



# Superfund and Natural Resource Damages Litigation Committee Newsletter

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## MESSAGE FROM THE CHAIR

### Connie Sue Martin

On April 20, 2010, the Deepwater Horizon oil rig suffered a devastating explosion and began leaking oil into the Gulf of Mexico. During the 152 days before the maneuver known as the “bottom kill” was completed and the well permanently sealed, it is estimated that more than 5 million barrels of oil was spilled—19 times more than was spilled from the *Exxon Valdez* in 1989. The spill response, led by the National Oceanic and Atmospheric Administration (NOAA), was the largest response to an environmental catastrophe in the history of the United States. But the work has just begun. NOAA’s analysis of the spill trajectory and its monitoring of subsurface oil are ongoing. Cleanup continues. The assessment of damage to the Gulf’s natural resources has begun. Restoration work will continue for years, if not decades—as will the litigation of the hundreds of lawsuits filed in the days and weeks after the explosion. Many of the skilled attorneys working on the Deepwater Horizon spill—on behalf of the responsible parties, state and federal natural resource trustees, and coastal residents who make their living on the Gulf—are members of SEER’s Superfund and Natural Resource Damages Litigation Committee.

As with the amendments to the Clean Water Act (CWA) that followed the *Exxon Valdez*, the Deepwater Horizon is almost certain to cause significant changes in the law. Admiral Thad Allen

outlined a number of potential changes during his comments at the recent SEER Fall Section Meeting in New Orleans, including legislation authorizing emergency powers to be exercised by the Incident Commander, changes to the ceiling and reimbursement provisions of the Oil Spill Liability Trust Fund, changes relating to permitting and certification of deep water drilling operations following the expiration of the moratorium, and amendments to the “tanker-centric” CWA to catch up with the technological advancements of the last two decades.

The Superfund and Natural Resource Damages Litigation Committee will keep an eye on the NRD work in the Gulf, track the legislative developments in the Capitol, and report back to you in future editions of this newsletter. If you are on the ground in either location and would like to offer your insights, we would be happy to hear from you.

**Connie Sue Martin** is Of Counsel with Bullivant Houser Bailey PC, where she leads the environmental practice in the Seattle office, and chairs the firm’s Indian Law practice. She can be reached at [conniesue.martin@bullivant.com](mailto:conniesue.martin@bullivant.com).

### BACK ISSUES

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**Superfund and Natural Resource Damages Litigation Committee Newsletter**  
**Vol. 6, No. 1, November 2010**  
**Kirk T. O'Reilly and Andrew W. Homer, Editors**

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**EDITORS' NOTE AND ISSUE OVERVIEW**

**Kirk T. O'Reilly and Andrew W. Homer**

This issue of the Superfund and Natural Resources Damages Litigation Committee Newsletter covers a number of timely topics. In this issue, we present a discussion of the Great Lake Legacy Act and Great Lakes Restoration Initiative. This article concludes by explaining how these programs provide opportunities for potentially responsible parties (PRPs) to realize significant cost savings through federal cost sharing. Continuing our prior focus on the evolving landscape of CERCLA liability, we present a case note on *United States v. Washington State Dept. of Transp.*, in which a court found an agency liable for highway storm water discharges, and finish with an updated summary of cases citing *Burlington Northern and Santa Fe Ry. Co. v. United States*.

As we begin planning the next issue, we again ask for your help in submitting articles or suggesting topics. While all submissions are welcome, we are specifically looking for someone who is interested in preparing a CERCLA case law update, as well as an article on the status of Superfund tax renewal legislation. As we wish to increase publication opportunities for law students, please pass the word to your alma mater that we are seeking student submissions.

**Kirk T. O'Reilly** is a managing scientist with Exponent's Environmental Science Practice in Bellevue, Washington. He is also a member of the Washington State Bar. He may be reached at [koreilly@exponent.com](mailto:koreilly@exponent.com).

**Andrew W. Homer** is an associate in the Los Angeles, California, office of Pillsbury Winthrop Shaw Pittman LLP. His practice is focused on environmental litigation and regulatory compliance counseling. He may be reached at [andrew.homer@pillsburylaw.com](mailto:andrew.homer@pillsburylaw.com).

## **RESTORING THE GREAT LAKES: THE GREAT LAKES LEGACY ACT, GREAT LAKES RESTORATION INITIATIVE, AND NRDA**

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**Pieter Booth, Johanna Salatas, and Steven Jawetz**

Decades of industrial and municipal discharges, combined sewer overflows, and urban and agriculture nonpoint source runoff have resulted in widespread distribution of contaminated sediments in the Great Lakes Basin. In 1972, the governments of Canada and the United States entered into the Great Lakes Water Quality Agreement to restore and enhance water quality in the Great Lakes. The agreement expresses the commitment of each country to restore and maintain the chemical, physical, and biological integrity of the Great Lakes Basin ecosystem and includes a number of objectives and guidelines to achieve these goals. The agreement was renewed in 1978, and in 1987 a protocol was signed to strengthen the programs, practices, and technology described in the 1978 agreement, and to increase accountability for implementation. Implementation of the agreement and protocol led to the identification of 43 areas of concern (AOCs) in the Great Lakes that were adversely affected by contaminated sediment, inadequately treated wastewater, nonpoint source pollution, inland contaminated sites, or degraded habitat. Of those, 26 are solely in the United States, 12 are solely in Canada, and 5 are in binational waterways. At present, only two AOCs in Canada and one in the United States have been delisted.

Contaminated site remediation in the Great Lakes has been conducted under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601, et seq., and to a lesser extent under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq., and various state statutes. Great Lakes cleanup efforts were given a significant boost in 2002 with the enactment of the Great Lakes Legacy Act (GLLA), Pub. L. No. 107-303, and were further advanced by President Obama's FY2010 budget, which included funding for a new program, the Great Lakes

Restoration Initiative (GLRI). GLLA funding is intended to focus on the cleanup of contaminated sediment, whereas the GLRI focuses on the recovery of ecosystems and delisting of AOCs.

The intersection of the GLLA, GLRI, and "traditional" site cleanup programs creates opportunities for potentially responsible parties (PRPs) to resolve sediment-related environmental liabilities in new and creative ways. In this article we first describe the authority and framework of the GLLA. We next describe the GLRI and how it is intended to function within the GLLA framework. Third, we describe the similarities and differences between the GLLA and GLRI in practice, and discuss the implications for PRPs who may be interested in taking advantage of these frameworks to leverage funding for sediment remediation projects. At the conclusion of this article we introduce the emerging challenges and opportunities for PRPs who may wish to pursue GLLA and GLRI funding to help resolve natural resource damages (NRD) claims in the Great Lakes. This last topic will be addressed in more detail in a future article.

### **The Great Lakes Legacy Act**

The goal of the GLLA is to accelerate the pace of sediment remediation by providing a discrete funding source. Enacted in 2002, the GLLA authorized \$270 million in funding over a five-year period beginning in fiscal year 2004. The Great Lakes National Program Office (GLNPO) of the U.S. Environmental Protection Agency (EPA) was designated to implement the GLLA. Funding was specifically intended to address remediation of contaminated sediment in the 31 AOCs in the U.S. waters of the Great Lakes Basin. Projects that involve implementing a plan to remediate contaminated sediments are the highest priority, followed by projects for monitoring or evaluation of contaminated sediment, or projects designed to prevent ongoing or renewed contamination. The GLLA was reauthorized by Congress in 2008 to provide two more years of funding at a level of \$54 million/year (Pub. L. No. 110-365). Several notable new provisions were included in the reauthorization, such as an emphasis on identifying PRPs for participation in the program as remediation project partners, and

recommendations for activities to restore aquatic habitat that are carried out in conjunction with a project for the remediation of contaminated sediment. The reauthorization also encouraged cost sharing through partnerships with state, local, and tribal entities.

For a project to become eligible for GLLA cost sharing, the project must be located within one of the 31 designated AOCs located wholly or partially in U.S. waters. A nonfederal sponsor (such as a state, local, tribal, or private entity) is required to contribute at least a portion of the money for GLLA implementation. There is a sliding scale of nonfederal cost-sharing requirements that create categories of projects related to the enforcement or regulatory status, as follows (71 Fed. Reg. 25,504, 25,506 (May 1, 2006)):

- Category 1: Formal enforcement and/or regulatory evaluation has been completed, and no action is anticipated by any governmental body against any entity. No restriction on GLLA implementation. GLNPO will require a nonfederal cost-share minimum of 35 percent.
- Category 2: No enforcement, regulatory, or CERCLA response actions are pending. GLNPO will coordinate with enforcement/regulatory programs to verify that no actions are pending or planned for the site. In cases where the nonfederal sponsor is a nonliable public entity, the nonfederal cost would typically be 35 percent. At a Superfund site, if it is determined following consultation with EPA's Superfund program that a specific Superfund project is particularly suited to receive GLLA funding, GLNPO will require a nonfederal cost share greater than 35 percent.
- Category 3: There is a signed decision document under Superfund, or a signed settlement agreement under another applicable state or federal authority. GLNPO will not provide any funding for implementation of the decision document or settlement agreement. Instead, GLNPO may use GLLA funding for

the portions of these sites not addressed by the Superfund decision document or settlement agreement. The nonfederal sponsor will be required to contribute at least 40 percent of costs.

- Category 4: Enforcement, regulatory, or CERCLA response actions are pending but no settlement has been reached. GLNPO will coordinate with the applicable enforcement or regulatory program to determine the appropriate project delineation and cost distribution between the GLLA and the other program. The nonfederal sponsor at these sites will be required to contribute at least 50 percent of costs.

At the time of this writing, six remediation projects have been completed with GLLA funding: Kinnickinnic River, Wisconsin; Ashtabula River, Ohio; St. Marys River-Tannery Bay, Michigan; Ruddiman Creek and Pond, Michigan; Hog Island Inlet and Newton Creek, Wisconsin; and Black Lagoon, Michigan. In addition, the following five remediation projects using GLLA funding are in progress: Grand Calumet River, West Branch, Indiana; Ottawa River, Ohio; Grand Calumet River-Roxanna Marsh, Indiana; St. Louis River/Interlake/Duluth Tar Site, Minnesota; St. Marys River-Manufactured Gas Plant Site, Michigan. These 11 remediation projects are estimated to cost a total of approximately \$254 million; \$148 million of GLLA funds and \$106 million in nonfederal cost sharing. Of the \$106 million in cost-sharing funds, approximately half was provided by industry PRPs, one-fourth was provided by states and local government, and one-fourth was provided as cash-outs from NRD settlements. When completed, it is estimated that these 11 projects will result in the removal of more than 1.6 million cubic yards of contaminated sediment from the Great Lakes. Several of these projects were at or related to Superfund sites, or could have become Superfund sites.

One major goal of the GLLA has been to identify PRPs as potential remediation project partners. Some individual companies as well as industry groups have

been remediating sites using GLLA funds. The following projects are examples:

- Ashtabula River: Approximately 497,000 cubic yards of contaminated sediments were dredged from the Ashtabula River in Ashtabula, Ohio. One-half the funding of the approximately \$61 million project was from the GLLA and the other half was from the Ashtabula River Cooperation Group II, a group of about 15 private companies and the Ashtabula City Port Authority.
- Ottawa River: Approximately 240,000 cubic yards of contaminated sediment are being removed from Sibley Creek and the Ottawa River in Toledo, Ohio. The costs of this \$49 million project are equally shared between GLLA funds and funds provided by the Ottawa River Group, which is a partnership of the city of Toledo and various companies with current and former facilities along the river. The city of Toledo's cost share is being provided in the form of landfill space for the disposal of dredged sediment. The cost sharing included a 50 percent contribution from GLLA funds toward costs of more than \$1 million for sediment investigations and remedial design prior to construction.
- St. Marys River: Approximately 40,000 cubic yards of contaminated sediment have been removed from Tannery Bay, west of Sault Ste. Marie, Michigan. The project was funded with \$4.8 million in GLLA funds, \$2.6 million contributed by Phelps Dodge, and \$600,000 from the Michigan Department of Environmental Quality.

## **The Great Lakes Restoration Initiative**

In May of 2004, Executive Order 13340 established the Great Lakes Interagency Task Force, chaired by EPA. Since then, the task force has been working to achieve the goals of the Great Lakes Water Quality Agreement. As a result of that work, a final Great Lakes Regional Collaboration Strategy was released in December 2005. The interagency task force has drawn upon the strategy and the collaborative efforts

and relationships that have continued since its inception to develop a proposed 2010 Great Lakes Restoration Initiative funding plan. The GLRI was proposed to Congress as part of EPA's 2010 Annual Performance Plan and Congressional Justification.

Outcome-oriented performance goals and measures will be used to track progress and demonstrate measurable results. Criteria and principles that will guide selection of programs and projects pursuant to the action plan are available on page 14 of [http://greatlakesrestoration.us/action/wp-content/uploads/glri\\_actionplan.pdf](http://greatlakesrestoration.us/action/wp-content/uploads/glri_actionplan.pdf).

The GLRI is intended to target the most significant problems in the Great Lakes region. Agencies will work together with states, tribes, municipalities, nongovernmental organizations, and industry to improve aquatic ecosystem resiliency; maintain, improve, or enhance the populations of native species; enhance wetlands, wetland-associated uplands, and high priority coastal upland and island habitats; identify, inventory, and track progress on Great Lakes habitats, including coastal wetlands restoration; and restore habitat function in areas of concern. Applications for grants will be accepted for the five major focus areas:

- Toxic substances and areas of concern: Efforts will be targeted to remediate contaminated sediments and to address other major pollution sources in order to restore and delist the 31 AOCs in the United States or binational waters of the Great Lakes Basin.
- Invasive species: Efforts will be targeted to institute a "zero tolerance policy" as a long-term goal with respect to new invasions.
- Nearshore aquatic habitat health and nonpoint source pollution: Efforts will be targeted geographically to focus on watersheds that are of extreme ecological sensitivity (such as Green Bay/Fox River, Genesee River, Maumee River, St. Louis River, and Saginaw River) and to address nutrient runoff problems.
- Habitat and wildlife protection and restoration: Efforts will target implementation of lakewide biodiversity conservation plans and restoration

of important species such as lake sturgeon and piping plover.

- Accountability, education, monitoring, evaluation, communication, and partnerships: Efforts will include implementing priority lakewide management plan projects for restoring the Great Lakes, as well as establishing quality goals and results-based accountability measures, learning initiatives, outreach, and strategic partnerships.

EPA, in concert with its federal partners on the Great Lakes Interagency Task Force and other stakeholders, is responsible for administering the GLRI, including allocation of funding. The federal agencies award funds through grants, cooperative agreements, or project agreements to nonfederal partners through existing funding programs.

Requests for proposals are issued each year to solicit grant proposals. Individuals and “for-profit” organizations are not eligible to apply for grants. However, state pollution control agencies, interstate agencies, tribes, colleges, universities, and other public or nonprofit private agencies, institutions, and organizations are eligible to apply for GLRI funding. There is no cost-sharing or matching requirement as a condition of eligibility. However, one important aspect of winning the grants is to demonstrate collaboration and support from the public, private, and independent sectors in performing the project, in order to expand its beneficial impact. In addition, applicants are encouraged to describe how the project will complement other projects or activities being performed in the Great Lakes to achieve greater benefits.

Eligible applicants may propose a voluntary cost share to provide additional support for the project. During the selection process, each submittal is evaluated under a points system, with a total of 100 points possible. Demonstration of collaboration and partnerships represents 10 percent of the application points. PRPs who are able to demonstrate that they will work in partnership with businesses, stakeholders, states, or community groups, to effectively and efficiently

implement the proposed project would score highly in that portion of the review.

### **Similarities and Differences Between the GLRI and GLLA and Implications for PRPs**

The GLRI and GLLA both share the goal of reducing persistent bioaccumulative toxics such as mercury, dioxins, and PCBs in contaminated sediments. The GLRI is also intended to provide significant funding and collaboration between agencies and stakeholders to accelerate the delisting of AOCs. In addition to funding remediation of legacy contamination, the GLRI also funds and supports development of strategies to deal with chemicals of emerging concern (such as pharmaceuticals, flame retardants, personal care products, and surfactants), invasive species reduction and native species enhancement, habitat restoration and nonpoint source pollution control, and monitoring. Therefore, the GLRI has a broader scope than the GLLA. Both programs, however, include the remediation of legacy sediment contamination within the 31 AOCs located wholly or partially in the U.S. waters of the Great Lakes.

Cost sharing is an integral aspect of the GLLA, but is not mandatory under the GLRI. For GLRI grant funding, however, credit is given to projects during the selection process if collaboration can be demonstrated. Both programs are intended to maximize the value of federal funding to achieve delisting of areas of concern in the Great Lakes. The goal statements associated with both the GLLA and the GLRI indicate that this is best accomplished through collaboration with industry as well other stakeholders.

PRPs with environmental liabilities relating to one or more of the AOCs in U.S. waters of the Great Lakes may benefit from considering whether particular sites may be eligible for cost sharing under the GLLA, or whether there are opportunities for taking advantage of grants under the GLRI. Important considerations for evaluating project eligibility for GLLA cost sharing or GLRI grants include the following:

**Enforcement Status**—Sediment remediation projects are generally not eligible for cost sharing to the extent

that such actions are already the subject of an enforceable government order, agreement, or permit requirement. However, many sites are not yet subject to an enforceable order, agreement, or permit requirement covering sediment remediation. Some sites are not yet the subject of government attention under CERCLA or RCRA; others are only at the study stage, with response actions still to be selected; still others have orders or agreements that relate to only a portion of the site or to only one component of a larger response action. Each of the latter situations may represent an opportunity to obtain federal cost sharing that can leverage other private and public funding for sediment response actions. Moreover, even if GLLA or GLRI funding is not available for the response action itself, such funding may be available to support complementary activities such as aquatic restoration or habitat enhancement. The latter types of activities may be particularly useful in mitigating PRP exposure to natural resource damages claims.

**Investigation Status**—Sediment investigations conducted in support of remedial decision making can be very costly. They can include extensive sampling and analysis for sediment, surface water, and sediment pore water chemistry; bioavailability and bioaccumulation testing; toxicity testing; aquatic community characterization; and other types of studies. As long as the subject investigation is not already within the scope of an enforceable government order, agreement, or permit requirement, GLLA funding may be available to help offset investigation and design costs in support of remediation planning.

**Operational Environment**—Both the GLLA and GLRI put a high premium on local involvement. Therefore, PRP projects that include local partners such as municipalities and port authorities (e.g., as was done for the Ottawa and Ashtabula rivers) and/or have a local nongovernmental organization (NGO) component may receive higher priority than those that do not include such partnering. Partnering with certain NGOs may create additional opportunities for leveraging programs that would otherwise be out of reach to PRPs. For example, partnering with an

organization such as Ducks Unlimited for wetland restoration may create additional grant opportunities, such as through the GLRI or through the U.S. National Water Quality Assessment program. Partnering with state and local governments or NGOs on a sediment project also could help PRPs in their relationships with those entities over the long term, and with the federal and state response agencies and trustee agencies in the short term. On the other hand, such partnerships might constrain other aspects of PRP decision making or raise confidentiality issues regarding discussions with those partners, particularly in cases of pending or threatened litigation. Other constraints may arise for PRPs as a result of limited resource availability or lengthy project timelines among public sector and NGO partners.

**Timeline for Project Completion**—A major objective of the GLLA and GLRI programs is to expedite sediment cleanup and resource restoration and enhancement projects. The timeline of such projects may have important implications for PRPs depending on internal prerogatives for managing environmental reserves. For some PRPs, it may be more advantageous to stretch environmental management expenditures over a longer time period rather than incurring large lump-sum costs in the near term. By contrast, in cases where it is advantageous for PRPs to resolve liabilities associated with sediment cleanup quickly, it may be difficult for PRPs to coordinate with nonfederal public entities and NGOs that may have longer project time frames. In addition, experience suggests that the time frame for resolving NRD liability tends to be longer than a typical time frame for an expedited sediment remediation project, which may limit the ability of PRPs to integrate projects that resolve all areas of potential liability.

**Relationship with Other PRPs**—At sites with multiple PRPs, the PRPs generally need to enter into an interim or final cost-sharing agreement among themselves before they can enter into an agreement with government agencies for the performance of a significant response action. This remains true for sites where GLLA or GLRI funding is being pursued. From

a logistical perspective, PRPs will need to consider the time and effort needed to complete an internal agreement when they are preparing a strategy for pursuit of federal funding through the GLLA or GLRI. This is particularly true if there is a need to address a significant “orphan share” or the threat of a PRP bankruptcy, as these circumstances tend to complicate internal cost-sharing arrangements.

**Special Considerations for NRD**—In assessing the merits of pursuing GLLA cost sharing and GLRI grant funding, PRPs should consider the following questions relating to the risk of NRD actions by trustees:

- Are there actions that should be taken to avoid or minimize trustees’ potential claims of injury resulting from the remediation itself? Trustees may claim ecological injury over the period starting when remediation occurs (as a result of the destruction of benthic communities, for example) up through the time when the resource is expected to recover to its baseline condition. PRPs may wish to enter in discussions with trustees early, to identify actions that can be built into the remedial design that will avoid or mitigate potential damages from the remediation itself.
- Are there actions that should be taken to avoid or minimize trustee claims of “residual” injury following remediation? Trustees often assert that there is residual injury following remediation in cases where EPA cleanup goals are less stringent than the trustees’ putative injury thresholds. PRPs may want to foster discussions between trustees and EPA on cleanup goals to minimize the effect of any such discrepancies on ongoing or future NRD claims.
- Are there actions that should be taken to ensure that sediment remediation satisfies trustee requirements for “primary restoration”? These are the actions necessary to return the resource services to the baseline condition that would be expected had the release not occurred. This question focuses on services

losses and the concept of baseline services. Primary restoration in theory consists of only the amount of restoration that is necessary to reach prerelease baseline. Sediment remediation programs also typically include other actions that may have the result of removing stressors not associated with CERCLA releases (e.g., nonpoint source control). Thus sediment remediation programs often result in ecological service levels that exceed baseline. PRPs may thus want to engage trustees in discussions regarding the effect of the remediation on ecological services to ensure that, at a minimum, full credit is given to the remediation as satisfying primary restoration obligations.

- Are there actions that should be taken to ensure that appropriate credits are given for any resource restoration or enhancement project and that such credits can be used as an offset for liability associated with compensatory restoration? Compensatory restoration consists of those actions necessary to fully compensate the public for lost resource services from the time of the release up to the time at which services are restored. PRPs may seek partnerships in order to secure GLRI funds for resource enhancement or restoration that complements a sediment remediation project. Enhancement and restoration projects of this nature are likely to provide ecological services above baseline conditions, and these services should be considered as offsets against any compensatory restoration obligations. In cases where NRD discussions are in early stages, trustees may be hesitant to issue credits prior to completion of the entire NRD assessment. Federal agency personnel may also resist the idea based on the belief that federal money should not be used to alleviate environmental responsibilities of private parties. PRPs may wish to explore resource enhancement or restoration projects with local partners to help garner support for the idea when approaching trustees and EPA. This local

partner support can only help when negotiating for restoration credits with trustees.

## Conclusions

For contaminated sites affecting U.S. or binational waters of the Great Lakes, the GLLA and GLRI have added complexity to the regulatory and management landscape for PRPs. However, these programs have also added opportunities for PRPs and PRP groups to realize significant cost savings through federal cost sharing for sediment investigation and remediation projects. These programs have also created opportunities to pursue grant money for resource enhancement or restoration projects when partnering with local governments or NGOs. In addition, these programs may offer unique opportunities for PRPs who seek settlement of NRD liability concurrently with environmental remediation. However, to realize the benefits offered by these programs (in cost savings, goodwill, and corporate reputation), PRPs will need to carefully orchestrate complex discussions and negotiations among a variety of disparate parties to harmonize differences of institutional culture, goals, priorities, and schedules.

**Pieter Booth** is a principal in the Ecological and Biological Sciences Practice at Exponent. His main practice areas include natural resource damages matters, providing technical support for scaling restoration projects, and environmental due diligence for infrastructure projects in Latin America and the Caribbean. Mr. Booth may be reached at boothp@exponent.com.

**Johanna Salatas** is a senior scientist in the Ecological and Biological Sciences Practice at Exponent. She provides technical expertise related to ecological risk and natural resource damage assessment and specializes in finding restoration-based solutions to mitigate environmental liabilities.

**Steven Jawetz** is a principal in the Washington, D.C., office of Beveridge and Diamond, P.C. His practice focuses on remediation and natural resource damages matters under CERCLA and similar state statutes imposing liability for hazardous substances releases.

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## STATE DOT LIABLE UNDER CERCLA FOR STORM WATER RUNOFF: RULING AFFIRMS ARRANGER LIABILITY FOR STORM WATER CONTAMINATION

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David C. Weber and Loren R. Dunn

Each year billions of gallons of storm water from highways and municipalities are discharged into the nation's waters. Those discharges often contain significant loadings of key contaminants:

polychlorinated biphenyls (PCBs), polycyclic aromatic hydrocarbons (PAHs), heavy metals. In many instances, such discharges have caused or contributed to sediment contamination requiring remediation under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 42 U.S.C. § 9601, et seq., or similar state authorities.

On June 7, U.S. District Court Judge Robert J. Bryan issued an order, on summary judgment, finding that the Washington State Department of Transportation (WSDOT) was liable to EPA under CERCLA for arranging the disposal of contaminated storm water runoff into the Thea Foss Waterway directly adjacent to downtown Tacoma, Washington. *United States v. Washington State Dept. of Transp.*, \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 2302502 (W.D. Wash. June 7, 2010). The waterway is part of the Commencement Bay Nearshore/Tideflats Superfund site, which, in 1981, was listed by EPA as one of the ten highest priority hazardous waste sites in the United States. The ruling is significant in several respects.

First, Judge Bryan's decision affirms that government entities, such as WSDOT, which operate storm water systems may be held liable under CERCLA for the disposal of hazardous substances contained in storm water runoff. Liability arises by virtue of a government entity's control over the design, location, and operation of drainage systems whose function is to collect runoff and dispose of it into nearby water bodies. In this case, WSDOT knew for years that the highway runoff it was discharging contained hazardous substances.

Second, the decision rejects previous authority suggesting that government entities, such as state

agencies and municipalities, are not responsible under CERCLA for preventing or treating contaminated storm water runoff from entering the environment. Government entities have argued, as WSDOT did here, that operators of storm water systems are not arrangers for disposal of hazardous substances because they lack control over what enters the storm water system. *See Carson Harbor Village, Ltd. v. Unocal Corp.*, 287 F. Supp. 2d 1118, 1194 (C.D. Cal. 2003).

Judge Bryan rejected this cramped interpretation of CERCLA, and succinctly ruled:

WSDOT arranged for disposal of hazardous substances. It is undisputed that WSDOT designed the drainage systems at issue. Designing is an action directed to a specific purpose. The purpose was to discharge the highway runoff into the environment. WSDOT had knowledge that the runoff contained hazardous substances and there was an actual release of the hazardous substances into the environment. WSDOT argues that it did not have control of the hazardous substances. However, it did have control over how the collected runoff was disposed of. WSDOT did design the drainage system and, as noted by the U.S., WSDOT has the ability to redirect, contain, or treat its contaminated runoff. For the foregoing reasons, WSDOT is an arranger under 42 U.S.C. § 9607(a)(3).

*Washington State Dept. of Transp.*, 2010 WL 2302502 at \*6.

Judge Bryan also rejected WSDOT's reliance on, and interpretation of, the Supreme Court's ruling in *Burlington Northern and Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870 (2009).

WSDOT had argued that it did not *intend* to dispose of its highway runoff, citing to *Burlington Northern* where the Court observed that the defendant had not intended for spills of its hazardous chemicals (a new and useful product) to occur and took steps to prevent those spills. In *Burlington Northern*, however, the defendant intended to sell the chemicals, not dispose of

them as waste. In contrast, the record here showed that WSDOT took purposeful actions to dispose of its polluted storm water runoff. As such, Judge Bryan ruled that the United States had established WSDOT's prima facie arranger liability under *Burlington Northern*.

Having found WSDOT to be a liable party under CERCLA, the court declined to address the issue of whether WSDOT was an owner or operator under 42 U.S.C. § 9607(a)(1) and (2). However, Ninth Circuit precedent likely also supports a finding of operator liability in this case. *See Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1342-43 (9th Cir. 1992) (rejecting argument that disposal does not include subsequent movement of hazardous substances).

The court left two issues unresolved. First, the court declined to rule on whether WSDOT is exempt from CERCLA liability under the federally permitted release provision in 42 U.S.C. § 9607(i) by virtue of WSDOT's National Pollutant Discharge Elimination System (NPDES) permit issued under the Clean Water Act, and the municipal permit issued to the larger Western Washington municipalities in 1995. The court ruled that there is a dispute as to whether WSDOT had operated in compliance with the permits. And, there is a question of the scope of the permits, whether there were releases outside that scope, and whether the injury is divisible. Second, the court declined to rule on WSDOT's defense that contaminants in the storm water are caused by third parties over whom it has no control. *See* 42 U.S.C. § 9607(b). The court ruled that there is a question of whether WSDOT exercised due care with respect to hazardous material.

For CERCLA practitioners, Judge Bryan's decision constitutes important authority. It affirms that government entities, including DOTs, municipalities, and public ports which operate, construct, or maintain storm water conveyance systems, may be held liable under CERCLA for the disposal of hazardous substances contained in storm water runoff.

**David Weber** is a principal at Riddell Williams. He practices environmental law and litigation, and represents regional and national companies in the

*transportation, manufacturing, and utility sectors. His practice includes federal and state hazardous waste cost recovery and contribution litigation.*

**Loren Dunn** is the chair of the Riddell Williams Environmental and Natural Resources Group. He practices in the environmental law and litigation fields, and represents regional and national companies at locations throughout the country. His environmental projects have involved hazardous waste and large multiparty toxics cleanup sites, including marine and freshwater sediment sites, landfills, and natural resource damages claims.

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**DECISIONS CITING *BURLINGTON  
NORTHERN* FOR ARRANGER LIABILITY  
AND/OR APPORTIONMENT ANALYSIS  
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SEPTEMBER 30, 2010**

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**Averil M. Edwards and Andrew W. Homer**

Since the Supreme Court decided *Burlington Northern* in May 2009, numerous district and circuit courts have examined or cited the case when deciding CERCLA issues. In the previous issue of this newsletter, we summarized all 2009 decisions citing *Burlington Northern* for apportionment and arranger liability analysis. See A. Edwards & A. Homer, *Decisions Citing Burlington Northern for Arranger Liability and/or Apportionment Analysis Through December 31, 2009*, 5 ABA SUPERFUND AND NATURAL RESOURCE DAMAGES LITIGATION COMMITTEE NEWSLETTER 23 (2010), available at [http://www.abanet.org/envIRON/committees/superfundnatresdamages/newsletter/mar10/Superfund\\_March10.pdf](http://www.abanet.org/envIRON/committees/superfundnatresdamages/newsletter/mar10/Superfund_March10.pdf). An additional 31 decisions published between January 1, 2010, and September 30, 2010, cite to *Burlington Northern*. Of these, the following decisions deal with arranger liability and/or apportionment:

### **I. Arranger Liability**

#### ***Hinds Inv., L.P. v. Team Enter., Inc.*, 2010 WL 289116 (E.D. Cal. Jan. 15, 2010)**

In an attempt to attach arranger liability to the manufacturers of dry cleaning equipment, the equipment's operator argued that the design and sale of a machine by someone who knew it would generate waste perchloroethylene (PCE) satisfied *Burlington Northern*'s test for arranger liability. *Hinds Investments, L.P. v. Team Enterprises, Inc.*, 2010 WL 289116, \*4 (E.D. Cal. Jan. 15, 2010) (*Hinds I*). The operator also alleged that the manufacturer included with its equipment instructions specifying the method of disposal for waste PCE. *Id.* The district court held that such manufacture and distribution of equipment, including instructions for disposal of resulting waste, do not provide the requisite intent for arranger liability to attach under *Burlington Northern*. *Id.* at \*5. The court noted that, in *Burlington*

*Northern* itself, the Supreme Court upheld a district court decision finding no liability for a pesticide manufacturer despite its knowledge that its product would be spilled during transfers and deliveries. The court cited the *Burlington Northern* proposition that, while "knowledge" may provide evidence of an intent to dispose of hazardous substances, it "... alone is insufficient to prove that an entity planned for the disposal." *Id.* (citing *Burlington Northern*, 129 S. Ct. 1870, 1880 (2009)). The court granted the defendant manufacturer's motion to dismiss. *Hinds I*, 2010 WL 289116 at \*10.

#### ***Veolia ES Special Servs., Inc. v. Hiltop Inv., Inc.*, 2010 WL 610094 (S.D. W.Va. Feb. 18, 2010)**

Although the parties agreed that *Burlington Northern* foreclosed any possibility that an entity that had loaded a tank car, which later spilled hazardous substances, could be an "arranger," a district court applied the Supreme Court's holding on arranger liability to instruct its analysis of operator liability. *Veolia ES Special Servs., Inc. v. Hiltop Inv., Inc.*, 2010 WL 610094, \*2 (S.D. W.Va. Feb. 18, 2010). In *Veolia*, the district court stated that, while it believed in a broad interpretation of CERCLA to support its remedial purpose, it could not ignore clear statutory language in determining whether a party was an operator. *Id.* at \*5. The court concluded that "just as the Supreme Court limited the application of arranger liability [in *Burlington Northern*] based on the plain meaning of the term arranger, this Court must pay heed to the limits of operator liability to those who operated a facility at the time of disposal. *Id.* Because the tank car loader and an inspector had no ability to "manage, direct, or conduct operation of the tank car at the time of disposal," they were not operators under CERCLA. *Id.*

#### ***Hinds Inv., L.P. v. Team Enter., Inc.*, 2010 WL 796844 (E.D. Cal. Mar. 5, 2010)**

In proceedings following the decision in *Hinds Investments, L.P. v. Team Enterprises, Inc.*, 2010 WL 289116 (*Hinds I*, described above), defendant manufacturers of filters specifically designed to remove waste materials from perchloroethylene (PCE) moved to dismiss the equipment operator's CERCLA claims. *Hinds Inv., L.P. v. Team Enter., Inc.*, 2010 WL

796844, \*1 (E.D. Cal. Mar. 5, 2010) (*Hinds II*). Plaintiff equipment operator claimed that defendant “made a conscious decision to send waste water containing PCE into sewers”; sold filters that created a waste to be disposed of by common drain into sewers; made filters that “existed for the purpose of waste removal and disposal” and “had nothing to do with the actual cleaning of clothes”; and “has thus *arranged for* and controlled the disposal of PCE Waste.” *Id.* at \*2 (emphasis added). The district court decided, in line with its decision in *Hinds I*, that plaintiff failed to show that the filter manufacturer “knew” enough about how waste that came from its machine would be disposed of to “rise to the level of intentional disposal of a hazardous waste.” *Id.* at \*7. The court noted that the defendant manufacturer’s instructions with respect to disposal were nonobligatory, and that plaintiff provided no evidence that defendant installed the filter, connected it to floor drains, directed waste disposal from the filter, or inspected the filter and its disposal mechanism. *Id.* The court dismissed the CERCLA claim against the defendant filter manufacturer. *Hinds II*, 2010 WL 796844 at \*16.

***Hinds Inv., L.P. v. Team Enter., Inc.*, 2010 WL 922416 (E.D. Cal. Mar. 12, 2010)**

In a third decision arising from the same operable facts, the Eastern District of California considered a motion to dismiss claims brought against a defendant dry cleaning equipment manufacturer. Citing the same portions of *Burlington Northern* it did in *Hinds I* and *Hinds II*, the district court found that the manufacturer again had insufficient knowledge of how its machine would dispose of hazardous waste to rise to the level of intentional disposal of a hazardous substance. *Hinds Inv., L.P. v. Team Enter., Inc.*, 2010 WL 922416, \*6 (E.D. Cal. Mar. 12, 2010) (*Hinds III*). The allegations against the defendant manufacturer in *Hinds III* were not materially different than those against the *Hinds I* and *Hinds II* defendants. However, defendant explicitly argued that arranger liability cannot be predicated on “mere knowledge of *likely* spills,” 2010 WL 922416 at \*5. The court endorsed this statement in its holding, reiterating that under *Burlington Northern*, knowledge alone is insufficient to prove that an entity planned for the disposal of hazardous substances. *Id.* at \*6 (citing *Burlington Northern*,

129 S. Ct. at 1880). The district court again dismissed plaintiffs’ CERCLA claims against a defendant equipment manufacturer. *Hinds III*, 2010 WL 922416 at \*16.

***Hinds Inv., L.P. v. Team Enter., Inc.*, 2010 WL 1663986 (E.D. Cal. Apr. 22, 2010)**

In a fourth decision arising from the same operable facts, the Eastern District of California considered a motion to dismiss CERCLA claims against an equipment manufacturer, again premised on arranger liability theory. *Hinds Inv., L.P. v. Team Enter., Inc.*, 2010 WL 1663986 (E.D. Cal. Apr. 22, 2010) (*Hinds IV*). In *Hinds IV*, similar to *Hinds II* discussed above, defendant was a manufacturer of filter equipment specifically intended to recover perchloroethylene (PCE) and recycle it for further use by dry cleaners. *Id.* at \*1–2. Plaintiffs advanced the same allegations against this defendant that they did against those in *Hinds I–Hinds III*, namely, that the manufacturer “knew” that operation of its equipment would result in releases of PCE to sewers and that its instruction manuals contained waste disposal guidance. *Id.* at \*2, \*5. The court, again citing *Burlington Northern* for the proposition that “knowledge alone is insufficient to prove that an entity planned for [] disposal” of hazardous substances, found that defendant’s knowledge about the use of its equipment did not rise to the level of intent. *Hinds IV*, 2010 WL 1663986 at \*6.

***United States v. Wash. Dep’t of Transp.*, 2010 WL 2302502 (W.D. Wash. June 7, 2010)**

Ruling on cross motions for partial summary judgment, a district court held that the Washington State Department of Transportation (WSDOT) was liable as an “arranger” because it designed, operated, and maintained storm water systems that discharge runoff, including hazardous substances, to waters within a Superfund site. *United States v. Wash. Dep’t of Transp.*, 2010 WL 2302502 (W.D. Wash. June 7, 2010). The court noted that under *Burlington Northern* arranger liability arises only for PRPs who take “intentional steps to dispose of a hazardous substance,” and that “the word ‘arrange’ implies action directed to a specific purpose.” *Id.* at \*5 (citing *Burlington Northern*, 129 S. Ct. at 1879). Here, the

court found that WSDOT's design, operation, and maintenance of storm water systems—because they were designed with the specific purpose of discharging highway runoff into the environment and WSDOT knew the runoff contained hazardous substances—met the CERCLA definition of “arranger” as clarified by *Burlington Northern*. *Id.* at \*6.

***Litgo New Jersey, Inc. v. Bob Martin*, 2010 WL 2400388 (D.N.J. June 10, 2010)**

In *Litgo New Jersey, Inc. v. Bob Martin*, 2010 WL 2400388 (D.N.J. June 10, 2010), the court rejected the argument made by various U.S. entities that they arranged for storage, rather than disposal, of hazardous waste materials. Citing the definition of “storage” of a hazardous waste from the Resource Conservation and Recovery Act, the court reasoned that the government defendants “intended to permanently get rid of what they believed to be waste products.” 2010 WL 2400388 at \*26. The court also rejected the government’s argument that it did not arrange for disposal because the containers of hazardous wastes were placed into a warehouse instead of onto land. *Id.* The court cited numerous cases in support of the proposition that disposal can occur when wastes are placed into an enclosed building such as a warehouse. These issues were not at issue in *Burlington Northern*, so the court did not differentiate the two cases from each other.

***Chubb Custom Ins. Co. v. Space Systems*, 2010 WL 2573386 (N.D. Cal. June 23, 2010)**

In *Chubb Custom Ins. Co. v. Space Systems*, the court held that plaintiff’s complaint failed to allege that defendant’s site remediation efforts met the statutory definition of “disposal.” 2010 WL 2573386, \*8 (N.D. Cal. June 23, 2010). The court indicated at the onset that a party can only be liable as an arranger if it takes intentional steps to dispose of hazardous substances. 2010 WL 2573386 at \*8 (citing *Burlington Northern*, 129 S. Ct. at 1878). Defendant Ford Motor argued that its only actions at the site were attempts to remediate legacy contamination not caused by it. *Id.* The court noted that the only *allegation* as to Ford Motor made by the plaintiff that could possibly meet the statutory definition [of “disposal”] was its installation of a dewatering system that allegedly exacerbated the groundwater contamination plume. *Id.*

The court found that the plaintiff failed to allege how the dewatering system caused its insured to incur response costs, so did not reach the issue of Ford Motor’s intent. *Id.*

***Arkema v. Anderson Roofing Co., Inc.*, 2010 WL 2607239 (D. Or. June 28, 2010)**

In *Arkema v. Anderson Roofing Co., Inc.*, 2010 WL 2607239 (D. Or. June 28, 2010), the court applied the *Burlington Northern* arranger liability holding to find that plaintiffs had properly pled arranger liability under section 107(a)(3) of CERCLA. The court found that the plaintiffs’ complaint “allege[d] sufficient facts to support [arranger liability] because it state[d] that General Steamship contracted with a transportation company to dispose of wastes at a common oil sump disposal facility,” and its intent to dispose of hazardous substances was clear. 2010 WL 2607239 at \*11.

***American Intern. Specialty Lines Ins. Co. v. United States*, 2010 WL 2635768 (C.D. Cal. June 30, 2010)**

In *American Intern. Specialty Lines Ins. Co. v. United States*, a California district court addressed whether the U.S. government had arranged for the disposal of perchlorate from rocket engines delivered to a facility to be refurbished and recycled. 2010 WL 2635768 (C.D. Cal. June 30, 2010). Bermite, the owner of the contaminated site, produced rocket motors for the United States from 1954 until the 1980s. In 1975, Bermite entered into a contract with the U.S. Army to repair, rebuild, and refurbish rocket motors. Bermite replaced perchlorate-containing propellant found in the recycled rocket motors with new propellant using equipment provided by the army. The propellant waste, which contained perchlorate, caused contamination at the site. The government argued that it was not liable as an arranger “because it did not own the perchlorate once it became waste.” The court held that CERCLA does not require continued ownership of disposed hazardous wastes for arranger liability to attach. 2010 WL 2635768 at \*27. The court determined that the *Burlington Northern* holding concerning arranger liability did not operate to defeat liability, because the “United States *intended* that perchlorate be removed from the engines and discarded as waste.” *Id.* at \*28. Because the contract between the United States and Bermite *required*

Bermite to remove and discard the original propellant from recycled rocket engines, the government arranged for the disposal of hazardous substances. *Id.*

***Government of the United States Virgin Islands v. Vulcan Materials Co.*, 2010 WL 2654631 (D.V.I. July 1, 2010)**

In *Government of the United States Virgin Islands v. Vulcan Materials Co.*, 2010 WL 2654631 (D.V.I. July 1, 2010), the court addressed whether defendant manufacturers of PCEs that caused groundwater contamination, and manufacturers/suppliers of dry-cleaning equipment that used PCEs, could be held liable under section 107 of CERCLA in order to answer the question of whether the court had subject matter jurisdiction over the case. The court cited the Supreme Court’s *Burlington Northern* analysis of arranger liability, which held that Shell Oil Company could not be held liable as an arranger under CERCLA merely through its sale and delivery of a hazardous substance. 2010 WL 2654631 at \*6. The court noted that plaintiffs had not even alleged that the circumstances required by the Supreme Court existed—that the defendants sold the PCEs “‘with the intention’ that at least a portion of PCE be disposed of when PCE was transferred or equipment was operated.” *Id.* at \*7. The mere allegation that defendants failed to prevent the disposal of PCE—or knew or had reason to know that the PCE was going to be released—was insufficient to create arranger liability under *Burlington Northern*. *Id.*

***Hinds Inv., L.P. v. Team Enter., Inc.*, 2010 WL 2403436 (E.D. Cal. July 11, 2010)**

In a fifth action spawned from the same operable facts in *Hinds I–Hinds IV*, described above, the district court granted a dry cleaning equipment manufacturer’s motion to dismiss plaintiff equipment operators’ CERCLA claims. *Hinds Inv., L.P. v. Team Enter., Inc.*, 2010 WL 2403436 (E.D. Cal. July 11, 2010) (*Hinds V*). As it did in the other *Hinds* decisions, plaintiff argued that defendant “arranged” for the disposal of hazardous substances “because it designed equipment to intentionally dispose of [hazardous substances] into the environment. *Id.* at \*4. As with the other defendants, the equipment manufacturer who moved to dismiss in this instance had not provided equipment that contained hazardous substances, and

did not own or possess the equipment once it came to contain hazardous substances. *Id.* The court held that the sale of dry cleaning equipment is not a “disposal” for purposes of CERCLA, and that defendant’s knowledge of how an operator of its equipment would dispose of hazardous substances did not “rise to the level of intentional disposal of a hazardous substance.” *Id.* at 5.

***Team Enter., LLC v. W. Inv. Real Estate Trust*, 2010 WL 3133195 (E.D. Cal. Aug. 9, 2010)**

In a sixth action based on the same operable facts as *Hinds I–Hinds V*, described above, the district court granted yet another dry cleaning equipment manufacturer’s motion to dismiss plaintiff equipment operator’s CERCLA claims. *Team Enter., LLC v. W. Inv. Real Estate Trust*, 2010 WL 3133195 (E.D. Cal. Aug. 9, 2010) (*Hinds VI*). The defendant in *Hinds VI* manufactured, distributed, and serviced combined dry cleaning filter and sill equipment, which was designed to catch used perchloroethylene (PCE) and filter it for reuse. *Id.* at \*1. Perhaps based on a lack of success defending similar motions by similar defendants, plaintiff provided more detailed allegations supporting theories of both arranger and transporter liability in this case. Specifically, plaintiff argued that deposition testimony showed that defendant knew that “the only disposal option [for PCE-contaminated wastewater generated by defendant’s equipment] was to discharge waste water from the [equipment container] into the sewer”, and that defendant knew this was the general practice among users of its equipment. *Id.* at \*2. Plaintiff further supported its claims that defendant’s equipment was designed for the disposal of PCE with allegations that defendant’s service representatives visited locations where the equipment was installed and witnessed equipment linked to sewer drains and that defendant’s equipment occasionally leaked contaminated wastewater to floor drains. *Id.* at \*4. However, defendant’s instruction manual stated that wastewater from its equipment should be “caught in a pail or other suitable container” and indicated that this would also prevent solvent (not wastewater) from being lost down a sewer drain. 2010 WL 3133195 at \*1. Consistent with its prior rulings on motions by similar defendants, the district court held that defendant had “no more than knowledge” that its equipment

“might leak, spill, dump or otherwise discard waste water with PCE residue” to sewer drains. *Id.* at \*10. Because defendant did not affirmatively direct plaintiff to pour wastewater into sewer drains and plaintiff “had other disposal options,” the court found that defendant’s knowledge did not amount to “intentional steps to dispose of PCE” and therefore did not satisfy the *Burlington Northern* test for arranger liability. *Id.* The court also noted that defendant here qualified for the CERCLA “useful product” defense to arranger liability because the primary purpose of its equipment was for use in “a main profit making venture” and not for “disposal” of the equipment itself. 2010 WL 3133195 at \*11. Finally, the court also held that “the record reveals no facts to suggest that [defendant] is a CERCLA transporter and dismissed plaintiff’s CERCLA claims. *Id.* at \*13.

***Celanese Corp. v. Martin K. Eby Constr. Co., Inc.*, 2010 WL 3620231 (5th Cir. Sep. 20, 2010)**

After a ruling by a district court that defendant pipeline installer—whose employee struck and damaged a methanol pipeline with a backhoe—was not responsible for resulting cleanup costs under CERCLA, plaintiff appealed the decision to the U.S. Court of Appeals for the Fifth Circuit. *Celanese Corp. v. Martin K. Eby Constr. Co., Inc.*, 2010 WL 3620231 (5th Cir. Sept. 20, 2010). At issue before the Fifth Circuit was whether defendant was liable as an “arranger” under CERCLA. *Id.* at \*1. The court, citing *Burlington Northern*, held that defendant was not an arranger because it did not intentionally damage the pipeline, and its failure to investigate the resulting damage was not “tantamount to intentionally taking steps to dispose of methanol.” 2010 WL 3620231 at \*4. The Fifth Circuit affirmed the district court’s defense ruling. *Id.*

## II. Apportionment

***United States v. Saporito*, 684 F. Supp. 2d 1043 (N.D. Ill. 2010)**

In *United States v. Saporito*, 684 F. Supp. 2d 1043, 1062 (N.D. Ill. 2010), the district court applied the Supreme Court’s *Burlington Northern* apportionment holding, and itself held that defendant had not met its

burden of proving that liability could be apportioned. The court differentiated the case from *Burlington Northern*, “where the contamination of a total site could be divided among spills that occurred on adjoining parcels of land owned by different parties.” 684 F. Supp. 2d at 1062 (citing *Burlington Northern*, 129 S. Ct. at 1882–83). In *Saporito*, the court held there was only one cause, the operations of a metal plating facility. *Id.* In *Burlington Northern*, the Court held that CERCLA incorporates common law principles, which allow apportionment of liability if there is a “reasonable basis for determining the contribution of each cause to a single harm.” The defendant argued that he did not own all of the equipment used in a single plating shop, and therefore should not be responsible for all releases related to that shop. *Id.* The court held that, while ownership of the shop equipment may have been divided, it was not “in the way that ownership was divided among owners of separate parcels of land in *Burlington Northern*.” *Id.* The court found that defendant’s ownership of some of the equipment necessary to the metal plating process “makes him comparable to a joint venturer” and that “apportionment is not appropriate for a joint venturer.” 684 F. Supp. 2d at 1062 (citing RESTATEMENT (SECOND OF TORTS) § 876). Moreover, defendant had not presented any theory for measuring the contamination caused by the equipment he owned, as opposed to contamination attributable to equipment owned by others. *Id.* The court declined to apportion liability.

***ITT Indus. v. BorgWarner, Inc.*, 700 F. Supp. 2d 848 (W.D. Mich. 2010)**

The Western District of Michigan held that there was no reasonable basis for apportionment of CERCLA response costs related to investigating different hazardous substances released by various potentially responsible parties (PRPs) at the site. *ITT Indus. v. BorgWarner, Inc.*, 700 F. Supp. 2d 848 (W.D. Mich. 2010). In its apportionment analysis, the district court noted at the onset that a defendant can avoid joint and several liability if it can prove divisibility based on any of a number of factors, including volumetric, chronological, geographic, or contaminant-specific considerations. *Id.* at 877 (citing *Burlington Northern*, 129 S. Ct. at 1883; *United States v. Twp.*

of *Brighton*, 153 F.3d 307, 313 (6th Cir. 1998). With respect to the “geographic divisibility” of contamination, the court reiterated the Sixth Circuit’s test:

[I]f [a PRP] could show . . . that its “operating” activities were completely limited to a discrete and measurable section of the property, and that releases onto or from that section of the property represented a discrete and measurable harm, this would provide a reasonable basis for apportionment.

*ITT Indus. v. BorgWarner, Inc.*, 700 F. Supp. 2d at 878 (citing *Brighton*, 153 F.3d at 320). With respect to a defendant that had leased the entire facility, the court found that there was evidence of releases at multiple locations throughout the property, that the defendant’s activities “were not limited to a discrete and measurable section,” and that there was therefore no reasonable basis for apportionment. *Id.* With respect to the same PRP’s claim that response costs could be apportioned based on the type of contaminant released, the court noted that nonrelease of a particular hazardous substance may be a basis for divisibility. *Id.* However, because prior to the incurrence of response costs (related to investigation of contamination) there was a significant potential that this PRP discharged several of the contaminants of concern (COCs), and investigating for a single COC “would have required the same level of effort,” the court held that the type of contaminant discharged did not provide a reasonable basis for apportionment as to this PRP. *Id.* at 878–79. With respect to two off-site PRP defendants who also moved to apportion their shares to those costs related to investigating a single contaminant, the court held that while data suggested that the “majority” of certain other contaminants came from a single on-site source, there was “no question” that the off-site PRPs discharged some amounts of those contaminants and evidence “suggested” their releases reached the site. *ITT Indus.*, 700 F. Supp. 2d at 879. Accordingly, the off-site PRPs did not meet their burden of showing a reasonable basis for apportioning their share of costs to those related to investigating a single contaminant. *Id.* at 880.

***United States v. Iron Mountain Mines, Inc.*, 2010 WL 1854118 (E.D. Cal. May 6, 2010)**

Presenting a motion for reconsideration of an earlier decision granting partial summary judgment against them, defendants asked the court to set a trial on the issue of apportionment. *United States v. Iron Mountain Mines, Inc.*, 2010 WL 1854118, \*1 (E.D. Cal. May 6, 2010). In ordering its earlier summary judgment, the court held defendants jointly and severally liable for response costs related to acid mine drainage and did not analyze whether there was a reasonable basis for apportionment. *Id.* Rather, the district judge ordered that defendants could raise their respective responsibility relative to other PRPs at a future contribution proceeding. *Id.* Now arguing their motion for reconsideration, defendants asserted that the Supreme Court’s decision on apportionment under CERCLA in *Burlington Northern* represented an intervening change in law, requiring reconsideration. *Id.* at \*2. The court noted that the Supreme Court based its *Burlington Northern* decision on “the seminal opinion on the subject of apportionment in CERCLA actions, *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983).” *Iron Mountain Mines*, 2010 WL 1854118 at \*2 (citing *Burlington Northern*, 129 S. Ct. at 1881). The government argued that *Burlington Northern* was limited to the narrow question of *whether the record before the original district court in that case supported a reasonable basis for apportionment.* *Id.* at \*3 (emphasis added). The court agreed with this position, and stated that “*Burlington Northern* simply reiterated the law as established in 1983 by *Chem-Dyne*, and then examined the record *to resolve a factual question of whether the record supported apportionment.*” *Id.* (emphasis added). The district court stated that “*Burlington Northern* did not add a new mandate that District Courts must apportion harm,” held that it did not represent an intervening change of law, and denied defendants’ motion for reconsideration. *Iron Mountain Mines*, 2010 WL 1854118 at \*3.

***Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 2010 WL 3893599 (D.S.C. Sep. 30, 2010)**

In *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, plaintiff landowner brought a CERCLA section

107 claim against a single defendant seeking declaratory judgment that the defendant was jointly and severally liable for the cost of remediating the site, a parcel of land that had been impacted by legacy contamination. 2010 WL 3893599 at \*1. Defendant filed contribution claims against various other parties, including the original plaintiff landowner. The contribution defendants then filed various cross- and counterclaims. *Id.* The case was bifurcated into liability and allocation phases, and trials were held for both. *Id.* at \*1–2.

The site consisted of approximately 33 acres that were impacted by widespread arsenic, lead, and carcinogenic polycyclic aromatic hydrocarbon (PAH) contamination, as well as low soil and groundwater pH. 2010 WL 3893599 at \*2–3. The court found that the contamination at the site was caused primarily by historical operations of a fertilizer plant, and specifically the on-site disposal of pyrite slag and lead sludge by-products of the fertilizer manufacturing process. *Id.* at 2. Additionally, “acid mine drainage” conditions resulted from the interaction of pyrite ore and residues with water and oxygen, causing the low pH in soils and groundwater at the site. *Id.* Various excavation, earthmoving, and road building activities were undertaken at the site over more than a century, and other industrial uses occurred. These latter activities contributed significantly to the spread of contamination at the site.

Ruling on plaintiff’s original section 107 claim, the court found that the original defendant, which had owned and operated the facility during a portion of the time in that hazardous substances were disposed of, was liable under CERCLA. 2010 WL 3893599 at \*38. The original defendant sought to avoid joint and several liability by advancing arguments based on the Supreme Court’s holding in *Burlington Northern* and proposing several reasonable bases for apportionment. *Id.* at \*42. The district court undertook a detailed analysis of *Burlington Northern* and other CERCLA cases dealing with apportionment, the *Restatement (Second) of Torts*, and the evidence presented by defendant. To begin, the court noted that liability under CERCLA is joint and several if the harm is indivisible, but that divisibility is a legal defense to joint and several liability. *Id.* at \*39 (citing *United States v. Monsanto Co.*,

858 F.2d 160, 171; *ITT Indus. v. BorgWarner, Inc.*, 2010 WL 1172533 at \*24 (W.D. Mich. Mar. 24, 2010)). The court reiterated the *Burlington Northern* holdings that the scope of liability in section 107 claims is determined “from traditional and evolving principles of common law,” that the “universal starting point for divisibility of the harm is § 433A of the Restatement (Second) of Torts,” and that not all harms are capable of apportionment. 2010 WL 3893599 at \*39–40 (internal citations omitted). The court held that the harm at the site—commingled contamination requiring remediation—was a single harm, and that such harm may be divisible based on several factors, including volumetric, chronologic, geographic, and contaminant-specific considerations, but not equitable considerations. *Id.* at 42 (citing *Burlington Northern*, 129 S. Ct. at 1882 n.9).

The court then considered each of five proposed methods of apportionment offered by defendant, including (1) the amount of fill or other material added to site during each party’s ownership period; (2) the volume of contaminants introduced into the site by the parties; (3) the period of time parties operated industrial facilities at the site; (4) the parties’ earthmoving activity contributing to the spread of contamination; and (5) identification of specific subareas of contamination attributable to defendant. The court rejected each of defendant’s proposed methods of apportionment, finding that there was insufficient or flawed evidence on the record for each to find a reasonable basis for apportionment in this case. For proposed method (1), the court found that defendant had failed to show a concise correlation between the addition of fill or other materials and the spread of contamination at the site. 2010 WL 3893599 at \* 42. Significantly, the court also noted that defendant’s testifying expert changed methodologies midway through his analysis, apparently to assign shares to a different party, discrediting the expert’s testimony. *Id.* For proposed method (2), the court found that pure volumetric considerations failed to account for the spread of contamination, which was particularly important at the site due to decades of excavation and related projects that moved contaminants across the parcel and worsened associated problems. *Id.* at 43. The court also noted that defendant’s volumetric calculations appeared to be

inaccurate, and that defendant's testifying expert withdrew his calculations at trial for this reason. *Id.* For proposed method (3), the court first noted that the duration of parties' operations at a site had been part of the reasonable basis upheld in *Burlington Northern*, but found that—on the facts of this case—such durational information was insufficient due to vast changes in production levels between periods of ownership. *Id.* For proposed method (4), the court held that consideration of earthmoving activity that contributed to the spread of contamination was alone insufficient as a reasonable basis for apportionment, because it did not consider original sources of contaminants. 2010 WL 3893599 at \*44. The court also noted that, again, problems with defendant's expert testimony contributed to the failure of this proposed method. *Id.* at \*44. Finally, with respect to proposed method (5), the court held that identification of particular sub-locations at the site for which defendant was certainly responsible was insufficient because it failed to account for or present a correlation with the overall volume of impacted soil and groundwater at the site. *Id.* Based on these points, the court held that defendant failed to meet its burden of showing a reasonable basis for apportionment, and was therefore jointly and severally liable for response costs. 2010 WL 3893599 at \*45. The court did, however, consider the liability of cross- and counterclaim defendants and allocation of costs among liable parties within the "Contribution" section of its decision. As noted by the Supreme Court, such "allocation" among responsible parties is different from apportionment, which is a defense to joint and several liability. *Burlington Northern*, 129 S. Ct. at 1882 n.9. Allocation, for example, may be based on equitable factors where apportionment may not. *Id.*

**Averil M. Edwards** is an Associate in the Chicago office of Winston & Strawn LLP. Her practice is focused on environmental law. She may be reached at [AEdwards@winston.com](mailto:AEdwards@winston.com).

**Andrew W. Homer** is an Associate in the Los Angeles office of Pillsbury Winthrop Shaw Pittman LLP. His practice is focused on environmental litigation and regulatory compliance counseling. He may be reached at [andrew.homer@pillsburylaw.com](mailto:andrew.homer@pillsburylaw.com).

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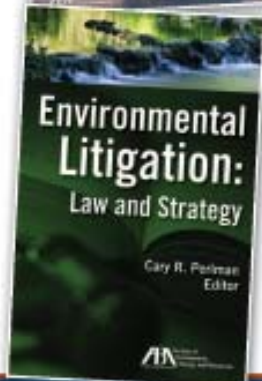
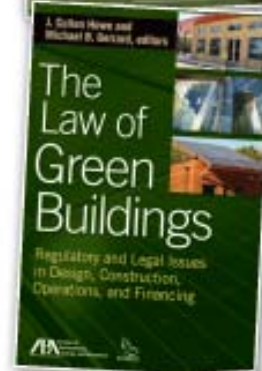
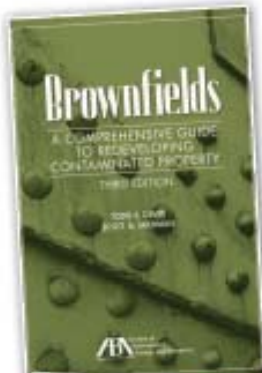
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