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Environmental Law, Eleventh Circuit Survey

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Environmental Law

by Travis M. Trimble*

The United States Court of Appeals for the Eleventh Circuit decided cases in 2008 that addressed the scope of agency discretion in several contexts. In an issue of first impression under the Clean Air Act (CAA),[1] the court held that the Environmental Protection Agency (EPA) properly exercised its discretion in not objecting to the issuance of an operating permit to a power company that the agency had earlier formally accused of violating the CAA.[2] In another case, the court held that the Federal Emergency Management Agency had the discretion to protect endangered species while administering the National Flood Insurance Act[3] and thus was required to comply with the Endangered Species Act[4] to ensure that its actions did not jeopardize endangered species.[5] In a case involving the National Environmental Policy Act (NEPA),[6] the court held that the United States District Court for the Southern District of Florida had not afforded the EPA the proper deference in reviewing the agency's Environmental Impact Statement prepared pursuant to NEPA, and the agency's subsequent decision to issue Clean Water Act[7] permits allowing mining in wetlands.[8] The court also held that the EPA did not act arbitrarily or capriciously in issuing a final rule altering the obligations of operators of underground injection wells under the Safe Drinking Water Act.[9] Finally, the court

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1. 42 U.S.C. §§ 7401-7671q (2006).
2. Sierra Club v. Johnson, 541 F.3d 1257, 1269 (11th Cir. 2008).
3. 42 U.S.C. §§ 4001-4129 (2006).
4. 16 U.S.C. §§ 1531-1544 (2006).
5. Florida Key Deer v. Paulison, 522 F.3d 1133, 1144 (11th Cir. 2008).
6. 42 U.S.C. §§ 4321-4347 (2006).
7. 33 U.S.C. §§ 1251-1387 (2006).
8. Sierra Club v. Van Antwerp, 526 F.3d 1353, 1363 (11th Cir. 2008).
9. 42 U.S.C. §§ 300f-300j (2006); Miami-Dade County v. EPA, 529 F.3d 1049, 1071 (11th Cir. 2008).

held that the government's remediation plan at a federal facility that had not been listed on the National Priorities List was selected pursuant to provisions of the Comprehensive Environmental Response, Compensation, and Liability Act[10] that deprived the federal district court of jurisdiction to hear a citizen suit challenging the sufficiency of the plan.[11]

I. CLEAN AIR ACT

In *Sierra Club v. Johnson*,[12] in an issue of first impression, the Eleventh Circuit held that the EPA had discretion not to object to the Georgia Environmental Protection Division's (EPD) issuance of a Clean Air Act (CAA)[13] Title V operating permit to a power company when the EPA had previously issued a notice of violation and filed a civil enforcement action against the power company for alleged violations of the CAA.[14]

The CAA creates a comprehensive regulatory scheme to prevent and control air pollution.[15] Under Title V of the CAA, every major source of air pollution must obtain an operating permit specific to that source.[16] The permit sets out emissions limits and monitoring requirements for that source.[17] An operating permit may also include limits for the prevention of significant deterioration (PSD) of air quality in certain geographical areas of the country; however, sources in existence as of August 7, 1977, are not required to comply with PSD limits.[18]

In states in which the EPA has delegated permitting authority, such as Georgia, the state issues Title V operating permits, but the EPA retains the right (and the duty) to object to state-issued permits that do not comply with the CAA.[19] The EPA itself may challenge a permit, or, if the EPA does not object to a permit, any person may challenge this decision by petitioning the EPA.[20] In this circumstance, the CAA provides that "'[t]he Administrator [of the EPA] shall issue an objection

10. 42 U.S.C. §§ 9601-9675 (2006).
11. OSI, Inc. v. United States, 525 F.3d 1294, 1299 (11th Cir. 2008).
12. 541 F.3d 1257 (11th Cir. 2008).
13. 42 U.S.C. §§ 7401-7671q (2006).
14. *Sierra Club*, 541 F.3d at 1259.
15. *Id.* at 1260 (citing 42 U.S.C. § 7401 (2006)).
16. *Id.* (citing Sierra Club v. Johnson, 436 F.3d 1269, 1272 (11th Cir. 2006)).
17. *Id.* (quoting Sierra Club v. Ga. Power Co., 443 F.3d 1346, 1348-49 (11th Cir. 2006)).
18. *Id.* at 1260-61.
19. *See* 42 U.S.C. § 7661d(b) (2006).
20. *Id.*

. . . if the petitioner *demonstrates* to the Administrator that the permit is not in compliance with the requirements of [the CAA].'"[21]

At issue in this case were operating permits issued by the Georgia EPD to two of Georgia Power Company's electric generating plants: Bowen and Scherer.[22] Georgia Power added two steam emission units to Plant Scherer in the 1970s and modified a boiler at Plant Bowen in the 1990s without obtaining operating permits that applied PSD limits to the plants. In 1999 the EPA issued a notice of violation to Georgia Power, stating that these upgrades constituted major modifications to the plants that triggered the PSD requirements. Georgia Power did not correct the alleged violations, and in the same year, the EPA filed a civil enforcement action seeking an injunction and penalties. Georgia Power answered, contending that the units at Scherer were exempt from PSD requirements because Georgia Power began construction on the units in 1974. Additionally, Georgia Power contended that the Bowen modifications had not resulted in net emission increases and therefore were not major modifications. The United States District Court for the Northern District of Georgia administratively closed the enforcement action pending a decision from a multidistrict litigation panel relevant to the issues raised by the parties. In 2002 the court denied without prejudice a motion by the United States to reopen the case. Subsequently, the United States did not attempt to reopen the case.[23]

In 2004 Georgia Power applied for—and the EPD issued—renewed Title V permits for the plants without including PSD requirements. The EPA did not object to the renewed permits. The petitioners petitioned the EPA to object to the permits, basing their challenge on the EPA's earlier violation notice and civil enforcement action.[24] The EPA denied the petition, concluding that the violation notice and civil enforcement action were not conclusive evidence of a CAA violation but merely "initial steps in the process" of determining whether a violation had occurred.[25] Thus, the EPA concluded that it had the discretion not to object to the permits because the petitioners failed to sufficiently demonstrate that the permits were not in compliance with the CAA.[26]

The Eleventh Circuit affirmed the agency's denial of the petition, holding that the EPA did not act arbitrarily or capriciously in concluding that the petitioners had not demonstrated that the permits were not in

21. *Sierra Club*, 541 F.3d at 1261 (ellipsis in original) (quoting 42 U.S.C. § 7661d(b)(2)).
22. *See id.* at 1259-60.
23. *Id.* at 1262.
24. *Id.* at 1262-63.
25. *Id.* at 1263.
26. *Id.*

compliance with the CAA.[27] First, the court agreed with the EPA that the second prong of the CAA's permit review provision,[28] which requires the EPA to object to a permit "'if the petitioner *demonstrates* . . . that the permit is not in compliance with the . . . [CAA],'"[29] is both discretionary and ambiguous: the EPA must judge whether a petitioner has demonstrated noncompliance, and neither the CAA nor its regulations define the term "demonstrates."[30] Thus, the court concluded that it must defer to the EPA's judgment that the petitioners failed to demonstrate noncompliance so long as the agency's decision was reasonable.[31]

Second, the court determined that the EPA's interpretation was reasonable.[32] The petitioners' only evidence that the Georgia Power permits were not in compliance with the CAA was the EPA's 1999 notice of violation and subsequent civil enforcement action.[33] The court noted that, under the CAA, the EPA could issue a notice of violation based on "'any information available'" to the agency, such as, "'a staff report, newspaper clipping, [or] anonymous phone tip,'"—a standard the court described as "exceedingly low."[34] Thus, a notice of violation would not necessarily indicate that a violation had occurred.[35]

Furthermore, the court concluded that the dormant civil enforcement action did not necessarily demonstrate the permits' noncompliance.[36] The court noted that the EPA's allegations in the action were "fiercely contested" by Georgia Power and that there had been no determination on the merits of the case.[37] The court acknowledged that by denying the petition of the petitioners, the EPA had put itself "in the peculiar position of defending its decision not to object to the operating permits without backing away from its violation notice or enforcement action,"[38] but the court concluded nonetheless that the agency's decision was reasonable.[39]

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27. *Id.* at 1269.
28. *See* 42 U.S.C. § 7661d(b)(2).
29. *Sierra Club*, 541 F.3d at 1265 (quoting 42 U.S.C. § 7661d(b)(2)).
30. *Id.* at 1266-67.
31. *Id.* at 1267.
32. *See id.* at 1267-69.
33. *Id.* at 1267.
34. *Id.* (quoting Tenn. Valley Auth. v. Whitman, 336 F.3d 1236, 1241 (11th Cir. 2003)).
35. *Id.*
36. *Id.*
37. *Id.* at 1268.
38. *Id.* at 1260.
39. *Id.* at 1269.

The court also acknowledged (but rejected) the United States Court of Appeals for the Second Circuit's reasoning in *New York Public Interest Research Group, Inc. v. Johnson*,[40] that reached the opposite conclusion.[41] In *Johnson* the Second Circuit held that the petitioners' evidence, which consisted of a state-issued violation notice and a pending civil enforcement action, was sufficient to demonstrate to the EPA that the permits at issue did not comply with the CAA.[42] According to the Eleventh Circuit, the Second Circuit based its holding on four rationales: first, the agency must make a finding that a violation of the CAA occurred before issuing a notice of violation; second, an agency's civil enforcement complaint is more significant than other complaints because of procedures undertaken by the agency before issuing the complaint; third, the agency is in a "'privileged position to monitor and regulate'" permitees and thus could claim to be uncertain of which permit requirements applied; and fourth, private parties should not be required to duplicate an agency's findings of noncompliance.[43]

The Eleventh Circuit was not persuaded by these arguments.[44] First, it explained that the agency's findings to support a notice of violation could be supported by "any information available," which as the court already noted, was a low standard of proof.[45] Second, the court refused to distinguish an agency complaint from any other because, as with all complaints, "the allegations it contains must be proven."[46] Third, in addressing the agency's "privileged position" to monitor permittees, the court explained that the agency was also in a privileged position to assess "the current strength of its case" in evaluating whether the issue had been resolved.[47] Finally, the court challenged the Second Circuit's reasoning that a private petitioner should not be required to duplicate an investigation already made by the agency.[48] According to the court, allowing a private petitioner merely to rely on an agency-issued notice of violation would "render meaningless" the statutory provision's directive that the petitioner "demonstrate" noncompliance.[49] Further, the court added that "[h]ad Congress intended the Administrator to object to an operating permit every time a violation notice is issued, it

40. 427 F.3d 172 (2d Cir. 2005).
41. *See Sierra Club*, 541 F.3d at 1268.
42. *Id.* (citing *Johnson*, 427 F.3d at 180).
43. *Id.* (quoting *Johnson*, 427 F.3d at 181).
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *See id.* at 1268-69.
49. *Id.*

could have easily made that an explicit part of the . . . permit review process. It did not."[50] In reaching its conclusion, the court expressly did not attempt "to define precisely the burdens facing a petitioner" under the CAA permit review provision.[51]

II. ENDANGERED SPECIES ACT

In *Florida Key Deer v. Paulison*,[52] the Eleventh Circuit held that FEMA had discretion to protect endangered species in administering the National Flood Insurance Act (NFIA);[53] therefore, the agency was subject to § 7(a)(2) of the Endangered Species Act (ESA),[54] which requires federal agencies to ensure that their actions do not jeopardize endangered or threatened species or their critical habitats.[55] The court also held that FEMA's "community rating system," which awarded communities with credits and reduced insurance rates for voluntarily adopting a habitat conservation plan, did not fulfill the agency's obligation under § 7(a)(1) of the ESA,[56] requiring federal agencies to carry out conservation programs to further the purposes of the ESA.[57]

The NFIA authorizes FEMA to provide low-cost flood insurance throughout the United States through the National Flood Insurance Program (the Program).[58] To be eligible for the Program, a community must demonstrate a positive interest in obtaining flood insurance and must adopt "adequate land use and control measures that are consistent with the comprehensive criteria for land management and use developed by FEMA pursuant to [the NFIA]."[59] FEMA is charged with developing those criteria, which must ensure that localities receiving flood insurance through the Program must, among other things, "'improve the long-range land management and use of flood-prone areas.'"[60] The NFIA also requires FEMA to establish a community rating system that provides discounts on insurance premiums in communities that establish floodplain management regulations beyond the minimum eligibility criteria.[61]

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50. *Id.* at 1269 (citation omitted).
51. *Id.* at 1266.
52. 522 F.3d 1133 (11th Cir. 2008).
53. 42 U.S.C. §§ 4001-4129 (2006).
54. 16 U.S.C. § 1536(a)(2) (2006).
55. *Florida Key Deer*, 522 F.2d at 1143.
56. 16 U.S.C. § 1536(a)(1) (2006).
57. *Florida Key Deer*, 522 F.2d at 1146-47.
58. *Id.* at 1136 (citing 42 U.S.C. § 4011 (2006)).
59. *Id.* at 1137 (citing 42 U.S.C. §§ 4102(c), 4022(a) (2006)).
60. *Id.* (quoting 42 U.S.C. § 4102(c)).
61. *Id.* (citing 42 U.S.C. § 4022(b) (2006)).

The ESA, administered in relevant part by the Fish and Wildlife Service (FWS), provides for the protection of endangered and threatened species (Listed Species) and their habitats.[62] To this end, § 7(a)(1) of the ESA provides that all federal agencies "'shall . . . utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of [Listed Species].'"[63] Section 7(a)(2) of the ESA, further provides that every federal agency shall "'insure [sic] that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize . . . [Listed Species or their critical habitats].'"[64] A joint regulation of the departments responsible for administering the ESA[65] in effect during the pendency of the case provides that section 7 of the ESA applies to all federal agency actions "'in which there is discretionary Federal involvement or control.'"[66]

ESA regulations provide for a process by which a federal agency contemplating action that may affect a Listed Species or its habitat must consult with the FWS regarding such action.[67] If the FWS believes that the agency's action will jeopardize a Listed Species or its habitat, then it must issue an opinion detailing how the federal agency's action will do so and suggest alternatives that the agency can take to avoid such a threat.[68] Upon receipt of the FWS's opinion, the agency may choose to terminate its action, adopt the alternatives recommended by the FWS, or seek a cabinet-level exemption.[69]

The events giving rise to *Florida Key Deer* began in 1984 when the FWS first determined that FEMA's administration of the Program in the Florida Keys jeopardized the existence of the Florida Key deer, a Listed Species, by authorizing development that destroyed the deer's habitat. In 1989 FEMA refused the FWS's request for a consultation, asserting that the ESA did not apply to the Program. In 1990 the plaintiffs, composed of various wildlife organizations, filed suit on behalf of the deer and obtained an injunction from the United States District Court for the Southern District of Florida requiring FEMA to consult with the FWS regarding the Program's impact on the Listed Species. Following the consultation, in 1997 the FWS issued its opinion that FEMA's administration of the Program jeopardized the deer, along with eight

62. *See id.* at 1137-38. The FWS's administration of the ESA is at issue in this case. *Id.* at 1138 n.2.

63. *Id.* at 1138 (quoting 16 U.S.C. § 1536(a)(1)).

64. *Id.* (quoting 16 U.S.C. § 1536(a)(2)).

65. The Department of the Interior and the Department Commerce.

66. *Florida Key Deer*, 522 F.2d at 1141 (quoting 50 C.F.R. § 402.03 (2008)).

67. *Id.* at 1138.

68. *Id.* at 1139.

69. *Id.*

other Listed Species, and recommended alternatives. Those alternatives included the FWS reviewing new developments in Monroe County, Florida—the area at issue—for compliance with the ESA, and FEMA developing an incentive program to provide lower premiums within the county in return for the county's development of a habitat conservation plan.[70]

The plaintiffs filed an amended complaint, contending that the alternatives proposed by the FWS would not prevent FEMA's Program from jeopardizing the Listed Species, which was a violation of § 7(a)(2). Additionally, the plaintiffs argued that the conservation program adopted by FEMA did not satisfy § 7(a)(1). In 2005 the district court granted the plaintiffs' motion for summary judgment on these two claims and enjoined FEMA from issuing flood insurance for new developments in the Listed Species' habitat until it brought the Program into compliance with the ESA.[71]

On appeal, the Eleventh Circuit held that § 7(a)(2) of the ESA, which requires federal agencies to ensure that their actions do not jeopardize Listed Species, applied to FEMA's administration of the Program because FEMA had the discretion to protect Listed Species in administering the Program.[72] The court noted that during the pendency of the appeal, the United States Supreme Court upheld the validity of the regulation construing the scope of § 7 of the ESA.[73] The Supreme Court held that under the regulation, an agency is subject to the requirement of § 7(a)(2) of the ESA if the agency has the discretion in taking a particular action "'to consider the protection of threatened or endangered species as an end in itself.'"[74]

Applying this standard, the Eleventh Circuit noted that pursuant to FEMA's enabling legislation,[75] the agency develops the criteria to determine whether communities are eligible for flood insurance under the Program.[76] In doing so, FEMA is directed to, among other things, encourage state and local governments to adopt planning measures to "'*improve the long-range land management and use* of flood-prone

70. *Id.* at 1139-40.

71. *Id.* at 1140.

72. *Id.* at 1142-43.

73. *Id.* at 1141 (citing Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007)).

74. *Id.* (quoting *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2537).

75. FEMA's enabling legislation is the National Flood Insurance Act, Pub. L. No. 90-448, 82 Stat. 572 (1968) (codified as amended at 42 U.S.C. §§ 4001-4129 (2006)). *See Florida Key Deer*, 522 F.3d at 1142.

76. *Florida Key Deer*, 522 F.3d at 1142.

areas.'"[77] Thus, the court held that FEMA has "broad discretion" to develop eligibility criteria under this directive, including the discretion to consider the protection of Listed Species.[78]

Additionally, the court held that § 7(a)(1) of the ESA imposed an affirmative obligation on FEMA to develop a species conservation program as part of its administration of the Program in the Florida Keys.[79] The court reasoned that FEMA's community rating system, whereby communities voluntarily electing to participate could develop conservation programs in exchange for lower insurance rates, amounted to "total inaction," which was not permitted under the ESA.[80] The court noted that in the nine years FEMA had offered the program, no community had elected to participate.[81] The court declined to define the scope of FEMA's discretion in developing a conservation program under § 7(a)(1), holding only that FEMA had a "baseline requirement" to develop some program, which it had not done.[82]

III. NATIONAL ENVIRONMENTAL POLICY ACT

In *Sierra Club v. Van Antwerp*,[83] the Eleventh Circuit held that the United States District Court for the Southern District of Florida failed to grant the Army Corps of Engineers (the Corps) the proper level of deference in deciding issues raised by the plaintiffs' National Environmental Policy Act (NEPA)[84] and Clean Water Act (CWA)[85] claims.[86]

A group of mining companies owned a substantial portion of a 60,000-acre area of wetlands east of Everglades National Park and northwest of Miami, in southern Florida. At the mining companies' request, in the late 1990s the Corps began investigating the possibility of issuing CWA permits, which would allow mining in a 15,800-acre tract for fifty years. In 1999 the Corps issued a draft Environmental Impact Statement (EIS), pursuant to NEPA, in which the Corps recognized that the mining would have serious negative environmental impacts.[87] The draft EIS drew extensive criticism during the public comment period, including criticism from other federal agencies raising "serious environmental, technical,

77. *Id.* (quoting 42 U.S.C. § 4102(c)).
78. *Id.*
79. *Id.* at 1146.
80. *Id.* at 1147.
81. *Id.*
82. *Id.* at 1146-47.
83. 526 F.3d 1353 (11th Cir. 2008).
84. 42 U.S.C. §§ 4321–4347 (2006).
85. 33 U.S.C. §§ 1251–1387 (2006).
86. *Van Antwerp*, 526 F.3d at 1359.
87. *Id.* at 1356-57.

and legal concerns."[88] In 2000 the Corps issued a final EIS that followed the draft EIS in recognizing that the mining would have an "irreversible significant impact on the environmental resources of the region."[89] The final EIS also proposed that some mitigation could be required in the permits, including requiring the companies to purchase and preserve wetlands adjacent to the proposed mining area. Following the final EIS, the Corps gave public notice that it intended to issue the permits.[90]

Following this notice, the Corps received additional information (1) that mining would impact the Miami area's primary source of drinking water significantly more than the Corps anticipated in its EIS and (2) that the Corps' mitigation requirement to purchase and preserve wetlands was cost-prohibitive to the companies because of rising property values in areas adjacent to the mining area. As a result, the Corps decided to issue ten-year mining permits covering only five thousand acres. The Corps refused to draft a supplemental EIS. Instead, the Corps issued a Record of Decision concluding that mining in the more limited area would have no significant impact on the environment other than what was discussed in the original EIS, on which the Corps based its initial decision to grant the permits.[91]

The plaintiffs (various public interest environmental groups) brought suit, contending that the Corps' decision to grant the permits was arbitrary and capricious in violation of the Administrative Procedure Act (APA).[92] All parties moved for summary judgment. The district court granted the plaintiffs' motion, vacating the permits.[93]

The Eleventh Circuit vacated the district court's order and remanded the case.[94] In its conclusion, the Eleventh Circuit offered no opinion on whether the Corps complied with the necessary agencies during the permit process, instructing the district court to answer this question by applying the proper standard of review.[95] By applying the proper standard, the district court can determine whether the Corps' decision to grant the permits was arbitrary and capricious.[96] The court first noted that only two of the plaintiffs' four claims against the Corps on which the district court granted summary judgment could properly be

88. *Id.* at 1357.
89. *Id.* at 1357 n.1 (internal quotation marks omitted) (citation omitted).
90. *Id.* at 1357.
91. *Id.*
92. 5 U.S.C. §§ 500-596, 701-706 (2006).
93. *Van Antwerp*, 526 F.3d at 1356.
94. *Id.* at 1364.
95. *Id.* at 1363-64.
96. *Id.* at 1359.

the basis of the district court's order: (1) a claim based on the CWA because the Corps improperly found that there were no practicable alternatives to the permits as issued after weighing the benefits and detriments of the project without holding a public hearing and (2) a claim based on NEPA that the Corps failed to meet NEPA's requirements in issuing the final EIS.[97]

First addressing the NEPA issue, the court reviewed an agency's duties under NEPA.[98] An agency must first determine whether its action constitutes a "'major [f]ederal action,'" that is, one that "'significantly affect[s] the quality of the human environment.'"[99] If it is such an action, the agency must prepare an EIS.[100] If the agency subsequently learns new information revealing a significant environmental effect that was not considered in preparing the initial EIS, it must issue a supplemental EIS.[101] However, if the agency takes "minimizing measure[s]" in its responsive action to the new information, it is not required to prepare a supplemental EIS if the environmental impacts of the action fall within those already considered as part of the original EIS.[102]

The court then framed the issues on appeal with regard to the NEPA claim: (1) whether the Corps' determination that the 10-year, 5,000-acre permits would have no significant environmental impacts beyond those considered in the original EIS was arbitrary and capricious or an abuse of discretion; (2) whether the Corps' determination that new information regarding the possible contamination of Miami's drinking water source and the mining's potentially detrimental impact on the wood stork did not require a supplemental EIS was arbitrary and capricious or an abuse of discretion; and (3) whether the original EIS complied with NEPA.[103]

The court noted that in reviewing whether an agency has met its obligations under NEPA, a court must afford "substantial deference" to the agency.[104] Further, the court explained that "NEPA is procedural,

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97. *Id.* The court held that the plaintiffs' two other claims on which the district court granted summary judgment, a claim against the Corps involving the ESA and a claim against the FWS based on decisions that the two agencies made regarding the mining's impact on an endangered wood stork, were moot at the time the district court issued its injunction. *Id.*

98. *Id.* at 1360.

99. *Id.* (quoting 42 U.S.C. § 4332(C) (2006)).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 1361.

104. *Id.*

setting forth no substantive limits on agency decision-making."[105] Thus, "NEPA can *never* provide grounds for a court to direct a federal agency's substantive decision."[106]

Here, the court determined that the district court "frequently condemned Corps actions based on simple disagreement, rather than based on a finding that the actions violated the APA's deferential standard."[107] The court continued:

> The district court's NEPA analysis erroneously focuses on the Corps's decision to take the major Federal action—granting the permits—and the adequacy of the mitigation measures on which the Corps conditioned the permits. Substantive issues like whether to grant the permits and what mitigation conditions to adopt are irrelevant to NEPA compliance.[108]

The court explained that NEPA cannot prohibit an agency from taking an action, even in the face of clear negative impacts to the environment, when the agency's decision is based on its conclusion that the economic or other benefits of taking the action outweigh any negative environmental impacts.[109] Because the district court did not limit its review of the Corps' permitting decision to the proper scope, the court of appeals vacated the plaintiffs' summary judgment and remanded for proper review.[110]

With regard to the CWA issue on appeal, and without discussing the proper scope of review in detail, the court held that the district court's decision suffered from the "same pervasive lack of deference . . . . As with its NEPA analysis, the court failed to view the CWA claims through the deferential lens of the APA."[111] Thus, the court also vacated the judgment on the CWA claim.[112]

IV. SAFE DRINKING WATER ACT/ADMINISTRATIVE PROCEDURE ACT

In *Miami-Dade County v. EPA*,[113] the Eleventh Circuit upheld a final rule[114] issued by the EPA pursuant to the Safe Drinking Water

105. *Id.* (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989)).
106. *Id.* at 1362.
107. *Id.* at 1361.
108. *Id.* at 1362 (footnote omitted).
109. *Id.* at 1361-62.
110. *Id.* at 1362-63.
111. *Id.* at 1363.
112. *Id.*
113. 529 F.3d 1049 (11th Cir. 2008).
114. *See* 40 C.F.R. §§ 146.15, 146.16 (2008).

Act (SDWA).[115] The court held that the plaintiffs had adequate notice of the final rule because it was a "logical outgrowth" of the draft rule despite differences between the draft rule and the final version.[116] The court further held that the EPA's interpretation of the "endangerment" standard[117] of the SDWA as it was embodied in the final rule was not arbitrary and capricious.[118]

The SDWA regulates the practice of the underground injection of wastewater and, more specifically, protects underground sources of drinking water from contamination.[119] The SDWA provides that underground injection of wastewater "endangers" drinking water sources

> if such injection may result in the presence in underground water which supplies . . . any public water system of any contaminant, and if the presence of such contaminant may result in such system's not complying with any . . . primary drinking water regulation or may otherwise adversely affect the health of persons.[120]

The EPA's initial regulations implementing the SDWA prohibited the movement of fluid containing any contaminant into an underground drinking water source.[121] The EPA allowed the state permitting authorities to determine well-construction methods ensuring that this "no-fluid-movement" standard was met.[122] In the 1990s, however, groundwater monitoring demonstrated that despite such methods, fluid from underground wastewater injection wells was reaching drinking water sources in Florida. Accordingly, in 2000 the EPA proposed a rule revision to apply to all municipal waste disposal wells that could contaminate drinking water sources. Under the draft rule, well operators could either provide advance wastewater treatment and disinfection coupled with a demonstration that any contaminants left after treatment would not "endanger" a drinking water source or, without providing advance treatment, could conduct a demonstration showing that the well did not cause contamination of a drinking water source.[123]

The EPA issued its final rule in 2005. Under the final rule, operators of wells from which contaminant migration was occurring were required

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115. 42 U.S.C. §§ 300f-300j (2006); *see Miami-Dade County,* 529 F.3d at 1071.
116. *Miami-Dade County*, 529 F.3d at 1060.
117. *See* 42 U.S.C. § 300h(d)(2) (2006).
118. *Miami-Dade County,* 529 F.3d at 1067.
119. *Id.* at 1052.
120. 42 U.S.C. § 300h(d)(2).
121. *Miami-Dade County,* 529 F.3d at 1053.
122. *Id.*
123. *Id.* at 1054-55.

within five years of the effective date of the rule to treat the wastewater prior to injection.[124] The EPA explained that the final rule was a modified version of the first option under the draft rule and that the "non-endangerment demonstration requirement had been eliminated" because the treatment requirements under the new rule "would necessarily eliminate any concern about [contaminants] remaining after treatment."[125] The petitioners, the Sierra Club and various local governments, challenged the final rule on several grounds, including lack of notice of the rule's content and the EPA's allegedly arbitrary and capricious interpretation of the "endangerment" definition in the SDWA.[126]

The Eleventh Circuit denied the petition.[127] First, regarding notice, the Sierra Club challenged the elimination of the demonstration requirement that had been in the draft rule.[128] The court noted that an agency may change a draft rule after the comment period without conducting a further comment period so long as the final rule is a "logical outgrowth" of the draft rule.[129] However, the court explained that "[n]otice is inadequate if 'the interested parties could not reasonably have anticipated the final rulemaking from the draft rule.'"[130] Regarding the rule at issue, the court decided that the EPA's adoption of the higher pre-injection treatment standards in the final rule eliminated the need for a demonstration by the well operator that the injected wastewater would not cause contaminants to enter a drinking water source.[131] Thus, the court held that the final rule was a "logical outgrowth" of the proposed rule.[132]

The petitioners also challenged the final rule on grounds related to the EPA's interpretation of the "non-endangerment" provision in the SDWA.[133] First, the Sierra Club contended that the rule was inconsistent with a "reasonable interpretation" of the provision because the rule did not provide for treatment of nonbiological contaminants.[134] The court noted that the non-endangerment provision left the EPA with a

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124. *Id.* at 1056.
125. *Id.* at 1057.
126. *Id.* at 1057-58.
127. *Id.* at 1052.
128. *Id.* at 1059.
129. *Id.* at 1058.
130. *Id.* at 1059 (quoting Am. Iron & Steel Inst. v. OSHA, 182 F.3d 1261, 1276 (11th Cir. 1999)).
131. *Id.* at 1058-59.
132. *Id.* at 1060.
133. *Id.* at 1066.
134. *Id.*

"gapfilling" role[135] in determining when a possible migration of a contaminant "'*may* result'" in a regulatory violation or "'*may* otherwise adversely affect'" health.[136] Thus, the EPA was entitled to deference from the courts.[137] The court noted that based on the record, the EPA had considered whether nonbiological contaminants posed a risk to drinking water sources and determined that under current waste injection practices, they would not.[138] Thus, the agency's decision not to require additional protective measures in the final rule was not arbitrary and capricious.[139]

Second, the local government petitioners complained that the final rule was arbitrarily too restrictive on well operators for several reasons.[140] They argued that the rule failed to consider differences in hydrology and geology as required by the SDWA.[141] The court again applied a deferential review and concluded that the EPA had properly considered evidence and tailored the rule geographically to apply to the geological regions of Florida most likely to be affected by migrating contaminants.[142] The local government petitioners also claimed that the final rule was not supported by the EPA's risk assessment because the methodology was flawed in four respects.[143] As to each claim, the court concluded that the EPA had made rationally supported assumptions in its methodology.[144] Finally, the court concluded that the final rule was based on a reasonable interpretation of the SDWA.[145]

V. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILILTY ACT

In *OSI, Inc. v. United States*,[146] the Eleventh Circuit held that under the Comprehensive Environmental Response, Compensation, and

135. *Id.* at 1063 (internal quotation marks omitted).
136. *Id.* (quoting 42 U.S.C. § 300h(d)(2)).
137. *See id.*
138. *Id.* at 1066-67.
139. *Id.* at 1067.
140. *See id.* at 1068-69.
141. *Id.* at 1068.
142. *Id.* at 1068-69.
143. *Id.* at 1069. The petitioners claimed that the methodology "(1) fail[ed] to consider the concentration of contaminants already in the aquifers, (2) fail[ed] to employ a quantitative probabilistic risk analysis methodology, (3) fail[ed] to consider the results of a then-unpublished University of Miami study of well-disposal practices, and (4) [made] faulty assumptions about contaminant plumes." *Id.*
144. *Id.* at 1069-70.
145. *Id.* at 1071.
146. 525 F.3d 1294 (11th Cir. 2008).

Liability Act (CERCLA),[147] a remedial action being conducted at a federal facility, when the EPA has not placed the facility on the National Priorities List (NPL), is conducted pursuant to § 9604 of CERCLA[148] rather than § 9620.[149] Because § 9613[150] deprives federal courts of jurisdiction to decide challenges to ongoing remedial actions brought under § 9604, the United States District Court for the Middle District of Alabama did not have jurisdiction over the plaintiff's Resource Conservation and Recovery Act (RCRA)[151] citizen suit regarding the facility.[152]

In this case, the plaintiff, OSI, owned property that had been leased by the Air Force from its previous owners and used as a landfill in the 1960s and 1970s. In the late 1990s, the Air Force discovered contamination on the property that required remediation under CERCLA. In response, the Air Force selected a remediation plan that consisted primarily of long-term groundwater monitoring plus protective fencing and hydrogen-releasing compound barriers. The plaintiff brought several claims, including the RCRA citizen suit claim seeking an injunction requiring removal of all contaminants.[153] The district court granted summary judgment to the Air Force. Regarding the RCRA claim, the district court ruled that the plaintiff failed to show a genuine issue of material fact regarding the citizen-suit requirement that the contamination at issue posed an imminent and substantial threat to health or the environment.[154]

On appeal, the Eleventh Circuit held that the district court did not have jurisdiction to decide the RCRA claim.[155] The court noted that under CERCLA, remedial actions conducted by the government are typically selected pursuant to § 9604.[156] Accordingly, § 9613[157] provides that federal courts do not have jurisdiction to hear challenges to an ongoing remedial action selected pursuant to § 9604.[158] However,

147. 42 U.S.C. §§ 9601–9675 (2006).
148. 42 U.S.C. § 9604 (2006).
149. *OSI, Inc.*, 525 F.3d at 1299; 42 U.S.C. § 9620 (2006).
150. 42 U.S.C. § 9613 (2006).
151. 42 U.S.C. §§ 6901-6992K (2006).
152. *OSI, Inc.*, 525 F.3d at 1299.
153. *Id.* at 1296-97. The court determined that the plaintiffs' other claims were without merit, *id.* at 1297, and discussed only the RCRA claim in detail, *see id.* at 1297-99.
154. *Id.* at 1297.
155. *Id.* at 1299.
156. *Id.* at 1298. Section 9604 authorizes the President "'to act . . . to remove or arrange for the removal of, and provide for remedial action relating to [any] hazardous substance.'" *OSI, Inc.*, 525 F.3d at 1298 (ellipsis in original) (quoting 42 U.S.C. § 9604(a)(1)).
157. 42 U.S.C. § 9613 (2006).
158. *OSI, Inc.*, 525 F.3d at 1297-98 (citing 42 U.S.C. § 9613(h) (2006)).

§ 9620[159] applies to federal facilities and is not subject to the § 9613 jurisdictional bar.[160] Section 9620 directs the responsible government department and the EPA to assess contamination at the site and determine whether to include the site on the NPL.[161] It further provides that after a facility has been included on the NPL, the government shall conduct a remediation assessment, which may lead to remedial action.[162] The court recognized that under § 9620, the government has no authority to conduct a remedial action at a facility unless and until the facility has been placed on the NPL.[163]

The plaintiff's property had not been placed on the NPL.[164] Thus, the court concluded that the Air Force had authority to select a remedial plan for the property only under § 9604, meaning the district court did not have jurisdiction over the plaintiff's RCRA suit.[165] The court expressed no opinion on whether a remedial action at a federal facility on the NPL would be selected under § 9620 and thus avoid the jurisdictional bar.[166]

159. 42 U.S.C. § 9620 (2006).
160. *OSI, Inc.*, 525 F.3d at 1298 (citing 42 U.S.C. § 9620).
161. *Id.*
162. *Id.*
163. *Id.* at 1298-99.
164. *Id.* at 1299.
165. *Id.*
166. *Id.* The court noted that the United States Court of Appeals for the Ninth Circuit held that challenges to remedial actions at federal facilities are not subject to the jurisdictional bar. *Id.* (citing Fort Ord Toxics Project, Inc. v. Cal. EPA, 189 F.3d 828 (9th Cir. 1999) (the facility at issue in *Fort Ord* had been placed on the NPL).