

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Hercules Incorporated,
Hercules Plaza
1313 North Market Street
Wilmington, DE 19894

Plaintiff,

v.

United States of America,

Defendant.

C.A. No. 1:03CV01475 (RWR)

COMPLAINT

Plaintiff, Hercules Incorporated alleges the following against Defendant, the United States of America.

NATURE OF THE ACTION

1. Plaintiff brings this action under Sections 107(a) and 113(f) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601 *et seq.* ("CERCLA").

2. Plaintiff seeks to recover from the Defendant necessary costs of response Plaintiff has incurred consistent with the National Contingency Plan, 40 C.F.R. Part 300, caused by the release or threatened release of hazardous substances at a facility at 50 South Minisink Ave., Parlin, New Jersey (hereinafter, the "Parlin Site"). Plaintiff also seeks a declaratory judgment of liability for response costs pursuant to 28 U.S.C. §§ 2201 and 2202 and CERCLA § 113(g)(2).

42 U.S.C. § 9613(g)(2), declaring Plaintiff's right to recover past and future response costs for the release of hazardous substances at and/or from the Parlin Site.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action under Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and under 28 U.S.C. § 1331. In addition, the Declaratory Judgment Act, 28 U.S.C. § 2201, and Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), authorize this Court to grant Plaintiff declaratory relief.

4. Venue in this Court is proper pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), because the Defendant resides or may be found in this district.

PARTIES

5. Plaintiff, Hercules Incorporated ("Hercules"), is a corporation duly organized and existing under the laws of Delaware with its principal place of business in Delaware. Plaintiff is a "person" as the term is defined under Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

6. The United States of America ("United States" or "government") has been named as a defendant on the basis of actions undertaken by its departments, agencies, and instrumentalities, including the following: the former Defense Plant Corporation; the U.S. Department of Commerce; the U.S. Department of Army; the U.S. Department of Navy; and the former War Department and its successor the U.S. Department of Defense and its subsidiary military agencies.

**FACTUAL BACKGROUND AND EXTENT OF GOVERNMENT
INVOLVEMENT**

7. The Parlin Site, which is the subject of this Complaint, is a 669-acre chemical manufacturing facility, located in Parlin, Middlesex County, New Jersey. The Parlin Site was originally built by the Union Powder Corporation. Around 1915, Hercules acquired the Parlin Site from Union Powder.

8. As described more fully below, throughout its history, but in particular during World Wars I and II, the Parlin Site manufactured chemical products for the United States Government that were deemed critical to the war effort, including nitrocellulose, smokeless powders, dichlorodiphenyl trichloroethene ("DDT"), and Parlon (a chlorinated rubber).

The World War I Era

9. During World War I, the government directed and controlled the manufacture of nitrocellulose and smokeless powder at the Parlin Site.

10. Nitrocellulose, also known as "gun cotton," is an incendiary material used to make smokeless powder, which is an explosive used to propel bullets, shells and other ordnance.

11. During World War I, and during other periods, the Parlin Site produced nitrocellulose and smokeless powders for government use in military ordnance.

12. The government employed a resident inspector at the Parlin Site to inspect the nitrocellulose and smokeless powder production process and final products.

13. The resident inspector exercised control over all aspects of the nitrocellulose and smokeless powder production processes. The resident inspector had the authority, and exercised

his authority, to direct Hercules to make changes in production processes, as well as waste disposal practices.

14. For example, following a government inspection in 1918, the government directed Hercules to refrain from using caustic solution to wash powder-sorting screens (a practice that was thought to contaminate later lots of smokeless powder) to remove off-specification powder and instead to resort to the waste disposal practice of "burning" off-specification powders.

15. The government knew that the generation and disposal of hazardous substances was inherent in the process of manufacturing nitrocellulose, smokeless powder, and their constituents.

16. The government intended that nitrocellulose and smokeless powder waste would be disposed of at the Parlin Site. The government had actual and/or constructive knowledge of the fact and manner of the disposal of nitrocellulose and smokeless powder waste.

17. As a result of government directives concerning operation of the nitrocellulose and smokeless powder production facilities, nitrocellulose, smokeless powder, and other hazardous substances were released into the environment at the Parlin Site. Nitrocellulose, smokeless powder, their constituents, and other hazardous substances have been found in the soil, sediment, and groundwater at and/or near the Parlin Site, and Hercules has, and may in the future, remediate this contamination.

The World War II Era

18. During World War II, the Parlin Site again became an integral cog of the United States' war effort. Before or during World War II, the government acquired a nitrocellulose

plant at the Parlin Site, and thereafter expanded the capacity of that plant to satisfy nitrocellulose demands created by World War II.

19. In January 1942, the War Production Board ("WPB") was established by Executive Order. The WPB was a government body created to supervise the mobilization of American industrial power for the World War II effort. The Chairman of the WPB was empowered to issue directives to industry in regard to matters such as purchasing, contracting, specifications, construction, requisitioning, plant expansion, conversion and financing and was delegated the authority vested in the President of the United States to take over plants that refused to give priority consideration of orders for the United States Government.

20. In or about 1943, the WPB determined that DDT was critical to the war effort for use in disease prevention and as a delousing agent. Specifically, the government needed DDT to protect U.S. troops in Europe from typhus, malaria, and yellow fever. Without DDT, the government believed it would have had to change its battle plans because of the casualties at the battlefield from insect-borne diseases. The United States Government consumed all domestic DDT production until as late as September of 1945.

21. The WPB chose several chemical companies, including Hercules, to form the base of the new DDT production capacity. After the WPB chose Hercules to participate in the DDT program, the WPB arranged to finance construction of the DDT production facilities through the Defense Plant Corporation ("DPC"), a government-owned corporation. Hercules and the DPC enter into a lease agreement dated May 26, 1944. Pursuant to the Lease, the DPC agreed to convert a portion of its nitrocellulose plant into a DDT production plant. Further, the DPC furnished to Hercules the equipment required for production of DDT.

22. The government retained title to the nitrocellulose and DDT plants and nitrocellulose and DDT production equipment furnished to Hercules at the Parlin Site.

23. Hercules produced DDT at the Parlin Site under the direction of the DPC, the WPB and the War Department and pursuant to government contracts supporting military programs in 1944 and 1945.

24. The government maintained pervasive control over all aspects of the production of DDT at the Parlin Site in that, among other things: (a) the government approved all plans, specifications, and drawings of equipment for the production of DDT; (b) the government controlled raw materials required for DDT production, in particular, scarce commodities such as benzene, chlorine, alcohol and sulfuric acid, which the government made special arrangement to procure and set aside for DDT producers; (c) the Lease specifically provided that the government's DDT production equipment could only be used to produce DDT and that all DDT produced had to be sold to the government; (d) the WPB provided exemptions from military service for personnel needed to produce DDT; (e) the government set DDT production goals that Hercules was expected to meet; and (f) the WPB, through the DDT Producers Advisory Committee, received and reviewed periodic reports relating to DDT production at the Parlin Site.

25. Upon information and belief, the government owned all of the materials needed to produce DDT under the contracts between Hercules and the government. Upon information and belief, the United States retained ownership and control over the DDT components at all times during the production process and owned the finished DDT products.

26. In October 1945, the government transferred the DDT plant to Hercules. Hercules could not find a commercial market for DDT. Thus, in September 1947, Hercules dismantled and closed the DDT plant.

27. During the years that the government owned and controlled the DDT production operations at the Parlin Site, hazardous substances including DDT and DDT byproducts were released into the environment from the government's DDT-equipment and DDT-manufacturing buildings.

28. The government knew from the plans, specifications and drawings it approved for the DDT production facility that the generation and disposal of wastes containing DDT was inherent in the process of manufacturing DDT, and had actual and/or constructive knowledge of the manner of disposal of DDT production wastes.

29. The government intended that DDT waste would be disposed of at the Parlin Site.

30. The release of DDT and DDT byproducts from the DDT plant and DDT equipment contaminated the soil, sediment, and groundwater in and around the Parlin Site.

31. During and after World War II, the government also requested that Hercules produce Parlon, a chlorinated rubber. As with DDT, Parlon was deemed critical to the war effort. Parlon was a basic constituent of weather-resistant paint used on battleships and in other military applications. Parlon also was an essential ingredient of flameproofing mixtures for treated canvas and other textiles used by the military.

32. Upon information and belief, the government maintained pervasive control over the production of Parlon, much in the way it maintained pervasive control over the production of DDT.

33. Upon information and belief, the government owned all of the materials needed to produce Parlon under the contracts between Hercules and the government. Upon information and belief, the United States retained ownership and control over Parlon components at all times during the production process and owned the finished Parlon products.

34. There were releases of Parlon and Parlon-related wastes at the Parlin Site, which contaminated the soil, sediment, and groundwater.

Remediation Efforts

35. Following an environmental investigation of the Parlin facility directed by U.S. Environmental Protection Agency ("EPA") and the New Jersey Department of Environmental Protection ("NJDEP"), Hercules remediated soil, sediment, and groundwater contaminated with hazardous substances, including DDT, nitrocellulose, smokeless powder, and Parlon.

36. To date, the cost of the Parlin Site investigation and remediation exceeds \$3.2 million. Hercules also continues to incur costs to monitor landfills and groundwater at the Parlin Site for DDT and other hazardous substances.

37. In the future, NJDEP may require Hercules to remediate DDT-contaminated sediments in the South River, which is adjacent to the Parlin Site, and other contamination at the Site.

COUNT I: OWNER LIABILITY

38. Plaintiff repeats and realleges as if fully set forth herein the allegations contained in Paragraphs 1 through 37 of this Complaint.
39. The Parlin Site is a "facility" within the meaning of CERCLA § 101(9), 42 U.S.C. § 9601(9).
40. Each of the structures owned by the government and used to produce nitrocellulose and DDT is a "facility" within the meaning of CERCLA § 101(9), 42 U.S.C. § 9601(9).
41. Each piece of nitrocellulose and DDT equipment provided to Hercules by the government is a "facility" within the meaning of CERCLA § 101(9), 42 U.S.C. § 9601(9).
42. The United States is a "person" as that term is defined under Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
43. Constituents found in the soil, sediment, and groundwater at the Parlin Site, including, but not limited to, DDT, DDT components and byproducts, Parlon, smokeless powder, and nitrocellulose, are "hazardous substances" within the meaning of CERCLA § 101(14), 42 U.S.C. § 9601(14).
44. During and after the production of DDT, Parlon, smokeless powder, nitrocellulose, and other products, hazardous substances were disposed of and released to the environment within the meaning of CERCLA §§ 101(14) & (22), 42 U.S.C. §§ 9601(14) & (22).
45. Hercules has undertaken, and will continue to undertake, investigations and response actions in connection with the Parlin Site in response to releases or threatened releases

of hazardous substances, and has incurred and will continue to incur necessary costs of response consistent with the National Contingency Plan.

46. Under CERCLA 107(a), 42 U.S.C. § 9607(a), persons who owned a facility at the time of disposal of hazardous substances are liable for necessary costs of responding to a release or threatened release of hazardous substances incurred by any person consistent with the NCP.

47. The United States is liable for response costs incurred by Hercules for cleanup of the Parlin Site under CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2), because the United States "owned" the DDT and nitrocellulose manufacturing plants and equipment at the time of disposal of hazardous substances.

COUNT II: OPERATOR LIABILITY

48. Plaintiff repeats and realleges as if fully set forth herein the allegations contained in Paragraphs 1 through 47 of this Complaint.

49. Under CERCLA 107(a)(2), 42 U.S.C. § 9607(a)(2), persons who operated a facility at the time of disposal of hazardous substances are liable for necessary costs of responding to a release or threatened release of hazardous substances incurred by any person consistent with the NCP.

50. The United States is liable for response costs incurred by Hercules for cleanup of the Parlin Site under CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2), because the United States was an "operator" of the Parlin Site at the time of disposal of hazardous substances.

COUNT III: ARRANGER LIABILITY

51. Plaintiff repeats and realleges as if fully set forth herein the allegations contained in Paragraphs 1 through 50 of this Complaint.

52. Under CERCLA 107(a), 42 U.S.C. § 9607(a), persons who arranged for disposal of hazardous substances at a facility are liable for necessary costs of responding to a release or threatened release of hazardous substances incurred by any person consistent with the NCP.

53. The United States is liable for response costs incurred by Hercules for cleanup of the Parlin Site under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), because the United States is a person who "arranged for disposal" of hazardous substances including DDT, nitrocellulose, smokeless powder, Parlon, and their constituents and byproducts at the Parlin Site.

PRAYER FOR RELIEF

WHEREFORE, Hercules requests that this Court enter judgment in favor of Hercules and against the United States as follows:

1) Declaring that the United States is liable as an owner, operator, and arranger under CERCLA § 107(a) for necessary response costs incurred in the past or which will be incurred in the future by Hercules in responding to releases of hazardous substances at the Parlin Site;

2) Awarding Hercules a share of the response costs incurred to date by Hercules, as contribution under CERCLA § 113(f), such amount to be determined at trial;

3) Ordering the United States, pursuant to CERCLA § 113(f), to pay a percentage of future response costs as they are incurred by Hercules;

- 4) **Awarding Hercules interest and costs of suit, including reasonable attorneys' fees;**
and
- 5) **Awarding Hercules such other relief as the Court may deem just and proper.**

Respectfully submitted,

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