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/vol49/iss4/6

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.
Perhaps in recognition of the growing prevalence of environmental issues in the day-to-day practice of law, this Article departs from the two-year survey period of its predecessors\(^1\) by covering only decisions handed down during 1997. Nonetheless, the survey period saw several interesting cases reach the Eleventh Circuit, including the appeal of a sua sponte assault on the constitutionality and retroactive application of the Comprehensive Environmental Response, Compensation, and Liability Act\(^2\) and an effort to use the Migratory Bird Treaty Act to block timber harvest in a national forest.\(^3\) Further, the survey period saw the continued emphasis on citizens' suits, the use of the Environmental Protection Agency's enforcement power to repair wetlands, and the use of criminal provisions to enforce federal environmental law.\(^4\)

In terms of organization, this Article begins with a discussion of the decision under the Comprehensive Environmental Response, Compensa-

\(^*\) Partner in the firm of Kilpatrick Stockton, member of the Environmental and Natural Resources Section, Atlanta, Georgia. University of the South (B.A., Psychology, 1984); Mercer University School of Law (J.D., magna cum laude, 1990). Member, Mercer Law Review (1988-1990).

\(^**\) Associate in the firm of Kilpatrick Stockton, member of the Environmental and Natural Resources Section, 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. Sierra Club v. Martin, 110 F.3d 1551 (11th Cir. 1997).
tion, and Liability Act ("CERCLA"), then reviews three cases decided under the Clean Water Act ("CWA"), and concludes with a discussion of the Eleventh Circuit's first opinion on the Migratory Bird Treaty Act ("MBTA").

I. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

Perhaps the most widely watched environmental decision by the Eleventh Circuit Court of Appeals during the survey period came in United States v. Olin Corp. in which the court considered a 1996 decision by the District Court for the Southern District of Alabama that declared CERCLA did not apply retroactively and, moreover, that the statute was an unconstitutional overextension of Congress's power under the Commerce Clause. In light of the otherwise unanimous view taken by courts across the country that CERCLA is both constitutional and retroactive, the Eleventh Circuit surprised no one in reversing the trial court's decision.

To review the facts of the case, Olin Corporation ("Olin") operated a chemical manufacturing plant in Alabama from 1951 to 1982 that

8. 107 F.3d 1506 (11th Cir. 1997).
10. Id. at 1519, 1523 (citing U.S. CONST. art. I, § 8).
contaminated both the soil and groundwater on the property. The site was listed on the National Priorities List in 1984, and investigatory work began at the site in 1993 to determine the extent of the contamination. Olin and the United States Environmental Protection Agency ("EPA") later entered into a consent decree that required Olin to remediate the property and pay all costs incurred by the government.

The questions concerning CERCLA's constitutionality and retroactivity arose when the EPA and Olin submitted the proposed consent decree to the district court for approval and, instead of approving the consent decree as expected, Judge Hand, sua sponte, decided that "rather than signing the consent decree, [the court] must dismiss the action both because 1) Congress did not clearly express its intent that the liability provision of CERCLA be retroactive ... and 2) the application of CERCLA, at least on the facts of this case, violates the Commerce Clause ..." In its decision, the court of appeals first addressed the threshold question of CERCLA's constitutionality. Like the district court, the Eleventh Circuit looked to the recent Supreme Court decision United States v. Lopez for guidance on Congress's Commerce Clause power. Both the appellate and district courts agreed that the starting point for the analysis set out in Lopez is consideration of the areas Congress is authorized to regulate under the Commerce Clause, which the Supreme Court described as:

First, Congress may regulate the use of the channels of interstate commerce .... Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities .... Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce ... i.e. those activities that substantially affect interstate commerce.

Both courts also agreed that CERCLA's enactment should be analyzed under the third category. Beyond this, however, the Lopez analysis by the two courts differs in two important ways.

14. 107 F.3d at 1508.
15. 927 F. Supp. at 1504.
16. 107 F.3d at 1505.
17. 927 F. Supp. at 1503.
18. 107 F.3d at 1509.
20. Id. at 558-59 (citations omitted).
21. 107 F.3d at 1599; 927 F. Supp. at 1531.
With respect to the first of these differences, the district court asserted that *Lopez* requires Congress to include in the statute a "jurisdictional element which would ensure, through case-by-case inquiry, that the [statute] in question affects interstate commerce." The court of appeals, however, read *Lopez* as simply holding that the inclusion of a jurisdictional element is one method Congress may use to ensure the statute is applied constitutionally. When this jurisdictional element is absent, the court of appeals ruled that courts must then make an independent inquiry into whether the statute is a constitutional exercise of power under the Commerce Clause.

The Eleventh Circuit's more significant departure from the district court was in the performance of this independent analysis to determine if the ostensibly intrastate activity substantially affects interstate commerce. The court of appeals read *Lopez* as permitting a looser connection between the intrastate activity and interstate commerce than the district court, which read *Lopez* as requiring a direct connection between not just an intrastate activity, but an intrastate *economic* activity and interstate commerce. The district court did not find this connection in the case at bar, and stated there was no "economic activity" being regulated because Olin's facility was closed long ago. Additionally, the trial court stated, "[w]hile environmental degradation generally may have an effect on interstate commerce, it is not clear to this court that the degradation at issue in this case is necessarily ‘economic activity’ or that it has a ‘substantial effect’ on interstate commerce." The court of appeals, however, took a less restrictive view of the types of activities targeted by the statute, describing the test as:

> whether the statute regulates "activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect [ ] interstate commerce." *Lopez*, [514] U.S. at [549], 115 S. Ct. at 1631. This determination turns on whether the statute constitutes "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut

23. 107 F.3d at 1510.
24. *Id.*
25. Although the district court stated the absence of a jurisdictional element should be fatal, it still performed the analysis by examining the connection between the statute and interstate commerce. 927 F. Supp. at 1533.
26. 107 F.3d at 1510.
27. 927 F. Supp. at 1531.
28. *Id.* at 1532.
29. *Id.* at 1533.
unless the intrastate activity were regulated." *Id.* A court's focus, thus, cannot be excessively narrow . . . .

Applying this broader test to CERCLA, the Eleventh Circuit's first step was to identify the activity CERCLA purported to regulate. 31 The court found it unnecessary to describe all the activities touched by the statute, and instead looked at the "narrowest, possible class" of activity regulated by the statute, which it identified as the on-site disposal of hazardous waste. 32 The court's next step was to determine whether the on-site disposal of hazardous waste substantially affects interstate commerce. In this step, the court found ample evidence in CERCLA's legislative history that "the unregulated management of hazardous substances, even strictly within individual states, significantly impacts interstate commerce . . . ." This evidence included data on agricultural losses and threats to the commercial fishing industry due to the improper disposal of hazardous substances as well as information on the significant costs to industry associated with the proper disposal of hazardous substances. 34 Thus, despite the appellee's argument that no evidence existed in this particular case to show that the on-site disposal of hazardous substances had any affect on interstate commerce, the Eleventh Circuit held CERCLA's application was constitutional because CERCLA's "regulation of intrastate, on-site waste disposal constitutes an appropriate element of Congress's broader scheme to protect interstate commerce and industries thereof from pollution." 35

In addition, although the appellate court ruled that it was not required to do so under *Lopez*, it also found that the on-site disposal of hazardous substances was, in fact, an "economic activity." 36 This finding was based on the theory that "to the extent a chemical plant can dispose of its waste on-site free of regulation, it would have a market advantage over chemical companies that lack on-site disposal options." 37 Consequently, under its own analysis as well as the district court's analysis, the court of appeals found that, "as applied in this case, CERCLA constitutes a permissible exercise of Congress's authority under the Commerce Clause." 38

---

30. 107 F.3d at 1509.  
31. *Id.* at 1510.  
32. *Id.*  
33. *Id.*  
34. *Id.* at 1511.  
35. *Id.*  
36. *Id.*  
37. *Id.*  
38. *Id.*
Having rejected the district court's holding that CERCLA violated the Commerce Clause, the court of appeals turned to the lower court's decision that the statute should not apply retroactively. Again, both courts based their respective decisions on the same Supreme Court decision, *Landgraf v. USI Film Products*, which explained the test used to determine whether a statute applies retroactively:

[When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.]

Both the district and appellate courts divided the first task into two parts, requiring initially a search of the text for an express statement of the statute's retroactivity and, if none could be found, then requiring a broader examination of the text and legislative history for guidance on Congress's intent.

Applying this two-step test to CERCLA, the district court first found that "CERCLA contains no language explicitly stating it is retroactive." Next, examining the text of the statute for evidence of Congress's intent, the court found the liability provisions of CERCLA, sections 106 and 107, contained "no language indicating congressional intent to authorize relief that is retroactive." As for the legislative history of CERCLA, the district court concluded:

[The most that can be said from the legislative history is that Congress left many questions, including retroactivity, as open ones to be decided later. Like *Landgraf*, the circumstances surrounding passage of CERCLA strongly suggest that the failure expressly to prescribe the reach of the statute was deliberate on Congress' part.]

---

40. Id. at 280.
41. 927 F. Supp. at 1511; 107 F.3d at 1512-13.
42. 927 F. Supp. at 1512.
43. Id. at 1513.
44. Id. at 1515.
Having determined that Congress gave no clear indication of its intent concerning retroactivity, the district court then determined that, under the facts of this case, applying CERCLA would have a retroactive effect, because it would hold Olin liable for actions it took before CERCLA's enactment.\textsuperscript{45} As a result, the district court applied the traditional presumption against retroactivity and refused to find Olin liable for actions taken prior to 1980.\textsuperscript{46}

As stated above, the court of appeals agreed that the test laid out in \textit{Landgraf} controlled, and thus the court first looked for an express provision of retroactivity in the statute.\textsuperscript{47} Finding none, the Eleventh Circuit then looked for evidence of congressional intent in the statute's text and legislative history.\textsuperscript{48} Unlike the district court, however, the court of appeals found clear legislative intent in both the text of the statute and the legislative history.\textsuperscript{49}

The appellate court cited textual examples of Congress's intent that the statute apply retroactively from three different sections of the act. The court first pointed to section 107(a), CERCLA's primary liability section, which makes liable "any person who at the time of disposal of any hazardous substance owned or operated any such facility" at which such hazardous substances were disposed of.\textsuperscript{50} The court concluded that, because the language of the statute imposes liability on both current and former owners and operators of facilities, "Congress manifested a clear intent to reach conduct preceding CERCLA's enactment."\textsuperscript{51}

The Eleventh Circuit next looked to section 103(c) which states,

\begin{quote}
[w]ithin one hundred and eighty days after December 11, 1980, any person who owns or operates or who at the time of disposal owned or operated . . . a facility at which hazardous substances . . . are or have been stored, treated, or disposed of shall . . . notify the Administrator of the Environmental Protection Agency of the existence of such facility . . . .
\end{quote}

Regarding this provision, the court explained,

\begin{itemize}
\item \textsuperscript{45} \textit{Id.} at 1516.
\item \textsuperscript{46} \textit{Id.} at 1519.
\item \textsuperscript{47} 107 F.3d at 1512.
\item \textsuperscript{48} \textit{Id.} at 1512-13. The court also examined the "structure and purpose" of the statute, although \textit{Landgraf} does not appear to endorse this method of determining congressional intent. \textit{Id.} at 1513-14.
\item \textsuperscript{49} \textit{Id.} at 1513-15.
\item \textsuperscript{50} \textit{Id.} at 1513 (citing 42 U.S.C.A. § 9607(a)(2)).
\item \textsuperscript{51} \textit{Id.}
\item \textsuperscript{52} 42 U.S.C. § 9603(c).
\end{itemize}
[r]ead reasonably, the foregoing subsection addresses conduct that occurred before CERCLA's effective date. It expressly mandates that persons who were former owners and operators as of December 11, 1980, make the required notification regarding their pre-enactment conduct . . . . If, as Olin asserts, these former owners and operators faced no liability under section 107, section 103 makes virtually no sense. We conclude the language of section 103 confirms that Congress believed its imposition of liability for cleanup upon former owners and operators in section 107(a) covered persons who were former owners and operators on December 11, 1980, as well as owners and operators who sold their interests after that date.\textsuperscript{53}

Finally, the appellate court cited section 107(f)(1), which expressly precludes retroactive liability for natural resource damages.\textsuperscript{54} This provision expressly states, "[t]here shall be no recovery under . . . this section where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980."\textsuperscript{55} Regarding this provision, the court stated, "Congress's decision to include an express limitation on retroactivity in the natural resource damage provision, but not in the adjacent response cost subsection further shows its intent to impose retroactive liability for remediation."\textsuperscript{56}

In addition to the foregoing examples of textual evidence of Congress's intent, the court also found support in what it considered to be a wealth of legislative history underlying CERCLA's enactment.\textsuperscript{57} Unlike the district court, which looked only to the legislative history of the bill that Congress finally enacted, the court of appeals employed the wider legislative history surrounding the previous versions of CERCLA, asserting that "the cleanup liability provisions from [the earlier versions of the bill] were incorporated into CERCLA," and that "careful scrutiny of the legislative record leading up to CERCLA's passage reveals that the compromise never turned upon the statute's imposition of retroactive liability for cleanup . . . ."\textsuperscript{58} After examining this broader legislative history, the Eleventh Circuit found that, while the predecessor bill did

\textsuperscript{53} 107 F.3d at 1513.
\textsuperscript{54} Id. at 1513 n.17.
\textsuperscript{55} 42 U.S.C. § 9607(f)(1).
\textsuperscript{56} 107 F.3d at 1513 n.17. The court further stated that "[a]lthough the Landgraf court declined to place substantial weight on negative inferences" in the statute in question there, the court "did not preclude all future use of a negative inference analysis in support of retroactive intent." Id. (quoting Nevada v. United States, 925 F. Supp. 691, 693 (D. Nev. 1996)).
\textsuperscript{57} Id. at 1513-14.
\textsuperscript{58} Id. at 1514.
not contain an express statement of retroactive liability, "all those commenting on [it and the parallel House bill] expressed the belief that the bills would apply retroactively to those responsible for the releases in existing waste sites."

The Eleventh Circuit's decision in Olin appears unquestionable in its two fundamental holdings that (1) CERCLA clearly regulates activity with a substantial effect on interstate commerce, and (2) Congress did, in fact, intend the statute to have retroactive effect. However, these two explicit conclusions point to a more subtle question unanswered by the decision concerning whether CERCLA's retroactive liability scheme, when viewed in isolation, can withstand scrutiny under the Commerce Clause. Certainly, the Eleventh Circuit's "economic advantage" argument makes sense when Congress is regulating activity on a forward-going basis. However, retroactive application by definition has little impact on a party's behavior in the present. Thus, it does not seem essential to apply CERCLA retroactively to avoid creating an incentive to pollute because CERCLA's forward-looking operation penalizes this type of behavior. Indeed, retroactive operation of CERCLA could be argued to have the opposite effect of placing companies that happen to have historical operations captured by the retroactive liability scheme at a disadvantage relative to new companies (or even reorganized companies) that have no such history. Further, it could be argued that CERCLA's retroactive application is merely a cost-shifting device rather than an integral component of a larger scheme. Accordingly, it seems unclear whether Olin will prove to be the final word on retroactive application of CERCLA.

II. CLEAN WATER ACT

The following discussion of Clean Water Act ("CWA") cases is divided into three sections. The first section looks at a case brought under the citizen suit provision of the CWA, challenging the EPA's failure to review a potential change in water quality standards. The second section concerns a suit instituted by the government for a violation of section 404, which focuses on the proper statute of limitations applicable to the EPA's equitable claims. Finally, the third section examines a criminal prosecution of two individuals for violations of the CWA that included a ruling on the breadth of the waters covered by the CWA.

59. Id. (quoting Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651, 662 (N.D. Ind. 1996)).
60. Miccosukee Tribe of Indians v. United States, 105 F.3d 599 (11th Cir. 1997).
A. Citizen Suit

Miccosukee Tribe of Indians v. United States\(^{63}\) concerned passage by the Florida Legislature of the Everglades Forever Act ("EFA"),\(^{64}\) which the Miccosukee Tribe of Indians of Florida (the "Tribe") alleged changed Florida's water quality standards for the Everglades. The Florida legislature's express intent in passing the EFA was to clean up, restore, and preserve the water quality and water quantity in the Everglades through the implementation of a comprehensive program.\(^{65}\) If, in fact, Florida's passage of the EFA did change the water quality standards, the CWA requires that "such revised or new standard shall be submitted to the Administrator" for mandatory review.\(^{66}\) Florida, however, did not submit the EFA to the EPA for review because the state believed the EFA did not change the water quality standards but, rather, merely provided a mechanism "to restore and maintain the ecosystem in the Everglades."\(^{67}\) Accepting the state's assessment that the statute did not change the water quality standards, the EPA never reviewed the EFA. Asserting that the EPA was without authority not to review the EFA, the Tribe brought a citizens suit against EPA under section 1365(a)(2) alleging the "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator."\(^{68}\)

The district court dismissed the suit for lack of subject matter jurisdiction, finding that the EPA had discretion in determining whether to treat the EFA as a change in water quality standards and that the Tribe could not sue under the CWA to enforce a discretionary power.\(^{69}\) The district court stated that the EPA "merely retained a supervisory role of reviewing the state's [water quality standards] submissions. The Administrator's review of the state water quality standards... is almost entirely dependent upon the state's own assessment."\(^{70}\) Because Florida determined that the EFA did not change the water quality standards and thus did not submit anything to the EPA, the court found that the EPA's nondiscretionary duty to review proposed changes was never triggered.\(^{71}\)

63. 105 F.3d 599 (11th Cir. 1997).
65. Id. § 373.4592(1)(d)(e).
67. 105 F.3d at 601.
68. Id. (quoting 33 U.S.C. § 1365(a)(2)).
69. Id.
70. Id.
71. Id.
The court of appeals reversed the district court's dismissal, finding that "Florida's failure to submit any new or revised standards cannot circumvent the purpose of the CWA . . . . Even if a state fails to submit new or revised standards, a change in state water quality standards could invoke the mandatory duty imposed on the Administrator to review new or revised standards." Due to the EPA's failure to conduct this independent investigation concerning the EFA, the record contained no evidence of whether the EFA actually changed the water quality standards. The court held that until this factual determination was made and it was clear whether the Administrator's nondiscretionary duty to review a change in water quality standards had arisen, the suit could not be dismissed for lack of subject matter jurisdiction.

The case appears to be one of first impression on this issue. Its holding seems to place a heavy obligation on the EPA, under certain circumstances, to conduct a review of laws that might have the effect of changing water quality standards, even if the state does not believe the law affects the water quality standards and thus does not submit the proposed changes to EPA.

B. Statute of Limitations

In United States v. Banks, the Army Corps of Engineers (the "Corps") sued Banks, a real estate developer, asserting that for more than a decade he had engaged in filling lots on an island off the coast of Florida without a permit, despite five administrative orders from the Corps to cease. The Corps sued for civil penalties, an injunction against future filling, and an order for the defendant to restore the wetlands to their original, undisturbed condition. The district court held in favor of the Corps, and the court of appeals affirmed.

The decision revolved around the statute of limitations applicable to the Corps' request for equitable relief. Regarding the claim for civil penalties, the court of appeals held that, because the CWA does not specify a statute of limitations for enforcement actions, the default five year statute of limitations imposed by 28 U.S.C. § 2462 should apply. This portion of the Code states, "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the

72. Id. at 602.
73. Id. at 603.
74. 115 F.3d 916 (11th Cir. 1997).
75. Id. at 917-18.
76. Id. at 918.
Having determined the statute of limitations applicable to the civil penalties, the court then had to settle whether this default statute of limitations was also applicable to the equitable relief sought by the Corps.

The court of appeals gave two reasons in support of its decision that the five-year statute of limitations did not apply to the Corps' claims for equitable relief. First, the court noted, "[t]raditionally 'statutes of limitation are not controlling measures of equitable relief.'" The court, however, also confronted Banks's argument that the "concurrent remedy rule" should govern the case and bar equitable relief as well as the legal relief.

In answer to Banks's contention, the court cited another rule of judicial construction that provides, "'an action on behalf of the United States in its governmental capacity . . . is subject to no time limitation, in the absence of congressional enactment clearly imposing it . . .'" Balancing these two rules, the court found the latter to be controlling and held that:

the properly constructed rule is that—absent a clear expression of Congress to the contrary—a statute of limitation does not apply to claims brought by the federal government in its sovereign capacity. The statute is enforced against the government only when the government is acting to vindicate private interests, not a sovereign or public interest.

Thus, the court concluded, the Corps's claims for equitable relief were not barred because Congress had not expressed a clear intention that any statute of limitations was to apply to these claims. In so holding, the court disagreed with the only two other courts that have addressed the concurrent remedy rule in the CWA context, thereby overruling an
earlier decision from the Northern District of Georgia in United States v. Windward Properties, Inc. 85

C. Criminal Prosecution

In United States v. Eidson, 86 EPA brought criminal charges against defendants who owned and operated a used oil recycling and wastewater disposal business. Defendants allegedly discharged a sludge substance from a company truck into a storm sewer that flowed into a drainage ditch, then into a drainage canal, and then into Tampa Bay. 87 They were convicted in the district court of violating the CWA by knowingly discharging a pollutant into navigable waters of the United States. 88 They appealed their convictions, claiming the man-made drainage ditch

85. 821 F. Supp. 690 (N.D. Ga. 1993) (holding that the concurrent remedy rule applied to bar the government's claim for equitable relief); United States v. Telluride Co., 884 F. Supp. 404 (D. Colo. 1995). The court of appeals did not fully explain its preference for what might be termed the "sovereign capacity" rule over the concurrent remedy rule. However, a possible explanation can be found in the district court decision in Federal Election Comm'n v. Christian Coalition, 965 F. Supp. 66 (D.C. Cir. 1997), which concerned the application of the concurrent remedy rule in the context of a government suit for equitable and legal relief brought under the Federal Election Campaign Act ("FECA"). The court stated that the Supreme Court cases supporting the application of the concurrent remedy rule, Cope v. Anderson, 331 U.S. 461 (1947) and Russell v. Todd, 309 U.S. 280 (1940), are inapplicable to an action brought by the federal government under a federal statute for three reasons. The first two reasons are because neither Cope nor Russell "involved a limitation on an action by the United States" and because "both cases involved the interplay between federal rights and state statutes of limitations—issues not present in a suit brought by the federal government under a federal statute." 956 F. Supp. at 71. The third reason cited by the court concerns the original purpose of the concurrent remedy rule, which was to bar the equitable remedy when it was sought only in aid of or to supplement the legal remedy. If, however, the equitable remedy could have been sought on its own, the statute of limitations applicable to the legal remedy will not bar the equitable relief sought. Id. Therefore, under the FECA, the granting of equitable relief is not barred by the statute of limitations, because the Act gives the government "authority to seek injunctive relief wholly separate and apart from its authority to seek a legal remedy." Id. at 72. That the two remedies were sought together in the same suit does not necessitate the application of the concurrent remedy rule so as to bar the issuance of equitable relief. While the court of appeals in Banks did not go through this analysis in its decision, the court's analysis in Christian Coalition is applicable to the facts of Banks, because under the CWA, as under the FECA, the government may seek injunctive relief "wholly separate and apart" from seeking legal relief. See 33 U.S.C. § 1319(b), (d).

86. 108 F.3d 1336 (11th Cir. 1997).
87. Id. at 1340.
88. Id.
did not constitute "navigable waters" under the CWA and, therefore, they could not be guilty of violating the CWA.\textsuperscript{89}

The CWA defines "navigable waters" broadly as "waters of the United States, including the territorial seas."\textsuperscript{90} Looking to earlier Eleventh Circuit precedent, the court noted that "Congress intended the definition of navigable waters under the Act 'to reach to the full extent permissible under the Constitution.'"\textsuperscript{91} As the Supreme Court has explained, the broad definition indicates "Congress chose to regulate waters that would not be deemed navigable under the classical understanding of that term."\textsuperscript{92} One way in which "navigable waters" under the CWA differs from this classical understanding, the Eleventh Circuit explained, is that the water does not have to be navigable-in-fact, as the drainage ditch was not, for it to be governed by the CWA.\textsuperscript{93} Rather, the "waters of the United States" can include tributaries. The court stated:

[i]t is by now well established that Congress intended to regulate the discharge of pollutants into all waters that may eventually lead to waters affecting interstate commerce . . . . In accordance with this legislative intent, EPA has defined "waters of the United States" to include tributaries to waters that "may be susceptible to use in

\textsuperscript{89} \textit{Id.} The defendants also appealed their sentences, alleging that the district court had improperly increased the offense level under the federal sentencing guidelines. \textit{Id.} at 1344. The court of appeals affirmed the district court's increase of the offense level and thus the length of the sentences for two reasons. The appellate court first agreed there had been an "ongoing, continuous or repetitive discharge" as required by the guidelines to increase the offense level, because there had been another, similar discharge only a week before the discharge that was observed by the police. \textit{Id.} The court found these two instances sufficient to constitute an ongoing and repetitive discharge which justified an increase in offense level. \textit{See} U.S.S.G. \textsection 2Q1.2(b)(1)(A) (1993). The court also noted that the cleanup "required a substantial expenditure," another condition of the sentencing guidelines. \textit{See id.} \textsection 2Q1.2(b)(3). Defendants argued this increase was improper, because the majority of the cleanup had yet to occur and the court improperly used projected costs as a basis to increase the sentences. \textit{Id.} at 1344. The court disagreed, stating:

\[\textit{We} find it unlikely that Congress intended that a defendant guilty of serious environmental contamination should receive a lesser sentence merely because the conviction occurred before the appropriate environmental agency could undo the harm. Such a reading would thwart Congress's intent to punish defendants according to the level of environmental degradation caused by their criminal offenses.}\]

\textit{Id.} Consequently, the court approved the district court's use of the projected costs in determining the offense level. \textit{Id.} at 1345.

\textsuperscript{90} 33 U.S.C. \textsection 1362(7).

\textsuperscript{91} \textit{Ididson}, 108 F.3d at 1341 (quoting United States v. Lambert, 695 F.2d 536, 538 (11th Cir. 1983)).

\textsuperscript{92} \textit{Id.} (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985)).

\textsuperscript{93} \textit{Id.}
interstate or foreign commerce" . . . and courts repeatedly have recognized that tributaries to bodies of water that affect interstate commerce are "waters of the United States" protected by the CWA.94

Given that the CWA covers tributaries, the court further reasoned that "[t]here is no reason to suspect that Congress intended to regulate only the natural tributaries of navigable waters. Pollutants are equally harmful to this country's water quality whether they travel along man-made or natural routes."95 Citing other cases in which man-made conveyances have been held to be "waters of the United States," the court held that the fact that the drainage ditch was a man-made tributary to a larger body of water (Tampa Bay) did not exclude it from the definition of "navigable waters."96

Finally, the court stated "there is no reason to suspect that Congress intended to exclude from 'waters of the United States' tributaries that flow only intermittently. Pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage."97 Given its findings that a man-made, intermittently flowing tributary can be a "water of the United States," the court of appeals upheld defendants' convictions, finding:

[the] sewer, the ditch, and the canal were all part of a storm drainage system that was designed to discharge storm water into Tampa Bay . . . . We hold that this evidence is sufficient to establish that the drainage ditch into which [the defendant] discharged its pollutants is a tributary of Tampa Bay and is thus a "water of the United States" under § 1362(7).98

The Eleventh Circuit is not alone in this broad view, which appears to extend the reach of the CWA to any conveyance or body of water so long as it ultimately reaches water navigable in the more traditional sense. A majority of the circuits agree that a waterway does not have to be navigable-in-fact in order to be a "navigable water" under the CWA,99 and several courts have held that man-made conveyances are

94. Id. at 1341-42 (quoting 40 C.F.R. § 230.3(s)).
95. Id. at 1342.
97. Id.
98. Id. at 1342-43.
99. See United States v. Wilson, 133 F.3d 251 (4th Cir. 1997); Quivira Mining Co. v. United States Envtl. Protection Agency, 765 F.2d 126 (10th Cir. 1985); Avoyelles Sportsmen’s League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983); National Wildlife Fed’n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982); United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979); Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978); United States v. Ashland
"navigable waters." Thus, it appears the set of water bodies left out of the navigable waters of the United States is small indeed.

III. MIGRATORY BIRD TREATY ACT

In a case that is really just the latest milepost in a dispute that has raged for almost two decades, Sierra Club v. Martin, the Eleventh Circuit considered whether the Migratory Bird Treaty Act applies to actions by the federal government. For more than twenty years, citizens groups on one side, and the U.S. Forest Service and logging interests on the other, have battled over the extent of logging that the federal government will permit in the Chattahoochee and Oconee National Forests in North Georgia. The Forest Service operates the various national forests under its jurisdiction through management plans that are developed pursuant to the National Forest Management Act ("NFMA"), which include the periodic sale of timber rights to private companies. In an attempt to halt or reduce logging in the national forests in North Georgia, various citizens groups in Georgia have fought, both administratively and judicially, the implementation of the management plans or have charged the Forest Service with taking action without performing the requisite environmental studies. Environmental groups successfully obtained in 1993 a court order that temporarily stopped logging on 22,059 acres of the Chattahoochee National Forest, because the Forest Service had allegedly failed to complete the environmental assessments required by the National Environmental Policy Act before deciding to cut and sell timber.


101. An example of a water body that might fall outside the definition of "waters of the United States" is an isolated pond that has no connection to a stream, lake, or other water body that comes under the definition and that does not affect interstate commerce. Additionally, the regulations state that wastewater treatment systems and cropland that has been converted to a water body are not waters of the United States. 40 C.F.R. § 230.3(s)(7).

102. 110 F.3d 1551 (11th Cir. 1997).


104. See id. See also John Harmon, Forest Service to Protect 82,000 acres in North Georgia, ATLANTA J. & CONST., Apr. 3, 1986, at B3; Charles Seabrook, Suit Challenges Logging Policy in National Forest, ATLANTA J. & CONST., May 2, 1992, at A3.


106. Scott Bronstein & John Harmon, Suit Halts All Logging in Tallulah Forest Area, ATLANTA J. & CONST., Apr. 9, 1993, at D1; John Harmon, National Forests: Environmen-
Turning to the specific statute at issue in *Sierra Club v. Martin*, the MBTA is a criminal statute similar to the Endangered Species Act, except that its scope is limited to migratory birds. The central provision of the MBTA provides:

> it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of several international conventions concerning the preservation of migratory birds.

This provision is enforced by the United States Fish and Wildlife Service, a division of the Department of the Interior, and “any person, association, partnership, or corporation who shall violate any provisions of said conventions or of this subchapter, or who shall violate or fail to comply with any regulation made pursuant to this subchapter” can be punished through both misdemeanor criminal fines and imprisonment. Additionally, any person who “shall knowingly (1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird, or (2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony . . . ”

The foregoing provisions expressly apply to persons, associations, partnerships, and corporations. The central question raised in *Sierra Club v. Martin* was whether the MBTA’s reach extends to the federal government.

The specific facts giving rise to the dispute in *Sierra Club v. Martin* began in 1995 when the Forest Service offered for sale the right to cut timber on seven parcels of land in the Chattahoochee and Oconee National Forests. This offer of sale came after each parcel had been subject to the environmental assessment required under NEPA.
Seven environmental groups sued under the Administrative Procedure Act, claiming that the decision to "allow timber cutting, logging, clearcutting, road building, and related activities in the seven parcels" violated the CWA, the MBTA, and the National Forest Management Act ("NFMA"). The district court issued a preliminary injunction against all timbercutting and roadbuilding activities and the sale of any unsold parcels, because the court found a substantial likelihood that plaintiffs would prevail on their claim that the Forest Service actions violated the MBTA. This finding was based on evidence that the Forest Service contracts with timber companies allowed timber cutting during the migratory birds' nesting season and that logging during that period would kill from 2,000 to 9,000 juvenile birds. The district court stated:

the text of the statute proscribes any killing of any migratory bird. Since the protection of migratory birds apparently was important enough to Congress to proscribe any killing of any migratory bird, the Court finds that the potential killing of 2,000 to 9,000 migratory birds is more than sufficient to show significant irreparable harm.

The appellate court reversed the district court's decision with regard to MBTA, however, not because it differed with the district court's findings regarding whether the potential deaths of migratory birds constituted irreparable harm, but because it found that the "MBTA does not apply to the federal government." Accordingly, the court explained that because "no violation of the MBTA could occur by any formal action of the Forest Service, the Forest Service may not be enjoined under the APA." In support of its holding, the appellate court first noted:

[t]he MBTA, by its plain language, does not subject the federal government to its prohibitions .... The MBTA is a criminal statute

---

113. 5 U.S.C. §§ 551-559 (1994 & Supp. 1996). The APA provides a vehicle for persons who are "adversely affected or aggrieved by agency action" taken pursuant to a statute to file suit against the agency when the federal statute in question does not contain a citizen suit provision. 5 U.S.C.A. § 702 (West Supp. 1996). For further discussion on this issue, see Sierra Club, 110 F.3d at 1554-55.
114. Sierra Club, 110 F.3d at 1552-53.
115. Id. at 1553. Five months after the issuance of this preliminary injunction based on the MBTA, the district court issued a permanent injunction based on violations by the Forest Service of NEPA and the NFMA. That injunction was still in place at the time of writing. Id. at 1553 n.5.
117. 110 F.3d at 1556.
118. Id. 
making it unlawful only for persons, associations, partnerships, and corporations to "take" or "kill" migratory birds. Moreover, there is no expression of congressional intent which would warrant holding that "person" includes the federal government, thus enabling the United States to prosecute a federal agency, or a federal official acting in his official capacity, for taking or killing birds and destroying nests in violation of the MBTA.  

Citing the Endangered Species Act, which expressly includes government agencies within its prohibition, the court explained that "Congress has demonstrated that it knows how to subject federal agencies to substantive requirements when it chooses to do so." The court also noted that the MBTA was enacted after the NFMA, which was passed "to conserve the water flows, and to furnish a continuous supply of timber for the people." Thus, the court continued:

[i]n light of that purpose, it is difficult to imagine that Congress enacted the MBTA barely twenty years later intending to prohibit the Forest Service from taking or killing a single migratory bird or nest "by any means or in any manner" given that the Forest Services' authorization of logging on federal lands inevitably results in the deaths of individual birds and destruction of nests. The application of the MBTA to the federal government would have severely impaired the Forest Service's ability to comply with the congressional directive to manage the national forests for timber production.

Finally, the court found that the NFMA and NEPA together ensure that the Forest Service considers the impact of its land management on migratory birds. The NFMA requires the Forest Service to manage its lands in order to "maintain viable populations of existing native and desired non-native vertebrate species in the planning area," while NEPA requires the Forest Service to perform an environmental assessment of its proposed actions. The court concluded that "Congress intended that the Forest Service follow the NFMA's regulatory process, rather than the MBTA's criminal prohibitions, in addressing conservation of migratory birds."

119. Id. at 1555.
120. Id.
121. Id. at 1556 (citing United States v. New Mexico, 438 U.S. 696, 707 (1978)).
122. Id.
123. Id.
124. Id. (quoting 36 C.F.R. § 219.19).
125. See 42 U.S.C. § 4332(C).
126. 110 F.3d at 1556.
The only other appellate court, the Eighth Circuit Court of Appeals, to directly address this issue agreed with the Eleventh Circuit that the MBTA is not applicable to the federal government. In February 1998, the U.S. Supreme Court denied plaintiff's petition for certiorari in that case. In addition, the United States Fish and Wildlife Service issued an internal memorandum in April 1997 that states, "[i]t is the position of the Federal Government that the prohibitions of the MBTA do not apply to Federal agencies or their employees acting in their official capacities." Accordingly, at least in the absence of legislative changes, it does not appear that the MBTA creates any restraint on the conduct of the federal government.

127. See Newton County Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997). There is another circuit court case, however, that seems to imply that the Forest Service must comply with the MBTA in developing its management plans, but it does not hold this explicitly. Sierra Club v. U.S. Dep't of Agric., 116 F.3d 1482 (7th Cir. 1997) (unpublished order) (finding that the Forest Service had not adequately addressed whether its management plan would violate the MBTA).


130. While environmentalists may have lost a weapon in the fight against logging on public lands, the Forest Service has recently introduced a plan to suspend construction of logging roads in most national forests in the country. During the moratorium, the Forest Service would be required to examine and promulgate rules dealing with new methods of building logging roads. See Administration of the Forest Development Transportation System, 63 Fed. Reg. 4350 (1998).