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Environmental Law

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In 2016,[1] the United States Court of Appeals for the Eleventh Circuit addressed, for the second time, whether the Army Corps of Engineers (Corps) acted arbitrarily when it issued Nationwide Permit 21 (NWP 21),[2] which authorizes dredge and fill activities by surface mining operations and applies differing standards to grandfathered operations and new operations. The court held that the Corps did not, and it upheld the permit. Also, the Eleventh Circuit held that the National Park Service did not act improperly under the Wilderness Act[3] when it reduced the number of acres it considered to be eligible for designation as wilderness in an Addition to the Big Cypress National Preserve in Florida. The United States District Court for the Southern District of Alabama ruled that the federal and state agency Trustees of a fund set up to provide for restoration of natural resources damaged by the Deepwater Horizon oil rig spill violated the National Environmental Policy Act (NEPA)[4] when they allocated funds for a proposed lodge and conference center development at Gulf State Park in Alabama. Finally, the United States District Court for the Middle District of Alabama decided a novel question under Alabama law: the court ruled that raw sewage was not a pollutant within the meaning of an absolute pollution exclusion provision in an insurance policy.

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1. For an analysis of environmental law during the prior survey period, see Travis M. Trimble, *Environmental Law, Eleventh Circuit Survey*, 67 MERCER L. REV. 895 (2016).

2. Reissuance of Nationwide Permits, 77 Fed. Reg. 10,184 (Feb. 21, 2012).

3. 16 U.S.C. §§ 1131-1136 (2012).

4. 42 U.S.C. §§ 4331-4370(h) (2012).

I. CLEAN WATER ACT – SECTION 404

For the second time, the Eleventh Circuit took up *Black Warrior Riverkeeper, Inc. v. United States Army Corps of Engineers*,[5] and, barring a successful application to the Supreme Court of the United States, put an end to the litigation. The court held that the Corps did not act arbitrarily and capriciously when it reissued NWP 21 under section 404 of the Clean Water Act (CWA)[6] in such a way as to apply more restrictive standards to new surface mining operations, but allowing grandfathered operations to continue to operate under the permit under less restrictive standards.[7]

Section 404 of the CWA requires a person desiring to discharge dredged or fill material into a water of the United States to obtain a permit from the Corps. Under Section 404(e) of the Act,[8] the Corps may authorize dredged or fill activity on a state, regional, or nationwide basis, rather than an individual basis, to certain categories of discharges. To issue a permit on a general rather than individual basis, the Corps must determine that activities authorized by the permit are similar in nature, and will cause only minimal adverse environmental effects when performed separately and also cumulatively.[9]

NWP 21,[10] first issued in 1982, is a general permit allowing the discharge of dredged or fill material associated with surface coal mining and reclamation operations. Surface coal mining can result in the discharge of material in a variety of ways, including filling or burying streams, or actually mining into and under streams to reach a coal seam.[11]

The previous version of NWP 21,[12] which had been issued in 2007 with a five-year term, expired in 2012, and the Corps reissued the permit on February 21, 2012.[13] It contained two new provisions. Paragraph (a) allows for the reauthorization of mining operations previously allowed under the 2007 permit (the grandfathered operations) under section 21(a), provided the Corps determines they continue to cause only minimal adverse impacts.[14] New surface mining operations were required to comply with paragraph (b), which limited the loss caused by an operation to one-

5. 833 F.3d 1274 (11th Cir. 2016).
6. 33 U.S.C. § 1344 (2012).
7. *See Black Warrior Riverkeeper*, 833 F.3d at 1277.
8. 33 U.S.C. § 1344(e).
9. *See Black Warrior Riverkeeper*, 833 F.3d at 1278.
10. Reissuance of Nationwide Permits, *supra* note 2.
11. *See id.* at 1279.
12. Reissuance of Nationwide Permits, 72 Fed. Reg. 11,092 (Mar. 12, 2007).
13. *See* Reissuance of Nationwide Permits, *supra* note 2.
14. *Id.*

half acre of waterway and 300 linear feet of streambed.[15] In its decision document accompanying NWP 21, the Corps stated that the numeric limitations in paragraph (b) were "necessary to constrain the adverse effects to the aquatic environment to ensure compliance with the statutory requirement that general permits, including NWPs, may only authorize those activities that have minimal individual and cumulative adverse effects on the aquatic environment."[16] The grandfathered operations were not bound by these specific limitations, and as a result, forty-one grandfathered operations in the Black Warrior River watershed in Alabama, reauthorized under the 2012 version of NWP 21, together were allowed to fill approximately twenty-five miles of streambed that, according to Riverkeeper, would not have been filled had the operations been subject to the requirements of 21(b). The first grandfathered operation was reauthorized in May 2012. The deadline for submitting an application for reauthorization was in February 2013, and the last reauthorization was approved by April 2013.[17]

Riverkeeper filed suit in November 2013 under the CWA and the NEPA to block the reauthorization of the grandfathered mining operations in the Black Warrior River watershed.[18] Riverkeeper contended (1) the reauthorization of the grandfathered mining operations that had previously been allowed under the 2007 version, without requiring the numeric limitations on new operations applicable under the 2012 permit, amounted to an unlawful ten-year permit term for the grandfathered operations; (2) the Corps' cumulative impact analysis of the 2012 permit was arbitrary and capricious; (3) the Corps' reauthorization of operations in the Black Warrior River watershed was arbitrary and capricious; and (4) the Corps' "Finding of No Significant Impact" (FONSI)[19] under NEPA, as to the 2012 permit, was arbitrary and capricious.[20] In the case's previous appearance in the Eleventh Circuit, the court described the claim as being based on one essential argument: the Corps could not have rationally found that the new specific limits on stream destruction applicable to new operations were necessary to avoid significant environmental impacts, and at the same time conclude that the cumulative impacts of the grandfathered projects, without the specific limits, would be minimal, as required to qualify for a general (Nationwide) permit.[21]

15. *Black Warrior Riverkeeper*, 833 F.3d at 1279.
16. *Id.* at 1284 (internal quotations omitted).
17. *See id.* at 1279-80.
18. *Id.* at 1282.
19. 40 C.F.R. § 1501.4(e) (2016).
20. *Black Warrior Riverkeeper, Inc.*, 833 F.3d at 1282.
21. *Id.* at 1284.

In the 2015 appearance of the case, *Black Warrior Riverkeeper, Inc. v. United States Army Corps of Engineers*,[22] the court remanded the case for reconsideration because the Corps admitted before oral argument that it had underestimated the number of acres of waters that could be affected by NWP 21.[23] The Corps did so, and submitted a revised analysis to the district court in August 2015.[24] The revised analysis showed that on average, each of the reauthorizations under NWP 21(a), the grandfathering provision, would impact six acres and 3200 linear feet of waterway, while new operations authorized under 21(b) would each impact one-half acre and 300 linear feet of waterway.[25] The Corps did not change the terms or language of NWP 21, and it contained "essentially the same statements on which the Riverkeeper's 'differential treatment error' argument had been based."[26] Overall, the Corps concluded that "despite the higher impact and compensatory mitigation amounts expected to occur across the country during the five-year period this NWP is in effect, . . . the individual and cumulative adverse effects on the aquatic environment resulting from the activities authorized by this NWP [would] be minimal."[27]

Riverkeeper renewed its motion for summary judgment based on its claim that the differing standards applicable to grandfathered operations and new operations was arbitrary and capricious, and the Corps filed a cross-motion for summary judgment. The district court granted the Corps' motion and denied Riverkeeper's, and Riverkeeper appealed.[28] The Eleventh Circuit affirmed.[29]

Reviewing the Corps' revised decision document that explained the basis for issuing NWP 21, and applying the deferential standard of review of an administrative agency's decision,[30] the court held that the Corps' decision to issue NWP 21 with different standards applicable to grandfathered and new surface mining operations was not arbitrary and capricious.[31] The court concluded that, notwithstanding the apparently contradictory language in the revised decision document:

22. 781 F.3d 1271 (11th Cir. 2015).
23. *Id.* at 1275.
24. *Black Warrior Riverkeeper*, 833 F.3d at 1287.
25. *Id.* at 1284.
26. *Id.*
27. *Id.*
28. *Id.* at 1284-85.
29. *Id.* at 1290.
30. *See id.* at 1285.
31. *Id.* at 1290.

> [I]t seems plain to us that the Corps took a hard look at the environmental impact of authorizations under both 21(a) and (b), and determined that the restrictions imposed on each set of authorizations were sufficient to ensure that they result in no more than minimal individual and adverse cumulative effects.[32]

The court also rejected Riverkeeper's argument that the Corps had not articulated a sufficient rationale for treating similar mining activities differently under 21(a) and (b).[33] Acknowledging that Riverkeeper was correct that one of the Corps' principal justifications for grandfathering existing operations under 21(a) was to avoid economic hardship for those companies, and that the Corps could not rely on economic considerations in issuing a general permit that did not comply with the CWA's minimal impact requirement, the court nevertheless noted that "the Corps was not required to impose identical restrictions on applications under the two provisions of NWP 21,"[34] because the Corps had rationally concluded that operations under either provision would have minimal adverse impacts, and thus, NWP 21 met the requirement of the CWA.[35] The court stated,"[n]othing in the CWA or NEPA precluded the Corps from relying on economic considerations in choosing between alternatives that have minimal aquatic impacts in order to ensure that mining [operations] were not unfairly burdened by the new permit requirements."[36]

II. WILDERNESS ACT

In *National Parks Conservation Ass'n v. United States Department of the Interior*,[37] the Eleventh Circuit held that the National Park Service acted properly when it reduced the acreage it had previously determined to be eligible for wilderness designation in an addition to Florida's Big Cypress National Preserve in order to remove from the wilderness-eligible area an off-road vehicle (ORV) trail system and a buffer area around the trails.[38] In 2006, as part of its work on a General Management Plan (GMP) for a 112,400-acre tract of land that it had acquired as an Addition to the Big Cypress National Preserve, the National Park Service concluded that 111,601 acres were eligible for wilderness designation. As it

32. *Id.* at 1288.

33. *Id.* at 1289. The court noted that "[a] long line of precedent has established that an agency action is considered arbitrary when the agency has offered insufficient reasons for treating similar cases differently." *Id.* (internal quotations omitted).

34. *Id.*

35. *Id.* at 1289-90.

36. *Id.* at 1290.

37. 835 F.3d 1377 (11th Cir. 2016).

38. *Id.* at 1386.

was working on the GMP, the Park Service was also evaluating a system of pre-existing off-road vehicle (ORV) trails on the tract; it concluded that 140 miles of the trails were "sustainable," meaning they could support current and future uses with minimal impact to the natural systems of the area.[39]

In 2009, the Park Service completed the draft GMP and Environmental Impact Statement, which included the wilderness-eligible acreage designation, and within it, the 140 miles of ORV trails. The Park Service also determined that it would recommend 85,862 acres of the wilderness-eligible acreage to the President for wilderness designation. After the public comment period for the GMP, the Park Service held a second wilderness workshop, and reduced its recommendation for wilderness designation from 85,862 to 48,130 acres. After that, the superintendent of the Big Cypress National Preserve sought a waiver from having to manage the wilderness-eligible acreage that the Park Service was not recommending for wilderness designation as potential wilderness. The request was denied, but the Park Service convened a third workshop in February 2010 to reassess its original wilderness-eligible determination, based on public comments that focused on the impact of the ORV trails on wilderness eligibility.[40]

Participants in the 2010 workshop agreed on two assumptions in reviewing the wilderness-eligible designation:

> [F]irst, the substantial imprint of human work would include roads, trails, or other areas created by man and requiring substantial human intervention for restoration; second, the viewpoint of a land manager, rather than a common visitor, would be used to determine whether the imprint of human work was substantially unnoticeable.[41]

As a result of the 2010 workshop, the Park Service determined that the ORV trails and a one-quarter mile buffer on either side of each trail were ineligible for wilderness designation. As a result, it reduced the acreage it classified as wilderness-eligible from 111,601 to 71,260.[42] Also, in 2010, the Park Service consulted with the United States Fish and Wildlife Service (FWS) concerning the impact of the GMP, including ORV trails, on the eastern indigo snake and the Florida panther. The Park Service and the FWS concluded that the GMP would not adversely affect the snake. Further, the FWS concluded that while ORV use in the Addition lands could alter panther behavior, those alterations "have not been

39. *Id.* at 1381.
40. *Id.* at 1382.
41. *Id.*
42. *Id.*

correlated with any change in reproductive success or survival."[43] The FWS authorized "incidental loss of panthers" in the form of habitat harassment, and required the Park Service to monitor the impact on panthers and consult with the FWS if the "level of incidental loss exceed[ed] expectations."[44]

The plaintiffs, the National Park Conservation Association (NPCA) and Public Employees for Environmental Responsibility (PEER), filed suit to block the GMP, contending that the Park Service's inclusion of the ORV trails and subsequent reduction of wilderness-eligible acreage in the Addition was arbitrary and capricious,[45] and violated the Wilderness Act[46] and the Organic Act.[47] The plaintiffs claimed the Park Service's adoption of a heightened standard under the Wilderness Act for determining whether "the ORV trails were wilderness-eligible was arbitrary and capricious."[48] The plaintiffs also claimed the Park Service violated the Organic Act by failing to account for the impairment of visitor experience caused by the ORV trails, and by favoring recreational use over preservation in the Addition.[49] Finally, the plaintiff PEER claimed the Park Service and FWS violated the Endangered Species Act (ESA)[50] by failing to engage in formal consultation concerning the eastern indigo snake, and by failing to properly analyze the impacts of ORV use on the Florida panther.[51]

The court first held that the Park Service did not violate the Wilderness Act.[52] According to the Wilderness Act, "wilderness is an 'area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions.'"[53] To be eligible as wilderness, land must "generally appear[] to have been affected

43. *Id.* at 1383 (internal quotations omitted).

44. *Id.*

45. *See Nat'l Parks Conservation Ass'n*, 835 F.3d at 1383. Under the Administrative Procedure Act, 5 U.S.C. § 551-559, 701-706 (2012), "a court may only set aside an agency's decision if it determines the decision to be arbitrary, capricious, an abuse of discretion, or contrary to law." *Nat'l Parks Conservation Ass'n*, 835 F.3d at 1383.

46. 16 U.S.C. §§ 1131-1136 (2012).

47. 54 U.S.C. § 100101(a) (2012 & Supp. II 2015). This amended and replaced 16 U.S.C. § 1, which was repealed in 2014.

48. *Nat'l Parks Conservation Ass'n*, 835 F.3d at 1384.

49. *Id.* at 1386.

50. 16 U.S.C. §§ 1531-1544 (2012).

51. *Nat'l Parks Conservation Ass'n*, 835 F.3d at 1387.

52. *Id.* at 1383.

53. *Id.* at 1384 (quoting 16 U.S.C. § 1131(c)).

primarily by the forces of nature, with the imprint of man's work substantially unnoticeable."[54] The court noted that in 2006, the Park Service considered trails that required significant engineering as examples of a substantial human imprint, while at the 2010 workshop the definition changed to trails "created by man and used significantly over time that would require substantial human intervention to restore."[55] While acknowledging that the Park Service used different language to evaluate whether certain ORV trails could be included in a wilderness-eligible area, the court:

> [Gave] the [Park Service] due deference, however, it does not appear that these are two wholly differing standards. In short, they are not so diametrically opposed to permit the Court to conclude that the [Park Service] drastically changed its criteria with the express purpose to omit the ORV trails from wilderness eligibility.[56]

The court also rejected the plaintiffs' argument that the Park Service's decision to use the perspective of a land manager, rather than a visitor, to determine whether the trails were "substantially unnoticeable" was improper, because the Wilderness Act did not require any particular perspective in making this determination, and because a land manager's viewpoint would be more reasonable anyway, given the "highly technical judgment" required to determine wilderness eligibility.[57] Finally, the court held that the plaintiffs had presented no evidence to support their contention that the Park Service reassessed the eligibility designation, and reduced the acres that qualified merely "to appease the State of Florida and special interest groups" who presumably wanted the ORV trail system excluded.[58]

The court went on to hold that, contrary to the plaintiffs' claims, the Park Service did not violate the Organic Act, first, because the Organic Act did not require the Park Service to take visitor experience into account when evaluating the impact of an activity, and second, because the record did not show that the Park Service improperly valued recreational use over conservation.[59] Rather, the court held the "record more than

54. *Id.*

55. *Id.* at 1385 (internal quotations omitted).

56. *Id.* The opinion does not discuss why the Park Service would have included some ORV trails within wilderness-eligible acreage under the 2006 standard and then excluded them under the 2010 standard, given its conclusion the two standards were substantially similar.

57. *Id.*

58. *Id.* at 1385-86.

59. *Id.* at 1386.

supports Appellees' claim that . . . the limited recreational use promoted by the GMP would not cause unacceptable environmental impairments or impacts."[60]

Finally, the court rejected plaintiff PEER's claim under the ESA.[61] The court held that the record supported the Park Service's and the FWS's decision that no formal consultation was needed as to the eastern indigo snake, because it showed that any adverse impact to the snake would be negligible.[62] The court also held that the record supported the agencies' Biological Opinion that ORV use would not jeopardize the panther.[63] While the record did show that panthers would likely avoid the trails and buffer areas during high-use periods, "any migration away from ORV trails would have minor to no biological consequences."[64]

III. NATIONAL ENVIRONMENTAL POLICY ACT

In *Gulf Restoration Network v. Jewell*,[65] the district court ruled that the defendant Trustees, appointed to administer funds paid by British Petroleum (BP) to provide for the restoration of natural resources damaged by the Deepwater Horizon drilling rig leak in the Gulf of Mexico, had violated the National Environmental Policy Act (NEPA)[66] and the Oil Pollution Act (OPA)[67] when they allocated funds to pay for a lodge and conference center at Gulf State Park in Alabama, as part of a larger spending program, without considering reasonable alternatives to the lodge project.[68] The court granted summary judgment to the plaintiff on

60. *Id.*

61. *See id.* at 1388. The ESA provides that federal agencies must ensure any action authorized, funded, or carried out by an agency is not likely to jeopardize the continued existence of any endangered or threatened species or destroy critical habitat. 16 U.S.C. § 1536(a)(2). To this end, agencies must informally consult with the FWS where an agency action "may affect" a listed species or its habitat. 50 C.F.R. § 402.14(a). Should the agency and the FWS conclude as a result of informal consultation that the agency action is not likely to have an adverse effect, no further action is required. 50 C.F.R. § 402.13(a). If the agencies determine that formal consultation is needed, the agency and the FWS prepare a Biological Opinion as to whether a listed species is likely to be jeopardized, and possible alternatives to the proposed action. 50 C.F.R. § 402.14(h)(3). *See Nat'l Parks Conservation Ass'n*, 835 F.3d at 1387.

62. *Nat'l Parks Conservation Ass'n*, 835 F.3d at 1387.

63. *Id.*

64. *Id.*

65. 161 F. Supp. 3d 1119 (S.D. Ala. 2016).

66. 42 U.S.C. §§ 4331-4370 (2012).

67. 33 U.S.C. §§ 2701-2762 (2012).

68. *Gulf Restoration Network*, 161 F. Supp. 3d at 1130-31.

this claim.[69] However, the court granted summary judgment to the Trustees on two other claims brought by the plaintiff.[70] The court ruled that the plaintiff's claim that the Trustees had used insufficient data in their analysis of lost recreational opportunities caused by the spill was not a proper claim under NEPA.[71] The court also ruled that the Trustees were not required to consider cumulative impacts and effects of consequences of the project that were not reasonably foreseeable.[72]

On April 10, 2010, BP's Deepwater Horizon drilling rig exploded and sank into the Gulf of Mexico, releasing millions of barrels of oil into the Gulf and causing damage to natural resources in all five Gulf Coast states.[73] Pursuant to the OPA, several federal and state agencies were designated as Trustees to assess natural resource damage caused by the BP spill and to develop a plan for the restoration, replacement, or acquisition of equivalent natural resources, including recreational opportunities.[74] BP entered into an agreement with the Trustees to make available $1 billion for early restoration of natural resources while the full damage assessment was being conducted. The Trustees allocated $58.5 million from this fund to partially pay for the construction of a lodge and conference center at Gulf State Park in Alabama.[75] This allocation was part of the Phase III allocation of the early restoration funds for various independent restoration projects in several states. The Trustees prepared an Environmental Impact Statement for the Phase III projects (known as the Phase III Programmatic Environmental Impact Statement, or PEIS). For purposes of the PEIS, in deciding which projects to pay for using the early restoration fund, the Trustees considered four possible alternatives for the entire Phase III program: (1) no action (i.e. no restoration); (2) restoration of habitat and living and coastal marine resources; (3) enhanced recreational opportunities; and (4) projects that combined alternatives (2) and (3). The Trustees chose alternative 4; that is, to spend money from the early restoration fund allocated to Phase III on projects that would meet either alternative 2 or alternative 3. The Trustees determined that the lodge project would "make up for the loss of recreational use caused by the spill."[76] The PEIS stated the lodge and conference center project would create "approximately 120,000 new visitor

69. *Id.*
70. *Id.* at 1131-32.
71. *Id.* at 1133.
72. *Id.* at 1132.
73. *Id.* at 1122.
74. *Id.* at 1123.
75. *Id.*
76. *Id.* at 1127.

nights per year and a roughly comparable number of visitor-days at the park."[77] The PEIS "did not explore any potential alternative projects," concluding that the only alternative to the lodge project was "No Action," in other words, "the Trustees would not pursue the Gulf State Park [project] as part of Phase III Early Restoration."[78] The court also noted that "[a]t the time Phase III was approved, the [lodge project] was little more than a concept. . . . There were no architectural plans . . . no specific cost estimates, and no timetable for completion."[79] Also, the money allocated to the project from the Phase III funds was not sufficient to fund the entire project, and the Trustees "did not explain where the remaining money would come from, when it would be available, when the project would be completed, or what would happen to the $58.5 million if the project did not come to fruition."[80]

The plaintiff, a non-profit organization, filed suit under OPA, NEPA, and the Administrative Procedure Act (APA),[81] challenging the allocation of early restoration funds to the lodge project. First, the plaintiff claimed the Trustees failed to consider alternatives specific to the lodge project as required by OPA and NEPA. Second, the plaintiff claimed the PEIS provided "little or no data" to support the justification for the lodge, and therefore violated NEPA. Third, the plaintiff contended the PEIS failed to analyze the cumulative and indirect impacts of the lodge project in violation of NEPA.[82]

The court granted summary judgment to the plaintiff on its first claim.[83] The court noted both NEPA and OPA require a comparative analysis of the project and possible alternatives to the project, and analyzed the separate alternative claims under these statutes as one.[84] The court rejected the Trustees' argument that the programmatic alternatives analysis satisfied the statutes' comparative analysis requirement.[85] The court explained that when an agency commits resources to a specific project (that is, namely the lodge and conference center) as part of a broader program (the Phase III restoration projects), "it must provide a

77. *Id.*
78. *Id.* (internal quotations omitted).
79. *Id.* at 1126-27.
80. *Id.* at 1127.
81. 5 U.S.C. §§ 501-559, 701-706 (2012).
82. *Gulf Restoration Network*, 161 F. Supp. 3d at 1128.
83. *Id.* at 1130-31.
84. *Id.* at 1128.
85. *Id.* at 1129.

sufficiently detailed alternatives analysis of the project," not just the entire program.[86] In this case, the Phase III PEIS "is not project specific and, therefore, does not satisfy the alternatives analysis requirement."[87] More specifically, the PEIS "discussed only two alternatives: (1) go forward with the project as proposed or (2) no action."[88] The plaintiff pointed to several reasonable alternatives to the lodge project that could have been considered, including purchasing property for public access and conservation; restoring wetlands and shoreline; building habitat; using funds for restoration; or building public education and trails at the Park and not fund a new lodge and conference center.[89]

The court noted that the Trustees did not dispute these alternatives were reasonable in theory.[90] The Trustees argued they were not reasonable in practice because under its early restoration funds agreement with BP, only projects that were approved by both parties could be funded, and since the parties had agreed to fund the lodge project, no other project was a reasonable alternative. The court rejected this argument as well, calling it "circular logic": "[a]t the project level, the Trustees contend that the only reasonable alternative is a project that can be funded. Since funding requires a Project Stipulation between the Trustees and BP, only those projects [agreed to by the Trustees and BP] are reasonable."[91] Finally, the court concluded, "the Trustees are simply wrong in their conclusion that the [funding agreement between BP and the Trustees] precludes the funding of alternative projects,"[92] pointing to specific language in the agreement that allowed the Trustees "for good cause" to not implement the early restoration program, and could instead fund alternative projects.[93] The court concluded, "[c]learly, the Trustees failed to evaluate whether there were reasonable restoration alternatives that would have conformed to the requirements of OPA and NEPA."[94]

Next, the court granted summary judgment to the Trustees on the plaintiff's claim that the PEIS did not have sufficient evidentiary support

86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 1130.
92. *Id.*
93. *Id.*
94. *Id.*

for the Trustees' conclusion that the lodge project would bring new visitors to the beach.[95] The court concluded that a claim of evidentiary support for restoration of lost recreational opportunities are not required by NEPA but by OPA.[96] Since the plaintiff did not challenge the PEIS' evidentiary support under OPA, the plaintiff could not show the Trustees acted arbitrarily in reaching that conclusion.[97]

Finally, the court granted summary judgment to the Trustees on the plaintiff's claim under NEPA that the PEIS did not consider cumulative impacts and indirect effects of the lodge project.[98] Under NEPA, an Environmental Impact Statement must consider "cumulative impacts and indirect effects of past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions."[99]

The plaintiff claimed the lodge project would result in the reconfiguration of an intersection or widening a state road at one entrance to the proposed lodge and conference center, the construction of a new road to accommodate a likely increase in traffic, and the likelihood the lodge project would lead to new development. The court concluded none of these possible impacts were reasonably foreseeable.[100] The court first read the PEIS to say the need to reconfigure the intersection or widen the road would arise only if "increased access were desired," and thus, their occurrence was speculative.[101] Second, the court accepted the PEIS' conclusion that any traffic increase would be moderate and not likely to lead to the need for new road construction.[102] Finally, the court held that the plaintiff did not present any evidence to contradict the PEIS conclusion that the project would not likely result in new development around the park.[103]

As a result of its grant of summary judgment to the plaintiff due to the lack of an analysis of reasonable alternatives to the lodge project, the court enjoined the Trustees from spending any of the allocated funds on the lodge development until they had complied with the analysis of alternatives under NEPA and OPA.[104]

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95. *Id.* at 1131.
96. *Id.*
97. *Id.*
98. *Id.* at 1133.
99. *Id.* at 1131 (internal quotations omitted).
100. *Id.*
101. *Id.* at 1132. The court noted "[t]he wording [of the PEIS] could be clearer." *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 1133.

IV. STATE LAW – INSURANCE POLLUTION EXCLUSION

In *Evanston Insurance Co. v. J&J Cable Construction, LLC*,[105] the United States District Court for the Middle District of Alabama, addressing a novel question of Alabama law in a diversity case, concluded that raw sewage was not a pollutant within the meaning of an insurance policy's absolute pollution exclusion clause, and thus, insurance coverage could not be denied on that basis.[106]

While performing underground boring work to install electrical conduits, the insured defendant contractor struck and broke sewer lines running from the sewer main to two houses. As a result, raw sewage backed up into the houses, and tenants in those houses sued the defendant's general contractor for personal injury and property damage. The general contractor in turn sued the defendant for indemnity, and the defendant sought insurance coverage from the plaintiff, its insurer. The insurer defended under a reservation of rights and sought a declaratory judgment that no coverage existed based on the policy's pollution exclusion provision.[107] The provision excluded from coverage any injury or damage "arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants.'"[108] "Pollutants" in turn was defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned, or reclaimed."[109]

The court concluded that sewage was not a pollutant for purposes of the insurance exclusion by reference to two previous Alabama Supreme Court cases.[110] First, the Alabama Supreme Court held sewage was not a pollutant within the meaning of a qualified pollution exclusion clause,[111] but had not addressed sewage in the context of an absolute pol-

105. No. 3:15CV-506-WHA, 2016 U.S. Dist. LEXIS 129371 (M.D. Ala. Sept. 22, 2016).

106. *Id.* at *16-17.

107. *Id.* at *10. The insurer asserted a second ground for declaratory judgment: the occurrences giving rise to the harm did not occur within the policy period. *Id.* This Article discusses only the pollution exclusion issue.

108. *Id.* at *9.

109. *Id.* at *9-10.

110. *Id.* at *16.

111. U.S. Fid. & Guar. Co. v. Armstrong, 479 So. 2d 1164 (Ala. 1985). The clause in *Armstrong* excluded coverage for harm caused by substances, including pollutants that were discharged, dispersed, or released "into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental." *Id.* at 1168. *See also Evanston Ins.*, 2016 U.S. Dist. LEXIS 129371, at *12. The district court in a later case, *Shalimar Contractors, Inc. v.*

lution exclusion clause. Second, the Alabama Supreme Court held, in construing an absolute pollution exclusion clause, that the terms in the clause, "discharge" and "dispersal," previously had been defined by Alabama courts as being associated with environmental law (and presumably, describing actions associated with industrial activity), and also as being ambiguous and construed against the insurer, and thus, "an insurer subsequently employing those terms can be presumed to have intended the same construction as used by the Court."[112] Based on this principle, the court in *Evanston* concluded that after the *Armstrong* case, holding that sewage was not a pollutant (albeit in a case involving a qualified exclusion), an insurer using the term "pollutant" in a policy exclusion would reasonably presume that the term "pollutant" would not include sewage.[113]

American States Insurance Co., 975 F. Supp. 1450 (M.D. Ala. 1997), distinguished the "absolute" exclusion in *Shalimar* from the "qualified" exclusion in *Armstrong* by stating that the absolute exclusion "makes no reference to whether the release was into or upon land, the atmosphere, or water, or whether the release was sudden, accidental, or gradual in nature." *Evanston Ins.*, 2016 U.S. Dist. LEXIS 129371, at *13-14 (quoting *Shalimar*, 975 F. Supp. at 1456). The clause in *Evanston* was similar to that in *Shalimar*, and thus, absolute.

112. *Evanston Ins.*, 2016 U.S. Dist. LEXIS 129371, at *15 (quoting Porterfield v. Audubon Indem. Co., 856 So. 2d 789, 806 (2002)).

113. *Id.* at *16.