Environmental Law

by Travis M. Trimble*

In 2017, district courts decided several issues that the United States Court of Appeals for the Eleventh Circuit had never addressed.[1] The United States District Court for the Middle District of Georgia concluded that the Clean Water Act's (CWA)[2] prohibition on the discharge of pollutants into waters of the United States without a permit extended to discharges into groundwater with a "direct hydrological connection" to surface waters within the Act's scope.[3] The court also concluded that a state-permitted land application system, whereby wastewater is sprayed onto fields as means of treatment and disposal, constituted a "point source" within the meaning of the CWA.[4] Finally, the court concluded that the *Burford v. Sun Oil Co.*[5] abstention does not apply to citizen-suits brought under the CWA.[6] The United States District Court for the Northern District of Alabama concluded that the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)[7] discovery rule for statutes of limitations did not preempt Alabama's discovery rule, where the plaintiff did not produce facts in his state law based tort claim for exposure to hazardous substances that would support a claim under CERCLA.[8] In a case that raised no novel issues of law, the United States District Court for the Middle District of Florida upheld the National Park Service's finding of no significant impact in favor of a

*Instructor, University of Georgia School of Law. Mercer University (B.A., 1986); University of North Carolina (M.A., 1988); University of Georgia School of Law (J.D., 1993). Member, State Bar of Georgia.

1. For an analysis of environmental law during the prior survey period, see Travis M. Trimble, *Environmental Law, Eleventh Circuit Survey*, 68 MERCER L. REV. 1003 (2017).

2. 33 U.S.C. § 1251 (2012).

3. Flint Riverkeeper, Inc. v. S. Mills, Inc., 276 F. Supp. 3d 1359, 1366 (M.D. Ga. 2017).

4. *Id.* at 1368.

5. 319 U.S. 315 (1943).

6. *Flint Riverkeeper*, 276 F. Supp. 3d at 1369–70.

7. 42 U.S.C. § 9601 (2018).

8. Arnold v. U.S. Pipe & Foundry Co., LLC, 274 F. Supp. 3d 1272, 1278 (N.D. Ala. 2017).

private mineral rights holder's plan to survey for oil and gas reserves in the Big Cypress National Preserve in Southern Florida.[9]

I. CLEAN WATER ACT

In *Flint Riverkeeper, Inc. v. Southern Mills, Inc.*,[10] the United States District Court for the Middle District of Georgia ruled that the plaintiffs successfully stated a claim under the Clean Water Act's[11] citizen-suit provision[12] that defendant's land application system (LAS) of its industrial wastewater violated the Clean Water Act (CWA). The court answered several questions that the Eleventh Circuit had not decided. First, the court concluded that the CWA applied to a discharge of pollutants from a point source into groundwater with a direct hydrologic connection to surface water that is a jurisdictional water of the United States.[13] Second, the court concluded that a permitted LAS is a point source within the meaning of the CWA.[14] Third, the court concluded that the *Burford v. Sun Oil Co.* abstention does not apply to citizen-suits brought under the CWA.[15]

The defendant operates a protective fabrics mill in Molena, Georgia. It treats its industrial wastewater by discharging it onto land via a LAS. The defendant's LAS involves spraying the wastewater onto three fields via a series of spray heads.[16] The defendant has two water permits issued by the State of Georgia: a National Pollution Discharge Elimination System (NPDES) permit,[17] allowing the discharge of storm water mixed with "certain pollutants from its LAS fields;"[18] and a LAS permit allowing it to operate its LAS subject to "various effluent limitations and monitoring requirements."[19] The plaintiffs, a group organized to protect the Flint River corridor and several individual landowners along Flint tributaries, filed suit against the defendant for violating its NPDES permit under the CWA, and for trespass, nuisance, and negligence under state law. The complaint generally alleged that because of the volume of

9. Nat'l Res. Def. Council v. Nat'l Park Serv., 250 F. Supp. 3d 1260, 1298 (M.D. Fla. 2017).

10. 276 F. Supp. 3d 1359 (M.D. Ga. 2017).

11. 33 U.S.C. §§ 1251–1275 (2018).

12. 33 U.S.C. § 1365 (2018).

13. *Flint Riverkeeper*, 276 F. Supp. 3d at 1367.

14. *Id.* at 1368.

15. *Id.* at 1369.

16. *Id.* at 1362.

17. 33 U.S.C. § 1342 (2018).

18. *Flint Riverkeeper*, 276 F. Supp. 3d at 1363.

19. *Id.*

wastewater the defendant sprayed on its LAS fields, the soil became saturated and during rain events, the wastewater left the fields, traveling both overland through ditches and other channels into surface waters regulated under the CWA, and into groundwater that has a "direct hydrological connection" to surface waters.[20] The defendant moved to dismiss the complaint for lack of subject matter jurisdiction[21] and for failure to state a claim.[22]

The court first concluded that the plaintiffs' complaint established subject matter jurisdiction over the CWA claim.[23] Although the defendant claimed that the court lacked subject matter jurisdiction because the defendant had stopped discharging polluted wastewater when it received the plaintiffs' ante litem notice, and thus, its alleged violations were wholly in the past, the court found that the complaint's allegations of ongoing storm water runoff containing pollutants from the LAS fields constituted allegations of "continuous or intermittent" discharges of pollutants that were sufficient to withstand a facial challenge to subject matter jurisdiction.[24]

The defendant also moved to dismiss the complaint for failure to state a claim, arguing that the complaint failed to allege facts plausibly showing that (1) the defendant's discharge of wastewater into groundwater via its LAS constituted a discharge into "navigable waters";[25] (2) discharges were from a "point source"; and (3) discharges were in violation of an NPDES permit. All three are essential elements of a claim under the CWA.[26]

First, the court concluded that the complaint's allegations that the wastewater discharges that reached groundwater that was "hydrologically connected" to surface waters stated a claim of discharge to navigable waters.[27] The court noted that groundwater itself is not "navigable water" under the CWA, and the Eleventh Circuit had not yet addressed whether the CWA prohibits a discharge into groundwater that reaches navigable water via a hydrological connection.[28] However, the court noted that its decision was consistent with that of other district

20. *Id.* at 1362–63.

21. FED. R. CIV. P. 12(b)(1); *Flint Riverkeeper*, 276 F. Supp. 3d at 1364.

22. FED. R. CIV. P. 12(b)(6); *Flint Riverkeeper*, 276 F. Supp. 3d at 1365.

23. *Flint Riverkeeper*, 276 F. Supp. 3d at 1364.

24. *Id.* at 1364–65.

25. The defendant did not challenge the sufficiency of the allegations that its discharges that reached surface water over land constituted a discharge into "navigable waters." *Id.* at 1366.

26. *Id.* at 1365.

27. *Id.* at 1367.

28. *Id.* at 1366–67.

courts that had addressed the issue, and with the Environmental Protection Agency's (EPA) regulations interpreting the CWA to apply to such discharges.[29]

Second, the court concluded that the complaint sufficiently alleged discharges from a point source.[30] The court explained first that the allegations that wastewater left the defendant's property "via ditches, runnels, seeps, and other discrete conveyances"[31] sufficiently alleged point source discharges over land.[32] Next, although the Eleventh Circuit had not addressed the issue, the court concluded that as to the alleged discharges into groundwater, the LAS itself was a point source.[33] Finally, the court concluded that the spray heads the defendant's LAS used to spray the wastewater onto the fields constituted point sources.[34]

Third, the court concluded that the complaint successfully alleged a violation of the defendant's NPDES permit.[35] The court explained that while the defendant had an NPDES permit authorizing the "discharge of storm water mixed with certain pollutants," the permit did not authorize "the discharge of storm water mixed with 'process wastewater.'"[36] Because the complaint alleged that during storms the LAS fields, already saturated with wastewater, leached over land into surface water tributaries of the Flint, it alleged a violation of the permit.[37]

Finally, the court ruled against the defendant on its demand that the court abstain from exercising jurisdiction over the plaintiffs' claim because the relief they sought would "effectively nullify defendant's state-issued LAS permit."[38] The defendant argued that abstention was proper under a principle the Supreme Court of the United States announced in *Burford*.[39]

According to the district court, "*Burford* abstention applies (1) when difficult questions of state law concerning policy problems of substantial public import transcend the case at bar; or (2) where federal judicial review would disrupt state efforts to establish a coherent policy as to a

29. *Id.*

30. *Id.* at 1368. The CWA only prohibits discharges of pollutants from "point sources," which are defined as "any discernable, confined, and discrete conveyance." *Id.* at 1367.

31. *Id.* at 1367.

32. *Id.* at 1367–68.

33. *Id.* at 1368.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 1368–69.

38. *Id.* at 1369.

39. *Id.*

matter of substantial public concern."[40] While the Eleventh Circuit had not addressed this issue, the court concluded that the defendant's right to "operate its LAS in accordance with its state-issued LAS permit is no defense to a CWA suit,"[41] and that the court would not abstain from exercising its jurisdiction, because abstention "would essentially deprive [the plaintiffs] of the statutory right that Congress saw fit to confer upon them"[42] with the citizen-provision of the CWA.[43]

II. CERCLA PREEMPTION

In *Arnold v. United States Pipe & Foundry Co. LLC*,[44] the United States District Court for the Northern District of Alabama concluded that a plaintiff's state law claim for personal injury arising out of exposure to chemicals from the defendant's pipe-making facility was time-barred under Alabama law.[45] The court also concluded, in an issue that the Eleventh Circuit had not addressed, that the Comprehensive Environmental Response, Compensation, and Liability Act's (CERCLA)[46] "discovery rule"[47] for toxic tort actions did not preempt Alabama law as to the commencement date of the limitations period, in cases such as this where the plaintiff did not produce facts that would state a claim under CERCLA.[48] The court granted the defendant's motion for summary judgment.[49]

On September 21, 2015, the plaintiff, Eugene Maddox, sued the defendant for personal injury and property damage he claimed arose out of his exposure to chemicals from the defendant's pipe-making plant in Birmingham. In a pre-litigation demand document, his attorney listed his injury as hearing loss that was diagnosed in 2006. The plant closed in 2010.[50]

The court first concluded that Alabama's applicable two-year statute of limitations barred the plaintiff's personal injury claim.[51] Prior to the

40. *Id.*

41. *Id.*

42. *Id.* at 1370.

43. *Id.* at 1369–70 (quoting Long Island Soundkeeper Fund, Inc. v. New York City Dep't of Envtl. Prot., 27 F. Supp. 2d 380, 385 (E.D.N.Y. 1998)).

44. 274 F. Supp. 3d 1272 (N.D. Ala. 2017).

45. *Id.* at 1278.

46. 42 U.S.C. §§ 9601–9675 (2018).

47. 42 U.S.C. § 9658(a)(1) (2018).

48. *Arnold*, 274 F. Supp. 3d at 1277–78.

49. *Id.* at 1278.

50. *Id.* at 1274–75.

51. *Id.* at 1276. The defendants did not claim that the plaintiff's property damage claim was time-barred. *Id.* at 1275.

Alabama Supreme Court's decision in *Griffin v. Unocal Corp.*,[52] Alabama's two-year limitation period for toxic substance exposure claims commenced on the "date of last exposure."[53] In *Griffin*, the Alabama Supreme Court held that the two-year period began to run when a "manifest, present injury"[54] related to toxic exposure occurred.[55] An injury was "manifest" when "its existence is objectively evident and apparent."[56] The district court also noted that the Alabama Supreme Court held that the new commencement rule would apply prospectively and to the plaintiffs "whose last exposure to a toxic substance, and first manifest injury resulting from that exposure, occurred within the two-year period before"[57] the decision in *Griffin*, on January 25, 2008.[58]

The court noted that from the information supplied by the plaintiff, the court could not determine when his injury became manifest, beyond the year 2006, which may or may not have been within two years of January 25, 2008.[59] However, the court concluded that regardless of when his injury became apparent, his date of last exposure could not have been later than December 31, 2010, the year the defendant's plant closed.[60] The plaintiff filed his claim in 2015. Thus, under either commencement rule, his complaint was filed outside the two-year limitation period.[61]

The court next rejected the plaintiff's argument that CERCLA's discovery rule, applicable to state hazardous substance exposure claims, preempted Alabama's commencement rule.[62] CERCLA's discovery rule "imposes a 'federally required commencement date'"[63] on actions brought under state law for exposure to hazardous substances, pollutants, or contaminants. Under the rule, a state's limitation period begins to run on "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned."[64]

52. 990 So. 2d 291 (Ala. 2008).
53. *Id.* at 293.
54. *Id.*
55. *Id.*
56. Cline v. Ashland, Inc., 970 So. 2d 755, 773 (Ala. 2007) (Harwood, J., dissenting).
57. *Arnold*, 274 F. Supp. 3d at 1275.
58. *Griffin*, 990 So. 2d at 291.
59. *Arnold*, 274 F. Supp. 3d at 1275.
60. *Id.*
61. *Id.* at 1276.
62. *Id.* at 1277–78.
63. *Id.* at 1276.
64. 42 U.S.C. § 9658(b)(4)(A) (2018); *Arnold*, 274 F. Supp. 3d at 1276.

CERCLA's discovery rule preempts conflicting state statutes of limitation.[65]

The court concluded that CERCLA's discovery rule did not preempt the Alabama commencement rule for its limitation period.[66] The court agreed with the defendant, who argued that CERCLA's discovery rule preemption applies only when a plaintiff can produce facts which could support a cause of action under CERCLA, regardless of whether the plaintiff actually brought a claim under CERCLA.[67] The court noted that the Eleventh Circuit had not specifically addressed the question of whether CERCLA's discovery rule preempted a state's commencement rule where a plaintiff did not produce facts in his state claim that would support a CERCLA claim.[68] The court reviewed case law from other circuits as well as Eleventh Circuit holdings applying the discovery rule in other contexts, and stated that "[t]he court is persuaded that § 9658's [preemption] is limited to those cases where facts could support a CERCLA claim."[69]

To prove a claim under CERCLA's citizen-suit provision, a plaintiff would, at a minimum, have to prove that his injury was caused by the release of hazardous substances into the environment.[70] The court determined that the plaintiff did not produce any evidence that exposure to hazardous substances caused his hearing loss.[71] Therefore, since he could not support a claim under CERCLA, the CERCLA discovery rule did not preempt Alabama's commencement rule for its two-year limitation period, and the plaintiff's claim was barred by the statute of limitation.[72]

III. NATIONAL ENVIRONMENTAL POLICY ACT

In *Natural Resources Defense Council v. National Park Service*,[73] the United States District Court for the Middle District of Florida found in favor of the defendant and against the plaintiffs in their challenge to the mineral rights owner's plan to explore the viability of oil and gas drilling in Big Cypress National Preserve in Southern Florida.[74] The court

65. *Arnold*, 274 F. Supp. 3d at 1276.
66. *Id.* at 1277.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 1277–78.
71. *Id.* at 1278.
72. *Id.*
73. 250 F. Supp. 3d 1260 (M.D. Fla. 2017).
74. *Id.* at 1272.

concluded that the National Park Service (NPS) and other defendants had met their obligations under the Administrative Procedure Act (APA),[75] the National Environmental Policy Act (NEPA),[76] the Endangered Species Act (ESA),[77] and NPS regulations when the NPS issued a Finding of No Significant Impact (FONSI) for the exploration plan.[78] The court granted summary judgment to the defendants.[79]

When Congress created the Big Cypress Preserve, it instructed the NPS to acquire surface rights to the land, but not oil and gas rights without the consent of the owner, unless the Preserve was threatened with uses that would be detrimental to its purpose. As a result, oil and gas rights under much of the Preserve remain in private hands.[80] One large mineral rights holder, Collier Entities, retained Burnett Oil to explore the viability of oil and gas drilling within the Preserve. Burnett proposed to do so using "vibroseis buggies" that would roll across terrain and send seismic waves underground, which in turn bounce off underground rock formations and return to the surface, where they are recorded by portable receivers placed on the ground (the Plan).[81] Burnett proposed the Plan to the NPS in November 2013, and over the next two years, the parties explored possible impacts of the Plan and refined it until they were satisfied that it complied with NPS regulations. During this process, Burnett reduced the area it proposed to explore from 400 square miles to 110 square miles.[82] On November 20, 2015, the NPS released an Environmental Assessment (EA) for public comment, and as a result of those comments the NPS revised the EA and reissued it for additional comment. During this time, the NPS also engaged in required consultation with the United States Fish & Wildlife Service (FWS) regarding potential impacts of the Plan on threatened or endangered species.[83] On February 25, 2015, the FWS issued a letter concurring with the NPS's biological assessment that the Plan would not adversely impact endangered or threatened species within the Plan area.[84]

On May 6, 2016, the NPS issued a FONSI as a result of the EA for the Plan, as modified by forty-seven mitigation measures that would be

75. 5 U.S.C. § 501 (2012).
76. 42 U.S.C. § 4321 (2018).
77. 16 U.S.C. § 1531 (2018).
78. *Nat'l Res. Def. Council*, 250 F. Supp. 3d at 1311.
79. *Id.* at 1272.
80. *Id.* at 1274.
81. *Id.* at 1276–77.
82. *Id.* at 1277.
83. *See id.* at 1301.
84. *Id.* at 1280.

required for approval of the Plan.[85] The NPS concluded that the kinds of impacts to the Preserve from the buggies and other off-road vehicles used in the Plan would be similar to those of recreational off-road vehicles that had previously been allowed in the Preserve under certain conditions,[86] but would be less harmful because of minimization and mitigation measures. The NPS concluded that impacts to the Preserve would occur in only 0.01% of the survey area and that any affected resources would return to their natural conditions within three years.[87]

On July 27, 2016, the plaintiffs filed a lawsuit[88] challenging the FONSI and the NPS's consequent failure to require a more detailed Environmental Impact Statement[89] on several grounds under NEPA and the ESA, contending generally that the NPS's decision to issue a FONSI was arbitrary and capricious under the APA. The plaintiffs contended that the NPS violated NEPA and the APA by failing to (1) prepare an EIS for the Plan; (2) take a "hard look"[90] at the effectiveness of mitigation measures that NPS required as part of the final Plan; (3) take a "hard look" at all adverse impacts of the Plan, including direct, indirect, and cumulative impacts on the Preserve; and (4) consider all reasonable alternatives to the Plan.[91] The court first addressed the plaintiffs' third

85. *Id.* at 1281.

86. *See* Nat'l Parks Conservation Ass'n v. U.S. Dep't of the Interior, 835 F.3d 1377 (11th Cir. 2016).

87. *Nat'l Res. Def. Council*, 250 F. Supp. 3d at 1281.

88. *Id.* at 1272.

89. A federal agency considering, among other things, a request for a permit for or approval of private activity that will or may impact the environment may prepare an EA, a document meant to be a concise and more superficial discussion of potential environmental impacts of the action. If the agency concludes that environmental impacts will not be significant, it issues a FONSI. If, on the other hand, the agency determines that environmental impacts will be significant, the agency must prepare an Environmental Impact Statement (EIS), a more detailed review that analyzes impacts of the proposed activity, reasonable alternatives, and other factors. *Id.* at 1284–85.

90. In determining whether an agency's decision not to require an EIS was arbitrary and capricious, a court considers four criteria:

> First, the agency must have accurately identified the relevant environmental concern. Second, once the agency has identified the problem it must have taken a "hard look" at the problem in preparing the EA. Third, if a finding of no significant impact is made, the agency must be able to make a convincing case for its finding. Last, if the agency does find an impact of true significance, preparation of an EIS can be avoided only if the agency finds that changes or safeguards in the project sufficiently reduce the impact to a minimum.

Hill v. Boy, 144 F.3d 1446, 1450 (11th Cir. 1998).

91. *Nat'l Res. Def. Council*, 250 F. Supp. 3d at 1284.

challenge under NEPA: that the NPS failed to take a hard look at the adverse impacts of the Plan.[92]

First, the court rejected the plaintiffs' argument that NPS should have considered Burnett's original plan to survey 400 square miles of the Preserve, an area Burnett reduced during the NPS's original assessment in order to make assessment of the project more manageable, as part of the cumulative impacts of the Plan.[93] An agency must consider the cumulative impact of a proposed action, which includes the present proposed action together with past and "reasonably foreseeable" future actions. This requirement is to prevent an applicant from breaking a larger proposed action into smaller pieces for permitting purposes in order to avoid the EIS requirement.[94] The plaintiffs argued that it was "reasonably foreseeable" to the NPS that Burnett would eventually seek permission to survey the larger area.[95] However, the court found that there was insufficient evidence that Burnett would ever seek to survey the remaining area, and thus it was unreasonable to expect the NPS to evaluate the cumulative impact of a survey over the originally proposed Plan area.[96]

Second, the court concluded that the NPS did not act arbitrarily when it concluded that the Plan would not have a significant impact when considered with eleven other ongoing projects affecting wildlife and habitat near the Preserve that were unrelated to the Plan.[97] The record showed that the NPS had considered those projects and their impacts, and its decision was "well within NPS's expertise to determine that the other projects would not have a cumulative impact."[98]

Third, the court concluded that the NPS did not act arbitrarily in determining that Burnett's use of an off-site staging area for surveying activities in the Preserve would cause direct impacts by increasing helicopter flights and off-road travel to and from the Preserve.[99] According to the court, the record showed that the NPS did consider the impacts of those activities, and on balance concluded that the off-site staging area would have less impact on the Preserve than the originally proposed on-site staging areas.[100]

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92. *Id.* at 1285.
93. *Id.*
94. *Id.* at 1286.
95. *Id.* at 1285–86.
96. *Id.* at 1287.
97. *Id.* at 1287–88.
98. *Id.* at 1288.
99. *Id.* at 1288–89.
100. *Id.*

Next, the court turned to the plaintiffs' claim that the NPS failed to consider all reasonable, less damaging alternatives to the Plan, including the alternative of acquiring the mineral rights outright. In performing an EA and evaluating alternatives to the proposed action, an agency must take into account the purpose of the action and the needs and goals of the parties involved.[101] An agency may not define the objectives of the proposed action so narrowly that only one alternative meets the goals of the action nor so broadly that an infinite number of possible actions would meet the goals.[102] The court noted that the NPS had considered ten alternatives in total, including three alternatives in detail: no action, surveying using vibroseis buggies (Burnett's proposed Plan), and surveying using explosives.[103] The NPS concluded that "no action" would not achieve Burnett's purpose and would likely result in a taking of the landowner's mineral rights, and that as between the remaining two, the Plan had less impact on the environment than the alternative of surveying using explosives.[104] The court also found that the NPS reasonably concluded that NPS's obtaining the mineral rights through purchase or trade would not accomplish Burnett's goal.[105] The court noted that the Department of Interior had previously proposed buying the mineral rights under the Preserve but had never received funding from Congress to do so, making that alternative likely not viable anyway.[106] The court concluded that the NPS had sufficiently considered enough alternatives to the Plan.[107]

The court next considered the plaintiffs' claim that the NPS did not take a "hard look" at the mitigation measures proposed in the Plan based on which the FONSI was issued.[108] Specifically, the plaintiffs complained that the NPS did not sufficiently investigate Burnett's promises to de-compact soils and remove ruts, depressions, and vehicle tracks to original contour conditions, avoid activities on soft soils and standing water, and operate primarily in "dry season" conditions (when standing water in the Preserve is at a minimum and soils are more stable).[109] The court concluded that the record showed support for the NPS's conclusion that

101. *Id.*
102. *Id.* at 1290.
103. *Id.*
104. *Id.* at 1290–91.
105. *Id.* at 1291.
106. *Id.*
107. *Id.* at 1292.
108. *Id.*
109. *Id.* at 1293.

each of these mitigation measures was viable and would result in lessened environmental impacts.[110]

Finally, the court addressed the plaintiffs' claim that the NPS had arbitrarily and capriciously decided against producing an EIS.[111] A proposed action that qualifies as a major federal action, for example one that significantly affects the environment, requires an EIS.[112] Where it is unclear whether a proposed action is a major federal action, the agency prepares an EA, which is a "shorter, preliminary statement . . . mandated when a proposed action is neither one normally requiring an EIS nor one categorically excluded from the EIS process."[113] If, as a result of the EA, the agency determines the proposed action is not a major federal action, it issues a FONSI, which briefly explains its reasons. The agency's decision whether a proposed action will have significant impact on the environment is one which "'implicates substantial agency expertise' and is entitled to deference."[114] The plaintiffs challenged the NPS's FONSI decision on five grounds,[115] and on each, the court concluded that the NPS had considered the ground and reasonably determined that no finding of significant impact was warranted.[116]

First, the plaintiffs asserted that an EIS was required due to the unique characteristics of the Preserve, including parkland, wetlands, and ecologically sensitive areas. The court held that the NPS had reasonably concluded that the Plan would not result in significant impacts to any of these resources.[117]

Second, the plaintiffs claimed that an EIS was required because the Plan was "controversial," as evidenced by the 65,000 comments that were submitted during the public comment period on the original EA. The court noted that the "controversial" factor in the agency's NEPA examination of a proposed action means more than simply opposition to the action.[118] It means "'scientific or other evidence that reveals flaws in the methods or data relied upon by the agency in reaching its

110. *Id.* at 1294–95.

111. *Id.* at 1295.

112. *Id.*

113. *Id.*

114. *Id.* (quoting Marsh v. Or. Nat'l Res. Council, 490 U.S. 360, 376 (1989)).

115. The five grounds were based on five of ten "intensity factors" that agencies should consider in making a determination of significant impact, set out in NEPA regulations at section 40-1508.27(b) of the Code of Federal Regulations (2018). *See Nat'l Res. Def. Council*, 250 F. Supp. 3d at 1295.

116. *Nat'l Res. Def. Council*, 250 F. Supp. 3d at 1296.

117. *Id.* at 1296—97.

118. *Id.* at 1297.

conclusions.'"[119] The court concluded that the NPS "reasonably found that 'there [was] no substantial dispute concerning the effects of the proposed action.'"[120]

Third, the plaintiffs argued that the FONSI could establish precedent for future action with significant impacts because Burnett planned to seek approval for surveying over other parts of the originally planned 400 square-mile area. The court rejected this argument, noting that the NPS explained in its response to public comments that it would evaluate each application for additional surveying independently.[121]

Fourth, the plaintiffs claimed the Plan would adversely affect endangered or threatened species because the EA concluded that "'short-term adverse impacts . . . are expected. '"[122] The court noted that the EA also concluded that no "mortality and injury to wildlife" was expected from the Plan, and given that conclusion, the plaintiffs did not explain how the adverse effects mentioned in the EA rose to the level of significant impact.[123]

Fifth, and finally, the court rejected the plaintiffs' contention that cumulative impacts of the Plan and proposed mitigation measures that would not succeed, warranted an EIS.[124] The court referred to its previous determinations regarding these factors in response to other parts of the plaintiffs' complaint.[125]

The court next rejected the plaintiffs' contention that the NPS violated its regulations under the Organic Act[126] pertaining to non-federal oil and gas operations within national parks.[127] The plaintiffs contended that the Plan did not contain any description of "technologically feasible alternative methods of operations, their costs, or their environmental [impacts,]"[128] as required by the regulations. The court concluded that the information the NPS considered as part of the EA process satisfied the NPS regulations as well.[129]

The plaintiffs' complaint also challenged the NPS's FONSI decision under the ESA. Specifically, the plaintiffs claimed that the NPS's

119. *Id.*
120. *Id.* at 1298 (quoting the administrative record).
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. 36 C.F.R. §§ 9.30–9.52 (2018).
127. *Nat'l Res. Def. Council*, 250 F. Supp. 3d at 1300.
128. *Id.* at 1299.
129. *Id.* at 1300.

required consultation with the FWS regarding impacts of the Plan to endangered or threatened species was inadequate, and that the agencies should have reinitiated consultation (1) when Burnett relocated its staging area off site and (2) because a new species, the Florida Bonneted Bat, was listed as endangered in 2013.[130]

The plaintiffs raised five specific challenges to the adequacy of the agencies' consultation in connection with the FONSI: (1) the Plan area the agencies analyzed was unlawfully narrow; (2) the agencies failed to fully evaluate direct and indirect impacts to listed species; (3) the agencies failed to evaluate cumulative impacts to listed species by failing to consider activities outside the Preserve; (4) the agencies failed to use the "best scientific and commercial data available" for wood storks and red-cockaded woodpeckers, including maps showing the locations of those birds in the Plan area; and (5) the agencies relied on mitigation measures that are "unenforceable, vague, or discretionary."[131] On each of these challenges, the court concluded that the agencies had not acted arbitrarily and capriciously, noting that as to each challenge, the record showed that the agencies had considered the issues raised by the plaintiffs, and showed evidence sufficient to support the agencies' conclusions.[132]

Finally, as to the plaintiffs' claims that the agencies should have reinitiated consultation related to (1) Burnett's relocation of its staging area to an off-site location and (2) the listing under the ESA of the Florida Bonneted Bat, the court ruled in favor of the agencies.[133] The court explained that as to the staging-area relocation, the plaintiffs themselves had requested the relocation to mitigate potential impacts of staging the survey within the Preserve, and "[i]n any event, the record shows that the Agencies did reinitiate consultation."[134] Next, as to the listing of the bat, the court first agreed with the defendants that the plaintiffs lacked standing to challenge the agencies' failure to reinitiate consultation because the plaintiffs did not demonstrate that implementation of the Plan would cause them an "injury in fact" with respect to the bat.[135] The court also concluded that even if the plaintiffs had standing, there was no obligation to reinitiate consultation.[136] The plaintiffs argued that the agencies should have reinitiated consultation on a 2010 Preserve

130. *Id.* at 1300–11.
131. *Id.* at 1301–06.
132. *Id.*
133. *Id.* at 1307.
134. *Id.*
135. *See id.* at 1309–10.
136. *Id.* at 1310–11.

Management Plan when the bat was listed in 2013, but the court noted that management plans are not agency actions subject to the consultation requirement, and the Plan's potential effects on the bat had been sufficiently considered during the agencies' consultation on the Plan.[137]

137. *Id.*