

# Recent Supreme Court Cases: Riverkeeper and Burlington Northern

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Berg Hill Greenleaf & Ruscitti LLP  
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# Entergy v. Riverkeeper

- **Cooling water intake structures for large power plants**
- **214 billion gallons of water per day**
- **Entrainment of 3.4 billion aquatic organisms per year**



# Entergy v. Riverkeeper

- “Standard ... shall require that the ... structures reflect the best technology available for minimizing adverse environmental impact”
- CWA Section 1326(b)



# Entergy v. Riverkeeper

- **New facilities use closed-cycle: 98%**
- **Existing facilities: too expensive to use closed-cycle**
- **EPA applied cost-benefit analysis to create standard for existing facilities**
- **2d Cir – not allowed**



# Entergy v. Riverkeeper

- **Held (5-1-3): EPA's interpretation is reasonable**
- **Chevron deference**
- **“best” may mean greatest possible reduction of harm with economically feasible technology**
- **“minimize” means degree; not greatest possible reduction**



# Entergy v. Riverkeeper

- Chevron not dead letter
- Narrow ruling
- EPA not forbidden from using cost-benefit analysis, but EPA not required to do so either: discretion
- “best” in other statutes – efficiency?



# Burlington Northern/Shell Oil

- CERCLA
- B&B operated: 3.8 acres
- 1960-1989
- Leased adjacent .9 acres from BN
- 1975-1989



# Burlington Northern/Shell Oil

- B&B distributor of chemical products
- Shell sold new products
- F.O.B. – common carrier
- Shell encouraged safe handling
- Shell knew about spills
- B&B sloppy



# Burlington Northern/Shell Oil

- NPL in 1989
- B&B insolvent
- USA sues BN and Shell
- BN as o/o
- Shell as arranger



# Burlington Northern/Shell Oil

- **Spectrum of facts**
- **Sole purpose to discard waste**
- **Sale of new and useful product with no seller knowledge**
- **Less clear with many permutations of “arrangements” in between extremes**
- **Seller knowledge and motive less clear**



# Burlington Northern/Shell Oil

- Plain meaning (8-1: Stevens)
- Action directed to a specific purpose
- Takes intentional steps to a specific purpose – planned for



# Burlington Northern/Shell Oil

- Seller's knowledge evidence of intent to dispose
- but knowledge alone not enough to prove that entity "planned for" disposal
- Shell aware of minor spills after B&B owned; Shell tried to reduce spills
- Although spills continued, not enough



# Burlington Northern/Shell Oil

- **Narrowly written**
- **Emphasis on sale of new product**
- **Interpretations of other cases in middle of spectrum**



# Burlington Northern/Shell Oil

- Appportionment
- Trial Court found divisibility of BN
- % of total geographic area
- Duration of business
- chems spilled on leased parcel 2/3 of contamination



# Burlington Northern/Shell Oil

- **Not on appeal:**
  - **Joint and Several liability?**
  - **Divisibility: is the harm capable of apportionment?**
  - **Principles to apply in CERCLA cases?**
- **Appeal: did record have reasonable basis for 9% apportionment?**



# Burlington Northern/Shell Oil

- Harmless error to consider equity in apportionment
- Rooted in evidence
- Evidence specific enough
- Precise calculations not necessary
- 2/3 contribution harmless error; time and geography enough to support 9%

