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Departing somewhat from the format of earlier environmental law survey articles,[1] this Survey devotes substantial attention to a 1998 decision of the United States Supreme Court in a case that arose under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[2] Although that case, *United States v. Bestfoods*,[3] emerged from the Sixth Circuit, it will almost certainly have important ramifications for Eleventh Circuit jurisprudence in the area of CERCLA operator liability. Further, the case may signal a new conservative leaning by the Supreme Court that may extend beyond the narrow issue of that case to other questions arising under CERCLA.

In addition to discussing *Bestfoods*, this Survey also discusses a recent case that arose under the National Environmental Policy Act ("NEPA")[4] and the Clean Water Act ("CWA"),[5] as well as a recent case involving

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1. *See* W. Scott Laseter & Julie V. Mayfield, *Environmental Law*, 49 MERCER L. REV. 1007 (1998); W. Scott Laseter & Julie V. Mayfield, *Environmental Law*, 48 MERCER L. REV. 1577 (1997); W. Scott Laseter, *Environmental Law*, 46 MERCER L. REV. 1359 (1995); Edward A. Kazmarek & W. Scott Laseter, *Environmental Law*, 44 MERCER L. REV. 1187 (1993); Edward A. Kazmarek & W. Scott Laseter, *Environmental Law*, 42 MERCER L. REV. 1411 (1991).

2. 42 U.S.C. §§ 9601-9675 (1994 & Supp. II 1996).

3. 118 S. Ct. 1876 (1998).

4. 42 U.S.C. §§ 4321-4370d (1994 & Supp. II 1996).

5. 33 U.S.C. §§ 1251-1387 (1994 & Supp. II 1996).

the Endangered Species Act ("ESA").[6] As with its more recent predecessors, this Survey will not provide a sketch of the broad statutory and regulatory schemes of these statutes; rather, it will refer to earlier survey editions for general overview as well as additional cases that address these laws.

I. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

In *Bestfoods* the Court considered for the first time the scope of operator liability for parent corporations under CERCLA.[7] In doing so, the Court potentially called into question the validity of hundreds of cases decided by federal circuit and district courts during the last fifteen years.

Prior to *Bestfoods*, federal courts had shown considerable disagreement concerning when a parent corporation should be held liable as an owner or operator of a facility at the time of disposal of hazardous substances.[8] Under what was probably the most expansive view, the Fourth Circuit employed an "authority to control" test by which a parent corporation could be held liable if it had the mere authority to control the subsidiary's operations.[9] At the other end of the spectrum, the Sixth Circuit held that, for the most part, a parent could be found liable only if its domination of the subsidiary was sufficient to pierce the corporate veil under traditional corporate law principles.[10] In between, the Eleventh Circuit and several other circuits held that a plaintiff must show that the parent exerted "actual control" over the subsidiary and that such control could be inferred from evidence of involvement in managing the subsidiary even though the evidence might not be sufficient to pierce the corporate veil under traditional corporate law rules.[11]

In *Bestfoods*, CPC International, Inc. ("CPC") owned substantially all the shares of Ott Chemical Corporation ("Ott") from 1965 to 1972, during which time large quantities of hazardous substances were released into the environment at the Ott facility.[12] During this time, CPC controlled the selection of Ott's officers and board members.[13] Additionally, the

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6. 16 U.S.C. §§ 1531-1544 (1994).
7. 118 S. Ct. at 1881.
8. 42 U.S.C. § 9607(a)(2) (1994).
9. Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 842 (4th Cir. 1992).
10. United States v. Cordova Chem. Co. of Mich., 113 F.3d 572, 580 (6th Cir. 1997).
11. *See, e.g.*, Jacksonville Elec. Auth. v. Bernuth Corp., 996 F.2d 1107, 1110-11 (11th Cir. 1993).
12. 118 S. Ct. at 1882.
13. CPC Int'l, Inc. v. Aerojet-Gen. Corp., 777 F. Supp. 549, 558, 559 (W.D. Mich. 1991).

chairperson of the board of Ott was always a high level CPC executive.[14] Furthermore, at least some individuals working for CPC were involved at the Ott facility even though they did not have official responsibilities for Ott.[15]

Employing an "actual control" test, the district court found CPC liable because CPC selected Ott's board of directors and populated Ott's executive ranks with CPC officials and because one CPC official played a significant role in shaping Ott's environmental compliance policy.[16] However, based on its precedents employing a very narrow view of operator liability, the Sixth Circuit reversed.[17] Although the circuit court noted that it was at least theoretically possible to find a parent corporation directly liable as an operator, writing that "[a]t least conceivably, a parent might independently operate the facility in the stead of its subsidiary; or, as a sort of joint venturer, actually operate the facility alongside its subsidiary," it rejected the district court's use of the broader "actual control" approach.[18] The circuit court held that

> where a parent corporation is sought to be held liable as an operator pursuant to 42 U.S.C. § 9607(a)(2) based upon the extent of its control of its subsidiary which owns the facility, the parent will be liable only when the requirements necessary to pierce the corporate veil [under state law] are met. In other words . . . whether the parent will be liable as an operator depends upon whether the degree to which it controls its subsidiary and the extent and manner of its involvement with the facility, amount to the abuse of the corporate form that will warrant piercing the corporate veil and disregarding the separate corporate entities of the parent and subsidiary.[19]

The Supreme Court granted certiorari.[20] As a preliminary step in its analysis, the Court framed the general standard for operator liability. The Court stated that "an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."[21]

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14. *Id.* at 558.
15. *Id.* at 561-62.
16. *Id.* at 561.
17. *Cordova Chem. Co. of Mich.*, 113 F.3d at 577-80.
18. *Id.* at 579.
19. *Id.* at 580.
20. *Bestfoods*, 118 S. Ct. at 1884.
21. *Id.* at 1887.

After summarily dispatching the "authority to control" test, the Court criticized the "actual control" test for direct liability for a parent corporation, stating:

> The well-taken objection to the actual control test, however, is its fusion of direct and indirect liability; the test is administered by asking a question about the relationship between the two corporations (an issue going to indirect liability) instead of a question about the parent's interaction with the subsidiary's facility (the source of any direct liability). If, however, direct liability for the parent's operation of the facility is to be kept distinct from derivative liability for the subsidiary's own operation, the focus of the inquiry must necessarily be different under the two tests. *"The question is not whether the parent operates the subsidiary, but rather whether it operates the facility, and that operation is evidenced by participation in the activities of the facility, not the subsidiary.* Control of the subsidiary, if extensive enough, gives rise to indirect liability under piercing doctrine, not direct liability under the statutory language." The District Court was therefore mistaken to rest its analysis on CPC's relationship with [Ott], premising liability on little more than "CPC's 100-percent ownership of [Ott]" and "CPC's active participation in, and at times majority control over, [Ott]'s board of directors." *The analysis should instead have rested on the relationship between CPC and the Muskegon facility itself.*[22]

Thus, the Supreme Court agreed with the Sixth Circuit that indirect liability can only be predicated on factors that would justify piercing the corporate veil.[23] The Court based its decision on two well-founded principles of corporate law: (1) "that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries";[24] and (2) "that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, inter alia, the corporate form would otherwise be misused to accomplish certain wrongful purposes."[25] Finding that "[n]othing in CERCLA purports to rewrite [these rules]," the Court held that "when (but only when) the corporate veil may be pierced, may a parent corporation be charged with derivative CERCLA liability for its subsidiary's actions."[26]

The Court further noted that "'it is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that

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22. *Id.* at 1887-88 (citations omitted) (emphasis added).
23. *Id.* at 1885-86.
24. *Id.* at 1884.
25. *Id.* at 1885.
26. *Id.* at 1885-86.

fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts.'"[27] The Court then created a presumption in favor of finding that a person occupying positions for both the parent and subsidiary corporations acts *in fact* on behalf of the corporation on whose behalf he appears to act.[28] The Court declared:

> This recognition that the corporate personalities remain distinct has its corollary in the "well established principle [of corporate law] that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership." Since courts generally presume "that the directors are wearing their 'subsidiary hats' and not their 'parent hats' when acting for the subsidiary," it cannot be enough to establish liability here that dual officers and directors made policy decisions and supervised activities at the facility. The [Plaintiff] would have to show that, despite the general presumption to the contrary, the officers and directors were acting in their capacities as CPC officers and directors, and not as [Ott] officers and directors, when they committed those acts. The District Court made no such inquiry here, however, disregarding entirely this time-honored common law rule.[29]

Finally, the Court addressed the situation of the individual who works for the parent but has some supervisory involvement with the subsidiary.[30] The Court stated that courts must distinguish

> a parental officer's oversight of a subsidiary from such an officer's control over the operation of the subsidiary's facility. "[A]ctivities that involve the facility but which are consistent with the parent's investor status, such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability." The critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility.[31]

However, despite agreeing with the Sixth Circuit's view of indirect liability, the Supreme Court vacated the circuit court's judgment and remanded the case because it rejected as too narrow the Sixth Circuit's opinion of the circumstances under which a parent could be directly

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27. *Id.* at 1888 (quoting American Protein Corp. v. AB Volvo, 844 F.2d 56, 57 (2d Cir. 1988)).

28. *Id.*

29. *Id.* at 1888-89 (citations omitted) (first alteration in original).

30. *Id.* at 1889.

31. *Id.* (citations omitted) (alteration in original).

liable for its own conduct.[32] Based on the involvement of one or more CPC officials without roles in Ott's management in establishing environmental policies at the facility in operation, the Supreme Court decided further facts were required to decide the issue of direct liability.[33]

The extent to which *Bestfoods* will impact the Eleventh Circuit's approach to operator liability is unclear. Arguably, the Eleventh Circuit's "actual control" test is consistent with *Bestfoods*. As the court most recently described the standard in *Redwing Carriers, Inc. v. Saraland Apartments*,[34] in order to establish "operator" liability, a plaintiff must show the operator "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."[35]

Consistent with *Bestfoods*, the actual control test as articulated by the Eleventh Circuit focuses on the facility in question.[36] Prior to *Bestfoods*, however, the Eleventh Circuit allowed the use of evidence of a parent's domination of a subsidiary's corporate governance to create an inference that the parent did, in fact, have sufficient control over the facility's activities to result in liability.[37] After *Bestfoods*, it seems clear that a plaintiff seeking to hold a parent corporation liable must have evidence of the parent's direct involvement in the facility, at least absent facts sufficient to pierce the corporate veil.

The broader implications of *Bestfoods* may take time to unfold. The Court's decision implies a wider disagreement with lower courts' apparent willingness to expand the bounds of traditional corporate law "to avoid frustrating [CERCLA's] legislative purpose."[38] It is possible that the decision may signify a trend towards narrowing the reach of CERCLA liability more generally. The existence or nonexistence of that trend will no doubt be the topic of much litigation in the years to come and will likely occupy the pages of future editions of this survey.

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32. *Id.* at 1885-87.
33. *Id.* at 1889-90.
34. 94 F.3d 1489 (11th Cir. 1996).
35. *Id.* at 1505 (alteration in original) (quoting *Jacksonville Elec. Auth.*, 996 F.2d at 1110).
36. *See Jacksonville Elec. Auth.*, 996 F.2d at 1110.
37. *Id.*
38. *CPC Int'l, Inc.*, 777 F. Supp. at 571.

II. NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

The Eleventh Circuit's decision in *Hill v. Boy*[39] fits in a discussion of either the CWA or NEPA. However, because the case resulted in a comparatively rare victory by plaintiffs alleging arbitrary and capricious conduct by a federal agency under NEPA, it is perhaps most enlightening to study as an example of a successful challenge under that statute.

In *Hill*, prior to issuing a permit pursuant to section 404 of the CWA to the Carroll County Water Authority ("County") for construction of a dam and reservoir in Carroll County, Georgia, the United States Army Corps of Engineers ("Corps") conducted an environmental assessment ("EA") of the proposed project as required by NEPA.[40] Under NEPA's scheme, the EA stage represents a fork in the road. Down one path, if the agency concludes, based on the EA, that the project will not significantly affect the environment, the agency issues a finding of no significant impact ("FONSI").[41] Down the other path, if the agency concludes that the project would have a significant impact, the agency must propose a detailed environmental impact statement ("EIS").[42] The burden of preparing an EIS is such that projects confronted by an EIS requirement can be delayed for years (or eliminated altogether) even though the ultimate outcome of an EIS never legally dictates a course of action.[43]

Following its EA, the Corps issued a FONSI. Property owners downstream from the proposed dam brought suit, claiming, in part, that the Corps failed to comply with NEPA's requirements. At the heart of plaintiffs' complaint was how to characterize a pipeline that ran beneath the proposed lake site. Initially, the Corps described it as a natural gas pipeline. When plaintiffs pointed out that it was actually a liquid petroleum pipeline, the Corps claimed the discrepancy did not matter because the pipeline was going to be moved. However, although the County had apparently indicated to the Corps that the pipeline would be moved, the Corps did not condition the section 404 permit on the relocation of the pipeline. Plaintiffs argued that there was no evidence in the administrative record that the County planned to relocate the pipe.[44]

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39. 144 F.3d 1446 (11th Cir. 1998).

40. *Id.* at 1447-48.

41. 40 C.F.R. § 1508.13 (1998).

42. 40 C.F.R. § 1502 (1998).

43. For more background on NEPA's statutory scheme, see Edward A. Kazmarek & W. Scott Laseter, *Environmental Law*, 42 MERCER L. REV. 1411, 1412-13 (1991).

44. *Hill*, 144 F.3d at 1447-49, 1450.

Reviewing the administrative record, the Eleventh Circuit agreed with plaintiffs that "the current record does not support the Corps' assumption that the petroleum pipeline will be relocated."[45] Given this finding, the court then employed the following criteria in analyzing whether the Corps' determination not to prepare an EIS was arbitrary and capricious: (1) whether the Corps had accurately identified the relevant environmental concern, (2) whether the Corps took a "hard look" at the problem in preparing the EA, and (3) if the Corps found that there would be no significant impact, whether it could make a convincing case for that finding.[46] The circuit court concluded that

> the Corps failed to satisfy these three criteria in assessing the potential adverse environmental impacts resulting from leaving the petroleum pipeline underneath the proposed reservoir. In finding that the [reservoir] project "will not have significant adverse impacts on the quality of the human environment," the Corps explicitly assumed that *the pipeline would be removed.* Thus, it is clear that the Corps did not identify the environmental concerns related to *the pipeline remaining underneath the proposed reservoir*, did not take a "hard look" at the potential adverse environmental consequences of such a pipeline, and did not make a convincing case for its finding of no significant impact from such a pipeline. Therefore, we conclude that the Corps violated NEPA by failing to adequately consider all relevant environmental factors prior to making its finding of no significant impact.[47]

As a result, because the circuit court held that the Corps' decision not to prepare an EIS was arbitrary and capricious, it reversed the district court's decision and remanded.[48]

The plaintiff's victory in *Hill* may be limited by the narrow scope of the issue remanded. Specifically, the Eleventh Circuit directed the lower court to "consider whether the petroleum pipeline will remain underneath the proposed Snake Creek reservoir and, if it will remain, whether the presence of such a pipeline necessitates the preparation of an EIS for the Snake Creek project."[49] The court noted, "if the Corps determines on remand that the pipeline will be relocated, none of the other arguments asserted on appeal by the property owners persuade us that the Corps' issuance of the EA was arbitrary or capricious."[50] However,

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45. *Id.* at 1451.

46. *Id.* at 1450 (citing Coalition on Sensible Transp., Inc. v. Dole, 826 F.2d 60, 66-67 (D.C. Cir. 1987)). A fourth criterion is listed but is not relevant to this analysis. *Id.*

47. *Id.* at 1451.

48. *Id.* The court also affirmed the district court's grant of summary judgment on the first two counts of the complaint. *Id.* at 1452.

49. *Id.* at 1451.

50. *Id.* at 1451 n.14.

even though the future legal battle may be limited in scope, the victory certainly opened the door for plaintiffs to pursue political or other nonlegal means of addressing their objections to the project.

Perhaps more importantly, the outcome may offer some strategic insights into the prosecution and defense of NEPA claims. As suggested in an earlier survey article, plaintiffs rarely, if ever, succeed in challenging a federal agency's judgment in balancing impacts on the environment against the perceived value of a proposed project.[51] Rather, as in *Hill*, successful plaintiffs almost always prevail by showing that the agency failed to consider a material fact or made some fundamental analytical error.[52] Thus, no matter how meritorious their claims may be, plaintiffs should focus on the details of the agency's procedures, not on its policies.

III. ENDANGERED SPECIES ACT

In *Loggerhead Turtle v. County Council of Volusia County*,[53] the Eleventh Circuit faced an issue of first impression in a case brought by the loggerhead sea turtle, the green sea turtle, and two individuals (collectively, "Turtles"). The loggerhead sea turtle and the green sea turtle are, respectively, a threatened and an endangered species under the ESA.[54] The Turtles sought preliminary and permanent injunctive relief against Volusia County ("County"), a coastal county in northeast Florida, claiming that the County's refusal to ban artificial beachfront lighting and driving on the beach during turtle nesting season violated the "take" provisions of the ESA.[55] These provisions prohibit anyone from harassing or harming an endangered or threatened species.[56]

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51. *See* Edward A. Kazmarek & W. Scott Laseter, *Environmental Law*, 42 MERCER L. REV. 1411, 1421, (1991).

52. *Id.*

53. 148 F.3d 1231 (11th Cir. 1998).

54. *Id.* at 1234.

55. *Id.* at 1235. For a discussion of the statutory framework of the ESA, see W. Scott Laseter & Julie V. Mayfield, *Environmental Law*, 48 MERCER L. REV. 1577, 1602-03 (1997). The basis of the Turtles' claim regarding the artificial lighting was that when newborn turtles hatch, they instinctively move toward the brightest light they see. In the absence of man-made development, the brightest light is the moon's reflection on the ocean; thus, the turtles make their way back to sea. In developed areas, however, the brightest lights are often from artificial light sources inland, which draw the small turtles away from the ocean and, most often, to their death. *Loggerhead Turtle*, 148 F.3d at 1235. While it is not clearly spelled out in the opinion, the likely basis for the Turtle's claim regarding driving on the beach was that cars would either hit or disorient turtles trying to lay their eggs.

56. 16 U.S.C. §§ 1532(19), 1538(a) (1994).

The district court initially granted a preliminary injunction prohibiting driving on the beach during turtle nesting season, but it declined to grant an injunction prohibiting artificial beachfront lighting.[57] The County then moved for partial summary judgment, claiming that the Turtles lacked standing to assert claims for takes that occurred in municipalities within the county that independently regulated beachfront lighting within their jurisdictions. The district court granted the motion, ruling (1) that the Turtles had not shown a causal connection between the County's regulation of beachfront lighting and the takes that occurred in self-regulating municipalities, and (2) that the injury could not be redressed by the court without joinder of those municipalities.[58] Shortly thereafter, the County received an incidental take permit from the United States Fish and Wildlife Service ("FWS"), which permitted the County to engage in certain authorized activities that would result in the taking of turtles. Agreeing with the County's argument that the incidental take permit mooted the Turtles' claims, the district court dismissed the suit.[59]

The Turtles appealed the dismissal of the suit and the partial grant of summary judgment.[60] The Eleventh Circuit first addressed the dismissal of the suit, which the Turtles appealed on the basis that the incidental take permit authorized incidental takes attributable to beach driving only and did not authorize incidental takes attributable to beachfront lighting.[61] Although the permit addressed beachfront lighting, it did so only in the context of mitigating measures that the County had to implement as a condition of the permit. The Turtles claimed that the discussion of beachfront lighting in the mitigation section of the permit was not sufficient to authorize takes attributable to the lighting. The County countered that the FWS had clearly considered beachfront lighting in issuing the permit and that, therefore, the County could not be liable for any takes attributable to beachfront lighting if it implemented the lighting conditions contained in the permit.[62]

The issue of whether an entity is exempted from liability under an incidental take permit for takes that result from activities performed as

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57. *Loggerhead Turtle*, 148 F.3d at 1235.

58. *Id.* at 1236.

59. *Id.*

60. *Id.* The Turtles also appealed the district court's refusal to allow joinder of the leatherback sea turtle as a plaintiff. The circuit court reversed the district court's decision on this point, determining that the district court abused its discretion in not permitting the leatherback sea turtle to join the litigation. *Id.* at 1258.

61. *Id.* at 1236.

62. *Id.* at 1236-37.

mitigation measures under the permit appears to be one of first impression in the Eleventh Circuit and other circuits.[63] In addressing the issue, the court examined the permit and found that all the activities authorized by the permit, meaning those activities that could result in legal, incidental takes of turtles, related only to beach driving and not to beachfront lighting.[64] Additionally, the court found that beachfront lighting was discussed only as a mitigation measure and that the mitigation section "does not contain any language expressly authorizing takes of sea turtles through artificial beachfront lighting."[65] Finding that the "ESA's text and the [Fish and Wildlife] Service's regulations provide every indication that incidental take permission must be express and activity-specific," the court stated that

> it is readily apparent that the incidental take permit exhaustively lists all authorized activities within Condition F and all mitigation measures within Condition G. Activities relative to driving on the beach are mentioned in both conditions. Activities relative to artificial beachfront lighting, however, are mentioned only in Condition G. Given the permit's structure, the express authority to take sea turtles through artificial beachfront lighting—if the Service had so intended—would be memorialized in Condition F. This absence is dispositive. Accordingly, Volusia County lacks the Service's express permission to take sea turtles incidentally through artificial beachfront lighting.[66]

In addition to this clear separation in the permit, the court found a distinct dividing line in the ESA's text and the FWS's regulations between authorized activities and mitigation measures.[67] The court also cited correspondence to the County from the FWS in which the FWS stated clearly that it did not view the County's application for a permit as including a request for incidental takes attributable to beachfront lighting, but only for incidental takes attributable to beach driving.[68] Finding that "no published case law even purports to suggest that purely mitigatory measures fall within the scope of the incidental take permit exception,"[69] the court held that the district court erred in dismissing the Turtles' claims.[70]

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63. *Id.* at 1242.
64. *Id.* at 1240.
65. *Id.* at 1242.
66. *Id.*
67. *Id.* at 1242-43. *Compare* 16 U.S.C. § 1539(a)(2)(A)(iii), *with* § 1539(a)(2)(A)(ii). *Compare also* 16 U.S.C. § 1539(a)(2)(B)(i), *with* § 1539(a)(2)(B)(ii).
68. *Loggerhead Turtle*, 148 F.3d at 1244.
69. *Id.*
70. *Id.* at 1246.

The court then addressed whether the district court erred in granting the County's motion for partial summary judgment on the basis that the Turtles had no standing to bring claims for takes that occurred in municipalities within the county that independently regulated beachfront lighting.[71] The court first restated the three requirements for standing: (1) that there must be an injury in fact, (2) that there must be a causal connection between the injury and the defendant's conduct, and (3) that the injury is likely to be redressed by a favorable decision by the court.[72] To determine if a causal connection existed between takes in the separate municipalities and the County's regulations, the court first examined the County's charter and beachfront lighting regulations to determine whether the county's activities in governing beachfront lighting were sufficiently related to the harm alleged by the Turtles.[73]

In doing so, the court found that the County's charter required it to set minimum standards for the protection of the environment that applied throughout the county, including separate municipalities.[74] Pursuant to this requirement, the County enacted an ordinance entitled "Minimum Environmental Standards for Sea Turtle Protection," which the Turtles alleged provided inadequate protections.[75] Citing precedent from the First and Eighth Circuits, the court noted that a governmental entity may be liable for takes resulting from its regulatory actions.[76] Holding for the Turtles, the Eleventh Circuit explained:

> Just as the *Strahan* agency was "vested with broad authority to regulate fishing" under state law, Volusia County is "vested with broad authority to regulate" artificial beachfront lighting under its charter and ordinances. Volusia County would have us hold that Daytona Beach, Daytona Beach Shores, Ormond Beach and New Smyrna Beach are "intervening independent actor[s]" in the regulation of artificial beachfront lighting. It is true that, as we concluded earlier, Ormond Beach and New Smyrna Beach independently enforce their county-approved lighting ordinances. In all other respects, however, no "intervening independent actor" exists concerning lighting standards and enforcement in Volusia County. As Volusia County concedes, it possesses sufficient regulatory and enforcement control over artificial beachfront lighting in all unincorporated areas and the Town of Ponce

71. *Id.* at 1247.
72. *Id.*
73. *Id.* at 1247-48.
74. *Id.* at 1247.
75. *Id.* at 1248-49.
76. *Id.* at 1251 (citing Strahan v. Coxe, 127 F.3d 155, 163 (1st Cir. 1997); Defenders of Wildlife v. Administrator, *EPA*, 882 F.2d 1294, 1301 (8th Cir. 1989)).

> Inlet. But for Volusia County's regulatory determination that Daytona Beach and Daytona Beach Shores fall outside the sea turtle nesting areas, light users in those locations would be subject to at least the Minimum Environmental Standards for Sea Turtle Protection as contained within Ordinance 89-60, as amended. Just as it was impossible in *Strahan* "for a licensed commercial fishing operation to use its gillnets or lobster pots in a manner permitted by the [agency] without risk of violating the ESA[,]" a genuine issue of fact exists in this case that the lighting activities of landowners along Volusia County's beaches—as authorized through local ordinance—violate the ESA. Accordingly, at the very least, the Turtles, analogous to the conservationist in *Strahan*, have standing to proceed against Volusia County for lighting-related "harm" in Daytona Beach, Daytona Beach Shores, Ormond Beach and New Smyrna Beach—even though the actions or inactions of those "third parties not before the court" may be another "cause of the harm[.]"[77]

On the issue of redressibility, the court noted that the test "asks whether it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'"[78] Again finding for the Turtles, the court held, "Given the Turtles' record evidence, we easily conclude that if the district court were to grant the requested relief, fewer protected sea turtles would be 'harmed' through misorientation."[79] *Loggerhead Turtle* joins a growing body of Eleventh Circuit case law under the ESA.[80]

77. *Id.* at 1253 (citations omitted) (alterations in original).

78. *Id.*

79. *Id.* at 1254.

80. For a discussion of recent cases that arose under the ESA, see W. Scott Laseter & Julie V. Mayfield, *Environmental Law*, 48 MERCER L. REV. 1577, 1602-05 (1997).