Environmental Law

by Travis M. Trimble*

Relatively few environmental cases were decided in the United States Court of Appeals for the Eleventh Circuit in 2010.[1] The court decided a case holding that the portion of the Omnibus Appropriations Act of 2009,[2] which funded a mile-long bridge in the Everglades, repealed the National Environmental Policy Act of 1969,[3] Endangered Species Act,[4] and other environmental laws to the extent they applied to the construction project.[5] Additionally, the court decided that the lead-based paint hazard warning required to be included in residential leases pursuant to the Residential Lead-Based Paint Hazard Reduction Act[6] had to be reproduced in such leases verbatim.[7] Finally, the court concluded that a determination by the United States Corps of Engineers (Corps) that limestone mining in wetlands was a water dependent activity for the purposes of issuing dredge and fill permits under the Clean Water Act[8] was arbitrary and capricious.[9]

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1. For analysis of Eleventh Circuit environmental law during the prior survey period, see Travis M. Trimble, *Environmental Law, 2009 Eleventh Circuit Survey*, 61 MERCER L. REV. 1095 (2009).

2. Pub. L. No. 111-8, 123 Stat. 524.

3. 42 U.S.C. §§ 4321-4370f (2006).

4. 16 U.S.C. §§ 1531-1544 (2006).

5. Miccosukee Tribe of Indians v. U.S. Army Corps of Eng'rs, 619 F.3d 1289, 1296, 1300 (11th Cir. 2010).

6. 42 U.S.C. §§ 4851-4856 (2006).

7. Vidiksis v. EPA, 612 F.3d 1150, 1156-57 (11th Cir. 2010).

8. 33 U.S.C. §§ 1251-1387 (2006).

9. Sierra Club v. Van Antwerp, 362 F. App'x 100, 107 (11th Cir. 2010).

I. NATIONAL ENVIRONMENTAL POLICY ACT AND ENDANGERED SPECIES ACT

In *Miccosukee Tribe of Indians v. U.S. Army Corps of Engineers*,[10] the Eleventh Circuit held that the Omnibus Appropriations Act of 2009 (Omnibus Act),[11] by means of a general, repealing clause repealed the National Environmental Policy Act of 1969 (NEPA),[12] Endangered Species Act (ESA),[13] and other laws to the extent those laws otherwise applied to the construction of a bridge across the Everglades in Florida.[14] This deprived the federal courts of subject matter jurisdiction to hear challenges to the bridge's construction brought under the environmental laws.[15]

U.S. Highway 41 across the Everglades, also known as the Tamiami Trail because it connects Miami and Tampa, was completed in the years following World War I. The highway acted as a dam that restricted water flow south into the Everglades, resulting in significant loss of native wildlife and habitat over the years. In 2000 Congress outlined a thirty-year plan to restore the Everglades, including the improvement of water flow through the Tamiami Trail.[16] In 2008 the Corps "concluded that the most effective and economical" means of accomplishing this was to replace the existing roadbed with "a mile-long bridge at the eastern end of the Trail," which would have the effect of greatly increasing water flow south past the highway.[17]

The plaintiff, the Miccosukee Indian tribe (Tribe) whose members live in the Everglades, filed two lawsuits in 2008 challenging the bridge construction. First, under NEPA, the Tribe contended that the Corps' environmental impact statements were inadequate and that the higher water levels made possible by the bridge would flood tribal lands. Second, under the ESA, the Tribe contended that the Fish and Wildlife Service's biological opinion failed to take into account the bridge's effect on two endangered species, the snail kite and the wood stork.[18] After the NEPA suit was filed, but before the ESA suit, an appropriations

10. 619 F.3d 1289 (11th Cir. 2010).
11. Pub. L. No. 111-8, 123 Stat. 524.
12. 42 U.S.C. §§ 4321-4370f (2006).
13. 16 U.S.C. §§ 1531-1544 (2006).
14. *Miccosukee Tribe*, 619 F.3d at 1296.
15. *Id.* at 1291.
16. *Id.* at 1293.
17. *Id.* at 1294.
18. *Id.* at 1292, 1294.

act[19] was passed by Congress.[20] Section 153 of the act funded the bridge construction, providing in part that construction funds be made available to the Corps, "which shall immediately carry out" construction of the bridge.[21]

The Corps moved to dismiss the NEPA case, contending that § 153 deprived the district court of subject matter jurisdiction.[22] The court denied the motion, "holding that § 153 was not specific enough to exempt the Corps from NEPA" because it did not mention NEPA by name nor did it include the phrase "notwithstanding any other provision of law."[23] Thereafter, the court granted in part the Tribe's motion for a preliminary injunction halting construction of the bridge until the Corps complied with NEPA.[24]

On March 11, 2009, Congress passed the Omnibus Act, which includes a provision relating to funding for the bridge.[25] The provision states that funds appropriated for the bridge were to be made available to the Corps, "which shall, notwithstanding any other provision of law, immediately and without further delay construct" the bridge.[26]

Based on the Omnibus Act, the Corps renewed its motion to dismiss the NEPA case for lack of subject matter jurisdiction, which the district court granted. The court held that the language in the Omnibus Act created an explicit exemption from NEPA for the bridge construction. The Corps then moved to dismiss the Tribe's ESA case on the same grounds; the court also granted this motion. The Tribe appealed.[27]

The Eleventh Circuit affirmed, though on slightly different grounds.[28] The court reviewed the three ways in which Congress can repeal, or exempt certain action from compliance with, a particular statute, thereby depriving the courts of jurisdiction to hear a claim based on the repealed statute.[29] The three ways are by explicit repeal, general

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19. Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, Pub. L. No. 110-329, 122 Stat. 3574.

20. *Miccosukee Tribe*, 619 F.3d at 1294.

21. *Id.* (emphasis omitted); *see also* Consolidated Security, Disaster Assistance, and Continuing Appropriations Act § 153, 122 Stat. at 3581.

22. *Miccosukee Tribe*, 619 F.3d at 1295.

23. *Id.* (internal quotation marks omitted).

24. *Id.*

25. 123 Stat. at 708-09.

26. *Id.* at 708.

27. *Miccosukee Tribe*, 619 F.3d at 1295.

28. *Id.* at 1303.

29. *Id.* at 1296. The court treats repeal and exemption as interchangeable concepts. *Id.* at 1296 n.12. The court noted that "Congress walks a fine line" with respect to the separation of powers when it effects repeal of a statute. *Id.* at 1296-97. The court explained that "Congress may not interfere in the judicial process. It may not dictate the

repealing clause, or implied repeal.[30] Congress effects an explicit repeal when a later statute identifies the earlier statute that is being repealed.[31] Congress can also effect a repeal of an earlier statute by means of a general repealing clause in a later statute, such as the clause Congress used in the Omnibus Act: "notwithstanding any other provision of law."[32] Finally, Congress can impliedly repeal an earlier statute by a later statute to the extent the later conflicts with the earlier.[33]

The court held that the notwithstanding clause of the Omnibus Act, together with its surrounding language, repealed the environmental laws that were the basis of the Tribe's suits, thereby depriving the courts of subject matter jurisdiction over them.[34] The court based its holding on three grounds.[35] First, the notwithstanding clause of the Omnibus Act "speaks directly to any laws regulating the construction of the bridge," which the environmental laws did.[36] Second, further language in the Omnibus Act, requiring the Corps to build the bridge "immediately and without further delay," conflicted with the environmental laws that mandated a "time-consuming administrative review" of the bridge construction project.[37] Finally, the Omnibus Act provided "that the Corps shall build the bridge," which deprived the Corps of discretion.[38] The court noted that claims brought against an agency under the environmental laws at issue "proceed only when the agency has choices in a matter . . . . Here, no discretion means no jurisdiction."[39]

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result for a particular case. . . . But Congress is always free to amend the law, even if doing so has the effect of extinguishing a pending case." *Id.* at 1297.

30. *Id.* at 1296.

31. *Id.*

32. *See id.* at 1297-98 (internal quotation marks omitted). The court acknowledged that a general repeal clause, or "notwithstanding" clause, "carries the potential to create confusion about precisely which laws, if any, it is repealing." *Id.* at 1298. The court noted that other courts required an "irreconcilable conflict" between the later statute and earlier statute it sought to repeal but referred to Eleventh Circuit precedent holding that a notwithstanding clause is "by itself sufficient to support a repeal." *Id.* (internal quotation marks omitted) (citing Castro v. Sec'y of Homeland Sec., 472 F.3d 1334, 1337 (11th Cir. 2006)).

33. *Id.* at 1299.

34. *Id.* at 1300. The court noted that while the district court's ruling reached the correct result, the Eleventh Circuit preferred to base its holding on the general repealing language of the Omnibus Act rather than the doctrine of explicit repeal. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 1301 (internal quotation marks omitted); *see also* Omnibus Appropriations Act, 123 Stat. at 708.

38. *Id.* at 1302 (emphasis omitted).

39. *Id.*

The court identified the general repeal, or notwithstanding clause, as the basis for its decision; in other words, the holding of the case seems to indicate that the notwithstanding clause alone was sufficient to effect the repeal of the environmental laws here, and the conflict created by the immediacy clause merely added support to that conclusion. The court explained the reach of a general repeal clause by citing its decision in *Castro v. Secretary of Homeland Security*:[40] the notwithstanding clause is "Congress's indication that the statute containing that language is intended to take precedence over any preexisting or subsequently-enacted legislation [*on the same subject*]."[41] In *Castro* a provision of the Aviation and Transportation Security Act (ATSA)[42] was held to repeal provisions of the Rehabilitation Act[43] with respect to hiring individuals with disabilities.[44] The court there noted that the ATSA provision at issue "explicitly requires [the Transportation Safety Administration] to promulgate hiring standards that are inconsistent with the Rehabilitation Act's prohibition against making hiring decisions based on physical disabilities."[45] Thus, in *Castro*, the statutes at issue addressed the same subject–hiring–and did so inconsistently.[46]

Here, the case is not so clear. As the Eleventh Circuit has previously noted, NEPA is procedural only and sets no substantive limits on agency decisionmaking.[47] NEPA requires only that an agency consider the environmental impacts of its actions, but does not dictate what those actions should be.[48] NEPA would apply to the bridge construction, but it is less clear that NEPA would regulate the construction, as the court concludes.[49] NEPA would not dictate whether or how the bridge could be built. As the court points out, the primary conflict between NEPA and the appropriations provision in the Omnibus Act is one of time: the immediacy clause versus the "time-consuming administrative review" required by NEPA.[50] Thus, the implied repeal indicated by NEPA's conflict with the immediacy clause appears to provide at least as much support for the court's holding, at least as far as NEPA is concerned, as

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40. 472 F.3d 1334 (11th Cir. 2006).
41. *Miccosukee Tribe*, 619 F.3d at 1298 (emphasis added) (quoting *Castro*, 472 F.3d at 1337).
42. 49 U.S.C. § 44935 (2006).
43. 29 U.S.C. §§ 791, 794 (2006).
44. *Castro*, 472 F.3d at 1335.
45. *Id.* at 1337.
46. *See id.*
47. *See, e.g.*, Sierra Club v. Van Antwerp, 526 F.3d 1353, 1361 (11th Cir. 2008).
48. *Id.*
49. *See Miccosukee Tribe*, 619 F.3d at 1300.
50. *Id.* at 1301.

the general repeal clause. It is interesting to speculate about whether the notwithstanding clause could have done the job on its own.

II. LEAD HAZARD ACT

In *Vidiksis v. EPA*,[51] the Eleventh Circuit affirmed an Environmental Appeals Board (Board) ruling against the petitioner, a lessor of residential property, for his failure to include in his leases the verbatim disclosure of the possible presence of lead paint in the leased houses.[52] Such disclosure is required by regulations (the Disclosure Rule) promulgated under the Residential Lead-Based Paint Hazard Reduction Act of 1992 (LHA).[53] Violations of the LHA and its regulations are in turn prohibited acts under section 409 of the Toxic Substances Control Act (TSCA),[54] which allows the EPA to seek civil penalties for violations thereof.[55]

The Disclosure Rule requires that leases of houses constructed before 1978 contain a specific disclosure of the possible presence of lead paint.[56] In 40 C.F.R. § 745.113(b)(1), the Disclosure Rule sets out the notification language required in such a lease.[57] In 40 C.F.R. § 745:-113(b)(2), the lessor is also required to include a statement in the lease either disclosing the presence of lead paint in the residence or indicating

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51. 612 F.3d 1150 (11th Cir. 2010).

52. *Id.* at 1152.

53. 42 U.S.C. §§ 4851-4856 (2006). The regulation the petitioner was accused of violating is 40 C.F.R. § 745.113(b)(1)-(2) (2010), which states:

> (b) *Lessor requirements.* Each contract to lease target housing [defined elsewhere as houses constructed before 1978] shall include, as an attachment or within the contract, the following elements . . .:
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> (1) A Lead Warning Statement with the following language:
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> Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.
>
> (2) A statement by the lessor disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing being leased or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards.

Id.

54. 15 U.S.C. § 2689 (2006).

55. 42 U.S.C. § 4852d(b)(5).

56. 40 C.F.R. § 745.113(b)(1).

57. *Id.*

that the lessor has no knowledge of the presence of lead paint in the residence.[58]

In *Vidiksis* the petitioner, through his leasing agent, had included a notice regarding lead paint in multiple leases for sixteen of petitioner's rental properties. The EPA alleged violations of the Disclosure Rule because the notice included in some of these leases did not exactly track the language prescribed by the Disclosure Rule.[59] Additionally, some of the leases did not include the required separate statement regarding the lessor's knowledge, or lack of knowledge, of lead paint in the residence, apart from the language in the notice that the premises "may contain lead-based paint."[60] The Administrative Law Judge found, and the Board affirmed, that the petitioner's notice violated both sections of the Disclosure Rule.[61]

On appeal to the Eleventh Circuit, the petitioner challenged first the validity of the regulations composing the Disclosure Rule and second the conclusion that his leases violated the Disclosure Rule.[62] On the petitioner's challenge to the validity of the Disclosure Rule, the court held the Disclosure Rule was reasonable and therefore valid.[63] The petitioner first challenged the validity of subsection (b)(1), requiring a specific notice regarding the presence of lead paint, arguing that the EPA did not have the authority to require specific language in a lease.[64] The court, applying the standard from *Chevron, U.S.A., Inc. v.*

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58. *Id.* § 745.113(b)(2).

59. 612 F.3d at 1153-54. Petitioner's leases contained the following notice:

> Lead Paint Notice. Tenant acknowledges that the leased premises may have been constructed before 1978, and may contain lead-based paint. Ingestion of paint particles containing lead may result in lead poisoning which can cause major health problems, especially in children under 7 years of age. In the event the Tenant or any family members or guests should develop lead poisoning, and it is determined that corrective measures are required to remedy the source of the lead poisoning, the cost of such remedy shall be at the sole expense of the Tenant. In the event that Tenant is either unwilling or unable to perform corrective measures, Tenant shall have the option at the discretion of the Landlord to terminate the lease with a written 30 day notice and providing Landlord with written verification of source of lead.

Id. at 1153.

60. *Id.* at 1157 (internal quotation marks omitted).

61. *Id.* at 1152.

62. *Id.* at 1155, 1157. The petitioner also challenged the amount of the assessed penalties, which totaled $97,545. *Id.* at 1152.

63. *Id.* at 1156.

64. *Id.* at 1155.

NRDC, Inc.,[65] held the regulation was reasonable.[66] The court noted that the LHA itself required the same language in sales contracts, and that the EPA had also determined that such language must be included in leases.[67] The court reasoned that because a stated purpose of the LHA is to ensure that lead paint hazards are considered in leases and sales of residences, the regulation requiring an identical notification in leases as the one required by the statute for sales reasonably fulfilled this purpose.[68]

The petitioner also challenged subsection (b)(2), requiring the lessor to disclose knowledge, or lack of knowledge, of lead paint at the premises.[69] The petitioner claimed that since the relevant language in the LHA required the lessor only "to disclose . . . the presence of . . . lead-based paint . . . in such housing,"[70] the EPA exceeded its authority by requiring in the Disclosure Rule that in the alternative lessors must disclose that they had "no knowledge" of lead paint.[71] Here, the court also held that the regulation was a reasonable interpretation of the statutory provision, because otherwise, "when the lessor made no declaration, the lessee would not know whether the lessor knew there was no lead-based paint or lacked knowledge as to whether there was any. The requirement prevents the silence of the lessor from being ambiguous."[72]

On the matter of whether the petitioner's leases had violated the Disclosure Rule, the court also held in favor of the EPA.[73] The court reviewed the EPA's findings and conclusions to determine whether they were arbitrary and capricious, noting that "an agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent

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65. 467 U.S. 837 (1984). A court hearing a challenge to the validity of a regulation must first determine whether Congress, by statute, has spoken directly to the issue. *Vidiksis*, 612 F.3d at 1154 (citing *Chevron*, 467 U.S. at 842). If so, the agency must apply the plain terms of the statute. *Id.* at 1155 (citing *Chevron*, 467 U.S. at 842-43). If the statute is ambiguous, the court must determine whether the agency's interpretation of the statute by regulation is reasonable or arbitrary and capricious. *Id.* (citing *Chevron*, 467 U.S. at 843-44).

66. *Vidiksis*, 612 F.3d at 1156.

67. *Id.* at 1155-56; *see also* 42 U.S.C. § 4852d(a)(3).

68. *Vidiksis*, 612 F.3d at 1156.

69. *Id.*

70. *Id.* (internal quotation marks omitted); *see also* 42 U.S.C. § 4852d(a)(1)(b).

71. *Vidiksis*, 612 F.3d at 1156 (internal quotation marks omitted).

72. *Id.*

73. *Id.* at 1156-58.

with the regulation."[74] As to the violations of 40 C.F.R. § 745.113(b)(1), requiring the verbatim notice in a lease, the court explained that the regulation states clearly that each lease of target housing "*shall* include" the required notice, followed by the language the notice is to contain, and that the petitioner's leases simply did not have the required language.[75] The court rejected the petitioner's argument that the required language was included in the EPA-issued pamphlet that was provided to his lessees, noting that the inclusion of the pamphlet was a separate and independent requirement from the lease notice.[76]

The court also held for the EPA on the petitioner's violations of 40 C.F.R. § 745.113(b)(1), requiring that the lessor disclose either knowledge or no knowledge of the presence of lead-based paint at the leased premises.[77] The petitioner's leases had no such disclosure.[78] The court rejected the petitioner's argument that the language "may contain lead-based paint" in his lease notice fulfilled his obligation under this regulation because it does not disclose to the lessee whether the lessor has such knowledge or not.[79] Finally, the court affirmed the penalty amount assessed against the petitioner despite his claim that the EPA had not properly applied its penalty calculation factors.[80]

III. CLEAN WATER ACT

In *Sierra Club v. Van Antwerp*,[81] the Eleventh Circuit affirmed the United States District Court for the Southern District of Florida's grant of summary judgment to the Sierra Club and the district court's vacatur of permits the Corps had issued for limestone mining in wetlands in southern Florida.[82] The court held that the Corps' threshold conclusion, as a prerequisite to its issuing the permits, that the limestone

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74. *Id.* at 1154 (quoting Sierra Club v. Johnson, 436 F.3d 1269, 1274 (11th Cir. 2006)) (internal quotation marks omitted).

75. *Id.* at 1156 (internal quotation marks omitted).

76. *Id.* at 1156-57.

77. *Id.* at 1157.

78. *Id.*

79. *Id.* (internal quotation marks omitted).

80. *Id.* at 1160. The court did not consider the petitioner's argument concerning whether the EPA had properly applied a factor relating to the presence of children at the premises in question because the petitioner had not raised it in the administrative hearing. *Id.* at 1158. The court rejected the petitioner's arguments that EPA had not properly adjusted his penalty amount down based on the factors of prior violations (he claimed he had none) and culpability (he claimed that the primary responsibility for the content of the leases was his agents' and not his) because the EPA was required to consider these factors but not compelled to adjust a penalty amount because of them. *Id.* at 1159-60.

81. 362 F. App'x 100 (11th Cir. 2010).

82. *Id.* at 102.

mining was water dependent, was arbitrary and capricious, and therefore, the remainder of the Corps' permitting process was flawed.[83]

This case arose out of permits the Corps had issued pursuant to section 404 of the Clean Water Act (CWA)[84] in 2002 to various mining companies to conduct limestone mining operations in an area of wetlands known as the Lake Belt on the eastern edge of the Everglades in southern Florida. The Lake Belt comprises 57,515 acres of wetlands. Although approximately 70% of the Lake Belt region remains in a natural state, mining companies own 46% of the land in the region, which produces roughly half of the state's construction grade limestone. The region also serves as a source of drinking water for the city of Miami, and it is important to the ecology of southern Florida in general.[85]

The Sierra Club brought this action in 2002, challenging the Corps' issuance of the permits.[86] The district court originally granted summary judgment to the Sierra Club in 2006, ruling that the Corps had not complied with its obligations under the National Environmental Policy Act of 1969 (NEPA)[87] and the CWA.[88] The court later vacated the permits.[89] On appeal from those rulings, the Eleventh Circuit held that the district court had not applied the proper standard in reviewing the Corps' permitting decision and remanded the case.[90] On remand, the district court, applying the proper standard, again granted summary judgment to the Sierra Club, ruling that the Corps had acted arbitrarily and capriciously in issuing the permits. The court concluded that the Corps erroneously determined that the mining project for which the permits were issued was water dependent, and therefore, the Corps' consequent determination that there were no practicable alternatives to allowing mining in the Lake Belt was likewise arbitrary and capricious. The court also ruled that the Corps did not comply with NEPA because it did not consider the impact that mining would have on the municipal water supply. The present appeal followed.[91]

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83. *Id.* at 106-07.

84. 33 U.S.C. § 1344 (2006). The CWA prohibits the discharge of dredged or fill material into waters of the United States, including wetlands, except pursuant to a permit issued by the Corps under § 404. *Id.*

85. *See Van Antwerp*, 362 F. App'x at 101-02.

86. *Id.* at 103.

87. 42 U.S.C. §§ 4321-4370f (2006).

88. Sierra Club v. Flowers, 423 F. Supp. 2d 1273, 1380 (S.D. Fla. 2006).

89. Sierra Club v. Strock, 495 F. Supp. 2d 1188, 1287 (S.D. Fla. 2007).

90. Sierra Club v. Van Antwerp, 526 F.3d 1353, 1356 (11th Cir. 2008).

91. *Van Antwerp*, 362 F. App'x at 103-04.

The Eleventh Circuit affirmed.[92] The court's analysis focused on the guidelines[93] developed by the EPA and the Corps to govern the Corps' determinations of whether to issue § 404 permits.[94] Specifically, the guidelines require the Corps to determine whether "there is a practicable alternative to the proposed [project] which would have less adverse impact on the aquatic ecosystem."[95] To make that determination, the guidelines require the Corps to follow a two-step process.[96] First, the Corps must determine the project's basic purpose.[97] Next, the Corps must decide if the basic purpose is "water dependent," that is, whether the project "requires access or proximity [to water] to fulfill its basic purpose."[98] If the project does not, then the guidelines require a presumption that a practicable alternative exists, which the permit applicant may rebut by clear and convincing evidence.[99] Thus, the Corps' determinations of what the basic purpose of a project is and whether that purpose "is water dependent are threshold questions that determine the procedure the Corps must follow in granting the applicant a permit. If the wrong decision is made, the required procedure will not be followed and the decision will be arbitrary."[100] Here, the Corps determined that the basic purpose of the mining companies' project was to extract limestone.[101] The Corps then determined that the basic purpose was water dependent because it had "to be located in a special aquatic site to fulfill its basic purpose."[102]

The court concluded that the Corps' answer to the threshold question, whether the project was water dependent, was arbitrary.[103] The court noted the mining companies' admission that limestone mining in general is not water dependent.[104] The companies argued that the Lake Belt project was water dependent because the limestone had to be mined in the wetlands where the limestone is located.[105] The court stated, however, that "[t]he Corps . . . did not define the basic purpose of this

92. *Id.* at 107.
93. 40 C.F.R. pt. 230 (2010).
94. *Van Antwerp*, 362 F. App'x at 105.
95. *Id.* (internal quotation marks omitted); *see also* 40 C.F.R. § 230.10(a).
96. *Van Antwerp*, 362 F. App'x at 105.
97. *Id.*
98. *Id.* at 106 (internal quotation marks omitted); *see also* 40 C.F.R. § 230.10(a)(3).
99. *Van Antwerp*, 362 F. App'x at 106.
100. *Id.*
101. *Id.*
102. *Id.* (internal quotation marks omitted).
103. *Id.* at 107.
104. *Id.* at 106.
105. *Id.* at 106-07.

project as the mining of limestone in the Lake Belt. Rather, the Corps defined the basic purpose as the extraction of limestone in general. Contrary to the Corps' determination, this basic purpose is not water dependent."[106] Thus, the Corps' issuance of the permits without applying the presumption that practicable alternatives to limestone mining in the Lake Belt existed, and requiring the mining companies to rebut that presumption, was also arbitrary and capricious.[107]

The court seems to presume that in further related proceedings the mining companies would have to overcome the presumption of practicable alternatives to mining in the Lake Belt.[108] The opinion does raise, however, but does not address, the possibility that in this case, or another involving a permit application for mining in wetlands, that the Corps could simply define the basic purpose of such a project as mining in the wetlands at issue rather than mining in general.[109] After all, as the companies here argued, mining must be done where the deposits are located.[110] The court's decision seems to turn on the fact that the Corps defined the basic purpose of the project as "mining in general" and not as "mining in the Lake Belt." The opinion leaves unanswered a more troublesome question: had the Corps determined that the basic purpose of the project here was "mining in the Lake Belt" and was therefore water dependent, and then as a result had not required the mining companies to overcome the practicable-alternative presumption, would that determination have been arbitrary and capricious?

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106. *Id.* at 107 (citations omitted).

107. *Id.* The court also affirmed the district court's vacatur of the permits and as a result did not address the Sierra Club's claim that the permit issuance violated NEPA because the Corps failed to consider limestone mining's impact on municipal water supply. *Id.* at 107 n.5. As of the date of decision of the case, the Corps was conducting further proceedings to determine whether to re-issue the permits based on a Supplemental Environmental Impact Statement. *See id.* at 104. The Sierra Club had requested that the court defer ruling until the Corps made that determination, but the court declined to do so. *Id.* at 104-05.

108. *See id.* at 107.

109. *See id.*

110. *Id.* at 106-07.