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## Environmental Law

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# Environmental Law

by Travis M. Trimble\*

In 2015,<sup>1</sup> the United States Court of Appeals for the Eleventh Circuit decided novel issues in two cases under the Clean Water Act (CWA).<sup>2</sup> In *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*,<sup>3</sup> the court held remand of a Corps of Engineers permitting decision for reconsideration without also vacating the permit is a remedy within the court's discretion and was appropriate under the circumstances.<sup>4</sup> In *Riverkeeper v. U.S. Environmental Protection Agency*,<sup>5</sup> the court held appellate review of a non-final response by the Environmental Protection Agency (EPA) to a petition to withdraw Alabama's authority to administer the National Pollution Discharge Elimination System (NPDES) permitting program was improper.<sup>6</sup> Also, in *Altamaha Riverkeeper, Inc. v. Rayonier, Inc.*,<sup>7</sup> the United States District Court for the Southern District of Georgia concluded that an NPDES permit issued by the Georgia Environmental Protection Division did not include Georgia's narrative water quality standards for turbidity, color, and odor despite two potentially ambiguous references to those standards in the permit.<sup>8</sup>

In *Black Warrior Riverkeeper, Inc. v. United States Army Corps of Engineers*, the Eleventh Circuit remanded to the Corps of Engineers

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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*, 66 MERCER L. REV. 951 (2015).

2. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended in scattered sections of 33 U.S.C.).

3. 781 F.3d 1271 (11th Cir. 2015).

4. *Id.* at 1289-90.

5. 806 F.3d 1079 (11th Cir. 2015).

6. *Riverkeeper*, 806 F.3d at 1083.

7. No. CV 214-44, 2015 U.S. Dist. LEXIS 42849, at \*1 (S.D. Ga. Mar. 31, 2015).

8. *Id.* at \*3, \*25-26.

Nationwide Permit 21 (NWP 21),<sup>9</sup> a general permit issued under Section 404 of the Clean Water Act (CWA),<sup>10</sup> for the Corps to reconsider its decision that NWP 21 would have minimal impact on the environment, reversing the district court's ruling that the Corps had not acted arbitrarily and capriciously in reaching that determination.<sup>11</sup> However, the court did not vacate the permit and on an issue of first impression, held remand without vacatur was a remedy within the discretion of the court.<sup>12</sup> The court also held the plaintiff environmental advocacy group (Riverkeeper) had standing to challenge the issuance of the permit and the group's suit was not barred by laches even though it was filed nine months after the Corps issued the permit.<sup>13</sup>

Section 404 of the CWA requires a person desiring to discharge dredged or fill material into waters of the United States obtain a permit from the Corps of Engineers.<sup>14</sup> Under § 404(e) of the Act, the Corps may authorize dredge or fill activity on a state, regional, or nationwide basis, rather than on an individual basis, for certain categories of discharges.<sup>15</sup> 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.<sup>16</sup>

NWP 21, first issued in 1982,<sup>17</sup> is a general permit allowing the discharge of dredged or fill material associated with surface coal mining and reclamation operations.<sup>18</sup> 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.<sup>19</sup>

The previous version of NWP 21,<sup>20</sup> which had been issued in 2007 with a five-year term, expired in 2012, and the Corps reissued the permit with two new provisions intended to address the cumulative

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

10. 33 U.S.C. § 1344(e) (2012).

11. *Black Warrior Riverkeeper*, 781 F.3d at 1275, 1289.

12. *Id.* at 1290.

13. *Id.* at 1275, 1284.

14. 33 U.S.C. § 1344(a) (2012).

15. 33 U.S.C. § 1344(e)(1).

16. *Black Warrior Riverkeeper*, 781 F.3d at 1275-76.

17. Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31,794, 31,833 (July 22, 1982).

18. *Black Warrior Riverkeeper*, 781 F.3d at 1276.

19. *Id.*

20. See Reissuance of Nationwide Permits, 72 Fed. Reg. 11,092 (Mar. 12, 2007).

impacts of surface mining activities authorized under the permit.<sup>21</sup> The 2012 version of NWP 21 was issued on February 21, 2012.<sup>22</sup> It allowed for the reauthorization of mining operations previously allowed under the permit (the “grandfathered operations”), provided the Corps determined they continued to cause only minimal adverse impacts; however, new operations were required to comply with specific numerical limitations in the amount of stream they could destroy.<sup>23</sup> 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-seven miles of streambed. 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.<sup>24</sup>

Riverkeeper filed suit on November 25, 2013, under the CWA and the National Environmental Policy Act (NEPA)<sup>25</sup> to block the reauthorization of the grandfathered mining operations in the Black Warrior River watershed.<sup>26</sup> Riverkeeper contended (1) the reauthorization of the grandfathered mining operations previously 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)<sup>27</sup> under NEPA, as to the 2012 permit, was arbitrary and capricious.<sup>28</sup> In essence, the plaintiff argued “the Corps could not rationally have found” the new specific limits on stream destruction applicable to new operations were “necessary” to avoid significant environmental impact and, at the same time, conclude the

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21. *Black Warrior Riverkeeper*, 781 F.3d at 1276-77.

22. *Id.* at 1284; Reissuance of Nationwide Permits, *supra* note 9.

23. *Black Warrior Riverkeeper*, 781 F.3d at 1277. New mining operations could not cause the loss of greater than one-half acre of non-tidal waters, including no more than 300 linear feet of streambed. *Id.*

24. *Id.* at 1277, 1284.

25. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (2012)).

26. *Black Warrior Riverkeeper*, 781 F.3d at 1278.

27. See 40 C.F.R. § 1501.4(e) (2015).

28. *Black Warrior Riverkeeper*, 781 F.3d at 1278. The plaintiff dismissed its third claim before the district court’s rulings on the merits. *Id.*

cumulative impacts of the grandfathered projects, without specific limitations, would be minimal as required for a general (Nationwide) permit.<sup>29</sup>

The district court denied Riverkeeper's motion for a preliminary injunction suspending the reauthorizations of the forty-one grandfathered mining operations under NWP 21. Then, on cross-motions for summary judgment by Riverkeeper, the Corps, and industry Intervenors, the district court ruled that Riverkeeper had standing to bring the suit, but its "delay" in filing suit until nine months after the deadline for seeking re-authorization was "inexcusable" and prejudiced the mining operations that relied on re-authorizations under NWP 21, thereby, warranting application of laches. Furthermore, the district court ruled that the Corps did not act arbitrarily and capriciously in concluding that the 2012 version of NWP 21 would have no more than minimal cumulative adverse effect on the environment. However, just prior to oral argument on appeal, the Corps conceded that concluding NWP 21 would have only minimal impact on the environment underestimated the number of acres of stream that would be affected by activities authorized under that permit.<sup>30</sup>

On appeal, the Eleventh Circuit first held Riverkeeper's members had individual standing to bring the suit and Riverkeeper had organizational standing.<sup>31</sup> In proving standing below, Riverkeeper showed its members used areas downstream from the forty-one grandfathered operations, and those operations caused aesthetic, recreational, and environmental harm within that area.<sup>32</sup> The court noted that the Intervenors "have not shown that Riverkeeper has failed to meet any of [the] traditional components (injury-in-fact, causation, and redressability) of the standing inquiry."<sup>33</sup> Instead, the Intervenors argued the plaintiff did not have standing for a claim under § 404 of the CWA because the purpose of § 404 is to prevent the loss of waters of the United States, not to protect water quality downstream from a permitted operation. Intervenors argued Riverkeeper should have brought suit under § 402,<sup>34</sup> which imposes pollutant limitations on point source discharges into waters.<sup>35</sup>

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29. *Id.*

30. *Id.* at 1275, 1278.

31. *Id.* at 1279-80.

32. *Id.* at 1280.

33. *Id.* at 1281.

34. 33 U.S.C. § 1342 (2012).

35. *Black Warrior Riverkeeper*, 781 F.3d at 1281.

The court rejected this argument and concluded, “Riverkeeper’s alleged injuries are included within the zone of interests of § 404 and its implementing regulations, which expressly consider downstream water quality.”<sup>36</sup> In any event, the court explained, the distinction between § 404 and § 402 did not affect the components of standing, which Riverkeeper had demonstrated.<sup>37</sup>

Next, the court reversed the district court’s holding and held laches did not bar Riverkeeper from filing suit nine months after the deadline for seeking reauthorization under NWP 21 had passed.<sup>38</sup> The court explained that Riverkeeper could have brought suit, at the earliest in May 2012, when the Corps reauthorized the first of the grandfathered operations.<sup>39</sup> But the court concluded it was reasonable for Riverkeeper to wait until February 2013, when the deadline for seeking reauthorizations had passed, so it would know the full extent of reauthorizations under NWP 21; subsequently, Riverkeeper filed suit nine to ten months after that time.<sup>40</sup> In addition, the court noted that it was “plainly legitimate” Riverkeeper needed time to “evaluate, investigate, and prepare its claims for litigation,” even though the district court had given no weight to this explanation for the lapsed time.<sup>41</sup> The court noted that the Corps was not obligated to, and did not, provide public notice of its reauthorizations.<sup>42</sup> Therefore, Riverkeeper had no way to know the extent of filling operations reauthorized under NWP 21 without filing Freedom of Information Act<sup>43</sup> requests with the Corps, reviewing information it received, and preparing a case.<sup>44</sup> The court explained that “[i]f we were to hold that a plaintiff’s reasonable need to fully investigate its claims does not excuse delay, we would create a powerful and perverse incentive for plaintiffs to file premature and even frivolous suits to avoid the invocation of laches.”<sup>45</sup> Lastly, the court noted that Riverkeeper filed suit well within the applicable six-year

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36. *Id.* at 1282.

37. *Id.* at 1282-83.

38. *Id.* at 1284.

39. *Id.* The court noted that even though Riverkeeper was challenging a procedural flaw in promulgation of NWP 21, Riverkeeper would have lacked standing to bring that challenge before a reauthorization under the permit was actually issued because, before that time, “it was unclear ‘when or how’ Riverkeeper would be injured, and ‘this factual underpinning is vital to a full-fledged judicial review’ of NWP 21.” *Id.*

40. *Id.* at 1284-85.

41. *Id.* at 1284.

42. *Id.* at 1285.

43. 5 U.S.C. § 552 (2012).

44. *Black Warrior Riverkeeper*, 781 F.3d at 1285.

45. *Id.*

statute of limitation and “there is a strong presumption that a plaintiff’s suit is timely if it is filed before the statute of limitations has run.”<sup>46</sup>

Finally, the court reversed the district court’s ruling that the Corps had not acted arbitrarily and capriciously in issuing a Finding of No Significant Impact as to NWP 21, although it could not conclude on the record the Corps had acted arbitrarily and capriciously.<sup>47</sup> The court explained that while the Corps had admitted it underestimated the total acres that would be adversely affected, the Corps also believed other requirements of the authorization process under the permit, such as individual reverification and compensatory mitigation, might make its error harmless.<sup>48</sup> The court concluded, “The bottom line is that we cannot now say that the Corps’ ultimate conclusion—that NWP 21 will have minimal effects—was unlawful.”<sup>49</sup> The court therefore ordered the case be remanded to the Corps for a full reconsideration of its CWA and NEPA determinations.<sup>50</sup>

In an issue of first impression in the Eleventh Circuit, the court also decided not to vacate NWP 21 during the Corps’ reconsideration.<sup>51</sup> The court agreed with other circuits<sup>52</sup> considering the question that had concluded remand of an agency decision without vacatur is permitted under the Administrative Procedure Act (APA),<sup>53</sup> even though vacatur “is the ordinary APA remedy.”<sup>54</sup> The court cited with approval a balancing of the equities test applied by the United States Court of Appeals for the District of Columbia Circuit to determine whether to vacate NWP 21,<sup>55</sup> but the court concluded it could not even balance the equities of vacatur on the record before it.<sup>56</sup> Therefore, it reversed the district court’s ruling on the merits and remanded to the district court

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46. *Id.* at 1286 (quoting *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1320 (11th Cir. 2008)).

47. *Id.* at 1288.

48. *Id.*

49. *Id.* at 1289.

50. *Id.*

51. *Id.*

52. *See, e.g.*, *Cal. Cmty. Against Toxics v. U.S. EPA*, 688 F.3d 989 (9th Cir. 2012); *Nat’l Org. of Veterans’ Advocates, Inc. v. Sec’y of Veterans Affairs*, 260 F.3d 1365 (Fed. Cir. 2001); *Cent. Me. Power Co. v. Fed. Energy Regulatory Comm’n*, 252 F.3d 34 (1st Cir. 2001); *Cent. & Sw. Servs., Inc. v. U.S. Env’tl. Prot. Agency*, 220 F.3d 683 (5th Cir. 2000); *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146 (D.C. Cir. 1993).

53. 5 U.S.C. §§ 500-596 (2012).

54. *Black Warrior Riverkeeper*, 781 F.3d at 1290.

55. The court considers “the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.” *Id.* (quoting *Allied-Signal*, 988 F.2d at 150-51).

56. *Id.* at 1291.

with instructions to remand to the Corps "for a thorough reevaluation of the Corps' CWA and NEPA determinations in light of all the relevant data, including the Corps' recalculated figure for the acreage of waters affected by NWP 21."<sup>57</sup> The court also instructed the district court that it "may also determine whether any further relief, including vacatur, is required in light of the Corps' admitted error."<sup>58</sup> Finally, the court instructed the Corps to complete its reconsideration within a year.<sup>59</sup>

In *Riverkeeper v. United States Environmental Protection Agency*, in an issue of apparent first impression, the Eleventh Circuit construed a provision of the CWA not to disallow appellate review of an interim or non-final EPA determination regarding Alabama's NPDES permitting program.<sup>60</sup>

Plaintiff environmental organizations filed petitions with the Environmental Protection Agency (EPA), seeking commencement of proceedings to withdraw Alabama's authorization to administer the National Pollution Discharge Elimination System permitting program under the CWA and alleging twenty-six deficiencies in Alabama's program. The EPA issued an "interim response" to the petitions, in which it concluded "22 of the alleged deficiencies did not warrant initiation of program withdrawal proceedings," but expressed "significant concerns" about the adequacy of Alabama's program with respect to the remaining four alleged deficiencies.<sup>61</sup> As to these matters, the EPA concluded it would defer a decision on the petitions and would instead "work with" the Alabama Department of Environmental Management (ADEM) and allow ADEM to respond before making a final determination as to whether to initiate withdrawal proceedings.<sup>62</sup> Thus, according to the court, the EPA "has not definitively ruled on the petitions as a whole or decided whether to commence withdrawal proceedings."<sup>63</sup> The court also pointed out both parties agreed at oral argument that the EPA could revise any of its findings set out in the interim response.<sup>64</sup>

The plaintiffs appealed the EPA's conclusions as to some of the twenty-two alleged deficiencies it found did not warrant withdrawal.<sup>65</sup> The plaintiffs based their challenge not on the APA, which allows for

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57. *Id.*

58. *Id.*

59. *Id.*

60. 806 F.3d at 1083-84.

61. *Id.* at 1080.

62. *Id.*

63. *Id.* at 1081.

64. *Id.* at 1082.

65. *Id.* at 1081.

appeal of “final agency action,”<sup>66</sup> but on a subsection of the judicial review provision of the CWA, “33 U.S.C. § 1369(b)(1)(D), which provides for appellate review of an EPA action ‘in making *any determination* as to a State permit program submitted’” pursuant to the CWA.<sup>67</sup> The court noted that the phrase “any determination” in the code section was “critical” to the issue—that is, whether the phrase should be construed to mean non-final determinations or only final determinations.<sup>68</sup>

The court held judicial review under this code section is available only for final agency determinations and therefore concluded it did not have jurisdiction to review the EPA’s “interim response” to the plaintiffs’ petitions.<sup>69</sup> The court noted that other circuit courts considering other subsections of § 1369<sup>70</sup> were divided on whether judicial review of non-final action by the EPA was allowed,<sup>71</sup> but pointed out no court had heretofore addressed subsection (b)(1)(D), the subsection at issue in this case.<sup>72</sup>

To explain its holding, the court pointed to Eleventh Circuit and United States Supreme Court precedent addressing judicial review in other statutory contexts for the “strong presumption” that non-final agency action does not fall within the scope of statutes allowing for judicial review of agency actions.<sup>73</sup> The court also noted that under the ordinary meaning of the text of the subsection, the word “determination” connotes a “final decision made at the end of a deliberative process,” and this connotation is not changed by the preceding word “any.”<sup>74</sup> Finally, the court in *Save the Bay, Inc. v. Environmental Protection Agency*<sup>75</sup> held § 1369(b)(1)(D) did not authorize judicial review where the plaintiff

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66. *Id.* The plaintiffs did not contend that the EPA had taken “final agency action” within the meaning of § 704 of the APA. *See id.*; *see also* 5 U.S.C. § 704 (2012).

67. *Riverkeeper*, 806 F.3d at 1081 (emphasis added); *see also* 33 U.S.C. 1369(b)(1)(D) (2012).

68. *Riverkeeper*, 806 F.3d at 1081-82.

69. *Id.* at 1080-81.

70. 33 U.S.C. § 1369 (2012).

71. The court compared *Iowa League of Cities v. Environmental Protection Agency*, 711 F.3d 844 (8th Cir. 2013) (holding that a final determination was not required for judicial review under § 1369(b)(1)(F)), and *Pennsylvania Department of Environmental Research v. Environmental Protection Agency*, 618 F.2d 991 (3d Cir. 1980) (explaining that review under § 1369 is not limited to final agency action in cases involving subsections (b)(1)(A) and (b)(1)(F)), with *National Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011) (holding that EPA guidance letters must constitute a final agency action to be reviewable under subsections (b)(1)(E) and (b)(1)(F)).

72. *Riverkeeper*, 806 F.3d at 1081.

73. *Id.* at 1081-82.

74. *Id.* at 1082.

75. 556 F.2d 1282 (5th Cir. 1977).

complaining of a state's CWA implementation program had not filed a formal petition but only sent a letter notifying the EPA of its intent to sue.<sup>76</sup> In *Riverkeeper*, it was noted that the court in *Save the Bay* agreed with the EPA that "full administrative development should precede litigation over claims that a state's program permit authority should be withdrawn."<sup>77</sup> The court explained that judicial intervention before the EPA has issued a final determination on the plaintiffs' petition would "disrupt the administrative process" and interfere with the EPA's exercise of its discretion as to whether to withdraw Alabama's authority to administer the NPDES program.<sup>78</sup>

In *Altamaha Riverkeeper, Inc. v. Rayonier, Inc.*,<sup>79</sup> the court applied Georgia's rules of contract interpretation to an NPDES<sup>80</sup> permit issued to Rayonier.<sup>81</sup> The court interpreted the permit to not require Rayonier to comply with Georgia's narrative water quality standards for color, odor, and turbidity.<sup>82</sup>

Rayonier operates a pulp mill in south Georgia that discharges fifty to sixty million gallons of wastewater per day into the Altamaha River. The defendant has an NPDES permit for the discharges, issued by the Georgia Environmental Protection Division (EPD) under authority delegated to it by the EPA under the CWA.<sup>83</sup>

Riverkeeper filed suit, claiming Rayonier's wastewater discharge violated Georgia's water quality standards for color, odor, and turbidity, which Riverkeeper contended were incorporated into Rayonier's NPDES permit.<sup>84</sup> Riverkeeper claimed the narrative water quality standards are incorporated into Rayonier's permit in two ways.<sup>85</sup> First, language on the first page of the permit states:

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76. *Id.* at 1289.

77. 806 F.3d at 1083 (quoting *Save the Bay*, 556 F.2d at 1288).

78. *Id.* at 1083-84.

79. No. CV 214-14, 2015 U.S. Dist. LEXIS 42849, at \*1 (S.D. Ga. Mar. 31, 2015).

80. National Pollution Discharge Elimination System, established by § 402 of the CWA, 33 U.S.C. § 1342 (2012), allows the discharge of pollutants into a water of the United States only in compliance with a permit issued by the Environmental Protection Agency or by a State under authority delegated to it by the EPA pursuant to the CWA. See *Altamaha Riverkeeper*, 2015 U.S. Dist. LEXIS 42849, at \*6.

81. *Altamaha Riverkeeper*, 2015 U.S. Dist. LEXIS 42849, at \*7-8.

82. *Id.* at \*26.

83. *Id.* at \*2; see 33 U.S.C. § 1342.

84. *Altamaha Riverkeeper*, 2015 U.S. Dist. LEXIS 42849, at \*3-4. Georgia's narrative water quality standards require that "[a]ll waters shall be free from material . . . which produce turbidity, color, odor or other objectionable conditions which interfere with legitimate water uses." *Id.* (brackets in original) (quoting GA. COMP. R. & REGS. 391-3-6-.03(5)(c) (2011)).

85. *Id.* at \*9.

In compliance with the provisions of the Georgia Water Quality Control Act . . . , the Federal Water Pollution Act, . . . and the Rules and Regulations promulgated pursuant to each of these Acts, Rayonier Jesup Mill . . . is authorized to discharge from a facility located [at the mill] to the receiving waters Altamaha River in accordance with the effluent limitations, monitoring requirements and other conditions set forth in Parts I, II and III hereof.<sup>86</sup>

Second, Part III of the permit, under the heading “Biomonitoring and Toxicity Reduction Requirements,” contains the language:

The Permittee shall comply with effluent standards or prohibitions established by section 307(a) of the Federal Act and with chapter 391-3-6-.03(5) of the State Rules and may not discharge toxic pollutants in concentrations or combinations that are harmful to humans, animals, or aquatic life.<sup>87</sup>

Riverkeeper contended that both of these references incorporated Georgia’s narrative standards set out in the state’s rules and regulations.<sup>88</sup>

The court, applying Georgia’s rules of contract interpretation, concluded that the first passage unambiguously did not incorporate the narrative standards into Rayonier’s permit.<sup>89</sup> The Court explained:

The first clause merely asserts the authority by which the Georgia EPD issues the permit; the second clause asserts that Rayonier is authorized to discharge only in accordance with the conditions enumerated in the Permit. If the Georgia EPD intended the conditions of Rayonier’s permit to be coextensive with the water quality standards set forth in the CWA, the State Act, and their rules and regulations, it could have said so by stating “Rayonier is authorized to discharge wastewater into the Altamaha River in accordance with the conditions set forth in Parts I, II and III hereof *and with the water quality standards enumerated in the Federal and State Acts and their attendant regulations.*”<sup>90</sup>

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86. *Id.* at \*9-10.

87. *Id.* at \*13.

88. *Id.*; see GA. COMP. R. & REGS. 391-3-6-.03(5)(c).

89. *Altamaha Riverkeeper*, 2015 U.S. Dist. LEXIS 42849, at \*10.

90. *Id.* at \*10-11 (emphasis in original). On the other hand, it seems that if Georgia EPD intended only to reference the authority by which it administered the NPDES program, which EPA originally delegated in 1974, it could have referenced, for example, the October 24, 2007 Memorandum of Agreement between EPA and EPD, recognizing Georgia’s authorization to administer the NPDES program, and O.C.G.A. § 12-5-30, requiring facility operators to obtain a permit from EPD for the discharge of pollutants into waters of the State. See October 24, 2007 Memorandum of Agreement available at

However, the court concluded the second reference to Georgia's water quality standards, including the narrative standards, was ambiguous.<sup>91</sup> Specifically, the court said:

This reference [in Part III of the permit] to [Ga. Comp. R. & Regs.] 391-3-6-.03(5) is ambiguous because its context suggests it is strictly concerned with toxic pollutants, but Rule 391-3-6-.03(5) lists a host of water quality standards that have nothing to do with toxicity. On one hand, a broad reference to [.03(5)] would seem to incorporate into the Permit all of the water quality standards throughout that rule. On the other hand, though, the context of that reference suggests that Georgia EPD intended only to incorporate those water quality standards within [.03(5)] that concern toxicity.<sup>92</sup>

After finding it could not determine conclusively whether Georgia EPD intended the reference in Part III of the permit to Rule 391-3-6-.03(5)<sup>93</sup> generally only to mean 391-3-6-.03(5)(e), the subsection of the Rule related to toxicity, either from the language of the permit itself or from the application of Georgia's statutory rules of contract construction,<sup>94</sup> the court turned to the common law rule that "courts interpret contract provisions in light of their headings."<sup>95</sup> The heading of Part III of the permit, containing the ambiguous reference to Rule 391-3-6-.03(5), is "Biomonitoring and Toxicity Reduction Requirements."<sup>96</sup> Although the court recognized a conflict in Georgia case law as to whether headings in contracts could supply meaning to a contract, the court found the weight of authority suggested a court could interpret a contract provision in light of its heading.<sup>97</sup> Applying this rule, the court concluded in light of the heading "Biomonitoring and Toxicity Requirements" of Part

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[www.epa.gov/sites/production/files/2013-09/documents/ga-moa-npdes.pdf](http://www.epa.gov/sites/production/files/2013-09/documents/ga-moa-npdes.pdf); see also O.C.G.A. § 12-5-30 (2012).

91. *Altamaha Riverkeeper*, 2015 U.S. Dist. LEXIS 42849, at \*12-13.

92. *Id.* at \*13. The "other water quality standards" the court referred to include the narrative standards related to turbidity, color, and odor that were at issue in the case. GA. COMP. R. & REGS. 391-3-6-.03(5)(c). The subsection of the Rule that relates only to toxicity is 391-3-6-.03(5)(e).

93. GA. COMP. R. & REGS. 391-3-6-.03(5) (2011).

94. The court explained, "Thus, on balance, the Riverkeeper's proffered rule against inserting terms does not appear to be binding or instructive to this Court, but at the same time Georgia Code section 13-2-2(6)[providing that a court may supply words to a contract if 'the instrument as it stands is without meaning'] also appears to be a poor fit." *Altamaha Riverkeeper*, 2015 U.S. Dist. LEXIS 42849, at \*20; see O.C.G.A. § 13-2-2(6) (2010).

95. *Altamaha Riverkeeper*, U.S. Dist. LEXIS 42849, at \*19-20, \*22.

96. *Id.* at \*20-21.

97. *Id.* at \*22-23.

III, together with introductory language following the heading that referenced toxicity standards, that “this Court has little difficulty in looking to that Part’s heading and the subsequent language to determine that Georgia EPD intended to refer to Rule 391-3-6-.03(5)(e) when it referred to Rule 391-3-6-.03(5) generally.”<sup>98</sup>

The court concluded Rayonier’s NPDES permit did not incorporate Georgia’s narrative water quality standards for turbidity, color, and odor.<sup>99</sup>

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98. *Id.*

99. *Id.* at \*26.