

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

NOV 17 1994

UNITED STATES OF AMERICA)

Plaintiff,)

v.)

COLORADO & EASTERN RAILROAD COMPANY,)

Defendant-Appellant,)

and)

FARMLAND INDUSTRIES, INC.,)

Defendant-Appellee,)

and)

MAYTAG CORPORATION, McKESSON)
CORPORATION,)

Defendant,)

v.)

GARY W. FLANDERS; GREAT NORTHERN)
TRANSPORTATION COMPANY,)

Third-Party Defendants-Appellants.)

No. 93-1422
and
No. 94-1041

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 89-C-1786)

Wayne B. Schroeder (Ronald L. Fano with him on the brief) of
Grimshaw & Haring, P.C., Denver, Colorado, for appellee.

Katherine L. Letson (Timothy R. Gablehouse, Joshua B. Epel and
Karina M. Thomas with her on the brief) of Gablehouse, Epel &
Letson, Denver, Colorado, for appellants.

Before ANDERSON, FAIRCHILD*, and BARRETT, Circuit Judges.

*The Honorable Thomas E. Fairchild, Senior Judge, United States
Court of Appeals for the Seventh Circuit, sitting by designation.

BARRETT, Senior Circuit Judge.

Colorado & Eastern Railroad Company (CERC), Great Northern Transportation Company (CERC's holding company) and Gary W. Flanders (CERC's former president and sole shareholder), collectively referred to as "the CERC parties," appeal from the district court's judgment following trial to the court in favor of Farmland Industries (Farmland) pursuant to section 107 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601 et. seq. (1987).

Facts

From the late 1950's to 1971, Woodbury Chemical Company (Woodbury) operated a pesticide formulation facility at 5400 Monroe Street in Commerce City, Colorado on what is now referred to as the "Woodbury Chemical Superfund Site" (site). In May 1965, the main Woodbury building was destroyed by fire. Shortly thereafter, Woodbury constructed a new building at the original location. During this time, contaminated debris and rubble from the fire was distributed to various locations at the site, including a 2.2 acre vacant lot directly east of the Woodbury building. In 1968, Farmland purchased a controlling interest in Woodbury. Three years later, in 1971, Farmland sold its interest to McKesson Corporation (McKesson).

In September 1983, the site was added to the National Priorities List of hazardous waste sites. In February 1985, the Environmental Protection Agency (EPA) completed its remedial investigation and feasibility study (RI/FS) for the First Study Area (Unit I), which consisted of the 2.2 acre vacant lot, and found substantial levels of pesticides and metals. The EPA issued a Record of Decision (ROD) in July 1985, specifying remediation measures for cleaning up the site. During pre-design studies, the EPA discovered significant additional contamination west of the 2.2 acre lot. The area of additional contamination (Unit II) included the original Woodbury property and vacant property located west and north of the Woodbury facility which had been purchased by CERC from McKesson in 1984. An amended ROD was issued in September 1986 expanding the site to include all of the CERC property, Unit II. The RI/FS for Unit II was completed and the final ROD was issued in September 1989.

In 1990, the EPA initiated this suit pursuant to CERCLA, against all potentially responsible parties (PRPs) including Farmland, McKesson, and CERC for injunctive relief and recovery of response costs in connection with the release and threat of release of hazardous substances at the site.

As a result of EPA's action, Farmland and McKesson entered into a Partial Consent Decree with the EPA on September 4, 1990, in which Farmland and McKesson agreed to finance and perform all remediation and pay \$700,000 in past EPA response costs. In April 1992, the CERC parties entered into a Consent Decree with the EPA, agreeing to pay \$100,000 in past EPA response costs. Remediation

of the Woodbury site cost approximately 15 million dollars and was completed in June 1992.

The defendants named in EPA's action cross-claimed against each other. All cross-claims were settled or dismissed before trial except Farmland's claims against the CERC parties¹ for (1) cost recovery under CERCLA § 107, 42 U.S.C. § 9607(a), or, in the alternative, (2) contribution under CERCLA § 113(f), 42 U.S.C. § 9613(f).²

Following a two day trial, judgment was entered in favor of Farmland and against the CERC parties for \$734,058.30 plus post-judgment interest at the rate of 3.54% per annum. Upon motion by Farmland, the judgment was amended to include prejudgment interest in the amount of \$27,060.00.

Issues

On appeal, the CERC parties contend that the district court: (1) erred in awarding Farmland cost recovery under a theory of strict liability pursuant to section 107 rather than requiring Farmland to prove causation under section 113(f)(1) and erred in denying them contribution protection under section 113(f)(2); (2) erred in finding that the response costs sought by Farmland were "necessary and consistent" with the National Contingency Plan; and

1. Farmland joined Great Northern Transportation Company and Gary W. Flanders in its cross-claim against CERC during pretrial proceedings.

2. Farmland pled a third claim asserting Great Northern Transportation Company and Gary W. Flanders are owner/operators and that they are liable for all debts of CERC. The CERC parties admit that they are all PRPs under section 107; therefore, this issue is moot. (Appellant's Appendix Vol. II at 357).

(3) erred in failing to rule on the CERC parties Act-of-God and Act-of-Third-Party defenses.

I.

The CERC parties contend that the district court erred in awarding Farmland cost recovery under a theory of strict liability pursuant to section 107 rather than requiring Farmland to prove causation under section 113(f)(1) and erred in denying them contribution protection under section 113(f)(2).

Questions of law are considered by this court de novo. Es-tate of Holl v. Commissioner, 967 F.2d 1437, 1438 (10th Cir. 1992). Because this issue on appeal turns on the correct interpretation of the relevant statutory provisions, we are not constrained by the district court's conclusions. FDIC v. Bank of Boulder, 911 F.2d 1466, 1469 (10th Cir. 1990), cert. denied, 499 U.S. 904 (1991). Thus, the standard of review is the same as that which would be applied by the district court in making its initial ruling. Lily v. Fieldstone, 876 F.2d 857, 858 (10th Cir. 1989).

A.

In its cross-claim, Farmland sought to recover from the CERC parties the cost of remediation of Unit II of the site that was allegedly caused by the CERC parties. Farmland argues that their claim is one to recover costs incurred in the removal of hazardous waste and the remediation of the site under CERCLA section 107; therefore, CERC is strictly liable and causation is not an element.

CERC contends that the district court erred in allowing Farmland to recover under section 107 since cost recovery between PRPs is a claim for contribution under section 113(f) and that causation is an element of contribution. We agree.

CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, § 101 et. seq., 100 Stat. 1613 (1986), provides two types of legal actions by which parties can recoup some or all of their costs associated with hazardous waste cleanup: cost recovery actions under section 107, 42 U.S.C. § 9607(a), and contribution actions under section 113, 42 U.S.C. § 9613(f). This appeal requires that we clarify the relationship between cost recovery and contribution actions; specifically, who can recover under each provision.

The original CERCLA legislation created the cost recovery mechanism under section 107. This provision makes enumerated parties, PRPs, "liable for . . . all costs of removal or remedial action incurred by [government entities]; [and] any other necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4).

Although the broad language of CERCLA has given the courts many challenges, it is now well settled that section 107 imposes strict liability on PRPs for costs associated with hazardous waste cleanup and site remediation. See Farmland Indus. v. Morrison-Quirk Grain, 987 F.2d 1335, 1339 (8th Cir. 1993) ("Under 42 U.S.C. § 9607, liability . . . for CERCLA response costs is a matter of strict liability"). It is also well settled that section 107

imposes joint and several liability on PRPs regardless of fault. See County Line Inv. Co. v. Tinney, 933 F.2d 1508 (10th Cir. 1991); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 809-811 (S.D. Ohio 1983).

Due to the impossibility of determining the amount of environmental harm caused by each party where wastes of varying and unknown degrees of toxicity and migratory potential have mixed, the courts have been reluctant to apportion costs between PRPs, and hence have adopted the rule that "damages should be apportioned only if the defendant can demonstrate that the harm is divisible." O'Neil v. Picillo, 883 F.2d 176, 178 (1st Cir. 1989) (emphasis original), cert. denied, 493 U.S. 1071 (1990); see Tinney, 933 F.2d at 1515 n. 11; Chem-Dyne, 572 F. Supp. at 810.

Where defendants bear the burden of proving divisibility, responsible parties rarely escape joint and several liability. O'Neil, 883 F.2d at 178-79. Therefore, CERCLA, as originally enacted, left a PRP faced with the prospect of being singled out as the defendant in a cost recovery action without any apparent means of fairly apportioning CERCLA costs awarded against it to other PRPs. The courts responded to this inequity by recognizing an implicit federal right to contribution where PRPs have been subject to joint and several liability and have incurred response costs in excess of their pro rata share. See Tinney, 933 F.2d at 1515; O'Neil, 883 F.2d at 179; Mardan Corp. v. C.G.C. Music Ltd., 804 F.2d 1454, 1457 n. 3 (9th Cir. 1986) ("district courts have interpreted section 107 of CERCLA to impose, as a matter of

federal law, joint and several liability for indivisible injuries with a correlative right of contribution") (citations omitted).

With the enactment of SARA in 1986, Congress codified this implied right of contribution by amending CERCLA section 113 to expressly recognize a right of contribution. United Technologies Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, -- (1st Cir. 1994); see 42 U.S.C. § 9613(f)(2). A principal objective of the new contribution section was to "clarif[y] and confirm[] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances." S.Rep No. 11, 99th Cong., 1st Sess. 44 (1985), re-printed in 2 Legislative History of Superfund Amendments and Re-authorization Act of 1986, 636, Sp. Print 101-120 (101st Cong., 2d Sess.) (1990).³

Section 113(f) provides:

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) [107(a)] of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rule of Civil Procedure, and shall be governed by Federal law.

³. For a detailed discussion of the meaning and history of contribution under section 113(f) see United Technologies Corp. v. Browning-Ferris Indus., Inc., 33 F.3d. 96 (1st Cir. 1994).

(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)(1)-(2).

To resolve contribution claims, section 113(f)(1) continues, "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 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." Environmental Transp. Sys. Inc. v. ENSCO, Inc., 969 F.2d 503, 509 (7th Cir. 1992).⁴ "Of course, the burden of proof is on the . . . party seeking apportionment to establish that it should be granted." H.R.Rep. No. 99-253 (III), 99th Cong. 1st Sess. 19 (1986), reprinted in 1986 U.S.C.C.A.N. 3038, 3042; see

4. In addition, many courts look to the "Gore Factors", proposed as a moderate approach to joint and several liability by Senator Albert Gore, to apportion contribution claims under section 113(f)(1). We emphasize that the Gore Factors are neither an exhaustive nor exclusive list. The six factors are: (i) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished; (ii) the amount of the hazardous waste involved; (iii) the degree of toxicity of the hazardous waste involved; (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (v) 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 (vi) the degree of cooperation by the parties with the Federal, State or local officials to prevent any harm to the public health or the environment. Environmental Transp. Sys., Inc. v. ENSCO, Inc., 969 F.2d 503, 508-09 (7th Cir. 1992).

United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1507-08 (6th Cir. 1989) (a party is entitled to relief against the other defendant to the extent that it can "demonstrate the divisibility of the harm and that it paid more than its fair share"), cert. denied, 494 U.S. 1057 (1990).

In our case, Farmland's claim against CERC must be classified as one for contribution. There is no disagreement that both parties are PRPs by virtue of their past or present ownership of the site; therefore, any claim that would reapportion costs between these parties is the quintessential claim for contribution. See Restatement (Second) of Torts § 886A (1979); Amoco Oil Co. v. Borden Inc., 889 F.2d 664, 672 (5th Cir. 1989) ("[w]hen one liable party sues another to recover its equitable share of the response costs, the action is one for contribution, which is specifically recognized under CERCLA" § 9613(f)).

It is true that section 107(a) permits any "person", not just the federal or state governments, to seek recovery of appropriate costs incurred in cleaning up hazardous waste sites. See 42 U.S.C. § 9607(a)(4)(B). However, Farmland has experienced no injury of the kind that would typically give rise to a direct claim under section 107(a). See Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d. 761 (7th Cir. 1994). "[I]t is not, for example, a landowner forced to clean up hazardous waste that a third party spilled onto its property or that migrated there from adjacent lands." Id. at 764. Instead, Farmland itself is a party liable in part for the contamination at the Woodbury site, and the essence of Farmland's claim is to recover costs it incurred from another

responsible party that it believes are in excess of its proportionate share.

Furthermore, were PRPs such as Farmland allowed to recover expenditures incurred in cleanup and remediation from other PRPs under section 107's strict liability scheme, section 113(f) would be rendered meaningless. In order to give full effect to both sections, we must limit section 107 claims to those brought by government entities or innocent parties and require PRPs to settle their claims between themselves pursuant to section 113(f).

Whatever label Farmland may wish to use, its claim remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make. Accordingly, we hold that Farmland's claim is controlled by section 113(f) as a matter of law and that the district court erred in allowing Farmland to proceed and recover under section 107.

B.

The CERC parties claim that they are immune from contribution claims under section 113(f)(2) because they settled their liability with the United States in a judicially approved consent decree.

Farmland argues that the CERC parties are not entitled to contribution protection because (1) the Consent Decree relates only to response costs incurred by the United States which are not the same matters addressed by Farmland's claim, and (2) the \$100,000 payment due under the Consent Decree has not been made.

The CERC parties contend that (1) Farmland's settlement reduced the amount which the United States could legally seek to recover from other parties to the extent that the CERC parties were only liable for any unrecovered response costs of the United States and, (2) unless and until the government decides to rescind its settlement agreement with a private party, a third party has no grounds or authority to invalidate it. We agree.

Section 113(f) of CERCLA authorizes claims for contribution between PRPs subject to the limitations set forth in paragraph (2):

(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). Thus, a PRP who has entered into a judicially approved settlement with the United States may not be held liable for contribution to another PRP if (1) the contribution claim concerns matters addressed in the settlement, or (2) earlier settlements have reduced the potential liability to the extent that the defendant PRP is no longer liable for the claimed costs.

1. Matters Addressed

First, our attention turns to whether the contribution that Farmland seeks is for "matters addressed" by the CERC parties' Consent Decree. The district court failed to address this issue

directly but determined that there was a genuine issue of material fact as to the scope of the contribution protection afforded by the CERC parties' Consent Decree. (Appellant's Appendix Vol. I at 236). In its determination that a genuine issue of material fact existed, the district court found that "[i]t is clear that Farmland's claims concern the same hazardous substances and site as the consent decree." (Appellant's Appendix Vol. I at 235).

The statute itself is silent on how we are to determine what particular "matters" a consent decree addresses. Although other courts have been prone to use balancing tests⁵, we conclude that section 113(f)(2) was intended to encourage settlement while providing settling PRPs a measure of finality in return for their willingness to settle. Therefore, "matter addressed" should be broadly construed to bar claims for contribution against settling parties who have resolved their liability to the United States with reference to the hazardous waste site as a whole.⁶

5. Courts that have applied a balancing test include: Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 766 (7th Cir. 1994) ("Ultimately, the 'matters addressed' by a consent decree must be assessed in a manner consistent with both the reasonable expectations of the signatories and the equitable apportionment of costs that Congress has envisioned"); United States v. Union Gas Co., 743 F. Supp. 1144, 1152 (E.D.Pa. 1990) ("Courts must strike a balance between the policy behind CERCLA's contribution provisions and the policy behind the act as a whole").

6. We are not the only court to construe CERCLA's contribution protection broadly. See United States v. SCA Services of Indiana, Inc., 827 F. Supp. 526, 533 (N.D.Ind. 1993) ("in order to further CERCLA's settlement-favoring policy, the court finds that the Non-Settlers are barred from making claims for contribution against the Settlers"); United States v. Asarco, Inc., 814 F. Supp. 951, 957 (D. Colo. 1993) (a cash settlement with the government and approved by the court has resolved that party's liability to the United States and, therefore, that party is entitled to contribution protection); Avnet, Inc. v. Allied-Signal, Inc., 825 F. Supp. 1132, 1138 (D.R.I. 1992) ("Contribution claims against

This interpretation is consistent with the congressional purpose of encouraging settlement of CERCLA cases. See H.R.Rep No. 99-253 (I), 90th Cong., 1st Sess. 80 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2862; United States v. Cannons Engineering Corp., 899 F.2d 79, 92 (1st Cir. 1990). Section 113(f)(2) provides the settlers with a statutory signal that any settlement they reach will end their liability in the case.⁷

The court in, In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1027 (D.Mass. 1989), described section 113(f) as "a carrot and stick" placed in the hands of the EPA to obtain settlements. The carrot the EPA can offer potential settlers is that they need no longer fear that a later contribution claim will compel them to pay still more money to extinguish their liability and that they will be able to seek contribution from non-settlers. The stick is that if the settlor pays less than its proportionate share of liability, the non-settlor, being jointly and severally liable, must make up the difference. Id.

The CERC parties accepted the EPA's carrot and settled their liability to the United States for "all claims alleged by the United States in the Complaint under section 104, 106, and 107 of CERCLA." (Appellant's Appendix Vol. I at 130). Therefore, based on the district court finding that the CERC parties' Consent

[settlers] . . . are strictly prohibited by the plain language of the contribution protection provisions of CERCLA").

7. Of course, contribution protection would not extend to unrelated acts of improper disposal of hazardous waste, CERCLA liability arising from disposal of hazardous waste outside the site in question in the settlement, or any other claims specifically exempted by the settlement itself.

Decree clearly involved the same hazardous substances at the same site as Farmland's claim, we hold that Farmland's contribution claim is barred under section 113(f)(2).

2. Reduction in Potential Liability

Second, the statute not only bars contribution claims against settling parties, but also provides that, while a settlement will not discharge other PRPs, "it reduces the potential liability of the others by the amount of the settlement." 42 U.S.C. § 9613(f)(2). There is a split in the district courts of this circuit as to whether the settlement reduces the potential liability of non-settling parties according to the pro tanto credit rule contained in the Uniform Contribution Among Tortfeasors Act (UCATA) or the proportionate credit rule used in the Uniform Comparative Fault Act (UCFA). Compare Atlantic Richfield Co. v. American Airlines, Inc., 836 F. Supp. 763 (N.D. Okla. 1993) (UCATA approach) and City & County of Denver v. Adolph Coors Co., 829 F. Supp. 340 (D. Colo. 1993) (UCATA approach) with Barton Solvents, Inc. v. Southwest Petro-Chem, Inc., 834 F. Supp. 342 (D. Kan. 1993) (UCFA approach).

Under the pro tanto rule, a non-settling party is entitled to a credit of the actual settlement amount regardless of fault of the parties. See Atlantic Richfield, 836 F. Supp. at 767-83. In contrast, under the proportionate credit rule contribution claims against non-settling parties are reduced by the percentage of the

settling party's fault. Id.⁸

We conclude that the plain language of the statute mandates the application of the pro tanto rule: the potential liability of non-settlers is reduced "by the amount of the settlement." 42 U.S.C. § 9613(f)(2) (emphasis added). In addition, application of the pro tanto rule will best achieve the objectives of CERCLA by encouraging settlement, simplifying trial and equitably distributing costs. CERCLA is a strict liability act, not a comparative fault act; it envisions that non-settling parties may bear disproportionate liability. Therefore "[t]he statute immunizes settling parties from liability for contribution and provides that only the amount of the settlement-not the pro rata share attributable to the settling party-shall be subtracted from the liability of the nonsettlers." United States v. Cannons Engineering Corp., 899 F.2d 79, 91 (1st Cir. 1990) (footnote omitted).

This interpretation is consistent with a majority of federal court decisions as well as the intent of Congress. See H.R. Rep. No. 99-253, Part I, 90th Cong., 1st Sess. 80 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2862 (this provision was designed to encourage settlements and provide PRPs a measure of finality in return for their willingness to settle); United Technologies Corp. v. Browing-Ferris Indus., Inc., 33 F.3d 96, -- (1st Cir. 1994) ("a party who settles with the government 'shall not be liable for claims for contribution regarding matters addressed in

⁸. For a detailed comparison of pro tanto and proportionate credit rules see the Report and Recommendation of U.S. Magistrate Judge attached to Atlantic Richfield Co. v. American Airlines, Inc., 836 F. Supp. 763 (N.D. Okla. 1993).

the settlement'" and the amount of the settlement is subtracted from the aggregate liability of non-settling or later settling parties); Atlantic Richfield Co., 836 F. Supp. at 765 ("This amendment [§ 113(f)(2)] clearly adopted the contribution bar and pro tanto credit rule for administrative or judicially approved settlements involving the United States or a State."); City & County of Denver, 829 F. Supp. at 346 ("liability will be reduced by the amount of money paid pursuant to the Agreements"); United States v. Rohm & Haas Co., 721 F. Supp. 666 (D.N.J. 1989) ("By enacting § 113(f)(2) and § 122(g)(5) of CERCLA in 1986, Congress has plainly indicated that non-settling defendants' contribution claims will be barred, and they will be credited only with the amount of the settlement and nothing more").

In Farmland's settlement, Farmland agreed to pay \$700,000 in past EPA response costs, to reimburse the United States for all future response costs and to "finance and perform, at their own expense, all activities necessary" for cleanup and remediation of the entire site. Therefore, the CERC parties potential liability was limited to unrecovered past response costs incurred by EPA. In recognition of their limited liability, the CERC parties' Consent Decree specifically stated that CERC's payment of \$100,000 "shall constitute full satisfaction of the United States' claims against CERC for past response costs not recovered pursuant to previously entered consent decrees in this matter" with McKesson and Farmland. (Appellant's Appendix Vol. I at 133) (emphasis added).

Accordingly, we conclude that Farmland's claim is outside the potential liability of the CERC parties with regard to CERCLA liability for the Woodbury site.

3. Timing of Contribution Protection

Finally, contribution protection is conferred on the settling parties at the time the settling parties enter into the agreement. See Dravco Corp. v. Zuber, 13 F.3d 1222, 1225-28 (8th Cir. 1994). The CERC parties are protected from contribution claims "unless and until the EPA rescinds the . . . agreement that created the protection from contribution claims." Id. at 1228. "Because only the EPA can rescind, . . . any information concerning whether the defendants remain in compliance with the agreement is irrelevant." Id. Accordingly, we hold that whether or not the CERC parties have satisfied their obligations to the United States under their consent decree does not affect section 113(f)(2) contribution protection.

II.

The CERC parties contend that the district court erred in finding the response costs incurred by Farmland were necessary and consistent with the National Contingency Plan (NCP).

"Findings of fact . . . shall not be set aside unless clearly erroneous." Fed. R. Civ. P. 52 (a). "A finding of fact is not clearly erroneous unless 'it is without factual support in the

record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.'" Las Vegas Ice & Cold Storage Co. v. Far West Bank, 893 F.2d 1182, 1185 (10th Cir. 1990) (quoting LeMaire ex rel. LeMaire v. United States, 826 F.2d 949, 953 (10th Cir. 1987)).

The district court found that Farmland's costs were consistent with the national contingency plan based on trial testimony and Title 40 Code of Federal Regulations section 300.700(c)(3)(ii) (1992) which states:

Any response action carried out in compliance with the terms of . . . a consent decree entered into pursuant to section 122 of CERCLA, will be considered "consistent with the NCP."

After a careful examination of the record, we cannot say that the district court's finding is clearly erroneous.

III.

The CERC parties argue that the district court erred in failing to rule on their Act-of-God and Act-of-Third party defenses.

The Act-of-God and Act-of-Third party defenses are available only in very limited circumstances to protect innocent parties from section 107's strict liability. 42 U.S.C. § 9607(b); see United States v. Stringfellow, 661 F. Supp. 1053 (C.D.Cal. 1987) (heavy rainfall not exceptional natural phenomenon and was not within meaning of "Act of God" defense); United States v. Mottolo, 26 F.3d 261, 263-64 (1st Cir. 1994) ("third-party" defense to CERCLA). Since we hold that Farmland's claim is one for

contribution, these defenses are unavailable to the CERC parties as a matter of law.⁹

Summary

In summary, we hold that (1) claims between PRPs to apportion costs between themselves are contribution claims pursuant to section 113 regardless of how they are pled; (2) under section 113, contribution claims against settling parties are barred as to "matters addressed" in the settlement which shall be construed broadly to encourage settlement and finalize CERCLA liability for settling parties, and (3) settlement reduces the potential liability of non-settling or later settling parties by the amount of the settlement, not the equitable share of the settling party.

Accordingly, we **REVERSE**.

⁹. Normally, these defenses would be available to refute PRP status under section 107 which is a prerequisite for section 113 liability. However, in our case, the CERC parties admit their PRP status and section 107 liability. (Appellant's Appendix Vol. II at 357).