

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

K.C. 1986 Limited Partnership,)	
)	
Plaintiff,)	
)	
v.)	Case No. 02-853-CV-W-NKL
)	
READE MANUFACTURING, <i>et al.</i> ,)	
)	
Defendants.)	

ALLOCATION ORDER

This case involves the cleanup of the Armour Road Superfund Site (“Site”) and, more specifically, how to allocate the costs of that cleanup pursuant to 42 U.S.C. § 9613(f)(3)(B), CERCLA § 113(f)(3)(B). The soil contamination at the Site, which consists primarily of arsenic, occurred over nearly seventy-five years during which time the Site was owned and operated by multiple parties. The Court has determined that the following parties are liable for the cleanup.

1. The North Kansas City Development Company is liable as a “owner” of the Site during a portion (1929-1942) of the Reade Era, a time during which hazardous substances were disposed of at the Site. *See* CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2).

2. Because North Kansas City Development Company is insolvent or cannot be identified, its allocable share represents an “orphan share.” *See Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1303 (9th Cir. 1997).

3. Reade Manufacturing Company is liable as an “owner” of the Site during the Reade Era (1929-1963) and Borax Era (1963-1968), times during which hazardous substances were disposed of at the Site. *See CERCLA § 107(a)(2)*, 42 U.S.C. § 9607(a)(2).

4. Reade Manufacturing Company is also liable as an “operator” of the Site during the Reade Era (1929-1963), a time during which hazardous substances were disposed of at the Site. *See CERCLA § 107(a)(2)*, 42 U.S.C. § 9607(a)(2).

5. Because Reade Manufacturing Company and its successor, REMACOR, are insolvent, Reade’s allocable share is an “orphan share.” *See Pinal Creek Group*, 118 F.3d at 1303; *see also Charter Township of Oshtemo v. American Cyanamid Co.*, 898 F. Supp. 506, 508 (W.D. Mich. 1995).

6. Borax has admitted liability under CERCLA for the cleanup of the Site.

7. Habco, Inc., is a dissolved corporation and therefore lacks the capacity to be sued. *See Fed. R. Civ. P. 17(b)*; *see also Minnesota v. Kalman W. Abrams Metals, Inc.*, 155 F.3d 1019, 1027 (8th Cir. 1998).

8. Habco International was the successor to Habco for purposes of all liabilities associated with the Site. *See Order, Case No. 02-0853-CV-W-NKL* (May 7, 2004) at 41-42.

9. DeAngelo Brothers, Inc., is the successor to Habco International and Habco for purposes of all liabilities associated with the Site. *See* Order, Case No. 02-0853-CV-W-NKL (May 7, 2004) at 42.

10. DeAngelo Brothers, Inc., as the successor to Habco, Inc., is liable as an “owner” of the Site during the Habco Era (1968-1986), a time during which hazardous substances were disposed of. *See* CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2).

11. DeAngelo Brothers, Inc., as the successor to Habco, Inc., is liable as an “operator” of the Site during the Habco Era (1968-1986), a time during which hazardous substances were disposed of. *See* CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2).

12. Donald Horne is liable as an “operator” of the Site during the Habco Era (1968-1986), a time during which hazardous substances were disposed of. *See* CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2); Order, Case No. 02-0853-CV-W-NKL (May 7, 2004) at 35-37.

13. Victor Horne is liable as an “operator” of the Site during the Habco Era (1968-1986), a time during which hazardous substances were disposed of. *See* CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2); Order, Case No. 02-0853-CV-W-NKL (May 7, 2004) at 37.

14. K.C. 1986 is not entitled to invoke CERCLA’s “innocent landowner” defense. *See* CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3); Order, Case No. 02-0853-CV-W-NKL (May 7, 2004) at 41.

15. K.C. 1986 is liable as an “owner” of the Site during the K.C. 1986 Era (1986-present). *See* CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1); Order, Case No. 02-0853-CV-W-NKL (May 7, 2004) at 41.

16. Donald Horne is liable as an “operator” of the Site during the K.C. 1986 Era (1986-present). *See* CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2); Order, Case No. 02-0853-CV-W-NKL (May 7, 2004) at 38.

Having determined liability, the Court must now determine an equitable method of allocating the cost of cleanup. Based on all the evidence in the record, including the evidence presented at the allocation hearing on August 24, 25, 2004, the Court makes the following findings of fact and conclusions of law.

I. Findings of Fact

A. The Site

1. The Site is located at and near 2251 Armour Road in North Kansas City, Missouri.
2. The Site consists of 79,364 square feet, or 1.822 acres.
3. Of that 1.822 acres, 1.136 acres are currently owned by K.C. 1986 Limited Partnership.

B. The Reade Era

4. Reade Manufacturing Co. (“Reade”) operated a herbicide manufacturing plant at the Site beginning around 1929 and ending in 1963.
5. Throughout the entire time it operated at 2251 Armour Road, Reade used

substantial amounts of arsenic, 2,4-D, 2,4,5-T, and pentachlorophenol in its herbicide blends.

6. Reade received arsenic at the Site in the form of powdered arsenic trioxide.

7. The arsenic trioxide was approximately 95% pure.

8. Pure arsenic trioxide contains 75.74% pure or elemental arsenic.

9. Between 1929 and 1953, Reade imported to the Site approximately 240 tons of 95% pure arsenic trioxide per year. (Tr. 404.) Between 1954 and 1963, Reade imported to the Site approximately 162.9 tons of 95% pure arsenic trioxide per year. (Tr. 406.) Accounting for the fact that arsenic trioxide contains 75.74% pure or elemental arsenic, Reade imported a total of approximately 5,488 tons of elemental arsenic to the Site during the time it operated there. (Tr. 410.)

10. At the Site, Reade had a total of 14 aboveground storage tanks (two 125,000 gallon, one 15,000 gallon, one 12,000 gallon, five 11,000 gallon, one 10,000 gallon, one 9,000 gallon, one 6,000 gallon, one 4,000 gallon, one 250 gallon), and five mixing tanks/vats (two 8,000 gallon aboveground mixers, and three 8,000 in-ground mixers).

11. Reade initially had two 6,000 gallon in-ground mixing vats on the southern portion of the Site, which it replaced in the mid- to late-1950s with two 8,000 gallon mixing vats.

12. These two 8,000 gallon mixing vats, which are still at the Site, are 10 feet in diameter and 12 feet deep.

13. During the Reade Era, when crude arsenic was used, mud would sometimes fall out of the arsenic solution and accumulate at the bottom of the storage tanks (called "tank

bottoms” or “sludge”) where the arsenic products were stored, but no one recalls what was done with these tank bottoms when the tanks were cleaned by Reade employees.

14. Based on all the evidence before the Court, the Court concludes that the Site was significantly contaminated by arsenic during the Reade Era. It is impossible to determine the exact level of contamination, however, the contamination which occurred during the Reade Era was sufficient to require the cleanup which has now been approved by the EPA.

15. In 1983, Reactive Metal and Alloys Corp. (“REMACOR”) purchased all of Reade’s stock. In 2001, REMACOR filed for bankruptcy in the Western District of Pennsylvania. Subsequently, REMACOR’s liabilities were discharged.

C. The Borax Era

16. Between November 1963 and November 1968, Borax leased Reade’s facilities at the Site for the purposes of manufacturing herbicides.

17. According to records from the American Smelting and Refining Company (“ASARCO”), which are available for the years 1957 through 1968, Borax received, on average, one hopper car containing 62.5 tons of 95% pure arsenic trioxide per year. (Tr. 407.) Accounting for the fact that arsenic trioxide contains 75.74% pure or elemental arsenic, Borax imported a total of approximately 225 tons of elemental arsenic to the Site during the time it operated there. (Tr. 408.)

18. As a result of Borax's operations at the Site, additional arsenic contamination occurred. However, it is not possible to quantify how much arsenic contamination occurred during the Borax Era.

19. After Borax decided not to exercise its buy-out option, Reade asked Borax to empty and clean all of the tanks at all locations (which Borax did) because Reade did not intend to continue in the weed killing business.

20. Borax did not remove any tanks, buildings, or other features from the Site during its period of operation.

D. The Habco Era

1. Company Ownership and Management

21. Donald Horne and Donald Boatright started the Horne-Boatright Chemical Co. in December 1964. The company changed its name to Habco, Inc., in January 1971.¹

22. In 1968, Habco purchased the property at the Site from Reade. Donald Boatright and Donald Horne were both involved in the Reade transaction to purchase the Site.

During the transaction process, Donald Boatright and Donald Horne were concerned about potential contamination at the Site.

23. Habco operated its herbicide business at the Site from 1968 until 1986.

24. Habco had three main components to its business: (a) formulating herbicides and entering into contracts with railroads to provide vegetation control services on railroad

¹The two companies will be referred to collectively as "Habco".

rights-of-way using those herbicides; (b) fabricating herbicide spray equipment; and (c) contracting with other companies to manufacture herbicides to sell under a Habco label.

25. As part of its railroad vegetation control services, Habco purchased chemicals and blended them to a proper solution for application on railroad rights-of-way.

26. In November 1968, Donald Horne's brother, Victor Horne, began managing Habco's operations at the Site. As manager, Victor Horne was closely involved with all aspects of Habco's day-to-day operations, including handling all chemical inventory, equipment repair, and equipment fabrication.

27. Between 1968 and 1976, Donald Horne and Donald Boatright sat at the top of Habco's decision-making hierarchy. Donald Horne and Donald Boatright were responsible for making decisions regarding aspects of the business such as safety procedures, what chemicals to purchase, mixing instructions, emergency procedures, compliance with environmental laws, and equipment fabrication for specific railroad jobs.

28. Victor Horne was responsible for implementing Donald Horne's and Donald Boatright's decisions. Victor Horne could not unilaterally make decisions regarding a substantial amount of money; rather, he would need Donald Horne's and Donald Boatright's combined authorization. For decisions involving a moderate amount of money, Victor Horne was required to obtain either Donald Horne's or Donald Boatright's approval. However, Victor Horne was authorized to approve and implement decisions involving a small amount of money.

29. Although Victor Horne often decided how to implement Donald Horne's and Donald Boatright's decisions, Donald Horne and Donald Boatright would review the procedures being used by Victor Horne and would approve them.

30. In 1976, Donald Horne bought out Donald Boatright's interest in Habco. Afterwards, the same decision-making process was followed, except that Donald Boatright was taken out of the process: Donald Horne was responsible for making decisions about Habco's operations, and Victor Horne was responsible for implementing those decisions.

2. Habco's Use of Arsenic

31. Habco used large volumes of hazardous substances at the Site, including arsenic. In particular, Habco used significant amounts of MSMA, herbicide containing 46.25% pure or elemental arsenic.

32. Habco usually received MSMA in bulk shipments, which it stored in its above-ground storage tanks and in-ground mixing vats.

33. Habco claims that it received bulk shipments of MSMA between 1968 and 1974, and that Habco accepted smaller shipments of MSMA after that time period. (Habco Proposed Findings [Doc. 362], p. 8). Habco further claims that it eventually phased out the use of MSMA in favor of non-arsenic herbicides such as Roundup.

34. However, according to Victor Horne, who was at the Site almost every day that Habco operated there, Habco received MSMA in bulk for the entire period it operated—from 1968 until 1986. (See J-301 at 127-28.) In addition, Donald Horne

testified in his deposition that Habco used MSMA from the time it started at the Site until at least 1983. (See USB-283 at 73-74.) Further evidence of Habco's continued use of MSMA is the fact that Habco left chemical drums containing MSMA at the Site when it ceased operations. (See J-150 at EMR14127.) Based on this evidence, the Court concludes that Habco received shipments of MSMA for the entire period it operated—from 1968 until 1986.

35. During its time at the Site, Habco imported to the Site approximately 75 tons of MSMA per year. (Tr. 409.) Accounting for the fact that MSMA contains 46.26 pure or elemental arsenic, Habco imported a total of approximately 624.5 tons of pure or elemental arsenic during the time it operated at the Site. (Tr. 409-410.)

3. Arsenic Spillage During the Habco Era

36. Habco's operations frequently caused arsenic to spill onto the Site. It was fairly common for bags containing chemicals to be ripped when delivered to the Site. Sometimes the ripped bags would be placed in recovery bags; other times, the bags would simply be taped. In addition, chemical leaks and spills occurred at the Site when drums were banged around or punctured. Some drums leaked just from sitting around during the winter. Sometimes the bags and drums would leak anywhere from a cup to a few gallons of liquid chemical, or from a few ounces to a few pounds of dry chemical. Sometimes boxcars came to the Site with leaking drums, in which case Habco employees were supposed to pump the leaking drum into a different drum.

37. When Habco rinsed its chemical drums, rinseate containing arsenic would sometimes spill onto the floor.
38. Habco never reconditioned its drums; instead, it reused drums due to economics, even though Donald Horne was aware that reused drums had a higher failure rate than reconditioned drums. Habco never pressure tested the reused drums to see if they leaked.
39. Habco also caused spillage at the Site by rinsing out railroad tank cars and tank trucks that carried Habco's herbicide product to spray locations. At Donald Horne's direction, Habco employees rinsed out these cars and trucks with standard water hoses, and would transfer the rinseate from the tank cars to the in-ground mixing vats on the southern portion of the Site.
40. Habco employees also washed off the outside of the spray trucks on the Site. These spray trucks had accumulated herbicide on them during spray operations.
41. Habco periodically used a pressure washer to rinse out its buildings. This was usually done by Victor Horne.
42. When a spill occurred, instead of collecting and properly disposing of the spilled substance, Habco used a pressure washer to spray the floor.
43. During the Habco Era, Donald Horne was aware of EPA standards and the danger of chemical contamination, including arsenic contamination.
44. In 1973, Habco settled a lawsuit brought by its neighbor for \$24,500, after the

neighbor—a greenhouse—alleged that its plants were damaged when herbicides containing 2,4-D and 2,4,5-T were released from the Site by Habco and ended up on the neighbor’s property.

45. A site inspection performed by Terracon Environmental in 1988—after Habco had left the property—revealed “high evidence of contamination” of the Site. (See J-131 at KS 16551.) Terracon observed concrete at the Site that appeared to be contaminated from the chemical activities that had occurred at the Site.

46. Terracon also took samples from an oily, stained area near the southeast corner of the building. The oily area generally contained the highest concentrations of the detected chemicals. In addition, Terracon evaluated concrete samples taken from the concrete floor installed by Habco.

47. EMR, an environmental consulting company hired by Donald Horne, took wipe samples of metal equipment and the walls of a building constructed by Habco. The samples contained arsenic ranging from 4,150 ppb to 451,000 ppb. EMR also took chip samples from concrete flooring and pavement surfaces. These samples contained arsenic ranging from 20.9 ppm to 888 ppm.

48. The highest arsenic concentration detected at the Site was located just to the south of the edge of Habco’s pavement, at the surface of the soil, in an area that slopes downward towards the south. This area is precisely where runoff from Habco’s building and yard would have gone.

49. Even with all of this evidence of spills during Habco's nineteen years at the Site, Donald Horne still believes that he, Victor Horne, and Habco should be responsible for, at most, an insignificant amount of the cleanup costs. Donald Horne believes that no significant contamination of the Site occurred during the Habco Era.

4. Habco's Storage Tanks

50. Habco used aboveground storage tanks and in-ground mixing vats located on the Site to store chemicals received in bulk.

51. Habco used the in-ground mixing vats to blend chemicals (including MSMA) with water and other chemicals before the herbicides were put into railroad tank cars or truck tank cars and shipped to spray locations.

52. Even as late as Fall 1985, the two in-ground mixing vats located on the southern portion of the Site were still being used by Habco to store chemicals.

53. Over the years, Habco removed all but one of the aboveground storage tanks that had been left by Reade, removing most of them in the early 1980s.

54. Regarding aboveground storage tank removal, that was generally Victor Horne's idea, but the removals were approved by Donald Horne and Donald Boatright. *See* USB-283 at 134:9-24.

55. Just prior to pouring the concrete foundation for the truck shop (the second building constructed by Habco in the mid- to late-1970s), Habco left in place and filled with rip-rap, the in-ground mixing vat located in the middle of the Site to the east of the central railroad track.

56. Habco chose to backfill the vat instead of remove it because it was cheaper to backfill it.
57. The procedure followed was to drill holes in the bottom of the tank for drainage, and then to backfill it, leaving it in place.
58. Donald Horne authorized the project, and Victor Horne oversaw the project.
59. Only one aboveground tank and two of the three mixing vats remained in tact when Habco transferred the Site to K.C. 1986.

E. Habco Sells Its Operating Assets to Habco-Loram and Transfers the Contaminated Real Estate to K.C. 1986

60. On July 11, 1986, the Habco shareholders (Donald Horne, Victor Horne, Avron Gordon, and Jeanne Sunde) authorized the voluntary dissolution of Habco and the disposition of its assets.
61. On July 11, 1986, Habco was authorized to sell its operating assets (this did not include the contaminated property) to Habco-Loram.
62. Habco-Loram paid a total purchase price of \$2,575,456.88 for Habco's operating assets. It paid \$500,000.00 in cash at closing and financed the remainder with promissory notes.
63. On December 30, 1986, Habco transferred the contaminated real estate to K.C. 1986, a limited partnership which was formed to take title to the contaminated property.

64. The Habco Board of Directors, who consented to transferring the Site to K.C. 1986 and selling the operating assets of Habco to Habco-Loram, consisted of Donald Horne, Victor Horne, Avron Gordon, and Jeanne Sunde.

65. As of December 12, 1986, Habco's shareholders held the following interests: (1) Donald Horne, 93.582%; (2) Victor Horne, 5.176%; (3) Jeanne Sunde, 1.035%; and (4) .207%.

66. The day after consenting to the transfer of the Site to K.C. 1986, Habco's Board of Directors distributed Habco's 99% limited partner interest in K.C. 1986 to Habco's stockholders as follows: 93.582% to Donald Horne; 5.176% to Victor Horne; 1.035% to Jeanne Sunde; and .207% to Avron Gordon.

67. At the time of the K.C. 1986/Habco transaction, the Site was listed on Habco's books as having a \$400,000 value.

F. Habco-Loram's Relationship to Donald Horne and Habco

68. As part of the Habco-Loram transaction, Donald Horne signed an employment agreement with Habco-Loram, which had a three-year term and included compensation during that time of \$315,000.

69. From November 1986 until November 1987, Donald Horne was Habco-Loram's president; he then retired.

70. Habco-Loram's operations, employees, customers, and contracts were essentially identical to those of Habco.

G. Habco-Loram Folds And Donald Horne Starts Habco International

With The Operating Assets Returned By Habco-Loram

71. Habco-Loram first notified Donald Horne in October 1988 of its intention to return the operating assets to Mr. Horne in lieu of paying off its notes.

72. Habco-Loram told Donald Horne he could take the business back or Habco-Loram would shut it down.

73. Donald Horne took the business back and continued operations.

74. In exchange for the business, Donald Horne and the other note holders canceled their outstanding notes.

75. Donald Horne then bought out the other note holders' shares (totaling about 7%) and started Habco International, which continued the same operations Habco-Loram had run after purchasing Habco's assets, which was essentially the same operation that Habco had run.

76. Ultimately, when Habco-Loram quit, Donald Horne walked away with a substantial profit, keeping \$1.1 million in cash paid by Habco-Loram along with all of Habco's original operating assets (plus improvements made by Habco-Loram).

77. All of Habco's employees who went to work for Habco-Loram later went to work for Habco International.

78. Donald Horne started as Habco International's president and 100% owner and, over time, stepped down as president but kept a 75% interest.

H. DeAngelo Brothers, Inc. Takes Over Habco International

79. DeAngelo Brothers, Inc. is a Pennsylvania corporation.

80. Neal DeAngelo and Paul DeAngelo each own 50% of DeAngelo Brothers, Inc.
81. On March 19, 1997, Neal DeAngelo and Paul DeAngelo, as individuals, purchased all of Habco International's stock from Donald Horne and Larry Jensen.
82. Neal DeAngelo and Paul DeAngelo were aware that all of Habco International's existing assets and liabilities were staying with Habco International as part of the stock purchase.
83. Following the stock purchase, Habco International continued the same operations.
84. On October 30, 1998 (and effective November 1, 1998), Habco International was merged into DeAngelo Brothers, Inc.
85. After the March 1997 stock purchase, DeAngelo continued to operate Habco International under its own name for about 1 ½ to 2 years.

I. The K.C. 1986 Era

1. Formation of K.C. 1986

86. In December 1986, Donald Horne arranged for K.C. 1986 Limited Partnership to be formed to act as a real estate holding company for the property at the Site. Donald Horne is a limited partner of K.C. 1986, and has a 99% interest in K.C. 1986.
87. The remaining 1% interest in K.C. 1986 is owned by DEH Merrywood Corp. DEH Merrywood was formed in December 1986, and was formed solely to act as the general partner of K.C. 1986. DEH Merrywood's only asset is its 1% interest in K.C. 1986.

88. According to the K.C. 1986 Limited Partnership Agreement, DEH Merrywood has full and exclusive decision-making authority over the management and control of the Site, and the Limited Partner has no decision-making authority. However, Donald Horne is the sole shareholder, officer, director, and executive of DEH Merrywood, and he makes all decisions for DEH Merrywood.

89. Donald Horne is the sole decision-maker regarding all aspects of and activities relating to the Site.

90. On December 30, 1986, Donald Horne, acting on behalf of Habco and K.C. 1986, sold the Site to K.C. 1986. He did not have an environmental investigation performed prior to K.C. 1986 purchasing the Site from Habco.

91. On April 30, 1989, Donald Horne purchased the entire interests held by Jeanne Sunde, Avron Gordon, and Victor Horne in K.C. 1986 — this equaled a 6.354% interest.

92. The parties agreed that the buy-out price was based on a \$450,000 value for the property and buildings.

93. Donald Horne made the buy-out payments from his personal account.

2. Donald Horne's and K.C. 1986's Knowledge of Site Contamination

94. Donald Horne was well-aware that the Site was contaminated long before he formed K.C. 1986 to purchase the Site.

- a. Horne had worked with herbicides since as early as 1953, and had even helped to start a program at Purdue University that educated the industry

and others about contamination at facilities where herbicide chemicals were stored, soil and groundwater contamination generally and discussed the need to cleanup spills.

- b. Horne was aware that Reade had used arsenic herbicides at the Site for years.
- c. By 1976, government regulators were warning companies about the need to safely dispose of chemical containers to avoid contamination. Around that time, states were beginning to express concerns, specifically about herbicides containing arsenic in any form.
- d. Mr. Boatright expressed concerns about potential contamination at the Site in 1968 when he and Donald Horne were considering whether to purchase the Site from Reade.
- e. In 1973, Habco settled a lawsuit brought by its neighbor for \$24,500, after the neighbor — a greenhouse — alleged that its plants were damaged when herbicides containing 2,4-D and 2,4,5-T were released from the Site by Habco and ended up on the neighbor's property.
- f. In 1980, Habco's label for its Habco 5H (Granular) product warned of irrigation water contamination, water contamination caused by cleaning equipment and disposing of waste, and also instructed not to reuse empty containers.

- g. Habco had received much correspondence from insurance providers warning it of potential contamination-related liability at the Site.
- i. Habco used Frank B. Hall & Associates as its insurance advisor beginning in the late 1960s through 1986. Donald Horne selected this company because of a personal relationship he had with Dwight Borne. Donald Horne's relationship with Mr. Borne was excellent and he viewed Mr. Borne as a trusted advisor on insurance matters.
- ii. As early as December 1979, Habco's insurance provider sent an article to Habco advising it of insurance issues relating to property contamination caused by operations such as Habco's, but Donald Horne did not respond.
- iii. In December 1982, Habco's insurance provider recommended environmental-related coverage and stated that Habco's exposure to environmental liability was "potentially the most catastrophic exposure Habco faced." (USB 124; Tr. 210-11.) Habco responded that it was "comfortable as is." (USB 124; USB 282, 97-98.) The insurance broker continued recommending environmental impairment coverage in subsequent years.
- iv. In June 1983, Habco's insurance provider informed Habco of its potential liability under CERCLA and offered to assist Habco in evaluating contamination issues. (USB 125.)

h. On November 11, 1986, in connection with its offer to purchase the Site for \$200,000, Payless Cashways stated that it was “quite concerned with chemical waste on the property.” (J-104.) Habco rejected this offer, and Donald Horne never asked Payless Cashways why it was concerned.

95. Donald Horne’s primary purpose in forming K.C. 1986 was to shield him from environmental liability associated with the Site. In early 1987, when asked by his accountant why he was setting up K.C. 1986, Donald Horne stated that “we haven't had the soil tested and we don't know whether or not there's any contaminations on the ground.” (J-296 at 66; Tr. 261-63.)

3. Hazardous Substances Spills and Poor Hazardous Substances Management Practices During the K.C. 1986 Era.

96. In mid-1988, Hardee’s expressed an interest in purchasing or leasing the Site. However, because Hardee’s was concerned about environmental contamination at the Site, it arranged for Terracon to perform an environmental evaluation of the Site.

97. When Terracon was performing its environmental assessment at the Site in October 1988, it observed an aboveground storage tank at the Site that still contained a liquid material.

98. But when Terracon came back to the Site in mid-1989 to continue its assessment, the aboveground tank was gone and it appeared that a large spill had occurred from the removed tank.

99. Donald Horne authorized the tank’s removal.

100. Bill Roberts, K.C. 1986's real estate agent, observed that the spill was quite large, covering a good part of the southern portion of the Site and extending to the ditch on the south end of the Site.

101. During its investigations in 1990 and 1991, MDNR also observed the staining from this spill.

102. Terracon tested some of the liquid from the spill and determined that it contained arsenic.

103. More likely than not, the liquid material in the tank was waste oil that Habco had put in the same tank that it had previously used to store MSMA.

104. In addition, Habco left several MSMA and other chemical drums at the Site when its operations ceased at the end of 1986. Some of these chemical drums containing hazardous waste leaked during the K.C. 1986 Era because Donald Horne failed to properly store and dispose of them.

105. On March 10, 1989, during a telephone call with Bill Roberts, Donald Horne suggested drilling holes in the two in-ground mixing vats located on the southern portion of the Site for drainage.

106. And in May 1991, Donald Horne again brought up the idea of drilling holes in the two mixing vats with his environmental consultant.

107. Donald Horne wanted to drill holes in the two vats rather than remove them because, "[i]f we pull those tanks, who knows what's under them."

108. Donald Horne's consultant responded by saying "[t]hat's exactly why you pull them."

4. Terracon's Discovery of the Contamination; Donald Horne's and K.C. 1986's Refusal to Report it to the MDNR.

109. In its September 1989 pre-acquisition environmental report, Terracon reported that the Site was contaminated with arsenic and other hazardous substances. As previously described, Terracon discovered the removal of the above-ground tank and the resulting contamination at the Site, but it also identified contamination at several other locations on the Site.

110. On September 22, 1989, Hardee's terminated its lease agreement with K.C. 1986.

111. Terracon sent a copy of its report to Donald Horne. Terracon also notified Donald Horne that he was required to report the contamination to MDNR and that, if he did not do so, Terracon likely would.

112. On October 9, 1989, Hardee's advised Donald Horne that he should report Terracon's findings to the MDNR.

113. On December 12, 1989, Terracon again advised Donald Horne that he should report the contamination at the Site to the MDNR and that, if he did not do so, Terracon would.

114. On December 20, 1989, Terracon sent a letter to the MDNR, with a copy of its environmental report, notifying the MDNR of the contamination found at the Site.

115. Donald Horne did not report it because he did not think he had an obligation to do so. (USB 282, p. 48.)

116. Donald Horne testified during his deposition that, after learning that the Site was contaminated and being told he had an obligation to report the findings, “I sat on my hands until Terracon turned in the report to the [MDNR]” (USB-281 at 63.)

5. Donald Horne’s and K.C. 1986’s Efforts to Delay Site Remediation by Refusing to Cooperate with the MDNR, the EPA, and the Other Parties.

117. On January 12, 1990, the MDNR informed Donald Horne that it had learned of the contamination at the Site and that, as the owner of the Site, Mr. Horne was obligated to report evidence of hazardous releases. The MDNR asked Donald Horne to submit a plan to, among other things, remove liquids from the on-Site tanks.

118. On February 5, 1990, Donald Horne responded to the initial letter from the MDNR by stating that he had only learned of the contamination at the Site “shortly before that time[,]” even though it had been three months. (J-147.)

119. On January 3, 1991, the MDNR notified Donald Horne and K.C. 1986 that, based on the MDNR’s preliminary site assessment, the MDNR was considering, among other options, turning the Site over to the EPA, listing the Site on the National Priority List, bringing an enforcement action to clean up the Site, or listing the Site on the Registry of Confirmed Abandoned or Uncontrolled Hazardous Waste Disposal Sites in Missouri.

120. In January 1991, even after learning that the MDNR would require Site remediation, K.C. 1986 listed the Site for sale at \$550,000, and at a lease rate of \$5,500 per month. (USB 162.)

121. Donald Horne, as the sole decision-maker for K.C. 1986, selected EMR to act as his environmental consultant. EMR was the only consultant Donald Horne considered, and was selected because Mr. Horne knew EMR executives.

122. In June 1991, Donald Horne asked EMR to put together a work plan “that would give [the MDNR] just enough to react.” (USB-165.)

123. On July 18, 1991, MDNR proposed that the Site be placed on the Registry of Confirmed Abandoned or Uncontrolled Hazardous Waste Disposal Sites in Missouri. Donald Horne appealed the proposed listing and submitted a work plan prepared by EMR on August 2, 1991.

124. As with all of EMR’s work, Donald Horne was very hands-on with this work plan. He reviewed, commented on, and approved all EMR work plans. He also provided his comments orally, and EMR would incorporate those comments into the draft documents.

125. The work plan proposed that liquids in an underground mixing vat at the Site be transported to Habco International for incorporation into its herbicide sprays. The liquid in the in-ground mixing vat had come from rinsing Habco equipment used in herbicide applications, including tanker trucks that held herbicides. The plan stated that there were only 1,000 gallons of liquid left in the vat, although there were 3,500 to 5,000 gallons in that vat when Terracon was at the Site in 1989. Although the liquid contained very high

levels of arsenic and other hazardous substances, Donald Horne did not believe the liquid was a hazardous substance.

126. The MDNR rejected the proposal as inadequate, and advised Donald Horne that the only way to avoid having the Site listed was if Donald Horne entered into a consent decree and agreed to clean up the Site to MDNR's satisfaction.

127. To avoid having the Site listed on the Registry, K.C. 1986, through Donald Horne, entered into a consent decree with MDNR in October 1993 and agreed to investigate and clean up the Site to MDNR's satisfaction.

128. Donald Horne's objective in having K.C. 1986 enter into the consent decree was to avoid having the Site listed on the state Registry. Ultimately, K.C. 1986 never completed the work that it was ordered to do; in fact, it never completed the investigation nor began any cleanup work.

129. In December 1994, EMR submitted to the MDNR a Remedial Investigation Report. The MDNR commented on that report by stating that, "[i]n general, the report contains a number of questionable conclusions, inaccuracies and completely inadequate recommendations for further investigation." (J-170, p. 1.)

130. The MDNR was frustrated with Donald Horne because he was delaying and not agreeing to do work required of him under the consent decree.

131. In January 1995, the Missouri Attorney General's office sent letters to K.C. 1986's counsel outlining many of the deficiencies in the work under the consent decree to date.

132. In February 1995, K.C. 1986 claimed that there was no basis for holding it liable for off-site contamination and that, as a result, K.C. 1986 did not intend to investigate beyond the boundaries of 2251 Armour Road.

133. EMR prepared yet another remedial action plan, completed on February 23, 1995. This plan was also rejected as inadequate by the MDNR, which noted that failure to correct the deficiencies could result in an enforcement action or referral to the EPA.

134. In June 1995, because K.C. 1986 would not meet its obligations under the 1993 consent decree, the MDNR disclosed its intent to involve the EPA and to get the Site listed on the National Priority List.

135. In August 1995, the MDNR told EMR that it was not meeting certain investigation deadlines and that, as a result, MDNR was going to move forward with an NPL listing.

136. K.C. 1986 received CERCLA 104 requests for information from the EPA, but K.C. 1986 failed to timely respond to the requests.

137. On April 30, 1996, the EPA conducted soil testing at the Site. The testing revealed very high levels of arsenic.

138. In May 1996, the EPA conducted a removal assessment and, between May 22 and May 24, 1996, conducted a Time Critical Removal Action by placing approximately 7,500 square feet of polypropylene geo-fabric and 338 tons of crushed rock on top of the contaminated surface soils. The EPA also placed 500 feet of security fence around the southern and eastern portions of the Site.

139. On May 14, 1996, the EPA issued Potentially Responsible Party (PRP) notice letters to K.C. 1986 and Habco.
140. In September 1996, the MDNR continued to express its frustration with K.C. 1986's continued failure to meet its obligations under the consent decree.
141. K.C. 1986 attempted to escape responsibility for meeting its obligations under the consent decree with the MDNR by claiming that the EPA had assumed responsibility for the Site. In response, the Missouri Attorney General's office told K.C. 1986 that it was still obligated to comply with the Consent Decree.
142. On May 28, 1996, Donald Horne's counsel stated that K.C. 1986 was admitting and conceding that it could not and would not comply with the terms of the Consent Decree due to a lack of financial resources.
143. On October 3, 1996, the EPA sent a letter and draft Administrative Order on Consent to K.C. 1986, REMACOR, and Borax, asking each entity to enter into an agreement with the EPA to perform an Engineering Evaluation and Cost Analysis ("EE/CA") for the Site.
144. K.C. 1986 did not cooperate with EPA or the other parties, and did not enter into an agreement to prepare the EE/CA, claiming that it did not have the financial resources to do so.
145. K.C. 1986 never contributed any funds towards the cost of performing the EE/CA.

146. In January 1997, the MDNR conducted an inspection of the Site to determine compliance with the Resource Conservation and Recovery Act (“RCRA”). The MDNR determined that there were 28 RCRA violations.

147. For example, MDNR found that several storage drums containing hazardous wastes were corroded or had bulged bottoms and/or tops, that some drums were leaking, and that at least one drum with a corroded bottom appeared to be empty.

148. In response, Donald Horne went to the Site in April 1997 with two other persons and performed work in an attempt to address some of the violations. However, Horne did not seek the MDNR’s approval for the work he intended to perform, nor did he seek assistance or advice from his environmental consultant before doing this work. Nor was he concerned about contamination exposure for himself or the two people he brought to assist him.

149. As a result of K.C. 1986's failure to remedy the RCRA violations the MDNR had found at the Site, the MDNR initiated an enforcement action against K.C. 1986 and Donald Horne in May 1998.

150. In November 1998, K.C. 1986 and Donald Horne entered into a consent judgment in the enforcement action in order to avoid potentially heavy penalties that could arise from the enforcement action. As part of the consent judgment, K.C. 1986 and Donald Horne were required to sample liquid that had built up in the service trench within sixty days after the date of the consent judgment.

151. K.C. 1986 and Donald Horne failed to comply with the terms of the consent judgment. In March 1999, the MDNR filed a motion for contempt against K.C. 1986 and Donald Horne for failing to comply with at least ten of the requirements set forth in the consent judgment. Donald Horne and K.C. 1986 avoided contempt by again agreeing to comply with the consent judgment.

152. In October 2001, Donald Horne received another Notice of Violation for failing to comply with the terms of the consent judgment and Missouri's Hazardous Waste Management law and regulations.

153. And in January 2002, MDNR again filed another motion for contempt against Donald Horne for failing to comply with at least three of the requirements set forth in the November 1998 consent judgment. As a result, the state court judge ordered Donald Horne to show cause why the motion should not be granted.

154. In responding to that order, Donald Horne asserted that, given CERCLA's "polluter pays" objective, it was unfair for MDNR to require Donald Horne to remedy the state-law violations because Donald Horne claimed that he was not responsible.

155. Ultimately, Donald Horne avoided a contempt ruling by agreeing to complete the work he had promised to do long before.

156. In April 2002, Donald Horne finally removed the liquid from the service trench as required by the 1998 consent judgment. Samples from this liquid revealed extremely high levels of arsenic.

157. In June 2002, after selecting a soil remedy for the Site based on the EE/CA prepared by Borax, the EPA requested K.C. 1986 to negotiate and enter into an agreement with the EPA and the potentially responsible parties to clean up the contaminated soil. The EPA also requested Donald Horne, in his individual capacity, to negotiate such an agreement. K.C. 1986, through Donald Horne, refused to negotiate an agreement because it did not have any assets other than the Property. Donald Horne refused to negotiate the agreement in his individual capacity because he thought the EPA did not have a basis for requesting him to do so personally.

158. Donald Horne still believes that there is no basis for requiring him to contribute to the cleanup. In fact, Donald Horne stated during trial that he never did fund any portion of the cleanup effort and “never will.” (Tr. 248.)

6. Donald Horne’s and K.C. 1986’s Misrepresentations to the EPA

159. In its response to the EPA’s request for information pursuant to section 104(e) of CERCLA, K.C. 1986 represented to the EPA that, as of May 1996, it had “not transported, used, purchased, generated, stored, treated, disposed of or handled any hazardous substances, pollutants or contaminants at the Site.” (J-195, p. 4.) That statement was untrue. In fact, K.C. 1986 had stored and handled several MSMA and other chemical drums at the Site that Habco had left there when its operations ceased at the end of 1986.

160. K.C. 1986 also represented to the EPA in its 104(e) response that “[t]here have been no leaks, spills, releases or threats of releases during the time when K.C. 1986 has

owned the Site.” (J-195, p. 5.) In fact, as the MDNR would find out later, K.C. 1986’s property contained several storage drums of hazardous waste which were corroded and leaking.

161. Donald Horne represented to the EPA in Habco’s 104(e) response that Habco had stopped receiving bulk shipments of MSMA in 1972.² In fact, as discussed above, Habco had received bulk shipments of MSMA during the entire time it operated at the Site.

162. Donald Horne represented to the EPA in Habco’s 104(e) response that Habco had not blended any chemicals onsite. That statement was false.

163. Even though it was untrue, Donald Horne represented to the EPA in Habco’s 104(e) response that “[t]here were no leaks, spills, releases or threats of releases during the time when Habco owned [the] Site.” In fact, as discussed above, there were many spills and releases of hazardous materials during that time.

164. In response to an interrogatory in the prior case before this Court, K.C. 1986 stated that it “has not removed any storage tanks from the [S]ite.” (USB-169, p. 6.) In fact, as discussed above, Donald Horne directed the removal of a large above-ground storage tank during the pendency of Terracon’s environmental evaluation.

7. Donald Horne’s Continuing Refusal to Accept Responsibility

165. Even after being presented with all of the evidence of contamination and spillage during the Habco and K.C. 1986 eras, Donald Horne refused to acknowledge that his

²Donald Horne made these representations on behalf of Habco in his capacity as former president of Habco. (J-194, p. 2.)

companies had caused any contamination at the Site. Indeed, Donald Horne believes very little should be done to cleanup the Site. (USB 281, p. 72.)

8. Donald Horne's Personal Assets

166. All of Donald Horne's individual personal assets (approximately \$6 million) are attributable to his Habco businesses; there are no other sources of income that contributed to those assets.

J. Borax's Efforts in Investigating and Cleaning up the Site

167. Borax, who was never contacted by the MDNR to assist in any way with the Site investigation and cleanup, paid 10% of EMR's investigation costs, incurred in 1994 and 1995, pursuant to an interim allocation agreement.

168. Borax was first contacted by the EPA in 1995, when it received a CERCLA § 104 information request.

169. In June 1996, Borax sent Requests for Proposals to at least three environmental consulting firms to develop and review remediation alternatives for the Site. In August 1996, Borax hired Radian (now URS) to serve as the consultant for the remedial investigation work at the Site.

170. In October 1996, the EPA sent Borax and the other Potentially Responsible Parties ("PRPs") a draft administrative order on consent, which would require the PRPs to investigate the environmental conditions at the Site.

171. In December 1996, Borax alone entered into the administrative order on consent with the EPA to perform an EE/CA at the Site.

172. As part of the EE/CA process, Borax was required to evaluate the environmental conditions at the Site, analyze remedial options, and present a remedy recommendation to EPA. To that end, URS performed an off-site groundwater study and further characterized the depth of arsenic contamination at the Site.

173. Throughout the EE/CA preparation process, URS and Borax worked closely with and collaborated with the EPA to develop work plans and to decide what methodologies to use to investigate the conditions at the Site. For example, EPA was closely involved with Borax's risk assessment process, which included evaluating how toxicity concerns would affect the selection of a remedy.

174. URS and Borax submitted a draft EE/CA to the EPA in late 1997 or early 1998.

175. Due to some unique hazardous substances in Site soils (referred to as F027 wastes), Borax, URS, and the EPA collectively agreed that there was no feasible, cost-effective remedial option using traditional remediation approaches.

176. As a result, Borax, URS, and the EPA decided to evaluate whether electrokinetic remediation would be feasible for the Site. Electrokinetic remediation is a potentially cost-effective remedy which involves subjecting the soil to electrical fields to cause the migration of contaminants to predesignated locations, where the contaminants can then be removed. In order to determine whether electrokinetic remediation would work at the Site, Borax, URS, and the EPA conducted a multi-phased evaluation. Although the first phase ended with promising results, it was determined during the second phase that electrokinetics would not work at this Site.

177. After it was determined that electrokinetic technology would not work at the Site, URS completed the investigative work necessary to complete the EE/CA. In March 2002, URS, submitted the final EE/CA to the EPA. The EE/CA evaluated several remedial options and ultimately recommended to the EPA that the remedy for the Site involve excavation and disposal of the contaminated soil.

178. Upon receiving the final EE/CA, EPA reviewed it and ultimately selected the remedy that had been recommended by Borax.

179. Borax and URS completed all of the work required by EPA under the 1996 and 1999 administrative orders on consent.

180. In April 2002, Borax sought a Notice of Completion for the work that it had performed under the Administrative Order on Consent. In May 2002, the EPA advised Borax that it had completed all of the requirements, except for paying the EPA's final oversight costs invoice, which had not yet been sent to Borax. In January 2003, the EPA sent Borax an invoice for its final oversight costs, which totaled \$56,044.84 for the period October 2001 through September 2002.

181. In February 2003, Borax requested that each party contribute to paying the EPA's oversight costs and provided each party with a copy of the EPA's invoice.

182. After Borax paid the EPA's final oversight cost invoice, in September 2003, the EPA sent Borax a Final Notice of Completion, stating that Borax had satisfactorily completed all of its obligations under the 1996 Administrative Order on Consent and 1999 amendment thereto.

183. None of the other PRPs ever assisted Borax with the EE/CA process.
184. Borax signed the Consent Decree in November 2003.
185. After the EPA and the U.S. Department of Justice lodged the Consent Decree with this Court in a separate action, and following a public comment period on the Consent Decree—during which time no comments were received—this Court entered the Consent Decree and a judgment in that action.
186. Borax has incurred a total of \$1,164,597.62 in past recoverable response costs—incurred prior to the “past costs” cut-off date set by the Court. These recoverable past response costs include the following: environmental and technical consulting fees relating to the Site investigation and cleanup; reimbursement of the EPA’s oversight costs; and legal fees incurred in investigating other PRPs and working with the EPA on the Site investigation and cleanup. As no party has asserted that these costs were not necessary response costs consistent with the National Contingency Plan, the Court finds that Borax’s costs were necessary and that they were consistent with the National Contingency Plan.
187. No other party ever contributed to the costs incurred by Borax in preparing the EE/CA—including the EPA’s oversight costs—even though Borax frequently asked that they do so.
188. The Court concludes that only Borax has incurred recoverable response costs.

K. Scientific Considerations

189. During the allocation hearing, the Court heard the testimony of Dr. Sandy Riese, an expert regarding the cause and effect of environmental contamination, the chemistry of hazardous substances including their fate and transport, environmental remediation processes, and the technical components of the CERCLA allocation process. The Court found Dr. Riese's testimony credible and largely persuasive.

190. As Dr. Riese testified, the different types of arsenic brought to the Site and their potentially different toxicity levels are irrelevant. Although early studies suggested that there were toxicity differences between organic and inorganic arsenic, that suggestion has been discredited by more recent studies. For that reason, the Agency for Toxic Substances and Disease Registry—the Agency that advises the Center for Disease Control, the EPA, and other governmental entities—recommends treating arsenic with a plus three (+3) valence state and arsenic with a plus five (+5) valence state as being equivalent in potency.

191. In addition, the EPA's remedy was selected based on total arsenic concentrations at the Site, without regard to type or toxicity. Accordingly, the type of arsenic used by each party would have no effect on the type of remediation required by the EPA at the Site.

192. The most equitable method of comparing the amount of arsenic each party imported to the Site is to reduce the various arsenic products to elemental arsenic. As Dr. Riese testified, this method of comparison allows one to compare apples to apples. The

Hornes's expert, Dr. Damian Shea, conceded that this method of comparison was reasonable.

193. Dr. Riese testified that arsenic is so hazardous that relatively small releases over time would lead to contamination requiring EPA intervention. (Tr. 411-414.) By way of analogy, Dr. Riese testified that approximately eight pounds of arsenic would be sufficient to contaminate 50,000 cubic feet of soil. Based on Dr. Riese's testimony, the Court finds that the Site became sufficiently contaminated during the Reade Era that the same EPA intervention would have been required even if the parties before the Court had never set foot on the Site.

194. The Court rejects Habco's suggestion that it should be treated favorably for paving portions of the Site. Habco did not pave the Site until well into its operations period, and it failed to maintain the concrete and asphalt, resulting in significant cracks. As Dr. Shea testified, poorly maintained pavement surfaces will not prevent chemical spills from reaching the subsurface. Moreover, much of the spilled arsenic that did not seep through the cracks in the concrete ultimately ended up in the soil anyway, as evidenced by the fact that extremely high concentrations of arsenic were found at the edge of the pavement.

L. Financial Considerations

195. URS currently estimates that it will cost approximately \$8.6 million to implement the remedy selected by EPA. The remedy will require decontaminating the buildings, demolishing and properly disposing of the buildings and other Site features, excavating

contaminated soils, stabilizing those soils, disposing of the soils at a proper facility, and backfilling the Site with clean fill.

196. The value of the Site post-cleanup is \$230,000.

II. Conclusions of Law

A. CERCLA Contribution Actions

CERCLA claims may be brought under section 107(a), referred to as a cost recovery action, or section 113(f), referred to as a contribution action. Only persons who are not themselves PRPs are permitted to bring section 107(a) cost recovery actions; PRPs, on the other hand, are only permitted to bring section 113(f) contribution actions. *See Dico, Inc. v. Amoco Oil Co.*, 2002 U.S. Dist. LEXIS 12776, at *10-11 (S.D. Iowa Mar. 13, 2002) (noting that, “[a]lthough the Eighth Circuit has yet to rule on whether a PRP may maintain a § 107(a) cost recovery action against another PRP, all other circuits have determined that a PRP seeking contribution from other PRPs is limited to a § 113(f) action for contribution.”); *see also Pinal Creek Group*, 118 F.3d at 1306.

All remaining parties in this case are liable under CERCLA and are therefore only permitted to maintain section 113(f) contribution claims. *See id.*

B. Contribution is Sought by Borax Pursuant to 42 U.S.C. § 9613(f)(3)(B), CERCLA § 113(f)(3)(B)

Borax is seeking contribution from other PRPs, including Donald Horne, Victor Horne, DeAngelo Brothers (as successor to Habco) and K.C. 1986, pursuant to 42 U.S.C. § 9613(f)(3)(B). That section permits a party to seek contribution from other responsible

parties if it has “resolved its liability to the United States . . . 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” 42 U.S.C. § 9613(f)(3)(B), CERCLA § 113(f)(3)(B).

Borax has entered into two qualifying settlements in this case. In December 1996, Borax entered into an Administrative Order On Consent with the EPA. In November 2003, Borax entered into a Consent Decree with EPA and the United States Department of Justice. The first settlement constitutes an administrative settlement and the second constitutes a judicial settlement.

C. K.C. 1986's CERCLA Claim for Past Response Costs

K.C. 1986 seeks to recover \$3,343,723.05 in alleged costs and damages in its CERCLA contribution claim. To the extent such costs are deemed to have been necessary under and incurred consistent with the NCP or otherwise fall within the “matters addressed” definition from the Consent Decree, they are preempted by CERCLA’s contribution protection provision. *See* 42 U.S.C. § 9613(f)(2)

To the extent the alleged costs and damages sought by K.C. 1986 are not “response costs” or otherwise fall outside the “matters addressed” definition from the Consent Decree, they are not recoverable through K.C. 1986’s CERCLA claim (the only claim at issue during this phase of the trial).

D. Declaratory Judgment for Borax’s Response Costs

Pursuant to CERCLA, Borax, as a party liable for contamination of a Superfund site, may recover past and future response costs from other liable parties. As for past

costs, CERCLA authorizes recovery of “necessary costs of response incurred . . . consistent with the national contingency plan.” 42 U.S.C. 9607(a)(4)(B). As for future costs, CERCLA requires the Court to “enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages.” 42 U.S.C. § 9613. It is undisputed that Borax has incurred past necessary response costs in the amount of \$1,164,597.62, prior to the agreed cutoff date of March 31, 2004. It is also undisputed that cleanup of the Site will require additional response costs.

A common approach to allocation of response costs in CERCLA cases is to allocate a percentage of the costs to each liable party. *See, e.g., Waste Mgmt. of Alameda County, Inc. v. East Bay Reg’l Park Dist.*, 135 F. Supp. 2d 1071, 1104-105 (N.D. Cal. 2001); *United States v. Western Processing Co.*, 1992 U.S. Dist. LEXIS 18635 (W.D. Wash. 1992); *Weyerhaeuser Co. v. Koppers Co.*, 771 F. Supp. 1420, 1427 (D. Md. 1991).

1. Equitable Factors

Allocation of response costs under CERCLA is case-specific. *See* 42 U.S.C. § 9613(f)(1) (“In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.”). “[C]ourts generally take into account the so-called ‘Gore factors’” in determining allocation. *United States v. Hercules, Inc.*, 247 F.3d 706, 718 (8th Cir. 2001). Those factors include the following:

1. The ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished;
2. The amount of hazardous waste involved;
3. The degree of toxicity of the hazardous waste;
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
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.

Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 935-936 (8th Cir. 1995). These factors “are neither an exhaustive nor exclusive list,” and “a court may consider any factors appropriate to balance the equities in the totality of the circumstances.”

Environmental Transp. Systems, Inc. v. ENSCO, Inc., 969 F.2d 503, 509 (7th Cir. 1992).

“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.’” *See Hatco Corp. v. W.R. Grace & Co.*, 836 F. Supp. 1049, 1090 (D. N.J. 1993)

(quoting *Environmental Transp. Systems*, 969 F. 2d at 509); *see also Waste*

Mgmt. of Alameda County, 135 F. Supp. 2d 1071 at 1089-90; *Beazer East, Inc. v. Mead*

Corp., 2000 U.S. Dist. LEXIS 4282 at *9 (W.D. Pa. March 7, 2000). “Because the

factors to be considered are both numerous and difficult to quantify, allocation cannot be

made with mathematical precision.” *United States v. Davis*, 31 F. Supp. 2d 45, 60 (D.R.I.

1998), *aff’d in part & remanded in part on other grounds*, 261 F.3d 1 (1st Cir. 2001).

Finally, to the extent liable parties cannot be located, identified, sued or are insolvent, their allocable shares are deemed “orphan shares” and must be reallocated among the remaining parties. *See Pinal Creek Group*, 118 F. 3d at 1303.

The Court’s method of allocation in this case does not account for every Gore factor. This is a complicated case with a long history. In a case such as this, it would be illusory to expect that even the most painstakingly detailed method of allocation could allocate responsibility with precision. The Court, therefore, has chosen a relatively simple method of allocation out of concern that additional steps of analysis would present additional occasions for confusion and error. The Court’s methodology is also driven by its conclusion that it is impossible to determine how each individual action of the parties increased or decreased the actual contamination at the Site in any quantifiable way. This Site was so contaminated during the Reade Era that the remediation plan approved by the EPA would have been required even if Habco, Borax, K.C. 1986, and the Hornes had never set foot on the property. On the other hand, each of these parties substantially contributed to the contamination of the Site by their own independent actions. Given these considerations, the Court’s calculation is based primarily on the following: 1) how much arsenic was imported to this Site; 2) who was responsible for the handling of the arsenic once it was at the Site; 3) the length of time each party was at the Site; 4) who was in the best position to prevent and clean up arsenic contamination once it was understood that the herbicide operations on the Site carried a substantial risk of arsenic contamination; 5) how did the parties cooperate with governmental officials.

2. Allocation Calculation

a. Arsenic Imported

To make its allocation, the Court first identified the elemental arsenic each party imported to the Site. As discussed above, the Court has found that approximately 5,488 tons of elemental arsenic were imported to the Site during the Reade Era; approximately 225 tons during the Borax Era; and approximately 624.5 tons during the Habco Era. The Court finds that no arsenic was imported to the Site during the K.C. 1986 Era, although Donald Horne, as the operator during the K.C. 1986 Era, is responsible for further contamination of the Site by the manner in which he handled and stored toxic chemicals already on the Site, even after he was fully aware of the risk and the inappropriateness of his actions.

TABLE 1. TOTAL ELEMENTAL ARSENIC IMPORTED TO THE SITE				
	Reade Era	Borax Era	Habco Era	K.C. 1986 Era
Elemental arsenic imported (in tons)	5,488	225	624.5	0

b. Owner/Operator Allocation

Prior courts have allocated responsibility for contamination to both owners and operators. See *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 571 (6th Cir. 1991); *South Florida Water Management District v. Montalvo*, 1989 U.S. Dist. LEXIS 17555, at *11 (S.D. Fla. Feb. 14, 1989), *aff'd*, 84 F.3d 402 (11th Cir. 1996); *Carter-Jones Lumber Co. v.*

LTV Steel Co., 1997 U.S. Dist. LEXIS 4174, at *44-45 (S.D. Ohio March. 31, 1997), *aff'd & rev'd in part on other grounds*, *Carter-Jones Lumber Co. v. Dixie Distributing Co.*, 166 F.3d 840 (6th Cir. 1999). This “owner”/”operator” distinction is appropriate even in instances where a lessee is deemed responsible for some of the contamination. In *United States v. Northernair Plating Co.*, 670 F. Supp. 742 (W.D. Mich. 1987), *aff'd*, 889 F.2d 1497 (6th Cir. 1989), the court noted that, even though the lessee was the sole source of contamination, both the lessee and the owner were liable:

[I]t could be argued that [the lessees] alone are responsible for causing the entire harm. This is, however, contrary to the plain language of the statute which makes a landowner strictly liable absent his ability to assert a defense under Section 9607(b)(3). Congress clearly intended that the landowner be considered to have “caused” part of the harm.

Id. at 748. Because Reade was the owner during the Borax Era, the Court will hold it responsible for 10% of the arsenic imported during the Borax Era.

Similarly, Habco, as owner, will be responsible for 10% of the arsenic imported during the Habco Era. It will also be responsible as an operator for 10% of the arsenic imported during the Habco Era. The remaining 80% of the arsenic imported during the Habco Era will be allocated to Victor and Donald Horne because of their direct involvement in the “generation, transportation, treatment, storage or disposal of the [arsenic]” *Control Data*, 53 F.3d at 935. The Hornes, by their own actions, played a significant role in contaminating the Site: Donald Horne was responsible for making decisions about what chemicals to purchase, herbicide mixing instructions, maintenance and cleanup of chemicals, and compliance with environmental laws; Victor Horne was

responsible for the day-to-day operation of the Site, including handling all chemical inventory and following Donald Horne's instructions. Because Donald Horne had far more control during the Habco Era than Victor Horne, Donald Horne will be responsible for 70% of the brothers' share and Victor Horne will be responsible for 30%.

To summarize, during the Reade Era, 5,488 tons of arsenic were imported and Reade is responsible for 100%. During the Borax Era, 225 tons of arsenic were imported and Borax is responsible for 90%, and Reade, as owner, is responsible for 10%. Habco imported 624.5 tons of elemental arsenic. As owner, Habco is allocated a 10% share, and as operator, Habco is allocated another 10% share. The remaining 80% is allocated to Donald and Victor Horne, as operators; Donald Horne to pay 70% of that 80% assessment and Victor Horne to pay 30%. K.C. 1986 never imported arsenic to the Site so no share is allocated for this factor to K.C. 1986 or Donald Horne as an operator of the K.C. 1986 property.³ These considerations are summarized in Table 2.

³While K.C. 1986 and Donald Horne did not import arsenic to the Site during the K.C. 1986 Era, Donald Horne, as operator, caused further contamination to the Site by the manner in which he transported, stored and disposed of previously imported hazardous substances. While the Court cannot rationally quantify the contamination caused by Mr. Horne during the K.C. 1986 Era, the Court concludes that the Site was actually contaminated by Donald Horne and K.C. 1986 during that Era.

TABLE 2. ALLOCATION OF RESPONSIBILITY FOR ARSENIC IMPORTATION ⁴							
(Includes allocation for both owner and operator liability)							
	Reade Era	Borax Era	Habco Era			K.C. 1986 Era	
Party	Reade	Borax	Habco (DeAngelo, as successor)	V. Horne	D. Horne	K.C. 1986	D. Horne
Responsibility for Elemental arsenic imported (in tons)	5,511	203	125	150	350	0	0

c. Reade’s Orphan Share

Neither Reade nor its successor REMACOR is solvent; therefore, Reade’s orphan share must be allocated among the remaining parties. Given the fact that Reade imported far more arsenic than all of the parties combined, the method of allocating its orphan share is of critical importance. Borax and the Hornes have proposed that the orphan share be allocated on a *pro rata* basis at the last step of the analysis. For example, under the Hornes’s analysis, after all considerations (except for distribution of the orphan share) are taken into account, Borax’s percentage of liability would exceed Habco’s by a factor of eight. The Hornes then propose that the orphan share be distributed *pro rata* such that Borax bears about eight times as much of that share as Habco. Although Borax would distribute the share using roughly the same method, the result would be that Habco would bear over thirty-three times as much of the orphan share as Borax.

⁴The figures in this and all subsequent tables are rounded to the nearest integer.

Rather than adopting the Hornes' and Borax's proposed method of allocation, the Court has determined that the most equitable method of distributing the orphan share is to allocate it according to the length of time the parties spent at the Site. The length of time is important for at least four reasons. First, the parties who spent the most time at the Site were in the best position to detect hazardous releases and to refine their manufacturing and/or storage techniques to prevent such releases. Second, the parties who spent the most time at the Site without remediation are most responsible for exposing people to contamination. Third, as land remains contaminated over time, the contamination becomes more widespread and difficult to rectify. Finally, allowing a site to languish in contamination over time is economically inefficient. As it exists today, the Armour Road Site is an economic wasteland, with no productive activity occurring there. The sooner contaminated sites are cleaned up, the sooner they can return to productive activity. For these reasons, the Court believes that allocating the orphan share according to the time the parties spent at the Site reflects CERCLA's primary objectives at the allocation stage—timely cleanup and due care in avoiding harm to the environment. *See United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1088 (8th Cir. 1995); *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 935-36 (8th Cir. 1995).

The Borax Era lasted five years; the Habco Era, eighteen years; and the K.C. 1986 Era, eighteen years. Because Habco, Victor Horne, and Donald Horne are liable for the same era, they will collectively bear the orphan share allocation for that era. Likewise, because K.C. 1986 and Donald Horne are liable for the same era, they will collectively

bear the allocation for that era. By distributing Reade’s orphan share accordingly, the Court arrives at the following preliminary allocation:

TABLE 3. PRELIMINARY ALLOCATION							
	Reade Era	Borax Era	Habco Era			K.C. 1986 Era	
Party	Reade	Borax	Habco ⁵ (DeAngelo)	V. Horne	D. Horne	K.C. 1986	D. Horne
Responsibility for elemental arsenic imported (from Table 2)	5,511	203	125	150	350	0	0
Allocation of Reade’s share of elemental arsenic (in tons)	(5,511)	672	806	806	806	1210	1210
Total preliminary allocation	0	875	931	956	1156	1210	1210

d. Cooperation and Knowledge

As noted above, one of CERCLA’s primary goals is to encourage timely cleanup of hazardous waste sites. Therefore, cooperation in the process is an important consideration. *United States v. BP Amoco Oil PLC*, 277 F.3d 1012, 1021 (8th Cir. 2002) (cooperation with the government is one of goals of CERCLA); *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 936 (8th Cir. 1995) (one of goals of CERCLA is to encourage quick response). *See, e.g., Gould, Inc. v. A & M Battery & Tire Serv.*, 987 F. Supp. 353, 372 (M.D. Pa. 1997) (adjusting allocation based on degree of cooperation), *rev’d & remanded on other grounds*, 232 F.3d 162 (3d Cir. 2000) (reversal based on

⁵For ease of computation, the Court has sometimes rounded up.

subsequent enactment of the Superfund Recycling Equity Act); *Hastings Bldg. Prods., Inc. v. National Aluminum Corp.*, 1992 U.S. Dist. LEXIS 11533, at *14 (W.D. Mich. Apr. 21, 1992) (degree of cooperation considered); *Central Maine Power Co.*, 838 F. Supp. at 646; *Consolidated Coal, Inc.*, 184 F. Supp. 2d at 752 (doubling allocable share due to failure to cooperate); *R. W. Meyer, Inc.*, 932 F.2d at 571 (affirming allocation assigning larger share to liable party based on failure to cooperate); *Waste Mgmt. of Alameda County*, 135 F. Supp. 2d at 1097-98 (failure to cooperate by “foot dragging” results in increased allocable share); *Raytheon Constructors Inc. v. ASARCO Inc.*, 1998 U.S. Dist. LEXIS 21815, at *34-37 (D. Co. Apr. 16, 1998) (increasing share of non-cooperating party and decreasing allocable share of cooperating party), *rev’d on other grounds*, 368 F.3d 1214 (10th Cir. 2003); *Pneumo Abex Corp. v. Bessemer & Lake Erie R.R. Co.*, 936 F. Supp. 1250, 1270-71 (E.D. Va. 1996) (failure to cooperate equitable factor considered by the court); *American Color & Chem. Corp. v. Tenneco Polymers, Inc.*, 918 F. Supp. 945, 959-60 (D.S.C. 1995); *Folino v. Hampden Color & Chem. Co.*, 832 F. Supp. 757, 764-65 (D. Vt. 1993) (imposing a 100% share of cleanup costs because party’s “concealment of the contamination does not comport with the goals of the federal or the state environmental statutes”); *Hastings Bldg. Prods.*, 1992 U.S. Dist. LEXIS 11533, at *13-15 (party who failed to cooperate received 75% allocation; other equitable factors considered); *AlliedSignal, Inc. v. Amcast Int’l Corp.*, 177 F. Supp. 2d 713, 754-56 (S.D. Ohio 2001) (“in the appropriate case, a party’s failure to cooperate with the cleanup of a

hazardous waste site could serve as the basis for equitably allocating a greater share of the response costs.”).

The cooperation factor is particularly important in this case because continued contamination occurred even after it was known that Site was contaminated. This contamination could have been avoided if K.C. 1986 and Donald Horne had cooperated in the cleanup of the Site. Therefore, the Court finds that the allocation should be adjusted to account for the fact that K.C. 1986 and Donald Horne have purposefully delayed the cleanup of the Site for over a decade, despite their knowledge that the Site was contaminated.

Since the time Terracon discovered contamination in 1989 until the present, K.C. 1986 and Donald Horne have cooperated with authorities only when threatened with official action, and only to the extent required to narrowly avoid such action. In a relentless effort to delay remediation efforts at the Site, K.C. 1986 and Donald Horne have made numerous misrepresentations of fact to the MDNR and the EPA. Moreover, Donald Horne has attempted to cover up the contamination of the Site, first by authorizing the removal of a large storage tank containing arsenic during Terracon’s investigation; and later by proposing that mixing vats containing hazardous substances be drilled, drained, and backfilled instead of removed. The Court finds that this dishonest and uncooperative behavior has thwarted CERCLA’s goal of encouraging timely cleanup, which must have been intentional, given Donald Horne’s knowledge at the time of his action.

In stark contrast, Borax's conduct related to the Site has been a model of cooperation. Borax has cooperated fully with the MDNR and the EPA. When the other parties failed to step up to the plate, Borax entered into the administrative order on consent with EPA to perform an Engineering Evaluation/Cost Analysis at the Site. Working closely with the EPA, and at its own expense, Borax evaluated the environmental conditions at the Site, analyzed remedial options, and presented a satisfactory remedy recommendation to the EPA. After fulfilling all of its obligations under the Administrative Order, Borax entered into a Consent Decree with the EPA.

To reflect Donald Horne's and K.C. 1986's extraordinary refusal to cooperate with environmental authorities, as well as Borax's extraordinary cooperation, the Court will require K.C. 1986 and Donald Horne to collectively bear 25% of Borax's responsibility for past and future response costs. Of that share, Donald Horne will bear 85%, and K.C. 1986 will bear 15%, to reflect Donald Horne's conduct, control of the Site, and his actual knowledge. The Court is making this adjustment between Borax, Donald Horne and K.C. 1986 because they are the only parties who were either extraordinarily cooperative or extraordinarily uncooperative.

TABLE 4. FINAL ALLOCATION⁶							
	Reade Era	Borax Era	Habco Era			K.C. 1986 Era	
Party	Reade	Borax	Habco (DeAngelo)	V. Horne	D. Horne	K.C. 1986	D. Horne
Preliminary allocation (from Table 3)	0	875	931	956	1156	1210	1210
Cooperation adjustment	0	(-219)	0	0	0	33	186
Total	0	656	931	956	1156	1242	1395
Final percentage allocation	0%	10%	15%	15%	18%	20%	22%

e. Orphan Shares Within an Era

The Court concludes that, if one party is unable to pay his or its full share, that share must be paid by the other liable party or parties within the same era. This is done to reflect the fact that parties in the same era are legally and factually interrelated and in some cases interdependent. In addition, it would be unfair to saddle a party with liability from an era in which that party did not operate, when there exists a solvent party who did operate in that era. So, for example, if K.C. 1986 is unable to pay its share of the response costs, Donald Horne must pay that share in full. Likewise, if DeAngelo

⁶Apparent inaccuracies in the calculations are due to rounding. The Court has used a spreadsheet application to ensure that the final percentage allocation is precise to the nearest integer.

Brothers is unable to pay its share,⁷ that share must be absorbed by the Hornes. In such an event, Donald Horne would be responsible for 70% of the DeAngelo Brothers' share, and Victor Horne would be responsible for the remaining 30%.

The Court's approach does not run afoul of *United States v. Bestfoods*, 524 U.S. 51 (1998). Unlike the parent corporation in that case, the Hornes were personally and intimately involved in the operation and contamination of the Site. It would be inequitable under these circumstances to require Borax to absorb any share which was allocated to K.C. 1986, Habco, Victor Horne or Donald Horne, so long as other liable parties in the respective era were solvent.

D. Prejudgment Interest

Borax has requested the Court to award prejudgment interest on the response costs it incurred. Although the Court determines that Borax is entitled to an award of prejudgment interest, Borax has not yet provided the Court with the documentation necessary to calculate the amount of such interest. Earlier this week the Court directed Borax to provide the Court with that documentation by Monday, January 10, 2005. Accordingly, this Order does not constitute final judgment in this case; final judgment will be made once the Court has awarded Borax the prejudgment interest to which it is entitled.

⁷DeAngelo Brothers has stated its intention to appeal the Court's decision that it is responsible for Habco's share of response costs. If DeAngelo Brothers is successful on appeal, the Hornes would be responsible for sharing Habco's share pursuant to this Order.

E. K.C. 1986's RCRA Claim

In its Complaint, K.C. 1986 asserted a claim against Borax under the RCRA. However, K.C. 1986 has not pursued that claim although the proper time to do so would have been during the bench trial. Accordingly, pursuant to Federal Rule of Civil Procedure 41(b), that claim is dismissed for failure to prosecute.

III. Conclusion

Accordingly, it is

ORDERED that the response costs incurred by Borax up to March 31, 2004, is \$1,164,597.62. DeAngelo Brothers, Inc., shall pay to Borax 15% of that amount; Victor Horne shall pay to Borax 15% of that amount; Donald Horne shall pay to Borax 40% of that amount; and K.C. 1986, Limited Partnership, shall pay 20% of that amount to Borax.

It is further

ORDERED that the future response costs for the Site located at and near 2251 Armour Road, North Kansas City, Missouri, are similarly allocated: U.S. Borax, Inc.: 10%; DeAngelo Brothers, Inc.: 15%; Victor Horne (in his individual capacity): 15%; Donald Horne (in his individual capacity for the Habco Era): 18%; K.C. 1986 Limited Partnership: 20%; Donald Horne (in his individual capacity for the K.C. 1986 Era): 22%.

It is further

ORDERED that Borax is entitled to prejudgment interest but the amount of the interest cannot be calculated on the current record. It is further

ORDERED that K.C. 1986's RCRA claim against Borax is DISMISSED.

s/ NANETTE K. LAUGHREY
NANETTE K. LAUGHREY
United States District Judge

Dated: January 7, 2005
Jefferson City, Missouri