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Environmental Law

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by Travis M. Trimble*

In this survey period,[1] the United States Court of Appeals for the Eleventh Circuit decided two cases addressing the scope of agency discretion to interpret statutes. In *Friends of the Everglades v. South Florida Water Management District*,[2] the Eleventh Circuit held that the Environmental Protection Agency's adoption of the "unitary waters" definition of *navigable waters* under the Clean Water Act[3] was reasonable[4] even though that approach had been universally rejected by the courts as an interpretation of the statute prior to the agency's rule.[5] In *Miccosukee Tribe of Indians of Florida v. United States*,[6] the Eleventh Circuit upheld the United States Fish & Wildlife Service's opinion that a water project in Florida would not jeopardize the survival of an endangered bird despite the project's adverse effects on the bird's habitat because the opinion was supported by adequate evidence.[7]

The United States District Court for the Middle District of Florida held, in the latest round in the three-state battle for rights to the Chattahoochee River's water, that the Army Corps of Engineers had violated federal law by the de facto reallocation of water stored in Lake Lanier in north Georgia for use as a municipal water supply.[8] The United States District Court for the Southern District of Florida, on an issue of first impression in the Eleventh Circuit, held that the court

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1. For analysis of Eleventh Circuit environmental law during the prior survey period, see Travis M. Trimble, *Environmental Law, 2008 Eleventh Circuit Survey*, 60 MERCER L. REV. 1193 (2009).
2. 570 F.3d 1210 (11th Cir. 2009).
3. 33 U.S.C. §§ 1251–1387 (2006).
4. *Friends of the Everglades*, 570 F.3d at 1228.
5. *Id.* at 1218.
6. 566 F.3d 1257 (11th Cir. 2009).
7. *Id.* at 1271.
8. *In re* Tri-State Water Rights Litigation, 639 F. Supp. 2d 1308, 1350 (M.D. Fla. 2009).

lacked subject matter jurisdiction over claims challenging federal and state agency permitting decisions regarding a natural gas pipeline because the Energy Policy Act of 2005[9] gave the federal circuit courts of appeal exclusive jurisdiction over permitting challenges to facilities or projects within its scope.[10]

Finally, the United States District Court for the Northern District of Georgia held that in order for a defendant to have "contributed to" the handling or disposal of waste for purposes of liability under the citizen-suit provision of the Resource Conservation and Recovery Act,[11] the defendant must have done affirmative acts that resulted in contamination; mere passive conduct was insufficient.[12] Nevertheless, the district court ruled that the defendant's conduct created an issue of fact as to whether it could be liable as an "operator" under the Comprehensive Environmental Response, Compensation and Liability Act.[13]

I. CLEAN WATER ACT

In *Friends of the Everglades v. South Florida Water Management District*,[14] the United States Court of Appeals for the Eleventh Circuit held that the Environmental Protection Agency (EPA) acted reasonably in adopting a regulation[15] exempting from the permitting requirements of the Clean Water Act[16] transfers of water from one body of navigable water to another.[17] The dispute concerned a dike and canals that were constructed to collect rainwater and runoff from sugar fields and industrial and residential areas near Lake Okeechobee in southern Florida. The canal water became polluted with agricultural and industrial contaminants contained in runoff. The Water District periodically pumped water containing those contaminants from the canals into the lake via pump stations in the dike.[18] The plaintiffs sought an injunction requiring the Water District to obtain a National

9. Pub. L. No. 109-58, 119 Stat. 594 (codified in scattered sections of 15 and 42 U.S.C. (2006)).

10. Palm Beach County Envtl. Coal. v. Florida, 651 F. Supp. 2d 1328, 1344–45 (S.D. Fla. 2009).

11. 42 U.S.C. §§ 6901–7000 (2006).

12. Scarlett & Assocs., Inc. v. Briarcliff Ctr. Partners, LLC, No. 1:05-CV-0145-CC, 2009 WL 3151089, at *12–13 (N.D. Ga. Sept. 30, 2009).

13. 42 U.S.C. §§ 9601–9675 (2006); *Scarlett & Assocs.*, 2009 WL 3151089, at *9.

14. 570 F.3d 1210 (11th Cir. 2009).

15. 40 C.F.R. § 122.3(i) (2009).

16. 33 U.S.C. §§ 1251–1387 (2006).

17. *Friends of the Everglades*, 570 F.3d at 1228; *see* 40 C.F.R. § 122.3(i).

18. *Friends of the Everglades*, 570 F.3d at 1214 & n.2.

Pollutant Discharge Elimination System (NPDES) permit[19] for the discharge of canal water into the lake via the pumps.[20] The parties did not dispute that (1) the canal water being pumped into the lake contained pollutants, (2) both the canals and the lake are navigable waters, or (3) the pumps were point sources, all within the meaning of the Clean Water Act.[21] At issue was whether "moving an existing pollutant from one navigable water body to another is an 'addition . . . to navigable waters' of that pollutant," thus requiring an NPDES permit.[22]

Prior to the Eleventh Circuit's consideration of the issue on appeal, the EPA adopted a regulation addressing the issue specifically.[23] The regulation, interpreting the definition of *discharge* in the Clean Water Act,[24] provides that "water transfers," defined as "an activity that conveys or connects waters of the United States [i.e., navigable waters] without subjecting the transferred water to intervening industrial, municipal, or commercial use," are not subject to NPDES regulation under the Clean Water Act.[25] Thus, the issue before the Eleventh Circuit was whether this regulation was entitled to *Chevron* deference[26] from the court—that is, "whether the regulation is a reasonable construction of an ambiguous statute."[27] More precisely, the issue the court addressed was whether the term *navigable waters* in the statutory definition means any discrete body of water otherwise defined as "navigable"—in which case a pollutant would be added to a navigable water body each time it were moved from one such body of water to

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19. The Clean Water Act requires that a person obtain a permit under the regulatory scheme known as the National Pollution Discharge Elimination System for the "discharge of any pollutant" from a point source into a navigable water. 33 U.S.C. § 1342(a).

20. *Friends of the Everglades*, 570 F.3d at 1214.

21. *Id.* at 1216.

22. *Id.*

23. *Id.* at 1218.

24. *Discharge* is defined in the Clean Water Act as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

25. 40 C.F.R. § 122.3(i); *Friends of the Everglades*, 570 F.3d at 1218–19.

26. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

27. *Friends of the Everglades*, 570 F.3d at 1219. The court noted that the EPA's regulation is essentially a codification of the so-called unitary waters theory, under which the movement of existing pollutants from one body of navigable water to another is not considered an "addition" of pollutants subject to regulation under the Clean Water Act. *Id.* at 1217. The court further noted that the "unitary waters theory" had been rejected by every Circuit that had considered it, including the Eleventh (albeit in a vacated opinion), though none of these courts had addressed the issue before the court—that is, whether the statute is ambiguous and thus whether the unitary waters theory was a reasonable interpretation of the statute. *Id.* at 1217–18.

another, as in this case—or all navigable waters as a whole—in which case a pollutant could only be added once.[28]

The court held that the EPA's interpretation of *navigable waters* means one entity as a whole for the purpose of determining when a discharge that has occurred was reasonable.[29] Following the standard of review of an agency regulation mandated by *Chevron*,[30] the court first applied the "traditional tools of statutory construction" and concluded that (1) the statutory language itself was ambiguous because it could reasonably be read either way;[31] (2) the context in which the term *navigable waters* is used in the statute did not resolve the ambiguity;[32] and (3) the broader context of the statute read as a whole did not resolve the ambiguity.[33] The court concluded that "because the EPA's construction is one of the two readings we have found is reasonable, we cannot say that it is 'arbitrary, capricious, or manifestly contrary to the statute'" under *Chevron*.[34]

II. ENDANGERED SPECIES ACT

In *Miccosukee Tribe of Indians of Florida v. United States*,[35] the United States Court of Appeals for the Eleventh Circuit held that language in House Report 697[36] contained in the legislative history of the Endangered Species Act of 1973 (ESA),[37] which requires a federal agency to "give the benefit of the doubt to the species" when evaluating

28. *Id.* at 1223.
29. *Id.* at 1228.
30. *See Chevron*, 467 U.S. at 842–44.
31. *Friends of the Everglades*, 570 F.3d at 1223.
32. *Id.* at 1225.
33. *Id.* The plaintiffs argued that the "unitary waters" approach from the EPA's regulation would frustrate the primary objective of the Clean Water Act: the restoration and maintenance of the "chemical, physical, and biological integrity of the Nation's waters." *Id.* at 1225–26. The plaintiffs pointed out, and the court seemed to agree, that the regulation would lead to the "absurd" result that the NPDES permitting system "would require no permit [for a project] to pump the most loathsome navigable water in the country into the most pristine." *Id.* at 1226. The court noted, though, that other provisions of the NPDES also frustrated the Clean Water Act's primary goal; notably, the permitting system's limitation to point sources where runoff from nonpoint sources of pollution is "widely recognized as a serious water quality problem." *Id.* at 1226–27. Thus, conforming a particular statutory provision, such as the term *navigable waters* in the definition of *discharge*, to the statute's overall objective did not necessarily resolve its ambiguity. *See id.* at 1226.
34. *Id.* at 1228 (quoting *Chevron*, 467 U.S. at 844).
35. 566 F.3d 1257 (11th Cir. 2009).
36. H.R. Rep. No. 96-697 (1979) (Conf. Rep.), *reprinted in* 1979 U.S.C.C.A.N. 2572.
37. 16 U.S.C. §§ 1531–1544 (2006).

the effects of its projects under the ESA,[38] did not render the Fish and Wildlife Service's biological opinion regarding the effect of part of an Everglades restoration project on the endangered Everglades snail kite[39] arbitrary and capricious.[40] The Eleventh Circuit reasoned that the language means only that an agency could not base a decision not to act to protect a species on inadequate scientific information.[41] The court held that the Service had adequate information and had considered it in this case.[42] Regardless, the court ultimately held, in part, that when given *Chevron* deference,[43] the Service's "incidental take" statement, which allowed for certain detrimental impacts to the kite's habitat, was defective because it used habitat impact measurements rather than population count to determine when an incidental taking would begin to jeopardize a species and trigger the need for further evaluation by the agencies involved.[44]

The Army Corps of Engineers, one of the federal agencies involved in the case, maintains "thousands of miles of canals and levees supported by scores of pumps, gates, and dams" around the Everglades to control flooding in southern Florida.[45] One of the gates in this system—designated "S-12"—is located in the critical habitats of two endangered bird species: the Everglades snail kite and the Cape Sable seaside sparrow. Both species depend on the water level for survival. The sparrow's critical habitat lies, in part, to the south of the S-12 gate, and the kite's lies, in part, to the north. Both species require stable periods of moderate to low water levels in their respective habitats to feed and to nest. As part of a long-term project to restore the Everglades, the Corps began to conduct tests of water flow that involved periodic and regular flooding into the Everglades through the S-12 gate. These periodic floods resulted in a precipitous decline in the sparrow population. In 1999 the Service determined that continued periodic flooding through the S-12 gate would result in the extinction of the sparrow, but preventing water from flowing through the gate to protect

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38. H.R. Rep. No. 96-697, at 12.

39. An Everglades snail kite is a type of hawk. *Miccosukee Tribe of Indians*, 566 F.3d at 1262.

40. *Id.* at 1268.

41. *See id.* at 1267.

42. *See id.* at 1268–69.

43. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–44 (1984). Under *Chevron* a court must defer to an agency rule-making decision, or its equivalent, so long as (1) Congress' intent on the question is unclear either from legislation or legislative history, and (2) the agency decision is reasonable. *Id.*

44. *Miccosukee Tribe of Indians*, 566 F.3d at 1275.

45. *Id.* at 1261.

the sparrow would adversely affect the kite. As a compromise, the Corps and the Service developed an "Interim Plan," which was approved in 2002, to provide for a water release schedule that would protect the sparrow. In connection with this Plan, the Service issued a biological opinion concluding that the Plan would not jeopardize the kite. Under the Plan, the Corps allowed the water to back up north of the S-12 gate. Consequently, the water backed up into the kite's critical habitat and on the Miccosukee Tribe's land.[46]

As a result of earlier litigation by the Tribe,[47] the Service issued another biological opinion in 2006.[48] Again, the Service concluded that while the Plan would adversely affect the kite to some extent, the Plan would not jeopardize the kite's survival.[49] The Service attached an incidental take statement to the biological opinion,[50] which acknowledged the adverse effects and stated that the Service and Corps would reconsult about the Plan's impact on the kite if the water level at a specified point in the kite's habitat dropped more than a certain amount in a specified period during any year.[51] The Tribe challenged the Service's 2006 biological opinion and associated incidental take statement concerning the Plan.[52] The district court granted summary judgment to the Service on all of the Tribe's claims, and the Tribe appealed.[53]

A. The Tribe's Procedural Attack on the Service's Biological Opinion

The Tribe first contended that the biological opinion was unlawful because the opinion "fails to follow proper procedures, which require using the best available scientific data, giving the benefit of the doubt to the species, analyzing the environmental baseline and cumulative effects, and issuing a proper incidental take statement."[54] With respect to the best available scientific data, the Eleventh Circuit noted that although an agency must consider all scientific data available at the time, an agency's decision regarding which scientific data and studies

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46. *Id.* at 1261–63.

47. *See* Miccosukee Tribe of Indians of Fla. v. United States, 420 F. Supp. 2d 1324 (S.D. Fla. 2006).

48. *Miccosukee Tribe of Indians*, 566 F.3d at 1264.

49. *Id.*

50. An incidental take statement is required by 50 C.F.R. § 402.14(i) (2009).

51. *Miccosukee Tribe of Indians*, 566 F.3d at 1272. The incidental take regulation requires immediate reconsultation when the amount or extent of incidental taking approved by the statement is exceeded. 50 C.F.R. § 402.14(i)(4).

52. *Miccosukee Tribe of Indians*, 566 F.3d at 1264.

53. *Id.*

54. *Id.* at 1264–65.

constitute the "best available" data is entitled to deference upon review.[55] The Tribe specifically argued that the Service's decision about whether the kite would be jeopardized by the Service's action should not be entitled to deference because the Service ignored relevant data in reaching its decision.[56] The court rejected the Tribe's argument and concluded that the Service had, in fact, considered the data that the Tribe claimed the Service had ignored.[57]

Regarding the Tribe's argument that the "benefit of the doubt" language in House Report 697 created a presumption in favor of the species whenever the evidence is "balanced between likely jeopardy and no jeopardy," the court held that the language only applied to an agency's failure to protect a species when the data the agency relied on was insufficient or uncertain.[58] The court concluded that the data on which the Service had based the 2006 biological opinion was adequate to support the opinion; thus, the "benefit of the doubt" presumption did not apply.[59]

Last, with respect to the Tribe's concern about the Service's analysis of the environmental baseline and cumulative effects, the court held that the Service had met the ESA's requirements to define an environmental baseline for its opinion and to consider the cumulative impacts of past and present federal, state, and private activities on the kite, both in connection with the 2006 biological opinion and in connection with the Service's separate evaluations of those projects.[60] Overall, the Tribe's procedural attacks on the biological opinion failed.[61]

B. The Tribe's Arbitrary and Capriciousness Argument

The Tribe's second contention was that the 2006 biological opinion was arbitrary and capricious.[62] In response to this argument, the court noted that the ESA prohibits a federal agency from taking any action that will jeopardize an endangered species' continued existence or adversely modify its habitat.[63] The biological opinion acknowledged several adverse consequences to the kite resulting from the periodic

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55. *Id.* at 1265.
56. *Id.*
57. *Id.* at 1266.
58. *Id.* at 1267.
59. *Id.* at 1267–68. The court did not reach the question of whether the "benefit of the doubt" language created a presumption in favor of the species when the agency's evidence is equally balanced between jeopardy to the species and no jeopardy. *See id.* at 1267–68.
60. *Id.* at 1268–69.
61. *Id.* at 1269.
62. *Id.* at 1265.
63. *Id.* at 1270 (citing 16 U.S.C. § 1536(a)(2)).

flooding of its habitat under the Plan but concluded that the Plan would result in no permanent loss of kite habitat.[64] The court noted that adverse modification within the meaning of the ESA was not limited to permanent loss of habitat; temporary habitat loss could constitute adverse modification depending on the life cycle of the species.[65] The court held that an agency's assessment of whether a federal action adversely modified a species' habitat must take into account the species' life cycle, so that even a short-term habitat loss would not permanently jeopardize the species.[66] The court concluded, however, that the Service had included in its opinion the fact that the kite was a "long-lived species . . . with a high adult survival rate and a wide range" beyond the area impacted by the Plan.[67] Accordingly, the Service's biological opinion that the Plan would not adversely modify the kite's habitat was not arbitrary and capricious, notwithstanding the opinion's acknowledgement of the short-term negative impacts to the kite from the flooding.[68]

C. The Tribe's Argument that the Incidental Take Statement was Defective

The Tribe's final contention was that the incidental take statement the Service issued in conjunction with the 2006 biological opinion was defective because it failed to set a trigger for agency reevaluation of the Plan based on a population count of the kite.[69] The Service followed its Endangered Species Consultation Handbook[70] in preparing the take statement.[71] The Handbook states that an incidental take "may be 'expressed as [either] the number of individuals [of the species reasonably likely to be] taken or the extent of habitat likely to be destroyed or disturbed.'"[72] The court held that the Service's Handbook was entitled to *Chevron* deference because it was "created following the same

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64. *Id.*
65. *Id.*
66. *Id.* at 1271.
67. *Id.*
68. *Id.* The court expressly limited its holding on this issue to the facts of the case: that the Plan caused "temporary flooding of twenty percent of the [kite's] critical habitat"; that the kite is a species with a long life span, high survival rate, and extensive range; and that the purpose of the flooding is to "restore the natural flow of the Everglades" and to avoid the extinction of the endangered sparrow. *Id.*
69. *Id.* at 1265, 1271–72.
70. U.S. FISH & WILDLIFE SERV. & NAT'L MARINE FISHERIES SERV., ENDANGERED SPECIES CONSULTATION HANDBOOK (1998) [hereinafter CONSULTATION HANDBOOK], *available at* http://www.fws.gov/endangered/consultations/S7hndbk/S7hndbk.htm.
71. *Miccosukee Tribe of Indians*, 566 F.2d at 1272.
72. *Id.* (first alteration in original) (quoting CONSULTATION HANDBOOK, *supra* note 70, at 4–47).

administrative procedures that official regulations undergo."[73] In applying the *Chevron* test, the court concluded that the Service's incidental take limit based on the Plan's impact to habitat was not entitled to deference from the court because Congress had directly spoken to the issue, and its intent was clear: the legislative history of the ESA establishes that "Congress wanted incidental take to be stated in numbers of animals where practical, not in terms of habitat markers."[74] Although the Service defended its use of habitat markers, the record showed that the Service routinely made population counts of the kite and had done so annually since 1969.[75] For these reasons, the court concluded that counting the kite was not impractical; therefore, the trigger for further consultation in the incidental take statement should have been based on a population count, not habitat impact.[76]

The court affirmed summary judgment for the Service as to its claim that the kite would not be jeopardized by the Plan but vacated the ruling as to the incidental take statement.[77]

III. WATER SUPPLY ACT: TRI-STATE WATER LITIGATION

In *In re Tri-State Water Rights Litigation,*[78] the United States District Court for the Middle District of Florida held that the Army Corps of Engineers' operation of Buford Dam on Lake Lanier in Georgia violated the Water Supply Act of 1958 (WSA)[79] by cumulatively reallocating over twenty percent of the water storage capacity of Lake Lanier to municipal water supply without obtaining the approval of Congress.[80]

A reservoir in the Apalachicola-Chattahoochee-Flint river basin (ACF Basin) was authorized by Congress in 1945 and 1946.[81] The Lake Lanier site was chosen in 1947,[82] and Buford Dam was completed in 1958, to be operated by the Corps.[83] (Lake Lanier and the Buford Dam are hereinafter referred to as the Project). The only municipal water

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73. *Id.* at 1273.
74. *Id.* at 1274.
75. *Id.* at 1275.
76. *Id.*
77. *Id.* The court noted that the incidental take statement would need to include a population-count trigger for agency reconsultation regarding the effect of the Plan on the kite. *Id.*
78. 639 F. Supp. 2d 1308 (M.D. Fla. 2009).
79. 43 U.S.C. § 390b (2006).
80. *In re Tri-State Water Rights*, 639 F. Supp. 2d at 1350.
81. *Id.* at 1309.
82. *See id.* at 1312–13.
83. *Id.* at 1319, 1321.

supply withdrawals from Lake Lanier approved by the Legislature as part of the original Project were for Gainesville and Buford, Georgia.[84] Both cities' municipal water intake on the Chattahoochee River were to be inundated by the lake.[85] In addition, the operation of the dam would guarantee 600 cubic feet per second (cfs) of water flow in the Chattahoochee River through Atlanta.[86]

Over time, the Corps through various agreements and contracts with municipalities gradually increased the amount of water in the lake allocated to water supply.[87] By 2006 the use of the lake's water for water supply accounted for over 21.5% of the lake's storage capacity.[88]

In 1989 the Corps issued a draft of a Post-Authorization Change (PAC) report together with a proposed Water Control Plan (WCP) for the ACF Basin to be submitted to Congress recommending that Congress approve a reallocation of water storage in Lake Lanier for water supply purposes.[89] In 1990, before the WCP was adopted, Alabama filed suit against the Corps in the United States District Court for the Northern District of Alabama, challenging the WCP and the various water supply contracts between the Corps and municipalities in the metro Atlanta area. Florida moved to intervene as a plaintiff and Georgia as a defendant. The suit was stayed while a commission created by Congress, comprised of governors of the three states, attempted to resolve the various competing water use issues.[90]

In 2001 Georgia filed a lawsuit challenging the Corps' denial of a request to reallocate a percentage of Lake Lanier's storage capacity for water supply.[91] Meanwhile, a power industry group—Southeastern Federal Power Customers—sued the Corps in the United States District Court for the District of Columbia, claiming that the Corps' reallocation of Lake Lanier's water to municipal water supply for Georgia communities "harmed the [power companies'] ability to produce power from

84. *Id.* at 1315 & n.6, 1348.
85. *Id.* at 1333, 1348.
86. *Id.* at 1349.
87. *See id.* at 1348.
88. *Id.* at 1350. For example, in 1982 the Corps reached an agreement with Georgia Power to increase the minimum water release from the lake during the summer to 1750 cfs from 600 cfs, the amount originally authorized by the Corps' operating manual for Buford Dam. *Id.* at 1324. The Corps also entered into contracts with Gwinnett County and the City of Cumming to allow for withdrawals directly from the lake. *Id.* at 1326.
89. *Id.* at 1331–32.
90. *Id.* at 1335–36.
91. *Id.* at 1336.

Buford Dam and increased the cost of that power."[92] In 2007 these cases were eventually consolidated into the present multidistrict litigation.[93]

According to the WSA, modifications to a reservoir that would "seriously affect the purposes for which [the reservoir] was authorized . . . or which would involve major structural or operational changes shall be made only upon the approval of Congress."[94] Based on an extensive review of the legislative history of authorization of and cost appropriations for the Project, the court held that the original legislatively approved purposes for the Project were power generation, flood control, and flow control for downstream navigation.[95] The purposes did not include water supply.[96] The court noted that while water supply for the Atlanta metropolitan area had frequently been mentioned in connection with the authorization and funding of the Project, the parties involved always treated water supply as an incidental benefit to municipalities arising from the regulation of flow in the river downstream from the dam.[97]

The court first concluded that water supply was not an authorized purpose of the Project.[98] Next, the court evaluated the three separate actual or proposed reallocations of water to water supply: (1) the municipal uses the Corps had already allowed as of 1990 when the first suit was filed, (2) the reallocations recommended by the Corps in the 1989 PAC report, and (3) Georgia's request to the Corps in 2000.[99] The court held that the reallocations the Corps had already allowed violated the WSA because the reallocations constituted major changes to the Project purposes and because the Corps had failed to obtain the approval of Congress.[100] The court also held that the reallocations to water supply proposed in the Corps' PAC report and those requested by

92. *Id.* In 2003 the Corps, the Georgia parties, and the power company group settled the District of Columbia case with an agreement that required the Corps to negotiate water supply contracts with Gwinnett County, Gainesville, and the Atlanta Regional Commission. *Id.* at 1336–37. The United States Court of Appeals for the District of Columbia Circuit reversed the district court's approval of the settlement agreement in 2008, and the case was remanded and then included in the present multidistrict case. *Id.* at 1339 (citing Se. Fed. Power Customers v. Geren, 514 F.3d 1316, 1325 (D.C. Cir. 2008)).

93. *Id.* at 1337–38.

94. 43 U.S.C. § 390b(d).

95. *In re Tri-State Water Rights*, 639 F. Supp. at 1345.

96. *Id.* at 1347.

97. *Id*. at 1345–46.

98. *Id*. at 1347.

99. *Id.* at 1348–52.

100. *Id.* at 1350.

Georgia constituted major changes to the purposes of the Project and would require the approval of Congress.[101]

The court further rejected the Corps' contention that the reallocations to water supply it had previously allowed did not significantly affect the Project's authorized purposes.[102] The court concluded that the Corps' reallocation of water in the lake for water supply had seriously affected power generation at the dam, which was one of the Project's authorized purposes.[103]

Ultimately, the court granted the plaintiffs' motion for summary judgment on their WSA claims.[104] The court stayed the portion of the litigation involving the WSA claims for three years to allow the parties "to obtain Congress's approval for the operational changes" to the Project purposes that would allow storage for water supply in Lake Lanier.[105] The court noted that at the end of the stay period its order would take effect.[106] As a practical matter, this would mean that the Corps would be required to return to baseline (mid 1970s level) operation of the Project—release of only 600 cfs of water flow from Buford Dam during off-peak (power generation) hours and withdrawal of water from the lake only by Gainesville and Buford.[107] The court acknowledged that this would be a "draconian result," but the only one possible under the WSA.[108]

IV. ENERGY SUPPLY ACT—JURISDICTION

In *Palm Beach County Environmental Coalition v. Florida*,[109] the United States District Court for the Southern District of Florida decided an issue of first impression in the Eleventh Circuit.[110] The court held that it lacked subject matter jurisdiction over the plaintiffs' claims challenging federal and state agency permitting decisions regarding a natural gas pipeline because under the Energy Policy Act of 2005[111]

101. *Id.* at 1352.
102. *Id.* at 1354.
103. *Id.*
104. *See id.* at 1354, 1356.
105. *Id.* at 1355.
106. *Id.*
107. *Id*.
108. *Id*.
109. 651 F. Supp. 2d 1328 (S.D. Fla. 2009).
110. *Id.* at 1344.
111. Pub. L. No. 109-58, 119 Stat. 594 (2005) (codified in scattered sections of 15 and 42 U.S.C. (2006)).

the federal courts of appeal had exclusive original jurisdiction over such decisions.[112]

In 2005 the defendant Florida Power & Light Co. began building a new power plant in Palm Beach County. Simultaneously, the defendant Gulfstream Natural Gas Systems began building a natural gas pipeline to the plant from another county to supply the plant.[113] The pipeline was to cross federal jurisdictional waters as well as state conservation areas and, thus, required under the Clean Water Act[114] and the Rivers and Harbors Act[115] that the defendants obtain permits.[116] The Army Corps of Engineers authorized the pipeline construction under Nationwide Permit 12 (allowing utility line activities).[117]

The plaintiffs challenged the Corps' permitting decision,[118] contending that the Corps had failed to evaluate the pipeline as part of the entire power plant project and thus improperly granted the permits.[119] The plaintiffs brought claims relevant to the Corps' permitting decisions under the citizen-suit provisions of the National Environmental Policy Act of 1969,[120] the Endangered Species Act of 1973,[121] the Clean Water Act, and the Rivers and Harbors Act.[122]

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112. *Palm Beach County Envtl. Coal.*, 651 F. Supp. 2d at 1345.

113. *Id.* at 1332.

114. 33 U.S.C. §§ 1251–1387 (2006).

115. 33 U.S.C. §§ 401–467n (2006).

116. *Palm Beach County Envtl. Coal.*, 651 F. Supp. 2d at 1332.

117. *Id.* at 1333.

118. The plaintiffs brought an eight-count complaint against federal, state, county, and private defendants, alleging violations of the Clean Air Act, 42 U.S.C. §§ 7401–7431 (2006), the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370f (2006), the Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006), the Clean Water Act, the Rivers and Harbors Act, the Florida Water Resources Act of 1972, FLA. STAT. ANN. §§ 373.012–373.71 (West 2005 & Supp. 2010), the Florida Government in the Sunshine Law, FLA. STAT. ANN. § 286.011 (West 2009), and federal and state RICO statutes. *Palm Beach County Envtl. Coal.*, 651 F. Supp. 2d at 1334. The court dismissed the RICO counts as to all defendants for failure to state a claim. *Id.* at 1340, 1354. The court dismissed the remaining federal law counts as to the state defendants due to their immunity under the Eleventh Amendment, U.S. CONST. amend. XI, and as to the county for failure to state a claim. *Palm Beach County Envtl. Coal.*, 651 F. Supp. 2d at 1338–39, 1354. The remaining federal counts as to the federal and private defendants fell under the court's ruling that it lacked subject matter jurisdiction under the Energy Policy Act. *Id.* at 1345, 1354. The court declined to retain jurisdiction over the state law claims. *Id*. at 1354.

119. *Palm Beach County Envtl. Coal.*, 651 F. Supp. 2d at 1333.

120. 42 U.S.C. §§ 4321–4370h (2006).

121. 16 U.S.C. §§ 1531–1544 (2006).

122. *Palm Beach County Envtl. Coal.*, 651 F. Supp. 2d at 1341.

The court held that it lacked subject matter jurisdiction over these claims.[123] The court noted that under the Natural Gas Act of 1938 (NGA),[124] the transportation and sale of natural gas in interstate commerce is comprehensively regulated by the Federal Energy Regulatory Commission.[125] The NGA was amended in 2005 by the Energy Policy Act, which gives United States Courts of Appeals "'original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency . . . acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval . . . required under Federal law' for the construction of a natural gas facility."[126] The court concluded that transmission pipelines were by implication treated as "facilities" under relevant regulations.[127] The court further concluded that the original exclusive jurisdiction provision of the Energy Policy Act applied to challenges to both federal and state permitting decisions; therefore, the district court lacked subject matter jurisdiction over the claims.[128] The court noted that unlike many federal statutes, the Energy Policy Act provision "does not have the qualifying language . . . such as 'for claims brought pursuant to' this Act, or 'for claims arising under' [the] Act."[129] Accordingly, the court stated, ". . . there is no language that limits this provision to only those claims specifically brought under the Natural Gas Act."[130]

V. CERCLA/RCRA

In *Scarlett & Associates, Inc. v. Briarcliff Center Partners, LLC*,[131] the United States District Court for the Northern District of Georgia ruled that evidence sufficient to create a dispute over a material fact as to whether the manager of a shopping center could be an "operator" for purposes of liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[132] was insufficient to create

123. *Id.* at 1345.
124. 15 U.S.C. §§ 717–717z (2006).
125. *Palm Beach County Envtl. Coal.*, 651 F. Supp. 2d at 1342.
126. *Id.* (alterations in original) (quoting 15 U.S.C. § 717r(d)(1)).
127. *Id.* at 1343.
128. *Id.* at 1345.
129. *Id.*
130. *Id.*
131. No. 1:05-CV-0145-CL, 2009 WL 3151089 (N.D. Ga. Sept. 30, 2009).
132. 42 U.S.C. §§ 9601–9675 (2006); *Scarlett & Assocs.,* 2009 WL 3151089, at *9. Under CERCLA, an "operator" for liability purposes is defined simply as "any person . . . operating [a] facility" where contamination exists. 42 U.S.C. § 9601(A)(ii). The court ruled that a genuine dispute over a material fact existed as to whether the defendant in this case acted as an operator under the CERCLA definition of *operator* as refined by the United

a dispute over a material fact as to whether the manager "contributed to" the hazardous waste contamination for the purposes of liability under the Resource Conservation and Recovery Act (RCRA)[133] citizen-suit provision.[134] As part of its ruling on the RCRA claim, the court implicitly held that in order to have "contributed to" the handling or disposal of waste within the meaning of RCRA, a person must have engaged in "affirmative," as opposed to merely "passive," conduct with regard to the waste.[135]

In this case, the plaintiff controlled a shopping center pursuant to a lease with the owner of the land on which the center was located. The plaintiff in turn leased the shopping center to AmSouth Bank of Florida, which entered into leases with the individual owners of businesses in the shopping center, including a dry cleaning business. In the early 1990s, tetrachloroethene (PCE) contamination was discovered in the surface area, soil, and groundwater around the dry cleaning business. In 1997 the Georgia Enivonmental Protection Division (GEPD) initiated remediation proceedings and identified responsible parties, including the plaintiff.[136]

In 2005 the plaintiff entered into a consent order with the GEPD to remediate the property.[137] The plaintiff subsequently sued several defendants, including Faison & Associates, LLC, which had managed the shopping center on behalf of AmSouth from 1995 to 1997.[138] Faison's responsibilities were set out in a management agreement with the plaintiff's lessee and included "obtaining all necessary governmental approval and permits and performing such acts necessary to effect AmSouth's compliance with all laws applicable to the operation of the Shopping Center."[139] Faison was not a party to the lease with the dry cleaner and was not involved in the day-to-day operation of the dry

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States Supreme Court in *United States v. Bestfoods*, 524 U.S. 51 (1998), which held that an operator under CERCLA "'is simply someone who directs the workings of, manages, or conducts the affairs of [a] facility.'" *Scarlett & Assocs.,* 2009 WL 3151089, at *9 (quoting *Bestfoods*, 524 U.S. at 66–67).

133. 42 U.S.C. §§ 6901–6992k (2006). Under RCRA's citizen-suit provision, a person may seek injunctive relief from "any person, including . . . any past or present . . . owner or operator [of a facility] who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste." *Id.* § 6972(a)(1)(B).

134. *Scarlett & Assocs.,* 2009 WL 3151089, at *13.

135. *Id.*

136. *Id.* at *1–2.

137. *Id.* at *3.

138. *See id.* at *1–2.

139. *Id.* at *4.

cleaner or any other business in the shopping center.[140] However, Faison "took responsibility for ensuring that the operators of the dry cleaning business complied with the Environmental Protection Agency's reporting requirements on dry cleaning facilities covering PCE emissions, equipment monitoring and repair, and accounting of PCE consumption."[141]

The plaintiff's claims against Faison included claims that (1) Faison was a former "operator" of the facility (that is, the shopping center, including the dry cleaner) under CERLCA, thus liable to the plaintiff for cost recovery,[142] and (2) that Faison was a former operator who had contributed to the handling, storage, or disposal of PCE within the meaning of the citizen suit provision of RCRA and, thus, should be ordered to contribute to the remediation.[143] The plaintiff and Faison each moved for summary judgment on these claims and others.[144]

On the plaintiff's CERCLA "operator" claim against Faison, the court concluded that issues of fact precluded summary judgment.[145] The court followed the United States Supreme Court's definition of *operator* under CERCLA from *United States v. Bestfoods*[146]—namely, that "'[a]n operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.'"[147] Applying this definition, the court noted that evidence showed that Faison "sent the dry cleaner a certified letter advising the dry cleaner of reporting requirements of the [EPA]" and "[i]n order to . . . [e]nsure governmental compliance [the defendant's agent] requested copies of the documentation that the dry cleaner was required to provide to the EPA or an explanation as to why the dry cleaner was exempt."[148] The court concluded that this evidence, together with Faison's authority under his management agreement to ensure his principal's compliance with law, "create[d] a genuine issue as to whether Faison managed the operations of the dry cleaner specifically related to pollution."[149]

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140. *Id.* at *3.
141. *Id.* at *4.
142. *Id.* at *6, *9.
143. *Id.* at *12.
144. *Id.* at *1, *6.
145. *Id.* at *9.
146. 524 U.S. 51 (1998).
147. *Scarlett & Assocs.,* 2009 WL 3151089, at *9 (quoting *Bestfoods*, 524 U.S. at 66–67).
148. *Id.*
149. *Id.*

To the contrary, on the plaintiff's RCRA citizen-suit claim, the court concluded that even if Faison could be considered an "operator" for purposes of the provision,[150] Faison did not "contribute" to the handling or disposal of hazardous waste.[151] Noting that the Eleventh Circuit has not yet determined "the precise circumstances in which an owner or operator meets the requirement of having contributed to" the handling or disposal of hazardous waste,[152] the court followed the approach of "the vast majority of courts that have considered this issue"—namely, that RCRA requires "affirmative action rather than merely passive conduct."[153] More specifically, the court stated that although the evidence supported the inference that Faison played a "minimal role" in managing the dry cleaner's operations, the evidence "far from shows that Faison acted as a determining factor over either the handling, storage, treatment, transportation, or disposal of PCE."[154] Overall, the court's conclusion implies that a plaintiff must meet a higher standard of proof to establish liability under RCRA's citizen suit provision than under CERCLA.

150. *Operator* is generally held to have the same meaning under CERCLA and RCRA. *See id.* at *11.

151. *Id.* at *12.

152. *Id.*

153. *Id.* at *13 (internal quotation marks omitted).

154. *Id.*