1-1-2005

Environmental Law, Eleventh Circuit Survey

Travis M. Trimble
University of Georgia School of Law, ttrimble@uga.edu

Environmental Law

by Travis M. Trimble*

In 2004 courts in the Eleventh Circuit addressed several Clean Water Act[1] issues. The Eleventh Circuit Court of Appeals arguably expanded the scope of the injuries a plaintiff may allege to have standing to sue under the Clean Water Act. The court held that the federal court had jurisdiction over a Clean Water Act citizen suit alleging violations of a permit issued by the State of Georgia under its permitting program authorized under the Act.[2] The Eleventh Circuit also addressed whether a Florida state regulation effectively revised or added to the state's Clean Water Act, which mandated water quality standards, necessitating a formal Environmental Protection Agency ("EPA") review and approval of the regulation.[3] In an appeal from the Eleventh Circuit, the United States Supreme Court held that a pump, which moves contaminated water from one water body to another but does not itself add pollutants to the water, is nevertheless a point source for purposes of the Act.[4] Finally, the United States District Court for the Northern District of Georgia held that the Corps of Engineers was not required to produce an Environmental Impact Statement ("EIS") for the issuance of a Section 404[5] permit for the construction of one of many pending reservoir projects in north Georgia.[6]

---

* Instructor, University of Georgia School of Law. Former Partner in the firm of Anderson, Walker & Reichert, LLP, Macon, Georgia. Mercer University (B.A., 1986); University of North Carolina—Chapel Hill (M.A., 1988); University of Georgia School of Law (J.D., 1993). The Author gratefully acknowledges the research assistance of Amelia A. Godfrey, University of Georgia School of Law, Class of 2005.

1. 33 U.S.C. § 1251 (2000).
2. Parker v. Scrap Metal Processors, Inc., 386 F.3d 993 (11th Cir. 2004).
3. Fla. Pub. Interest Research Group Citizen Lobby, Inc. v. EPA, 386 F.3d 1070, 1073 (11th Cir. 2004).
4. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95 (2004).
5. Clean Water Act, 33 U.S.C. § 1344 (2000).
6. Ga. River Network v. United States Army Corps of Eng'rs, 334 F. Supp. 2d 1329 (N.D. Ga. 2004).

In addition, the Eleventh Circuit directed the EPA to determine whether, under Georgia's state-implemented Clean Air Act[7] permit program, a power company could be denied a pre-construction permit for a new major stationary source of air pollutants because it was a part-owner of an existing noncompliant major stationary source.[8] Finally, the Eleventh Circuit, under the Wilderness Act[9] and the National Environmental Policy Act ("NEPA"),[10] addressed the National Park Service's use of vehicles to transport tourists on a road that runs through the Cumberland Island wilderness area.[11]

I. CLEAN WATER ACT

A. Standing

In *Parker v. Scrap Metal Processors, Inc.*,[12] the Eleventh Circuit held, among other things,[13] that plaintiffs had standing to sue under the Clean Water Act[14] ("CWA") when plaintiffs alleged that defendants, who owned and operated a scrap metal recycling business adjacent to plaintiffs' property, allowed contaminated storm water to migrate onto plaintiffs' property.[15] Plaintiffs also had standing when plaintiffs alleged that defendants allowed contaminated storm water to migrate into a stream that was not on plaintiffs' property even though plaintiffs did not allege any harm to them resulting from that contamination.[16] The court also held that it had subject matter jurisdiction over plaintiffs' CWA claims despite the fact that the claims alleged violations of the National Pollutant Discharge Elimination System ("NPDES") permit conditions, which were administered by the State of Georgia under its

7. 42 U.S.C. § 7401 (2000).
8. Sierra Club v. Leavitt, 368 F.3d 1300 (11th Cir. 2004).
9. 16 U.S.C. § 1131 (2000).
10. 42 U.S.C. § 4321 (2000).
11. Wilderness Watch v. Mainella, 375 F.3d 1085, 1087 (11th Cir. 2004).
12. 386 F.3d 993 (11th Cir. 2004).
13. Plaintiffs filed suit in the Northern District of Georgia, asserting violations of the CWA and the Resource Conservation and Recovery Act ("RCRA") as well as claims for contribution under the Georgia Hazardous Site Response Act, O.C.G.A. section 12-8-90, negligence, nuisance, and trespass. The jury found defendants liable under all theories and awarded plaintiffs $1.5 million in damages, which the court reduced to $1 million. Defendants appealed on numerous grounds. *Parker*, 386 F.3d at 1002.
14. 33 U.S.C. § 1251 (2000).
15. *Parker*, 386 F.3d at 1003-04.
16. *Id.*

own permit program and had been authorized by the EPA pursuant to the CWA.[17]

In *Parker* plaintiffs owned property in Covington, Georgia (the "Parker property"). Defendants owned and operated a metal recycling facility (the "SMP facility") on adjacent property that the EPA had previously determined was contaminated with metals, petroleum products, solvents and paint wastes, discarded drums containing hazardous substances, and discarded underground storage tanks. In 2001 plaintiffs discovered contamination on their property, which they reported to the Georgia Environmental Protection Division ("EPD"). The EPD determined that the SMP facility was the probable source of the contamination. Storm water from the SMP facility flowed across the Parker property, depositing contaminated dirt and sediment and causing erosion. The storm water also flowed into a stream located on property adjacent to the facility and owned by one of defendants. Defendants had neither the storm-water discharge permit the CWA required nor the required Resource Conservation and Recovery Act ("RCRA") permits. However, defendants did obtain the storm-water permit prior to the commencement of litigation.[18]

Before addressing the lower court's determinations, the Eleventh Circuit addressed two threshold issues raised by defendants on appeal: standing and subject matter jurisdiction with respect to the federal claims.[19] The court first held that plaintiffs had standing under the CWA.[20] To have standing, a plaintiff must have suffered an "injury-in-fact," caused by the defendant's conduct, and the plaintiff must have requested relief likely to redress the injury.[21] Regarding the first prong of the standing test, injury-in-fact, the court determined that plaintiffs showed "water runoff originating on the defendants' property caused hazardous substances . . . to migrate onto the Parker property, where the substances contaminated the soil and eventually made their way into the stream. This injury is fairly traceable to the defendants' alleged failure to obtain or comply with their . . . NPDES permit."[22] In other words, the incidental injury from defendants' failure to comply with an NPDES permit was sufficient to satisfy the injury-in-fact prong of the

17. *Id.* at 1005. States are authorized to implement CWA NPDES permit programs pursuant to 33 U.S.C. § 1342 (2001). *Id.*

18. *Id.* at 1001-02.

19. *Id.* at 1002-05.

20. *Id.* at 1003-04. The court also held plaintiffs had standing under RCRA. *Id.*

21. *Id.* at 1003.

22. *Id.* at 1003-04.

standing test under the CWA.[23] This incidental injury was sufficient, even though the injury was in addition to and did not necessarily result from the contamination of a body of water that the NPDES permit requirement was intended to prevent.[24]

Next, the court addressed its subject matter jurisdiction over plaintiffs' CWA and RCRA claims.[25] Among other things, defendants contended that because Georgia has implemented its own programs under these statutes, plaintiffs' claims arose under state law and not federal law.[26]

After examining the relevant language in the CWA and United States Supreme Court precedent, the Eleventh Circuit concluded that "a plain reading of this statute indicates that state permits and conditions fall

---

23. *Id.*

24. *Id.* The dissent contended that plaintiffs lacked standing under the CWA because plaintiffs did not allege any harm resulted from the stream's pollution. *Id.* at 1021 (Forrester, J., dissenting). The majority never directly addressed this point, stating that for standing, plaintiffs may show only that "the value of their property was diminished, at least in part due to the pollution from the polluting facility." *Id.* at 1004 n.11. The majority and dissent both cited *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 (2000), in support of their positions. The majority claimed that *Laidlaw* "belies the dissent's conclusion" because in that case

> Gail Lee [one of the members of the plaintiff group] "attested that her home, *which is near* Laidlaw's facility, had a lower value than similar homes located farther from the facility, and that she believed the pollutant discharges accounted for some of the discrepancy." There is no suggestion in the Supreme Court's opinion that Lee alleged an aesthetic or recreational injury, or that Lee was a riparian owner, but the Supreme Court held that her sworn statement adequately demonstrated an injury-in-fact.

Parker, 386 F.3d at 1004 n. 11 (citing *Laidlaw*, 528 U.S. at 182-83).

The court's characterization of *Laidlaw* in *Parker* is slightly misleading. The quoted language from *Laidlaw* recounted the testimony of Lee, who was one of numerous members of the plaintiff group whose testimony the Supreme Court summarized. *Laidlaw*, 528 U.S. at 183. All of the members, but Lee, alleged that they actually used the waterway at issue or would use it but for the pollution. *Id.* The United States Supreme Court summarized their testimony for the proposition that "environmental plaintiffs adequately allege injury in fact when they aver 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.* (citation omitted). Although Lee appeared to allege an economic injury, which is also sufficient for CWA standing, rather than an aesthetic or recreational one, the clear implication in *Laidlaw* is that plaintiffs, including Lee, alleged injuries that directly *resulted* from the water in issue's lessened quality, which was due to defendant's pollution and not merely injuries caused by defendant's pollution, when the pollution also happened to contaminate a navigable water in violation of the CWA. *Id.* at 183-84.

25. *Parker*, 386 F.3d at 1004-06. Because the rest of plaintiffs' claims were state law claims, the court's jurisdiction over the entire case depended on it having jurisdiction over at least one of the federal claims. *See id.* at 1005 n.12. *See also* 28 U.S.C. § 1367 (2005).

26. *Parker*, 386 F.3d at 1005. The CWA authorizes states to implement their own NPDES permit programs after receiving EPA approval. *Id.*

within the effluent standards of conditions covered [by the CWA]"[27] and that "the Supreme Court apparently has incorporated state law standards under the CWA into federal environmental law for jurisdictional purposes."[28]

Regarding its jurisdiction over plaintiffs' RCRA claim, the court noted that an EPA-approved state implementation program under RCRA, unlike the CWA, operates "'in lieu of the federal program.'"[29] The court declined to determine if the "RCRA grants federal courts jurisdiction over citizen suits alleging a violation of an EPA-approved state law under the RCRA."[30] The court ultimately did not decide the RCRA jurisdiction question, concluding that, because it had jurisdiction over plaintiffs' CWA claims, it had supplemental jurisdiction over the RCRA claim.[31]

The court determined there was sufficient evidence on the merits to support the jury's determination that defendants were liable under the state law theories for the CWA and RCRA claims.[32] However, the court remanded the case for a new trial on damages because the district court failed to instruct the jury that plaintiffs, who were not owners of the Parker Property prior to filing the complaint, could not recover damages.[33]

B. Water Quality Standards

In *Florida Public Interest Research Group Citizen Lobby, Inc. v. Environmental Protection Agency*,[34] the Eleventh Circuit remanded the case to the United States District Court for the Northern District of Florida to determine whether a Florida administrative rule[35] actually changed or added to the CWA water quality standards, which would have required a full review of the new regulation by the EPA.[36] The Florida administrative rule was adopted ostensibly to provide criteria for the state to use in evaluating if state waters should be designated as

---

27. *Id.* at 1005-06.
28. *Id.* at 1006.
29. *Id.* at 1006 n.13.
30. *Id.*
31. *Id.* at 1008.
32. *Id.* at 1015.
33. *Id.* at 1018-19. Only one of the plaintiffs, Quebell Parker, had an ownership interest in the property during the events at issue in the case. After the institution of the lawsuit, Mrs. Parker created a joint tenancy in the property with the other two plaintiffs, her daughter and son. *Id.* at 1000 n.2.
34. 386 F.3d 1070 (11th Cir. 2004) [hereinafter *FPIRG*].
35. FLA. ADMIN. CODE ANN. R. 62-302.200 to .800 (1997).
36. 386 F.3d at 1073, 1089.

"impaired" under Florida's separate water quality standards, which were adopted pursuant to the CWA.[37] The court held that plaintiffs, Florida Public Interest Research Group ("PIRG") and other groups, had standing and had presented a claim that was not moot.[38]

The substantive issue the case presented was whether the Florida Department of Environmental Protection ("FDEP") modified the state's existing water quality standards by establishing a new rule.[39] The CWA requires each state to establish water quality standards for all its bodies of water.[40] The standards must designate permissible use or uses of the water body and must also set basic criteria for the level of water quality necessary to allow the water body's designated use or uses safely. Each state may express the criteria numerically or narratively.[41] While the state initially establishes its own water quality standards, the EPA must undertake a review of any new or revised water quality standards adopted by the state.[42] Any new or revised state rule cannot allow further degradation of a water body's quality.[43]

The state must also maintain a list of waters it deems unsafe for its intended uses, known as the "Impaired Waters List." Once the state determines a water is impaired, both the state and federal governments must take action to control and remedy the pollution.[44]

Florida's water quality standards regulations, which set the maximum levels of pollutants that each water body can contain without becoming unsafe for use, state, among other things, that "[u]nless otherwise stated, all criteria express the maximum not be exceeded *at any time*."[45] The rules also provide that "[i]n no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or fauna."[46]

In April 2001 FDEP adopted an "Impaired Waters Rule," the stated purpose of which was to "'interpret existing water quality criteria and evaluate attainment of established designated use.'"[47] The rule further provided that its purpose was "not . . . to establish new water quality

37. *Id.* at 1074.
38. *Id.* at 1085, 1088.
39. *Id.* at 1073.
40. 40 C.F.R. § 131.2 (2004).
41. *FPIRG*, 386 F.3d at 1073.
42. *Id. See also* 33 U.S.C. § 1313(c)(2)(a) (2000). When the EPA undertakes such a review, the rule defines the issues it is required to consider. *FPIRG*, 386 F.3d at 1073.
43. *FPIRG*, 386 F.3d at 1073.
44. *Id.* at 1074.
45. *Id.* at 1075 (quoting FLA. ADMIN. CODE ANN. R. 62-302.530).
46. *Id.*
47. *Id.* (citation omitted).

criteria or standards."[48] The EPA provided the FDEP guidance in drafting the Impaired Waters Rule, but the EPA did not conduct the official review, which the CWA would require for any new or revised water quality standard.[49]

Plaintiffs sued under the CWA's citizen suit provision to force the EPA to conduct the review required of new or revised water quality standards. Plaintiffs contended that the Impaired Waters Rule effectively created new or revised water quality standards by first requiring more than a single sample from a water body to exceed a maximum concentration level of a pollutant before the water body would be deemed impaired (contradicting the standard that no maximum limit would be exceeded at any time); and second, by adopting specific nutrient concentrations to assess nutrient impairment, which do not exist in the water quality standards. Plaintiffs claimed that the water quality standards instead prohibited any nutrient imbalance from affecting natural populations of plant or animal life. Additionally, plaintiffs contended that the effect of the Impaired Waters Rule was a "more forgiving, looser water quality standard,"[50] which, as a practical matter, resulted in the state removing over two hundred waters from the Impaired Waters List.[51] The court noted that waters removed from the list were "no longer subject to procedures used to clean up impaired waters."[52] Even though the EPA reviewed the state's de-listing decisions individually and re-listed some waters, it did not formally review the rule or require Florida to change either the rule itself or its application of the rule in future updates to the Impaired Waters List.[53]

The district court granted defendants' motion for summary judgment.[54] As described by the Eleventh Circuit, the district court first reasoned that to amend the water quality standards, FDEP had to follow the rule-making procedure in Florida's Administrative Procedure Act.[55] Because FDEP did not do so, no amendment occurred.[56] Second, the court reasoned that an amendment to the standards required formal

48. *Id.*
49. *Id.* at 1076-77.
50. *Id.* at 1075.
51. *Id.* 1080 n.14. The parties disputed the exact number of water bodies de-listed by the FDEP's application of the Impaired Waters Rule. Because the EPA reviewed the de-listings individually and re-listed some the court found that at least over one hundred water bodies had been removed from the list and not replaced by the EPA. *Id.*
52. *Id.* at 1080.
53. *Id.* at 1079-80, 1080 n.13.
54. *Id.* at 1080.
55. FLA. STAT. ch. 120.54 (2002).
56. *FPIRG*, 386 F.3d at 1081.

EPA approval.[57] Because the EPA did not obtain that approval, no amendment occurred.[58] Finally, the court reasoned that because the terms of the Impaired Waters Rule stated that its purpose was not to establish new water quality criteria or standards, none could have legally been established.[59]

The Eleventh Circuit disagreed with the district court and remanded the case, holding that the district court was "required to conduct an independent inquiry into the actual effect of the Impaired Waters Rule" to determine whether the rule "has the [practical] effect of loosening Florida's water quality standards."[60] The court stated,

> if waterbodies that under pre-existing testing methodologies would have been included on the [impaired waters] list were left off the list because of the Impaired Waters Rule, then *in effect* the Rule would have created new or revised water quality standards, even if the language of the regulation said otherwise. This is the crux of the matter.[61]

If the district court were to find that the rule did create new or revised standards, then the EPA would have a non-discretionary duty to review the rule according to criteria set out in the EPA's own rules and its anti-degradation policy.[62]

C. NPDES Permit—Point Source

In *South Florida Water Management District v. Miccosukee Tribe of Indians*,[63] the United States Supreme Court held that a pump that did not itself generate pollutants but merely conveyed pollutant-containing water into a navigable water was a point source under the CWA. The Court further held that the pump's operation required a National Pollutant Discharge Elimination System ("NPDES") permit.[64] The Court also discussed, but did not decide, an issue with potentially far-reaching effects on governmental water management projects: The "unitary waters" approach to defining "navigable waters" under the CWA.[65]

---

57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 1089-90.
61. *Id.* at 1090.
62. *See id.* at 1088.
63. 541 U.S. 95 (2004).
64. *Id.* at 105.
65. *Id.* at 105-06.

The South Florida Water Management District (the "District") manages a system of canals, pumps, and levees constructed in the early 1900s by the Corps of Engineers to control flooding in south Florida. Prior to the system's construction, rain water in the area at issue drained south and east and joined groundwater to form a single large wetland. The system artificially separated the drainage into western and eastern sides, keeping the eastern side relatively dry and habitable. Presently, rain water that falls on the populated eastern side of the levee is collected in a canal and pumped over the levee into a wetland on the undeveloped western side, which is part of the Everglades ecosystem.[66] Describing the process, the Court stated, "[t]he combined effect of [the levees and canal] is artificially to separate the [canal] basin from [the wetland]; left to nature, the two areas would be a single wetland covered in an undifferentiated body of surface and ground water flowing slowly southward."[67] However, rain water that falls on the eastern side of the drainage also absorbs contaminants, primarily phosphorus from fertilizers, which are then trapped in the canal and eventually pumped into the wetland on the western side.[68]

The Miccosukee Tribe ("the Tribe") and another organization filed suit in the United States District Court for the Southern District of Florida to enjoin the District's operation of the pump that conveys the phosphorus-containing water from the canal on the eastern side of the levee to the wetland on the western side of the levee. Plaintiffs argued that the pump was a point source that discharged pollutants into "navigable waters," as defined in the CWA, for which the District did not have an NPDES permit. The district court granted summary judgment to the Tribe, ruling that the District was required to obtain an NPDES permit for the pump. The Eleventh Circuit affirmed.[69]

In its appeal, the District and the federal government as *amicus* made three separate arguments that the pump did not require an NPDES permit. First, the District's pumping of water from the canal to the wetland did not constitute an addition of pollutants from a point source within the meaning of the CWA because no pollutant originated from the pumping process.[70] Second, the CWA did not require a permit for the

---

66. *Id.* at 98-100.

67. *Id.* at 101.

68. *Id.*

69. *Id.* at 103. The Eleventh Circuit decision is reported at 280 F.3d 1364 (11th Cir. 2002).

70. *Id.* at 104-05. The CWA prohibits "any addition of any pollutant to navigable waters from any point source" except in compliance with an NPDES permit, which places limits on the type and quantity of pollutants that may be discharged. *Id.* at 102. A "point source" is in turn defined as "any discernible, confined and discrete conveyance from which

conveyance of unaltered water from one body of navigable water to another (the "unitary waters" argument).[71] Finally, the canal on the eastern side of the levees and the wetland on the west were actually two parts of a single, interconnected body of water, and thus, the act of pumping water from one to the other simply moved water around within the same water body rather than adding anything to a separate water body.[72]

As to the first issue, the Court held that the pump could be considered a point source that discharged pollutants to navigable waters and thus could require an NPDES permit.[73] The Court noted that a point source, by definition, is any "discernible, confined and discrete *conveyance*"[74] and stated "[t]hat definition makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters' . . . ."[75]

The Court discussed the second issue at greater length but did not decide it.[76] In its "unitary waters" theory, the Government as *amicus* argued that because the CWA definition of the discharge of a pollutant[77] does not contain the word "any" before "navigable waters," Congress did not intend to regulate the transfer of one "navigable water" into another. Instead, the Court concluded that Congress intended to regulate only the introduction of pollutants from a source other than a navigable water into navigable water.[78]

The Court raised several potential problems with the "unitary waters" theory of defining navigable waters.[79] The Court noted that other parts of the CWA suggest that "the Act protects individual water bodies as well as the 'waters of the United States' as a whole" and that the approach "could also conflict with current NPDES regulations."[80] The

---

pollutants are or may be discharged." *Id.* (quoting 33 U.S.C. § 1311 (2000) and 33 U.S.C. § 1362 (2000)).

71. *Id.* at 103-06. There was no dispute that the canal and the wetland were both navigable waters within the CWA's definition. *Id.* at 102.

72. *Id.* at 108.

73. *Id.* at 105.

74. *Id.* (quoting 33 U.S.C. § 1362(14) (2000)).

75. *Id.*

76. *Id.* at 109.

77. *Id.* at 105. The CWA definition of the discharge of a pollutant is "any addition of any pollutant to navigable water from any point source." *Id.* at 105-06.

78. *Id.* at 106. The Government's and other *amici's* primary concern with the Eleventh Circuit's holding appeared to be the regulatory burden it could place on public water supply networks, particularly in the west, that rely on water supply and flood control from the engineered transfer of water among various bodies of water. *Id.* at 108.

79. *Id.* at 105-06.

80. *Id.* at 107.

Court acknowledged that if it were to adopt the "unitary waters" approach, the District could operate its pump without an NPDES permit.[81] However, the Court ultimately declined to resolve the "unitary waters" issue because petitioners did not raise the argument before the Eleventh Circuit or in their petition for certiorari, and because the Court would vacate the grant of summary judgment to the Tribe and remand the case to the Eleventh Circuit based on the third issue raised by petitioners.[82] The Court noted that the issue would be available to petitioners on remand.[83]

The Court remanded the case on the third issue raised by petitioners, which petitioners had also raised below: The canal and the wetland were actually one hydrologically connected body of water, and thus, no NPDES permit was required to move water around in it.[84] The Court acknowledged there was significant evidence in the record that the two bodies of water were in fact one.[85] Most notably, the record reflected the possibility that if the pump was shut down, the canal would quickly flood and possibly join the wetland to form one body of water, which in turn "might call into question the Eleventh Circuit's conclusion that [the pump] is the cause in fact of phosphorus addition to [the wetland]."[86] The Court noted that the district court found that the canal and wetland were separate without considering this evidence, and therefore, the Court remanded the case for further development of the record.[87]

D. Section 404—NEPA Environmental Impact Statement

In *Georgia River Network v. U.S. Army Corps of Engineers*,[88] the United States District Court for the Northern District of Georgia held that the Corps of Engineers ("Corps") was not required to issue an Environmental Impact Statement ("EIS") prior to issuing a CWA section 404 permit[89] to defendant Henry County Water and Sewerage Authority ("HCA") to deposit fill material into Tussahaw Creek to construct a

---

81. *Id.* at 106.
82. *Id.* at 109.
83. *Id.*
84. *Id.* at 111-12. The parties did not dispute that if the canal and wetland were found to be two parts of the same water body, pumping water from one side to the other would not constitute the addition of pollutants and thus would not require an NPDES permit. *Id.*
85. *Id.* at 110.
86. *Id.* at 111.
87. *Id.* at 111-12.
88. 334 F. Supp. 2d 1329 (N.D. Ga. 2004).
89. Section 404 of the CWA, 33 U.S.C. § 1344 (2001), requires a party seeking to place dredge or fill material into waters of the United States to obtain a permit from the Corps.

dam and reservoir. Accordingly, the court denied plaintiffs' motions to enjoin the Corps from issuing the permit.[90]

In 2000 HCA applied for a section 404 permit to construct a reservoir on Tussahaw Creek in the Upper Ocmulgee River Basin to meet the water needs of its booming population. At the time the court issued its opinion, HCA's reservoir was one of forty-three reservoirs planned in Georgia, many in the north due to the population growth in the Atlanta metropolitan area. Furthermore, no comprehensive statewide plan existed to manage water resources, resulting in what the Corps described as a "race for permits" and the issuance of permits on a first-come, first-served basis for north Georgia counties seeking reservoirs.[91]

During the comment phase of the HCA's permit process, both the EPA and the U.S. Fish and Wildlife Service recommended that the Corps deny the permit, citing the need for a comprehensive assessment of the impact of pending reservoir permits in north Georgia.[92] However, after conducting an Environmental Assessment ("EA"), the Corps determined that HCA's reservoir did not pose a significant impact to the environment[93] and issued to HCA a 404 permit with mitigation conditions.[94]

Using the Eleventh Circuit's four-part test to determine whether an agency decision not to prepare an EIS was arbitrary or capricious,[95] the court reviewed the record before the Corps regarding direct, cumulative, and indirect impacts of the reservoir on wetlands, aquatic and wildlife habitat, and water quality and quantity. The court found in each case that the Corps had properly concluded either that the reservoir had no significant impact, or that the mitigation HCA was required to perform as part of the 404 permit would reduce the cumulative impact to a minimum on wetlands and streams.[96]

The court also determined that the Corps did not need to perform a comprehensive EIS, examining the impact of all pending reservoir

---

90. *Georgia River Network*, 334 F. Supp. 2d at 1332.

91. *Id.* at 1332-33.

92. *Id.* at 1333.

93. "Finding of No Significant Impact," or FONSI. NEPA and its relevant regulations require an agency to assess the environmental impact of a proposed agency action to determine whether it will have a significant impact on the environment. If so, the agency must perform an EIS. If not, the agency issues a FONSI. *Id.* at 1335.

94. *Id.* at 1333.

95. Under *Hill v. Boy*, 144 F.3d 1446 (11th Cir. 1998), the agency must have accurately identified the relevant environmental concern; it must have taken a "hard look" at each concern when preparing an EA; it must make a convincing case for a FONSI; and if the agency finds a significant impact, it can still avoid preparing an EIS if it finds that changes or safeguards in the project reduce the impact to a minimum. *Georgia River Network*, 334 F. Supp. 2d at 1335.

96. *Id.* at 1341-42.

decisions in north Georgia.[97] The court noted that a comprehensive EIS was sometimes warranted when the agency's projects were either regional or systemic in scope, or when a project was "one of a series of interrelated proposals that will produce cumulative systemwide effects that can be meaningfully evaluated together."[98] The court, however, determined that the Corps limited its review of the project's scope to the Ocmulgee basin, and plaintiffs did not challenge the scope. Thus, the reservoirs were not part of a regional plan or program.[99] Nothing in the record showed that the forty-two proposed reservoirs had a significant cumulative impact on a discrete area, thus eliminating the need for a comprehensive EIS.[100]

II. CLEAN AIR ACT

In *Sierra Club v. Leavitt*,[101] the Eleventh Circuit held that the EPA acted arbitrarily and capriciously in upholding a state agency's issuance of a preconstruction permit for a major stationary source of air pollutants under the Clean Air Act ("CAA").[102] In doing so the EPA failed to explain why the permit applicant, who was part owner of another non-compliant major stationary source, was entitled to have only the parts of the non-compliant source it actually owned considered for the purposes of its compliance with the requirements of the rule governing the issuance of preconstruction permits.[103]

In *Sierra Club* respondent Oglethorpe Power Corporation ("Oglethorpe") applied to the Georgia Environmental Protection Division ("EPD") in 2000 for preconstruction and Title V operating permits for Block 8, an unbuilt "power block" it had acquired from Georgia Power Company. Block 8 was located at part of Plant Wansley, a coal-fired

97. *Id.* at 1343.

98. *Id.* at 1342 (citing Isaak Walton Legal of Am. v. Marsh, 655 F.2d 346, 374 (D.C. Cir. 1981)).

99. *Id.* at 1343. The construction of a large number of reservoirs in north Georgia in the absence of a comprehensive water use plan, which perhaps would take into account the environmental impacts over a large region, was no doubt one of the problems plaintiffs sought to address by attempting to obtain a comprehensive EIS from the Corps. The court recognized as much when it stated that "[n]o reasonable person can disagree with Plaintiffs that some comprehensive consideration of the use of water resources in north Georgia should be considered. Plaintiffs, however, may have chosen the wrong reservoir in the wrong place to use NEPA as the tool to accomplish this goal." *Id.* The court indicated that this issue was better addressed by the state. *Id.*

100. *Id.*

101. 368 F.3d 1300 (11th Cir. 2004).

102. 42 U.S.C. § 4321 (2000); *Sierra Club*, 368 F.3d at 1309.

103. *Id.*

power plant in Heard County, Georgia.[104] When it applied for the permits, Oglethorpe was the owner of two of the four power-generating units at Plant Scherer, which is also in Georgia. The other two generating units at Scherer were owned by Georgia Power, and Plant Scherer was out of compliance with its Title V operating permit due to emissions from Georgia Power's units. Oglethorpe's units at Scherer were not out of compliance.[105]

Georgia's State Implementation Plan, adopted to implement the CAA, requires a so-called "preconstruction permit" for the construction of a new or modified "major stationary source," which the CAA defines as "any stationary source (or any group of stationary sources located within a contiguous area and under common control)" that emit in excess of a defined amount of air pollutants.[106] The relevant Georgia administrative rule (the "Georgia Rule") governing the issuance of preconstruction permits provides that

> [N]o permit to construct a new or modified major stationary source . . . shall be issued unless . . . (3) [t]he owner or operator of the proposed new or modified source has demonstrated that all major stationary sources owned or operated by such person (or by an entity controlling, controlled by, or under common control with such person) in this State, are subject to emission limitations and are in compliance, or on a schedule for compliance, with all applicable emission limitations and standards under the Act.[107]

Petitioner Sierra Club challenged Oglethorpe's permit application before the EPD, which issued the permit in 2002. Sierra Club petitioned the EPA to object to the issuance but the EPA declined. Sierra Club then appealed to the Eleventh Circuit.[108]

The issue before the Eleventh Circuit was whether, under the Georgia Rule, Oglethorpe should have been issued preconstruction and Title V operating permits for its new unit at Plant Wansley when it was an owner of two constituent units comprising Plant Scherer, which in turn was out of compliance with its Title V permit because of two other plant units that Georgia Power owned, not Oglethorpe.[109] The court noted that the Georgia Rule was ambiguous in this situation, for example,

---

104. *Id.* at 1303.
105. *Id.* at 1305.
106. *Id.* at 1302 n.1 (quoting 42 U.S.C. § 7661 (2003)).
107. *Id.* at 1305 (quoting GA. COMP. R. & REGS. R. 391-3-1-.03(8)(c)(3)).
108. *Id.* at 1301.
109. *Id.* at 1304, 1306-07. The court assumed *arguendo* that because two of its four units were out of compliance, Plant Scherer, as a major stationary source under Title V, was out of compliance. *See id.* at 1306 n.10.

when the permit applicant "owns *part* of a noncompliant major stationary source."[110] The court went on to note that when a regulation is ambiguous, the court follows *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*[111] and defers to the agency's interpretation of the regulation.[112] However, here the court concluded that deference was not appropriate because the EPA "failed entirely to address or explain part of the problem it faced."[113] The court noted that the EPA had presumed, without explanation, that when the applicant co-owned a non-compliant major stationary source, the Georgia Rule allowed the agency to consider the compliance status of only that portion of the source owned by the entity applying for the permit.[114] The court interpreted the EPA's finding in an implicit determination that "the Georgia Rule allows breaking major stationary sources into constituent parts with compliance determined individually."[115]

The court determined that in so doing, the EPA treated the two appearances of the term "major stationary source" in the Georgia Rule as having different meanings.[116] In other words, for the purpose of determining that Oglethorpe needed a preconstruction permit for its unit at Plant Wansley, the agencies determined that the unit was part of a single major stationary source because it was on contiguous property and under common control.[117] However, when considering whether all the major stationary sources that Oglethorpe owned or controlled were in compliance under the CAA, the agencies considered the units it owned at Plant Scherer separately from those Georgia Power owned. The court stated that in the EPA's order upholding the permit issuance,

> the EPA failed even to note that it ha[d] defined the same term, major stationary source, in two different ways, and it failed to acknowledge, much less explain or justify, the implicit policy decision driving the creation of the two definitions—that for the purposes of the Georgia

110. *Id.* at 1304 (emphasis added).
111. 467 U.S. 837 (1984).
112. *Sierra Club*, 368 F.3d at 1304.
113. *Id.*
114. *Id.* at 1305-06. Both EPA and EPD adopted the term "facilities" to describe and focus on only those power generating units owned by Oglethorpe, rather than "major stationary source," which is the term required by the rule. *Id.* at 1305. Thus, the agencies were able to conclude that "all of Oglethorpe Power's facilities in Georgia are in compliance with all applicable requirements." *Id.*
115. *Id.*
116. *Id.* at 1304.
117. *Id.* at 1303 n.6.

> Rule, "major stationary sources" may be broken into separate parts with compliance determined individually.[118]

The court noted that the rules of statutory interpretation require a consistent interpretation for a term appearing twice in statutory language and that while "[t]hese principles of statutory interpretation are not absolute, [the] EPA should offer something more before abandoning them."[119]

For these reasons, the court held that the EPA's decision upholding EPD's permit issuance was arbitrary and capricious.[120] The court refused to address the EPA's post-hoc justifications for interpreting the term differently within the same rule because the explanation was a "litigation position" in its brief and the agency itself did not articulate or explain its justification based on information it had during its decision-making process.[121] The court vacated the order upholding Oglethorpe's permit and remanded the case to the agency for further consideration.[122]

III. NATIONAL ENVIRONMENTAL POLICY ACT/WILDERNESS ACT

In *Wilderness Watch v. Mainella,*[123] the Eleventh Circuit held that the National Park Service ("Park Service") violated the Wilderness Act[124] and the National Environmental Policy Act of 1769 ("NEPA")[125] when it began transporting visitors in motor vehicles through Cumberland Island's designated wilderness area to visit historic sites on the north end of the island.[126]

Cumberland Island, on the Georgia coast, was declared a National Seashore in 1972. In 1982 Congress designated 19,000 acres of the island to either wilderness or potential wilderness, including much of the northern end of the island. Park Service land on the island also includes two historic sites on the north end: Plum Orchard and the Settlement.

---

118. *Id.* at 1306.
119. *Id.*
120. *Id.* at 1303.
121. *Id.* at 1307.
122. *Id.* at 1309.
123. 375 F.3d 1085 (11th Cir. 2004).
124. 16 U.S.C. § 1131 (2000).
125. 42 U.S.C. § 4321 (2000).
126. *Wilderness Watch*, 375 F.3d at 1096. The portion of the court's holding regarding the Wilderness Act has apparently been rendered moot by the passage of Public Law No. 108-447 (2004), the omnibus spending bill signed into law on December 8, 2004. This law contains provisions by Representative Jack Kingston of Georgia that redraw the wilderness area on Cumberland Island to exclude the road at issue in this case.

Vehicle access to these sites is by a one-lane dirt road that runs through the wilderness area.[127]

The Park Service has traditionally used the road to access the sites for maintenance purposes as needed. In 1999 the Park Service began providing vehicle transportation to the sites for island visitors, first in four-person vehicles then in a fifteen-passenger van on a regular schedule. After litigation commenced in 2002, the Park Service began transporting visitors to Plum Orchard by boat and discontinued van service there, but continued to use the van and the road to take visitors to the Settlement.[128]

Plaintiffs filed suit to enjoin transportation of visitors by vehicle across the wilderness area, contending that the practice violated the Wilderness Act's restriction on the use of motor vehicles in a wilderness area.[129] Plaintiffs further argued that under NEPA, the Park Service should have conducted a review of the practice's potential environmental impacts before it began.[130]

The Park Service contended that its transportation of visitors to the historic sites was permissible under the Act because (1) the Park Service required vehicle access to meet its separate obligation to maintain the historic structures in the wilderness area, which is part of its duty to "further the purposes of the Wilderness Act," and (2) under the Act, designated wilderness may be used for "public purposes."[131] Regarding the NEPA claim, the Park Service admitted that it did not perform an environmental impact review, but argued that its activities relating to the sites' maintenance were exempt from NEPA requirements.[132]

The court reversed the district court's grant of summary judgment to the Park Service.[133] Regarding plaintiffs' Wilderness Act claim, the

---

127. *Id.* at 1088-89.

128. *Id.* at 1084, 1090 n.6.

129. The Wilderness Act prohibits the use of motor vehicles in a wilderness area "except as necessary to meet minimum requirements for the administration of the area." 16 U.S.C. § 1133(c) (2000).

130. *Wilderness Watch*, 375 F.3d at 1087. Under the NEPA, federal agencies must document "the potential environmental impacts of significant decisions before they are made, thereby insuring that environmental issues are considered by the agency and that important information is made available to the larger audience that may help to make the decision or will be affected by it." *Id.* at 1094.

131. *Id.* at 1090.

132. *Id.* at 1094. The Park Service cited a regulation of the Council on Environmental Quality that excluded from the NEPA environmental impact review requirement any "routine and continuing government business, including . . . administration [and] maintenance . . . activities having limited context and intensity; e.g., limited size and magnitude or short-term effects." *Id.*

133. *Id.* at 1087-88, 1096.

court first noted that the Park Service's obligation to maintain the historic structures came from the National Historic Preservation Act,[134] and not from the Wilderness Act.[135] The court determined that the purpose of the Wilderness Act was the maintenance of a designated area in its natural state.[136] In any event, the court concluded that "[t]he Park Service's decision to 'administer' the Settlement using a fifteen-passenger van filled with tourists simply cannot be construed as 'necessary' to meet the 'minimum requirements' for administering the area 'for the purpose of the [Wilderness Act].'"[137] The court further held that the language of the specific Wilderness Act provision at issue and the Wilderness Act's overall purpose and structure demonstrated that "Congress has unambiguously prohibited the Park Service from offering motorized transportation to park visitors through the wilderness area."[138]

The court also concluded that the Park Service violated the NEPA.[139] The court held that for the Park Service to rely on the regulatory exclusion from NEPA requirements for routine government business, it would have had to show it considered whether the exclusion applied to the proposed activity in question before undertaking the activity, which the Park Service did not do.[140] However, the court rejected the argument that the categorical exclusion for 'routine and continuing government business' included the agency action.[141] The court concluded that "obtaining a large van to accommodate fifteen tourists hardly appears to be a 'routine and continuing' form of administration and maintenance."[142]

---

134. 16 U.S.C. § 470 et. seq. (2000).
135. *Wilderness Watch*, 375 F.3d at 1091.
136. *Id.* at 1092.
137. *Id.* at 1092.
138. *Id.* at 1094.
139. *Id.* at 1095.
140. *Id.*
141. *Id.* at 1094.
142. *Id.* at 1095. The court's holding regarding the NEPA issue does not specifically state that the Park Service should have performed an environmental impact review. *Id.* The holding appears to be that the Park Service violated NEPA by failing to determine, prior to making the decision to transport visitors through the wilderness area, whether the exclusion for "routine and continuing government business," including relevant exceptions to the exclusion, applied to this activity. *Id.* The court's NEPA holding may be more significant after the legislative revision to the wilderness area designation on Cumberland, which apparently renders moot the court's holding that the Wilderness Act prohibited the transportation of passengers in vehicles through the area.