



School of Law
UNIVERSITY OF GEORGIA

Digital Commons @ University of Georgia
School of Law

Scholarly Works

Faculty Scholarship

1-1-2004

Environmental Law, Eleventh Circuit Survey

Travis M. Trimble

University of Georgia, ttrimble@uga.edu



Repository Citation

Travis M. Trimble, *Environmental Law, Eleventh Circuit Survey* (2004),
Available at: https://digitalcommons.law.uga.edu/fac_artchop/809

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University of Georgia School of Law. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ University of Georgia School of Law. [Please share how you have benefited from this access](#)
For more information, please contact tstriepe@uga.edu.

Environmental Law

by Travis M. Trimble*

In 2003 the United States Court of Appeals for the Eleventh Circuit decided two cases concerning the Clean Air Act,¹ holding that provisions allowing the Environmental Protection Agency (“EPA”) to address compliance issues through the issuance of administrative compliance orders are unconstitutional² and that the Clean Air Act does not waive the United States’s defense of sovereign immunity in an action for punitive penalties for past violations of air pollution laws.³ The court also considered for the first time the circumstances under which a state enforcement action would preempt a citizen suit under the Clean Water Act.⁴ This Article also discusses a district court case that decides two issues which have not yet been addressed by the Eleventh Circuit: (1) whether and to what extent the Supreme Court’s decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*⁵ changed the definition of “navigable waters” under the Clean Water Act and the Oil Pollution Act;⁶ and (2) what standards, if any, apply to a government cleanup under the Oil Pollution Act for the purpose of determining whether the cleanup costs were reasonable.⁷ This Article then discusses a district court case holding that a county government was acting as a market participant in the solid waste collection and disposal markets, and thus, its contract with a private

* Instructor, University of Georgia School of Law. Former Partner in the firm of Anderson, Walker & Reichert, 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).

1. 42 U.S.C. §§ 7401-7671a (2003).
2. *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1260 (11th Cir. 2003).
3. *City of Jacksonville v. Dep’t of the Navy*, 348 F.3d 1307, 1320 (11th Cir. 2003).
4. *McAbee v. City of Fort Payne*, 318 F.3d 1248 (11th Cir. 2003); 33 U.S.C. §§ 1251-1387 (2001 & Supp. 2003).
5. 531 U.S. 159 (2001).
6. 33 U.S.C. §§ 2701-2761 (2001 & Supp. 2003).
7. *United States v. Jones*, 267 F. Supp. 2d 1349 (M.D. Ga. 2003).

waste hauler was not subject to review under the Commerce Clause of the United States Constitution.⁸ Finally, this Article briefly reviews a district court holding remanding an Army Corps of Engineers issuance of a "Finding of No Significant Impact" under the National Environmental Policy Act⁹ in connection with a dam project in Alabama,¹⁰ and an Eleventh Circuit decision awarding litigation costs to plaintiffs under the Clean Water Act for fees paid to an expert for monitoring compliance with a consent order.¹¹

I. THE CLEAN AIR ACT

A. *Constitutionality*

In *Tennessee Valley Authority v. Whitman*,¹² the Eleventh Circuit held unconstitutional those provisions of the Clean Air Act ("CAA") that allow the EPA to address various alleged violations of the Act by issuing an administrative compliance order ("ACO").¹³ The court concluded that under the plain language of the CAA, the EPA could issue an ACO having the force and effect of law, with civil and criminal penalties possible for noncompliance, without the affected party having an opportunity to challenge judicially the substantive allegations of the ACO.¹⁴ For these reasons, the ACO provisions violate the Due Process Clause of the Fifth Amendment of the United States Constitution.¹⁵

In this case, between 1982 and 1996, the Tennessee Valley Authority ("TVA") replaced boilers at nine of its coal-fired electrical power plants without obtaining permits from the EPA. In 1999 the EPA contended that these projects triggered New Source Review under the CAA and that the TVA was required to have met New Source Performance Standards ("NSPS") for the replacement boilers.¹⁶ The TVA contended that the projects constituted "routine maintenance" at the plants, which was exempt from NSPS.¹⁷ The EPA issued an ACO, which required the

8. BFI Waste Sys. of N. Am., Inc. v. Broward County, 265 F. Supp. 2d 1332 (S.D. Fla. 2003); U.S. CONST. art. I, § 8, cl. 3.

9. 42 U.S.C. §§ 4321-4370f (2003).

10. Am. Canoe Ass'n v. White, 277 F. Supp. 2d 1244 (N.D. Ala. 2003).

11. Ga. Env'tl. Org. v. Hankinson, 351 F.3d 1358 (11th Cir. 2003).

12. 336 F.3d 1236 (11th Cir. 2003).

13. *Id.* at 1260; Clean Air Act § 113(a)(1)(A), 42 U.S.C. § 7413(a)(1)(A) (2003); Clean Air Act § 113(a)(2)(A), 42 U.S.C. § 7413(a)(2)(A) (2003); Clean Air Act § 113(a)(3)(B), 42 U.S.C. § 7413(a)(3)(B) (2003) [hereinafter "AOC provisions"].

14. 336 F.3d at 1258.

15. *Id.*; U.S. CONST. amend. V.

16. 336 F.3d at 1244.

17. *Id.*

TVA to obtain permits for the projects and to bring the plants into compliance with the NSPS. The TVA disputed the findings of the ACO on several grounds. Subsequently, the EPA issued a notice to the TVA that it would reconsider the ACO but directed the TVA to comply with the ACO pending its reconsideration. The EPA undertook its reconsideration by referring to the Environmental Appeals Board (“EAB”) for adjudication of the issue of whether the TVA violated the CAA by replacing the boilers in its plants without permits. The EAB, after a hearing,¹⁸ affirmed most of the ACO, which directed the TVA to obtain permits and comply with the NSPS at its plants that had undergone boiler replacement. The TVA petitioned the Eleventh Circuit for review of the EPA’s notice of reconsideration, which referred the matter to the EAB for adjudication and review of the EAB’s decision.¹⁹

The threshold issue before the court, and the one on which the case turned, was whether the EAB decision affirming the ACO was a final decision and therefore subject to judicial review.²⁰ After analyzing the ACO provisions in context with other enforcement actions available to the EPA under the CAA and the statutory history of the Act itself, the court concluded that Congress likely did not intend for an ACO to be a final order.²¹ However, in looking to the “unambiguous language” of the ACO provisions themselves,²² the court concluded that “Congress established a scheme in which noncompliance with an ACO issued ‘on the basis of any information available’ can lead to the imposition of severe civil penalties and imprisonment—even if the EPA is incapable of proving an act of illegal pollution in court.”²³ The court noted that under the statute, court review of an ACO was limited to two issues: (1) whether the ACO was issued, and (2) whether the ACO was in fact violated.²⁴ Thus, a party receiving an ACO, such as the TVA, would

18. The EPA contended it set up this hearing because it could not sue the TVA, another federal agency, and thus could not bring a judicial enforcement action to enforce the ACO. In an earlier decision, the court rejected this contention. *Id.* at 1245 n.19 (citing *Tenn. Valley Auth. v. EPA*, 278 F.3d 1184 (11th Cir. 2002)). In any event, this hearing did not satisfy the court that EPA had fulfilled its due process obligations. *Id.* at 1246. Among other things, as the EPA admitted, the Clean Air Act does not provide for or contemplate such an adjudication, and no regulations govern how such an adjudication is to be conducted. *Id.* Further, the court recited a litany of due process problems with the hearing as it was conducted, stating among other things that “the EAB and ALJ manufactured the procedures they employed on the fly, entirely ignoring the concept of the rule of law.” *Id.*

19. *Id.* at 1244-46.

20. *Id.* at 1247-48.

21. *Id.* at 1252.

22. *Id.* at 1255.

23. *Id.* at 1256.

24. *Id.* at 1250, 1255.

have no opportunity to challenge the substantive allegations of the order in court.²⁵

For this reason, the court held that “[t]he Clean Air Act is unconstitutional to the extent that mere noncompliance with the terms of an ACO can be the sole basis for the imposition of severe civil and criminal penalties,” and therefore, “ACOs lack finality . . .,”²⁶ depriving the court of jurisdiction to review their validity.²⁷ The court stated that for an ACO to constitute a final agency action, “[t]he EPA must do what it believes it has been required to do all along—namely, prove the existence of a CAA violation in district court, including the alleged violation that spurred the EPA to issue the ACO in this case.”²⁸

B. Sovereign Immunity

In *City of Jacksonville v. Department of the Navy*,²⁹ the Eleventh Circuit held that the CAA did not waive the defense of sovereign immunity available to the United States when the request for relief was for punitive penalties for past, noncontinuing violations of state and local pollution control laws enacted pursuant to the CAA.³⁰

In this case, the City of Jacksonville sued the Navy in state court, alleging that from 1996 through 2001, the Navy violated various state and local air pollution laws enacted under the CAA. The City did not allege any continuing violations but instead sought punitive penalties for the past violations. The Navy answered with the defense of sovereign immunity and removed the case to district court pursuant to 28 U.S.C. § 1442(a)(1).³¹ The City moved for remand, contending that the CAA implicitly precluded removal. In the meantime, the Navy moved for judgment on the pleadings as to its sovereign immunity defense. In response, the City contended that the CAA waived the United States’s sovereign immunity for punitive penalty actions. The district court held that removal was proper and that the CAA did waive the Navy’s

25. *Id.* at 1255.

26. *Id.* at 1260. The court noted that the Clean Water Act shares an ACO-based compliance scheme with the CAA, allowing ACOs to be issued on the basis of any information available to the agency, with penalties for violations. *See id.* at 1255 n.32.

27. *Id.* at 1260. The court also stated that the statute could not be saved on an ad hoc basis by the EPA voluntarily undertaking an adjudication prior to the issuance of an ACO. *Id.* at 1259.

28. *Id.* at 1260.

29. 348 F.3d 1307 (11th Cir. 2003).

30. *Id.* at 1319-20.

31. *Id.* at 1309; 28 U.S.C. § 1442(a)(1) (1994 & Supp. 2003). Section 1442(a)(1) provides that any action brought against the United States or any agency thereof in a state court may be removed to district court. 28 U.S.C. § 1442(a)(1).

sovereign immunity defense.³² The Eleventh Circuit accepted the Navy's interlocutory appeal.³³

The court first considered the City's contention that the CAA implicitly precluded the Navy's removal of the state court case to district court and held that it did not.³⁴ The City based its contention on section 304(e)³⁵ of the CAA, a subsection of the Act's citizen suit provision.³⁶ The court noted that, in contrast to removal actions under 28 U.S.C. § 1441,³⁷ there was no requirement in 28 U.S.C. § 1442³⁸ that Congress "expressly override" a party's right to remove an action for Congress to preempt such removal.³⁹ However, the court stated that it was nevertheless required by precedent to find that Congress's intent to preclude such removal be "clear and manifest."⁴⁰ The court found no clearly manifested congressional intent to preclude removal in either the language of section 304(e) or in the legislative history of the CAA.⁴¹ The court also noted that a sovereign immunity defense was precisely the kind of defense Congress intended the federal courts to resolve.⁴² Thus, the court held that the Navy's removal was proper and not precluded by the CAA.⁴³

Next, the court held that the CAA did not waive the United States's sovereign immunity defense to actions for punitive penalties for past violations of the Act.⁴⁴ The court first noted, and the Navy conceded,

32. 348 F.3d at 1309.

33. *Id.* at 1309.

34. *Id.* at 1310-13.

35. 42 U.S.C. § 7604(e) (2003). Section 304(e) provides in part that nothing . . . in any . . . law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from (1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court . . . against the United States . . . under State or local law respecting control and abatement of air pollution.

Id.

36. 348 F.3d at 1311.

37. 28 U.S.C. § 1441 (1994).

38. 28 U.S.C. § 1442(a)(1) (1994 & Supp. 2003).

39. 348 F.3d at 1311.

40. *Id.* (citing *Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988)).

41. *Id.* at 1311-12. The court also rejected the City's argument that the presence of a provision preserving removal of actions against the United States under the Clean Water Act, and its absence in the CAA, implicated congressional intent that removal not be available for cases brought under state or local air pollution laws. *Id.* at 1313. The court stated that it must find "express affirmative support indicating that such is the intent of Congress." *Id.*

42. *Id.* at 1313.

43. *Id.*

44. *Id.* at 1320.

that the CAA did waive the sovereign immunity defense for continuing violations under the federal facilities provision of the CAA.⁴⁵ The federal facilities provision provides that the federal government shall be subject “to any process and sanction, whether enforced in Federal, State, or local courts, or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law”⁴⁶ The City contended that this provision waived the defense for punitive-penalty actions as well.⁴⁷ The court noted that while no court had addressed this issue under the CAA, the Supreme Court in *United States Department of Energy v. Ohio*⁴⁸ addressed the issue under the Clean Water Act’s federal facilities provision,⁴⁹ which has language similar to that of the CAA.⁵⁰ There, the Court held that the CWA did not waive sovereign immunity from punitive penalties.⁵¹ The court followed the Supreme Court’s reasoning that the word “sanction” in the statute meant coercive sanction only, “to the exclusion of punitive fines.”⁵²

The court also rejected the City’s contention that the Act’s citizen suit provision⁵³ waived the defense.⁵⁴ The court found that while certain language in the provision constituted a waiver of sovereign immunity, the waiver was not of greater extent than the waiver in the federal facilities provision.⁵⁵ The court concluded that because the CAA contained no “affirmative and unequivocal waiver” of the sovereign

45. *Id.* at 1314; 42 U.S.C. § 7418(a) (2003).

46. 42 U.S.C. § 7418(a).

47. 348 F.3d at 1314.

48. 503 U.S. 607 (1992).

49. 33 U.S.C. § 1323(a) (2001).

50. *City of Jacksonville*, 348 F.3d at 1315-16.

51. *Id.* (citing *United States Dep’t of Energy*, 503 U.S. at 607).

52. *Id.* at 1316 (citing *United States Dep’t of Energy*, 503 U.S. at 623).

53. 42 U.S.C. § 7604(e) (2003). The Sixth Circuit accepted this argument in *United States v. Tennessee Air Pollution Control Board*, 185 F.3d 529 (6th Cir. 1999).

54. 348 F.3d at 1318.

55. *Id.* The relevant language in the CAA citizen suit provision provides that [n]othing in . . . any . . . law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from (1) bringing any enforcement action or obtaining any *judicial remedy or sanction* in any state or local court . . . against the United States . . . under any State or local law respecting control and abatement of air pollution.

Id. at 1317 (citing 42 U.S.C. § 7604(e) (2000) (emphasis added)). In place of the words “judicial remedy or sanction,” the CWA federal facilities provision construed in *U.S. Dep’t of Energy* and the CAA federal facilities provision here, contained the words “process and sanction.” *See id.*

immunity defense to punitive-penalty actions, the district court's grant of the Navy's motion for judgment on this issue was proper.⁵⁶

II. CLEAN WATER ACT

A. State Enforcement Preemption of Citizen Suits

In *McAbee v. City of Fort Payne*,⁵⁷ the Eleventh Circuit held that portions of the Alabama Water Pollution Control Act ("AWPCA")⁵⁸ and the Alabama Environmental Management Act ("AEMA")⁵⁹ were not "comparable" to subsection 309(g) of the Clean Water Act ("CWA").⁶⁰ Therefore, the acts did not preclude plaintiff's citizen suit alleging that the City violated its National Pollution Discharge Elimination System ("NPDES") permit,⁶¹ which authorized discharges from the City's wastewater treatment plant.⁶²

The CWA's citizen suit provision⁶³ bars a citizen's right to bring a civil action seeking penalties under the provision for any alleged violation

"with respect to which a State has commenced and is diligently prosecuting an action under State law comparable to [subsection 309(g)]⁶⁴, the administrative penalties subsection of the Clean Water Act's enforcement section,"⁶⁵ or "for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law"⁶⁶

At the time McAbee filed her complaint, defendant Fort Payne, Alabama (the "City"), had already violated its NPDES permit on several occasions and was operating under an administrative enforcement order issued by the Alabama Department of Environmental Management ("ADEM"). ADEM had fined the City \$11,200 under the order. McAbee, a landowner near the City's plant, filed suit under the citizen suit

56. *Id.* at 1319.

57. 318 F.3d 1248 (11th Cir. 2003).

58. ALA. CODE §§ 22-22-1 to -14 (1997).

59. ALA. CODE §§ 22-22A-1 to -16 (1997).

60. 318 F.3d at 1257.

61. An NPDES permit authorizes and regulates the discharge of pollutants at a facility pursuant to the CWA. *See* 33 U.S.C. § 1342 (2001 & Supp. 2003).

62. 318 F.3d at 1256-57.

63. 33 U.S.C. § 1365 (2001 & Supp. 2003).

64. 33 U.S.C. § 1319(g) (2001).

65. *Id.* § 1319(g)(6)(A)(ii).

66. *Id.* § 1319(g)(6)(A)(iii).

provision of the CWA, contending that the City's permit violations were continuing.⁶⁷ The City moved for summary judgment, contending that ADEM's enforcement order and penalty constituted both a diligent prosecution of an action and a final order with a penalty, both under "comparable state law" to the CWA, so as to bar McAbee's citizen suit.⁶⁸ The district court ruled that the AWPCA and the AEMA were not "comparable" to section 309(g) of the CWA, denied the City's motion, and certified an appeal to the Eleventh Circuit.⁶⁹ The issue of first impression before the Eleventh Circuit was whether Alabama's laws were comparable to subsection 309(g).⁷⁰

In determining the correct standard to apply, the court first noted that the language of the Act itself and the Supreme Court's interpretation of the Act's citizen suit provisions suggested that citizen suits were meant to supplement, but not replace, state action in dealing with pollution.⁷¹ Therefore, a state law need only be sufficiently similar, not identical, to subsection 309(g).⁷²

Next, the court reviewed standards adopted by other circuits that had considered the issue of comparability.⁷³ In adopting its standard for

67. 318 F.3d at 1250.

68. *Id.*

69. *Id.* at 1250-51.

70. *Id.* at 1252.

71. *Id.*

72. *Id.* (citing *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49 (1987)).

73. *Id.* at 1252-53. The court reviewed the First Circuit's holding in *North & South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1992); the Eighth Circuit's holding in *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994); the Ninth Circuit's holding in *Citizens for a Better Environment v. Union Oil Co.*, 83 F.3d 1111 (9th Cir. 1996); and the Sixth Circuit's holding in *Jones v. City of Lakeland*, 224 F.3d 518 (6th Cir. 2000).

In *Town of Scituate*, the First Circuit held that a state proceeds under comparable state law against a party so as to bar citizen suits against the same party when: (1) the state statutory scheme under which the state is acting contains penalty-assessment provisions comparable to the Federal Act; (2) the state is authorized to assess those penalties; and (3) the overall state statutory scheme seeks to correct the same violations that the CWA seeks to correct. 949 F.2d at 556. The First Circuit concluded that it was not necessary that the state actually assessed penalties as long as it had the authority to do so comparable to the Clean Water Act. *Id.* Further, the court looked to the state's overall statutory enforcement scheme to determine whether public participation rights, including the right to intervene in an action and the right to a hearing, were comparable. *Id.* at 556 n.7. The court looked at state administrative law statutes and not just to the statute under which the state actually prosecuted the enforcement action. *Id.*

The Eighth Circuit in *Arkansas Wildlife Federation* essentially adopted the First Circuit's test but added the requirement that state law, meaning the state's overall statutory scheme as in *Town of Scituate*, provide citizens a "meaningful opportunity to participate at significant stages of the [administrative] decision-making process" 29 F.3d at 381.

determining comparability in *McAbee*, the court held that it would require “rough comparability” of the state’s law to the federal law between each “class” of provisions contained in subsection 309(g) of the CWA, i.e., penalty-assessment provisions, public-participation provisions, and judicial review provisions.⁷⁴ The court rejected as too “loose,” the First, Sixth, and Eighth Circuits’ approach of looking at the overall effect of a state statutory scheme to determine whether a state’s enforcement action under state law, for example, “seeks to remedy the same violations as duplicative civilian action” or whether state law “adequately safeguarded the substantive interests of citizens in enforcement actions.”⁷⁵ The court stated that its approach of comparing classes of provisions was “easier to apply” than the “loose” standard, provided more certainty for parties involved and for courts⁷⁶ and also was supported by legislative history.⁷⁷ However, the court also did not explicitly follow the Ninth Circuit’s approach of looking only at the statute under which the state actually proceeded in its enforcement action. In fact, the court left it somewhat unclear what the proper source of state law would be as a basis of comparison to subsection 309(g) in future cases.⁷⁸

Applying its standard to the facts of the case, the court held that while the penalty-assessment provisions of Alabama law were comparable to those of the CWA, the public-participation provisions were not.⁷⁹ Specifically, the Clean Water Act requires the agency to give the public

The Ninth Circuit in *Citizens for a Better Environment*, adopted a more narrow standard in assessing comparability. That court rejected the approach of looking at a state’s entire statutory scheme to determine whether enforcement, including penalty provisions and public participation provisions, was comparable, and instead looked only to the specific statutory enforcement provision under which the state actually brought the action. 83 F.3d at 1118. Further, the court held that the state must have actually assessed penalties in order for the citizen suit bar to apply. *Id.*

The Sixth Circuit in *Jones* adopted a standard much like that of the First and Eighth circuits, also looking to the state’s entire statutory scheme to determine whether it contained public participation opportunities comparable to those of the Clean Water Act. 224 F.3d at 523-24.

74. 318 F.3d at 1255-56.

75. *Id.* at 1255 (quoting *Town of Scituate*, 949 F.2d at 556).

76. *Id.*

77. *Id.* at 1255-56 (citing comments of Senator John Chafee, principal author and sponsor of the 1987 amendments to the Clean Water Act).

78. See *id.* at 1254 n.8. The court stated that it “need not resolve this issue in the present case” because the public-participation provisions of Alabama’s laws were not comparable, whether or not the court looked only to the AWPCA and the AEMA or to those statutes plus the Alabama Administrative Code. *Id.* The court considered the statutes and the code for purposes of deciding the case. *Id.*

79. *Id.* at 1256. The court did not evaluate the judicial review provisions of the respective laws.

notice of and an opportunity to comment on a proposed penalty-assessment action and notice of any hearing held concerning the assessment to anyone who commented on the assessment.⁸⁰ The Act also provides that if no hearing is held before an assessment order is issued, a commentor may petition the agency to set aside the order and hold a hearing.⁸¹ In contrast, the Alabama scheme provided only ex post facto notice to the public of an enforcement action with no right to participate in pre-order proceedings.⁸² The Alabama scheme gave only parties “aggrieved” by the order, as opposed to the general public, the right to contest the order, and then only within fifteen days of the publication of the post-order notice in a newspaper.⁸³ The court held that the provisions were not comparable to those of the Clean Water Act and therefore the citizen suit bar did not apply to preclude McAbee’s suit.⁸⁴

B. Definition of Navigable Waters Under the Clean Water Act and the Oil Pollution Act

In *United States v. Jones*,⁸⁵ the United States District Court for the Middle District of Georgia considered the United States’s action for the recovery of cleanup costs under the Oil Pollution Act (“OPA”)⁸⁶ and for penalties under the Clean Water Act (“CWA”).⁸⁷ The court held that the government had proven the elements of its OPA cost-recovery action and its CWA penalty action, including whether a discharge of oil into “navigable waters” had occurred.⁸⁸ More specifically, the court held that the Supreme Court’s decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (“SWANCC”)⁸⁹ did not narrow the definition of “navigable waters” so as to preclude the government’s actions.⁹⁰ The court also held that defendants would be allowed to present evidence that the government’s OPA cleanup action was inconsistent with the National Contingency Plan to determine the amount the government was entitled to recover.⁹¹

80. *Id.* (citing 33 U.S.C. § 1319(g)(4)(B) (2001)).

81. *Id.* (citing 33 U.S.C. § 1319(g)(4)(C)).

82. *Id.* at 1257.

83. *Id.*

84. *Id.*

85. 267 F. Supp. 2d 1349 (M.D. Ga. 2003).

86. 33 U.S.C. § 2702(a) (2001 & Supp. 2003).

87. 33 U.S.C. § 1321(b) (2001).

88. 267 F. Supp. 2d at 1364.

89. 531 U.S. 159 (2001).

90. 267 F. Supp. 2d at 1360.

91. *Id.* at 1363.

Defendants in the case were Bay Street Corporation, GC Quality Lubricants, Inc., Georgia-Carolina Oil Company, and Jones, respectively, a holding company, two subsidiaries, and the chief officer and majority shareholder of the companies, collectively owning and operating an oil distributor in Macon, Georgia. During an inspection of defendants' facility, EPA investigators discovered pooled oil and traced oil runoff from the facility into a ditch that emptied into a creek and wetland adjacent to the Ocmulgee River. The EPA ordered Jones to remove the contamination, and he deferred to the EPA to conduct the cleanup. The EPA spent over \$2.5 million on the cleanup. The United States then brought the action in three counts: cost recovery for the cleanup under the OPA, penalties under the Clean Water Act for discharge of pollutants into navigable waters, and penalties under the Clean Water Act for failing to have an adequate Spill Prevention Control and Countermeasures (SPCC) plan at the facility. The United States moved for summary judgment on its claims.⁹²

The court first considered the United States's claim for cost recovery under the OPA.⁹³ The court found that the corporate defendants were responsible parties under the OPA as owners and operators of the facility and that Jones individually was liable as an operator.⁹⁴

The court next addressed the government's claim that the discharges from the facility into the drainage ditch constituted discharges in to "navigable water,"⁹⁵ an essential element of both the OPA cost-recovery action⁹⁶ and the CWA penalty count.⁹⁷ The defendants contended that the government could not prove the ditch actually led to the Ocmulgee

92. *Id.* at 1352-53.

93. *Id.* at 1353. Liability under the OPA comprises four elements: (1) a responsible party; (2) a vessel or facility; (3) a discharge of oil into or upon navigable waters or adjoining shorelines; and (4) removal costs and damages. *Id.*

94. *Id.* at 1356. Responsible parties are defined in OPA as persons owning or operating the facility. The corporate defendants admitted to owning and operating the facility in question. *See id.* at 1353-54. With respect to Jones individually, the court, applying CERCLA case law, found that issues of fact remained regarding whether the corporate veil could be pierced so as to hold him responsible as an owner. *Id.* at 1355. However, the court followed a Seventh Circuit decision in holding that because Jones directed the facility's activities generally and because Jones was the "primary decision maker" over the facility's regulatory compliance, he was liable as an operator. *Id.* at 1355-56 (citing *Browning-Ferris Indus., Inc. v. Ter Maat*, 195 F.3d 953 (7th Cir. 1999) and on remand at *Browning-Ferris Indus., Inc. v. Ter Maat*, 2000 WL 1716330 (N.D. Ill. 2000)).

95. *Id.* at 1356-57. The court held there was not a dispute that discharges to the ditch eventually ended up in the Ocmulgee River, which itself is "undeniably a navigable water." *Id.* at 1357.

96. *See id.* at 1361.

97. *Id.*

River, a navigable waterway.⁹⁸ The court pointed to an analogous Eleventh Circuit decision in a 1996 case, *United States v. Eidson*,⁹⁹ which held that a defendant's discharges in to a storm drainage ditch that emptied into a canal and then into the Tampa Bay were discharges in to navigable waters for purposes of the CWA.¹⁰⁰ The Eleventh Circuit in *Eidson* relied on well-settled case law and broadly construed navigable waters, as defined in the CWA, to include non-navigable tributaries to navigable waters.¹⁰¹ At issue in defendant's contention was the extent to which the Supreme Court's decision in *SWANCC* narrowed that definition.¹⁰²

After reviewing various court decisions interpreting the reach of *SWANCC*,¹⁰³ the district court declined to follow courts interpreting the holding in *SWANCC* to mean that navigable waters under the CWA and the OPA only included "actually navigable" waterways.¹⁰⁴ Instead, the court followed the Ninth Circuit's more narrow reading of *SWANCC*, which excludes only "isolated waters" from the definition of navigable waters, not waters somehow connected to navigable waters,¹⁰⁵ and held that the decision in *SWANCC* "did not serve to limit the [Clean Water Act] as narrowly as Defendants contend here."¹⁰⁶ The court determined that the decision in *SWANCC* had not affected the Eleventh Circuit's decision in *Eidson*, and under *Eidson*, defendants' discharge into a ditch that eventually led to the Ocmulgee River constituted a discharge in to navigable waters under the OPA and CWA.¹⁰⁷

The court also found that the United States had met its burden on the other elements of its OPA cost-recovery claim except with respect to the amount it was entitled to recover (discussed below), its penalty claims

98. *Id.* at 1357. The court addressed defendants' implied argument that because the ditch itself was a non-navigable waterway, discharges in to it did not violate the OPA or the CWA. *Id.*

99. 108 F.3d 1336 (11th Cir. 1997).

100. *Id.* at 1341.

101. *Jones*, 267 F. Supp. 2d at 1360 (citing *Eidson*, 108 F.3d at 1341).

102. *Id.*

103. *Id.* at 1358-60. The court noted that some courts, e.g., *F.D. & P. Enter., Inc. v. United States Army Corps of Eng'rs*, 239 F. Supp. 2d 509 (D.N.J. 2003), have read *SWANCC* to substantially narrow the definition of "navigable water" under the CWA to waters which are actually navigable or have a "substantial nexus beyond a mere hydrological connection" to actually navigable waters. *Jones*, 267 F. Supp. at 1359.

104. *Id.* at 1360, 1359 n.7.

105. *Id.* at 1360 (referring to *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001)).

106. *Id.*

107. *Id.*

for discharge in to navigable waters, and its claim that defendants failed to maintain a proper SPCC plan under the Clean Water Act.¹⁰⁸

In addressing the amount of recovery to which the United States was entitled under its OPA claim, the court reached an interesting conclusion regarding defendants' affirmative defense that the government's expenditures on remediation were inconsistent with the National Contingency Plan ("NCP").¹⁰⁹ Defendants contended that the government failed to follow several NCP regulations in carrying out the remediation action.¹¹⁰ The court noted that while the government's cost-recovery actions under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")¹¹¹ are limited to costs "not inconsistent with the national contingency plan,"¹¹² there is no such limitation on costs that the government may recover under the OPA.¹¹³ Therefore, the court found that defendants "cannot limit the government's recovery of costs [under the OPA] merely by showing that its actions were inconsistent with the National Contingency Plan."¹¹⁴

However, the court went on to state that the government did not have "unlimited power to recover any costs" under the OPA.¹¹⁵ The court found that the government's expenditures were limited by the Administrative Procedure Act to those which were not arbitrary or capricious.¹¹⁶ The court added that a plaintiff claiming that an agency's decision was arbitrary or capricious must show that the decision was either "not based on a consideration of the relevant factors or amounted to a clear error of judgment."¹¹⁷ Based on this standard, the court held

108. *Id.* at 1360-62.

109. *Id.* at 1362. The National Contingency Plan, authorized at 33 U.S.C. § 1321(d) (2001) and revised and republished under CERCLA, 42 U.S.C. § 9605 (1995 & Supp. 2003), provides for a regulatory scheme governing remedial actions under the Clean Water Act and CERCLA. For example, CERCLA provides that "[t]he plan shall specify procedures, techniques, materials, equipment and methods to be employed in identifying, removing, or remedying releases of hazardous substances" 42 U.S.C. § 9605(a) (1995). The Plan is published at 40 C.F.R. Part 300.

110. 267 F. Supp. 2d at 1362-63.

111. 42 U.S.C. §§ 9601-9675 (1995 & Supp. 2003).

112. 267 F. Supp. 2d at 1363 (citing CERCLA at 42 U.S.C.A. § 9607(a)(4)(A) (1995)).

113. *Id.* (citing OPA at 33 U.S.C.A. § 2702(b)(1)(A) (2001)).

114. *Id.*

115. *Id.*

116. *Id.* (citing the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1996) and *United States v. Hyundai Merchant Marine Co.*, 172 F.3d 1187 (9th Cir. 1999) for the rule that the government's expenditures could not be arbitrary, capricious, or an abuse of discretion).

117. *Id.* (citing *Ward v. Campbell*, 610 F.2d 231 (5th Cir. 1980), which reviewed a decision of the Civil Service Commission to downgrade the plaintiff employees to a lower pay class).

that the defendants' contention that the government's removal action was inconsistent with several NCP regulations amounted to contention that "the government's removal methods amounted to a clear error of judgment and, therefore, were arbitrary and capricious."¹¹⁸

The court's ruling on this issue seemingly amounts to a holding that the NCP can provide the "relevant factors" for determining whether a government removal action under the OPA was carried out arbitrarily or capriciously for the purposes of the government's OPA cost-recovery action.

III. CONSTITUTIONAL LAW

In *BFI Waste Systems of North America, Inc. v. Broward County*,¹¹⁹ the United States District Court for the Southern District of Florida considered whether contracts that Broward County, Florida ("the County") entered into with BFI, a private waste hauler, were invalid restrictions on interstate commerce.¹²⁰ The court previously had held that similar contracts were an unconstitutional restriction on interstate commerce.¹²¹ In this case, however, the court held that the contracts were not unconstitutional restrictions, concluding that the County entered into the contracts as a market participant in the solid waste collection and disposal markets, and as such, its contracts were exempt from constitutional scrutiny.¹²²

In 1986 the County and several municipalities within the county entered into an interlocal agreement for waste disposal. Pursuant to this agreement, the County enacted an ordinance under which, among other things, the County assumed the obligation to provide for disposal of all solid waste generated in the county and in the municipalities that were parties to the interlocal agreement. The County met its obligation by contracting with a private company to construct and operate resource recovery facilities (incinerators) in the County. This contract called for the County to deliver a minimum tonnage of solid waste to the facilities and to pay a fee if the minimum was not met. Thus, to ensure the minimum would be met, the parties to the interlocal agreement, including the County, enacted flow-control ordinances, which required solid waste haulers doing business in the respective areas covered by the agreement to deliver their collected waste to the County-funded

118. *Id.* at 1363-64.

119. 265 F. Supp. 2d 1332 (S.D. Fla. 2003).

120. *Id.* at 1338.

121. *Id.* at 1336 (citing *Coastal Carting, Ltd. v. Broward County*, 75 F. Supp. 2d 1350 (S.D. Fla. 1999)).

122. *Id.* at 1346.

facilities. The interlocal agreement also required the governments to include a provision requiring the haulers to deliver waste to the County facilities in their own waste collection contracts with private waste haulers. In both instances, waste haulers paid the county a “tipping fee,” or a per ton fee to dispose of waste at the facilities.¹²³

In 1996 the County entered into a waste collection contract with BFI’s predecessor, which gave BFI, as successor, an exclusive right to collect residential solid waste and a nonexclusive right to collect commercial solid waste in a part of the unincorporated county.¹²⁴ The contract contained a “designation clause,” which provided that “[BFI] must deliver such solid waste to a Designated Disposal Facility or Facilities as directed by the Contract Administrator in writing and shall pay any County fees or charges established for the use thereof.”¹²⁵

In 1999 the district court ruled in *Coastal Carting Ltd. v. Broward County*¹²⁶ that the County’s flow-control ordinance violated the Commerce Clause of the United States Constitution because it discriminated against out-of-state waste disposal service providers in favor of the County’s facilities.¹²⁷ Because of the decision in *Coastal Carting*, the County amended its flow-control ordinance to allow a waste hauler, otherwise obligated by the ordinance to deliver waste to the County facilities, to deliver it to out-of-state facilities under certain circumstances.¹²⁸ After this decision, BFI informed the County that it wished to dispose of waste collected in the county at out-of-state facilities that charged smaller tipping fees than BFI was required by its contract to pay at the County facilities. The County responded that, notwithstanding amendments to the flow-control ordinance adopted to make the ordinance comply with the court’s decision, BFI was contractually obligated to deliver its waste to the County facilities.¹²⁹

BFI filed suit against the County seeking, among other things, a declaration that the County’s post-*Coastal Carting* amendments to its flow-control ordinances effectively amended the designation clause of BFI’s contract, allowing it to haul waste to out-of-state facilities. Therefore the County was violating the Commerce Clause and breaching its contract with BFI by refusing to allow BFI to haul waste to out-of-state facilities. The County answered that the amended ordinance did

123. *Id.* at 1334-36.

124. *Id.* at 1337.

125. *Id.*

126. 75 F. Supp. 2d 1350 (S.D. Fla. 1999).

127. *Id.* at 1357.

128. 265 F. Supp. 2d at 1336-37.

129. *Id.* at 1338.

not amend the contract. The County also claimed that the designation clause did not constitute regulation of interstate commerce because the County was acting as a market participant in the waste collection and disposal markets and was therefore exempt from complying with the Commerce Clause.¹³⁰

In analyzing the issue, the court first reviewed the restriction that the "dormant" Commerce Clause places on state action.¹³¹ The court then noted the "market-participant" exception to this restriction, which applies when a state or local government acts as a market participant rather than a market regulator.¹³² The court identified what it considered the central issue in various Supreme Court holdings regarding whether the market-participant exception would apply even when the government had entered into a private market; i.e., whether the government was using its power, through contract or otherwise, in one market to regulate other markets in which it was not participating.¹³³ For example, in *South Central Timber Developers, Inc. v. Wunnicke*,¹³⁴ a case on which BFI relied, the Supreme Court held that the state of Alaska's requirement that contracts for the sale of state-owned timber include a provision requiring the timber to be processed in the state before shipment out of state violated the Commerce Clause because Alaska was participating in the timber-sale market but not the timber processing market.¹³⁵ BFI argued that, like Alaska, the County was using its contracts in the waste collection market to regulate the waste disposal market, a market in which it did not participate.¹³⁶

The court rejected this argument.¹³⁷ The court distinguished BFI's case from *South-Central Timber* and instead followed the Second Circuit's holding in *SSC Corp. v. Town of Smithtown*.¹³⁸ Like the County, the government in *SSC Corp.* contracted out its waste disposal obligations to a company to operate an incinerator.¹³⁹ Also, the government had pursued a two-part scheme to ensure a sufficient volume of waste at the incinerator: (1) a flow-control ordinance and (2)

130. *Id.* at 1338-39.

131. *Id.* at 1339-41.

132. *Id.* at 1340.

133. *Id.* at 1340-41. In particular, the court compared *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983), with *South Central Timber Developers, Inc. v. Wunnicke*, 467 U.S. 82 (1984). *Id.*

134. 467 U.S. 82 (1984).

135. 265 F. Supp. 2d at 1341 (citing *Wunnicke*, 467 U.S. at 97-98).

136. *Id.* at 1342.

137. *Id.* at 1343.

138. *Id.*; 66 F.3d 502 (2d Cir. 1995).

139. 265 F. Supp. 2d at 1342.

a designation clause in its own contracts with waste haulers.¹⁴⁰ The Second Circuit held that the ordinance was unconstitutional, but upheld the contracts, finding that “to the extent that Smithtown was expending public funds and entering into contracts for solid waste collection and disposal services, it was a participant in both of those distinct markets.”¹⁴¹ The court in *BFI* found that like the government in *SSC Corp.* and unlike the state of Alaska, the County, through its contract with another contractor to operate the waste disposal facilities, was a participant in the waste disposal market and thus participated in both the collection and disposal markets.¹⁴² The court therefore held that the designation clause in the County’s contract with BFI, requiring BFI to send waste it collected pursuant to the contract to the County’s facilities (operated by another contractor to the County), was exempt from scrutiny under the Commerce Clause.¹⁴³

IV. OTHER CASES

A. *Expert Fees Under the Clean Water Act*

The Eleventh Circuit considered an issue of first impression in *Georgia Environmental Organization, Inc. v. Hankinson*.¹⁴⁴ This case was an appeal from an award of attorney fees and costs under the Clean Water Act’s citizen suit provision.¹⁴⁵ The court held that plaintiffs were entitled to recover fees they paid to an expert who assisted in monitoring the EPA’s compliance with a consent order, notwithstanding the fact that the expert did not actually testify or otherwise directly participate in the lawsuit itself.¹⁴⁶ The court followed the Supreme Court’s ruling in *Pennsylvania v. Delaware Valley Citizens’ Council*,¹⁴⁷ a Clean Air Act fee-shifting case involving costs of monitoring the consent decree, where the Supreme Court reasoned that “measures necessary to enforce the remedy ordered by the District Court cannot be divorced from the

140. *Id.*

141. *Id.* at 1343.

142. *Id.* at 1345.

143. *Id.* In a related holding, the court also held that the amended flow-control ordinance did not effectively amend BFI’s contract to include its post-*Coastal Carting* terms, in part because the court read the ordinance to affect only future contracts, not existing ones, and also because BFI’s contract with the county contained a provision prohibiting any amendment except in writing signed by the parties. *See id.* at 1345-46.

144. 351 F.3d 1358 (11th Cir. 2003).

145. 33 U.S.C. § 1365 (2001 & Supp. 2003).

146. 351 F.3d at 1364.

147. 478 U.S. 546 (1986).

matters upon which the [plaintiffs] prevailed in securing the consent decree.”¹⁴⁸ The Eleventh Circuit went on to state:

protection of the rights enshrined in the consent decree depends upon highly technical, post-judgment monitoring and evaluation of discharge levels, including the intricacies of pollution movement through various water bodies and associated sediment. Given the absence of a hearing at which an expert could testify and the importance of his work to the enforcement of the consent decree, we cannot say that the district court abused its discretion by determining that the plaintiffs were entitled to expert witness fees.¹⁴⁹

B. National Environmental Policy Act—Finding of No Significant Impact

In *American Canoe Ass’n v. White*,¹⁵⁰ the district court vacated a Clean Water Act § 404 permit issued to the Cullman-Morgan [counties, Alabama] Water District for construction of a dam on the Duck River in northeastern Alabama.¹⁵¹ The court also remanded to the Corps of Engineers its Finding of No Significant Impact (“FONSI”) in connection with the project, instead of an Environmental Impact Statement (“EIS”), for further consideration by the agency.¹⁵² Applying the standards to determine whether an agency’s decision not to prepare an EIS was arbitrary and capricious set out by the Eleventh Circuit in *Hill v. Boy*,¹⁵³ the court determined that the Corps had failed to take a “hard look” at the cumulative impacts of the project on the future water quality of the proposed reservoir and at the downstream effects of the dam.¹⁵⁴ The court also determined that even if the Corps did take a hard look at these factors, it did not make a “convincing case” for issuing a FONSI.¹⁵⁵ For these reasons, the court held that the Corps’ issuance of the FONSI was arbitrary and capricious, and the court vacated the permit and remanded to the Corps for further proceedings.¹⁵⁶

148. 351 F.3d at 1364.

149. *Id.*

150. 277 F. Supp. 2d 1244 (N.D. Ala. 2003).

151. *Id.* at 1266.

152. *Id.* at 1265-66.

153. 144 F.3d 1446, 1450 (11th Cir. 1998).

154. 277 F. Supp. 2d at 1265.

155. *Id.*

156. *Id.*