

*CARSON HARBOR VILLAGE, LTD. v. UNOCAL
CORPORATION: IS IGNORANCE BLISS FOR POTENTIALLY
RESPONSIBLE PARTIES UNDER CERCLA?*

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I. INTRODUCTION

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) is the vehicle through which the federal government recovers money spent cleaning up Superfund sites. Superfund sites include some of the largest chemical cleanups in the United States, and few entities are willing to compensate the government for these costly projects. When parties are forced to pay for a cleanup, they generally seek contribution, if not indemnity, from other entities. This scenario plays out repeatedly under CERCLA. Recently, the Ninth Circuit Court of Appeals addressed this situation in *Carson Harbor Vill., Ltd. v. Unocal Corp.*, where it was asked to determine a third party's duty under CERCLA to contribute to clean-up costs based solely on past ownership of contaminated property despite not having contributed affirmatively to the contamination.

II. THE CASE

A. *Background*

Carson Harbor concerns a wetland that was owned or controlled by three entities. Unocal Corporation (Unocal) held a leasehold interest in the land from 1945 to 1983.¹ Carson Harbor Village Mobile Home Park, a Partnership operated by two defendants, Braley and Smith ("the Partnership") owned the land from 1977 to 1983.² Carson Harbor Village, Ltd. ("Carson") took over the land in 1983, and discovered hazardous substances on the property in 1993.³ An environmental consultant's assessment determined that the contaminants were petroleum production by-products containing petroleum hydrocarbons and lead.⁴ Because the hazardous materials affected a nearby water supply, the consultant reported the contamination to the Regional Water Quality Control Board

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¹ *Carson Harbor*, 270 F.3d 863, 868 (9th Cir. 2001).

² *Id.*

³ *Id.*

⁴ *Id.*

(RWQCB).⁵ Thereafter, Carson sought a “no-further-action” letter from RWQCB and submitted a remedial action plan (RAP) in support of its request.⁶ RWQCB approved the RAP but required a lower contaminant level than Carson proposed.⁷ Carson complied with the condition and cleaned up the affected area at a cost of approximately \$285,000.⁸

B. *Procedural Posture*⁹

Carson sued the Partnership for costs of cleanup and other relief under CERCLA.¹⁰ The parties then filed cross-motions for summary judgment.¹¹ The district court ruled in favor of the Partnership and granted summary judgment.¹² Thereafter, the Ninth Circuit reviewed the district court’s decision,¹³ and affirmed the grant.¹⁴ The Ninth Circuit grounded its decision on its determination that the Partnership was not within the scope of the definition of potentially responsible parties (PRPs) under CERCLA due to the cause of the contamination.¹⁵

C. *CERCLA*

CERCLA imposes strict liability on PRPs, which include “the owner or operator of a vessel or a facility” and a “person who at the time of disposal of any hazardous substance owned or operated any facility at which hazardous substances were disposed of.”¹⁶ Since the contamination was not thought to be the result of any affirmative action by any of the parties, the Ninth Circuit had to address whether a pollutant that settled following passive soil migration could be considered “disposed” within the meaning of the statute.¹⁷ If so, the Partnership would be liable under CERCLA by virtue of having owned a property at which hazardous substances were “disposed.”

⁵ *Id.*

⁶ *Id.* at 868-69.

⁷ *Id.* at 869.

⁸ *Id.*

⁹ Although Carson sued several defendants under multiple theories of recovery, this analysis focuses only on Carson’s CERCLA claim against the Partnership.

¹⁰ *Carson Harbor*, 270 F.3d at 869.

¹¹ *See Carson Harbor Vill., Ltd. v. Unocal Corp.*, 990 F. Supp. 1188, 1199 (C.D. Cal 1997).

¹² *Id.*

¹³ *See generally Carson Harbor*, 270 F.3d 863.

¹⁴ *Id.* at 888.

¹⁵ *Id.* at 887.

¹⁶ 42 U.S.C. § 9607(a)(1)-(2) (1994).

¹⁷ *Carson Harbor*, 270 F.3d at 874.

D. *The Ninth Circuit's Analysis under CERCLA*

Until this case, the Ninth Circuit had not ruled on the issue of whether "disposal" incorporates passive migration of hazardous substances under CERCLA.¹⁸ The other circuit courts had taken a variety of approaches and "the dichotomy of a classic circuit court split" did not exist.¹⁹ Rather, the court determined that the outcome of each case depended largely on the facts of each case concerning how the contaminant reached the site at issue.²⁰

Thus lacking clear guidance from the other circuit courts, the Ninth Circuit began its analysis with an examination of the plain meaning of CERCLA.²¹ CERCLA defines "disposal" as "discharge, deposit, injection, dumping, spilling, leaking, or placing of solid or hazardous waste."²² After examining each of the words in the statutory definition of "disposal," the Ninth Circuit found that none of the terms listed encompass the "gradual spread" at issue in the case.²³ Therefore, the Ninth Circuit concluded that passive soil migration does not constitute disposal under the plain meaning of the statute.²⁴

To reinforce this conclusion, the Ninth Circuit looked to Congress's general intent in enacting CERCLA, and found two purposes: ensuring prompt cleanup of contaminated sites, and ensuring that responsible parties bear the cost of cleanup.²⁵ After determining that a definition of disposal that excluded passive soil migration²⁶ would not undermine these dual purposes of CERCLA, the Ninth Circuit further determined that this interpretation was consistent with the statute as a whole and with the legislative histories of CERCLA and the Superfund Amendments and Reauthorization Act (SARA).²⁷

E. *The Dissent*

The dissent argued that the plain meaning of "disposal" should reflect contemporary or common usage.²⁸ This common meaning analysis is appropriate when Congress has not indicated a specific meaning for

¹⁸ *Id.* at 875.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 876.

²² *Id.* at 875; *See also* 42 U.S.C. § 6903(3) (1994).

²³ *Id.* at 879.

²⁴ *Id.*

²⁵ *Id.* at 880.

²⁶ The Ninth Circuit did note that "disposal" may encompass other forms of passive migration. *Id.*

²⁷ *Id.* at 880-88.

²⁸ *Id.* at 890 (Fletcher, J. dissenting).

the words in a statute as they have here.²⁹ Because Congress has defined what “disposal” is to mean within CERCLA, the correct analysis is whether the facts of the case fit within the definition of any of the terms set forth. The majority’s analysis and conclusion, that “disposal” did not incorporate passive soil migration, are correct.

III. POTENTIAL PUBLIC POLICY IMPLICATIONS OF *CARSON HARBOR*

Looking at *Carson Harbor* from a policy perspective, is the policy precedent beneficial to society? Is the result in *Carson Harbor* what CERCLA intended? What happened to Carson seems to be a simple case of bad timing; Carson happened to own the land when the contaminants were discovered. The Partnership did nothing to contribute to the existence of the contaminants in the soil. Carson did just as much, or just as little, as the Partnership to contribute to the existence of the contaminants in the soil. Yet, Carson was liable simply because it owned the land, not at the time that the soil was contaminated, but at the time that the contaminants were discovered. At first glance, it would seem, as the dissent argues, that this case sets a bad policy precedent: that it’s better to simply not find out if the land you own is contaminated, or sell it before you do, because once you do you will be held strictly liable.³⁰ In other words, ignorance seems to have been bliss for the Partnership.

Upon further examination, however, the policy precedent set by this case is arguably a good one. Theoretically, if the Partnership had tested the soil before it purchased the property, the Partnership could have avoided liability.³¹ Carson also could have tested the soil before purchasing the property and thereby avoid liability easily as well. The precedent, then, is one that encourages purchasers of land to investigate carefully the condition of land before assuming ownership. This precedent, in turn, benefits society by promoting responsible and informed buying and selling of land. With time this will assure that only active depositors of hazardous waste liable for clean up under CERCLA.

Furthermore, this result appears to be what Congress intended in enacting CERCLA. The dissent and majority disagree as to the purpose

²⁹ See *Williams v. Taylor*, 529 U.S. 420, 431, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000) (“We give the words of a statute their ordinary, contemporary, common meaning, *absent an indication Congress intended them to bear some different import*”) (emphasis added). See also 42 U.S.C. § 6903(3) (1994) (defining “disposal” under CERCLA).

³⁰ See *Carson Harbor*, 270 F.3d at 892 (Fletcher, J., dissenting).

³¹ The Partnership purchased the land in 1977. CERCLA was enacted in 1980. The proposition asserted, that the Partnership could have avoided CERCLA liability through inspection, is applicable only to situations similar to the Partnership’s occurring after the enactment of CERCLA.

of CERCLA.³² But this much they do agree on: CERCLA was meant to facilitate the quick and successful cleanup of hazardous waste.” This goal is achieved under the ruling in *Carson Harbor* since the contaminants were cleaned up, regardless of which party ended up paying for it.

The dissent in the case argues that this decision will enable parties like the Partnership to sell property knowing that it may contain contaminants and thereby avoid CERCLA liability. It may be true that parties will be able to evade CERCLA liability, but this does not mean there will be no one to bear the cleanup cost. This gap is filled by contract law.³³ Fraud in the inducement would apply to this situation as it is likely that Carson would not have purchased the property if they knew that they would be spending \$285,000 to clean it up. At the very least the negotiated price would have reflected the cleanup cost. The Partnership, and entities in similar positions, are not likely to evade liability all together.

The dissent does have a valid argument under what it claims is the second aim of CERCLA: “to assure that that parties responsible for hazardous substances [bear] the costs of remedying the conditions they created.”³⁴ The dissent points out that the only difference between the Partnership and Carson is that during the Partnership’s ownership of the property, Unocal was actively engaging in petroleum production.³⁵ Not only does this mean the Partnership should have suspected the contamination of the property, but it also opens the possibility that during the time that they owned the property that the contaminants were actively deposited into the soil. This issue is not addressed by the majority. However, as discussed above, the Partnership could not avoid all liability under the fraud in the inducement analysis.³⁶ Moreover, even though

³² The majority says that “CERCLA was enacted to protect and preserve public health and the environment by facilitating the expeditious and efficient cleanup or hazardous waste sites.” *Carson*, 270 F.3d at 880. (quoting *Pritikin v. Dept. of Energy*, 254 F.3d 791, 794-795 (9th Cir. 2001)). The dissent argues that CERCLA was enacted “to ensure the prompt and effective cleanup of waste of disposal sites, and to ensure that parties responsible for hazardous substances [bear] the cost of remedying the conditions they created.” *Id.* at 890-91 (quoting *Pinal Creek Group v. Newmont Mining Corp.* 118 F.3d 1298, 1300 (9th Cir. 2001)) (Fletcher, J. dissenting).

³³ See *Cont’l Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1526 (9th Cir. 1987) (holding that a defrauded party in California may “rescind his contract, seek consequential damages for fraud, or both”). See also *Carpenters Health and Welfare Trust Fund for California v. Bla-Delco Constr., Inc.*, 8 F.3d 1365, 1369 n.3 (9th Cir. 1993) (holding that “fraud in the inducement induces a party to assent to something he otherwise would not have”).

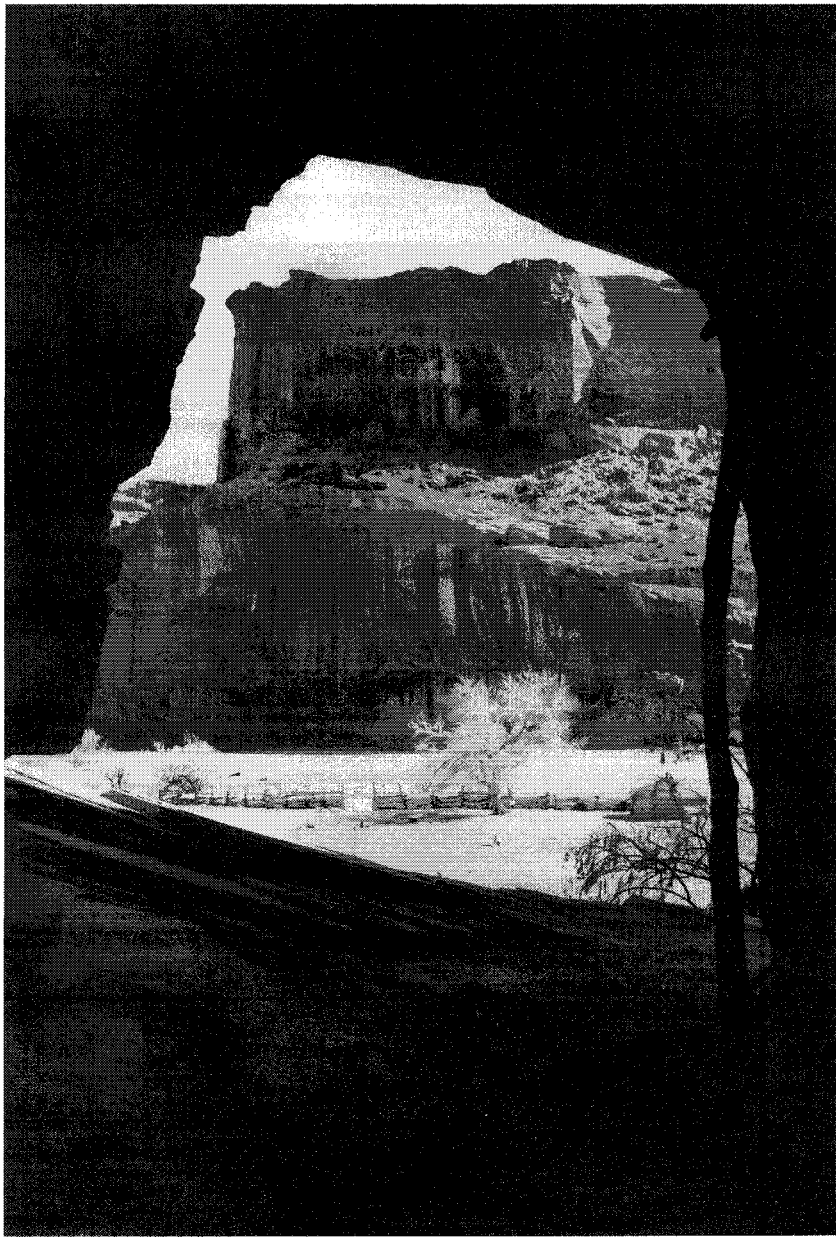
³⁴ *Carson Harbor*, 270 F.3d 891 (quoting *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir. 1997)) (Fletcher, J. dissenting).

³⁵ *Id.* at 892.

³⁶ See *Carpenters Health*, 8 F.3d at 1369 n.3.

CERCLA liability may be evaded, as the dissent argues, liability all together may not be.

In the end, the outcome of *Carson Harbor* promotes good social policy: purchasers of land should inquire into the status of the land that they are purchasing. If the purchasers truly had nothing to do with the active depositing of hazardous substances onto or into the land, they will be able to recover cleanup expenses under CERCLA or other relevant law. Just as CERCLA intended: ignorance is not bliss for PRPs.



REBEKAH MOORE

THE EPA'S REACTIVATION POLICY IN COURT

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I. INTRODUCTION

The United States Environmental Protection Agency (EPA) first articulated its Reactivation Policy in 1978 to subject facilities that had long-suspended operations to the recently promulgated New Source Review (NSR) provisions of the Clean Air Act.¹ The EPA has applied the Reactivation Policy consistently over the past 23 years, but until recently, the Policy had not been subjected to any judicial review. However, on September 26, 2001, the United States District Court for the Central District of California issued an order, acknowledging and formally applying the Reactivation Policy. That order granted a preliminary injunction in favor

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¹ Memorandum from EPA Director of the Division of Stationary Source Enforcement, to Stephen A. Dvorkin, Chief General Enforcement Branch, Region II (Sept. 6, 1978) (on file with author) [hereinafter EPA Dvorkin Memo].

of an environmental justice organization suing a Southern California oil refinery that failed to apply New Source Review before beginning construction and operation of a facility shut down for over five years.²

II. BACKGROUND

A. *A Brief History of NSR*

The Clean Air Act Amendments of 1970 restructured the CAA to establish a regulatory program that would cover new and existing sources of pollution in response to the growing recognition of air pollution as a grave national problem.³ The program centered on the creation of federally promulgated NAAQS.⁴ NAAQS represent the maximum permissible concentrations of certain air pollutants in a region.⁵ The Act anticipated the use of pollution control measures on major new or existing sources to attain NAAQS and required the enforcement of NAAQS by the states through the development of State Implementation Plans (SIPs) for each “air quality control district” (“air district”).⁶ The SIP represents the state or air district’s plan for the achievement or maintenance of NAAQS. The 1970 Amendments to the Act mandated that each SIP include a provision for pre-construction review of any new sources to assure the speedy attainment of NAAQS.⁷ However, these amendments did not mention explicitly the appropriate form of review in the event that the air district already had achieved NAAQS.

In 1974, in *Fri v. Sierra Club*⁸, the Supreme Court affirmed a ruling by the District Court of Columbia⁹ that the Act required the “prevention of significant deterioration” of air quality in areas already in attainment of ambient standards. Congress responded to the Supreme Court’s affirmation of *Sierra Club v. Ruckelshaus*, by enacting PSD regulations, which it strengthened with the 1977 CAA Amendments by designating increments of permissible air quality degradation and including addi-

² *Communities for a Better Env’t v. Cenco Ref. Co.*, No. CV 00-5665 AHM (AIJx), 2001 U.S. Dist. LEXIS 16249 (C.D. Cal. Sept. 26, 2001) (order granting temporary injunction) [hereinafter *Cenco Order*].

³ Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1971).

⁴ 42 U.S.C. § 7409 (1994). The Act requires the EPA to establish “National primary ambient air quality standards. . . the attainment and maintenance of which in the judgment of the Administrator. . . are requisite to protect the public health.” The following provision requires the establishment of secondary NAAQS “requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air.” *Id.* at § 7409(b)(2)

⁵ *See id.*

⁶ 42 U.S.C. § 7410 (1994).

⁷ *Id.*

⁸ *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253 (D. D.C. 1972), *aff’d sub nom Fri v. Sierra Club*, 412 U.S. 541 (1974).

⁹ 40 C.F.R. §§ 52.21, 51.166 (2001).

tional control technology requirements to assure protection of ambient standards.¹⁰

In addition to the PSD requirements, the 1977 CAA Amendments established strict requirements for areas where NAAQS have not yet been attained.¹¹ The Act defines a "nonattainment area" as an air quality region in exceedance of any pollutant regulated under the NAAQS.¹² These areas are required to implement nonattainment NSR, (just as regions in attainment of NAAQS must apply PSD review,) to any new facility or any existing facility making a major modification that will result in a significant increase in emissions.¹³ Congress added the PSD and nonattainment NSR to the CAA with the intention that they apply to industrial changes that might significantly increase pollution in an area.¹⁴

Practically, NSR and PSD review and permitting is required before construction of any new major stationary source or modification of a major stationary source commences. New sources are targeted for review because of an implicit recognition of the efficiency of implementing pollution control measures during construction; modifications are similarly treated because they may result in facility-wide higher emissions, and pollution control can be installed during construction if necessary.¹⁵ A major stationary source is defined as a plant with a potential to emit either 100 or 250 tons per year of a regulated pollutant.¹⁶ Major modifications are physical or operational changes that will cause a "significant net emissions increase,"¹⁷ but exclude "routine maintenance, repair and replacement."¹⁸ To determine the applicability of review, a plant's baseline emissions, equivalent to the average rate of "past actual emissions" within two years before the proposed modification, are compared with the future potential emissions of the post-modification or post-construction source.¹⁹ For example, if the post-change emissions of a source lo-

¹⁰ The EPA adopted a PSD program in response to the Sierra Club decision in 1974. *See* 39 Fed. Reg. 42,510 (Dec. 5, 1974). The administrative program was superseded by the 1977 amendments, adding Part C (sections 160-60, CAA sections 7470-79) to the Clean Air Act. Pub. L. No. 95-95, 91 Stat. 685.

¹¹ *See id.* The 1977 CAA amendments also added to § 171 in Part D, CAA 7501 to define "nonattainment."

¹² 42 U.S.C. § 7501 (1994).

¹³ 42 U.S.C. § 7503 (2000).

¹⁴ 40 C.F.R. §§ 51-52 (2000).

¹⁵ 45 Fed. Reg. 52,676, 52,688. *See also* 54 Fed. Reg. 27,274, 27,277.

¹⁶ 40 C.F.R. §§ 51.165, 51.166.

¹⁷ 40 C.F.R. § 51.166(b)(2)(i).

¹⁸ 40 C.F.R. § 51.166(b)(2)(iii)(a).

¹⁹ The EPA modified the meaning of future potential emissions for steam-generating units to equal the "representative actual annual emissions of the unit following the physical or operational change." *See* 40 C.F.R. § 52.21(b)(21)(v). The EPA concluded that the comparison of past actual to future actual emissions was a suitable method for evaluating emissions changes because the EPA's "extensive experience

cated in a nonattainment region exceed the emissions previously allowed by the site's permit by an increment determined in the regulations, the source will be required to implement nonattainment NSR. Nonattainment NSR includes meeting the Lowest Achievable Emissions Reductions ("LAER"), providing an alternatives analysis, demonstrating that other sources within the state owned by the owner or operator of the proposed site are in compliance with the regulatory program, and acquiring sufficient emission credits to offset the proposed increase.²⁰

B. *The NSR Program of the Clean Air Act and Power Producers*

One of the most frustrating aspects of the Clean Air Act ("CAA" or "Act") may very well be the New Source Review provisions embodied in Parts C and D of the Act.²¹ New Source Review generally refers to the Act's construction permit program for major sources. New Source Review includes two separate programs with specific requirements to be implemented according to an air district's achievement of satisfactory air quality: nonattainment NSR and Prevention of Significant Deterioration (PSD). The nonattainment NSR applies in areas with poor air quality as determined by the failure to achieve the National Ambient Air Quality Standards (NAAQS) for a regulated pollutant as established under the Act. PSD applies to the construction of or on major sources in areas in attainment of NAAQS.

Power producers, including oil refiners, tend to resent the NSR process under the "command and control" approach of the Act because procuring permits is time-consuming and delays the commencement of construction, operation or emissions.²² Additionally, the CAA regulates new sources more stringently than existing sources expecting continuous air quality improvement as old sources are taken off-line.²³

However, Congress built several escape devices into the Act, which facilities have exploited skillfully, and which have earned the disapproval of some environmentalists.²⁴ For instance, power generators prefer to

with electric utilities and the similar nature of operations within [the] source category" would allow a sufficient basis from which to predict future actual emissions. *See also* 40 C.F.R. §§ 51-52 (2000).

²⁰ 40 C.F.R. § 51.165.

²¹ Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1971).

²² EPA, NSR 90-DAY REVIEW BACKGROUND PAPER 11 (2001), *available at* <http://www.epa.gov/air/nsr-review/background.html>. ("Permitting can be a costly process that negatively impacts ROR [rate of return for the power sector]. Most developers describe permitting as an extremely complex and time-consuming process. The financial impacts from permitting (including NSR) can change the economic feasibility of the project.")

²³ ARNOLD W. REITZE, AIR POLLUTION LAW 60-61 (1995).

²⁴ EPA Requirements for Preparation, Adoption and Submittal of Implementation Plans, 40 C.F.R. § 52.165 (2001); EPA Approval and Promulgation of Implemen-

call any changes at their facilities "routine maintenance or repair"²⁵ or "an increase in the hours of operation"²⁶ to exempt their actions from the permitting process.²⁷ Furthermore, facilities have undermined the expectation of continuous air quality improvement by maintaining existing sources beyond their anticipated life spans.²⁸ Through these actions, power producers have further complicated the permit process and compromised the goals of its enactment.

While the NSR process may be complex, its enforcement provides a degree of protection to the nation's air quality (as well as those living in and breathing the air) when the process succeeds in requiring the implementation of pollution control measures. Indeed, the stringency of the nonattainment NSR requirements reflects the purpose of the Act itself: to protect the public health and welfare from unhealthy air quality.²⁹ In a report commissioned by the Clean Air Task Force, Abt Associates, the consulting firm relied on by the EPA to determine prospective health benefits of regulatory programs, data confirmed that between 5,500 and 9,000 premature deaths are "attributable to fine particle pollution from 51 plants" that are targets of NSR enforcement proceedings.³⁰ As a result, when a facility successfully argues that a major change is a replacement, repair or any other exception to the rule and, therefore, free from New Source Review permitting, everyone must share the burden of living in dirtier air.³¹

With this short and intentionally skeletal background on PSD and NSR in place, this note will proceed to discuss a recent order of the United States District Court in the Central District of California, recognizing a longstanding EPA policy. The EPA's Reactivation Policy inter-

tation Plans, 40 C.F.R. § 52.21 (2000). See Thomas J. Graff, *Harnessing Market Forces to Protect Our Environment*, ENVTL. DEF. FUND NEWSL., Feb. 1989, at 3, available at, http://www.environmentaldefense.org/pubs/EDF-Letter/1989/Feb/i_market.html.

²⁵ 40 C.F.R. § 51.165; 40 C.F.R. § 52.21.

²⁶ *Id.*

²⁷ See *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901(7th Cir. 1990) (replacement of several steam drums is more than the exception qualifies); *Puerto Rican Cement Co. v. U.S. EPA*, 889 F.2d 292 (1st Cir. 1989) (replacement of cement kiln that increased efficiency and emissions is not a like-kind replacement).

²⁸ REITZE, *supra* note 23, at 61.

²⁹ 42 U.S.C. § 7401 (1994).

³⁰ ABT ASSOCIATES, INC., *THE PARTICULATE-RELATED HEALTH BENEFITS OF REDUCING POWER PLANT EMISSIONS* (2000) (on file with author) [hereinafter Abt Report]. See also CLEAN AIR TASK FORCE, *DEATH AND DISEASE FROM POWER PLANTS CHARGED WITH VIOLATING THE CLEAN AIR ACT* (2001), available at: <http://clnatf.org/resources>.

³¹ In addition to reporting on avoidable premature deaths, the Abt Associates estimated that compliance with pollution control standards required under nonattainment NSR and PSD permit programs would result in the avoidance of between 4,300 and 7,000 premature deaths. See Abt Report.

prets the CAA to impose PSD or nonattainment NSR on any source that has been permanently shut down for a period over 2 years. A minimal grasp on PSD and nonattainment NSR is necessary to understand the importance of the EPA's policy, and the Court's decision to acknowledge it, because the policy effectively closes a potential loophole of the PSD and NSR permit provisions by treating a reactivated source as a "new source" under the Act.

This note also will address the consistent application and enforcement of the Reactivation Policy by the EPA, as well as the deference due to the Reactivation Policy as a permissible and reasonable standard to apply in interpreting the Act. Though an extremely necessary and relevant point of discussion, this note will not discuss the changes to the NSR program proposed by the current Bush administration, nor the Reactivation Policy's position within a cap-and-trade regulatory scheme.³²

III. THE ORDER IN *COMMUNITIES FOR A BETTER ENVIRONMENT V. CENCO REFINING CO.*

On September 26, 2001, the United States District Court in the Central District of California granted a motion for a preliminary injunction in favor of Communities for a Better Environment ("CBE") against the Cenco Refining Company ("Cenco").³³ In so holding, the district court ordered that the Cenco Refining Company was precluded preliminarily from performing any construction or operation of its crude oil refinery without first applying nonattainment NSR to its facility as required by the CAA.³⁴ The district court acknowledged that CBE had made a strong showing that the EPA's Reactivation Policy would mandate that the Cenco refinery, out of operation since 1995, be treated as a new

³² The Reactivation Policy is clearly relevant to a cap-and-trade scheme illustrated by *CBE v. Cenco Ref. Co.* Cenco Refinery is located in the South Coast basin, and therefore regulated by the State Implementation Plan of the South Coast Air Quality Management District. The SCAQMD SIP includes the RECLAIM program, a system of emission trading credits required to offset facility emissions. S. COAST AIR QUALITY MGMT. DIST., REGULATION 20: REGIONAL AIR INCENTIVES (RECLAIM) (1993), available at <http://www.aqmd.gov/rules/html/r2000.html>. The Reactivation Policy applied to this case to determine that the facility must complete New Source Review as a "new source" under the CAA before construction or operation. Included in the SCAQMD NSR program is the mandatory purchase of RECLAIM Trading Credits to offset the emissions resulting from the facility's operation. For a comprehensive discussion of the dangers of a pollution trading scheme, see Richard Toshiyuki Drury et al., *Pollution Trading and Environmental Injustice: Los Angeles' Failed Experiment in Air Quality Protection*, 9 DUKE ENVTL. L. & POL'Y F. 231 (Spring 1999).

³³ *Communities for a Better Env't v. Cenco Ref. Co.*, No. CV 00-5665 AHM (AIJx), 2001 U.S. Dist. LEXIS 16249 (C.D. Cal. Sept. 26, 2001).

³⁴ Cenco Order at 35.

source, and therefore subject to the NSR program for a nonattainment region.³⁵

A. EPA's Reactivation Policy

To best understand the Reactivation Policy, it is convenient to imagine a major polluting source—usually an oil refinery or a power plant, but possibly a wood pulping mill or a cement plant, among other facilities—in full operation. Tall stacks predominate the facilities' landscapes sending steam plumes or occasional flares into the air. The emissions released by these facilities are regulated under the Act's NAAQS. The facility is permitted to release a certain number of tons per year of regulated pollutants through the NSR and PSD regulations. If a facility chooses to upgrade its facility or to construct a new source within its facility, under the mandate of the CAA, it must apply for a new permit under NSR and PSD if the emissions resulting from the modification or new source construction will result in a "significant increase in emissions" compared with the baseline emissions.³⁶

But what happens if the source discontinues its operations for an extended period of time? The plumes disappear and the flares no longer burn off emissions. If the source ceases operations, there is a presumption that its emissions discontinue as well. Should the source decide to reactivate operations after a time, the EPA's Reactivation Policy treats the reactivated source as a new source under the CAA if it satisfies a number of factors demonstrating that the initial shutdown was permanent.³⁷ As a new source, the facility is required to apply NSR or PSD review and permitting processes before undertaking any activity to restart operations.

The first expression of the EPA's Reactivation Policy appeared in a 1978 memo addressing the applicability of PSD requirements to a source that had been shut down for over four years.³⁸ In response to concern about the applicability of PSD to a source that had been shut down for 4 years, the EPA's Director of the Division of Stationary Source Enforcement wrote:

A shutdown lasting for two years or more, or resulting in removal of the source from the emissions inventory of the State, should be presumed permanent. The owner or operator proposing to reopen the source would have the burden of

³⁵ *Id.* at 3. *See also id.* at 35.

³⁶ 40 C.F.R. §§ 52.21, 51.166.

³⁷ *See* Monroe Electric Generating Plant Entergy Louisiana, Inc., Proposed Operating Permit, Petition No. 6-99-2, ("Order Partially Granting and Partially Denying Petition for Objection to Permit") (EPA June 11, 1999), *available at* <http://www.epa.gov/ttn/oarpg/tlpfpr.h> [hereinafter Monroe Electric].

³⁸ EPA Dvorkin Memo, *supra* note 1.

showing that the shutdown was not permanent, and of overcoming any presumption that it was. Under the facts you have given us, we would presume that the shutdown was permanent, since it has already lasted about four years. Consequently, unless the owner or operator of the source were to rebut that presumption, we would treat the source as a new source for PSD purposes.³⁹

Since 1978, the Reactivation Policy has been further clarified through the EPA's consistent and repeated enforcement of its mandate.⁴⁰

The Reactivation Policy explicitly considers the permanence of a shutdown facility as a "key determination" as to whether the facility will be treated as a new source for purposes of PSD and NSR.⁴¹ The permanence of a shutdown "depends on the intention of the owner or operator at the time of shutdown based on all facts and circumstances."⁴² To assist

³⁹ *Id.*

⁴⁰ See e.g., Memorandum from Edward Reich, Director, Stationary Source Enforcement Division to William K. Sawyer, General Enforcement Branch, Region II (Aug. 8, 1980) (on file with author) (municipal waste incinerator shut down for five years must be treated as a new source because of the duration of the shutdown and the State removed the incinerator from its emission inventory) [hereinafter EPA Babylon 2 Memo]; Memorandum from Edward Reich, Director, Stationary Source Enforcement Division to Sandra S. Gardebring, Director, Enforcement Division, Region V (Oct. 3, 1980) (on file with author) (cement kiln shut down for over three years, removed from State's emissions inventory, and described by the owner as permanently closed is to be considered a new source upon reactivation, requiring NSR and PSD permitting) [hereinafter EPA SME Cement Memo]; Memorandum from Edward Reich, Director, Stationary Source Enforcement Division to Conrad Simon, Director, Air and Waste Management Division, Region II (July 9, 1982) (on file with author) (refinery is not subject to PSD as a new source though shut down for over five years because owner provided adequate evidence that the shutdown was not intended to be permanent; PSD may apply for any significant net emissions increases over its baseline emissions) [hereinafter EPA Amerada Hess Memo]; Memorandum from John S. Seitz, Director Stationary Source Compliance Division, Office of Air Quality Planning and Standards to David P. Howekamp, Director Air Management Division, Region IX (May 27, 1987) (on file with author) (shut down leach acid plant must be considered new source when reopening because emissions removed from State's inventory and several hundred thousand dollars worth of work required to become operable) [hereinafter EPA Noranda Lakeshore Memo]; Letter from David Howekamp, Director, Air Management Division, Region IX to Robert Connery, Holland & Hart (Nov. 7, 1987) (on file with author) (transfer of ownership "represents further attenuation. . . between shutdown and prospective reactivation" and, though not determinative, is probative of permanence) [hereinafter EPA Cyprus Casa Grande Letter]; Memorandum from John Resnic, Director, Stationary Source Compliance Division, OAQPS, to Douglas Skie, Director Air Programs Branch (Nov. 19, 1991) (on file with author) (reactivation of power plant did not trigger PSD because statements of intent by owners were supported by maintenance documentation and an ability to reactivate the plant easily).

⁴¹ See Monroe Electric, *supra* note 37.

⁴² *Id.* at 8.

in evaluating intent, Carol Browner, former EPA Administrator, listed the following factors in *Monroe Electric*:

the amount of time the facility has been out of operation, the reason for the shutdown, statements by the owner or operator regarding intent, cost and time required to reactivate the facility, status of permits, and ongoing maintenance and inspections that have been conducted during shutdown. No single factor is likely to be conclusive in the Agency's assessment of these factors, and the determination will often involve a judgment as to whether the owner's or operator's actions at the facility during the shutdown support or refute any express statements regarding the owner's or operator's intentions.⁴³

B. *The Shutdown of the Cenco Refinery*

The Cenco facility is a crude oil refinery located in Santa Fe Springs in southeastern Los Angeles County.⁴⁴ Prior to Cenco's purchase of the refinery in August 1998, Powerine Oil Company ("Powerine") owned the facility.⁴⁵ Operations at the facility started on the site in approximately 1936, and the site ultimately came into the control and ownership of Powerine.⁴⁶ In June 1995, Powerine informed the South Coast Air Quality Management District ("SCAQMD") that it would be shutting down the refinery⁴⁷ and laying off the majority of its workforce in the first week of July 1995.⁴⁸ On July 3, 1995, Powerine terminated all refining operations and has not refined crude oil since that day.⁴⁹

In September 1995, Castle Energy, the parent company of Powerine, entered a contract with Kenyen Projects Ltd. ("Kenyen") for the sale of the refinery equipment.⁵⁰ Kenyen publicly announced that, under the terms of the contract, the refinery would be dismantled and the equipment shipped to India.⁵¹ One month later, Powerine wrote to SCAQMD to inform them that they were "in the process of shutting down the refinery for its ultimate dismantling."⁵² In the same month, Powerine also applied to SCAQMD to obtain emission reduction credits resulting from

⁴³ *Id.* at 9.

⁴⁴ Cenco Order at 3.

⁴⁵ Cenco Order at 7.

⁴⁶ Brief of Communities for a Better Environment, Communities for a Better Env't v. Cenco Ref. Co., at 3, *supra* note 34 [hereinafter CBE Brief]. *See also* Certain Underwriters at Lloyd's London v. Superior Court, 24 Cal.4th 945, 947 (2001).

⁴⁷ Cenco Order at 3.

⁴⁸ CBE Brief at 3.

⁴⁹ Cenco Order at 3.

⁵⁰ *Id.*

⁵¹ CBE Brief at 3.

⁵² *Id.*

the permanent shutdown of the refinery equipment.⁵³ Additionally, Powerine repeatedly requested that SCAQMD defer its regulatory reporting requirements based on its suspension of operations.⁵⁴

By December 1995, Powerine informed a number of state entities of the possibility that the refinery would resume crude oil processing.⁵⁵ The then Chief Financial Officer of Powerine stated that though Powerine had accepted the Kenyen deal, the Powerine management was concerned that the agreement would not be successful.⁵⁶ Powerine then engaged in negotiations with Energy Merchant Corporation who, in January 1996, purchased Powerine's stock, divesting Castle Energy of ownership. In February 1996, Powerine sent another letter to SCAQMD asking for the cancellation of the earlier request for Emissions Reduction Credits because the Energy Merchant Corporation intended to operate the refinery again.⁵⁷

Despite the renewed interest in crude oil refining, at some point after the termination of operations in 1995, Powerine "demolished a 28,000 square foot main office building, a warehouse, truck fuel loading racks, tanks and associated equipment, and sold the property on which the equipment was located."⁵⁸ In 1997, Powerine notified SCAQMD that the fuel feed lines had been disconnected and a process feed line had been disconnected and flanged.⁵⁹ In August 1998, Cenco purchased the refinery from Powerine.⁶⁰ In a 1998 letter to the Securities and Exchange Commission, Cenco stated, "the refinery has had no operations since July 1995" and that "currently the refinery has a skeleton staff that oversees the maintenance of its assets, which consist of an oil refinery and related assets."⁶¹ Additionally, the California Supreme Court found in 2001 that since 1995, the Cenco "facility has not been operated at all, and only a skeleton crew of employees has remained, primarily for environmental compliance and equipment purposes."⁶²

⁵³ *Id.* The RECLAIM program of the South Coast Air Quality Management District intends to reduce air pollution by allowing industry the flexibility to take advantage of the market by purchasing and selling RECLAIM Trading Credits ("RTCs") as it increases or reduces its emissions. The purpose and efficiency of the RECLAIM market-based program is frustrated when a source fails to purchase a sufficient supply of reduction trading credits to offset emissions.

⁵⁴ *Id.*

⁵⁵ Cenco Order at 4.

⁵⁶ *Id.*

⁵⁷ *Id.* at 4-5.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 7.

⁶¹ *Id.* at 6.

⁶² *Certain Underwriters at Lloyd's of London v. Superior Court*, 24 Cal. 4th 945, 951 (2001), cited in Order Denying CBE's Motion for Summary Adjudication and

Powerine did consistently renew or timely reinstate its permits through the period of 1995-1998.⁶³ In letters to SCAQMD between 1996-1998, Powerine repeatedly expressed its intent to resume crude oil refining at the facility, even as it requested extensions of time for payment of fees required for permits.⁶⁴ Powerine consistently fulfilled its obligation to pay to SCAQMD the required annual permit fees between July 1995 and July 1998.⁶⁵ In December 1997, SCAQMD notified Powerine that the facility could allow its permits to expire without threat of permanent revocation as long as Powerine paid a 15% penalty within one year.⁶⁶ Powerine accepted SCAQMD's offer in January 1998, and the Powerine permits were allowed to expire under the condition that they could be reinstated with payment of the penalty.⁶⁷

Just before the formal transfer of ownership to Cenco in August 1998, Powerine applied to SCAQMD to reinstate its permits.⁶⁸ Cenco proceeded to apply to SCAQMD for a change in ownership in October 1998.⁶⁹ On December 29, 1998, SCAQMD reinstated the Powerine permit to operate and at some time between October 1998 and January 1999, SCAQMD named Cenco as the holder of the refinery facility permit.⁷⁰

After purchasing the facility, Cenco applied to SCAQMD, the City of Santa Fe Springs and the State Water Board for the permits necessary to operate the refinery.⁷¹ The city provided permits conditioned on the implementation of health and safety modifications, and changes to enable the manufacture of gasoline in compliance with state regulations.⁷² SCAQMD concluded that some of Powerine's permits could be reinstated consistent with both SCAQMD rules and the EPA Reactivation Policy.⁷³ However, SCAQMD required the application of NSR to equipment that had been altered or modified before it would reactivate permits for such equipment.⁷⁴ Similarly, SCAQMD refused to reinstate permits to construct for any activity not commenced by Powerine.⁷⁵ In its order, the Court surmised that SCAQMD used an emissions baseline

Permanent Injunction and Granting CBE's Motion for Preliminary Injunction, CBE v. Cenco Ref. Co., *supra* note 33.

⁶³ Cenco Order at 6.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 7.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 9.

⁷³ *Id.* at 10.

⁷⁴ *Id.*

⁷⁵ *Id.*

consistent with the facility's emissions recorded before the termination of operations in 1995 to determine whether the application of NSR was appropriate for the equipment in question.⁷⁶ SCAQMD applied NSR only to modifications that it found would increase emissions over the 1995 baseline.⁷⁷

Subsequently, CBE filed suit, alleging that defendants Cenco and SCAQMD failed to comply with the CAA when NSR was not applied to the Cenco crude oil refinery.⁷⁸ CBE then moved for summary judgment and a permanent injunction, or in the alternative, a preliminary injunction, arguing, among other reasons⁷⁹ that Cenco and SCAQMD should have applied NSR to the facility under the EPA's Reactivation Policy because the refinery had been permanently shut down by Powerine and had been non-operational for over six years.⁸⁰ Finding that CBE had made a sufficient showing to demonstrate that the refinery's six-year shutdown, combined with its physical modifications, required NSR for the entire facility, the court granted a preliminary injunction.⁸¹ The preliminary injunction "prohibit[ed] [Cenco and SCAQMD] from taking actions in furtherance of construction or operation of the facility and require[d] SCAQMD to rescind Cenco's permits pending trial."⁸²

C. *The District Court's Application of the Monroe Electric Factors*

The district court analyzed the facts and circumstances of the Cenco refinery's shutdown under the guidance of the factors established in *Monroe Electric*.⁸³ By addressing each factor listed in *Monroe Electric*, the court created a clear and succinct test to determine the applicability of the Reactivation Policy to a shutdown facility.

⁷⁶ *Id.* at 11.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1.

⁷⁹ CBE asserted that Cenco and SCAQMD violated the California SIP by "failing to void the refinery's facility permit" when the permit was transferred to Cenco from Powerine, and when equipment was altered. If the permit had been properly voided, CBE argued that NSR would apply. CBE also asserted that Cenco and SCAQMD violated other SIP provisions, including the SCAQMD Rule 2005(c)(2) (a facility must hold sufficient RECLAIM credits to offset facility emissions through the first year of operation); Rule 201 (construction may not be commenced without compliance with NSR); Rule 210 (failing to submit materials required by NSR); Rule 212 (a 30-day public comment period is required for grants of permits).

⁸⁰ Cenco Order at 1.

⁸¹ *Id.* at 2-3.

⁸² *Id.*

⁸³ Cenco Order at 28-33.

1. Duration of Shutdown

First, the district court found that minimal operations and presence of a nominal staff was insufficient to overcome the presumption of permanent shutdown indicated by six years of suspended crude oil refining operations.⁸⁴ Though Cenco argued that there had been “various operations” occurring at the facility since 1995, the court pointed to the statements by Cenco that “any activity at the facility was that of a ‘skeleton staff that oversees the maintenance of its assets.’”⁸⁵

2. Reasons for Shutdown

Next, the court explained that Cenco's economic reasons for shutdown “do not militate in favor of finding” permanence *per se*.⁸⁶ While EPA did consider economic factors in *Monroe Electric* and the Noranda Lakeshores Memo, in neither case did the EPA state that reasons based on “market conditions” were absolute indicators of permanent closure; rather they were generally “incidental to the decisions” by the EPA.⁸⁷

3. Intent of Owner

The order in *Monroe Electric*, as adopted by the district court, included the following comment about the relevant time period to consider when determining the owner's intent:

While the policy suggests that the key determination is whether, *at the time of shutdown*, the owner or operator intended shutdown to be permanent, in practice, after two years, statements of original intent are not considered determinative. Instead, EPA assesses whether the owner or operator has demonstrated a continuous intent to reopen. To make this assessment, EPA looks at activities during time of shutdown that evidence the continuing validity of the original intent not to permanently shutdown.⁸⁸

Therefore, owners and operators of a shutdown facility must provide documentation or other evidence demonstrating their continuous intent and “concrete plans” to restart the facility in the “reasonably foreseeable future” if they wish to take advantage of reactivating without a new source permit.⁸⁹ *Monroe Electric* further explains that once an owner or

⁸⁴ *Id.* at 28.

⁸⁵ *Id.*

⁸⁶ *Id.* at 29.

⁸⁷ *Id.* at 28-29.

⁸⁸ See *Monroe Electric* at 9, *supra* note 29 (emphasis in original).

⁸⁹ *Id.*

operator is found to have no plans to reopen a facility, this intent cannot be superseded by later efforts to restart operations.⁹⁰

The district court points to several letters from Powerine to SCAQMD to demonstrate that the refinery in question was at one point definitely intended to be permanently shutdown. Powerine not only informed SCAQMD of the suspension of all refining operations, but also stated that the facility would be shutting down beginning in July 1995. In fact, as the district court pointed out, the refinery had not refined crude oil since that date. Powerine also notified SCAQMD in October 1995 that the refinery was preparing for "ultimate dismantling" by its new parent company, and subsequently applied to SCAQMD for emission reduction credits and suspension of reporting requirements due to its termination of operations.

Although the court acknowledged that Powerine later notified state entities, including SCAQMD, of changes in sale of the refinery that could result in bringing the refinery back into operation, the court found that the period between July 1995 and December 1995 "negates any showing. . . that Powerine *continuously* planned to restart the facility."⁹¹ Furthermore, the court considered the statements made by Powerine that its management was not satisfied with the bargain struck with Kenyen insufficient evidence of intent to reopen and use the facility in the foreseeable future.⁹²

4. Cost and Time Needed to Restart

In the Noranda Lakeshores Memo, the EPA found that reactivation of a roaster leach acid plant at the cost of "several hundred thousand dollars" and lasting "approximately four months" was a sufficient expenditure of time and capital to evidence the permanence of the plant's shutdown.⁹³ In comparison, reactivation of the Cenco refinery was estimated by the parties to require between \$28 million and \$180 million and between six to eighteen months of work. The court found that despite the large disparity between the estimates, even the lowest numbers were significantly higher than those in other cases in which the EPA found facilities to be permanently shutdown.⁹⁴ Therefore, the court concluded that the cost to reactivate the Cenco refinery "slightly favors finding a permanent shutdown."⁹⁵

⁹⁰ *Id.* at 10.

⁹¹ Cenco Order at 31 (emphasis in original).

⁹² *Id.*

⁹³ EPA Noranda Lakeshores Memo at 2. The EPA also considered the significant amount of time that had passed since the suspension of operations, failure to maintain the permit, and removal of the plant from the emissions inventory.

⁹⁴ Cenco Order at 32.

⁹⁵ *Id.*

5. Status of Permits

In the EPA Cyprus Grande Letter, the facility in question had allowed its operating permit to expire.⁹⁶ The facility was then sold to another owner who purchased the site with knowledge that the facility neither no longer had an operating permit, nor was listed in the State's emissions inventory.⁹⁷

Because Powerine allowed its facility permit to expire in 1998 with the express understanding that the permit could be reinstated within one year upon payment of a 15 percent penalty, and because Powerine did reinstate the permit within six months, the court determined that Powerine satisfactorily maintained its necessary permit.⁹⁸ Additionally, Powerine kept other permits up to date during the period of shutdown. As a result, the court found that this factor contributed nothing to a finding of permanent shutdown.⁹⁹ Although the court emphasized the maintenance of the Cenco refinery on the SCAQMD emissions inventory, it noted that Powerine did apply to SCAQMD for emission reduction credits for the suspension of operations in October 1995.¹⁰⁰ Nevertheless, the court concluded that SCAQMD's retention of the refinery on its emissions inventory "militates in favor of finding no permanent shutdown."¹⁰¹

6. Ongoing Maintenance at the Facility during Shutdown

Powerine continuously employed about 24 workers at the refinery to maintain the equipment at the site. The small crew working at the facility was engaged "primarily for environmental compliance and equipment maintenance purposes."¹⁰² For this simple reason, the court concluded that this factor supports finding no permanent shutdown as maintenance did continue, though minimally, at the site.

IV. THE IMPACT OF THE CENCO ORDER

By acknowledging and systematically applying the Reactivation Policy, the district court in the Cenco Order introduced a formal test into legal precedent. The district court addressed Cenco's challenge to the Policy by affirming CBE's contention that the Reactivation Policy is a reasonable interpretation of the Act's regulations and does not conflict with the terms of the NSR program.¹⁰³

⁹⁶ EPA Cyprus Casa Grande Letter at 2.

⁹⁷ *Id.* at 3.

⁹⁸ Cenco Order at 33.

⁹⁹ *Id.* at 32-33.

¹⁰⁰ CBE Brief at 19.

¹⁰¹ Cenco Order at 32, note 14.

¹⁰² *Id.* at 6 (citing *Certain Underwriters at Lloyd's of London*, 24 Cal.4th at 951).

¹⁰³ Cenco Order at 25-27.

The NSR regulations require the application of NSR to a facility that will experience a “significant increase in net emissions.”¹⁰⁴ To determine the increase in emissions, the emissions baseline will be compared with the future potential emissions of the facility. The baseline calculation is therefore a very important factor in the NSR program. Under the NSR regulations, the baseline equals the past actual emissions as of the date preceding the change; according to the regulations, “in general, the actual emissions as of a particular date shall equal the average rate. . . at which the unit actually emitted the pollutant during the two-year period which precedes the [date of the change] and which is representative of normal source operation.”¹⁰⁵

The Reactivation Policy presumes the permanence of a facility shutdown after a period of two years; at that time, it is presumable under the regulations that the facility’s baseline emissions would be zero. Any operation of a shutdown facility will result in an emissions increase; the increase will be “significant” under the Act if it reaches the requisite increment for the emitted pollutant, thereby establishing the facility as a new source under the NSR program.¹⁰⁶

Accordingly, the district court in the Cenco Order determined that the application of the Reactivation Policy does not conflict with a regulatory provision exempting changes in the hours of operation or production rate because restarting the facility would constitute a “fundamental change in the facility’s operational status”; moreover, the restart would involve physical modifications to the refinery that would “trigger a comparison of new emissions to the zero baseline.”¹⁰⁷ Because the NSR regulations of the CAA are not in conflict with the Reactivation Policy, the court found that the Policy is a “permissible and reasonable standard to apply in interpreting the Clean Air Act.”¹⁰⁸

The district court declined to rule on the level of deference entitled to the Reactivation Policy, stating merely that a federal regulatory agency’s reasonable interpretation of its own regulations cannot be ignored.¹⁰⁹ According to the United States Supreme Court, a “court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”¹¹⁰ As dis-

¹⁰⁴ See 40 C.F.R. § 51.165(a)(1)(vi)(A)(1), § 51.166(b)(3)(i)(a).

¹⁰⁵ 40 C.F.R. § 51.165(a)(1)(xii)(B), § 51.166(b)(21)(ii).

¹⁰⁶ See 40 C.F.R. § 51.165 for the regulated pollutants and emission levels sufficient to find significant increase under nonattainment NSR. See also 40 C.F.R. 52.21 for the relevant increases under PSD.

¹⁰⁷ Cenco Order at 26. See also 40 C.F.R. § 51.165.

¹⁰⁸ Cenco Order at 27.

¹⁰⁹ *Id.*

¹¹⁰ *Chevron v. Natural Resources Defense Counsel*, 467 U.S. 837, 843-44 (1984). After the decision in *Christensen v. Harris County*, 529 U.S. 576, 577 (2000), a court is not required to give total deference to an agency decision that has not completed

cussed above, in *Monroe Electric*, the former Administrator of the EPA discussed the restart of a polluting facility as a new source and as a major modification to the facility under the NSR program.¹¹¹ When the administrator of an agency interprets a regulation, the agency's interpretation is accorded great deference.¹¹²

Finally, it is important to note that the reactivation of a facility long out of operation may also trigger the application of NSR or PSD review as a "major modification" to the facility. While the permanence of a facility's suspension of operations does not need to be shown, the restart must meet the definition of major modification under the CAA regulations. As discussed above, major modification is "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act."¹¹³ The CAA only defines exceptions to the term "physical change"; routine maintenance, repair and replacement are not "physical changes" under the Act.¹¹⁴ While the courts have generally interpreted "physical changes" broadly, the exceptions to the rule ultimately guide most of the decisions as to whether a facility's restart will mandate the application of the NSR program.¹¹⁵

V. CONCLUSION

The district court's recognition and application of the EPA's Reactivation Policy in *CBE v. Cenco* is a valuable addition to the sources available to aid interpretation of the Clean Air Act's NSR program. In light of the main goals of the Act, particularly installation of pollution control equipment at the time of construction of or major modification to a polluting source, the implementation of such measures may also be appropriate when a source is preparing to restart after years of suspended operation. Not only do nonattainment NSR and PSD review subject a source to control technology, they also require offsets from elsewhere in the facility or acquisition of offsets from other sources in the district. If the factors in *Monroe Electric*, as formally applied in the Cenco Order, are satisfied predominately by consideration of the facts and circum-

formal rulemaking. Instead, a court may interpret such policies or guidelines with "respect" to the extent that those interpretations have the power to persuade. Although the Reactivation Policy has not been formally promulgated as a rule, it has been consistently applied for over 20 years and its application substantially incorporates CAA regulations.

¹¹¹ *Monroe Electric*, *supra* note 29 at 10-11.

¹¹² *Chevron*, 467 U.S. at 843-44.

¹¹³ 40 C.F.R. § 51.166(b)(2)(i).

¹¹⁴ 40 C.F.R. § 51.166(b)(2)(iii)(a).

¹¹⁵ See *Wisconsin Electric Power Co.*, 893 F.2d at 908 ("any physical change" means precisely that").

stances surrounding the shutdown, a facility will be subject to NSR as a "new source." The Reactivation Policy shifts the burden of establishing the applicability of NSR from the party requesting review to the allegedly offending facility, which must show that it never intended to permanently shut down its operations. This shift is consistent with the aim of the CAA, and limits the availability of exceptions to the NSR program on which facilities had customarily relied.

Moreover, practical considerations support the reasonableness of this shift. If a community has been free of one source of polluting emissions for a period of time, there may be very strong reactions to the reactivation of that source. In such a situation, a source should be expected to update its pollution control measures to the apex of current technology to ameliorate the effects on the surrounding areas. While facilities may argue that such measures are cost prohibitive or are impediments to smooth functioning during normal operations, it is certainly foreseeable that these measures would be required at a site that has been dormant for a period of more than two years. Thus, the Cenco Order solidifies an EPA policy intended to look closely at emissions caused by reactivation of shutdown facilities and takes a step closer to the clean air Congress envisioned.



JKMPHOTOGRAPHY

A PLACE IN THE COUNTRY: RURAL DWELLINGS AND THE PARADOX OF RURALITY

*Mike Madison**

The alluvial fan of Putah Creek comprises some forty thousand acres of flat land in the lower West Side of the Sacramento Valley. The landscape is a handsome one, prosperous and orderly, nearly entirely devoted to farming. Hardly a person who lives in the region has not at some time entertained the thought of buying some land and building a place in the country. The idea seems innocuous enough, and yet one who pursues it quickly becomes entangled in a web of historical, economic, environmental, architectural, legal and ethical issues. My purpose in this essay is to untangle some of those relationships, and to show how a confused notion of urbanity in nearby towns affects the fate of the rural countryside.

My approach is oblique. What I propose is to describe seven houses; four are rural and three are urban; two no longer exist; one is only imagined. By placing each house in its context, I hope to illuminate some of the social issues that attach to rural housing. The data on which these remarks are based were not collected in the usual scholarly way—stirring up dust in the archives. I started out doing farm work along Putah Creek in the 1950's, picking tomatoes in the fields around Davis and pitting apricots in the fruit drying yards near Winters. Farming along the creek became my vocation. In the seasons when farm work is slow, I purchase abandoned rural buildings, dismantle them and sell the used lumber, or build barns or sheds from the recycled materials. There is not a house or barn in the district that I have not studied with a critical eye toward its architectural merits, its social history, and its value as salvage. And so my data derive from first hand observation, and from conversations with old timers.

ONE: NINETEENTH CENTURY RURAL MANSION

The traveler on rural roads in the district will from time to time come across a nineteenth century mansion set at the edge of a field. There are more than a dozen of these surviving in the district. Perhaps the first thing that one notices is that these are big houses, of four or five thousand square feet. Ceilings of twelve to sixteen feet high, which

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helped cool the interior in summer, make for a tall two-story house. A prosperous farm needed a house this big. Families were large and often augmented by guests. Passage on muddy roads in winter was a slow business, and travelers would be put up for the night in farmhouses that served as seasonal hotels. The house also served for schooling, musical performances, dances, and religious services, and for conducting the business of the farm.

The architectural styles of rural houses from this era are national styles (Greek Revival, Queen Anne, Italianate), reflecting whatever was current in Sacramento or San Francisco, or what was to be seen in the magazines. Although the national styles that were used were not particularly well suited to the climate, no local, vernacular architectural style developed.

A house is a reflection of social structure, and the old mansions of the district reflect a more hierarchical society than the present one. The traveler approaching a nineteenth century mansion in the country passes through a series of increasing intimacies (or for a stranger, increasing trespasses); from the public road to the private drive, to the front yard, perhaps passing through a gate in a low fence, to the steps, then ascending to the porch, across the porch, over the threshold past the massive front door with its impressive hardware, into a foyer, to the public rooms (living room, dining room) to the private rooms. Because the house was usually built on high ground, the approach entailed a slight ascent at each stage. The many stages of this transition permitted fine social distinctions. One guest might be admitted to the porch, but not across the threshold; another less privileged might state his business from the base of the porch stairs, not feeling entitled to ascend.

An important social function of the private house is that it provides the opportunity to offer hospitality, one aspect of which is the conspicuous abandonment of defenses. The purpose of the brass bolts and locks of the massive front door was not to keep uninvited people out-one could easily enough gain entry by a flimsy side door or back door-but to allow for their symbolic breaching as a mark of hospitality.

The fine old nineteenth century manor houses that persist in the district are not easily interpreted as landscape elements. At the time they were built, they must have had a well understood social significance, but decades have passed and the houses have gradually lost their context. What did their contemporaries make of the elaborate encrustation with architectural ornament? Was it seen as refined, or beautiful, or ostentatious, or more sympathetically, as architectural exuberance? We do not know. But human nature does not change so much in a century or two, and it seems likely that the principal symbolic role of the big house was a display of the prosperity and success of the farmer.

TWO: NINETEENTH CENTURY FARM WORKER'S SHACK

It would be an error to think that the old mansions that still survive typify the nineteenth century housing of the district. They have survived because they were well built of good materials, and because they were too valuable to be allowed to perish. But the majority of houses were much humbler in scale and in materials, and most of them are gone. So we see now a landscape from which the commonest elements have been removed and the exceptional ones remain. Each mansion was the center of a community of workers, who lived nearby in simple dwellings, or shacks, or tents. Travel on foot or horseback was slow, and the farm workers had to live on the farm. Large crews were required, for farming was hardly mechanized and consequently was extremely labor intensive. By 1870 the Jerome Davis farm in Davis had seventy-five full time workers and considerably more seasonal workers. Nothing remains of those workers' houses.

I once dismantled a one hundred-twenty year old farm worker's house that was to be demolished. It was a simple building of a few hundred square feet, framed in fir, on a redwood foundation sitting directly on the ground, with rough redwood one-by-twelve boards nailed up vertically for siding, and no interior finish to the walls. There were two rooms, one with a wood-burning iron stove provided with a clay flue. The north wall of the north room had been papered with Chinese newspapers printed in Stockton, California in 1886. The building had been occupied by a Chinese tenant farmer who grew fresh market produce on ten acres of leased land. More recently Mexican workers had occupied it, one of whom had penciled a calendar on the wall to track his hours of work:

L	M	M	J	V	S	D
		13	12	14	13½	7½
15	12½	14	14	12	13	8
13½	11	15				

Sunday was the day of rest, on which he worked only eight hours. An immense cottonwood tree shaded the house, and framed an outdoor living space, (where, presumably, a privy also once stood). Primitive dwellings of this type were once common throughout the district, either isolated, or clustered near the big manor houses, but hardly any remain.

THREE: HOUSE IN TOWN, 1910

There are two towns in the district: Winters, near the base of the mountains, and Davis, fourteen miles downstream on the creek. Winters is only seventy feet higher in elevation than Davis, indicating the remarkable flatness of the land, sloping about five feet to the mile. By 1910,

each town had a business district and a residential district with a grid of orthogonal streets, each block divided by an unpaved alley. Residential lots were fifty by one hundred or one-hundred-twenty feet.

The typical town house of that era was a simple wood-frame structure of six- or seven-hundred square feet. Often the house had no closets, for the owners had little to put in a closet. People had few possessions, and material culture was simple. Much of daily life was enacted on the front porch, where one might enjoy the evening breeze, and visit with neighbors passing by on foot. Such a house cost about one year's salary of an average worker.

In 1910 the majority of Americans still lived on farms, and a rural orientation was a dominant feature of the culture. The residential neighborhood of the town was essentially a compressed rural landscape. The town house was a farm house placed on an eighth of an acre instead of one-hundred-sixty acres. Architecturally, the house made no acknowledgement of its neighbors. Windows were placed on all sides, without regard to a neighbor's window a few feet away.

When the houses were small in relation to the size of the lots, and when architecture was relatively homogeneous, the resulting landscape of the town was congenial despite the absence of truly urban values or an urban culture. In later decades, when houses were larger and architects less modest, some bizarre neighborhoods were created. What is one to make of a pseudo-Virginia colonial adjacent to a Spanish hacienda adjacent to a Cape Cod saltbox adjacent to an Arizona ranch complete with trucked-in boulders and a bleached cow skull? The spectator is expected to suspend his disbelief, and to imagine each house as if it were solitary, with an appropriate landscape extending to the horizon. This type of neighborhood in town is a denial of urbanity; rather, it is descended from the myth of the pioneer with his isolated rural homestead.

FOUR: RURAL FARMSTEAD, 1952

There used to be a farmstead on county road 31 with a house built about 1952. The house was long and low, as was the style of that time. The foundation was a concrete slab on grade, rather than a wood floor raised over a crawl space as in older buildings. Eight-foot ceilings replaced the fourteen footers of an earlier time, reflecting the adoption of four by eight feet as a standard size for sheet goods (drywall and plywood) in the 1940's. I believe that the four-by-eight standard was a blunder; three-by-nine would have made for less claustrophobic buildings and easier handling of materials. The fine distinctions of transition from public to private space that typified the nineteenth century mansions had nearly disappeared here; one stepped directly from the driveway into the living room. In part this reflects the evolution of a more egalitarian and

less formal society; in part it reflects a loss of architectural subtlety. By the 1950's, the contrast between mansion and shanty was greatly attenuated, and the farm owner's house did not much differ from the houses of his workers.

In the early 1960s, the place burned to the ground and was abandoned. By 1980, a few charred timbers and rusted pipes remained standing over the old foundation, and a thicket of feral rose bushes covered what had once been the yard. In the remains of the garage sat the burnt hulk of a '53 Cadillac, its chromium dental work grinning through the brambles. One day men showed up with heavy machinery, such as loaders and excavators and trucks, and they scooped up the remains of the homestead-foundations, Cadillac, roses, and all-and hauled it away. By the next season, the site was incorporated into the surrounding field, with no evidence left that there had ever been a home there.

The disappearance of that farmstead was part of the depopulation of the rural district that occurred between 1940 and 1990. Farming became mechanized, thus fewer workers were needed. Mechanization of tillage and cultivation using tractor-drawn implements was common by the 1920's; mechanization of harvesting (tomatoes, walnuts, almonds, and prunes) came in the 1970's. At the same time, roads were improved, automobiles became inexpensive and widely available, and the farmer, his family, and the workers, could choose to live in town. Many farmsteads were abandoned or torn down.

There is another reason why the burned-out homestead was not rebuilt; the surrounding land is now under the control of a large farming corporation that farms thousands of acres in the district. The corporate farm embraces the industrial model of farming, in which farming is reckoned to be simply a type of manufacturing, and in which fossil fuel and pesticides are substituted for experience and judgment. It is a farmerless type of farming. From time to time a crew of workers will show up with equipment and carry out some operation, and then leave. But you could watch that field every day for a year and never say, "Ah, there's the farmer," because there isn't one; and without a farmer, there is no need for a farmstead.

TRACT HOUSE IN TOWN, 1999

In 1910, a typical single family dwelling had two bedrooms and one bath, totaling an area of 600 square feet. By 1950, three bedrooms and a thousand square feet were the norm. By 1970, three bedrooms, two baths, and 1500 square feet typified new housing. In 1999, a new house has four to five bedrooms, three baths, a three car garage, and 3000 square feet of living space. Contrary to the growing size of houses, families are smaller than they were a century ago.

In part, people need larger houses because they have more stuff. During the twentieth century the manufacture and distribution of goods became enormously efficient. The price of virtually all goods, measured in constant terms, declined, and an increment of labor now buys far more than it once did. Additionally, many new kinds of goods have been invented: computers, televisions, microwave ovens, scuba gear, jet skis, many other things unheard of a generation ago are now considered necessary.

Also true is that daily life has increasingly moved indoors. The aboriginal inhabitants of the district lived outside and entered their huts only to sleep or wait out stormy weather. But now even children are seldom outdoors. Indoor life has been made more attractive and comfortable with heating, air conditioning, good lighting, refrigeration, and recorded music. This might justify a need for more interior space. In addition, the outside world has steadily been degraded. Where one might once have sat on the porch of a summer's evening, listening to the rustling of the leaves in the Delta breeze, one now is oppressed by booming music from passing cars, roaring gasoline engines, and the sound of sirens. The gentle scratch of a bamboo rake has been replaced by the insane scream of a leaf blower. Outdoors is not what it used to be; people now take refuge in their homes.

More than either of these, the chief determinant of the size of houses is the price of land. When land is expensive, builders put up big houses. If a bare lot cost \$100,000, and if building a house costs \$100 per square foot, then one could build a 600 square foot house for \$160,000 (\$100,000 for the lot plus \$60,000 for the house). Doubling the size of the house to 1200 square feet makes a cost of \$220,000 (\$100,000 for the lot plus \$120,000 for the house). The result is that one can get twice as much house (1200 instead of 600 square feet) for only a 37% increase in the total price. This is an irresistible economic force. Empirically, the total cost of the house plus the lot will not drop below two and one half times the cost of the lot. So if a lot sells for \$125,000, which is a typical low-end price today, the finished house will not be less than \$312,000. The house one gets for \$312,000 will be big and fancy, not small and humble.

Expensive, detached, single-family dwellings are bought by expensive, detached, single families. The father's an attorney, the mother's a doctor, they have 1.5 children and 3.2 automobiles. The town house of 1910 cost about one year's salary of an average worker; the average new house in Davis today costs about seven years salary of an average worker. The self-employed artist, the farm-worker with five children, and the single mother are squeezed out of the picture.

In modern tract housing, the lots are small and the houses are large, built fully to the legal setback, so that each house seems to be staring

furiously, eyeball to eyeball, at its neighbor only a few feet away. Big houses, so close together, seem confrontational. Yet the developers are unwilling to take the obvious next step of a shared common wall and a row of townhouses. In Spain or Morocco, the problem is solved by using a fundamentally different notion of a house. Instead of outward looking, it is introspective; it turns its back to its neighbors and looks into its own interior courtyard. The courtyard, with its trickling fountain, potted lemon trees, drying laundry, and bicycle leaning against a wall, is an attractive space, outdoors, and yet private and protected from the chaos of the streets. This style of housing would be entirely appropriate in this region, more so than what we have, but real estate developers and the bankers who back them are notorious for their conservatism and lack of imagination, so Mediterranean housing has not been attempted here. It is also true that the free-standing house is an icon of the pioneer homestead. The tract house, however far it may be from the pioneer's cabin, is still a remnant of a deeply ingrained rural tradition.

Why is it that an eighth of an acre lot in town costs \$125,000? A developer buys forty acres of farmland near town at farmland prices (\$5,000 per acre) and sits on it for ten years until finally permission to develop it is granted. He pays for utilities and paving, and after the lots are sold, he walks off with twenty million dollars in his pocket. This is what motivates the developer—he wants to grab his twenty million and clear out. He can charge the prices that he does because demand for lots exceeds the supply. The city implements a policy of limiting growth, which makes the city more desirable, and drives up prices even further. City officials, who are charged with fiscal responsibility, are not opposed to a community of large, expensive houses, which generate tax revenues greater than their costs to the city.

As an alternative, a nonprofit organization could buy the farmland and subdivide it, and taking precautions to discourage speculators, could sell those lots for \$40,000 instead of \$125,000. Figuring in the ratio of two and a half to one, houses could be sold at \$100,000 rather than \$312,000. Under this scenario, development of new lands could sustain a more pluralistic society than what we have. The difference of \$85,000 in the market price versus not-for-profit price of a lot is a measure of the real estate developer's greed.

SIX: URBAN FLAT, 2001

There is a handsome building, nestled between similar neighboring buildings, that has two levels of underground parking and six stories above ground. The ground level has space for businesses, while the upper floors are residential flats. The residents of these flats are not troubled with maintaining a yard, nor do they need to drive everywhere—shops and

restaurants are within easy walking distance. This building exists only in the imagination. It has not been built in Winters or Davis because it is a truly urban building in an urban neighborhood, and urban culture does not exist in these towns.

A town does not suddenly become a city by reaching a certain level of population. There are cities in Greece and Italy of only a thousand people. What makes them cities is the architecture, the culture, and the prizing of sociability over materialism. If we look at successful small cities around the country, those that are vibrant and interesting and sought-after places to live, such as Cambridge, Georgetown, Greenwich Village, we notice three traits that they share. The first is a high population density, of about one hundred dwelling units per acre (more than ten times the density of Davis and Winters). This is achieved by a grid system of streets with attached buildings of five or six stories, not so high as to be intimidating or to create the effect of urban canyons. The second feature is a mixed used zoning, so that the ground floors of the buildings are for businesses, and the upper floors are residential. The third feature is hostility to the automobile. Traffic is slow, parking is difficult to find and extremely expensive. Conversely, public transportation is effective.

The small town mindset rejects all of these notions. Widely spaced detached single family homes are considered to be almost the only suitable housing, commercial zoning is scrupulously separated from residential, and the automobile is never offended. An obvious result is suburban sprawl. A less obvious result is housing that is unsuited to the needs of a diverse populace. Single family tract housing is best suited to traditional families with children. There are, however, many non-traditional families, older couples whose children have left home, single people, and childless couples for whom a single family house is not the best housing. An urban flat from which one can walk to shops and restaurants, and which relieves one of the burden of maintaining a yard and a car, is more desirable for many people.

In both Davis and Winters, growth is controversial, but there seems to be agreement that an increase in population also requires moving the edge of town further out into the countryside. Indeed, real estate developers who hold title to lands on the periphery of town are impatient for the chance to finally make their millions. But the linkage of population growth with expansion of the city limits is a false notion and should be rejected. It comes from a failure to conceive of any other kind of housing than that of the rural tradition that has evolved into modern tract housing. It is time to give that up and adopt urban values. The fortified medieval town had a perimeter defined by the city wall, and all growth took place within that boundary. Similarly, Davis or Winters could define its perimeter with a greenbelt and declare, "This is it. This is the edge of town. Forever more." Growth of the urban population would be

allowed by the same mechanisms that operated in medieval towns: by increasing density. The result would inescapably be superior to continuing suburban sprawl, no matter how much the populations of the towns grew. Growth restricted by area but not the number of citizens would force a diversification of building styles that would better serve the needs of the citizens than what exists now. Such a limitation of growth would protect farmland that currently is vulnerable to urbanization.

SEVEN: A PLACE IN THE COUNTRY, 2001

When an eighth-of-an-acre lot in town sells for nearly the same price as forty acres of farmland a few miles out of town, many buyers looking for a home site will choose the farmland. The agricultural economy is depressed, and the farm value of rural land is low compared to its speculative value and its value as a place to build a house. Farm land is being sold as forty acre building lots. I saw an advertisement recently for a plot of rural land: "Ninety-acre home site, secluded, great views, easy commute." No mention was made of the farming potential of the land. Is it rice ground or orchard ground? Does it have district water or its own wells? The farm's value as a place to build a house had eclipsed its agricultural value.

In the last ten years the majority of farmland sold in the district has been sold to non-farmers. Doctors, professors, lawyers, engineers, and businessmen are the new owners. They have no interest in farming; they just want a place to build a big house unrestrained by the tight regulation of city building, and perhaps to add a tennis court and a pool and a barn with a couple of horses. They expect that some tenant farmer will be interested in farming the remainder of the land, and usually they can find someone. Typically, it is the biggest corporate farms that are interested in picking up such leases.

One consequence is that large, suburbanesque houses are being built throughout the district. They are obviously not working farmsteads, and there is something fraudulent about them. The architecture bears no meaningful relationship either to the land or to the community or to the history of the region. Indeed, there is a spate of architects eager to flaunt their outrageousness. A slate roof imported from China? Why not? There is now one such roof in the district. Another consequence is that land is being farmed by corporate tenants who, on the average, embrace industrial practices of farming, which is to say, heavy use of herbicides and fossil fuels.

When the wealthy townsman builds his place in the country, he inadvertently harms the young man or woman with few assets who wishes to become a farmer. What is a young farmer to do? When a parcel of rural land has been encumbered with a \$600,000 house, no would-be farmer

can afford it. The extravagant house has alienated the farmland from the farmer. It is possible for the young farmer to lease the arable part of the parcel from the wealthy owner. So the farmer lives in town, commutes to his fields, and on the road he passes the rich owner, who lives on the farm, and commutes to his office in town. This is not a good situation. To farm well, one must follow practices that are unprofitable in the short term, but which enhance the health of the land in the long term. It would take an unusual degree of maturity for the young farmer to farm well on land that he does not own simply because it is the righteous thing to do. One could not blame him for cutting some corners, and farming badly, if he has no assurance that the land will be available to him for years to come.

THE PARADOX OF RURALITY

There is a phenomenon we might call the paradox of rurality. It is a cousin to the paradox of wilderness, which goes like this: We value wilderness for the absence of humans and their artifacts. By setting foot in the wilderness, we contaminate it, and lessen it. The dream of wilderness is more pure than the wilderness itself, which is disturbed by our presence. Surely, Yosemite Valley with fifty-thousand tourists is not a wild place. Similarly, people are attracted to the rural countryside by the deep beauty of its landscape, its orderliness, the abundance of its fields, the prosperity of its orchards, and by the purposefulness of its workers. But, when the townsman builds a country house he has sure enough begun to ruin the countryside that attracted him. For he has no real business being there, his house is non-organic to the landscape, and when dozens of such houses are scattered through the countryside, the rural district loses its authenticity, its architectural coherence, and its harmony of purpose. It becomes a diluted suburbia. Several times a year I am asked with great earnestness by someone or other if I wouldn't sell them just an acre on one corner of my farm so that they could build a country house. They fail utterly to understand that doing so, multiplied many times over, would destroy what attracted them in the first place.

We recognize the value of wild lands. The most spectacular are preserved as national parks, and a variety of agencies preserve other, subtler tracts of wilderness. Similarly, we recognize the value of historic buildings and neighborhoods, and many of these are protected by law from thoughtless alteration. The agrarian landscape, however appealing, is hardly protected. Zoning codes, building codes, and conservation easements offer slight protection to the rural countryside, but the codes are full of holes, and variances are commonly granted.

The rural lands of the Great Valley of California are vulnerable on two fronts. One is the ever increasing spread of cities and towns by the

addition of housing tracts and the businesses that serve them. A farm where I lived in 1954 was three miles from Davis; now it's in the city limits. I have tried in this essay to make the case that suburban sprawl is not so much a matter of population growth as it is of the failure to adopt truly urban values and the architecture appropriate to them. Such a change can be forced by a city government with a sense of what a city should be and the courage to carry out that vision, or by an imaginative entrepreneur.

The second front on which the rural lands are vulnerable is the transfer of rural land, parcel by parcel, from farmers to non-farmers. This wreaks a change on the landscape that undermines its authenticity. If we want to see where this course leads over time, we need only look to the Santa Clara Valley, Orange County, or Santa Rosa, each of which has lost its rural charm when the agrarian culture was overwhelmed by non-farming immigrants who wanted to live in such a beautiful place. The Napa valley is far along this pathway as well, with its increasing architectural chaos from the houses of wealthy and thoughtless immigrants who want to see the lovely view, but don't stop to think of what they are doing to everyone else's view when they erect their mansion on a hilltop.

It is not obvious how the rural lands can be protected from this kind of transformation. Formation of a Farmlands Commission, analogous to the Coastal Commission or to the commissions that oversee the preservation of historic neighborhoods, might be possible. Such a commission would have a regional rather than a local scope, and like the Coastal Commission, would have broad powers to regulate building and development within its jurisdiction. Similar farmland commissions operate effectively in Denmark and Sweden, but the exaggerated notion of personal freedom engrained in our culture would be, at best, a nearly insurmountable obstacle.

MY FATHER'S CAMPING STOVE, UNUSED ON A TRIP TO
BERRYESSA RESERVOIR

*Laurie Glover**

High wind would have set the tent in constant motion,
extinguished the stove's flame—it had been my father's.
I fled indoors. The next day we went to the grave-
yard of the town that was buried underwater.
Past the headstones, horses jostled one another
for our attention. The rows were like houses

(all of which, but a few, were burned, and those houses,
jacked up on risers with who knows what commotion,
moved who knows where, separated from the others,
don't remake a town). I wept for my father,
and also for all that lay under that water,
knowing what it's like to have a year to grieve

ahead of loss and see it on the grave
face. As it fades, I wonder what the mind houses:
childhood's succession of days, playing in water,
the slanting sunlight, ripples and trees in motion,
fish in the green shade, finding veined stones and feathers,
the wandering creek, the animals, calls to each other.

And the other days, going with Grandmother
with coffee cans of garden flowers for the graves,
did you know them? Or maybe that was your father,
and you never went, instead stayed in the house,
having decided at thirteen that emotion
could be lived without. Before the rising water

covered it all, all the families' tears watered
the sweet ground of the familiar, every mother,
in square hat and white gloves, undertook the motions
at that cemetery for the last time. The graves

* Laurie Glover teaches in English and in the Nature and Culture Program at UC Davis. She wrote this poem during the first artists and writers retreat sponsored by the Putah-Cache Bioregion Project. It first appeared in *Nimrod International Quarterly*.

were emptied. The bones, really no more than houses
we once occupied, were reburied. The fathers

were absent in their grief. Of all this, my father
would have said that to stop the yearly floodwaters
downstream was worth the price of the town—the houses,
trees, orchards, a small price for progress. Another
town will rise elsewhere, as when after gravel
is dredged, the creek finds its bed, refines its motions.

Maybe so. Still, I've lost my father, others, their houses.
With perhaps unnecessary emotion, I mourn
for a grave under trees, the oblitative water.

NOTES OF DECISIONS

*Jon Schutz**
*Eli R. Makus***
*Johnny Tran****

The selected cases were decided between July and October 2001.

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* J.D. Candidate, 2003, University of California, Davis; B.A. 2000, Brigham Young University.

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*** J.D. Candidate, University of California, Davis 2004; B.A. 1999, University of California. San Diego.

PALAZZOLO V. RHODE ISLAND
121 S. Ct. 2448 (2001)

Plaintiff, Anthony Palazzolo, (Palazzolo) filed an inverse condemnation action against the Rhode Island Coastal Resources Management Council (Council) in state court asserting that the Council's wetlands regulations constituted a taking without compensation of his land in violation of the Fifth Amendment's Takings Clause. The Rhode Island Supreme Court rejected Palazzolo's takings claim.

The first issue on appeal was whether Palazzolo had a right to bring his action even though the regulations at issue became effective before he became legal owner of the property. The Court held that Palazzolo's claim was not barred even though the regulation predated his acquisition. Secondly, the Court determined that Palazzolo's claim of total economic deprivation was invalid because the development value in his land was estimated at \$200,000 despite the regulatory prohibitions.

WHITMAN V. AMERICAN TRUCKING ASS'N INC.
531 U.S. 457 (2001)

Whitman arose from the Environmental Protection Agency's (EPA) revised national ambient air quality standards (NAAQS) for ozone and particulate matter. On certiorari, the court considered, *inter alia*, whether the Clean Air Act permitted cost considerations in establishing NAAQS. The appellate court's determination that cost is an impermissible consideration in setting NAAQS was affirmed.

EDWARDSEN V. UNITED STATES DEP'T OF THE INTERIOR
268 F.3d 781 (9th Cir. 2001)

The U.S. Army Corps of Engineers approved a development plan for an oil and gas development off the coast of Alaska. Petitioners, individual native Alaskans and environmental organizations, challenged the approval arguing that it would threaten their ability to continue hunting, fishing, and gathering traditional subsistence resources. Specifically, they alleged that the Department of the Interior's Minerals Management Service erred by relying upon an Environmental Impact Statement that didn't comply with National Environmental Policy Act requirements. The Court held that direct and indirect effects of the project had been adequately analyzed and rejected petitioners' request for additional review. As to petitioners' assertion that the spill response portion of the plan was defective, the Oil Pollution Act, 33 U.S.C. § 1321, invests District Courts with sole jurisdiction over claims arising from its violation. The Court therefore declined to review this portion of the appeal.

PACIFIC COAST FED. OF FISHERMEN'S ASS'N, INC v.
NAT'L MARINE FISHERIES SERV.
265 F.3d 1028 (9th Cir. 2001)

Concern over the impact of twenty-three proposed timber sales on Umpqua River cutthroat trout and Oregon Coast Coho salmon prompted six environmental organizations to sue the National Marine Fisheries Service (NMFS) for declaratory and injunctive relief. Led by the Pacific Coast Federation of Fishermen's Associations (Pacific Coast), the organizations claimed the NMFS had inappropriately adopted several biological opinions to enable the timber sales. The District Court granted summary judgment to Pacific Coast, holding the NMFS had "acted arbitrarily and capriciously" by concluding the timber sales were not likely to jeopardize these species. The Ninth Circuit affirmed the District Court's ruling with regard to all but two of the proposed sales.

SIERRA CLUB v. WHITMAN
263 F.3d 898 (9th Cir. 2001)

Does the Environmental Protection Agency have a duty to enforce the Clean Water Act, 33 U.S.C. § 1319, if evidence shows a waste water treatment plant is knowingly violating the Act? The Sierra Club sued the EPA for not taking action against the City of Nogales, Arizona and the International Boundary and Water Commission. Together the entities controlled a waste water plant which discharged pollutants under an expired 1996 EPA permit. Addressing the broader issue of when courts should review an administrative agency's enforcement decisions, the Ninth Circuit relied on a Supreme Court opinion which held that "[agencies are] far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities". *Heckler v. Chaney*, 470 U.S. 821 (1985). While recognizing that the Clean Water Act obliges the EPA to act against such forms of pollution, the Court relied on legislative history in determining that the Act allows the EPA discretion and does not mandate specific enforcement actions.

UNITED STATES v. ELIAS
269 F.3d 1003 (9th Cir. 2001)

Defendant, Allen Elias, required four employees to empty between one and two tons of cyanide-laced sludge from a holding tank and into the ground without proper safety equipment. One of the employees collapsed in the process and had to be medically treated. All four employees suffered respiratory injuries. Elias was convicted of, inter alia, criminal violation of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6928, in the Idaho District Court for attempting to dispose of hazardous waste without a permit, knowing that the attempt

placed others in imminent danger of death or serious bodily injury. The Ninth Circuit upheld the §6928 criminal charge against Elias, resulting in a possibility of a seventeen year federal prison sentence. However, the Court vacated the portion of the judgment which ordered Elias to pay \$6.3 million in restitution to the most seriously injured employee.

WETLANDS ACTION NETWORK v.
UNITED STATES ARMY CORPS OF ENG'RS
222 F.3d 1105 (9th Cir. 2001)

In developing 1,000 acres of one of the largest undeveloped sites in a portion of west Los Angeles for residential and commercial use, Playa Capitol Group (Playa) will have to dredge and fill 21.4 acres of natural wetlands. To compensate for the loss of wetlands, they plan to create a separate 52-acre freshwater wetland complex. To begin the first phase, Playa applied to the U.S. Army Corps of Engineers (Corps) for a permit to fill 16.1 acres of wetlands. Based on extensive prior research, the Corps concluded the project would not "significantly affect the quality of the human environment" because the "freshwater wetland system [would] result in a net environmental benefit." An Environmental Impact Statement was determined unnecessary and the Corps issued the permit to Playa. Plaintiffs attained summary judgement against the Corps for not demanding an EIS. The Ninth Circuit reversed, holding that "an agency's decision to forego issuing an EIS may be justified in the presence of mitigating measures." The Court accepted the "net environmental benefit" as a sufficient mitigating factor.

ALSEA VALLEY ALLIANCE v. EVANS
161 F. Supp. 2d 1154 (D. Or. 2001)

This case began when the National Marine Fisheries Service (NMFS) decided to list only naturally spawned coho salmon as "threatened" under the Endangered Species Act, thereby excluding hatchery bred coho. Plaintiff sued challenging this final NMFS ruling. The court held that the challenge to the ruling was timely and that the NMFS ruling was arbitrary and capricious.