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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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FIREMAN'S FUND INSURANCE
COMPANY,

NO. CIV. S 98-1489 FCD JFM

Plaintiff,

v.

MEMORANDUM AND ORDER

CITY OF LODI, CALIFORNIA,
et. al.,

Defendants.

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Plaintiff Fireman's Fund Insurance Company ("plaintiff") brought suit alleging that defendant City of Lodi's ("Lodi") ordinance, the Comprehensive Municipal Environmental Response and Liability Ordinance ("MERLO"), violates the Supremacy Clause of the United States Constitution because MERLO is preempted by the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675.¹

¹ In the related case, Unigard v. City of Lodi, CV S 98-1712 FCD/JFM, plaintiffs Unigard Insurance Company and Unigard (continued...)

1 This matter is before the court on plaintiff's motion for
2 (1) partial summary judgment on its preemption claim asserted
3 pursuant to 42 U.S.C. § 1983 and (2) a permanent injunction
4 prohibiting Lodi from further enforcing MERLO. Plaintiff's
5 motion follows a remand from the Ninth Circuit Court of Appeals.
6 See Fireman's Fund Ins. Co. v. City of Lodi, 302 F.3d 928, 934-35
7 (9th Cir. 2002), cert. denied, 123 S. Ct. 1754 (2003). The
8 parties presented oral argument on October 10, 2003.

9 **BACKGROUND²**

10 **A. Contamination Discovered within the City**

11 In April, 1989, Lodi first detected tetrachloroethene
12 ("PCE") in a water sample from a new water tank. Subsequent
13 testing found PCE contamination in the groundwater and several
14 Lodi water wells. In March, 1992, the Central Valley Regional
15 Water Quality Control Board ("RWQCB") issued a report identifying
16 a cleaning business insured by plaintiff as one potential source
17 of PCE-contaminated wastewater discharged into Lodi's sewer lines
18 and suspected as a source of the soil and groundwater
19 contamination.

20 In 1993, the California State Department of Toxic Substance
21 Control ("DTSC") commenced an investigation of the contamination.

23 ¹(...continued)
24 Security Company (collectively "Unigard") brought a motion for
25 summary judgment and permanent injunction on its complaint and
26 adopted Fireman's Fund's briefing. Accordingly, the findings of
preemption and the issuance of a permanent injunction shall apply
with equal force to plaintiff Unigard in the related case.

27 ² The Background is drawn from the complaint and the
28 Ninth Circuit's decision in Fireman's Fund, 302 F.3d at 934-38.
A more detailed history describing the contamination within the
City of Lodi is recounted in Fireman's Fund, 302 F.3d at 934-35.

1 In 1994, DTSC initiated an administrative action against selected
2 potentially responsible parties, including Lodi, to address the
3 soil and groundwater contamination.

4 **B. 1997 Cooperative Agreement**

5 At a meeting on May 6, 1997, Lodi's City Council authorized
6 the City Manager to execute a "Comprehensive Joint Cooperative
7 Agreement" ("Cooperative Agreement" or "Agreement") with the DTSC
8 concerning the investigation and abatement of hazardous substance
9 contamination within the City. Fireman's Fund, 302 F.3d at 935.

10 Under the Agreement, DTSC was required to act with Lodi in a
11 consolidated effort, providing the oversight, consultation, and
12 cooperation necessary and appropriate to ensure the contamination
13 site was remediated in a timely, competent, and cost-effective
14 manner. Id. at 950 n.21. In exchange for DTSC's "ongoing and
15 substantial services," the DSTC received in excess of one million
16 dollars. Id.

17 Since the discovery of the contamination, Lodi has faced the
18 issue of potential liability. Indeed, Agreement expressly stated
19 that DTSC may have certain claims against Lodi for the design,
20 construction, operation, and maintenance of its sewer system.
21 Id. at 936. Despite this acknowledgment of potential liability,
22 the Agreement specifically designated Lodi the "lead enforcement
23 entity," in place of the DTSC, and obligated Lodi to "cause a
24 prompt, comprehensive, and cost-effective investigation and
25 remediation" of the ground and soil contamination. (Cooperative
26 Agreement, in Ex. D to Decl. of Thomas Hixson ("Hixson Decl."),
27 at 1); see Fireman's Fund, 302 F.3d at 935.

28 ///

1 **C. MERLO**

2 To support Lodi's lead enforcement role, the Agreement also
3 required the "prompt enactment and enforcement of a comprehensive
4 municipal environmental response ordinance."³ (Cooperative
5 Agreement, in Ex. D to Hixson Decl., at 5.) Just ninety days
6 later, on August 6, 1997, Lodi's City Council enacted the
7 Comprehensive Municipal Environmental Response Ordinance
8 ("MERLO"), which sets forth a remedial liability scheme partially
9 modeled on CERCLA. MERLO is the subject of plaintiff's
10 preemption claim and present motion.

11 MERLO provides Lodi with municipal authority to investigate
12 and remediate existing or threatened environmental nuisances
13 affecting the City and to hold responsible parties or their
14 insurers liable for the cost of Lodi's nuisance abatement
15 activities. Id. MERLO incorporated many of CERCLA's standards.
16 Id. Specifically, MERLO borrowed CERCLA's definition of (1) who
17 may be considered a "potentially responsible party" ("PRP"),⁴
18 (2) who may avoid liability by proving certain affirmative
19 defenses,⁵ and (3) who may impose joint and several liability on
20

21 ³ Under the Cooperative Agreement, Lodi's "enforcement
22 activities" include "the prompt enactment and enforcement of a
23 comprehensive municipal environmental response ordinance which
24 shall enact into municipal law additional legal authorities to
appropriately supplement the City of Lodi's . . . authority under
federal, state and local law." (Cooperative Agreement, in Ex. D
to Hixson Decl., at 5.)

25 ⁴ MERLO §§ 8.24.040 (A) (1)-(9) (defining nine categories of
26 "persons" who "shall be liable" under Lodi's municipal liability
scheme).

27 ⁵ See MERLO §§ 8.24.040 (B) (1)-(4) ("There shall be no
28 liability under subsection A of this section for a person

(continued...)

1 responsible parties.⁶ Id. However, in significant departures
2 from CERCLA, MERLO's liability scheme did not provide a mechanism
3 for responsible parties to impose costs upon Lodi for its share
4 of any attributable costs but did provide Lodi recovery for a
5 broad range of "action abatement costs," including attorney's
6 fees. See id.

7 Plaintiffs Fireman's Fund Insurance Company and Unigard
8 brought actions in this court to prevent Lodi from invoking or
9 enforcing MERLO against its insureds. Id. at 934. Both insurers
10 asserted MERLO was preempted by CERCLA based upon field and
11 conflict preemption. In separate rulings, this court granted
12 Lodi's motion to dismiss Unigard's federal preemption claim and
13 denied Fireman's Fund's motion for partial summary judgment and
14 permanent injunction. Both insurers appealed. The Ninth Circuit
15 consolidated the appeals of the insurers and issued the Fireman's
16 Fund decision on August 6, 2002.

17 ///

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20 _____
21 ⁵(...continued)
22 *otherwise liable* who can establish by clear and convincing
23 evidence that" the environmental nuisance was caused by (1) an
24 act of God, (2) an act of War, (3) a third party meeting certain
25 requirements, or (4) any combination of the three
26 defenses) (emphasis added).

27 ⁶ See MERLO § 8.24.040(E) ("The scope of liability in this
28 chapter is joint and several for any person who has caused,
created, contributed to, or maintained a single indivisible harm
to public health, welfare or the environment resulting from, or
which may result from, in whole or in any part, an environmental
nuisance and for which there is no reasonable and reliable basis
of apportioning the harm among the *responsible*
parties.") (emphasis added).

1 **ANALYSIS**

2 **I. The Remand**

3 The Ninth Circuit described MERLO as a "comprehensive
4 remedial liability scheme modeled on CERCLA and [state
5 environmental law] . . . [which] specifically provides Lodi with
6 municipal authority to investigate and remediate existing or
7 threatened environmental nuisances affected the City, and to hold
8 PRPs or their insurers liable for the cost of the City's nuisance
9 abatement activities." Id. at 936 (citing MERLO §§ 8.24.010-
10 8.24.090). After a lengthy analysis of MERLO and its
11 relationship to CERCLA, the Ninth Circuit concluded "several
12 sections of MERLO are preempted by state and federal law under
13 the doctrine of conflict preemption . . ." Id. at 957. In
14 particular, the Ninth Circuit remanded the two cases and
15 instructed that, if Lodi is a PRP, portions of MERLO would
16 be preempted "to the extent" it legislatively insulated Lodi (1)
17 from contribution liability,⁷ or (2) from bearing its share of
18 responsibility,⁸ and, (3) granted Lodi the right to recover
19
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21

22 ⁷ "If Lodi is indeed a PRP, it cannot simply legislate
23 away this potential contribution liability under state and
24 federal law. For these reasons, we find that MERLO is preempted
25 to the extent that it legislatively insulates Lodi from
26 contribution liability under state and federal law." Fireman's
27 Fund, 302 F.3d at 946.

26 ⁸ "[I]f the district court determines that Lodi is a PRP,
27 Lodi may not escape its share of responsibility by imposing all
28 the costs of cleanup on others. . . . For these reasons, we find
that MERLO is preempted to the extent that it legislatively
insulates Lodi from bearing its share of responsibility by
imposing joint and several liability on other PRPs." Id. at 947.

1 "action abatement costs," including attorney's fees.⁹ See
2 Fireman's Fund, 302 F.3d at 946, 947, 953.

3 **II. Fireman's Fund and CERCLA Policy**

4 **A. PRP Status under CERCLA**

5 CERCLA section 107(a) imposes strict, joint and several
6 liability on parties falling within one of the four categories
7 "subject only to the defenses set forth in subsection (b) of this
8 section." 42 U.S.C. § 9607(a)¹⁰; see Morrison Enters. v.

9
10 ⁹ "[A] city that is also a PRP should not be able to
11 avail itself of this advantage. If the district court finds that
12 Lodi is indeed a PRP, it may not legislate for itself a
litigation advantage by granting itself the right to collect
attorney's fees." Id. at 953.

13 ¹⁰ CERCLA section 107(a) provides:

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

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

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

20 (3) any person who by contract, agreement, or
21 otherwise arranged for disposal or treatment,
22 or arranged with a transporter for transport
23 for disposal or treatment, of hazardous
24 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

25 (4) any person who accepts or accepted any
26 hazardous substances for transport to
27 disposal or treatment facilities,
28 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,

(continued...)

1 McShares, Inc., 302 F.3d 1127, 1132 (10th Cir. 2002) ("Liability
2 attaches to four categories of individuals [under CERCLA section
3 107(a)] . . . [CERCLA 107(b)] provides very limited defenses to
4 liability."). In other words, section 107(a) defines the "four
5 classes of persons subject to the liability provisions" of
6 CERCLA. Carson Harbor Village Ltd. v. Unocal Corp., 270 F.3d
7 863, 871 (9th Cir. 2001) (en banc), cert. denied, 535 U.S. 971
8 (2002); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153
9 F.3d 344, 347 (6th Cir. 1998); see Pinal Creek Group v. Newmont
10 Mining Corp., 118 F.3d 1298, 1300 n.1 (9th Cir. 1997). Those
11 persons are "potentially responsible parties" or "PRPs." Carson
12 Harbor, 270 F.3d at 874 ("Those four categories of persons
13 [subject to liability under 42 U.S.C. §§ 9607(a)] are
14 'potentially responsible parties' or 'PRPs.'"); Centerior, 153
15 F.3d at 347 n.8 ("There are four categories of PRPs . . . under
16 42 U.S.C. §§ 9607(a)(1)-(4)"); Pinal Creek, 118 F.3d at 1300 n.1;
17 New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1120
18 (3rd Cir. 1997); accord 42 U.S.C. § 9613(f)(1) ("Any person may
19 seek contribution from any other person who is liable or
20 potentially liable under section 9607(a) . . ."); 40 C.F.R. §
21 304.12 (defining potentially responsible party, or PRP, as "any
22 person who *may be liable* pursuant to section 107(a) of CERCLA.").
23 Thus, determining PRP *status* under section 107(a) is wholly
24 distinct from application of the narrowly-defined, causation-

25
26 ¹⁰(...continued)
27 of a hazardous substance, *shall be*
28 *liable* . . .

28 CERCLA § 107(a); 42 U.S.C. § 9607(a) (emphasis added).

1 based affirmative defenses to CERCLA liability in section 107(b)
2 or proving the elements of a *claim* for cost recovery or
3 contribution under CERCLA.

4 **B. Lodi's Interpretation of PRP Status**

5 Lodi asserts that a municipal PRP with a claimed defense
6 under section 107(b) may proceed as a party without CERCLA
7 liability by enforcing its own municipal environmental
8 ordinance.¹¹ However, Lodi has never articulated how this
9 construction of PRP status is consistent with CERCLA's structure
10 or policies. It appears such an approach is dramatically at odds
11 with CERCLA's PRP cost allocation scheme, which encourages the
12 prompt and voluntary cleanup of hazardous waste sites *before*
13 *protracted litigation* by imposing, at a very early stage, the
14 costs of cleanup on parties potentially responsible for the
15 contamination.

16 Under CERCLA, Congress intended to impose strict joint and
17 several liability upon PRPs because "their actions contribute to
18 the release of contaminated material and increase the cost of
19 remedial action." Kaiser Aluminum & Chem. Corp. v. Catellus Dev.
20 Corp., 976 F.2d 1338, 1343 (9th Cir. 1992) (citing H.R. Rep. No.
21 1016, 96th Cong., 2d Sess. 33 (1980), reprinted in 1980
22 U.S.C.C.A.N. 6119, 6136); see United States v. Union Corp., 277
23 F. Supp. 2d 478, 488 (E.D. Pa. 2003) (finding plaintiff City of

24
25 ¹¹ Lodi also argues in its opposition that a ruling on
26 preemption is premature because it has appealed (in a related
27 case) the issue of whether a PRP with a claimed defense to CERCLA
28 liability may wield joint and several liability. However, the
Ninth Circuit has subsequently upheld this court's interpretation
of PRP status. See People of the State of California v. M & P
Invs., Nos. 03-15205, 03-15596, at 3 (9th Cir. Dec. 11, 2003)
(unpublished memorandum).

1 Philadelphia a potentially responsible party under CERCLA despite
2 its claimed affirmative defense under 107(b) based upon releases
3 from its sewers); Lincoln Properties, Ltd. v. Higgins, 823 F.
4 Supp. 1528, 1538 (E.D. Cal. 1992) ("In short, as a matter of law,
5 the County may be liable for releases from its facilities--viz,
6 its portion of the sewer and its wells."). In this case, Lodi,
7 though now adjudged a PRP, relies upon the possible success of a
8 section 107(b) defense in a related, but separate, liability
9 case, City of Lodi v. M & P Investments, CV 00-2441 FCD/GGH ("the
10 M & P case"), in order to *prevent* the prompt and orderly
11 application of CERCLA's cost allocation scheme. To permit a
12 municipal PRP to await the outcome of its alleged section 107(b)
13 defense before being subject to the restrictions and limitations
14 of CERCLA, undermines the CERCLA process that Congress mandated.
15 The problem here, however, is further compounded by MERLO and
16 Lodi's imaginative legal stratagems employed regarding its legal
17 status.

18 Acting outside the parameters of CERCLA, first, as the
19 "People of the State of California,"¹² then, as a municipality
20 enforcing state nuisance laws, Lodi has continued to assert lead
21 enforcement authority. As a result, years of litigation have
22 been consumed in efforts to either divine or obscure its true
23 legal status and the justification for its lead enforcement
24 authority. Consequently, important remediation efforts have been
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27 ¹² See California v. M & P Invs., 213 F. Supp. 2d 1208,
28 1217 (E.D. Cal. 2002), aff'd in part, dismissed in part on juris.
grounds, 46 Fed. Appendix 876 (9th Cir. 2002) (mem. unpublished
decision).

1 brought to a grinding halt.¹³

2 Such a result undermines the primary CERCLA objective of
3 "effectuat[ing] quick cleanups of hazardous waste sites"¹⁴ and
4 "encouraging voluntary private action to remedy environmental
5 hazards."¹⁵ Moreover, to adopt Lodi's position would ignore the
6 express remand of Fireman's Fund and impermissibly allow any
7 potentially responsible municipality, armed with a similar
8 ordinance, to impose its liability on others, thus rendering the
9 congressional goal of prompt remediation of hazardous waste sites
10 a nullity. See Fireman's Fund, 302 F.3d at 948-49.

11 **III. Lodi is a PRP under CERCLA § 107(a)**

12 **A. Admission**

13 The court has previously found that Lodi is a PRP within the
14 meaning of CERCLA section 107(a) in the "M & P" case, based upon
15 counsel's admission in open court.¹⁶ (See Mem. and Order, filed
16

17 ¹³ The court notes that several months ago the DTSC took
18 action to initiate remediation. On May 30, 2003, the DTSC issued
19 an "Imminent and Substantial Endangerment Determination and Order
20 and Remedial Action Order" (the "RAO") to eight entities, seven
21 of which are defendants in the M & P case. The RAO requires each
22 entity to conduct an extensive set of investigations and
23 implement appropriate removal actions or face penalties of up to
24 \$25,000 per day. The DTSC apparently has assumed a degree of
25 authority that it previously delegated to Lodi, though the court
26 makes no findings in this regard.

23 ¹⁴ Transtech Indus., Inc. v. A & Z Septic Clean, 798 F.
24 Supp. 1079, 1082 (D.N.J. 1992), appeal dismissed, 5 F.3d 51 (3d
25 Cir. 1993), cert. denied, 512 U.S. 1213 (1994).

25 ¹⁵ Lincoln Properties, Ltd. v. Higgins, 823 F. Supp. 1528,
26 1537 (E.D. Cal. 1992).

26 ¹⁶ The relevant portion of Lodi's admission in open court
27 reads as follows:

28 MR. DONOVAN: [I]f the question is, does the City of
(continued...)

1 Mar. 31, 2003 in M & P, at 17-18.)¹⁷

2 Lodi now asserts that its admission is not dispositive of
3 MERLO's preemption because there are issues of fact (1) regarding
4 the maintenance of Lodi's sewer system and (2) "where, if
5 anywhere, the City is a 'PRP' with or without a defense to CERCLA
6 liability." (Lodi Opp. at 12-17) (emphasis in original.)
7 Neither assertion is persuasive. The court addresses each in
8 turn.

9 In light of the court's previous finding in M & P, Lodi's
10 evidence regarding the condition of its sewer system is
11 irrelevant to MERLO preemption because, as plaintiff points out,
12 such evidence "pertains, if at all, to Lodi's ability to assert
13 the third-party defense under CERCLA § 107(b)(3)" in the M &
14 P case. (Reply at 13.) The Ninth Circuit's remand plainly
15 requires evidence that Lodi is within one of the four classes of
16 persons subject to the liability provisions of CERCLA. See
17 Fireman's Fund, 302 F.3d at 946, 947, 953. In short, Lodi's

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20 ¹⁶(...continued)

Lodi fall within the definition of a
party under 107(a) without regard to any
other statutes . . . the answer would be
yes.

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22
23 (Rep. Tr., Feb. 28, 2003 in M & P, at p. 71:11-14.)

24 In later colloquies and arguments to the court Lodi has
25 sought to limit its admission. (See Joint Pretrial Statement,
26 filed Nov. 14, 2003 in M & P, at 44-45.) However, Lodi's
27 admission has not been subsequently limited by the court.

28 ¹⁷ As a result of Lodi's PRP admission, the court ruled in
M & P that Ninth Circuit authority precluded it from imposing
preliminary injunctive relief on other alleged potentially
responsible parties. (See Mem. and Order, filed Mar. 31, 2003, in
M & P, at 17-18.)

1 alleged entitlement to an affirmative defense under section
2 107(b) has no bearing on whether Lodi is a PRP or whether MERLO
3 is preempted.

4 Lodi also contends that "the widespread, regional nature of
5 the contamination problem in Lodi" means that plaintiff must
6 prove liability with respect to each "particular site or plume"
7 within the area of contamination.¹⁸ (Lodi Opp. at 17.) Thus,
8 Lodi argues, if plaintiff "proves the [sic] that the City is a
9 responsible party with respect to a specific sewer line in the
10 southern section of the City, such proof will not preempt MERLO
11 with respect to a separate plume in the northern section of
12 town." (Lodi's Opp. at 17.) Lodi's construction of PRP status
13 is undermined by the text and purpose of CERCLA's cost allocation
14 structure.

15 Contrary to Lodi's assertion, section 107(a) does not impose
16 a requirement that plaintiff trace specific contaminants within
17 the overall hazardous waste site to a particular location where
18 Lodi's sewers released hazardous substances. "Although it is
19 true that PRP status, by itself, does not generate liability,"
20 once Lodi admitted it was a PRP, the legal consequences of that
21

22 ¹⁸ The "area of contamination" has been defined by the
23 DTSC as a an area within the City of Lodi, California, that is
24 "bordered approximately by the Mokelumne River to the north,
25 Beckman Road to the east, Harney Lane to the south, and Mills
26 Avenue to the west and the surrounding commercial and residential
27 area from which Hazardous Substances have been, or are threatened
28 to be, released or where Hazardous Substances have or may come to
be located." (Cooperative Agreement, Section IV.(K), in Ex. D to
Hixson Decl., at 4.) In addition, Lodi's complaint in the M & P
case provides a broad definition of "site," which includes "the
environment at, around and in the vicinity of Lodi's central
business district and peripheral commercial and residential
community." (Compl. in M & P, ¶ 3.)

1 status took hold without respect to the "location" of the release
2 within the contamination site. See Pinal Creek, 118 F.3d at
3 1305. Indeed, section 107 does not even "require a plaintiff to
4 show any direct causal link between the waste each defendant sent
5 to the site and the environmental harm." Kalamazoo River Study
6 Group v. Menasha Corp., 228 F.3d 648, 655 (6th Cir. 2000).

7 Under Lodi's interpretation, its PRP status within the
8 "northern" section of the contamination site would not limit
9 enforcement of MERLO in the "southern" section of the
10 contamination site. Enforcement of MERLO in this manner would
11 allow Lodi to be a PRP for one fractional "region" of
12 contamination while simultaneously being considered the lead
13 enforcement agency within a another fractional "region" of the
14 site. This anomaly is completely at odds with CERCLA. Under
15 CERCLA, liability attaches "despite the fact that the defendant
16 PRP was in fact responsible for only a fraction of the
17 contamination." Fireman's Fund, 302 F.3d at 945; see Morrison,
18 302 F.3d at 1133.¹⁹ Thus, Lodi's construction is "not supported
19 by CERCLA's text, is inconsistent with the traditional doctrine
20 of contribution, entails a significant risk of producing unfair
21 results, and runs the risk of creating procedural chaos." Pinal
22

23 ¹⁹ Lodi's recent version of compartmentalized "regions" of
24 contamination is at odds with two definitions it has previously
25 utilized to describe the same hazardous waste site.
26 Specifically, the definition used in the Cooperative Agreement,
27 which gave rise to Lodi's "lead enforcement" role, defines the
28 "site" broadly without reference to distinct "regions" or
"plumes" of contamination. (See Cooperative Agreement, Section
IV.(K), in Ex. D to Hixson Decl., at 4) (quoted supra note 16.)
Similarly, Lodi's complaint in the M & P case does not describe
distinct "regions" of contamination. (See Compl. in M & P, ¶ 3)
(quoted supra note 16.)

1 Creek, 118 F.3d at 1303.

2 Accordingly, Lodi's various proffered arguments
3 notwithstanding, the court reaffirms its previous finding that
4 Lodi is a PRP. (See Mem. and Order, filed Mar. 31, 2003, at 17-
5 18.)

6 **B. Cooperative Agreement**

7 Although the court has previously found that Lodi is a PRP,
8 plaintiff asserts an alternate ground based upon the Cooperative
9 Agreement which establishes Lodi's PRP status. The court will
10 address this alternate ground.

11 According to plaintiff, Lodi's 1997 Cooperative Agreement
12 with the DTSC confers PRP status upon Lodi as a matter of law.
13 Specifically, plaintiff asserts the Cooperative Agreement is an
14 administrative settlement within the meaning of CERCLA section
15 113(f) (3) (B)²⁰ because "DTSC covenanted not to sue Lodi, nor

17 ²⁰ CERCLA section 113(f) (2)-(3), 42 U.S.C. §§ 9613(f) (2)-
18 (3), provides in relevant part:

19 (2) Settlement

20 A person who has resolved its liability to the United
21 States or a State in an administrative or judicially
22 approved settlement shall not be liable for claims for
23 contribution regarding matters addressed in the
24 settlement. [. . .]

25 (3) Persons not party to settlement

26 (A) If the United States or a State has obtained less
27 than complete relief from a person who has
28 resolved its liability to the United States or the
State in an administrative or judicially approved
settlement, the United States or the State may
bring an action against any person who has not so
resolved its liability.

(B) A person who has resolved its liability to the

(continued...)

1 pursue administrative action against Lodi, for claims relating to
2 releases of the PCE/TCE contamination at issue from the Lodi
3 sewers, in exchange for approximately \$1 million in payments for
4 DTSC's past and future response costs." (Mot. for Summ. Judgment
5 at 21.) As a result, plaintiff argues, Lodi is a PRP because "a
6 party that settles some of its CERCLA liability is by definition
7 a PRP." (Reply at 20.)

8 Aside from invoking Rule 408 of the Federal Rules of
9 Evidence, discussed below, Lodi does not address plaintiff's
10 argument that the Cooperative Agreement gives rise to PRP status.
11 (Lodi Opp. at 17.)

12 **1. Admissibility of Agreement**

13 Relying upon Rule 408 of the Federal Rules of Evidence and
14 the court's now-vacated Memorandum and Order of December 31,
15 2002, in the M & P case, Lodi asserts the Cooperative Agreement
16 is inadmissible to prove liability, fault, or PRP status.²¹

17
18 ²⁰ (...continued)

19 United States or a State for some or all of a
20 response action or for some or all of the costs of
21 such action in an administrative or judicially
22 approved settlement may seek contribution from any
23 person who is not party to a settlement referred
24 to in paragraph (2). [. . .]

25 42 U.S.C. §§ 9613(f)(2)-(3).

26 ²¹ In M & P, the court previously analyzed whether the
27 Cooperative Agreement could be introduced by defendant Guild
28 Cleaners, Inc. ("Guild") in order to prove Lodi's liability for
environmental contamination and, consequently, preclude Lodi from
imposing joint and several liability. The court rejected
"Guild's attempt to use the language of the Cooperative Agreement
to prove the City's PRP status" because it ran "counter to Rule
408 and violates the strong public policy favoring negotiated
resolution of disputes." (Mem. and Order, filed Dec. 31, 2002 in
M & P, at 21) (emphasis in original.) On March 31, 2003, the
(continued...)

1 Rule 408 of the Federal Rules of Evidence prohibits the
2 introduction of evidence concerning the "(1) furnishing or
3 offering or promising to furnish, or (2) accepting or offering or
4 promising to accept, a valuable consideration in compromising or
5 attempting to compromise a claim which was disputed as to either
6 validity or amount," in order to "prove liability for or
7 invalidity of the claim or its amount." Fed. R. Evid. 408
8 (emphasis added).²² However, Rule 408 "does not require
9 exclusion when the evidence is offered for another purpose, such
10 as proving bias or prejudice of a witness, negating a
11 contention of undue delay, or proving an effort to obstruct a
12 criminal investigation or prosecution." Fed. R. Evid. 408. "The
13 use of the phrase 'such as' [in Rule 408] implies that the
14

15 ²¹ (...continued)
16 court vacated the December 31, 2002, decision based upon Ninth
17 Circuit authority precluding Lodi from imposing joint and several
18 liability through preliminary injunctive relief following its
19 admission of PRP status. (See Mem. And Order, filed Mar. 31,
20 2003 in M & P, at 19.)

21 ²² Rule 408 provides:

22 Evidence of (1) furnishing or offering or promising to
23 furnish, or (2) accepting or offering or promising to
24 accept, a valuable consideration in compromising or
25 attempting to compromise a claim which was disputed as
26 to either validity or amount, is not admissible to
27 prove liability for or invalidity of the claim or its
28 amount. Evidence of conduct or statements made in
compromise negotiations is likewise not admissible.
This rule does not require the exclusion of any
evidence otherwise discoverable merely because it is
presented in the course of compromise negotiations.
This rule also does not require exclusion when the
evidence is offered for another purpose, such as
proving bias or prejudice of a witness, negating a
contention of undue delay, or proving an effort to
obstruct a criminal investigation or prosecution.

Fed. R. Evid. 408.

1 ensuing list is not exhaustive, but is only illustrative.”

2 United States v. Technic Servs., Inc., 314 F.3d 1031, 1045 (9th
3 Cir. 2002).

4 In this case, plaintiff does not assert a claim of liability
5 against Lodi and, thus, the Cooperative Agreement is not being
6 introduced to prove Lodi’s liability. Indeed, plaintiff’s
7 present motion is premised upon its claim under 42 U.S.C. § 1983
8 alleging MERLO violates the Supremacy Clause of the United States
9 Constitution. Lodi’s ultimate liability is simply not relevant
10 to this motion. However, its *legal status* under CERCLA is.

11 A potentially responsible party under CERCLA may or may not
12 be found ultimately liable for contamination. However, the
13 statutory and judicial restraints imposed by CERCLA upon such a
14 party is quite another matter. Here, the issue before the court
15 is whether Lodi’s *legal status* under CERCLA was altered by the
16 Cooperative Agreement with the DTSC and, thus, the Agreement is
17 admissible for that purpose.

18 Accordingly, the court finds Rule 408 is inapplicable and
19 overrules Lodi’s objection. See Fed. R. Evid. 408.

20 **2. Delegation Aspects of the Agreement**

21 The Ninth Circuit interpreted the Cooperative Agreement to
22 “require DTSC to act with Lodi in a consolidated effort,
23 providing the oversight, consultation, and cooperation necessary
24 and appropriate to ensure the Lodi Groundwater Site is remediated
25 in a timely, competent, and cost-effective manner.” Fireman’s
26 Fund, 302 F.3d at 950 n.21. In exchange for DTSC’s “ongoing and
27 substantial services,” the DSTC received “the consideration
28 enumerated in the Cooperative Agreement.” Id.

1 Although the stated purpose of the Cooperative Agreement is
2 to "resolve all liability which may be asserted against the City
3 of Lodi" based upon Lodi's "design, construction, operation or
4 maintenance of the commercial, industrial and residential storm
5 and sanitary sewer systems," it simultaneously delegates DTSC's
6 authority²³ to Lodi by conferring upon it the status of "lead
7 enforcement entity." As part of this delegation, the Cooperative
8 Agreement requires the "prompt enactment and enforcement of a
9 comprehensive municipal environmental response ordinance." In
10 essence, the parties agreed to reallocate the state's authority
11 to enforce environmental laws to a municipality which settled its
12 liability to the state. Thus, at the outset, the Cooperative
13 Agreement must be viewed as much more than an "administrative
14 settlement" of liability under section 113(f).

15 The DTSC is entitled to proper deference in carrying out its
16 statutory duties, however, the Cooperative Agreement must still
17 be "fair, reasonable, and faithful" to the objectives of CERCLA.
18 United States v. Cannons Eng'g Corp., 899 F.2d 79, 84 (1st Cir.
19 1990). Neither the DTSC, nor Lodi, have the authority to execute
20 an agreement that "conflict[s] or interfere[s] with the
21 accomplishment and execution of CERCLA's full purpose and
22 objective," by circumventing the legal limitations placed upon

23
24 ²³ Under California Health and Safety Code section
25 25355.5(a)(1)(C), the DTSC has authority to enter into
26 "agreements" with PRPs that "require[] the party to take
27 necessary corrective action to remove the threat of the release,
28 or to determine the nature and extent of the release and
adequately characterize the site, prepare a remedial action plan,
and complete the necessary removal or remedial actions, as
required in the approved remedial action plan." Cal. Health &
Safety Code § 25355.5(a)(1)(C); see Fireman's Fund, 302 F.3d at
935 n.6.

1 PRPs. Fireman's Fund, 302 F.3d at 943. The court need not find,
2 at this time, that the Agreement "conflicts" or "interferes" with
3 CERCLA because DTSC's delegation of authority to Lodi is
4 ancillary to a determination of Lodi's PRP status. Nevertheless,
5 the court observes that such delegation of authority is a
6 critical component of the strategy which led to the enactment of
7 MERLO and Lodi's assertion of lead enforcement authority.

8 **3. Consequences of CERCLA § 113(f) Settlement**

9 The court of appeals declined to decide whether Lodi, as a
10 settling municipality, was a PRP as a result of the Agreement
11 and, instead, left it to this court "to consider this argument in
12 the first instance." Id. at 958 n.30. To answer this question,
13 the court must analyze the Agreement's substantive terms and
14 practical effect. See Canons Eng'g Corp., 899 F.2d at 85
15 (district court reviewing proposed CERCLA settlement must
16 "satisfy itself that the settlement is reasonable, fair, and
17 consistent with the purposes that CERCLA is intended to serve.")
18 (quoting H.R. Rep. No. 253, Pt. 3, 99th Cong., 1st Sess. 19
19 (1985) reprinted in 1986 U.S.C.C.A.N. 3038, 3042).

20 CERCLA section 113 is designed to "maximize the
21 participation of responsible parties" in hazardous waste cleanup
22 and expedite that cleanup by "encouraging early settlement, thus
23 reducing the time and expense of enforcement litigation."²⁴

24
25 ²⁴ CERCLA's PRP cost allocation scheme creates an
26 incentive to settle before litigation because all CERCLA
27 defendants are generally jointly and severally liable and, as a
28 result, non-settlers must make up the difference between the
settlor's resolved liability and the remaining liability since
the potential liability of the others is reduced "by the amount
(continued...)

1 Alcan, 25 F.3d at 1184. Such settlements further the purpose of
2 CERCLA by providing immediate funds "to enhance environmental
3 protection, rather than the expenditure of limited resources on
4 protracted litigation." In re Acushnet River & New Bedford
5 Harbor, 712 F. Supp. at 1029. A party benefits from early
6 settlement with the United States, or a State, because, by
7 operation of section 113(f)(2), such a party becomes immune from
8 contribution claims asserted by other potentially responsible
9 parties for "matters addressed" in the settlement. Centerior,
10 153 F.3d at 348; Halliburton, 111 F.3d at 1124 n.8; Alcan, 25
11 F.3d at 1186. However, that party is also limited by CERCLA
12 section 113(f) to asserting claims for contribution. See
13 Centerior, 153 F.3d at 352 (finding CERCLA section 113(f)
14 permitted only a contribution claim, not a cost recovery claim,
15 where "a potentially responsible party has been compelled to pay
16 for response costs for which others are also liable" and then
17 seeks to recover "reimbursement for such costs."); Akzo Coatings,
18 Inc. v. Aigner Corp., 30 F.3d 761, 764 (7th Cir. 1994) (a party
19 entering into consent decree with EPA is itself liable "in some
20 measure for the contamination" and, consequently, "its claim
21 [against other PRPs] remains one by and between jointly and
22 severally liable parties for an appropriate division of the
23 payment one of them has been compelled to make," and such suits
24 are governed by CERCLA section 113(f)).

25
26
27 ²⁴ (...continued)
28 of settlement," not by the settlor's proportionate share of
damages it caused. See In re Acushnet River & New Bedford
Harbor, 712 F. Supp. 1019, 1027 (D. Mass. 1989)

1 Under CERCLA section 113(f)(3)(B), a "person who has
2 resolved its liability" to a state for "some or all of a response
3 action or for some or all of the costs of such action" in an
4 "administrative" settlement "may seek contribution from any
5 person who is not party to a [CERCLA section 113(f)] settlement .
6 . ." 42 U.S.C. § 9613(f)(3)(B). In New Castle County v.
7 Halliburton NUS Corp., 111 F.3d 1116 (3d Cir. 1997), the Third
8 Circuit Court of Appeals interpreted CERCLA section 113(f)(3)(B)
9 to *require* a potentially responsible person who has resolved its
10 liability in an administrative settlement to "use section 113,
11 and only section 113, to obtain an equitable redistribution of
12 liability among other potentially responsible persons."
13 Halliburton, 111 F.3d at 1124 n.8; see Centerior, 153 F.3d at 351
14 (plaintiffs compelled by EPA administrative order to cleanup
15 hazardous waste could not assert cost recovery claims against
16 defendant PRPs because plaintiffs were themselves PRPs and were
17 limited to contribution claims governed by section 113(f)); Akzo,
18 30 F.3d at 764 (treating claims by party entering into consent
19 decree with EPA as "one by and between jointly and severally
20 liable parties for an appropriate division of the payment one of
21 them has been compelled to make" governed by CERCLA section
22 113(f)).²⁵

24 ²⁵ Several district court decisions have reached the same
25 result. See Signature Combs, Inc. v. United States, 248 F. Supp.
26 2d 741, 747 (W.D. Tenn. 2003) (plaintiffs entering into consent
27 decrees with United States and Arkansas without admitting
28 liability were PRPs because (1) they were compelled to pay for
hazardous waste cleanup and (2) continued to be subject to fines
and penalties and, thus, were limited to contribution claims
under CERCLA as joint tortfeasors); United States v. Compaction
(continued...)

1 The interpretations of section 113(f) in Halliburton,
2 Centerior, Akzo, and various district courts relied upon (1) the
3 implicit limitations placed upon settling parties in CERCLA's
4 structure²⁶ and (2) application of common law principles
5 governing joint tortfeasors to CERCLA. On the latter point, it
6 is important to note that parties compelled to initiate a
7 hazardous site cleanup may not themselves assert joint and
8 several cost recovery claims but are, instead, limited to
9 contribution claims.²⁷

10 _____
11 ²⁵ (...continued)
12 Sys. Corp., 88 F. Supp. 2d 339, 351 (D.N.J. 2000) (party limited
13 to contribution claims after entering into consent decree with
14 the United States because, by agreeing to incur substantial costs
15 for its own liability, party satisfied liability requirements of
16 CERCLA section 107(a) and, consequently, was considered a joint
17 tortfeasor); Borough of Sayreville v. Union Carbide Corp., 923 F.
18 Supp. 671, 679 (D.N.J. 1996) (plaintiff, an admitted PRP, limited
19 to contribution claims and could not rely upon settlement
20 agreement with state environmental agency to assert CERCLA
21 section 107(a) cost recovery claims); Transtech, 798 F. Supp. at
22 1086 ("The clear import of [CERCLA section 113(f)(1)] . . . is to
23 allow persons situated like plaintiffs in this case to gain
24 reimbursement for their clean-up expenditures from other
25 PRPs--the point of Section 113(f)(1) is to share the costs among
26 the blameworthy parties.").

27 ²⁶ See Centerior, 153 F.3d at 352 (PRP that has been
28 compelled to pay for response costs for which others are also
liable and then seeks to recover "reimbursement for such costs"
is limited by section 113(f)(1) to contribution claims);
Halliburton, 111 F.3d at 1124 n.8 ("Application of section 113
does not rest upon a finding of liability, however; a potentially
responsible person who has 'resolved its liability to the United
States' in a 'judicially approved settlement' may seek
contribution.") (citing CERCLA § 113(f)(3)(B), 42 U.S.C. §
9613(f)(3)(B)).

²⁷ See Signature Combs, 248 F. Supp. 2d at 747 (settling
plaintiffs were PRPs limited to contribution claims under CERCLA
as joint tortfeasors); Compaction, 88 F. Supp. 2d at 351 (party
limited to contribution claims after entering into consent decree
with the United States); Borough of Sayreville, 923 F. Supp. at
679 (plaintiff, an admitted PRP, could not rely upon settlement
(continued...))

1 In this case, the Cooperative Agreement partially resolved
2 Lodi's liability to the state²⁸ for past and future response
3 costs. Because Lodi resolved its liability to an agency of the
4 state for some of its response costs based upon the design,
5 construction, and operation of Lodi's sewers, the court finds the
6 Agreement is an "administrative settlement" within the meaning of
7 CERCLA section 113(f) (3) (B). 42 U.S.C. § 9613(f) (3) (B);
8 Halliburton, 111 F.3d at 1124 n.8.

9 The court further finds the Cooperative Agreement provides
10 an alternate ground for Lodi's PRP status because Lodi
11 (1) incurred substantial liability for the past and future
12 response costs based upon its contribution to contamination at
13 the site, (2) continues to be under the threat of legal
14 compulsion to perform remedial work, and (3) accepted
15 responsibility for cleaning up the contamination site.
16 Halliburton, 111 F.3d at 1124 n.8; Signature Combs, 248 F. Supp.

17
18 ²⁷ (...continued)
19 agreement to assert cost recovery claims); cf. Centerior, 153
20 F.3d at 351 (plaintiffs compelled by EPA could not assert cost
21 recovery claims because plaintiffs had acted under legal
22 compulsion and were thus PRPs limited to contribution claims);
23 Transtech, 798 F. Supp. at 1086 (CERCLA section 113(f) (1) governs
24 cost allocation claims among liable parties).

25 ²⁸ The Cooperative Agreement obligated Lodi to pay
26 \$450,000 to the DTSC within 30 days of entering the Agreement to
27 cover DTSC's past response costs "arising from or related to" the
28 contamination site. (Cooperative Agreement, in Ex. D to
Hixson Decl., at 6.) Lodi is also liable to DTSC for up to
\$1,024,649.55 in past and future response costs, to the extent
Lodi cannot recover those from funds from other PRPs. (Id. at
7.) In addition, if Lodi is unable to compel other PRPs to
commence remedial work within 24 months from the effective Date
of the Cooperative Agreement, Lodi is required to "promptly
undertake in the first instance, at its **Sole Cost** and in the sole
discretion of the DTSC," certain "interim work." (Id. at 6-7)
(emphasis in original.)

1 2d at 747; Compaction, 88 F. Supp. 2d at 351; Borough of
2 Sayreville, 923 F. Supp. at 679; see Centerior, 153 F.3d at 351.²⁹

3 **IV. The Impact of Lodi's PRP Status on Preemption of MERLO**

4 **A. Overview**

5 In light of the court's finding that Lodi is a PRP, the next
6 issue is whether the portions of MERLO challenged by plaintiff
7 are preempted by CERCLA.

8 As mentioned above, the Cooperative Agreement required "the
9 prompt enactment and enforcement" of a municipal environmental
10 ordinance "to appropriately *supplement*" Lodi's authority under
11 federal, state and local law. (Cooperative Agreement, in Ex. D
12 to Hixson Decl., at 5) (emphasis added.) However, MERLO did not
13 merely "supplement" CERCLA; it far exceeded the reach of CERCLA.

14 After settling its liability with the DTSC, Lodi enacted an
15 ordinance that effectively launched a variety of highly complex
16 and sophisticated litigation strategies designed to deter any
17 examination of its own liability. During the years of the
18 litigation, Lodi has repeatedly sought numerous injunctive and
19 dispositive orders and continual reconsiderations and appellate
20 reviews of this court's orders in order to overturn, delay, or
21 deflect rulings on Lodi's legal status.³⁰

22
23 ²⁹ As a third ground for proving Lodi's status as a PRP,
24 plaintiff offers evidence that allegedly demonstrates Lodi
25 released hazardous substances into the environment from its
26 sewers. Because the court has already found Lodi's admission and
the Cooperative Agreement establish Lodi's PRP status, the court
does not address plaintiff's evidence of alleged releases from
Lodi's sewers as a separate basis for PRP status.

27 ³⁰ In the related litigation matters, Lodi has filed eight
28 appeals to the Ninth Circuit and two petitions to United States
(continued...)

1 (emphasis in original.)

2 MERLO § 8.24.090(D)(1) provides:

3 Any person alleged *by the city* to be jointly and
4 severally liable pursuant to this chapter who has
5 entered into an effective settlement, administrative
6 settlement or judicially approved settlement shall not
7 be liable for claims for contribution, equitable
8 indemnity, or partial or comparative equitable
9 indemnity regarding matters addressed in the
10 settlement.

11 MERLO § 8.24.090(D)(1) (emphasis added). In addition,

12 MERLO § 8.24.090(D)(4)(b) provides that a party settling its
13 MERLO liability with Lodi may seek contribution from others under
14 state law.³¹

15 Plaintiff contends that MERLO insulates Lodi from
16 contribution claims because, under the scheme, Lodi is a
17 necessary party to any settlement and, as a result, it cannot be
18 sued for contribution. In Fireman's Fund, the Ninth Circuit
19 agreed and stated: "If Lodi is indeed a PRP, it cannot simply
20 legislate away this potential liability under state and federal

21 ³¹ MERLO § 8.24.090(D)(4)(b) provides:

22 A person who has resolved its liability imposed
23 pursuant to this chapter *to the city* for some or all of
24 an abatement action or other obligation imposed
25 pursuant to this chapter or for some or all of
26 abatement action costs in an administrative or
27 judicially approved settlement may seek contribution
28 pursuant to the general laws of the state of California
from any person who has not obtained valid contribution
protection for some or all of the liability imposed
under this code or pursuant to federal law or the
general laws of the state of California.

29 MERLO § 8.24.090(D)(4)(b) (emphasis added).

1 law. For these reasons, we find that MERLO is preempted to the
2 extent that it legislatively insulates Lodi from contribution
3 liability under state and federal law.” Fireman’s Fund, 302 F.3d
4 at 946.

5 Here, MERLO § 8.24.090 (D) (1) and MERLO § 8.24.090 (D) (4) (b)
6 conflict and interfere with the accomplishment and execution of
7 CERCLA’s purpose and objective. Specifically, the lack of
8 contribution rights available under MERLO against Lodi
9 inappropriately insulates Lodi, a PRP, from contribution claims
10 arising out of response costs at the site. Such an outcome runs
11 counter to CERCLA because parties subject to MERLO’s enforcement
12 scheme would be liable for a municipal PRP’s full response costs.
13 In contrast, CERCLA section 113(f) (1) operates to limit PRPs to
14 contribution claims where a PRP “has been compelled to pay for
15 response costs for which others are also liable” and then seeks
16 “reimbursement for such costs.” Centerior, 153 F.3d at 352.

17 By enforcing MERLO’s one-sided cost recovery provisions
18 outside of CERCLA’s cost allocation scheme, MERLO directly
19 thwarts congressional intent to “effectuate quick cleanups of
20 hazardous waste sites”³² and encourage voluntary private action to
21 remedy environmental hazards. See Lincoln Properties, 823 F.
22 Supp. at 1537.

23 Accordingly, the court finds MERLO § 8.24.090 (D) (1) and
24

25 ³² Transtech, 798 F. Supp. at 1082.

1 MERLO § 8.24.090(D)(4)(b) improperly insulate Lodi from
2 contribution liability under CERCLA and, therefore, are preempted.
3 Fireman's Fund, 302 F.3d at 946.

4 **D. Joint and Several Liability under MERLO**

5
6 Plaintiff challenges a second portion of MERLO which permits
7 Lodi, a PRP, to impose joint and several liability for the entire
8 cleanup cost onto any one PRP. Plaintiff asserts this conflicts
9 with CERCLA which does not permit a PRP to impose joint and
10 several liability on other PRPs. Lodi argues, again, that issues
11 of fact preclude summary judgment because the court must still
12 ascertain whether MERLO "actually legislatively insulates Lodi
13 from bearing its share of responsibility." (Lodi Opp. at 12)
14 (emphasis in original.)
15

16 The challenged provision, MERLO § 8.24.040(E), provides in
17 relevant part:

18 The scope of liability [under MERLO] . . . is *joint and*
19 *several* for any person who has caused, created,
20 contributed to, or maintained a single indivisible harm
21 to public health, welfare or the environment resulting
22 from, or which may result from, in whole or in any part,
23 an environmental nuisance and for which there is no
24 reasonable and reliable basis of apportioning the harm
25 among the responsible parties.

26 MERLO § 8.24.040(E) (emphasis added).

27 After analyzing this provision of MERLO, the Fireman's Fund
28 court held:

[I]f the district court determines that Lodi is a PRP,
Lodi may not escape its share of responsibility by
imposing all the costs of cleanup on others. Allowing

1 it do so would interfere with CERCLA's PRP cost
2 allocation scheme, and would implicate the same policy
3 concerns relied upon by this court in Pinal Creek in
4 rejecting a § 107 cost recovery action for PRPs. For
5 these reasons, we find that MERLO is preempted to the
6 extent that it legislatively insulates Lodi from bearing
7 its share of responsibility by imposing joint and
8 several liability on other PRPs.

9 Fireman's Fund, 302 F.3d at 947.

10 MERLO § 8.24.040(E) allows the municipal PRP to impose joint
11 and several liability on others for all of its response costs.
12 However, such full cost recovery is permitted under CERCLA by
13 non-PRPs, such as the EPA or the DTSC. Lodi is not such a party.
14 Nevertheless, MERLO § 8.24.040(E) permits Lodi, a PRP, to "escape
15 its share of responsibility by imposing all the costs of cleanup
16 on others" *outside* of CERCLA's process. Id. Such an
17 unprecedented assumption of power by a PRP directly "interfere[s]
18 with CERCLA's PRP cost allocation scheme" causing inefficiency
19 and delay in the remediation process and prolongation of a
20 litigation process. See Fireman's Fund, 302 F.3d at 947; Pinal
21 Creek, 118 F.3d at 1303.

22 Accordingly, the court finds MERLO § 8.24.040(E) conflicts
23 and interferes with CERCLA's cost allocation scheme and,
24 therefore, is preempted. Fireman's Fund, 302 F.3d at 947.

25 **E. Attorney's Fees and "Action Abatement Costs" under
26 MERLO**

27 Plaintiff's final challenge is to certain MERLO provisions
28 allowing Lodi to collect attorney's fees and "action abatement

1 costs." Lodi contends issues of fact preclude summary judgment
2 for plaintiff because the court must still determine whether
3 MERLO "actually gives Lodi a litigation advantage with respect to
4 the ability to collect attorneys' fees." (Lodi Opp. at 12)
5 (emphasis in original.)
6

7 **1. Attorney's Fees**

8 MERLO § 8.24.040(A)(9)(a) grants Lodi a right to collect
9 attorney's fees and "action abatement costs." It provides in
10 relevant part:

11 Any person . . . who has contributed to or is
12 contributing to the past or present handling, storage,
13 treatment, transportation or disposal of any hazardous
14 substance or pollutant which presents an environmental
nuisance . . . shall be liable for:

- 15 a. *All abatement action costs* incurred by the city .
16 . . .

17 MERLO § 8.24.040(A)(9)(a) (emphasis added).

18 MERLO defines "action abatement costs" expansively to
19 include: (a) "any and all legal, technical or administrative fees
20 and costs," (b) "interest and other costs of financing incurred
21 by the city," (c) "expert assistance in health, law, engineering
22 and environmental science," (d) "expert witness services,"
23 (e) "legal fees (including, but not limited to, internal costs of
24 the city attorney's office or outside legal counsel deemed
25 necessary at the sole discretion of the city)," and (f) "costs of
26 issuing, servicing, and retiring of any financing instruments
27 authorized by the city council." MERLO §§ 8.24.010(2)(a)-(h).
28

1 "Under section 9607(a) (4) (B), a private party³³ may recover
2 the 'necessary costs of response.'" FMC Corp. v. Aero Indus.
3 Inc., 998 F.2d 842, 847 (10th Cir. 1993). "CERCLA defines
4 'response' to include 'enforcement activities related thereto.'" Id.
5 (quoting 42 U.S.C. § 9601(25)). "CERCLA § 107 does not
6 provide for the award of private litigants' attorney's fees
7 associated with bringing a cost recovery action." Key Tronic
8 Corp. v. United States, 511 U.S. 809, 819 (1994); see United
9 States v. Chapman, 146 F.3d 1166, 1173-75 (9th Cir. 1998)
10 (distinguishing between recovery of attorney's fees by government
11 and private litigants under CERCLA). Thus, CERCLA plaintiffs are
12 "confined to recovery of 'necessary costs,' which do not include
13 attorney's fees." Fireman's Fund, F.3d at 953 (citing 42 U.S.C.
14 § 9607(a) (4) (B)).

15
16
17 In Fireman's Fund, the Ninth Circuit interpreted MERLO's

18
19 ³³ Congress did not intend municipalities to recover their
20 response costs pursuant to CERCLA's government cost recovery
21 provision, section 107(a) (4) (A), 42 U.S.C. § 9607(a) (4) (A),
22 because CERCLA's definition of "state" does not include
23 municipalities. City of Philadelphia v. Stepan Chem. Co., 713 F.
24 Supp. 1484, 1488 (E.D. Pa. 1989) ("CERCLA's definition of the
25 term 'state' does not include the word 'municipality.' The
26 entities that are included--states, the District of Columbia,
27 Puerto Rico, Guam, Samoa, the Virgin Islands, the Marianas, and
28 United States territories and possessions-- differ so vastly from
villages, towns, boroughs, townships, counties, and cities as to
be words of exclusion. Even accepting the broad remedial purpose
of CERCLA, there is simply nothing in the statute to suggest that
Congress intended to allow municipalities to recover their
response costs by proceeding under section 107(a) (4) (A) rather
than by proceeding as a private party under section
107(a) (4) (B)."); see 42 U.S.C. § 9601(27); City of Toledo v.
Beazer Materials and Servs., Inc., 833 F. Supp. 646, 651-52 (N.D.
Ohio 1993) (relying upon Stepan to conclude municipalities are
not "states" under CERCLA).

1 provision permitting recovery of attorney's fees and held:

2 [A] city that is also a PRP should not be able to avail
3 itself of this advantage. If the district court finds
4 that Lodi is indeed a PRP, it may not legislate for
5 itself a litigation advantage by granting itself the
6 right to collect attorney's fees.

7 Fireman's Fund, 302 F.3d at 953.³⁴

8 MERLO's provision allowing Lodi, despite its PRP status, to
9 recover attorney's fees in the midst of hazardous waste
10 litigation finds no support in CERCLA's text or in judicial
11 precedent. Clearly, the impermissible recovery of legal fees by
12 Lodi is a distinct litigation advantage which frustrates CERCLA's
13 purpose of effectuating prompt remediation and resolution of
14 disputes.

15 The Ninth Circuit has noted, "[T]he ability to recover
16 litigation-related attorney's fees does not necessarily advance
17 the pace of cleanup because it may encourage ambitious
18 litigation." Fireman's Fund, 302 F.3d at 953. Indeed, as a
19 result of MERLO's extraordinary legislative largesse, it would
20 seem that Lodi's attorneys, unimpeded by CERCLA or typical
21 economic constraints, have often produced unnecessarily
22 voluminous or redundant filings³⁵ and imaginative ploys that have

24 ³⁴ The Ninth Circuit also noted that it "did not interpret
25 the Cooperative Agreement to allow Lodi to recover its attorney's
26 fees, nor do we necessarily believe that it could bestow on Lodi
27 the right to recover all of its attorney's fees under the
28 circumstances of this case." Fireman's Fund, 302 F.3d at 953.

³⁵ As an example, both this court and the court of appeals
(continued...)

1 sent this litigation needlessly down paths from the goals of
2 CERCLA. It is obvious that, unlike CERCLA, MERLO
3 § 8.24.040(A)(9)(a) *promotes* the very "overlawyering" Congress
4 intended to eliminate in these types of cases.

5 Accordingly, the court finds MERLO § 8.24.040(A)(9)(a),
6 granting Lodi a right to collect attorney's fees outside of
7 CERCLA, is preempted. Id.

9 2. "Action Abatement Costs"

10 The court must next determine whether MERLO's broad
11 definition of "action abatement costs" conflicts with the
12 "necessary costs of response" permitted under CERCLA section
13 107(a). See Fireman's Fund, 302 F.3d at 954. In Fireman's Fund,
14 the Ninth Circuit declined "to pass judgment" on "action
15 abatement costs" and, instead, left it "to the district court to
16 determine if these costs are recoverable under the standard of
17 'necessary costs of response' if Lodi should prove to be a PRP."
18 Id.³⁶

19
20 As outlined above, MERLO provides Lodi the right to recover
21

22
23 ³⁵ (...continued)
24 have had considerable difficulty reigning in Lodi's counsel's
25 insatiable appetite to file briefs that far exceed reasonable
page limits.

26 ³⁶ The Ninth Circuit noted MERLO's definition of "action
27 abatement costs" reflected a Lodi strategy to recover "costs
28 related to a financing scheme upon which it has embarked in order
avoid municipal finance mechanisms that would make Lodi's
ratepayers responsible (at least initially) for principal and
interest costs." Fireman's Fund, 302 F.3d at 954.

1 extensive categories of ill-defined costs that are not supported
2 by CERCLA's text and cannot be reconciled with Key Tronic's
3 interpretation of permissible "necessary costs of response" under
4 CERCLA. In Key Tronic Corp. v. United States,³⁷ the United
5 States Supreme Court held that CERCLA section 107 did not
6 "provide for the award of private litigants' attorney's fees
7 associated with bringing a cost recovery action." Key Tronic,
8 511 U.S. at 819.

10 In determining the types of costs recoverable under CERCLA,
11 the Key Tronic court indicated that costs which are "*closely tied*
12 to the *actual cleanup* may constitute a necessary cost of response
13 in and of itself under the terms of § 107(a)(4)(B)." Id. at 820
14 (emphasis added). The Court noted that such costs may include
15 "work performed in identifying other PRP's," or work "performed
16 by engineers, chemists, private investigators, or other
17 professionals who are not lawyers," because "tracking down other
18 responsible solvent polluters increases the probability that a
19 cleanup will be effective and get paid for" which "significantly
20 benefited [sic] the entire cleanup effort and served a statutory
21 purpose . . ." Id.

24 In contrast, the Supreme Court instructed that fees incurred
25 as "litigation expenses" or "in *pursuing litigation*" are not
26 properly included in recoverable CERCLA costs. Id. (emphasis
27

28 ³⁷ 511 U.S. 809 (1994).

1 added). For example, recoverable costs did not include "legal
2 services performed in connection with the negotiations between
3 Key Tronic and the EPA that culminated in the consent decree," or
4 "[s]tudies that Key Tronic's counsel prepared or supervised
5 during those negotiations" because such work "primarily
6 protect[ed] Key Tronic's interests as a defendant in the
7 proceedings that established the extent of its liability." Id.
8 at 820. "As such, these services do not constitute 'necessary
9 costs of response' and are not recoverable under CERCLA." Id.
10

11 Clearly, Congress intended that cost recovery be limited to
12 cleaning up the environment, not provide an opportunity to profit
13 at the expense of the environment. Unfortunately, MERLO provides
14 just such an opportunity.
15

16 MERLO's definition of "action abatement costs" permits
17 recovery of costs associated with Lodi's *financing* scheme for its
18 litigation. Such costs include: "interest and other costs of
19 financing incurred by the city," or "costs of issuing, servicing,
20 and retiring of any financing instruments authorized by the city
21 council." MERLO § 8.24.010(2); MERLO § 8.24.010(2)(h)(ii).
22 Apparently such a scheme was implemented "in order to avoid
23 municipal finance mechanisms that would make Lodi's ratepayers
24 responsible (at least initially) for principal and interest
25 costs." Fireman's Fund, 302 F.3d at 954. The scheme, contrary
26 to federal environmental law, was designed to pay "lawyers to
27
28

1 build a case for the recoverability of costs," rather than
2 directing "energy and resources toward cleaning up the site,"³⁸
3 and to "pursu[e] litigation," rather than pay costs "closely tied
4 to the actual cleanup." Key Tronic, 511 U.S. at 820.

5
6 Similarly, the remaining balance of "action abatement costs"
7 permitted under MERLO include categories of fees and costs that
8 are not permitted by CERCLA. Such fees and costs include, "any
9 and all legal, technical or administrative fees and costs,"
10 "expert assistance in health, law, engineering and environmental
11 science," "expert witness services," and "legal fees (including,
12 but not limited to, internal costs of the city attorney's office
13 or outside legal counsel deemed necessary at the sole discretion
14 of the city)." See MERLO §§ 8.24.010(2). The above "action
15 abatement costs" go far beyond recognized recoverable response
16 costs under CERCLA because they are not carefully defined or
17 limited to costs "closely tied to the actual cleanup" and include
18 many costs incurred "in pursuing litigation." Key Tronic, 511
19 U.S. at 820.

20
21 Indeed, MERLO's cost recovery scheme generates the
22 opportunity for a financial windfall for some few fortunate
23 professionals, as well as Lehman Brothers, Inc., an investment
24 bank, which has no interest in cleaning up the contaminated
25
26
27

28 ³⁸ See Fireman's Fund, 302 F.3d at 950.

1 site.³⁹ This profit-seeking concept of cost recovery is the
2 polar opposite of CERCLA and is in direct violation of the goals
3 and objectives set by Congress. See Fireman's Fund, 302 F.3d at
4 953.

5 _____Accordingly, the court finds the "action abatement costs"
6 defined by MERLO §§ 8.24.010(2)(a)-(h) are preempted by CERCLA
7 because such costs are clearly broader than the definition and
8 judicial interpretation of recoverable "necessary costs of
9 response." See 42 U.S.C. § 9607(a)(4)(B); Key Tronic, 511 U.S.
10 at 819; Fireman's Fund, F.3d at 953-54.

11 **F. Conclusion of Analysis**

12
13 In sum, CERCLA is a comprehensive settlement process
14 designed by Congress to further the efficient environmental
15 cleanup and prompt resolution of disputes. In contrast, MERLO
16 advances different priorities. Importantly, MERLO is carefully
17 designed to make Lodi impervious to the consequences of CERCLA.
18 In effect, MERLO elevates the financial interests of Lodi, its
19 attorneys, and others, above the priorities of environmental
20 cleanup and the prompt resolution of disputes. Such a
21 legislative scheme is in direct conflict with the express goals
22
23
24

25 ³⁹ In its request for reconsideration of the Magistrate
26 Judge's ruling relating to documents regarding the financing of
27 Lodi's litigation in the M & P case, non-party Lehman Brothers,
28 Inc. stated: "*Lehman invested solely out of a desire to profit
from its investments.*" (Non-Party Lehman Brothers, Inc.'s Req.
for Reconsideration by the Dist. Ct. of Mag. Judge's Ruling,
filed May 19, 2003 in M & P, at 7) (emphasis added.)

1 and objectives of Congress and, thus, violates the Supremacy
2 Clause of the United States Constitution.

3 **V. Preemption**

4 Because the court has held portions of MERLO are preempted
5 by CERCLA, those provisions are invalid. See Fireman's Fund, 302
6 F.3d at 941. Plaintiff requests that the court enter an order
7 permanently enjoining Lodi and its officers from enforcing or
8 invoking any of the preempted provisions against any person who
9 is a PRP for the contamination at the site.⁴⁰

10
11 Based upon the court's findings of preemption, the court
12 makes the following orders:

- 13
14 1. Lodi and its officers are enjoined from enforcing or
15 invoking MERLO § 8.24.090(D)(1) and MERLO
16 § 8.24.090(D)(4)(b) against any person who
is a PRP at the site of contamination, as that site is
defined by this order;
- 17 2. Lodi and its officers are enjoined from enforcing or
18 invoking MERLO § 8.24.040(E)'s provision for joint and

19
20 ⁴⁰ Despite the rulings above, the court finds that the
21 unchallenged portions of MERLO remain valid because the invalid
22 provisions are easily severable from the remainder of the
ordinance, and MERLO § 8.24.090(A) contains a severability
clause, which provides:

23 If any provision of this chapter or the application
24 thereof to any person or circumstances is held invalid,
25 such invalidity shall not affect other provisions or
26 applications of the chapter which can be given effect
27 without the invalid provision or application. To this
end, the provisions of this chapter are severable. The
city council declares that it would have adopted the
ordinance codified in this chapter irrespective of the
invalidity of any particular portion thereof.

28 MERLO § 8.24.090(A); see Fireman's Fund, 302 F.3d at 957.

1 several liability against any person who is a PRP at
2 the site of contamination, as that site is defined by
3 this order;

3 3. Lodi and its officers are enjoined from enforcing or
4 invoking MERLO § 8.24.040(A)(9)(a) to collect
5 attorney's fees against any person who is a PRP at the
6 site of contamination, as that site is defined by this
7 order;

7 4. Lodi and its officers are enjoined from enforcing or
8 invoking MERLO §§ 8.24.010(2) to collect "action
9 abatement costs" against any person who is a PRP at the
10 site of contamination, as that site is defined by this
11 order.

10 **CONCLUSION**

11 Based upon the above, plaintiff Fireman's Fund's motion for
12 partial summary judgment is GRANTED and a permanent injunction is
13 issued against defendant City of Lodi in accordance with the
14 above orders.
15

16 IT IS SO ORDERED.

17 DATED: _____
18

19 _____
20 FRANK C. DAMRELL, Jr.
21 UNITED STATES DISTRICT COURT
22
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