RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

Watertown Tire Recyclers, LLC v. Nortman, No. 2010AP305, 2011 WL 166100 (Wis. Ct. App. Jan. 20, 2011)

In *Watertown Tire Recyclers, LLC v. Nortman*, the Court of Appeals of Wisconsin examined an insurance coverage dispute that arose after a stockpile fire occurred at a tire recycling facility. No. 2010AP305, 2011 WL 166100, ¶ 1 (Wis. Ct. App. Jan. 20, 2011). The dispute concerned a Commercial General Liability (CGL) policy between Watertown Tire Recyclers, LLC (Watertown) and its insurer,

ACE Property and Casualty Insurance Co. (ACE). *Id.* Following the fire at the recycling facility, the United States Environmental Protection Agency (EPA or Agency) cleaned contaminated water that had been used to suppress the fire. *Id.* Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the EPA is authorized to remediate hazardous waste sites by cleaning up the identified site and requiring compensation from the responsible party. 42 U.S.C. §§ 9601-9675 (2006). In this case, Watertown was the responsible party, and accordingly, the EPA presented a bill to Watertown for cleanup costs in the amount of $663,457.08. *Nortman*, 2011 WL 166100, ¶ 9. Watertown made a claim for these cleanup costs under its CGL policy. *Id.* ¶ 8. ACE denied the claims based on the CGL's "absolute pollution" exclusion. *Id.* Watertown pled several causes of action against ACE seeking coverage under the CGL policy: (1) declaratory judgment, (2) equitable estoppel, (3) breach of modified contract, (4) bad faith, and (5) reformation. *Id.* ¶ 2. The Circuit Court of Wisconsin issued a declaratory judgment, finding that coverage existed under the "sublimit" exception to the "absolute pollution" and "owned property" exclusions up to a maximum of $300,000. *Id.* ¶ 3. The circuit court dismissed Watertown's other claims seeking full coverage of the cleanup costs. *Id.* Both parties appealed from the judgment—ACE arguing that the "sublimit" exception did not trigger insurance coverage, and Watertown arguing that the circuit court erred in failing to establish a monetary judgment and in dismissing its other claims seeking coverage. *Id.* ¶ 4.

A. Obligation of the Insurer Under the CGL Policy

The circuit court issued a declaratory judgment in favor of Watertown, finding that the CGL policy's "sublimit exception" triggered coverage for the EPA's remediation costs. *Id.* ¶ 12. ACE appealed the decision of the circuit court, arguing that the "sublimit" exception did not apply. *Id.* ¶ 13. In order to determine whether coverage was available for Watertown's claims, the state appellate court interpreted the CGL policy. *Id.* ¶ 15. According to *Wisconsin Label Corp. v. Northbrook Property & Casualty Insurance Co.*, the goal of interpreting an insurance policy is to determine and give effect to the shared intention of the parties. 607 N.W.2d 276, 328 (Wis. 2000). Insurance policies may not be interpreted to provide coverage for costs not contemplated by the insurer or paid for by the insured.

The CGL policy in *Nortman* is a standard CGL policy. *Nortman*, 2011 WL 166100, ¶ 36. It provided coverage for "sums that the insured

becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." *Id.* ¶ 35. "Property damage" under the CGL policy includes physical injury to tangible property, as well as loss of use of tangible property. *Id.* ¶ 25 n.2. In order to assess whether CERCLA costs for remediating contaminated property qualify as "damages" within a standard CGL policy, the court looked to *Johnson Controls, Inc. v. Employers Insurance of Wausau*. In that case, the Wisconsin Supreme Court held that CERCLA response costs for restoring and remediating contaminated properties are "damages" under a standard CGL policy, unless the policy specifically precludes coverage for those damages. *Johnson Controls, Inc. v. Emp'rs Ins. of Wausau*, 665 N.W.2d 257, 270 (Wis. 2003). Therefore, damages covered under a CGL policy include costs of remediating damaged property, as long as the costs are not excluded by an additional provision in the policy. These costs may be "based on remediation efforts by a third party (including the government)" or "incurred directly by the insured." ACE interpreted the language in *Johnson Controls* to mean that coverage is only available under a CGL policy in the context of CERCLA when there is a claim for property damage that the insured does not own, lease, or control ("off-site property"). *Nortman*, 2011 WL 166100, ¶ 29. The court of appeals rejected ACE's interpretation of the *Johnson Controls* language, because the court in *Johnson Controls* did not distinguish between on-site and off-site property damage triggering CERCLA liability coverage. *See Johnson Controls*, 665 N.W.2d at 269. Rather, *Johnson Controls* deferred to specific policy language, such as the "owned property" and "absolute pollution" exclusions in Watertown's CGL policy, to address the scope of coverage. *Nortman*, 2011 WL 166100, ¶ 30.

The "owned property" exclusion of Watertown's CGL policy precluded coverage for "property damage" to "property you own, rent, or occupy." *Id.* ¶ 17. The "absolute pollution" exclusion of the policy precluded coverage for "any injury, damage, expense, cost, loss, liability or legal obligation arising out of or in any way related to pollution." *Id.* ¶ 33 n.4. The property on which the fire occurred was leased by Watertown from Springer, the LLC's sole member. *Id.* ¶ 6. Because the property was rented, Watertown's claim for coverage fell under the "owned property exclusion." Additionally, the damage was related to pollution because the contaminated water had, or was alleged to have had, "the effect of making the environment impure, harmful, or dangerous." *Id.* ¶ 33 n.4. Therefore, Watertown's claim also fell under the "absolute pollution" exclusion. *Id.* Thus, the initial grant of coverage

given under standard CGL policies was not applied under this specific CGL policy. However, Watertown argued that a "sublimit" exception applied to these exclusions and reinstated coverage.

The "sublimit" exception provided up to $300,000 of supplemental coverage for damage by fire to premises while rented or temporarily occupied by the insured, with permission of the owner of that property. *Id.* ¶ 34. The court of appeals found that the "sublimit" exception provided coverage for claims where the insured was liable for damages caused by fire to property it rents, including third-party claims. *Id.* ¶ 35. The EPA's CERCLA response costs for remediating contaminated property that Watertown leased from Springer were considered third-party "damages" under the CGL policy. *Id.* ¶ 36. Therefore, the court affirmed the circuit court's declaratory judgment, finding that the CGL policy provided coverage for the costs of the EPA's remediation under CERCLA. *Id.* ACE, the insurer, was obligated to provide coverage for Watertown's claim for costs incurred to remediate the recycling facility.

B. Monetary Judgment

Watertown also appealed the decision of the circuit court, arguing that the court erred in failing to enter a monetary judgment in its favor. *Id.* ¶ 37. Watertown asserted that it was entitled to a monetary judgment of $300,000, which was the maximum amount available under the "sublimit" exception. *Id.* ¶ 41. Under section 806.04(8) of Wisconsin Statutes, the circuit court had discretionary authority to order supplemental relief, including monetary damages, after issuing the declaratory judgment. *Id.* ¶ 38. The circuit court declined to enter a monetary judgment because Watertown's liability for the EPA claim had not yet been established. *Nortman*, 2011 WL 166100, ¶ 42. Watertown claimed that a consent decree entered into by Watertown, Springer, and the EPA provided the necessary information for the circuit court to determine the amount of damages owed to Watertown. *Id.* ¶ 41. However, the circuit court disagreed. Watertown needed to prove that it was obligated to pay the EPA an amount for damages due to "property damage" to which the CGL policy applied, yet the circuit court found that Watertown failed to introduce evidence proving this obligation. *Id.* ¶ 42. The record showed no evidence of why the consent decree was entered into, nor evidence of whether the amount Watertown was liable to pay under the consent decree was for costs covered under the CGL policy. Accordingly, the court of appeals concluded that the circuit court did not erroneously exercise its discretion in declining to issue a monetary judgment. *Id.* ¶ 43.

C. Other Claims Seeking Full Coverage

Aside from seeking a declaratory judgment, Watertown pled four other causes of action seeking full coverage of the cleanup costs: (1) equitable estoppel, (2) breach of modified contract, (3) bad faith, and (4) reformation. *Id.* ¶ 2. Watertown's estoppel claim was based on the allegation that an ACE agent verbally stated that the CGL policy would cover all cleanup costs after the fire. *Id.* ¶ 45. Watertown claimed that it detrimentally relied on this representation by the ACE agent, and that it suffered damage when coverage was later refused. *Id.* According to *Shannon v. Shannon*, a court determines whether equitable estoppel is available by first determining whether the language that the insured seeks to estop the insurer from asserting is (1) a scope of coverage clause that includes or excludes a potential claim or (2) a forfeiture clause. 442 N.W. 2d 25, 33 (Wis. 1989). If the language is a scope of coverage clause, the doctrines of waiver or equitable estoppel do not apply. The "absolute pollution" and "owned property" exclusions of the CGL policy between Watertown and ACE were scope of coverage clauses. *Nortman*, 2011 WL 166100, ¶ 48. Therefore, equitable estoppel did not apply.

Watertown's next claim for breach of modified contract was based on the allegation that there was a modification of the insurance contract, and that the modification was not supported by new consideration. *Id.* ¶ 60. In Wisconsin, written contracts may be modified if there is a meeting of the minds between both parties as to the proposed modification. *Nelsen v. Farmers Mut. Auto Ins. Co.*, 90 N.W.2d 123, 133 (Wis. 1958). If the subsequent conduct of either party is ambiguous, or is consistent with the continued existence of the original contract, it is not sufficient to establish a modification. *Id.* ACE argued that there was no unambiguous intent to modify the insurance contract, and the court of appeals agreed. *Nortman*, 2011 WL 166100, ¶ 60. Watertown alleged that there was intent to modify the contract because ACE's agent declared that coverage was available when Watertown's representative asked the agent whether Watertown was covered for cleanup costs under the CGL policy. *Id.* ¶ 63. The circuit court did not find that this response amounted to modification, or intent to modify, the contract. The court of appeals agreed, and therefore found that the circuit court correctly dismissed Watertown's claim of breach of modified contract.

Watertown's next claim seeking full coverage was that ACE acted in bad faith by not conducting a neutral and detached investigation of Watertown's claims. *Id.* ¶ 65. There is a two-prong test for establishing bad faith in Wisconsin. *Weiss v. United Fire & Cas. Co.*, 541 N.W.2d

753, 757 (Wis. 1995). The first prong is objective: the insured must show that insurer lacked a reasonable basis for denying coverage. The second prong is subjective: the insured must show that the insurer had knowledge or reckless disregard of the lack of a reasonable basis for denying coverage. In assessing the first prong, the court looks to see if the claim is "fairly debatable." *Trinity Evangelical Lutheran Church & Sch.-Freistadt v. Tower Ins. Co.*, 661 N.W.2d 789, 795 (Wis. 2003). When the claim is not fairly debatable, there is no reasonable basis for denying a claim. The court of appeals concluded that Watertown's claims for the cleanup costs met the "fairly debatable" standard. *Nortman*, 2011 WL 166100, ¶ 69. A reasonable insurer could have denied Watertown's claim under the "owned property" exclusion, because the claim sought coverage for "property damage" for property that Watertown had leased. *Id.* ¶ 70. Because the objective prong of the test was met, the court did not consider the subjective prong. *Id.*; *see Mills v. Regent Ins. Co.*, 449 N.W.2d 294, 298 (Wis. Ct. App. 1989). Thus, the court of appeals concluded that the circuit court did not err in finding that ACE did not act in bad faith. *Nortman*, 2011 WL 166100, ¶ 73.

Watertown's final claim seeking full coverage was for reformation of the insurance contract. Watertown asserted that the CGL policy did not cover the cleanup costs solely because its insurance agent was negligent in procuring a policy with the "absolute pollution" exclusion, thus the policy should have been reformed to remove the "absolute pollution" exclusion. *Id.* ¶ 74. In Wisconsin, an insurance contract may be reformed if the writing fails to express the understood agreement between two parties because of a mistake of both parties as to the content of the writing. *Vandenberg v. Cont'l Ins. Co.*, 628 N.W.2d 876, 889 (Wis. 2001). The court of appeals found that Watertown's claim failed, because even if the agent was negligent in procuring the policy with the "absolute pollution" exclusion, the coverage was also excluded by the "owned property" exclusion. *Nortman*, 2011 WL 166100, ¶ 76. Thus, there was no "mistake of both parties as to the content" of the CGL policy. Accordingly, the court of appeals concluded that Watertown failed to raise a ground for reformation.

D. Analysis and Conclusion

The court's decision that the CGL policy provided coverage for Watertown's liability is grounded in the legislative intent of CERCLA. One of the main goals of CERCLA is to force parties that are responsible for the release of hazardous waste into the environment to pay for the cleanup of those releases. EPA, RCRA ORIENTATION MANUAL VI-10

(2008), *available at* http://www.epa.gov/osw/inforesources/pubs/orientat/rom4.pdf. Companies such as Watertown seek out insurance policies specifically to cover potential costs for environmental cleanup. It is important that the insurer covers cleanup costs, especially in situations such as this where a fire at the facility, not an intentional release of pollutants, caused contamination. Watertown clearly paid its insurance premium under the assumption that it would be covered for events such as the fire. As a matter of policy in both the CERCLA and insurance contexts, it is important for the insurer to provide coverage in this instance. However, the court's decision to not enter a monetary judgment is unfounded. The court asserted that because liability on the part of Watertown has not yet been determined, entering a monetary judgment is premature. *Nortman*, 2011 WL 166100, ¶¶ 42-43. However, it seems clear from the facts of the case, particularly the fact that Watertown, Springer, and the EPA entered into a consent decree that Watertown is wholly liable for costs incurred by the fire. It seems that entering a monetary judgment for the maximum amount available under the CGL policy—$300,000—would have been a better exercise of the court's discretion.

Anupama Prasad

II. NATIONAL ENVIRONMENTAL POLICY ACT

Wilderness Society v. U.S. Forest Service, 630 F. 1173 (9th Cir. 2011)

In the recently decided *Wilderness Society v. U.S. Forest Service*, the United States Court of Appeals for the Ninth Circuit abandoned the "federal defendant" rule. 630 F.3d 1173, 1176 (9th Cir. 2011). Unique to the Ninth Circuit, the "federal defendant" rule prohibits private parties and state and local governments from intervening of right on the merits of claims brought under the National Environmental Policy Act of 1969 (NEPA). *Id.*; *see* 42 U.S.C. § 4321 (2006).

The issue in *Wilderness Society* arose when the United States Forest Service (Forest Service) authorized 1196 miles of roads and trails in the Minidoka Ranger District of Idaho's Sawtooth National Forest for use by motorized vehicles. Two conservation groups, the Wilderness Society and Prairie Falcon Audubon, Inc., claimed that the Forest Service violated NEPA by failing to prepare an Environmental Impact Statement or to consider reasonable alternatives to the travel plan that would protect certain ecologically sensitive watershed and wildlife habitats within the

Minidoka Ranger District. The groups sought declaratory and injunctive relief to invalidate the travel plan and to limit motorized vehicles to the previously authorized routes. Accordingly, three recreation interest groups, the Magic Valley Trail Machine Association, Idaho Recreation Council, and Blue Ribbon Coalition, Inc., moved to intervene to counter the conservation groups' contentions; however, applying the "federal defendant" rule, the United States District Court for the District of Idaho denied such intervention. The recreation groups appealed, urging the Ninth Circuit to modify or abandon the "federal defendant" rule. *Id.* at 1776-77.

Following Federal Rule of Civil Procedure 24(a)(2), when analyzing a motion to intervene of right, the applicant must meet four requirements: (1) the motion must be timely, (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action, (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest, and (4) the applicant's interest must be inadequately represented by the parties to the action. *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993) (citing FED. R. CIV. P. 24(a)(2)).

The "federal defendant" rule, however, categorically precludes private parties and state and local governments from intervening of right as defendants on the merits of NEPA actions, the rationale being that such parties lack a "significantly protectable" interest warranting intervention of right under Rule 24(a) because NEPA is a procedural statue that binds only the federal government. *Churchhill Cnty. v. Babbitt*, 150 F.3d 1072, 1082 (9th Cir. 1998). The rule originated in *Wade v. Goldschmidt* when the United States Court of Appeals for the Seventh Circuit denied intervention of right to a construction group that attempted to bring an action claiming a proposed bridges and expressway project violated NEPA. 673 F.2d 182 (7th Cir. 1982). The court asserted that governmental bodies charged with compliance could be the only defendants in actions brought to require compliance with federal statutes regulating governmental projects. *Id.* at 185. Consequently, the construction group lacked a significantly protectable interest required for intervention of right under Rule 24(a)(2).

Wade was reaffirmed in *Portland Audubon Society v. Hodel* when a logging group sought to intervene of right in a NEPA action brought by conservation groups challenging the Bureau of Land Management's approval of logging old-growth timber in Oregon forests. 866 F.2d 302, 303-04 (9th Cir. 1989). In *Portland Audubon Society*, the Ninth Circuit

approved the district court's reliance on *Wade* and held that because NEPA provides no protection for purely economic interests, the logging groups' significant economic stake in the outcome of the case was not a protectable interest that justified intervention as of right. *Id.* at 308-09. The holding was interpreted in subsequent cases to designate the federal government as the only proper defendant in a NEPA compliance action.

Here, however, the court asserted that the "federal defendant" rule runs counter to the standards applied in all other intervention of right cases. *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011). Because a liberal policy in favor of intervention encourages both efficient resolutions and broadened access to the courts, when evaluating whether the requirements of Rule 24(a)(2) are met, a court normally follows "practical and equitable considerations" and construes the rule "broadly in favor of proposed intervenors." *United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002). Generally, a prospective intervenor's interests qualify as "significantly protectable" if the interest is protectable under some law and a relationship exists between the legally protected interest and the claims at issue. *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993). In all other cases, such an interest is demonstrated if it will suffer a practical impairment as a result of the pending litigation. *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006). The "federal defendant" rule mistakenly focuses on the underlying legal claim rather than the property or transaction that is the subject of the lawsuit, as no language in Rule 24(a)(2) provides for a limitation on intervention of right to parties liable to the plaintiffs on the same grounds as the defendants. *Wilderness Soc'y*, 630 F.3d at 1178.

The "federal defendant" rule lacks support in all other intervention of right cases in which violations of environmental statutes other than NEPA, such as the Federal Land Policy and Management Act of 1976 and the Endangered Species Act of 1973, are asserted. *Id.* at 1179-80; *see Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526-28 (9th Cir. 1983); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397-98 (9th Cir. 1995). While the Seventh Circuit applies a similar rule, it does not single out NEPA cases as the Ninth Circuit has done. *Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1983); *see, e.g.*, *Keith v. Daley*, 764 F.2d 1265, 1269 (7th Cir. 1985); *United States v. 39.96 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1985). This further lack of support in other circuits only strengthens the case for the abandonment of the rule.

In summary, the "federal defendant" rule ignores not only the language of the Federal Rules of Civil Procedure, but also all traditional

policies previously applied by the courts, and in doing so, it denies prospective intervenors of right their deserved day in court. As noted by the United States Court of Appeals for the Third Circuit, "[t]he reality is that NEPA cases frequently pit private, state, and federal interests against each other. Rigid rules in such cases contravene a major premise of intervention—the protection of third parties affected by pending litigation." *Kliessler v. U.S. Forest Serv.*, 157 F.3d 964, 971 (3d Cir. 1998). Consequently, the court abandoned the rule and reinstated the traditional application of Rule 24(a)(2), the fulfillment of which, given the many different scenarios in which NEPA claims arise, is to be determined on a case-by-case basis. *Wilderness Soc'y*, 630 F.3d at 1180. Because the district court applied the rule to deny the recreation groups' motion to intervene, the Ninth Circuit reversed and remanded so that the district court could reconsider the intervention request in light of circuit court's holding.

The abandonment of the "federal defendant" rule now allows private parties to intervene on the defendant's side and, in some cases, argue for particular claims that the government would not otherwise assert. Because the rule was unique to the Ninth Circuit, its abandonment simply allows states in the Ninth Circuit's jurisdiction to assert the same rights as all other citizens in this country. However, notably, as the *New York Times* reported, "[t]he ruling will have considerable consequences in the environmental context because the [Ninth] Circuit's jurisdiction includes the nine Western states, and its caseload therefore includes a substantial number of environmental cases in which the federal government is the defendant." Lawrence Hurley, *Court Ruling Opens Door for Intervenors in Western NEPA Disputes*, N.Y. TIMES, Jan. 14, 2011, http://www.nytimes.com/gwire/2011/01/14/14greenwire-court-ruling-opens-door-for-intervenors-in-west-1120.html?scp=6&sq=environment%20and%20law%20and%20v&st=cse.

Ruth Schimmel

III. CLEAN WATER ACT

Final Determination of the Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Spruce No. 7 Mine, Logan County, WV, 76 Fed. Reg. 3426 (2011)

In a rare demonstration of force, the United States Environmental Protection Agency (EPA) has withdrawn a mountaintop mine-waste

permit issued by the United States Army Corps of Engineers (Corps). *Final Determination of the Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, WV*, 76 Fed. Reg. 3126, 3126 (2011) [hereinafter *Final Determination of the Assistant Administrator* or *Final Determination*]. The withdrawal does not encompass the entire project permit at Spruce No. 1 Mine, but is specific to "Pigeonroost Branch, Oldhouse Branch, and their tributaries, within Logan County, West Virginia." It prohibits the disposal of "dredged or fill material in connection with construction, operation, and reclamation" of the mine project authorized by DA Permit No. 199800436-3 (Section 10: Coal River) (Permit). The determination also prohibits the use of Pigeonroost Branch, Oldhouse Branch, and their tributaries as a disposal site for future surface coal mining.

The EPA's determination was rendered pursuant to the Clean Water Act, which authorizes the EPA to

> deny . . . the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever [it] determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

Clean Water Act § 404(c), 33 U.S.C. § 1343(c) (2006).

Affirming the broad statutory discretion imparted by this provision, the EPA found that the discharge from the mining project would "result in unacceptable adverse effects on wildlife." *Final Determination of the Assistant Administrator*, 76 Fed. Reg. at 3126.

A. The Determinations

The EPA developed three reasons for demanding the withdrawal of the Spruce No. 1 Mine permit: determinations of adverse impacts on wildlife in the project area, determination of adverse impacts on downstream wildlife, and statutory compliance determinations. The Agency noted that "[e]ach of these determinations on its own is a sufficient basis" to demand the withdrawal of the permit specification. EPA, FINAL DETERMINATION OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY PURSUANT TO § 404(C) OF THE CLEAN WATER ACT CONCERNING THE SPRUCE NO. 1 MINE, LOGAN COUNTY, WEST VIRGINIA 74 (2011), http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/upload/Spruce_No-

_1_Mine_Final_Determination_011311_signed.pdf [hereinafter FINAL DETERMINATION OF THE U.S. EPA].

1. Determination of Adverse Impacts on Wildlife in the Project Area

The EPA conducted a broad evaluation of the impacts directly affecting the Spruce No.1 Mine project area. It concluded that the project would result in "unacceptable adverse impacts to Pigeonroost Branch, Oldhouse Branch, and their tributaries." *Final Determination of the Assistant Administrator*, 76 Fed. Reg. at 3126. Its reasoning was that discharge from the mine would bury "6.6 miles of high-quality stream habitat, including all wildlife in this watershed that utilize these streams for all or part of their life cycles." *Id.* at 3127. It made special mention that the streams in question were "some of the last remaining high quality, least-disturbed headwater stream habitat within the sub-basin." *Id.* at 3127-28.

Studies on the direct effect of the mining project to macroinvertebrates, salamanders, fish, and water-dependent birds in the area concluded that the harm was unacceptable. FINAL DETERMINATION OF THE U.S. EPA, *supra*, at 49-50. The EPA stressed that the streams "support resident wildlife, . . . provide ecosystem functions for downstream waters, serve as refugia for aquatic life and potential sources for recolonizing nearby waters, and ultimately serve to maintain the aquatic ecosystem integrity in the sub-basin and the rich animal diversity in the ecoregion." *Final Determination of the Assistant Administrator*, 76 Fed. Reg. at 3128. Dredge and fill mine waste would destroy 5.6% of the total headwater stream length. FINAL DETERMINATION OF THE U.S. EPA, *supra*, at 47. This would also destroy all the wildlife within that area, including "over 84 taxa of macroinvertebrates[,] . . . 46 species of reptiles and amphibians, 4 species of crayfish, 5 species of fish and at least one water-dependent bird species." *Id.* at 49. With this evaluation, the Agency stated that the aquatic and wetland ecosystem simply could not afford the large adverse effect, thus rendering it unacceptable. *Id.* at 50.

2. Determination of Adverse Impacts on Downstream Wildlife

The Final Determination then reviewed the downstream effects of Spruce No. 1 Mine. The project would effectively remove two high-quality headwater streams that act as sources of freshwater dilution, and would "[convert] them to sources of pollution" contributing to the already polluted downstream waters. *Id.* It noted particular concern for increases in pollution from selenium and total dissolved solids (TDS)

(referring to an increased level of salinity). *Id.* at 51, 58. For example, the report noted that selenium levels from the Dal-Tex Mine (situated near Spruce No. 1) have consistently surpassed West Virginia's numeric water criterion, and the data strongly suggest that discharge from Spruce No. 1 will cause equally elevated levels of selenium. *Id.* at 53-54. Similarly, the report noted that the average conductivity (employed to calculate TDS and expressed as microsiemens per centimeter, μS/cm) in the "main stem of Spruce Fork" (into which the Pigeonroost and Oldhouse Branches flow) is elevated "as much as ten times above" the levels of Oldhouse Branch. *Id.* at 59. The average conductivity at every downstream site of Spruce Fork "exceeded 500 μS/cm," compared to Oldhouse Branch at 90 μS/cm. *Id.* The pollution, in turn, would cause a number of adverse impacts to the downstream environment, such as an increase in the possibility for harmful golden algal blooms. *Final Determination of the Assistant Administrator*, 76 Fed. Reg. 3126, 3128 (2011). The contamination would impair salamander, fish, and bird populations, "harming the ability of these local populations to rebound." *Id.* The EPA noted a probable loss of the macroinvertebrate communities as well as a "population shift to more pollution-tolerant taxa," which would also have substantial effects on the species that "rely on these communities as a food source." *Id.* Due to these findings, the EPA determined that the "[b]urial of Pigeonroost Branch, Oldhouse Branch, and their tributaries will also result in unacceptable adverse effects on wildlife downstream." *Id.*

3. Statutory Compliance Determinations

In its Final Determination, the EPA also found a number of statutory compliance failures on the part of the Corps and the Mingo Logan Coal Company, to which the Permit was issued. The Agency stated that the project's harmful effects "do not comply with the requirements of the Clean Water Act (CWA) and EPA's implementing regulations under section 404(b)(1)." *Id.* (citing Clean Water Act § 404(b)(1), 33 U.S.C. § 1343(b)(1) (2006)). Compliance failures rest on three statutory requirements. First, the project "fails to adequately evaluate less environmentally damaging alternatives." *Id.* Second, it will cause and contribute to "significant degradation of U.S. waters," and the project did not adequately consider the cumulative effects causing "losses and impairment of streams across the Central Appalachian ecoregion." *Id.* Finally, the project "lacks compensatory mitigation to adequately offset the impacts" to the area in question. *Id.* The EPA also determined

unacceptable adverse effects to the wildlife due to the failure to comply with these statutory requirements.

B. Conclusion

The EPA's withdrawal of DA Permit No. 199800436-3 (Section 10: Coal River) for Spruce No. 1 Mine demonstrates the Agency's intentions and aspirations under EPA Administrator Lisa P. Jackson. In this decision, the Agency clearly intended to draw the line at what was perceived to be purposeful rejection of environmental impact consideration and assessment procedure. However, the EPA's reluctance to employ its veto power was also evident in its repeated attempts to illicit compliance and corrective action on the part of the Corps and the Mingo Logan Coal Company.

The 404(c) process requires four major steps before a determination is issued. *Id.* at 3126-27 (citing Clean Water Act § 404(c)). Upon first notice to the Corps and the permittee on October 16, 2009, corrective action was not taken. On April 2, 2010, EPA Region III published a Proposed Determination in the Federal Register "to withdraw, deny, restrict, or prohibit the use of the site, soliciting public comment." *Id.* at 3126. A public hearing was conducted on May 18, 2010. Following this second step of notice and comment, a Recommended Determination was submitted on September 24, 2010, to which the U.S. Fish and Wildlife Service concurred. The EPA noted that the coal company again failed to "provide EPA with corrective actions that would meaningfully address the likely unacceptable adverse effects." *Id.* at 3127. This prompted the EPA to issue its Final Determination on January 13, 2011.

The EPA further stressed that this was an exceptional "case-specific" determination, noting "that this is only the second final determination following permit issuance in the past 40 years," thus demonstrating "that EPA does not undertake such an action lightly." FINAL DETERMINATION OF THE U.S. EPA, *supra*, at 99. While the determination is a single step taken with great precaution, it is an important and decisive one, sending a strong message to other agencies and the current Congress: regardless of political pressures, the EPA will not tolerate such blatant disregard for critical environmental consideration.

Marion Abbott

Precon Development Corp. v. U.S. Army Corps of Engineers,
No. 09-2239, 2011 WL 213052 (4th Cir. Jan. 25, 2011)

In *Precon Development Corp. v. U.S. Army Corps of Engineers*, the United States Court of Appeals for the Fourth Circuit concluded that the United States Army Corps of Engineers' (Corps) administrative record did not provide sufficient evidence to support the Corps' determination that a "significant nexus" existed between wetlands adjacent to man-made ditches and a river five to ten miles away, thereby giving the Corps jurisdiction over the wetlands under the Clean Water Act (CWA or Act). No. 09-2239, 2011 WL 213052, at *15 (4th Cir. Jan. 25, 2011). Accordingly, the Fourth Circuit reversed the lower court's grant of summary judgment in favor of the Corps and remanded the case with instructions to remand to the Corps for further consideration of jurisdiction over the wetlands in question. Although the court's decision provides guidance as to what evidence is required to satisfy the "significant nexus" test asserted by Justice Kennedy's concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), it left unanswered the question of whether the *Rapanos* plurality's "continuous surface connection" test can also be used to establish CWA jurisdiction.

Under the CWA, the government can regulate any "discharge of dredged or fill material into navigable waters." Clean Water Act, 33 U.S.C. § 1344(a) (2006). The Act defines navigable waters as "the waters of the United States." *Id.* § 1362(7). The Corps' regulations define waters of the United States "to encompass all wetlands 'adjacent to waters,' including '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' and tributaries of such waters." *Precon Dev.*, 2011 WL 213052, at *7 n.8 (quoting 33 C.F.R. § 328.3(a) (1999)).

In May 2007, the Corps determined that the wetlands situated on Precon Development Corporation, Inc.'s (Precon) property (Site Wetlands) were subject to CWA jurisdiction, and thus, Precon was required to obtain a permit before filling the area. *Id.* at *2. The Site Wetlands sit adjacent to a man-made drainage ditch, separated only by a berm created during a previous excavation of surrounding wetlands. *Id.* at *1. This drainage ditch flows seasonally into a larger, perennial drainage ditch, which then flows into a second perennial tributary. *Id.* at *2. These merged tributaries flow into the Northwest River approximately five to ten miles away from the Site Wetlands. The Corps

concluded that the Site Wetlands qualified as "waters of the United States" under the CWA because the wetlands sat adjacent to a drainage ditch and subsequently denied Precon's request for a permit to fill the wetlands.

Precon sought administrative review of the Corps' determination. The Corps, relying on the United States Environmental Protection Agency's post-*Rapanos* guidance, upheld its previous finding of jurisdiction over the Site Wetlands and again denied Precon's permit application. The *Rapanos* Guidance instructs the Corps to evaluate wetlands to determine whether they have a "significant nexus" with traditional navigable waters. *See* EPA & U.S. ARMY CORPS OF ENG'RS, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES* (2007), http://www.water.epa.gov/lawsregs/guidance/wetlands/upload/2007_6_5_Wetlands_RapanosGuidance6507.pdf. The Corps found that there was a significant nexus between the tributaries and the adjacent Site Wetlands and the Northwest River, and that "loss of these wetlands 'would have a substantial negative impact on water quality and biological communities of the river's ecosystem.'" *Precon Dev.*, 2011 WL 213052, at *6. Accordingly, the Corps upheld its determination that it had jurisdiction over the Site Wetlands and its denial of Precon's permit.

Precon sued the Corps in the United States District Court for the Eastern District of Virginia, challenging the Corps' determination of CWA jurisdiction and its permit decision. Both parties moved for summary judgment. The district court granted summary judgment in favor of the Corps, finding that it had permissibly defined the scope of jurisdiction over the wetlands and that it did not err in denying Precon's permit application. Precon then appealed to the Fourth Circuit, challenging only the district court's finding that the Corps properly asserted jurisdiction over the wetlands in question.

To determine whether the Corps had jurisdiction over Precon's wetlands, the Fourth Circuit first reviewed the United States Supreme Court's jurisprudence addressing the scope of federal CWA jurisdiction. In *United States v. Riverside Bayview Homes, Inc.*, the Supreme Court supported the broad definition of wetlands that fall within CWA jurisdiction asserted in the Corps regulations and upheld the Corps' determination that it had jurisdiction over wetlands adjacent to navigable waters. 474 U.S. 121, 139 (1985). The Court reasoned that Congress included a broad definition of "navigable waters" in the CWA intending to "exercise its powers under the Commerce Clause to regulate at least

some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.* at 133. In a later decision, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the Court distinguished the wetlands discussed in *Riverside Bayview Homes* from seasonal, isolated ponds. 531 U.S. 159 (2001). The Court held that the isolated ponds were too far removed from navigable waters to fall within CWA jurisdiction, because the isolated ponds lacked the "significant nexus" that existed between the wetlands and navigable waters in *Riverside Bayview Homes*. *Id.* at 167.

In *Rapanos v. United States*, the Supreme Court again attempted to define the scope of federal jurisdiction over wetlands. 547 U.S. 715 (2006). But because there was no majority opinion (the Justices split 4-1-4), the case left CWA jurisdictional requirements unclear. The plurality opinion, written by Justice Scalia, suggested that wetlands should fall under CWA jurisdiction only if (1) the adjacent channel contains a relatively permanent water of the United States and (2) the wetland has a continuous surface connection to that water. *Id.* at 717.

In his concurrence, Justice Kennedy disagreed with the plurality's finding that federal jurisdiction over a wetland required a "continuous surface connection." Instead, Kennedy suggested that a more expansive test be adopted: for the Corps to have jurisdiction over wetlands, there must be a "significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 779 (Kennedy, J., concurring in the judgment). Wetlands that possess such significant nexus are those that "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780 (Kennedy, J., concurring in the judgment). The Court failed to make a conclusive determination of which test—Scalia's "continuous surface connection test" or Kennedy's "significant nexus" test—should be adopted by lower courts.

In *Precon Development*, the parties made the Fourth Circuit's determination of which test to apply simple by agreeing that the "significant nexus" test should apply. *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, No. 09-2239, 2011 WL 213052, at *8 (4th Cir. Jan. 25, 2011) ("We therefore do not address the issue of whether the plurality's 'continuous surface connection' test provides an alternate ground upon which CWA jurisdiction can be established."). Thus, the court was left only with the task of determining whether the Corps correctly applied Justice Kennedy's test.

The Fourth Circuit first examined the Corps' decision to consider the Site Wetlands, adjacent drainage ditches, and surrounding wetlands together for purposes of the significant nexus determination. *Id.* at *9. The court reasoned:

> Justice Kennedy's significant nexus test clearly allows some aggregation of wetlands in determining whether a significant nexus exists. He explained that the significant nexus inquiry should focus on whether "wetlands, either alone or *in combination with similarly situated lands in the region*, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"

Id. (quoting *Rapanos*, 547 at 780 (Kennedy, J., concurring in the judgment)). The court found that there was no error in the Corps' decision to aggregate both abutting and adjacent wetlands in its significant nexus determination. *Id.* at *11.

Next, in determining whether the Corps had properly applied the "significant nexus" test, the Fourth Circuit found that the Corps had established that there was a "nexus" between the Site Wetlands and the Northwest River but had not produced enough evidence to sufficiently show that the nexus was "significant." *Id.* at *13. Although the Corps argued that the measurements of the tributaries' flows contained in the administrative record demonstrated the area's ability to aid with river functions (such as slowing flows, retaining floodwaters, and delivering food resources to fish species downstream), the record provided no way to determine whether the functions that these wetlands performed were "significant" for the Northwest River. Unlike the expert testimony presented by the Corps in *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009), which established that the challenged actions contributed to increased flood peaks and significant impacts to navigation on the Green River, the evidence in the Corps' record in *Precon Development* provided no support for the assertion that the functions of the relevant wetlands impacted the condition of the relevant navigable waters. *Precon Dev.*, 2011 WL 213052, at *14. Accordingly, the court reversed the district court's grant of summary judgment and remanded the case to the district court with instructions to remand to the Corps for further consideration in light of the opinion. *Id.* at *15.

The Fourth Circuit's decision did not provide much assistance to lower courts on how to interpret the conflicting opinions in *Rapanos*, because the court was able to sidestep the debate over which test—Scalia's or Kennedy's—should govern the determination of federal wetlands jurisdiction. Like the Fourth Circuit, other federal courts of appeals also remain confused as to which test to apply. Generally, courts

have adopted the "significant nexus" test, while finding that jurisdiction would also be proper if Scalia's "continuous surface connection" test were met. *See N. Cal. River Watch v. Wilcox*, No. 08-15780, 2011 WL 238292 (9th Cir. Jan. 26, 2011) (amending the previous opinion in the case to add that although the "significant nexus" test governed the case, "[the court] did not, however, foreclose the argument that Clean Water Act jurisdiction may also be established under the plurality's standard"); *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009). As more courts of appeals tackle the daunting task of defining the scope of federal jurisdiction over wetlands, more confusion arises. Until the Supreme Court clearly establishes law by at least a majority, the question of federal jurisdiction under the CWA remains murky.

Allison Shipp

IV. OTHER DEVELOPMENTS

Healthy, Hunger-Free Kids Act of 2010,
Pub. L. No. 111-296 (2010)

A. Introduction

In the wake of a legislative and programmatic push by the Obama Administration aimed at providing a panacea for this nation's epidemic of unhealthy living, Walmart recently announced plans to provide its customers with healthier and more affordable food choices through its Healthy Foods Initiative. More specifically, on December 13, 2010, President Obama signed the Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296 (2010) (Act), a piece of legislation vehemently endorsed by First Lady Michelle Obama. *See* Press Release, White House, Office of the Press Secretary, President Obama Signs Healthy, Hunger-Free Kids Act of 2010 into Law: First Lady Michelle Obama, Administration Officials and Let's Move! Advocates Reaffirm Commitment to Raise a Healthier Generation of Kids (Dec. 13, 2010), http://www.whitehouse.gov/the-press-office/2010/12/13/president-obama-signs-healthy-hunger-free-kids-act-2010-law [hereinafter White House, Healthier Generation of Kids]. In fact, the Act marks a significant accomplishment for the First Lady's *Let's Move!* campaign and the President's Healthy Food Financing Initiative. It is not clear whether Walmart's initiative was in response to the Obama Administration's clear agenda for a healthier nation, Walmart's own humanitarian efforts, pure economics, or a

conglomeration thereof. *See* Hank Cardello, *The Reasons for Walmart's Healthy Foods Initiative*, ATLANTIC, Feb. 10, 2011, http://www.theatlantic.com/food/archive/2011/02/the-reasons-for-walmarts-healthy-foods-initiative/70904. In any event, because of Walmart's sheer size and market control, its actions will inevitably have far-reaching implications. *See* Helena Bottemiller, *Walmart Unveils Healthy Food Initiative*, FOOD SAFETY NEWS, Jan. 21, 2011, http://www.foodsafetynews.com/2011/01/walmart-unveils-healthy-food-initiative.

While the aforementioned legislation, programs, and initiatives directly mandate or implicitly cajole various federal agencies' involvement, there are ancillary but significant concerns for the United States Environmental Protection Agency (EPA). The EPA is empowered to control a wide breadth of governmental action in order to abate pollution; however, another essential part of its mission is to protect human health. *Learn the Issues*, EPA, http://www.epa.gov/epahome/learn.htm#human (last visited Mar. 22, 2011). Simultaneously, the EPA must support "other Federal agencies with respect to the impact of their operations on the environment." EPA Statement of Organization and General Information, 40 C.F.R. § 1.3 (2011). Therefore, it is naïve to ignore the EPA's corresponding role of ensuring a greener tomorrow when evaluating the recent movement toward creating a healthier nation by a veritable pantheon of political and economic power.

B. Healthy, Hunger-Free Kids Act of 2010

When President Obama signed the Healthy, Hunger-Free Kids Act of 2010, it not only marked a legislative victory in bipartisanship, it also reaffirmed the government's dedication to improving the health of its children. *See* White House, Healthier Generation of Kids, *supra*. Echoing the President and First Lady's sentiments on the issue, the Act ensures the continuation and expansion of programs designed to increase access to healthy foods and provide nutritional education for children, thus combating childhood obesity. Fact Sheet, White House, Office of the Press Secretary, Child Nutrition Reauthorization: Healthy, Hunger-Free Kids Act of 2010 1 (Dec. 13, 2010), *available at* http://www.whitehouse.gov/sites/default/files/Child_Nutrition_Fact_Sheet_12_10_10.pdf. By giving the United States Department of Agriculture (USDA) near *carte blanche* authority to set and enforce nutritional standards within school meal programs, the Act sends a clear message that the Obama Administration is serious about making changes in the quality of food that our children consume. One of the key objectives of the Act is to establish local farm-to-school networks that utilize more local products

in school meals. Despite the abysmal economic situation, the Act infuses $4.5 billion in additional funding to accomplish these goals.

C. Healthy Food Financing Initiative

One year after releasing details of the Healthy Food Financing Initiative (HFFI), a $400 million initiative to bring smaller healthy food retailers and grocery stores to the nation's underserved areas, less tangible progress has been realized in comparison to bringing healthy foods to children via schools under the Healthy, Hunger-Free Kids Act of 2010. *See Improving Access to Healthy Food*, POLICYLINK, http://www.policylink.org/site/c.lkIXLbMNJrE/b.5136643/k.1E5B/Improving_Access_to_Healthy_Food.htm (last visited Jan. 12, 2011) (indicating that more support is needed to pass through Congress). Nonetheless, HFFI has gained nearly full financial support from both the House and Senate subcommittees involved. Additionally, a bipartisan coalition recently introduced bills aimed at eliminating "food deserts," communities that lack access to grocery stores or other healthy food retailers. *See* Press Release, U.S. Dep't of Health & Human Servs., Obama Administration Details Healthy Food Financing Initiative (Feb. 19, 2010), http://www.hhs.gov/news/press/2010pres/02/20100219a.html. HFFI is thought to be an effective and sustainable vehicle to eliminate a myriad of health, social, and economic deficiencies that plague low-income communities, which has been proven by successful state models. While HFFI is touted as a conduit to increase American health, it also supports the Obama Administration's commitment and efforts to create sustainability through place-based approaches. These approaches seek to incorporate factors such as infrastructure, transportation, job creation, suppliers, and other resources that create a community's built-environment around a centralized theme of proximity and interdependence. Pennsylvania's model exhibits how connecting producers and consumers can not only provide healthier foods to the community and ignite economic growth, but also create tangible environmental improvements.

D. Walmart's Healthy Foods Initiative

With First Lady Michelle Obama in attendance, on January 20, 2011, retail behemoth Walmart unveiled its Healthy Foods Initiative, a five-pronged approach to achieve its comprehensive goal of bringing healthier food to customers and making healthier foods more affordable. Press Release, Walmart, Walmart Launches Major Initiative to Make Food Healthier and Healthier Food More Affordable (Jan. 20, 2011),

http://walmartstores.com/pressroom/news/10514.aspx. Walmart's first objective is to reduce sodium, sugars, and trans fats in thousands of everyday packaged foods by 2015. Second, Walmart will seek to make healthier foods more affordable. By implementing a new front-of-package labeling system, Walmart aims to achieve its third objective of helping consumers readily identify nutritional information. Fourth, Walmart plans to build stores in underserved communities, thus eliminating food deserts. Walmart will increase its charitable donations in order to achieve its fifth objective, educating consumers on healthier foods. Acknowledging Walmart's clout, president and CEO Bill Simon pointed out its unique position to effect change.

In order to provide lower prices for healthier options like produce, which typically carries a higher base price point, Walmart will look to cut costs by revamping its sourcing, transportation, and logistic schemes. Vice President of sustainability, Andrea Thomas, stated, "With local farmers, we can supply [directly] great products to our stores, the quality is great and they don't have to travel as far so we save money." Bottemiller, *supra*. Thus, Walmart will be able to cut unnecessary costs within its supply chain. Walmart's track record in reducing food deserts has not been stellar, though it is not clear whether blaming Walmart for obesity in these areas is warranted. *See* Rachel Cernansky, *Are Walmart's Eco-Efforts Enough? Balancing Sustainability & Social Responsibility at America's Largest Retailer*, TREE HUGGER, Jan. 31, 2011, http://www.treehugger.com/files/2011/01/walmarts-eco-efforts-enough-balancing-sustainability-social-responsibility.php (providing a balanced assessment of Walmart's initiative). The information and data surrounding Walmart's negative impact on local communities have been a result of current practice, not its proposed course of action, the effects of which are yet to be seen. While Walmart has been known for its profit mongering, this profit-driven motive may actually improve Americans' health, which "represents enlightened self-interest at its best." Cardello, *supra*.

E. Smart Growth: Food Health Meets Environmental Protection

The EPA's smart growth practices address the proverbial elephant in the room: where are the environmental implications of healthy food initiatives? Smart growth personifies the connection between healthy food initiatives and the environment by demonstrating how supply chains and food deserts directly affect air quality, natural areas and wildlife, sustainability, and farming. *Smart Growth: Environmental Benefits of Smart Growth*, EPA, http://www.epa.gov/smartgrowth/topics/eb.htm (last visited Jan. 10, 2011). HFFI's objective to eliminate food deserts is

driven by the desire to bring healthier food to underserved areas by making it more accessible, yet that practice corresponds with the EPA's concern with how development of our built environment influences environmental quality. If people live closer to grocery stores, there are fewer miles driven and less air emissions. Therefore, the trickle-down effect of air pollution on water quality and wildlife is broken. The same can be said for reducing the distance traveled from producer to consumer. While synergistic approaches can yield greater benefits, the EPA acknowledges that individual smart growth methods can have significant positive impacts on the environment. On one hand, Walmart's recent initiative seems to be individual; however, Walmart's control, size, and influence on the market may actually bring pause in its classification. How far is Walmart willing to push and how serious does it take the initiative?

An excellent example of this paradigm between healthy food and the environment is New York City's *PlaNYC* program, winner of the EPA's 2010 National Award for Smart Growth Achievement in Overall Excellence. Press Release, N.Y.C. Office of the Mayor, Mayor Bloomberg Announces New York City Receives U.S. EPA National Smart Growth Award for *PlaNYC* Programs (Dec. 1, 2010), http://www.nyc.gov (follow "New and Press Releases" hyperlink; then follow "2010 Events" link; then select "December 2010"). *PlaNYC* specifically promoted the establishment of grocery stores in underserved communities in need of healthy food retailers through Food Retail Expansion to Support Health (FRESH), which the EPA recognized as an essential part of New York City's contribution to smart growth. By focusing on the design of its built environment, New York City simultaneously influenced and improved its environment and public health.

F. Implications and Conclusion

The direct impact on the EPA is yet to be realized, but it seems pretty clear what role it will play as the legislation and corresponding initiatives mature past their infancy. While there is little talk on exactly what the USDA will require of healthier foods, it is foreseeable that pesticide residue, something already regulated by the EPA, could become a critical factor in determining the health of foods. As other retailers feel the backlash of Walmart's initiative and adjust their supply chains accordingly, there may be a larger forum for the EPA to offer incentives for reducing miles traveled per product from producer to consumer; reducing emissions and greenhouse gases is certainly a primary concern

for the EPA. Whether built-environment development and planning warrants the EPA's time and resources is another question left unanswered. In any event, the EPA must support the USDA and other federal agencies insofar as their actions necessitate environmental protection. *See* EPA Statement of Organization and General Information, 40 C.F.R. § 1.3 (2011).

Though the connection between healthier food initiatives and environmental protection may seem trivial on its face, the EPA's National Award for Smart Growth Achievement has recognized and honored the efficient interfacing management of these principles for ten years. With that said, it may not come as much of a surprise that the Healthy, Hunger-Free Kids Act of 2010, HFFI, and Walmart's Healthy Foods Initiative all share the common goals of increasing local sourcing and abating food deserts. The impetus varies, but the goal remains constant: create a healthier today for a greener tomorrow.

Taylor H. Reinhard

Center for Food Safety v. Vilsack, No. C 10-04038 JSW, 2010 WL 4869117 (N.D. Cal. Dec. 1, 2010)[1]

In *Center for Food Safety v. Vilsack*, the United States District Court for the Northern District of California issued a preliminary injunction ordering the immediate removal of 256 acres of genetically engineered (GE) sugar beet stecklings (seedlings) that were planted four months earlier in fields in Arizona and Oregon. C 10-04038 JSW, 2010 WL 4869117, at *10 (N.D. Cal. Dec. 1, 2010), *vacated*, Nos. 10-17719, 10-17722, 2011 WL 676187 (9th Cir. Feb. 25, 2011). The Northern District held that the plaintiffs had demonstrated a strong likelihood that irreparable harm would occur absent a preliminary injunction requiring destruction of the seedlings. *Id.* at *2. The court also found that farmers and consumers would likely suffer harm due to the possibility of cross-contamination between GE sugar beets and non-GE crops. *Id.* at *3. Furthermore, the court held that public interest in preserving nature favored issuance of a preliminary injunction over defendants' claims of possible economic harm. *Id.* at *7-8.

1. *Editor's Note*: *Center for Food Safety v. Vilsak* was vacated and remanded by the United States Court of Appeals for the Ninth Circuit on February 25, 2011. Nos. 10-17719, 10-17722, 2011 WL 676187 (9th Cir. Feb. 25, 2011). The Ninth's Circuit's holding was based on its finding that "Plaintiffs have not demonstrated that the permitted steckling plants present a possibility, much less a likelihood, of genetic contamination or other irreparable harm." *Id.* at *5.

Center for Food Safety, Organic Seed Alliance, Sierra Club and High Mowing Organic Seeds (Plaintiffs) filed the suit on behalf of a coalition of farmers and conservation groups who either live in agricultural locations where GE sugar beets will be grown or will be affected by the GE sugar beet crops. *Id.* at *3. Plaintiffs, many of which are national nonprofit membership organizations, are dedicated to shedding light on the adverse impacts of industrial farming and food production systems on human health, animal welfare, and the environment. Complaint for Plaintiffs at 10, *Ctr. for Food Safety v. Vilsack*, C 10-04038 JSW, 2010 WL 4869117 (N.D. Cal. Dec. 1, 2010). Plaintiffs alleged that the growth of GE sugar beets would contaminate non-GE sugar beets and reduce the supply of sugar beets that are not derived from GE sources. *Id.* at 13. Plaintiffs claimed that the planting of GE sugar beet crops would make it more difficult for CFS's member to produce, sell, and eat foods not contaminated by GE material or derived from GE sources, because many members of the Plaintiffs' organizations do not eat or sell foods that contain GE material and chemical pesticides. *Id.*

Defendants were the United States Department of Agriculture (USDA) and its Animal and Plant Health Inspection Service (APHIS), which is responsible for issuing permits to four seed companies to plant seedlings of GE sugar beets. *Ctr. for Food Safety*, 2010 WL 4869117, at *1. Defendant-Intervener Monsanto Company (Monsanto) owns the underlying intellectual property rights in the technology used to produce the GE sugar beets and assisted its licensees to seek the permits in question.

This case arose out of the decision by the APHIS to issue permits to four seed companies to plant seedlings of GE sugar beets. Monsanto, along with Betaseed, Inc., a sugar beet seed supplier, genetically engineered "Roundup Ready" sugar beets to be resistant to Roundup herbicide. Monsanto and the parent company of Beta seed, KSW, submitted a petition to the USDA to deregulate the GE sugar beet seed so that it could be grown on U.S. soil. The USDA granted this petition on March 4, 2005. Plaintiffs then brought suit and alleged that the APHIS's decision to issue these permits without conducting any environmental review violated the National Environmental Policy Act, 42 U.S.C. §§ 4321-4335 (2006), the Plant Protection Act, 7 U.S.C. §§ 7701-7751 (2006), the 2008 Farm Bill, Pub. L. No. 110-234 (2008), and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006). On September 21, 2009, the Northern District of California agreed and vacated the USDA's deregulation decision due to the Agency's failure to

prepare an Environmental Impact Statement. *Ctr. for Food Safety v. Vilsack*, No. C 08-00484 JSW, 2009 WL 3047227 (N.D. Cal. Sept. 21, 2009). Ten months later, on August 13, 2010, the court ruled again in *Center for Food Safety v. Vilsack*, 734 F. Supp. 2d 948 (N.D. Cal. 2010) (*Sugar Beets I*), to vacate the APHIS's decision to deregulate genetically engineered sugar beets. This decision made any future planting and sale unlawful until the USDA complies with federal law and APHIS issues an Environmental Impact Statement. *Ctr. for Food Safety*, 2010 WL 4869117, at *1.

On September 1, 2010, APHIS announced that it would grant permits to authorize sugar beet seedling production over the next two weeks and issued these permits a few days later despite the previous rulings. *Id.* at *6. Nine days later, on September 10, 2010, Plaintiffs filed this lawsuit requesting a preliminary injunction to stop any planting, sale or dissemination of Roundup Ready sugar beets or seed pending APHIS's compliance with all applicable federal laws.

The district court found that a preliminary injunction was warranted in this situation under the requirements set forth in *Winter v. Natural Resources Defense Council*, 129 129 S. Ct. 365, 374 (2008). *Id.* at *1. According to the *Winter* court, in order to obtain a preliminary injunction, plaintiffs "must establish that [they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Id.* (quoting *Winter*, 129 S. Ct. at 374).

In this case, the court first concluded that it had already found that the Plaintiffs had demonstrated a strong likelihood of success on the merits when it vacated the USDA's deregulation decision in *Sugar Beets I*. *Id.* at *2. Therefore, the court began by analyzing the Plaintiffs' likelihood of suffering irreparable harm. First, the court dismissed the Defendants' argument that Plaintiffs' allegation of environmental harm was speculative because the USDA had not yet made a decision on allowing later cycles of GE sugar beets plantings. The court pointed out that the purpose of the permits in question was to produce seeds for commercial trial use, and therefore the likelihood of irreparable harm is not speculative if the logical outcome of the permit is realized.

Additionally, the court found that the Defendants' argument attempted to penalize the environment and the Plaintiffs as the effects of the GE seedlings were not yet known. The court reasoned that this was exactly why an Environmental Assessment is needed, to determine unknown risks. The court cited to evidence that, despite plans to

minimize environmental harm, a significant risk to the environment exists if the sugar beets are planted in accordance to the permit due to the high possibility of cross-pollination with non-GE plants. *Id.* at *3. The court noted that in regards to the planting and growth of the sugar beets in question, "there are points of vulnerability where contamination is likely at every production stage." *Id.*

Defendants also argued that the court should consider the economic harm on the Defendants if the seedlings must be removed. The court found this argument unpersuasive because the law only authorizes the consideration of potential environmental impacts the GE crops may have and not the potential economic impacts of unlawful GE crops.

The next issue the court addressed was whether the balance of equities tipped in the Plaintiffs' favor. *Id.* at *5. The court began by pointing out that Defendants' claimed harm was not only caused by the court's prior decision to vacate the permits but also by the Defendants' own actions. The court's decision required the Defendants to halt all growing and processing of GE sugar beets. Furthermore, Plaintiffs had made it clear that they would vigorously litigate any further issuance of permits regarding GE sugar beets. *Id.* at *6. Despite the foreseeable lawsuit, Defendants rushed to issue permits and begin planting the GE crops. The court concluded that the anticipated economic losses established by the Defendants did not outweigh the potential harm to the environment if the GE crops continued to grow. Last, the court found that the public interest favored preserving nature and that Congress's intent in enacting NEPA was to consider environmental impacts before projects were undertaken. *Id.* at *8.

Thus, the court granted Plaintiffs' request for a preliminary injunction and ordered the removal of the GE sugar beet seedlings from the ground. *Id.* at *10. As it was likely that the Defendants would seek a stay pending appeal from the Ninth Circuit, the injunction was not to take effect until December 7, 2010. On December 6, 2010, the Ninth Circuit granted a temporary stay of the district court's ruling that was still in effect at the time of this writing.[2]

Despite the stay, this decision is significant as it is the first time a court has ordered the destruction of GE crops due to environmental concerns. The court stressed the numerous ways the crops posed potential environment risks. Acknowledging the Defendants' attempts to circumvent the court's previous ruling, the court sharply rebuked them, stating that "the legality of Defendants' conduct does not even appear to

2. *See* Editor's Note, *supra* note 1.

be a close question" and "[i]t appears clear that defendants . . . were merely seeking to avoid the impact of the Court's prior order *in Sugar Beets I*." *Id.* at *9. By ordering the injunction, this decision marked a victory for farmers and environmentalists who desire to see the rule of law applied equally to the demands of biotech industry giants such as Monsanto.

Rebecca Lasoski

United States v. Cinergy Corp.,
623 F.3d 455 (7th Cir. 2010)

In the long, drawn-out court battle of *United States v. Cinergy Corp.* (*Cinergy II*), the United States Court of Appeals for the Seventh Circuit reversed the United States District Court for the Southern District of Indiana's 2009 injunction shutting down three Cinergy coal-generating units in Indiana and penalties in the amount of $687,500. 623 F.3d 455, 461 (7th Cir. 2010); *United States v. Cinergy Corp.* (*Cinergy I*), 618 F. Supp. 2d 942, 971 (S.D. Ind. 2009). The suit, originally filed a decade ago, concerned modifications that Cinergy made from 1989 to 1992 to generating units at its plant located along the Wabash River in Indiana (Wabash plant). *Cinergy I*, 618 F. Supp. 2d at 945. These modifications increased the plant's ability to operate for more hours during the year, thus maintaining the operating capacity of the aging plant. *Cinergy II*, 623 F. 3d at 456. Cinergy made such modifications without first obtaining a permit from the United States Environmental Protection Agency (EPA) under the impression that no such permit was required under Indiana law unless the modification increased a plant's *hourly* emissions of pollutants, as opposed to its *annual* emissions. Thus, even though the plant's annual emissions potentially increased because of the increase in operating hours, Cinergy argued that the modifications did not require a permit because emissions did not increase within each individual hour, standing alone. The EPA sued under section 165(a) of the Clean Air Act (CAA or Act), 42 U.S.C. § 7475(a) (2006), for failure to first obtain a permit before making the modifications. In district court, a jury found that the modifications to the Wabash plant were likely to increase the plant's annual emissions of both sulphur dioxide and nitrogen oxide; thus, Cinergy's failure to obtain a permit constituted a violation of the CAA. *Cinergy II*, 623 F.3d at 457. Ultimately, the district court granted an injunction that closed three operating units at the Wabash plant and imposed penalties of $25,000 for each day Cinergy

violated the permit requirement. *Cinergy I*, 618 F. Supp. 2d at 971. On appeal to the Seventh Circuit, Cinergy argued its actions were permitted by Indiana state law, and thus, the judgment against them should be reversed.

The appeal centered on an apparent tension between the CAA and Indiana's law, which sought to implement the Act. The state plan, enacted and approved by the EPA in 1980, stated that all modifications to coal plants needed to be preceded by a permit. *Id.* at 458. However, section 43 of the state plan defined "modification" as "an addition to an existing facility or any physical change, or change in the method of operation of any facility which increases the potential . . . emissions . . . of any pollutant that could be emitted from the facility." 325 IND. ADMIN. CODE § 1.1-1, p. 5 (1980). This state plan stood at odds with the CAA and accompanying regulations that required state implementation plans to adopt an actual-emission standard. *Cinergy II*, 623 F.3d at 458. The EPA approved the Indiana plan with the exception that section 43 of the plan would be excluded and that Indiana would submit a revised plan that conformed to the CAA. However, Indiana did not actually submit a revised plan until 1994, a decade following the modifications at issue at the Wabash plant. *Id.* at 458-59.

In its appeal, Cinergy argued that the modifications to the Wabash plant fell in accordance with the unrevised state plan, which included section 43. *Id.* at 458. It argued that the statute, on its face, only required a permit for modifications that increased a plant's potential generating capacity. In essence, Cinergy argued that the state regulation did not require a permit for the modifications because the modifications did not increase the Wabash plant's generating capacity, yet rather allowed the aging plant to maintain the same capacity by running for more hours of the day without having to shut down for repairs. Rather than contesting Cinergy's interpretation of section 43, the EPA argued that because Indiana agreed to update its state plan to conform to the actual emission standard of the CAA, Cinergy was "on notice" that section 43 would be changed and could not be relied upon. While the district court agreed with this argument, the Seventh Circuit reversed, reasoning that "[t]he Clean Air Act does not authorize the imposition of sanctions for conduct that complies with a State Implementation Plan that the EPA has approved." While the court conceded that Cinergy was indeed "on notice" that section 43 would be updated to conform to the CAA's "actual emission standard," this did not prevent Cinergy from relying on section 43, absent an express rejection of the regulation by the EPA or an actual change in the language. The court clearly stated "[w]hat Cinergy was not

on notice of was that the EPA would treat approval of section 43 as a rejection of it." *Id.* at 459. In other words, when the EPA originally approved the state plan, which included section 43, this gave Cinergy the right to rely on its requirements. In so holding, the Seventh Circuit placed the blame for these circumstances on the EPA, as it noted that the EPA should have unequivocally rejected the state plan from the very onset. Due to this blunder by the EPA, Cinergy effectively sought shelter under a "bad" plan, in which it could increase the yearly output of sulphur dioxide at its Wabash plant without suffering penalties.

While the court expressed the importance of maintaining an actual emission standard in order to promulgate the goals of the CAA, it simply could not find a legal basis to hold Cinergy liable. The Seventh Circuit went through great lengths to discuss the policy behind the actual emissions standard replacing the hourly emission standard that Cinergy relied upon. The difference between these two standards proves most important when dealing with aging plants, such as Cinergy's Wabash coat plant. The court suggested that under an hourly emissions standard, a plant would be incentivized to make modifications that increased the hours of operation, even if it increased annual emissions, because the change would not require a permit and the plant would be free from liability for the increased pollutants. *Id.* at 456-57. Furthermore, such a standard would remove incentives to replace older plants with new and more environmentally friendly ones. Currently, power companies can keep an old plant operating by increasing its operating hours, all while escaping liability for increased emissions and avoiding the high costs of building new facilities that would be subject to new source performance standards. *Id.* at 457.

After failing in its arguments regarding the emission of sulphur dioxide, the government next sought to impose liability on Cinergy for the release of nitrogen oxide, to which the parties agreed that the actual-emission standard applies. *Id.* at 459. However, even with the appropriate standard applied, the EPA failed to assert its claim effectively. The district court accepted testimony from the government's expert witness who forecasted that the modifications at the Wabash plant were likely to increase emissions of nitrogen oxide. Here, only the forecasting of increased emissions, as opposed to actual increase of emissions, is a necessary finding, because the issue involves whether Cinergy should have first obtained a permit. Cinergy appealed the district court's decision to allow the experts to testify on the basis that they used a forecast applicable to baseload, as opposed to cyclical, facilities. In order to meet demand, power companies continually run their newer and more

cost efficient facilities ("baseload" facilities) to meet the average demand. However, in periods of increased demand, such as the daytime, the company may also run its cyclical facilities, which are usually older and more expensive to operate. In terms of projecting any increase of emissions, the difference between these two types of facilities becomes crucially important. With baseload facilities, because they run continuously, any increase in operating capacity will necessarily be realized. The court exemplified that if a baseload facility's capacity increased by 10%, its generation (and accompanying emissions) will also increase by 10%. *Id.* at 460. This is true because baseload facilities are designed to run continuously and at full capacity. However, with cyclical plants, increase in operating capacity will not necessarily be realized, for example, if demand is actually lower than originally predicted. Because the EPA's experts used baseload facility formulas in predicting the emission output of the Wabash plant, the Seventh Circuit held that their testimony should have been excluded. Furthermore, without such expert evidence, the court found that the government could not prove any projected increase of emissions that would necessitate a permit and reversed the district court's judgment with regard to nitrogen oxide emissions as well. The court acknowledged that other methods are indeed available to predict the emissions of cyclical facilities accurately, yet faulted the government for failing to utilize them.

The Seventh Circuit's reversal of the injunction and penalties imposed upon Cinergy represents the lingering detrimental effect that poor Agency decision making can have on the environment, even as much as thirty years later. By failing to reject Indiana's state implementtation plan, the EPA passively allowed Cinergy's Wabash plant to operate at an increased yearly emission rate, free from any penalty or fine since 1980. These effects are not de minimis. According to one government expert, the modifications increased the annual emission of sulphur dioxide by 23,000 tons. *Cinergy I*, 618 F. Supp. 2d 942, 949 (S.D. Ind. 2009). This is the equivalent to the amount of sulphur dioxide emitted by 324,000 diesel trucks, which the district court noted, is "the total number of trucks registered in Indiana, Ohio, and Kentucky." *Id.* It is further estimated by the government's experts that the annual emissions (from the Wabash plant) alone would rank in the top five percent of sources of SO_2 pollution in the eastern United States. This extreme increase was effectuated without a permitting process and thus with no input or oversight by the EPA. However, without any legal basis to issue an injunction or impose a penalty, these emissions continue today with impunity.

Brett Chalke