hazardous waste disposal also effectively prevents the City from seeking refuge in the third-party defense, 42 U.S.C. § 9607(b)(3).<sup>FN26</sup> See, e.g., *Westfarm*, 66 F.3d at 682-83, (“WSSC had the power to abate the foreseeable release of [hazardous substances], yet failed to exercise that power.”), *cert. denied*, 517 U.S. 1103, 116 S.Ct. 1318, 134 L.Ed.2d 471 (1996). I therefore recommend that the Court find that the City is a PRP with respect to the tar slick in the Penobscot River.

<sup>FN24</sup>. I think it is appropriate for the Court to pin PRP status on the City based on both § 107(a)(3) “arranger” status and (a)(2) “operator” status because both concepts fit comfortably with the facts pertaining to the City's involvement with, participation in or facilitation of this particular sewer installation.

<sup>FN25</sup>. The term “transport” is defined as the “movement of a hazardous substance by any mode.” 42 U.S.C. § 9601(26).

<sup>FN26</sup>. This entire case has to be placed in its historical context. Imagine a municipality today exercising its municipal authority to obtain an easement over others' property in order to enable a private manufacturing company to discharge its “residuum of filth” directly into the Penobscot River and then arguing in court that it was entitled to assert the third-party defense under CERCLA be-

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cause the current release of the tar in the river was “caused solely ... by the act or omission of a third party.” 42 U.S.C. § 9607(b)(3). Yet everything that happened in this case vis-à-vis the actual generation of the tar at the gas plant happened before Citizens discontinued its operation of the plant in 1963. By 1972, the year in which the Clean Water Act was passed and Senator Edmond Muskie observed that we had ignored for too long “the grim realities of lakes, rivers, and bays where all forms of life have been smothered by untreated wastes,” the tar residue at issue in this case was already either deposited in the Penobscot River or migrating underground toward the river. 118 CONG. REC. 33,692 (1972), reprinted in 2 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 161-62 (1973); see also 92 Cong. Senate Debates 1972, at 33,692 (LEXIS). Within CERCLA’s statutory framework, retroactive responsibility for clean up costs is assigned to those who are historically responsible for the current release. I just do not see how that does not include the City of Bangor, the current owner of the riverfront inter-tidal zone where the tar now rests and the former “operator/arranger” of the sewer installation that brought it there.

#### 4. Sovereign immunity.

\*12 In the event that the Court should find PRP status based on the City’s connection to the sewer, as recommended, the City argues that it is entitled to sovereign immunity for sewer activities because, as a matter of law, its Nineteenth Century sewer activities were conducted in agency to the State, which is protected from CERCLA liability pursuant to the Eleventh Amendment. (Docket No. 205 at 13-14 (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (overruling Pennsylvania v. Union Gas Co., 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989)).) The obvious answer to this argument is that the City is forgetting who the plaintiff is in this action. Nothing about this case exposes the City or the State to liability to a private party. This is a case brought by the City against a private party. Furthermore, the mere determination that the City qualifies as a PRP and therefore cannot

maintain a *federal* cause of action could not possibly offend the Eleventh Amendment. In any event, “a political subdivision of a state cannot claim sovereign immunity under the Eleventh Amendment.” United States v. Township of Brighton, 153 F.3d 307, 324 n. 2 (6th Cir.1998) (citing Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 691 n. 54, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)).

#### Conclusion

For the reasons stated herein, I DENY the City’s Motion to Deem Facts Admitted (Docket No. 249) and RECOMMEND that the Court GRANT Citizens’s Motion for Partial Summary Judgment (Docket No. 176) by entering a judgment that the City is precluded from obtaining a “full recovery”<sup>FN27</sup> of all of its response costs from Citizens in its CERCLA § 107 claims (Counts I and II), as a matter of law, but not dismissing Counts I and II to the extent that they can be read as requesting the imposition of more limited, equitable liability on Citizens’s part, assuming for present purposes that such relief is available.

FN27. Citizens refers to these claims as the City’s “joint liability claims.” (Docket No. 176 at 12.) I characterize them as “full recovery” claims, as did the First Circuit Court of Appeals in UTC, 33 F.3d at 99.

#### NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court’s order.

D.Me.,2004.

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NO. 39699-8-II

COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON

PACIFICORP ENVIRONMENTAL  
REMEDATION 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.

PROOF OF SERVICE

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STATE OF WASHINGTON  
BY [Signature]

I, Tiffany R. Horton, 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 July 2, 2010, I transmitted a true and correct copy of Appellant Washington State Department of Transportation's Reply Brief, Appellant Washington State Department of Transportation's Motion to File Overlength Reply Brief, Declaration of Deborah L. Cade in Support of WSDOT's Motion to File Overlength Reply Brief, and this Proof of Service via electronic mail to each of the following parties:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2nd day of July, 2010, at Tumwater, Washington.



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TIFFANY R. HORTON, Legal Assistant