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Asserting Divisibility in CERCLA Litigation in Federal Court: Practical Tips and Lessons Learned

THURSDAY, NOVEMBER 19, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

William S. Hatfield, Director, Environmental, **Gibbons**, Newark, NJ

Adam H. Love, Ph.D., Vice President and Principal Scientist, **Roux**, Oakland, CA

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Practical Tips and Lessons Learned for Asserting Divisibility in CERCLA Litigation in Federal Court

Objective: Provide the foundational bases and discuss the practical application of asserting the divisibility defense.

Agenda:

- Legal Basis for Divisibility and Technical Apportionment/Allocation
- Technical Basis for Divisibility and Technical Apportionment
  - Case Study:
    - Von Duprin LLC v. Moran Electric Service Inc. et al.
- Practical Discussion Questions

GIBBONS

Legal Basis for Divisibility and Apportionment vs. Allocation

- Divisibility is a defense to joint & several liability under CERCLA, it is not an equitable allocation among parties.
- Apportionment is not the same as Allocation under CERCLA:
  - Apportionment = Separate Checks
  - Allocation = Equitably Splitting the Check
- Courts sometimes confuse these legal concepts, which apply in different circumstances but use some of the same factors.

CERCLA Basics – 107 and 113

- CERCLA Cost Recovery - Section 107
  - Joint and Several Liability (generally): Divisibility is a Defense
- CERCLA Contribution – Section 113
  - "[T]he court may allocate response costs among liable parties using such *equitable* factors as the court determines are appropriate."
  - Objective Gore Factors considered in equitable allocation:
    - The ability of the parties to demonstrate that their contributions to a discharge, release, or disposal of a hazardous waste **can be distinguished**
    - The **amount** of the hazardous waste involved
    - The **degree of toxicity** of the hazardous waste involved
- Non-Objective equitable factors for allocation may include degree of involvement, care, cooperation, state of mind/knowledge, degree of benefit/profit gained from conduct.
- Only objective factors are used in Divisibility/Apportionment.

Divisibility Under CERCLA

- Judicially created *defense* to joint & several liability.
  - See U.S. v. Monsanto Co., 858 F.2d 160, 172 (4th Cir. 1988).
- Based on Restatement (Second) of Torts § 433A:

> "[W]hen two or more persons acting independently caus[e] a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he himself caused…But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm."

Two Step Process for Divisibility

- 1. Determine if the harm is divisible.

- 2. Apportion the liability, assuming there is a reasonable factual basis to divide the harm.

Practice Tip

- If possible, look to bifurcate the elements of divisibility via motions for partial summary judgment:
  - First, whether the harm is theoretically capable of apportionment; and
  - Second, if the harm is capable of apportionment, the fact-finder must determine how actually to apportion the damages.
- This approach:
  - simplifies the issues before the Court; and
  - affords the parties an opportunity to focus solely on the methodology for apportionment.

GIBBONS

Apportionment v. Allocation

Apportionment v. Allocation

- Some courts conflate apportionment with allocation.
- "To apportion is to request separate checks, with each party paying only for its own meal. To allocate is to take an unitemized bill and ask everyone to pay what is fair."
  - Yankee Gas Services Co. v. UGI Utilities, Inc., 852 F. Supp. 2d 229, 241-42 (D. Conn. 2012).

Allocation & Litigation under CERCLA §§ 107 & 113

GIBBONS

- An action under CERCLA § 107(a) allows plaintiff to pass off all response costs to any defendant found liable, but the defendant can "blunt any inequitable distribution of costs" by filing a counterclaim under § 113(f).
  - United States v. Atl. Research Corp., 551 U.S. 128, 140 (2007).

- "[O]nce a § 107(a) claim is met with a § 113(f) counterclaim, the action has been effectively converted into an allocation of costs made on the basis of such equitable factors as the court determines are appropriate."
  - Yankee Gas, 852 F. Supp. 2d at 240 (2012).

Breakthrough:
The Burlington Northern Decision

Burlington N. & Santa Fe Ry. v. U.S.

556 U.S. 599 (2009)

GIBBONS

- Defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists.
- Both District Court and Circuit Court agreed that the harm created by the contamination of the site, although singular, was capable of apportionment.
- The District Court used geographical factors, timeframes, and types of hazardous substances to apportion liability.

Burlington N. & Santa Fe Ry. v. U.S.

556 U.S. 599 (2009)

- Factors Considered by District Court in Apportioning Liability:
  - Railroad parcel constituted only 19% of the surface area of the site;
  - The Railroad leased their parcel for 13 years, which was 45% of the time the facility was operated;
  - The volume of activities on the property was 10 times greater than the releases on the Railroad parcel;
  - Only spills of two chemicals, Nemagon and dinoseb, substantially contributed to the contamination that had originated on the Railroad parcel and those two chemicals contributed 2/3 of the overall site contamination requiring remediation.

Burlington N. & Santa Fe Ry. v. U.S.

556 U.S. 599 (2009)

- Court of Appeals faulted the District Court for relying on *simple calculations* involving percentages of land area, time of ownership and types of hazardous products.
- However, the Supreme Court sided with the District Court because its allocation of liability was supported by the evidence and with apportionment principles.
- Upshot: SCOTUS recognizes availability of apportionment of CERCLA liability.

How do you know if it is divisible?

- ” The threshold for divisibility established by the Supreme Court - BNSF, 129 S. Ct. 1870, 1881 (2009):
  - apportionment need not be precise, only that there must simply be “facts contained in the record reasonably support[ing] the apportionment of liability

Technical Basis for Divisibility and Apportionment/Allocation

Divisibility of What?

- Distinctions based on:
  1. Geography
  2. Chemical Type
  3. Volume
  4. Time

Technical Strategy for Divisibility

- Divisibility Approaches Often Draw From Multiple Lines of Evidence
  - Operational History
  - Nature of Release
  - Extent and Magnitude
  - Fate and Transport
  - Toxicity
  - Degradation Analysis
  - Chemical Fingerprinting
  - Cleanup Remedy

1. Geography

- Easiest
  - Impacted matrix is not moving
    - Soils
    - Sediment deposition
- Medium
  - Impacted matrix is moving, but maintaining physical separation
    - Groundwater
    - Air
    - Suspended sediment
- Difficult
  - Impacted matrix is co-mingled
    - Landfills
    - Sewer discharges
    - Fluctuating transport direction
    - Close proximity

Co-mingling does not mean the contamination is indivisible – as other approaches to divisibility may apply

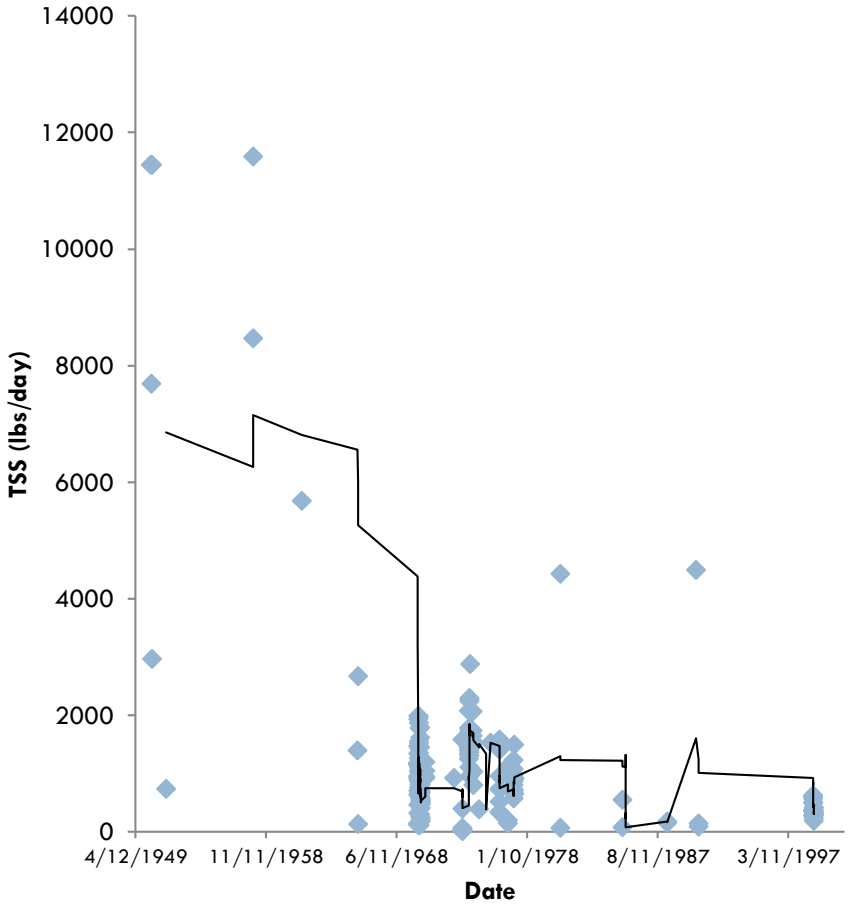
2. Chemical Type

- Easiest
  - Unique COC use
- Medium
  - Common COC use, but from different source/application
    - Unique chemical distribution of COC mixtures
    - Unique chemical ratios/markers associated with COC
    - Isotope differences
- Difficult
  - Common COC use, from similar source/application
    - Successive or adjacent operators

Chemical indistinguishability does not mean the contamination is indivisible – as other approaches to divisibility may apply

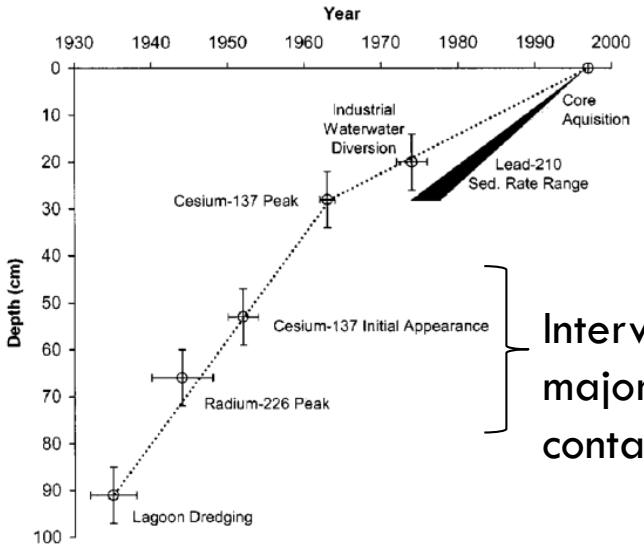
3. Volume

- Easiest
  - Complete records of COC volumes and loading
- Medium
  - Use of Surrogates for Volume/Mass Released
    - Facility land area (BNSF factor)
    - Years of operations (BNSF factor)
    - Nature of Release
- Difficult
  - Reconstructing release history
    - Operational parameters
    - Discharge/disposal/spill records
    - Fate and transport analysis

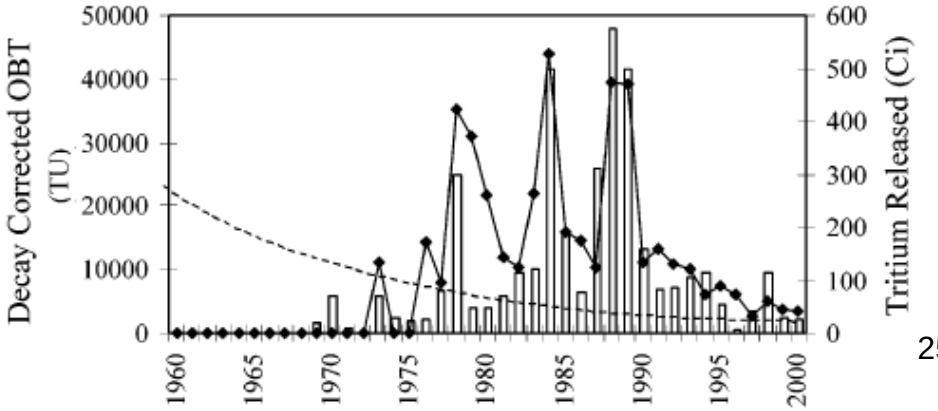


4. Timing

- Easiest
  - Complete records of when releases occurred
- Medium
  - Reconstructing timing of release
    - Transport
    - Degradation
- Difficult
  - Impacted matrix age-dating
    - Isotopic age-dating



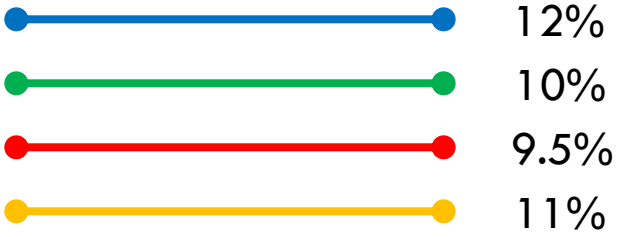
Interval of major contamination



Putting It All Together

- Geography
- Chemical type
- Volume
- Time

- Parallel Lines of Analyses
  - Leading to comparable results



- Analyses in Series
  - Divisibility within earlier divisions

25% x 50% x 40% x 80% = **4%**

Practice Tip

- If you apply divisibility factors in Series, be sure you are not double counting in your divisibility fractions!

- Analyses in Series
  - Divisibility within earlier divisions

25% x 50% x 40% x 80% = **4%**

Other Apportionment Factors?

Remedy Costs

- How much of the divisible portion is being addressed by the remedy?

Human Health and/or Ecological Risk

- How much of the divisible portion is contributing to health and/or ecological risk?

…or in-practice are costs and risk weighting factors on COC divisibility contributions?

Summary

- The Court's threshold of "a reasonable basis" for divisibility allows for numerous techniques to be potentially applied.
  - Make sure you are considering all the potential technical tools and methods at your disposal to slice up the liability.

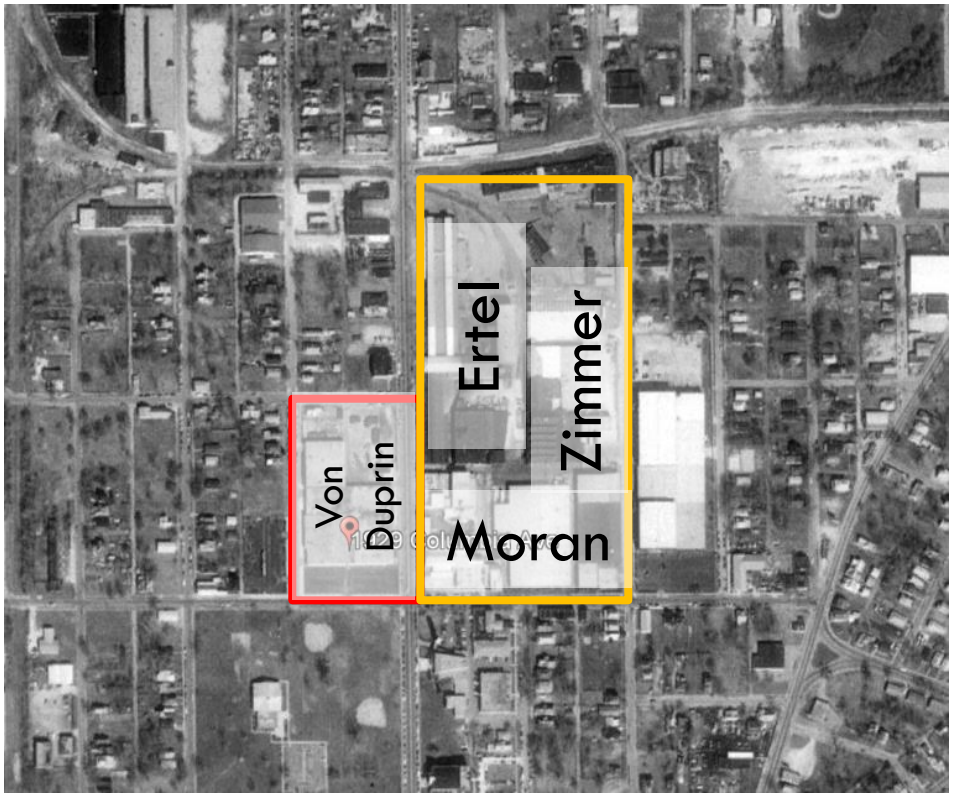
Case Study:
Von Duprin LLC v. Moran Electric Service Inc. et al.

United States District Court
Southern District of Indiana – Indianapolis Division.
Case No. 1:16-cv-01942-TWP-DML

Historical Operations

- Von Duprin
  - 1910-2008
    - Dry Cleaner & Degreasing
- Ertel
  - 1890-2001
    - Degreasers
- Zimmer and Zimmer Paper
  - 1936-2012
    - Undocumented COC use
  - 1986-2006
    - CVOC UST
- Moran Motor/Electric Serv.
  - 1927-2009
    - Degreasing

Historical



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Historical Operations

- Von Duprin
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  - 1890-2001
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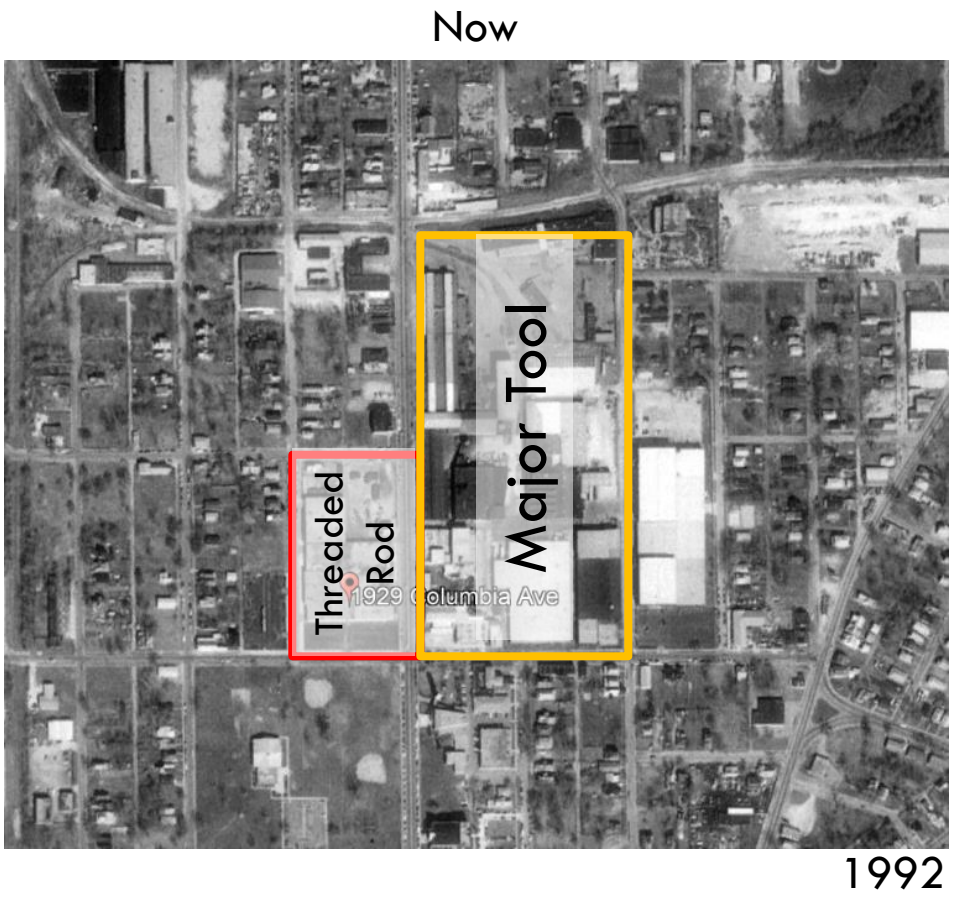
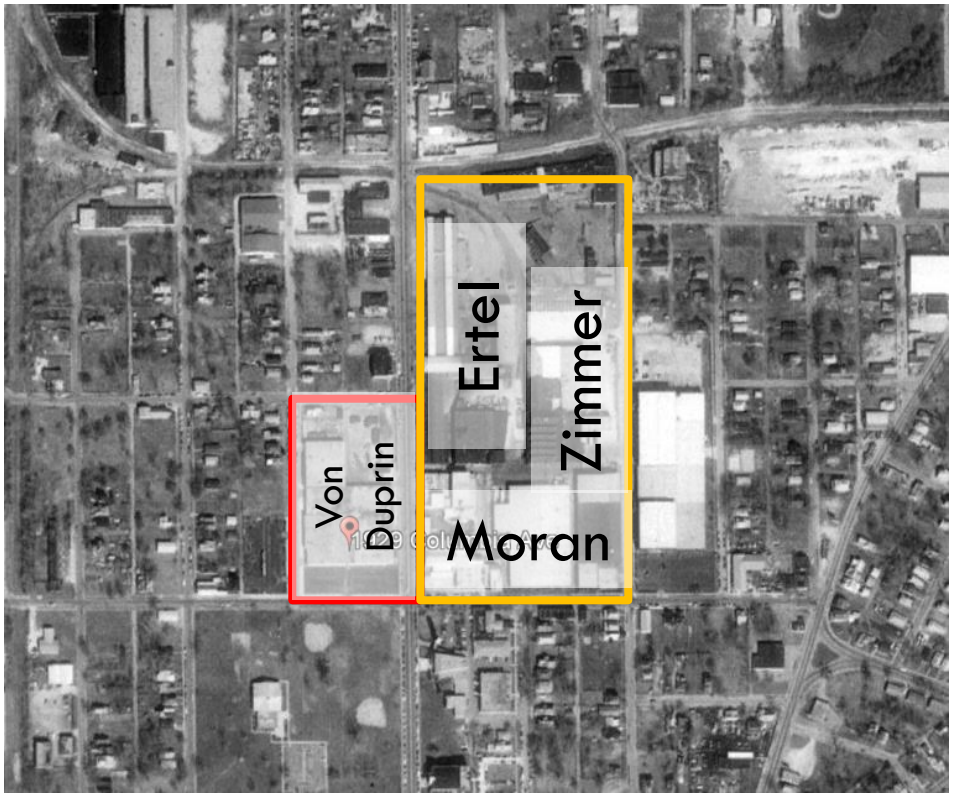


Lawsuit

- In 2016, Von Duprin filed its action for cost recovery under Section 107(a) and for declaratory relief under 113(g)(2) of CERCLA against:
  - Moran
  - Major Tool
  - Zimmer and Zimmer Paper
- Van Duprin sought costs totaling $3,238,945.80 (and future costs):
  - including the amount paid to Threaded Rod in settlement and IDEM's oversight costs.
- In turn, Moran and Major asserted contribution cross-claims and counterclaims under Section 113(f), seeking contribution for any liability allocated to them.
- Major Tool asserted a bona fide prospective purchaser defense.



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Co-mingled CVOC Plume

Total CVOCz

Two Step Process

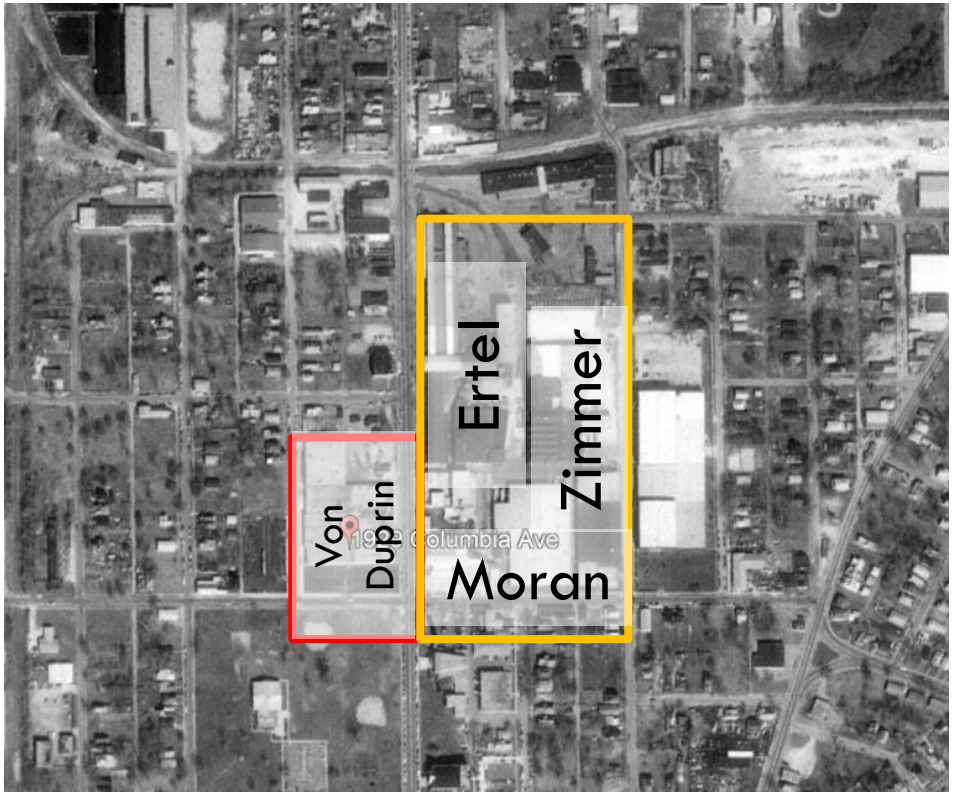
- 1. Determine if the harm is divisible.

- 2. Apportion the liability, assuming there is a reasonable factual basis to divide the harm.

Divisibility of What?

For Von Duprin v. Moran

- Distinctions based on:
  1. Geography
  2. Chemical Type
  3. Volume
  4. ~~Time~~



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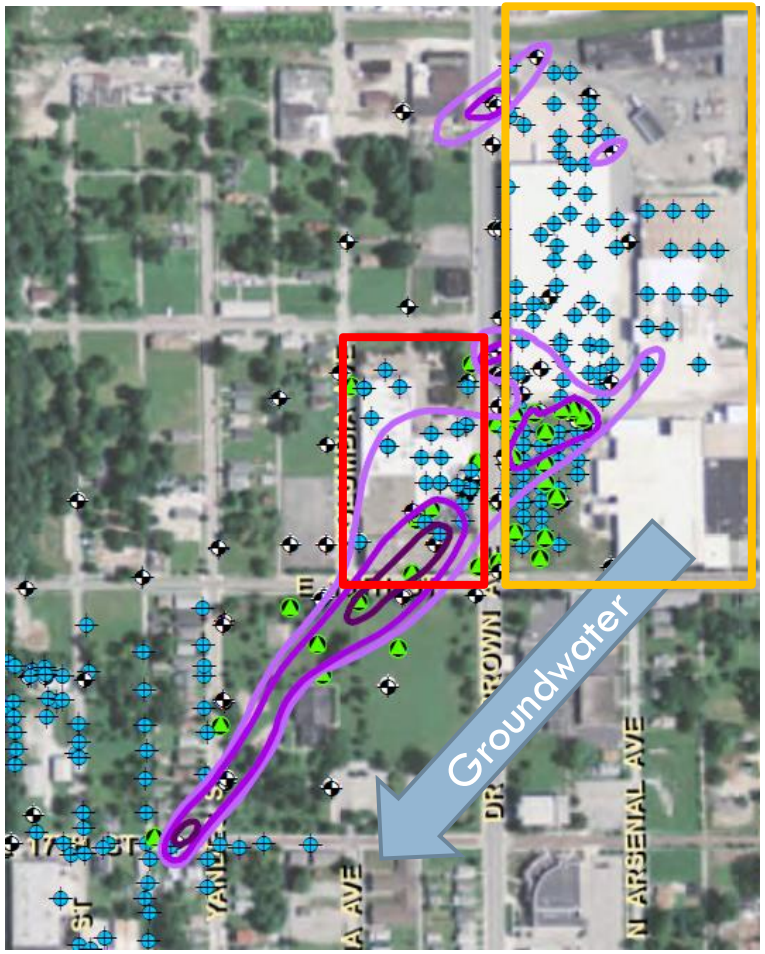
Geographic Divisibility

Opinion: Within groundwater, distinct downgradient source areas did not contribute CVOCs to upgradient locations in groundwater

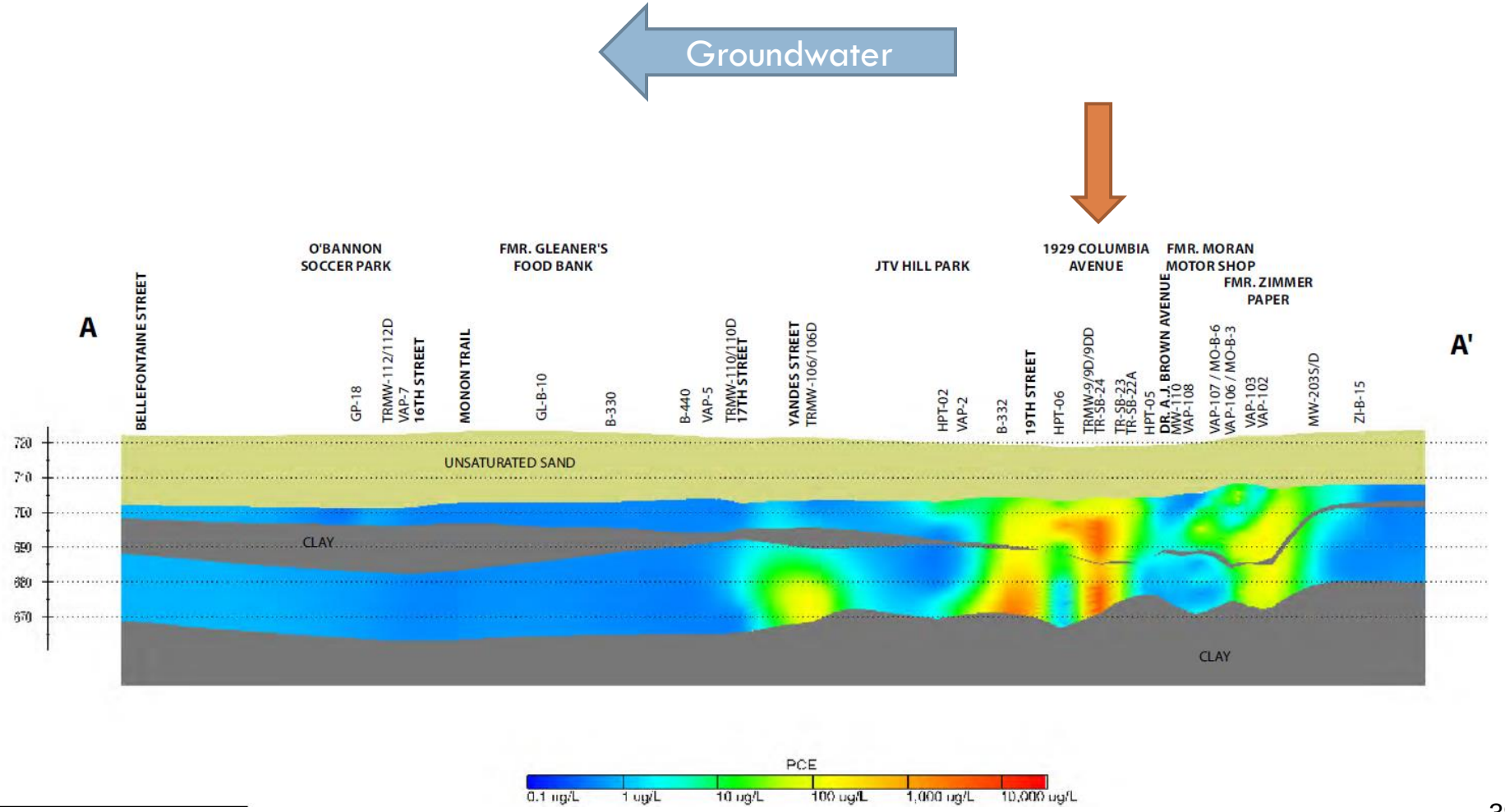
Chemical Distinction

Table 1. Time- and Depth-averaged CVOC Concentrations (µg/L) Among Upgradient and Downgradient Groundwater Monitoring Locations Near the Von Duprin Property.

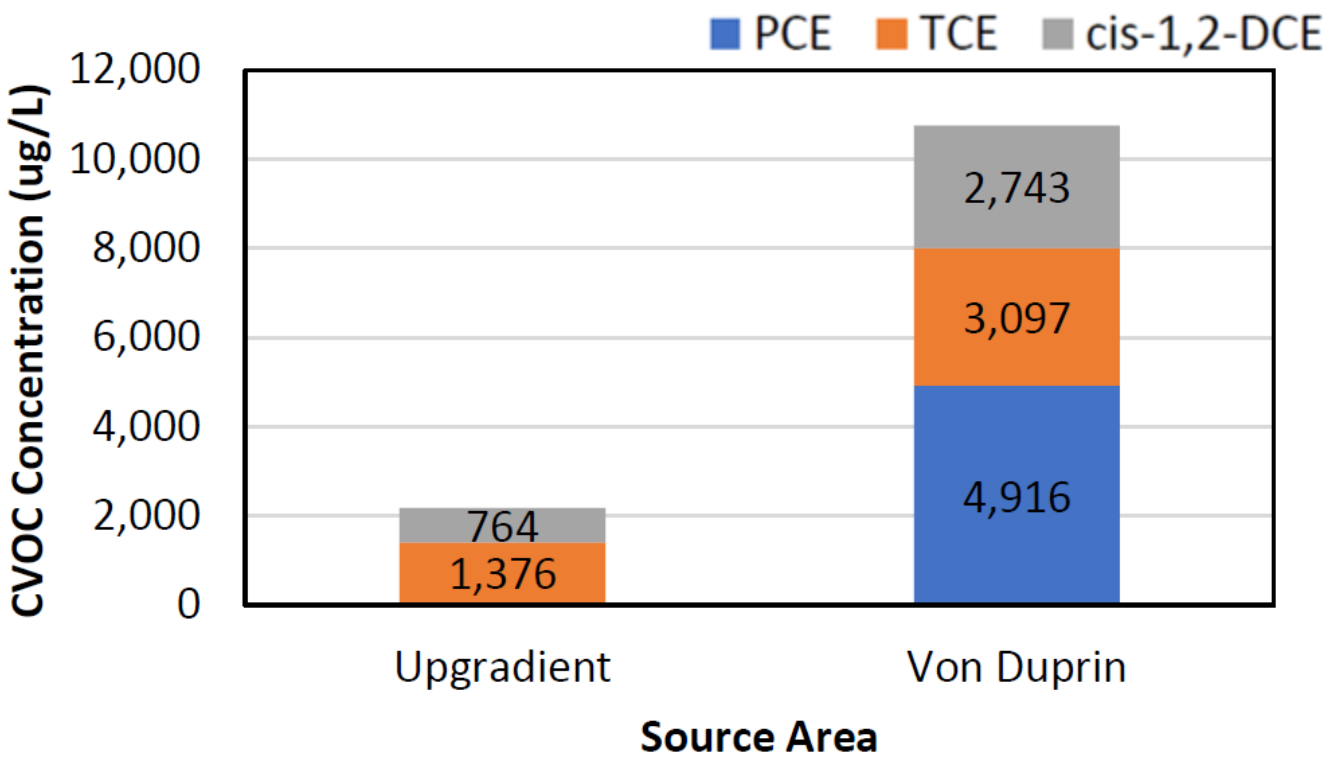
Group	Location	Screen Interval Midpoint Depth (ft)	PCE	TCE	*Cis*-1,2-DCE	Vinyl Chloride
Upgradient	TRMW-3	17.5	19	600	121	0.0
	TRMW-6	17.5	4	1,481	93	0.4
	TRSB-6/SB-6A	19.5	87	948	212	0.0
	TRSB-7-7A	19.5	42	1,350	62	0.0
	TRSB-22A	19.5	149	1,880	12	0.0
	TRSB-16	19.5	0	1,450	118	0.0
	TRMW-6D	27.5	0	1,120	545	3.3
	HPT-05	31.5	8	2,188	5,485	3.5
	TRMW-6DD	39.3	22	1,370	223	0.8
	Average		**37**	**1,376**	**764**	**0.9**
Downgradient	TRSB-25	19.5	870	2,700	144	0.0
	TRSB-24	19.5	696	2,820	122	0.0
	TRMW-9D	28.5	4,054	2,008	677	1.7
	VAP-21/SB-JTV-1	39.3	8,420	3,555	1,423	8.1
	B-332	40.4	10,119	3,625	1,777	13.3
	TRSB-32	43.0	1,111	4,395	6,835	14.4
	TRMW-9DD	44.6	9,141	2,579	8,223	12.8
	Average		**4,916**	**3,097**	**2,743**	**7.2**



Chemical Distinction



Chemical Distinction



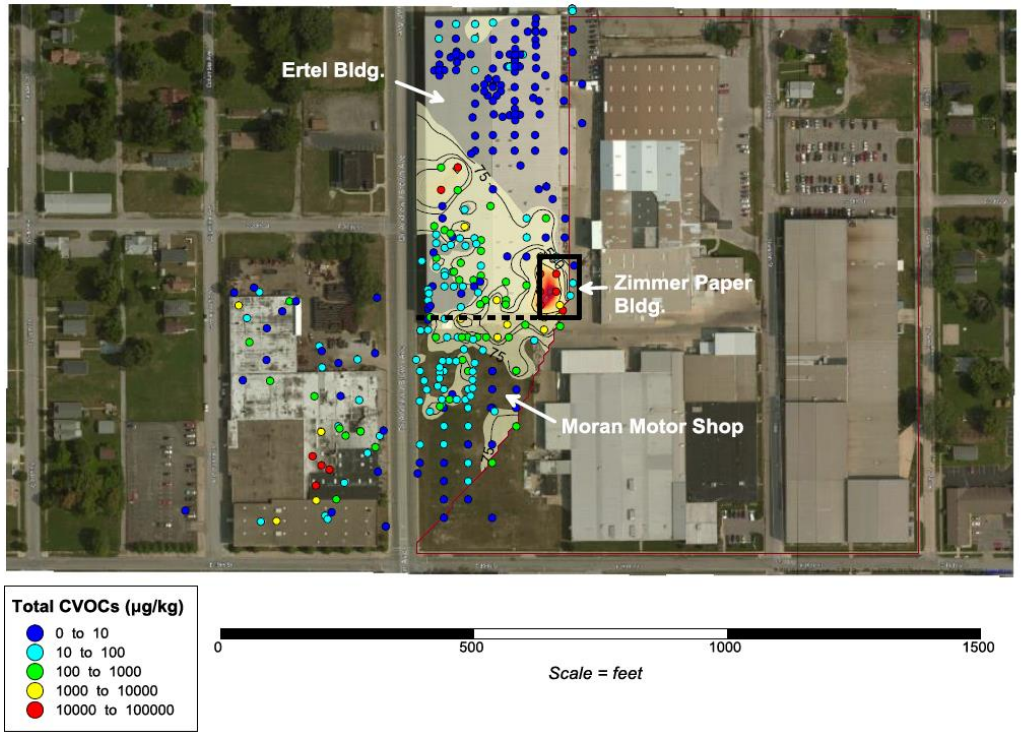
Opinion: COC Contamination at Von Duprin Parcel is Chemically Divisible from Upgradient Parcels

Geographic Distinction

Opinion: Groundwater COC contributions in the area upgradient in Von Duprin are divisible based on geographically distinct soil impacts

Without other release information, the amount of soil contamination at the location of each RP operations is a reasonable basis for dividing CVOC contribution to the underlying groundwater.

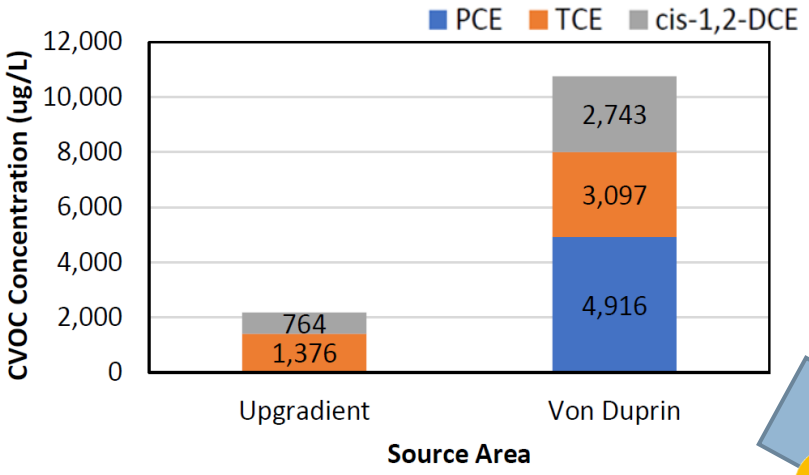
The spatial and extent and magnitude of CVOC soil impacts at each site of RP operations is reasonably expected to remain distinct and the groundwater impacts are expected to be a direct result of infiltration of CVOCs from the soil to the groundwater (the initial point of release from surface spills, leaking storage tanks, utility lines, etc.)



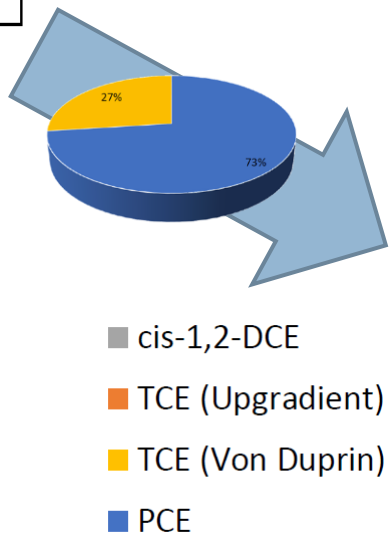
Summary Judgment Ruling Held Harm is Divisible

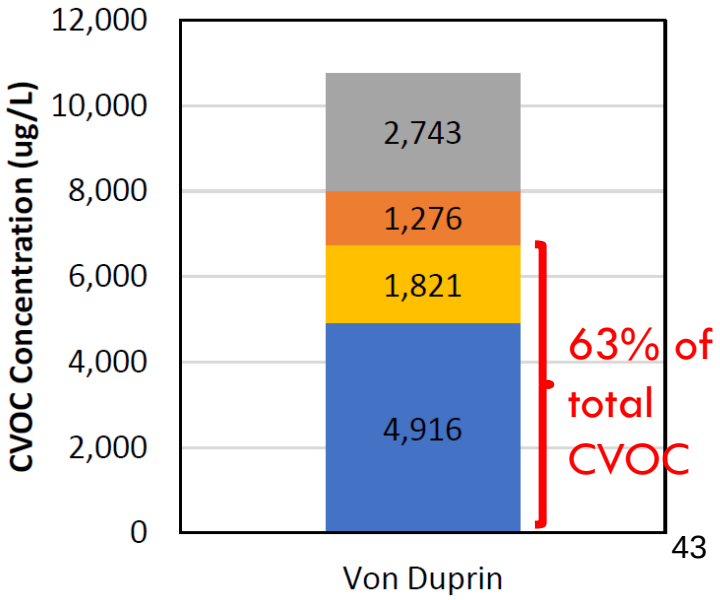
Moving on to Trial for Apportionment

Apportionment – Von Duprin v. Upgradient

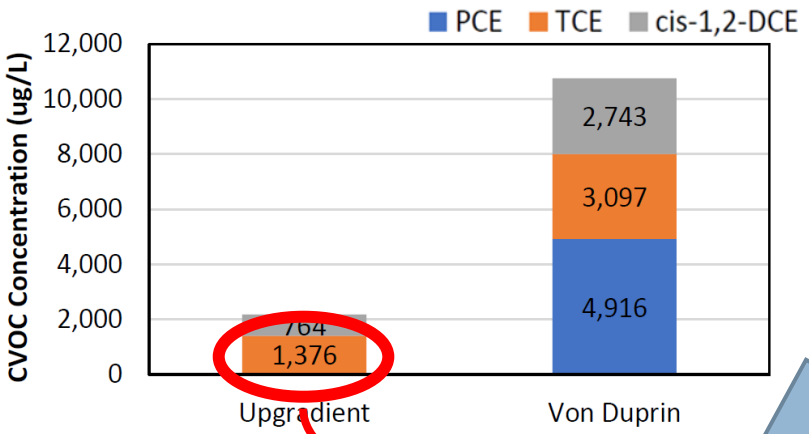


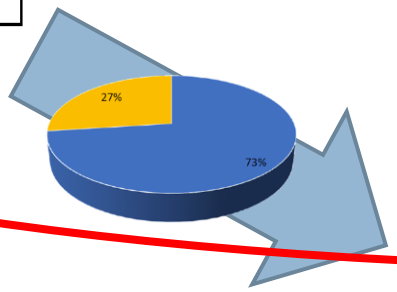
Proportional apportionment of TCE in groundwater to the Von Duprin site, based on the groundwater PCE concentration and the TCE-to-PCE ratio in the overlying shallow soil

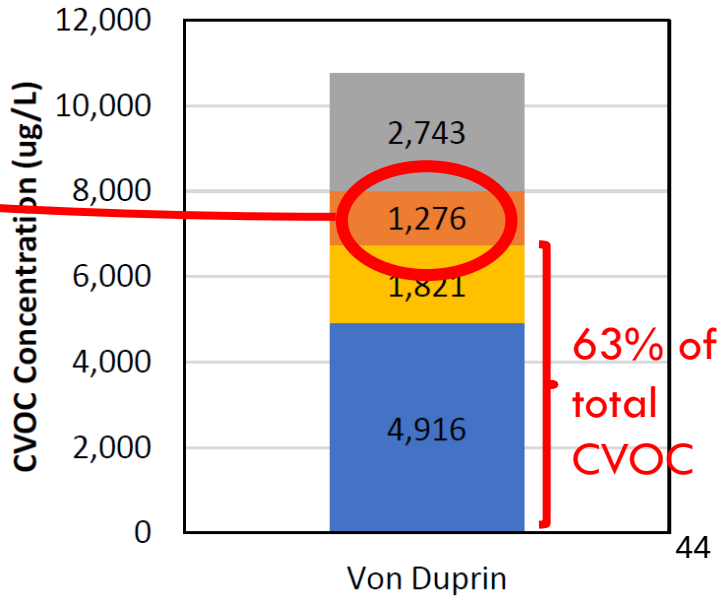




Apportionment – Von Duprin v. Upgradient



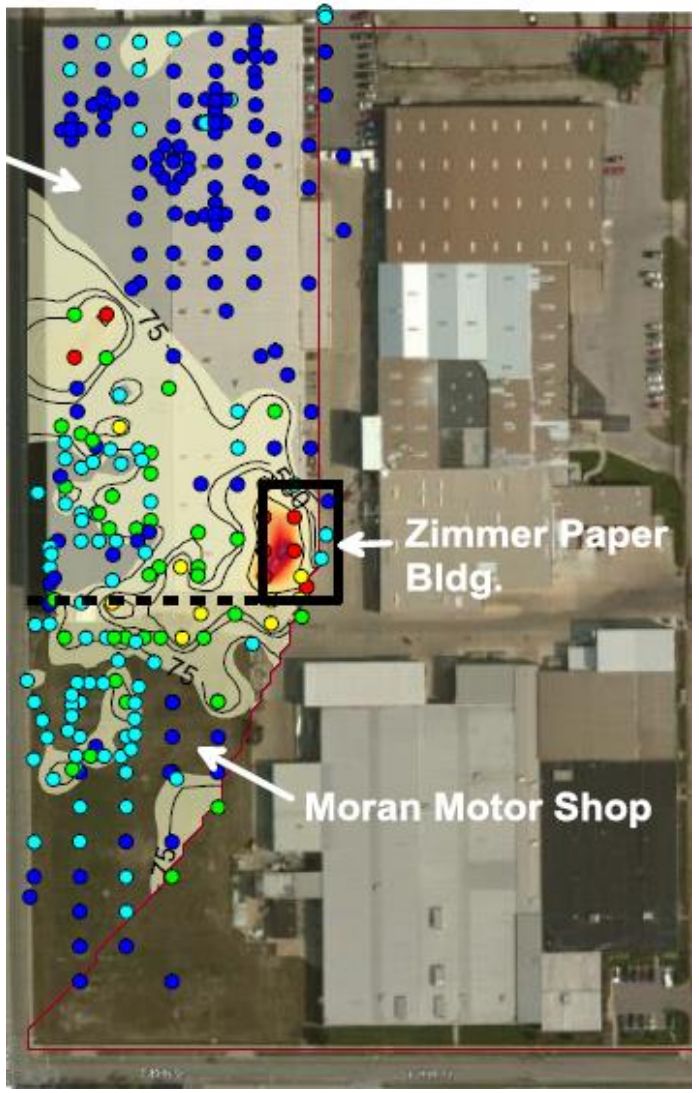




Note: When proportional apportionment of TCE in groundwater is applied, the remaining TCE attributable to upgradient sources match the actual TCE concentration upgradient of the Von Duprin parcel

Apportionment – Among Upgradient Parties

- Summed up the total CVOC soil contamination on each parcel

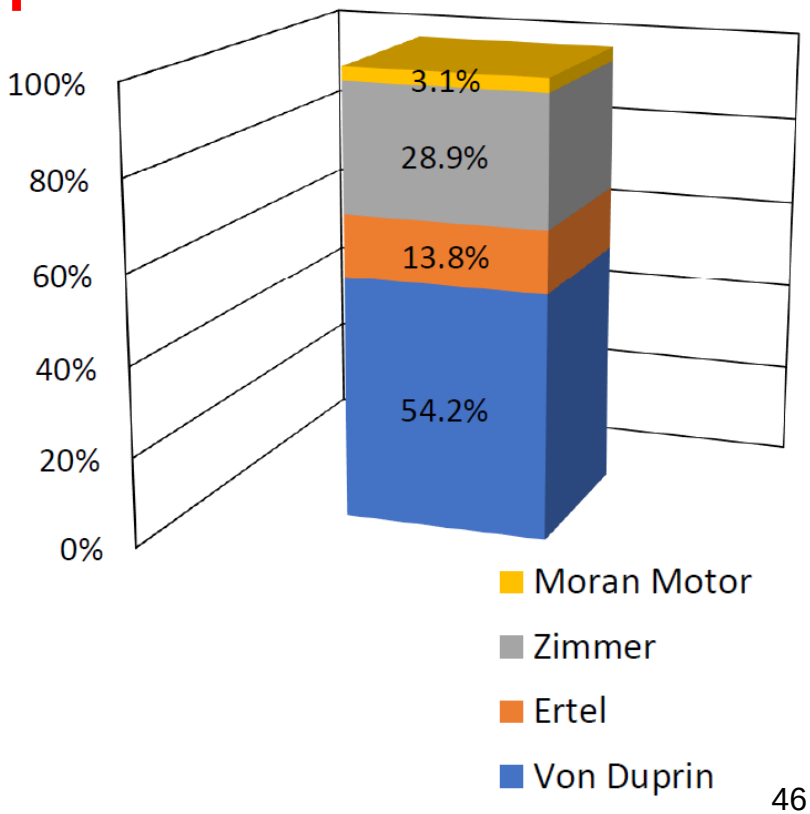


Apportionment Result

Apportionment based on parcel contribution – no opinion on associated liability for parties in the litigation

Table 2. Plume Allocation by Area.

Plume Section	Overall CVOC Mass Distribution	Source Areas	CVOC Apportionment by Source Area	Overall CVOC Apportionment
Upgradient	13%	Von Duprin	0.00%	0.00%
		Ertel (main portion)	28.58%	3.85%
		Ertel (N. plume)	1.47%	0.20%
		Zimmer Paper	63.08%	8.50%
		Zimmer Bldg	0.08%	0.01%
		Moran Motor	6.79%	0.91%
Downgradient	87%	Von Duprin	62.64%	54.20%
		Ertel (main portion)	10.68%	9.24%
		Ertel (N. plume)	0.55%	0.48%
		Zimmer Paper	23.57%	20.40%
		Zimmer Bldg	0.03%	0.03%
		Moran Motor	2.54%	2.20%



Court Ruling on Liability

- Technical Apportionment
  - Von Duprin parcel 54.2%
  - Zimmer parcel 28.9%
  - Ertel parcel 13.8%
  - Moran parcel 3.1%

- Judge's Ruling
  - Von Duprin parcel 50%
  - Zimmer parcel 20%
  - Ertel parcel 10%
  - Moran parcel 20% (Note Difference from Technical Apportionment of Harm

- Judge's Ruling on Liability
  - Von Duprin 50%:
    - 100% of its 50% parcel
  - Major Tool 30%:
    - 100% for Ertel and Zimmer parcel
  - Moran 20%:
    - 100% of its 20% parcel

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Practical Discussion Questions

Discussion Question #1

Is it best to present the minimum apportionment number as possible for your client?

- Best Case vs. Worse Case scenarios
- Using a Range vs. Absolute Figure for Share
- Know your audience!

Discussion Question #2

How do the differences in facts and circumstances for the parties involved in the case influence the divisibility strategy?

- Public vs. Private?
  - Municipality v. Fortune 500 Company
  - United States v. Smaller Private Company
  - David v. Goliath syndrome
- Deep pockets or empty pockets?
  - Judges may want to “split the baby.”
- Who eats the orphan?

Discussion Question #3

What happens if you fail in convincing the Court that there is a reasonable basis to divide the harm? What is your Plan B?

- Divisibility Defense is not an equitable argument and doesn't allow for consideration of non-objective factors such as care, conduct, knowledge, etc.

Discussion Question #4

How do Courts handle the technical complexity that divisibility cases typically include?

- Science Day(s)
- Special Masters
- Simplifying Complex Issues

Practice Tips from Case Rulings

- **Tip #1:** Asking for too much can result in the Court finding against you on all issues:
  - Do not put your client's share too low or your adversary's share too high.
    - See also United States v. Saporito, 684 F. Supp. 2d 1043 (N.D. Ill. 2010):
      - "Defendant suggests that because the rectifiers were not capable of producing waste on their own, he should be apportioned no liability for owning them. . . It is undisputed that the rectifiers were a necessary part of the plating process, so they must be responsible for *some* amount of the waste that the process produced. Aside from zero, *Defendant suggests no other possible proportion*."
  - Instead, it is better to craft a well-grounded, reasonable argument, identify why/where your adversary's approach fails to consider all of the facts/data, and how your approach does.

Practice Tips from Case Rulings

- **Tip #2:** Judges do not appreciate attempts to stack the deck:
  - Admit things that are negative or adverse to your position and account for them. See Centerdale case: Emhart v. New England Container, 130 F. Supp.3d 534 (2015):
    - Failure to address key facts and circumstances will kill the case even if the Judge thinks divisibility is theoretically applicable in a matter; and
    - Recognizing weaknesses may gain credibility with the Court.
  - Test your theories early with the Court in discovery conferences/hearings/mediations to avoid going down the wrong road:
    - The apportionment/divisibility argument may be viable in a case but it may be rejected on a factual/technical basis.
  - Frame the case for potential settlement.

Practice Tips from Case Rulings

- **Tip #3:** Deal with bad facts, make reasonable assumptions, and provide a range of options to the Court:
  - Consider more than one methodology of apportionment:
    - Explain the pros/cons of each methodology; and
    - Support the most "appropriate one" or "ones" to put your client in the best position to be successful.
  - Be forthcoming about lack of lack of data:
    - See Von Duprin v. Moran, et al., Civ. No. 16-01942, 2020 WL 1501876, at *16 (S.D. Ind. Mar. 30, 2020):
      - "Because he had no data from earlier time periods, Dr. Love's allocation analysis is limited to the time period covered by available data (primarily 2005-2017) and does not take into account the releases and migration of chlorinated solvents that occurred in the decades preceding the collection of the first data."

Other Practice Tips

- **Tip #4**: Experts should explore using opponent's method(s) or analysis as one of the options and revise it to fit your view of the facts/circumstances:
  - This serves to:
    - highlight your opponent's flaws; and
    - steer the court toward your assumptions; and
    - increase the options before the Court.

Other Practice Tips

- **Tip #5**: Try to keep it as simple as possible for the Court:
  - Complexity may result in:
    - The Court getting certain facts wrong; and
    - The Court overlooking or misinterpreting expert testimony.
  - Do not assume the Court understands the basics:
    - Courts do not see these technical issues often.
  - Courts lack the resources that are available to the parties and are often pressed for time.

Thank You

William S. Hatfield

whatfield@gibbonslaw.com

Adam H. Love

alove@rouxinc.com