

Wisconsin Judge Reconsiders and Holds that Superfund Costs Cannot Be Apportioned

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Yesterday, a judge in the Eastern District of *Wisconsin* reversed his own ruling and held that *NCR Corporation's* liability for the cleanup of **polychlorinated biphenyls (PCBs)** at the **Fox River Superfund Site** was not subject to divisibility. [Last May](#), the court held that NCR had proven that the environmental harm in Operable Unit 4 of the Site was capable of apportionment and could be reasonably apportioned based on NCR Corporation's contribution of PCBs to this area. In its May decision, the court held NCR liable only for its portion of the costs and determined NCR was not jointly and severally liable for all the costs of cleaning up PCBs in Operable Unit 4 (OU4). That ruling upheld NCR's "divisibility defense" to joint and several liability. After yesterday's decision, however, NCR is once again jointly and severally liable for all cleanup costs at OU4.

The court reversed itself after it determined that the evidence and testimony that NCR Corporation had provided to show its volume of contributions to the PCBs found in OU4 was "unreliable." Because NCR had the burden to establish its defense, the court was willing to re-examine the evidence and, when it did, it found gaps in NCR's contribution estimates. Without reliable evidence to prove the quantity of PCBs that NCR Corporation had contributed to OU4, the court determined that the environmental harm could not be apportioned. It therefore determined that NCR Corporation remained jointly and severally liable for the costs of cleaning up PCBs in OU4.

The Court's now-overturned May 2015 decision had been the first district court decision to uphold a divisibility defense under CERCLA since ***Burlington N. & Santa Fe Ry. Co. v. United States***, 556 U.S. 599 (2009).

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