APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT

Nos. 18-2633 & 18-2738

VALBRUNA SLATER STEEL CORPORATION, *et al.*,

Plaintiffs-Appellees, Cross-Appellants,

v.

JOSLYN MANUFACTURING COMPANY, *et al.*,

Defendants-Appellants, Cross-Appellees.

Argued May 16, 2019
Decided August 8, 2019
Rehearing En Banc Denied September 6, 2019

St. Eve, Circuit Judge.

This case is about an on-and-off, decades-long effort to stop an Indiana steel mill's pollution. Valbruna Slater Steel purchased the mill (or the "site") in 2004, and it quickly got to work on needed, but costly, clean-up efforts. Valbruna then sued Joslyn Manufacturing Company, which last operated the site in 1981, to recover costs under both the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Indiana's Environmental Legal Actions statute (ELA).

Joslyn's fault is undisputed; its operation of the site started the pollution problems. But Joslyn defended itself in the district court on claim-preclusion, statute-

of-limitations, and contribution grounds. The district court decided the CERCLA claim was not precluded, but the ELA claim was. It also decided the suit was timely. The district court, however, did impose equitable contribution on Valbruna, requiring it to pay for a quarter of the past and future costs incurred during the site's cleanup. Joslyn appeals and Valbruna cross-appeals. We affirm across the board.

I. Background

Joslyn,[1] a steel manufacturer, owned and operated the site, located in Fort Wayne, Indiana, from 1928 to 1981. Joslyn's operation polluted nearby soil, sludge, and, as a result, ground-water. In 1981, Joslyn sold the site to Slater Steels Corporation through an Asset Purchase Agreement. After acquiring the site, Slater set to work with cleanup efforts. Slater did so, the record suggests, upon pressure from regulators and to bring the site into compliance with the Resource Conservation and Recovery Act of 1976. *See* 42 U.S.C. § 6901 *et seq.*

From 1981 to 1987, Slater excavated sludge and contaminated soil from two areas on the site: an impoundment area and a waste pile. The excavation, however, did not remove all contaminates. In 1988, Slater signed an agreement with the EPA, which permitted monitoring of the site until the Indiana Department of Environmental Management (IDEM) could certify the closure of the polluted areas. In 1991, Slater undertook more work, this time capping the excavated impoundment area with a concrete lid to prevent runoff. Slater

[1] We refer to the parties as Joslyn, Valbruna, and Slater. The parties' briefs identify the particular affiliates or corporate entities that were involved in the various transactions and suits, but those corporate distinctions do not matter for our purposes.

also implemented a ground-water detection program. IDEM then issued a certification of completion for the work Slater had started, though IDEM recognized that more work was ongoing and necessary at the site.

Slater repeatedly tried to get Joslyn to pay for the cleanup work it had done, to no avail. In 1988 and again in 1994, Slater sent Joslyn a demand letter explaining that Joslyn was responsible for the cleanup under their agreement. Joslyn disagreed, telling Slater that it had assumed responsibility for the costs. Slater escalated its demand in 1999. With another demand letter, it sought costs not just per the agreement, but under CERCLA and the ELA statute as well. Joslyn again declined to pay for the cleanup.

The dispute headed to court. In 2000, Slater sued Joslyn in an Indiana state court seeking (1) indemnification under the agreement and (2) costs under the ELA statute. Slater did not bring a CERCLA claim in its state-court suit—nor could it. Federal courts have exclusive jurisdiction over CERCLA claims. 42 U.S.C. § 9613(b).

Slater's state-law claims ultimately failed. First, in 2001, the trial court ruled that the ELA statute—enacted in 1998—could not be retroactively enforced. (Later, in different litigation, the Indiana Supreme Court supported retroactive application. *See Cooper Indus., LLC v. City of South Bend*, 899 N.E.2d 1274, 1285 (Ind. 2009). But for Slater's purposes, its ELA claim was over.) Then, in 2003, Slater filed for bankruptcy and stopped cooperating in discovery. When it failed to produce its environmental manager for a deposition, Joslyn moved to dismiss for want of prosecution under Indiana Trial Rule 41(E). The trial court granted that motion in 2005.

In 2004, with the state suit pending, Valbruna purchased the site at a competitive bankruptcy auction. It paid $6.4 million. Before finalizing the deal, and apparently recognizing the ongoing pollution hazards, Valbruna negotiated with IDEM. Valbruna and IDEM agreed to a Prospective Purchase Agreement (PPA). Under the PPA, both parties agreed to put down $500,000 each, the total of which would go toward cleanup if Valbruna won the auction.

After Valbruna won the auction, its purchase contract granted Valbruna the right to intervene in Slater's pending state-court suit. Valbruna never did so. Valbruna, instead, set out to perform more cleanup in 2005, as the PPA required. IDEM approved Valbruna's cleanup plan, but the plan budgeted to (and ultimately would) deplete more than the $500,000 Valbruna set aside. In 2007, with work ongoing, IDEM again reviewed the site, and ordered even more cleanup.

Upset with how much the cleanup cost, Valbruna filed this suit in 2010 against Joslyn in federal court. Valbruna claimed cost recovery pursuant to § 107 of CERCLA, 42 U.S.C. § 9607(a), and the ELA statute, Ind. Code §§ 13-30-9-2–3. Valbruna also sought a declaratory judgment regarding Joslyn's liability. Joslyn counterclaimed for contribution under § 113(f). 42 U.S.C. § 9613(f). Valbruna did not cause the pollution, Joslyn admitted, but under § 107(a)(1), a facility's owner, like Valbruna, may be liable for cleanup costs.

Joslyn moved to dismiss on claim-preclusion grounds, citing the earlier state-court suit between it and Slater. The district court converted that motion to one for summary judgment. It granted the motion with respect to the ELA claim, concluding that Slater and Valbruna were in privity, but it denied the motion on the CERCLA claim. The court explained, in a revised ruling, that

because CERCLA is an exclusively federal claim there could be no claim preclusion based on the failure to raise it in an earlier state-court suit.

Joslyn then tried to defeat the CERCLA claim on a different ground. It filed a motion for summary judgment arguing that the claim was time-barred because it was brought more than six years after the start of "remedial action"—Slater's earlier cleanup, according to Joslyn. 42 U.S.C. § 9613(g)(2). The district court disagreed. In a thorough opinion, the district court decided, as a matter of law, that Slater's cleanup was "removal" and therefore the relevant limitations period had not tolled. *Compare id.* § 9613(g)(2)(A) (time limits for removal actions) *with* (B) (time limits for remedial actions). Joslyn attempted to amend its answer, adding the claim-preclusion and statute-of-limitations defenses for which it had already filed summary-judgment motions. The magistrate judge granted Joslyn leave to amend but struck the defenses, concluding that the district court's earlier decisions settled that those defenses did not apply as a matter of law. Joslyn asked for reconsideration, which the magistrate judge denied.

Joslyn was undeterred. It filed another motion for summary judgment, without first seeking leave as the court had told it to. Again, Joslyn argued its already-stricken claim-preclusion and statute-of-limitations defenses. Valbruna then sought a declaration that Joslyn was liable under § 107(a) of CERCLA. The district court denied Joslyn's successive motion and granted Valbruna's motion, finding that there was no question that Joslyn, as the initial polluter, was liable.

That left only two issues: damages and contribution under CERCLA. The case went to a bench trial in two phases on those issues. As for damages, after trial the district court concluded that Valbruna had incurred

$2,029,871.09 in costs while remediating the site. It then reduced that amount by $500,000, believing that it would be unfair for Valbruna to recover that sum twice, as it had been contemplated in Valbruna's purchase price and the PPA. As for contribution, the district court apportioned liability for past and future costs: 75% for Joslyn, 25% for Valbruna. The district court justified Valbruna's share by citing its assumed risk in purchasing an old metal-production site with well-known pollution problems.

Joslyn appealed and Valbruna cross-appealed.

II. Discussion

The parties on appeal continue their dispute over who should pay what for the site's costly clean up. The answer turns on issues of preclusion, timeliness, and the district court's discretion in equitably allocating costs. We will address those issues and the parties' appeals in turn.

A. Joslyn's Appeal

Joslyn argues two reasons why Valbruna's cost-recovery claim under CERCLA should fail: it is precluded by the earlier state-court suit and it is untimely. Before addressing those arguments, we must pass a procedural hurdle.

This is how the litigation over Joslyn's defenses should have played out: Joslyn timely pleaded its preclusion and limitations defenses; the parties cross-moved at summary judgment on those defenses; and the district court, concluding, as it did, that the defenses did not apply as a matter of law, granted Valbruna summary judgment on the defenses. No doubt we could review that (hypothetical) grant of summary judgment after the final judgment. *Bastian v. Petren Res. Corp.*, 892

F.2d 680, 683 (7th Cir. 1990). But things played out differently. Joslyn did not plead the defenses before moving for summary judgment on them, and so Valbruna never cross-moved on them (it just opposed Joslyn's motion). As a result, Joslyn now wants us to review the district court's *denial* of its motions for summary judgment on the preclusion and limitations defenses.

That request gives us pause, though, because we do not typically review summary-judgment denials. After a case goes to trial, as happened here, an earlier summary-judgment denial is "old news." *Kreg Therapeutics, Inc. v. VitalGo, Inc.*, 919 F.3d 405, 416 (7th Cir. 2019); *see also Ortiz v. Jordan*, 562 U.S. 180, 184, 131 S.Ct. 884, 178 L.Ed.2d 703 (2011). We have noted a possible exception to that rule of non-reviewability, for "purely legal issues." *Mimms v. CVS Pharmacy, Inc.*, 889 F.3d 865, 869 (7th Cir. 2018); *see also Carmody v. Bd. of Trustees of Univ. of Illinois*, 893 F.3d 397, 404 (7th Cir. 2018) (discussing the "controversial exception"); *Lawson v. Sun Microsystems, Inc.*, 791 F.3d 754, 761 n.2 (7th Cir. 2015) (noting "a split of authority on this point"). This case arguably fits into this possible exception. The facts are undisputed and the district court's preclusion and limitations decisions were as a matter of law.

We, however, need not decide as much to hear Joslyn's appeal. Despite Joslyn's focus on the summary-judgment denials, Joslyn's defenses were finally put to bed by a different order—the order striking the defenses from the amended answer.[2] The decision to strike, which incorporated the earlier summary-judgment reasoning, was a dispositive order on the defenses, which we

[2] This is true despite Joslyn's later attempt to resuscitate the defenses with another summary-judgment motion, which, again, it filed without leave from the court.

can review. *See Heraeus Kulzer, GmbH v. Biomet, Inc.*, 881 F.3d 550, 563 (7th Cir. 2018). Because the defenses failed in the district court as a matter of law, our review is de novo. *Lopez-Aguilar v. Marion Cty. Sheriff's Dep't*, 924 F.3d 375, 384 (7th Cir. 2019).

1. CERCLA Claim Preclusion

Claim preclusion, or res judicata, generally bars the relitigation of claims that were brought, or could have been brought, in an earlier suit that has reached final judgment. The district court here concluded that the state-court suit did not preclude the CERCLA claim. To decide the preclusive effect of a state-court judgment, and in the interest of affording full faith and credit to state-court judgments, 28 U.S.C. § 1738, we look to the law of the state where the judgment occurred. *Mains v. Citibank, N.A.*, 852 F.3d 669, 675 (7th Cir. 2017). That state here is Indiana.

Under Indiana law, the following four elements must be met for claim preclusion to apply:

> (1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the former judgment must have been rendered on the merits; (3) the matter now in issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action must have been between the parties to the present suit or their privies.

Freels v. Koches, 94 N.E.3d 339, 342 (Ind. Ct. App. 2018). We begin and end with the first element, regarding jurisdictional competency.

Cost-recovery actions under CERCLA, as we noted earlier, can only be brought in federal court. 42 U.S.C. § 9613(b). The question, then, is whether an Indiana

court has jurisdictional competency over an exclusively federal claim. Indiana courts have not answered the question—nor will they. State courts do not hear exclusively federal claims, by definition, and so the question will not come before them.[3] *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 375, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996); Wright & Miller, 18B Fed. Prac. & Proc. § 4470.1 (2d ed. 2019). So our task is to answer the question "in the same way (as nearly as we can tell) as the state's highest court would." *Newman v. Metro. Life Ins. Co.*, 885 F.3d 992, 1000 (7th Cir. 2018).

The starting point is *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985). In *Marrese*, the Supreme Court held that in deciding whether res judicata bars an exclusively federal claim (there, a Sherman Act claim), federal courts must look to state law. En route to that holding, the Court noted that, under most state law, "claim preclusion generally does not apply where '[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy because of the limitations on the subject matter jurisdiction of the courts.'" *Id.* at 382, 105 S.Ct. 1327 (quoting Restatement (Second) of Judgments § 26(1)(c) (1982)). The Court elaborated, if "state preclusion law includes this requirement of prior jurisdictional competency, which is generally true, a state judgment will *not* have claim preclusive effect on a cause of action within the exclusive jurisdiction of the federal courts." *Id.* (emphasis in original). Based on this general rule, the Court saw no need to carve out an exception to the Full Faith and Credit statute,

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[3] With one exception: a state supreme court could, of course, answer the question if we were to certify it. *See* Ind. R. of App. P. 64. Joslyn, however, expressly disavowed any request to certify the question to the Supreme Court of Indiana at oral argument.

and the deference to state judgments that it requires, for exclusively federal claims that are brought after a state judgment. Such claims will usually not be precluded under state law, the Court reasoned. *Id.* at 382–83, 105 S.Ct. 1327 & n.3.

The Restatement (Second) of Judgments § 26, which *Marrese* quotes, is equally explicit about the general rule. It states: "When the plaintiff brings an action in the state court, and judgment is rendered for the defendant, the plaintiff is not barred from an action in the federal court in which he may press his claim against the same defendant under the federal statute." The Restatement then offers Illustration 2, which *Marrese* also cites, 470 U.S. at 383, 105 S.Ct. 1327, and it offers clarification by hypothetical:

> A Co. brings an action against B Co. in a state court under a state antitrust law and loses on the merits. It then commences an action in a federal court upon the same facts, charging violations of the federal antitrust laws, of which the federal courts have exclusive jurisdiction. The second action is not barred.

Restatement (Second) of Judgments § 26(c)(1). Federal courts make the same point. Following *Marrese* and the Restatement, they recognize that if state law requires jurisdictional competency for res judicata purposes, state judgments do not preclude exclusively federal claims. *See United States v. B.H.*, 456 F.3d 813, 817 (8th Cir. 2006) (Iowa law); *In re Lease Oil Antitrust Litig. (No. II)*, 200 F.3d 317, 320–21 (5th Cir. 2000) (Alabama law); *Valley Disposal, Inc. v. Cent. Vermont Solid Waste Mgmt. Dist.*, 31 F.3d 89, 98 (2d Cir. 1994) (Vermont law); *Pension Tr. Fund For Operating Eng'rs v. Triple A Mach. Shop, Inc.*, 942 F.2d 1457, 1461 (9th Cir. 1991) (California law); *Gargallo v.*

Merrill Lynch, Pierce, Fenner & Smith, Inc., 918 F.2d 658, 662–64 (6th Cir. 1990) (Ohio law); *McCarter v. Mitcham*, 883 F.2d 196, 199–200 (3d Cir. 1989) (Pennsylvania law); *Cullen v. Margiotta*, 811 F.2d 698, 732 (2d Cir. 1987) (New York law), *overruled on other grounds by Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987).

Would the Supreme Court of Indiana apply the general rule that *Marrese* describes, the Restatement adopts, and federal courts have ascribed to other states' law? We hold that it would. Indiana's res judicata elements include the jurisdictional-competency requirement, which was the basis for *Marrese*'s general rule. More, the Supreme Court of Indiana has already cited *Marrese*'s general rule approvingly.

Green v. Hendrickson Publishers, Inc., 770 N.E.2d 784, 791 (Ind. 2002), addressed an exclusively federal counterclaim under copyright law. 42 U.S.C. § 1338(a). It explained:

> [W]e agree [with the lower court] that claim preclusion could prevent the Greens from presenting their [counter] claim in a separate suit. *We do not agree that that would be the case if the state court had no jurisdiction over the Greens' counterclaim*. Although it is true that the subject matter of the Greens' counterclaim and the as yet unfiled federal copyright claim are logically related and presumably arise out of the same "transaction or occurrence," if the state court had no jurisdiction over the subject matter of the counterclaim, it cannot be "compulsory."

770 N.E.2d at 791 n.2 (citing *Marrese*, 470 U.S. at 382, 105 S.Ct. 1327, quoting in turn Restatement (Second) of

Judgments § 26(1)(c)) (emphasis added). This is the rule *Marrese* describes: if there is no state-court jurisdiction to hear an exclusively federal claim, there is no claim preclusion.

Joslyn submits that *Green*'s adoption of the rule was dicta. But we cannot ignore it. Dicta from a state supreme court is good evidence of how the court would decide an issue it has not yet directly encountered. *Allen v. Transamerica Ins. Co.*, 128 F.3d 462, 467 (7th Cir. 1997). That is especially true in this case. As we noted earlier, state courts have no "occasion" to answer the question we face. *Marrese*, 470 U.S. at 381–82, 105 S.Ct. 1327. Absent certification (which Joslyn disavows), dicta offers the clearest insight into how the court would rule here.

Plus, *Green's* approval of *Marrese* and Restatement § 26 was considered. *Green* concerned, in part, whether a copyright counterclaim was "compulsory" such that it had to be brought in the state-court action. This question is intertwined with preclusion, as *Green* recognized, because if a claim is compulsory it is later precluded if not raised. *See also Publicis Commc'n v. True N. Commc'ns Inc.*, 132 F.3d 363, 365 (7th Cir. 1997). *Green* dropped the footnote approving *Marrese* and Restatement § 26 to correct the Indiana appellate court's misunderstanding of these related issues. *See* 770 N.E.2d at 791 n.2. If, as *Green* held, a federal counterclaim was not exclusively federal, it could be compulsory in state court and later precluded if not raised. *See id.* at 791–92 & n.2. It follows, as *Green* noted, that if the counterclaim was exclusively federal—like the CERCLA claim here—it is not compulsory and not subject to claim preclusion. *See id.* at 791 n.2.

Joslyn also attempts to distinguish *Green* on procedural grounds, noting that it involved a defendant's

counterclaim and not, as here, a plaintiff's claim. That distinction does not undermine *Green*'s persuasiveness. *Green* remains Indiana's only treatment of whether earlier state-court judgments bar exclusively federal claims. It indicates that they cannot be claim precluded.

Green notwithstanding, Joslyn submits that the Supreme Court of Indiana would in fact find res judicata here because Indiana, like most states, disapproves of claim splitting. *See, e.g.*, *Erie Ins. Co. v. George*, 681 N.E.2d 183, 189–90 (Ind. 1997). *Marrese* considered a similar problem and found it unavailing. Despite the general prohibition on claim splitting, the Court explained, "the jurisdictional competency requirement" means that "subsequent attempts to secure relief in federal court" are permitted "if the state court lacked jurisdiction over the federal statutory claim." 470 U.S. at 383 n.3, 105 S.Ct. 1327. Restatement § 26 also allows for the tension between possible claim splitting and the rule against claim preclusion in these circumstances. It makes clear that the rule is an "exception" to the general prohibition on claim splitting.

Still, Joslyn insists, a decision that claims are not precluded based only on their federal exclusivity will lead to gamesmanship. Joslyn theorizes that plaintiffs' lawyers will bring state-law claims without their exclusively federal counterparts (like securities or antitrust claims) in state court, see how that litigation goes, and if it goes poorly, switch gears and bring federal claims in federal court. We are not so worried. For one, an overt practice of claim splitting amounts to bad-faith litigation. For another, other statutory and doctrinal bars should serve to prevent such gamesmanship. Federal statutes of limitations, for example, will not toll simply because a state-law claim was filed. *See In*

re Copper Antitrust Litig., 436 F.3d 782, 793–94 (7th Cir. 2006). And issue preclusion, or collateral estoppel, prohibits plaintiffs from relitigating facts, even if not claims, that the state court already resolved.

Joslyn makes one more argument worth addressing. Whatever *Marrese* thought "jurisdictional competency," means, Joslyn says, Indiana interprets it differently. It cites Indiana cases that describe jurisdictional competence as meaning that the earlier suit "was based on proper jurisdiction." *Reed v. State*, 856 N.E.2d 1189, 1194 (Ind. 2006). That generic description is surely one aspect of jurisdictional competency. But it does not foreclose a broader meaning in a different context—as *Marrese*, Restatement § 26, and many other courts have understood it in the context we face. The only Indiana case to touch on that context was *Green*. We think it clear that Indiana's highest court would continue with the course *Green* mapped and find no jurisdictional competency here.

2. CERCLA's Statute of Limitations

Joslyn's second defense is a timeliness one. The applicable limitations period for CERCLA cost-recovery claims depends on whether, and when, "removal" or "remediation" occurred. *See* 42 U.S.C § 9613(g)(2)(A)–(B). For removal actions, the time to file suit expires three years after the removal is complete. For remedial action, however, the time expires six years after the remedial action's initiation. The parties agree Valbruna started remedial action in 2005. The question is whether there was earlier remedial action—namely, in the 1980s or in 1991, when Slater performed cleanup. Joslyn thinks that cleanup was remedial, and thus, this action is untimely. *Id.* § 9613(g)(2)(B). Valbruna contends Slater's actions were only removals, and so

this suit, filed within six years of the remediation that began in 2005, is timely. *Id.*

We agree with Valbruna. The parties do not dispute the underlying facts, and therefore we can decide how to characterize the earlier cleanups—as removal or remediation—as a matter of law. *See New York v. Next Millenium Realty, LLC*, 732 F.3d 117, 126 (2d Cir. 2013); *United States v. Navistar Int'l Transp. Corp.*, 152 F.3d 702, 707 (7th Cir. 1998).

Removal and remediation are terms of art under CERCLA. CERCLA defines a removal as "the cleanup or removal of released hazardous substances from the environments," and it defines remedial actions as "those actions consistent with permanent remedy taken instead of or in addition to removal actions." 42 U.S.C. § 9601(23), (24). In clearer terms, removal generally "refers to a short-term action taken to halt risks posed by hazardous wastes immediately." *Frey v. E.P.A.*, 403 F.3d 828, 835 (7th Cir. 2005). Remedial actions "are longer term, more permanent responses." *Bernstein v. Bankert*, 733 F.3d 190, 201 n.5 (7th Cir. 2013). Filling in those definitions further, a removal action is usually one that: is designed as an interim or partial fix; performed in response to an immediate threat; is short in length; does not address the entire problem; and/or does not address the root of the problem. On the other hand, remedial action is generally: designed as a permanent or complete fix; performed not in response to an imminent environmental threat; lengthy; designed to address the root of the problem; and/or designed to address the entire problem. *See* 42 U.S.C. §§ 9601(23), (24); *Next Millenium Realty, LLC*, 732 F.3d at 127; *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1244–45 (9th Cir. 2005); *Colorado v. Sunoco, Inc.*, 337 F.3d 1233, 1240 (10th Cir. 2003). Given the potential

for overlap between the two characterizations, courts decide the removal-or-remediation question on a case-by-case basis. No one characteristic of the cleanup is usually dispositive. *See Pub. Serv. Co. of Colorado v. Gates Rubber Co.*, 175 F.3d 1177, 1182 (10th Cir. 1999) ("Elements of either response action may overlap and semantics often obscure the actual nature of the cleanup performed.").

Here, neither the 1980s cleanup nor the 1991 work constituted remedial action. In the 1980s, Slater excavated sludge and soil from just two areas of the site (a former surface impoundment and waste pile). That was far from a comprehensive or permanent action. It was a temporary solution, covering only a part of the plant's pollution causes. Slater also performed the work in response to the threat the waste posed to nearby water sources, which was of concern to regulators. As for the 1991 work, Slater filled the excavated area at the surface impoundment area with clean soil. It then constructed a concrete cap for that area, and Slater implemented a ground-water detection monitoring program. Again, this was a limited fix: it focused only the impoundment lot. And the capping, too, was performed in response to an impending environmental threat, as regulators highlighted for Slater.

Joslyn makes a few points in response. It argues, first, that the length of the 1980s cleanup—nearly eight years—means it was a remedial, not removal, action. The length of a cleanup is not dispositive, however, and here the circumstances and limitations of the excavation outweigh the length of time it took to complete the task. *See Vill. of Milford v. K-H Holding Corp.*, 390 F.3d 926, 934 (6th Cir. 2004). Joslyn also contends that neither of the cleanups was in response to an imminent and serious environmental hazard. Even so, the evi-

dent limitations of the earlier cleanups, both in terms of space and the amount of pollution, do not persuade us that they were remedial under CERCLA.

Joslyn argues further that the work Slater performed was "consistent" with remediation. Indeed, Joslyn argues, Slater excavated the sludge and installed the cap as a part of the "Voluntary *Remediation* Plan" it had with IDEM. But we, like the district court, see little merit in this argument. As the district court put it, "every removal action is consistent with every remedial reaction in that all are attempts to alleviate environmental concerns." The key considerations here are the circumstances and purpose of Slater's work, and those considerations show that the work was not remedial.

Joslyn, finally, sets aside the 1980s work and focuses on the 1991 capping. What, Joslyn asks, could be more permanent than a concrete cap? And, as Joslyn points out, permanent "confinement" of pollutants is one of CERCLA's examples for what may constitute remedial action. 42 U.S.C. § 9601(24); *see also Navistar Int'l Transp.*, 152 F.3d at 711 (assuming, based on parties' concessions, that a clay cap was a part of a remediation effort). Here, however, Joslyn's argument prioritizes form (the cap's makeup) over function (the cap's purpose and effect). The concrete cap covered just one area, and not even Joslyn seriously contends that it was meant to substantially resolve the bulk of the site's ongoing pollution problems. So while the fix may have been permanent, it was so far from comprehensive that we cannot say it was a remedial action.[4]

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[4] Because we affirm on this ground, we need not delve into the district court's alternative reason for finding the CERCLA claim timely: that even if the earlier cleanups were remedial, they were

B. Valbruna's Cross-Appeal

We turn now to Valbruna's cross-appeal. Valbruna challenges two of the district court's decisions: first, the decision that Valbruna's ELA claim was precluded by the earlier state-court suit, and second, the decision to reduce the costs by $500,000 and then hold Valbruna liable for 25%.

1. ELA Claim Preclusion

As noted earlier, Indiana law requires privity between claimants for res judicata to apply. *E.g.*, *Freels*, 94 N.E.3d at 342. The district court concluded that Valbruna was a privy of Slater, which had filed the state-court suit over cleanup costs and from which Valbruna purchased the site. Valbruna takes issue only with this privity decision on appeal. The district court granted Joslyn summary judgment on the ELA claim, thus our review is de novo. *Mollet v. City of Greenfield*, 926 F.3d 894, 896 (7th Cir. 2019).

Under Indiana law, a privy includes "one who after rendition of [a] judgment has acquired an interest in the subject matter affected by the judgment." *Becker v. State*, 992 N.E.2d 697, 700–01 (Ind. 2013); *Webb v. Yeager*, 52 N.E.3d 30, 40 (Ind. Ct. App. 2016). The post-judgment acquisition may occur "through or under one of the parties, as by inheritance, succession, or pur-

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separate "operable units" from Valbruna's current cleanup. We note that we appear to have recognized that ground before. *See Bernstein v. Bankert*, 702 F.3d 964, 984 (7th Cir. 2012), *amended and superseded on reh'g*, 733 F.3d 190 (7th Cir. 2013). But other circuit courts have rejected the idea that there can be multiple removal or remediation actions at a given site. *See Sunoco, Inc.*, 337 F.3d at 1241; *Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 843 (6th Cir. 1994). We leave for another day whether our decision in *Bernstein* represents a circuit split on the question.

chase." *Hockett v. Breunig*, 526 N.E.2d 995, 1000 (Ind. Ct. App. 1988). And an "entity does not have to control a prior action . . . for privity to exist." *Becker*, 992 N.E.2d at 700–01.

Whether Valbruna was in privity with Slater turns on the "subject matter affected" by the earlier judgment. That subject matter was the site and the costs Slater sought to recover. Slater, the site's owner, brought the state-court suit to collect under the ELA statute the costs incurred for cleanup at the site. After Valbruna's purchase, Valbruna had the right to intervene in the suit and similarly pursue those costs. With the subject matter clear, so too is Valbruna's privity with Slater. By purchasing the site it "acquired an interest" in both the site and the potential cost recovery. *Id.* at 701.

Valbruna's counterarguments miss the mark. It argues, for example, that there was no privity because at the time of its purchase it had not yet incurred any cleanup related costs. Privity, however, exists when one "acquire[s] an interest in the subject matter affected by the judgment." *Webb*, 52 N.E.3d at 40. Valbruna acquired an interest in the thing over which the state-court suit was fought. That is enough for privity under Indiana law.

Valbruna also advances a different conception of the relevant subject matter. It submits that the subject matter was not the property, or even the costs sought, but instead the Asset Purchase Agreement between Joslyn and Slater. This conception is too narrow. The agreement was a part of the state-court suit, to be sure, but the claims there, like the ones here, were brought by the site's current owner to collect costs owed for Joslyn's operation of the site, including through the ELA statute. Valbruna gives us no reason to ignore

those salient features of the state-court action and instead focus on just the agreement.

2. Allocation of Costs

That leaves the district court's equitable allocation of costs. CERCLA gives district courts the discretion not only to decide how to ultimately divvy cleanup costs, "but it also grants the court the authority to decide which equitable factors will inform its decision in a given case." *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 695 (7th Cir. 2014).

Courts usually look to the "Gore factors"—named after then-Congressman Al Gore—to decide allocation. The Gore factors include, among other things, the parties' respective fault for the pollution, the degree of toxicity of the pollution, and the care exercised by the respective parties. *Envtl. Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 508 (7th Cir. 1992). But these factors are neither binding nor exhaustive, and courts may "consider any factors appropriate to balance the equities in the totality of the circumstances." *Id.* at 509. We will not reverse unless the district court's decision about which factors apply was irrational. *NCR Corp.*, 768 F.3d at 700.

Valbruna first takes issue with the district court's decision to reduce the amount it could recover, more than $2,000,000, by $500,000. It did so believing that Valbruna had accounted for at least $500,000 in cleanup costs before purchasing the site, as evidenced by the PPA with IDEM. Thus, reasoned the district court, not reducing the recovery amount by that sum would sanction "double recovery" for Valbruna, which would be inequitable. That decision was rational.

Valbruna concedes that a district court can consider the potential windfall for a plaintiff that stands to

collect more than it has actually lost. But the problem, Valbruna says, is that there was "no evidence" of a potential windfall. There may have been no *direct* evidence of the windfall, like a cost-based comparison, but that is not a requirement under CERCLA. The district court could, as it did, reasonably infer the potential windfall from the existing record. It is not a hard inference to draw: if a rational buyer pursues a piece of property knowing that it will have to spend X for cleanup, it will discount the potential value of the property by X and accordingly reduce its purchase price by X. "No sensible person would pay as much for a property with a known liability as for one without, whether the price expressly discounted for the cleanup or not." *W. Properties Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 691 (9th Cir. 2004), *abrogation on other grounds recognized in Kotrous v. Goss-Jewett Co. of N. Cal.*, 523 F.3d 924, 931 (9th Cir. 2008). So from the PPA, which Valbruna, a sophisticated, experienced, well-lawyered manufacturer, entered into, the district court could rationally infer that Valbruna considered the $500,000 PPA payment as "functionally part of the price."

Valbruna also cites *Trinity Indus., Inc. v. Greenlease Holding Co*., 903 F.3d 333, 362 (3d Cir. 2018), but that case was different. In *Trinity Indus.*, the Third Circuit vacated the district court's imposition of a 10% equitable deduction from the recoverable costs because, as a result of the cleanup, the property's value increased. The Third Circuit recognized the valid equitable concern behind the deduction (to prevent windfall recoveries), yet it held that without evidence of how much the property's value had increased the deduction lacked evidentiary support. Here, however, the district court did not peg the deduction ad hoc without evidence. Valbruna's prepurchase decision to put the $500,000 in escrow suggests strongly that Valbruna considered

it (a) to be a necessary cleanup-related liability and (b) factored it into the purchase price accordingly. More evidence would have been preferable, but the district court's decision was rational.

The second challenge Valbruna makes is to the district court's decision to hold Valbruna accountable for 25% of past and future costs. Valbruna tells us that this number is unprecedented, and that no court has ever held a no-fault owner to more than 10% of the costs.

We agree that the 25% imposition is striking, but we disagree that the district court exceeded its discretion. The district court's decision was based on the evidence and reasoned. The court cited the fact that Valbruna clearly understood the site's serious pollution problems before deciding to purchase it—so caveat emptor. Valbruna offers no reason why that consideration was inappropriate. There was also evidence that Valbruna paid far less than the asking price, $6.4 million compared to $20 million, and far less than the amount for which it ultimately insured the site, around $80 million. So, again, the district court was rationally concerned about a windfall for Valbruna. The district court's 25% imposition on a no-fault owner reached the limits of its discretion, but we see no abuse of that discretion based on the facts of this case.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

Case No. 1:10-CV-044-JD

VALBRUNA SLATER STEEL CORPORATION and
FORT WAYNE STEEL CORPORATION,

Plaintiffs / Counter Defendants,

v.

JOSLYN MANUFACTURING COMPANY f/k/a
JOSLYN CORPORATION f/k/a JOSLYN MANUFACTURING
& SUPPLY COMPANY, JOSLYN CORPORATION f/k/a
JOSLYN HOLDING COMPANY and
JOSLYN MANUFACTURING COMPANY, LLC,

Defendants / Counter Plaintiffs.

ENTRY OF FINAL JUDGMENT

Pursuant to Fed. R. Civ. P. 58, the Court now enters final judgment in favor of Plaintiffs Valbruna Slater Steel Corporation and Fort Wayne Steel Corporation (collectively, "Plaintiffs") and against Defendants Joslyn Manufacturing Company f/k/a Joslyn Corporation f/k/a Joslyn Manufacturing & Supply Company, Joslyn Corporation f/k/a Joslyn Holding Company, and Joslyn Manufacturing Company, LLC (collectively, "Joslyn") in accordance with the Opinions and Orders previously issued by the Court and in the amounts reflected below *(see* 4/11/11 Opinion and Order (docket # 35); 12/4/15 Opinion and Order (docket # 124); 5/12/17

Opinion and Order (docket # 175); 1/16/18 Opinion and Order (docket # 182); 5/22/18 Opinion and Order (docket # 192); 6/11/18 Stipulation on Fees/Expenses (docket # 195)):

	Amount Before Allocation	Amount After 75% Allocation	Accrued Interest (Through 7/20/18)	75% Amount Plus Interest (Through 7/20/18)
Past Costs (incurred before 12/14/16)	$1,529,871.09	$1,147,403.32	$56,993.58	$1,204,396.90
Additional Past Costs (incurred 12/14/16 - 3/15/18)	$240,745.69	$180,559.27	$1,310.99	$181,870.26
Stipulated Fees/Expenses (incurred before 1/31/18)				$24,500.00
TOTAL OWED BY JOSLYN AS OF JULY 20, 2018 • $26.59 in pre-judgment interest to be added for each day after July 20, 2018 until Final Judgment is entered. • Post-judgment interest to accrue thereafter in accordance with applicable law and prevailing interest rates. • Joslyn responsible for 75% of additional/future compensable costs incurred by Plaintiffs per Declaratory Judgment.				**$1,410,767.20**

SO ORDERED.

ENTERED: July 20, 2018

/s/ JON E. DEGUILIO
Judge
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT,
N.D. INDIANA, FORT WAYNE DIVISION

Cause No. 1:10-CV-44

VALBRUNA SLATER STEEL CORPORATION
and FORT WAYNE STEEL CORPORATION,

Plaintiffs,

v.

JOSLYN MANUFACTURING CO.,
f/k/a JOSLYN CORPORATION f/k/a
JOSLYN MANUFACTURING & SUPPLY
COMPANY; JOSLYN CORPORATION,
f/k/a JOSLYN HOLDING COMPANY; and
JOSLYN MANUFACTURING COMPANY, LLC,

Defendants.

Signed 06/05/2013

OPINION AND ORDER

Roger B. Cosbey, United States Magistrate Judge

This matter is before the Court on Defendant Joslyn Manufacturing Company, LLC's ("Joslyn") Motion for Leave to File Counterclaim. (Docket # 52.) Plaintiffs object to the motion to the extent that the proposed Amended Answer includes the affirmative defenses of claim preclusion and statute of limitations—both previously rejected by the Court—and thus seek to strike them from the proposed Amended Answer. (Docket

54 at 2 n.1.) The Court heard argument on the motions on May 28, 2013. (Docket # 57.)

For the following reasons, Plaintiffs' motion to strike the claim preclusion and statute of limitations defenses will be GRANTED. As such, Joslyn's Motion for Leave to File Counterclaim will be GRANTED, but these affirmative defenses will be stricken from the Amended Answer.

A. Factual and Procedural Background

Plaintiffs Valbruna Slater Steel Corporation and Fort Wayne Steel Corporation (collectively, "Valbruna") brought this action under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a), and Indiana's Environmental Legal Action Statute ("ELA"), Ind. Code §§ 13-30-9-1 *et seq.*, against the Joslyn Defendants in February 2010.[1] (Docket # 1.) Valbruna seeks contribution for costs incurred in cleaning up a contaminated site Joslyn previously owned and a declaratory judgment declaring Joslyn liable for future costs and expenses of responding to hazardous substances at the site. (*See* Compl. ¶¶ 21-38.)

In May 2010, Joslyn moved to dismiss the complaint for failure to state a claim, arguing that all three of Valbruna's claims were precluded by res judicata as its predecessor in interest had previously brought an ELA action against Joslyn in state court, which was dismissed with prejudice. (Docket # 19.) The motion was converted into a motion for summary judgment (Docket # 25), which the Court subsequently denied as

[1] Because Joslyn Manufacturing and Supply Company ultimately merged into the present company, Joslyn Manufacturing Company, LLC (Docket # 20-8 at ¶ 2), the Court will refer to the Joslyn Defendants as simply "Joslyn."

to the CERCLA count and the related request for a declaratory judgment, but granted for the ELA count (Docket # 35). On Joslyn's motion (*see* Docket # 36), the Court later revised the rationale underlying its decision to deny summary judgment as to the CERCLA and declaratory judgment counts, but nonetheless affirmed the outcome (Docket # 39).

In January 2012, Joslyn moved for summary judgment on Valbruna's remaining claims, arguing that they were barred by the statute of limitations. (Docket # 42.) The Court ultimately determined that the statute of limitations did not bar Valbruna from bringing its CERCLA claim and the accompanying request for declaratory judgment and denied Joslyn's motion for summary judgment in March 2013. (Docket # 50.)

Shortly thereafter, Joslyn moved for leave to file an Amended Answer adding a Counterclaim and to amend its claim preclusion and statute of limitations defenses. (Docket # 52.) Valbruna objects to the motion to the extent Joslyn seeks to amend these defenses and requests they be stricken under Federal Rule of Civil Procedure 12(f) since the Court has already determined they are not viable.[2] (Docket # 54 at ¶¶ 5-6.)

Joslyn maintains that it moved for early summary judgment on both the claim preclusion and statute of limitations defenses in good faith, with the hope of ending the case as quickly as possible. (Docket # 55.) And although Joslyn recognizes that the Court has

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[2] Valbruna also seeks to strike these defenses pursuant to Federal Rule of Civil Procedure 8(b) because they are both approximately a page long (*see* Docket # 52-1 at 10-11) and, thus, are not "short and plain" statements. (Docket # 54 at ¶¶ 5-6.) As the affirmative defenses are properly stricken under Rule 12(f), the Court need not address this argument.

already rejected these defenses on summary judgment, it contends they are still issues in the case, subject to future discovery, and will prove availing next time around. (Docket # 55.)

B. Applicable Law

Federal Rule of Civil Procedure 12(f) provides that a court may, on its own or on a motion made by a party, strike an insufficient defense from a pleading. FED. R. CIV. P. 12(f). Motions to strike affirmative defenses are generally disfavored because they can cause delay. *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989). But where they "remove unnecessary clutter from the case, they serve to expedite not delay." *Id.* Ultimately, however, affirmative defenses are stricken "only when they are insufficient on the face of the pleadings." *Cottle v. Falcon Holdings Mgmt.*, No. 2:11-CV-95-PRC, 2012 WL 266968, at *1 (N.D. Ind. Jan. 30, 2012) (quoting *Williams v. Jader Fuel Co.*, 944 F.2d 1388, 1400 (7th Cir. 1991) (citing *Heller*, 883 F.2d at 1294 ("Ordinarily, defenses will not be struck if they are sufficient as a matter of law or if they present questions of law or fact."))).

C. Analysis

A court may strike an affirmative defense as legally insufficient when it has already addressed and rejected the exact argument on a previous motion. *See United States ex rel. Spay v. CVS Caremark Corp.*, No. 09-4672, 2013 WL 1755214, at *3 (E.D. Pa. Apr. 24, 2013) (striking identical affirmative defenses when the Court had already squarely rejected those arguments on a motion to dismiss); *Prakash v. Pulsent Corp. Emp. Long Term Disability Plan*, No. C-06-7592 SC, 2008 WL 3905445, at *2 (N.D. Cal. Aug. 20, 2008) (striking affirmative defense as legally insufficient where court

had previously rejected exact argument on a motion to dismiss); *In re Modern Creative Serv., Inc. v. Dell, Inc.*, No. 05-3891 (JLL), 2008 WL 305747, at *3-4 (D. N.J. Jan. 28, 2008) (striking affirmative defenses where court had already considered and rejected same arguments in context of a motion to dismiss); *AMEC Civil, LLC v. DMJM Harris, Inc.*, No. 06-64 (FLW), 2007 WL 433328, at *5 (D. N.J. Feb. 6, 2007) (striking certain affirmative defenses "in light of the fact that" such defenses "were already decided by this Court"); *see generally Ohmer Corp. v. Duncan Meter Corp.*, 8 F.R.D. 582, 583 (N.D. Ill. 1948) (where the issues presented in the affirmative defenses had already been ruled upon by the court on a preliminary motion, the record in the case would preserve defendant's rights).

The same holds true when the Court specifically considered and resolved the issues on summary judgment. *See In re YRC Worldwide, Inc. ERISA Litig.*, No. 09-2593-JWL, 2011 WL 1457288, at *5 (D. Kan. Apr. 15, 2011) (striking an affirmative defense that the court had already squarely addressed and rejected on defendants' motion for summary judgment); *Zamboroski v. Karr*, No. 04-73194, 2005 WL 2314011, at *1 (W.D. Mich. Sept. 22, 2005) (striking qualified immunity affirmative defense when the court had already resolved the issue in the plaintiff's favor when denying summary judgment).

Here, the Court squarely addressed and explicitly rejected the claim preclusion and statute of limitations defenses in separate, lengthy opinions denying Joslyn's motions for summary judgment. (*See* Docket # 35, 39, 50.) As such, striking them from the Amended Answer eliminates unnecessary clutter. *See, e.g., In re YRC Worldwide, Inc. ERISA Litig.*, 2011 WL 1457288, at

*5; *Zamboroski*, 2005 WL 2314011, at *1; *see also Heller*, 883 F.2d at 1294.

More to the point, Joslyn gambled with its summary judgment motions that it could get out of the case early, perhaps a sound strategic move, but also one with consequences. Having elected to consume substantial judicial and litigant resources early on, Joslyn does not get another chance—presumably after even more extensive and expensive discovery—to assert defenses the Court has already rejected as a matter of law. *See Spay*, 2013 WL 1755214, at *3 (refusing to allow Defendants another bite at the apple to reassert, in an alternative format, the identical theory that the Court previously rejected on a motion to dismiss); *Middlegate Dev., LLP v. Beede*, No. 10-0565-WS-C, 2011 WL 3475474, at *11 n.26 (S.D. Ala. Aug. 9, 2011) (refusing to allow litigants to treat their initial summary judgment motions as a "dry run" which they can later redo or supplement); *see generally Divane v. Krull Elec. Co.*, No. 95 C 6108, 2002 WL 31844987, at *1 (N.D. Ill. Dec. 18, 2002) (denying request for successive motion for summary judgment in absence of "good reasons" and explaining that "[t]his court has neither the time nor the inclination to consider arguments one at a time in serial motions, to suit a litigant's convenience"). Even though Joslyn is not seeking now, of course, leave to file another motion for summary judgment, allowing it to continue to assert previously rejected affirmative defenses gives it the unwarranted hope that it can do so in the future, or the "opportunity to seek reconsideration" of the Court's prior ruling. *Spay*, 2013 WL 1755214, at *3.

Finally, while Joslyn asserts, but without specificity, that with more discovery it can overcome some of the Court's previous factual determinations, it appears

that discovery did occur—or was available—before Joslyn filed its summary judgment motions, and therefore, since these affirmative defenses were fully litigated and found unavailing as a matter of law, they should be stricken.

D. Conclusion

Accordingly, Valbruna's motion to strike Joslyn's claim preclusion and statute of limitations affirmative defenses (*see* Docket # 54 at 2 n.1) from Joslyn's proposed Amended Answer is GRANTED. Joslyn's Motion for Leave to File Counterclaim (Docket # 52) is therefore GRANTED, provided however that the affirmative defenses of claim preclusion and the statute of limitations will automatically be stricken from the Amended Answer upon filing. The Clerk is directed to show the Counterclaim and Amended Answer filed.

SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

Cause No. 1:10-CV-044 JD

VALBRUNA SLATER STEEL CORP. and
FORT WAYNE STEEL CORP.,

Plaintiffs,

v.

JOSLYN MANUFACTURING CO., *et al.*,

Defendants.

OPINION AND ORDER

Plaintiffs Valbruna Slater Steel Corporation and Fort Wayne Steel Corporation (collectively "Valbruna") sued defendants Joslyn Manufacturing Company, *et alia*, ("Joslyn") on February 11, 2010. [DE 1].[1] Valbruna is the current owner of a parcel of land near Fort Wayne, Indiana, which Joslyn occupied until 1981. Valbruna is currently engaged in remedial efforts at the site in cooperation with the Indiana Department of Environmental Management ("IDEM"). Valbruna's complaint essentially blames Joslyn for the contamination at the site, and alleges three counts: (1) a cost recovery action under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a); (2) a similar action under the Indiana

[1] The record is cited in the following format: ["Docket Entry Number" at "page or paragraph number within docket entry"].

Environmental Legal Actions statute; and (3) a declaratory judgment of the defendant's future liability. Joslyn's first move was to attempt to preclude the suit based on earlier state court litigation with Valbruna's predecessor in interest. This court found that the Indiana ELA claim was precluded, but that the federal claims survived. [DE 35; DE 39]. On January 13, 2012, Joslyn moved for summary judgment against Valbruna's remaining claims, arguing that they are barred by the statute of limitations. On March 14, 2012, Valbruna responded, and moved to strike certain exhibits supporting Joslyn's motion. On March 28, 2012, the briefing was completed, and the motions have been under advisement. Having considered the law and the facts of this case, the court now denies Joslyn's motion for summary judgment [DE 42], and denies Valbruna's motion to strike [DE 47], for the reasons discussed in this order.

STANDARD OF REVIEW

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 922 (7th Cir. 2001). A "material" fact is one identified by the substantive law as affecting the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" exists with respect to any such material fact, and summary judgment is therefore inappropriate, when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.* On the other hand, where a factual record taken as a whole could *not* lead a rational trier of fact to find for

the non-moving party, there is no genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *Bank of Ariz. v. Cities Servs. Co.*, 391 U.S. 253, 289 (1968)).

In determining whether a genuine issue of material fact exists, this Court must construe all facts in the light most favorable to the non-moving party, as well as draw all reasonable and justifiable inferences in her favor. *Anderson*, 477 U.S. at 255; *King v. Preferred Tech. Grp.*, 166 F.3d 887, 890 (7th Cir. 1999). Still, the non-moving party cannot simply rest on the allegations or denials contained in its pleadings. It must present sufficient evidence to show the existence of each element of its case on which it will bear the burden at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986); *Robin v. Espo Eng'g Corp.*, 200 F.3d 1081, 1088 (7th Cir. 2000). Furthermore, the non-moving party may rely only on admissible evidence. *Lewis v. CITGO Petroleum Corp.*, 561 F.3d 698, 704 (7th Cir. 2009).

The issue presented in this case is particularly appropriate for resolution at the summary judgment stage. Not only are the material facts undisputed [DE 49 at 1], but the primary issue is whether certain work undertaken by the plaintiff's predecessor in interest in the 1980s and 1990s was a "remedial action" or a "removal action" under CERCLA. That is a question of law. *Cytec Industries, Inc. v. B.F. Goodrich Co.*, 232 F.Supp.2d 821, 832 (S.D. Ohio 2002); *OBG Technical Services, Inc. v. Northrup Grumman Space & Mission Sys. Corp.*, 503 F.Supp.2d 490, 524 (D.Conn. 2007).

BACKGROUND[2]

From 1928 to 1981, defendant Joslyn Manufacturing Company owned and operated a steel mill at 2302 and 2400 Taylor Street in Fort Wayne, Indiana (collectively "the Site"). [DE 28-1 at 1; DE 28-2 at 11-13]. During Joslyn's tenure, steel mill operations polluted the Site's soil and groundwater with chlorinated solvents, metals, and other contaminants. On February 2, 1981, Joslyn sold the Site to Slater Steels Corporation ("Slater"). In connection with the sale, the two companies signed an Asset Purchase Agreement ("APA") in which Joslyn agreed to indemnify Slater for certain costs and expenses. [DE 20-1 at 19-22].

From 1981 to 1987, Slater excavated sludge and metal-contaminated soil from two areas of the Site: (1) Joslyn's former surface impoundment (located in the far northeast corner of the Site) and (2) Joslyn's former waste pile (located in the far northwest corner of the site). [DE 46-6 ¶ 3]. The excavation did not remove all of the contaminants from the former surface impoundment, so additional action was necessary. [DE 46-6 ¶ 4]. In 1988, Slater signed a Consent Agreement and Final Order with the United States Environmental Protection Agency ("EPA") obligating Slater to monitor groundwater at the Site until the Indiana Department of Environmental Manage-

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[2] This section is not meant to be an exhaustive catalogue of every fact or piece of evidence presented to the court. It is simply meant to provide a brief narrative of the events underlying the case. The inclusion of a fact in this section does not mean that it is material, and the exclusion of a fact does not mean that it is immaterial, or that the court did not consider it. The court will recount particularly relevant facts where appropriate in the discussion section.

ment ("IDEM") could certify the clean closure of the polluted areas under excavation. [DE 46-7 at 8].

In 1991, Slater filled the excavated area at the surface impoundment with clean, compacted soil, constructed a reinforced-concrete cap over the impoundment area, and implemented a groundwater detection monitoring program. [DE 42-7 at 36]. On January 19, 1996, Slater submitted an application to the Indiana Department of Environmental Management ("IDEM") Voluntary Remediation Program. [DE 42-5]. The application noted that the site investigation was complete, and that the site remediation was complete. [DE 42-5]. On February 7, 1996, IDEM accepted the application. [DE 42-8 at 1]. On June 14, 1999, IDEM issued a certificate of completion to Slater concerning their work in the Voluntary Remediation Program. [DE 42-7 at 11]. The certificate did not represent a successful remediation of the entirety of the Site, however. To the contrary, attached documents verified that investigative work was going on elsewhere on Slater's property. It simply acknowledged a successful remediation of the former Joslyn surface impoundment location on the far northeast corner of the Site. On several occasions between 1988 and 1999, Slater sought indemnification under the APA for cleanup costs relating to alleged historical contamination of the Site, but Joslyn denied those requests. [DE 28-6; DE 28-7].

On May 17, 2000, IDEM issued a Notice of Violation ("NOV") to Slater. [DE 46-7]. IDEM had determined that there was a release of trichloroethylene into the environment at the Site, and enclosed a proposed Agreed Order for Slater to sign and return. Among other things, the Agreed Order required Slater to notify IDEM in the event that a "current or potential"

threat to human health or the environment developed. [DE 46-7 at 11]. In total, the Agreed Order outlined 45 areas of concern, stemming from various locations on the Site, which Slater was to investigate for potential threats to the environment. [DE 46-7 at 77-82]. On July 17, 2000, Slater filed suit against Joslyn in the Allen County Superior Court, again seeking indemnification. [DE 28-9]. Counts I and II of that suit raised claims of contractual indemnification based on the APA, while Count III brought an ELA claim under Indiana Code §§ 13-30-9-1 *et seq.* [DE 28-9]. On October 30, 2000, Joslyn filed a motion to dismiss Slater's claims. On April 19, 2001, the court denied the motion with respect to Counts I and II, and granted the motion with respect to Count III. Count III was later dismissed with prejudice for a failure to prosecute.

On March 25, 2002, Slater executed and joined in the Agreed Order which IDEM had proposed when it issued the Notice of Violations. [DE 46-10]. On September 11, 2002, Slater provided IDEM with a proposed Remediation Work Plan for the entire Site. [DE 46-13]. But on June 2, 2003, before IDEM could issue final approval, and before Slater could begin work on the Remediation Work Plan for the entire Site, Slater filed a Chapter 11 voluntary bankruptcy petition in the U.S. Bankruptcy Court for the District of Delaware. [DE 28-12]. At auction, Valbruna Slater Stainless Inc., the plaintiffs' corporate parent, purchased the site. In April, 2004, the plaintiffs – Valbruna Slater Steel Corporation and Fort Wayne Steel Corporation (collectively "Valbruna") – purchased the Site from their parent corporation. In so doing, Valbruna entered into a Prospective Purchaser Agreement ("PPA") with IDEM. The PPA essentially required a $1 million commitment to carry out the work pre-

viously contemplated by IDEM in its dealings with Slater pre-bankruptcy.

On May 3, 2005, Valbruna's environmental consultant submitted a Remedial Work Plan to IDEM which laid out a plan to use Electrical Resistance Heating ("ERH") for soil and groundwater remediation of trichloroethylene at the Site. [DE 46-17]. IDEM approved, and the ERH project commenced on May 23, 2005. [DE 46-18 at 7]. Although ERH was successful in eradicating 93.5% of TCE from the soil and groundwater, work at the Site continues with respect to other environmental issues. But since Valbruna acknowledges that remedial efforts began no later than May 23, 2005, cleanup efforts that took place thereafter are not relevant to the purposes of this order.

DISCUSSION

There are two motions to address: (1) Joslyn's motion for summary judgment [DE 42] and (2) Valbruna's motion to strike certain exhibits supporting that motion. [DE 47]. For the following reasons, the court denies Joslyn's motion for summary judgment, even taking all of the evidence submitted into account. As a result, the motion to strike certain exhibits is denied as moot.

I. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [DE 42]

In 1980, Congress enacted CERCLA in response to the serious environmental and health risks posed by industrial pollution. *Burlington N. and Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009) (citing *United States v. Bestfoods*, 524 U.S. 51, 55 (1998)). Two CERCLA sections – 42 U.S.C. §§ 9607(a) and 9613(f) – afford rights of action to private parties seeking to recover expenses associated with cleaning up contaminated sites. *See United States v. Atl.*

Research Corp., 551 U.S. 128 (2007). Valbruna is pursuing an action under § 9607(a), the "cost recovery" provision of CERCLA. [DE 1 at 5].[3] A cost recovery action essentially allows the person doing the work of cleaning up a contaminated site to attempt to pass the bill on to the person, or persons, actually responsible for the pollution, provided certain conditions are met. § 9607(a)(4)(B). The purpose of CERCLA is to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts are borne by those responsible for the contamination. *Burlington N.*, 556 U.S. at 602 (citing *Consol. Edison Co. of N.Y. v. UGI Util., Inc.*, 423 F.3d 90, 94 (2d Cir. 2005)); *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 n. 13 (1994) ("CERCLA is designed to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others.").

In its motion for summary judgment, Joslyn argues that Valbruna's cost recovery action, filed on February 11, 2010, is barred by the statute of limitations. The limitations period for an initial action for recovery of costs can be found at 42 U.S.C. § 9613(g)(2). That section provides, in relevant part:

> (2) Actions for recovery of costs
>
> An initial action for recovery of the costs referred to in section 9607 of this title must be commenced —
>
> (A) for a removal action, within 3 years after completion of the removal action . . .

---

[3] Valbruna is also pursuing a declaratory judgment of Joslyn's continuing liability for contamination at the Site [DE 1 at 7], but for all purposes relevant to this order, that claim is derivative to the cost recovery action.

> (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action . . . [.]

Both parties agree that the action Valbruna is currently taking at the Site (the ERH and associated cleanup efforts) is a "remedial action," so subsection 9613(g)(2)(B) governs when the statute of limitations began to run for this lawsuit. The issue under debate is when the triggering event – the "initiation of physical on-site construction of the remedial action" – occurred. Valbruna argues that it occurred in 2005, when the ERH project commenced. Joslyn believes that it occurred in the 1980s or early 1990s, when Slater first attempted to address pollution at the Joslyn surface impoundment and waste pile areas, and that this lawsuit is therefore time-barred.[4] Valbruna's rejoinder is that those earlier actions were removal actions, not a part of the current remedial action. As a result, Valbruna argues, any recovery for *those* expenses is barred under subsection 9613(g)(2)(A), but that has no effect on recovery for the remedial action currently underway.

The court agrees with Valbruna that Slater's actions were removal actions, and therefore do not determine when the statute of limitations began to run for a cost recovery action based on Valbruna's current remedial work. Moreover, there is an alternate basis for denying

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[4] In passing, the court notes that the earliest date that the cause of action could have accrued is October 17, 1986, which is the effective date of the CERCLA statute of limitations, because the limitations period cannot have begun to run prior to its enactment. *See United States v. Fairchild Indus., Inc.*, 766 F.Supp. 405, 415 (D. Md. 1991); *Velsicol Chemical Corp. v. Enenco, Inc.*, 9 F.3d 524, 528–29 (6th Cir. 1993); *United States v. Moore*, 698 F.Supp. 622, 625–27 (E.D. Va. 1988).

summary judgment apparent in the record. Even if Slater's actions were remedial in nature, the undisputed evidence shows that they were discrete, divisible "operable units" such that they have no bearing on Valbruna's ability to recover for the remedial action now underway.

A. Slater's Cleanup Efforts in the 1980s and 1990s Were Removal Actions, so the Present Action Is Timely.

The court agrees with Valbruna that the actions Slater took in the 1980s and 1990s were removal actions, for two reasons. First, federal regulations identify those exact actions, when taken under circumstances like those present in this case, as removal actions. Second, although Slater's efforts have some characteristics in common with both removal and remedial actions as generally exemplified in the case law, on balance they are more consistent with what courts typically consider to be removal actions. As a result, Valbruna's lawsuit is not time-barred.

1. The statutory scheme and federal regulations suggest that Slater's activity was a removal.

The terms "removal action" and "remedial action" represent the two primary forms of response contemplated by CERCLA, and they are statutorily defined:

> (23) The terms "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of

removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C.A. § 5121 et seq.].

(24) The terms "remedy" or "remedial action" means those actions consistent with [the] permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and

> welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

42 U.S.C. § 9601(23)-(24).

At first glance, it would appear that the actions Slater took at the surface impoundment and waste pile qualify as a "remedial action;" the definition specifically includes excavations and clay covers, *inter alia.* § 9601(24). But cases suggest that, under a proper reading of the statutory distinction, it is not possible to determine whether an action is a removal action or a remedial action based solely on the characteristics of the action itself. The court must instead look to the circumstances which the action is meant to address. Practically speaking, "removal actions are 'those taken to counter imminent and substantial threats to public health and welfare,' while remedial actions 'are longer term, more permanent responses.'" *Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594, 608 (8th Cir. 2011) (quoting *Minnesota v. Kalman W. Abrams Metals, Inc.*, 155 F.3d 1019, 1024 (8th Cir. 1998)); *see also See also Carson Harbor Village, Ltd. v. Unocal Corporation*, 287 F.Supp.2d 1118, 1158 (C.D. Cal. 2003) (property owner's cleanup of tar-like and slag materials was "remedial action" because there was no evidence that

the materials posed the type of threat to human health and welfare that required immediate action); *Advanced Micro Devices, Inc. v. National Semiconductor Corp.*, 38 F.Supp.2d 802, 810 (N.D. Cal. 1999) (removal actions are "short-term action[s] taken to halt the immediate risks posed by hazardous wastes"); *Channel Master Satellite Systems, Inc. v. JFD*, 748 F.Supp. 373, 385 (E.D.N.C. 1990) ("The courts have consistently found that the removal category was to be used in that limited set of circumstances involving a need for rapid action, while non-urgent situations are to be addressed as remedial actions").

Moreover, the federal regulations support that approach. They provide a non-exhaustive list of actions which qualify as "removals," but only under certain circumstances:

(1) Fences, warning signs, or other security or site control precautions – where humans or animals have access to the release;

(2) Drainage controls, for example, run-off or run-on diversion – where needed to reduce migration of hazardous substances or pollutants or contaminants off-site or to prevent precipitation or run-off from other sources, for example, flooding, from entering the release area from other areas;

(3) Stabilization of berms, dikes, or impoundments or drainage or closing of lagoons – where needed to maintain the integrity of the structures;

(4) Capping of contaminated soils or sludges – where needed to reduce migration of hazardous substances or pollutants or contaminants into soil, ground or surface water, or air;

(5) Using chemicals and other materials to retard the spread of the release or to mitigate its effects – where the use of such chemicals will reduce the spread of the release;

(6) Excavation, consolidation, or removal of highly contaminated soils from drainage or other areas – where such actions will reduce the spread of, or direct contact with, the contamination;

(7) Removal of drums, barrels, tanks, or other bulk containers that contain or may contain hazardous substances or pollutants or contaminants – where it will reduce the likelihood of spillage; leakage; exposure to humans, animals, or food chain; or fire or explosion;

(8) Containment, treatment, disposal, or incineration of hazardous materials – where needed to reduce the likelihood of human, animal, or food chain exposure; or

(9) Provision of alternative water supply – where necessary immediately to reduce exposure to contaminated household water and continuing until such time as local authorities can satisfy the need for a permanent remedy.

40 C.F.R. § 300.415(e)(1)-(9). One can see immediately that it is, at least partially, the circumstances in which an action is taken that must determine whether that action is a "removal" or a "remedial" action under the statutory and regulatory scheme. Otherwise, the list of removal actions contained in the federal regulations would be hopelessly in conflict with the statutory text. In fact, every item listed in the regulations as a "removal action" is also specifically included in the

meaning of "remedial action" by the statutory definition. *See* 42 U.S.C. § 9601(24).

Items (4) and (6) seem directly applicable to what Slater did in this case. Slater's actions consisted of soil and sludge excavations, site capping, and groundwater monitoring and assessment. [DE 42-7 at 36]. The purpose of those efforts was, among other things, to "prevent or mitigate any migration or releases of hazardous waste and/or hazardous constituents at or from the facility." [DE 46-7 at 8]. Such releases, or threatened releases, had drawn the attention of the EPA and IDEM, which were not convinced (despite Slater's efforts) that conditions at the areas in question following initial excavation were "not harmful to human health and the environment [or] that closure by removal had been achieved." [DE 46-7 at 9]. IDEM was also concerned, based on regional groundwater movement patterns, that the pollutants at issue would transfer into a local river, especially given the relatively shallow depth of groundwater in the area. [DE 46-7 at 8-9]. Joslyn seems to suggest that the fact that Slater's efforts to clean up the surface impoundment began with its desire to come into compliance with the newly-passed Resource Conservation and Recovery Act ("RCRA") means it could not have been a removal action, but that seems to be besides the point. Whether Slater was combating an impending environmental threat out of fear of regulatory enforcement or out of a more benevolent desire to keep others safe, either way it was still combating an impending environmental threat.

The court recognizes that it is not an easy question, considering the overlap between the statutory definitions. *See Public Serv. Co. of Colo. v. Gates Rubber Co*., 175 F.3d 1177, 1182 (10th Cir. 1999) (noting that

elements of remedial actions and removal actions "may overlap and semantics often obscure the actual nature of the cleanup performed"). But where, as here, the actions were taken as a sort of "first response," in order to mitigate a substantial present or threatened release of pollutants into ground and surface water, EPA regulations strongly suggest classifying them as "removal" actions. 40 C.F.R. § 300.415(e)(4); (e)(7).

2. On balance, Slater's activities are more consistent with what courts typically consider to be removal actions than with what courts typically consider to be remedial actions.

Although Slater's efforts have some characteristics in common with both removal and remedial actions as generally exemplified in the case law, on balance they are more consistent with what courts typically consider to be removal actions.

Joslyn relies on only a few cases to argue that Slater's actions were part of the "remedial" action to be taken at the Site. The first, and the case on which Joslyn relies most heavily, is *Cytec Indus., Inc. v. B.F. Goodrich Co.*, 232 F.Supp.2d 821 (S.D. Ohio 2002). In *Cytec*, cleanup efforts at a contaminated site commenced after the EPA inspected the facility for RCRA compliance and designated 28 waste management areas for further evaluation. *Id.* at 825-26. The plaintiff began its compliance efforts by designating two ponds – the major problem areas identified by the EPA evaluation – for closure. *Id.* at 826. The court was asked to consider whether the pond cleanups were part of the larger remedial action for the entire site. It found that they were, largely because "[t]he cleanup of Ponds 1 and 2 was not the result of an immediate release or threat of release of hazardous substances[.]"

Id. at 838. The court also considered that removal actions generally cost less, and take less time, than remedial actions. *Id.* at 833. "Further, '[r]emoval concerns are more procedural in nature in that they speak to 'monitoring,' 'assessing,' and 'evaluating' the measures necessary to abate short-term, manageable environmental cleanup.'" *Id.* (quoting *Rhodes v. County of Darlington, S.C.*, 833 F.Supp. 1163, 1182 (D.S.C. 1992)).

Joslyn thinks *Cytec* is a near-exact analogue, but the facts of this case produce a mixed match at best. On one hand, Slater's actions in this case spanned several years – roughly a decade, in fact. That does seem incompatible with the typically short time duration ascribed to removal actions by *Cytec* and other authorities. *See Pub. Serv. Co. v. Gates Rubber Co.*, 175 F.3d 1177, 1182 (10th Cir. 1999) ("Generally, a removal action costs less, takes less time, and is geared to address an immediate release or threat of release," whereas a remedial action, which "usually cost[s] more and take[s] longer," "seeks to effect a permanent remedy to the release of hazardous substances when there is no immediate threat to the public health"). But on the other hand, unlike the cleanup in *Cytec*, the Slater cleanup in this case does appear to have been for the purpose of combating the threat of release of hazardous substances, as indicated in the documentary evidence, although RCRA compliance was obviously also on the table. The cleanup at the surface impoundment and waste pile do not appear to have come at great expense, and the Slater cleanup plans spoke to "monitoring," "assessing," and "evaluating" at considerable length, all of which the *Cytec* court considered to be indicative of a removal action, not a remedial action. *See* 232 F.Supp.2d at 833. Moreover, the duration of an action is just one factor to consider.

Under the right circumstances, a removal action can last quite some time. *See Vill. of Milford v. K-H Holding Corp.*, 390 F.3d 926, 934 (6th Cir. 2004) (in which the Sixth Circuit held that a short terms of duration are not "requirements for finding the costs of action recoverable as removal costs); *United States v. Nalco Chem. Co.*, 2002 WL 548840 (finding a removal action lasting from 1974 to 1998).

Beyond *Cytec*, Joslyn only cites a few authorities, and does so in passing. Joslyn cites *United States v. Navistar Intl. Trans. Corp.*, 152 F.3d 702, 713 (7th Cir. 1998), for the proposition that the placement of a clay cover over a landfill triggers the subsection 9613(g)(2)(B) limitations period, but the parties in that case did not dispute that the action in question was remedial. They disputed only when the remedial action was initiated. Joslyn also cites *Schaefer v. Town of Victor*, 457 F.3d 188, 203-204 (2d Cir. 2006), and *Yankee Gas Services Co. v. UGI Utilities, Inc.*, 616 F.Supp.2d 228 271-75 (D.Conn. 2009), to suggest that excavation and re-fill activities are inherently remedial in nature. But putting so much emphasis on the type of activity undertaken, and not on the circumstances in which it was undertaken, seems to fly in the face of the regulatory framework, as discussed above. It also conflicts with the Seventh Circuit's previous acknowledgment that excavation and capping *can* be considered a removal action. *See Schalk v. Reilly*, 900 F.2d 1091, 1093 (7th Cir. 1990) (splitting a cleanup effort into "a removal action involving surface excavation and capping of abandoned dump sites" and a subsequent remedial action to eradicate all hazardous wastes); *see also United States v. Cantrell*, 92 F.Supp.2d 704, 715 (S.D. Ohio 2000) (clay capping considered a removal action).

Viewing all of the factors the courts in these cases have considered, it seems clear that Slater's actions were a removal, not a remediation. The only factors weighing in favor of classifying the actions as a remediation is that the process took several years, and that cleaning up those two small sites was consistent with the purpose of the wider remedial action now underway. [DE 49 at 6]. But the duration is not dispositive. *See United States v. Peterson Sand & Gravel, Inc.*, 824 F.Supp. 751, 753 (N.D. Ill. 1991) ("Clearly, the term removal . . . includes time necessary to dispose of the removed material as well as the time needed to evaluate the need for further activity"). And consistency with the objectives of remediation cannot, alone, be enough. If one adopts a wide enough perspective, every removal action is consistent with every remedial action in that all are attempts to alleviate environmental concerns. Joslyn's argument is generic in that way; it claims that the earlier actions were steps towards the permanent remedy simply because they removed contamination. [DE 49 at 6]. But the excavations and capping at the surface impoundment and waste pile were not consistent with current ERH remedial measures in any case-specific, meaningful way. In fact, excavation/removal and the in-place eradication of contaminants through ERH seem like two completely unrelated ways to combat contaminants in the soil and groundwater.

More importantly, the Slater cleanup in the 1980s and 1990s was undertaken to combat an environmental threat, was narrowly tailored to address that specific threat, included monitoring and evaluation components with an eye towards a larger-scale remedial action in the future, and was not exceptionally complex or expensive. Under the relevant cases as cited by both parties, all of those factors weigh in favor of

considering Slater's cleanup efforts at the surface impoundment and waste pile a removal action. That interpretation is also consistent with the federal regulations, which specifically designate the actions taken by Slater, in this context, as "removal actions."

3. Valbruna's lawsuit is timely.

The court has determined that Slater's actions in the 1980s and 1990s were not remedial in nature, but were a prior removal action. The next question is whether the "initiation of physical on-site construction of the remedial action" which is currently ongoing occurred within six years of the filing of this lawsuit. The suit was filed on February 11, 2010. That means the triggering event must have occurred sometime after the same date in 2004, in order for Valbruna's remedial expenses to be recoverable. It is undisputed that the ongoing remedial action was in the planning stages several years before that date. For example, on September 11, 2002, Slater initially provided IDEM with a proposed Remediation Work Plan for the entire Site. [DE 46-13]. But Slater entered bankruptcy not long thereafter, and no work was commenced with respect to the remedial plan until several years later. Specifically, on May 3, 2005, Valbruna's environmental consultant submitted a Remedial Work Plan to IDEM which laid out a plan to use ERH for soil and groundwater remediation of trichloroethylene at the Site. [DE 46-17]. IDEM approved, and the ERH project commenced on May 23, 2005. [DE 46-18 at 7].

In our circuit, the triggering event occurs when "the (1) physical (2) initiation (3) on the site (4) of the construction (5) of the remedial action" takes place. *Navistar*, 152 F.3d at 711. It need not occur after the

final remedial work plan is adopted, *Id.* at 711-12,[5] and it in fact occurred earlier in this case. The earliest evidence the court can find in the record of physical on-site construction consistent with the remediation plan is when Valbruna's environmental consultant "mobilized the [Site] for well abandonment and the installation of new monitoring wells" on February 14, 2005. [DE 46-17 at 22]. No party produced any evidence of actions prior to that date which might qualify as the triggering event under the Navistar test (aside from Slater's actions in the 1980s and 1990s, which this court has found do not qualify because they constituted a removal effort). Since that date was within the six years preceding the filing of the suit, Valbruna's action is timely and may proceed.

B. Even if Slater's Actions Were Remedial in Nature, They Were Discrete, Divisible "Operable Units."

Even if the actions Slater took in the 1980s and 1990s were remedial in nature, there is an alternative basis for denying summary judgment on statute of limitations grounds. Slater's actions at the surface impoundment and waste pile were a separate and distinct cleanup effort from the ERH remediation, and

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[5] The Ninth Circuit has gone so far as to conclude that "the initiation of physical on-site construction of the remedial action" under the statute "can only occur *after* the final remediation plan is adopted[,]" and that action taken before the plan adoption cannot constitute "remedial action" for statute-of-limitations purposes. *California ex rel. Cal. Dep't of Toxic Substances Control v. Neville Chem. Co.*, 358 F.3d 661, 667 (9th Cir. 2004) (emphasis added). That would mean the triggering event in this case could not occur until on or after May of 2005, but our circuit has previously declined to draw such a bright line. *Navistar*, 152 F.3d at 711-12.

as such had no effect on when the statute of limitations began to run for the remedial action currently taking place.

It is true that some courts have found that different phases of the same removal or remedial action cannot serve as the basis for separate legal actions. *See Colorado v. Sunoco*, 337 F.3d 1233, 1241 (10th Cir. 2003); *Kelley v. E.I. DuPont de Nemours and Co.*, 17 F.3d 836, 841-44 (6th Cir. 1994). In *Sunoco*, the Tenth Circuit observed:

> Although both subsections (A) and (B) of § 9613(g)(2) use the indefinite article "a" to modify the phrases "removal action" and "remedial action," they also both use the definite article "the" to modify those same phrases. As asserted by defendants, use of this definite article suggests there will be but a single "removal action" and a single "remedial action" per site. Perhaps most persuasive is the language in subsection (B) which states that "if *the remedial action* is initiated within 3 years after the completion of *the removal action*, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph." In our view, this language indicates there will be but one "removal action" per site or facility, as well as a single "remedial action" per site or facility. If Congress intended to allow multiple actions for separate components of recovery or remedy, it surely would have used the indefinite article "a" rather than the definite article "the" to modify the phrases "removal action" and "remedial action."

337 F.3d at 341-42 (internal citations omitted). The Tenth Circuit's conclusion – that Congress would have used the indefinite article "a" to modify the phrases

"removal action" and "remedial action" if it intended to allow multiple actions for separate cleanup components – is interesting, considering that Congress *did* use the indefinite article "a", a fact which the Tenth Circuit acknowledges earlier in the same paragraph. To acknowledge that Congress used both "a" and "the," only to then assign dispositive importance to one of the two without much more, seems less than convincing. The Sixth Circuit's approach in *Kelley* was similar. *See* 17 F.3d at 843 (concluding that Congress's choice of the modifying articles "a" and "the" to precede "removal action," *see* 42 U.S.C. § 9613(g)(2)(A), if it proves anything, proves that Congress intended that there generally will be only one removal action."). This court is reluctant to decide such a significant issue relying solely on the use of definite and indefinite articles.

A more thorough examination comes from *United States v. Manzo*, 182 F.Supp.2d 385 (D.N.J. 2000). In *Manzo*, Judge Cooper agreed that the statute was ambiguous. But rather than infer congressional intent from the use of one form of article where two forms of article were used, Judge Cooper discussed at length the legislative history of the statute and the administrative framework established by the EPA. *Id.* at 401-02. Among other things, she noted that the House Conference Report accompanying the SARA[6] amendment to CERCLA in 1986 explicitly acknowledged the availability of multiple actions based on separate "phases" of a cleanup:

> Similarly, if a response action is being conducted at a complex site with many areas of contamina-

[6] Referring to the "Superfund Amendments and Reauthorization Act," which created the statute of limitations under discussion.

> tion, a challenge could lie to a completed excavation or incineration response in one area, as defined in a Record of Decision, while a pumping and treating response activity was being implemented at another area of the facility. It should be the practice of the President to set forth each separate and distinct phase of a response action in a separate Record of Decision document. *Any challenge under this provision to a completed stage of a response action shall not interfere with those stages of the response action which have not been completed.*

H.R. Conf. Rep. No. 99-962 at 224 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3317 (emphasis added). This expression of congressional intent could not be more clear. Not only did Congress intend to make different actions available for different phases of a response, it urged the President to set forth EPA regulations consistent with that intent.

Judge Cooper accordingly concluded that separate actions for multiple removal or remedial actions *can* be available under the right circumstances. But, obviously, breaking down a response action too far is unacceptable. *See*, *e.g.*, *Kelley*, 17 F.3d at 843 (noting that, clearly, each barrel removed from a cleanup site does not trigger a new limitations period). Judge Cooper reasoned that the logical "breakdown point" is one essentially consistent with the EPA concept of the "operable unit." 182 F.Supp.2d at 402. An "operable unit," as defined by EPA regulations:

> [M]eans a discrete action that comprises an incremental step toward comprehensively addressing site problems. This discrete portion of a remedial response manages migration, or eliminates or mitigates a release, threat of a release, or path-

> way of exposure. The cleanup of a site can be divided into a number of operable units, depending on the complexity of the problems associated with the site. Operable units may address geographical portions of a site, specific site problems, or initial phases of an action, or may consist of any set of actions performed over time or any actions that are concurrent but located in different parts of a site.

40 C.F.R. § 300.5. The regulation is reflective of the reality that CERCLA cleanups often, like the one in this case, span several decades. They tend to evolve continuously, in phases, from the initial detection of contamination to a final solution for the entire threatened site. Moreover, EPA regulations are entitled to deference, especially where the statutory text is ambiguous. 182 F.Supp.2d at 402 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984); *Christensen v. Harris County*, 529 U.S. 576 (2000). The regulations, in addition to the legislative history, suggest the availability of multiple actions.

Many courts have recognized that CERCLA response actions are conducted in divisible parts, and, like Judge Cooper in *Manza*, have tethered the statute of limitations in one way or another to the "operable units," or distinct phases, of a cleanup project. *See, e.g.*, *United States v. Ambroid Co., Inc.*, 34 F.Supp.2d 86 (D.Mass. 1999) (considering each of several remedial actions separately for purposes of determining the statute of limitations); *Douglas Autotech Corp. v. The Scott Fetzer Co.*, 2008 WL 205217 (W.D. Mich. 2008)

(analyzing two cleanup phases separately for statute of limitations purposes).[7]

The evidence in this case shows that even if Slater's actions at the surface impoundment and waste pile were remedial actions, they were distinct from the remedial project undertaken by Valbruna over the last decade. First, they were the product of a different set of consent orders with IDEM and the EPA, issued in the 1980s. [DE 46-7]. Second, they dealt primarily with RCRA compliance in two small areas that comprised only a fraction of the whole Site, not with overall CERCLA compliance at the whole Site, as the current remedial plan does. Third, they were completed in the early 1990s and certified completed by IDEM in 1999. [DE 42-7 (certificate of completion of work required at surface impoundment and waste pile)]. That was before the current Site-wide remedial action was even found to be necessary [DE 46-7 (Notice ov Violation issued in 2000)], developed [DE 46-13 (proposed remediation work plan submitted to IDEM in September of 2002)], approved, or put into action. [DE 46-18 (both

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[7] The court notes that the Seventh Circuit has also recently employed the "divisibility" approach to a CERCLA statute of limitations question. *See Bernstein v. Bankert*, 702 F.3d 964, 981-84 (7th Cir. 2012) (analyzing a pair of removal actions separately for statute of limitations purposes where each removal action was the product of a separate consent order and where the first removal action was certified complete by the EPA before the nature of the second removal action was even determined); *but see Navistar*, 152 F.3d 702, 713 (noting that the mere fact that a first attempt at removal fails and has to be repeated does not mean that a second attempt of the same removal action founds a new cause of action). Since the time available for possible rehearing on the *Bernstein* decision has not yet expired, this court will not rely on *Bernstein* as diapositive. But there is no need to do so. The remaining authorities on the issue are persuasive.

occurring in 2005)]. Finally, and most importantly, Slater's cleanup effort at the surface impoundment and waste pile perfectly match the regulatory definition of a distinct "operable unit," in that it was a "discrete action that comprise[d] an incremental step toward comprehensively addressing site problems" which "manage[d] migration, or eliminate[d] or mitigate[d] a release, threat of a release, or pathway of exposure" and "address[ed] geographical portions of a site[.]" 40 C.F.R. § 300.5.

Slater's actions in the 1980s and 1990s at the surface impoundment and waste pile were removal actions, and for that reason had no impact on when the statute of limitations for the current remedial action began to run. But even if they were remedial actions, they were separate and distinct remedial actions – "operable units" which were divisible from the current project – which likewise had no bearing on when the statute of limitations for the current project began to run.

II. VALBRUNA'S MOTION TO STRIKE [DE 47]

On March 14, 2012, Valbruna moved to strike eight of the exhibits Joslyn submitted in support of summary judgment. [DE 47]. Joslyn's objection is that the exhibits – each retrieved from the IDEM website – were not properly authenticated. Since the court has concluded that Joslyn's motion for summary judgment must be denied as a matter of law even when the exhibits in question *are* considered, it is not prejudicial to Valbruna to allow them into the summary judgment record. Valbruna's motion to strike is accordingly denied.

CONCLUSION

For the reasons stated herein, Joslyn's motion for summary judgment [DE 42] is DENIED. The federal regulations differentiating between removal and remedial actions weigh in favor of classifying Slater's activities at the Site in the 1980s and 1990s as removal, rather than remedial, activities, and the balance of the factors referenced by the case law support the same conclusion. Even if that were not the case, Slater's actions in the 1980s and 1990s were distinct from the remedial action underway, and therefore have no impact on when the statute of limitations began to run. Finally, Valbruna's motion to strike [DE 47] is DENIED.

SO ORDERED.

ENTERED: March 21, 2013

/s/ JON E. DEGUILIO
Judge
United States District Court

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 18-2633 & 18-2738

VALBRUNA SLATER STEEL CORPORATION, *et al.*,

Plaintiffs-Appellees, Cross-Appellants,

v.

JOSLYN MANUFACTURING COMPANY, *et al.*,

Defendants-Appellants, Cross-Appellees.

Appeal from the United States District Court for the
Northern District of Indiana, Fort Wayne Division
No. 1:10-cv-00044-JD
Jon E. DeGuilio, *Judge*

September 6, 2019

ORDER

Before WILLIAM J. BAUER, *Circuit Judge*, DAVID F. HAMILTON, *Circuit Judge*, AMY J. ST. EVE, *Circuit Judge*

On consideration of the petition for rehearing en banc, no judge in regular active service has requested a vote on the petition for rehearing en banc and the judges on the original panel have voted to deny rehearing. It is, therefore, ORDERED that the petition for rehearing en banc is DENIED.

APPENDIX F

42 U.S.C. § 9601

§ 9601. Definitions

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(23) The terms "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act.

(24) The terms "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage,

confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

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42 U.S.C. § 9613

§ 9613. Civil proceedings

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(g) Period in which action may be brought

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(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may

be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

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