Chapter 6
WHAT'S UP WITH WATER, AIR, AND POST-*AVIALL* JURISPRUDENCE?

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Synopsis

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§ 6.01 Introduction

This article presents a summary of significant recent developments involving environmental law—principally clean water, clean air, and site cleanup and cost recovery—that may affect natural resource industries. Most of these recent developments derive from U.S. Supreme Court and leading appellate court decisions over the last five years. The article draws together leading trends and lessons from these cases and presents practical pointers to natural resource practitioners about permitting and compliance planning, enforcement defense, and site cleanup and cost recovery.

§ 6.02 Scope of Federal Clean Water Act Jurisdiction

[1] Background of the 2006 U.S. Supreme Court Decisions

The federal Clean Water Act (Act or CWA) makes it unlawful to discharge into navigable waters without a permit. The definition of navigable waters is "waters of the United States, including the territorial seas."[1] It applies to the dredge and fill program under section 404 as well as the point source permit program under section 402. The U.S. Army Corps of Engineers (Corps), i.e., the agency primarily responsible for the implementation of the dredge and fill permitting program and the U.S. Environmental Protection Agency (EPA), the agency primarily responsible for the issuance of permits under section 402, have promulgated broad definitions of CWA-covered "waters" including waters that are navi-

[1] 33 U.S.C. § 1362(7) (elec. 2006).

gable-in-fact, tributaries of those waters, wetlands that are adjacent to any such waters, and other kinds of waters.[2]

The majority of the case law assessing the scope of federal CWA regulation, including prior decisions by the U.S. Supreme Court, has arisen in the context of the Corps's administration of the dredge and fill permit program. In a unanimous 1985 decision, the Supreme Court assessed the scope of the Corps's regulations interpreting waters of the United States and held that the Act covers traditionally navigable waters, tributaries of these waters, and wetlands adjacent to traditionally navigable waters (but did not address wetlands adjacent to open bodies of water).[3] In a 2001 opinion, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*), the Supreme Court held that the Corps does not have jurisdiction over isolated wetlands with no "significant nexus" to traditionally navigable waters.[4] In spite of predictions to the contrary, the post-*SWANCC* appellate decisions have, in large part, defined covered waters as including every ephemeral and intermittent stream and wetland, provided there is any surface connection between the waters in question and downgradient navigable-in-fact waters.[5] The controversy over the scope of the Act resulted in the Supreme Court's

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[2] 33 C.F.R. § 328.3 (elec. 2006) (Corps definition); 40 C.F.R. § 122.2 (elec. 2006) (EPA definition). In 1986, the Corps promulgated rules defining "waters of the United States" but has not amended the rules since that time.

[3] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985) (finding jurisdiction over wetlands that abutted a navigable creek).

[4] 531 U.S. 159 (2001) (holding that use of "waters" (abandoned sand and gravel pits) by migratory birds does not alone constitute a significant nexus).

[5] *See, e.g.*, Baccarat Fremont Devs., LLC v. U.S. Army Corps of Eng'rs, 425 F.3d 1150 (9th Cir. 2005) (affirming Corps jurisdiction over wetlands separated from navigable-in-fact flood control channels); United States v. Gerke Excavating, Inc., 412 F.3d 804, 807 (7th Cir. 2005) ("[w]hether the wetlands are 100 miles from a navigable waterway or 6 feet, if water from the wetlands enters a stream that flows into the navigable waterway, the wetlands are 'waters of the United States' within the meaning of the Act"), *vacated*, 126 S. Ct. 2964 (June 26, 2006) (judgment vacated and remanded to the Seventh Circuit for reconsideration in light of *Rapanos v. United States*); Treacy v. Newdunn Assocs., LLP, 344 F.3d 407 (4th Cir. 2003) (jurisdiction based on fact that surface water occasionally exits the property through a spur ditch that leads to a series of manmade ditches that are dry most of the year); United States v. Deaton, 332 F.3d 698 (4th Cir. 2003) (wetlands adjacent to roadside ditch with intermittent flows over 32-mile path to navigable waters are jurisdictional). *But see In re* Needham, 354 F.3d 340 (5th Cir. 2003) (relying on *SWANCC* to hold that waters of the United States under the Oil Pollution Act are only subject to regulation if navigable in fact or adjacent thereto).

determination to review two Sixth Circuit decisions and the extent of CWA regulation over wetlands near ditches or drains but as far as 20 miles from the closest navigable water and wetlands near a drainage ditch but hydrologically isolated from that ditch. The cases were thought by many as the opportunity for the "new" Court to clarify a bright line test that would limit federal CWA jurisdiction.

[2] Supreme Court Decision in *Rapanos*

On June 19, 2006, the Supreme Court decided two consolidated Sixth Circuit cases[5.1] addressing the scope of jurisdiction under the Act and, in particular, the definition of "waters of the United States." The Supreme Court, in *Rapanos v. United States*,[6] did not develop a bright line test for jurisdiction. The *Rapanos* result was characterized as a 5-4 vote; notably, that characterization was based on the majority's determination to vacate and remand. The reasoning behind the five different opinions in the case was anything but uniform.

The decisions consisted of a plurality opinion authored by Justice Scalia (joined by Justices Thomas, Alito, and Chief Justice Roberts); a concurring opinion authored by Justice Kennedy (sharply disagreeing with the reasoning of the plurality but concurring in the determination to remand); a dissent (authored by Justice Stevens with Justices Ginsburg, Breyer, and Souter joining); a concurring opinion authored by Chief Justice Roberts admonishing the Corps for not issuing revised regulations post-*SWANCC* (expressing dissatisfaction over the disparate decision making); and a dissenting opinion authored by Justice Breyer indicating that the Corps needs to resolve the multiple questions on jurisdiction through rulemaking.[7]

[5.1] United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003); Carabell v. U.S. Army Corps of Engineers, 391 F.3d 704 (6th Cir. 2004).

[6] 126 S. Ct. 2208 (2006).

[7] The decisions have rekindled the call by many for an expedited Corps/EPA rulemaking to define "tributary" and "navigable waters." Those calls point to multiple Corps memoranda over the last 20 years that have promised such a rulemaking. *See, e.g.*, Memorandum from Corps/EPA on Clean Water Act Section 404 Jurisdiction Over Isolated Waters In Light of *Tabb Lakes v. United States* (Jan. 24, 1990) (calling for a rulemaking); Memorandum from Corps/EPA on Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters In Light of *United States v. James Wilson* (May 29, 1998) (same). *See also* Advance Notice of Pro-

The plurality asserted a bright line test for jurisdiction: waters (including wetlands) are covered under the Act only if they are characterized as having a continuous flow to a navigable water. The Scalia opinion rejected the notion that "the ecological considerations upon which the Corps relied in *Riverside Bayview* . . . provided an *independent* basis for including entities like 'wetlands' (or 'ephemeral streams') within the phrase 'the waters of the United States.' "[8] The opinion reasoned that an exclusive focus on ecological factors "would permit the Corps to regulate the entire country as 'waters of the United States.' "[9]

Justice Kennedy's opinion articulated a substantially different view of the legal basis for jurisdiction and looked to the *SWANCC* opinion as the foundation for requiring the presence or absence of a "significant nexus" between the alleged waters and downgradient navigable waters, noting that "neither the plurality nor the dissent addresses the nexus requirement."[10] The Kennedy opinion rejected the Scalia continuous flow requirement arguing that it "makes little practical sense in a statute concerned with downstream water quality."[11] Instead, Justice Kennedy asserted what appears to be a case-by-case test of ecological significance, an approach dismissed in the Scalia opinion. Despite his seemingly broad view of jurisdiction, Justice Kennedy also specified that the Corps's existing interpretations go too far. For example, Justice Kennedy maintained that the breadth of the ordinary high water mark (OHWM) standard, i.e., the assertion of jurisdiction over any drainage based on the existence of an OHWM, should not be determinative absent a specific showing that the

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posed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991 (Jan. 15, 2003) (addressing a potential rulemaking).

[8] *Rapanos*, 126 S.Ct. at 2226.

[9] *Id*. at 2230. The plurality scoffed at the exceedingly broad decisions of a number of appellate courts as stretching the term "waters of the United States" "beyond parody" and specifically cited the "implausibl[e]" results of determinations that make sweeping assertions of jurisdiction over ephemeral channels and drains as tributaries (citing the development case in Arizona, *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1118 (9th Cir. 2005) as one example of the erroneous breadth of the decisions). *Rapanos*, 126 S. Ct. at 2218-22. This expansive review undermines, in the reasoning of the opinion, the primary rights and responsibilities of the states over the development and use of land and water resources. *Id*. at 2223-24.

[10] *Id*. at 2241 (Kennedy, J., concurring).

[11] *Id*. at 2242.

tributary or any adjacent wetlands "play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood."[12] That nexus must be something *more* than a "mere hydrologic connection."[13]

The dissent concurred with the analysis supporting broad federal CWA jurisdiction and discounted the Scalia opinion's disregard of 30 years of practice by the Corps.[14] The dissent similarly maintained that the Kennedy opinion, although more faithful to precedents, lacks sufficient deference to the Corps.

[a] Potential Post-*Rapanos* Jurisdictional Test

The holding of a fragmented Court is often represented by the position that reflects concurrence on the most narrow grounds.[15] Arguably Justice Kennedy's concurrence reflects that position and therefore, the holding of the case. In other words, the continuous flow language of the plurality is not likely to be relied upon as the ultimate test for asserting jurisdiction under the CWA. The application of Justice Kennedy's reasoning may, however, heighten the continuing uncertainty over what constitutes a nexus worthy of federal regulation. On the other hand, Justice Kennedy's opinion may also hint at greater opportunities for project proponents to assert a lack of jurisdiction. For example, the opinion's skeptical reference to OHWM-based jurisdiction may suggest a narrower view of tributary connection in more instances. Whereas the implications of the opinions' language will take time to sort out, the outcome of the cases and the contrasting views of the Court are likely to ensure that questions regarding CWA regulation are far from being resolved. Justice Stevens may be most accurate in concluding that the scope of jurisdiction may not be substantially amended by *Rapanos* but that the

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[12] *Id*. at 2249. *But see* 33 C.F.R. § 328.4(c)(1) (elec. 2006) (indicating that in the absence of adjacent wetlands, CWA jurisdiction extends to the OHWM).

[13] *Rapanos*, 126 S. Ct. at 2251. Justice Kennedy also disagrees with the dissent's disregard of the term "navigable" and the concept that federal regulation is proper over waters no matter how "remote and insubstantial" the connection to traditional navigable waters. *Id*. at 2247.

[14] *Id*. at 2252 (Stevens, J., dissenting).

[15] *See, e.g.*, Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)) (holding that the prevailing position is that taken by "those Members who concurred in the judgments on the narrowest grounds").

amount of effort required to evaluate jurisdiction may have substantially increased.[16]

[b] Potential Implications for Jurisdictional Determinations at Mining Operations

After *SWANCC*, many mine site operators, particularly those in the arid West, reassessed and concluded that there was no significant nexus between the mine site and any downgradient waters. In a number of instances, the Corps concurred and issued "no jurisdiction" determinations concluding that the sites did not have regulated CWA waters. The "no jurisdiction" determinations are not timeless. Corps regulatory guidance states that a jurisdictional delineation is generally valid for five years from the date of issuance in writing.[17] Consequently, a number of the "no jurisdiction" determinations made in the months following *SWANCC* are now close to expiring. The broad scope of jurisdiction being assessed by the courts in the intervening years suggested that the new round of jurisdictional determinations could influence the Corps to assert a more expansive view of covered waters. That risk may be modified by the Supreme Court's decisions in *Rapanos*. It is unclear, but possible, that the post-*Rapanos* standard will be perceived as increasing the burden placed on the Corps for demonstrating a significant nexus and may lend more support for reissuance of many sites' "no jurisdiction" determinations (and, as referenced above, for a rulemaking to clarify the scope of the program).[18]

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[16] *Rapanos*, 126 S. Ct. at 2262-63.

[17] *See* U.S. Army Corps of Eng'rs, Regulatory Guidance Letter 05-02 (June 15, 2005); *see also* Administrative Appeal Process for Approved Jurisdictional Determinations, 33 C.F.R. pt. 331, app. C (elec. 2006) (referencing jurisdictional delineations as valid for five years).

[18] It will take time to assess the status of the post-*Rapanos* directives to field staff as well as the implications on the pre-decision cases. Pending the release of new guidance from the agencies, *Rapanos* is having an effect on a variety of different cases. *See, e.g.*, Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, No. 1:06-cv-00502 (challenging policies in Pennsylvania Corps office asserting jurisdiction over ditches); the Corps has requested, through an unopposed motion, that the policy be remanded to the Corps where it will be withdrawn and reconsidered in light of *Rapanos* (July 26, 2006). *See also* N. Cal. River Watch v. City of Healdsburg, No. C01-04686WHA, 2004 WL 201502 (N.D. Cal. Jan. 23, 2004), *aff'd* 2006 WL 2291155 (9th Cir. Aug. 10, 2006) (post-*Rapanos* decision affirming finding of significant nexus and the claims of CWA jurisdiction over a municipal sewage treatment pond as a result of a hydrologic groundwater connection between an abandoned pit and nearby perennial water); N. Cal. Riverwatch v. Mercer Fraser Co., No. C-04-4620SC, 2005 WL 2122052 (N.D. Cal. Sept. 1, 2005) (CWA jurisdiction was

[3] Corps Permitting and the Kensington Mine Tailings Impoundment: Regulation of Discharges of Fill vs. Pollutants

[a] Background Associated with Revisions to Definition of Fill Material

Prior to 1977, the Corps and EPA had comparable definitions of "fill" material for purposes of determining what activities were properly regulated as discharges under the dredge and fill permit program.[19] The agencies looked at the "effects" of the activities to determine whether filling was occurring and, in turn, whether section 404 permitting was required. In 1977, the Corps revised its definition of "fill" to adopt what was referred to as a "primary purpose test." If the "primary purpose" of the activity was waste disposal, it was regulated under the section 402 point source program rather than the section 404 dredge and fill program. The divergent definitions resulted in substantial ambiguity and litigation including that associated with the coal industry's mountain top mining issues. In one of the earlier of those decisions, the District Court in West Virginia held that valley fills were not properly covered by section 404 since the filling activity involved a discharge primarily intended to dispose of waste.[20]

In response to the litigation and confusion, the Corps and EPA determined to promulgate a rule that would conform the Corps's definition to EPA's longstanding "effects"-based determination. The revised definition (finalized in 2002) provides that "fill material" is material placed in waters of the United States that has the effect of either replacing waters with dry land or changing the bottom elevation of the water.[21] The rule includes specific reference to "overburden from mining or other excavation activities" as fill (but excepts trash and garbage); "where a waste has

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based on a groundwater connection between a manmade pond and a perennial water body). *But see* U.S. v. Chevron Pipe Line Co., 2006 WL 1867376 (N.D. Tex. June 28, 2006) (holding post-*Rapanos* that the connection of generally dry channels and creek beds will not create a regulable "significant nexus" to a navigable water).

[19] 40 Fed. Reg. 31,325 (July 25, 1975); 40 Fed. Reg. 41,291 (Sept. 5, 1975).

[20] Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 204 F. Supp. 2d 927 (S.D. W.Va. 2002), *vacated*, 317 F.3d 425 (4th Cir. 2003).

[21] 67 Fed. Reg. 31,129, 31,130 (May 9, 2002) (codified at 33 C.F.R. § 323.2(e)(1)(i) & (ii) (elec. 2006)).

the effect of fill, we believe that regulation under the section 404 program is appropriate."[22]

[b] Background Related to the Kensington Mine Proposal and the Section 404/402 Controversy

Coeur Alaska, Inc. (Coeur) has plans to construct an underground gold mine and processing facility near Juneau, Alaska (referred to as the Kensington Mine). Controversy has erupted over the Corps's authorization (pursuant to the section 404 permit program) of the temporary conversion of an existing lake (Lower Slate Lake in the Tongass National Forest) into a tailings impoundment.[23]

According to the Corps's permit information, the tailings impoundment will only include a portion of the project's tailings. As much as 40% of the proposed tailings will be backfilled in the underground workings with the remainder going to the impoundment. Processing will be by a flotation circuit with no addition of cyanide (and will remove sulfides as well as gold mineralization). Any water from the tailings impoundment will be pumped to a reverse osmosis water treatment plant prior to discharge below the facility into Slate Creek. That discharge will be covered by a section 402 (point source discharge) permit.

Coeur has proposed to reclaim the lake after operations (and may be required to install a cap over the tailings after mining operations cease unless it can demonstrate that the tailings are not toxic).[24] The Corps anticipates that the original 23 acres of habitat in the existing lake will constitute, post-project, 62 acres of habitat (resulting, in part, from the creation of a larger, deeper lake).[25]

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[22] 67 Fed. Reg. 31,129, 31,130 & 31,133 (May 9, 2002).

[23] The Corps has issued two permits for the project: one authorizing the discharge of processed mine tailings into the lake and for construction of a marine dock facility at Slate Creek Cove, and the other to Goldbelt, Inc. for work associated with a docking facility at Cascade Point. *See generally* U.S. Army Corps of Eng'rs, Records of Decision and Permit Evaluation, POA-1990-592-M & POA-1997-245-N (Mar. 29, 2006). Additionally, the Alaska Department of Environmental Conservation has issued its 401 certification authorizing the project subject to certain conditions.

[24] *See generally* U.S. Army Corps of Eng'rs, Records of Decision and Permit Evaluation, POA-1990-592-M & POA-1997-245-N (Mar. 29, 2006).

[25] *Id.*

Whereas the amount of impacted waters is projected to be 98.6 acres, the reclamation is expected to restore all but 3.44 acres.[26]

The mine plans have prompted methodical review by the agencies and resulted in unwavering conclusions regarding the section 404 authorization. The Corps and EPA have indicated they believe "the text of the [revised fill] rule makes clear that mine tailings placed into impounded waters of the U.S. . . . are regulated under section 404 of the CWA as a discharge of fill material, and that effluent discharged from the impoundment to a downstream water . . . is covered by section 402."[27] In the same EPA memorandum, the agency clarified that the section 404(b)(1) Guidelines, i.e., the environmental regulations governing issuance of 404 permits, establish that the proposed discharges need not comply with water quality criteria within the impoundment created in the lake "since the impoundment is the disposal site proposed to be authorized to be filled under the Corps' section 404 permit."[28]

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[26] *Id*. Notably, the Corps issued Coeur a permit in 1998 to construct a dry tailings facility in a different drainage. Coeur did not proceed with mine construction. For this permit, the Corps continued to look at alternatives to using Lower Slate Lake, i.e., the construction of a tailings impoundment in a wetlands area that would result, according to the Corps, in the *permanent* loss of more than 100 acres of wetlands.

[27] *See generally* Mem. from Diane Regas (Director, EPA Off. of Wetlands, Oceans & Watersheds), James Hanlon, (Director, EPA Off. of Wastewater Management), Geoffrey Grubbs (Director, EPA Off. of Science & Technology) to Randy Smith (Director, EPA Off. of Water Region X) (May 17, 2004) [hereinafter EPA Mem.). Notably, the language in the analysis is remarkably similar to the agencies' assessment of tailings disposal associated with the AJ and alternative Kensington mines' proposals in the early 1990s. *See* EPA Mem. from LuJuana S. Wilcher to Charles E. Findley (Oct. 2, 1992); U.S. Army Corps of Eng'rs Mem. from John F. Studt (Feb. 27, 1992).

[28] EPA Mem., *supra* note 27. *See also In re* Vico Construction Corp., CWA Appeal No. 05-01, 2005 WL 2832865 (Sept. 29, 2005) (indicating that the Corps views its definition of fill material as "creating a practical bifurcation of the regulatory framework, channeling those discharges that can be effectively regulated under the NPDES provision into the section 402 permit program, and addressing under section 404 those discharges that primarily have the effect of changing the bottom elevation of a waterbody or replacing a waterbody with dry land"). Where the discharges have the effect of displacing water or changing the bottom elevation of a waterbody and the material is not of a type ordinarily regulated under the effluent limitation guidelines, the discharges are subject to section 404 permitting requirements. *Id*.

[c] Litigation Arguments

The Kensington 404 permit has been opposed by a number of nongovernmental organizations including the Southeast Alaska Conservation Council and the Sierra Club, which filed suit against the Corps (and the U.S. Forest Service) maintaining that the plans to use the lake as a tailings impoundment do not comply with the CWA.[29] The plaintiffs seek, among other things, a declaratory judgment that the permitted discharge does not comply with the Act. In November 2005, the Corps suspended the section 404 permits and requested remand of the record of decision (ROD) so it could reconsider its permit decision.[30] On March 30, 2006, the Corps issued a press release stating that after completing its reexamination of the ROD, it had determined that reinstatement of the permits was appropriate.[30.1]

Opponents of the Kensington mine proposal have argued that the discharges into the lake constitute waste disposal that should be covered by the point source permit regulations. Citing section 306(e) of the CWA, the groups maintain that the mine must comply with the technology-based standards (referred to as effluent limitation guidelines) where those standards exist;[31] the new source performance standards, i.e., the effluent limitation guidelines for froth flotation mills, preclude any discharge from mills constructed after 1982.[32] The groups challenging permit issuance conclude that, correspondingly, Coeur cannot discharge any waste material from its mill into the lake. The mine opponents further argue that the EPA memorandum should not be afforded deference since the memorandum is inconsistent with the CWA and

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[29] *See* Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs, No. J05-0012 CV (D. Alaska 2005).

[30] *See* Press Release, U.S. Army Corps of Eng'rs-Alaska Dist., Corps Reinstates Permits for Kensington Mine and Goldbelt Dock (Mar. 30. 2006).

[30.1] *Id.*

[31] Section 306 of the Act specifies that persons may not operate a source in violation of any standard of performance "applicable to such source." 33 U.S.C. § 1316(e) (elec. 2006).

[32] EPA promulgated new source performance standards for froth flotation mills in 1982. The standards establish a zero discharge requirement and are based on what similar facilities achieve using certain types of technology. *See generally* 40 C.F.R. pt. 440 (elec. 2006).

conflicts with the intent of the EPA and Corps in promulgating the revised regulatory definition of fill in 2002.[33]

The government and Coeur (as an Intervenor) contest the assertions of the mine opponents on the grounds that the discharges into the tailings impoundment are properly covered by the dredge and fill permit program to which the effluent limitation guidelines do not apply. The briefs cite the language in the 2002 definition of fill material as supporting the claims that the creation of the impoundment replaces waters with dry land, changes the bottom elevation of the waters, and consists of mine materials, i.e., specified fill material in the promulgation of the revised fill definition.[34] According to the government's briefs, the discharges regulated under section 402 must consider the effluent guidelines promulgated under section 306. In contrast, discharges authorized by section 404 are not subject to those requirements.

[d] Potential Implications of Arguments Opposing Kensington Mine 404 Permit

The mine opponents' effluent limitation guidelines argument, if successful, would substantially affect the regulation of filling activities. To date, the regulated community has generally understood that if a discharge is regulated under section 402, it will not also be regulated under section 404 and vice versa.[35] In contrast, the position taken by mine opponents is that promulgated effluent limitation guidelines trump the distinction between section 404 and section 402 activities—no matter the nature of the discharge. In other words, the effluent limitations establish water quality limitations applicable to the discharge, no matter the type of discharge. That interpretation would, in many instances, preclude mine development. On August 3, 2006, the federal district court in Alaska upheld the Corps's issuance of the section 404 permit and the charac-

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[33] Brief of Plaintiff, Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs, No. J05-0012 (D. Alaska Apr. 7, 2006).

[34] Brief for United States, Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs, No. J05-0012 CV (D. Alaska May 5, 2006; Brief for Coeur Alaska, Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs, No J05-0012 CV (D. Alaska May 5, 2006).

[35] *See generally* 67 Fed. Reg. 31,129, 31,135 (May 9, 2002) (indicating that "EPA has never sought to regulate fill material under effluent guidelines").

terization of the discharge of mine tailings as fill material.[36] That decision has been appealed to the Ninth Circuit.

[4] Permitting Requirements for Water Transfers: What Constitutes an Addition of a Pollutant?

[a] Background and Early Water Transfer Cases

Section 301 of the Act prohibits the discharge of any pollutant by any person into navigable waters except in compliance with, for example, the permitting programs under sections 402 or 404.[37] The discharge of a pollutant is defined as "any addition of any pollutant to navigable waters from any point source."[38] There has been substantial recent debate over whether CWA permitting requirements apply to water transfers; those discussions have often assessed whether the transfer results in a discharge of a pollutant and typically refer back to early dam cases.

The early dam cases considered what constitutes a regulable addition of a pollutant and concluded that the mere movement of water through a dam does not trigger any permitting obligations.[39] Subsequent decisions relied on the dam cases to hold that the conveyance of water in other circumstances, absent some other activity, does not trigger NPDES permitting obligations.[40]

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[36] Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs, No. 1:05-CV-00012-JKS (D. Alaska Aug. 3, 2006). Section 404 permitting obligations have the potential to be further affected by a recent Corps/EPA proposal to amend compensatory mitigation requirements. 71 Fed. Reg. 29,604 (May 23, 2006). If finalized, the revised rules, among other things, would establish a preference for mitigation through mitigation banks, standardize criteria for measuring mitigation success, phase out in lieu fee mitigation, and seemingly reduce the flexibility with respect to mitigation planning and implementation.

[37] 33 U.S.C. § 1311(a) (elec. 2006).

[38] *Id*. § 1362(12).

[39] *See, e.g*., Nat'l Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988) (the flow of water between points in a dam, even where that water includes entrained fish parts, does not constitute an addition of pollutants regulated under the point source provisions of the CWA); Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) (movement of water in a dam is only a conveyance and does not constitute an addition of pollutants from the outside world); Appalachian Power Co. v. Train, 545 F.2d 1351 (4th Cir. 1976) (holding that it was beyond the authority of the EPA to require an industrial plant, through which preexisting pollutants pass, to treat or reduce those pollutants in the "intake" water, and noting that there was no permitting requirement for the conveyance of contaminated flow).

[40] *See, e.g.*, Bettis v. Town of Ontario, 800 F. Supp. 1113 (W.D.N.Y. 1992) (movement of water from one place to another does not trigger a point source permit obligation).

[b] The Evolution of the Water Transfer Cases and the Corresponding Expansion of Regulation

As with the CWA jurisdiction decisions, the water transfer case law can be characterized as reflecting the courts' expanding view of water pollution control regulation. More recent decisions have indicated that the transfer of water between water bodies, without any other activity, could constitute the addition of pollutants and trigger an NPDES permitting requirement.[41] A similar evaluation resulted in the Ninth Circuit determination that unaltered groundwater produced in association with coal bed methane extraction required an NPDES permit to be discharged to a receiving surface water body.[42]

The Supreme Court considered the issue in a decision evaluating whether the movement of water from a collection canal via a pump station to a separate area of the Florida Everglades required a point source permit.[43] The Court vacated and remanded the case to the Eleventh Circuit to assess whether the waters were being conveyed between separate water bodies but did not directly address the question of what constitutes an addition that would trigger a permit obligation.[44]

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[41] *See, e.g.*, Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001), *aff'd*, 207 F. Supp. 2d 3 (N.D.N.Y. 2002) *and* 244 F. Supp. 2d 41 (N.D.N.Y. 2003) (grant of summary judgment and damages to Trout Unlimited where transfer of water between water bodies to accommodate management associated with City of New York drinking water source constituted a regulable addition), *aff'd*, 451 F.3d 77 (2d Cir. 2006) (holding that the district court correctly determined that water transfers require NPDES permits, but remanding on the issue of civil penalties); Dubois v. U.S. Dep't of Agric., 102 F.3d 1273 (1st Cir. 1996) (pumping of water from river to pond for snowmaking constitutes a transfer of pollutants between water bodies). *See also* Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133 (10th Cir. 2005) (remanding for factual determinations and holding that passive landowner that never conducted mining operations on abandoned site could be held liable for additions of pollutants as a result of water conveyance through underground workings).

[42] N. Plains Resource Council v. Fidelity Exploration & Dev. Co., 325 F.3d 1155 (9th Cir. 2003).

[43] S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004).

[44] *Id.* at 108-09 (noting that if volumes of water are "simply two parts of the same water body, pumping water from one into the other cannot constitute the 'addition' of pollutants").

[c] 2006 Supreme Court Dam Case Addresses Movement of Water Through a Dam in the Context of 401 Water Quality Certification

On May 15, 2006, the Supreme Court decided another dam case.[45] The unanimous *S.D. Warren Co*. decision (authored by Justice Souter) held that the movement of water through a dam constitutes a "discharge" under section 401 of the Act, requiring states to certify that the activity does not violate state water quality standards.[46] Section 401 requires that states review activities of an applicant for a federal license or permit (e.g., the Federal Energy Regulatory Commission (FERC) dam license) to confirm that the conditions associated with that authorization ensure compliance with applicable water quality standards.[47]

The *Warren* decision was anticipated by some as providing another opportunity for the Supreme Court to define what constitutes an "addition of a pollutant" and to clarify the myriad questions surrounding the section 402 permitting questions. Not surprisingly, the analysis did not address those issues; instead the decision focused on the fact that the term discharge under section 401 is distinct and broader than the term "discharge of a pollutant" under section 402.[48] The Court held that a section 401 discharge does not require an "addition" and distinguished the *Miccosukee* water transfer analysis under section 402. The Court specified that sections 402 and 401 "are not interchangeable, as they serve different purposes and use different language to reach them."[49] As such, the case does not shed any light on the issues surrounding the section 402 program. Recent agency action, however, has tried to tackle the practical considerations recognized by but not resolved in the case law.

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[45] S.D. Warren Co. v. Me. Bd. of Envt'l Protection, 126 S. Ct. 1843 (2006).

[46] *Id*. at 1846.

[47] 33 U.S.C. § 1341(a)(1) (elec. 2006).

[48] *S.D. Warren Co.*, 126 S. Ct. at 1847 (noting that the CWA defines " 'discharge of a pollutant' and 'discharge of pollutants,' as meaning 'any addition of any pollutant to navigable waters from any point source.' But 'discharge' presumably is broader, else superfluous, and since it is neither defined in the statute nor a term of art, we are left to construe it 'in accordance with its ordinary or natural meaning' ").

[49] *Id*. at 1850.

[d] EPA's Response to the Practical Considerations

EPA issued an agency interpretation on the applicability of the NPDES permitting program to water transfers.[50] The Agency Interpretation specified that water transfers are subject to water resource management and state program oversight and are not regulated by the point source discharge program. EPA has proposed a corresponding rule that, if finalized, would exempt simple transfers of water from NPDES point source permitting.[51] The rule would apply only to transfers of waters that are not subject to an intervening industrial, municipal, or commercial use but would clarify that the addition of pollutants by the water transfer activity need not be covered by a point source CWA permit; as currently drafted, the rule would *not* address the withdrawal of groundwater.[52]

[5] The Evolving Burden of the Stormwater Regulatory Program

[a] Recent Developments

On December 1, 2005, EPA proposed revisions to its multi-sector general permit for storm water discharges associated with industrial activity.[53] The proposed permit would replace the administratively continued multi-sector permit that expired on October 30, 2005. It includes specific changes for the mining sector including potentially expanded requirements for inactive mines and requirements for more rigorous benchmark monitoring, e.g., the comparison of runoff from wasterock and overburden with water quality standards of the receiving water. While EPA's multi-sector permit applies only in those areas where the program has not been delegated to states or other permitting authorities, the potential implications for state and other delegated programs are evident. The multi-sector permit is typically viewed as the starting point for

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[50] Mem. from Ann R. Klee (EPA General Counsel) to Benjamin H. Grumbles (Ass't Administrator for Water) (Aug. 5, 2005) [hereinafter Agency Interpretation].

[51] 71 Fed. Reg. 32,887 (June 7, 2006) (requesting comments on the water transfer rule on or before July 24, 2006).

[52] *Id*. Interestingly, the Second Circuit's *Catskill Mountain* decision has been cited as evidence that the proposed water transfer rule is inconsistent with the language of the Act. Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001), *aff'd*, 451 F.3d 77 (2d Cir. 2006).

[53] 70 Fed. Reg. 72,116 (Dec. 1, 2005).

permit development; accordingly, changes to the federal program portend changes to delegated programs.

[b] Certain Controversial Aspects of the Proposed Multi-Sector Permit Revisions

Industry representatives, including the National Mining Association (NMA), have raised several objections to certain of the proposed permit revisions, such as the substantially more rigorous requirements for inactive mine sites (including, for example, monitoring obligations). The comments have also addressed proposed requirements for active mine sites, which would be required to compare the quality of waste rock and overburden runoff to ultra-low benchmark monitoring values (leading to multiple sites documenting benchmark excursions and the corresponding costly site-wide reviews of water management practices). Some of the comments have also requested stormwater permitting relief for the mining industry comparable to that afforded the oil and gas industry, exempting those areas where stormwater does not come into contact with raw material, overburden, and similar types of mine materials.[54]

[c] Potential Implications for the Mining Industry

The battle over the terms of the revised multi-sector permit appears to be part of a broader trend. Non-governmental organizations have continued to object to the CWA general permitting program as overly broad and without sufficient basis to ensure adequate water quality protection.[55] The application of rigid data monitoring without consideration of, for example, the impacts of natural mineralization and stormwater flows on receiving water quality threatens to result in a conclusion that the general per-

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[54] EPA has proposed a rule exempting those types of oil and gas exploration and construction activities from storm water permitting obligations (to implement the Energy Policy Act of 2005 and consistent with section 402(l)(2) of the Act). 71 Fed. Reg. 33,628 (June 12, 2006). That provision of the statute refers to both oil and gas *and* mining activities but arguments to expand the exemption to the mining have, so far, not triggered corresponding agency action.

[55] "[T]he proposed permit fails to determine whether the discharges have the reasonable potential to cause or contribute to water quality standards violations . . . and it lacks any method even to determine whether (much less set conditions to ensure that) discharges authorized by the permit are in compliance with [water quality standards]." Comments of Conservation Law Foundation, Waterkeeper Alliance, and Natural Resources Defense Council on Multi-Sector Permit (Feb. 16, 2006) (comments on file with author).

mits are not adequately protective. These issues, of course, are being closely tracked by agencies delegated permitting primacy, given that they will be required, in most instances, to adopt comparable obligations.

§ 6.03 Selected Comments on Emerging Air Quality Issues: Enforcement, Defenses, and NSR Developments

[1] Introduction

While there are a number of significant pending developments in air quality law that are being widely anticipated,[56] three recent federal appeals court decisions will have concrete and immediate implications to sources in and outside of the mineral industry. The first case, *New York Public Interest Research Group, Inc. v. Johnson* (*NYPIRG*),[57] held that the mere issuance of a notice of violation was sufficient to demonstrate noncompliance for purposes of the Title V permit review process. Any Title V source subject to an enforcement action or a noncompliance situation will have to consider the holding in this Second Circuit decision. The second case, *Sierra Club v. Georgia Power Co.*,[58] involves an Eleventh Circuit decision upholding a state exception for excess emissions that occur during periods of startups, shutdowns, and malfunctions notwithstanding a narrower EPA policy. This is an important defense and one that should have continued future validity. Finally, the D.C. Circuit decision in *New York v. EPA*,[59] holding that EPA's Equipment Replacement Provision (ERP) rulemaking was con-

[56] For example, the Supreme Court has recently granted certiorari in two cases of great importance. One case addresses the question of whether the EPA must regulate carbon dioxide as an air pollutant under the Clean Air Act. Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 2960 (2006). The other case addresses whether the Clean Air Act requires the EPA to interpret the statutory term "modification" consistently under both the new source performance standards (NSPS) and prevention of significant determination (PSD) programs. United States v. Duke Energy Corp., 411 F.3d 539 (4th Cir. 2005), *cert. granted*, 126 S. Ct. 2019 (2006). In addition, there are several important pending EPA rulemakings that the regulated community is awaiting with great interest. For example, the EPA is expected to issue its final rulemaking to revise particulate matter air quality standards by September 27, 2006. 71 Fed. Reg. 2620, 2624 (Jan. 17, 2006).

[57] 427 F.3d 172, 175 (2d Cir. 2005).

[58] 443 F.3d 1346 (11th Cir. 2006).

[59] 443 F.3d 880 (D.C. Cir. 2006).

trary to the Clean Air Act (CAA), will have a significant impact. The ERP rulemaking addressed whether certain equipment replacements at major sources may be considered "routine" and therefore exempt from major new source review permitting. Major sources are constantly replacing equipment and it is essential for the source to understand whether a particular replacement is exempt as routine or subject to major new source review permitting.

[2] When is a Notice of Violation Sufficient to Demonstrate Noncompliance?

In *NYPIRG*, the Second Circuit considered whether a notice of violation (NOV) issued by a state air permitting agency alleging noncompliance with the CAA was sufficient to compel a state permitting agency to impose a schedule of compliance in a source's operating permit.[60] The court held that issuance of the NOV alone was a sufficient basis to compel EPA to require that a compliance schedule be included in the operating permit to address the alleged noncompliance.

[a] Title V Background

The 1990 amendments to the CAA established the Title V operating permit program. The purpose of the Title V operating permit program is for each "major" stationary source of air pollution to have catalogued in a single permit all "applicable requirements" that apply to the source.[61] Additionally, an operating permit must specify monitoring, recordkeeping, and reporting provisions aimed at ensuring that a source's compliance status with its applicable requirements can be readily determined.[62]

One provision of the Title V operating permit program particularly relevant to the *NYPIRG* case is the requirement that a source identify its compliance status with each applicable requirement.[63] For any applicable requirement that a source will not be in compliance with at the time of permit issuance, a compliance schedule must be established in the operating permit.[64]

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[60] 427 F.3d at 175.

[61] 40 C.F.R §§ 70.2, 70.5(c) (elec. 2006).

[62] *Id.* § 70.6(a)(3).

[63] *Id.* § 70.5(c)(8)(i).

[64] *Id.* §§ 70.5(c)(8), 70.6(c)(3).

States, acting in accordance with an EPA approved permit program, have the primary role in issuing Title V operating permits. However, the Title V permit issuance process includes a role for both public and EPA review. EPA is given a 45-day review period during which it may "veto" the proposed issuance of an operating permit by a state permitting agency on the grounds that the permit does not comport with the requirements of Title V.[65] Further, for up to 60 days following the conclusion of EPA's review period, any person may petition EPA to object to the permit.[66] The CAA instructs that "[t]he Administrator shall issue an objection . . . if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this chapter."[67] Should EPA object to issuance of the permit, the state permitting agency may not issue the permit until the deficiency is addressed.[68] EPA's denial of a petition to object to a Title V operating permit is subject to judicial review.[69]

[b] The Second Circuit's Decision in *NYPIRG*

In May 2000, the New York State Department of Environmental Conservation (DEC) issued NOVs to two of New York's largest coal-fired power plants for noncompliance with the prevention of significant deterioration (PSD) permitting program. The NOVs alleged that Niagara Mohawk Power Corp. (Niagara) and NRG Energy, Inc. (NRG)[70] modified two of their coal-fired power plants on more than 31 occasions without first obtaining required PSD permits.[71] Notwithstanding the issuance of the NOVs, the DEC issued operating permits to both power plants. New York Public Interest Research Group (NYPIRG) objected to the permits on the grounds that the PSD program imposed applicable requirements that the plants were not in compliance with and the draft operating permits failed to address the non-

[65] *Id.* § 70.8(a), (c).

[66] *Id.* § 70.8(d).

[67] 42 U.S.C. § 7661d(b)(2) (elec. 2006).

[68] 40 C.F.R. § 70.8(d) (elec. 2006).

[69] 42 U.S.C. § 7661d(b)(2) (elec. 2006).

[70] The plants were owned and operated by Niagara until June 1999, when they were purchased by NRG.

[71] *NYPIRG*, 427 F.3d at 177, 181.

compliance through compliance plans and schedules, as required by the Title V program.[72]

The DEC rejected NYPIRG's challenge and submitted the draft permits to the EPA for its review. When the EPA did not object to issuance of the permits, NYPIRG petitioned EPA to do so. The EPA denied NYPIRG's petition on the basis that, so long as the source did not concede that particular PSD limits applied, the permits could issue subject to later amendment once the DEC and the source reached agreement as to the appropriate PSD limits.[73] Furthermore, the EPA maintained that the DEC had discretion under Title V not to include in the permits PSD limits not yet determined to be applicable.[74]

Apart from the Title V permitting process and in connection with the NOVs, DEC sued Niagara and NRG for their failure to obtain PSD permits prior to making certain modifications. The federal district court granted NRG's motion to dismiss on the basis that it was not liable for the prior owners' failure to obtain PSD permits. The federal district court permitted the DEC to amend its complaint to claim instead that NRG was in violation by operating without valid Title V permits.

The *NYPIRG* court focused on the CAA's statutory language addressing Title V permit objections, noting that "[t]he Administrator shall issue an objection . . . *if the petitioner demonstrates* to the Administrator that the permit is not in compliance with the requirements of this chapter."[75] Specifically, the court addressed whether the DEC's issuance of the NOVs and its subsequently filed lawsuit "demonstrated" noncompliance. EPA argued that NOVs, as well as complaints, are "inherently accusatory rather than conclusive documents."[76] Further, EPA argued that it "could not determine the contents of the permits because the deficiencies identified in the NOVs and in the complaint might be found inapplicable, changed or mooted."[77]

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[72] *Id.* at 178.

[73] *Id.* at 177.

[74] *Id.*

[75] 42 U.S.C. § 7661d(b)(2) (elec. 2006) (emphasis added).

[76] *NYPIRG*, 427 F.3d at 180.

[77] *Id.*

The court disagreed with EPA's position and held that the issuance of the NOVs and the commencement of the suit was "a sufficient demonstration to the Administrator of non-compliance for purposes of the Title V permit review process."[78] The court observed that both the CAA and the New York state implementation plan "direct enforcement for a 'violation' not merely for allegations."[79] The court referenced section 113(a)(1) of the CAA to support this reasoning, determining that

> [w]henever, on the basis of any information available to the Administrator, the Administrator finds that any person *has violated or is in violation of* any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall [issue a notice of violation]. At any time after the expiration of 30 days following the date on which such notice of a violation is issued, the Administrator may [initiate enforcement action].[80]

The court noted that this language, like that found in the applicable New York law, "means that, to issue a NOV, the Administrator must first find a source in violation."[81] The court was "confident that the DEC does not issue NOVs lightly," and saw "no reason why its findings for purposes of issuing NOVs . . . do not suffice to demonstrate non-compliance for purposes of objections under [Title V]."[82]

[c] Implications of *NYPIRG*

While on its face the *NYPIRG* decision is one that might be viewed as having significant implications for Title V sources that are subject to enforcement actions at even the preliminary NOV stage, in reality it appears that its effects might be more modest.

The court's holding that the mere issuance of an NOV equates to a demonstration of noncompliance might seem circular and

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[78] *Id.*

[79] *Id.* at 181.

[80] 42 U.S.C. § 7413(a)(1) (elec. 2006) (emphasis added).

[81] *NYPIRG*, 427 F.3d at 181.

[82] *Id.* The *NYPIRG* court also addressed issues relating to the "prompt" reporting of permit deviations, holding that the DEC and EPA definition of prompt as quarterly reporting for SO_2 and NO_x emission deviations should be accorded deference; however, the DEC and EPA definition of "prompt" as quarterly reporting for opacity deviations and six months for everything else was not accorded deference by the court and was remanded. *Id*. at 185.

conclusory, and subject to criticism on grounds of due process. The court's circular, almost hyper-technical reading of the statute—"[w]henever . . . the Administrator finds that any person *has violated*"—led it to conclude that if the agency has issued an NOV it necessarily must follow that there was a violation. This conclusion seemingly disregards the widely recognized view that "[r]ather than the consummation of the agency's decisionmaking process, a NOV is merely a first step in a potential enforcement process."[83] Furthermore, as the D.C. Circuit has explained,

> no legal consequences flow from the issuance of the NOV because it merely notifies plaintiffs of their existing obligations under the CAA. It does not impose any new obligations or penalties on plaintiffs, and it does not even direct or request that plaintiffs correct the alleged violations. In order to compel action or impose penalties, EPA would have to pursue further enforcement action, at which time plaintiffs would have an opportunity to raise the defenses that they have raised here.[84]

Air quality practitioners are well aware that the CAA and its implementing regulations are often complex, nuanced, and confusing, the proper interpretation of which are often hotly contested and no more so than in the context of PSD applicability determinations—the very issue underlying the NOVs in *NYPIRG*.[85] Furthermore, following an adjudicatory proceeding in which issues of fact and law are resolved, a source is sometimes found not to be liable. Indeed, the court itself refers to "specific *allegations* in the NOVs,"[86] allegations that have not yet been tested in an adjudicatory proceeding.

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[83] Royster-Clark Agribusiness, Inc. v. Thomas, 391 F. Supp. 2d 21, 27 (D.D.C. 2005).

[84] *Id*. at 28 (citations omitted). Consistent with *Royster-Clark*, some state statutes make express reference to "alleged" violations. *See, e.g.*, Nev. Rev. Stat. § 445B.450(1) (elec. 2006) ("Whenever the director *believes* that a statute or regulation for the prevention, abatement or control of air pollution has been violated, he shall cause written notice to be served upon the person or persons responsible for the *alleged* violation.") (emphasis added). Consistently, Nevada Division of Environmental Protection's Bureau of Air Pollution Control styles its notices as NOAVs, or Notices of *Alleged* Violation.

[85] *Compare* United States v. Duke Energy Corp., 411 F.3d 539 (4th Cir. 2005), *cert. granted*, 126 S. Ct. 2019 (2006) (affirming the district court holding that only a project that increases a plant's *hourly* rate of emissions constitutes a modification), *with* New York v. EPA, 413 F.3d 3 (D.C. Cir. 2005) (concluding that the PSD provisions compel an "actual emissions" test for modifications).

[86] *NYPIRG*, 427 F.3d at 181 (emphasis added).

Depending on how it is read, the court's decision—mandating compliance schedules without an adjudication on the merits—raises questions of due process.[87] Under the holding in *NYPIRG*, a state permitting agency can arguably gain significant leverage by the threat or actual issuance of an NOV in a case involving a legitimate dispute between it and a source over the source's compliance status; once the state agency alleges a violation in an NOV, under *NYPIRG*, it now has grounds to require a source to come into compliance through a compliance schedule.

Upon closer review of the decision, however, it appears that the court's holding is more limited than it might seem. Specifically, the court limited its holding to the notion that the mere issuance of an NOV is sufficient to demonstrate noncompliance to that of "Title V purposes," holding "that the DEC's issuance of these NOVs and commencement of the suit is a sufficient demonstration to the Administrator of non-compliance *for purposes of the Title V permit review process*."[88] Further, and importantly, while the court held that the EPA must insist upon a compliance schedule to address the "demonstrated" noncompliance, it did not prescribe how the noncompliance must be addressed in the compliance schedule. The compliance schedule might be open-ended, accommodating subsequent resolution of the underlying alleged noncompliance. In fact, the court's decision approvingly recounted how EPA addressed the need for a compliance schedule in another Title V permit that involved alleged noncompliance that was the subject of ongoing settlement negotiations, stating that "in that proceeding the EPA took the position that any permit issued pre-settlement must include a compliance schedule that reflects up-to-date requirements although the permit could be amended post-settlement."[89] This suggests that a compliance schedule addressing matters of yet-to-be-resolved alleged noncom-

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[87] *See, e.g.*, Tenn. Valley Auth. v. Whitman (TVA), 336 F.3d 1236, 1258 (11th Cir. 2003), *cert. denied*, 541 U.S. 1030 (2004) ("The statutory scheme established by Congress—in which the head of an executive branch agency has the power to issue an order that has the status of law after finding, 'on the basis of any information available,' that a CAA violation has been committed—is repugnant to the Due Process Clause of the Fifth Amendment.").

[88] *NYPIRG*, 427 F.3d at 180 (emphasis added).

[89] *Id*. at 182.

pliance can be addressed in a flexible manner pending the ultimate resolution of an alleged noncompliance incident.

Such an approach is realistically the only practical option. Consider, for example, how an operating permit could otherwise address appropriate BACT controls and corresponding emission limitations that have yet to be determined for a source,[90] or how an ambient air quality analysis, including PSD increment consumption, could be addressed. Accordingly, to the extent a compliance schedule is to be established for such yet-to-be-determined requirements and analysis, the schedule must necessarily be flexible.[91]

In truth, the Second Circuit's decision in *NYPIRG* could benefit from some clarification because it raises more questions than it answers. For instance, did the court, in fact, intend its holding to be limited to Title V purposes? Additionally, how does the Title V permitting process accommodate the ultimate resolution of alleged noncompliance? Further, how does a settlement that does not definitively resolve liability—and, therefore, what applicable requirements do in fact apply to a source as a matter of law—mesh with the requirement that all applicable requirements must be included in a Title V permit? Finally, how should a compliance schedule address yet-to-be-resolved allegations and requirements that are indeterminate at the time of permit issuance?

Some of these issues might be addressed by a case pending in the Eleventh Circuit that was filed in January 2006 by environmentalists who objected to EPA's approval of a Title V operating permit for a Georgia power plant because the agency has a pending enforcement action over alleged new source review violations against a *separate* facility owned by the company.[92] Based on a

[90] Assuming that they are even applicable in the first instance.

[91] This last point appears to be one that the *NYPIRG* court did not completely understand or at least did not clearly address: "The EPA also considers it premature to include PSD limits in a permit before they are determined by the permitting authority to be applicable. It is not premature, precisely because we believe that the DEC, in issuing the NOVs and filing suit, has determined that these standards are, indeed, applicable." *NYPIRG*, 427 F.3d at 181. This suggests that the court believed that once a determination is made that PSD is applicable, the applicable PSD limits are set. This of course is not the case; such limitations are established only after a detailed, case-by-case technical analysis.

[92] Sierra Club v. Johnson, No. 06-10579-AA (11th Cir. filed Jan. 20, 2006).

2003 Eleventh Circuit decision, due process considerations may be central to the court's considerations.[93]

[3] The Eleventh Circuit's Reaffirmation of the Startup/Shutdown/Malfunction Defense: *Sierra Club v. Georgia Power Co.*

In *Sierra Club v. Georgia Power Co.*,[94] the Eleventh Circuit upheld the validity of a legal defense contained in Georgia's air quality program for excess emissions that occur during startups, shutdowns, and malfunctions. This case should help to sustain similar defenses in other states notwithstanding an EPA policy that seeks to eliminate or severely narrow the defense.

[a] The Old Defense

For many years, there have been exceptions for excess air pollutant emissions occurring during periods of startups, shutdowns, and malfunctions (SSM). Excess emissions occurring during such operating conditions were not deemed to constitute a violation. Such exemptions have been part of the fabric of both federal and state air programs for many years. For example, EPA has long had a SSM exception as part of its new source performance standards (NSPS) program:

> Operations during periods of startup, shutdown, and malfunction shall not constitute representative conditions for the purpose of a performance test *nor shall emissions in excess of the level of the applicable emission limit during periods of startup, shutdown, and malfunction be considered a violation of the applicable emission limit unless otherwise specified in the applicable standard*.[95]

EPA explained the rationale for these exceptions:

> [T]here is some statistical probability of infrequent, unavoidable mechanical failures in process or air pollution control equipment, which, despite the best maintenance and control practices, cannot be

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[93] Tenn. Valley Auth. v. Whitman, 336 F.3d 1236 (11th Cir. 2003).

[94] 443 F.3d 1346 (11th Cir. 2006).

[95] 40 C.F.R. § 60.8(c) (elec. 2006) (emphasis added). *See also* 40 C.F.R. § 60.11(c) (elec. 2006) (SSM exception for opacity). Similar exceptions for startups, shutdowns, and malfunctions are provided in the MACT/NESHAP provisions. *See* 40 C.F.R. § 63.6(f) & (h) (elec. 2006).

> controlled immediately, and consequently leads to some temporary excess emission.[96]

Similar to the federal provisions, many state air quality programs contain an SSM exception for excess emissions that occur during startups, shutdowns, and malfunctions. For example, Utah's air quality program provides, in pertinent part, that "emissions resulting from an unavoidable breakdown will not be deemed a violation of these regulations."[97] Nevada's air program provides that a "[b]reakdown or upset, determined by the Director to be unavoidable and not the result of careless or marginal operations, shall not be considered a violation of these regulations."[98] These provisions have generally been in place for 20 or more years and have often been approved by EPA as part of the state implementation plan or SIP.[99]

[b] EPA's 1999 SSM Policy

In 1999, EPA issued a policy that placed significant constraints on what EPA would regard as an acceptable state SSM rule. EPA's 1999 SSM Policy[99.1] is significantly narrower than most of the state SSM exceptions, limiting the circumstances under which a source can claim a defense for a violation that occurs as the result of startup, shutdown, or malfunction conditions. For example,

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[96] 37 Fed. Reg. 17,214, 17,214 (Aug. 25, 1972) (original notice of proposed rulemaking for NSPS startup/shutdown/malfunction provision).

[97] Utah Admin. Code R307-107 (elec. 2006). A "breakdown" is defined as "any malfunction or procedural error, to include but not limited to any malfunction or procedural error during start-up and shutdown, which will result in the inoperability or sudden loss of performance of the control equipment or process equipment causing emissions in excess of those allowed by approval order or Title R307." *Id.* R307-101-2. Breakdowns that "are caused entirely or in part by poor maintenance, careless operation, or any other preventable upset condition or preventable equipment breakdown shall not be considered unavoidable breakdown." *Id.* R307-107-1.

[98] Nevada Approved State Implementation Plan, art. 2.5.4.

[99] For example, EPA's regulations approving Utah's SIP include 40 C.F.R. § 52.2320(c)(6) (elec. 2006): "Provisions to meet the requirements of Part D and other Sections of the Clean Air Act, as amended in 1977, were submitted on December 28, 1978, by the Governor." Those provisions include Utah Air Conservation Reg. 4.7, the Unavoidable Breakdown Rule (UBR), which is essentially identical to the current version of the rule, Utah Admin. Code R307-107. *See* 44 Fed. Reg. 28,688, 28,691 (May 16, 1979) (notice of proposed rulemaking to revise Utah SIP); 45 Fed. Reg. 10,761, 10,763, 10,765 (Feb. 19, 1980) (final rulemaking to revise Utah SIP to add UBR). The UBR therefore constitutes current federal law.

[99.1] *See* http://epa.gov/Region7/programs/artd/air/title5/t5memos/excesem2.pdf.

the policy contains the qualification that, regardless of the unpredictability of an upset condition or the fault of the source operator, an affirmative defense is not available where excess emissions from a source cause or have "the potential to cause an exceedance of the NAAQS or PSD increments."[100]

[c] *Sierra Club v. Georgia Power Co.*

The Sierra Club asserted that on thousands of occasions between 1998 and 2002, a large power plant owned and operated by Georgia Power Co. exceeded the emissions limits allowed under its operating permit issued under Title V of the CAA.[101] Georgia Power did not take issue with the fact that the exceedances occurred but argued that the exceedances were not CAA violations because they all occurred during periods of excused startups, shutdowns, or malfunctions.

Georgia's SSM Rule was adopted as part of the Georgia SIP in 1979 and approved by EPA in 1980 and provides that "[e]xcess emissions resulting from startup, shutdown, [or] malfunction of any source which occur though ordinary diligence is employed shall be allowed" so long as: (1) the best operational practices to reduce emissions were used; (2) pollution control equipment was operated properly; and (3) "the duration of excess emissions [was] minimized."[102] This condition was memorialized into a permit for one of Georgia Power's facilities but was rephrased to state that "[t]he Division [i.e., Georgia EPD] may allow excess emissions in certain cases as described below."[103]

The lower court concluded that even if the exceedances at the power plant occurred during SSM, this offered Georgia Power no defense against the Sierra Club's lawsuit. The court focused on the fact that the Georgia Power permit provided that "*the Division* may allow excess emissions" that meet the Georgia SSM exception and therefore, by its terms, the SSM exception or defense could not be used to rebut an action brought by Sierra Club. The district court also agreed with the Sierra Club that the Georgia SSM exception was impermissibly broader than EPA's 1999 SSM

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[100] *Id.*

[101] Sierra Club v. Georgia Power Co., 443 F.3d 1346 (11th Cir. 2006).

[102] Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)(7)(i) (elec. 2006).

[103] *Sierra Club*, 443 F.3d at 1351.

Policy. The district court granted Georgia Power's motion to certify its liability ruling for interlocutory appeal.

The Eleventh Circuit held that the district court erred in granting partial summary judgment in favor of the Sierra Club. The court noted that it was clear that the Georgia SSM rule was broader than EPA's 1999 SSM Policy; however, EPA had issued a clarifying memorandum in 2001 indicating that the SSM Policy was to be applied *prospectively* only.[103.1] The court distinguished the case before it from a Sixth Circuit case that upheld EPA's disapproval of a Michigan air agency SSM rule based on the Michigan rule's departure from EPA's guidance.[104] The Eleventh Circuit noted that "[i]n that case, Michigan sought EPA approval for a SIP *revision*, one that included a *new* SSM provision," while "[i]n contrast, Georgia's SSM rule has been in place since 1980."[105]

Even if EPA intended otherwise—that is, that the 1999 SSM Policy should apply to existing SSM rules—the Eleventh Circuit opined that it "would have been powerless to effect such a change absent formal SIP revision."[106] The Georgia SSM Rule was adopted by Georgia and approved by EPA through a formal rulemaking process and, therefore, the court concluded that EPA's SSM Policy was "not due the same level of deference as formally adopted rules," and "EPA policy guidance cannot trump the SSM Rule adopted by Georgia and approved formally by the EPA."[107]

The Eleventh Circuit found that the Georgia SSM rule did not limit the SSM defenses to actions initiated by the Georgia Environmental Protection Division, but simply provided a potential defense to alleged violations—regardless of who is making the allegations—where the emissions exceedances at issue occur during an otherwise qualifying startup, shutdown, or malfunction condition.[108] The court went on to hold that this defense applies in any

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[103.1] *See* http://envinfo.com/dec2001/clarify.pdf.

[104] *See* Mich. Dep't of Envtl. Quality v. Browner, 230 F.3d 181 (6th Cir. 2000) (holding that deference must be granted to the EPA's interpretation of the Clean Air Act that SIPs cannot provide broad exclusions from compliance with emission limitations during SSM periods).

[105] *Sierra Club*, 443 F.3d at 1354.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 1353.

enforcement action, whether it is initiated by the EPD or by a citizen's group and that the rephrasing of the Georgia SSM provision "did not in any way alter the general SSM provision of the Georgia SIP."[109]

The court noted that "it appears that Sierra Club's real complaint is not with Georgia Power's permit compliance, but rather with Georgia's SSM Rule itself."[110] The court continued, "[e]ven with our holding today, Sierra Club remains free to challenge Georgia's SSM rule as contrary to the Clean Air Act. In particular, Sierra Club could petition the EPA for rulemaking, asking the EPA to demand that Georgia alter its SIP to conform to the EPA's SSM policy."[111]

[d] Significance of *Sierra Club*

The validity of several states' existing SSM exceptions has been raised in some western states by EPA regional offices. Some EPA regional offices have strongly encouraged states that maintain SSM exceptions more liberal than EPA's 1999 SSM Policy to eliminate or modify their SSM provisions in favor of an EPA-styled SSM provision.[112] Industry has opposed this elimination, arguing that the states, absent an EPA SIP Call, need not take any action based on EPA's 1999 Policy. The CAA authorizes EPA to call upon a state to revise its SIP when the agency makes a finding "on the basis of information available to the Administrator that the plan is *substantially inadequate* to attain the national ambient air quality standard which it implements."[113] *Sierra Club* should help bolster industry's position.

[4] Routine or Not? Equipment Replacements Following *New York v. EPA*

In *New York v. EPA*,[114] the Court of Appeals for the District of Columbia rejected EPA's Equipment Replacement Provision (ERP)

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[109] *Id.* at 1354.

[110] *Id.* at 1357.

[111] *Id.*

[112] *See, e.g.*, Letter from Richard R. Long, Director, Region VIII Air and Radiation Program, to Richard W. Sprott, Director, Utah Div. of Air Quality (Oct. 22, 2004) (regarding Excess Emission Reporting).

[113] 42 U.S.C. § 7410(a)(2)(H)(ii), (k)(5) (elec. 2006) (emphasis added).

[114] 443 F.3d 880 (D.C. Cir. 2006).

rule establishing an automatic exemption from major new source review for equipment replacements that are less than 20% of the cost of the replacement value of the entire process unit. Notwithstanding this decision, the rulemaking process that ultimately resulted in the rejected rule suggests a fundamental change in how EPA will assess replacements.

[a] Background to the ERP

Existing major stationary sources planning to make modifications generally wish to avoid major new source review (NSR) if at all legally possible. Major NSR adds a layer of complexity to the permitting process and can significantly lengthen the permitting time required to secure project approval. One longstanding, ambiguous, and contentious exception from NSR is carved out for "routine maintenance, repair and *replacement*."[115] The "routine replacement" portion of this exemption has come to be known as the ERP. The applicability of this exception has been at the root of many of EPA's NSR enforcement cases, with the defendant and EPA disagreeing as to whether a particular replacement was or was not exempt from major NSR as a "routine" replacement.

[b] Equipment Replacements Under EPA's Historic Application of the "Four-Factor" Test Prior to the ERP Rulemaking

Through various case-specific determinations, EPA has developed a four-factor test for assessing whether a replacement may be deemed "routine." The four factors address (1) the nature and extent of a particular replacement, (2) the purpose of the replacement, (3) the frequency of such replacements, and (4) the cost of the replacement.[116] These factors are evaluated together to reach a determination of whether a particular replacement is "routine." Application of the four-factor test most often results in the conclusion that a particular replacement is not routine. A review of EPA's published determinations shows that out of 16 requests

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[115] *See* 40 C.F.R. § 52.21(b)(2)(iii)(a) (elec. 2006) (emphasis added).

[116] *See, e.g.*, Letter to Henry Nickel, Hutton & Williams, from Francis X. Lyons, EPA Regional Administrator, EPA Evaluation of Proposed Replacement at Detroit Edison Company's Monroe Power Plant (May 23, 2000), *available at* http://www.epa.gov/region7/programs/artd/air/nsr/nsrmemos/detedisn.pdf.

made to EPA for applicability determinations as to whether replacements were routine, EPA concluded that all 16 were *not* routine and therefore were subject to major NSR.[117] A limited survey of state decisions indicates that state permitting agencies have been more liberal in making such assessments, concluding in three out of four instances that replacements were routine.[118]

[c] The 2003 ERP Rulemaking

EPA's ERP rulemaking established a bright-line rule that "states categorically that the replacement of components with identical or functionally equivalent components that do not exceed 20% of the replacement value of the process unit and does not change its basic design parameters is not a change and is within the RMRR exclusion."[119] In other words, equipment replacements that satisfy the "20% of the replacement value" criterion are automatically deemed "routine" and therefore exempt from major NSR. The rule also retained the case-by-case determination procedure for those replacement activities that do not automatically qualify as routine under the 20% criterion.[120]

Given the ambiguity and narrow application of the four-factor test that had preceded the ERP, industry hailed the ERP as providing a clear and reasonable test for determining whether replacements were routine. Environmental groups, on the other hand, viewed the ERP as encouraging industry to prolong the life of older and more polluting plants in lieu of building newer and cleaner facilities.

[d] The *New York II* Decision

The D.C. Circuit had previously considered the first of two rules promulgated by the EPA providing ways for stationary sources to

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[117] Access to most of these determinations is available through EPA Region 7's searchable NSR database at http://www.epa.gov/region7/programs/artd/air/policy/search.htm (last visited July 10, 2006).

[118] The determinations include three by North Carolina, one by Wisconsin, and two by Oklahoma. One of the Oklahoma determinations concluded that the replacement of a catalytic cracker was routine and was concurred in by EPA Region 6. Copies of these determinations are on file with the author.

[119] Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion, 68 Fed. Reg. 61,248, 61,270 (Oct. 27, 2003) (Final Rule); *see also* 70 Fed. Reg. 33,838 (June 10, 2005) (Reconsideration).

[120] 68 Fed. Reg. at 61,255.

avoid triggering NSR.[121] The *New York I* court upheld the rule in part and vacated it in part.[122] In the second *New York v. EPA* case (*New York II*),[123] the court considered the ERP, and vacated it, concluding that the 20% bright-line criterion was contrary to the plain language of section 111(a)(4) of the CAA.[124] The D.C. Circuit vacated the ERP rule on the grounds that it violated the definition of "modification" contained in section 111(a)(4) of the Clean Air Act in two ways. First the court held that the broadly phrased definition of the term "modification" ("*any* physical change") was not intended to be limited to only those physical changes that are costly or major.[125] Additionally, the court found that the ERP would exempt changes that would result in more than a *de minimis* increase in emissions in contradiction to *Alabama Power Co. v. Costle*, which recognized EPA's discretion to exempt from NSR "some emission increases on grounds of *de minimis* or administrative necessity."[126]

[e] Replacements Following *New York II*

Notwithstanding the D.C. Circuit's vacation of the ERP in *New York II*, the authors believe that the ERP rulemaking *process* resulted in a significant shift in how EPA will apply the so-called four-factor test on a going forward basis. Following *New York II*, the 20% bright-line criterion is undoubtedly an unacceptable basis for concluding that a replacement is routine and therefore exempt from major NSR. Determinations of whether a particular replacement is "routine" must continue to be based on the case-by-case four-factor test. Importantly, however, the rulemaking process that accompanied the ERP provided a robust discussion of EPA's current view of what is properly considered a routine replacement. That discussion suggests a view that is certainly more expansive than what it had been prior to the ERP rulemaking, as evidenced by EPA's applicability determinations discussed above.[127]

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[121] New York v. EPA (New York I), 413 F.3d 3 (D.C. Cir. 2005).

[122] *Id*.

[123] 443 F.3d 880 (D.C. Cir. 2006).

[124] 42 U.S.C. § 7411(a)(4) (elec. 2006).

[125] *New York II*, 443 F.3d at 887.

[126] *Id*. at 888 (quoting Alabama Power Co. v. Costle, 636 F.2d 323, 400 (D.C. Cir. 1980)).

[127] *See infra* note 117 and accompanying discussion.

[i] The ERP Preamble: A New View

In the preamble that accompanied the final ERP rulemaking, EPA announced a new philosophical view toward its evaluation of replacements. EPA emphasized the importance of replacing equipment as vital for maintaining, restoring, or even enhancing safe, reliable operations:

> As we observed at the time of our RMRR proposal, we believe that most identical and functionally equivalent replacements are necessary for the safe, efficient and reliable operations of virtually all industrial operations; are not of regulatory concern; will improve air quality (e.g., by decreasing startup, shutdown, and malfunctions); and thus should qualify for the ERP under the RMRR exclusion. We believe industrial facilities are constructed with the understanding that certain equipment failures are common and ongoing maintenance programs that include replacing components in order to maintain, restore, or enhance the reliability, safety, and efficiency of a plant are routine. Conversely, delaying or foregoing maintenance could lead to failure of the production unit and may create or add to safety concerns.[128]

Importantly, EPA recognized that *routine* replacements (1) need not be identical, (2) might include replacements that take advantage of technological and design improvements, and (3) could lead to improvements in efficiency:

> We also believe that this principle extends beyond the replacement of equipment with identical equipment. When equipment is wearing out or breaks down, it often is replaced with equipment that serves the same purpose or function but is different in some respects or improved in some ways in comparison with the equipment that is removed.
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> . . . .
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> This is particularly true since technology is constantly changing and evolving. When equipment of this sort needs to be replaced, it often is simply not possible to find the old-style technology. Owners or operators may have no choice but to purchase and install equipment reflecting current design innovations. Even if it is possible to find old-style equipment, it seems unnecessary and undesirable to generally construe NSR permitting requirements in a manner that is bound to deter owners or operators from using the best equipment that suits the given need when replacements must be installed.
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> . . . .

[128] 68 Fed. Reg. 61,248, 61,252-53 (Oct. 27, 2003).

> We also believe, however, that we need not and should not treat efficiency as a basic design parameter as we do not believe NSR was intended to impede industry in making energy and process efficiency improvements.[129]

[ii] EPA's Adoption of the ERP Preamble as the Basis for Applying the "Four-Factor" Test

By themselves, and in light of the ultimate rejection of the 20% bright-line criterion by the *New York II* court, the preamble statements might not be considered as altering the implementation of the four-factor test. However, following the October 2003 ERP rulemaking and the D.C. Circuit's stay of the ERP rule in December 2003, top administrators of EPA's air program spoke to the applicability of the four-factor test apart from the ERP rulemaking.

Annually, the American Bar Association sponsors a half-day satellite seminar providing an update of EPA's implementation of major CAA programs. Among the topics addressed at the 2004 seminar was the status of the NSR reforms, including the ERP. Jeff Holmstead, EPA's Assistant Administrator for the Office of Air and Radiation, addressed determinations of whether a replacement was or was not routine given the stay that had been placed on the ERP:

> [T]he federal [ERP] rule has been stayed while the court looks at it so that is not being implemented either in delegated states or in SIP approved states but I think it is also important for people to understand that our basic legal view of the term "physical change" or "change in the method of operation" has changed and we have told that to the courts, we have told that to the world, and I think it is important for people to take that into account when they are working with their states. We . . . obviously aren't implementing the stayed regulation. *We are continuing to implement the famous four factor test but as we implement that we do think it is important that that be informed by our current view of the law*.[130]

While Assistant Administrator Holmstead did not specifically elaborate on EPA's "current view of the law" or otherwise reference the October 2003 preamble, his Chief Counsel Bill Wehrum did:

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[129] *Id.* at 61,253.

[130] Jeff Holmstead, EPA Ass't Adm'r, Off. of Air & Radiation (June 10, 2004) (comments made during the American Bar Association satellite seminar: *2004 Update Clean Air Act*) (emphasis added).

> With regard to routine maintenance, Jeff did make a comment in his remarks earlier today and . . . we have talked a good bit about this internally, I would elaborate just by saying in the final equipment replacement provision which clearly has been stayed by the DC Circuit and we in no way, shape or form are attempting to implement that regulation because of the stay. *But having said that, in the final regulation, we express a policy about how we think routine maintenance repair and replacement ought to be implemented under this program. We express a legal interpretation of how the rule that has been stayed could be accommodated under the statute and our belief is that the policy that was expressed and the legal interpretation that was expressed stand. So we have received and we will continue to receive specific applicability determinations during the pendency of the stay and during the pendency of the litigation and we are going to act on those applicability determinations as we always have and as we always will and when we act on them we are certainly going to apply the four factor test, that is the rule of the land right now. But when we apply the four factor test we are going to apply our best sense of the right policy and our best sense of the law when we do that.*[131]

[iii] Replacements Following *New York II*: Conclusion

Combining the preamble with the statements made by Messrs. Holmstead and Wehrum,[132] the four-factor test remains in place, but it appears that the test has been recalibrated such that determinations are to be made consistent with the policy and interpretation articulated in the October 2003 preamble. This suggests that under the four-factor test, more replacements will qualify as routine and NSR-exempt.

§ 6.04 Post-*Aviall* Jurisprudence

[1] Introduction

For more than 25 years, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),[133] has been a fixture of environmental law. Throughout its history, CERCLA has generated a wide variety of issues for the courts charged with interpreting its terms. The most recent development in CER-

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[131] William (Bill) Wehrum, EPA, Counsel to the Ass't Adm'r, Off. of Air & Radiation (June 10, 2004) (comments made during the American Bar Association satellite seminar: *2004 Update Clean Air Act*) (emphasis added).

[132] Since those statements were made, Holmstead resigned his position as the Assistant Administrator of the Office of Air and Radiation. Wehrum has been serving as the Acting Assistant Administrator since Holmstead's resignation.

[133] 42 U.S.C. §§ 9601-9675 (elec. 2006).

CLA jurisprudence, the Supreme Court's opinion in *Cooper Industries, Inc. v. Aviall Services, Inc.* (*Aviall*),[134] spawned a new generation of questions regarding the available remedies for parties seeking to recover their fair share of response costs from parties that are also responsible for contamination of the hazardous waste site.

This section charts the different courses taken by lower courts in resolving bases for CERCLA contribution jurisdiction. It also offers suggestions for practical cleanup planning in accordance with *Aviall* and lower court opinions. The broad range of CERCLA jurisdictional interpretations since *Aviall* leads to the conclusion that circuit court law specific to the location of a cleanup site will dictate cleanup planning until the Supreme Court resolves emerging divergences among district and appellate courts.

[2] CERCLA Cost Recovery and Contribution Claims Prior to *Aviall*

Congress enacted CERCLA to address threats to human health and the environment arising from releases of hazardous substances from active and abandoned hazardous waste sites across the United States.[135] CERCLA includes cleanup and cost recovery provisions, which hold potentially responsible parties (PRPs) strictly liable for response costs at hazardous waste sites.[136] In many cases, PRPs conduct cleanups "voluntarily"—without being subject to a civil action compelling cleanup—and seek to use CERCLA to recover some of their cleanup costs from other PRPs responsible for contamination of the site. Such claims are commonly called contribution claims.[137]

Prior to the 1986 Superfund Amendments and Reauthorization Act (SARA), which amended CERCLA to include an express contribution provision, courts held that an implied right of contribution and cost recovery existed under section 107(a).[138] With the

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[134] 543 U.S. 157 (2004).

[135] *See* United States v. Bestfoods, 524 U.S. 51, 55 (1998).

[136] *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 7 (1989).

[137] CERCLA contains two sections that form the basis for cost recovery and contribution claims, sections 107 and 113. *See* 42 U.S.C. §§ 9607 & 9613 (elec. 2006).

[138] *See, e.g.*, Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 892 (9th Cir. 1986) (holding district court erred in dismissing complaint brought under section 107(a)); Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27, 31 (E.D. Mo. 1985) (holding, in

passage of SARA and section 113, an express contribution provision was added to CERCLA. Section 113 included multiple subsections regarding contribution claims; however, section 113(f)(1) soon emerged as the preferred basis for contribution actions between PRPs. Section 113(f)(1) states:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.[139]

Prior to *Aviall*, PRPs commonly used section 113(f)(1) for contribution claims arising from voluntary cleanups regardless of whether there was an underlying civil action based on section 106 or section 107.[140]

[3] The *Aviall* Decision: What It Said and What It Did Not Say

In December 2004, the Supreme Court issued its opinion in *Aviall* and upended the commonly understood interpretation of section 113(f)(1) by holding that a PRP who voluntarily incurs

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an action brought under section 107, "this Court rules that CERCLA allows contribution among joint tortfeasors"); Pinole Point Props., Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 292 (N.D. Cal. 1984) (allowing PRP to proceed with a claim under section 107(a) for recovery of voluntarily incurred costs and declaratory relief).

[139] 42 U.S.C. § 9613(f)(1) (elec. 2006).

[140] *See* W. Props. Serv. Corp. v. Shell Oil Co., 358 F.3d 678, 683-84 (9th Cir. 2004) (holding that an owner of an environmentally contaminated site could bring a contribution action pursuant to CERCLA against other potentially responsible parties even if no abatement or cost recovery action had been brought against the owner); Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F.3d 677, 688-89 (5th Cir. 2002) (en banc), *rev'd & remanded*, 543 U.S. 157 (2004); Morrison Enters. v. McShares, Inc., 302 F.3d 1127, 1132-33 (10th Cir. 2002); Kalamazoo River Study Group v. Rockwell Int'l Corp., 274 F.3d 1043, 1046 (6th Cir. 2001); Crofton Ventures Ltd. P'ship. v. G & H P'ship, 258 F.3d 292, 300 (4th Cir. 2001); Bedford Affiliates v. Sills, 156 F.3d 416, 422-25 (2d Cir. 1998); PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, 613 (7th Cir. 1998); Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 932-936 (8th Cir. 1995).

cleanup costs does not have a right under that section to seek contribution from other parties.[141]

The *Aviall* case involved aircraft engine maintenance sites owned and operated first by Cooper Industries (Cooper), and subsequently by Aviall Services.[142] Several years after purchasing the sites from Cooper, Aviall Services discovered contamination in the properties' soil and groundwater. Aviall Services voluntarily elected to clean up the contamination, and in doing so, incurred approximately $5 million in costs.[143] Based on evidence that Cooper was partially responsible for the contamination, Aviall Services filed a CERCLA action, alleging in its amended complaint that it was entitled to contribution from Cooper under section 113(f)(1).[144]

The district court interpreted section 113(f)(1) as allowing a PRP to bring a contribution claim only during or following a suit under CERCLA sections 106 or 107(a).[145] Because it had not been subject to a section 106 or section 107(a) claim, the district court held that as a matter of law, Aviall Services could not obtain relief under section 113(f)(1).

The Fifth Circuit, sitting en banc, reversed.[146] The court reasoned that the first sentence of section 113(f)(1), which states that a person *may* seek contribution from a PRP "during or following" any civil action under CERCLA sections 106 or 107(a), should not be interpreted as creating a prerequisite to all contribution actions under section 113(f)(1).[147] Instead, the Fifth Circuit held that section 113(f)(1) set forth two causes of action, one in the section's first sentence and another in the section's last sentence.[148] The last sentence of section 113(f)(1) states: "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of

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[141] *See* Cooper Indus., Inc. v. Aviall Svcs., Inc., 543 U.S. 157, 161, 168 (2004).

[142] *Id.* at 163-64.

[143] *Id*.

[144] *Id*.

[145] *See* Aviall Services v. Cooper Indus., No. Civ. A. 397CV1926D, 2000 WL 31730, at *2 (N.D. Tex. 2000).

[146] *See* Aviall Svcs., Inc. v. Cooper Indus., Inc., 312 F.3d 677, 679 (5th Cir. 2001).

[147] *Id*. at 686.

[148] *Id.* at 687-90.

this title or section 9607 of this title."[149] The court interpreted this last sentence of 113(f)(1) as codifying the section 107(a) implied contribution claim that had been judicially recognized before the 1986 CERCLA amendments that added section 113.[150] Because the implied contribution right did not require as a prerequisite that a PRP be subject to a section 106 or section 107(a) claim, the Fifth Circuit held that likewise this contribution right, now codified in the final sentence of section 113(f)(1), did not demand that a PRP be sued under sections 106 or 107(a) before initiating a contribution action against other PRPs.[151]

The Supreme Court reversed the Fifth Circuit, holding that section 113(f)(1) allows contribution claims *only* after the party seeking contribution has been sued under sections 106 or 107(a).[152] Consistent with the district court's interpretation, the Supreme Court stated that the natural meaning of the word "may" in the first sentence of 113(f)(1) is that contribution claims may only be sought "during or following" a section 106 or 107(a) civil action.[153] The seven-member *Aviall* majority also held that the final sentence of 113(f)(1) did not itself create any separate cause of action for contribution and, instead, interpreted it as clarifying that section 113(f)(1) did not diminish any contribution action available to a PRP that may exist independent of section 113(f)(1).[154]

Significantly, the Court limited its analysis to section 113(f)(1) and explicitly declined to rule on PRP claims for (1) "an implied right of contribution under section 107," and (2) "a section 107 cost recovery action for some form of liability other than joint and several."[155] Additionally, the Court noted in dictum that "SARA also created a separate express right of contribution, § 113(f)(3)(B), for '[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the

[149] 42 U.S.C. § 9613(f)(1) (elec. 2006).
[150] *Aviall*, 312 F.3d at 687.
[151] *Id*.
[152] *Aviall*, 543 U.S. at 168.
[153] *Id*. at 166.
[154] *Id*. at 166-67.
[155] *Id*. at 169-71.

costs of such action in an administrative or judicially approved settlement.' "[156]

Thus through *Aviall*, the Supreme Court overturned a consistent body of appellate case law which previously held that a contribution action following voluntary cleanup need not require either an underlying enforcement action or a formal settlement with a state or EPA. This dramatically changed judicial interpretation of subject matter jurisdiction for CERCLA contribution actions, and has especially far reaching implications for cost recovery options under CERCLA for PRPs conducting voluntary cleanups.

[4] Post-*Aviall* Alternatives for PRPs Seeking Contribution or Cost Recovery for Voluntary Cleanups

The Supreme Court's "clarification" of contribution claims under section 113(f)(1) in *Aviall* quickly created confusion as courts began to adjudicate claims for contribution or partial cost recovery under various alternative theories. Moreover, some district courts found creative alternatives or previously seldom used alternatives to resuscitate voluntary cleanups and contribution jurisdiction under CERCLA. Since the *Aviall* decision, four primary types of potential private party contribution or cost recovery claims have been evaluated by the courts.

First, section 113(f)(1) remains a basis for contribution claims for those plaintiffs that qualify. However, only those plaintiffs that have themselves been subject to a claim under section 106 or 107 will qualify. This creates obvious conflicts with "voluntary" cleanups which, by definition, do not normally involve litigation. Courts have been exploring the interstices of exactly what constitutes an underlying civil action for purposes of satisfying *Aviall* and section 113(f)(1).

Second, as *Aviall* also noted, section 113(f)(3)(B) provides a right of contribution for parties that have resolved their CERCLA liability with a state or the federal government. Some courts are flexible in what constitutes such a settlement, while others limit this alternative by tightening the requirements that a section

[156] *Id.* at 163.

113(f)(3)(B) settlement must satisfy in order to serve as the basis for a contribution claim.

Third, some courts returned to CERCLA precedent established prior to SARA and held that section 107(a) implies a right for private party contribution claims. District courts are divided on this issue; however, in dictum, the Supreme Court expressed general disfavor for implying contribution claims that are not expressly stated in statutory language.

Fourth, a small number of courts have held that section 107(a)(4)(B) expressly provides for cost recovery claims seeking several (or proportionate) liability for response costs. Case law on this particular claim is still relatively undeveloped and most post-*Aviall* litigation has focused on one or more of the first three alternatives.

[a] Section 113(f)(1)—What Remains After *Aviall*?

Aviall stated unequivocally that an underlying civil action must be filed against the contribution plaintiff under section 106 or section 107 for a contribution claim to arise under section 113(f)(1). This appears to be a simple, straightforward holding, but in reality it can be difficult to achieve in a "voluntary" cleanup, the purpose of which is to accomplish cleanup objectives while avoiding the degree of conflict that results from a "civil action." Furthermore, *Aviall* did not provide any meaningful explanation of exactly what qualifies as a civil action in these circumstances. In an effort to preserve their contribution claims, plaintiffs have argued that a variety of administrative proceedings qualify as a civil action.

CERCLA section 106 authorizes EPA to issue administrative orders compelling parties to clean up hazardous waste sites. These orders may be issued unilaterally by EPA, in a unilateral administrative order (UAO), or negotiated with PRPs as an administrative order on consent (AOC). EPA commonly uses UAOs and AOCs to govern cleanups. State agencies often also use equivalent administrative orders. In *Aviall*, no UAO or AOC had been issued and the Supreme Court declined to decide whether any such order qualifies as a civil action under sections 106 or 107.[157] To date, district courts

[157] *Id*. at 168 n.5.

have declined to hold that either a UAO or an AOC issued under section 106 qualifies as a civil action for purposes of making a section 113(f)(1) contribution claim.[158] Thus, presently, for purposes of triggering a contribution claim under section 113(f)(1), a civil action under sections 106 or 107 must occur in a judicial forum, not an administrative proceeding.

Although administrative proceedings do not satisfy *Aviall*, it appears that a disputed section 107 claim by one PRP against another can serve as a basis for section 113(f)(1) contribution claims. For instance, in *R.E. Goodson Construction Co. v. International Paper Co.*,[159] the plaintiff claimed it was an "innocent landowner," a CERCLA defense that entitled it to pursue other PRPs for joint and several liability under section 107. The plaintiff's innocent landowner status was vigorously disputed in a summary judgment motion; however, the court held that factual disputes precluded it from ruling as a matter of law that the plaintiff did not qualify as an innocent landowner. The court went on to hold that the plaintiff's section 107 claim served as a basis for one defendant's cross-claim for contribution under section 113(f)(1) against another defendant.[160] Thus, although the merits of the underlying section 107 claim may be highly debatable, it may still trigger a contribution claim under section 113(f)(1) in some circumstances.

[b] CERCLA Section 113(f)(3)(B)—Settlement with a State or the Federal Government as the Basis for a Contribution Claim

Settlements under section 113(f)(3)(B) are the second basis for contribution actions that the Supreme Court recognized in *Aviall*. The Court noted in dictum in *Aviall* that contribution claims can also arise under section 113(f)(3)(B) if the claimant has resolved some or all of its liability to a state or the federal govern-

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[158] *See* Pharmacia Corp. v. Clayton Chem. Acquisition, LLC, 382 F. Supp. 2d 1079, 1086-91 (S.D. Ill. 2005) (holding that "civil action" requires a judicial proceeding, not an administrative process that leads to issuance of an administrative order); *but see* Montville Twp. v. Woodmont Builders, LLC, No. Civ. A. 03-2680DRD, 2005 WL 2000204, at *12-13 (D.N.J. 2005) (holding that a memorandum of agreement with the state regarding cleanup did not constitute a civil action under section 106, but basing its holding partly on the absence of a threatened enforcement action).

[159] No. 4:02-4184-27, 2005 WL 2614927 (D. S.C. Oct. 13, 2005).

[160] *Id.* at *39.

ment.[161] Section 113(f)(3)(B) states in relevant part: "A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution."[162] This leads to the issue of what type of settlement is required to meet these criteria.

[i] Courts Are Split Regarding the Necessary Elements for a Settlement Under Section 113(f)(3)(B)

There has been a split among courts in determining the necessary elements required for a settlement to permit a contribution claim under section 113(f)(3)(B). Some courts have taken an approach that facilitates contribution claims, while others have concluded that this section creates difficult hurdles for parties seeking to both resolve liability during a voluntary cleanup and facilitate a subsequent contribution action under section 113(f)(3)(B). The limited case law on this issue does not articulate any particular required terms in a settlement agreement between a PRP and a state or the United States.

Courts taking the more permissive approach focus on the plain language of section 113(f)(3)(B), which simply requires a party to resolve some of its liability in a judicial or administrative settlement with the state or federal government.[163] These courts have held that a liberal interpretation of what constitutes a settlement is appropriate because "[a]s a broad remedial statute, CERCLA should be given a liberal construction in order to effect its purposes of 'assuring that those responsible for environmental damage and injury from hazardous substances bear the costs

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[161] *Aviall*, 543 U.S. at 163.

[162] 42 U.S.C. § 9613(f)(3)(B) (elec. 2006).

[163] *See, e.g.*, Fireman's Fund Ins. Co. v. City of Lodi, 296 F. Supp. 2d 1197, 1212 (E.D. Cal. 2003) (holding a cooperative agreement between the city and the state constituted an "administrative settlement" under § 113(f)(3)(B) where the city had resolved its liability to the state for some of the city's response costs); Pfohl Bros. Landfill Site Steering Comm. v. Allied Waste Sys., Inc., 255 F. Supp. 2d 134, 154-55 (W.D.N.Y. 2003) (holding that orders of consent requiring PRP to reimburse the state for past response costs and for expected future costs qualified as administrative settlements under CERCLA § 113(f)(3)(B)).

of their actions.' "[164] Courts addressing this issue post-*Aviall* have also held that an agreement between a PRP and a state qualifies as an "administrative settlement" if the agreement specifically states that it is a settlement of the PRP's CERCLA liability to the state.[165]

However, other courts analyzing this issue post-*Aviall* have made harder, "defense-oriented" interpretations that narrowly interpret settlements and AOCs. These courts have looked beyond the language of section 113(f)(3)(B) and required satisfaction of section 122(g) elements, such as an EPA-state memorandum of understanding, or EPA approval of the settlement, or judicial entry of a consent decree.[166]

[ii] Structuring Cleanup Agreements to Satisfy *Aviall*

Recognizing the ambiguity created by *Aviall*, the EPA and the U.S. Department of Justice (DOJ) have issued guidance for CERCLA settlement documentation to clarify settling parties' contribution rights under section 113(f).[167] These revisions are intended to qualify an AOC as a "settlement" for purposes of section 113(f)(3)(B)).

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[164] *Pfohl*, 255 F. Supp. 2d at 148 (quoting B.F. Goodrich v. Betkoski, 99 F.3d 505, 513 (2d Cir. 1996) (citing S. Rep. 848, 96th Cong., 2d Sess. 13 (1980)).

[165] *See, e.g.*, Benderson Dev. Co. v. Neumade Prods. Corp., No. 98-CV-0241SR, 2005 WL 1397013, at *12 (W.D.N.Y. June 13, 2005) (finding that plaintiff had settled with the state where the Order on Consent specifically stated that " 'the provisions of 42 U.S.C. § 9613(f)(3) shall apply' "); United States v. Jagiella, No. 87 C 1406, 1991 WL 78171, at *2-3, (N.D. Ill. May 2, 1991) (denying motion to dismiss a § 113(f)(3)(B) claim where settlement between plaintiff and the state contained unequivocal language that it resolved plaintiff's CERCLA liability to the state).

[166] *See* ASARCO, Inc. v. Union Pac. R.R. Co., No. CV 04-2144-PHX-SRB, 2006 WL 173662 (D. Ariz. Jan. 24, 2006) (holding that in order for a PRP to settle its CERCLA liability with a state, the federal government must explicitly delegate the authority to settle CERCLA liability to the state, or the settlement must be a judicially entered consent decree); s*ee also* W.R. Grace & Co. v. Zotros Int'l, Inc., No. 98-CV-838S(F), 2005 WL 1076117, at *7 (W.D.N.Y. May 3, 2005) (holding that in order for a PRP to settle its CERCLA liability with a state, the federal government must explicitly delegate the authority to settle CERCLA liability to the state).

[167] *See* EPA, Interim Revisions to CERCLA Removal, RI/FS and RD AOC Models to Clarify Contribution Rights and Protection Under Section 113(f) (Aug. 3, 2005) [hereinafter EPA/DOJ Guidance].

This guidance provides revisions to the language used in the model settlement agreements intended to resolve CERCLA liability with the federal government. Some of the revisions proposed by the EPA/DOJ Guidance are simply wording changes to address questions raised in cases such as *Pharmacia Corp. v. Clayton Chemical Acquisitions LLC*.[168] The guidance also proposes changes to model AOC provisions regarding EPA's covenant not to sue and the protection against contribution actions. These changes have not yet been judicially tested; however, they would likely serve as clear evidence that the AOC was intended to resolve liability for purposes of section 113(f)(3)(B).

One side effect of *Aviall* will likely be that the time and resources necessary to negotiate and document settlements for the purpose of satisfying section 113(f)(3)(B) may strain the ability of state and federal regulators to accomplish cleanups within the confines of current voluntary cleanup programs (VCP). Many state VCPs are truly "voluntary" and participants can terminate the agreement during the cleanup process.[169] Additionally, some of these programs do not include provisions for releases of liability and covenants not to sue. It may be a stretch to require inclusion of such provisions in voluntary agreements. Finally, state VCPs also rarely include EPA participation in any agreements or "settlements," leading to potential problems if courts continue to follow the rationale of the *Zotros* decision discussed above.

Notwithstanding these complications, section 113(f)(3(B)-worthy settlements present a relatively straightforward cleanup and contribution approach that is recognized in *Aviall* dictum.

[c] Section 107(a) Implied Contribution Claims

In *Aviall*, the Supreme Court also identified, but declined to rule on, "an implied right of contribution under § 107."[170] Implied contribution was also recognized by the Supreme Court in dicta in *Key Tronic Corp. v. United States*,[171] stating that CERCLA "expressly authorizes a cause of action for contribution in Section 113

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[168] 382 F. Supp. 2d 1079, 1084-85 (S.D. Ill. 2005).

[169] *See, e.g.*, Utah Code Ann. § 19-8-109(1) (elec. 2006) (allowing for either the state or the VCP participant to cancel the cleanup agreement with 15 days' notice).

[170] Cooper Indus., Inc. v. Aviall Svcs, Inc., 543 U.S. 157, 170-71 (2004).

[171] 511 U.S. 809 (1994).

and impliedly authorizes a similar and somewhat overlapping remedy in Section 107."[172] However, in *Aviall*, the Supreme Court expressed skepticism about the validity of implied contribution in light of its negative treatment of arguments for implied contribution under unrelated statutes in *Texas Industries, Inc. v. Radcliff Materials, Inc.*[173] and *Northwest Airlines, Inc. v. Transport Workers Union of America*.[174] Implied contribution under section 107(a) may possibly be distinguished from *Texas Industries* and *Northwest Airlines* on the grounds that Congress recognized implied contribution under section 107(a) when it subsequently enacted the contribution provisions in section 113 as part of SARA in 1986.[175]

Prior to *Aviall*, courts have interpreted the legislative history of CERCLA noting that "[t]he legislative history behind § 113(f) also supports the conclusion that, in enacting that provision, Congress was only confirming and clarifying an existing claim for contribution under § 107."[176] Various district courts analyzing this issue after *Aviall* have used similar logic and recognized implied contribution claims under section 107.[177] However, this recognition is

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[172] *Id*. at 814-15 & 816 n.7.

[173] 451 U.S. 630, 638-47 (1981).

[174] 451 U.S. 77, 90-99 (1981).

[175] It is also worth noting that six of the nine currently-sitting Supreme Court justices have previously expressed support for contribution under section 107: Justices Ginsberg and Stevens supporting implied contribution in both *Aviall* and *Key Tronic*; Justices Kennedy and Souter supporting implied contribution in *Key Tronic*; and Justices Scalia and Thomas stating in *Key Tronic* that section 107 *expressly* provides for private party contribution in the context of recovering attorneys fees. *See Aviall*, 543 U.S. at 159; *Key Tronic*, 511 U.S. at 811.

[176] Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301 (9th Cir. 1997) (citing H.R. Rep. No. 99-253, pt. 3, at 18-19 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3041 (section 113 "clarifies the availability of judicial review regarding contribution claims") and S. Rep. No. 99-111, at 43 (1985) (bill "clarifies and confirms existing law" by adding contribution provision)).

[177] *See, e.g.*, Metro. Water Reclamation Dist. v. Lake River Corp., 365 F. Supp. 2d 913 (N.D. Ill. 2005); City of New York v. N.Y. Cross Harbor R.R. Terminal Corp., No. 98CV7227 ARRRML, 2006 WL 140555 (E.D.N.Y. Jan. 17, 2006); McDonald v. Sun Oil Co., 423 F. Supp. 2d 1114, 1133 (D. Or. 2006) (holding that "[w]hen a plaintiff falls outside the technical requirements of § 113, the contribution claim is allowed under § 107, and the mechanics of apportionment are governed by the factors established in § 113"). The district courts within the Ninth Circuit have provided the most consistent support for implied contribution under § 107. As of the date of this article, eight out of nine courts have ruled that a plaintiff may pursue a § 107(a) implied contribution claim independent of a § 113(f) contribution claim. *See* Kotrous v. Goss-Jewett Co. of N. Cal., Inc., No. Civ. S02-1520 FCD JFM, 2005 WL

not universal, and other district courts have refused to recognize implied contribution claims under section 107.[178]

The Second Circuit is the only court of appeals to address this issue so far. In *Consolidated Edison Co. v. UGI Utilities, Inc.* (*Con Ed*),[179] the court held that PRPs were permitted to seek contribution under section 107(a) if they incurred costs "voluntarily" and were not compelled to perform such cleanups pursuant to administrative orders. *Con Ed*'s "voluntary" criteria for implied contribution under section 107(a) was necessary to distinguish *Bedford Affiliates v. Sills*,[180] which held that a party performing cleanup pursuant to two consent orders was limited to contribution under section 113.[181] Considering the divergent opinions among district courts on implied contribution under section 107 and the uncertainty of how appellate courts and the Supreme Court may interpret such claims, it is a very high risk strategy to rely upon implied contribution as a means of recovering CERCLA response costs for a voluntary cleanup.

1417152, at *3 (E.D. Cal. June 16, 2005); Adobe Lumber, Inc. v. Taecker, No. CV S02-186 GEB GGH, 2005 WL 1367065, at *1 (E.D. Cal. May 24, 2005); Ferguson v. Arcata Redwood Co, LLC, No. C 03-05632SI, 2005 WL 1869445, at *6 (N.D. Cal. Aug. 5, 2005); Aggio v. Aggio, No. C 04-4357 PJH, 2005 WL 2277037, at *5 (N.D. Cal. Sept. 19, 2005); Adobe Lumber, Inc. v. Hellman, 415 F. Supp. 2d 1070, 1079 (E.D. Cal. 2006); Otay Land Co. v. U.E. Ltd., No. 03CV2488 BEN (POR) (S.D. Cal., Sept. 20, 2005); Universal Paragon Corp. v. Ingersoll-Rand Co., No. C05-03100 MJJ (N.D. Cal., Nov. 22, 2005); *but see* City of Rialto v. United States, 2005 U.S. Dist. LEXIS 26941, at *17 (C.D. Cal. Aug. 16, 2005).

[178] *See, e.g., City of Rialto*, LEXIS 26941, at *17 (holding that PRPs may only seek contribution under the combined effects of section 107(a) and section 113(f)); Mercury Mall Assocs. v. Nick's Mkt., Inc., 368 F. Supp. 2d 513 (E.D. Va. 2005); City of Waukesha v. Viacom Int'l Inc., 362 F. Supp. 2d 1025 (E.D. Wis. 2005).

[179] 423 F.3d 90 (2d Cir. 2005), *petition for cert. filed,* No. 05-1323 (Apr. 14, 2006). In addition to the possibility that the Supreme Court will grant certiorari and address implied contribution under § 107(a), this issue will also be addressed by at least three additional courts of appeals in the near future. Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings Inc., No. 05-3299 (7th Cir.); Atlantic Research Corp. v. United States, No. 05-3152 (8th Cir.); City of Rialto v. Dep't of Defense, No. 05-56749 (9th Cir.); Kotrous v. Goss-Jewett Co., No. 06-15162 (9th Cir.).

[180] 156 F.3d 416 (2d Cir. 1998).

[181] *See Con Ed*, 423 F.3d at 100-01.

[d] Section 107(a)(4)(B)—Several (or Proportionate) Cost Recovery

Aviall also recognized the potential for "a § 107 cost recovery action for some form of liability other than joint and several."[182] In the wake of *Aviall*, a few courts examining claims for contribution under section 107(a) have held that the plain language of section 107(a)(4)(B) provides PRPs with a right to recover proportional response costs against other PRPs.[183] In *Viacom, Inc. v. United States*, for instance, the court denied a motion to dismiss the plaintiff's section 107 cost recovery claim, holding that the plain language of section 107(a)(4)(B) allowed PRPs to recover costs from other PRPs. The court noted that

> [t]he statute explicitly permits recovery of "any other necessary costs of response incurred by *any other person* consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B) (emphasis added). Thus, a plain reading of § 107 shows that anyone—whether a PRP or not—may sue thereunder to recover its response costs.[184]

Similarly, after *Aviall* the Second Circuit considered the plain language of section 107(a)(4)(B) and determined that a PRP could recover cleanup costs from other PRPs because "[s]ection 107(a) makes its cost recovery remedy available, in quite simple language, to *any* person that has incurred necessary costs of response, and nowhere does the plain language of section 107(a) require that the party seeking necessary costs of response be innocent of wrongdoing."[185]

Thus, while *Aviall* clarified the boundaries of section 113(f)(1), some courts have held that the Supreme Court did not construe Congress's clear intent, expressed in section 107(a)(4)(B), that any person, including PRPs, may be held liable for cleanup costs.

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[182] *Aviall*, 543 U.S. at 169-70.

[183] *See* Viacom, Inc. v. United States, 404 F. Supp. 2d 3 (D.D.C. 2005); *see also Con Ed*, 423 F.3d at 99.

[184] *Viacom*, 404 F. Supp. 2d at 7. *See also* Vine Street LLC v. Keeling, 362 F. Supp. 2d 754, 763 (E.D. Tex. 2005) (holding that a potentially responsible party that voluntarily works with a government agency to remedy environmentally contaminated property can bring a claim under section 107(a)(4)(B) and "should not have to wait to be sued to recover cleanup costs since Section 113(f)(1) is not meant to be the only way to recover cleanup costs").

[185] *Con Ed*, 423 F.3d at 100.

However, claims for several (or proportionate) cost recovery under section 107(a)(4) are relatively uncommon and many courts tend to merge such claims with claims for implied contribution.[186]

[5] What *Aviall* Means for Private Party Cleanups and Cost Recovery

In the aftermath of *Aviall*, private parties, as well as state and federal regulators, find themselves in the midst of a policy crisis. Congress encouraged voluntary cleanups under CERCLA and courts previously interpreted this to mean action. "A CERCLA regime which rewards indifference to environmental hazards and discourages voluntary efforts at waste cleanup cannot be what Congress had in mind."[187] *Aviall*, however, potentially hinders administrative agencies with enforcement and settlement demands to meet *Aviall* jurisdictional requirements. The Supreme Court created a new necessity for private parties to obtain adequate settlement or wait for an enforcement action under sections 106 or 107 to obtain jurisdiction. This implicitly creates a dilemma for environmental agencies, which must determine how to revise priorities or risk discouraging voluntary cleanups.

Recovering private cleanup costs as a PRP is more complicated than it was prior to *Aviall*. Considering the limitations and risks associated with each of the four primary types of contribution or cost recovery strategies discussed above, the most conservative option is to obtain a settlement with the state or federal government that includes covenants and releases sufficient to satisfy section 113(f)(3)(B). This will require additional time and resources for all parties involved to ensure any such settlements satisfy jurisdictional requirements. Case law will undoubtedly continue to develop in this area and better establish what is necessary for parties to resolve their liability and pursue a contribution claim to help pay for a voluntary cleanup.

Aviall has also placed increased importance on the Brownfield liability relief provisions enacted in 2002.[188] Under those provisions, if a purchaser of property performs all appropriate inquiries and exercises appropriate care with respect to envi-

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[186] *Id*. at 99.

[187] Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 845-46 (4th Cir. 1992).

[188] 42 U.S.C. § 9607 (elec. 2006).

ronmental conditions at the property, that purchaser can qualify as a bona fide prospective purchaser (BFPP).[189] BFPPs are exempt from liability as PRPs, despite owning contaminated property.[190] Accordingly, a BFPP is not subject to the contribution limitations imposed by *Aviall* because the BFPP can pursue PRPs for joint and several liability under section 107.

Aviall created a significant and needless crisis in CERCLA cleanup incentives and upended well-established contribution law. The literal reasoning of *Aviall* ignored widely acknowledged CERCLA policies and practical realities of remediating properties and providing cost recovery options for those parties voluntarily stepping up to the task. As a result, the scope of section 113(f)(1) appears to be narrowly limited to situations when a lawsuit has been filed. Implied contribution has been treated unevenly at the district court level, and with several circuit courts considering the issue and a petition for certiorari pending at the Supreme Court, little security can be derived from such a claim. A small number of courts have been creative and recognized several contributions under the plain language section 107(a)(4); however, there have been relatively few such cases. Accordingly, section 113(f)(3)(B) appears to be the most viable option; however, some courts have exceeded the literal application of section 113(f)(3)(B), which simply requires that a party resolve "some or all" of its CERCLA liability with a state or federal government, and have required an EPA or judicially approved settlement to satisfy section 113(f)(3)(B).

Practical planning for a private cleanup and cost recovery is likely best served by seeking a settlement that satisfies section 113(f)(3)(B). If one is working within a state VCP, it will likely be necessary to include additional language in the standard VCP agreement to assure subject jurisdiction. For example, the agreement should acknowledge that it constitutes a settlement for resolving CERCLA response actions and costs, and should include releases and covenants along with a binding agreement to perform the necessary remedies.

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[189] *See* 42 U.S.C. § 9607(r) (elec. 2006).

[190] *Id.*

§ 6.05 Conclusion

Both the Supreme Court and the federal courts of appeals have attempted to clarify clean water, clean air, and cleanup law. The Supreme Court's recent forays into clean water and cleanup law were generally unsuccessful in clarifying the legal issues. The *Rapanos* decisions, by no other criterion than the absence of a majority opinion, portend additional rulemaking and appellate litigation to define the reach of jurisdictional waters. *Aviall*—a Supreme Court excursion into CERCLA contribution jurisprudence in the absence of appellate court conflict—creates new hurdles for contribution plaintiffs and challenges for state voluntary cleanup programs, but does little if anything to advance the statute's underlying purposes of effectuating site cleanup and equitable cost sharing. In the clean air arena, federal appeals court decisions have been somewhat more definitive, with the Second Circuit holding in *NYPIRG* that a state-issued NOV is sufficient to demonstrate noncompliance for Title V purposes; the Eleventh Circuit upholding the validity of a SIP-approved exception for excess emissions that occur during periods of startups, shutdowns, and malfunctions; and the D.C. Circuit striking down the bright-line applicability test contained in EPA's ERP. However, these decisions leave several questions unanswered. Furthermore, the Supreme Court's grant of certiorari in the global warming and new source review cases creates hopes of substantive clarification, but these cases may as easily be decided as administrative law cases as Clean Air Act cases. Thus, in all three areas of environmental law, the courts' attempts to clarify the law have generated more unanswered questions.