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Recommended Citation
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Environmental Law

by W. Scott Laseter

I. INTRODUCTION AND SCOPE

This Article is the third survey of environmental case law in the United States Court of Appeals for the Eleventh Circuit, and covers the period of January 1993 to December 1994.1 The survey comes at a time when the nation’s political climate has turned dramatically to the right with the majority of both houses of Congress now being held by the Republican Party. Over the last two decades, it sometimes appeared as if Congress was pushing a reluctant judiciary uphill towards enforcing more stringent environmental laws. In the months ahead, however, Congress may instead be seen pumping the brakes to slow down what many view as virtual runaway environmental programs. In the first few weeks of the 104th Congress, members have proposed major revisions to several cornerstone environmental statutes including the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)2 and the Clean Water Act (“CWA”),3 and have proposed to repeal the 1990 Clean Air Act Amendments.4

If history is any gauge, voices from the center and left will likely considerably water-down this ambitious agenda as the realities of the


complex nature of environmental problems and the myriad of special interests come into focus. Nonetheless, the momentum for change in the legislative and administrative branches may well re-open questions of environmental law which now appear settled. Indeed, even CERCLA's notorious scheme of retroactive joint and several liability, which has perhaps best epitomized the force of environmental law, has been opened for debate in Congress.

Despite the possibility of sweeping changes in certain programs (or perhaps because of it), this Article surveys significant environmental decisions by the Eleventh Circuit and selected decisions from the associated district courts. In keeping with past formats, the Article begins with the National Environmental Policy Act ("NEPA"), followed by the CWA and CERCLA. Also included is a section on the Resource Conservation and Recovery Act ("RCRA"), which, although not new, received significant treatment by the Eleventh Circuit for arguably the first time during the survey period. With the exception of the section on RCRA, the overview of the basic statutory scheme contained in earlier Surveys is omitted but can be obtained from those articles.

II. DISCUSSION OF CASES

A. The National Environmental Policy Act

1. Major Federal Action. In United States v. Southern Florida Water Management District the Eleventh Circuit shed further light upon what constitutes a "major federal action" sufficient to trigger NEPA's obligation that the agency access whether the environmental impacts are significant. The case arose from a long-standing dispute

10. A number of statutes which might be at home in an environmental law survey are absent either because they have not been the subject of significant decisions in the Eleventh Circuit, such as the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2603-2692 (1995), or because, like the Occupational Safety and Health Act ("OSHA"), 29 U.S.C. §§ 651-678 (1995) they are more appropriately treated in other surveys.
13. 28 F.3d 1563 (11th Cir. 1994).
concerning water pollution in the Everglades region of Florida caused by extensive agricultural activities. The United States, as the owner of both the Everglades National Park and the Loxahatchee National Wildlife Refuge, sought to compel the Florida Department of Environmental Regulation ("FDER") and the South Florida Water Management District ("SFWMD") to apply more stringent controls on excessive nutrient loading caused by run-off from agricultural activities to the north of the Everglades. In settling the case, the federal government entered into a settlement agreement with FDER and the SFWMD which the United States District Court for the Southern District of Florida converted to a consent decree.

The consent decree primarily provided interim and long-term phosphorous concentration limits for the park and refuge and delineated specific remedial programs designed to achieve those limits. At the urging of the cities of Belle Grande and Clewiston, Florida and several agricultural organizations, however, the district court held the negotiation and implementation of the Settlement Agreement constituted a "major federal action" requiring an environmental impact statement ("EIS") pursuant to NEPA. Reversing the district court, the Eleventh Circuit drew a distinction between government activities which merely lay ground work for future decision making and those which will themselves result in governmental action. The Eleventh Circuit found the primary thrust of the consent decree was to require state agencies to follow state law. The mere possibility that the consent decree might result in the future in greater federal involvement in the decision making process, either through funding or through more direct actions, was not sufficient to convert the federal government's negotiation of the consent decree into a major federal action within the meaning of NEPA.

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14. Id. at 1567-68.
16. Id. at 1569.
17. Id. at 1572. Although the district court held its finding of a major federal action would require an EIS, this holding misstates NEPA's requirements. In actuality, a finding that a project is a major federal action necessitates a less onerous environmental assessment which, in turn, determines whether an EIS is required. See 40 C.F.R. § 1501.3.
18. 28 F.3d at 1572-73.
19. Id.
20. Id. at 1573. See also Kleppe v. Sierra Club, 427 U.S. 390, 399-402 (1976); Environmental Defense Fund v. Marsh, 651 F.2d 983, 999 (5th Cir. 1981).
B. The Clean Water Act

1. Defining the Waters of United States. The Eleventh Circuit's decision in *Mills v. United States* may prove to be as significant for what it expressly did not decide as for the decision's actual holding. The case involved an appeal of the sentence from a criminal conviction arising out of the unlawful placing of fill material into the "waters of the United States" in violation of the CWA. The convictions resulted from the filling of a portion of a residential lot to build a driveway located adjacent to East Bay, which empties to the Gulf of Mexico on Florida's west coast. In appealing their sentences, the defendants raised the issue of whether the Army Corps of Engineers ("Corps") had authority to regulate the discharge of fill material into wetlands which were not navigable waters but, rather, were merely adjacent to such navigable waters. The Eleventh Circuit made short work of this defense citing the Supreme Court's decision in *United States v. Riverside Bayview Homes, Inc.* which held that the Corps' interpretation of waters of the United States to include wetlands adjacent to navigable waters is reasonable and in keeping with the expressed intent of Congress.

However, in a footnote that may be a beacon for future litigants, the Eleventh Circuit pointed out, "the question of whether the corps' authority properly extends to regulating the discharge of fill material onto wetlands not adjacent to bodies of open water was not before the Supreme Court [in *Riverside Bayview Homes*] nor is it before us now." Thus, while the decision itself is unremarkable, it could be read as an limitation to future litigants travelling under slightly different facts.

2. Statute of Limitations. In *United States v. Windward Properties, Inc.* the United States District Court for the Northern District of Georgia decided another potentially significant decision concerning section 404 enforcement cases. The case involved the alleged

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22. 36 F.3d 1052 (11th Cir. 1994).
24. 36 F.3d at 1054.
25. Id. at 1053.
26. Id. at 1056.
27. 474 U.S. 121 (1986).
28. Id. at 131-39.
29. 36 F.3d at 1056 n.5.
place of fill into three creeks as part of a large development located north of Atlanta near Alpharetta, Georgia. The construction firm had completed the fill activities by March 1982, but the government did not file suit until February 1991. Consequently, the defendant sought summary judgment on statute of limitations grounds.

The parties agreed that the five-year statute of limitations set forth in 28 U.S.C. § 2462 applied to the government's claim for fines or penalties. The government, however, asserted section 2462 did not apply to its claim for injunctive relief. Further, the government argued that the statute of limitations begins to run when the government actually learns of the violation, while the defendant argued that the period commenced at the time of violation.

On the question of whether the statute of limitations applied to the government's claim for injunctive relief, the district court held, "when legal and equitable relief are available concurrently (i.e., when an action at law or equity could be brought on the same facts), 'equity will withhold its relief . . . where the applicable statute of limitations would bar the concurrent legal remedy.'" Therefore, if the government's claim for fines or penalties was barred, the claim for injunctive relief would likewise be barred.

Considering when the limitations period begins to run, the district court rejected both the government's "actual knowledge" accrual time and the defendant's date of violation trigger. Instead, the court opted for an "objective discovery rule" under which the statutory period commences when the government either actually discovers or, "through the use of reasonable diligence should have discovered" the violation. Deciding that a genuine issue of material fact remained on when the government should have discovered the offense, the court denied defendant's summary judgment motion.

31. Id. at 692.
32. Id. at 692-93.
33. Id. at 692.
34. Id.
35. Id. at 693.
36. Id.
37. Id. (quoting Cope v. Anderson, 331 U.S. 461, 464 (1947)).
38. Id. at 695 (quoting Welch v. Celotex Corp., 951 F.2d 1235, 1236 (11th Cir. 1992)).
39. Id. The government also apparently asserted that the defendant's activities constituted a "continuing violation." Id. at 693. Although not clear from the opinion, this argument would presumably assert that each day the defendant maintains the fill material constitutes a new violation. Consequently, the government would argue that, even if the statute of limitations had run from the date of the original violation, it was still entitled to recover for any period of continuing violation during the five years immediately preceding the lawsuit. The opinion does not appear to rule on this assertion. However,
C. The Comprehensive Environmental Response, Compensation and Liability Act


a. Operator Liability. The last edition of the Environmental Law Survey reported the United States District Court for the Middle District of Florida's decision in Jacksonville Electric Authority v. Eppinger & Russell Co., which held on summary judgment that a university (Tufts) which had owned most or all of the stock of a corporation in the wood treatment business from 1925 to 1942 was not liable under CERCLA as an "operator." Affirming that decision, the Eleventh Circuit adopted a two-pronged test under which a person may be liable as an operator either because: 1) it was actually involved in the facility's day-to-day business efforts, or 2) because it was actively involved in decisions related to the disposal of hazardous substances.

The determination of whether a person qualifies as an operator is extremely fact-sensitive. Therefore, a close examination of the evidence the plaintiff presented to the trial court in its losing effort to survive summary judgment is important:

(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.
In laying out the two-pronged test, the Eleventh Circuit explained:

When reviewing the record to evaluate the sufficiency of the evidence of Tufts' operation of the Eppinger facility, we seek more than just indicia of a parent-subsidiary relationship. We look for evidence that would demonstrate that Tufts was actively involved in Eppinger's occupational business affairs, or that Tufts itself actually participated in the contamination. Finding that Tufts satisfied neither branch, the Eleventh Circuit affirmed the trial court's decision. The rather sympathetic nature of the university defendant no doubt influenced the court's analysis:

It is particularly important that the record contain such evidence in a case such as this, where the parent company—the trustees of a university—is in an entirely different business than that of the subsidiary. Certain isolated bits of evidence in this record may have greater meaning if attributed to a parent engaged in a similar endeavor such that a greater level of direct involvement and control by the parent could be presumed. Such is not the case here.

Thus, a defendant with a similar indicia of involvement in a management of the facility might fare worse if that defendant's primary business is more closely related to the types of activities engaged in at the facility.

b. Liability as Person Arranging for Disposal. In Chatham Steel Corp. v. Brown, the United States District Court for the Northern District of Florida held that a party need not have an intent to dispose of or treat hazardous substances in order to be liable as a person arranging for the disposal or treatment of hazardous substances. The relevant part of the statute provides liability for 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

44. 776 F. Supp. at 1548.
45. 996 F.2d at 1111.
46. Id.
47. Id.
owned or operated by another party or entity and containing such hazardous substances.\(^49\)

*Chatham Steel* involved a private cost recovery action at the former site of a battery recycler. The plaintiffs named a number of parties who had sold spent batteries, either directly to the recycler or to intervening brokers who subsequently sold them to the recycler.\(^50\) As to the defendants who sold batteries directly to the recycler, the court rejected defenses based on lack of intent regarding, or even knowledge of, the ultimate disposition of the batteries.\(^51\) In so doing, the Eleventh Circuit refused to follow a number of cases which have read section 107(a)(3) as requiring intent to dispose of or treat the hazardous substances before liability will attach.\(^52\) Further, the court also distinguished apparent dicta from Eleventh Circuit precedent found in *Florida Power & Light Co. v. Allis Chalmers Corp.*\(^53\)

In *Allis Chalmers*, the Eleventh Circuit held that a manufacturer of electric transformers would not be liable for clean-up costs of the facility where those transformers were disposed of by parties who purchased the transformers from the manufacturer and used them for a number of years.\(^54\) The Eleventh Circuit noted the plaintiffs in *Allis Chalmers* "did not present any affidavits to support their contention that the manufacturers intended to otherwise dispose of hazardous waste when they sold the transformers."\(^55\) The district court in *Chatham Steel*, however, read the Eleventh Circuit’s decision as placing emphasis on the fact that the defendants in *Allis Chalmers* sold useful products, not on the absence of intent.\(^56\) In contrast, the defendants in *Chatham Steel* were not selling a useful product, and they were clearly aware that the used batteries would be broken down and processed before any components would be reused.\(^57\) Consequently, the Eleventh Circuit held that the defendants who sold batteries directly to the recycler "essentially trafficked in a hazardous substance. This is precisely the type of transaction CERCLA covers."\(^58\)

\(^{49}\) 42 U.S.C. § 9607(a)(3).

\(^{50}\) 858 F. Supp at 1135-36.

\(^{51}\) Id. at 1138-42.

\(^{52}\) See, e.g., Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746 (7th Cir. 1993).


\(^{54}\) 893 F.2d at 1319.

\(^{55}\) Id.

\(^{56}\) 858 F. Supp. at 1140.

\(^{57}\) Id. at 1140-41.

\(^{58}\) Id. at 1140.
However, the court in *Chatham Steel* denied summary judgment as to certain "indirect sellers" who sold batteries to intervening brokers. In so doing, the court stated:

Unlike the other defendants, these defendants did not make the decision to sell batteries to [the recycler]. Instead, the battery broker chose who would recycle the batteries. Under the reasoning of *A & F Materials*, it would appear these indirect sellers should not be held liable under § 107(a)(3). Indeed, liability under CERCLA is not boundless. If a party does not exercise some control over the location and method of disposal, then it should not be held liable under CERCLA.

At the same time, parties cannot escape liability under CERCLA merely because they pawned their hazardous substances off on a broker or middleman. As noted earlier, persons who generate hazardous substances or arrange for their disposal should not be allowed to shirk their duties under CERCLA by operating blindfolded. Thus, the Court concludes defendants who sold batteries to [the recycler] through a battery broker cannot avoid liability merely because it was the middleman who decided to sell the batteries to [the recycler]. Instead, if the defendant had actual or constructive knowledge that [the recycler] would be the ultimate recipient of its batteries and still sold the batteries to the broker, then the defendant can be found liable under § 107(a)(3).

Finding that a genuine issue of material fact remained regarding the indirect seller's knowledge of where the batteries would end up, the court denied cross-motions for summary judgment against both the plaintiffs and the indirect sellers.

2. Lender Liability. As was suggested in the First Environmental Law Survey, the terror *United States v. Fleet Factors* visited upon the lending community in 1990 appears to have largely faded in the wake of subsequent, less threatening decisions from other circuits and a fairly pro-lender interpretive rule from the Environmental Protection

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59. *Id.* at 1144.
60. *Id.*
61. *Id.*
Agency ("EPA"). Consequently, the district court's subsequent decisions in *Fleet* have garnered far less attention. However, several aspects of the latest district court decision merit some consideration.

By way of background, *Fleet Factors* involved the bankruptcy of the Swainsboro Print Works ("SPW") and subsequent foreclosure by Fleet. Following foreclosure, Fleet hired independent contractors who imprudently handled drums of hazardous substances and asbestos waste left behind by SPW. The EPA performed a removal action and sought recovery of its response costs from Fleet. Fleet sought summary judgment under CERCLA's secured creditor exemption. The district court denied that motion on the basis that Fleet's involvement in management of the facility destroyed the exemption, a decision affirmed by the Eleventh Circuit's famous decision in *Fleet Factor*.

Following a bench trial, the district court ruled that Fleet was liable for EPA's response cost. In so doing, the court held that the EPA's Lender Liability Rule must be narrowly construed and that a secured creditor seeking protection from the rule bears the burden of showing that it falls within the exception to liability. It then examined Fleet's conduct both before and after foreclosure.

Although the court found Fleet liable due to its agent's post-foreclosure activities, lenders may find equally interesting the wide range of pre-foreclosure activities which the court said did not destroy the secured creditor exemption. These activities include: 1) liquidating inventory; 2) covering SPW's payroll; 3) paying SPW's bills; 4) participating in resolution of customer disputes; and 5) pre-approving all goods shipments, credit terms and price terms. Further, the Eleventh Circuit even stated that "incidental handling of hazardous substances does not void the Exemption." Indeed, it was not until Fleet's agents

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70. 901 F.2d at 1550, 1560.
71. 821 F. Supp. at 721.
72. Id. at 714 n.13.
73. Id. at 713 n.12.
74. Id. at 716.
75. Id.
76. Id. at 719. This statement should be compared to the Eleventh Circuit's decision in Jacksonville Elec. Auth. v. Bernuth Corp., 996 F.2d 1107 (11th Cir. 1993). That decision held that making decisions about disposal of hazardous substances can result in CERCLA liability as an "operator." Thus, if the district court's decision in *Fleet* withstands
conspicuously mishandled the hazardous substances that the court found the protection was lost. Thus, in a rather ironic twist, lenders may soon be seeking shelter under, rather than from, the Fleet Factors line of cases.


a. State Statute of Limitations. The Eleventh Circuit decided one other CERCLA case during the survey period which may have important consequences beyond the context of CERCLA litigation. In Tucker v. Southern Wood Piedmont Co., the Eleventh Circuit considered the effect of CERCLA Section 309 which requires that the statute of limitations for certain causes of actions arising under state law begin running at the time the plaintiff knew or reasonably should have known about the alleged harm (i.e., a “discovery rule”).

Tucker involved a class action brought by property owners in the vicinity of a Southern Wood Piedmont Company facility in Georgia, which for a number of years had used a variety of potentially hazardous chemicals for treating wood products. The class action made a number of state and federal law claims, including claims for nuisance under Georgia law.

Examining Official Code of Georgia Annotated section 9-3-30, the district court held that a four-year statute of limitations would apply to those claims alleging property damage. Further, under Georgia law, the statute of limitations begins to run when the alleged harm occurs, not when it is discovered. As a result, since the Southern Wood Piedmont facility had ceased the alleged harmful process in 1986, Georgia’s statute of limitations would bar those claims. However, the district court held that Section 309 required the use of a discovery rule despite Georgia’s law to the contrary.

The Eleventh Circuit affirmed. The court examined the statute which provides:

subsequent review, it appears that an argument could be made that conduct within the secured creditor exemption could nonetheless result in operator liability.

77. 821 F. Supp. at 720.
78. 28 F.3d 1089 (11th Cir. 1994).
79. Id. (citing 42 U.S.C. § 9658 (1995)).
80. Id. at 1090.
81. Id.
84. 1993 WL 733015, at *3.
85. 28 F.3d at 1093.
In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.\textsuperscript{86}

The statute defines "commencement date" as "the date specified in a [state] statute of limitations as the beginning of the applicable limitations period."\textsuperscript{87} However, the statute further provides "the term 'federally required commencement date' means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned."\textsuperscript{88} Accordingly, the Eleventh Circuit held that the four-year period provided under Georgia law begins when the plaintiffs discovered, or should have discovered, the alleged harm.\textsuperscript{89}

For jurisdictions like Georgia that do not apply the discovery rule to claims involving real property, the decision in \textit{Tucker} could have a significant impact. The precise reach of the decision, however, is unclear at this time. At least one other court has held that section 309 is limited to cases where there is also a claim for cost recovery under CERCLA.\textsuperscript{90} Since the plaintiffs in \textit{Tucker} also made claims for CERCLA cost recovery, neither the district court nor the Eleventh Circuit ever discussed this possible limitation. To date, it does not appear that any published decision from a Georgia state court or a federal court applying Georgia law has considered the effect of section 309 in the absence of a cost recovery claim. Additionally, while courts have generally upheld CERCLA's retroactive liability scheme,\textsuperscript{89} at least one commentator has suggested the constitutional due process analysis might be different.

\textsuperscript{86} 42 U.S.C. § 9658(a)(1).
\textsuperscript{87} Id. § 9658(b)(3).
\textsuperscript{88} Id. § 9658(b)(4)(A).
\textsuperscript{89} 28 F.3d at 1091.
\textsuperscript{90} See Knox \textit{v. AC&S, Inc.}, 690 F. Supp. 752 (S.D. Ind. 1988). This limitation could be particularly significant in state court cases. Under 42 U.S.C. § 9613(b), federal courts have exclusive jurisdiction over CERCLA cases. Pointing to the combination of \textit{Knox} and CERCLA's exclusive federal court jurisdiction, a state court might well hold that section 309 has no application in state court cases.
where an act of Congress retroactively changes a state level statute of limitations.92

D. Resource Conservation and Recovery Act93

1. Statutory Framework. The Resource Conservation and Recovery Act ("RCRA"),94 along with the extensive regulations promulgated under that statute, comprise what is arguably the most complex of all environmental laws. Although even a cursory survey of the entire RCRA program is far beyond the scope of this Article,95 a brief description of RCRA subtitle C will be helpful in understanding the cases discussed below.

RCRA's subtitle C was intended to create a "cradle to grave" scheme for controlling the generation, transportation and ultimate disposal of "hazardous waste."96 Although it captures a vast range of materials, the statute and regulations define the term hazardous waste very narrowly. More specifically, before a material can be hazardous waste, it must first meet the definition of solid waste.97 From the class of materials deemed solid waste, RCRA defines two subgroups of solid waste as hazardous waste.98 The first group of materials are commonly referred to as characteristic hazardous waste because they exhibit one of the four characteristics of hazardous waste: toxicity, ignitability, corrosivity, or reactivity.99 The second group of materials are those the EPA specifically lists in Sub-part D of the hazardous waste regulations.100

Among its many mandates, the RCRA regulatory scheme prohibits the treatment, storage or disposal of hazardous waste at an unpermitted facility.101 Acquiring a treatment, storage or disposal ("TSD") facility permit is so complex that it can take many years for the EPA to approve

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94. Id.
97. 40 C.F.R. 261.3(a) (1995); United States v. Self, 2 F.3d 1071 (10th Cir. 1993).
98. 40 C.F.R. 261.3(a)(2).
99. Id. §§ 261.20-261.24.
100. Id. § 261.30.
Because the range of hazardous waste activities that the regulations allow generators is extremely narrow, becoming an inadvertent TSD Facility is one of the most dangerous (and common) pitfalls in this area of environmental regulation.

2. Definition of Solid and Hazardous Waste. Inadvertent TSD Facility status was precisely the dilemma facing a secondary lead smelter in United States v. ILCO, Inc. Although the United States District Court for the Northern District of Alabama held ILCO liable on a number of other theories, the district court rejected EPA's assertion that ILCO was also operating an unpermitted TSD Facility due to its storage of lead battery components for longer than the ninety-day window allowed most generators of hazardous waste. In this regard, the district court agreed with ILCO that the lead components were not hazardous waste; rather, they were raw materials not subject to RCRA regulation. The EPA appealed this portion of the district court's opinion to the Eleventh Circuit which reversed, holding that the lead components were hazardous waste and ILCO therefore had operated a TSD facility without a permit.

It was beyond question that the lead components exhibited the characteristic of toxicity so that, if the material met the definition of a solid waste, it would clearly be a hazardous waste and ILCO would be an unpermitted TSD Facility. Thus, the key to the Eleventh Circuit's analysis was whether the lead components were "solid waste."

Building on the definition found in the statute, the RCRA regulations define a solid waste as any "discarded material" that is not otherwise excluded by the regulations. "Discarded material" means any material that is "abandoned," "recycled," or considered "inherently wastelike." Looking at ILCO's process, the Eleventh Circuit evaluat-
ed whether the lead components qualified as a solid waste by virtue of being a recycled material. 112

Under the regulation, not all materials, however, constitute solid waste when recycled. Rather, recycled material is only solid waste if it fits within one of seven categories.113 Further, the seven categories of materials only become solid waste when recycled in specific manners.114 The Eleventh Circuit focused on the first category of materials, “Spent Materials,” which are solid waste when recycled by reclamation.115 The term “spent material” is defined as “any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing.”116 Tying those provisions together, the court held: “Reclaimed material’ clearly includes lead values derived from the [lead components] at issue here . . . . Thus, the applicable regulations are unambiguous with respect to spent lead components used in a recycling process: spent materials ‘are solid waste when reclaimed’”.117

The Eleventh Circuit further bolstered its holding by emphasizing that the EPA has specifically stated that recycled lead components from batteries “are solid wastes under the federal regulations because they are spent materials being reclaimed.”118 The court noted the general rule that “courts accord great deference to the interpretation of statutes and regulations by the agency charged with administering that regulatory scheme.”119 Accordingly, the court explained that the EPA’s view that recycled lead components from batteries are solid wastes was entitled to substantial deference.120 The court went on to state, “[w]e have found nothing in the language of the statute, and ILCO has brought forth nothing from the legislative history to show that EPA’s policy choice is not one Congress would have sanctioned.”121

3. Citizens’ Suits. Like several of the major environmental statutes, RCRA contains a “citizens’ suit” provision122 which allows private persons to bring actions for non-compliance with certain

112. 996 F.2d at 1131.
113. 40 C.F.R. § 261.2 (Table 1).
114. Id.
115. 996 F.2d at 1131 (citing 40 C.F.R. § 261.2 (Table 1)).
116. 40 C.F.R. 261.1(c)(1).
117. 996 F.2d at 1131.
119. 996 F.2d at 1132 n.11.
120. Id. (quoting Borden v. Meese, 803 F.2d 1530, 1535 (11th Cir. 1986)).
121. Id. at 1132.
provisions of the statute where the government has failed to enforce the requirements in question. In *Paper Recycling, Inc. v. Amoco Oil Co.*, the United States District Court for the Northern District of Georgia refused to grant summary judgment against a property owner who filed a citizen's suit against a petroleum pipeline company where petroleum products had escaped from the pipeline onto the plaintiff's property. The Plaintiff based its claim on the "imminent hazard" section of RCRA's citizen's suit provision which allows a private party to commence a civil action on its own behalf:

against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

In allowing Plaintiff's citizen's suit to stand, the court agreed with a handful of other district courts which have held that the "leaking" of petroleum products into soil or groundwater constitutes "disposal" and that, once the petroleum product escapes from the underground vessel, the material is solid waste by virtue of being "abandoned." Thus, the court held that Plaintiff was entitled to an opportunity to show that the defendant's "disposal" of solid waste represented "an imminent and substantial endangerment to health or the environment."

Although the cases cited by the district court do support its holding, there is authority to the contrary from other federal jurisdictions, at least in the context of petroleum underground storage tanks ("UST's"). In *Winston v. Shell Oil Co.*, the court held that releases of petroleum products from USTs is regulated solely under Subchapter IX of the SWDA and that subchapter IX has no citizen's suit provision. Therefore, the court reasoned, the government has the exclusive

124. Id. at 674.
127. 856 F. Supp. at 675.
129. Id. at 718.
authority to enforce violations caused by releases from petroleum USTs. 130

130. 864 F. Supp. at 718. See also Edison Elec. Inst. v. EPA, 2 F.3d 438 (D.C. Cir. 1993) (upholding EPA's interpretation that petroleum USTs are not subject to regulation under the hazardous waste program).