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IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff, v. TERRY SHANER, Defendant and GENERAL BATTERY CORP., Defendant/Third-Party Plaintiff, v. BARBARA BROWN DIMENICHI, et al., Third-Party Defendants.	:CIVIL ACTION : No. 85-1372

MEMORANDUM

HUYETT, J. June 25, 1990

This is an action arising under Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §9607(a). The United States, on behalf of the Environmental Protection Agency ("EPA"), seeks to recover the response costs incurred in an environmental clean-up at a site known as Brown's Battery Breaking site ("the Site"). The United States also seeks a declaratory judgment t

defendants are liable for future response costs at the Site. On the Government's unopposed motion, this action was placed in civil suspense late in 1985 pending the outcome of criminal proceedings involving B.E.S. Environmental Specialists, Inc. ("BES"), the contractor that performed much of the environmental clean-up work for the United States. I removed this case from civil suspense on June 7, 1989. Plaintiff now moves for partial summary judgment on the issue of liability for the costs of clean-up. For the reasons stated below, I will grant plaintiff's motion.

I.

The Site is located on a 10-year floodplain in a rural area comprised of mostly open fields and farm lands near Shoemakersville in Tilden Township, Berks County, Pennsylvania. Bordered by the Schuylkill River to the south, Mill Creek to the west, Conrail railroad tracks to the north and Fisher Lane to the east, the Site covers approximately 14 acres, and contains a garage and auto body shop, three homes with vegetable gardens and residential wells, and a large open field.

From 1961 until 1971, Robert T. Brown, Sr. owned the Site and operated a battery breaking and reclamation business. As part of his business, Brown obtained automobile batteries and "broke" them to remove, recover and resell the lead contents of the batteries. Although he may not have been aware of it at the

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time, Brown released substantial quantities of lead into the environment in the ordinary course of his business.

Car batteries consist of a hard rubber casing containing grids, electrodes, plugs, and an acid solution. Brown's business consisted of opening large used batteries with a specially designed "hydraulic guillotine," removing the interior grids, components and acid, washing and recovering the lead from the batteries, and crushing the battery casings for disposal. Brown salvaged the grids and washwater for reclamation and return to his customers. In the course of the reclamation operations, liquids from the batteries and the washwater spilled onto the ground. After completing the salvaging process, Brown crushed the battery casings and utilized them as fill on the Site or to form the road surface for the driveways on the Site. It is estimated that Brown "broke" as many as 5,000 batteries in a single day.

Defendant General Battery Corporation ("GBC") and its predecessor[1] utilized the services of Brown's battery breaking and lead recovery facility. Pursuant to an arrangement with Brown, GBC sent batteries to the Site for breaking and Brown returned the lead contents of the batteries to GBC. However, GBC was not the only source of Brown's business.

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1. GBC was acquired by Price Battery ("Price") in 1966

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In 1971, Robert Brown died and his widow[2] became the owner of the Site. In 1977, the property was sold to defendant Terry Shaner and his wife, Susan Shaner. Subsequently, the property was transferred to the sole ownership of Terry Shaner. Shaner leased the three residences and garage and utilized the remainder of the property for a trucking business.

In May 1980, the Pennsylvania Department of Environmental Resources ("PaDER") investigated the Site. An inspector discovered crushed battery casings covering approximately five acres of the Site. A month later, PaDER issued a Notice of Violation to the Shaners. The Notice of Violation alleged that the Shaners were in violation of the Pennsylvania Solid Waste Management Act, because disposal was occurring on the Site without a permit. PaDER ordered the Shaners to cease waste disposal at the Site. In December 1980, PaDER investigated the Site again but took no further action despite finding additional crushed battery casings.

Nearly three years later, in June 1983, the Pennsylvania Department of Health ("PaDOH") took blood samples from the four children living on the Site. The results showed elevated levels of lead in their systems.[3] At this point, the EPA was notified.

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2. Robert Brown's widow, Barbara Brown DiMenichi, is a third-party defendant in this action.

3. GBC expends a great deal of effort challenging the sufficiency of the blood tests of these four children. See GBC's Memorandum of Law at 11-13. However, this overlooks the EPA testing which reveals lead in the soil, fill material, garden vegetables, stream sediments and ambient air.

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EPA conducted a Site visit, an extent of contamination survey, a preliminary assessment of Site conditions, and a feasibility study. EPA sampling and testing demonstrated extensive lead contamination in the fill material, soil, garden vegetables, stream sediments and ambient air.[4] In certain areas, the level of lead contamination was very substantial. Analysis of stream sediments, surface water and ambient air suggested that lead was being transported off-site. In addition, operation of vehicles on the battery casing based driveways resulted in increased emissions of lead into the air.[5]

Based upon the sampling results, PaDOH and the Center for Disease Control ("CDC") certified that the levels of lead at the Site posed an imminent threat to public health and advised EPA to evacuate and relocate the residents.[6] After relocation of the residents, EPA decided to address the immediate problems on the Site through excavation, consolidation of lead contaminated soil and battery casings, and capping those materials on the Site. These activities took place approximately from January to July 1984. The clean-up consisted of excavation of approximately

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4. Because the Site is located on a 10-year floodplain, the contaminated casings and soil would be subject to periodic inundation. In fact, the Site was flooded in 1972 and 1984. Flooding, or heavy rains, could cause transportation off-site into the groundwater, Mill Creek, and the Schuylkill River.

5. Terry Shaner's business required the operation of heavy equipment throughout the Site.

6. Under an Inter-Agency Agreement with EPA, the Federal Emergency Management Agency ("FEMA") utilized Superfund monies for temporary relocation of the residents beginning on or about October 31, 1983.

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55,000 cubic yards of lead-contaminated soil and casings which were consolidated in the area of highest concentration of casings in a mound. The mound was subsequently capped with a thick clay layer. Both the clay cap and excavated areas were graded and seeded or graveled. EPA installed monitoring wells and a security fence, and decontaminated the residences and personal effects of those relocated.

The removal action was primarily performed by EPA through its contractor, BES. BES was indicted for making false claims to the government in connection with the work performed at the Site. However, after a non-jury trial before Judge Joseph S. Lord, III, BES was acquitted of all charges. Subsequent administrative proceedings resulted in the debarment of BES from government contracting for a period of 21 months. However, the debarment was based upon an official finding that BES gave two gratuities to the EPA's on-scene coordinator, not upon allegations of false billing.[7]

II.

Congress enacted CERCLA in 1980 in an effort to provide the United States, through the EPA, with the authority to address risks to the health and environment posed by the release or threatened release of hazardous substances, pollutants and

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7. The government maintains that it will not seek to recover any costs from defendants which have been "tainted" by the alleged fraud of BES.

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contaminants. CERCLA creates a fund ("Superfund") to be used by the EPA to conduct removal actions and to implement long-term remedial actions at hazardous waste sites.

By enacting CERCLA, Congress clearly intended that

> society should not bear the costs of protecting the public from hazards produced in the past by a generator, transporter, consumer, or dumpsite owner or operator who has profitted or otherwise benefitted from commerce involving these substances and now wishes to be insulated from any continuing responsibilities from the present hazards to society that have been created.

S.Rep. No. 96-848, 96th Cong. 2d Sess. 13 (1980). To this end, CERCLA permits the federal government to bring actions against responsible parties to recover its response costs and replenish the Superfund. See 42 U.S.C. 9607(a).

Section 107(a) of CERCLA provides in pertinent part as follows:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section --
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> (1) the owner and operator of a vessel or a facility,
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> * * * * * *
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> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another person or entity and containing such hazardous substances, and
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> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities,

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> incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for --
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> > (A) all costs of removal or remedial action incurred by the United States Government ....

42 U.S.C. §9607(a).

The liability which CERCLA imposes upon potentially responsible parties ("PRPs") under Section 107(a) is strict liability. New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985); United States v. Tyson, 25 Env't Rep. Cas. 1897 (E.D. Pa. 1986) (Broderick, J.); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 576 (D. Md. 1986); United States v. Northeastern Pharmaceutical and Chemical Co., Inc., 579 F. Supp. 823, 844 (W.D. Mo. 1984), aff'd in part and rev'd in part on other grounds, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed. 2d 102 (1987). In addition, unless the harm is divisible, the liability imposed under CERCLA is joint and several. See United States v. Bliss, 667 F. Supp. 1298, 1313 (E.D. Mo. 1987) ("Each of the defendants contributed in some degree to the release of the hazardous substances and the incurrence of response costs, and the defendants have offered no rational basis for apportionment of this harm"); see also Chemical Waste Management, Inc. v. Armstrong World Industries, Inc., 669 F. Supp. 1285, 1295 (E.D. Pa. 1987) (Cahn, J.); United States v. Stringfellow, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1395-96

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(D.N.H. 1985), aff'd in part and vacated in part on other grounds, 900 F.2d 429 (1st Cir. 1990); United States v. Wade, 577 F. Supp. 1326, 1338-39 (E.D. Pa. 1983) (Newcomer, J.).

A. Potentially Responsible Parties.

Section 107 establishes four broad categories of parties that may be held responsible for the clean-up of a release or threatened release of a hazardous substance. Chemical Waste Management, Inc., 669 F. Supp. at 1295. The first two classes of PRPs include the past and present owners, 42 U.S.C. §9607(a)(1), and past and present operators, 42 U.S.C. §9607(a)(2), of hazardous waste sites and facilities. As a present site owner, plaintiff argues that defendant Shaner falls into the first category. The third class consists generally of persons who arranged for disposal or treatment of hazardous substances at any facility owned or operated by a third party. 42 U.S.C. §9607(a)(3). The final category of PRPs includes those persons who have transported hazardous substances for disposal or treatment. 42 U.S.C. §9607(a)(4). Plaintiff argues that GBC falls within both of the final two categories.

It is undisputed that defendant Terry Shaner owns Brown's Battery Breaking site.[8] Therefore, defendant Shaner is liable under Section 107(a) of CERCLA, if the other requirements of the section are satisfied. Current owners of facilities are liable

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8. Defendant Shaner has failed to respond to the instant motion. However, the answer filed on his behalf admits ownership of the site.

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despite their non-involvement with the original contamination of the site. United States v. Tyson, 25 Env't Rep. Cas. at _____ ("The current owner of a facility is within section 9607(a)(1) even if it never operated the facility as a hazardous waste dumpsite and even if no hazardous wastes were dumped at the facility during its period of ownership"); see also New York v. Shore Realty Corp., 759 F.2d at 1043-45; United States v. Conservation Chemical Co., 619 F. Supp. 162, 186-90 (W.D. Mo. 1985); United States v. Argent Corp., 21 Env't Rep. Cas. 1354, 1356 D.N.M. 1984).

The record also clearly establishes that defendant GBC arranged for the disposal or treatment, or arranged with a transporter for transport for the disposal or treatment, of hazardous substances within the meaning of Section 107(a)(3). Briefly, GBC's predecessor, Price, had an arrangement with Brown for breaking of junk batteries as early as October 1962. Pursuant to the arrangement, Price loaded its trailers with used batteries at its plant which were then picked up by Brown with his own tractor. Brown then transported the trailers, with the batteries, to his facility. The batteries were to be broken at Brown's battery breaking plant in Tilden Township. The entire breaking process required Brown to break the batteries, wash out the cases, return scrap and sediment from the washing to Price with its trailer, and dispose of all "broken" containers. Further, the batteries and scrap remained the property of Price at all times. While the record does not demonstrate how long the

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contract remained in place, it is clear that Price, and later GBC, enjoyed this arrangement for a substantial period of time.

When GBC purchased Price in 1966, it acquired certain assets of Price, including Price's contract with Brown. Further, GBC acknowledged that it was a successor in interest to Price in 1977 when released Mrs. Brown from the purchase option which existed in the original contract with Price.

GBC cannot avoid liability by arguing that it did not arrange for the disposal or treatment of lead. Intent or knowledge are not elements of the United States' burden of proof. See United States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373, 1381 (8th Cir. 1989) ("Courts have also held defendants 'arranged for' disposal of wastes at a particular site even when defendants did not know the substances would be deposited at the site or in fact believed they would be deposited elsewhere"). More importantly, the arrangement between Price and Brown specifically contemplated the disposal of battery casings by Brown, and the process necessarily involved the risk that battery acid and washwater would be spilled onto the ground.

CERCLA defines "disposal" to include the "discharge, deposit, ... spilling, leaking or placing" of a hazardous substance, in this case lead, onto the site. 42 U.S.C. §§6903(3), 9601(29). Further, "treatment" means "any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste

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or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume." 42 U.S.C. §§6903(34) (emphasis supplied), 9601(29). The conduct of GBC, and its predecessor, falls squarely within the plain language of these sections of CERCLA. See New York v. General Electric Co., 592 F. Supp. 291, 297 (N.D.N.Y. 1984); see also United States v. Aceto Agricultural Chemicals Corp., 872 F.2d at 1373 (CERCLA imposes liability upon companies that provide hazardous substances to another company for processing and return).

B. Other Elements of CERCLA Liability.[9]

In addition to establishing that the defendants fall within at least one class of PRPs listed in Section 107(a), the United States must prove each of the following elements: (a) that Brown's Battery Breaking site was a "facility"; (b) that a "release" or "threatened release" of a "hazardous substance" occurred; and (c) that the United States incurred "response costs" as a result. Each of these elements will be dealt with seriatim.

CERCLA defines "facility" as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. §9601(9)(B).

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9. While GBC argues that genuine issues of material fact exist in respect to whether GBC can be classified as a transporter or generator, it does not raise such an argument in respect to the elements discussed in this section.

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Congress established an expansive definition of this term "to deal with every conceivable area where hazardous substances came to be located." New York v. General Electric Co., 592 F. Supp. at 296 (dragstrip to which contaminated oil was applied is a "facility"); see United States v. Conservation Chemical Co., 619 F. Supp. at 185 ("the term 'facility' includes every place where hazardous substances come to be located"); United States v. Metate Asbestos Corp., 584 F. Supp. 1143, 1148 (D. Ariz. 1984) (real estate subdivision with asbestos fibers on the ground is a "facility").

A "release" consists of "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment" of a hazardous substance. 42 U.S.C. §9601(22). A release or threatened release of any hazardous substance is sufficient to establish liability. United States v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984, 991-93 (D.S.C. 1984), aff'd in part and vacated in part on other grounds, United v. Monsanto Co., 858 F.2d 60 (4th Cir. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 3156, 104 L.Ed. 2d 1019 (1989).

CERCLA defines "hazardous substance" by reference to several other environmental protection statutes and regulations, including those substances designated under the Clean Water Act, 33 U.S.C. §1321(b)(2)(A), listed in 40 C.F.R. §116.4, and Section 102 of CERCLA, 42 U.S.C. §9602, listed in 40 C.F.R. Part 302. See 42 U.S.C. §9601(14). A substance is considered hazardous, if

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it falls within one or more of the categories in Section 101(14) of CERCLA, 42 U.S.C. §9601(14). Eagle-Picher Industries v. EPA, 759 F.2d 922, 927-29 (D.C. Cir. 1985). Lead is included on the regulatory lists identifying hazardous substances.

The record demonstrates that the activities at Brown's Battery Breaking on behalf of Price and GBC included: (1) the picking up of batteries by Brown, or, on some occasions, delivery to Brown by the company; (2) a lead reclamation process; and (3) the return of the reclaimed lead and salvaged interior grids to Price or GBC. The lead reclamation process consisted of placing the batteries on a conveyor belt, chopping the tops of the batteries off with a hydraulic guillotine, removing the inside grids from the batteries, washing out the battery casings, crushing the casings, and using them on the Site as either landfill or paving materials. Spillage of battery acid and washwater onto the ground was a regular part of the battery breaking process. All of these actions constituted the release of a hazardous substance, lead, into the environment. Moreover, heavy rainfall or flooding could cause the further release of lead off-site.

There is no genuine issue of material fact that the Brown's Battery Breaking site was a facility upon which a release of a hazardous substance occurred. Lead is clearly a hazardous substance within the meaning of CERCLA. Moreover, through the operations of Brown's Battery Breaking, lead came to be located and disposed of on the Site. Therefore, the Site constitutes a

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facility within the meaning of CERCLA. EPA testing revealed elevated levels of lead in soil sediment and surface water. These findings demonstrate both a release of lead on-site and a threatened release of lead off-site.

Finally, the United States incurred response costs as a result of the release or threatened release of the hazardous substance on the Site. The term "response" simply means "remove, removal, remedy, and remedial action" and includes related "enforcement activities." 42 U.S.C. §9601(25). "Removal" includes

> such actions as may be necessary [sic] taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, ... or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, ... [and] temporary evacuation and housing of threatened individuals not otherwise provided for ....

42 U.S.C §9601(23).

In light of this very broad statutory definition of response, there can be no question that the United States incurred response costs. These could include, to name only a few, the costs of investigation and testing, the costs of relocating the residents on the site, the costs of excavation, consolidation and capping of lead-contaminated materials, and the costs of enforcing the provisions of CERCLA.

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C. Consistency with the National Contingency Plan.

GBC's response to plaintiff's motion for partial summary judgment devotes a substantial amount of space to the following matters: (1) whether the removal action, in whole or in part, was inconsistent with the National Contingency Plan ("NCP"); (2) whether costs were incurred as a result of fraud on the government; and (3) whether the removal action was effective or, stated differently, whether the removal mitigated the source of the alleged risk of harm. See GBC's Memorandum of Law at 9-46.

The instant motion seeks only partial summary judgment on the issue of liability, not a judicial determination of the extent of the obligation of the defendants. Most of GBC's lengthy response is devoted to arguments which go to the extent of liability, not the fact of liability. Therefore, much of this information is not relevant to the motion presently pending before the court. I, therefore, decline to repeat this factual information herein. However, before discussing GBC's asserted defenses to CERCLA liability, I will briefly address some of the arguments made by GBC.

Section 107(a) of CERCLA states that a PRP "shall be liable for all costs of removal or remedial action ... not inconsistent with the national contingency plan; ..." 42 U.S.C. §9607(a)(4)(A); see also 42 U.S.C. §§9604(a), 9605(a). Compliance with the NCP assures that response actions are both cost-effective and environmentally sound. Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1291 n.42 (D. Del. 1987).

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aff'd, 851 F.2d 643 (3d Cir. 1988); see also 40 C.F.R. §§300.65(a) & (c), 300.61(c). The NCP is comprised of regulations, required by CERCLA and promulgated by the EPA, establishing the procedures and standards for response actions.

The government need not prove consistency with the NCP to obtain partial summary judgment on the issue of liability. United States v. Medley, 25 Env't Rep. Cas. 1315, 1318 (D.S.C. 1986); see also United States v. Northernaire Plating Co., 670 F. Supp. 742 (W.D. Mich. 1987) (partial summary judgment as to CERCLA liability to the extent not inconsistent with the NCP), aff'd, United States v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1527, 108 L.Ed. 2d 767 (1990); United States v. SEPTA, 24 Env't Rep. Cas. 1860, 1864 (E.D. Pa. 1986); but see Artesian Water Co. v. New Castle County, 659 F. Supp. at 1291-92.[10]

GBC's primary claim of inconsistency with the NCP is that immediate action was not justified by an "immediate and significant risk of harm to human life or to the environment" as required by the NCP. See 40 C.F.R. §300.65. Even if immediate removal was not justified, an issue which I need not address at this juncture, the EPA incurred some other costs in responding to

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10. I note that while the district court opinion in Artesian Water Co. clearly states that "consistency with the NCP is an element of [plaintiff's] prima facie case under section 107," id. at 1291, it does not preclude the entry of partial summary judgment on all other issues relevant to plaintiff's prima facie case except consistency with the NCP. While affirming the decision of the district court, see 851 F.2d at 643, the [illegible] Circuit's opinion does not address this issue.

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the release or threatened release of lead at the Site. See United States v. Wade, 577 F. Supp. at 1333 n.4 (costs of "investigating, monitoring, testing and evaluating the situation" at the site are recoverable); see also United States v. Hardage, 733 F. Supp. 1424, ___ (W.D. Okla. 1989); Artesian Water Co., 659 F. Supp. at 1291-92; New York v. General Electric Co., 592 F. Supp. at 298. In fact, the NCP specifically contemplates that EPA would incur response costs outside of and before immediate removal. See, e.g., 40 C.F.R. §300.64 (preliminary assessment); 40 C.F.R. §300.65(a) (review of preliminary assessment). Moreover, both CERCLA and the NCP anticipate the recovery of costs of long-term remedial action not associated with immediate removal action. See 42 U.S.C. §9607(a); 40 C.F.R. §300.68.

From this, I conclude that plaintiff has incurred some response costs consistent with the NCP. Consequently, I will enter partial summary judgment in favor of plaintiff but only to the extent that claimed response costs were consistent with the NCP. GBC correctly points out that genuine issues of material fact exist as to whether all of the claimed response costs incurred by plaintiff were consistent with the NCP.[11] This

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11. In fact, plaintiff has candidly admitted that it may not be able to recover certain expenditures made because of the "taint" of alleged fraud by BES. However, the possibility of this fraud does not automatically invalidate the costs of all removal or remedial action taken by the government. For a more detailed discussion of this issue, see section IV. A. below.

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issue is more properly left for the trial of the remaining issues in this case.[12]

III.

GBC has asserted a host of defenses to CERCLA liability. See GBC's Memorandum of Law at 90-125. Section 107(b) enumerates the defenses available under CERCLA as follows:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by --
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> (a) an act of God;
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> (b) an act of war;
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> (c) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant ... ; or
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> (4) any combination of the foregoing paragraphs.

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12. I also decline to resolve the dispute between the parties as to whether plaintiff has the burden of proving consistency with the NCP or defendant has the burden of proving inconsistency with the NCP. Compare Artesian Water Co., 659 F. Supp. at 1291-92 ("consistency with the NCP is an element of [plaintiff's] prima facie case under section 107") with United States v. Northeastern Pharmaceutical, 810 F.2d at 747-48 (statutory scheme supports allocation of burden of proof of inconsistency with the NCP upon defendants when the government seeks to recover response costs). A motion in limine may be filed with respect to this issue prior to trial.

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42 U.S.C. §9607(b). In keeping with the remedial purpose of CERCLA, courts have narrowly construed these statutory defenses. See United States v. Aceto Agricultural Chemicals Corp., 872 F.2d at 1378; Levin Metals Corp. v. Parr-Richmond Terminal Co., 799 F.2d 1312, 1317 (9th Cir. 1986); United States v. Dickerson, 640 F. Supp. 448 (D. Md. 1986).

None of the above enumerated defenses apply to either defendant. However, GBC does assert certain equitable and constitutional defenses.[13]

A. Equitable Defenses.

13. In addition to asserting equitable defenses, GBC argues that CERCLA (1) violates the due process clause (procedural and substantive), (2) violates the equal protection clause, and (3) is an unconstitutional penal statute. Also, GBC briefly argues that this case is not justiciable.

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GBC argues that the doctrine of "unclean hands"[14] bars plaintiff from recovery under Section 107(a). While GBC correctly points out that some courts have concluded that equitable defenses are available under CERCLA, see United States v. Mottolo, 695 F. Supp. 615, 626-27 (D.N.H. 1988); Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049, 1057 (D. Ariz. 1984), aff'd, 804 F.2d 1454 (9th Cir. 1986), other courts have flatly rejected the raising of equitable defenses to a cost recovery action under CERCLA as inconsistent with the statutory scheme and congressional intent. See United States v. Vineland Chemical Co., Inc., 692 F. Supp. 415, 423 (D.N.J. 1988) (Gerry, C.J.); Chemical Waste Management Inc. v. Armstrong World Industries, Inc., 669 F. Supp. at 1291 n.7.

Specifically, in an action for contribution by one CERCLA responsible party against another, the Third Circuit has stated

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14. The United States Supreme Court has described the defense of "unclean hands" as follows:

> The guiding doctrine .. is the equitable maximum that "he who comes into equity must come with clean hands." This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. ... Thus while "equity does not demand that its suitors shall have led blameless lives," as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue.

Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 814-15, 65 S.Ct. 993, 89 L.Ed. 1381 (1945) (citations omitted).

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> The statute does not list caveat emptor as a defense against initial liability. Contribution may be enforced against one who is liable under the Act, but a court may utilize equitable factors in determining the amount allocated.
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> * * * * * *
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> Although not a defense to a government suit for clean-up costs, caveat emptor if applied between private parties arguably would not contradict the statutory text. Several considerations, however, lead us to conclude that this venerable doctrine is not in keeping with the policies underlying CERCLA.
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> * * * * * *
>
> Doctrines such as a caveat emptor and "clean hands," which in some cases could bar relief regardless of the degree of culpability of the parties, do not comport with the congressional objectives. In the words of one district judge, "the 'unclean hands' doctrine espoused in Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049, 1057 (D. Ariz. 1984), aff'd, 804 F.2d 1454 (9th Cir. 1986), has no place in CERCLA actions."

Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 89-90 (3d Cir. 1988) (quoting Chemical Waste Management Inc. v. Armstrong World Industries, Inc., 669 F. Supp. at 1291 n.7; footnote and citation omitted), cert. denied, ___ U.S. ___, 109 S.Ct. 837, 102 L.Ed. 2d 969 (1989).

Following the holding of the Third Circuit in Smith Land & Improvement Corp. and Judge Cahn in Chemical Waste Management Inc., I conclude that the equitable defense of "unclean hands" does not bar the United States from recovering against

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defendants.[15] This result is consistent with the general principle that equitable defenses may not be used to prevent the government from enforcing its laws to protect the public interest. Henderson v. International Union of Operating Engineers, Local 701, 420 F.2d 802, 808 (9th Cir. 1969); Eichleay Corp. v. National Labor Relations Board, 206 F.2d 799, 806 (3d Cir. 1953).

B. Constitutional Defenses.

The constitutional defenses raised by GBC are entirely without merit and, thus, do not require extended discussion.

CERCLA meets the requirements of substantive due process.[16] See, e.g., United States v. Monsanto Co., 858 F.2d at 173-74 (retroactive application and potentially harsh consequences of CERCLA do not violate due process clause); United States v. Northern Pharmaceutical, 810 F.2d at 734 (retroactive application

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15. As stated previously, GBC has not created a genuine issue of material fact which would tend to prove that the entire cost of the recovery action at the Site was based upon "unclean hands." I leave for another day the issue of whether the doctrine of "unclean hands" may be used to mitigate any amount which may be due to the government under Section 107(a). Defendants may raise this issue at an appropriate time. I note that the United States has stated that it will not seek to recover those amounts from defendant which may be "tainted" by the alleged fraud of BES.

16. GBC's procedural due process argument is merely a restatement of its substantive due process argument. In any event, because the liability of any PRP under Section 107(a) is determined by an appropriate federal court, such parties are receiving notice and an opportunity to be heard as required by the strictures of procedural due process. See generally Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed. 2d 494 (1985).

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of CERCLA does not violate due process clause); cf. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed. 2d 752 (1976) (retroactive liability on coal mine operators for black lung benefits to former miners does not violate the due process clause because such legislative action satisfies the rational basis test).

GBC's equal protection argument is best summarized from the following passage from its brief:

> CERCLA violates the guarantee of equal protection because it permits -- indeed encourages -- the discriminatory enforcement of its provisions. Because the statute has been interpreted to provide for joint and several liability, the EPA is not required to seek recovery from each of the parties who sent hazardous material to the same waste site. The Agency is free to select (as it has in this case) one member or a small number of members from a group of similarly situated parties, and attempt to impose on those few entities the full clean-up burden.
>
> The Agency is given this discretion even when it knows of the existence [of] other viable PRPs who may have been the primary source of the waste at a site. The decision of who will pay is often based on the selected party's wealth, its willingness to pay, or, perversely, its willingness to cooperate with the EPA by candidly admitting to prior conduct that now runs afoul of CERCLA. This discriminatory selection procedure is obviously the result of a conscious, deliberate policy within the EPA to ease its own administrative burden, rather than to ensure that all those who created the perceived waste problem pay for its remediation. This is surely the type of intentional, capricious enforcement that the equal protection guarantee was designed to prohibit.

See GBC's Memorandum of Law at 114-15.

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"Plaintiff's choice of defendants does not raise a constitutional equal protection claim and is clearly contemplated by joint and several liability." United States v. Conservation Chemical Co., 619 F. Supp. at 214-15. Congress recognized the impact joint and severally liability could have upon those parties selected by the government for recovery and tempered this by conferring the right to seek of contribution to the party selected and found liable. See H.R.Rep. No. 253(I), 99th Cong., 1st Sess. 1 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News 2835, 2861-62. The right of contribution permits a PRP found liable to seek reimbursement of response costs paid from other PRPs so as to spread out the extent of that parties liability more equitably. See Smith Land & Improvement Corp., 851 F.2d at 90.

Finally, "[t]here is no question that CERCLA furthers a legitimate and important nonpunitive legislative purpose: to clean-up hazardous waste disposal sites which pose a threat to human life." United States v. Tyson, 25 Env't Rep. Cas. at 1908-1909. For this reason, I reject GBC's argument that CERCLA is an unconstitutional penal statute. See United States v. Monsanto Co., 858 F.2d at 174-75 ("CERCLA does not exact punishment. Rather it creates a reimbursement obligation on any person judicially determined responsible for the costs of remedying hazardous conditions at a waste disposal facility. The restitution of clean-up costs was not intended to operate, nor

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does it operate in fact, as a criminal penalty or a punitive deterrent").

C. Justiciability.

GBC's non-justiciability argument rests solely on its contention that plaintiff has failed to demonstrate that it has incurred response costs in the past or that plaintiff will be incurring response costs in the future.

Although the extent to which plaintiff is entitled to recover response costs is hotly disputed by defendant GBC, I conclude that plaintiff has incurred response costs in the past for the reasons stated above. As to the propriety of entering a declaratory judgment as to liability for future response costs, I note that the record demonstrates that plaintiff is in the process of conducting a study as to the need for future response costs. Because the cost of the study is recoverable as a response cost, this establishes that plaintiff will, in fact, be incurring additional response costs despite the fact that the full nature and extent of these costs is presently unknown. Moreover, CERCLA expressly authorizes a court to enter a declaratory judgment on a PRP's liability for further response costs. See 42 U.S.C. §9613(g)(2).

Accordingly, GBC's arguments that this case is not justiciable and that this court may not enter a declaratory judgment as to future response costs are without merit.

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IV.

Finally, I will briefly address GBC's argument that much, if not all, of the evidence plaintiff relies on to support its motion for partial summary judgments based on inadmissible hearsay.

GBC correctly points out that Rule 56(e) of the Federal Rules of Civil Procedure requires that a court may enter summary judgment only when the moving party establishes the absence of material issues of fact on the basis of competent, admissible evidence. However, plaintiff properly demonstrates that the evidence presented in support of its motion is admissible hearsay.

The declarations and documents submitted by the government do not constitute inadmissible hearsay. The records upon which plaintiff relies -- the on scene coordinator's report, the extent of contamination study and feasibility study (to name a few) -- fall within the business records and public records exception to the rule against hearsay. See Fed.R. Evid 803(6) and (8); see also United States v. Northernaire Plating Co., 670 F. Supp. at 743-44 (reports of the EPA clearly fall within the purview of Fed.R.Evid. 803(8)); United States v. Tyson, 25 Env't Cas. Rep. at ____ (EPA and EPA contractor reports, including on-scene coordinator's report, admitted under Fed.R.Evid. 803(8)).

The declarations to which these documents are attached establish that the documents were made in the regular course of

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business, at or near the time, from information from persons with knowledge. The declarations further show that the documents are public agency records prepared in accordance with the agency's responsibility under CERCLA. The persons making the declarations were qualified to do so. Moreover, GBC has failed to challenge the trustworthiness of any documents in any significant respect. United States v. Northernaire Plating Co., 670 F. Supp. at 744 (opposing party has the burden of establishing untrustworthiness of report; absent showing of untrustworthiness, facts adduced from report may be included in affidavits).

Further, the facts and records upon which plaintiff relies to establish the relationship between GBC and Brown's Battery Breaking does not rest solely upon inadmissable hearsay. First, Carlton Dunkelberger, an ex-employee of Brown with personal knowledge of his business operations, clearly states that GBC's batteries were delivered to the Site, and describes in detail the process the batteries underwent once they reached the Site and the disposal of the crushed lead casings. Moreover, Brown's widow has verified that the GBC and Price receipts relied upon by plaintiff are business records of her ex-husband. These documents demonstrate that large quantities of batteries were delivered to the Site from defendant's place of business. This is sufficient to support this court's conclusion that GBC was a PRP under CERCLA. Finally, GBC presents no affirmative evidence which would contradict the facts presented by plaintiff concerning its business relationship with Brown.

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VI.

For the reasons stated above, plaintiff's motion for partial summary judgment is granted. Defendants are jointly and severally liable for the costs, past and future, incurred by the United States during the clean-up of Brown's Battery Breaking site only insofar as those costs are not inconsistent with the NCP. A determination of consistency with the NCP and the extent of defendants' liability will be made by the court at trial.

An appropriate order follows.

Daniel H. Huyett, 3rd, Judge

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VOL LAW

FILED JUN 25 1990

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

JUN 25 4 01 PM '90

UNITED STATES OF AMERICA, Plaintiff,	:	CIVIL ACTION No. 85-1372
v.	:	
TERRY SHANER, Defendant	:	
and	:	
GENERAL BATTERY CORP., Defendant/Third Party Plaintiff,	:	
v.	:	
BARBARA BROWN DIMENICHI, et al., Third Party Defendants.	:	

O R D E R

HUYETT, J. June 21, 1990

This Court's Memorandum and Order dated June 1, 1990 shall be amended as follows:

(1) Line 7 of footnote 15 on page 23 shall read as follows:

> this issue at an appropriate time. I note that the United States

(2) Line 4 of footnote 16 on page 23 shall read as follows:

> determined by an appropriate federal court, such parties are

(3) The bottom line on page 26 shall read as follows:

> judgment as to future response costs are without merit.

IT IS SO ORDERED.

ENTERED: 6-25-90

Daniel H. Huyett, 3rd, Judge

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FILED: 6-25-90