IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RESPONSIBLE ENVIRONMENTAL SOLUTIONS ALLIANCE,	:	
Plaintiff,	:	Case No. 3:04cv013
vs.	:	JUDGE WALTER HERBERT RICE
WASTE MANAGEMENT, INC., et al.,	:	
Defendants.	:	

AMENDED DECISION AND ENTRY (TO REFLECT SETTLEMENT BY AND BETWEEN THE PARTIES) SUSTAINING AMENDED JOINT MOTION OF PLAINTIFF AND SETTLING DEFENDANTS TO APPROVE SETTLEMENT (DOC. #246); OPINION ALLOCATING EQUITABLE SHARES BETWEEN PLAINTIFF AND DEFENDANT CHEMICAL WASTE MANAGEMENT, INC.; DEFENDANTS COLOR PAC, INC., AND RIVERWOOD INTERNATIONAL CORPORATION ORDERED TERMINATED AS PARTIES DEFENDANT; JUDGMENT TO BE ENTERED IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT CHEMICAL WASTE MANAGEMENT, INC.; TERMINATION ENTRY

Plaintiff Responsible Environmental Solutions Alliance ("Plaintiff") is comprised of a number of potentially responsible parties ("PRPs") which have entered into an administrative consent order with the United States Environmental Protection Agency ("U.S. EPA"), agreeing to fund a Remedial Investigation/ Feasibility Study ("RI/FS") for the barrel fill operating unit ("BFOU"), located at the Tremont City Landfill Site ("Tremont Site"), in Clark County, Ohio. Plaintiff brings

this litigation under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601, et seq. In particular, Plaintiff seeks to recover contribution, under § 113(f) of CERCLA, 42 U.S.C. § 9613(f), from a number of other PRPs, including Defendants Chemical Waste Management, Inc. ("CWM"),[1] The Danis Companies ("TDC"), Diversified Environmental Management Company ("DEMCO"), Danis Environmental Industries, Inc. ("DEI"), and Clarkco Land Co. ("Clarkco"), the latter three being subsidiaries of TDC.[2] In particular, Plaintiff seeks to recover a portion of the response costs it has so far incurred to fund that RI/FS from those five Defendants. Plaintiff also requests the entry of a declaratory judgment, holding that those Defendants are liable for a portion of the response costs it incurs in the future to complete the RI/FS and to construct any remedy ordered by the U.S. EPA.

Chemical wastes were disposed at the BFOU from November 5, 1976, until December 17, 1979. On March 8, 1977, the property on which the BFOU is located was transferred to IWD Chemical Disposal Co., Inc., of Ohio ("IWD Chemical"),[3] by N.D. Realty Co., Inc. ("N.D. Reality"), which, through a series of name changes, became Defendant Tremont Landfill Company ("TLC").[4] TLC is a subsidiary of DEMCO. At the time, IWD Chemical was a subsidiary of Danis

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[1]CWM is a subsidiary of Waste Management, Inc., which Plaintiff initially named as a Defendant herein. However, this Court has previously granted Plaintiff's Motion to Dismiss Waste Management Without Prejudice (Doc. #218). See Doc. #219.

[2]The Court will refer to TDC, DEMCO, DEI and Clarkco, collectively, as the "Settling Defendants."

[3]IWD Chemical was initially named Chemical Disposal Co., Inc.

[4]For sake of convenience, this Court will use "TLC" to refer to all incidents involving N.D. Reality/TLC, regardless of what that entity was named at the time.

Industries Corporation ("Danis Industries"), which, by virtue of a merger, is a predecessor of DEMCO.[5] In 1980, after the disposal of hazardous waste at the BFOU had ceased, Waste Management, Inc. ("Waste Management"), purchased the shares of IWD Chemical from Danis Industries. Prior to that transaction, the property on which the BFOU is located was transferred to TLC. Through a subsequent merger, CWM became the successor of IWD Chemical.

This Case in now before the Court on two matters, to wit: 1) a decision on the merits of Plaintiff's claim for contribution against CWM, which requires that the Court allocate equitable shares of the response costs to each of those parties; and 2) the Amended Joint Motion of Plaintiffs and Settling Defendants to Approve Settlement (Doc. #246). As a means of analysis, the Court will initially rule on the Amended Joint Motion of Plaintiff and Settling Defendants to Approve Settlement (Doc. #246), following which it will turn to the equitable allocation.

I. Amended Joint Motion of Plaintiff and Settling Defendants to Approve Settlement (Doc. #246)

The Plaintiff has entered into a settlement agreement with the Settling Defendants, under which the Settling Defendants have agreed to pay Plaintiff the

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[5]No evidence has been introduced in this litigation, demonstrating that DEMCO is the successor to Danis Industries. However, a federal court may take judicial notice of records in other cases before it. United States v. Doss, 563 F.2d 265, 269 n. 2 (6th Cir. 1977). See also, Lynch v. Leis, 382 F.3d 642, 647 n. 5 (6th Cir. 2004) (taking judicial notice of the records of another court); Lyons v. Stovall, 188 F.3d 327, 332 n. 3 (6th Cir. 1999) (same). In Waste Management, Inc. v. Danis Industries Corp., Case No. 3:00cv256 (S.D.Ohio), TDC, DEMCO and DEI admitted that DEMCO was the successor to Danis Industries as a result of a merger. See Doc. #27 in Case No. 3:00cv256 at ¶ 28.

sum of $300,000, in exchange for dismissal of its claims against them. The settlement agreement also covers claims against TLC, which has had a default judgment entered against it and for which a receiver has been appointed. In addition, the Settling Defendants would receive contribution protection. As further consideration for the settlement, Clarkco has agreed to transfer 24.803 acres of land adjacent to the BFOU to TLC, which through its receiver would grant permanent access and environmental covenants to Plaintiff, the U.S. EPA and the Ohio Environmental Protection Agency ("Ohio EPA").[6]

This is not the first time the Court has been asked to approve that settlement agreement. In its Decision of March 27, 2008, this Court overruled, without prejudice, the Joint Motion of Plaintiff and the Settling Defendants to Approve Settlement, for a Declaration of Contribution Protection for Settled and Dismissed Defendants and to Credit Settlement Proceeds Pro Tanto (Doc. #236). See Doc. #245. As the caption of that motion indicates, the Plaintiff and the Settling Defendants had requested that the Court approve a settlement agreement entered into by the Plaintiff and the Settling Defendants, that this Court declare that the Settling Defendants are protected against claims for contribution by CWM or any other PRP and that the Court credit the settlement proceeds on a pro tanto basis. CWM opposed that motion. See Doc. #238. The Court overruled the first two branches of that motion, because the moving parties had failed to present evidentiary support for their assertion that the settlement is fair, reasonable and adequate, had been reached as a result of arms length negotiations and Settling

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[6]Access to that property is necessary to complete the RI/FS and for any potential remedial action to follow.

Defendants had limited resources with which fund a settlement. See Doc. #245 at 3. The Court also directed the Plaintiff and CWM to address the issue of whether to credit the settlement proceeds on a pro tanto basis in supplemental briefing concerning the equitable allocation of costs between those parties. Id. at 3 n. 3.

Plaintiffs and the Settling Defendants (collectively "Moving Parties") have renewed their requests that the Court approve their settlement agreement and that the Court afford contribution protection to the Settling Defendants and TLC. Doc. #246. As a means of analysis, the Court will initially decide whether to approve the settlement agreement, following which it will turn to the question of whether to afford contribution protection to the Settling Defendants.

Both Moving Parties and CWM agree that, in deciding whether to approve the settlement, this Court must determine whether it is "fair, reasonable and adequate[,] in other words, consistent with the purposes that CERCLA is intended to serve." United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1435 (6th Cir. 1989). See also United States v. Cannons Engineering Corp., 899 F.2d 79, 85 (1st Cir. 1990) (noting that, in determining whether to approve a settlement agreement, "the trial court's review function is only to 'satisfy itself that the settlement is reasonable, fair and consistent with the purposes that CERCLA is intended to serve'") (quoting H.R.Rep. No. 253, Pt. 3, 99th Cong., 1st Sess. 19 (1985), reprinted in, 1986 U.S.C.C.A.N. 3038, 3042). In Akzo Coatings, the Sixth Circuit stressed that in determining whether settlement is fair, reasonable and consistent with the purposes of CERCLA, the District Court must apply an arbitrary and capricious standard. 949 F.2d at 1424-26. Of course, a settlement must be both procedurally and substantively fair. Cannons Engineering, 899 F.2d at 86. Substantive fairness introduces into the question of whether to approve a

settlement "some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each PRP has done." Id. at 87.

In their motion, the Moving Parties have presented a number of factual reasons in support of their contention that the settlement is fair, reasonable and adequate, such as the settlement was reached as a result of arms length negotiations; the Settling Defendants have limited resources with which fund a settlement; it would be exceedingly difficult, at best, to impose direct or derivative liability on any one or more or all of the Settling Defendants; and TLC has had a default judgment entered against it and a receiver appointed for it. See Doc. #246. Unlike their earlier motion, the Moving Parties have submitted evidentiary support to the motion, in the form of the deposition of Gregory Daily ("Daily"), as well as the affidavits of Michael Cyphert ("Cyphert"), counsel for Plaintiffs; R. Gary Winters ("Winters"), counsel for the Settling Defendants; and Thomas Danis, the majority shareholder of TDC.[7] In response, CWM argues that the Court should overrule the Moving Parties' motion, because there is ample evidence that liability for the actions of TLC can be imposed upon the Settling Defendants. See Doc. #249. CWM also contends that the Moving Parties have not submitted sufficient evidence demonstrating that the Settling Defendants are unable to pay more than the amount set forth in the settlement agreement.[8] Id. As a means of analysis, the Court will initially discuss the issue of the imposition of direct or

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[7]Daily's Deposition, along with its accompanying exhibits, is Doc. #240, while the affidavits are attached to the Moving Parties' motion (Doc. #246).

[8]CWM does not challenge that the settlement was reached as a result of arms length negotiations.

derivative liability on TDC, DEMCO and/or DEI, following which it will turn to the parties' arguments concerning the ability of the Settling Defendants to fund a settlement.

In discussing the imposition of derivative or direct liability on TDC, DEMCO and/or DEI, it bears emphasis that the Court is not determining whether such liability can be imposed upon any one or more or all of them. Rather the Court is assessing whether the Plaintiff's position that such liability cannot be imposed is objectively reasonable, since an objectively reasonable position that direct or derivative liability cannot be imposed on any of the Settling Defendants constitutes a "plausible explanation" for the proportionate share of the liability that the settlement imposes upon the Settling Defendants. See Cannons Engineering, 899 F.2d at 87 (noting the formula or scheme the proponents of a settlement advance for measuring comparative fault and allocating liability should be upheld so long as they supply "a plausible explanation for it, [yielding] some reasonable linkage between the factors it includes in its formula or scheme and the proportionate share of the settling PRPs").

DEMCO and DEI are subsidiaries of TDC, while TLC is a subsidiary of DEMCO. As to direct liability, Plaintiff points out that a thorough review of documents in the possession of the U.S. EPA and the Ohio EPA pertaining to operations at the BFOU, the corporate records of the Settling Defendants, statements made by individuals employed at the BFOU and depositions conducted by its counsel failed to reveal evidence that any of those Defendants owned or operated the BFOU at the time that chemical waste was disposed of therein. With respect to the derivative liability, Plaintiff notes that, in Waste Management, Inc. v. Danis Industries Corp., 2004 WL 5345389 (S.D.Ohio 2004), this Court concluded

that the evidence failed to raise a genuine issue of material fact as to whether liability could be imposed upon the former shareholders of TDC, because there was no evidence that it or its predecessors ignored the corporate form or that funds had been commingled. Plaintiff also states that it has not discovered evidence that would support the imposition of derivative liability on any of the Settling Defendants. Nevertheless, CWM argues that there is evidence that direct or derivative liability can be imposed upon the Settling Defendants. In particular, CWM points to evidence that Danis Industries assumed TLC's obligations after the BFOU had closed.[9]

Assuming such liability is imposed, it is quite likely that the Settling Defendants would be judgment proof.[10] On September 13, 2004, Plaintiff and CWM deposed Gregory Daily ("Daily") of St. Paul Travelers, which entered into a security credit agreement with DEI in June, 2002. TDC, DEMCO and TLC, among others, signed that agreement as indemnitors. Seaboard Surety Company, which is owned by St. Paul Travelers, has been the bonding company for the various entities related to TDC and their predecessors for about 80 years. The agreement was necessitated, because DEI needed assistance in completing about 17 waste water and water treatment plants. As a result of that agreement, St. Paul Travelers was granted a security interest in all assets of the Settling Defendants and TLC. Thus, St. Paul Travelers has a priority to the assets of Settling Defendants and TLC over any recovery that would be had herein. Currently

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[9]CWM also emphasizes that the BFOU was retained by a predecessor of TLC, when Waste Management purchased the shares of IWD Chemical.

[10]There is no hint that TLC, which CWM describes as a shell corporation with no employees or assets and which no longer conducts any operations (Doc. #229 at 2), could satisfy a judgment entered against it.

available financial information demonstrates that there will be a shortfall of between approximately $50 million and $60 million owed to St. Paul Travelers under the security agreement. Despite having had the opportunity to depose Thomas Danis, the majority shareholder of TDC, CWM has pointed to no evidence which would support the proposition that the Settling Defendant collectively have sufficient assets to fund that shortfall, after which they could make a substantial payment in this litigation.[11]

Based upon the foregoing, this Court concludes that the settlement agreement is "fair, reasonable and adequate[,] in other words, consistent with the purposes that CERCLA is intended to serve." Akzo Coatings, 949 F.2d at 1435.

The Court now turns to the question of whether to provide contribution protection to the Settling Defendants and TLC.

A party can be afforded contribution protection under § 113(f)(2) of CERCLA, which provides:

> (2) Settlement
> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

42 U.S.C. § 9613(f)(2). A number of courts, including the Sixth Circuit, have held that § 113(f)(2) does not apply to settlements between private parties. See e.g.,

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[11]Moreover, this Court has concluded in another lawsuit that Waste Management, an affiliate of CWM, is entitled to recover, at a minimum in excess of $15 million from DEMCO, plus prejudgment interest on that sum. See Waste Management, Inc. v. Danis Industries Corp., 2004 WL 5345389 (S.D.Ohio 2004).

City of Detroit v. Simon, 247 F.3d 619, 627-28 (6th Cir. 2001) (noting that § 113(f)(2) applies "only when the settlement is with the federal government or a state government"); Gurley v. City of West Memphis, Ark., 489 F. Supp. 2d 876, 879 (E.D.Ark. 2007) (holding that the "unambiguous language of § 113(f)(2) limits the application of the contribution bar to those persons who have settled with 'the United States or a State'"); Barton Solvents, Inc. v. Sw. Petro-Chem, Inc., 834 F. Supp. 342, 345-46 (D.Kan. 1993) (noting that § 113(f)(2) "does not apply to private settlements"); Comerica Bank-Detroit v. Allen Indus., Inc., 769 F. Supp. 1408, 1413 (E.D.Mich. 1991) (holding that the "plain language of the statute limits § 113(f)(2) to settlements between a private party and a governmental body like a state or the United States"). Nevertheless, a number of courts have held that it is permissible to bar contribution claims against the settling parties in a CERCLA contribution action, in accordance with the federal common law as exemplified by § 6 of the Uniform Comparative Fault Act or § 4 of the Uniform Contribution Among Tortfeasors Act. See e.g., Stearns & Foster Bedding Co. v. Franklin Holding Corp., 947 F. Supp. 790, 813 (D.N.J. 1996); Foamseal, Inc. v. Dow Chemical Co., 991 F. Supp. 883, 886 (E.D.Mich. 1998); Barton Solvents, Inc., supra; American Cyanamid Co. v. King Indus., Inc., 814 F. Supp. 215, 219 (D.R.I. 1993); Comerica Bank-Detroit, supra. In United States v. Alcan Aluminum Corp., 990 F.2d 711, 725 (2d Cir. 1990), the Second Circuit concluded that the federal common law failed to provide a contribution bar to third-party defendant Cornell University, since it had not entered into a release, covenant not to sue or similar agreement with the United States. See also AmeriPride Services, Inc. v. Valley Indus. Services, Inc., 2007 WL 1946635 (E.D.Cal. 2007) (adopting contribution bar order as set forth in § 6 of the Uniform Comparative Fault Act).

In its Decision of March 27, 2008, this Court indicated that it was inclined to follow the decisions adopting a contribution bar as part of the federal common law, even though such a bar is not authorized by § 113(f)(2), because such a holding is in accordance with § 113(f)(1) of CERCLA, which provides that, "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate" (42 U.S.C. § 9613(f)(1)), given that the imposition of such a bar rests on equitable considerations, and, further, since contribution bars will foster the voluntary settlement of complex CERCLA lawsuits, a goal which is worthy of being furthered. See Doc. #245 at 5. Quite simply, there has been no intervening authority, nor has CWM presented any argument causing this Court to decline to follow its earlier inclination. Therefore, this Court adopts a bar, preventing CWM and every other PRP from seeking contribution from the Settling Defendants and TLC.[12]

Based upon the foregoing, the Court sustains the Amended Joint Motion of Plaintiffs and Settling Defendants to Approve Settlement (Doc. #246).

II. Equitable Allocation

In anticipation of a bench trial for the purpose of allocating an equitable share of response costs incurred by Plaintiff to fund the RI/FS at the BFOU, the parties submitted a Joint Final Pretrial Statement, in which they indicated that, as an alternative to such a trial, they had agreed in principle to enter into a stipulation

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[12]Parenthetically, given that the Settling Defendants and TLC appear to be judgment proof, the only practical effect of such a bar appears to be to prevent CWM from needlessly pursuing contribution against them.

as to the factual history of the BFOU, to stipulate the authenticity of documents which have been exchanged during the course of this litigation and to submit legal and factual issues to the Court for a decision on briefs. See Doc. #220. Therein, the parties also indicated that they reserved the right to present testimony from witnesses and to introduce other evidence. Id. Subsequently, the parties submitted their Joint Notice Regarding Exhibits, wherein they indicated that they had conferred regarding exhibits, exchanged same and concluded that neither had an objection concerning the authenticity of any exhibit. See Doc. #222. Therein, the parties also stipulated:

> The parties further advise the Court that there are no objections at this time regarding any Exhibit. Each party may refer to its listed Exhibits in its respective Briefs and oral arguments. Unless a specific objection is raised regarding a particular Exhibit, the Court is free to decide whether an Exhibit has any probative value concerning an issue presented in this matter and may assign whatever weight the Court finds is appropriate. Both parties reserve the right to argue in their Briefs or oral argument that an Exhibit is not relevant or should be accorded little, if any, weight.

Id. at 2. Thereafter, the parties filed their Joint Notice Regarding Witnesses and Statement Regarding Stipulation of Facts, indicating that no live testimony would be presented and that the parties would not be filing a stipulation of historical facts.[13] See Doc. #226. The parties also stated therein that objections to the admissibility of specific exhibits could be raised in their reply memoranda.[14] Id.

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[13]In that document, the parties also agreed that, in lieu of Plaintiff presenting live testimony from Frank Rovers ("Rovers"), it would submit his affidavit detailing his direct testimony and that CWM would have the opportunity of deposing Rovers and submitting a transcript of that deposition for purposes of cross-examination. Rovers' affidavit is Plaintiff's Ex. 94, and CWM has filed a transcript of Rovers' deposition. See Doc. #233.

[14]Neither the Plaintiff nor CWM has objected to the admissibility of any exhibit in its respective Reply Brief. See Doc. #231 (Plaintiff's Reply Brief); Doc. #232

The parties have submitted the exhibits, and have filed their opening and reply memoranda. See Docs. ##227, 229. 231 and 232. In addition, on June 8, 2007, the Court heard the parties' final arguments concerning this matter. See Doc. #235. The Court now allocates to CWM and Plaintiff equitable shares of the response costs incurred by Plaintiff to pay for the RI/FS at the BFOU. As a means of analysis, the Court will initially recount the historical facts concerning the BFOU at the Tremont Site, following which it will review the legal principles that must be applied whenever a court equitably allocates shares in a CERCLA contribution action. The Court will then apply those principles to the evidence herein in order to allocate an equitable share to CWM.[15]

Chemical wastes were disposed of at the BFOU from November 5, 1976, until December 17, 1979.[16] The record ownership of the 8.524 acres which would

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(CWM's Reply Brief). CWM does argue, however, that this Court should give little weight to Plaintiff's Ex. 93, the recommendation of the neutral allocator retained by Plaintiff and CWM. That contention is discussed in the text which follows.

[15]Although the Court is deciding this matter on the merits, based upon evidence submitted by the parties, it does not set forth separately numbered findings of fact and conclusions of law herein, given that the parties have not submitted proposed findings and conclusions. Moreover, Rule 52(a)(1) of the Federal Rules of Civil Procedure expressly authorizes a District Court to make its findings of fact and conclusions of law in a memorandum decision such as that entered by the Court herein:

> (a) Findings and Conclusions.
> (1) In General. In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court.

[16]The BFOU occupies only a portion of the Tremont Site and is one of its three operating units. The other operating units are the now closed Tremont City Landfill and a facility formerly used to recycle, to treat and to store waste and as a transfer station. This litigation relates exclusively to the BFOU. Parenthetically, Plaintiff also refers to the Tremont City Landfill as the North Sanitary Landfill. This Court

become that operating unit is as follows. By deed dated June 5, 1969, TLC acquired the Tremont Site, 80.010 acres of land in German Township, Clark County, Ohio. The Tremont City Landfill would be constructed on a portion of that property.[17] By deed dated March 8, 1977, TLC conveyed 22.284 acres of that land to IWD Chemical. The BFOU was constructed on 8.524 acres of the land that had been conveyed to IWD Chemical. By quit claim deed dated February 22, 1980, IWD Chemical reconveyed those 8.524 acres of land to TLC.

IWD Chemical, formerly known as Chemical Disposal Co., Inc., was incorporated in May, 1976. It was a wholly owned corporate subsidiary of Danis Industries, a predecessor of DEMCO. In May, 1975, IWD Liquid Waste, Inc. ("IWD Liquid"), was incorporated. Like IWD Chemical, IWD Liquid was a wholly owned subsidiary of Danis Industries, to which DEMCO is the corporate successor. On March 4, 1980, Waste Management, Inc. ("Waste Management"), and Danis Industries entered into an agreement, whereby the former purchased the shares of stock of IWD Chemical and IWD Liquid from the latter. Through subsequent mergers, CWM became the successor of both IWD Chemical and IWD Liquid.

As indicated, Chemical wastes were disposed of at the BFOU from November 5, 1976, until December 17, 1979. Before such operations began at that hazardous waste site, an Application for Permit to Install was submitted to the

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will not utilize that alternative name, in order to avoid confusion between the Tremont City Landfill and the Valleycrest Landfill, located in Montgomery County, Ohio, which is also referred to as the North Sanitary Landfill.

[17]On October 15, 1969, the Ohio Department of Health notified N.D. Realty that it had approved plans to construct a landfill for municipal and industrial waste on that site, which became the Tremont City Landfill. That approval was expressly conditioned upon the landfill not accepting volatile hydrocarbons, soluble chemicals and toxic or objectionable liquid industrial waste for disposal, thus necessitating the construction of the BFOU.

Ohio EPA.[18] On August 4, 1976, the Director of that regulatory agency issued the requested Permit to Install, which would become effective on September 20, 1976. That Permit required that the BFOU be constructed in strict conformity with the plans set forth in the Application. It also created an Operating Panel, which would discuss types of wastes that could be disposed of at the facility.[19] IWD Chemical began construction of the BFOU on September 20th. In addition, it operated that facility throughout the period of disposal. Moreover, after TLC had conveyed the land upon which the BFOU was located to IWD Chemical on March 7, 1977, it (IWD Chemical) became the owner of that hazardous waste site throughout the remainder of the time that waste was accepted at that facility.

There are eight members of the Plaintiff, including Delphi, The Proctor & Gamble Company, PPG Industries, International Paper and General Motors. The Plaintiff's members generated about 80% of the waste that was disposed of at the BFOU. Throughout the time that waste was disposed of at the BFOU, IWD Liquid transported the chemical wastes generated by the Plaintiff's members and other generators to that facility. As part of the Operating Panel, IWD Liquid met with the Ohio EPA, in order to discuss the disposal of additional types of chemical wastes at the facility.

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[18]Attached to the Application for Permit to Install is a letter from the Clark County Health Department, indicating that, although that agency was without authority to approve or to disapprove a chemical landfill, it would approve that application, without hesitation, if it possessed such authority.

[19]Attachment 3 to the Application for Permit to Install is a list of types of waste that will be accepted at the BFOU. See Plaintiff's Ex. 8 at Attachment 3. Such wastes have been for the most part generically defined; however, they include encapsulated metal sludge, bulk asbestos and water, polyol and encapsulated paint sludge.

The disposal of waste at the BFOU ceased on December 17, 1979. All operations ceased at that facility in February, 1980, with closure activities alone being conducted after that date. Given that IWD Chemical had reconveyed the 8.524 acres encompassing the BFOU to TLC on February 22, 1980, neither IWD Chemical nor IWD Liquid was involved in those activities. On the contrary, although TLC was the owner of the facility after the reconveyance, Danis Industries assumed the post-closure responsibilities for the BFOU during the 1980's and into the 1990's. For instance, Danis Industries consulted with the Ohio EPA, whenever an issue relating to the BFOU arose after its closure. Moreover, Danis Industries was also involved in drilling investigatory and sampling wells at that facility and monitored and repaired the cap over the landfill. As such, Danis Industries was the operator of that facility during those years.[20]

The BFOU has never been placed on the National Priorities List,[21] nor is there evidence that hazardous substances have moved from that facility to the ground water in its vicinity. Nevertheless, that hazardous waste site has come to the attention of both the Ohio EPA and the U.S. EPA, as a result of community concerns that the BFOU was constructed near to that ground water and that, as a result, hazardous chemicals leaking from the facility could migrate into that ground water. Beginning in the summer of 2000, and continuing through the spring of 2001, the U.S. EPA conducted a three-phase site investigation of the Tremont Site,

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[20]CERCLA defines an operator as a person operating a facility. 42 U.S.C. § 9601(20A). The actions of Danis Industries detailed above demonstrate that it was operating the BFOU during the 1980's and into the 1990's.

[21]The National Priorities List is 40 C.F.R. Pt. 300, App. B.

including the BFOU.[22] The U.S. EPA sent two communications to a number of PRPs, requesting that they voluntarily enter into an administrative order of consent, agreeing to perform a RI/FS. On October 3, 2002, the Plaintiff's members entered into such an order with the U.S. EPA, under which they agreed to perform the RI/FS at the BFOU.

As a reference tool for the equitable allocation, the Court will briefly review the function at the BFOU of the various parties and other entities implicated by that allocation. The members of the Plaintiff were all generators of hazardous chemical waste that was disposed of at the BFOU. IWD Chemical, an entity to which CWM succeeded, was the owner of the BFOU during most of the time such waste was disposed of therein and the operator of that site during that entire time. IWD Liquid, another entity to which CWM succeeded, was the transporter of hazardous chemical waste to that site. TLC was the owner of the BFOU during the first few months that facility was in operation and became the owner again, after such hazardous waste was no longer being disposed of therein. Danis Industries, a predecessor to DEMCO, operated that facility after hazardous chemical waste was no longer being disposed of therein. TDC and DEI did not own or operate the BFOU, nor did either generate hazardous waste disposed of therein. In addition, neither transported such waste to that site.

Plaintiff seeks to recover contribution from CWM in accordance with § 113(f)(3)(B) of CERCLA, which provides:

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[22]Members of the community had also expressed concerns about the other two operating units at the Tremont Site, the Tremont City Landfill and the facility formerly used to recycle to treat and to store waste and as a transfer station.

(3) Persons not party to settlement

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(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

42 U.S.C. § 9613(f)(3)(B). Although that statutory provision does not expressly so provide, this Court will assess the liability of CWM in accordance with the requirement set forth in § 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), that the defendant be liable under § 107(a) of CERCLA, 42 U.S.C. § 9607(a).[23] See e.g., Basic Management, Inc. v. United States, — F. Supp.2d —, 2008 WL 2397519 (D.Nev. 2008 (holding that plaintiff must establish that the defendant is liable under § 107(a) in order to recover contribution under § 113(f)(3)(B)). In addition, when equitably allocating shares, the Court will apply the following sentence contained in § 113(f)(1), which provides: "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). As a means of analysis, the Court will initially consider whether Plaintiff has established that CWM is liable under § 107(a) of CERCLA. If it concludes that Plaintiff has met that burden, it will turn to the equitable allocation.

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[23]The Sixth Circuit has repeatedly held that, in order to recover contribution under § 113(f)(1), the plaintiff must establish that the defendant is liable under § 107(a). See e.g., Kalamazoo River Study Group v. Menasha Corp., 228 F.3d 648, 653 (6th Cir. 2000); Centerior Service Co. v. Acme Scrap Iron & Metal, 153 F.3d 344, 350 (6th Cir. 1998).

In Centerior Service Co. v. Acme Scrap Iron & Metal, 153 F.3d 344 (6th Cir. 1998), the court set forth the requisite elements of a claim under § 107(a):

> In order to establish a prima facie case for cost recovery under § 107(a), a plaintiff must prove four elements: (1) the site is a "facility"; (2) a release or threatened release of hazardous substance has occurred; (3) the release has caused the plaintiff to incur "necessary costs of response"; and (4) the defendant falls within one of the four categories of PRPs.

Id. at 347-48. Accord Regional Airport Authority of Louisville v. LFG, LLC, 460 F.3d 697, 703 (6th Cir. 2006); Village of Milford v. K-H Holding Corp., 390 F.3d 926, 933 (6th Cir. 2004); Kalamazoo River Study Group v. Menasha Corp., 228 F.3d 648, 653 (6th Cir. 2000). In Centerior Service, the Sixth Circuit also set forth the four categories of PRPs:

> There are four categories of PRPs: (1) the current owner or operator of a waste facility; (2) any previous owner or operator during any time in which hazardous substances were disposed at a waste facility; (3) any person who arranged for disposal or treatment of hazardous substances at the waste facility; and (4) any person who transported hazardous substances to a waste facility. See 42 U.S.C. § 9607(a)(1)-(4).

153 F.3d at 347 n. 8.

Herein, this Court concludes that Plaintiff has met its burden of establishing a prima facie case of liability under § 107(a).[24] First, § 101(9) of CERCLA, 42 U.S.C. § 9601(9), defines the term "facility" broadly to include any area into which hazardous substances have been disposed. It could not be and is not questioned that hazardous substances were disposed of at the BFOU. Second, the term "release" is defined very broadly by § 101(22) of CERCLA to include "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping,

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[24]Although the Plaintiff and CWM have addressed only the fourth element of a prima facie case under § 107(a), the Court will briefly discuss the other three elements.

leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant)."[25] 42 U.S.C. § 9601(22). The two communications that the U.S. EPA sent to PRPs, which ultimately led to the Plaintiff's members entering into the administrative order of consent, contain findings by that administrative agency that there is a release or threatened release of hazardous substances from the Tremont Site, including the BFOU. Moreover, there is evidence that, as early as the mid-1980's, leachate was seeping from that hazardous waste site. Third, it could not be questioned that the Plaintiff has incurred necessary response costs, by funding the RI/FS at the behest and under the supervision of the U.S. EPA.[26] See AlliedSignal, Inc. v. Amcast International Corp., 177 F. Supp.2d 713, 737 (S.D.Ohio 2001) (holding that expenses incurred to fund RI/FS were necessary response costs). Fourth, CWM concedes that, by virtue of being the successor to IWD Chemical and IWD Liquid, it is liable as a former owner and operator of the BFOU, as well as a generator. See Doc. #229 at 17. Parenthetically, the Plaintiff's members, all of whom generated hazardous waste that was disposed of at the BFOU, come within the third category of PRPs under § 107(a), i.e., persons who arranged for disposal or treatment of hazardous substances at the waste facility. See United States v. USX Corp., 68 F.3d 811,

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[25]The statute does not define "threatened release;" however, the adjective "threatened" is defined as "to hang over as a threat." Webster's Third International Dictionary at 2382. "Threat," in turn, is defined as "an indication of something impending." Id.

[26]A plaintiff seeking contribution must also demonstrate that the response costs it has incurred were consistent with the National Contingency Plan. Prisco v. A & D Carting Corp., 168 F.3d 593, 602-03 (2nd Cir. 1999). This Court discusses that question below, along with the issue of the amount of costs Plaintiff has incurred.

815 (3d Cir. 1995) (noting that the third type of PRPs "are generally known as 'generators'").[27]

Based upon the foregoing, this Court finds that CWM is liable under § 107(a) and turns to the issue of an equitable allocation of response costs between Plaintiff and CWM.

As is indicated, § 113(f)(1) provides that, "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). In United States v. R.W. Meyer, Inc., 932 F.2d 568 (6th Cir. 1991), the Sixth Circuit held that § 113(f)(1) invests District Courts with broad discretion to "construct a flexible decree balancing the equities in light of the totality of the circumstances." Id. at 572. See also, United States v. Colorado & Eastern R. Co., 50 F.3d 1530, 1536 (10th Cir. 1995) ("a court may consider several factors, a few factors, or only one determining factor, ... depending upon the totality of the circumstances presented to the court.") (citation and internal quotation marks omitted). Among other such factors, courts have frequently looked to some or all of the "Gore factors"[28] when exercising the broad discretion with which they are invested to make an equitable apportionment under § 113(f)(1). See e.g., Kalamazoo River

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[27]The term "person" is broadly defined by CERCLA to include "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21). This Court uses that term with that broad meaning throughout this Decision, rather than using it to mean an individual.

[28]The Gore factors are named for then Congressman Albert Gore, Jr., one of the sponsors of CERCLA.

Study Group v. Rockwell International Corp., 355 F.3d 574, 583 (6th Cir. 2004); Centerior Service, 153 F.3d at 354; Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 935 (8th Cir. 1995); Colorado & Eastern, 50 F.3d at 1536 n. 5; R.W. Meyer, 932 F.2d at 571; Kerr-McGee Chemical v. Lefton Iron & Metal, 15 F.3d 321, 326 (7th Cir. 1994). See also, H.R. Rep. No. 253(III), 99th Cong., 2nd Sess. 19, reprinted in, 1986 U.S.C.C.A.N. 3038, 3042 (listing the Gore factors as criteria a court may consider when making an apportionment). The Gore factors are:

> 1. the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished;
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> 2. the amount of hazardous waste involved;
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> 3. the degree of toxicity of the hazardous waste;
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> 4. the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
>
> 5. the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
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> 6. the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.

Centerior Service, 153 F.3d at 354; Control Data, 53 F.3d at 935. See also, R.W. Meyer, 932 F.2d at 571. Herein, the second and third Gore factors are clearly inapplicable, since the generators of hazardous waste are on one side of the equation, while the successor to the owner, operator and transporter are on the other. In other words, since the members of the Plaintiff generated the toxic waste which CWM's predecessors transported to and disposed of at the BFOU, questions concerning the amount of the hazardous waste involved and its toxicity are not relevant to the equitable allocation. This is not a case in which one PRP

argues that it should be assigned a lesser share of the joint liability, since its waste was not toxic. In addition, the evidence does not support basing the Court's equitable allocation on the fifth factor, since there is no evidence that any person failed to exercise reasonable care with respect to the BFOU. For instance, a Permit to Install was obtained from the Ohio EPA, before operations began at the BFOU. Thus, this Court will consider only the first, fourth and sixth Gore factors when it equitably allocates shares.

Courts have also have also utilized the four "critical factors" identified by Judge Torres in United States v. Davis, 31 F. Supp.2d 45, 63 (D.R.I.1998), aff'd, 261 F.3d 1 (1st Cir.2001). United States v. Consolidation Coal Co., 345 F.3d 409, 413 (6th Cir. 2003). Those factors are:

> 1. The extent to which cleanup costs are attributable to wastes for which a party is responsible.
> 2. The party's level of culpability.
> 3. The degree to which the party benefitted from disposal of the waste.
> 4. The party's ability to pay its share of the cost.

31 F. Supp.2d at 63. Herein, this Court will not utilize those factors, since there is no evidence before the Court concerning the third and fourth factors, while the first factor is not applicable in this litigation, since CWM (as a transporter, former operator and former owner) and Plaintiff's members (as generators/arrangers) are responsible for the same waste. Moreover, the second factor is not clearly applicable in this litigation, since there is no hint of evidence in the record that anyone acted in blameworthy fashion regarding the BFOU. It bears emphasis that the Ohio EPA approved the plans for the construction of that hazardous waste site and gave its imprimatur to the types of waste that were disposed of therein.

Indeed, the Clark County Health Department encouraged the Ohio EPA to approve the request to construct the BFOU.

Rather, in making its equitable allocation, this Court will bear in mind the instructive language of the Sixth Circuit that, "in any given case, a court may consider several factors, a few factors, or only one determining factor ... depending on the totality of the circumstances presented to the court." Consolidation Coal, 345 F.3d at 413-14 (internal quotation marks and citation omitted; ellipses in the original).

The parties disagree about what equitable share of the joint responsibility of paying for the RI/FS this Court should allocate to CWM. The Plaintiff contends that this Court should require CWM to bear 75% of that burden, a figure which is comprised of a 60% equitable share and a 15% recalcitrance penalty.[29] See

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[29]The parties previously engaged in a type of non-binding mediation, by submitting exhibits and briefs to an allocator, an attorney from St. Louis, who issued a non-binding allocation recommendation and report, suggesting that CWM be allocated slightly less than a 60% share. See Plaintiff's Ex. 93. The parties agreed that the report by the allocator would be admissible, and that this Court could determine the weight to give it. See Docs. ##150 and 151. In support of its proposed allocation, the Plaintiff has extensively relied upon that allocation recommendation and report. See Doc. #227 at 11-14 and passim. CWM, in contrast, argues that this Court should afford little weight to that report. See Doc. #232 at 10-11. This Court will decline to give any evidentiary weight to same. The task before the Court is to allocate equitable shares to Plaintiff and CWM of the response costs incurred by the Plaintiff to fund the RI/FS. The Court will not accomplish that goal more quickly or justly, by relying on evidence that another person believes that the Court should reach a certain result. First, the parties have not presented any evidence concerning the background of their allocator, other than she is an attorney in St. Louis. Thus, the Court has not been afforded the opportunity of assessing her credibility, based upon her education and experience. Second, the parties have not expressly indicated that they have provided the Court with all exhibits which were given to the allocator. Just as an appellate court needs the record before the District Court in order to fulfill its function of appellate review, this Court must be able to examine all of the evidence before the allocator in order to assess the quality of her work and to determine the weight to give it. Third,

Doc. #227. CWM, in contrast, argues that the Court should require it to pay only 15% of the cost of the RI/FS, a figure which does not include any recalcitrance penalty. See Doc. #229. For reasons which follow, this Court rejects the figures proposed by the parties.

CWM argues that the Court should require it to pay no more than 15% of the amount incurred for the RI/FS, see Doc. #229 at 4-5, basing its proposition on the assertion that it was not involved with the preparation of the site for the BFOU, the regulatory permitting for it, or its operation or ownership. CWM also points out that it did not profit from the operation of the BFOU. Rather, CWM attempts to cast itself as being nothing more than technically responsible for a share of the Plaintiff's response costs, since it did not become the successor to IWD Chemical and IWD Liquid until after the BFOU had been closed. Although CWM's factual predicate is accurate, this Court cannot agree that it serves as the basis for concluding that it should be required to pay only 15% of the response costs incurred at that hazardous waste facility. As the corporate successor to IWD Chemical and IWD Liquid, CWM steps into their shoes as an owner and the operator of the BFOU, as well as the transporter of hazardous waste to that facility. Anspec Co., Inc. v. Johnson Controls, Inc., 922 F.2d 1240 (6th Cir. 1991) (noting that the corporate successor of a person described § 107(a) of CERCLA stands in its shoes). Accordingly, the fact that CWM did not become the corporate

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even if all evidence considered by the allocator were before it, the Court could not imagine a more exorbitant expenditure of scarce judicial resources than reviewing evidence, not in order to make an equitable allocation, but rather to assess the quality of the work of a person who engaged in that process, in order to determine the weight to give her recommendations.

successor to IWD Chemical and IWD Liquid until after the BFOU had been closed is of no matter, since the successor stands in the shoes of its predecessors.[30]

Plaintiff, on the other hand, suggests that this Court commence its equitable allocation by assigning a 50% share of the joint responsibility to the generators of the waste disposed of at BFOU and those who transported that waste thereto, and an equal share to its owner and operator. See Doc. #227 at 15-18. To a degree, this Court agrees with the Plaintiff. The Court will, as the starting point for its equitable allocation assign 50% of the shared responsibility to the generators of the hazardous waste and the remaining 50% to the owners and operators of the BFOU and those who transported hazardous waste to that facility.[31] The actions of all fours types of PRPs came together to create the conditions at the BFOU which have caused the U.S. EPA to direct that an RI/FS be conducted. The generators created the hazardous waste which was disposed of at that facility; the

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[30]CWM has cited and discussed at length this Court's decision in AlliedSignal, supra. See Doc. #229 at 14-16. Since the facts, circumstances and substances giving rise to the equitable allocation in this litigation are not remotely analogous to those that drove both the cleanup and the Court's equitable allocation therein, the presence of carcinogenic polycyclic aromatic hydrocarbons, that decision does not cast light on the manner in which this Court should equitably allocate response costs in this matter.

[31]Plaintiff suggests that the Court should consider the responsibility of the transporter, IWD Liquid, with the generators, so that those two types of PRPs would initially be assessed a joint share of 50%. Of course, treating the transporter and generators together would reduce the generators' ultimate share of the liability and would increase that of CWM, the successor to IWD Liquid. This Court will decline Plaintiff's suggestion, because the evidence is that, during the active operation of the BFOU, the owner and operator (IWD Chemical) and transporter (IWD Liquid) acted in concert to provide generators with "one-stop shopping" for the disposal of hazardous chemical waste. See Plaintiff's Ex. 35. Therefore, IWD Chemical and IWD Liquid are appropriately assigned 50% of the parties' joint responsibility.

transporter, operator and owner were responsible for moving the hazardous waste to the BFOU and disposing of same in that facility.

Of course, Plaintiff's members were not the only generators whose hazardous waste was disposed of at the BFOU. The evidence before this Court demonstrates that the Plaintiff's members are responsible for approximately 80% of the gallons of chemical waste that were disposed of therein. However, this Court will require that the Plaintiff assume all responsibility for the generators' share of the cost of the RI/FS at the BFOU. CWM argues that Plaintiff should be responsible for more than the approximately 80% of the generators' share, since they settled with most of the generators which contributed waste to the BFOU, and which were originally named as Defendants in this litigation.[32] See Doc. #229 at 5. This Court agrees. Although it is not clear whether the Plaintiff has settled with all generators which have contributed of hazardous waste to the BFOU, Plaintiff appears to have settled its claims for contribution against every generator named as a Defendant in this litigation, as well as settling with a number of such other PRPs before this litigation was initiated. See Docs. ##100, 109 and 140. Plaintiff has dismissed the generators named as Defendants herein, without prejudice, in accordance with Fed. R. Civ. P. 41(a)(1)(i). See Docs. ## 30, 31, 36, 37, 49, 84, 86, 102, 104, 106, 110, 111, 115, 119, 120, 125, 126, 128, 135, 138, 144, 175, 176, 190, 201 and 204.[33] The Plaintiff has not indicated that it

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[32]CWM also contends that Plaintiff gave contribution protection to those generators. CWM has failed to support that contention with evidence. On the contrary, there is no record of Plaintiff having so acted, since it has not requested that this Court provide such protection to any PRP, other than to TDC, DEI, DEMCO and Clarkco.

[33]Although the docket sheet indicates that two of the generators named as Defendants herein, Color Pac, Inc., and Riverwood International Corporation, have

has failed to settle with any of the generators named as Defendants in this litigation or that it has been unable to do so with one or more significant generators, because they are no longer in existence. Therefore, the Court concludes that the Plaintiff is responsible for the generators' share of the joint liability for the BFOU, even though its members were not the only such PRPs.

Plaintiff argues that, from the starting point of equal shares, the Court should reduce its share, increasing that of CWM. In support thereof, Plaintiff points out that CWM is the successor to the entity which owned the BFOU unit throughout much of the time that it was in operation and which operated that facility that entire time, as well as being the successor to the only known transporter of hazardous wastes to that facility. Therefore, Plaintiff's argument continues, CWM is responsible for the vast majority of the costs associated with the current state of that hazardous waste site.[34] For instance, Plaintiff contends that CWM's predecessors determined where the BFOU would be located and solicited business from generators of hazardous waste and transported it to the BFOU, where they

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not been terminated, an examination the record in this litigation causes this Court to conclude that the Plaintiff has dismissed those Defendants without prejudice, as it has the other generators named herein. In its Post-Settlement Conference Status Report, Plaintiff indicated that it had reached a settlement with Graphic Packaging, acting on behalf of both Color Pac and Riverwood. See Doc. #109 at 2. Parenthetically, Graphic Packaging has not been named as a Defendant in this litigation. Subsequently, the Plaintiff dismissed Graphic Packaging, without prejudice. See Doc. #176. Moreover, neither Color Pac nor Riverwood is named as a Defendant in Plaintiff's Second Amended Complaint (Doc. #194). Accordingly, the Court orders Color Pac and Riverwood terminated as Defendants in this litigation.

[34]With this argument, the Plaintiff is in essence relying on the first and fourth Gore factors.

then disposed of the waste in that facility.[35] The Plaintiff places primary support for this proposition on the recommendation of the allocator. For reasons stated above, however, this Court has declined to credit that recommendation. Moreover, none of those reasons causes this Court to conclude that CWM is responsible for a greater share of the responsibility for the RI/FS at the BFOU. There is no evidence that either of CWM's predecessors acted negligently in the process of selecting the location for the BFOU. Moreover, accepting for present purposes that IWD Liquid, as transporter, solicited chemical waste from the Plaintiff's members, there is no evidence that, as a result, they redirected their waste streams to the BFOU.[36] The generators, both Plaintiff's members and those with which Plaintiff has settled, acted together with IWD Chemical and IWD Liquid and came together to create the

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[35]Plaintiff also argues that, in accordance with the version of Ohio Admin. Code § 3745-31-04(C), in effect when the Permit to Install was issued, IWD Chemical remained responsible as the post-closure obligor for the BFOU, even though it transferred the ownership of that facility to TLC. See Doc. #227 at 19. Parenthetically, the current version of Ohio Admin. Code § 3745-31-04(C) no longer contains a provision which would impose such responsibility. Assuming for present purposes that Plaintiff has correctly interpreted the version of Ohio Admin. Code § 3745-31-04(C), applicable in the mid-1970's, this Court will not impose a greater share of the joint obligation for the RI/FS on CWM, as a result of that provision. It is unquestioned that IWD Chemical transferred its interest in the BFOU to TLC, before that facility closed. As a consequence, TLC became legally responsible for post-closure actions. Nothing in the provision cited by Plaintiff absolved TLC of that responsibility. Whether the former version of Ohio Admin. Code § 3745-31-04(C) would have provided a vehicle to the Ohio EPA to impose liability on CWM, as the successor to IWD Chemical, if TLC had failed to meet its obligations, will not be decided in a lawsuit which that state agency did not bring and which it has not intervened to argue herein. Moreover, despite the regulation relied upon by the Plaintiff, the Ohio EPA looked to Danis Industries to accomplish tasks regarding the BFOU in the 1980's and 1990's, rather than requiring that CWM, as successor to IWD Chemical, complete them.

[36]General Motors generated the most waste that was disposed of in the BFOU, although Plaintiff has attributed much of that waste to Delphi Corporation, which did not come into existence until long after that waste site had closed.

hazardous conditions at the BFOU, which the U.S. EPA concluded required a RI/FS to investigate fully, even though that federal administrative agency did not place that waste site on the National Priorities List. Those conditions would not exist without the efforts of all. For instance, the hazardous waste which may be threatening the ground water was created by Plaintiff's members during their manufacturing processes. In addition, although the Plaintiff is correct in stating that CWM's predecessors are responsible for having selected the site for the hazardous waste facility, in the vicinity of ground water, they received approval from the Ohio EPA for the site at that location. Accordingly, this Court will reject the Plaintiff's request to adjust CWM's equitable share upward from 50%. Thus, the equitable shares of the Plaintiff and CWM remain at 50% per party.

Consequently, and based on information provided by the parties, Plaintiff is now entitled to recover $3,200,000 in past response costs through January 31, 2009 from CWM. Plaintiff has also requested that the Court enter declaratory relief as to CWM's liability for the response costs it (Plaintiff) incurs in the future to complete RI/FS and to construct any remedy required by the U.S. EPA.[37] See Plaintiff's Second Amended Complaint (Doc. #194) at 11. In GenCorp v. Olin Corp., 390 F.3d 433 (6th Cir. 2004), the Sixth Circuit held that, since "requests for declaratory judgments concerning future response costs in § 107 and § 113(f) suits must be treated alike," the provision of CERCLA, § 113(g)(2), 42 U.S.C. § 9613(g)(2), making the award of declaratory relief for future response costs mandatory in an action under § 107, is equally applicable in an action for

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[37]Given that the Plaintiff's recovery is limited to 55% of the costs through March 14, 2007, some of those future response costs have undoubtedly already been incurred.

contribution under § 113(f). Id. at 451. In accordance with GenCorp, and based on the agreement of the parties, this Court will direct the entry of a declaratory judgment in favor of Plaintiff, indicating that CWM is responsible for 49.5% of all reasonable and necessary response costs, consistent with the NCP, Plaintiff (or its successor) has incurred since February 1, 2009, and will incur in the future to complete the RI/FS and to construct any remedy ordered by the U.S. EPA.[38]

Based upon the foregoing, the Court directs that judgment be entered in favor of Plaintiff and against Defendant Chemical Waste Management, Inc., in the sum of $3,200,000, and a declaratory judgment, indicating that CWM is responsible for 49.5% of all reasonable and necessary response costs, consistent with the NCP, which Plaintiff (or its successor) has incurred since February 1, 2009, and incurs in future to complete the RI/FS and to perform any remedy ordered by the U.S. EPA.[39]

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[38]Although the Court directs that final judgment be entered herein, it will retain jurisdiction over this matter, in order to resolve disputes between the parties concerning consistency with the NCP. See United States v. Atchison, Topeka & Santa Fe Ry. Co., 2003 WL 25518047 (E.D.Cal. 2003) (directing the entry of final judgment, while retaining jurisdiction to resolve disputes as to whether future response costs were consistent with the NCP and, therefore, can be recovered in accordance with declaratory judgment entered therein), affirmed in part and reversed in part on other grounds, 520 F.3d 918 (9th Cir. 2008).

[39]Plaintiff requested an award of prejudgment interest in its Second Amended Complaint. See Doc. #194 at 12. The Plaintiff did not, however, address that request in its Allocation Brief (Doc. #227). In its Reply Brief, Plaintiff merely states that "[p]rejudgment interest should be awarded [Plaintiff] ...." Doc. #231 at 18. By failing to raise that issue in its Allocation Brief (Doc. #227), Plaintiff has waived its request for an award of such interest. Indeed, the Sixth Circuit has frequently held that the failure to raise an issue in an opening brief constitutes a waiver of that issue. Pagan v. Fruchey, 492 F.3d 766, 769 n. 1 (6th Cir.) (en banc), cert. denied, 128 S.Ct. 711 (2007); McCalvin v. Yukins, 444 F.3d 713, 723 (6th Cir. 2006). Moreover, even if that request had not been waived, the Court would conclude that Plaintiff has failed to demonstrate its entitlement to prejudgment interest. The award of prejudgment interest is governed by § 107(a) of CERCLA,

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

February 3, 2011

WALTER HERBERT RICE, JUDGE
UNITED STATES DISTRICT COURT

Copies to:

Counsel of Record.

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which provides that such interest begins to accrue "'the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned.' 42 U.S.C. § 9607(a)." United States v. Consolidation Coal Co., 345 F.3d 409, 415 (6th Cir. 2003). In AlliedSignal, 177 F. Supp.2d at 757-58, this Court concluded that prejudgment interest must be awarded to a party seeking contribution under § 113(f) in the same manner that it would be awarded to a party bringing a cost recovery action under § 107(a). However, since the Plaintiff has not pointed to evidence, demonstrating that it demanded payment from CWM on a particular date, the Court concludes that prejudgment interest has not begun to accrue prior to the judgment ordered herein.