No.

In the Supreme Court of the United States

MRP PROPERTIES COMPANY, LLC; VALERO REFINING COMPANY–OKLAHOMA; PREMCOR REFINING GROUP INC.; ULTRAMAR, INC.; VALERO REFINING COMPANY–TENNESSEE; VALERO REFINING–TEXAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), an "owner" or "operator" of a "facility" at the time hazardous substances were disposed must pay to remediate environmental concerns. 42 U.S.C. § 9607(a)(1)-(2). The existence and apportionment of CERCLA liability often depends on whether a party is a facility "operator." *Id.*

In 1998, this Court held that to be a facility "operator," an entity "must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998). Despite that explanation, lower courts remain divided as to what types of activities can confer "operator" liability. The Third, Fifth, and Eighth Circuits consider both pollution-producing activities as well as waste-disposal and environmental-compliance activities. In contrast, the Sixth Circuit and district courts across the nation consider *only* waste-disposal and regulatory-compliance activities—but not pollution-producing activities. The federal government has taken full advantage of this confusion—advancing conflicting positions as expedient.

The question presented is, when analyzing whether an entity is a facility "operator" under CERCLA, should courts consider pollution-*producing* activities that the entity managed, directed, or conducted—or should courts instead limit this analysis to waste-*disposal* and regulatory-*compliance* activities.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners state as follows:

Petitioner MRP Properties Company, LLC, is a wholly owned subsidiary of Valero Energy Corporation.

Petitioner Valero Refining Company — Oklahoma is a wholly owned subsidiary of Valero Energy Corporation.

Petitioner Valero Refining Company — Tennessee, LLC, is a wholly owned subsidiary of Valero Energy Corporation.

Petitioner Premcor Refining Group Inc. is a wholly owned subsidiary of Valero Energy Corporation.

Petitioner Valero Refining — Texas, L.P. is a wholly owned subsidiary of Valero Energy Corporation.

Petitioner Ultramar Inc. is a wholly owned subsidiary of Valero Energy Corporation.

Valero Energy Corporation is a publicly traded company (NYSE: VLO). It has no parent corporation, and The Vanguard Group, Inc. owns more than 10% of its stock.

RELATED PROCEEDINGS

1. *MRP Properties Co., LLC v. United States*, No. 1:17-cv-11174, U.S. District Court for the Eastern District of Michigan. Judgment entered Dec. 9, 2021. Certificate of appealability granted Feb. 16, 2022.

2. *In re United States*, No. 22-103, U.S. Court of Appeals for the Sixth Circuit. Judgment entered Sept. 8, 2022.

3. *MRP Properties Co., LLC v. United States*, No. 22-1789, U.S. Court of Appeals for the Sixth Circuit. Judgment entered June 23, 2023. Amended judgment entered June 29, 2023.

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INTRODUCTION

This petition is an ideal vehicle for resolving a circuit split on a recurring pure question of law, which dictates the allocation of liability for hundreds of millions of dollars in environmental remediation—in this case alone. Review is especially warranted because the federal government exploits this confusion among the lower courts. The government has asserted conflicting positions, arguing for broad liability for industry yet limited liability for itself.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is our Nation's foremost environmental cleanup statute. It requires every "operator" of a "facility" at the time hazardous substances were disposed to fund the cleanup. 42 U.S.C. § 9607(a)(1)-(2). A quarter century ago, this Court set out the general definition of a facility "operator": "under CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility." *United States v. Bestfoods*, 524 U.S. 51, 66 (1998). This Court then tried to "sharpen the definition": "an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id.* at 66-67.

But lower courts remain intractably divided over which activities are relevant in determining whether a party is a facility "operator." The Third, Fifth, and Eighth Circuits correctly hold that an entity with control over a facility's pollution-producing activities is an

operator. *FMC Corp. v. U.S. Dep't of Com.*, 29 F.3d 833, 843 (3d Cir. 1994) (en banc), *reaff'd*, *PPG Indus. Inc. v. United States*, 957 F.3d 395, 405-06 (3d Cir. 2020); *United States v. Nature's Way Marine, LLC*, 904 F.3d 416, 420-21 (5th Cir. 2018); *United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1088 n.5 (8th Cir. 1995). That makes sense. Directing, managing, or conducting a facility's operations producing hazardous waste is "specifically related to pollution"—as it "ha[s] to do with the leakage," if not conventional "disposal," of "hazardous waste." *Bestfoods*, 524 U.S. at 66-67.

Applying that straightforward standard in this case, the district court determined that "every reasonable juror would conclude that the Government operated" the refineries at issue during World War II. Pet. App. 74a; *accord* Pet. App. 83a, 91a. After all, the government "dictated which petroleum products the [refineries] could produce" and "repeatedly determined the [refineries'] production levels." Pet. App. 75a; *accord* Pet. App. 83a, 92a.

Reversing, the Sixth Circuit rejected the legal standard used in the Third, Fifth, and Eighth Circuits. The Sixth Circuit held that a party's control over a facility's pollution-*producing* activities is irrelevant because only "control over the waste *disposal* process" can suffice. Pet. App. 6a (emphasis added) (citation omitted). That holding conflicts with three other circuits' decisions and cannot be squared with this Court's *Bestfoods* opinion. It also threatens to breed the sort of nonuniform mischief that seriously undercuts CERCLA's environmental goals.

Both fostering and exploiting that mischief, the federal government has advanced inconsistent interpretations of facility "operator," arguing for broad industry liability yet limited governmental liability. For example, the Solicitor General previously told this Court that the Eighth Circuit was correct: "The language related to operator liability . . . does not require any involvement in the disposal activities themselves." U.S. Br. in Opp., *Atl. Richfield Co. v. United States*, Nos. 02-500 & 02-506, 2002 WL 32134324, at *24 (U.S. Dec. 2, 2002) (alteration in original) (quoting *TIC*, 68 F.3d at 1090 n.7).

The federal government also has pressed this position in some lower courts. For example, the government told the First Circuit that "[a] person who manages, directs, or conducts operations that do use or *generate* hazardous substances, however, is an operator under CERCLA." U.S. Appellee Br., *United States v. Kayser-Roth Corp.*, No. 00-2038, 2001 WL 36025287 (1st Cir. Mar. 9, 2001) (emphasis added). The government likewise told the Fifth Circuit that pollution-causing activity was sufficient, even absent control of waste disposal: "A person with physical control over the facility who 'actually participate[s]' in *causing the pollution* cannot escape liability as an operator." U.S. Appellees Br., *Nature's Way*, No. 17-60698, 2018 WL 1641061, at *19 (5th Cir. Mar. 23, 2018) (alteration in original) (emphasis added) (citing *Bestfoods*, 524 U.S. at 65-66). The Fifth Circuit agreed. *Nature's Way*, 904 F.3d at 420-21.

In this case, however, the federal government endorsed a district court opinion on the other side of the split, arguing that "involvement in the waste-disposal matters at issue is required." U.S. Appellant's Opening

Br., Doc. 17, 2022 WL 17583425, at *35 (quoting *Exxon Mobil Corp. v. United States*, 108 F. Supp. 3d 486, 523 (S.D. Tex. 2015)).[1]

This case is an ideal vehicle for certiorari review. Twelve separate refinery facilities comprise this dispute—"more refineries than any other CERCLA operator-liability case"—making this, in the words of the district court, "the largest CERCLA case ever." Pet. App. 27a, 30a. Besides being an important case in its own right with hundreds of millions of dollars at stake, this petition cleanly presents an important question of federal law that has split the lower courts. As the government explained below, this is "a controlling question of law" that "involves construction of a statute (CERCLA's definition of 'operator') and the meaning of binding Supreme Court precedent (*Bestfoods*)." Pet. of U.S. for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) at 3, *In re United States*, No. 22-103 (6th Cir. Feb. 25, 2022). The Court should therefore grant this petition, resolve the circuit split, and prevent the federal government from further exploiting the lack of definitive guidance on the scope of CERCLA facility-operator liability.

OPINIONS BELOW

The order of the court of appeals denying rehearing (Pet. App. 107a-108a) is unreported. The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 72 F.4th 166. The opinion of the district court (Pet. App. 32a-106a) is reported at 583 F. Supp. 3d 981.

[1] Citations to "Doc." are to the Sixth Circuit's docket.

JURISDICTION

The court of appeals entered its amended judgment on June 29, 2023. The court of appeals denied a petition for rehearing on July 26, 2023. On October 2, 2023, Justice Kavanaugh granted an application to extend the time to file a petition for a writ of certiorari from October 24, 2023, to December 22, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The relevant CERCLA provisions (42 U.S.C. §§ 9601, 9607) are reproduced in the appendix to this petition (Pet. App. 109a-111a).

STATEMENT

A. CERCLA and facility-operator liability

Congress enacted CERCLA "in response to the serious environmental and health risks posed by industrial pollution." *Bestfoods*, 524 U.S. at 55. "The Act was designed to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009) (internal quotation marks and citation omitted).

To encourage cleanup efforts, CERCLA allows those who respond to the release of hazardous waste to recover their costs from those responsible for the waste. An entity responding to a release or threatened release of hazardous waste can recover its "necessary costs of response . . . consistent with the national contingency plan" promulgated by the Environmental Protection Agency.

42 U.S.C. § 9607(a)(4)(B). In general, that entity can recover those costs from four groups of potentially responsible parties: (1) the "owner" or "operator" of the "facility"; (2) parties that previously "owned or operated any facility" at "the time of disposal"; (3) those who "arranged for disposal or treatment . . . of hazardous substances"; and (4) those who "transport[ed]" hazardous waste. *Id.* § 9607(a)(1)-(4). These classes of potentially responsible parties are "broad" and subject to "strict liability for environmental contamination." *Burlington N.*, 556 U.S. at 608. "The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup." *Bestfoods*, 524 U.S. at 56 n.1 (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21 (1989) (plurality op.)).

The second class of potentially responsible parties, the one particularly at issue in this case, includes "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). A "facility"—the object that is operated—broadly includes "any building, structure, installation, equipment, pipe or pipeline," among other things. *Id.* § 9601(9). And the time of "disposal" refers to the time of "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." *Id.* § 6903(3); *see id.* § 9601(29).

Despite those more helpful definitions, CERCLA defines "[t]he phrase 'owner or operator' . . . only by tautology . . . as 'any person owning or operating' a facility." *Bestfoods*, 524 U.S. at 56 (quoting 42 U.S.C. § 9601(20)(A)(ii)). This Court attempted to clarify the definition of facility "operator" in *Bestfoods*. "Ru[ing] the uselessness of CERCLA's definition of a facility's 'operator,'" the Court gave "the term its 'ordinary or natural meaning.'" *Id.* at 66 (citation omitted). After quoting two dictionaries, the Court concluded that, "under CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility." *Id.* The Court then "sharpen[ed] the definition for purposes of CERCLA's concern with environmental contamination": "[A]n operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id.* at 66-67.

Even if an entity qualifies as an operator, it will not necessarily have to pay *all* cleanup costs. Where there are multiple potentially responsible parties, one of them held liable for CERCLA response costs can seek contribution from other potentially responsible parties. *See* 42 U.S.C. § 9613(f)(1). "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." *Id.*

B. Factual background

Petitioners are six affiliates of Valero Energy Corporation, a Texas-based energy company with interests in

refineries nationwide. Pet. App. 37a. This case involves twelve refinery sites scattered across California, Illinois, Kansas, Michigan, Oklahoma, Tennessee, and Texas. Pet. App. 66a, 80a, 88a.

These sites were controlled by the federal government during World War II. The government ordered Petitioners "what to make and for whom to make it," Pet. App. 3a, all in a successful effort to defeat the Axis powers. The government dictated "the quantities and grades of crude oil each refinery could process." Pet. App. 3a. This included production of critical wartime products like "aviation gasoline." Pet. App. 3a. Producing such products "creates sludge, slop, and other waste products." Pet. App. 3a. Hazardous waste also resulted each time the government ordered a change in operations—like forcing refineries to install new equipment and make a new product or dictating inefficient changes in production practices to meet short-term needs. Pet. App. 76a-79a & n.18, 84a-87a & n.19, 92a-98a & n.20. And the more the government ordered refineries to produce, the more hazardous waste resulted. Pet. App. 3a. These changes in government-ordered production also "corroded refinery equipment," further "increasing leakage and spillage" of waste. Pet. App. 3a.

In the years after World War II, the government ceded control over the activities of the refinery sites back to Petitioners. One notable exception occurred when, after the war, "the government seized one plant for six months . . . to deal with labor unrest." Pet. App. 13a. During that time, the government negotiated resolution of a labor strike at the plant and ordered employees back to work. *See* Notice, ECF 94-14 at 2 (Navy "tak[ing]

possession" of the Refinery, which was to operate "subject to the control and supervision of Vice Admiral Ben Moreell"); Report, ECF 77-49 at 17 ("[A]ll striking employees are directed to report for work . . . and company is directed to accept them." (capitalization altered)).[2]

Ultimately, inspections at all twelve sites revealed environmental contamination caused at least in part by the government's wartime operations. Pet. App. 4a. By the district court's estimate, environmental cleanup at *each* of the twelve sites could cost as much as $50 million. Pet. App. 29a ("At issue in each case is whether the CERCLA Superfund or private parties must foot the bill for environmental cleanup," which "could cost upwards of $50 million, and the cleanup could last for decades."); *cf. United States v. Shell Oil Co.*, 506 F. Supp. 3d 1038, 1041 (C.D. Cal. 2020) (awarding government $49,861,337.62 in cleanup costs for a single site that made aviation fuel during World War II). This litigation concerns the allocation of financial responsibility for those cleanup costs.

C. Proceedings below

1. Petitioners filed this action under CERCLA and the Declaratory Judgment Act to make the federal government pay its fair share of cleanup costs attributable to its control over these refineries during World War II. Following discovery, both sides moved for partial summary judgment on whether the federal government is a former "operat[or]" of each refinery under CERCLA. 42 U.S.C. § 9607(a)(2).

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[2] Citations to "ECF" are to the district court's docket.

The district court had little trouble concluding, based on extensive record evidence documenting the breadth and depth of its wartime control, that the federal government was a former "operator" of each of the twelve refineries at issue:

- The government "dictated which petroleum products the [refineries] could produce." Pet. App. 75a; *accord* Pet. App. 83a, 92a (all twelve refineries). This included ordering the production of new materials, which naturally resulted in new waste streams. Pet. App. 76a n.18, 84a n.19, 92a n.20. It also included ordering the modification of existing equipment. Pet. App. 86a-87a n.19, 96a n.20.
- The government "repeatedly determined the [refineries'] production levels." Pet. App. 75a; *accord* Pet. App. 83a, 92a (all twelve refineries).
- The government "decided to whom the [refineries] could sell petroleum products." Pet. App. 75a; *accord* Pet. App. 83a-84a, 92a (eleven of twelve refineries).
- The government "controlled the product prices for the [refineries]." Pet. App. 76a; *accord* Pet. App. 84a, 92a (ten of twelve refineries).

In the aggregate, this evidence confirmed that the federal government had "enough management, direction, or control over the refineries' pollution-producing operations to be considered an 'operator.'" Pet. App. 59a-60a. Accordingly, the district court concluded, "no reasonable juror could find that the extent of the Government's management, direction, and control over the [refineries] had nothing 'to do with' the amount of waste they produced." Pet. App. 79a (quoting *Bestfoods*, 524

U.S. at 66); *accord* Pet. App. 83a, 91a (all twelve refineries).

2. Insisting that the district court's opinion rested on an incorrect understanding of a "question of law" that lower courts "expressly disagree" about, the government successfully moved to certify the district court's order for interlocutory appeal under 28 U.S.C. § 1292(b). Pet. of U.S. for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) at 3, 14, *In re United States*, No. 22-103 (6th Cir. Feb. 25, 2022). The government explained that the "proper definition of 'operator' is a legal issue that involves the interpretation of CERCLA as well as Supreme Court case law." *Id.* at 12. The government also emphasized that "reasonable jurists not only could disagree, but *have* disagreed" on the answer to that legal question. *Id.* at 13; *see also* Mem. ISO U.S. Mot. to Certify, ECF 104-1 at 11 ("[C]ourts have not uniformly interpreted 'operator.'" (citation omitted)). Accepting the government's arguments, the district court certified the interlocutory appeal, Pet. App. 20a-31a, as did the Sixth Circuit, Pet. App. 15a-19a.

3. On appeal, the government argued that the district court erred by basing facility-operator liability on the government's influence over "pollution-producing activities." U.S. Appellant's Opening Br., Doc. 17, 2022 WL 17583425, at *29. According to the government, *Bestfoods* allows facility-operator liability "only if there was evidence that [the alleged operator] made decisions or exercised control directly over decisions regarding whether and how to remediate leakage of hazardous substances and whether, how, and when to dispose of waste containing hazardous substances." *Id.* at 32. The

government urged that "activity concerning a facility's productive operations," on the other hand, should not be considered "specifically related to pollution." *Id.* at 33 (internal quotation marks omitted).

Agreeing with the government, the Sixth Circuit reversed. It refused to consider the government's control over a facility's pollution-*producing* activities. Instead, it expressly limited its analysis to waste-*disposal* activities.

The Sixth Circuit recognized the key legal question in this case: "Who or what counts as 'conduct[ing]' or 'manag[ing]' 'operations . . . specifically related to pollution' and concerning the leakage or disposal of hazardous waste?" Pet. App. 5a (alterations in original) (quoting *Bestfoods*, 524 U.S. at 66). After describing cases on both "sides of the operator line," the court concluded: "All in all, a person . . . manages activities specifically related to pollution, and thus qualifies as an operator, where she exercises control over the waste disposal process." Pet. App. 6a (internal quotation marks and citation omitted). Applying this framework, the Sixth Circuit rejected facility-operator liability because "the refineries, not the government, made the key management decisions related to waste and implemented those decisions." Pet. App. 8a.

Although the Sixth Circuit acknowledged governmental control of these facilities more broadly, it found that control irrelevant because it did not extend to the specific handling of waste: "To be sure, the government influenced refineries' business decisions during the war. But that influence did not extend to refinery facilities' waste-related features—to how refinery buildings,

structures, installations, and equipment handled or mishandled waste." Pet. App. 8a (cleaned up).

REASONS FOR GRANTING THE PETITION

This case presents an important recurring legal issue that has divided the lower courts since *Bestfoods*, and the resolution of this issue in this case alone implicates potentially hundreds of millions of dollars in liability. Until the decision below, the longstanding majority view had recognized, consistent with the district court's approach in this case, that an entity bears CERCLA facility-operator liability when it directs, manages, or conducts the facility's activities *producing* pollution. But the Sixth Circuit has now departed from the Third, Fifth, and Eighth Circuits' commonsense understanding. The opinion below insisted that production of pollution is irrelevant and only *disposal* matters when determining who is a CERCLA facility "operator."

This Court should resolve this exceptionally important conflict among the lower courts and provide much needed clarity on the scope of facility-operator liability under CERCLA and *Bestfoods*. Such clarity would stop the government's practice of opportunistically asserting contradictory positions to impose broad CERCLA facility-operator liability on industry yet limited liability on itself. And this case is the perfect vehicle to do so. This case "includes more refineries than any other CERCLA operator-liability case ever." Pet. App. 27a; *accord* Pet. App. 19a. And it presents a pure question of law for all the reasons the government advanced below in seeking interlocutory appellate review. The Court

should therefore grant certiorari, resolve the circuit split, and reverse the Sixth Circuit's erroneous decision.

I. The circuits are split on the scope of facility-operator liability under CERCLA.

The Sixth Circuit's decision conflicts with the decisions of the Third, Fifth, and Eighth Circuits. Unless this Court grants certiorari, whether control over pollution-*producing* activities is relevant to facility-operator liability under CERCLA will depend on the circuit in which the case happens to arise. This case illustrates the untenability of that status quo: For the Gulf Oil and Eastern States refineries in Texas at issue in this case, Pet. App. 88a, such activities are *irrelevant* per the Sixth Circuit's blinkered approach. But for other hazardous waste sites in Texas, such activities will be *relevant* per the Fifth Circuit's contrary approach. *See infra* pp.20-22.

Uniformity is always important for fairness purposes, but it is especially important in the CERCLA context. *See Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1225 (3d Cir. 1993) (noting "the federal interest in uniformity in the application of CERCLA" (citation omitted)); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 809 (S.D. Ohio 1983) ("A liability standard which varies in the different forum states would undermine the policies of the statute by encouraging illegal dumping in states with lax liability laws." (citation omitted)).

That is why this Court readily grants plenary review to resolve confusion over CERCLA's interpretation. *Territory of Guam v. United States*, 141 S. Ct. 1608, 1612 (2021); *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335,

1348-49 (2020); *Burlington N.*, 556 U.S. at 608; *United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 131-33 (2007); *Bestfoods*, 524 U.S. at 60; *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994); *cf. Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 165 (2004) (granting review even without a circuit split). It should likewise do so here.

A. The Sixth Circuit below and multiple district courts refuse to consider pollution-producing activities when determining facility-operator liability.

In the Sixth Circuit and multiple district courts, no amount of control over a facility's activities that *produce* pollution can suffice to make a party "potentially responsible for hazardous-waste contamination." *Bestfoods*, 524 U.S. at 56 n.1 (internal quotation marks and citation omitted). That is because those decisions hold that only control over waste *disposal* or environmental *compliance* matters.

Here, the Sixth Circuit held Petitioners had not established that the federal government operated the refineries because Petitioners proved the federal government's control over these facilities' pollution-producing activities rather than waste-disposal activities. The district court had granted summary judgment to Petitioners based on the government's "management, direction, or control over the refineries' pollution-producing operations." Pet. App. 59a-60a. But the Sixth Circuit reversed because Petitioners had not established that the government "exercise[d] control over the waste disposal process." Pet. App. 6a (quoting *GenCorp, Inc. v. Olin Corp.*,

390 F.3d 433, 449 (6th Cir. 2004)). Under the Sixth Circuit's approach, even undisputed control over "what to produce and when to produce it" could not make the federal government a facility "operator" of refineries. Pet. App. 2a.

In reaching that incorrect view, the Sixth Circuit aligned itself with a longstanding minority view adopted by district courts across the nation, which have made waste disposal the *sine qua non* of operator liability. *See United States v. Sterling Centrecorp Inc.*, 209 F. Supp. 3d 1151, 1158 (E.D. Cal. 2016), *aff'd*, 977 F.3d 750 (9th Cir. 2020) ("The Ninth Circuit has made it clear that 'operator' liability under CERCLA requires active management of the enterprise and/or decision-making authority over the facility's waste disposal operations." (citation omitted)); *Lockheed Martin Corp. v. United States*, 35 F. Supp. 3d 92, 121 (D.D.C. 2014), *aff'd*, 833 F.3d 225 (D.C. Cir. 2016) ("*Bestfoods* requires that an operator 'make the relevant decisions' regarding the disposal of hazardous wastes 'on a frequent, typically day-to[-]day basis.'" (citation omitted)); *City of Wichita v. Trustees of APCO Oil Corp. Liquidating Tr.*, 306 F. Supp. 2d 1040, 1055 (D. Kan. 2003) ("[A]n operator must be actively involved in decisions regarding disposal of hazardous substances or environmental compliance." (citation omitted)).

B. The Third, Fifth, and Eighth Circuits consider pollution-producing activities when determining facility-operator liability.

In contrast, the Third, Fifth, and Eighth Circuits (home to multiple of the refineries at issue in this case) consider pollution-producing activities, not just waste-

disposal activities, when determining "operator" liability. *See FMC*, 29 F.3d at 843; *Nature's Way*, 904 F.3d at 421; *TIC*, 68 F.3d at 1088 n.5.

1. In *FMC Corp. v. U.S. Department of Commerce*, the en banc Third Circuit analyzed whether the federal government was an operator of a textile-manufacturing facility during World War II. 29 F.3d at 834. The Third Circuit concluded "the government reasonably cannot quarrel with the conclusion that the leading indicia of control were present, as the government determined what product the facility would produce, the level of production, the price of the product, and to whom the product would be sold." *Id.* at 843. These "leading indicia" go far beyond waste-disposal activities and include activities affecting the amount and type of pollution produced in the first place. As the court below conceded, the Third Circuit's opinion establishes "a framing that favors Valero." Pet. App. 13a; *cf.* Pet. of U.S. for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) at 3, *In re United States*, No. 22-103 (6th Cir. Feb. 25, 2022) (noting that the district court below was aligned with the en banc Third Circuit's *FMC* opinion).

The opinion below acknowledged this circuit split yet tried to downplay it by noting that *FMC* pre-dates *Bestfoods* and claiming that, since *Bestfoods*, the Third Circuit has "retreat[ed] . . . from *FMC*'s 'leading indicia' language." Pet. App. 13a.

But the Third Circuit remains firmly on the other side of the split. In the very case the opinion below cited (*PPG*), the Third Circuit embraced the approach it previously took in *FMC*. Instead of declaring *FMC* abrogated by *Bestfoods*, the Third Circuit in *PPG* reaffirmed

FMC's vitality: "Although *FMC* pre-dates *Bestfoods*, even under the *Bestfoods* standard, *FMC* was correctly decided." *PPG*, 957 F.3d at 405. The Third Circuit in *PPG* even described control over a facility's pollution-producing activities as "dispositive." *Id.* at 406 n.11.

Although the Third Circuit held the government was not a facility operator in *PPG*, it did so because the factual evidence of control over pollution-producing activity was less compelling than in *FMC*—not because *PPG* had a different understanding of the legal standard. When the plaintiff argued "that there was a 'nexus' between the Government's actions and waste disposal at the site because the Government 'directed' [the plaintiff's predecessor] to switch to the quicker, more wasteful manufacturing process," the court rejected that argument only because the plaintiff "offered no evidence permitting [such] an inference." *Id.* at 404. On those facts, the Third Circuit concluded the plaintiff's predecessor had not been "directed by the Government" but had "itself chose[n] the option that was the most convenient for it." *Id.* at 406. Put simply, it could "not be said that the Government exercised the same kind of 'day-to-day' control" over pollution-producing activities. *Id.*

In reaffirming *FMC*'s understanding of the legal standard for CERCLA facility-operator liability, the Third Circuit in *PPG* emphasized that both pollution-producing and waste-disposal activities matter. It treated the government's involvement in pollution-producing activities—such as "order[ing] the facility to produce a different product"—as a "significant factual difference[] between *FMC* and" *PPG*. *Id.* at 405. The lack of governmental control over waste-disposal activities

was not dispositive in *PPG*, contrary to the Sixth Circuit's decision. Rather, it was another relevant consideration alongside governmental control over pollution-producing activities like "who made the decisions about how to increase output." *Id.* at 406 n.11. In *PPG*, government control over *both* aspects was lacking. Here, in stark contrast, the federal government had immense control over the refineries' producing-pollution activities. *See supra* pp.8-9. That is why the federal government below argued this case presents a pure question of law. *See supra* p.11.

2. Consistent with the Third Circuit's approach, the Eighth Circuit has also ruled that CERCLA facility-operator liability does not require involvement in waste-disposal activities. *TIC*, 68 F.3d at 1090 n.7. The Solicitor General previously told this Court that the Eighth Circuit was correct. *See* U.S. Br. in Opp., *Atl. Richfield*, Nos. 02-500 & 02-506, 2002 WL 32134324, at *24 (U.S. Dec. 2, 2002) ("[O]perator liability . . . does not require any involvement in the disposal activities themselves" (quoting *TIC*, 68 F.3d at 1090 n.7)).

The text of 42 U.S.C. § 9607(a)(2), the Eighth Circuit explained, "merely requires that the person in question own or operate the facility at which hazardous substances are disposed of, at the time of disposal; nowhere does this subsection require that the person be involved in the disposal activities themselves." *TIC*, 68 F.3d at 1089 n.5. The Eighth Circuit contrasted "operator" liability under 42 U.S.C. § 9607(a)(2) with "arranger" liability under § 9607(a)(3). "The language of CERCLA's arranger subsection specifically requires that one arrange for disposal or treatment, or arrange for transportation for disposal or treatment." *Id.* at 1090 n.7. "The language

related to operator liability, by contrast, merely requires that one operate the facility at which hazardous substances are disposed of, at the time of the disposal; it does not require any involvement in the disposal activities themselves." *Id.*

TIC (just like the Third Circuit's *FMC* opinion) is consistent with *Bestfoods* and remains good law. Just as *TIC* "does not require any involvement in the disposal activities themselves," *id.*, neither did this Court in *Bestfoods*, 524 U.S. at 66. *Bestfoods*, instead, requires only that a facility's "operator" direct "operations having to do with the leakage or disposal of hazardous waste." *Id.* at 66-67. Indeed, the Solicitor General has recognized the continued vitality of *TIC*'s holding after *Bestfoods*. *See* U.S. Br. in Opp., *Atl. Richfield*, Nos. 02-500 & 02-506, 2002 WL 32134324, at *24-25 (U.S. Dec. 2, 2002).

3. The Fifth Circuit has also rejected the Sixth Circuit's reading of *Bestfoods*. In *Nature's Way*, "a tugboat . . . was moving two oil-carrying barges . . . down the Mississippi River" when "[t]he barges collided with a bridge, resulting in one of the barges discharging over 7,000 gallons of oil into the Mississippi River." 904 F.3d at 418. The tugboat owner argued it was not an "operator" of the barge that discharged the oil. *Id.*

Although the case arose under the Oil Pollution Act ("OPA"), that statute and CERCLA "define[] the term 'operator' with the exact same language." *Id.* at 420. Because the statutes have the same text, a "common purpose[]," and "a shared history," the Fifth Circuit relied on CERCLA precedent, including *Bestfoods*, to analyze operator liability under OPA. *Id.* Relying on that same standard, the tugboat owner argued that it "did not

'manage, direct, or conduct operations [of the barge] specifically related to pollution.'" Original Br. of Defendant-Appellant & Counter Claimant-Appellant, *Nature's Way*, No. 17-60698, 2018 WL 333435, at *34 (5th Cir. Jan. 3, 2018) (quoting *Bestfoods*, 524 U.S. at 66).

The federal government cited *Bestfoods* when urging the Fifth Circuit to reject the owner's argument on the basis that pollution-causing activity is sufficient, even absent control of waste disposal: "A person with physical control over the facility who 'actually participate[s]' in *causing the pollution* cannot escape liability as an operator." U.S. Appellees Br., *Nature's Way*, No. 17-60698, 2018 WL 1641061, at *19 (5th Cir. Mar. 23, 2018) (emphasis added) (citing *Bestfoods*, 524 U.S. at 65-66).

The Fifth Circuit adopted the position urged by the federal government that "operator" liability can arise even without control over waste disposal. The court rejected the tugboat owner's argument that it could not "be deemed to have been 'operating' the barge because . . . it did not exercise control over its environmental affairs or inspections." *Nature's Way*, 904 F.3d at 421. On the contrary, the company was an operator because it "directed precisely the *activity that caused the pollution*—it literally was the party that crashed the barge into the bridge." *Id.* (emphasis added). "To hold that [the tugboat owner] was not 'operating' the barge at the time of the collision would be to strain beyond the ordinary and natural meaning of the word." *Id.*

That *Nature's Way* arose under the OPA while this case arose under CERCLA does not undermine the importance or existence of the split. The Fifth Circuit's interpretation of "operator" and application of *Bestfoods*

are fundamentally inconsistent with the Sixth Circuit's opinion in this case. Because the Fifth Circuit interprets the OPA and CERCLA in parallel, *Nature's Way* means that this CERCLA case would have been decided differently in the Fifth Circuit than it was in the Sixth Circuit.

C. The federal government exploits the nationwide confusion over the CERCLA question presented, heightening the need for review.

The government's own litigation positions in other cases confirm that this confusion should not be permitted to continue. When it tries to impose CERCLA liability on *industry*, the government has taken a broad approach to "operator" liability, arguing that it does not require involvement in waste-disposal activities. But when the government tries to avoid shouldering *its own* fair share of the costs industry will otherwise have to bear, the government advances a much narrower view of CERCLA "operator" liability. This gamesmanship by the government is enabled by the nationwide confusion Petitioners now ask the Court to resolve.

The government has previously claimed, for example, that "[a] person who manages, directs, or conducts operations that . . . *generate* hazardous substances . . . is an operator under CERCLA." U.S. Appellee Br., *Kayser-Roth*, No. 00-2038, 2001 WL 36025287 (1st Cir. Mar. 9, 2001) (emphasis added). The government has likewise argued that pollution-causing activity was sufficient, even absent control of waste disposal: "A person with physical control over the facility who 'actually participate[s]' in *causing the pollution* cannot escape liability as an operator." U.S. Appellees Br., *Nature's Way*, No.

17-60698, 2018 WL 1641061, at *19 (5th Cir. Mar. 23, 2018) (emphasis added). The government prevailed in *Nature's Way* on that basis—even though that position is contrary to the one it asserted in this case below. These are not isolated examples of the United States endorsing a broad view of operator liability. *See* U.S. Br. in Opp., *Atl. Richfield*, Nos. 02-500 & 02-506, 2002 WL 32134324, at *24-25 (U.S. Dec. 2, 2002) (Solicitor General endorsing Eighth Circuit's view and arguing that operator liability "focuses on the question of ownership or operation *of the facility*," not "arranging for the disposal *of the substances*" (emphasis in original)).

By contrast, when the federal government wants to avoid operator liability for itself, it plays up the other side of the nationwide disagreement. In this case, for example, the government argued that basing operator liability on "pollution-producing activities is inconsistent with . . . *Bestfoods*." U.S. Appellant's Opening Br., Doc. 17, 2022 WL 17583425, at *29; *see id.* at 32-33. And in the *PPG* Third Circuit litigation discussed above, the government similarly argued that "operator liability requires control over the waste disposal process." Final U.S. Response Br., *PPG*, No. 19-1165, 2019 WL 3543419, at *18 (3d Cir. Aug. 1, 2019).

The government's heads-I-win-tails-you-lose approach disserves the interests of justice, thwarts the significant purposes of CERCLA, and confirms the need for this Court to establish a single nationwide test.

II. This case is an ideal vehicle to resolve a recurring pure question of law at the heart of an important environmental statute.

In this case alone, potentially hundreds of millions of dollars in liability—not to mention critical policy concerns regarding pollution control and remedy—turn on the question presented. The Court should embrace this opportunity to settle the law nationwide.

A. The question presented is exceptionally important.

CERCLA is a hugely consequential statute that governs decades-long cleanup projects costing hundreds of millions of dollars. The question presented here cuts at the heart of "what is often the crucial question" in CERCLA actions: "Who pays?" *Guam*, 141 S. Ct. at 1611.

That question has widespread significance and high stakes. The stakes in this case are particularly high: As the district court noted, this is "the largest CERCLA case ever" in that it "includes more refineries than any other CERCLA operator-liability case ever." Pet. App. 27a, 30a. But the importance of the question presented stretches far beyond this case. There are thousands of contaminated sites across the country. *See* Justin R. Pidot & Dale Ratliff, *The Common Law of Liable Party CERCLA Claims*, 70 Stan. L. Rev. 191, 203 & n.56 (2018). And at even one of those sites, the scope of operator liability can have the effect of shifting tens of millions of dollars of response costs from one party to another. *See, e.g.*, *PPG*, 957 F.3d at 398 ($367 million spent on remediation); *FMC*, 29 F.3d at 846 (government estimate of "between $26,000,000 and $78,000,000" in potential liability);

Exxon, 108 F. Supp. 3d at 491 ($41 million in remediation for one facility and $30 million for another).

That is a result of the "massive environmental liability" CERCLA can impose. *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 330 (2d Cir. 2000). Some commentators estimate that the average cost to clean up a single contaminated site ranges "between $25 million and $50 million." Michael L. Italiano *et al.*, *Environmental Due Diligence During Mergers and Acquisitions*, 10 Nat. Resources & Env't 17, 17 (1996). The cost to clean up larger sites runs far higher. *See, e.g.*, Press Release, U.S. Dep't of Justice, *W.R. Grace to Pay for Cleanup of Asbestos Contamination in Libby, Montana* (Mar. 11, 2008), https://perma.cc/Q6ZJ-Y644 (chemical supplier to pay $250 million for clean-up costs at a site in Montana); Cindy Skrzycki, *GE Ads Zap the EPA Over PCB Cleanup*, Wash. Post (July 24, 2001), https://perma.cc/23TS-NLW4 (cost to clean up the Hudson River estimated to be $460 million); *see also* Michael Carter, *Successor Liability Under CERCLA: It's Time to Fully Embrace State Law*, 156 U. Pa. L. Rev. 767, 774 (2008) ("the average cost of remedial action" at larger sites is $140 million).

The scope of operator liability is important in such high-stakes CERCLA cases in at least two different respects. First, operator liability is a threshold question affecting who qualifies as a potentially responsible party that will have to cover cleanup costs often running into the hundreds of millions of dollars. "Who bears the burden for hazardous waste cleanup costs is an issue of great consequence." *Centerior Serv. Co. v. ACME Scrap & Iron Metal Corp.*, 153 F.3d 344, 349 n.9 (6th Cir. 1998),

abrogated on other grounds as recognized by ITT Indus., Inc. v. BorgWarner, Inc., 506 F.3d 452, 457-58 (6th Cir. 2007). Second, even when an entity qualifies as a potentially responsible party for a different reason (*e.g.*, being an owner), the allocation of costs between potentially responsible parties can still turn on the extent of their involvement, including whether they also qualified as operators. *See Lockheed*, 35 F. Supp. 3d at 120 n.34, 144.

The scope of operator liability is also critical to ensuring that CERCLA functions as intended outside the courtroom. As this Court recently recognized, "[s]ettlements are the heart of the Superfund statute." *Atl. Richfield*, 140 S. Ct. at 1355. CERCLA contains a detailed section on settlement between a potentially responsible party and the federal government. 42 U.S.C. § 9622. Such settlements benefit the government, the potentially responsible party, and the public by quickly clarifying the parties' respective cleanup responsibilities and facilitating prompt and organized cleanup. The Sixth Circuit's unduly crabbed view of operator liability discourages such settlements by removing key players from the liability (and thus the contribution) equation. *Cf. Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 138 (2d Cir. 2010) ("Congress created the statutory right to contribution in [CERCLA] in part to encourage settlements and further CERCLA's purpose as an impetus to efficient resolution of environmental hazards.").

B. This case is an ideal vehicle.

The government's interlocutory-appeal-certification briefing confirms that this case presents an exceptional vehicle to resolve the question presented. As the government explained, this case presents "a controlling question of law" that "involves construction of a statute (CERCLA's definition of 'operator') and the meaning of binding Supreme Court precedent (*Bestfoods*)." Pet. of U.S. for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) at 3, *In re United States*, No. 22-103 (6th Cir. Feb. 25, 2022). In accepting this interlocutory appeal, the Sixth Circuit even expressly recognized that "the United States 'does not seek to overturn any findings of fact,' and the identified question 'requires the interpretation, and not merely the application, of a legal standard.'" Pet. App. 17a (citation omitted).

The Court should resolve this issue now. Because of the "massive environmental liability" CERCLA cases can entail, *Commander*, 215 F.3d at 330, potentially responsible parties face overwhelming pressure to settle. And CERCLA is designed to "encourage settlements." *Niagara Mohawk Power*, 596 F.3d at 138. Yet those settlements and the dynamics that underly them are necessarily warped when they arise in parts of the country that apply an incorrect view of the law.

The nationwide confusion documented above has persisted for decades—and distorted the apportionment of undoubtedly (in this case alone) hundreds of millions of dollars in liability. This case is the perfect opportunity to clarify the law and ensure that CERCLA cases proceed according to the rules Congress wrote.

III. The Sixth Circuit's decision below is wrong.

The decision below was wrong in refusing to consider control over pollution-producing activities when determining whether an entity may be held liable under CERCLA as a facility's "operator." That refusal conflicts with the statutory text and this Court's precedent, which instructs that a person is an "operator" if he "directs the workings of, manages, or conducts the affairs of a facility." *Bestfoods*, 524 U.S. at 66. So, an entity is a CERCLA facility operator if it "manage[s], direct[s], or conduct[s] operations . . . having to do with the leakage . . . of hazardous waste." *Id.* at 66-67. Moreover, the Sixth Circuit's approach contravenes CERCLA's recognized goals by incentivizing companies to turn a blind eye to pollution.

The Sixth Circuit repeatedly emphasized that whether someone is an "operator" within the meaning of CERCLA depends on whether the entity specifically controlled or directed the disposal of hazardous waste. Pet. App. 9a ("World War II demands did not give [the government] control over waste disposal"); Pet. App. 8a (the government "did not tell [the refineries] how to handle their waste"). But that is not the test this Court set forth in *Bestfoods*. *Bestfoods* instead held that "an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility." 524 U.S. at 66. And in the context of CERCLA, with its focus on environmental contamination, that means "manag[ing], direct[ing], or conduct[ing] operations specifically *related to* pollution" or "*having to do with* the leakage or disposal of hazardous waste." *Id.* at 66-67 (emphases added). Pollution production is plainly "specifically related to pollution." *Id.* at 66.

This is a deliberately broad test that unambiguously requires courts to consider pollution-producing activities as well as waste-disposal activities. Courts have made clear that phrases like "related to" and "having to do with" are necessarily "expansive." *E.g.*, *N.Y. Conf. of Blue Cross Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655-56 (1995) (giving "expansive" reading to "relate to" in context of ERISA); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992) (explaining that "related to" is an expansive phrase); *PPG*, 957 F.3d at 401-02 (reading the phrase "having to do with" in *Bestfoods* "broad[ly]" (citation omitted)). And *Bestfoods* is concerned not just with activities that "hav[e] to do with . . . disposal," strictly speaking, but also activities that "hav[e] to do with leakage." 524 U.S. at 66-67. The Sixth Circuit's decision wrote this "leakage" part of the text out of the statute.

But even on a constrained reading of *Bestfoods*, facility operations that produce hazardous waste are "specifically related to pollution" and "hav[e] to do with" hazardous waste because they are the source of that waste. *Id.* Thus, if the government or any other person manages, directs, or conducts a facility's operations that produce pollution, it necessarily manages, directs, or conducts operations "related to pollution." *Id.* at 66. That is all the more so here where the government actually seized a refinery for half a year—literally nationalizing it. *See* Pet. App. 13a.

Perhaps Congress could have designated operators (and owners) as "responsible parties" only if they specifically directed the disposal of hazardous waste. But that

is not the choice Congress made.[3] Where Congress intended to condition becoming a "responsible party" on direct involvement in the disposal of hazardous waste, it did so explicitly. In addition to operators and owners, CERCLA separately imposes liability on persons who "arranged for disposal or treatment" of hazardous waste. 42 U.S.C. § 9607(a)(3). Under this language, "an entity may qualify as an arranger . . . when it takes intentional steps to dispose of a hazardous substance." *Burlington N.*, 556 U.S. at 611. Operator liability under section 9607(a)(2), in contrast, includes no similar language, and the court of appeals had no license to add it. *See Polselli v. IRS*, 598 U.S. 432, 439 (2023) (explaining that the inclusion of language in one statutory section "strongly suggests that Congress deliberately omitted a similar requirement . . . in the adjacent section").

The Sixth Circuit's decision is inconsistent with CERCLA's statutory scheme in yet another way: it requires courts to ignore pollution generation when determining *who* is liable, but to consider it when *allocating costs* among those deemed responsible parties. Under CERCLA, all potentially responsible parties are jointly and severally liable, but courts still apportion costs through contribution claims on the back end. This means that courts engage in a "two-step process." *Kalamazoo River Study Grp. v. Menasha Corp.*, 228 F.3d 648, 656-

[3] Similarly, the Sixth Circuit's focus on *decisions* about waste disposal contradicts CERCLA's strict liability scheme, *see* 42 U.S.C. § 9607(a)(2), which imposes liability even for unintentional disposal of hazardous substances, *see id.* § 9601(29). CERCLA thus creates broad, strict liability, with or without a waste disposal "decision."

57 (6th Cir. 2000). First, they determine liability, and then second, they determine contribution. *Id.* "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). And when considering an operator's fair share of costs, courts routinely analyze an operator's *pollution-causing* activities, not only an operator's waste-disposal activities. For example, courts routinely apply the "Gore factors," which include "the degree of involvement by the parties in the *generation*, transportation, treatment, storage, or disposal of the hazardous waste." *ASARCO LLC v. Atl. Richfield Co.*, 975 F.3d 859, 870 (9th Cir. 2020) (emphasis added).[4]

It would be "manifestly unjust" to base "allocated share" of costs on activities that do not create "liability" in the first place, as the federal government has previously recognized. *See* U.S. Joint Br. in Opp., *Litgo N.J., Inc. v. Martin*, No. 06-2891, 2010 WL 4786390 (D.N.J. July 19, 2010). Indeed, the federal government has successfully used that argument to avoid liability. *See Litgo N.J., Inc. v. Martin*, No. 06-2891, 2011 WL 65933, at *4 (D.N.J. Jan. 7, 2011), *aff'd sub nom. Litgo N.J. Inc. v. Comm'r N.J. Dep't of Envt'l Prot.*, 725 F.3d 369 (3d Cir.

[4] *Accord In re Hemingway Transp., Inc.*, 993 F.2d 915, 921 n.4 (1st Cir. 1993); *Litgo N.J. Inc. v. Comm'r N.J. Dep't of Envt'l Prot.*, 725 F.3d 369, 387-88 (3d Cir. 2013); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672-73 (5th Cir. 1989); *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 571 (6th Cir. 1991); *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 326 n.4 (7th Cir. 1994); *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 935 (8th Cir. 1995); *United States v. Colo. & E. R.R. Co.*, 50 F.3d 1530, 1536 n.5 (10th Cir. 1995).

2013) ("The Court believes it would be inappropriate to assign the United States Defendants a large portion of costs based on conduct . . . that would not subject them to CERCLA liability.").

Because the decision below is at odds with *Bestfoods* and CERCLA's text, it is unsurprising that it also undermines the incentives Congress chose to create to reduce pollution. CERCLA is supposed to ensure that those in a position to influence pollution at a facility have a strong incentive to minimize and safely deal with any hazardous waste. Any interpretation of CERCLA that would instead incentivize a company to shirk responsibility for dealing with waste that it produces is a strong sign that something has gone awry. As Judge Wilkinson once explained, "[a] CERCLA regime which rewards indifference to environmental hazards and discourages voluntary efforts at waste cleanup cannot be what Congress had in mind." *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 845-46 (4th Cir. 1992); *see also United States v. Township of Brighton*, 153 F.3d 307, 330 (6th Cir. 1998) (Moore, J., concurring) (explaining that that courts "will not allow a previous operator to escape liability where it lacked knowledge of or involvement in the disposal of hazardous substances at its facility at the time of its ownership or operation of the facility").

But that is exactly what the Sixth Circuit's approach does: it incentivizes not close attention but willful blindness. A company hoping to avoid CERCLA liability could simply structure its affairs so that, even though it controls the general production process resulting in hazardous waste, it lacks control over waste disposal in particular. Then, the company could say, as the Sixth Circuit

said of the government here, that it "had little to do with" "waste disposal process[es]." Pet. App. 8a (alteration in original). Put another way, a company could exercise "virtually unlimited control" over a facility without triggering operator liability so long as it "knows well enough to close [its] eyes to the specific details of the company's hazardous waste disposal practices." *TIC*, 68 F.3d at 1089. That strategy may be attractive from a business perspective because the company could retain the traditional benefits of control over the facility without any of the risk. It could, for example, retain the power to decide "what to produce and when to produce it" without subjecting itself to CERCLA liability. Pet. App. 2a. Such a result would be devasting to Congress's goal to ensure environmental remediation by the truly responsible parties.

This Court should not countenance an interpretation of CERCLA that not only contradicts this Court's precedent and the statutory text, but that also would substantially undermine CERCLA's goal of "promot[ing] the 'timely cleanup of hazardous waste sites' and . . . ensur[ing] that the costs of such cleanup efforts [a]re borne by those responsible for the contamination." *Burlington N.*, 556 U.S. at 602 (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2023

APPENDIX

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APPENDIX A — AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED JUNE 29, 2023

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-1789

MRP PROPERTIES COMPANY, LLC; VALERO REFINING COMPANY-OKLAHOMA; PREMCOR REFINING GROUP INC.; ULTRAMAR, INC.; VALERO REFINING COMPANY-TENNESSEE LLC; VALERO REFINING-TEXAS, L.P.,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Michigan at Bay City. No. 1:17-cv-11174—Thomas L. Ludington, District Judge.

June 15, 2023, Argued;
June 29, 2023, Decided;
June 29, 2023, Filed

Before: SUTTON, Chief Judge; BATCHELDER and STRANCH, Circuit Judges.

Appendix A

AMENDED OPINION

SUTTON, Chief Judge. During World War II, the federal government played a significant role in American oil and gasoline production, often telling refineries what to produce and when to produce it. It also rationed crude oil and refining equipment, prioritized certain types of production, and regulated industry wages and prices. All of this affected the operations of American oil companies at the time. But did it make the United States a refinery "operator" under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-75? We hold that it did not and reverse the district court's contrary determination.

I.

The Allies fought the Axis largely with American supplies. American steel built their tanks, ships, and aircraft. American factories assembled them. And American petroleum products, including oil and gasoline, fueled them for war.

Wartime demand led to shortages. Congress responded. It authorized the President to ration essential materials, to set wages and prices, to prioritize production of critical war products, to inspect defense contractors' facilities, and to requisition property for military use. *O'Neal v. United States*, 140 F.2d 908, 910-11 (6th Cir. 1944); 50a U.S.C. §§ 633, 643 (1946) (expired); An Act to Authorize the President of the United States to Requisition Property Required for the Defense of the United States, Pub. L. No. 77-274, 55 Stat. 742 (1941).

The President applied these powers with care, at least to America's oilmen. He did not nationalize their industry or confiscate their equipment. But he did impose wage and price controls and inspect refinery facilities, including for "[c]ontrol of dust, fumes [and] vapors." R.77-47 at 8. And he did regulate the quantities and grades of crude oil each refinery could process, ration capital goods such as steel piping, and seize several refineries temporarily after labor disputes threatened production. Perhaps most importantly, he told refiners what to make and for whom to make it, demanding tractor fuel for farmers one week and aviation gasoline for the Air Force the next.

Refining oil creates sludge, slop, and other waste products. Wartime refineries burned this waste, buried it, impounded it in landfills, or kept it in vats. Leaks and spills, often managed by the refineries "by visual inspection," also released waste into the environment. R.74-32 at 56. These practices preceded the war, and the war did not end them. But to produce what the government requested using the crude oil it allotted, refineries sometimes changed their manufacturing techniques. These changes led to more waste production and corroded refinery equipment, increasing leakage and spillage. Compounding this last problem, government rationing of steel and other construction materials delayed repairs meant to address corrosion and prevent "unintended leaks, spills, and breaks." *Id.* at 50.

This case involves twelve refinery sites, all owned today by the Valero Energy Corporation or its affiliates. Each refinery operated during the war, faced wartime

regulations, and managed wartime waste. After the war, inspections revealed environmental contamination at each site.

Valero started cleaning up the sites. It then sought contribution from the United States, arguing that the government "operated" each site during World War II. It did not contend that government personnel regularly disposed of waste at any of the sites or handled specific equipment there. Nor did it allege that the United States designed any of the refineries or made engineering decisions on their behalf. Valero instead claimed that the government's production directives, rationing schemes, and wartime inspections made the United States an operator of each facility.

After discovery, the district court granted partial summary judgment to Valero. It held that any reasonable juror would find that the United States operated each site during the war, emphasizing that it controlled what and how much the refineries would produce during wartime. With the permission of the district court and our permission, the United States took an interlocutory appeal. *See* 28 U.S.C. § 1292(b).

II.

As its name conveys, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, CERCLA for short, creates a national program for remediating pollution and sharing the clean-up costs among responsible parties. 42 U.S.C. §§ 9601-75. One of its

key provisions makes "operator[s]" of a "facility" liable for cleaning up hazardous waste found on facility premises, sometimes long after the discharges and other pollution occurred. *Id.* § 9607(a)(1)-(2). A facility's current operators may seek contribution to pay for the remediation of the property from their predecessors. *Id.* § 9613(f)(1).

The two key terms are facility and operator. Facility includes "any building, structure, installation, equipment, pipe[,] or pipeline," along with "any site or area where a hazardous substance has . . . come to be located." *Id.* § 9601(9).

Operator means a "person . . . operating . . . [a] facility." *Id.* § 9601(20)(A)(ii). More helpfully, "an operator . . . directs the workings of, manages, or conducts" a facility's "affairs." *United States v. Bestfoods*, 524 U.S. 51, 66, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998) (citing dictionaries). Honing the definition further, "an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id.* at 66-67.

Who or what counts as "conduct[ing]" or "manag[ing]" "operations . . . specifically related to pollution" and concerning the leakage or disposal of hazardous waste? One category that suffices covers those who perform day-to-day work with hazardous waste. *Id.* at 66 & n.12. Another category covers those who make strategic decisions about waste management, say by choosing to

store waste onsite rather than offsite or by adopting processes that lead to leakage or spillage. *See GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433, 449 (6th Cir. 2004); *Am. Premier Underwriters, Inc. v. Gen. Elec. Co.*, 14 F.4th 560, 580-81 (6th Cir. 2021) (citing cases); *see also* 42 U.S.C. §§ 9601(29), 6903(3) ("disposal" includes "leaking" and "spilling" along with intentional removal or storage). By contrast, run-of-the-mill regulators, lenders, and suppliers do not amount to "operators." *United States v. Township of Brighton*, 153 F.3d 307, 315 (6th Cir. 1998) (opinion of Boggs, J.) (regulators); *id.* at 324-25 (Moore, J., concurring in the judgment) (agreeing); *see* 42 U.S.C. § 9601(20)(F) (lenders); *Am. Premier Underwriters*, 14 F.4th at 580 (suppliers). All in all, "a person . . . 'manages' activities 'specifically related to pollution,'" and thus qualifies as an operator, where she "exercises control over the waste disposal process." *GenCorp*, 390 F.3d at 449.

Some cases illustrate the two sides of the operator line. On the one side, consider *GenCorp*. GenCorp, Inc. and the Olin Corporation built a manufacturing plant together. GenCorp helped pay for construction, its employees worked side-by-side with Olin's, and its senior management decided how the plant would dispose of toxic waste. *Id.* at 438-40. We described GenCorp as an "operator" of the plant, emphasizing "GenCorp's control over the hazardous waste" and its disposal. *Id.* at 449. Or consider *Nu-West Mining Inc. v. United States*. 768 F. Supp. 2d 1082, 1091 (D. Idaho 2011); *see Am. Premier Underwriters*, 14 F.4th at 576 (relying on *Nu-West*). The Forest Service told a mine how to design its waste dumps and where to put them. 768 F. Supp. 2d at 1089-90. That

meant the United States "operated" the dumps, for it "actively manag[ed] the disposal of hazardous waste" there. *Id.* at 1091; *accord Am. Premier Underwriters*, 14 F.4th at 576.

On the other side of the line, consider *American Premier Underwriters*. General Electric designed railroad equipment to vent toxic chemicals when hot, then sold the equipment to a railroad. 14 F.4th at 565-66. That made General Electric a "service provider" but not an operator, as General Electric did not "t[ell]" the railroad "what to do" about the venting or "play [a] substantial role[] in the day-to-day operation of" the equipment. *Id.* at 580-81. Or consider *United States v. Vertac Chemical Corp.*, a case whose facts rhyme with today's. 46 F.3d 803 (8th Cir. 1995). A factory manufactured Agent Orange pursuant to official government directives and in accordance with government specifications; that said, the government did not design the factory, supply it with equipment, or "address the manner in which [it] was to handle waste[]." *Id.* at 807. The Eighth Circuit held that the United States had not "operated" the factory. *Id.* at 809.

The parties share some initial common ground in applying these principles and definitions. They agree that Valero's refinery sites count as "facilities" and that they contain hazardous waste. And they agree that a high-volume purchaser is not for that reason alone an operator. They part ways over whether the United States, a high-volume purchaser and regulator, "operated" these facilities during World War II. It did not, for several reasons.

During the war, the refineries, not the government, made the key management decisions related to waste and implemented those decisions. Individual refineries, not the government, worked "day-to-day" with petroleum's hazardous byproducts. *Am. Premier Underwriters*, 14 F.4th at 581. Employees of the refinery, not the government, burned and buried toxic waste. Employees of the refinery, not the government, manned refinery control rooms. And employees of the refinery, not the government, maintained the refineries and monitored them for leaks or spills. Far from "exercis[ing] control" over routine "waste disposal process[es]," government officials had little to do with them. *GenCorp*, 390 F.3d at 449.

So too, individual refineries, not the government, made broader, strategic decisions about waste disposal. The government did not design Valero's refineries or tell them how to process petroleum. *Cf. Am. Premier Underwriters*, 14 F.4th at 575-81 (citing cases). It did not tell them how to handle their waste, say by treating rather than burning it, or tell them how to supervise maintenance or refining activities. *See id.* And it did not instruct them about where they should locate waste disposal sites. *Id.* at 576. Rather, as Valero's expert admits, "[w]aste disposal was an afterthought in [the United States'] wartime control of the petroleum industry." R.74-32 at 53. To be sure, the government influenced refineries' business decisions during the war. But that influence did not extend to refinery facilities' waste-related features—to how refinery "building[s], structure[s], installation[s], [and] equipment" handled or mishandled waste. 42 U.S.C. § 9601(9) (defining "facility"); *see id.* § 9601(20)(A)(ii).

Decisions from other circuits confirm this conclusion. Case after case holds that the government's World War II demands did not give it control over waste disposal and did not make it an "operator" of American mining or manufacturing facilities. *See, e.g., PPG Indus. Inc. v. United States*, 957 F.3d 395, 403 (3d Cir. 2020) (chromite ore processing); *United States v. Sterling Centrecorp Inc.*, 977 F.3d 750, 758-59 (9th Cir. 2020) (gold mining); *Exxon Mobil Corp. v. United States*, 108 F. Supp. 3d 486, 521 (S.D. Tex. 2015) (oil refining). One of these cases, like today's, considered "the government's pervasive wartime regulation of the petroleum industry." *Exxon*, 108 F. Supp. 3d at 521. The court's bottom line in that case mirrors ours. "Although the government had regulatory authority over the [petroleum] industry," it did not thereby "'manage, direct, or conduct . . . operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.'" *Id.* (quoting *Bestfoods*, 524 U.S. at 61).

A dose of common sense runs in the same direction. Emergency rationing is a paradigmatic regulatory tool. *See, e.g.*, 15 U.S.C. § 753(a) (1976) (expired) (petroleum rationing during 1973 oil shock). So are orders directing manufacturers to prioritize production of key products. 50 U.S.C. § 4511. So are mandatory inspection regimes. *Donovan v. Dewey*, 452 U.S. 594, 600-02, 101 S. Ct. 2534, 69 L. Ed. 2d 262 (1981); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 73-76, 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970) (listing examples). By wielding these powers, regulators do not "operate" the industries they regulate any more than "'extensive regulation' of a private

company" makes the regulated party a state actor. *Ciraci v. J.M. Smucker Co.*, 62 F.4th 278, 284 (6th Cir. 2023) (quoting *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928, 1932, 204 L. Ed. 2d 405 (2019)).

All told, the government did not "operate" Valero's refineries during the war.

Valero attacks this conclusion along several fronts. It says that the government told refineries what to produce and that, to produce those items, refineries altered their operations in ways that increased waste production. But manufacturers often reorganize production in order to meet their end-users' needs. That reality does not turn end-users into "operators." *PPG*, 957 F.3d at 405 (holding that "a [g]overment directive to increase output during a time of war" did not make the government an operator, even when manufacturer responded by altering production processes).

Valero adds that the government managed facility inputs as well as outputs, restricting "the supply of crude oil . . . to" each refinery. R.74-18 at 48. That does not improve things either; controlling a facility's supply of inputs does not make the supplier an "operator." *See, e.g., PPG*, 957 F.3d at 403 (controlling supply of chromite ore to processing plant did not make government an "operator"); *cf. Am. Premier Underwriters*, 14 F.4th at 581 (supplier of railcar components that emitted toxic substances did not "operate" railcars or components); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 157-58 (7th Cir. 1988) (entity supplying toxic substance to factory, which

it had also designed, did not "operate" factory when toxic substance leaked into groundwater). CERCLA regulates "the waste *disposal* process," not the supply of products leading to the production and disposal of waste. *GenCorp*, 390 F.3d at 449 (emphasis added).

In a similar vein, Valero observes that the wartime government rationed steel and other necessary capital goods, leading to deferred maintenance and increases in leakage. Still, again, controlling the supply of goods or services available for market does not make the controller an "operator." The government limits the domestic supply of raisins, *Horne v. Dep't of Agric.*, 576 U.S. 351, 355, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015), but that does not make the United States an "operator" of raisin distributors or of the grocery store's raisin aisle. Many wartime industries relied on steel and thus were affected by such rationing. Were Valero correct, that would make the government, implausibly, an operator of each of those facilities. *See also Exxon Mobil*, 108 F. Supp. 3d at 526-28.

Trying to show that this was not an ordinary supplier-customer relationship, Valero emphasizes the nature of the government's wartime regulations, which left refineries with little choice about usage and production decisions. But many regulatory regimes create such pressures without making regulators "operators." Utility regulators, for instance, tell electrical utilities whom they must serve (typically everyone within their service area), what they must provide (electricity of a certain voltage, frequency, and degree of reliability) and often how they must provide it (by purchasing power from certain generators or kinds

of generators). *See generally Jackson v. Metro. Edison Co.*, 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974); *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 136 S. Ct. 760, 193 L. Ed. 2d 661 (2016); Regulatory Assistance Project, *Electricity Regulation in the US: A Guide* (2011). These mandates do not transform utility regulators into "operators" of the facilities they regulate. *Cf. Jackson*, 419 U.S. at 351.

Switching gears, Valero says that the government "required . . . [r]efineries to convert their operations" to make the government's new products. Appellees' Br. 9. But the government did not second-guess refineries' engineering decisions about how to rejigger their plants. It told the refineries to produce new products, then allowed them to create or modify the necessary production facilities. Having left the production decisions to the refineries, the government did not become their "operator." *See PPG*, 957 F.3d at 405 (finding that government did not operate chromium manufacturing facility when it directed increased output but did not choose production methods).

FMC Corp. v. U.S. Department of Commerce does not help Valero either. 29 F.3d 833 (3d Cir. 1994) (en banc). A synthetic rubber plant leased government-owned machinery, which a third party installed at the government's behest. *Id.* at 837. "[W]astes were generated and disposed of by the government-owned equipment," and a government representative monitored the facility employees who handled waste disposal. *Id.* at 837-39. The Third Circuit found that the United States operated the facility. But here, unlike in *FMC*, the government did not

own the waste-producing equipment or supervise the waste-disposing employees.

FMC, it is true, describes control over "what product [a] facility would produce, the level of production, the price of the product, and to whom the product would be sold" as "leading indicia" of operator status, a framing that favors Valero. *Id.* at 843. But the Third Circuit decided *FMC* before the Supreme Court decided *Bestfoods*, and *Bestfoods* clarified that CERCLA requires control over activities "specifically related to pollution" rather than control over general pricing and product-related decisions. 524 U.S. at 66-67; *see also PPG*, 957 F.3d at 405-06 (retreating, in a subsequent Third Circuit decision, from *FMC*'s "leading indicia" language in a similar way).

Valero's remaining arguments meet a similar end. It observes that the United States capped some refinery employees' wages, but it never explains why those controls amounted to operation rather than regulation. It emphasizes that government employees inspected refineries for leaks and spills, but it does not show that those inspections made the government an operator of Valero's refineries, perhaps unsurprising because the United States sometimes faced "considerable difficulty convincing . . . management" to carry out its post-inspection recommendations. R.94-20 at 2. And it says that the government seized one plant for six months, after the war ended, to deal with labor unrest. But it does not spell out why that seizure made the United States an "operator" of *all* of its plants, or even of the plant the government seized, during the wartime period at issue in

this appeal—the position the district court took and that Valero has sought to defend.

We reverse.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED SEPTEMBER 8, 2022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-0103

IN RE: UNITED STATES OF AMERICA,

Petitioner.

September 8, 2022, Filed

Before: McKEAGUE, STRANCH, and DONALD, Circuit Judges.

ORDER

Plaintiffs, six wholly owned subsidiaries or affiliates of Valero Energy Corporation (collectively "the Valero Companies"), filed this cost recovery action against the United States under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "the Act"), 42 U.S.C. § 9601 *et seq.* The district court entered a partial summary judgment order holding the United States liable for response costs at twelve Valero refineries, determining in part that the federal government's control of the domestic petroleum industry during World War II rendered the United States liable as a former operator of these facilities under the Act. *See MRP Props. Co., LLC v. United States*, No. 1:17-CV-11174,

583 F. Supp. 3d 981, 2021 U.S. Dist. LEXIS 236477, 2021 WL 5834305 (E.D. Mich. Dec. 9, 2021), *cert. to appeal granted*, 2022 U.S. Dist. LEXIS 28502, 2022 WL 476071 (E.D. Mich. Feb. 16, 2022). The United States petitions this court for leave to appeal the district court's interlocutory order under 28 U.S.C. § 1292(b). The Valero Companies do not oppose the petition.

Section 1292(b) allows a district court to certify an otherwise non-appealable interlocutory order for immediate review if the district court is "of the opinion that [1] such order involves a controlling question of law [2] as to which there is substantial ground for difference of opinion and that [3] an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see In re Trump*, 874 F.3d 948, 951 (6th Cir. 2017) (order). If a district court certifies an order under § 1292(b), the court of appeals "may . . . in its discretion, permit an appeal to be taken." 28 U.S.C. § 1292(b). In deciding whether to permit an appeal, we treat the § 1292(b) factors "as *guiding criteria* rather than *jurisdictional requisites*," *In re Trump*, 874 F.3d at 951 (quoting 16 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3930 (3d ed. 2002) (emphasis in original)). We may also look to "other prudential factors." *Id.*

The parties agree that the district court's order involves a controlling question of law as to the governing legal standard for operator liability under CERCLA. A party's operator status is a mixed question of law and fact, and may be a fact-intensive one at that. *See Am.*

Premier Underwriters, Inc. v. GE, 14 F.4th 560, 569 (6th Cir. 2021); *United States v. Twp. of Brighton*, 153 F.3d 307, 315 n.9 (6th Cir. 1998) ("*Brighton I*"). But the United States "does not seek to overturn any findings of fact," and the identified question "requires the interpretation, and not merely the application, of a legal standard." *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 625 (7th Cir. 2010). Because different interpretations of the standard could impact the United States' liability, the first § 1292(b) factor is satisfied. *See In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002).

The parties also agree that there are different plausible interpretations of the governing standard. The Supreme Court defined the term "operator" in *United States v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998), a case involving a CERCLA claim against a parent corporation. The Court concluded:

> [A]n operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

Id. at 66367.

After *Bestfoods* was decided, we applied its "actual control" standard in *Brighton I*, a case involving a CERCLA claim against a government entity. *See Brighton I*, 153 F.3d 307. The precedential value of *Brighton I* is limited, however, because the case "produced three separate opinions but no majority opinion." *United States v. Twp. of Brighton*, 282 F.3d 915, 917 (6th Cir. 2002) (per curiam). Given the limited precedential value of *Brighton I* and countervailing authority from other circuits, the second § 1292(b) factor is also satisfied. *See, e.g., PPG Indus. Inc. v. United States*, 957 F.3d 395, 403 (holding that, although "the Government was involved in various aspects of production at NPRC's plant during WWII, ... PPG [] presented no evidence that the Government specifically controlled operations related to pollution"); *see also, e.g., Exxon Mobil Corp. v. United States*, 108 F. Supp. 3d 486, 522 (S.D. Tex. 2015) (concluding that *Brighton I* conflicts with the standard set forth in *Bestfoods*).

Finally, "Congress intended that section 1292(b) should be sparingly applied." *Kraus v. Board of County Comm'rs*, 364 F.2d 919, 922 (6th Cir. 1966) (citation omitted). Certification should be granted "only in exceptional cases where an intermediate appeal may avoid protracted and expensive litigation and is not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation." *Id.* (citation omitted); *see also In re Somberg*, 31 F.4th 1006, 1008 (6th Cir. 2022) (order) ("Appeals fulfilling that criterion typically are those where, absent review, potentially unnecessary 'protracted and expensive litigation' will ensue." (citation omitted)). This case falls within that

narrow category. As the district court explained, "[o]nly liability has been determined thus far. What remains, then, is the discovery-intensive damages phase"—and "this trial could take months." *MRP Props. Co.*, 2022 U.S. Dist. LEXIS 28502, 2022 WL 476071, at *3. "Allowing the parties to proceed to discovery while their efforts could later become moot or irrelevant risks wasting judicial resources and litigation expenses—especially considering that this case includes more refineries than any other CERCLA operator-liability case ever." *Id.*

Accordingly, the petition for permission to appeal is **GRANTED**.

ENTERED BY ORDER OF
THE COURT

/s/_____
Deborah S. Hunt, Clerk

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION, FILED FEBRUARY 16, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Case No. 1:17-cv-11174

Honorable Thomas L. Ludington
United States District Judge

MRP PROPERTIES CO., LLC, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

OPINION AND ORDER GRANTING THE GOVERNMENT'S MOTION FOR CERTIFICATE OF APPEALABILITY AND TO STAY PROCEEDINGS

This matter is before this Court upon the Government's Motion for a Certificate of Appealability and to Stay Proceedings. ECF No. 104. As explained hereafter, the Government's Motion will be granted.

Appendix C

I.

Plaintiffs are six wholly owned subsidiaries or affiliates of the Valero Energy Corporation.[1] In April 2017, Plaintiffs filed a complaint against the Government under section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), seeking response costs arising from the investigation and cleanup of pollution created by processing petroleum. ECF No. 43. To that end, Plaintiffs seek declaratory relief under section 113(g)(2) of CERCLA regarding the Government's liability.[2] *Id.* at PageID.777-78. Plaintiffs contend that the Government "operated" 12 of their refineries before and during WWII and also "owned" one of them. This case is divided into two phases: liability and damages. ECF Nos. 47; 48; 49. Factual discovery closed in August 2019. ECF No. 52. Discovery for the liability phase ended on May 4, 2020. *Id.*

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1. For a self-reported history of the Valero Corporation, see Valero Energy Corp., *Our History*, Valero (2021), https://www.valero.com/about/our-history [https://perma.cc/2ZVD-7ESE].

2. Although Plaintiffs have not yet proven recovery costs, they need not do so when seeking declaratory relief under § 113(g)(2). *Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 844 (6th Cir. 1994); *see also* Rachael A. Doyle, Comment, *Obtaining A Declaratory Judgment Under CERCLA: Should the Past Control the Future*?, 46 Wake Forest L. Rev. 359, 368, 381 (2011) (stating that mandatory declaratory relief under CERCLA "allows for expedited responses and settlement, and encourages private parties to clean up according to the NCP after the defendant is declared liable, thereby serving CERCLA's broader purposes" and "allowing the PRP to plan ahead").

Appendix C

In September 2020, Plaintiffs filed a motion for summary judgment. ECF No. 68. In October 2020, the Government filed a combined cross-motion for summary judgment and response to Plaintiffs' Motion. ECF Nos. 81; 86. On November 9, 2020, Plaintiffs filed a combined reply and response to Defendant's Motion. ECF No. 91. On November 23, 2020, Defendant filed a combined sur-reply to Plaintiff's Motion and reply to Plaintiff's Response to its Motion. ECF No. 96. On December 7, 2020, Plaintiffs filed a sur-reply to Defendant's Motion. ECF No. 99.

On December 9, 2021, this Court granted in part and denied in part both parties' motions for summary judgment. *See generally MRP Props. v. United States*, No. 1:17-CV-11174, 2021 U.S. Dist. LEXIS 236477, 2021 WL 5834305 (E.D. Mich. Dec. 9, 2021). Specifically, Plaintiffs' motion was granted as to the request for a declaration that the Government is liable as an operator of all 12 facilities and denied as to the request for a declaration that the Government was an owner of the Plancor 1534 Facilities or the entire Eastern facility. *Id.* 2021 U.S. Dist. LEXIS 236477, [WL] at *26. Conversely, the Government's motion was granted as to the request for a declaration that the Government was not an owner of the Plancor 1534 Facilities or the entire Eastern facility and denied in all other respects. *Id.*

On February 7, 2022, the Government filed a motion for a certificate of appealability and to stay the proceedings pending appeal. ECF No. 104. The certificate of appealability will be granted in Part II, *infra*, and the case will be stayed in Part III, *infra*.

Appendix C

II.

In limited circumstances, a district judge may certify for appeal a nonfinal order in a civil case. Indeed, 28 U.S.C. § 1292(b) provides that:

> When a district judge . . . shall be of the opinion that [an order not subject to interlocutory review] involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b).

In other words, this Court may certify the order for interlocutory appeal if it is "of the opinion" that "[1] the order involves a **controlling question of law** to which there is [2] **substantial ground for difference of opinion** and . . . [3] **an immediate appeal may materially advance the termination of the litigation**." *In re Trump*, 874 F.3d 948, 951 (6th Cir. 2017) (quoting 28 U.S.C. § 1292(b)) (emphases in original) (internal quotations omitted).

These findings, "along with other prudential factors," guide the Sixth Circuit's discretion to permit an appeal of this Court's order. *Id.*

Appendix C

A.

This Court's Order involves a "question of law" that is "controlling." 28 U.S.C. § 1292(b).

The "question of law" is whether this Court should have applied the Sixth Circuit's "actual control" standard of operator liability—set forth by Chief Judge Boggs's interpretation of *United States v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998)—from *United States v. Township of Brighton*, 153 F.3d 307 (6th Cir. 1998). This Court's order holding that no reasonable juror could find that the Government was not an operator of all 12 facilities to some extent under CERCLA seemingly falls within the category of an "order [that] involves . . . a question of law," even if mixed with questions of fact. *See* 28 U.S.C. § 1292(b); *see, e.g., Nw. Ohio Adm'rs, Inc. v. Walcher & Fox, Inc.*, 270 F.3d 1018, 1025 (6th Cir. 2001) (granting petition to hear interlocutory appeal after certification and affirming denial of motion to dismiss and partial motion for summary judgment). Further, the application and import of *United States v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998) are also questions of law. *See In re Trump*, 874 F.3d at 951. Indeed, by interpreting *Bestfoods*, this Court held as a matter of law that the Government is a former operator of each of the 12 refineries in question. *MRP Props.*, 2021 U.S. Dist. LEXIS 236477, 2021 WL 5834305, at *18, 21, 23.

Second, a legal issue is controlling if it could materially affect the outcome of the case. *In re City of Memphis*, 293 F.3d 345, 351 (6th Cir. 2002). These questions of law

are undoubtedly "controlling" because their resolution "could materially affect the outcome of the case." *Cf. In re Trump*, 874 F.3d at 951 (finding the same at the motion-to-dismiss stage).

B.

This Court's order gives rise to a "substantial ground for difference of opinion." 28 U.S.C. § 1292(b).

"A substantial ground for difference of opinion exists whe[n] reasonable jurists might disagree on an issue's resolution, not merely whe[n] they have already disagreed." *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). Further, as this Court has explained, substantial ground for a difference of opinion on the issues raised by an interlocutory order exists when: "(1) the question is difficult, novel and either a question on which there is little precedent or one whose correct resolution is not substantially guided by previous decisions . . . or (4) the circuits are split on the question." *Newsome v. Young Supply Co.*, 873 F. Supp. 2d 872, 876 (E.D. Mich. 2012).

There is only one case in the Sixth Circuit that directly addresses the issue that was before this Court when it issued the December 9, 2021 order: *Brighton*, 153 F.3d 307. The Government contends that *Brighton* directly conflicts with the Third Circuit's "macro-management" standard for operator liability set forth in *PPG Industries v. United States*, 957 F.3d 395 (3d Cir. 2020). ECF No. 104-1 at PageID.11623. Further, as the Government correctly notes, *Bestfoods* did not elaborate on the meaning of

"operations specifically related to pollution" and there is no controlling Sixth Circuit precedent on this question. *Id.* at PageID.11623-24. Moreover, the Government adds, reasonable jurists might disagree on the proper interpretation of *Bestfoods*. *Id.* at PageID.11627.

In essence, then, the Government argues that the Sixth Circuit might walk back the standards that this Court applied from Chief Judge Boggs's plurality opinion and Judge Moore's concurring opinion in *Brighton*, and instead adopt Judge Dowd's dissent from *Brighton*, the Third Circuit's standard from *PPG*, or that of some "other courts outside of the Sixth Circuit." *See id.* at PageID.11622-31.

It is entirely possible that the Sixth Circuit would overturn *Brighton* to adopt or create a new standard of operator liability under CERCLA, so there is "substantial ground for a difference of opinion." *In re Trump*, 874 F.3d at 951.

C.

The petition "*may* materially advance the termination of the litigation." *In re Trump*, 874 F.3d at 952 (quoting 28 U.S.C. § 1292(b)).

An interlocutory appeal materially advances the litigation when it "save[s] judicial resources and litigant expense." *West Tenn.*, 138 F.Supp.2d at 1026. "The requirement that an appeal may materially advance the ultimate termination of the litigation is closely tied to the

requirement that the order involve a controlling question of law." *City of Dearborn*, 2008 U.S. Dist. LEXIS 107527 at *7, 2008 WL 5084203 at *3 (quoting *Philip Morris Inc. v. Harshbarger*, 957 F. Supp. 327, 330 (D. Mass. 1997)).

Only liability has been determined thus far. What remains, then, is the discovery-intensive damages phase. An order from the Sixth Circuit requiring this Court to apply a new standard for operator liability would rewind this case to the summary-judgment stage. Allowing the parties to proceed to discovery while their efforts could later become moot or irrelevant risks wasting judicial resources and litigation expenses—especially considering that this case includes more refineries than any other CERCLA operator-liability case ever. Indeed, as the Government notes, this trial could take months. ECF No. 104-1 at PageID.11632.

For these reasons, this Court will issue a certificate of appealability.

III.

The certification of an order for interlocutory review does not automatically stay district court proceedings. *See* 28 U.S.C. § 1292(b). However, this Court has the inherent authority to stay proceedings pending resolution of the certified issues on appeal. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S. Ct. 163, 81 L. Ed. 153 (1936).

No scheduling order has been issued for Phase Two. And no Phase Two discovery has commenced.

Procedurally, therefore, this case is at a natural breaking point for appellate resolution of the Government's liability over the 12 refineries.

To decide whether to stay proceedings during the pendency of an appeal, courts "consider the same four factors that are traditionally considered in evaluating the granting of a preliminary injunction":

> (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991) ("These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together."). The Government has not addressed any of the four factors.

A.

The first factor in considering whether to grant a stay is the appellant's likelihood of success on the merits. *Id.* at 153.

The Government does not have a high likelihood of success on the merits of its claim. According to the Sixth Circuit, "[c]ustom and tradition in the various circuits of

the United States Court of Appeals dictate that one panel of a circuit court will not overrule the decision of another panel; only the court sitting *en banc* may overrule a prior decision of a panel." *United States v. Smith*, 73 F.3d 1414, 1418 (6th Cir. 1996) (citing *Shattuck v. Hoegl*, 523 F.2d 509 (2d Cir. 1975)). Moreover, "[t]he Sixth Circuit has long adhered to this venerable principle." *Id.*

Although the Sixth Circuit might take up the question *en banc* to reverse *Brighton*, it is unlikely. However, as discussed later, Defendants would suffer irreparable injury absent a stay. *See* discussion *supra* Section II.C; *infra* Section III.B. Therefore, because the "[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury," Defendants need only show the presence of "serious questions going to the merits." *Griepentrog*, 945 F.2d at 154.

The issue of the proper standard to apply when resolving operator liability under CERCLA is a serious question. At issue in each case is whether the CERCLA Superfund or private parties must foot the bill for environmental cleanup. That could cost upwards of $50 million, and the cleanup could last for decades.

In this way, this factor weighs in favor of a stay.

B.

The second factor is the irreparability of the harm that would be suffered absent a stay.

As discussed earlier, absent a stay, all the parties would be irreparably harmed if they had to assess damages in the largest CERCLA case ever then later to be required to reassess those damages due to the Sixth Circuit creating or adopting a new CERCLA operator-liability standard. *See* discussion *supra* Section II.C. An additional spill-over effect would be the lag created in this Court if it must address the damages phase twice.

Therefore, this factor weighs in favor of a stay.

C.

The last two factors are whether a stay would harm anyone and the public interest in a stay.

No foreseeable parties will be harmed if this Court grants a stay. Moreover, the public interest in granting the stay is large because tax dollars compose the Superfund, which pays out if the Government is found liable under CERCLA. Indeed, a new CERCLA operator-liability standard, as the Government notes, "could result in the dismissal of up to five of the six Plaintiffs." ECF No. 104-1 at PageID.11613, 11620, 11622. Moreover, both factors are bolstered by the expense likely to follow a rewind of the discovery phase if the Sixth Circuit creates a new CERCLA operator-liability standard.

Therefore, the last two factors weigh in favor of a stay.

Because all four factors weigh in favor, the case will be stayed pending denial or resolution of the Government's appeal.

Appendix C

IV.

Accordingly, it is **ORDERED** that the Government's Motion for a Certificate of Appealability and to Stay Proceedings, ECF No. 104, is **GRANTED**.

Further it is **ORDERED** that the Government is **ISSUED** a certificate of appealability for *MRP Properties Co., LLC v. United States*, No. 1:17-CV-11174, 2021 U.S. Dist. LEXIS 236477, 2021 WL 5834305 (E.D. Mich. Dec. 9, 2021).

Further, it is **ORDERED** that this case is **STAYED** until the Sixth Circuit resolves the Government's appeal.

Dated: February 16, 2022

/s/ Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION, FILED DECEMBER 9, 2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Case No. 1:17-cv-11174

Honorable Thomas L. Ludington
United States District Judge

MRP PROPERTIES CO., LLC, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND OVERRULING DEFENDANT'S OBJECTION AS MOOT

This matter is before this Court upon cross-motions for summary judgment from Plaintiffs MRP Properties, *et al.*, ECF No. 68, and the United States ("the Government"), ECF No. 81, as well as the Government's

objection to two of Plaintiffs' expert reports, ECF No. 80. Plaintiffs claim they "have incurred and will continue to incur response costs consistent with the National Contingency Plan ('NCP')" related to "wartime contamination." ECF No. 43 at PageID.709. After failed negotiations with the Government, Plaintiffs brought this action seeking "payment of the Government's fair share." *Id.* at PageID.699, 778-79. For the reasons stated hereafter, Plaintiffs' Motion will be granted in part and denied in part, the Government's Motion will be granted in part and denied in part, and the Government's objection will be overruled as moot.

I.

This case is rooted in the complex history of the United States's efforts to coordinate the domestic processing of petroleum oil to win World War II (WWII).

A.

In December 1941, Congress declared war on Japan and Germany following the Imperial Japanese Navy's attack on Pearl Harbor. *Compania Maritima v. United States*, 145 F. Supp. 935, 937, 136 Ct. Cl. 697 (Ct. Cl. 1956); *id.* at 944 (Littleton & Madden, JJ., dissenting). Later that month, Congress enacted the First War Powers Act, empowering President Roosevelt to puppeteer executive agencies for the war effort. *See generally Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 67 S. Ct. 1129, 91 L. Ed. 1375 (1947). In March 1942, Congress enacted the Second War Powers Act, granting

the President license to jigger the war economy, which included the production of petroleum. *Louisville Flying Serv. v. United States*, 64 F. Supp. 938, 941 (W.D. Ky. 1945).

Petroleum was critical to the United States during WWII, yielding everything from tires to bombs to heat for hospitals and kitchens. ECF No. 74-1 at PageID.4487.[1] Indeed, the armed services regularly used over 500 different petroleum products, without which "the warrior could neither fight nor live." ECF No. 68-2 at PageID.1115 (quoting J. A. Krug, Harold L. Ickes & Ralph K. Davis, U.S. Petrol. Admin. for War, A History of the Petroleum Administration for War, 1941-1945, at 1 (John W. Frey & H. Chandler Ide eds., 1946)). But "business as usual would not work," as crude was in short supply nationwide, and the Allies [2] required nearly seven billion barrels of petroleum—six billion of which came from the United States alone. ECF Nos. 74-1 at PageID.4477; 74-2 at PageID.4499; 81-2 at PageID.7793.

To ensure victory, the United States created an oil agency called the Petroleum Administration for War

1. All citations to the record containing a "subnumber" (e.g., ECF No. 74-1; 77-47; 81-2) are citations to exhibits attached to the parties' briefs.

2. The Allies, which later formed the United Nations, were an international military coalition formed during WWII to defeat the Axis powers. Although eventually including over 25 countries, during WWII the Allies principally consisted of the "four Powers": the United Kingdom, the United States, the Soviet Union, and China. *See* Richard W. Van Alstyne, *The United States and Russia in World War II: Part I*, 19 Current Hist. 257, 260 (1950).

("PAW").[3] ECF No. 81-2 at PageID.7789. PAW "exercised significant control over," among other things, the prices, profits, and allocation of petroleum products and the raw materials needed to create them. *See United States v. Shell Oil Co.*, 294 F.3d 1045, 1049-50 (9th Cir. 2002). But overseeing the nation's petroleum refineries proved daunting.

To alleviate congestion at its centralized office in Washington, D.C., PAW divided the United States into five Districts[4]: District I (East Coast), District II (Midwest), District III (Gulf Coast), District IV (Rocky Mountain), and District V (West Coast). ECF No. 74-1 at PageID.4479. The five Districts were more "familiar with local situations" and "provided necessary supervision over" the petroleum refineries. *Id.* Each District's director "had over-all responsibility for activities in the district." *Id.* Each District entailed "successive delegations of authority" to administer PAW's orders and directives to petroleum refineries. *Id.* And each District included subdivisions that supervised, among other things, the production, refining, supply, transportation, distribution, and marketing of petroleum products. *Id.*

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3. At its inception on May 28, 1941, PAW was called "The Office of Petroleum Coordinator for National Defense." ECF No. 74-1 at PageID.4477. After WWII began, it was called the "Office of Petroleum Coordinator for War." *Id.* On December 2, 1942, "its authority was strengthened" as the "Petroleum Administration for War." *Id.*

4. Although officially called Petroleum Administration for Defense Districts (PADDs), the parties and sources refer to the PADDs as "Districts."

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In December 1942, President Roosevelt issued Executive Order 9276, providing PAW with practically unfettered control over the petroleum industry. *See MRP Props., LLC v. United States*, 308 F. Supp. 3d 916, 920 (E.D. Mich. 2018). Thus empowered, PAW went to great lengths to plan the allocation of crude oil to petroleum refineries for up to a year in advance. ECF No. 74-1 at PageID.4479. There was no room for "failure in meeting the war requirements for oil," so PAW issued directives as necessary to acquire the "materials that it needed to fulfill the petroleum industry's responsibility." *Id.*; ECF No. 43 at PageID.705. But "there was never a time when crude supply was not a problem somewhere in the country." ECF No. 74-1 at PageID.4482.

To mitigate the effects of the crude-oil shortage, PAW tracked each refinery's "crude stocks, runs, yields, and other pertinent information." *Id.* at PageID.4483. Armed with that data, PAW diverted supplies to "refineries that were in the greatest need" from those "in [a] relatively comfortable position." *Id.* To ensure maximum output of wartime products and to "keep *all* refineries operating," PAW allocated "*specific* volumes of crude to *specific* refiners" every month and then divided all remaining crude equitably. *Id.* The refiners did "the greatest share of the work," but PAW was *always* responsible for final approval. *Id.*

Among the most intrusive conditions of PAW's supervision over petroleum refineries was its frequent directives for them to change yields. *Id.* at PageID.4487. For example, PAW would telegram refineries to increase

gasoline yields and decrease fuel-oil yields but then telegram the opposite soon after—often requiring refineries to change operations and equipment "virtually overnight." *Id.* Unfortunately, as PAW's Assistant Director of Refining put it, cleaning hazardous waste was a "necessary" part of the refineries' operations. *See* ECF No. 78-28.

To the extent PAW supervised refineries' operations, it "told the refiners what to make, how much of it to make, and what quality" to make it. ECF No. 74-1 at PageID.4483. According to another high-ranking PAW official, the petroleum industry had "no choice." ECF No. 74-30 at PageID.5274. The refineries "either produced the . . . products in accordance with the instructions and directives of PAW . . . . or they wouldn't have any business to operate." *Id.* Although "nobody wanted it to be that way," it was "the only way to do it in wartime." ECF No. 74-1 at PageID.4487.

B.

Plaintiffs are six wholly owned subsidiaries or affiliates of the Valero Energy Corporation.[5] In April 2017, Plaintiffs filed a complaint against the Government under § 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), seeking response costs arising from the investigation and cleanup of pollution created by processing petroleum.

5. For a self-reported history of the Valero Corporation, see Valero Energy Corp., *Our History*, VALERO (2021), https://www.valero.com/about/our-history [https://perma.cc/2ZVD-7ESE].

ECF No. 43. To that end, Plaintiffs seek declaratory relief under § 113(g)(2) of CERCLA regarding the government's liability.[6] *Id.* at PageID.777-78. Plaintiffs contend that the Government "operated" 12 of their refineries before and during WWII and also "owned" one of them. This case is divided into two phases: liability and damages. ECF Nos. 47; 48; 49. Factual discovery closed in August 2019. ECF No. 52. Discovery for the liability phase ended on May 4, 2020. *Id.*

In September 2020, Plaintiffs filed a motion for summary judgment. ECF No. 68. In October 2020, the Government filed a combined cross-motion for summary judgment and response to Plaintiffs' Motion. ECF Nos. 81; 86. On November 9, 2020, Plaintiffs filed a combined reply and response to Defendant's Motion. ECF No. 91. On November 23, 2020, Defendant filed a combined sur-reply to Plaintiff's Motion and reply to Plaintiff's Response to its Motion. ECF No. 96. On December 7, 2020, Plaintiffs filed a sur-reply to Defendant's Motion. ECF No. 99.

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6. Although Plaintiffs have not yet proven recovery costs, they need not do so when seeking declaratory relief under § 113(g)(2). *Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 844 (6th Cir. 1994); *see also* Rachael A. Doyle, Comment, *Obtaining A Declaratory Judgment Under CERCLA: Should the Past Control the Future?*, 46 Wake Forest L. Rev. 359, 368, 381 (2011) (stating that mandatory declaratory relief under CERCLA "allows for expedited responses and settlement, and encourages private parties to clean up according to the NCP after the defendant is declared liable, thereby serving CERCLA's broader purposes" and "allowing the PRP to plan ahead").

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C.

A motion for summary judgment should be granted if the movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The movant has the initial burden of "identifying those portions of [the record that], which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The court must view the evidence and draw all reasonable inferences in favor of the nonmovant and determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *see Lossia v. Flagstar Bancorp, Inc.*, 895 F.3d 423, 428 (6th Cir. 2018).

The burden then shifts to the nonmovant, who must set out specific facts showing "a genuine issue for trial." *Anderson*, 477 U.S. at 250 (citation omitted). The nonmovant must show more than "some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Indeed, the "mere existence of a scintilla of evidence" in support of the nonmovant does not establish a genuine issue of material fact. *Anderson*, 477 U.S. at 252.

Summary judgment will be granted if the nonmovant "fails to make a showing sufficient to establish the

existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. But summary judgment will be denied "[i]f there are . . . 'genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.'" *Hancock v. Dodson*, 958 F.2d 1367, 1374 (6th Cir.1992) (citation omitted). The standard is the same when "the parties present cross-motions." *Taft Broad. Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991).

D.

Congress enacted CERCLA in 1980 to mitigate "the serious environmental and health risks posed by industrial pollution." *Burlington N. & Santa Fe Ry. v. United States*, 556 U.S. 599, 602, 129 S. Ct. 1870, 173 L. Ed. 2d 812 (2009); *see also CTS Corp. v. Waldburger*, 573 U.S. 1, 4, 134 S. Ct. 2175, 189 L. Ed. 2d 62 (2014); *United States v. Bestfoods*, 524 U.S. 51, 55, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998). As amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613, CERCLA provides several causes of action. At the heart of this case is § 107(a).

Section 107(a) identifies four categories of potentially responsible parties (PRP)[7] who may be liable for the costs of cleaning hazardous waste. *See* 42 U.S.C. § 9607(a)(1)–(4).

7. CERCLA defines a "potentially responsible party or PRP" as "any person who may be liable pursuant to section 107(a) of CERCLA, 42 U.S.C. 9607(a), for response costs incurred and to be incurred by the United States not inconsistent with NCP." 40 C.F.R. § 304.12.

As relevant, PRPs include "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." *Id.* § 9607(a)(2). Such "owners" and "operators" are liable for not only "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan," but also "any other necessary costs of response incurred by any other person consistent with the national contingency plan." *Id.* § 9607(a)(4). CERCLA also provides a narrow set of defenses to § 107(a), none of which the parties have raised yet. *See, e.g., id.* §§ 9607(b), (e).

If the Government is a PRP, it is "jointly and severally liable for any hazardous material that is found, whatever its source, unless [it] can show divisibility." *United States v. Twp. of Brighton (Brighton I)*, 153 F.3d 307, 317 (6th Cir. 1998) (citing 42 U.S.C. § 9607(a)(2)). Lower courts must follow the Restatement (Second) of Torts § 433A to determine whether harm is divisible in any specific case, which occurs when "there is a reasonable basis for determining the contribution of each cause to a single harm." *Burlington*, 556 U.S. at 614. The burden of proof is on defendants to establish that such a reasonable basis exists. *See* RESTATEMENT (SECOND) OF TORTS § 433B(2) (Am. L. Inst. 1965); *Burlington*, 556 U.S. at 617 (there must be "facts contained in the record reasonably support[ing] the apportionment of liability"). In this way, "responsible parties rarely escape joint and several liability," and a single PRP may be held responsible for the entire cost of a cleanup even though many contributed the waste. *O'Neil v. Picillo*, 883 F.2d 176, 178-79 (1st Cir. 1989).

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To mitigate frequently harsh results of making one or a few PRPs foot the bill for many, Congress authorizes PRPs to bring contribution actions under § 113, which provides:

> Any person may seek contribution from any other person who is liable or potentially liable under [§ 107(a)], during or following any civil action under [§ 106 or 107(a)]. . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§ 106 or 107].

42 U.S.C. § 9613(f)(1). Section 113(f) enables a party liable for response costs to seek contribution from any other party liable or potentially liable under § 107(a). Under § 113, a PRP that "has resolved its liability to the United States or a State in an administrative or judicially approved settlement" is immune from contribution claims made by other PRPs "regarding matters addressed in the settlement." *Id.* § 9613(f)(2). But a settling PRP may seek contribution under § 113(f)(3) from PRPs who have not settled. *Id.* § 9613(f)(3)(B). And § 107(a) allows a plaintiff to recover 100% of its response costs from all liable parties, including those who have settled their CERCLA liability with the Government. *Id.* §§ 9613(g)(2), 9607(a).

Section 113's right to contribution is narrower than § 107's. Section 107 has a six-year statute of limitations;

§ 113 has a three-year statute of limitations in certain scenarios. Under § 107, plaintiffs may recover only costs beyond their equitable share and may not recover from parties who have settled. *Id.* § 9613(f)(1), (f)(2), (g)(3). Federal and state governments may sue PRPs for response costs and may also be liable as PRPs for response costs others incur. *See id.* § 9607(a)(4)(A) and (B).

"To establish a prima facie case for cost recovery under § 107(a), a plaintiff must prove four elements: (1) the site is a 'facility'; (2) a release or threatened release of hazardous substance has occurred; (3) the release has caused the plaintiff to incur 'necessary costs of response' consistent with the NCP; and (4) the defendant falls within one of the four categories of potentially responsible parties." *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 541 (6th Cir. 2001).

The Environmental Protection Agency (EPA) administers CERCLA. 42 U.S.C. §§ 9604, 9606. But states, tribes, and citizens may also enforce CERCLA. States may file a citizen suit against a federal agency to enforce interagency agreements (IAG) under § 310. *Id.* § 9659. Section 126 requires the EPA to afford Indian tribes substantially the same treatment as a State with respect to certain CERCLA provisions. *Id.* § 9626. With some exceptions, § 310(a) allows citizens to file a civil action against any person or entity that is alleged to be in violation of any CERCLA standard, regulation, condition, requirement, order, or IAG. *Id.* § 9659(a)(1). In addition, § 310(a) allows citizens to file a civil action against the president or any other officer of the United States

(including the EPA Administrator and the Administrator of the Agency for Toxic Substances and Disease Registry) for alleged failure to perform any nondiscretionary act or duty. *Id.* § 9659(a)(2).

This Court will next address Plaintiffs' operator-liability claims, *infra* Parts III, IV, V; Plaintiffs' owner-liability claim, *infra* Part VI; and the Government's objection, *infra* Part VII.

II.

Although CERCLA "speak[s] for the trees," it defines potentially liable parties "only by tautology." *United States v. Bestfoods*, 524 U.S. 51, 56, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998); *see* 42 U.S.C. § 9601(20)(A)(ii) (defining "owner or operator" as "any person owning or operating such a facility"); Dr. Seuss, The Lorax 22 (1971). Consequently, courts have not uniformly interpreted "operator."

A.

In *FMC Corp. v. United States Department of Commerce*, the owner of a former rayon-textile facility brought an action under CERCLA to recover clean-up costs from the Government based on its role in operating the facility during World War II. 29 F.3d 833, 843 (3d Cir. 1994) (en banc). The *FMC* court noted that "the Government can be liable when it engages in regulatory activities extensive enough to make it an operator of a facility." *Id.* at 840. In determining whether the Government was an operator, the *FMC* court considered whether the Government exercised

"*actual and substantial control* over the corporation's day-to-day operations and its policy making decisions." *Id.* (emphasis added). The *FMC* court concluded that the Government exercised "substantial control" because it controlled the "product the facility would produce, the level of production, the price of the product, and to whom the product would be sold." *Id.*

In *United States v. Bestfoods*, the Government brought an action to recover the clean-up costs of a chemical plant's waste. 524 U.S. 51, 55, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998). The issue before the *Bestfoods* Court was whether a parent corporation can "operate" a polluting facility that its subsidiary owns. The district court reasoned that:

> "[A] parent corporation is *directly liable* under section 107(a)(2) as an operator only when it has exerted power or influence *over its subsidiary* by actively participating in and exercising control *over the subsidiary's business* during a period of disposal of hazardous waste. A parent's actual participation in and control over a subsidiary's functions and decision-making creates 'operator' liability under CERCLA; a parent's mere oversight of a subsidiary's business in a manner appropriate and consistent with the investment relationship between a parent and its wholly owned subsidiary does not."

Id. at 59 (emphases added) (quoting *CPC Int'l, Inc. v. Aerojet-Gen. Corp.*, 777 F. Supp. 549, 572 (W.D. Mich. 1991)).

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The district court applied the "participation and control" test and determined that the parent entity was liable as an operator, because it exercised control over the subsidiary's business by selecting its board of directors, populating its ranks with officials, and playing a significant role in shaping its environmental policy. *Id.* In addition to direct liability, it observed that the parent entity may also be subject to indirect or vicarious liability for the subsidiary's actions if the corporate veil was pierced under state law. *Id.*

The Sixth Circuit Court of Appeals reversed the district court in part, rejecting the direct-liability analysis (largely without explanation) and finding that piercing the corporate veil does not establish indirect liability. *Id.* at 59-60 (citing *United States v. Cordova Chem. Co. of Mich.*, 59 F.3d 584 (6th Cir. 1995)).

The Supreme Court reversed the Sixth Circuit, finding that "the Court of Appeals correctly rejected the District Court's analysis of direct liability" but "erred in limiting direct liability under the statute to a parent's sole or joint venture operation." *Id.* In this way, the *Bestfoods* Court rejected the "participation-and-control test" for determining direct liability as an operator under CERCLA. *Id.* at 68.

That is, the *Bestfoods* Court found that the proper focus of direct operator liability is control over the polluting facilities' operations. *Id.* at 67-68. The *Bestfoods* Court elaborated on the activities that might lead to operator liability:

> "[A]ctivities that involve the facility but which are consistent with the parent's investor status, such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability." *The critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility.*

Id. at 72 (emphasis added) (internal citation omitted). To elaborate, the *Bestfoods* Court clarified the definition of "operator":

> So, under CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, *operations having to do with the leakage or disposal of hazardous waste*, or decisions about compliance with environmental regulations.

Id. at 66-67 (emphasis added). Indeed, the Court underscored that "Congress intended the verb "'to operate' . . . to contemplate 'operation' as including the *exercise of direction over the facility's activities*." *Id.* at 71. (emphasis added).

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In *United States v. Township of Brighton (Brighton I)*, the Government brought an action against a township and property owner to recover response costs incurred from cleaning a dumpsite. 153 F.3d 307, 314 (6th Cir. 1998) (Boggs, C.J.). Brighton Township had contracted with the property owner to use his land as a dumpsite for township residents. *Id.* at 310. The district court found that both the property owner and township were liable as operators. *Id.* The Sixth Circuit vacated and remanded to the district court.

Chief Judge Boggs noted that mere "authority to control" does not give rise to operator liability; instead, "actual control" is required. *Id.* at 313. Chief Judge Boggs elaborated that the plain meaning of the word "operator," as set forth by the *Bestfoods* Court, applies regardless of whether the case involves a corporation or governmental entity. *Id.* at 313. Even though *FMC* predates *Bestfoods*, Chief Judge Boggs found *FMC* instructive in determining that "mere regulation does not render the Government liable, but actual operation (or 'macromanagement') does." *Id.* at 316. Under that standard, Chief Judge Boggs concluded that it could not determine the township's operator liability because:

> [T]he agreement with Collett specified that the dump "meet the specifications of and be under the supervision of the Board of Appeals." The township was not operating at arm's length with a contractor. Rather, it made repeated and substantial ad hoc appropriations, and it made arrangements (including with the local

> Junior Fire Department) for bulldozing and other maintenance when Collett himself proved unequal to the task. It also took responsibility for ameliorating the unacceptable condition of the dump, before and after scrutiny from the state government, at least as early as 1965.

Id. at 315 (footnote omitted).

Judge Moore concurred that the "actual control" standard applied but noted that Chief Judge Boggs "fail[ed] to define this standard clearly so as to provide the lower courts with direct guidance as to when a governmental entity engages in regulatory activities extensive enough to make it an operator of the facility in question." *Id.* at 325 (Moore, J., concurring in the result). By contrast, Judge Moore defined governmental "actual control" as "involvement [that] extends beyond 'mere regulation' and amounts to 'substantial control,' or 'active involvement in the activities' at the facility." *Id.* at 325.

Judge Dowd dissented, disagreeing with the idea "that a governmental entity should be held to a lower threshold level of control which would give rise to liability."[8] *Id.* at 332 (Dowd, J., dissenting in part and concurring in part). Judge Dowd would have instead applied *Bestfoods*'s operator-liability standard "to both corporate form and the governmental entity situations." *Id.* Notably, like

8. Chief Judge Boggs explicitly stated that his "opinion should not be read to suggest, as Judge Dowd characterizes it, that a Governmental entity should be held to a lower threshold level of control." *Id.* at 334 n.7 (Boggs, C.J.).

Chief Judge Boggs, Judge Dowd found *FMC* instructive but determined that a governmental entity is liable as an operator only when it manages "the day-to-day activities of a facility." *Id.* Under her standard, Judge Dowd would have found that the township was not an operator. *Id.*

On remand, the district court again found that the township was an operator. On appeal, the same panel of the Sixth Circuit reversed the district court, again, because it did not apply any of *Brighton I*'s three standards. *United States v. Twp. of Brighton (Brighton II)*, 282 F.3d 915, 917 (6th Cir. 2002). Explaining *Brighton I*'s precedential value, the *Brighton II* court stated:

> *Brighton I* produced three separate opinions but no majority opinion; despite the fragmented nature of the panel, however, *Brighton I* provided the district court with standards for defining "operator" liability under CERCLA and for determining whether the recovery costs incurred by the Government were divisible. Specifically, Judges Boggs and Moore agreed that [*Bestfoods*] provided the appropriate standard for determining whether Brighton Township was liable as an "operator" of the facility in question . . . .

Id. at 918 (footnote omitted). Thus, *Brighton II* understands *Brighton I* to say that when determining the operator liability of either a governmental entity or a corporation, the court should apply *Bestfoods*'s "actual control" standard.

Thirteen years later, Exxon Mobile brought an action against the Government to recover response costs incurred in connection with the operation of oil refineries during World War II. *Exxon Mobil Corp. v. United States*, 108 F. Supp. 3d 486 (S.D. Tex. 2015). On cross-motions for summary judgment, the *Exxon* court held, in relevant part, that the Government did not "operate" Exxon Mobil's oil refineries under CERCLA. *Id.* at 521. To that end, the *Exxon* court interpreted *Brighton I* as inconsistent with *Bestfoods*. *Id.* at 522 ("The distinction that [*Brighton I*] drew between the government-entity and private-entity cases, applying the 'regulation' versus 'macromanagement' test only when a government entity is involved is not consistent with *Bestfoods*.").

The *Exxon* court also found that *Bestfoods* rejected *FMC*'s "actual control" test as overbroad. *See id.* at 527-27. In reaching that conclusion, the *Exxon* court surveyed three decisions from other circuits that "recognized that *FMC*'s test is unhelpful after *Bestfoods*." *See id.* at 521 (citing *Lockheed Martin Corp. v. United States*, 35 F. Supp. 3d 92, 149 (D.D.C. 2014) (finding that the Government was not an operator of rocket-motor production facilities; observing that "*FMC*'s 'substantial control' test is in tension with *Bestfoods*'s focus on a party's particularized control over hazardous waste disposal processes"; and declining to opine as to whether *FMC* remains good law), *aff'd*, 833 F.3d 225, 425 U.S. App. D.C. 257 (D.C. Cir. 2016)); *Id.* (citing *Miami-Dade Cnty. v. United States*, 345 F. Supp. 2d 1319, 1342 (S.D. Fla. 2004) (finding that the Government was not an operator of an airport and that "*FMC* is inconsistent with *Bestfoods*")); *Id.* (citing

Steadfast Ins. v. United States, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *8 (C.D. Cal. Nov. 10, 2009) (mentioning *FMC*'s standard yet ultimately basing its holding on *Bestfoods*'s requirement that an operator "manage, direct, or conduct, operations specifically related to pollution" and concluding that the Government was not an operator of former explosive-material manufacturing sites)).

Applying *Bestfoods*, the *Exxon* court found that the Government engaged in "procurement activities" but did not "manage, direct, or conduct . . . operations having to do with leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id.* at 523. In this way, the *Exxon* court narrowed *Bestfoods* to require a "direct nexus between the Government's activities and the decisions in the refineries' waste leakage, disposal, or environmental compliance," and it found that no such nexus was present. *Id.* at 524.

B.

Bestfoods did not elaborate on the meaning of operations "specifically related to pollution" or operations "having to do with leakage or disposal of hazardous waste." *See generally United States v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998). But *Brighton I* provided some guidance. *See Brighton II*, 282 F.3d 915, 918 (6th Cir. 2002) ("*Brighton I* produced three separate opinions but no majority opinion."). Chief Judge Boggs found *FMC*'s "actual control test" instructive and determined that a governmental entity can be liable as an operator through

"actual operation" or "macromanagement." *Brighton I*, 153 F.3d at 316 (Boggs, C.J.). By contrast, Judge Moore defined "actual control" as "involvement [that] extends beyond 'mere regulation' and amounts to 'substantial control,' or 'active involvement in the activities' at the facility." *Id.* at 325 (Moore, J., concurring in the result). And Judge Dowd restricted "actual control" to when an entity manages "the day-to-day activities of a facility." *Id.* at 332-35 (Dowd, J., dissenting in part and concurring in part). In this way, all three judges found *FMC* to be consistent with *Bestfoods*.

This Court previously found that *FMC* is "quite factually analogous" to this case. *MRP Props.*, 308 F. Supp. 3d at 929-30. The *FMC* court considered whether the Government exercised "actual and substantial control over the corporation's day-to-day operations and its policy making decisions." *FMC Corp.*, 29 F.3d at 843. In finding the Government liable, the *FMC* court principally relied on four "leading indicia of control": the Government's control over the "product the facility would produce, the level of production, the price of the product, and to whom the product would be sold." *Id.* Similarly, Plaintiffs have principally relied on *FMC* 's four "leading indicia of control" but have also invoked a litany of other factors courts have considered. Incidentally, this Court finds Judge Boggs's reliance on *FMC* to be consistent with *Bestfoods*, as it is most consistent with CERCLA's broad remedial purpose. Consequently, *Exxon*, upon which the Government principally relies, is not instructive. *See MRP Props.*, 308 F. Supp. 3d at 930-34.

Indeed, *Bestfoods* did not explicitly disturb *FMC*'s holding. Rather, *Bestfoods* "sharpen[ed]" the definition of an "operator" for CERLCA purposes by broadening the "actual control" inquiry to include control over "operations *having to do with* leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Bestfoods*, 524 U.S. 51 at 61 (emphasis added). *Bestfoods* did not redefine "operator" to render operator liability indistinguishable from arranger liability[9] and, therefore, inconsistent with CERCLA's text and remedial purpose. *Contra Exxon Mobil*, 108 F. Supp. 3d at 521.

Contrary to the *Exxon* court's reading, *Bestfoods*'s definition of "operator" must not be read in a vacuum. *Id.* at 520 ("A court must decide whether a contractor is an operator after considering the totality of the circumstances concerning its involvement at the site."); *accord United States v. Sterling Centrecorp Inc.*, 977 F.3d 750, 757 (9th Cir. 2020) (holding that operator liability "may be inferred from the totality of the circumstances"); *Brighton I*, 153

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9. Arranger liability is the third type of liability available under § 107(a)(3) and attaches to:

> [A]ny person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.

42 U.S.C. § 9607(a)(3) (2018).

F.3d at 326 (Moore, J., concurring in the result) (stating that operator liability "requires a fact-intensive inquiry and consideration of the totality of circumstances"). Instead, *Bestfoods*'s definition of "operator" should be read in the context of its considerations regarding operator liability:

> The question is not whether the parent operates the subsidiary, but rather whether it operates the facility, and that operation is evidenced by participation in the activities of the facility, not the subsidiary.
>
> . . . .
>
> . . . The critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility.

Bestfoods, 524 U.S. at 68-72 (cleaned up). In other words, the operator-liability standard is broader than the *Exxon* court construed it.

CERCLA's text supports that conclusion. First, CERCLA operator liability applies to "any person." 42 U.S.C. § 9607(a)(2). Congress has defined "person" to connote more than human beings and include governmental entities. *See Dictionary Act*, 1 U.S.C. § 1 (defining "person" to include inanimate entities). Further, all CERCLA's textual references to contractual

relationships are expansive. *See* 42 U.S.C. § 9607(a)(3) (applying arranger liability to those who arranged for waste disposal "by contract, agreement, or otherwise"); *id.* § 9607(b)(3) (excluding from CERCLA's third-party defense those "whose act or omission occurs in connection with a contractual relationship, existing *directly or indirectly*, with the defendant" (emphasis added)); *id.* § 9607(n)(8)(B) (expressly allowing claims against an "independent contractor retained by a fiduciary" despite the statute's fiduciary damage cap); *id.* § 9607(q)(1)(A)(ii)(I) (creating strict liability for owners of property that others' property polluted if they were in a contractual relationship that was not only for goods or services).

Construing CERCLA liability broadly makes sense because the more PRPs, the more likely they will clean the site, which cosigns CERCLA's priority of cleanliness over godliness. *See United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 136, 127 S. Ct. 2331, 168 L. Ed. 2d 28 (2007) ("Moreover, [CERCLA] defines PRPs so broadly as to sweep in virtually all persons likely to incur cleanup costs."); Jacob Podell, Note, *Resolving "Resolved": Covenants Not to Sue and the Availability of CERCLA Contribution Actions*, 119 Mich. L. Rev. 205, 207 (2020) ("CERCLA created a complicated structure designed to effect two goals: (1) make sure hazardous-waste sites are cleaned up in a timely manner and (2) make those who caused the contamination pay for the cleanup."); *see also Brighton I*, 153 F.3d at 315 n.10 (noting "the passive and expansive language of" 42 U.S.C. § 9607(a)(2)).

Unfortunately, CERLCA's "legislative history is, at

best, messy." Podell, *supra*, at 207; *see Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 885 (9th Cir. 2001) (en banc) ("Any inquiry into CERCLA's legislative history is somewhat of a snark hunt."). *See generally* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENV'T L. 1 (1982) (discussing comprehensively CERCLA's legislative history). But even a cursory review demonstrates Congress was predominantly concerned with "the long-term dangers inherent in the manufacture and use of hazardous and toxic substances." *E.g.*, 125 CONG. REC. S15,003 (daily ed. Nov. 29, 1980) (statement of Sen. Patrick Leahy); *see also* H.R. REP. NO. 96-1016, pt. 1, at 22 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6125 ("It is the intent of the Committee in [CERCLA] to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites.").

Broad applicability seems even more persuasive considering, among other things,[10] the bifurcated nature of CERCLA proceedings: phase one merely determines whether a party is liable to *any* extent; phase two determines the extent of any liability—much like the damages scheme for comparative negligence. Therefore, after this Order (phase one), the parties' respective degrees of culpability will still have to be determined

10. *See* Jacob Podell, Note, *Resolving "Resolved": Covenants Not to Sue and the Availability of CERCLA Contribution Actions*, 119 MICH. L. REV. 205, 210-11 (2020) (outlining CERCLA's five sweeping mechanisms to ensure polluted sites are cleaned).

(phase two).

The Government relies on two CERCLA cases that have emerged since the last Order in this case. First, the Government relies on *PPG Industries, Inc. v. United States*, in which the owner of a chromite-ore processing plant sued the Government under CERCLA to recover response costs. 957 F.3d 395 (3d Cir. 2020). The *PPG* court held that *FMC* was consistent with *Bestfoods. Id.* at 402 ("In sum, consistent with *FMC*, the *Bestfoods* standard (1) focuses on the relationship between the purported operator and the facility at issue; and (2) further focuses on 'operations specifically related to pollution.'" (quoting *Bestfoods*, 524 U.S. at 66)). The *PPG* court elaborated that:

> *Bestfoods* did not address when the government can be held liable as an operator, [but] this distinction is irrelevant. At no point, regardless of how the test was formulated, has any court said that the test for determining operator liability should be different depending on whether the potentially responsible party is the government, a parent or subsidiary, or some other type of corporation. Thus, the *Bestfoods* operator definition is not limited to the parent-subsidiary context and applies when the question is whether the government can be held liable as an operator.

Id. (internal citations and footnote omitted). Thus, under *PPG* the Government is as subject to CERCLA as private companies.

Second, the Government relies on *United States v. Sterling Centrecorp Inc.*, in which a corporation filed a CERCLA contribution suit against the Government for its role in operating a mine during World War II. 977 F.3d 750 (9th Cir. Oct. 5, 2020). The *Sterling* court reiterated that "an operator's relationship to the facility at issue must, at least in part, focus on 'operations specifically related to pollution.'" *Id.* at 758 (quoting *Bestfoods*, 524 U.S. at 66). The *Sterling* court concluded that "operator liability requires . . . . some level of direction, management, or control over the facility's *polluting activities*." *Id.* at 758 (emphasis added). Thus, under *Sterling*, the Government's must have managed, directed, controlled, or conducted some activity that contributed to the facility's pollution.

Therefore, the Government will be liable as an "operator" if, to any extent, it managed, directed, controlled, or conducted any of the facility's activities that produced "pollution."

C.

At issue here is whether PAW exercised sufficient control over 12 petroleum refineries. All 12 refineries responded to the Government's directives in different ways. But one thing was clear: if they defied the Government's directives, they faced dire repercussions. Indeed, the record contains no evidence of a refinery opposing a governmental directive without facing repercussion or receiving an exception. Therefore, it would not be reasonable to infer that the Government did not have enough management, direction, or control over the

refineries' pollution-producing operations to be considered an "operator." Yet before delving into that discussion, two points deserve elaboration.

i.

First, some courts seemingly absolve the Government from CERCLA recovery costs owing to a voluntary contractual relationship. *See, e.g., Exxon*, 108 F. Supp. 3d at 523 ("The government 'played the role of a very interested consumer' in its wartime contracts with suppliers, including Exxon's predecessors. But the contracts gave [them] bargaining power." (citing *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1277, 1284 n.14 (E.D. Cal. 1997)); *Rospatch Jessco Corp. v. Chrysler Corp.*, 962 F. Supp. 998, 1005 (W.D. Mich. 1995), *as amended* (Aug. 11, 1995) (finding that the Government did not get involved in the contractor's "management of its operations" or "management decisions" and that the contractor was not forced into doing the work but rather had "sought out such work").

But in the context of the defense market, that deference misapplies the "actual control" standard. Although it might not render the Government an "operator" of the other party's polluting activities, the mere existence of a contractual relationship does not absolve the Government of operator liability. *See, e.g., Lockheed*, 35 F. Supp. 3d at 132 (finding it "impossible" to allocate the parties' respective operator liability without considering "the extent of the government's involvement," because the contamination stemmed from "government

contracts"); *Brighton I*, 153 F.3d at 315 ("The township was not operating at arm's length with a contractor."); *FMC*, 29 F.3d at 837 ("Under its contract with Rust, the government had substantial control over and participation in the work related to the DPC equipment."); *see also Bestfoods*, 524 U.S. at 57 n.5 (affirming Michigan Court of Appeals's determination that CERCLA liability may be precluded by a contract's indemnification provision). As indicated, even with a voluntary contractual relationship, the Government could be an operator.

CERCLA's operator-liability inquiry is straightforward: Based on the totality of the circumstances, did the Government—to any extent—manage, direct, control, or conduct any of the facility's activities that produced pollution? The WWII defense industry, then, is a relevant consideration among the totality of the circumstances.

A "monopsony" is a market situation in which there is only "*one buyer*." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) (emphasis added). And "[t]here is only one military customer that matters, the government, and thus the defense market has the characteristics of a monopsony." Loren Thompson, *Five Factors That Should Drive the FTC's Assessment of a Lockheed-Aerojet Merger*, FORBES (Sept. 7, 2021, 9:41 AM), https://www.forbes.com/sites/lorenthompson/2021/09/07/five-factors-that-should-drive-the-ftcs-assessment-of-a-lockheed-aerojet-merger/?sh=5527e8d7c0b8 [https://perma.cc/HK3H-ADYL]. Therefore, when it comes to wartime products, the Government innately has "the power to

set wages below competitive levels" and the "power to exact an unequal distribution of the relationship-specific surplus." *See* Hiba Hafiz, *Structural Labor Rights*, 119 MICH. L. REV. 651, 653 (2021). So, defense contracts are products of the Government's monopsony power over the wartime market.

Because of its immense defense-market power, voluntary contracts cannot weigh against the Government's operator liability. Indeed, a private actor's voluntary contractual relationship with the Government does not immunize the Government from operator liability. *See* 42 U.S.C. § 9607(q)(1)(A)(ii)(I) (creating strict liability for owners of contiguous property that others' property polluted if they were in a contractual relationship not solely for goods or services); *cf. United States v. Souza*, 223 F.3d 1197 (10th Cir. 2000) (considering a private party that the Government encouraged and assisted to be an agent of the Government); *United States v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981) (applying Fourth Amendment to private citizens who voluntarily assist the Government). In other words, a contract giving the Government discretion to operate a facility does not mean the Government did not "operate" the facility.

In this way, a defense-market contract not within CERCLA's defenses, if anything, is weightless. But in light of the command to draw all reasonable inferences in favor of the nonmovant, this Court assumes that the voluntary relationship between the parties weighs against CERCLA liability.

ii.

Second, some courts have granted the Government a higher degree of discretion owing to wartime conditions. Donald M. Carley, Note, *Environmental Law—The Federal Government Must Share in the Pain of CERCLA Cleanup Costs*—FMC Corp. v. United States Department of Commerce, *29 F.3d 833 (3d Cir. 1994).*, 14 TEMP. ENV'T L. & TECH. J. 93, 113 (1995) (noting "some may argue that the government . . . was simply attempting to mobilize the United State[s's] war machine"); *see, e.g., Exxon*, 108 F. Supp. 3d at 523 ("The federal government's wartime influence over these refineries stemmed from its voluntary contractual relationships with Exxon's predecessors."); *Rospatch*, 962 F. Supp. at 1005-06 (holding the government was not an operator when it did not "twist [the] arm" of contractor to produce wartime materials); *cf.* Tricia R. Russo, FMC Corp. v. United States Department of Commerce*: An Overexpansion of "Operator" Liability Under CERCLA*, 7 VILL. ENV'T L.J. 157, 179 (1996) (arguing "the costs of cleanup should be internalized through the [private] company" to preserve sovereign immunity).

But that conclusion misunderstands the goings-on of war. *See* Christopher J. Plaisted, Note, *Environmental Law—Too Much of a Good Thing: When Government Involvement in Waste Disposal Crosses the Line Between Regulating and "Operating" Under CERCLA*, 22 W. NEW ENG. L. REV. 221, 261 (2000) ("[I]t is common for government involvement in the waste disposal process to be predicated upon the responsibilities the government

actor bears as the sovereign."). The United States Government does not pass the "actual control" test by exercising more control than it otherwise would have without war. *See FMC*, 29 F.3d at 840. Indeed, the United States has been "at war" for about 230 years of its 245-year existence.[11]

Granted, during war the Government and all those who assist it are literally up in arms, conducting 24-hour operations with the haste of Hermes. But after the dust settles, the Government, like those who assisted it, must collect its dead and, similarly, share in the costs to clean up the messes that it managed, directed, controlled, or conducted. *See Bestfoods*, 524 U.S. at 66; *Brighton I*, 153 F.3d at 314; *MRP Props.*, 308 F. Supp. 3d at 922. That is CERCLA's mandate. And nothing in its text says otherwise.

Recall that Congress intended CERCLA to apply broadly. *See United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 136, 127 S. Ct. 2331, 168 L. Ed. 2d 28 (2007). The more potentially liable parties, the more likely the disposal site would be cleaned. *See* discussion *supra* Section II.B (discussing CERLCA's priority of "cleanliness over

11. Martin Kelly, *American Involvement in Wars from Colonial Times to the Present: Wars from 1675 to the Present Day*, ThoughtCo (Nov. 4, 2020), https://www.thoughtco.com/american-involvement-wars-colonial-times-present-4059761 [https://perma.cc/PE8P-VLYN]; Sabir Shah, *The US Has Been at War 225 out of 243 Years Since 1776*, News Int'l (Jan. 9, 2020), https://www.thenews.com.pk/print/595752-the-us-has-been-at-war-225-out-of-243-years-since-1776 [https://perma.cc/EM82-H3U].

godliness"). And by construing liability to cover any management, direction, or control "having to do with" a facility's pollution, the Supreme Court interpreted CERCLA's text broadly to include any reasonable inference of influence over any of a facility's polluting activities. *See Bestfoods*, 524 U.S. at 66.

Therefore, wartime control, which is among the most powerful in existence, either increases the Government's likelihood of operator liability or is irrelevant. *See* Carley, *supra*, at 113 ("In reality, the government is the only proper party to pay for past pollution, especially when it was caused in connection with the United State's war effort during World War II."); *cf. Ex parte Milligan*, 71 U.S. 2, 120-21, 18 L. Ed. 281 (1866) ("The Constitution of the United States is a law for *rulers and people, equally in war and in peace*, and covers with the shield of its protection all classes . . ., at all times and under all circumstances." (emphases added)).

In the sovereign's interest, this Court assumes that wartime control is irrelevant. *See Mones v. Com. Bank of Kuwait*, S.A.K., No. 18 MISC. 0302(SAS), 2007 U.S. Dist. LEXIS 72701, 2007 WL 2815626, at *1 (S.D.N.Y. Sept. 25, 2007) ("[A] court in the United States must balance the interests of its citizens in pursuing litigation against the interests of a sovereign state, and that balance tips in favor of deference to the sovereign state."); *id.* at 932 n.5 ("The idea of comity-of treating sovereigns . . . with greater respect than other litigants counsels us to exercise forbearance in construing legislation to intrude upon the central regulatory functions of a sovereign entity.").

Appendix D

III.

Plaintiffs claim that the Government operated eight refineries in District Two ("the Eight"): Leonard's refinery in Alma, Michigan ("Leonard"); Mid-West's refinery in Alma, Michigan ("Mid-West"); Bell Oil/Ben Franklin's refinery in Ardmore, Oklahoma ("Bell"); Kanotex's refinery in Arkansas City, Kansas ("Kanotex"); Worth's refinery in Blue Island, Illinois ("Worth"); Delta's refinery in Memphis, Tennessee ("Delta"); Roosevelt's Oil refinery in Mount Pleasant, Michigan ("Roosevelt"); and Vickers's refinery in Potwin, Kansas ("Vickers").

A.

According to Plaintiffs, the Government required the Eight to convert equipment and operations, including production methods, to make WWII petroleum products.[12] Further, the Government dictated the "kind and quantity" of the Eight's petroleum products through, for example, "enumerated temperature specifications" and a maximum "octane number" for manufacturing gasoline.[13] And the Government controlled and adjusted the "amount, source,

12. ECF No. 68-2 at PageID.1135 (Leonard); *id.* at PageID.1140 (Mid-West); *id.* at PageID.1144-45 (Bell); *id.* at PageID.1148 (Kanotex); *id.* at PageID.1151-52 (Worth); *id.* at PageID.1156-57 (Delta); *id.* at PageID.1160 (Roosevelt); *id.* at PageID.1164 (Vickers).

13. ECF No. 68-2 at PageID.1135-36 (Leonard); *id.* at PageID.1140-41 (Midwest); *id.* at PageID.1145 (Bell); *id.* at PageID.1148-49 (Kanotex); *id.* at PageID.1152-53 (Worth); *id.* at PageID.1157 (Delta); *id.* at PageID.1160-61 (Roosevelt); *id.* at PageID.1164-65 (Vickers).

and price" of the Eight's raw materials.[14] Moreover, the Government controlled the sales price and purchasers of the Eight's petroleum products.[15] The Government also required approval of Leonard's employee's salaries and bonuses and conducted on-site safety inspections at seven of the Eight related to waste.[16] Finally, Plaintiffs contend that the Government's involvement in the Eight's operations affected "pollution and the disposal of hazardous substances" because directives affecting production and yields of petroleum affected waste streams.[17]

B.

The Government's arguments regarding the Eight vary by refinery.

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14. ECF No. 68-2 at PageID.1136 (Leonard); *id.* at PageID.1141-42 (Mid-West); *id.* at PageID.1145-46 (Bell); *id.* at PageID.1149 (Kanotex); *id.* at PageID.1153-54 (Worth); *id.* at PageID.1157-58 (Delta); *id.* at PageID.1161-62 (Roosevelt); *id.* at PageID.1165-66 (Vickers).

15. ECF No. 68-2 at PageID.1137 (Leonard); *id.* at PageID.1142 (Mid-West); *id.* at PageID.1146 (Bell); *id.* at PageID.1149-50 (Kanotex); *id.* at PageID.1154 (Worth); *id.* at PageID.1158 (Delta); *id.* at PageID.1162 (Roosevelt); *id.* at PageID.1166 (Vickers).

16. ECF No. 68-2 at PageID.1138 (Leonard); *id.* at PageID.1142-44 (Mid-West); *id.* at PageID.1146-47 (Bell); *id.* at PageID.1154-55 (Worth); *id.* at PageID.1158-59 (Delta); *id.* at PageID.1162 (Roosevelt); *id.* at PageID.1166-67 (Vickers).

17. ECF No. 68-2 at PageID.1138-39 (Leonard); *id.* at PageID.1143-44 (Mid-West); *id.* at PageID.1147-48 (Bell); *id.* at PageID.1150-51 (Kanotex); *id.* at PageID.1155-56 (Worth); *id.* at PageID.1158-59 (Delta); *id.* at PageID.1162-63 (Roosevelt); *id.* at PageID.1167-69 (Vickers).

Appendix D

i.

According to the Government, Leonard, "[l]ike other District Two refineries," experienced a shortage of crude oil. ECF No. 81-2 at PageID.7793. Because of that shortage, Leonard sought and secured contracts with the Government to process crude oil for WWII. *Id.* at PageID.7794. Accordingly, Leonard sought and received "the necessary equipment to co[n]vert" its production facilities from the Government. *Id.* The Government characterizes its relationship with Leonard as a voluntary contractual relationship, in which Leonard would make suggestions to PAW and vice versa. *See id.* at PageID.7795-96. Further, the Government claims that Leonard processed "sweet crude oil" but not "sour." *Id.* at PageID.7796. The Government also notes its approval for Leonard to build a machine to "produce high-octane avgas for the war effort." *Id.* And the Government contends that, though it inspected Leonard's refinery "for security and safety," it did not have sufficient control over Leonard because it approved the salaries of only "key employees." *Id.* at PageID.7797.

ii.

According to the Government, it approved Mid-Wests's "proposal to produce codimer." ECF No. 81-2 at PageID.7798. The Government claims it "directed" Mid-West to sell its products to a refinery that could not use them, leaving the details of the "arrangement" to Mid-West. *Id.* at PageID.7800-01. The Government states that it frequently required Mid-West to "promptly"

inform the Government about its petroleum production capacity. *Id.* at PageID.7801. The Government also notes that it denied Mid-West's requests for more crude. *Id.* at PageID.7802-03. The Government indicates that Mid-West stated it was "not following [one] directive," because it was physically impossible to comply. *Id.* at PageID.7803. The Government also recounts a letter in which Mid-West expressed its dismay about not receiving more sour crude because it "made extensive improvements" based on the Government's directives. *See id.* at PageID.7803-04. The Government admits to inspecting Mid-West for "security and safety." *Id.* at PageID.7804. Finally, the Government discusses two other contracts it entered with Mid-West for war-time production, from which Mid-West profited. *Id.*

iii.

According to the Government, it solicited Bell to produce petroleum products, and Bell "was eager." ECF No. 81-2 at PageID.7809. The Government also suggests that it granted Bell permission to "modify its refining equipment" at its own expense to produce petroleum products for the Government. *Id.* at PageID.7810-11. Further, the Government mentions two negotiated contracts through which it paid Bell for the products. *Id.* at PageID.7810. And the Government explains that it had ultimate approval authority over the sales prices of such products, which it later audited. *Id.* at PageID.7810-11, 7812. The Government also acknowledges that Bell "cooperated" with the Government's directive to maximize crude production. *Id.* at PageID.7812-13. Moreover, the Government notes that it approved Bell's requests to

receive more crude, share its crude with another Bell-owned refinery, and process more crude to compensate for underproduction. *Id.* at PageID.7813-14. Ultimately, the Government characterizes its directives to Bell as "not . . . coercive dictates." *Id.* at PageID.7814.

iv.

According to the Government, Kanotex "sought" to produce petroleum products for WWII. ECF No. 81-2 at PageID.7823. The Government also claims that Kanotex did not interpret PAW's directives as "coercive" and bragged about already meeting the requirements of one such directive. *Id.* at PageID.7823-24, 7826. Further, the Government mentions that it granted Kanotex an exception to a directive to conserve natural gas. *Id.* at PageID.7824. And the Government claims that PAW "did not manage Kanotex's operations" because it merely "suggested" that Kanotex change its production output. *Id.* Moreover, the Government admits that it required Kanotex to comply with "new gasoline specifications," for which the Government granted Kanotex "a thirtyday extension." *Id.* at PageID.7825. The Government also discusses a conversation in which Kanotex "acknowledged" PAW's crude production requirements. *Id.* at PageID.7826. And the Government notes that Kanotex provided more petroleum products than their contract required. *Id.* at PageID.7825-26. Finally, the Government reveals that it inspected Kanotex "on at least three occasions." *Id.* at PageID.7827.

Appendix D

v.

According to the Government, Worth produced the same products before and during WWII. ECF No. 81-2 at PageID.7828. The Government asserts that it considered letting Worth close after it asked the Government to make other refineries send it crude. *Id.* at PageID.7828-29. The Government also states that it found a producer to send Worth "90,000 barrels of crude oil" but was not "involved in . . . the sale." *Id.* at PageID.7829-30. And the Government says that its "assistance was temporary" and Worth eventually closed "due to a lack of crude oil." *Id.* at PageID.7830. Further, the Government reveals a letter from PAW's chief counsel, J. Howard Marshall, discussing PAW's "statutory authority" to require "one man to sell . . . crude oil [] to another . . . where it clearly appears that such action is necessary for the prosecution of the war." *Id.* at PageID.7831. Moreover, the Government claims both that Worth's participation was "voluntary" and that Worth's processing of sour crude did not lead to hazardous waste spills. *Id.* Finally, the Government asserts that "PAW's directives did not materially change the product specifications of Worth's [petroleum products]." *Id.* at PageID.7833.

vi.

According to the Government, Delta "intend[ed] to cooperate in every possible way." ECF No. 81-2 at PageID.7818. The Government characterizes its relationship with Delta as an "arm's-length" contract. *Id.* The Government claims that Delta complied with several

directives that often "had no effect on Delta's operations." *Id.* at PageID.7819. The Government also explains that it required Delta to use less crude, after which a Tennessee Senator "intervened on Delta's behalf" to convince the Government to grant Delta permission to obtain and process more crude. *Id.* at PageID.7820. The Government later granted a second increase. *Id.* at PageID.7821. Moreover, the Government states that it increased the price Delta had to pay for crude while prohibiting Delta from raising its sales prices, which Delta said would make it "impossible" to stay in business. *See id.* at PageID.7821. The Government also acknowledges that Delta "had been operating at a loss" because of the price the Government mandated and Delta's high operation costs. *Id.* at PageID.7821-22. Finally, the Government claims it "lacked detailed knowledge" of Delta's operations, noting the Government's months-long ignorance of a destructive fire. *Id.* at 7822.

vii.

According to the Government, "there is no evidence that Roosevelt produced critical war products." ECF No. 81-2 at PageID.7805. But the Government points out that its petroleum-production directives to Roosevelt "required the company to shut down its cracking unit." *Id.* The Government also notes that Roosevelt "sought [its] assistance to acquire materials" to meet the Government's directives. *Id.* at PageID.7806. Further, the Government asserts that it gave Roosevelt "the opportunity to present [its] case" after Roosevelt requested steady crude shipments because it feared not meeting the Government's need. *Id.* The Government also indicates that Roosevelt

griped that it would have received more crude if it had fewer private contracts. *Id.* at PageID.7807. And the Government admits to investigating Roosevelt's claimed need, for which the Government allotted more crude. *Id.* at PageID.7807. The Government also discusses it contract with Roosevelt to produce petroleum products. *Id.* at PageID.7808. Finally, the Government admits to at least three inspections of and four recommendations to Roosevelt. *Id.*

viii.

According to the Government, Vickers produced petroleum products for WWII. ECF No. 81-2 at PageID.7815. The Government also notes that it gave Vickers permission to "alter its equipment to produce codimer," and later sought information on Vickers's progress. *Id.* at PageID.7815-16. Further, the Government acknowledges auditing Vickers's costs before approving its sales price for codimer. *Id.* at PageID.7816. Moreover, the Government explains that after Vickers recovered its conversion costs, the Government "re-negotiated" and ultimately lowered the sales prices of Vickers's codimer. *Id.* at PageID.7816-17. Finally, the Government mentions that Vickers "touted its participation in the war," had "little thought of personal benefit," and "praised" the Government. *Id.* at PageID.7817-18.

C.

Plaintiffs have demonstrated that there is no genuine issue of material fact regarding whether the Government was one of each of the Eight's "operators." Construing

the facts in the light most favorable to the Government, this Court finds that, based on the totality of the circumstances, every reasonable juror would conclude that the Government operated each of the Eight to some extent.

Under CERCLA, "an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility." *United States v. Bestfoods*, 524 U.S. 51, 66, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998). More sharply, an operator must have "manage[d], direct[ed], or conduct[ed] operations specifically related to pollution." *Id.* Therefore, the Government operated Leonard if, based on "a fact-intensive inquiry and consideration of the totality of the circumstances," it exercised some extent of management, direction, or control leading Leonard to take affirmative acts that anyway affected "leakage or disposal of hazardous waste." *Id.; Brighton I*, 153 F.3d at 326. Accordingly, the Government needs to be merely *one* operator, not *the* operator. *See Brighton I*, 153 F.3d at 318-19 (distinguishing "the divisibility defense to joint and several liability from the equitable allocation principles available under CERCLA's contribution provision").

In *FMC*, the Third Circuit held that the "leading indicia of control" in finding operator liability were whether the Government determined (1) the product the facility could produce; (2) the level of production; (3) the products' price; and (4) to whom the product could be sold. *FMC*, 29 F.3d at 843; *see also PPG*, 957 F.3d at 403 (considering factors three and four); *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *6 (same).

The record comprises over 11,500 pages replete with communications between the Eight and the Government

that, if viewed in isolation, might be interpreted as either cooperative or coercive. But in viewing the record as a whole, no reasonable juror could disagree that the Government exercised all four of *FMC*'s four leading indicia of control over Leonard, Mid-West, Bell, Kanotex, Delta, Roosevelt, and Vickers and three of four over Worth.

The record indicates that the Government dictated which petroleum products the Eight could produce. *See, e.g.*, ECF No. 74-21 at PageID.5072 ("I hereby direct that you shall not manufacture or blend any civilian gasoline except such as will conform to the following . . . ."); *see also* ECF Nos. 74-40; 75-1 (Leonard, Delta, and Roosevelt); 75-14 (Mid-West); 75-16; 77-19. The Government also repeatedly determined the Eight's production levels (i.e., yields). *See, e.g.*, ECF No. 74-50 at PageID.5942 ("Therefore, effective immediately and until further advised you are hereby directed to increase the percentage yields of motor gasoline . . . and of distillate fuels . . . based on crude input . . . at your . . . refinery(ies)."); *see also* ECF Nos. 74-21; 74-42; 74-49; 74-50 (Leonard, Kanotex, and Delta); 75-1 (Leonard, Delta, and Roosevelt); 75-2 (Leonard, Kanotex, Delta, and Roosevelt); 75-3 (Leonard); 75-14 (Mid-West); 75-16; 75-43 (Bell); 75-50; 76-1 (Bell, Kanotex, and Vickers); 77-19. Moreover, the Government decided to whom the Eight could sell petroleum products. *See* ECF No. 74-21 at PageID.5072 ("TYPES A, B, AND C [motor fuel] *SHALL* BE MARKETED IN SUCH LOCALITIES AND DURING SUCH SEASONS AS ARE INDICATED . . . IN US ARMY SPECIFICATION 2-114." (emphasis added)); *see also* ECF Nos. 75-14 (Mid-West); 75-15 (Mid-West); 75-41 (Bell); 75-43 (Bell); 76-2 (Kanotex). Further,

the Government controlled the product prices for the Eight minus Worth. *See* ECF Nos. 75-4 (Leonard); 75-28 (Mid-West); 75-41 (Bell); 75-42 (Bell); 75-45 (Kanotex); 76-2 (Kanotex); 76-18 (Delta); 82-16 (Leonard); 82-28 (Mid-West); 83-4 (Roosevelt); 83-14 (Bell); 83-15 (Bell); 83-32 (Vickers); 83-36 (Vickers).

Plus, the Government publicly declared its control over the petroleum refineries and their employees; seized at least one other petroleum refinery; conducted hourly militaristic inspections of nearly every aspect of the petroleum refineries; determined and adjusted the petroleum concentration of the Eight's petroleum products, which inherently affected pollution levels; and was aware that processing petroleum created such waste. In sum, among other factors from operator-liability cases that suggest the Government exercised actual and substantial management, direction, or control over a refinery's pollution-producing operations to some extent, 26 factors are present regarding Leonard; 25 regarding Bell; 24 regarding Mid-West; 23 regarding Kanotex, Delta, Roosevelt, and Vickers; and 22 regarding Worth.[18]

18. First, the Government required the Eight to process different petroleum products. *See FMC*, 29 F.3d at 853; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *6, 2; ECF Nos. 74-21; 74-31 at PageID.5410 (Roosevelt); 74-49; 74-50 (Leonard, Kanotex, and Delta); 75-1 (Leonard, Delta, and Roosevelt); 75-14 (Mid-West); 75-16; 77-19 at PageID.6956 (Kanotex). Second, the Government directed and supervised the Eight's production process by, for example, mandating product specifications and petroleum concentration. *See PPG*, 957 F.3d at 397; *FMC*, 29 F.3d at 843; *Exxon*, 108 F. Supp. 3d at 525; *Miami-Dade*, 345 F. Supp. 2d at 1341, 1344, 1346; ECF Nos. 74-21; 74-42; 74-49; 74-50 (Leonard, Mid-West, Delta,

and Roosevelt); 75-1 (Mid-West, Delta, Roosevelt, and Vickers); 75-2 (Roosevelt and Vickers); 75-10 (Mid-West); 75-14 (Mid-West); 75-16; 75-29 (Mid-West); 75-50; 76-1 (Bell, Kanotex, and Vickers); 77-19 at PageID.6956. Third, the Government had seized at least one other petroleum processing plant. *See PPG*, 957 F.3d at 404; *FMC*, 29 F.3d at 836; *Exxon*, 108 F. Supp. 3d at 524; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *4-6; ECF Nos. 77-49; 77-50 at PageID.7203; 78-1; 94-14 at PageID.11060. Fourth, the Government was aware that processing petroleum created pollution and that the Eight's petroleum processing created pollution. *See FMC*, 29 F.3d at 838; *Exxon* 108 F. Supp. 3d at 529; ECF Nos. 77-47 (inspecting nearly every inch of the refinery from storage capacity of crude oil to "control of dust, fumes, and vapors"); 78-19 at PageID.7538; 78-20 at PageID.7569; 78-28 ("The recovery of slop oils, which is a necessary function in any refinery . . . ."); 78-29; 94-14 (ordering "personnel working on . . . . waste oil separators" to "[r]eturn to work"). Fifth, through inspections, the Government was aware of and monitored the Eight's production of petroleum waste. *See FMC*, 29 F.3d at 838; *Brighton I*, 153 F.3d at 327 (Moore, J. concurring in the result); ECF Nos. 77-47; 78-19 at PageID.7538 (Delta, Roosevelt, and Vickers); 78-20 at PageID.7569 (Delta, Roosevelt, and Vickers); 78-28 (Delta, Roosevelt, and Vickers); 78-29 (Roosevelt and Vickers); 94-14 at PageID.11060. Sixth, the Government had expertise and knowledge of the dangers of waste created by processing petroleum. *Brighton I*, 153 F.3d at 327 (Moore, J., concurring in the result); ECF Nos. 77-47; 78-28; 78-29; 94-14 at PageID.11060. Seventh, the Government determined the Eight's operational plans. *See Brighton I*, 153 F.3d at 327 (Moore, J., concurring in the result); ECF Nos. 74-22 (Leonard); 74-42; 74-50 (Leonard, Delta, and Roosevelt); 75-1 (Leonard, Delta, Roosevelt, and Vickers); 75-15 (Mid-West); 75-50; 76-1 (Bell, Kanotex, and Vickers). Eighth, the Government publicly declared responsibility over all petroleum refineries and their employees with words and actions. *See Brighton I*, 153 F.3d at 327 (Moore, J., concurring in the result); ECF Nos. 77-19 at PageID.6958 (announcing nationwide that "[a]ll U. S. refiners were notified of the change in octane rating of house brand gasoline");

94-14 at PageID.11060; *see, e.g.*, 77-47 at PageID.7151 (showing at least 126 armed military guards were permanently stationed at some refineries, conducting hourly "watchmen" inspections under 24-hour ops). Ninth, the Government had more than a mere contractual relationship with the Eight. *See Brighton I*, 153 F.3d at 315-16; ECF Nos. 74-42; 77-47. Tenth, the Government had quality control employees and other representatives on site. *See Miami-Dade*, 345 F. Supp. 2d at 1341-42; ECF No. 77-47. Eleventh, the Government's directives to the Eight led to changes in their waste management. *See Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *5; ECF No. 74-31 at PageID.5422. Twelfth, the Government determined which petroleum products the Eight had to produce. *See Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *5-6; ECF Nos. 74-49 (Mid-West); 74-50 (Kanotex and Delta); 75-14 (Mid-West); 75-16; 75-40 (Leonard). Thirteenth, the Government set and adjusted the Eight's production quotas. *See PPG*, 957 F.3d at 397, 400, 403; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565 at *4-6; ECF Nos. 74-21; 74-50 (Leonard and Delta); 75-1 (Leonard and Delta); 75-4 (Leonard); 75-18 at PageID.4964 (Kanotex); 76-1 (Bell, Kanotex, and Vickers); 76-2 (Kanotex). Fourteenth, the record indicates that the Government's directives to the Eight were direction, not mere guidance. *See Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565 at *7; ECF Nos. 74-42; 74-43; 74-45 at PageID.5902; 74-47 (Mid-West); 74-50 (Leonard, Kanotex, and Delta); 75-1 (Leonard, Mid-West, Delta, Roosevelt, and Vickers); 75-50; 76-1 (Bell, Kanotex, and Vickers); 77-47. Fifteenth, the Government inspected the Eight's disposal sites. *See Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *1, *4, *5, *7, *8; ECF Nos. 77-47; *see also* 81-2 at PageID.7797 (Leonard, Mid-West, Bell, Kanotex, and Roosevelt). Sixteenth, the Government had officials who worked on site. *See Exxon*, 108 F. Supp. 3d at 526; ECF No. 77-47. Seventeenth, the Government determined who could purchase the Eight's petroleum products. *See PPG*, 957 F.3d at 397, 400, 403; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565 at *4-6; ECF Nos. 74-21; 75-15 (Mid-West); 75-21 (Delta, Roosevelt, and Vickers); 75-43 (Bell). Eighteenth, the Government was

Therefore, no reasonable juror could find that the extent of the Government's management, direction, and control over the Eight had nothing "to do with" the amount of waste they produced. *See Bestfoods*, 524 U.S. at 66.

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permanently stationed on site. *See Exxon*, 108 F. Supp. 3d at 525-26, 532; ECF No. 77-47. Nineteenth, the Eight resembled a military base. *See Exxon*, 108 F. Supp. 3d at 533; ECF No. 77-47. Twentieth, the Government required the Eight to send regular reports regarding petroleum processing. *See Exxon*, 108 F. Supp. 3d at 509, 527, 532; ECF Nos. 74-20; 74-21; 74-45 at PageID.5902; 74-49 (Leonard); 75-50; 76-1 (Bell, Kanotex, and Vickers). Twenty-first, the Government controlled the priority of orders for petroleum products at the Eight. *See PPG*, 957 F.3d at 397, 403; ECF No. 74-21. Twenty-second, the Government participated in decisions related to the Eight's pollution. *See Exxon*, 108 F. Supp. 3d at 527; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *8; ECF No. 74-31 at PageID.5422. Twenty-third, the Government determined sales prices for Leonard, Mid-West, Bell, Kanotex, Delta, Roosevelt, and Vickers. *See PPG*, 957 F.3d at 397, 400, 403; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565 at *4-6; ECF Nos. 75-28 (Mid-West); 75-45 (Kanotex); 76-18 (Delta); 82-16 (Leonard); 82-28 (Mid-West); 83-4 (Roosevelt); 83-14 (Bell); 83-15 (Bell); 83-32 (Vickers); 83-36 (Vickers). Twenty-fourth, the Government audited some of the pollution-related costs at Mid-West and Bell. *See Miami-Dade*, 345 F. Supp. 2d at 1341, 1344; ECF Nos. 75-26 (Mid-West); 75-28 (Mid-West); 75-41 (Bell). Twenty-fifth, the Government dictated the quantity of petroleum products Bell could sell. *See PPG*, 957 F.3d at 403; ECF No. 75-43. Twenty-sixth, the Government required approval for Leonard's "'key employee' bonuses." *See PPG*, 957 F.3d at 403; ECF No. 81-2 at PageID.7797. Twenty-seventh, the Government approved Leonard's expansion projects. *See* PPG, 957 F.3d at 398; ECF Nos. 74-46. Twenty-eighth, the Government required approval for changes to Leonard's facility. *See Exxon*, 108 F. Supp. 3d at 495, 502-03; ECF Nos. 75-8 at PageID.5994; 78-2.

Appendix D

IV.

Plaintiffs claim that the Government operated two refineries in District Five: Caminol's refinery in Hanford, California ("Hanford") and Caminol's refinery in Santa Fe Springs, California ("Springs").

A.

According to Plaintiffs, the Government required Hanford to convert equipment and operations to make WWII products. ECF No. 68-2 at PageID.1169 (Hanford). Further, the Government dictated the "kind and quantity" of Hanford's petroleum products. *Id.* at PageID.1169-70 (Hanford). And the Government controlled and adjusted the "amount, source, and price" of Hanford's raw materials. *Id.* at PageID.1170-71 (Hanford). Moreover, the Government controlled the sales price and purchasers of Hanford's petroleum products. *Id.* at PageID.1171 (Hanford). Plaintiffs also contend that the Government conducted safety inspections at Hanford related to waste. *See id.* at PageID.1171-72 (Hanford). Finally, Plaintiffs contend that the Government's involvement in Hanford's operations affected "pollution and the disposal of hazardous substances" because directives affecting production and yields of petroleum affected waste streams. *See id.* at PageID.1172 (Hanford).

B.

The Government's arguments regarding Hanford and Springs vary by refinery.

Appendix D

i.

According to the Government, Hanford processed petroleum products for the Government under five contracts. ECF No. 81-2 at PageID.7854, 7856. The Government contends that its contractual right to control the location and quantity of the sale of Hanford's petroleum products does not amount to control. *See id.* at PageID.7861. And the Government presents one instance in which Hanford was unable to follow a directive to adjust the concentration of its petroleum products. *See id.* at PageID.7857. But the Government concedes that Hanford changed its concentration of "91-octane avgas" at the Government's request. *See id.* at PageID.7856. The Government also contends that the record contains contradictory evidence as to whether Hanford expanded its petroleum-processing facility at PAW's request. *See id.* at PageID.7858. But the Government believes that its approval of new production equipment at Hanford is not relevant to operator liability. *See id.* at PageID.7861. The Government elaborates that it offered to remove a restriction it placed on Hanford if it manufactured different "critical war products," but Hanford did not comply. *See id.* at PageID.7858-59. Moreover, the Government claims that its directive to adjust the petroleum concentration of Hanford's gasoline production "did not manage . . . or dictate" Hanford's production, despite Hanford's compliance. *See id.* at PageID.7859-60. The Government also declares that no evidence shows it "controlled" Hanford's daily production of crude. *Id.* at PageID.7860. Further, the Government admits that it inspected Hanford for "safety and security." *Id.* at

PageID.7862. The Government concludes that sending directives to all District Five refineries does not mean it individually controlled Hanford. *See id.* at PageID.7862.

ii.

According to the Government, Springs processed petroleum products for the Government under two contracts. *Id.* at PageID.7854, 7856. The Government contends that its contractual right to control the location and quantity of the sale of Springs's petroleum products does not amount to control. *See id.* at PageID.7861. And the Government presents one instance in which Springs was unable to follow a directive to adjust the concentration of its petroleum products. *See id.* at PageID.7857. But the Government concedes that Springs changed its concentration of "91-octane avgas" at the Government's request. *See id.* at PageID.7856. Further, the Government believes that its approval of new production equipment at Springs is not relevant to operator liability. *See id.* at PageID.7861. Moreover, the Government claims that its directive to adjust the petroleum concentration of Springs's gasoline production "did not manage . . . or dictate" Springs's production, despite Springs's compliance. *See id.* at PageID.7859-60. The Government also declares that no evidence shows it "controlled" Springs's daily production of crude. *See id.* at PageID.7860. The Government also denies inspecting Springs. *Id.* at PageID.7862. The Government concludes that sending directives to all District Five refineries does not mean it individually controlled Springs. *See id.* at PageID.7862.

Appendix D

C.

Plaintiffs have demonstrated that there is no genuine issue of material fact regarding whether the Government was an "operator" of both Hanford and Springs. Construing the facts in the light most favorable to the Government, this Court finds that, based on the totality of the circumstances, a trier of fact could not reasonably conclude that the Government did not operate Hanford and Springs to some extent.

The same CERCLA standard for operator liability applies to Hanford and Springs. *See* discussion *supra* Sections II.A, II.B, II.C, III.C. The record comprises over 11,500 pages replete with communications between the Government and Hanford and Springs that, if viewed in isolation, might be interpreted as either cooperative or coercive. But in viewing the record as a whole, no reasonable juror could disagree that the Government exercised all four of *FMC*'s four leading indicia of control over both Hanford and Springs.

The Government determined which products Hanford and Springs could produce. *See* ECF Nos. 77-1 at PageID.6816 ("THEREFORE ALL PERSONS IN DISTRICT FIVE ARE HEREBY NOTIFIED TO COMPLY WITH THE FOLLOWING OPERATING INSTRUCTIONS . . . ."); *see also* 74-19 at PageID.5055; 76-50; 77-8. The Government also repeatedly determined Hanford's and Springs's production levels (i.e., yield). *See* ECF Nos. 74-19; 76-50; 77-1; 77-8. Moreover, the Government decided to whom Hanford and Springs could

sell their products. *See* ECF Nos. 77-8; 77-12 (Hanford); 77-13; 77-14. Further, the Government controlled the product prices for Hanford and Springs. *See* ECF Nos. 77-10; 77-11; 77-12 (Hanford).

Plus, the Government publicly declared its control over the petroleum refineries and their employees; seized at least one other petroleum refinery; conducted hourly militaristic inspections of nearly every aspect of the petroleum refineries; determined and adjusted the petroleum concentration of Hanford's and Springs's petroleum products, which inherently affected pollution levels; and was aware that processing petroleum created such waste. In sum, among other factors from operator-liability cases that suggest the Government exercised actual and substantial management, direction, or control over a refinery's pollution-producing operations to some extent, 30 factors are present regarding both Hanford and Springs.[19] Therefore, no reasonable juror could find that

19. First, the Government required Hanford and Springs to process different petroleum products. *See FMC*, 29 F.3d at 853; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *6, 2; ECF Nos. 74-19 at PageID.5055; 76-50; 77-1; 77-8. Second, the Government directed and supervised the production process at Hanford and Springs by, for example, mandating product specifications and petroleum concentration. *See PPG*, 957 F.3d at 397; *FMC*, 29 F.3d at 843; *Exxon*, 108 F. Supp. 3d at 525; *Miami-Dade*, 345 F. Supp. 2d at 1341, 1344, 1346; ECF Nos. ECF Nos. 74-19 at PageID.5055; 76-50 at PageID.6793; 77-1 at PageID.6816; 77-4; 77-8 at PageID.6867; 77-19 at PageID.6956. Third, the Government had seized at least one other petroleum processing plant. *See PPG*, 957 F.3d at 404; *FMC*, 29 F.3d at 936; *Exxon*, 108 F. Supp. 3d at 524; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *4-6;

ECF Nos. 77-49; 77-50 at PageID.7203; 78-1; 94-14 at PageID.11060. Fourth, the Government was aware that processing petroleum created pollution and that petroleum processing created pollution at Hanford and Springs. *See FMC*, 29 F.3d at 838; *Exxon* 108 F. Supp. 3d at 529; ECF Nos. 77-47 (inspecting nearly every inch of the refinery from storage capacity of crude oil to "control of dust, fumes, and vapors"); 78-19 at PageID.7538; 78-20 at PageID.7569; 78-28 ("The recovery of slop oils, which is a necessary function in any refinery . . . ."); 78-29; 94-14 (ordering Gulf's "personnel working on . . . . waste oil separators" to "[r]eturn to work"). Fifth, through inspections, the Government was aware of and monitored the production of petroleum waste at Hanford and Springs. *See FMC*, 29 F.3d at 838; *Brighton I*, 153 F.3d at 327 (Moore, J. concurring in the result); ECF Nos. 76-34; 77-47; 78-19 at PageID.7538; 78-20 at PageID.7569; 78-24 at PageID.7666; 78-28; 78-29; 94-14 at PageID.11060. Sixth, the Government had expertise and knowledge of the dangers of waste created by processing petroleum. *Brighton I*, 153 F.3d at 327 (Moore, J., concurring in the result); ECF Nos. 77-47; 78-28; 78-29; 94-14 at PageID.11060. Seventh, the Government determined the operational plans for Hanford and Springs. *See Brighton I*, 153 F.3d at 327 (Moore, J., concurring in the result); ECF Nos. 74-19 at PageID.5055; 76-50 at PageID.6793; 77-1 at PageID.6816; 77-8 at PageID.6867. Eighth, the Government publicly declared responsibility over all petroleum refineries and their employees with words and actions. *See Brighton I*, 153 F.3d at 327 (Moore, J., concurring in the result); ECF Nos. 77-19 at PageID.6958 (announcing nationwide that "[a]ll U. S. refiners were notified of the change in octane rating of house brand gasoline"); 94-14 at PageID.11060; *see, e.g.*, 77-47 at PageID.7151 (showing at least 126 armed military guards were permanently stationed at some refineries, conducting hourly "watchmen" inspections under 24-hour ops). Ninth, the Government had more than a mere contractual relationship with Hanford and Springs. *See Brighton I*, 153 F.3d at 315-16; ECF Nos. 77-9 at PageID.6871 (Hanford); 77-21 at PageID.6973 (Springs); 77-47. Tenth, the Government had quality control employees and other representatives on site. *See Miami-Dade*, 345 F. Supp. 2d at

1341-42; ECF No. 77-47. Eleventh, the Government's directives to Hanford and Springs led to changes in their waste management. *See Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *5; ECF No. 74-31 at PageID.5422; 77-9 at PageID.6870-71 (Hanford); 77-21 at PageID.6973 (Springs). Twelfth, the Government determined which petroleum products Hanford and Springs had to produce. *See Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *5-6; ECF Nos. 74-19 at PageID.5055; 76-50; 77-1; 77-8. Thirteenth, the record indicates that the Government's directives to Hanford and Springs were direction, not mere guidance. *See Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565 at *7; ECF Nos. 74-19 at PageID.5055; 76-50 at PageID.6793; 77-1 at PageID.6816; 77-8 at PageID.6867. Fourteenth, the Government inspected and approved the disposal sites at Hanford and Springs. *See Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *1, *4, *5, *7, *8; ECF Nos. 76-34; 77-47; 78-7 at PageID.7286; 78-31; 78-32; 78-33; 78-34; 78-35. Fifteenth, the Government had officials who worked on site. *See Exxon*, 108 F. Supp. 3d at 526; ECF No. 77-47. Sixteenth, the Government was permanently stationed on site. *See Exxon*, 108 F. Supp. 3d at 525-26, 532; ECF No. 77-47; 94-14 at PageID.11060. Seventeenth, Hanford and Springs resembled a military base. *See Exxon*, 108 F. Supp. 3d at 533; ECF No. 77-47. Eighteenth, the Government participated in decisions related to pollution at Hanford and Springs. *See Exxon*, 108 F. Supp. 3d at 527; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *8; ECF No. 74-31 at PageID.5422. Nineteenth, the Government approved expansion projects at Hanford and Springs. *See* PPG, 957 F.3d at 398; ECF Nos. 77-9 at PageID.6870-71 (Hanford); 77-21 at PageID.6973. Twentieth, the Government required approval for changes to Hanford's and Springs's facility. *See Exxon*, 108 F. Supp. 3d at 495, 502-03; ECF Nos. 77-1; 77-9 at PageID.6870-71 (Hanford); 77-21 at PageID.6973 (Springs). Twenty-first, the Government, in part, established and designed Hanford and Springs. *See Brighton I*, 153 F.3d at 327 (Moore, J., concurring in the result); *See Exxon*, 108 F. Supp. 3d at 526; ECF Nos. 77-9 at PageID.6870-71 (Hanford); 77-21 at PageID.6973 (Springs). Twenty-second, the Government designed,

the extent of the Government's management, direction, and control over Hanford and Springs had nothing "to do with" the amount of waste it produced. *See Bestfoods*, 524 U.S. at 66.

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specified, or provided some of the equipment and machinery needed to process petroleum at Hanford and Springs. *See FMC*, 29 F.3d at 838; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *5-6; ECF Nos. 77-9 at PageID.6870-71 (Hanford); 77-21 at PageID.6973 (Springs). Twenty-third, the Government set and adjusted Hanford's and Springs's production quotas. *See PPG*, 957 F.3d at 397, 400, 403; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565 at *4-6; ECF Nos. 76-50; 77-8; 77-9; 77-21. Twenty-fourth, the Government determined who could purchase petroleum products from Hanford and Springs. *See PPG*, 957 F.3d at 397, 400, 403; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565 at *4-6; ECF Nos. 77-8; 77-12 (Hanford); 77-13; 77-14. Twenty-fifth, the Government controlled the product prices for Hanford and Springs. *See* ECF Nos. 77-10; 77-11; 77-12 (Hanford). Twenty-sixth, the Government required Hanford and Springs to send regular reports regarding petroleum processing. *See Exxon*, 108 F. Supp. 3d at 509, 527, 532; ECF Nos. 74-19; 76-50. Twenty-seventh, the Government determined Hanford's and Springs's sales prices. *See PPG*, 957 F.3d at 397, 400, 403; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565 at *4-6; ECF Nos. 77-10; 77-11; 77-12 (Hanford). Twenty-eighth, the Government had unfettered control over waste-related activities at Hanford and Springs. *See Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565; ECF Nos. 77-9 at PageID.6870-71 (Hanford); 77-21 at PageID.6973 (Springs). Twenty-ninth, the Government allowed Hanford and Springs to request exceptions from its mandates. *See* ECF Nos. 77-1; 77-9 at PageID.6870-71 (Hanford); 77-10; 77-11 (Hanford); 77-21 at PageID.6973 (Springs). Thirtieth, the Government admitted to delaying the improvement of the disposal process at Hanford and Springs. *See Exxon*, 108 F. Supp. 3d at 531; ECF No. 77-9 at PageID.6870-71 (Hanford); 77-21 at PageID.6973 (Springs).

Appendix D

V.

Plaintiffs claim that the Government operated two refineries in District Three: Gulf Oil's refinery in Port Arthur, Texas ("Gulf") and Eastern States's refinery in Houston, Texas ("Eastern").

A.

According to Plaintiffs, the Government required Gulf and Eastern to convert equipment and operations to make WWII products. ECF No. 68-2 at PageID.1176-77 (Gulf); *id.* at PageID.1187 (Eastern). Further, the Government dictated the "kind and quantity" of Gulf's and Eastern's petroleum products through, for example, "enumerated temperature specifications" and a maximum "octane number" for manufacturing gasoline. *Id.* at PageID.1177-78 (Gulf); *id.* at PageID.1187 (Eastern). And the Government controlled and adjusted the "amount, source, and price" of Gulf's and Eastern's raw materials. *Id.* at PageID.1178-79 (Gulf); *id.* at PageID.1187 (Eastern). Moreover, the Government controlled the sales price and purchasers of Gulf's and Eastern's petroleum products. *Id.* at PageID.1179-80 (Gulf); *id.* at PageID.1187 (Eastern). Plaintiffs also contend that the Government controlled Eastern's employees' salaries. *See id.* at PageID.1187-88. Plaintiffs also contend that the Government conducted safety inspections at Gulf related to waste. *See id.* at PageID.1180-81. Plaintiffs also contend the Government nearly seized Gulf. *Id.* at PageID.1181. Finally, Plaintiffs contend that the Government's involvement in Gulf's and Eastern's operations affected "pollution and the disposal of hazardous substances" because directives

affecting production and yields of petroleum affected waste streams. *See id.* at PageID.1181-82 (Gulf); *id.* at PageID.1188-89 (Eastern).

B.

The Government's arguments regarding Gulf and Eastern vary by refinery.

i.

According to the Government, "at PAW's request" and not under contract, Gulf expanded its facilities and installed "additional equipment" to produce petroleum products for the Government. ECF No. 81-2 at PageID.7835. The Government also discusses its approval of Gulf's proposed cost analysis. *Id.* at PageID.7836. Further, the Government notes its failed attempt to control the price of Gulf's private contracts for petroleum products. *Id.* at PageID.7837-38. And the Government mentions its self-deferential "fair and reasonable" approval standard by which it would "certify" Gulf's proposed sales prices. *Id.* at PageID.7838. The Government elaborates that it granted Gulf reimbursements for some losses incurred from the Government's directives. *Id.* at PageID.7839. And the Government acknowledges that it required a 4¢ lower sales price than what Gulf requested. *Id.* at 7839-40. The Government also claims that its directives to Gulf limiting crude input led to an increase in both yields of petroleum products and crude throughput. *Id.* at PageID.7840-41. Further, the Government contends that its directives not to use benzol to produce crude did not direct Gulf to "discontinue production of certain products."

Id. at PageID.7841. The Government also asserts that "Plaintiffs selectively quote and mischaracterize" three PAW directives. *Id.* at PageID.7841-42. Moreover, the Government admits to rejecting Gulf's "proposed construction projects" but claims they were not related to hazardous waste disposal. *Id.* at PageID.7834. Finally, the Government concedes that it "prepared" a draft executive order to seize Gulf, which was not executed because it became moot. *Id.* at PageID.7844.

ii.

According to the Government, Eastern processed petroleum products for WWII on its own volition. ECF No. 81-2 at PageID.7845. The Government discusses how Eastern asked the Government to fund Eastern's refinery, which PAW supported. *Id.* The Government elaborates that it purchased and owned the land upon which Eastern "was responsible for constructing and operating the plant." *Id.* The Government also claims it negotiated Eastern's sales prices. *Id.* Moreover, the Government admits that it was aware that Eastern created waste when it processed petroleum. *See id.* at PageID.7846. The Government claims Eastern was the only operator of its facility because it publicly said so. *See id.* at PageID.7846-50. The Government also indicates that Eastern could not convert its facility's production capacities without governmental approval pursuant to their contract. *Id.* at PageID.7847. And the Government admits that it inspected Eastern and surveyed its employees. *Id.* at PageID.7847-49. Moreover, the Government concedes that it was aware that Eastern was not cleaning up its hazardous waste properly, which the Government considered "systemic" to refinery

culture. *See id.* at PageID.7849-50. The Government also contends that Eastern leased the Government's equipment to produce petroleum products. *Id.* at PageID.7850-51. Further, the Government acknowledges evidence that demonstrates it had the authority to approve or reject Eastern's employees' salaries. *Id.* at PageID. 7851. Finally, the Government admits that it was aware Eastern was disposing of hazardous waste and merely made suggestions instead of directives for disposal. *Id.* at PageID.7852.

C.

Plaintiffs have demonstrated that there is no genuine issue of material fact regarding whether the Government was an "operator" of both Gulf and Eastern. Construing the facts in the light most favorable to the Government, this Court finds that, based on the totality of the circumstances, a trier of fact could not reasonably conclude that the Government did not operate Gulf and Eastern to some extent.

The same CERCLA standard for operator liability applies to Gulf and Eastern. *See* discussion *supra* Sections II.A, II.B, II.C, III.C. The record comprises over 11,500 pages replete with communications between the Government and Gulf and Eastern that, if viewed in isolation, might be interpreted as either cooperative or coercive. But in viewing the record as a whole, no reasonable juror could disagree that the Government exercised all four of *FMC*'s four leading indicia of control over Gulf and two of four over Eastern.

The record indicates that the Government determined which petroleum products Gulf and Eastern could produce. *See* ECF Nos. 74-21 (Gulf); 77-19; 77-31 (Gulf); 77-32; 77-33; 77-34 (Gulf); 77-35; 77-36 (Gulf); 77-37 (Gulf); 77-40 (Gulf); 77-45 (Gulf); 77-46; 78-3 (Eastern). The Government also repeatedly determined Gulf's and Eastern's production levels (i.e., yield). *See* ECF Nos. 74-21 (Gulf); 77-31 (Gulf); 77-32; 77-33; 77-34 (Gulf); 77-35; 77-36 (Gulf); 77-37 (Gulf); 77-45 (Gulf); 77-46; 78-3 (Eastern). Moreover, the Government decided to whom Gulf could sell petroleum products. *See* ECF No. 74-21; 77-30 at PageID.7097; 77-43; 77-44; 77-45; 77-46. Further, the Government controlled the product prices for Gulf. *See* ECF Nos. 77-43; 77-44.

Plus, the Government publicly declared its control over the petroleum refineries and their employees; seized at least one other petroleum refinery; conducted hourly militaristic inspections of nearly every aspect of the petroleum refineries; determined and adjusted the petroleum concentration of Gulf's and Eastern's petroleum products, which inherently affected pollution levels; and was aware that processing petroleum created such waste. In sum, among other factors from operator-liability cases that suggest the Government exercised actual and substantial management, direction, or control over a refinery's pollution-producing operations to some extent, 41 factors are present regarding Gulf and 43 regarding Eastern.[20] Therefore, no reasonable juror could find that

20. First, the Government required Gulf and Eastern to process different petroleum products. *See FMC*, 29 F.3d at 853; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *6,

2; ECF Nos. 74-21 (Gulf); 77-19; 77-31 (Gulf); 77-32; 77-33; 77-34 (Gulf); 77-35; 77-36 (Gulf); 77-37 (Gulf); 77-40 (Gulf); 77-45 (Gulf); 77-46 (Gulf); 78-3 (Eastern). Second, the Government directed and supervised the production process at Gulf and Eastern by, for example, mandating product specifications and petroleum concentration. *See PPG*, 957 F.3d at 397; *FMC*, 29 F.3d at 843; *Exxon*, 108 F. Supp. 3d at 525; *Miami-Dade*, 345 F. Supp. 2d at 1341, 1344, 1346; ECF Nos. 74-21 (Gulf); 77-19; 77-31 (Gulf); 77-32; 77-33; 77-34 (Gulf); 77-35; 77-36 (Gulf); 77-37 (Gulf); 77-40 (Gulf); 77-45 (Gulf); 77-46 (Gulf); 78-3 (Eastern); *see also* ECF No. 94-14 at PageID.11060 (Gulf). Third, the Government had seized at least one other petroleum processing plant. *See PPG*, 957 F.3d at 404; *FMC*, 29 F.3d at 836; *Exxon*, 108 F. Supp. 3d at 524; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *4-6; ECF Nos. 77-49; 77-50 at PageID.7203; 78-1; 94-14 at PageID.11060 (Gulf). Fourth, the Government was aware that processing petroleum created pollution and that petroleum processing created pollution at Gulf and Eastern. *See FMC*, 29 F.3d at 838; *Exxon* 108 F. Supp. 3d at 529; ECF Nos. 77-47 (inspecting nearly every inch of the refinery from storage capacity of crude oil to "control of dust, fumes, and vapors"); 78-19 at PageID.7538; 78-20 at PageID.7569; 78-28 ("The recovery of slop oils, which is a necessary function in any refinery . . . ."); 78-29; 94-14 (ordering Gulf's "personnel working on . . . . waste oil separators" to "[r]eturn to work"). Fifth, through inspections, the Government was aware of and monitored the production of petroleum waste at Gulf and Eastern. *See FMC*, 29 F.3d at 838; *Brighton I*, 153 F.3d at 327 (Moore, J. concurring in the result); ECF Nos. 76-34 (Eastern); 77-47 (Gulf); 78-19 at PageID.7538 (Eastern); 78-20 at PageID.7569 (Eastern); 78-24 at PageID.7666 (Eastern); 78-28 (Eastern); 78-29 (Eastern); 94-14 at PageID.11060 (Gulf). Sixth, the Government had expertise and knowledge of the dangers of waste created by processing petroleum. *Brighton I*, 153 F.3d at 327 (Moore, J., concurring in the result); ECF Nos. 77-47; 78-28; 78-29; 94-14 at PageID.11060. Seventh, the Government determined the operational plans for Gulf and Eastern. *See Brighton I*, 153 F.3d at 327 (Moore, J., concurring in the result); ECF Nos. 74-25; 77-31 at PageID.7104

(Gulf); 77-32; 77-33; 77-34 (Gulf); 77-35; 77-36 (Gulf); 77-37 (Gulf); 77-40 (Gulf); 78-3 at PageID.7238, 7239 (Eastern). Eighth, the Government publicly declared responsibility over all petroleum refineries and their employees with words and actions. *See Brighton I*, 153 F.3d at 327 (Moore, J., concurring in the result); ECF Nos. 77-19 at PageID.6958 (announcing nationwide that "[a]ll U. S. refiners were notified of the change in octane rating of house brand gasoline"); 94-14 at PageID.11060 (Gulf); *see, e.g.*, 77-47 at PageID.7151 (showing at least 126 armed military guards were permanently stationed at some refineries, conducting hourly "watchmen" inspections under 24-hour ops). Ninth, the Government had more than a mere contractual relationship with Gulf and Eastern. *See Brighton I*, 153 F.3d at 315-16; ECF Nos. 77-47 (Gulf); 77-30 (Gulf); 78-3 at PageID.7234 (paying all Eastern's operational costs); 78-7 at PageID.7284, 7286 (Eastern); 78-14 (Eastern); 78-24 at PageID.7674 (approving Eastern's employees' salaries); 78-25 (Eastern); 78-26 (Eastern); 78-27 (rejecting Eastern's proposed employee salaries); 94-14 at PageID.11060 (Gulf). Tenth, the Government had quality control employees and other representatives on site. *See Miami-Dade*, 345 F. Supp. 2d at 1341-42; ECF No. 77-47. Eleventh, the Government's directives to Gulf and Eastern led to changes in their waste management. *See Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *5; ECF Nos. 74-31 at PageID.5422; 94-14 at PageID.11060. Twelfth, the Government determined which petroleum products Gulf and Eastern had to produce. *See Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *5-6; ECF Nos. 74-21 (Gulf); 77-19; 77-31 (Gulf); 77-32; 77-33; 77-34 (Gulf); 77-35; 77-36 (Gulf); 77-37 (Gulf); 77-40 (Gulf); 77-45 (Gulf); 77-46 (Gulf); 78-3 (Eastern). Thirteenth, the record indicates that the Government's directives to Gulf and Eastern were direction, not mere guidance. *See Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565 at *7; ECF Nos. 78-25 (Eastern); 78-26 (Eastern); 78-29 (Eastern); ECF No. 94-14 at PageID.11060 (Gulf). Fourteenth, the Government inspected the disposal sites at Gulf and Eastern. *See Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *1, *4, *5, *7, *8; ECF Nos. 76-34 (Eastern); 77-47 (Gulf); 78-7 at

PageID.7286 (Eastern); 78-31 (Eastern); 78-32 (Eastern); 78-33 (Eastern); 78-34 (Eastern); 78-35 (Eastern). Fifteenth, the Government had officials who worked on site. *See Exxon*, 108 F. Supp. 3d at 526; ECF No. 77-47. Sixteenth, the Government was permanently stationed on site. *See Exxon*, 108 F. Supp. 3d at 525-26, 532; ECF No. 77-47; 94-14 at PageID.11060. Seventeenth, Gulf and Eastern resembled a military base. *See Exxon*, 108 F. Supp. 3d at 533; ECF No. 77-47 (Gulf). Eighteenth, the Government controlled the priority of orders for petroleum products at Gulf and Eastern. *See PPG*, 957 F.3d at 397, 403; ECF No. 74-21 (Gulf); 74-45; 77-45 (Gulf); 77-46 (Gulf). Nineteenth, the Government participated in decisions related to pollution at Gulf and Eastern. *See Exxon*, 108 F. Supp. 3d at 527; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *8; ECF No. 74-31 at PageID.5422; 77-30 at PageID.7097 (Gulf); 94-14 at PageID.11060 (Gulf). Twentieth, the Government approved expansion projects at Gulf and Eastern. *See* PPG, 957 F.3d at 398; ECF Nos. 77-30 at PageID.7097 (Gulf); 77-31 at PageID.7104 (Gulf); 77-39 (Gulf); 77-41 (Gulf); 78-3 (Eastern); 78-4 (Eastern); 78-5 (Eastern); 78-6 (Eastern); 78-7 (Eastern); 78-8 (Eastern); 78-9 (Eastern); 78-14 (Eastern). Twenty-first, the Government required approval for changes to Gulf's and Eastern's facility. *See Exxon*, 108 F. Supp. 3d at 495, 502-03; ECF Nos. 77-30 at PageID.7097 (Gulf); 77-31 at PageID.7104 (Gulf); 77-39 (Gulf); 77-41 (Gulf); 78-3 (Eastern); 78-4 (Eastern); 78-5 (Eastern); 78-6 (Eastern); 78-7 (Eastern); 78-8 (Eastern); 78-9 (Eastern). Twenty-second, the Government, in part, established and designed Gulf and Eastern. *See Brighton I*, 153 F.3d at 327 (Moore, J., concurring in the result); *See Exxon*, 108 F. Supp. 3d at 526; ECF Nos. 77-30 at PageID.7097 (Gulf); 77-39 (Gulf); 77-41 (Gulf); 78-3 at PageID.7238 (Eastern); 78-7 at PageID.7284, 7286 (Eastern); 78-14 (Eastern). Twenty-third, the Government, participated in the opening and closing of Gulf and Eastern. *See Brighton I*, 153 F.3d at 327 (Moore, J., concurring in the result); ECF Nos. 77-49 at PageID.7177 (Gulf); 78-7 at PageID.7284 (Eastern); 78-14 (Eastern). Twenty-fourth, the Government had some control over waste disposal at Gulf and Eastern. *See Brighton I*, 153 F.3d at 327 (Moore, J., concurring in

the result); ECF Nos. 76-34 (Eastern); 77-30 at PageID.7097 (Gulf); 78-28 (Eastern). Twenty-fifth, the Government provided financial assistance to Gulf and Eastern to process petroleum. *See Miami-Dade*, 345 F. Supp. 2d at 1341; ECF Nos. 77-30 at PageID.7097 (Gulf); 77-46 (Gulf); 78-3 at PageID.7234 (Eastern); 78-8 at PageID.7284 (Eastern). Twenty-sixth, the Government supervised or was involved with the hiring and firing of employees involved in cleaning or producing petroleum waste at Gulf and Eastern. *See Brighton I*, 153 F.3d at 327 (Moore, J., concurring in the result); *Exxon*, 108 F. Supp. 3d at 526; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *6; *Miami-Dade*, 345 F. Supp. 2d at 1342; ECF Nos. 77-49 at PageID.7177 (Gulf); 78-24 at PageID.7666 (Eastern); 78-25 (Eastern); 94-14 at PageID.11060 (Gulf). Twenty-seventh, the Government owned some of the materials used at Gulf and Eastern. *See Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *4; ECF Nos. 77-38 (Gulf); 78-7 at PageID.7284 (Eastern); 78-14 (Eastern). Twenty-eighth, the Government lent significant amounts of money to Gulf and Eastern to produce petroleum products. *See Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *5; ECF Nos. 77-46 (Gulf); 78-3 at PageID.7234 (Eastern). Twenty-ninth, the Government told Gulf and Eastern whether, when, how, or where to dispose of waste. *See Exxon*, 108 F. Supp. 3d at 528; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *8; ECF No. 76-34 (Eastern); 77-30 at PageID.7097 (Gulf). Thirtieth, the Government negotiated with Gulf and Eastern and specified how they should dispose of waste. *See Exxon*, 108 F. Supp. 3d at 525; ECF Nos. 76-34 (Eastern); 77-30 at PageID.7097 (Gulf); 78-24 at PageID.7666 (Eastern); 76-34 (Eastern). Thirtyfirst, the Government subsidized some of Gulf's and Eastern's purchases of the raw materials they used to process petroleum products. *See PPG*, 957 F.3d at 398; ECF Nos. 77-30 at PageID.7097 (Gulf); 77-46 (Gulf); 78-3 at PageID.7234 (Eastern). Thirty-second, the Government designed, specified, or provided some of the equipment and machinery needed to process petroleum at Gulf and Eastern. *See FMC*, 29 F.3d at 838; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *5-6; ECF Nos. 77-30 at PageID.7097 (Gulf); 77-39 (Gulf); 77-41 (Gulf); 78-7 at PageID.7284 (Eastern); 78-14 (Eastern).

Thirty-third, the Government dictated the quantity of petroleum products Gulf could sell. *See PPG*, 957 F.3d at 403; ECF No. 75-45 at PageID.7143. Thirty-fourth, the Government sent an on-site supervisor to Gulf. *See FMC*, 29 F.3d at 838; ECF No. 94-14 at PageID.11060. Thirty-fifth, the Government supervised some of Gulf's pollution-related employees. *See FMC*, 29 F.3d at 838; ECF No. 94-14 at PageID.11060. Thirty-sixth, the Government set and adjusted Gulf's production quotas. *See PPG*, 957 F.3d at 397, 400, 403; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565 at *4-6; ECF Nos. 74-21; 77-30 at PageID.7097; 77-43; 77-44; 77-45 at PageID.7143; 77-46. Thirty-seventh, the Government determined who could purchase Gulf's petroleum products. *See PPG*, 957 F.3d at 397, 400, 403; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565 at *4-6; ECF Nos. 74-21; 77-30 at PageID.7097; 77-43; 77-44; 77-45 at PageID.7143; 77-46. Thirty-eighth, the Government required Gulf to send regular reports regarding petroleum processing. *See Exxon*, 108 F. Supp. 3d at 509, 527, 532; ECF Nos. 74-21; 74-43; 74-44; 74-45 at PageID.7143; 74-48. Thirty-ninth, the Government determined Gulf's sales prices. *See PPG*, 957 F.3d at 397, 400, 403; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565 at *4-6; ECF Nos. 77-43; 77-44. Fortieth, at least one employee of the Government filled a position at Gulf. *See Miami-Dade*, 345 F. Supp. 2d at 1342; ECF No. 94-14 at PageID.11060. Forty-first, the Government reimbursed Gulf for the purchase of some of its petroleum-processing equipment. *See Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *5; ECF No. 77-30 at PageID.7097. Forty-second, Eastern produced petroleum products exclusively for the Government. *See Bestfoods*, 524 U.S. at 72; ECF No. 78-8 at PageID.7290. Forty-third, the Government oversaw the hiring and firing of employees involved in cleaning or producing petroleum waste at Eastern. *See Brighton I*, 153 F.3d at 327 (Moore, J., concurring in the result); *Exxon*, 108 F. Supp. 3d at 526; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *6; ECF Nos. 78-24 at PageID.7666, 7674; 78-25; 78-26; 78-27. Forty-fifth, the Government audited some of Eastern's pollution-related costs. *See Miami-Dade*, 345 F. Supp. 2d at 1341, 1344; ECF Nos. 78-3; 78-5 at PageID.7257; 78-7 at PageID.7285, 7286; 78-24 at PageID.7674; 78-

the extent of the Government's management, direction, and control over Gulf and Eastern had nothing "to do with" the amount of waste it produced. *See Bestfoods*, 524 U.S. at 66.

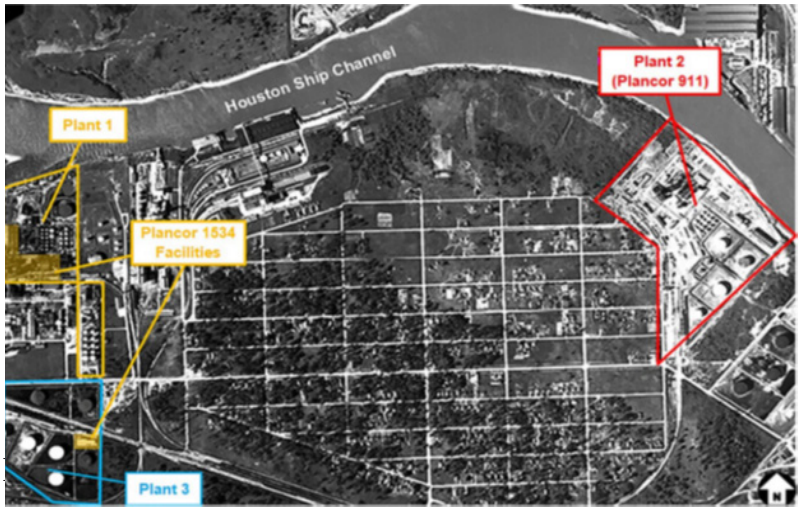
VI.

Plaintiffs also claim that "the Government is a 'prior owner' of the Houston Refinery and therefore is a 'potentially responsible party' subject to response costs under CERCLA." *See generally* ECF No. 68 at PageID.1073, 1104-06 (quoting 42 U.S.C. § 9607(a)(2)).

25; 78-26; 78-27. Forty-sixth, Eastern believed that the Government was at least in part responsible for or involved with its waste-related operations. *See Miami-Dade*, 345 F. Supp. 2d at 1346; ECF No. 76-34. Forty-seventh, the Government leased or owned all the facilities and land at Eastern. *See Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *4; *Miami-Dade*, 345 F. Supp. 2d at 1351, 1354-55; ECF Nos. 78-7 at PageID.7284; 78-14. Forty-eighth, the Government owned or leased some of the disposal sites at Eastern. *See Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *4; *Miami-Dade*, 345 F. Supp. 2d at 1354-55; ECF Nos. 78-7 at PageID.7284; 78-14. Forty-ninth, the Government owned some of Eastern's land. *See Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *4; ECF Nos. 78-7 at PageID.7284; 78-14. Fiftieth, the Government had unfettered control over waste-related activities at Eastern. *See Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565; ECF No. 76-34. Fifty-first, the Government directed some of Eastern's waste-disposal activities. *See Exxon*, 108 F. Supp. 3d at 495, 531; *Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *5; ECF Nos. 76-34; 78-24 at PageID.7666. Fifty-second, the Government controlled Eastern's waste-disposal mechanics. *See Steadfast*, 2009 U.S. Dist. LEXIS 104681, 2009 WL 3785565, at *6; ECF No. 76-34. Fifty-third, the Government authorized wage increases at Eastern. *See PPG*, 957 F.3d at 397; ECF Nos. 78-24 at PageID.7674; 78-25; 78-26; 78-27.

Appendix D

The following photograph illustrates the entire Houston "facility" (i.e., "Eastern"):



As shown above, Eastern consists of two Plancors[21]: Plancor 1534 to the West (entailing one facility within Plant 1 and one facility with Plant 3), and Plancor 911 to the East (entailing all of Plant 2). According to Plaintiffs, the Government owned all of Eastern, because Eastern is one "facility" under CERLCA and the Government owned part of it, specifically Plancor 911. But for the reasons discussed hereafter, the Government is not a "prior owner" of all of Eastern.

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21. The term "Plancor" was a contraction of "Plant Corporation" and was used by the Government to designate, administer, and monitor the plants built to support the war effort. Across the nation, there were as many as 2,511 Defense Plant Corporation "Plancor" facilities, designated as Plancor 1 through 2511. Don Strack, *Defense Plant Corporation: Overview*, UtahRails.Net (Feb. 23, 2015), https://utahrails.net/industries/defense-plant-corp.php [https://perma.cc/W2GL-AMJ4].

Appendix D

A.

Owner liability involves less foggy criteria than operator liability. CERCLA imposes liability on the person or entity that possesses legal title to the contaminating facility. *United States v. A & N Cleaners & Launderers, Inc.*, 788 F. Supp. 1317, 1332 (S.D.N.Y. 1992) ("Mere ownership of the property on which the release took place is sufficient to impose liability under § 107(a), regardless of any control or lack or control over the disposal activities."). Indeed, courts have imposed liability on a facility's titleholder despite arguments that the owner had no responsibility or control over the disposal activity. *See, e.g., United States v. Monsanto Co.*, 858 F.2d 160, 168 (4th Cir. 1988) ("The plain language of section 107(a)(2) extends liability to owners of waste facilities *regardless of their degree of participation* in the subsequent disposal of hazardous waste." (emphasis added)).

But some courts have extended owner liability to lessees who sublet a site but maintained control over it. *United States v. A & N Cleaners and Launderers, Inc.*, 788 F. Supp. 1317 (S.D.N.Y. 1992) (holding that lessee bank that subleased property to dry cleaner operator was an "owner" subject to liability under 42 U.S.C. § 9607(a)(2) since bank had site control and responsibility for the use of the site). Yet other courts have excluded from owner liability persons and entities that possess an easement but not legal title. *See, e.g., Lincoln Props., Ltd. v. Higgins*, 823 F. Supp. 1528 (E.D. Cal. 1992) (county that had an easement in a sewer line but had no possessory interest or authority to determine how the line would be used under

California law was not an owner under CERCLA).[22] So, where does a lessee that does not sublease the property fit into the owner-liability inquiry?

B.

It is an elementary legal principle that owners and lessees have legally distinct property interests. The problem is that, as noted *supra* Part II, CERCLA defines "owner" by tautology as "any person . . . owning the facility." 42 U.S.C. § 9601(20)(A)(ii). So, who is "owning the facility"? An owner.

An "owner" is "[o]ne who has the legal or rightful title, *whether the possessor or not*." WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 1745 (1935) (emphasis added). Thus, possessor and titleholder are distinct identities—albeit not mutually exclusive. Indeed, a lease "divides the interests in property between a landlord and a tenant." LaVonda N. Reed-Huff, *Are You Still Settling for Cable? A Case for Broader Application of the FCC's Over-the-Air Reception Devices Rule*, 26 HASTINGS COMM. & ENT. L.J. 179, 215-16 (2004). Through a lease, a tenant generally receives "some but not all of the[] ownership interest," which is wholly distinct from a transfer of all rights. *Id.* at 216.

22. Courts also agree that a parent corporation may be held liable as an owner of its subsidiary's facility if piercing the corporate veil is warranted. *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209 (3rd Cir. 1993); *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990).

Because private property rights are creatures of state law, *see Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), this Court must look to Texas law to determine what the Government "owned" under CERCLA. *See* ECF No. 68-2 at PageID.1182-83 (noting Eastern is in Houston, Texas).

Under Texas law, a title-holding lessor is a legal *owner* of property who gives a *lessee* the right to use or occupy the property for an agreed length of time. *See Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 918 (Tex. 2013) (treating owners and lessees as having distinct property interests) (citing *ICM Mortg. Corp. v. Jacob*, 902 S.W.2d 527, 530 (Tex. App. 1994)); *see also Freestone Power Generation, LLC v. Texas Comm'n on Env't Quality*, 564 S.W.3d 1, 14 (Tex. App. 2017) (same under Texas environmental law), *aff'd sub nom. Texas Comm'n on Env't Quality v. Brazos Valley Energy, LLC*, 582 S.W.3d 277 (Tex. 2019). *See generally* Tex. Prop. Code Ann. § 92 *et seq.* (same under Texas property law); *Marathon Oil Co. v. Rone*, 83 S.W.2d 1028 (Tex. Civ. App. 1935) (same during WWII).

So, the operative question is: Did the Government possess legal title to any property at Eastern other than Plancor 911? The answer is "No."

C.

Eastern States Petroleum Corp. owned all the real property at Eastern except Plancor 911. Indeed, the record suggests that the Government merely leased

and, therefore, did not own title to the land on which the Plancor 1534 facilities were located (i.e., Plant 1 and Plant 3). Specifically, the Government signed a lease agreement on December 5, 1942, to rent that land from Eastern "for a term of 20 years at $1 per year." *See* ECF No. 78-3 at PageID.7231, 7234. Therefore, the Government did not "own" the Plancor 1534 facilities.[23]

Plaintiffs are correct that "[s]tatutory intent and case law supports treatment of the Houston Refinery as one integrated CERCLA facility." ECF No. 68 at PageID.1105 (citing 42 U.S.C. § 9601(9); then citing *Bestfoods*, 524 U.S. at 56; then citing *Exxon*, 108 F. Supp. 3d at 517-19; and then citing *Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F. Supp. 2d 693, 708-10 (W.D. Ky. 2003)). Indeed, the Government conceded that its facility was "dependent upon [Eastern's]" and "could not operate within itself." ECF No. 78-9 at PageID.7343. But Plaintiffs conflate two of CERCLA's provisions, which "must 'be read as a whole.'" *United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 135, 127 S. Ct. 2331, 168 L. Ed. 2d 28 (2007) (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221, 112 S. Ct. 570, 116 L. Ed. 2d 578 (1991).

The inquiry regarding whether a property is a CERCLA-covered "facility" is distinct from whether a person or entity is an "owner" of that facility. Indeed, CERCLA contemplates situations involving property

23. The Government believes it "owned" the Plancor 1534 facilities. *See* ECF No. 81-2 at PageID.7485. But as discussed above, that is simply untrue as a matter of law. Therefore, this Court will not consider that issue further.

owners of contiguous facilities. *See* 42 U.S.C. § 9607 (q)(1)(A)(ii)(I).

In other words, owners of separate real property are not necessarily liable for each other's clean-up costs simply because their respective properties are considered one "facility" under CERLCA. After determining whether a property is a "facility," the court must still determine if any affiliated parties are an "owner," "operator," "arranger," or some combination thereof. To hold otherwise would offend the rule against surplusage. *TMW Enters., Inc. v. Fed. Ins. Co.*, 619 F.3d 574, 578 (6th Cir. 2010) ("Where there are two ways to read the text—and the one that avoids surplusage makes the text ambiguous—applying the rule against surplusage is, absent other indications, inappropriate." (quotations and citation omitted)).

Nothing in CERCLA's text or history compels the adaptation of Plaintiffs' extratextual hybrid criteria. Although a leasehold interest in a property subject to CERCLA cost recovery might indicate some degree of operator liability, it says *nothing* of owner liability. *See Brighton I*, 153 F.3d at 315 n.10 ("Since . . . the entire site is defined as a single facility, if Brighton Township exercised *authority over the facility*, it is liable." (emphasis added)). That is, under CERCLA, "the things you [did not] used to own [do not] own you." *See* CHUCK PALAHNIUK, FIGHT CLUB 44 (2005). Therefore, the Government was an "owner" of only Plancor 911 and did not "own" all, or any other part, of Eastern.

Appendix D

VII.

As a final matter, the Government objects to the admissibility of two of Plaintiffs' exhibits. It claims that the expert reports prepared by A.J. Gravel, ECF No. 74-18, and David Lerman, ECF No. 74-32, are "inadmissible hearsay" under Federal Rules of Evidence 801 and 802. ECF No. 80. But given the overwhelming evidence favoring operator liability for the Government, this Court did not consider those reports. Therefore, the Government's objection will be overruled as moot.

VIII.

Accordingly, it is **ORDERED** that Plaintiffs' Motion for Summary Judgment, ECF No. 68, is **GRANTED IN PART AND DENIED IN PART**. Plaintiffs' Motion is **GRANTED** as to the request for a declaration that the Government is liable as an operator of all 12 facilities. Plaintiffs' Motion is **DENIED** as to the request for a declaration that the Government was an owner of the Plancor 1534 Facilities or the entire Eastern facility; the Government owned only the portion of Plancor 911 to which it held legal title.

Further, it is **ORDERED** that the Government's Motion for Summary Judgment, ECF No. 81, is **GRANTED IN PART AND DENIED IN PART**. The Government's Motion is **GRANTED** as to the request for a declaration that the Government was not an owner of the Plancor 1534 Facilities or the entire Eastern facility; the Government owned only the portion of Plancor 911

to which it held legal title. The Government's Motion is **DENIED** in all other respects.

Further, it is **ORDERED** that Defendant's Objection, ECF No. 80, is **OVERRULED AS MOOT**.

Further, it is **ORDERED** that the case shall **PROCEED** to Phase 2 (Damages) regarding all remaining issues.

Dated: December 9, 2021

/s/ Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED JULY 26, 2023

Case No. 22-1789

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

MRP PROPERTIES COMPANY, LLC; VALERO REFINING COMPANY - OKLAHOMA; PREMCOR REFINING GROUP INC.; ULTRAMAR, INC.; VALERO REFINING COMPANY - TENNESSEE LLC; VALERO REFINING - TEXAS, L.P.,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant.

BEFORE: SUTTON, Chief Circuit Judge; BATCHELDER and STRANCH, Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellees, and in further consideration of the response filed in opposition,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/_____
Deborah S. Hunt, Clerk

Issued: July 26, 2023

APPENDIX F — RELEVANT STATUTORY PROVISIONS

42 U.S.C. § 9601

For purpose of this subchapter--

[. . .]

(20)(A) The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

[. . .]

42 U.S.C. § 9607

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

> **(A)** all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> **(B)** any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

[. . .]