

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CITY OF BANGOR,)	
)	
Plaintiff,)	
)	
v.)	Civil No. 02-183-B-S
)	
CITIZENS COMMUNICATIONS)	
COMPANY,)	
)	
Defendant and)	
Third-Party Plaintiff,)	
)	
v.)	
)	
BARRETT PAVING MATERIALS, INC.,)	
<u>et al.</u> ,)	
)	
Third-Party Defendants)	

**RECOMMENDED DECISION ON THIRD-PARTY DEFENDANT
UNITED STATES ARMY CORPS OF ENGINEERS’S
MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AND
MOTION TO DISMISS ALL THIRD-PARTY CLAIMS**

The City of Bangor filed suit against Citizens Communications Company seeking, among other relief, a judgment ordering Citizens to “pay all of the costs” incurred by the City in association with its ongoing “investigation, corrective action and other response actions” to remediate hazardous substances present in a certain tar slick on the bottom of the Penobscot River.¹ The relief is requested pursuant to the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”), 42 U.S.C. §§ 9601-9626. In response, Citizens filed ten third-party complaints² seeking contribution toward the City’s recovery, in the event

¹ Second Am. Compl., Docket No. 175, ¶¶ 37, 41.

² Docket Nos. 17-27.

that Citizens is found liable for the City's CERCLA response costs. In turn, the third-party defendants have counter-claimed against Citizens and cross-claimed against each other. Among the third-party defendants is the United States Army Corps of Engineers. The Corps now moves for partial judgment on the pleadings,³ seeking an entry of judgment against Citizens's third-party CERCLA claims and all derivative CERCLA claims filed against the Corps.⁴ According to the Corps, the plaintiff City is a potentially responsible party (PRP) under CERCLA and, as such, its only available CERCLA remedy against Citizens is a claim for contribution. Because a contribution action against Citizens does not expose Citizens to liability beyond its equitable share in the City's response costs, the Corps argues that Citizens has no legal basis to seek contribution from third-parties. In a separate motion,⁵ the Corps moves to dismiss all third-party "tort" claims against the Corps on the ground that sovereign immunity strips this Court of subject matter jurisdiction over the same. I recommend that the Court grant both motions.

Facts

The background facts of this litigation are more extensively set forth in a companion Recommended Decision on Citizens's motion for partial summary judgment, issued on even date herewith. The recommendations made herein are based, in part, on the recommendations contained therein. In a nutshell, the City of Bangor, the plaintiff, seeks to recover from Citizens Communications Company, the defendant and third-party plaintiff, CERCLA "response costs" associated with the City's effort to "respond" to or "remediate" a tar slick existing in the Penobscot River. In turn, Citizens seeks contribution in numerous third-party complaints "for

³ Docket No. 207.

⁴ Docket Nos. 18, 81, 84, 93, 97, 202.

⁵ Docket No. 218.

any environmental cleanup costs or other harms [sic] for which it is held liable in the underlying action.” (Docket No. 18, ¶ 7.) According to Citizens’s third-party complaint against the Corps:

11. On several occasions beginning in or about 1908, the Corps participated in dredging activities on the Brewer side of the Penobscot River.
12. During these dredgings, tens of thousands of cubic yards of sediment and debris were removed from the Penobscot [R]iver bottom on the Brewer side of the [R]iver.
13. Some or all of the sediment and debris [was] dumped on the Bangor side of the Penobscot River at or near the outfall of what the City’s Amended Complaint calls the Old Stone Sewer.
14. Upon information and belief, the sediment and debris removed from the Brewer side of the Penobscot and dumped on the Bangor side of the Penobscot contained hazardous substances and hazardous wastes, some of which may have originated at [a] manufactured gas plant in Brewer.

(Citizens Communications Co.’s 3d Party Compl. against the U.S. Army Corps of Eng’rs, Docket No. 18.)

The non-CERCLA claims asserted against the Corps by Citizens and the third parties are for declaratory relief, common law contribution, common law indemnification and common law negligence.

The Corps’s Motion for Judgment on the Pleadings

The Corps moves for judgment on the pleadings against “all third-party claims and cross-claims filed against the United States under the [CERCLA].” (Docket No. 207 at 1.)⁶

After the pleadings are closed but within such time as not to delay the trial, any party may move for “judgment on the pleadings.” Fed. R. Civ. P. 12(c). In deciding whether to grant judgment for the moving party, the Court must “accept all of the nonmoving party’s well-pleaded factual averments as true and draw all reasonable inferences in [his] favor.” Feliciano v. Rhode Island, 160 F.3d 780, 788 (1st Cir. 1998). Judgment on the pleadings is not appropriate “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his

⁶ The claims referenced in the Corps’s motion are found at docket numbers 18, 81, 84, 93, 97 and 202. Parties weighing in on this motion include Honeywell (Docket No. 239), Barrett Paving (Docket No. 240), and City of Bangor (Docket No. 238).

claim which would entitle him to relief.” Rivera-Gomez v. De Castro, 843 F.2d 631, 635 (1st Cir. 1988).

In addition to the pleadings themselves, the Court may consider certain attachments to the pleadings without converting the motion into one for summary judgment. Rubert-Torres ex. rel. Cintron-Rubert v. Hosp. San Pablo, Inc., 205 F.3d 472, 476 (1st Cir. 2000). Specifically, it may consider “documents the authenticity of which are not disputed by the parties; . . . official public records; . . . documents central to plaintiffs’ claim; or . . . documents sufficiently referred to in the complaint.” Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993).

Shapiro v. Haenn, 190 F. Supp. 2d 64, 66 (D. Me. 2002). This is not an ordinary motion for judgment on the pleadings. As discussed herein, the entire thrust of the Corps’s motion depends on a finding that the City is a PRP. While there is nothing inappropriate about the Corps’s desire to establish this fact, none of three arguments it provides for making such a finding is persuasive. Two of the arguments, which are based exclusively on the contents of the pleadings themselves, are thoroughly unpersuasive.⁷ The third argument, discussed in the following section, presents a more appropriate factual contest, although ultimately it is also unpersuasive. Nevertheless, I have not recommended that the Court automatically deny the instant motion because I have recommended in a companion Recommended Decision on Citizens’s motion for partial summary judgment that the Court find the City to be a PRP and dismiss the City’s claims for joint and several liability. Assuming that the Court accepts that recommendation, it will be the “law of the

⁷ The Corps contends that the Court must conclude, for purposes of disposing of Citizens’s third-party claim against the Corps, that the City is a PRP because the City did not raise any defense to such a finding in its complaint against Citizens. (Corps’s Mot. for Partial J. on Pleadings, Docket No. 207, at 7.) The logic of this argument escapes me entirely. There is no precedent that I am aware of that requires a CERCLA plaintiff to allege a defense to CERCLA liability in order to assert a CERCLA claim for joint and several liability in a complaint. Alternatively, the Corps argues that the finding is required because Citizens’s counterclaim against the City depends on a finding that the City is potentially responsible and because the “third-party complaint [against the Corps] does not allege that [Citizens] has or will incur more than its equitable share of response costs in connection with cleaning up the Penobscot River.” (Id. at 8.) I do not consider this argument to be particularly persuasive either. Although I agree that a party subject only to CERCLA contribution liability cannot maintain a derivative, third-party CERCLA contribution claim, it is illogical to suggest that such a party cannot at once deny joint and several liability on the underlying complaint while still pursuing third-party claims that may depend on the imposition of joint and several liability. If these were the only justifications for entering judgment on the pleadings, I would have recommended that the Court deny the motion without a second thought.

case” that the City is a PRP with respect to the Penobscot River tar slick and the City’s joint and several claims (claims for “full recovery”) will be dismissed. Rather than resolving the instant motion in a vacuum, it appears more appropriate to take notice of the impact such a finding will naturally have on derivative claims by virtue of the law of the case doctrine. Such an application is fair as respects the City because the City was the object of, and fully participated in, Citizens’s summary judgment motion.

The law of the case doctrine is a “prudential principle that ‘precludes relitigation of the legal issues presented in successive stages of a single case once those issues have been decided.’” Field v. Mans, 157 F.3d 35, 40 (1st Cir. 1998) (quoting Cohen v. Brown Univ., 101 F.3d 155, 167 (1st Cir. 1996)). Although the instant motion and Citizens’s motion are essentially being treated simultaneously, that should not preclude application of the doctrine in this instance. Indeed, the Court would be free to withhold its disposition on the instant motion until judgment has entered on Citizens’s partial summary judgment motion.

If the PRP recommendation is adopted and incorporated into the instant motion, it will serve to convert the instant motion to a motion for summary judgment. Conversion of the motion in this fashion is fair because both parties have submitted materials extraneous to the pleadings in conjunction with the instant motion. Pursuant to Rule 56, judgment should enter only if “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); United States Steel v. M. DeMatteo Constr. Co., 315 F.3d 43, 48 (1st Cir. 2002).

1. The City’s PRP Status

In a companion Recommended Decision on Citizens’s motion for partial summary judgment on the City’s CERCLA claims for “full recovery,” I have recommended that the Court

find the City to be a potentially responsible party (PRP) for the tar slick in the Penobscot River pursuant to CERCLA § 107(a)(1), (2) and (3), 42 U.S.C. § 6907(a)(1), (2), (3), based on the City's ownership of part of the River facility and its operation/installation and arrangement of the sewer that facilitated the disposal of hazardous waste into the Penobscot River. The facts on which that recommendation is based are not repeated here. If accepted, that recommendation would resolve one aspect of the Corps's motion for judgment on the pleadings.

If the companion recommendation is not accepted, the Corps offers one additional ground to support the finding of PRP status: that the response costs incurred by the City in this case were incurred "pursuant to an enforceable settlement or cost-sharing agreement with a governmental regulatory agency." (Docket No. 207 at 12.) The City responds that the Corps has misconstrued the nature of a Memorandum of Agreement (MOA) between the City and the Maine Department of Environmental Protection (MDEP) as a "settlement agreement" rather than as a "cost sharing agreement." (Docket No. 238 at 1, 5-9.) The MOA is attached to the Corps's motion as exhibit 1. (Docket No. 207, Ex. 1.) It is captioned "Memorandum of Agreement Between the State of Maine and the City of Bangor Regarding Investigation of a Site Located in the City of Bangor Known as the Bangor Landing Site." (Id.)

The Corps's lead case is Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 351 (6th Cir. 1998). In Centerior, the United States Environmental Protection Agency (EPA) inspected a site and identified several PRPs that had contributed to the presence of hazardous substances there. Based on its findings, "the EPA issued a unilateral Administrative Order to the plaintiffs under CERCLA § 106, which required the plaintiffs to undertake and complete an emergency cleanup of the site." Id. at 346. The Centerior Court held that the plaintiffs were PRPs, in part because "[p]ursuant to a § 106 order they had a legal obligation to

conduct the site cleanup, which they fulfilled and in so doing, paid more than their fair share of the obligation.” Id. at 351. The Centerior Court observed, “Under the common law . . . there was no requirement that a party be ‘adjudged’ liable before seeking contribution It was enough that a plaintiff act under some compulsion or legal obligation to an injured party when he or she discharged the payment.” Id. Therefore, the court rejected an argument by the plaintiffs that they could maintain a claim for full recovery of costs because the EPA had never taken them to court for an adjudication of liability. Id. at 352 (“Contribution . . . applies in claims such as these where a potentially responsible party has been compelled to pay for response costs for which others are also liable, and who seeks reimbursement for such costs.”).

A review of the MOA reveals that it serves only to memorialize a cost sharing arrangement entered into by the City and the State with regard to certain “additional site work” sought by the City “with a view towards future remediation of the Penobscot River as well as providing a factual basis for arranging for contribution and/or indemnification of the City’s response costs from any potentially responsible party.” (Docket No. 207, Ex. 1 at 2.) The additional site work concerns investigative work performed by an environmental engineering and consulting firm to determine, among other things, “the vertical and horizontal extent of the tar deposit,” to perform an “Ecological Risk Assessment and Human Risk Assessment,” to recommend “Target Cleanup Levels” and to conduct a “Feasibility Study . . . to assess remediation options concerning the tar deposit.” Id. In the MOA’s twelfth provision, it is written that “nothing contained herein shall be deemed or construed to be an acknowledgement of liability by either Party under any federal, state, or local law . . . or any other principle of law.” (Id. at 10.)

Contrary to the Corps's characterization, the MOA does nothing to demonstrate the City's status as a PRP. The MOA is, as the City contends, a cost sharing arrangement for investigative site work.⁸ Because the MOA does not compel the City to assume response costs and does not involve any administrative finding of liability, it does not create an alternative basis for finding the City to be a PRP. Nevertheless, I have found the City to be a PRP in the companion Recommended Decision, and the balance of this recommendation on the instant motion proceeds on that basis.

2. *Tenability of the third-party contribution claims*

According to the Corps, Citizens may not maintain claims for contribution against third parties because the City, as a PRP, can only maintain a claim against Citizens for recovery of Citizens's proportional share of the costs. In other words, because Citizens is not exposed in the primary complaint to legal liability beyond its equitable share of responsibility, Citizens cannot be required to discharge the liability of others and, therefore, has no basis to pursue third-party contribution claims against them. (Docket No. 207 at 14.) Citizens responds that the City's status as a PRP-plaintiff does not preclude third-party claims because the City's suit has caused Citizens to incur its own response costs, which provides Citizens with an independent basis for its contribution claims. "Those response costs include substantial payments to Citizens'[s] consultants for evaluation, investigation, testing and characterization of the environmental conditions in and around the Penobscot River." (Docket No. 242 at 6.)

The contribution remedy set forth in CERCLA § 113(f) is generally to be construed in accordance with the common law. United Techs. Corp. v. Browning-Ferris Indus., Inc., 33 F.3d 96, 99 (1st Cir. 1994) ("UTC") ("Under accepted canons of construction, legal terms used in

⁸ The City also offers that the MOA is an agreement that it voluntarily sought out, offering affidavit testimony to that effect. (Docket No. 238, Ex. 1, ¶¶ 4-6.) Given the nature of the MOA itself, I do not think that the Court needs to open the record to consider testimonial evidence.

framing a statute are ordinarily presumed to have been intended to convey their customary legal meaning. . . . [A]bsent evidence that Congress had a different, more exotic definition in mind, we are inclined, in parsing 42 U.S.C. § 9613, to give the word ‘contribution’ its generally accepted legal meaning.”). The Restatement of Torts (Second) § 886A, “Contribution Among Tortfeasors,” provides that:

- (1) [W]hen two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them, even though judgment has not been recovered against all or any of them
- (2) The right of contribution exists only in favor of a tortfeasor who has discharged the entire claim for the harm by paying more than his equitable share of the common liability, and is limited to the amount paid by him in excess of his share.

The First Circuit Court of Appeals has construed the § 113 remedy accordingly, holding that it allows a “‘non-innocent’ party . . . only to seek recoupment of that portion of his expenditures which exceeds his pro rata share of the overall liability.” UTC, 33 F.3d at 100.

The City has incurred and intends to incur considerable response costs in connection with the cleanup of environmental contamination for which it, Citizens and possibly all of the third-party defendants are potentially responsible. As the party expending response costs in the context of a voluntary cleanup, the City claims it is entitled to recoup its costs from any and all of its fellow PRPs.⁹ However, the City has chosen to pursue its remedy exclusively against

⁹ Currently before the Supreme Court is the question, not raised by the parties herein, of whether a polluter who incurs response costs voluntarily, *i.e.*, in the absence of a civil action or enforcement proceeding by the United States or a state, see 42 U.S.C. §§ 106 & 107(a)(4)(A), has standing to pursue a contribution remedy pursuant to § 113(f), the remedy requested by the City in its third and fourth counts. The countervailing arguments are thoroughly set forth in Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F.3d 677 (5th Cir. 2002) (en banc) (Barksdale, Garza and Smitt, JJ., dissenting), cert. granted, 124 S.Ct. 981 (2004) and in E.I. Du Pont De Nemours and Co. v. United States, 297 F. Supp. 2d 740 (D. N.J. Jan. 5, 2004) (presenting an alternative to the two positions set forth in Aviall). This issue focuses on the nature of a contribution action as one in which the contribution plaintiff has already extinguished the contribution defendant’s liability and on the limiting temporal language used by Congress in section 113(f):

Citizens. But because the City is itself a PRP, Citizens is exposed to liability for, at most, only its equitable share in the City's response costs. Id. Having no liability beyond its equitable share, Citizens has no basis to seek contribution towards the City's response costs from third parties, regardless of the fact that they might also be potentially responsible for the contamination at issue. Because Citizens will not be called upon to pay more than its equitable share of the City's response costs, its third-party claims seeking contribution toward the City's response costs should be dismissed. FMC Corp. v. Vendo Co., 196 F. Supp. 2d 1023, 1035 (E.D. Cal. 2002); City of Merced v. R.A. Fields, 997 F. Supp. 1326, 1333 (E.D. Cal. 1998). Cf. Amland Props. Corp. v. Aluminum Co. of Am., 808 F. Supp. 1187, 1999 (D. N.J. 1992) (addressing a claim for contribution pursuant to § 113(f)(1), brought by a party who had settled a private CERCLA suit to obtain contribution from non-settling third-parties, and concluding that "the more general policy considerations behind CERCLA mandate adoption of the common law rule that a settling party must have extinguished the liability of a party before seeking contribution from that party.") By extension, all third-party claims and cross-claims that derive from Citizens's third-party CERCLA claims under CERCLA for contribution toward the City's response costs are subject to dismissal as well.

Any person may seek contribution from any other person who is liable or potentially liable under section 107(a) [42 U.S.C. § 9607(a)], during or following any civil action under section 106 [42 U.S.C. § 9606] or under section 107(a).

42 U.S.C. § 9613(f) (emphasis added). See also Aviall, 312 F.3d at 682-83 (discussing precedents indicating that "prior government involvement [is] not a prerequisite to recoupment of § 107 response costs by one group of PRPs against other PRPs"); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301-02 (9th Cir. 1997) (holding that "only a claim for contribution lies between PRPs," observing that section 113(f) governs where one PRP brings a section 107 action against another PRP, and citing cases).

If this Court agrees with the companion recommendation, that the City is potentially responsible for the tar slick and therefore cannot obtain a "full recovery" in its first two counts, and if the Supreme Court holds that a polluter who voluntarily incurs response costs cannot maintain a claim for contribution against fellow polluters pursuant to section 113(f), then it would seem that the CERCLA component of this litigation would be concluded.

According to Citizens, even if it cannot pursue contribution toward the City’s response costs, it can pursue contribution in connection with its own “first instance” response costs, which it describes as the costs that it “incurred in the first instances while investigating the City’s allegations” and “consistent with the National Contingency Plan” (NCP). (Docket No. 242 at 5; Docket No. 18, ¶ 15.) In support, Citizens points to paragraphs 15 and 22 of its third-party complaint against the Corps:

15. Citizens has incurred response costs consistent with the National Contingency Plan, 40 C.F.R. Part 300, in connection with the alleged pollution in the Penobscot River.

* * * *

22. As a responsible party, the Corps is liable for an equitable share of response costs related to the Penobscot River.

(Docket No. 18.) I have several concerns about treating Citizens as a party seeking contribution for the incurrence of response costs consistent with the NCP. First, both of the foregoing allegations relate conclusions of law, not factual allegations.¹⁰ Thus, they deserve critical assessment. Second, Citizens’s third-party complaint is replete with references to the “underlying action,” which reflects the fact that Citizens’s third-party action is wholly derivative of the City’s action. Most tellingly, in paragraph 7, Citizens flatly recites, “In this third-party action, Citizens is seeking contribution and/or indemnity for any environmental cleanup costs or other harms for which it is held liable in the underlying action.” (*Id.*, ¶ 7 (emphasis added).)

As for the allegation that Citizens’s “first instance” costs were response costs expended in accordance with the NCP, I observe that “response costs” are not something a party spends in

¹⁰ In Citizens’s Answer to the Second Amended Complaint, it characterizes the City’s similar description of the City’s response costs as a legal conclusion not deserving of an answer. (Docket No. 192, ¶ 36.)

connection with pollution it refuses to describe as other than “alleged.” (Docket No. 18, ¶ 15.)¹¹ “Response” is defined as “remove, remedy, and remedial action,” including “enforcement activities related thereto.” 42 U.S.C. § 9601(25). Each of these terms, if used to modify “costs,” would describe costs incurred for the purpose of removing or remedying contamination. “Removal” is defined as “cleanup or removal of released hazardous substances” or actions taken to prevent releases or “such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment.” *Id.* § 9601(23). “Remedy” and “remedial action” are defined in a similar fashion, but relate to “actions consistent with permanent remedy . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare of the environment.” *Id.* § 9601(24). Citizens contends that its response costs include “substantial payments to Citizens’s consultants for evaluation, investigation, testing and characterization of the environmental conditions in and around the Penobscot River.” (Docket No. 242 at 6.) But the fact remains that Citizens’s expenditures were incurred to defend against the pending litigation, as is reflected by the derivative nature of its third-party actions and by its refusal to acknowledge the existence of a problem. Such expenditures do not constitute response costs as a matter of law because they are not addressed toward either response or remedial action. See Black Horse Lane Assoc., L.P. v. Dow Chem. Corp., 228 F.3d 275, 294 (3d Cir. 2000) (affirming entry of summary judgment against CERCLA claim for costs expended on expert consulting fees); Redland Soccer Club v. Dep’t of the Army, 55 F.3d 827, 848-50 (3d Cir. 1995) (affirming dismissal of CERCLA claim for costs expended on attorneys fees, expert witness fees and health risk assessment costs); United States v. Hardage, 982 F.2d 1436, 1447-48 (10th Cir.

¹¹ Citizens denies that any releases have occurred at the tar slick in the Penobscot River. (Docket No. 192, ¶ 33.)

1992) (affirming trial court's judgment that costs incurred by party to defend against government action were not response costs because unnecessary to the containment and cleanup of hazardous releases). Finally, as for the allegation that the Corps is liable for an equitable share of response costs as a PRP, I observe only that the City, the one party that has incurred response costs in connection with the river contamination, has declined to proceed against the Corps. Presumably, the City is satisfied that the effort of proceeding against additional parties is not worth the value of their pro rata shares in liability.

Because Citizens cannot maintain third-party contribution claims derivative to the City's contribution claims and because Citizens has incurred no independent response costs to justify the maintenance of a non-derivative contribution claim, its third-party CERCLA claims should be dismissed as a matter of law.

3. *Tenability of Citizens's third-party declaratory judgment claim*

In a final effort to keep the third-party defendants moored at Bangor Harbor, Citizens contends that its request for a declaratory judgment "is ripe for decision even in the absence of a joint liability suit against the [third-party] declaratory plaintiff." (Docket No. 242 at 9.) According to Citizens, "the ongoing remediation work in the Penobscot River creates a live controversy among all PRPs over the allocation of those response costs." (*Id.* at 10 n.3.) I do not consider either of these contentions to have merit. The first contention is erroneous because Citizens is liable only for its equitable share of the response costs. Contrary to what Citizens suggests, there is nothing in the law that compels (or even permits) the Court to impose liability on Citizens for the shares of liability that should be borne by third-party PRPs not named in the City's complaint. *Cf. United States v. Davis*, 261 F.3d 1, 48 (1st Cir. 2001) ("The ongoing nature of the work and the fact that its ultimate cost [is] not known at trial [does] not affect the

district court's ability to consider the evidence that other PRPs contributed to the waste in the soil, and to determine whether some of [the response] costs should thus be allocated to them.""). Rather, it would appear that the City has waived such recovery in the context of the instant suit. The second contention is erroneous because the "live controversy" in this case arises from the City's incurrence of response costs to remedy or remediate the river contamination. At this juncture, only the City and the State have incurred response costs toward that end and only the City has alleged an intention to do what is necessary to remediate the contamination. Unless there is a seismic shift in Citizens's perspective on the alleged river contamination, such as becoming an active partner in the City's remedial efforts, the only response costs "in controversy" will be those incurred by the City.

Because Citizens does not face joint and several liability for response costs in excess of its pro rata share and because Citizens has not incurred response costs in its own right, Citizens has no ground to request a declaratory remedy. None of the cases cited by Citizens suggest that the Court can or should proactively exercise its jurisdiction over third-party PRPs that are not subject to damages or injunctive relief in the context of the pending litigation. As for the "rights and other legal relations of any interested party seeking such declaration," 28 U.S.C. § 2201, (i.e., the rights and legal relations of Citizens) the Court is already in a position to declare the same by virtue of the City's request for declaratory relief.

The Corps's Rule 12(b)(1) Motion to Dismiss

The Corps separately moves to dismiss Citizens's non-CERCLA, third-party claims and all of the third parties' common law cross-claims pursuant to Rule 12(b)(1). (Docket No. 218.) The basis of the motion is that the Corps has immunity in connection with the discretionary act of dredging Bangor Harbor and, therefore, the Court lacks jurisdiction over these claims.

Citizens and third-party defendants/cross-claimants Honeywell International and UGI Utilities oppose the motion, arguing that decisions pertaining to the dumping of dredging “spoils” do not involve policy-related judgments. (Docket Nos. 243, 244, 251.)

At the pleading stage, a dismissal for lack of subject matter jurisdiction “is appropriate only when the facts alleged in the complaint, taken as true, do not justify the exercise of subject matter jurisdiction.” Muniz-Rivera v. United States, 326 F.3d 8, 11 (1st Cir. 2003). “[I]t is a fundamental tenet of our country’s jurisprudence that, as a general matter, sovereign immunity bars suits against the government.” Santana-Rosa v. United States, 335 F.3d 39, 41 (1st Cir. 2003). “[T]he FTCA offers a limited waiver of the federal government’s sovereign immunity as to negligent acts of government employees acting within the scope of their employment. It provides that ‘the United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances.’” Id. at 42 (quoting 28 U.S.C. § 2674). But this limited waiver “is itself subject to several exceptions[,] the most expansive [being] the ‘discretionary function’ exception, which precludes government liability for claims based upon ‘the exercise or performance [of] a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.’” Id. (quoting 28 U.S.C. § 2680(a)). This exception prevents “judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy.” United States v. S.A. Empresa de Viacao Aerea Rio Grandense, 467 U.S. 787, 814 (1984). The test for whether the discretionary function exception applies involves three steps:

First, an inquiring court must identify the conduct that allegedly caused the harm. Then, in determining whether Congress sought to shelter that sort of conduct from tort liability, the court must ask two interrelated questions: (1) Is the conduct itself discretionary? (2) If so, does the exercise of discretion involve (or is it susceptible to) policy-related judgments? If both of these queries yield

affirmative answers, the discretionary function exception applies and the government is shielded from liability.

Muniz-Rivera v. United States, 326 F.3d 8, 15 (1st Cir. 2003) (citing United States v. Gaubert, 499 U.S. 315, 322 (1991)).

The conduct complained of herein is the Corps's alleged decision to dump dredging spoils, allegedly in the vicinity of the "Old Stone Sewer." Citizens concedes that the Corps's decisions with respect to the placement of dredging spoils was discretionary in character. (Docket Nos. 243 at 4.) For its part, Honeywell refuses to make this concession (Docket No. 244 at 2),¹² but the very nature of the conduct alleged makes manifest the fact that "there was 'room for choice' in making the allegedly actionable decision." Santana-Rosa, 335 F.3d at 43 (finding discretion existed "as a matter of common sense and practicality"). Indeed, the basis for the third-party claims is precisely the Corps's choice to dump dredging spoils in one location rather than another. Moreover, "[t]he jurisprudence of the FTCA permits [the Court] to classify these actions as non-discretionary only if a federal statute, regulation, or policy specifically instructed federal officials to follow a specified course of action." Muniz-Rivera, 326 F.3d at 15 (involving government's role in planning housing developments and siting homes in a flood zone and citing Gaubert, 499 U.S. at 322). Neither Citizens nor Honeywell have presented any statutory, regulatory or policy directive that required the Corps to follow a specific course in dumping dredging spoils in the late Nineteenth and very early Twentieth Centuries. Thus, the Corps's dredging and dumping activities were presumptively discretionary. "Because the law presumes that the exercise of official discretion implicates policy judgments," Citizens and Honeywell cannot prevail unless they demonstrate that decisions about where to dump dredging spoils are not susceptible to policy analysis. Shansky v. United States, 164 F.3d 688, 692 (1st Cir. 1999).

¹² UGI joins in the arguments presented by Citizens and Honeywell. (Docket No. 251.)

According to Citizens, “The Corps most likely chose its dumping site based on technical convenience and practicality.” (Docket No. 243 at 5.)¹³ The Corps responds that its dumping decisions “were constrained by the finite resources allocated by Congress for the projects at issue, and were also based on various policy based considerations, including the feasibility of the proposed disposal options, the potential impact on navigation and the potential impact on the Corps’ budget¹⁴ and operations.” (Docket No. 246 at 4; Docket No. 247 at 3-4.)

In my assessment, the Corps’s¹⁵ decisions about where to dump dredging spoils must be understood as policy-based because they were integral to the expansion and maintenance of a navigable waterway. See, e.g., Payne v. United States, 730 F.2d 1434, 1436-37 (10th Cir. 1984) (“The modification of the Tombigbee River necessitated widening and straightening bends that were too sharp for the capacity of traffic contemplated for the river. One of the bends was upstream from the plaintiff’s property[, which was destroyed through erosion]. The decision to alter the water course at this point in the river was a part of the overall decision to improve navigation on this river . . . and, as such, was a discretionary function of the type exempt from

¹³ Honeywell does not offer any rationale for why the Corps’s dumping decisions were not susceptible to policy analysis; it argues only that the Corps cannot show that they were. (Docket No. 244 at 3-4.)

¹⁴ Citizens and Honeywell complain that budgetary considerations are not policy matters. Congress, understandably, views budgetary considerations differently. See 42 U.S.C. § 541 (“[I]n the consideration of such works and projects the board [of engineers] shall have in view the amount and character of commerce existing or reasonably prospective which will be benefited by the improvement, and the relation of the ultimate cost of such work, both as to cost of construction and maintenance, to the public commercial interests involved, and the public necessity for the work and propriety of its construction, continuance, or maintenance at the expense of the United States.”). See also Muniz-Rivera, 326 F.3d at 17 (“In a world of finite public resources, government officials must weigh competing considerations in the selection, location, and outfitting of housing projects. While such decisions are often difficult to make (and easy to criticize in hindsight), they are clearly susceptible to policy analysis.”); Limar Shipping, Ltd. v. United States, 324 F.3d 1, 10 (1st Cir. 2003) (“Allocation of resources and budget management involve prioritizing and are quintessentially policy-based choices.”).

¹⁵ Actually, I think the dredging activities at issue were conducted by the Secretary of War. “The Department of War was the Department of the Army and the title of the Secretary of War was changed to Secretary of Army [in] 1947” 33 U.S.C. § 540 (historical and statutory notes). See also, e.g., An Act Making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes, ch. 1079, 32 Stat. 331, 372-73 (1902) (organizing a board of five engineer officers within the Office of the Chief of Engineers, United States Army, to review projects “for works of river and harbor improvements” and to make recommendations regarding the same).

review under the [FTCA].”); Boston Edison Co. v. Great Lakes Dredge & Dock Co., 423 F.2d 891, 896 (1st Cir. 1970) (“It cannot be gainsaid that the decision of the Secretary of the Army to cause a dredging of the river was a discretionary act on his part.”); Coates v. United States, 181 F.2d 816, 817 (8th Cir. 1950) (“It would be difficult if not impossible to point to any example of exercising and performing discretionary functions and duties on the part of federal agencies more clearly within the exception of the Federal Tort Claims Act than the changing of the Missouri River”); Devito v. United States, 12 F. Supp. 2d 269, 270-71 (E.D. N.Y. 1998) (dismissing claims alleging Corps’s dredging activities negligently accelerated erosion and caused property damage). Accordingly, sovereign immunity applies to the alleged dumping activity and the Court lacks jurisdiction to second guess that activity.

Conclusion

For the reasons stated herein, I **RECOMMEND** that the Court **GRANT** the Corps’s Motion for Partial Judgment on the Pleadings (Docket No. 207) and enter judgment against Citizens’s third-party claims against the Corps that seek contribution and declaratory relief pursuant to CERCLA.¹⁶ In addition, I **RECOMMEND** that the Court **GRANT** the Corps’s Rule 12(b)(1) motion to dismiss (Docket No. 218) and dismiss all third-party common law claims and cross-claims filed against the Corps.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy

¹⁶ Although the Corps only requests brevis disposition with respect to the third-party CERCLA claims filed against it, this legal ruling would become the law of the case and would logically extend to all of Citizens’s third-party CERCLA claims and each of the third parties’ CERCLA counterclaims and cross-claims. The court can anticipate, should it affirm this recommendation, that other third-parties would file similar motions.

thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

March 11, 2004

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

**U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 1:02-cv-00183-GZS**

BANGOR, CITY OF v. CITIZENS COMMUNICA
Assigned to: JUDGE GEORGE Z. SINGAL
Referred to:
Demand: \$0
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 42:6901 Environmental Cleanup Expenses

Date Filed: 11/22/02
Jury Demand: Defendant
Nature of Suit: 893 Environmental
Matters
Jurisdiction: Federal Question

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