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Edward A. Kazmarek

W. Scott Laseter

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Environmental Law

by Edward A. Kazmarek*
and
W. Scott Laseter**

I. INTRODUCTION

Environmental law as a separate discipline has continued to grow in stature during the last few years and the rising influence of environmental factors in all areas of law and business shows no signs of abating. With President Clinton's appointment of Carol Browner, former Florida Department of Environmental Regulation Secretary, as Administrator of the United States Environmental Protection Agency ("EPA"), the new administration signaled its intent to place greater emphasis on environmental issues. Even Vice President Gore's popular book, Earth In The Balance, advocates wide ranging and fundamental changes in American society and revolves around a particular environmental vision.

Like its predecessor, this survey provides a single compilation of the significant case law on environmental issues in the Eleventh Circuit. During the survey period, courts in the Eleventh Circuit focused most of their attention on the Comprehensive Environmental Response, Compensation and Liability Act,¹ the chief federal statute addressing contaminated land. However, for the sake of consistency and usefulness, this Article will follow the format of the previous survey² addressing the issues in the order of environmental procedure, water protection, land related cases, and, finally, criminal enforcement.

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II. Environmental Procedure

A. Background and Statutory Scheme

In passing the National Environmental Protection Act ("NEPA"), the primary statute governing environmental procedure, Congress sought to ensure that important environmental consequences of the federal government's actions would not "be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." NEPA requires federal agencies to follow procedures that insure environmental issues are fully considered whenever a proposed project would be a "major federal action." Initially, an agency must prepare an environmental assessment ("EA") if it determines the proposal is a major federal action. If the assessment shows no "significant effect on the human environment," then the agency may issue a finding of no significant impact ("FONSI"). If the initial assessment indicates a likelihood that the project will have significant impacts, the agency must prepare a far more detailed environmental impact statement ("EIS").

B. Curing Defective Procedure

During the survey period, the United States District Court for the Southern District of Florida considered whether subsequent studies performed after an agency issues a clearly inadequate EA can cure previously defective procedure. In Protect Key West, Inc. v. Cheney, the court held that, at least when an agency makes the decision to commit to performing a major federal action prior to conducting the appropriate initial studies, subsequent environmental investigations do not satisfy the mandates of NEPA.

Protect Key West concerned the Navy's attempt to construct a 160 unit housing development for military personnel on property adjoining the city of Key West's historic district. After concluding the project would constitute a major federal action, the Navy issued an eleven page EA (three pages of which were area maps) that merely listed certain areas of environmental effect and concluded the project would have no significant impact on any of the identified concerns. As a result of this EA, the

7. Id. § 1508.13.
8. Id. § 1502.
10. Id. at 1560-62.
Navy issued a FONSI and proceeded with the project. Plaintiff citizens group sought and received a temporary restraining order and then requested a permanent injunction pending a full EIS. First holding that the EA failed to meet the requirements of NEPA, the court explained:

[T]he Navy prudently does not attempt to defend this action solely on the adequacy of the EA. Indeed, the Mayor of Key West, as amicus curiae testifying in favor of the construction of military housing on the site, noted: "[i]f all the Court had to look at was the original Environmental Assessment from 1988, the Court would have to find that the decision to reconstruct the military housing at [the site] was arbitrary and capricious."

However, despite the court's initial holding on the inadequacy of the EA, the Navy argued that additional studies, surveys and investigations conducted after it made the decision to proceed with the development cured any defects in the original EA. Those additional studies, the Navy contended, satisfied the requirements for preparation of an EA and supported the 1988 FONSI. Describing the Navy's approach as "Commit First, Ask Questions Later," the court held, "[i]n the NEPA context, post hoc compliance by definition does not accord with the Congressional mandate." The court differentiated this case from decisions in other circuits allowing subsequent investigations to amend an otherwise inadequate EIS because the defect in the Navy's procedure occurred at the first step of the process. The court stated that, "[t]he case for remand is certainly stronger where an agency has foreclosed NEPA considerations from its decision making early on in the process."

C. Remedies for Breaches of Environmental Procedure

Although the court in Protect Key West held that the Navy's efforts to cure its defective procedure had failed, it was still confronted with the question of an appropriate remedy. Ironically, both plaintiff and defendant asked the court to make a substantive decision regarding whether the proposed project would cause significant impacts on the environment. The Navy hoped the court would look at its post-EA studies and con-

11. Id. at 1554.
12. Id. at 1560.
13. Id.
14. Id. at 1561.
15. Id. at 1562.
16. Id. at 1562 n.4.
17. Id. at 1562.
clude that its finding of no significant impact was correct. Plaintiff argued that the court should determine from the evidence it submitted during trial that the project would indeed cause significant impacts and that the court should order the Navy to produce an EIS. The court rejected both positions, however, explaining:

Both parties now urge the court to determine from this conflicting evidence whether the Peary Court project will have a significant impact on the environment, much as the agency properly should have done in the first instance.

This determination, however, is appropriately made by the agency and not the court. The court's proper function at this point is not to make this substantive determination, but rather to insure that the agency reasonably took account of all of the environmental consequences of its action before making the decision to proceed. The court made the limited finding here that based on plaintiff's evidence adduced in these proceedings, the agency at the time the EA was filed, failed reasonably to consider the environmental consequences of its decision to proceed as required by NEPA. Therefore, a remand to the agency for further proceedings consistent with NEPA and this opinion is appropriate.

The court's holding in Protect Key West states an important lesson for both potential NEPA plaintiffs and government agencies. The case suggests to agencies that, at least in the eyes of the federal judiciary, NEPA is not a mere formality along the road to business as usual. For plaintiffs, the case illustrates that, although NEPA is a powerful tool compelling agencies to consider the consequences of their actions, it offers no substantive protection even from devasting environmental projects.

III. PROTECTION OF WATER RESOURCES

A. Wetlands

Background and Regulatory Scheme. The federal wetlands protection program is authorized under two principal statutes. First, permits under Section 10 of the Rivers and Harbors Appropriation Act ("RHAA") govern the placement of structures in the "navigable waters of the United States." Second, Section 404 of the Clean Water Act ("CWA") authorizes permits regulating the placement of dredge or fill

18. Id. at 1563.
19. Id. (footnotes omitted).
20. See, e.g., 903 F. 2d at 1533. See Kazmarek & Laseter, supra note 2, at 1412.
material into a broader class of water defined as "waters of the United States." The definition of "waters of the United States" begins with the "navigable waters of the United States" and then adds virtually any connected water system such as a remote tributary or "adjacent wetland." Section 10 and section 404 permits frequently overlap because of the types of waters regulated and because the "fill" substances covered under section 404 permits include many raw building materials, such as concrete or gravel, necessary for the structures contemplated under section 10 permits. Consequently, the United States Army Corp of Engineers ("Corps") administers both programs.

Definition of "Navigable Water of the United States." As a precondition to the Corps' exercise of authority under Section 10, the affected water must be classified as "navigable waters of the United States." The Eleventh Circuit considered the definition of "navigable waters of the United States" in United States v. Harrell. In Harrell commercial fisherman tried to gain access to a tributary of the Tombigbee River in southern Alabama by arguing that the tributary was subject to the federal government's navigational servitude and, therefore, open to public access. Defendants were riparian owners along the tributary. After the trial court determined that the tributary was a non-navigable stream, plaintiffs sought an evaluation of the waters by the Corps which determined that the tributary was "below the ordinary high water mark" and, therefore, within the "navigable waters of the United States." On appeal, the Eleventh Circuit looked to the Corps' section 10 regulations that define the extent of the navigable waters of the United States as including "the entire surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark." All the parties agreed that the Tombigbee itself was a navigable water and, therefore, public property. The Corps argued that its navigational servitude should extend from the channel of the Tombigbee to "the en-

24. Id. § 1344; see also 33 C.F.R. § 328.3 (1992).
25. 33 C.F.R. § 328.1-328.3.
26. See id. §§ 320.1-320.4.
27. 926 F.2d 1036 (11th Cir. 1991).
28. For a definition of the federal government's navigational servitude, see Utah v. United States, 403 U.S. 9, 10 (1971); see also United States v. Rand, 389 U.S. 121, 123 (1967).
29. 926 F.2d at 1038.
30. Id.
31. 33 C.F.R. § 329.11(a).
32. As one federal court of appeals recently stated: "the nation's navigable waters have always been considered 'public property.'" Owen v. United States, 851 F.2d 1404, 1408 (D.C. Cir. 1988) (citing Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1864)).
tire area covered by the ordinary high waters of the stream, including tributaries that might not otherwise be considered navigable and areas adjacent to the low water channel that revert to a swampy or even a dry condition as the waters recede."\(^{33}\) However, the court refused to take such an expansive view, holding that under the Corps' own regulations, the navigable servitude was limited to the "ordinary high water mark."\(^{34}\)

The Corps defines the "ordinary high water mark" of non-tidal waters as:

> the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.\(^{35}\)

Reading this definition, the court held that "the ordinary high water mark of non-tidal rivers is not the elevation reached by flood waters; rather, it is 'the line to which high water ordinarily reaches.'"\(^{36}\) With this legal definition of the "navigable waters of the United States" in hand, the court deferred to the trial court's findings that indicated the area in question was not ordinarily under water:

The district court found that the Tombigbee floods and their duration and extent "are unpredictable except that they generally occur, if they do at all, during the winter, or wet months, December through March." These floods may last as briefly as a few days before receding and returning to within the banks and bed of the Tombigbee. When flooding occurs, "the Tombigbee flood waters back up through these adjacent riverbottom lands, and depending on their volume and duration, can flood the area around Lewis Creek, approximately three miles from the banks of the Tombigbee." Navigation on Lewis Creek during this flooding, even by small outboard motor boats, however, is not possible more than 25% of any year and, even then, is temporary and unpredictable. Moreover, the court noted that "the evidence is uncontroverted that the waters of the Tombigbee River have not occupied the lowland bottomland area abutting Lewis Creek long enough to destroy all terrestrial plant life and render the land valueless for agricultural purposes." The riverbottom of Lewis Creek "is covered with grasses, trees and other terrestrial vegetation." The land in the immediately surrounding area is used for raising cattle and hogs, for harvesting timber, and for hunting.\(^{37}\)

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33. 926 F.2d at 1043.
34. Id. at 1041.
35. 33 C.F.R. § 329.11(a)(1).
36. 926 F.2d at 1042 (quoting in part State v. Sorenson, 271 N.W. 234, 326 (Iowa 1937)).
37. Id. (footnotes omitted).
The Corps' authority to regulate structures was not directly at stake in *Harrell*. Nonetheless, even though a section 10 permit was not at issue, the court's definition of "navigable waters of the United States" should control the Corps' section 10 jurisdiction. As the court noted, however, the federal government still retains broad regulatory power over these more remote waters under the section 404 permitting program.\(^{38}\)

**Review of Corps Determinations.** In *Banks v. Page*,\(^{39}\) the United States District Court for the Southern District of Florida considered whether the recipient of a cease and desist order from the Corps may seek judicial review of that order prior to any enforcement action by the Corps. The case involved a long history of dealings between the Corps and plaintiff. Plaintiff had filled land in Monroe County, Florida, during the early 1980s. The Corps discovered the discharges and determined that the property was within the "waters of the United States."\(^{40}\) Consequently, the Corps issued a cease and desist order directing plaintiff to stop the discharges and further requiring plaintiff to apply for an after-the-fact permit.\(^{41}\) Plaintiff filed for the after-the-fact permit, but the Corps subsequently denied that request. No further activity occurred at that time.

In early 1990, the Corps discovered that plaintiff had made additional discharges onto the property. The agency then issued a second series of cease and desist orders. In response, plaintiff sought a declaratory judgment that the subject property was not within the Corps' jurisdictional waters under the CWA. The Corps moved to dismiss, arguing that the CWA precluded judicial review prior to enforcement actions by the Corps.\(^{42}\)

In holding that the CWA does not allow pre-enforcement review of cease and desist orders, the court noted a split among the federal circuits that have decided the issue.\(^{43}\) In the Fourth Circuit case of *Southern Pines Ass'n v. United States*,\(^{44}\) plaintiff challenged an EPA compliance order issued under the CWA, claiming that the EPA lacked jurisdiction over the site. Following the majority view, the Fourth Circuit affirmed the trial court's dismissal for lack of subject matter jurisdiction.\(^{45}\) The Fourth Circuit emphasized that the CWA enforcement scheme expressly author-

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38. *Id.* at 1043.
40. 768 F. Supp. at 810-11.
41. *Id.* at 810.
42. *Id.* at 811.
43. *Id.* at 811-13.
44. 912 F.2d 713 (4th Cir. 1990).
45. *Id.* at 717.
ized judicial review of orders issued by the EPA assessing administrative penalties as well as civil enforcement actions. In contrast, the CWA provided no such express authorization of judicial review of compliance orders. Therefore, the court considered the absence of such an express provision "clear and convincing evidence that Congress intended to exclude this type of action." On the other hand, in a Ninth Circuit case, Swanson v. United States, the court allowed pre-enforcement review of a Corps cease and desist order under section 404 of the CWA because it found there was no administrative procedure to challenge the Corps' jurisdiction.

The court in Banks agreed with the majority view announced in Southern Pines, holding that the CWA precluded judicial review of cease and desist orders until the Corps actually brings an enforcement action. Therefore, a recipient of a Corps cease and desist order must choose between alternative courses of conduct. If confident that the property is outside the jurisdictional waters, the person may proceed with the proposed activity in spite of the order, thereby inviting the Corps to initiate enforcement action. If seeking a more secure route, that person must apply to the Corps for a permit to continue the questioned activity. If the Corps denies that permit, the applicant may then contest that denial under the CWA.

B. National Pollution Discharge Elimination System

Background and Statutory Scheme. The CWA's National Pollution Discharge Elimination System ("NPDES") program governs the dis-
charge of pollutants into the nation’s waters.\footnote{51} This program regulates “point source” discharges of pollutants into the “waters of the United States.”\footnote{52} Under the NPDES program’s basic regulatory scheme, a discharger must obtain a permit from the EPA unless the state in which the discharge occurs has its own program approved by the EPA.\footnote{53} If the state has an approved program, then it becomes the implementing agency subject to the EPA’s authority to approve or disapprove specific state issued permits.\footnote{54}

Citizens Suits. Like most other major environmental statutes, the CWA contains a citizens suit provision allowing private attorneys general to bring suits that would otherwise be in the sole province of government agencies.\footnote{55} In National Environmental Foundation v. ABC Rail Corp.,\footnote{56} the Eleventh Circuit considered whether the requirement that citizens groups give potential defendants sixty days notice prior to commencing a lawsuit was mandatory.\footnote{57}

That case concerned the National Environmental Foundation’s ("NEF") contention that the ABC Rail Corporation was violating sections 301 and 307\footnote{58} of the CWA as well as the requirements of its NPDES permit by discharging pollutants, including copper, lead and zinc, into Alabama’s Buxahatchee Creek. The NEF filed suit the day after it gave notice to ABC Rail, the Alabama Department of Environmental Management and the EPA under section 505 of the Act.\footnote{59} Section 505 provides in relevant part:

No action may be commenced—
(1) under subsection (a)(1) of this section—
(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in

\footnotesize{\begin{itemize}
\item \footnote{51} 33 U.S.C. § 1342 (1988).
\item \footnote{52} Id. § 1362(14). Historically, NPDES permits principally have targeted industrial and municipal discharges of waste water, although portions of the statute that have recently gone into effect broaden the program to cover many previously unregulated discharges of storm water. See id. § 1342(p). While no storm water cases have yet to be reported from Eleventh Circuit courts, this area is likely to warrant substantial coverage in future survey articles.
\item \footnote{53} Id. § 1362.
\item \footnote{54} Alabama and Georgia have approved NPDES programs, while Region IV of the EPA administers the NPDES program in Florida.
\item \footnote{56} 926 F.2d 1096 (11th Cir. 1991).
\item \footnote{57} Id. at 1097; 33 U.S.C. § 1365(b) (1988).
\item \footnote{58} 33 U.S.C. §§ 1311, 1317 (1988).
\item \footnote{59} Id. § 1365.
\end{itemize}}
which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, . . . except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title . . . .

Examining this language, the court held that the express terms of section 505 make the notice requirement mandatory. However, the NEF argued that section 505 also provides an express exception to the sixty day notice requirement for suits brought under section 307(a). Section 307(a) requires the EPA to promulgate effluent limitations for toxic pollutants. In turn, section 307(d) prohibits the owner or operator of any point source from violating the limitations promulgated under section 307(a).

The Eleventh Circuit rejected the NEF's argument holding that the provisions of section 307(a) are directed solely at the EPA. In contrast the court determined that the NEF's claims were against a private party and, therefore, came under section 307(d). As a result, the appellate court affirmed the district court's dismissal of the NEF complaint.

IV. CERCLA

A. Background and Statutory Scheme

Perhaps no statute better epitomizes the force of modern environmental law than the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). Sometimes called Superfund in reference to the trust fund Congress established to finance some of the EPA's activities under the Act, CERCLA grants broad powers to the Agency, allowing it to respond to actual or threatened releases of hazardous substances and then recover the costs of clean-up from other responsible parties. Also, CERCLA allows private parties to bring both direct actions against other responsible parties to recover response costs and contribution claims if the private party is ordered to perform a clean-up by the government. During the previous survey period the Eleventh Circuit

60. Id.
61. 926 F.2d at 1097-98.
63. Id. § 1317(d).
64. 926 F.2d at 1099.
65. Id.
66. Id.
68. Id. § 9604(a)(1).
69. Id. § 9659.
demonstrated its willingness to take a very aggressive stance on cases arising under CERCLA.\textsuperscript{79} In some instances, the court may have gone farther than even the EPA wanted. For example, in \textit{United States v. Fleet Factors Corp.},\textsuperscript{71} the court suggested in dicta that a lender could be liable for response costs under CERCLA based on the mere inference that it was in a position to influence the borrower’s environmental practices.\textsuperscript{72} This case prompted the EPA to issue its “lender liability rule” that details the kinds of activities lenders can safely pursue with their borrowers without losing CERCLA’s “secured creditor” exemption.\textsuperscript{73} At least in comparison to some of the more draconian readings of the potential impact of \textit{Fleet Factors}, the EPA’s lender liability rule gives secured creditors much greater latitude in their lending practices than the Eleventh Circuit’s opinion.\textsuperscript{74}

\section*{B. CERCLA Enforcement Power}

One of the Act’s enforcement mechanisms, section 106 of CERCLA, gives the EPA the power to order private parties to perform clean-ups of hazardous substances that pose an “imminent and substantial endangerment to the public health or welfare or the environment . . . .”\textsuperscript{75} Under section 107, the EPA can collect treble damages from any person otherwise liable under the Act that fails to properly carry out such an order.\textsuperscript{76} This provision places a respondent in a difficult position. Although the statute does allow a person not to respond to an order for “sufficient cause,” a respondent risks treble damages to find out if his cause is sufficient.\textsuperscript{77}

The treble damages provision was the subject of the only case directly under CERCLA to reach the appellate court during the survey period. \textit{United States v. Parsons}\textsuperscript{78} concerned the refusal of several individual defendants to carry out an EPA order to remove drums of hazardous wastes from a farm used as a disposal site. The trial court granted the EPA’s

\textsuperscript{70} See Kazmarek & Laseter, \textit{supra} note 2, at 1435. \\
\textsuperscript{71} 901 F.2d 1550 (11th Cir. 1990), \textit{cert. denied}, 111 S. Ct. 752 (1991). \\
\textsuperscript{72} 901 F.2d at 1558. \\
\textsuperscript{74} The Rule allows lenders to engage in a broad range of activity so long as these activities “are primarily to protect a security interest.” \textit{Id.} at 18,383. Allowed activities include requiring environmental assessments or even remediation prior to closing the loan, assessments or clean-ups after the loan is made, pre-foreclosure workouts, and even foreclosure. Even after foreclosure, the lender will only become liable if its primary purpose changes from protection of the collateral to managing the property for investment. \textit{Id.} \\
\textsuperscript{75} 42 U.S.C. § 9606a (1988). \\
\textsuperscript{76} \textit{Id.} § 9607(c)(3). \\
\textsuperscript{77} \textit{Id.} \\
\textsuperscript{78} 936 F.2d 526 (11th Cir. 1991).
request for punitive damages but limited the amount to a total of three times the cost of the clean-up.\footnote{79} In vacating the district court's order, the Eleventh Circuit noted that the statute was unclear on whether treble damages should be the total sum recovered or an amount in addition to the actual cost of clean-up.\footnote{80} Consequently the court held:

[As the second circuit noted with respect to CERCLA, we are unwilling to interpret the statute “in any way that apparently frustrates the statute’s goals, in the absence of a specific congressional intention otherwise.” We accordingly believe that the section should be interpreted to allow the government to recover up to a total of four times the amount it expended in cleaning up the hazardous wastes.\footnote{81}]

\section{Persons Liable Under CERCLA}

The United States District Court for the Middle District of Florida decided what may prove to be a very important case regarding the activities sufficient to trigger “operator” liability under CERCLA in \textit{Jacksonville Electric Authority v. Eppinger & Russell Co.}\footnote{82} Although often perceived as ensnaring virtually anyone remotely connected to a contaminated facility, CERCLA actually only creates potential liability in four specific classes of parties: (1) the current owner and operator of the facility; (2) the owner or operator of the facility at the time of disposal of hazardous substances; (3) the persons who arranged for the treatment, transport or disposal of hazardous substances; and (4) the persons who accept hazardous substances for treatment, transport or disposal.\footnote{83}

In \textit{Jacksonville Electric Authority}, the district court considered whether the current owner of the site of a wood creosoting plant could hold the trustees of Tufts College (“Tufts”) liable as either the owner or


\footnote{80} 936 F.2d at 527-28.

\footnote{81} \textit{Id.} at 528-29 (footnotes omitted).

\footnote{82} 776 F. Supp. 1542 (M.D. Fla. 1991).

\footnote{83} 42 U.S.C. § 9607 (1988). Specifically, the Act provides liability for:

(1) the owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substance for transport to disposal or treatment facilities, incineration vessels or sites selected by such person. . . .

\textit{Id.}
operator of the facility at the time of disposal of hazardous substances. From 1925 to 1942, Tufts owned the majority of the stock of the corporation that directly owned and operated the plant and it exercised certain supervisory functions frequently associated with majority ownership of a corporation.\(^8^4\) The court initially separated the issues of "owner" liability from "operator liability."\(^8^5\) By rejecting plaintiff's claim that a majority stockholder of a corporation that directly holds title to a contaminated facility is an owner of the facility under CERCLA in the absence of factors that might justify piercing the corporate veil, the court followed the clear majority of other courts that have addressed the question.\(^8^6\) The court held:

In order to hold Defendant liable as an owner of the facility, the facts must justify piercing the corporate veil. The corporate veil should be pierced to impose liability on the parent for the subsidiary's acts when the subsidiary is used as a sham to avoid direct liability. Factors to be considered in determining whether the corporate veil should be pierced to reach a parent corporation are: (1) The parent and the subsidiary have common stock ownership; (2) The parent and the subsidiary have common directors or officers; (3) The parent and the subsidiary have common business departments; (4) The parent and subsidiary file consolidated financial statements and tax returns; (5) The parent finances the subsidiary; (6) The parent caused the incorporation of the subsidiary; (7) The subsidiary operates with grossly inadequate capital; (8) The parent pays the salaries and other expenses of the subsidiary; (9) The subsidiary receives no business except that given to it by the parent; (10) The parent uses the subsidiary's property as its own; (11) The daily operations of the two corporations are not kept separate; and (12) The subsidiary does not observe the basic corporation formalities, such as keeping separate books and records and holding shareholder and board meetings.\(^8^7\)

Finding that the facts before it did not justify piercing the corporate veil, the court held Tufts could not be a PRP as the owner of the facility at the time of disposal of hazardous substances.\(^8^8\) The court then turned to plaintiff's contention that, even if Tufts was not the owner of the facility under CERCLA, it nonetheless exercised sufficient influence over the actual owner to be an operator under the Statute.\(^8^9\) The court first noted

\(^{8^4}\) 776 F. Supp. at 1544.
\(^{8^5}\) Id. at 1545-46.
\(^{8^7}\) 776 F. Supp. at 1545 (citations omitted).
\(^{8^8}\) Id. at 1546.
\(^{8^9}\) Id.
that no other court in the Eleventh Circuit appeared to have directly considered the issue of operator liability, although the court in Fleet Factors did discuss the question in dicta. Therefore, it turned to cases from the First and Fifth Circuits for guidance on when a parent company should be deemed an operator.

In a recent decision, Riverside Market Development Corp. v. International Building Products, Inc., the Fifth Circuit refused to impose operator liability on the former majority stockholder of a corporation that owned an asbestos manufacturing facility. In crafting what is probably the most limited definition of "operator" under CERCLA handed down by any court, the Fifth Circuit stated that parties are only liable as operators if "they themselves actually participate in the wrongful conduct prohibited by the Act." The court found the majority stockholder spent very little time at the facility and that his visits to the facility afforded him little opportunity to direct or personally participate in the improper disposal of asbestos or asbestos by-products. Therefore, the appellate court affirmed summary judgment in favor of the majority stockholder on the issue of operator liability.

The First Circuit created a somewhat broader test in United States v. Kayser-Roth Corp. In that case, the parent corporation "exerted practical total influence" over the subsidiary's day to day activities. Specifically, the court found that Kayser-Roth (1) exercised total monetary control over the subsidiary, including collecting accounts payable and restricting the subsidiary's budget, (2) directed that subsidiary-governmental contact be funneled directly through Kayser-Roth, (3) required pre-approval by Kayser-Roth of any capital transfer or expenditures exceeding $5,000 and of any real estate transactions by the subsidiary, and (4) placed Kayser-Roth personnel in most of the subsidiary's director and officer positions. In addition, the court found that Kayser-Roth had the authority "to control the release or threat of release of pollution at the site and the ability to prevent and abate damage from the release."

Responding to these facts, the First Circuit stated "[t]o be an operator requires more than merely complete ownership and the concomitant gen-

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90. 901 F.2d at 1559-60.
91. 931 F.2d. 327 (5th Cir. 1991).
92. Id. at 330.
93. Id.
94. Id.
95. Id.
96. 910 F.2d 24 (1st Cir. 1990).
97. Id. at 27 (quoting United States v. Kayser-Roth Corp., 724 F. Supp. 15, 18 (D.R.I. 1989)).
98. Id.
99. Id. at 27-28.
eral authority or ability to control that comes with ownership. At a minimum it requires active involvement in the activities of the subsidiary. However, because of Kayser-Roth's "total influence and control over" the subsidiary's day to day activities, the court held the parent corporation liable as an operator.

After reviewing this precedent, the district court in *Jacksonville Electric Authority* stated:

> Viewed together, *Riverside, Kayser-Roth, and Fleet Factors* impose operator liability on the parent corporation of a wholly-owned subsidiary when the parent exercises actual and pervasive control of the subsidiary to the extent of actually involving itself in the daily operations of the subsidiary. Actual involvement in decisions regarding the disposal of hazardous substances is a sufficient, but not a necessary, condition to the imposition of operator liability.

Applying the law to the facts, the court explained:

Plaintiff cites the following actions as evidence that Tufts actively involved itself in Eppinger's affairs: (1) Tufts owned all or almost all the stock in Eppinger; (2) Tufts dictated the terms of employment of Eppinger's President (Chadwick) and other executive officers; (3) Tufts' creation of a profit sharing plan for the Eppinger officers; (4) Eppinger's distribution of dividends in excess of net earnings during Tufts' period of ownership, which allegedly contributed to a situation where the equipment at the wood preserving facility was not properly upgraded and replaced; (5) Tufts' receipt of reports at Trustee meetings on the status of Eppinger's operations; (6) Tufts' alleged hiring of William Cook as Director, Vice-President, and General Manager of Eppinger; (7) Statements by trustees to the effect that Tufts carried on a business at the Eppinger facility; (8) During Tufts' period of ownership, the method of wood treatment was changed from the use of arsenic salt to the use of another unspecified chemical. These contacts do not, taken as a whole or individually, amount to "active involvement" by Tufts in the operations of Eppinger beyond the general authority that derives from parent company status.

Like all cases, *Jacksonville Electric Authority* was not decided in a vacuum. The court no doubt was influenced by the fact that Tufts was not the usual defendant for a CERCLA suit. Indeed, in reference to its factual findings that Tufts did not exercise day to day control, the court said, "[i]t would be extremely odd if Tufts had taken such an [active]
approach, given the vast dissimilarities between operating an educational institution and operating a creosoting plant." 

Possibly, the district court's announced rule for operator liability, broader than the Fifth Circuit's approach but which is by no means the most aggressive position among the various courts considering the issue, was tempered by the comparatively sympathetic defendant in the case before it. In light of the Eleventh Circuit's expansive view of CERCLA in cases like Fleet Factors and Parsons, the Eleventh Circuit might choose to paint a broader definition of operator liability when given a less sympathetic defendant.

D. Citizens Suits

Like the CWA, CERCLA contains a "citizens suit" provision that allows private citizens to bring suits which would otherwise be within the sole province of governmental enforcement. Normally, the citizens suits are used by private plaintiffs such as environmental organizations and other interested groups as a supplemental enforcement mechanism to the government's prosecutorial discretion. However, in Woodman v. United States, a defendant in a section 107 cost recovery action tried to use a provision in CERCLA's citizens suit provision that bars such suits after the President has initiated an enforcement action as a shield against a private plaintiff.

That case concerned a lawsuit filed by residents of a neighborhood constructed near a former landfill used by the Navy to dispose of waste. In addition to a variety of state law claims, plaintiff alleged he incurred response costs in the form of medical surveillance expenses and associated costs in obtaining an alternative water supply. One of the defendants, a

104. Id.
105. At least two district court cases have suggested a lower standard for finding a parent corporation liable as an operator. In Colorado v. Iderado Mining Co., 18 Envt. L. Rep. 20, 578 (D. Col. 1987), the court stated:

Other factors to be considered in determining whether a parent corporation is an "owner or operator" of a facility held by one of its subsidiaries include the percentage of the subsidiary's stock owned by the parent, whether and to what extent the parent exercises authority to execute contracts on behalf of the subsidiary and whether the parent controls the selection, supervision, transfer and similar aspects of employment for those normally employed by the subsidiary.

Similarly, the court in Bunker Hill, 635 F. Supp. at 655, pointed to a parent's "capacity" to control the subsidiary as a significant factor in finding liability. Both Iderado and Bunker Hill relied on the definition of "owner-operator" under the Federal Water Pollution Control Act in crafting the broad definition of "operator" under CERCLA.

private waste hauler responsible for transporting the Navy's allegedly hazardous waste to the site, responded that plaintiff's CERCLA cause of action was barred because the EPA had initiated a lawsuit under section 106 to compel clean-up of the site.\footnote{110}

The relevant portion of the citizens suit provision, which is created by section 310 of the Act, states that "[n]o action may be commenced under [the citizens suit provision] if the President has commenced and is diligently prosecuting an action under this chapter . . . ."\footnote{111} The court rejected plaintiff's contention that its medical surveillance costs were recoverable in a response action under section 107 because they were directed only at plaintiff and not at the general public.\footnote{112} However, all the parties agreed that plaintiff's expenditures to obtain alternative water supply were proper response costs.\footnote{113} Thus, plaintiff's suit was properly characterized as a cost recovery action under section 107, not a true citizens suit under section 310.\footnote{114} The court further held that the liability provisions of section 107 and the citizens suit provision of section 310 addressed separate issues.\footnote{115} The citizens suit provision was designed to "prod the executive branch into zealously enforcing hazardous waste laws."\footnote{116} The liability provisions of section 107 were intended to encourage private clean-ups by providing a mechanism through which persons who cleaned up releases of hazardous substances could recover those costs from the parties responsible for the contamination.\footnote{117} Therefore, the court held that plaintiff could maintain its section 107 cause of action even if the EPA had previously initiated an enforcement action.

\textbf{E. The Petroleum Exclusion}

As discussed earlier, although CERCLA casts a broad net of liability, the Act contains some important exceptions to the scope of coverage.\footnote{118} Among its significant limitations, CERCLA only creates liability for releases or threatened releases of "hazardous substances."\footnote{119} While the statute's definition of hazardous substances incorporates a long list of materials, it specifically excludes "petroleum, including crude oil or any fraction
thereof."¹²⁰ In *Bunger v. Hartman*,¹²¹ the United States District Court for the Southern District of Florida followed the majority of courts in holding the so-called "petroleum exclusion" extends to hazardous contaminants that result from releases of petroleum products.¹²²

*Bunger* concerned plaintiff's efforts to recover the costs of cleaning up contamination at a bulk petroleum storage facility allegedly caused by defendant's (plaintiff's predecessor in interest) operations.¹²³ On defendant's motion to dismiss, the court cited cases from other jurisdictions in holding that the petroleum exclusion applied.¹²⁴ The court stated:

A fair reading of Plaintiff's Complaint leads to the inescapable conclusion that the "hazardous substances" discovered on the site were derived from the petroleum products which were stored and sold by Texaco and Hartman. The pleading identifies no other viable sources of the pollutants and contaminants. Accordingly, Counts VIII through XIII should, and by the same are, [sic] dismissed without prejudice. [The Plaintiffs are granted leave to amend the complaint.] This pleading should give an indication as to which hazardous substances were found on the site, whether they are inherent in petroleum, and if possible, their sources.¹²⁵

**F. Pleading and Practice**

The court in *Bunger* also ruled that a complaint must allege four elements to state a cost recovery action under CERCLA.¹²⁶ The complaint must allege that (1) the site in question is a "facility"¹²⁷ within the meaning of the statute, (2) there has been a release¹²⁸ or threatened release of hazardous substance from the facility, (3) the release or threatened release has caused the plaintiff to incur response costs that were necessary and consistent with the "National Contingency Plan ("NCP"),¹²⁹ and (4) the defendant falls within one of the four classes of parties subject to

¹²⁰ *Id.* § 9601(14).
¹²² *Id.* at 972.
¹²³ *Id.* at 970.
¹²⁵ 797 F. Supp. at 972-73 (footnotes omitted).
¹²⁶ *Id.* at 971.
¹²⁸ *Id.* § 9601(22).
¹²⁹ *Id.* § 9605. The National Oil and Hazardous Substances Pollution Contingency Plan ("NCP") is a complex set of regulations that govern the methodologies for CERCLA clean-ups. These regulations cover such broad topics as the preliminary site assessments and investigation, the selection of short and long term remedies and the mechanisms for public involvement in the clean-up process. See 40 C.F.R. § 300.1-300.1106 (1992).
liability. Although arguably unnecessary because of its application of the petroleum exclusion, the court in Bunger also found merit in the defendant’s motion to dismiss on the grounds that plaintiff failed to allege that the claimed response costs were consistent with the NCP.

This facet of the 1992 decision in Bunger stands in apparent conflict to a 1991 opinion from Judge Harold Murphy of the United States District Court for the Northern District of Georgia. In Mathis v. Velsicol Chemical Corp., Judge Murphy held on a motion for judgment on the pleadings that, while a plaintiff would have to show consistency with the NCP for purposes of measuring damages, the movant did not need to show that consistency with the NCP was undisputed to establish the non-movant’s liability. The court explained:

[Non-movants] have admitted that they were owners of the facility at the time the hazardous material was transported there; that they are the current owners of the facility; that the Marble Top Landfill is a facility under CERCLA; that the EPA has determined that a release or threatened release has occurred at the facility; and, that Velsicol has incurred “response costs.” Instead of admitting that the response costs are consistent with the National Contingency Plan, however, Plaintiffs have stated that they do not know if the costs are consistent. Therefore, under the Federal Rules their answer is considered as a denial regarding whether the costs are consistent with the Plan. This denial, however, does not affect whether Plaintiffs are liable parties under CERCLA, it only affects what expenses Velsicol can collect in this private action under CERCLA. Accordingly, because of these admissions, Plaintiffs are liable parties under CERCLA unless they can establish one of the four statutory defenses.

V. ENVIRONMENTAL CRIMES

During the survey period, the Eleventh Circuit heard another appeal of a criminal conviction under the Resource Conservation and Recovery Act’s (“RCRA”) prohibition on transporting hazardous waste to unpermitted landfills in United States v. Goldsmith. Affirming the conviction that resulted in a two year prison sentence, the court held that to satisfy the “knowledge” requirement the government need only show that the defendant knew the waste material was not a harmless substance such as

130. 797 F. Supp. at 971.
131. Id. at 973. See supra note 83.
133. Id. at 973-74.
134. Id. at 974 (citations omitted).
135. 978 F.2d 643 (11th Cir. 1992).
as water, not that the defendant knew the waste was a specifically identified “hazardous waste.”

At issue in Goldsmith was the jury charge given by the district court. RCRA makes it a crime to transport a “hazardous waste” to an unpermitted facility. However, the RCRA definition of hazardous waste only applies to very specific types of materials. Therefore, defendant requested the following charge:

Before you can convict Mr. Goldsmith of either Count I or Count II, you must find beyond a reasonable doubt that Mr. Goldsmith knew what the substance in the barrels was, that the substance he believed was contained in the barrels was one defined as hazardous waste by the Environmental Protection Agency, and that Mr. Goldsmith knew that as to Count I that he did not have a permit from E.P.A. to transport hazardous waste, and as to Count II, that Action Testing did not have a permit to store hazardous waste.

However, the district court instead charged the jury that, before it could convict the defendant, it must find in relevant part:

That the defendant knew that the stored material had the potential to be harmful to others or to the environment, in other words, that it was not an innocuous substance like water. I charge you that in deciding whether the defendant had knowledge of the permit status at 1801 Montreal Court and 1804 Montreal Court, you are instructed that if you find that the defendant willfully failed to determine the permit status of these locations to which he moved the drums, then you may conclude that the defendant acted knowingly in this regard.

Upholding the conviction, the court said, “[i]t is not necessary that the government prove that defendant knew a chemical waste had been defined as a “hazardous waste” by the [EPA]. The Government need only prove that a defendant had knowledge of “the general hazardous character” of the chemical.”

As mentioned in the introduction to this Article, the new Clinton administration is likely to place an even greater emphasis on environmental matters than its predecessor. Due to the substantial leverage gained from the deterrence effect, criminal enforcement activity probably will continue to rise in the coming years. In light of the near strict liability of environmental crimes, vigilant compliance programs for business dealing

136. Id. at 645.
137. 978 F.2d at 644.
138. Id.
139. Id. at 645.
140. Id. (quoting United States v. Dee, 912 F.2d 741, 745 (1990)).
with potentially harmful materials or processes will become increasingly critical for the ongoing viability of the enterprise.