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Memorandum

TO: Grand Haven Board of Light and Power

FROM: Arthur H. Siegal

RE: Liability Allocation

DATE: January 26, 2022

The BLP finds itself addressing coal ash impoundment closure issues which have been complicated by the fact that the Sims Site (part of Harbor Island) has a complicated history including the "construction" of the Island from various sources of debris and waste over time and the reported use of portions of Harbor Island for the disposal of Army Corps of Engineers' contaminated dredging spoils and the operation of some type of landfill by the City of Grand Haven. For purposes of this memo, we do not evaluate the former Army Corps' use as it appears that that disposal was primarily in an area away from the Sims Site to the northeast where we understand there are now soccer fields present. We have researched the location of the former City landfill without success. To date, relatively shallow excavations as part of construction or demolition operations at the Sims Site have discovered wastes in various locations. The BLP has been conducting groundwater monitoring at the Sims Site and has discovered PFAS compounds which would not be associated with coal ash but which would be consistent with treated tannery wastes and other industrial and residential wastes.

The costs of monitoring groundwater, treating groundwater that may be removed from the Sims Site as part of the closure of the coal ash impoundments, *in situ* controls and/or the

removal, management and disposal of wastes that may be encountered during excavations are all factors to take into account in this situation which would not be the case if Harbor Island and the Sims Site were simply land at the time the BLP began its operations and its management of coal ash there.

We have reviewed who is legally responsible for these costs, assuming that, as to coal ash related expenses that are clearly separate from the City waste, those are solely the BLP's responsibility. As is often the case, there is no clear roadmap to answer this question in this unusual context. There are three sources of legal guidance here - the BLP's Charter, and federal and State statutes and case law that deal with the allocation of liability in a "superfund" type setting.

I. The BLP Charter

The BLP "charter" is found in Chapter 16 of the City Charter. Chapter 16 provides that the "city's electric utility facilities and services shall constitute a department of the city government." Section 16.1. Section 16.6 provides:

> The board shall have full power and authority to fix all rates for electricity…. Such rates shall not be fixed any lower than will produce the revenue required to pay all operating, maintenance, depreciation, obsolescence and debt service expenses of the city's electric utility system, including the payments required by section 16.9 of this charter, together with a sufficient amount to provide for necessary plant expansions.

Section 16.7 prohibits appropriations of money by the City Council for the operating expenses of the city's electric utility. Section 16.8 provides that except as provided in Sections 16.9 to 16.12 of the Charter, the BLP funds must be used ***only*** to

> defray the cost of operating the city's electric plant or plants and distribution system … including necessary overhead, plant and system extensions, debt service, and other incidental and pertinent expenses of operating, maintaining, improving,

> extending, and changing the plant and system … including allowance for depreciation and obsolescence.

Section 16.9 referenced above provides for monthly payments by the BLP to the City of five percent of the BLP's gross retail sales that month Section 16.12. also noted above provides that the BLP revenues must be used for the following purposes in the following order:

> *First,* to the expense of administration and operation of the utility as well as the maintenance thereof as may be necessary to preserve it and its facilities in good repair and working order;
>
> *Second,* as required for the principal and interest on any indebtedness;
>
> *Third,* to the city treasurer for deposit in the general fund the 5% required to be paid pursuant to section 16.9;
>
> *Fourth,* the remainder is to be placed annually in the public utility reserve fund.

Importantly, to my knowledge there is no written license or lease agreement between the City and the BLP for the use of the Sims Site. As we construe the BLP Charter, the question turns on whether remedial expenses can be considered costs of operating the electrical system. It is our understanding that the BLP views the costs of investigating, monitoring and closing its impoundments as a "cost of doing business" and therefore a cost of operating its system. As to the remainder of the Sims Site, Harbor Island and the difference in cost resulting from past City practices, my understanding is that the City attorney may have addressed these issues in previous research or opinions and we did not want to duplicate that work.

II. Federal law

A. Liability

Under the federal Superfund law, CERCLA, the owner or operator of a contaminated facility is liable for remedial expenses. 42 U.S.C. §9607(a)(1). This is also true if the owner or

operator owned or operated the site at the time of disposal of hazardous substances, or arranged for disposal of such substances. 42 U.S.C. §9607(a)(2), (3).

There are other sources of potential liability (including federal rules relating to coal ash impoundment closure) but for purposes of this memo, we expect that this would be a court's primary focus as the liability source given the volume of case law in this area. Section 9607(a)(4) provides that any liable person shall be liable for:

> (A) all costs of removal or remedial action incurred by the United States Government or a State … not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; ….

Section 9613(f)(2) provides that:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement....

Much of the remainder of this memo discusses the difference between "allocation" and "apportionment" which are similar, sometimes identical, and often confused. *In Yankee Gas Services v. UGI Utilities, Inc*., 852 F. Supp. 2d 229 (D. Conn., 2012), the court addressed a suit between the current and former owners of a manufactured gas plant. The court noted that both parties had already been found to have CERCLA joint and several liability and the remaining dispute was about who should pay how much. In such cases, a court must allocate liability (or the costs) based on equitable principles.

The court distinguished allocation from apportionment. Apportionment was the issue in the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. United States*, 556 U.S. 599 (2009). Apportionment is deciding who should pay how much when the parties are <u>not</u> jointly and severally liable (when each is liable only for part). Allocation, on the other hand,

is an equitable doctrine, intended to determine who, among the jointly and severally liable parties, should pay how much. The court analogized: "To apportion is to request separate checks, with each party paying only for his own meal. To allocate is to take an un-itemized bill and ask everyone to pay what is fair." The problem, of course, is that, unlike restaurant diners, liable parties generally weren't thinking about the "check" when they were disposing of waste materials, particularly not until 1980 or so.

So, as to those areas where it is solely the City's obligation (*i.e.*, the soccer fields), or solely the BLP's obligation (*i.e.*, the closure of Impoundment 3), the apportioning to be done is fairly straightforward. Where there is overlapping obligations (much of the remainder of Sims Site), the question is, is apportionment even available.

B. Apportionment

Courts faced with apportionment arguments under Section 107 of CERCLA have looked to the Second Restatement of Torts to inform their analysis of whether a reasonable basis for division exists such that a given harm (and liability) can be said to be divisible (rather than joint and several). *E.g., United States v. Chem-Dyne Corp.*, 572 F Supp. 802, 810 (S.D. Ohio 1983), quoting Restatement Torts, 2d (1963), § 433A, 875. The Second Restatement provides:

> (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.[1]

[1] The Third Restatement takes the position that apportionment is proper where the legally culpable conduct of a party was a legal cause of less than the entire damages and those damages are calculable. Restatement (Third) of Torts: Apportionment of Liability Section 26.

The “reasonable basis” for defining contribution has generally been ignored by the courts in favor of the “distinct harms" test.

Establishing apportionment has historically been a difficult task; the nature of contamination at facilities has led very few courts to find that the harm is sufficiently divisible to allow apportionment of harm. The overwhelming majority of cases, therefore, have emphasized the difficulty of meeting the divisibility-of-harm burden and refused to hold that the harm is divisible. *E.g., United States v. Burlington Northern & Santa Fe Ry,* 479 F.3d 1113, 1136 (9th Cir. 2007), rev'd 556 U.S. 599 (2009) ("CERCLA is not a statute concerned with allocation of fault. Instead, CERCLA seeks to distribute economic burdens. Joint and several liability, even for PRPs with a minor connection to the contaminated facility, is the norm, designed to assure, as far as possible, that some entity with connection to the contamination picks up the tab. Apportionment is the exception, available only in those circumstances in which adequate records were kept and the harm is meaningfully divisible.").

In *Burlington Northern v. United States*, *supra*, the U.S. Supreme Court appeared to have lowered the bar to apportionment. The district court in that case apportioned liability by looking to the percentage of surface area owned by the defendants, the percentage of time each defendant owned the facility, and the volume, identity, and location of the contamination that could be attributed to the portion of the site owned by each defendant. *Id.* at 1882. This last point indicates that wastes were not commingled (as is the case here) and so allocation among the parties was easier than is often the case.

The Court built in a 50% safety factor on top of each party's share to account for possible "calculation errors." *Id*. The Ninth Circuit rejected the district court's apportionment, concluding that the court's rough approximations lacked the necessary supporting data and precision to serve

as a truly reasonable basis for attributing each defendant's share of the harm at the site. *Id.* The U.S. Supreme Court reversed and held that the district court's apportionment was sufficiently reasonable. *Id.* at 1882–83. Despite predictions of many cases being "apportioned" after *Burlington Northern*, that hasn't happened.

In 1998, the Sixth Circuit contrasted approaches to divisibility and held that causation was the key factor and not the fairness or equitable based approaches (discussed below in the analysis of allocation/contribution) in determining divisibility. The court rejected an argument that the removal action in question did not address the corner of a dump used by a Township (and the Township didn't use any portion of the dump that was remediated) because local residents placed waste throughout the site, and the Township did not show that its maintenance work was limited to that corner. The court rejected and remanded for further proceedings the Township's argument for a split on a volumetric basis because there were questions regarding the operations of the dump calling those volumetric arguments into question. *U.S. v. Township of Brighton*, 153 F.3d 307, 317 (6th Cir. 1998).

C. Contribution- Allocation

CERCLA allows potentially responsible parties who pay cleanup costs to seek contribution for those costs from other potentially responsible parties. 42 U.S.C. § 9613(f). These contribution claims are commonly referred to as Section 113(f) claims. Contribution claims are to be brought after a person has resolved its liability to the State or the United States. 42 U.S.C. §9613(f)(3)(B). *See also, Guam v. United States,* 593 U.S. _____ (2021).

Courts allocating costs under Section 113(f) typically do so by analyzing six equitable factors proposed by then-Senator Al Gore. *Envtl. Transp. Sys., Inc. v. ENSCO, Inc*., 969 F.2d 503, 508 (7th Cir. 1992). These "Gore" factors are:

1. The ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished.

2. The amount of the hazardous waste involved.

3. The degree of toxicity of the hazardous waste involved.

4. The degree of involvement by the parties in the generation, transportation, treatment, storage or disposal of the hazardous waste.

5. The degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste.

6. 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. United States v. RW Meyer, Inc, 932 F2d 568 (6th Cir. 1991).

In 2000, the US District Court evaluated a contribution action in *Kalamazoo River Study Group v. Rockwell Intern. Corp.*, 107 F. Supp.2d 817 (W.D. MI. 2000), relating to contamination of the Kalamazoo River by PCBs from a number of sources on and near the river. A group of responsible parties formed an group to pay toward remedial work and that group (known as "KRSG") brought a contribution action under CERCLA section 113(f) against a number of allegedly liable non-members. The court stated:

> Because harm to the environment is a product of volume and toxicity, the parties' assert that the most relevant Gore factors in this allocation phase are volume of discharge, toxicity, and cooperation with governmental authorities.
>
> Courts are not required to make meticulous findings as to the precise causative contribution each of the parties have made to a hazardous site, as in many cases such a finding would be literally impossible. *R.W. Meyer*, 932 F.2d at 573–74. Similarly, the plaintiff in a contribution action may seek reimbursement even though it cannot make a meticulous factual showing as to the causal contribution of each defendant. *Id*. at 573–74. Although the CERCLA plaintiff is not required to prove its case with scientific certainty, it still has the burden of proving its case by a preponderance of the evidence. *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 526 (2d Cir.1996).

> In an appropriate set of circumstances, a tortfeasor's fair share of the response costs may be zero. *Acushnet Co. v. Mohasco Corp*., 191 F.3d 69, 78 (1st Cir.1999)….

Id. at 822. The court held that any equitable allocation must consider the relative volume of PCBs contributed by the various parties. The court noted that no plaintiff was seeking contribution for remediation of PCBs at their own facilities but evaluated the contamination of those sites as an "important key to understanding the quantity of PCBs in the wastes generated at these locations and discharged into the river. Using this information, the court reached a rough conclusion of how much PCBs each KRSG member discharged into the river. The court also evaluated the differing levels of various PCB compounds accumulating in river fish tending to cause more cancer to support an argument that Rockwell's PCB releases were more toxic than plaintiffs' release by a factor of 3 to 4. The court discussed conflicting evidence and did not distinguish between the various aroclors of PCBs on toxicity. A later decision in the same case held that a district court's allocation of response costs will not be disturbed unless an appellate court finds that the court abused its discretion or the factual findings are clearly erroneous. *Kalamazoo River Study Gp. v. Rockwell Intern. Corp*., 274 F.3d 1042, 1047 (6th Cir. 2001).

"The apportionment of CERCLA liability under § 113(f) among various responsible parties is an equitable undertaking within the broad discretion of the district court." *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc*., 240 F.3d 534, 549 (6th Cir. 2001). In the 2001 Kalamazoo case, the court of appeals held that the district court's decision not to allocate any costs for an investigation/feasibility study to Rockwell was based on its finding that the KRSG was responsible for more than 99.9% of the PCBs in the River. Again, the court relied on the testimony of experts regarding the volumes and toxicities of PCBs discharged to the river in affirming the decision below not to impose any liability on Rockwell.

In yet another Kalamazoo River case, *Georgia-Pacific Consumer Products LP v. NCR Corp.*, 358 F. Supp.3d 613 (W.D. MI. 2018), the court reviewed much of the history and concluded that there was no convincing basis to divide the harm in the river system and rejected various geographic-based arguments to divide liability based on where each party was located along the river. The court looked at all the various factors proposed by the parties to make an allocation. The court held that each of the parties was liable, all of the parties used landfills that had inadequate protections, rejected an argument based on different types of PCBs discharged (because there had been no convincing showing that those other PCBs had affected cleanup in a way that justified a shifting of the equitable allocation) and announced an allocation "based on an equitable weighing of the many factors in play."

Courts are not limited to using the Gore factors and are permitted to consider any equitable factor they deem appropriate. *Id.* There is a second list of factors sometimes referred to as the Torres Factors from Judge Torres' opinion in *United States v. Davis*, 31 F. Supp. 2d 45, 63 (D.R.I. 1998). They include:

(1) extent to which the costs are related to waste for which each party is responsible;

(2) each party's level of culpability;

(3) degree to which the party benefitted from the disposal; and

(4) ability to pay.

In *Valbruna Slater Steel Corp. v. Joslyn Manufacturing. Co.*, No. 1:10-CV-044 JD, 2018 WL 446645 (N.D. Ind. Jan. 16, 2018), the court took the unusual step of allocating CERCLA liability to a party who played no part in contaminating the site at issue. In *Valbruna*, the court found the Gore factors' usefulness was limited because "[t]hey focus primarily on apportioning

liability between two or more polluting parties," a circumstance not facing the court. *Valbruna*, 2018 WL 446645, at 4.

Defendants Joslyn Manufacturing Company, Joslyn Corporation and Joslyn Manufacturing Company, LLC (collectively, "Joslyn") owned a contaminated site near Fort Wayne, Ind., from 1929 until 1981. The property was later acquired by Plaintiffs Valbruna Slater Steel Corporation and Fort Wayne Steel Corporation (collectively, "Valbruna") through a bankruptcy auction. To recover the costs it spent to remediate the property, Valbruna sued Joslyn under Section 107(a) of CERCLA. The court held that Joslyn was strictly liable to Valbruna for more than $2 million in remediation costs. *Id.* In response, Joslyn filed a counterclaim, seeking an equitable contribution from Valbruna.

Had the court strictly applied the Gore factors, Valbruna would have escaped liability, leaving Joslyn responsible for the full amount. Joslyn owned, operated and contaminated the site for more than 50 years, while Valbruna did not contribute to the contamination at all. Joslyn refused to accept liability for the contamination or participate in the cleanup efforts. Counting against Valbruna, however, was the fact that it "was well aware that the Site suffered from serious environmental issues prior to purchasing it." *Id.* at 4.

Rather than strictly applying the Gore factors, the court based its decision on other equitable considerations and allocated 75% of the costs to Joslyn and 25% to Valbruna. Joslyn received the lion's share because it was the sole polluter and because of its "blatant avoidance of liability and refusal to assist with some cleanup despite knowing it was responsible for contaminating the Site." *Id.* at 7. Even though Valbruna was not responsible for any of the contamination, the court still found that it was equitable to allocate it a portion of the costs

because it voluntarily assumed some of the risk when it knowingly purchased a contaminated property at a reduced price.

Under CERCLA's cost-recovery-and-contribution scheme, it is still an open question as to whether cost recovery (under section 107) is available to parties that bring a contribution claim. It is clear that a cost recovery action may be brought both by persons who voluntarily incur response costs and by truly voluntary parties—that is, 'innocent,' non-liable parties who voluntarily incur response costs. *United States v. Atlantic Research Corp*, 551 U.S. 128, 135, 139 (2007). But in deciding that issue, the U.S. Supreme Court left open the question of whether there might be circumstances where a liable person has claims for both cost recovery and contribution. *Id*. at 139 n6. Courts appear to be trending toward denying cost recovery in circumstances where contribution is available, but this area of the law is still developing. *See, e.g., Niagara Mohawk Power Corp. v. Consol. Rail*, 596 F.3d 112, 127–128 (2d Cir. 2010); *Kotrous v. Goss-Jewett Co*., 523 F.3d 924, 933 (9th Cir. 2008); *Centerior Service Co v. Acme Scrap Iron & Metal Corp*, 153 F.3d 344, 356 (6th Cir. 1998) overruled on other, related grounds; *ITT Indus, Inc v. BorgWarner, Inc.*, 506 F.3d 452 (6th Cir. 2007); *Appleton Papers, Inc v. George A Whiting Paper Co*., No. 08-C-16, 2009 WL 3931036, at 3 (E.D. Wis, Nov. 18, 2009). *But see Ford Motor Co v. Mich. Consol. Gas Co.*, No 08-CV-13503, 2009 WL 3190418, at 8-9 (ED Mich., Sept 29, 2009).

III. State law

A. Liability

It is important to note, at the outset, that Michigan courts often look to the federal courts and their interpretation of CERCLA and follow that in interpreting Part 201. *City of Detroit v. Simon*, 247 F.3d 619, 630 (6th Cir. 2001), *Pitsch v. ESE Mich., Inc.*, 233 Mich. App. 578 (1999)

(concluding that MCL 299.612(2), now MCL 324.20129(3), permits a private right of action under Part 201 without a state action first being brought – thereby rejecting that a PRP may only recover response costs from other PRPs in a contribution action).

Under Michigan law, putting aside certain issues that do not apply here, a party is liable for contamination if it is the owner or operator of the contaminated facility that is responsible for an activity causing a release or threat of release to the environment. MCL §324.20126(1)(a).[2] Without parsing the definition, it is fairly clear that the BLP is an operator and the City is the owner of the site in question. That does not necessarily give rise to liability under Michigan law. The main question is whether the BLP and the City are each responsible for an activity causing a release to the environment. The BLP appears responsible for activities causing a release as coal ash constituents have been found in groundwater (and in soils at least under the former coal pile) associated with the regulated impoundments. The City appears responsible as it reportedly operated a landfill at the Sims Site and either encouraged, allowed or permitted the disposal of waste on the Island. EGLE has taken the position that the BLP is also legally obligated to bring to closure its regulated impoundments and its former coal pile under Part 115 of the Michigan environmental code, MCL §324.11501 *et seq.*

Under MCL §324.20126a, a person may bring a direct action for costs of response activity reasonably incurred by that person. "Response activity" broadly means

> "evaluation, interim response activity, remedial action, demolition, providing an alternative water supply, or the taking of other actions necessary to protect the public health, safety, or welfare, or the environment or the natural resources. Response activity also includes health assessments or health effect studies carried out under the supervision, or with the approval of, the department of community health and enforcement actions related to any response activity."

[2] Also, if either party arranged for disposal of a hazardous substance at a facility. MCL §324.20126(1)(d).

MCL §324.20101(vv).

B. Apportionment of Liability in Cost Recovery Claims

Under Part 201, liability is joint and several for any person who is liable. This means that both the City and the BLP are both liable 100% unless there is some apportionment. MCL §324.20129(1) provides that:

> If 2 or more persons acting independently are liable under section 20126 ***and there is a reasonable basis for division of harm according to the contribution of each person***, each person is subject to liability under this part only for the portion of the total harm attributable to that person. However, a person seeking to limit his or her liability on the grounds that the entire harm is capable of division has the burden of proof as to the divisibility of the harm and as to the apportionment of liability.

As you can see, this section does not define what is a reasonable basis to divide harm to limit one's liability. As with the federal law, one may find guidance in the law on contribution.

Under MCL §324.20129(3), it appears that a person may seek contribution from any liable person either during a lawsuit or without one. That section of the law lays out the following factors to consider in determining contribution:

(a) Each person's relative degree of responsibility in causing the release or threat of release.

(b) The principles of equity pertaining to contribution.

(c) The degree of involvement of and care exercised by the person with regard to the hazardous substance.

(d) The degree of cooperation by the person with federal, state, or local officials to prevent, minimize, respond to, or remedy the release or threat of release.

(e) Whether equity requires that the liability of some of the persons should constitute a single share.

Under MCL §324.20129(4) if, during a contribution lawsuit, the court concludes that part or all of a person's share of liability is uncollectible, then the court may reallocate any uncollectible amount among the other liable persons according to the factors listed in subsection (3). As with the federal law, it is important to understand that apportionment or allocation of liability and contribution are not the same.

If Michigan courts adopt the *Burlington Northern* test and apply it to Part 201's essentially identical apportionment-and-allocation scheme, then it may be somewhat easier for liable persons to establish apportionment under Part 201. Michigan courts may not adopt the nominally more lenient *Burlington Northern* test, or a party may not meet its burden— under either test—of showing that the harm is capable of apportionment. In those instances, to avoid being liable for the entire amount of a cleanup, a jointly and severally liable party will need to argue that the damages should be allocated among all of the liable parties under Part 201's contribution provisions in MCL § 324.20129. *See Forest City Enterprises, Inc v. Nationwide Ins. Co*, 228 Mich. App. 57, 66 (1998) ("Once it is determined that these parties are jointly and severally liable, the critical issue becomes one of contribution.").

C. Contribution

As noted above, in addition to cost recovery actions, Part 201 also provides for contribution actions to apportion harm and allocate damages among liable parties. Once a cost recovery action against a liable person has been initiated, that person may seek to show that it should not be jointly and severally liable because the harm is apportionable or it may "seek contribution from any other person who is liable under section 20126." MCL §324.20129(1), (3).

Under the similar CERCLA framework, a person can bring a contribution action only after the person has been sued or otherwise settled with the State or federal government. *Cooper*

Indus, Inc. v. Aviall Servs, Inc, 543 U.S. 157 (2004). The similarity of the language in CERCLA's contribution provision, §113(f)(1) of CERCLA, and the contribution language in MCL 324.20129(3) suggests that a similar rule applies under Part 201, and at least one Michigan court has so held in an unpublished decision. *Hicks Family Ltd P'ship v. Nat'l Bank of Howell*, (Mich. Ct. App. Oct. 3, 2006) 2006 WL 2818514.

> "There is no material difference in the two saving clauses, and the United States Supreme Court's construction of § 113(f)(1) is consistent with the basic principle that unambiguous statutory language should be enforced as written.... Accordingly, we conclude that § 20129(3) does not permit a party who is not a defendant in an action under Part 201 to bring an action for contribution." Id. (citations omitted).

As with federal law, a contribution claim allows a person already exposed to liability in a cost recovery action to allocate its share of liability associated with response activity costs incurred at a facility among the other liable parties. In performing that allocation, a court must look to the five factors set forth in Part 201. MCL §324.20129(3). Courts are also likely to look to the "Gore factors" in this context.

For example, in *Forest City Inc. v. Leemon, supra,*, Forest City appealed a trial court decision attributing 95.5% of $1.4 Million in damages to Forest City due it its negligence. The case related to property owned by Forest City that for 25 years was used as a dry cleaners and gas station. Contamination relating to both uses was found, Forest City cleaned up the site and sought recovery from its former tenant, Leemon Oil based on a single known spill incident that Leemon claimed it had immediately cleaned up.

The court of appeals rejected Forest City's arguments including that the harm of groundwater impact by petroleum and by dry cleaning solvents was indivisible. The trial court treated Forest City's claim as a claim for contribution and under such a claim could not shift all liability to Leemon. The court of appeals concluded that once the parties are determined to be

jointly and severally liable, the issue is one of contribution. The trial court did not divide the harm but applied the equitable factors in then MCL §299.612 (now MCL §324.20129(3)).

The court of appeals noted that the trial court found that BTEX (petroleum contamination) accounted for 11% of the total costs, then applying those factors, capped Leemon's contribution to that amount and noted that Leemon had nothing to do with drycleaning solvents, the area of contamination with those solvents was much larger than the area with BTEX contamination alone and, unlike the BTEX compounds, there was no dispute regarding the source of the dry cleaning solvents. The court also took into account the short time Leemon was a tenant during the gas station's 25 year history

CONCLUSION

Given the voluminous case law on the topics of Section 107 cost recovery lawsuits and apportionment and Section 113 contribution litigation and allocation and their state counterparts, it is certainly possible that more research might put a finer point on this but ultimately, we conclude that, assuming the BLP negotiates a proper agreement with EGLE or EPA resolving its CERCLA or Part 201 liability – it could have a claim against the City for contribution under federal law, assuming that there is nothing in the City's municipal law preventing such a claim. Assuming that the BLP does not negotiate such an agreement, it likely has no claim for contribution against the City under federal law. It appears that, even without a lawsuit or settlement, the BLP may have a claim for direct recovery from the City under State (but not necessarily federal) law. This is important, as the burdens of proof and statutes of limitations for these two different liability schemes are different in many cases.

As to how responsibility will be divide, how should responsibility for the costs be divided between the City and the BLP, allocation and apportionment are both intensely factually driven

determinations. Here, it is clear that the closure of the former coal pile and the regulated Impoundments are the responsibility of the BLP. It is similarly clear that issues outside the footprint of the Sims Site are not the responsibility of the BLP and are most likely to be the responsibility of the City as owner (among others).

As to areas outside or below the Impoundments and even as to areas within the Legacy Impoundment where there is ash mixed with waste, it would be difficult to seek apportionment under federal principles. Under State law, it appears that a direct action against other liable parties would be possible if the BLP incurred remedial expenses. Further, if the BLP were to enter into a Consent Agreement or other settlement agreement resolving its liability under Part 201 or CERCLA, it would certainly be able to bring a contribution action against other liable parties. If that occurs, then the courts would most likely look to the long list of equitable factors including:

1. The ability to distinguish the party's contribution to a discharge, release or disposal of a hazardous waste;
2. The amount of the hazardous waste involved;
3. The degree of toxicity of the hazardous waste involved.
4. The degree of involvement and care by the parties in the generation, transportation, treatment, storage or disposal of the hazardous waste.
5. The degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste.
6. The extent to which the costs related to waste for which each party is responsible;
7. Each party's level of culpability;
8. The degree to which the party benefitted from the disposal;
9. Each party's ability to pay;
10. Each person's relative responsibility causing the release or threat of release;

11. The degree of cooperation by the person with federal, state, or local officials to prevent, minimize, respond to, or remedy the release or threat of release or harm.

A court looking at this situation would evaluate: the history of the Sims Site, the time each party operated or utilized the site; the amount of waste disposed of by each party or allowed by each party; the degree of toxicity of such wastes; the care taken by each party; the cost to address each type of waste; the benefit experienced by each party, and so on.

In this regard, there is quite a lot of information regarding the BLP's activities in compliance with the laws and rules and the BLP continues to gather information regarding the toxicity of the materials at the Sims Site. Developing information regarding volumetric measurements or history of time on the risk will be challenging. This is not uncommon in this context. It often occurs that parties have to develop factual information after the fact to try and argue for allocation. Developing information on past disposal practices by the City will be difficult. Developing cost differential factors for the treatment of PFAS compounds vs coal ash compounds may be possible and should be considered by a Court in allocating responsibility.

In short, applying the factors with this limited information is less than certain in predicting how a court might allocate responsibility between the BLP and the City. More factual development work would be needed and it is possible that a court may split the responsibility based on its own sense of equity and, as in the 2018 Kalamazoo River case and the *Valbruna v Joslyn* case, split the responsibility after considering the factors, discussing them and then applying its own sense of equity without necessarily providing a mathematical basis for how it reached its conclusion.