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Editor's Corner

We are proud to introduce the inaugural issue of Squire Sanders' *Multimedia: Environmental Bulletin,* a publication of our Environmental, Health & Safety Practice Group. The goal of *Multimedia: Environmental Bulletin* is to provide analysis of emerging and wide-ranging environmental issues. Each edition will highlight topics relevant to key industry sectors and policy debates around the world. In this edition, we discuss EPA's Clean Air Act Reactivation Policy and steps business owners can take to assure they can rebut a presumption of a permanent shutdown. In addition, we discuss issues solar plant developers face in the Sun Belt and questions that remain regarding Superfund after the Supreme Court's ruling in *Burlington Northern v. United States.* We look forward to many more editions and hope you find this a valuable and informative publication.

Regards,

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EPA's Clean Air Act Reactivation Policy: Steps to Avoid Its Application in This Economic Climate

By Jessica E. DeMonte

In today's unprecedented economic climate, businesses are facing difficult decisions on whether to idle, shut down, sell or continue to maintain facilities in anticipation of a rebound. All of these decisions can have significant and costly repercussions in the long term for a major source of air emissions when it comes to Clean Air Act (CAA) permitting. The United States Environmental Protection Agency's (EPA) Reactivation Policy can subject restarts of existing equipment or facilities to lengthy and costly New Source Review (NSR) permitting,

which may not only delay restarts but add millions to the bottom line. As a result, businesses need to evaluate the implications of the Reactivation Policy at both the time of idling or shutdown and at the time of any purchase or restart.

I. CAA NSR Permitting Program

Under the CAA, new major stationary sources[1] of air emissions or major modifications[2] to existing major stationary sources are required to obtain a permit before commencing construction. This permitting process is known generally as NSR. Sources in areas that are not in attainment with national ambient air quality standards must obtain a nonattainment (NAA) permit whereas sources in attainment areas must obtain a Prevention of Significant Deterioration (PSD) permit. The NSR permitting process is time consuming – taking more than a year in many cases – because it requires extensive air quality modeling, impact analysis and pollution control identification. Indeed, each new source or major modification seeking a PSD permit is required to employ best available control technology (BACT). BACT is the maximum degree of pollution reduction achievable for the proposed source based on a case-by-case analysis of environmental and economic factors. The applicant and the agency can differ over what constitutes BACT for a particular source, which can add millions of dollars to a proposed project. Sources that require a NAA permit are subject to the lowest achievable emission rate (LAER) instead of BACT. LAER is even more stringent and does not consider economic factors in determining the appropriate level of control. NSR also requires extensive public participation, opening up opportunities for public opposition or challenge to a permit's issuance. Therefore, most businesses want to avoid NSR permitting (if possible) due to the tremendous cost, agency discretion and delay involved.

[1] A major stationary source subject to NSR is one of 28 source types that emits or has the potential to emit 100 tons per year or more of any individual pollutant subject to regulation under the CAA, or any other source type that emits or has the potential to emit such pollutants in amounts equal to or greater than 250 tons per year.

[2] A major modification is generally any physical change or change in the method of operation of a major stationary source that would result in a contemporaneous significant net emissions increase in the emissions of any regulated pollutant.

II. EPA's Reactivation Policy

EPA's longstanding "Reactivation Policy"[3] presumes that a major stationary source that has been shut down for two years or more is intended to be permanently shut down.[4] If permanently shut down, such a source will be considered a "new" source upon reactivation and subject to NSR permitting before operation is permissible. This presumption is, however, rebuttable and owners or operators of a shut down or idled source can demonstrate that a shutdown was temporary. The burden of proof in such a case is on the owner or operator.

Under EPA's Reactivation Policy, the intention of the owner or operator at the time of and during the shutdown is crucial to rebutting the presumption of permanence. The factors that EPA routinely considers in evaluating "intent" include:

- Length of time and concrete plans for restart
- Contemporaneous statements by the owner or operator of intent
- The cause of the shutdown
- Change in ownership
- Operating permits, emission inventory and the state's treatment of the shutdown
- Maintenance and inspections during shutdown
- Time and capital necessary to restart vs. replacement cost

No single factor is conclusive in such an assessment. Instead, EPA generally considers the totality of all such factors in evaluating the intent of the shutdown.

[3] The Reactivation Policy, as it is known, has been cobbled together through a series of EPA memoranda, letters and determinations issued since the late 1970s. *See* EPA Memorandum from E. Reich (Sept. 6, 1978) re: *PSD Requirements*; EPA Memorandum from J. Seitz (May 27, 1987) re: *Reactivation of Noranda Lakeshore Mines' RLA Plant and PSD Review*; EPA Letter from D. Howekamp (Nov. 6, 1987) re: *Supplemental PSD Applicability Determination Cyprus Case Grande Corporation Copper Mining and Processing Facilities*; USEPA Memorandum from J. Rasnic (Nov. 19, 1991) re: *Applicability of PSD to Watertown Power Plant, South Dakota, Shutdown 9 Years*.

[4] "A shutdown lasting for two years or more, or resulting in removal of the source from the emissions inventory of the State should be presumed permanent. The owner or operator proposing to reopen the source would have the burden of showing that the shutdown was not permanent, and of overcoming any presumption that it was." *See* EPA Memorandum from E. Reich (Sept. 6, 1978) re: *PSD Requirements.*

The importance of demonstrating that a shutdown is not permanent is critical in the NSR context. If a shutdown is only temporary, the source will not be considered a new source upon restart. An existing source would be subject to NSR only if the restart constituted a "major modification," and only certain "modifications" are subject to NSR. Even if the restart constituted a major modification, an existing source could potentially escape NSR by demonstrating that the restart would not result in a significant net emission increase due to contemporaneous reductions.

III. Protective Measures

Given EPA's Reactivation Policy, a facility considering a shutdown should take steps to make sure it will be able to rebut a presumption of the permanence of the shutdown if it expects to restart at some future point. Additionally, any person planning to restart or purchase a source that has been idled for more than two years will need to conduct an analysis of the Reactivation Policy factors to evaluate whether it can rebut the presumption. These factors are fact driven and the analysis will depend on the particular circumstances of a given case. EPA guidance provides examples of protective measures that businesses can undertake at the time of idling a source or during the shutdown period that will provide objective support for demonstrating that a shutdown is not intended to be permanent. These include:

Length of Time and Concrete Plans for Restart – The Reactivation Policy provides that a presumption of permanence attaches after a source has been shut down for two years.[5] However, this presumption may be rebutted by evidence of an intent to restart. As a result, an idled source should create and maintain records to support a demonstration of its intentions. For example, a documented timeline for the source's restart would be evidence of intent even if the shutdown is expected to last longer than two years. Maintaining employees related to the idled source in a manner that would allow them to be quickly called back to operations may be additional evidence of a concrete intent to restart.

Contemporaneous Statements by Owner or Operator of Intent – The presumption that a shutdown is intended to be permanent is difficult to overcome unless the entity can show that there is a "continuous intent to reopen" by the facility.[6] Published or written statements not only at the time of the shutdown but also during the shutdown period are crucial to the analysis. If a restart is a possibility even though there is no clear timeframe, statements of "permanence" should be avoided. Statements should indicate that the facility or equipment has been temporarily idled as opposed to shutdown. Where a facility has been shut down and there is an intent by the current owner to sell the facility, statements should indicate an intent by the current owner to preserve the source for restart by a new owner along with other objective measures to preserve the source during that period.

Cause of the Shutdown – EPA will also consider information as to what necessitated the shutdown in the analysis of whether it is permanent. Accidents or incidents beyond the control of the owner are often afforded considerable latitude in terms of time to complete repair or reactivation. When the shutdown is due to market conditions, however, other objective indications of intent become more important to the analysis.[7]

Change in Ownership – EPA looks at changes in ownership critically; a shutdown by a current owner in anticipation of sale or transfer may be considered by EPA as an indication that the shutdown was intended to be permanent. However, EPA guidance provides that "[a] change in ownership does not, standing alone, render a stationary source subject to [NSR]."[8] Instead, EPA will look at the intent on both sides of the transaction. Accordingly,

[5] Time of shutdown is not as crucial if there is a clear intent to restart. For example, EPA has previously determined that a power plant that was shut down for more than nine years was not permanently shutdown given other factors that showed an intent to restart. *See* USEPA Memorandum from J. Rasnic (Nov. 19, 1991) re: *Applicability of PSD to Watertown Power Plant, South Dakota, Shutdown 9 Years*.

[6] *In the Matter of Monroe Electric Generating Plant, Entergy Louisiana, Inc. Proposed Operating Permit, Petition No. 6-99-2, Order Partially Granting and Partially Denying Petition for Objection to Permit*.

[7] Compare Note 6, *supra, with* EPA Letter from D. Howekamp (Nov. 6, 1987) re: *Supplemental PSD Applicability Determination Cyprus Case Grande Corporation Copper Mining and Processing Facilities* (finding newly purchased facility that had been shut down for 10 years due to market conditions and was no longer on the state emission inventory to be a new source for NSR review).

[8] EPA Letter from D. Howekamp (Nov. 6, 1987) re: Supplemental PSD Applicability Determination Cyprus Case Grande Corporation Copper Mining and Processing Facilities.

a current owner that wants to sell should demonstrate a continuing intent to ensure that a new owner can restart as an existing source. This might include maintaining the permits and the equipment during a shutdown and avoiding dismantling equipment or taking other actions that could be seen as inhibiting a new owner from restarting.[9] A new owner should have plans in place for restarting or express its intent to restart following acquisition. A new owner may also want to conduct a Reactivation Policy analysis with regard to an idled facility or unit before its purchase to ensure that the prior owner has taken steps to preserve the argument that the shutdown was not permanent.

Operating Permits, Emission Inventory and the State's Treatment of the Shutdown – Other factors that can support a demonstration include maintaining the source's operating permits and continuing to maintain the source on the state's emissions inventory. Allowing the operating permit to lapse or removing a source from an operating permit would be indicative of an intent to permanently shutdown. Maintaining or seeking any necessary renewal of operating permits during the shutdown period is also critical. Continuing permit reporting obligations would also be evidence of an intent to maintain the permit. Likewise, maintaining the facility or source on the state's emission inventory listing and paying required emissions inventory fees (if any) are other objective measures that help to demonstrate that the shutdown is not intended to be permanent. The state's reaction to the shutdown is also a factor that will be considered. It is strong evidence that the shutdown is not intended to be permanent if the state does not take action to either remove an idled source from its inventory or otherwise eliminate its operating permit in response to a shutdown.

Maintenance and Inspections During Shutdown – Obviously, a factor indicating a clear intent to restart would be maintaining the source in a condition that would allow it to be restarted. Following a protocol during the shutdown that is designed to preserve the source would be objective evidence of an intent to operate in the future. Conducting maintenance during the idle period would also support such a demonstration. Other factors would include conducting routine inspections of the source, and having the state or local entities continue to inspect and provide security for the idled source to prevent thefts or destruction. Facilities should avoid dismantling equipment, removing or transferring parts from the idled source to an operating one and eliminating power supplies or taking other actions that could be interpreted to indicate that a restart is not expected to occur. Always maintain records on any maintenance and inspections conducted during the shutdown period as well as the costs of such efforts so that such evidence can be presented to support a demonstration if necessary.

Time and Capital Necessary to Restart v. Replacement Cost – EPA will also consider the time and resources necessary to restart a source. A restart that requires significant lead time and capital may be considered indicative of prolonged neglect, which would be more consistent with an intent to permanently shut down the source. Less time and capital needed to restart the unit might show intent that the shutdown was not expected to be permanent. If significant parts or components need to be replaced or acquired, or if the unit needs to be reconfigured for power or operational needs, EPA might consider this the start of a new source.

Generally, EPA will also look at the cost to restart the source in comparison to the cost of a replacement as a gauge on whether the costs to restart are significant in this context. EPA promulgated the final NSR reform rules in December 2003 that excluded routine replacements from permitting review if the routine annual component replacement costs were less than 20 percent of the fixed capital cost of a new source. If the cost for the restart is less than this 20-percent threshold, restart costs would not likely be considered significant. In making this demonstration, facilities should include only those costs necessary to restart the source in question and should not include costs associated with other maintenance requirements (i.e. building repairs).

[9] Intuitively, there is a strong incentive for current owners to take objective steps to avoid a "permanence" determination with respect to an idled facility. Assets that do not have to proceed through NSR permitting are likely to be more valuable to a subsequent owner than those that must go through that onerous, expensive and time-consuming process. Indeed, NSR permitting is likely to provide a strong disincentive to a prospective new owner.

IV. Conclusion

There are clear steps that businesses can undertake to preserve the ability to restart sources idled during this economic downturn without incurring the costs and delay of NSR. The key is to begin when the source is idled, and continue throughout the shutdown period. These measures should also be taken even if you expect to sell the source in order to preserve the ability for a potential future purchaser to restart as market conditions improve. Buyers should also strongly consider these factors as they contemplate acquisition of an idled facility or source as NSR can delay and add to the project's costs.

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For Solar Plant Developers, It's Not All Fun in the Sun

By Peter W. Culp and Chad C. Baker

With 29 states adopting renewable energy portfolio standards, [10] the United States targeting federal standards,[11] and regulatory agencies reducing barriers to solar development[12] and streamlining others,[13] America's desire for solar energy couldn't be any clearer. Awash in sun, it is not surprising that the Southwest is experiencing a veritable land rush to secure public and private lands for utility scale solar development. In the sunny Southwest, solar plant proposals seem to outnumber Starbucks.

Despite the potential of solar energy, the technology is still subject to skepticism. Solar energy is generally perceived to be land and water intensive, with the latter especially relevant in the arid Southwest. That is, there's not much water in the places with lots of sun. As more land and water resources are allocated for solar facilities, concerns over environmental, ecological and cultural impacts will mount, as will the all-too-familiar "not in my backyard" battles.

The federal and state permits necessary to locate a new solar facility ensure that there will be substantial regulatory scrutiny of the potential environmental, natural resource and cultural impacts of any proposed facility. Although many states provide for hearings to resolve contested plant siting issues, leaving significant issues to chance at such hearings is risky. Permitting strategy and stakeholder discussions must begin during a project's infancy and proceed throughout the permit application process.

Solar Production Methods

Solar power is primarily produced in one of two ways, photovoltaic (PV) or concentrated solar power (CSP). Photovoltaic cells convert sunlight directly into electricity when photons excite electrons within the PV cells into a higher energy state. Solar thermal or CSP indirectly uses the sunlight to create energy. CSP uses mirrors to concentrate sunlight to heat a fluid, which then is used to boil water to create steam that turns a conventional turbine. As such, CSP operates much like conventional steam plants except sunlight is the fuel source.

Environmental Concerns

Solar energy offers some substantial potential environmental and political benefits, as utility scale generating facilities reduce greenhouse gas emissions and potentially America's dependence on foreign fossil fuels. These benefits, however, are not without costs, including potential impacts to land and water.

Both forms of solar generation, CSP and PV, often require extensive areas of land to produce utility scale electricity.

[10] Arizona, for instance, requires that by 2025, 15 percent of a utility's energy portfolio must come from renewable energy sources. Nevada law calls for 25 percent by 2025, and California has set a much more ambitious goal of 33 percent by 2020.

[11] The US House of Representatives recently passed – albeit narrowly (219 to 212) – the American Clean Energy and Security Act. Among other things, the act calls for the reduction of greenhouse gas emissions and greater energy efficiency, and establishes minimum renewable energy portfolio standards for regulated utilities.

[12] The American Recovery and Reinvestment Act of 2009 earmarked more than US$400 billion to expand solar and renewable energy development. Some states, such as Arizona, have also included a tariff mechanism in their Renewable Energy Standard regulations, aimed at offsetting the cost of providing energy from renewable resources. *See* Ariz. Admin. Code § R14-2-1808.

[13] Prompted in part by the Department of the Interior's prioritization of renewable energy development, the Bureau of Land Management (BLM) has initiated a programmatic environmental impact statement aimed at promoting solar siting on the more than 600,000 acres of federal land set aside for such development. BLM has also signed a memorandum of understanding with California to promote simultaneous permitting and approval of jointly regulated projects.

Applications for CSP plants and data from existing PV plants suggest that utility scale CSP plants average roughly 10 acres per MW, while utility scale PV arrays require approximately 12 acres per MW. With some applications projecting more than 800 MW of output, utility scale solar plants have the potential to cover several square miles of land with mirrors or PVs. The large land required by the plant is compounded by the transmission corridors potentially required to carry electricity from the remote areas where it is generated to the population centers where it is used.

The large tracts of land necessary to site a solar facility potentially could impact ecologically or culturally sensitive areas and spark a debate over whether public or private lands should be devoted to energy generation. The Southwest, in particular, is rich with Native American history and homeland. Uncovering archeological and funerary artifacts generally triggers a suspension in development that, along with the resulting archeological excavations, can lead to delays and dramatically increase project costs. Development on ecologically sensitive lands, such as those with endangered or threatened species or critical habitat, can similarly compound project costs. Given the large amounts of land required by solar facilities, locating enough ecologically appropriate land elsewhere to provide sufficient mitigation can be difficult.

Although the Southwest enjoys vast expanses of open land, serious disagreement exists about the appropriate use and associated values of these lands. For example, an environmental group may support solar development on private agricultural lands, in part because it preserves public lands. In direct conflict, agricultural advocates generally dislike the idea of retiring agricultural land (and perhaps the associated irrigation water rights) for energy production, instead supporting the use of non-irrigable, public range land or scrubland. Understanding the competing views of the various stakeholders, anticipating potential disputes and carefully considering impacts to sensitive lands will help to avoid costly disruptions during the development and permit application process.

Energy production also requires water, and solar generation is no exception. Indeed, historically solar power production has been a very water-intensive operation. Consider water use statistics from the US Department of Energy that indicate that current CSP plants use 760-920 gallons per MW hour, considerably more water than a coal fired plant's requirement of 110-300 gallons. Although some technologies require much less water, in the arid Southwest locating a sufficient supply of water can create both practical and political challenges.

In addition to physical limitations, statutory and common law governing groundwater and surface water rights as well as local water conservation policies can compound water scarcity. Under these water laws and policies, many regional water supplies are fully allocated – if not over-allocated – leaving little to no water available for new water demand associated with energy development. Identification of "new" water sources or reallocation of existing water resources may thus be necessary for development of a solar facility.

Reallocation of water resources, however, is often highly controversial and can be extremely expensive; just ask Las Vegas, which faces extreme opposition (more than 830 parties have protested) to its proposal to import groundwater from rural communities through a pipeline estimated to cost US$2 billion. Reallocating water, however, can produce project supporters. For example, the Sierra Club recently supported the location of a solar plant in Arizona, in part because the proposed water use was greatly below that associated with the prior agricultural use of the project's land. Needless to say, stakeholder views on reallocation will differ, and conflict will almost certainly arise. Identification and development of "new" water sources, such as from deeper portions of the aquifer or degraded quality water, may help alleviate reallocation issues, but not without increasing water production, treatment and possibly wastewater disposal costs. Understanding the physical and legal availability of water is thus essential to containing project costs and ensuring project completion.

Environmental Regulatory Review

Federal and state laws require regulatory review of, among other things, the potential environmental and cultural impacts associated with any solar utility facility. The

National Environmental Policy Act (NEPA) requires the United States to evaluate and provide a detailed description on the environmental impact statement (EIS) of a proposed action subject to federal oversight or control. The EIS must propose and evaluate alternative actions and measures to mitigate potential impact. Energy projects under federal jurisdiction must also comply with the Endangered Species Act and perhaps the National Historic Preservation Act to promote the preservation and mitigation of America's natural and cultural resources. Solar facilities planned for development on Native American tribal lands must also undergo NEPA review, unless a tribe has entered into a Tribal Energy Resource Agreement (TERA) with the Secretary of the Interior. TERAs, which promote greater Native American self-governance, require tribe specific, public environmental review procedures.

In addition to federal environmental review, most states have an independent environmental review as part of their utility location permitting process. For example, in California, the Siting, Transmission, and Environmental Protection Division of the California Energy Commission is charged with performing an environmental review under the California Environmental Quality Act (CEQA). Much like NEPA, CEQA requires an analysis of alternatives and their impacts to biological and water resources, air quality, public health, land use and other issues, as well as an analysis of the mitigation measures designed to minimize any significant adverse affects.[14] The Public Utilities Commission of Nevada similarly requires regulated utilities to comply with the Utility Environmental Protection Act.[15] Likewise, Arizona requires a Certificate of Environmental Compatibility (CEC) issued by the Arizona Corporation Commission (ACC).

Although each state's review process differs, Arizona's system provides a good example of the types of issues facing a permit applicant. Arizona law requires that any utility generating 100 MW or more must obtain a CEC. An applicant begins the process by paying a US$10,000 filing fee for a proposed plant site. Before submitting an application for a CEC, the utility must file a plan with the ACC 90 days before filing an application for a CEC. This plan provides general information such as: (1) the size and location of the plant; (2) the estimated date of operation; (3) the average and maximum output of the plant (measured in MW); (4) the estimated capacity factor; (5) the fuel source; and (6) a power flow and stability analysis report showing the proposed plant's effect on the current Arizona electric transmission system.

The utility then submits the application for the CEC to the Arizona Power Plant and Transmission Line Siting Committee, charged with holding public hearings and considering a host of factors to make a recommendation to the ACC. The factors considered by the Siting Committee include:

- Existing development plans at or in the vicinity of the site.
- Fish, wildlife and plant life.
- Noise emission levels and interference with communication signals.
- Proposed availability of the site to the public for recreation purposes.
- Existing scenic areas, historic sites and structures or archaeological sites.
- The area's total environment.
- The technical practicability of achieving the proposed objective and the previous experience with equipment and methods available for achieving the proposed objective.
- Costs including potential increase in the cost of electric energy for consumers.
- Additional factors applicable under state or federal law governing the site.
- Special consideration to the protection of areas unique because of biological wealth or their status as habitats for rare or endangered species.
- Compliance with all air and water pollution control standards and regulations.

[14] Cal. Pub. Res. § 25000 et seq. (2009).
[15] Nev. Rev. Stat. § 704.820 et seq. (2009).

- Compliance with local zoning under all applicable jurisdictions.

The Siting Committee's recommendation to the ACC may include "reasonable conditions" to be included on the permit. Examples of some reasonable conditions that are likely to be imposed on solar power plants include:

- Compliance with federal environmental law and Arizona special species statutes, such as the Arizona Native Plant Law.
- Compliance with instructions from the Arizona State Land Department regarding the treatment of the State Register of Historic Places.
- Work stoppage upon the uncovering of human remains or funerary objects pending consultation with the director of the Arizona State Museum.
- Providing notice of the project to neighboring land and homeowners.
- Providing copies of the CEC to appropriate local and state governments and regulatory agencies.

Conclusion

As state and federal requirements for renewable energy portfolios continue to mount, demand for renewable energy and the need for renewable energy facilities will grow. In the Southwest, solar energy will play a large role in meeting these demands. Moreover, utilities face the prospect of seeking project approval from multiple jurisdictions, as states reduce their preference for in-state renewable energy production and multijurisdictional projects come to the fore. Understanding and providing acceptable mitigation for a project's potential environmental, natural resource and cultural impacts will be an important factor in determining whether a proposed project is successful. The failure to consider the environmental, natural resource and cultural issues associated with solar development early and throughout the project can eliminate the opportunity for economical and appropriate evaluation and resolution of these issues. If the project proponent is fighting about impacts at a siting hearing, it's usually too late.

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Despite Supreme Court Superfund Rulings, Questions and Woes Remain for Cleanup Targets

By Christopher D. Thomas and Allen A. Kacenjar, Jr.

Earlier this year the United States Supreme Court issued yet another major ruling interpreting the Superfund statute, holding in *Burlington Northern v. United States*[16] that private parties can avoid joint and several liability if they are able to demonstrate a "reasonable basis" for apportionment. The Court's ruling – while purporting to reaffirm existing law – clarified that lower courts and the United States had been too stingy in allowing relief in matters brought under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). CERCLA targets have long complained about the unfairness of facing joint and several liability under the Superfund program, particularly at sites where the relevant disposal activity occurred decades ago and at the time was legal and customary.

In addition to reviving moribund apportionment arguments for all parties, *Burlington Northern* also narrowed the circumstances under which sellers of virgin product to haphazard reformulators can be held liable as "arrangers for disposal" of hazardous substances spilled by the purchaser.[17] The ruling thus included one holding that may signal good news for defendants in a broad array of cases

[16] *Burlington Northern and Santa Fe Railway Companies, et al, v. United States, et al,* 129 S. Ct. 1870, 173 L.Ed.2d 812 (May 4, 2009).
[17] As discussed further below, the Court in *Burlington Northern* held that sellers of chemical products cannot be held liable as "arrangers for disposal" of their commercial products absent specific intent that disposal occur.

and a second that may be great news in a small universe of them.

The ruling extended a pro-defense trend at the high court, following two recent Supreme Court cases interpreting the CERCLA cost recovery and contribution regimes. In the first case, *Cooper Industries, Inc. v. Aviall Services, Inc.,*[18] the Court clarified that parties may seek contribution under § 113(f)(1) of CERCLA only "during or following" a "civil action" against them under § 107. This ruling was a boon for third-party defendants and a setback for working parties. The ruling left many liable volunteers without a CERCLA claim at all, since prevailing law at the time was that working but liable parties could seek relief only under § 113, as § 107 cost recovery claims were available only to innocent parties.[19]

That setback was reversed, and then some, by the Court's subsequent ruling in *United States v. Atlantic Research Corp.*[20] In that case, the Court held that parties who voluntarily incur Superfund cleanup costs have a direct claim for cost recovery under CERCLA § 107. The *Atlantic Research* ruling ensured that targets of EPA and state level enforcement have a vehicle for spreading the costs of cleanup under circumstances where, under *Aviall*, they lack a right of contribution. And it did so with an arguably preferable cause of action that carries a longer statute of limitations and potentially leaves defendants with the ultimate burden of proving equitable allocation based upon equitable factors selected by the Court.

Read together with *Aviall* and *Atlantic Research*, does *Burlington Northern* justify this great rejoicing throughout the land? Or does expecting the ruling to inject lasting fairness into the Superfund enforcement scheme – like a fourth marriage – represent the triumph of hope over experience? History suggests that maintaining a certain amount of pessimism is appropriate. At a minimum, the legal issues left unresolved by the Court's piecemeal approach and Congress' failure to clarify the statute ensures that there will be additional wailing and gnashing of teeth in the future. Most notably, the opinions leave crucial issues unanswered, including whether the cost recovery rights of liable but working parties can effectively prevent EPA and states from offering meaningful finality in the form of contribution protection.

As detailed on the following pages, even after three recent Supreme Court rulings, CERCLA's mysteries still abound.

***Burlington Northern:* The Factual Background**

The *Burlington Northern* case arose out of an agricultural distribution business operated by Brown & Bryant, Inc. (B&B) at its 3.8-acre Arvin, California site in 1960. In 1975 B&B expanded its operation to an adjacent parcel it leased from Burlington Northern Santa Fe and Union Pacific. For 28 years, B&B stored and distributed hazardous substances on the site including two herbicides sold by Shell. During this time, transfers, leaks and spills frequently occurred. Shell reportedly knew that B&B's operations resulted in releases, and over time it demanded increasingly stringent handling practices.

State and federal agencies began investigating the B&B site in 1983. After conducting some remedial work, B&B became insolvent in 1989. The site was added to the federal National Priorities List, and the United States and California spent more than US$8 million to clean it up. Three lawsuits involving the railroads, Shell, B&B, the California Department of Toxic Substances Control and EPA culminated in a six-week trial in 1999. The District Court held that both the railroads and Shell were liable under CERCLA, the railroads as partial owners of the facility and Shell as an "arranger for" disposal of chemicals spilled by B&B. The court, however, declined to impose joint and several liability on the defendants, finding that the harm was "divisible." Instead, the Court apportioned 9 percent of the liability to the railroads based upon: (1) the percentage of the facility leased to B&B; (2) the duration of B&B's activity on the leased property; (3) the conclusion that only two of the three chemicals requiring remediation were spilled on the leased parcel; and (4) a "margin of error" adjustment.

[18] 543 U.S. 157 (2004).
[19] See, e.g., *ASARCO, Inc. v. Union Pacific Railroad Company*, 2006 U.S. Dist. LEXIS 2626 (D. Ariz. Jan. 24, 2006) (following *Aviall* but prior to *Atlantic Research*, dismissing volunteer's CERCLA claims under both § 107 and § 113). Prior to the ruling in Atlantic Research, the courts of appeals – largely at the urging of EPA – had uniformly held that working but liable parties had no right to seek direct cost recovery under § 107. *See, e.g., Pinal Creek Group v. Newmont Mining Corp.*, 118 F. 3d 1298 (9th Cir. 1997).
[20] 551 U.S. 128 (2007).

On appeal, the US Court of Appeals for the Ninth Circuit, as it often does, took a different path. With regard to Shell, the court concluded that Shell was not a "traditional" arranger because it did not contract with B&B to directly dispose of hazardous substance-containing waste. Instead, it found that Shell fell within a "broader category of arranger liability" that applies where "disposal of hazardous wastes [wa]s a ***foreseeable byproduct*** of … the transaction" and held Shell liable as an arranger without regard to its subjective intent to dispose. The Ninth Circuit then reversed with regard to the extent of liability, holding that Shell and the railroads were jointly and severally liable because the record contained no reasonable basis for the apportionment – particularly since the burden of proof was on the defendants.

The Supreme Court accepted *certiorari* to address two issues: (1) whether Shell's sale of herbicides to B&B was an "arrange[ment] for disposal" of hazardous substances, since Shell knew leaks would occur, and (2) whether the railroads should be held jointly and severally liable for remediation of the whole site, despite having leased only part of the property to B&B for part of its operating tenure.

The Supreme Court Rules on Arranger Liability

Resolution of the "arranger" issue ultimately – and surprisingly, given CERCLA's strict liability structure – turned on the issue of intent. "Arranged for" is not defined in either CERCLA or the nation's companion hazardous waste law, the Resource Conservation and Recovery Act. Rejecting the government's argument, the Court ruled that "knowledge alone is insufficient to prove that an entity 'planned for' the disposal" of hazardous wastes "particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product." As a result, the Court held that Shell was not liable because the evidence did "not support an inference that Shell intended such spills to occur."

This portion of the ruling will directly and substantially impact useful product cases – that is, cases where the defendants argue that they merely sold a useful chemical product, rather than arranged for disposal of it. It may also significantly impact cases involving sale of recyclable materials with more modest value. What remains to be seen is whether the Court's underlying principles can be extended to other situations.

The Supreme Court Offers Hope to the Hopeless

The Court's ruling on apportionment of CERCLA liability will have broader, but more amorphous impacts. CERCLA's legislative history and policy led courts to import strict liability from the Clean Water Act and impose joint and several liability on the assumption that it was difficult or impossible to segregate most environmental harms. While divisibility was theoretically possible, the factual bar was set very high. Over the years, while acknowledging the possibility of apportioning harm, the courts and United States have gradually assumed that joint and several liability is almost always appropriate. The Supreme Court's ruling helps level this playing field by reaffirming three rules for determining whether to impose joint and several liability:

1. That "apportionment is proper when there is a ***reasonable basis*** for determining the contribution of each cause to a single harm;"
2. That "CERCLA defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists;" and
3. That "equitable considerations play no role in the apportionment analysis" and "apportionment is proper only when the evidence supports… divisibility…."

Applying those rules, the Supreme Court held that it was "reasonable" for the District Court "to use the **size** of the leased parcel and the **duration** of the lease as the starting point for its analysis." The Court also supported a statement by the Ninth Circuit that "divisibility may be established by '**volumetric**, **chronological**, or other types of evidence,' including appropriate **geographic** considerations." Although the Supreme Court questioned the District Court's conclusion that two chemicals released on the railroad parcel "accounted for only two-thirds of the contamination," the Court deemed that error harmless due to the District Court's "margin of error adjustment." The Supreme Court affirmed the District Court's apportionment.

While purporting to do nothing other than apply the historic standards, the Court's opinion has the potential to materially impact the litigation and settlement of CERCLA cases nationwide. District courts now know they need only a "reasonable basis" for apportioning liability. They also have examples of "safe" apportionment factors, including time onsite, contaminant remedy drivers and area impacted. The Courts of Appeal, meanwhile, may be more reluctant to second-guess district courts on apportionment. With relaxed standards for apportionment will come greater ability to avoid orphan shares. Whether all of this will produce more equitable settlements and judgments with less protracted litigation or simply more litigation remains to be seen.

Putting It All Together: What We Know and What We Don't

Nearly 30 years after passage of the statute, and following a flurry of Supreme Court rulings, one would assume that CERCLA law is now relatively settled. One would be wrong.

Aviall affirms that one can only seek contribution under § 113(f)(1) "during or following" a "civil action" under § 106 or § 107. But it does not answer whether a § 106 order, pending judicial enforcement, is a "civil action." The United States argued in *Atlantic Research* that it is not. Why does this matter? Because *Aviall* also fails to answer whether a contribution claim under § 113 is sufficiently tied to § 107 so that it constitutes the requisite civil action. If not, then concurrent third-party practice will be dead, and those initially targeted by the government or working-party plaintiffs will face tremendous delay in their ability to add third-party defendants to the fray.

Similarly, *Atlantic Research* tells us that liable but voluntarily working parties can seek cost recovery under § 107. But it does not explain whether parties who have been compelled to incur costs – and therefore may seek contribution under § 113(f)(3)(B) – can opt for a potentially more potent cost recovery claim instead. Nor does *Atlantic Research* adequately explain what happens if such § 107 claims are asserted against parties previously granted contribution protection. Early settlors obviously claim that it is unfair to allow working parties who have existing contribution claims (because they have been compelled by the government to incur costs) to proceed under § 107 instead, and thereby disrupt the government's settlements with other parties. Parties seeking to invoke § 107 argue that nothing in the statute expressly limits those compelled to incur costs to by pursuing litigation under § 113. That is the logic that some courts, including the Northern District of Alabama in the *Anniston* litigation, have accepted.[21]

Moreover, the Supreme Court's decisions raise the prospect that recipients of unilateral cleanup orders by EPA under § 106 – which generally are not subject to pre-enforcement review and carry the threat of treble damages – will face the worst of all possible worlds.[22] Conceivably courts could decide that such an order does not trigger contribution rights under *Aviall*, but is sufficiently compulsive to deprive the recipient of any right to proceed under § 107. This interpretation would leave an enforcement target without a single reasonable option. That result would be especially troubling at sites where the federal government is a liable party, since the United States interprets the unitary executive doctrine as prohibiting the issuance of a § 106 order by EPA against a liable sister agency such as the Department of Defense. Finally, although *Burlington Northern* has unquestionably revived the apportionment defense, it is far from clear that EPA and the Department of Justice will respond more favorably to such arguments. Indeed, they have every reason to interpret *Burlington Northern* narrowly to maintain their enforcement leverage. Unless and until courts develop a body of authority broadly implementing

[21] *Solutia, Inc. and Pharmacia Corporation v. McWane, Inc., et al,* CV-03-PWG-1345-E (N.D. Ala. June 10, 2008).
[22] 42 U.S.C. § 9606 authorizes the United States, but not states, to issue unilateral cleanup orders against liable parties. Those who decline to comply with them "without sufficient cause" face daily penalties and treble damages.

Burlington Northern, the government's settlement demands are unlikely to reflect any increased legal risk to the United States, thus further delaying or denying resolution of federal CERCLA claims.

There is no doubt that *Burlington Northern* is cause for some rejoicing, but more wailing and gnashing of teeth still lie ahead.

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