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## Environmental Law

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# Environmental Law

by **W. Scott Laseter\***  
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## I. INTRODUCTION

Perhaps following broader legal trends, the Eleventh Circuit's environmental law decisions in this survey period suggest a rise in the importance of state law, both as it might impact enforcement of federal environmental programs and as a source of independent environmental remedies. As an example of the former, the court narrowed the extent to which the absence of a state-level program to implement the federal Clean Water Act's permit requirement shields a member of the regulated community from the obligation to obtain a permit. As an example of the latter, the court affirmed an award of \$4,350,000 in punitive damages on a common-law nuisance theory in a case in which the actual damages totaled only \$47,000 and the administrative penalties under the state-enforced clean water regulations totaled only \$10,000.

As with earlier environmental law survey articles,<sup>1</sup> this Article will

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1. See W. Scott Laseter & Julie V. Mayfield, *Environmental Law*, 50 MERCER L. REV. 1005 (1999); W. Scott Laseter & Julie V. Mayfield, *Environmental Law*, 49 MERCER L. REV. 1007 (1998); W. Scott Laseter & Julie V. Mayfield, *Environmental Law*, 48 MERCER L. REV. 1577 (1997); W. Scott Laseter, *Environmental Law*, 46 MERCER L. REV. 1359 (1995); Edward A. Kazmarek & W. Scott Laseter, *Environmental Law*, 44 MERCER L. REV. 1187 (1993); Edward A. Kazmarek & W. Scott Laseter, *Environmental Law*, 42 MERCER L. REV.

not review basic statutory schemes unless the Eleventh Circuit has not previously interpreted the statute in question. For readers seeking background on the law, a brief overview of those statutes can be found in earlier survey articles.

## II. DISCUSSION

### A. *Clean Water Act: The Zero-Discharge Rule*

Under the Clean Water Act ("CWA"),<sup>2</sup> the discharge of any pollutant into waters of the United States is prohibited unless allowed by a permit under the National Pollutant Discharge Elimination System ("NPDES").<sup>3</sup> "Pollutant" is defined broadly and includes "rock, sand, cellar dirt and industrial . . . waste."<sup>4</sup> This strict-liability scheme is known as the "zero-discharge" rule.

#### 1. *The Hughey Exception Re-Examined: Driscoll v. Adams.*

The Eleventh Circuit had occasion to address several CWA issues in 1999. In *Driscoll v. Adams*,<sup>5</sup> the court took the opportunity to revisit its 1996 decision in *Hughey v. JMS Development Corp.*,<sup>6</sup> which exempted from the permit requirement discharges of stormwater runoff generated by construction activities when no approved program for issuing the applicable permit exists and the discharger makes a good-faith effort to comply with all other regulations.<sup>7</sup>

In *Driscoll* plaintiffs sued their adjoining property owner under the CWA's citizen suit provision, alleging that during timber-harvesting and road-building operations defendant allowed sediment-laden stormwater to flow across his property and wash into ponds and waterways on plaintiffs' properties. As part of his operation, defendant built culverts, check dams, and other devices to channel stormwater runoff from his property and divided his property for development. Defendant conceded, however, that these efforts did not prevent erosion of mud, sand, and other debris from his property onto his neighbors' property.<sup>8</sup>

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1411 (1991).

2. 33 U.S.C. §§ 1251-1387 (1994 & Supp. III 1997).

3. *Id.* § 1311(a).

4. 40 C.F.R. § 122.2 (1999).

5. 181 F.3d 1285 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1961 (2000).

6. 78 F.3d 1523 (11th Cir. 1996).

7. *Id.* at 1530.

8. 181 F.3d at 1287.

Defendant also failed to obtain any federal, state, or local permits or other approvals before starting his development activities.<sup>9</sup> In fact, he first filed for a required state permit a year after commencement of his operation and first obtained a county development permit two years after commencement.<sup>10</sup> Moreover, defendant never sought a NPDES permit, which is the only means of authorizing discharges of pollution into waters of the United States under the CWA, and he violated the CWA's prohibition on "the discharge of any pollutant by any person" into the waters of the United States without a permit.<sup>11</sup> However, as in *Hughey*, the State of Georgia had neither issued a general permit nor developed a program providing for individual permits.<sup>12</sup> In following *Hughey*, the district court held that compliance with the CWA's requirements was impossible and granted defendant's motion for summary judgment.<sup>13</sup>

On appeal, the Eleventh Circuit reversed the trial court, holding that the district judge had read the opinion in *Hughey* too broadly.<sup>14</sup> In *Hughey* a plaintiff living downstream from a construction project sued a developer to enjoin it from discharging stormwater runoff into a tributary of the Yellow River, which ran adjacent to plaintiff's property.<sup>15</sup> As in *Driscoll*, no general stormwater permit for construction activities was available to defendant in *Hughey*.<sup>16</sup> Unlike defendant in *Driscoll*, however, defendant in *Hughey* did "everything possible to comply with the legal requirements of building a small residential subdivision."<sup>17</sup> Defendant hired consulting engineers, installed state-of-the-art sedimentation control devices that exceeded Gwinnett County's requirements, and complied with Georgia's Soil Erosion and Sedimentation Control Act of 1975 ("SESCA").<sup>18</sup>

In *Hughey* the Eleventh Circuit rejected plaintiff's citizen-suit claim because "Congress could not have intended a strict application of the

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9. *Id.*

10. *Id.*

11. *Id.* at 1287-88 (quoting 33 U.S.C. § 1311(a)).

12. *Id.* at 1288.

13. *Id.* at 1287.

14. *Id.* at 1290-91. The court in *Driscoll* also reaffirmed the expansive definitions of the terms "pollutant," "point source," and "navigable waters" applied in the context of the CWA. *Id.* Because the court merely reaffirmed what had appeared to be settled law, this Article will not discuss these holdings. See *United States v. Eidson*, 108 F.3d 1336, 1341-43 (11th Cir. 1997) (discussing the broad definitions of "navigable waters" and "pollutant").

15. 78 F.3d at 1527.

16. *Id.* at 1526.

17. *Id.*

18. *Id.* at 1526 & n.3. SESCO is located at O.C.G.A §§ 12-7-1 to -18 (1996).

zero discharge standard in Section 1311(a) when compliance is factually impossible."<sup>19</sup> Stating that "whenever it rained in Gwinnett County some discharge was going to occur; nothing [defendant] could do would prevent all rain water discharge," the court refused to penalize a developer that "made every good-faith effort to comply with the Clean Water Act and all other relevant pollution control standards."<sup>20</sup> The court relied heavily on the fact that defendant had complied with SESCO's requirements and that the proposed Georgia general NPDES stormwater permit required "permittees to perform certain erosion and sedimentation control practices" identical to those then required by SESCO.<sup>21</sup> Thus, under *Hughey*, if (1) compliance with a zero-discharge standard under the CWA is factually impossible, such as in the context of stormwater runoff; (2) no NPDES permit exists to cover such discharge; (3) the discharger was in good-faith compliance with local requirements that are substantially similar to the proposed NPDES standards; and (4) the discharges are minimal, then the discharger is not subject to a citizen suit under the CWA.<sup>22</sup>

In contrast to the defendant in *Hughey*, the court in *Driscoll* found that defendant had failed make a good-faith effort to comply with the CWA or relevant pollution control standards.<sup>23</sup> Moreover, plaintiffs proved that the discharges from defendant's property were not minimal by showing the operation resulted in the deposit of approximately sixty-four tons of sediment into plaintiffs' ponds.<sup>24</sup> Because the facts in *Driscoll* did not square with the facts in *Hughey*, the court refused to relax the CWA's zero-discharge rule any further.<sup>25</sup>

While the court preserved the narrow *Hughey* exception to the general rule of no discharge without a permit, it noted that its decision was consistent with the Fifth Circuit's decision in *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*<sup>26</sup> The court in *Cedar Point* held that when the issuing authority has not issued a NPDES permit, the CWA prohibits all discharges of pollutants.<sup>27</sup> In that case, the Sierra Club sued an oil producer for unlawful discharge of "produced water" into Galveston Bay.<sup>28</sup> Because the EPA had not issued an applicable permit

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19. *Id.* at 1530.

20. *Id.*

21. *Id.*

22. *Id.*

23. 181 F.3d at 1289; *see also supra* text accompanying notes 8-11.

24. 181 F.3d at 1289.

25. *Id.* at 1290.

26. *Id.* (citing 73 F.3d 546 (5th Cir. 1996)).

27. 73 F.3d at 562.

28. *Id.* at 551, 553.

under the NPDES, Cedar Point argued that it could not have violated an effluent limitation or permit condition under the CWA.<sup>29</sup> The Fifth Circuit rejected this argument because it found that Congress had built in a grace period for noncompliance with effluent standards or permits, which had expired on July 1, 1973, so that the EPA would have time to issue permits.<sup>30</sup> The court interpreted Congress's failure to extend the grace period beyond July 1, 1973, even in light of the EPA's failure to issue certain permits, as evidence of Congress's intent to apply the strict zero-discharge standard.<sup>31</sup>

Thus, the Fifth Circuit determined that the CWA allows no exception to its prohibition on unpermitted discharge of pollutants into the waters of the United States, even when the EPA has not issued an NPDES permit.<sup>32</sup> The Eleventh Circuit in *Hughey* was ambiguous as to whether the exception it carved out should be applied to nonstormwater permits.<sup>33</sup> However, by citing *Cedar Point* in *Driscoll*, it is possible that the Eleventh Circuit opened the door to an argument that the *Hughey* exception can be applied in nonstormwater cases when the *Hughey* factors are satisfied. Thus, in *Driscoll* the Eleventh Circuit reinforced the general rule that, except under facts that closely align with those in *Hughey*, the lack of an applicable NPDES permit is no defense to a citizen suit under the CWA.<sup>34</sup>

**2. *Sierra Club v. Georgia Power Co.: A Public Policy Limitation on Remedies for Violation of Effluent Limitations.*** While the decision in *Driscoll* might be read as narrowing the potential breadth of the *Hughey* exception, the Eleventh Circuit's decision in *Sierra Club v. Georgia Power Co.*<sup>35</sup> may have created another modest exception to the zero-discharge limitation. In *Georgia Power* the court affirmed the district court's denial of a preliminary injunction mandating an immediate end to violations of the CWA against the operator of a power plant.<sup>36</sup> Georgia Power operated a plant on the banks of Lake Sinclair that was authorized to discharge heated wastewater into the lake under

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29. *Id.* at 559.

30. *Id.* at 560 (citing 33 U.S.C. § 1365(f)(1)).

31. *Id.*

32. *Id.* at 562.

33. Compare *Hughey*, 78 F.3d at 1530 ("The facts of this case necessarily limit our holding to situations in which the stormwater discharge is minimal."), with *id.* (recounting the *Hughey* factors, including when "no NPDES permit covering such discharge exists," with no mention of a requirement that the discharge limitation apply only to stormwater).

34. 181 F.3d at 1290.

35. 180 F.3d 1309 (11th Cir. 1999) (per curiam).

36. *Id.* at 1310-11.

the conditions of a NPDES permit. During a particularly hot summer, the plant exceeded this effluent limitation and the Sierra Club brought suit to enjoin further violations.<sup>37</sup>

The Sierra Club contended that this thermal loading resulted in fish kills and undermined lakeside residents' enjoyment of the lake. Georgia Power responded that it simply could not achieve the permit requirements without impacting the level of power generated throughout its entire system.<sup>38</sup> The district court agreed with Georgia Power following an evidentiary hearing, concluding "that the potential harm to the general public from a reduction of electrical power or thermal loading into the lake, outweighed the potential injury to lakeside residents if the plant continued to operate at its current output *pendente lite*."<sup>39</sup>

In affirming the trial court, the Eleventh Circuit noted that an appellate court should disturb the district court's findings "only if the district court abused its discretion" with respect to the denial or grant of a preliminary injunction.<sup>40</sup> The court found that Georgia Power had supplied ample evidence to show the grant of a preliminary injunction would be adverse to the general public's interest.<sup>41</sup> The court also found that reducing the power supplied during the hottest months of the year could injure the public welfare.<sup>42</sup> For example, during the hottest days of summer, supplying power for air conditioning to day-care centers, hospitals, and nursing homes was of prime importance.<sup>43</sup> Georgia Power also produced evidence showing that the fish kills because of excessive thermal loading were rare and only a temporary problem.<sup>44</sup> Because Georgia Power showed that the injunction would disserve the public interest, the court upheld the trial court's decision.<sup>45</sup>

The reach of the Eleventh Circuit's opinion is unclear because the case involved only the question of whether to grant a preliminary injunction. However, because Georgia Power essentially stipulated that it violated

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37. *Id.* at 1310.

38. *Id.*

39. *Id.*

40. *Id.* (citing *Crochet v. Housing Auth. of Tampa*, 37 F.3d 607, 610 (11th Cir. 1994)).

41. *Id.*

42. *Id.* at 1311.

43. *Id.*

44. *Id.* at 1310-11.

45. *Id.* at 1311.

In order to prevail on a motion for preliminary injunction, the movant has the burden of proving: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) its own injury outweighs the injury to the nonmovant; and (4) *the injunction would not disserve the public interest*.

*Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991) (per curiam) (emphasis added).

its effluent limitation, the decision suggests a willingness to tolerate some degree of temporary noncompliance in the face of public necessity.

*B. Comprehensive Environmental Response, Compensation, and Liability Act*

In *Canadyne-Georgia Corp. v. NationsBank, N.A. (South)*,<sup>46</sup> the court considered the relatively new fiduciary liability provision of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").<sup>47</sup> In *Canadyne* the former owner of a site where a pesticide plant was located filed suit under CERCLA and the Georgia Hazardous Site Response Act ("HSRA")<sup>48</sup> against, among others, the current and former trustees of a trust that held a general partnership interest.<sup>49</sup> NationsBank, a former trustee of the trust that was a general partner, filed a motion to dismiss, arguing that it was neither an owner nor an operator of the site under CERCLA.<sup>50</sup>

The district court agreed that NationsBank was not a "covered person" under CERCLA and granted NationsBank's motion to dismiss.<sup>51</sup> Citing the Eleventh Circuit's decision in *Redwing Carriers, Inc. v. Saraland Apartments*,<sup>52</sup> the trial court reasoned that state law governed whether a person was an "owner" of property within the meaning of CERCLA.<sup>53</sup> The district court found that under the applicable Georgia limited partnership statute, the individual partners owned partnership property as tenants in common, and thus NationsBank held legal title to the property.<sup>54</sup> However, the court also noted that "where a general partner is such in his representative capacity, only the person represented—that is, the principal, trust or estate—is liable for partnership debts."<sup>55</sup> Then, looking to Georgia trustee liability cases, the court noted that when a trustee is operating a business according to testamentary design, the trustee's liability for torts committed in the course of the business is limited to the trustee's representative capacity, rather than

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46. 183 F.3d 1269 (11th Cir. 1999).

47. 42 U.S.C. §§ 9601-9675 (1994 & Supp. III 1997).

48. O.C.G.A. §§ 12-8-90 to -113 (1996 & Supp. 1999).

49. *Canadyne-Georgia Corp. v. NationsBank, N.A. (South)*, 982 F. Supp. 886, 888, 891 (M.D. Ga. 1997).

50. *Id.* at 887-88.

51. *Id.* at 891.

52. 94 F.3d 1489 (11th Cir. 1996).

53. 982 F. Supp. at 888. The trial court's reasoning also comports with the Supreme Court's holding in *United States v. Bestfoods*, 524 U.S. 51, 63-64 (1998).

54. 982 F. Supp. at 888 (citing *Bloodworth v. Bloodworth*, 178 S.E.2d 198, 200 (Ga. 1970)).

55. *Id.* at 889 (quoting O.C.G.A. § 14-9-101 cmt. (1994)).

direct individual liability.<sup>56</sup> By this path the trial court reached the conclusion that "Georgia trust law prohibited [NationsBank's] liability for the obligations of the partnership" and found that it could not hold the trustee liable as an "owner" of the facility.<sup>57</sup> The district court also rejected Canadyne's argument that NationsBank was an "operator" of the facility because Canadyne's bare allegation that the bank was an operator was not specific enough to survive a motion to dismiss.<sup>58</sup> Because the trial court found that the bank was neither an owner nor an operator, it did not reach NationsBank's defense under the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act.<sup>59</sup>

The Eleventh Circuit reversed the district court's decision and remanded the case, holding that NationsBank was indeed an owner of the site and that the district court prematurely dismissed the action.<sup>60</sup> In reversing the district court, the Eleventh Circuit first assessed whether the bank was an owner under CERCLA.<sup>61</sup> As a threshold matter, the court agreed that state law governed whether a person should be considered an owner of property.<sup>62</sup> However, applying state law, the Eleventh Circuit found that "[e]ven though [NationsBank] technically held its WCW general partnership interest in trust, under Georgia law, [NationsBank] held legal title to and therefore owned the general partnership interest. [NationsBank] therefore owned whatever property the general partners of [the partnership] owned."<sup>63</sup> The court did not directly address the district judge's holding that if a trustee is not personally liable for the obligations of the trust, the trustee is not an owner. However, the Eleventh Circuit's opinion in *Redwing Carriers* may be instructive in advising that "[u]ltimately, federal law determines the issue of CERCLA liability."<sup>64</sup> Thus, though state law controls whether a particular person is an owner of a facility,<sup>65</sup> whether that

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56. *Id.* (citing *Beaudry, Inc. v. Freeman*, 38 S.E.2d 40, 48 (Ga. Ct. App. 1946)).

57. *Id.* at 890.

58. *Id.* at 890-91. The court stated that Canadyne's bare allegation, without providing more specific examples of when NationsBank "play[ed] an active role in the actual management of the enterprise," was inadequate. *Id.* at 890 (quoting *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993)).

59. 183 F.3d at 1272 n.2.

60. *Id.* at 1273, 1276.

61. *Id.* at 1272.

62. *Id.* at 1273.

63. *Id.* (citing O.C.G.A. § 53-12-2(11) (1997)).

64. 94 F.3d at 1500.

65. *Id.* at 1498.

person is liable because of the condition of ownership is wholly dictated by CERCLA.<sup>66</sup>

The court noted that its analysis could not end with a finding that NationsBank was a potentially liable party as an owner because NationsBank claimed exemption from liability under the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act ("ACLLDIPA").<sup>67</sup> According to the bank, the ACLLDIPA barred personal liability because "[t]he liability of a fiduciary under any provision of [CERCLA] for the release or threatened release of a hazardous substance at, from, or in connection with a vessel or facility held in a fiduciary capacity shall not exceed the assets held in the fiduciary capacity."<sup>68</sup> Barring application of a statutory exception, "fiduciaries, even those who might otherwise be deemed 'owners' under § 107(a), generally cannot be held personally liable under CERCLA."<sup>69</sup>

However, Canadyne asserted that the exception for negligence of a fiduciary should apply to NationsBank's relationship to the limited partnership.<sup>70</sup> That provision precludes the application of the fiduciary rule when the "negligence of a fiduciary causes or contributes to the release" of a hazardous substance.<sup>71</sup> Although the court noted that "to survive summary judgment, much less to prevail, Canadyne must do more than just utter the word 'negligence,'" it found that the bare allegation of negligence was enough to survive a motion to dismiss.<sup>72</sup>

Significantly, in reaching its holding on the motion to dismiss, the court placed two conditions on the application of the exception for negligent conduct by a fiduciary.<sup>73</sup> First, the court held that to invoke the exception, a plaintiff must show that the fiduciary "took particular negligent actions that caused or contributed to the release of hazardous substances."<sup>74</sup> Second, the court noted the fiduciary must have performed some discrete negligent act because CERCLA does not impose

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66. *Id.* at 1500; *see also* 42 U.S.C. § 9607(a) ("Notwithstanding any other provision or rule of law . . .").

67. 183 F.3d at 1274.

68. *Id.* (quoting 42 U.S.C. § 9607(n)(1)).

69. *Id.* at 1274-75.

70. *Id.*

71. *Id.* at 1274 (quoting 42 U.S.C. § 9607(n)(3)).

72. *Id.* at 1275-76.

73. *Id.* at 1275.

74. *Id.* This is similar to the rule adopted in *Briggs & Stratton Corp. v. Concrete Sales & Services, Inc.*, 20 F. Supp. 2d 1356, 1367-68 (M.D. Ga. 1998), but it appears to provide a more focused inquiry. *See also* *Norfolk S. Ry. v. Shulimson Bros.*, 1 F. Supp. 2d 553, 557 (W.D.N.C. 1998).

a duty to act.<sup>75</sup> Thus, the fiduciary cannot be liable for negligence in failing to prevent pollution.<sup>76</sup>

### C. *National Forest Management Act*

The Eleventh Circuit also ruled on a challenge brought under the National Forest Management Act ("NFMA")<sup>77</sup> by the Sierra Club to agency approval of seven timber cutting projects in Georgia's Chattahoochee National Forest.<sup>78</sup> The NFMA and regulations promulgated thereunder require the Forest Service to adopt a Land and Resource Management Plan ("Forest Plan").<sup>79</sup> The NFMA requires all permits and contracts for the use of the National Forests to be consistent with the Forest Plans.<sup>80</sup> The Forest Plan for the Chattahoochee National Forest required that the Forest Service gather and consider population inventory data before issuing any decision affecting areas within the forest.<sup>81</sup> The regulations require that the Forest Service "provide for diversity of plant and animal communities" by, in part, gathering and keeping data on species diversity.<sup>82</sup> Such "[i]nventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present condition."<sup>83</sup> The Forest Service must also monitor the population of management indicator species ("MIS").<sup>84</sup> Specifically, the Forest Service is required to select certain species as MIS and monitor those species' populations and determine their relationship to habitat changes.<sup>85</sup>

In *Martin*, after conducting an environmental assessment of the proposed logging activities in the Chattahoochee National Forest, the Forest Service issued a finding of no significant impact on the forest and approved the activities. The Sierra Club challenged these findings and the Forest Service's subsequent approval of the activities, asserting that the Forest Service did not consider population inventory and trend data for endangered or threatened species ("PETS") as the Forest Plan required. The Sierra Club also contended that the decision did not adequately protect the forest's watershed, fish and wildlife. Thus,

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75. 183 F.3d at 1275.

76. *Id.*

77. 16 U.S.C. §§ 1600-1687 (1994 & Supp. IV 1998).

78. *Sierra Club v. Martin*, 168 F.3d 1 (11th Cir. 1999).

79. *Id.* at 2 n.2 (citing 16 U.S.C. § 1604(a)).

80. *Id.* (citing 16 U.S.C. § 1604(i) (1994)).

81. *Id.* at 3.

82. 35 C.F.R. § 219.26 (1999).

83. *Id.*

84. *Id.* § 219.19(a)(1) (1999).

85. *Id.*

according to the Sierra Club, the Forest Service's decision violated the NFMA and the Forest Plan.<sup>86</sup>

In challenging the Forest Service's approval of the projects under the regulations promulgated pursuant to the NFMA,<sup>87</sup> the Sierra Club also argued that harmonization of Section 219.26 and Section 219.19 required the Forest Service to maintain population data on all affected MIS in a planning area.<sup>88</sup> Because the Forest Service lacked quantitative inventory data on many MIS, and the data it did have indicated that the species were declining, the Sierra Club argued that the agency's approval of the projects was arbitrary and capricious.<sup>89</sup> The Forest Service countered that neither Section 219.19 nor Section 219.26 applies at the site-specific level, but only to the formulation of the Forest Plan.<sup>90</sup> Moreover, because the Forest Plan is not a final agency action under the Administrative Procedure Act, the agency argued that it was not reviewable.<sup>91</sup>

The district court granted summary judgment for the Forest Service, ruling that the Forest Service was not required to consider PETS population data prior to the approvals and that the regulations did not deal with site-specific actions, but with the formulation of Forest Plans. On appeal the Sierra Club sought a ruling that the NFMA requires consideration of PETS data prior to approval of forest activities and that the regulations applied to site-specific actions under existing Forest Plans.<sup>92</sup>

The Eleventh Circuit reversed the district court on both issues and remanded the case.<sup>93</sup> With respect to the PETS population and trend data, the court noted that both parties agreed that the habitat in sections of the project areas was suitable for sensitive species.<sup>94</sup> Based on this fact, the Sierra Club argued that the Forest Service was required by its own Forest Plan to gather population data before permitting timber harvesting.<sup>95</sup> The Forest Service responded that its data was adequate and that population studies were required by the Forest Plan only if the habitat had a high potential for occupancy by PETS.<sup>96</sup> The

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86. 168 F.3d at 2-3.

87. *Id.* at 3.

88. *Id.* at 5-7.

89. *Id.* at 6.

90. *Id.*

91. *Id.*

92. *Id.* at 3-4.

93. *Id.* at 7-8.

94. *Id.* at 4.

95. *Id.*

96. *Id.*

Forest Service also contended that it had the discretion to make determinations of potential impact.<sup>97</sup>

Outlining the standard of review, the Eleventh Circuit explained that while agency interpretations of their own regulations are afforded great deference, "courts must overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself."<sup>98</sup> The court explained, "Agency actions must be reversed as arbitrary and capricious when the agency fails to examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."<sup>99</sup>

The Forest Service conceded that PETS occurred in numerous places within the project boundaries, but approved the project

without gathering any inventory or population data on many of the PETS species. Though these species are, by definition, at risk, nothing in the record indicates that the Forest Service possessed baseline population data from which to measure the impact that their destruction in the project areas would have on the overall forest population.<sup>100</sup>

The Forest Plan required the Forest Service to gather population and trend data for PETS species in the path of a project when adequate population inventory information was unavailable.<sup>101</sup> Although the Forest Service argued that it had adequate information, the court found that it really had "no information at all in terms of many of the PETS species."<sup>102</sup> Therefore, the court held that "the Forest Service's failure to gather population inventory data on the PETS species occurring or with a high potential to occur within the project areas [was] contrary to the Forest Plan," and, consequently, the Forest Service's subsequent approval of the timber projects was arbitrary and capricious.<sup>103</sup>

Regarding the MIS claims, the court again found for the Sierra Club, holding that the obligations of the Forest Service do not end upon approval of a Forest Plan, but rather require compliance with its provisions when reviewing site-specific actions.<sup>104</sup> Thus, the Eleventh Circuit held that the Forest Service has a continuing obligation to gather

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97. *Id.*

98. *Id.* (quoting *Simmons v. Block*, 782 F.2d 1545, 1550 (11th Cir. 1986)).

99. *Id.* at 5 (internal quotation marks omitted).

100. *Id.* at 4-5.

101. *Id.* at 5.

102. *Id.*

103. *Id.*

104. *Id.* at 6.

MIS inventory data.<sup>105</sup> The court ruled that the two regulations require the Forest Service to use the MIS data to measure the impact of habitat changes on the forest's diversity.<sup>106</sup>

### III. CONCLUSION

Trends in environmental law, like most other areas of practice, are almost impossible to spot other than by hindsight. However, a person wishing to speculate on future areas of activity might take note of the Eleventh Circuit's recent decision in *Johansen v. Combustion Engineering, Inc.*<sup>107</sup> That factually unremarkable case involved the owner of a former mine site who allowed acidic water to escape from the site and enter plaintiffs' land. Plaintiffs brought a lawsuit asserting common-law nuisance and trespass claims. Although it awarded only \$47,000 in actual damages and the Georgia Environmental Protection Division assessed only \$10,000 in statutory fines, the federal jury initially awarded more than \$45 million in punitive damages.<sup>108</sup> Following one trip all the way to the Supreme Court, the Eleventh Circuit eventually approved \$4,350,000 in punitive damages.<sup>109</sup>

Although overshadowed by statutory titans like CERCLA and the CWA, most regular practitioners in the environmental arena know that common-law remedies have played significant roles in the development of environmental law since its inception. The federal courts' blessing of significant punitive damages awards may signal the beginning of a new era in environmental enforcement in which common-law theories re-emerge to drive resolution of environmental disputes.

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105. *Id.* at 6-7.

106. *Id.* at 7.

107. 170 F.3d 1320 (1999).

108. *Id.* at 1326-27.

109. *Id.* at 1327, 1339.

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