# RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW


I. ADMINISTRATIVE PROCEDURE ACT ... 388
*Center for Biological Diversity v. Lueckel*, 417 F.3d 532 (6th Cir. 2005) ... 388
II. CLEAN AIR ACT ... 390
*Sierra Club v. Johnson*, 436 F.3d 1269 (11th Cir. 2006) ... 390
III. CLEAN WATER ACT ... 394
*United States v. Johnson*, 437 F.3d 157 (1st Cir. 2006) ... 394
*Baccarat Fremont Developers, LLC v. United States Army Corps of Engineers*, 425 F.3d 1150 (9th Cir. 2005) ... 399
IV. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT ... 403
*United States v. E.I. DuPont de Nemours & Co.*, 432 F.3d 161 (3d Cir. 2005) ... 403
*Carson Harbor Village v. County of Los Angeles*, 433 F.3d 1260 (9th Cir. 2006) ... 407
*United States v. Asarco Inc.*, 430 F.3d 972 (9th Cir. 2005) ... 411
*United States v. W.R. Grace & Co.*, 429 F.3d 1224 (9th Cir. 2005) ... 416
1. Libby, Montana ... 417
2. The Ninth Circuit's Analysis ... 418
a. Characterization Issue ... 418
b. Exemption from Statutory Cap ... 421
c. Indirect Costs Calculation ... 422
V. INTERSTATE COMMERCE COMMISSION TERMINATION ACT ... 423
*Green Mountain Railroad Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005) ... 423
VI. NATIONAL ENVIRONMENTAL POLICY ACT ... 427
*Navajo Nation v. United States Forest Service*, 408 F. Supp. 2d 866 (D. Ariz. 2006) ... 427
*Silverton Snowmobile Club v. United States Forest Service*, 433 F.3d 772 (10th Cir. 2006) ... 432
1. Background ... 433
2. NEPA ... 435
3. NFMA ... 437
4. FLPMA ... 437

## I. ADMINISTRATIVE PROCEDURE ACT

### *Center for Biological Diversity v. Lueckel*, 417 F.3d 532 (6th Cir. 2005)

In 1992, Congress designated certain sections of several Michigan rivers and their adjacent lands as part of the wild and scenic rivers system. It charged the Forest Service with setting river corridor boundaries and promulgating management plans for each section within a year of the designation. It was undisputed that the Forest Service had yet to do this, even by the time of appellate review in 2005. Plaintiffs were members of three environmental groups and challenged the Forest Service's inaction under, inter alia, the Wild and Scenic Rivers Act.

The Forest Service filed a motion for summary judgment arguing that the plaintiffs did not having standing to sue. In response, nine plaintiffs filed affidavits stating how they were aggrieved by the Forest Service's inaction. The district court agreed with the Forest Service that the plaintiffs had not met the three-part constitutional test for standing: injury, traceability, and redressability. The United States Court of Appeals for the Sixth Circuit reviewed the case *de novo*.

The Sixth Circuit first addressed whether the plaintiffs had standing under the Administrative Procedure Act (APA). The court decided summarily that the failure to create the boundaries and management system was "agency action" within the meaning of the APA, 5 U.S.C. § 551(13) (2000). The court said that plaintiffs did not allege a "legal wrong" resulting from the inaction, but rather they alleged that their aesthetic, recreational and scientific interests were protected within the "zone of interests" of the Wild and Scenic Rivers Act. The court did not dispute this, also assuming that associational standing was satisfied.

However, the zone of interests test is not a constitutional one. The requisites of injury, traceability, and redressability must all be met before the constitution permits the plaintiffs to sue. The court first addressed whether the plaintiffs had alleged an injury. To meet the constitutional minimum, the plaintiffs had to prove that the failure to demarcate the boundaries and create a management plan for the rivers injured them. The court, however, would not permit generalized allegations that their use and enjoyment of the areas in question was hampered. They had to show "site specific activities" that diminished their use and enjoyment of the lands. Recall that the Sixth Circuit was reviewing a summary judgment decision. The court appeared to have trouble distinguishing between the merits of the case and the baseline showing of standing.

The court admonished the plaintiffs that they mostly had referred only generally to logging and road building, but did not establish that these activities actually impinged their enjoyment of the lands. Notably, and rather troublingly, the court cited Justice Scalia's dissent from a recent United States Supreme Court standing case, rather than the majority opinion itself, and concluded, "Expressions of generalized concern are insufficient to establish the requisite injury." *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc*.*, 528 U.S. 167, 199 (2000) (Scalia, J., dissenting). The court used this proposition to declare that some of the plaintiffs allegations of injury were generalized because logging and road-building was only underway on "small portions" of the areas in question.

However, the court found that two of the nine plaintiffs had pointed to specific logging and flooding projects that interfered with their enjoyment of the lands. Thus, for these two plaintiffs, the court moved to step two: traceability (or causation). The pertinent inquiry here is whether the defendant caused the injury in question, or whether the injury can be traced to the defendant's conduct. The court noted that the third constitutional requisite for standing, redressability, is "closely related" to traceability, for the plaintiff must prove that the harm will be alleviated by a judicial decree. Within the context of an agency's noncompliance with procedural requirements, the court cited another circuit's analysis and stated that two links must be established: "a link between the plaintiff's injury and some substantive decision of the agency, and a link between that substantive decision and the agency's procedural omissions." *See* Fla. Audubon Soc'y v. Bentsen*,* 94 F.3d 658, 668 (D.C. Cir. 1996) (en banc).

As to the first link, the court concluded that one logging project resulted from a Forest Service decision. However, it concluded the flood project was not a result from any decision by Forest Service. As to the second link, whether the procedural abdications caused the decision which enabled the injury-inflicting harm, the court looked inquired how likely the promulgation of the management system and corridor-boundaries would prevent the logging. The court, citing to the Supreme Court, noted that this showing of procedural causation and redress are "relaxed." *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 572-73 n.7 (1992) (stating that a plaintiff need not show "with any certainty" whether the procedural obligation would affect the injury-inducing conduct).

The court then, apparently trying to educate the Supreme Court, argued that even with this lax showing, the plaintiffs still need to show

the constitutionally required quantum of redressability. The court then said that plaintiffs did not point to specific facts that would lead to the conclusion that the procedural obligations would change the Forest Service's decision-making on logging activities and whether those decisions would even protect the area from logging. Despite one plaintiff alleging that a management plan would diminish the amount of logging, the court held that his assertion was not specific enough. The court also dismissed plaintiff's contention that the lack of a management plan affected the agency's consideration of a highway. Once again, although the court was deciding the question of standing, the opinion recurrently analyzed the merits of the case through the summary judgment lens.

The Sixth Circuit concluded that, in general, the plaintiffs had not proved that the existing management plans at the forests in question were any less restrictive than the plans would be if the procedural obligations were followed. In summary, the court concluded that the plaintiffs had not averred specific enough facts to prove that what they asked for would redress their injuries. It is transparent that although the Sixth Circuit was deciding the preliminary issue of standing, they conflated the constitutional analysis with a decision of the merits of the case. The Supreme Court specifically prohibited this conflated analysis in *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

Noah Perch-Ahern

## II. CLEAN AIR ACT

### *Sierra Club v. Johnson*, 436 F.3d 1269 (11th Cir. 2006)

The United States Court of Appeals for the Eleventh Circuit found that the EPA abused its discretion by not objecting to the King Finishing permit issued by the Georgia EPD because the Georgia EPD did not follow notice requirements outlined in the Clean Air Act Title V, but the court also found the EPA reasonably interpreted its regulations in limiting the state permitting authority's public reporting requirements to reports of violations and documentation supporting permit decisions. Plaintiffs, the Sierra Club and Georgia Forestwatch asked the Eleventh Circuit to review an Environmental Protection Agency (EPA) order denying the plaintiffs' requests that the EPA object to four Clean Air Act Title V permits. Title V of the Clean Air Act (Title V) does not impose any substantive air quality control requirements, but is meant to increase source accountability and ensure compliance with existing requirements. To achieve that end, Title V requires permits to contain monitoring and

record-keeping requirements and imposes public participation requirements.

According to EPA regulations, to comply with the public participation requirements, the public must be given notice and time to comment before the issuance of a Title V permit. Notice must be given to the public at large through newspapers and must be afforded to individuals through mailing lists, including those who request in writing to be notified of a draft permit. The state permitting authorities must give notice at least thirty days before any public hearing and provide thirty days to comment on a Title V draft permit. After the state authority considers comments and approves the permit, it is sent to the EPA for review. The EPA then has forty-five days to object to the permit. If there is no objection from the EPA, then any person may challenge this lack of objection within sixty days after the forty-five day review period has expired. In court, if the petitioner can prove the permit does not comply with Title V, then the court can compel the EPA to issue an objection to the permit.

In the case at bar, four permits were issued by the Georgia Environmental Protection Division (EPD) to King Finishing, Monroe Power, and Shaw Industries' plants No. 2 and No. 80. The EPA did not object to the permits and the plaintiffs petitioned the EPA to object, but the EPA denied this request. In the Eleventh Circuit, the Sierra Club challenged the validity of the permit the EPD issued to King Finishing because the EPD did not implement a mailing list to notify the public of its right to comment. Furthermore, the Sierra Club and Georgia Forestwatch challenged the EPA's lack of objections to all four permits because of EPD's failure to require the facilities under Title V to report all monitoring data and to provide all relevant information to the public during the comment period.

For Sierra Club's claim regarding King Finishing, the court easily found that the EPD did not comply with Title V's notice requirement because it did not create a public notice mailing list until after the comment period had expired. To finalize that conclusion, however, the court still had to determine if the Sierra Club had standing to bring the claim and whether the EPA is required to object to procedural defects, even when there are no substantive defects in the permit.

Although the Sierra Club presented an affidavit of a member who lives and fished near the plant expressing concerns with the facility's emissions, the EPA claimed the Sierra Club does not have standing because it did not present an affidavit from a member who did not comment but would have had proper notice been given. Following the

analysis in *Lujan v. Defenders of Wildlife*, the court found that enforcement of a procedural right "requires determining whether he [the plaintiff] has suffered a concrete injury as a result of the claimed procedural error or omission." Sierra Club v. Johnson, 436 F.3d 1269, 1277 (11th Cir. 2006). Furthermore, to prove standing, the plaintiff's injury cannot be a generalized claim. *Id.* (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992)). To determine standing here, the court asked "if he [the plaintiff] established that the claimed violation of the procedural right caused a concrete injury in fact to an interest of the plaintiff that the statute was meant to protect." *Id.* at 1277-78 (citing Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 655 (D.C. Cir. 1996)). To meet the burden established in *Florida Audubon Society*, the plaintiff must show that "they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Id.* (quoting Friends of the Earth v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 183 (2000)). The court found that the Sierra Club met that burden and established standing by presenting an affidavit from a member who was concerned about the "reduced aesthetic and recreational values stemming from pollution."

Next the court had to determine whether the EPA is compelled to object to only substantive defects in the permit, or also is compelled to object when there are procedural defects in the permit. The statute, which requires that the EPA "*shall* issue an objection" if a permit is defective, prompted the court to conclude that Congress clearly "intended for EPA to object to a permit when the public participation requirements for issuing it have not been met." *Id.* at 1280 (citing 42 U.S.C. § 7661d(b)(2) (2000)). Although the permit was not substantively defective, the EPA, by not objecting to the permit, violated Title V. Since Title V requires the EPA to object when a state authority violates the statute procedurally or substantively, and because Sierra Club had standing, the court found that the EPA abused its discretion by not objecting to King Finishing's permit and the EPA's order was vacated and remanded to the EPA.

Similarly, the plaintiffs also challenged EPA's acceptance of all four permits because the permits only required the companies to report monitoring results showing permit violations instead of mandating reports that included permit deviations and compliance. The statute requires the permittee to *submit* to the state authority. *See* 42 U.S.C. § 7661c(a). The EPA's corresponding regulation compels "[*s*]*ubmittal of reports of any required monitoring* at least every 6 months. *All instances of deviations* from permit requirements must be clearly identified in such

reports." 40 C.F.R. § 70.6(a)(3)(iii)(A) (2005). The Sierra Club argued that the statute and the regulation require all monitoring data and not just deviations and that all that data is necessary for the public to detect unreported deviations. The EPA responded that the information the permits require the companies to report is sufficient to indicate if the company is in compliance with the permit.

When an agency interprets one of its regulations consistently then that interpretation controls unless clearly erroneous or inconsistent with the regulation. *Sierra Club*, 436 F.3d at 1282-83 (citing Auer v. Robbins, 519 U.S. 452 (1997)). The Sierra Club also argued that the EPA's regulatory interpretation of requiring reporting of only deviations does not comport with a memo sent by a member of EPA's staff to the Georgia EPD. That memo asked that another draft permit similar to those four permits in dispute in the 11th Circuit be revised to require reporting of all monitoring data, not just deviations. That memo, however, did not pass muster to create a uniform interpretation of the regulation and was viewed by the court as merely staff comments on a draft permit. Since that memo was not controlling, the court had to discern if the EPA's interpretation of the regulation was clearly erroneous or inconsistent. The court, applying deferential review to an agency's interpretation of its own regulation, held that the EPA's interpretation of the regulation is not inconsistent with the regulation's plain language, thus upholding EPA's decision to not object to the permits even though the permits do not require the permittees to report all monitoring data.

Finally, the Sierra Club and Georgia Forestwatch claimed EPA should have objected to all four permits because Georgia EPD did not provide the public with adequate information about the facilities. *Id.* The EPA regulation, 40 C.F.R. § 70.7(h)(2), requires that the Georgia EPD, in its notice, to provide the public "all other materials available to the permitting authority that are *relevant to the permit decision*." The Georgia EPD and the EPA have adopted the position that only information used in the permit review process is required to be made available to the public under the regulation. The plaintiffs contended that all relevant information available to the permitting authority, not just the information the Georgia EPD used in its permit review, is required to be available to the public.

Again, the court applied a deferential standard of review because the EPA is interpreting its own regulation. The court found that since the regulation does not detail what information is "relevant to the permitting decision," the EPA's interpretation that the only information the Georgia EPD is required to make available to the public is that used in the permit

decision-making process is reasonable under the deferential abuse of discretion standard. *Sierra Club*, 436 F.3d at 1284.

The Eleventh Circuit here vacated the EPA order that denied the plaintiffs' request for the EPA to object to the Title V permit for the King Finishing facility. The court held that Sierra Club had standing to bring the claim and that the EPA was required under Title V to object not only to substantive but also procedural deficiencies in permits. However, the plaintiffs failed to convince the court that the EPA's orders denying objection to the remaining permits should be vacated because the EPA's interpretation of its own regulations finding that in public notice, the public only needs to be given reports of violations and information that the state permitting agency used to make the permit decision was a reasonable interpretation of the EPA regulations under the abuse of discretion standard. In the end, the only order the court vacated was the EPA order, which denied objection to the permit for the King Finishing facility; all the other permits passed muster.

Kate Iannuzzi

## III. CLEAN WATER ACT

### *United States v. Johnson*, 437 F.3d 157 (1st Cir. 2006)

In the noted case, the United States Court of Appeals for the First Circuit affirmed the district court's decision that extended the jurisdiction of the Clean Water Act to the owners' properties. The United States sued the property owners for discharging pollutants without a permit in violation of the Clean Water Act (CWA), 33 U.S.C.S. § 1251-1387 (2000). The United States District Court for the District of Massachusetts granted summary judgment in favor of the government. Subsequently, the owners appealed challenging the government's jurisdiction over the properties arguing their property was not covered by the Environmental Protection Agency (EPA). The First Circuit addressed whether the government's jurisdiction over the properties complied with constitutional, statutory, and regulatory requirements.

In 1999, the United States (hereafter called "the government") filed a civil action against a group of cranberry farmers claiming that the farmers discharged dredged and fill material into wetlands without a permit in violation of the CWA § 301(a), 33 U.S.C. § 1344. Between 1979 and 1999, the owners discharged material at three locations in order to construct and maintain cranberry bogs. The three properties at issue (the "target sites") are located in Carver, Massachusetts: (1) the Cross

Street site, (2) the Fosdick Street site, and (3) the Forest/Fuller Street site. The district court determined that all three sites were "hydrologically connected" to the navigable Weweantic River by nonnavigable tributaries. Thus, water from all sites eventually drains into the Weweantic River.

The merging of the Rocky Meadow Brook and the South Meadow Brook form the Weweantic River, which is a "navigable-in-fact" waterway that flows from Carver, Massachusetts, to Wareham, Massachusetts, where it empties into Buzzards Bay and the Atlantic Ocean. The Cross Street site drains into an unnamed stream which turns into another stream, which flows into the navigable Weweantic River. The Fosdick Street site flows from the wetlands into a stream, into another wetland, into a pond, into a channel of water, into another stream, and into the navigable-in-fact Weweantic River. And, the Forest/Fuller site flows through a stream, a reservoir, a bog, another stream, a wetland, a pond, another bog, a third stream, and into the Weweantic River.

The farmers challenged the government's jurisdiction over the target sites. While, the government asserted its jurisdiction over the target sites according to § 301 and § 502 of the Clean Water Act, 33 U.S.C. § 1311 and § 1362. Any discharge of dredged or fill material into "navigable waters," defined as "waters of the United States," is forbidden unless authorized by a permit issued by the United States Army Corps of Engineers (Corps) pursuant to § 404 of the CWA. 33 U.S.C. § 1344. The district court granted a summary judgment in favor of the government by finding: "there is a sufficient basis for the United States to exercise jurisdiction because the undisputed evidence shows that the three wetlands [the Johnsons' properties] are hydrologically connected to the navigable Weweantic River by non-navigable tributaries."

The First Circuit used Supreme Court decisions as guidance on the issue of regulatory jurisdiction over the target sites. In *United States v. Riverside Bayview Homes*, the Supreme Court found that the Corps redefined "navigable waters" as "waters of the United States," which includes navigable-in-fact waters, tributaries, interstate waters, and nonnavigable intrastate waters. 474 U.S. 121, 123-24 (1985). Specifically, the language of the statute states:

(s) The term "waters of the United States" means
(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams, (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce. . . .
(4) All impoundments of waters otherwise defined as waters of the United States under the definition;
(5) Tributaries of waters identified in paragraphs (s)(1)-(4) of this section;
(6) The territorial seas;
(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1)-(6) of this section.

40 C.F.R. § 230.3 (2005).

The government asserted jurisdiction over the target sites by relying on § 230.3(s)(5), which extends jurisdiction over tributaries, and (s)(7), which extends jurisdiction over wetlands adjacent to waters. The owners of the target sites argued that CWA jurisdiction is limited to navigable waters and adjacent wetlands. The First Circuit disagreed and by referencing to the Supreme Court's decision in Riverside which extended the definition of navigable waters to waters that were not navigable-in-fact and approved jurisdiction over adjacent wetlands and tributaries. 474 U.S. at 133. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, the Supreme Court reaffirmed its holding in *Riverside*. 531 U.S. 159, 167 (2001). The Supreme Court stated: "We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands inseparably bound up with the 'waters' of the United States." *Id.* at 167. Furthermore, the First Circuit concluded that neither Supreme Court directly addressed the issue of jurisdiction over the target sites at issue.

In order to extend CWA jurisdiction over the target sites, there must be a "significant nexus" between the target sites and a navigable-in-fact water. This requirement of "inseparably bound up with" or "significant nexus" does not require adjacency to a navigable-in-fact water, but there must be a hydrological connection. The First Circuit inquired into the validity of regulatory jurisdiction over the target sites by using *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), as guidance for its Commerce Clause analysis due to the similarities of the properties at issue.

According to the Supreme Court, Congress can regulate certain broad categories of activity pursuant to the Commerce Clause. United States v. Lopez, 514 U.S. 549, 558-59 (1995). Congress may regulate the use of channels of interstate commerce, the instrumentalities of interstate

commerce, and those activities having a substantial relation to interstate commerce. *Id.* The Fourth Circuit reiterated that Congress enacted CWA under "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made;" and "the power over navigable waters is an aspect of the authority to regulate channels of interstate commerce." *Deaton*, 332 F.3d at 706. The *Deaton* court concluded that "Congress's authority over the channels of commerce is thus broad enough to allow it to legislate, as it did in the Clean Water Act, to prevent the use of navigable waters for injurious purposes." *Id.* at 707. Congress has the authority to delegate decisions to the Corps, so long as there is an "intelligible principle" to guide the agency's decision-making. *Id.* In the past, the Corps has regulated nonnavigable tributaries and their adjacent wetlands, which is a delegated authority within Congress's power over navigable waters. *Id.*

After reviewing the Fourth Circuit's approach, the First Circuit tested its constitutionality by referring to the Commerce Clause. According to the Commerce Clause, Congress has the power in the CWA to prevent the injurious use of navigable waters by regulating the discharge of pollutants at their source. The Fourth Circuit declared that "any pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves." *Deaton*, 332 F.3d at 707. The Supreme Court has held that those tributaries or wetlands are "inseparably bound up with waters of the United States." *Riverside*, 474 U.S. at 134. Therefore, the First Circuit reasoned that the decision of the Fourth Circuit in *Deaton* is consistent with the Supreme Court decisions when analyzing Congress' power over "channels of commerce."

Next, the court considered *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), when addressing the statutory question of whether the regulation as interpreted by the EPA was a reasonable interpretation of the CWA. First, the court determined whether the CWA directly resolved the question of extending jurisdiction over the target sites, or if the CWA was silent or ambiguous. *Id.* at 842-43. If the intent of Congress is clear, then the court must give effect to the intent of Congress. *Id.* If Congress is silent or ambiguous, then the court must decide whether the agency's regulation extending jurisdiction to the target sites is based on a reasonable construction of the statute. *Id.*

The Clean Water Act defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1344(a). This definition does not limit jurisdiction to only waters that are navigable-in fact. The Supreme Court in *Riverside* concluded that Congress's decision to change the traditional

definition of "navigable waters" and expand the definition to "waters of the United States" shows that Congress intended to regulate some waters that are not navigable-in-fact waters. 474 U.S. at 133. Additionally, *Solid Waste* stated that the CWA extends to nonnavigable waters that are "inseparably bound up with the 'waters' of the United States." 531 U.S. at 167. Thus, the First Circuit concluded that the phrase "waters of the United States" is ambiguous enough to constitute an implied delegation of authority to the EPA to administer the CWA and create rules that fill the gaps inherent within the Act.

In addition, the court addressed the owners' challenge of the meaning of the agency regulation. The EPA interpreted the regulation to cover the target sites, but the owners argued that this interpretation is inconsistent with the language of the regulation. The regulation in dispute § 230.3(s) defines "waters of the United States" to include "tributaries" of navigable-in-fact waters. Again, the court looked to *Deaton* for guidance, where the Fourth Circuit found conflicting definitions of "tributary." 332 F.3d at 710-11. Here, the First Circuit reasoned that the government had reasonably interpreted "tributaries" to mean any body of open water hydrologically connected to a navigable-in-fact water. Thus, a tributary system does not have to be a contiguous series of open waters, but can be interrupted by other waters.

The First Circuit ruled that there is ambiguity in the CWA, and Congress intended to delegate authority to the EPA. Also, the court found that "Congress intended said term [navigable waters] to be given 'the broadest constitutional interpretation.'" Next, the court had to decide whether the regulation is based on a permissible construction of the CWA. The government provided undisputed evidence that hydrological connections exist between the target sites and the Weweantic River. Thus the court concluded that there is a significant nexus between the target sites and the Weweantic River, and the sites are inseparably bound. Because of this hydrological connection and Congress's broad delegation of authority, the government had reasonably interpreted the CWA to extend jurisdiction over the entire tributary system.

In sum, the First Circuit used Supreme Court cases as a guide on the issue of government jurisdiction over the target sites. Additionally, the persuasive decision of the Fourth Circuit convinced the court to hold that the extension of jurisdiction to the target sites fell within Congress's power under the Commerce Clause. First, the CWA is silent on the question of whether jurisdiction could be extended to the target sites, which constituted a delegation of authority by Congress to the EPA and

the Corps. Second, the meaning of the word "tributaries" in § 230.3(s)(5) is uncertain, thus the EPA's interpretation was given deference. Third, the EPA's interpretation of § 230.3(s) and its jurisdiction over the target sites was a permissible, reasonable interpretation of the CWA. The target sites are inseparably bound up with the navigable-in-fact Weweantic River. There is a hydrological connection through a tributary system and its adjacent wetlands linking them together. This court affirmed the district court's decision that the CWA's jurisdiction extended to the target sites.

Hadiyah Thompson

*Baccarat Fremont Developers, LLC v. United States Army Corps of Engineers*,
425 F.3d 1150 (9th Cir. 2005)

In the instant case, the United States Court of Appeals for the Ninth Circuit held that the regulatory jurisdiction of the Army Corps of Engineers (Corps) over "adjacent wetlands" under the Clean Water Act did not depend on existence of actual hydrological or ecological connection between wetland and navigable waters, and even if some connection was necessary for jurisdiction, there was a connection between wetlands and flood control channels. The plaintiffs, real estate developers, argued that adjacency alone is insufficient to support the Corps' jurisdiction; for the Corps to have jurisdiction, there had to be a significant hydrological or ecological connection between the wetlands and the jurisdictional water on which the adjacency determination is based. The Ninth Circuit disagreed; it concluded that the law was well-settled in this area by the United States Supreme Court's decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

In July 1997, Baccarat purchased a 31-acre tract of land near San Francisco Bay in Fremont, California, on which it planned to develop a 6-building office, research, and manufacturing facility. The site was bordered on the north by Cushing Parkway, on the east by Fremont Boulevard, and on the south and west by property owned by the Alameda County Flood Control District (ACFCD). Two ACFCD flood control channels ran parallel to the southern and western boundaries of the site. The flood control channels were navigable and connected with the Bay.

The site contained roughly eight acres of wetland, which was separated from the flood control channels by man-made berms following the southern and western boundaries of the site. A maintenance road ran on top of the berms. If the berms had been removed, the wetlands would

have connected directly to the flood control channels. Baccarat asserted that if the berms were removed, the wetlands would drain entirely. At the closest point, the wetlands were 35 to 70 feet from the flood control channels. The wetlands on the site were separated into six delineated areas, five of which were at issue in the case. In February 1998, at Baccarat's request, the Corps' San Francisco District (District) determined that it had jurisdiction under the Clean Water Act (CWA) over all wetlands on the site.

Baccarat then sought a permit from the District to fill 2.36 of those acres. On January 29, 2001, Baccarat requested that the Corps reconsider its jurisdiction over the wetlands on the site in light of the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (*SWANCC*), 531 U.S. 159 (2001). In a letter dated May 8, 2001, the District reaffirmed its determination of jurisdiction, and explained that SWANCC "did not eliminate the Corps' authority to regulate wetlands adjacent to a tidal waterway." The District noted that the flood control channels were "within 250 feet of the site's western and southern boundaries," and that under 33 C.F.R. § 328.3(c) (2005), the presence of the man-made berms did not defeat adjacency. Finally, the District noted that water from the wetlands would flow into the flood control channel during storms if not for the man-made berms.

Baccarat appealed the District's determination to the Corps' South Pacific Division (Division). After an appeal conference and site visit, the Division issued its decision on October 25, 2001, which rejected Baccarat's contention that SWANCC modified the Corps' jurisdiction over adjacent wetlands. However, the Division found that the District had not provided sufficient evidence for its adjacency determination, and that the District's finding that the wetlands would drain into the ACFCD channels but for the berms was irrelevant to the jurisdictional determination. The Division then remanded to the District.

On January 28, 2002, the District determined once again that the wetlands on the site are adjacent to tidal waters and thus subject to the Corps' jurisdiction under the CWA. The Corps set forth six reasons for its conclusion: "(1) that barriers such as berms do not defeat adjacency pursuant to 33 C.F.R. § 328.3(c); (2) that the wetlands are in reasonable proximity to the ACFCD flood control channels; (3) that the wetlands serve important functions that contribute to the aquatic environment in general and to the nearby tidal waters in particular; (4) that the wetlands' functions are particularly important given the reduction of wetlands in the San Francisco Bay area; (5) that the wetlands are within the 100 year

floodplain of tidal waters; and (6) that the wetlands are part of a hydric soil unit that is contiguous with the area covered by tidal waters. The District noted that it agreed with the Division that it was irrelevant to the jurisdictional determination that the wetlands would drain into the ACFCD channels but for the berms." Baccarat Fremont Developers, L.L.C. v. U.S. Army Corps of Eng'rs, 425 F.3d 1150, 1153 (9th Cir. 2005)

On February 6, 2002, the Corps offered Baccarat a permit to fill 2.36 acres of wetland, subject to the condition that it (1) create on-site a minimum of 2.36 acres of seasonal freshwater wetlands and (2) enhance the remaining 5.3 acres of existing brackish wetlands. Baccarat signed the permit, reserving the right to seek judicial review of the Corps' jurisdictional determination. The permit was issued on March 1, 2002.

Baccarat sued the Corps in California Superior Court, seeking declaratory and injunctive relief from the Corps' determination that it has jurisdiction under the CWA. The suit was removed to federal district court, which granted summary judgment to the Corps, holding that the Corps had jurisdiction.

The Ninth Circuit, upon *de novo* review, affirmed the district court's grant of summary judgment to the Corps, holding that it did indeed have jurisdiction over Baccarat's proposal. The Ninth Circuit first noted that they were only able to reverse the Corps' determination if the agency had "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Baccarat*, 425 F.3d at 1154.

The court then discussed the meaning of "waters of the United States" under 33 U.S.C. § 1362(7). It noted that the Corps had issued regulations expounding on the meaning of "waters of the United States," and those regulations defined such waters to include "[w]etlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section." *Baccarat*, 425 F.3d at 1154 (citing 33 C.F.R. § 328.3 (2005)). The regulations further defined the term "adjacent" as "bordering, contiguous, or neighboring," and they specify that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" *Id.* (quoting 33 C.F.R. § 328.3(c)).

The Ninth Circuit then rejected Baccarat's argument that a significant hydrological or ecological connection between the wetlands

and the jurisdictional water is required for the Corps to have jurisdiction over the wetlands at issue. *Id.* As the court noted, "[t]he text of the CWA and the implementing regulations promulgated by the Corps give no indication that a significant hydrological or ecological connection is a condition of Corps jurisdiction over adjacent wetlands." *Id.*

Although Baccarat had largely relied on the Supreme Court's decision in *SWANCC* to support its interpretation of "adjacent," the Ninth Circuit distinguished that case from the instant facts, stating that *SWANCC* did not address the Corps' adjacency jurisdiction, but instead invalidated the Corps' Migratory Bird Rule. *Id.* (citing *SWANCC*, 531 U.S. at 163-64). Moreover, the contested waters at issue in *SWANCC* were "isolated ponds, some only seasonal, wholly located within two Illinois counties." *Id.* at 1155 (quoting *SWANCC*, 531 U.S. at 171).

The Ninth Circuit then addressed Baccarat's argument that the court should read footnote 9 of *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), to require a significant hydrological connection between the disputed site and wetlands under the Corps' jurisdiction. The footnote in that case stated:

> 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. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.

*Riverside Bayview Homes*, 474 U.S. at 135 n. 9 (citation omitted).

Baccarat argued that, according to this footnote, "refusing to invalidate a regulatory 'definition' on the grounds that 'not every adjacent wetland is of great importance to the environment of adjoining bodies of water' is not the same thing as saying that in an individual case requiring a jurisdictional delineation by the Army Corps, no evidence of a hydrological and ecological connectivity is required." *Baccarat*, 425 F.3d at 1155. Baccarat asserted that every jurisdictional claim made by the Army Corps must be fact-based; otherwise, the Army Corps' claim of jurisdiction is "arbitrary and capricious for failure to articulate a rational connection between the facts found and the choice made." *Id.* at 1156.

The court stated that the plaintiffs had misread footnote 9; CWA jurisprudence states that when the Corps is confronted with adjacent wetlands not "significantly intertwined" with the ecosystem of adjacent waterways, it "may allow development simply by issuing a permit." *Id.* (quoting *Riverside Bayview Homes*, 474 U.S. at 135 n.9). Thus, according to the Ninth Circuit, "the [Supreme] Court clearly contemplates the Corps' jurisdiction over adjacent wetlands, even when they lack a significant ecological connection with waters of the United States. Otherwise the issuance of a permit would be both unnecessary and ultra vires." *Id.* at 1156.

The Ninth Circuit went on to state that under *Riverside Bayview Homes*, the Corps' determination that a majority of adjacent wetlands have important ecological connections to waters of the United States is sufficient to support its regulations establishing jurisdiction over other adjacent wetlands that fall within the adjacency clause in 33 C.F.R. § 328.3(a)(7). In conclusion, the Ninth Circuit held that, contrary to Baccarat's assertions, a significant hydrological or ecological connection is not required to support the Corps' jurisdiction over particular adjacent wetlands is not supported by either the CWA, by the implementing regulations, by Supreme Court case law, or by the relevant case law. *Id.* at 1156-57. In so holding, the Ninth Circuit stated that it "join[ed] the Sixth Circuit in rejecting the idea that SWANCC modified the holding of Riverside Bayview Homes." *Id.* at 1157 (citing Carabell v. U.S. Army Corps of Eng'rs, 391 F.3d 704 (6th Cir.2004), *cert. granted*,73 U.S.L.W. 3632 (U.S. Oct. 11, 2005) (No. 04-1384)). Because no such connection is required for Corps jurisdiction, the Ninth Circuit concluded that the district court had appropriately granted the Corps' motion for summary judgment.

Abaigeal Van Deerlin

## IV. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

### *United States v. E.I. DuPont de Nemours & Co.*, 432 F.3d 161 (3d Cir. 2005)

In *United States v. E.I. DuPont de Nemours & Co.*, the United States Court of Appeals for the Third Circuit overruled *United States v. Rohm & Haas Co.*, 2 F.3d 1265 (3d Cir. 1993), and held that Comprehensive Environmental Response, Compensation and Liability of Act of 1980 (CERCLA), 402 U.S.C. § 9601-9675 (2000), provides for the recovery of oversight costs incurred by responsible private parties

during the course of hazardous waste site cleanup. 432 F.3d 161, 179 (3d Cir. 2005). In a memorandum order and opinion, the district court determined that *Rohm & Haas* barred the government's recovery of both "removal" and "remedial" action oversight costs. *See* United States v. E.I. du Pont de Nemours & Co., No. 02-1469, 2004 WL 1812704, at *6-9 (D. Del. Aug. 5, 2004). Asking the Third Circuit to reconsider *Rohm & Haas*, the United States appealed and petitioned for initial hearing en banc. The Third Circuit granted petition given the importance of the issue and because of several intervening decisions questioning or rejecting the analysis in *Rohm & Haas*. Reversing the order of the district court, the Third Circuit concluded that CERCLA § 107 authorizes the United States to recover costs incurred in overseeing private party removal and remedial actions not inconsistent with the National Contingency Plan.

This suit involves the DuPont Newport Superfund site, an industrial site in Delaware, owned and operated at various times by E.I. DuPont de Nemours and Company and Ciba Specialty Chemicals Corporation. The DuPont Newport Superfund site was identified in the early 1980s to be a potential threat to human health because of severe contamination to the property and its groundwater. Therefore, the DuPont Newport Superfund Site was placed on CERCLA's National Priorities List in February 1990. 42 U.S.C. § 9605(a)(8)(B) (establishing the National Priorities List). Subsequently, the Environmental Protection Agency (EPA) established a remedial action plan calling for various measures including excavating and dredging contaminated soil, monitoring contaminated groundwater, and constructing treatment facilities. However, the parties could not agree on implementation, and thus the EPA issued a unilaterally administrative order directing DuPont to remediate the site according to the remedial action plan, subject to EPA oversight and approval. *Id.* § 9606 (authorizing administrative orders "as may be necessary to protect public health and welfare of the environment"). Complying with the EPA's administrative order, DuPont executed a two-stage "private party cleanup action." The first stage was a "removal action" under CERCLA § 101(23), 42 U.S.C. § 9601(23), which included developing project specifications and schedules tailored to the EPA's stated objectives. The second stage was a "remedial action" under CERCLA § 101(24), 42 U.S.C. § 9601(24), consisting of the actual cleanup work, including soil excavation remedial "cap" construction, monitoring and treatment, and wetland restoration. DuPont completed the cleanup under budget, ahead of schedule, and to the EPA's satisfaction.

The EPA oversaw both stages of the cleanup. In the first stage, oversight included reviewing and approving (1) project specifications, (2) treatment technologies, (3) testing and sampling methods, and (4) construction schedules. Oversight of the second stage entailed monitoring, reviewing, and approving (1) design plan implementation, (2) construction schedules, (3) health and safety issues, (4) field work, and (5) field change requests. The parties stipulated that government incurred oversight costs of $746,279.77 in supervising the first stage, and $648,517.17 in supervising the second stage. Thus, the total cost to the government was $1,394,796.94.

In *Rohm & Haas*, the Third Circuit previously held that the government cannot recover "removal action" oversight costs incurred while supervising a private party cleanup. 2 F.3d at 1278. The court reasoned that *National Cable Television Ass'n, Inc. v. United States,* 415 U.S. 336 (1974), barred the recovery of those costs "unless the statutory language clearly and explicitly requires that result." *Rohm & Haas*, 2 F.3d at 1274. In *Rohm & Haas*, the court emphasized the lack of any "explicit reference to oversight of activities conducted and paid for by a private party," and "the dramatic and unusual effect of requiring regulated parties to pay a large share of the administrative costs incurred by the overseeing agency." Consequently, the court determined that CERCLA lacked a "clear statement." After the *Rohm & Haas* decision every other court of appeals that addressed the issue of oversight costs questioned or rejected the holding in *Rohm & Haas*. *See* United States v. Lowe, 118 F.3d 399, 401, 404 (5th Cir. 1997); United States v. Dico, Inc., 266 F.3d 864, 877-78 (8th Cir. 2001); Atl. Richfield Co. v. Am. Airlines, Inc., 98 F.3d 564, 568-69 (10th Cir. 1996).

The Third Circuit explained that the clear statement doctrine provides that "Congress must indicate clearly its intent its intention to delegate to the Executive the discretionary authority to recover administrative cost not inuring directly to the benefit of regulated parties by imposing additional financial burdens, whether characterized as 'fees' or 'taxes,' on those parties." Skinner v. Mid-Am Pipeline Co., 490 U.S. 212, 224 (1989). The court further explained that Congress must set forth "an intelligible principle" to constrain a federal agency when delegated this type of discretionary authority. However upon reconsideration, the Third Circuit determined that *National Cable* no longer applies to the analysis of CERCLA cases because of significant distinctions between the statutory framework at issue in *National Cable* and CERCLA. *See Dico*, 266 F.3d at 877; *Lowe*, 118 F.3d at 401; *Atl. Richfield Co,* 98 F.3d at 568. The court reasoned that while *National*

*Cable* addressed the imposition of user fees by the Federal Communications Commission on parties it was authorized to regulate, CERCLA neither imposes user fees or taxes, nor imposes them on a regulated industry. Instead, CERCLA response costs are restitutionary payments, imposed on responsible pasties for contamination to cover costs of the contamination's cleanup. The court also noted several additional distinctions between CERCLA and the statutory scheme in *National Cable*. For example, CERCLA liability is judicially determined under a federal cause of action, and not determined by administrative levy. Furthermore, CERCLA does not divorce an agency from the appropriations process, implicating agency accountability. Finally, the court explained that even if CERCLA were to implicate *National Cable*, its cost recovery provision, 42 U.S.C. § 9607, provides a clear statement of the power conferred by an intelligible principle governing the exercise of such power. Therefore, the court concluded that CERCLA authorizes the government to recover "all costs of removal or remedial action incurred by the United States government . . . not inconsistent with the National Contingency Plan." 42 U.S.C. § 9607(a)(1)-(4)(A).

The court then determined that the National Contingency Plan provides that the "methods and criteria for determining the appropriate extent of removal, remedy, and other measures," *id.* § 9605(a)(3), and "means of assuring that remedial action measures are cost-effective." *Id.* § 9605(a)(7). Additionally, the court noted that the plan requires documentation if costs are to be recovered. 40 C.F.R. § 300.160(a)(1) (2005). The court further explained that the National Contingency Plan sets forth an intelligible principle to limit the government's authority to recover CERCLA costs.

The Third Circuit determined that because *National Cable* is inapposite, the ordinary principles of statutory construction govern the recovery of CERCLA oversight costs. The court established that the cost recovery provision of CERCLA by its terms holds responsible parties liable for "all costs of removal or remedial action, incurred by the U.S. government or a State or an Indian tribe not inconsistent with the national contingency plan" and "any other necessary costs of response incurred by any other party consistent with the national contingency plan." 42 U.S.C. § 9707(a)(1)-(4)(A), (B). The court further explained that "remedial action" and "removal actions" are expressly defined in CERCLA to include enforcement activities. *Id.* § 9601(25). Additionally, the court stated that enforcement activities include all aspects of ensuring CERCLA compliance from monitoring whether a private party is in compliance with CERCLA standards to bring a

specific enforcement action where compliance is lacking. *See* Office of Solid Waste and Emergency Response, U.S. EPA, *Guidance on EPA Oversight of Remedial Designs and Remedial Actions Performed by Potential Responsible Parties*, EPA/540/G-90/001, OSWER, Directive 9355.5-01 (Apr. 1, 1990).

The Third Circuit also noted that the recovery of the EPA's oversight costs are consistent with CERCLA's functional objective of ensuring that parties responsible for hazardous waste contamination are tagged with the costs. *See* United States v. Bestfoods, 524 U.S. 51, 56 (1998). Accordingly, the Third Circuit concluded that CERCLA § 107 authorizes the United States to recover the costs incurred in overseeing private party removal and remedial action not inconsistent with the National Contingency Plan.

Pia Das

### *Carson Harbor Village v. County of Los Angeles*, 433 F.3d 1260 (9th Cir. 2006)

In *Carson Harbor Village* (Carson Harbor), the United States Court of Appeals for the Ninth Circuit affirmed a district court's grant of summary judgment in favor of Unocal Corporation (Unocal), a former operator of a petroleum production facility, for reimbursement of costs incurred by Carson Harbor in removing hazardous material from a Mobile Home Park. 433 F.3d 1260, 1265 (9th Cir. 2006).

Carson Harbor first filed suit against Unocal, various local governments, and the prior owners of the Park seeking damages under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Resource Conservation and Recovery Act, the Clean Water Act, and various state laws including nuisance, indemnity, and negligent nondisclosure. The district court granted summary judgment in favor of the defendants on all claims save some state law claims not pertinent to this article. The Ninth Circuit reversed summary judgment on the CERCLA claim against Unocal and remanded for a finding of whether Carson Harbor substantially complied with the National Contingency Plan outlined in CERCLA. On remand, the district court granted summary judgment in favor of Unocal, finding that Carson Harbor failed to show any genuine issue of material fact regarding whether its remedial actions substantially complied with the National Contingency Plan's public participation and feasibility study requirements.

The Ninth Circuit reviewed the district court's grant of summary judgment *de novo* and held the participation of a local environmental agency in the clean-up did not satisfy the public participation requirement in the National Contingency Plan, promulgated by the EPA through CERCLA, and although Carson Harbor did substantially comply with the remedial investigation requirement, it did not substantially comply with the feasibility study requirement, thus precluding reimbursement of cleanup costs.

CERCLA was enacted "to provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites." Pub. L. No. 96-510, 94 Stat. 2767 (1980). CERCLA contains a provision which would make it possible for private parties, Carson Harbor in this case, to recover cleanup costs from "various types of persons who contributed to the dumping of hazardous waste" at the Park site. 42 U.S.C. § 9607(a) (2000).

Private parties have the burden of showing that the cleanup costs incurred were consistent with the National Contingency Plan outlined in CERCLA. *Id.* § 9607(a). In order to overcome summary judgment and establish a prima facie case against Unocal, Carson Harbor had the burden of showing that (1) the Park was a "facility" as defined in 42 U.S.C. § 9601(9), (2) a "release" or "threatened release" of a "hazardous substance" occurred, (3) the "release" or "threatened release" caused Carson Harbor to incur response costs that were "necessary" and "consistent with the national contingency plan" outlined in CERCLA, and (4) Unocal and the local government entities were in one of the four classes of persons subject to liability under § 9607(a). 433 F.3d 1260, 1265 (9th Cir. 2006).

The Ninth Circuit began its discussion by analyzing the purposes of the National Contingency Plan. The court noted that private parties must take certain measures in choosing a remedial action plan and cleaning up hazardous waste. Specifically, private parties must provide an opportunity for public comment and participation in the cleanup, conduct a remedial site investigation, and prepare a feasibility study. The court reiterated its analysis in a previous case that the National Contingency Plan is "designed to make the party seeking response costs choose a cost-effective course of action to protect public health and the environment." *Id.* at 1265.

The court then focused on Carson Harbor's compliance with the public participation requirement. The public participation requirement has two elements. "First, in developing a remedial action plan, prior to

actual field work beginning, the party conducting the cleanup 'shall . . . to the extent practicable' interview local officials, community residents, or other interested or affected parties to learn their concerns." *Id.* (citing 40 C.F.R. § 300.430(c)(2)(i) (2005)).

In addition, Carson Harbor was required to establish a formal community relations plan to secure community involvement and make information about the site cleanup readily available to the public. Second, Carson Harbor had to publish notice of the chosen remediation plan in a local newspaper and allow for a public meeting as well as an opportunity for the public to comment on the plan.

The district court found there was evidence that Carson Harbor notified local officials and other interested parties, including Unocal. "Additionally, meetings were held with representatives from Carson Harbor, Unocal, the [Regional Water Quality Control Board] RWQCB, and state Senator Dills's office to discuss the Property and remediation efforts." *Id.* However, the Ninth Circuit found that this alone did not create a genuine issue of material fact as to whether Carson Harbor substantially complied with the public participation requirement of the National Contingency Plan "because there was never an opportunity for the public at large to comment on the plan." *Id.*

Carson Harbor's major contention was that the public participation requirement in the National Contingency plan was satisfied because of the substantial involvement of the overseeing governmental unit, the RWQCB. Carson Harbor additionally provided evidence that they sent out letters to each of the Park residents notifying them of the contaminations found in the Park. The Ninth Circuit declined to decide the issue of whether significant agency involvement can satisfy the public participation requirement, an issue of first impression for the court. Instead, the court held that even if agency involvement is sufficient to satisfy the public participation requirement, the RWQCB's involvement was not enough in this case.

The court noted that the Second Circuit previously held that "extensive involvement of a government agency charged with the protection of the public environmental interest is an effective substitute for public comment." 433 F.3d 1260, 1267 (9th Cir. 2006) (citing Bedford Affiliates v. Sills, 156 F.3d 416 (2d Cir. 1998). However, in that case the agency had been actively involved with the proposed cleanup for years and was present to ensure the correct implementation of the remedial plan. Only under those facts did the Second Circuit find that "[w]here a state agency responsible for overseeing remediation of hazardous wastes gives comprehensive input, and the private parties

involved act pursuant to those instructions, the state participation may fulfill the public participation requirement." *Bedford Affiliates*, 156 F.3d at 428.

Conversely, in the present case the RWQCB was involved in only a "limited fashion" and was not even involved in the remedial action at the Park or in Carson Harbor's preliminary investigation of the pollutants. 433 F.3d 1260, 1267 (9th Cir. 2006). The RWQCB merely approved the remedial action plan with a few modifications and simply inspected the property *after* the cleanup was completed.

In addition, the court noted that Carson Harbor submitted no evidence that a community relations plan was prepared, that the public was given notice of the cleanup, that the remediation plan was made available to the public, or that any other opportunity for public comment was given. The court found the best evidence that the public was given any opportunity to comment was that local residents had to go to their state senator to voice any concerns about the pollution at the Park and its remediation. For the Ninth Circuit, this simply was not enough to raise a genuine issue of material fact as to whether Carson Harbor substantially complied with the public participation requirement.

The court then addressed the National Contingency Plan's remedial investigation and feasibility study requirements. The stated purpose of the remedial investigation is to "ensure that appropriate remedial alternatives are developed and evaluated such that relevant information concerning the remedial action options can be presented to a decision-maker and an appropriate remedy selected." 40 C.F.R. § 300.430(e)(1) (2005). Additionally, each plan presented must be analyzed for its "effectiveness, ease of implementation, and cost." *Id.* § 300.430(e)(7). Finally, the feasibility study should include a "detailed analysis . . . on the limited number of alternatives that represent viable approaches to remedial action after evaluation in the screening stage." 433 F.3d 1260, 1268 (9th Cir. 2006) (citing 40 C.F.R. § 300.430(e)(9) (2005)).

The feasibility study was prepared using data collected during the remedial investigation. The court agreed with the district court's finding that Carson Harbor, arguably, did conduct a remedial investigation, however, found no evidence submitted showed there was compliance with the feasibility study requirement. Carson Harbor argued there was only one feasible alternative, removal of the waste, and as a result it was not required to investigate other possible alternatives. The Ninth Circuit rejected this argument declaring that "[o]ne of the hallmarks of the feasibility study requirement is assessing a variety of possible alternatives and providing analysis of the costs, implementability, and

effectiveness of each, and choosing the best alternative for the site at issue." *Id.* The court found the remedial action plan submitted to the RWQCB had a full analysis of only one alternative: removal. Although the remedial action plan "discusses the remediation goals, the process for removal, and the pollutant levels required after remediation to be safe for human health and the environment," Carson Harbor proposed no other alternatives. *Id.* The court determined that discussing a single remediation alternative did not establish substantial compliance with the feasibility study requirement of the National Contingency Plan.

The Ninth Circuit had previously rejected this argument in a similar factual situation. In the previously decided case the court held "summary analysis [which] states that disposal is the only feasible option and does not indicate that other alternatives were even considered" is not enough for National Contingency Plan compliance. Wash. State Dep't of Transp. v. Wash. Nat. Gas Co., 59 F.3d 793, 804 (9th Cir. 1995). The facts in the present case are very similar to those in the previously decided case in that Carson Harbor's remedial action plan only discussed removal of the waste and did not address any other alternatives. Additionally, the court pointed out that "there was no assessment of the chosen removal alternative in the remedial action plan in terms of effectiveness, cost, or ease of implementation." 433 F.3d 1260, 1269 (9th Cir. 2006). Consistent with the court's previous holding, it found that Carson Harbor had not shown that there were genuine issues of material fact remaining on the issue of whether it substantially complied with the feasibility study requirement of the National Contingency Plan.

The court did concede that only substantial compliance is required to satisfy the National Contingency Plan, and Carson Harbor met that standard as to the remedial investigation. However, it found Carson Harbor's arguments unpersuasive as to the public participation and feasibility study requirements. The Ninth Circuit concluded that there was no genuine issue of material fact as to whether there was compliance with the participation requirement or the feasibility study requirement and therefore affirmed the district court's holding that Unocal was entitled to summary judgment.

Monica Emilienburg

### *United States v. Asarco Inc.*, 430 F.3d 972 (9th Cir. 2005)

In *United States v. Asarco Inc.*, the United States Court of Appeals for the Ninth Circuit found that in modifying a consent decree, under

Rule 60(b)(5) of the Federal Rules of Civil Procedure, a court must begin its analysis with the terms and provisions of the decree on its face to determine if the moving party anticipated a significant change in factual conditions, thereby making modification improper. 430 F.3d 972, 976 (2005). The United States appealed a decision of the District Court for the District of Idaho reducing the defendant's (Asarco) cleanup obligation under an existing consent decree. The United States argued that the district court abused its discretion when it relied on extrinsic evidence, rather than the four corners of the decree, to determine that defendants did not anticipate the future actions taken to clean up the region. Asarco asserted that subsequent documents and statements made before and after the decree, by the Environmental Protection Agency (EPA), amounted to evidence sufficient to show that they could not have anticipated the future action at the site in issue.

In 1994, the United States and the state of Idaho entered into a consent decree with various mining companies, including Asarco, Inc., requiring the latter to perform certain cleanup actions. *Asarco Inc.*, 430 F.3d at 975. Asarco would obtain liability releases for the contaminated "Bunker Hill Superfund Site." The site, referred to in the opinion as "the Box," is a twenty-one square mile area. This area is surrounded by the Coeur d'Alene River Basin. *Id.*

Bunker Hill Superfund site is a highly contaminated site. In 1983, it was put on the National Priorities List. The area had been subject to 165 of mining and smelting activity. As a result the soil was saturated with various heavy metals as well as other contamination. The contamination was widespread, covering soils, ground and surface water, as well as the air. The EPA determined that a widespread and multifaceted remedial action was needed combat the contamination in the Box. From 1992 until 1994, The United States and the State of Idaho conducted settlement negotiations with potentially responsible parties (PRPs). *Id.* at 976. At the time of these negotiations, it was EPA's intent not to use the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as a vehicle to clean up contamination outside of the Box. Under CERCLA, sections 106 and 107 allow government officials to sue PRPs. Specifically, section 106 allows the government to obtain relief for environmental damages. 42 U.S.C. § 9606 (2000). Further, under section 122 of CERCLA, the government is allowed to enter into agreements with PRPs as opposed to entering the litigation arena. *Id.* § 9622. This is done to promote speedy cleanup of contaminated sites.

However, EPA decided instead to use local administration and planning in order to maximize any cleanup efforts outside of the Box. To

do this, the EPA initially planned to use the Coeur d'Alene Basin Restoration Project, a joint public and private venture, as a guidepost for any other remediation required outside of the Box. *Asarco Inc.*, 430 F.3d at 977. At the beginning, the parties decided to separate the cleanup duties. The PRPs would be responsible for the environmental contamination that had entered or reached the populated areas of the Box. The United States would take on remediation efforts in the nonpopulated areas of the Box. As stated above, in 1994, the district court accepted the consent decree.

Of key contention in this case is the fact that the United States expressly reserved the right to bring other lawful remedial actions against parties if it felt a response was warranted for the area of the basin outside of the Box. Specifically, they retained the right to sue PRPs for all liability, regardless of the timing of the individual offenses, for any release of contaminated materials outside of the Box. Further, all parties to the decree recognized that the United States did not limit its ability to recover from PRPs costs incurred for remediation efforts conducted outside the Box. The decree, which no party disputed, allowed the United States to bring response actions, of any kind, at any time. This was the thrust of the initial setting of this case.

In 1996, the United States decided to bring an action under CERCLA to recover costs incurred for cleanup activities conducted in the Basin, but outside of the Box. The EPA proceeded over the next five years to conduct ecological and toxicity studies of the Basin to determine the extent of the damages. In 2001, Asarco cried foul.

Asarco felt that EPA's decision to CERCLA or "superfund" the area constituted an unanticipated change in factual circumstances. This, Asarco argued, made compliance with the 1994 consent decree very difficult, if not impossible. Asarco argued that the costs allocated to them were too high, given EPA's new action. They filed a motion to modify the existing consent decree in an effort to reduce the costs attributable to their conduct in the Box. The crux of Asarco's argument was the fact that EPA had repeatedly assured them that it had no desire or plans to "superfund" the area of the Basin outside of the Box.

At trial, the district court looked to oral and written statements, produced by Asarco. These documents and statements ranged in date from before settlement negotiations for the 1994 decree up until the 1996 litigation. The court held that given the assurances from the Department of Justice (DOJ) and EPA, in the form of letters, records of decisions, conversations, the Basin framework documents, and pleadings, that Asarco could not have anticipated the change in circumstances. Further,

the court felt that if the decree remained unchanged, it would be severely damaging to the domestic mining industry. The court found for Asarco and modified the decree, reducing their allocated costs by seven million dollars.

The Ninth Circuit began its analysis and review of the district court by selecting the standard of review. They determined that this case concerned a mixed question of fact and law. As such, they reviewed the lower court de novo. The Ninth Circuit Court of Appeals then began its examination of the substantive issues in the case, beginning with the Federal Rule of Civil Procedure at issue here.

The court turned its attention federal rule 60(b)(5) which provides that a court may grant relief from a decision when "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." FED R. CIV. P. 60(b)(5). This rule, in effect, gives credence to a court's ability to modify decisions to achieve a more equitable result, especially in the face of changed circumstances. The court next turned to precedent to determine what was required to invoke this power. The court focused on *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992).

In *Rufo*, the Supreme Court articulated a two part test for determining when a court has the authority to modify a final decision. The first prong is that the claimant must first show that there was a significant change in the settings that gave rise to the original decision. The second prong involves the courts evaluation of the alleged change and the proposed modification. In order to modify a decision or judgment, the court must be satisfied that the proposed modification will adequately resolve the deficiency in the changed fact or facts. *Asarco Inc.*, 430 F.3d at 979. Further, if the alleged change is one of a factual nature, the claimant must also show that if it is not allowed the desired modification, that the decree will become unworkable or that it would violate the public interest. The Ninth Circuit went on, however, to say that courts must be careful in modification and should not do so if "a party relies upon events that actually were anticipated at the time it entered into a decree." *Id.* (quoting *Rufo*, 502 U.S. at 385). The court determined that Asarco bore the burden of proof in showing that the change complained of was actually "a significant and unanticipated change in factual conditions warranting modification of the decree." *Id.* Furthermore, the court went on to say that if the alleged change was foreseeable at the time of the decree, the burden is even heavier for the

claimant to overcome. This standard the court articulated as the "heavy burden standard". *Id.*

The Court did recognize the other side of the argument, particularly the need to be flexible. The Ninth Circuit echoed Asarco's concerns that rule 60(b)(5) should be a moldable rule. Asarco argued that since these decrees last for long stretches of time, they should remain readily open to modification. The Court agreed with Asarco, but went on the say that just because it is possible that decrees and decisions, like the one at issue here, are susceptible to change does not mean that courts should freely change them, especially when such change was anticipated or foreseeable. *Id.*

Next, the Ninth Circuit articulated the two questions that it felt must be answered in order to come to a decision. The first, did Asarco actually anticipate, at the time they entered into the decree, that the EPA would "superfund" the Basin? The second, did Asarco satisfy the "heavy burden standard" established in *Rufo*? The Ninth Circuit held that Asarco did in fact anticipate that EPA could "superfund" the Basin but failed in meeting their burden for modification.

The Ninth Circuit discussed how Asarco anticipated EPA's future actions. The court reiterated what was discussed at the district court level. No parties, at any time, ever challenged the actual express terms of the 1994 consent decree. Furthermore, all the parties agreed that the United States had every right to take any lawful response action it chose to outside of the Box. This understanding was expressly laid out in the decree. Asarco even stated this in their brief. The Ninth Circuit looked at the decree and determined that nowhere had the United States expressly said they were forfeiting their right to bring future action for activities outside of the Box.

Next, the court moved to the error made by the lower court. As stated above the lower court used extrinsic evidence to determine that modification was warranted and necessary. The Ninth Circuit rejected this holding. Without the extrinsic evidence, Asarco could not claim that the change was unforeseeable, thus increasing the burden needed to prove that modification was needed.

The Ninth Circuit then determined that consent decrees are like contracts. Thus, a contract is determined by what is stated in it or its four corners. The court went on to state that only if the language is ambiguous does a court turn to extrinsic evidence to resolve that ambiguity. To illustrate its point, the court turned to *United States v. Armour & Co.*, 402 U.S. 673 (1971). In *Armour*, the Supreme Court determined that consent decrees are to be examined as if they were

contracts. The Ninth Circuit further developed this point by stating that the existence of a consent decree or settlement evidences a meeting, discussion, and negotiation. Parties are given the opportunity to determine risk and benefits for themselves. As such, the burden to show an ambiguity rests with those who are party to the agreement. Here the Ninth Circuit found no ambiguity.

Asarco still contended that because rule 60(b)(5) was a rule based in equity, that a court is not required to look solely at the four corners of the contract. In fact a court can look to the totality of the circumstances to determine if modification is needed, which includes the use of extrinsic evidence. The Ninth Circuit rejected this argument. The very fact that terms retaining EPA's right to bring future remedial or response actions existed, expressly, in the consent decree, at the time Asarco entered into it, negates any need for a court to look beyond the document. The Ninth Circuit found:

> [T]he plain terms of the consent decree reveal the parties' expectation that a particular change in factual circumstances might occur during the lifetime of the decree. In fact, the decree provided that the United States reserved its "rights to take any and all response actions authorized by law" and to pursue defendants for liability for response costs incurred outside the Box.

*Id.* at 982. Asarco missed its opportunity to clearly define its role in the future of the Basin.

Finally the Ninth Circuit went on to state that since the lower court had incorrectly found that the alleged changes were unanticipated, they applied the wrong burden. The court then examined Asarco's position in light of the "heavy burden standard." After determining that a remand was not required, the court decided, based on the record before them, that there was no financial evidence justifying a hardship on Asarco and further that they had not tried reasonably to comply with the decree. The Ninth Circuit Court of Appeals reversed the holding of the Idaho District Court, canceling the modification and reinstating the original cost allocation.

Matthew Gigliotti

*United States v. W.R. Grace & Co.*,
429 F.3d 1224 (9th Cir. 2005)

In *United States v. W.R. Grace & Co.*, the United States Court of Appeals for the Ninth Circuit affirmed the United States District Court for the District of Montana's order granting summary judgment for the Environmental Protection Agency (EPA) on plaintiff's liability claims

against defendant, W.R. Grace and Co. (Grace), under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 107(a)(4), 42 U.S.C. § 9607(a)(4) (2000). The Ninth Circuit also affirmed the district court's order, which awarded the EPA both costs and a declaratory judgment concerning future liability against the defendant. In reaching its decision, the Ninth Circuit decided on appeal a challenge based on three questions: First, whether the EPA had mischaracterized its cleanup actions under the "guise" of a removal in order to evade the more stringent remediation requirements. United States v. W.R. Grace & Co., 429 F.3d 1224, 1226 (2000). The court held that the EPA was within its delegated authority to classify the cleanup a removal. Second, even if the cleanup was classified as a removal, whether the district court erred in exempting the action from the "temporal and monetary" caps provided in section 415(b)(5) of the National Contingency Plan (NCP). *Id.*; National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.415(b)(5) (2005). The Ninth Circuit again affirmed the district court, finding that the EPA's decision to exceed the statutory cap was not arbitrary and capricious. Finally, whether the district court had erred in accepting the EPA's methodology for calculating indirect costs. In affirming the district courts decision and refusing to accept Grace's plea for a *de novo* review of the accounting practices, the Ninth Circuit held that district court's decision was not clearly erroneous.

1. Libby, Montana

For nearly seventy years, companies including Grace mined and processed minerals containing asbestos within a close proximity of Libby, Montana. At the time, asbestos was not recognized for its health dangers; in fact, Grace made the mineral by-product available for employees to take home and donated it to various schools. While studies were conducted nationally focusing on the effects of workplace exposure, no review was made into the potential contamination of the Libby community until the EPA commenced an investigation in 1999.

In 2000, the EPA, suspecting a significant problem, began to formulate a plan that would determine "whether or not time-critical intervention [was] needed to protect public health." 429 F.3d at 1230. The EPA investigation revealed that there was a large probability that "significant amounts of asbestos" remained in the immediate vicinity of Libby and that there was an concerning number of "asbestos related diseases" which involved both former employees and "non-occupational exposures." *Id.* While asbestos is not typically considered harmful

unless inhaled or ingested, "the EPA documented 'complete human exposure pathways' through which asbestos particles were becoming airborne as a result of normal human activities." *Id.* Further, the EPA conducted a survey of Libby residents, which verified the EPA's fear of multiple exposure routes while also documenting significant irregularity in the lining of the survey participant's lungs—eighteen percent were found to have abnormalities compared with a national average of less than 2.3%.

In response to their findings, the EPA issued three memorandums (Action Memos) that documented and laid the groundwork for its removal action. Over the next two years, the EPA, relying on the "unless" language found in section 104(c)(1) of CERCLA, continued to raise the removal's project ceiling to an aggregated cost of over fifty-five million dollars. 42 U.S.C. § 9604(c)(1). In March of 2001, the EPA filed suit against Grace under the recovery mechanisms provided in CERCLA. *See id.* §§ 9607, 9613(g)(2). The district court first granted summary judgment on the issue of Grace's liability and then after a brief bench trial, awarded the EPA its entire requested reimbursement, including indirect costs. In addition, the court held Grace liable for future cleanup costs associated with the EPA's final remedy, which as of the date of the Ninth Circuit's decision was still in its study and selection phase.

2. The Ninth Circuit's Analysis

On appeal, Grace challenged the characterization of clean up, arguing that the EPA's actions were more of a remedial action, and as such, the EPA did not fulfill the more stringent requirements for remediation under CERCLA and the NCP. Separately, Grace argued that even if the action was deemed a removal, the EPA did not meet the exemption requirements required under CERCLA and thus the district court erred in granting the EPA its entire reimbursement plus a judgment for future costs. *See* 42 U.S.C. § 9604(c); 40 C.F.R. § 300.415(b)(5). Finally, Grace challenged the method the EPA used in calculating indirect costs that were attributable to the cleanup action.

a. Characterization Issue

In reviewing Grace's first challenge, the Ninth Circuit began by distinguishing between the requirements of removal and remedial actions under CERCLA, recognizing that the latter's standards are "much more detailed and onerous." 429 F.3d at 1228 (citing Morrison Enters. v. McShares, Inc., 302 F.3d 1127, 1136 (10th Cir. 2002)). Relying on the

express language of CERCLA, the Ninth Circuit agreed with the district court's determination that the EPA's response actions would be upheld "unless arbitrary and capricious or otherwise not in accordance with the law." 42 U.S.C. § 9613(j)(2). Based on this determination, the Ninth Circuit reasoned that under an arbitrary and capricious standard of review the EPA's selection of removal did not warrant challenge. To support this reasoning, the Ninth Circuit cited various factors found in the NCP that correlated directly with the EPA's three Action Memos. 429 F.3d at 1242; 40 C.F.R. § 300.415(e). Further, the Ninth Circuit emphasized that the burden was on Grace to produce evidence that the EPA's removal decision was either arbitrary or capricious or not in accordance with the law. The Ninth Circuit concluded that Grace had failed to meet this burden.

At this point, however, the Ninth Circuit deviated from the district court's final findings and acknowledged that a further inquiry that must be made. While recognizing that the EPA's choice of action was not challengeable unless arbitrary or capricious (i.e., removal verses remediation), the court distinguished the EPA's actual implementation process, ruling that these actions must still fall within the parameters of the statute. *See* 42 U.S.C. § 9604(a)(1). As the court opined, "[t]he decision to select a removal or remedial action is therefore distinct from the question whether the action carried out was, in fact, the action selected." 429 F.3d at 1234-35. This latter issue, the court determined, should be reviewed as a matter of law and thus a question of statutory interpretation.

As with any type of administrative review, the Ninth Circuit acknowledged that the main issue was what level of deference should be granted "the EPA's formulation of the term 'removal.'" *Id.* The EPA argued that all agency decisions should be reviewed based on an arbitrary and capricious standard; however, the Ninth Circuit disagreed, recognizing two standards of review. In cases in which the EPA's actions are based on its statutory authority, the court will review based on an arbitrary and capricious standard. On the other hand, when the issue is one of statutory interpretation, the court will grant deference based on the United States Supreme Court's decisions in *Chevron* and its progeny. *See* Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984). Because the issue of whether the EPA's removal actions fall within the statutory definition, the Ninth Circuit determined that the latter standard of review applied.

Particularly important in the Ninth Circuit's inquiry was whether the level of deference should be lessened if it is determined that the EPA's

formulation was not the product of its formal rulemaking authority. While a traditional *Chevron* analysis had granted agency's wide deferential latitude, its progeny in *Mead*, *Barnhart*, and *Brand X* have made the question of agency deference "fraught with ambiguity." *See Chevron*, 467 U.S. 837; United States v. Mead Corp., 533 U.S. 218 (2001); Barnhart v. Walton, 535 U.S. 212 (2002); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 162 L.Ed.2d 820 (2005). Thus, the Ninth Circuit chose against relying too heavily on the conflicting majority opinions, concurrences and dissents in those cases and instead looked more closely at the more analogous United State Supreme Court decision in *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004). Under that analysis, "the EPA's interpretation of a statute in internal guidance memoranda warrants respect but does not qualify for *Chevron* deference." 429 F.3d at 1236. Thus, while "full-blown *Chevron* deference" may not be due, a court "will still accord a modified level of respect" to the agency's interpretation. *Id.*

Looking first at step one of the Chevron analysis, the court concluded that section 104(a)(1) of CERCLA, which grants the EPA the authority to engage in removal and remedial actions, provides little clarification as to the characterization of those actions. *See* 42 U.S.C. § 9614(a)(1). Reviewing the statute as a whole, the purpose section of the statute and the legislative history, the court was only able to ascertain the general principle that the drafters supported aggressive actions in protection of the public health. Without having the clear intent of Congress, the court moved to the second step of Chevron and asked "whether, in the view of the deference owed to the EPA, the Libby cleanup was a removal action as a matter of law." 429 F.3d at 1241. The court opined that if the EPA's actions fell within the NCP, an interpretation promulgated through the formal rulemaking process, then its actions would be justified as a matter of law. The court recognized, however, that there was still ambiguity between the terms "removal" and "remediation" as defined under the NCP. Still, the court was guided by other sections of the NCP; primarily, section 415(e) which provided a nonexhaustive list of appropriate removal methods. *See* 40 C.F.R. § 300.415(e). The court found that the bulk of the actions taken by the EPA fell within the scope of this list. In sum, the Ninth Circuit found a good deal of formal support under the NCP justifying the EPA's removal action.

Instead of stopping its analysis with a finding of deference for the EPA removal action based on the formal rulemaking regulations of the

NCP, the Ninth Circuit further supported its final holding by looking to other documents the EPA had produced. Cognizant of the Supreme Court's deference standard opined in *Alaska Department of Environmental Conservation*, the Ninth Circuit focused on a memo that the EPA issued to "guide project managers during the decisionmaking process of selecting between remedial and removal action." *Id.* at 1243; 540 U.S. 461 (2000) [hereinafter Removal Memo]. The Removal Memo emphasized the NCP's focus on "time sensitivity" and "prompt action" as key characteristics for removal actions. 429 F.3d at 1243. Combining the informal interpretations of the Removal Memo with the formal NCP descriptions, the court found that "removal actions encompass interim, partial time-sensitive responses taken to counter serious threats to public health." *Id.* Applying that broad language to the action taken at Libby, the court held that the cleanup fell within the bounds of a removal action.

b. Exemption from Statutory Cap

The second question that the Ninth Circuit had to resolve on appeal was whether the district court was correct in granting the EPA an exemption from the two million dollar, twelve-month statutory cap for removal actions. *See* 42 U.S.C. 9604(c)(1); 40 C.F.R. § 300.415(b)(5). The district court, in holding the excess spending fell within the statutory exemption of CERCLA section 104(c)(1), was persuaded by the EPA's well-documented explanation of the "immediate risk to public health" in each of its three Action Memos. 429 F.3d at 1247 (citing United States v. W.R. Grace & Co.-Conn., 280 F. Supp. 2d 1135, 1139 n.1 (D. Mont. 2002). The Ninth Circuit agreed with the court's analysis and held that the EPA's decision to exceed the statutory cap, in light of the eminent public threat, was not arbitrary and capricious. The Ninth Circuit began its review by looking at the statutory language of sections 104(c)(1) of CERCLA and section 415(b)(5) of the NCP. *See* 42 U.S.C. 9604(c)(1); 40 C.F.R. § 300.415(b)(5). Integrating the requirements of both sections, the Ninth Circuit concluded the statutory cap could not be exceeded "unless the [EPA] finds that" one of the section 104(c) exemptions applies. 429 F.3d at 1248 (citing 42 U.S.C. § 9604(c)(1)). Under section 104(c)(1), the EPA must find that "(i) continued response actions are immediately required to prevent limit, or mitigate an emergency, (ii) there is an immediate risk to public health or welfare or the environment, and such assistance will not otherwise be provided on a timely basis," in order to invoke the exemption. 42 U.S.C. § 9604(c)(1). The court then compared the EPA's conclusions and the evidentiary support found in each of its three Action Memos against the three

statutory requirements of section 104(c)(1)'s "emergency exemption." 429 F.3d at 1248; 42 U.S.C. § 9604(c)(1). The court concluded that the excess spending was warranted based on the EPA's findings. Further, contrary to Grace's assertion, the Ninth Circuit agreed with the district court that because the language of the statute uses the word "finds," judicial review of the EPA's actions were subject only to arbitrary and capricious review. *See* 5 U.S.C. § 706(2). The court determined that a review of the EPA's decision was "inherently fact-based." 429 F.3d at 1248. Applying practical reasoning, the court opined that "given the urgency, magnitude, and long-standing nature of the problem" it was unrealistic to suggest that the EPA could have stayed within the statutory cap. *Id.* at 1249. The court held that based on the "daunting realities and the EPA's careful documentation" based on "the relevant factors" the excess costs of the removal action were not a clear error of judgment; in sum, the decision was held to not be arbitrary and capricious. *Id.*

c. Indirect Costs Calculation

Grace's final assertion was that the EPA's methodology in calculating indirect costs was flawed. Grace argued that the EPA had incorrectly abandoned a "labor hour" approach, which calculated as indirect costs only the billable hours of EPA personnel, and replaced it with a "full cost" approach, which aggregated the total site-expenditures, whether incurred by EPA personnel or other outside sources. *Id.* at 1250. The EPA had produced evidence at trial that "the revised methodology is a better process for estimating and allocating the total Superfund overhead costs." *Id.*; *see* United States v. W.R. Grace & Co., 280 F. Supp. 2d. 1149, 1171-72 (D. Mont. 2003). This approach was supported by reports from both the General Accounting Office and a nationally recognized accounting firm. The Ninth Circuit found that the district court's conclusions comported with both the statute and the evidentiary record. In refusing to review the district court's decision *de novo*, the Ninth Circuit opined, "we do not think it is in anyone's interests to have appellate courts step into the accountants' shoes and determine the accuracy of accounting calculations *de novo*." *Id.* In sum, rejecting Grace's plea for *de novo* review, the Ninth Circuit held that the district court's findings were not clearly erroneous.

Jonathan G. Nash

## V. INTERSTATE COMMERCE COMMISSION TERMINATION ACT

### *Green Mountain Railroad Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005)

In *Green Mountain Railroad Corp. v. Vermont*, the United States Court of Appeals for the Second Circuit followed in the footsteps of other federal courts when it held that Vermont's environmental land use statute (Act 250) could not impose preconstruction permit requirements on Green Mountain Railroad Corporation's (Green Mountain) proposed railroad transloading facilities, on the ground that Act 250 was preempted by the Interstate Commerce Commission Termination Act (Termination Act). The State of Vermont, its Agency of Natural Resources and the State Attorney General appealed from a judgment entered in the United States District Court for the District Court of Vermont's grant of summary judgment to Green Mountain. The Second Circuit affirmed the District Court of Vermont's grant of summary judgment to Green Mountain.

Green Mountain Railroad Corporation is a "rail carrier" as defined by the Termination Act, with fifty-two miles of rail tracks between Vermont and New Hampshire. *See* 49 U.S.C. § 10102(5) (2000). It serves industries that depend on trucks to transport cargo from the rail site to processing sites located elsewhere. Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 640 (2d Cir. 2005). Green Mountain owns sixty-six acres in Rockingham, Vermont, known as Riverside. Here, wetlands cover portions of the land becoming unviable for any type of development. *Id.* To expand its business, Green Mountain proposed to build facilities at Riverside to serve several purposes: (1) unloading bulk salt that arrives by rail to be distributed to local areas by truck or for temporary storage until distribution; (2) temporary storage and transportation of nonbulk goods; and (3) unloading bulk cement that arrives by rail for storage and eventual transport by truck. *Id.*

However, Vermont found the construction violative of its environmental land use statute, Act 250, which mandates preconstruction permits for land development. *Id.* This process of permitting begins when a District Commission evaluates the permit applications using ten criteria, including: "undue water or air pollution . . . and undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas." *Id.*

In 1997, PMI Lumber leased a portion of Riverside and subsequently applied for an Act 250 construction permit. In order to satisfy environmental criteria, PMI Lumber proposed a seventy-five foot

buffer zone along the river, however, the Vermont Agency of Natural Resources recommended a buffer zone of 100 feet. Consequently, a local permitting agency issued a land use permit (dash-2 permit) in the name of PMI Lumber and Green Mountain. The permit required the recommended 100-foot buffer zone. Soon after, PMI Lumber stopped operations at Riverside and Green Mountain used it for its transloading operation. When the transloading operation began, Green Mountain invaded the buffer zone with a settling pond, storage of minerals, and vehicles. *Id.* In the spring of 1998, Green Mountain attempted to amend the dash-2 permit in order to construct a 100-foot by 275-foot salt storage shed. Vermont granted another land use permit (dash-3 permit) in the winter of 1999. However, this permit included stipulations to the condition of the shed, including the shape and color. The shed had to be rectangular, and either brown or dark green in order to comply with the dash-3 permit. *Id.* Several months later, Green Mountain applied for another permit amendment (dash-3B permit) to modify the size, color, and location of the salt shed. *Id.* at 641. Despite the permit never being issued, Green Mountain began construction of its modified salt shed in November 1999. *Id.* Vermont issued a notice of violation of the dash-2 permit in January 2000, citing storage of materials with the 100-foot buffer zone in addition to other violations. *Id.* A month later, the State issued a second notice of violation contending construction of the salt shed without the needed dash-3B permit. *Id.*

In the spring of 2000, Vermont conducted hearings on Green Mountain's dash-3B salt shed application. *Id.* Green Mountain objected stating that the State Environmental Commission lacked jurisdiction to adjudicate the pending permit application because of the Termination Act preempting Act 250. *Id.* The Termination Act expressly preempts "remedies provided under Federal or State law" and vests with the Transportation Board, a federal agency, exclusive jurisdiction over "transportation by rail carriers." 49 U.S.C. § 10501.

Therefore, the Second Circuit faced the question of whether the Termination Act preempted Vermont's Act 250 with respect to Green Mountain's permit issue. The court began its analysis by stating that state law is preempted by federal law when: "(1) the preemptive intent is 'explicitly stated in [a federal] statute's language or implicitly contained in its structure and purpose'; (2) state law 'actually conflicts with federal law'; or (3) 'federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Id.* at 641 (citing Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992)). Additionally, the Second Circuit stated that

congressional intent was the "touch-stone" of preemption analysis and the Termination Act contained explicit congressional language on preemption: "[e]xcept as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." *Green Mountain*, 404 F.3d 638 at 641-42 (citing 49 U.S.C. § 1050(b)). The Second Circuit delved further into the Termination Act, specifically, section 10501 which vested the Transportation Board with exclusive jurisdiction over "transportation by rail carriers" and "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State." *Id.* at 642. Additionally, the Termination Act expansively defined "transportation" to include: "a locomotive, car, vehicle, vessel, warehouse . . . yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail." *Id.*

Following other federal courts, the Second Circuit recognized that the Termination Act preempted most preconstruction permit requirements imposed by states. Specifically, the Second Circuit discussed the Ninth Circuit decision in *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), in which the Ninth Circuit affirmed a Transportation Board decision that the Termination Act preempted state and local environmental regulations requiring a railway to submit a permit before making any repairs on its track line. *Green Mountain*, 404 F.3d at 642.

The Second Circuit stated two reasons why Act 250's preconstruction permit requirement was preempted: (1) it "unduly interfere[s] with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations." *Id.* at 643 (quoting Town of Ayer, STB Finance Docket No. 33971, 2001 WL 458685, at *5 (S.T.B. Apr. 30, 2001)). And, (2) "it can be time-consuming, allowing a local body to delay construction or railroad facilities almost indefinitely." Green Mountain R.R. Corp., v. Vermont, 2003 U.S. Dist. LEXIS 23774, at *13. However, the Second Circuit also recognized that not all state and local regulations were preempted by the Termination Act. *Green Mountain*, 404 F.3d at 643. Specifically, the court stated that local bodies retain some police powers to protect public health and safety. Therefore, the court stated, local bodies "may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are

settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions." *Id.* The court used the legislative history of the Termination Act to support the conclusion that Act 250 interfered in interstate commerce. Particularly, the court relied on legislative language to conclude that although states retain police powers reserved by the Constitution, economic regulation functioned completely exclusive of this. *Id.* Therefore, the court did not see a need in drawing a line between local regulations that are preempted and those that are not because preemption is clear in this case. The Second Circuit found the railroad restrained from development until a permit was issued, however, the requirements for the permit were not set forth in any "schedule or regulation" in which Green Mountain could obtain to assure compliance; and the state or local agency had discretionary ruling of the issuance of the permit. *Id.*

Vermont argued that Act 250 could not be preempted facially unless there was "no possible set of conditions that [the permitting authority] could place on its permit that would not conflict with federal law." *Id.* (citing Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987)). However, the court disagreed stating that there could be permit applications affecting railroad facilities that could be promptly approved without much imposition on rail operations. Nonetheless, the court did not consider this to be the issue. Instead, the court concluded that the permitting process itself was preempted, not the length or outcome of that process in particular cases. *Id.* at 644. Interestingly, Vermont failed to raise explicitly this facial preemption argument with the district court, though it preserved this issue for appellate review in order for the Second Circuit to even consider this argument. *Id.* at 644 n.3. The court found the facial/as applied distinction relevant only if it found some applications of the statute preempted and others not. *Id.* Next, Vermont argued that Act 250 withstood preemption because it was an environmental, rather than economic, regulation. However, the Second Circuit used *City of Auburn* to show that such a distinction was useless. "If local authorities have the ability to impose 'environmental' permitting regulation on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." *Id.* Therefore, since Green Mountain serves industries reliant upon trucks for transporting goods, the Second Circuit concluded that the proposed transloading and storage facilities were integral to Green Mountain's operations. *Id.*

Furthermore, the court stated that the Transportation Board maintained exclusive jurisdiction over rail transportation. *Id.*

Vermont made one last argument to the Second Circuit regarding preemption. Specifically, the State argued that *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d Cir. 1999), compels a different conclusion. There, the Second Circuit held that a section of the Termination Act dealing with motor carrier operations did not preempt New York's police power to suppress tow trucks from racing to accident scenes broadcast on police radios. *See* 49 U.S.C. § 14501; *Ace Auto Body*, 171 F.3d at 769-71. In addressing this argument, the Second Circuit found Vermont's reliance on *Ace Auto Body* "misplaced" since the federal preemption language in that case provided that a state or municipality "may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." *Green Mountain*, 404 F.3d at 645. In *Ace Auto Body*, the Second Circuit concluded that the statutory language focused upon the preemption on economic regulations and reflected congressional intent to leave the state's historic police powers undisturbed when the economic burdens were minimum. *Id.* Therefore, the Second Circuit concluded that New York's regulations were "sufficiently safety-oriented" with only an incidental economic effect on the industry. *Id.*

The Second Circuit in *Green Mountain* distinguished *Ace Auto Body* quickly by stating that the plain language of section 10501 of the Termination Act reflects the clear intent of Congress to preempt state and local regulations of integral rail facilities. *Id.* Because of the clear congressional intent, the Second Circuit found no need to conduct a fact-based inquiry weighing the economic impact of the permit process of Act 250 on Green Mountain. *Id.* Thus, the Second Circuit concluded that Vermont's effort to regulate rail transportation through Act 250 permit process was preempted by the Termination Act. *Id.*

Carmen E. Daugherty

## VI. NATIONAL ENVIRONMENTAL POLICY ACT

### *Navajo Nation v. United States Forest Service*, 408 F. Supp. 2d 866 (D. Ariz. 2006)

In *Navajo Nation v. United States Forest Service*, the United States District Court for the District of Arizona upheld the Forest Service's authorization of several upgrades to the Arizona Snowbowl (Snowbowl) facilities. The court held that the Forest Service fully discharged its National Environmental Protection Act, 42 U.S.C. §§ 4321-4307(d)

(2000) (NEPA) responsibilities by preparing an environmental impact statement (EIS) with public involvement; the Forest Service complied with its obligations under National Historic Preservation Act, 16 U.S.C. §§ 470-470(mm) (2000) (NHPA); the Forest Service satisfied its fiduciary duty to the local tribes by following all applicable statutes in authorizing upgrades to facilities at an existing ski area in national forest; and the Forest Service's decision did not violate the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4 (2000) (RFRA). Therefore, it granted Defendant's motions for summary judgment on all non-RFRA claims and the RFRA claims were dismissed after a bench trial. Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866, 869 (D. Ariz. 2006).

The Snowbowl is located within the Coconino National Forest (CNF) and is operated under a 777-acre Forest Service-issued special use permit (SUP) as part of the CNF Land and Resource Management Plan (Forest Service Plan), which was adopted in 1987 after a full NEPA review process. The Snowbowl is located within a management area designated for developed recreation. The ski facilities lie on the western flank of the San Francisco Peaks (Peaks) region and are surrounded on three sides by the Kachina Peaks Wilderness which is managed under the CNF plan for wilderness uses only. The Peaks are recognized as a place of cultural importance and have substantial religious and spiritual significance to Plaintiff tribes. They have also been identified by the Forest Service as a Traditional Cultural Property (TCP).

The Snowbowl has been used as a ski area since 1938 and in 1979, after a full NEPA review, the Forest Service approved plans for significant upgrades to the recreation site including 206 acres of skiable terrain and facilities to support a comfortable carrying capacity of 2,825 skiers. This plan was challenged in court by several Indian tribes which claimed that the development of the Peaks would be a profane act, and would impair their ability to pray and conduct ceremonies traditionally performed on the Peaks. Despite these challenges, the plans for upgrades to the facilities were upheld by the District of Columbia Court of Appeals in 1983 in *Wilson v. Block*, 708 F.2d 753 (D.C. Cir. 1983).

In 2003 Arizona Snowbowl Resort Limited Partnership (ASR), the current owner and operator of the facilities located at the Snowbowl ski area, which was granted intervenor status in this action, sought to implement the last of several upgrades approved in the 1979 EIS and submitted a formal proposal to implement snowmaking at the facility using reclaimed water. In February 2005, after an environmental review under NEPA the Forest Service issued a Final Environmental Impact

Statement (FEIS) and Record of Decision (ROD) approving (a) approximately 205 acres of snowmaking coverage throughout the area using reclaimed water; (b) a 10 million gallon reclaimed water reservoir; (c) the construction of a reclaimed water pipeline between Flagstaff and the Snowbowl with booster stations and pump houses; (d) the construction of a 3,000 to 4,000 square foot snowmaking control building; (e) construction of a new 10,000 square foot guest services facility; (f) an increase in skiable acreage from 139 to 205 acres—an approximately 47% increase; and (g) approximately 47 acres of thinning and 87 acres of grading/stumping and smoothing. After administrative appeals to the Forest Service by Plaintiffs were unsuccessful, and the Forest Service issued its final decision in June 2005 affirming its original decision, Plaintiffs sought review of the decision in district court. Specifically, the plaintiffs brought suit under the Administrative Procedure Act, 5 U.S.C.§§ 701-706 (2000) (APA) alleging that the Forest Service failed to comply with its NEPA requirements, NHPA, the Endangered Species Act, 16 U.S.C. § 1531-1544 (2000) (ESA) and the National Forest Management Act, 16 U.S.C. §§ 1600-1687 (NFMA), RFRA and its fiduciary duties as trustee of tribal lands when it approved these plans. In August 2005 the parties filed cross motions for summary judgment. (The ESA claim was dismissed for lack of jurisdiction because Plaintiffs failed to provide written notice to the Secretary of the Interior sixty days in advance of filing suit.).

First, the court rejected Plaintiff's claim that the Forest Service did not comply with NEPA requirements in its FEIS. It held that the Forest Service's statement of purpose and need for the proposed action was not "impermissibly narrow, [and] improperly focused solely on improving the Snowbowl's financial viability based on faulty data" and found that it was "not unreasonable." *Navajo Nation*, 408 F. Supp. 2d at 873. The Forest Service's purpose to ensure a consistent and reliable operating season, thereby maintaining the economic viability of the Snowbowl and stabilizing employment levels and winter tourism within the local community was "because skier visits are directly correlated to the amount of snow on the ground, [and] the significant variability in snowfall has resulted in inconsistent operating seasons." *Id.* Moreover, the Snowbowl SUP designates the region as a "Developed Recreation Site" which is consistent with the ski resort's activities and the Service's mandate to provide recreational opportunities for the public. The second purpose, "improve[ing] safety, skiing conditions, and recreational opportunities, [and] bringing terrain and infrastructure into balance with current use levels," was reasonable because the Snowbowl had a deficit

of intermediate and beginner terrain when compared to ski industry norms and the proposed upgrades included plans to resolve this issue.

The court also found that the EIS properly considered sufficiently reasonable alternatives as required under the regulations. *Id.*; *see* 40 C.F.R. § 1502.14. The Forest Service gave detailed consideration to three alternatives including a "no action alternative," "the proposed action", and "the no snowmaking or snowplay alternative." *Navajo Nation*, 408 F. Supp. 2d at 874. Additionally the Service was held to have properly eliminated several more alternatives while the Plaintiffs had not borne their burden of demonstrating that defendants did not consider a reasonable alternative which was brought to its attention.

Next, the court held that the Service gave the requisite hard look at the environmental impacts of the Snowbowl project's use of reclaimed water for snowmaking and that it used the best available scientific evidence. The diversion of water from the Flagstaff aquifer was found to be only a negligible to moderate amount and was determined both by hydrologist testing as well as other sources including two reports raised by the plaintiffs. Additionally the use of Class A+ reclaimed water met the Arizona Department of Environmental Quality (ADEQ) standards. Furthermore, due to the high level of technical expertise needed to analyze the scientific data for this issue the court held that deference should be paid to the agency and its reliance on reasonable opinions of its own experts. Lastly, the court found that the Service had sufficiently considered several alternatives to using reclaimed water for snowmaking but found no other feasible options. The findings of fact, which the court specifically held to be neither all inclusive nor narrowly limited, showed that their review of alternatives included options such as potable water, and harvested water and took into account expert opinions.

Finally, the court found that the Service adequately made decisional documents available when particular documents were all referenced in record documents even though they themselves were not initially noted as record documents. Therefore, any person seeking information referenced or described in the record documents would be aware of their existence and would be able to request them under the Freedom of Information Act, 40 C.F.R. § 1506.6(f), during the NEPA process.

With respect to plaintiff's NHPA claims, the court found that tribes had a reasonable opportunity to participate in the resolution of the adverse effects of the proposed action and the fact that the Memorandum of Agreement (MOA) was completed before the end of the NEPA process did not render the NHPA consultation inadequate. Once the Forest Service found there to be an adverse effect on the Peaks, the

Service sought ways to minimize the adverse effects associated with each of the three alternatives considered and it made numerous efforts to communicate with the tribes and elicit their input. This effort included phone calls, letters and an invitation to meet and discuss the MOA. In the end four Indian tribes, including two of the plaintiffs in this case, signed the agreement. Moreover the court noted that in addition to the consultations for this project, the "Service has been consulting with approximately 13 tribes or chapters about the religious and cultural significance of the Peaks since at least 1970." *Id.* at 880.

Lastly, upon finding compliance with all of the applicable statutes, the court found that the Service complied with its fiduciary duty as trustee of the tribal land. It held that due to the fact that this case did not deal with any tribal property directly no additional duty was imposed upon the Service above its obligation to abide all applicable statues.

After denying the motions for summary judgment of Plaintiff's non-RFRA claims, the court held a bench trial for Plaintiff's RFRA claims and ultimately denied plaintiffs request for declaratory and injunctive relief. RFRA provides that a law of general applicability which imposes conduct that substantially burdens a person's exercise of religion is invalid unless the law is the least restrictive means of serving a compelling government interest. The substantial burden test is met if an action "puts substantial pressure on an adherent to modify his behavior and violate his beliefs." *Id.* at 903 (citing Guam v. Guerrero, 290 F.3d 1210 (9th Cir. 2002)). In this case, the court noted that tribal members had not identified any specific plants, springs, natural resources, shrines or ceremony locations within the Snowbowl area. Furthermore testimony by two archeologist witnesses showed that "although practitioners sincerely felt that the Forest Service decision would impact their beliefs and exercise of religion, the impacts [were] not a substantial burden." *Navajo Nation*, 408 F. Supp. 2d at 889. Moreover, land of the plaintiff tribes, the White Mountain Apache, which was also considered sacred, was used for developed recreational uses including specifically a ski resort. That resort also relied on artificial snowmaking which comes in part from reclaimed water. For all these reasons, the court found that Plaintiffs had not established the Service's plan to impose a substantial burden because "the Snowbowl decision d[id] not bar Plaintiffs' access, use, or ritual practice on any part of the Peaks . . . [and it did] not coerce individuals into acting contrary to their religious beliefs [or] penalize anyone for practicing his or her religion." *Id.* at 905.

The court's analysis of the compelling interest prong looked at defendant's actions in light of the Service's duties under the National

Forest Management Act's multiple-use mandate. NFMA requires every National Forest to establish a plan, subject to the requirements of NEPA, by which to manage the land for "outdoor recreation, range, timber, watershed, and wildlife and fish purposes." *See* 16 U.S.C. § 1604(e). The forest plan established in accordance with NFMA for the CNF designates the Snowbowl area as a developed recreation site which therefore directs it to be run as a developed ski area. The court found the Forest Service had a compelling interest in managing the public land for recreational uses such as skiing, in keeping with the government's interest in the multiple-use mandate under NFMA. Additionally, the Service had a compelling interest in the protection of public safety which was furthered by the authorization of the upgrades at Snowbowl which would ensure that the users would have a safe experience. Lastly, the Service's compliance with the Establishment Clause was a compelling interest. Here the court held that the cultural and religious significance of this land to Plaintiffs could not "justify a religious servitude over large amounts of public land." *Navajo Nation*, 408 F. Supp. 2d at 906. Moreover, the Service had made several accommodations for the religious activities of the plaintiff tribes involving the Peaks, including the designation of 19,000 acres surrounding the Snowbowl area from future development, the nomination of the Peaks as TCP, the waiver of any fee imposed on members of the general public to remove forest products from the Peaks, guaranteed access to the area during times when it is closed due to fire risk.

Finally, the court found that the Service's choice of the alternatives was the least restrictive means for achieving its land management decision. The Service rejected an alternative which would not permit any snowmaking and a No-action alternative because both would likely lead to the loss of the Snowbowl facility. Moreover, the MOA guaranteed that, to the extent possible, new ski runs would take advantage of previously-disturbed areas and access within and outside the Snowbowl area would be guaranteed for traditional cultural practitioners for cultural purposes, such as collection of medicinal, ceremonial and food plants.

Sarah S. Marcus

*Silverton Snowmobile Club v. United States Forest Service*,
433 F.3d 772 (10th Cir. 2006)

In *Silverton Snowmobile Club*, the United States Court of Appeals for the Tenth Circuit affirmed the decision of the United States District Court for the District of Colorado, ruling in favor of the federal agencies,

the United States Forest Service (USFS) and the United States Bureau of Land Management (BLM) and against the Silverton Snowmobile Club (SSC) and the other joined plaintiffs, all of whom were motorized vehicle recreational associations. Silverton Snowmobile Club v. U.S. Forest Serv., 433 F.3d 772, 776 (10th Cir. 2006). The dispute revolved around the Molas Pass area in Colorado which consists of approximately thirty-seven square miles of public land which has been used for both motorized and nonmotorized recreational purposes. *Id.* at 776-77. The SSC and the other joined plaintiffs (the motorized recreationists) appealed an order of the United States District Court for the District of Colorado which affirmed a Decision Notice and Finding of No Significant Impact (Decision), as well as an accompanying Final Environmental Assessment (EA), issued by the USFS and BLM. *Id.* at 776. SSC alleged that the Decision violated the National Environmental Policy Act (NEPA), NEPA §§ 2-209, 42 U.S.C. §§ 4321-4370(f) (2000), the National Forest Management Act of 1976 (NFMA), 42 U.S.C. §§ 1600-1614 (2000), and the Federal Land Policy and Management Act of 1976 (FLPMA), FLPMA §§ 102-603, 43 U.S.C. §§ 1701-1782 (2000). *Id.*

1. Background

The Molas Pass area is located forty-two miles north of Durango, Colorado, and encompasses both sides of a stretch of U.S. Highway 550. *Id.* Part of the area lies within San Juan National forest, managed by the USFS and partly within public lands managed by BLM. *Id.* The area was governed by two plans; the San Juan National Forest Land and Resource Management Plan (Forest Plan) of 1983, which generally allows snowmobiling, and the 1985 BLM San Juan Resource Area Management Plan (RMP) which limits motorized use in certain areas. *Id.*

This conflict was precipitated by a lack of snow at lower elevations during the winters of 1998-99 and 1999-2000 which increased the concentration of both motorized and nonmotorized recreation at the Molas Pass area, which ranges in elevation from 9,000 to more than 13,000 feet above sea level. *Id.* at 776-77. Clashes between the motorized and nonmotorized recreationists led to numerous complaints to the federal agencies (BLM & USFS) as well as to the San Juan County Commissioners. *Id.* at 777. The nonmotorized recreationists expressed a desire to use the land without the noise and fumes caused by motorized vehicles whereas the motorized recreationists merely desired more land in which to run their snowmobiles, etc. *Id.*

The numerous complaints prompted the federal agencies to initiate a "public process to evaluate whether changes were necessary in the winter recreation management protocols applicable to the Molas Pass area." *Id.* First, the agencies formed an interdisciplinary team (IT) tasked with the mission to analyze and develop alternatives. *Id.* The agencies then issued a draft environmental assessment (Draft EA) in November 1999, which laid out four potential alternatives which ranged from an alternative which would leave the management plan unchanged to one which would add 3,600 acres to the lands available for motorized use. *Id.* Interested parties were given a sixty-day period for comments on the Draft EA, and although no alternative was decisively favored, a majority favored segregation of motorized and nonmotorized uses, and a strong minority favored the alternative of "no change." *Id.*

During this period, the agencies, pursuant to the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544 (2000), consulted with the United States Fish and Wildlife Service (FWS) as to what affects each alternative might have on any species protected under the ESA who might be present in the general Molas Pass area. *Id.* at 778. The FWS issued a Biological Evaluation and Biological Assessment (BE/BA) in November 2000, in which FWS concluded that although the Canada Lynx was present in the area, and although the Molas Pass area contains "potential foraging, denning and travel habitat" for the Lynx, the proposed alternatives were not likely to "adversely affect the continued existence of the species" or adversely modify its habitat. *Id.* These findings were partly predicated on the finding that prohibition on nighttime commercial activities would allow the Lynx to forage at night without human disruption and the fact that the Lynx rarely ventures more than 330 feet into open spaces. *Id.* Under the assumption that the Lynx may be present in this potential habitat, the BE/BA did list mitigation measures including a prohibition on night-time grooming and a general prohibition on grooming tracks within 330 feet of certain wooded areas. *Id.*

The agencies released their Decision, final EA and Finding of No Significant Impact (FONSI) in June of 2001, blending the alternatives, and prohibiting motorized activity in certain areas surrounding Andrews Lake, thus leaving motorized users with 6,900 acres or 97% of the area originally open to that use. *Id.* The Decision also incorporated the above noted mitigation measures suggested by the BE/BA. *Id.* at 779. The SSC appealed the Decision to the USFS and to BLM. Both agencies upheld the Decision, however BLM's decision, through the Interior Board of Land Appeals (IBLA) was not issued until April 5, 2005. *Id.*

Without waiting for IBLA's decision, SSC and the other motorized recreationalist plaintiffs filed suit in the federal district court in Colorado alleging that the agencies had violated the Administrative Procedure Act (APA), APA §§ 10-10(e), 5 U.S.C. §§ 701-706, NEPA, NFMA, and FLPMA. *Id.* The Tenth Circuit analyzed the agencies' compliance with NEPA, NFMA and FLPMA under the APA which allows a reviewing court to set aside agency actions which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 779-80 (citing Greater Yellowstone Coal. v. Flowers, 359 F.3d 1257, 1268 (10th Cir. 2004)). The court then applied the same deferential standard as the district court under which agency action would only be set aside for "'substantial procedural or substantive reasons.'" *Id.* (citing *Greater Yellowstone Coal.*, 359 F.3d at 1268).

2. NEPA

SSC alleged that the agencies violated NEPA , and its supporting regulation, "by reaching a predetermined result, failing to take the requisite 'hard look' at the environmental consequences and failing to prepare an Environmental Impact Statement (EIS)." *Id.* at 779. NEPA is primarily a procedural statute which does not impose substantive limits on agency conduct, but rather requires a "hard look" at potential environmental consequences of an agency's proposed course of action. *Id.* at 780. NEPA requires that, before an agency takes "major federal action" which significantly affects the environment, the agency first prepare an environmental impact statement (EIS) which "considers the environmental impacts of the proposed action," and alternatives to that proposed course of action, including the alternative of "taking 'no action.'" *Id.* (citing NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C)). If however the agency prepares the less detailed environmental assessment (EA) and based on the EA issue a finding of no significant impact (FONSI), the agency need not prepare an EIS. *Id.* The determination to issue a FONSI, thereby forgoing the EIS process, is a factual determination which implicates the expertise specific to the agency, and is thus reviewable under the arbitrary and capricious standard only. *Id.* In the instant case, the agencies issued an EA, and then a FONSI. *Id.*

SSC argued that the agencies violated NEPA because they "'structured the analysis and framed the issues to ensure that additional restrictions on the use of snowmobiles would be an inevitable result of the analysis'" when issuing the Decision. *Id.* at 781. The Tenth Circuit disagreed. *Id.* The articulated goal for the IT incorporated both motorized and nonmotorized use. *Id.* Although the alternative selected

took 200 acres away from the motorized recreationists, it opened up some additional terrain, and the agencies rejected alternatives which would have removed more acreage from motorized use. *Id.* Thus the end result reached, was a compromised not a predetermined agenda. *Id.*

SSC also contented that the agencies "failed to take a 'hard look' at the potential environmental consequences of the alternatives" as required by NEPA. *Id.* at 781-82; *see* NEPA § 102(2)(C)(iii), 42 U.S.C. § 4332(2)(C)(iii). In particular, SSC challenged as unsubstantiated the assumption that because the Molas Pass area included Canada Lynx habitat, the species was present, and that the snowmobile use and trail groom would adversely affect the lynx. *Silverton Snowmobile Club*, 433 F.3d at 782. Again, the Tenth Circuit disagreed, noting evidence in the EA which would support the agencies' position, that the area consists of potentially suitable lynx habitat, that there were enough of the lynx's preferred prey (snowshoe hares), that there were "ongoing efforts to reintroduce lynx . . . into the area," that at least one transplanted lynx was known to occupy an area near Molas Pass, and that the "effect of human activity on the lynx was uncertain." *Id.* In light of the foregoing considerations, the court could not say that the agencies' decision did not have a rational basis, and thus satisfied NEPA's "hard look" requirement. *Id.*

Plaintiffs also raised the argument that "the decision to impose 'lynx-based restrictions fails arbitrary and capricious review under the APA.'" *Id.* at 783. However, they did so only in their reply brief, and the Tenth Circuit cited precedent which holds an issue waived if a party fails to raise that issue in their opening brief. *Id.* at 783-84 (citing Anderson v. U.S. Dep't of Labor, 422 F.3d 1155, 1174 (10th Cir. 2005)). Nonetheless, the court intimated that had it, in its discretion, addressed the issue, SSC would not have prevailed. *Id.* at 784. In doing so, the Tenth Circuit distinguished the United States Court of Appeals for the Ninth Circuit's recent decision in *Arizona Cattle Growers' Ass'n v. United States Fish & Wildlife*, 273 F.3d 1229 (9th Cir. 2001), stating that the evidence of the presence of the species at issue in that case was far more speculative than that relied upon by the agencies in the instant case. *Id.* at 784-85.

SSC also contended that NEPA required the preparation of an EIS for the agencies' decision rather than an EA, which is less detailed. *Id.* at 785. However, the Tenth Circuit found this issue to be waived as the plaintiffs failed to raise it at the administrative proceedings. *Id.*

3. NFMA

SSC alleged that the agencies violated NFMA, and the regulations enacted pursuant to NFMA, "by failing to follow the requirements for compliance with and amendment of the Forest Plan." *Id.* at 779. NFMA "provides for the 'development and maintenance of land management plans'" to be used on units of the National Forest System, and created a two step process for forest planning. *Id.* at 785 (quoting NFMA, 16 U.S.C § 1604(b)). The Forest service must prepare a forest plan, for which the Forest Service must first prepare an EIS. *Id.* Then, the Forest service must implement the forest plan by approving specific projects, which must be consistent with the forest plan, or rejecting specific projects. *Id.* (citing Lamb v. Thompson, 265 F.3d 1038, 1042 (10th Cir. 2001)). All projects are subject to NEPA's procedural requirements. *Id.* (citing *Lamb*, 265 F.3d at 1042). Further, "'any significant amendments to a forest plan must also follow the same procedures required for the creation of the original forest plan.'" *Id.* (quoting Colo. Off-Highway Vehicle Coal. v. U.S. Forest Serv., 357 F.3d 1130, 1132 (10th Cir. 2004)).

SSC thus claimed because the agencies changed the Forest Plan without formally amending it, the agencies violated NFMA. *Id.* at 785-86. Specifically, the plaintiffs argued that the conversion of the area surrounding Andrews Lake form a "2B Management Area Prescription" in which motorized travel may be prohibited or restricted to an "A travel management area on which motorized use is banned," and that this conversion was "a significant change necessitating an amendment to the Forest Plan. *Id.* at 786. The Tenth Circuit reasoned that the regulations clearly required compliance with NEPA in order to amend the Forest Plan, including "consultation with other agencies and appropriate public involvement." *Id.* The court recognized that whether or not the conversion of the area surrounding Andrews Lake is labeled as an amendment to the Forest Plan, "[i]t is difficult to imagine what further analysis could have been done, given the agencies' compliance with NEPA." *Id.* Indeed, the court found that this would have been a change in name only, and that to require the agencies at this point to re-label their conduct as amending the Forest Plan would be wasteful and unnecessary. *Id.* Thus, the Tenth Circuit found no NFMA violation. *Id.*

4. FLPMA

Finally, SSC alleged that the agencies violated FLPMA, as well as its supporting regulations, "by failing to follow the requirements for compliance with and amendment of the RMP." *Id.* at 779. Below, the

district court held that it did not have jurisdiction over this claim because SSC failed to exhaust their administrative remedies, as the IBLA had not yet ruled on their appeal of the Decision. *Id.* at 786-87. The IBLA ruled in the interim and affirmed the Decision, finding that even if SSC were correct and the change in snowmobile use was more than a minor one, the agencies followed all procedures attendant upon an amendment to the RMP. *Id.* at 787. Even though the IBLA has now ruled on SSC's claims, the Tenth Circuit affirmed the district court's dismissal of SSC's FLPMA claims as, at the time of filing, they had plainly failed to exhaust their administrative remedies. *Id.*

Sara Porsia