CASO-Atlas

SAN FRANCISCO
101 CALIFORNIA STREET
SAN FRANCISCO, CALIFORNIA 94111
FACSIMILE: (415) 982-4608
(415) 434-4000

SAN JOSE
333 W. SANTA CLARA STREET
SAN JOSE, CALIFORNIA 95113
FACSIMILE: (408) 295-2612
(408) 295-3210

NEWPORT BEACH
4695 MacARTHUR COURT
NEWPORT BEACH, CALIFORNIA 92660
FACSIMILE: (714) 476-0117
(714) 476-7676

PETTIT & MARTIN
ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
601 THIRTEENTH STREET, N.W.
WASHINGTON, D.C. 20005
TELEX: 904205 PEMLAW WSH
FACSIMILE: (202) 637-3699
(202) 637-3600

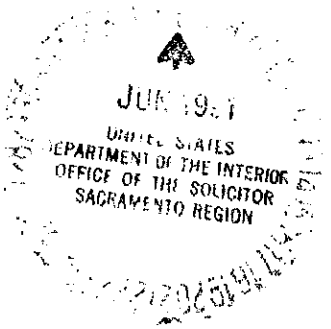
LOS ANGELES
355 SOUTH GRAND AVENUE
LOS ANGELES, CALIFORNIA 90071
FACSIMILE: (213) 625-5704
(213) 626-1717

DALLAS
600 NORTH PEARL STREET, LB 183
DALLAS, TEXAS 75201
FACSIMILE: (214) 953-0038
(214) 953-0100

HONG KONG
2816-17 JARDINE HOUSE
1 CONNAUGHT PLACE
CENTRAL, HONG KONG
FACSIMILE: 852-5-8106242
011-852-5-266381

May 30, 1991

RICHARD H. MAYS *
*NOT ADMITTED IN THE DISTRICT OF COLUMBIA
(202) 637-3640



Clementine (Temi) Berger, Esq.
Department of the Interior
Office of the Solicitor
Pacific Southwest Region
2800 Cottage Way, Room E2753
Sacramento, California 95825

Re: Atlas Mine Superfund Site

Dear Temi:

As a matter of professional courtesy, I am advising you that Vinnell Mining and Minerals Corporation and Atlas Corporation did, on May 30, file suit against the Bureau of Land Management, Department of Interior of the United States of America for contribution and cost recovery under CERLCA, for a declaratory judgment regarding BLM's liability, for attorneys and consultants fees in enforcing this contribution claim, and for other relief. The suit was filed in the U.S. District Court for the District of Columbia. A filed copy of the Complaint is enclosed.

For your information, I am also enclosing a Westlaw printing of an opinion rendered in by the 6th Circuit in the case of U.S. v. R.W. Meyer, Inc. et al on May 9, in which the court affirmed a ruling of the U.S. District Court of the Western District of Michigan, allocating liability in a CERCLA case on a basis of two-third of the remedial costs to tenants of contaminated property, and one-third to the owner. The owner in that case had not been actively involved in the management or disposal of hazardous substances on the property. However, the court affirmed the District Court's

finding that the landowner "bore significant responsibility simply by virtue of being the landowner."

Best regards,

Richard

Richard H. Mays

Enclosures

RHM/dd

PETTIT & MARTIN
Richard H. Mays, Esq.
Paul M. Laurenza, Esq.
William J. Hamel, Esq.
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 637-3600
Attorneys for Plaintiffs
Vinnell Mining and Minerals Corporation
and Atlas Corporation

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOYCE GREEN, J. JHG

MAY 30 1991

91 1321

VINNELL MINING AND MINERALS CORPORATION
10530 Rosehaven Street, Suite 600
Fairfax, Virginia 22030 AND

ATLAS CORPORATION
370 17th Street, Suite 3150
Denver, Colorado 80202

Plaintiffs

v.

CIVIL NO. _____

BUREAU OF LAND MANAGEMENT, DEPARTMENT OF INTERIOR, UNITED STATES OF AMERICA
Washington, D.C.

Defendant

COMPLAINT FOR CERCLA CONTRIBUTION,
CERCLA COST RECOVERY,
EQUITABLE INDEMNITY, UNJUST ENRICHMENT,
DECLARATORY RELIEF AND INJUNCTIVE RELIEF

Plaintiffs, Vinnell Mining and Minerals Corporation (VMMC) and Atlas Corporation (Atlas), allege in their Complaint against the defendant, United States of America, as follows:

PARTIES

1. Plaintiff VMMC is, and at all times herein relevant was, a corporation organized and existing under the laws of the State of California, with its principal office in Fairfax County, Virginia.

2. Plaintiff Atlas is, and at all times herein relevant was, a corporation organized and existing under the laws of the State of Delaware. Atlas' principal office is located in the City of Denver, Colorado.

3. The Bureau of Land Management of the Department of Interior, United States of America (BLM), is named as the defendant on the basis of its ownership of the real property described herein, and actions by and through the Bureau of Land Management (BLM) of the Department of Interior, a principal agency within the federal government, authorized and charged with the responsibility to administer the public lands of the United States.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to Section 113(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. Section 9613(b).

5. Venue is proper in this Court pursuant to 42 U.S.C. Section 9613(b), because defendant may be found in this District.

FACTUAL BASIS OF COMPLAINT

6. This action arises out of a former asbestos mine site (the Mine Site) consisting of approximately 140 acres located in the southern Diablo Mountains in western Fresno County, California. The Mine Site lies within an approximately 48 square mile area of serpentine rock known as the New Idria Formation, which contains large amounts of naturally occurring asbestos.

7. The Mine Site is within the United States Department of Interior, Bureau of Land Management (BLM) Clear Creek Management Area. With the exception of ten (10) acres, the Mine Site is owned entirely by defendant, and is subject to the exclusive control and management of the BLM.

8. From 1959 through 1967, defendant, acting through BLM, conveyed fee simple interests in ten acres of the Mine Site to private parties, and administered mining claims to the remainder of the Mine Site to private parties for the purpose of exploration for and mining and milling of asbestos and other minerals.

9. Plaintiff Atlas acquired title to said ten acre tract and to the mining claims in or about 1961, and operated asbestos mines and a mill on the Mine Site from that date until 1967, at which time the tract and claims were assigned and transferred to plaintiff VMMC. VMMC operated the asbestos mines and mill on the Mill Site from that time until 1974, at which time VMMC conveyed the tract and claims to Wheeler Properties,

Incorporated (Wheeler). Wheeler continued to operate the mines and mill until 1979, after which Wheeler ceased operations at the Mine Site and declared bankruptcy. Following commencement of bankruptcy proceedings, Wheeler was liquidated, and no longer exists as a corporate entity. Wheeler was the last record owner of the ten acre tract described in Paragraph 7, above. The ownership of the said ten acre tract is unclear at this time. Said tract is located wholly within the Mine Site.

10. The mining activity conducted by Atlas, VMMC and Wheeler consisted of excavating the asbestos ore out of surface pits on the Mine Site, and then milling the ore in the mill located on the Mine Site to remove asbestos from the accompanying rock and soil. Plaintiffs conducted their mining and waste disposal activities on the Mine Site in accordance with applicable laws and regulations and to the satisfaction of BLM. The by-products of the milling process, known as mill tailings, were placed into piles on the Mine Site. It is estimated that there are approximately three million cubic yards of asbestos ore and mill tailings remaining at the Mine Site. The Mine Site currently consists of three open pit asbestos mine surfaces, stockpiles of asbestos waste material, an abandoned mill building, and a settling pond.

11. The defendant, acting by and through BLM, has owned and controlled use of the Mine Site at all times relevant herein, including the times in which asbestos wastes were being deposited on the Mine Site. Since the cessation of mining

operations in 1979, the Mine Site has been under the exclusive control of BLM. BLM has allowed the Mine Site to be used for a variety of purposes, including, among other things, use by members of the public for recreational purposes, including hiking, camping, hunting, mineral collecting, and riding of off-highway vehicles. BLM also uses roads traversing the Mine Site for its own vehicles, and permits the use of the roads by private parties who have commercial interests in the area. All of said uses have contributed and continue to contribute substantially to any release or threat of release of hazardous substances from the Mine Site.

12. In September, 1984, the United States Environmental Protection Agency (EPA) placed the Mine Site on the National Priority List of Hazardous Sites pursuant to Section 105 of CERCLA, 42 U.S.C. Section 9605, and the National Oil and Hazardous Substances Contingency Plan, 40 CFR Section 300. In addition, EPA has expended funds from the Superfund Trust Fund to conduct a remedial investigation and feasibility study at the Mine Site.

13. As a result of EPA's expenditure of funds at the Mine Site, EPA has notified VMMC, Atlas and BLM that EPA considers those three parties to be responsible for payment of costs expended by EPA, allegedly amounting to approximately $2.7 million, and for the development and performance of remedial design and construction at the Mine Site to control the further

discharge of hazardous substances from the site, and for the operation and maintenance of such remedial construction.

14. In addition to the claims and demands upon the plaintiffs by EPA, plaintiffs have expended and will continue to expend significant sums for the investigation, study, and remediation of the site, and for attorneys' and consultants' fees. Plaintiffs have made demand upon BLM for contribution to these costs, and for contribution to the costs of the remedial design and construction, and operations and maintenance costs to be undertaken at the Mine Site. Notwithstanding these demands, BLM has failed and refused to contribute to such costs.

FIRST CAUSE OF ACTION

(CERCLA Contribution Claim)

15. Plaintiffs reallege and incorporate by reference herein the allegations contained in Paragraphs 1 through 14 of this Complaint as though fully set forth herein.

16. The United States is a "person" as defined in Section 101(21) of CERCLA, 42 U.S.C. Section 9601(21).

17. The United States, acting through BLM, is an "owner and operator" of the Mine Site as defined in Section 101(20) of CERCLA, 42 U.S.C. Section 9601(20), and was an owner of the Mine Site at the time of disposal of hazardous substances. The United States is, therefore, a "responsible party", and strictly liable for response costs as provided in Section 107(a) and (b) of CERCLA, 42 U.S.C. Section 9607(a) and (b).

18. The Mine Site is, and at all times relevant to this action was, a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. Section 9601(9).

19. Asbestos fibers that have been released or are threatened to be released at the Mine Site are "hazardous substances" as defined by Section 101(14) of CERCLA, 42 U.S.C. Section 9601(14).

20. There has been a "release" or threat of release of hazardous substances at the Mine Site as defined in Section 101(22) of CERCLA, 42 U.S.C. Section 9601(22).

21. Plaintiffs have incurred and will continue to incur necessary costs of response consistent with the National Contingency Plan for reimbursement of response costs incurred by EPA, additional investigation and remediation of the contamination on the property, and for other costs allowed plaintiffs pursuant to Sections 107 and 104 of CERCLA, 42 U.S.C. Sections 9607 and 9604, respectively.

22. Plaintiffs have requested contribution from the United States for the costs described in Paragraph 21, above, but the United States, acting through BLM, has not contributed nor agreed to contribute to those costs.

23. Pursuant to Section 113(f) of CERCLA, 42 U.S.C. Section 9613(f), defendant United States, as current owner and operator of the Mine Site, and as owner of the Mine Site at the time of disposal of hazardous substances thereon, is strictly liable to plaintiffs under Section 107(a) of CERCLA, 42 U.S.C.

Section 9607(a). Plaintiffs are entitled to contribution from the defendant for the costs and expenses incurred to date and to be incurred in the future by plaintiffs, together with prejudgment interest on all sums expended by the plaintiffs as aforesaid, and for attorneys' fees and consultants' fees incurred in connection with the investigation and remediation of the Mine Site and the enforcement of this action.

SECOND CAUSE OF ACTION

(CERCLA Cost Recovery Claim)

24. Plaintiffs reallege and incorporate by reference herein the allegations contained in Paragraphs 1 through 23 of this Complaint as though fully set forth herein.

25. Plaintiffs have incurred and will continue to incur necessary costs of response consistent with the National Contingency Plan for reimbursement of response costs incurred by EPA; have incurred and will continue to incur costs consistent with the National Contingency Plan for additional investigation and remediation of the contamination on the Mine Site, and for other costs allowed to plaintiffs pursuant to Sections 104 and 104 of CERCLA, 42 U.S.C. Sections 9607 and 9604, respectively.

26. Plaintiffs have demanded and do hereby demand payment from the United States for the costs described in Paragraph 25, above, but the United States has not paid nor agreed to pay those costs.

27. Pursuant to Section 107(a) of CERCLA, 42 U.S.C. Section 9607(a), the United States, as current owner and operator of the Mine Site, and as owner of the Mine Site at the time of disposal of hazardous substances thereon, is strictly liable to plaintiffs for their costs and expenses incurred to date and to be incurred in the future consistent with the National Contingency Plan, together with prejudgment interest on all sums expended by the plaintiffs as aforesaid, and for attorneys' and consultants' fees incurred in connection with the investigation and remediation of the Mine Site and the enforcement of this action.

THIRD CAUSE OF ACTION

(Equitable Indemnity)

28. Plaintiffs reallege and incorporate by reference herein the allegations contained in Paragraphs 1 through 27 of this Complaint as though fully set forth herein.

29. By being the owner of the Mine Site at all times described herein; by having controlled the uses of the Mine Site at all times described herein; and by having participated in the use of the Mine Site, the defendant caused or contributed to the release or threat of release of hazardous substances at the Mine Site.

30. These actions give rise to a duty on the part of the defendant to comply with CERCLA and other applicable laws relating to the remediation of the hazardous substances

currently deposited at the Mine Site and associated operation and maintenance actions, and to reimburse EPA and plaintiffs for the costs of response actions taken at the Mine Site.

31. As former operators of the Mine Site at the time of disposal of the hazardous substances described above, plaintiffs are also subject to claims made by EPA for past and future response and oversight costs, and have in the past incurred and will in the future continue to incur response costs.

32. Because responsibility for the release or threat of release of hazardous substances at the Mine Site lies in whole or in part with BLM, plaintiffs are entitled to indemnification and reimbursement from the defendant for the costs associated with the investigation and remediation of the contamination, for response and oversight costs that may be paid to EPA, and for all attorneys' and consultants' fees incurred by plaintiffs in connection with investigating and enforcing the liability of the defendant.

FOURTH CAUSE OF ACTION

(Unjust Enrichment)

33. Plaintiffs reallege and incorporate by reference herein the allegations contained in Paragraphs 1 through 32 above as though fully set forth herein.

34. Defendant is responsible for all or a portion of the contamination detected at the Mine Site as a result of the acts described in Paragraph 11, above.

35. Defendant is liable for all costs associated with the providing of response actions at the Mine Site resulting from the release or threat of release of hazardous substances from the site.

36. As a result of payment by plaintiffs of costs of response actions at the Mine Site taken by the plaintiffs and/or by the EPA, defendant has been unjustly enriched, and plaintiffs are entitled to a judgment against defendant for the amounts of such expenditures made at time of trial, and for a declaration of liability for all sums to be expended on the Mine Site in the future by plaintiffs.

FIFTH CAUSE OF ACTION

(Declaratory Relief)

37. Plaintiffs reallege and incorporate by reference herein the allegations contained in Paragraphs 1 through 36 above as though fully set forth herein.

38. An actual controversy exists between plaintiffs and defendant in that the plaintiffs have requested that defendant, as current owner and operator of the Mine Site, and as owner of the Mine Site at the time of disposal of hazardous substances thereon, contribute to the costs of the investigation, remediation, operation and maintenance, and EPA oversight. Defendant has refused to contribute to remedial costs or to reimburse plaintiffs for costs already incurred or for such costs as will be incurred in the future.

39. Without a judicial determination setting forth the parties' rights and obligations, a multiplicity of actions may result as plaintiffs will be required to bring suit for present and future costs as they are incurred in the remediation, investigation, and operation and maintenance of the Mine Site.

40. Plaintiffs request a judicial determination that defendant is liable to plaintiffs for all past and future costs incurred by plaintiffs as alleged herein. In the event that defendant is found liable to plaintiffs for less than all such costs, plaintiffs request that the Court apportion the liability of the defendant and the plaintiffs, and grant plaintiffs judgment against the defendant for the defendant's aliquot share of such costs owed to the plaintiffs, and for attorneys' and consultants' fees incurred in the investigation and enforcement of these claims against the defendant.

WHEREFORE, plaintiffs, Vinnell Mining and Minerals Corporation and Atlas Corporation, pray for judgment as follows:

1. On their First Cause of Action, for judgment directing defendant to reimburse plaintiffs for all response costs that plaintiffs have incurred and will incur to investigate, remove and remediate the hazardous substances at the Mine Site, and for attorneys' and consultants' fees incurred in the investigation of and response to such hazardous substances, and in enforcing plaintiffs' claims against the defendant.

2. On their Second Cause of Action, for judgment directing defendant to reimburse plaintiffs for all response costs that plaintiffs have incurred and will incur to investigate, remove and remediate the hazardous substances at the Mine Site, and for attorneys' and consultants' fees incurred in the investigation of and response to such hazardous substances, and in enforcing plaintiffs' claims against the defendant.

3. On their Third Cause of Action, for judgment directing defendant to indemnify plaintiffs for all response costs that plaintiffs have incurred and will continue to incur to investigate, remove and remediate the hazardous substances at the Mine Site, and for attorneys' and consultants' fees incurred in the investigation of and response to such hazardous substances, and in enforcing plaintiffs' claims against the defendant.

4. On their Fourth Cause of Action, for judgment against defendant for all sums heretofore or hereafter expended by plaintiffs on response costs or remedial action at the Mine Site, and for attorneys' and consultants' fees.

5. On their Fifth Cause of Action, for a declaration that defendant is liable to plaintiffs for all costs of plaintiffs in investigation, removal, remediation (including operation and maintenance of remediation actions) of the hazardous substances as alleged above, and for all costs incurred by EPA in the investigation, removal, remediation (including operations and

maintenance of remediation actions), and oversight of plaintiffs' remediation actions. In the alternative, if the defendant be found to be liable to plaintiffs for less than the entire amount of costs claimed herein, then plaintiffs pray for a declaration of the amount or percentage of the defendant's liability in relation to the amount or percentage of responsibility of the two plaintiffs for such costs, and for judgment in favor of the plaintiffs against the defendant for that amount or percentage of costs for which it is responsible.

6. For prejudgment interest on the amounts awarded to plaintiffs from defendant;

7. For costs of suit herein, and for attorneys' and consultants' fees;

8. For such other and further relief as the Court may deem equitable, just and proper.

PETTIT & MARTIN

By: Paul M. Laurenza

Paul M. Laurenza D.C. Bar #217919
Richard H. Mays
William J. Hamel D.C. Bar #405278
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 637-3600

Attorneys for Plaintiffs Vinnell Mining and Minerals Corporation and Atlas Corporation

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VINNELL MINING AND MINERALS CORPORATION)
10530 Rosehaven Street, Suite 600)
Fairfax, Virginia 22030 AND)
)
ATLAS CORPORATION)
370 17th Street, Suite 3150)
Denver, Colorado 80202)
)
Plaintiffs)
)
v.)
)
BUREAU OF LAND MANAGEMENT, DEPARTMENT)
OF INTERIOR, UNITED STATES OF AMERICA)
Washington, D.C.)
)
Defendant)

MAY 30 1991

91 1321

CIVIL NO. _____

DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTERESTS

Certificate required by Rule 109
of the Local Rules of the
United States District Court of the District of Columbia

I, the undersigned, counsel of record for Vinnell Mining and Mineral Corporation and Atlas Corporation, certify that to the best of my knowledge and belief, the following are parent companies, subsidiaries or affiliates of Vinnell Mining and Mineral Corporation and Atlas Corporation which have any outstanding securities in the hands of the public.

Vinnell Mining and Mineral Corporation:
None (privately owned)

Atlas Corporation:
Atlas Precious Metals Inc. (subsidiary)
Atlas Gold Mining Inc. (subsidiary of subsidiary)

These representations are made in order that judges of this court may determine the need for recusal.

Paul M. Laurenza

Paul M. Laurenza, Esq.
Attorney of Record for

Vinnell Mining and Minerals Corp.
and Atlas Corporation

itation | Rank(R) | Database | Mode
-- F.2d ---- | R 2 OF 13 | CTA6 | P
Cite as: 1991 WL 72081 (6th Cir.(Mich.))

UNITED STATES OF AMERICA, Plaintiff,
v.
R. W. **MEYER,** INC., Defendant/Third Party, Plaintiff-Appellant, NORTHERNAIRE PLATING COMPANY, WILLARD S. GARWOOD, Defendants/Third Party, Plaintiffs-Appellees, CITY OF CADILLAC, Third Party Defendant, Fourth Party Plaintiff.
No. 89-2236
United States Court of Appeals
Sixth Circuit
Decided and Filed May 9, **1991.**

On Appeal from the United States District Court for the Western District of Michigan.

Before: GUY and BOGGS, Circuit Judges; and BERTELSMAN, District Judge.*

***1** BERTELSMAN, District Judge, delivered the opinion of the court. GUY, Circuit Judge, (pp. 13-22), delivered a separate concurring opinion in which BOGGS, Circuit Judge, joined.

This appeal involved the construction of the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) governing contribution actions among responsible parties following a cleanup of a hazardous waste site and an Immediate Removal Action by the Environmental Protection Agency (EPA). 42 U.S.C. # # 9607, 9613(f)(1).

BACKGROUND

The facts and background necessary to place this opinion in context were well stated by Chief Judge Hillman in his unpublished opinion awarding contribution, as follows:

"This matter stems from a suit brought by the United States against Northernaire Plating Company ("Northernaire") for recovery of its costs in conducting an "Immediate Removal Action" pursuant to the Comprehen-sive Environmental Response, Compensation & Liability Act (hereinafter, "CERCLA"), 42 U.S.C. # 9601, et seq. Northernaire owned and operated a metal electroplating business in Cadillac, Michigan. Beginning in 1972, it operated under a 10-year lease on property owned by R.W. **Meyer,** Inc. **("Meyer").** Northernaire continued operations until mid-1981 when its assets were sold to Toplocker Enterprises, Inc. ("Toplocker"). From July of 1975 until this sale, Willard S. Garwood was the president and sole shareholder of Northernaire. He personally oversaw and managed the day- to-day operations of the company.

"Acting upon inspection reports from the Michigan Department of Natural Resources ("MDNR"), the United States Environmental Protection Agency ("EPA") conducted an Immediate Removal Action at the Northernaire site from July 5 until August 3, 1983. Cleanup of the site required neutralization of caustic acids, bulking and shipment of liquid acids, neutralization of caustic and acid sludges, excavation and removal of a contaminated sewer line, and decontamination of the inside of the building. All of the hazardous substances found at the site were chemicals and by-products of metal electro-plating operations.

"In an earlier opinion and order dated May 6, 1988, this court found the defendants Garwood, Northernaire, and **Meyer** jointly and severally liable to plaintiff for the costs of the Immediate Removal Action under Section 107(a) of

CERCLA. 42 U.S.C. # 9607(a). United States v. Northernaire Plating Co., 670 F. Supp. 742 (W.D. Mich. 1987). The court awarded plaintiff $268,818.25 plus prejudgment interest. The court later determined the prejudgment interest due to be $74,004.97, making the total award to plaintiff $342,823.22.

"Each defendant, (Northernaire and Garwood moving together) has brought cross-claims for contribution against the other. Currently before the court are the summary judgment motions on these cross-claims.

"CERCLA specifically allows actions for contribution among parties who have been held jointly and severally liable:

***2** "(1) Contribution

"Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this sub-section shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 or section 9607 of this title.

"42 U.S.C. 9613(f)(1)." Joint App., at 414-16. Further details may be found in the opinions of the trial court and this court which imposed joint and several liability on the instant parties. [FN1] United States v. Northernaire Plating Company, 670 F.Supp. 742 (W.D. Mich. 1987); aff'd sub nom., United States v. R.W. **Meyer,** Inc., 889 F.2d 1497 (6th Cir. 1989), cert. denied, 110 S.Ct. 1527 (1990).

Apparently, the parties allowed the building to degenerate into a true environmental disaster area. As this court observed in the former appeal: "In March 1983, officials from the EPA and the Michigan Department of Natural Resources (MDNR) examined the property. Their examination was prompted by earlier reports of MDNR officials indicating that the building had been locked and abandoned and that a child had received chemical burns from playing around discarded drums of electroplating waste that were left outside the building. State tests on samples of the soil, sludge, and drum contents disclosed the presence of significant amounts of caustic and corrosive materials. During their examination of the site, EPA and MDNR officials observed drums and tanks housing cyanide littered among disarray outside the facility. Based on their observations outside the building, the officials determined that Northernaire had discharged its electroplating waste into a "catch" basin and that the waste had seeped into the ground from the bottom of the basin. The waste then entered a pipe that drained into a sewer line that discharged into the sewage treatment plant for the city of Cadillac."

Meyer, 889 F.2d at 1498-99 (footnote omitted). In the former appeal, this court affirmed the decision of the trial court finding that the damage to the site had been "indivisible" and imposing joint and several liability on the present parties to reimburse the EPA for the removal costs for the cleanup of the building. [FN2]

The total cost of the cleanup plus prejudgment interest was $342,823.22. In this subsequent contribution action, the trial court held that two-thirds of the liability should be borne by Northernaire and its principal shareholder,

each contributing one-third each. But the court held that the remaining one-third ($114,274.41) should be borne by the appellant property owner.

*3 The appellant attacks this apportionment, arguing strenuously that its responsibility should be limited to an amount apportioned according to the degree that the sewer line mentioned in the above quote contributed to the cleanup costs. Applying this approach, the appellant generously offers to pay $1,709.03. Appellees accept the trial court's apportionment.

The appellant also quibbles about certain statements made by the trial court in its opinion, stating that some facts recited were not supported by the record.

ANALYSIS

The trial court held that it was within its discretion to apply certain factors found in the legislative history of CERCLA in making its contribution apportionment. Although these factors were originally intended as criteria for deciding whether a party could establish a right to an apportionment of several liability in the EPA's initial removal action, the trial court found "these criteria useful in determining the proportionate share each party is entitled to in contribution from the other." Joint App., at 417.

The criteria mentioned are:

"(1) the ability of the parties to demonstrate that their contribution to a discharge release or disposal of a hazardous waste can be distinguished;

"(2) the amount of the hazardous waste involved; "(3) the degree of toxicity of the hazardous waste involved; "(4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;

"(5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and "(6) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment."

Id. (citing Amoco Oil Co. v. Dingwell, 690 F.Supp. 78, 86 (D.Ma. 1988), aff'd sub nom. Travelers Indemnity Co. v. Dingwell, 884 F.2d 629 (1st Cir. 1989); United States v. A & F Materials Co., Inc., 578 F.Supp. 1249 (S.D. Ill. 1984); H.R. No. 253(III), 99th Cong., 2d Sess. 19, (1985), reprinted in 1986 U.S. Code Cong. & Admin. News 3038, 3042).

The trial court recognized that the lessee was the primary actor in allowing this site to become contaminated. (Appellant argues that the lessee was the only actor.) The trial court found, however, that in addition to constructing the defective sewer line which contributed to the contamination, appellant bore significant responsibility "simply by virtue of being the landowner." Id. at 418. The trial court observed further that appellant "neither assisted nor cooperated with the EPA officials during their investigation and eventual cleanup of the ... site." Id.

Chief Judge Hillman concluded, "As it is well within the province of this court, I have balanced each of the defendants' behavior with respect to the equitable guidelines discussed." Id. at 421. As a result of the balancing, he made the apportionment described above.

*4 The trial judge was well within the broad discretion afforded by the statute in making the apportionment he did.

Congress intended to invest the district courts with this discretion in making

CERCLA contribution allocations when it provided, "the court may allocate response costs among the liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. # 9613(8)(1) (emphasis added).

Essentially, appellant argues here that a narrow, technical construction must be given to the term "contribution," so that, as in common law contribution, contribution under the statute is limited to the percentage a party's improper conduct causally contributed to the toxicity of the site in a physical sense. This argument is without merit. On the contrary, by using the term "equitable factors" Congress intended to invoke the tradition of equity under which the court must construct a flexible decree balancing all the equities in the light of the totality of the circumstances. [FN3]

"It is well established that flexibility is proper in the successful shaping ... of an equitable decree. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15, 91 S.Ct. 1267, 1275, 28 L.Ed.2d 554 reh'g denied 403 U.S. 1912, 91 S.Ct. 2200, 29 L.Ed.2d 689 (1971); United States v. City of Parma, 661 F.2d 562, 563, 576 (6th Cir. 1981)." [FN4]

In a highly persuasive decision, Charles v. Charles, 788 F.2d 960, 965 (3d Cir. 1986), the court held that a Virgin Islands statute directing courts to consider the "equity of the case" in allocating marital property required the trial court to consider marital fault. The court observed that the statute authorized the trial court to "use a variety of means to obtain an equitable result." Id. at 966.

Noting the accepted definition of "equitable," the court observed:

"In this regard, Black's Law Dictionary, 482 (5th ed. 1979) defines 'equitable' as '[j]ust; conformable to principles of justice and right. Existing in equity; available or sustainable in equity, or upon the rules and principles of equity. 'Equity' is defined as '[j]ustice administered according to fairness as contrasted with the strictly formulated rules of common law.' Id. at 484."

Id. at 965, n.13.

"The hallmark of a court of equity is its ability to frame its decree to effect a balancing of all the equities and to protect the interest of all affected by it, including the public." [FN5] Congress reemphasized that the trial court should invoke its moral as well as its legal sense by providing that the court use not just "equitable factors," which phrase already implies a large degree of discretion, but "such equitable factors as the court determines are appropriate." This language broadens the trial court's scope of discretion even further.

Thus, under # 9613(f)(1) the court may consider any factor it deems in the interest of justice in allocating contribution recovery. Certainly, the several factors listed by the trial court are appropriate, but as it recognized, it was not limited to them. No exhaustive list of criteria need or should be formulated. However, in addition to the criteria listed above, the court may consider the state of mind of the parties, their economic status, any contracts between them bearing on the subject, any traditional equitable defenses as mitigating factors [FN6] and any other factors deemed appropriate to balance the equities in the totality of the circumstances.

***5** Therefore, the trial court quite properly considered here not only the appellant's contribution to the toxic slough described above in a technical causative sense, but also its moral contribution as the owner of the site.

Review of the trial court's equitable balancing process is limited to a review for "abuse of discretion." [FN7] This is in accord with the principle of equity that the chancellor has broad discretion to frame a decree. [FN8]

This case, even though it involves over $300,000, is but a pimple on the elephantine carcass of the CERCLA litigation now making its way through the court system. Some of these cases involve millions or even billions of dollars in cleanup costs and hundreds or even thousands of potentially responsible parties.

I do not believe Congress intended to require meticulous findings of the precise causative contribution each of several hundred parties made to a hazardous site. In many cases, this would be literally impossible. [FN9] Rather, by the expansive language used in # 9613(f)(1) Congress intended the court to deal with these situations by creative means, considering all the equities and balancing them in the interests of justice. As recognized by a recent comprehensive scholarly article, this multi-factor approach takes into account more varying circumstances than common law contribution. [FN10]

"Courts are also following CERCLA Section 113(f) and taking 'equitable factors' into account in apportioning liability for response costs. The equitable factors which courts are examining in order to decide what kind of apportionment to make depend on the actual facts of each case. Nevertheless, many federal courts do consider common law equitable defenses such as unclean hands and caveat emptor as mitigating factors in deciding liability for response costs. This approach is in line with Congressional intent as long as courts do not consider these equitable defenses to be a total bar to a liability action, but merely mitigating factors in awarding damages. Courts are also using a modified comparative fault analysis that takes numerous factors such as culpability and cooperation into account in apportioning damages." [FN11] Although such an approach "cannot be applied with mathematical precision, it is the fairest and most workable approach for apportioning CERCLA liability. [FN12] Such an approach furthers the legislative intent of encouraging the prompt cleanup of hazardous sites by those equitably responsible. [FN13] The parties actually performing the cleanup can look for reimbursement from other potentially responsible parties without fear that their contribution actions will be bogged down by the impossibility of making meticulous factual determinations as to the causal contribution of each party. Chief Judge Hillman was well within the equitable discretion afforded him by Congress in the way he handled this CERCLA contribution action.

AFFIRMED.

RALPH B. GUY, JR., Circuit Judge, concurring. Although I concur in the result reached by Judge Bertelsman, I write separately because this area of the law is both new and complex. In many, if not most, of these cases arising under CERCLA, multi-party liability will be involved. Unfortunately, for the parties as well as the courts, the sorting out of responsibility is not an easy task. I view this particular case as a close one, and want to set forth in more detail my reasons for concurrence.

I.

*6 Appellate review of a district court's findings of fact is controlled by the "clearly erroneous" rule. Fed. R. Civ. P. 52(a). Consequently, a district

court's findings of fact shall not be set aside unless clearly erroneous, and that occurs "when[,] although there is evidence to support [the finding], the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Loudermill v. Cleveland Bd. of Educ., 844 F.2d 304, 308 (6th Cir.), cert. denied, 488 U.S. 941 (1988) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). It is pursuant to this standard that we review **Meyer's** claim that the court's decision allocating clean-up costs relied on findings of fact not supported by the record. The main thrust of this argument is that there was insufficient evidence to support a finding of causation between **Meyer's** negligent activity and the condition ultimately requiring the EPA response. "A district court's ultimate and subsidiary findings concerning causation, negligence, nuisance, trespass, actual damages, and punitive damages, are all factual determinations included within the scope of Rule 52(a)." Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1198 (6th Cir. 1988) (footnotes omitted). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, this court may not reverse the trial court even though we would have weighed the evidence differently had we been sitting as the trier of fact. Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985).

A different standard is employed, however, when reviewing **Meyer's** claim that the trial court erred when it included **Meyer's** status as a landowner among the relevant equitable considerations. In Loudermill, we looked to the language of the governing statute to determine the standard for reviewing the lower court's award of attorney fees, and determined that an abuse of discretion standard was required. 844 F.2d at 308-09. Here, the governing statute provides that, "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. # 9613(f)(1) (emphasis added). The clear language of the statute states that the court will be free to allocate responsibility according to any combination of equitable factors it deems appropriate. See O'Neil v. Picillo, 883 F.2d 176, 183 (1st Cir. 1989), cert. denied, 110 S. Ct. 1115 (1990). Consequently, it is within the trial court's discretion to determine what considerations are relevant to apportioning costs, and only when the court clearly abuses that discretion can we reverse that determination. Similarly, and for reasons set forth below, **Meyer's** claim that the court improperly balanced the equitable factors, thereby unfairly apportioning CERCLA costs, must be reviewed under an abuse of discretion standard.

II.

A.

***7 Meyer** first contends that the court erroneously attributed the buildup of hazardous waste on the premises to a defective sewer line constructed by **Meyer** to carry discharge from the electroplating plant to a sewer line belonging to the City of Cadillac. **Meyer** acknowledges that it constructed the sewer line in question and concedes responsibility for excavation and decontamination of the line, but asserts that the record does not support the finding that defects in the sewer line were the cause of Northernaire's inability to dispose safely of the toxic substances. Instead, the buildup of waste on the premises that led to the subsequent EPA response and a substantial portion of the response costs, according to **Meyer,** can be attributed to the city's revocation of Northernaire's permit to discharge waste into the city's

sewage system. Contending that the city revoked the permit because Northernaire exceeded the permitted levels of waste discharge, and not because the sewer line constructed by **Meyer** leaked, **Meyer** argues that the court erred in finding that construction defects in the sewer line contributed to Northernaire's inability to remove hazardous waste from the building.

While one of the district court's findings was in error, we do not believe that this mistake makes its apportionment of the amount due clearly erroneous. The district court found that **Meyer's** failure to construct and maintain an adequate sewer line contributed to Northernaire's failure to properly dispose of the waste. This finding is in error because Northernaire's failure to dispose of the waste was directly tied to the revocation of its permit for disposal into the city's sewers, and **Meyer's** faulty sewer had nothing to do with this revocation. The sewer permit was revoked because the concentration of toxic wastes was too high, and the sewer merely carried the already highly concentrated wastes from Northernaire's building to the city's sewers. While the city did state that "[p]ermanent reduction through sound management practices incorporating well-designed and constructed pre-treatment facilities is the only solution[,]" sewer lines are not part of pre-treatment facilities. Sewers only carry the waste water that has already passed through pre-treatment facilities. As **Meyer** had no contractual responsibility in the construction of the building for the provision of pre-treatment facilities, providing only the plumbing, sewers, and concrete slab under the building, **Meyer** had no contractual responsibility for the revocation of the sewer permit.

This finding, however, does not require us to hold that the district court's apportionment of costs was clearly erroneous. CERCLA gives wide discretion to the district court in establishing levels of contribution and permits the evaluation of other factors besides direct causation. **Meyer's** involvement with Northernaire extended well beyond the failure to provide an adequate waste water disposal system. **Meyer** disputes this, and specifically assails the trial court finding that **Meyer** was instrumental in the negotiations which brought Northernaire to Cadillac. Yet, Robert **Meyer's** own deposition supports the finding that **Meyer** was interested in developing its property for industrial use; that **Meyer** pursued this interest by entering lease negotiations with Northernaire officials, which subsequently led to the collection of rent; that **Meyer** contracted with Northernaire to build its facility; and that **Meyer** arranged construction of the building which housed Northernaire, fully aware of the nature of the manufacturing to be conducted on the site. Therefore, **Meyer's** contention that the trial court erroneously based its decision on findings of fact not supported by the record must be rejected.

B.

***8** Before Congress confirmed the right to contribution by amending CERCLA in 1986, 42 U.S.C. # 9613(f)(1), courts looked to the 1980 legislative history of CERCLA to sustain a defendant's right to contribution and to determine criteria for apportioning contribution. Colorado v. Asarco, Inc., 608 F. Supp. 1484, 1489 (D. Colo. 1985); United States v. A & F Materials Co., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984). Although Congress clarified the right to contribution in 1986, it provided no further guidance as to the considerations for apportioning contribution, other than to say that the court may use "such equitable factors as the court determines are appropriate." 42 U.S.C. # 9613(f)(1). Consequently, the lower court in this case, as other courts have

done, looked to the 1980 Senate and House bills for guidance in determining the proportionate share each party is entitled to in contribution from the other. Amoco Oil Co. v. Dingwell, 690 F. Supp. 78, 86 (D. Me. 1988), aff'd sub nom. Travelers Indem. Co. v. Dingwell, 884 F.2d 629 (1st Cir. 1989). The pertinent language of the House bill states: [FN14]

In apportioning liability under this subparagraph, the court may consider among other factors, the following:

(i) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished;

(ii) the amount of the hazardous waste involved;

(iii) the degree of toxicity of the hazardous waste involved;

(iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;

(v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and

(vi) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.

126 Cong. Rec. 26,779, 26,781 (1980) (emphasis added). See also H.R. Rep. No. 253(III), 99th Cong., 1st Sess. 19 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News 2835, 3042.

Although **Meyer** acknowledges that section 107(a) of CERCLA, 42 U.S.C. # 9607(a), provides that landowners shall be liable for the costs of removal actions, **Meyer** argues that the court erred by including its status as a landowner among the factors for determining the allocation of costs among liable parties. Implicit in **Meyer's** argument is the contention that it is improper for the court to go beyond a consideration of the apportionment criteria enumerated in the House bill. **Meyer's** claim of error is not persuasive.

First, as indicated by the emphasis provided in the quoted legislative provisions, the language of the original bills simply provided that the court could apportion damages according to the listed criteria. Second, because the apportionment criteria were not retained in CERCLA as finally enacted, they are not mandated by Congress. [FN15] Although there is authority for the proposition that Congress implicitly retained the essence of the Gore factors and intended to reject only mandatory legislative standards, A & F Materials, 578 F. Supp. at 1256-57, the deletion of the criteria also supports the proposition that Congress intended the court to have flexibility in determining apportionment. See Asarco, 608 F. Supp. at 1489. Finally, Congress's clear expression in the 1986 amendments to CERCLA that the court may use "such equitable factors as the court determines are appropriate," 42 U.S.C. # 9613(f)(1), confirms the legislative intent to grant courts flexibility in exercising their discretion. See also H.R. Rep. No. 253(I), 99th Cong. 1st Sess. 1, 80 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News 2835, 2862 ("courts are to resolve such claims on a case-by-case basis, taking into account relevant equitable considerations"). Consequently, the criteria are neither mandatory nor necessarily exclusive of other considerations when apportioning damages among contributing tortfeasors under CERCLA.

***9** Insofar as the court considered **Meyer's** landowner status as bearing on its relative contribution to the events necessitating the removal action, such

consideration does not represent an abuse of discretion when the court viewed the landowner status in combination with other relevant factors. The district court's decision was not guided solely by **Meyer's** landowner status but, rather, by the actions he took or failed to take as the landowner. Landowner status provided **Meyer** with the opportunity to solicit Northernaire to conduct business on the site-business which involved the use of highly corrosive and caustic substances. Knowing the business to be conducted on its property, **Meyer** then built and leased to Northernaire a sewer line inadequately designed and constructed for the disposal of the waste generated by Northernaire's electroplating operations. **Meyer's** status as landowner, when viewed in combination with actions taken by **Meyer** that determined the manner in which its property would be used, is a permissible consideration in determining **Meyer's** degree of involvement in the events precipitating the removal action.

C.

Meyer next argues that the court unfairly apportioned the liability under CERCLA through an improper balancing of the equitable factors in this action. CERCLA is silent as to the methodology to be applied when apportioning costs among liable parties. However, if anything can be gleaned from a reading of the legislative history, particularly the six criteria utilized by the trial court, it is that Congress sought to impose upon the judiciary an obligation to apportion responsibility in a fair and equitable manner. As long as the trial court does not arbitrarily or unreasonably ignore the comparative fault of the parties, where there is a reasonable basis for allowing that comparison to be made, its determination will not be set aside. See United States v. Conservation Chem. Co., 628 F. Supp. 391, 401-02 (W.D. Mo. 1985).

This reading of CERCLA is consistent with previous holdings that, where joint and several liability is imposed, courts must consider traditional and evolving principles of federal common law. United States v. Monsanto Co., 858 F.2d. 160, 171 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); United States v. Chem-Dyne, 572 F. Supp. 802, 808-10 (S.D. Ohio 1983). In Monsanto, the Fourth Circuit held that the principles reflected in the Restatement (Second) of Torts represented the correct and uniform rules applicable to CERCLA cases. 858 F.2d at 172. The proper standard for contribution is that contained in section 886A of the Restatement. Asarco, 608 F. Supp. at 1490;

Sands Springs Home v. Interplastic Corp., 670 F. Supp. 913, 917 (N.D. Okla. 1987). Section 886A reads as follows:

(1) Except as stated in Subsections (2), (3) and (4), when two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them, even though judgment has not been recovered against all or any of them.

***10** (2) The right of contribution exists only in favor of a tortfeasor who has discharged the entire claim for the harm by paying more than his equitable share of the common liability, and is limited to the amount paid by him in excess of his share. No tortfeasor can be required to make contribution beyond his own equitable share of the liability.

(3) There is no right of contribution in favor of any tortfeasor who has intentionally caused the harm.

(4) When one tortfeasor has a right of indemnity against another, neither of them has a right of contribution against the other.

Restatement (Second) of Torts # 886A (1982) (emphasis added)

The pertinent inquiry under the Restatement is whether the court required **Meyer** to make contribution beyond its own equitable share of the liability. If the contribution ordered by the court arguably reflects the relative fault of each of the parties, as established by a fair reading of the facts, then the contribution **Meyer** appeals is not beyond his own equitable share. See Restatement (Second) of Torts # 886A, comment h. See also Monsanto, 858 F.2d. at 173, n.29 ("the language of CERCLA's new contribution provisions reveals Congress' concern that the relative culpability of each responsible party be considered in determining the proportionate share of costs each must bear").

Because the relative fault of parties to a contribution action will depend upon the factual circumstances, **Meyer's** claim must be reviewed by examining whether the equitable considerations employed by the trial court, when applied to the facts of this case, support the conclusion that the court properly exercised its discretion.

The court established that **Meyer** was instrumental in efforts to bring Northernaire to Cadillac, was fully aware of the nature of the manufacturing to be conducted on the site, built the building that housed the facility, and failed to construct or maintain an adequate sewer line. Applying these facts to the first criterion listed among the Gore factors, the court could fairly determine that **Meyer** had not demonstrated that its contribution to the events precipitating the government's cleanup were limited to the defective sewer line. Furthermore, the same facts applied to the fifth criterion support the conclusion that **Meyer** failed to exercise care with respect to the hazardous waste that was produced on its property.

It cannot be said that the court unfairly overlooked the responsibility of Northernaire and Garwood in apportioning relative liability in this contribution action. On the contrary, the court concluded that Northernaire and Garwood were the primary actors involved in the generation, transportation, treatment, storage, and disposal of the effluents. In addition, the court determined that Northernaire and Garwood bore heavy responsibility for knowingly and carelessly leaving substantial amounts of contaminated wastes in the facility. For these reasons, the court placed the majority of the costs of the immediate removal action upon Northernaire and Garwood. Consequently, placing one-third responsibility on **Meyer** does not represent such an unfair and inequitable allocation of fault as to constitute an abuse of discretion.

***11 Meyer** argues, finally, that although none of the parties participated in the EPA investigation or clean-up, the court weighed **Meyer's** lack of cooperation against him, while ignoring that Northernaire and Garwood also did not cooperate. This contention lacks merit. The court's opinion clearly discusses and considers the "wholly uncooperative" behavior of Northernaire and Garwood throughout the investigation, and concludes that this behavior indicates a total disregard for their responsibilities.

Contribution actions among parties held jointly and severally liable under CERCLA often involve complex factual scenarios associated with multi-party liability and necessarily require courts to perform a case-by case-evaluation when allocating the cost for clean-up of hazardous waste. Under the facts of this case, it cannot be said that the court improperly balanced the equitable factors relevant to resolving contribution claims under CERCLA.

FN* William O. Bertelsman, United States District Judge for the Eastern

District of Kentucky, sitting by designation.

FN1 The statutory scheme of CERCLA is well described in Barr, CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 45 Bus. Law. 923 (1990); See also, Developments in the Law-Toxic Waste Litigation, 99 Harv. L. Rev. 1458 (1986)(published before 1986 amendments).

FN2 Joint and several liability may be imposed on a responsible party, even though its role in creating the hazardous site was small, if the harm is indivisible. It may then seek contribution from other potential responsible parties in an action such as the instant case. See e.g., The Anspec Co., Inc. v. Johnson Controls, Inc., 922 F.2d 1240 (6th Cir. 1991); United States v. Western Processing Co., Inc., 734 F.Supp. 930, 942 (W.D. Wash. 1990); CERCLA Made Simple, supra, at 977-79, 990-93.

FN3 The pertinent legislative history reads: "New subsection 113(g)(1) of CERCLA was also amended by the Committee to ratify current judicial decisions that the courts may use their equitable powers to apportion the costs of clean-up among the various responsible parties involved with the site. The Committee emphasizes that courts are to resolve claims for apportionment on a case-by-case basis pursuant to Federal common law, taking relevant equitable considerations into account. Thus, after all questions of liability and remedy have been resolved, courts may consider any criteria relevant to determining whether there should be an apportionment." H.R. 253(III), 99th Cong., 2d Sess. 19, (1985), reprinted in 1986 U.S. Code Cong. & Admin. News 3038, 3041-42.

FN4 United States v. City of Birmingham, Mich., 727 F.2d 560, 566 (6th Cir. 1984); accord S.Childress & M.Davis, Standards of Review # 4.16 (1986).

FN5 Kay v. Mills, 490 F.Supp. 844, 855 (E.D. Ky. 1980) (citing W. DeFuniak, Handbook of Modern Equity # 25 (1956); H. McClintock, Equity # 70 (2d ed. 1948); D. Dobbs, Remedies 52-57 (1973)).

FN6 Appellant here did not argue the defense of "clean hands." Apparently, it accurately recognized that in a contribution action the plaintiff will almost never have clean hands, since the action is brought as a responsible party, seeking to recoup some of its cleanup costs from other responsible parties. However, the relative culpability of the parties is one of the "equitable factors" the trial court may consider as the trial judge did here.

FN7 S. Childress, supra note 5, # 4.16; cf. Voest-Alpine Trading USA Corp. v. Vantage Steel Corp., 919 F.2d 206 (3d Cir. 1990); Fuller v. Quire, 916 F.2d 358 (6th Cir. 1990); Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291 (6th Cir. 1989).

FN8 Cf., In re Chicago, Milwaulkee, St. P. & Pac. R.R., 841 F.2d 789 (7th

Cir. 1988); Charles v. Charles, 788 F.2d 960 (3d Cir. 1986); Rivers v. Washington County Bd. of Educ., 770 F.2d 1010 (11th Cir. 1985); First Commodity Traders, Inc. v. Heinold Commodities, Inc., 766 F.2d 1007 (7th Cir. 1985); Grand Union Co. v. Cord **Meyer** Development Co., 761 F.2d 141 (2d Cir. 1985).

FN9 See e.g., United States v. Monsanto Co., 858 F.2d 160, 172 (4th Cir. 1988), cert. denied, 109 S.Ct. 3156 (1989). In O'Neil v. Picillo, 883 F.2d 176 (1st Cir. 1989), cert. denied, 110 S.Ct. 1115 (1990), the court noted the presence of at least 10,000 barrels of waste at a site, the origin of most of which was undeterminable.

FN10 Russo, Contribution under CERCLA, 14 Col. J. Env. L. 267, 276-81 (1989).

FN11 Id. at 286.

FN12 Id..

FN13 Cf. The Anspec Co., Inc. v. Johnson Controls, Inc., 922 F.2d 1240 (6th Cir. **1991**).

FN14 The language provided here is from section 3071(a) of H.R. 7020, which does not differ substantially from section 4(f) of S. 1480, except that the Senate bill did not include the sixth factor. These criteria are commonly known as the "Gore Factors," named after Representative Gore who introduced them as part of an amendment to H.R. 7020.

FN15 In the compromise version of S. 1480, the explicit contribution provision and apportionment criteria found in section 4(f) were replaced by section 107(e)(2), 42 U.S.C. # 9607(e)(2), which has been interpreted as preserving claims for contribution under CERCLA, even though not explicitly establishing a right to contribution.

C.A.6, 1991
u.s. v. **Meyer**
--- F.2d ----, 1991 WL 72081 (6th Cir.(Mich.))
END OF DOCUMENT