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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 UNITED STATES OF AMERICA,

CASE NO. C22-0485JLR

11 Plaintiff /  
12 Counter-Defendant,

ORDER

13 v.

14 THE BOEING COMPANY,

15 Defendant /  
16 Counter-Claimant.

17 Before the court is the parties' joint motion for clarification of the court's August  
18 31, 2023 order and for relief from a deadline. (Mot. (Dkt. # 65); *see also* 8/31/23 Order  
19 (Dkt. # 64).) In its August 31, 2023 order, the court granted in part  
20 Plaintiff/Counter-Defendant the United States of America's (the "Government") motion  
21 to phase proceedings, outlined the issues to be addressed in each phase, and ordered the  
22 parties to jointly propose a scheduling order for Phase I by no later than September 8,

1 2023. (8/31/23 Order at 8.) Relevant here, the court directed that Phase I will address  
2 Defendant/Counter-Claimant the Boeing Company’s (“Boeing”) divisibility defense and  
3 counterclaim for contribution, while Phase II will address equitable allocation of the  
4 Government’s response costs. (*Id.*) The parties now jointly seek to clarify in which  
5 phase discovery relating to the Government’s liability shall take place. (Mot. at 1-3.)

6 The Government argues Boeing is not entitled to discovery regarding the  
7 Government’s liability in Phase I. (*Id.* at 2.) Because the Government has stipulated  
8 generally that it “falls within one or more of the four categories of ‘covered persons’”  
9 under the Comprehensive Environmental Response, Compensation, and Liability Act  
10 (“CERCLA”) Section 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4), the Government argues  
11 discovery concerning its liability is relevant only to the equitable allocation of response  
12 costs, which will be addressed in Phase II. (Mot. at 2; *see also* Joint Status Rep. (Dkt.  
13 # 52) at 5 (stipulation); 8/31/23 Order at 8.) The Government further argues that  
14 Boeing’s contribution claim is separate and distinct from Boeing’s divisibility defense,  
15 and therefore discovery on the former is not relevant to the latter and would most  
16 appropriately be conducted during Phase II. (Mot. at 2-3). In contrast, Boeing argues the  
17 Government’s stipulation does not obviate the need for discovery concerning the  
18 Government’s liability in Phase I, particularly because Boeing intends to prove that the  
19 Government falls within a specific category of covered persons under CERCLA, 42  
20 U.S.C. § 9607(a), namely as an “operator” and “arranger.” (Mot. at 3-4; *see also* Ans. to  
21 Counterclaim (Dkt. # 57) ¶ 100 (denying the Government is an operator or arranger  
22 within the meaning of CERCLA).) Boeing also anticipates significant overlap between

1 the evidence supporting its divisibility defense and its counterclaim for contribution, such  
2 that bifurcating liability-related discovery into two phases would be inefficient and  
3 prejudicial. (Mot. at 4.) Finally, the parties seek relief from the September 8, 2023  
4 deadline to propose a schedule for Phase I. (*Id.* at 1; *see also* 8/31/23 Order at 8.) The  
5 parties jointly move for an extension of time to propose a schedule for Phase I until one  
6 week after the court rules on the instant motion. (Mot. at 1.) Being fully advised, the  
7 court rules on the parties' joint motion as follows.

8 First, Boeing shall be entitled to discovery regarding the Government's liability  
9 during Phase I. The court finds that such discovery is necessary to permit Boeing to  
10 pursue its divisibility defense and contribution counterclaim, both of which will be  
11 addressed during Phase I. (*See* 8/31/23 Order at 8.) To succeed on a divisibility defense,  
12 Boeing must show that "two or more persons acting independently caused a distinct or  
13 single harm for which there is a reasonable basis for division." *Pakootas v. Teck*  
14 *Cominco Metals, Ltd.*, 905 F.3d 565, 588 (9th Cir. 2018) (internal quotation marks  
15 omitted). Divisibility analysis is "intensely factual," and involves two steps. *Id.* at  
16 588-89. The court first considers whether the environmental harm is theoretically  
17 capable of apportionment. *Id.* at 588. This is primarily a question of law, though  
18 underlying this question "are certain embedded factual questions that must necessarily be  
19 answered, such as what type of pollution is at issue, who contributed to that pollution,  
20 how the pollutant presents itself in the environment after discharge, and similar  
21 questions." *Id.* at 588-89. Second, "if the harm is theoretically capable of  
22 apportionment, the fact-finder determines whether the record provides a reasonable basis

1 on which to apportion liability for the divisible harm, which is purely a question of fact.”  
2 *Id.* at 589 (internal quotation marks omitted). The defendant asserting the divisibility  
3 defense bears the burden of proof at both steps. *Id.* “The necessary showing requires a  
4 fact-intensive, site-specific assessment, generating concrete and specific evidence.” *Id.*  
5 (internal quotation marks omitted). In short, Boeing must discover facts relating to the  
6 details and extent of the Government’s involvement in the alleged contamination in order  
7 to mount a divisibility defense. Otherwise, Boeing cannot meet its burden of proof on  
8 divisibility.

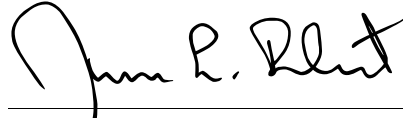
9       Turning to Boeing’s counterclaim, to successfully establish the Government’s  
10 liability for contribution, Boeing must show, among other things, that the Government  
11 fits within one of the four classes of responsible parties outlined in CERCLA Section  
12 107(a), 42 U.S.C. § 9607(a)(1)-(4). *Kaiser Aluminum & Chem. Corp. v. Catellus Dev.*  
13 *Corp.*, 976 F.2d 1338, 1340 (9th Cir. 1992); *see also* 42 U.S.C. § 9613(f)(1) (“Any  
14 person may seek contribution from any other person who is liable or potentially liable  
15 under section 9607(a) of this title . . .”). Though the Government has stipulated that it  
16 falls within “one or more” of these categories (Joint Status Rep. at 5), Boeing argues  
17 discovery is necessary to determine which category of responsible party the Government  
18 falls into. (Mot. at 3-4; *see also* Joint Status Rep. at 6 (jointly identifying key legal and  
19 factual issues potentially subject to discovery, including “[w]hether the United States is  
20 liable as an owner and operator of Site 70” and “[w]hether the United States is liable as  
21 an arranger for the disposal of a hazardous substance”).) Boeing claims the Government  
22 consistently argues in other actions that the category of responsible party “is central to the

1 determination of a fair allocation of cleanup costs.” (Mot. at 4 (internal quotation marks  
2 omitted).) Published authority in this circuit supports the proposition that the category of  
3 responsible party can matter to the question of equitable allocation. *See TDY Holdings*  
4 *LLC v. United States*, 885 F.3d 1142, 1146-48 (9th Cir. 2017) (stating the district court  
5 has broad discretion to allocate costs based on equitable factors the court deems  
6 appropriate, and here, the district court properly considered that the government was not  
7 an “operator”). The court agrees with Boeing that discovery as to the Government’s  
8 liability is necessary so that Boeing may seek to prove that the Government fits within a  
9 particular category of responsible party, which will form part of Boeing’s prima facie  
10 case for contribution in Phase I. Though the court won’t address equitable allocation  
11 until Phase II, if at all, the court shares Boeing’s concern that the Government’s proposed  
12 approach would result in one-sided phasing. Moreover, because of the significant  
13 overlap between evidence relating to the Government’s cost recovery claim, Boeing’s  
14 divisibility defense, and Boeing’s contribution counterclaim, it would be inefficient to  
15 bifurcate liability-related discovery into separate phases. In sum, the court ORDERS that  
16 Boeing shall be entitled to discovery concerning the Government’s liability during  
17 Phase I.

18 Second, the Court GRANTS the parties’ joint motion for relief from the  
19 September 8, 2023 deadline and for an extension of time. The court further ORDERS the  
20 parties to jointly propose a scheduling order for Phase I that: (1) is consistent with the  
21 Government’s motion to phase proceedings (Mot. (Dkt. # 61) at 8-9), except that the  
22 triggering event for each deadline shall be entry of the instant order, rather than the

1 court's order on phasing; (2) identifies specific dates for each proposed deadline; and  
2 (3) includes an estimated length of trial. The parties must file their joint proposal by no  
3 later than **September 28, 2023**.

4 Dated this 14th day of September.



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6 JAMES L. ROBART  
United States District Judge

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