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## McCormick v. Walmart Stores, Inc., 600 S.E.2d 576 (W. Va. 2004)

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The court also held that since another, uncontested condition requires upstream and downstream sampling, using WER studies only to tighten restrictions is unjustified.

The Port proposed the restoration of Vacca Farm, a wetland used for farming and grazing, to its historic peat wetland condition. Ecology found that Vacca Farm was degraded enough to qualify for restoration. The Citizens Groups contended that PCHB and Ecology wrongly categorized the work at Vacca Farm as restoration instead of enhancement and accordingly granted the Port too much credit for their activities at the Vacca Farm site. Since the Citizens Groups did not show that Ecology's opinion was flawed, the court deferred to Ecology's assessment and held that a site does not have to be entirely functionless to qualify for restoration; a degraded wetland can be restored.

The last sentence of PCHB's condition eleven urged the Port to consider other in-basin mitigation sites to fulfill its obligation. The Port claimed, and the court agreed, there was no evidence of legislative intent to require in-basin mitigation opportunities to be exhausted before the Port turned to out-of-basin possibilities. Based on this evidence, and since the Citizens Groups did not present convincing arguments regarding the prohibition of out-of-basin mitigation, the court overruled the final sentence of condition eleven and found the Port's plan for out-of-basin mitigation adequate.

The court also ruled on two evidentiary issues. First, the court found that PCHB did not abuse its discretion when it redacted testimony regarding the political motivations that allegedly undercut the section 401 certification. PCHB was entirely within its rights to exclude irrelevant evidence. Second, the court held that PCHB did not need to include inadvertently disclosed privileged opinions of the assistant attorney general because the lack of these opinions did not prejudice the decision of PCHB against the Citizens Groups.

The court affirmed the ruling of PCHB regarding the reasonable assurance of the Port's compliance with water quality standards, affirmed PCHB's conditions one through four, nine, ten, the first two sentences of condition eleven, and conditions twelve through fifteen, overturned conditions five through eight, the final sentence of condition eleven, and condition sixteen.

*Meredith Ginn*

## WEST VIRGINIA

**McCormick v. Walmart Stores, Inc., 600 S.E.2d 576 (W. Va. 2004)** (reversing dismissal of the town as defendant because neither intervening stormwater flow through private property nor statutory immunity prevented town liability for negligent operation of city drainage systems).

The McCormick family ("McCormick") filed suit against the Town of Lewisburg ("Town"), Walmart Stores ("Walmart"), and Walmart's

construction and engineering companies seeking damages for injuries to McCormick's real property allegedly caused by negligent operation of the Town's stormwater drainage systems. McCormick alleged that the Town operated its drainage systems in a manner such that stormwater previously diverted elsewhere flowed across Walmart's property and onto McCormick's property causing injury. The Circuit Court of Greenbrier County granted a motion to dismiss the Town as a defendant on the grounds that McCormick's complaint failed to state a claim against the Town for which the circuit court could grant relief. McCormick appealed.

The Supreme Court of West Virginia first addressed the Town's contention that because the stormwater from Town facilities first flowed over Walmart's property before entering McCormick's property, the Town could not be liable. Citing *Whorton v. Malone*, the court noted that a landowner could not claim immunity because of the subsequent path of stormwater through a third party's land before injury occurred on the land of another.

The court next dismissed the Town's argument that because the Town granted Walmart a permit to construct a store on Walmart's property, West Virginia law granted the Town statutory immunity from the suit. Section 29-12A-5(a) immunizes political subdivisions for claims that arise due to the action of private parties who first obtain a permit. However, the court noted McCormick was not attempting to hold the Town liable for Walmart's actions. Specifically, McCormick had alleged that the Town itself had been negligent in operating the Town's own drainage systems, and therefore McCormick's claim was not precluded by § 29-12A-5(a). The court thus found that McCormick had stated a claim against the Town for which the circuit court could grant relief and accordingly reversed the circuit court. Chief Justice Maynard, in dissent, found no basis in case law for holding a non-adjacent landowner liable for water runoff injuries to another. The dissent stated that case law only required that a landowner be reasonable in light of effects on adjacent landowners when diverting stormwater. Additionally, the dissent stated that because the court had never recognized a duty of a landowner to alleviate stormwater problems caused by the development of nearby land, the court should have affirmed the circuit court.

*Matthew Sarles*

## WYOMING

***In re The Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 85 P.3d 981 (Wyo. 2003)** (holding: (1) the district court lacked jurisdiction to hear claim to the extent irrigators sought to enforce federal rights, (2) irrigators failed to preserve the right to bring claim by not challenging reservoir certificate, (3) irrigators were not entitled to reopen water rights certification confirmation process, (4)