

# Environmental Law

by Julie V. Mayfield\*

The significant decisions handed down by the Eleventh Circuit Court of Appeals during the last three years concern only a few federal environmental statutes.<sup>1</sup> First, four cases arose under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”),<sup>2</sup> with three of those addressing issues of first impression in the Eleventh Circuit. The latter three cases address defenses to cost-recovery actions,<sup>3</sup> prohibitions on challenges to approved remediation plans,<sup>4</sup> and exemptions from liability for secured creditors.<sup>5</sup> The other CERCLA case addresses arranger liability.<sup>6</sup> Second, two cases concern the Resource Conservation and Recovery Act (“RCRA”),<sup>7</sup> one addressing criminal liability under RCRA,<sup>8</sup> and the other addressing the interaction

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1. As with earlier environmental law survey articles, this Article will not review the basic statutory schemes of the statutes discussed. Readers may instead refer to previous survey articles for brief overviews of each statute as well as prior Eleventh Circuit case law. See W. Scott Laseter & Julie V. Mayfield, *Environmental Law*, 49 *MERCER L. REV.* 1007 (1998); W. Scott Laseter, *Environmental Law*, 46 *MERCER L. REV.* 1359 (1995); Edward A. Kazmarek & W. Scott Laseter, *Environmental Law*, 44 *MERCER L. REV.* 1187 (1993).

2. 42 U.S.C. §§ 9601-9675 (1994 & Supp. V 1999).

3. *Blasland, Bouck & Lee, Inc. v. City of North Miami*, 283 F.3d 1286 (11th Cir. 2002).

4. *Broward Gardens Tenants Ass'n v. EPA*, 311 F.3d 1066 (11th Cir. 2002).

5. *Monarch Tile, Inc. v. City of Florence*, 212 F.3d 1219 (11th Cir. 2000).

6. *Concrete Sales & Servs., Inc. v. Blue Bird Body Co.*, 211 F.3d 1333 (11th Cir. 2000).

7. 42 U.S.C. §§ 6901-6992K.

8. *United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001). Also, criminal charges were filed under CERCLA; the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1994 & Supp. III 1997); and the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994 & Supp. V 1999). *Id.* at 1231.

between state law and RCRA.<sup>9</sup> Finally, this Survey discusses an Eleventh Circuit case<sup>10</sup> and two district court cases<sup>11</sup> concerning the Endangered Species Act (“ESA”),<sup>12</sup> which appear to be the final chapters in the battle, first reported in the 1999 Environmental Law Survey,<sup>13</sup> over protection of sea turtles on the Florida coast.

I. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

A. *Defenses to Cost Recovery Actions*

In *Blasland, Bouck & Lee, Inc. v. City of North Miami*,<sup>14</sup> the court addressed for the first time whether equitable defenses are available to defendants in CERCLA cost recovery actions. Plaintiff Blasland, Bouck & Lee (“Blasland”) was under contract with the City of North Miami (“City”) to clean up a contaminated site owned by the City. The contract contained a “pay-when-paid” clause stating that Blasland would be paid for portions of the work only after the City received payment from the Florida Department of Environmental Regulation (“FDER”). After the work was underway, the City terminated the contract with Blasland, resulting in a suit by Blasland against the City for claims including breach of contract and cost recovery under CERCLA. The City countersued, and following a jury trial on the common law claims and a bench trial on the CERCLA claims, the trial court concluded that Blasland could recover most of its fees under both the contract and CERCLA claims. The court held, however, that Blasland could not recover \$110,000 of its fees because the City had not received payment from FDER for this work and the pay-when-paid clause barred Blasland from recovering this amount, even under the CERCLA cost recovery claim.<sup>15</sup>

The issue for the court of appeals was whether the pay-when-paid clause in the contract barred Blasland’s recovery of these fees under the CERCLA cost recovery claim.<sup>16</sup> The court determined that the City’s

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9. *Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260 (11th Cir. 2000).

10. *Loggerhead Turtle v. County Council*, 307 F.3d 1318 (11th Cir. 2002).

11. *Loggerhead Turtle v. County Council*, 92 F. Supp. 2d 1296 (M.D. Fla. 2000); *Loggerhead Turtle v. County Council*, 120 F. Supp. 2d 1005 (M.D. Fla. 2000).

12. 16 U.S.C. §§ 1531-1544.

13. See W. Scott Laseter & Julie V. Mayfield, *Environmental Law*, 50 MERCER L. REV. 1005, 1013 (1999).

14. 283 F.3d 1286 (11th Cir. 2002).

15. *Id.* at 1290-92.

16. *Id.* at 1301.

reliance on the contract clause was akin to an equitable, instead of a legal, defense of the cost recovery claim.<sup>17</sup> The court then noted that while CERCLA does contain several defenses to cost recovery actions, such as the defendant is not responsible for the contamination, the defendant is an innocent landowner, and the contamination is not covered by the statute, the statute does not allow for the assertion of equitable defenses.<sup>18</sup> Citing the Third, Seventh, and Eighth Circuits, the court stated that there are two reasons to prohibit the use of equitable defenses to cost recovery actions:

The first, of course, is the plain language of section 107(a) which explicitly limits defenses to those three enumerated in section 107(b). The second reason is the Congressional intent behind the statute, which was to have pollution cleaned up as quickly as possible and to see that the responsible polluters are made to pay for the cleanup.<sup>19</sup>

Reversing the district court and holding that equitable defenses cannot bar a cost recovery claim, the court stated, "Recognizing unenumerated equitable defenses would widen too far the circle of exemption from CERCLA liability, and invite defendants in suits brought by an innocent party . . . to raise such defenses in the hopes of persuading the court that although the defenses were not enumerated in CERCLA, they should have been."<sup>20</sup> Thus, defendants may only avail themselves of those defenses specifically identified in the statute.<sup>21</sup>

### *B. Challenges to Approved Remediation Plans*

In *Broward Gardens Tenants Ass'n v. EPA*,<sup>22</sup> neighbors of a contaminated site undergoing cleanup sued the Environmental Protection Agency ("EPA"), the Department of Housing and Urban Development ("HUD"), and other officials, alleging violations of the Fifth, Thirteenth, and Fourteenth Amendments.<sup>23</sup> Because the cleanup was being conducted according to an approved remediation plan, an EPA Record of Decision, and a consent decree, the district court concluded that section 113(h) of CERCLA, which bars all but a few enumerated challenges to

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17. *Id.* at 1303-04.

18. *Id.* at 1301-04.

19. *Id.* at 1304 (citing *Town of Munster, Ind. v. Sherwin-Williams Co.*, 27 F.3d 1268, 1271 (7th Cir. 1994); *Monarch Tile, Inc. v. Florence*, 212 F.3d 1219, 1221 (11th Cir. 2002)).

20. *Id.* at 1304-05.

21. *Id.* at 1305.

22. 311 F.3d 1066 (11th Cir. 2002).

23. Plaintiffs also alleged violations of Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000d-2000d-7 (1994 & Supp. 2002) and the Fair Housing Act, 42 U.S.C.A. §§ 3601-3619 (1994 & Supp. 2002). *Id.* at 1070.

remediation plans, barred plaintiffs' suit. Plaintiffs appealed, asserting that they were not challenging the approved clean up plan and, alternatively, that section 113(h) does not bar judicial review of constitutional claims.<sup>24</sup>

The court dispensed with the first assertion quickly, concluding that plaintiffs' complaint clearly sought relief that would change the approved remediation plan.<sup>25</sup> The alternative assertion presented the court with an issue of first impression: whether section 113(h) bars challenges that a remediation plan violates certain provisions of the Constitution.<sup>26</sup> Holding that section 113(h) does bar these constitutional claims, the court looked to the plain language of the statute, which provides, "No Federal court shall have jurisdiction . . . to review *any* challenges to removal or remedial action" approved according to the statute, except those challenges specifically listed in the statute.<sup>27</sup> Stating that "any" means all,<sup>28</sup> the court concluded that "Congress meant to bar jurisdiction over constitutional as well as statutory claims challenging the adequacy of a remedial plan."<sup>29</sup> In this case, the court continued the strict constructionist interpretation of CERCLA seen earlier in *Blasland*, holding that plaintiffs may only assert those challenges specifically listed in section 113(h).<sup>30</sup>

### C. Arranger Liability

In *Concrete Sales & Services, Inc. v. Blue Bird Body Co.*,<sup>31</sup> the Eleventh Circuit provided an analysis of "arranger liability" under CERCLA for the third time in four years.<sup>32</sup> In each of these cases, the court cited the standard set forth in its decision in *South Florida Water Management District v. Montalvo*.<sup>33</sup> In *Montalvo* the court held that because the statute does not define "arranged for," courts must look at a variety of factors and make a fact-specific determination in every case.<sup>34</sup> The court in *Concrete Sales* listed a number of factors as

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24. *Id.* at 1069-72.

25. *Id.* at 1073.

26. *Id.* at 1074.

27. *Id.* at 1071-72 (citing 42 U.S.C. § 9613(h) (1994)) (emphasis added).

28. *Id.* at 1075 (citing *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir. 1997)).

29. *Id.*

30. *Id.* See *Blasland*, 283 F.3d at 1286.

31. 211 F.3d 1333 (11th Cir. 2000).

32. *Id.* at 1336-37. See *S. Fla. Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402 (11th Cir. 1996); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489 (11th Cir. 1996).

33. 84 F.3d 402, 407 (11th Cir. 1996).

34. *Id.* at 406-07.

relevant to the analysis, including: (1) whether a sale involved the transfer of a “useful” or “waste” product; (2) whether the party intended to dispose of a substance at the time of the transaction; (3) whether the party made the “crucial decision” to place hazardous substances in the control of a particular facility; (4) whether the party had knowledge of the disposal; and (5) whether the party owned the hazardous substances.<sup>35</sup>

*Concrete Sales* was initially an action by one former owner of contaminated property against other former owners, seeking contribution for clean up costs.<sup>36</sup> One of those former property owners, the McCord Trust (“Trust”), in turn brought contribution actions against other parties, including Peach Metals Industries (“PMI”), the Blue Bird Body Co. (“Blue Bird”), and Simplex Nails (“Simplex”). PMI had operated the electroplating facility that was the source of the contamination on the property in question. Blue Bird and Simplex were customers who had outsourced their electroplating needs to PMI. The trial court granted summary judgment against the Trust in its attempt to hold Blue Bird and Simplex liable as parties who “arranged for” the disposal of hazardous substances, and the Trust appealed.<sup>37</sup>

The Eleventh Circuit first addressed whether the Trust had proved its case for arranger liability against Simplex.<sup>38</sup> The Trust alleged that Simplex had control over the parts it sent to PMI for electroplating, that Simplex knew the electroplating process produced hazardous substances, and that Simplex had even loaned money to PMI.<sup>39</sup> Using the *Montalvo* factors, however, the court found that the Trust failed to prove its case.<sup>40</sup> The court stated that, although Simplex’s officers were aware that hazardous substances were produced during the electroplating process, there was no evidence that Simplex intended to arrange for the disposal of these hazardous substances, no evidence that Simplex knew of or had any power to control the disposal practices, and the loan could not be tied to any specific purpose, such as the disposal of hazardous substances.<sup>41</sup>

The court then turned to the more difficult case of Blue Bird, against whom the Trust made three primary arguments.<sup>42</sup> First, the Trust

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35. 211 F.3d at 1336-37 (citing *Montalvo*, 84 F.3d at 406-07).

36. *Id.* at 1335.

37. *Id.* at 1335-36.

38. *Id.* at 1336-37.

39. *Id.* at 1337.

40. *Id.*

41. *Id.*

42. *Id.*

asserted that Blue Bird actually exercised control over PMI and could have controlled its disposal practices. In support of this allegation, the Trust pointed to the fact that a former Blue Bird employee founded PMI, that Blue Bird was PMI's largest customer, that Blue Bird loaned money to PMI to purchase hazardous substances, that Blue Bird dictated the work to be done on its parts, and that the contracts between Blue Bird and PMI required PMI to be in compliance at all times with applicable law. Second, the Trust claimed that Blue Bird could have inferred that PMI was not properly disposing of the hazardous substances because Blue Bird knew that hazardous substances were generated there, that PMI was in financial trouble, that the facility was in disrepair, and that Blue Bird employees had seen contaminated waste water on the facility's floor. Finally, the Trust asserted that Blue Bird intended for PMI to dispose of Blue Bird's electroplating waste because without PMI, Blue Bird would have done its own electroplating and would have had to dispose of the waste.<sup>43</sup>

Again applying the *Montalvo* factors, the court deemed all of these allegations insufficient to hold Blue Bird liable as an arranger.<sup>44</sup> The court determined that Blue Bird did not have "sufficient knowledge or control of PMI's disposal practices to trigger arranger liability"<sup>45</sup> and that even "Blue Bird's facilitation of the purchase of hazardous substances . . . does not, in the limited circumstances of this case, show that Blue Bird owned, possessed, or even had the ability to control the hazardous substances."<sup>46</sup> On this same point, the court held that the contracts between PMI and Blue Bird that required compliance with applicable laws "did not imply a duty for Blue Bird to police PMI's compliance."<sup>47</sup> The court also held that although Blue Bird was aware of PMI's financial troubles and its rundown facility, this knowledge "falls shy" of knowledge of improper disposal.<sup>48</sup> Finally, the court held that Blue Bird did not constructively own the waste produced as a result of its contractual relationship with PMI.<sup>49</sup> Instead, Blue Bird owned only the metal plates that it sent to PMI for processing, which were not, "before or after the electroplating, a hazardous substance."<sup>50</sup>

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43. *Id.* at 1337-38.

44. *Id.* at 1339.

45. *Id.*

46. *Id.* at 1338.

47. *Id.* at 1339.

48. *Id.*

49. *Id.*

50. *Id.*

Explaining its reasoning, the court stated, “If Congress wishes to impose CERCLA liability on parties who contract for services that produce hazardous waste, it, not us, has the authority to do so.”<sup>51</sup> While the court did not foreclose the possibility of arranger liability when the relationship between parties is a contractual one for services, it is clear that something more than the contract and knowledge of the creation of hazardous substances from the contracted work is required for a finding of arranger liability.<sup>52</sup>

#### D. Secured Creditor Exemption

While *Concrete Sales* follows several Eleventh Circuit cases interpreting arranger liability, *Monarch Tile, Inc. v. City of Florence*<sup>53</sup> is among the Eleventh Circuit’s first decisions concerning lender liability under CERCLA since Congress amended the statute in 1996 to address this issue.<sup>54</sup> The history of *Monarch Tile* began in 1952 when the City of Florence, Alabama (the “City”), acquired a parcel of property to encourage development within the City and then leased the property to a tile manufacturing company. The City issued bonds to purchase the property and then mortgaged the property to a bank, pledging to use all of the rental income it received to repay the bonds. Monarch Tile began leasing the property in 1973 and then purchased it in 1988. The operations of both Monarch Tile and its predecessor lessee caused the site to become contaminated, and Monarch sought contribution from the City for its clean up costs. The City claimed, and the district court agreed, that it was exempt from liability under CERCLA’s secured creditor exemption.<sup>55</sup>

The secured creditor exemption states that “the term ‘owner or operator’ does not ‘include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily

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51. *Id.*

52. *Id.*

53. 212 F.3d 1219 (11th Cir. 2000).

54. The statutory amendment came in large part as a response to the Eleventh Circuit Court of Appeals decision in *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1559 n.13 (11th Cir. 1990), which held that lenders could be found liable as owners or operators of facilities against which they held a security interest if they merely had the “capacity to influence” a facility’s handling or disposal of hazardous wastes. Congress’s amendment narrowed the scope of potential liability by making it clear that a lender must actually participate in the management of a facility, not just have the capacity to influence operations, in order to be held liable as an owner or operator. *Id.* at 1556. See also 42 U.S.C. § 9601(20)(F)(i)(II) (1994 & Supp. V 1999).

55. 212 F.3d at 1220-21.

to protect his security interest in the vessel or facility.’”<sup>56</sup> It was undisputed that the City did not participate in the management of the tile facility, so the only question was whether the City held indicia of ownership over the property primarily to protect its security interest.<sup>57</sup>

As this was an issue of first impression in the Eleventh Circuit, the court looked to a similar Ninth Circuit case, *In re Bergsoe Metal Corp.*,<sup>58</sup> for guidance.<sup>59</sup> In that case, Bergsoe Metal Corporation bought property from the Port of St. Helens (“Port”), giving the Port a mortgage on the property. The Port then assigned all the revenues it would receive under the mortgage to a bank to pay back municipal bonds the bank had purchased.<sup>60</sup> The Ninth Circuit concluded that the Port held indicia of ownership primarily to protect its security interest, as shown by the fact that Bergsoe’s mortgage payments to the Port were equal to the Port’s payments to the bank for the bonds.<sup>61</sup> The Eleventh Circuit characterized this holding broadly, stating, “[*Bergsoe*] held that where a party held bare title, and devoted the lease revenues to pay off the development bonds that had financed the property’s acquisition, the party held a ‘security interest’ within the meaning of § 9601(20)(A).”<sup>62</sup> The court also observed that

[t]here is nothing in the 1996 amendments suggesting that Congress sought to constrain the definition of a “security interest” so as to preclude the type of security interest identified in *Bergsoe* . . . . We therefore view the type of “security interest” identified in *Bergsoe* as having survived the enactment of 42 U.S.C. § 9601(G)(vi).<sup>63</sup>

Attempting to counter the *Bergsoe* analysis, Monarch Tile asserted that the City held indicia of ownership not just to protect a security interest but for the public purpose of spurring development.<sup>64</sup> The court responded:

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56. *Id.* at 1222 (quoting 42 U.S.C. § 9601(20)(A) (1994)).

57. *Id.*

58. 910 F.2d 668 (9th Cir. 1990).

59. 212 F.3d at 1222.

60. 910 F.2d at 670.

61. *Id.* The First Circuit also adopted this reasoning in *Waterville Industries, Inc. v. Finance Authority of Maine*, 984 F.2d 549 (1st Cir. 1993).

62. 212 F.3d at 1223.

63. *Id.* Section 9601(20)(G)(vi) of 42 U.S.C. (1994 & Supp. V 1999) defines the term “security interest” to include “a right under a mortgage, deed of trust, assignment, judgment lien, pledge, security agreement, factoring agreement, or lease and any other right accruing to a person to secure the repayment of money, the performance of a duty, or any other obligation by a nonaffiliated person.” *Id.* (quoting 42 U.S.C. § 9601(20)(G)(vi)).

64. *Id.* at 1223.

Plainly, governments will never acquire property for the purpose of protecting a security interest in that same property. Governments acquire property to further some public purpose, be it economic development, environmental protection, or flood control. Once those public purposes are met, however, as it was in this case when a tile manufacturing factory began operating on the property, the government often holds title or other indicia of ownership during the duration of a long-term lease so that it can ensure that its investment is repaid . . . . The fact that a government's initial motivation for purchasing land was to further economic development will not preclude it from qualifying for the secured creditor exception as long as it "holds indicia of ownership primarily to protect" its security interest in the property during the period when the pollution occurs.<sup>65</sup>

## II. RESOURCE CONSERVATION AND RECOVERY ACT

### A. *Criminal Prosecution*

*United States v. Hansen*<sup>66</sup> is one of the most interesting environmental crime cases in recent history due to the extent and nature of the contamination, the duration of the criminal activity, and the lengthy prison sentences that resulted from the prosecution. This case centers on the LCP Chemicals-Georgia facility in Brunswick, Georgia, which began operations in 1979 and produced caustic soda, hydrogen gas, hydrochloric acid, and chlor-alkali bleach. Poor management of the facility's wastewater resulted in massive mercury contamination of the property and the eventual closure of the facility in 1994.<sup>67</sup> Three men, two corporate executives, and one plant manager were charged and found guilty of conspiracy to commit environmental crimes and of violating the Clean Water Act ("CWA"),<sup>68</sup> RCRA, and CERCLA. The district court sentenced the company's long-time president and chief executive officer to nine years in prison, the company's executive vice president and later chief executive officer to almost four years in prison, and the plant manager to over six years in prison.<sup>69</sup>

The facility's problems began in earnest in the early 1990s when Georgia's Environmental Protection Division ("EPD") issued a National Pollutant Discharge Elimination System ("NPDES") permit to the

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65. *Id.* at 1223-24.

66. 262 F.3d 1217 (11th Cir. 2001).

67. The EPA estimated the clean up would cost over fifty million dollars. *Id.* at 1231.

68. 33 U.S.C. § 1251-1387 (1994 & Supp. 2000).

69. 262 F.3d at 1225-32.

facility. The NPDES permit allowed the facility to discharge seventy gallons of wastewater per minute, but the facility's new treatment plant only had the capacity to discharge half that amount. Choosing not to decrease production to meet the limited capacity of the wastewater treatment plant, the company managers had to find a way to hold the excess wastewater until it could be processed and discharged. EPD had authorized the storage of wastewater on the workroom floor, but EPD likely did not know that the wastewater overflowed from the plant floor, went out the door, and accumulated into a lake.<sup>70</sup>

The company declared bankruptcy in 1991, and funds for maintenance of the environmental systems were restricted. Wastewater began accumulating in various locations around the plant, including the workroom floor, outside the plant, and in large tanks that had once stored oil. In the first half of 1993, the plant violated its NPDES permit numerous times each month, and in June 1993, EPD notified the company of its proposal to revoke the NPDES permit. EPD officially revoked the permit in September 1993, and the plant closed shortly thereafter. The EPA assumed responsibility for assessing and remediating the contamination and for prosecuting the responsible corporate officials and plant workers.<sup>71</sup>

The criminal charges included conspiracy to commit environmental crimes; violating the CWA by exceeding the NPDES permit limits; violating RCRA by storing wastewater on the plant floor, allowing it to leak into the environment, and knowingly endangering employees by exposing them to the wastewater; violating CERCLA by failing to notify the government of unpermitted releases of contaminated wastewater; and violating the ESA by "taking" a wood stork, an endangered species, as a result of the discharge of contaminated wastewater into the surrounding marsh, creek, and river. Defendants were acquitted of the ESA charge but convicted on almost all other counts as charged.<sup>72</sup>

Defendants challenged many aspects of their convictions, including that the government did not have sufficient evidence to convict them of "knowing endangerment" under RCRA and that the government failed to show that one defendant had the required knowledge of the CWA and RCRA violations.<sup>73</sup>

With regard to the "knowing endangerment" charge under RCRA, the government had to prove that

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70. *Id.* at 1226.

71. *Id.* at 1226-31.

72. *Id.* at 1231-32.

73. *Id.* at 1232.

defendants knowingly caused the illegal treatment, storage, or disposal of hazardous wastes while knowing that such conduct placed others in imminent danger of death or serious injury. A defendant acts “knowingly” “if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.” The defendant must have possessed “actual awareness or actual belief.”<sup>74</sup>

Regarding the knowledge requirement for the hazardous nature of the substance at issue, the Eleventh Circuit reiterated its holding from an earlier case that “[t]he government need only prove that a defendant had knowledge of the general hazardous character of the chemical’ and knew ‘that the chemicals have the potential to be harmful to others or to the environment.’”<sup>75</sup> The court reviewed the evidence against these standards and deemed the evidence sufficient for the convictions.<sup>76</sup>

Concerning the allegation that the government failed to show that one defendant had the requisite knowledge of the CWA and RCRA violations, the court again turned to a previous ruling for the appropriate standard for knowledge under RCRA: “[A] defendant, who may not have ‘directly’ caused a hazardous waste violation but had ‘approved of previous dumpings as a way to meet storage squeezes,’ ‘effectively ordered’ a subsequent violation when he instructed a subordinate to ‘handle’ hazardous waste.”<sup>77</sup> Though the vice-president defendant in *Hansen* did not actually cause the violations, the court found sufficient for conviction his knowledge that the plant was violating its permit almost daily, was accumulating waste it could not treat, and was releasing waste to keep the plant running.<sup>78</sup>

### B. Pre-emption

While the foregoing cases concerned the interpretation of federal environmental laws, the next case evidences the trend in environmental law towards more environmental legislation at the state level. Many states are developing statutory schemes that are supplementary to, rather than in lieu of, various federal statutory schemes, raising the potential for conflict between federal and state environmental programs. *Boyes v. Shell Oil Products Co.*<sup>79</sup> illustrates a conflict between Florida’s

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74. *Id.* at 1242 (citing 42 U.S.C. § 6928(e), (f)(1)(C), (f)(2)(A) (1994)).

75. *Id.* at 1243 (quoting *United States v. Goldsmith*, 978 F.2d 643, 645-46 (11th Cir. 1992)). For a discussion of *Goldsmith*, see Edward A. Kazmarek & W. Scott Laseter, *Environmental Law*, 44 MERCER L. REV. 1187 (1993).

76. 262 F.3d at 1246.

77. *Id.* at 1248 (citing *United States v. Greer*, 850 F.2d 1447, 1451-52 (11th Cir. 1988)).

78. *Id.*

79. 199 F.3d 1260 (11th Cir. 2000).

underground storage tank remediation program and RCRA. In this case, plaintiffs' property had become contaminated due to activities at two gas stations formerly owned by defendants Shell and Tenneco. Plaintiffs sued under RCRA's citizen suit provision, seeking an injunction to require defendants to clean up plaintiffs' property.<sup>80</sup> The district court dismissed the suit on the basis of *Burford* abstention<sup>81</sup> and the primary jurisdiction doctrine,<sup>82</sup> citing a Florida statute,<sup>83</sup> which purported to bar the plaintiffs' suit for remediation.<sup>84</sup>

The Eleventh Circuit noted that a state can operate a RCRA program if the state creates a statutory scheme that the EPA approves.<sup>85</sup> In such cases, the state operates its program "in lieu of the capital federal program."<sup>86</sup> In contrast, Florida's statutory scheme for addressing underground petroleum storage tank contamination, which offers cleanup cost reimbursement and liability protection to participating sites, was not approved by the EPA.<sup>87</sup>

The parties did not dispute that plaintiffs' property was eligible for the state program, so the question for the court was whether RCRA pre-empted the state statute.<sup>88</sup> The court determined that RCRA does not expressly pre-empt the state program and that RCRA does not pre-empt the field.<sup>89</sup> The court then explored whether conflict pre-emption was applicable such that RCRA's citizen suit provision, which permitted plaintiffs' suit, pre-empted the Florida statute prohibiting it.<sup>90</sup> The court looked to RCRA's statutory scheme, stating:

If a state enacts its own underground storage tank program and gets it approved by the EPA Administrator, the state program essentially

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80. *Id.* at 1262.

81. *Burford* abstention comes from the case *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and requires federal courts to refrain from exercising jurisdiction over certain claims when there are questions of state law and policy at issue or when a federal court's exercise of jurisdiction would interfere with a state's attempt to create coherent policy in the area in question. *Id.* at 317-18.

82. The primary jurisdiction doctrine is concerned with preventing judicial interference in administrative matters in order to allow the administrative agency the opportunity to exercise its expertise. See *United States v. W. Pac. R.R.*, 352 U.S. 59 (1956).

83. FLA. STAT. ANN. § 376.308(5) (1998).

84. 199 F.3d at 1262.

85. *Id.* at 1262-63.

86. *Id.* at 1262 (citation omitted).

87. *Id.* at 1263, 1269.

88. *Id.* at 1266. The court stated that "[a]bstention under *Burford* and under the primary jurisdiction doctrine is rarely, if ever, appropriate when federal law preempts state law." *Id.*

89. *Id.* at 1267.

90. *Id.* at 1268 n.15.

replaces the federal regulations, and no conflict between the state and federal program will exist. But the clear negative implication of the approval requirement . . . is that if a state does not get its underground storage tank program approved, the state cannot operate its program in place of the federal program.<sup>91</sup>

Having made that inference, the court then reversed the district court's opinion, concluding:

Florida has a comprehensive statutory scheme to regulate contamination caused by underground storage tanks. Its program, however, has never been approved by the EPA Administrator. Because Florida's underground storage tank program has not been approved pursuant to the RCRA, which would have allowed Florida law to supplant or replace federal law, the Florida program is preempted to the extent there is a conflict . . . . Here Florida law is an obstacle to the accomplishment of the RCRA's full purposes and objectives. Under § 376.308(5) of the Florida Statutes, the Boyes cannot sue to obtain the relief that they are seeking—remediation of the petroleum contamination. Under 42 U.S.C. § 6972, the citizen suit provision of the RCRA, they can. If allowed to operate in lieu of the RCRA, the Florida statute would patently “interfere[] with the methods by which the federal statute was designed to reach [its] goal.”<sup>92</sup>

### III. ENDANGERED SPECIES ACT

This discussion focuses on two district court decisions that, as stated earlier, constitute what appears to be the final chapter in the story about protecting sea turtles from the dangers of beach lighting and beach driving on Florida's coast.<sup>93</sup> These decisions follow the Eleventh Circuit's 1998 decision in *Loggerhead Turtle v. County Council*,<sup>94</sup> in which the court reversed and remanded several issues that the district court then split and decided in two separate cases. This Section also discusses the most recent Eleventh Circuit decision in this case, which involves an issue of first impression concerning the fee-shifting provision of the ESA.<sup>95</sup>

A brief review of this factually complex case will be helpful before a discussion of the recent opinions. This case began in 1995 when plaintiffs filed an action on behalf of the Loggerhead Sea Turtle, the

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91. *Id.* at 1268.

92. *Id.* at 1269-70 (alterations in original) (citations omitted).

93. *Loggerhead Turtle v. County Council*, 92 F. Supp. 2d 1296 (M.D. Fla. 2000); *Loggerhead Turtle v. County Council*, 120 F. Supp. 2d 1005 (M.D. Fla. 2000).

94. 148 F.3d 1231 (11th Cir. 1998).

95. *Loggerhead Turtle v. County Council*, 307 F.3d 1318 (11th Cir. 2002).

Green Sea Turtle, and later, the Leatherback Sea Turtle, all of which are protected under the ESA, claiming that Volusia County's (the "County") beach-driving and beach-lighting regulations were harmful to the turtles.<sup>96</sup> Plaintiffs requested an injunction against all beach driving and asked the court to compel the County to enforce its beach-lighting regulations throughout the entire county, including in independent municipalities that enforced their own beach-lighting ordinances.<sup>97</sup>

The district court dismissed the claims concerning beach lighting due to plaintiffs' lack of standing to sue for "takes" that had occurred in municipalities that were not subject to the County's lighting ordinance.<sup>98</sup> The court then dismissed all of the claims because the County received an Incidental Take Permit ("ITP") from the U.S. Fish and Wildlife Service ("FWS") that, in the court's opinion, allowed the County to "take" some turtles as a result of both beach driving and beach lighting.<sup>99</sup> The court of appeals reversed the district court on both counts. First, the court held that plaintiffs had standing to pursue take claims against the County because the County had sufficient regulatory control over all of the municipalities in its borders to be potentially responsible for takes that occurred in those jurisdictions.<sup>100</sup> The court also held that the ITP permitted takes attributable only to beach driving, not those attributable to beach lighting.<sup>101</sup>

The recent district court decisions bifurcated these issues, with one case addressing only the standing issue and beach lighting while the other case solely addressed the ITP. In the beach-lighting case, discussed first below, plaintiffs requested a preliminary injunction to prevent the County, through its beach-lighting ordinance, from permitting all artificial light sources that harm the turtles during nesting season.<sup>102</sup> In the ITP case, plaintiffs challenged the ITP and the FWS's refusal to revoke it or reinitiate consultation for the permit as provided by the ESA.<sup>103</sup>

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96. 92 F. Supp. 2d at 1297-98. Beach lighting is potentially fatal to baby turtles because the lights draw the turtles toward human development as they leave the nest and away from the ocean. Beach driving can harm turtles because cars can run over both nesting turtles and baby turtles, and baby turtles can get caught in the tire tracks and never reach the ocean. *Id.* at 1304-05.

97. *Id.* at 1298.

98. *Id.* at 1299.

99. *Id.* at 1299-1300.

100. *Id.* at 1300.

101. *Id.*

102. *Id.* at 1298.

103. 120 F. Supp. 2d at 1011.

Shortly before the 1998 Eleventh Circuit opinion, the County adopted two new ordinances, one being the “Minimum Standards for Sea Turtle Protection” and the other being new lighting standards for development on the coast. All of the independent municipalities in the County adopted these standards and elected to have the County enforce the standards within their boundaries, so the County was the governing and enforcing authority with regard to beach lighting throughout the County. Because of this pervasive authority, plaintiffs were again trying to hold the County liable for takes of sea turtles attributable to beachfront lighting and to secure a preliminary injunction against the County to enjoin it from authorizing such lighting through its ordinances.<sup>104</sup>

The court first stated that a preliminary injunction under the ESA is appropriate (1) when the wildlife in question is protected by the ESA and (2) when “there is a reasonable likelihood that the defendant will commit future violations of the Act.”<sup>105</sup> As there was no question that the turtles were protected, the primary question was whether the County would commit future ESA violations. In order to answer this question, however, the court first had to determine whether the turtles were still being harmed and whether the County was responsible for that harm.<sup>106</sup>

Regarding the first question, the court found there was no doubt that “harm to the sea turtles continue[d]. Plaintiffs present[ed] sufficient evidence demonstrating that artificial beachfront lighting continue[d] to ‘take’ turtles within the ESA’s meaning.”<sup>107</sup> Regarding the second question, plaintiffs argued that the “County’s *affirmative* acts of adopting and enforcing an ineffective artificial beachfront lighting ordinance [were] a proximate cause of the harm to and mortality of sea turtles.”<sup>108</sup> The County countered that it regulated beachfront lighting through its ordinances, but that it did not permit beach lighting that harms turtles.<sup>109</sup> In other words, “[the County] contend[ed] that its regulatory scheme act[ed] to prohibit, restrict, and limit artificial beachfront lighting, not to authorize, entitle, or legitimize it.”<sup>110</sup>

The court agreed with the County, stating:

Plaintiffs’ theory of the case rests upon the assertion that, [because] Volusia County voluntarily regulates beach lighting, it is responsible

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104. 92 F. Supp. 2d at 1300-01, 1306.

105. *Id.* at 1302.

106. *Id.* at 1307.

107. *Id.* at 1305.

108. *Id.* at 1306.

109. *Id.*

110. *Id.* at 1307.

for the ESA-violative conduct of its residents under an “implied permission” theory. This contention is without merit. The fact is, Volusia County’s ordinance *does ban* artificial lighting on the beach . . . . The Plaintiffs want Volusia County to cease enforcing “harmfully” inadequate lighting regulations. Although Plaintiffs deny that they want the Court to compel the County to adopt an even *more* “turtle-friendly” ordinance (because that would raise a separation of powers conundrum), whether they admit it or not, that is the only remedy that would satisfy their complaint. Plaintiffs wish to hold the County liable for takings because its beach residents are not turning off their lights in compliance with the ordinance. This the Court is unwilling to do.<sup>111</sup>

In other words, the court held that the County’s ordinance itself does not violate the ESA.<sup>112</sup> As much as the court was sympathetic to the perils the turtles face during the nesting season, it held that “Volusia County cannot be made to assume liability for the act of its private citizens merely because it has chosen to adopt regulations to ameliorate sea turtle takings.”<sup>113</sup> Because the court can only enjoin violators of the ESA, and because “[t]he true violators, the persons responsible for illuminating the beaches, are not before this Court,”<sup>114</sup> the court refused to enjoin the county from implementing and enforcing its ordinances.<sup>115</sup>

In the second case, concerning the beach driving ITP, all of plaintiffs’ claims were against the FWS for the agency’s alleged failure to follow its own regulations and to consider certain information in issuing the ITP, failure to revoke the ITP when the County violated the permit, and failure to reinstate consultation with the County based on new information that came to light after the permit was issued.<sup>116</sup> As all of these claims were asserted under the Administrative Procedure Act (“APA”),<sup>117</sup> the court’s standard of review was whether the agency’s

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111. *Id.*

112. *Id.* at 1307-08.

113. *Id.*

114. *Id.* The court went on to suggest that the better way for plaintiffs to address the beach lighting issue was in the context of the beach driving ITP, which was due to expire in 2001 and would need to be renewed. *Id.* at 1309.

115. *Id.* at 1307-08. The court clearly stated that it made its judgment based on the county’s current lighting ordinance. This leaves open the questions of whether a less stringent ordinance that did not effectively ban beachfront lighting, such as the one in place prior to the current ordinance, could be a violation of the ESA and whether the County could be held liable for takes resulting from implementation of the ordinance. *Id.* at 1307.

116. 120 F. Supp. 2d at 1011.

117. 5 U.S.C. §§ 551-559, 701-706 (2000).

action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.<sup>118</sup>

In reviewing these claims, the court recited the mantra that accompanies review under the APA, stating, "In applying the arbitrary and capricious standard, a reviewing court must give the agency action substantial deference. Where, as here, an agency's special scientific expertise is involved, the Court must be 'most deferential.'"<sup>119</sup> The court further stated the familiar standard that

a reviewing court may not set aside an agency rule that is rational, based on consideration of relevant factors, and within the scope of the authority delegated to the agency by the statute. The Court's only task is to determine whether the agency has considered the relevant factors and articulated a rational connection between the facts found and the choice made.<sup>120</sup>

The court then proceeded to review and reject each of plaintiffs' claims regarding the issuance of the ITP, finding that

Plaintiffs have raised so many criticisms of the ITP that it would be impossible to discuss all of them here. For every point the Plaintiff raises, the Service presents a counterpoint in the record. The Court cannot allow itself to become bogged down in the minutiae of each of the permit's measures. Plaintiffs must bear in mind that an agency's decision need not be ideal, so long as it is not arbitrary or capricious, and so long as the agency gave at least minimal consideration to relevant facts contained in the record.<sup>121</sup>

The court further stated that

Plaintiffs[] belie[ve] that the Service must accept, utilize, and incorporate all of the best available data into each of its decisions. There is simply no authority for the proposition that the Secretary is required to do anything more than consider the data when reaching his decisions. Where there is a substantial volume of research, data, and comments, the agency exercises its expertise to make a reasonable decision based on all of the data and information.<sup>122</sup>

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118. 120 F. Supp. 2d at 1013.

119. *Id.* (citing *Fund for Animals v. Rice*, 85 F.3d 535, 541-42 (11th Cir. 1996); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)).

120. *Id.* (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 41 (1983); *Bowman Transp. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 285-86 (1974)).

121. *Id.* at 1021 (citing *Louisiana ex rel. Guste v. Verity*, 853 F.2d 322, 327 (5th Cir. 1988)).

122. *Id.* at 1022-23.

With regard to the claim for the FWS's failure to revoke the permit based on the County's violations, the court held that "[c]ontrary to Plaintiffs' apparent belief, notice of an alleged violation does not automatically trigger mandatory revocation. The Secretary must first make a finding of non-compliance. . . . The Secretary states that the Service has never made such a finding."<sup>123</sup> The court further held that "[t]he Secretary's enforcement of the permit is discretionary and his decision concerning permit revocation is entitled to deference. The record contains evidence that the Service used its discretion reasonably in not revoking the County's ITP."<sup>124</sup> Therefore, the court again refused to overturn the agency's decision.<sup>125</sup>

Finally, in determining whether the FWS incorrectly failed to reinitiate consultation under section 7 of the ESA, the court found that plaintiffs had not presented any "new information" on which a new consultation would be justified.<sup>126</sup> In summary, the court held, "The voluminous administrative record contains the requisite support for the Service's decisions to approve Volusia County's Habitat Conservation Plan and grant the Incidental Take Permit, and its refusal to revoke the Permit or to reinitiate consultation."<sup>127</sup> Because plaintiffs were unable to surmount the significant hurdle of proving the agency's actions were arbitrary or capricious, the court held in favor of the agency.<sup>128</sup>

Plaintiffs decided not to appeal the adverse decisions in these two cases.<sup>129</sup> Instead, plaintiffs sought and were awarded \$286,000 in

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123. *Id.* at 1023.

124. *Id.* at 1025.

125. *Id.*

126. *Id.*

127. *Id.* at 1026.

128. *Id.* For additional examples of the difficulty of overcoming the arbitrary and capricious standard, see discussions of *Preserve Endangered Areas of Cobb's History v. U.S. Army Corps of Eng'rs*, 87 F.3d 1242 (11th Cir. 1996) and *Fund for Animals v. Rice*, 85 F.3d 535 (11th Cir. 1996) in W. Scott Laseter & Julie V. Mayfield, *Environmental Law*, 48 MERCER L. REV. 1577, 1578-82 (1997).

Shortly after these suits were dismissed, another group of plaintiffs, this time beachfront homeowners, sued the County in state court to overturn the beach-lighting regulations, claiming they violated plaintiffs' constitutional rights to privacy and free speech and that they were unconstitutionally vague. See Ludmilla Lelis, *Beachfront Owners Sue to Keep Lights On*, ORLANDO SENTINEL, July 21, 2000, at D1. A circuit court judge denied plaintiffs' request for a preliminary injunction, but plaintiffs appealed. See Derek Catron, *Volusia Wins One on Beach Lighting*, ORLANDO SENTINEL, Aug. 19, 2000, at D1; and *Lighting Rules Appealed*, ORLANDO SENTINEL, Sept. 19, 2000, at D2.

129. See Derek Catron, *Dark Beach Ends Sea Turtle Suit*, ORLANDO SENTINEL, June 14, 2000, at D3.

attorney fees.<sup>130</sup> This fee award, however, did spark an appeal to the Eleventh Circuit by the County. In its analysis, the district court utilized the “catalyst test” and awarded fees to plaintiffs on the basis that the lawsuits were the primary reason the County strengthened its beach-lighting and beach-driving regulations.<sup>131</sup> The County claimed that the district court’s use of the catalyst test was improper under the Supreme Court’s recent decision, *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,<sup>132</sup> in which the Court struck down use of the catalyst test.<sup>133</sup> The Eleventh Circuit, however, noted that the fee-shifting provisions in the statutes at issue in *Buckhannon* allowed courts to award fees to the “prevailing party.”<sup>134</sup> The ESA, on the other hand, has a broader standard for fee-shifting under which fees may be awarded “whenever the court determines such award is appropriate.”<sup>135</sup> Largely on the basis of this statutory difference, the court upheld the fee award and the use of the catalyst test in cases brought under the ESA.<sup>136</sup>

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130. See Ludmilla Lelis, *County Told to Pay Sea Turtle Suit Fees*, ORLANDO SENTINEL, March 27, 2001, at D1.

131. 307 F.3d at 1321.

132. 532 U.S. 598 (2001).

133. *Id.* at 610.

134. 307 F.3d at 1324-25.

135. *Id.* at 1322-23.

136. *Id.* at 1326-27. The court also based its holding on a policy consideration, noting an argument raised in *Buckhannon* that rejecting the use of the catalyst test might allow defendants to change their conduct at any time prior to judgment, moot the case, and avoid paying attorney fees. *Id.* While this argument was not persuasive in *Buckhannon* because such behavior would not moot cases involving an award of damages, the Eleventh Circuit found that such behavior would moot a case under the ESA because the ESA permits only claims for equitable relief. *Id.* at 1327. The court noted that “[a] contrary rule would cripple the citizen suit provision of the Endangered Species Act.” *Id.*