NOT FOR PUBLICATION

FILED

NOV 7 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

and

STATE OF CALIFORNIA, ex rel. State of California Department of Health Services Hazardous Substances Cleanup Fund,

Plaintiff,

v.

UNION OIL COMPANY OF CALIFORNIA; et al.,

Defendants-Appellants,

and

SHELL USA, INC.; et al.,

Defendants.

No. 21-55320

D.C. No. 2:91-cv-00589-CJC

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Argued and Submitted October 17, 2022

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Portland, Oregon

Before: PAEZ and BADE, Circuit Judges, and R. COLLINS,** District Judge.

Union Oil Company of California, Atlantic Richfield Company, and Texaco, Inc. (collectively, the "Oil Companies"), appeal the district court's grant of summary judgment to the United States requiring the Oil Companies and Shell Oil Company[1] to reimburse approximately $50 million, plus statutory interest, of EPA's environmental cleanup costs at the McColl Superfund Site (the "Site") pursuant to § 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*[2] The Oil Companies argue that the United States was required to seek the costs at issue in a claim for contribution under § 113(f), rather than a claim for cost recovery under § 107(a), because of the government's liability for a portion of the waste at the Site. We have jurisdiction under 18 U.S.C. § 1291. This case presents a question of law that we review de novo. *Arconic, Inc. v. APC Inv. Co.*, 969 F.3d 945, 950 (9th Cir. 2020). We affirm.

** The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

[1] Shell Oil Company settled with the United States and is not party to this appeal.

[2] We use the convention of referring to Public Law section numbers of CERCLA provisions in text while citing to the United States Code.

We have summarized the history of the contamination at the Site previously[3] and we do not repeat it here. In brief, during World War II, the Oil Companies dumped excess waste at the Site while producing greatly increased quantities of primarily aviation fuel and, to a lesser extent, benzol, for the United States. *See Shell III*, 294 F.3d at 1049–51.

In 1991, the United States and the State of California brought this CERCLA liability action against the Oil Companies to recover environmental cleanup costs incurred at the Site. The Oil Companies counterclaimed alleging that the United States was also liable under CERCLA for the same environmental costs. In 1993, the district court found that the Oil Companies were liable for all costs at the Site. *Shell I*, 841 F. Supp. at 975. In 2002, we held that the United States is not liable for non-benzol waste but is liable for benzol waste at the Site. *Shell III*, 294 F.3d at 1048–49. We affirmed the district court's allocation of 100% of benzol-related costs to the United States. *Id.*

In response to *Shell III*, "the parties stipulated that the United States' fair share for benzol waste contamination at the Site is 6.25%." *United States v. Shell Oil Co.*, 506 F.3d 1038, 1043 (C.D. Cal. 2020). In 2020, following an extended

[3] *United States v. Shell Oil Co.* (*Shell III*), 294 F.3d 1045, 1049–51 (9th Cir. 2002); *see also United States v. Shell Oil Co.* (*Shell I*), 841 F. Supp. 962, 966–67 (C.D. Cal. 1993); *United States v. Shell Oil Co.* (*Shell II*), 13 F. Supp.2d 1018, 1020–24 (C.D. Cal. 1998).

stay pending out-of-circuit litigation, the district court granted summary judgment to the United States on its request for reimbursement of ongoing non-benzol cleanup costs under § 107(a), with costs calculated using the 6.25% stipulation. *Id.* The Oil Companies timely appealed. They argue that, as a polluter at the Site, the United States can no longer maintain its claim under § 107(a), CERCLA's cost recovery provision, and instead is limited to a claim for equitable contribution between polluters under § 113(f).

The United States can recover the requested non-benzol costs under § 107(a), and not § 113(f), because in *Shell III* we held that the United States is not liable for non-benzol costs at the Site and therefore the United States voluntarily incurred these costs. *See* 294 F.3d at 1059. Because the United States' non-benzol costs were voluntarily incurred rather than required by a judgment or other order imposing CERCLA liability, it may not pursue a § 113(f) contribution claim for non-benzol costs and properly proceeded for cost recovery under § 107(a). *See Whittaker Corp. v. United States*, 825 F.3d 1002, 1009 (9th Cir. 2016).

Section 107(a) creates a right of action for parties to recover their voluntary environmental cleanup costs from "Potentially Responsible Parties" (PRPs); Section 113(f) creates a right of action for a PRP forced to pay more than its fair share to require contribution from other PRPs towards a common CERCLA liability. *United States v. Atl. Research Corp.*, 551 U.S. 128, 138–39 (2007).

Although § 107(a) and § 113(f) are mutually exclusive causes of action, a party is not limited to a contribution claim under § 113(f) based solely on its status as a PRP at a particular site. *Whittaker,* 825 F.3d at 1007, 1008. Rather, a PRP may recover under § 107(a) its own voluntary response costs, i.e., those costs not required by a judgment, settlement agreement, or administrative order imposing CERCLA liability. *Id.* at 1009.

Shell III expressly held that the United States is not liable for non-benzol waste at the McColl Site. 294 F.3d at 1048–49. Although CERCLA liability is generally joint and several, in *Shell III* we affirmed the United States' liability for benzol waste but concluded that: "[b]ecause the United States is not liable as an arranger, the question of allocation of liability for the non-benzol waste between the United States and the Oil Companies under § [1]13(f)(1) is moot." *Id.* The plain holding of *Shell III* is that the United States is not liable for non-benzol waste and is not subject to allocation of any non-benzol waste costs.

Rather than present an alternative interpretation, the Oil Companies point to a statement made by the United States in which the government agreed that "the United States' liability for the benzol-related waste at the Site made all the waste at the Site potentially subject to allocation . . . ." In context, the statement merely acknowledged the general rule of joint and several liability; the United States then proceeded to defend the holding in *Shell III*. In addition, the Oil Companies cite

no authority for the proposition that a judicial admission would override our holding.

We see no reason to disturb the law of this case. Although the district court did not make findings to support divisibility of the environmental harm at the Site, *see Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 588–89 (9th Cir. 2018), the parties have stipulated repeatedly since 2003 that the United States' proper share representing benzol waste is 6.25%.[4] The amount requested by the United States and awarded by the district court was calculated to represent only non-benzol waste using the parties' stipulation. The United States is not liable for these costs, and they were incurred voluntarily rather than required by a judgment or other order imposing CERCLA liability. The non-benzol waste costs are therefore properly recovered under § 107(a), and not § 113(f).

AFFIRMED.

[4] The Oil Companies now argue that they stipulated only to 6.25% as a share of *volume* of benzol waste, not costs. Even if the original stipulation were ambiguous, multiple subsequent joint submissions signed by the Oil Companies and the Oil Companies' Opposition to the United States' Motion for Partial Summary Judgement (Aug. 10, 2020) in the district court all expressly refer to the 6.25% stipulation as a share of costs.