

Superfund and Natural Resource Damages Litigation Committee Newsletter

Vol. 8, No. 1

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EDITORS' NOTE

Ashley A. Peck and Andrew W. Homer

We are pleased to bring committee members another batch of interesting and timely articles on topics in our field. In this issue, we feature discussion of internal initiatives to improve the Environmental Protection Agency's (EPA) five-year review program, the continued lack of clarity regarding private parties' rights under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) sections 107 and 113, CERCLA liability for historical disposal of chlorinated solvents, and divisibility/apportionment issues at riverine sediment sites.

Ashley Peck has stepped in as co-vice chair and co-editor for our committee's newsletter. Her contributions will ensure that the newsletter continues to provide the membership with important and interesting updates on judicial, regulatory, and legislative initiatives, members' news, and more.

As always, we are very interested in receiving your suggestions and submissions. Please spread the word, and feel free to contact either of us using the e-mail addresses below.

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MESSAGE FROM THE CHAIR

Kirk O'Reilly

I'm pleased to take over the chair of the Superfund and Natural Resource Damages (NRD) Litigation Committee and thank our former chair, Connie Sue Martin, for her service. For those new to the committee, it focuses on federal and state law, cases, and policy related to Superfund sites and NRD. Issues include assignment of liability, cost allocation, enforcement, and interactions between agencies, trustees, and potentially responsible parties.

With this being the first newsletter of the 2012–2013 ABA year, I'd like to share some committee news. Due to the willingness of our serving vice chairs to continue in their roles and an enthusiastic response to a call for volunteers, we now have co-vice chairs in most positions. Also, a LinkedIn group has been initiated to help spur communication between committee members. For more information, see the announcement below. Looking ahead, our committee is participating in the 42nd Spring Conference

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**AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT,
ENERGY, AND RESOURCES**

CALENDAR OF SECTION EVENTS

January 25-27, 2013
ABA SEER Winter Council Meeting
La Concha Resort
San Juan, PR

February 6-12, 2013
ABA Midyear Meeting
Dallas, TX

February 26, 2013
Key Environmental Issues in US EPA Region 4
Atlanta, GA

March 21-23, 2013
42nd Spring Conference
Grand America Hotel
Salt Lake City, UT

April 11-12, 2013
ABA Petroleum Marketing Attorneys' Meeting
Washington, DC

April 18, 2013
ABA Public Lands and Resources Law Symposium
Missoula, MT

April 19-21, 2013
ABA SEER Spring Council Meeting
Greenough, MT

June 5-7, 2013
31st Annual Water Law Conference
Las Vegas, NV

**For full details, please visit
www.ambar.org/EnvironCalendar**

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(formerly the Annual Conference on Environmental Law) with a panel on cost allocation and NRD recovery. As our service project, we continue to support SEER's One Million Trees project. Remember to register any trees you plant, whether as part of an organized effort or just a backyard improvement, at the section's Web site.

As the former newsletter vice chair, I strongly support this forum and remind members we are always looking for interesting articles. Suggestions for webinars, CLE, or panel topics are also welcome. I can be reached at 425-519-8700 or koreilly@exponent.com, and look forward to working with committee members in the year ahead.

Kirk T. O'Reilly is senior managing scientist with Exponent's Environmental Science Practice in Bellevue, Washington, and is a member of the Washington State Bar.



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STRONGER MANAGEMENT CONTROLS WILL IMPROVE EPA FIVE-YEAR REVIEWS OF SUPERFUND SITES

Carolyn Copper, Kathryn Hess, and Patrick Milligan

As required by law or as a matter of Environmental Protection Agency (EPA) policy, five-year reviews (FYRs) are conducted at Superfund sites where a cleanup remedy leaves conditions that impose restrictions on full use of a site. FYRs provide a critical "checkup" on the years of public and private sector work and expense invested in Superfund cleanups. FYRs ensure protection of human health and inform the public on conditions at these sites. These reviews are conducted at least every five years following a trigger date defined according to statute or a policy requirement. During an FYR, the effectiveness of cleanup remedies and site conditions should be properly assessed and evaluated, and changes made as needed. The responsibility for ensuring completion of FYRs is delegated to EPA regional offices, but EPA headquarters in Washington, D.C., provides oversight and policy direction on conducting FYRs. EPA is required to report to Congress on the results of FYRs.

The three primary questions addressed in a Superfund FYR are:

- Is the remedy functioning as intended by the decision documents?
- Are the exposure assumptions, toxicity data, and remedial action objectives used at the time of remedy selection still valid?
- Has any other information come to light that could call into question the protectiveness of the remedy?

Several steps are carried out to answer these questions:

- **Community involvement and notification:** Issue public notices announcing the initiation and completion of the FYR and provide results of the review in a local site repository.

- **Document review:** Gather and review all relevant documents, environmental monitoring and sampling data, and other information in support of the FYR.
- **Site inspection:** Conduct a site inspection to visually confirm and document the conditions of the remedy and the site.
- **Interviews:** Gather additional information about the site through interviews with site personnel, regulatory authorities, local officials, and/or community action groups.
- **Data review and evaluation:** Review and analyze the data collected as part of a technical assessment of the remedy and the site.
- **Protectiveness statements:** Based on the technical assessment, make a determination as to whether the remedy is protective of human health and the environment. EPA has several protectiveness categories:
 - **Protective:** Protective of human health and the environment.
 - **Will be protective:** Will be protective once the remedy is completed.
 - **Protective in the short term:** Protective in the short term; however, for the remedy to be protective in the long term, follow-up actions need to be taken.
 - **Protectiveness deferred:** Protectiveness cannot be determined until further information is obtained.
 - **Not protective:** Not protective unless specified actions are taken.

Depending upon the protectiveness determination, recommendations for improvements or remedy modifications may be made.

Over the last several years, EPA FYRs have tended to result in decisions that Superfund site remedies are *protective in the short term* or *protective*. There are few instances where EPA has judged a site remedy to be *not protective*.

Since 1999, the EPA Office of Inspector General (OIG) has identified concerns with EPA's management of the Superfund FYR process. In response, EPA has substantially improved and implemented changes to include issuing comprehensive guidance, providing

training, reducing large backlogs of FYRs, and improving the quality and consistency of FYRs. However, in OIG's most recent report, issued in February 2012, we again identified opportunities for EPA to improve in this area.

OIG's February 2012 report was prompted by a series of independent OIG studies that evaluated EPA's long-term monitoring at several Superfund sites. These studies uncovered problems with Superfund sites that were not detected or reported by the FYRs that EPA had conducted at those sites. For example, at Superfund sites, we found that:

- A site monitoring network was inadequate to assess whether off-site migration of contaminants had been controlled by the cleanup remedy, affecting EPA's ability to make an accurate protectiveness determination in the FYR;
- Environmental sampling data collected at a Superfund site did not support the protectiveness determination made by EPA in the FYR;
- Long-term sampling had not sufficiently measured ecological impacts and, therefore, the protectiveness determination EPA made in the site's FYR could be challenged; and
- Oversight of long-term monitoring did not detect the collection, reporting, and analysis of invalid data that was then used in completing the site's FYR.

As a result of the findings above, OIG's February 2012 report focused on a follow-up and verification review of EPA's implementation and action on FYR improvements it previously committed to make. Specifically, we reviewed EPA's commitment to reviewing 75 percent of EPA regions' draft FYR reports to improve quality and consistency. The results of our review signaled the need for additional management controls to ensure quality and consistency in EPA's FYRs. We found no formal process in place to resolve differences when EPA headquarters and

regions disagree on the conclusions of FYR reports. Consequently, protectiveness determinations included in published FYR reports may reflect unresolved EPA disagreements about site protectiveness. In addition, our review showed that EPA did not always follow up to determine whether the regions implemented recommendations made in FYRs, and regions sometimes disregarded valid EPA headquarters comments about the quality of FYRs. Specifically:

- We found cases where the protective status declared in the final FYR report was more protective than could be supported by data and other information included in the FYR report. While EPA headquarters pointed out these problems in its reviews of draft FYR reports, it did not have a procedure in place to resolve issues and ensure that regions modified their final FYR reports accordingly. In one significant example, our review of monitoring data showed a contaminant at concentrations greater than 100 times the drinking water standard seeping from the groundwater to a river a half-mile upstream from a major city's drinking water intake. The region declared the remedy *protective in the short term* partly because monitoring results at the intake showed contaminant concentrations were below the standard. The EPA headquarters reviewer recommended a *not protective* determination, which was also in agreement with the state's position.
- In over 80 percent of the cases we examined in detail (15 of 18), the region had declared the remedy to be protective of human health and the environment in the short term. EPA regions were using *protective in the short term* even when serious issues had been identified at sites that warranted considerable follow-up action similar to that needed for a site declared *not protective*. EPA's guidance did not adequately define *short-term protective*. Because of the wide-ranging use of "short term protective" and unclear definition in EPA guidance, we made recommendations to EPA to provide greater clarity to regions on which situations are acceptable under a short-term-protective

determination to prevent misuse of this determination.

Conclusions

Superfund FYRs are a critical and mandated checkup on the performance and effectiveness of cleanup remedies designed to protect the public and the environment from unsafe levels of contamination. Checks that are not done or not done properly can contribute to failed or underperforming remedies that go undetected and introduce potential risks to the public and environment. Our work has documented that this has occurred in the past. The Superfund FYR process can also detect when a cleanup remedy should be modified to improve efficiency and cost. EPA's FYR process has improved substantially over the last decade. It should continue to be a priority area and focus of continuous improvement given EPA's emphasis on reusing and developing contaminated properties, including Superfund sites. A rigorous and conforming FYR process is critical to providing assurance that reused Superfund sites are safe.

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Kathryn Hess is a project manager in the EPA OIG Boston office with over 20 years of experience as a federal environmental scientist.

Patrick Milligan is a project manager in the EPA OIG Philadelphia office, leading OIG evaluations of EPA's Superfund program. The full report is available at <http://www.epa.gov/oig/reports/2012/20120206-12-P-0251.pdf>. For more information on OIG reports, contact the OIG Office of Congressional and Public Affairs at (202) 566-2391.

SUPREME COURT DECLINES TO RESOLVE INTERPLAY BETWEEN CERCLA COST RECOVERY AND CONTRIBUTION PROVISIONS

Meline MacCurdy and Adam Orford

The Supreme Court has denied a petition for review regarding the interplay between Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) sections 107 and 113, the law’s cost recovery and contribution provisions. The petition for certiorari in *Solutia, Inc. v. McWane, Inc.*, Supreme Court Case No. 12-89, asked the Supreme Court to reverse a recent Eleventh Circuit ruling that a party with a viable section 113 contribution claim may not also seek recovery under section 107, even when that party has incurred costs voluntarily under a consent decree.

The issue is an important one for environmental law practitioners and their clients who are considering whether to comply with an order under CERCLA section 106 or to enter into a CERCLA consent decree. If by doing either one—as the Eleventh Circuit held—such parties are limited to recovery under section 113, they risk becoming unable to recover from other parties who settle with the United States, unable to impose joint and several liability on other responsible parties, and unable to bring actions at all under a potentially more onerous statute of limitations.

The issue was touched on, but left undecided, by two earlier Supreme Court decisions, *Cooper Industries, Inc. v. Aviall Services, Inc.* and *United States v. Atlantic Research Corp.* Neither case resolved whether the two statutory provisions are mutually exclusive or can be pleaded in the alternative. The Supreme Court’s denial of certiorari leaves the matter unsettled.

Legal Background

The Supreme Court’s decisions in *Aviall* and *Atlantic Research* answered two specific questions, but left little guidance as to how to resolve the question at issue in *Solutia*. In *Aviall*, 543 U.S. 157 (2004), the Court ruled that the plain language of section 113(f)

foreclosed parties who had not already been sued from bringing a contribution action. The *Aviall* decision left untouched numerous circuit decisions that had held that section 113 was the sole avenue of cost recovery for private parties, i.e., that section 107 was not available to them, which, combined with *Aviall*’s denial of the section 113 remedy, would have severely limited the ability of private parties to recover response costs.

The Court revisited these issues in *Atlantic Research*, 551 U.S. 128 (2007), ruling that a party who had voluntarily incurred response costs but had not been sued could bring a cost recovery action against other potentially responsible parties (PRPs) under CERCLA section 107(a). The Court also addressed the government’s arguments that permitting private parties to recover under section 107 would “effectively allow[] PRPs to circumvent [section 113’s] shorter statute of limitations . . . [and to] eschew equitable apportionment under [section 113] in favor of joint and several liability under [section 107],” and that the ruling “eviscerates the settlement bar set forth in § 113(f)(2).” *Id.* at 137–38. The court dismissed the government’s concerns in a discussion of the differences between sections 107 and 113. *Id.* at 138–41. However, as one court explained, notwithstanding these rulings, the Supreme Court’s decisions “have done little to provide the lower courts with useful guidance in determining which subsection of CERCLA provides a cause of action for parties seeking reimbursement of response costs in *differing* situations.” *New York v. Solvent Chem. Co., Inc.*, 685 F. Supp. 2d 357, 425 (W.D.N.Y. 2010) (emphasis added). As Justice Thomas put it in *Aviall*, after the 1986 amendments to CERCLA, “CERCLA provided for a right to cost recovery in certain circumstances [section 107] and separate rights to contribution in other circumstances [section 113].” 543 U.S. at 163. The question ever since has been *which* circumstances.

One important unresolved question is the issue raised by *Solutia*: the rights to recovery available to parties who have incurred costs that are “compelled” by a consent decree or administrative order. The *Atlantic Research* Court specifically noted the issue and declined to rule on it:

We do not suggest that §§ 107(a)(4)(B) and 113(f) have no overlap at all. For instance, we recognize that a PRP may sustain expenses pursuant to a consent decree following a suit under § 106 or § 107(a). In such a case, the PRP does not incur costs voluntarily but does not reimburse the costs of another party. We do not decide whether these compelled costs of response are recoverable under § 113(f), § 107(a), or both. For our purposes, it suffices to demonstrate that costs incurred voluntarily are recoverable only by way of § 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under § 113(f). Thus, at a minimum, neither remedy swallows the other, contrary to the Government's argument.

551 U.S. at 139 n.6 (citations and internal quotation marks omitted).

The Solutia Case

Factual Background

The *Solutia* case arose from contamination at a Monsanto plant in downtown Anniston, Alabama. The Environmental Protection Agency (EPA) brought an enforcement action against Monsanto's successor, Solutia & Pharmacia (Solutia), in 2002, and Solutia entered into a partial consent decree (PCD) with EPA in August 2003. During cleanup, it was discovered that numerous areas were contaminated by historic foundry wastes used as fill. The PCD retained Solutia's right to seek contribution from those parties for related cleanup costs.

Two years later, based on information provided by Solutia, EPA entered into a separate settlement agreement with numerous parties that Solutia had already sued. Solutia's petition for writ of certiorari (cert petition) at 7. EPA accepted reimbursement and the parties' agreement to continue cleanups, in exchange for contribution protection against Solutia. *Id.* In Solutia's words, the net effect of the settlement was to "trade[] [Solutia's] cleanup claims against the [settling parties] in order to get [the settling parties] to take over EPA's portion" of the cleanup. *Id.* Notwithstanding the court's willingness to vacate the

PCD given Solutia's changed circumstances, Solutia declined. *Id.* at 8.

Having settled with the government, the settling PRPs that Solutia was suing moved to dismiss Solutia's claims, arguing that contribution claims were barred by the settlement and that Solutia, as a liable party with a consent decree compelling its work, could not pursue claims under section 107. After initially dismissing Solutia's section 113 claims but preserving its section 107 claims, the magistrate judge vacated his ruling and entered summary judgment against Solutia on its section 107 claims as well. The judge based his decision on cases decided since *Atlantic Research*, finding that, because the PCD and stipulation between Solutia and EPA provided Solutia with contribution rights under section 113(f), it could not seek to recover those same costs under section 107(a).

The Eleventh Circuit's Decision

On appeal, the Eleventh Circuit concluded that a section 113 claim precludes a section 107 claim. *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230 (11th Cir. 2012). In doing so, the court rejected Solutia's argument that there is no language in either section that suggests that section 107(a) and section 113(f) are mutually exclusive remedies, finding that the statute had to be "read as a whole" and that, in doing so, it was apparent that the remedies are "clearly distinct": "If a party subject to a consent decree could simply repackage its § 113(f) claim for contribution as one for recovery under § 107(a), then the structure of CERCLA remedies would be completely undermined." 672 F.3d at 1236. This would also allow circumvention of the differing statutes of limitation, as well as thwarting the contribution protection provided to defendants who had settled with EPA. *Id.* at 1236–37.

The Cert Petition and Opposition

Following the Eleventh Circuit's decision, Solutia petitioned the Supreme Court for review. The Court accepts cases only "for compelling reasons," including but not limited to situations where the circuit courts are in disagreement "on some important matter" (a circuit split), or where the case at issue has "decided an important question of federal law that has not been, but

should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.” Supreme Court Rule 10. Solutia’s petition focused largely on the last requirement, arguing that the question presented—whether parties in Solutia’s situation, having incurred response costs under a consent decree, may bring claims against other PRPs under section 107—is an important question left open by *Aviall* and *Atlantic Research*, which the lower courts have gotten wrong.

In support of its petition, Solutia offered three broad arguments. First, Solutia argued that the Eleventh Circuit, and the other circuit courts with which the Eleventh Circuit agreed, had elevated policy considerations over CERCLA’s clear statutory text. Cert petition 14–17. In concluding that parties incurring response costs under a consent decree could only seek cost recovery against other parties who had already settled with the United States under section 113(f), Solutia argued that the Eleventh Circuit had relied primarily on the perceived policy benefits of that decision, with only the most general reference to reading the statute “as a whole” and keeping section 107(a) and section 113(f) remedies “clearly distinct.” But, Solutia pointed out, the Supreme Court’s decisions in *Aviall* and *Atlantic Research* had both relied entirely on the plain meaning of the statutory text. Just so, Solutia argued, section 113 “provided that PRPs ‘may seek contribution’ under § 113(f) . . . not that they may *only* seek contribution under that subsection.” *Id.* at 17 (emphasis in original).

Opponents to Solutia’s petition—defendants who had settled with EPA and thereby foreclosed contribution liability under section 113—responded that Solutia’s “wooden” interpretation ignored the broader statutory context. Brief for the respondents in opposition (opposition brief), at 14–19. If Congress had intended parties in Solutia’s position to avail themselves of section 107, Congress, the opponents argued, would not have included statutory limitations on section 113 liability, including the settlement bar. *Id.* at 15. Citing earlier Supreme Court precedent, the opponents also argued that, generally, broader statutory remedies are not available when a more specific statutory remedy is designed to address the “specific situation” for which

recourse is sought. *Id.* at 16. Thus, they noted, the *Aviall* Court itself had reasoned that there would be no purpose to section 113 if parties could simply avail themselves of section 107. *Id.* at 17, citing 543 U.S. at 166. “Likewise, there is no reason why Congress would have bothered to attach conditions to § 113 contribution rights if petitioners were free to invoke § 107 to evade them.” *Id.*

Solutia’s next argument in support of its position was that, even lacking a clear circuit split, the question of whether costs incurred under a consent decree are recoverable under section 107, section 113, or both, is causing “extensive confusion among the courts, parties considering entering into agreements to conduct cleanups, and the United States.” *Id.* at 24. The thrust of Solutia’s discussion of the relevant precedents was that the majority of the section 107/113 jurisprudence rests on “truly strained logic” and ephemeral distinctions between the types of parties who deserve various remedies. Solutia then made its own policy argument: that the overriding purpose of CERCLA is to promote quick and efficient cleanups, and that denying recovery to parties in Solutia’s position has the consequence of forcing parties to refuse to settle their CERCLA liability and commence cleanups.

This led directly to Solutia’s third point in support of its petition: that its suit raised an issue of exceptional importance worthy of resolution by the Supreme Court. Solutia turned to an unlikely ally—the United States itself, in its petition for certiorari in *Atlantic Research*. There, the government stressed the central importance of voluntary cleanup actions to CERCLA’s administration and effectiveness, and offered that parties were devoting resources to litigation that would otherwise be spent on cleanups, in a situation that “may be deterring PRPs from entering into settlements with the government.” *Id.* at 24–27. “That statement,” concluded Solutia, “is just as true today as it was in 2006.” *Id.* at 28.

Solutia’s opponents struck back at Solutia’s admission regarding the lack of a circuit split. Opposition brief 17–22. “It is thus unsurprising that *every* court of appeals to have resolved this issue, as well as ‘almost [all other [district] courts,’” have ruled against parties

in *Solutia*'s position. *Id.* at 17 (emphasis in original). Rather than "confusion," the opponents pointed to a "clear trend." *Id.* at 18. The opponents also responded to *Solutia*'s policy argument. Pointing to EPA's position, reflected in numerous amicus briefs filed in similar cases, the opponents argued that the best way to promote early settlement is to enforce the section 113 settlement bar, pushing parties to quickly resolve their liability and take advantage of the contribution protections offered under section 113. Opposition brief 22–23.

The Cert Denial and Implications

On October 9, 2012, the Supreme Court denied certiorari. As usual, the Court did not provide any reason for its decision.

The direct effect of the denial is to leave the Eleventh Circuit's judgment untouched: parties in *Solutia*'s position must bring suit against other PRPs under section 113, subject to the additional limitations applicable to such suits, including the settlement bar, which may leave them entirely without judicial recourse. More broadly, the denial means that courts will continue to grapple with the interplay between sections 107 and 113.

Evidence of this process is readily available. Although the cert opponents in *Solutia* were correct that the majority of courts have ruled consistent with the Eleventh Circuit, the outcome is by no means universal. Recently, for example, the Seventh Circuit stated in dicta that the Supreme Court had "intimated that" sections 107 and 113 "may not always be mutually exclusive," thereby leaving "some aspects" of the interplay between 107 and 113 "up in the air," with a party's ability to recover costs under section 113 "an open question." *United States v. NCR Corp.*, 688 F.3d 833, 844 (7th Cir. 2012). And consistent with many other district courts, the Eastern District of California recently ruled that work performed under a *state* consent order does not foreclose a section 107 claim. *Chevron Environmental Management Co. v. BKK Corp.*, 2012 WL 2958871 (E.D. Cal. July 19, 2012).

For the time being, then, parties considering whether to comply with a section 106 order or to enter into a consent decree and conduct a cleanup, and the practitioners advising them, will need to consider carefully what impacts compliance or settlement—both their own and that of other PRPs—will have on their rights to recover cleanup costs through litigation.

Meline MacCurdy and **Adam Orford** are attorneys at Marten Law PLLC. The firm handles complex environmental matters, including numerous Superfund sites across the country. The authors may be reached at mmacurdy@martenlaw.com and aorford@martenlaw.com.



CHLORINATED SOLVENTS, LEAKING SEWERS, AND CERCLA LIABILITY

Gary Brugger and Kirk O'Reilly

This article explores the technical, compliance, and legal issues associated with determining liability resulting from the discharge of chlorinated solvents by leaking sewers. It describes how actions taken under the Clean Water Act (CWA) or Resource Conservation and Recovery Act (RCRA) may control liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Additionally, we review the Ninth Circuit's opinion in *Team Enterprises, LLC v. Western Inv. Real Estate Trust*, 647 F.3d 901 (2011) on whether manufacturers of dry-cleaning equipment may be subject to arranger liability under CERCLA.

For the last two decades, environmental specialists have grown increasingly aware of the problems created by the release of chlorinated solvents, such as perchloroethylene (PCE) and trichloroethylene (TCE), to sanitary sewers and storm drains. Today, many water providers are finding chlorinated solvent concentrations in pretreatment water at or above Environmental Protection Agency (EPA) drinking-water standards. Facing the need for expensive treatment systems to meet these standards, water purveyors are increasingly looking to litigation to fund the purchase of this equipment. Furthermore, many state and federal Superfund sites contain groundwater contaminated by chlorinated solvents.

A number of factors influence the liability framework for groundwater contaminated by chlorinated solvents released by leaking sewers. Under CERCLA § 107(j), recovery of damages resulting from federally permitted discharges “shall be pursuant to existing law” and not under CERCLA. CERCLA § 101(A)(10) defines federally permitted discharges as including those permitted under the CWA's national pollution discharge elimination system (NPDES). Many waste streams that contained chlorinated solvents were discharged to sewers or drains from businesses that held NPDES discharge permits issued under the authority of EPA, or

separate state discharge permits issued under state authority. However, in cases where chlorinated solvents were noted in the permit application, but not specifically listed in the permits, the permits themselves may not have been written properly to comply with the CWA. In other cases, neither the application nor the permit noted the presence of chlorinated solvents in the discharge. In these cases, a discharge that included chlorinated solvents would not be compliant with the permit.

RCRA provides limitations and exemptions for discharge of certain liquid waste streams to publicly owned treatment works (POTWs) and sewers. RCRA also bans the discharge or release of water that exceeds specified concentrations of some compounds, such as PCE or TCE.

Finally, there have been attempts to hold manufacturers and suppliers of dry-cleaning equipment at least partially liable for contamination that results from the discharge of PCE and other solvents from their machines. This argument was rejected by the Ninth Circuit Court of Appeals in *Team Enterprises*.

Implications of the Clean Water Act

As noted above, legal actions are focusing increasingly on the users of chlorinated solvents. In many cases, these users were historically permitted and/or directed by regulators to discharge wastes containing chlorinated solvents to the sewers, and in some cases directly to surface waters. Because of more stringent enforcement of water quality standards under the CWA and RCRA as of late, it is unlikely that any current permits allow discharge of chlorinated solvent wastes to the sewer or directly to the environment.

State permits, EPA NPDES permits, and local pretreatment permits were issued at different times in different localities. Some states, such as Washington, operated a discharge permit program prior to the enactment of the CWA, which program covered direct discharges and industrial discharges to POTWs. To further confuse matters, not all NPDES permits provided the same restrictions. Because the focus of this paper is releases from leaking sewers, we focus on permits for discharges to POTWs. From our collective

experience writing, reviewing, and in some cases approving, sewer discharge limitations from across the United States, including Hawaii and Alaska, we generally found three variations in permit language that significantly influenced what could be discharged.

The least restrictive permits stated that “the permittee was allowed to discharge process wastewater subject to the following limitations.” These permits initially had numeric limits for flow; biological oxygen demand (BOD); total suspended solids (TSS); fats, oils, and grease (FOG); and pH. These permits authorized the holder to discharge their process wastewater with restrictions on only these four components. If the process wastewater discharged from the facility contained PCE, TCE, or other solvents, there were no numerical limits on the amounts of these solvents that could be discharged.

The most restrictive permit language allowed discharge of wastewater containing only the contaminants listed in the permit. An example of this permit language would be “the permittee may discharge up to 50,000 gallons of wastewater per day containing not more than 200 mg/L BOD, 250 mg/L TSS, 100 mg/L FOG, and pH between 6 and 9.” The discharge of other chemicals such as PCE and TCE would not be allowed under this permit.

The third type of permit language tied the discharge to the permit application. An example of this type of permit language was: “The applicant is permitted to discharge wastes as defined in the permit application of January 29, 1979, subject to the following limitation: 50,000 gallons of wastewater per day, not more than 200 mg/L BOD, 250 mg/L TSS, 100 mg/L FOG, and pH between 6 and 9.” In this case, if the applicant’s test results provided with the application showed 100 mg/L PCE and 80 mg/L DCE, these test results effectively became the permit limits, even though they were not specifically cited in the permit. Therefore, discharging 100 mg/L of PCE to the sewer would have been permitted, and the facility could have discharged contaminants listed in their waste stream without fear of violating their CWA permit.

NPDES permits, state permits, and pretreatment permits covered only a portion of solvent users, typically, those using larger volumes. Smaller users, such as a shopping mall dry cleaner or a start-up electronics manufacturer, would have been regulated only by local sewer ordinance. Historical, local sewer ordinances from the time of connection are often difficult to find, and more difficult to interpret, because they were typically written in general terms. Further complicating this situation is that the regulations were enforced by different people at different times, producing different interpretations as to what could be connected and what could be discharged.

The responsibility of state and local agencies that approved the discharge of chlorinated solvents to the sewers is being called into question through litigation from water districts and other water providers. In some cases, the agency that operated the POTW and issued the sewer discharge permit that allowed discharge of chlorinated solvents to the sewer is a sister agency to the plaintiff water provider.

The fact that the discharge of chlorinated solvents to the sewer was authorized or permitted, for even a portion of the time of operation, can also significantly affect insurance coverage and defense, and can also provide some protection from damage claims.

The RCRA Connection

RCRA regulations exempt any mixture of domestic sewage and any other waste that passes through a sewer system to a POTW for treatment, as well as industrial wastewater discharges that are point-source discharges subject to regulation under section 402 of the CWA (40 C.F.R. 261.4(a)(1)(ii)). However, this is a limited exemption and applies only during the time that the wastewater mixture is in the conveyance and treatment systems and only to discharges that are less than the characteristic waste threshold ([http://yosemite.epa.gov/osw/rcra.nsf/ea6e50dc6214725285256bf00063269d/4FEEC16F53FE34F28525670F006BD526/\\$file/11181.pdf](http://yosemite.epa.gov/osw/rcra.nsf/ea6e50dc6214725285256bf00063269d/4FEEC16F53FE34F28525670F006BD526/$file/11181.pdf)). (So, wastewater within a permitted sewer system that contains PCE at concentrations greater than 0.7 mg/L or TCE greater than 0.5 mg/L is not a

hazardous waste, even though it exceeds the characteristic threshold of 40 C.F.R. 261.24.) However, if this PCE and/or TCE leaks or is otherwise released from the sewer, a release of a hazardous waste may have occurred. If the PCE and/or TCE concentrations in groundwater, or the results of the toxicity characteristic leaching procedure (TCLP) test of the soils affected by the release, exceed 0.7 mg/L for PCE and 0.5 mg/L for TCE, a release of hazardous waste has occurred, and these characteristic hazardous wastes must be recovered and treated to meet the universal treatment standard before final disposal.

Because some states have a more conservative interpretation, it is important to consult state and local restrictions. For example, the Florida Administrative Code (http://www.dep.state.fl.us/waste/quick_topics/publications/shw/hazardous/DrycleaningSeparator.pdf) prohibits discharges that result in “the presence of toxic gases [and] vapors[.]” Accordingly, the Florida Department of Environmental Protection considers a release from a sewer system with a PCE concentration exceeding 0.53 mg/L to be a discharge of a hazardous waste. Because the Florida rule is based in part on EPA guidance, it is likely that other states have a similar rule.

The RCRA exemption noted above, related to releases of non-characteristic chlorinated solvent wastes, raises the issue of whether the cleanup of such non-characteristic/non-hazardous wastes under CERCLA requires compliance with the National Contingency Plan (NCP). Technically, the cleanup of non-hazardous wastes should not be the basis of remediation or litigation under CERCLA and would raise serious compliance questions compliance for cost recovery under sections 104, 107, and 113. However, once action is taken for another hazardous waste release at a Superfund site, the remediation can be extended to these non-hazardous chlorinated solvents under the applicable or relevant and appropriate requirements (ARARs; *see* 40 C.F.R. 430(e)(1)(9)(iii)(B)).

Consequently, the exemption from RCRA could create problems for an innocent purchaser or another responsible party trying to recover remediation costs

from someone who legally discharged solvents in sewage mixtures to leaking sewers.

The Manufacturer Connection

The issue of whether dry-cleaning equipment manufacturers may be liable for releases linked to their systems was considered by the Ninth Circuit recently in *Team Enterprises*. In one of the first cases to apply the updated arranger liability standard that the U.S. Supreme Court laid out in *BNSF v. US*, 556 U.S. 559 (2009), the Ninth Circuit found that, absent a showing that the equipment manufacturer, R.R. Street & Co., Inc. (Street), intended the use of the equipment to result in disposal of a hazardous chemical, the company lacked the required intent for arranger liability. Under *BNSF*, arranger liability attaches if an entity enters into a transaction for *the sole purpose of discarding a used and no longer useful hazardous substance*. *Team Enterprises*, 647 F.3d at 907. Because there are many ways by which a party may arrange for disposal, the Court recognized that determining whether a transaction gives rise to liability is a fact-intensive inquiry.

The equipment at issue was used to recycle PCE at retail dry cleaners. In addition to generating PCE for reuse, some wastewater was produced. The plaintiff, Team Enterprises, LLC (Team), poured the wastewater down a drain, resulting in soil contamination that required remediation. Seeking contribution under CERCLA, Team alleged that Street was subject to arranger liability under two distinct theories: (1) Street took “intentional steps” and “planned a disposal” of PCE; and (2) Street had “authority to control and exercised control over the disposal process.” *Id.*

Team claimed that the intent could be inferred from Street’s designing its product in such a way as to render disposal inevitable. According to Team, because the system generated wastewater, there was “no other choice than to dispose of the contaminated wastewater” by pouring it down the drain. Rejecting this claim, the court found that, while the design might suggest an indifference to the possibility of improper disposal, this does not indicate that Street intended

the disposal of PCE. Affirming the district court's summary judgment in Street's favor, the court concluded that the plaintiff "has presented no evidence indicating that Street designed the [equipment] for the alleged purpose of being a waste disposal machine." The fact that Team felt compelled to dispose of the wastewater does not indicate that Street planned a disposal. *Id.* at 909.

In evaluating whether Street had "authority to exercise control over the disposal process," the court reiterated that arranger liability should not be imposed on a party that "never owned or possessed, and never had any authority to control or duty to dispose of, the hazardous materials at issue," *id.* at 910 (citing *United States v. Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002)); and "[i]t is the obligation to exercise control over hazardous waste disposal, and not the mere ability or opportunity to control the disposal of hazardous substances that makes an entity an arranger under CERCLA's liability provision," *id.* (citing *Gen. Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281 (2d Cir. 1992)). Based on the facts presented in this case, the court found that the defendant had no legal authority to direct Team's conduct, never owned or possessed the hazardous substance, and had no duty to dispose of the PCE used by the plaintiff.

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THE DIVISIBILITY DEFENSE TO JOINT AND SEVERAL LIABILITY APPLIED TO CONTAMINATED SEDIMENT SITES

John P. Ashworth and Emily C. Rake

The Seventh Circuit Court of Appeals is the first appellate court to consider how the divisibility defense applies to sediment cleanups since the U.S. Supreme Court's landmark decision in *Burlington Northern and Santa Fe Railway Co. v. United States*, 556 U.S. 599 (2009), confirmed that a potentially responsible party (PRP) can avoid joint and several liability by showing that despite a singular harm, a reasonable basis to apportion liability exists. *United States v. NCR Corp.*, 688 F.3d 833, 839 (7th Cir. 2012). In *NCR Corp.*, the Seventh Circuit upheld an injunction, predicated on the conclusion that apportionment was unavailable, requiring NCR Corporation (NCR) to continue dredging polychlorinated biphenol (PCB)-contaminated sediments from the Lower Fox River. This may be the first decision in the Comprehensive Environmental Response, Compensation, and Liability Act's (CERCLA's) 32-year history where a court issued a preliminary injunction to compel a PRP to comply with government-required remediation before a trial on the merits. *See* Expedited Brief for Defendant-Appellant at 4, *NCR Corp.*, 688 F.3d 833 (No. 12-2069).

NCR Corp. held that a PRP fails to show sediment contamination is reasonably capable of apportionment if the PRP independently contributed an amount of contamination sufficient to require remediation. 688 F.3d at 842. This holding is significant because today the U.S. Environmental Protection Agency (EPA) is "taking on the most expensive and most technically complex cleanups ever attempted—large stretches of urban waterways where the pollution is out of sight." *See* Anthony DePalma, *Superfund Cleanup Stirs Troubled Waters*, N.Y. TIMES, Aug. 14, 2012, at D1. As increasing numbers of entities participate in large sediment cleanups, *NCR Corp.* may make it more difficult for PRPs to limit liability to divisible shares.

The Lower Fox River Cleanup

The Wisconsin paper industry contaminated Lower Fox River sediment with PCBs, which are toxic and

persistent hazardous substances. *NCR Corp.*, 688 F.3d at 836. Several PCBs in river sediment are attributed to the production of carbonless copy paper, which NCR developed in 1954. From 1954 to 1971, two NCR predecessors manufactured this paper and discharged PCBs into the river. *Id.*

Beginning in 1998, EPA and the Wisconsin Department of Natural Resources acted under CERCLA to investigate and clean up Lower Fox River contamination. *Id.* In 2002, EPA issued a remedial plan that divided the river into five operable units (OUs) and required a combination of sediment removal by dredging and sediment containment by capping. EPA determined that PCB concentrations above its designated maximum safety threshold of 1.0 part per million (ppm) were hazardous to human health. Areas where PCB concentrations exceeded this threshold required remediation. In 2007, EPA issued a unilateral administrative order (UAO) that required NCR and seven other PRPs to implement a remedial plan in OUs 2 through 5. *Id.*

During the next four years, NCR complied with the UAO and spent approximately \$50 million to remediate OUs 2 and 3. 688 F.3d at 836. NCR also performed some work in OU 4. Subsequently, after losing claims for contribution from other paper plants, NCR determined that it cleaned up the river beyond its divisible share of liability and ceased to comply with the UAO. *Id.* at 837; *Appleton Papers Inc. v. George A. Whiting Paper Co.*, No. 08–C–16, 2009 U.S. Dist. LEXIS 117112, at *48–84 (E.D. Wis. Dec. 16, 2009) (holding NCR was not entitled to contribution and finding that NCR knew the potential harm PCBs posed and “accept[ed] the risk of potential environmental harm in exchange for the financial benefits of continued (and increasing) sales of carbonless paper. . . .”); *Appleton Papers Inc. v. George A. Whiting Paper Co.*, 776 F. Supp. 2d 857, 867–70 (E.D. Wis. 2011) (holding that other PRPs were entitled to full contribution from NCR and Appleton Papers, Inc., for approximately \$700 million in cleanup costs in OUs 2 through 5). A trial on the merits is scheduled for December 2012.

District Court Issues an Injunction

EPA sought a preliminary injunction to require NCR to complete work in OU 4 on schedule. *United States v. NCR Corp.*, No. 10–C–910, 2012 WL 14090200, at *1 (E.D. Wis. 2012). NCR opposed the injunction, arguing that it was likely to succeed at trial in showing that the harm was divisible. *Id.* The district court found that harm was not reasonably capable of apportionment and granted the injunction. *Id.* at *2–6. Estimating that the OU 4 work would cost about \$70 million, NCR appealed the injunction, and the Seventh Circuit granted expedited review. Expedited Brief for Defendant-Appellant at 4, *NCR Corp.*, 688 F.3d 833 (No. 12–2069); 688 F.3d at 837.

Seventh Circuit Rejects the Divisibility Defense

The Seventh Circuit considered NCR’s likelihood of success at trial, which turned on NCR’s argument that the harm to the river was divisible. 688 F.3d at 837. Under *Burlington Northern*, “[t]he universal starting point for divisibility of harm analysis in CERCLA cases is § 433A of the Restatement (Second) of Torts.” *Id.* at 838 (internal citations and quotations omitted). While CERCLA imposes strict liability, it does not mandate joint and several liability. *Id.* Courts look to common law to determine if harm is divisible. *Burlington Northern* instructs courts to use the Restatement standard, which provides as follows:

[W]hen two or more persons acting independently caus[e] a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he himself has caused. . . . But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm.

Id. (internal citations and quotations omitted).

The Seventh Circuit explained that there is a two-step analysis under *Burlington Northern*. 688 F.3d at 838. First, courts determine whether the harm, though singular, is theoretically capable of apportionment. Under the Restatement, this is a question of law

subject to “underlying findings of fact on which the court’s decision will rest.” *Id.* Examples of district court findings include “what type of pollution is at issue, who contributed to that pollution, how the pollutant presents itself in the environment after discharge, and similar questions.” *Id.* Second, if the harm is theoretically capable of apportionment, courts must determine how to apportion the damages, which is a question of fact. At all times, the party seeking apportionment bears the burden to “prove that a reasonable basis for apportionment exists.” *Id.* (internal citations and quotations omitted).

Multiple Sufficient Causes

The Seventh Circuit held that NCR failed to show that harm was theoretically capable of apportionment because NCR’s PCB releases alone were a sufficient cause of environmental harm. *NCR Corp.*, 688 F.3d at 839. Relying on the Restatement’s commentary that “[a]pportionment is improper where either cause would have been sufficient in itself to bring about the result, as is the case of merging fires which burn a building,” the court held that the facts at issue exemplified “just this kind of multiple sufficient causes of an environmental harm.” *Id.* (internal citations and quotations omitted).

One of NCR’s experts testified that NCR’s discharge of PCBs in OU 2 contributed about 9 percent of the PCBs in OU 4’s upper half and about 6 percent of the PCBs in OU 4’s lower half. 688 F.3d at 839. On review, the Seventh Circuit reasoned that “it does not necessarily follow that NCR is responsible for only 9% or 6% of the cleanup costs” because “[e]ven if all that were present in the river were NCR’s contributions, the Lower Fox River would still need to be dredged and capped, because EPA has set a maximum safety threshold of 1.0 ppm of PCB.” *Id.* The court explained the district court credited the government expert’s testimony, and noted this opinion showed that “[e]ven in the absence of inputs of PCBs from [other OU 4] sources, remediation would likely still be required in certain areas of [OU 4] at the 1.0 ppm” level. *Id.* Additionally, the court observed that the district court’s analysis recognized that “a cubic yard of sediment would need to be dredged whether it contained 10 ppm or 100 ppm, because that cubic yard of sediment

contains PCBs above the maximum threshold.” *Id.* This meant that NCR’s contributions of PCBs would, alone, require approximately the same remediation. *Id.* The Seventh Circuit also concluded NCR’s expert relied on models that failed to take into account the “threshold-triggering aspect of PCB remediation.” 688 F.3d at 839. When asked how to assign liability between a hypothetical polluter A who deposited 3 ppm, and polluter B who deposited 30 ppm, NCR’s expert testified the model would assign 10 percent liability to polluter A and 90 percent liability to polluter B. The court rejected the expert’s model and held that under the Restatement both polluters are liable because either release alone was sufficient to create a condition that exceeded EPA’s maximum safety threshold of 1.0 ppm. The court reasoned that there was no linear correlation between the need for cleanup triggered by PCB levels and the amount of PCBs discharged by each PRP. Thus, once PCBs exceeded EPA’s threshold, their presence was harmful and cleanup was required. *Id.* at 840.

The Measure of Harm

Inherent in the Seventh Circuit’s analysis of whether harm was theoretically capable of apportionment was a characterization of the proper measure of harm. Following the Ninth Circuit, the court concluded that “contamination traceable to each defendant is a proper measure of harm.” 688 F.3d at 841 (citing *United States v. Burlington Northern*, 520 F.3d 918, 939 (9th Cir. 2008), rev’d on other grounds, 556 U.S. 599). In *NCR Corp.*, contamination occurred once PCBs surpassed EPA’s maximum safety threshold triggering remedial requirements. 688 F.3d at 841. But the method of defining “contamination” may change, because in many cases the threshold level requiring remediation depends on the type of contaminants at a site. The Seventh Circuit explained that courts may measure harm based on the volume of a contaminant when “it is reasonable to assume that the harm done by each of the defendants is proportionate to the volume of [contaminant] each discharged into the environment.” *Id.* (internal citations and quotations omitted). By contrast, if an otherwise innocuous chemical becomes harmful only when commingled with other chemicals, or a chemical becomes harmful only by surpassing a concentration threshold, then “it will

not suffice to look solely at the amount of contamination present in order to estimate the harm.” *Id.* The Seventh Circuit concluded “[l]ike the Ninth Circuit, we believe that cleanup costs may sometimes be a relevant factor for courts to use to determine the level of contamination, and thus the level of harm, caused by each polluter.” *Id.* There is not one universal way to approach apportionment; rather “apportionment will vary depending on how that harm that flows from the pollution is characterized.” *Id.*

Strategic Considerations

NCR Corp. influences how a PRP should approach step one of the divisibility of harm analysis: proving that a singular harm is theoretically capable of apportionment. 688 F.3d at 839. After *NCR Corp.*, a PRP may have difficulty, at least in the Seventh Circuit, showing that a singular harm is theoretically capable of apportionment if a plaintiff can demonstrate and/or the court concludes that the PRP’s hazardous substance releases alone were a sufficient cause of environmental harm. To rebut the plaintiff’s evidence, a PRP should show that its contaminant contributions alone were insufficient to cause the harm. A PRP still must still meet step two of the analysis: proving a reasonable factual basis to apportion liability. *Id.*

While the Supreme Court’s decision in *Burlington Northern* did not address step one of the divisibility analysis, the district court’s opinion in *Burlington Northern* suggests that the defendant railroads would have prevailed under step one of the analysis as interpreted and applied in *NCR Corp.* See *U.S. v. Atchison Topeka & Santa Fe Ry. Co.*, Amended Findings of Fact and Conclusions of Law, 2003 WL 25518047 (E.D. Cal. July 14, 2003). Evidence would not have supported a conclusion that the railroads’ contributions were a sufficient cause of environmental harm because the railroads’ minor contributions of agricultural chemical contamination did not exceed applicable soil and groundwater remediation levels. See *id.* ¶¶ 60, 77, 249, 245–51, 472–89; see also Mark A. Zeppetello, *Apportionment at the Burlington Northern Trial and Implications of the Case for Demonstrating a Reasonable Basis to Apportion*

CERCLA Liability, 20 ENVTL. L. NEWS 38, 39 (2011).

To show that an environmental harm is theoretically capable of apportionment, a PRP should develop facts about “what type of pollution is at issue, who contributed to that pollution, how the pollutant presents itself in the environment after discharge, and similar questions.” See 688 F.3d at 838; see also, *United States v. Washington State Department of Transportation (WSDOT)*, No. 3: 08–cv–05722RJB, at 17–20 (W.D. Wash. Mar. 10, 2011) (holding WSDOT jointly and severally liable for \$9.3 million in response costs incurred for stormwater releases at the Commencement Bay Superfund site when opinion witnesses failed to address the divisibility of harm). At sediment sites, key factors also include the relative toxicity of contaminants and comparisons of the volume of contamination a PRP contributed to site-wide contamination. Beyond a mass-balance analysis, a PRP should consider arguments based on evidence of sediment deposition, sediment fate and transport, and sediment depth. Whereas PCBs deposited close to a river floor’s surface may require dredging, PCBs buried far below a riverbed may not require remediation or may be capped at a lower cost. 2012 WL 14090200, at *3. Addressing EPA determinations of thresholds at which contaminant levels are hazardous to human health is essential in the Seventh Circuit and prudent elsewhere. See 688 F.3d at 839–40. A PRP should develop facts showing its contaminant contributions alone would not trigger a need for cleanup or would require different remedial measures.

The Seventh Circuit acknowledged that some evidence showed that dredging costs would have been lower if lower concentrations of PCBs were present because disposal of extremely contaminated sediment is more expensive. 688 F.3d at 839. While the court considered this point inadequately developed, it signaled a way that a PRP might be able to reach a different outcome. *Id.* Thus, a PRP should present facts that demonstrate cleanup costs would be lower if a sediment site contained lower contaminant concentrations because the higher the sediments’ contaminant concentrations, the higher the disposal

costs. Additionally, a PRP should consider that *NCR Corp.* emphasized there is not one universal way to approach apportionment; rather, apportionment will vary depending on how the harm that flows from the contamination is characterized. *Id.* at 841; *cf. Pakootas v. Teck Cominco Metals, Ltd.*, No. 2012 WL 11336656, at *8 (E.D. Wash. 2012) (finding that the defendant failed to show harm was theoretically capable of apportionment when its apportionment theories failed to address the entirety of a site's contamination, including PCBs and polycyclic aromatic hydrocarbons (PAHs), because the theories began with the flawed assumption that the only harm at issue was metal contamination released by defendant and others). Finally, a PRP seeking divisibility should also assert that the fairness-based argument for apportionment—that no actor should be charged with liability for harm it did not cause—does not support apportionment among multiple sufficient causes. Steve C. Gold, *Dis-Jointed? Several Approaches to Divisibility After Burlington Northern*, 11 VT. J. ENVTL. L. 307, 349 (2009) (citing RESTATEMENT (SECOND) OF TORTS § 881 and RESTATEMENT (THIRD) OF TORTS: Apportionment of Liability § 10 cmt. a). In practice, a PRP should retain an expert early on to develop the scientific and/or technical bases for apportioning liability. Care should be taken to avoid

issues of discoverability of the testifying expert's file, and in some cases it may be prudent to use a separate consulting expert. The expert should develop models for apportioning sediment site liability by comparative assessment of the key factors (noted above) and should be prepared to demonstrate a clear correlation between those factors and the harm at issue.

Conclusion

In sum, *NCR Corp.* may make it more difficult for a PRP to advance divisibility arguments when the PRP's causal contribution was arguably sufficient to cause harm. Thus, a PRP should analyze the divisibility defense as soon as possible and press divisibility at multiple stages of litigation and negotiation. A favorable ruling could alleviate the need for further litigation.

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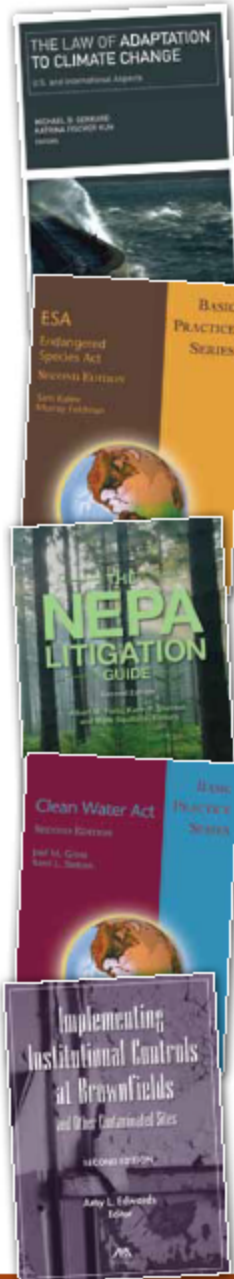
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