RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. CLEAN WATER ACT

Carabell v. United States Army Corps of Engineers, 391 F.3d 704 (6th Cir. 2004)

In *Carabell v. United States Army Corps of Engineers*, the United States Court of Appeals for the Sixth Circuit upheld the finding of the United States Army Corp of Engineers (Corps) that a significant nexus existed between wetlands on private property and an adjacent nonnavigable ditch, which abutted the property. Plaintiffs, June Carabell, Keith Carabell, Harvey Gordenker, and Frances Gordenker (Carabells), applied for a state permit to fill 15.9 forested acres of the 19.61 acres they owned in Chesterfield Township, Macomb County, Michigan. The Michigan Department of Environmental Quality (MDEQ) initially denied the application that would permit construction of a 130-unit

condominium complex. MDEQ found that the proposed activity would have a significant adverse impact on the natural resources, the public interest, and the public trust held in the wetlands. During prehistoric times, the Carabells' property was submerged under Lake St. Clair. The lake receded with time; however, some of this property remained as wetlands. The property is now located one mile northwest of Lake St. Clair and is one of the final large forested wetlands still intact in Macomb County. An unnamed ditch divides the Carabells' property from neighboring property. During the excavation of this ditch, spoils were cast on either side to create upland berms. The upland berms measured four feet in width along the banks of the ditch. The effects of the berm were to block immediate drainage of surface water out of the parcel and into the ditch. Whether on the northeastern corner or the southwestern corner, the ditch empties water through the Auvase Creek to Lake St. Clair, which is a part of the Great Lakes drainage system.

Although MDEQ found significant impacts, a state administrative law judge ordered it to issue a permit for a 112-unit alternative condominium development with on-site wetland enhancement. Over the Environmental Protection Agency's (EPA) objection, MDEQ issued the permit in November 1998. However, this permit specified that it did not waive federal jurisdiction. Therefore, the Carabells needed to obtain a federal permit from the Corps. EPA notified MDEQ that under the Clean Water Act (CWA), federal jurisdiction trumped. Further, the EPA advised the Carabells that the Corps had the authority to process this permit application. The Carabells contested jurisdiction, but nonetheless applied for a federal permit to place 57,437 cubic yards of fill on the wetland. Although the Carabells would disturb 15.87 acres of wetlands, they would dredge and replant 3.74 acres of wetlands.

The Corps conducted three site inspections and issued its permit evaluation on September 11, 2000. The Corps found that the operation would have major, long-term, negative impacts on the water quality in the Auvase Creek and Lake St. Clair, on terrestrial wildlife, on the wetlands, on conservation, and on the overall ecology of the area. In addition, the project would have minor negative impacts on downstream erosion and sedimentation, on flood hazards and floodplain values, and on aquatic life. The Corps notified the Carabells of its decision on October 5, 2000. The Corps found that the impacts would violate the public interest and that the Carabells had failed to overcome the presumption that there were less damaging practicable alternatives available.

Consequently, the Carabells filed an administrative appeal of the permit denial. The Carabells argued (1) that the Corps did not have regulatory jurisdiction over their property, (2) that the MDEQ's permit barred the Corps' denial, and (3) that the Corps should have issued the permit because the proposed activities met all statutory and regulatory requirements. The appeal was denied. The Carabells then filed suit in district court on July 26, 2001. Carabell v. United States Army Corps of Eng'rs, 391 F.3d 704, 707 (6th Cir. 2004). Both parties filed motions for summary judgment and the magistrate denied the plaintiffs' motion. *Id.* The magistrate found that "because Plaintiffs' property is adjacent to neighboring tributaries of navigable waters and has a significant nexus to 'waters of the United States,' it is in fact not isolated, and is subject to the jurisdiction of the CWA." *Id.* The magistrate also found that denial of the permit was rational based on the Corps' findings regarding the effect of the project and the plaintiffs' failure to show the absence of less damaging practicable alternatives. The district court accepted these recommendations, and the Carabells appealed.

The Sixth Circuit reviewed the order of summary judgment de novo and affirmed the district court's decision. The court reviewed the Corps' final decision under the Administrative Procedure Act (APA). The APA allows a court to set aside an agency's action "only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2000). This "highly deferential standard" does not allow a court to "substitute its judgment for that of the agency." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). In the current case, the court would uphold an agency's findings if they were supported by substantial evidence. *See* 5 U.S.C. § 706(2)(E). Further, the court would also uphold an agency's interpretation of its own regulations unless plainly erroneous or inconsistent with the regulatory text. *See id.* The Carabells argued on appeal that the court erred (1) in finding that the Corps had CWA jurisdiction over the property and (2) in affirming the Corp's decision to deny the permit application.

The court closely examined the jurisdictional requirements of the CWA. The CWA requires landowners to obtain permits from the Corps prior to discharging fill material into navigable waters. CWA § 404(a), 33 U.S.C. § 1344(a) (2000). Navigable waters are "waters of the United States, including the territorial seas." CWA § 502(7), 33 U.S.C. § 1362(7). The court emphasized both the Corps' and EPA's definition of "waters of the United States" included "wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) in this section." 33 C.F.R. § 328.3(a) (2004); *see also* 40 C.F.R.

§ 122.2 (2004). The Corps defines "adjacent" as "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(c). Further, "adjacent wetlands" include "wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." *Id.* The court first considered the district court's finding that the Carabells' property was not isolated. The ditch running along the property is separated from wetlands by a manmade berm. On the northeastern end, the ditch is connected to the Sutherland-Oemig Drain. On the southwest end, the ditch is connected to other ditches. Both corners of the property outlet into Auvase Creek and then into Lake St. Clair. The district court reasoned that the property would not be isolated from the waters of the United States but in fact constituted "adjacent wetlands" under the CWA. Therefore, the district court correctly found that CWA jurisdiction existed. The Sixth Circuit focused on the fact that the ditch emptied on both sides into drains or other ditches that in the end connect to Lake St. Clair. On the northeast end, the connection flows to Lake Erie and Lake Huron. Irrespective of direction of water flow, the ditch is "necessarily a tributary of 'waters' identified in paragraphs (a)(1)-(6) of . . . section 328.3(a)." *Carabell*, 391 F.3d at 708. A man-made berm does not isolate this property. Therefore, the ditch is connected on either side to "waters of the United States" as defined in the regulations. The court found that these wetlands were adjacent to a tributary of waters of the United States and were therefore "adjacent wetlands" under 33 C.F.R. section 328.3(a)(7).

The court then addressed the applicability of the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). Prior to *SWANCC*, intrastate waters that provided habitat for migratory birds fell within the scope of Corps' jurisdiction under the CWA. In *SWANCC*, the Supreme Court rejected the "Migratory Bird Rule" and held that isolated intrastate waters could not be subject to the Corps' jurisdiction. *SWANCC*, 531 U.S. at 166. Although some courts have read *SWANCC* broadly to limit the Corps' jurisdiction, the Sixth Circuit followed the majority of courts and interpreted *SWANCC* narrowly as holding only that the CWA does not reach isolated waters. *See, e.g.*, United States v. Rapanos, 339 F.3d 447, 452-53 (6th Cir. 2003) (adopting a narrow interpretation of *SWANCC* and finding that the CWA reached a roadside ditch and its adjacent wetlands), *cert. denied*, 124 S. Ct. 1875 (2004); United States v. Deaton, 332 F.3d 698, 702 (4th Cir. 2003) (same).

The court next addressed the applicability of *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In *Riverside*

Bayview, the Supreme Court affirmed the Corps' "adjacent wetlands" jurisdiction. The *Riverside Bayview* Court noted that Congress broadly defined the waters within CWA jurisdiction.

> Of course, it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand.

Riverside Bayview, 474 U.S. at 135 n.9. The Sixth Circuit found that *SWANCC* did not weaken the *Riverside Bayview* holding. In *SWANCC*, the Court noted Congress's "unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters." 531 U.S. at 167. The *SWANCC* Court, however, did not decide any issue with regard to "adjacent wetlands" under 33 C.F.R. section 328.3(a)(7). Rather, it addressed the application of the Migratory Bird Rule to isolated ponds defined as "waters of the United States" under 33 C.F.R. section 328.3(a)(3). *Id.* at 174.

The Sixth Circuit then discussed its decision in *Rapanos v. United States*, where it noted that in *Riverside Bayview* the Supreme Court concluded that the Corps was entitled to regulate adjacent wetlands because of what *SWANCC* described as the "significant nexus between the wetlands and navigable waters." *Rapanos*, 339 F.3d. at 452. The *Rapanos* court concluded that there "is also a nexus between a navigable waterway and its nonnavigable tributaries" and that this nexus allowed the Corps reasonably to determine that it had jurisdiction over "the whole tributary system of any navigable waterway." *Id.* at 452; *see also* United States v. Rapanos, 376 F.3d 629, 639 (6th Cir. 2004) (describing CWA jurisdiction over adjacent wetlands and the requirement of a significant nexus between the wetlands and navigable waters, "which can be satisfied by the presence of a hydrological connection").

In the instant case, the Sixth Circuit held that the district court properly followed the *Rapanos* cases and determined that a significant nexus existed between the Carabells' wetlands and the adjacent nonnavigable ditch, which flows one way or another into other tributaries of navigable waters of the United States. The court upheld the Corps' jurisdiction under the CWA and found that the Corps' regulations and evaluations provided a rational basis for its decision to deny the Carabells' permit. The court held that the Corps' decision was neither

arbitrary nor capricious and affirmed the district court's decision to grant summary judgment to the defendants.

Rebekah Salguero

II. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

Gencorp, Inc. v. Olin Corp., 390 F.3d 433 (6th Cir. 2004)

In *Gencorp, Inc. v. Olin Corp.*, the United States Court of Appeals for the Sixth Circuit found that under section 113(g)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) liability as an arranger requires only constructive ownership of waste. 390 F.3d 433, 448. Olin Corp. (Olin) brought this suit in order to have a portion of the environmental cleanup costs associated with the disposal of toluene di-isocyanate (TDI) and toluene di-amine (TDA) shifted to its business partner in the production of these chemicals, Gencorp, Inc. (Gencorp). Gencorp responded by arguing that (1) the statute of limitations had expired on Olin's claims, and (2) Gencorp was not an arranger under CERCLA because it neither owned the waste nor participated in its disposal. At trial, the district court determined that Gencorp was liable as an arranger because the company managed and co-owned the facility at which the waste was produced. It set the allocation of liability and the dollar value of that liability. However, the court refused to rule on Gencorp's contract claims because they were the subject of a parallel suit in the United States District Court for the Southern District of New York between Olin and its insurers.

On June 21, 1962, Gencorp and Olin entered into a contract in which Olin would pay for, and build, two facilities to produce TDA and TDI on land owned by Gencorp. In return, Gencorp would lease the land to Olin for a nominal sum and purchase fifty percent of the TDI produced. Olin had title to the facilities but Gencorp had an option to buy them for book value at a later date. The agreement also allowed for joint administration of the facilities. Gencorp employed all of the workers but the majority of the management level staffers in the facility were Olin employees. In addition, Gencorp and Olin created a "TDI Committee" comprised of equal numbers of Gencorp and Olin employees which oversaw the operation and management of the facilities. This committee dealt with, among other things, the method of

waste disposal and attempts to reduce the total amount of waste the facility produced. This committee determined that some of the waste would be disposed of on site, at Fields Brook, but the majority would be trucked to the "Big D site." On October 1, 1973, Olin and Gencorp modified their agreement so that Gencorp relinquished its option to buy the facilities in exchange for $1.65 million and the right to purchase at least eighty percent of the facilities' output at the lesser of market value or cost.

Problems caused by the facilities' waste disposal plans became apparent to Olin in the late 1970s when it began investigating toxic contamination at the Big D site. The Ohio Environmental Protection Agency (OEPA) asked Olin for information about the Big D site in May 1980. The EPA's attention was attracted when Olin filed a report under CERCLA stating that it had disposed of 28,000 tons of waste at the Big D site. Later in 1980, the TDI and TDA facilities were shut down, dismantled and decontaminated. In 1982, Olin voluntarily attempted to mitigate the damage at the Big D site by increasing the slope gradient and adding clay topsoil to prevent runoff. Olin then deemed the site a nonthreat to human life and stated that no further corrective action was required.

The EPA disagreed with Olin's determination and after some fruitless negotiations issued an administrative order requiring Olin to conduct further remedial action at the Big D and Fields Brook sites. Anticipating a suit by Olin for contribution, Gencorp filed a declaratory judgment suit in the United States District Court for the Northern District of Ohio to determine its liability for the contamination of Big D and Fields Brook. Olin filed a counterclaim, arguing that either Gencorp was jointly and severally liable for the costs of clean up or that Gencorp owed half the costs by means of contribution. Gencorp dismissed its initial claims, but answered Olin's counterclaims with a claim for breach of contract to insure.

The district court trifurcated the trial into (1) initial determination of liability, (2) allocation of liability as a percentage, and (3) assignment of liability as a dollar amount. In the first part of the trial, the district court determined that Gencorp was an arranger under CERCLA either because of its business association with Olin or due to its own actions as an owner and operator. The court then determined that Gencorp bore the liability for thirty percent of the Big D site and forty percent of the Field Brook site. Finally, the district court set Gencorp's liability at $19 million plus $9 million in prejudgment interest. It refused to rule on the contract

matter because it was the subject of a concomitant suit in the Southern District of New York between Olin and its insurers.

The parties filed cross appeals requesting the determination of (1) the appellate court's jurisdiction to hear the appeal, (2) whether the statute of limitations barred Olin's claims, (3) whether Gencorp was liable as an arranger under CERCLA for the Big D site contamination, (4) whether the district court abused its discretion by apportioning liability, (5) whether the district court erred in allowing prejudgment interest, and (6) whether the district court should have allowed Olin's request for declaratory judgment regarding future clean up at the sites.

The Sixth Circuit determined that it had jurisdiction to review a district court's entry of final judgment on some, but not all of the claims. The court based its decision on its own precedent in *General Acquisition, Inc. v. Gencorp, Inc.*, 23 F.3d 1026 (6th Cir 1994). The court stated that for an entry of judgment under Rule 54(b) of the Federal Rules of Civil Procedure, the district court needs to (1) expressly direct the entry of judgment against some, but not all claims in the trial, and (2) determine that efficiency of one appeal at the close of all issues in the case is outweighed by the need for prompt review of certain matters. The court held that the first requirement was met because Olin's CERCLA claims and Gencorp's contract claims did not share an aggregate of operative facts to deny the entry of judgment as to one without the other. In addition, the Sixth Circuit stated that the district court's ruling on Olin's CERCLA claim satisfied both the finality requirement of Rule 54(b) and 28 U.S.C. § 1291. It determined that the district court met the second requirement by explaining that the efficiency of immediate determination stemmed from the fact that the remaining issue would be settled in another court.

The Sixth Circuit continued its analysis by considering the statute of limitations arguments. CERCLA allows for a statute of limitations for a contribution claim either within three years of a removal action or within six years of physical construction of a remedial action. Gencorp argued that Olin's voluntary clean up of Big D in 1982 constituted an initiation of a remedial action and therefore the statute of limitations had run long before Olin commenced the current action. Olin contended that its activities in 1982 at Big D were removal acts and that the statute of limitations could not begin with these acts because they were separate and distinct from the actions ordered by the EPA. The district court looked at the National Contingency Plan and determined Olin's actions were removal acts because they were short in duration and low in cost and because they were undertaken before the EPA's administrative order.

The Sixth Circuit agreed with the district court and added that an action must be permanent in order for it to start the tolling of the statute of limitations under CERCLA. Since the EPA determined that Olin's actions in 1982 were insufficient to remedy the problem, the Sixth Circuit concluded these acts were not permanent as that concept is understood in CERCLA.

Next, the court turned its attention to whether Gencorp was liable for the contamination at the Big D site as an arranger. The court stated that for a party to be an arranger under CERCLA that party must own hazardous waste and plan or prepare to transport it. The planning component, the court asserted, required a showing that the party intended to dispose of the hazardous waste. The Sixth Circuit stated that Gencorp's mutual role in operating and managing the TDI plant demonstrated Gencorp's knowledge of the waste and intent to dispose of it. Gencorp argued that it neither (1) actively participated in disposing the waste, nor (2) owned the waste. To support its first argument that active participation was required, Gencorp cited *United States v. Best Foods*, 524 U.S. 51 (1998), *Carter-Jones Lumber Co. v. Dixie Distributing Co.*, 166 F.3d 840 (6th Cir. 1999), and *United States v. Township of Brighton*, 153 F.3d 307 (6th Cir. 1998). The court distinguished *Best Foods* on the grounds that the case dealt with the question of whether a parent company could be considered an operator under CERCLA merely because of the acts of its subsidiary. *Best Foods*, stated the Sixth Circuit, stands for the preposition that either there must be an ability to pierce the corporate veil between the parent and subsidiary or the parent's acts must qualify it for operator liability under CERCLA independently. *Carter-Jones*, the court explained, was inapplicable to Gencorp's situation because that case dealt with shareholder liability as an arranger under CERCLA for the acts of the shareholder's corporation. Similarly, *Township of Brighton* was inapposite because it dealt with a governmental unit's liability as an operator under CERCLA. The court concluded that these cases stood for the proposition that alleged violators under CERCLA must meet the criteria for operators or arrangers themselves and an attenuated relationship to a violator will not suffice to meet this criteria. The court concluded its analysis on Gencorp's first argument by asserting that none of the cited cases required that a party be actively involved in the disposal of waste in a particular place and manner in order to satisfy CERCLA.

Gencorp's second argument was that it never owned the waste. The Sixth Circuit stated that constructive ownership was enough to satisfy the ownership requirement in CERCLA. Then, the court looked at the time

when CERCLA was passed and pointed out that constructive ownership was well known in both the common law and federal statutes. In addition, the Sixth Circuit noted that other courts had found that constructive ownership of waste was enough to impose penalties under CERCLA. The court explained that control over the waste was the dispositive factor that determined constructive ownership. Gencorp controlled the waste, the court proffered, because it had an option to buy the TDI plant, participated in managing the plant through a position on the board, and approved the plans to dispose of the waste.

The court next considered Olin's objection to the allocation of costs. Olin argued that the district court abused its discretion by considering Olin's delay in informing Gencorp of the EPA's interest in Big D and Olin's greater control over the TDI facility when setting the allocation of costs. The court found no abuse of discretion because CERCLA allows the court to utilize any equitable considerations it deems appropriate. Therefore, the district court had not abused its discretion in considering these factors.

Gencorp's objection to the prejudgment interest award was the next item on the Sixth Circuit's agenda. Gencorp argued that the district court erred because it considered prejudgment interest mandatory under CERCLA and Olin's delay in bringing a contribution suit eliminated the claim for such interest. The Sixth Circuit, referring to CERCLA, determined that under a section 113 action for contribution, prejudgment interest was mandatory even for late claims.

Finally, the Sixth Circuit considered Olin's claim that the district court should have entered a declaratory judgment as to Gencorp's liability for any future clean up at the sites. It found that section 113 of CERCLA did require such declaratory judgment, but stated that there was not enough evidence in the record to determine if a case or controversy existed, as required by Article III of the Constitution, concerning this issue to allow a ruling on the declaratory judgment claim. Therefore the court remanded this issue to the district court for further consideration.

Charles Merrill

Young v. United States, 394 F.3d 858 (10th Cir. 2005)

In *Young v. United States*, the United States Court of Appeals for the Tenth Circuit affirmed the United States District Court for the Eastern District of Oklahoma's order granting summary judgment to the

United States on the plaintiffs' claims for cost recovery under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (2000). According to the Tenth Circuit, the plaintiffs' claims failed because the plaintiffs had not incurred any response costs necessary and consistent with the national contingency plan (NCP), or EPA regulations on the procedures and standards for responding to the release of hazardous substances, pollutants, and contaminants. *See* CERCLA § 105(a), 42 U.S.C. § 9605(a); 40 C.F.R. §§ 300.1, 300.3 (2004).

The plaintiffs brought suit after purchasing a parcel of property adjacent to the Eagle-Pitcher Superfund Site in Henryetta, Oklahoma, for considerably less than its appraised value. Although the plaintiffs knew about EPA cleanup actions at the site, they did not conduct any site investigations on their property until after they purchased it. The plaintiffs then surveyed the property, hired an environmental consulting company to conduct a site investigation, and hired an environmental engineering company to assess the potential risks to humans. The investigations revealed lead and arsenic present on the property as well as a potential health risk for workers. The plaintiffs brought suit against the federal government and the City of Henryetta under CERCLA section 107(a), 42 U.S.C. § 9607(a), seeking to recover $237,273—the costs incurred in hiring the companies to conduct the site investigations. The plaintiffs did not take any action to contain or clean up the hazardous substances on their property; they abandoned their property and do not intend to spend any money to clean up the lead and arsenic contamination.

The Eastern District of Oklahoma dismissed all but the plaintiffs' claim to recover costs under CERCLA section 107(a). The court then concluded that the cost-recovery claim failed as a matter of law because plaintiffs were potentially responsible parties (PRPs). Under Tenth Circuit precedent, a plaintiff-PRP must proceed under the contribution provisions of CERCLA section 113(f) when suing another PRP for costs incurred in responding to contamination. The plaintiffs appealed the district court's grant of summary judgment, arguing that they are able to maintain a claim under CERCLA section 107(a) because they are not PRPs.

The Tenth Circuit, upon de novo review, affirmed the district court's grant of summary judgment to the United States. Unlike the lower court, the Tenth Circuit avoided the question of whether the plaintiffs are PRPs.

In reaching its decision, the Tenth Circuit acknowledged that CERCLA is not a general vehicle for toxic tort claims but rather exists to

further two goals: facilitating the cleanup of hazardous waste sites and imposing the costs of such cleanup on parties responsible for the contamination. Young v. United States, 394 F.3d 858, 862 (citing Meghrig v. KFC Western, Inc., 516 U.S. 479, 483 (1996)). The court then laid out the elements necessary for a plaintiff to establish a prima facie case for cost-recovery under section 107(a). A plaintiff must prove (1) the site is a facility, (2) defendant is a responsible person, (3) the release or threatened release of a hazardous substance has occurred, and (4) the release or threatened release caused the plaintiff to incur necessary response costs consistent with the NCP.

The Tenth Circuit then pointed to the language of section 107(a)(4)(B), which states that a private party may recover "any . . . necessary costs of response incurred . . . consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). The plaintiff thus bears the burden of proving its response costs were both necessary and consistent with the NCP. United States v. Hardage, 982 F.2d 1436, 1447 (10th Cir. 1992). With respect to the statutory requirement that the cost be necessary, the court pointed out that the response cost must be "necessary to the containment and cleanup of the hazardous releases." *Young*, 394 F.3d at 863 (quoting *Hardage*, 982 F.2d at 1448). Next, the Tenth Circuit stated that it was in agreement with other circuit courts of appeals that recognized costs cannot be deemed "necessary" to the containment and cleanup of hazardous releases absent some nexus between the alleged response costs and an actual effort to respond to the environmental contamination. *Id.*

The court then discussed the consistency requirement in the language of section 107(a). Any response action must be consistent with the NCP. Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc., 100 F.3d 792, 796 (10th Cir. 1996). According to the NCP, "[a] private party response action will be considered 'consistent with the NCP' if the action, when evaluated as a whole, is in substantial compliance with the applicable requirements . . . and results in CERCLA-quality clean-up." 40 C.F.R. § 300.700(c)(3)(i).

In conclusion, the Tenth Circuit stated that even if the assumption is made that all the costs incurred could be properly characterized as "response costs," the costs were neither necessary to the containment and cleanup of hazardous releases nor consistent with the NCP. The court reasoned that the plaintiffs' alleged response costs claim failed as a matter of law because the costs were not tied in any manner to the actual cleanup of the hazardous releases from the site. According to the NCP, a response action in a private party cost-recovery action must be in

compliance with 40 C.F.R. section 300.700(c)(5)-(6) in order to result in a CERCLA-quality cleanup. The court concluded that the plaintiffs incurred no costs consistent with NCP because their actions did not result in any cleanup. The court dismissed the plaintiffs' argument that they were not required to follow their initial actions with additional response action because the source is a defendant-controlled site. According to the court, the costs appeared to be incurred in connection with litigation and therefore are not compensable. In the court's opinion, the plaintiffs had failed to establish an essential element of their cost-recovery claim, that the release or threatened release of a hazardous substance caused them to incur necessary response costs consistent with the NCP.

Lisa Hargadon

III. FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT

Hardin v. BASF Corp., 397 F.3d 1082 (8th Cir. 2005)

The United States Court of Appeals for the Eighth Circuit upheld a district court's ruling that state tort claims arising out of herbicide labeling were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136-136y (2000). In this instance, rice farmers used defendant BASF Corporation's (BASF) Facet herbicide (Facet) in a manner that contaminated plaintiffs' tomato crops. The Eighth Circuit held that labeling was the real issue because any remedy would require BASF to alter the Facet label. And, once altering the label is at stake, FIFRA's labeling requirements preempt any state law.

The Eighth Circuit began its treatment of the issue by describing the injury suffered by the tomato farmers. The farmers were harmed by "off-target drift" of Facet. Off-target drift occurs when an herbicide is applied aerially. Any aerial application of herbicide will cause a small amount of the herbicide to drift through the air, eventually landing in nearby areas. The small amount of drift created from these applications is usually harmless, but Facet is unusual because it is extremely harmful to domestic plants, such as tomatoes, even in small amounts. In this case, the drift landed on the farms of commercial tomato growers and injured their plants.

The court then discussed the nature of preemption and explained why FIFRA preempted the plaintiffs' state law claims in this case. First, the plaintiffs' claims were couched in negligence and strict liability, but

the court found they were really based in labeling practices. The EPA regulates all herbicide labels under FIFRA, including the label of BASF's product Facet. The EPA-determined labeling of Facet already contained warnings about aerial application, which included special instructions for Arkansas aerial application. Not only does the EPA regulate herbicide labels, but FIFRA has an explicit provision providing preemption as a defense to herbicide producers if their labeling is called into question.

The court's discussion of preemption focused on the fact that it does not matter how plaintiffs couch their claim because the law requires a federal remedy. The claims available to plaintiffs under state law included design defect or manufacturing error, but not defective labeling or breach of express or implied warranties. According to Arkansas state law, a design defect exists if plaintiffs can prove that a product is unsafe for its use and consumption. ARK. CODE. ANN. §§ 4-86-102, 16-116-102 (2000). The plaintiffs' argument in this case failed because Facet is safe and effective for its designed use, namely protecting rice farms from barnyard grass.

The plaintiffs' further argued that no use of Facet by rice farmers would prevent the drift that harmed their tomato plants. The court rejected this argument as inconsistent with *Netland v. Hess & Clark, Inc.*, 284 F.3d 895 (8th Cir. 2002). In *Netland*, the Eighth Circuit found that FIFRA preempted *any* claim that "directly or indirectly" challenged EPA's labeling authority. *Id.* at 898-900. The standard is satisfied by asking "whether in seeking to avoid liability for any error, would the manufacturer choose to alter the label or the product." *Id.* at 900. In the instant case, the answer for BASF would be to alter the label rather than the product. Or the defendant could change the label to one that precludes all aerial application of the herbicide, in favor of only ground application. Because a simple label change, such as the ones above, could remedy the situation, FIFRA vests the authority to set label standards exclusively in the EPA.

Finally, the court noted that plaintiffs could not show that Facet is unreasonably dangerous because it could be applied in a contained manner that would no longer harm tomato farmers in plaintiffs' situation. Further, Facet is "extraordinarily effective" for its intended use of killing barnyard grass in rice crops; this alone precluded plaintiffs from prevailing on that claim.

Jaclyn Strassberg

IV. NATIONAL ENVIRONMENTAL POLICY ACT

Fuel Safe Washington v. Federal Energy Regulatory Commission, 389 F.3d 1313 (10th Cir. 2004)

In *Fuel Safe Washington v. Federal Energy Regulatory Commission*, the United States Court of Appeals for the Tenth Circuit denied petitioner Fuel Safe Washington's (FSW) request for review of two orders of the Federal Energy Regulatory Commission (FERC) granting a Certificate of Public Convenience and Necessity (Certificate) to Georgia Strait Crossing Pipeline LP (GSX) to build a new natural gas pipeline and ancillary facilities in Washington state and denying requests for rehearing. FSW brought suit against FERC seeking to vacate FERC's final orders or to remand to FERC for further proceedings. FSW alleged that FERC improperly exercised jurisdiction over the pipeline because the pipeline would not transport gas in interstate commerce, and that the Final Environmental Impact Statement (FEIS) issued by FERC pursuant to the project was deficient because it failed to address reasonable alternatives, transboundary impacts, cumulative acoustic impacts and the impacts of reasonably foreseeable earthquakes. The Tenth Circuit held that FSW's jurisdictional challenge failed because FSW had not complied with the statutory mandate of the Natural Gas Act, which required FSW to seek rehearing by FERC before petitioning for judicial review. Fuel Safe Washington v. Fed. Energy Regulatory Comm'n, 389 F.3d 1313, 1321-22 (10th Cir. 2004). In addition, the court held that FSW's claims regarding the sufficiency of the FEIS, brought under the National Environmental Policy Act (NEPA) were likewise without merit. *Id.* at 1327.

On April 24, 2001, GSX applied for Certificates from FERC to construct and operate a natural gas pipeline and accompanying facilities in Whatcom and San Jose Counties in Washington state. The proposed pipeline would primarily transport Canadian gas to Canadian consumers on Vancouver Island—at most, only ten percent of the pipeline's capacity would transport gas to United States markets. In the summer of 2001, FERC issued a "Notice of Intent to Prepare an EIS" for the GSX project, received comments from the public and held two public meetings regarding the project. In December 2001, FERC filed its draft EIS, setting a February 4, 2002, deadline for public comments. FERC also held another public meeting on February 26, 2002. Subsequently, FERC issued a Preliminary Determination concluding that, subject to

completion of the environmental review process, the proposed project's benefits outweighed its potential adverse effects.

On June 17, 2002, Whatcom County filed a motion to dismiss GSX's application, or alternatively seeking rehearing from FERC. Whatcom County argued that FERC "lacked jurisdiction over the pipeline under section 7 of the [Natural Gas Act] because the gas supply sources and end consumers were Canadian, and there was therefore no interstate transportation of the gas." *Id.* at 1319. On September 20, 2002, FERC issued a final order denying Whatcom County's motion, analyzing the environmental issues and issuing a Certificate authorizing GSX to proceed with the construction and operation of the proposed pipeline. On March 17, 2003, FSW sought review in the United States Court of Appeals for Ninth Circuit. After FERC moved to dismiss based on improper venue, the Ninth Circuit transferred the case to the Tenth Circuit. FSW's petition for judicial review followed.

The Tenth Circuit rejected FSW's jurisdictional argument in its entirety. Under section 19(b) of the Natural Gas Act, no objection to orders issued by FERC may be considered by the courts of appeals unless the objection was first raised before FERC in an application for rehearing. *See* 15 U.S.C. § 717(b) (2000). In the instant case, FSW argued that the general rule of section 19(b) was inapplicable because its challenge to FERC's jurisdiction was a challenge of subject matter jurisdiction which may always be raised; and, alternatively, that Whatcom County had previously raised the jurisdictional issue before FERC in satisfaction of the requirement that objections first be raised in an application for rehearing. The court rejected FSW's claim of a distinction between regulatory jurisdiction and subject matter jurisdiction, citing a line of cases denying jurisdictional challenges not previously brought before FERC in an application for rehearing. The court also rejected FSW's attempt to rely on Whatcom County's petition for rehearing as a basis for FSW's petition for subsequent judicial review, holding that FSW could not "bootstrap its way into . . . court by relying upon the fact that another party argued the issue before [FERC]." *Id.* at 1322.

The court next addressed FSW's NEPA arguments, which challenged the sufficiency of FERC's FEIS. FSW first claimed that the FEIS inadequately analyzed alternatives to the project by arbitrarily abbreviating such analysis in the scope of the project and by inappropriately eliminating alternatives that were considered. The court, applying an abuse of discretion standard to determine whether FERC took a "hard look" at environmental concerns (as required by NEPA),

found that FERC's definition of the project was not overly narrow and did not compel FERC to ignore other means to meet the project's objective of providing natural gas to Vancouver Island in order to meet increasing electrical power needs. According to the court, the FEIS cited other potential methods to increase electrical power on the island and adequately explained why each was not a feasible alternative. Furthermore, the court found that FERC adequately considered alternative pipeline routes in addition to the route ultimately selected. In light of the deferential standard of review, the court held that FERC had taken a "hard look" at available alternatives and validly rejected each due to engineering or environmental difficulties, or because the alternative would leave the need for the project unfulfilled.

FSW next claimed that the FEIS failed to adequately consider transboundary effects. However, because FSW had not challenged this alleged failure in its rehearing request, the court held that section 19(b) of the Natural Gas Act precluded judicial review of the claim. FSW also claimed that the FEIS failed to consider various acoustic effects of the project on the marine environment. The court also rejected these claims. Because the acoustic effects from repair and maintenance of the pipeline would be speculative, the court held that FERC need not consider these effects in the FEIS. Additionally, the court found that FSW had not challenged the adequacy of the FEIS's analysis of acoustic effects from construction, which FERC reasonably presumed would be mirrored by any potential effects from repair or maintenance. The court also held that the FEIS adequately considered the cumulative acoustic effects of the project, both in light of background marine noise and in light of reasonably foreseeable future projects. Although the court noted that the FEIS' cumulative acoustic impact analysis was not a "model of clarity or thoroughness," the court found that under the applicable deferential standard of review, FERC reasonably concluded that such impacts would occur only during the limited time period of pipeline construction. The court also rejected FSW's contention that the FEIS devoted insufficient attention to the cumulative effects of the project along with other current and reasonably foreseeable future actions, finding that FERC's analysis here was neither arbitrary nor capricious.

Finally, the court addressed and rejected FSW's argument that the FEIS failed to evaluate the consequences of all reasonably foreseeable future earthquakes. Here, the court found that FERC's mitigation analysis with respect to earthquakes was adequate. Although various commentators raised concerns as to whether FERC applied the proper engineering standard for the pipeline to withstand earthquakes, the court

found that FERC considered these views before rejecting them, thus satisfying the deferential "hard look" standard required by NEPA.

Jason Rapp

High Sierra Hikers Ass'n v. Blackwell,
390 F.3d 630 (9th Cir. 2004)

In *High Sierra Hikers Ass'n v. Blackwell*, the United States Court of Appeals for the Ninth Circuit held that the United States Forest Service (Forest Service) violated NEPA through the issuance of multi-year special-use permits and one-year renewals of existing special-use permits without preparing either environmental assessments (EA) or environmental impact statements (EIS). The court also reversed the lower court's summary judgment holding, finding that, by deciding to grant special-use permits at existing levels, without considering what impact this decision would have on the agency's responsibilities under the Wilderness Act, triable issues of fact existed as to whether the Forest Service degraded wilderness lands in violation of the Wilderness Act.

The John Muir and Ansel Adams Wilderness Areas encompass over 800,000 acres, stretching from the Mammoth Lakes to Lone Pine, California. Both the Inyo and Sierra National Forests contain some portion of each wilderness area. Both wilderness areas provide users unique opportunities to hike, camp, fish, and mountain climb. To access these recreational areas, packstock, including horses and mules, have traditionally been used. Commercial packstock operators provide the public access to these resources to enable transportation of supplies, provide guided tours, and grant access to backcountry areas. The Forest Service regulates the usage of the wilderness areas by issuing permits. Commercial outfitters, including the packstock operators, must obtain a "special-use permit" to engage in their commercial enterprises.

In 1997, the Forest Service issued a draft EIS proposing to replace existing management plans for the John Muir and Ansel Adams Wilderness Areas with new management plans. On April 10, 2000, High Sierra filed suit in federal district court seeking declaratory and injunctive relief against the Forest Service for the new management plans in the John Muir and Ansel Adams Wilderness Areas. High Sierra claimed that the Forest Service had (1) violated the National Forest Management Act by failing to meet or implement Forest and Wilderness Standards, (2) violated the Wilderness Act by failing to determine if commercial services are necessary and proper and by allowing commercial services to degrade the wilderness, and (3) violated NEPA

by failing to prepare environmental analyses before issuing special-use permits. In response, the Forest Service filed a motion to dismiss, or alternatively, for summary judgment on the grounds that High Sierra's suit was barred by *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), as an impermissible programmatic challenge. The Forest Service also argued that High Sierra's suit should have been dismissed because there was no final agency action from which High Sierra could obtain relief under the Administrative Procedure Act. Then, on April 20, 2001, the Forest Service issued a final EIS, a Record of Decision, and a 2001 Wilderness Management Plan for the John Muir and Ansel Adams Wilderness Areas. These documents, which now analyzed the need for commercial packstock services and found them necessary, again replaced the management plans for the two wilderness areas. Both High Sierra and the Forest Service filed supplemental briefs addressing the revised management plans, as ordered by the district court.

On June 5, 2001, the district court issued a decision on the merits of the case. The district court granted the Forest Service's motion for summary judgment as to the claims brought under the Wilderness Act and the National Forest Management Act. The court found that the April 20, 2001, revised management plans analyzed the need for commercial packstock services and found them necessary, thus the court considered these claims moot. The district court also granted the Forest Service's summary judgment motion on High Sierra's claim that the Forest Service was degrading the wilderness areas by allowing the commercial packstock services. The court stated that the Forest Service had broad discretion to determine how much pack use to allow and how to deal with the impacts of such use. The court did, however, grant summary judgment to High Sierra on its NEPA claim. The district court found that the Forest Service was violating NEPA by issuing multiyear special-use permits and granting one-year renewal special-use permits to packstock operators without first analyzing the impact of this practice by completing an EIS. On January 9, 2002, the district court issued an order granting injunctive relief and ordering the Forest Service to conduct a NEPA analysis of the cumulative impacts of commercial packstock use in the wilderness areas by December 31, 2005, and a site-specific analysis by December 31, 2006. The court also ordered, in the interim, a reduction in the allocation of special-use permits and limited access to areas of environmental concern. Both High Sierra and the Forest Service appealed to the Ninth Circuit.

The Ninth Circuit, reviewing the district court's findings de novo, affirmed in part, reversed in part, and remanded. The Ninth Circuit first

addressed whether High Sierra's claims were ripe under the requirements of *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882-94 (1990). The court determined that High Sierra had alleged "specific discrete agency actions taken by the Forest Service that have caused harm." High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 639 (9th Cir. 2004). The Ninth Circuit also determined that the issuance of special-use permits was a final agency action as required in *Lujan*, and thus agreed to address all of the issues on the merits.

The Ninth Circuit then turned its attention to High Sierra's NEPA claim. After briefly stating that NEPA required federal agencies to prepare an EIS, or at least an EA, for "all significant federal actions affecting the quality of the human environment," the Ninth Circuit determined that "the issuance of multi-year special-use permits to the commercial packers constitutes major federal action that significantly affects the environment and requires the agency to prepare a detailed EIS." *Id.* at 640. The court further stated that the Forest Service had breached its obligation under NEPA to take the required "hard look" at its environmental consequences through an EA or EIS regarding the issuance of multiyear special-use permits. Upon this reasoning, the Ninth Circuit upheld the district court's finding that the Forest Service had violated NEPA through the issuance of multi-year special-use permits. In regard to the one-year renewals of special-use permits, the Ninth Circuit again upheld the district court's findings that the Forest Service had violated NEPA by issuing these renewals. The Ninth Circuit determined that these renewal permits were not "categorical exclusions" outside of NEPA. While the Forest Service had at first classified the renewals as "categorical exclusions," the Ninth Circuit relied on the Forest Service's own handbook of regulations, which prohibited "categorical exclusions" in all wilderness areas, to determine the status of the one-year-renewal permits. The Ninth Circuit held that "the agency's failure to prepare an EIS prior to the renewal of the special-use permits has violated NEPA by failing to take the requisite 'hard look' at the environmental consequences of its proposed action." *Id.* at 641.

The Ninth Circuit then addressed the injunctive relief ordered by the district court. The Forest Service argued that the scope of the relief granted imposed significant and inappropriate burdens on the agency. It specifically argued that the injunction interfered with its discretion by ordering it to conduct a cumulative impact analysis before analyzing site specific impacts. The Ninth Circuit stated that courts generally have broad discretion in fashioning equitable relief. The court also stated, relying on *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531,

542 (1987), that injunctive relief should be based on irreparable injury and inadequate legal remedies. Following this basis, the Ninth Circuit reasoned that in the NEPA context, failure to evaluate the environmental impact of a major federal action creates an irreparable injury, strongly favoring the issuance of an injunction. The Ninth Circuit relied on the district court record to determine that not only was environmental injury "likely" in the John Muir and Ansel Adams Wilderness Areas, but that it did occur as a result of commercial packstock activity until the district court issued its injunction. The Ninth Circuit then found that "the district court crafted a fair and balanced injunction that provided for interim relief for the environment pending compliance with NEPA and did not drastically curtail the packers' operations." *High Sierra Hikers Ass'n*, 390 F.3d at 642-43. The Ninth Circuit then stated, relying on the Wilderness Act, 16 U.S.C. §§ 1131-1136 (2000), that Congress had recognized the public interest in maintaining wilderness areas. The court found that this public interest further weighed in favor of granting equitable relief through the issuance of an injunction. Finally, the court dismissed the Forest Service argument that the district court's injunction interfered with agency operation by requiring a cumulative analysis before site specific analysis. The Ninth Circuit held that not only does the injunction requirement that cumulative impacts be analyzed first comport with the requirements of NEPA, but analyzing the cumulative impacts of commercial packstock use before site specific use will be necessary to the overall decisionmaking process of the agency. Thus, the Ninth Circuit affirmed the district court's injunctive relief order in full.

The Ninth Circuit then turned its attention to High Sierra's claim that the Forest Service violated the Wilderness Act. High Sierra claimed that the Wilderness Act, 16 U.S.C. § 1133(d)(5), required that before an agency could authorize commercial services in a wilderness area, the agency first had to determine the amount and type of commercial services that were necessary and proper. In addressing this claim, the court noted that the Wilderness Act generally prohibits commercial enterprises in wilderness areas, but authorizes such services "to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes in the area." 16 U.S.C. § 1133(c)-(d)(5). The court first deferred to the Forest Service decision that packstock was "necessary" in the John Muir and Ansel Adams Wilderness Areas. The court stated that broad deference should be given to the Forest Service Needs Assessment which found that packstock was needed to provide access to those people who would otherwise not be able to enjoy the wilderness areas. However, the Ninth Circuit stated that

under the Wilderness Act, this finding of "necessity" only allowed the Forest Service to allow commercial packstock use to the *extent* necessary. Thus, the Ninth Circuit determined that the Forest Service was required to prove that it only allowed commercial packstock use to the extent necessary to achieve the goals of the Wilderness Act. The court noted that nowhere in the Forest Service Wilderness Plan of 2001 or the Needs Assessment did the Forest Service state to what extent commercial packstock use was necessary. The court determined that in developing its Needs Assessment, the Forest Service examined three independent factors related to commercial packstock services: the type of activities for which the services were needed, the extent to which current permits were being used, and the amount of use the land could tolerate. The Ninth Circuit held that while all three of these factors were relevant to consider the extent that commercial packstock services were necessary, the Forest Service failed to consider the three factors together in relation to one another. The court determined that this resulted in the Forest Service continuing to issue permits at preexisting levels, rather than at levels which would preserve the wilderness character of the land. The court found that because of this oversight, the Forest Service failed to balance the negative impact that the commercial activity was having on the wilderness land, and possibly resulted in elevated recreational activity at the expense of the long-term preservation of the land.

The Ninth Circuit then considered what degree of deference should be given to the Forest Service decision to issue permits at preexisting levels. The court determined that because the Forest Service was not acting with the "force of law," its decision could only be afforded respect based on the persuasiveness of the decision. The court stated that when applying this review, it would look to the process the agency used in arriving at its decision. The court, citing *Wilderness Society v. United States Fish & Wildlife Service*, 353 F.3d 1051, 1068 (9th Cir. 2003), stated that the "interpretation's thoroughness, rational validity, and consistency with prior and subsequent pronouncements . . . the logic and expertness of an agency decision, the care used in reaching the decision, as well as the formality of the process used" were all factors that could be considered in its review. Concluding that the overarching objective of the Wilderness Act was to protect the wilderness character of the land, the Ninth Circuit found that the Forest Service decision to issue permits at preexisting levels in spite of documented damage resulting from commercial packstock use did not have "rational validity." The court further found that because the Forest Service granted the permits without going through the required NEPA impact analysis process, the Forest

Service decision also lacked legal formality. Therefore, the Ninth Circuit held that the Forest Service was not within its statutory discretion when it granted the permits, and so the court reversed the district court's grant of summary judgment for the Forest Service on this claim. Finally, the Ninth Circuit determined that the injunction granted by the district court in relation to the NEPA violation, while providing adequate equitable relief to prevent future environmental harm to the wilderness areas, did not provide relief for degradation to the wilderness lands that had already occurred. Thus, the Ninth Circuit remanded that issue to the district court to determine the appropriate relief under the Wilderness Act for remediation of any prior degradation to the John Muir and Ansel Adams Wilderness Areas.

Clayton Ratliff

Lands Council v. Powell,
395 F.3d 1019 (9th Cir. 2005)

In *Lands Council v. Powell*, the United States Court of Appeals for the Ninth Circuit held that the United States Forest Service (Forest Service) failed to comply with both the National Environmental Policy Act (NEPA) and the National Forest Management Act (NFMA) when it approved a timber harvest as part of a watershed restoration project in the Idaho Panhandle National Forest (IPNF or Forest). The Ninth Circuit reversed the United States District Court for the District of Idaho's grant of summary judgment to the Forest Service and granted summary judgment in favor of the Lands Council thereby vacating the Forest Service's decision.

The Iron Honey Project (Project) is designed to improve the aquatic, vegetative, and wildlife habitat of watersheds within the Project area. As a result of over thirty years of intense logging, eighty-five percent of the watersheds within the Project area are either not functioning, or functioning at risk. After going through the NEPA process—from scoping the project to a Final Environmental Impact Statement (FEIS)—the Forest Supervisor issued a final Record of Decision in February 2002, which contemplated harvesting 1048 acres of the Forest by the "shelterwood harvesting" method. This method cuts the majority of trees in a given harvesting area. The Project called for removal of seventy percent of the canopy within the Project area.

After the Forest Service denied its administrative appeal, the Lands Council filed suit in district court pursuant to the Administrative Procedure Act (APA) claiming the Forest Service violated both NEPA

and NFMA. The district court found that the Forest Service complied with both statutes and granted summary judgment to the Forest Service. The Ninth Circuit, reviewing de novo, reversed the district court and granted summary judgment to the Lands Council.

Under NEPA, the Lands Council first alleged that the Forest Service erred in its cumulative effects analysis by failing to take a "hard look" at the cumulative effects of four activities: (1) prior timber harvests, (2) reasonably foreseeable future timber harvests, (3) possible toxic sediment transport, and (4) the impact on Westslope Cutthroat Trout (Cutthroat Trout). The Ninth Circuit held that the Forest Service violated NEPA by failing to take a "hard look" at both prior timber harvests and the impact on the Cutthroat Trout. The Lands Council next alleged that the scientific methodology used in the FEIS was flawed and therefore violated NEPA. Here again, the Ninth Circuit ruled against the Forest Service.

The Lands Council alleged that the Forest Service violated NFMA by failing to abide by the IPNF Forest Plan in three areas: (1) fisheries protection, (2) soils impact, and (3) old-growth species viability. Based on the record before the court, the Ninth Circuit again found that the Forest Service failed to meet NFMA's statutory requirements.

Addressing the issue of prior timber harvests, the court agreed with the Lands Council that the FEIS was vague and lacked a detailed cataloguing and discussion of past timber harvesting projects. The court stated that "the general rule under NEPA is that, in assessing cumulative effects, the [FEIS] must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment." Lands Council v. Powell, 395 F.3d 1019, 1028 (9th Cir. 2005). Even though the Forest Service did acknowledge past environmental harms from prior harvesting, the FEIS "should have provided adequate data of the time, type, place, and scale of past timber harvests and should have explained in sufficient detail how different project plans and harvest modes affected the environment." *Id.* Because the FEIS for the Project lacked this information, the Forest Service denied the opportunity for informed public comment which is an essential component of NEPA's procedural mandate.

With regard to the Cutthroat Trout, the Lands Council argued that the thirteen-year-old habitat data the Forest Service relied on to assess impacts on the trout was out-of-date. Although the Forest Service countered that it conducted several more recent fish count surveys, the court found that the agency relied on "state habitat data" in predicting the

Project's impact on Cutthroat Trout and its habitat. *Id.* at 1031. The court concluded that the data "was too outdated to carry the weight assigned to it" by the Forest Service, and that "the lack of up-to-date evidence [regarding Cutthroat Trout] prevented the Forest Service from making an accurate cumulative impact assessment of the Project." *Id.*

In its analysis of the scientific methodology the Forest Service relied on, the court concluded that the "Water and Sediment Yields" model (WATSED) contained faulty analysis and therefore failed to meet the high-quality information and accurate scientific analysis required by NEPA. 40 C.F.R. § 1500.1(b) (2004). NEPA requires that an agency disclose any incompleteness or unavailability of data in an FEIS. *Id.* § 1502.22. Although the Forest Service did make some disclosures of WATSED's shortcomings in an appendix to the Project FEIS, the court found these disclosures both inadequate in substance and late in arriving to the administrative record. The agency's inadequate and belated disclosures of WATSED's shortcomings, coupled with its ultimate reliance on this model for its approval of the Project, both failed to meet NEPA's requirements.

In addition to its failure to comply with NEPA on many fronts, the Forest Service also failed to comply with NFMA in its approval of the Project. NFMA requires the Forest Service to issue a comprehensive Forest Plan (Plan) for every National Forest. 16 U.S.C. § 1604(a), (e). Once a Plan is adopted, the Forest Service may not approve any site-specific activities that are inconsistent with the Plan. *See* Inland Empire Pub. Lands Council v. United States Forest Serv., 88 F.3d. 754, 757 (9th Cir. 1996). The Lands Council argued that approval of the Project failed to comply with the IPNF Plan in three areas: protection of fisheries, soils impact, and old-growth viability.

The dispute over fisheries protection turned on whether a 1995 amendment to the IPNF Plan superseded or supplemented the Forest Service's "fry emergence standard"—a method used to measure the health of fisheries. The Lands Council argued that the amendment's adoption of a so called "Inland Native Fish Strategy" (INFISH)—which created buffer zones limiting timber harvest and minimizing road construction—supplemented, rather than superseded, the fry emergence standard in the original IPNF Plan. If the fry emergence standard was not superseded by INFISH then the Forest Service's approval of the Project would have to be vacated because the agency conceded that it did not analyze the Project under the former standard. The court first looked to see if the two standards were in conflict; if so, it would have to determine whether the fry emergence standard provided more fisheries

protection than INFISH. In analyzing the two standards, the court determined that the two standards did not conflict: INFISH is designed to minimize sediment deposits by limiting timber harvest, while the emerging fry standard requires remedial action if a certain sedimentation threshold is met. The court concluded that because the two standards "measure different variables, are triggered by different conditions, and have different remedies," they are not inconsistent and therefore INFISH must be viewed as a supplement to the Plan's fry emergence standard. *Lands Council*, 395 F.3d at 1034. Based on this conclusion, the court set aside the Forest Service's approval of the Project.

The IPNF Plan provided that the Forest Service cannot allow any activity that would create detrimental soil conditions in fifteen percent of the project area. The Lands Council claimed that the methodology used by the Forest Service in addressing this issue was "insufficiently reliable because the Forest Service never sampled the soil in the activity area," instead choosing to rely on aerial photographs and soil samples from throughout the IPNF. *Id.* In analyzing this issue, the Ninth Circuit was persuaded by a similar case in the United States District Court for the Eastern District of Washington which expressly rejected this exact methodology. The court concluded that "based on assumptions . . . [the Forest Service] *estimated* the condition of each unit, tried to determine which units *might* exceed established standards, and *projected* potassium levels." Kettle Range Conservation Group v. United States Forest Serv., 148 F. Supp. 2d 1107, 1127 (E.D. Wash. 2001) (emphasis in original). Because the Forest Service failed to verify the projections of its model with on the ground analysis, "[t]he Forest Service, and consequently the public at large, has no way to know whether the projection of the Project area's soils was reliable." *Lands Council*, 395 F.3d at 1035. The court found that this unconfirmed modeling failed to comply with NFMA.

The Lands Council's final arguments related to the Project's effect on old growth species in the IPNF. The Lands Council first argued that the Project failed to meet the Plan's ten percent minimum old growth requirement. The Ninth Circuit rejected this argument, because as "no old growth forest is to be harvested under the Project . . . it cannot be said that the Project itself violates the IPNF Plan's requirement to maintain ten percent of the forest acreage as old growth forest." *Id.* at 1036. The court agreed, however, that the Forest Service mishandled its analysis of old growth habitat as it relates to the population and viability of species dependent on this habitat.

Ordinarily, NFMA requires that the Forest Service "identify [Management Indicator Species (MIS)], monitor their population trends,

and evaluate each project alternative in terms of the impact on both [MIS] habitat and [MIS] populations." *Id.* (citing Idaho Sporting Cong., Inc. v. Rittenhouse, 305 F.3d 957, 971-74 (9th Cir. 2002)). In this case, the Forest Service utilized the "proxy on proxy" method. It did not study the population trends of MIS; rather, it used MIS habitat as a proxy for population trends. While the Ninth Circuit has approved of this method in certain circumstances, it always required that "the methodology for identifying the habitat proxy be sound." *Id.* at 972. If the habitat proxy is flawed, then it follows that any evaluation of population trends will also be flawed. Here, the Forest Service used the "timber stand management reporting system" (TSMRS) as its habitat proxy, but the court found that this method was inaccurate. Because the utilized data "is about fifteen years old, with inaccurate canopy closure estimates, and insufficient data on snags," the court concluded that the population data resulting from this proxy on proxy analysis was flawed. The court found that as a result of this defective analysis "NFMA is violated because there was no population monitoring as required by NFMA." *Rittenhouse*, 305 F.3d at 970 n.5. While the Forest Service tried to validate its proxy on proxy method by pointing to the fact that it also utilized some field surveys and on-the-ground detection methods, the court found that "the surveys [did] not even begin to qualify as an accurate monitoring of population trends," and that the on-the-ground detection methods were "largely irrelevant." *Lands Council*, 395 F.3d at 1036-37.

Whiton Paine

Alliance to Protect Nantucket Sound, Inc. v. United States,
398 F.3d 105 (1st Cir. 2005)

This case involved a challenge to a decision of the United States Army Corps of Engineers (Corps) to issue a permit for the construction of a scientific measurement devices station on the outer continental shelf near Nantucket Sound. Permittee Cape Wind Associates (Cape Wind) filed an application with the Corps on November 20, 2001, for a navigability permit under section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (2000), to build and operate an offshore data tower in an area of Nantucket Sound known as Horseshoe Shoals. Located on the outer continental shelf, Horseshoe Shoals is subject to federal jurisdiction under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 (2000). The tower would consist of a platform and a fixed monopole measuring approximately 170 feet in height, and would be

supported by three piles driven into the ocean floor. Instrumentation used to collect weather data would be attached to the tower in order to gather information regarding the feasibility of locating a wind energy plant on Horseshoe Shoals. On December 4, 2001, following an announcement that it was considering Cape Wind's application, the Corps invited public comments on the matter. The resulting comment period, which generated a sizeable response, included two public hearings and ended on May 13, 2002. Following this period, the Corps issued a section 10 permit on August 19, 2002, that authorized construction and maintenance of the data tower, subject to sixteen special conditions. Among other things, these conditions required removal of the tower within five years, obligated Cape Wind to post a $300,000 bond for emergency repairs and removal, and allowed other government agencies and private research institutions to share in information collected by the tower, and to attach their own data-gathering instruments to it. *See* Department of the Army Permit No. 199902477 (August 19, 2002). To comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4331-4332, an Environmental Assessment (EA) and a Finding of No Significant Impact (FONSI) were attached to the permit.

The Alliance to Protect Nantucket Sound (Alliance), a residents group opposed to construction of the data tower, filed suit against the Corps in the United States District Court for the District of Massachusetts, claiming that (1) the Corps lacked the necessary authority to issue a section 10 permit, (2) the Corps violated the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), by acting arbitrarily and capriciously in approving Cape Wind's application despite its lack of property rights on the outer continental shelf, and (3) the Corps failed to satisfy NEPA requirements for considering the project's environmental impacts. After cross motions for summary judgment were filed, the district court granted summary judgment for the Corps and intervenor Cape Wind. The United States Court of Appeals for the First Circuit, reviewing that decision de novo, affirmed the lower court's judgment. Alliance to Protect Nantucket Sound, Inc. v. United States, 398 F.3d 105, 115-16 (1st Cir. 2005).

The First Circuit initially considered whether the Corps had jurisdiction to issue a section 10 permit for construction on the outer continental shelf. According to the court, permitting authority is rooted in OCSLA, which Congress passed in 1953 to establish federal jurisdiction over the outer continental shelf and to create a regulatory background for mineral extractions therefrom. The statute gives the Corps authority under section 10 "to prevent obstruction to navigation in

the navigable waters of the United States . . . to artificial islands and fixed structures located on the [outer continental shelf]." 43 U.S.C. § 1333(f) (1953). The grant of federal jurisdiction was amended in 1978 to apply to "all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom." *Id.* at § 1333(a)(1). The Alliance argued that the phrase "which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom" restricted the Corps' permitting authority on the outer continental shelf to structures associated with mineral extraction. The Corps, on the other hand, based its section 10 authority on section 4(f) of OCSLA, as amended, which covered artificial islands, installations, and other devices located on the seabed to the seaward limit of the outer continental shelf. Relying on the "which may be" language of the statute, the district court determined that section 1333(a)(1) was not restrictive, and that the Corps had authority to issue a section 10 permit for all structures on the outer continental shelf (OCS).

Acknowledging the ambiguity of the statutory language, the First Circuit turned to legislative history to determine if section 10 authority under OCSLA was restricted to structures associated with mineral extraction. Clearly helpful to the court in answering this question was a sentence in the conference report for the 1978 OCSLA amendments which said "[t]he existing authority of the Corps of Engineers . . . applies to all artificial islands and fixed structures on the [OCS], whether or not they are erected for the purpose of exploring for, developing, removing and transporting resources therefrom." H.R. CONF. REP. NO. 95-1474, at 82 (1978). Based on this express reference to Congress's intent, the court upheld the district court's judgment that the Corps had jurisdiction to issue a section 10 permit for Cape Wind's data tower.

The First Circuit next addressed the issue of whether the Corps failed to consider Cape Wind's lack of property rights on the OCS before it granted the section 10 permit. The Alliance argued in the district court that applicants for such a permit were required to have property rights in the project area, and to make an affirmation to that effect. 33 C.F.R. § 325.1(d)(7) (2004). Therefore, they contended that Cape Wind's lack of a property interest in the proposed tower site, and its inability to get such an interest under existing law, meant that its permit should not have been approved. In response, and through reference to another of its regulations, the Corps argued that it was only required to *remind* applicants of the need to possess all requisite property interests, and

would not otherwise get involved in property ownership disputes. 33 C.F.R. § 320.4(g)(6). Furthermore, in the Corps' view, the requirement under section 320.4(g)(6) that property ownership disputes would not be a factor in the Corps' decisionmaking process eliminated any consideration of the permittee's disputed property interests in the site. The district court agreed with the Corps' position on both points, and deferred to the Corps' overall interpretation of the regulation. The First Circuit echoed this view, and referred to the language of section 320.4(g)(6) as being clear evidence of the Corps' intent to stay out of private property disputes. The court went so far as to say that even if the Corps' interpretation was not clearly supported by the regulation, that understanding was still entitled to deference because it was reasonable. Specifically, the court thought it was a reasonable goal to preserve the Corps' limited resources by shielding it from consideration of property ownership disputes.

In relation to this issue, the Alliance argued that the Corps' decision to issue a section 10 permit was arbitrary and capricious, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000), because Cape Wind's affirmation that it possessed property rights in the project area was obviously false. This argument, according to the circuit court, depended on whether specific authorization for construction of the data tower was needed in addition to a section 10 permit. Having already found that a section 10 permit was *necessary* for building structures on the OCS, the court discussed whether this permit was *sufficient* to authorize construction on the federally controlled outer continental shelf. Only when a developer significantly infringes on the federal government's rights in the outer continental shelf is additional authorization necessary, and the data tower at issue here, in the court's opinion, did not represent such an infringement. Therefore, the court stated that the Alliance incorrectly used the arbitrary and capricious provision in the APA as a basis for its arguments, and held that additional authorization was not required.

Finally, the First Circuit considered whether the Corps violated NEPA by failing to circulate for public comment certain draft materials concerning the data tower project's environmental impacts. The Alliance argued that Council on Environmental Quality (CEQ) regulations, aimed at ensuring compliance with NEPA, required an agency to involve the public "to the extent practicable." 40 C.F.R. § 1501.4(b) (2004). In their view, this included giving the public an opportunity to comment on draft Environmental Assessments (EAs), a notion they supported by reference to the Ninth Circuit case *Citizens for Better Forestry v. United States*

Department of Agriculture, 341 F.3d 961 (9th Cir. 2003). The Corps rebuffed this argument by pointing out contrary precedent from other circuits while also noting that the Alliance's textual support in *Citizens for Better Forestry* was merely dicta. Further, the Corps argued that it sufficiently involved the public "to the extent practicable" by issuing public notice of Cape Wind's application, providing for a comment period of more than five months, holding two public hearings, and responding to public comments in the EA. The circuit court agreed with the Corps regarding the extent of public involvement they had facilitated, and held that nothing in the CEQ regulations required circulation of a draft EA for public comment except in "limited circumstances." 40 C.F.R. § 1501.4(e)(2).

The Alliance argued that such circumstances did exist here, because "[the] nature of the proposed action is one without precedent." *See id.* § 1501.4(e)(2)(ii). The unprecedented act, according to the Alliance, was the construction of a privately-owned structure to be used for research purposes on the outer continental shelf, in the undefiled environment of Nantucket Sound. This assertion was incorrect, however, based on the Corps' determination that a similar structure already existed, in the form of a data tower in Martha's Vineyard, and other pile-supported structures in other areas of Nantucket Sound. Like the district court, the First Circuit decided that the Corps reasonably determined that the Cape Winds data tower was not without precedent, and thus a draft FONSI did not have to be circulated for public comment. In so holding, the First Circuit concluded that the Corps fully satisfied NEPA requirements designed to involve the public when preparing the EA and FONSI.

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V. RESOURCE CONSERVATION AND RECOVERY ACT

Interfaith Community Organization v. Honeywell International, Inc., 399 F.3d 248 (3d Cir. 2005)

The United States Court of Appeals for the Third Circuit followed the lead of three other circuit courts this February in adopting a clear error standard of review for endangerment determinations pursuant to the citizen suit provision of the Resource Conservation and Recovery Act (RCRA). The issue came before the Third Circuit for the first time in *Interfaith Community Organization v. Honeywell International, Inc.*, in which a local community organization together with five individual plaintiffs alleged that a New Jersey site owned by defendant Honeywell

International, Inc. (Honeywell), presented "an imminent and substantial endangerment to health or the environment" in violation of RCRA. 399 F.3d 248, 253 (3d Cir. 2005).

The site at the center of this controversy came into existence as a byproduct of a chromate chemical plant that Mutual Chemical Company of America (Mutual) began operating in 1895. Mutual created the thirty-four-acre landmass (Site) when it began dumping the plant's waste residue into adjacent tidal wetlands located along the Hackensack River. This dumping continued until 1954 and now consists of approximately 1.5 million tons of waste that measure 15- to 20-feet deep. The Site changed hands three times, and Honeywell ultimately became the corporate successor and is, therefore, "liable for any and all acts, omissions, debts and liabilities . . . related to or arising out of the chromium contamination at the Site." Interfaith Cmty. Org. v. Honeywell Int'l Inc., 263 F. Supp. 2d 796, 803 (D.N.J. 2003). The waste that makes up the Site contains high concentrations of hexavalent chromium, which is a human carcinogen and which the EPA considers "more potent than arsenic, benzene and PCBs." 399 F.3d at 252 n.1. Additionally, the waste is high in pH, which prevents the hexavalent chromium from breaking down into its less harmful trivalent form.

The State of New Jersey first took action to force a cleanup in 1982 when the Site began emitting "yellowish-green plumes" in the surface water at the Site. *Id.* at 252. In 1988, Honeywell responded to a two-year-old order for permanent remediation of the site, issued by the New Jersey Department of Environmental Protection (NJDEP), by implementing an interim measure, which was intended to control the contamination for five years while Honeywell studied its permanent remedy options. Honeywell informed the NJDEP prior to implementing the interim measure, which involved pouring concrete and asphalt over half of the Site and lining the remaining half with a plastic "cap," that it would not prevent all discharges from the Site. However, as a case manager from NJDEP testified at trial, "there has been much foot-dragging and non-cooperation by Honeywell and . . . the Site is not much closer to final remediation now than it was when the problems were first brought to Honeywell's attention twenty years ago." *Interfaith*, 263 F. Supp. 2d at 811.

Experts testified at trial that the Site contained quantities of hexavalent chromium far exceeding the amounts allowed by NJDEP contamination standards for soil, surface water, groundwater, and river sediments.

> [T]he average level of contamination [in the soil at the Site] was over 30 times higher than the state standard, and, at its highest, was about 75 to 90

> times higher . . . . [H]exavalent concentrations in surface water at the Site in drainage ditches, or "swales," . . . was over 350 times higher than New Jersey's acceptable limit. . . . [C]oncentrations in the groundwater . . . ranged from about 200 to 8,000 times higher than acceptable. . . . Concentrations in the river sediments were . . . roughly 90 to 400 times higher than allowed.

399 F.3d at 261.

The results from a standard bioassay test on sediment dwelling organisms conducted by one expert revealed mortality rates of 50 to 100% for the many organisms living in the sediment. Honeywell conceded that the hexavalent chromium was leaking into the Hackensack River, the surface of the Site, and the river sediments, and that the interim measure was not preventing this leakage. Additionally, the asphalt and plastic cap was being continually upset by a phenomenon called "heaving," which caused the structure of at least one building in the area to fail. *Id.* at 252 n.1. At the time of trial, the asphalt was buckling and the plastic liner had over one million holes per acre, enabling contaminated water to percolate to the surface.

In 1995, the plaintiffs brought their claim pursuant to the citizen suit provision of RCRA alleging, inter alia, that they resided in close proximity to the Site and that the contamination had prevented each individual from engaging in activities such as walking and biking next to the river, fishing, shopping at a supermarket located one block from the Site, and using gas pumps located adjacent to the Site. Each individual plaintiff averred that the visible contamination and/or the fear of exposure to health risks prevented them from engaging in these activities.

The United States District Court for the District of New Jersey, which heard testimony from ten expert witnesses and fact witnesses, including the plaintiffs, in a nonjury trial, held that the Honeywell site posed imminent and substantial endangerment to health and environment in violation of RCRA. The district court concluded an injunction was necessary to remedy the violation. On appeal, Honeywell challenged the issuance of that injunction, as well as plaintiff's standing and the district court's determination that the Site posed an imminent and substantial danger. In the instant case, the court of appeals affirmed the lower court's judgment after concluding that an endangerment determination for RCRA purposes is a question of fact and the district court's factual findings were not clearly erroneous.

The court of appeals first addressed the standards of review to be applied to each of the issues on appeal, noting that it would review the legal issues pertaining to standing de novo, and the issuance of the

injunction for abuse of discretion. Then, in a determination not previously made by the Third Circuit, it held that a clearly erroneous standard should be used for reviewing the lower court's RCRA endangerment determination. The Third Circuit provided little insight into its reasoning for finding that such a determination is a question of fact other than to note that other courts of appeals have treated it as such. The court cited the Eleventh Circuit's opinion in *Parker v. Scrap Metal Processors, Inc.*, where a "jury's RCRA endangerment finding [was reviewed] for sufficiency of the evidence;" the Fifth Circuit's conclusion in *Cox v. City of Dallas* that the "district court 'did not clearly err' in finding RCRA endangerment;" and the Second Circuit's conclusion in *Dague v. City of Burlington* that the "district court's endangerment 'finding' was not error." *Id.* at 254 (citing Parker v. Scrap Metal Processors, 386 F.3d 993, 1014-15 (11th Cir. 2004); Cox v. City of Dallas, 256 F.3d 281, 300-01 (5th Cir. 2001); Dague v. City of Burlington, 935 F.2d 1343, 1355-56 (2d Cir. 1991)). With no further analysis, the court stated: "We will accordingly not disturb the determination here absent clear error." *Id.* However, Circuit Judge Ambro's concurring opinion notes that "none of these decisions explicitly states that the determination of imminent and substantial endangerment is one of fact," *id.* at 269, and "none of these decisions gives any reasoning for why [that determination] should be reviewed deferentially." *Id.* at 269 n.7 (Ambro, J., concurring).

After applying his proposed test for distinguishing between questions of fact, questions of law, and those that are mixed, Judge Ambro concluded that the endangerment determination is a mixed question of fact and law because it "can only be answered by both determining the facts of a case and determining what the relevant law means." *Id.* He then concluded that since fact questions, such as the implications of scientific studies, predominate in the instant case, and since the "Fifth, Sixth, Eighth, Ninth and Tenth Circuits have also applied clearly erroneous review to mixed questions," the proper standard is, indeed, a clearly erroneous standard. *Id.* at 270 (citing Connally v. Transcon Lines, 583 F.2d 199, 202 (5th Cir. 1978); Nash v. Farmers New World Life Ins. Co., 570 F.2d 558 n.7 (6th Cir. 1978); Rogers v. Bates, 431 F.2d 16, 18 (8th Cir. 1970); Levi Strauss & Co. v. Blue Bell, Inc., 778 F.2d 1352, 1355-56 (9th Cir. 1985); Love Box Co. v. Commissioner, 842 F.2d 1213, 1215 (10th Cir. 1988)).

The Third Circuit properly began its analysis of the issues with the challenge to the individual plaintiffs' standing. After stating the three requirements for individual standing—injury-in-fact, causation, and

redressability—the circuit court determined that the activities the plaintiffs were unable to participate in were sufficiently similar to those accepted by the Supreme Court in *Friends of the Earth Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000). The court rejected Honeywell's argument that the plaintiffs in *Laidlaw* were distinguishable because they "averred direct use of an area . . . whereas here the averments speak only to recreating 'near,' 'next to' and 'along' the river." *Id.* at 256-57. Noting that the Supreme Court in *Laidlaw* "instructs that courts may not 'raise the standing hurdle higher than the necessary showing for success on the merits in an action,'" the Third Circuit held that all of the individual plaintiffs claimed "sufficiently direct and present concerns" to establish legally cognizable injuries. *Id.* at 255, 257. With brief reference to Honeywell's arguments regarding the remaining two requirements, the court declared that plaintiffs had standing. Interfaith Community Organization (ICO) was uncontested in asserting associational standing because its mission is to improve the quality of life in Hudson County, New Jersey, where the Site is located.

Proceeding to its review of the lower court's endangerment determination, the Third Circuit articulated the three elements that a plaintiff must prove in order to succeed under RCRA's citizen suit provision, section 6972(a)(1)(B):

> (1) that the defendant is a person . . . who was or is an owner or operator of a solid or hazardous waste treatment, storage, or disposal facility; (2) that the defendant has contributed or is contributing to the handling, storage, treatment . . . or disposal of solid or hazardous waste; and (3) that the solid or hazardous waste may present an imminent and substantial endangerment to health or the environment.

Id. at 258.

The first two requirements having been conceded by Honeywell, the court turned to the Eleventh Circuit's analysis in *Parker*, which suggests Congress's use of the word "may" in the third element indicates "the plaintiffs must [only] show that there is a potential for an imminent threat or serious harm" and "an endangerment is substantial if it is 'serious' . . . to the environment or health." *Id.* (quoting *Parker*, 386 F.3d at 1015 (internal quotations and citations omitted)). The court declared this permissive reading of the statute to be the proper legal standard for a endangerment determination given RCRA's purpose to "minimize the present and future threat to human health and the environment" posed by contaminated sites. *Id.* at 267 (quoting 42 U.S.C. § 6902). As a result, the Third Circuit found that the district court erred in applying this legal standard because it required that plaintiffs also prove that there was a

population at risk, that the contaminant was present at levels exceeding state standards, and that "there is a pathway for current and/or future exposure." *Id.* at 259. The court rejected the imposition of these requirements noting that they derived from an expert witness in a district court case that was affirmed by the Ninth Circuit. *See* Price v. United States Navy, 818 F. Supp. 1323 (S.D. Cal. 1992). As such, their satisfaction was not required by the statute. However, since the district court actually required a more rigorous showing than was necessary, it was harmless error.

The court then reviewed the factual findings of the district court for clear error. With regard to the lower court's finding that contamination levels exceeded state standards, the court of appeals found no clear error because the evidence revealed that the hexavalent concentration levels in the surface water, groundwater, river sediments and soil were, at times, hundreds or thousands of times greater than New Jersey standards allow. The court also found no clear error in the lower court's finding that there were present and continuing pathways for exposure pointing to evidence of the breaches in the interim cap that allowed leakages. In further support of this finding, the court noted Honeywell's admissions that the hexavalent chromium is discharging into the Hacksensack River via groundwater and surface water runoff, that the interim measure is ineffective in preventing all discharges, and that river sediment has already been contaminated by the Site. The court also noted evidence that humans and animals were using the land and water surrounding the Site, and testimony from "exceptionally qualified experts" which supported the conclusion that there were numerous pathways for human and environmental endangerment. *Id.* at 263. On the basis of this evidence the Third Circuit found "no valid reason to disturb any of the district court's thorough findings." *Id.* at 262.

With regard to the injunction, the Third Circuit reviewed the factual findings upon which the district court made its decision. This evidence included testimony that the district court found to be credible indicating that excavation is the only effective remedy for the Site, that a permanent solution was necessary to eliminate the danger, and that Honeywell has "a history of dilatoriness" with regard to the remedial efforts at the Site. *Id.* at 266. Finding no clear error, the Third Circuit held that the injunction was "necessary" under the enforcement language of the statute, and therefore was not an abuse of discretion. *Id.* at 268.

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