

# Superfund/CERCLA: Federal Appellate Court Addresses Allocation of Cleanup Costs



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The United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) addressed in a January 31st Opinion a dispute between two Comprehensive Environmental Response, Compensation, and Liability Act (“Superfund or CERCLA”) responsible parties. See *Columbia Falls Aluminum Company, LLC vs. Atlantic Richfield Company*, 2023 WL 1281669.

The dispute involved the allocation of environmental cleanup costs between the two parties at a Columbia Falls, Montana, site (“Site”).

Atlantic Richfield Company (“ARCO”) owned and operated an aluminum smelting site from 1955 to 1985. The company sold the site to Columbia Falls Aluminum Company (“CFAC”) for \$1.00 in 1985. The written Agreement between ARCO and CFAC contained cross-indemnity provisions. CFAC operated the site until 2009.

Both ARCO and CFAC are stated to have during their respective operations,

- Generated substantial profits
- Disposed of hazardous waste throughout the site that resulted in environmental contamination

The United States District Court for the District of Montana (“Lower Court”) was apparently required to allocate the environmental cleanup costs at the Site between the two companies.

The Lower Court allocated 65 percent of the environmental cleanup costs to CFAC as opposed to 35 percent to ARCO.

CFAC appealed:

. . . the district court’s equitable allocation of environmental cleanup costs between CFAC and Appellee Atlantic Richfield Co. (“ARCO”) under the Comprehensive Environmental Response, Compensation, and Liability Act . . .

The Ninth Circuit stated that in such circumstances it reviews the:

- Equitable factors considered for abuse of discretion
- Equitable allocation of those factors for clear error

The Ninth Circuit upheld the Lower Court’s allocation decision. The rationale for its decision included:

- Referenced Agreement between the parties did not effectuate a waiver of right to sue under CERCLA
- Extrinsic evidence of the parties’ intent was not sufficiently clear to overcome the lack of specificity in the Agreement’s text

- Refusal to enforce the Agreement was based solely on the fact that the “high bar set by state law was not met”
- The finding that the parties intended the Agreement to cover non-statutory liability for environmental conditions enabled the Lower Court to consider it for purposes of equitable allocation under CERCLA
- Reference to evidence that the parties intended for CFAC alone to have an indemnification obligation to ARCO after August 31, 1990
- Citing Cadillac Fairview/California, Inc. v. Dow Chemical Co., 299 F.3d 1019, 1025 (9th Cir. 2002) (equitably allocating 100 percent of CERCLA costs to the government based on an indemnity clause that was not enforceable as a matter of law)
- Lower Court did not err in applying the Gore Factors which focused on the amount and nature of hazardous waste
- Rejects CAFC’s contention that the Lower Court was required to allocate costs based on each party’s respective contamination of the Site
- CERCLA clearly states that in resolving contribution claims, response costs may be allocated among the responsible parties using equitable factors as are determined appropriate
- Lower Court considered Gore Factors but found the first four to be neutral taking into consideration the practical effect of the proposed remedial measure (slurry wall that would encompass the West Landfill and the Wet Scrubber Sludge Pond [WSSP])
- CFAC’s contamination of the WSSP and the fact that a large portion of the slurry wall would contain the WSSP was appropriate to consider
- In certain circumstances where the cost of remedial measures does not equate to the volume of contamination it is not necessarily appropriate to look solely at contamination
- Lower Court did not err in its economic benefit analysis
- Despite the fact that ARCO earned more profit than CFAC it expended over \$1 billion on the Site (referencing the construction and upgrades to mitigate environmental contamination)
- CFAC spent \$95 million on Site improvements
- Reference to CFAC acquiring the facility and the ARCO improvements for \$1.00

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