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Environmental Law, Eleventh Circuit Survey

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Environmental Law

by Travis M. Trimble*

In 2014,[1] the United States Court of Appeals for the Eleventh Circuit, addressing an issue of first impression, rejected the district court's use of a *Lone Pine* case-management order as a means of testing the sufficiency of the plaintiffs' pleadings in a state law environmental torts case. The court also interpreted Florida law to mean that plaintiffs are not required to allege that groundwater contamination exceeded regulatory maximum contaminant levels for drinking water to maintain their claims and that they could recover "stigma" damages to their property without alleging actual contamination. The United States District Court for the Middle District of Florida, also in a matter of first impression, concluded that claims brought under the National Environmental Policy Act of 1969 are subject to a six-year limitation period pursuant to the Administrative Procedure Act. Finally, the United States District Court for the Northern District of Alabama concluded that, for standing purposes, the "zone of interest" protected by section 404 of the Clean Water Act included matters beyond loss of jurisdictional waters, including water quality and aesthetic and recreational values.

I. PLEADING

In *Adinolfe v. United Technologies Corp.*,[2] a mass tort case alleging personal injury and property damage resulting from groundwater contamination, the Eleventh Circuit held that the United States District Court for the Southern District of Florida erred in issuing a *Lone Pine* order[3] and using the resulting submitted facts as a basis to dismiss the

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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*, 65 MERCER L. REV. 929 (2014).

2. 768 F.3d 1161 (11th Cir. 2014).

3. *See* Lore v. Lone Pine Corp., No. L-33606-85, 1986 N.J. Super. LEXIS 1626 (Law Div. 1986). In the words of the Eleventh Circuit, the purpose of a *Lone Pine* order is to "require

plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).[4] The circuit court held that the district court should have ruled on the defendant's motion to dismiss based solely on the sufficiency of the complaint under the standards set out by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*[5] and its progeny.[6] Although the circuit court declined to address "the general propriety [or] utility of *Lone Pine* orders" the court's holding appears to foreclose, or at least disapprove of, the district court's use of such orders as a means of assessing the sufficiency of a plaintiff's complaint in deciding a defendant's motion to dismiss for failure to state a claim.[7]

The circuit court also held that the plaintiffs' complaint, alleging generally that contamination from the defendant's plant caused personal injury and property damage and setting out causes of action arising under Florida law regarding negligence, nuisance, strict liability, and recovery in the environmental law context were not insufficient on the grounds set out in the defendant's motion.[8] Specifically, the court first held the plaintiffs were not required to allege that each property covered by the complaint had actual contamination.[9] Second, the plaintiffs were not required to allege that contamination discovered under some of the properties exceeded applicable regulatory safe drinking water standards under Florida law.[10] Third, the plaintiffs adequately alleged causation.[11] And fourth, certain plaintiffs were entitled to seek diminution in property value damages arising out of the "stigma" of contamination without alleging actual contamination.[12] As a result, the Eleventh Circuit reversed the district court's dismissal of the plaintiffs' complaint for failure to state a claim.[13]

The plaintiffs were 384 property owners in a residential development in Palm Beach County, Florida, known as The Acreage. The defendant, doing business as Pratt & Whitney, operated an aircraft and rocket engine manufacturing plant (the site) six miles north of The Acreage.

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plaintiffs in mass tort cases to provide some factual support, including expert testimony, for their claims or run the risk of having those claims dismissed." *Adinolfe*, 768 F.3d at 1167.

4. 768 F.3d at 1169-73; *see also* FED. R. CIV. P. 12(b)(6).
5. 550 U.S. 544 (2007).
6. *See Adinolfe*, 768 F.3d at 1168-69.
7. *Id.* at 1168.
8. *Id.* at 1174-75.
9. *Id.* at 1173.
10. *Id.*
11. *Id.* at 1175.
12. *Id.* at 1176-79.
13. *Id.* at 1179.

According to the plaintiffs' complaint, the site and The Acreage sit above the same aquifer, in which water flows north to south, that is the source of drinking water for The Acreage. The site underwent remediation in the 1980s, but remained a continuing source of environmental contamination. In 2003, metal drums marked "hazardous waste" were discovered at the site, and a plume of a particular contaminant, dioxane, had spread from the drums. In 2008, the Environmental Protection Agency (EPA) found twenty-four listed contaminants in the soil and groundwater at the site, and testing done for the defendant found contaminants present in high concentrations at the site. In 2010, the Palm Beach County Health Department labeled The Acreage a "cancer cluster," with some children developing cancerous brain tumors and at least three adults developing a type of renal cancer.[14] Also in 2010, the Federal Housing Administration warned appraisers that the cancer cluster declaration could be harming home values in the area. Samples from test wells in The Acreage showed the presence of certain contaminants that the plaintiffs alleged the defendant released on the site and that plaintiffs' experts stated had migrated under The Acreage.[15]

Over 300 of the individual plaintiffs alleged their properties were actually contaminated by chemicals that had migrated from the site (the actual-contamination plaintiffs). The remaining plaintiffs claimed either their properties were not presently contaminated but would be in the future, or their properties had lost value because of the proximity to contaminated property (the anticipated-contamination and proximity plaintiffs).[16]

After the district court dismissed the plaintiffs' initial complaints and the plaintiffs filed amended complaints, the district court issued a *Lone Pine* order giving the plaintiffs sixty days to produce "all evidence they contend supports the *prima facie* elements of contamination and causation," included but not limited to "disclosure of any testing for contaminants conducted on each plaintiff's property, [] disclosure of any contaminants found on each plaintiff's property," and expert opinions on several factual issues, including whether individual properties were contaminated and whether the defendant had caused the contamination and other evidence of causation and harm, including diminution in

14. *Id.* at 1164, 1169-70. One of the adults had her well water tested and found it to be contaminated with various cancer-causing chemicals. *Id.* at 1170. She and her husband filed a related suit for personal injury, *Pinares v. United Technologies Corp.*, No. 10-80883-CIV-RYSKAMP/VITUNAC, 2011 U.S. Dist. LEXIS 8923 (S.D. Fla., Jan. 19, 2011), which was consolidated with *Adinolfe*. *Adinolfe*, 768 F.3d at 1164.

15. *Adinolfe*, 768 F.3d at 1169.

16. *Id.* at 1170.

value.[17] The order also provided that the defendant could respond by challenging the plaintiffs' compliance with the order within sixty days of receiving the plaintiffs' evidence.[18]

In response to the order, the plaintiffs filed declarations from their experts purporting to show, among other things, causation. The defendant responded with opinions of its own experts challenging the validity of the plaintiffs' experts' opinions and moved to dismiss the plaintiffs' amended complaints for failure to comply with the *Lone Pine* order.[19] As the Eleventh Circuit noted, even though the district court intended to keep the two separate, the hearing and proceedings related to compliance with the *Lone Pine* order became inextricably linked to the motion to dismiss the complaint with the district court and the parties "frequently stray[ing] beyond the four corners of the complaints and discuss[ing] the expert testimony and factual submissions contained in the *Lone Pine* filings."[20]

After the hearing, the district court dismissed the plaintiffs' amended complaints and subsequently dismissed with prejudice their second amended complaints as well. The district court ruled, regarding the actual-contamination plaintiffs, the complaint was insufficient because it did not allege that these plaintiffs actually tested for contamination or that each of their individual properties was actually contaminated. As a result, the allegation that their properties were contaminated by the site was merely conclusory and not entitled to be accepted as true, and the complaint was further deficient because it did not allege that any contamination exceeded the applicable regulatory safe drinking water standards.[21] The district court also ruled that the actual-contamination plaintiffs' causation allegations were inadequate because the plaintiffs "did not establish a causal link between any particular pollutant that specifically traveled from [the site] on one hand and the pollution in The Acreage on the other," and thus the allegations of causation were conclusory.[22] Finally, the district court ruled that the anticipated-contamination and proximity plaintiffs could not state a

17. *Id.* at 1165.

18. *Id.*

19. *Id.* at 1165-66.

20. *Id.* at 1166-67.

21. *Id.* at 1167, 1171. The Supreme Court, in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), explained its holding in *Twombly*, stating, "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678.

22. *Adinolfe*, 768 F.3d at 1171.

state-law claim for "stigma" damage to their property values in the absence of actual contamination.[23]

In disentangling the two issues, the Eleventh Circuit first held that the district court erred in issuing the *Lone Pine* order "requiring factual support for the plaintiffs' claims before it ha[d] determined that those claims survive a motion to dismiss under *Twombly*."[24] The Eleventh Circuit stated that

> [w]hatever the general propriety and/or utility of *Lone Pine* orders–matters we do not pass on today–they should not be used as (or become) the platforms for pseudo-summary judgment motions at a time when the case is not at issue and the parties have not engaged in reciprocal discovery.[25]

The court went on to note,

> We understand the district court's concern that, without a *Lone Pine* order, a defendant in a case like this one would have to engage in expensive and time-consuming discovery without the plaintiffs first demonstrating some factual support for their claims. That concern may be a valid one, but it cannot be allayed by use of a scheduling order that runs counter to the adversarial process envisioned by . . . the Federal Rules of Civil Procedure.[26]

The court then turned to the dismissal of the plaintiffs' second amended complaints, independent of the evidence submitted by the parties in response to the district court's *Lone Pine* order, and held that the complaints did state claims on which relief could be granted.[27] The court noted first that while the causes of action set out in the complaints required the pleading of distinct elements, the defendant moved to dismiss and the district court agreed based on "grounds common to all of the claims instead of challenging whether the plaintiffs properly pled each cause of action."[28] The Eleventh Circuit therefore confined its analysis to those grounds for dismissal.[29]

First, the Eleventh Circuit held that the district court erred in concluding that the actual-contamination plaintiffs had inadequately alleged contamination.[30] These plaintiffs alleged that each of their

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23. *Id.* at 1171, 1176.
24. *Id.* at 1168.
25. *Id.*
26. *Id.* at 1169.
27. *Id.* at 1169-76.
28. *Id.* at 1171-72.
29. *Id.* at 1172.
30. *Id.*

properties "ha[d] been contaminated by [the defendant]."[31] The court stated that "[a]lthough this allegation may appear conclusory when read in isolation, the complaint provides additional factual allegations that easily push the 'contamination' plaintiffs' claims across the line from conceivable to plausible."[32] The court pointed to the allegations that the defendant released contaminants into the soil, groundwater, and surface water on its property; that The Acreage and the defendant's property share the same aquifer; that the aquifer flows south from defendant's property to The Acreage; and that water samples from test wells in The Acreage contained three specific contaminants also found on the defendant's property.[33] The court stated that, in the aggregate, these allegations made the claim that the defendant had contaminated each of the actual-contamination plaintiffs' individual properties plausible.[34] The court also held that the district court erred in requiring each of the actual-contamination plaintiffs allege they tested their properties, noting that while such testing might be necessary for the plaintiffs to meet their burden of persuasion, it was not necessary to plead a prima facie case.[35]

The court also held the plaintiffs were not required to allege that contamination on their properties exceeded the Florida safe drinking water standards for various contaminants.[36] The court reached this conclusion based on "the substantial body of Florida law endorsing the basic tort principle that 'while one's compliance with a statute or an ordinance may amount to evidence of reasonableness, such compliance is not tantamount to reasonableness as a matter of law.'"[37] The court noted that while courts dealing with groundwater contamination in other jurisdictions hold that a plaintiff must show the alleged contamination exceeds the applicable maximum contaminant levels, "that view is not unanimous, and Florida courts have not endorsed such a rule."[38]

Second, the court held that the plaintiffs had adequately pled causation.[39] Pointing to essentially the same set of fact allegations in the complaint that it had focused on to conclude that the plaintiffs

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31. *Id.*
32. *Id.* (quoting *Twombly*, 550 U.S. at 570) (internal quotation marks omitted).
33. *Id.* at 1173.
34. *See id.* at 1172.
35. *Id.* at 1173.
36. *Id.*
37. *Id.* at 1174 (quoting Westland Skating Ctr., Inc. v. Gus Machado Buick, Inc., 542 So. 2d 959, 964 (Fla. 1989)); *see also* Nicosia v. Otis Elevator Co., 548 So. 2d 854, 856 (Fla. Dist. Ct. App. 1989).
38. *Adinolfe*, 768 F.3d at 1174.
39. *Id.* at 1175.

plausibly pled that the defendant had contaminated the plaintiffs' properties, the court stated that "[i]n the aggregate, these assertions give rise to a 'reasonable inference that [the defendant] is liable for the misconduct alleged.'"[40]

Third, the court held that the proximity and anticipated-contamination plaintiffs were not required to allege actual contamination of their properties to seek diminution in property value based on the "stigma" of their properties' proximity to contaminated areas.[41] The court pointed to precedent from the Florida Supreme Court holding that plaintiffs bringing nuisance claims, strict liability claims, negligence claims, and Florida environmental law claims could seek "stigma" damages without showing a physical invasion of their property interests.[42] The court again distinguished *St. Joe Co. v. Leslie*,[43] the principal case relied on by the defendant.[44] The court acknowledged that language in the *Leslie* case could support a contrary conclusion, but asserted that the Florida Supreme Court cases it pointed to indicated that if the Florida Supreme Court were to address the question, it would hold that "a tort plaintiff seeking to recover for economic harm caused by pollution or contamination need not own property that is itself polluted or contaminated."[45]

II. NATIONAL ENVIRONMENTAL POLICY ACT

In *RB Jai Alai, LLC v. Secretary of the Florida Department of Transportation*,[46] the United States District Court for the Middle District of Florida, in an issue of first impression, concluded that claims brought under the National Environmental Policy Act (NEPA)[47] and the Federal Aid Highway Act (FAHA)[48] are subject to the Administrative Procedure Act's (APA)[49] six-year limitation period.[50] The court also took the position (though perhaps in dicta) that purely economic

40. *Id.* (quoting *Iqbal*, 556 U.S. at 678).
41. *Id.* at 1176.
42. *Id.* at 1177-78.
43. 912 So. 2d 21 (Fla. Dist. Ct. App. 2005). In *St. Joe Co.*, the Court of Appeals of Florida stated that "because no proof was adduced that any of the class representatives' land was contaminated, the concept of 'stigma' damages is inapplicable." *Id.* at 24-25.
44. *Adinolfe*, 768 F.3d at 1177.
45. *Id.* at 1178.
46. No. 6:13-cv-1167-Orl-40GJK, 2014 U.S. Dist. LEXIS 131792 (M.D. Fla. 2014).
47. 42 U.S.C. §§ 4321-4370h (2012).
48. 23 U.S.C. §§ 101-170 (2012).
49. 5 U.S.C. §§ 551-559, 701-706 (2012).
50. *RB Jai Alai, LLC*, 2014 U.S. Dist. LEXIS 131792, at *23-24; *see also* 28 U.S.C. § 2401(a) (2012) (providing limitations period for civil actions).

interests are not within the "zone of interests" protected by NEPA, and thus a plaintiff claiming purely economic harm lacks standing to assert a NEPA claim.[51] Nevertheless, the court concluded that the plaintiffs in this case, a jai alai club and two of its employees, alleged more than merely economic harm and thus did have standing to assert a NEPA claim.[52] Accordingly, the court denied the defendants' motion to dismiss the complaint except pertaining to the portion of the complaint challenging agency action more than six years prior to the filing of the complaint.[53]

In the early 2000s, the Florida Department of Transportation (FDOT) developed a plan, finalized in 2004, to build an overpass allowing U.S. Highway 17-92 to cross over State Road 436 in Seminole County, Florida (the Project). The FDOT sought federal funding for the Project, which triggered review under NEPA.[54] The Federal Highway Administration (FHWA) and FDOT determined that the Project qualified for a Categorical Exclusion (CE) under FHWA's regulations,[55] meaning that no environmental assessment or impact study was required under NEPA. In 2012, because of design changes in the Project, the agencies re-evaluated whether the Project continued to qualify for a CE and determined that it did.[56]

The plaintiffs filed suit in 2013, generally challenging the agencies' determination that the Project was exempt from NEPA and also claiming that the approval and funding of the Project violated FAHA. In relevant part, the complaint alleged that the overpass proposed in the Project would cause greater traffic and congestion around the plaintiffs' business (thus increasing the risk of injury to persons using the business), would decrease access to the business resulting in economic harm, and would increase air and noise pollution around the business.[57]

The defendants, FDOT and FHWA, moved to dismiss the complaint. The defendants asserted that the plaintiffs lacked standing because they had not suffered a cognizable injury under NEPA or FAHA and because the plaintiffs' alleged harms were not within the zone of interests protected by the statutes; that the complaint was a "shotgun" pleading and impossible to answer; that the complaint failed to state claims under

51. *RB Jai Alai, LLC*, 2014 U.S. Dist. LEXIS 131792, at *18-19.
52. *Id.* at *20-21.
53. *Id.* at *29-30.
54. *Id.* at *2-3.
55. 23 C.F.R. § 771.117(a) (2014).
56. *RB Jai Alai, LLC*, 2014 U.S. Dist. LEXIS 131792, at *3.
57. *Id.* at *4-5, *14.

the statutes; and that, regarding the defendants' action initially exempting the Project from NEPA review in 2004, the claims were barred by the statute of limitations.[58]

The defendants first contended that the injuries the plaintiffs alleged were "merely conjectural" and that the complaint failed to set out facts from which the court could conclude that the plaintiffs suffered actual harm.[59] However, the court concluded that the general factual allegations were sufficient to allege a concrete and particularized risk of harm, and thus the complaint sufficiently alleged injury for constitutional standing purposes.[60]

The defendants also contended that as a business alleging economic harm, the plaintiffs did not fall within the zone of interests protected by NEPA or FAHA and thus lacked "prudential" standing.[61] In response to that argument, the court, noting a "disagreement among the circuits" regarding whether NEPA protects purely economic interests, first explained that under Eleventh Circuit precedent a plaintiff must demonstrate, among other things, an environmental injury to fall within NEPA's zone of interests.[62] Therefore, the court "side[d] with those courts concluding that purely economic injuries with no connection to the environment are insufficient to fall within NEPA's zone of interests."[63] However, the court concluded the plaintiffs here had alleged environmental injuries in addition to economic ones and therefore fell within NEPA's zone of interests for standing purposes.[64]

The court reached the same conclusion for the plaintiffs' FAHA claim, explaining that the zone of interests protected by FAHA included "transportation, economic growth, environmental protection, land use, and quality of life," and that the allegations of the complaint that placed the plaintiffs within NEPA's zone of interests also placed them within that of FAHA.[65]

Next, the court, addressing what it described as an issue of first impression in the Eleventh Circuit—whether a NEPA action was subject to a limitation period—concluded that such actions were subject to the six-year limitation period for actions brought under the APA.[66] As a result, the court ruled that the portion of the plaintiffs' complaint

58. *Id.* at *6-7.
59. *Id.* at *15.
60. *Id.*
61. *Id.* at *15-16, *18.
62. *Id.* at *18.
63. *Id.* at *19.
64. *Id.* at *20-21.
65. *Id.* at *21-23.
66. *Id.* at *23-24.

challenging the defendants' initial decision in 2004 to exclude the Project from NEPA review was time-barred.[67]

Finally, based largely on the factual allegations the court had already determined established that the plaintiffs had standing, the court concluded that the complaint adequately stated claims for relief under both NEPA and the FAHA.[68] The court denied the defendants' motion to dismiss the complaint, except the portion the court concluded was time-barred.[69]

III. CLEAN WATER ACT–SECTION 404

In *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*,[70] a challenge to the Corps of Engineers' (the Corps) reissuance of Nationwide Permit 21 (NWP 21)[71] under section 404 of the Clean Water Act (the CWA),[72] the United States District Court for the Northern District of Alabama concluded, among other things, that downstream water quality fell within the "zone of interests" protected by § 404 of the CWA, and thus the plaintiffs, users of a river whose water quality they alleged was degraded by surface mining operations in the river's watershed, had standing to bring their challenge under § 404.[73] However, the court also concluded that the plaintiffs' action, filed ten months after the reissuance, was barred by laches and for this and other reasons granted summary judgment to the defendants.[74]

Under § 404, the Corps may issue general permits (known as nationwide permits) allowing the deposit of dredged or fill material into jurisdictional waters—in lieu of requiring permittees to apply for individual permits—if the Corps determines that the activities covered by the nationwide permits will have only minimal effects on the environment both individually and cumulatively.[75] By law, nationwide permits are limited to five-year terms.[76]

The Corps first issued NWP 21 in 2007,[77] authorizing surface mining operations to deposit dredged or fill material into waters of the United States, subject to certain restrictions. The Corps reissued NWP 21 in

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67. *Id.* at *25-26.
68. *Id.* at *29.
69. *Id.* at *29-30.
70. 23 F. Supp. 3d 1373 (N.D. Ala. 2014).
71. Reissuance of Nationwide Permits, 77 Fed. Reg. 10,184 (Feb. 21, 2012).
72. 33 U.S.C. § 1344(e) (2012).
73. *Black Warrioer Riverkeeper, Inc.*, 23 F. Supp. at 1376-77, 1382-83.
74. *Id.* at 1393.
75. 33 U.S.C. § 1344(e).
76. *Id.*
77. Reissuance of Nationwide Permits, 72 Fed. Reg. 11,092 (Mar. 12, 2007).

2012. The 2012 version separated mining operations into two categories: those that had previously received authorization to operate under the 2007 NWP 21 (the reauthorization provision), and those that had not. The 2012 NWP 21 applied more restrictive standards to operations that had not been previously authorized under the 2007 version than to those that were previously authorized. Thus, previously authorized operations were allowed to continue in ways that were potentially more damaging to the environment than were newly authorized operations. The 2012 version was issued on February 18, 2012, and became effective March 19, 2012. The first previously authorized mining operation was reauthorized under the 2012 NWP 21 in May 2012, and by February 2013, thirty-nine reauthorizations had been granted.[78]

The plaintiffs, environmental groups whose members "use and enjoy waters downstream" from the surface mining operations authorized under NWP 21, filed suit on November 25, 2013.[79] The plaintiffs challenged the 2012 NWP 21, in particular the section applying more lenient restrictions to previously authorized operations, on two grounds. First, the plaintiffs contended that the 2012 NWP 21 implicitly extended the 2007 NWP 21 beyond its statutorily mandated term of five years. Second, the plaintiffs contended that the Corps's cumulative-effects analysis of the reauthorization provision was arbitrary and capricious because: the Corps did not conduct a "cumulative effects" analysis of the 2012 NWP 21's reauthorization provision, as required by the CWA and by NEPA; the Corps improperly relied on its 2007 analysis of cumulative effects in issuing the 2012 NWP 21; and the Corps improperly considered compensatory mitigation in its cumulative effects analysis. The plaintiffs alleged that mining activities permitted under the 2012 NWP 21 had impaired downstream water quality and interfered with the plaintiffs' aesthetic and recreational enjoyment of the water.[80]

The court first addressed the defendants' motion to dismiss for lack of subject matter jurisdiction.[81] Specifically, the defendants contended that the plaintiffs lacked standing because (1) § 404 does not regulate water quality, which is exclusively regulated under section 402 of the CWA,[82] and (2) the plaintiffs could not show that the alleged harm

78. *Black Warrior Riverkeeper*, 23 F. Supp. at 1378-80, 1385.

79. *Id.* at 1377, 1380.

80. *Id.* at 1377, 1387-88.

81. *Id.* at 1380. The plaintiffs' claim was challenged by both defendants, including the Corps, and intervenors, including mining companies that had received re-authorizations to operate under the 2012 NWP 21. *Id.* at 1376. The defending parties and the intervenors will be collectively referred to as "the defendants."

82. 33 U.S.C. § 1311 (2012).

resulted from activities authorized by the 2012 NWP 21 "as opposed to previous mining or unrelated activities."[83] The court concluded that the plaintiffs did have standing to challenge the 2012 NWP 21 under § 404.[84] First, the court reviewed both the regulatory framework of § 404 and cases from other jurisdictions and determined that the zone of interests protected by § 404 went beyond loss of jurisdictional waters and included effects on wildlife, water-related recreation, aesthetics, and fisheries—the kind of harm the plaintiffs alleged.[85] The court also concluded that the plaintiffs had sufficiently alleged causation and redressability to confer standing.[86]

Turning to the defendants' motion for summary judgment, the court concluded that the plaintiffs' claim was barred by laches.[87] Even though only ten months elapsed between the time the 2012 NWP 21 took effect and the time the plaintiffs filed suit, the court found that the plaintiffs could have filed suit as early as May 2012, when the first mining operation was reauthorized under NWP 21, or February 2013, when thirty-nine operations had been reauthorized, and that the delay from that time until November 2013, when the plaintiffs filed suit, was unexcused.[88] The court also found that by that time, companies receiving reauthorization to operate under NWP 21 had purchased equipment, hired workers, entered into contracts, and made sales commitments.[89] The court reasoned that forcing these companies to cease operations pending the issuance of a new general permit, or pending their applications for individual permits under § 404, would result in lost income and other financial hardships.[90] Finally, the court found that the environmental benefits the plaintiffs claimed would result if they received the relief sought were speculative because neither the plaintiffs nor the court could predict what criteria the Corps would impose were it required to issue a new general permit or issue individual permits.[91] Therefore, the court concluded that the defendants had suffered undue prejudice as a result of the plaintiffs' delay in filing

83. *Black Warrior Riverkeeper*, 23 F. Supp. at 1381.

84. *Id.* at 1383.

85. *Id.* at 1382.

86. *Id.* at 1383.

87. *Id.* at 1393. The court noted that while some circuits disfavored laches as a defense in environmental cases, "[t]he Eleventh Circuit has never adopted such a strict standard." *Id.* at 1384.

88. *Id.* at 1385.

89. *Id.* at 1386.

90. *Id.*

91. *Id.*

suit.[92] Weighing these considerations, the court concluded that the plaintiffs' claim was barred by laches.[93]

The court went on to address the plaintiffs' substantive contentions in the context of the defendants' motion for summary judgment.[94] First, the court rejected the plaintiffs' claim that by creating a separate set of criteria governing reauthorizations, the Corps implicitly extended the 2007 NWP 21 beyond its statutorily mandated five-year term.[95] The court reasoned that the five-year term is merely a time limit and "does not impose constraints on the content of general permits or require that . . . their treatment of permittees change for each permit reissuance."[96] In other words, the Corps could have reissued NWP 21 in 2012 using criteria identical to the 2007 NWP 21, provided that the criteria were otherwise in accordance with law and that operators re-applied for authorization.[97]

Second, the court concluded that the Corps's cumulative effects analysis in connection with the 2012 NWP 21 was not arbitrary or capricious.[98] The court found that the Corps did conduct a new analysis, that the Corps did not simply rely on the cumulative effects analysis it performed for the 2007 NWP 21, and that the Corps's reliance on compensatory mitigation to conclude that NWP 21 would have minimal cumulative effects on the environment was supported by its record (that is, the Corps's record showed that mitigation would in fact minimize the effects of surface mining).[99]

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92. *Id.* at 1387.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *See id.*
98. *Id.* at 1391.
99. *Id.* at 1388-92.

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