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7 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA
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10 UNITED STATES OF AMERICA,
11 Plaintiff,
12 v.
13 WASHINGTON STATE DEPARTMENT
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1 *U.S., Inc. v. State Farm Mut. Auto.*, 463 U.S. 29, 43 (1983).

2 B. BACKGROUND

3 The area concerned in this litigation is the Commencement Bay-Nearshore Tideflats
4 Superfund Site ("the Site" or "CB/NT") in Tacoma, Washington. The Site consists of several
5 identified problem areas where hazardous substances have contaminated sediment, including the
6 Thea Foss and Wheeler Osgood waterways. Dkt. 1, at 3-4. Due to the level of contamination in the
7 water and sediment, the Site was placed on the first official National Priorities List of hazardous
8 waste sites pursuant to CERCLA § 105, 42 U.S.C. § 9605. Dkt. 1, at 4.

9 On December 2, 2008, the United States of America ("U.S.") filed a complaint against the
10 Washington State Department of Transportation ("WSDOT") under the Comprehensive
11 Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq*.
12 Dkt. 1. The U.S. seeks to recover, pursuant to 42 U.S.C. § 9607(a), its un-reimbursed costs incurred
13 in response to releases and threatened releases of hazardous substances at the Thea Foss and
14 Wheeler Osgood Waterway Problem Areas within the Commencement Bay-Nearshore Tideflats
15 Superfund Site, located in Tacoma, Washington. Dkt. 1, at 8-9.

16 The complaint involves claims by the United States for response costs, past and future, from
17 WSDOT, (1) for contamination at the Tacoma Spur (I-705) construction site; and (2) for
18 contamination as a result of highway runoff from I-5, SR 705, and SR 509 highways. Dkt. 1. In
19 addition, the U.S. seeks a declaratory judgment under 42 U.S.C. § 9613(g)(2), that WSDOT is
20 jointly and severally liable for any future response costs incurred by the U.S. in connection with the
21 Site. Dkt. 1, at 9. One of the bases of liability alleged against WSDOT is the ownership and
22 operation of I-5, SR 705, and SR 509, and their storm drains. Dkt. 1, at 7.

23 The complaint alleges that WSDOT owned/owns and operated/operates I-5, SR 705, and SR
24 509 highways; and the drainage structures designed to drain runoff away from these highways and
25 to discharge the runoff into the Thea Foss Waterway. Dkt. 1, at 7. The United States contends that
26 the highway runoff from I-5, SR 705, and/or SR 509 contains hazardous substances, including
27 phthalates, heavy metals, including cadmium, lead, zinc, and nickel, and petroleum hydrocarbons.
28 Dkt. 1, at 7. The United States alleges that highway runoff containing hazardous substances is and

has been transported from I-5, SR 705, and SR 509 by drainage structures and disposed of in the Thea Foss and/or Wheeler Osgood Waterways. Dkt. 1, at 7.

In 1989, the United States, through the Environmental Protection Agency (EPA), contacted 133 potentially responsible parties (PRPs), including WSDOT, to begin directing remedial actions and recouping response costs associated with the Site. Dkt. 1, at 7. In May of 2003, the United States entered into consent decrees with over eighty PRPs (but not WSDOT) to provide funding and remedial action to facilitate clean-up of the Site. Dkt. 1, at 5. The United States alleges that, as of June 30, 2008, it has incurred at least $6.8 million in unreimbursed response costs in association with the Thea Foss and Wheeler Osgood Waterways, and that response costs will continue to mount in the future. Dkt. 1, at 7-8.

On February 6, 2009, WSDOT filed an answer and counterclaim against the United States. Dkt. 10. The counterclaim seeks contribution from the United States, pursuant to 42 U.S.C. § 9613(b) and (f) (CERCLA § 113), contending that (1) the United States Army Corps of Engineers (USACE), an agency of the United States, dredged the bottom of the Thea Foss waterway from 1902 until 1949, and permitted public and private entities to dredge the Thea Foss waterway between 1975 and 1983 and possibly in 1912 and 1915, thereby moving hazardous substances released by others and causing additional releases to the environment near the waterways; (2) until 1924, the USACE used the dredged material, which included hazardous substances, as fill near the waterways; (3) beginning in 1924, the USACE deposited the dredged material in Commencement Bay, further spreading the contaminated materials; (4) at least until 1940, the USACE deposited the dredged materials at a location near the mouth of the Thea Foss waterway, where it could easily re-enter and re-contaminate the waterway; and (5) WSDOT incurred costs of response for the Thea Foss site. Dkt. 10 at 15-18. WSDOT further alleges that the United States is liable to WSDOT for contribution under 42 U.S.C. § 9613(f) because the USACE meets the requirements of an "operator" under 42 U.S.C. § 9607(a)(2), an "arranger" under § 9607(a)(3), and a "transporter" under 42 U.S.C. § 9607(a)(4). Dkt. 10 at 19. On September 15, 2009, the court issued an order, dismissing that portion of WSDOT's counterclaim [illegible] and

10404-1 (Wash. Sup. Ct. July 31, 2009), and permitted that portion of WSDOT's counterclaim for contribution under § 9613(f)(1) for response costs the United States is seeking against WSDOT under § 9607(a), to proceed. Dkt. 47.

II. DISCUSSION

A. LEGAL STANDARD

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 .S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect. Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra)*. Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

B. DISCUSSION

To establish a *prima facie* case to recover its response costs under CERCLA §107, the United States must prove: (1) the site is a "facility"; (2) a "release" or "threatened release" of a

hazardous substance occurred; (3) the government incurred costs in responding to the release or threatened release; and (4) the defendant is the liable party under 42 U.S.C. §9607(a). *U.S. v. Chapman*, 146 F.3d 1166, 1169 (9th Cir. 1998); 42 U.S.C. §9607(a)(4)(A) (defendants may be held liable for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan"). 42 U.S.C. §9607(a) authorizes the United States to recover its costs from four classes of responsible parties, three of which are relevant here: (1) current owners or operators of the facility, (2) owners or operators at the time of disposal of hazardous substances at or from the facility, and (3) entities who arrange for disposal of hazardous substances. *See* 42 U.S.C. §9607(a)(1), (2), and (3). Once the government presents a *prima facie* case for response costs, the burden shifts to the defendant to prove the government's response action was not consistent with the national contingency plan. *Chapman*, 146 F.3d at 1169.

The first three elements of the four element test in *Chapman* are not contested. However, WSDOT is challenging whether it falls under one of the four classes of responsible parties enumerated in 42 U.S.C. § 9607(a). The court will deal with arrangers liability under § 9607(a)(3) first.

1. Arrangers

WSDOT contends that it may not be held liable as an arranger under CERCLA because it did not have control over the release of hazardous substances and it did not intend to dispose of hazardous substances. Dkt. 56, at 13-19. WSDOT also contends that there is no evidence that it actually disposed of waste through the highway stormwater system. Dkt. 56, at 16.

The U.S. counters by arguing that WSDOT arranged for disposal by designing, constructing, and operating drainage systems whose sole function was to collect highway runoff and dispose of it into nearby water-bodies. Dkt. 62, at 27. The U.S. states that WSDOT had actual knowledge that the runoff that it was discharging contained hazardous substances. *Id*. The U.S. further states that WSDOT has the ability to redirect, contain, and treat its contaminated runoff. *Id*. at 28.

An arranger is defined as "any person who by contract, agreement, or otherwise arranged for disposal or treatment... of hazardous substances owned or possessed by such person, by any party or

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larger Western Washington municipalities in 1995. *Id.* WSDOT indicates that it has "operated the storm drain system in compliance with NPDES permits since 1995." Dkt 56, at 10.

The U.S. responds by arguing that WSDOT has the burden of proof in establishing the affirmative defense that its releases were federally permitted and that the mere existence of a permit does not immunize WSDOT from liability. Dkt. 62, at 30. The U.S. states that even if WSDOT meets its burden of establishing that some of its post-permit releases are federally permitted, WSDOT may still be held liable under CERCLA for any releases that were not expressly permitted, exceeded the limitations of the permit, or occurred at a time when there was no permit. *Id.* The U.S. states that where there are both permitted and unpermitted releases, recovery of response costs related to a federally permitted release is prevented only where the defendant proves that the injury is divisible. *Id.* The U.S. also states that documents identify "instances of non-compliance with WSDOT's permit." Dkt. 62, at 31.

As a preliminary matter, the U.S. moves to strike Paragraph 6 of the Declaration of Kenneth Stone in Support of WSDOT's motion for partial summary judgment because his statement regarding compliance with permits is without foundation. Dkt. 62, at 31. The court should deny the motion to strike and the statement will be considered. The motion goes to the weight to be given the declaration.

42 U.S.C. § 9607(j) states that "[r]ecovery by any person (including the United States...) for response costs or damages resulting 1.96 TDrE5(S)1.9(DOTlerm)8.8(itted r7lease is prevenshasiderepursus thT*o
is divisible.[(U.S. tim)8.pru ide.Aise dnsihe

3. Defenses under 42 U.S.C. § 9607(b).

WSDOT argues that contaminants in stormwater are caused by third parties over whom it has no control. Dkt. 56, at 19. WSDOT states that the contamination was not caused by it, but by individuals who use the highways, and by other sources. Dkt. 56, at 20. WSDOT also contends that CERCLA requires that a party asserting the third party defense has handled the hazardous substances with due care and that it has met that standard by seeking permits. Dkt. 56, at 19. WSDOT states that the permits require the use of "all known, available, and reasonable technology" and requires that the pollutants be reduced to the "maximum extent practicable." *Id.* Therefore, WSDOT contends, it has used due care.

The U.S. counters by asserting that WSDOT has not established that the releases were caused "solely by" a third party, and that even if WSDOT established that the releases were caused solely by a third party, WSDOT failed to exercise due care prior to the issuance of the permits. Dkt. 62, at 32. Additionally, the U.S. argues that even after the 1995 permit was issued, WSDOT did not retrofit State Route 705 to add best methods and practices for treatment of stormwater. Dkt. 62, at 33.

CERCLA contains a third party defense which states in part,

> There shall be no liability under [42 U.S.C. § 9607(a)] for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by... an act or omission of a third party..., if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned... and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

42 U.S.C. § 9607(b).

There is a question of whether WSDOT exercised due care with respect to hazardous material. WSDOT contends that it did exercise due care because it sought and complied with permits. The U.S. contends that the permits do not establish that WSDOT acted with due care and that WSDOT did not act with due care in regard to pre-permit discharges. At this stage of litigation, there is not enough information or evidence presented to establish a due care standard under CERCLA. Moreover, as noted above, the divisiblity of discharges pre and post 1995 is in question.

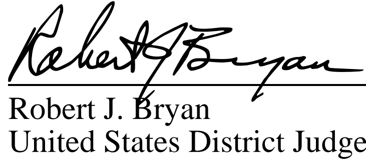
For the foregoing reasons, the parties' motions for partial summary judgment regarding third party defense should be denied.

4. State Sovereign

WSDOT also argues that Federal courts have refused to impose CERCLA liability on agencies exercising the state's sovereign power non-negligently and that operation of a state highway system is a sovereign function of the state government. Dkt. 56, at 20-21. The U.S. responds by arguing that nothing in CERCLA supports WSDOT's argument. Dkt. 62, at 34-35. The U.S. states that CERCLA is a strict liability statute and that CERCLA applies to states and state agencies as well as private entities. Dkt. 62, at 35. The court is persuaded by the U.S.'s arguments.

(4) The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 7th day of June, 2010.



Robert J. Bryan
United States District Judge