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California Court Rejects CERCLA Apportionment Defense in Cleanup Case

Article By:

J. Michael Showalter

Bradley S. Rochlen

Alex Garel-Frantzen

"Joint and several" liability for environmental remediation costs is fundamental to the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

In general, CERCLA incorporates "joint and several" liability under which any party who owned or operated a contaminated real estate is (potentially) collectively responsible for performing cleanup activities. In turn, parties who are found liable for costs can bring a claim for contribution against other potentially responsible parties, or PRPs. A court then uses equitable factors (often called the *Gore* or *Torres* factors) to allocate liabilities among all PRPs.

CERCLA allocation actions are notoriously long-lived and accordingly viewed as expensive. To avoid allocation, parties sometimes argue that environmental costs should be "apportioned" (*i.e.* actually divided), rather than "allocated" (*i.e.* shared in some proportion) among PRPs. "Apportionment" requires a finding that costs are *actually* divisible, and thus not subject to joint and several liability.

A recent ruling from a Central District of California case styled *California Department of Toxic Substances Control (DTSC) v. NL Industries* (available here) illustrates this.

Procedural Background

California regulators filed *DTSC v. NL Industries* in 2020 to recover approximately $700 million in expected remediation costs. (For more information on the site and history of litigation, see here.)

In August, the court held a three-day trial on a divisibility defense (*i.e.* apportionment) by eight former owners or operators of a former lead battery recycling plant in Vernon, California. In precedent, courts have used a variety of factors, including the volume and nature of the waste contributed by each PRP, timing, and geographic considerations, to justify apportionment.

The court heard factual testimony from industrial historians and environmental engineers on many of

these factors and on the legal questions of (a) the environmental conditions present at the site could be separated theoretically; and (b) on whether any of the involved PRPs presented testimony providing a reasonable basis to apportion liability. Relying in large part in gaps in historic site records and comingled contamination found throughout involved properties, the court rejected use of apportionment at the site and found that allocation and not apportionment was the appropriate way to divide costs. The court directed the parties to confer on appropriate next steps for the litigation.

What to Keep in Mind

Issues like gaps in the historical record and comingled contamination are ubiquitous at CERCLA sites, and their ubiquity usually forecloses the possibility of any apportionment. Where it is difficult to establish one PRP's contribution compared to another PRP's contribution, a court is unlikely to find that the harm is divisible and reasonably apportioned.

DTSC v. NL Industries — like others before it — affirms that the allocation is the usual way CERCLA liabilities are divided. CERCLA allocations use the *Gore* equitable factors, which include the amount of waste provided by a party, its toxicity, the degree of care parties used relevant to waste, the degree to which parties cooperated in cleanup efforts, and whether parties can "demonstrate that their contribution to a discharge, release, or disposal . . . can be distinguished." (See here.)

Apportionment is only available in limited circumstances where defendants can establish actual divisibility. Because gaps in the historical record and commingled contamination are common at many sites, apportionment is most often possible where contaminants are separated geographically or where there are exceedingly clear historical records documenting what parties contributed what wastes to a site. PRPs generally cannot narrowly define the harm to achieve divisibility out of context of the entire site.

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