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Environmental Law

by Travis M. Trimble*

In 2011,¹ the United States Court of Appeals for the Eleventh Circuit held that the intervenors lacked standing to challenge on appeal a consent decree entered into by the main parties and approved by the district court in a Clean Water Act² case.³ The United States District Court for the Northern District of Alabama, in a Clean Air Act⁴ case, excluded on *Daubert*⁵ grounds testimony of the government's experts purporting to establish that repair and replacement projects at several power plants in Alabama had in fact been major modifications to the plants that resulted in increased air pollutant emissions, which would have required the plants' operators to obtain pre-construction permits prior to undertaking the projects.⁶ Finally, the United States District Court for the Southern District of Alabama, in one of what will surely be many lawsuits arising out of the Deepwater Horizon oil rig explosion and spill, dismissed as moot parts of an environmental group's complaint challenging a federal agency's continued sale of leases for deepwater oil and gas drilling in the Gulf based on inadequate environmental safeguards, but let stand a portion of the case related to ongoing sales and approval of leases following the Deepwater Horizon disaster in reliance on an Environmental Impact Statement prepared in 2007.⁷

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1. For an analysis of Environmental Law during the prior survey period, see Travis M. Trimble, *Environmental Law, Eleventh Circuit Survey*, 62 MERCER L. REV. 1151 (2010).

2. 33 U.S.C. §§ 1251-1387 (2006).

3. Fla. Wildlife Fed'n, Inc. v. Jackson, 647 F.3d 1296, 1299 (11th Cir. 2011).

4. 42 U.S.C. §§ 7470-7671 (2006).

5. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

6. *United States v. Ala. Power Co.*, 773 F. Supp. 2d 1250, 1260 (N.D. Ala. 2011).

7. *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt., Regulation & Enforcement*, 791 F. Supp. 2d 1158, 1182 (S.D. Ala. 2011).

I. CLEAN WATER ACT / STANDING

In *Florida Wildlife Federation Inc. v. Jackson*,⁸ the Eleventh Circuit held that intervenor-appellants South Florida Water Management District and Florida Water Environment Association Utility Council lacked standing to challenge on appeal a consent decree entered into by plaintiff environmental advocacy groups and the Environmental Protection Agency (EPA), and approved by the United States District Court for the Northern District of Florida.⁹ Pursuant to the decree, the EPA was obligated to promulgate rules establishing numeric nutrient standards for Florida's lakes, rivers, and coastal waters.¹⁰

The Clean Water Act¹¹ allows states to adopt their own water quality standards, subject to EPA approval.¹² As did many states, Florida adopted a narrative water quality standard that provided that the concentration of nutrients in a water body "must not be altered 'so as to cause an imbalance in natural populations of aquatic flora or fauna.'"¹³ In 1998, the EPA and the Department of Agriculture issued a report stating that 40% of waters tested by various states did not meet water quality goals and indicated that the EPA expected states that had not done so to adopt numerical nutrient criteria to replace narrative standards by 2003.¹⁴ In 1999, a group of environmental advocacy organizations sued the EPA to force it to issue site-specific numeric water quality standards for certain Florida waterways; the parties settled this case with a consent decree whereby the EPA agreed to issue those standards if Florida did not do so itself.¹⁵

Although Florida studied the issue, it did not adopt numeric water-quality standards; so in 2008, five environmental groups sued the EPA, claiming that the EPA's 1998 report constituted a determination by the EPA that Florida's narrative standard was inadequate, which if true would impose on the EPA a nondiscretionary duty under the Clean Water Act to propose and adopt new standards for Florida.¹⁶ Thirteen

8. 647 F.3d 1296 (11th Cir. 2011).

9. *Id.* at 1307.

10. *Id.*

11. 33 U.S.C. §§ 1251-1387 (2006).

12. *Fla. Wildlife Fed'n*, 647 F.3d at 1300.

13. *Id.*; FLA. ADMIN. CODE ANN. r. 62-302-530(47)(b) (2010).

14. *Fla. Wildlife Fed'n*, 647 F.3d at 1299-1300.

15. *Id.* at 1300.

16. *Id.*; see also 33 U.S.C. § 1313(c)(4) (2006). The Act requires the EPA to "promptly prepare and publish proposed regulations setting forth a revised or new water quality standard" whenever the agency determines that an existing state standard is inadequate. 33 U.S.C. § 1313(c)(4).

parties, including the two appellants, intervened as defendants. While this suit was pending, the EPA made just such a formal determination, independent of the suit, that Florida's narrative standard was inadequate, which unequivocally triggered the EPA's obligation to promulgate new water quality standards.¹⁷

On August 25, 2009, the plaintiffs and the EPA moved for the entry of a consent decree that would require the EPA to propose numeric nutrient standards for lakes and flowing waters by January 14, 2010, and to adopt these standards by October 15, 2010 (again, unless Florida proposed its own standards acceptable to the EPA), and to propose standards for coastal and estuarine waters by January 14, 2011, and adopt them by October 15, 2011. The district court approved the consent decree by order on December 30, 2009, and the intervenor-appellants appealed the order, contending on appeal that the consent decree was "procedurally and substantively unreasonable" and that the district court abused its discretion by approving it.¹⁸ More specifically, the utility council claimed it would be injured by conflicting compliance directives between the 1999 consent decree and the 2009 consent decree; by having a limited opportunity to provide input into the rulemaking process due to the short timelines imposed by the consent decree; and by the district court's denying it an evidentiary hearing before approving the consent decree. The Water Management District claimed it had been injured by the parties' entering a consent decree without an administrative record, without adequate discovery, and without adequate fairness. The District also claimed injury from the short time frame set out in the consent decree for the EPA to adopt the new rules.¹⁹

The Eleventh Circuit held that the intervenors lacked constitutional standing to challenge the consent decree.²⁰ The court first noted that since the original parties to the case had settled it with the consent decree, the intervenors must have independent standing to challenge the decree.²¹ The court concluded that the intervenors lacked standing because the court could not redress the injuries the intervenors claimed they suffered because of the consent decree.²² The court noted that the

17. *Fla. Wildlife Fed'n*, 647 F.3d at 1300.

18. *Id.* at 1300-01.

19. *Id.* at 1303.

20. *Id.* at 1302. To have constitutional standing to bring a suit, a plaintiff must show (1) an injury in fact that is both concrete and particularized and actual or imminent, (2) that the injury is fairly traceable to the defendant's conduct being challenged in the suit, and (3) a likelihood that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 582 U.S. 167, 180-81 (2000).

21. *Fla. Wildlife Fed'n*, 647 F.3d at 1302.

22. *Id.* at 1303.

EPA had a valid independent basis apart from the consent decree for promulgating the rules called for in the consent decree: its determination pursuant to 33 U.S.C. § 1313(c)(4)²³ that Florida's existing water quality standard (in this case the narrative nutrient standard) was inadequate, and its resulting nondiscretionary duty to promulgate regulations setting out a new standard.²⁴ As a result, "[s]triking down the consent decree would not affect the validity of the December 2010 Rule and thus the Appellants' alleged injuries stemming from it are not redressable."²⁵

The opinion leaves some confusion as to how the intervenors could have challenged the rule-making process. The majority opinion states that

[t]he Intervenors had an open door to bring a full challenge to the agency's 2009 Determination that Florida's existing *narrative* water quality standards were inadequate—the real source of their alleged injuries They chose instead to challenge a consent decree which did nothing to change the effect of the 2009 Determination.²⁶

This language suggests that the intervenors did not challenge the 2009 Determination. However, the dissenting judge argues that the majority's reasoning is flawed because "[a]lthough Appellants have challenged the 2009 Determination in a separate, pending case, they are now bound by the terms of the consent decree. Indeed the district judge presiding over the suit challenging the 2009 Determination has stayed all proceedings pending resolution of Appellants' claims surrounding the consent decree."²⁷ The dissent characterizes the intervenors' resulting position as follows: "If the validity of the 2009 Determination depends on resolution of the consent decree, but a challenge to the consent decree is not justiciable because Appellants should instead challenge the 2009 Determination, Appellants have alleged a legally cognizable injury for which there is literally no legal remedy."²⁸

II. CLEAN AIR ACT / EVIDENCE

In *United States v. Alabama Power Co.*,²⁹ the United States District Court for the Northern District of Alabama excluded from evidence on

23. 33 U.S.C. § 1313(c)(4) (2006).

24. *Fla. Wildlife Fed'n*, 647 F.3d at 1304.

25. *Id.*

26. *Id.* at 1306 (emphasis in original).

27. *Id.* at 1307 (Wilson, J., dissenting).

28. *Id.* at 1308.

29. 773 F. Supp. 2d 1250 (N.D. Ala. 2011).

*Daubert*³⁰ grounds the plaintiff government agency's expert scientific testimony purporting to show that repair projects at defendant's power plants resulted in a significant increase of air pollutant emissions from the plants, thus making the projects a major modification to the plants, which in turn would have triggered a pre-construction "New Source Review" permitting requirement under the Clean Air Act³¹ and also required the installation of more modern pollution control technology.³² The court, following a recent decision by the United States Court of Appeals for the Seventh Circuit, held that the experts' threshold conclusion that there existed a one-to-one ratio of increased power generation capacity to increased power output at the plants was unreliable when applied to plants, such as the ones at issue in the case, that did not run both continuously and at full capacity.³³

Alabama Power Company conducted maintenance, repair, and replacement activities between 1985 and 1997 at plants in the state.³⁴ The U.S. Environmental Protection Agency (EPA) filed suit against the company following these activities, contending that the activities constituted "major modifications" to the plants for which Alabama Power was required to obtain permits pursuant to relevant provisions of the Clean Air Act and the corresponding State Implementation Plan.³⁵ The EPA alleged that, as a result of the modifications, plants in Alabama Power's system have since been emitting "massive amounts" of sulfur dioxide and nitrous oxide.³⁶

Power plants in Alabama Power's system are of three types: units that operate continuously at their maximum capacity (referred to as "baseload" units), units that run at less than maximum capacity and can be used to absorb increases in power demand (called "load following"

30. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

31. 42 U.S.C. §§ 7470-7671 (2006).

32. *Ala. Power Co.*, 773 F. Supp. 2d at 1260.

33. *Id.* at 1258 (citing *United States v. Cinergy Corp.*, 623 F.3d 455, 460 (7th Cir. 2010)).

34. *Id.* at 1253.

35. *Id.*

36. *Id.* The Clean Air Act, passed in 1980, required new sources of air pollution to be constructed with the best available pollution-preventing technology. Sources of air pollution that existed when the law was passed were exempted from meeting this requirement unless they underwent "major modifications" that resulted in a significant net emissions increase. *See* 42 U.S.C. § 7475(a) (2006). In such a case, the plant operator would be required to estimate the increase and obtain a pre-construction permit for the modification. *Id.* Routine maintenance that does not result in a significant emissions increase does not require a permit. *Id.* A plaintiff claiming a defendant power plant operator failed to obtain a required permit bears the burden of proving that the operator made a major modification to a plant. *See Ala. Power Co.*, 773 F. Supp. 2d at 1252-53.

units), and units that are kept offline and can be started on short notice to meet greater than anticipated surges in power demand (“quick start units”).³⁷

The EPA filed the case in its present form in 2005, contending that the maintenance, repair, and part-replacement projects at Alabama Power’s plants were major modifications of those plants requiring New Source Review and pre-construction permitting.³⁸ At issue in the case in its present posture³⁹ were three coal-fired plants that had undergone maintenance and repair activities, all of which are operated as “load-following” plants in Alabama Power’s system.⁴⁰

To prove that Alabama Power’s projects at the plants constituted major modifications, the EPA relied on the work of two experts, Robert Koppe, a plant reliability engineer, and Dr. Ranajit Sahu, an environmental permitting engineer. Mr. Koppe analyzed how the maintenance and repair projects affected future power generation at the plants, and Dr. Sahu then determined to what extent increased power generation caused increased emissions.⁴¹ The court described the work of these experts together as “the heart of the Plaintiff’s case on emissions.”⁴²

Alabama Power filed a motion in limine to exclude the experts’ testimony from the case on *Daubert* grounds, contending that the testimony as applied to the plants was unreliable.⁴³ The court explained that under a *Daubert* analysis, the proponent’s burden is not to show that an expert’s testimony is scientifically correct, but that it is reliable.⁴⁴ But the court went on to note that

nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that

37. See *Ala. Power Co.*, 775 F. Supp. 2d at 1253-54 & n.3.

38. *Id.* at 1253.

39. Issues involving other plants originally part of the suit had been resolved or dismissed. *Id.*

40. *Id.*

41. *Id.* at 1255-56.

42. *Id.* at 1255.

43. *Id.* at 1252.

44. *Id.*; see *Daubert*, 509 U.S. at 579. As the district court explains, *Daubert* imposes a duty on trial judges to ensure that scientific evidence is both reliable and relevant before it can be admissible. *Ala. Power Co.*, 773 F. Supp. 2d at 1252. The *Daubert* court set out four factors to be considered in assessing the reliability of expert scientific testimony: “(1) whether the theory or technique is capable of being tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether the technique has a high known or potential rate of error; and (4) whether the theory has gained general acceptance within the scientific community.” *Id.* (citing *Daubert*, 509 U.S. at 593-94).

there is simply too great an analytical gap between the data and the opinion proffered.⁴⁵

The court granted Alabama Power's motion and ruled the experts' testimony inadmissible.⁴⁶ The court, relying primarily on the Seventh Circuit's reasoning in *United States v. Cinergy Corp.*,⁴⁷ concluded that the experts' methodology, which presumes that an increase in a plant's annual capacity to generate power yields a proportionately equal increase in its actual annual output of power, which in turn would increase emissions, is unreliable when applied to a power generating unit that does not operate continuously and at maximum capacity—a "baseload" unit.⁴⁸ The court found that the first unit at issue, Barry Unit 2, operated at 78.7 percent of its capacity during the times it was in operation prior to the maintenance project, and was offline, or did not operate at all, 9.9 percent of the time; the second, Greene County Unit 2, also operated at 78.7 percent of capacity prior to the project; and the third unit, Gorgas Unit 10, operated at 82.1 percent of capacity.⁴⁹ The court accepted that these last two units operated "virtually continuously."⁵⁰ According to the court, then, none of the units operated at maximum capacity prior to the maintenance and repair project and thus were not "baseload" units to which the experts' methodology to determine increased emissions after the project could be reliably applied.⁵¹ Since none of the three plants at issue in the case operated as baseload units,⁵² the court concluded that the experts' conclusions as to power generation and therefore emissions were unreliable.⁵³

Mr. Koppe testified that his and Dr. Sahu's method of predicting post-project emissions could be accurately applied to "cycling"⁵⁴ units as well

45. *Id.* (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

46. *Id.* at 1260.

47. 623 F.3d 455 (7th Cir. 2010).

48. *Ala. Power Co.*, 773 F. Supp. 2d at 1258.

49. *Id.* at 1258-60.

50. *Id.* at 1260.

51. *Id.* at 1258.

52. The court accepted the definition of a "baseload" unit from *Cinergy* as one that operates virtually continuously at maximum capacity. *Id.* at 1257. Mr. Koppe had employed a broader definition of a baseload unit as one that operates "most of the time when it is available" but not necessarily at maximum capacity. *Id.* at 1257 n.8.

53. *Id.* at 1260. Mr. Koppe contended at the hearing that his methodology could be applied to "cycling" units, those that change output to meet demand, to predict accurately the increased emissions resulting from increased capacity. *Id.* at 1259 n.14.

54. The term "cycling" is used in *Cinergy* and appears to have the same meaning as "load-following" in describing the function of a power plant—that is, one online but not operated at full capacity that can be used to absorb short-notice increases in power demand. *See Cinergy*, 623 F.3d at 459-60.

as “baseload” units as long as certain preliminary facts were true about the unit.⁵⁵ Mr. Koppe testified that he had established these facts to be true about the units at issue in the case, and while the court challenged this conclusion factually as to Barry Unit 4, the court did not comment on it as to the other units except to note that Mr. Koppe “did not explain these limitations on the formula in his report,” concluding that the units were not “baseload” units under the definition adopted by the *Cinergy* court and thus the Koppe/Sahu conclusions as to increased emissions were unreliable because the units at issue did not operate continuously at full capacity.⁵⁶ The court seemed to base its decision not so much on the four factors of *Daubert* as on the proposition, as the court stated it, that “*Daubert* does not permit the Court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert.”⁵⁷ In other words, the district judge was not satisfied that Dr. Koppe explained how his data supported his conclusion with regard to “cycling” or “load-following” plants such as the ones in the case.⁵⁸

The court’s ruling appears to gut the EPA’s case, without Mr. Koppe’s and Dr. Sahu’s findings the EPA cannot prove that the maintenance and repair projects constituted major modifications to the plants. If the projects were not major modifications, no preconstruction permits were required regardless of whether there was an increase in emissions from the plants after the projects were completed.

III. NATIONAL ENVIRONMENTAL POLICY ACT / ENDANGERED SPECIES ACT

In *Defenders of Wildlife v. Bureau of Ocean Energy Management, Regulation, & Enforcement*,⁵⁹ plaintiff Defenders of Wildlife (DOW) challenged the Bureau of Ocean Energy Management, Regulation, and Enforcement’s (BOEMRE) continued acceptance of bids for deepwater oil and gas drilling leases under a 2007 lease sale program that was based on an Environmental Impact Statement (EIS) completed in 2007—after

55. *Ala. Power Co.*, 773 F. Supp. 2d at 1259 n.14. First, that the additional available hours at the unit will actually be used post-project; second, that the unit will not spend more time in reserve shutdown post-project than it had pre-project; and third, the output factor for the unit will not decrease post-project. *Id.*

56. *Id.* at 1259-60 & n.14.

57. *Id.* at 1259. The court appears to change the meaning somewhat of the language it cited from *General Electric v. Joiner* for this proposition. *See id.* The language in the *Joiner* opinion *permits* the trial court to exclude opinion that is related to data only by the say-so of the expert; here, the district court’s characterization is that *Daubert requires* the court to exclude such evidence. *Compare id.*, with *Joiner*, 522 U.S. at 146-47.

58. *See Ala. Power Co.*, 773 F. Supp. 2d at 1259 n.14.

59. 791 F. Supp. 2d 1158 (S.D. Ala. 2011).

the Deepwater Horizon drilling rig explosion on April 20, 2010 (“Deepwater Incident” or “Incident”) and subsequent oil spill.⁶⁰ The United States District Court for the Southern District of Alabama dismissed as moot, among other reasons, the portion of DOW’s claims that related to lease sales under the 2007 program that BOEMRE cancelled after the Deepwater Incident pending its preparation of a Supplemental EIS (SEIS) in response to the Incident, but the court allowed to stand the claims related to lease sales that were not cancelled after the Incident and for which BOEMRE continued to accept bids in reliance on the 2007 EIS.⁶¹

Pursuant to the Outer Continental Shelf Lands Act,⁶² BOEMRE sells leases for offshore oil and gas drilling. BOEMRE’s practice is to develop programs for lease sales in five-year increments. The program sets out a schedule for the sale of leases for that period. BOEMRE completes an EIS covering all sales for the period and then offers and awards the leases through a competitive bid process. When a bidder is successful, it submits an exploration plan to BOEMRE for approval. If the lease holder discovers oil or gas during the exploration phase, it then submits to BOEMRE for approval a development plan identifying the number and location of production wells, and upon approval, the lessee drills for and recovers oil or gas.⁶³ BOEMRE developed such a program covering the years 2007-2012 (the 2007 Program) which comprised eleven separate lease sales, including a sale known as Lease Sale 213. Each sale included multiple leases that were let for bid. BOEMRE prepared a single EIS for these eleven separate sales. Then, for each separate lease sale, BOEMRE prepared an Environmental Assessment (EA) that was keyed to the EIS and that resulted in a Finding of No Significant Impact (FONSI) on the environment for that sale, beyond any impacts already identified in the 2007 EIS.⁶⁴ As the court explained, “if the Multi-sale EIS is invalid, the EAs tiered off that EIS are similarly problematic.”⁶⁵

The Deepwater Horizon Incident occurred in April, 2010. On July 30, 2010, BOEMRE sent letters to the National Marine Fisheries Service (NMFS) and the United States Fish and Wildlife Service (FWS) requesting that these agencies reinstate consultation on the effects of the 2007 Leasing Program on the Gulf as required under the Endan-

60. *Id.* at 1161.

61. *Id.* at 1182.

62. 43 U.S.C. §§ 1331-1356(a) (2006).

63. *Defenders of Wildlife*, 791 F. Supp. 2d at 1161 n.2.

64. *Id.* at 1164 n.6.

65. *Id.*

gered Species Act (ESA).⁶⁶ On November 10, 2010, BOEMRE announced its intention to prepare a SEIS specifically in response to the Incident and halted all lease sales pending completion of the SEIS except for sales in Lease Sale 213, where BOEMRE continued to accept and approve bids for leases following the Incident and prior to the completion of the SEIS.⁶⁷

In its suit, DOW made four specific claims: first, that BOEMRE violated the National Environmental Policy Act (NEPA)⁶⁸ and the Administrative Procedure Act (APA)⁶⁹ by continuing to rely on the conclusions of the 2007 EIS governing the eleven lease sales even though the conclusions of the EIS were invalid after the Incident; second, that more specifically as to Lease Sale 213, BOEMRE accepted over 200 new bids for leases after the Incident while relying on a FONSI based on the 2007 EIS for that sale in violation of the APA; third, that BOEMRE violated the APA and the ESA by failing to reinitiate consultation with the NMFS and the FWS based on new data gathered from the Incident showing that drilling in the area may harm endangered or threatened species and critical habitat; and fourth, that BOEMRE violated the APA and the ESA by proceeding with lease sales in the Gulf after the Incident without ensuring that by continuing to permit drilling in the Gulf BOEMRE was not likely to jeopardize the continued existence of any species.⁷⁰ DOW sought a declaratory judgment that BOEMRE had violated the specified statutes, vacature of lease bids under lease sale 213 that BOEMRE accepted after the Incident, vacature and remand of the 2007 EIS and an injunction against any further lease sales pursuant to the EIS until BOEMRE prepared a SEIS, and an order requiring BOEMRE to reinitiate consultation with the other agencies to account for information learned from the Incident.⁷¹

BOEMRE moved to dismiss the first, third, and part of the fourth claims on grounds that they were moot and unripe. BOEMRE did not move to dismiss claim two, which focused specifically on BOEMRE's acceptance and approval of bids under Lease Sale 213. Several associations representing various oil and gas companies, and Chevron, U.S.A., were allowed to intervene in the case, and moved to dismiss DOW's claim in its entirety, including claim two, on similar grounds as BOEMRE and also on the basis of improper venue with respect to all

66. *Id.* at 1169-70; *see also* 16 U.S.C. § 1536(a)(2) (2006); 50 C.F.R. § 402.16(b) (2011).

67. *Defenders of Wildlife*, 791 F. Supp. 2d at 1164, 1166, 1167 n.13.

68. 42 U.S.C. §§ 4321-4357 (2006).

69. 5 U.S.C. §§ 500-596 (2006).

70. *See Defenders of Wildlife*, 791 F. Supp. 2d at 1161-62.

71. *Id.*

claims, lack of federal action remaining with respect to Lease Sale 213, and claim four on the basis that BOEMRE had complied with its obligation to ensure no endangerment under the ESA.⁷²

The court considered BOEMRE's motions first.⁷³ The court dismissed DOW's first claim as moot except to the extent it applied to Lease Sale 213 because BOEMRE had cancelled other lease sales in the 2007 Program and announced its intention to prepare an SEIS in response to the Deepwater Incident and not to resume conducting lease sales until the SEIS was completed.⁷⁴ The court also dismissed DOW's third claim, that BOEMRE was required under the ESA to reinitiate consultation with other agencies having jurisdiction to determine the effects of the Incident on species and habitat in the Gulf, for the same reason: BOEMRE had in fact requested renewed consultation with the NMFS and the FWS, which the court stated was the extent of its obligation under the provision of the ESA relevant to DOW's third claim.⁷⁵

The court denied BOEMRE's motion to dismiss DOW's fourth claim, that BOEMRE was in violation of its independent duty under the ESA to ensure that its actions did not jeopardize the continued existence of any endangered or threatened species in the Gulf.⁷⁶ BOEMRE had moved to dismiss this claim as unripe because it applied to future lease sales, and the agency argued that because no future lease sales had been approved any action the agency would or would not take with respect to the protection of species was speculative.⁷⁷ However, the court construed DOW's claim four, as set out in its complaint, as applying only to "actions that BOEMRE has taken and is taking now in the wake of the Deepwater Horizon spill, rather than lease sale approvals that may or may not happen at some future time."⁷⁸ The court also noted that DOW confirmed this interpretation of its claim in its response brief to BOEMRE's motion to dismiss.⁷⁹ The court did not specify what present actions of BOEMRE claim four might apply to, but it seems that, again, the only ongoing actions involved Lease Sale 213 because the agency had halted other sales pending completion of the SEIS in response to the Incident.⁸⁰ This more narrow interpretation of claim four, though,

72. *Id.* at 1162-64, 1172.

73. *Id.* at 1164-72.

74. *Id.* at 1166-67.

75. *Id.* at 1170.

76. *Id.* at 1172.

77. *Id.* at 1171.

78. *Id.* at 1172.

79. *Id.*

80. *See id.*

seems to mean that any challenge to BOEMRE's future approval of lease sales based on the potential inadequacy of the SEIS with respect to listed species under the ESA would have to be the subject of a later suit.

The court next turned to the Intervenor's non-redundant motions to dismiss, including a motion to dismiss the claims as they related to Lease Sale 213, the sale in which DOW alleged, and BOEMRE did not dispute, that BOEMRE had continued to accept and approve bids for leases in reliance on the 2007 EIS, following the Deepwater Incident.⁸¹ The Intervenor contended that with respect to Lease Sale 213, BOEMRE was under no obligation to prepare an SEIS after the Deepwater Incident because there was no major Federal action remaining to occur at that time.⁸² BOEMRE published a Final Notice of Sale for Lease Sale 213 on February 12, 2010, and, at that time, announced that a public reading of bids would occur on March 17, 2010. The Deepwater Incident happened on April 10, 2010. Thus, all the bids for Lease Sale 213 had been received prior to the Incident; however, BOEMRE still had to analyze the bids and determine that the highest bid for each tract represented fair market value. This bid acceptance process continued for several months after the Incident. The Intervenor contended that the last major Federal action in connection with Lease Sale 213 was the bid reading in March (at which time BOEMRE had apparently received all bids for Lease Sale 213). The Intervenor argued that BOEMRE's only actions in connection with the sale after the Incident were to evaluate the bids for economic factors, not environmental ones, before awarding them.⁸³ The court applied a definition of "major federal action" used by the District of Columbia Circuit stating

81. *Id.* at 1172-75. The court denied the Intervenor's motion to dismiss for improper venue. *Id.* at 1174-75. The Intervenor argued that venue was improper because none of BOEMRE's actions being challenged by DOW took place in Alabama. *Id.* at 1173-74. However, the court noted the great weight of authority for the proposition that intervening parties, who have voluntarily elected to enter a lawsuit already ongoing in a particular venue, cannot then claim that the venue is improper, and ruled consistent with this rule. *Id.* at 1174-75. The court also denied the Intervenor's motion to dismiss claim four with respect to Lease Sale 213, which was based on a similar ground to their challenge to claim two, that Lease Sale 213 had been completed prior to the Incident and therefore BOEMRE was not presently taking any action that could jeopardize a protected species. *Id.* at 1178-79. The court rejected this argument for the same reason as it did the Intervenor's motion directed at claim two: BOEMRE continued to analyze and accept bids from Lease Sale 213 after the Incident, and if those actions jeopardized any protected species, then claim four is cognizable. *Id.*

82. An agency is required to supplement an EIS only where there remains a "major Federal action[]" yet to occur at the time the agency learns of new information that could render an existing EIS invalid. *Id.* at 1176.

83. *Id.* at 1175-77.

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that a major federal action requiring supplementation of an EIS is one where the government retains the discretion to act in a way that “might usefully be informed by further environmental review.”⁸⁴ The court noted that while BOEMRE may have been primarily interested in economic criteria in reviewing and accepting bids, it nevertheless retained the discretion to reject a bid for any reason prior to formal acceptance,⁸⁵ and the mere submission of a high bid “did not confer upon the bidders any right to lease a particular tract without agency approval.”⁸⁶

84. *Id.* at 1176.

85. *Id.* at 1177. Among other reasons, the court noted that the Federal Register Notice announcing Lease Sale 213 stated “The United States reserves the right to reject any and all bids . . . prior to issuance of a written acceptance of a bid.” *Id.*; 75 FED. REG. 6874, 6881 (Feb. 12, 2010).

86. *Defenders of Wildlife*, 791 F. Supp. 2d at 1178.