Nos. 07-1601, 07-1607 (Consolidated)

# In the Supreme Court of the United States

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY,

PETITIONERS,

v.

UNITED STATES OF AMERICA, ET AL.,

RESPONDENTS.

SHELL OIL COMPANY,

PETITIONER,

v.

UNITED STATES OF AMERICA, ET AL.,

RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR PETITIONERS THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY AND UNION PACIFIC RAILROAD COMPANY

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## QUESTION PRESENTED

Whether the Ninth Circuit erred by reversing the district court's reasonable apportionment of responsibility under CERCLA, and by adopting a standard of review and proof requirements that depart from common-law principles and conflict with decisions of other circuits.

## LIST OF PARTIES AND RULE 29.6 STATEMENT

BNSF Railway Company ("BNSF"), whose name changed from The Burlington Northern and Santa Fe Railway Company, is the successor in interest to the Atchison Topeka and Santa Fe Railway Company. BNSF has publicly traded debt securities listed on the New York Stock Exchange. BNSF is also a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation, which is a publicly held corporation whose common stock is listed on the New York Stock Exchange, Chicago Stock Exchange, and Pacific Exchange. Approximately 18.5% of the stock of Burlington Northern Santa Fe Corporation is owned by Berkshire Hathaway Inc.

Union Pacific Railroad Company ("UPRR") was formerly known as Southern Pacific Transportation Company. Union Pacific Corporation owns 62.6% of UPRR's stock, and also wholly owns Southern Pacific Rail Corporation. Union Pacific Corporation has issued publicly traded securities, and UPRR has issued publicly traded debt securities.

Also petitioning from the decision below, by separate petition for certiorari, is:

Shell Oil Company ("Shell"), a wholly owned subsidiary of Shell Petroleum, Inc.

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## OPINION BELOW

The amended opinion of the U.S. Court of Appeals for the Ninth Circuit and the dissent from the denial of rehearing en banc (Pet.App.-1a-81a) are reported at 502 F.3d 781.

## JURISDICTION

The Ninth Circuit entered judgment and denied petitions for rehearing en banc on March 25, 2008. Petitioners timely filed petitions on June 23, 2008. This Court granted certiorari on October 1, 2008 and has jurisdiction pursuant to 28 U.S.C. §1254(1).

## STATUTORY PROVISIONS INVOLVED

The addendum at the back of this brief (Add.-3a-7a) reproduces the relevant text of the Comprehensive, Environmental, Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§9601 et seq.

## STATEMENT OF THE CASE

CERCLA authorizes the government to seek reimbursement from "covered persons" for the cost of remediating hazardous waste sites. *See* 42 U.S.C. §9607(a). Congress declined to enact provisions that would have made all covered persons jointly and severally liable, and chose instead to rely on common-law principles to govern apportionment of liability. As numerous courts have recognized, the common law favors apportionment so long as a "reasonable basis" can be found for a "rough estimate" of each party's causal contribution. *See* Restatement (Second) of Torts §433A & cmt. b (1965) ("Second Restatement").

The potentially responsible parties ("PRPs") in this case include the owner and operator of an agricultural

chemical distribution facility (Brown & Bryant, or "B&B"); the maker of some of the chemicals distributed there ("Shell"); and petitioners Union Pacific Railroad Company and The Burlington Northern and Santa Fe Railway Company (the "Railroads")—who were the passive owners of a small adjacent parcel of land ("the Railroad parcel") that B&B leased, for less than half of the relevant time period, primarily for use as a parking lot. The lion's share of the response costs is attributable to investigation and remediation of soil and groundwater contamination on and underneath B&B's property ("the B&B parcel"), which represented 80% of the site. After a 27-day trial, the district court made detailed findings supporting its determination that the Railroads' liability could be apportioned at 9% by reference to the relative sizes of the land parcels, the length of time each was used, and the particular chemicals spilled on each.

That figure was reasonable and resolved all uncertainty by overstating the Railroads' relative responsibility. In what the Ninth Circuit later described as an "exceedingly detailed" 185-page opinion, Pet.App.-15a, the district court compared both the frequency of and relative risk posed by the spills on each parcel and determined:

(1) that the Railroad parcel was used far less intensively, such that the activities giving rise to spills on the B&B parcel were "at least ten times greater" than the "relatively limited extent of hazardous release-producing activities on the Railroad parcel," Pet.App.-251a;

(2) that the groundwater contamination that drove the need for remediation was located almost

exclusively (99%+) under a sump and pond on the B&B parcel, Pet.App-104a-05a;

(3) that spills of these volatile chemicals were extremely unlikely to reach groundwater unless they were mixed with a substantial volume of water at the surface, Pet.App.-98a; and

(4) that spills mingled with water occurred overwhelmingly on the B&B parcel, where B&B dumped thousands of gallons of rinsate a month directly into the wet sump and pond, Pet.App.-247-48a; JA-367.

Indeed, the district court expressed doubt that the spills on the Railroad parcel contributed to the groundwater contamination *at all*, and ultimately concluded that the Railroads were not responsible for any expenses relating to one of the three chemicals at the site. Pet.App.-102a-03a, 248a, 251a.

The Ninth Circuit "d[id] not fault the district court's factfinding," Pet.App.-38a, but nevertheless reversed and held the Railroads jointly and severally liable for the entire cleanup, Pet.App.-43a-44a. The panel held that apportionment requires "records" showing with "precision" exactly what chemicals were spilled, where, and when—and that any uncertainty must be resolved in favor of joint and several liability to maximize the odds that some solvent PRP, even if minimally responsible, can be saddled with the entire loss. In this context, that rule means that the owners of an ancillary parcel leased on average for less than $1,000 per year will be held jointly and severally liable for tens of millions to clean up contamination they did not cause on property they never owned.

The Ninth Circuit's approach disregards the common-law principles that Congress intended to govern apportionment under CERCLA, in the service of the court's own flawed conception of public policy. Eight judges dissented from the denial of rehearing en banc, explaining that the panel "applie[d] CERCLA in a novel and unprecedented way to impose impossible-to-satisfy burdens on CERCLA defendants," Pet.App.-57a (footnote omitted), and that "[t]he whole point of Restatement §433A is that no *specific* evidence is required for apportionment so long as the evidence and method used are 'reasonable,'" Pet.App.-69a-70a. This case presents a clear example of liability that would be apportioned at common law and, as the district court observed, a ruling to the contrary "takes strict liability beyond any rational limit." Pet.App.-245a.

The Ninth Circuit's decision should be reversed.

## I. STATUTORY BACKGROUND

1. CERCLA, enacted in 1980, was a radical statute tempered by traditional principles. CERCLA imposed expansive, retroactive liability for cleanup of environmental contamination that occurred decades or more ago, on classes of contemporary PRPs that frequently bear no fault for that contamination in any ordinary sense. Even "'innocent' private parties …. not responsible for contamination," such as an uninvolved landlord, "may fall within the broad definitions of PRPs." *United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2336 (2007).

Congress did not, however, abandon traditional principles allowing for apportionment based on causal responsibility. Congress declined to adopt the express,

mandatory impositions of joint and several liability that existed in versions of CERCLA that passed the House and were reported out of committee in the Senate. H.R. 85, 96th Cong. (1980) and S. 1480, 96th Cong. (1979). Fearing that such a regime would "impose financial responsibility for massive costs and damages awards on persons who contributed minimally (if at all) to a release or injury," 126 Cong. Rec. 30972 (1980), sponsors eliminated any mention of joint and several liability "to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases," *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983). Senator Jennings Randolph, a co-sponsor of S. 1480, explained that "we have deleted any reference to joint and several liability, relying on common law principles to determine when parties should be severally liable." 126 Cong. Rec. 30932 (1980); *see also* H.R. Rep. No. 96-1016(1), pt. 1, at 34 (1980) ("Where a defendant establishes that only a portion of the total costs incurred ... may be reasonably attributable to him in light of his activities with respect to hazardous wastes …, he will be required to pay only the amount of such costs, and the remainder of total costs incurred by the Fund or paid by other liable parties.").[1] CERCLA also established the "Superfund," and California established a similar account, to fund

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[1] "Liability" under CERCLA "shall be construed to be the standard of liability" under the Clean Water Act ("CWA"). 42 U.S.C. §9601(32) (citing 33 U.S.C. §1321). The CWA mandates strict liability but imposes joint and several liability only "'under appropriate circumstances.'" *Chem-Dyne*, 572 F. Supp. at 807 (citation omitted).

remediation of contamination when the responsible party is insolvent or no longer exists. 42 U.S.C. §9611; Cal. Health & Safety Code §§25300-25395.45.

2. The leading case, since followed by all subsequent appellate courts to address the issue, held that Congress intended the scope of liability under CERCLA to be governed by "traditional and evolving principles of common law," as articulated in §433A of the Second Restatement. *Chem-Dyne*, 572 F. Supp. at 807-08, 810.[2] The Restatement provides that "[d]amages for harm are to be apportioned among two or more causes where (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm." §433A. One illustration suggests that "where the cattle of two or more owners trespass upon the plaintiff's land and destroy his crop," the resulting damages should "be apportioned among the owners of the cattle, on the basis of the number owned by each, and the reasonable assumption that the respective harm done is proportionate to that number." Second Restatement

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[2] When Congress passed the Superfund Amendments and Reauthorization Act in 1986, reforming CERCLA and providing additional funding to the Superfund program, it had a second opportunity to consider CERCLA's standard of liability. The relevant legislative history reaffirmed that "[e]xplicit mention of joint and several liability was deleted from CERCLA in 1980 to allow courts to establish the scope of liability through a case-by-case application of 'traditional and evolving principles of common law' and pre-existing statutory law." H.R. Rep. No. 99-253(I) at 74 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2856 (citations omitted). The House Energy and Commerce Committee noted that it "fully subscribe[d]" to the court's reasoning in the "seminal case" of *Chem-Dyne*. *Id.*

§433A cmt. d. Another example suggests that if two defendants "operating the same plant, pollute a stream over successive periods," responsibility should be apportioned in proportion to the length of time each operated the facility—on the premise that total pollution would be roughly proportionate to length of operation. *Id.* cmt. c. If no "reasonable basis" for apportionment can be identified, even after making "reasonable assumption[s]" like these, the Second Restatement calls for joint and several responsibility.

## II. FACTUAL BACKGROUND

The district court's detailed factual findings, the vast majority of which have not been challenged on appeal, clearly reveal that apportioning the response costs by reference to land area, time of operation, and type of chemical is reasonable and, if anything, overstates the Railroads' share of causal responsibility.

### The Arvin Site

B&B began operating an agricultural chemical distribution facility on the 3.8-acre B&B parcel in 1960. Pet.App.-85a. B&B would store, mix, and load into application rigs agricultural chemical products, which it sold to local growers. Pet.App.-88a; JA-247a-48a. B&B was a "sloppy operator," Pet.App.-130a, and its activities ultimately contaminated the soil and groundwater.

B&B stored and distributed the weed killer dinoseb, and the pesticides D-D and Nemagon. Pet.App.-88a. Dinoseb does not evaporate rapidly and has only "moderate solubility" in water. Pet.App.-99a. D-D and Nemagon, by contrast, are volatile chemicals designed to evaporate rapidly and "fume" when

injected into soil, and also are "very soluble" in water. Pet.App.-105a, 100a. A D-D or Nemagon spill is therefore highly likely to evaporate away unless significant amounts of water are present. "In the absence of added water," the district court found, "a spill of at least 500 gallons (on bare soil) or in excess of 10,000 gallons (on intact asphalt), of a volatile chemical such as 1,2-DCP," one of the major constituents of D-D, "would be required ... before a spill would reach groundwater in concentrations sufficient to require a remedial response." Pet.App.-98a-99a. But when a chemical like D-D mixes with water it "could not readily volatize due to the pressure of the water overlying it." Pet.App.-105a.

An overhead photograph showing the geography of the Arvin site appears in the addendum. The B&B parcel was graded toward an unlined pond in the southeast corner (bottom left in the picture). Pet.App.-95a; Add.-2a. B&B installed an unlined sump near a wash rack on its parcel in 1960, which connected directly to the pond. Pet.App.-96a, 111a, 251a; RR SER 342.[3] The sump was approximately 35-by-35 feet across, at least 10 feet deep, and contained several feet of water at any given time. JA-114-15, 118-19. B&B did not line the sump and the pond until 1979. Pet.App.-95a, 111a.

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[3] "RR SER" and "Shell SER" refer to the Supplemental Excerpts of Record filed in the Ninth Circuit by the Railroads and Shell, respectively. "US SER" refers to the Supplemental Joint Excerpts of Record filed by the United States and the State of California.

In 1975, B&B began leasing the 0.9-acre Railroad parcel, located to the west of its property, for $410 a year. Pet.App.-83a, 85a; RR SER 354. The Railroad parcel appears at the top of the photograph, above the warehouses lining the western edge of B&B's property. B&B did not construct a pond, sump, or wash rack on the Railroad parcel. JA-127-28. The Railroad parcel was largely separated from the B&B parcel by the warehouses and by a rail spur. Pet.App.-86a. The district court found that a "small pipe" under the spur allowed surface run-off from the Railroad parcel to drain onto the B&B parcel. Pet.App.-95a.

**Differences in the Nature of Operations on the B&B Parcel and the Railroad Parcel**

1. The B&B parcel was the heart of B&B's operations, both before and after B&B leased the Railroad parcel. The district court found that most of the "[m]ixing, formulating, loading, and unloading of ag-chemical hazardous substances" occurred there. Pet.App.-247a-48a.

Workers used the wash rack on the B&B parcel to rinse out residual D-D and other chemicals from 2,000 to 2,600-gallon four-wheeled "nurse tanks" and two-ton trucks known as "bobtails" that were mounted with 1,800- to 2,000-gallon tanks. Pet.App.-93a, 111a; 255a. One veteran B&B worker, Lonnie Merryman, testified that during the busy season the wash rack was in use "[p]robably every hour it was open," with three tanker trucks "probably [getting] washed out at least two or three times" every day. JA-130, 133.

These activities discharged an enormous amount of contaminants mixed with water into the sump and surrounding area. As much as 2,000 to 4,000 gallons of

rinse water were dumped into the sump every month. Pet.App.-251a; JA-367. As one worker described it, "everything that [B&B] ever drained out of any tank went into [the sump.] They didn't spare anything. Nemag[o]n, DD, whatever, it all went in there." JA-68-69. Merryman stated that the B&B workers "could never pump [the bobtail truck tanks] completely dry. They would probably have five to ten gallons, sometimes 20 gallons [of D-D] left in a truck." JA-132. This residual D-D either drained into the sump or ran off into the ground next to one of the concrete wash pads. *Id.* The district court calculated that from 1960 to 1983, rinsing out D-D bobtails and nurse tanks at the wash rack resulted in the discharge of 205 and 168 gallons of D-D per year, respectively. Pet.App.-254a-255a.

Tanker deliveries of D-D contributed an additional 81 gallons spilled per year on the B&B parcel. Pet.App.-254a. Merryman said it was difficult to estimate the quantity of such spills; sometimes they "were just a few cupfuls," whereas "other times they would fill a 5-gallon bucket, no problem." JA-125. Finally, the process of loading bobtails on the B&B parcel "resulted in leaks and spills on a daily basis." Pet.App.-254a. The district court estimated that these transfers resulted in a discharge of 7 gallons of D-D per year. Pet.App.-254a.

2. The district court found that during the period covered by the lease B&B only used the smaller Railroad parcel "for vehicle and equipment storage, washing[,] and limited loading-unloading of agricultural chemicals, not active operations or maintenance." Pet.App.-247a. B&B parked "pull rigs" (a 500- or 600-gallon tank mounted on a two-wheel trailer, used to

apply D-D to fields), occasionally parked D-D nurse tanks, stored 55-gallon drums and 5-gallon cans of dinoseb, and temporarily stored empty drums and cans of Nemagon and dinoseb before crushing them on the B&B parcel and sending them off-site. Pet.App.-90a-95a. B&B never kept any permanent bulk storage tanks on the Railroad parcel. JA-128.

Witnesses described the spills on the Railroad parcel as accidental and sporadic events, caused by a broken sight gauge on a D-D rig or the run-off from hosing out the adjacent B&B warehouse before "occasional company barbeques." Pet.App.-91a-92a, 94a. One B&B worker testified that over the course of nearly four years he never saw any ruptured tank, broken line, or spilled chemical on the Railroad parcel. JA-55-56. John Brown, the son of the founder of B&B, testified that he had no "personal knowledge" of *any* D-D spills taking place on the Railroad parcel. JA-222. Brown recalled leaks from the 5-gallon dinoseb cans occurring "[e]very once in a while," or "three or four times at least." JA-347. Spills that others saw were relatively insignificant. When B&B workers checked the filters on D-D nurse tanks—which they did from time to time on the Railroad parcel but preferred to do near the wash rack—resulting spills were about a pint or quart of D-D or less than a gallon of D-D rinsate. JA-140-42. The empty cans and drums stored temporarily on the Railroad parcel also caused only "small leaks." JA-135.

3. The district court took repeated notice of the disparity in activity and spills on the respective parcels—a disparity plainly depicted by the site map and photograph included in the addendum. At the summary judgment hearing before trial, the district

court observed that based on its assessment of the "evidence in gross," the spills on the Railroad parcel likely constituted "less than 10 percent, probably less than 5 percent" compared to the spills on the B&B parcel. JA-76.

After trial, at a hearing on cross-motions to amend the district court's preliminary findings and conclusions, the court observed that, in contrast to the Railroad parcel, the B&B parcel had "loading, formulating, tremendous activities .... [A]ll of the different facilities, the storage tanks, the loading docks, the wash pads, all ... that was at the Brown & Bryant parcel, which was 80 percent of the surface area of the site." JA-611. The court continued that "I think 80 percent would be an understatement of what's going on day in and day out in terms of the spilling, the washing, the introduction of water," and that "the evidence the Court believes showed that there was simply less washing, less surface water that was nonprecipitation introduced to the railroad parcel than there was to the Brown & Bryant site." *Id.* Ultimately, the district court concluded that "[t]he volume of hazardous substance releasing activities on the B&B property is at least ten times greater than any Railroad parcel releases." Pet.App.-251a.

**Cause of Harm at the Arvin Site**

B&B's activities contaminated the facility's soil and underlying groundwater. Pet.App.-130a. The district court found that the "overwhelming contaminant mass is on and under the B&B parcel." Pet.App.-102a. And the court's detailed findings confirm that its apportionment could not possibly have *understated* the Railroad's share of the harm.

1. Dinoseb was the only contaminant in the surface soils of concern to the United States Environmental Protection Agency ("EPA"). JA-603. The Railroad parcel required *no soil remediation* because any dinoseb concentrations on the parcel were several times below the remediation level set by the EPA. JA-381, 384-85, 411, 604. In fact, the EPA's contractor for the site assessment designated the Railroad parcel as the "clean area" for its mobilization activities. JA-194-97. By contrast, the EPA identified numerous locations with dinoseb spills requiring remediation on the B&B parcel, JA-411, including a dinoseb "hot spot" on the east side of the B&B parcel—with a concentration almost *100 times* the remediation level—that led the EPA to undertake an emergency removal action involving the excavation of 80 yards of soil at a cost of $1.3 million. Pet.App.-137a, 139a, 253a.

2. The bulk of the study and remediation costs at the Arvin site relates to contamination of the underlying groundwater.[4] The soil sampling results

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[4] The district court found that the "primary focus" of the EPA's investigation of the site was groundwater contamination. Pet.App.-145a. Likewise, the "EPA's remedy is primarily directed at a plume of contaminated groundwater that underlies the facility." Pet.App.-172a. One part of the EPA's selected remedy—paving over the site and placing an engineered cap over the sump and the pond—was implemented to control surface water drainage and to reduce the infiltration of rainwater, deterring the transport of contaminants down to the groundwater. Pet.App.-149a. As of December 31, 2007, the EPA had incurred at least $26.6 million in response costs related to the site. EPA, Letter to Railroads Requesting Payment (Aug. 12, 2008). The EPA's expenses moving forward relate entirely to groundwater remediation, and will cost approximately $15.6 million over a ten-year period. EPA, Record of Decision, 2-52 (Sept. 2007), *available*

demonstrated, and the district court found, that *none* of the groundwater contamination resulted from the downward migration of chemicals spilled on the Railroad parcel. Pet.App.-96a-97a. Respondents' own expert "found no evidence of an independent plume of groundwater contamination caused by surface releases on the Railroad parcel." Pet.App.-96a, 101a.

It is undisputed that "the most important variable affecting the downward migration of any chemical substance released at the Arvin site ground surface is the amount of water" present. Pet.App.-97a-98a. The district court's findings show that the vast majority of the spills mingled with water occurred on B&B's parcel. There was no wash station on the Railroad parcel, and the sporadic spills there tended to involve leaks from sight gauges or used drums and cans. *Supra* at 9, 11. On the B&B parcel, by contrast, workers rinsed large quantities of hazardous materials with water and drained them directly into the sump on a daily basis. The sump typically contained standing water and was connected directly to the pond. *Supra* at 8. The district court found that the sump and the pond created a "direct conduit" to the groundwater, and that "[i]t is undisputed that the pond, the sump, and the dinoseb spill area, all of which are located on the B&B parcel, were and are the primary sources of the groundwater contamination at the Site." Pet.App.-104a. "[O]ver 99% of the dissolved and absorbed chemical mass in the A-zone [groundwater] is in the area of the sump and pond." Pet.App.104a-05a.

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*at* http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/ViewByEPAID/CAD052384021?OpenDocument#documents (last visited Nov. 17, 2008).

Respondents nevertheless argued that after a rainfall "surface runoff of water containing dissolved chemicals may have migrated from the Railroad parcel to B&B's waste pond." Pet.App.-102a. The district court found it "plausible" that "some surface spills of chemicals on the Railroad parcel reached the waste pond by down-gradient surface water flow." Pet.App.-102a, 248a. At a minimum, however, its findings demonstrate that the sequence of events necessary for such surface migration is so improbable that spills on the Railroad parcel were significantly less likely to reach the groundwater than spills on the B&B parcel. Pet.App.-87a, 111a-12a.

Respondents' theory depends on rainfall and surface runoff but the Arvin site is located in a desert-like area averaging just six inches of rainfall a year. Pet.App.-87a, 100a. The district court acknowledged that "[c]hemical releases on the Railroad parcel have not been matched with significant rainfall events," and that a "substantial dispute remains whether rainfall at Arvin is sufficient to generate the quantity of runoff that would have been necessary for such transport to occur." Pet.App.-102a. Respondents' own expert estimated that, on any given day, the likelihood of rain sufficient to cause surface runoff was about 7% (while a defense expert placed the estimate at 2%). JA-179, 278. But Respondents did not even contend that these infrequent rainfalls could have *disproportionately* carried contaminants from the Railroad parcel to the pond. Rain would have fallen equally on both parcels, and any runoff from the Railroad parcel would need to travel through the small pipe underneath the rail spur and over more than two hundred feet of land on the B&B parcel to reach the vicinity of the pond. And even

if the runoff contamination from desert rainfall were comparable, the B&B parcel was the site of the washing and rinsing that directly dumped contaminants into the sump—and from there into the pond—on a "*daily*" basis. Pet.App.-252a (emphasis added). So even assuming the government's premises are correct, which is doubtful, the district court's apportionment would still be very conservative with regard to the likelihood that spills on each parcel mixed with water and migrated to the groundwater.

Indeed, the district court found that the D-D contamination on the Railroad parcel was so "slight," in light of that product's high volatility and the Arvin site's overall geography and conditions, that the Railroads should not be apportioned *any* of the responsibility for the D-D component of the groundwater contamination. Pet.App.-251a. The court also explained that the relative concentrations of D-D's chemical constituents found in the groundwater are inconsistent with a "surface spill" origin, and suggest instead that the D-D came from an "underwater" source such as B&B's sump. Pet.App.-105a.

3. The district court's findings also supported its assumption that B&B's activities did not become more harmful during the later period when it leased the Railroad parcel. The district court found that "[i]n the first twenty years of its operations, B&B took almost no precautions to prevent the release of hazardous agricultural chemicals into the environment." Pet.App.-130a. By contrast, only a few years after it began leasing the Railroad parcel, B&B reduced the risk of groundwater contamination by lining the sump and the pond, which were the "primary" sources of the groundwater contamination. Pet.App.-95a, 104a.

Around this time, B&B also installed two "double-lined sand traps" between the sump and the pond, designed to catch sediment flowing from the sump, as well as a "leak detector system" on the north side of the pond. RR SER 315-16; JA-94-95. And the evidence shows that B&B's spill-generating activities were reasonably consistent over time. The district court found that the evidence established "by more than a preponderance that *throughout its operations*, B&B personnel spilled chemicals, allowed chemical leakage, and rinsed down equipment, causing hazardous agricultural chemicals to be released to the environment." Pet.App.-130a (emphasis added). The evidence also indicates that the volume of chemicals purchased by B&B fluctuated from year to year, but was not dramatically higher in later years than earlier ones. For example, B&B's purchases of D-D averaged 94,237 gallons per year from 1960 to 1974 and 104,279 gallons per year from 1975 to 1984. US SER 1019.

## III. PROCEDURAL BACKGROUND

### District Court Proceedings

1. Investigations by the EPA and California's Department of Toxic Substances Control ("DTSC") drove B&B out of business in December 1988. Shell SER 64-65. In 1989, the EPA listed the B&B facility on the CERCLA National Priorities List. While the limited contamination on the Railroad parcel did not require remediation, in 1991 the EPA ordered the Railroads to take measures to prevent future contamination. Pet.App.-15a. The Railroads spent over $3 million to comply. Pet.App.-161a. In 1996, the EPA and DTSC filed suit under CERCLA against the

Railroads and Shell for reimbursement of their investigation and cleanup expenses. Pet.App.-15a.

2. After a 27-day bench trial, the district court issued an "exceedingly detailed" 185-page opinion. Pet.App.-15a. It found the Railroads liable as owners, and Shell liable as an entity that "arranged" for the disposal of hazardous substances. *See* 42 U.S.C. §9607(a)(3). The court found that the EPA and DTSC had incurred response costs of $7,809,683.46 (as of June 30, 1997) and $401,872.81 (as of March 31, 1998) respectively, not including interest or attorneys fees. Pet.App.-230a-231a. The court also entered a declaratory judgment establishing liability for future costs. Pet.App.-231a.

The district court placed the burden on the defendants "to demonstrate, by a preponderance of the evidence, that there exists a reasonable basis for divisibility." Pet.App.-235a. The court determined that there was "considerable evidence of the relative levels of activity and number of releases on the two parcels," and that "[t]his is a classic 'divisible in terms of degree' case, both as to the time period in which defendants' conduct occurred, and ownership existed, and as to the estimated *maximum contribution* of each party's activities that released hazardous substances that caused Site contamination." Pet.App.-239a (emphasis added).

The court "roughly calculated" the maximum harm causally attributable to the Railroads by multiplying the percentage of the Arvin site owned by the Railroads (19.1%), the percentage of B&B's 29 years of operation that it leased the Railroad parcel (45%), and the percentage of overall site contamination

attributable to Nemagon and dinoseb (66%). That calculation produced an initial apportionment of 6%, which the district court then increased to 9% to account for any "calculation errors up to 50%." Pet.App.-252a. The district court resolved essentially all doubts in Respondents' favor, and correctly recognized that joint and several liability would "take[] strict liability beyond any rational limit." Pet.App.-245a.

### Ninth Circuit Proceedings

1. On March 16, 2007, the Ninth Circuit issued an opinion that reversed the district court's apportionment and imposed joint and several liability on the Railroads and Shell. It amended that opinion immaterially in September 2007, and then more substantially in March 2008, in response to petitions for rehearing en banc.

In its September 2007 opinion, the court of appeals agreed that apportionment under CERCLA is governed by federal common-law principles, guided by the Second Restatement and the "seminal case," *Chem-Dyne*, with "slight modifications" to "comport[] with the liability and remediation scheme of CERCLA"—which the Ninth Circuit described as "super-strict." Pet.App.-275a, 277a-79a. The Ninth Circuit concluded, for example, that CERCLA "does not require causation as a prerequisite to liability." Pet.App.-280a.

The Ninth Circuit agreed with the district court that the harm at issue here is theoretically capable of apportionment if the court had "perfect information." Pet.App.-289a-90a. But it held that the Railroads had failed, *as a matter of law*, to establish a "reasonable basis" for apportionment because they did not supply "records that separate out, with any precision, the

amount of toxic chemicals stored on one part of a facility as opposed to another" or "the amount of chemicals stored, poured from one container to another, or spilled on each parcel." Pet.App-290a, 293-94a.

The panel acknowledged that from a business perspective keeping such records "would have had little utility to B&B, the operator of the facility, and none to the Railroads, the owners of the parcel." Pet.App.-294a. Because "[i]t will often be the case that a landowner PRP will not be able to prove in any detail the degree of contamination traceable to activities on its land," the panel recognized, "[t]he net result of our approach to apportionment … may be that landowner PRPs, who typically have the least direct involvement in generating the contamination, will be the least able to prove divisibility." Pet.App.-296a. The panel thought that outcome acceptable because CERCLA is "not … concerned with allocation of fault" and because joint and several liability should be "the norm" in order "to assure, as far as possible, that *some* entity with connection to the contamination picks up the tab," rather than the taxpayers. Pet.App.-296a.

Applying those principles, the panel held that geographic apportionment was a "'meat-axe' approach" because the Railroad parcel may have had the "synergistic" effect of enabling B&B to purchase more chemicals and consequently process and spill a higher volume of contaminants *on its own land*. Pet.App.-294a, 293a. The panel acknowledged (inconsistently) that comparisons of "the proportion of the amount of chemicals stored, poured from one container to another, or spilled on each parcel" might nonetheless have been "pertinent." Pet.App.-293a-94a. Despite the

district court's extensive findings about precisely those issues, however, the Ninth Circuit stated that "none of this data is in the record." Pet.App.-294a.

The court of appeals similarly overturned the district court's temporal apportionment, reasoning that it "assumes constant leakage on the facility as a whole or constant contamination traceable to the facility as a whole for each time period," and that "no evidence suggests that to be the case." Pet.App.-295a. Again, the panel ignored the district court's finding that B&B was more careless "[i]n the first twenty years of its operations," which indicates that an assumption of "constant contamination" is reasonable or even conservative. Pet.App.-130a. Finally, the panel held without explanation that the district court committed a "factual error" in determining that any D-D contamination on the Railroad was too "slight" to contribute to the groundwater.

The panel also held Shell strictly liable as an "arranger," and reversed the district court's apportionment analysis (for reasons similar to those deployed against the Railroads) to hold Shell jointly and severally liable. Pet.App.-300a-09a.

2. The Railroads and Shell sought en banc review. The panel amended its opinion to eliminate some of its obviously incorrect statements, but did not modify its basic reasoning or conclusions. *See* Pet.App.-3a-10a.

Eight judges dissented from the denial of rehearing en banc, concluding that the panel's opinion "effectively ... disregard[s]" the Second Restatement test for apportionment, Pet.App.- 59a, 65a, and that the district court's extensive findings "not only provide[] a reasonable basis to apportion liability, but, if anything,

*overestimate*[] the contamination attributable to the Railroad parcel." Pet.App.-73a. They explained that "[i]f this evidence does not provide a 'reasonable estimate' for apportionment of liability, I do not see how—short of 'perfect information' sufficient to trace every molecule of pollution to the landlord's parcel—apportionment could ever be possible under CERCLA." Pet.App.-59a.

## SUMMARY OF ARGUMENT

After a lengthy trial, the district court found that spills on the Railroad parcel could not have been causally responsible for more than 9% of the response costs at the Arvin site. The district court gave Respondents the benefit of every doubt, and its 9% calculation almost certainly overstates the Railroad's responsibility. The Ninth Circuit nonetheless held that CERCLA imposes joint and several liability on the Railroads unless they can provide documentation separating out their causal share with "precision." That reasoning misstates the law and must be rejected.

I. The Ninth Circuit's approach flouts the traditional and evolving common-law principles that Congress intended to govern apportionment under CERCLA. Even during the early twentieth-century heyday of joint and several liability, the common law regarded pollution as the paradigmatically apportionable harm. By the time CERCLA was enacted, the Restatement reflected a broad modern consensus favoring apportionment whenever a reasonable basis can be found for even a rough estimation of each party's causal contribution.

The Second Restatement's examples and illustrations—and the cases upon which they are

based—demonstrate that harms relating to pollution are readily divisible by employing reasonable assumptions, such as that causal responsibility is roughly proportionate to time of operation or percentage of land area. Courts following those common-law principles have applied a pragmatic and flexible approach to apportionment under CERCLA, and have not required "precision" or detailed records that (as the Ninth Circuit conceded) will never actually exist.

II. The district court's apportionment should be reviewed only for clear error, but under any standard of review its conclusions were conservative and amply justified. Proportionate responsibility by geography and time surely overstated the contribution of the Railroad parcel given the district court's findings, and the district court was amply justified in refusing to attribute any significant share of the D-D contamination in the groundwater under B&B's sump and pond to the Railroads. The district court also increased the Railroads' share by half, from 6% to 9%, to account for any possibility that those calculations understated their contribution to the harm. The Ninth Circuit "d[id] not fault the district court's factfinding," Pet.App.-38a, but simply decided that since we cannot be sure whether the Railroads' proper share is 7% or 9% it should be arbitrarily increased to *100%*. Common-law principles do not require such a drastic, arbitrary, and unfair approach to apportionment of responsibility.

III. The Ninth Circuit based its *sub rosa* departure from common-law principles on its own misguided conception of public policy and CERCLA's structure and purposes. This Court has held that to abrogate a

basic common-law principle CERCLA "'must speak directly to the question addressed by the common law'" and "reject" the common-law approach. *United States v. Bestfoods*, 524 U.S. 51, 62-63 (1998) (citation omitted). Congress chose to incorporate common-law apportionment principles and created the Superfund, funded by a special tax on products and industries deemed particularly responsible for pollution, to cover cleanup expenses when the responsible party is insolvent. Congress has since chosen not to renew that tax, which means that some orphaned response costs may be borne by the taxpayers more broadly. The Ninth Circuit has no authority to modify common-law apportionment principles to pursue a different conception of public policy.

Joint and several liability without reasonable causal apportionment threatens to sever the liability of CERCLA defendants from the reasons the statute makes them liable, and would make everything turn on how broadly the "facility" is initially defined by the EPA. Congress provided essentially no guidance on that issue, and there is no evidence that it intended for those determinations to be the tail that wags the dog of liability. The Ninth Circuit's hostility to apportionment also needlessly creates serious questions about CERCLA's constitutionality that adherence to common-law principles would help to avoid.

The Ninth Circuit's decision should be reversed, and the district court's careful apportionment should be reinstated.

## ARGUMENT

### I. THE NINTH CIRCUIT'S ANALYSIS OF APPORTIONMENT DEPARTS FROM COMMON-LAW PRINCIPLES

CERCLA provides that covered persons "shall be liable" for costs plaintiffs incur in cleanups of contaminated sites but does not specify what portion of the costs are attributable to each defendant. 42 U.S.C. §9607(a)(4). Courts have uniformly held—and the United States agrees—that this terse liability clause incorporates common-law principles governing the apportionment of damages. *See* Opp.-4-5. Congress twice rejected proposals for mandatory joint and several liability under CERCLA, and intended for courts to determine the scope of liability on a "case by case" basis in light of "traditional and evolving principles of [the] common law." *Chem-Dyne*, 572 F. Supp. at 808. This Court is not bound by the law of any particular state, but "develop[s] a uniform federal common law for CERCLA cases." *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 897 (5th Cir. 1993).

While the common law's approach to joint and several liability has evolved over time, it has consistently encouraged apportionment of defendants' liability for commingled pollution based on reasonable assumptions and rough estimates. There has never been, and never should be, any requirement for "precision" or documentary proof.

### A. Traditional And Evolving Common-Law Standards Permit Rough Apportionment Of Responsibility For Pollution Based On Reasonable Assumptions

The common law governing causal apportionment of damages has become steadily more pragmatic over time. While joint and several liability was common prior to the twentieth century, modern case law increasingly favors apportionment. Then as now, however, the law has recognized pollution as the *paradigmatic* apportionable harm, and has permitted apportionment based on assumptions permitting even a rough estimate of relative responsibility.

1. The First Restatement generally provided that any tortfeasor whose conduct "is a substantial factor in causing a harm to another is liable for the entire harm." Restatement of Torts §879 (1939) ("First Restatement"). The First Restatement's preference for joint and several liability was controversial even at the time. Prosser argued that it was an artifact of the obsolete "common law concept of the unity of the cause of action," and that joint and several liability should be imposed only when "no logical basis can be found for apportionment of damages"—in other words, "only when there is no reasonable alternative." William L. Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413, 418-20, 442-43 (1937). "[A] considerable body of case law authorizing apportionment of similar or single harms" already existed at the time. Gerald W. Boston, *Apportionment of Harm In Tort Law: A Proposed Restatement*, 21 U. Dayton L. Rev. 267, 288 (1996) (hereinafter, "Boston"); *see also* Restatement (Third) of Torts: Apportionment of Liability §26,

Reporters' Note at 333, 329 (2000) ("Third Restatement") (describing Boston's article as an "excellent history" with "excellent analysis").

Prosser's preference for apportionment initially prevailed in only one area: nuisance. The Ninth Circuit wrongly believed that apportionment is the "exception" in pollution cases, Pet.App.-43a, but §881 of the First Restatement actually *mandated* apportionment of nuisances like pollution, stating that where "two or more persons" interfere with a "landowner's interest in the use and enjoyment of land ... each is liable only for such proportion of the harm caused ... as his contribution to the harm bears to the total harm." This rule applied "whether or not there has been a physical or chemical union of materials and whether or not fumes or polluted matter sent out by the defendant have united with those sent out by others." *Id.* cmt. a. The illustrations accompanying §881 reflected Prosser's view that courts were required "to attempt some rough apportionment of the damages" in pollution cases. 25 Cal. L. Rev. at 442-43.

2. The Second Restatement represents the eventual broader triumph of Prosser's view, and provides for apportionment of *all* unitary harms, so long as "there is a reasonable basis for determining the contribution of each cause to a single harm." §433A(1)(b). Prosser was the Reporter, and he "drafted the language of section 433A to comport with his treatise." Boston, *supra*, at 292. And although the new §433A covers all torts, nuisances like pollution are still treated as the paradigmatic divisible harm. Comment d, which analyzes "divisible harm," explains that "apportionment is commonly made" in cases where "pollution of a stream, or flooding, or smoke or dust or

noise, from different sources, has" caused a nuisance, even though such harm is not "clearly marked out as severable into distinct parts." *See also* W. Page Keeton et al., *Prosser & Keeton on The Law of Torts* §52 (5th ed. 1984) (same); Boston, *supra*, at 301 (comment d's "illustrations demonstrate the continued vitality of the proportional liability rules transplanted from section 881 of the first *Restatement*"); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 269 n.27 (3d Cir. 1992) (noting parallel between comment d and CERCLA water pollution cases). The Reporter's Notes to the Second Restatement also continue to cite the cases underlying the First Restatement's conclusion that apportionment is mandatory in nuisance cases. *See* Second Restatement §433A Reporter's Notes at 140-41 (App. III 1966); *Seely v. Alden*, 61 Pa. 302, 306 (1869) (holding that when a defendant's pollution has commingled with others' his "deposit must be separated by means of the best proof the nature of the case affords, and his liability ascertained accordingly").

Section 433A does not require parties to divide causal responsibility with anything approaching "precision" or detailed "records." Pet.App.-41a. A party need only present evidence showing a "reasonable" and "rational" basis for a "rough estimate," or a "fair apportionment among the causes responsible." §433A(1)(b) & cmts. b, d. For example, when cattle owned by two or more defendants destroy a plaintiff's crop, the harm may be apportioned among the defendants "on the basis of the number owned by each, and the *reasonable assumption* that the respective harm done is proportionate to that number." §433A cmt. d (emphasis added). Similarly, when

dogs—three of which are owned by one defendant, and two by another—kill ten of the plaintiff's sheep, it is reasonable to hold the former owner liable for six sheep and the latter four, based solely on evidence that "the dogs are of the same general size and ferocity." *Id.* cmt. d, illus. 3.

In the common-law cases relied upon by the Restatement, the plaintiff usually bore the burden of proving the damages caused by each defendant, and argued for joint and several liability on the ground that the evidence did not reveal any reasonable basis for dividing the harm. The courts rejected that argument, permitting the plaintiff to recover based on rough assumptions about each defendant's divisible share, and denying joint and several liability on the same basis. In *Little Schuylkill Navigation, Railroad & Coal Co. v. Richards's Administrator*, 57 Pa. 142 (1868), for example, multiple mines dumped coal dirt into the same stream over a period of eight years. The plaintiff sought to hold one mine liable for the entire harm, claiming that several liability would present insurmountable problems of proof. The court refused, recognizing that "it may be difficult to determine how much dirt came from each [mine], but the relative proportions thrown in by each may form some guide." *Id.* at 147. And when estimates were uncertain, a factfinder "would measure the injury of each with a liberal hand" to ensure the plaintiff was not undercompensated. *Id.*[5]

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[5] *See also Thomas v. Ohio Coal Co.*, 199 Ill. App. 50, 56 (1916) (same); *Hughes v. Great Am. Indem. Co.*, 236 F.2d 71, 75 (5th Cir. 1956) (rejecting plaintiffs' argument that joint and several liability

The Second Restatement thus adopts a pragmatic symmetry, under which "an approximation to accuracy" in the estimation of relative causal responsibility suffices because a plaintiff "is not to be denied all damages, nor [a defendant] loaded with damages to which he is not legally liable, simply because the exact ascertainment of the proper amount is a matter of practical difficulty." *Sellick v. Hall*, 47 Conn. 260, 274 (1879). Second Restatement §912, which requires a plaintiff to prove damages only with "as much certainty as the nature of the tort and circumstances permit," reinforces that symmetry by echoing the pollution and crop damage examples from §433A. *See also* §912 cmt. c, illus. 3 & 5.

Courts have held, in most contexts, that CERCLA implicitly shifts the burden of proof on causation and requires the *defendant*, rather than the plaintiff, to prove a reasonable basis for dividing the damages. Even if true, that shift does not change the level of certainty required. Indeed, the Second Restatement contemplates situations in which the defendant bears the burden at common law, *see* §433B(2), and explains that he must prove "a reasonable basis for the apportionment but he is not required to establish [it] with any greater degree of definiteness or certainty" than applies when the burden is on the plaintiff, §912

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should be imposed because it would be "impossible" for them "to make proof which would segregate the injuries" from automobile collisions three minutes apart, and holding that "[d]amages do not have to be established with mathematical certainty" so long as there was a "reasonable basis" for estimating damages that "probably ensue[d]" from the second collision), *cert. denied*, 352 U.S. 989 (1957).

cmt c. The Second Restatement specifically refers to cases in which multiple defendants harm another's land as an example of when the burden is on the defendant, but the substantive analysis is nonetheless the same. *See* §433B cmt. d, illus. 7.

The cases serving as models for §433A's illustrations completely refute the Ninth Circuit's suggestion that hard "data ... in the record" sufficient to "separate out, with any precision" a defendant's share was necessary to avoid joint and several liability at common law. Pet.App.-41a. In one of the cases underlying the example about cattle trampling crops, for instance, the court acknowledged that "[t]here is nothing in the findings or testimony tending to show how much of this damage was done by any specific cattle, and in the nature of things it could not well be shown." *Powers v. Kindt*, 13 Kan. 74, 76 (1874). As the Restatement explains, "reasonable assumption[s]" are enough. And those assumptions can be based on approximations drawn from witness testimony. For example, in another case cited by the Reporter's Notes, *Hill v. Chappel Brothers of Montana, Inc.*, 18 P.2d 1106 (Mont. 1932), the court apportioned harm from overgrazing on the plaintiff's land on the basis of testimony that witnesses saw what seemed to be "between 7,000 and 8,000" of the defendant's horses grazing over a three-year period, although "[o]ther steeds, owned [by others] or ownerless ... kept [defendant's horses] company in goodly numbers," in estimated proportions of "six-tenths to one-tenth of the whole" throughout that time. *Id.* at 1108. (Presumably that testimony was based on a rough sense gained by observing brands on particular animals.) The court held that "[w]here the injury occasioned by the tortious

act of a defendant is indistinguishable from that arising from a like act of others, ... the jury, as reasonable men, [should] make from the evidence the best possible estimate" of causal responsibility. *Id.* at 1110.[6]

3. If this Court chooses to consider developments in the law after the Second Restatement, they merely confirm and extend the common law's preference for apportionment and hostility to joint and several liability.

For example, courts are increasingly willing to apportion damages for injuries that the Second Restatement would have considered theoretically indivisible, like cancer or death, on the basis of rough, statistical estimates of the parties' relative causal responsibility. *See, e.g.*, *Dafler v. Raymark Indus.*, 611 A.2d 136 (N.J. Super. 1992) (dividing causation of lung cancer between asbestos and plaintiff's smoking), *aff'd*, 622 A.2d 1305 (N.J. 1993); *Sauer v. Burlington N. R.R.*, 106 F.3d 1490 (10th Cir. 1996) (defendant's share of liability reduced in light of plaintiff's preexisting condition); *Stahl v. Ford Motor Co.*, 381 N.E.2d 1211

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[6] The court in *Thomas v. Ohio Coal Co.* similarly apportioned responsibility among oil companies for draining salt water and oil onto the plaintiff's property on the basis of testimony "that out of something over eighty wells" nearby, eighteen were the defendant's, and that the defendant's wells "were among the strongest and heaviest producers." 199 Ill. App. at 56-57. And in *Griffith v. Kerrigan*, 241 P.2d 296, 298 (Cal. App. 1952), a court apportioned liability for a flood between one defendant's canal and another's irrigated field based on expert testimony that "was largely guesswork, but was the best he could do, and was based on a consideration of comparative area, comparative head, and other physical factors."

(Ill. App. Ct. 1978) (manufacturer strictly liable only to extent design defects aggravated injuries from auto accident). Courts also readily apportion causal responsibility in strict liability cases based on probabilistic assumptions, as opposed to hard proof. *See, e.g.*, *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal.) (apportioning strict products liability based on defendant's market share), *cert. denied*, 449 U.S. 912 (1980). And courts have increasingly permitted factfinders to assess comparative fault in cases where different defendants are liable for reasons that are superficially incommensurable with regard to fault and causation, such as negligence and strict liability. *See, e.g.*, *Sandford v. Chevrolet Div. of Gen. Motors*, 642 P.2d 624 (Or. 1982) (responsibility of strictly liable manufacturers and negligent driver are comparable); Third Restatement §8 & cmt. a.

The Third Restatement embraces those trends and calls for factfinders to allocate comparative "responsibility" for harm in almost all cases. *See* §26 cmt. a; §1 cmt. a. The Third Restatement offers these "rules and principles" as a guide when a statute "calls for courts to develop common-law principles to fill in unanswered questions about apportionment of liability among multiple parties," and specifically references CERCLA as an example. *See* §1, Reporters' Note at 17; *cf. Norfolk S. Ry. v. Sorrell*, 127 S. Ct. 799, 807-08 (2007) (relying on Third Restatement).

### B. Courts Correctly Applying These Principles In CERCLA Cases Permit Apportionment Based On Reasonable Assumptions

CERCLA apportionment cases are surprisingly rare, particularly at the appellate level, because of the overwhelming pressure on PRPs to settle with the government. But several decisions have applied a pragmatic and flexible approach to apportionment, consistent with the Second Restatement.

In *Bell Petroleum*, for example, the Fifth Circuit reversed a district court's rejection of apportionment, explaining that so long as "expert testimony and other evidence establishes a factual basis for making a reasonable estimate that will fairly apportion liability, joint and several liability should not be imposed in the absence of exceptional circumstances." 3 F.3d at 903. Even though many records cataloging the disposal of pollutants that entered the water supply had been "destroyed," the court held that witness testimony and reasonable "assumption factors" regarding the defendants' activities sufficed. *Id.* at 903-04 & n.17. Similarly, despite the fact that testimony presented diverging methods of dividing the harm, offered "conflicting" evidence, and relied on assumptions, *Bell Petroleum* found apportionment proper because the Restatement requires not "certainty," but rather "evidence sufficient to permit a rough" or "reasonable and rational approximation of each defendant's individual contribution to the contamination." *Id.* at 903-04 & nn.18, 19.

*Coeur D'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094 (D. Idaho 2003), similarly allowed reasonable

estimates to divide liability for lead, cadmium, and zinc tailings that 22 mines had deposited in a river basin over 100 years. The "exact percentages" of metals in the tailings were "unknown" and varied over time, and calculation of the PRPs' disposals was "not an exact science." *Id.* at 1120. The relative shares were therefore "based on best available information," including "historical information available regarding the milling methods used" and adjustments for various remedial steps the mines took over the years. *Id.* at 1120, 1105 & n.9. The court found the experts' assumptions "reasonable" based on the available evidence and explained that the Restatement does not require "fingerprinting of each mill's hazardous waste ... in this particular case which spans multiple decades, changes [in] processing method, and changes in ownership." *Id.* at 1120.

Respondents have recognized that apportionment based on reasonable estimates and assumptions is proper, at least when they face potential CERCLA liability. In *Kamb v. United States Coast Guard*, 869 F. Supp. 793, 798 (N.D. Cal. 1994), Respondents were PRPs by virtue of Coast Guard and police personnel's "contamination" of a shooting range with lead bullets. Relying on *Bell*, Respondents persuaded the court that joint and several liability was inappropriate because, among other things, "the volume of lead ... contributed to the Site" gave a reasonable basis for apportionment. *Id.* at 799. *Kamb* did not flyspeck Respondents' evidence estimating their share, and ruled in Respondents' favor despite deferring "final

determination" of the "pro rata share of the response costs." *Id.*[7]

The CERCLA cases that are hostile to apportionment tend to fall into two categories. First, many CERCLA cases involve genuinely synergistic harms that are, in the Second Restatement's terms, *theoretically* indivisible. In *United States v. Monsanto Co.*, wastes from "numerous off-site waste producers" were haphazardly deposited on the site, "generating noxious fumes, fires, and explosions," as well as a "toxic cloud" that led to the hospitalization of twelve firemen. 858 F.2d 160, 164 (4th Cir. 1988). Given this clear evidence of interactive consequences, *Monsanto* declined to apportion harm absent evidence about the "relative toxicity, migratory potential, and syngergistic capacity of the hazardous substances." *Id.* at 172 & n.26.

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[7] Similarly, in *United States v. Shell Oil Co.*, the Army and Shell deposited wastes through a common sewer built by the Army, resulting in a release of commingled contaminants. 605 F. Supp. 1064, 1067 (D. Colo. 1985). Sued under CERCLA and fearing joint and several liability, Shell sought to join the Army as a co-defendant. Apparently in opposing joinder, the United States represented that, as a CERCLA plaintiff, "it only seeks payment from Shell for Shell's proportionate share of the cleanup." *Id.* at 1083 n.9. Relying on the Second Restatement and the government's position, the court concluded that "non-joinder will not subject Shell to any risk of increased or multiple liability" because apportionment appeared proper. *Id.; see also Price v. United States Navy*, 818 F. Supp. 1326, 1332 (S.D. Cal. 1992), *aff'd in relevant part*, 39 F.3d 1011, 1018 (9th Cir. 1994) (Navy liable under §107(a) as transporter-PRP for only percentage of response costs).

Some of the decisions invoke but misapply that principle, under the misapprehension that commingled waste always gives rise to synergistic and indivisible harm. *Compare, e.g.*, *O'Neil v. Picillo*, 883 F.2d 176, 183 n.11 (1st Cir. 1989) ("Because there was substantial commingling of wastes, ... any attempt to apportion the costs incurred by the state in removing the contaminated soil would necessarily be arbitrary"), *cert. denied*, 493 U.S. 1071 (1990), *with United States v. Hercules, Inc.*, 247 F.3d 706, 718 (8th Cir.), *cert. denied* 534 U.S. 1065 (2001) ("'commingling is not synonymous with indivisible harm'") (citation omitted). That conclusion is inconsistent with both the First and Second Restatements, which expressly authorize apportionment of harm to polluted streams, or harm caused by intermingled floodwaters. *See also* Boston, *supra*, at 313-14 (noting that under §433A and comment d, "[m]any single injuries can be apportioned because" their causes "are amenable to some rational comparison").

Second, other CERCLA cases involve such a large number of PRPs, engaged in polluting activity about which so little is known, that apportionment would be nothing but a blind guess. In *O'Neil*, for example, the site consisted of "massive trenches and pits 'filled with free-flowing, multi-colored, pungent liquid wastes' and thousands of 'dented and corroded drums containing a veritable potpourri of toxic fluids'" that culminated in a "monstrous fire." 883 F.2d at 177 (quoting district court opinion). "[M]ost of the waste could not be identified," making apportionment among parties impossible. *Id.* at 182. That is not this case.

## II. THIS DISTRICT COURT DID NOT CLEARLY ERR BY FINDING A REASONABLE BASIS TO APPORTION LIABILITY

This case has none of the attributes that have prevented apportionment in prior CERCLA cases. The Ninth Circuit held under *de novo* review that the contamination is theoretically apportionable.[8] Respondents do not contest that conclusion, and it is plainly correct. Pet.App-36a-37a; Opp.-25. There are no synergistic effects among the chemicals. D-D, Nemagon, and dinoseb are each organic compounds and the EPA's remedy can treat all three chemicals with a common process.[9] There also was no disagreement with the conclusion of the Railroads' expert "that costs for remediating impacts to groundwater can be calculated as a divisible share of the total chemical mass present in the groundwater." JA-287; *see also* JA-355-64.

Apportionment in this case therefore comes down to whether a "reasonable basis" can be found for a rough estimate of the proportion of the overall

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[8] As the Third Restatement explains, and as the Sixth Circuit has held, the question of whether a harm is theoretically apportionable is so closely related to the facts that it should be reviewed for clear error. *See United States v. Twp. of Brighton*, 153 F.3d 307, 317-18 (6th Cir. 1998); Third Restatement §26 cmt. h.

[9] The selected groundwater remedy included a granulated activated carbon treatment system to remove the contamination from the water for disposal offsite. *See* Pet.App.-149a; *see also* JA-288-89 ("[A]ll of the chemicals that were detected in the A zone groundwater can be treated by a common, conventional technology known as granular activated carbon ....").

response costs attributable to spills originating on the Railroads' parcel. The district court's affirmative conclusion is entitled to deference—but under any standard of review the evidence here was more than sufficient to permit apportionment.

### A. The District Court's Apportionment Should Be Reviewed For Clear Error

The district court found that the evidence provided a reasonable basis for causal apportionment. That finding should be reviewed for clear error, and it is not clearly erroneous. The Ninth Circuit purported to apply the clear error standard but, in a move that the dissenters appropriately characterized as "sleight of hand," eliminated any deference to the district court by reviewing de novo whether the Railroads met their burden of proof as a matter of law. Pet.App.-65a, 35a. That maneuver should be rejected.

"The question of whether the defendants are jointly or severally liable for the cleanup costs turns on a fairly complex factual determination." *Chem-Dyne*, 572 F. Supp. at 811. Once a court determines, as here, that a harm is capable of division in principle, the Second Restatement provides that the *factfinder* should decide the "apportionment of the harm to two or more causes." §434(2)(b). Apportionment represents a factual judgment about the evidence, and the assignment of particular shares cannot meaningfully be separated from the factfinder's implicit conclusion that those shares reasonably approximate the defendant's contribution to the harm under the evidence. *Cf. Chem-Dyne*, 572 F. Supp. at 811 (denying summary judgment on apportionment because genuine issues of material fact remained). An appellate court may

reverse as a matter of law only if no reasonable factfinder could apportion the harm based on the evidence. Second Restatement §434(1)(c).

The Third Restatement is both clear and persuasive on this issue. "[D]etermining whether a plaintiff's damages are divisible often depends on careful attention to facts." §26, Reporters' Note at 336. Accordingly, the Third Restatement treats as a question of fact "[w]hether damages are divisible" and "[t]he magnitude of the divisible part." §26 cmt. h. Apportionment is "determined as a matter of law" only when "there is no dispute or when no reasonable jury could find otherwise." §26, Reporters' Note at 329.

As explained above, the proof necessary for apportionment and the proof necessary for a plaintiff to prove damages with reasonable certainty are frequently two sides of the same coin. Courts have long treated a factfinder's conclusions regarding reasonable certainty of damages as findings of fact reviewed for clear error. *See, e.g.*, *Merrill Stevens Dry Dock Co. v. M/V Yeocomico II*, 329 F.3d 809, 816 (11th Cir. 2003) ("We find no clear error in the district court's application of the reasonable certainty standard to the evidence presented."); *accord Fifth Third Bank v. United States*, 518 F.3d 1368, 1374-75 (Fed. Cir. 2008); *Durasys, Inc. v. Leyba*, 992 F.2d 1465, 1470 (7th Cir. 1993); *Royal College Shop, Inc. v. N. Ins. Co. of N.Y.*, 895 F.2d 670, 679 (10th Cir. 1990); *Marcona Corp. v. Oil Screw Shifty III*, 615 F.2d 206, 209-10 (5th Cir. 1980). This Court employed that approach under the Sherman Act in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969), explaining that the jury's damage award would be disturbed for insufficiency of the evidence only if no jury could reasonably infer this

"causal relation between the [defendant's] conduct and the claimed damage."

### B. The District Court's Apportionment Was Not Clearly Erroneous

The district court's apportionment was not clearly erroneous, and indeed should be affirmed even if review is de novo. The district court correctly determined that these facts present a "classic 'divisible in terms of degree' case," Pet.App.-239a, where the Railroads' approximate causal share of the harm may be estimated by reference to geographic, temporal, and other factors. The court evaluated the extensive historical and scientific evidence and concluded that the Railroads' share could not possibly exceed 9%. That evidence is substantially better—in terms of quantity, reliability, and precision—than the evidence relied upon by many of the common-law cases underlying the Restatement. And neither Respondents nor the Ninth Circuit challenge the core factual findings.

- *Geography*

There is a long tradition of geographic apportionment in pollution cases, and such divisions are eminently sensible under a statute that imposes strict liability *tied to ownership of land*. *See, e.g.*, *Hercules*, 247 F.3d at 717-18. Geography provides a reasonable proxy for relative responsibility here so long as (1) spill-producing activities on the defendant's land were proportionate to land area, or less; and (2) the spills on the defendant's land were not more likely to cause remediable harm than spills elsewhere. The record evidence clearly supports the district court's finding that relative land area if anything *overstates* the Railroads' share of responsibility here.

First, the district court reviewed "considerable evidence of the relative levels of activity and number of releases on the two parcels," Pet.App.-252a, and found that the Railroad parcel was used much less intensively than the B&B parcel. The district court found that "[t]he volume of the hazardous substance releasing activities on the B&B site is at least ten times greater," Pet.App.179a, and that the activities "contribut[ing] most of the liability causing releases, were predominantly carried out by B&B on the B&B parcel," Pet.App.247a-48a. *See generally supra* at 9-12. The district court could not document the volume of contamination with precision, but it was entitled to credit and roughly quantify based on the testimony of witnesses who explained the character of the activity and spills, and to draw conclusions based on "'common sense and sound judgment.'" *Hughes*, 236 F.2d at 75 (quoting *Schulz v. Pa. R.R.*, 350 U.S. 523, 525 (1956)); *see Bell Petroleum*, 3 F.3d at 902-04; *Coeur D'Alene*, 280 F. Supp. 2d at 1120; *Kamb*, 869 F. Supp. at 799.[10]

Second, the scientific evidence clearly showed (and the district court found) that spills on the Railroad parcel were much *less* likely to have contributed to the

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[10] The district court also found that while "[t]here is no evidence to quantify the difference in volume of the releases, ... the Railroad parcel could not have contributed to more than 10% of the volume or mass of the overall site contamination." Pet.App.-252a. That finding appears in a paragraph consistently directed at activities during the lease period, and thus indicates that spills on the Railroad parcel likely accounted for less than 5% of B&B total spills by volume. Although the district court chose to rest its apportionment on other grounds, that volumetric finding provides additional confirmation that his calculations were conservative.

harms that required remediation than spills on the B&B parcel. None of the dinoseb contamination that required soil remediation was on the Railroad parcel. *Supra* at 12-13. And the groundwater contamination that was the primary driver of the cleanup originated entirely from the sump and pond on the B&B parcel. *Supra* at 14. The district court credited as "plausible" Respondents' theory that *some* of the spills on the Railroad parcel could have been carried to the pond, and from there down into the groundwater, via surface runoff. But there can be no serious dispute that the typical spill on the Railroad parcel was far *less* likely to reach the pond or the sump, on a volume-by-volume basis, than the typical spill on the B&B parcel. *Supra* at 15-16.

The Ninth Circuit suggested that geographical apportionment was a "'meat-axe' approach" here because B&B's usage of the Railroad parcel as a parking and storage lot may have had the "synergistic" effect of enabling B&B to purchase more chemicals and consequently process and spill a higher volume of contaminants *on its own land*. Pet.App.-294a, 293a. As the dissenting judges observed, these "synergies" were the product of the Ninth Circuit's speculation in contravention of the district court's findings. *See* Pet.App.-70a-72a. In any event, the Ninth Circuit's reasoning would preclude geographic apportionment in nearly every case, and is inconsistent with the basic premises of landowner liability under CERCLA. The statute imposes strict liability on passive landowners for disposals of hazardous substances on their land—not for disposals of hazardous substances *elsewhere* that were somehow enabled by activities on that land. In *General Electric Co. v. AAMCO Transmissions*,

*Inc.*, 962 F.2d 281, 287-88 (2d Cir. 1992), for example, the Second Circuit explained that the lessor of a service station is not liable for damage caused by his lessee's disposal of hazardous substances generated at the leased premises but disposed of elsewhere. Even if a landlord "had the opportunity or ability to control [its lessee's] waste disposal practices" off the leased property, it has no obligation to do so. *Id.* at 286.

- **Time**

The district court also correctly held that any estimation of the Railroads' causal responsibility must reflect the fact that B&B leased the Railroad parcel for only 45% of its entire period of operation at the Arvin site. Pet.App.-251a. Once again, temporal apportionment finds ample support in the Restatement and common law. *See* Second Restatement §433A cmt. c ("Thus if two defendants, independently operating the same plant, pollute a stream over successive periods, it is clear that each caused a separate amount of harm, limited in time, and that neither has responsibility for the harm caused by the other."); *Midland Empire Packing Co. v. Yale Oil Corp.*, 169 P.2d 732 (Mont. 1946) (cited in §433A Reporter's Notes at 139 (App. III 1966)) (same); *Bell Petroleum*, 3 F.3d at 903-04 (apportioning liability of successive operators).

The Ninth Circuit held that temporal apportionment wrongly "assumes constant leakage on the facility as a whole or constant contamination traceable to the facility as a whole for each time period," and that there was an "evidentiary vacuum" (meaning precise records) concerning contamination prior to the lease period. Pet.App.-42a. In fact, the

record is replete with evidence of spills pre-dating 1975 on B&B's parcel.[11] The district court found, for instance, that "B&B washed out bobtails and nurse tanks at an unlined sump on the B&B parcel from the early 1960s until the sump was lined in 1979." Pet.App.-111a; *see also* Pet.App.-115a ("The bulk storage of corrosive D-D in the 1960s … caused numerous tank failures and spills."); JA-219 (B&B used the unlined sump as early as 1964). And the evidence indicates that B&B's activities were generally consistent over time, but that B&B took *greater* precautions during the period following the lease of the Railroad parcel. *Supra* at 16-17. As the dissenters from the denial of hearing en banc recognized, in this case a strict temporal apportionment "if anything, *overestimates* the contamination attributable to the Railroad parcel." Pet.App.-73a.

- **Distinguishing Among Contaminants**

The district court also applied a one-third discount to reflect its finding that the D-D contamination on the Railroad parcel did not contribute significantly to the remediable harm. Pet.App.-251a. The Ninth Circuit dismissed this calculation as "a basic factual error" because the evidence suggests that "there may well have been leakage on the Railroad parcel of D-D." Pet.App.-42a.

The Ninth Circuit missed the point. The district court recognized that there was some D-D

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[11] There is no allegation that B&B used or released any contaminants on the Railroad parcel prior to B&B's lease in 1975. JA-72; Pet.App.-83a.

contamination on the Railroad parcel, but characterized it as "slight." Pet.App.-251a. The only soil remediation that the EPA found necessary was attributable to *dinoseb* and confined to the B&B parcel. And the district court had ample grounds for concluding—in light of D-D's extreme volatility, the low rainfall, the site geography, and the proportions of chemical constituents found in the groundwater—that even if some D-D might have been carried to the pond by surface runoff from the Railroad parcel, such surface migration did not contribute to the groundwater contamination to any significant extent. *See supra* at 16. The Ninth Circuit did not explain why that conclusion was clearly erroneous, and the brief in opposition conspicuously declined to respond to the petition's demonstration that it was not. *Compare* Railroads' Pet.-22 n.3 *with* Opp.-12 n.4.

As the en banc dissenters observed, even if the district court did err on this point "[i]t has no impact on the ultimate conclusion that the Railroads cannot be jointly and severally liable for the entire cleanup cost," and would "merely alter[] the proportion of liability attributable to the Railroads and perhaps ... be a basis for remand." Pet.App.-74a n.19. Even a remand would be unnecessary because, as discussed below, the district court built a safety margin into its apportionment that is precisely the same size as the D-D issue.

- **Safety Margin**

The geographic, temporal, and chemical considerations discussed above led the district court to estimate the Railroads' proportion of the site's cleanup costs at 6%. Pet.App.-252a. Even though this figure

was a product of conservative assumptions, the district court chose to increase it by 50% to allow for any "calculation errors," bringing the total apportionment to 9%. *Id.* Like the common-law cases cited in the Restatement, the district court assessed the Railroads' responsibility with a "liberal hand," to ensure that the Railroads were not paying less than their fair share. *See Thomas*, 199 Ill. App. at 56.

That flexibility guarantees that any uncertainty in the evidence supporting apportionment does not prejudice Respondents in any way. Indeed, neither Respondents nor the Ninth Circuit put forward any real argument that the Railroads' share of the harm *exceeds* the 9% apportioned by the district court. Their position seems to be that since the correct number *below 9%* cannot be determined with great precision and confidence, the Railroads' share should be grossed up to *100%*. Neither the common law nor common sense supports that result.

## III. NOTHING ABOUT CERCLA'S STRUCTURE OR POLICIES JUSTIFIES ABANDONING THE COMMON LAW'S APPROACH TO APPORTIONMENT

The Ninth Circuit believed its *sub rosa* abrogation of the common law to be justified by CERCLA's "imposition of no-fault land ownership liability," Pet.App.-41a, and by the court's belief that apportionment "would leave the taxpayers holding the bag" in violation of CERCLA's "basic structure," Pet.App.-34a. The Ninth Circuit's reasoning is incorrect, and its approach embraces a conception of the public policies underlying CERCLA that Congress

explicitly rejected, and that unnecessarily amplifies doubts about the statute's constitutionality.

### A. CERCLA's Strict Liability Regime Is Not Inconsistent With Apportionment

The Ninth Circuit wrongly believed that a pragmatic approach to apportionment would be "tantamount to a disagreement with the imposition of no-fault land ownership liability" under CERCLA. Pet.App.-41a. As the dissenting judges recognized, however, "[s]trict liability is *not* mandatorily joint and several liability." Pet.App.-67a n.12 It is undisputed that Congress considered, and squarely rejected, a regime of mandatory joint and several liability under CERCLA. And while CERCLA may alter common-law notions of causation in some limited respects, Congress never intended to hold every PRP liable for every environmental harm, without any constraints.

Indeed, the basic apportionment problem in this case is created not by the "strict" nature of CERCLA liability but by the broad discretion the statute gives the EPA to define the boundaries of the "facility" for which all of the covered persons are responsible. *See, e.g.*, 42 U.S.C. §9607 (defining covered persons as those who, *inter alia*, owned, operated, or arranged for disposal at a "facility"); *id.* §9601(9)(B) (defining "facility" as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed"). The Railroads are strictly liable here because of their ownership of land. By refusing apportionment, however, the Ninth Circuit effectively held the Railroads strictly liable as landowners for the consequences of disposals of hazardous materials *on land they did not own*. The Railroads' only connection

to the contamination originating on B&B's parcel is that the EPA chose to describe the Arvin site as one "facility" rather than two.

Designating a facility "'is simply the first step'" in the CERCLA process, and its purpose "'is to identify, quickly and inexpensively, sites that may warrant further action,'" *Honeywell Int'l Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004) (citations omitted), not to "'assign liability to any person,'" *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 920 (D.C. Cir. 1985) (citation omitted). Courts have long recognized that the "facility" concept is "intentionally expansive." *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 185 (W.D. Mo. 1985). Challenges to designation of a site as a "facility" on the National Priorities List are limited to judicial review within 90 days under a deferential arbitrary-and-capricious standard, well-before any response or recovery action, if any, by the EPA. 42 U.S.C. §9613(j)(2). The EPA generally does not specify "any exact geographic boundaries" to a facility at the listing stage and is free to expand the boundaries after its designation. *See Wash. State Dep't of Transp. v. U.S. EPA*, 917 F.2d 1309, 1310-11 (D.C. Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991). Thus, challenges to the boundaries of a "facility" generally occur in cost recovery actions, where courts "have uniformly refused to divide widely contaminated properties like the one at issue here into separate facilities in response to a party's claim to be responsible for contamination in only certain parts of the property." *Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 191 F.3d 409, 418 (4th Cir. 1999). Instead, "[s]uch considerations are appropriately addressed not in determining what constitutes a facility in the case, but rather in

determining ... whether the harm is divisible." *Id.* at 419.

There are good reasons to give the EPA broad discretion in its designation of the "facility" that provides the basic organizational unit for initiating a cleanup. But there is no evidence that Congress intended for that rough initial designation to be the tail that wags the dog of ultimate financial responsibility under CERCLA. Congress does not "hide elephants in mouseholes," or "alter the fundamental details of a regulatory scheme in ... ancillary provisions." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). If Congress had intended for the definition of the "facility" to be the primary crucial event in every CERCLA case, it would have provided standards and safeguards to guide and constrain those designations. Absent such standards, the statute must permit reasonable apportionment of liability. Otherwise a landowner whose lessee happens to spill small, undocumented amounts of hazardous substances, confined entirely to the lessor's own small parcel of land, could find himself jointly and severally liable for all of the cleanup expenses across an area the size of a large city—simply because the EPA chose to describe the "facility" in a manner that sweeps up thousands of unrelated landowners. *See, e.g.*, *Eagle-Picher Indus., Inc. v. EPA*, 822 F.2d 132, 144 n.59 (D.C. Cir. 1987) (approving EPA expansion of site *from 15 to 115 square miles* after comment period).

The Ninth Circuit's hostility toward apportionment also threatens to dissolve any logical linkage between the *extent* of a defendant's liability under CERCLA and the *reasons* that the statute makes him liable. A passive landowner is liable under the statute because

he owns a parcel of land, but if geographic apportionment is disfavored the *amount* of his liability will ultimately be unrelated to what was disposed of on that land—and will depend instead on whether the EPA chooses to treat that parcel by itself, or lump it together as a "facility" with a large number of nearby properties. An "arranger" is liable for arranging for the disposal of hazardous materials, but if volumetric apportionment is disfavored the extent of his liability will have little or nothing to do with what he "arranged"—and will depend instead on how the EPA defines the metes and bounds of the "facility" at which the disposal occurred.

Such absurdities make a mockery of any coherent justification for strict liability, and suggest that Congress should instead have imposed CERCLA liability *pro rata* by net worth on the nation's wealthiest landowners and companies. An apportionment jurisprudence is therefore essential not only to avoiding unfairness to individual PRPs, but also to making sense of the statutory categories that Congress enacted. It frequently "'frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's [primary] objective must be the law.'" *Sorrell*, 127 S. Ct. at 808 (quoting *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam)).

Liability that robustly disregards not just fault but also *causation* principles may actually increase pollution and response costs. If liability is unrelated to the amount of contamination for which a PRP is causally responsible (and which it could have prevented), the PRP has little incentive to pay for precautions that will not correspondingly diminish

liability. If anything, such expenditures put a PRP at a disadvantage compared to sloppier competitors that enjoy reduced operational costs but face similar liability risks. Thus, the rational strategy for a firm that may unavoidably emit even trace amounts of contaminants will be to "save by reducing precaution costs" and hope to not be among those found liable. Richard A. Epstein, *Two Fallacies in the Law of Joint Torts*, 73 Geo. L.J. 1377, 1386 (1985). The only way to avoid such perverse incentives in a strict liability regime is "by not treating the polluters as joint tortfeasors." William M. Landes & Richard A. Posner, *Joint & Multiple Tortfeasors: An Economic Analysis*, 9 J. Legal Stud. 517, 543 (1980).

### B. The Ninth Circuit's Concern For The Public Fisc Does Not Justify Disregarding Common-Law Principles Of Apportionment

A central theme in the Ninth Circuit's "super strict" reading of CERCLA is fear that reasonable apportionment would leave the government, rather than other PRPs, paying for orphan shares of cleanups. In the Ninth Circuit's view, imposing joint and several liability on those with an admittedly "minor connection" promotes CERCLA's purpose of "distribut[ing] economic burdens .... as far as possible [to] *some* entity with connection to contamination," rather than the government. Pet.App-43a. The Ninth Circuit did not purport to find this principle in the common law, but drew it solely from the court's own view of the public policies underlying CERCLA.

A "polluter pays" principle is undeniably one of the policies underlying CERCLA, but it is not absolute—

and the Ninth Circuit's hostility to apportionment pushes that notion beyond all rational limits. If Congress had been solely concerned with ensuring that the government was never forced to absorb orphan shares, then it would have mandated joint and several liability. Congress's *rejection* of that choice necessarily represented a decision that orphan shares should be borne by the government in at least some cases. Congress also established the Superfund to pay for cleanup costs that cannot be collected from PRPs. *See* 42 U.S.C. §9611; S. Rep. No. 96-848, at 13 (1980) (fund created to "finance response actions where a liable party does not clean up, cannot be found, or cannot pay the costs of cleanup and compensation"). Until 1995, that account was primarily funded by levies on crude oil and chemicals, as well as an environmental tax on corporations. After Congress allowed that taxing authority to lapse, the Superfund has been increasingly funded by general appropriations and fines.[12] Congress has decided that when cleanup expenses cannot be assigned to a truly responsible party they should be shared by industry or the public generally. It is not the Ninth Circuit's place to bend common-law principles in the service of a different conception of public policy.

This Court has consistently refused to assume that CERCLA abrogated common-law principles, even when doing so would maximize the Government's

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[12] *See* Letter from John B. Stephenson, Director of Natural Resources & Environment, Government Accounting Office, to Sen. James M. Jeffords (Feb. 18, 2004), *available at* http://www.gao.gov/new.items/d04475r.pdf (last visited Nov. 16, 2008).

ability to recover from PRPs. In *Bestfoods*, the government sought to hold a parent company "that actively participated in, and exercised control over, the operations of a subsidiary" liable for contamination caused by that subsidiary. 524 U.S. at 55. Rather than looking to the broader purposes of CERCLA, this Court defined the scope of the parent corporation's liability in light of common-law principles and held that a parent could not be derivatively liable for the acts of its subsidiaries unless "the corporate veil may be pierced." *Id.* at 62-63. This Court held that "'in order to abrogate a common-law principle, [CERCLA] must speak directly to the question addressed by the common law,'" that "nothing in CERCLA purports to reject [the] bedrock principle" respecting the legal distinctiveness of a subsidiary, and that "against this venerable common-law backdrop, the congressional silence is audible." *Id.* (citation omitted).

Similarly, CERCLA's remedial purposes did not move this Court to discard the default "American" rule that attorneys' fees are not recoverable absent explicit authorization. *See Key Tronic Corp. v. United States*, 511 U.S. 809 (1994). Because CERCLA did not "expressly mention[]" or "otherwise evince an intent to provide" fees spent on recovery litigation, this Court held that they were generally not recoverable as response costs under §107. *Id.* at 815, 819. *Key Tronic* followed the American rule even though "'awarding [such] fees'" would have promoted CERCLA's broader purpose of "'encourag[ing] private parties to assume the financial responsibility of cleanup.'" *Id.* at 819 n.13 (citation omitted).

In *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986), a state defending its toxic "spill tax" argued that CERCLA's

cleanup goals counseled for a narrow construction of CERCLA's preemptive scope. *Id.* at 371. In finding the tax preempted, *Hunt* emphasized that CERCLA's preemption provision "resulted in part from Congress' concern about the potentially adverse effects of overtaxation" of polluters. *Id.* at 372. Here, as in *Hunt*, "remedying the Nation's toxic waste problems as effectively as possible was not the sole policy choice reflected in CERCLA," *id.*, and courts should not disturb the balance Congress struck in adopting common-law principles of apportionment and causation.[13]

The only possible common-law basis for the Ninth Circuit's policymaking is comment h to Second Restatement §433A, which suggests that considerations of "injustice" could permit courts to impose joint and several liability if some responsible parties are unavailable or insolvent. The district court considered comment h and found it inapplicable here. Pet.App.-243a-45a The Ninth Circuit did not review this conclusion, but courts firmly reject comment h in the CERCLA context. *See, e.g.*, *Bell Petroleum*, 3 F.3d at 901 n.13; *Hercules*, 247 F.3d at 718 n.10. The

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[13] When this Court fashions common-law rules more generally, it rejects those that would saddle parties with unforeseeable liability. In crafting common-law restrictions on punitive damages, the Court identified "the stark unpredictability of punitive awards" as the primary evil it sought to avoid. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2625 (2008). Raising the apportionment bar—and thus holding landowners liable for pollution *completely* unrelated to their ownership—similarly prevents potential PRPs from structuring their conduct to avoid capricious liability.

retroactive strict liability imposed by CERCLA is often remarkably "unjust" in common-law terms, and there certainly is no justification for importing broader equitable considerations into the apportionment analysis *only* when they favor plaintiffs. Liberal application of comment h in cases involving insolvent defendants would also completely undo Congress's decision not to mandate joint and several liability—by imposing joint and several liability in every situation where it matters. Regardless, the district court certainly did not abuse its discretion in declining to impose joint and several liability under comment h here, and no further proceedings on this question are necessary.

The Ninth Circuit's suggestion that it is always better for a private party with "some connection" to the pollution to pay for cleanup, rather than the taxpayers, is also nonsensical public policy. Society as a whole is a better insurer against the risks of insolvency than a marginal PRP. *See* Jerry L. Anderson, *The Hazardous Waste Land*, 13 Va. Envtl. L.J. 1, 34-35 (1993) (citing Guido Calabresi, *The Costs of Accidents* 40 (1970), and Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L.J. 499, 519-24 (1961)). And if the purpose of CERCLA is shifting the costs of cleanup to "'parties who benefited from the disposal of the wastes,'" Pet.App.-17a (citations omitted), *society*—which enjoys the lower product costs that accompany environmental laxity, *id.* at 35—is a far more plausible candidate than a landowner with the misfortune of being near a toxic

waste site.[14] As one commenter observed, in multiple-PRP cases, "what appears on the surface to be a fair distribution of the cleanup costs deteriorates rapidly into a liability lottery, in which a few randomly-selected parties, many of whom have little or even no connection to the waste disposal activity, bear the entire cost of cleanup." Anderson, s*upra*, 13 Va. Envtl. L.J. at 9. PRPs are pulled into the liability pool by dint of a waste truck driver's foggy, decades-old recollection, *id.* at 12-14, by the government's practice of searching out deep-pocketed parties, *id.* at 40, or (as explained above) simply by the EPA's decision to define a "facility" that might encompass a hundred square miles.

### C. The Ninth Circuit's Interpretation Exacerbates Doubts About CERCLA's Constitutionality

CERCLA imposes far-reaching and unprecedented retroactive liability. Current defendants who are entirely innocent in terms of traditional fault are held liable for the conduct of others, sometimes as far back as a century ago, that in many cases would not even have been understood to be wrongful by the participants at the time. This Court enjoined

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[14] The "innocent landowner" defense only applies to those who acquired land *after* any disposal. 42 U.S.C. §9601(35)(A). Even if such an innocent purchaser can *prove* that the disposal occurred before his acquisition, he must also show that he had no reason to know of any disposal at the time of acquisition, and that he made all "appropriate inquiries" at the time of purchase. *Id.* §9601(35)(B). Courts have "held [such] parties to rigid standards in proving their purchase was innocent." 1 Allan J. Topol & Rebecca Snow, *Superfund Law & Procedure* §5:21, at 574 (2007).

application of the Coal Act in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), because it imposed retroactive liability for the health care costs of former coal miners and their families on coal industry participants, under circumstances where the companies had made no promises and were not genuinely *responsible* for the harms they were being forced to shoulder. CERCLA strains the basic due process and takings principles articulated in cases like *Eastern Enterprises* close to the breaking point, even if liability is rationally apportioned among responsible parties.

The Railroads respectfully submit that interpreting CERCLA to impose joint and several liability in all but extraordinary cases, as the Ninth Circuit's reasoning here would dictate, would raise "a multitude of constitutional problems." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005). Absent reasonable apportionment here, for example, CERCLA would hold the Railroads retroactively liable for the cleanup of nearly fifty-year-old contamination on the B&B parcel—contamination for which the Railroads had no fault or responsibility under governing law at the time, and that the Railroads had absolutely no power to prevent. The Ninth Circuit would excuse the Railroads from such retroactive liability only if they can produce records that only *B&B* could have kept, about activities on B&B's own land fifteen years before it began leasing the Railroad parcel, and that the court of appeals admitted would have been of "little utility to B&B" and unlikely to be "available for periods long in the past." Pet.App.-41a. The companies in *Eastern Enterprises* at least once *employed* the coal workers to whom they were ordered to pay unexpected benefits, *cf.* 524 U.S. at 560 (Breyer, J., dissenting); impressing a party to

pay after the fact for a problem it did not cause and could not have prevented is "far outside the bounds of retroactivity permissible under" the Constitution, *id.* at 550 (Kennedy, J., concurring in the judgment and dissenting).

There is no reason for this Court to adopt an interpretation of CERCLA that would create serious constitutional doubts in a great many cases, including this one, when common-law principles provide a ready framework for confining the statute within sensible bounds.

## CONCLUSION

The decision of the Ninth Circuit should be reversed, and the district court's judgment should be affirmed. There is no need for a remand.

Respectfully submitted,

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