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Environmental Law

by Travis M. Trimble*

In 2007 the Eleventh Circuit interpreted the United States Supreme Court's decision in *Rapanos v. United States*,¹ regarding the federal government's jurisdiction over waters under the Clean Water Act ("CWA"),² and held that in order for federal jurisdiction to exist over a water that is not navigable in fact, the water must have a "significant nexus" with a water that is navigable in fact.³ Also under the CWA, the court partially reversed a granting of summary judgment to the Florida Department of Environmental Protection, holding that the department had improperly excluded some types of evidence in approving Florida's 2002 list of impaired waters.⁴ In a case concerning the Endangered Species Act,⁵ the Eleventh Circuit held that (1) the United States Fish and Wildlife Service had reasonably concluded that the Alabama sturgeon was a separate species and (2) listing the fish, a noncommercial species found only in Alabama, did not violate the Commerce Clause of the United States Constitution.⁶ The court also held that the agency's failure to designate the critical habitat for the sturgeon, as required by the Endangered Species Act, was not fatal to the listing procedure.⁷ The Eleventh Circuit also decided two cases concerning the Clean Air Act.⁸ One case arose out of the Tennessee Valley Authority's alleged failure to comply with the Clean Air Act's New Source programs

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1. 547 U.S. 715 (2006).
2. 33 U.S.C. §§ 1251-1387 (2000 & Supp. V 2005).
3. *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007).
4. *Sierra Club, Inc. v. Leavitt (Sierra Club II)*, 488 F.3d 904, 913 (11th Cir. 2007).
5. 16 U.S.C. §§ 1531-1544 (2000 & Supp. V 2005).
6. *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1260, 1277 (11th Cir. 2007); U.S. CONST. art. 1, § 8, cl. 3.
7. *Alabama-Tombigbee Rivers Coal.*, 477 F.3d at 1268.
8. 42 U.S.C. §§ 7401-7671q (2000 & Supp. V 2005).

regarding a boiler that it modified in 1982-1983.⁹ The court there held that two of the plaintiffs' claims were time-barred and a third failed due to insufficient pre-suit notice.¹⁰ In the other case, the court held (1) that the Environmental Protection Agency's interpretation of a Georgia state regulation, promulgated as part of its state implementation plan under the Clean Air Act, was entitled to deference and (2) that the agency's interpretation was reasonable.¹¹

I. CLEAN WATER ACT

In *United States v. Robison*,¹² the Eleventh Circuit interpreted the United States Supreme Court's plurality decision in *Rapanos v. United States*¹³ that defined "navigable waters" under the CWA.¹⁴ The court adopted the definition set out by Justice Kennedy in his concurrence in *Rapanos* and held that a district court's jury charge that was based on pre-*Rapanos* Eleventh Circuit precedent was erroneous.¹⁵

In *Robison* the United States brought criminal charges against a Birmingham, Alabama manufacturer of cast iron products and several of its managers, alleging unauthorized discharges of pollutants into Avondale Creek, a perennial stream that flows through another perennial stream, which then flows into a lake, which in turn flows through a fork of the Black Warrior River, and finally into the Black Warrior River itself.¹⁶ The evidence at trial clearly showed that the defendants had discharged process wastewater from the plant into Avondale Creek from discharge points other than the one authorized by the plant's National Pollutant Discharge Elimination Systems ("NPD-ES") permit; process wastewater also regularly overflowed into the plant's stormwater discharge system, which flowed into Avondale Creek.¹⁷

The CWA prohibits the discharge of pollutants into "navigable waters," except in accordance with a permit issued pursuant to the CWA.¹⁸

9. Nat'l Parks & Conservation Ass'n v. Tenn. Valley Auth., 502 F.3d 1316, 1318 (11th Cir. 2007).

10. *Id.*

11. *Sierra Club v. Adm'r*, U.S. E.P.A., 496 F.3d 1182, 1188 (11th Cir. 2007).

12. 505 F.3d 1208 (11th Cir. 2007).

13. 547 U.S. 715 (2006).

14. 33 U.S.C. §§ 1251-1387 (2000 & Supp. V 2005).

15. *Robison*, 505 F.3d at 1223-24.

16. *Id.* at 1211-12. McWane, Inc. was the corporate defendant. Individual defendants were Charles Robison, McWane's Vice President for Environmental Affairs, James Delk, the plant's general manager, and Michael Devine, its manager. *Id.* at 1211.

17. *Id.* at 1212.

18. *Id.* at 1215 (citing 33 U.S.C. §§ 1311(a), 1362(7), 1362(12) (2000 & Supp. V 2005)).

Thus, for the federal government to have jurisdiction under the CWA, there must be an unpermitted discharge into a navigable water.¹⁹ With respect to the jurisdictional question, the district court charged the jury, in accordance with the Eleventh Circuit's decision in *United States v. Eidson*,²⁰ that to qualify as a navigable water, "[t]he stream into which the discharge is made may be a natural or manmade [stream] and may flow continuously or only intermittently, as long as it may eventually flow directly or indirectly into a navigable stream or river whose use affects interstate commerce."²¹ In accordance with this definition, the United States established that Avondale Creek eventually flowed into the Black Warrior River, a navigable water, but presented no other evidence to establish jurisdiction.²² Specifically, the court noted that the United States presented "no evidence . . . of the chemical, physical, or biological effect that Avondale Creek's waters had or might have had on the Black Warrior River" or of "any actual harm or injury to the Black Warrior River" caused by the defendants' violations.²³

Following the defendants' convictions, the United States Supreme Court decided *Rapanos*, a wetlands case in which the court set out to define "navigable waters" for CWA jurisdictional purposes.²⁴ According to the court in *Robison*, "[t]he entire Supreme Court agreed that the term 'navigable waters' encompasses something more than traditionally 'navigable-in-fact' waters," but while a five-member majority remanded the consolidated cases for further consideration of whether the wetlands at issue constituted navigable waters, the majority disagreed about the appropriate definition to be applied.²⁵ As noted by the court in *Robison*, Justice Scalia, writing for a four-member plurality, stated that navigable waters include only "relatively permanent, standing or

19. *Id.* at 1224.

20. 108 F.3d 1336 (11th Cir. 1997). The court in *Robison* recounted the definition of "navigable waters" from *Eidson* as follows:

In *Eidson*, we observed: (1) that Congress chose to define broadly the waters covered by the CWA; (2) that it was "well-established that Congress intended to regulate the discharge of pollutants into all waters that may eventually lead to waters affecting interstate commerce"; and (3) that courts repeatedly had recognized that tributaries to waters affecting interstate commerce—even when man-made or intermittently flowing—were subject to the CWA.

Robison, 505 F.3d at 1215-16 (quoting *Eidson*, 108 F.3d at 1341-42).

21. *Robison*, 505 F.3d at 1215 (brackets in original) (emphasis omitted) (quoting jury charge).

22. *Id.* at 1211-12.

23. *Id.* at 1212.

24. 547 U.S. 715.

25. 505 F.3d at 1216.

continuously flowing bodies of water.”²⁶ Furthermore, because wetlands only fall within the jurisdictional scope of navigable waters if they are “adjacent to” such waters, the plurality held that “only those wetlands with a *continuous surface connection* to bodies that are “waters of the United States” in their own right, so that there is no clear demarcation between “waters” and wetlands, are “adjacent to” such waters and covered by the Act.”²⁷ Thus, the court in *Robison* stated that two findings are required to meet the plurality’s test for establishing that wetlands are covered by the Act: (1) the channel adjacent to the wetland must contain “a water of the United States,” which is “a relatively permanent body of water connected to traditional interstate navigable waters” and (2) the wetland must have “a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.”²⁸

In his concurring opinion in *Rapanos*, Justice Kennedy stuck with the Supreme Court’s earlier definition of navigable waters from the Court’s decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*:²⁹ the “significant nexus” test.³⁰ The court in *Robison* noted that under this test, “a ‘water or wetland’ can only be ‘navigable’ under the CWA if it possesses a “significant nexus” to waters that are or were navigable in fact or that could reasonably be so made.”³¹ The court also noted that under Justice Kennedy’s test, in order for a wetland to have a significant nexus to a navigable-in-fact water, it must,

“either alone or in combination with similarly situated lands in the region, . . . significantly affect[] the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’ When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’”³²

Justice Kennedy further noted in his concurrence that a “mere hydrologic connection” between a wetland and a navigable water “may be too insubstantial” to establish such a nexus.³³ Finally, the court in

26. *Id.* at 1217 (quoting *Rapanos*, 547 U.S. at 716 (plurality opinion)).

27. *Id.* (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion)).

28. *Id.* (internal quotation marks omitted) (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion)).

29. 531 U.S. 159 (2001).

30. *Rapanos*, 547 U.S. at 779-80 (Kennedy, J., concurring).

31. 505 F.3d at 1218 (quoting *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring)).

32. *Id.* (citation omitted) (quoting *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring)).

33. *Id.* (quoting *Rapanos*, 547 U.S. at 784 (Kennedy, J., concurring)).

Robison observed that the four Justices dissenting in *Rapanos* would uphold jurisdiction when either the plurality's or Justice Kennedy's test was met.³⁴

In *Robison* the court held that the Eleventh Circuit would adopt Justice Kennedy's significant nexus test as the prevailing definition of navigable waters from *Rapanos*.³⁵ The court noted that under *Marks v. United States*,³⁶ "when a majority of the Supreme Court agrees only on the result of a case, lower courts 'are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose.'"³⁷ The court explained that the "narrowest ground" is more clearly stated as the "less far-reaching" common ground.³⁸ The court, unlike the United States Court of Appeals for the First Circuit, also disregarded the dissenting Justices' opinion on the proper definition because "*Marks* does not direct lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented."³⁹ As such, the court held that the remaining issue to be decided was which of the concurring opinions in *Rapanos* put forth the least far-reaching position.⁴⁰ Specifically, the issue hinged on which definition of navigable waters, found within either the plurality opinion authored by Justice Scalia or Justice Kennedy's concurrence, was less far-reaching, that is, less-restrictive of CWA jurisdiction.⁴¹ The court concluded that in wetlands cases, waters would more often be classified as navigable under Justice Kennedy's significant nexus test than under Justice Scalia's test, and thus Justice Kennedy's test was less-restrictive.⁴² The court explained that Justice Scalia's test contained two limitations rejected by Justice Kennedy's test: (1) that navigable waters

34. *Id.* at 1219 (citing *Rapanos*, 547 U.S. at 810 (Stevens, J. dissenting)).

35. *Id.* at 1221. The court noted that the circuits are thus far split on the proper application of *Rapanos*: the Seventh and Ninth Circuits have held that Justice Kennedy's concurrence controls regarding the definition of navigable waters, while the First Circuit has concluded that in a CWA case the United States could elect to establish jurisdiction under either the plurality's test or Justice Kennedy's test. *Robison*, 505 F.3d at 1219 (citing and discussing *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006) (per curiam), *cert. denied* 128 S. Ct. 45 (2007); *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), *cert. denied* 128 S. Ct. 375 (2007)).

36. 430 U.S. 188 (1977).

37. *Robison*, 505 F.3d at 1220 (quoting *Gerke*, 464 F.3d at 724).

38. *Id.* at 1221 (quoting *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1247 (11th Cir. 2001)).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

“must be ‘relatively permanent, standing or flowing bodies of water’” and (2) that there must be a “‘continuous surface connection’” between the bodies of water.⁴³ The court acknowledged that if the circumstances were different from *Rapanos*, Justice Scalia’s test may allow for broader CWA jurisdiction, but it also recognized that it could not merely ignore the facts underlying *Rapanos* when determining which of its various opinions is narrowest.⁴⁴

The court in *Robison* then determined that the district court’s charge was erroneous and that the error was harmful because the United States failed to present any evidence to establish a significant nexus between Avondale Creek and the Black Warrior River.⁴⁵ Specifically, the court noted that the United States presented no evidence to show that Avondale Creek had any chemical, physical, or biological effect on the Black Warrior River, or that the Black Warrior River suffered any actual harm.⁴⁶ Based on this finding, as well as other issues, the court remanded the case for a new trial in which the government would have an opportunity to present evidence that a significant nexus existed between Avondale Creek and the Black Warrior River, and the defendants would have a similar opportunity to present contrary evidence.⁴⁷

The Eleventh Circuit’s decision to adopt Justice Kennedy’s significant nexus test as the operative holding in *Rapanos* will limit the federal government’s jurisdiction in Clean Water Act cases in this circuit. The court noted that thus far, circuits have split on the proper application of *Rapanos*.⁴⁸ The United States Courts of Appeals for the Seventh and Ninth Circuits both adopted the significant nexus test as the proper test.⁴⁹ The First Circuit, on the other hand, has held that under *Rapanos*, the government may elect to establish jurisdiction under either the significant nexus test or the plurality’s continuous surface connection test because the four dissenting Justices in *Rapanos* would uphold jurisdiction under either test.⁵⁰ The United States Supreme Court has denied certiorari in both the Seventh Circuit and First Circuit cases,

43. *Id.* at 1221-22 (quoting *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring)).

44. *Id.* at 1222.

45. *Id.*

46. *Id.* at 1223.

47. *Id.* at 1224.

48. *Id.* at 1219.

49. The Seventh Circuit adopted the significant nexus test in *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006) (per curiam), and the Ninth Circuit adopted it in *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007).

50. *United States v. Johnson*, 467 F.3d at 60.

leaving the circuits to sort out *Rapanos* without further guidance.⁵¹ Also, the Eleventh Circuit acknowledged that under the facts of *Robison*, the plurality's continuous surface connection test would be more likely to result in CWA jurisdiction than Justice Kennedy's significant nexus test, and it seems that this situation would generally arise in any case involving flowing surface waters such as streams and rivers, as opposed to wetlands.⁵² Under the plurality's test, a continuous surface connection between the water at issue and a navigable-in-fact water, without more, will establish jurisdiction, so presumably the government would have jurisdiction over any perennial stream flowing to a navigable-in-fact waterway. Under the significant nexus test, though, the government would have to establish that the stream significantly affected the chemical, physical, and biological integrity of the navigable-in-fact waterway.

In *Sierra Club, Inc. v. Leavitt (Sierra Club II)*,⁵³ the Eleventh Circuit reversed in part the district court's grant of summary judgment to the Environmental Protection Agency ("EPA") on the plaintiffs' CWA claims that the EPA violated its oversight responsibility under the CWA by acting arbitrarily in approving Florida's list of impaired waters.⁵⁴ The Eleventh Circuit held that in evaluating water bodies for inclusion on its impaired waters list, Florida (and the EPA) should have considered stream data older than seven-and-a-half years and also water-body specific fish consumption advisories for mercury.⁵⁵ Because the EPA's evaluation lacked any consideration of these factors, the court observed that factual issues remained regarding whether additional water bodies should be added to the impaired waters list, and it concluded that summary judgment for the EPA was improper concerning the issue of whether the agency acted arbitrarily in approving Florida's list.⁵⁶ The court also held that the EPA had a duty to review the procedure Florida used to prioritize water bodies for establishing pollutant limits, and it remanded the case to the district court to determine whether Florida had properly ranked the water bodies.⁵⁷ On the other hand, the court held that the EPA did not act arbitrarily in concluding that Florida did not have to consider statewide fish consumption advisories when evaluating

51. *Gerke Excavating, Inc. v. United States*, 128 S. Ct. 45 (2007); *Johnson v. United States*, 128 S. Ct. 375 (2007).

52. *Robison*, 505 F.3d at 1223.

53. 488 F.3d 904 (11th Cir. 2007).

54. *Id.* at 913.

55. *Id.* at 913, 916.

56. *Id.* at 917.

57. *Id.* at 917-18.

any particular water body for inclusion on its impaired waters list.⁵⁸ The court also held that the EPA could correct omissions in Florida's list by unilaterally adding waters to the list, rather than being required to disregard the list in its entirety and develop its own independent list.⁵⁹ The court concluded that Florida (and the EPA) could evaluate water bodies for inclusion on the list using a totality of circumstances approach, and thus, Florida could decide not to list water bodies notwithstanding the existence of discrete test samples showing elevated levels of pollutants in the waters.⁶⁰ Finally, the court held that Florida (and the EPA) was not required to include waters on the list that did not meet water quality standards due to natural causes.⁶¹

Under the CWA, states are required to establish water quality standards for their waters first by designating the uses made of the water and then by establishing water quality criteria necessary to protect those uses.⁶² States must then make a list of waters that do not meet their water quality standards, commonly known as the "impaired waters list."⁶³ For each segment of a water body that is impaired, the state must then establish total maximum daily loads ("TMDLs") for pollutants, that is, the maximum amount of a particular pollutant that can pass through the water segment without violating the quality standard set for that water body.⁶⁴ Finally, the state must rank its impaired waters for which it has not established TMDLs, showing the order in which it proposes to establish TMDLs.⁶⁵ States must submit their impaired waters list, TMDLs, and priority rankings to the EPA for approval every two years.⁶⁶

The plaintiffs challenged the EPA's approval of Florida's 2002 updated impaired waters list and related information. The EPA approved the list Florida submitted in large part but also added eighty impaired waters to the list that Florida had either omitted or removed from the original 1998 list.⁶⁷ The plaintiffs claimed that Florida, and the EPA by its approval, (1) improperly excluded waters from the list when the only evidence showing a water to be impaired either was more than seven-and-a-half years old or consisted solely of fish consumption advisories for

58. *Id.* at 917.

59. *Id.* at 916-17.

60. *Id.* at 920.

61. *Id.* at 921.

62. *Id.* at 907 (citing 33 U.S.C. § 1313(a)-(c)).

63. *Id.* (citing 33 U.S.C. § 1313(d)(1)(A)).

64. *Id.* at 908 (citing 33 U.S.C. § 1313(d)(1)(c)).

65. *Id.* (citing 33 U.S.C. § 1313(d)(1)(A)).

66. *Id.* (citing 40 C.F.R. § 130.7(d)(1) (2007)).

67. *Id.* at 908-09.

mercury contamination, (2) did not take into account standards required by the CWA in prioritizing its list for establishing TMDL, and (3) improperly excluded waters from the list that had exceeded water quality standards at least once in the preceding seven-and-a-half years or had exceeded the standards due to natural causes.⁶⁸ The district court granted summary judgment to the EPA on all of the plaintiffs' claims, and the plaintiffs appealed.⁶⁹

First, the Eleventh Circuit reversed the grant of summary judgment for the EPA on the issue of whether EPA had arbitrarily approved Florida's list of impaired waters, and in so holding, the court observed that Florida and the EPA had failed to consider certain data in developing and approving the impaired waters list.⁷⁰ Florida developed its 2002 list by examining only stream data collected within the preceding seven-and-a-half years, and the EPA approved this methodology.⁷¹ The Eleventh Circuit noted that the EPA's regulations require states to "assemble and evaluate all existing and readily available water quality-related data and information to develop" its impaired waters list.⁷² The regulations also require the state to submit, and the EPA to consider, "[a] rationale for any decision to not use any existing and readily available data."⁷³ Florida justified its seven-and-a-half year cutoff based on its desire to make listing decisions based on current conditions, which the EPA found to be reasonable.⁷⁴ However, the Eleventh Circuit held that while the state could elect not to use certain data after an initial evaluation, it could not elect to merely not consider the data in the first place; thus, the EPA's approval of Florida's decision to only consider data within the preceding seven-and-a-half years contradicted the EPA's own regulations, and the EPA's decision was not entitled to deference from the court.⁷⁵ For similar reasons, the court held that Florida improperly failed to consider water body-specific fish consumption advisories due to mercury contamination in making its listing decisions, and thus the EPA's approval of the list may have been arbitrary on this ground as well.⁷⁶ However, the court held that

68. *Id.* at 909.

69. *Id.*

70. *Id.* at 913.

71. *Id.*

72. *Id.* (emphasis omitted) (quoting 40 C.F.R. § 130.7(b)(5) (2007)).

73. *Id.* (brackets in original) (quoting 40 C.F.R. § 130.7(b)(6)(iii) (2007)).

74. *Id.*

75. *Id.* at 913.

76. *Id.* at 914-17. The EPA contended that neither of these alleged deficiencies resulted in waters being left off the list that otherwise would have been included. The plaintiffs disputed this assertion. *Id.* at 914. The court remanded the case for this determination;

Florida was not required to consider statewide fish consumption advisories in making its list because an EPA guidance letter stated that only water body-specific data constituted “existing and readily available data” within the meaning of its regulations.⁷⁷ While the court noted that it did not accord the guidance letter traditional deference, it found the rationale in the letter reasonable.⁷⁸ Finally, the court rejected the plaintiffs’ argument that although the EPA found that Florida improperly omitted eleven waters from the list, the EPA could not simply unilaterally add those waters to the list because it was required to discard Florida’s list in its entirety and develop a new one independently.⁷⁹ The court explained that the relevant provision of the CWA⁸⁰ did not mandate such a remedy.⁸¹

Second, the court reversed the grant of summary judgment for the EPA on Florida’s priority ranking of its impaired waters because Florida had automatically given a low priority for the development of TMDLs to waters listed due to fish consumption advisories for mercury.⁸² The plaintiffs contended that because the CWA directed states to establish its priority ranking based on the “severity of the pollution and the uses to be made of such waters,” the automatic ranking of Florida’s impaired waters list was arbitrary.⁸³ The district court had concluded that the EPA was entitled to summary judgment because, unlike the list itself, the EPA had no duty to approve or disapprove the priority rankings a state gives its waters.⁸⁴ The Eleventh Circuit agreed regarding the actual rankings, but it held that the EPA still had a duty to ensure that the state developed its rankings by taking into account the statutory factors of the severity of the pollution and the uses to be made of the

the court explained: “Unless the dispute is resolved or found not material, it may preclude the entry of summary judgment [to the EPA] on [the plaintiffs’] first claim.” *Id.*

77. *Id.* at 914.

78. *Id.* at 915. The court stated that while an agency guidance letter is not entitled to the level of deference that courts afford to an agency’s formal rulemaking or adjudication of its regulations under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the guidance letter was entitled to some deference from the court “proportional to its ‘power to persuade.’” *Sierra Club II*, 488 F.3d at 915 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001)).

79. *Sierra Club II*, 488 F.3d at 917.

80. 33 U.S.C. § 1313(d)(2). The section provides that when the EPA disapproves of a state’s list of impaired waters, it must “identify such waters in such State and establish such loads [that is, TMDLs] for such waters as [it] determines necessary to implement the water quality standards applicable to such waters.” *Id.*

81. *Sierra Club II*, 488 F.3d at 916-17.

82. *Id.* at 918.

83. *Id.* at 917 (quoting 33 U.S.C. § 1313(d)(1)(A) (2000)).

84. *Id.*

water.⁸⁵ While the EPA, in its review of Florida's list, found that Florida had done so, the court held that a factual dispute existed on the question, and it remanded for a determination of whether Florida had in fact applied the statutory factors to each water in developing its priority rankings.⁸⁶

Third, the court affirmed the grant of summary judgment to the EPA on its approval of Florida's removal of certain waters from the previous list, waters that the plaintiffs contended either had exceeded applicable water quality standards at least once in the previous seven-and-a-half years or had exceeded standards due to natural conditions.⁸⁷ As to the first issue, in reviewing Florida's list, instead of considering an individual exceedance as absolute evidence that the water was impaired, the EPA applied what the court termed a "totality" approach.⁸⁸ The court explained: "These factors [used by the EPA to review the list] included whether more recent data show attainment that renders earlier data suspect (trends); the magnitude of exceedance; the frequency of exceedance; pollutant levels during critical conditions; and any other site-specific data."⁸⁹ The court held that this approach was reasonable and not in conflict with the CWA.⁹⁰

Finally, as to the last issue (waters impaired due to natural conditions), the court held that while the CWA "does not specifically address whether waterbodies not meeting water quality criteria because of naturally occurring conditions must be included on a state's impaired waters list, the EPA's interpretation of the CWA as not requiring such listings . . . is supported by a careful reading of the CWA and its regulations."⁹¹ The court affirmed the grant of summary judgment to the EPA on this issue.⁹²

II. ENDANGERED SPECIES ACT

In *Alabama-Tombigbee Rivers Coalition v. Kempthorne*,⁹³ the Eleventh Circuit held that the United States Fish and Wildlife Service

85. *Id.* at 918.

86. *Id.*

87. *Id.* at 921.

88. *Id.* at 920.

89. *Id.* at 919-20 (internal quotation marks omitted).

90. *Id.* at 920.

91. *Id.* The court explained that the "CWA's express purpose is 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Id.* at 920-21 (quoting 33 U.S.C. § 1251(a) (2000)). Thus, the court concluded that Congress intended that waters should be returned to their natural state, not modified from it. *Id.*

92. *Id.* at 921.

93. 477 F.3d 1250 (11th Cir. 2007).

“FWS”) did not act arbitrarily when it relied on taxonomic rather than genetic evidence to determine that the rare Alabama sturgeon was a separate species from the more abundant shovelnose sturgeon⁹⁴ for the purposes of listing the Alabama sturgeon as an endangered species.⁹⁵ The court also held that the FWS’s failure to designate critical habitat for the Alabama sturgeon within two years of its listing, as required by the Endangered Species Act (the “Act”),⁹⁶ did not require that the species be delisted.⁹⁷ Finally, the court held that the FWS’s listing of the Alabama sturgeon, a species with no commercial value found only in south Alabama, did not violate the Commerce Clause of the United States Constitution.⁹⁸

The Alabama sturgeon was at one point a plentiful species that was fished commercially, but overfishing, dam construction, dredging and channeling of its habitat, and declining water quality reduced its numbers to the point that the FWS had to withdraw its first attempt to list the sturgeon, in 1993, because it could not confirm that the fish still existed at all. After eight confirmed catches of the fish in the 1990s, the FWS again proposed listing the sturgeon as endangered in 1999 and issued the final rule listing the fish in 2000.⁹⁹

The Alabama-Tombigbee Rivers Coalition (the “Coalition”), a group of industries and associations opposed to the listing, sued, claiming defects in the listing process. The United States District Court for the Northern District of Alabama granted the FWS’s motion for summary judgment, but it also ordered the FWS to designate critical habitat for the sturgeon by November 2006. The Coalition appealed the grant of summary judgment to the FWS.¹⁰⁰

The Coalition first claimed that in listing the Alabama sturgeon as endangered, the FWS failed to consider the “best scientific data available” as required by the Act.¹⁰¹ The Coalition claimed that the FWS discounted genetic evidence that the Alabama sturgeon and the

94. Or, as Judge Carnes succinctly described the issue: “Two fish, or not two fish? That is the question.” *Id.* at 1252.

95. *Id.* at 1259-60.

96. 16 U.S.C. §§ 1531-1544 (2000 & Supp. V 2005).

97. *Alabama-Tombigbee Rivers Coal.*, 477 F.3d at 1271.

98. *Id.* at 1276; U.S. CONST. art. 1, § 8, cl. 3.

99. *Alabama-Tombigbee Rivers Coal.*, 477 F.3d at 1253.

100. *Id.* at 1254. The Endangered Species Act requires the FWS to designate critical habitat for an endangered species within, at most, two years from the date the species is listed. 16 U.S.C. 1533(b)(6)(c)(ii) (2000). In this case, FWS failed to designate critical habitat, and still had not done so at the time of the Eleventh Circuit’s decision. *Alabama-Tombigbee Rivers Coal.*, 477 F.3d at 1263.

101. *Alabama-Tombigbee Rivers Coal.*, 477 F.3d at 1254.

nonendangered shovelnose sturgeon were in fact the same species and instead relied on the “older, subjective method of morphological taxonomy” to reach its separate-species determination.¹⁰² The FWS countered that genetic testing evidence is but one factor in a taxonomic determination. In this case, the FWS claimed that it did consider genetics, which by itself was inconclusive, but it also balanced other relevant factors in the taxonomic analysis, including morphological, chromosomal, biochemical, physiological, behavioral, ecological, and biogeographic characteristics, which the FWS argued supported classifying the Alabama sturgeon as a separate species.¹⁰³ The court sided with the FWS, noting that the FWS had considered genetic testing along with much other evidence, including all “existing literature and the additional expert opinions” on the species question, almost all of which supported treating the Alabama sturgeon as a separate species.¹⁰⁴ The court noted that under its standard of review applicable to an agency decision, it could only find a rule arbitrary and capricious when

“the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”¹⁰⁵

Because FWS had considered the best scientific data available and had considered all aspects of the problem, including genetic evidence, and because most of that evidence in fact supported FWS’s decision, the court concluded that the listing decision was rational.¹⁰⁶

The Coalition also contended that the final rule listing the sturgeon as endangered should be vacated because FWS had failed to designate critical habitat for the sturgeon, as required by the Act, within the time frame allowed by the Act.¹⁰⁷ Specifically, the Coalition claimed that

102. *Id.* at 1254-55 (internal quotation marks omitted).

103. *Id.* at 1255.

104. *Id.* at 1259.

105. *Id.* at 1254 (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

106. *Id.* at 1260.

107. *Id.* at 1262. The Endangered Species Act requires the FWS to publish proposed rules to list a species and to designate its critical habitat “not less than 90 days” before publication of the final rules, respectively. 16 U.S.C. § 1533(b)(5)(A) (2000). The FWS is required to publish its final listing decision not later than one year from the date of publication of the proposed rule, *id.* § 1533(b)(6)(A), and a final habitat designation concurrently with the listing decision, unless the FWS determines that the critical habitat is not determinable at the time of the listing decision, in which case the FWS can extend

the FWS's failure to propose a critical habitat designation during the public comment period for FWS's proposed decision may have caused some potentially interested parties not to comment on the listing decision who otherwise might have, thus "undermin[ing] the accuracy of the listing decision."¹⁰⁸ The court rejected this argument based on a thorough analysis of both the Act's language itself and its legislative history.¹⁰⁹ First, the court noted that the Act did not require the FWS to publish its proposals to list a species and designate its critical habitat concurrently; rather, the Act requires concurrence only between critical habitat designations and final listing decisions (critical habitat designations are even subject to extensions).¹¹⁰ As such, the court explained that there is no necessary connection between the comment period for the listing decision and the comment period for the habitat designation.¹¹¹ Consequently, the court concluded that the absence of comments on the habitat designation does not affect the integrity of the listing decision.¹¹² The court thus affirmed the district court's ruling that the FWS was not required to vacate and re-propose its final rule listing the sturgeon as endangered.¹¹³

The court was critical of the FWS's failure to designate critical habitat for the sturgeon, noting that the failure to designate habitat is a chronic problem with the agency's administration of the Act.¹¹⁴ The court

the time to publish the final habitat designation by one additional year beyond the initial one-year period between the proposed and final designations. *Id.* § 1533(b)(6)(C). The court reads these crisscrossing timelines to allow the FWS up to two years beyond the date of its final listing rule to designate critical habitat for the species. *Alabama-Tombigbee Rivers Coal.*, 477 F.3d at 1267. The Author reads the provisions to allow the FWS at most twenty-one months beyond the final listing decision. The difference is moot in this case, though, because the FWS has never designated critical habitat for the sturgeon. *See id.* at 1263.

108. *Alabama-Tombigbee Rivers Coal.*, 477 F.3d at 1263. The Eleventh Circuit has previously recognized that a party has standing to challenge an agency decision due to a procedural defect in the notice and comment period for the decision—even if the challenger itself participated in the comment process—if the challenger can show (1) a concrete injury in fact due to the defect, (2) that such an injury in fact could have resulted from a lack of participation—caused by the procedural defect—by others in the comment process, and (3) that the additional participation would have improved the process and may have affected the outcome. *See Sierra Club v. Johnson*, 436 F.3d 1269, 1275-79 (11th Cir. 2006).

109. *Alabama-Tombigbee Rivers Coal.*, 477 F.3d at 1264-67.

110. *Id.* at 1266-67.

111. *See id.*

112. *See id.*

113. *Id.* at 1271.

114. *Id.* at 1268. In 2006, in another case involving the FWS's failure to designate critical habitat for a listed species, the Eleventh Circuit held that the agency's failure constituted a one-time violation rather than an ongoing one for the purpose of determining

stated that “[i]t may be that in an appropriate case a court should . . . fashion some creative remedy to spur the Fish and Wildlife Service on with habitat designation,” but then noted that as a remedy, “delisting [as the Coalition proposed] is not creative, it is destructive. A species in free fall needs all the protection it can get. We would not cut the cords of a skydiver’s main parachute to punish the jump master for failing to pack the fellow a reserve chute.”¹¹⁵

Finally, the Coalition contended that the FWS’s extension of Endangered Species Act protection to the Alabama sturgeon—a species admittedly with no commercial value and found only in one river basin located entirely within Alabama—violated the Commerce Clause of the United States Constitution, which generally limits the federal government’s regulatory activities to matters involving interstate commerce.¹¹⁶ The court rejected this argument as well.¹¹⁷ The court noted that under settled United States Supreme Court interpretations of the Commerce Clause, Congress could permissibly regulate “purely local activities” that are part of an economic class of activities that have a substantial effect on interstate commerce.¹¹⁸ The court further held that the Endangered Species Act is a “general regulatory statute bearing a substantial relation to commerce,”¹¹⁹ and therefore, the fact that its regulatory scheme also could reach entirely local species, as it did in this case, is not fatal to any individual decision to list such a species.¹²⁰

III. CLEAN AIR ACT

In *National Parks & Conservation Ass’n v. Tennessee Valley Authority*,¹²¹ the Eleventh Circuit affirmed the district court’s dismissal with prejudice of the plaintiffs’ claims that the defendant, the Tennessee Valley Authority (“TVA”), violated the Clean Air Act (“CAA”)¹²² when it overhauled one of its coal-fired boilers in Colbert County, Alabama in 1982 and 1983.¹²³ The court affirmed that two of the plaintiffs’ claims were barred by the five-year statute of limitations applicable to citizen

the limitations period for filing suit to challenge the failure. *Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1335 (11th Cir. 2006).

115. *Alabama-Tombigbee Rivers Coal.*, 477 F.3d at 1270-71.

116. *Id.* at 1271.

117. *Id.* at 1273.

118. *Id.* at 1272 (quoting *Gonzales v. Raich*, 545 U.S. 1, 17 (2005)).

119. *Id.* at 1273.

120. *Id.* at 1277.

121. 502 F.3d 1316 (11th Cir. 2007).

122. 42 U.S.C. §§ 7401-7671q (2000 & Supp. V 2005).

123. 502 F.3d at 1318 (citing 42 U.S.C. § 7604(a)).

suits under the CAA and that the third was barred by the plaintiffs' failure to provide sufficient notice of their intent to sue.¹²⁴

The TVA's boiler at issue in the case had been in operation since 1965. In 1982 and 1983 the TVA overhauled the boiler to restore capacity and efficiency. The TVA did not treat the overhaul as a major modification of an existing source under the CAA and thus neither obtained a preconstruction permit for the modification nor modified the boiler in compliance with New Source Performance Standards. It did, however, operate the boiler at all times under an operating permit issued by the state of Alabama under the CAA State Implementation Plan. In the first two counts of the plaintiffs' complaint, they alleged that the TVA modified the boiler in violation of the "New Source Review" programs; in the third count, the plaintiffs alleged that the boiler's emissions after modification exceeded limitations applicable to a new source. The plaintiffs sought both civil penalties and injunctive relief.¹²⁵

The Eleventh Circuit held that the plaintiffs' claims based on the TVA's alleged failure to modify the boiler in compliance with the New Source Review program were barred by the five-year statute of limitations.¹²⁶ The court first held that even assuming the boiler modification constituted a "major modification" subject to the New Source program,¹²⁷ the TVA's failure to comply with the program constituted a one-time violation of the CAA and not a continuing violation, as the plaintiffs contended.¹²⁸ The court noted that most courts considering the question treated an operator's failure to modify an existing source in compliance with the New Source program as a one-time and not a continuing violation.¹²⁹ Although the court recognized

124. *Id.*

125. *Id.* at 1318-20. The substantive issue before the district court was whether the TVA's overhaul of its boiler constituted a "major modification" of an existing source that would subject TVA to the requirements of the New Source Review program, including, among other things, preconstruction permitting and the installation of the best available technology to reduce emissions, as well as more stringent emissions regulations thereafter. *See id.* at 1319 n.1. Neither the district court nor the Eleventh Circuit reached this issue, however. The EPA had brought the same claim against several TVA facilities, including the boiler at issue in this case, in an administrative enforcement action in 1999. *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1239, 1244 (11th Cir. 2003). The Eleventh Circuit subsequently held that proceeding unconstitutional. *Id.* at 1260. The plaintiffs then brought the present action under the citizen suit provision of the CAA. *Nat'l Parks & Conservation Ass'n, Inc.*, 502 F.3d at 1318-20.

126. *Nat'l Parks & Conservation Ass'n, Inc.*, 502 F.3d at 1318.

127. *Id.* at 1320.

128. *Id.* at 1322 (quoting *New York v. Niagara Mohawk Power Corp.*, 263 F. Supp. 2d 650, 661 (W.D.N.Y. 2003)).

129. *Id.*

that some courts had found such a violation to be continuing, the court distinguished these cases on the ground that those jurisdictions issued construction and operating permits that were somehow integrated or connected, making compliant construction a condition of lawful operation of the source.¹³⁰ The court explained that in this situation, the failure to follow applicable preconstruction and construction regulations would be a continuing violation of the source's operating permit.¹³¹ However, under Alabama's State Implementation Plan in effect at the time of TVA's modification of the boiler, the construction and operating permits were separate, and thus a failure to modify the boiler in compliance with applicable regulations would not be a violation of the boiler's operating permit.¹³² As such, the court held that because any violation that occurred during construction occurred well more than five years before the suit was filed, claims arising out of those alleged violations were barred.¹³³

The court also affirmed dismissal of the plaintiffs' third count—that TVA's operation of the boiler after it was modified had violated the New Source Performance Standards continuously for twenty years.¹³⁴ The citizen suit provision of the CAA requires that a plaintiff send a notice of intent to sue to the defendant prior to filing suit.¹³⁵ The notice must contain, among other things, specific information identifying the standard, limitation, or order allegedly violated and the date or dates of the alleged violation.¹³⁶ In their pre-suit notice letter to TVA, the plaintiffs alleged generally that TVA's boiler had violated the New Source Performance Standards with regard to several pollutants (including nitrogen oxide, particulates, and sulfur dioxide) every day

130. *Id.* at 1323.

131. *Id.*

132. *Id.* at 1323-25.

133. *Id.* at 1326. The court pointed out that the applicable five-year statute of limitations, 28 U.S.C. § 2462 (2000), by its terms applies only to legal claims, not equitable claims. *Nat'l Parks & Conservation Ass'n, Inc.*, 502 F.3d at 1326. However, the court in a separate analysis held that the plaintiffs' equitable claims were barred by the "concurrent remedy doctrine," which bars equitable claims based on the same facts as legal claims when the legal claims are time-barred. *Id.* (citing *Cope v. Anderson*, 331 U.S. 461, 464 (1947)). The court rejected the plaintiffs' argument that because they were acting as "private attorneys general" in bringing the citizen suit, an exception to the doctrine for claims brought by the federal government should apply to them. *Id.* at 1327. In rejecting this argument, the court explained that under the CAA, plaintiffs in citizen suit cases are acting on their own behalf and "do not represent the public at large in the same way the government does when it brings suit to enforce the statute." *Id.*

134. *Id.* at 1330.

135. *Id.* at 1328 (citing 42 U.S.C. § 7604(b)(1)(A)).

136. *Id.* (citing 40 C.F.R. § 54.3(b) (2004)).

since the modification. The plaintiffs' subsequent complaint alleged violation of the standards only with respect to sulfur dioxide.¹³⁷ As a result, the court held that the notice letter was insufficiently specific regarding the alleged violations.¹³⁸ Also, the court held that the letter did not identify the dates of the alleged violations with sufficient specificity to allow TVA to "identify[] the violations of which it was accused."¹³⁹ Based on these holdings, the court affirmed the dismissal of the plaintiffs' complaint in its entirety.¹⁴⁰

In *Sierra Club v. Administrator, U.S. E.P.A.*,¹⁴¹ the Eleventh Circuit answered a question that it left unanswered in a previous appearance of the case:¹⁴² whether the EPA's interpretation of a state regulation,¹⁴³ part of Georgia's State Implementation Plan under the CAA, should be accorded *Chevron* deference¹⁴⁴ and, if so, whether the agency's interpretation of the regulation was reasonable?¹⁴⁵ The court answered both questions in the affirmative and therefore affirmed the EPA's order challenged by the plaintiffs.¹⁴⁶

Under the Georgia regulation at issue in the case, the state would not issue a permit to construct or modify a major source of air pollutants unless the owner or operator of the source could demonstrate that all other sources owned or operated by that owner were in compliance with all applicable CAA emission limitations and standards.¹⁴⁷ In 2000 Oglethorpe Power Company applied for preconstruction and operating permits for a power generating unit it owned at Plant Wansley. Oglethorpe also owned a sixty percent interest in two power generating units at Plant Scherer. Both of those units were in compliance with all applicable CAA standards. Georgia Power Company owned two other units at Plant Scherer that were not in compliance. Georgia Power also operated Plant Scherer, and the four units shared one CAA operating

137. *Id.* at 1330.

138. *Id.* at 1329.

139. *Id.* at 1330.

140. *Id.*

141. 496 F.3d 1182 (11th Cir. 2007).

142. *Sierra Club v. Leavitt (Sierra Club D)*, 368 F.3d 1300 (11th Cir. 2004) (labeled "*Sierra Club F*" by the court in the 2007 case).

143. GA. COMP. R. & REGS. 391-3-1-.03(8)(c) (2007).

144. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). The *Chevron* case requires courts, among other things, to give deference to an administrative agency's reasonable interpretations of ambiguous statutory or regulatory provisions that it administers. See *Sierra Club v. Adm'r, U.S. E.P.A.*, 496 F.3d at 1186.

145. *Sierra Club v. Adm'r, U.S. E.P.A.*, 496 F.3d at 1184.

146. *Id.*

147. See *id.* at 1186; GA. COMP. R. & REGS. 391-3-1-.03(8)(c) (2007).

permit.¹⁴⁸ Oglethorpe did not own any controlling interest in Georgia Power and could not force Georgia Power to bring the noncompliant units at Scherer into compliance.¹⁴⁹ As the court explained,

the issue confronted by the Georgia EPD, and subsequently by the EPA [in approving Georgia's permitting decision in favor of Oglethorpe], was whether to deem Oglethorpe an owner of a noncompliant major stationary source when it had part ownership of two CAA-compliant units in a major stationary source [that also contained two noncompliant units].¹⁵⁰

Georgia decided not to treat Oglethorpe as the owner of a noncompliant source at Plant Scherer and issued Oglethorpe permits for its unit at Plant Wansley. The EPA approved Georgia's decision and the plaintiff challenged the EPA's approval.¹⁵¹

The court first held that the EPA's interpretation of Georgia's regulation was entitled to the deference from the court required by the United States Supreme Court's holding in *Chevron*.¹⁵² The court concluded that the regulation was ambiguous regarding the question involved in the case.¹⁵³ The court also concluded that because Georgia's administration of the regulation, which was part of Georgia's CAA Implementation Plan, was subject to EPA oversight, the regulation was also subject to EPA enforcement for deference analysis purposes.¹⁵⁴ For these reasons, the court held that the district court's deference to the EPA's interpretation of the regulation was proper.¹⁵⁵

The court then held that the EPA's order approving the permit issuance to Oglethorpe was based on a reasonable interpretation of the regulation.¹⁵⁶ In the case's previous appearance at the Eleventh Circuit, *Sierra Club I*, the plaintiff had successfully challenged the EPA's approval of the Oglethorpe permits on the ground that the EPA had given the term "major stationary source" in the regulation different meanings "in the permitting and compliance contexts."¹⁵⁷ The Eleventh Circuit, without reaching the deference issue, determined that the EPA's interpretation in that instance was arbitrary because the agency

148. *Sierra Club v. Adm'r, U.S. E.P.A.*, 496 F.3d at 1184-85.

149. *Id.* at 1188.

150. *Id.* at 1185.

151. *Id.*

152. *Id.* at 1186.

153. *Id.* at 1187.

154. *Id.* at 1186.

155. *Id.* at 1188.

156. *Id.*

157. *Id.* at 1187 (citing *Sierra Club I*, 368 F.3d at 1302 n.1).

provided no explanation for the different interpretations.¹⁵⁸ In the present case, the EPA did provide an explanation for its interpretation of the terms that the court held was reasonable.¹⁵⁹ The court explained, “[I]t does not appear to us to be unreasonable for the EPA to have looked only to the owner or operator of a *specific* noncompliant unit in a major stationary source when deciding whether a company should receive a permit under the Georgia Statewide Compliance Rule,” and the court consequently accepted the agency’s explanation that the rule’s purpose would not be served if the applicant were penalized for violations at sources where it does not have the power to correct the violations.¹⁶⁰

158. *Id.*

159. *Id.* at 1188.

160. *Id.*