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Carruth v. Bentley, Case No. 18-12224 (11th Cir. 2019).
The Governor and those in his employ are entitled to qualified immunity for governmental actions taken to regulate a credit union.

Center for Biological Diversity v. U.S. Army Corps of Engineers, Case No. 18-10541 (11th Cir. 2019).
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In Re: Amendments to Florida Rules of Appellate Procedure 9.120 And 9.210, Case No. SC19-884 (Fla. 2019).
The Florida Rules of Appellate Procedure are amended to allow cross-notices and briefs when jurisdiction is pending.

Blamey v. Menadier, Case No. 3D19-849 (Fla. 3d DCA 2019).
Upon rehearing, the Third District holds that an attorney's drafting of a term sheet for purchase of corporate stock is sufficiently related to the dispute over failure to deliver the stock such that the attorney, who represented the selling entity in some matters, cannot represent the buyer against the selling entity.

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Adverse rulings are not grounds for recusal of a judge, but judicial findings that counsel lied in proceedings before the court indicate future bias and require recusal.

Tison v. Clairmont Condominium F Association, Inc., Case No. 4D19-117 (Fla. 4th DCA 2019).
Legal rights accrue and are fixed when the last element of the cause of action occurs and not when the action is brought. Accordingly, a former unit owner who sold his unit is entitled to an award of attorney's fees under Florida Statute section 718.303(1) if he was a unit owner when his right to attorney's fees accrued.

Central Florida Investments, Inc. v. Orange County, Case No. 5D19-943 (Fla. 5th DCA 2019).
Appeals from a local government code enforcement board are plenary appeals governed by Florida Statute section 162.11, and are not petitions for writ of certiorari.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12224

D.C. Docket No. 7:17-cv-01445-LSC

JOHN DEE CARRUTH, an individual,

Plaintiff - Appellant,

versus

ROBERT J. BENTLEY, an individual,
DAVID BYRNE, an individual,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(November 7, 2019)

Before MARCUS, JULIE CARNES, and KELLY,[*] Circuit Judges.

MARCUS, Circuit Judge:

[*] Honorable Paul J. Kelly, Jr., United States Circuit Judge for the Tenth Circuit, sitting by designation.

John Dee Carruth, the former CEO of Alabama One Credit Union, sued former Governor of Alabama Robert Bentley and his legal advisor, David Byrne, after Alabama One was taken into conservatorship by a state agency and he was terminated. Carruth alleged that the Governor and his counsel conspired with others to improperly exert regulatory pressure on the credit union, in order to induce Alabama One to settle lawsuits brought by a friend and former law partner of Byrne. Carruth filed an array of constitutional claims against Bentley and Byrne under § 1983 -- including violations of the Equal Protection Clause, a substantive due process claim, a Takings Clause claim in violation of the Fifth Amendment, the denial of his First Amendment right to petition government, retaliation for exercising his right to petition the courts, and conspiracy to violate his rights, along with three supplemental state law claims. The district court dismissed all of the civil rights claims on qualified immunity grounds and declined to entertain the supplemental claims.

Carruth now appeals the dismissal of his complaint. After thorough review, we affirm. The first defect in the complaint is that Carruth does not plausibly allege that the Governor or his legal advisor was responsible for causing his injuries. The decision to place Alabama One in conservatorship and the concomitant decision to terminate Carruth's employment were made by Sarah Moore, the Administrator of the Alabama Credit Union Administration (ACUA),

and approved by the ACUA Board of Directors. Carruth has pled no facts plausibly establishing that the Governor and Byrne made the decisions causing Carruth harm. What's more, even if we could assume away the basic causation problem permeating the entire complaint, Carruth also has failed to plausibly allege that Bentley and Byrne violated his clearly established constitutional rights. From the face of the complaint, it is clear that he cannot defeat their entitlement to qualified immunity. The district court did not err in dismissing the federal claims.

I.

John Dee Carruth served as the Chief Executive Officer of Alabama One Credit Union from 1998 until 2015. Like all other credit unions in the state, Alabama One was regulated by the Alabama Credit Union Administration, an independent state agency. In December 2011, the ACUA and the National Credit Union Association (NCUA), an agency of the federal government, determined that Alabama One was in violation of a regulatory cap placed on the percentage of loans that could be made to any one member of the credit union. The violation related to a series of "Member Business Loans" made to a used-car broker named Danny Butler, a long-time member of Alabama One. The ACUA and NCUA issued a joint Letter of Understanding and Agreement (LUA) requiring Alabama One to reduce its concentration of Member Business Loans, directed an outside investigation by a law firm into the actions of Carruth and other senior

management officials, and ordered an accounting audit. The investigations did not turn up evidence of wrongdoing and the LUA was lifted in April 2013.

On July 16, 2013, a group of attorneys that Carruth refers to as the "Smyth Group" -- Jay Smyth, his firm Lewis Smyth Winter Ford LLC, Albert Lewis, and Bobby Cockrell -- filed four lawsuits against Alabama One and various employees, including Carruth. The plaintiffs were past business associates of Butler, who claimed that Alabama One was responsible for the losses they sustained in connection with the loans made to Butler. A fifth lawsuit followed in March 2015. Carruth characterizes these cases as an "old-fashioned 'stick-up,'" pursued in the hope that Alabama One would choose to "pay off" the plaintiffs in order to avoid extended litigation.

Finding little success in these lawsuits, the Smyth Group allegedly hatched a plot "to improperly increase the regulatory pressure on and governmental and public scrutiny of Alabama One and Carruth in order to coerce Alabama One to settle the Smyth Lawsuits." Smyth reached out to his former law partner and friend David Byrne, Jr., the chief legal advisor to then-Governor Bentley. On November 25, 2013, Smyth, Byrne, Governor Bentley, State Senator Gerald Allen, and former Alabama Supreme Court Justice Bernard Harwood allegedly held a meeting at the state capitol. According to an email from Smyth, the meeting's purpose was to allow the parties to "speak freely" on "Alabama One Issues" in

order to decide "what actions would seem to be most . . . appropriate for the State of Alabama." Smyth told Senator Allen in a separate email that he hoped Governor Bentley would direct the ACUA to "pick up where it left off," claiming that "conditions at Alabama One have only deteriorated."

According to the complaint, on January 24, 2014 another meeting took place at the state capitol, which was attended by Smyth, Byrne, Carrie McCollum (another legal advisor to Governor Bentley), ACUA Administrator Larry Morgan, NCUA and ACUA officials, and a disgruntled former Alabama One employee named Lori Baird. At this meeting, Smyth led Baird through a presentation that provided "inside information" on wrongdoing within Alabama One. Eleven days later, Smyth sent a memorandum to State Senator Allen, copying Byrne and McCollum, claiming that Alabama One "has become so impaired that the only responsible action would be for the [ACUA] to take prompt remedial action." He requested that certain Alabama One employees be suspended and that Alabama One be placed into conservatorship.

About a week later, on February 12, 2014, Smyth sent another memorandum to Byrne and Senator Allen, and in an email to Byrne's assistant he wrote:

> Thanks for your help, Pam. I believe now that everyone (perhaps with the notable exception of Larry Morgan) is on the same page re Alabama One issues. I have confidence the Governor will act decisively on this. David (Byrne) is providing good leadership, as usual.

Smyth sent another email to Byrne, Allen, and others the following day, in which he discussed a lawsuit two of his clients had filed against Alabama One. He wrote:

> [The plaintiffs] continue to hope for prompt and effective remedial action against Alabama One by the ACUA acting in concert and coordination with the Governor's office. They are, quite literally, depending on the Bentley administration's showing up like the cavalry in a John Wayne movie. While we all expect these civil plaintiffs to ultimately prevail in their various lawsuits, the results from the courthouse will not materialize soon enough to save them from suffering serious -- and wholly unnecessary -- damages in the meantime.

During a break in a deposition in one of the Smyth-Alabama One lawsuits, on February 27, 2014, Smyth said to an Alabama One attorney, "If you don't settle our lawsuits today and pay us money today, the regulators will do bad things to Alabama One tomorrow." The next day, Carruth and three other Alabama One employees were suspended by the ACUA. Administrator Morgan later said that "both Mr. Byrne and Governor Bentley wanted something to happen at Alabama One, they wanted suspensions," and that Bentley told Morgan to suspend the Alabama One employees or resign. Morgan said that he did not know who prepared the suspension letters. That evening, Smyth sent an email to Byrne with the subject line "Alabama One" expressing his appreciation.

The ACUA allowed the suspended employees to return to work on March 21, 2014, after they agreed to release all claims against the ACUA. The next day, Morgan resigned from his position as Alabama Credit Union Administrator. On

April 15, 2014, Bentley appointed Sarah Moore as the new Administrator. Moore had no professional experience in credit union regulation. Prior to her appointment, she was an executive at Colonial Bank in Montgomery, Alabama, where she worked with Byrne while he was the bank's general counsel. During the interview process, Byrne told her that Alabama One was a "large problem" that she'd have to deal with.

Ms. Moore officially took office on July 1, 2014 as the new Administrator of the Alabama Credit Union Administration. A few days later, she met with Carruth and told him she was ordering an examination of Alabama One by an outside auditing firm. ACUA and NCUA conducted a joint examination in August, and they then issued a Preliminary Warning Letter directing Alabama One to stop making Member Business Loans. In March 2015, the ACUA informed Alabama One that it would be receiving a Cease and Desist Order, a more severe sanction requiring Alabama One to undergo more extensive outside review of its lending activities and its management.

In June 2015, Alabama One and Carruth filed their first lawsuit in federal district court against the Smyth Group, Byrne, Moore, and others, alleging violations of various constitutional provisions and several claims under Alabama law. On August 26, the complaint was amended to add Governor Bentley as a defendant. The following day, on August 27, 2015, some sixteen months after

Sarah Moore had taken the reins, the ACUA placed Alabama One in conservatorship and removed Carruth as CEO. The ACUA appointed itself conservator of Alabama One and delegated its authority to Moore to run Alabama One. Moore, in turn, denied Carruth indemnification for his legal expenses related to his challenge to the conservatorship order.

Carruth then commenced this lawsuit in federal district court against Bentley and Byrne under § 1983 on August 25, 2017. He claimed that (1) his termination and the denial of indemnification was a taking in violation of the Fifth Amendment, (2) the defendants violated his right to the equal protection of the laws, (3) they violated his substantive due process rights, (4) they interfered with his First Amendment right to petition the courts, (5) they retaliated against him because of the lawsuit he filed against the Smyth Group in 2015, and, finally, (6) they conspired to deprive him of his rights. Carruth added three state law claims, for tortious interference, intentional infliction of emotional distress, and civil conspiracy.

In a lengthy order, the district court granted Bentley and Byrne's motion to dismiss, concluding that they were entitled to qualified immunity on each of Carruth's § 1983 claims. Having dismissed all of the federal claims, the court declined to exercise supplemental jurisdiction over the state law claims and dismissed them without prejudice.

This timely appeal followed.[1] Carruth now challenges the district court's conclusion that Bentley and Byrne are entitled to qualified immunity and that his equal protection, takings, due process, retaliation, and conspiracy claims should be dismissed. He also says that the district court erred by not granting leave to amend his complaint.

II.

We review the dismissal of a complaint under Rule 12(b)(6) de novo. Gates v. Khokhar, 884 F.3d 1290, 1296 (11th Cir. 2018). We accept all facts alleged in the complaint as true and draw all inferences in the plaintiff's favor. Id. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

Carruth argues that the district court erred in granting Bentley and Byrne qualified immunity. Qualified immunity shields "government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would

[1] This case against defendants Bentley and Byrne is one of four appeals currently pending in our Court arising out of the conservatorship of Alabama One. See also Powell v. Ala. Credit Union Admin., No. 18-11176 (11th Cir. argued Apr. 9, 2019); Carruth v. Moore, No. 18-11192 (11th Cir. argued Apr. 9, 2019); Carruth v. Lewis Smyth Winter Ford LLC, No. 18-13272 (11th Cir. argued Apr. 9, 2019).

have known.'" Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The doctrine is designed to permit "government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation." Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002). It "protect[s] from suit 'all but the plainly incompetent or one who is knowingly violating the federal law.'" Id. (quoting Willingham v. Loughnan, 261 F.3d 1178, 1187 (11th Cir. 2001)).

"In order to receive qualified immunity, the public official 'must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.'" Id. (quoting Courson v. McMillian, 939 F.2d 1479, 1487 (11th Cir. 1991) (internal quotations omitted)). If the official makes this showing, "the burden shifts to the plaintiff to show that qualified immunity is not appropriate." Id. To defeat qualified immunity, "(1) the relevant facts must set forth a violation of a constitutional right, and (2) the defendant must have violated a constitutional right that was clearly established at the time of defendant's conduct." Taylor v. Hughes, 920 F.3d 729, 732 (11th Cir. 2019). In this case, we look only to decisions from the United States Supreme Court, this Court, or the Supreme Court of Alabama for clearly established law. See Snider v. Jefferson State Cmty. Coll., 344 F.3d 1325, 1328 (11th Cir. 2003).

A.

For starters, Carruth claims that the district court erred at the first step in finding that Bentley and Byrne acted within their discretionary authority. An official is entitled to qualified immunity only if he was "engaged in a 'discretionary function' when he performed the acts of which the plaintiff complains." Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1264 (11th Cir. 2004). The question is essentially whether the actions "are of a type that fell within the employee's job responsibilities." Id. at 1265. The inquiry is two-fold: "We ask whether the government employee was (a) performing a legitimate job-related function (that is, pursuing a job-related goal), (b) through means that were within his power to utilize." Id.

Two actions allegedly tie Bentley and Byrne to Administrator Moore's decision to place Alabama One into conservatorship and terminate Carruth: Bentley's appointment of Moore as the new ACUA Administrator on April 15, 2014; and Byrne's comment to Moore when she was interviewed for the position that Alabama One would be "a large problem." Both were part of the legitimate job-related functions of the defendants. An Alabama statute expressly provides that the Alabama Credit Union Administrator "shall be appointed by the Governor." Ala. Code § 5-17-41. It could not be clearer, then, that Bentley's

appointment of Moore was a legitimate job function and that it fell well within his powers as the Governor of the state.

As for legal advisor Byrne, a different Alabama statute empowers the Governor to "employ an attorney or attorneys to advise him in his official capacity." Id. § 36-13-2. Bentley and Byrne assert that this statutory provision and the Governor's general executive authority bring Byrne's statement to Moore within the province of his discretionary functions as the Governor's advisor. Under the Constitution of Alabama, "[t]he supreme executive power" of the state is vested in the governor, and he has the duty to "take care that the laws be faithfully executed." Ala. Const. §§ 113, 120. The Supreme Court of Alabama has explained that "these express constitutional provisions, all of which are of course unique to the office of governor, plainly vest the governor with an authority to act on behalf of the State and to ensure 'that the laws [are] faithfully executed.'" Riley v. Cornerstone Cmty. Outreach, Inc., 57 So. 3d 704, 719 (Ala. 2010); see also id. ("[E]verything pertaining to the executive department is at all times pending before the Governor in his official capacity." (quoting State v. Simon, 99 A.2d 922, 925 (Me. 1953))).

The regulation of Alabama One fell within the Governor's lawful job functions because the Alabama Credit Union Administration executes and enforces Alabama's laws regarding credit unions and the Governor has the duty to ensure

that the laws are faithfully executed. See Ala. Code § 5-17-40(a) (providing that the ACUA "shall administer the laws of this state which regulate or otherwise relate to credit unions in the state"). The Governor also has statutory authority to hire lawyers to serve as his advisors and aid him in the execution of his duties. When an advisor seeks to inform an official appointed by the Governor of the administration's regulatory priorities or discuss some issue falling under that official's portfolio, that advisor is also performing a discretionary job-related function.

Carruth argues, nevertheless, that Byrne and Bentley did not execute their job-related functions "in an authorized manner," since they allegedly coerced and threatened ACUA Administrators Larry Morgan and Sarah Moore to take unwarranted regulatory actions against Carruth and Alabama One. This argument has been rejected by our precedent: at this stage in the analysis, we "temporarily put[] aside the fact that [the official's actions] may have been committed for an unconstitutional purpose, in an unconstitutional manner, to an unconstitutional extent, or under constitutionally inappropriate circumstances." Holloman, 370 F.3d at 1266. That means we must set aside, for now, the claim that Bentley and Byrne undertook these actions in order to wrongfully pressure Alabama One to settle the Smyth cases or in order to retaliate against Carruth for bringing his first lawsuit against them. For present purposes, the question is whether the official's

actions are of the sort that fall within the "'arsenal' of powers" the official is given "to accomplish her goals." Id. at 1267. In this setting, we do not ask whether the defendants acted illegally, because "[f]ramed that way, the inquiry is no more than an 'untenable' tautology." Harbert Int'l, Inc. v. James, 157 F.3d 1271, 1282 (11th Cir. 1998) (quoting Sims v. Metro. Dade Cty., 972 F.2d 1230, 1236 (11th Cir. 1992)). A plaintiff cannot plead around qualified immunity simply by saying that the official was animated by an unlawful purpose. The exception would swallow the rule.

Governor Bentley had the authority to appoint the Administrator of the Alabama Credit Union Administration and, as part of his constitutional authority as the state's chief executive, the power to direct and inform her actions as a regulator. And Byrne was a statutorily authorized legal advisor to Governor Bentley; their relevant actions fell within their discretionary authority.

B.

Bentley and Byrne submit that Carruth's complaint fails to plausibly plead any constitutional violation of the First, Fifth, or Fourteenth Amendments because he cannot show that Bentley and Byrne were the legal cause of his injuries. "As with any common law tort," a § 1983 plaintiff "must establish an adequate causal link between the alleged harm and the alleged unlawful conduct." Dixon v. Burke County, 303 F.3d 1271, 1275 (11th Cir. 2002). Carruth's complaint tells a detailed

story about the influence and control that the defendants -- and Byrne in particular -- had over the ACUA. But the factual allegations relate almost entirely to the Administrator (Larry Morgan) who served in that position before Sarah Moore assumed her duties, and Moore (not Morgan) was the official who ultimately acted against Carruth and Alabama One. The problem for Carruth is that his claims do not plausibly allege that Bentley and Byrne caused the injuries he sustained.

For one thing, Carruth's only allegations on this score are pled at the highest order of abstraction and therefore must be disregarded. Other than the claim that Byrne told Moore in her interview for the Administrator position in 2014 that Alabama One would be "a large problem," the allegations involving Moore are stated in a wholly conclusory manner: thus, for example, the complaint alleges that Moore ordered an audit of Alabama One "[p]ursuant to and in furtherance of the Defendants' scheme," and that Moore conserved Alabama One and terminated Carruth while "acting at the direction of" Bentley and Byrne. These claims are strikingly similar to those the Supreme Court disregarded in Ashcroft v. Iqbal, 556 U.S. 662 (2009). See, e.g., id. at 680–81 (holding that the allegations that an individual was the "principal architect" of a policy or was "instrumental" in adopting it were conclusory and not entitled to the presumption of truth); see also McCullough v. Finley, 907 F.3d 1324, 1333–34 (11th Cir. 2018) (holding that allegations that defendants "adopted" and "administered" an unlawful scheme "at

the highest level" were conclusory). We, therefore, need not and indeed cannot take it as true that Bentley and Byrne directed Administrator Moore to place the credit union in a conservatorship or fire Carruth.

Moreover, Administrator Moore and the other members of the Board of the ACUA sit in the middle of the causal chain allegedly running from Bentley and Byrne to Carruth's injuries. The requisite "causal relation" for a § 1983 claim "does not exist when the continuum between Defendant's action and the ultimate harm is occupied by the conduct of deliberative and autonomous decision-makers." Dixon, 303 F.3d at 1275. The Dixon case involved an appointment to a local board of education. To fill the seat, a grand jury was required to select an individual from those who applied and submit that person's name to a state court judge, who had the final approval. Id. at 1273. An advisor to the grand jury suggested that the new member should be of the same race and gender -- white and male -- as the outgoing board member; the grand jury followed that advice and the judge approved their selection. A female applicant sued the advisor, the grand jury foreman, and the County under § 1983. The Court held that the claims against the individual defendants failed on causation grounds. Id. at 1275. As for the foreman, the Court concluded that other "acts includ[ing] the votes of independent grand jurors and the action of an independent state Judge" vitiated the chain of causation. Id. A panel of this Court observed that the case against the advisor was

"even weaker," since "the intervening free, independent, and volitional acts of the Grand Jury and the state Judge" stood between his advice and the hiring decision. Id. Because of these intervening steps and because neither defendant "possess[ed] or assert[ed] any coercive force that subverted the individual free will of those who voted," the causal chain was broken. Id.

So too here. Importantly, Carruth does not make any allegations that impugn or otherwise undermine the independence of the other members of the ACUA Board, none of whom noted their dissent to the conservatorship. See Ala. Code § 5-17-8(f) (requiring majority approval by the ACUA Board to appoint a conservator). Under a straightforward application of Dixon, then, there were "intervening free, independent, and volitional acts" between any improper acts by the defendants and the decisions taken by Administrator Moore and the members of the Board of Directors of the ACUA that caused Carruth's injuries.

Carruth disagrees, asserting that this case is like a "cat's paw" Title VII case where a plaintiff attempts to show causation by establishing "that the decisionmaker followed [a] biased recommendation without independently investigating the complaint against the employee." Stimpson v. City of Tuscaloosa, 186 F.3d 1328, 1332 (11th Cir. 1999). He says that Sarah Moore was under the control of Bentley and Byrne, and the Board simply followed Moore's tainted decision without making a truly independent and deliberative decision. The

allegations in the complaint do not support Carruth's argument. In fact, Carruth has offered precious little to suggest that Moore herself was not an independent deliberative actor -- at most, he has presented only Byrne's comment some sixteen months before the conservatorship decision was taken that Alabama One would be a problem, the fact that the Governor appointed her to run ACUA after the campaign to pressure Alabama One had been ongoing for several years, and the time span of 13 months from Moore's appointment to the conservatorship decision. That's not much to create an inference that Moore was not an autonomous decisionmaker, and the conclusory allegation that she was acting at the direction of Byrne and Bentley must be disregarded under Iqbal.

Moreover, even if the complaint could somehow be read to plausibly claim that Moore was acting under the influence of Byrne and Bentley -- and we do not think the complaint can fairly be read that way -- the complaint does not even remotely suggest that the other members of the Board of the ACUA were somehow under the sway of Bentley and Byrne, or that Moore "possess[ed] or assert[ed] any coercive force that subverted the individual free will of those who voted." Dixon, 303 F.3d at 1275. Quite simply, Carruth's complaint does not plausibly allege that the Governor and his counsel were the cause of Carruth's injuries, and so he cannot establish the necessary nexus between these defendants and any violation of his constitutional rights.

C.

Even if Carruth had adequately pled causation, however, he still would be unable to overcome Bentley and Byrne's entitlement to qualified immunity for reasons specific to each claim. We address each in turn, starting with equal protection.

1.

Carruth argues that "[d]espite the similarity between 2012/2013 Alabama One and Carruth and 2015 Alabama One and Carruth, regulators treated them far differently," in violation of the Equal Protection Clause. He has asserted what is called a "class of one" equal protection claim, arguing that he was singled out for arbitrary and irrational mistreatment, and he attempts to use the state's earlier treatment of himself and Alabama One as a proper comparator to establish that his treatment in 2015 was an outlier. His claim fails.

The Supreme Court first explicitly recognized the "class of one" equal protection theory in Village of Willowbrook v. Olech, 528 U.S. 562 (2000) (per curiam). In Olech, the plaintiff claimed that the Village demanded a 33-foot easement as a condition of connecting her property to the municipal water supply, while it only asked for a 15-foot easement from similarly situated property owners. She alleged that the difference was "irrational and wholly arbitrary," and said that a 15-foot easement was "clearly adequate." Id. at 565. The Supreme Court held

that the plaintiff's complaint stated a valid "class of one" equal protection claim. Id.

In a later case, the Court explained that the class of one theory applies when there is "a clear standard against which departures, even for a single plaintiff, [can] be readily assessed." Engquist v. Or. Dep't of Agr., 553 U.S. 591, 602 (2008). The Court went on:

> There are some forms of state action, however, which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.

Id. at 603. Thus, the Supreme Court held that the class of one theory "has no application" in the context of public employment decisions, since it would open up too many discretionary governmental decisions to equal protection claims. Id. at 607.

We conclude that the class of one equal protection theory similarly has no application to the decision to place Alabama One in conservatorship or to terminate Carruth as its CEO. As the district court observed, it is difficult to "envision a better example of discretionary decisionmaking than whether to conserve a Credit Union and terminate certain of its employees." The decision to

conserve a credit union and depose its leadership is a major one, as Carruth tells us, and it requires the ACUA to make "a vast array of subjective, individualized assessments." Id. at 603. For a state regulatory agency to do its job effectively, it must be able to take into account all of the relevant facts and circumstances of the individual cases before it. In Griffin Industries, Inc. v. Irvin, 496 F.3d 1189 (11th Cir. 2007), this Court held that state government officials were entitled to qualified immunity from a similar class of one claim brought by a company that operated a chicken rendering plant. Id. at 1207. The company claimed that the officials subjected the plant to stricter environmental regulation than other similarly situated facilities. Id. at 1194–95. We rejected the claim, explaining that unlike in Olech, the regulatory decisions involved were "multi-dimensional," with "varied decisionmaking criteria applied in a series of discretionary decisions made over an extended period of time." Id. at 1203. When the challenged government action "is not the product of a one-dimensional decision" it is more difficult to make out a class of one claim. Id. at 1203–04. The various decisions made by the defendants and other state officials leading up to the conservatorship of Alabama One are similarly complex and multidimensional. Carruth has not pointed to any "one-dimensional decision" that shows that he and Alabama One were treated arbitrarily or dissimilarly from similarly situated entities.

Moreover, and equally fatal to this claim, Carruth's attempt to use a prior version of himself and Alabama One as a comparator finds no support in our case law. Carruth has cited no case in which this Court, the United States Supreme Court, the Supreme Court of Alabama, or any other court, for that matter, has held that a plaintiff can make out a class of one claim by using an earlier version of himself as the "similarly situated" comparator. In fact, the cases say without fail that a class of one claim is available when a plaintiff has been "intentionally treated differently from others similarly situated." Olech, 528 U.S. at 564 (emphasis added); see also Engquist, 553 U.S. at 601; Griffin Indus., 496 F.3d at 1202. That language naturally suggests that a plaintiff must point to someone else who received or is receiving more favorable treatment. Carruth appears to recognize that there is no clearly established law in support of his theory. His opening brief says that this appeal presents an "issue of first impression" of "[w]hether an earlier 'version' of an individual subject to state regulation can be an adequate comparator to the current 'version' of that same individual for purposes of a 'class of one' claim." Initial Br. of Appellant i. If the question is one of first impression, the defendants are almost certainly entitled to qualified immunity, since there is rarely a clearly established violation of law in the absence of supporting case law.

Carruth cites to no case, and we can find none, in which this Court or the Supreme Court has approved a class of one equal protection theory that involved regulatory decisions remotely similar to those made by the Alabama Credit Union Administration in this case. Nor has he cited to any case indicating that a plaintiff may use an earlier version of himself as a comparator to prove a class of one claim. Since there is no clearly established law establishing that Carruth's alleged differential treatment violated the Equal Protection Clause, Bentley and Byrne are entitled to qualified immunity.

2.

Bentley and Byrne are also entitled to qualified immunity on the due process claim. Carruth's complaint asserts a violation of his substantive due process rights -- indeed, the relevant heading reads, "COUNT III – 42 U.S.C. § 1983 (SUBSTANTIVE DUE PROCESS)" -- and the district court therefore properly construed it as a substantive due process claim. Carruth now says that he intended to bring a procedural due process claim. He made no such argument in district court, and, accordingly, we need not consider it. See Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1331 (11th Cir. 2004) ("This Court has repeatedly held that an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court." (quotations omitted)).

If we did, however, Carruth still could not defeat Bentley and Byrne's claim of qualified immunity because he fails to cite to any clearly established law that would have placed the defendants fairly on notice that their conduct violated his substantive or procedural due process rights. In the first place, this Court has expressly held that "an employee with a property right in employment is protected only by the procedural component of the Due Process Clause, not its substantive component." McKinney v. Pate, 20 F.3d 1550, 1560 (11th Cir. 1994) (en banc). So to the extent that Carruth asserts a substantive due process claim based on the deprivation of his right to continued employment as CEO of Alabama One, controlling precedent holds that it must fail.

And even if we grant Carruth the benefit of construing his complaint as having somehow included a procedural due process claim, he has not met his burden of plausibly alleging the violation of a clearly established constitutional right. A terminated government employee cannot bring a procedural due process claim "before the employee utilizes appropriate, available state remedial procedures." Id. And even "[w]hen a state procedure is inadequate, no procedural due process right has been violated unless and until the state fails to remedy that inadequacy." Id. Assuming that Carruth had a property right in his continued employment -- a highly debatable proposition, since any property right he held was

probably extinguished by the conservatorship[2] -- Carruth also must show that state law does not afford him an adequate remedial procedure for the deprivation of his rights.

To prevail, then, Carruth must allege that he has attempted to make use of whatever state law avenue for relief is available to him and that the remedial procedure is inadequate. By statute, Alabama law provides for judicial review of a conservatorship decision and of a decision by the ACUA Board to suspend an employee. See Ala. Code § 5-17-8(g) ("Not later than 10 calendar days after the date on which the Alabama Credit Union Administration takes possession and control of the business and assets of a credit union pursuant to subsection (f), officials of the credit union who were terminated by the conservator may apply to the circuit court for the judicial circuit in which the principal office of the credit union is located for an order requiring the administration to show cause why it should not be enjoined from continuing possession and control."). Indeed, Carruth's separate lawsuit against Administrator Moore and the ACUA now pending in this Court began as an action under Alabama Code § 5-17-8 challenging the conservatorship and seeking reinstatement. See Notice of Removal at 11–88,

[2] Alabama Code § 5-17-8(m) provides that "[a]fter taking possession of the property and business of a credit union through conservatorship, the conservator may terminate or adopt any executory contract to which the credit union may be a party." The district court concluded that this provision implied that Carruth had no entitlement to continued employment upon the conservatorship of Alabama One, since the conservator had the apparently unrestricted power to terminate any contracts made by the credit union, including employment contracts.

Carruth v. Moore, No. 7:16-cv-01935-LSC (N.D. Ala. Dec. 2, 2016). Carruth has offered us no reason to conclude or even suspect that this procedure would be inadequate to protect his due process rights. Carruth's claim for reinstatement under Alabama law is being heard in a competent court of law. In short, he has not shown a clearly established violation of his right to due process.

3.

Carruth's Takings Clause claim also fails because there is no clearly established law on this matter either. He has not cited to any case from this Court, the United States Supreme Court, or the Supreme Court of Alabama holding that a state regulatory agency's decision to place an institution into conservatorship and terminate its executives is an unconstitutional taking, nor can he establish that this is the rare case where a constitutional violation would be apparent without clarifying law. See, e.g., United States v. Lanier, 520 U.S. 259, 271 (1997) (explaining that in some cases, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question"); Vinyard v. Wilson, 311 F.3d 1340, 1350 (11th Cir. 2002) ("[T]he words of the pertinent federal statute or federal constitutional provision in some cases will be specific enough to establish clearly the law applicable to particular conduct and circumstances and to overcome qualified immunity, even in the total absence of case law. (emphasis omitted)). A constitutional violation can be clearly

established without factually similar case law when "no reasonable officer could have believed that [the defendants'] actions were legal," Lee v. Ferraro, 284 F.3d 1188, 1199 (11th Cir. 2002), but this case plainly does not fall within that category and Carruth does not claim that it does.

It is Carruth's burden to establish that Byrne and Bentley are not entitled to qualified immunity and he has not met it. None of the cases cited by Carruth even involved the Takings Clause; rather, all of them were due process cases. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 536 (1985); Econ. Dev. Corp. of Dade Cty. v. Stierheim, 782 F.2d 952, 953 (11th Cir. 1986) (per curiam); Fowler v. Johnson, 961 So. 2d 122, 128 (Ala. 2006). Carruth's failure to meet his burden compels us to affirm the district court's dismissal of this claim. Bentley and Byrne are entitled to qualified immunity on this one too.

4.

As for his First Amendment retaliation claim, Carruth argues primarily that the district court erred in dismissing the claim on causation grounds. As we've noted already, we agree with the district court's causation analysis and in fact conclude that it requires dismissal of all of Carruth's § 1983 claims. But Carruth's retaliation claim has an additional flaw.

"To state a retaliation claim, the commonly accepted formulation requires that a plaintiff must establish first, that his speech or act was constitutionally

protected; second, that the defendant's retaliatory conduct adversely affected the [plaintiff]; and third, that there is a causal connection between the retaliatory actions and the adverse effect on speech." Bennett v. Hendrix, 423 F.3d 1247, 1250 (11th Cir. 2005). The parties do not dispute, for present purposes, whether Carruth engaged in protected conduct or whether the purported retaliatory action had an adverse effect that would deter "a person of ordinary firmness" from engaging in that conduct. See id. at 1253. The only question is whether Carruth has plausibly alleged a causal connection between Carruth's protected acts -- filing his first lawsuit in federal court and, more particularly, adding Governor Bentley as a defendant in August 2015 -- and the alleged retaliatory actions.

The problem is that the causal connection Carruth points to contradicts the bulk of the allegations in his complaint. For the purposes of this claim, Carruth asserts that the defendants terminated his employment as an act of retaliation for his 2015 lawsuit. He notes that the ACUA put Alabama One in conservatorship and terminated his employment the day after he added Governor Bentley as a defendant in that lawsuit. Carruth suggests that the temporal proximity between the events implies a causal relationship. But a heading in his complaint asserts, in sharp contrast, that "Conservatorship Was The Goal All Along For The Smyth Group And Their Co-Conspirators." Original Compl. ¶ 147. He also alleged that "[f]rom the beginning of the discussions between the Defendants and the Smyth

Group regarding putting improper regulatory pressure on Alabama One and Carruth, Smyth made no secret of his end-goal -- conserve the credit union [and] remove management." Id. (emphasis added). The over-arching narrative is that the defendants were part of a conspiracy dating back well before his 2015 lawsuit was filed.

Carruth lacks any plausible account of how conserving Alabama One and replacing its leadership was both Bentley and Byrne's ultimate goal for years and an act of retaliation for Carruth's protected activities in 2015. In his brief, he argues:

> While Carruth does allege that, as early as November 20, 2013, attorney Jay Smyth began first discussing with state officials the issue of conserving Alabama One, Carruth also alleges that the final nail in the coffin was when Carruth joined Appellee Bentley as a defendant in a federal lawsuit. It was not until this event happened that the Appellees made the decision to carry through with the "goal".

Reply Br. of Appellant 23. In other words, Carruth now says that Bentley and Byrne wanted to fire him all along, but they did not decide to actually do it until Carruth engaged in the protected conduct.

If we take all of the facts as alleged as true, however, the claim of retaliation is facially implausible. The thrust of his complaint is that there was an ongoing and longstanding conspiracy to put regulatory pressure on Alabama One that resulted in conservatorship and Carruth's termination. It is only in response to the defendants' argument on appeal that he asserts that the defendants didn't really

decide to conserve Alabama One until August 2017. There are no allegations in the complaint referring to discussions between the defendants and ACUA Administrator Moore around the time that Carruth amended his complaint to include Bentley as a defendant. He does not say or even suggest that after Carruth filed his lawsuit, Bentley and Byrne told Moore to pull the trigger. In fact, Carruth specifically alleged that "the decision to conserve Alabama One and terminate Carruth had been made and communicated well before the ACUA Board met in Montgomery on August 27, 2015" to make the formal decision. Original Compl. ¶ 144 (emphasis added). Apparently, Carruth now argues that "well before" means "the day before," immediately after the defendants learned that Bentley was being included as a defendant. We are unpersuaded.

Carruth offers no factual allegations to support the claim that the decision to place Alabama One into conservatorship and terminate his employment was made because of his protected activities, and the "obvious alternative explanation" is that the decision was made long before that date, since that is the story told by Carruth's complaint. See Iqbal, 556 U.S. at 682; see also Initial Br. of Appellant 15 (claiming that "remov[ing] Carruth . . . was the goal of the conspiracy"). Thus, this claim fails too because Carruth's complaint does not state a plausible causal connection between his protected activities and the defendants' acts of retaliation.

5.

Finally, we come to Carruth's conspiracy claim. As we see it, this one fails for two independent reasons. The district court dismissed it because he "made no argument as to why Defendants are not entitled to qualified immunity in regards to his conspiracy claim." He has still failed to offer any argument on this point. Again, it is his burden to show that the defendants are not entitled to qualified immunity, and he has not attempted to surmount it.

Moreover, "to sustain a conspiracy action under § 1983 . . . a plaintiff must show an underlying actual denial of its constitutional rights." GJR Invs., Inc. v. County of Escambia, 132 F.3d 1359, 1370 (11th Cir. 1998), abrogated on other grounds as recognized by Randall v. Scott, 610 F.3d 701, 709 (11th Cir. 2010). For the reasons set forth above, we do not think that Carruth has plausibly alleged the denial of any of his constitutional rights.

* * *

The long and short of it is that the district court did not err in dismissing Carruth's federal claims with prejudice.[3] Carruth has not plausibly alleged that

[3] Carruth also argues that the district court erred in dismissing his claims with prejudice and denying him leave to amend his complaint. But Carruth never moved to amend his complaint in district court. "A district court is not required to grant a plaintiff leave to amend his complaint sua sponte when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court." Wagner v. Daewoo Heavy Indus. Am. Corp., 314 F.3d 541, 542 (11th Cir. 2002) (en banc). Carruth -- who at all times was represented by counsel -- did not move to amend his complaint or suggest to the district court how he would do

Bentley and Byrne were the legal cause of his injuries. Nor has he otherwise plausibly alleged violations of his rights under the Equal Protection Clause, the Due Process Clause, the First Amendment, or the Takings Clause. He cannot overcome Bentley and Byrne's claims to qualified immunity. His § 1983 claims were properly dismissed by the district court.

AFFIRMED.

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so, and he has not even told us in his appellate briefs how he would attempt to cure his complaint. The district court did not abuse its discretion by declining to grant leave to amend sua sponte.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10541

D.C. Docket No. 8:17-cv-00618-SDM-MAP

CENTER FOR BIOLOGICAL DIVERSITY,
MANASOTA-88, INC.,
PEOPLE FOR PROTECTING PEACE RIVER, INC.,
SUNCOAST WATERKEEPER,

Plaintiffs - Appellants,

versus

U.S. ARMY CORPS OF ENGINEERS,
TODD T. SEMONITE,
Lt. Gen., in his official capacity as
Commanding General and Chief of Engineers
of the U.S. Army Corps of Engineers,
JASON A. KIRK,
Col., in his official capacity as
District Commander of the U.S. Army Corps of Engineers,
U.S. DEPARTMENT OF THE INTERIOR,
DAVID BERNHARDT,
in his official capacity as
Secretary of the U.S. Department of the Interior, et al.,

Defendants - Appellees,

MOSAIC FERTILIZER, LLC,

Intervenor-Defendant - Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(November 4, 2019)

Before ED CARNES, Chief Judge, and MARTIN and ROGERS,* Circuit Judges.

ROGERS, Circuit Judge:

Under the Clean Water Act, the Army Corps of Engineers regulates discharges into wetlands that are waters of the United States, and must consider the direct and indirect environmental effects of such discharges before issuing a permit to discharge. Mining for phosphate ore (used to make phosphoric acid that is in turn used to make fertilizer) produces dredged and fill material that Mosaic, a fertilizer manufacturer engaged in phosphate mining, seeks to discharge into such wetlands. The subsequent process of manufacturing fertilizer from the mined phosphate ore generates a radioactive byproduct, phosphogypsum. The primary question in this case is whether the Corps must take into account certain environmental effects of producing and storing phosphogypsum—distant in time

* Honorable John M. Rogers, United States Circuit Judge for the Sixth Circuit, sitting by designation.

and place from the wetland discharges accompanying the phosphate mining—merely because phosphogypsum is a byproduct of manufacturing fertilizer from the mined ore. While it is true that the Corps must consider indirect environmental effects, the Supreme Court has made clear that indirect effects must be proximate, and do not include effects that are insufficiently related to an agency's action. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004). In assessing this proximate cause limitation, the Corps may reasonably take into account the fact that the distantly caused effects in question are subject to independent regulatory schemes. *Id.* In granting the discharge permit in this case without addressing the environmental effects of phosphogypsum, the Corps relied in part on the fact that other agencies directly regulate these effects. Such reasoning in this case by the Corps was not arbitrary, capricious, or an abuse of discretion. Other bases asserted for rejecting the Corps' discharge permit also lack merit, and the district court accordingly properly upheld the Corps' permit.

I.

Mosaic wishes to extend its mining operations within the central Florida phosphate mining district. Mosaic must obtain mining permits from the Florida Department of Environmental Protection ("FDEP"), which, under authority delegated to it by the EPA, issues permits for phosphate mining in Florida, with conditions and requirements regarding pollutant discharge. *See* 33 U.S.C.

§§ 1311(a), 1342(a) (describing the National Pollutant Discharge Elimination System ("NPDES") permit program). In connection with these planned mining operations, Mosaic seeks to discharge dredged and fill material into waters of the United States. This activity is subject to regulation under the Clean Water Act, which prohibits the discharge of pollutants into the waters of the United States absent an appropriate permit. *See id.* § 1344(a). The Corps has regulatory authority over the applicable permit here, the Section 404 permit, to allow the discharge of dredged or fill material into navigable waters. *See id.* § 1344.

In 2010 and 2011, Mosaic sought four Section 404 permits under the Clean Water Act to carry out this discharge activity.[1] The Corps' issuance of a Section 404 permit counts as a major federal action, so the Corps was required to consider the environmental impact of issuing such a permit to Mosaic, which it did. As documented in its 500-page report, the Corps considered—among many other things—direct effects, such as how the discharge of dredged material into surrounding wetlands might affect the water quality of those wetlands. *See* 40 C.F.R. § 1508.8(a). The Corps also considered indirect effects, such as how that discharge might through stormwater runoff be carried to and affect the quality of distant waters. *Id.* § 1508.8(b).

[1] Mosaic's predecessor, CF Industries, applied for the permit at issue. Mosaic and CF later merged. We refer to the combined entity as Mosaic throughout for convenience.

Because the Corps' action constitutes a major federal action, the Corps must also comply with the National Environmental Policy Act ("NEPA"). NEPA requires federal agencies to "take a 'hard look' at the potential environmental consequences of their actions." *Ohio Valley Envt'l Coal v. Aracoma Coal Co.*, 556 F.3d 177, 191 (4th Cir. 2009) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)). Under NEPA, agencies are required to produce environmental-impact statements that account for the direct, indirect, and cumulative effects of major proposed actions. Direct effects are "caused by the action and occur at the same time and place"; indirect effects "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8. By "reasonably foreseeable," the regulations mean effects that are "sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision." *See EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016) (quoting *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016)).

The Corps determined that Mosaic's four mining-related projects had similarities that provided a basis for evaluating their environmental consequences together in one area-wide environmental-impact statement. The area-wide environmental-impact statement served as the project-specific NEPA analysis for each of the four permit applications. In 2016, the Corps published a draft Section

404 analysis and public-interest review for one of the proposed projects, the South Pasture Mine Extension. In doing so, the Corps also prepared a supplemental environmental assessment focusing on the South Pasture Mine Extension, to be read in conjunction with the area-wide environmental-impact statement for purposes of NEPA. In connection with the proposed Section 404 permit for the South Pasture Mine Extension, the Corps formally consulted with the Fish and Wildlife Service to obtain a biological opinion analyzing the potential effects that the mine extension would have on certain species. Ultimately, in November 2016, the Corps issued Mosaic a Section 404 permit for the South Pasture Mine Extension.

Accordingly, Mosaic will be able to discharge dredged and fill material into the waters of the United States in connection with mining phosphate at the South Pasture Mine Extension for subsequent use in fertilizer production. Phosphate mining is a form of strip mining. After excavating the sand, clay, and phosphate ore from the site, Mosaic engages in a beneficiation process to separate the sand and clay from the valuable phosphate ore. The phosphate ore is then transported to Mosaic's fertilizer plants for processing into phosphoric acid. Phosphoric acid in turn is used to produce fertilizer. But the process of producing phosphoric acid generates waste in the form of phosphogypsum, a radioactive byproduct. Approximately five tons of phosphogypsum waste is created for every ton of

useful phosphoric acid produced, for a total of over 30 million tons generated each year. Because phosphogypsum contains radioactive uranium and other metals that the EPA considers to pose a risk to humans and the environment, it must be stored and left to "weather" (reduce in radioactivity) in large open-air "stacks" that are hundreds of acres wide and hundreds of feet tall. The Corps determined that the environmental effects of phosphogypsum production and storage fell outside the scope of its NEPA review. This led Bio Diversity to file suit.

Bio Diversity's complaint raises several claims under the Administrative Procedure Act ("APA"), NEPA, and the Endangered Species Act. The Corps moved for and was granted summary judgment. The district court found that there was nothing arbitrary and capricious about the Corps' determination that phosphogypsum stacks fell outside the scope of its NEPA analysis. Rather, the district court found that the Corps rationally treated fertilizer plants and their phosphogypsum waste as independent from the mining activities authorized by the Section 404 permit. The district court also approved the Corps' decision to analyze all four closely related projects in a single area-wide environmental-impact statement for NEPA purposes. Finally, the court rejected Bio Diversity's claim under the Endangered Species Act that the Corps was required to consult with the Fish and Wildlife Service before finalizing the area-wide environmental-impact statement. Bio Diversity appeals.

II.

As the district court properly determined, it was reasonable for the Corps to conclude that the environmental effects of phosphogypsum production and storage fell outside the scope of its NEPA review. NEPA and its regulations require agencies to consider only those effects caused by the agency's action, but phosphogypsum-related effects are caused by the Corps' Section 404 permit in only the most attenuated sense. In traditional legal terms, even if the Corps' permit is a but-for cause of those effects, it is not a proximate—or legally relevant—cause. Moreover, because the Corps lacks the authority to regulate phosphogypsum wholesale, the "rule of reason" instructs that the Corps need not consider its effects. Finally, the Corps' scoping decision is consistent with its own regulations, the Corps' interpretation of which is entitled to deference.

NEPA requires agencies to consider the "environmental impact of the proposed action." 42 U.S.C. § 4332(C)(i). Here, the Corps' action is the issuance of a Section 404 permit authorizing the discharge of dredged and fill material into United States waters. The Corps did not issue a mining permit, nor a permit to produce fertilizer or to store phosphogypsum—it has no jurisdiction to regulate or authorize any of that. Having defined the federal action, "[t]o determine whether [NEPA] requires consideration of a particular effect, [the court] must look at the relationship between that effect and the change in the physical environment caused

by the major federal action at issue." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773 (1983). Only the effects caused by that change in the environment—here, the discharge into U.S. waters—is relevant under NEPA.

Phosphogypsum-related effects are, at most, tenuously caused by the discharge of dredged and fill material allowed by the Corps' permit. Phosphogypsum is a byproduct not of dredging and filling—nor even of phosphate mining or beneficiation—but of fertilizer production. Further, the fertilizer production takes place far from and long after the Corps-permitted discharges. Further still, the EPA and the FDEP—not the Corps—directly regulate fertilizer plants and phosphogypsum, including the "design, construction, operation, and maintenance of phosphogypsum stack systems." *See* 42 U.S.C. § 6901 *et seq*. Mosaic's fertilizer production will add to existing gypstacks, as they are called, but will not result in any new stacks. Even the nearest fertilizer plants and gypstacks to the South Pasture Mine Extension receive phosphate rock from many different sources outside of the Corps' jurisdiction. That means that gypstacks and the effects of phosphogypsum will continue to exist so long as, and to the extent that, Florida and the EPA allow—regardless of the Corps' permitting decision.

Bio Diversity focuses on what it deems a but-for causal relationship between the Corps' permit and the production of phosphogypsum. That relationship focuses on the fact that Mosaic's fertilizer plants, which produce phosphogypsum,

receive phosphate ore from local mines the company also owns. Bio Diversity therefore contends that "but for" the Corps' Section 404 permit, phosphogypsum's environmental effects would be diminished because Mosaic would not be able to obtain as much phosphate, thereby reducing its fertilizer (and phosphogypsum byproduct) production, if it could not discharge dredged and fill material into U.S. waters, which necessarily accompanies Mosaic's phosphate mining here. But the happenstance that Mosaic is the company mining the phosphate and discharging dredged and fill material into U.S. waters, and also the company running the fertilizer plant that produces phosphogypsum, does not change the fact that these events are insufficiently related to one another. NEPA does not stretch this far.

NEPA does not cover all "effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation." *Metro. Edison Co.*, 460 U.S. at 774. Instead, NEPA requires a "reasonably close causal relationship between a change in the physical environment and the effect at issue," akin to the "familiar doctrine of proximate cause." *See id.* Agencies and courts must "look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Id.* at 774 n.7. The Corps reasonably determined that its Section 404 permit is not a proximate cause of attenuated phosphogypsum-related

effects, and the competing line suggested by Bio Diversity is anything but manageable.

Whatever causal relationship exists between the Corps-approved discharges and the effects of phosphogypsum, it is not a reasonably close one. Phosphogypsum is created and stored miles from the authorized discharges. In addition, phosphogypsum will only be created so long as Mosaic continues to operate in the fertilizer industry, the market continues to demand fertilizer with phosphoric acid, and phosphogypsum's regulators continue to permit its creation and storage throughout Florida. Intervening events such as these ordinarily break the causal chain.

Given this tenuous causal chain, it was sensible for the Corps to draw the line at the reaches of its own jurisdiction, leaving the effects of phosphogypsum to phosphogypsum's regulators. The Corps' line respects the jurisdictional boundaries set by Congress and inherent in state–federal cooperation. The Clean Water Act empowers the Corps to grant Section 404 permits to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by regulating "the discharge of pollutants into the navigable waters." 33 U.S.C. § 1251(a)(1). No federal law empowers the Corps to protect the environment writ large or to regulate phosphate mining as such, much less fertilizer production or phosphogypsum stacking. Whatever federal regulatory powers there are over

phosphogypsum-related effects, Congress granted to the EPA, leaving the bulk of control over phosphate mining and fertilizer production to the states. *See* 42 U.S.C. § 6901 *et seq*. Requiring the Corps to enter those regulatory spheres not only offends congressional design but risks duplicative, incongruous, and unwise regulation. Because the Corps does not generally regulate phosphogypsum, it has no subject-matter expertise in that area.

"The scope of the agency's inquiries must remain manageable if NEPA's goal of 'ensur[ing] a fully informed and well considered decision' is to be accomplished." *Metro. Edison Co.*, 460 U.S. at 776 (quoting *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978)). Far from manageable, the new inquiries required of the Corps would bog down agency action in the name of duplicative and potentially incoherent regulation.

The Corps' decision not to consider phosphogypsum-related effects is fully justified by the rule of reason announced in *Public Citizen*. 541 U.S. at 767. The rule of reason "ensures that agencies determine whether and to what extent to prepare an [environmental-impact statement] based on the usefulness of any new potential information to the decisionmaking process." *Id.* Thus, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Id.* at 770.

The Corps has no categorical statutory authority under the Clean Water Act to prevent phosphogypsum-related effects apart from the possibility that they are direct, indirect, or cumulative effects of the discharges into U.S. waters. This supports the Corps' decision not to consider those effects. Section 404 of that Act authorizes the Corps to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). That section further authorizes the Corps to reject such a permit "whenever [it] determines . . . that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." *Id.* § 1344(c). The Corps has no categorical power to refuse a permit for any other reason, such as its dislike of the applicant's business or downstream effects not sufficiently caused by "the discharge of such materials." The Corps accordingly properly relied upon the fact that phosphogypsum-related effects are primarily regulated by other agencies in its determination not to consider those effects, and did so without violating NEPA.

This makes good sense in light of the existing regulatory landscape over phosphogypsum. Mosaic and others already produce fertilizer in Florida, and gypstacks will exist in Florida regardless of the Corps' actions. Thus, current and future phosphogypsum will cause environmental effects with or without the Corps'

permit—subject only to regulation by Florida and the EPA. On the flip side, Florida or the EPA could regulate those gypstacks out of existence even if the Corps were to grant Mosaic its Section 404 permit. Requiring the Corps to consider the effects of phosphogypsum is not reasonable when it is independent of the regulators more directly responsible for evaluating those effects.

Further, that the Corps could indirectly mitigate future phosphogypsum-related effects by conditioning the supply of phosphate ore does not mean the Corps must consider wielding its regulatory powers with that ulterior motive in mind. The rule of reason turns, at least in part, on the agency's statutory authority, not on what outcomes an agency might achieve through indirect coercion. If the Corps were required to consider all effects that it might indirectly police—even those far from its proper sphere of regulatory authority—its NEPA review would have to account for every conceivable environmental effect of fertilizer's use. It is foreseeable, for instance, that farmers will use Mosaic's fertilizer to treat their crops and that some fertilizer will be carried by stormwater runoff into sewers and streams. Extending Bio Diversity's logic, because the Corps could indirectly mitigate those effects by denying Mosaic its Section 404 permit and thereby choking its fertilizer plants of phosphate, the Corps must consider the environmental effects of crop fertilization. That cannot be right.

Public Citizen flatly held that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." 541 U.S. at 770. There, an agency within the Department of Transportation was tasked with setting federal safety standards and registration requirements for Mexican-domiciled commercial vehicles operating in the United States. *See id.* at 758–59. In earlier years, Congress had enacted a moratorium on the agency's registration of Mexican-domiciled motor carriers. Eventually, Congress and the President agreed to lift the moratorium—but only after the agency promulgated new safety and registration rules. *See id.* at 760. In the course of that rulemaking, the agency conducted a NEPA analysis of the environmental effects of its proposed rules, such as the effects on air quality caused by the increased number of roadside inspections its new rules would bring about. *See id.* at 761. An environmental group sued, contending that the agency was required to consider the environmental effects of the increased number of Mexican-domiciled motor carriers operating within the U.S. because of the lifting of the moratorium. That was necessary, according to the environmental group, because the agency's rulemaking was a but-for cause of the lifting of the moratorium. *See id.* at 765–66.

Despite this "but for" relationship between the agency's rulemaking and the lifting of the moratorium, the Supreme Court held that NEPA did not require the

agency to consider effects that it "ha[d] no ability categorically to prevent." *See id.* at 768. That followed because the rule of reason recognizes that it is pointless to require agencies to consider information they have no power to act on, or effects they have no power to prevent. In *Public Citizen*, the agency had the statutory authority only to promulgate safety and regulation standards—not to keep the moratorium in place or modify its lifting, which only Congress and the President could do.

That rule applies in much the same way here. The Corps has no ability categorically to prevent fertilizer production or the creation and storage of phosphogypsum. As in *Public Citizen*, it is irrelevant that the Corps' action is, in an attenuated way, a but-for cause of phosphogypsum production, because Florida and the EPA have primary authority to regulate or prevent phosphogypsum's creation and storage. Thus, here too it would be pointless to require the Corps to gather and examine information regarding effects that it has no authority to prevent.

It is true that the agency in *Public Citizen* had no discretion to refuse registration (absent the moratorium) to a motor carrier that complied with its regulations. But that is beside the point. Individual registration was not at issue; rulemaking was, and the agency did have discretion to set safety and registration standards. The Supreme Court rejected the idea that the agency could indirectly

mitigate the environmental effects of lifting the moratorium by (i) not promulgating any new rules or (ii) setting burdensome standards so that fewer motor carriers could meet them and operate in the U.S. *See id.* at 765–68. The Court held that it was not enough that the agency could, in fact, mitigate those effects, when the agency was not statutorily authorized to base its decision on those ancillary effects. *See id.* The same is true here: The Corps could, in fact, mitigate the effects of phosphogypsum by rejecting the Section 404 permit and choking off Mosaic's supply of phosphate ore. But the Corps is not statutorily authorized to base its permitting decision on environmental effects that are so indirectly caused by its action.

The Corps could conceivably hinge its permitting decision on the effects of phosphogypsum, but only by ignoring the Clean Water Act's text and misapplying its implementing regulations. The Clean Water Act does not give the Corps the discretion to deny a Section 404 permit for any reason of its choosing. Although the first subsection of § 1344 says the Corps "may issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites," 33 U.S.C. § 1344(a), the Act also provides that the Corps

> is authorized to deny or restrict the use of any defined area for specification . . . as a disposal site [i.e., deny a permit], whenever [it] determines . . . that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

Id. § 1344(c). Read together, those provisions limit the Corps' discretion to grant or issue permits. The Corps may not deny a permit for any reason under the sun—including its distaste for later conduct the applicant will engage in—but only if the allowed *discharge* will directly, indirectly, or cumulatively have an unacceptable environmental effect. And the scope of that analysis is bounded by proximate cause and the rule of reason. Because the Corps cannot deny a permit because of phosphogypsum effects, which are beyond the scope of § 1344(c), the Corps was not required to consider those effects. *See Pub. Citizen*, 541 U.S. at 767–68. Thus, as in *Public Citizen*, the Corps' Section 404 permit for the discharge of dredged material is not a proximate cause of the effects of Mosaic's fertilizer production, and such effects need not be considered under NEPA.

The same is true under the Clean Water Act's implementing regulations. Those regulations require the Corps to conduct a public-interest review before granting a permit, but that obligation is not an authorization to deny a permit based on the environmental impacts of non-agency action. In the first place, regulations cannot contradict their animating statutes or manufacture additional agency power. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125–26 (2000); *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129, 134–35 (1936). Because the statute authorizes the Corps to deny a permit only if the discharge itself will have an unacceptable environmental impact, the

regulations cannot empower the Corps to deny permits for any other reason—including downstream phosphogypsum-related effects of fertilizer production.

The regulations also focus the Corps' review on the effects of its action. The regulations provide that "[t]he decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, *of the proposed activity and its intended use* on the public interest." 33 C.F.R. § 320.4(a)(1) (emphasis added). Again, the "proposed activity" is the proposed federal action that triggers NEPA—here, the issuance of the discharge permit. Obligating the Corps to consider whether the discharge of dredged and fill material is in the public interest, is not the same as authorizing the Corps to consider whether fertilizer production and its consequences are in the public interest.

To take an alternative, unbounded view of the public-interest review would be to appoint the Corps de facto environmental-policy czar. Rather than consider whether the Corps' own action is in the public interest, that broader view would have the Corps consider whether fertilizer production and use is really worth the cost. And that could be just the beginning. The next time the Corps is asked to approve a section of a gas pipeline running through a wetland, would the Corps be required to consider whether the country's reliance on fossil fuels is really in the public interest?

The D.C. Circuit's outlier opinion in *Sabal Trail* provides little support for Bio Diversity's argument. *See Sierra Club v. FERC* (*Sabal Trail*), 867 F.3d 1357 (D.C. Cir. 2017). There, FERC authorized the construction and operation of a pipeline network that would feed gas directly to power plants that would burn the gas. *See id.* at 1363. The Sierra Club sued and argued that FERC failed to consider the greenhouse-gas effects of burning that gas at the power plants. The D.C. Circuit, over a powerful dissent, held that FERC was required to consider those downstream environmental effects.

Sabal Trail is both questionable and distinguishable. First, the causal relationship between the agency action and the putative downstream effect was much closer there than it is here. FERC authorized a pipeline that would pump gas directly into a power plant to be burned, causing greenhouse-gas emissions. The Corps, on the other hand, approved only the discharge of dredged and fill material—one small piece of Mosaic's mining operations, which extracts a sand, clay, and phosphate ore mixture, which is supplied to beneficiation plants where the phosphate ore is separated out, which is then transported to fertilizer plants to make phosphoric acid, which results in phosphogypsyum byproduct, and the phosphoric acid is used to produce fertilizer. The phosphogypsum produced as a byproduct when phosphate ore is processed into phosphoric acid is only then stored around the state of Florida and liable to produce environmental effects.

That articulated causal chain bears little resemblance to the two-link version in *Sabal Trail*.

Second, the scope of the agency's statutory authority in *Sabal Trail* was much broader than the Corps' here, and the rule of reason hinges, in any given case, on the scope of the agency's statutory authority because an agency need not consider an effect it has no statutory authority to prevent. *See Pub. Citizen*, 541 U.S. at 770. In *Sabal Trail*, FERC was statutorily empowered to deny a pipeline certificate on the ground that its construction and operation "is [not] required by the present or future public convenience and necessity." *See* 15 U.S.C. § 717f(e). The *Sabal Trail* court understood that to mean "FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment." *See Sabal Trail*, 867 F.3d at 1373. But here, as discussed, the Corps has no broad statutory authority to deny a discharge permit based on the public convenience and necessity of the operation of Mosaic's fertilizer plants. *See* 33 U.S.C. § 1344(c).

Third, *Sabal Trail* is at odds with earlier D.C. Circuit cases correctly holding that "the occurrence of a downstream environmental effect, contingent upon the issuance of a license from another agency with the sole authority to authorize the source of those downstream effects, cannot be attributed to the [agency]; its actions 'cannot be considered a legally relevant cause of the effect for NEPA purposes.'"

Sabal Trail, 867 F.3d at 1381 (Brown, J., concurring in part and dissenting in part) (quoting *Sierra Club v. FERC* (*Freeport*), 827 F.3d 36, 47 (D.C. Cir. 2016) and citing *Sierra Club v. FERC* (*Sabine Pass*), 827 F.3d 59, 68 (D.C. Cir. 2016) and *EarthReports, Inc. v. FERC*, 828 F.3d 949, 952 (D.C. Cir. 2016)).

Fourth, the legal analysis in *Sabal Trail* is questionable at best. It fails to take seriously the rule of reason announced in *Public Citizen* or to account for the untenable consequences of its decision. The *Sabal Trail* court narrowly focused on the reasonable foreseeability of the downstream effects, as understood colloquially, while breezing past other statutory limits and precedents—such as *Metropolitan* and *Public Citizen*—clarifying what effects are cognizable under NEPA. *See id.* at 1380–81.

Under the rule of reason, agencies are not required to consider effects that they lack the statutory authority categorically to prevent. Here, the Corps lacks the authority categorically to prevent the effects of downstream fertilizer production, including those from phosphogypsum's creation and storage. Thus, the Corps acted reasonably in deciding not to consider those effects.

Finally, the Corps' decision is consistent also with the Corps' own regulations. At the very least, the regulations are ambiguous as to their exact application in this case. That means we are in the heartland of *Auer* deference: where "the law runs out, and policy-laden choice is what is left over." *See Kisor v.*

Wilkie, 139 S. Ct. 2400, 2415 (2019). Because the Corps tailored its analysis according to a reasonable interpretation of its own regulations and its own substantive expertise, the Corps' interpretation should be deferred to. *See id.* at 2414–18; *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *see also Aracoma*, 556 F.3d at 177.

The Corps' regulations anticipate that a permit applicant "may propose to conduct a specific activity requiring a [Corps permit] (e.g., construction of a pier in a navigable water of the United States) which is merely one component of a larger project (e.g., construction of an oil refinery on an upland area)." 33 C.F.R. pt. 325, app. B § 7(b)(1). That is what happened here: Mosaic proposed to discharge dredged and fill material into U.S. waters as merely one component of its larger mining operation. In those circumstances, the regulations provide that the Corps "should establish the scope of the NEPA document (e.g., the [Environmental Assessment] or [Environmental Impact Statement]) to address the *impacts of the specific activity requiring a [Corps] permit* and those portions of the entire project over which the [Corps] has sufficient control and responsibility to warrant Federal review." *See id.* (emphasis added). If that guidance were not clear enough, the statement accompanying the regulation is: "The Corps authorizes the discharge of dredged or fill material in 404 permits. Therefore, the activity the Corps studies in its NEPA document is the discharge of dredged or fill material." *Environmental*

Quality Procedures for Implementing the National Environmental Policy Act (NEPA), 53 Fed. Reg. 3120, 3121 (Feb. 3, 1988). The Corps was required to study more only if it had "sufficient control and responsibility" over those other effects.

It was not arbitrary and capricious for the Corps to conclude that it did not have "sufficient control and responsibility" over Mosaic's downstream fertilizer production. Those plants already exist; they are not a part of Mosaic's proposed mining expansion. The plants and gypstacks are many miles away from where Mosaic would discharge into U.S. waters. Moreover, two other regulators—one state, one federal—have express control and responsibility over fertilizer production and phosphogypsum.

The hypotheticals included in the regulations squarely support the Corps' determination. For example, when a power plant is proposed to be built and the Corps' only involvement is to approve a connecting pipeline or road through U.S. waters, that permit "normally would not constitute sufficient" control and responsibility to expand the Corps' NEPA analysis to cover the portions of the facility outside its jurisdictional waters. *See* 33 C.F.R. pt. 325, app. B § 7(b)(3). The reasonableness of the Corps' decision here follows *a fortiori* from there. In that hypothetical, the Corps approved a pipeline or road that ran directly to the proposed power plant. Despite that close connection, the regulations did not extend control over the facility. Here, the relationship is nowhere near that close.

The scope of the benefit of a project cannot, moreover, always define the scope of the agency's consideration. It is true that, under the regulations, "the scope of analysis used for analyzing both impacts and alternatives should be the same scope of analysis used for analyzing the benefits of a proposal." *See id.* § 7(b)(3). But this cannot mean that whenever an agency determination will help the local economy, for instance, it is required to consider whether the proposed activity may put some other employers out of business. Here, the argument is that the Corps violated § 7(b)(3) by including in its report that one "substantial indirect effect of the mining" is the "export of finished phosphate products and fertilizer through the Port of Tampa each year." The Corps was not, however, trying to have its cake and eat it too—it properly balanced the benefits of the project against its detriments. In doing so, it recognized that the overall project purpose was the extraction of phosphate ore within a practicable distance of Mosaic's beneficiation plants. It makes no sense to expand the required scope of the Corps' environmental consideration merely because the Corps explained why phosphate ore is mined in the first place—largely to be converted into phosphoric acid and used in fertilizer.

The obvious purpose of § 7(b)(3) is to prevent the Corps from unfairly carving a project (over which it has control) into thin slices and then balancing the benefits of the overall project against the watered-down environmental impacts of

each individual slice—in order to avoid a true study of the overall impacts. *Florida Wildlife Federation v. U.S. Army Corps of Engineers* shows how this works in action. 401 F. Supp. 2d 1298 (S.D. Fla. 2005). There, Palm Beach County made plans to build a research park, the development of which would require discharges into U.S. waters. The County applied for a Section 404 permit, but only in relation to one subdivision of the research park; it asked the Corps to evaluate that one subdivision independently from the much larger planned development, which would also require Section 404 permits. *See id.* at 1305. The Corps acquiesced and considered the environmental impacts of the subdivision alone. Yet, it balanced those minor negative impacts against the great benefits of the entire planned research park. *See id.* at 1332–33. By stacking the deck in that way, the Corps was able to justify, on paper, its conclusion that the permit would have no significant impact and thus avoid having to prepare an environmental-impact statement at all. Following the admonition in the regulations, the court held that it was not proper to use a narrower scope for the effects analysis than for the benefits analysis. That case illustrates the import of § 7(b)(3), but this case is nothing like that one. Eschewing an evaluation of the effects of building a house by evaluating each piece of lumber one at a time is obviously different from evaluating the effects proximately caused by that construction without following the chain of causation to the ends of the earth.

In contrast, the regulations provide, by way of an example, that when the Corps approves only a portion of a pipeline feeding gas to a power plant, the Corps is generally not required to consider the impacts of the power plant's operation. *See* 33 C.F.R. pt. 325, app. B § 7(b)(3). But that conclusion cannot logically depend on the Corps' never mentioning in its impact statement that the pipeline's purpose is to feed gas to the power plant. If that were correct, how would the Corps explain the project or consider its public benefit without having to consider all manner of downstream effects way beyond the reasonable scope of required consideration?

At bottom, the Corps followed its own regulations in determining the scope of the NEPA analysis as it did. The Corps' reasonable interpretation should be deferred to. *See Kisor*, 139 S. Ct. at 2414–18.

Our sister circuits have ruled similarly. *See Aracoma*, 556 F.3d at 177; *Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698 (6th Cir. 2014). In these cases, the Corps approved Section 404 permits in connection with mining operations. In each, an environmental group argued that the Corps failed to take account of the downstream environmental effects of mining. In each, the court held that NEPA did not require consideration of those effects.

In *Aracoma*, the Fourth Circuit appreciated both that "obtaining a § 404 permit is a 'small but necessary' component of the overall upland [mining] project," and that this fact alone did not give the Corps control and responsibility over the entire mining project. *See Aracoma*, 556 F.3d at 195. Looking to *Public Citizen*, and the state's regulation of coal mining, the court held that "under the plain language of the [Corps'] regulation, activity beyond the filling of jurisdictional waters is not within the Corps' 'control and responsibility' because upland environmental effects are 'not essentially a product of Corps action.'" *Id.* at 196–97 (citing 33 C.F.R. pt. 325, app. B § 7(b)(2) (2008)). The court added that, even were it to credit the environmental group's arguments, it "must still deem the regulation 'ambiguous,' and the Corps' interpretation would be entitled to deference." *See id.* at 197.

In *Kentuckians*, the Sixth Circuit applied more or less the same analysis in holding that the Corps was not required "to expand the scope of its review beyond the effects of the filling and dredging activity to the effects of the entire surface mining operation as a whole." *See* 746 F.3d at 707. Again, the court held that the Corps' determination was a reasonable interpretation of those regulations and entitled to deference. *See id.* at 707–08, 714. It added that the Corps' interpretation and determination "effectuated in practice" the principles underlying

the proximate-cause doctrine and rule of reason announced in *Metropolitan* and *Public Citizen*. *See id.* at 710.

These cases are not different merely because they dealt with coal mining rather than phosphate mining. Although it is true that Congress fleshed out in more detail the balance between federal and state regulatory control over coal mining, that same balance functionally exists in the context of phosphate mining. Florida has authority over phosphate mining, and the Corps has authority only over U.S. waters. *Public Citizen* and the Corps' regulations focus on the Corps' authority; that authority is the same here as it was in *Aracoma* and *Kentuckians*.

In short, requiring an analysis of the environmental effects of gypstacks in the context of this case expands NEPA's environmental consideration in an unwieldy and indefensible way. Taken to its logical conclusion, that view would expand consideration of the effects of dredging certain wetlands to require study of the environmental effects of far-flung activity like the use of fertilization in commercial farming.

III.

The Corps otherwise complied with NEPA by issuing an area-wide environmental-impact statement, which served as the mine-specific impact statement for each of the four proposed mine sites, and following that up with a supplemental environmental assessment of the South Pasture Mine Extension,

before issuing the Section 404 permit related to that mine in a record of decision. Bio Diversity claims that this process skirted NEPA's implementing regulations and that the Corps was required to publish an additional impact statement for the South Pasture Mine Extension because of alleged new circumstances. Those claims are without merit.

Agencies have broad discretion to determine "how best to handle related, yet discrete, issues in terms of procedures and priorities." *Grunewald v. Jarvis*, 776 F.3d 893, 905 (D.C. Cir. 2015). The NEPA regulations specifically allow—indeed, encourage—agencies to consider "[s]imilar actions" together in one environmental-impact statement where the actions "have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography." 40 C.F.R § 1508.25(a)(3). The Corps here determined that the four proposed mining-related projects were "similar in geographic coverage, the periods of proposed activity, alternatives, and impacts." Thus, it was reasonable for the Corps to conclude that "[t]hese shared characteristics provide an additional basis for evaluating their environmental consequences in a single comprehensive [area-wide] EIS [environmental-impact statement]."

As Bio Diversity agrees, after the Corps prepared an impact statement to evaluate the environmental impacts of issuing the permit, it was required to publish a record of its decision, at the time of its decision. 33 C.F.R. § 230.14; 40 C.F.R.

§ 1505.2. The Corps did not err by preparing in the interim a supplemental environmental assessment specific to the South Pasture Mine Extension to assist with its permit decision and confirm that its area-wide impact statement was not outdated. The NEPA regulations expressly allow for a "broad environmental impact statement" followed by a "subsequent statement or environmental assessment," which need only summarize and incorporate those earlier discussions by reference. *See* 40 C.F.R. § 1502.20. Indeed, Bio Diversity concedes that the Corps may undertake a "tiered" process, in which case "it must follow the broader—here 'area wide'—EIS [environmental-impact statement] with a subsequent site-specific review that at a minimum ensures the agency address all relevant matters not considered in a previous EIS, and analyzes and substantively considers new or changed circumstances that bear on the proposed action or its impacts." That is precisely what the Corps did here.

Bio Diversity argues also that—even if procedurally proper—the supplemental environmental assessment was substantively insufficient because it (1) did not analyze substantial changes or significant new circumstances that arose after the Corps finalized the area-wide impact statement, (2) identified impacts in the area-wide impact statement which were left for but never analyzed in the supplemental assessment, and (3) never analyzed the impacts of digging out 409 acres of the Payne Creek watershed.

As to the purported new circumstances that went unanalyzed between the area-wide impact statement and the supplemental assessment, Bio Diversity points to: (i) changes in ownership of the mine, (ii) revisions to the project design and permit application, (iii) changes to the timing and duration of the mining plan, and (iv) changes to the compensatory mitigation plan. NEPA requires that an impact statement be supplemented if "(i) [t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R § 1502.9. Read in light of the "rule of reason," additional information need only be accounted for if the information would have been useful to the agency's decisionmaking process. *See Pub. Citizen*, 541 U.S. at 767. That is to say, the Corps "need not supplement an EIS [environmental-impact statement] every time new information comes to light after the EIS is finalized," as doing so "would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." *See Marsh v. Or. Nat'l. Res. Council*, 490 U.S. 360, 373 (1989).

None of the purportedly changed circumstances is significant or would otherwise affect the Corps' decisionmaking process.

Ownership. The Corps persuasively argues that Mosaic's acquisition of CF Industries' Florida phosphate operations is of no significance to the environmental impacts of the project, because any owner must comply with the same terms of the permit. The Corps directly acknowledged the change of ownership in the supplemental assessment and explained that it "did not change the basic or overall purposes for [the] project."

Timing. Bio Diversity claims that inconsistencies in the stated timing of the project between the area-wide statement and supplemental assessment require additional analysis. But, as the Corps explains, there is no material inconsistency. In the area-wide statement, the Corps estimated that mining would take place over thirteen years; whereas, in the supplemental assessment it approximated fourteen years. Bio Diversity has not explained how these slightly different estimates have any bearing on the Corps' NEPA analysis.

Revisions to Application. The only significant revisions to the permit applications that Bio Diversity identifies support, rather than undermine, the Corps' decision to prepare a supplemental assessment rather than an entirely new impact statement. The changes resulted in *less* extensive environmental impacts than originally envisioned. An agency is generally not required to conduct a new environmental analysis when changes result in less harmful environmental effects than originally anticipated. *See Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1360

(11th Cir. 2008). In any event, the Corps considered the changes and invited public comment before issuing its supplemental assessment.

Mitigation Plan. Without offering any specific criticism, Bio Diversity claims that a supplemental statement was required because of significant changes to the compensatory mitigation plan. But, as the Corps explains, the area-wide statement contemplated changes to the mitigation plan for each specific mine, based on review and modification of the applicants' suggested plans in coordination with the EPA. Because these plans are necessarily site-specific, it was reasonable for the Corps to verify and set out the final mitigation plan in the record of decision specific to the South Pasture Mine Extension.

Second, Bio Diversity argues that the Corps failed to meaningfully discuss its mitigation analysis, but Bio Diversity fails to provide support for that assertion. The area-wide statement includes an entire chapter on mitigation, and the Corps is entitled to rely on its own expertise in drawing conclusions within its wheelhouse. Bio Diversity cannot prove an actionable claim under NEPA and the APA by asserting baldly that the Corps' analysis was not meaningful.

Third, Bio Diversity argues that the Corps failed to analyze the effects of mining 409 acres within the Payne Creek watershed. But the Corps expressly relied on its expertise in determining that, given Payne Creek's size and history, "mining this relatively small percentage of the overall subwatershed would [not]

have a measurable additional effect on flows within the subwatershed." As Bio Diversity concedes, only significant effects of a proposed action need be analyzed. Thus, Bio Diversity fails to show that the Corps acted arbitrarily and capriciously in determining that mining within the Payne Creek would have little if any measurable effect and need not be analyzed further.

IV.

Finally, the Corps did not violate § 7(a)(2) of the Endangered Species Act, which requires each agency to consult with the Fish and Wildlife Service before taking an "action" to ensure that such action is not likely to jeopardize the continued existence of any endangered species or its habitat. *See* 16 U.S.C. § 1536(a)(2). The term "action" means "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," including the granting of permits or causing indirect modifications to land. *See* 50 C.F.R. § 402.02. Bio Diversity does not dispute that the Corps consulted with the Service and obtained a biological opinion concerning its decision to issue a Section 404 permit for the South Pasture Mine Extension. Rather, Bio Diversity argues that completing the area-wide environmental-impact statement constituted an "agency action"—separate from the permitting decision—that required its own formal consultation under the Act.

The Corps' area-wide statement did not, however, constitute an "agency action" that required consultation with the Service independent of the Corps' later issuance of the Section 404 permit. An impact statement is the culmination of an agency's NEPA analysis, which is performed in furtherance of some other agency action, here the issuance of a permit. It makes no sense to say the NEPA analysis constitutes an agency action separate and apart from the action that triggers that review in the first place.

Bio Diversity's attempts to characterize the area-wide impact statement as a programmatic agency action are not persuasive. To be sure, an agency's establishment of a program, which binds, funds, or directs subsequent action may constitute an "agency action." For instance, in *Florida Key Deer v. Paulison*, this court held that the Federal Emergency Management Agency's administration of the National Flood Insurance Program was an agency action that triggered § 7(a)(2) review because it set a framework that would direct future land management decisions and thus "effectively authoriz[ed] . . . development that pushed the Key deer to the brink of extinction." 522 F.3d 1133, 1139 (11th Cir. 2008). Similarly, in *Cottonwood* the Ninth Circuit held that the Forest Service's promulgation of standards for permitting activities that could adversely affect Canada lynx qualified as an agency action under the Endangered Species Act. *See Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1085 (9th Cir.

2015). These cases, and the others cited by Bio Diversity, hold that setting guidelines to direct or cabin future agency action may constitute a programmatic action that triggers consultation under § 7(a)(2).

But the area-wide impact here did nothing of the sort—it did not direct or authorize the Corps' substantive decision to issue the Section 404 permit under the Clean Water Act or otherwise bind the agency to take any future action. It merely disclosed the Corps' environmental analysis of four proposed permitting actions (each one of which would require its own § 7(a)(2) consultation). Thus, the Corps' area-wide environmental-impact statement did not constitute an "agency action" that required consultation under § 7(a)(2) of the Endangered Species Act.

V.

For these reasons, the judgment of the district court is affirmed.

MARTIN, Circuit Judge, concurring in part and dissenting in part:

Piles of a radioactive waste product called phosphogypsum lie across 3,200 acres in Bone Valley, Florida. To date, over 1 billion tons of phosphogypsum loom over the flat Floridian landscape. These mountains of waste are a monument to the lasting environmental impact of Florida's phosphate fertilizer industry.

The land in Bone Valley is rich in phosphate. Mosaic, a fertilizer manufacturer, mines 17.1 million tons of phosphate there each year. Mosaic turns this phosphate into fertilizer at four Mosaic fertilizer plants, also located in Bone Valley.

This process generates more hazardous waste than it does fertilizer. The making of one ton of fertilizer-ready phosphate leaves five tons of phosphogypsum byproduct behind. Phosphogypsum has no beneficial use, so Mosaic heaps it in massive outdoor "stacks." These stacks are often built on top of old phosphate mines and wherever else Mosaic owns "unused" land in Bone Valley. To dispose of phosphogypsum, Mosaic pumps gallons of phosphogypsum-water "slurry" into huge reservoirs on top of the stacks. Over time, this slurry hardens into a crust, raising the stack and its basin for wastewater. A fully grown stack is as big as a square mile and as tall as 300 feet high.

In the past 30 years, there have been five "major" spills of phosphogypsum-tainted water from stacks in Bone Valley. Tens of millions of gallons of

phosphogypsum-tainted wastewater have gushed into local rivers, creeks, wetlands, and aquifers. In 1997, a phosphogypsum spill into Florida's Alafia River poisoned 42 miles of its water, killing more than one million baitfish and shellfish, 72,900 gamefish, and 377 acres of trees and vegetation.[1]

I dissent today because I believe the Army Corps of Engineers had a duty to consider the environmental impact of Mosaic's phosphogypsum stacks before it granted a permit needed for Mosaic to mine phosphate. Otherwise, I readily join parts III and IV of the majority opinion. The majority correctly concludes that the Army Corps of Engineers ("the Corps") consulted with the Fish and Wildlife Service, as required by the Endangered Species Act. I also agree with the majority that the Corps did not violate the National Environmental Policy Act ("NEPA") when it declined to publish a separate environmental impact statement for the South Pasture Mine Extension.

However, I believe the Corps' environmental impact statement violates NEPA. As a result, I would sustain the challenge to that document. NEPA requires federal agencies to consider indirect environmental effects of major actions. *See* 42 U.S.C. § 4332; 40 C.F.R. § 1508.8(b). Indirect effects are those that are "reasonably foreseeable." 40 C.F.R. § 1508.8(b). This record makes quite

[1] *See* Craig Pittman, *The Clock is Ticking on Florida's Mountains of Hazardous Phosphate Waste*, Sarasota Magazine, Apr. 26, 2017, https://www.sarasotamagazine.com/articles/2017/4/26/florida-phosphate.

clear that it was more than reasonably foreseeable that granting a permit under section 404 of the Clean Water Act to Mosaic would result in the creation of more phosphogypsum. Mosaic told the Corps it needed the § 404 permit to mine phosphate for its fertilizer plant. And again, every single ton of fertilizer-ready phosphate sourced from Mosaic's mines produces five tons of radioactive phosphogypsum. Thus, it is undeniable that issuing a permit to Mosaic's phosphate mine would add to the stacks of phosphogypsum already piled high across central Florida. Yet, the Corps did not consider phosphogypsum as an indirect effect in the environmental impact statement at issue here.

I view the Corps' reasons for failing to consider phosphogypsum as an indirect effect as arbitrary and capricious. *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377, 109 S. Ct. 1851, 1861 (1989). In order to hold otherwise, the majority opinion turns a blind eye to the record here, and expands upon the argument actually made by the Corps. I part ways with the majority opinion on four points. First, this record makes clear that phosphogypsum production was a reasonably foreseeable effect of the § 404 permit that enabled Mosaic to mine phosphate for fertilizer. Second, the Corps violated its own NEPA procedures when it considered the benefits of fertilizer manufacturing without considering its environmental impacts, including the production of radioactive phosphogypsum. Third, other agencies' oversight of phosphogypsum did not relieve the Corps of its

obligation to consider the environmental effects. Finally, the Corps has underlying statutory authority to consider phosphogypsum as an indirect effect under NEPA.

I.

The majority opinion is mistaken in concluding that the production of phosphogypsum was not a reasonably foreseeable consequence of granting Mosaic a § 404 Clean Water Act permit, and thus not an "indirect effect" the Corps needed to consider under NEPA. Maj. Op. at 7–10. Aside from being at odds with the record before us, this conclusion could allow agencies to avoid their obligations to address important environmental impacts on projects within their jurisdiction.

To begin, the majority opinion glosses over whether the Corps could reasonably foresee production of phosphogypsum. It first reasons that "fertilizer production takes place far from and long after" Mosaic uses its § 404 permit to mine phosphate. Maj. Op. at 8. But this is exactly how NEPA defines "indirect effects." Indirect effects are "caused by the action and are later in time or farther removed in distance," but still "reasonably foreseeable." *See* 40 C.F.R. § 1508.8(b) (defining indirect effects). The fact that phosphogypsum production occurs after the phosphate has been mined and in a different place does not mean it is not a reasonably foreseeable indirect effect.

Beyond that, the record shows that Mosaic's entire operation—from phosphate mining, to beneficiation, to production of phosphoric acid and

phosphogypsum—takes place right in Bone Valley. Granted, Mosaic owns tens of thousands of acres in Bone Valley. But the extraordinary scale on which Mosaic produces fertilizer makes its production of phosphogypsum more foreseeable, not less.

The majority opinion hypothesizes about the fertilizer market, the regulatory landscape, and Mosaic's business plans. *See* Maj. Op. at 10. It predicts that changes in the wider world could distance phosphogypsum from Mosaic's phosphate mining. It supposes that because phosphogypsum stacks would exist without Mosaic producing phosphogypsum, the stacks should not be considered as environmental effects. *See* Maj. Op. at 12. But these hypothesized facts cannot properly relieve the Corps of its obligation to consider environmental effects altogether. For example, the Corps should surely consider environmental effects on fish when a river is dredged and filled, even if those fish might also exist in different waters or if dredging and filling operations ongoing elsewhere would harm them.

The majority opinion is forced to reason based on hypothetical facts because the actual facts cannot support its conclusion. There is overwhelming evidence, acknowledged by the Corps—but not referenced in the majority opinion—that Mosaic would produce millions of tons of phosphogypsum byproduct as a result of the dredging and filling permit for its phosphate mine. The operation of this

phosphate mine clearly results in the production of phosphogypsum. Indeed, this fact is more than reasonably foreseeable. It is obvious and certain.

The record undermines the majority opinion's theories that Mosaic's phosphate mining was separate from its fertilizer production. In Mosaic's initial application for a permit, it plainly told the Corps that it would have to "cease operations" at its fertilizer plant "unless it is able to acquire economically viable phosphate rock from some unknown future source in order to continue operating it." It continued: "Mining existing reserves [in Florida] is the only viable long-term solution to meeting this need" for phosphate ore. When Mosaic amended its application some time later, it again acknowledged its dependence on mining to continue its fertilizer production operations. As for the possibility of running the fertilizer plants on imported phosphate, Mosaic's applications made clear that this would not work long-term. Importing phosphate "does not," as Mosaic explained, "provide for a predictable business model or allow for evaluation of risk, as [Mosaic] would have no control of the essential raw material needed for phosphate fertilizer production." As a result, Mosaic said importing rock "is neither reasonable nor practicable" from a business standpoint.

Mosaic told the Corps that its fertilizer plants "would not be able to compete in the phosphate crop nutrient market if they were required to pay for imported phosphate rock." Mosaic explicitly tied its ability to mine to the permit it was

seeking: "the viability of the remaining four [fertilizer plants] is dependent upon the ability to continue phosphate ore mining and phosphate rock production . . . , which in turn depends on issuance of the pending 404 Permit applications."

Thus, Mosaic's own words belie the conjecture in the majority opinion that Mosaic might stop producing fertilizer with the phosphate it mined. Mosaic's words also deflate the idea that it would not need to mine phosphate, using the § 404 permit, in order to produce fertilizer. Certainly, this record shows that it was at least reasonably foreseeable to the Corps that granting a permit to Mosaic would result in production of phosphogypsum from Mosaic's fertilizer plants. The Corps' decision to ignore the environmental effects of phosphogypsum based on the idea that it did not foreseeably result from granting Mosaic a § 404 permit is simply not supported.

II.

Beyond running counter to the record evidence, the Corps' decision not to account for the indirect effects of phosphogypsum violated its own regulations. The Corps' environmental impact statement sang the praises of the fertilizer industry as a reason to award Mosaic a § 404 permit, yet it failed to consider the industry's known environmental impacts—like phosphogypsum. This, despite the Corps' own regulations that require it to weigh both the benefits and impacts of fertilizer manufacturing equally, without placing its thumb on the scale.

The Corps has regulations implementing its NEPA responsibilities. *See* 33 C.F.R. pt. 325, app. B. Those regulations establish certain procedures for considering the environmental effects of granting permits. And these procedures require the Corps "[i]n all cases" to use the same "scope of analysis" for "analyzing both impacts and alternatives" as for "analyzing the benefits of a proposal." 33 C.F.R. pt. 325, app. B(7)(b)(3) (emphasis added). This requirement thus dictates how the Corps must frame the scope of its analysis when making environmental impact statements. *See* 40 C.F.R. § 1508.25 (defining the scope of analysis for environmental impact statements); 33 C.F.R. pt. 325, app. B(7)(b).

The Corps' NEPA implementation procedures require it to conduct an environmental analysis for portions of the project "over which the [Corps] has sufficient control and responsibility to warrant Federal review." 33 C.F.R. pt. 325, app. B(7)(b)(1), (2). The procedures offer several examples of what this means. *Id.* app. B(7)(b)(3). For example, the implementation procedures say the Corps need not do a NEPA review of the effects of an electric plant if the only Clean Water Act permit necessary for the project relates solely to a "fill road," and the electric plant will not otherwise impact United States waters. *Id.* B(7)(b)(3). The admonition to use the same scope of analysis for impacts and benefits in all cases follows these examples. *Id.* I understand this admonition to qualify what's come before. *See, e.g.*, *Edison v. Douberly*, 604 F.3d 1307, 1310 (11th Cir. 2010)

(interpreting words "in a manner consistent with their plain meaning and context"). The regulations thus call for the Corps to use a broader scope of review for environmental impacts whenever it uses that same broader scope of review for benefits. This is so even if its regulations would not otherwise require consideration of those impacts.

The Corps was required to consider phosphogypsum here. It framed the public benefits of the phosphate mine in terms of its importance to fertilizer production. It noted that nearly all the phosphate rock mined in the United States—more than 95% of it, to be precise—is used to make wet phosphoric acid, which has phosphogypsum as a byproduct. And it factored in economic impacts on the phosphate industry far removed from mining as part of the public's need for the project. For example, as one "substantial indirect effect of the mining," the Corps pointed to benefits related to "the export of finished phosphate products and fertilizer through the Port of Tampa each year, [which] contribut[e] significantly to making the port the state's largest in tonnage shipped and about the 10th largest in the nation."

The majority opinion concludes the Corps did not violate its own regulations because it simply "explained why phosphate ore is mined in the first place." Maj. Op. at 24. But the Corps went much further: it analyzed the economic benefits of fertilizer production as an indirect effect of granting Mosaic a § 404 permit. Yet in

the same document it refused to analyze the impact of phosphogypsum, a byproduct of the fertilizer, as an indirect effect. The NEPA implementation regulations do not allow the Corps to have it both ways. That is, it cannot consider the broad downstream economic benefits of mining and fertilizer production, and then ignore the environmental impacts associated with those benefits. Its own regulations require it to do more. *See* 33 C.F.R. pt. 325, app. B(7)(b).

The majority opinion says it defers to the Corps' decision to overlook phosphogypsum as an interpretation of its own regulations. However, the Corps itself gave no official interpretation of its own regulations that would warrant this deference. *See Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 911 (1997) (holding that an agency's interpretation of its own regulations is "controlling" unless "plainly erroneous or inconsistent with the regulation" (quotation marks omitted)). Without an agency interpretation, not even one offered "in the form of a legal brief," *see id.* at 462, 117 S. Ct. at 912, the Corps' failure to analyze environmental impacts of fertilizer manufacturing does not merit deference.

The majority opinion goes on to insist that the Corps did not exercise "sufficient control and responsibility" over Mosaic's manufacturing of phosphate-based fertilizer, so the Corps did not have to consider any effects of fertilizer production. Maj. Op. at 21–27. I agree the Corps is not required to analyze the impacts of activities over which it lacks "sufficient control and responsibility."

But it must home its analysis in on the "specific activity requiring a" permit. 33 C.F.R. pt. 325, app. B(7)(b)(1). And it is not free to disregard the impacts of activities over which it has no control when it chooses to count the benefits of those same activities. This required balance effectuates NEPA's purpose of ensuring informed decision-making. *See Marsh*, 490 U.S. at 371, 109 S. Ct. at 1858. The majority's approach, which allows consideration of endless benefits without concomitant consideration of the impacts associated with those benefits, thwarts this purpose.

In short, this record does not support the majority's conclusion that the Corps followed its own procedures. The Corps did not do its job when it failed to consider phosphogypsum as an indirect environmental effect of Mosaic's § 404 permit.

III.

The majority opinion not only sanctions the Corps' wayward decision to overlook phosphogypsum's environmental effects for the reason that fertilizer production was somehow unforeseeable. The opinion also holds that the Corps could not have considered phosphogypsum because it altogether lacked the statutory authority to do so. Maj. Op. at 12–18. But this exceeds any disclaimer the Corps made on its own behalf. Instead, the Corps initially said it did not consider phosphogypsum because other state and federal agencies regulate it and

those agencies therefore more directly cause the environmental effects of phosphogypsum.

Thus, when the majority opinion holds that the Corps had no statutory authority at all to consider phosphogypsum, it transforms the argument made by the Corps, and at the same time deals a blow to NEPA. I discuss each aspect of the majority opinion in turn.

A.

The Corps decided it need not account for environmental effects of phosphogypsum because other agencies more directly regulated these environmental effects. As I understand it, the Corps is assigning responsibility for the effects of pollution not to the polluter, but to other agencies that regulate the polluter. The idea is that the manner in which other agencies regulate the polluter ultimately delivers the pollution. But this notion ignores the Corps' own responsibility to monitor and regulate polluters. And the fact that other agencies have regulatory responsibilities in this area does not mean the Corps is relieved of its own duties. *See Sierra Club v. Fed. Energy Regulatory Comm'n* ("*Sabal Trail*"), 867 F.3d 1357, 1375 (D.C. Cir. 2017) ("[T]he existence of permit requirements overseen by another federal agency or state permitting authority cannot substitute for a proper NEPA analysis."). NEPA requires the Corps to answer the question of whether some downstream impact should count as an

indirect effect, and the answer turns on whether it is "reasonably foreseeable." 40 C.F.R. § 1508.8(b). Another agency's jurisdiction over an effect does not make the effect unforeseeable. *Cf. Sabal Trail*, 867 F.3d at 1375.

The majority opinion concludes "the existing regulatory landscape over phosphogypsum," overseen by the EPA and the state of Florida, sets phosphogypsum out of the Corps' reach. Maj. Op. at 12. But this conclusion puts NEPA entirely out of business. Given our robust "administrative state with its reams of regulations," there will always be another agency regulating a potential environmental harm. *See Alden v. Maine*, 527 U.S. 706, 807, 119 S. Ct. 2240, 2291 (1999) (Souter, J., dissenting). NEPA does not ask agencies to consider only novel environmental effects that are not otherwise addressed by the administrative state. NEPA requires agencies to consider direct, indirect, and cumulative environmental effects, full stop. *See* 40 C.F.R. §§ 1508.7, 1508.8.

The majority relies on *Department of Transportation v. Public Citizen*, 541 U.S. 752, 124 S. Ct. 2204 (2004), and *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009), to support its conclusion that Florida and the EPA's regulation of phosphogypsum means it is not a foreseeable environmental effect that the Corps must consider. *See* Maj. Op. at 13–17, 26–28. These cases do not support this conclusion. *Public Citizen* and *Aracoma Coal* address unique factual contexts that implicate federalism and constitutional

presidential power. Those facts are not at issue in our more run-of-the-mill case here.

Public Citizen held that the Federal Motor Carrier Safety Administration ("FMCSA") did not violate NEPA when it did not consider the environmental effects of the President's decision to honor treaty obligations and allow Mexican motor carriers into the United States. 541 U.S. at 766, 773, 124 S. Ct. at 2214, 2218. The North American Free Trade Agreement ("NAFTA") required the United States to admit trucks from Mexico, despite American concerns that those trucks were unsafely regulated. *Id.* at 759–60, 124 S. Ct. at 2211. To comply with NAFTA, the President directed the FMCSA to set new safety standards and admit Mexican trucks that met those standards. *Id.* at 760, 124 S. Ct. at 2211. *Public Citizen* thus addressed the circumstance in which the decision whether to admit Mexican trucks was entirely out of the FMCSA's control. *Id.* at 772–73, 124 S. Ct. at 2218. Even if the FMCSA considered the environmental impacts of allowing trucks from Mexico, this data could not have changed its duty to comply with NAFTA and the President's order to admit the trucks. *See id.* at 768, 124 S. Ct. at 2216.

Public Citizen does not control here. The EPA and the state of Florida's primary oversight of phosphogypsum stacks is a far cry from the unilateral authority a president has to enter into binding treaties. Also, in contrast to the

FMCSA, the Corps is charged with undertaking a public-interest review of § 404 permits and it enjoys discretion to grant or deny those permits based on environmental concerns. *See* 33 C.F.R. § 320.4(a) (prescribing public-interest review of permits issued by the Corps); *Sabal Trail*, 867 F.3d at 1380 (Brown, J., concurring in part and dissenting in part) (concluding *Public Citizen* does not apply where the agency has "broad discretion" under public-interest review to account for environmental impacts). The Corps is empowered to deny § 404 permits if it determines the permit's impact on "general environmental concerns," "water quality," or "the needs and welfare of the people" would be against "the public interest." 33 C.F.R. § 320.4. The power of the FMCSA to deny entry to Mexican motor carriers for environmental reasons had been bargained away by treaty. *See Public Citizen*, 541 U.S. at 770, 124 S. Ct. at 2217. In contrast, the Corps has the power to, and must, consider environmental effects when issuing Clean Water Act permits.

Neither does *Aracoma Coal* support the majority's holding. In *Aracoma Coal*, the Fourth Circuit held that NEPA did not require the Corps to assess the environmental impact of a mining project seeking a § 404 permit to fill stream waters. 556 F.3d at 197. The court was faced with reconciling NEPA and the Surface Mining Control and Reclamation Act of 1977, a federal statute that gave states "exclusive jurisdiction over the regulation of surface coal mining and

reclamation operations on non-Federal lands . . . .” *Id.* at 189 (quotation marks omitted). Thus, *Aracoma Coal* addressed an “environmental review process that has already been delegated to federally approved state programs.” *Id.* at 196. We do not address a program under the Surface Mining Act here, and Florida does not have “exclusive jurisdiction” to regulate phosphogypsum.[2] *See id.* at 195.

To the contrary, here there is no comprehensive scheme of state regulation that would remove the Corps’ power to consider broad environmental effects of phosphate mining, fertilizer production, and phosphogypsum. As it must, the majority opinion recognizes that Florida and the EPA regulate phosphogypsum concurrently. Maj. Op. at 15. Thus, the Corps would not trample on a careful federalist balance, like the one addressed in *Aracoma Coal*, by considering the environmental impact of phosphogypsum.

Neither *Public Citizen* nor the mere fact that another agency has jurisdiction changes the reality that Mosaic’s phosphate mine will create more phosphogypsum to feed the existing stacks in Bone Valley. The Corps’ refusal to analyze

[2] The majority also relies on *Kentuckians for the Commonwealth v. U.S. Army Corps of Engineers*, 746 F.3d 698 (6th Cir. 2014), authored by our visiting colleague on his home court. *See id.* at 701; Maj. Op. at 26–27. Like *Aracoma Coal*, *Kentuckians* does not bear on this case. *Kentuckians* holds that NEPA did not require the Corps to consider the environmental impact of a surface mining project. *See* 746 F.3d at 709, 713–14. Like *Aracoma Coal*, the *Kentuckians* decision hinged on the federalist balance struck in the Surface Mining Act. *See id.* at 713 (“Congress has granted exclusive jurisdiction over the regulation of surface mining [to] Kentucky . . . . The Corps, in light of the entire project’s approval under the more comprehensive [Surface Mining Act], did not abuse its discretion in limiting the scope of its NEPA review.”).

phosphogypsum as an indirect effect cannot be excused by other agencies' ability to oversee it.

B.

I now turn to the majority's conclusion that the Corps altogether lacked statutory authority to consider phosphogypsum as an indirect effect of enabling Mosaic's phosphate mining. *See* Maj. Op. at 12–18. To start, this holding provides an explanation for the Corps' actions that the Corps did not give itself. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2867 (1983) ("We may not supply a reasoned basis for the agency's action that the agency itself has not given." (quotation marks omitted)). But setting aside that the Corps did not advance the argument made in the majority opinion, the argument cannot withstand scrutiny in any event.

The majority says the Clean Water Act allows the Corps to deny a § 404 permit for one reason only: environmental effects from dredged and fill material discharged into U.S. waters. Maj. Op at 12, 16–17 (citing 33 U.S.C. § 1344(c) (giving the Corps authority over § 404 permits)). To arrive at this conclusion, the majority relies on *Public Citizen*'s holding that an agency is not required to consider environmental effects where the agency "has no ability to prevent a certain effect due to its limited statutory authority." 541 U.S. at 770, 124 S. Ct. at 2217. Thus the majority opinion reasons that since the Corps could not deny a

§ 404 permit for any reason other than dredging and filling, it did not have to consider any environmental effects beyond dredging and filling. Maj. Op. at 16–17. This logic continues: phosphogypsum is not a dredged and fill material discharged into U.S. waters, so the Corps had no statutory authority to consider its environmental effects. Maj. Op. at 15–16.

Again, I reject this justification. Certainly, the Corps has authority to consider the environmental effects of phosphogypsum. It can even deny dredging and filling permits based on the production of phosphogypsum. That is because the implementing regulations of the Clean Water Act give the Corps the power to deny a dredging and filling permit when potential impacts on "general environmental concerns," "water supply and conservation," and "water quality" outweigh "[t]he benefits which reasonably may be expected to accrue" from the proposed activity. 33 C.F.R. § 320.4(a)(1) (guiding the Corps' "decision whether to issue a permit"). This record shows that radioactive phosphogypsum stacks tower above Florida water sources, and these stacks have spilled waste into the surrounding waters. Production of more phosphogypsum is a clearly foreseeable result of Mosaic's phosphate mining and fertilizer operation. The Corps should have assessed the environmental impact that leaky phosphogypsum stacks might have on U.S. waters and the environment at large before granting Mosaic its permit.

I fear the majority's holding does damage to the Clean Water Act's implementing regulations. In support of its conclusion, the majority opinion says these implementing regulations improperly "manufacture additional agency power." Maj. Op. at 17. Despite the clear statement in the regulations that the "decision whether to issue a permit will be based on" factors like "conservation" and "general environmental concerns," *see* 33 C.F.R. § 320.4(a)(1), the majority says this regulation does not empower the Corps to deny a permit for general environmental reasons. This cannot be right.

Even if I were to accept the majority's premise that the Corps' authority to issue § 404 permits under the Clean Water Act must turn only on considerations of dredging and filling, *see* Maj. Op. at 16, the text of the Clean Water Act still requires the Corps to give a "hard look" under NEPA to the broader effects of the dredging. "Courts have consistently held that the Corps' NEPA obligations when issuing a § 404 dredge and fill permit . . . extend beyond consideration of the effects of the discharge of dredged or fill material in jurisdictional waters." *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1063 (10th Cir. 2015) (McHugh, J., concurring); *see also O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 232–34 (5th Cir. 2007) (holding that NEPA required the Corps to consider the environmental effects of increased auto traffic when authorizing dredging and filling to construct a residential subdivision); *Save Our Sonoran, Inc. v. Flowers*,

408 F.3d 1113, 1118, 1122 (9th Cir. 2005) (holding the Corps must consider the environmental impact of an entire residential subdivision before granting a permit to fill natural waterways running through the subdivision). Simply put, "[a]lthough the Corps' permitting authority is limited to those aspects of a development that directly affect jurisdictional waters, it has responsibility under NEPA to analyze all of the environmental consequences of a project. . . . The Corps' responsibility under NEPA to consider the environmental consequences of a permit extends even to environmental effects with no impact on jurisdictional waters at all." Sonoran, 406 F.3d at 1122.

Requiring the Corps to consider the environmental implications of the underlying project benefited by dredging and filling is true to NEPA and the realities of our "human environment." *See* 42 U.S.C. § 4332(C) (explaining agencies' NEPA obligations). Considering the entire project preserves NEPA's "information-forcing" purpose by airing the environmental consequences of the entire endeavor. *See Sabal Trail*, 867 F.3d at 1367. This approach recognizes that environmental consequences do not occur in a vacuum. *See, e.g.*, Erin E. Prahler et al., *It All Adds Up: Enhancing Ocean Health by Improving Cumulative Impacts Analyses in Environmental Review Documents*, 33 Stan. Envtl. L.J. 351, 354 (2014) ("The environmental effects caused by human activities do not occur independently of one another."). And evaluating the entire project is consistent

with the Corps' authority to issue permits "based on an evaluation of the probable impacts . . . of the proposed [dredging and filling] activity and its intended use on the public interest." *See* 33 C.F.R. § 320.4(a)(1) (emphasis added). As the record clearly shows, Mosaic intended to use its § 404 permit to mine phosphate for fertilizer. The Corps had the authority to consider the environmental effects that emanate from this permit.

IV.

This Court is duty-bound to enforce NEPA when an agency strays from it. *See Sabal Trail*, 867 F.3d at 1367–68. I do not believe the Corps honored its obligations under NEPA. Because none of the reasons the Corps gave for excluding consideration of phosphogypsum comply with NEPA, I would invalidate the environmental impact statement and send it back to the Corps to prepare a new one. The Corps should have articulated a NEPA-compliant reason for excluding phosphogypsum from consideration or else considered it as an indirect effect. I respectfully dissent.

Supreme Court of Florida

No. SC19-884

IN RE: AMENDMENTS TO FLORIDA RULES OF APPELLATE PROCEDURE 9.120 AND 9.210.

November 7, 2019

PER CURIAM.

The Court has for consideration out-of-cycle amendments to Florida Rules of Appellate Procedure 9.120 (Discretionary Proceedings to Review Decisions of District Courts of Appeal) and 9.210 (Briefs) proposed by The Florida Bar's Appellate Court Rules Committee (Committee). The proposals are in response to a request by the Court that the Committee propose rule amendments to provide a procedure for respondents to raise cross-review issues in discretionary review proceedings in this Court. *See* Fla. R. Jud. Admin. 2.140(f). We have jurisdiction[1] and amend the rules with the modifications to the proposed amendments to rule 9.120 explained below.

1. *See* art. V, § 2(a), Fla. Const.

The proposed amendments to rules 9.120 and 9.210 were unanimously approved by the Board of Governors of The Florida Bar and were published by both the Committee and the Court. No comments were received in response to either publication.

A new subdivision (f) titled "Notices of Cross-Review" is added to rule 9.120 (Discretionary Proceedings to Review Decisions of District Courts of Appeal). The new subdivision as proposed by the Committee would have required a respondent who intends to raise cross-review issues in a discretionary review case to serve a notice of cross-review within fifteen days of the rendition of this Court's order accepting jurisdiction. However, we have modified new subdivision (f) of the rule to require a notice of cross-review to be served within five days of the service of a timely filed notice to invoke the Court's discretionary jurisdiction. We also have added a requirement that the notice identify the issue(s) the respondent intends to raise on cross-review. We modified the new subdivision because we agree with the Committee's observation in the report that a notice of cross-review filed at the jurisdiction determination stage of a discretionary review case would be beneficial to the Court in deciding whether it should accept jurisdiction in a case in which a basis exists for the Court to exercise its discretionary jurisdiction. Consistent with our change to new subdivision (f), we have amended subdivision (d) (Briefs on Jurisdiction) of rule 9.120 to allow the

petitioner's jurisdictional brief to be served within ten days of the filing of the notice to invoke or the service of a notice of cross-review, if one is filed. Existing subdivision (f) (Briefs on Merits) of rule 9.120 is relettered subdivision (g). Language is added to the second sentence of that subdivision, as proposed by the Committee, to require briefs on cross-review to be served in the same manner as additional briefs under rule 9.210.

Subdivision (a)(5)(B) of rule 9.210 (Briefs) is amended, as proposed, to address the length of merits briefs in a discretionary review case in which a notice of cross-review has been filed. The amendment makes the page limitations for briefs in such a case the same as the page limitations for briefs in a case in which a cross-appeal has been filed. The amendments to subdivision (c) (Contents of Answer Brief) of rule 9.210 clarify that the contents of an answer brief in a case in which a notice of cross-review has been filed are the same as the contents of an answer brief in a case in which a cross-appeal has been filed. Subdivision (e) (Contents of Cross-Reply Brief) of rule 9.210 is amended to apply to cross-reply briefs in both cross-appeal and cross-review cases and to clarify that the cross-reply brief in a cross-review case is limited to rebuttal of the argument in the cross-answer brief.

Accordingly, the Florida Rules of Appellate Procedure are amended as reflected in the appendix to this opinion. New language is indicated by

underscoring; deletions are indicated by struck-through type. The amendments shall become effective on December 1, 2019, at 12:01 a.m.

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, LAGOA, LUCK, and MUÑIZ, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THESE AMENDMENTS.

Original Proceeding – Florida Rules of Appellate Procedure

Thomas D. Hall, Chair, Appellate Court Rules Committee, Tallahassee, Florida, and Courtney Rebecca Brewer, Past Chair, Appellate Court Rules Committee, Tallahassee, Florida; and Joshua E. Doyle, Executive Director, and Heather Savage Telfer, Staff Liaison, The Florida Bar, Tallahassee, Florida,

for Petitioner

APPENDIX

RULE 9.120. DISCRETIONARY PROCEEDINGS TO REVIEW DECISIONS OF DISTRICT COURTS OF APPEAL

(a) – (c) [No Change]

(d) Briefs on Jurisdiction. The petitioner's brief, limited solely to the issue of the supreme court's jurisdiction and accompanied by an appendix containing only a conformed copy of the decision of the district court of appeal, shall be served within 10 days of the filing of the notice to invoke the court's discretionary jurisdiction or the service of a notice of cross-review under subdivision (f) of this rule, if one is filed. The respondent's brief on jurisdiction shall be served within 30 days after service of petitioner's brief. Formal requirements for both briefs are specified in rule 9.210. No reply brief shall be permitted. If jurisdiction is invoked under rule 9.030(a)(2)(A)(v) (certifications of questions of great public importance by the district courts of appeal to the supreme court), no briefs on jurisdiction shall be filed.

(e) [No Change]

(f) Notices of Cross-Review. Within 5 days of the service of a timely filed notice to invoke the court's discretionary jurisdiction, a respondent shall serve a notice of cross-review if the respondent intends to file a cross-initial brief raising any issues independent of those upon which the petitioner sought review. The notice shall identify the issue(s) the respondent intends to raise on cross-review.

(fg) Briefs on Merits. Within 20 days of rendition of the order accepting or postponing decision on jurisdiction, the petitioner shall serve the initial brief on the merits. Additional briefs, including any briefs on cross-review, shall be served as prescribed by rule 9.210.

Committee Notes

[No Change]

RULE 9.210. BRIEFS

(a) Generally. In addition to briefs on jurisdiction under rule 9.120(d), the only briefs permitted to be filed by the parties in any 1 proceeding are the initial brief, the answer brief, a reply brief, and a cross-reply brief. All briefs required by these rules shall be prepared as follows:

(1) – (4) [No Change]

(5) The page limits for briefs shall be as follows:

(A) [No Change]

(B) Except as provided in subdivisions (a)(5)(C) and (a)(5)(D) of this rule, the initial and answer briefs shall not exceed 50 pages and the reply brief shall not exceed 15 pages. If a cross-appeal is filed or a notice of cross-review is filed in the supreme court, the appellee or respondent's answer/cross-initial brief shall not exceed 85 pages, and the appellant or petitioner's reply/cross-answer brief shall not exceed 50 pages, not more than 15 of which shall be devoted to argument replying to the answer portion of the appellee or respondent's answer/cross-initial brief. Cross-reply briefs shall not exceed 15 pages.

(C) – (E) [No Change]

(6) [No Change]

(b) [No Change]

(c) Contents of Answer Brief. The answer brief shall be prepared in the same manner as the initial brief, provided that the statement of the case and of the facts may be omitted, if the corresponding section of the initial brief is deemed satisfactory. If a cross-appeal has been filed or a notice of cross-review has been filed in the supreme court, the answer brief shall include the issues presented in the cross-appeal ~~that are presented for review~~or cross-review, and argument in support of those issues.

(d) [No Change]

(e) Contents of Cross-Reply Brief. The cross-reply brief is limited to rebuttal of argument ~~of~~in the cross-~~appellee~~answer brief. A table of contents, a table of citations, a certificate of service, and, for computer-generated briefs, a certificate of compliance shall be included in the same manner as in the initial brief.

(f) – (g) [No Change]

Committee Notes

[No Change]

Court Commentary

[No Change]

Third District Court of Appeal

State of Florida

Opinion filed November 6, 2019.

No. 3D19-849
Lower Tribunal No. 19-298

Francisco Aracena Blamey, et al.,
Petitioners,

vs.

Juan Menadier, et al.,
Respondents.

A Writ of Certiorari to the Circuit Court for Miami-Dade County, Peter R. Lopez, Judge.

Law Offices of Jonathan A. Heller, P.A., and Jonathan A. Heller; Jay M. Levy, P.A, and Jay M. Levy, for petitioners.

Law Offices of Charles M-P George, and Charles M-P George, for respondents.

Before LOGUE, LINDSEY, and LOBREE, JJ.

ON MOTION FOR REHEARING

LOGUE, J.

This case comes before us on rehearing. We withdraw our previous opinion, and issue this opinion in its stead.

Petitioners, Francisco Aracena Blamey ("Aracena") and Above Ground Level Aerospace Corp. ("AGL"), seek a writ of certiorari quashing the trial court's order denying their motion to disqualify the attorney representing the respondents, Juan Menadier ("Menadier") and A Professional Aviation Services Corp ("Menadier's Corporation"). Before filing this lawsuit against AGL, the respondents' attorney, Stephen J. Kolski, performed legal work for AGL. The issue presented is whether the underlying lawsuit is substantially related to Kolski's prior legal work for AGL. For the reasons below, we hold it is. Accordingly, we grant the petition and quash the trial court's order.

FACTS

AGL repairs and sells various aircraft parts. At all relevant times, it was owned by Aracena. Aracena hired Menadier to manage AGL. While working for AGL, Menadier formed his own corporation, which we refer to as Menadier's Corporation. Menadier claims Aracena orally agreed to give Menadier 50% of the stock of AGL. Menadier and Aracena's discussions in this regard came to a head at a meeting in October 2018. In anticipation of the meeting, Menadier asked Kolski to draft a term sheet. The term sheet that Kolski prepared set forth the current

ownership interest of the corporate entities and individuals involved in the deal, but left items to be resolved at the meeting.

When AGL was formed, Menadier brought Kolski on board to serve as its lawyer. Kolski had previously performed legal work for Menadier. Kolski's sole contact at AGL was Menadier. Kolski did various legal tasks for AGL. Kolski did not sign a formal retainer agreement. When Menadier's employment with AGL ended, Kolski also stopped doing legal work for AGL. While Kolski represented AGL, he never represented Aracena personally.

When Kolski prepared the term sheet, Menadier was the General Manager of AGL and Kolski was AGL's only lawyer. Kolski billed Menadier's Corporation for the term sheet. When Menadier received the invoice, however, he forwarded the bill to AGL's accounting department for payment. Menadier indicated that this was a mistake. But he also testified that his practice during this time was to send all Kolski's legal bills to AGL's accounting department for payment. In fact, he did not even open the bills. "I was AGL," he explained, "I was the company." The AGL employee who ran its day to day operations testified that she understood Kolski prepared the term sheet for AGL, which is why AGL paid the invoice.

When the meeting took place, however, Aracena and Menadier failed to agree and AGL fired Menadier. Menadier and Menadier's Corporation then filed the instant lawsuit, represented by Kolski.

The current, operative complaint contains nine individual counts. We focus on three. In count I, Menadier sued Aracena for breach of the oral agreement to give Menadier 50% of the stock of AGL. In count II, Menadier sued AGL for unjust enrichment claiming Menadier had transferred $54,670 to AGL and had paid a third party $83,948.90 to pay a debt of AGL as part of "Menadier's required equity contribution." In count VIII, Menadier's Corporation sued AGL for unjust enrichment over $252,325.39 for airplane parts which were sold to third parties with the proceeds going to AGL, as Menadier and Menadier's Corporation admit in their Response, "in anticipation of becoming a 50% owner of AGL."

Aracena and AGL moved to disqualify Kolski from representing Menadier and Menadier's Corporation. The trial court held an evidentiary hearing and denied the motion to disqualify. Aracena and AGL now seek a writ of certiorari quashing the order denying the motion to disqualify.

STANDARD OF REVIEW

To grant certiorari relief, there must be: "(1) a material injury in the proceedings that cannot be corrected on appeal (sometimes referred to as irreparable harm); and (2) a departure from the essential requirements of the law." Nader v. Fla. Dep't of Highway Safety & Motor Vehicles, 87 So. 3d 712, 721 (Fla. 2012) (quotation omitted).

Moreover, in a certiorari proceeding, "[t]he required 'departure from the essential requirements of law' means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice." Chessler v. All Am. Semiconductor, 225 So. 3d 849, 852 (Fla. 3d DCA 2016).

ANALYSIS

Under Florida law, "[t]he disqualification of a party's attorney is 'an extreme remedy and should be employed sparingly.'" Scott v. Higginbotham, 834 So. 2d 221, 223 (Fla. 2d DCA 2002) (citation omitted). Thus, "[t]o disqualify opposing counsel the movant must demonstrate that (1) 'an attorney-client relationship existed,' which 'giv[es] rise to an irrefutable presumption' that confidential information was disclosed during the relationship; and (2) 'the matter in which the law firm subsequently represented the interest adverse to the former client was the same or substantially related to the matter in which it represented the former client.'" Chessler, 225 So. 3d at 852 (quoting State Farm Mut. Auto. Ins. Co. v. K.A.W., 575 So. 2d 630, 633 (Fla. 1991)) (emphasis added); see also Junger Utility & Paving Co. v. Myers, 578 So. 2d 1117, 1119 (Fla. 1st DCA 1989).

Aracena and AGL sought to disqualify Kolski under Rule Regulating the Florida Bar 4-1.9, which provides that a lawyer cannot represent a person against a

former client where that person's interests are materially adverse to those of the former client. Rule 4-1.9(a) reads:

> A lawyer who has formerly represented a client in a matter must not afterwards:
>
> represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.

(Emphasis added). The comments to Rule 4-1.9 define what constitutes a "substantially related" matter:

> Matters are "substantially related" for purposes of this rule if they involve the same transaction or legal dispute, or if the current matter would involve the lawyer attacking work the lawyer performed for the former client.

Here, the trial court concluded there was "no substantial similarity between the representation sought at this moment" and the prior work performed by Kolski. We respectfully disagree.

The lawsuit stems from the fact that Aracena failed to honor his alleged oral promise to give Menadier 50% of AGL's stock. Kolski acted as AGL's attorney in drawing up the term sheet. Admittedly, only Aracena, and not AGL, is a defendant in count I of the complaint. But AGL is the named defendant in other counts including count II, where Menadier sued AGL for unjust enrichment for cash and other consideration provided to AGL as part of "Menadier's required equity contribution" relating to the oral promise. Similarly, count VIII against AGL is also

based on actions taken in anticipation of Menadier becoming a 50% owner of AGL. The unconsummated transfer on which Kolski worked for AGL is at the heart of the lawsuit.

In fact, both sides essentially admitted the lawsuit stems from Aracena's failure to honor the alleged oral promise. In their brief, Petitioners Aracena and AGL state:

> Respondents' claims predominantly arise from Respondent Menadier's allegations that [Aracena and AGL] orally agreed to give Menadier 50% of the stock of AGL, and alleged actions that Menadier claims he took in reliance upon that oral agreement for stock ownership (such as allegedly lending monies to AGL).

Similarly, in their brief, Respondents Menadier and Menadier's Corporation concede that the acts or omissions giving rise to the claims in the lawsuit are related to the failed transfer of AGL's stock:

> in anticipation of becoming a 50% owner of AGL, Mr. Menadier had [Menadier's Corporation] turn over its aircraft parts inventory to AGL. AGL sold those parts and did not compensate [Menadier's Corporation]. After it became clear that Mr. [Aracena] would not sell 50% of AGL to Mr. Menadier as promised, [Menadier's Corporation] sued in unjust enrichment to recover the value of those parts.

(Emphasis added.).

Because Kolski's prior work for AGL in drawing up the term sheet for the transfer is substantially related to the current lawsuit over the failure to consummate the transfer, Kolski is disqualified from suing his past client, AGL. See K.A.W., 575 So. 2d at 633; Chessler, 225 So. 3d at 852; Junger, 578 So. 2d at 1119.

Petition granted, order quashed.

Third District Court of Appeal

State of Florida

Opinion filed November 6, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1875
Lower Tribunal No. 18-4917

JJN FLB, LLC,
Petitioner,

vs.

CFLB Partnership, LLC, et al.,
Respondents.

No. 3D19-1876
Lower Tribunal No. 18-4923

JJN FLB, LLC, et al.,
Petitioners,

vs.

CFLB Partnership, LLC,
Respondent.

No. 3D19-1948
Lower Tribunal No. 18-596

Bilzin Sumberg Baena Price & Axelrod, LLP,
Petitioner,

vs.

The Cantor Group Law P.A., et al.,
Respondents.

Cases of Original Jurisdiction – Prohibition.

Bilzin Sumberg Baena Price & Axelrod LLP, Mitchell E. Widom, and Raquel M. Fernandez; Kozyak Tropin & Throckmorton LLP, Detra Shaw-Wilder, Javier A. Lopez, and Harley S. Tropin, for petitioners.

Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Alan H. Fein, and Jenea M. Reed; Zarco Einhorn Salkowski & Brito, P.A., Colby G. Conforti, Robert M. Einhorn, and Robert Zarco, for respondents.

Before LOGUE, MILLER, and LOBREE, JJ.

MILLER, J.

Petitioners, JJN FLB, LLC, 551 FLB 1, LLC, 551 FLB 2, LLC, 551 FLB 3, LLC, 551 FLB 4, LLC, FLB Hotel, LLC, FLB Restaurant, LLC, FLB R-Units, LLC, FLB U-Units, LLC, and Bilzin Sumberg Baena Price & Axelrod, LLP, seek writs of

prohibition to prevent the assigned trial judge from further presiding over their civil disputes against respondents, CFLB Partnership, LLC, CFLB Management, LLC, The Cantor Group Law P.A., Sharon Dresser and The Estate of Steven L. Cantor, Hal J. Webb, Hal J. Webb, P.A., Pruco Life Insurance Company, Neal Slafsky, CPG Capital, LLC, and United Capital Financial Advisers, LLC. All motions are grounded upon judicial findings within a sanctions order rendered in an unrelated case. Given the common underlying legal and factual issues, we have consolidated the three separately-filed petitions, and for the reasons explicated below, we grant relief.

FACTS AND BACKGROUND

In two of the petitions, petitioners are represented in the lower tribunal by the law firm of Bilzin Sumberg Baena Price & Axelrod, LLP (the "Law Firm").[1] In the remaining petition, the Law Firm is a party to the litigation and the General Counsel to the Law Firm has been disclosed as a witness.

In mid-September of 2019, after convening a multi-day evidentiary hearing, the trial judge issued a detailed, fifty-one-page sanctions order in an unrelated civil case.[2] The tribunal found by clear and convincing evidence that the Law Firm

[1] The parties in these two disputes have waived trial by jury.

[2] In the sanctions order, the court defined "Plaintiff's lawyers" as both the individual attorney of record and the Law Firm. Thus, the overwhelming majority of sanctionable acts were broadly imputed to all members of the Law Firm. Cf. Sands Pointe Ocean Beach Resort Condo. Ass'n v. Aelion, 251 So. 3d 950 (Fla. 3d DCA

"[r]epeatedly made unsubstantiated, false, and defamatory allegations in sealed documents and in open court," violated the Rules of Professional Conduct, misused attorney-client privileged communications, and participated "in a scheme to bring [fabricated criminal] charges."[3] The court imposed sanctions, jointly and severally, against both the individual attorney of record and the Law Firm.

Less than ten days later, petitioners filed the subject disqualification motions. See Fla. R. Jud. Admin. 2.330(e) ("A motion to disqualify shall be filed within a reasonable time not to exceed [ten] days after discovery of the facts constituting the grounds for the motion and shall be promptly presented to the court for an immediate ruling."). In their appended, incorporated affidavits, petitioners asserted they harbored a well-founded fear that, based upon the findings articulated within the sanctions order in the unrelated case, they will not receive a fair trial. The lower tribunal denied the motions and the instant petitions ensued.

STANDARD OF REVIEW

"[A] writ of prohibition is the proper procedure for appellate review to test the validity of a motion to disqualify." Pilkington v. Pilkington, 182 So. 3d 776, 778

2018) (refusing to impute the alleged fear of prejudice held by a single associate to all members of the law firm). The court further made individualized findings that the General Counsel engaged in misconduct.

[3] We express no opinion regarding the ultimate propriety of the findings set forth in the sanctions order. For purposes of reviewing the denial of disqualification, "[t]he facts and reasons for the belief of prejudice [set forth in the motion] must be taken as true." Brown v. St. George Island, Ltd., 561 So. 2d 253, 255 (Fla. 1990).

(Fla. 5th DCA 2015) (citation omitted). We review "a trial judge's determination on a motion to disqualify . . . de novo." Parker v. State, 3 So. 3d 974, 982 (Fla. 2009). "The standard for viewing the legal sufficiency of a motion to disqualify is whether the facts alleged, which must be assumed to be true, would cause the movant to have a well-founded fear that he or she will not receive a fair trial at the hands of that judge." Wall v. State, 238 So. 3d 127, 143 (Fla. 2018) (citation omitted).

LEGAL ANALYSIS

"It has long been said in the courts of this state that 'every litigant is entitled to nothing less than the cold neutrality of an impartial judge.'" Great Am. Ins. Co. of N.Y. v. 2000 Island Blvd. Condo. Ass'n, Inc., 153 So. 3d 384, 385 (Fla. 3d DCA 2014) (quoting State ex rel. Davis v. Parks, 141 Fla. 516, 519, 194 So. 613, 615 (1939)). "Due process requires that a judge possess neither actual nor [perceived] bias." Eric P. Christofferson, Comment, Authority of the Trial Judge, 89 Geo. L.J. 1559, 1559 (2001).[4] "The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his [or her] ability to act fairly and impartially." Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983).

[4] "[T]he Due Process Clause has been implemented by objective standards that **do not require proof of actual bias**." Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 883, 129 S. Ct. 2252, 2263, 173 L. Ed. 2d 1208 (2009) (emphasis added).

Although "[t]he facts must be viewed from the perspective of the petitioner[s]," Michaud-Berger v. Hurley, 607 So. 2d 441, 446 (Fla. 4th DCA 1992), it is equally "well-settled that adverse rulings are insufficient to show bias." Clark v. Clark, 159 So. 3d 1015, 1017 (Fla. 1st DCA 2015) (citations omitted). This is because judicial rulings "cannot possibly show reliance upon an extrajudicial source, [thus], . . . [a]lmost invariably, they are proper grounds for appeal, not recusal." Liteky v. United States, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157, 127 L. Ed. 2d 474 (1994). Similarly, the "mere reporting of perceived . . . unprofessionalism" is insufficient to sustain disqualification. 5-H Corp. v. Padovano, 708 So. 2d 244, 248 (Fla. 1997).

Nonetheless, "[u]nder Florida law, a judge's statement that he [or she] feels a party has lied in a case before him [or her], generally indicates bias against the party." DeMetro v. Barad, 576 So. 2d 1353, 1354 (Fla. 3d DCA 1991) (citing Brown v. St. George Island, Ltd., 561 So. 2d 253, 257 (Fla.1990)). In reconciling these outwardly juxtaposed principles, our court has held:

> [T]he formation of a prejudice during and as a result of a party's testimony in a trial need not affect the case in which it was arrived at in that manner, although it may operate to disqualify that judge from hearing any later or second trial of that case if one is had, or from participating in any subsequent trial in which that party is involved.

Deauville Realty Co. v. Tobin, 120 So. 2d 198, 202 (Fla. 3d DCA 1960), cert. denied, 127 So. 2d 678 (Fla. 1961); see also St. George Island, Ltd. v. Rudd, 547 So. 2d 958,

960 (Fla. 1st DCA 1989) (granting prohibition where the trial court made a remark at a hearing in another case "if [witness] were here, I wouldn't believe him anyway").

Here, in the midst of protracted litigation, petitioners received the sanctions order, penned by the judge slated to serve as the arbiter in their current disputes. The order was rendered after the Law Firm became embroiled in the suits below, as a party to one dispute, and as counsel of record in the remaining two cases.[5] The court signed the order in close temporal proximity to hearings in the underlying cases. The decision deduced that the Law Firm engaged in treacherous conduct, including lying and fabricating allegations of a criminal conspiracy. Further, the tribunal was expansive in the scope of its findings of deceit, equally condemning the actions of the Law Firm and the individual attorney of record.[6]

Consequently, the court's "denouncement of the petitioners' [counsel's] character and believability in the prior proceeding was a strong implication that [it] would not believe them in future proceedings, and that [it] had already formed a hostile opinion . . ."[7] DeMetro, 576 So. 2d at 1355; see also Cummings v. Montalvo,

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[5] "Ordinarily a party may not bring an attorney into a case after it has been assigned to a judge, and then move to disqualify the judge on grounds that the judge has a bias against the attorney." Town Ctr. of Islamorada, Inc. v. Overby, 592 So. 2d 774, 776 (Fla. 3d DCA 1992).

[6] The order expressly implicated the General Counsel.

[7] We are cognizant that "[s]uch a stringent rule may sometimes bar trial by judges who have **no actual bias** and who would do their very best to weigh the scales of

135 So. 3d 389 (Fla. 5th DCA 2014) ("The motion, which sought disqualification based upon the judge's statements indicating that she had strongly and definitively prejudged Petitioner's credibility in an unfavorable fashion, should have been granted."); Holmes v. Goldstein, 650 So. 2d 87, 88 (Fla. 4th DCA 1995) ("Petitioner is entitled to have a trial judge preside over matters involving petitioner's credibility in the present case who has not evaluated petitioner's credibility and character in a negative fashion.").

Under prevailing jurisprudence, that the findings implicate petitioners' counsel in two of the petitions before us, rather than petitioners individually, is a distinction without a discernible difference. See Lowman v. Racetrac Petroleum, Inc., 220 So. 3d 1282, 1284 (Fla. 1st DCA 2017) ("[A]s an indication of a bias which may create a party's fear of not receiving an impartial hearing, there is no appreciable difference" between statements regarding the credibility of petitioners or his or her counsel.); Kline v. JRD Mgmt. Corp. & CCMSI, 165 So. 3d 812, 815 (Fla. 1st DCA 2015) (requiring disqualification where the tribunal "found that [p]etitioner's attorney acted dishonestly, had committed a crime (if not multiple crimes), and that he was not worthy of belief"); see also Fla. Code Jud. Conduct, Canon 3E(1)(a) ("A

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justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955) (emphasis added) (citation omitted).

judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: the judge has a personal bias or prejudice concerning a party or a party's lawyer."). As was so eloquently posited by our sister court in Hayslip v. Douglas, 400 So. 2d 553, 557 (Fla. 4th DCA 1981):

> "It is not always possible with exact particularity in a matter of this kind to set forth facts as to the process of the human mind." Brewton v. Kelly, 166 So. 2d 834, 836 (Fla. 2d DCA 1964). Nonetheless, we feel certain that under the facts as alleged in [petitioners'] motion[s], [their] fear was reasonable and not frivolous nor fanciful. Though a client and his counsel are separate entities, they share a common bond forged by the attorney-client relationship and tempered in the rigors of litigation. Most clients find the courtroom to be an unfamiliar and, in some instances, uncomfortable atmosphere and so it is not unusual that they entrust themselves into their counsel's care and view their interests as one. Thus, it is understandable that a client would become concerned and fearful upon learning that the trial judge has an antipathy toward [its] lawyer and has expressed the opinion that the client's counsel "should not be in this case."

See also Michaud–Berger, 607 So. 2d at 446 (granting prohibition where trial judge, in an unrelated case, found petitioner's counsel engaged in "sophistry," masking "greed, overreaching[,] and attempted extortion").

Accordingly, the attested facts sufficiently support the proposition that petitioners hold a well-grounded fear that they will not receive "a fair trial at the hands of the judge." State v. Cam Voong Leng, 987 So. 2d 236, 237 (Fla. 4th DCA 2008) (citation omitted); see also Parks, 141 Fla. at 518, 194 So. at 614 ("Such a fear rests in the mind of the litigant and if the attested facts supporting the suggestion are

reasonably sufficient to create such a fear, it is not for the trial judge to say that it is not there.").

Thus, we grant the petitions for writ of prohibition. As we are confident the trial judge will abide by this decision, we withhold formal issuance of the writs.

Prohibitions granted.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

VICTOR TISON,
Appellant,

v.

CLAIRMONT CONDOMINIUM F ASSOCIATION, INC., and
ROBERT ORLOFF,
Appellees.

No. 4D19-117

[November 6, 2019]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Martin J. Bidwill, Judge; L.T. Case No. CACE-15-022512.

Lourdes E. Ferrer of the Ferrer Law Group, PLLC, Weston, and Michael T. Ross of the Law Office of Michael T. Ross, P.A., Hollywood, for appellant.

Ashley R. Tulloch of Kaye Bender Rembaum, P.L., Pompano Beach, for Appellee Clairmont Condominium F Association, Inc.

TAYLOR, J.

Victor Tison appeals a final order denying his motion for attorney's fees and costs. We hold that Tison, as the prevailing party in a lawsuit brought against him by a condominium association for unpaid assessments, is entitled to recover prevailing party attorney's fees even though he sold his interest in the condominium unit during the pendency of the litigation. We therefore reverse.

In December 2015, Clairmont Condominium F Association (the "Association") filed a two-count complaint against Tison and another defendant, seeking to foreclose on an assessment lien against the defendants' condominium unit (Count I) and to recover damages for unpaid assessments (Count II). Both counts were brought pursuant to section 718.116, Florida Statutes, and the Declaration. At the time of the complaint, the defendants were the title owners of the unit.

Shortly after filing the complaint, the Association recorded a notice of

lis pendens.

The defendants filed an Answer and Affirmative Defenses, which they later amended. In both Answers, the defendants alleged that they were entitled to recover attorney's fees and costs.

In March 2017, the trial court denied the Association's motion for summary judgment. Later that month, the defendants sold their respective interests in the condominium unit to a third party.

Over a year later, the trial court entered a final order dismissing the action for lack of prosecution. Tison then moved for attorney's fees and costs, alleging in relevant part that he was the prevailing party and that he was entitled to an award of fees pursuant to the Declaration and section 718.303(1), Florida Statutes.

The Association opposed Tison's fee motion on various grounds. In relevant part, the Association argued that Tison was not entitled to attorney's fees under either section 718.303(1) or the Declaration because he was no longer a unit owner. The trial court denied Tison's fee motion, ruling that although Tison was the prevailing party, Tison was not a unit owner and was not entitled to attorney's fees.

On appeal, Tison argues that he is entitled to recover prevailing party attorney's fees pursuant to the Declaration and section 718.303(1), Florida Statutes, even though he sold his interest in the condominium unit during the pendency of the litigation. We agree.

"The issue of entitlement to attorney's fees based on the interpretation of a statute or contract is a pure matter of law involving de novo review." *Land & Sea Petroleum, Inc. v. Bus. Specialists, Inc.*, 53 So. 3d 348, 355 (Fla. 4th DCA 2011).

Section 19.3 of the Declaration addresses entitlement to attorney's fees in proceedings arising because of an alleged failure of a unit owner or the Association to comply with the requirements of the Condominium Act or the Declaration:

> In any proceeding arising because of an alleged failure of a Unit Owner of the Association to comply with the requirements of the Act, this Declaration, the exhibits annexed hereto, or the rules and regulations adopted pursuant to said documents, as the same may be amended from time to time, the prevailing party shall be entitled to

> recover the costs of the proceeding and such reasonable attorneys' fees (including appellate attorneys' fees) as may be awarded by the court.

Section 2.34 of the Declaration, in turn, defines a "Unit Owner" as the "owner of a condominium parcel."

Section 718.303(1), Florida Statutes, likewise addresses attorney's fees in actions for damages against an association or a unit owner for failure to comply with the provisions of Chapter 718 or the Declaration:

> (1) Each unit owner, each tenant and other invitee, and each association is governed by, and must comply with the provisions of, this chapter, the declaration, the documents creating the association, and the association bylaws which shall be deemed expressly incorporated into any lease of a unit. Actions for damages or for injunctive relief, or both, for failure to comply with these provisions may be brought by the association or by a unit owner against:
>
> (a) The association.
>
> (b) A unit owner.
>
> . . .
>
> The prevailing party in any such action . . . is entitled to recover reasonable attorney's fees. A unit owner prevailing in an action between the association and the unit owner under this section, in addition to recovering his or her reasonable attorney's fees, may recover additional amounts as determined by the court to be necessary to reimburse the unit owner for his or her share of assessments levied by the association to fund its expenses of the litigation. . . .

§ 718.303(1), Fla. Stat. (2015). Finally, section 718.103(28), Florida Statutes (2015), defines a "unit owner" as "a record owner of legal title to a condominium parcel."

As a preliminary matter, Tison was the prevailing party in the litigation because this case was dismissed for lack of prosecution, and the Association received none of the relief it sought in the complaint. *See, e.g.*, *Vivot v. Bank of Am., NA*, 115 So. 3d 428, 429 (Fla. 2d DCA 2013) (holding

that the defendant became the prevailing party when the foreclosure suit was dismissed for lack of prosecution).

The question presented in this case is whether Tison, as the prevailing party in the Association's lawsuit against him for unpaid assessments, is entitled to attorney's fees and costs even though he was no longer a unit owner at the time he filed his fee motion.

"It is settled law that legal rights accrue and are fixed, not when an action is brought to enforce them, but rather when 'the last element necessary to constitute the cause of action occurs.'" *Serna v. Arde Apparel, Inc.*, 657 So. 2d 966, 966 (Fla. 3d DCA 1995) (citation omitted). Accordingly, "the right to recover attorney's fees ancillary to another particular underlying cause of action always accrues at the time the other, underlying, cause of action accrues." *L. Ross, Inc. v. R.W. Roberts Constr. Co.*, 466 So. 2d 1096, 1098 (Fla. 5th DCA 1985), *approved*, 481 So. 2d 484 (Fla. 1986). Stated another way, the "substantive rights and obligations as to attorney's fees in particular types of litigation vest and accrue as of the time the underlying cause of action accrues." *Id.*

In this case, the trial court erred in denying Tison's motion for attorney's fees. The relevant question is not whether Tison was a unit owner at the time he filed the fee motion. Rather, the relevant question is whether Tison was a unit owner when the cause of action for unpaid assessments accrued. Here, Tison was a unit owner within the meaning of both the Declaration and section 718.303(1) at the time the Association's alleged cause of action accrued.

Under the plain language of the Declaration, Tison's entitlement to attorney's fees did not turn on whether he was a unit owner at the specific time he filed his fee motion. Even though Tison was no longer a unit owner at the time of the fee motion, the litigation below was undeniably a "proceeding arising because of an alleged failure of a Unit Owner of the Association to comply with the requirements of [the Condominium Act or the Declaration]," thereby entitling the prevailing party in the proceeding to attorney's fees under the plain language of section 19.3 of the Declaration.

Likewise, the plain language of section 718.303(1) authorized an award of fees under these circumstances. "In enacting section 718.303(1), the Legislature clearly intended the prevailing party in disputes between unit owners and condominium associations to be awarded attorney's fees." *Ocean Bank v. Caribbean Towers Condo. Ass'n*, 121 So. 3d 1087, 1090 (Fla. 3d DCA 2013). Here, Tison's sale of his interest in the unit during

the litigation did not preclude a determination that he was "the prevailing party" in an action brought by an association against a unit owner "for damages or for injunctive relief . . . for failure to comply with" the provisions of "[Chapter 718], the declaration, the documents creating the association, and the association bylaws," thereby entitling him to an award of "reasonable attorney's fees" under the plain language of section 718.303(1), Florida Statutes.

The Association's reliance upon *Garcia v. Stewart*, 961 So. 2d 1025 (Fla. 4th DCA 2007), is misplaced. There, we held that a former condominium unit owner, whose interest in the unit had been foreclosed upon, did not have any statutory or contractual basis to obtain fees from the association in proceedings involving the proper disbursement of funds after the foreclosure sale. *Id.* at 1027. Thus, in *Garcia*, unlike in this case, the former unit owner's claim to the disputed funds accrued *after* the foreclosure sale had already terminated his legal relationship with the association.

In short, because Tison was a unit owner at the time the Association's alleged cause of action accrued, he had a vested right to attorney's fees under the Declaration and under section 718.303(1) upon prevailing in the litigation. Tison's substantive legal rights, including his status as a unit owner for purposes of the statutory and contractual fee provisions at issue here, were fixed when the cause of action accrued.

Finally, we conclude that none of the Association's alternative arguments for affirmance have merit.

Based on the foregoing, we reverse the order on appeal and remand with instructions for the trial court to award Tison a reasonable amount for attorney's fees and costs.

Reversed and Remanded.

MAY and FORST, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CENTRAL FLORIDA INVESTMENTS, INC.,

Petitioner,

v. Case No. 5D19-943

ORANGE COUNTY, FLORIDA,

Respondent.

_____/

Opinion filed November 7, 2019

Petition for Certiorari Review of Decision from the Circuit Court for Orange County Acting in its Appellate Capacity.

Michael E. Marder, and Thu Pham, of Greenspoon Marder LLP, Orlando, and John H. Pelzer, Of Greenspoon Marder LLP, Fort Lauderdale, For Petitioner.

Elaine Marquardt Asad, and William C. Turner, Jr., of Orange County Attorney's Office, Orlando, for Respondent.

EDWARDS, J.

Central Florida Investments, Inc., Petitioner ("CFI"), argues that the circuit court, acting in its appellate capacity, departed from the essential requirements of the law by treating CFI's appeal as though it were instead a petition for a writ of certiorari and then dismissing the petition. We agree with CFI that section 162.11, Florida Statutes (2017), provides for a plenary appeal to the circuit court as a matter of right from a final

administrative order of an enforcement board. However, the record reveals that CFI requested a more limited review, which the circuit court may have conducted. Because it is unclear whether the circuit court indeed employed the scope of review requested by CFI, we remand for further proceedings.

Our review of the circuit court's appellate decision is by way of second-tier certiorari, which limits our consideration to whether the circuit court: (1) afforded CFI procedural due process and (2) applied the correct law. *See Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995); *DMB Inv. Tr. v. Islamorada, Vill. of Islands*, 225 So. 3d 312, 316 (Fla. 3d DCA 2017).

CFI was cited for a violation of the building code by Orange County Code Enforcement Division with regard to what were deemed to be unsafe conditions in a structure that had been partially demolished during certain activities engaged in by CFI. Because CFI contested the violation and ownership of the building in question, an evidentiary hearing was held before the Orange County Special Magistrate who entered a final administrative order against CFI and in favor of Orange County, Respondent.

CFI took an appeal, ostensibly pursuant to section 162.11, requesting the circuit court to reverse the final order entered by the magistrate. That section provides:

> 162.11 Appeals. An aggrieved party, including the local governing body, may appeal a final administrative order of an enforcement board to the circuit court. Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board. An appeal shall be filed within 30 days of the execution of the order to be appealed.

§ 162.11, Fla. Stat. (2017).

As CFI correctly argues, that statutory section clearly provides for an appeal as a matter of right to the circuit court. *See City of Ocala v. Gard*, 988 So. 2d 1281, 1282–83 (Fla. 5th DCA 2008). This Court has described the nature of such an appeal as plenary. *Id.* at 1283. There is nothing in the statute to suggest otherwise. "[W]here the language of a statute is plain and unambiguous there is no occasion for judicial interpretation." *DMB Inv. Tr.*, 225 So. 3d at 317 (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla. 1992)). Accordingly, if CFI had pursued a plenary appeal, the circuit court would have departed from the essential requirements of the law if it provided a more limited review, such as that afforded by first-tier certiorari review.

When CFI appealed the magistrate's order to the circuit court, it did not request a plenary appeal. Instead, CFI specifically requested the circuit court to conduct a first-tier review of the magistrate's order, governed by a three-prong standard of review, to determine whether: (1) procedural due process was afforded; (2) the essential requirements of law were observed; and (3) the magistrate's final order was supported by competent substantial evidence. It is understandable that CFI requested the circuit court to follow that procedure, as there are several Florida Supreme Court cases suggesting that the three-pronged first-tier review is the appropriate scope for a circuit court's appellate review of an agency or board decision; however, none of those cases discuss, concern, or cite section 162.11. *See, e.g.*, *Dusseau v. Metro. Dade Cty. Bd. of Cty. Comm'rs*, 794 So. 2d 1270, 1273–74 (Fla. 2001); *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000); *Haines City Cmty. Dev.*, 658 So. 2d at 530; *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). Indeed, section 166.061, Florida Statutes (1980), the predecessor to section 162.11, originally provided that "[a]n

aggrieved party may appeal a ruling or order of the enforcement board by **certiorari** in circuit court." (emphasis added). However, in 1982 the Legislature amended section 166.061 by deleting the word "certiorari." Ch. 82-37, § 10, Laws of Fla. The Legislature then renumbered that section, and in 1985 amended the statute further by using only the unmodified word "appeal" repeatedly. Ch. 85-150, § 3, Laws of Fla. Section 162.11 is the current and controlling grant of appellate review, by appeal and not by certiorari, from an enforcement board to circuit court, as further authorized by the Florida Constitution. *See* Art. V, § 5(b), Fla. Const.

In the case at hand, the circuit court's initial appellate decision stated: "We treat this appeal as a petition for writ of certiorari, *see Orange County v. Lewis*, 859 So. 2d 526, 528 n.1 (Fla. 5th DCA 2003), and deny certiorari." Indeed, this Court in *Lewis* stated that a circuit court's review of an administrative body's decision was by certiorari and was limited to a consideration of the three-prong test mentioned above. 859 So. 2d at 528 n.1. However, as in the above-cited supreme court cases, *Lewis* does not discuss or cite section 162.11. In a more recent case, this Court noted that "[s]ection 162.11 . . . specifically authorizes appeals of final administrative orders of enforcement boards to the circuit court." *City of Palm Bay v. Palm Bay Greens, LLC*, 969 So. 2d 1187, 1189 (Fla. 5th DCA 2007).

Review by certiorari is not the same as review by appeal. "The difference between certiorari review and appellate review is important." *M.M. v. Dep't of Child. & Fams.*, 189 So. 3d 134, 138 (Fla. 2016). "[O]n appeal, all errors below may be corrected: jurisdictional, procedural, and substantive." *Haines City Cmty. Dev.*, 658 So. 2d at 526 n.3. "Certiorari review is 'intended to fill the interstices between direct appeal and the

other prerogative writs' and allow a court to reach down and halt a miscarriage of justice where no other remedy exists.'" *Williams v. Oken*, 62 So. 3d 1129, 1133 (Fla. 2011) (quoting *Broward Cty. v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 842 (Fla. 2001)). "The writ [of certiorari] never was intended to redress mere legal error." *Broward Cty.*, 787 So. 2d at 842. Certiorari review considers whether the correct law was applied; review by appeal goes further to also consider whether the law was correctly applied. It makes sense that where two levels of appellate review are provided, at least one reviewing court would consider whether the enforcement board correctly applied the law. It has been said that the three-pronged first-tier certiorari review is "akin in many respects to a plenary appeal." *Fla. Power & Light Co.*, 761 So. 2d at 1092. However, section 162.11 provides for an actual appeal, not something similar to an appeal. The Legislature has the power to provide a wider scope of review than is available through certiorari by providing for appeals. *Haines City Cmty. Dev.*, 658 So. 2d at 526 n.3. "Moreover, where the Legislature has directed how a thing shall be done, it is, in effect, a prohibition against it being done in any other way." Op. Att'y Gen. Fla. 81-25 (1981) (citing *Alsop v. Pierce*, 19 So. 2d 799, 805–06 (Fla. 1944)). If a court uses the inappropriate standard of review, that may be considered to be a departure from the essential requirements of the law. *City of W. Palm Beach Zoning Bd. of Appeals v. Educ. Dev. Ctr., Inc.*, 504 So. 2d 1385, 1385–86 (Fla. 4th DCA 1987). Because CFI requested the circuit court, sitting in its appellate capacity, to employ the three-pronged first-tier standard, rather than requesting a plenary appeal, the concept of invited error forecloses CFI's entitlement to relief on that basis. *See Pope v. State*, 441 So. 2d 1073, 1076 (Fla. 1983).

However, it is not clear whether the circuit court actually employed the three-pronged test as it entertained CFI's appeal. As noted above, the circuit court's initial order clearly said that it treated CFI's appeal as though it were a petition for certiorari, which is not what CFI requested. However, in response to CFI's motion for rehearing, the circuit court noted its agreement with CFI that it was required to determine whether: (1) procedural due process was afforded; (2) the essential requirements of the law were observed; and (3) the administrative body's findings were supported by competent substantial evidence. Rather than confirming that it followed that invited scope of review, when denying CFI's motion for rehearing, the circuit court said only that "there is nothing on the face of the Court's opinion to indicate that the Court did not apply this three part test for first tier review." Nor, we note, is there anything on the face of the circuit court's order to indicate that it *did* apply the three-pronged test, as invited by CFI, which would be the only permissible reason for treating CFI's section 162.11 appeal as a petition for first-tier certiorari review, and which would otherwise explain what currently appears to be a clear departure from the essential requirement of the law. Accordingly, we remand this matter to the circuit court, sitting in its appellate capacity, with instructions to state whether it applied the three-pronged first-tier scope of review, as invited by CFI, leading it to reject CFI's appeal and affirm the magistrate's final order.

PETITION FOR CERTIORARI GRANTED, REMANDED WITH INSTRUCTIONS.

JACOBUS, B.W., Senior Judge, concurs.
GROSSHANS, J., concurs in result only.