UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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| CITY OF WEST SACRAMENTO, CALIFORNIA; and PEOPLE OF THE STATE OF CALIFORNIA,<br><br>*Plaintiffs*,<br><br>*v.*<br><br>R AND L BUSINESS MANAGEMENT, a California corporation, f/k/a STOCKTON PLATING, INC., d/b/a CAPITOL PLATING, INC., a/k/a CAPITOL PLATING, a/k/a CAPITAL PLATING; CAPITOL PLATING, INC., a dissolved California corporation; *et al*.,<br><br>*Defendants.* | Case No. 2:18-cv-00900-WBS-JDP<br><br>**STIPULATED JUDGMENT** |
| AND RELATED CLAIMS. | |

Plaintiffs CITY OF WEST SACRAMENTO, CALIFORNIA (the "City") and PEOPLE OF THE STATE OF CALIFORNIA (the "People") (collectively the "Plaintiffs" or "the City and the People") and Defendants R AND L BUSINESS MANAGEMENT, formerly known as Stockton Plating, Inc. ("R&L"), JOHN CLARK ("Clark"), and ESTATE OF NICK SMITH, DECEASED ("Estate of Smith"), (collectively, "Defendants") (Plaintiffs and Defendants collectively, "Parties") have agreed to resolve the remaining issues between them in this action and have

agreed to entry by the Court of this Stipulated Judgment.

THEREFORE, pursuant to the stipulation of and on the joint motion of the Parties, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

Plaintiff the City filed suit alleging claims under the Resource Conservation & Recovery Act ("RCRA") § 7002(a)(1)(B), 42 U.S.C. § 6972, the Comprehensive Environmental Response, Compensation & Liability Act ("CERCLA") § 107(a), 42 U.S.C. § 9607(a), the Gatto Act, Cal. Health & Saf. Code §§ 25403.1, 25403.5, the Porter-Cologne Water Quality Control Act ("Porter-Cologne Act"), Cal. Wat. Code § 13304(c), statutory indemnity pursuant to the Carpenter-Presley-Tanner Hazardous Substance Account Act ("HSAA"), Cal. Health & Saf. Code § 26363(d), and declaratory relief under CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2), and the Declaratory Judgment Act, 28 U.S.C. § 2201.[1] Plaintiffs also allege claims for abatement of a public nuisance pursuant to Cal. Civ. Code §§ 3479, 3480, 3483, 3491(2) and Cal. Civ. Proc. Code § 731. Former defendants Richard Leland and Sharon Leland (now deceased) were dismissed from the case following motions pursuant Fed. R. Civ. P. 12(b)(6) which the Court granted. (ECF Nos. 18, 44.) The Third Amended Complaint (ECF No. 45) is Plaintiffs' operative complaint.

Plaintiffs' suit relates to contamination at and emanating from a 0.3 acre parcel of real estate located at 319 3rd Street, West Sacramento, California, identified by Assessor's Parcel Number 010-371-03-01 (the "Property" and the entire area of contamination at and emanating from the Property is referred to as the "Site").

Plaintiffs filed a motion for partial summary judgment on the issue of liability on the RCRA, CERCLA, Gatto Act, public nuisance, and declaratory relief claims against Defendants. The Court granted Plaintiffs' motion in part and denied it in part. The Court's ruling and analysis are set forth in its order (ECF No. 125), which is attached hereto as Exhibit A and incorporated herein by reference as though stated in full.

[1] The City voluntarily dismissed its claims for ultrahazardous activity and trespass. In addition, the City and the People voluntarily dismissed their prayer for damages on their public nuisance claim.

The Court then held an evidentiary hearing on Defendants' divisibility defense to joint and several liability under CERCLA. After that hearing, the Court found that Defendants had not met their burden to prove that the contamination was divisible and that Defendants were therefore jointly and severally liable for the contamination at the Site. The Court's ruling and analysis are set forth in its order (ECF No. 203), which is attached hereto as Exhibit B and incorporated herein by reference as though stated in full.

Plaintiffs then filed a second motion for partial summary judgment against Defendants. With that motion, the City sought summary judgment as to liability on its Gatto Act claim against R&L and Estate of Smith and on its Porter-Cologne Act, public nuisance, HSAA, and declaratory relief claims against Defendants, and the People sought summary judgment as to liability on their sole cause of action—the public nuisance claim—against Defendants. The Court granted Plaintiffs' motion in part and denied it in part. The Court's ruling and analysis are set forth in its orders (ECF Nos. 211 and 225), which are attached hereto as Exhibits C and D and incorporated herein by reference as though stated in full.

The Court subsequently entered an Amended Pretrial Order, which set out the issues left to be tried: the element of causation on the City's Porter-Cologne Act claim and Plaintiffs' public nuisance claims against Defendants; the imminent and substantial endangerment element on the City's RCRA claim against R&L and Estate of Smith; the amount of response costs that the City is entitled to recover from Defendants under CERCLA, the HSAA, the Porter-Cologne Act, and the Gatto Act; and the form of injunctive relief, if any, against Defendants that Plaintiffs may be entitled to under California public nuisance law and that the City may be entitled to under RCRA and the Gatto Act. The Court's order (ECF No. 252) is attached hereto as Exhibit E and incorporated herein by reference as though stated in full.

To avoid the time and expense of trial on the remaining issues cited above and to facilitate the final resolution of this action, the Parties stipulate, through their counsel, to entry of the following findings:

The conditions at the Site present or may present an imminent and substantial endangerment to health or the environment.

Defendants' conduct was a substantial factor in causing the nuisance and condition of pollution or nuisance at the Site.

The City is entitled to judgment on its CERCLA and HSAA claims against Defendants.

The City is entitled to judgment on its RCRA and Gatto Act claims against R&L and Estate of Smith.

The City is entitled to judgment on its Porter-Cologne Act claim against Defendants.

The City is entitled to judgment on its declaratory relief claim against Defendants.

Plaintiffs are entitled to judgment on their public nuisance claim against Defendants.

The City is entitled to recover from Defendants its past response costs in the sum of $125,627.90.

The City is entitled to recover from Defendants any reasonable future response costs for the Site it incurs with the oversight and approval of the Department of Toxic Substances Control ("DTSC") consistent with the National Contingency Plan.

The City is entitled to recover from Defendants its reasonable attorneys' fees, expert witness fees, and other litigation costs in the sum of $1,409,500.

THEREFORE, Judgment is entered: (1) in favor of the City on its CERCLA, Porter-Cologne Act, public nuisance, and HSAA claims, and a declaration that the City is entitled to recover from Defendants any reasonable future response costs for the Site it incurs with the oversight and approval of DTSC consistent with the National Contingency Plan; (2) in favor of the City on its RCRA and Gatto Act claims against R&L and Estate of Smith; and (3) in favor of the City and the People of the State of California of the City of West Sacramento on the public nuisance claim against R&L, Clark, and Estate of Smith. The State of California is not a party to this action or to this Stipulated Judgment.

Defendants are ordered to reimburse the City for its past response costs in the sum of $125,627.90, and to reimburse the City for its reasonable attorneys' fees, expert witness fees, and other costs of suit incurred in litigating this action in the sum of $1,409,500. The remaining amount of the judgment against Defendants reflecting the estimated cost to remediate and obtain regulatory closure of the Site shall not be stated in a sum certain, in part because the cost of the

remediation and regulatory closure of the Site is not known.

Defendants shall conduct a Site investigation to the satisfaction of DTSC.

Defendants shall perform those tasks listed within DTSC's I&S/E Order, Docket No. HSA-FY 19/20-129, dated May 6, 2020, as it may be amended by DTSC, to the extent DTSC determines that those tasks are needed, with the oversight and approval of DTSC.

Nothing contained in this Stipulated Judgment is intended to be given preclusive effect in a subsequent claim or action filed by any third party, including but not limited to DTSC or any similar governmental entity.

NOW, THEREFORE, IT IS SO ORDERED, ADJUDGED, AND DECREED.

Dated: March 9, 2021

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

IT IS SO STIPULATED.

Dated: March 4, 2021

PALADIN LAW GROUP® LLP

By: */s/ Bret A. Stone*

Bret A. Stone

Special Assistant City Attorney
for the City of West Sacramento

Counsel for Plaintiffs
City of West Sacramento and
People of the State of California

Dated: March 4, 2021

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: */s/ Joseph Salazar*

Joseph Salazar

Counsel for R and L Business Management, John Clark, and the Estate of Nick Smith, Deceased

Dated: March 4, 2021

CLYDE AND CO US LLP

By: */s/ Alexander E. Potente*

Alexander E. Potente

Counsel for Arrowood Indemnity Company, formerly known as Royal Insurance Company of America, and successor to Royal Globe Insurance Company

# EXHIBIT A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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CITY OF WEST SACRAMENTO, CALIFORNIA; and PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

v.

R AND L BUSINESS MANAGEMENT, a California corporation, f/k/a STOCKTON PLATING, INC., d/b/a CAPITOL PLATING INC., a/k/a CAPITOL PLATING, a/k/a CAPITAL PLATING; CAPITOL PLATING, INC., a dissolved California corporation; at al.,

Defendants.

No. 2:18-cv-00900 WBS EFB

MEMORANDUM AND ORDER RE: PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS R AND L BUSINESS MANAGEMENT, JOHN CLARK, AND THE ESTATE OF NICK SMITH, DECEASED

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Plaintiffs City of West Sacramento, California ("the City") and the People of the State of California filed suit against Defendants R&L Business Management and John Clark (collectively referred to as "R&L"), the estate of Nick Smith, et al., to address toxic levels of soil and groundwater

contamination resulting from the release of hazardous substances at a property once occupied by a metal plating facility. Before the court is plaintiffs' motion for partial summary judgment against defendants R&L and Smith. (Docket No. 95.)

I. Factual Background

During the 1940s, an automobile repair facility operated at operated at 319 3rd Street, West Sacramento, California (the "Property"). (Love. Decl. at 7.) Between 1940 and 1986, the Property was used for electroplating operations. (Defs.' Resp. to Pls.' Statement of Undisputed Facts ("Defs.' SUF") ¶ 70. A partnership of E. Birney Leland, Nick Smith, and Frank Rosen owned and operated Capitol Plating during the early 1960s. (Id. at ¶ 71.) The partnership dissolved in 1963. (Id. at ¶ 72.) Leland, Smith, and several others, including John Clark, formed Stockton Plating, Inc. in December 1963. (Id. at ¶ 73.) In 1973, Smith and Clark again took over Capitol Plating. Smith became president of Stockton Plating, Inc. and Clark took over as general manager of the facility. (Id.; Pls.' Mot. for Summ. J. at 12.)

The Capitol Plating facility primarily plated chrome bumpers. (Defs.' SUF ¶ 74.) The process for plating chrome on to bumpers consists of striping the bumper in acid or alkaline solutions to the bare metal. (Pls.'s Mot. for Summ. J., Ex. 13 at 1 (Docket No. 95-15).) Before plating, the metal may be ground and polished. (Id. at 2.) The surface is buffed after each plating operation and after the finish coat. (Id.) Each cycle involved the bumper being placed in a different tank of metal solution: first, copper; then, nickel; last, chromium.

(Id.; Pls.' Mot. for Summ. J. Ex. 2 (Dep. Richard Leland) at 63-64.)

For the plating and washing cycles, a worker would manually lift the bumpers, and move the bumpers between tanks containing either chemicals or plain water. (Dep. Richard Leland at 65-66.) The worker accomplished this by using two hooked rods to hook onto the bumper and leverage it in and out of the tank. (Id. at 64-65.) The bumper would be placed into a tank containing a metal solution and an electrical current would be applied to the tank. (Id. at 65-66.) The worker would then lift the bumper from the tank and move it to the next tank in the process. (Id.)

Due to the height of the tanks, an elevated duckboard floor was built so the workers could stand in the optimal position to lift and lower bumpers into the metal solutions. (Pls.' Mot for Summ. J., Ex. 1 (Dep. John Clark) at 84-85.) Duckboard consisted of two-by-fours with half-inch spacers set in a grid pattern on the floor to create an elevated platform approximately three feet high for the workers to walk on around the tank. (Id.) Any overflow from the tanks that fell through the duckboard to a floor drain connected to the sewer system. (Pls.' Mot. for Summ. J., Ex. 19 at 1; Decl. John Clark at 84 (Docket No. 95-3).) Overflow could result, for example, from bumper bolt holes holding liquid on the bumper's way out of the liquid and releasing it once the bumper was out of the liquid. (Dep. John Clark at 85-86.) The duckboard would get slippery with the water from the plating tanks. (Id. at 90.) The platers could then slip and drop the bumpers causing the contents of the

tank to splash outside of the tank. (Id.)

If the floor drain was unable to handle the volume of fluid, the plating fluids would flow out of the building through a hole in the wall or through the back door where they spill out onto the ground outside. (Dep. John Clark at 97-99.) When Clark started as the general manager of the Capitol Plating facility, he noticed that the ground outside the hole in the wall was colored blue, which suggests that acidic copper was present. (Dep. John Clark at 77 (Docket No. 95-3).) To prevent the solutions used in the metal plating process from escaping the building, Clark covered the hole in the wall with a dirt dam. (Id. at 82.; Decl. John Clark at ¶ 3 (Docket No. 102-3).) The dirt dam failed five to ten times before Clark decided to build a concrete barrier in the dam's place. (Dep. John Clark at 83.) When the dirt wall broke, rinse water containing diluted concentrations of plating fluids was likely released. (Defs.' Separate Statement at 3, ¶ 6 (Docket No. 102-2).) Clark then built a concrete wall to stop fluids from exiting the facility. (Decl. Adam Love at 15.)

The plating shop suffered two fires, one in 1973 and the other in 1985. Plating operations stopped in May of 1985. (Love Decl. at 8.) Capitol Plating used the property for storage of bumpers until 1991. (Id.) No business has operated out of the Property since then. (Id.)

In 1986, the California Department of Health Services launched an investigation on Capitol Plating after the Sacramento Bee reported that R&L was illegally dumping waste on the Property (the "Site"). (Defs.' Resp. to Pls.' SUF at 3, ¶ 2f.) The

Department investigated and took samples and pictures of the facility. (Id. at 3, ¶ 2g.) Later investigations at the Property showed soil and groundwater contaminated with various heavy metals including copper, chromium, and nickel at and emanating from the Property. (Decl. Anne Farr at 7-10 (Docket No. 95-27).) The levels of copper, nickel, and chromium at the Site exceed federal and state regulatory limits for both groundwater and soil. (Id.)

The City filed suit alleging, inter alia, violations of the Resource Conservation Recovery Act ("RCRA") §7002(a), 42 U.S.C. § 6972; the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") § 107(a), 42 U.S.C. § 9607(a), and the Gatto Act, Cal. Health & Safety Code §§ 25403.1, 25403.5. Plaintiffs also raise claims for public nuisance and declaratory relief. Plaintiffs now seek summary judgment on the issue of liability on each of these claims. (Docket No. 95.)

## II. Legal Standard

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A material fact is one that could affect the outcome of the suit, and a genuine issue is one that could permit a reasonable jury to enter a verdict in the non-moving party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The party moving for summary judgment bears the initial burden of establishing the absence of a genuine issue of material fact and can satisfy this burden by presenting evidence that

negates an essential element of the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986). Alternatively, the movant can demonstrate that the non-moving party cannot provide evidence to support an essential element upon which it will bear the burden of proof at trial. Id. Any inferences drawn from the underlying facts must, however, be viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Under Fed. R. Civ. P. 56(g), if the court does not grant all of the relief requested by the motion, it may enter an order stating any material fact that is not genuinely in dispute and treat those facts as established in the case.

## III. Discussion

### A. CERCLA Claim

"CERCLA was enacted in 1980 as a broad remedial measure aimed at assuring 'the prompt and effective cleanup of waste disposal sites' and ensuring that 'parties responsible for hazardous substance bore the cost of remedying the conditions they created.'" Adobe Lumber, Inc. v. Hellman, 658 F. Supp. 2d 1188, 1192 (E.D. Cal. 2009) (quoting Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1455 (9th Cir. 1986)). The Act holds owners and operators of facilities at which hazardous substances were disposed strictly liable. 3550 Stevens Creek Assocs. v. Barclays Bank of Cal., 915 F.2d 1355, 1357 (9th Cir. 1990). The Act does not "mandate 'joint and several liability' in every case." Burlington N. & Santa Fe Ry. Co. v. U.S., 556 U.S. 599, 613 (2009). When "there is a reasonable basis for determining

the contribution of each cause to a single harm," each defendant "is subject to liability only for the portion of the total harm that he has himself caused." Id. (quoting Restatement (Second) of Torts, § 433A).

To prevail in a private cost recovery action under CERCLA, a plaintiff must prove that "(1) the site on which the hazardous substances are contained is a 'facility' under CERCLA's definition of that term; (2) a 'release' or 'threatened release' of any 'hazardous substance' from the facility has occurred; (3) such 'release' or 'threatened release' has caused the plaintiff to incur response costs that were 'necessary' and 'consistent with the national contingency plan,'; and (4) the defendant is within one of four classes of persons subject to the liability provisions of Section 107(a)." Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 870–71 (9th Cir. 2001) (internal citations omitted) (quoting Stevens Creek, 915 F.2d at 1358.

Defendants do not appear to seriously dispute that plaintiffs have established each of the elements above.[1] Defendants instead argue that the harm is divisible and that a divisibility defense may be invoked to defeat a motion for summary judgment on CERCLA liability. (Defs.' Opp. to Mot. Summ. J. at 8 (Docket No. 102).) For that proposition, defendants rely on United States v. Alcan Aluminum Corporation, 964 F.2d 252 (3d

[1] Although defendants appear to suggest that there was no release or that the release was insufficient, they do not further discuss the issue. See Defs.' Opp. to Mot. for Summ. J. at 6 ("Based on the evidence, R and L had, at most, five to ten releases through the hole in the back of the plating facility. (Love Dec.) There is no direct evidence of any releases by R and L other than those.").

Cir. 1992). Defendants argue that the court in Alcan evaluated the divisibility defense "just like any other affirmative defense" and that the Ninth Circuit has "implicitly adopted the Third Circuit's approach" to the defense in Pakootas v. Teck Cominco Metals, Ltd., 905 F.3d 565, 587 (9th Cir. 2018). (Defs.' Opp. to Mot. Summ. J. at 9 (Docket No. 102).)

The court does not agree with defendants' interpretation of Alcan. In Alcan, the government filed a complaint against multiple defendants, including Alcan, to recover costs incurred in the cleanup of hazardous wastes released. Alcan, 964 F.2d at 257. The government settled with all defendants except Alcan. Id. The government then moved for summary judgment "to collect the balance of its response costs." Id. The district court granted the motion and "held that Alcan was jointly and severally liable for the removal costs." Id. Upon review, the Third Circuit found "error" in the district court granting summary judgment "for the full claim . . . without conducting a hearing." Id. at 269 (emphasis added). The Third Circuit then remanded the case for the district court to determine if Alcan could limit its liability based on its "personal contribution to the harm." Id. In other words, the Third Circuit reversed not because the harm was divisible, but rather because the district court assumed that the harm was not, and assigned full liability for the remaining costs. See id. at 270 ("Neither the magistrate judge nor the district court engaged in any factual investigation concerning the divisibility of the environmental harm."). Alcan does not stand for the proposition that divisibility precludes partial summary judgment on the issue

of liability. Instead, Alcan permits this court to find defendants liable under CERCLA and thereafter hold a hearing to determine the extent of defendants' contribution to the harm.

Further, even if the Alcan court interpreted divisibility to preclude summary judgment on the issue of liability, the Ninth Circuit did not adopt such an interpretation in Pakootas. In Pakootas, plaintiffs first moved for partial summary judgment on defendants' divisibility defense and the district court granted it. 905 F.3d at 573-74. Then, the district court "held that [defendant] was a liable party under [CERCLA]." Id. at 574. After holding that defendant was liable, the court then concluded "that without its divisibility defense, [defendant] was jointly and severally liable" for recovery costs. Id. The district court thus made three independent findings: (1) that the harm was not divisible; (2) that defendant was liable under CERCLA; and (3) that defendant was jointly and severally liable. Defendant appealed all three findings. Id. at 574.

Defendants are correct that the Ninth Circuit in Pakootas evaluated "how to review divisibility evidence on summary judgment." Id. at 588; see Defs.' Opp. to Mot. for Summ. J. at 9 (Docket No. 102). Defendants are incorrect, however, in concluding that the Pakootas court's evaluation of divisibility on summary judgment means divisibility can "defeat" a motion for summary judgment as to CERCLA liability. The court discussed divisibility on summary judgment because plaintiffs specifically moved for summary judgment on divisibility. 905 F.3d at 573-74. The court did not find, nor did it "implicitly adopt" the idea, that a finding of genuine issue of material fact as to

divisibility precludes a district court from finding a party liable under CERCLA. Indeed, the district court separated its finding of CERCLA liability from its finding on divisibility, and the Ninth Circuit evaluated each finding independently. The Ninth Circuit did not comingle the issues because a court can find that a party was both liable under CERCLA but not jointly and severally liable for all of the harm. See Burlington, 556 U.S. at 614 (distinguishing CERCLA liability from the "scope of liability"); Cal. Dep't of Toxic Substances Control v. Interstate Non-Ferrous Corp., 298 F. Supp. 2d 930, 968 (E.D. Cal. 2003) ("[A] plaintiff 'bringing a cost recovery action ... must prove only that each defendant is a 'liable' party and not that defendants are responsible for a certain share of the plaintiff's response costs."). Accordingly, plaintiff is entitled to summary on the issue of liability on their CERCLA claim. Defendants are entitled to a hearing on the scope of that liability and the proportion of damages and costs they must bear.[2]

B. RCRA Claim

Section 6972(a)(1)(B) of the RCRA "permits a private party to bring suit against certain responsible persons, including former owners, "who ha[ve] contributed or who [are] contributing to the past or present handling, storage, treatment,

[2] The court makes no factual conclusions as to divisibility. No party has moved for summary judgment on the issue. Further, divisibility analysis is "factually complex," Alcan, 964 F.2d at 269, and apportionment methods "vary tremendously depending on the facts and circumstances of each case," Pakootas, 905 F.3d at 595. Those questions must be determined in a subsequent hearing.

transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." Meghrig v. KFC W., Inc., 516 U.S. 479, 484 (1996); 42 U.S.C.A. § 6972(a)(1)(B). Section 6972(a) authorizes district courts "to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste ..., to order such person to take such other action as may be necessary, or both." 42 U.S.C.A. § 6972(a). To prevail on a claim under RCRA § 7002(a)(1)(B), a plaintiff must prove that (1) defendant "was a past or present generator or transporter of solid or hazardous waste or past or present owner or operator of a solid or hazardous waste treatment, storage or disposal facility"; (2) defendant "contributed to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste"; and, (3) "the solid or hazardous waste in question may present an imminent and substantial endangerment to health or the environment." Cal. Dep't of Toxic Substances Control, 298 F. Supp. 2d at 971; 42 U.S.C. § 6972(a)(1).

Defendants contest only the substantial and imminent endangerment element. As under plaintiffs' CERCLA claim, defendants also argue that the divisibility defense precludes summary judgment on this claim. Assuming, without deciding, that the divisibility defense applies here just as it applies under a CERCLA claim, for the reasons above, the court rejects the divisibility argument and evaluates only whether the waste may present an imminent and substantial endangerment.

1. Legal Standard

The RCRA authorizes injunctive relief where the site conditions "may present an imminent and substantial endangerment to health or the environment." Id. The language in the statute is "expansive." Lincoln Properties, Ltd. v. Higgins, No. CIV. S-91-760DFL/GGH, 1993 WL 217429, at *12 (E.D. Cal. Jan. 21, 1993) (quoting Dague v. City of Burlington, 935 F.2d 1343, 1355 (2nd Cir. 1991)). First, the word "may" precedes the standard of liability. This wording is intended "to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes." Cal. Dep't of Toxic Substances Control, 298 F. Supp. 2d at 971 (quoting id.). Application of the statute is therefore not limited to emergency situations. Lincoln Properties, No. CIV. S-91-760DFL/GGH, 1993 WL 217429, at *12. Second, "endangerment" means "a threatened or potential harm and does not require proof of actual harm." Cal. Dep't of Toxic Substances Control, 298 F. Supp. 2d at 971 (quoting id.) Third, "a finding of 'imminence' does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present." Id. (quoting Lincoln Properties, No. CIV. S-91-760DFL/GGH, 1993 WL 217429, at *13).

Finally, "'[s]ubstantial' does not require quantification of the endangerment (e.g., proof that a certain number of persons will be exposed, that 'excess deaths' will occur, or that a water supply will be contaminated to a specific degree) . . . endangerment is substantial if there is some reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or a threatened release of

a hazardous substance if remedial action is not taken." Id. (quoting Lincoln Properties, 1993 WL 217429, at *13). "Injunctive relief should not be granted," however, "'where the risk of harm is remote in time, completely speculative in nature, or de minimis in degree.'" Id. (quoting Lincoln Properties, 1993 WL 217429, at *13).

2. Application

The court finds a genuine issue of material fact as to whether the site conditions may present an imminent and substantial endangerment. Plaintiffs present evidence that the levels of copper, nickel, and chromium at the Site exceed state regulatory limits for both groundwater and soil. (Decl. Anne Far at 7-10). Dr. Farr, plaintiffs' expert, relies on the findings from three separate investigations conducted by Advanced GeoEnvironmental on behalf of Capitol Plating, concluding that the Site contained "hazardous levels of chromium, nickel, and copper." (Id. at 7.) Dr. Farr also cites two additional investigations concluding the same. (Id. at 7-8.) Defendants do not offer competing evidence on the level of contamination found on the Site nor do they dispute that the concentration of copper, nickel, and chromium exceed regulatory limits.

The crux of the issue, however, is whether this level of contamination constitutes an imminent and substantial endangerment. Dr. Farr concludes that such level of "contamination poses a threat to human health and the environment." (Decl. Anne Farr at 3 (Docket No. 95-27).) On the other hand, defendants argue that Dr. Farr relies on a Department of Toxic Substance Control (DTSC) report that was written but

never issued. (See id. at ¶ 25.) Plaintiffs argue that the lack of issuance does not mean that the Site is not an imminent and substantial endangerment. Id. at 5. The DTSC's refusal to conclude that the contamination may pose an imminent and substantial danger, however, competes with Dr. Farr's conclusion that the level of contamination does pose such a threat and suffices to find an issue of material fact.

Indeed, this court cannot conclude that the risk of harm is imminent and substantial merely because contamination levels exceed California regulatory standards. In Simsbury-Avon Preservation Club, Inc. v. Metacon Gun Club, Inc., 575 F.3d 199 (2d Cir. 2009), the Second Circuit refused to find an imminent and substantial endangerment where lead levels "exceeded Connecticut's [Remediation Standard Regulation] and [Significant Environmental Hazard] thresholds for residential sites," and plaintiff "dr[e]w the conclusion that lead contamination on the site presents 'a potential exposure risk to both humans and wildlife'" based "solely" on the contamination exceeding such regulatory thresholds. Id. at 212. Plaintiff's report specifically noted that "evaluation of the degree of such risk would require a further risk assessment" and did not suggest "that anyone is subject to long-term exposure to lead contamination . . . or that there are realistic pathways of exposure." Id.

Simsbury-Avon is instructive here. Every report Dr. Farr relies on (other than the DTSC report) concludes only that the contamination levels exceed California regulatory levels. Just as in Simsbury-Avon, however, Dr. Farr repeatedly qualifies

the conclusions of almost every report by stating that the full extent of contamination is unknown. (Decl. Anne Farr at ¶ 19; see also, e.g., id. at ¶ 21 ("The extent(s) of the constituents exceeding [Maximum Concentration Levels] were not defined."); id. at ¶ 23 ("Additional sampling . . . is necessary to fully evaluate the extent of contamination at and emanating from the Facility."); id. at 24 ("The full extent of the contamination has not yet been defined.").) Dr. Farr also does not conclude that anyone is subject to long-term exposure, or that they realistically will be exposed, to the contamination. In other words, Dr. Farr does not evaluate the risk at hand beyond the conclusion that the levels of contamination exceed California regulatory thresholds. "State standards do not define a party's federal liability under RCRA." Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 399 F.3d 248, 261 n.6 (3d Cir. 2005). This court therefore cannot conclude that the Site poses an imminent and substantial threat based only on the Site's noncompliance with California concentration limits.

3. Injunctive Relief

"Section 6972(a) authorizes district courts 'to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste ..., to order such person to take such other action as may be necessary, or both.'" Meghrig v. KFC W., Inc., 516 U.S. 479, 484 (1996). Because plaintiffs have not established all elements of the RCRA claim, the current state of the record does not support issuance of a mandatory injunction. See id.; see also LAJIM, LLC v. Gen Elec.

Co., 917 F.3d 933, 945 (7th Cir. 2019) ("A RCRA plaintiff either demonstrates irreparable harm or fails to prove his or her case on the merits."). Accordingly, plaintiffs' request for injunctive relief is denied.

IT IS THEREFORE ORDERED that plaintiff's motion for partial summary judgment on the issue of liability on their federal claim for violation of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") § 107(a) be, and the same hereby is GRANTED.

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment on their federal claim for violation of the Resource Conservation Recovery Act ("RCRA") §7002(a) be, and the same hereby is DENIED.

This matter is set for Status Conference on January 21, 2020, at 1:30 p.m., to discuss the scheduling of an evidentiary hearing to determine the scope and extent of defendants' liability and the proportionate share of the damages and cleanup costs to be borne by each defendant on the CERCLA claim. At such evidentiary hearing, the court will also hear the conflicting evidence on the RCRA claim and consider the supplemental state law claims. No later than ten court days before the Status Conference, counsel shall file a Joint Status Report which shall include suggested dates for the evidentiary hearing.

Dated: December 3, 2019

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

# EXHIBIT B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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CITY OF WEST SACRAMENTO, CALIFORNIA; and PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

v.

R AND L BUSINESS MANAGEMENT, a California corporation, f/k/a STOCKTON PLATING, INC., d/b/a CAPITOL PLATING, INC., a/k/a CAPITOL PLATING, a/k/a CAPITAL PLATING; CAPITOL PLATING, INC., a dissolved California corporation; ESTATE OF GUS MADSACK, DECEASED; ESTATE OF CHARLES A. SCHOTZ a/k/a SHOTTS, DECEASED; ESTATE OF E. BIRNEY LELAND, DECEASED; ESTATE OF FRANK E. ROSEN, DECEASED; ESTATE OF UNDINE F. ROSEN, DECEASED; ESTATE OF NICK E. SMITH, DECEASED; RICHARD LELAND, an individual; SHARON LELAND, an individual; ESTATE OF LINDA SCHNEIDER, DECEASED; JUDY GUESS, an individual; JEFFREY A. LYON, an individual; GRACE E. LYON, an individual; THE URBAN FARMBOX LLC, a suspended California limited liability company; and DOES 1-50, inclusive,

No. 2:18-CV-00900 WBS EFB

MEMORANDUM AND ORDER RE: DEFENDANTS' DIVISIBILITY DEFENSE

Defendants.

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Plaintiffs City of West Sacramento, California and the People of the State of California (collectively, "plaintiffs") brought this action to address toxic levels of soil and groundwater resulting from the release of hazardous substances at a property once occupied by a metal plating facility. Plaintiffs' lawsuit involves the contamination at the property located at 319 3rd Street in West Sacramento, California (the "Site"). This court described much of the factual and procedural background to this lawsuit in its prior orders. (See Docket Nos. 18, 33, 44, 63, 115, & 125).

This court previously granted plaintiffs' motion for partial summary judgment and found defendants R and L Business Management ("R&L"), John Clark, and the Estate of Nick E. Smith (collectively, "defendants") liable under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a). (Order at 10 (Docket No. 125).) The court then set an evidentiary hearing to determine whether defendants' contribution to the pollution at the Site is divisible from the total contamination present at the Site (the "divisibility hearing"). (Docket No. 129.) The divisibility hearing began on August 25, 2020 and lasted three days, concluding on August 27, 2020.

At the hearing, defendants offered the testimony of John Clark, the general manager who oversaw R&L's plating

operations at the Site, and Richard Leland, the owner of R&L. Defendants also offered the expert testimony of Dr. Adam Love. Plaintiffs offered the testimony of Andrew Reimanis, a hazardous substances engineer at the California Department of Toxic Substances Control ("DTSC"), and Daniel Gallagher, a senior engineering geologist at DTSC. Plaintiffs also offered the expert testimony of Dr. Anne Farr.

Based on this testimony and additional evidence submitted by the parties, the court finds that the defendants have not met their burden to prove divisibility and are therefore jointly and severally liable for the harm caused to the Site. This memorandum constitutes the court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a).[1]

## I. Factual Background

### A. Background on the Site's Characteristics and Operations

The Site at issue is a relatively small parcel--approximately 80x160 feet, or 0.3 acres--located in a portion of West Sacramento zoned "Mixed-Use Neighborhood Commercial." (Expert Report Dr. Adam Love, Ex. 3, at 5 ("Love Report") (Docket No. 180-1)[2]; Tr. of Evidentiary Hr'g 531:7-9 ("Hr'g Tr.") (Docket No. 200-202).) The Site is bordered by property containing a firehouse to the north, Third Street to the east, and largely vacant lots to the south and west. (See Love Report at 5.) The

[1] The court expresses no opinion as to whether or to what extend defendants may offset their liability by the liability of another in a subsequent contribution proceeding under CERCLA section 113. See 42 U.S.C. § 9613(f).

[2] All exhibit numbers refer to the parties' joint exhibit list for the divisibility hearing.

Site and the surrounding properties were originally developed on top of imported fill material. (Love Report at 10.)

Beginning in the 1930s, the Site was used for residential purposes and then as a bus and automobile repair facility until 1949. (Id.) Between 1949 and 1973, a series of businesses performed vehicle electroplating operations on the Site. (Id.) Operations largely took place in a single facility that abutted the northern and western property lines.[3] (See Ex. 23). The remainder of the Site consisted of a drainage area in the southwest corner and a driveway where workers would park in the southeast corner. (See id.)

Defendant R&L purchased the business operating on the Site, Capitol Plating, in 1973. (Id.) At the time, R&L was incorporated as "Stockton Plating, Inc."[4] (Hr'g Tr. 139:7-141:1.) Stockton Plating continued the same type of electroplating operations on the Site as Capitol Plating, and even retained the business' name, until 1985. (Id.) From 1985 to 1991, defendants used the Site to store bumpers. (Id.) No operations have occurred on the Site since 1991. (Id.)

B. Overview of Contamination at the Site

Various environmental consulting groups have conducted environmental investigations at the Site since 1986, including defendants' expert, who collected soil and groundwater data at the Site in 2020 for the purposes of preparing a remedial cost estimate for the Site. (See Love Report; Expert Report of Dr.

[3] This facility has since been demolished, but the concrete foundation is still present at the Site. (See Ex. 7.)

[4] Defendant would later reincorporate as "R and L Business Management" in 1996.

Anne Farr, Ex. 1, at 7-16 ("Farr Report").) Based on these investigations, DTSC has determined that chromium, copper, lead, nickel, and cadmium are present in Site soils at levels that require remediation. (Farr Report at 15.) Samples from monitoring wells and borings also show that groundwater at the Site is contaminated with nickel, copper, chromium, and cadmium, as well as a volatile organic compound ("VOC") known as 1,2-DCA. (See, e.g., id. at 10.)

C. Sources of Nickel, Copper, and Chromium Contamination

Electroplating operations at the Site have contributed to the elevated levels and distribution of nickel, copper, and chromium at the Site. (See Farr Report at 16; Love Report at 12-14.) The process of electroplating objects like car bumpers is likely to produce this type contamination because the process is so reliant on liquid solutions containing metal. (See Farr Report at 16.)

Both defendants and previous electroplating businesses at the Site primarily plated chrome bumpers. (Id.) The process involved initially stripping away the bumper's plating down to the bare metal using acid or alkaline solutions. (Id.) Any damaged portions of the bumper were then ground, polished, and straightened in two rooms located on the northeast corner of the Site. (Id.; Hr'g Tr. 110:23-112:1.) Metal previously used to plate the bumpers was released as particulates were ground off, fell through the air, and settled on the ground. (Hr'g Tr. 110:23-112:1). Defendants and their predecessors gathered these particulates with a dust collector or swept them up and eventually placed them in a dumpster located in the southwestern

portion of the Site. (Hr'g Tr. 77:14-78:11, 134:23-135:4; Ex. 23.)

Workers then placed the bumpers into tanks in the facility's plating area that contained specific metal solutions--first, copper; then, nickel; last, chromium--and applied an electric current while they were submerged. (Love Report at 6; Ex. 23.) A worker would manually lift each bumper by using two hooked rods to leverage it in and out of the tank. (Id.) Workers also lowered the bumpers in and out of tanks containing rinse water, and buffed the bumpers after each stage of the plating operation and the finish coat. (Id.)

Due to the height of the tanks, an elevated "duckboard" floor was built in the plating area so the workers could stand in the optimal position to lift and lower bumpers into the metal solutions. (Id. at 7.) The duckboard consisted of two-by-fours with half-inch spacers set in a grid pattern on the floor to create an elevated platform approximately three feet high for the workers to walk on around the tank. (Id.) Because of the space between the two-by-fours, the duckboard permitted fluid falling from above to fall directly onto the concrete floor below. (Id.) "Dragout" releases occurred when plating fluid or rinse water would drip from the bumpers as they were pulled out of one tank and moved into another. (Rebuttal Expert Report of Dr. Farr, Ex. 5, at 7-11 ("Farr Rebuttal").) These releases would not only cause plating fluid or rinse water fluid to fall onto the concrete, they would also cause the duckboard to get slippery and wet. (Id.) Platers would sometimes slip, dropping the bumpers and causing the contents of the tank to splash and fall onto the

ground. (Id. at 9.) Releases onto the concrete floor also occurred when plating tanks leaked or holes developed due to normal wear and tear, or when employees dropped the bumpers when trying to move them from one tank to the next. (Id. at 8-9.)

Any releases that reached the concrete floor in the plating room would initially flow into a floor drain that connected to a larger sewer system. (Love Report at 7.) When the floor drain was unable to handle the volume of fluid released, the plating fluids would flow out of the building through a hole in the southern wall or through the back door where they would spill out onto the ground outside. (Id.) Indeed, when Clark started as the general manager at the Capitol Plating facility in 1973, he noticed that the ground outside the hole in the wall was stained blue--evidence of releases of liquids from the plating tanks and/or rinse tanks in the plating room. (Hr'g Tr. 49:15-50:12.)

Releases of metal plating wastes occurred in three primary source areas. (See Hr'g Tr. 251:7-253:7, 597:25-598:15; Farr Report at 16.) Plating operations released metals through the footprint of the plating room and through the hole in the southern wall of the plating process building into the parking lot area. (Farr Report at 16.) Releases also occurred in the northeastern portion of the Site. (Id.)

D. Stockton Plating's Efforts to Prevent Releases

After Stockton Plating arrived at the Site in 1973, the company made several operational and structural changes to try to limit the number and magnitude of releases of plating metals to the subsurface. In 1973, Clark plugged the hole in the southern

wall of the plating facility with packed dirt to prevent releases of plating fluid and rinse water from reaching the parking lot area. (Love Report at 7; Hr'g Tr. 56:15-57:5.) Clark testified that he recalled the earthen dam failing "five to ten" times before he decided to replace it with a concrete retaining wall that surrounded the wet plating operations the next year. (Hr'g Tr. 59:14-63:4; Farr Rebuttal at 6.)

Between 1973 and 1976, Stockton Plating also installed a "counterflow" plumbing system and restrictor valves in the rinse tanks, reduced overall water usage in the rinse tanks, and installed racks above the plating tanks to reduce the number of dragout and spillover releases from the tanks and pipe rinse water directly into the sewer pump. (Love Report at 14.)

## II. Legal Standard

Liability for potentially responsible parties under CERCLA "is ordinarily joint and several, except in the rare cases where the environmental harm to a site is shown to be divisible." Pakootas v. Teck Cominco Metals, Ltd., 905 F.3d 565, 588 (9th Cir. 2018) (emphasis added); see also Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 614 (2009). The divisibility defense allows CERCLA defendants to avoid joint and several liability by showing "that a reasonable basis for apportionment exists." Burlington, 556 U.S. at 614.

"The divisibility analysis involves two steps." Pakootas, 905 F.3d at 588. First, the court determines whether the contamination at issue is "theoretically capable of apportionment." Id. "Second, if the harm is theoretically capable of apportionment, the fact-finder determines whether the

record provides a 'reasonable basis' on which to apportion liability, which is purely a question of fact." Id. If the CERCLA defendant carries its burden, the court will apportion liability among the responsible parties so that "each is subject to liability only for the portion of the total harm that he has himself caused." See id. (quoting United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983)) (alteration omitted). Otherwise, the responsible parties will be held jointly and severally liable so that "each is subject to liability for the entire harm." Id. (quoting Chem-Dyne, 572 F. Supp. at 810).

"[T]he defendant asserting the divisibility defense bears the burden of proof" as to both elements of the defense. Pakootas, 905 F.3d at 589; see also Burlington, 556 U.S. at 614. "This burden is 'substantial' because the divisibility analysis is 'intensely factual.'" Pakootas, 905 F.3d at 598 (quoting United States v. Alcan Aluminum Corp., 964 F.2d 252, 269 (3d Cir. 1992)). "The necessary showing requires a 'fact-intensive, site-specific' assessment," id. at 589 (quoting PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714 F.3d 161, 182 (4th Cir. 2013)), "generating 'concrete and specific' evidence," id., 905 F.3d at 589 (quoting United States v. Hercules, Inc., 247 F.3d 706, 718 (8th Cir. 2001)). While absolute certainty is not required, "the defendant must show by a preponderance of the evidence--including all logical inferences, assumptions, and approximations--that there is a reasonable basis on which to apportion the liability for a divisible harm." Id.

Apportionment under the divisibility defense is

"conceptually distinct from contribution or allocation of damages." Hercules, 247 F.3d at 718. In a CERCLA §113(f) contribution action, during "the allocation phase, the only question is the extent to which a defendant's liability may be offset by the liability of another; the inquiry at this stage is an equitable one and courts generally take into account the so-called 'Gore factors.'" Id.; see also 42 U.S.C. § 9613(f) (providing that a court "may allocate response costs among liable parties using such equitable factors as the court determines are appropriate") (emphasis added). "The divisibility of harm inquiry, by contrast, is guided not by equity--specifically, not by the Gore factors--but by principles of causation alone." Hercules, 247 F.3d at 718; see United States v. Rohm Haas Co., 2 F.3d 1265, 1280-81 (3d Cir. 1993); APL Co. Pte. Ltd. v. Kemira Water Sols., Inc., 999 F. Supp. 2d 590, 624 (S.D.N.Y. 2014) ("The divisibility doctrine is not a means by which courts allocate the costs incurred in a cleanup and response operation among PRPs [potentially responsible parties] on an equitable basis (i.e., on the basis of relative fault)."). Instead, "equitable considerations play no role in the apportionment analysis[.]" PCS Nitrogen, 714 F.3d at 182 (quoting Burlington, 556 U.S. at 615 n.9).

Because courts must not consider equitable factors, "where causation is unclear, divisibility is not an opportunity for courts to 'split the difference' in an attempt to achieve equity." Hercules, 247 F.3d at 718. "Rather, '[i]f they are in doubt, district courts should not settle on a compromise amount that they think best approximates the relative responsibility of

the parties.' In such circumstances, courts lacking a reasonable basis for dividing causation should avoid apportionment altogether by imposing joint and several liability." Id. at 718-19 (citations omitted).

III. Discussion

A. Whether the Contamination Is Theoretically Capable of Apportionment

Whether the environmental harm is theoretically capable of apportionment "is primarily a question of law." Pakootas, 905 F.3d at 588. "Underlying this question, however, are certain embedded factual questions that must necessarily be answered, such as 'what type of pollution is at issue, who contributed to that pollution, how the pollutant presents itself in the environment after discharge, and similar questions.'" Id. (quoting NCR Corp., 688 F.3d at 838). This is because "a court cannot say whether a harm 'is, by nature, too unified for apportionment' without knowing certain details about the 'nature' of the harm." Pakootas, 905 F.3d at 591. "As one commentator has explained: 'Even if a party's waste stream can be separately accounted for, its effect on the site and on other parties' wastes at the site must also be taken into account.'" Id. (quoting William C. Tucker, All Is Number: Mathematics, Divisibility and Apportionment Under Burlington Northern, 22 Fordham Envtl. L. Rev. 311, 316 (2011)). "That is, 'a defendant must take into account a number of factors relating not just to the contribution of a particular defendant to the harm, but also to the effect of that defendant's waste on the environment.'" Id. "Those factors generally include when the pollution was

discharged to a site, where the pollutants are found, how the pollutants are presented in the environment, and what are the substances' chemical and physical properties." Id. "Chief among the relevant properties are 'the relative toxicity, migratory potential, degree of migration, and synergistic capacities of the hazardous substances at the site.'" Id. (quoting United States v. Alcan Aluminum Corp., 990 F.2d 711, 722 (2d Cir. 1993)).

Moreover, "[f]or the purpose of apportioning CERCLA liability, the relevant 'harm' is the entirety of contamination at a site that has caused or foreseeably could cause a party to incur response costs, suffer natural resource damages, or sustain other types of damages cognizable under section 107(a)(4)." Id. at 592. The defendant asserting the divisibility defense must therefore produce evidence showing divisibility of the entirety of contamination at a site, the harm caused by its wastes combined with all other pollution, not just the harm caused by its wastes alone. Id. at 590–91.

Finally, the mixing of pollutants raises a rebuttable presumption of indivisible harm. Id. at 592–93. This presumption arises for pollutants that are physically interspersed, not just those that are chemically commingled. Id. at 593. "Even if pollutants do not chemically interact, their physical aggregation can cause disproportionate harm that is not linearly correlated with the amount of pollution attributable to each source." Id. In other words, "the fact that a single generator's waste would not in itself justify a response is irrelevant . . . as this would permit a generator to escape liability where the amount of harm it engendered to the

environment was minimal, though it was significant when added to other generators' waste." Id. (quoting Alcan, 964 F.2d at 264).

In this case, defendants' expert, Dr. Love, seeks to determine defendants' contribution to the contamination at the site by dividing the contaminants up three ways: geographically, chemically, and volumetrically. (See Hr'g Tr. 250:13-251:6.) He then proposes a remedial plan that shows three distinct areas of contamination, corresponding to the three primary source areas of the releases at the Site. (See Hr'g Tr. 250:13-253:7.) Within each of the three geographic areas, Dr. Love first looks to the chemical nature of the contamination, concluding that because defendants were not responsible for any lead releases at the property, the plating metal contamination (i.e., nickel, copper, and chromium) is divisible from the lead contamination. (See id. at 258:1-24.)

Dr. Love then estimates the portion of the plating metal contamination that the defendants contributed, using time spent at the Site as a proxy for volume and considering the improvements to the plating equipment and operations that Stockton Plating made after arriving on the Site. (See id. at 259:17-262:2.) Based on these estimates, Dr. Love calculates that defendants should only be liable for 3.1% of the costs laid out in his plan to remedy the Site's soil and 3.7% of the costs to remedy the Site's groundwater. (See id. at 296:3-24; Love Report at 22-23.)

A fundamental problem with Dr. Love's analysis is that it fails to take into account the impact of the ongoing investigation by the DTSC. Before any remedial plan can be

implemented it must be approved by the DTSC. Michael Gallagher is the DTSC hazardous substance engineer tasked with investigating the Site and recommending a remedial plan. He testified at the hearing that the subsurface contamination at the Site still has not been fully delineated. (See id. at 466:14-23, 472:10-473:17.) Based on his investigation of the Site to date, Gallagher concludes that further sampling of soil and groundwater beyond the property line to the southeast and the northeast is needed to determine how far vertically and laterally chromium, copper, nickel, and lead extend beyond the Site's property line. (Id. at 489:23-490:3; Ex. 38 at 5.)

Gallagher also testified that it is impossible to know whether Site groundwater contamination has been adequately characterized, since reliable groundwater data has not been collected since 2004 and the samples taken by Dr. Love were biased. (Hr'g Tr. 488:9-489:15, 490:16-25; Ex. 38 at 5.) Because the full scope of the contaminant plume at the site is still unknown, Gallagher has recommended to DTSC that it wait to implement a remedial plan for the Site until additional delineation of the contamination can be performed. (Hr'g Tr. 473:5-17; Ex. 38 at 5.) DTSC adopted Gallagher's recommendation when it issued its imminent and substantial endangerment order. (Hr'g Tr. 493:9-494:7.)

Thus, because Gallagher and (by extension, DTSC) is not yet willing to approve a remedial plan for the Site, a percentage cannot be accurate if the whole from which it is measured is not known. See Pakootas, 905 F.3d at 590-91 ("As a result, Teck was required to produce evidence showing divisibility of the entire

harm caused by Teck's wastes combined with all other River pollution--not just the harm from sources of Teck's six metals alone." (emphasis added)). Because the nature and extent of the contamination at the Site have still not been fully defined, it is entirely possible that further harm caused by Stockton Plating beyond the property line or within it will be discovered. Granting defendants' divisibility request based on Dr. Love's analysis would leave the remaining defendants in the case holding the bag for additional contamination or harm that was in fact caused by Stockton Plating.

Considering all the evidence offered at the hearing, the court is not convinced that Dr. Love's divisibility analysis fully defines the contamination at the Site that will require remediation. Contamination that originated at the Site but has since spread beyond the property line is part of the "relevant harm" because it is foreseeable that it could cause a party to incur response costs under CERCLA to remove it. Pakootas, 905 F.3d at 591. But testimony and reports by plaintiffs' expert, Dr. Farr, as well as engineers at DTSC--the state regulatory agency that will eventually have to review and approve a plan for cleanup of the Site--indicate that the nature and extent of the contamination at the Site, including how far the contamination extends beyond the property line, has yet to be determined. (See Hr'g Tr. 549:11-551:21.) Accordingly, Dr. Love's analysis fails to satisfy defendants' burden of showing that the contamination is theoretically capable of apportionment.

The trial court is given broad latitude in judging the credibility of a witness and determining the weight to be given

to his testimony. See Young Ah Chor v. Dulles, 270 F.2d 338, 341 (9th Cir. 1959). Based upon the court's perception of the witnesses at the evidentiary hearing and discrepancies between Dr. Love's testimony and the evidence presented, the court finds the testimony of Gallagher and Dr. Farr to be more credible than that of Dr. Love.

Dr. Farr agrees that the full scope of the contamination beyond the property lines to the southeast and northeast remains undefined. She testified that significant data gaps remain for copper, chromium, and nickel soil concentrations extending beyond the northeast and southeast property lines of the Site, despite the amount of sampling that has taken place over the years, including by Dr. Love. (See Hr'g Tr. 473:5-17, 476:2-15; Ex. 2, fig.s 1, 5, 6.) Similar data gaps exist with respect to copper, nickel, and chromium concentrations in the groundwater extending beyond the property line in all directions. (See id., fig.s 7, 8, 9.)

Dr. Love also does not adequately account for the uncertainty that remains surrounding the nature and extent of the contamination at the Site. He proposes a soil remedial scheme that divides the Site into fourteen discrete "excavation areas," where the soil would be excavated and removed in volumes determined according to the extent of metal contamination at that location. (See Hr'g Tr. 272:13-19; Love Report at 16-18; Ex. 4, fig. 12.) None of the excavation areas proposed for the northeast corner of the Site extend beyond the property line, despite the evidence showing that the contamination likely spreads further out onto adjacent properties. (Compare Ex. 4,

fig. 12 with Ex. 2, fig.s 1, 5, 6.) And though the proposed excavation area for the southeast corner of the Site does extend onto the adjacent property, Dr. Love conceded on cross-examination that additional investigation of the southeast corner of the Site is still necessary to determine exactly how far remediation there would need to extend. (See Hr'g Tr. 332:19-333:4.) Absent an evaluation of the contamination as a whole, the court cannot conclude that the harm is divisible. See Pakootas, 905 F. 3d at 594.

Moreover, Dr. Love fails to evaluate the contamination beyond Stockton Plating's contribution to the pollution or the additional impacts that mixing pollutants may have had, even in the portions of the Site where the experts agree that the nature and extent of the contamination is well-understood. (See Hr'g Tr. 473:5-17; 476:2-15.) For instance, Dr. Love's groundwater analysis does not adequately consider the impact of 1,2 DCA in the groundwater. He acknowledges the presence of 1,2 DCA at unsafe levels, but his analysis does not provide enough information to adequately assess current groundwater conditions at the Site because it does not provide adequate field sampling information for the data upon which the analysis relies or indicate whether sampling wells were properly re-developed prior to sample collection. (Farr Report at 19-20; Ex. 38 at 5.)

Dr. Love also does not adequately evaluate the impact of lead in the soil. He concludes that the heightened lead levels observed at the Site are due to fill material upon which the Site was developed, not Stockton Plating's operations. (Love Report at 10-11; Farr Rebuttal at 3-4.) Though plaintiff's

expert disputes this conclusion, (see Farr Rebuttal at 3-4), even if the court assumes that Dr. Love is correct, his analysis concedes that the lead is commingled and collocated with other contaminants in the soil. (See Love Report at 23; Hr'g Tr. 273:24-274:7.) This type of commingling raises a rebuttable presumption of indivisible harm. Pakootas, 905 F. 3d at 594. Yet Dr. Love makes no effort to rebut this presumption by showing that lead does not chemically or physically interact with other contaminants in the soil. Id.; see also id. at 590-91 ("As a result, Teck was required to produce evidence showing divisibility of the entire harm caused by Teck's wastes combined with all other River pollution--not just the harm from sources of Teck's six metals alone.")

Dr. Love also dismisses the additional effects that Stockton Plating's releases of plating metals may have had through chemical or physical reactions with the plating metals or other contaminants already present in the soil (often referred to as "synergistic effects"). (See Farr Rebuttal at 12-13.) He acknowledges that the plating metals released by Stockton Plating are commingled in the soil with plating metals released by prior operators, but nevertheless concludes that the metals have not produced any synergistic effects because they do not react chemically with one another. (See Hr'g Tr. 231:15-232:19.) In Pakootas, the court rejected a similar argument by the defendant: "[e]ven if pollutants do not chemically interact, their physical aggregation can cause disproportionate harm that is not linearly correlated with the amount of pollution attributable to each source." Pakootas, 905 F.3d at 593. Thus, even if Dr. Love is

correct in asserting that Stockton Plating's plating metals could not have chemically interacted with metals released by prior operators, his analysis is insufficient because it does not address the potential exacerbating effects of physical commingling between Stockton Plating's releases and plating metals already present in the soil. See id.

The court is persuaded by Dr. Farr's Rebuttal Report, which points out that Dr. Love overlooked the potential for releases from Stockton Plating's facility to drive metals already in the soil deeper into the subsurface and into groundwater as concentrations near the surface reached equilibrium. (See Farr Rebuttal at 12-13.) The court therefore cannot conclude that the impact of Stockton Plating's releases of additional copper, nickel, and chromium into the soil or groundwater was linear. See Pakootas, 905 F.3d at 593.

For these reasons, defendants have not established that the entirety of the contamination is theoretically capable of apportionment.

B. Whether a Reasonable Basis for Apportionment Exists

Even if the contamination were theoretically capable of apportionment, the defendants' claim of divisibility would still fail because they have not put forward a reasonable basis for apportionment. In the second step of the divisibility analysis, a CERCLA defendant must show that "there is a reasonable basis for determining the contribution of each cause to a single harm." Burlington, 556 U.S. at 614 (quoting Restatement (Second) of Torts § 433A(1)(b)); Pakootas, 905 F.3d at 595. "What is reasonable in one case may not be in another, so apportionment

methods 'vary tremendously depending on the facts and circumstances of each case.'" Pakootas, 905 F.3d at 595 (quoting Hercules, 247 F.3d at 717). The basis for apportionment may rely on the "simplest of considerations," most commonly volumetric, chronological, or geographic factors. Burlington, 556 U.S. at 617–18; Pakootas, 905 F.3d at 595. "The only requirement is that the record must support a 'reasonable assumption that the respective harm done is proportionate to' the factor chosen to approximate a party's responsibility." Pakootas, 905 F.3d at 595 (quoting Restatement (Second) of Torts § 433A cmt. d).

Here, defendants argue that amount of contamination attributable to defendants can be apportioned chemically, geographically, and volumetrically. For the following reasons, none of these options provides a reasonable basis for apportionment.

1. Chemical Apportionment

Dr. Love concludes that soil contaminants at the Site are readily distinguishable as metals originating from plating operations (copper, nickel, and chromium) and metals originating from fill material (lead). (See Love Report at 20.) In other words, because Dr. Love concludes that all lead at the Site originated from fill material, he apportions no responsibility or cost for remediation to defendants for soil that contains only lead, and apportions 50% responsibility for portions of soil that contain lead and another metal originating from plating operations. (See id. at 23.)

Dr. Love's assumption that all lead at the Site must originate with fill material is not based on site-specific data.

Rather it is based only on shallow soil samples collected at the Firehouse Property north of the Site. (Farr Rebuttal at 3.) Dr. Love provides no analysis to determine whether the elevated lead concentrations in these shallow soil samples were also detected in fill soils. (Id.) And, crucially, his analysis fails to account for sampling in 2008 that failed to detect lead at elevated concentrations in fill soils at the Site and to the east of the Site. (Id. at 4.) If anything, the evidence tends to show that one of the primary source areas for lead was the parking lot located in the southeastern corner of the Site. (Id.) The elevated lead concentrations in this portion of the Site are commingled and collocated with elevated chromium, copper, and nickel, suggesting that Stockton Plating could have been the source of at least some of the lead contaminants found in the soil. (See id.) It is therefore not reasonable to assume that defendant contributed 0% of the harm to soil contaminated only with lead or even 50% of the harm to soil contaminated with lead and one other metal. See Burlington, 556 U.S. at 617–18; Pakootas, 905 F.3d at 595.

2. Geographic Apportionment

Dr. Love's analysis uses geographic location to try to apportion fault by identifying three distinct areas of the Site where plating metal contamination can be found: the plating facility footprint, the southern rinse water drainage area, and the northeast dumping area. (See Love Report at 19.) According to the analysis, defendants cannot be held responsible for any of the contamination in the northeast dumping area because all the contaminants found there originate from fill material or dumping

of plating metals that occurred prior to Stockton Plating's operations at the Site. (See id. at 20.)

This attempt to apportion fault geographically ignores evidence that Stockton Plating likely contributed to contamination in the northeast corner of the Site. Stockton Plating's operations in the northeast corner of the Site included grinding, straightening, and polishing chrome-plated bumpers. (Hr'g Tr. 110:23-112:19; 115:22-116:17.) This process resulted in releases of copper, nickel, and chromium that fell through the air and settled onto the ground. (Id.) Though these operations took place indoors and above a concrete floor, two fires in 1973 and 1985 could have resulted in the release of particles outside the building either directly or via firefighters' efforts to douse the flames. (Id. at 161:18-162:22.) A major rain event in the Sacramento area in 1986, after defendant had ceased operations but before it had completely removed its chemicals and equipment from the property, could have also spread metal particles to the subsurface. (See Ex. 52.) In light of the evidence of additional ways that releases of plating metals from the northeast corner of the facility could have made their way to the subsurface, the court cannot find that the record reasonably supports an assumption that defendants are not responsible for any of the harm to the northeastern portion of the Site. See Pakootas, 905 F.3d at 595.

In addition, Dr. Love gives the impression that the geographic areas he defines would remain distinct throughout the process of remediation. (See Ex. 4, fig. 12.) But as Dr. Love conceded on cross-examination, the excavation areas his analysis

proposes would not remain separate and distinct once excavation began. (See Hr'g Tr. 342:1-343:20.) The court is persuaded by Dr. Farr's testimony and rebuttal report, which point out that repeated releases over a period of years at a site this small are likely to form "one big blob" in the soil. (See Hr'g Tr. 531:23-532:7, 625:3-626:24; Farr Rebuttal at 15.) It is simply not possible in this case to carve up the Site geographically into separate and distinct portions that reflect the defendants' "contribution . . . to a single harm." Burlington, 556 U.S. at 614 (quoting Restatement (Second) of Torts § 433A(1)(b)). There is therefore no reasonable basis upon which to apportion the harm geographically.

3. Volumetric Apportionment

Finally, Dr. Love attempts to apportion defendants' contribution to the harm at the Site within the geographically and chemically divisible areas in his analysis using a volumetric approach. (See Love Report at 20-22.) Essentially, Dr. Love calculates the relative amount of plating metals within the three defined portions of the Site that Stockton Plating's operations were responsible for, as compared to prior operators at the Site. (See id.)

To distinguish between releases attributable to defendant and releases attributable to prior operators at the Site, Dr. Love argues that the measures taken by Stockton Plating shortly after it took over operations at the Site eliminated the possibility of releases occurring through the hole of the southern wall of the plating facility after 1974 or through the footprint of the plating room after 1975. (See Love Report at

14.) He also concludes that any releases that occurred as Stockton Plating was implementing these operational changes were "minimal and incremental" compared to prior plating operations at the Site. (See id. at 14-15.) Because neither defendants nor prior operators kept adequate records to determine the specific volume of plating fluids used at the Site, Dr. Love's analysis uses time on the Site as a proxy for volume. (Love Report at 20.) Resting on the assumption that "the production volume of the plating operations was fairly similar throughout the history of Site operations," the analysis calculates that defendants only contributed 3.1% of the harm to Site soil and 3.7% of the harm to Site groundwater. (Love Report at 20, 22-23.)

The court cannot accept Dr. Love's attempt to apportion fault volumetrically because his analysis relies on fundamentally flawed assumptions and reaches conclusions that are belied by evidence concerning Stockton Plating's operations and the nature of the contamination at the Site. See Burlington, 556 U.S. at 617-18; Pakootas, 905 F.3d at 595. Dr. Love opines that any discharges by the defendant prior to 1974 were minimal or incremental, but his analysis does not mention the "five to ten" known releases of plating metals that Stockton Plating's general manager admitted occurred before he replaced the earthen dam with the concrete retaining wall. (Hr'g Tr. 57:16-25.) Dr. Love also provides no analysis or estimate of the volume of waste or contaminant mass released through the hole in the southern wall of the plating facility as a result of these known discharges. (Farr Rebuttal at 6.)

Dr. Love also assumes that the concrete retaining wall

prevented any liquid from migrating out of the plating area. (Love Report at 14.) While the wall likely reduced the amount of releases that made their way outside the plating area, the court is not convinced that it eliminated the risk entirely. (See Farr Rebuttal at 6.) Dr. Farr's testimony confirms that the wall was not designed to be impermeable to liquids. (Hr'g Tr. 534:14-535:4.) Site inspections revealed cracks and erosion of the concrete retaining wall as well as mineral discoloration, indicating that liquids did in fact migrate through the concrete wall during Stockton Plating's operations after 1974. (Farr Rebuttal at 7.) Because the opening to the sewer was located within the bounds of the retaining wall, any fluid that made it beyond the retaining wall would likely have been released onto the land south of the plating facility. (Id.)

Dr. Love also assumes that Stockton Plating's installation of racks above the plating tanks and improvements to the rinse tanks' pipes eliminated the potential for releases to occur from the plating room after 1975. (Love Report at 14.) This is contrary to testimony by Clark that the floor of the plating room would still get wet as a result of plating operations even after Stockton Plating installed the counterflow and drainpipe systems.[5] (Hr'g Tr. 119:22-120:4.)

[5] Dr. Farr's rebuttal report also relied on deposition testimony by Stockton Plating's own officers and owners indicating that plating operations continued to cause discharges of plating liquids and rinse water onto the concrete floor after Stockton Plating's improvements were put into place. (Farr Rebuttal at 7-11.) Deposition testimony by Leland specifically showed that dragout releases continued to occur all the way up until plating operations at the Site ceased in 1985. (Id.)

Even if Stockton Plating's improvements to its plating equipment reduced the frequency with which releases occurred, it strains credulity to believe that they eliminated the risk completely. (Id. at 9-10.) And, contrary to Dr. Love's assumption, a release onto the concrete floor or directly into the sewer system would not necessarily prevent the plating metal from reaching the subsurface. Neither the concrete slab nor the sewer system was completely impermeable to liquids; releases therefore could have made their way through the concrete slab--especially if there were joints or fractures in the floor--or through joints and cracks in the sewer lines. (Id. at 11-12; Hr'g Tr. 534:14-535:4.)

Finally, Dr. Love's entire volumetric analysis rests on the assumption that the production volume of plating operations at the Site remained relatively constant from 1949 to 1975. But Clark and Leland's testimony tends to establish that business increased during Stockton Plating's time at the Site. (Hr'g Tr. 73:15-25, 99:19-101:21.) Stockton Plating added a second 1,250-gallon copper tank to the premises that allowed workers to plate two bumpers simultaneously, and implemented efficiency improvements that allowed the Site to process more bumpers each shift. (Id.) Dr. Farr agreed that changes in the facility's footprint indicated that production at the facility was likely increasing over time. (Hr'g Tr. 539:24-540:17, 561:8-19; Farr Rebuttal at 14-18.) While some evidence indicates that Stockton Plating pursued increased "finished bumpers" business in the late 1970s that would have had little to no potential for releases of plating metals, the weight of the evidence--much of it provided

by defendants' own managers and owners--indicates that operations that carried a risk of releases increased over time at the Site. Dr. Love's assumption that production stayed relatively constant was therefore unreasonable. See Pakootas, 905 F.3d at 595 (quoting Hercules, 247 F.3d at 717).

In summary, to accept Dr. Love's theory of volumetric apportionment, the court would have to (1) accept that the memory of Stockton Plating's general manager of events that occurred almost 50 years ago is accurate and that there were only five to ten releases of plating fluids at the Site in 1973, (2) assume that these releases were de minimis, and (3) assume that the structural and operational improvements defendants implemented over the next two years prevented any releases of plating fluids from reaching the subsurface, all while assuming, contrary to the evidence, that operations at the Site remained relatively constant over time.

Defendants essentially ask the court to stack assumption on top of assumption to conclude that they should be held liable for exactly 3.1% of the harm to Site soil and exactly 3.7% of the harm to Site groundwater. (See Love Report at 20, 22-23.) Because these assumptions run counter to the weight of the evidence, defendants have not met the "substantial" burden of showing a reasonable basis for determining their contribution to the overall harm at the Site. Pakootas, 905 F.3d at 598 (quoting Alcan, 964 F.2d at 269).

IT IS THEREFORE ORDERED that the defendants' request for a finding of divisibility be, and the same hereby is, DENIED. The court hereby finds and declares as follows:

1. Defendants have not met their burden of establishing that the contamination at the Site is theoretically capable of apportionment.
2. Even if the contamination were theoretically capable of apportionment, defendants have not met their burden of establishing that there is a reasonable basis by which to determine their contribution to the overall harm.
3. The CERCLA liability of Defendants R&L, John Clark, and the Estate of Nick E. Smith is not divisible from the total contamination present at the Site.
4. Defendants R&L, John Clark, and the Estate of Nick E. Smith are therefore jointly and severally liable for the CERCLA violations that have occurred at the Site.
5. The court expresses no opinion as to whether or to what extent defendants may offset their liability by the liability of another in a subsequent contribution proceeding under CERCLA section 113.

Dated: September 16, 2020

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

# EXHIBIT C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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CITY OF WEST SACRAMENTO, CALIFORNIA; and PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

v.

R AND L BUSINESS MANAGEMENT, a California corporation, f/k/a STOCKTON PLATING, INC., d/b/a CAPITOL PLATING INC., a/k/a CAPITOL PLATING, a/k/a CAPITAL PLATING; CAPITOL PLATING, INC., a dissolved California corporation; et al.,

Defendants.

No. 2:18-cv-00900 WBS EFB

MEMORANDUM AND ORDER RE: PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON ITS PUBLIC NUISANCE AND PORTER-COLOGNE ACT CLAIMS

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Plaintiffs City of West Sacramento, California and the People of the State of California (collectively, "plaintiffs") brought this action to address toxic levels of soil and groundwater contamination resulting from the release of hazardous

substances from a metal plating facility formerly located at 319 3rd Street, West Sacramento, California (the "Site").

The court previously granted in part plaintiffs' motion for partial summary judgment, holding defendants R and L Business Management ("R&L"), John Clark, and the Estate of Nick E. Smith (collectively, "defendants") liable under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a). (Order at 10 (Docket No. 125).) The court found that triable issues of material fact remained as to plaintiffs' claim under the Resource Conservation and Recovery Act ("RCRA"), 43 U.S.C. § 6972. (Id. at 14-16.)

After holding an evidentiary hearing, the court further determined that defendants' contribution to the pollution at the Site was not divisible from the total contamination present at the Site under CERCLA. (See Mem. and Order re: Defendants' Divisibility Defense ("Divisibility Order") (Docket No. 203).) The court described the factual and procedural background of this lawsuit in great detail in these prior orders. (See Docket Nos. 125, 203.)

Plaintiffs now move for partial summary judgment against defendants as to their claims under California public nuisance law and the Porter-Cologne Water Quality Control Act, Cal. Wat. Code § 13304(c).[1]

I. Legal Standard

[1] Plaintiffs' contemporaneous motion for summary judgment on their claims under the Gatto Act, Cal. Health & Safety Code §§ 25403.1, 25403.5; the Carpenter-Presley-Tanner Hazardous Substance Account Act ("HSAA"), Cal Health & Safety Code § 25363(d); and for Injunctive Relief will be decided in a separate Order.

A. Summary Judgment

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A material fact is one that could affect the outcome of the suit, and a genuine issue is one that could permit a reasonable jury to enter a verdict in the non-moving party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The party moving for summary judgment bears the initial burden of establishing the absence of a genuine issue of material fact and can satisfy this burden by presenting evidence that negates an essential element of the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986). Alternatively, the movant can demonstrate that the non-moving party cannot provide evidence to support an essential element upon which it will bear the burden of proof at trial. Id. Any inferences drawn from the underlying facts must, however, be viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

II. Discussion

Plaintiffs first argue that they are entitled to summary judgment on their claim that defendants' contributions to pollution at the Site have caused a public nuisance. (See Pls.' Mem. P. & A. at 23-32 (Docket No. 204).) Under California law, a nuisance is "[a]nything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the

free use of property, so as to interfere with the comfortable enjoyment of life or property . . . ." Cal. Civ. Code § 3479. A public nuisance is "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." Cal. Civ. Code § 3480. A plaintiff must show "substantial and unreasonable interference, either with a public right or with the enjoyment of a plaintiff's property." Coppola v. Smith, 935 F. Supp. 2d 993, 1017–19 (E.D. Cal. 2013) (Ishii, J.) (citing City of Los Angeles v. San Pedro Boat Works, 635 F.3d 440, 452 (9th Cir. 2011); People ex rel. Gallo v. Acuna, 14 Cal. 4th 1090 (Cal. 1997)).

To prevail on a claim of public nuisance, "[a] plaintiff must establish a 'connecting element' or a 'causative link' between the defendant's conduct and the threatened harm." Citizens for Odor Nuisance Abatement v. City of San Diego, 8 Cal. App. 5th 350, 359 (2017) (quoting In re Firearm Cases, 126 Cal. App. 4th 959, 988 (2005)). "[T]he causation element of a public nuisance cause of action is satisfied if the conduct of a defendant is a substantial factor in bringing about the result." People v. ConAgra Grocery Products Co., 17 Cal. App. 5th 51, 101 (2017).

"'The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical.' Thus, 'a force which plays only an infinitesimal or theoretical part in bringing about injury, damage, or loss is not a substantial factor,' but a very minor force that does cause harm is a substantial factor." Id.

(quoting Bockrath v. Aldrich Chem. Co., 21 Cal. 4th 71, 79 (Cal. 1999)).

Plaintiffs also argue that they are entitled to summary judgment on their claim that defendants violated the Porter Cologne Water Quality Control Act. The Porter-Cologne Act permits a governmental cost recovery claim to be brought against "any person who has discharged or discharges waste . . . or who has caused or permitted . . . waste to be discharged or deposited . . . into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance." Cal. Wat. Code § 13304(a).

To prevail on a claim under the Porter-Cologne Act, a plaintiff must satisfy the same common-law causation requirements as for a claim under California public nuisance law. See City of Modesto Redev. Agency v. Superior Court, 119 Cal. App. 4th 28, 38 (2004) ("[I]t appears that the Legislature not only did not intend to depart from the law of nuisance, but also explicitly relied on it in the Porter-Cologne Act . . . .").

Here, a disputed issue of fact remains as to whether defendants' acts or omissions were a substantial factor in causing the nuisance or condition of pollution at issue. Defendants' expert, Dr. Love, and plaintiffs' expert, Dr. Farr, disagree as to the extent of defendants' contribution to the pollution at the Site. While Dr. Farr concludes that defendants' contribution was significant enough to require remediation on its own, independent of any contributions made by prior operators of the Site (see Salazar Decl. Ex. C, Rebuttal Exp. Report of Dr. Farr at 5-13 ("Farr Rebuttal") (Docket No. 206-1)), Dr. Love

concludes that defendants' contributions "would have been trivial compared to the numerous years of hazardous materials release from previous Site operations" and "would reasonably be expected to not have, on their own, caused the need for site clean-up" (see Salazar Decl. Ex. B, Exp. Report of Dr. Love at 15 ("Love Report") (Docket no. 206-1)). Though the court previously assessed the experts' credibility the evidentiary hearing on defendants' divisibility defense under CERCLA, the court made no finding of credibility in the context of issue of causation now before the court. (See generally Divisibility Order.)

Plaintiff's motion for summary judgment on its nuisance and Porter Cologne Act claims must therefore be denied. See Celotex, 477 U.S. at 322-23. The court will resolve the credibility of Dr. Love and Dr. Farr as to causation with respect to plaintiffs' claims for nuisance Porter Cologne Water Quality Control Act violation at the time of trial.

IT IS THEREFORE ORDERED that plaintiffs' motion for summary judgment (Docket No. 204) be, and the same hereby is, DENIED as to plaintiffs' claims under California public nuisance law and the Porter Cologne Water Quality Control Act.

Dated: October 28, 2020

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

# EXHIBIT D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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CITY OF WEST SACRAMENTO, CALIFORNIA; and PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

v.

R AND L BUSINESS MANAGEMENT, a California corporation, f/k/a STOCKTON PLATING, INC., d/b/a CAPITOL PLATING INC., a/k/a CAPITOL PLATING, a/k/a CAPITAL PLATING; CAPITOL PLATING, INC., a dissolved California corporation; et al.,

Defendants.

No. 2:18-cv-00900 WBS EFB

AMENDED MEMORANDUM AND ORDER RE: PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THEIR CLAIMS UNDER THE GATTO ACT AND THE HSAA

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Plaintiffs City of West Sacramento, California and the People of the State of California (collectively, "plaintiffs") brought this action to address toxic levels of soil and groundwater contamination resulting from the release of hazardous substances from a metal plating facility formerly located at 319

3rd Street, West Sacramento, California (the "Site").

The court has previously granted summary judgment for plaintiffs on the issue of liability on their claim under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a), against defendants R and L Business Management ("R&L"), John Clark, and the Estate of Nick E. Smith (collectively, "defendants"). (Order at 10 (Docket No. 125).) The court has also found that triable issues of material fact remain as to plaintiffs' claims under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 7002(a), California public nuisance law, and the Porter-Cologne Water Quality Control Act, Cal. Water Code § 13304(c). (See id. at 14-16; Docket No. 211.) Additionally, after an evidentiary hearing the court has determined that defendants' contribution to the pollution at the Site is not divisible from the total contamination present at the Site under CERCLA. (See Mem. and Order re: Defendants' Divisibility Defense ("Divisibility Order") (Docket No. 203).) The facts and procedural background of the case have been discussed fully in these prior Orders, and will not be repeated here. (See Docket Nos. 125, 203, 211.)

The remaining motion before the court is plaintiffs' motion for partial summary judgment on their Carpenter-Presley-Tanner Hazardous Substance Account Act ("HSAA") claim, Cal. Health & Safety Code §§ 25363(d), and on their claim under the Gatto Act, Cal. Health & Safety Code §§ 25403.1, 25403.5 and. (See Pls.' Mot. Partial Summ. J. ("Pls.' Mot.") (Docket No. 204).) On their Gatto Act claim, the City requests a permanent injunction requiring defendants to investigate and clean up

releases of hazardous materials at the Site. (See id. at 32-35.)

II. Discussion

A. HSAA

The HSAA allows any "person who has incurred response or corrective action costs in accordance with [CERCLA to] seek contribution or indemnity from any person who is liable pursuant to [the HSAA]." Cal. Health and Safety Code § 25363(d). For the purposes of the HSAA, a "'responsible party' or 'liable person,' . . . means those persons described in section 107(a) of [CERCLA]." Id. § 25323(a)(1). Thus, a cost recovery claim under the HSAA has the same elements as a cost recovery claim under CERCLA. Orange Cty. Water Dist. v. Alcoa Glob. Fasteners, Inc., 12 Cal. App. 5th 252, 297 (2017); Castaic Lake Water Agency v. Whittaker Corp., 272 F. Supp. 2d 1053, 1084 n.40 (C.D. Cal. 2003) ("HSAA creates a scheme that is identical to CERCLA with respect to who is liable.").

Because the court has already found defendants to be liable under CERCLA § 107 (see Docket No. 125), defendants do not dispute that plaintiffs have satisfied the elements of liability on their claim under the HSAA. (See Defs.' Opp'n at 2.) Accordingly, plaintiffs' motion summary judgment on the issue of liability under the HSAA will be granted. Damages have yet to be determined, and plaintiffs do not seek summary judgment on the amount of damages at this time.

B. The Gatto Act

The Gatto Act authorizes California "local agencies," including cities and counties, to investigate and clean up properties within their jurisdiction that have been contaminated

by hazardous materials and to recover the costs of investigation and cleanup from responsible parties. See Cal. Health & Safety Code §§ 25403.1, 25403.5. Section 25403.1 provides local agencies with investigatory and cleanup authority, subject to certain procedural requirements:

> A local agency may, in accordance with this chapter, take any action that the local agency determines is necessary and that is consistent with other state and federal laws to investigate and clean up a release on, under, or from blighted property that the local agency has found to be within a blighted area within the local agency's boundaries due to the presence of hazardous materials following a Phase I or Phase II environmental assessment . . . .

Cal. Health & Safety Code § 25403.1(a)(1)(A).

This section applies "whether the local agency owns that property or not." Id. In other words, without the need for a court order a local agency may enter blighted property that it does not own to investigate and clean up the property so long as (1) the agency provides the owner of the property with 60 days' notice to respond and to propose an investigation and/or cleanup plan, and (2) the owner fails to respond or provides an inadequate response. See id. §§ 25403.1(a)(1)(A), 25403.1(b)(2)(A).

Section 25403.5 further allows local agencies to recover the costs they incur during the investigation and cleanup of a site. See id. § 25403.5. "[I]f a local agency undertakes action to investigate property or clean up, or to require others to investigate or clean up, including compelling a responsible party through a civil injunctive action, a release of hazardous

material, the responsible party shall be liable to the local agency for the costs incurred in the action." Id. Like the HSAA, a "responsible party" for the purposes of the Gatto Act is anyone who qualifies as a responsible party under CERCLA § 107(a). See id. §§ 25403.5(a), 25403(s), 25323.5(a)(1).

Defendants again concede that they are responsible parties under the Gatto Act § 25403.5 because the court has already found them to be liable under CERCLA §107(a). (See Defs.' Opp'n at 2; Docket No. 125.) Defendants also do not dispute that the City has fulfilled the remaining Gatto Act requirements set out in section 25403.1--namely, (1) that "releases" have occurred on the Site, (2) that the City has determined the Site to be a "blighted property" within a "blighted area" within the City's boundaries due to the release of hazardous materials, (3) that the City's determination followed Phase I and Phase II environmental assessments of the Site, and (4) that the City provided defendants with requisite notice to respond and to propose an investigation and/or cleanup plan. See id. § 25403.1(a)(1)(A).

Therefore, as the court reads the Gatto Act, the City is entitled to enter the Site and take the necessary action to clean up the contamination. No order of this court is required for the City to do so. However, the City asks the court to go further and to order defendants to do the investigation and cleanup themselves. Considering the present posture of this case, the court determines that such an order would be premature and impractical at this time.

District courts have broad discretion "to manage their

own affairs so as to achieve the orderly expeditious disposition of cases." Dietz v. Bouldin, 136 S. Ct. 1885, 1891 (2016) (quoting Link v. Wabash R. Co., 370 U.S. 626, 630–31 (1962)); see also Zivkovic v. S. Cal. Edison Co., 302 F.3d 1080, 1087 (9th Cir. 2002). Though the court has already found defendants to be liable under plaintiffs' CERCLA claim (see Docket No. 125) and this Order finds them to be liable under plaintiffs' HSAA claim, several of plaintiffs' claims remain outstanding, including their claims under RCRA, the Porter-Cologne Water Quality Control Act, California public nuisance law, California trespass law, and for declaratory relief. (See Third Am. Compl. ("TAC") (Docket No. 45); Docket Nos. 125, 203, 211.) For the reasons that follow, the court finds that deferring its determination as to whether the City is entitled to permanent injunctive relief under the Gatto Act until final resolution of those remaining claims will aid in the orderly and expeditious disposition of the case. See Dietz, 136 S. Ct. at 1087.

Several of plaintiffs' other outstanding claims also seek some form of permanent injunctive relief requiring defendants to investigate and clean up the Site. (See TAC ¶ 85 ("The City is entitled to injunctive relief under RCRA § 7002(a), 42 U.S.C. § 6972(a), compelling each defendant jointly and severally to conduct a complete, timely, and appropriate investigation and abatement of all actual and potential endangerments arising from the presence of the Contaminants in the environment at the Site, and to obtain regulatory closure of the Site."); id. ¶ 144 ("Plaintiffs are entitled to injunctive relief compelling defendants jointly and severally, promptly and

competently to take such action as may be necessary to abate the public nuisance at the Site and to obtain regulatory closure of the Site."); id. ¶ 157 ("The City is entitled to injunctive relief compelling the defendants jointly and severally, promptly and competently to take such action as may be necessary to abate the trespass . . . .").)

Because injunctive relief "must be narrowly tailored to remedy the specific harm shown," City and Cty. of San Francisco v. Trump, 897 F.3d 1225, 1244 (9th Cir. 2018) (quoting Bresgal v. Brock, 843 F.2d 1163, 1170-71 (9th Cir. 1987)), the precise nature and extent of injunctive relief to which plaintiffs are entitled will depend on which, if any, of those claims are successful.[1]

For example, RCRA § 7002(a) authorizes an injunction where a plaintiff can successfully show that a defendant was a past or present generator of hazardous waste, contributed to the handling, storage, treatment, or disposal of hazardous waste, and that the hazardous waste "may present an imminent and substantial endangerment to health or the environment." See 42 U.S.C. § 6792(a); Meghrig v. KFC W., Inc., 516 U.S. 479, 484 (1996); LAJIM, LLC v. Gen. Elec. Co., 917 F.3d 933, 943 (7th Cir. 2019). California public nuisance law also authorizes injunctive relief to abate a nuisance--i.e., something that is "injurious to health" or "offensive to the senses"--where a plaintiff can show that a defendant was a substantial factor in causing the

[1] The court expresses no opinion in this Order as to the merits of any of plaintiffs' claims beyond their Gatto Act and HSAA claims.

nuisance, that the nuisance is "substantial and unreasonable," and that the nuisance affects an entire community or neighborhood at the same time. See Cty. of Santa Clara v. Atl. Richfield Co., 137 Cal. App. 4th 292, 306 (2006); Cal. Code Civ. P. § 731.

Thus, if defendants are found to be liable under RCRA § 7002(a), and the court finds that injunctive relief is warranted, the court will have to shape any injunctive relief to account for the "imminent and substantial endangerment" that the hazardous waste at the Site poses to health or the environment. See 42 U.S.C. § 6792(a); San Francisco, 897 F.3d at 1244. But if defendants are also found to be liable under public nuisance law, the injunction may take a different form, as the court will have to ensure that the Site is remedied to the point that conditions there are no longer "substantial and unreasonable" or "injurious to health or offensive to the senses." Santa Clara, 137 Cal. App. 4th at 306.

Because plaintiffs' remaining claims have the potential to alter the scope and extent of any eventual injunctive relief in this way, the court finds that, regardless of whether the City is entitled to an injunction under the Gatto Act,[2] issuing a

[2] Whether the Gatto Act authorizes suits for injunctive relief is not entirely clear. Section 25323.5 of the Act contemplates that, in instances where a local agency "undertakes action to investigate property or clean up, or to require others to investigate or clean up, including compelling a responsible party through a civil injunctive action, a release of hazardous material, the responsible party shall be liable to the local agency for the costs incurred in the action." See Cal. Health & Safety Code §§ 25323.5(a). One California Court of Appeals has held that similar language contained in the Polanco Redevelopment Act, when read in concert with language authorizing redevelopment agencies to take "any action" necessary to remove hazardous substances from properties within a redevelopment project area,

permanent injunction prior to final judgment would be premature. Cf. Lincoln Props., Ltd. v. Higgins, No. S-91-760 DFL GGH, 1993 WL 217429 at *16 (E.D. Cal. Jan. 21, 1993) (stating that, although plaintiff was entitled to injunctive relief under RCRA and public nuisance law at summary judgment stage, "[t]he precise nature and scope of injunctive relief shall be determined, and the injunction shall issue, at a later date").

Moreover, issuing permanent injunctive relief at this

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authorized redevelopment agencies to seek injunctive relief requiring responsible parties to clean up hazardous substances on property within a redevelopment project area. See Redev. Agency of San Diego v. San Diego Gas & Elec. Co., 111 Cal. App. 4th 912, 920 (2003). This interpretation may also apply to the language in the Gatto Act, inasmuch as the California Legislature has declared the Gatto Act to be the "policy successor to the Polanco Redevelopment Act" and "that any judicial construction or interpretation of the Polanco Redevelopment Act also apply to [the Gatto Act]." Cal. Health & Safety Code § 25403.8.

On the other hand, plaintiffs do not point to, and the court is not aware of, any case in which a local agency has obtained an injunction under the Gatto Act compelling a responsible party to investigate or clean up a site contaminated with hazardous materials. The Act's text and structure seem overwhelmingly concerned with authorizing local agencies to investigate, clean up, and recover costs for contaminated sites themselves. See Cal. Health & Safety Code § 25403.1-25403.5. For instance, the Act imposes a number of detailed requirements on local agencies to ensure that their investigations and/or cleanups receive California Department of Toxic Substances Control ("DTSC") or the appropriate regional water board approval. See, e.g., id. § 25403.1(a)(2)(B) (requiring that the local agency "submit an investigation plan and cost recovery agreement to the regional board or the department for review and approval" before taking action to clean up the release); § 25403.1(a)(2)(C) ("After completion of the investigation plan, have a cleanup plan prepared by a qualified independent contractor."). These requirements would seem to be superfluous if local agencies were simply entitled to injunctive relief compelling responsible parties to investigate and clean up the site instead of the agency. However, the court does not resolve that issue at this time.

juncture would be inconsistent with Orders previously issued by the court pertaining to plaintiffs' CERCLA § 107 claim. (See Docket Nos. 125, 203). Since the court has already found defendants to be jointly and severally liable for plaintiffs' necessary response costs under CERCLA § 107 (see id.), this Order finds that the defendants are also liable under the HSAA, and the City has its remedies under the Gatto Act, the City will be entitled to enter the Site, perform its own investigation and cleanup, and to recover the resulting costs from defendants. See 42 U.S.C. § 9607(a); Cal. Health & Safety Code §§ 25363(d), 25403.5. Either the City should do the cleanup or the defendants should; to have both of them doing it at the same time would potentially lead to chaos. This potential conflict would more appropriately be resolved at the time of final judgment, when the precise scope of the plaintiffs' remedy under CERCLA and their other claims are determined after hearing.

IT IS THEREFORE ORDERED that plaintiffs' motion for summary judgment on the issue of liability on their claim under the Carpenter-Presley-Tanner Hazardous Substance Account Act, Cal. Health & Safety Code §§ 25363(d), is hereby GRANTED;

AND IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment on their claim for violation of the Gatto Act, Cal. Health & Safety Code §§ 25403.1, 25403.5, is hereby DENIED.

Dated: December 15, 2020

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

# EXHIBIT E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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| CITY OF WEST SACRAMENTO, CALIFORNIA; and PEOPLE OF THE STATE OF CALIFORNIA,,<br><br>Plaintiff,<br><br>v.<br><br>R AND L BUSINESS MANAGEMENT, a California corporation, f/k/a STOCKTON PLATING, INC., d/b/a CAPITOL PLATING INC., a/k/a CAPITOL PLATING, a/k/a CAPITAL PLATING; CAPITOL PLATING, INC., a dissolved California corporation; JOHN CLARK, an individual; ESTATE OF NICK E. SMITH, DECEASED; et al.,<br><br>Defendant. | No. 2:18-cv-00900 WBS EFB<br><br>AMENDED FINAL PRETRIAL ORDER |

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A Final Pretrial Conference was held in this matter, pursuant to the provisions of Rule 16(d) of the Federal Rules of Civil Procedure and Local Rule 282, on January 4, 2021. Bret A.

Stone appeared as counsel for plaintiffs City of West Sacramento ("the City") and the people of the State of California. Joseph A. Salazar, Jr. appeared as counsel for defendants and third-party plaintiffs R and L Business Management fka Stockton Plating, Inc. ("R&L"), John Clark ("Clark"), and the Estate of Nick E. Smith ("Smith").[1] Jennifer Hartman King and Alanna Lungren appeared as counsel for third-party defendant County of Yolo. Following the conference, the court issued a Final Pretrial Order ("PTO"), directing the parties to file and serve any objections and proposed modifications to PTO the within five court days. (Docket No. 233.)

On January 12, 2021, plaintiffs filed objections and proposed modifications to the PTO. (Docket No. 239.) On January 20, 2021, defendants filed a response to plaintiffs' objections and proposed modifications. (Docket No. 243.) The court held a hearing on those objections and proposed modifications on January 26, 2010. Having considered plaintiffs' objections and defendants' responses, the court issues the following Amended Pretrial Order:

I. Jurisdiction – Venue

Jurisdiction over plaintiffs' claims is predicated upon federal question, 28 U.S.C. § 1331. Specifically, the court has federal question jurisdiction over plaintiffs' first claim under the Resource Conservation and Recovery Act ("RCRA") § 7002(a), 42 U.S.C. § 6972(a), and plaintiffs' second claim under the

[1] Only defendants R and L Business Management and John Clark filed third-party claims against the County of Yolo; the Estate of Nick E. Smith is not a third-party plaintiff in this matter.

Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") § 107(a), 42 U.S.C. § 9607(a). The court has supplemental jurisdiction over plaintiffs' other claims pursuant to 28 U.S.C. § 1367.

Jurisdiction over third-party plaintiffs' claim is predicated upon federal question, 28 U.S.C. § 1331, because their claim for contribution under CERCLA § 9613(f)(1) arises under laws of the United States. Jurisdiction over third-party defendant's counterclaim under CERCLA § 113(f) is likewise predicated upon federal question, 28 U.S.C. § 1331. The court has supplemental jurisdiction over third-party defendant's other counterclaims pursuant to 28 U.S.C. § 1367.

Venue is undisputed and is hereby found to be proper.

II. Jury – Non-Jury

Plaintiffs represent that they have voluntarily abandoned any claims that would require trial by jury and, accordingly, have requested a bench trial.

A. The City's RCRA Claim against Defendants

Defendants have demanded a trial by jury of the City's RCRA claim, arguing that the potential availability of civil penalties under RCRA § 6972(a)(1)(B) triggers the Seventh Amendment right to a jury. Defendants cite to Tull v. United States, 481 U.S. 412, 418-25 (1987), where the Supreme Court held that the defendant had "a constitutional right to a jury trial to determine his liability" as to his claim under § 1319 of the Clean Water Act because the statute provided for, and the plaintiff sought, civil penalties.

At least one federal district court has held that,

under Tull, parties are entitled to a jury determination on the issue of liability for civil penalties under RCRA's citizen suit provision, 42 U.S.C. § 6972(a)(1)(B). See N.C. Envtl. Justice Network v. Taylor, No. 4:12-CV-154-D, 2014 WL 7384970, at *3 (E.D.N.C. Dec. 29, 2014). However, plaintiffs here do not seek civil penalties under RCRA. They seek only "an injunction compelling defendants to abate the imminent and substantial endangerment . . . at the Site." (See Pls.' Pretrial Statement § 10 (Docket No. 226).) In fact, plaintiffs do not seek civil penalties under any of their claims--the operative complaint in this matter, plaintiffs' Third Amended Complaint, does not mention civil penalties at all. (See Pls.' Third Am. Compl. ("TAC"), Prayer for Relief ¶¶ 1-10 (Docket No. 45).) Because there is no potential for the City to recover civil penalties in this case, defendants are not entitled to a jury and the City's RCRA claim will be tried before the court, sitting without a jury.

B. Third-Party Claims under CERCLA § 113(f)

Third-party defendant has demanded a jury trial on third-party plaintiffs' claim against it for contribution under CERCLA § 113(f), 42 U.S.C. § 9613(f)(1), as well as on its counterclaim against third-party plaintiffs for contribution under § 113(f).[2] Third-party defendant cites Cal. Dep't of Toxic

[2] Two days after filing their pretrial statement, third-party plaintiffs filed an "Addendum" in which they indicated that they "augment[ed] their request for a jury and incorporate and join the reasons and authorities cited by the [third-party defendant] County of Yolo in its Pre-Trial Statement." (See Addendum to Pre-Trial Statement (Docket No. 230).) Though third-party plaintiffs do not appear to have timely demanded a jury

Substances Control v. Jim Dobbas, Inc., No. 2:14-595 WBS EFB, 2014 WL 4627248 (E.D. Cal. Sep. 16, 2014) for the proposition that CERCLA § 113(f) provides parties with a right to a trial by jury. However, this court in Dobbas did not hold that the plaintiff was entitled to a jury under CERCLA § 113(f). Rather, this court merely held that it would be inappropriate to strike the plaintiff's jury demand at the pleading stage, noting that the function of a Rule 12(f) motion to strike "is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." See Dobbas, 2014 WL 4627248, at *6 ((quoting Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983)).

Because striking a jury demand at the pleading stage in Dobbas would not have saved the parties any time or money, the court chose to err on the side of caution and preserved the plaintiff's right to demand a jury trial until the proper occasion for the court to consider the issue. See id.

In this case, the issue of whether the parties are entitled to a jury is now squarely before the court. The purpose of a final pretrial conference to "formulate a trial plan," including whether the trial will proceed before a jury or before the bench sitting without a jury. Fed. R. Civ. P. 16(e). Under Rule 16, the court must now issue an order determining whether the parties are entitled to a jury that will "control[] the

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trial of their claim for contribution against third-party defendant under Rule 38 (see Am. Third-Party Compl. (Docket No. 116)), they do appear to have timely demanded a jury trial on third-party defendant's counterclaim (see Answer to Counterclaim (Docket No. 142)). See Fed. R. Civ. P. 38.

course of the action before it . . . ." Id.; see also Dream Games of Ariz. v. PC Onsite, 561 F.3d 983, 996 (9th Cir. 2009) (stating that, to prevent prejudice, parties are typically bound by the pretrial order which "control[s] the subsequent course of action unless modified" (quoting Fed. R. Civ. P. 16(e)); Pradier v. Elespuru, 641 F.2d 808, 811 (9th Cir. 1981) ("The parties are entitled to know at the outset of the trial whether the decision will be made by the judge or the jury.").

In the only appellate decision to have squarely addressed the issue, Hatco Corp. v. W.R. Grace & Co. Conn., the Third Circuit held that parties are not entitled to a jury trial in suits brought under CERCLA § 113(f). See 59 F.3d 400, 414 (3d Cir. 1995). The court reasoned that, because the "precipitating claims under section 9607 are [also] primarily equitable in nature," and because § 9613(f)(1) requires courts to apportion costs between the parties "using such equitable factors as the court determines are appropriate," a claim for contribution under § 113(f) is essentially an equitable claim, under which no right to a jury exists. See id. at 412-414 (citing United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726 (8th Cir. 1987) for the proposition that no right to a jury exists under CERCLA § 107).

This court agrees with the Third Circuit's reasoning. In particular, the court is persuaded that the statute's use of the term "equitable factors as the court determines are appropriate" is evidence that Congress--who was well aware that juries were not traditionally a feature of equitable trials--likely intended to design a "flexible" remedy that would track

traditional equity practice and would "be based on circumstances not cognizable in nor readily adapted to an action at law." See id.; 42 U.S.C. § 9613(f)(1).

The court further notes that the vast majority of district courts to have considered the question have also found that no right to a jury exists under CERCLA § 113(f). See, e.g., Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., 217 F. Supp. 2d 1028, 1047 (C.D. Cal. 2002); Zuckerman, Bois II & Johnson, Common law toxic tort actions--Background, Envtl. Liability Allocation L. & Prac. § 9:2 n.4 (2020-2021) (noting that Hatco's holding that no jury trial is available under CERCLA § 113(f) "has . . . been universally accepted"). In fact, the court has not found a single example of a case in which a district court has tried a CERCLA § 113(f) claim before a jury since the Third Circuit's decision in Hatco.

When asked at the final pretrial conference to identify case law in support of the proposition that § 113(f) provides the right to a jury trial beyond the district court's ruling in Dobbas, third-party defendant pointed only to footnote 9 in Hatco, which cites to three district court cases for the proposition that "district courts have reached conflicting results on the issue." See Hatco, 59 F.3d at 412 n.9 (citing American Cyanamid Co. v. King Indus., Inc., 814 F. Supp. 209, 213–15 (D.R.I. 1993); Wehner v. Syntex Corp., 682 F. Supp. 39, 39–40 (N.D. Cal. 1987); United States v. Shaner, No. 85–1372, 1992 WL 154618, at **2–4 (E.D. Pa. June 15, 1992)).

Only one of those cases actually held that CERCLA § 113 provides parties with the right to a jury trial, see Shaner, 1992

WL 154618, at *3 ("[T]he Court concludes that CERCLA § 113 contribution actions are legal in nature and thus create an implicit right to jury trial."), and that decision was implicitly overruled when the Third Circuit unequivocally held that claims brought pursuant to CERCLA § 113(f) are equitable in nature and do not provide a right to a jury trial. See Hatco, 59 F.3d at 414.

Therefore, because the court agrees with the Third Circuit's reasoning in Hatco, and because there does not appear to have been any intervening change in law since that decision was issued, the court finds that the parties are not entitled to a jury trial under CERCLA § 113(f). Third-party plaintiffs' and third-party defendant's claims for contribution under CERCLA § 113(f) will therefore be tried before the court, sitting without a jury.[3]

[3] The fact that both parties to defendant's claims for contribution have demanded a jury trial under § 113(f) does not change the court's analysis. Under Federal Rule of Civil Procedure 39(c)(2), in "an action not triable of right by a jury, the court, on motion or on its own may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial." While this Rule "permits both sides to stipulate to a jury trial . . . a district court does not have to go along with the stipulation." Hildebrand v. Board of Trustees of Mich. State Univ., 607 F.2d 705, 711 (6th Cir. 1979) (citing Fed. R. Civ. P. 39(c)); Merex A.G. v. Fairchild Weston Systems, Inc., 29 F.3d 821, 827 (2d Cir. 1994) ("[W]hen both parties consent, Rule 39(c) invests the trial court with the discretion--but not the duty--to submit an equitable claim to the jury for a binding verdict. While the litigants are free to request a jury trial on an equitable claim, they cannot impose such a trial on an unwilling court."); Universal Elecs., Inc. v. Universal Remote Control, No. SACV 12-00329 AG (JPRx), 2014 WL 12587050 (C.D. Cal. Dec. 16, 2014) (same) (citing Merex, 29 F.3d at 827)).

C. Third-Party Defendant's Public Nuisance Counterclaim

The only remaining claim for which a party has demanded a jury trial is the third-party defendant's counterclaim against third-party plaintiffs for damages under California public nuisance law. No party has presented any argument that the county is not entitled to a jury on this claim.

The court will not be able to empanel a jury in March of 2021 due to the COVID-19 pandemic. The pandemic has caused our courthouse to be closed to the public since March of 2020. See Eastern District of California General Orders 611, 612, 618. Now, nearly ten months later, it is fair to say that the circumstances necessitating the closure have only gotten worse. At this point in time it is impossible to predict with any degree of confidence when this court will be able to begin jury trials again, and when jury trials do resume criminal cases will have to take precedence over civil cases such as this one.[4]

Accordingly, the trial of the claims between third-party plaintiffs and third-party defendant will be postponed and reset at a subsequent date, if and when the court is able to

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In light of the fact that Congress, in enacting CERCLA § 113(f), intended to provide the court with a flexible remedy under which it could apply such equitable factors as it determines are appropriate, see Hatco, 59 F.3d at 412-14, and in light of the present unavailability of jury trial due to the COVID-19 pandemic, see section II.C, infra, the court will not exercise its discretion under Rule 39(c) to try the parties' equitable claims for contribution under § 113(f) to a jury. See Merex, 29 F.3d at 827.

[4] For a discussion of the difficulties in even attempting to empanel a jury in this district under the current circumstances, see this court's Order in United States v. Sheikh, No. 2:18-CR-00119 WBS, 2020 WL 5995226, at **1-2 (E.D. Cal. Oct. 9, 2020).

resume jury trials in civil cases. See Fed. R. Civ. P. 42(b) (authorizing the court to order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims "[f]or convenience, to avoid prejudice, or to expedite or economize").[5]

III. Proposed Findings of Fact and Conclusions of Law and Form of Judgment

No later than fourteen court days before the trial date, plaintiffs shall lodge and serve the Findings of Fact and Conclusions of Law and form of judgment which they propose to be entered at the conclusion of the trial pursuant to Federal Rule of Civil Procedure 52. No later than seven court days before trial, defendants shall lodge and serve the Findings of Fact and Conclusions of Law and form of judgment which they propose be entered.

IV. Trial Briefs

According to the briefing schedule listed below, the parties shall submit briefs on the following issue: whether, during a trial solely of the claims brought by plaintiffs against defendants (i.e., excluding the third-party claims under CERCLA § 113(f) for contribution brought by third-party plaintiffs and third party defendant), the court will have to consider the

[5] If third-party defendant County of Yolo decides to withdraw its demand for a jury trial on its public nuisance claim and notifies the court and the other parties by January 8, 2021, the court will try the third-party claims between defendants and the County of Yolo at the same time that it tries plaintiffs' claims against defendants, on March 9, 2021. Should third-party defendant withdraw its demand for a jury trial, the court will amend this Pretrial Order accordingly.

question of how to equitably apportion cleanup costs between the defendants and all other parties, including predecessors at the Site and third-party defendant County of Yolo.

- January 14, 2021: Deadline for defendants R&L, Smith, and Clark, as well as third-party defendant County of Yolo, to submit their opening briefs
- January 21, 2021: Deadline for plaintiffs to submit their response brief
- January 26, 2021, at 10:00 a.m.: Hearing on the parties' briefs, to be conducted over Zoom

No later than fourteen calendar days before the trial date, counsel for each party shall file any additional trial briefs pursuant to Local Rule 285. Because this action is to be tried before the court sitting without a jury, motions in limine are not appropriate. However, counsel may alert the court to any legal issues they anticipate will need to be addressed in their respective trial briefs. No later than five court days before trial, the parties may file responses to the other side's trial briefs.

V. Remaining Claims

In addition to their CERCLA claim, plaintiffs assert a claim under California public nuisance law against defendants R&L, Smith, and Clark. The City also asserts a claim under the Porter Cologne Water Quality Control Act, Cal. Water Code § 13304(c), against R&L, Smith, and Clark. The parties agree that only the causation element of each claim remains to be tried along with the remedies of injunctive relief on the nuisance claim and cost recovery on the Porter-Cologne Act claim.

The City also asserts claims under RCRA, 42 U.S.C. § 6972(a)(1)(B), and the Gatto Act, Cal. Health & Safety Code §§ 25403.1, 25403.5, against R&L and Smith. The parties agree that the only remaining element of the City's RCRA claim that remains to be tried is the presence of an imminent and substantial endangerment to human health or the environment along with the remedy of injunctive relief. See 42 U.S.C. § 6972(a)(1)(B). The parties also agree that the only aspects of the City's Gatto Act claim that remain to be tried are the remedies of cost recovery and injunctive relief. See Cal. Health & Safety Code §§ 25403.1, 25403.5.

The court has already ruled that defendants are jointly and severally liable to the City under CERCLA § 107(a). (See Docket No. 125.) The parties disagree as to whether the court still must determine the defendants' equitable share of the cleanup costs as to other parties, including predecessors at the Site and third-party defendant County of Yolo, prior to the trial of the third-party claims between defendants and the County. If the court is satisfied, based on the parties' briefing, see section IV, supra, that the court must equitably apportion cleanup costs prior to trial of the third-party claims, it will do so at the trial between plaintiffs and defendants on March 9, 2021.

The court has also ruled that defendants are liable under the Carpenter-Presley-Tanner Hazardous Substance Account Act ("HSAA"), Cal. Health & Safety Code § 25363(d). (See Docket No. 225.) The court must still determine the amount of costs to which the City is entitled under CERCLA § 107 and the HSAA.

The parties agree that there are no issues remaining to be tried on the City's declaratory relief claim against defendants under CERCLA § 113(g)(2). The court's findings after trial will therefore include a judgment declaring that defendants are liable to the City under CERCLA § 113(g)(2) in any subsequent action for recovery of response costs the City incurs in the future. Any defenses to the amount or the nature of any response costs, including whether those responses costs were incurred consistent with existing law, are reserved for an appropriate time.

The parties agree that plaintiffs have abandoned their trespass and ultrahazardous activity claims against defendants, as well as their prayer for damages under their public nuisance claim.

There is one party in default, Urban Farmbox, LLC. As plaintiffs represent that little evidence is needed for prove-up, the court will permit evidence as to Urban Farmbox's liability to be presented at trial, rather than at a separate hearing or through motion practice after trial.

Defendants, as third-party plaintiffs, assert a claim for contribution against third-party defendant under CERCLA § 113(f), 42 U.S.C. § 9613(f)(1). Third-party defendant asserts counterclaims for contribution against third-party plaintiffs under CERCLA § 113(f), 42 U.S.C. § 9613(f)(1), and the HSAA, Cal. Health & Safety Code § 25363(d), and common law contribution and indemnity, as well as counterclaims against third-party plaintiffs under California law for continuing public nuisance, negligence, and negligence per se. As discussed above, see section II.C, supra, the court will try these third-party claims

separately, at a later date.

Accordingly, plaintiffs' claims against defendants under (1) California public nuisance law; (2) the Porter-Cologne Water Quality Control Act; (3) RCRA; and (4) the Gatto Act will be tried on March 9, 2021. The court will also determine the amount of costs to which plaintiffs are entitled under CERCLA § 107 and the HSAA § 25363(d), enter an order granting declaratory relief under CERCLA § 113(g)(2), determine defendants' equitable share of the cleanup costs as to predecessors and the County of Yolo (if warranted), and hear plaintiffs' evidence regarding Urban Farmbox, LLC's default at the March 9th trial. All third-party claims between defendants and third-party defendant Yolo County under CERCLA § 113, the HSAA, common law contribution and indemnity, public nuisance, negligence, and negligence per se will be postponed and tried separately, at a later date.

VI. Witnesses

(A) Plaintiffs anticipate calling the witnesses identified at Exhibit "A" attached hereto.

(B) Defendants and Third-Party Plaintiffs R&L, Clark, and Smith anticipate calling the witnesses identified at Exhibit "B" attached hereto.

(C) Third-party Defendant County of Yolo anticipates calling the witnesses identified at Exhibit "C" attached hereto.

(D) Except for retained experts, each party may call any witness designated by any other party.

(E) No other witnesses will be permitted to testify at trial unless:

(1) all parties stipulate that the witness may testify;

(2) the party offering the witness demonstrates that the witness is for the purpose of rebutting evidence which could not have been reasonably anticipated at the time of the Pretrial Conference; or

(3) the witness was discovered after the Pretrial Conference.

(F) Testimony of a witness not designated in this Order, which is offered under paragraph VI(E)(3), above, upon the grounds that the witness was discovered after the Pretrial Conference, will not be permitted unless:

(1) the testimony of the witness could not reasonably have been discovered prior to the Pretrial Conference;

(2) the court and opposing counsel were promptly notified upon discovery of the testimony; and

(3) counsel proffered the witness for deposition if time permitted or provided all opposing counsel a reasonable summary of the testimony if time did not permit a deposition.

(G) Plaintiffs and defendants have agreed to submit Dr. Adam Love and Dr. Anne Farr's CVs and/or resumes to the court in lieu of establishing their qualifications via testimony at trial.

VII. Exhibits

(A) Plaintiffs intend to offer the exhibits identified at Exhibit "D" attached hereto.

(B) Defendants and Third-Party Plaintiffs R&L, Clark, and Smith intend to offer the exhibits identified at Exhibit "E"

attached hereto.

(C) Third-party Defendant County of Yolo intends to offer the exhibits identified at Exhibit "F" attached hereto.

(D) Each party may offer any exhibit designated by any other party.

(E) No other exhibits will be received in evidence unless:

(1) all parties stipulate that the exhibit may be received in evidence;

(2) the party offering the exhibit demonstrates that the exhibit is for the purpose of rebutting evidence which could not have been reasonably anticipated at the time of the Pretrial Conference; or

(3) the exhibit was discovered after the Pretrial Conference.

(F) An exhibit not designated in this Order, which is offered under paragraph VII(E)(3), above, upon the grounds that the exhibit was discovered after the Pretrial Conference, will not be received in evidence unless:

(1) the exhibit could not reasonably have been discovered prior to the Pretrial Conference;

(2) the court and opposing counsel were promptly notified upon discovery of the exhibit; and

(3) counsel provided copies of the exhibit to all opposing counsel if physically possible or made the exhibit reasonably available for inspection by all opposing counsel if copying was not physically possible.

(G) Each party shall exchange copies of all exhibits

identified in this Order, or make them reasonably available for inspection by all other parties, no later than seven calendar days before the trial date. Any and all objections to such exhibits shall be filed and served not later than four calendar days before the trial date.

(H) The attorneys for plaintiffs and defendants are directed to submit an electronic copy of each exhibit to Deputy Clerk Karen Kirksey Smith at 8:30 a.m. on the date of trial. As discussed at the final pretrial conference, the parties are also directed to submit physical copies of (1) any exhibit a witness is likely to be asked about, (2) each witness' own deposition transcript, and (3) if the witness testified at the evidentiary hearing on divisibility, a transcript of their testimony to that witness in advance of trial.

(I) Each exhibit which has been designated in this Order and presented on the morning of the date of trial shall be pre-marked by counsel. Plaintiffs' exhibits shall bear numbers; defendants and third-party plaintiffs' exhibits shall bear letters; third-party defendants' exhibits shall bear numbers beginning with number 301. If no objection has been made to such exhibit pursuant to paragraph VII(F), above, such exhibit will require no further foundation and will be received in evidence upon the motion of any party at trial.

VIII. Further Discovery and Motions

No further motions shall be brought before trial except upon order of the court and upon a showing of manifest injustice. Fed. R. Civ. P. 16(e). No further discovery will be permitted except by the express stipulation of all parties or upon order of

the court and upon a showing of manifest injustice. Id.

IX. Date and Length of Trial

The trial is set for March 9, 2021 at 9:00 AM. The trial on plaintiffs' claims will occur via videoconference over Zoom. The court estimates that trial will last approximately 3 to 4 court days.

X. Settlement

The parties are willing to participate in a pretrial settlement conference. Accordingly, a settlement conference is set before Magistrate Judge Edmund F. Brennan on February 11, 2021, at 10:00 a.m. via Zoom. Further information regarding appearances at the settlement conference will be provided by the courtroom deputy for Magistrate Judge Brennan. Each party is ordered to have a principal with full settlement authority present at the settlement conference or to be fully authorized to settle the matter on any terms.

No later than 12:00 p.m. on February 4, 2021, counsel for each party shall submit a Confidential Settlement Conference Statement via email to EFBorders@caed.uscourts.gov. The parties may agree, or not, to serve each other with the Confidential Settlement Conference Statements. The Confidential Settlement Conference Statements shall not be filed with the clerk and shall not otherwise be disclosed to the trial judge. However, each party shall e-file a one-page document entitled "Notice of Submission of Confidential Settlement Conference Statement."

XI. Objections to Pretrial Order

Any objections or suggested modifications to this Pretrial Order shall be filed and served within five court days

from the file-stamped date of this Order. All references herein to the date of this Order shall refer to the date the tentative order is filed and not to the date any amended order is filed. If no objections or modifications are made, this Order will become final without further order of the court and shall control the subsequent course of the action, pursuant to Rule 16(e) of the Federal Rules of Civil Procedure.

Dated: January 26, 2021

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

Exhibit A: Plaintiffs' Witnesses

1. Aaron Laurel – City of West Sacramento City Manager
2. Anne Farr, Ph.D. – expert
3. Andrew Reimanis – expert
4. Dan Gallagher - expert

Exhibit B: Defendants and Third-Party Plaintiffs' Witnesses

1. Dr. Adam Love
2. Dr. Anne Farr
3. Daniel Gallagher
4. Andrew Reimanis
5. Aaron Laurel
6. John Clark
7. Richard Leland
8. Diane Richards
9. Heather Lanctot
10. Joseph Turner

Exhibit C: Third-Party Defendant's Witnesses

1. Joseph Turner, PG, CHG – County's Expert, Geosyntec Consultants Inc., 3043 Gold Canal Drive, Suite 100, Rancho Cordova, CA 95670
2. Heather Lanctot – County's Person Most Knowledgeable

Exhibit D: Plaintiffs' Exhibits

1. Plaintiffs incorporate the exhibits already admitted into evidence at the evidentiary hearing as identified by the court. (Dkt. No. 193-1.)
2. Regular Meeting of the City of West Sacramento City Council, Redevelopment Successor Agency, and West Sacramento Financing Authority Minutes dated October 18, 2017 (WESTSAC0020406-20408)
3. Notice of Endangerment to R and L Business Management dated October 27, 2017 (WESTSAC0020398-20401)
4. Notice of Endangerment to Nick E. Smith, Deceased *ex rel.* Royal Insurance Company dated October 27, 2017 (WESTSAC0020402-20405)
5. SWCRB Memo re PFAS at chrome plating shops (SWCRB0000001-27)
6. DTSC Imminent and Substantial Endangerment Determination and Order and Remedial Action Order dated May 6, 2020
7. Letter from R&L to DTSC re Imminent and Substantial Endangerment Determination and Order and Remedial Action Order dated June 26, 2020
8. Health Based Risk Assessment with PRGs and Fate and Transport Evaluation for Former Capitol Plating Facility by Clint Skinner Ph.D. dated September 18, 2001 (DTSC0002231-2348)
9. Resume of Andrew Reimanis
10. The City's invoices relating to investigating the Site and protecting the public
11. Yolo County Recorder Documents related to Property ownership
12. The Installment Note for the Property

Exhibit E: Defendants and Third-Party Plaintiffs' Exhibits

Defendants represent that they do not intend to introduce any evidence beyond that introduced at the evidentiary hearing in their defense against the City's claims.

As to their claim against third-party defendant, third-party plaintiffs incorporate their exhibits offered in opposition to third-party defendant's motion for summary judgment by reference.

Exhibit F: Third-Party Defendant's Exhibits

1. Property ownership documents and parcel maps for 305, 317, and 319 3rd Street, and 221/ 225 C Street
2. Expert and Rebuttal Reports of Anne Farr (City)
3. Expert and Rebuttal Reports of Adam Love (R&L)
4. Rebuttal Expert Report of Joseph Turner (County)
5. To the extent the Exhibits submitted in the briefing of the County's Motion for Summary Judgment (ECF 207), and Opposition thereto (ECF 213), are not listed above, the County includes:
   a) Exhibits to Declaration of Jennifer Hartman King in Support of Motion for Summary Judgment (ECF 207-5)
   b) Exhibits to Declaration of Alanna Lungren in Support of Motion for Summary Judgment (ECF 207-6)
   c) Exhibits A through E of R&L's Opposition to County of Yolo's Motion for Summary Judgment (ECF 213-3 – 213-8)
6. 2000 Advanced GeoEnvironmental, Inc., Additional Subsurface Investigation
7. 2004 URS, Former Capitol Plating Site - Site Summary Investigation Report
8. 2004 URS, Former Capitol Plating Site - Preliminary Cost Analysis Report
9. 2006 Wallace Kuhl & Associates Inc., Shallow Soil Investigation Report of Findings
10. 2007 Wallace Kuhl & Associates Inc., All Appropriate Inquiries Report

11. 2007 Kleinfelder, Sampling and Analysis Plan – Phase II Environmental Site Assessment Washington Firehouse
12. 2008 Kleinfelder, Phase II Environmental Assessment Report – Firehouse Block Site
13. 2010 Department of Toxic Substances Control, Draft Report – Phase II Environmental Assessment Report Firehouse Block Site
14. 2020 Roux, Sampling and Analysis Plan (and subsequent revised sampling maps)
15. 2020 DTSC, Imminent and Substantial Endangerment Determination and Order and Remedial Action Order