Environmental Law

W. Scott Laseter

Julie V. Mayfield

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr

Part of the Environmental Law Commons

Recommended Citation
Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol48/iss4/9

This Survey Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.
Environmental Law

W. Scott Laseter* and
Julie V. Mayfield**

I. INTRODUCTION AND SCOPE

This Article marks the fourth survey of environmental law in the Eleventh Circuit.¹ In terms of environmental issues, the most recent period was an active one for the Eleventh Circuit and its associated district courts² during which the appellate court handed down its first Endangered Species Act decisions;³ issued a sweeping decision under the Comprehensive Environmental Response, Compensation, and Liability Act;⁴ and heard several other cases raising important environmental questions. Additionally, the survey period saw a federal district judge from Alabama strike a blow against Superfund's⁵ vaunted armor

---


** Associate in the firm of Kilpatrick Stockton, Atlanta, Georgia. Davidson College (B.A., cum laude, Religion, 1989); Emory University School of Law (J.D., with distinction, 1996). Emory International Law Review, Executive Articles Editor (1995-1996).


3. See infra discussion beginning at n. 204.

4. See infra discussion beginning at n. 112.

5. Superfund is a common name for the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675, in reference to the trust fund used to finance some of the United States Environmental Protection Agency's activities under the statute.
by declaring that the statute should not be given retroactive effect. While the long-term viability of that particular decision remains to be seen, it has at least sparked a spirited debate among environmental practitioners both in the Eleventh Circuit and across the country.

In keeping with previous surveys, this Article begins by discussing cases addressing the National Environmental Policy Act ("NEPA"), followed by the Clean Water Act ("CWA"), the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), and the Resource Conservation and Recovery Act ("RCRA"). As suggested earlier, this survey also includes a discussion of the Endangered Species Act ("ESA"). With the exception of the section on the ESA, this Article omits a review of the basic statutory scheme of the acts in question as these reviews can be found in previous survey articles.

II. DISCUSSION OF CASES

A. National Environmental Policy Act

The Eleventh Circuit considered two cases during the survey period that raised the issue of what constitutes a "significant impact" on the environment sufficient to trigger an obligation to perform an environmental impact statement ("EIS") under NEPA. In both cases, plaintiffs disagreed with the agency's determination that its proposed action would not have a significant impact, and in both cases the court upheld the agency's decision. These cases join with decisions from this and other circuits indicating that, to challenge an agency's action under NEPA, plaintiffs must do more than earnestly disagree with the agency's decision. Rather, to prevail, NEPA plaintiffs must almost always show that the agency either failed to take into consideration relevant information or made some fundamental analytical error.

12. See supra note 1.
13. See Dubois v. United States Dept' of Agric., 102 F.3d 1273 (1st Cir. 1996) (EIS prepared by Forest Service did not sufficiently explore all reasonable alternatives); City of Carmel-by-the-Sea v. United States Dept' of Transp., 95 F.3d 892 (9th Cir. 1996) (EIS by Federal Highway Administrator did not consider the reasonable range of alternatives, its cumulative impact analysis was insufficiently detailed, and its reliance on old data rendered the EIS inadequate); Oregon Natural Resources Council v. Marsh, 52 F.3d 1485
In *Preserve Endangered Areas of Cobb's History, Inc. v. United States Army Corps of Engineers*, the Eleventh Circuit considered whether the United States Army Corps of Engineers ("Corps") acted arbitrarily and capriciously in issuing a finding of no significant impact ("FONSI") following an environmental assessment ("EA") in connection with a CWA section 404 permit application. While at first glance the decision appears to consider whether the issuance of the section 404 permit was a "major federal action," the case is best understood as raising the question of what constitutes a "significant impact." Accordingly, a brief detour to review the Corps' regulations implementing NEPA may be helpful before discussing the case itself.

Normally, the threshold question in NEPA cases is whether the proposed agency activity is a "major federal action." In the absence of a major federal action, NEPA simply does not apply. If, on the other hand, the activity is a "major federal action," the next question is whether the action will have a "significant impact" on the environment. The Corps' regulations, however, alter this analytical sequence in that the Corps concedes that the issuance of a section 404 permit is a major federal action. Accordingly, under the Corps' regulations, the...
threshold question in section 404 permit cases is whether the proposed action will have a significant impact on the environment. This question is answered through the preparation of an EA.\textsuperscript{22} Although the court in \textit{Preserve Endangered Areas} makes reference to the question of whether the permit approval was a major federal action, the real thrust of the opinion deals with the question of significant impact.

Plaintiffs in \textit{Preserve Endangered Areas} sued to stop a proposed road which would have cut through approximately four acres of wetland as well as one acre of a Cobb County, Georgia, historic district.\textsuperscript{23} As part of the CWA section 404 permit application, Cobb County developed a mitigation plan that set aside almost twenty acres of wetlands for preservation and restored another eight acres of wetlands.\textsuperscript{24} The plan also contained measures to mitigate the effect the highway would have on the historic district by providing for special signs and limited access in those areas.\textsuperscript{25} Taking into account the mitigation plan, the Corps issued a FONSI and granted the section 404 permit application, determining the project would not significantly affect the environment.\textsuperscript{26}

Claiming that the Corps acted arbitrarily and capriciously in issuing the permit, plaintiffs first argued that the Corps should not have segmented the project so that it was viewed in isolation instead of as part of a larger highway system.\textsuperscript{27} The court, as had the Corps, examined the project under the Federal Highway Administration guidelines that govern whether a project is a stand-alone project.\textsuperscript{28} Placing the burden on the plaintiffs, the court held that they failed to show that the Corps had not considered these factors or that it was fundamentally mistaken in its analysis.\textsuperscript{29} Therefore, the court held, the Corps “did not act arbitrarily and capriciously when it analyzed the highway as a stand-alone project.”\textsuperscript{30}

\begin{itemize}
\item \textsuperscript{22} 33 C.F.R. § 230.10 (1996).
\item \textsuperscript{23} See 87 F.3d at 1245.
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id. at 1247.
\item \textsuperscript{28} See id. Numerous decisions have used these factors in examining highway segments for purposes of NEPA analysis. See Save Barton Creek Ass'n v. Federal Highway Admin., 950 F.2d 1129 (5th Cir. 1992); Village of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477 (10th Cir. 1990); Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294 (D.C. Cir. 1987); Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430 (6th Cir. 1981); Swain v. Brinegar, 542 F.2d 364 (7th Cir. 1976); Daly v. Volpe, 514 F.2d 1106 (9th Cir. 1975); Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973).
\item \textsuperscript{29} 87 F.3d at 1247-48.
\item \textsuperscript{30} Id. at 1248.
\end{itemize}
The court next considered plaintiffs' position that the highway would have a significant impact on both the wetlands and the historic district. On both points, however, the court found that the Corps did not err in its decision. The court explained:

[Although the plaintiffs disagree with the conclusion of the Corps, they can point to nothing that would make the Corps' decision arbitrary and capricious. The Corps considered the impact on the wetlands, considered the county's mitigation plan, and reasonably concluded that the impact on the wetlands would not be significant.]

As for the historic district, the court likewise stated that, "[t]he plaintiffs may disagree with [the Corps' conclusion], but the Corps considered their arguments, considered the effects on the district, and considered the county's mitigation plan. The conclusion was based on those considerations." Accordingly, the Eleventh Circuit affirmed the district court's grant of summary judgment in favor of the Corps on the NEPA issues.

In Fund for Animals, Inc. v. Rice, the Eleventh Circuit further emphasized the need for plaintiffs to produce either new information or show material analytical errors in order to prevail under NEPA. Fund for Animals involved a Florida county's effort to build a landfill on a 6150 acre site called the Walton Tract. The site contained significant acreage of wetlands, giving rise to the county's application for a CWA section 404 permit. As part of its review process, the Corps performed an EA and issued a FONSI. Consequently, the Corps issued the section 404 permit without preparing an EIS.

Among a number of other claims, plaintiffs objected to the Corps' FONSI under NEPA. Following the district court's grant of summary judgment in favor of the Corps, plaintiffs appealed, claiming that the Corps ignored the proposed project's harmful effects on the environment.

31. Id.
32. Id.
33. Id.
34. Id. at 1248-49.
35. Id. at 1250.
36. 85 F.3d 535 (11th Cir. 1996).
37. Id. at 539.
38. Id.
39. Id. See supra notes 21-22 for discussion of the Corps' regulations triggering the need for NEPA analysis.
40. 85 F.3d at 539.
41. Plaintiffs also asserted claims under the CWA and ESA, see 85 F.3d at 540, which are discussed in the respective sections of this Article. See infra text accompanying notes 83-92 and 216-19.
and, therefore, violated NEPA by not preparing an EIS. Setting forth the familiar standard of review, the court explained that its "only role [under NEPA] is to ensure that the agency has taken a 'hard look' at the environmental consequences of the proposed action." Thus, "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot interject itself within the area of discretion of the executive."

Examining the facts, the court noted that when the Corps issued the FONSI, it had in its possession two "no jeopardy" biological opinions issued by the Fish and Wildlife Service ("FWS") regarding the endangered and threatened species in the area, volumes of information gathered at two public hearings, the benefit of five years of administrative review of the project, and the approval of the permit by the EPA. Based on this information, the court found that the Corps had considered all the environmental consequences of the landfill raised by plaintiffs, and therefore, the Corps' decision was not arbitrary or capricious.

As suggested earlier, Fund for Animals and Preserve Endangered Areas join a long line of cases in which courts have refused to second-guess an agency's judgment regarding the importance or significance of impacts when the agency has considered all the pertinent information. The lesson of these cases is that success under NEPA is more likely if a plaintiff can call to the court's attention either factors not considered by the agency in assessing the significance of the impacts or an error in its analysis, rather than merely pressing a disagreement with the agency's conclusion, no matter how heart-felt (or even justified) the plaintiff's difference of opinion may be.

B. Clean Water Act

The following CWA cases are divided into two sections. The first section examines those cases that are brought under the citizen suit provision of the CWA. The second section considers a case brought by the government for a violation of section 404.

42. 85 F.3d at 546.
43. Id. (quoting Druid Hills Civic Ass'n v. Federal Highway Admin., 772 F.2d 700, 709 (11th Cir. 1985)).
44. Id. at 546-47 (quoting Stryker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1979)).
45. Id. at 546.
46. Id. at 546-47.
47. See supra cases cited at notes 13 and 14.
1. Citizen Suits. In *Hughey v. JMS Development Corp.*, the court considered whether a defendant home builder had violated section 301 of the CWA by discharging stormwater without a National Pollutant Discharge Elimination System ("NPDES") permit when no permit for such construction activities was available. JMS commenced construction on a residential subdivision, having obtained all the required state and local permits that were available at that time. Under section 402 of the CWA, the EPA has delegated administration of the NPDES program in Georgia to the state's Environmental Protection Division ("EPD"). Although under the CWA regulations construction activities disturbing greater than five acres are prohibited without a permit, at the time JMS commenced construction, the EPD was not issuing stormwater permits, explaining that it was waiting for the EPA's development of federal guidelines.

During and after construction of the subdivision, silt-laden rainwater ran off the property into the Yellow River, and plaintiff sued JMS alleging it violated the CWA by discharging pollutants without a permit. Plaintiff argued that, in the absence of a lawfully issued permit setting discharge conditions and limits, defendants were not allowed to discharge any pollutants into the waters of the United States. JMS defended on the basis that it should not be punished for "failing to secure a NPDES permit when no such permit was available." The district court rejected this defense and granted plaintiff both a permanent injunction and his attorney fees.

---

48. 78 F.3d 1523 (11th Cir.), cert. denied, 117 S. Ct. 482 (1996).
49. The "National Pollution Discharge Elimination System" ("NPDES") program regulates "point source" discharges of pollutants into the waters of the United States. 33 U.S.C. § 1362(14) (West Supp. 1996). These permits principally target industrial and municipal waste water. Under the regulatory scheme, dischargers normally must obtain a permit from the EPA. States, however, may develop their own permitting program. If the EPA approves a state's program, the state then becomes the implementing agency for NPDES permits although the federal agency retains authority to veto state issued permits. All three Eleventh Circuit states have delegated NPDES programs; however, Florida is not yet fully authorized to issue stormwater permits. Id. § 1342. Section 1342(p) of the CWA extends the NPDES program to stormwater discharges.
52. 78 F.3d at 1526.
53. Id. at 1527.
54. Id.
55. Id. at 1528.
56. Id. at 1524.
Observing that its jurisprudence has "eschewed the rigid application of a law where doing so produces impossible, absurd, or unjust results," the Eleventh Circuit reversed. The appellate court focused not only on the impossibility of obtaining a permit, but also on the factual impossibility of complying with the zero discharge standard contained in section 301 for stormwater, because "[t]he evidence was uncontroversial that whenever it rained in Gwinnett County some discharge was going to occur; nothing JMS could do would prevent all rain water discharge." The court pithily added, "[p]ractically speaking, rain water will run downhill, and not even a law passed by the Congress of the United States can stop that." Due to the fact that there was no NPDES permit available to JMS, that JMS had complied with all state and county discharge limits on stormwater, that the discharges were minimal, and that zero discharge was factually impossible, the court found that JMS was not in violation of the CWA. In so doing, the court refused to place on JMS the burden produced by the EPD's inability to issue a stormwater permit.

*Preserve Endangered Areas*, discussed previously in the section on NEPA, also involved a CWA citizen suit claim. In that case, plaintiffs tried to block construction of a highway segment by challenging the Corps' issuance of a CWA section 404 permit. In addition to their NEPA claims, plaintiffs purported to bring a citizen suit under the CWA against both the Corps and the EPA, alleging that the Corps' issuance of the section 404 permit violated the CWA and, further, that the EPA Administrator failed in her duty to veto the permit. Rejecting these assertions, however, the Eleventh Circuit affirmed the district court's dismissal of all the CWA claims, holding that the CWA does not permit citizen suits challenging the issuance or denial of a section 404 permit.

Analyzing the CWA claims against the Corps, the Eleventh Circuit noted that section 1365 of the CWA authorizes suits only "against the Administrator where there is alleged a failure of the Administrator to

---

57. *Id.* at 1529.
58. *Id.* at 1530.
59. *Id.*
60. *Id.*
61. *Id.* at 1532.
62. 87 F.3d 1242 (11th Cir. 1996). *See supra* text accompanying notes 15-35 for the discussion of the NEPA issues involved in that case.
63. 87 F.3d at 1245.
64. *Id.*
66. 87 F.3d at 1249.
The issue of whether the Corps is subject to a citizen suit has been dealt with by courts in two other circuits. In *National Wildlife Federation v. Hanson*, the Fourth Circuit held that the Corps could be sued in a citizen suit because its duty is nondiscretionary, while the District Court for the Western District of Washington recently rejected such a suit in *Cascade Conservation League v. M.A. Segale, Inc.* The Eleventh Circuit's holding raises the question of how citizens can properly challenge the Corps' issuance of a section 404 permit. Although the Eleventh Circuit did not address the issue, the court in *Cascade Conservation League* suggested that the Administrative Procedure Act ("APA") and federal question jurisdiction provide adequate avenues for citizens to sue the Corps.

As for the EPA, the Eleventh Circuit noted that citizen suits under the CWA are available only to compel the Administrator to perform nondiscretionary duties. With regard to the EPA's oversight of the Corps' section 404 program, the statute merely provides that "the Administrator is authorized to prohibit the specification" of a site for disposal purposes when the Corps has approved the site. Citing the emphasized language, the court held that the citizen suit provision of the CWA does not allow citizens to sue the Administrator for failure to disapprove the Corps' decision to issue a section 404 permit.

---

68. 87 F.3d at 1249.
69. Id.
70. Id.
71. 859 F.2d 313 (4th Cir. 1988).
72. Id. at 315-16.
74. Id. at 696.
77. 921 F. Supp. at 697 (citing Oregon Natural Resources Council v. United States Forest Serv., 834 F.2d 842 (9th Cir. 1987)).
78. 87 F.3d at 1249.
80. 87 F.3d at 1249.
Plaintiff had argued that the court's decision would effectively nullify the CWA citizen suit provision in relation to section 404 permits, thereby making it impossible to challenge the issuance of such a permit. Although the court acknowledged this concern, it responded only by stating that a court's role in interpreting a statute is to "presume that a legislature says in a statute what it means and means in a statute what it says there." The unstated corollary is that if Congress did not intend this result, the burden is on Congress, not the courts, to remedy the problem.

Fund for Animals, Inc. v. Rice also included a citizen suit challenge to the Corps' issuance of a section 404 permit. As discussed in more detail earlier, that case involved the construction of a landfill in Sarasota, Florida. At trial, plaintiffs in Fund for Animals asserted three violations of the CWA by the Corps: (1) that the Corps acted arbitrarily and capriciously in failing to choose an alternative site where there would be less of an adverse impact on the wetlands; (2) that the Corps acted arbitrarily and capriciously in failing to consider the cumulative impacts of the decision to issue the section 404 permit; and (3) that the Corps failed to give notice and hold a public hearing on the permit. The Eleventh Circuit rejected each of plaintiffs' three CWA arguments and affirmed the district court's grant of summary judgment.

With regard to the first two arguments, the court again showed its deference to agency decisions in cases where plaintiffs object to the agency's value judgments, but fail to show an analytical error or to show that the agency failed to consider relevant information. On the issue of the Corps' alternatives analysis, the Eleventh Circuit stated:

In discussing the alternatives analysis, the district court did not suggest, nor do we, that practicable alternatives may be ignored because of the mitigation potential of a site, as the Plaintiffs claim. To the contrary, the district court recognized, as do we, that the Corps had

81. Id. at 1250.
82. Id. (quoting Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992)).
83. 85 F.3d 535 (11th Cir. 1996). This case is also discussed in the NEPA and ESA sections of this Article. See supra text accompanying notes 36-46 for the NEPA discussion, and infra text accompanying notes 217-20 for the ESA discussion. Interestingly, although the CWA basis for this suit was the same as that found in Preserve Endangered Areas, the court never addressed whether the CWA citizen suit provision could be used to challenge the issuance of a section 404 permit. According to counsel for plaintiffs, the Corps simply never raised it as a defense. Therefore, while Funds for Animals is technically a citizen suit case, it is probably better understood as a case challenging the Corps' actions under the Administrative Procedure Act.
84. 85 F.3d at 542.
85. See id. at 542-45.
taken into account all the considerations which factor into the alternatives analysis . . . . Sarasota County, the Corps, the F.W.S., and the E.P.A. all scrutinized the project for over five years, and all agree that the Walton Tract is the most suitable site for the new landfill. Accordingly, insofar as the CWA practicable alternatives analysis is concerned, we hold that the Plaintiffs failed to demonstrate that the Corps acted arbitrarily and capriciously in granting a permit to fill seventy-four acres of wetlands on the Walton Tract. 86

Likewise, on the issue of cumulative impacts, the court disagreed with plaintiffs' assertion that the Corps had failed to take into account the impact of the landfill on the Florida panther. 87 Rather, the court found that the Corps had considered the cumulative impacts and even proposed steps to offset the impacts. 88 The fact that plaintiffs merely disagreed with the Corps' decisions did not make them arbitrary and capricious. 89

With regard to plaintiffs' third argument that the Corps failed to hold a public hearing on the permit, the court noted that the CWA does require the "opportunity for public hearings." 90 However, the court held:

[t]he statute does not state that the Corps itself must hold its own public hearings regardless of how many other hearings have been held on a project. The applicable regulations provide the Corps discretion to hold hearings on permit applications on an "as needed" basis. If the Corps determines that it has the information necessary to reach a decision and that there is "no valid interest to be served by a hearing," the Corps has the discretion not to hold one. 91

The court found that, because the state had already held two public hearings on the project, the Corps was not required to hold an additional hearing. 92

Finally, at least one district court decision merits discussion under this citizen suit section. Sierra Club v. Hankinson 93 involved a citizen suit brought against the EPA as a result of the State of Georgia's failure to issue Total Maximum Daily Loads ("TMDLs") for its rivers, as required under the CWA. 94 To understand the court's decision, a brief review of

86. Id. at 544.
87. Id. at 545.
88. Id.
89. Id.
91. 86 F.3d at 545 (citations omitted).
92. Id.
the statutory requirement is helpful. TMDLs are part of the Water Quality Standards Program under which states are required to adopt water quality standards for individual bodies of water in the state based on the uses of the given body of water and the amount of pollution that would impair those uses. If the effluent limitations imposed under the NPDES program do not permit a water body to reach the water quality standard applicable to it, then the state is required to establish and enforce TMDLs for each pollutant that is preventing that body of water from attaining its water quality standard. The TMDL is the total amount of any given pollutant, from both point and nonpoint sources, that can enter the water each day, with allowances made for seasonal variation and a margin of safety. Further, the CWA specifically requires the EPA to develop water quality standards and TMDLs if a state fails to do so or if the EPA disapproves of the lists produced by the states.

Under the CWA, 1979 was the first deadline for submission by states of the list of bodies of water that did not meet water quality standards ("water quality limited segments" or "WQLSs") and the accompanying TMDLs. Georgia submitted its first list of WQLSs in 1992 and its first TMDLs in 1994. As of the date of the district court's hearing on cross-motions for summary judgment, Georgia had submitted, and the EPA had approved, only two TMDLs for the state's list of WQLSs.

Among other arguments, plaintiffs in Sierra Club v. Hankinson asserted that the EPA had a duty to develop TMDLs for Georgia because the state had failed to do so. On the issue of TMDLs, the court held:

Georgia clearly has not complied with the TMDL requirements of the Clean Water Act. The CWA requires states to submit TMDLs for all WQLSs. In over sixteen years since Georgia's first TMDL submissions were due, Georgia has developed only two TMDLs, both submitted after the filing of this action . . . . Defendants state that Georgia has promised to develop approximately 25 complex TMDLs for its major river basins within the next eight years. At this pace, Georgia will take over a hundred years to complete TMDLs for the approximately 340 WQLSs identified on the 1994 WQLS list.

95. Id. § 1313(a).
96. Id. § 1313(d)(1).
97. Id. § 1313(d)(1)(C).
98. Id. § 1313(d)(2).
100. Id.
101. Id.
102. Id.
The tight deadlines for submission of TMDLs demonstrate a congressional intent that TMDLs be established promptly. Georgia's submissions clearly fail CWA's requirement that states promptly identify TMDLs for all WQLSs. The statutory framework of the CWA granted EPA an oversight function to ensure that states fulfill their statutory duties. While the Court acknowledges that the Clean Water Act places "primary reliance for developing water quality standards on the states," the Court believes that the Act requires EPA to step in when states fail to fulfill their duties under the Act. The Court finds that EPA's failure to disapprove of Georgia's inadequate TMDL submissions was arbitrary and capricious in violation of the Administrative Procedure Act and that EPA's failure to promulgate TMDLs for Georgia violates the Clean Water Act. Therefore, the Court grants summary judgment in favor of plaintiffs on their TMDL claim.

The Hankinson decision could have tremendous implications. At least theoretically, every NPDES permit authorizing discharges into a WQLS that has constituents above the TMDL is subject to modification. Thus, the issue of TMDLs will almost certainly be the subject of future editions of this survey.

2. Statute of Limitations Under Section 404. One other district court decision under the CWA warrants some discussion. In United States v. Reaves, defendant raised the statute of limitations as a defense in a suit brought by the government for civil penalties and injunctive relief arising out of the alleged filling of wetlands without a section 404 permit in violation of the CWA and the Rivers and Harbors

103. *Id.* at 871-72 (footnotes and citations omitted).

104. Shortly after the issuance of this decision, the court entered an order establishing the basic parameters of a short and long term TMDL process for Georgia. Sierra Club v. Hankinson, No. 1:94-CV-2501 MHS (N.D. Ga. September 30, 1996). Under the Order, EPA must promulgate (or ensure that the State promulgates) TMDLs for all WQLSs according to a basin-by-basin schedule coordinated with Georgia's River Basin Management Plan. TMDLs must be established for the Chattahoochee and Flint River basins by June 30, 1997 and for the state's other four major river systems by June 30, 2001 at a rate of one per year. If EPA elects not to follow Georgia's current River Basin Management Plan, TMDLs must be submitted at a rate of 20% per year for five years. Within one year after promulgation of the TMDL, EPA or the state must modify, revoke and reissue, or terminate NPDES permits as necessary to implement the TMDL. On December 31 of each year, EPA must submit a report to the court detailing its progress in promulgating and implementing TMDLs for Georgia's WQLSs. An appeal of the court's decision in this case is pending before the Eleventh Circuit, but the Order continues to be in effect.

Act. The Corps discovered the violation in 1989 and did not file suit against the owner until 1994, thirteen years after the initial discharge.

In the absence of an express statute of limitations for government actions in the CWA itself, the parties agreed that 28 U.S.C. § 2462 applied to government actions for civil penalties. That section provides a five-year statute of limitations that begins when the claim first "accrued." Defendant asserted the claim accrued when the violation first occurred, that is, when he discharged the fill material into the creek in 1981. However, the government argued that defendant's violation of the CWA was a continuing violation so long as the fill material remained in place without a permit. Accordingly, each new day commenced a new limitations period. The court agreed with the government, adopting the reasoning of the Fourth Circuit in Sasser v. Administrator, and holding that the "unpermitted discharge of dredged or fill materials into wetlands on the site is a continuing violation for as long as the fill remains." As a result, the court held the statute of limitations did not bar the government's claim.

C. Comprehensive Environmental Response, Compensation, and Liability Act

The Eleventh Circuit's decision in Redwing Carriers, Inc. v. Saraland Apartments added significantly to the court's CERCLA jurisprudence. That opinion addresses a variety of issues, including the scope of persons liable under the statute, the availability of joint and several liability between responsible parties, and the availability of the third party defense. In addition, by negative implication, the case rebuked a recent district court decision questioning the retroactive application of the statute.

107. 923 F. Supp. at 1533.
110. 923 F. Supp. at 1534.
111. Id.
112. 94 F.3d 1489 (11th Cir. 1996).
113. See United States v. Olin Corp., 927 F. Supp. 1502 (S.D. Ala. 1996), rev'd, 107 F.3d 1506 (11th Cir. 1997), in which Judge Hand held that, in light of the Supreme Court's decision in Landgraf v. USI Film Products, 511 U.S. 244 (1994), CERCLA should not be presumed to have retroactive effect and in the absence of clear expression of congressional
Redwing Carriers involved a lawsuit to recover costs associated with cleaning up a former trucking facility that had been redeveloped into an apartment complex.\textsuperscript{114} Redwing Carriers, Inc. ("Redwing") had used the property as a trucking terminal from 1961 to 1972.\textsuperscript{115} During that period, the terminal serviced trucks carrying construction and other materials that included asphalt, tar, and sulfur. Trucks were cleaned out on site, with wastewater running directly onto the ground.\textsuperscript{116} In addition, Redwing also dumped excess asphalt and other materials into pits dug on site.\textsuperscript{117} In 1971, Redwing sold the property to a series of intervening landowners who, in turn, sold the property in 1973 to Saraland Apartments, Ltd. ("Saraland").\textsuperscript{118} Saraland then hired Meador Contracting Company ("Meador") to build an apartment complex on the site.\textsuperscript{119} As part of the construction project, Meador had to grade, excavate, and fill the ground on the property, during which time its subcontractors encountered "patches of contaminated soil and deposits of ... tar-like substances buried by Redwing."\textsuperscript{120} In 1980, Saraland hired Marcrum Management Company ("Marcrum") as its "management agent" for the property.\textsuperscript{121} In 1984, a group of investors (the "Partnership") bought-out the original partners in Saraland.\textsuperscript{122}

\textsuperscript{114} 94 F.3d at 1494.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 1495.
Specifically, a group referred to as the "Hutton Partners" purchased a ninety-nine percent limited partnership interest, while Robert Coit and Roar Company purchased a one percent general partnership interest. Under the partnership agreement, Coit and Roar were primarily responsible for managing the business of the partnership.\textsuperscript{123}

Saraland first became aware of tar seeping onto the surface of the property in 1977.\textsuperscript{124} By the mid-1980s, the EPA was involved with the site, entering into an administrative order with Redwing in 1985.\textsuperscript{125} By the time of the lawsuit, Redwing claimed to have spent approximately $1.9 million in investigation and clean-up costs at the site.\textsuperscript{126}

Due to the range of topics covered by the decision, the following discussion divides the decision by its major issues. When other cases during the survey period address the same issues, those decisions will be discussed in those subsections alongside Redwing Carriers.

1. Persons Liable. By its statutory scheme, CERCLA makes four different classes of persons potentially liable for response costs.\textsuperscript{127} The Redwing Carriers decision addresses three of these four categories. Specifically, Redwing filed suit against the Partnership and its general and limited partners as current owners and operators of the site and as persons who arranged for the disposal of hazardous substances.\textsuperscript{128} Redwing also filed against Meador as a person who arranged for the disposal of hazardous substances and against Marcrum as both a current operator and as an operator at the time of disposal.\textsuperscript{129} The district court granted summary judgment on the issue of liability in favor of all

\begin{itemize}
  \item \textsuperscript{123} Id.
  \item \textsuperscript{124} Id. at 1494.
  \item \textsuperscript{125} Id. at 1495.
  \item \textsuperscript{126} Id.
  \item \textsuperscript{127} 42 U.S.C. § 9607(a) (1994). These potentially liable parties are:
    \begin{itemize}
      \item (1) the owner and operator of a vessel or a facility,
      \item (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,
      \item (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,
      \item (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . .
    \end{itemize}
  \item \textsuperscript{128} 94 F.3d at 1497.
  \item \textsuperscript{129} Id.
\end{itemize}
the defendants except the Partnership, which conceded it was a liable party as the current owner of the site. However, the district court allocated one-hundred percent of the response costs to Redwing, thereby absolving the Partnership of any liability under CERCLA. Redwing then appealed both the district court's decision regarding the liability of the other defendants and its decision on the allocation of costs.

a. Current Owners and Operators. As a threshold matter, in granting summary judgment in favor of the partners, the district court read literally the phrase "owner and operator" in section 107(a)(1) as being a requirement that the liable party be both owner and operator of the site. However, citing to its earlier decision in United States v. Fleet Factors Corp., the Eleventh Circuit noted that earlier panels of the court had already "interpreted the phrase 'owner and operator' in subsection 107(a)(1) to be disjunctive, imposing liability on any person who was either the current owner or the current operator of a facility." The Eleventh Circuit went on to state that, despite the language of the statute, "[t]he district court was not free to disregard Fleet Factors [sic] reasoning, and neither are we." Accordingly, it is "settled that a person is a responsible party under subsection 107(a)(1) if they are the current owner or operator of a facility."

With that preliminary point settled, the court began its discussion of whether the limited partners were liable as owners of the site. In analyzing the issue, the Eleventh Circuit looked to state partnership law for guidance on the definition of owners of real property. Finding that Alabama law did not make limited partners owners of the partnership property, the court held the limited partners were not owners within the meaning of CERCLA.

After deciding that the limited partners were not current owners of the property, the court next considered whether they might be "oper-
Plaintiff argued that, under the Fourth Circuit's "authority to control" test, the limited partners should be liable as operators because, under the partnership agreement, they had the right to control certain partnership activities.\textsuperscript{142} However, the court said that "the Fourth Circuit's 'authority to control' test is simply incompatible with our reasoning in \textit{Jacksonville Electric} . . . in which we adopted the 'actual control' standard for operator liability."\textsuperscript{143} The "actual control" test is a bifurcated standard under which a plaintiff must show the defendant "either (1) actually participated in operating the Site or in the activities resulting in the disposal of hazardous substances, or (2) 'actually exercised control over, or [were] otherwise intimately involved in the operations of' the Partnership."\textsuperscript{144} Under this test, the court held that the limited partners were not liable as "operators."\textsuperscript{145}

The court then turned to the question of liability for the general partners who raised the so-called third-party defense under section 107(b).\textsuperscript{146} For purposes of its analysis, the court assumed that the general partners were within the class of responsible parties under section 107(a).\textsuperscript{147} Under the third party defense, a party is not liable if it can show that

\begin{quote}
the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

. . . (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions . . . \textsuperscript{148}
\end{quote}

Looking at Coit's and Roar's actions regarding the tar seeps, the court found that

\textsuperscript{141} Id. at 1502-03.
\textsuperscript{142} Id. at 1504.
\textsuperscript{143} Id. at 1505.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id. at 1507.
\textsuperscript{147} Id.
\textsuperscript{148} Id. at 1507-08 (citation omitted).
Coit and Roar have satisfied all the elements of this defense. The general partners have never had a direct or indirect contractual relationship with either Redwing or Meador Contracting Company — the only two parties whose conduct potentially caused the release or threat of hazardous substances at the Saraland site . . . .

The record indicates that since 1984, the general partners have exercised due care towards the hazardous substances contaminating the property.

. . . . Coit and Roar have demonstrated they did nothing to exacerbate conditions at the Site.149

Based on this finding, the court held, “Coit and Roar have carried their burden of demonstrating they are entitled to summary judgment on their third-party defense under [section] 107(b). This defense relieves the general partners of any direct liability under CERCLA.”150

Redwing also asserted that Marcrum, the current apartment management company, was liable as a current operator under section 107(a)(1).151 Marcrum defended by claiming that it only provided administrative assistance in running the complex that, it argued, should not be sufficient to create operator liability under CERCLA. Due to the fact-sensitive nature of operator liability under CERCLA, it is important to review the list of duties Marcrum executed as managing agent for the complex. In performing these duties, Marcrum:

1. prepared annual budgets for the complex and required the resident manager to regularly report expenses to Marcrum and seek approval from Marcrum of any expenses exceeding the budget;
2. regularly inspected the complex, and required the resident manager to perform quarterly inspections and report on these inspections to Marcrum;
3. ordered the resident manager to implement major improvement and repair programs for the complex as a whole;
4. ordered the resident manager to make specific repairs to particular units by certain deadlines;
5. received complaints from tenants, and forwarded these complaints to the resident manager with instructions as to how and by when to respond to the complaints; and
6. prepared proposed rent increases for approval by the Partnership and HUD.

In addition to having a hand in these routine operations of the complex, the record also suggests Marcrum has, in the past, been

---

149. Id. at 1508.
150. Id.
151. Id. at 1509.
Reviewing these factors, the court held that

[t]aken as a whole, this evidence could support a claim that Marcrum is an operator of the Saraland site. Unlike the case against Tuft University and Jacksonville Electric, it is evident that Marcrum is “actively involved in . . . [the] occupational business affairs” of Saraland Apartments. This supports the finding that Marcrum has “actually participated in the operations of the facility” so as to be an “operator” within the meaning of section 107(a). We therefore reverse the district court’s grant of summary judgment on Redwing’s claim under subsection 107(a)(1) based on Marcrum being a current operator of the site.\(^\text{153}\)

In light of the court’s holding that the general partners could avail themselves of the third-party defense under section 107(b), one could speculate that Marcrum might also ultimately escape liability on similar grounds. However, more significant perhaps is the extent to which the court’s decision may impact other property managers who might not be able to satisfy the “due care” requirement of the third-party defense.

\textit{b. Owners and Operators at the Time of Disposal.} Redwing also asserted that Marcrum was liable as a past operator under subsection 107(a)(2).\(^\text{154}\) In order to determine whether Marcrum was an operator of the facility during a time hazardous substances were disposed of at the site, the court had to more clearly define “disposal.”\(^\text{155}\) Redwing asserted that, even though all the hazardous substances at the facility first came to be located on the property prior to Marcrum’s tenure, the paving of a parking lot and the underground utility repair work performed under Marcrum’s management caused the materials to be spread or dispersed about the site, and thus constituted “disposal.”\(^\text{156}\) The court agreed with Redwing with regard to this “secondary disposal argument,” stating that “we do not read CERCLA’s definition of ‘disposal’ as being limited to instances where a hazardous substance is initially introduced into the environment at a facility.”\(^\text{157}\) Instead, the court held that “CERCLA’s definition of ‘disposal’ should be read broadly to include the subsequent movement and dispersal of hazardous

\(^{152}\) Id. at 1509-10.
\(^{153}\) Id. at 1510 (citation omitted).
\(^{154}\) Id.
\(^{155}\) Id.
\(^{156}\) Id.
\(^{157}\) Id.

substances within a facility." However, the court found no evidence that the paving or gas line work disturbed or moved any contaminated soil. Therefore, the court upheld the district court's issuance of summary judgment on Marcrum's status as an operator at the time of disposal, implicitly rejecting the possibility that mere passive migration could constitute disposal.

c. Persons who Arrange for Disposal of Hazardous Substances. A second Eleventh Circuit decision, *South Florida Water Management District v. Montalvo*, was cited by the court in *Redwing Carriers* as setting forth the standard for determining "arranger" liability. In that case, the owner of a pesticide manufacturing and spraying service sought contribution for costs incurred in cleaning up its contaminated chemical loading site from various farmers (referred to in the opinion as "Landowners") who contracted for the company's aerial-spray pesticide services. The third-party plaintiffs alleged that, by virtue of their contracts with the Landowners, the Landowners had "arranged for the disposal of hazardous substances." The district court dismissed the complaint against the Landowners, and third-party plaintiffs appealed.

The Eleventh Circuit began its analysis by noting that CERCLA does not define the phrase "arranged for," so courts have looked at various factors to define the parameters of the phrase. Citing its decision in *Florida Power & Light v. Allis-Chalmers Corp.*, the court noted that in the Eleventh Circuit there is no bright-line test for determining whether someone arranged for the disposal of hazardous substances. Rather, the trier of fact must make a fact-specific determination in every case. However, the court identified as particularly important a party's intent and knowledge (or lack thereof) of the disposal of the hazardous substances.

158. *Id.*
159. *Id.*
160. *Id.* at 1511.
161. 84 F.3d 402 (11th Cir. 1996).
162. 94 F.3d at 1506.
163. 84 F.3d at 405.
164. *Id.*
165. *Id.* at 404.
166. *Id.* at 406-07.
168. 84 F.3d at 406.
169. *Id.* at 407.
170. *Id.*
The court in *Montalvo* disagreed with third-party plaintiffs’ assertion that arranger liability can be based solely on the fact that the Landowners contracted for their spraying services and held that third-party plaintiffs must be able to show that the Landowners did “more than simply [contract] for aerial spraying services.” Third-party plaintiffs in *Montalvo* could not show that the Landowners assisted them in loading the planes or rinsing the tanks or that there was evidence that the Landowners even knew the spills of pesticides had occurred. The court wrote, “[T]he Landowners contracted to have pesticides applied to their property. They did not agree to have pesticides and contaminated rinse water spilled onto the [contaminated] Site.” There was also no allegation that the Landowners had any control or authority over third-party plaintiffs’ actions. While the Landowners bought, and therefore owned, the chemicals that were sprayed on their property, the court stated that “the Landowners’ ownership of the pesticides during the application process does not, by itself, imply the kind of control over the Sprayers’ application procedures” necessary to find arranger liability.

Although the court rejected third-party plaintiffs’ arguments and affirmed the dismissal of their claims, the court also declined “the Landowners’ invitation to broadly exclude from CERCLA’s reach cases where a plaintiff seeks to hold a defendant liable because the defendant contracted for a service involving the use and disposal of hazardous substances.” The court noted that each decision requires a fact-based determination, and there could be circumstances when a contracting party asserts the kind of control over the use and disposal of the hazardous substances necessary to create arranger liability.

Third-party plaintiffs in *Montalvo*, however, simply failed to prove such circumstances were present in that case.

As mentioned above, the panel in *Redwing Carriers* cited *Montalvo* in addressing Redwing’s claim that the limited partners and Meador, the construction company, arranged for the disposal of hazardous substances

171. Id. Likewise, in *Florida Power & Light Co. v. Allis Chalmers Corp.*, 85 F.3d 1614 (11th Cir. 1996), the court held that the “mere sale of a useful product without additional evidence that the transaction included an arrangement for the disposal of the hazardous substance does not subject the manufacturers [of the product] to liability under CERCLA.” *Id.* at 1517 (affirming following appeal after remand).
172. 84 F.3d at 407.
173. Id.
174. Id. at 408.
175. Id.
176. Id. at 409.
177. Id.
Regarding the limited partners, the three events that Redwing cited as constituting arranging for disposal were (1) the repaving of the parking lot in 1986, (2) the repairing of the gas line in 1991, during which soil was disturbed, and (3) the failing of the partnership to remove the tar seeps as provided under an agreement reached in 1984.179

The Redwing panel dismissed the third basis first, stating that failure to remove the tar could not constitute arranging for the disposal of the tar at the site because, by failing to remove the tar, the limited partners just left it in the ground.185 Failure to act was not an "affirmative act" to arrange for disposal of the tar, as required by Montalvo.181 As for the repaving and the gas line work, the court found Redwing had failed to show a connection between the limited partners and these actions.182 Therefore, they could not be held liable as arrangers based on those events.183

With regard to Meador's liability, in keeping with its earlier finding that disposal includes the subsequent dispersal of hazardous substances, the court held that "disposal" may occur when a party disperses contaminated soil during the course of grading and filling a construction site.184 In so holding, the court reversed the district court's grant of summary judgment in favor of Meador.185 Meador then argued that even if it disposed of hazardous materials during the construction, it did not intend to do so. However, the court held that intent is irrelevant in proving a party arranged for the disposal of hazardous substances.186

2. Claims Under Section 107 versus Claims Under Section 113. The decision in Redwing Carrier also addressed whether a party who is a "covered person" under section 107 of CERCLA can bring an

178. 94 F.3d at 1505-06, 1511.
179. Id. at 1506.
180. Id.
181. Id.
182. Id.
183. Id.
184. Id. at 1512.
185. Id.
186. Id. At first blush, this holding appears inconsistent with the court's statement in Montalvo that a party's intent is especially important. See supra text accompanying note 167. The inconsistency is probably best reconciled by understanding the intent requirement as focusing on the act giving rise to disposal, rather than the actual disposal. Thus, the landowners in Montalvo were not liable because they had no knowledge of or intent regarding the acts giving rise to disposal. In contrast, Meador was liable in Redwing because, although it did not specifically intend to dispose of hazardous substances, it did intend to do the regrading activities that resulted in the disposal.
action under that section, or alternatively, whether such parties are limited to contribution actions under section 113. This issue is significant because section 107 claims are subject to joint and several liability, whereas under section 113, a claimant may only recover an equitable share from a fellow potentially responsible party. Although Redwing brought its claims under both provisions, the court held that

[a]s a matter of law, . . . Redwing's CERCLA claims against the Appellees are claims for contribution governed by [section] 113(f). To bring a cost recovery action based solely on [section] 107(a), Redwing would have to be an innocent party to the contamination of the Saraland Site . . . . Redwing cannot deny it originally disposed of most, if not all, of the hazardous substances now contaminating the Site. Redwing is a responsible party under CERCLA, and therefore, its claims against other allegedly responsible parties are claims for contribution.

D. Resource Conservation and Recovery Act

In PaineWebber Income Properties Three Ltd. Partnership v. Mobil Oil Corp., the United States District Court for the Middle District of Florida wrestled with the question of whether petroleum that leaked from an underground storage tank ("UST") is a "hazardous waste" under RCRA. The issue arose under RCRA's citizen suit provision that allows private parties to seek an injunction against any person "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 eminent and substantial endangerment to health or the environment." Under this "eminent endangerment" provision, a plaintiff is required to give notice to the EPA, the state, and the potential defendant, ninety days before filing suit, unless the claim

189. 94 F.3d at 1496 (emphasis added).
arises under RCRA's provisions governing hazardous wastes.\textsuperscript{192} If the suit concerns a hazardous waste, the action may be brought immediately after notice is given.\textsuperscript{193} In Painewebber, the plaintiff failed to give the ninety-day notice, but argued that its claim should not be dismissed, alleging that the leaked petroleum was a hazardous waste under RCRA.\textsuperscript{194}

Thus, the question before the court was whether petroleum products released from a UST are hazardous waste. The court noted that one district court in Georgia had termed petroleum a hazardous waste,\textsuperscript{195} but it found more persuasive decisions from other district courts that held that petroleum can be a solid waste but not a hazardous waste.\textsuperscript{196}

The court specifically agreed with the holding by the United States District Court for the Central District of Illinois in Winston v. Shell Oil Co., which found petroleum is not a hazardous waste.\textsuperscript{197} In reaching its conclusion, the court in Winston first noted that Congress did not specifically exclude petroleum from the definition of hazardous waste, even though it had excluded petroleum from the definition of hazardous substance in CERCLA.\textsuperscript{198} However, under RCRA, petroleum is classified in subchapter IX as a "regulated substance," which is defined as "(A) any substance defined in section 9601(14) of this title (but not including any substance regulated as a hazardous waste under subchapter III of this chapter), and (B) petroleum."\textsuperscript{199} The court in Winston reasoned that, by including petroleum in this definition of regulated substances and excluding substances classified as hazardous wastes, Congress evidenced its intent to exclude petroleum from the definition of hazardous waste.\textsuperscript{200}

Adopting the reasoning in Winston, the court in Painewebber held that petroleum that had leaked from a UST is not a hazardous waste.\textsuperscript{201} Also, finding that the notice "requirements 'are mandatory conditions precedent to commencing suit under the RCRA citizen suit provisions;'"

\begin{itemize}
\item 192. Id. § 6972(b)(2)(A).
\item 193. Id.
\item 194. 902 F. Supp. at 1518.
\item 198. 902 F. Supp. at 1519.
\item 200. 200 F. Supp. at 1519.
\item 201. Id.
\end{itemize}
the court granted defendant's motion for partial summary judgment because plaintiff had failed to meet the ninety-day notice requirement.

E. Endangered Species Act

1. Statutory Framework. The ESA seeks to protect endangered and threatened species through limiting or prohibiting a wide range of activities harmful to those species and their ecosystems. In parts relevant to the cases discussed below, section 7 of the ESA requires federal agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical.” Thus, if it appears an agency action is likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of its habitat, the agency must consult with the Secretary of the Interior or the Secretary of Commerce (collectively, the “Secretary”) before commencing that action.

As part of that consultation, the FWS undertakes a study of the project and issues a biological opinion. The biological opinion states whether the action is likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of a critical habitat. A “jeopardy” opinion means adverse consequences are likely, while a “no jeopardy” opinion means adverse consequences are not expected.

The Secretary creates and maintains the lists of endangered and threatened species pursuant to section 4 of the ESA. An endangered species is defined as one “which is in danger of extinction throughout all

202. Id. at 1522. On a motion for rehearing, the court clarified that its decision related to the question of jurisdiction and not the merits of plaintiff’s claim. Accordingly, plaintiff was not barred from curing the notice defect and refiling or pursuing its pendant state law claims in state court. See id.
203. Id. at 1519.
205. Id. § 1536(a)(2).
206. Id. § 1536(a)(3).
208. Id. § 402.14(h)(3).
209. Id.
A threatened species is one "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." The Secretary also designates the habitats of endangered and threatened species as "critical," which heightens the protection these habitats are accorded from federal actions that are likely to jeopardize the existence of the species in question. In addition, section 4 requires the Secretary to develop and implement "recovery plans" that formulate actions designed to enhance species recovery to the point where ESA protection is no longer needed.

Finally, section 9 of the ESA prohibits anyone from importing or exporting, taking, possessing, delivering, carrying, transporting or shipping, or selling or offering to sell endangered or threatened species. The term "take" is defined by the statute as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

2. Recovery Plans under Section 4. In addition to their NEPA and CWA claims, plaintiffs in Fund for Animals, Inc. v. Rice also asserted ESA claims alleging that the Corps and the FWS unlawfully violated a 1987 Recovery Plan for the Florida panther. The court summarized plaintiffs' arguments as follows:

(1) the ESA requires that recovery plans shall be developed and implemented for endangered species; (2) the F.W.S.'s 1987 Recovery Plan for the Florida Panther includes a "Habitat Preservation Plan" stating that "areas proposed for habitat preservation," which include the Walton Tract, "should be monitored to the maximum extent possible to obviate adverse habitat modifications;" (3) the F.W.S. fails to "implement" the Recovery Plan if it issues a "no jeopardy" opinion for a suitable Florida Panther habitat as specified by the Recovery Plan; and (4) the Corps acted arbitrarily and capriciously in relying on the F.W.S. "no jeopardy" opinions in granting a permit to Sarasota County.

211. Id. § 1532(6). Insects are expressly excluded from this definition. See id.
212. Id. § 1532(20).
213. Id. § 1533(a)(3).
214. Id. § 1533(f).
215. Id. § 1538(a). The Secretary can also issue exemptions from this provision. Id. § 1539(a).
216. Id. § 1532(19).
218. 85 F.3d at 547.
Explaining that the 1987 Recovery Plan “is not a document with the force of law,” the Eleventh Circuit affirmed the trial court’s grant of summary judgment in favor of the government defendants.\textsuperscript{219} The court stated:

The Plaintiffs’ line of reasoning is flawed in several respects. First, the practical effect of the Plaintiffs’ position would be to elevate the 1987 Recovery Plan into a document with the force of law. We cannot take such an approach. Section 1533(f) makes it plain that recovery plans are for guidance purposes only. By providing general guidance as to what is required in a recovery plan, the ESA “breathe[s] discretion at every pore.”

Second, the Plaintiffs’ position cannot be reconciled with the Corps’ statutory duty under [section] 7 of the ESA to consult with the F.W.S. about the environmental impact of proposed agency actions and the F.W.S.’s duty to arrive at a biological opinion based upon the best scientific data available. There would be absolutely no point to the consultation and preparation of a biological opinion if the F.W.S.’s opinion were predetermined based upon whether proposed project lands fell within the borders of properties discussed in one of any number of recovery plan documents . . . .

Third, the F.W.S. identified reasonable justifications for issuing its “no jeopardy” Biological Opinions. To begin with, there have been no verified Florida Panther sightings either on the Walton Tract or near it within the last ten years. According to the Florida Panther Habitat Protection Plan (“HPP”), there is no occupied Florida Panther territory anywhere in Sarasota County . . . . Moreover, the contested land has not been designated as critical habitat under the ESA. It is a major flaw in the Plaintiffs’ argument to assume that the project will destroy or adversely modify the Florida Panther’s “critical habitat” when it has not been determined that this particular site is a critical habitat. The land included in the HPP’s recommendation for a critical habitat designation area is not anywhere in Sarasota County. In addition, the Walton Tract has not been identified as a reintroduction site for Florida Panthers, nor is it adjacent to any such sites.\textsuperscript{220}

3. Unlawful “Takings” by Individuals. \textit{United States v. Guthrie}\textsuperscript{221} involved an appeal following a conditional guilty plea to charges of taking, possessing, selling, and transporting an endangered species in violation of section 9 of the ESA.\textsuperscript{222} Guthrie had been

\textsuperscript{219} \textit{Id.} at 548.

\textsuperscript{220} \textit{Id.} at 547-48 (citations omitted).

\textsuperscript{221} 50 F.3d 936 (11th Cir. 1995).

\textsuperscript{222} \textit{Id.} at 937. Guthrie was also charged with violating the Lacey Act, 16 U.S.C. §§ 3371-73, by purchasing and selling alligator snapping turtles which are protected by
arrested by undercover agents from whom he bought several Alabama red-bellied turtles, animals that the Secretary had added to the endangered species list in 1987. Guthrie's primary argument on appeal regarding the Alabama red-bellied turtle was that it was actually a hybrid, rather than a species, and was therefore not eligible for ESA protection.

Guthrie's argument hinged on DNA analysis which he alleged would conclusively show that the Alabama red-bellied turtle was actually a hybrid. During its review, the Secretary had noted that "[t]he taxonomic status of this turtle has been questioned," but, based on all the evidence, the Secretary determined the animal merited status as a species. Significantly, the DNA evidence promoted by Guthrie was not available at the time of the turtle's listing, and Guthrie never attempted to present DNA evidence to the agency in a challenge of that listing.

Consequently, the court held that Guthrie's collateral attack on the Alabama red-bellied turtle's listing must fail. In so doing, the court emphasized that the ESA provides mechanisms for individuals to challenge the listing of a species as endangered or threatened, but that Guthrie did not seek to change the agency regulation. He chose to violate the law. We will not reward that choice by allowing him to bypass the agency and receive judicial review of the regulation in light of the new DNA study. Instead, Guthrie at most is entitled to the same review he would have received had he sought direct review of the agency regulation at the time it was promulgated. Such a review is limited to the evidence before the agency at the time of promulgation.

Alabama state regulations. 50 F.3d at 937. The Lacey Act makes it a federal felony to deal in any fish or wildlife taken in violation of a state or foreign law. 16 U.S.C. § 3373(d). Among the defenses rejected by the Eleventh Circuit, defendant argued that the Lacey Act resulted in an unconstitutional delegation. 50 F.3d at 938. The court held this argument was foreclosed by its decision in United States v. Rioseco, 845 F.2d 299 (11th Cir. 1988), in which the court upheld the Lacey Act's provision enforcing foreign law, finding it "involved no delegation of power." Id.

223. 50 F.3d at 939. See also 52 Fed. Reg. 22,939 (June 1987).
224. 50 F.3d at 939.
225. Id. at 945.
226. Id. at 944. There was evidence in the record suggesting that Guthrie may not have been interested in getting the turtle de-listed. Rather, it appeared he may have hoped to develop a private stock for which he would be highly compensated once the animal became extinct in the wild. Id. at 938.
227. Id. at 946.
229. 50 F.3d at 944.