

EXPERT ANALYSIS

Divided, But Not Conquered: Approaches to Apportioning Liability for Contaminated Sites

By Philip Hinerman, Esq., *Fox Rothschild LLP*, and Philip T. Tringale and Patrick B. Hubbard, *Langan Treadwell Rollo*

Falling under the Environmental Protection Agency's hammer of "joint and several liability" in contaminated site cleanup cases is a costly proposition. The U.S. Supreme Court recently threw open the door to dividing these costs, and courts are now considering how to do it.

"Joint and several liability" is a legal concept that holds any one entity can be solely responsible for the entire cost of cleanup whether or not other companies may have contributed to the problem. The EPA often threatens to seek full liability for costs if companies refuse settlements. Parties that do not agree to settlements acceptable to the EPA face the prospect of a trial, after which they may be liable for all costs that were not paid by those who settled.

In 2009, the Supreme Court endorsed "divisibility" — the notion that apportionment of costs rather than joint total liability is proper in some cases. This endorsement was widely viewed to open the possibility of settlements with the EPA based on fair shares for liability, considering parties' individual contribution to conditions. But how can you prove divisibility to the EPA and the courts?

COURTS ATTEMPT TO DEVELOP A STANDARD

In *Burlington Northern & Santa Fe Railway Co. v. United States*, 556 U.S. 599 (2009), the Supreme Court reviewed the EPA's claim that a group of railroads owning a portion of a site should be liable for millions in cleanup costs for the entire site. At trial, the U.S. District Court for the Eastern District of California found the railroads liable for 9 percent of the costs. For the first time, a trial court had divided cleanup liability.

On appeal, the 9th U.S. Circuit Court of Appeals reversed and agreed the EPA that joint and several liability should be imposed. The 9th Circuit placed a huge burden of proof on the railroads to prove divisibility.

The Supreme Court reversed the 9th Circuit and returned the case to the trial court to fully consider the railroads' divisibility/apportionment facts. In doing so, it pointed to a number of facts shown at trial, including:

- The railroads owned only 19 percent of the surface area of the site.
- The main polluter leased that property for only 45 percent of the time that it operated in the area.
- The volume of contaminants on other portions of the site was much greater than the volume present on the railroads' property.
- Only two chemicals of concern were used on the railroads' property; other chemicals not present on the railroad sites had increased costs by one-third.



“Joint and several liability” is based on the legal concept that one entity can be solely responsible for the entire cost of cleanup whether or not other companies may have contributed to the problem.

APPLYING THE STANDARD

In the last seven years, only one other court has applied divisibility in an action filed by the United States — then reversed itself. That case involves the remediation of a portion of the Fox River addressed in *United States v. NCR Corp.*, No. 10-cv-910 (E.D. Wis.) and related cases. This case involves disposal of PCBs into a section of the Fox River in Wisconsin.

In 2012 the U.S. District Court for the Eastern District of Wisconsin held a trial on the issue of NCR Corp.’s liability for cleanup of one section of the Fox River. NCR had been issued an EPA order to clean up that section. After initially complying with the order, NCR concluded that it had paid more than its fair share. It asserted that it was not liable for additional work because the harm could be divided among several companies. The trial court disagreed and held that the harm was not reasonably capable of apportionment.

The court found that the costs of PCB cleanup would not be different if multiple parties contributed PCBs. The PCB cleanup would have been triggered even if NCR had acted alone. NCR immediately appealed to the 7th U.S. Circuit Court of Appeals.

The 7th Circuit reviewed the trial court’s ruling in light of the language in the Supreme Court’s *Burlington Northern* decision. In its opinion at *United States v. NCR Corp.*, 688 F.3d 833 (7th Cir. 2012), the appeals court concluded “there is not necessarily one universal way that we should approach apportionment in pollution cases. Instead, apportionment will vary depending on how the harm that flows from the pollution is characterized.” It nevertheless concurred with the trial court in declining to find divisibility.

Two years later, the 7th Circuit considered another case involving a different section of the Fox River with multiple parties. In *United States v. P.H. Glatfelter Co. et al.*, 768 F.3d 662 (7th Cir. 2014), the appeals court reviewed the trial court’s consideration of divisibility arguments presented by co-defendants NCR and Glatfelter. One theory asserted divisibility using an EPA PCB target cleanup number that allowed some PCBs to remain on site.

The 7th Circuit concluded that costs alone were not necessarily a basis for divisibility. It concluded “harm would be theoretically capable of apportionment if NCR could show the extent to which it contributed to PCB concentrations.” The appeals court returned the case to the U.S. District Court for the Eastern District of Wisconsin to consider evidence. In a companion decision, it again suggested revisiting divisibility in the portion of the river for which NCR had previously appealed.

The District Court held a trial, and in May 2015 NCR was held liable for 43 percent of cleanup costs for one area and 23 percent for another. The EPA asked for reconsideration, and in October 2015 the trial court reversed itself and said NCR’s divisibility evidence was unreliable. The case is being monitored, as it is far from over.

HOW TO PRESENT THE CLAIM

Despite court struggles, the Supreme Court in *Burlington Northern* provides guidance by quoting the District Court’s finding that the case was a “classic ‘divisible in terms of degree’ case, divisible both as to the time period in which the defendants’ conduct occurred or ownership existed, and as to the estimated maximum contribution of each party’s activities that released hazardous substances that caused site contamination.” Time periods, ownership interest and contributions are a starting point for asserting divisibility.

In a recent case in California, we analyzed numerous divisibility approaches to determine which ones were the strongest. This matter involved contamination from several sources that entered the environment and traveled through and mixed in groundwater. As a result of this contamination, cleanups and infrastructure improvements were required at an estimated cost of \$50 million to \$100 million.

Area	TIME			PROCESS				VOLUME		MIGRATION			REMEDATION	
	Date	Operation	Allocation and Weighting Factor	Activity		Chemical		Area Volume or Mass	Allocation and Weighting Factor	Activity/ Storage/ Handling	Off-site	Allocation and Weighting Factor	Total Cost	Allocation and Weighting Factor
				Type	Allocation and Weighting Factor	Type	Allocation and Weighting Factor							
Basin														
Parcel														
Soil														
Vapor														
Ground water														
Inputs and References									\$ _____ Million Capital	\$ _____ Million Annual O&M	_____ % Geometric Mean Weighting	_____ % Allocation	\$ _____ Million Total Allocation	

A key apportionment challenge was to untangle and divide the respective contributions of the parties responsible for the costs using the most direct, simple and reliable methods possible. To establish divisibility, engineering and legal factors related to the contamination and costs were systematically compiled, checked and evaluated. These factors can include:

- Contaminant toxicity.
- Care and cooperation of the parties.
- Financial benefit of the parties from the historic property operations.
- Control of portions of the site and the potential releases by area.
- Operational processes and chemicals that may have released the contamination.
- Location of the operations and/or releases.
- Migration potential of the contaminants.
- Types of remediation technologies needed and implemented.

The factors we identified were reviewed and set out in a calculation spreadsheet for each party at the site who was identified as a potentially responsible party. For the \$50 million to \$100 million contamination matter, five factors for each PRP provided the most discriminating and most effective basis for divisibility. As presented in a simplified version below, the spreadsheet included compiled data on five factors for specific impacted areas and media, calculation of relative percent allocations and weighting factors, and calculation total allocation in dollars.

We considered elements of each factor, including:

- Time: This is a relatively straightforward percentage of the total time period during which the PRP had access or ownership and its operations contributed contamination that needed to be remediated. The key data were property sale closing records, aerial photographs, and site facility and operations maps over time.
- Process: These processes include activities and chemicals that may have contributed to the release of contamination. There were a number of activities leading to waste piles and burn pits with chemicals that required remedial action.

In 2009 the U.S. Supreme Court endorsed “divisibility” — the notion that apportionment of costs, not joint total liability, is proper in some cases.

Parties should start their analysis with the factors cited by the Supreme Court in Burlington Northern (property ownership, volume and toxicity).

- Volume: The volume was quantified as a relative concentration that must be treated or the volume of groundwater, such as gallons per minute, that must be processed, which adds to the cost of remediation.
- Migration: This factor included on- or off-site activities and/or conditions that may have added to the remedial action costs or liabilities, such as spreading of contaminated soil, sewer system discharges, extraction well seals and operations, and groundwater flow directions.
- Remediation types: A PRP may cause an increase in the cost of remediation as a result of a number of drivers. The contaminants contributed by a specific PRP may be remediated differently. For example, hexavalent chromium may be mixed in a chlorinated solvent groundwater plume and create the need for additional treatment technology.

Parties should start their analysis with the factors cited by the Supreme Court in *Burlington Northern* (property ownership, volume and toxicity). Then, a sophisticated analysis can add other relevant grounds that would aid a court in dividing potential liability.

We took the time needed to develop the facts that influence these grounds. It was clear to us that it takes strategic and sound engineering as well as environmental and legal analysis to best advance the prospects of court acceptance of divisibility positions.

The approach we used can be used both in settlement and at trial. In our matter, we were able to successfully persuade others that we had fully vetted potential divisibility claims and were prepared to present them to a court. Settlement negotiations became much easier due to our advance preparation.



Philip Hinerman (L) is a partner with **Fox Rothschild LLP** in Philadelphia, where he is a member of the firm's environmental practice group and its zoning and land use practice group. He is also the firm's first chief sustainability partner, charged with overseeing the implementation of firm-wide sustainability initiatives. He can be reached at phinerman@foxrothschild.com. **Philip T. Tringale**, Ph.D., PE, (C), is the managing principal/director of the western region of **Langan Treadwell Rollo**, an environmental, geotechnical and site/civil consulting firm headquartered in San Francisco. He has over 25 years of environmental consulting experience on numerous sites and redevelopment projects, including commercial and industrial facilities, landfills, and cases requiring technical support for litigation. He can be reached at ptringale@langan.com. **Patrick B. Hubbard**, PG, CEG, vice president/senior associate (R), is a consulting principal in Langan's Oakland, California, office. For over 30 years, he has completed a range of projects and has served as an expert witness in matters involving water resources and contamination in water supply basins. He can be reached at phubbard@langan.com.

©2016 Thomson Reuters. This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit www.West.Thomson.com.