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Environmental Law

by Travis M. Trimble*

In 2012,¹ the United States Court of Appeals for the Eleventh Circuit, deciding an issue of first impression, held that a party that enters a consent order to settle potential liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)² is not entitled to pursue a cost recovery action against other potentially responsible parties under section 107³ of the Act, but may only seek contribution from those parties under section 113(f)⁴ of the Act.⁵ The court also affirmed a decision by the Bureau of Ocean Energy Management to approve an exploration plan for oil and gas drilling in the Gulf of Mexico after the Deepwater Horizon oil rig disaster without requiring an Environmental Impact Statement.⁶ The petitioners' challenge under the National Environmental Policy Act⁷ and the Endangered Species Act⁸ was rejected by the court.⁹ Finally, the court held that the United States Fish & Wildlife Service's decision not to designate a critical habitat for the endangered Florida panther was exclusively within the discretion of the agency and thus not a violation of the Endangered Species Act.¹⁰ District courts in the Eleventh Circuit also issued two

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1. For an analysis of environmental law during the prior survey period, see Travis M. Trimble, *Environmental Law, Eleventh Circuit Survey*, 63 MERCER L. REV. 1223 (2012).

2. 42 U.S.C. §§ 9601-9675 (2006 & Supp. V 2011).

3. See 42 U.S.C. § 9607.

4. See 42 U.S.C. § 9613(f).

5. *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230, 1233, 1237-38 (11th Cir. 2012).

6. *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt.*, 684 F.3d 1242, 1253 (11th Cir. 2012).

7. 42 U.S.C. §§ 4321-4370h (2006 & Supp. IV 2010).

8. 16 U.S.C. §§ 1531-1544 (2006 & Supp. IV 2010).

9. *Defenders of Wildlife*, 684 F.3d at 1251-53.

10. *Conservancy of Sw. Fla. v. U.S. Fish & Wildlife Serv.*, 677 F.3d 1073, 1074 (11th Cir. 2012).

significant decisions under the Clean Water Act¹¹ in 2012. The United States District Court for the Northern District of Florida upheld the Environmental Protection Agency's determination that water quality criteria to limit nutrient pollution in Florida waters should be numeric rather than narrative.¹² The court went on to uphold parts of the Final Rule setting out numeric criteria applicable to lakes, but struck down criteria applicable to streams and certain streams entering unimpaired lakes, concluding that they were arbitrary and capricious.¹³ Finally, the United States District Court for the Middle District of Georgia held that Georgia's state law water quality protection scheme was sufficiently different from that of the federal Clean Water Act and parties entering consent orders with the state to settle potential liability under Georgia's scheme are not protected from citizen suits under the Clean Water Act for the same violations.¹⁴

I. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

Deciding an issue of first impression, the United States Court of Appeals for the Eleventh Circuit held in *Solutia, Inc. v. McWane, Inc.*,¹⁵ that a party obligated to remediate a hazardous site under a consent decree with the Environmental Protection Agency (EPA) may seek reimbursement for its costs of remediation from other potentially responsible parties (PRPs) only in a contribution action under § 113(f) of CERCLA,¹⁶ and, under § 107(a) of CERCLA,¹⁷ may not pursue cost recovery.¹⁸ The plaintiffs, Solutia & Pharmacia (S&P), were successors in interest to the Monsanto Company, which produced polychlorinated biphenyls (PCBs) at a plant in Anniston, Alabama, from 1929 to 1971. In 2002, EPA named S&P as defendants in a CERCLA enforcement action in the United States District Court for the Northern District of Alabama, seeking remediation of PCB and lead contamination at two sites in the Anniston area known as the PCB Site and the Lead Site. In June 2003, S&P filed the present case in the same court, seeking reimbursement of their costs of remediation in two counts: first, under § 113(f) for contribution as to costs they incurred at both the PCB Site

11. 33 U.S.C. §§ 1251-1387 (2006 & Supp. VI 2010).

12. *Fla. Wildlife Fed'n, Inc. v. Jackson*, 853 F. Supp. 2d 1138, 1176 (N.D. Fla. 2012).

13. *Id.* at 1176-77.

14. *Leakey v. Corridor Materials, LLC*, 839 F. Supp. 2d 1340, 1350 (M.D. Ga. 2012).

15. 672 F.3d 1230 (11th Cir. 2012).

16. 42 U.S.C. § 9613(f) (2006).

17. 42 U.S.C. § 9607(a) (2006).

18. *Solutia*, 672 F.3d at 1233, 1237-38.

and the Lead Site; and second, for cost recovery under § 107 as to costs they incurred at the Lead Site only. In August 2003, to settle the original enforcement action EPA entered into a Partial Consent Decree (PCD) with S&P, under which S&P were obligated to remediate both the PCB Site and the Lead Site, and under which they reserved the right to seek contribution from other PRPs for their costs of remediating the Lead Site.¹⁹

In 2005, EPA entered into a separate CERCLA settlement agreement with Foothills Community Partnership, a group of PRPs, for reimbursement of EPA's costs of remediating lead contamination in the Anniston area, including some areas that overlapped with areas addressed in the S&P PCD. Members of this PRP group were also defendants in the present case in district court. S&P filed a motion in the original enforcement case seeking to have its obligations under the PCD suspended on the ground that EPA, by entering into the 2005 agreement, had undermined S&P's right to seek contribution from the PRPs, who were parties to the 2005 agreement.²⁰ The district court agreed to suspend S&P's obligations under the PCD provided they filed a motion requesting that relief; but instead S&P resolved this issue with EPA in July 2006 by entering into a stipulation clarifying the original PCD. The stipulation required S&P to remediate four specified geographical zones around Anniston, which included areas containing lead contamination. The stipulation also preserved S&P's right to bring an action for contribution against other PRPs for costs related to the remediation.²¹

Subsequently, the defendants in S&P's cost recovery and contribution action who were parties to the 2005 settlement agreement (Settling Defendants) moved for summary judgment as to both the § 107 cost recovery claim and the § 113(f) contribution claim. Additionally, two defendants in the case who had not settled with EPA in 2005 (Non-Settling Defendants) moved for summary judgment only as to the § 107 claim. In June 2008, the magistrate judge deciding that case granted summary judgment to the Settling Defendants as to S&P's § 113(f) contribution claim because § 113(f)(2) bars a contribution claim against a party who has resolved its liability to the United States in an administrative or judicially approved settlement, which the 2005 agreement was. The magistrate also initially ruled that S&P could proceed with their § 107 cost recovery claim against all defendants, but

19. *Id.* at 1233-34.

20. *Id.* at 1234. This is because § 113(f)(2) protects from contribution claims a party that "has resolved its liability to the United States or a State in an administrative or judicially approved settlement." *Id.*; see also 42 U.S.C. § 9613(f)(2).

21. *Solutia*, 672 F.3d at 1233-34.

upon motions to reconsider vacated that part of its order in December 2009, and in July 2010 granted summary judgment to all defendants as to S&P's § 107 claim.²² S&P appealed.²³

The Eleventh Circuit, based on its holding in *Atlanta Gas Light Co. v. UGI Utilities, Inc.*,²⁴ first held that S&P had a contribution claim under § 113(f) for costs it incurred in complying with the PCD and stipulation.²⁵ The court then held that S&P were not entitled to seek cost recovery under § 107 for the same costs.²⁶ The court relied on two recent United States Supreme Court cases—*Cooper Industries, Inc. v. Aviall Services, Inc.*,²⁷ and *United States v. Atlantic Research Corp.*²⁸—which explained and clarified the difference between a § 107 cost recovery action and a § 113(f) contribution action.²⁹ Based on these cases, the Eleventh Circuit noted that cleanup costs incurred by a party voluntarily and directly (that is, not incurred in reimbursing another party) are recoverable only under § 107(a), even if the party incurring the costs is not an innocent party.³⁰

In contrast, a party forced to reimburse another party (such as EPA) for cleanup costs may only seek reimbursement from other PRPs for those costs in a § 113(f) contribution action.³¹ Unlike the joint and several liability imposed by § 107, liability in a § 113(f) contribution

22. *Id.* at 1234-35. The Magistrate Judge based the reversal of the district court's previous ruling on the stipulation, which had not been presented to the court before its 2008 ruling and which preserved S&P's right to seek contribution for its costs incurred, which the Magistrate found meant that it could not also seek cost recovery under § 107 for the same costs, and on cases from other circuits decided after *United States v. Atlantic Research Corp.*, 551 U.S. 128 (2007). *Solutia*, 672 F.3d at 1234-35.

23. *Solutia*, 672 F.3d at 1233.

24. 463 F.3d 1201 (11th Cir. 2006).

25. *Solutia*, 672 F.3d at 1236.

26. *Id.* at 1237.

27. 543 U.S. 157 (2004).

28. 551 U.S. 128 (2007).

29. *Solutia*, 672 F.3d at 1235-36.

30. *Id.* at 1235. Section 107 imposes joint and several liability on defendants, allowing a party bringing a § 107 action to recover jointly or severally from any defendant in the action. *Id.*

31. *Id.* Section 113(f) allows a party to bring a contribution action against any other PRP "during or following any civil action under [42 USC § 9606] or under [42 USC § 9607(a)]." 42 U.S.C. § 9613(f)(1). Section 106 allows the government to order private parties to take remedial action. 42 U.S.C. § 9604. Section 107 creates a cause of action for the government or for any other person voluntarily incurring "necessary costs . . . consistent with the national contingency plan" to recover costs of removal or remediation against any responsible party, as defined in the code section. 42 U.S.C. § 9607(a)(4)(B). Thus, a party who would be entitled to bring a contribution action under § 113(f) would necessarily be a defendant in a cost recovery action.

action may be apportioned according to fault.³² Furthermore, parties who have settled their liability to the government through an administrative or judicial settlement are protected from § 113(f) contribution actions by other PRPs, but not from § 107 cost recovery actions.³³

Because of these differences, the court concluded that § 113(f) should be the only remedy for a party obligated to undertake remediation under a consent decree, even though that party would incur those costs directly rather than being required to reimburse a third party.³⁴ The court explained that:

[i]f a party subject to a consent decree could simply repackage its § 113(f) claim for contribution as one for recovery under § 107(a), then the structure of CERCLA remedies would be completely undermined. For example, parties[,] . . . like Solutia & Pharmacia, could thwart the contribution protection afforded to parties that settle their liability with the EPA, like the Settling Defendants. This, in turn, would destroy CERCLA's statutorily-created settlement incentive.³⁵

The court also pointed out that allowing a § 107 recovery action for costs incurred pursuant to a consent order would allow the plaintiff in that action to hold the defendants jointly and severally liable, and those defendants in turn would be barred from seeking proportional allocation of those costs in a § 113(f) counterclaim because the plaintiff would have the protection of § 113(g),³⁶ barring such a claim.³⁷ As a result the plaintiff, itself likely not an innocent party, could potentially recover one hundred percent of its incurred costs complying with the consent order.³⁸

The opinion did not discuss whether the § 113(f) contribution claim, which the court held that S&P had against the Settling Defendants, survived those defendants' settlement with EPA in 2005, but presumably it did not. Although the PCD and subsequent stipulation purported to preserve S&P's right to seek contribution from other PRPs for costs S&P incurred complying with the PCD, and the court held that S&P indeed had the right to a § 113 claim generally for those costs, the Settling

32. *Solutia*, 672 F.3d at 1235.

33. *Id.*

34. *Id.* at 1236-37.

35. *Id.* at 1236 (citation omitted). The court characterized the Settling Defendants' agreement with EPA as a settlement agreement and S&P's as a consent decree, but consent decrees are in fact a form of settlement, because a PRP enters into one voluntarily. *Id.* at 1236-37.

36. *See* 42 U.S.C. § 9613(g) (2006).

37. *Solutia*, 672 F.3d at 1236-37.

38. *See id.*

Defendants would also have the statutory protection from contribution claims under § 113(g) as to any costs for which they and S&P could both be liable.³⁹ This would mean that S&P would be left without any claim at all against the Settling Defendants, and would be left with contribution claims only against the Non-Settling Defendants.

II. CLEAN WATER ACT

In *Florida Wildlife Federation, Inc. v. Jackson*,⁴⁰ the United States District Court for the Northern District of Florida issued several holdings related to EPA's determination under the Clean Water Act (CWA)⁴¹ that numeric rather than narrative criteria were necessary to control nutrient pollution in certain Florida waters.⁴² The court held that this initial determination was not arbitrary and capricious, and that the numeric criteria in the Final Rule for lakes (Final Rule) were also not arbitrary and capricious.⁴³ Furthermore, the court held that EPA's decision to adopt downstream protective values (DPVs) for lakes was not arbitrary and capricious, and nor were the DPVs applicable to already impaired lakes.⁴⁴ However, the court held that the numeric criteria applicable to streams and the DPVs applicable to non-impaired lakes were arbitrary and capricious because EPA set the values without a basis to conclude that nutrient levels above those values caused a harmful increase in flora or fauna in the waters.⁴⁵ Finally the court held that EPA's authorization of site-specific alternative criteria and the procedure it established for adopting that criteria were not arbitrary and capricious.⁴⁶

Nutrients occur naturally in surface waters, but they are also increased by the introduction of certain substances in concentrated amounts by human activity, notably wastewater treatment, power generation, and agriculture.⁴⁷ A nutrient increase in a body of water can cause "significant changes in the ecosystem, in the health of plants and animals, in the recreational value of waters, and in the safety of drinking water."⁴⁸

39. *Id.* at 1236-38; *see also* 42 U.S.C. § 9613(g).

40. 853 F. Supp. 2d 1138 (N.D. Fla. 2012).

41. 33 U.S.C. §§ 1251-1387 (2006 & Supp. VI 2010).

42. *Fla. Wildlife*, 853 F. Supp. 2d at 1176-77.

43. *Id.* at 1143.

44. *Id.*

45. *Id.* at 1143-44.

46. *Id.* at 1144.

47. *Id.* at 1145.

48. *Id.*

The addition of substances that cause or contribute to nutrient pollution in water is regulated under the CWA. According to the Act, states are allowed to set their own water quality standards and criteria to meet those standards, unless EPA determines that a revised or new standard is necessary, in which case EPA must “promptly” publish a revised or new standard and adopt the new standard within ninety days of publication.⁴⁹ Water-quality criteria may be either narrative (that is, a written description of a water-quality goal), or numeric (that is, an absolute value).⁵⁰

Prior to 2009 Florida had a narrative criterion for nutrient levels in state waters.⁵¹ As early as 1998, though, EPA was aware that narrative criteria were not working to control nutrient pollution in Florida’s waterways. That year, EPA adopted a Clean Water Action Plan and produced a report related to that plan in which it recognized that nutrient pollution constituted a large part of the nation’s water-quality problem and that narrative criteria to control it were not working. The report stated that EPA expected all states to implement numeric nutrient criteria by the end of 2003. The Florida Department of Environmental Protection (FDEP) was developing a numeric criterion by 2001. In 2003, FDEP submitted to EPA a plan for developing numeric criteria that proposed to have a draft rule ready by October 2005. FDEP subsequently pushed back its projected dates for developing a numeric rule in 2004, 2007, and 2008, at which point its proposed time schedule for producing a final rule, assuming possible political and administrative challenges to a proposed rule, could have been as late as 2014.⁵² As a result of this delay, in July 2008, environmental organizations filed suit against EPA under the CWA citizen-suit provision,⁵³ seeking to compel EPA to issue a numeric-criteria rule for nutrients in certain Florida waters.⁵⁴

49. *Id.* at 1144; *see also* 33 U.S.C. § 1313(c)(4).

50. *Fla. Wildlife*, 853 F. Supp. 2d at 1145-46.

51. *Id.* at 1146. The criterion stated: “In 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.” *Id.*; *see also* Fla. Admin. Code r. 62-302.530(47)(b), *available at* <https://www.flrules.org/gateway/ruleNo.asp?id=62-302.530>.

52. *Fla. Wildlife*, 853 F. Supp. 2d at 1144-48.

53. 33 U.S.C. § 1365(a)(2).

54. *Fla. Wildlife*, 853 F. Supp. 2d at 1151-52. The waters at issue in the case are those classified “I” or “III” under Florida’s rules. Class III waters are those assigned the uses of “Fish Consumption; Recreation, Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife.” Fla. Admin. Code r. 62-302.400(1) (2010). Class I waters are assigned those uses and also “Potable Water Supplies.” *Id.*

In January 2009, while that case was pending, EPA made a formal determination that Florida needed a new standard in order to comply with the CWA (2009 Determination); then in August 2009 EPA and the plaintiffs entered into a settlement resulting in a consent order, in which EPA agreed to propose a numeric criteria rule for Florida by January 2010 and adopt the rule by October 2010 for lakes and streams and one year later for coastal and estuarine waters.⁵⁵ With a small court-approved delay EPA complied with the consent order; EPA published the Final Rule setting numeric criteria for nutrient pollution in lakes in flowing waters⁵⁶ in December 2010.⁵⁷

Subsequently, twenty-five parties—including seven environmental organizations, the State of Florida, and numerous industry and agricultural trade associations—filed thirteen separate actions in Florida district courts challenging the 2009 Determination and the Final Rule, all of which were consolidated into the present case. The state and industry parties contended that the 2009 Determination was arbitrary and capricious. Those parties also contended that, even if the 2009 Determination was valid, the criteria for lakes and streams and the default DPVs were arbitrary and capricious and thus invalid for two reasons: first, the criteria in the Final Rule were not connected to the designated uses of the water bodies to which they applied; and second, they were not based on sound science. The environmental parties did not challenge the 2009 Determination or the DPVs, but they did contend that the lake and stream criteria were not protective enough and should be corrected.⁵⁸

The district court decided these challenges under the standard applicable to a court reviewing an agency action under the Administrative Procedure Act:⁵⁹ a court must set aside an agency action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁶⁰ The court summarized its obligation under this standard: “to make a searching and careful review of the Administra-

55. *Fla. Wildlife*, 853 F. Supp. 2d at 1148, 1152.

56. The rule does not apply to flowing waters in an area of the state designated as the South Florida Region. *Id.* at 1151.

57. *Id.* Two intervenors appealed to challenge the validity of the consent decree as issued by the district court. The Eleventh Circuit dismissed the appeal for lack of standing, holding that EPA’s 2009 Determination, not the consent decree, was the basis of the intervenors’ alleged harm. *Id.* at 1153 (citing *Fla. Wildlife Fed’n Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F.3d 1296, 1306-07 (11th Cir. 2011)).

58. *Id.* at 1153-55.

59. 5 U.S.C. §§ 701-706 (2006).

60. *Fla. Wildlife*, 853 F. Supp. 2d at 1155; *see also* 5 U.S.C. § 706(2)(A).

tor's action but to be 'exceedingly deferential,' especially on matters calling for scientific judgment."⁶¹

The court first upheld EPA's 2009 Determination that new or revised criteria were necessary in Florida.⁶² The court noted that EPA had concluded that narrative criteria were not working to reduce or even control nutrient pollution in Florida waters, and "[t]he evidence supporting the conclusion was substantial, indeed overwhelming."⁶³ The court also pointed out that FDEP had essentially agreed with this conclusion since as early as 2003 and had "never wavered from that position."⁶⁴ The court discussed six contentions made by the challengers, including one on the basis that EPA did not need to act because the state was actively working toward developing numeric criteria for nutrients.⁶⁵ The court noted that EPA's authority under the CWA allows it to determine whether a new standard is necessary, but not necessarily that EPA, rather than the state, should be the entity to promulgate the standard.⁶⁶ Nonetheless, the court pointed out that under FDEP's watch the numeric standard had been subject to seemingly indefinite delay, and assumed that EPA "may properly take into account the likelihood that a state will correct the problem itself."⁶⁷ The court rejected other bases for challenge as not being supported by facts or law.⁶⁸

Turning to the challenges to the substance of the Final Rule, the court noted two bases for its review of EPA's exercise of discretion in promulgating the rule.⁶⁹ First, EPA had explained its goal in developing the numeric rule as an effort to translate Florida's existing narrative criterion into numeric criteria.⁷⁰ Second, Florida had interpreted its narrative criterion to prohibit not *any* change in natural populations of flora and fauna, but only a *harmful* change.⁷¹

Considering first the challenges to the lake criteria, the court concluded overall that the numeric criteria set out in the Final Rule

61. *Fla. Wildlife*, 853 F. Supp. 2d at 1156. The court preceded this summary with a thorough discussion of the standard of review. *Id.* at 1155-56.

62. *Id.* at 1160.

63. *Id.* at 1157.

64. *Id.* The court found "especially curious" the fact that the State of Florida was a party challenging the 2009 Determination in the case. *Id.*

65. *Id.* at 1157-60.

66. *Id.* at 1158 n.16.

67. *Id.*

68. *Id.* at 1159.

69. *Id.* at 1160-61.

70. *Id.* at 1160.

71. *Id.* at 1160-61.

were not arbitrary and capricious.⁷² First, the state and industry challengers objected to the Final Rule's classifying lakes based on their response to nutrients based only on color and alkalinity.⁷³ The court concluded that this classification was not arbitrary and capricious.⁷⁴ Second, the state and industry plaintiffs challenged the Final Rule's setting independent numeric criteria for three parameters in lakes: chlorophyll, total nitrogen, and total phosphorus—that is, under the Final Rule, a lake could not be unimpaired unless it met all three criteria independently.⁷⁵ The court concluded this requirement for a lake to be unimpaired was not arbitrary and capricious.⁷⁶ Third, the environmental parties challenged the Final Rule's provision that for a lake to be considered impaired the mean of a parameter must exceed its numeric limit in more than one of three consecutive years. The challengers argued that this definition does not sufficiently protect recreation or drinking water uses.⁷⁷ The court appeared sympathetic to this argument, but it concluded that “[w]hile the issue is not free of doubt, I resolve the question in [EPA's] favor, giving substantial weight to the standard of review.”⁷⁸

The court also concluded that the Final Rule's nutrient criterion for springs was based on scientific judgment within EPA's discretion and was not arbitrary and capricious.⁷⁹ However, the court held that the Final Rule's nutrient criterion for streams was arbitrary and capricious.⁸⁰ EPA's goal in adopting the numeric criteria was to translate Florida's narrative criterion into numerical standards, and Florida should interpret its narrative criterion to protect water bodies from a

72. *Id.* at 1161-62.

73. *Id.* at 1162.

74. *Id.* Challengers claimed EPA had ignored other relevant characteristics that could influence the effect nutrients would have on a particular lake, principally, temperature, high color, and the fact that high levels of phosphorous occur naturally in the West Central Region of the state. *Id.* at 1162-63. The court concluded that EPA's decision not to take these characteristics into account in classifying lakes was not arbitrary and capricious. *Id.* at 1163.

75. *Id.* at 1164. Challengers claimed that since chlorophyll measures algae growth, and nitrogen and phosphorus contribute to algae growth, a lake should only have to meet the chlorophyll criterion to be considered unimpaired. EPA explained that high nitrogen and phosphorus levels are predictors of algae growth before it occurs, and thus could potentially be used to prevent algae growth before it spikes. *Id.*

76. *Id.*

77. *Id.* at 1165.

78. *Id.*

79. *Id.* at 1166-67.

80. *Id.* at 1169.

harmful increase in nutrient levels.⁸¹ The court interpreted the Final Rule as applied to streams to prevent *any* increase in nutrient levels.⁸² The court held that this approach to stream protection was arbitrary and capricious, both because it differed from EPA's stated goal and because EPA provided no scientific basis for preventing any change in nutrient levels in streams.⁸³

Furthermore, the court upheld EPA's decision to enact DPVs, noting that the reasonable effect of DPVs would be to apply nutrient limits to a stream that was causing nutrient levels in a lake to be unacceptably high, even if nutrient levels within the stream itself met the stream criteria.⁸⁴ However, the court struck down the Final Rule's DPV levels as they applied to an unimpaired lake, finding the same flaw in these default DPV levels as with the stream criteria: they prohibited any change in nutrient levels in the lake, not just harmful changes.⁸⁵ The court also upheld the Final Rule's application to canals and EPA's adoption of site-specific alternative criteria, which would allow EPA to raise or lower criteria for a particular water based on specific conditions at that site.⁸⁶

In *Leakey v. Corridor Materials, LLC*,⁸⁷ the United States District Court for the Middle District of Georgia held the opportunities for public participation during an enforcement proceeding provided for by the Georgia Water Quality Control Act⁸⁸ and the Georgia Administrative Procedure Act⁸⁹ are not comparable to those provided under the federal CWA, and thus a consent order entered into by a party with the State of Georgia under state law did not bar an action to enforce the CWA under the citizen-suit provision of the CWA.⁹⁰ The defendants owned and operated a quarry in Hancock County, Georgia. The plaintiffs owned land downstream from the quarry site, including a two-acre pond and associated wetlands. In 2007 the defendants obtained a Surface Mining Permit, a Water Quality Permit, and an Air Quality Permit from the Georgia Environmental Protection Division (EPD) for the operation of the quarry. In 2008 the defendants conducted extensive clearing and other site preparation activities. Subsequently, the EPD issued two

81. *Id.* at 1168.

82. *Id.*

83. *Id.* at 1168-69.

84. *Id.* at 1169-70.

85. *Id.* at 1170-71.

86. *Id.* at 1171-72.

87. 839 F. Supp. 2d 1340 (M.D. Ga. 2012).

88. O.C.G.A. §§ 12-5-20 to -586 (2012).

89. O.C.G.A. §§ 50-13-1 to -44 (2009 & Supp. 2012).

90. *Leakey*, 839 F. Supp. 2d at 1347, 1350.

Notices of Violation to the defendants related to the discharge of pollutants into wetlands on the defendants' property and other state waters. To resolve these violations, in May 2009, the defendants entered into a consent order with the EPD, which required the defendants to pay a \$20,000 fine and to implement various remedial activities related to the discharges.⁹¹

In January 2010 the plaintiffs filed suit against the defendants under the CWA's citizen-suit provision to enforce provisions of the CWA related to the defendants' land-clearing activities, including the discharge of pollutants into state waters on the plaintiffs' land and the failure to obtain certain permits.⁹² The defendants moved for dismissal of the plaintiffs' claim for lack of subject-matter jurisdiction based on the CWA's limitation on the actions provision.⁹³ The court noted that relevant to the plaintiffs' claim in this case, the CWA bars citizen suits against a party for claims for which a state has issued a final order not subject to further judicial review and the party has paid a penalty assessed under a comparable state law.⁹⁴

Furthermore, the court held the limitation on the actions provision of the CWA did not bar the plaintiffs' citizen suit.⁹⁵ The court concluded that while the May 2009 consent order entered into between the defendants and the Georgia EPD was a final order not subject to review, and the defendants had paid a penalty, the Georgia Water Quality Control Act and relevant provisions of the Georgia Administrative Procedure Act did not constitute "comparable [s]tate law" and thus an element necessary for the citizen suit bar to apply was not present.⁹⁶ The court reached this conclusion primarily because the opportunities for public participation in the consent order process are not comparable.⁹⁷ The court used the standard from *McAbee v. City of Fort Payne*⁹⁸ and applied the Eleventh Circuit's "rough comparability test."⁹⁹ In that case the Eleventh Circuit held that a court needing to determine whether a state's statutory enforcement scheme was comparable to that of the CWA should focus on three categories—penalty assessment, public participation, and judicial review—and each category independently

91. *Id.* at 1342-43.

92. *Id.*

93. *Id.* at 1343-44; *see also* 33 U.S.C. § 1319(g)(6)(A).

94. *Leakey*, 839 F. Supp. 2d at 1344; *see also* 33 U.S.C. § 1319(g)(6)(A)(iii).

95. *Leakey*, 389 F. Supp. 2d at 1344.

96. *Id.* at 1345-47, 1350.

97. *Id.* at 1350.

98. 318 F.3d 1248 (11th Cir. 2003).

99. *Leakey*, 839 F. Supp. 2d at 1346-47.

must be “roughly comparable” to the corresponding category in the CWA’s enforcement scheme.¹⁰⁰

The district court in *Leakey* concluded, as the Eleventh Circuit had done regarding Alabama’s enforcement scheme in *McAbee*, that the public participation opportunities under Georgia’s enforcement scheme were not comparable to those under the CWA.¹⁰¹ The court noted, “The CWA provides ‘interested persons,’ which essentially means anyone, with the right to public notice and an opportunity to comment, the right to present evidence if a hearing is held, and the right to petition for a hearing if one is not held” during a CWA enforcement action.¹⁰² In contrast, the Georgia enforcement scheme’s¹⁰³ public participation provisions allow participation only by parties who are aggrieved or adversely affected by any action or order, and the right arises only upon service of the notice of action or order on those parties.¹⁰⁴ The court noted that members of the public, including the Leakeys, were not “aggrieved or adversely affected” by the consent order, nor would the order have been served on them.¹⁰⁵ Furthermore, the Georgia scheme did not provide for public notice or opportunity to comment on the proposed enforcement action prior to the entry of a consent order.¹⁰⁶ In contrast, the court noted, the CWA provisions “allow members of the general public, even those who have not suffered an injury, to participate in the enforcement process before and after the issuance of a penalty order.”¹⁰⁷ The court held that in this regard, the Georgia scheme was even less comparable to the federal one than the Alabama enforcement scheme in *McAbee* that the Eleventh Circuit had rejected as not comparable to the CWA, in that the Alabama statute did require public

100. *Id.* at 1346-47 (quoting *McAbee*, 318 F.3d at 1254, 1256). The district court noted, as the *McAbee* court had, that the CWA limitation on actions provision is unclear as to the scope of state law provisions that may be compared to the CWA; that is, whether a court should compare the state’s “overall” statutory enforcement scheme to the CWA’s, or only compare the specific state statute under which the state had commenced the action against the defendant. *Id.* at 1347 (quoting *McAbee*, 318 F.3d at 1255 n.8). Both courts declined to resolve this ambiguity, because both concluded that even assuming the broader category of state law for comparison, the state law was still not comparable to the CWA. *Id.* at 1347 (citing *McAbee*, 318 F.3d at 1255 n.8).

101. *Id.* at 1347.

102. *Id.* at 1348 (quoting *McAbee*, 318 F.3d at 1256); see also 33 U.S.C. § 1319(g)(4).

103. For purposes of comparison, the court considered both the Georgia Water Quality Control Act and the Georgia Administrative Procedure Act. *Leakey*, 839 F. Supp. 2d at 1348-49; see also O.C.G.A. §§ 12-5-43(a), 50-13-14.

104. *Leakey*, 839 F. Supp. 2d at 1348.

105. *Id.*

106. *Id.*

107. *Id.*

notice in a newspaper of the issuance of an enforcement action.¹⁰⁸ As a result, assuming this ruling stands on appeal, parties entering into consent orders with the Georgia EPD regarding water quality violations are not protected from citizen suits brought under the federal CWA.¹⁰⁹

III. NATIONAL ENVIRONMENTAL POLICY ACT & ENDANGERED SPECIES ACT

In *Defenders of Wildlife v. Bureau of Ocean Energy Management*,¹¹⁰ the Eleventh Circuit upheld the Bureau of Ocean Energy Management's (BOEM)¹¹¹ approval of an Exploratory Plan submitted by Shell Oil for oil and gas drilling off the coast of Alabama following the BP Deepwater Horizon oil spill, rejecting a challenge by the petitioners that the National Environmental Policy Act (NEPA)¹¹² and the Endangered Species Act (ESA)¹¹³ were violated by the approval.¹¹⁴ Under the Outer Continental Shelf Lands Act (OCSLA)¹¹⁵ Shell submitted this particular Exploratory Plan for a lease it purchased during a multi-year lease-sale conducted by BOEM.¹¹⁶ OCSLA authorizes the sale of offshore oil and gas drilling leases, including in the Gulf of Mexico. It sets out a four-stage process for the agency conducting the sales: first, the development of a leasing program; second, sales of leases; third, exploration by the lessees; and fourth, development and production.¹¹⁷

BOEM, the agency in charge of leases, developed a leasing program for western and central regions of the Gulf of Mexico for the years 2007 to 2012, and produced an environment impact statement (EIS) for the program as required by NEPA that would apply to eleven leases in this program.¹¹⁸ BOEM produced a supplemental environment impact statement (SEIS) in 2009 for seven remaining lease sales in the program. Both EISs concluded that drilling activities in the Gulf under the 2007-2012 lease program would not significantly affect the environ-

108. *Id.* at 1348-49.

109. *Id.* at 1350. The United States District Court for the Northern District of Georgia, following *Leakey*, reached the same conclusion regarding the comparability of the Georgia water quality enforcement scheme with the CWA. *Kendall v. Thaxton Road LLC*, No. 1:09-CV-3520-TWT, 2013 WL 210892, at *4 (N.D. Ga. Jan. 18, 2013).

110. 684 F.3d 1242 (11th Cir. 2012).

111. An agency of the United States Department of the Interior.

112. 42 U.S.C. §§ 4321-4370h (2006 & Supp. IV 2010).

113. 16 U.S.C. §§ 1531-1544 (2006 & Supp. IV 2010).

114. *Defenders of Wildlife*, 684 F.3d at 1245-46, 1253.

115. 43 U.S.C. §§ 1331-1356 (2006 & Supp. V 2011).

116. *Defenders of Wildlife*, 684 F.3d at 1245-46.

117. *Id.* at 1246.

118. *Id.* at 1246-47; *see also* 42 U.S.C. § 4332(C).

ment. They took into consideration the possibility of a large oil spill, but concluded that such a possibility was small, and even if one occurred it would not be “catastrophic” to the region, animal populations, and ecosystems.¹¹⁹ The Deepwater Horizon spill occurred in April 2010, and as a result BOEM undertook another SEIS that was completed in January 2012. The 2012 SEIS found no new information to change the conclusions of the 2007 EIS and the 2009 SEIS.¹²⁰ Also, following the Deepwater Horizon spill, BOEM began requiring environmental assessments (EAs)¹²¹ for any application to drill that would involve the use of a blowout preventer.¹²² Finally, BOEM reinitiated consultation with the United States Fish & Wildlife Service and the National Marine Fisheries Service, pursuant to the ESA, to determine whether continued lease sales would jeopardize listed species.¹²³

Shell submitted the Exploratory Plan at issue in March 2011. BOEM produced an EA for the Exploratory Plan that was tied to the the 2007 EIS and the 2009 SEIS (but not the 2012 SEIS), which concluded that it would not “significantly affect the quality of the human environment within the meaning of NEPA.”¹²⁴ BOEM approved the Exploratory Plan in May 2011, and the petitioners filed this action in June 2011.¹²⁵

The petitioners contended that BOEM’s decision not to prepare an EIS for the Exploratory Plan violated NEPA. The petitioners raised four objections to the decision: first, that BOEM failed to include site-specific information in its evaluation; second, that BOEM failed to use the Mechanical Risk Index methodology to evaluate the risk of a spill; third, that an EIS could provide additional information on the Deepwater Horizon spill; and fourth, that BOEM improperly relied on the 2007 EIS and 2009 SEIS, given that BOEM had already recognized the need for

119. *Defenders of Wildlife*, 684 F.3d at 1247.

120. *Id.*

121. Regulations allow an agency required to review the environmental impact of a federal project to produce an EA to determine whether a more extensive EIS is required; if not, the agency makes a Finding of No Significant Impact. 40 C.F.R. 1508.9 (2012); see *Defenders of Wildlife*, 684 F.3d at 1246-47.

122. *Defenders of Wildlife*, 684 F.3d at 1247.

123. *Id.* at 1247-48. The ESA requires federal agencies to ensure that their actions do not jeopardize the existence of any listed species. 16 U.S.C. § 1536(a)(2). If a proposed action may affect a species, the agency must consult with either the United States Fish & Wildlife Service or the National Marine Fisheries Service. 50 C.F.R. § 402.14(a) (2012). An agency must reinitiate consultation if new information arises that was not examined in the initial consultation. 50 C.F.R. § 402.16 (2012). Here, the agencies’ reinitiated consultation remained ongoing when BOEM approved the Shell EP and when the case was decided. *Defenders of Wildlife*, 684 F.3d at 1248.

124. *Defenders of Wildlife*, 684 F.3d at 1248.

125. *Id.*

an additional SEIS to evaluate information from the Deepwater Horizon spill.¹²⁶

The court rejected these challenges.¹²⁷ The court reviewed the petitioners' claims under the deferential "arbitrary and capricious" standard required by the Administrative Procedure Act,¹²⁸ examining the agency's decision not to produce an EIS only to ensure that the agency took a "hard look" at potential environmental concerns associated with its action.¹²⁹ First, the court concluded that the EA did include sufficient site-specific information, including an evaluation of the potential for an oil spill.¹³⁰ The petitioners appeared to focus on the EA's lack of evaluation of the possibility and effects of a catastrophic spill such as the Deepwater Horizon spill, but the court pointed out that the project, and the EA, concerned operations under the Exploratory Plan, "not an expected oil spill from those operations."¹³¹ Second, the court concluded that BOEM was not required to use the methodology to assess the risk of a blowout advocated by the petitioners.¹³² The court noted that no evidence suggested that methodology was standard in the industry, and pointed out also that the choice of methodology to evaluate risks was a decision based on "complex scientific data within the agency's technical expertise."¹³³ Third, the court concluded that BOEM was not required to wait until the effects of the Deepwater Horizon spill were fully known—which could take years—in order to go forward with the lease-sale projects, explaining that under the Outer Continental Shelf Lands Act, "[e]xploration plan approval decisions are based upon existing available information."¹³⁴ Fourth, the court concluded that BOEM's reliance on the 2007 EIS and 2009 SEIS in not requiring an EIS for the Shell Exploratory Plan was not arbitrary and capricious because BOEM included all information then available to it in its EA of the Shell Exploratory Plan, and BOEM's 2012 SEIS did not contain any information that would alter the conclusions of the earlier EISs.¹³⁵

126. *Id.* at 1249-51.

127. *Id.*

128. 5 U.S.C. §§ 701-706 (2006).

129. *Defenders of Wildlife*, 684 F.3d at 1248-49 (quoting *Hill v. Bog*, 144 F.3d 1446, 1450 (11th Cir. 1998)).

130. *Id.* at 1250.

131. *Id.* at 1249-50.

132. *Id.* at 1250.

133. *Id.* (quoting *Miami-Dade Cnty. v. EPA*, 529 F.3d 1049, 1065 (11th Cir. 2008)).

134. *Id.* at 1250-51; *see also* 43 U.S.C. § 1346(d).

135. *Defenders of Wildlife*, 684 F.3d at 1251.

The petitioners also challenged BOEM's approval of the Shell Exploratory Plan under the ESA, contending that because BOEM reinitiated consultations with the National Marine Fisheries Service and the United States Fish & Wildlife Service following the Deepwater Horizon spill, BOEM in essence conceded that its initial consultation was inadequate, and it was required to complete the new consultation before approving the Exploratory Plan.¹³⁶ The court rejected this challenge as well.¹³⁷ The court found no basis to conclude that BOEM's choice to reinitiate consultation automatically invalidated the biological opinions (that oil drilling in the region would not jeopardize any listed species) that resulted from the agencies' initial consultation.¹³⁸ The court also noted that BOEM had considered the possible effects of an oil spill following the Deepwater Horizon spill in its EA of the Shell Exploratory Plan, and while the agency did see some basis for concern that a spill would put certain listed species at risk, it concluded that the overall impacts would be minimal "based on the low probability of a spill occurring."¹³⁹ For these reasons, the court held that BOEM's decision to approve the Exploratory Plan without first concluding its reinitiated consultation under the ESA was not arbitrary or prohibited by the ESA.¹⁴⁰

IV. ENDANGERED SPECIES ACT

In *Conservancy of Southwest Florida v. United States Fish & Wildlife Service*,¹⁴¹ the Eleventh Circuit held that the Fish & Wildlife Service's (F&WS) denial of the plaintiffs' petition to designate critical habitat for the Florida panther, a listed endangered species under the Endangered Species Act (ESA),¹⁴² was a decision committed to agency discretion by law and thus not subject to judicial review under the Administrative Procedure Act (APA)¹⁴³ because the panther was listed prior to the 1978 amendments to the ESA, which made the agency's designation of critical habitat for species listed prior to the amendments discretionary rather than mandatory, and no law exists that provides standards governing the agency's exercise of that discretion.¹⁴⁴

136. *Id.* at 1251-52.

137. *Id.* at 1253.

138. *Id.* at 1252.

139. *Id.* at 1253.

140. *Id.* at 1252-53.

141. 677 F.3d 1073 (11th Cir. 2012).

142. 16 U.S.C. §§ 1531-1544 (2006 & Supp. IV 2010).

143. 5 U.S.C. §§ 701-706 (2006).

144. *Conservancy of Sw. Fla.*, 677 F.3d at 1074, 1078-79.

The precursor to the ESA, the Endangered Species Preservation Act (ESPA),¹⁴⁵ was enacted in 1966.¹⁴⁶ The ESPA authorized the Secretary of the Interior to list a species as endangered upon finding that “its existence is endangered because its habitat is threatened with destruction, drastic modification, or severe curtailment”¹⁴⁷ However, the ESPA did not require the Secretary to designate critical habitat for a listed species. The ESA was enacted in 1973, and in its original form it also did not require the designation of critical habitat. The ESA was amended in 1978 to provide, among other things, that the Secretary was required to designate critical habitat for an endangered species at the time such species was listed as endangered. Under the current version of the ESA, the Secretary must, at the time of listing a species as endangered, designate any habitat considered to be critical at that time.¹⁴⁸ However, the 1978 amendments included an exception for species listed prior to 1978, providing “Critical habitat *may* be established for those species now listed as threatened or endangered species [that is, at the time the 1978 Amendments took effect] for which no critical habitat has heretofore been established”¹⁴⁹ The Secretary listed the Florida panther as endangered in 1967, and no critical habitat was designated for the panther at that time or since.¹⁵⁰

In 2009, environmental advocacy groups petitioned F&WS pursuant to the APA to designate critical habitat for the panther, citing scientific studies including some relied on by the F&WS in its own Florida Panther Recovery Plan, demonstrating the decline of the panther population due to loss and degradation of habitat. F&WS denied the petition in February 2010, explaining that other efforts F&WS was taking to protect the panther’s habitat were sufficient without the designation of critical habitat. The plaintiffs then filed suit in the United States District Court for the Middle District of Florida, claiming that F&WS’s denial of their petition was arbitrary and capricious under the APA, and sought an order vacating the denial and remanding to F&WS. F&WS and other defendants moved to dismiss for lack of subject-matter jurisdiction and failure to state a claim, on the ground that, among other reasons, APA review was unavailable because F&WS’s decision was one within the absolute discretion of the agency and not

145. Pub. L. No. 89-669, 80 Stat. 926 (1966).

146. *Conservancy of Sw. Fla.*, 677 F.3d at 1074-75.

147. *Id.* at 1075; *see also* ESPA § 1(c), 80 Stat. at 926.

148. *Conservancy of Sw. Fla.*, 677 F.3d at 1075-76; *see also* 16 U.S.C. § 1533(a)(3).

149. *Conservancy of Sw. Fla.*, 677 F.3d at 1076; *see also* 16 U.S.C. § 1532(5)(B).

150. *Conservancy of Sw. Fla.*, 677 F.3d at 1076.

subject to judicial review.¹⁵¹ The district court dismissed the case on this ground, and the plaintiffs appealed.¹⁵²

The Eleventh Circuit affirmed the dismissal because the decision to designate critical habitat for a species listed prior to the 1978 Amendments to the ESA was discretionary, not mandatory, and with regard to whether to designate critical habitat in this circumstance, existing law provided “no meaningful standard against which to judge the agency’s exercise of discretion.”¹⁵³ The court explained that under the United States Supreme Court’s interpretation of judicial review of agency action in the APA, F&WS’s decision not to designate critical habitat for the panther was “committed to agency discretion by law” under the APA and not subject to judicial review.¹⁵⁴

The plaintiffs pointed to three agency regulations that they contended provided standards for judicial review: 50 C.F.R. § 424.14(d),¹⁵⁵ which provides that upon receiving a petition to designate critical habitat, the agency “shall promptly conduct a review in accordance with” departmental regulations.¹⁵⁶ Those regulations in turn provide specific guidance the agency must follow in determining critical habitat for a listed species, and that these regulations in turn provide standards for judicial review.¹⁵⁷ The plaintiffs also argued that 50 C.F.R. § 424.12(a),¹⁵⁸ which requires the agency to make a critical habitat designation based on the best scientific data, provided such standards.¹⁵⁹ The court concluded, however, that based on context these regulations did not apply to a decision whether to designate habitat for a species listed before 1978 (that is, the agency’s decision whether to designate critical habitat at all).¹⁶⁰

151. *Id.* at 1076-78. In support of this ground, the defendants relied on an APA section providing that APA provisions subjecting agency action to judicial review are inapplicable “to the extent that . . . agency action is committed to agency discretion by law.” *Id.* at 1078; *see also* 5 U.S.C. § 701(a)(2).

152. *Conservancy of Sw. Fla.*, 677 F.3d at 1078.

153. *Id.* at 1078-79 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

154. *Id.*

155. 50 C.F.R. § 424.14(d) (2012).

156. *Conservancy of Sw. Fla.*, 677 F.3d at 1079; *see also* 50 C.F.R. § 424.14(d).

157. *Conservancy of Sw. Fla.*, 677 F.3d at 1079; *see also* 50 C.F.R. § 424.12 (2012).

158. 50 C.F.R. § 424.12(a).

159. *Conservancy of Sw. Fla.*, 677 F.3d at 1080.

160. *Id.*
