

# Superfund/Cost-Recovery Action: Federal Appellate Court Addresses Challenge to Allocation Methodology



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The United States Court of Appeals for the Ninth Circuit (“Court”) addressed in a June 3rd Opinion an issue arising under a Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA” or “Superfund”) cost recovery action. See *Mission Linen Supply v. City of Visalia*, 2020 WL 2917272 (9th Cir.).

The issue addressed was whether the United States District Court (“District Court”) utilized appropriate factors in allocating responsibility for the costs of cleaning up subsurface contamination that originated from a dry-cleaning facility.

The City of Visalia, California (“City”) appealed from the District Court’s equal allocation of responsibility for future cleanup costs between the City and Mission Linen Supply (“Mission”).

Between 1971 and 1983 Mission and the previous owner of the property in question, Star Laundry & Dry Cleaning (“Star”), operated dry-cleaning facilities that discharged perchloroethylene (“PCE”) into the City’s sewers. Mission and the City were stated to have not disputed that the City’s sewers were installed below industry standards and contained multiple defects – e.g., broken pipes, exposed soil, cracks, sags, separated joints, missing pipes, root intrusion, debris, and blockages.

The parties also agreed that, but for the defects in the sewers, the wastewater would have reached the City’s treatment facilities. This was alleged to be due to the City’s alleged failure to properly maintain the sewers and restrict the dumping of PCE into the sewers.

PCE leaked out of the sewers and created a large underground pollution plume in the vicinity of Mission’s property.

The District Court was tasked with allocating responsibility in a CERCLA cost recovery action for the underground pollution that originated near Mission’s property. It allocated 50% of the responsibility for future cleanup costs to Mission and 50% to the City—Star was no longer in existence and not a party to the action.

The City argued on appeal that the District Court abused its discretion when it selected certain factors to use to allocate responsibility for the underground pollution.

The Court noted that CERCLA gives district courts discretion to allocate costs among liable parties using equitable factors that are deemed appropriate. It held that the District Court did not abuse its broad discretion in identifying the three principal considerations on which it based its allocation division.

Those considerations included:

1. How to divide up the pollution plume by its geographic features—i.e., which portions of the plume counted as being on Mission’s property and which counted as off-site;
2. How to assign responsibility for off-site portions of the plume; and
3. How to allocate the “orphan” responsibility of Star.

The City cited cases to support its argument that the District Court abused its discretion. However, the Court noted that none of the cases involved factually similar circumstances. Further, it stated that even if the cases were factually similar, the existence of discretion meant that one District Court could reach a conclusion different from that of another.

The City also argued that the District Court committed clear error in allocating responsibility for future cleanup costs equally between the parties based on its selected considerations.

Once it identified its three principal considerations, the District Court had adopted two alternative methods for resolving the three principle considerations. In devising the two alternative methods, the District Court took the method Mission’s expert witness proposed and made various modifications to it.

In applying the first method, the Court used Mission’s color-coded map showing 46 circles. Because the circles indicated an underlying contamination plume, the District Court used the circles to measure responsibility for the pollution.

The District Court assigned the circles that fell within its definition of on-site to Mission and Star. It assigned the circles that fell within its definition of off-site to either the City and Mission, the City and Star, or the City, Mission, and Star depending upon which parties had used the sewer lines near the circles.

After calculating each parties’ number of circles, the District Court allocated half of Star’s share to Mission and half to the City. This method yielded a 50/50 split between Mission and the City.

The Court deemed the District Court’s second method simpler and less nuanced than the first. It removed Star completely and allocated responsibility for all on-site or on-the-border circles to Mission and responsibility for all off-site circles to the City. This method also yielded a 50/50 split between Mission and the City.

The Court, rejecting City’s contention, found that the District Court permissibly focused on geographic distribution and attributed most responsibility for on-site pollution to Mission and most responsibility for off-site pollution to the City.

The Court affirmed the District Court’s equal allocation of responsibility for cleanup costs between Mission and the City.

A copy of the decision can be downloaded [here](#).