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Environmental Law

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In general, 2006 was a good year to be a defendant in environmental cases that reached the Eleventh Circuit. The court placed a narrow construction on operator liability for corporate parents under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")[1] and backed agency interpretations of the Clean Air Act ("CAA")[2] regulations in the face of challenges to their interpretation[3] and use.[4] In an issue of first impression, the court held that the agency's failure to carry out a nondiscretionary duty under the Endangered Species Act ("ESA")[5] constituted a one-time, and not a continuing, violation for purposes of applying the statute of limitation.[6] Conversely, in a case involving proposed limestone mining in wetlands adjacent to both the Everglades National Park and the urban coast of Florida, the United States District Court for the Southern District of Florida ruled for the plaintiffs, remanding an Environmental Impact Statement ("EIS")some eight years in the making due to inadequacies under both the National Environmental Policy Act ("NEPA")[7] and the Clean Water Act ("CWA").[8]

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1. 42 U.S.C. §§ 9601-9675 (2000 & Supp. III 2003); *see* Atlanta Gas Light Co. v. UGI Utils., Inc., 463 F.3d 1201 (11th Cir. 2006).

2. 42 U.S.C. §§ 7401-7671q (2000 & Supp. III 2003).

3. See Sierra Club v. Johnson, 436 F.3d 1269 (11th Cir. 2006), with the exception of a successful challenge to the adequacy of public notice in the case of one permit.

4. *See* Sierra Club v. Georgia Power, 443 F.3d 1346 (11th Cir. 2006).

5. 16 U.S.C. §§ 1531-1544 (2000).

6. Center for Biological Diversity v. Hamilton, 453 F.3d 1331 (11th Cir. 2006).

7. 42 U.S.C. §§ 4321-4370d (2000 & Supp. III 2003).

8. 33 U.S.C. §§ 1251-1387 (2000 & Supp. III 2003); *see* Sierra Club v. Flowers, 423 F. Supp. 2d 1273 (S.D. Fla. 2006).

I. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

In *Atlanta Gas Light Co. v. UGI Utilities, Inc.*,[9] a case involving the site of a former manufactured gas plant facility ("MGP"), the Eleventh Circuit applied the *United States v. Bestfoods*[10] corporate-parent liability standard to determine whether a parent corporation alleged to have acted as an operator of a facility was liable under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[11] The court affirmed the district court's grant of summary judgment as to defendants UGI Utilities ("UGI") and CenterPoint Energy Resources Corporation ("CenterPoint"), holding that defendants UGI and CenterPoint were not liable as operators of the MGP because, even though both companies were parents and played active roles in the management of Atlanta Gas Light Company's ("AGL") predecessor-owner of the MGP, neither conducted operations specifically related to the leakage or disposal of hazardous waste.[12] The court also held that defendant Century Indemnity Company ("Century") was not liable for leakage under an insurance policy that provided coverage for "accidents" because leakage from the MGP was routine and expected in the industry, and AGL's predecessor-owner was likely aware that such leakage was occurring.[13]

MGP began operation in the late nineteenth century. The process involved heating products such as coal or oil and producing gas. The process also generated byproducts, including coal tar, which contained hazardous substances and which, AGL contended, routinely leaked from the MGP equipment. The MGP at issue in the case was located in St. Augustine, Florida, and began operation in 1886. AGL's predecessor, St. Augustine Gas and Electric Company ("SAGE"), was incorporated in 1887 and owned the MGP through 1947.[14]

From 1887 to 1928, defendant UGI's predecessor was a minority owner of SAGE but also nominated most of the local superintendents for the MGP, provided management and consulting services to SAGE, and placed several of the officers and directors on SAGE's board.[15] In 1928

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9. 463 F.3d 1201 (11th Cir. 2006).

10. 524 U.S. 51, 66-67 (1998).

11. 42 U.S.C. §§ 9601-9675 (2000 & Supp. III 2003); *Atlanta Gas Light Co.*, 463 F.3d at 1204.

12. *Atlanta Gas Light Co.*, 463 F.3d at 1208.

13. *Id.* at 1209 & nn. 12-14.

14. *Id.* at 1202-03.

15. *Id.* at 1202-03, 1205.

CenterPoint's predecessor acquired the stock of SAGE and replaced SAGE's board with CenterPoint executives. From 1930 to 1935, CenterPoint provided management and engineering services to SAGE. Finally, from 1940 to 1947, Century's predecessor provided liability insurance to SAGE that covered liability due to "accidents." AGL contended that during all of these time periods, daily leaks occurred from the MGP equipment.[16] AGL, named as a responsible party at the facility, settled with the Environmental Protection Agency ("EPA") and sued the defendants for contribution under § 113 of CERCLA,[17] contending that during the designated times, UGI's and CenterPoint's predecessors had operated the MGP, and Century's had provided insurance coverage.[18] The district court granted the defendants' motion for summary judgment, holding that AGL had not produced enough evidence to create an issue of fact that either UGI or CenterPoint had operated the plant or that any leaks had actually occurred during the time Century's insurance coverage applied.[19]

The Eleventh Circuit affirmed.[20] First, as to the operator liability of UGI and CenterPoint under CERCLA, the court applied the United States Supreme Court's test for the imposition of CERCLA operator liability on a parent for a facility owned by its subsidiary set out in *Bestfoods*.[21] In *Bestfoods* the Court held that a plaintiff seeking to impose liability must show that the parent "manage[d], direct[ed] or conduct[ed] 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."[22]

Following this standard, the Eleventh Circuit concluded that AGL failed to show that either UGI or CenterPoint made operating decisions regarding the leakage or disposal of hazardous waste, as required under

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16. *Id.* at 1203.

17. 42 U.S.C. § 9613 (2000). Because AGL settled, UGI contended that the court did not have jurisdiction over the case, citing the United States Supreme Court's holding in *Cooper Industries v. Aviall Services*, 543 U.S. 157, 165-171 (2004), where the Court held that a party could not bring a contribution action under CERCLA § 113 unless the party itself had been sued under CERCLA § 106 or § 107 (42 U.S.C. § 9606 or § 9607). UGI argued that because AGL settled before litigation, AGL could not bring a CERCLA contribution claim. *Atlanta Gas Light Co.*, 463 F.3d at 1203-04. The Eleventh Circuit held that it did have jurisdiction, relying on dicta in the *Cooper Industries* opinion that CERCLA § 113(f)(3)(B) offered an avenue for contribution actions for parties that had settled CERCLA claims with the United States. *Id.* at 1204.

18. *Atlanta Gas Light Co.*, 463 F.3d at 1202.

19. *Id.*

20. *Id.* at 1210.

21. 524 U.S. 51, 67-68 (1998); *Atlanta Gas Light Co.*, 463 F.3d at 1205.

22. *Atlanta Gas Light Co.*, 463 F.3d at 1205 (quoting *Bestfoods*, 524 U.S. at 66-67).

Bestfoods.[23] Although UGI supervised the plant through centralized committees, appointed plant superintendents, and maintained management and consulting contracts with SAGE, the court concluded that none of this involvement included work with hazardous waste leakage or disposal.[24] Similarly, CenterPoint placed its senior executives on the board of SAGE and entered into a contract to manage SAGE,[25] but the court held that this evidence, without more, was insufficient to establish operator liability.[26] The court noted that under *Bestfoods*, interrelationships between a corporate parent and subsidiary that are within "corporate norms" cannot in and of themselves be the basis for CERCLA operator liability without evidence that the parent actually participated in decisions about hazardous waste at a facility.[27] Furthermore, in neither case did the management contracts actually involve the parent in the day-to-day operations of the plant with regard to hazardous waste leakage or disposal.[28]

Turning to AGL's claim against Century, the liability insurer, the court held that summary judgment in Century's favor was also proper.[29] The insurance policies at issue provided coverage for "accidents."[30] The court noted that by AGL's own assertions, MGPs leaked routinely and consistently.[31] Further, uncontradicted evidence showed that the MGP industry was aware of the leakage during the time periods in question.[32] The court noted that the burden was on AGL to produce evidence tending to show that SAGE's owners were unaware of ongoing leakage that AGL asserted was occurring during this time; however,

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23. *Id.*

24. *Id.* at 1205-06.

25. The court noted that while CenterPoint's contracts with SAGE called for "management" services, the contracts in fact did not contemplate operation of the plant itself; one was for the provision of consulting engineering services and the other for management advisory services, primarily financial. *Id.* at 1207. The court ruled that neither of these contracts contemplated involvement in the day-to-day operation of the plant, which distinguished this case from the court's holding in *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1509-10 (11th Cir. 1996) (holding an apartment complex management company liable as an operator of the complex under CERCLA due to its involvement in the day-to-day-operations of the facility). *See Atlanta Gas Light Co.*, 463 F.3d at 1208 n.10.

26. *Atlanta Gas Light Co.*, 463 F.3d at 1208.

27. *Id.* at 1205-06.

28. *Id.* at 1205.

29. *Id.* at 1210.

30. *Id.* at 1208-09.

31. *Id.* at 1209.

32. *Id.*

AGL failed to produce this evidence.[33] For these reasons, the court held that any leaks of byproduct of the MGP process during the time Century's insurance coverage was in place could not have been the result of "accidents."[34]

II. CLEAN AIR ACT

In *Sierra Club v. Johnson*,[35] the Eleventh Circuit decided two consolidated appeals of EPA decisions in failing to object to the Clean Air Act ("CAA")[36] Title V operating permits issued by the Georgia Environmental Protection Division ("EPD"), reversing the agency's decision in one appeal and affirming in the other.[37] The first challenged permit involved the EPD's failure to notify the public of the permit application via a required mailing list. The second challenge addressed the kind of compliance information made available to the public during both the permitting process and facility operation.[38]

In the first case, the court reversed the EPA's decision not to object to the issuance of the permit.[39] The court held that the EPA abused its discretion in failing to object where the EPD had failed to notify the public via a required mailing list until after the permit application had been approved.[40] CAA regulations clearly required the EPD to issue notices via the mailing list, and the EPA had a clear statutory duty to object to any permit that did not comply with the Act.[41] Also, in a threshold issue in the first case, the court held that the Sierra Club had standing to challenge the EPA's failure to object where one of its members alleged that the EPD's failure to follow the notice requirement had a concrete, adverse affect on him, even though the member himself had actual notice of the permit application.[42]

In the second case, the court affirmed the EPA's refusal to object to four permits issued by the EPD, holding that the EPA did not abuse its discretion in failing to object where the permits required the permitted facilities only to report monitoring results showing any deviation from the permit requirements and not results showing permit compliance.[43]

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33. *Id.* at 1209 n.12.
34. *Id.* at 1210.
35. 436 F.3d 1269 (11th Cir. 2006).
36. 42 U.S.C. §§ 7401-7671q (2000 & Supp. III 2003).
37. *Sierra Club*, 436 F.3d at 1284.
38. *Id.* at 1272.
39. *Id.* at 1280.
40. *Id.*
41. *Id.*
42. *Id.* at 1279.
43. *Id.* at 1283.

The court also held that the EPA did not abuse its discretion in failing to object where the EPD did not make available to the public monitoring data and other information that might be relevant to the permitting process and was kept at the facilities themselves, but was not considered by the EPD in the permitting process.[44] On both these issues, the court concluded that the EPA based its decision on reasonable interpretations of its regulations, and the court deferred to the agency's decisions.[45]

First, the court held that the EPA abused its discretion in failing to object to a CAA operating permit issued to King Finishing Company for its fabric printing and dyeing facility in Dover, Georgia, because the EPD, the state permitting agency acting pursuant to its State Implementation Plan ("SIP"), failed to notify persons on its mailing list of the permit application before approving the permit.[46] The permitting agency must provide notice and an opportunity to comment to the public before acting on a CAA Title V permit application; notice must be given by newspaper publication and also by notifying persons on a mailing list that the EPA regulations require the agency to maintain.[47] Following state approval, the EPA reviews the permit and must object to the permit if it violates any provision of the CAA. If the EPA fails to object, any person may challenge the failure by petitioning the EPA.[48]

In the King Finishing permit process, the EPD did not create the required mailing list until after the public comment period had expired. The parties did not dispute that the EPD violated the mailing list requirement. The petitioner, Sierra Club, had actual notice of the permit application and submitted comments but requested that the EPD go through the notice and comment process again to include the mailing. The EPD declined, and after Sierra Club's petition, the EPA declined to object, reasoning that use of the mailing list would not have significantly increased public participation, and further, that it was not required under its regulations to object to procedural defects in the permitting process but instead was only required to object to defects in the permit itself.[49]

The court considered the EPA's position under both the *Chevron* standard of review applicable to a court's review of an agency's

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44. *Id.* at 1284.
45. *Id.*
46. *Id.* at 1280.
47. *Id.* at 1273. See generally 40 C.F.R. § 70.7 (2007) for notice requirements.
48. *See Sierra Club*, 436 F.3d at 1280.
49. *Id.* at 1279-80.

interpretation of a statute[50] and the *Auer* standard of review applicable to an agency's interpretation of its own regulations.[51] The court determined that in the CAA, Congress intended for the EPA to have a nondiscretionary duty to object to a permit where the state permitting agency had clearly violated a regulatory requirement in issuing the permit.[52] Further, the court held that the EPA could not avoid this duty by a contrary interpretation of a regulation that the EPA itself implemented.[53]

The court also determined that the Sierra Club had standing to challenge the EPA's failure to object to the King Finishing permit.[54] The Sierra Club's standing was based on the affidavit of one of its members[55] who lived near the King facility and alleged that the EPD's failure to notify via the mailing list possibly reduced the level of public participation in the permitting process, thereby reducing the likelihood that the permit would be more protective of health and the environment. However, this member did not allege that he did not have actual notice of the permit application in time to comment on it. The EPA contended that a person complaining of a defect in notice regarding an agency permitting decision only had standing to challenge the defect if he did not receive actual notice.[56]

The court held that under the United States Supreme Court's decision in *Lujan v. Defenders of Wildlife*,[57] the member had standing because the EPD's violation of its procedural duty to notify via the mailing list threatened the member's concrete interest in his health, notwithstanding the fact that he had actual notice of the permit application.[58] The court held that "[t]he [United States Supreme] Court's analysis in *Lujan*

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50. Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984), a court reviewing an agency's interpretation of a statute it administers first must decide as a threshold matter whether Congress has spoken directly to the question at issue. *Id.* If so, the court gives effect to Congress's intent, and no further inquiry is necessary. *Id.*

51. *Sierra Club*, 436 F.3d at 1274. Under *Auer v. Robbins*, 519 U.S. 452, 461 (1997), a court reviewing an agency's interpretation of its own regulations defers to the agency unless the interpretation is "'plainly erroneous or inconsistent with the regulation.'" *See Sierra Club*, 436 F.3d at 1274 (quoting *Auer*, 519 U.S. at 461).

52. *Sierra Club*, 436 F.3d at 1280.

53. *Id.*

54. *Id.* at 1279.

55. An organization such as the Sierra Club has standing to sue on behalf of its members only if, among other things, the members would have standing in their own right. *Id.* at 1276.

56. *Id.* at 1279.

57. 504 U.S. 555 (1992).

58. *Sierra Club*, 436 F.3d at 1279.

suggests that a procedural injury not personal to a plaintiff is enough to confer standing if that injury is connected to a separate concrete interest of the plaintiff's."[59] The court concluded that "a plaintiff has established procedural injury standing if he has established that the claimed violation of the procedural right caused a concrete injury in fact to an interest of the plaintiff that the statute was designed to protect," regardless of whether the alleged procedural violation was specific to the plaintiff or merely a violation of a procedural duty owed to the general public.[60] Based on this interpretation of standing, the court held that the Sierra Club's member, and therefore the Sierra Club, had standing to challenge the EPA's refusal to object to the King Finishing permit.[61] The court reached this conclusion because the member had alleged a general procedural violation—the EPD's failure to notify via the mailing list. This failure was connected to a threatened injury in fact to him—the possibility that had the EPD complied with the notice requirements, the notice would have received more comments on the permit application, which could have resulted in stricter permit requirements and thus done more to protect the environment where the member lived.[62] The fact that the member himself had notice and the opportunity to comment was deemed irrelevant.[63]

Next, the court held that the EPA did not abuse its discretion in failing to object to four permits issued by the EPD,[64] including the King Finishing permit, on the ground that the permits required the facilities to report to the EPD only incidents of noncompliance, not all monitoring data.[65] The regulation at issue, which was incorporated into the permits, required that reports of required monitoring must be submitted at least every six months and that "[a]ll instances of deviations from permit requirements must be clearly identified."[66] The Sierra Club contended that the regulation required the facilities to submit the results of all required monitoring and argued that without access to all the monitoring data, the public would not be able to detect unreported incidents of noncompliance. The EPA interpreted the regulation only to

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59. *Id.* at 1277.
60. *Id.* at 1278.
61. *Id.* at 1279.
62. *Id.* at 1278-79.
63. *Id.* at 1279.
64. In addition to the King Finishing permit, the Sierra Club challenged the EPA's refusal to object to permits issued to a facility owned by Monroe Power and two facilities owned by Shaw Industries. *Id.* at 1280.
65. *Id.* at 1283.
66. 40 C.F.R. § 70.6(a)(3)(iii)(A) (2007); *Sierra Club*, 436 F.3d at 1281.

require the submission of data showing noncompliance with the permit.[67]

The court stated that it was obliged to defer to the EPA's "'reasonable interpretation of its own regulations'"[68] and that "[w]hen an agency has interpreted one of its regulations in a consistent manner, that interpretation is 'controlling unless plainly erroneous or inconsistent with the regulation.'"[69] The court noted that the EPA had issued a previous permit with the same requirement (that is, that the facility report only incidents of noncompliance and not all monitoring data), which the court considered to be a consistent interpretation of the reporting requirement and not erroneous or inconsistent with the regulation.[70] The court thus held that the EPA did not abuse its discretion in failing to object to the four permits on this ground.[71]

With regard to the Sierra Club's complaint, the court similary held that the EPA should have objected to the same four permits because the EPD did not require the facilities to submit and make available information for public review (during the comment period for the permits) that the EPD itself did not consider as part of the permitting process, including monitoring data and risk management plans.[72] The regulation at issue requires the EPD to make available to the public during the comment period all "supporting materials" to the application and all materials "relevant to the permit decision."[73] The Sierra Club argued that this regulation requires the permitting authority to make available all information relevant to the permit application, regardless of whether the authority actually considers and uses the information.[74] The EPA interpreted the phrase "relevant to the permit decision" more narrowly to mean only the "information that the permitting authority has deemed to be relevant."[75] Otherwise, the EPA argued, the phrase would have no boundaries at all.[76]

Again, the court noted that it was obliged to defer to the agency's reasonable interpretation of its own regulation, and because the regulation itself "does not detail what materials are 'relevant to the

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67. *Sierra Club*, 436 F.3d at 1281.

68. *Id.* at 1282 (quoting U.S. Steel Mining Co. v. Dir. Office of Workers' Comp. Programs, 386 F.3d 977, 985 (11th Cir. 2004)).

69. *Id.* (citing *Auer*, 519 U.S. at 461).

70. *Id.*

71. *Id.* at 1283.

72. *Id.* at 1283-84.

73. 40 C.F.R. § 70.7(h)(2); *Sierra Club*, 436 F.3d at 1283-84.

74. *Sierra Club*, 436 F.3d at 1284.

75. *Id.*

76. *Id.*

permitting decision' and does not specify who gets to decide," the EPA did not abuse its discretion in refusing to object to EPD's issuance of the four permits on that basis.[77] The court's holding in the second appeal highlights the limitations on the public's ability to scrutinize both regulated facilities and the regulating agency in the administration of Title V permits. While the holding is sound, based on the court's own limitations in reviewing agency interpretations of its rules, the rules themselves are ambiguous, and on both points the agency chose to interpret those rules to require that less information be made available to the public rather than more.

In *Sierra Club v. Georgia Power Co.*,[78] the Eleventh Circuit held that the "startup, shutdown, or malfunction" ("SSM") rule in Georgia's Clean Air Act State Implementation Plan ("SIP"), which allows a facility to emit pollutants in excess of its Title V permit limits during those three circumstances, was not eliminated by a subsequent EPA guidance policy for two reasons: first, the EPA later clarified the guidance policy to explain that the policy was not intended to alter existing provisions of an EPA-approved SIP, and second, even if the policy were so construed, it was not a formal rule and thus could not supersede an SIP provision.[79] The court also held that the SSM rule as incorporated into the defendant's Title V permit was not altered by changes in the language of the rule as it appeared in the permit.[80]

The Sierra Club filed suit against Georgia Power, contending that on approximately 4,000 occasions between 1998 and 2002, two operating units at Georgia Power's Plant Wansley exceeded the opacity limit in its Title V operating permit.[81] Georgia Power did not dispute the exceedances, but contended that the exceedances were not permit violations because they all occurred within periods of startup, shutdown, or malfunction, during which times both its permit and the SSM rule in the Georgia SIP allowed such exceedances.[82] The Sierra Club contended

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77. *Id.*

78. 443 F.3d 1346 (11th Cir. 2006).

79. *Id.* at 1353-54.

80. *Id.* at 1355-56.

81. *Id.* at 1350. The court explained that opacity is a measure of the amount of light that passes through stack emissions at a facility. *Id.* at 1350 n.4. Opacity is a surrogate measurement for particulate matter in emissions. *Id.*

82. *Id.* at 1350. The SSM rule in the Georgia SIP provides that:

> [e]xcess emissions resulting from startup, shutdown, malfunction of any source which occur though ordinary diligence is employed shall be allowed provided that (I) the best operational practices to minimize emissions were adhered to, and (II) all associated air pollution control equipment is operated in a manner consistent with good air pollution control practice for minimizing emissions and (III) the

that Georgia Power did not have an affirmative defense based on the SSM exemption for two reasons: first, the SSM rule, which had been part of Georgia's SIP since 1980, had been superseded by an EPA guidance policy issued in 1999, which greatly narrowed the scope of the defense, and second, the rule in the form it had been incorporated into the Plant Wansley permit precluded Georgia Power from raising the defense.[83]

The court rejected the Sierra Club's first contention on two grounds. First, the court held that the EPA's 1999 Guidance policy was intended only to apply prospectively to SIPs being considered for approval by the EPA and not to SIPs that had been approved prior to the Guidance.[84] The court noted that the EPA recognized this prospective application in a clarification to the Guidance it issued in 2001, in which the EPA stated that the "[1999] Guidance was not intended to alter the status of any existing [SSM] provision in a SIP that has been approved by the EPA."[85] Second, the court held that even if the EPA had intended the 1999 Guidance policy to apply retrospectively to SIPs approved prior to 1999, it could not have done so except by requiring a formal revision of Georgia's SIP pursuant to the CAA.[86] The court stated that the "EPA policy guidance cannot trump the SSM rule adopted by Georgia and approved formally by the EPA."[87] Thus, the EPA's 1999 Guidance policy did not affect the SSM rule in the Georgia SIP.

The court also rejected the Sierra Club's second contention that the rule, due to slightly altered language that was incorporated into the facility's permit, precluded Georgia Power from raising the SSM defense in the case.[88] In the permit itself, the language from the rule was prefaced with an introductory statement that read, "'the [Georgia Environmental Protection] Division may allow' SSM exceedances" under the conditions set out in the rule.[89] The Sierra Club argued first that this language limited the SSM defense to agency enforcement actions and thus rendered it unavailable to Georgia Power in a citizen suit and second that the language made the entire rule merely an acknowledg-

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duration of excess emissions is minimized.
GA. COMP. R. & REGS. 391-3-1-.02(2)(a)(7)(i).

83. *Georgia Power*, 443 F.3d at 1350, 1354-55.
84. *Id.* at 1354.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 1355 n.13.
89. *Id.*

ment of the EPD's enforcement discretion and not a rule on which Georgia Power could rely.[90]

The court held that the permit merely restated the rule and did not alter it by the addition of the introductory clause.[91] The court noted that the purpose of an operating permit is to "merely consolidate . . . in a single document all of the clean air requirements already applicable to that source," and further noted that the provisions of an SIP remain binding on regulated facilities regardless of the permit itself.[92] Finally, the court noted that the Sierra Club's attempt to reduce the SSM rule to an expression of agency discretion would render the SSM provision meaningless in the permit.[93] Thus, Georgia Power was entitled to use the SSM rule as a defense.

As a result of these holdings, the court reversed the district court's grant of summary judgment to the Sierra Club and remanded, allowing Georgia Power to raise the SSM rule as an affirmative defense to the permit exceedances.[94] The court noted that Georgia Power would still have to prove that it met the three conditions set out in the rule as to each of the exceedances.[95] The court also noted, with a point that could also apply to *Johnson*, that the plaintiff's "real complaint is not with Georgia Power's permit compliance, but rather with Georgia's SSM Rule itself," for which the remedy (in the present case at least) is a petition for rulemaking.[96]

III. ENDANGERED SPECIES ACT

In *Center for Biological Diversity v. Hamilton*,[97] the Eleventh Circuit, in an issue of first impression, held that the failure of the Fish and Wildlife Service ("FWS") to designate a critical habitat for a threatened species as required under the Endangered Species Act ("ESA")[98] was not a continuing violation that would allow an extension of the six-year limitation period for bringing suit.[99]

The FWS proposed to designate two species of minnows as threatened species in 1991. The final rule confirming the listing was issued in 1992.

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90. *Id.* at 1355-56.
91. *Id.* at 1356.
92. *Id.*
93. *Id.*
94. *Id.* at 1357.
95. *Id.*
96. *Id.*
97. 453 F.3d 1331 (11th Cir. 2006). The defendant was the regional director of Region 4 of the United States Fish and Wildlife Service.
98. 16 U.S.C. §§ 1531-1544 (2000).
99. *Hamilton*, 453 F.3d at 1335.

Under the ESA, the FWS was required to act on the proposal within a year. The agency was required to designate the critical habitat of the species and issue a final rule designating the species as threatened. However, if agency found that the critical habitat of the species was undeterminable, then the agency would have an additional year to determine the critical habitat. In this case, the FWS determined that the habitat was undeterminable. Thus, the FWS was required to designate the critical habitat by 1993, two years after the proposed rule designating the species as threatened was issued. The agency failed to do so. However, the Center for Biological Diversity ("Center") did not file suit to force the FWS to designate the critical habitat until 2004. The district court held that the suit was untimely and dismissed.[100]

The Eleventh Circuit affirmed.[101] The court first noted that the ESA's citizen suit provision contained no limitation period; thus, the general six-year limitation period for suits against the United States applied in the case, and the period had clearly lasped.[102] But the Center argued that the agency's failure to designate the critical habitat for the minnows was a continuing violation of its nondiscretionary duty under the ESA, which in effect extended the limitation period indefinitely.[103] The court rejected this argument[104] and concluded that the ESA's language requiring the critical habitat designation to be made "'not later than'" two years after the proposed listing was published "create[d] not an ongoing duty but a fixed point in time at which the violation for the failure of the [agency] to act arises."[105] The court also determined that this interpretation was consistent with its own precedent, noting that its holdings regarding the continuing violation doctrine was distinguishable from the continuing consequences of a one-time violation, which do not extend the limitation period, and the continuation of the violation itself, which does.[106] Finally, the court pointed out that it has limited the application of the continuing violation doctrine to cases in which a "reasonably prudent plaintiff would have been unable to determine that a violation had occurred."[107] The court concluded that because a reasonably prudent plaintiff in this case would have been able to determine that the agency had not designated the

100. *Id.* at 1333.
101. *Id.* at 1336.
102. *Id.* at 1334-35. *See* 28 U.S.C. § 2401(a).
103. *Hamilton*, 453 F.3d at 1334-35.
104. *Id.* at 1335.
105. *Id.*
106. *Id.*
107. *Id.*

critical habitat as soon as the deadline for doing so expired, the Center could not take advantage of the doctrine.[108] In closing, the court emphasized that its holding did not foreclose relief for the Center because the Center could still petition the agency to designate the critical habitat.[109]

IV. NATIONAL ENVIRONMENTAL POLICY ACT/CLEAN WATER ACT

In *Sierra Club v. Flowers*,[110] the United States District Court for the Southern District of Florida ruled in favor of environmental plaintiffs and against the Corps of Engineers ("Corps"), the United States Fish and Wildlife Service ("FWS"), and several private mining companies in the plaintiffs' National Environmental Policy Act ("NEPA")[111] and Clean Water Act ("CWA")[112] challenges to the Corps's issuance and extension of "dredge and fill"[113] permits allowing limestone mining on approximately 5,400 acres of wetlands in Dade County, Florida.[114]

The court held that the Environmental Impact Statement ("EIS") prepared by the Corps and the FWS was legally insufficient for five reasons:

> 1) the information contained in the EIS . . . was inaccurate, incomplete, and unclear; 2) the analysis of alternatives was insufficiently rigorous and therefore misleading; 3) methods for protecting the municipal water supply were neither identified nor established; 4) seepage impacts were not studied sufficiently nor mitigated for; and 5) the [EIS] failed to report, or even account for, the foreseeable loss of wood stork habitat.[115]

The court also held that the Corps should have prepared a supplemental EIS to account for changes in the permit conditions after the EIS was issued.[116] Finally, the court held that the Corps violated the CWA by (1) failing to consider practicable alternatives to mining in the wetlands;[117] (2) concluding that mining would not be contrary to the public

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108. *Id.*
109. *Id.* at 1336.
110. 423 F. Supp. 2d 1273 (S.D. Fla. 2006).
111. 42 U.S.C. § 4321–4370d (2000 & Supp. III 2003).
112. 33 U.S.C. § 1251–1387 (2000 & Supp. III 2003).
113. Under § 404 of the Clean Water Act, 33 U.S.C. § 1344 (2000 & Supp. III 2003), activities that will result in placing dredged or fill material into a water of the United States, including a wetland, require a permit from the Corps of Engineers.
114. *Flowers*, 423 F. Supp. 2d at 1279-80.
115. *Id.* at 1380.
116. *Id.* at 1349.
117. *Id.* at 1363-64.

interest based on an inadequate record;[118] (3) failing to provide adequate plans to minimize adverse impacts of the mining;[119] and (4) failing to provide adequate public hearings regarding the permits.[120]

The area of northwestern Dade County, Florida, in which the mining activities were proposed is a ninety-square-mile area of wetlands lying between the urban coast and the Everglades National Park. The area serves as both a buffer between the developed areas of the coast and the Park and as a source of drinking water for Miami.[121] Limestone mining, a highly destructive activity that fundamentally alters the character of wetlands in which it occurs,[122] has occurred in the contested area since the 1950s,[123] and the limestone excavated from this area is of high quality and is valuable.[124]

In 1991 mining companies began discussing with the Corps and coordinating with state and local agencies to permit mining operations in the area. In 1992 the Corps began developing an EIS[125] that would address mining in a 54,000-acre area to include the wetlands in question. A preliminary draft of the EIS was completed in 1997, at which point mining companies began submitting permit applications. The Corps issued the final EIS in 2000 together with a notice of intent to issue permits for fifty years of mining, which was later reduced to ten years. The EIS concluded that there were no practicable or less-damaging alternatives that would satisfy the project's purpose.[126]

In short, NEPA requires an agency producing an EIS about a proposed federal action to identify (1) the environmental impact of the action; (2) adverse environmental impacts that cannot be avoided; (3) alternatives to the action (including the alternative of no action, that is, not issuing a permit); (4) the relationship between short-term uses of the environment and the enhancement of long-term productivity; and (5) any irreversible or irretrievable commitments of resources caused by the action.[127] Additionally, as to permit issuance, the CWA and its

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118. *Id.*
119. *Id.* at 1365.
120. *Id.* at 1366-67.
121. *Id.* at 1292-94.
122. *Id.* at 1298-99.
123. *Id.* at 1294.
124. *Id.* at 1296-97.
125. NEPA requires an agency to prepare an EIS for any "'major Federal action[] significantly affecting the quality of the human environment.'" *See Flowers*, 423 F. Supp. 2d at 1308 (quoting 42 U.S.C. § 4332(2)(c)). Permit issuance constitutes a major federal action. *See id.*
126. *Id.* at 1304-07.
127. 42 U.S.C. § 4332(2)(c); *Flowers*, 423 F. Supp. 2d at 1309-10.

regulations require that a permit not be issued if a preferable and practicable alternative exists, or if the permitted activity would cause or contribute to a significant degradation of the waters at issue (here, wetlands), or if the permit does not require that potential adverse impacts be minimized through appropriate and practical steps.[128] The CWA also requires public participation in the permitting process.[129]

The court, in an extensive analysis, noted numerous areas in which the Corps's EIS failed to meet these standards.[130] In its introduction, the court noted that the EIS in this case was conducted against the backdrop of a takings case that resulted in a large award, and even larger settlement, in favor of one of the mining companies seeking permits.[131] The court speculated that due to the state legislature's clear support for the mining industry and the prospect of more expensive litigation that would undoubtedly result from permit denials, "there [was] an underlying theme of pre-determination" in the EIS process that resulted in procedural and substantive shortcuts, that the Corps appeared to be serving more as a negotiator with the mining industry applicants than as a regulator charged with enforcing environmental laws, and that the Corps's perceived duty to safeguard the rights of property owners to use their property "overwhelmed significant environmental factors regarding the adverse impact" that mining in the area would have.[132]

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128. *Flowers*, 423 F. Supp. 2d at 1351.

129. *Id.*

130. The opinion, including footnotes, is 103 pages long in the Federal Supplement. This summary omits an in-depth analysis of the court's reasoning.

131. *Id.* at 1291. The EIS proceeded against the backdrop of a takings case brought by Florida Rock Industries in the early 1980s. *Id.* The Corps had denied Florida Rock's application for a permit to mine on ninety-eight acres of wetlands. Florida Rock won its case initially in the Federal Court of Claims, and its claim survived several appeals and remands. Its initial award in the claims court was $1,029,000. Florida Rock expanded its claim to the entire 1,560 wetland acres it owned in the area and was awarded $10.5 million. Florida Rock eventually settled the case in 2001 for $21 million. The court in *Flowers* noted that the settlement amount bore no relation to the award. *See id.* at 1300-02. See also Fla. Rock Indus., Inc. v. United States, 8 Cl. Ct. 160 (1985) and its subsequent history.

132. *Flowers*, 423 F. Supp. 2d at 1287, 1291.