
***Environmental Protection Agency v. Sequa* and the Erosion of Joint and Several Liability under Superfund**

by Robert M. Harkins, Jr.

I. Introduction

The imposition of joint and several liability to hazardous waste cleanup sites under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹ has been called "one of the most controversial aspects of CERCLA."² Under common interpretation, courts have uniformly applied strict, joint, and several liability to those involved in Superfund sites.³ Under tort common law norms, however, a responsible party may escape full liability by proving divisibility of the harm among itself and others.⁴ Courts may require the party to seek contribution from the other parties or require the government to amend the complaint to include the other parties.

Recently, in *Environmental Protection Agency v. Sequa Corp.*,⁵ the Fifth Circuit took a substantial step toward empowering defendants in Superfund liability suits to avoid full liability. The court reversed judgement entitling the EPA to remaining costs of cleanup at a site where the other parties had already entered into settlement agreements and remanded to reapportion damages based on a defense by Sequa Corporation even though the trial court could not find a reliable way to divide the damages.

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This article examines the history of joint and several liability under CERCLA and its initial application by the courts, subsequent legislative revisions under the 1986 Superfund amendments that eased defendants' burdens under joint and several liability, the recent even more lenient application of joint and several liability by the Fifth Circuit, and implications for the future. The article concludes by suggesting that courts apply joint and several liability in stricter accordance with previous Superfund case law to best meet the goals of CERCLA.

II. Joint and Several Liability under Superfund and CERCLA

Joint and several liability in tort context is defined by Black's Law Dictionary as a legal standard whereby an injured party may "sue one or more of the parties to such liability separately, or all of them together at his option. . . . [T]he liability of joint tortfeasors (i.e., liability that an individual or business either shares with other tortfeasors or bears individually without the others)."⁶

When the CERCLA was passed in 1980, Congress did not expressly define a standard of liability. Instead, courts have focused upon two indirect means of determining that standard. First, the sponsors of the law stated that "issues of liability not resolved by the Act, if any, shall be governed by traditional and evolving principles of common law."⁷ Second, section 101(32) states that the "term 'liable' or 'liability' under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of Title 33."⁸ While not an explicit adoption of joint and several liability, the reference in CERCLA §101(32) assured that the common law standard used to judge oil spill liability under the Clean Water Act would also be used for CERCLA. The standard used at the time was strict, joint, and several liability.⁹

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The strict liability standard eases the federal government's burden of proof in prosecuting polluters because those parties named under CERCLA are liable for cleanup costs of the pollutions with which they were involved regardless of fault. Joint and several liability allows the government to sue any collection of parties or any single party under the strict liability standard and hold that group or individual responsible for the entire cost of the cleanup.

The difference, however, is that while oil spills are generally easy to trace to a single source, toxic pollution sites under CERCLA may consist of a variety of different chemicals from various owners.¹⁰ Furthermore, section 107 of CERCLA creates a broad category of liable parties including any party who was involved in the manufacture, transport, or disposal of the waste.¹¹

However, Congress decided to apply the Clean Water Act oil spill standard for hazardous waste sites to strongly enforce the intent of CERCLA as well as to shift the cost of risk to industry and ensure

successful governmental prosecutions: "By holding the factually responsible person liable, [CERCLA] encourages that person – whether generator, transporter, or disposer of hazardous substances – to eliminate as many risks as possible."¹² The overriding purpose of the Act is to "facilitate the prompt clean-up of hazardous waste sites."¹³ Thus, regardless of the potential for extreme results regarding the liability of parties under Superfund, Congress selected a standard of strict, joint, and several liability to effectively eliminate hazardous waste pollution.

After its adoption, most courts interpreted CERCLA as calling for the application of strict, joint, and several liability for defendants who cannot prove divisibility of the harm they caused from the total harm. As the First Circuit stated in *O'Neil v. Picillo*,

It is now well settled that Congress intended that the federal courts develop a uniform approach governing the use of joint and several liability in CERCLA actions. The rule adopted by the majority of courts, and the one we adopt, is based on the Restatement (Second) of Torts: damages should be apportioned only if the *defendant* can demonstrate that the harm is divisible. (emphasis in original)¹⁴

III. SARA Hearings and Congressional Reaction

The application of several liability, however, has potentially severe results. Under tort law, joint and several liability is applied to parties found at fault for damage.¹⁵ Because the CERCLA

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standard is also strict liability, though, a party not at fault could potentially be liable for the entire damage at a Superfund site. This may result because any party who has hazardous substances deposited at the site is automatically liable for impacts of the site as a whole, even if the

defendant's material does not contribute to the hazard requiring cleanup.

The heavy-handedness with which joint and several liability may be applied did not escape Congress when it passed the Superfund Amendments and Reauthorization Act (SARA) in

1986.¹⁶ The insurance industry and others lobbied for a repeal of strict, joint and several liability.¹⁷ While the standard of liability remained, Congress did enact two new sections to ease the potential burden to defendants. First, section 122 gives EPA authority to enter into settlement agreements with parties including a covenant not to sue.¹⁸ For parties potentially responsible, but only for a minor part of the cleanup costs, de minimis settlements could expedite the proceedings and excuse the involved parties from involvement in any future lawsuit arising from the site.¹⁹ Second, Congress enacted section 113(f)(1), which creates a statutory cause of action for contribution.²⁰ Under that section, a party found liable and assessed the entire amount of recovery costs may initiate suit against others to be reimbursed for their portion of damage done.²¹

Undoubtedly, expedited settlement and a cause of action for contribution may remove some of the pain inflicted by joint and several liability. The SARA additions did not, however, answer all questions regarding application of joint and several liability. When the EPA settles with some of those involved at a Superfund site but not others, defendants may not later seek contribution from the settling parties.²² It remains the duty of the courts to decide how to handle apportionment claims of defendants when the other parties have already settled.

IV. The Post-SARA Application of Joint and Several Liability

While the basic notion of joint and several liability is now applied in CERCLA cases, its function may still be eroded if a lax standard of proof is applied to a defendant's attempt to show divisibility. If a defendant successfully shows the degree of

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damage it contributed at a particular site, the defendant becomes responsible only for that portion of the damage. The remaining issue of how to deal with joint and several liability in the wake of the SARA additions has resulted in three separate approaches.

The majority approach was advanced in one of the first and

most-noted cases involving CERCLA and joint and several liability, *United States v. Chem-Dyne Corp.*²³ A group of 24 defendants asked the court to rule that they were not jointly and severally liable for cleanup costs at a particular site. 289 generators and transporters were involved with hazardous waste totaling over 600,000 pounds of material at the site. There were a variety of wastes that commingled and the identities of all sources were not determined. The trial court ruled that due to the complex nature of the commingled substances, the defendants could not prove divisibility. The court denied the defendants' motion for summary judgment.²⁴

A trial court could make an equitable decision not to impose joint and several liability even where the defendant is unable to prove divisibility.

Following the majority approach developed in *Chem-Dyne*, the First Circuit Court of Appeals ruled that even when a basis exists for apportioning waste at the site, the court is not obligated to find that the harm is divisible. In

O'Neil v. Picillo,²⁵ the court stated that even if the number of barrels per defendant could be attributed, divisibility was not proved. The court reasoned that because the cost of removing the barrels varied according to contents, and because the contents of various barrels leached into the soil, apportionment would "necessarily be arbitrary."²⁶ Furthermore, in *United States v. Cannons Engineering Corp.*,²⁷ the ability of parties to challenge settlement agreements between other parties and the EPA was limited by a judicial deference to the EPA's methods of calculating fault. The court in that case further ruled that the EPA could encourage quick settlements by agreeing to amounts less than the party's actual portion of costs. As a result, nonsettling parties who remain would be left necessarily paying a greater amount of the cleanup costs than they were at fault for.

A second approach was developed in the Second and Third Circuits. In *United States v. Alcan Aluminum Corp (Alcan-Butler)*,²⁸ the Third Circuit reversed a trial court ruling for summary judgment in favor of the EPA. Millions of gallons of waste including hazardous waste had been dumped into a five square mile mining tunnel network. 100,000 gallons of contaminated water ended up in the Susquehanna River in 1985. 19 of 20 defendants settled with the EPA, leaving Alcan. Unlike

the court in *Chem-Dyne*, the Third Circuit ruled that even though the case involved commingling of complex substances, joint and several liability, and in fact all liability, could be escaped if Alcan could prove that its substance could not have contributed to the release of the contaminated water.²⁹

The Second Circuit, in *United States v. Alcan Aluminum Corp. (Alcan-PAS)*,³⁰ basically followed the logic of the other Alcan case. The court allowed Alcan to potentially escape all liability and present evidence on a variety of factors that could weigh in divisibility, including "relative toxicity, migratory potential, degree of migration, and synergistic capacities of hazardous substances at the site."³¹ At what stage in the litigation such evidence would be introduced, during the hearing on liability or damages, was left to the trial court's discretion.³²

A third approach to dealing with joint and several liability was taken in *United States v. A & F Materials*.³³ In that case the court listed six factors to be considered in apportioning damages even when the harm was not proved divisible and joint and several liability would normally be applied.³⁴ The court in that case emphasized the harshness of potentially holding a minor contributor liable for the entire cleanup costs associated with a Superfund site. Under the *A & F* approach, a trial court could make an equitable decision not to impose joint and several liability even where the defendant is unable to prove divisibility.

The *A & F* approach was rejected in *United States v. South Carolina Recycling and Disposal, Inc.*³⁵ The district court expressly upheld joint and several liability and rejected the defendant's method of apportionment based on volume. The court stated, "[A]rbitrary or theoretical means of cost apportionment do not diminish the indivisibility of the underlying harm, and are matters more appropriately considered in an action for contribution between responsible parties after the plaintiff has been made whole."³⁶ The Fourth Circuit affirmed the imposition of joint and several liability on appeal.³⁷ Thus, the last approach, which would take a marked turn away from joint and several liability and common law tradition, has probably been

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abandoned.

The first two approaches to joint and several liability contain more subtle differences. Under the majority view, a contributor to a hazardous site may avoid joint and several liability only upon proof accepted by the trial court about that defendant's contribution. In contrast, the Second and Third Circuits adopt a view whereby the defendant may claim no contribution and avoid any liability. The Second and Third Circuit cases also suggest that a more lax standard might be applied in determining whether the defendant has made a proper showing of apportionment. In either case, however, the defendant carries the burden of proving divisibility with reliable data and accepted methods in order to avoid joint and several liability.

V. A Weakened Stance in *Sequa*: Proving Divisibility without Complete Evidence and with Conflicting Theories

On September 28, 1993, the Fifth Circuit dealt with the issue of joint and several liability under Superfund for the first time. In *Environmental Protection Agency v. Sequa Corp.*,³⁸ the appellate court had to decide whether the trial court properly applied joint and several liability to Sequa Corporation for its involvement in the discharge of chromium into groundwater.

A citizen complaint in 1978 led to a Texas Water Commission investigation into the drinking water in Odessa, Texas. A chrome-plating shop on the outskirts of Odessa had been rinsing chrome-plated items after completing the plating process. The rinse water was then pumped from the building onto the ground. Discharge of the rinse water caused the drinking water contamination.

In 1984, the EPA declared the area a Superfund site. From 1971 to 1977, the shop was operated by three parties: John Leigh; Western Pollution Control Corporation (Bell); and Woolly Tool Division of Chromalloy American Corporation, which at a later point merged with Sequa. The EPA settled with Leigh and Bell for a total of \$1.1 million (\$100,000 for Leigh and \$1 million for Bell), leaving Sequa as the sole defendant to the legal action. At the time when the EPA sought approval for the settlement with Bell, Sequa obtained a hearing on the fairness of the settlement motion and the contribution of all parties to the contamination.

The trial court ruled that the settlement was a fair assessment of Bell's contribution and upheld the imposition of joint and several liability.

The district court held that Sequa was jointly and severally liable for \$1,866,904.19 plus all future costs incurred by the EPA with regard to the site.³⁹ Among other items, Sequa appealed the decision of the trial court to impose joint and several liability. The trial court's ruling revolved around two

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reasons why Sequa did not adequately prove divisibility of liability among defendants: (1) Sequa's methods were too speculative because Sequa presented multiple methods which varied significantly from each other; and (2) there were significant assumptions made in each of Sequa's methods due to the fact that all of Sequa's pre-1977 records were destroyed.

The Fifth Circuit adopted the majority *Chem-Dyne* approach over the *A & F* approach.⁴⁰ It did not take a stance regarding the approach adopted by the Second and Third Circuits (which it referred to as the *Alcan* approach) because the facts of the case did not deal with a defendant potentially escaping all liability, but voiced approval for the general logic applied in those cases.⁴¹

The *Sequa* court made three significant findings. First, it ruled that the district court had used an improper standard for determining whether the harm could be divided. The EPA had argued that the fact of commingling itself made it impossible to divide the harm, even though only one type of contaminant was present. The circuit court accepted the appellant's argument that the district court was improperly influenced by the EPA's incorrect stance and therefore did not apply the proper standard.⁴² Citing the *Alcan* decisions for support, the court held that the fact of commingling does not eliminate the possibility of proving divisibility.⁴³

Second, the court ruled that as a matter of law in this case there was a reasonable basis for apportionment.⁴⁴ The court

rejected the district court's rationale for denying Sequa's apportionment claims. The majority opinion stated, "The fact that apportionment may be difficult, because each defendant's exact contribution to the harm cannot be proved to an absolute certainty, or the fact that it will require weighing the evidence and making credibility determinations, are inadequate grounds upon which to impose joint and several liability."⁴⁵

Third, the Fifth Circuit held that the defendant may make an adequate showing of apportionment even when its data is incomplete and its theories differ significantly. As to conflicting and incomplete data, the court stated that it is the job of the district

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court to make factual determinations in the face of imperfect proof.⁴⁶ The court also held, "The existence of competing theories of apportionment is an insufficient reason to reject all of those theories."⁴⁷ Specifically, after reviewing the record, the circuit court ruled that the volumetric theory⁴⁸ presented by Sequa offered enough of a basis for apportionment to eliminate joint and several liability.⁴⁹

Thus, the Fifth Circuit decided that the record of apportionment on appeal was reviewable by the appellate court to make a determination of whether adequate information was presented to eliminate joint and several liability. The appellate court ruled that such a finding can be made even when the defendant presents incomplete data and significantly varying theories.

VI. The Future of Joint & Several Liability under Superfund

Does the *Sequa* decision relax the showing required of a defendant enough to create a loophole to the imposition of joint and several liability? Judge Parker in his dissent states,

The gist of the majority opinion is this legal fallacy: because the evidence is clear that Sequa did not cause 100% of the harm to the aquifer, Sequa must be entitled to a finding by the district court apportioning the amount of harm attributable to it under the Restatement (Second) of Torts, § 433. The majority's "rule of

thumb" miscasts the role of the district court and eviscerates the very concept of joint and several liability.⁵⁰

However, the majority denied making such a broad holding. It would not eliminate joint and several liability merely because the defendant proved it was responsible for some phantom percentage less than the whole. The majority opinion states that the defendant's calculations must more likely than not be roughly correct. The majority believed that the defendant in this case met that standard.⁵¹ Even if the majority misapplied the standard by accepting too low a quantum of evidence as to the percentage of damage caused by *Sequa*, that type of judgment is fact-specific and may have little impact on future decisions. Furthermore, in order to determine what impact *Sequa* will have on future CERCLA cases, the actual scope of the decision must be analyzed.

The court's decision may well be limited to the narrow circumstances presented to it.

First, *Sequa* is only compelling in the courts under the jurisdiction of the Fifth Circuit. The courts of the *Chem-Dyne* majority may come to different conclusions on similar questions. However, at least one commentator believes that the ruling is merely an extension of the *Alcan* courts, stating, "[It] is in line with recent federal appellate opinions in Philadelphia and New York, which also have limited the theory of blanket liability for a single defendant in pollution cases in favor of requiring a more precise showing of individual responsibility."⁵² In the *Alcan* cases, though, the defendant merely overcame summary judgment to have the opportunity to prove divisibility and a means of apportioning harm. The defendant in those cases was not guaranteed a reprieve from joint and several liability.

Also, while the *Sequa* court arguably took a step away from the liberal application of joint and several liability that would most empower the EPA in Superfund suits, the majority did not attempt to abandon the concept by favoring the *A & F* approach. Instead, it claimed to follow the majority standard.

As for the finding that apportionment was adequate, the court's decision may well be limited to the narrow circumstances presented to it. There was only one contaminant involved in the site, which lent itself to a volumetric measurement in a way that multiple contaminants may not. Additionally, there was only one source of contamination. Finally, there were only three parties who caused the contamination from that source, and only one at any given time. The time periods of operation were

established. Thus, while the court remanded for a determination of apportionment without complete data, it only did so in a situation where a rougher estimate of causation might still be enough to apportion fault. If future courts limit the holding to the narrow facts of this case, little ground will be lost for joint and several liability in CERCLA cases.

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Also, even though the court found that Sequa made enough of a showing to eliminate joint and several liability, it admitted that Sequa's case was far from perfect. The court suggested that while a denial of Sequa's motion was inappropriate, the lapses of data and variance in theories could be weighed against Sequa in making the

apportionment.⁵³ Therefore, Sequa may not be liable for the entire remaining cost, but any holes in its factual showing could result in the court assigning it a greater portion of damages.

Thus, while the *Sequa* decision may take a step away from the use of joint and several liability in Superfund cases, its holding maintains that the apportionment must be roughly correct by a preponderance of evidence to overcome the application of joint and several liability. Furthermore, the scope of the case is extremely narrow when viewed in relation to its facts. Additionally, the court took steps to compensate for defense weaknesses in proving divisibility by holding factual gaps against the defendant. When future courts decide questions pertaining to divisibility, however, it is important that they retain the common law standard upheld in cases like *Chem-Dyne*. Under the *Chem-Dyne* standard, joint and several liability can remain in force and work toward the goals proscribed by Congress in CERCLA to promote efficient hazardous waste removal and the reduction of future contamination risks.

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NOTES

1. Also commonly referred to as "Superfund." The statute may be found at 42 U.S.C.A. §§ 9601 et seq. CERCLA consists of four major components. First, §102 authorizes the EPA Administrator to gather information and designate certain substances to be "hazardous" if they may "present "substantial danger" to public health or welfare or the environment. The EPA uses information about hazardous waste storage to create a National Priorities List of uncontrolled sites. Second, §104 gives the President authority to clean up those hazardous substance sites. Third, §111 provides for a Hazardous

Substances Trust Fund to pay for cleanup costs. Last, §§106-107 assign liability to those responsible for hazardous waste releases. This article focuses on the major element of CERCLA, liability, and court rulings impacting the way in which liability is interpreted under CERCLA.

2. Robert V. Percival et al., Environmental Regulation: Law, Science and Policy 392 (1992).

3. Under strict liability, a party may be held responsible for damages even though that party is not actually at fault. In the context of CERCLA, it is a means of attributing liability to those who control the substances or the sites which are the basis of a suit, even if previous owners, employees, or others actually caused the hazardous substances to be released. Under joint liability, when multiple parties are connected to a harm, a court may hold them all liable. Several liability enables a plaintiff to sue one or more of the liable group and gain full recovery without having to name every responsible party. Thus, when strict, joint, and several liability is imposed under CERCLA, the EPA may sue any party connected to a hazardous waste site whether or not that party actually caused the leakage, and that party may be held responsible for the full costs of the EPA's cleanup. See notes 6 & 15 and accompanying text.

4. Restatement (Second) of Torts, §433:

- (1) Damages for harm are to be apportioned among two or more causes where
 - (a) there are distinct harms, or
 - (b) there is a reasonable basis for determining the contribution of each cause to a single harm.
- (2) Damages for any other harm cannot be apportioned among two or more causes.

5. 3 F.3d 889 (5th Cir.); 1993 U.S. App. LEXIS 24892.

6. Black's Law Dictionary 837 (6th ed. 1990). See also note 4.

7. 126 Cong. Rec. S14964 (Nov. 24, 1980); 126 Cong. Rec. H11787 (Dec. 3, 1980).

8. §311 of the Clean Water Act. 42 U.S.C.A. §9601(32).

9. "The committee staff argued that strict, joint, and several liability, explicitly referred to in S. 1480 and the November 18 substitute, was not radical but was the standard of liability under §311 of the CWA. Alan Simpson (R-Wyoming) was skeptical; if that were so, he countered, why not just say that? The committee staff agreed to put in the reference to the standard of liability under §311 that is now §101 of CERCLA." Philip Cummings, "Completing the Circle", Envtl. Forum 11, 15 (Nov.-Dec. 1990).

10. See, e.g., United States v. Stringfellow, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987); United States v. South Carolina Recycling & Disposal, Inc. 653 F. Supp. 984, 994 (D.S.C. 1986), *aff'd in part & vacated in part*; United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1396 (D.N.H. 1985).

11. 42 U.S.C.A. § 9607.

12. S. Rep. No. 848, 96th Cong., 2d Sess. 33 (1980).

13. Environmental Protection Agency v. Sequa Corp., 1993 U.S. App. LEXIS 24892,

8. See also United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1500 (6th Cir. 1989).

14. 883 F.2d 176 (1st Cir. 1989). See also United States v. Chem-Dyne Corp., 572 F.

Supp. 802 (S.D. Ohio 1983); United States v. Bliss, 667 F.Supp. 1298 (E.D. Mo. 1987);

United States v. Monsanto, 858 F.2d 160 (4th Cir. 1988).

15. Restatement (Second) of Torts §433A.

16. The SARA amendments are integrated into CERCLA.

17. Percival, at 310.

18. 42 U.S.C.A. § 9622.

19. 42 U.S.C.A. § 9622(g).

20. 42 U.S.C.A. § 9613(f)(1).

21. At first glance, this may seem to lead to the same result as proving divisibility, since either way additional parties may be required to contribute to the cleanup costs. The main difference is that under CERCLA §113(f)(1), two lawsuits occur instead of one. The party in the first suit pays full costs to the EPA and then files a separate suit to recover an appropriate portion of that cost from others. Thus, the EPA has funds for cleaning up the hazardous substance site before litigation is ended. In contrast, proving divisibility is a defense to the original lawsuit. If successful, the EPA would be required to amend the original suit to include additional parties. The government would then have to prove its case against additional parties, resulting in delays in litigation and cleanup cost recovery.

22. 42 U.S.C.A. § 9613(f)(2).

23. 572 F. Supp. 802 (S.D. Ohio 1983). *See supra* note 14 and accompanying text.

24. *Id.* at 811. Proof of divisibility was requisite to a ruling for summary judgement since without it the defendants were presumed to be contributing parties to the hazard. An adequate showing of divisibility is a defense to joint and several liability under tort common law. See note 4 and accompanying text.

25. 883 F.2d 176 (1st Cir. 1989)

26. *Id.* at 183 n.11 (1st Cir. 1989).

27. 899 F.2d 79 (1st Cir. 1990).

28. 964 F.2d 252 (3d Cir. 1992).

29. *Id.*, at 270.

30. 990 F.2d 711 (2d Cir. 1993).

31. *Id.*, at 722.

32. *Id.*, at 723.

33. 578 F. Supp. 1249 (S.D. Ill. 1984).

34. The factors advanced by the court were,

(i) the ability of the parties to demonstrate that their contribution to a discharge[,] release or disposal of a hazardous waste can be distinguished;

(ii) the amount of the hazardous waste involved;

(iii) the degree of toxicity of the hazardous waste involved;

(iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;

(v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and

(vi) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.

Id., at 1256.

35. 653 F. Supp. 984 (D.S.C. 1986), *aff'd* in part and vacated in part; United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988).

36. *Id.* at 995. It is also notable that an amendment to CERCLA including categories substantially similar to the rationale used in A & F was introduced to weaken the common law imposition of joint and several liability, but failed. 1993 U.S. App. LEXIS 24892, 28.

37. 858 F.2d at 173.

38. 3 F.3d 889 (5th Cir.); 1993 U.S. App. LEXIS 24892.

39. As part of Bell and Leigh's settlements, they were dismissed from all present and future liability.

40. 1993 U.S. App. LEXIS 24892, 37.

41. *Id.*

42. *Id.* at 40 & 46 n.19.

43. Id. at 40 n.15

44. Id. at 41.

45. Id. at 40-41.

46. Id. at 44 n.18 & 45.

47. Id. at 45.

48. One of Sequa's methods of showing divisibility was simply to compare the volume of chromium discharged by each of the owners.

49. 1993 U.S. App. LEXIS 24892, 37 at 47.

50. Id. at 64.

51. "Sequa, is, of course, required to prove its contribution to the harm by a preponderance of the evidence. Our point is that such proof need not rise to the level of certainty; evidence sufficient to permit a rough approximation is all that is required under the Restatement." Id. at 46 n.19.

52. Wall Street Journal, Oct. 5, 1993, p. B5.

53. 1993 U.S. App. LEXIS 24892, 44 n.18 & 45.

