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Environmental Law

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by Travis M. Trimble*

In 2017,[1] district courts in the United States Court of Appeals for the Eleventh Circuit decided three cases that clarified issues arising under the Clean Water Act (CWA).[2] The United States District Court for the Southern District of Georgia preliminarily enjoined the Environmental Protection Agency (EPA) and the Army Corps of Engineers from enforcing the Waters of the United States Rule (WOTUS Rule),[3] a regulatory attempt to define the term "Waters of the United States," which is a jurisdictional threshold for agencies' regulatory authority under the CWA.[4] Also, the United States District Court for the Northern District of Alabama ruled that ongoing contamination that resulted from wholly past discharges of pollutants was not a violation of the CWA.[5] Finally, the United States District Court for the Middle District of Florida ruled that Florida's statutory enforcement scheme for CWA violations was not similar to the federal enforcement scheme because it did not allow for persons unaffected by an alleged violation to have input into the State's enforcement action, and therefore, an ongoing enforcement action by Florida did not bar a CWA citizen suit brought by plaintiffs for the same violations.[6]

In other cases, the Eleventh Circuit reaffirmed its position on the kind of evidence that is necessary to prove causation in a toxic tort case.[7] The

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1. Travis M. Trimble, *Environmental Law, Eleventh Circuit Survey*, 69 MERCER L. REV. 1133 (2018).

2. Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended at 33 U.S.C. §§ 1251–1387 (2018)).

3. 33 C.F.R. § 328 (2018).

4. Georgia v. Pruitt, 326 F. Supp. 3d 1356 (S.D. Ga. 2018).

5. Day, LLC v. Plantation Pipe Line Co., 315 F. Supp. 3d 1219 (N.D. Ala. 2018).

6. Suncoast Waterkeeper v. City of St. Petersburg, No. 8:16-cv-3319-T-27AEP, 2018 U.S. Dist. LEXIS 8960 (M.D. Fla. Jan. 19, 2018).

7. *See* Williams v. Mosaic Fertilizer, LLC, 889 F.3d 1239 (11th Cir. 2018).

United States District Court for the Northern District of Alabama ruled that the required *ante litem* notice for a citizen suit under the Endangered Species Act (ESA)[8] is not perfected until the necessary parties have actually received the notice, and only at that time does the sixty-day waiting period before the plaintiff can file suit begin to run.[9]

I. CLEAN WATER ACT

In *Georgia v. Pruitt*,[10] the United States District Court for the Southern District of Georgia granted the plaintiffs'—Georgia and ten other states[11]—motion for preliminary injunction, enjoining the EPA and Army Corps of Engineers from enforcing the Waters of the United States Rule, a rule issued by the agencies in 2015 intended to define "Waters of the United States" for the purposes of establishing the agencies' jurisdiction under the CWA.[12] The states challenged the WOTUS Rule on the grounds that it violated the Administrative Procedure Act (APA)[13] and the CWA.[14]

The agencies promulgated the WOTUS Rule to simplify and streamline the agencies' approach to determining whether waters fell within the definition of "Waters of the United States" under the CWA. A water that is a "Water of the United States" is subject to many of the permitting requirements of the CWA and its associated regulations, including the National Pollutant Discharge Elimination System administered by the EPA, and permits for the discharge of dredged or fill material into wetlands, administered by the Corps. Thus, whether a water falls within the definition of Waters of the United States is a threshold jurisdictional issue for the agencies.[15]

The court in *Pruitt* ruled that the states were likely to succeed on the merits of their claim challenging the WOTUS Rule because the Rule likely encompassed waters that did not meet the "significant nexus" test set out in *Rapanos v. United States*[16] by the Supreme Court of the United

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8. 16 U.S.C. § 1531 (2018).

9. Black Warrior Riverkeeper Inc. v. U.S. Army Corps of Eng'rs, No. 2:17-cv-00439-LSC, 2018 U.S. Dist. LEXIS 137322 (N.D. Ala. Aug. 14, 2018).

10. 326 F. Supp. 3d 1356 (S.D. Ga. 2018).

11. West Virginia, Alabama, Florida, Kansas, Kentucky, South Carolina, Utah, Wisconsin, North Carolina, and Indiana. *Id.* at 1360.

12. *Id.* at 1370.

13. Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551–559 (2018)).

14. *Pruitt*, 326 F. Supp. 3d at 1360.

15. *Id.* at 1360–61.

16. 547 U.S. 715 (2006).

States.[17] In *Rapanos*, a plurality of the Court held that in order for a water to come within an agency's jurisdiction under the CWA, there must be a significant nexus between the water and a navigable-in-fact water.[18] The Court invalidated an agency rule that defined a tributary (included within the definition of waters of the United States) as a water that "feeds into a traditional navigable water [or tributary thereof] and possesses an ordinary high-water mark."[19] The Supreme Court concluded that definition "seem[ed] to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact waters."[20]

The district court stated that "[t]he same fatal defect appears to plague the WOTUS Rule here."[21] The court noted that, as the term "tributary" was defined in the WOTUS Rule, it could cover "a trace amount of water so long as the 'physical indicators of a bed and banks and an ordinary high water mark' can be found by 'mapping information' or 'remote sensing tools' where actual physical indicators are 'absent in the field.'"[22] The court concluded that the Rule's definition "is similar to the one invalidated in *Rapanos*, and it carries with it the same concern that Justice Kennedy had there—it seems 'to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water.'"[23] As a result, the court concluded that the Rule likely violated the CWA.[24]

The court also concluded that the Rule likely violated the APA.[25] First, the court concluded that the Rule was likely arbitrary and capricious because it was "not in accordance with law," for the same reason that it likely violated the CWA: it likely encompasses waters that do not "have a nexus with any navigable-in-fact waters."[26] Second, the court concluded that the Rule likely violated the APA because the final Rule was not a "logical outgrowth" of the proposed Rule.[27]

Finally, the court concluded that a preliminary injunction was an appropriate remedy because the states demonstrated that they were

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17. *Pruitt*, 326 F. Supp. 3d at 1364.

18. *See id.*

19. *Id.* (quoting *Rapanos*, 547 U.S. at 781).

20. *Id.* (quoting *Rapanos*, 547 U.S. at 781).

21. *Id.*

22. *Id.* at 1365 (quoting 33 C.F.R. § 328.3(c)(3) (2018)).

23. *Id.*

24. *Id.* at 1369.

25. *Id.*

26. *Id.* at 1365.

27. *Id.* at 1365–66 (citing Long Island Care at Home Ltd. v. Coke, 551 U.S. 158, 160 (2007)). "The final [R]ule must be a 'logical outgrowth' of the proposed [R]ule" in order to be valid. *Id.* at 1365.

likely to suffer irreparable harm in the form of loss of sovereignty over state waters and monetary costs to handle permitting requirements over additional waters that would be included under the Rule.[28] The court also found that the likelihood of harm was both actual and imminent.[29]

In *Day, LLC v. Plantation Pipeline Co.*,[30] the District Court for the Northern District of Alabama concluded that, among other things, the continuing presence of gasoline contamination on the plaintiffs' property resulting from a pipeline leak that had been repaired two years earlier did not constitute a "continuous or intermittent violation" so as to give the court subject matter jurisdiction over the plaintiffs' claim under the citizen suit provision of the CWA.[31] The court also concluded that the plaintiffs' evidence was insufficient to show "an imminent and substantial endangerment to human health" or the environment, a necessary element of the plaintiffs' claim under the citizen suit provision of the Resource Conservation and Recovery Act (RCRA).[32] The court granted summary judgment to the defendant–pipeline owners as to those claims; the court also granted summary judgment to the defendants on the plaintiffs' Alabama state law claims for wantonness, trespass, and infliction of emotional distress.[33]

A portion of the defendants' petroleum pipeline, carrying gasoline, crossed the plaintiffs' property in northern Alabama. The defendants repaired a dent in the pipeline under the plaintiffs' property in 1979. In August 2014, the defendants discovered that the repair had leaked gasoline from the pipeline into soil and surface water on the plaintiffs' property. The defendants repaired the leak within two days of discovering it and remediated the property over the next two years.[34] The plaintiffs sued in 2016, alleging claims under the citizen suit provisions of the CWA and the RCRA and under Alabama law for wantonness, trespass, and infliction of emotional distress.[35]

Underlying these claims was the plaintiffs' contention that the pipeline continued to leak gasoline onto their property, which in turn was based on the testimony of their expert to that effect. The defendants

28. *Id.* at 1367.

29. *Id.* at 1367–69.

30. 315 F. Supp. 3d 1219 (N.D. Ala. 2018).

31. *Id.* at 1240.

32. *Id.* at 1242, 1244; *see also* Pub. L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. §§ 6901–6991 (2018)).

33. *Day, LLC*, 315 F. Supp. 3d at 1244.

34. *Id.* at 1223.

35. *Id.* at 1244.

moved for summary judgment on the plaintiffs' claims and also made a *Daubert*[36] motion to exclude the testimony of the plaintiffs' expert.[37]

The court first addressed the *Daubert* motion, noting that the plaintiffs' expert's conclusion that the pipeline was continuing to leak was crucial to the plaintiffs' CWA claim, because citizen suits under the CWA could only be brought to remedy ongoing violations of the CWA.[38] The expert tested soil and groundwater on the property in 2017, and those tests confirmed the presence of gasoline. The expert based his opinion that the pipeline continued to leak on his opinion that the gasoline he found "smell[ed] way too fresh [to be] two years old," and his belief that the steep elevation of the location of the leak meant that if the leak was two years old, gasoline in a free state would not still be found near the location of the leak but would have migrated downhill.[39]

The court granted the defendants' motion to exclude the expert's testimony.[40] The court explained that the expert insufficiently explained the methodology he used to distinguish the smell of fresh gasoline from that of decayed gasoline or how his experience with remediation allowed him to reach this conclusion.[41] The court also noted that the expert was not a geologist and had not shown how he was qualified to testify on the movement of gasoline through subsurface.[42]

On the federal claims, the court first concluded that it did not have jurisdiction over the CWA claim because the plaintiffs could not prove a "continuous or intermittent" violation of the CWA.[43] The CWA's citizen suit provision allows any person to bring suit against any person "alleged to be in violation of" provisions of the CWA.[44] The Supreme Court, in *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation, Inc.*,[45] interpreted that language to mean a violation that was "continuous or intermittent" as opposed to wholly past.[46]

Although the court excluded the plaintiffs' expert's testimony that the pipeline was continuing to leak at the time the plaintiffs filed suit, the court took up the plaintiffs' alternative argument: that the continued

36. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).
37. *Day, LLC*, 315 F. Supp. 3d at 1225.
38. *Id.* at 1226.
39. *Id.* at 1226–27.
40. *Id.* at 1226.
41. *Id.* at 1227.
42. *Id.*
43. *Id.* at 1234.
44. 33 U.S.C. § 1365(a)(1) (2018).
45. 484 U.S. 49 (1987).
46. *Day, LLC*, 315 F. Supp. 3d at 1234.

presence of gasoline on their property constituted an ongoing violation of the CWA.[47] The court noted that "[t]he Eleventh Circuit has not directly ruled on what constitutes an ongoing violation" and noted further that two competing interpretations had arisen in the courts.[48] Under the broader interpretation, a defendant's "failure to undertake remedial measures to remove the effects of a wholly past violation of the CWA constitutes an ongoing violation."[49] The more narrow interpretation looks to when the conduct that caused the violation took place.[50]

The court chose the narrow approach, concluding that the lingering contamination of the plaintiffs' property from the leak that had ceased in 2014 did not constitute an ongoing violation of the CWA.[51] The court distinguished a ruling of the District Court for the Northern District of Georgia where the court concluded that the continued presence of fill material in lakes did constitute an ongoing violation of the CWA.[52] The court in *Day* noted that the Northern District itself distinguished fill material, which remains permanently where it is placed, from a "leachate plume, or petroleum products," which dissipate over time.[53]

The court also rejected the plaintiffs' contention, based on a 2018 United States Court of Appeals for the Fourth Circuit decision,[54] that the CWA citizen suit provision applied to the present effects of past violations because the RCRA citizen suit provision could do so.[55] The court disagreed with the Fourth Circuit that the citizen suit provisions of the two acts were identical, noting that under CWA, "[c]essation of conduct, e.g., the discharging of a pollutant, . . . means that there is no longer a violation. On the other hand cessation of conduct does not necessarily cure a violation of any 'permit, standard, regulation, condition, requirement, prohibition, or order [under the RCRA citizen suit provision].'"[56] The court ultimately concluded that, because it had rejected the plaintiffs' expert's testimony that the pipeline continued to leak, and because the continued presence of gasoline on the property from the leak that was repaired in 2014 did not constitute an ongoing violation

47. *Id.* at 1239.

48. *Id.* at 1236.

49. *Id.*

50. *Id.*

51. *Id.* at 1239.

52. City of Mountain Park v. Lakeside at Ansley, LLC, 560 F. Supp. 2d 1288, 1298 (N.D. Ga. 2008).

53. *See Day, LLC*, 315 F. Supp. 3d at 1237.

54. *See* Upstate Forever v. Kinder Morgan Energy Partners, L.P., 887 F.3d 637 (4th Cir. 2018).

55. *Day, LLC*, 315 F. Supp. 3d at 1238; *see* 42 U.S.C. § 6972(a)(1)(A) (2018).

56. *Day, LLC*, 315 F. Supp. 3d at 1238 (quoting 42 U.S.C. § 6972(a)(1)(A)).

of the CWA, the court did not have jurisdiction over the plaintiffs' CWA citizen suit claim, and therefore, granted summary judgment to the defendants.[57]

Second, the court concluded that the plaintiffs' evidence was insufficient to establish that the gasoline on its property constituted an imminent and substantial endangerment to health or the environment, and therefore their RCRA citizen suit claim failed as well.[58] The court determined that the plaintiffs' evidence showing harm on the property was either related to the time of the leak in 2014, or was simply too speculative to show a present threat of endangerment to health.[59] As to a danger to the environment, the court noted that "[n]o binding precedent has adequately discussed whether the presence of certain levels of gasoline" presents a danger to the environment.[60] The plaintiffs presented some evidence that gasoline was currently present in the soil or groundwater of the property at levels that exceeded the EPA's maximum contaminant levels of exposure to the components of gasoline, but the court found that the "[p]laintiffs . . . never attempt[ed] to explain what the applicable standards mean or how they apply to the RCRA."[61] Otherwise, the court found the plaintiffs' evidence related primarily to 2014, when the leak was discovered, rather than 2016, when the plaintiffs filed suit, and thus was not relevant, or was lacking sufficient support in the record.[62]

This case is significant primarily for the court's clarification that the continuing presence of contamination (other than dredged or fill material) resulting from wholly past discharges of pollutants is not a violation of the CWA.

In *Suncoast Waterkeeper v. City of St. Petersburg*,[63] the District Court for the Middle District of Florida ruled that the plaintiff's CWA citizen suit was not barred by the State of Florida's enforcement action for the same violations, because Florida's statutory enforcement scheme was not comparable to the federal enforcement scheme established by the CWA.[64]

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57. *Id.* at 1239.

58. *Id.* at 1242; 42 U.S.C. § 6972(a)(1)(B) (2018). This provision, the second of two citizen suit provisions in § 6972, requires the plaintiff to prove that the defendant's "past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . . may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B).

59. *Day, LLC*, 315 F. Supp. 3d at 1242.

60. *Id.*

61. *Id.* at 1243.

62. *Id.* at 1244.

63. No. 8:16-cv-3319-T-27AEP, 2018 U.S. Dist. LEXIS 8960 (M.D. Fla. Jan. 19, 2018).

64. *Id.* at *12; *see* 33 U.S.C. § 1365 (2018).

The defendant, operator of St. Petersburg, Florida's municipal wastewater treatment system, notified the Florida Department of Environmental Protection (FDEP) of a "bypass" event in June 2016.[65] FDEP responded by noting a pattern of bypasses following heavy rains and requested a meeting with defendant "to discuss measures . . . to eliminate . . . the discharges/bypasses."[66] The meeting took place in June 2016 and, in September, the FDEP proposed a consent order addressing the bypass issues. On September 28, the plaintiffs sent their *ante litem* notice of alleged CWA violations related to the bypass events to the defendant and filed a CWA citizen suit on December 2, 2016, alleging that the defendant discharged pollutants in violation of the CWA.[67]

The defendant moved for summary judgment, asserting that the plaintiffs' suit was barred because "the FDEP [had] commenced and [was] diligently prosecuting an enforcement proceeding" with respect to the alleged violations.[68]

The court denied the defendant's motion.[69] The court, following on *McAbee v. City of Fort Payne*,[70] explained that, in order for § 1319(g)(6)(A)(ii)[71] of the CWA (relied on by the defendant) to bar a citizen suit, three requirements must be met: "First, the state must have 'commenced' an enforcement procedure against the polluter[; s]econd, the state must be 'diligently prosecuting' the enforcement proceedings[; and third], the state's statutory enforcement scheme must be 'comparable' to the federal scheme promulgated in 33 U.S.C. § 1319(g)."[72]

The court concluded that Florida's enforcement scheme for CWA violations was not comparable to the federal scheme because, while "the CWA provisions allow members of the general public, even those who have not suffered a threatened or actual injury in fact, to participate in

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65. *Suncoast Waterkeeper*, 2018 U.S. Dist. LEXIS 8960, at *2. A "bypass" at a sewer treatment plant is an intentional diversion of the waste stream from all or part of the treatment process. *See* 40 C.F.R. § 122.41(m) (2018).

66. *Suncoast Waterkeeper*, 2018 U.S. Dist. LEXIS 8960, at *2.

67. *Id.* at *3.

68. *Id.*

69. *Id.* at *2.

70. 318 F.3d 1248, 1249 (11th Cir. 2003) (holding that Alabama's enforcement scheme was not comparable to the federal scheme and thus section 1319(g)(6)(A)(ii) did not bar the plaintiff's CWA citizen suit in Alabama).

71. 33 U.S.C. § 1319(g)(6)(A)(ii) (2018).

72. *Suncoast Waterkeeper*, 2018 U.S. Dist. LEXIS 8960, at *4 (quoting *McAbee*, 318 F.3d at 1251). *McAbee* held that as to the third requirement, the state's statutory enforcement scheme had to be comparable to the federal one in three respects: penalty assessment, public participation, and judicial review. *McAbee*, 318 F.3d at 1256. *See also* 33 U.S.C. § 1319(g) (2018).

the enforcement process,"[73] Florida's enforcement scheme "does not provide the general public with a comparable right to participate in the enforcement proceedings,"[74] but rather, "limits participation to those whose 'substantial interests' are affected."[75] The court found "no distinction between the proposed consent order in this case and a contested enforcement proceeding. The public participation provisions of the CWA and Florida's scheme must [be] 'roughly comparable' [under *McAbee*], regardless of the nature of the enforcement proceeding" in order for the § 1319 bar to apply to a CWA citizen suit.[76] The court concluded that they were not comparable because the Florida enforcement process allowed "those whose substantial interests [were] affected by the [consent] order" to participate in the process before the FDEP issued the consent order—or to challenge the order itself.[77]

The court therefore denied the defendant's motion for summary judgment.[78] While this case is an unpublished decision of a district court, the court found "Florida['s] public participation scheme [to be] substantially similar to the Alabama scheme examined in *McAbee*," which the Eleventh Circuit held was not comparable to the federal enforcement scheme and, therefore, did not serve to bar a CWA citizen suit there.[79] The court's ruling suggests that Florida's enforcement scheme also likely will not serve to bar a citizen suit under the CWA, even if the other two requirements of the bar are met (the state has (1) commenced an enforcement procedure; and (2) is diligently prosecuting a civil penalty action with respect to the same alleged violations).

II. TOXIC TORTS—EVIDENCE

In *Williams v. Mosaic Fertilizer, LLC*,[80] a toxic tort case, the Eleventh Circuit affirmed a district court decision to exclude the plaintiff's expert's testimony linking the plaintiff's exposure to chemicals produced by the defendant's fertilizer plant to numerous alleged pulmonary disorders.[81] The court also affirmed the district court's decision to exclude the plaintiff's own testimony as to the diminution in value of her property

73. *Suncoast Waterkeeper*, 2018 U.S. Dist. LEXIS 8960, at *5–6 (citing *McAbee*, 318 F.3d at 1257).

74. *Id.* at *6–7.

75. *Id.* at *7 (citing FLA. ADMIN. CODE ANN. 28-106.111(2) (2018)).

76. *Id.*

77. *Id.* at *12.

78. *Id.*

79. *Id.* at *9.

80. 889 F.3d 1239 (11th Cir. 2018).

81. *Id.* at 1251.

resulting from the defendant's operation.[82] As these were the only sources of evidence the plaintiff offered, the court affirmed the district court's grant of summary judgment to the defendant.[83] Among other things, this case reaffirms the Eleventh Circuit's insistence in toxic tort cases that a plaintiff prove causation by a dose-response assessment specific to the plaintiff rather than by more general reference to regulatory maximum exposure levels.[84]

The plaintiff lived her whole life in Tampa, Florida—three miles from the defendant's plant in which several substances, at times, were in excess of federal and state air quality standards.[85] In particular, the plant emitted sulfur dioxide in excess of the federal "National Ambient Air Quality Standard ('NAAQS') of 75 parts per billion" and in excess of the state maximum of 100 parts per billion.[86] The plaintiff brought several state-law claims against the defendant, including negligence, negligence *per se*, and strict liability, seeking to recover for various pulmonary ailments. To prove causation, she offered the testimony of an expert, who opined that the plaintiff's health problems were caused by exposure to hazardous substances emitted from the defendant's plant.[87]

After deposing the expert, the defendant "moved to exclude [his] testimony under Federal Rule of Evidence 702 and *Daubert*."[88] The district court granted the defendant's motion.[89] The district court also excluded the plaintiff's own testimony—the total diminution in value to her home due to the defendant's contamination of the surrounding air—on the issue of property damage.[90] As the plaintiff was left with no evidence, the district court granted summary judgment to the defendant on the plaintiff's claims.[91]

The Eleventh Circuit affirmed the district court's evidentiary rulings and grant of summary judgment to the defendant.[92] On the issue of causation, the Eleventh Circuit explained that the expert's report, purporting to establish a causal link between the hazardous substances in the air and the plaintiff's health issues, was flawed in three respects:

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82. *Id.*
83. *Id.*
84. *Id.* at 1251 n.2.
85. *Id.* at 1242.
86. *Id.*; *see* 42 U.S.C. § 7409 (2018); 40 C.F.R. pt. 50 (2018).
87. *Williams*, 889 F.3d at 1243.
88. *Id.*; FED. R. EVID. 702.
89. *Williams*, 889 F.3d at 1243.
90. *Id.* at 1244.
91. *Id.* at 1243.
92. *Id.* at 1251.

it "fail[ed] to properly assess dose-response with regard to [the plaintiff]; [it] fail[ed] to meaningfully rule out other potential causes of [the plaintiff's] medical conditions; and [it failed] to account for the background risk of her conditions."[93]

The court devoted much of its opinion to emphasizing "the importance of a dose-response assessment" to prove causation in toxic tort cases.[94] The court explained that "[s]tripped to its bare essentials, a dose-response assessment estimates scientifically 'the dose or level of exposure at which [the substance at issue] causes harm.'"[95] The expert

> conceded he never conducted an independent dose calculation specific to [the plaintiff]. Instead, [the expert] relied on two academic studies measuring the ambient air concentration of pollutants in the area in which [the plaintiff] lived to estimate the dose she received and on the EPA's NAAQS regulatory standards to establish the dose threshold above which [the plaintiff's] conditions would likely result from her exposure.[96]

The court pointed out, as the district court had, that the academic studies actually contradicted the expert's conclusion.[97] Further, the court reiterated "the potential methodological perils of relying . . . on regulatory emissions levels to [prove] causation."[98] The court explained that regulatory standards are typically protective, that is, set to include a "cushion . . . to account for the most sensitive members of the population," whereas a dose-response calculation is predictive of the actual level of exposure to a substance at which a person would be harmed.[99]

The plaintiff argued that the EPA's NAAQS for sulfur dioxide of seventy-five parts per billion was predictive of harm, because according to the EPA, exposure to that level of the chemical "causes (not *may* cause or *can* cause, but actually *does* cause) respiratory morbidity."[100] The court rejected this argument, noting that the EPA itself has stated that "the dose-response assessments [it used to set NAAQS standards] are not suited to predicting the incidence of exposure-caused disease in humans."[101]

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93. *Id.* at 1245.
94. *Id.* at 1246.
95. *Id.* (quoting McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1241 (11th Cir. 2005)).
96. *Id.*
97. *Id.* at 1247.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*

The court avoided holding that regulatory standards were never an appropriate basis with which to prove causation.[102] However, the court said that the plaintiff "bore the burden of demonstrating to the District Court that [her expert's] facial reliance on NAAQS standards was methodologically sound" and that given the standards' "protective nature and EPA's express warnings that those standards . . . are unreliable predictors of conditions in humans, we are not persuaded that the District Court erred in determining that [the plaintiff] failed to meet that burden."[103] The court also agreed with the district court that the plaintiff's expert's report was flawed because it "failed to meaningfully rule out other potential causes of [the plaintiff's health] conditions," and because it did not establish "the background risk of [those] conditions," that is, the risk that a person could contract the condition without exposure to the substances in question.[104]

III. ENDANGERED SPECIES ACT

In *Black Warrior Riverkeeper Inc. v. U.S. Army Corps of Engineers*,[105] the District Court for the Northern District of Alabama, considering a "novel issue" under the Endangered Species Act, ruled that the mandated sixty-day notice-requirement period prior to the plaintiff's filing a citizen suit did not begin to run until the time the defendants actually received the notice,[106] rather than the time when the notice was postmarked.[107] The court dismissed the plaintiffs' ESA citizen suit because the suit had been filed "fewer than sixty days after receipt of notice by both the Corps and the Secretary."[108] The court also granted summary judgment to the defendants on the plaintiffs' claims under the CWA and National Environmental Protection Act (NEPA),[109] ruling "that the Corps [had not] acted arbitrarily and capriciously in granting a CWA § 404[110] [discharge] permit" to operate a surface mine within the Locust Fork watershed in northern Alabama.[111]

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102. *Id.* at 1248.

103. *Id.*

104. *Id.* at 1248–49.

105. No. 2:17-cv-00439-LSC, 2018 U.S. Dist. LEXIS 137322 (N.D. Ala. Aug. 14, 2018).

106. *See* 16 U.S.C. § 1540(g)(2)(A)(i) (2018). "No action may be commenced under subparagraph (1)(A) of this section—(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation." *Id.*

107. *Black Warrior Riverkeeper*, 2018 U.S. Dist. LEXIS 137322, at *8–9.

108. *Id.* at *13.

109. 42 U.S.C. § 4321 (2018).

110. 33 U.S.C. § 1344 (2018).

111. *Black Warrior Riverkeeper*, 2018 U.S. Dist. LEXIS 137322, at *25.

In 2014, a mining company sought permission from the Corps to expand its mining operations in the Locust Fork watershed with a 1293-acre surface mine, which was to be the eighteenth most active surface mine in the area. The Corps performed a cumulative impacts analysis of the proposed mine, including as part of its baseline analysis for water quality and aquatic habitat both the existing surface mining operations and the history of mining in the area, including numerous abandoned mines that continued to impact water quality.[112] "The Corps also [took into account that] the permittee would be required" to operate the mine using "best management practices" imposed by the Alabama Department of Environmental Management and "to employ compensatory mitigation measures to offset environmental impacts [of the mine]."[113] The Corps concluded that the mine would have a "relatively small cumulative impact" and issued a Finding of No Significant Impact together with the § 404 permit, and without performing an Environmental Impact Statement.[114]

The plaintiffs filed suit under the CWA and the NEPA, challenging the issuance of the permit.[115] Pursuant to 16 U.S.C. § 1540(g)(2)(A)(i),[116] the plaintiffs mailed notice of their intent to bring a citizen suit claim under the ESA to "the Corps and the Secretary of the Interior ("the Secretary") on March 21, 2017."[117] "The Corps received [the] written notice on March 24, and the Secretary received it on March 27th."[118] The plaintiffs amended their original complaint to add the ESA claim on May 23, 2017, fifty-seven days after the Secretary received the notice and sixty days after the Corps received the notice.[119]

The court first ruled that the plaintiffs' ESA claim had not been filed at least sixty days after all the mandated parties had received notice of the suit and therefore could not be maintained.[120] The court noted that "[t]he starting point of the required notice period presents a novel issue."[121]

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112. *Id.* at *2–4.

113. *Id.* at *4.

114. *Id.* at *4–5. An agency's Finding of No Significant Impact represents its conclusion that no Environmental Impact Statement is necessary. *Id.* at *15.

115. *Id.* at *6.

116. 16 U.S.C. § 1540(g)(2)(A)(i) (2018).

117. *Black Warrior Riverkeeper*, 2018 U.S. Dist. LEXIS 137322, at *6.

118. *Id.*

119. *Id.*

120. *Id.* at *13–14.

121. *Id.* at *9.

> If the notice period began on the postmark date, then [the] Plaintiffs' filing of the[ir] amended complaint [to add the ESA claim] 63 days after mailing notice would be sufficient. But if the notice period began upon receipt by all parties, then the fact that [the] Plaintiffs filed their amended complaint only 57 days after the Secretary received notice would warrant dismissal without prejudice of the ESA claim.[122]

To decide the question, the court first noted that other "[c]ourts have interpreted this [notice requirement] provision strictly to ensure that all parties have 'an opportunity to resolve the dispute and take any necessary corrective measures before a resort to the courts,'"[123] and that the notice "'requirement is jurisdictional,' and non-compliance warrants dismissal."[124]

The plaintiffs pointed to the analogous notice requirement for citizen suits under the CWA and noted that EPA regulations interpreted the sixty-day notice period as beginning to run on the postmark date of the notice if the notice was mailed.[125] The court declined to follow that principle for the ESA; however, the court noted that the ESA is administered by the United States Fish and Wildlife Service, not the EPA, and the Fish and Wildlife Service was not bound by interpretations of statutory language made by another agency.[126]

The court concluded there was "no precedent as to when the [ESA] notice period" begins to run and looked to the purpose of the notice provision itself, which the court found was to "provide[] agencies with opportunity to take corrective measures and thereby make litigation via citizen suits unnecessary."[127] The court concluded that "it would seem necessary for the notice period to begin only once the parties ha[d] received notice of the intent to sue."[128] The court also said that requiring a plaintiff to find out whether the required parties had received the notice did not pose an "undue burden."[129] "No great obstacle prevented Plaintiffs from making inquiries into when the Secretary had received notice and then delaying the filing of their amended complaint accordingly."[130] As a

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122. *Id.* at *8–9.

123. *Id.* at *8 (quoting Water Keeper All. v. U.S. Dep't of Def., 271 F.3d 21, 29 (1st Cir. 2001)).

124. *Id.* (quoting Alabama v. U.S. Army Corps of Eng'rs, 441 F. Supp. 2d 1123, 1129 (N.D. Ala. 2006)).

125. *Id.* at *9–10.

126. *Id.* at *10.

127. *Id.* at *10–11 (citing Hallstrom v. Tillamook Cty., 493 U.S. 20, 29 (1989)).

128. *Id.* at *11.

129. *Id.* at *12.

130. *Id.*

result, the court interpreted the statute as requiring a sixty-day notice period prior to filing suit as beginning to run when all necessary parties actually received notice and dismissed the plaintiffs' ESA claim without prejudice.[131]

Turning to the plaintiffs' CWA and NEPA claims, the court ruled that the Corps had not acted arbitrarily and capriciously when it issued a Finding of No Significant Impact for the mine and issued the § 404 permit to the operator.[132] The court applied the "hard look" analysis[133] mandated by the Eleventh Circuit's decision in *Hill v. Boy*.[134]

The court found that the Corps adequately "examine[d] the potential impacts [of the mine] by conducting a cumulative impacts analysis, taking into account [the mine's impacts] over a 14 year period," starting from a baseline that included the cumulative impact of past and existing mining operations.[135] In finding that the mine would not have a significant impact, the Corps also took into account compensatory mitigation that would be required by the permit and other restrictions on the mine's operation that would be imposed by state regulations.[136] For these reasons, the court concluded that the Corps did not act arbitrarily and capriciously when it determined that an Environmental Impact Statement was unnecessary and when it issued the § 404 permit for the mine.[137]

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131. *Id.* at *13.

132. *Id.* at *25.

133. *Id.* at *16.

134. 144 F.3d 1446, 1450 (11th Cir. 1998) (stating that when reviewing an agency's decision not to prepare an Environmental Impact Statement under the arbitrary and capricious standard four criteria will be applied: "[f]irst, the agency must have accurately identified the relevant environmental concern[; s]econd . . . the agency . . . must have taken a 'hard look' at the problem in preparing the [Environmental Assessment;]" third, if the agency makes a Finding of No Significant Impact, "the agency must be able to make a convincing case for its finding[;]" and fourth, "if the agency does find an impact of true significance," it must prepare an EIS unless it "finds that changes or safeguards in the project sufficiently reduce the impact to a minimum."); *see Black Warrior Riverkeeper*, 2018 U.S. LEXIS 137322, at *16.

135. *Black Warrior Riverkeeper*, 2018 U.S. LEXIS 137322, at *17. The cumulative impact analysis described here illustrates another reason why the piecemeal permitting scheme of § 404 is inadequate to protect water resources. If the Corps starts from a baseline of water quality in a watershed, and that baseline already includes the damaging impacts of numerous active and abandoned mining operations on water quality, then another single mining operation is not likely having a significant impact over the already degraded quality of the watershed that is built into the baseline. Once that new operation is permitted, though, it becomes part of the baseline for the next cumulative impacts analysis, and so on.

136. *Id.* at *18.

137. *Id.* at *20.