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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

CALIFORNIA DEPARTMENT OF
TOXIC SUBSTANCES CONTROL
and the TOXIC SUBSTANCES
CONTROL ACCOUNT,

Plaintiffs,

v.

NL INDUSTRIES, INC., et al.,

Defendants.

No. 2:20-cv-11293-SVW-JPRx

PLAINTIFFS' POST-TRIAL BRIEF

Judge: Stephen V. Wilson
Action Filed: December 14, 2020
Trial Date: May 30, 2023

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I. Introduction

The Phase II trial addressed only limited issues: (1) the *prima facie* elements of Plaintiffs’ cost-recovery claims under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) and the Hazardous Substances Account Act (“HSAA”); (2) Defendants’ defenses to those claims other than divisibility; and (3) Defendants’ counterclaim against Plaintiff California Department of Toxic Substances Control (“DTSC”).

Two of the nine Defendants—NL Industries, Inc. (“NL”) and Gould Electronics Inc. (“GEI”)—are former owners or operators, or successors to former owners or operators, of the Vernon Plant (“Plant”). NL and GEI have largely stipulated to, admitted to, or declined to contest the four *prima facie* elements of Plaintiffs’ cost-recovery claims. NL and GEI have not asserted any defenses that can completely absolve them. Therefore, NL and GEI must proceed to further stages of this action.

NL and GEI contest only a subset of the “release causation” *prima facie* element. They, along with the other seven Defendants, dispute whether hazardous substance releases from the Vernon Plant caused Plaintiffs to incur response costs relating to the Exposition Aquifer, one of the deeper groundwater layers beneath the Plant. Plaintiffs prevail on that dispute because a unique chemical fingerprint of the Plant—sulfate contamination—proves that hazardous substances released from the Plant, most significantly the dangerous chemical trichloroethylene (“TCE”), reached the Exposition Aquifer.

The remaining seven Defendants, the “A/T Defendants,”¹ are sued as

¹ The A/T Defendants are Clarios, LLC (“Clarios”); International Metals Ekco, Ltd. (“Ekco”); Kinsbursky Bros. Supply, Inc. (“KBI”); Oregon Tool, Inc. (f/k/a Blount, Inc.) (“Oregon Tool”); Quemetco, Inc. (“Quemetco”); Ramcar Batteries, Inc. (“Ramcar”); and Trojan Battery Company, LLC (“Trojan”).

Of the A/T Defendants, four—Clarios, Ekco, KBI, and Quemetco—transported hazardous substances to the Plant (“Transporters”).

Clarios is sued as a successor to liable entities. Clarios has admitted that it is a successor to the relevant liabilities of Globe-Union Inc., Johnson Controls, Inc., and

1 “arrangers” or “transporters” that “arranged with a transporter” to send, or transported,
2 hazardous waste to the Plant. The A/T Defendants do not contest that they sent lead-
3 bearing hazardous substances to the Vernon Plant, the core conduct that gives rise to
4 their *prima facie* liability. Instead, the A/T Defendants argue that their intent to
5 “recycle” lead-bearing materials may not serve as a basis for CERCLA or HSAA
6 liability and that the materials they sent to the Plant were “useful products,” not
7 “waste.” The A/T Defendants’ “recycling” argument lacks merit. Although the
8 Superfund Recycling Equity Act (“SREA”) establishes a narrow affirmative defense
9 from arranger and transporter liability for certain kinds of recycling transactions,
10 SREA does not alter CERCLA’s *prima facie* elements. Moreover, the A/T Defendants
11 have failed to prove the required elements of SREA’s affirmative defense, which is
12 often called a “recycling” exemption. Likewise, the A/T Defendants are wrong to
13 characterize the lead-bearing materials they sent to the Plant as “useful products.”
14 These materials either were at the ends of their useful lives or were never useful to
15 begin with; the materials were waste that could only be smelted and used as an input
16 to recover useful pure lead. Under controlling Ninth Circuit precedents, such materials
17 are waste, not useful products.

18 Also, GEI and six A/T Defendants assert a federally permitted release defense;
19 those six A/T Defendants advance a “third-party defense”; and all the A/T Defendants
20 press a statute-of-limitations defense. These other defenses also lack merit.

21 Finally, Defendants’ counterclaim against DTSC fails because DTSC has
22 always served as a government regulator with limited involvement with the Plant, not
23 Johnson Controls Battery Group, Inc. *See* Dkt. 712 (LeMieux Decl.) ¶ 19. In 1978,
24 the battery company Globe-Union Inc. merged into Johnson Controls, Inc. *See*
25 PX_2-0424.1–3. In 1990, Johnson Controls, Inc. transferred its “entire Battery
26 Division, including . . . associated past, present and future liabilities” to Johnson
27 Controls Battery Group, Inc. *See* PX_2-0424.17. Johnson Controls Battery Group,
28 Inc., became Johnson Controls Battery Group, LLC, which was renamed as Clarios.
See PX_2-0395.15.

This brief uses “Clarios” to refer collectively to Clarios and its predecessors
except where any distinction is relevant.

as an “operator” subject to CERCLA and HSAA liability.

The Court should find for Plaintiffs on all Phase II trial issues.

II. Scope of the Phase II Trial

A. Matters Within the Phase II Trial’s Scope

The Court limited the Phase II trial’s scope to address only select issues. This scope has been further narrowed by stipulations and admissions. As discussed, the Phase II trial concerned only (1) the *prima facie* elements of Plaintiffs’ CERCLA and HSAA cost-recovery claims; (2) Defendants’ affirmative defenses except those relating to the divisibility of harm; and (3) Defendants’ counterclaims against DTSC under CERCLA and the HSAA. *See* Dkt. 593 at 1–2 (Pretrial Order).

Plaintiffs’ CERCLA and HSAA claims have four elements.² First, Plaintiffs must show that “the site on which the hazardous substances are contained is a ‘facility.’” *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 870 (9th Cir. 2001) (quotations omitted). Second, Plaintiffs must show that “a ‘release’ or ‘threatened release’ of any ‘hazardous substance’ from the facility has occurred.” *Id.* (quotations omitted). Third, under the release-causation element, Plaintiffs must show that “such ‘release’ or ‘threatened release’ has caused [Plaintiffs] to incur response costs.” *Id.* at 870–71 (quotations omitted). Fourth, under the covered-person element, Plaintiffs must show that each “defendant is within one of four classes of persons subject to [CERCLA’s] liability provisions.” *Id.* at 871 (quotations omitted). CERCLA imposes strict liability upon those liable under these *prima facie* elements, subject only to a divisibility defense and other enumerated defenses. *See Burlington N. & Santa Fe Ry. Co. v. United States (BNSF)*, 556 U.S. 599, 608–09 (2009); Dkt. 176 at 4 (“[T]he defenses available to Defendant[s] under CERCLA are statutorily limited”). CERCLA is “construed liberally to effectuate its remedial purpose.” *Pakootas v. Teck Cominco Metals, LTD.*, 830 F.3d 975, 985 (9th Cir. 2016).

² CERCLA and HSAA liability are similar but “not identical.” *Orange Cnty. Water Dist. v. Sabic Innovative Plastics US, LLC*, 14 Cal. App. 5th 343, 371 (2017). Plaintiffs have identified any differences where relevant.

Defendants mostly have not contested the *prima facie* elements of CERCLA and HSAA liability. NL and GEI—the former owners and operators (or successors thereto)—have stipulated or admitted that they are “covered persons” under CERCLA. Meanwhile, the A/T Defendants do not dispute that they arranged with a transporter to transport, or transported, large quantities of lead-bearing hazardous substances to the Vernon Plant—the core conduct that makes them liable. No Defendant contests that the Vernon Plant released hazardous substances, and that those releases generally caused Plaintiffs to incur response costs. This leaves only two areas of dispute regarding Defendants’ *prima facie* liability for the Court to resolve. First, the A/T Defendants argue that they lacked the necessary intent to be held liable under the covered-person element, and also assert that the materials they sent to the Plant were “useful products” rather than “waste” that may give rise to CERCLA arranger liability. Second, Defendants partly contest the release-causation element, insisting that releases of hazardous substances from the Plant did not cause Plaintiffs’ response costs in the deeper Exposition Aquifer.

The Court also must address Defendants’ four defenses: (1) a SREA defense by all A/T Defendants; (2) a “federally permitted release” defense by GEI and all A/T Defendants except Clarios; (3) a “third-party” defense; and (4) a statute of limitations defense.

Finally, the Court must address the *prima facie* elements of Defendants’ counterclaims against DTSC, which allege that the agency became an “operator” of the Vernon Plant by regulating it after it ceased operating.

B. Matters Outside the Phase II Trial’s Scope

It is equally important to identify what matters are not before the Court. These include Defendants’ divisibility defenses; the precise amount of Plaintiffs’ past response costs that are recoverable under CERCLA and the HSAA; Defendants’ affirmative defense that Plaintiffs’ costs were inconsistent with the National Contingency Plan (“NCP”); equitable allocation of liability among Defendants under

1 CERCLA Section 113 and the HSAA; the NCP compliance of Plaintiffs’ future
2 response costs and actions; and Plaintiffs’ claims for injunctive relief, including their
3 public nuisance claim.

4 The Court should disregard any invitation to prematurely broach these matters.
5 Later, the Court will have ample opportunity to consider each Defendant’s precise
6 degree of responsibility under either divisibility or equitable principles; whether
7 Plaintiffs’ past response costs were incurred in a manner consistent with the NCP; and
8 whether other forms of relief are warranted. These future determinations will allow
9 liability to be distributed equitably among the liable Defendants.

10 **1. Divisibility**

11 Divisibility is an affirmative defense that a liable covered person may use to
12 avoid joint and several liability. *See Pakootas v. Teck Cominco Metals, Ltd. (Pakootas*
13 *IV)*, 905 F.3d 565, 588 (9th Cir. 2018). Divisibility is an “intensely factual” inquiry
14 under which Defendants bear a “substantial” “burden.” *Id.* at 589 (quotations omitted).
15 The Court has set an August 1, 2023 trial to address divisibility. *See* Dkt. 830.

16 **2. Equitable Allocation**

17 Jointly and severally liable persons usually may assert CERCLA Section 113(f)
18 contribution claims against each other. *See TDY Holdings, LLC v. United States*, 885
19 F.3d 1142, 1146–47 (9th Cir. 2018). Under the Section 113(f) framework, the Court
20 will have discretion to allocate liability among those persons using equitable
21 principles. *See id.* While there is no fixed list of equitable factors, courts have often
22 used the “Gore factors” and “Torres categories.” *See Seattle Times Co. v.*
23 *LeatherCare, Inc.*, 337 F. Supp. 3d 999, 1072 & nn.72–73 (W.D. Wash. 2018). Some
24 Defendants have argued that they are ill-resourced or took good-faith actions that
25 warrant lenience. *E.g.*, Dkt. 729 at 10–22. While those arguments are irrelevant now,
26 the Court will have discretion to consider them during equitable allocation.

27 **3. Amount of Plaintiffs’ Recoverable Costs Under the NCP**

28 Plaintiffs’ right to recover response costs is limited by the NCP. The NCP is a

1 set of detailed regulations “designed to make the party seeking response costs choose
2 a cost-effective course of action to protect public health and the environment.” *See*
3 *Carson Harbor Vill. v. Cnty. of L.A.*, 433 F.3d 1260, 1265 (9th Cir. 2006) (quotations
4 omitted); *see generally* 40 C.F.R. pt. 300. The issue of NCP consistency, including
5 the precise amount of Plaintiffs’ response costs that are recoverable, has been deferred
6 to a later stage.³ When the Court considers NCP compliance, Plaintiffs’ response costs
7 will be “presumed” consistent with the NCP, and Defendants will bear the burden of
8 proving otherwise. *See Wash. State Dep’t of Transp. v. Wash. Nat. Gas Co.*, 59 F.3d
9 793, 799–800 (9th Cir. 1995). Among other things, the NCP requires those that clean
10 up contaminated sites to consider cost-effectiveness. 40 C.F.R. § 300.430(e)(7)(iii),
11 (e)(9)(iii)(G), (f)(1)(i)(B), (f)(1)(ii)(D), (f)(5)(ii)(D). Thus, under the NCP framework,
12 the parties will later have an ample opportunity to debate the propriety of Plaintiffs’
13 response costs.

14 **4. Future Response Actions and Costs**

15 Before the Phase II trial, the Court granted Plaintiffs’ motion *in limine* to
16 exclude evidence of Plaintiffs’ potential future response actions and costs. *See* Dkt.
17 735 at 2. As Plaintiffs explained in their briefs, *see generally* Dkt. 663, 684, Plaintiffs’
18 CERCLA Section 107(a) claim and parallel HSAA claim seek recovery of only
19 Plaintiffs’ past response costs. If Plaintiffs prevail on their CERCLA Section 107(a)
20 claim, they will be automatically entitled under CERCLA Section 113(g)(2) to a
21 declaratory judgment that will be binding in future proceedings that will address future
22 response costs if and after they are incurred. *See City of Colton v. Am. Promotional*
23 *Events, Inc.-W.*, 614 F.3d 998, 1007 (9th Cir. 2010); *Voggenthaler v. Md. Square,*
24 *LLC*, 724 F.3d 1050, 1064–65 (9th Cir. 2013); *Pakootas IV*, 905 F.3d at 583–84.

25
26 ³ *See* Dkt. 517 (Joint Case Management Report) at 6 (agreeing that “post-
27 liability issues in the litigation, including the consistency of Plaintiffs’ response
28 costs with the National Contingency Plan [] and related remedies,” will not be part
of Phase II); Dkt. 593 (Pretrial Order) at 1–2 (declining to disturb the parties’
agreement to exclude NCP compliance issues from Phase II).

Nothing in CERCLA or the HSAA authorizes a court to speculate about future response actions and costs when adjudicating a cost-recovery claim.

5. Other Claims

The Court excluded other claims from the Phase II trial, including Plaintiffs' HSAA injunctive relief claim under Cal. Health & Safety Code § 25358.3 and Plaintiffs' public nuisance abatement claim against NL. *See* Dkt. 593 at 2.

III. Plaintiffs Have Satisfied Each *Prima Facie* Element of Their Cost-Recovery Claims.

A. Many Key Elements Are Undisputed.

Most of the elements of Defendants' CERCLA liability are uncontested.

Facility. The Vernon Plant is undisputedly a facility under CERCLA's broad definition, which includes "any building, structure, installation, [or] equipment," and anywhere hazardous substances have "come to be located." *See* 42 U.S.C. § 9601(9)(A); *see also* 3550 *Stevens Creek Assocs. v. Barclays Bank of Cal.*, 915 F.2d 1355, 1360 n.10 (9th Cir. 1990) ("[T]he term . . . has been broadly construed . . ."). In fact, most Defendants admitted that the Plant is a facility.⁴

Release and Release-Causation. Likewise, Defendants mostly do not contest that hazardous substances were released from the Vernon Plant, and those releases caused Plaintiffs to incur response costs. Indeed, the Court found both releases and release-causation within the Industrial Area in its Decision and Verdict following the Phase I trial, *see* Dkt. 482 ("Phase I Verdict") at 1, 63; GEI and Quemetco have stipulated to releases and release-causation, *see* Dkt. 679 at 3–4 (GEI); Dkt. 733 at 2–3 (Quemetco); and NL and most of the other A/T Defendants have admitted to releases.⁵

Further, the Court received Dr. Laton's and Ms. Mistry's testimony that the

⁴ *See* PX_2-0398.5–6 (Clarios); Dkt. 678 at 3 (GEI); PX_2-0408.21 (NL); PX_2-0393.5 (Oregon Tool); PX_2-0388.4 (Quemetco); PX_2-0384.5–6 (Ramcar).

⁵ *E.g.*, PX_2-408.28 (NL); PX_2-0398.7 (Clarios); PX_2-0404.7 (KBI); PX_2-0393.7 (Oregon Tool); PX_2-0384.7 (Ramcar).

Plant and its surroundings were contaminated by the facility's releases, and Mr. Ruttan's testimony that Plaintiffs' response costs were caused by DTSC responding to those releases. Dkt. 741-1 (Laton Decl.); Dkt. 714-5 (Mistry Decl.); Dkt. 714-7 (Ruttan Decl.). Defendants do not submit evidence contradicting that testimony. Instead, Defendants contest the release-causation element for only a small subset of the Vernon Plant's contamination: the Exposition Aquifer underneath the Plant.

Covered-Person Status. NL and GEI have stipulated or admitted to all the elements of their covered-person status as former owners and operators: namely, that disposals of hazardous substances occurred at the Vernon Plant while they or their predecessor owned or operated it. *See* Dkt. 727 at 17 & n.13. NL has admitted that it is a successor of Morris P. Kirk & Son, Inc. ("Kirk") with regard to Vernon Plant liabilities; that Kirk owned or operated the Vernon Plant; that NL owned or operated the Vernon Plant; and that there was a disposal of a hazardous substance at the time NL and Kirk owned or operated the Vernon Plant. *See* Dkt. 628 at 2; PX_2-0408.18–19 (NL's response to requests for admissions); PX_2-0409.15, 32–33 (same). GEI has stipulated that it is a successor to Gould Inc.'s ("Gould") liabilities; that Gould owned or operated the Vernon Plant; and that a disposal of a hazardous substance occurred while Gould owned or operated the Vernon Plant. *See* Dkt. 679 at 3–4.

Moreover, even though the A/T Defendants oppose arranger and transporter liability, they, too, mount only a narrow challenge to *prima facie* liability. They do not contest that they arranged with a transporter to transport, or transported, lead-bearing materials to the Vernon Plant—the core conduct that gives rise to their liability. Instead, the A/T Defendants argue only that they lacked the requisite intent to be held liable, and that the materials they sent to the Plant were "useful products," not "waste."

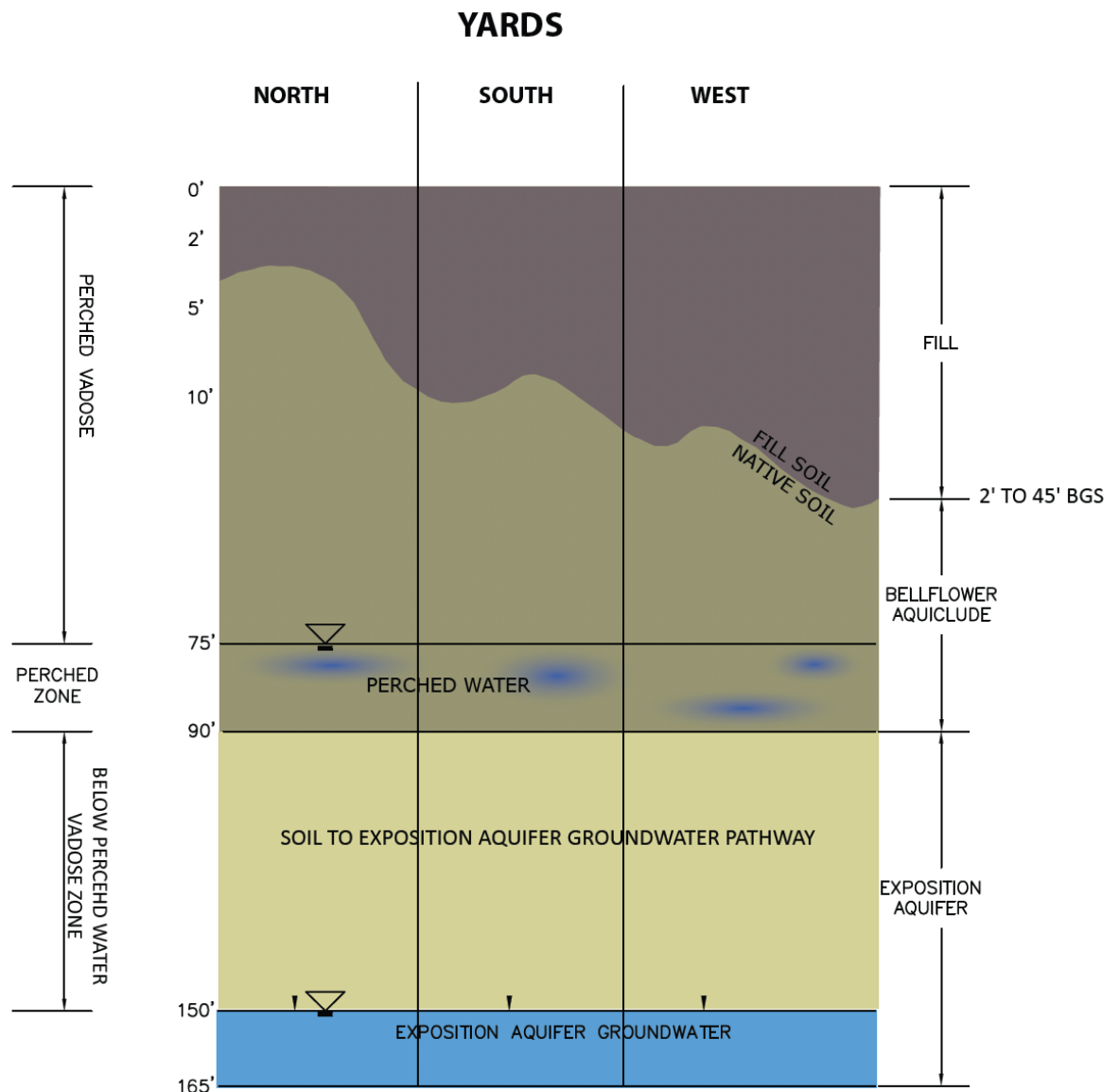
The limited areas of disagreement reflect the strength of Plaintiffs' case.

B. Release Causation Extends to the Exposition Aquifer.

Plaintiffs satisfy the third element of their *prima facie* case by establishing a "causal link" between the Vernon Plant's releases and their response costs. *See* Phase

I Verdict at 5 (quoting *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 287 F. Supp. 2d 1118, 1186 (C.D. Cal. 2003)). The parties refer to this element as “release causation.” As noted, Defendants do not challenge release causation for most of the contamination at the Vernon Plant. The one exception is TCE contamination in the zone of groundwater that is known as the Exposition Aquifer.

Before turning to Defendants’ limited challenge to release causation, the Court may benefit from a brief overview of the hydrogeology beneath the Vernon Plant. A simple diagram illustrates the two key subsurface zones of groundwater.



Dkt. 741-2 at 6 (Laton Decl., App’x G, Fig. 4b).

As shown in the diagram, the Vernon Plant sits on a layer of fill material,

1 underneath which are native soils. The initial zone of groundwater below the Plant is
2 found at approximately 70 to 90 feet below the ground surface, and consists of pockets
3 of saturated native soil known as the Perched Zone. The groundwater in this zone is
4 “perched” atop a layer of discontinuous clay that is contained within the Bellflower
5 Aquiclude. Dkt. 741-1 (Laton Decl.) ¶ 25. Beneath the Perched Zone is the next zone
6 of groundwater, called the Exposition Aquifer. The Exposition Aquifer consists of an
7 upper segment of unsaturated soil and a lower segment of groundwater.

8 The Exposition Aquifer and the Perched Zone are not presently used for
9 drinking water. However, both of these groundwater sources are designated as having
10 a beneficial use by the State Water Resources Control Board. PX_2-0431.6, 12. Under
11 the Los Angeles Basin Plan developed by the Los Angeles Regional Water Quality
12 Control Board, these groundwater sources are further designated as “MUN,” which
13 means the water may be used “for community, military, or individual water supply
14 systems including, but not limited to, drinking water supply.” PX_2-0431.8, 12.

15 Returning to the issue of release causation, there is no dispute that at least *some*
16 groundwater was contaminated by the Plant’s TCE releases. Plaintiffs’ and
17 Defendants’ groundwater experts each agree the Perched Zone is contaminated with
18 TCE that emanated from the Vernon Plant. Laton Decl. at 33:15–16; Trial Tr. Day 1
19 at 162:24–163:3. Thus, at a minimum, Plaintiffs are entitled to recover their past costs
20 of testing and monitoring groundwater in the Perched Zone.

21 Plaintiffs should also be permitted to recover their response costs for the
22 Exposition Aquifer for at least two reasons. First, as explained in detail below, TCE
23 from the Vernon Plant contaminated the Exposition Aquifer. Second, even if the Court
24 determines TCE from the Vernon Plant did not ultimately reach the Exposition
25 Aquifer, Plaintiffs’ testing and monitoring costs are still recoverable based on the
26 *threatened* release of TCE to the Exposition Aquifer. *See* 42 U.S.C. § 9607(a)(4).

27 The uncontested evidence showed that releases from the Vernon Plant caused
28 at least some of the TCE contamination found in the Exposition Aquifer. And one fact

1 predominates and is dispositive—a fact which Defendants’ expert Dr. Robrock
2 ignored: sulfates released from the Plant and found together with TCE in the Perched
3 Zone migrated to the Exposition Aquifer. Defendants’ asserted impermeable layer
4 separating the Perched Zone from the Exposition Aquifer is not selective. If the
5 sulfates got through (uncontroverted), then the TCE also got through.

6 Defendants’ experts all agreed that the Perched Zone was contaminated with
7 hazardous substances released from the Vernon Plant. Defendants’ experts also either
8 agreed or did not contest that the Exposition Aquifer was also contaminated by
9 releases from the Plant. In an attempt to blunt the impact of this testimony, Defendants
10 have relied on Dr. Robrock, who testified that only a “small amount” of contamination
11 from the Vernon Plant reached the Exposition Aquifer. But expert testimony regarding
12 the *amount* of the contamination does not alter the central fact that no expert disputes
13 there is a pathway by which hazardous substances can, and in fact did, migrate from
14 the surface of the Vernon Plant down to the Exposition Aquifer. This uncontroverted
15 evidence more than satisfies Plaintiffs burden to establish a causal link between
16 Vernon Plant releases and Plaintiffs’ response costs in the Exposition Aquifer.

17 **1. Legal Standard for Release Causation**

18 This Court previously held that Plaintiffs are not required to show “actual
19 contamination” to establish release causation. Phase I Verdict at 13. Rather, Plaintiffs
20 need only demonstrate that their theory of contamination is plausible. *Id.* at 15 (“[T]he
21 Court is persuaded that ‘plausibility’ captures the best approach to the release
22 causation inquiry.”). CERCLA requires only that Plaintiffs establish a “loose” causal
23 nexus between the Vernon Plant’s releases and Plaintiffs’ response costs. *See Carson*
24 *Harbor Vill., Ltd.*, 287 F. Supp. 2d at 1186–87 (collecting cases).

25 The evidence produced at trial demonstrates that a migration pathway between
26 the Vernon Plant and the Exposition Aquifer is not only plausible; it is undisputed.

27 **2. Release Causation for Contamination at the Plant**

28 As the Court previously noted, release causation is “relatively simple” where

1 the “release, contamination, and [response actions] occur at one site.” *See* Phase I
2 Verdict at 16 n.13. This is precisely the situation at the Vernon Plant. The releases
3 occurred in the form of dumping, spilling, leaking, and emitting hazardous substances
4 at the Plant.⁶ The contamination at the Plant is located in the exact same area where
5 these releases occurred, including in areas deep beneath the surface.⁷ Plaintiffs’
6 response actions include the oversight of investigation and cleanup activities at the
7 Plant. Thus, the releases, contamination, and response actions occurred specifically at
8 the Vernon Plant, making release causation “relatively simple.” Indeed, in these
9 situations, many courts hold that release causation is “presumed.” *See Thomas v. FAG*
10 *Bearings Corp.*, 846 F. Supp. 1382, 1386 (W.D. Mo. 1994) (noting that in the
11 “overwhelming majority” of CERCLA cases the contamination is located at the same
12 site where the release occurred, and thus release causation is not in question).

13 Despite the Court’s observation that release causation is relatively simple,
14 Clarios elected to present expert testimony from Dr. Robrock, who opined that
15 “significant TCE contamination” released from the Vernon Plant that contaminated
16 the Perched Zone did not migrate further downward into the Exposition Aquifer, and
17 thus Clarios contends that release causation in the Exposition Aquifer is lacking. But
18 Dr. Robrock’s concession that at least *some* TCE migrated to the Exposition Aquifer,
19 combined with her failure to account for the migration of other hazardous substances
20 (i.e., sulfates) that corroborate the Vernon Plant’s impact, is fatal to Defendants’
21 efforts to disprove release causation in the Exposition Aquifer.

22 **3. Undisputed Evidence Establishes that Contamination**
23 **from the Plant Migrated to the Exposition Aquifer.**

24 Plaintiffs’ expert Dr. Laton explained the migration of TCE and sulfates from
25 the Vernon Plant to the Exposition Aquifer. Dr. Laton testified that a principal basis
26 for his opinion was the “co-location” of contaminants in specific areas of the Plant

27 _____
28 ⁶ *See generally* Quivik Decl. ¶¶ 52-86; Laton Decl. ¶¶ 26-30 & App’x C.

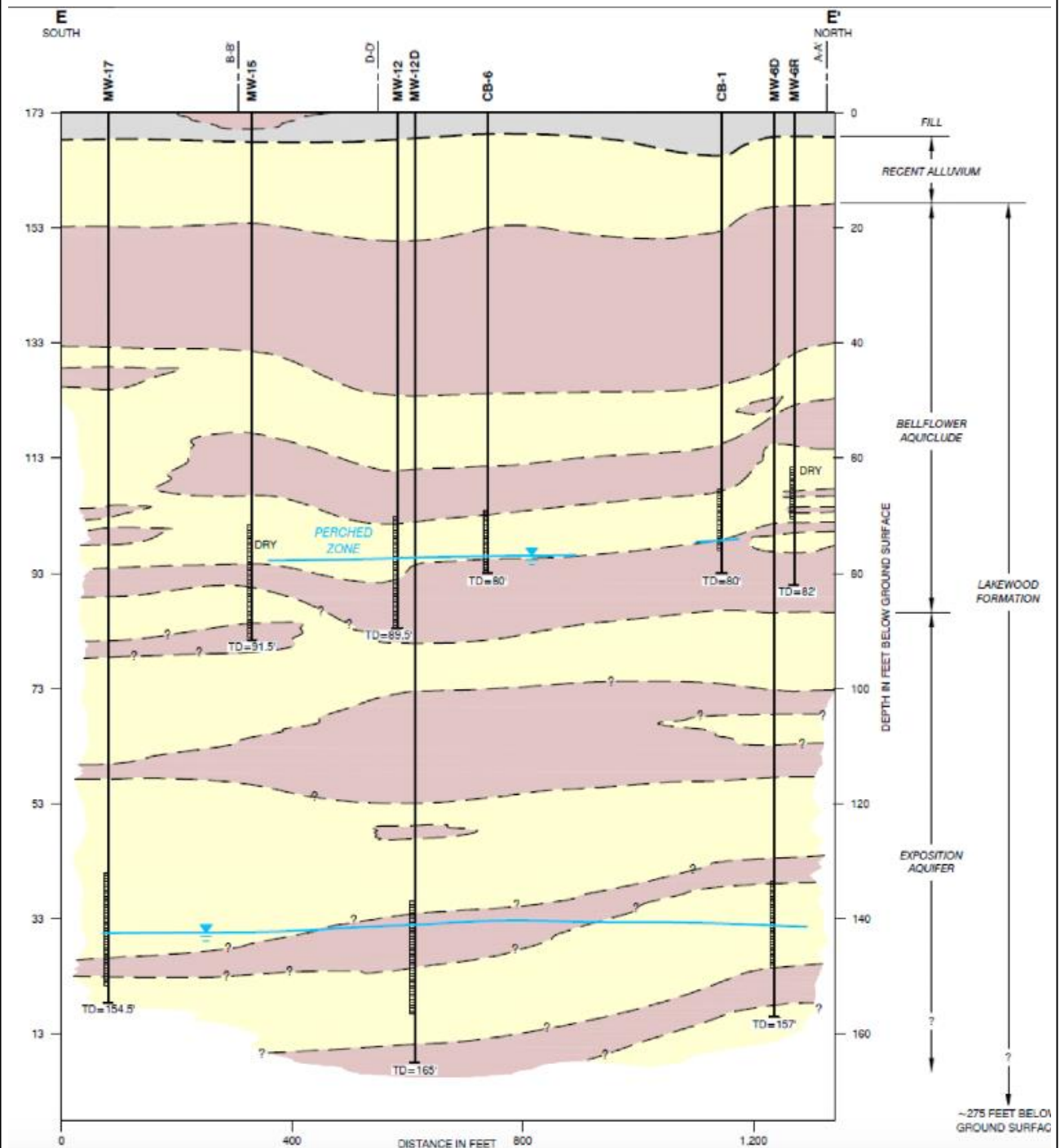
⁷ *See* Mistry Decl. ¶¶ 14-57.

1 where releases were known to have occurred. For example, Dr. Laton explained that
2 the highest levels of TCE in the soil, soil gas, Perched Zone, and Exposition Aquifer
3 were all co-located (horizontally and vertically) in an area adjacent to the Mixed
4 Metals Building, which was where TCE was primarily used at the Plant. Dkt. 741-1
5 (Laton Decl.) ¶ 39. Dr. Laton also described a similar pattern for sulfates, which were
6 released throughout the Plant and were found at elevated levels in the soil, Perched
7 Zone, and Exposition Aquifer underneath the Plant, including at concentrations eight
8 times higher than the regulatory level. Trial Tr. Day 1 at 111:9–24, 126:15–21. The
9 co-location of different contaminants proves that the Plant’s hazardous substance
10 releases migrated to the Exposition Aquifer. In short, the sulfates found in the
11 Exposition Aquifer came from the Plant and could not have originated elsewhere. And
12 if sulfates released at the Plant reached the Exposition Aquifer, then so did the TCE.

13 Clarios presented testimony by an environmental engineer, Dr. Robrock, to
14 buttress its theory that a clay barrier prevented TCE from migrating to the Exposition
15 Aquifer. But Dr. Robrock conceded there is a “hydraulic connection” between the
16 Perched Zone and the Exposition Aquifer, meaning that contamination in the Perched
17 Zone will migrate to the Exposition Aquifer despite several feet of clay. Dkt. 719
18 (Robrock Decl.) ¶ 23. Dr. Robrock tried to minimize this concession by describing the
19 hydraulic connection as “limited” and asserting that the amount of contamination from
20 the Plant that reached the Exposition Aquifer was “small.” *Id.*; Trial Tr. Day 1 at
21 151:11–18. As described below, Dr. Robrock’s assertion of only a *de minimis* impact
22 is contradicted by data of high levels of TCE in Vernon Plant monitoring wells. But
23 the more important point is that Dr. Robrock agreed with Dr. Laton that TCE released
24 from the Plant reached the Exposition Aquifer. *See* Trial Tr. Day 1 at 151:11–18.

25 Dr. Laton disproved Dr. Robrock’s hypothesis that a layer of clay, often called
26 the Bellflower Aquiclude, completely prevented any migration of contaminants from
27 the Perched Zone to the Exposition Aquifer beneath the Vernon Plant. Dr. Laton
28 pointed out that, while clay does slow the movement of contaminants, it is not a

complete barrier. As evidence, Dr. Laton cited examples where contaminants in the Perched Zone were discovered beneath a layer of clay, which would be possible only if the contaminants had migrated downward from the Plant and through the clay layers to reach the water in the Perched Zone. Dkt. 714-1 ¶ 105; Trial Tr. Day 1 at 119:16–120:16. A figure prepared by Dr. Robrock depicts this (DX_2-1027):



1 As depicted above, the Perched Zone is located between 60 and 80 feet below
2 ground surface, and it sits beneath a thick, 20-foot clay layer that is located between
3 20 and 40 feet below ground surface. It is undisputed that TCE contamination from
4 the Vernon Plant migrated to the Perched Zone. Dr. Robrock admitted that TCE
5 contamination in the Perched Zone originated from the Plant; this is only possible if
6 the TCE migrated vertically through approximately 20 feet of clay. *See* Dkt. 719-2
7 (similar figure showing more than 20 feet of clay above the location where MW-11R
8 was sampled in the Perched Zone). This is clearly inconsistent with Clarios' argument
9 that the presence of clay creates a complete barrier to migration.

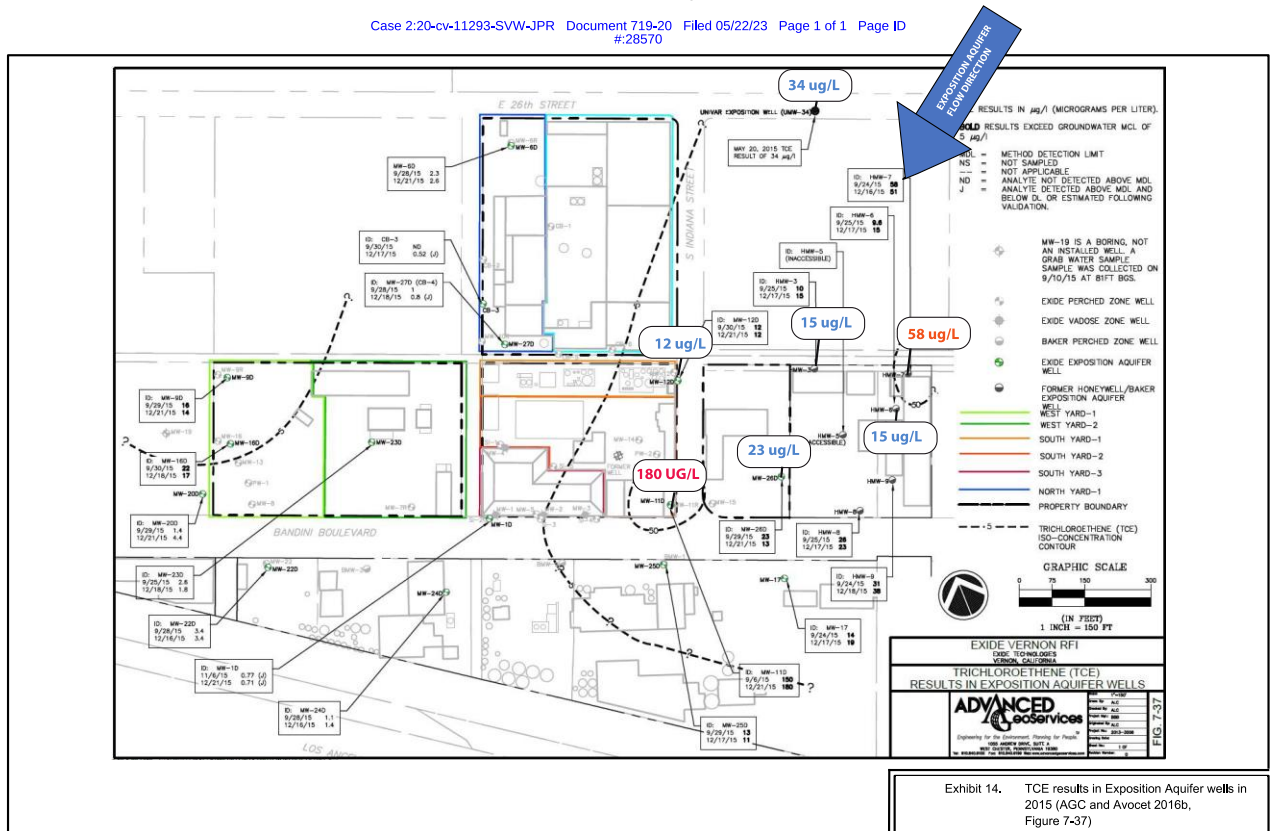
10 Thus, no expert disputes that TCE released from the Vernon Plant migrated to
11 the Exposition Aquifer, nor argues that such migration was implausible. Drs. Laton
12 and Robrock agreed that Vernon Plant contamination reached the Exposition Aquifer,
13 although Dr. Robrock questioned the amount. Dr. Cutler, the expert for certain A/T
14 Defendants, testified that TCE from the Vernon Plant contaminated the Perched Zone,
15 but did not offer an opinion regarding contamination in the Exposition Aquifer. Dkt.
16 708 (Cutler Decl.) at 8:16–19. Dr. Davis, the expert for NL, acknowledged the
17 presence of TCE contamination in the Exposition Aquifer, but did not suggest the
18 Vernon Plant was not one of the sources of that contamination. Dkt. 699 (Davis Decl.)
19 ¶ 816. Finally, Dr. McGinnis, GEI's expert, opined in his expert report that TCE
20 released from the Plant was one of several sources contributing to elevated TCE levels
21 in the Exposition Aquifer. DX_2-1590 at 68–69 (assigning 50% of TCE
22 contamination in Exposition Aquifer to off-site sources and remainder to the Plant).

23
24 **4. Groundwater Data Confirms that Vernon Plant**
25 **Releases Caused Significant Contamination in the**
Exposition Aquifer.

26 Dr. Laton testified that the highest level of TCE in the Exposition Aquifer that
27 lies underneath the Vernon Plant was found in monitoring well MW-11D. He
28 explained that this well is closest to the Mixed Metals Building, a fact that Defendant's

expert acknowledged. Contrary to Dr. Robrock's opinion that any impact from Vernon Plant releases was "small," Dr. Laton testified that in 2015, when a spike in TCE was reported in MW-11D, the two closest upgradient (or upstream) wells—which would not have been impacted by contaminants from the Vernon Plant—showed much lower concentrations of TCE. This sampling data directly refutes the suggestion that the elevated TCE levels detected under the Vernon Plant were exclusively caused by an upgradient source, signaling a measurable (or detectable) impact from releases at the Vernon Plant.

An annotated version of a figure to Dr. Robrock's declaration (Dkt. 719-20) indicates the level of TCE in MW-11D and adjacent wells in 2015:



As depicted in this figure, MW-11D contained 180 micrograms per liter (or ug/L) of TCE when tested in 2015, which is 36 times the maximum contaminant level (MCL) of 5 ug/L for TCE in drinking water. The closest upgradient wells, MW-26D and HMW-3, contained much lower TCE levels, at 23 ug/L and 15 ug/L, respectively. This illustrates Dr. Laton's key point, which is that the elevated TCE level detected in

1 MW-11D was caused by releases from the Vernon Plant rather than exclusively by
2 off-site sources, because the upgradient wells do not show the same high elevations.
3 This strongly corroborates the contribution of a local source (i.e., the Vernon Plant)
4 to the elevated TCE levels, as opposed to exclusive contribution from more distant
5 sources, such as the Univar or Honeywell sites.

6 Dr. Robrock's opinions regarding the source of groundwater contamination in
7 the Exposition Aquifer are also inadequate because they are based exclusively on data
8 regarding a class of chemicals known as volatile organic compounds (VOCs). She
9 thus failed to consider data regarding other hazardous substances that were present in
10 the Exposition Aquifer and that were released at the Plant but did not come from
11 Univar or Honeywell. In particular, Dr. Robrock ignored the data showing elevated
12 levels of sulfate in the Exposition Aquifer measured in wells located at the Vernon
13 Plant. Trial Tr. Day 1 at 176:1–2, 199:2–4. This is a critical omission, because sulfate
14 is strongly associated with Vernon Plant operations, and supports the finding that other
15 contaminants from the Vernon Plant like TCE were able to reach the Exposition
16 Aquifer through a plausible migration pathway. *Id.* at 111:9–113:4.

17 Moreover, unlike TCE, there are no other significant sources of sulfate in the
18 area, which further confirms that the high sulfate levels in the Exposition Aquifer
19 came from the Vernon Plant. During the cross-examination of Dr. Laton, Clarios'
20 counsel asked about a single spill in the 1950s of 50,000 pounds of sulfuric acid at an
21 off-site location. Trial Tr. Day 1 at 131:16-20. But this one-time release was a tiny
22 fraction of the sulfuric acid releases that occurred at the Plant. In the West Yard pit
23 alone, 10,000 gallons of sulfuric acid (or 95,000 pounds⁸) was dumped *every day*
24 during its operation. Dkt. 714-6 (Quivik Decl.) ¶ 65. An additional 4,000 gallons (or
25 38,000 pounds) of sulfuric acid was discharged to the ground every week in the North
26 Yard for several decades. *Id.* In 1990 alone, the Plant treated 60 *million* pounds of

27 _____
28 ⁸ PX_2-0072.10 (6.35 million gallons of sulfuric acid was 60.5 million
pounds, such that 1 gallon of acid was about 9.5 pounds).

[illegible]

DX_2-1564 at 189 (Fig. 7-35, DTSC1338127). The figure includes a dashed line around a large portion of the Vernon Plant to indicate the area of sulfate concentrations exceeding 1,000 ug/L (which is 4 times higher than the sulfate MCL). As this and other figures demonstrate (e.g., Dkt. 741-3 at 16), sulfate contamination is found at various locations throughout the Vernon Plant, because releases were the result of plant-wide operations with sulfuric acid, whereas TCE releases were primarily at or near the Mixed Metals Building. Trial Tr. Day 1 at 127:1–7.

Dr. Laton testified that sulfate moves more slowly through groundwater than VOCs like TCE. *Id.* at 112:25–113:4. Thus, if sulfate was able to migrate to the Exposition Aquifer in significant quantities, then TCE was as well. In this regard, sulfate acts as a tracer or fingerprint of Vernon Plant releases, and high detections of these same contaminants confirms that releases of TCE also moved vertically downward to the Exposition Aquifer. *Id.* at 79:25–80:3; 111:25–112:10.

In an effort to explain the elevated TCE concentrations in the Exposition Aquifer at the Vernon Plant well (MW-11D), counsel for Clarios suggested that a “slug” from the Univar facility could have caused the high TCE levels. *Id.* at 75:19–24. But the slug hypothesis is pure *ipse dixit* of an attorney, and Clarios’ expert, Dr. Robrock, expressly refused to adopt such a theory. *Id.* at 173:6–9. Dr. Laton explained why the sampling data contradicts the notion that a slug can explain the TCE elevations in the Vernon Plant well. *Id.* at 76:21–77:16; 116:9–118:17.

5. The Court’s Phase I Verdict Supports a Finding of Release Causation for the Exposition Aquifer.

During the Phase II trial, counsel for Clarios frequently alluded to the Court’s Phase I Verdict regarding release causation for the Exposition Aquifer. But the evidence presented at the Phase II trial regarding groundwater migration does not suffer from the same infirmities that the Court found regarding airborne emissions from the Vernon Plant.

In its Phase I Verdict, the Court observed that establishing plausible migration

1 in groundwater does not present the same evidentiary concerns that apply to airborne
2 releases and resulting soil contamination. Phase I Verdict at 17 (noting that, unlike
3 soil contamination, “even a trace amount of contaminants may propagate throughout
4 an entire body of water, like a well or an aquifer”); *see also id.* at 62 (“[In] [w]ater
5 contamination cases . . . the only question is whether the contaminants could have
6 traveled to the body of water.”). Clarios disregards the Court’s earlier pronouncement
7 regarding the difference between soil and water contamination and seeks to set a bar
8 for release causation that is much higher than what the Court established. Thus,
9 Clarios argues incorrectly that establishing *some* amount of contamination migrated
10 to the Exposition Aquifer is insufficient, and that Plaintiffs bear the additional burden
11 of establishing an unspecified minimum level of contamination. This argument runs
12 afoul of another important principle recognized by the Court, which is that CERCLA
13 “does not require any sort of minimum showing—nor even a showing of actual
14 contamination . . . —for a finding of liability.” *Id.* at 19. The rejection of a minimum
15 threshold is fully consistent with Ninth Circuit case law. *See A & W Smelter &*
16 *Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1110 (9th Cir. 1998) (rejecting arguments “to
17 read a minimum level requirement into the statute”).

18 Plaintiffs have proved release-causation for the Exposition Aquifer.

19 **C. The A/T Defendants Are “Covered Persons” as Arrangers or**
20 **Transporters.**

21 The A/T Defendants concede the core evidence that makes them liable under
22 CERCLA as “arrangers”: they arranged with a transporter to transport lead-bearing
23 hazardous substances to the Vernon Plant. Dkt. 729 at 2 (admitting “they sent lead-
24 bearing materials to the Vernon Plant”). Nor do the four Transporters—Clarios, Ekco,
25 KBI, and Quemetco—contest that they each transported such substances to the Plant.
26 Instead, the A/T Defendants argue that they lacked the requisite intent to be held liable,
27 because they intended to “recycle”—not dispose or treat—hazardous substances at the
28 Plant. This semantic argument fails because recycling is a form of “treatment” that

gives rise to CERCLA arranger liability. Also, the A/T Defendants argue that the materials they sent to the Vernon Plant were “useful products,” not “waste.” But any careful examination of the materials the A/T Defendants sent to the Plant reveals that they were useless. In any event, the A/T Defendants’ arguments under the intent-to-dispose-or-treat doctrine and useful products doctrine are irrelevant to the Transporters’ liability.

1. The Intent Requirement for Arranger Liability Is Satisfied.

a. The A/T Defendants Intended to Treat.

To be arrangers, the A/T Defendants must have “take[n] intentional steps to dispose of [or treat] a hazardous substance.” *See KFD Enters., Inc. v. City of Eureka*, No. C 08-4571 MMC, 2010 WL 4703887, at *6 (N.D. Cal. Nov. 12, 2010) (second alteration in original) (quoting *BNSF*, 556 U.S. at 611).

Plaintiffs have satisfied this element. All the A/T Defendants have admitted outright that they “intended [the] lead [they sent] to be recycled.” Dkt. 729 at 2. Ample record evidence corroborates that each A/T Defendant intended that the lead-bearing materials that they sent to the Vernon Plant would be run through its processes to extract pure lead and then make usable lead or lead alloys.⁹ Also, the A/T Defendants’

⁹ *Clarios*: Dkt. 729 at 10 (“All materials sent . . . to the Vernon Plant were sent with the purpose and intention that they be recycled and that the lead and plastic recovered from them be returned to Clarios’ predecessors[’] battery plants to use for making new batteries.”); Dkt. 715 (Wycklendt Decl.) ¶¶ 31–39 (similar); Dkt. 716 (Wussow Decl.) ¶¶ 31–36 (similar); Dkt. 713 (Lafond Decl.) ¶ 25 (“Recycling of cores and other lead-bearing materials was a critical part of JCBGI’s battery manufacturing process.”); *id.* ¶ 45 (“JCBGI sent lead-bearing materials to the Vernon Plant for the purpose of recycling. . . . Anything with lead in it that was sent to the Vernon Plant was sent with the intention to receive lead and plastic back”); Dkt. 712 (LeMieux Decl.) ¶ 19 (describing the importance of recycling to Clarios); *id.* ¶ 20 (admitting that Clarios’ predecessors entered agreements with the Plant’s operators); *id.* ¶ 33 (“Clarios’ predecessors sent batteries and lead-bearing scrap to recycling facilities with the purpose and intention that these materials would be recycled with the recovered lead being returned to make new batteries.”)

1 intent may be inferred circumstantially from what the Plant did to the materials it
2 received. *See United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1233 (6th Cir.
3 1996) (“Frequently, the most probative evidence of intent will be objective evidence
4 of what actually happened rather than evidence describing the subjective state of mind
5 of the actor. For normally the actor is presumed to have intended the natural
6 consequences of his deeds.” (quotations omitted)); *see also* Dkt. 727 at 22 & n.17.

7
8 Ekco: Dkt. 700 (Gelman Decl.) ¶ 18 (“Again, all material sent by Ekco Metals
9 to the Vernon Plant was . . . resold to the Vernon Plant with the intent that the
10 materials be recycled.”); *id.* ¶ 26 (“Ekco Metals understood and believed throughout
11 the years that the Vernon Plant . . . handled the recycling of whole lead-acid batteries
12”); Dkt. 701 (Cobb Decl.) ¶ 4 (Ekco received information from the Plant about
13 “the technology that was employed” there).

14 KBI: Dkt. 706 (Saldaña Decl.) ¶ 4 (testimony of former KBI employee that:
15 “The primary purpose of the Vernon Plant, whether it was owned by NL, Gould,
16 GNB, or Exide, was to recycle spent lead-acid automotive batteries and other lead
17 bearing scrap metal materials and to reclaim the lead through the recycling process.
18 The operators . . . would then sell the lead back to the companies that supplied the
19 batteries or lead bearing materials. The recycling process resulted in the continual
20 recovery of lead from spent automotive batteries and lead bearing scrap metal, and
21 the return of lead to the battery manufacturers”).

22 Oregon Tool: *See* Dkt. 697 (Von Lindern Decl.) ¶¶ 3, 23 (“[L]ead-bearing
23 materials sent by [Blount’s] Lewiston Plants to the Vernon Plant were sent with the
24 intention that the lead in those materials would be recycled”)

25 Quemetco: Dkt. 702 (Davis Decl.) ¶ 5 (Quemetco stayed informed about the
26 Vernon Plant’s processes); *id.* ¶ 15 (Quemetco sent batteries to the Vernon Plant “for
27 the purpose of recycling the useful lead within the batteries,” which “was the Vernon
28 Plant’s function”).

29 Ramcar: Dkt. 729 at 17 (Ramcar had an “intent to recycle”); Dkt. 711 (Crowe
30 Decl.) ¶¶ 5–7, 29 (Ramcar contracted with the Plant to send lead-bearing waste, then
31 receive pure lead or lead oxide back); Crowe Tr. at 22:6–11, 24:3–5 (Ramcar sent
32 materials to Exide under a tolling agreement, under which Ramcar bought lead from
33 Exide made using recycled materials); *id.* at 28:22–29:6 (the Plant was a smelter that
34 “would convert recyclable materials . . . into something that we could use for our
35 own process”); *id.* at 74:3–10 (Ramcar understood that lead dust sent to the Plant
36 would be converted into lead that Ramcar would buy).

37 Trojan: Dkt. 729 at 17 (describing the “clear intent by Trojan Batteries to
38 recycle spent batteries and spent lead.”); Dkt. 707 (Ganster Decl.) ¶ 21 (Trojan’s
“intent” was to send hazardous wastes to the Vernon Plant for recycling).

As explained in Plaintiffs’ Pre-Trial Brief, the Plant’s recycling process that created useful lead and lead alloys from the Plant’s feedstock (inputs) constituted “treatment” under CERCLA’s statutory definition. *See* Dkt. 727 at 19–20. The definition of “treatment” includes any way a hazardous waste can be altered to make it more reusable, more amenable for recovery, or less hazardous, dangerous, or voluminous: “any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, **amenable for recovery**, amenable for storage, or reduced in volume.” 42 U.S.C. § 6903(34) (emphasis added); *see id.* § 9601(29) (statutory cross-reference).

Because the A/T Defendants cannot escape the obvious conclusion that the Vernon Plant was in the very business of treating the hazardous wastes sent there,¹⁰ the A/T Defendants resort to a semantic argument. They maintain that because they intended for the *recycling* of lead-bearing materials at the Plant, they did not intend for the *treatment* thereof. *See* Dkt. 729 at 2–5. This argument is defective because recycling plainly *is* a form of CERCLA “treatment” that transforms waste to make it “amenable for recovery” of materials. *See* 42 U.S.C. §§ 6903(34). Indeed, “recycle” means “to pass . . . through a series of changes or *treatments*: as [] to process . . . in order to regain material for human use,” or to “*recover*.” *See Recycle*, Merriam-Webster’s Collegiate Dictionary (11th ed. 2020) (first emphasis added). Thus, by admitting that they intended to *recycle*, each A/T Defendant has admitted that they intended to *treat*.

This conclusion is reinforced by documentary evidence and witness testimony

¹⁰ *See, e.g., Catellus Dev. Corp. v. United States (Catellus)*, 34 F.3d 748, 752–53 (9th Cir. 1994) (lead recycling plant was engaged in treatment because it would make the lead in the batteries “amenable for recovery” and the waste “reduced in volume” (quoting 42 U.S.C. § 6903(34)). While the A/T Defendants are correct that this analysis was dicta, *see* Dkt. 729 at 5, the Ninth Circuit’s analysis based on CERCLA’s plain text is nonetheless highly persuasive.

1 corroborating that the Plant’s waste handling processes were designed to *recover*, or
2 recycle, lead from the materials sent there. For example, Evert Desart, a former Exide
3 senior director, stated “[a]bsolutely” that “the purpose of the Vernon Plant [was] to
4 recover lead.” Desart Tr. at 155:3–7; *see id.* at 24:3–10, 30:13–20, 62:19–21 (similar).

5 This conclusion is further reinforced by examining the actual processes that
6 were used at the Vernon Plant. The record shows that each key step of the Plant’s
7 operations fell squarely within the definition of “treatment.”

- 8 1. When it received lead-acid batteries, the Plant would break them apart so that
9 the lead-bearing metals, plastic, and acid could be separated.¹¹
- 10 2. In the Plant’s later decades, battery acid was neutralized instead of being
11 dumped onto the ground.¹²
- 12 3. Lead-bearing battery parts and other lead-bearing materials were smelted—
13 melted in furnaces to allow impurities to be separated from the lead.¹³
- 14 4. The resulting molten lead—the “good lead”—was further refined.¹⁴ In some
15 instances, the Vernon Plant then re-added some metals in conformance with
16 customer specifications, creating lead and lead alloys.¹⁵
- 17 5. The finished lead or lead alloys were allowed to cool and re-solidify, yielding
18 ingots that were sold for use in making new, useful products.¹⁶

19 These processes, whether taken individually or collectively, fall neatly within
20 CERCLA’s definition of “treatment.” They were a “method, technique, or process,

21 _____
22 ¹¹ Dkt. 706 (Saldaña Decl.) ¶ 13; Dkt. 707 (Ganster Decl.) ¶ 6; Dkt. 714-6
(Quivik Decl.) ¶¶ 61–75; *see* Dkt. 712 (LeMieux Decl.) ¶ 29.

23 ¹² Dkt. 714-6 (Quivik Decl.) ¶¶ 61–75; Desart Tr. at 33:2–21, 38:9–39:5,
24 39:15–40:4.

25 ¹³ Desart Tr. at 43:44–45:4, 51:4–9; Dkt. 706 (Saldaña Decl.) ¶ 15–18; Dkt.
26 707 (Ganster Decl.) ¶ 7–10; *see* Dkt. 712 (LeMieux Decl.) ¶ 30.

27 ¹⁴ Desart Tr. at 45:9–19, 46:2–47:10 (using the term “good lead”); Preuth Tr.
28 at 69:1–25; *see* Dkt. 706 (Saldaña Decl.) ¶¶ 15, 20.

¹⁵ Desart Tr. at 48:6–18; Preuth Tr. at 69:1–25.

¹⁶ Desart Tr. at 47:14–22; Dkt. 706 (Saldaña Decl.) ¶ 5; *see* Dkt. 712
(LeMieux Decl.) ¶ 30.

1 including *neutralization*.” *See* 42 U.S.C. § 6903(34) (emphasis added). They were
2 “designed to change the physical, chemical, or biological character or composition of”
3 “hazardous waste” that contained lead and sulfuric acid. *See* 42 U.S.C. § 6903(34). To
4 the extent many of the A/T Defendants sent spent lead-acid batteries to the Plant that
5 contained sulfuric acid, “such waste” was “neutralize[d].” *See id.* That process and
6 others at the Plant “render[ed] such waste . . . amenable for recovery” of lead. *See id.*¹⁷

7 **b. The A/T Defendants’ “Clarification” Argument**
8 **Based on SREA Is Unsupported.**

9 Because the Vernon Plant’s processes fall squarely within the statutory
10 definition of “treatment,” the A/T Defendants hardly address the definition. *See* Dkt.
11 729 at 4–6. Instead, the A/T Defendants insist that SREA provides for a “clarification”
12 “show[ing] that Congress never intended ‘treatment’ to include legitimate recycling
13 transactions.” *See id.* at 5–6. This argument fails because SREA was not a statutory
14 clarification. Moreover, regardless of whether SREA was a clarification, the statute
15 did not amend the definition of “treatment” that CERCLA incorporates by reference
16 or suggest any intent to amend that definition by implication. *See United States v.*
17 *Dahl*, 314 F.3d 976, 978 (9th Cir. 2002) (“Amendment . . . by implication may only
18 be found where legislative intent is clear and manifest.”). SREA created only an
19 affirmative defense from CERCLA liability that a defendant may attempt to prove.

20 Federal courts recognize that a statutory amendment may be either “a
21 clarification of existing law” or “a substantive change in law.” *See Beaver v. Tardasia*
22 *Hotels*, 816 F.3d 1170, 1187 (9th Cir. 2016).¹⁸ This distinction matters for

23 ¹⁷ *See* Desart Tr. at 161:7–162:1 (explaining that the Plant’s smelting and
24 refining process are what made the lead “amenable for recovery”); Smith Tr. at
25 58:4–14 (Oregon Tool 30(b)(6) witness, agreeing that a secondary lead smelter
changes the physical and chemical composition of a battery in order to recover lead
and other valuable components).

26 ¹⁸ The A/T Defendants argued that a clarification is not an amendment. *See*
27 Trial Tr. Day 3 at 59:12–14, 21–24. That is wrong. A clarification is a type of
28 amendment. *See Beaver*, 816 F.3d at 1186 (asking whether “an amendment merely
serves to clarify rather than change the substance of existing law”).

1 retroactivity purposes: if an amendment “merely serves to clarify,” courts should
2 simply apply it retroactively instead of performing the retroactivity analysis from
3 *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). *See Beaver*, 816 F.3d at 1186.

4 Even if Congress labels a statutory amendment as a clarification, courts are not
5 bound by that label. *Id.* at 1186–87; *see Beverly Cmty. Hosp. Ass’n v. Belshe*, 132 F.3d
6 1259, 1264–66 (9th Cir. 1997) (declining to afford conclusive effect to “labeling of
7 the new legislation as simply a ‘clarification’”); *United States v. Jordan*, 952 F.3d
8 160, 173 (4th Cir. 2020) (joining other courts of appeal in determining that a First Step
9 Act provision labeled as a “Clarification” was not a clarification).

10 Under these standards, SREA did not clarify CERCLA; SREA substantively
11 changed it in a specific way. SREA created an exemption to CERCLA liability and
12 burdened the A/T Defendants with proving every single required element. *See* 42
13 U.S.C. § 9627. SREA was not a mere clarification intended to correct a statutory
14 “ambigu[ity]” or “a dispute among the courts.” *See ABKCO Music, Inc. v. LaVere*,
15 217 F.3d 684, 691 (9th Cir. 2000). Rather, SREA created a novel framework that was
16 not reflected in CERCLA, and that no court could have foreseen by reading
17 CERCLA’s text as passed in 1980. *Cf. id.* at 690 (a clarification explains what a law
18 meant “all along”). Even more, the position that SREA merely clarified CERCLA is
19 irreconcilable with Section 127(i) of SREA, which includes a carve-out stating that
20 “[t]he exemptions provided in this section shall not affect . . . any pending judicial
21 action initiated by the United States prior to November 29, 1999.” *See* 42 U.S.C.
22 § 9627(i). If SREA were merely clarifying, it would have applied with full force to all
23 actions, even the ones described in Section 127(i).

24 The A/T Defendants have stressed that the subsection heading of SREA Section
25 127(a) labels the law as a “Liability Clarification.” *See* Trial Tr. Day 3 at 59:15–17.
26 But labels including “subsection headings” cannot alter the clear statutory text, *J.B. v.*
27 *United States*, 916 F.3d 1161, 1169–70 (9th Cir. 2019), which demonstrates that
28 SREA substantively changed the law. Or, the A/T Defendants may point to SREA’s

1 legislative history, which sometimes describes the statute as a “clarification.” *See* 145
2 Cong. Rec. S14986-03, S15048–49, 1999 WL 1050353. But legislative history and
3 other “extrinsic evidence,” *see J.B.*, 916 F.3d at 1167 (quotations omitted), also cannot
4 alter SREA’s plain text. In any event, SREA’s legislative history is equivocal because
5 it is replete with expressions of Congress’s intent to substantively fix problems that
6 an earlier Congress did not anticipate when it passed CERCLA nearly two decades
7 before SREA. *E.g.*, 145 Cong. Rec. at S15048, 1999 WL 1050353 (“[SREA] seeks to
8 *correct the unintended consequence of CERCLA . . .*”). Any references to
9 “clarification” are best interpreted as signaling Congress’s intent that SREA should
10 apply retroactively, an issue that Plaintiffs do not dispute for the purposes of this
11 litigation. *See United States v. Hunt*, 793 F. App’x 764, 767 (10th Cir. 2019)
12 (unpublished) (considering that a “‘clarification’ label” might “indicate Congress’s
13 intent regarding retroactivity”).

14 Even assuming SREA clarified CERCLA, SREA clarified only the overall
15 scope of CERCLA liability and left untouched the definition of “treatment.” SREA
16 did not address the definition of “treatment” or the intent to arrange for treatment—
17 issues on which *Plaintiffs* bear the burden of proof. Indeed, SREA’s elaborate
18 affirmative defense would be superfluous if a defendant could negate *prima facie*
19 CERCLA liability by asserting that recycling is not “treatment.”

20 Finally, the A/T Defendants ignore that even if they intended for the lead in the
21 materials they sent to the Vernon Plant to be recycled, they intended for the other
22 hazardous substances in those materials to be treated or disposed. For example, the
23 A/T Defendants knew that the acid in any batteries sent to the Plant would be disposed
24 or treated.¹⁹ *See United States v. Atlas Lederer Co.*, 85 F. Supp. 2d 828, 834 (S.D.
25 Ohio 2000) (“This process of extracting lead from spent batteries *and* discarding the
26 unwanted acid and casings has been characterized as . . . ‘disposal’ . . .” (emphasis

27 ¹⁹ *E.g.*, Trial Tr. Day 2 at 169:9–170:4 (testimony of Ramcar witness Clifford
28 Crowe, stating that he understood that acid in spent lead-acid batteries would not be
recovered, and would be disposed or treated).

added)) (citing *Catellus*, 34 F.3d at 753). The A/T Defendants overread SREA when they posit that it alters the *prima facie* elements of Plaintiffs’ cost-recovery claims, including the intent-to-dispose-or-treat requirement for arranger liability.²⁰

c. The A/T Defendants’ Other Arguments About Intent Change Nothing.

Nor do Defendants’ other arguments about intent have merit. First, the A/T Defendants point to *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682 (7th Cir. 2014). There, the court found that a paper mill that sold “undersized” paper rolls, paper waste, and paper scraps that contained hazardous substances to other mills did not intentionally arrange for disposal. *See id.* at 688, 703–05. The Seventh Circuit accepted the district courts’ factual “finding[s]” that the manufacturer had “no particular knowledge of [the paper’s] fate,” and “was at most indifferent to the final destination of the [hazardous substances carried in the paper].” *Id.* at 706. Those are not the circumstances here, where each A/T Defendant admittedly “intended the lead [they sent to the Vernon Plant] to be recycled.” *See* Dkt. 729 at 2.

Second, the A/T Defendants rely on *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769 (4th Cir. 1998). There, the court undertook a “fact-specific inquiry” to hold that railroads that sent used wheel bearings containing hazardous substances to a parts manufacturer and received a credit to buy new wheel bearings made at the same facility did not intend to arrange for treatment. *Id.* at 772–73, 775 (quotations omitted). *Pneumo Abex* is easily distinguishable. *See Atlas Lederer Co.*, 85 F. Supp. 2d. at 836 (distinguishing *Pneumo Abex* under similar circumstances).

In *Pneumo Abex*, there was no factual contention that the railroads even knew about the manufacturing facility’s processes. *See generally* 142 F.3d 769. Rather, from the railroads’ perspective, they sent used bearings to the facility, they intended that

²⁰ The A/T Defendants have also suggested that the partisan affiliations of the Congress that passed SREA and the President who signed the law should matter. *See* Trial Tr. Day 1 at 56:8–15. They do not.

1 the used bearings would be “reused in their entirety,” and they received a credit to buy
2 the exact same product—“new wheel bearings”—made at the facility. *Id.* at 775 (“The
3 intent of both parties to the transaction was that the wheel bearings would be reused
4 in their entirety in the creation of new wheel bearings.”). By contrast, here, the A/T
5 Defendants intended that the materials they sent to the Vernon Plant—spent batteries
6 and other lead-bearing waste—would be put through smelting and other treatment
7 “process[es]” “designed to change the[ir] physical [and] chemical . . . character or
8 composition” and “recover[]” a different end product—pure lead and lead alloy
9 ingots. *See* 42 U.S.C. § 6903(34). The A/T Defendants knew that the lead-bearing
10 materials they sent would not be “reused in their entirety”—for example, battery acid
11 would be neutralized or dumped, and non-lead constituents were not fully reused.
12 *Compare Atlas Lederer Co.*, 85 F. Supp. 2d at 836. *Pneumo Abex* is unlike the facts
13 here.²¹

14 Third, Ekco and KBI have suggested that because they were scrap metal
15 dealers, the Court should hold that they did not intend to treat the lead-bearing waste
16 they sent to the Plant. Their position clashes with their admission to the Court that
17 they “intended the lead [they sent to the Vernon Plant] to be recycled.” *See* Dkt. 729
18 at 2. In any event, an arranger’s intent to treat or dispose need only be one of multiple
19 motives behind their conduct. *See* Dkt. 727 at 22 n.18 (collecting decisions by courts
20 of appeal); *accord Emhart Indus. Inc. v New England Container Co. Inc.*, No. C.A.

21 ²¹ In a similar vein, the A/T Defendants rely on *United States v. Wedzeb*
22 *Enterprises*, 844 F. Supp. 1328 (S.D. Ind. 1994). Dkt. 729 at 2. That case is even
23 further afield. There, the court rejected the United States’ attempt to hold two
24 companies liable as CERCLA arrangers for selling new, unused, “functional, not
25 broken or leaking” electrical capacitors that contained hazardous substances to
26 Wedzeb, a “brokerage for surplus electrical components.” *Id.* at 1331–35. Wedzeb
27 would advertise these capacitors for sale “in industry periodicals,” and “distributed
28 catalogs of components . . . including numerous ratings of capacitors” to tens of
thousands of customers. *Id.* at 1331. *Wedzeb* does not resemble the facts here, where
the A/T Defendants sent used, non-functional waste to the Vernon Plant for
smelting, and the materials would not be used for their originally intended purpose
(to the extent the materials had any useful intended purpose in the first place).

06-218 WES, 2022 WL 15437874, at *3 (D.R.I. 2022) (“[D]isposal need not be the only purpose of the transaction; instead, it may be one among several.”). Even if Ekco and KBI had a profit motive, they nonetheless intended to arrange for treatment.

d. The A/T Defendants Also Intended to Dispose of Hazardous Substances.

In the event the Court is persuaded by the A/T Defendants’ unsupported theory that recycling is not *treatment*, the A/T Defendants nonetheless intended to *dispose* of hazardous substances. As Plaintiffs’ Pre-Trial Brief explained, “disposal” has been “liberally” construed, *see Voggenthaler*, 724 F.3d at 1064, to include “disposal inside a building,” including disposals into or onto “fixtures,” *see United States v. Fleet Factors Corp.*, 821 F. Supp. 707, 722 (S.D. Ga. 1993) (canvassing the case law); *accord Premium Plastics v. LaSalle Nat’l Bank*, 904 F. Supp. 809, 813–14 (N.D. Ill. 1995) (collecting “ample authority” along these lines). Even putting hazardous substances on the “floor” of a building constitutes disposal. *Voggenthaler*, 724 F.3d at 1064 (relying on, *inter alia*, *Amland Props. Corp. v. Aluminum Co. of Am.*, 711 F. Supp. 784, 791 (D.N.J. 1989) (“[P]lacement of hazardous wastes inside an enclosed manufacturing facility may constitute disposal of such waste into or on any land so as to satisfy the CERCLA definition.”)). As explained, each A/T Defendant acknowledges that they sent lead-bearing materials to the Plant with the intent to recycle them, which necessarily entailed the intent to place the materials in or on the Plant’s fixtures and buildings.²²

²² To the extent the A/T Defendants’ Pre-Trial Brief disavows intent to dispose, their disavowal is meritless because they wholly ignore the statutory definition of “disposal.” *See* Dkt. 729 at 2–3. This causes them to make numerous analytical errors, such as conflating the distinct statutory terms “release” and “disposal.” *See id.* (impertinently arguing that “evidence . . . that Defendants were aware of lead released to the environment . . . is insufficient to establish arranger liability,” then proceeding to cite cases about knowledge of disposal).

1 **2. The Materials that the A/T Defendants Sent to the**
2 **Vernon Plant Were Not Useful Products.**

3 As Plaintiffs explained in their Pre-Trial Brief, the A/T Defendants attempt to
4 escape arranger liability by insisting that the materials they sent to the Vernon Plant
5 were useful products, not waste. *See* Dkt. 727 at 18, 23–26. The useful products
6 doctrine is a “proxy” for, or corollary to, the intent requirement for arranger liability.
7 *See Team Enters., LLC v. W. Inv. Real Estate Tr.*, 647 F.3d 901, 908 (9th Cir. 2011).

8 In making this argument, the A/T Defendants conveniently omit what types of
9 lead-bearing materials they sent to the Vernon Plant. *See* Dkt. 729 at 2 (describing
10 them as a “useful, valuable product, such as lead”). They also do not confront the
11 controlling Ninth Circuit case law categorically “holding” that “lead components from
12 spent batteries” and “spent batteries would [] be defined as waste,” *see Catellus*, 34
13 F.3d at 752, and do not consider the factors that the U.S. Supreme Court and Ninth
14 Circuit have identified to distinguish between waste and useful products, Dkt. 727 at
15 24–25 (Plaintiffs’ Pre-Trial Brief, identifying these cases and factors). The A/T
16 Defendants bypass these issues because each of them sent materials to the Plant that
17 cannot—under the case law and simple common sense—plausibly be categorized as
18 “useful products.” They were materials at the ends of their useful lives, or materials
19 that were never useful in the first place, whose only remaining purpose was to be
20 broken up and smelted. *See Cal. Dep’t of Toxic Substances Control v. Interstate Non-*
21 *Ferrous Corp.*, 298 F. Supp. 2d 930, 963 (E.D. Cal. 2003) (“[I]f a product has no value
22 for the purpose for which it was manufactured and it contains a hazardous substance,
23 then it is more likely the sale is an ‘arrangement’ to dispose of the substance” and not
24 “the sale of a useful product.” (quotations omitted)).

25 For example, the A/T Defendants sent materials to the Vernon Plant that they
26 themselves deemed as waste, or that constitute waste as a matter of common sense:

- 27 • Clarios sent materials to the Vernon Plant that it called “leaded trash,” PX_2-
28 0002.77–82, as well as a wide range of other “scrap” such as “floor sweeps”

1 and “wastewater treatment sludge.” *See* Dkt. 712 (LeMieux Decl.) ¶ 23.

- 2 • Trojan sent a dizzying array of useless materials. Examples include “wood
3 with acid,”²³ “sump mud,”²⁴ “trash,”²⁵ “bag house filters,”²⁶ “remelt lead
4 scrap,”²⁷ “used belts,”²⁸ “trash sump,”²⁹ “lead dust,”³⁰ “floor sweeping,”³¹ and
5 “used floor sweepings.”³²
- 6 • Ramcar sent a wide array of lead-bearing “scrap” materials to the Plant such as
7 “lead oxide dust,” “lead mud,” “defect[ive]” “lead plates,” and spent lead-acid
8 batteries to the Vernon Plant. *See* Dkt. 711 (Crowe Decl.) ¶¶ 9, 15; *see also*
9 Crowe Tr. at 24:2–15, 24:18–23, 25:3–10 (testimony about an agreement
10 between Ramcar and the Vernon Plant’s operator that is available as PX_2-
11 0192, which indicated that the batteries were spent or used).
- 12 • Oregon Tool sent spent air filters to the Vernon Plant. *See* Dkt. 697 (Von
13 Lindern Decl.) ¶¶ 25–30.
- 14 • KBI sent battery plates extracted from spent batteries, “scrap lead,” and “filters
15 contaminated with lead.” *See* Dkt. 693 (Johnson Decl.) ¶ 8; *infra* n.73
16 (compiling evidence of KBI’s battery breaking).
- 17 • Ekco sent lead-acid batteries to the Plant that it labeled as “waste battery,” as
18 well as lead plates extracted from spent batteries. *See* PX_2-0003.3–20
19 (exemplary hazardous waste manifests); Dkt. 700 (Gelman Decl.) ¶ 18; *infra*
20 n.73 (compiling evidence of Ekco’s battery plate shipments).

21 ²³ PX_2-0206.5.

22 ²⁴ PX_2-0007.389–390; PX_2-0206.5; PX_2-0207.3; DX_2-2500_0180.0003;
23 DX_2-2500_0183.0003.

24 ²⁵ PX_2-0007.393–394; *see* DX_2-2500_0130.0002 (“Lead Bearing Trash”).

25 ²⁶ PX_2-0007.431; PX_2-0007.809.

26 ²⁷ PX_2-0206.2; *see* DX_2-2500_0180.0003 (“Remelt Lead”).

27 ²⁸ PX_2-0207.3; DX_2-2500_0180.0003.

28 ²⁹ DX_2-2500_0130.0002.

³⁰ DX_2-2500_0130.0002–0003.

³¹ DX_2-2500_0125.0002.

³² PX_2-0206.5.

- 1 • Quemetco sent “waste batteries,” which its corporate representative described
2 as “batteries that are not going to be used for their original purpose.” *See* Davis
3 Tr. at 43:21–45:4; *see also* PX_2-0005 (hazardous waste manifests).

4 Instead of explaining why each of these materials (and the other materials they
5 sent) were useful, the A/T Defendants make two facile arguments. First, they assert
6 that because “lead-bearing materials sent by Defendants” to the Vernon Plant were
7 “bought” and wanted by the Plant’s operators, they were necessarily useful products.
8 *See* Dkt. 729 at 4–5. But controlling precedent makes clear that a material may be
9 considered a waste even if it has some residual market value as a feedstock for a
10 disposal or treatment process. For example, in *Louisiana-Pacific Corp. v. ASARCO*
11 *Inc.*, 24 F.3d 1565, 1574 (9th Cir. 1994), the Ninth Circuit held that a material “can”
12 simultaneously be “a product with intrinsic value in trade or commerce,” and a
13 hazardous waste under CERCLA that is “dispos[ed].” Similarly, in *Catellus*, 34 F.3d
14 at 752, the Ninth Circuit adopted the “holding” that spent lead-acid batteries *sold* to a
15 lead recycling facility would “clearly be defined as waste.” Here, the A/T Defendants’
16 waste had residual value only to the extent that useful products could be recovered
17 from it through treatment, not because the waste was a useful product in and of itself.³³

18 Second, the A/T Defendants imply that a material that is recycled is *per se* not
19 a waste, but rather is a useful product. *E.g.*, Dkt. 729 at 12 (KBI’s argument that
20 “[r]ecyclable materials are . . . not waste . . . by definition”). Controlling precedent
21 forecloses this argument. To reiterate: In *Catellus*, 34 F.3d at 752, the Ninth Circuit
22 held that spent lead-acid batteries sold to a lead recycling facility would “clearly be
23 defined as waste.” Likewise, in *Cadillac Fairview/California, Inc. v. United States*,
24 41 F.3d 562, 563–66 (9th Cir. 1994) (*per curiam*), the Ninth Circuit unequivocally

25 ³³ In any event, testimony submitted by the A/T Defendants shows that the
26 Plant’s operators did not purchase all the materials that the A/T Defendants sent to
27 it. For example, an Oregon Tool witness testified that the company had to pay the
28 Vernon Plant a “recycling charge” to accept spent air filters. *See* Dkt. 697 (Von
Lindern Decl.) ¶ 29. Quemetco has likewise submitted no evidence that the Plant
purchased or otherwise paid for the batteries that Quemetco sent there.

1 held that contaminated styrene that was recycled using a redistillation process could
2 qualify as waste. *See* Dkt. 727 at 25–26 (explaining this decision). There is no bright-
3 line rule that a recyclable material is not waste. Moreover, the A/T Defendants have
4 not shown that all the materials they sent to the Plant were recyclable. For example,
5 lead-acid batteries sent to the Plant contained sulfuric acid. This acid was undisputedly
6 not recycled; it was instead dumped or neutralized—and thus disposed or treated. The
7 A/T Defendants have not introduced any evidence suggesting that the Plant ever
8 recycled the acid inside the batteries, as opposed to the lead.

9 As explained, SREA’s recycling exemption does not alter this analysis. SREA
10 established only a limited affirmative defense to CERCLA liability. *See* 42 U.S.C.
11 § 9627. If Congress had intended to provide that recyclable materials could not give
12 rise to *prima facie* arranger liability, Congress could have said so. Instead, Congress
13 chose to establish a multi-criteria exemption that puts the burden on a defendant.

14 As Plaintiffs noted in their Pre-Trial Brief, “[a]ll the materials shipped to the
15 Vernon Plant were used, spent materials that were at the ends of their useful lives (or
16 were never useful in the first place), could not be used in their existing states, and had
17 to be gotten rid of.” *See* Dkt. 727 at 25. The A/T Defendants’ attempt to recharacterize
18 these materials as useful products fails.

19 **3. Neither the Intent-to-Dispose-or-Treat Doctrine Nor the**
20 **Useful Products Doctrine Limits Transporter Liability.**

21 The A/T Defendants’ Pre-Trial Brief scarcely mentions transporter liability. *See*
22 Dkt. 729 at 2 n.1. Instead, Clarios, Ekco, KBI, and Quemetco—the four
23 Transporters—hypothesize that transporter liability is co-extensive with arranger
24 liability. *See* Trial Tr. Day 1 at 39:10–12 (conclusorily asserting that transporter and
25 arranger liability rise and fall together); *cf.* Dkt. 729 at 2 n.1 (similarly making a
26 conclusory argument in pre-trial briefing).

27 The Transporters are wrong. As Plaintiffs explained, courts have not required a
28 CERCLA plaintiff to prove that a transporter had the “intent to treat or dispose.” *See*

1 Dkt. 727 at 24 n.19. That difference stems from a textual difference between the
2 arranger liability paragraph at Section 107(a)(3), and the transporter liability
3 paragraph at Section 107(a)(4). An arranger must “arrange[] for disposal or
4 treatment.” 42 U.S.C. § 9607(a)(3). By contrast, a transporter must “accep[t] any
5 hazardous substances for transport to disposal or treatment facilities.” *Id.* § 9607(a)(4).
6 The intent-to-dispose-or-treat doctrine stems from statutory “plain language” specific
7 to arranger liability. *See BNSF*, 556 U.S. at 611. Because “[i]n common parlance, the
8 word ‘arrange’ implies action directed to a specific purpose,” the U.S. Supreme Court
9 in *BNSF* held that a person must “take[] intentional[] steps to dispose of a hazardous
10 substance” to be deemed as an arranger. *See id.* The Court did not state or imply that
11 this logic applies to transporters. Consonantly, no court has required a CERCLA
12 transporter to have intended to treat or dispose of hazardous substances.

13 Because the intent-to-dispose-or-treat doctrine does not apply to transporters,
14 its corollary, the useful products doctrine, also does not apply. The Ninth Circuit has
15 explained that the “useful product doctrine” has been “recognized” “[i]n light of,” and
16 “serves as a convenient proxy for[,] the intent [doctrine].” *See Team Enters., LLC*, 647
17 F.3d at 908. The “presumption animating the doctrine” is that a person cannot
18 intentionally arrange for the disposal or treatment of a hazardous substance if it was a
19 useful product and not waste. *See id.* at 908–09. This logic is inapplicable to
20 transporter liability, which does not involve an intent requirement and requires only
21 that the transporter “accepted any hazardous substances for transport to disposal or
22 treatment facilities,” not that the substances were actually disposed or treated. *See* 42
23 U.S.C. § 9607(a)(4). And the Transporters have not disputed that they accepted
24 hazardous substances for transport to the Plant, or that the Plant was a disposal or
25 treatment facility.

26 The Transporters may resist the consequences of CERCLA’s plain text by
27 protesting that it would be strange for arrangers, but not transporters, to benefit from
28 the intent-to-dispose-or-treat doctrine and the useful product doctrine. Not so. Because

arrangers are one step removed from the actual delivery of hazardous waste to a facility, Congress may have found it necessary to give them greater statutory protections than transporters. *Cf. BNSF*, 556 U.S. at 610 (describing the concern that an arranger should not be held liable based on a disposal “unbeknownst” to them).

Or, as they did in their Pre-Trial Brief, the Transporters may try to elide the distinction between arranger and transporter liability by misquoting CERCLA. The Transporters claimed that transporter liability “includes a requirement that materials be transported for ‘disposal or treatment.’” *See* Dkt. 729 at 2 n.1. But that is not what the statute says. *See* 42 U.S.C. § 9607(a)(4).

The Transporters cannot invoke the intent-to-dispose-or-treat doctrine or useful product doctrine. Clarios, Ekco, KBI, and Quemetco are liable as transporters.

IV. Defendants’ Affirmative Defenses Do Not Help Them.

A. SREA’s Affirmative Defense Does Not Help the A/T Defendants.

The A/T Defendants have not proved the necessary elements of their SREA affirmative defense, which requires each A/T Defendant to show that all of their shipments to the Vernon Plant that may give rise to liability meet many criteria.

The A/T Defendants misconstrue SREA from the outset when they argue that SREA, which expressly does not apply to state laws, *see* 42 U.S.C. § 9627(k), may limit their HSAA liability, *see* Trial Tr. Day 3 at 61:1–8. Then, the A/T Defendants attempt to distract from SREA’s elements by painting the statute with a broad brush. They insist that Congress intended to protect *all* recycling by passing SREA and posit that they fall within SREA’s exemption as long as they were engaged in “legitimate” or “real,” and not “sham,” recycling. *See* Dkt. 729 at 7–18. This argument lacks merit because SREA’s plain text and legislative history show that Congress intended to protect only *some* recycling transactions. In fact, the preamble to the RCRA regulation that codifies the concepts of “sham” and “legitimate” recycling expressly noted that the concepts are inapplicable to CERCLA and SREA.

1 Instead of accepting the A/T Defendants’ impressionistic rendition of SREA,
2 the Court should examine whether the A/T Defendants have proved each of SREA’s
3 required elements. The record shows that each A/T Defendant has failed to satisfy
4 multiple elements.

5 **1. SREA Does Not Limit the A/T Defendants’ HSAA**
6 **Liability.**

7 It is important to establish at the outset that SREA does not limit the A/T
8 Defendants’ HSAA liability. The HSAA nowhere incorporates SREA, which is
9 codified at 42 U.S.C. § 9627. *See* Cal. Health & Safety Code § 25300, *et seq.* Instead,
10 the HSAA’s relevant liability provision, Section 25323.5, incorporates only the
11 definitions of “‘responsible’ party’ or ‘liable person’ . . . described in Section 107(a)
12 of the federal act (42 U.S.C. Sec. 9607(a)),” as well as those “defenses specified in
13 Sections 101(35) and 107(b) of the federal act (42 U.S.C. Secs. 9601(35) and
14 9607(b)).” Cal. Health & Safety Code § 25323.5(a)(1), (b). Nor could the California
15 Legislature have incorporated SREA by implication when passing the HSAA, because
16 the HSAA predated SREA by nearly two decades.³⁴

17 Nor did Congress—powerless as it is to rewrite state laws—intend to amend
18 state Superfund laws like the HSAA when passing SREA. Section 127(k) of SREA
19 expressly provides, “(k) Relationship to liability under other laws[:] Nothing in this
20 section shall affect—(1) liability under any other Federal, State, or local statute”
21 *See* 42 U.S.C. § 9627(k). Courts have taken this language at face value: the Fifth
22 Circuit held that “[w]e conclude this language that the SREA . . . does not affect
23 liability under a state law like [Texas’s state Superfund law].” *Del-Ray Battery Co. v.*
24 *Douglas Battery Co.*, 635 F.3d 725, 732 (5th Cir. 2011).

25 As Plaintiffs explained in their Pre-Trial Brief, at least eight states with state
26 Superfund laws have passed state SREA equivalents. *See* Dkt. 727 at 35 n.26. These
27 equivalents would be unnecessary if SREA affected liability under state Superfund

28 ³⁴ *See* Dkt. 727 at 34–35 n.24 (detailing this history).

1 laws. For example, South Carolina’s state Superfund law goes much further than the
2 HSAA in relying on CERCLA’s provisions: instead of importing specific CERCLA
3 provisions into state law like the HSAA does, South Carolina’s law imports CERCLA
4 into state law in its entirety. *See* S.C. Code Ann. § 44-56-200(B) (2022). Even in that
5 circumstance, the South Carolina General Assembly needed to amend the statute to
6 expressly incorporate SREA. *See id.* § 44-56-200(C)(2). The California Legislature
7 would have to do the same for the HSAA to incorporate SREA into state law.

8 **2. The Court Should Reject the A/T Defendants’ Attempts**
9 **to Distract from SREA’s Elements.**

10 The A/T Defendants have suggested that any recycling transaction
11 automatically qualifies for SREA because Congress intended SREA to protect all
12 recycling activities from CERCLA liability. *E.g.*, Dkt. 729 at 6–7.

13 This oversimplification rests on a revisionist retelling of SREA’s history,
14 which—in reality—is not so favorable to the A/T Defendants. In the legislative history
15 proffered by the law’s co-sponsors (Senators Trent Lott and Tom Daschle), SREA
16 was described as a statute that *disapproved* of some recycling transactions: the statute
17 “buil[t] a test to determine what are recycling transaction[s] that should be encouraged
18 under the legislation.” *See* 145 Cong. Rec. at S15049, 1999 WL 1050353. SREA
19 “defines those recycling transactions for which there is no liability by providing that
20 only those persons who can demonstrate that they ‘arranged for the recycling of
21 recyclable material’ as defined by the criteria in sections 127(c) through (e) are not
22 liable under [CERCLA’s arranger and transporter liability provisions].” *Id.* at
23 S15048.³⁵ Plainly, SREA does not indiscriminately grant an affirmative defense to
24 every arranger or transporter that sent waste for recycling.³⁶ Instead, SREA sets forth

25 ³⁵ In any event, the A/T Defendants’ resort to legislative history is misplaced
26 because “legislative history is not the law.” *Azar v. Allina Health Servs.*, 139 S. Ct.
27 1804, 1814 (2019). At most, it is useful to clarify “ambiguous text.” *Id.* (quotations
omitted).

28 ³⁶ The A/T Defendants emphasize a Senator’s floor statement claiming that

1 specific statutory criteria that the A/T Defendants must meet.

2 In their closing arguments, the A/T Defendants tried a slightly different tack:
3 they proposed that a regulatory distinction between “sham” and “legitimate” recycling
4 that the U.S. Environmental Protection Agency (“EPA”) developed in the context of
5 the Resource Conservation and Recovery Act (“RCRA”) should be applied to
6 CERCLA and SREA. *See* Trial Tr. Day 3 at 68:25–69:24. However, the preamble to
7 the EPA’s regulation codifying this legitimate/sham recycling dichotomy, 40 C.F.R.
8 § 260.43, clearly states that the “rule does not change the universe of recycling
9 activities that could be exempted from CERCLA liability pursuant to [SREA],” *see*
10 *Revisions to the Definition of Solid Waste*, 73 Fed. Reg. 64,668, 64,718 (Oct. 30,
11 2008).³⁷ As the Second Circuit put it in an analogous context, the A/T Defendants’
12 attempt to blindly export RCRA concepts to the CERCLA context would “frustrate
13 [CERCLA’s] broad remedial purposes as well as unjustifiably expand the scope of the
14 Resource Conservation and Recovery Act’s regulations.” *See B.F. Goodrich Co. v.*
15 *Murtha*, 958 F.2d 1192, 1201–02 (2d Cir. 1992) (a RCRA amendment and regulation
16 exempting household waste from hazardous waste regulation did not apply to
17 CERCLA). Indeed, courts have consistently rejected invitations to treat CERCLA and
18 RCRA as co-extensive.³⁸

19 SREA would eliminate “virtually all lawsuits that deal with recycling transactions.”
20 Dkt. 729 at 7 (quoting 145 Cong. Rec. at S15028, 1999 WL 1050353 (Sen. Blanche
21 Lincoln)). This puffery is immaterial because “floor statements by individual
22 legislators rank among the least illuminating forms of legislative history.” *NLRB v.*
SW Gen., Inc., 580 U.S. 288, 307 (2017).

23 ³⁷ *Accord Am. Petroleum Inst. v. EPA*, 862 F.3d 50, 57 (D.C. Cir. 2017)
24 (“[The rule] requires that all recycling of hazardous secondary materials meet a
25 legitimacy test set forth in 40 C.F.R. § 260.43(a) or else be labeled ‘sham’ and
subjected to full RCRA regulation.” (emphasis added)).

26 ³⁸ *See Murtha*, 958 F.2d at 1201–02; *United States v. Alcan Aluminum Corp.*,
27 964 F.2d 252, 261 n.13, 263 n.19 (3d Cir. 1992) (rejecting the application of a
28 threshold concentration requirement for hazardous waste under RCRA in the
CERCLA context, because “RCRA’s goals differ from those of CERCLA”);
Interstate Non-Ferrous Corp., 298 F. Supp. 2d at 975 (SREA’s recycling exemption

1 Finally, contrary to the A/T Defendants' exaggeration that "every recycling law
2 and rule [including SREA] has guard rules to try to distinguish legitimate recycling
3 from sham recycling," *see* Trial Tr. Day 3 at 69:21–22, no court has applied the
4 legitimate/sham recycling dichotomy to CERCLA and SREA. Instead, courts have
5 followed SREA's plain text, assessing whether an arranger or transporter has proved
6 each element of their defense.

7 **3. None of the A/T Defendants Has Proved SREA's**
8 **Required Elements for All of Their Shipments.**

9 SREA provides that shipments of certain types of recyclable materials to
10 disposal or treatment facilities cannot be a basis for CERCLA liability. *See* 42 U.S.C.
11 § 9627(a)(1). Therefore, to completely avoid CERCLA liability under SREA, each
12 A/T Defendant must show that *all* of their shipments to the Vernon Plant that may
13 give rise to CERCLA liability qualify for SREA's liability protections. *See Evansville*
14 *Greenway & Remediation Tr. v. S. Ind. Gas & Elec. Co., Inc. (Evansville Greenway)*,
15 No. 3:07-CV-66-SEB-WGH, 2011 WL 13237784, at *4 (S.D. Ind. Feb. 25, 2011)
16 (describing a defendant's burden as one to show that "it sold *only* scrap metal
17 qualifying" under SREA (emphasis added)).

18 To show that a shipment is SREA-qualifying, an A/T Defendant must satisfy
19 many statutory requirements. First, the Defendant must demonstrate that all the
20 materials they sent to the Vernon Plant fall within one of three categories of
21 "recyclable material," the first of which is irrelevant here: (1) "scrap paper, plastic,
22 glass, textiles, or rubber," 42 U.S.C. § 9627(c); (2) "scrap metal," *id.* § 9627(d); and
23 (3) "spent batteries" including spent lead-acid batteries, *id.* § 9627(e). Second, the
24 Defendant must show that their shipments of materials met "all the [statutory]
25 criteria." *See Evansville Greenway*, 2011 WL 13237784, at *4, *5. No A/T Defendant
26 has met this burden.

27
28 did not apply to a RCRA claim).

a. Shipments with Unidentified Lead Materials

A prerequisite to proving that a hazardous waste shipment qualifies for SREA protection is to demonstrate what it contained. Because Clarios, Ekco, KBI, and Trojan made shipments of unidentified and unidentifiable lead-bearing waste to the Vernon Plant, they axiomatically cannot satisfy SREA's requirements.

Uniform hazardous waste manifests prepared by Clarios, KBI, and Trojan in the ordinary course of business³⁹ show that they sent many shipments of lead-bearing hazardous waste to the Vernon Plant, but did not indicate on manifests what exactly those shipments contained.⁴⁰ These A/T Defendants have not provided sufficient evidence proving the nature of the materials in each of these shipments.

For example, during trial, the Court heard cross-examination testimony by Clarios witness Jeramy LeMieux, who was unable to identify what types of lead-bearing materials were contained in a shipment that was documented in a hazardous waste manifest. *See* Trial Tr. Day 2 at 64:7–25 (questioning about PX_2-0132). That

³⁹ Plaintiffs have introduced many uniform hazardous waste manifest forms into evidence. These forms are prepared in the first instance by the generator of hazardous waste. *See* 40 C.F.R. §§ 262.20(a)(1), 262.20(b)–(c), 262.23(a). A generator is the person that “produce[d] [the] hazardous waste” or took actions “caus[ing] a hazardous waste to become subject to regulation.” *Id.* § 260.10.

When a transporter accepts waste from its generator for transportation, the generator must obtain the transporter's signature on the manifest. *Id.* § 262.23(a)(2). Finally, when the transporter delivers the waste to a designated facility (here, the Vernon Plant), the transporter must obtain their signature on the manifest. *Id.* § 263.20(d)(1). The generator fills out the top portions of manifests from Boxes 1 to 16; the transporter fills out Boxes 17 and 18; and the designated facility fills out Boxes 19 and 20. *See* Davis Tr. at 26:7–27:5; 69:19–70:16, 70:23–71:15; *see also* DX_2-4352 (guidance document about how to fill out a manifest).

Most of the manifests in evidence contain the code “D008” in either Box 11 or Section I (“Waste Number”). “D008” is an EPA waste code indicating that the shipment contained lead. *See* 40 C.F.R. § 261.24 & tbl.1; *see also* Dkt. 714-4 (Mason Decl.) ¶ 12 (testimony by a DTSC representative).

⁴⁰ *E.g.*, PX_2-0002.2, 4–8, 61–76; PX_2-0132 (exemplary manifests by Clarios' predecessor); PX_2-0004.956–57, 960, 965–66 (exemplary manifests by KBI); PX_2-0007.1–10 (exemplary manifests by Trojan).

1 principle applies equally to KBI and Trojan, who have not identified what was inside
2 each of their documented shipments of lead-bearing hazardous waste to the Plant.

3 Also, documentary evidence other than manifests shows that Clarios, Ekco and
4 Trojan started shipping lead-bearing hazardous waste to the Plant long before
5 manifests started to be required in the 1980s. Clarios, Ekco, and Trojan have not
6 provided evidence establishing exactly what these pre-manifest shipments contained.
7 For example, a 1973 agreement between Clarios' predecessor Globe-Union and NL
8 stated that Globe-Union would send unidentified lead-bearing "plant scrap" to the
9 Plant. *See* PX_2-0115.3. Clarios has not identified with any precision what this plant
10 scrap would have contained. *See* LeMieux Tr. at 18:18–22, 105:1–18 (testimony of
11 Clarios' 30(b)(6) witness, providing only a vague description); *see also* Dkt. 715
12 (Wycklendt Decl.) ¶ 34 (testimony of former Clarios employee who lacked first-hand
13 knowledge about Globe-Union, giving only a non-exclusive list of what "plant scrap"
14 "might" have "included").

15 Similarly, 1978 invoices issued by NL to Ekco indicate that Ekco sent materials
16 to the Plant long before the advent of manifests. *See* PX_2-0100. Ekco has not
17 provided evidence sufficient to determine what it sent to the Vernon Plant during that
18 era. Finally, a 1978 letter from NL to Trojan reflects that the two Defendants reached
19 an agreement whereby Trojan sent "scrap batteries and plant scrap" to the Vernon
20 Plant. *See* PX_2-0052.1–2; *see also* Ganster Tr. at 56:20–60:4 (testimony of Trojan's
21 30(b)(6) witness about this letter). Trojan has not provided any detailed description of
22 what this plant scrap contained. *Cf.* Ganster Tr. at 60:6–14 (testimony of Trojan's Rule
23 30(b)(6) witness, providing only a vague description).

24 Because Clarios, Ekco, KBI, and Trojan cannot prove what was inside their
25 shipments to the Vernon Plant, they axiomatically cannot show that those shipments
26 were SREA-qualifying.

b. Lead-Bearing Materials That Were Not “Scrap Metal”

Six of the seven Defendants—Clarios, KBI, Oregon Tool, Quemetco, Ramcar, and Trojan—sent materials to the Vernon Plant that were not “spent batteries” and also did not fall within SREA’s definition of “scrap metal.” They do not qualify for the SREA exemption.

SREA defines “scrap metal” restrictively. It “means bits and pieces of metal parts (e.g., bars, turnings, rods, sheets, wire) or metal pieces that may be combined together with bolts or soldering (e.g., radiators, scrap automobiles, railroad box cars), which when worn or superfluous can be recycled.” 42 U.S.C. § 9627(d)(3). EPA’s 2002 guidance document about SREA opines that “material that is powdery or dust-like may not fall within the definition of ‘scrap metal.’” PX_2-0376.6. Likewise, something that “is different from solid metal in content, physical form and manageability would not represent ‘bits and pieces of metal parts . . . or metal pieces that may be combined together with bolts or soldering.’” *Id.*

A preamble to an EPA RCRA regulation that adopted an identical definition of “scrap metal” for RCRA purposes, *see* 40 C.F.R. § 261.1(c)(6), suggests “[m]aterials not covered by this term include residues generated from smelting and refining operations (*i.e.*, drosses, slags, and sludges), liquid wastes containing metals (*i.e.*, spent acids . . .), . . . or metal-containing wastes with a significant liquid component, such as spent batteries.” *See Hazardous Waste Management System; Definition of Solid Waste*, 50 Fed. Reg. 614, 624 (Jan. 4, 1985).

Oregon Tool. Oregon Tool, known as Blount, Inc. during relevant time periods, undisputedly sent lead-bearing dross and spent air filters to the Vernon Plant. *E.g.*, PX_2-0001.11–14 (exemplary manifests); Dkt. 697 (Von Linder Decl.) ¶¶ 25–30 (declaration by Oregon Tool’s witness admitting to such shipments). At trial, Oregon Tool’s witness testified that dross was not “bits and pieces of metal parts.” Trial Tr. Day 2 at 108:8–15; *see id.* at 104:2–11. Likewise, dross was not combined with bolts

1 or soldering. *Id.* at 105:15–18. Rather, dross was the by-product of melting lead. *See*
2 *id.* Therefore, dross was not “scrap metal” under SREA.

3 Also, Oregon Tool’s witness admitted that spent air filters, which were made of
4 fabric or paper, were not “bits and pieces of metal parts” and were not combined with
5 bolts or soldering. *Id.* at 107:2–108:7; *see* Dkt. 697 (Von Lindern Decl.) ¶¶ 25–26.
6 Those filters were not “scrap metal” under SREA.

7 Clarios. Clarios—through its predecessors Globe-Union, Johnson Controls,
8 Inc., and Johnson Controls Battery Group, Inc.—shipped a wide range of lead-bearing
9 waste to the Vernon Plant that was neither “spent batteries” nor “scrap metal.”
10 According to Clarios’ witnesses, the company’s predecessors sent—among other
11 things—a wide range of “scrap” such as lead oxide paste, “pasted plates” (“perforated
12 plates of [] lead alloys that have been pressed with lead oxide paste”), “baghouse
13 dust,” “floor sweeps” (“a mixture of materials that fell to the floor during the lead-
14 acid battery manufacturing process”), “wastewater treatment sludge,” “dross,” *see*
15 Dkt. 712 (LeMieux Decl.) ¶ 23, and “sump mud,” *see* Dkt. 716 (Wussow Decl.) ¶ 67,
16 to the Plant. Documentary evidence shows that Clarios also sent “leaded trash” to the
17 Plant. *See* PX_2-0002.77–82.

18 As Clarios’ witness confirmed at trial, many of these materials were not “spent
19 batteries” or “scrap metal” that qualify for the SREA exemption. For example, lead
20 paste was a “mixture of oxidized lead mixed with sulfuric acid” with “a cookie dough
21 type of consistency.” *See* Trial Tr. Day 2 at 46:12–22 (testimony of Clarios employee
22 Jeramy Lemieux). Under EPA’s SREA guidance, such materials that are “different
23 from solid metal” are not “scrap metal.” *See* PX_2-0376.6. Consistent with this view,
24 Clarios’ witness stated that lead oxide paste was not “bits and pieces of metal parts,”
25 it did not have “bits and pieces [of metal parts] mixed into [it],” and it was not “metal
26 pieces that may be combined with bolts or soldering.” *Id.* at 46:16–25. Likewise, mud
27 and wastewater treatment sludge were not bits and pieces of metal parts that may be
28 combined with bolts or soldering. *See id.* at 46:12–20, 48:3–7. Further, baghouse dust

1 was neither bits and pieces of metal parts nor something that could be combined with
2 bolts or soldering. *Id.* at 47:24–48:2. Instead, baghouse dust was a fine powder, *id.* at
3 47:22–23, which—as EPA’s SREA guidance suggests—is not “scrap metal.” *See*
4 PX_2-376.6. And, as discussed, dross does not fall within SREA’s “scrap metal”
5 definition.

6 Because Clarios sent many materials to the Vernon Plant that were not “spent
7 batteries” or “scrap metal” under SREA, it is ineligible for the defense.

8 Trojan. When asserting its SREA defense, Trojan omits that it sent an even
9 wider array of hazardous waste to the Vernon Plant than Clarios. *See* Dkt. 729 at 17–
10 18. Documentary evidence shows that Trojan sent—among other things—the
11 following lead-bearing wastes to the Vernon Plant: “wood with acid,”⁴¹ “sump
12 mud,”⁴² “soda ash,”⁴³ “trash,”⁴⁴ “calcium grids,”⁴⁵ “calcium plates,”⁴⁶ “bag house
13 filters,”⁴⁷ “remelt lead scrap,”⁴⁸ “used belts,”⁴⁹ “trash sump,”⁵⁰ “lead dust,”⁵¹
14 “plates,”⁵² “A&E Plates,”⁵³ “dross,”⁵⁴ “dry oxide,”⁵⁵ “wet oxide,”⁵⁶ “floor

15
16 ⁴¹ PX_2-0206.5.

17 ⁴² PX_2-0007.389–390; PX_2-0206.5; PX_2-0207.3; DX_2-2500_0180.0003;
DX_2-2500_0183.0003.

18 ⁴³ PX_2-0007.393–394; PX_2-0206.2; PX_2-0206.5; DX_2-2500_0130.0002.

19 ⁴⁴ PX_2-0007.393–394; *see* DX_2-2500_0130.0002 (“Lead Bearing Trash”).

20 ⁴⁵ PX_2-0007.428; PX_2-0007.792; PX_2-0007.798; PX_2-0007.811.

21 ⁴⁶ PX_2-0007.798.

22 ⁴⁷ PX_2-0007.431; PX_2-0007.809.

23 ⁴⁸ PX_2-0206.2; *see* DX_2-2500_0180.0003 (“Remelt Lead”).

24 ⁴⁹ PX_2-0207.3; DX_2-2500_0180.0003.

25 ⁵⁰ DX_2-2500_0130.0002.

26 ⁵¹ DX_2-2500_0130.0002–0003.

27 ⁵² PX_2-0206.2; PX_2-0206.5; PX_2-0207.3; DX_2-2500_0125.0002; DX_2-
28 2500_0130.0002.

⁵³ DX_2-2500_0183.0003.

⁵⁴ PX_2-0206.2; PX_2-0207.3; DX_2-2500_0125.0002; DX_2-
2500_0180.0003; *see* DX_2-2500_0130.0002 (“Lead Dross”).

⁵⁵ PX_2-0206.2; PX_2-0206.5; DX_2-2500_0125.0002; *see* PX_2-0207.3
 (“Dry Oxide / Baghouse”); DX_2-2500_0180.0003 (same).

⁵⁶ DX_2-2500_0183.0003.

1 sweeping,”⁵⁷ and “used floor sweepings.”⁵⁸

2 Obviously, “wood with acid” was not “scrap metal.” Likewise, Trojan’s witness
3 confirmed that lead dust and sump mud were not “scrap metal,” because they were
4 not bits and pieces or metal parts, or something that could be soldered or attached to
5 other metal parts. *See* Trial Tr. Day 2 at 115:17–116:8. As discussed, filters and dross
6 plainly fall outside the “scrap metal” definition. And Trojan has not introduced
7 evidence showing that all of the other myriad non-battery materials it sent to the
8 Vernon Plant fall within SREA’s definition of “scrap metal.”

9 KBI. KBI also sent a wide array of materials to the Plant. At minimum, it sent
10 lead battery plates, “lead oxide,” “lead acid batteries,” “lead battery tops,” “scrap
11 lead,” “lead solder/dross,” “catalyst cases,” “battery cases,” “lead vests and aprons,”
12 “filters contaminated with lead,” and “lead dust.” *See* Dkt. 693 (Johnson Decl.) ¶ 8.⁵⁹
13 KBI’s shipments of dross, contaminated filters, and dust were plainly not “scrap
14 metal.”

15 Ramcar. Ramcar sent “scrap” materials like “lead oxide plates,”⁶⁰ “lead oxide
16 dross,”⁶¹ “lead oxide dross calcium,”⁶² “lead oxide dust,”⁶³ “lead oxide cake,”⁶⁴ and
17 “lead oxide mud”⁶⁵ to the Vernon Plant, as well as lead-acid batteries.⁶⁶ For the
18

19 ⁵⁷ DX_2-2500_0125.0002.

20 ⁵⁸ PX_2-0206.5.

21 ⁵⁹ Mr. Johnson’s declaration states that several of these items constituted
22 “0%” of KBI’s shipments to the Vernon Plant. Dkt. 693 ¶ 8. He clarified that the
23 “0%” descriptor meant that KBI sent a small amount of that material to the Vernon
24 Plant. Trial Tr. Day 2 at 178:17–22.

25 ⁶⁰ PX_2-0006.1–3; PX_2-0006.27.

26 ⁶¹ PX_2-0006.1–3; PX_2-0006.27.

27 ⁶² PX_2-0006.15; PX_2-0006.45; PX_2-0006.63.

28 ⁶³ PX_2-0006.1–3; PX_2-0006.27.

⁶⁴ PX_2-0006.13; PX_2-0006.18–19; PX_2-0006.23.

⁶⁵ PX_2-0006.27.

⁶⁶ *See* Dkt. 711 ¶¶ 9, 14, 15 (Ramcar’s admission through its witness Clifford
J. Crowe that it sent “scrap” such as batteries and “[d]ross containing lead,” “[l]ead
oxide dust,” “[l]ead mud,” and “[l]ead plates” to the Vernon Plant).

1 aforementioned reasons, Ramcar cannot, and has not, advanced a plausible argument
2 that dross, dust, cake, and mud were scrap metal. Ramcar does not qualify for SREA.

3 Quemetco. Quemetco sent mostly lead-acid “waste batteries” to the Vernon
4 Plant. *See* PX_2-0005 (uniform hazardous waste manifests); *see also* Davis Tr. at
5 43:21–45:4. In addition to these battery shipments, Plaintiffs and Quemetco dispute
6 whether, on one instance in 1995, Quemetco also sent dross to the Plant. The manifest
7 that records this shipment, PX_2-0005.46, lists the Vernon Plant’s “US EPA ID
8 Number” (CAD097854541) as the “Designated Facility” that received Quemetco’s
9 dross shipment. Dkt. 729 at 15 (Quemetco’s admission that “the 1995 Manifest bears
10 the Vernon Plant’s US EPA ID number”). However, the manifest lists a street address
11 other than the Vernon Plant’s. *Id.* Plaintiffs’ position is that Quemetco would not have
12 bothered to use the Vernon Plant’s specific identifying code if it were sending the
13 dross elsewhere. *See* Davis Tr. at 69:19–70:16 (Quemetco’s 30(b)(6) witness,
14 explaining that the waste generator is responsible for filling out the top portion of a
15 manifest). And if Quemetco sent dross to the Plant, that shipment would be ineligible
16 for SREA, as discussed above.

17 Every A/T Defendant other than Ekco sent non-battery materials to the Vernon
18 Plant that plainly were not “scrap metal.” Because these materials do not qualify for
19 SREA, these A/T Defendants cannot benefit from the affirmative defense.

20 **c. Dross that Was Melted Before the Recycling**
21 **Transaction**

22 As discussed, Clarios, KBI, Oregon Tool, Quemetco, and Trojan each sent
23 dross to the Vernon Plant. As discussed, dross does not qualify as “scrap metal.” Even
24 if dross was “scrap metal,” it falls outside of SREA’s “scrap metal” exemption because
25 a defendant must show that they “did not melt the scrap metal prior to the [recycling]
26 transaction.” *See* 42 U.S.C. § 9627(d)(1)(C). Dross is created by melting metal.⁶⁷ As

27

⁶⁷ This Court has received and heard ample testimony that dross is the product
28 of melting metal. *See* Dkt. 697 (Von Lindern Decl.) ¶ 20 (testimony of Oregon

1 EPA’s SREA guidance explains, “Dross is a by-product from the melting . . . of
2 metal,” “a metallic sludge which floats.” PX_2-0376.20. “To the extent material such
3 as dross is melted prior to the recycling transaction, it may be covered by the exclusion
4 in Section 127(d)(1)(C) and may be outside the scope of the recycling exemption.”
5 PX_2-0376.7. Because Clarios, KBI, Oregon Tool, Quemetco, and Trojan each sent
6 dross to the Plant, they do not qualify for the SREA exemption.

7 **d. Commercial Specification Grade**

8 To qualify for the SREA exemption, a material—whether it is categorized as
9 “spent batteries” or “scrap metal”—must have met a “commercial specification
10 grade.” 42 U.S.C. § 9627(c)(1), (d)(1)(A), (e)(1).

11 Both Plaintiffs and the A/T Defendants have embraced the definition of
12 “commercial specification grade” from *Evansville Greenway*, 2011 WL 13237784, at
13 *5 (S.D. Ind.). *See* Dkt. 727 at 29; Dkt. 729 at 8. There, the court held that “commercial
14 specification grade” “can include specifications as those published by industry trade
15 associations, or other historically or widely utilized specifications are acceptable.”
16 *Evansville Greenway*, 2011 WL 13237784, at *5 (quoting 145 Cong. Rec. at S15049,
17 1999 WL 1050353).⁶⁸

18 Tool’s witness that dross was created through melting, was “ladled off,” and then
19 “cool[ed] and solidif[ied]”); LeMieux Tr. at 40:13–41:5 (Clarios Rule 30(b)(6)
20 witness); Wussow Tr. at 42:1–10; Davis Tr. at 86:22–87:3 (Quemetco Rule 30(b)(6)
21 witness); Crowe Tr. at 62:2–13 (Ramcar 30(b)(6) witness); Ganster Tr. at 94:19–
22 95:14 (Trojan Rule 30(b)(6) witness); Preuth Tr. at 70:18–71:2 (testimony of former
Exide employee).

23 ⁶⁸ Perhaps recognizing their inability to meet the commercial specification
24 grade requirement from *Evansville Greenway* and the legislative history the case
25 cites, the A/T Defendants changed course in their closing arguments, suggested that
26 the *Evansville Greenway* “overcomplicate[es]” the commercial specification grade
27 requirement, and posited that the commercial specification grade requirement is a
28 mere proxy for RCRA’s legitimate/sham recycling distinction. *See* Trial Tr. Day 3
71:12–72:18. The Court should not credit this new position, which contradicts the
A/T Defendants’ own pre-trial brief, *see* Dkt. 729 at 8, and—as discussed—errs by
importing RCRA’s sham/legitimate recycling dichotomy into the CERCLA and
SREA context.

1 The Court received and heard conflicting testimony on what was the
2 commercial specification grade that applied to the materials that the A/T Defendants
3 sent to the Vernon Plant. Many witnesses attested that they did not know what the
4 term meant or were not aware of a commercial specification grade. For example, Mr.
5 Desart, the former Exide senior director, testified that the Vernon Plant accepted all
6 types of lead-acid batteries and did not require them to meet any “specific
7 requirement” or commercial specification grade. Desart Tr. at 174:3–17; *see id.* at
8 108:20–109:12 (similar).⁶⁹

9 Some witnesses claimed that standards *specific to waste received by the Vernon*
10 *Plant* constituted a commercial specification grade. For example:

- 11 • Clarios witness Jeramy LeMieux suggested that the commercial specification
12 grade for materials that Clarios sent to the Vernon Plant could be located in
13 “[t]he operating permit for the facility, which would dictate whether or not those
14 materials fit within the specification that they are legally permitted to recycle.”
15 *See* Trial Tr. Day 2 at 51:2–6, 54:13–55:9.
- 16 • Ramcar’s purported expert Ron Hayes, whose helpfulness the Court doubted
17

18 ⁶⁹ *See also* LeMieux Tr. at 46:6–15 (Clarios 30(b)(6) witness, who did not
19 know of any commercial specification grade for lead dross); Gelman Tr. at 51:13–15
20 (Ekco 30(b)(6) witness, who lacked knowledge of any commercial specification
21 grade for spent lead-acid batteries that Ekco sent to the Vernon Plant); Smith Tr. at
22 62:22–63:21 (Oregon Tool 30(b)(6) witness, who lacked knowledge of any
23 commercial specification grade for lead-acid batteries or dross); Davis Tr. at 97:21–
24 98:14 (Quemetco 30(b)(6) witness, who lacked knowledge of any commercial
25 specification grade for spent lead-acid batteries); Crowe Tr. at 60:25–61:21, 64:11–
26 65:3 (Ramcar 30(b)(6) witness, who lacked knowledge about commercial
27 specification grades for lead oxide plates that Ramcar sent to the Vernon Plant);
28 Ganster Tr. at 107:23–109:11, 122:12–18, 128:14–22, 148:9–149:7 (Trojan 30(b)(6)
witness, who lacked knowledge of any commercial specification grade for any lead-
bearing materials that Trojan sent to the Vernon Plant); Wycklendt Tr. at 60:17–20
(former employee of Clarios predecessor who lacked knowledge about commercial
specification grades); Preuth Tr. at 49:6–15 (former employee of Exide who lacked
knowledge about commercial specification grades)

1 because he offers legal opinions,⁷⁰ argued there was a commercial specification
2 grade because the Vernon Plant accepted only lead-bearing materials that
3 contained some minimum amount of lead. *See* Dkt. 710 (Hayes Decl.) ¶ 48.

- 4 • Ekco witness David Cobb suggested that the commercial specification grade
5 may be located in the Vernon Plant’s “written requirements,” without pointing
6 to any particular one. *See* Dkt. 701 (Cobb Del.) ¶ 8;⁷¹ *cf.* PX_2-0392.8 (Oregon
7 Tool’s interrogatory response, wherein it argued that materials sent to the
8 Vernon Plant met a commercial specification grade because the Plant rejected
9 some materials).

10 Other witnesses took yet another approach in describing the purported commercial
11 specification grade. For example, another Ekco witness argued that the materials it
12 sent to the Vernon Plant met a commercial specification grade because *Ekco* could
13 lawfully sell it. *See* Dkt. 700 (Gelman Decl.) ¶ 10; Trial Tr. Day 2 at 138:4–20.

14 The A/T Defendants’ conflicting arguments about commercial specification
15 grade are united by a common theme: they have identified only standards that are
16 specific to either the Vernon Plant or a Defendant. The A/T Defendants have failed to
17 identify any commercial specification grade that meets the definition set forth in
18 *Evansville Greenway*, which requires something “published” by a recognized body
19 such as a trade association, or a “historically or widely utilized specification[.]” *See*
20 *Evansville Greenway*, 2011 WL 13237784, at *5 (quotations omitted).

21 Moreover, no A/T Defendant has methodically catalogued for the Court the
22 different types of materials they sent to the Vernon Plant, identified a commercial

23 ⁷⁰ *See* Trial Tr. Day 2 at 174:22–25 (“THE COURT: There is no point to the
24 witness [Mr. Hayes]. . . his legal opinions and his assessment of what other people
25 said in depositions doesn’t move the ball.”).

26 ⁷¹ Mr. Cobb then contradicted himself in the same breath, insisting that the
27 commercial specification grade was “the commonly understood industry standard
28 that [the materials that Ekco sent to the Vernon Plant] had an economic value.” *See*
Dkt. 701 ¶ 8. But that does not fall within the A/T Defendants’ own definition of
commercial specification grade, or within any plausible meaning of the term.

1 specification grade for each, and explained why the materials they sent to the Vernon
2 Plant satisfied that grade. They are unable to do so because they cannot meet the
3 requirement. This failure is fatal to each A/T Defendant's SREA affirmative defense.

4 **e. Battery Components Derived from Battery**
5 **Breaking**

6 Ekco and KBI each sent battery components to the Vernon Plant that they
7 obtained by breaking batteries apart. These shipments do not qualify for SREA.⁷²

8 SREA extends its affirmative defense only to those that "did not recover the
9 valuable components of [spent lead-acid] batteries." *See* 42 U.S.C. § 9627(e)(1).
10 Therefore, shipments of battery components obtained by breaking up batteries do not
11 qualify for SREA's exemption. *See Interstate Non-Ferrous Corp.*, 298 F. Supp. 2d at
12 965. As the EPA's guidance on SREA explains, this rule exists for a good reason:
13 "Limiting the exemption to whole batteries encourages the sound practice of selling
14 whole batteries to a properly equipped recycling facility and discourages the cracking
15 of batteries by smaller dealers on their own property." *See* PX_2-0376.7.

16 Here, Ekco and KBI have admittedly broken up batteries, recovered the
17 valuable lead-bearing components from them, and sent those components to the
18 Vernon Plant.⁷³ This conduct is precisely what Congress intended to discourage by
19 restricting SREA's reach. Ekco and KBI do not qualify for SREA's exemption.⁷⁴

20 ⁷² In their Pre-Trial Brief, Plaintiffs argued that Clarios and Ramcar also sent
21 battery components to the Plant after breaking batteries apart. *See* Dkt. 727 at 31–32.
22 Plaintiffs withdraw that argument based on an absence of evidence.

23 ⁷³ *See* Gelman Tr. at 79:8–23 (with regard to a manifest reproduced at PX_2-
24 0003.21 that documents a shipment by Ekco of lead battery plates to the Vernon
25 Plant, testifying that Ekco would have "generated" the plates "from lead acid
26 batteries"); *id.* at 19:24–20:7 (testimony by Ekco's 30(b)(6) witness that it—as a
27 scrap metal dealer—buys only whole batteries, and not battery components, such
28 that Ekco would have created any battery components in its possession by breaking
apart whole batteries); Trial Tr. Day 2 180:12–15 (KBI witness Paul Johnson's
admission that the plates KBI sent to the Vernon Plant were the product of its battery
breaking activities); Dkt. 693 (Johnson Decl.) ¶ 11 (similar).

⁷⁴ Ekco and KBI may argue that these battery components qualify as scrap

f. Due Diligence

SREA Section 127(c)(5) requires that for “transactions [on or after February 27, 2000],” the arranger or transporter must have “exercised reasonable care to determine that the facility . . . was in compliance with substantive (not procedural or administrative) provisions of any Federal, State, or local environmental law or regulation, . . . applicable to the handling, processing, reclamation, storage, or other management activities associated with recyclable material.” 42 U.S.C. § 9627(c)(5). As Plaintiffs’ Pre-Trial Brief explained, *see* Dkt. 727 at 33, reasonable care is measured according to a wide range of criteria, *see* 42 U.S.C. § 9627(c)(6).

No A/T Defendant has proved this requirement. The record evidence significantly undermines any such argument by demonstrating that even minimal due diligence would have uncovered serious problems at the Plant that would have given any reasonable arranger or transporter pause.⁷⁵ For example, a circa-1991 document shows that Clarios’ predecessor had conducted limited due diligence and became aware that the Vernon Plant had experienced a “Notice of Violation/Non-Compliance” and had “Consent Orders” entered against it. *See* PX_2-0047.8; LeMieux Tr. at 198:22–24, 199:4–201:14 (testimony about this document). Yet, Clarios continued to ship materials to the Vernon Plant until 2012 or 2013, *see* LeMieux Tr. at 159:11–25, even as due diligence became easier in the 2000s due to advances in technology,⁷⁶ and even as regulatory agencies including DTSC repeatedly

metal that falls within SREA’s exemption. As Plaintiffs explained in their Pre-Trial Brief, battery components are not scrap metal. *See* Dkt. 727 at 32:11–20.

⁷⁵ *E.g.*, Crowe Tr. at 83:10–21, 85:25–86:3, 86:22–87:1, 87:22–88:4, 88:15–17 (Ramcar 30(b)(6) witness’s testimony that the company did not observe or inspect conditions at the Vernon Plant; made no public records requests or other inquiries to verify its compliance; accepted the Vernon Plant’s word that it was compliant and authorized to accept hazardous waste; and—on one instance in 2003—asked the Plant’s operator about its compliance status, but not before 2003).

⁷⁶ *See* Dkt. 713 (Lafond Decl.) ¶ 57 (Clarios’ witness’s testimony that facility-related information was not available online in the 1990s but became available afterward); Dkt. 712 (LeMieux Decl.) ¶ 41 (similar).

1 cited the Plant for violations.⁷⁷

2 Each A/T Defendant easily could have—like Clarios—discovered that the
3 Vernon Plant was not in compliance with environmental laws and regulations (and,
4 unlike Clarios, stopped shipping to the Plant). None of the A/T Defendants have
5 proved they exercised such reasonable care.

6 **g. Violations by the A/T Defendants**

7 As Plaintiffs have explained, SREA sets forth a trio of requirements that require
8 a party claiming exemption to show that their own waste handling practices (as
9 opposed to those of the facility that received the waste) were compliant. *See* ECF No.
10 727 at 33–34. Notably, two of the relevant requirements require the A/T Defendants
11 to show that they were actually “in compliance with applicable Federal environmental
12 regulations or standards,” *see* 42 U.S.C. § 9627(d)(1)(B) (scrap metal); *id.*
13 § 9627(e)(2)(A) (similar), not just that they were *not in violation* of such regulations
14 or standards.

15 KBI and Quemetco cannot meet these requirements because of evidence that
16 their waste handling practices were deficient during relevant times. KBI’s facility
17 from which it shipped hazardous waste to the Vernon Plant was cited for violations of
18 its RCRA hazardous waste facility permit. These violations had a direct nexus to
19 KBI’s Vernon Plant arranger activities. Namely, KBI entered consent orders with
20 DTSC regarding hazardous waste violations at its facility that occurred in 2004 and

21 ⁷⁷ Air Violations. PX_2-0416 (South Coast Air Pollution Control District
22 notice of violation from 1977); PX_2-0417 (South Coast Air Pollution Control
23 District notice of violation from 1977); PX_2-0245 (SCAQMD notice of violation
24 from 1982); PX_2-0246 (SCAQMD notice of violation from 1984); PX_2-0008
(SCAQMD notices of violation from 1988 to 2014).

25 Hazardous Waste-Related Violations. PX_2-0009 (DTSC and its
26 predecessor’s inspection reports for the Plant, noting numerous violations); *see also*
27 Clark Tr. at 29:21–30:4 (witness testimony about a 1987 violation); PX_2-0240
(1991 California Department of Justice letter to Vernon Plant’s operator).

28 Municipal Enforcement Action. PX_2-0241 (2013 letter from City of Vernon
to Exide regarding a compliance order).

1 between 2013 and 2014. *See* PX_2-0375, PX_2-0374. The second of these two
2 consent orders related to the Vernon Plant. Specifically, KBI admitted that between
3 November 1, 2013, and March 21, 2014, it used Golden State, an unauthorized
4 transporter, to send shipments of hazardous waste to other facilities. *See* PX_2-0374.2
5 (in Section 1.8, admitting to the violations in Section 2). These shipments included
6 ones carrying lead-bearing hazardous waste from KBI to the Vernon Plant. *E.g.*,
7 PX_2-0004.840, PX_2-0004.845, PX_2-0004.6432.

8 Likewise, when Quemetco sent spent lead-acid batteries from its City of
9 Industry facility to the Vernon Plant between May and June 2001,⁷⁸ its wastewater
10 treatment system—which was integral to Quemetco’s handling of spent batteries⁷⁹—
11 was likely out of compliance with applicable regulations. September and October
12 2000 inspections of Quemetco’s City of Industry facility revealed “numerous
13 violations,” including “major corrosion,” “overflowing” and spilling sumps, and
14 possibly compromised leak containment infrastructure in the facility’s wastewater
15 treatment system. *See* PX_2-0189.6. Quemetco has not introduced any evidence
16 showing that these substantive violations had been corrected by the time it sent
17 hazardous waste to the Vernon Plant in May or June 2001.⁸⁰

18 These substantive violations by KBI and Quemetco make them ineligible for
19 the SREA exemption.

20 * * * *

21 In summary, to prove an affirmative defense under SREA, each A/T Defendant
22 must show that each of their shipments of hazardous substances to the Plant meets
23 SREA’s enumerated requirements. No Defendant meets that tall burden.

24 ⁷⁸ *See* Dkt. 702 ¶ 13 (Davis Decl.) (Quemetco’s admission about such
25 shipments).

26 ⁷⁹ *See* Davis Tr. at 110:1–22, 111:2–11, 112:2–23, 113:1–114:1 (Quemetco’s
27 witness’s testimony that the treatment system processed wastewater relating to
Quemetco’s battery recycling, handling, or processing operations).

28 ⁸⁰ Plaintiffs likewise have not located evidence showing that these violations
had been corrected by May 2001.

B. The Federally Permitted Release Defense Does Not Absolve Any Defendant of Liability.

Every Defendant other than Clarios and NL⁸¹ asserts a federally permitted release defense on which they bear the burden of proof.⁸² See 42 U.S.C. §§ 9601(10)(h), 9607(j). Even assuming Defendants establish that certain airborne releases from the Plant were federally permitted or regulated, that fact would not exempt any Defendant from liability. Rather, if federally permitted or regulated releases exist, the total amount of Plaintiffs' recoverable response costs that can be recovered from these Defendants could be reduced, but *only if* they prove divisibility as to their federally permitted releases, an issue that is reserved for the Phase III trial. In any event, Defendants have failed to prove that the Vernon Plant's airborne releases were federally permitted or regulated because the releases did not comply with federal permits and regulations during relevant time periods, and because an important subset of the Plant's lead emissions—so-called “non-process fugitive” air emissions—were not subject to regulations or permits.

1. The Defense Requires Defendants to Prove Divisibility.

Even assuming Defendants establish the existence of federally permitted (or regulated) releases, that fact would not provide a complete defense to liability. Rather, if such releases exist, Plaintiffs' total recoverable response costs could be reduced, but *only if* each Defendant proves divisibility as to relevant federally permitted releases.

Here, Plaintiffs have established that their response costs have been caused by the combined effect of both airborne releases and non-airborne releases.⁸³ In turn,

⁸¹ Clarios and NL have thus waived any federally permitted release defense.

⁸² Perhaps trying to downplay their burden, Defendants call the federally permitted release defense “a choice of law provision.” See Dkt. 728 at 1. No court has ever used that label in a decision indexed on Westlaw. In any event, Defendants admit that the federally permitted release doctrine is a “defense,” *see id.* at 2, consistent with the unanimous case law to that extent, *see, e.g.*, Dkt. 727 at 35 n.27 (collecting authorities).

⁸³ See generally Dkt. 741-1 (Laton Decl.); Dkt. 714-5 (Mistry Decl.); Dkt. 714-7 (Ruttan Decl.).

Defendants argue only that the Plant’s *airborne releases* were federally permitted or regulated. Since the federally permitted release defense limits Plaintiffs from recovering “response costs” only to the extent the relevant Defendants can prove they “result[ed] from a federally permitted release,” 42 U.S.C. § 9607(j), Defendants bear the burden of showing not only “which releases are federally permitted,” but also “what portion of [Plaintiffs’] damages are allocable to the federally permitted releases.” *United States v. Shell Oil Co.*, No. CV 91-0589-RJK, 1992 WL 144296 at *6 (C.D. Cal. Jan. 16, 1992); *accord Lincoln Props., Ltd. v. Higgins*, No. CIV. S-91-760DFL/GGH, 1993 WL 217429, at *22 (E.D. Cal. Jan. 21, 1993) (similar). This requires the relevant Defendants to prove that the contamination caused by federally permitted airborne releases is divisible from the contamination caused by non-federally permitted releases, both airborne and non-airborne. *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1541 (E.D. Cal. 1992) (divisibility is “an essential element of [the] defense”).⁸⁴

The Court has reserved divisibility issues for a trial set to begin on August 1, 2023. *See* Dkt. 830. There, Defendants will bear the burden of demonstrating that there is some identifiable subset of contamination that is attributable to federally permitted airborne releases and divisible from the rest of the contamination. This means that the defense cannot fully absolve any Defendant and will have no practical effect unless and until Defendants make a divisibility showing.

2. The Federally Permitted Release Defense Fails.

a. Defendants Failed To Show the Plant’s Compliance with Federal Requirements.

As Plaintiffs anticipated in their Pre-Trial Brief, *see* Dkt. 727 at 36–39, Defendants (other than Clarios and NL) argue that they can benefit from the federally permitted release defense even if the Vernon Plant’s airborne emissions violated

⁸⁴ This burden is heavy: each Defendant must present “concrete and specific evidence” to enable an “intensely factual” divisibility inquiry. *Pakootas IV*, 905 F.3d at 589 (quotations omitted).

1 federal permits and regulations, *see* Dkt. 728 at 8–9. That is incorrect. As explained
2 in Plaintiffs’ Pre-Trial Brief, these Defendants overread CERCLA’s ambiguous
3 language defining the scope of the defense and fail to afford *Chevron* to a controlling,
4 contrary EPA interpretation. *See* Dkt. 727 at 36–39.

5 Specifically, the federally permitted release defense covers only those releases
6 “*subject to* a permit or control regulation” under the Clean Air Act. *See* 42 U.S.C.
7 § 9601(10)(H) (emphasis added). As discussed, the EPA’s Environmental Appeals
8 Board—whose decisions “warrant[] *Chevron* deference,” *REDOIL v. EPA*, 716 F.3d
9 1155, 1161 (9th Cir. 2013)—interpreted the ambiguous and undefined term “subject
10 to” to mean “in compliance with,” *see In re: Mobil Oil Corp.*, 5 E.A.D. 490 (E.P.A.),
11 1994 WL 544260, at *9 (E.A.B. 1994). Thus, the federally permitted release defense
12 covers only airborne releases that comply with federal permits and regulations.

13 The EPA’s expert interpretation of CERCLA is reasonable because the Clean
14 Air Act has no means to compel a person who emits airborne pollution in violation of
15 federal law to pay for investigating and cleaning up any resulting contamination. *See*
16 42 U.S.C. § 7401, *et seq.* Interpreting the federally permitted release defense to
17 absolve CERCLA defendants when illegal airborne releases cause contamination
18 would improperly create a gap in CERCLA’s protective scheme, contravening
19 Congress’s intent. *See* S. Rep. No. 96-848 at 47 (1980) (“While the exemptions from
20 liability for federally permitted releases are provided to give regulated parties clarity
21 in their legal duties and responsibilities, these exemptions are not to operate to create
22 gaps in actions necessary to protect the public or the environment.”).⁸⁵

23 Defendants have not attempted to prove that the Vernon Plant actually complied
24 with its federal permits or regulations. *See generally* Dkt. 728.⁸⁶ And they cannot do

25 ⁸⁵ Elsewhere, Plaintiffs criticize Defendants for their undue reliance on
26 legislative history. Plaintiffs’ use of legislative history is appropriate here because
27 courts may consider extratextual indicia of statutory meaning when interpreting
28 ambiguous laws.

⁸⁶ Plaintiffs stipulated with Quemetco that air emissions from the Vernon

1 so because the Plant was a chronic violator. *See supra* n.77 (list of exhibits showing
2 air violations issued to the Vernon Plant over multiple decades). The Plant’s incessant
3 pattern of violations supports the reasonable inference that—even during time periods
4 the Plant was not actually being cited for permit and regulatory violations—the Plant
5 was actually out of compliance, dooming Defendants’ ability to meet their burden.

6 **b. Many of the Vernon Plant’s Emissions Were Not**
7 **Federally Permitted or Regulated.**

8 Even if Defendants show that some subset of the Vernon Plant’s airborne
9 releases was federally permitted or regulated, they have failed to show that the Plant’s
10 non-process fugitive lead emissions were permitted or regulated.⁸⁷ They also have not
11 shown the Plant’s air emissions were permitted or regulated during key time periods.

12 Non-process fugitive lead emissions are non-stack lead emissions caused by
13 things other than the Plant’s industrial processes. Plaintiffs’ un rebutted evidence
14 shows that such emissions occurred throughout the Vernon Plant’s period of industrial
15 operations, including through trucks that delivered waste and kicked up lead-bearing
16 dust while driving in and near the Plant. *See* Dkt. 714-6 (Quivik Decl.) ¶ 50.

17 Defendants offer the testimony of two experts—Joseph Hower and Ed
18 Muehlbacher—in an attempt to establish the federally permitted release defense.
19 However, neither Mr. Hower nor Mr. Muehlbacher shows that non-process fugitive
20 lead emissions were governed by federal permits or regulations. Mr. Hower opines
21 that South Coast Air Quality Management District (“SCAQMD”) Rule 403 governed
22 all fugitive lead emissions, including non-process fugitive lead emissions. *See* Dkt.
23 705 ¶¶ 53–54. However, by his own admission, Rule 403 nowhere addressed lead; it
24 addressed only dust. *Id.* ¶ 53; *see* DX_2-4330 to 4333 (various iterations of the rule).
25 Plant associated with any shipments by Quemetco to the Vernon Plant in 1995 and
26 2001 were substantively compliant with relevant Clean Air Act permitting and
27 regulatory requirements. *See* Dkt. 733 ¶¶ 1–3. The arguments in Section IV.B.2 of
28 this brief are not asserted, and are waived, against Quemetco only.

⁸⁷ Plaintiffs stipulated with Quemetco to waive the argument in this Section
against Quemetco only. *See* Dkt. 733 ¶ 3.

1 Mr. Muehlbacher similarly relies on “fugitive dust” provisions in permits, *see* Dkt.
2 704 ¶ 20, and Rule 403, *see id.* ¶ 24, in an attempt to show that non-process fugitive
3 lead emissions at the Vernon Plant were federally permitted or regulated.

4 The problem with Mr. Hower and Mr. Muehlbacher’s approach is that lead and
5 dust are not the same. Lead emissions are a subset of dust (or particulate) emissions.
6 So, it is true that a regulation that limits dust might have the indirect effect of
7 controlling lead emissions. However, the mere existence of such a potential indirect
8 regulation is insufficient to prove that the Plant’s lead emissions were federally
9 permitted or regulated. The Senate Environment and Public Works Committee’s
10 Report stated in the context of the federally permitted release defense that “[w]hether
11 control of hazardous substance emissions is achieved directly or indirectly, the means
12 must be specifically designed to limit or eliminate emissions of a designated
13 hazardous pollutant or a criteria pollutant.” *See* S. Rep. No. 96-848 at 49 (1980). Put
14 differently, a federal permit or regulation (here, a permit or regulation controlling
15 fugitive dust) that only *indirectly* controls a criteria pollutant or hazardous air pollutant
16 (lead) “must” provide for “means” of “control” that are “specifically designed to limit
17 or eliminate emissions of” that pollutant. EPA guidance takes the same view. *See*
18 *Guidance on the CERCLA Section 101(10)(H) Federally Permitted Release Definition*
19 *for Certain Air Emissions*, 67 Fed. Reg. 18,899, 18,902 (Apr. 17, 2002) (answer to the
20 question starting with, “My facility has a CAA permit which contains . . .”).
21 Defendants have not proved that SCAQMD Rule 403 or other measures targeted at
22 controlling *dust* were “specifically designed to limit or eliminate” non-process
23 fugitive *lead* emissions from the Plant.

24 The foregoing analysis is reinforced by the fact that air pollution regulators have
25 consistently treated lead as an especially harmful pollutant that is regulated separately
26 from run-of-the-mill dust or particulates. For example, particulates and lead are listed
27 as separate “criteria” air pollutants under the Clean Air Act, *compare* 40 C.F.R.
28 §§ 50.6, 50.7, 50.14 (particulate matter), *with id.* § 50.13 (lead), and lead compounds

1 have been designated as “hazardous air pollutants” under the Act, *see* EPA, *Initial List*
2 *of Hazardous Air Pollutants with Modifications*, [https://www.epa.gov/haps/initial-](https://www.epa.gov/haps/initial-list-hazardous-air-pollutants-modifications)
3 [list-hazardous-air-pollutants-modifications](https://www.epa.gov/haps/initial-list-hazardous-air-pollutants-modifications). As Plaintiffs showed at the Phase I trial,
4 lead is so dangerous to human health that any “incremental exposure” should be
5 “reduced and eliminated if possible.” *See* Dkt. 351-3 (Gettmann Decl.) ¶¶ 9–10.

6 Moreover, KBI, Ramcar, and Trojan have failed to prove that the Vernon
7 Plant’s airborne releases were permitted or regulated during time periods relevant to
8 their shipments. To render their opinions, Mr. Hower and Mr. Muehlbacher had to
9 examine countless documents such as air permits particular to specific pieces of
10 Vernon Plant equipment, variances, permit applications, and regulatory
11 communications. *See* Dkt. 704 (Muehlbacher Decl.) ¶ 7; Dkt. 705 (Hower Decl.)
12 ¶¶ 25–45. Mr. Hower’s and Mr. Muehlbacher’s intricate opinions covered *only* the
13 time periods relevant to the parties that had retained them. Mr. Hower, retained only
14 by GEI, limited his opinions to the period of GEI’s predecessor “Gould Inc.’s
15 ownership of the Vernon Plant,” which is from about 1979 to 1983. *See* Dkt. 705 ¶¶ 2,
16 47–54.⁸⁸ Mr. Muehlbacher, retained only by Oregon Tool and Quemetco, limited his
17 opinions to the period between 1990 and 2001. *See* Dkt. 704 ¶¶ 2–3, 26. KBI, Ramcar,
18 and Trojan did not retain experts like Mr. Hower or Mr. Muehlbacher, despite
19 admitting to shipments to the Vernon Plant outside the time periods covered by Mr.
20 Hower’s and Mr. Muehlbacher’s opinions.⁸⁹

21 In sum, Defendants have not shown that the Vernon Plant’s non-process
22 fugitive lead emissions were federally permitted or regulated.⁹⁰ KBI, Ramcar, and
23 Trojan have likewise failed to prove that the airborne releases during time periods

24 ⁸⁸ Plaintiffs and GEI have debated the exact start and end dates, but the parties
25 agree upon the approximate range.

26 ⁸⁹ Dkt. 693 (Johnson Decl.) ¶ 8 (KBI shipped from at least 1985 to 2014); Dkt.
27 711 (Crowe Decl.) ¶¶ 4, 24 (Ramcar shipped from at least 1990 to 2012); Dkt. 707
(Ganster Del.) ¶ 18 (Trojan shipped from at least 1987 to 2008).

28 ⁹⁰ To reiterate: this statement and others are qualified by the stipulation
between Plaintiffs and Quemetco. *See* Dkt. 733.

relevant to their shipments were federally permitted or regulated.

C. Six A/T Defendants Have Failed to Meet Their Burden To Prove that All Contamination Was Solely Caused by Third Parties or Federally Permitted Releases.

Six of the seven A/T Defendants (all except Clarios) seek to assert a complete defense by combining two separate affirmative defenses: the third-party defense (42 U.S.C. § 9607(b)(3)) and the federally permitted release defense (42 U.S.C. § 9607(j)). Notably, three Defendants—NL, GEI, and Clarios—do not advance this hybrid affirmative defense. For the remaining six Defendants, they argue any *subsurface* contamination was solely caused by third parties and that any *surface* contamination was the result of federally permitted airborne releases. This combined affirmative defense fails for four reasons.

First, the six A/T Defendants' argument is contrary to the weight of the evidence, and thus Defendants cannot meet their burden. There is undisputed evidence of non-airborne hazardous substance releases (i.e., releases that necessarily were not federally permitted) to the surface during the period when the six Defendants shipped waste to the Vernon Plant. Second, the six Defendants have failed to meet their burden to establish that subsurface contamination (i.e., soil, soil gas and groundwater) solely resulted from third parties, especially in the North Yard where there is ample evidence of soil contamination caused by releases during the period when the Defendants were shipping hazardous substances to the Plant. Third, the evidence is undisputed that there is extensive lead contamination of buildings and structures at the Plant, and the six Defendants made no effort to establish that this contamination was solely the result of federally permitted releases. Fourth, at least two of the six A/T Defendants had a contractual relationship with the Plant's owners and operators during the 1970s, and thus during the time when releases to the subsurface occurred by their own admission.

1 **1. Defendants’ Third-Party Defense Fails Because There**
2 **Were Non-Airborne Releases to the Surface When the**
3 **Six A/T Defendants Shipped Waste to the Plant.**

4 To succeed on their third-party defense under CERCLA, the six A/T
5 Defendants must prove that they are “wholly innocent” and did not contribute to the
6 release of a hazardous substance. *United States v. Honeywell Int’l, Inc.*, 542 F. Supp.
7 2d 1188, 1201 (E.D. Cal. 2008). These Defendants cannot meet this standard.

8 As an initial matter, Defendants’ expert, Dr. Cutler, did not absolve these
9 Defendants of responsibility for any and all releases of hazardous substances. On the
10 contrary, he testified that he was not disputing the mountain of evidence that releases
11 occurred during the post-1986 period when each of the six A/T Defendants shipped
12 hazardous substances to the Plant:

13 Q. . . . You are not disputing that after 1986, there were, in fact,
14 releases of lead and other heavy metals to the surface, right?

15 A. I don’t dispute that.

16 Trial Tr. Day 2 at 79:19–22. This concession is critical because Plaintiffs presented
17 considerable evidence of post-1986 non-airborne releases to the surface of the Plant.
18 *See, e.g.*, Dkt. 741-1 (Laton Decl.) at 10:8–12 (discussing post-1986 releases); Dkt.
19 714-6 (Quivik Decl.) ¶¶ 84–86 (same); PX002.28–29, 80–81, 107–08 (Phase I trial
20 exhibit that documented post-1986 releases to the surface, including from crushed
21 drum storage pile, battery storage area, and polypropylene loading dock). In other
22 words, Defendants’ own expert agreed with Plaintiffs that there were releases of
23 hazardous substances to the surface after 1986. Thus, Defendants were not “wholly
24 innocent,” and their third-party defense fails. *Honeywell Int’l*, 542 F. Supp. 2d at 1201.

25 Defendants might argue that simply showing that releases occurred after 1986
26 is insufficient to defeat their third-party defense and that those releases must be traced
27 to a particular Defendant. That argument would improperly invert the burden of proof.
28 As the Court found in its Phase I Verdict, Plaintiffs are not required to show that “a

1 specific defendant's waste caused Plaintiffs to incur cleanup costs." Phase I Verdict
2 at 6. Rather, Defendants must prove their complete innocence under the third-party
3 defense. *See Adobe Lumber, Inc. v. Hellman*, 658 F. Supp. 2d 1188, 1204 (E.D. Cal.
4 2009) (holding that a defendant must prove the defense by a preponderance). To do
5 so, Defendants must prove that any and all post-1986 releases had no relationship to
6 the materials they sent to the Plant. *See United States v. Alcan Aluminum Corp.*, 990
7 F.2d 711, 722 (2d Cir. 1993) ("[Defendant] may escape any liability for response costs
8 if it either succeeds in proving that its [waste] . . . did not contribute to the release and
9 the clean-up costs that followed, or contributed at most to only a divisible portion of
10 the harm"). Defendants have developed no such evidence.

11 **2. Contamination to the Subsurface Occurred After 1986.**

12 The six A/T Defendants' argument that subsurface contamination was solely
13 caused by third parties can be summarized as follows: Defendants' expert, Dr. Cutler,
14 testified that the Vernon Plant was fully paved by 1986, and this pavement prevented
15 any further contamination of the subsurface. Dr. Cutler concluded that all of the
16 contamination of the subsurface must have therefore occurred from releases before
17 1986. Defendants then suggest, through their fact witness declarations, that they did
18 not ship any hazardous substances to the Vernon Plant before 1986, and therefore any
19 contamination of the subsurface was solely the result of third parties.

20 Dr. Cutler's testimony that there was no subsurface contamination after 1986 is
21 contradicted by the weight of the evidence. At trial, Dr. Cutler struggled to explain
22 why the Plant's stormwater system, which was found in 1994 to be heavily
23 compromised with leaks, missing sections, and corrosion, would have prevented all
24 releases to the subsurface after 1986. *See* Trial Tr. Day 2 at 86:7–98:7. He also
25 remained steadfast in his insistence that the surface was completely impermeable after
26 1986, despite evidence of cracks and damage (Dkt. 741-1 (Laton Decl.) ¶¶ 45, 121–
27 37) as well as a regulatory determination in 1987 that the Vernon Plant's surface was
28 not impermeable (PX_2-0125.13). Finally, Dr. Laton testified that at least some of the

1 extensive shallow soil contamination in the North Yard would have occurred
2 sometime *after* the soil was paved in the early 1980s, undermining Dr. Cutler's
3 testimony. Dkt. 741-1 (Laton Decl.) ¶ 81, App'x E.

4 **3. There Is No Evidence that Surface Contamination Is**
5 **Solely the Result of Federally Permitted Releases.**

6 Even if the Court were to determine that subsurface contamination was solely
7 the result of third parties, the six A/T Defendants would still bear the burden to
8 establish that they are not liable for any of the contamination at the Vernon Plant's
9 surface. They attempt to do this by arguing that any surface contamination is solely
10 the result of federally permitted releases. But argument is not evidence, and a careful
11 review of the trial record reveals no testimony or exhibit that proves all of the surface
12 contamination at the Plant resulted from federally permitted airborne releases.

13 Defendants' expert, Dr. Cutler, specifically disavowed any opinions regarding
14 contamination at the surface. Trial Tr. Day 2 at 76:12–14. He therefore did not offer
15 any testimony that the contamination of buildings and structures at the Vernon Plant
16 was only the result of airborne releases, let alone airborne releases that occurred during
17 a period when airborne emissions were federally permitted. Indeed, no expert offered
18 this testimony at trial. Absent such expert testimony, Defendants cannot prevail on
19 their combined third party/federally permitted release defense.

20 For example, there is undisputed evidence that the foundation of the North Yard
21 secondary lead smelter (which was not constructed until 1982) is heavily
22 contaminated with lead, including extremely high concentrations that have been found
23 deep in the concrete itself. Dkt. 714-5 (Mistry Decl.) ¶¶ 69–71. No expert testified that
24 this contamination was solely the result of airborne releases, nor would such testimony
25 comport with common sense given that the lead is found *inside* the concrete
26 foundation, and thus more likely the result of a spill or leak.

1 **4. Ekco, KBI, and Trojan Shipped Materials to the Plant**
2 **Before 1987.**

3 As previously noted, the six A/T Defendants’ third-party defense is premised
4 on the factual assertion that they did not ship any materials to the Vernon Plant before
5 1986 (the year that their expert, Dr. Cutler, believes the surface became impermeable).

6 However, three of the A/T Defendants—Ekco, KBI, and Trojan—shipped
7 hazardous substances to the Plant before 1986. KBI’s own witness admitted that its
8 shipments had started by at least 1985. *See* Dkt. 693 (Johnson Decl.) ¶ 8. For Ekco
9 and Trojan, uncontroverted trial evidence showed they started shipping hazardous
10 substances to the Vernon Plant in the 1970s while NL operated the Vernon Plant.
11 DX_2-0080 at 53-61 (Trojan agreements and invoices, NL-VERNONLIT-0023010 to
12 0023018), 62-63 (Ekco invoices, NL-VERNONLIT-0023019 to 0023020); Trial Tr.
13 Day 2 at 112:5–7. Ekco, KBI, and Trojan’s contractual relationship with the Plant’s
14 owner and operator prohibits them from invoking the third-party defense, particularly
15 given Dr. Cutler’s opinion that any subsurface contamination of the Vernon Plant
16 “would have occurred as a result of historical plant operations prior to the early
17 1980s.” Cutler Decl. ¶ 12; *see* 42 U.S.C. § 9607(b)(3) (third-party defense is
18 inapplicable if the third party is “one whose act or omission occurs in connection with
19 a contractual relationship, existing directly or indirectly, with the defendant”).

20 **D. The A/T Defendants’ Statute of Limitations Defense Is**
21 **Meritless.**

22 The A/T Defendants press a thinly briefed statute of limitations defense to
23 CERCLA liability. *See* Dkt. 729 at 11, 14, 18 n.13. Their argument appears to be that
24 Plaintiffs’ “recovery is barred by the applicable statute of limitations” for “releases
25 for which removal actions have been completed.” *Id.* at 18 n.13.

26 The A/T Defendants have the burden of showing how and when the limitations
27 periods in CERCLA Section 113(g)(2) began running. *See* 42 U.S.C. § 9613(g)(2).
28 By failing to do so, they have effectively waived their defense. Likewise, by not

1 developing a limitations argument under HSAA's distinct statute of limitations, they
2 have waived that defense, too. *See* Cal. Health & Safety Code § 25360.4.

3 In any event, the A/T Defendants' limitations argument is meritless. As for
4 CERCLA, Section 113(g)(2) draws a distinction between "removal" and "remedial"
5 actions. "Removal actions are typically described as time-sensitive responses to public
6 health threats" *See United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1227–28
7 (9th Cir. 2005). Remedial actions "are often described as permanent remedies to
8 threats for which an urgent response is not warranted." *Id.* at 1228. A cost-recovery
9 claim must be commenced "within 3 years after completion of the removal action,"
10 *see* 42 U.S.C. § 9613(g)(2)(A), and "within 6 years after initiation of physical on-site
11 construction of the remedial action," *id.* § 9613(g)(2)(B). However, "if the remedial
12 action is initiated within 3 years after the completion of the removal action," the statute
13 of limitations for recovering the costs of the removal action is extended; those costs
14 may be recovered at the same time as the costs for the remedial action. *Id.*

15 Here, it is undisputed that DTSC has been continuously involved with the
16 Vernon Plant for many years, engaging in a still-ongoing removal action to safeguard
17 the public from public health threats. It is also undisputed that DTSC has not yet
18 finished planning its remedial actions for the Vernon Plant. Therefore, DTSC's cost-
19 recovery claims are timely.

20 The A/T Defendants vaguely suggest, but do not explicitly argue, that Plaintiffs'
21 cost-recovery claims are untimely because *some* of DTSC's removal actions were
22 conducted long ago, without specifying which ones. *See* Dkt. 729 at 18 n.13
23 ("Plaintiffs' experts rely on releases for which removal actions have been completed
24 and recovery is barred by the applicable statute of limitations."). This argument is
25 insufficiently developed. In any event, it misunderstands CERCLA law. As explained
26 in the painstaking analysis in *California Department of Toxic Substances Control v.*
27 *Alco Pacific*, 308 F. Supp. 2d 1124, 1131–33 (C.D. Cal. 2004) (collecting authorities),
28 the consensus is that a when a person undertakes multiple removal activities at a

contaminated site, those activities are not considered to be separate removal actions. Rather, those activities are considered as together constituting a single removal action. Thus, “[t]he statute of limitations only begins to run at the conclusion of the entire removal phase.” *Id.* at 1133. “[I]t would be inappropriate to divide the removal action into separate phases.” *Id.*; accord *Pneumo Abex Corp. v. Bessemer & Lake Erie R.R. Co.*, 936 F. Supp. 1250, 1260–61 (E.D. Va. 1996). This coheres with CERCLA’s plain text because the statute-of-limitations provision contemplates only a single removal action. *See* 42 U.S.C. § 9613(g)(2)(A)–(B) (referring to “the removal action”).

As for HSAA, the statute of limitations begins to run when DTSC certifies the completion of a removal or remedial action. *See* Cal. Health & Safety Code § 25360.4. That has not happened. The A/T Defendants’ statute-of-limitations defense falls short.

* * * *

In sum, the Defendants have not proved any affirmative defenses. Nor does CERCLA leave room for equitable defenses, because “the defenses available to Defendant[s] under CERCLA are statutorily limited.” Dkt. 176 at 4 (citing *California v. Neville Chem. Co.*, 358 F.3d 661, 672 (9th Cir. 2004) (“[T]he statutory defenses are exclusive.”)). Each Defendant must proceed to the next phase of this suit.

V. DTSC is Not Liable Under CERCLA or the HSAA for Regulating or Responding to Defendants’ Releases of Hazardous Substances.

Defendants counterclaim against DTSC, asserting that the agency became a CERCLA and HSAA “operator” of the Vernon Plant after the Plant ceased commercially operating in 2014. Dkt. 729 at 19.⁹¹ Defendants have developed scant and insufficient evidence supporting such a theory of liability. Defendants’ theory is out of step with the ample case law holding that an operator must be involved in a

⁹¹ Defendants’ HSAA counterclaim rises and falls with its CERCLA counterclaim. The HSAA counterclaim rests on a provision authorizing Defendants to seek contribution or indemnity from “any person who is liable” under the HSAA. Cal. Health & Safety Code § 25363(d). In turn, “[l]iable person” is defined as “those persons described in Section 107(a) of [CERCLA].” Cal. Health & Safety Code § 25323.5(a)(1).

1 running a polluting facility’s business operations, and setting a high bar to deem
2 regulators like DTSC to be operators. If anything, the evidence only confirms that
3 DTSC has faithfully discharged its role as a government regulator.

4 **A. The Court Has Already Expressed Skepticism About**
5 **Defendants’ Counterclaim.**

6 When Defendants pleaded their CERCLA and HSAA counterclaims, they
7 included a wide range of allegations about DTSC’s purported “operation” of the
8 Vernon Plant. As the Court summarized in a September 2021 order, Defendants’
9 allegations divided into three categories: “(1) allegations related to the permitting and
10 [financial] assurance requirements imposed by DTSC, (2) allegations of DTSC’s
11 management and control of the Vernon Plant through the time Exide ceased its
12 secondary smelting activities in 2014, and (3) allegations related to the closure of the
13 Vernon Plant and DTSC’s subsequent remediation efforts.” Dkt. 177 at 3.

14 The Court was rightly skeptical of Defendants’ counterclaims. The Court
15 observed that DTSC’s permitting authority was insufficient to support operator
16 liability. *Id.* Likewise, Defendants’ allegations about DTSC’s role in the Vernon
17 Plant’s financial assurance were “insufficient to show” operational control. *Id.* As for
18 remediation, the Court stressed that “[i]t is not clear that a government’s remedial
19 efforts undertaken pursuant to statutory authority are sufficient for a finding of
20 operator liability.” *Id.* at 4. But the Court allowed the counterclaim to proceed because
21 of “the fact-intensive nature of th[e] inquiry” regarding operator status. *Id.* at 5.

22 Now, after discovery, Defendants have developed only paltry evidence of
23 Plaintiffs’ purported “operator” activities. *See* Dkt. 729 at 19–20 (only two pages of
24 pre-trial briefing); Trial Tr. Day 3 at 119:16–120:20 (Defendants’ summary of
25 evidence). Far from the sweeping allegations they made when pleading their
26 counterclaims, Defendants now focus on only three issues pertaining to DTSC’s
27 conduct in or after 2014: (1) DTSC’s role in the Plant’s “closure,” a regulatory
28 process; (2) DTSC’s 2017 budget request to the Legislature seeking funds for the

1 agency's regulatory response; and (3) pavement wetting at the Plant required by air
2 pollution regulations. *See* Dkt. 729 at 19–20.

3 Defendants' failure to develop more evidence shows that the Court's skepticism
4 was justified. As discussed below, Defendants' evidence falls far short of what is
5 required to establish their counterclaim.

6 **B. A Government Entity Must Do More Than Regulate and**
7 **Respond to Pollution To Be an Operator.**

8 According to the U.S. Supreme Court, “operate” as “intended by CERCLA”
9 means “[t]o conduct the affairs of; manage: *operate a business.*” *United States v.*
10 *Bestfoods*, 524 U.S. 51, 66 (1998) (quotations omitted). An operator is someone that
11 “run[s] the facility,” and has “hands-on, day-to-day participation in [a] facility’s
12 management.” *United States v. Sterling Centrecorp Inc.*, 977 F.3d 750, 758 (9th Cir.
13 2020) (quoting *Long Beach Unif. Sch. Dist. v. Dorothy B. Godwin Cal. Living Tr.*, 32
14 F.3d 1364, 1367 (9th Cir. 1994)). Examples of such control include “set[ting] prices,”
15 *Long Beach Unif. Sch. Dist.*, 32 F.3d at 1368, “choos[ing] employees,” *id.*, and setting
16 wages or the length of the work week, *Coeur D’Alene Tribe v. Asarco Inc.*, 280 F.
17 Supp. 2d 1094, 1108 (D. Idaho 2003). The concept of “operation” centers on an
18 actively operating, polluting facility. *See Sterling Centrecorp Inc.*, 977 F.3d at 758
19 (operator liability “requires some level of direction, management, or control *over the*
20 *facility’s polluting activities*” (emphasis added)).

21 Given these precedents, arguments that government regulators operated a
22 polluting facility are disfavored and rarely meritorious. After all, Congress did not
23 intend CERCLA to discourage government regulators from doing their jobs. *Cf. FMC*
24 *Corp. v. U.S. Dep’t of Commerce*, 29 F.3d 833, 841 (3d Cir. 1994) (“CERCLA does
25 not intend to discourage the government from making cleanup efforts by making the
26 government liable for such efforts.”). In fact, under CERCLA, regulators like DTSC
27 are *expected* to be involved in major cleanups at heavily contaminated sites like the
28 Vernon Plant. *See Bedford Assocs. v. Sills*, 156 F.3d 416, 428 (2d Cir. 1998) (EPA

1 included a public comment provision in the NCP because “it was troubled by private
2 cleanups lacking significant governmental involvement”). Thus, usually, a regulator
3 becomes an operator only if it stops acting like a regulator and begins to act like a
4 private operator of a polluting facility. *See FMC Corp.*, 29 F.3d at 840 (“[W]hen the
5 government engages in activities that would make a private party liable if the private
6 party engaged in those types of activities, then the government is also liable.”).

7 A body of case law rejecting private parties’ attempts to misportray
8 governments as operators illustrates these principles. In *Steadfast Insurance Co. v.*
9 *United States*, No. CV 06-4686-AHM-RZx, 2009 WL 3785565 (C.D. Cal. Nov. 10,
10 2009), the court rejected an argument that the United States had operated an explosives
11 manufacturing facility. *Id.* at *1. The court emphasized that to be an operator, the
12 United States had to have directed the facility’s employees that engaged in “waste
13 disposal.” *Id.* at *7–8. It was not enough for the United States to have imposed
14 stringent criteria for, exerted extensive influence over, and stationed staff at the
15 facility. *See generally id.* This holding comported with Ninth Circuit case law holding
16 that an operator must control the polluting activities that cause hazardous substances
17 to enter the environment. *See Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*,
18 976 F.2d 1338, 1341–42 (9th Cir. 1992).

19 Out-of-circuit decisions reinforce this analysis. The most striking one is
20 *Lockheed Martin Corp. v. United States*, 35 F. Supp. 3d 92 (D.D.C. 2014). As
21 explained in Plaintiffs’ Pre-Trial Brief, the United States was not an operator in
22 *Lockheed Martin* despite having exerted an extremely heavy degree of control over
23 polluting facilities. *See* Dkt. 727 at 45–46. No matter how much the United States
24 influenced the facilities, it was not an operator because it “did not manage, direct, or
25 otherwise control on a frequent basis the day-to-day hazardous *waste disposal*
26 *activities* at the Sites.” *Lockheed Martin*, 35 F. Supp. 3d at 150 (emphasis added).

27 Summing up: A CERCLA or HSAA operator is someone that operates a
28 polluting business on a day-to-day basis. For example, an operator is the sort of

1 manager that sets prices, chooses employees, or otherwise organizes industrial
2 activities. An operator must have had a hand in *waste disposal* activities that caused
3 hazardous substances to enter the environment.

4 Defendants, of course, have provided no evidence of DTSC’s involvement in
5 such activities. *See* Dkt. 727 at 20–21. Defendants implausibly assert that DTSC
6 became an operator *after* the Vernon Plant ceased operating as a waste disposal and
7 treatment business, and after the Plant was finished releasing hazardous substances
8 into the environment. To defend this unusual position, Defendants quote *United States*
9 *v. Bestfoods*, 524 U.S. 51, 66–67 (1998), out of context. *See* Dkt. 729 at 19. Defendants
10 assert that *Bestfoods* stands for the proposition that operators are those that “manage,
11 direct, or conduct operations specifically related to pollution, that is, operations having
12 to do with the leakage or disposal of hazardous waste, or decisions about compliance
13 with environmental regulations.” 524 U.S. at 66–67. However, Defendants’ quoted
14 portion of *Bestfoods* had nothing to do with whether a government operated a private
15 facility. Rather, that portion of the Court’s analysis addressed whether a corporate
16 parent could be held liable as an operator of a polluting facility owned or operated by
17 its subsidiary. *See id.* Put differently, in *Bestfoods*, there was no real dispute that the
18 facility *was* being “operate[d] [as] a business” that disposed of waste. *See id.* at 66.
19 Rather, the dispute centered on whether the corporate parent or subsidiary was the
20 operator. Therefore, the Court focused on whether the corporate parent had exercised
21 enough control over its subsidiary. *See id.*

22 Defendants also rely on *United States v. Township of Brighton (Brighton)*, 153
23 F.3d 307 (6th Cir. 1998). *See* Dkt. 729 at 19. *Brighton* strongly supports Plaintiffs.
24 There, a township was heavily involved in the operations of a dump: it had exclusive
25 use of it, took charge of bulldozing to maintain it when others “proved unequal to the
26 task,” and required the dump to “meet the specifications of and be under the
27 supervision of the [town’s] Board of Appeals.” *Id.* at 310–16. Even under these facts,
28 the Sixth Circuit vacated the district court’s determination that the township was an

operator, finding insufficient evidence and requiring further proceedings on remand to resolve the township’s operator liability. The Sixth Circuit emphasized that ordinary regulation “in which a governing authority uses its conventional police power to ensure that a dump does not pose a threat to public health and safety” would not give rise to operator liability. *Id.* at 315. Only unusual “situations in which the ‘regulations’ are just the government’s method of macromanaging the facility” would support operator liability. *Id.* Thus, *Brighton* supports the view that only extensive, unusual control by a government agency will give rise to operator liability.

Thus, the case law—including some of the very cases Defendants cite—demonstrates that DTSC should not be treated as an operator.⁹²

C. The Evidence Does Not Show that DTSC Operated the Vernon Plant.

Defendants argue that DTSC became an operator of the Vernon Plant sometime in or after 2014, when it ceased running as an operational business. But Defendants’ evidence shows only that DTSC had limited involvement with the no-longer-operational Plant, consistent with its role as a regulator. Given the thin evidence of DTSC’s involvement, Defendants may shift course and assert that DTSC operated the Plant during an earlier time period while the Plant was operating. That argument, too, would lack merit because DTSC has always acted as a regulator and has never controlled business activities at the Vernon Plant.

⁹² Defendants also cite without explanation *California Department of Toxic Substances Control v. Jim Dobbas, Inc.*, No. 2:14–595 WBS EFB, 2014 WL 4627248 (E.D. Cal. Sept. 16, 2014), and *United States v. Stringfellow*, No. CIV 83-2501 JMI, 20 ELR 20656 (C.D. Cal. Jan. 9, 1990). *See* Dkt. 729 at 20. As the Court has already reasoned, *Stringfellow* is “inapposite.” *See* Dkt. 177 at 4 n.2. And the *Jim Dobbas* court likely took too expansive a view of CERCLA liability. *See id.* at 4–5 n.2. In any event, *Jim Dobbas* dealt with a lenient plausibility pleading standard, not the more demanding preponderance-of-evidence standard at hand here. *See Jim Dobbas, Inc.*, 2014 WL 4627248, at *1–2.

1 **1. DTSC Did Not Become an Operator After the Vernon**
2 **Plant Ceased Operating.**

3 Defendants use three bases to argue that DTSC became an operator of the
4 Vernon Plant sometime in or after 2014, *see* Dkt. 177 at 20–21: (1) DTSC’s role in
5 the Plant’s “closure,” (2) DTSC’s 2017 budget request to the Legislature for DTSC’s
6 regulatory response at the Plant; and (3) pavement wetting at the Plant required by air
7 pollution regulations. Defendants’ evidence does not show that DTSC went beyond
8 its role as a regulator and became an operator that “operate[d] a business,” *Bestfoods*,
9 524 U.S. at 66; “play[ed] an active role in *running* the facility,” *Sterling Centrecorp*,
10 977 F.3d at 758 (emphasis added); or controlled the “day-to-day *hazardous waste*
11 *disposal activities* at the [Plant],” *Lockheed Martin Corp.*, 35 F. Supp. 3d at 150
12 (emphasis added).

13 First, Defendants focus on DTSC’s role in the Vernon Plant’s closure, an
14 indisputably regulatory process controlled by the California Hazardous Waste Control
15 Law (“HWCL”). *See* Cal. Health & Safety Code § 25100, *et seq.* (statutory
16 authorities); Cal. Code Regs. tit. 22, §§ 66265.110–115 (closure requirements).
17 Defendants mistakenly assert that that since 2014, by approving and overseeing
18 compliance with a closure plan for the Plant required by the HWCL, DTSC has
19 “assumed complete control” over the Plant and “t[aken] over [its] day-to-day
20 management.” Dkt. 729 at 19.

21 Defendants’ evidence does not support this assertion. Defendants emphasize
22 that DTSC employees “have spent hundreds of hours overseeing the closure activities
23 at the Vernon Plant.” *See* Dkt. 729 (citing Acharya Tr. at 397:17–20). However,
24 Defendants provide no evidence that DTSC employees did anything more than ensure
25 that the Plant’s closure was complying with HWCL requirements. Given the size and
26 complexity of the Plant, it is to be expected that DTSC would spend hundreds of hours
27 ensuring that its closure was HWCL-compliant. Likewise, the other portions of
28 testimony by DTSC’s representative that Defendants cite describe only run-of-the-

1 mill regulatory oversight. *See* Acharya Tr. at 396:8–20, 468:20–25.

2 Second, Defendants draw an out-of-context quotation from a budget proposal
3 prepared by DTSC for the Legislature to argue that DTSC was an operator. In that
4 proposal, DTSC requested money to hire “a third-party quality assurance contractor”
5 to assist with regulatory functions typically carried out directly by DTSC—for
6 example, providing field oversight to ensure the Closure Plan requirements were being
7 complied with and reporting any delays or instances of non-compliance to DTSC.
8 PX_2-4354 at 4 (DTSC4533357). Specifically, “[t]he selected contractor will conduct
9 real-time air monitoring; confirm compliance with truck-leading procedures, truck-
10 decontamination procedures, and transportation routes; and ensure that the closure
11 activities do not add additional environmental impacts that are not already identified
12 in the [environmental impact report].” *Id.* at 3 (DTSC4533356). Thus, the contractor
13 was assisting DTSC in its regulatory role under the HWCL, not running the operations
14 of the defunct Vernon Plant’s business.

15 Defendants make much of a statement in the budget proposal that “DTSC will
16 be ultimately responsible for all decision-making and approval of work activities and
17 will maintain overall oversight responsibilities to ensure that all work is meeting the
18 highest standards of performance related to environmental compliance.” *Id.* Contrary
19 to Defendants’ assertion, this statement did not reflect that DTSC had taken control of
20 the Plant. Read in context, DTSC’s statement merely assured the Legislature that
21 “[t]he third-party QA contractor will act” merely as an “on-site presence to observed
22 closure activities on a day-to-day basis,” and that DTSC was not ceding any of its
23 HWCL regulatory functions over the closure to a private contractor. *Id.* Put
24 differently, “DTSC w[ould] be ultimately responsible” for regulatory oversight, not
25 the third-party contractor.

26 Third, Defendants assert that since at least 2016, DTSC has been responsible
27 for keeping the Vernon Plant from falling out of regulatory compliance with its Title
28 V air pollution permit by covering the costs of wetting the Plant’s pavement, which is

1 performed to comply with the permit’s dust control requirement. Dkt. 729 at 20. The
2 evidence shows that the pavement-wetting regulatory requirement was first imposed
3 upon Exide by SCAQMD. *See* Preuth Tr. at 35:4–20. Defendants’ evidence shows
4 only that DTSC has ensured that this regulatory requirement is being complied with,
5 including by covering the costs of such pavement wetting at certain times after the
6 Plant went defunct and Exide went bankrupt. *See* Acharya Tr. at 470:13–18 (noting
7 that DTSC was incurring such costs); *see also id.* at 114:3–13, 134:11–22, 552:16–25
8 (other testimony cited by Defendants).⁹³ Defendants have not shown that DTSC has
9 ever made any decisions that shaped these regulatory requirements, conducted
10 watering using DTSC staff, or managed how that wetting has been conducted (because
11 DTSC has not done so, as the agency does not ordinarily do “shovels-on-the-ground”
12 type work).

13 At most, then, DTSC paid for some costs of keeping the Vernon Plant in
14 regulatory compliance with air permitting requirements that predated the Plant’s
15 closure and were designed by a different regulatory agency. Defendants have not
16 identified any case showing that such limited involvement—viewed under “the
17 totality of the circumstances” and in view of all the facts, *see Sterling Centrecorp*, 977
18 F.3d at 757 (operator liability is a “fact-intensive inquiry”)—rises to the level of
19 “operat[ing] a business,” *Bestfoods*, 524 U.S. at 66; “playing an active role in *running*
20 the facility,” *Sterling Centrecorp*, 977 F.3d at 758; and controlling the “day-to-day
21 *hazardous waste disposal activities* at the [Plant],” *see Lockheed Martin Corp.*, 35 F.
22 Supp. 3d at 150 (emphasis added). As the Sixth Circuit put it in *Brighton*, DTSC was
23 merely “a governing authority us[ing] its conventional police power to ensure that a
24 [facility] does not pose a threat to public safety”; it was not using “regulations” as a
25 “method of macromanaging the [Plant].” *See* 153 F.3d at 315. In fact, other decisions

26 ⁹³ Defendants disparage the Title V permit’s pavement wetting requirement as
27 “now-pointless.” *See* Dkt. 729 at 20. The Court should disregard this statement,
28 which is purely the *ipse dixit* of Defendants’ counsel, pays undue regard to
SCAQMD’s expertise, and is irrelevant to whether DTSC is an operator.

1 confirm that even if DTSC *had* played a greater role at the Vernon Plant, its activities
2 still would not have given rise to operator liability. *See Stilloe v. Almy Bros., Inc.*, 782
3 F. Supp. 731, 736 (N.D.N.Y. 1992) (“[W]hen a state is acting solely in its statutory
4 capacity to clean up a hazardous waste site, this activity does not raise its status to that
5 of an operator within the meaning of CERCLA section 107.”)

6 Defendants have developed only limited evidence in support of their unfounded
7 theory that DTSC was an operator. The trivial nature of their evidence—such as a
8 single sentence in a budget request—underscores that DTSC has stayed well within
9 its role as a regulator and has not taken the much more extensive steps needed to assert
10 operational control over the Plant.

11 **2. DTSC’s Pre-2014 Regulation of the Vernon Plant Did**
12 **Not Make It an Operator.**

13 Given the paucity of evidence indicating that DTSC became the operator of the
14 defunct Vernon Plant in or after 2014, Defendants may change course and focus on
15 DTSC’s actions before 2014. *See* Dkt. 729 at 19–20. Such an argument would be even
16 weaker than the ones addressed above.

17 If Defendants choose this strategy, they may focus on the 2002 Corrective
18 Action Consent Order (“CACO”), which was a stipulated agreement between DTSC
19 and Exide that DTSC entered into under its regulatory authority. *See* DX_2-1544. Any
20 such argument is unpersuasive because the CACO—upon careful review—only
21 reinforces that DTSC has for decades limited its role to that of a non-operator
22 regulator. From the outset, the CACO acknowledges that Exide, not DTSC, “is *the*
23 owner and operator” of the Plant. *Id.* § 1.2. The CACO was an administrative order
24 entered under DTSC’s statutory authorities under RCRA and state laws. *Id.* § 1.3.
25 Exide was responsible for “perform[ing] any and all work undertaken pursuant to this
26 Consent Order,” including by hiring any needed technical experts. *Id.* §§ 4.1, 13.1.
27 DTSC’s role was limited to reviewing regulatory work plans submitted by Exide for
28 compliance with legal requirements. *Id.* While DTSC had the right to access the Plant

1 as needed for its regulatory oversight, *id.* § 17, the CACO contemplated that Exide
2 would continue to operate the Plant as it was doing. At most, DTSC was “a governing
3 authority us[ing] its conventional police power to ensure that a [facility] does not pose
4 a threat to public safety”; it was not using “regulations” as a “method of
5 macromanaging the [Plant].” *Brighton*, 153 F.3d at 315.

6 **D. DTSC Falls Within Three Statutory Exemptions from**
7 **CERCLA Liability.**

8 Even if the Court were to find that certain of DTSC’s actions make it an
9 operator, three statutory provisions exempt DTSC from liability.

10 First, DTSC is shielded by CERCLA Section 107(d)(2), which protects states
11 and local governments from response-cost liability “result[ing] [from] actions taken
12 in response to an emergency created by the release or threatened release of a hazardous
13 substance generated by or from a facility owned by another person.” *See* 42 U.S.C. §
14 9607(d)(2). “In the hazardous waste context, the existence of a severe or potentially
15 severe environmental problem that threatens to worsen if not promptly addressed,
16 constitutes an emergency.” *United States v. Davis*, 20 F. Supp. 2d 326, 335 (D.R.I.
17 1998). This provision has been interpreted expansively to “remove[] a disincentive for
18 governments to respond to emergencies covered by CERCLA.” H.R. Rep. No. 99-
19 253(I), at 73 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2855; *see Pennsylvania v.*
20 *Union Gas Co.*, 491 U.S. 1, 52 n.4 (1989) (White, J., concurring in part and dissenting
21 in part) (similar).

22 In 2015, DTSC determined that such “severe or potentially severe
23 environmental problem[s]” exist at the Vernon Plant. Specifically, DTSC issued to
24 Exide an administrative enforcement order because “there may be an imminent and/or
25 substantial endangerment to the public health or welfare or to the environment because
26 of the release or threatened release of the hazardous substance at the Site,” and lead
27 released from the Plant had contaminated surrounding areas. JX007 (Phase I trial
28 exhibit) at 3. Any involvement by DTSC at the Vernon Plant has always been

undertaken for that very reason—to prevent the already dangerous situation from becoming a greater threat to public health and the environment.⁹⁴

Second, DTSC is exempt from liability under CERCLA Section 107(d)(1). That provision exempts all “persons”—including government entities⁹⁵—from CERCLA liability for actions taken “in the course of rendering care, assistance, or advice” with respect to an “incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof,” as long as those actions are “in accordance with the [NCP].” *See* 42 U.S.C. § 9607(d)(1). As discussed, all of DTSC’s actions that Defendants contend give rise to “operator” liability were taken “in the course of rendering” such “care, assistance, or advice.”⁹⁶

Third, as explained in Plaintiffs’ Pre-Trial Brief, *see* ECF No. 727 at 47–49, CERCLA Section 101(2)(D), 42 U.S.C. § 9601(2)(D), provides that DTSC would fall outside the definition of “operator” to the extent it engaged in any operator conduct *after* Exide abandoned the Vernon Plant in October 2020. *See In re Exide Holdings*, No. 20-1157-CSS, 2021 WL 3145612, at *2–3 (D. Del. July 26, 2021) (detailing the October 2020 abandonment).

These exemptions apply fully to the HSAA. CERCLA Sections 107(d)(1) and (2), which have been part of the law in materially unchanged form since its passage in 1980, affect which persons are liable “under [the same] subchapter,” which includes CERCLA Section 107(a). *See* 42 U.S.C. § 9607(d)(2). HSAA, in turn, incorporates Section 107(a)’s liability standard. *See* Cal. Health & Safety Code § 25323.5(a)(1). Likewise, CERCLA Section 101(2)(D) defines the class of persons subject to owner

⁹⁴ CERCLA Section 107(d)(2) contains an exception where the state or local government was grossly negligent or engaged in intentional misconduct. *See* 42 U.S.C. § 9607(d)(2). Defendants have introduced no evidence showing such conduct by DTSC.

⁹⁵ *See United States v. Azrael*, 765 F. Supp. 1239, 1246 (D. Md. 1991).

⁹⁶ CERCLA Section 107(d)(1) contains an exception for negligent persons. 42 U.S.C. § 9607(d)(1). Defendants have introduced no evidence showing negligence by DTSC.

1 and operator liability under CERCLA Section 107(a).

2 In sum, even if the Court were to otherwise find DTSC to be an “operator,”
3 DTSC would still be exempt from CERCLA and HSAA operator liability.

4 **E. Defendants Are Jointly and Severally Liable to DTSC Even If**
5 **DTSC Is a Liable Party.**

6 In closing, Defendants argued that under *Pinal Creek Group v. Newmont*
7 *Mining Corp. (Pinal Creek)*, 118 F.3d 1298 (9th Cir. 1997), DTSC cannot seek to
8 impose joint and several liability on Defendants if it is found to have been an operator.
9 See Trial Tr. Day 3 at 118:18–22. Defendants overlook that *Pinal Creek* “has been
10 overruled.” *Kotrous v. Goss-Jewett Co. v. N. Cal.*, 523 F.3d 924, 927 (9th Cir. 2008).
11 Even if *Pinal Creek* was still good law, courts applying it uniformly held that its logic
12 was inapplicable to CERCLA claims brought by states and other sovereigns.
13 Therefore, Plaintiffs may continue to hold Defendants jointly and severally liable even
14 if DTSC is found to have been an operator.

15 In *Pinal Creek*, the Ninth Circuit dealt with a private CERCLA plaintiff that
16 admitted it was a covered person and brought cost-recovery claims against other
17 covered persons. 118 F.3d at 1300. The court addressed whether the plaintiff could
18 impose joint and several liability on the defendants, or only seek from each defendant
19 their “own equitable share of the costs incurred by the [plaintiff].” *Id.* at 1301. The
20 court chose the latter result. *Id.*

21 The court’s analysis rested on interpreting Section 107(a)(4)(B), the paragraph
22 that authorizes non-sovereign plaintiffs other than the United States, a state, or an
23 Indian tribe to sue, in conjunction with Section 113(f), CERCLA’s contribution
24 provision. See *id.* at 1300–01. Based on Section 107(a)(4)(B)’s text, the court
25 concluded that when a non-sovereign plaintiff that is itself a liable covered person
26 brings a cost-recovery claim, that claim is necessarily a claim for contribution under
27 Section 113(f). *Id.* at 1301–02.

28 Even while *Pinal Creek* was controlling precedent in the Ninth Circuit, its logic

1 was limited to cost-recovery actions brought by *non-sovereign plaintiffs* that happened
2 to be covered persons. Most district courts reasoned that the distinct statutory language
3 in CERCLA Section 107(a)(4)(A) that authorizes the United States, states, and Indian
4 tribes to recover “*all costs* of removal and remedial action,” 42 U.S.C.
5 § 9607(a)(4)(A), empowered such sovereign plaintiffs to seek joint and several
6 liability against defendants even when the plaintiffs themselves were covered persons.
7 *See United States v. Hunter*, 70 F. Supp. 2d 1100, 1103–08 & n.5 (C.D. Cal. 1999)
8 (“[T]he Court is persuaded that the government should be able to impose joint and
9 several liability upon private PRPs, even when government agencies are themselves
10 PRPs.”); *Cal. Dep’t of Toxic Substances Control v. Alco Pac., Inc.*, 217 F. Supp. 2d
11 1028, 1036 (C.D. Cal. 2002) (following *Hunter* for a claim brought by DTSC).

12 In any event, *Pinal Creek* “has been overruled” by the U.S. Supreme Court. *See*
13 *Kotrous*, 523 F.3d at 932. Specifically, in *United States v. Atlantic Research Corp.*,
14 551 U.S. 128 (2007), the Court held that “a [covered person] may sue for cost recovery
15 under § 107,” and that such an action is not “necessarily for contribution.” *See*
16 *Kotrous*, 523 F.3d at 932. Since *Atlantic Research*, Ninth Circuit district courts have
17 held that because *Pinal Creek* has been overruled, “‘PRPs bringing suit under
18 § 107(a)’ are no longer ‘precluded from seeking to impose joint and several liability.’”
19 *Santa Clarita Valley Water Agency v. Whittaker Corp.*, No. 2:18-CV-06825-SB-RAO,
20 2021 WL 4340520, at *2 n.1 (C.D. Cal. July 22, 2021) (quoting *Chartis Specialty Ins.*
21 *Co. v. United States*, No. C-13-1527 EMC, 2013 WL 3803334, at *17–18 (N.D. Cal.
22 July 19, 2013)); *accord Raytheon Aircraft Co. v. United States*, 532 F. Supp. 2d 1306,
23 1309–13 (D. Kan. 2007). Therefore, even if Defendants establish their counterclaim,
24 Plaintiffs may nonetheless seek joint and several liability from Defendants.

25 **VI. Conclusion**

26 The Court should find for Plaintiffs on all Phase II trial issues.
27
28

1 DATED: July 1, 2023

Respectfully submitted,

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