TRIBUTE TO THE ACHIEVEMENTS OF PROFESSOR FRED P. BOSSELMAN

The four articles in this section honor Professor Bosselman who retired from full-time teaching at the Chicago-Kent College of Law in 2002. One might ask why the tributes are being published in this *Journal* rather than the *Chicago-Kent Law Review*. There are three reasons. First, the *Chicago-Kent Law Review* is an all symposium review so the format is not well-suited to the four short articles that focus on Fred's wide-ranging career and important substantive contributions to land use and environmental law. Second, in October 2001, Professor Bosselman delivered the Distinguished Lecture at the The Florida State University College of Law. His lecture, *What Lawmakers Can Learn from Large-Scale Ecology*,[1] will be published in the Spring 2002 issue of the *Journal of Land Use & Environmental Law*. It shows Fred at the height of his creative powers, and it seemed appropriate that Fred should be honored in one of the leading land use and environmental law journals. Third, Fred had a distinguished career in practice before joining the Chicago-Kent faculty in 1992 and large segments of that career were spent in Florida.

The four articles by a group of distinguished land use and environmental scholars, who are also friends and colleagues, highlight his illustrious legal career. One should view them as a tasting sampler rather than a seven-course meal because they do not do justice to the breath and depth of his scholarship and related work. For example, the tributes do not recognize his return to his early roots as a public utility lawyer. In the past few years, Fred has been revitalizing energy law and policy, which became an exciting area in the 1980s but died when the Reagan-Bush-Clinton administrations decided to rely on imported oil almost exclusively to meet petroleum demands. His 2000 casebook, ENERGY, ECONOMICS AND THE ENVIRONMENT, co-authored with Professor James Rossi of The Florida State University and Jacqueline Lang Weaver of the University of Houston, is the first comprehensive energy law casebook in over a decade.

From the beginning Fred combined a high-level, cutting edge land use and environmental practice with first-rate, increasingly inter-disciplinary scholarship. His practice initially concentrated on land use issues and early in his career, he made important contributions to the American Law Institute's Model Land

1. Fred P. Bosselman, *What Lawmakers Can Learn from Large-Scale Ecology*, 17 J. LAND USE & ENVTL. L. (forthcoming 2002).

Development Code, an effort which influenced Florida's land use law. One of Fred's many valuable skills is his ability to spot important, emerging trends. He quickly spotted the importance of the environmental movement, and for over thirty years, Fred has played a major role in integrating land use and environmental law. His long-standing interest in the impact of tourism on vulnerable landscapes and his role in promoting the use of multiple-species habitat conservation plans are examples of his ability to find innovative legal approaches to new problems.

The four articles include:

- Professor David L. Callies, *Fred Bosselman and the Taking Issue.*
- Professor Daniel R. Mandelker, *Fred Bosselman's Legacy to Land Use Reform*.
- Professor Craig A. Peterson, *Twenty-five Years of Taming Tourism*.
- Professor A. Dan Tarlock, *Fred Bosselman as Participant Observer Lawyer: The Case of Habitat Conservation Planning.*

A. Dan Tarlock

FRED BOSSELMAN AND THE TAKING ISSUE

DAVID L. CALLIES*

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I. INTRODUCTION

Fred Bosselman's contribution to land use planning law theory and practice is legendary. Three works in particular stand out: *The Quiet Revolution in Land Use Control*,[1] *The Taking Issue*[2] and A Model Land Development Code.[3] The first two he did for the President's Council on Environmental Quality. The last he did as reporter for the American Law Institute (ALI). All three had tremendous influence on the course of land use law, and influenced a generation of lawyers, law professors and judges. All involved some aspect of what we now call "the taking issue" – the point at which a land use regulation so restricts a landowner's use of land that it becomes a constitutionally protected taking of property, either without compensation or without due process of law.[4] I had the extraordinary privilege of working with Fred on the first two projects and helping with his implementation of the Model Land Development Code in Florida shortly after its adoption by the ALI. What follows is a summary of the formulation and implementation of these landmark projects.

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1. FRED P. BOSSELMAN & DAVID L. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1972).

2. FRED P. BOSSELMAN, DAVID L. CALLIES & JOHN BANTA, THE TAKING ISSUE: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS (1973).

3. MODEL LAND DEV. CODE (Proposed Official Draft 1975).

4. There are dozens of articles on regulatory taking, most following publication of THE TAKING ISSUE, *supra* note 2, as described later in the text. For two perspectives on what has happened in the past thirty years in this fertile field of property law, see ROBERT MELTZ ET AL., THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION (1999); *and* STEVEN J. EAGLE, REGULATORY TAKINGS (2d ed. 2001).

The story of these landmark projects needs to be set against the backdrop of the law firm that helped make them possible: Ross, Hardies, O'Keefe, Babcock and Parsons of Chicago. Direct successor and descendent of the politically powerful early twentieth century firm of Cook, Sullivan and Ricks,[5] by the 1960s the firm, one of Chicago's largest, was best known for its corporate and utility work, particularly its representation of Peoples Gas, Natural Gas Pipeline and Central Telephone Company. The firm's reputation changed, however, when its managing partner, Clarence Ross, in the 1960s, brought in Richard F. Babcock, a liberal Democrat from another large firm, to take over the representation of Peoples Gas, and eventually to himself become managing partner. Babcock, however, had nurtured another specialty for which the firm was soon to develop a national reputation: zoning and associated land use controls. In 1967, he published a thin volume entitled *The Zoning Game*,[6] hailed as a masterpiece of explanation of what really went on in the local classification and regulation of land use. A close friend of Dennis O'Harrow, of the fledgling American Society of Planning Officials (now the American Planning Association), Babcock was soon writing regular articles for *Land Use Law and Zoning Digest* and seeing to the collection and digesting of land use cases for that publication using a cadre of young associates whose names were soon to become as famous as his own: Marlin Smith, Don Glaves, David McBride, and later Bill Singer and John Costonis; and, of course, Fred Bosselman. Others later joined the firm for various periods of time so that the firm's "alumni" list soon read like a who's who of land use lawyers (affectionately christened "Babcock's Bastards" by Vanderbilt Dean John Costonis) and its increasingly national land use practice became the envy of everyone who wanted to "do" land use.

II. THE QUIET REVOLUTION IN LAND USE CONTROL

While most eventually concentrated on other aspects of the firm's diverse practice, Fred Bosselman found land use to be the perfect outlet for his uncanny knack for predicting future trends and his keen intellect. After joining Babcock on several projects in the late 1960s, Bosselman became involved in the ALI Model Land Development Code at the behest of Babcock, who chaired the project's advisory committee, eventually becoming its associate, and

5. Indeed, so powerful was the firm that its managing partners allegedly successfully directed a state supreme court justice to resign and join its ranks in order to further burnish its image.

6. RICHARD F. BABCOCK, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES (1966); *see also* RICHARD F. BABCOCK & CHARLES L. SIEMON, THE ZONING GAME REVISITED (1985).

principal, reporter. About the same time, he approached the President's Council on Environmental Quality (CEQ), then headed by Boyd Gibbons and staffed by a former firm summer associate, William K. Reilly, who later headed Laurence Rockefeller's Citizen's Council on Environmental Quality, The Conservation Foundation, The World Wildlife Fund, and the U.S. Environmental Protection Agency, all organizations with which Fred would later work in his capacity as an expert in land use.[7] Bosselman and Reilly convinced Gibbons that a study of the growing role of states in the control of land use would be useful in support of a federal bill to implement the Model Code which sought to require a formal state role in the planning and use of land to solve regional and statewide land use problems. Thus was born *The Quiet Revolution in Land Use Control*.[8]

As Bosselman conceived it, the study and report which followed it would concentrate on several key states which "took back" some of the police power delegated through zoning- enabling legislation to local governments. The reasons were varied: to end the "balkanization" of local zoning; to save statewide resources; and to better manage large regional development projects. The choice of states reflected both geographic and technical diversity: from Hawaii's statewide zoning in the west to Vermont's multi-tiered statewide environmental project reviews in the east. In the middle were such regional controls as San Francisco's Bay Area Conservation and Development Commission designed to preserve what was left of that Bay, and Minnesota's Twin Cities Metro Council, designed to manage growth in order to coordinate infrastructure in the Twin Cities region. The scope of this ambitious project was enormous for the times.[9]

Equally impressive was the methodology which Bosselman proposed: over a two-year period, both a junior associate and Bosselman would visit each of the nine states (and several other "also-rans") to interview not only government officials and politicians, but also representatives of the land development community to find out exactly how these "revolutionary" land use controls actually worked. Bosselman generally concentrated on the

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7. He was, for example, a contributor to the Rockefeller Fund's report, THE USE OF LAND: A CITIZEN'S POLICY GUIDE TO URBAN GROWTH (William K Reilly ed., 1973); and author of IN THE WAKE OF THE TOURIST: MANAGING SPECIAL PLACES IN EIGHT COUNTRIES (1978), a product of The Conservation Foundation's International Comparative Land Use Project.

8. BOSSELMAN & CALLIES, *supra* note 1.

9. The nine state and regional land use programs included: Hawaii, Vermont, San Francisco, Massachusetts (2), Maine, the Twin Cities, Wisconsin and the New England River Basin. The bills passed the House time and again, only to be defeated in the Senate. Eventually, part of the bill became law in the federal Coastal Zone Management Act, 16 U.S.C. § 1455 (2000).

officials, and the rest of us, variously Bill Eades, John Banta and myself, batted cleanup in the public sector and talked with the developers. Bosselman, Eades and I wrote the first draft of several chapters (Banta later drafted 2 more), but when Eades left to pursue other interests, I ended up rewriting many of them with Bosselman, and hence became co-author of the report, albeit clearly a junior one. Fred reviewed and revised much of every single chapter, fretting ceaselessly over notes and wording to delete anything sounding remotely like legalese, until, as Bill Reilly described the final product: "It sings."

Allowing for that justifiable hyperbole, *The Quiet Revolution in Land Use Control*[10] easily became the most influential study of land use in the 1970s, if not in the entire last quarter of the twentieth century, even though the model legislation it was designed to support never did pass Congress. It has been "revisited" many times, and its methodology repeated over and again not only in further state and regional studies, but in the Conservation Foundation's famous International Comparative Land Use Study[11] and the many books and articles it produced in the late 1970s and early 1980s.

However, in the course of reviewing the "revolutionary" state land use controls of the 1960s and the handful of cases supporting them, Bosselman became increasingly troubled by the specter of constitutional challenges as viewed by state legislators and other officials. The issue was the constitutionality of regulating so much private land outside the context of local zoning and the warning of Chief Justice Oliver Wendell Holmes in the 1922 U.S. Supreme Court case of *Pennsylvania Coal Company v. Mahon*[12]: If a regulation went "too far" it could be construed as a taking, as if the government took the property by eminent domain. In other words, a "regulatory taking." Indeed, local zoning almost suffered the fate of being declared such an unconstitutional taking in 1923 in *Village of Euclid v. Ambler Realty Company*,[13] sustained only after rehearing and largely on the basis of protecting single-family residential districts from the nuisance-like predations of physically-overpowering apartment towers, which, incidentally, had nothing whatsoever to do with the facts of the case. However, as Bosselman noted later, after declaring a specific instance of zoning

10. BOSSELMAN & CALLIES, *supra* note 1.

11. CONSERVATION FOUND., GROPING THROUGH THE MAZE: FOREIGN EXPERIENCE APPLIED TO THE U.S. PROBLEM OF COORDINATING DEVELOPMENT CONTROLS: A CONSERVATION FOUNDATION REPORT FROM THE INTERNATIONAL COMPARATIVE LAND-USE PROGRAM (John H. Noble, John S. Banta & John S. Rosenberg eds., 1977).

12. 260 U.S. 393 (1922).

13. 272 U.S. 365 (1926).

unconstitutional as applied the very next year in *Nectow v. City of Cambridge*,[14] the Supreme Court had virtually retired from the zoning game, leaving it up to the state courts to define what constituted a regulatory taking under the U.S. Constitution. These state courts had riddled the regulatory taking doctrine with holes, leading Bosselman to conclude it should have no effect on either statewide or local land use regulatory practice. But how to convince the rest of the country?

III. THE TAKING ISSUE

The answer was a second report to the Council on Environmental Quality: *The Taking Issue*.[15] Its purpose was threefold: (1) to set out in painstaking detail how relatively anomalous *Pennsylvania Coal*[16] was for the legal times; (2) to point out the dearth of federal guidance since the 1920s; and finally, (3) to enumerate and digest the growing multitude of state court decisions which all but ignored *Pennsylvania Coal*.[17] Bosselman's first task, therefore, was to cast doubt on the theory of regulatory taking in any form. This we did, first, by examining the historical roots of physical takings and land use regulations. Fred dispatched me to London for the better part of an entire summer to examine British records and treatises on early land use regulation during Elizabethan times. He then enlisted Professor Stanley Katz of the University of Chicago and his legal history seminar students to research and write papers on colonial land use controls and the roots of the Constitution's takings clause. John Banta, a summer and later regular associate at the firm, commenced collecting state court cases from around the country which largely ignored *Pennsylvania Coal*[18] in upholding land use regulations against takings challenges. Fred concentrated on *Pennsylvania Coal*[19] itself and what led to the decision.

After a year of research, conferring, drafting and redrafting, the evidence led to several basic conclusions. First, land use regulations had been around for several centuries, both in England and the United States, without any hint that a regulation could become a constitutionally protected physical taking under the Fifth Amendment. Second, there was no precedent for so holding in the years leading up to 1922, either in caselaw or relevant treatises. Third, the Court had abandoned the area of land use controls for the

14. 277 U.S. 183 (1928).
15. BOSSELMAN, CALLIES & BANTA, *supra* note 2.
16. 260 U.S. 393 (1922).
17. *Id*.
18. *Id*.
19. *Id*.

past half-century. Fourth, state courts had all but ignored the case and its regulatory taking doctrine for almost all of that time. All of which led us to conclude that regulatory taking was dying and that the Court should repudiate it at the earliest opportunity, thereby recognizing what many state courts had already done.

That left the writing of the report and its naming. Oddly, the former was easier than the latter. Many conferences ended without anything nearly so catchy as *The Quiet Revolution in Land Use Control*.[20] After one particularly fruitless conference, Fred announced in frustration that if Banta and I could not between us come up with a title by the end of the week, he was going to send along the report to the CEQ with its file title: *The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control*. And so, *The Taking Issue*[21] it was. The book was published in 1973 with a rendering of the U.S. Constitution in an off-shade of red against a pale reddish-tan background, with the title at the bottom. Which leads to one final anecdote: Fred was asked by his alma mater, Harvard Law School, to give a lecture on the book that was taking the land use world by storm and assuring the law firm's place as the leading firm in the nation to do land use work. However, that fame had not fully permeated the hallowed precincts of Harvard Law School. When Fred arrived for his lecture, he found the venue papered with posters advertising a lecture by its famous alumnus based on his new and famous book, the title of which had been hurriedly gleaned from the front jacket: "We The People!"

IV. MODEL LAND DEVELOPMENT CODE

Fred's work on the ALI, A Model Land Development Code (Model Code),[22] is less familiar to me than its implementation in Florida. As noted above, Fred largely replaced Michigan Law Dean Terrance Sandalow, one of three Assistant Reporters, in 1969, becoming the Associate Reporter with Chief Reporter Professor Allison Dunham, who had replaced Charles Haar of Harvard upon his 1966 appointment as Assistant Secretary of HUD. Designed as a source for the rethinking of prevailing norms, the purpose of the Model Code[23] was not to provide a comprehensive statute like the Uniform Commercial Code, but to provide an accordion-like resource, parts of which could be adopted, or not, depending upon

20. BOSSELMAN & CALLIES, *supra* note 1.
21. BOSSELMAN, CALLIES & BANTA, *supra* note 2.
22. MODEL LAND DEV. CODE, *supra* note 3.
23. *Id.*

the goals and political climate in a particular jurisdiction. The Model Code[24] was formally adopted by the ALI in 1975.

As noted above, the Model Code never did make it through Congress as a land use statute, though parts were adopted in the federal Coastal Zone Management Act.[25] However, the Model Code[26] sparked the interest of the late Professor Gilbert Finnell, then at Florida State University, and part of a task force charged with drafting statewide legislation for controlling development and saving some of the environment in Florida. A vacation resident of Florida for decades, Fred was soon shuttling regularly between Chicago and the state capital of Tallahassee to meet with state officials in aid of drafting what eventually became the Environmental Land and Water Management Act (ELMS) of 1973.[27] Based on the Model Code's Article 7,[28] the Act provided for regional review of defined Developments of Regional Impact – those with impacts on more than one county (marinas, shopping centers, large residential developments) and state designation of development-free Areas of Critical State Concern. One of the first such Areas designated were the Florida Keys.[29] The Act became a model for use of parts of the Model Code[30] in state land use legislation.

V. CONCLUSION

In sum, Fred's influence on the law of takings, particularly regulatory takings, was, and is, immense. His work goes beyond theory into the practical realm of achieving land use controls within the context of regulatory takings, moving more recently into the environmental realm and the negotiating of habitat conservation agreements under the Endangered Species Act.[31] Of course, the U.S. Supreme Court eventually returned to the issue of regulatory takings in a series of cases commencing with *Penn Central Transportation Company v. City of New York*[32] in 1978 (defining partial takings) and ending with the recent *Palazzolo v. Rhode Island*[33] in 2001 (dealing with the so-called "notice" rule pertaining

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24. *Id*.
25. 16 U.S.C. § 1455 (2000).
26. MODEL LAND DEV. CODE, *supra* note 3.
27. FLA. STAT. § 380.012-10 (1973).
28. MODEL LAND DEV. CODE, *supra* note 3, § 7.
29. For contemporary commentary on ELMS, see Gilbert L. Finnell, Jr., *Saving Paradise: The Florida Environmental Land and Water Management Act of 1972*, 6 URB. L. ANN. 103 (1973). S*ee also* ROBERT G. HEALY & JOHN S. ROSENBERG, LAND USE AND THE STATES 126-176 (2d ed. 1979).
30. MODEL LAND DEV. CODE, *supra* note 3.
31. 16 U.S.C. §§ 1531-1544 (2000).
32. 438 U.S. 104 (1978).
33. 533 U.S. 606 (2001).

to landowners who acquire interests in land knowing of existing stringent land use controls). In between, the Court announced a categorical or *per se* rule for regulations which deny a landowner all economically beneficial use (*Lucas v. South Carolina Coastal Council*[34] in 1992) and decided when a controversy over land use regulation was sufficiently "ripe" for determination in federal court (*Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County*[35] in 1985). The legal landscape with respect to regulatory takings is much changed today from the early 1970s, but Fred Bosselman continues to counsel state and local governments on how best to regulate land in order to avoid – the taking issue.

34. 505 U.S. 1003 (1992).
35. 473 U.S. 172 (1985).

FRED BOSSELMAN'S LEGACY TO LAND USE REFORM

DANIEL R. MANDELKER*

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I. INTRODUCTION

The division of authority between states and their local governments is a major issue in land use control. Historically, states are enablers. They authorize local governments to plan and regulate land use, but do not usually tell them how to do it.

All that began to change some thirty years ago when selected small and vulnerable states, like Hawaii and Vermont, modified their land use systems by adopting an overlay of state controls. These controls had an environmental tilt, and left the established local system in place subject to state overrides through state land use districts or permit systems.

Fred Bosselman chronicled this change when he coauthored a pathbreaking book with David Callies in 1971, *The Quiet Revolution in Land Use Control*.[1] Their book described the new movement in land use law that transferred power over land use decisions from local governments to the states and continues to have a critical influence on the design of state land use systems. At least a dozen

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1. This is enough of a citation. Fred and I had a mutual friend, the late Sir Desmond Heap, who was England's leading land use lawyer. Desmond once said, when commenting on an American law review article stocked with footnotes, that obviously the author was not capable of original ideas. The footnotes in this article will be limited.

states now have some type of state land use program, though the emphasis in many of the newer programs is on growth management rather than environmental preservation.

This tribute describes two state-level control techniques that Fred Bosselman pioneered: the regulation of areas of critical state concern and the control of developments of regional impact (DRI). The critical area technique has become an accepted method of land use regulation at both the state and local level, and several states have adopted it, either in comprehensive state land use programs or as a stand-alone control measure. The DRI proposal has also gained acceptance, though not as widely. Florida is the only state that includes the development of regional impact concept in its state land use program, but the Cape Code Commission in Massachusetts and some other land use systems have adopted it, such as the regional land use control program in Atlanta, Georgia and the comprehensive planning program in the Twin Cities of Minnesota.

Fred Bosselman is modest, and his contributions to land use reform are not as well known as they should be. They appeared for the first time in A Model Land Development Code adopted by the American Law Institute (ALI) in 1976 (hereinafter Model Code), and many of us who were active in land use matters at the time were aware that Fred originated these ideas in the code. This is an appropriate time to honor Fred's pioneer role in developing these important techniques for the regulation of land use.

II. HOW CRITICAL AREAS AND DEVELOPMENTS OF REGIONAL IMPACT CAME TO BE

The late 1960s and early 1970s were a heady time in land use regulation. By this time the early struggles to uphold the constitutionality of land use controls were over, and observers of the land use system began a more critical evaluation that examined the way in which land use controls functioned. Gradually, many came to believe that local land use regulation, though beneficial, also had a number of problems that called out for reform.

A number of concurrent yet related developments contributed to a perception that reform was needed. One was a sea change in how society viewed its obligation to preserve environmental and natural resources. Fred and David wrote *The Quiet Revolution* at the dawn of an era that brought new concerns to the management of land environmental resources. Conventional local land use regulation could not contribute effectively in the protection of environmental resources because it did not have an environmentally-sensitive focus.

The insular and self-serving administration of land use controls contributed to the environmental problem. Land use controls can be powerful, but they are concentrated in local governments that can advance local interests at the expense of larger public concerns they do not have to consider.[2] Local governments allowed developers to build in wetlands, for example, even though wetland destruction has a disastrous impact on wildlife habitat and environmental quality. Critics began to realize this kind of development was destructive, and that local governments would not have an incentive to take the larger public interest into account by rejecting development that could create environmental problems. There was a growing consensus that some form of state intervention was needed to deal with this problem, and the early land use programs in states like Hawaii and Vermont were a change in this direction.

Self-serving local governments can also use their land use powers to exclude.[3] Critics coined the term LULUS, or locally unwanted land uses, to describe the kinds of uses local governments were likely to exclude as unwanted. They ranged all the way from low and moderate-income housing to public facilities such as prisons.

A substantial amount of state planning and financial investment goes into public facilities, and this state interest arguably requires some form of intervention at the state level to guard against local exclusionary tactics. The national system of interstate and limited-access highways is an example. Though most of the funding is federal, there is also a substantial state financial commitment. State condemnation powers can override local objections to highway construction, but there are also land use issues that cannot be handled through construction programs.

Congress authorized the interstate system in 1956, and by the early 1970s enough of the system was completed to make its role in shaping development opportunities obvious. The system includes large numbers of highway interchanges throughout its length, and these interchanges are attractive to commercial and office developers, especially in urban areas, who depend on easy access to the interstate system to make their development economically viable.

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2. For discussion of this issue see Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1 (1992).

3. Fred Bosselman included a provision in the Model Code to deal with this problem by providing a review process for developments of regional benefit. Unfortunately, this proposal has not had much success.

Here the danger was that local governments might do either too little or too much. Neighborhood opposition could block intensive development at interchanges, or force a developer to accept a project so reduced in scale that it was no longer economically attractive. Tax-hungry municipalities might also approve major projects at interchange locations that would congest highways. Nor would new development necessarily occur at the right place if exclusionary policies by some municipalities compelled developers to seek a less optimal location.

Finally, the magnitude of development projects had changed dramatically since the United States Department of Commerce proposed the first model land use laws in the 1920s. At that time, large-scale residential developments were unknown, and the shopping center had not arrived. By the 1960s, however, large-scale residential and commercial projects were commonplace. They created a new set of problems because decisions on the location of major development projects have spillover effects beyond local boundaries.

These are examples of land use issues that were apparent at the time the ALI code was prepared that transcend local concerns, and arguably demanded some kind of state intervention to correct local decisions that did not take the larger public interest into account. There was precedent for this approach in state management of land use in the Vermont state land use law, which created a state permit system for major developments as an add-on to local control. Developers of large housing developments, for example, were among those required to seek state permit approval. The Vermont system thus had two elements that also became part of the DRI and critical area ideas: the identification of major developments and vulnerable areas that required state review, and the implementation of that review through a separate system of review at the state level.

III. THE AMERICAN LAW INSTITUTE'S MODEL LAND DEVELOPMENT CODE

Legislative issues in land use also came to the attention of the American Law Institute in the mid-1960s. The late Dick Babcock, a leading Chicago land use lawyer and then Fred Bosselman's law partner, had undertaken a study funded by the Ford Foundation that led the Institute to undertake a major overhaul of enabling legislation for land use regulation. The Institute selected Fred as one of the reporters for that project who was responsible for the project's direction.

To understand the direction the Model Code took and Fred's role in its preparation, it is necessary to look at other issues that were

receiving attention in land use planning and regulation at that time. One important issue was the failure of comprehensive planning to take hold at the local level. Planning failure had occurred despite almost fifty years of experience with land use regulation, and a mandate from the early model laws that required land use planning. Local incentives to plan had been undermined, however, by the interpretation courts placed on a requirement in the model laws that zoning must be "in accordance with" a comprehensive plan. The courts took the starch out of this language by holding that the "plan" could be found in the zoning ordinance. As a result, local governments did not have to adopt a separate and independent land use plan in order to satisfy the "in accordance" requirement.

The failure of planning to take hold in a significant way at the local level was an important issue that faced the drafters of the Model Code. One solution to this problem, of course, would have been a statutory requirement that clearly made planning mandatory and that clearly required land use regulations to be consistent with the plan. For ideological reasons, the Model Code project stopped short of adopting that solution, although it held out incentives to local governments that did plan by authorizing them to adopt more sophisticated land use controls.

A mandate for comprehensive planning and the consistency of local controls with the comprehensive plan would have helped correct the problem of arbitrary decision-making at the local level, particularly if it had included a requirement for state or regional planning. State and regional plans, if binding, could have curbed local excesses. The drafters of the Model Code did not see a major role for regional planning, so they omitted it. They included requirements for a state plan but did not make it a binding document.

Fred Bosselman's solution to the problem of controlling local land use decisions was to propose an article in the code that, for the first time in model land use legislation, addressed the issue of state participation in local land use decisions. However, the absence of a mandatory state and local planning requirement, and the failure to require local land use regulations to be consistent with a mandatory plan, created problems in deciding how to draft the state intervention sections. Had the code included a requirement for mandatory land use planning, a proposal for state participation in local land use decisions could have used the plans as the basis for decision-making. The problem was complicated by the decision to omit regional planning from the code, though regional planning is closer to the local level and could have provided a detailed and responsive basis for planning policies that could drive state intervention decisions.

Fred Bosselman's proposal for state participation in local land use decisions contained two solutions to the problems created by the absence of mandatory planning. One was an idea he called the regulation of Development of Regional Impact.[4] This proposal was a response to the regulation of major developments, such as shopping centers, whose size created problems that extend beyond the local community.

To take care of this problem, Fred proposed a process that would allow objectors who were displeased with a local government's decision on a DRI to appeal that decision to a state agency. The problem was to provide a basis for state review of DRI in the absence of a binding state plan. The Model Code solved that problem by requiring the state agency to apply a type of cost-benefit analysis when it reviewed the local DRI decision.[5] Florida adopted this idea as part of its state land use control system, and other jurisdictions use it as well, notably the Cape Code Commission in Massachusetts.

The Area of Critical State Concern proposal was a twin to the DRI proposal.[6] The critical area proposal was a response to the problem of regulating areas, such as environmental areas and areas around highway interchanges, whose development would create issues of state importance. However, although the critical area proposal covered more than environmental areas, its usefulness as a technique to preserve these areas has become its dominant application. Several states have adopted the critical area concept in their state land use programs.

The critical area idea was straightforward. The state planning agency would have the authority to designate specified areas in the state, such as environmental areas, for which it would adopt a set of guidelines. Local governments would then have to adopt local land use regulations consistent with the state guidelines. The state agency had to approve local comprehensive plans, and local land use

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4. MODEL LAND DEV. CODE § 7-301 (1976). This section also contained a proposal for state intervention in local decisions that affected Development of Regional Benefit, which included developments of affordable housing.

I am not suggesting that Fred Bosselman was responsible for every detail of the DRI and critical area proposals in the Model Code. The code was a team effort, and I have not queried Fred in detail on his responsibility for particular code provisions, and whether he agreed with every legislative decision the code made.

5. The model also contained a requirement that a DRI not "substantially or unreasonably interfere with the ability to achieve the objectives" of a local or state plan, but state and local planning was not made mandatory. MODEL LAND DEV. CODE § 7-304(2)(b) (1976).

6. *Id.* § 7-301. I reviewed the critical area concept in *Critical Area Controls: A New Dimension in American Land Development Regulation*, 41 J. AM. INST. OF PLANNERS 21 (1975). *See also* DANIEL R. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 63-126 (1976 & Supp. 1982).

decisions would have to apply local land use regulations adopted to implement the guidelines once the state agency approved these regulations.

Fred hoped through these two proposals to enable states to intervene in important local land use decisions without a major revision in local land use regulation, and without mandating land use planning. He accomplished this purpose for DRI projects by specifying a set of standards the state agency had to use when reviewing them. He accomplished this purpose for critical areas by authorizing the state agency to adopt specially tailored guidelines for the control of development in these areas. These guidelines would not be plan-driven, but policy-making problems would be eased in environmental areas because physical necessity would determine, to some extent, the policies the state agency should adopt.

IV. WHAT THE CRITICAL AREA AND DEVELOPMENT OF REGIONAL IMPACT IDEAS WERE INTENDED TO DO

A word is in order here on the implicit regulatory philosophy behind these proposals, and how they fit with the American system of land use controls. The DRI and critical area proposals were incremental and pragmatic. They did not require wholesale reconstruction of the land use regulation system, which might have encountered opposition. Instead, they are overlays on the existing system that seek to correct identified decision-making problems.

Fred's decision to move incrementally and pragmatically was perceptive. American political agendas often organize around single issues, and environmental protection is one of them. Proponents of protective land use regimes usually prefer enactment of a specific legislative solution to remedy the problems they perceive, rather than comprehensive revision of land use systems. The federal Highway Beautification Act adopted in 1965 is an example. The DRI and critical area proposals are another, though the popularity of environmental causes has made the critical area proposal the more popular of the two. Incremental and piecemeal change creates problems of coordination and internal consistency, but is inevitable in a political system that often fragments responsibility and avoids extreme centralization.

The critical area and DRI proposals also remedy an eternal tension in land use decision-making between the making of policy and the application of that policy. The absence of binding state or regional plans in the Model Code meant there would not be a planning policy as the basis for administering critical area and DRI controls, but Fred's proposal attempted to deal with this problem by

providing decision criteria for DRI and state guidelines for regulating land development in critical areas.

Either proposal is easily included in a land use system that mandates comprehensive planning. The critical area idea fits easily into a land management system based on comprehensive planning, as indicated by the inclusion of a critical area requirement in the Washington state growth management legislation, which has a mandatory planning requirement.[7] Within the planning context, critical area planning and control is simply another application of subarea planning and regulation. Downtown design planning is another example.

Comprehensive plans can also provide policies for the review of development of regional impact. The Washington state growth management statute, for example, requires county plans to include a process for identifying and siting "essential public facilities" that are typically difficult to site, such as airports and correctional facilities.[8] This requirement implements the DRI proposal that Fred included in the Model Code.

V. THE CRITICAL AREA IDEA IN FLORIDA AND ELSEWHERE

Once the critical area idea gained inclusion in the Model Code proposals, developments at the national and state level brought Fred Bosselman into the limelight as its proponent in new legislative proposals that gained public and political support. One such proposal was a national land use law that came before Congress in the early 1970s, and that would have provided a program of financial assistance to enable states to adopt land use programs that included the critical area idea.

Fred played an important role in the drafting of the national legislation, and was asked by the Department of Interior, which would have administered the new program, to draft model state legislation to incorporate expected federal program requirements. However, although the national land use law passed by an overwhelming vote in the Senate, it died in the House where the delegation from Fred's own city of Chicago voted against it. This happened because Chicago's mayor Daley was in a dispute with the state over an expressway that was to go through the city. He urged the Chicago delegation to vote against it because he thought it would transfer power over the expressway to the governor.

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7. WASH. REV. CODE § 36.70A.200 (2001). *See* Whatcom County v. Brisbane, 884 P.2d 1326 (Wash. 1999).

8. WASH. REV. CODE § 36.70A.200 (2001).

At the same time that Congress rejected the proposed national land use law, however, it considered and adopted a National Coastal Zone Management Act that included for coastal areas of coastal states many of Fred's ideas in the Model Code for state participation in local land use regulation.[9] The national coastal act compromised, however, on state participation in local decision-making. The act requires a state agency, but only to receive and administer federal grants for coastal management. The state may choose, and almost all have, to leave land use regulation in the coastal zone to local coastal governments.

However, the act does require local governments to consider "the national interest … including the siting of facilities, such as energy facilities, which are of greater than local significance." States are directed to inventory and designate "areas of particular concern" in their coastal zones.[10] Enforcement of these requirements is carried out through "means" of state control, and some states have adopted a system of appeals on land use decisions to a state agency. Other states, such as North Carolina, have explicitly included the designation of critical areas as part of their coastal management program.

The next test for the critical idea came in Florida in the early 1970s, just as the Model Code was under development. The state had experienced a prolonged water drought that threatened saltwater intrusion of its freshwater aquifers on which the state relies for its drinking water. Rapid development and the problems it brings were another major issue.

The governor at the time saw the need for urgent reforms, and appointed a statewide commission to study the need for legislative change. Fred played an important role in the drafting of the state land use legislation the legislature finally adopted, and that included both the DRI and critical area proposals contained in the Model Code.[11] Fred believed both proposals met planning and regulatory needs presented by the Florida land use system at that time. Despite intense population growth, local planning and land use control in the state did not exist or was limited, ineffective, or a political sellout. The authority to regulate critical areas was especially acute in Florida because critical natural areas were threatened by development pressures and by the lack of effective

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9. Rumor has it that the authors of the Coastal Zone Management Act retired to the basement of the federal executive offices building in Washington one evening with the Model Code and used it as the basis for a draft of the coastal law they then prepared. For discussion of the adoption of the act and its history see Daniel R. Mandelker & Thea A. Sherry, *The National Coastal Zone Management Act of 1972*, 7 URB. L. ANN. 119 (1974).

10. 16 U.S.C. § 1455(d)(8) (2000).

11. FLA. STAT. § 380.05 (2000).

local control. The Florida Keys were a prime example. Although the new state land use law was intended to build up the planning capabilities of Florida local governments, the need for authority at the state level to deal with immediate land use problems was apparent.

A setback occurred in the critical area program when the Florida Supreme Court invalidated the critical area provision in the state law as an unconstitutional delegation of power,[12] but the legislature remedied that problem. The state has since designated several critical areas, including the Keys, and the program survives as an important element of the state land use program.[13]

A number of other states have seen the value of the critical area concept. Maryland adapted this concept in its program for the preservation of Chesapeake Bay.[14] Washington State, as noted earlier, has included a mandatory requirement to designate critical areas as part of its state growth management program.

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12. Askew v. Cross Key Waterways, 372 So. 2d 913, 925 (Fla. 1978).

13. For an excellent discussion of the critical areas program in Florida see John M. DeGrove, *Critical Areas Programs in Florida: Creative Balancing of Growth and the Environment*, 34 WASH. U. J. URB. & CONTEMP. L. 51 (1988).

14. *See* Paul D. Barker, Jr., Note, *The Chesapeake Bay Preservation Act: The Problem With State Land Regulation of Interstate Resources*, 31 WM. & MARY L. REV. 735 (1990).

VI. THE AMERICAN PLANNING ASSOCIATION'S CRITICAL AREA AND DEVELOPMENT OF REGIONAL IMPACT PROPOSALS IN ITS MODEL LAND USE LEGISLATION

History was not kind to the American Law Institute's Model Land Development Code. Although states have included a few of the ideas in the code in state legislation, the DRI and especially the critical area proposals are the only ones that have received serious legislative attention. The failure of the Model Code, and the failure of most states to reform their planning and land use legislation, soon made the need for new model land use legislation apparent.

With funding from federal agencies and private support, the American Planning Association (APA) began a major project for the preparation of model legislation for land use planning and regulation in the 1990s. This model legislation includes proposals for the regulation of areas of critical state concern and developments of regional impact at the state level that build on the ideas Fred had included in the Model Code years before.

The APA's proposal for critical area legislation builds on and improves Fred's original recommendations. I had offered some comments on the ALI critical areas proposal when it first appeared, and the APA noted them in its in commentary on its model legislation:

> Some of [the] problems arise from the geographical extent of critical areas, which are likely to be smaller than the local governments in which they are located. Development policies in critical areas may not be well coordinated with the land development policies in the remainder of the community. Other problems arise from the inability of state critical area controls to effectively guide local government decisions on specific development applications . . . .[15]

These concerns identified problems likely to arise in an overlay system of state controls that was not integrated into a comprehensive system of state planning and regulation. The APA responded to these criticisms by keeping the original structure of

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15. DANIEL R. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 76 (1976). This passage was quoted by the AMERICAN PLANNING ASSOCIATION, GROWING SMART LEGISLATIVE GUIDEBOOK, MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE 5-27 (Phases I and II Interim Ed. 1998) [hereinafter LEGISLATIVE GUIDEBOOK]. The Guidebook discusses the ALI proposal and critical area legislation adopted in various states. *See* LEGISLATIVE GUIDEBOOK.

Fred's critical area proposal and by making some changes in the original concept. [16] For example, under the APA model legislation a state, before it can adopt a critical area program, must adopt a state plan that contains goals, policies and guidelines to "provide a framework and priorities for the administration of the program."[17] Basing a critical area program on a state plan should provide needed direction from the state level that can integrate the designation of critical areas with development problems in the remainder of the community. The state plan also provides an opportunity to provide detailed development policies to guide local development decisions.[18]

The APA proposal for critical areas also adds to the Model Code by requiring local governments to submit their comprehensive plans as well as their land development regulations to the state planning agency for review.[19] This change will also allow local governments to integrate their planning and land development programs with the designation and control of critical areas.

VII. CONCLUSION

The origin of ideas is always a fascinating subject. In land use regulation, especially, many ideas compete for attention, and change is difficult in a system that has won the approval of time and that has acquired fixed constituencies with frozen agendas.

The source of ideas that gain public approval and political endorsement is also a subject of fascinating study. Good ideas require common sense, good intuition, and political judgment. The critical area idea is a tribute to Fred Bosselman's common sense, good intuitions, and political perceptions. The survival of our environmental resources is the better for it.

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16. LEGISLATIVE GUIDEBOOK, *supra* note 15, at 5-30-5-32.

17. *Id*. at 5-30.

18. The APA model also calls for the use of environmental risk assessment techniques to designate biological, not political, boundaries for critical areas. This proposal takes account of the possibility that critical areas may be located in more than one political jurisdiction. *Id*. at 5-32.

19. *Id*.

TWENTY-FIVE YEARS OF "TAMING" TOURISM

CRAIG A. PETERSON*

Table of Contents

I. INTRODUCTION

This essay describes and evaluates Professor Fred P. Bosselman's many contributions to understanding, conceptualizing and managing tourism growth,[1] as well as the historical and academic contexts of those efforts. It also demonstrates how his work has been consistently prescient and describes how Professor Bosselman regularly enriched his analysis of complex tourism problems by references to concepts and methodologies from

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1. In the interest of full disclosure, the author notes his longstanding professional and personal relationship with Professor Bosselman.

disciplines other than land use and environmental law, his principal areas of expertise.

Professor Bosselman's contributions are best reflected in three major projects: a well known and long term consulting engagement on Sanibel Island, Florida; a remarkable 1978 book entitled *In the Wake of the Tourist: Managing Special Places in Eight Countries*;[2] and finally a co-authored 1999 work, *Managing Tourism Growth: Issues and Applications*.[3]

II. TOURISM TWENTY-FIVE YEARS AGO

Twenty-five years ago, when Professor Bosselman began his many significant contributions to managing tourism growth, the tourism industry was far smaller and less important than today. Nevertheless, governments and non-governmental organizations were marshalling resources to address vacation travel as a potentially powerful tool in improving economic well-being throughout the world, especially in the developing nations.[4] In 1972, for example, the President of the World Bank recommended that funds be allocated to foster mass tourism in developing countries, such as the now heavily visited Thailand, Indonesia, Egypt, and Turkey, as well as currently less traveled destinations such as Lebanon, Colombia, and Syria.[5] At that time, the World Bank estimated that over the next ten years tourism would increase by forty million visitors, a 45 percent increase over the period.[6]

In the 1970s tourism growth in the United States was also a powerful agent of community change, triggered largely by private entrepreneurial activity rather than official interventions. Sun Valley, Idaho was one of those destinations, as chronicled by history Professor Hal K. Rothman.[7] Rothman recites that private

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2. FRED P. BOSSELMAN, IN THE WAKE OF THE TOURIST: MANAGING SPECIAL PLACES IN EIGHT COUNTRIES (1978).

3. FRED P. BOSSELMAN, CRAIG A. PETERSON & CLAIRE MCCARTHY, MANAGING TOURISM GROWTH: ISSUES AND APPLICATIONS (1999).

4. A very recent example of this phenomenon could well have occurred in those early days. The interests of elected public officials have not in this respect changed meaningfully. In July 2001 the newly elected President of Peru (of Andean Indian descent) conducted a symbolic inauguration at Machu Picchu, primarily in order to spur tourism and to bring more hard currency into the country. President Toledo stated that Peru's annual 600,000 foreign visitors per year were fewer than most of its neighboring countries and that his goal was three million tourist visits per year. *Peru's New President Replays Inauguration in Ancestral Andes*, N.Y. TIMES, July 30, 2001, at A4.

5. *See generally* PATRICIA GOLDSTONE, MAKING THE WORLD SAFE FOR TOURISM 45-73 (2001).

6. *Id.* at 51.

7. HAL K. ROTHMAN, DEVIL'S BARGAINS: TOURISM IN THE TWENTIETH CENTURY AMERICAN WEST (1998).

developers purchased the Valley in 1964 to create a multi-faceted resort area for year-round visits.[8] In addition to such traditional resort facilities as hotels, restaurants, and ski lifts, the owners developed condominiums (a new form of legal ownership at that time) and luxury houses.[9] Local employment patterns rapidly changed from farming to the service sector,[10] so that by the late 1960s "[the principal owner had] created a structurally and economically different community that, like Santa Fe and Aspen before it, catered to outsiders more than to locals."[11] Then, Rothman notes, came a "backlash" against the impacts of the resort, led by many local citizens and longtime visitors who "felt that the quantity and quality of development threatened the community."[12] Those people engaged in a number of efforts to modify the pace and style of change.[13]

This pattern of controversy and citizen activism in the face of rampant tourism growth was not limited to Sun Valley or to other communities[14] in the Western United States during the 1970s. It also occurred in Sanibel Island, Florida.

A. The Sanibel Island, Florida Experience

Well-known to thousands of visitors and part-time residents from around the world, Sanibel is a small barrier island off the Southwest coast of Florida.[15] It is famous for its seashell-covered beaches, havens for birds (especially in nature reserves that constitute half of the island) and a "laid back" ambiance.[16] After 1963 visitors could easily access the island by car, using a newly built causeway to the mainland.[17] This promptly encouraged developers to build condominiums, many of them tall and close to

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8. *Id*. at 239.
9. *Id*. at 239-41.
10. *Id*. at 242-43.
11. *Id*. at 243.
12. *Id*.
13. *Id*.
14. Rothman also covers such destinations as Aspen, Jackson Hole, Santa Fe, and Ketchum, with a decidedly negative interpretation on the impacts of tourism development, reflected in the title of his book.
15. BOSSELMAN, PETERSON & MCCARTHY, *supra* note 3, at 137.
16. *See id*. at 137, 143.
17. Causeway construction usually has an immediate transforming impact because the number of visitors can, on the day of the bridge opening, increase many fold, while the infrastructure of the island remains the same. This naturally produces citizen conflicts because some local residents do not want any change and others plan to benefit economically (e.g. increased land values, more businesses to serve the new visitors) from that change. *See id*. at 137-44. The multi-year controversies over the now completed bridge to the Scottish Isle of Skye illustrate that type of conflict.

the high water line on the beaches.[18] Golf courses and man-made lakes adversely impacted fragile interior wetlands.[19] The population on this 12,000 acre island rapidly grew to 3,000 permanent residents and 13,000 seasonal visitors.[20]

Many citizens wanted local control over their land use decisions. This was essential because the county standards permissively allowed about 30,000 potential residential dwelling units, which translated into a permanent and seasonal population of roughly 70,000.[21] The first step was therefore to incorporate Sanibel as a municipality with concomitant land use regulatory authority, a legal milestone that occurred in 1974.[22]

Armed with regulatory powers, the new city island hired prominent national consultants in many disciplines to create a comprehensive plan and consistent development standards.[23] Professor Bosselman, then in private practice, was prominent among that group, as was the famous design and planning firm of Ian L. McHarg, a visionary who, in 1969, had authored an influential book, *Design With Nature*.[24] That work promoted the concept that the environmental context of a development should determine its scope and design.

The burgeoning tourism growth caused three principal risks on Sanibel: hurricane risks to life, land, and buildings; risks associated with the ability of the island resources to tolerate[25] the increased human activity (now usually called "carrying capacity");[26]

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18. *Id*. at 137-38.
19. *See id*.
20. *Id*. at 138.
21. *Id*.
22. *Id*.
23. *Id*.
24. IAN L. MCHARG, DESIGN WITH NATURE (1969).
25. Non-island settings can also only tolerate a reasonable level of human activity. The famed Inca ruins at Macchu Picchu are a good example. There:

> the biggest long-term threat is ... fast-growing popularity with tourists. Each year some 300,000 visit the site, which is surrounded by a large nature reserve sheltering more than 400 species of birds and dozens of rare orchids. In the dry season (May to September), up to 2,200 people tramp around the ruins each day. With them come problems: the gradual erosion of the Inca roads to the site; the chaotic growth of . . . a nearby village that has become an ugly town; and rubbish and other pollution at the ruins.

Tourism in Peru: Road to Ruin, THE ECONOMIST, July 21, 2001, at 30.

26. This evolving concept is undergoing continual re-evaluation and refinements. *See, e.g.*, PETER W. WILLIAMS & ALISON GILL, CARRYING CAPACITY MANAGEMENT IN TOURISM SETTINGS: A TOURISM GROWTH MANAGEMENT PROCESS (1991); Harry Coccossis & Apostolos Parpairis, *Tourism and the Environment: Some Observations on the Concept of Carrying Capacity, in* TOURISM AND THE ENVIRONMENT 23 (Helen Briassoulis & Jan van der Straaten eds., 2d ed. 1992). Related approaches include the "limits of acceptable change" (*see* GEORGE H. STANKEY ET AL., THE LIMITS OF ACCEPTABLE CHANGE SYSTEM FOR WILDERNESS PLANNING (1985)) and

and risks as to the adequacy of sewage and water supplies.[27] Professor Bosselman guided the consultants and citizen leaders as to the requirements of the Florida Statutes and judicial opinions, as well as the (then few) federal decisions on United States constitutional limitations such as the takings clause.

The interdisciplinary team of specialists then produced relevant data and opinions that proved invaluable in creating the plan and regulations (as well as in defending the new city in lawsuits filed by disappointed landowners whose developments would be adversely affected by the new restrictions):

> Meteorologists provided the latest information on forecasting major storms, indicating how much time the island would have from the initial forecast until landfall contact; traffic engineers studied how many cars would be able to leave the island in what period of time, and offered ways to improve traffic flow; construction engineers recommended revised building standards to increase the ability of new construction to withstand storm damage; environmentalists studied the impacts of growth on the fragile ecosystem of the barrier island; other experts analyzed Sanibel's capacity to provide potable water and adequate wastewater treatment and its ability to expand utility services.[28]

The most significant outcome of those scientific studies was a legal limitation on the number of dwelling units to 7,800 (roughly 26 percent of the number of units allowed under the previously governing county ordinance); that and many other provisions were embodied in a 1976 Plan and, in the 1980s, legally enforceable development standards.[29]

At the time of the plan's adoption in 1976, it was the leading example (at least in the United States and probably in the world as a whole) of applying scientific methodologies to complex, tourism-driven land use problems and producing factual data upon which to rationally base land use regulatory standards and decisions.[30]

"visitor impact management" (*see* F.R. KUSS ET AL., VISITOR IMPACT MANAGEMENT: A REVIEW OF RESEARCH (1990)).

27. BOSSELMAN, PETERSON & MCCARTHY, *supra* note 3, at 138.
28. *Id.* at 138-39.
29. *Id.* at 139.
30. *Id.* at 143-44.

B. Summary Observations

Professor Bosselman was a key "player" in this very successful effort. The project nicely illustrates the many benefits of plan development using a consulting team of experts. The basic concepts and approaches of the early plan are in place today; there were amendments in 1989 and again in 1997, but they refined rather than rejected the earlier conceptual premises and enactments.[31] There has been, over the twenty-five years to date, a commendable level of predictability and continuity of benefit to the business community as well as to visitors and permanent residents.[32] Lawsuits filed by disgruntled landowners were common in the early years,[33] but are now rare. The island is thriving (as are the birds and other wildlife).[34] The underlying factually-based methodology of the 1976 plan has allowed sufficient flexibility to accommodate new facts and analysis, such as an increased ability to forecast hurricanes and the effect of incremental commercial developments over the years.[35] Finally, using the carrying capacity of a geographical area as a method of controlling tourism growth is now a widely used planning and implementation tool.

III. AN INTERNATIONAL INQUIRY INTO THE IMPACTS OF TOURISM: *IN THE WAKE OF THE TOURIST: MANAGING SPECIAL PLACES IN EIGHT COUNTRIES*

In 1978 Professor Bosselman shared his views on tourism impacts in book form. *In the Wake of the Tourist*[36] was the product of a large project with extensive international fieldwork by Professor Bosselman and others and funded by a number of foundations (such as the Rockefeller Foundation and the Ford Foundation) but principally by the German Marshall Fund of the United States.[37] The prominence of and high levels of support by the funders reflected their high level of interest in the process of tourism growth.

The time context of this important work is worthy of note. In 1978 the fields of tourism research and planning were in their infancies. There were very few tourism education schools or programs,[38] whereas currently there are hundreds around the

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31. *Id.* at 139.
32. *Id.* at 143.
33. *Id.* at 139.
34. *See id.* at 143.
35. *Id.* at 143, 185-86.
36. BOSSELMAN, *supra* note 2.
37. William K. Reilly, *Introduction* to BOSSELMAN, *supra* note 2, at 14.
38. As to how the field should be regarded in academia, see John Tribe, *The Indiscipline*

world. There were very few academic journals in the field;[39] currently there are more than thirty-six in the general tourism field[40] and fourteen in the allied discipline of "leisure and recreation." There are now also highly specialized research journals for industry leaders and educators,[41] as well as professional affinity groups.[42] When *In the Wake of the Tourist*[43] was published, there were very few books in the tourism literature,[44] far different from August 2001 when an internet search of the Amazon.com on-line bookstore list under the topic "tourism" produced 2,889 entries, and a search of articles in the English language in the database of Lexis-Nexis produced an unmanageable number (more than 1,000 entries over a sixty day period). Professor Bosselman's 1978 book should thus be regarded as a very unusual entry into a then tiny literature concerning tourism impacts and planning.

Structurally, the book has five components: Building, Moving, Planning, Mediating, and Placemaking. In the "Building" chapter, Professor Bosselman analyzes two government initiatives: the then early stages of the Cancun, Mexico development and the Aquitaine region alternative to the overcrowded French Riviera. The "Moving" chapter is considerably more elusive, addressing two very different places: Ayers Rock, Australia (now called the Uluru-Kata Tjuta National Park, designated a UNESCO World Heritage Site in 1987), where the aboriginal and modern cultures meet on sometimes uncomfortable terms; and Amsterdam, where in the 1970s young drug-using drifters were allowed to camp out in a city park, to the chagrin of many citizens. In the chapter entitled "Planning," Professor Bosselman focuses on numerous examples illustrating undesirable tourism sprawl (some sites in England and the Netherlands) and new styles of tourism creating stress in Westerland, Germany; Torquay, England; and Zihuatanejo, Mexico. Chapter Four ("Mediating") covers how disputes generated by

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of Tourism, 24 ANNALS OF TOURISM RES. 638 (1997); Krzysztof Przeclawski, *Tourism as the Subject of Interdisciplinary Research*, *in* TOURISM RESEARCH: CRITIQUES AND CHALLENGES 9 (Douglas G. Pearce & Richard W. Butler eds., 1993).

39. One of the earliest was the social sciences journal ANNALS OF TOURISM RESEARCH, begun modestly in 1974.

40. As to coverage of tourism impacts, this author feels that among the other leaders are JOURNAL OF SUSTAINABLE TOURISM, THE TOURIST REVIEW, TOURISM MANAGEMENT, JOURNAL OF TRAVEL RESEARCH, and a recent new journal, TOURISM GEOGRAPHIES.

41. Examples include the JOURNAL OF HOSPITALITY AND TOURISM EDUCATION and the GAMING RESEARCH AND REVIEW JOURNAL.

42. For example, The Recreation, Tourism and Sport Specialty Group of the Association of American Geographers.

43. BOSSELMAN, *supra* note 2.

44. One of the earliest broadly framed works was published in 1982, the still influential A. MATHIESON & G. WALL, TOURISM: ECONOMIC, PHYSICAL AND SOCIAL ASPECTS (1982).

tourism pressures can be resolved, as typified by London and Japan. The final chapter, entitled "Placemaking," explores Professor Bosselman's highly original concept of "specialness," using as illustrations the parks at Mount Fuji, Japan and the English Lake District as well as the "Sea of Galilee," Lake Kinneret, Israel.

Although written more than twenty years ago, *In the Wake of the Tourist*[45] remains a classic in the field—lucid, analytically sound, and comprehensive. Additionally, the author's approach and many of his ideas were precursors to much of the best current literature of tourism policy.

Initially striking about the book's methodology is Professor Bosselman's *in-depth treatment of a wide range of destinations to support and illustrate his principal arguments*. Indeed, the sites he discusses are located throughout the world, with the exception of North America. Perhaps that region was excluded because many of the readers would be familiar with such places.[46] This is an encompassing approach, suggesting by the choice of places that there are many broad principles and practices that have validity irrespective of the country or cultural/social/economic circumstances, even though the nuances of the problems and potential solutions might well vary considerably. Much of the most interesting and useful current writing in the field uses the multi-country approach[47] taken by Professor Bosselman: two examples among many are *People and Tourism in Fragile Environments*[48] and *Sustainable Tourism in Islands and Small States: Issues and Policies*.[49] These two works, however, reflect a dilemma faced by participants in edited volumes: while most of the individual case studies themselves may be of high quality, they are written by many different authors, producing the challenge for the editor of creating appropriate interconnections between offerings. Professor

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45. BOSSELMAN, *supra* note 2.

46. Interestingly and by contrast, Professor Hal Rothman chose to limit his historical analysis to the United States West. *See* ROTHMAN, *supra* note 7. Another excellent recent book addressing problems in an astonishingly broad range of "gateway" communities in the United States is JIM HOWE ET AL., BALANCING NATURE AND COMMERCE IN GATEWAY CITIES (1997).

47. *See generally* Douglas G. Pearce, *Comparative Studies in Tourism Research*, *in* TOURISM RESEARCH: CRITIQUES AND CHALLENGES 20 (Douglas G. Pearce & Richard W. Butler eds., 1993).

48. PEOPLE AND TOURISM IN FRAGILE ENVIRONMENTS (Martin F. Price ed., 1996) (discussing New Mexico; Nunavut, Canada; Far North Queensland, Australia; Northern Barents Sea; Richtersveld, South Africa; Flathead County, Montana; New South Wales; the Masai areas of Kenya, Zimbabwe; and the Monteverde Cloud Forest, Costa Rica).

49. SUSTAINABLE TOURISM IN ISLANDS AND SMALL STATES: ISSUES AND POLICIES (Lino Briguglio et al., eds., 1996) (covering the Shetland Islands, Zanzibar, Sri Lanka, Guadeloupe, Martinique, Barbados, St. Lucia, Belize, Dominica, Mykonos and Malta).

Bosselman's book is fully integrated in all respects, being much more than a strong collection of individual contributions.[50]

A. Emphasis on Tourism Impacts on the Natural Environment

Another very strong element of *In the Wake of the Tourist*[51] is its *emphasis on tourism impacts on the natural environment*. One telling illustration is the treatment of several natural areas on the mainland adjacent to Cancun Island, where Mexican government tourism development authorities scraped topsoil from fertile areas in order to construct a golf course and gardens. On Cancun itself, two wildlife sanctuaries were eliminated and important mangrove forests bordering some lagoons were destroyed in construction. When Professor Bosselman's book was published, it was in the vanguard; there was very little existing literature concerning the environmental impacts of tourism. Thankfully, this oversight has been largely remedied: each of the major tourism planning textbooks includes treatment of impact analysis and there are several books and scores of academic and other articles with principal focus on the topic.[52]

B. Careful, Fact-based Planning Should Inform and Guide Tourism Growth and Activities

Another theme of Professor Bosselman's book is that *careful, fact-based planning should inform and guide tourism growth and activities*. In critiquing the tourism patterns at Ayers Rock, Australia (where aborigines conduct ceremonies in traditional venues located near visitor camping areas) he notes many planning deficiencies: "The makeshift motels, campsites, roads, airport, and garbage dump, and the almost constant drone from the sightseeing flights, tend to destroy the feeling that Ayers Rock stands isolated in the middle of the outback."

> It is questionable . . . whether the unplanned growth of tourism at Ayers Rock can continue at its present pace without destroying the very things that attract people. Even small numbers of tourists can cause

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50. Many then young professional field reporters participated actively in on-site field work, several of whom have reached prominence in later life.

51. BOSSELMAN, *supra* note 2.

52. *See, e.g.*, ZBIGNIEW MIECZKOWSKI, ENVIRONMENTAL ISSUES OF TOURISM AND RECREATION (1995); Richard W. Butler, *Pre- and Post-Impact Assessment of Tourism Development*, *in* TOURISM RESEARCH: CRITIQUES AND CHALLENGES 135 (Douglas G. Pearce & Richard W. Butler eds., 1993).

> considerable destruction in this environment of harsh climate and fragile desert ecology. Poor planning of roads and trails has aggravated the damage to native flora. In many places around the rock, trampling has destroyed wide areas of vegetation. The paths from parking lots to special points of interest are not wide enough to handle busloads of people, so many wander onto the desert grasses.[53]

Twenty years after the numerous calls within *In the Wake of the Tourist*[54] for tourism planning, there are many undergraduate and graduate school courses in the subject, as well as three leading English language course textbooks devoted to the discipline.[55]

C. Wide-ranging, Structured Citizen Input into the Planning and Implementation of Tourism Guidance Systems

Perhaps influenced by his work on Sanibel, Professor Bosselman consistently encourages *wide ranging, structured citizen input into the planning and implementation of tourism guidance systems.* The quality of such interaction is partly a product of the attitudes of affected residents to the place itself. *In the Wake of the Tourist*[56] analyzes many situations where citizen input triggered sensible governmental actions (and where lack of input generated poor governmental decision-making). Three case studies stand out here. First, in the German coastal area of Sylt a very involved citizenry in the city of Westerland ultimately succeeded in overturning previously granted local permission to build a group of high-rise condominium buildings on the beach, on the grounds of excessive scale and numbers of units.[57] Second, in an English example, Professor Bosselman discusses with approval the efforts of local citizens to protest the proposed demolition of a Victorian era Pavilion at a time when many other Victorian structures had previously been demolished, much to the detriment of town character and ambiance.[58] Finally, a third example occurred in

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53. BOSSELMAN, *supra* note 2, at 93.

54. BOSSELMAN, *supra* note 2.

55. *See, e.g.*, CLARE A. GUNN, TOURISM PLANNING: BASICS, CONCEPTS, CASES (3d ed. 1994); EDWARD INSKEEP, TOURISM PLANNING: AN INTEGRATED AND SUSTAINABLE DEVELOPMENT APPROACH (1991); and most recently a modest work but with an excellent bibliography, C. MICHAEL HALL, TOURISM PLANNING: POLICIES, PROCESSES, AND RELATIONSHIPS (2000).

56. BOSSELMAN, *supra* note 2.

57. *See id*. at 151-66.

58. *See id*. at 166-75.

Zihuatanejo, Mexico where local peasants who owned land in common successfully objected to a number of elements of a government relocation project. Protesters focused on the size, location, and infrastructure amenities of land to be given in exchange for land taken for the tourism program, the shape of streets, the restoration of some homes, and other elements.[59]

The selection of those three destinations to illustrate the need for early and effective community involvement is typical of the eclectic site choices throughout the book. All three are seashore communities, but with many individual differences relating to history, culture, amenities, and other important characteristics. Westerland is the only city on Sylt, a destination for summer "health cures" and for quiet seaside vacations in Germany,[60] a country not known for beaches. Torquay shares the "health spa" history of Westerland but enjoys a Victorian ambiance.[61] Zihuatanejo was a low-key, small-scale village with fifteen hotels and 12,000 (principally Mexican) visitors per year, but selected by the Mexican authorities for extensive development as a secondary resort and service center near Ixtapa, which the government agency was building four miles to the north.[62]

Professor Bosselman's choice of Zihuatanejo as a case study was particularly apt, as it has changed most dramatically since he examined it in the 1970s. As of 2001, in "Zihua" (as it is known to most of its returning visitors) there are still vestiges of the older village: fishermen park boats by palm-frond covered shelters on the relatively quiet beach of Playa Madera; another popular beach is reachable only by hiking in or taking a small boat.[63] On the other hand, the population has multiplied by a factor of ten from 1975, to a current total of 80,000.[64] There are now 400 hotel rooms, of varying price and amenities, from $50 per night for a simple, small hotel to several decidedly upscale establishments charging more than $300.[65]

In each of these three cases, writes Professor Bosselman, the "glare of others' views" was appropriate:

> Those who sought to bring new development – and more tourists … might reasonably have believed that

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59. *See id.* at 176-78.
60. *See id.* at 153.
61. *See id.* at 166-67, 172.
62. *See id.* at 176-77.
63. Christopher Reynolds, *Beyond Ixtapa: Zihuatanejo Offers Laid-back Approach*, CHI. TRIB., July 29, 2001, at 14.
64. *Id.*
65. *Id.*

> they were creating benefits for the entire community. Seaside resorts, after all, depend on tourism. But people do not always see change as advantageous .... In assessing the environmental impacts of development, selfish values of existing residents can no more be dismissed than can the aspirations of potential tourists because a developer will make money satisfying them.[66]

Professor Bosselman proposes that early citizen input is vital, characterized by good communication, using terminology that local residents can truly understand and methods that encourage public involvement.[67]

Since the book was published, there has been a great deal of international progress in improving the quality and quantity of citizen input in tourism development decisions.[68] Professor Bosselman's recognition of the difficulty of resolving conflicts based upon disparate viewpoints is congruent with current thinking. In an article aptly titled *Crafting a Destination Vision*,[69] author J.R. Brent Richie points out that applying the current buzz-word theory of "visioning" in *normal* planning contexts to situations of planning for tourism destinations is complicated because the points of view of the many "stakeholders" (the identities of whom will vary with the proposed development) holding widely diverse views may be hard to resolve.[70] The leading book in the field is the superb work by Peter E. Murphy, called *Tourism: A Community Approach*,[71] which presents a detailed, systemic approach (called by the author an "ecological" construct), which is consistent with the broad ideas on citizen involvement expressed in *In the Wake of the Tourist*.[72]

D. Quality of Specialness

Probably the most elusive topic that Professor Bosselman addresses in his book is the *quality of specialness* of a destination.

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66. BOSSELMAN, *supra* note 2, at 178.

67. *See id.* at 179-80.

68. Professor Maureen Reed has carefully analyzed the power struggles that occurred in a community-based tourism planning process held to guide development at Squamish, British Columbia, Canada, an emerging visitor setting. *See* MAUREEN G. REED, *Power Relations and Community-based Tourism Planning*, 24 ANNALS OF TOURISM RES. 566, 573-89 (1997).

69. J.R. Brent Ritchie, *Crafting a Destination Vision*, in TRAVEL, TOURISM, AND HOSPITALITY RESEARCH: A HANDBOOK FOR MANAGERS AND RESEARCHERS 29-38 (J.R. Brent Ritchie & Charles R. Goeldner eds., 2d ed. 1994).

70. *See id.*

71. PETER E. MURPHY, TOURISM: A COMMUNITY APPROACH (1985).

72. BOSSELMAN, *supra* note 2.

Professor Bosselman's simply expressed, but profound, conclusion from the case studies (and presumably his professional experiences at Sanibel and many other special places) is that "when people treat places as special, the development process generally seems to work out better."[73] The question then becomes how to identify those qualities that make a place special and how to communicate that specialness to visitors.

E. Application of Broad Perspectives and Learning

One of the many strengths of the book is its author's *application of broad perspectives and learning*.[74] Professor Bosselman summarizes a number of different approaches (each of which could well be extended into a book-length treatment) to evaluating *why* a particular place might be thought of as "special."[75] Drawing upon work in many disciplines (law, religion, poetry, and ecology), he wisely notes that one approach for determining the "value" of a place is symbolic: the place represents "important emotions and ideas."[76] A poetic approach (from Wordsworth) would contend that special places (like the Lake District of England) bring back feelings "of unremembered pleasure."[77] An ecologist might argue that the principal reason that a place is "special" is that a wide diversity of places is necessary to "maintain a wide variety of biological species: to ensure the availability of a maximum number of 'ingredients' for creative responses to unpredictable future conditions."[78] (This ecological perspective was especially creative in 1978 when *In the Wake of the Tourist*[79] was published; this now well-known field was then only modestly developed with a literature only a fraction of its current size and scope.)

F. Summary Observations

In the Wake of the Tourist[80] was a groundbreaking multi-national synthesis of many concepts, cutting across a number of disciplines. Written for an intelligent, non-academic audience, the book is (to use poet Robert Penskey's phrase) "unassumedly learned."

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73. *Id*. at 240.

74. For example, he includes insights from such literary luminaries as Mark Twain, Herman Melville, William Butler Yeats, Washington Irving, and Gertrude Stein.

75. *See* BOSSELMAN, *supra* note 2, at 239-40.

76. *Id*. at 240.

77. *Id*.

78. *Id*.

79. BOSSELMAN, *supra* note 2.

80. *Id*.

IV. TOURISM ISSUES REVISITED TWENTY YEARS LATER: MANAGING TOURISM GROWTH: ISSUES AND APPLICATIONS[81]

The twenty years following publication of *In the Wake of the Tourist*[82] saw a rapid development in worldwide tourism. By the mid-1990s tourism was by many measures the world's largest industry, and certainly one of the most controversial. In many countries it was the fastest growing economic segment. In 1996 there were roughly 500 million international arrivals, with an expected 1.6 billion by 2020.[83] The employment impact was staggering, as well. According to the World Tourism Organization (which later developed a complex methodology called "National Satellite Accounting" for measuring the total economic impacts which it encouraged countries to adopt), the tourism industry employment in 1995 was 232 million.[84]

By the mid-1990s scholars and others had identified many other potential benefits: fostering greater appreciation among residents in host communities of their local structures, landscapes and culture; replacing harmful activities (e.g. reducing slash and burn agriculture though jungle tourist visits); improving water, sewer, road and other infrastructure;[85] and opportunities for cross cultural communication.

Controversy, however, centered on issues of tourism impacts. Computer database searches of English language articles throughout the world for a two-year period generated thousands of references to negative effects, including such aspects as water and air pollution, overbuilding, illegal building, traffic congestion, crime, favoritism to certain neighborhoods, exploitation of visitors,

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81. BOSSELMAN, PETERSON & MCCARTHY, *supra* note 3.

82. BOSSELMAN, *supra* note 2.

83. *See* BOSSELMAN, PETERSON & MCCARTHY, *supra* note 3, at 1.

84. Barbara Crossette, *Surprises in the Global Tourism Boom*, N.Y. TIMES, Apr. 12, 1998, at 5 (citing the World Tourism Organization). The boom continues to this day. According to the World Tourism Organization data as of Jan. 2001, there were in 2000 a total of 698 million international arrivals (in addition to arrivals that originated in the country of arrival) and a growth rate (compared with 1998-99) of an astonishing 7.4 %. Regions other than Europe and the Americas (which are the principal tourist-receiving areas) are growing the most rapidly, *e.g.* East Asia/Pacific 14.5 % and South Asia 9 %, each as of 2000. In 2000, receipts from international tourism were $478 billion. *WTO Tourism Highlights*, (WTO, Madrid) 2001.

85. Travel essayist Christopher Baker remarked later to a Cuban professor of linguistics (then a hotel manager) that tourism had "created an inverted society in which bellhops and [casual prostitutes] make far more money than surgeons and college professors." The Professor responded that there were benefits to the changes: special events at the hotel for the poor and disabled, free entrance into the disco, and nominal rates for local citizens to use a huge protocol villa for birthdays and special occasions. CHRISTOPHER P. BAKER, MI MOTO FIDEL, 212 (2001).

manipulation of traditional culture, hostility of hosts to guests, decline in ambiance, and a myriad of other problems.

A. Success

Thus for some destinations, there were some (often significant) negative environmental, cultural and social impacts, even though the tourism development brought increased economic prosperity to many residents and businesses in the host communities. On the other hand, there were many destinations that *succeeded* (at least in part) in guiding tourism growth to bring the benefits sought by those communities, while minimizing the impacts that the community deemed harmful. In several years leading to 1999, Professor Bosselman and two co-authors conducted research on those concepts, leading to the publication of *Managing Tourism Growth: Issues and Applications*.[86]

B. Potential

Each of the three co-authors believes that notwithstanding the many *potential* negative impacts, tourism can be appropriately managed to maximize benefits and minimize burdens.[87] We do not share the negative views of some skeptics, typified by Professor Hal K. Rothman, who argues:

> Tourism is a devil's bargain, not only in the twentieth-century American West but throughout the nation and the world. Despite its reputation as a panacea for the economic ills of places that have lost their way in the postindustrial world or for those that never found it, tourism typically fails to meet the expectations of communities and regions that embrace it as an economic strategy. Regions, communities, and locales welcome tourism as an economic boon, only to find that it irrevocably changes them in unanticipated and uncontrollable ways. From this one enormous devil's bargain flows an entire collection of closely related conditions that

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86. BOSSELMAN, PETERSON & MCCARTHY, *supra* note 3.

87. *Id*. at xi. Professor Bosselman tried to encapsulate this idea by suggesting a highly imaginative title for the book: OUTWITTING CIRCE. Circe was an enchantress in Greek mythology who lived on an island. She lured sailors and transformed them into beasts (a decidedly negative impact), as she did to the companions of Odysseus in THE ODYSSEY. But Odysseus was able (with the help of a god) to force Circe to break the negative spell and change his companions back from swine to humans (thus generating a very positive outcome).

> complement the process of change in overt and subtle ways. Tourism transforms culture into something new and foreign; it may or may not rescue economies.[88]

Managing Tourism Growth[89] offers insights on how successful management of tourism growth can proceed, using a combination of existing literature, case study, and analysis. Our project methodology was for one of the authors to research and prepare first drafts of particular chapters or sub-chapters, followed by full exchanges of views and editing by each of the two others. The result was a long work with full substantive and stylistic input by each co-author.

Professor Bosselman's unique contributions went far beyond being a very active "partner" in the enterprise. He suggested two especially noteworthy approaches that informed our thinking on tourism management strategies: first, drawing parallels to existing growth management strategies developed in the United States in non-tourism contexts; and second, developing analogies to the new interdisciplinary field called "common pool resources." As the book research progressed, it became evident to each of us that the tourism case studies, hundreds of other empirical examples, and our joint interpretations and analysis of available data, all fit (in a broad sense) very well into those two overarching analytical structures.

As to existing growth management strategies, Professor Bosselman was conversant with a wide array of potentially useful systems by reason of his previous and very well regarded activities as a land use law attorney and consultant to governments and landowners across America. Additionally, he included growth management components in his classroom teaching of land use law and, on occasion, in his outside lectureships. Based upon this extensive background and knowledge, he conceptualized growth management strategies as belonging primarily, but not necessarily exclusively, in one of three categories. First, "quality" of tourism development strategies are those that "focus on the quality of development, usually with the objective of encouraging only development that meets certain standards."[90] This category can be further sub-divided into districting, performance standards, and trade-off strategies. Second, "quantity" of tourism development strategies usually "regulat[e] the rate of growth or ultimate capacity

88. ROTHMAN, *supra* note 7, at 10.
89. BOSSELMAN, PETERSON & MCCARTHY, *supra* note 3.
90. *Id.* at 40.

for development."[91] The quantity category can have three variants: preservation rules, growth limitation, and incremental growth strategies. Third, "location of development" strategies "emphasize the location of development by expanding or contracting existing areas that attract growth or by diverting the growth to new areas."[92] As with other categories, this grouping is composed of several possibilities: expansion, dispersal, concentration, and tourism resource identification strategies. It is well beyond the scope of this essay to more fully explore (as we do in the book, using detailed case studies and many shorter examples) the implications and examples of this overarching conceptual framework.

As previously noted, another of Professor Bosselman's creative suggestions was to use "common pool resource" studies to inform our analysis of tourism growth strategies. This approach began in the 1980s when scholars in a number of disciplines[93] began to study systems to regulate the use of property that is owned "in common," that is, not privately owned. Ocean fisheries and common animal grazing lands are two good examples. Studies demonstrated that some systems (often customary, but sometimes enforced by legal mechanisms) work well to allocate rights without harming the resource being allocated (e.g., in one Turkish village the fishermen met once a year to draw lots for fishing positions, which were then rotated in one direction each day, allowing equal access to the best positions).

Drawing from a number of different published works in the field of common pool resources, Professor Bosselman posited to the team early in the project that a number of "objectives" and "elements" of successful common pool resource allocation systems might well be applicable also in the case of tourism growth strategies. This preliminary suggestion was fully borne out by our subsequently produced case studies and much additional data.

C. Objectives

The common pool resources scholarship, as well as our studies, suggest that four *objectives* are essential to success: equity, sustainability, efficiency, and resilience. An equitable system of management is perceived as fair by those affected by it. Sustainability (a "buzz word" in ecology and some other disciplines) implies the protection and conservation of resources for future

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91. *Id.*
92. *Id.*
93. Such as anthropology, ecology, economics, geography, marine biology, political science, and sociology.

generations, as opposed to the current users unduly depleting them.[94] Efficient systems are those that create an appropriate, reasonable level of value, given the cost inputs[95] (not the optimal economic benefit that some economists promote). Finally, the term "resiliency" connotes a capacity to respond to changed circumstances, which are very likely to occur and affect the management system.[96]

D. Elements

As to common *elements* of a system most likely to succeed, many common pool resources scholars (to varying degrees and using sometimes different terminology) have proposed six components for success: clear definition of the physical and temporal boundaries of the resource; identification of potential users of the resource; encouraging repetitive users, so as to promote confidence that long term interaction is likely; letting the users participate in making the rules, so as to improve the chance of compliance; localizing the rules as much as possible, so that they are carefully tailored to local conditions; and monitoring for rule violations.[97]

In summary, Professor Bosselman offered a multitude of contributions to the conceptualization, research, and writing of *Managing Tourism Growth*,[98] the most creative and central of which are addressed in this essay. He was also a delightful colleague with whom to work on this most challenging project.

V. CONCLUSION

The last few paragraphs of *In the Wake of the Tourist*[99] are particularly prescient, compelling and appropriate material with which to conclude this essay. Professor Bosselman links tourism to the promotion of what today is generally called "inter-generational equity."[100] The argument is that sensitive visitors who recognize the "special" quality of the places they visit will then be more conscious of the qualities of their own neighborhoods and, by extension, other neighborhoods, towns, regions, states, and countries. The potential for change is broad, even existential: "Concern for special places is a stepping stone—a consciousness

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94. BOSSELMAN, PETERSON & MCCARTHY, *supra* note 3, at 18.
95. *Id.*
96. *Id.* at 19.
97. For detailed discussion, *see id.* at 19-38.
98. BOSSELMAN, PETERSON & MCCARTHY, *supra* note 3.
99. BOSSELMAN, *supra* note 3.
100. *See generally* TIMOTHY BEATLEY, ETHICAL LAND USE: PRINCIPLES OF POLICY AND PLANNING 134-52 (1994).

raising. Defining a geographic area and emphasizing its intrinsic merits helps people sharpen their perceptions, reorient their values, and take a new look at the world."[101] Thus in Professor Bosselman's view, tourism can have the effect of enhancing the conservation of resources worldwide for the benefit of current and future generations. Professor Bosselman's twenty-five years of "taming tourism" have greatly advanced a number of policy fields and measurably enhanced present and future experiences of hosts and guests alike.

101. BOSSELMAN, *supra* note 2, at 257.

FRED BOSSELMAN AS PARTICIPANT-OBSERVER LAWYER: THE CASE OF HABITAT CONSERVATION PLANNING

A. DAN TARLOCK*

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I. INTRODUCTION: THE PARTICIPANT-OBSERVER

One of the many pleasures and benefits of my academic career has been my professional relationship and friendship with Fred Bosselman. I first encountered Fred during his early land use scholarship. Along with his mentor, the late Richard Babcock, Fred was one of a small group of land use lawyers who fused practical experience with a deep understanding of land use law to produce works of major scholarship widely accepted and used in the academic community. Fred's subsequent books, including *The Quiet Revolution in Land Use Control* and *The Taking Issue*, still stand as major works of land use scholarship and helped those of us in the field understand the potential consequences of the rapid transition of land use controls from a tool of suburban politics to an important and still underappreciated component of environmental protection. Later, I met Fred socially when I discovered that we both lived in

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the same Chicago suburb. This led to my professional association with him.

In 1991, my former colleague Dean Stuart Deutsch, now dean of Rutgers, Newark, and I were able to lure Fred from a successful practice into teaching once we assured him that he could continue his normal diet of a minimum of one round trip per week from O'Hare International Airport. His wife Kay has probably never forgiven us for enabling his travel addiction. Fred's arrival at Chicago-Kent anchored our expanding program in Land Use and Energy Law and began a long period of fruitful and exciting learning and collaboration for me. Like all successful collaborations where genuine learning occurs, there was always an element of fear present.

Fred is a lawyer's lawyer and can best be described as an optimistic pragmatist. His work demonstrates an abiding faith in the ability of law to achieve fair social and environmental progress. He is equally a model of graciousness and understatement, but his razor-sharp mind and encyclopedic legal and nonlegal research have taught me to think very carefully about what I say and to understand better the depth and accuracy of the research necessary to address an issue. Many times I have stopped by his office to confirm my understanding of a legal principle only to have him gently tell me to consult a recently decided case he caught electronically or to refer to an old case that I forgot about or probably never found in the first place. Several times, I had the hubris to suggest a topic that seemed to merit a law review article. After acknowledging and complimenting my suggestion, Fred would often pull out a 50- to 100-page manuscript from a neat stack of papers on his credenza and ask if I had the time to look at a very rough (translation, fully developed and exhaustively researched) draft of an article on the same suggested topic. Alternatively, Fred would point to a tall stack of books that he was reading in preparation for the draft.

In the 1960s, the term "participant-observer" became popular in sociology to describe academic fieldwork by those studying and participating in the anti-Vietnam War movement.[1] The term is a charged one in sociology because of the dangers that the dual role poses for objective research and for the betrayal of subject confidentiality. However, the term is an apt description of Fred's unique contributions to lawyering and legal scholarship and carries none of the baggage of sociology. Through his involvement in many

1. *See* Barrie Thorne, *Political Activist as Participant Observer: Conflicts of Commitment in a Study of the Draft Resistance Movement in the 1960s*, *in* CONTEMPORARY FIELD RESEARCH: A COLLECTION OF READINGS 216 (Robert M. Emerson ed., 1983).

cutting-edge land use and environmental situations, he has developed into the ultimate legal participant-observer.

Fred's greatest contribution to land use and environmental innovation has been his ability to function both as an on-the-ground expert, bringing his vast knowledge of the law to solve immediate on-the-ground problems, and then to use this experience to serve as a bridge to the scholarly world. He has used his first-hand experience and vast legal and interdisciplinary knowledge to make two specific contributions. First, he has helped to legitimate innovative environmental protection experiments. Second, he has helped to provide creative and well-justified answers to tough legal questions that these experiments pose. Fred's role in the creation of two large-scale multi-species habitat conservation reserves in Southern California illustrates these two contributions at work.

II. BRIEF HISTORY OF HABITAT CONSERVATION PLANS

A. Balancing Development and Conservation

The story of habitat conservation plans begins in the 1970s when a desire to balance land development with the creation of species reserves led to a 1982 amendment to the Endangered Species Act (ESA).[2] Section 10(a) permits the Secretary of the Interior to issue incidental take permits for the activities that threaten to destroy listed species if there is an approved habitat conservation plan (HCP) in place.[3]

HCPs lay dormant until the late 1980s, when the potential impact of the ESA on private as well as public land development became clear. As a result, intense landowner opposition threatened to undermine this core federal biodiversity conservation program. The ESA created a process to list endangered or threatened species and prohibit federal agencies from jeopardizing their continued existence.[4]

B. Takings Implications and Exceptions

The ESA was originally perceived as an Act that limited federally permitted activities, primarily on public lands. However, section 9 prohibits private parties from "taking" listed species.[5] The prohibition against taking in section 9 applies both to the federal

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2. *See* MICHAEL J. BEAN ET AL., RECONCILING CONFLICTS UNDER THE ENDANGERED SPECIES ACT: THE HABITAT CONSERVATION PLANNING EXPERIENCE 52-65 (1991), for a history of the first plan at San Brunno Mountain west of San Francisco International Airport.

3. 16 U.S.C. § 1539(a)(2) (1994).

4. *Id.* at § 1536(a)(2).

5. *Id.* at § 1538.

government and to private landowners. In short, any land development risks taking a listed species because "take" is defined as "to harass, harm, pursue . . . wound, . . . [or] kill."[6]

In 1975, the Secretary of the Interior promulgated a rule defining "harm" to include "significant habitat modification where it actually kills or injures wildlife."[7] Despite efforts to modify it, amended versions of this rule stood for nearly two decades and were upheld, expanded, and enforced by the Fifth and Ninth Circuits in two influential decisions[8] that were ultimately upheld by the Supreme Court.[9]

The extension of takings to any habitat modification exposed local governments and landowners to uncertain liability risks for both direct development activities and regulatory decisions that allowed the development.[10] HCPs were the primary safety value because they constituted a potential variance process to allow limited "takes."

However, the price for a variance is high because HCPs generally require the creation and maintenance of a habitat reserve administered by local governments and financed by public expenditures and developer exactions. The broad definition of "take" is the primary legal glue that holds these programs together and creates the enforcement threat necessary to induce their creation. As this new liability risk to development became known, states in biodiversity hot spots[11] such as California, Florida, and Texas began to seek ways to avoid the enforcement of the ESA in a manner that prohibited all land development. The United States Department of the Interior became a supporter of these efforts after the Republicans captured Congress in 1994 and began a frontal assault on the ESA.

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6. *Id.* at § 1532(19).

7. Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or., 515 U.S. 687, 690 (1995).

8. Sierra Club v. Yeutter, 926 F.2d 429 (5th Cir. 1991); Palila v. Hawaii Dep't of Land & Natural Res., 639 F.2d 495 (9th Cir. 1981).

9. *See Sweet Home*, 515 U.S. 687; Alan M. Glen & Craig M. Douglas, *Taking Species: Difficult Questions of Proximity and Degree*, 16 NAT. RESOURCES & ENV'T 65 (2001).

10. J.B. Ruhl, *State and Local Government Vicarious Liability Under the ESA*, 16 NAT. RESOURCES & ENV'T 70, 74 (2001); J.B. Ruhl, *The Endangered Species Act and Private Property: A Matter of Timing and Location*, 8 CORNELL J.L. & PUB. POL'Y 37 (1998).

11. The term was coined by Norman Myers in 1988 and further popularized in EDWARD O. WILSON, THE DIVERSITY OF LIFE 261 (1992). The California floristic reserve is the only United States site among the fifteen listed by Wilson. *Id.* at 262-263.

III. CALIFORNIA'S RESPONSE

A. Natural Community Conservation Plans

One of the first chances to find creative ways to balance species conservation and continued development arose in California. To avoid the state listing of a small songbird, California devised a soft planning process to promote multi-species reserves. At the urging of Governor Wilson, the California legislature passed the Natural Community Conservation Act in its 1991 session. The Act created a voluntary program through which local governments and private landowners may cooperate in the preparation of plans (hereinafter "Natural Community Conservation Plans" or "NCCPs") for the protection of those natural areas that provide habitat for a variety of rare birds and other species.[12] The NCCP was a vague formulation of an idea on a slim statutory basis[13] with a high potential for ineffectiveness. Many environmentalists immediately rejected the idea as an ESA avoidance scheme, but the state had the vision that NCCPs could become large scale, multi-species equivalents of the Habitat Conservation Plans ("HCPs") authorized under the federal Endangered Species Act ("ESA"), which addressed species conservation plans proactively rather than reactively.[14]

B. Coastal Sage Scrub NCCP

To test the NCCP program, the Resources Agency in 1991 selected as a pilot project the "coastal sage scrub" terrain of Southern California, a region that had already experienced conflicts under the existing endangered species legislation. The state wildlife agencies (the Department of Fish and Game and its parent agency, the California Resources Agency) began working closely with the United States Fish and Wildlife Service (the "Service") to implement the new statute in three counties of Southern California, putting aside years of distrust and rivalry. As a reward for the good faith

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12. CAL. FISH & GAME CODE §§ 2800-2840 (West 1998 & Supp. 2001). The statute authorizes any person or governmental agency to prepare a Natural Community Conservation Plan (NCCP) pursuant to an agreement with, and guidelines written by, the Department of Fish and Game. *Id.* at §§, 2810, 2815, 2820. Each such plan is to promote "protection and perpetuation of natural wildlife diversity, while allowing compatible and appropriate development and growth." *Id.* at § 2805. Once the Department of Fish and Game approves an NCCP, the department may authorize developments that might otherwise be found to have an adverse impact on listed or candidate species if those developments are consistent with the NCCP. *Id.* at §§ 2081, 2825(c) and 2835.

13. The metaphor is borrowed from Justice Holmes's opinion in *Missouri v. Holland*, 252 U.S. 416 (1920).

14. 16 U.S.C. § 1539(a) (1994).

but then untested efforts of the State, the Secretary of the Interior designated the California gnatcatcher as a threatened species rather than an endangered species. More importantly, he concurrently proposed to list the songbird under a section § 4(d) rule, therefore exempting those activities that are approved as part of the NCCP process from the prohibition of taking the species.[15] In effect, the Department of the Interior de facto delegated considerable authority to the state to set allowable yearly takes. Although this action changed the voluntary nature of the NCCP program substantially, it set in motion an opportunity to test cooperative habitat planning at the national level.

The federal government listed the gnatcatcher by a 4(d) special rule as threatened rather than endangered because it provided a legal basis for the Fish and Wildlife Service not to designate its critical habitat. Thus, identification of its habitat might precipitate quick clearing to eliminate the threat to development. The Endangered Species Act gives the Fish and Wildlife Service considerable discretion not to list habitat when designation would actually jeopardize the continued existence of the species.[16]

The basic idea of the coastal sage scrub NCCP was to promote federal, state, and local agency cooperation plans to be developed into multi-species conservation plans for the protection of rare habitat. Conservation plans are more effective and efficient than the process outlined in the ESA of listing, designating critical habitat, and strictly enforcing the Act against all violators.[17] At a

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15. Endangered and Threatened Wildlife and Plants, 58 Fed. Reg. 16,742, 16,758 (Mar. 30, 1993) (to be codified at 50 C.F.R. pt. 17).

16. Early cases challenging the failure to designate habitat held that the failure to designate would not be an abuse of discretion. Some courts have accepted as a justification for the Secretary's refusal to designate critical habitat the likelihood that designation will encourage species destruction. *See, e.g.*, Fund for Animals v. Babbitt, 903 F. Supp. 96 (D.D.C. 1995), *amended*, 967 F. Supp. 6 (D.D.C. 1997). But many of the more recent cases suggest that it will be difficult to justify a refusal to designate. *E.g.*, Sierra Club v. U.S. Fish and Wildlife Serv., 245 F.3d 434 (5th Cir. 2001); Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999); Natural Res. Def. Council v. U.S. Dep't of Interior, 113 F.3d 1121 (9th Cir. 1997). Nondesignation does not excuse noncompliance with the Act. Jeopardy can still be found if there is no designation. United States v. Glenn Colusa Irrigation Dist., 788 F. Supp. 1126 (E.D. Cal. 1992). However, the failure to designate makes it somewhat easier to find no jeopardy. *E.g.*, Pyramid Lake Paiute Tribe v. U.S. Dep't of the Navy, 898 F.2d 1410 (9th Cir. 1990); Enos v. Marsh, 769 F.2d 1363 (9th Cir. 1985).

17. *See Secretary Babbitt Outlines Support for Endangered Species Act*, U.S. NEWSWIRE, May 6, 1993, *available at* LEXIS, News Library, WIRES File. The Service had been taking a similar position under the previous administration as well, as reflected by the settlement of litigation in the 1990-92 period, as part of which the Department of Interior and the Service "made an explicit commitment to pursue a 'multi-species, ecosystem approach' to its listing responsibilities." *See* Eric R. Glitzenstein, *On the USFWS Settlement Regarding Federal Listing of Endangered Species*, ENDANGERED SPECIES UPDATE, Mar. 1993, at 1-3. The arguments in favor of the broader approach are summarized in Christopher A. Cole, *Species*

minimum, many strong supporters of species conservation saw the process as the best alternative to counter efforts to roll back species protection on the theory that the ESA blocked almost all development, small and large. More grandly, the NCCP process provided an opportunity to cure the central defect of the ESA: the ESA is a biodiversity conservation strategy, but it only indirectly addresses the primary cause of biodiversity loss, which is habitat destruction. And it only comes into play at the eleventh hour when the species' survival is in doubt. It does not therefore promote the conservation of the ecosystems and the geographic scale necessary to promote biodiversity generally, not just for species on death's door.

Some mainstream nongovernmental organizations (NGOs) agreed, but others saw the process as an end run around the one substantive environmental law with real teeth and opposed the process. They preferred a strategy of listing, designating critical habitat, and enforcing all takes. The risks in large-scale multi-species HCPs are substantial, but risks of ineffectiveness from the ESA strategy are equally high. The debate continues to this day, although it seems to have shifted from the merits of the basic idea of the HCP to how to improve the HCP process.[18]

IV. TRIBUTE TO FRED BOSSELMAN: APPRECIATING HIS ROLE IN THE NCCP EFFORT

Fred was hired by the California Resources Agency as special counsel to assist the state in creating the coastal sage and other NCCPs based on his work in establishing similar smaller scale innovative land conservation programs in Florida and elsewhere. As he so often does with issues just below the profession's radar screen, Fred wrote the first article on the NCCP program.[19] His article defended what was then a bold but untested experiment in inducing all three levels of government to cooperate with private stakeholders to eliminate both existing and future obstacles to an acceptable level of land development while conserving both existing and future threatened and endangered species on a large geographic scale.[20]

Conservation in the United States: The Ultimate Failure of the Endangered Species Act and Other Land Use Laws, 72 B.U. L. REV. 343, 350-54 (1992).

18. *See* John Kostyack, *Reshaping Habitat Conservation Plans for Species Recovery: An Introduction to a Series of Articles on Habitat Conservation Plans*, 27 ENVTL. L. 755 (1997).

19. Fred Bosselman, *Planning to Prevent Species Endangerment*, LAND USE L. & ZONING DIG., Mar. 1992, at 3.

20. There is now a great deal of literature on habitat conservation and ecosystem conservation. *See* Cymie Payne, *The Ecosystem Approach: New Departures for Land and*

He saw the process as a creative way to apply a new area of science, conservation biology, to help all levels of government take a more proactive role in biodiversity conservation and to carry forward the idea of "bio-regionalism," the use of a region's biodiversity resources to delineate an area and ultimately to structure development. As demonstrated by his recent lecture delivered at the Florida State University College of Law,[21] Fred's interest in conservation biology's application to land use and environmental law has deepened and matured.

A. Stakeholder Collaboration: A Move Away From Rule of Law Litigation

HCP experiments represent a potentially important turning point in environmental law. Not only was the geographical scale of the reserve unprecedented, but also it was one of the first major uses of stakeholder collaboration to try to move away from the use of rule of law litigation to drive the resolution of environmental problems. In brief, environmental lawyers have relied heavily on lawsuits to bring conflicts to the surface and force their favorable resolution.

Environmental law is an unplanned byproduct of the unique politics of environmentalism in the late 1960s and early 1970s. Environmental law began as a legal guerilla movement led by ad hoc groups of citizens that tapped into a growing frustration with development and the idea that all technological application is progress.[22] The objective was often to stop a local public works project or a federally- or state-licensed activity that allowed the development of scenic "natural" areas.[23] In the seminal case of

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Water, Foreword, 24 ECOLOGY L. Q. 619 (1997); Kostyack, *supra* note 18. Marc J. Ebbin, *Is the Southern California Approach to Conservation Succeeding*, 24 ECOLOGY L.Q. 695 (1997), is an especially useful introduction to the coastal sage program by the Special Assistant to the Secretary of Interior who was the principal DOE-state liaison.

21. Fred P. Bosselman, *What Lawmakers Can Learn from Large-Scale Ecology*, 17 J. LAND USE & ENVTL. L. (forthcoming 2002).

22. Former Secretary of the Interior Stewart Udall describes Victor Yannacone, the first lawyer to try and stop the use of DDT, as follows:

> Yannacone was a brilliant tactician, but from the beginning he had no illusions that litigation would produce resounding legal victories. His maverick motto was "Sue the Bastards," and he envisioned his lawsuits as show trials to dramatize environmental truths that would ultimately compel members of the legislative and executive branches of government to act. He was willing to lose court decisions if his cause prevailed in the court of public opinion.

STEWART L. UDALL, THE QUIET CRISIS AND THE NEXT GENERATION 224 (1988).

23. In his history of the modern environmental movement, Samuel P. Hays stresses the grass roots, bottoms-up nature of the movement compared to the top-down elite scientific conservation movement. SAMUEL P. HAYS, BEAUTY, HEALTH AND PERMANENCE:

Scenic Hudson Preservation Conference v. Federal Power Commission, the petitioners convinced the court of appeals to read a broad regulatory statute, which at best conferred discretion on the agency to consider aesthetic values (a then much contested idea), to impose mandatory duties on an agency to consider environmental values and to justify more fully decisions not to protect environmental values.[24] *Scenic Hudson* was a stunning achievement, but it produced two lasting legacies for the environmental movement that blocked its progress. Environmental preservation was cast as a negative rather than an affirmative objective, and the primary policy instrument became a rule of law litigation strategy.

This strategy worked well at the beginning of the environmental movement when there was little legal basis for the recognition of environmental values or when agencies did not take the new mandates seriously. The value of rule of law litigation has declined over time because many new second-generation problems require much more complex, long-range, and experimental solutions. Biodiversity conservation is a prime example of a second-generation problem. Environmental protection needs to be carried out on larger landscape scales; thus, the ability of rules to structure this process (except in its ability to provide the necessary legal framework) is diminishing. We can set objectives and even performance targets, but we can never be sure that the objectives will be achieved.

This uncertainty means that environmental protection is increasingly an exercise in risk-sharing among stakeholders rather than the strict enforcement of statutory mandates. In legal terms, discretion must be exercised for long periods of time, and thus it becomes more difficult to determine when an action is arbitrary. In addition, in consensus-decentralized processes, participants must adapt statutory mandates that were not written with the problem being addressed in mind, so a rule of law suit to declare an action ultra vires may be counter-productive. Often, the best that we can do is to apply adaptive management to ecosystem management. In short, the new environmental law, as many have pointed out, is a law of deals.[25]

ENVIRONMENTAL POLITICS IN THE UNITED STATES, 1955-1985 (Donald Worster & Alfred Crosby eds., 1987).

24. 354 F.2d 608 (2d Cir. 1965). The plaintiffs were aided by the fact that a decade earlier the Commission had successfully defended its authority to deny a license to protect a free-flowing river. *See* Nanekagon Hydro Co. v. F.P.C., 216 F.2d 509 (7th Cir. 1954); *see also* A. Dan Tarlock et al., *Environmental Regulation of Power Plant Siting: Existing and Proposed Institutions*, 45 S. CAL. L. REV. 502, 514-523 (1972).

25. *E.g.*, Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis*

Many environmental NGOs recoil at the characterization of these new processes because the "deals" that have been struck have the potential to displace federal standards for which many have fought hard, to push all the hard management and effectiveness questions to the future, and to shift the responsibility for all risks to the federal government. The price for participation is often immunity from responsibility for changed conditions in the future. The Department of the Interior has responded to this concern by issuing its "No Surprises" rule over NGO protest.[26] The rule effectively shifts the responsibility for future protection measures to the federal government once a Habitat Conservation Plan is approved.

These solutions present a rich target of opportunity for rule of law litigation because deals raise both vires and constitutional issues. The case against these deals is that natural resources management is not place driven, but centralized. The great conservation battles of this century have been fought to eliminate or minimize place-based, or local and low, standards by subjecting them to the discipline of scientifically rational standards, and this lesson was carried forward into environmental protection legislation.

B. Creation of the Orange County Reserve

Fred's faith in the NCCP process bore fruit, thanks in no small measure to Fred's contributions. In 1996, state and local governments, private landowners, and other stakeholders entered into an agreement to create a multi-species habitat reserve to preserve a remnant of the coastal sage scrub ecosystem in Orange County in Southern California.[27] San Diego began a parallel process to create an even larger and more complex reserve system. It took a great deal of creative lawyering and risk-taking on all sides, much of it structured by Fred to produce the Orange County reserve. Fred's role in risk reduction is a classic example of the creative lawyering process.

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for Flexible Regulation, 41 WM. & MARY L. REV. 411 (2000).

26. The rule was initially adopted as policy statement, but the Department ultimately issued it as a federal regulation after the policy was challenged on procedural and substantive grounds. The final rule and comments can be found at 63 Fed. Reg. 8859-8873 (Feb. 23, 1998) and 50 C.F.R. pt. 17 (2000).

27. *See* Ebbin, *supra* note 20.

1. Risk Reduction through the No Surprises Policy

The debate over the allocation of responsibility for changed conditions and management failures illustrates the challenges for law and lawyers in a deal-making environment. For these deals to work, private parties must forego the enjoyment of their full development entitlements in return for public approval of ecosystem protection and related mandates. To encourage this cooperation, acceptable ways must be found to limit the risk exposure of the participants over time. The federal government, and ultimately NGOs, must walk a thin line between offering less than full enforcement of a statute as an incentive for a superior solution[28] and maintaining a credible threat of a more drastic alternative to cooperation.[29] Otherwise, landscape-scale experiments will not go forward, and biodiversity protection will not work.

The Department of the Interior took a bold risk-reduction step to induce landowner cooperation and land donation. It issued a "No Surprises" policy.[30] The policy shifted the financial responsibility for remedying unforeseen species to the federal government. No surprises is the linchpin of large HCPs, and it raises major legal problems. Orthodox constitutional doctrine, premised on sovereign immunity, teaches that the state can bargain away its police powers because there is no estoppel against the federal government.

2. Fred Bosselman's Defense of the No Surprises Policy

In 1997, Fred wrote an elegant and powerful theoretical defense of the doctrine and its crucial role in biodiversity conservation.[31] In brief, he defended the policy because it both created the certainty necessary to induce landowners to afford innovative biodiversity conservation measures and encouraged the design of the most scientifically credible and geographically extensive reserves possible under existing scientific knowledge and land realistically available

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28. In his pioneering exploration of under-enforcement of environment law, Daniel Farber concludes that under-enforcement both has the potential to encourage innovation and "also has an inevitable cost in terms of damage to our concept of the rule of law." Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance In Environmental Law*, 23 HARV. ENVTL. L. REV. 297, 325 (1999).

29. *Cf.* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984). Professor Dan-Cohen suggests that there are two types of criminal rules; conduct rules that are designed to produce uniform citizen behavior, and decision rules that are more flexible for the police. The latter are more flexible and do not always require full compliance.

30. *Supra* note 26.

31. *See* Fred P. Bosselman, *The Statutory and Constitutional Mandate for a No Surprises Policy*, 24 ECOLOGY L.Q. 707 (1997).

for inclusion. He addressed the troubling ultra vires issue by arguing that the 1982 Amendments to the ESA creating HCPs shifted the focus of the Act from species-by-species protection. This shift permitted the Department of the Interior to administer the Act in a manner that would minimize the taking of listed species and to negotiate creative private-public partnerships. Thus, the Department can (and should) negotiate assurance agreements when "they can provide the maximum benefit to the species in comparison with other available means."[32]

Fred Bosselman's article also tackled the constitutionality of the no surprises rule in a way that combines Fred's characteristic pragmatism with a close reading of Supreme Court precedents and the no surprises policy. He did not address the abstract question of whether the no surprises policy bargained away the federal government's power to act in the future. Instead, he framed the issue more narrowly: Can the federal government constitutionally assume the costs of financing future modifications in the HCP? This legitimately finessed the more difficult constitutional issues because the no surprises policy reflected a contemplation of revisions of the HCP in response to changed conditions but placed the financial burden for paying for these changes over the life of the project on the federal government.

He found support for a positive answer in the Supreme Court's *Windstar* decision.[33] W*indstar* held that Congress could not legislatively abolish a favorable accounting rule contained in Federal Home Bank Board- savings and loan contracts negotiated as part of the industry bailout in the 1980s and early 1990s.[34] The Court agreed that Congress could not promise not to change the rule in the future but could promise to indemnify the industry for the losses incurred as a result of the change.[35] The distinction between a promise not to exercise the police power and a risk-shifting promise described exactly what the Department of the Interior had done in the no surprises policy.

V. CONCLUSION

Fred's legal work and resulting scholarship in the creation of the Orange County multi-species reserve is only one in a long series of examples of how Fred both shaped the legal structure of innovation and participated in the careful lawyering to implement the

32. *Id.* at 723.
33. United States v. Windstar Corp., 518 U.S. 839 (1996).
34. *Id.* at 909-10.
35. *Id.*

structure. He has shown us how to work within existing legal frameworks to accomplish creative results and the deeper legal and cross-disciplinary dimensions of the structures that he has helped create. This is the stuff of a great and distinguished legal career.

IMPLEMENTING EVERGLADES RESTORATION*

MARY DOYLE**

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I. INTRODUCTION

I am going to talk about Everglades restoration this evening, dividing my talk into two parts. First, I want to offer a few reflections on the passage of the Everglades authorization in the last session of the U.S. Congress. What lessons did we learn about the future of the restoration effort from the arduous experience of seeing the legislation passed? Second, I will commend three issues worth watching closely over the next period as we seek to assess how effectively the Everglades restoration plan is working.

II. REFLECTIONS ON THE PASSAGE OF THE EVERGLADES AUTHORIZATION

My memory runs back to a sunny Friday morning on Capitol Hill in early November of 2000. In fact, it is the Friday before the Tuesday on which the hard fought presidential election is supposed to be decided. On the floor of the House of Representatives there is only one piece of business before the long-delayed adjournment of the session: adoption of the Army Corps of Engineers' project authorization bill whose major component is Everglades restoration. This morning the bill passes the House by acclamation, as it had passed in the Senate. It is a love fest. Many speeches are delivered crediting Congressman Clay Shaw, head of the Florida delegation and locked in a very close race for reelection, for getting the

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* The author delivered this speech to the University of Florida College of Law PIEC on March 23, 2001.

** Professor of Law, University of Miami.

legislation through. Not a dissenting voice is raised. After the vote, the ceremony moves out to the front lawn of the Capitol for a press briefing. My boss, Secretary of the Interior Bruce Babbitt, is there, and House Speaker Dennis Hastert drops by to say a few words. There are congratulations all around. The South Florida Water Management District ("SFWMD") had the foresight and good taste to send their mascot—actually a guy in a giant green plush alligator outfit. He is seven-feet-tall and sticks to Congressman Shaw like glue, so the pictures in the national press the next day feature the Congressman in the clutches of the velvety green monster.

Now turn the clock back again, this time to the early 1990s. Put yourself in the shoes of Florida or federal officials or leaders of environmental groups desiring ultimately to get Everglades restoration funded in congress. What if you had told them, as they were speculating about the political future back then, that when the legislation was finally ripe for submission to Congress, the circumstances would be these:

(i) The Senate and House would both be in GOP hands;

(ii) The Congressional leadership would be locked in a brutal budget war with the Democratic president, whom they had earlier impeached;

(iii) A Republican would have been elected governor of Florida, defeating a Democrat closely associated with the cause of Everglades restoration;

(iv) This Republican governor of Florida is the brother of the GOP candidate for President, who would be engaged with his Democratic opponent, himself a long-time champion of Everglades restoration, in one of the closest and most indecipherable presidential contests in history;

(v) Adding to all that, you tell them in the early 1990s that just before the Everglades bill is to get to Congress, Senator John Chaffee of Rhode Island, a true environmentalist long head of the Senate Environment and Public Works Committee, would be lost to death and be succeeded as chairman by Bob Smith of New Hampshire, the self-proclaimed most conservative member of Congress who once quit the Republican party on grounds that it is too liberal.

Back in the early 1990s, had the leaders of the cause of restoration known of these political developments to come, could they have mustered any optimism whatsoever for successful passage of the authorizing legislation? Could anyone ten years ago have foreseen the unlikely love fest that took place on Capitol Hill on the Friday before the election of the year 2000?

How it all happened – the struggles, the strategies and fortuities, the alignment of the political stars – makes a great story, one that needs to be told and retold. Like all good stories, this is one full of paradox and irony. I would like to offer just a few observations on this amazing political tale, focused on the themes of personality, politics, conflict and coalitions.

First, on personality and election politics: Senator Bob Smith of New Hampshire proved to be one of the Everglades' most effective champions. Somewhere along the way he fell deeply, unabashedly in love with the subtle beauty of "America's Everglades." He did everything he promised to do in moving the bill through the Senate, and more. Governor Jeb Bush delivered too. Lesson learned: Take your support from whence it comes. Stay open to unlikely possibilities.

It turned out that Florida's 25 electoral votes were up for grabs in the presidential election of 2000, and not a lock for the Republicans as some had anticipated. This significantly advantaged the cause of Everglades restoration in Congress. Polls showed Floridians wanted the Everglades saved, by margins of more than two-to-one, and they were willing to pay for it. Neither political party could afford to antagonize the voters of Florida by opposing the Everglades cause. Lesson learned: Public support is crucial. If public support is lost, the cause is lost. And public support needs to be continuously cultivated by education and advocacy.

About conflicts and coalitions: The Everglades bill passed the Senate, and by the time it was introduced in the House of Representatives there was unanimous support for it among all interested constituents and stakeholders in Florida. In fact, the bill arrived at the House without any serious opposition. This did not just happen. It was the product of endless hours of sometimes tense negotiation among government officials and stakeholders. In the end the contending interest each concluded that they wanted the bill more than they wanted to fight. Each understood that without unanimity, the bill would not make it through Congress. Without unanimity among the Everglades stakeholders, senators and representatives from other parts of the country would say: "Why should we put $4 billion in federal funding into Florida if the Florida interests cannot agree on what they want?"

The irony here is that anyone closely associated with Everglades restoration over the years will talk about the disputes, the fights, the conflict, even acrimony and personal hostilities that frequently have attended decision-making affecting the Everglades. Disputation is endemic to relations among agencies and people connected to the Everglades. The Army Corps of Engineers, the National Park Service, and the Fish and Wildlife Service have their territorial and cultural rivalries with each other and with outsiders. The Micosukkee tribe brings a lot of lawsuits against the other participants. The State of Florida and the federal government have differing views on the benefits to be delivered by restoration. The environmentalists oppose the sugar industry, and vice versa. The farmers in South Dade County are usually ticked off at the SFWMD and Everglades National Park. And there are conflicts within constituent entities too.

Most of these conflicts will persist as the restoration project moves forward; some will intensify. That is because this is an ecosystem-wide effort that brings together agencies that are not used to working together. They have different goals, budgets, constituents, mandates, cultures and histories. Overcoming and resolving conflict are prominent among the historic challenges presented here.

We will always remember Tom Adams of National Audobon, and Bob Dawson, representing sugar and urban interests, walking the halls of Congress together in support of the bill. Bob says the act of finding unanimity in support of the legislation itself has the potential to change the future of the Everglades restoration effort; that finding consensus on the bill will have its own positive precedential force. Lesson learned: We know now that consensus is possible because we saw it accomplished.

III. THREE ISSUES WORTH WATCHING

I would like to devote my remaining time this evening to pointing out for you three issues to follow in assessing whether the restoration plan is being implemented as intended. First: watch the status and the progress of the state-federal relationship in the plan's implementation.

A. State-Federal Relationship

The State of Florida and the federal government are entering an unprecedented partnership of shared costs, authorities, and responsibilities. This partnership will manifest in several ways. One is that the State and federal government will share equally the cost of construction, operation, and maintenance of the project. This

50-50 financial arrangement is unique for Army Corps projects; usually the federal government pays substantially less than half the cost of construction and the state partner pays the entire cost of operation and maintenance.

Another aspect of the partnership is the requirement that the Governor of Florida and the President of the United States enter into a "binding agreement" in which the Governor promises to use Florida law to ensure that water developed by the project will be available to restore the natural system, as contemplated by the plan, and not diverted or permitted away to support more urban growth and development in South Florida. Future Congressional appropriations are dependent upon getting the binding agreement in place.

A third aspect of the partnership will be played out in development of the "programmatic regulations" called for in the legislation, whose purpose is to lay out the course of implementation and establish substantive interim goals "to ensure that the …purposes of the Plan are achieved." The Army Corps is required to secure the concurrence of the Governor of Florida (as well as the Secretary of the Interior) in the promulgation of these regulations.

In watching the state-federal partnership unfold, we should ask: Are both governments meeting their obligations to fund the project? What issues have the parties identified in drafting and implementing the binding agreement between the President and the Governor? What are the disagreements between them, if any? Are the federal agencies getting themselves staffed and otherwise prepared to monitor accurately the water permitting and planning activities of the SFWMD in order to determine whether the State is complying with the binding agreement? What processes have the state and federal agencies adopted for development of the programmatic regulations? Of particular interest is how the interim goals called for in the programmatic regulations are being developed. How have the agencies provided for public participation in developing the programmatic regulations?

B. Science Underpinning the Project

The second issue deserving our attention as implementation proceeds is how the science underpinning the project is practiced and reviewed. The Everglades restoration plan is science-based. It accepts the reality of scientific uncertainty and commits to a regime of "adaptive management," whereby we monitor results and refine or change course as we learn more. A question that interests me lies in the relation of adaptive management to coalition building and maintenance. How will we hold together a stakeholder coalition

supporting the scientific and technical approaches taken in the current plan (like aquifer storage and recovery) if the scientists later opine that these approaches are not working as promised and need to be altered?

Scientific peer review is a necessity. Congress requires it, as does good scientific practice. But how do we best organize and deliver peer review? The path to establishing the National Academy of Sciences peer review panel under the auspices of the South Florida Ecosystem Restoration Task Force has been rocky. There was contention on the questions of what issues the panel would look at, and who would determine the panel's work agenda. The tendency of policy-makers is to restrict and control inquiry by peer reviewers from outside. But this can tend to undermine their independence, and call into question the legitimacy of their ultimate conclusions. So the question of how best to organize and deliver effective scientific peer review is unresolved and filled with difficult and contentious issues.

Science budgets are limited. Government decision-makers must wrestle with how the scarce dollars should be divided between longer range, more theoretical research into various aspects of ecosystem recovery, and immediately helpful and practically oriented scientific inquiry, such as operating pilot projects and monitoring the results of actions taken.

C. Stakeholder Coalitions

The third implementation issue that bears watching is how effectively stakeholder coalitions are maintained over the next period. We would not have come this far without the truly remarkable work of the Governor's Commission for a Sustainable South Florida, chaired by Dick Pettigrew in the early 1990s. Agreements hammered out by stakeholders in meetings of the Governor's Commission later led to broad support for the Army Corps' restoration plan and to the virtually unanimous support for the authorizing legislation I have described.

There is no such entity functioning now. The South Florida Ecosystem Restoration Task Force, authorized and funded by Congress, is currently in existence, but is not appropriately constituted to perform the task of dispute resolution in its most varied and comprehensive aspects. The Task Force is made up of 14 governmental entities: federal, state, local, and tribal. It is poorly constituted as a forum for the resolution of specific inter-agency and inter-governmental disputes. Most such disputes can be expected to be bi-lateral between the Army Corps and the SFWMD, or at the most tri-lateral, involving the Army Corps, the Department of the

Interior, and the SFWMD. These agencies will resist the intervention of the Task Force, representing as it does entities not party to the dispute in question. Conversely, the Task Force is under-representative when it comes to building stakeholder support because, unlike the defunct Governor's Commission, it has no non-governmental members representing interested communities.

Constituent education, and developing and retaining consensus, are ongoing challenges. We do not have the right mechanisms in place to do the job now. On a hopeful note, the SFWMD has recently established an advisory committee of government and non-government representatives to advise it in connection with implementation of the plan. This entity may prove a useful forum for working through disputed issues in the future.

IV. CONCLUSION

In conclusion, let us remind ourselves that the Everglades project is the most fully realized and best funded ecosystem restoration effort ever undertaken by humankind. What we do here in managing the application of science, adaptive management, dispute avoidance and resolution, and coalition building is crucial not only for South Florida and our state, but for the future of the ecosystem-wide approach to environmental restoration. We are the pioneers others will look to. I urge you all to stay involved and committed to this great project over the years to come, and to encourage others to do the same.

TRAITS AND TOOLS FOR ETHICAL ENVIRONMENTAL ADVOCATES IN FLORIDA

BRION BLACKWELDER*

Table of Contents

I. INTRODUCTION

The personality traits of the lobbyist and the successful advocate in court are often overlooked when we talk about ethics and professionalism. Environmental advocates, despite believing in a high moral justification for their positions, are often frustrated

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when better-financed efforts gain an inside track. It takes a certain preparation and personality to carry off influencing the decision makers.

If you are a public interest advocate for the environment in Florida, whether as a legislative or administrative lobbyist, or before the courts, the suggestions of this article may help you foretell and structure the success of your approach. The tools and traits are meant to encourage you to find and enhance an effective place and style for your advocacy. By organizing the great capabilities of your personal effectiveness, you can advance the causes you support.

Suggestions here take you from the basics of registering to lobby the executive and legislative branches, to profiles of effective lobbying in the modern style, deciphering administrative agencies and the cabinet, ethical conflicts, preparation of clients pre-suit and handling sanctions and other hardball tactics during litigation. The goal of this article is that you will build an outline of your approach with specific points to enhance your effectiveness, and go forward with effective ethical advocacy.

II. INFLUENCING LEGISLATIVE BODIES

Lobbyists are a fixture of the system with 80,000 in Washington, D.C. by the 1990s. There were hundreds registered with the Florida legislature in the 2000 session. There must be thousands, at least part-time, at the city and county levels in Florida.

Most environmental advocates have to influence local or state legislative bodies from time to time. Most of the advice herein about the state legislature is adaptable to local governments, which have their own registration procedures, fewer members and easier access.

A. Preliminaries: Register as a Legislative Lobbyist, and Research

In addressing legislators, including at local offices or by telephone, you may need to register beforehand, and file reports as a lobbyist. The Florida Legislature defines a 'lobbyist' as "a person who is employed and receives payment, or who contracts for economic consideration, for the purpose of lobbying, or a person who is principally employed for governmental affairs by another person or governmental entity to lobby on behalf of that other person or governmental entity."[1] It defines 'lobbying' as "influencing or attempting to influence legislative action or nonaction through oral

1. FLA. STAT. § 11.045 (2000).

or written communication or an attempt to obtain the goodwill of a member or employee of the Legislature." [2] Consult the Guide to Lobbyist Registration and Reporting, available from the Office of Legislative Services' Lobbyist Registration Office.[3] The forms are online, but original signed documents must be filed to comply. At the local level, inquire with the city or county clerk or attorney or check the Code for any requirements.

The web site http://www.leg.state.fl.us/ also connects you to a great deal of descriptive matter on the members (photos, biographies, and maps of districts) and their committee assignments and what they are sponsoring. For instance, in the 2001 legislature, the 63 new House members figure into 120 total. Many come from prior positions in local government. Most Senators were previously in the House. Take the material a step further and ask around about their personalities.

B. Identify Your Place in the Lobbying Hierarachy

Legislative lobbyists in the modern style can be described in terms of a hierarchy. Look over the four profiles and honestly consider where you now fit. Do not despair; suggestions follow on how to elevate your status.

> *Premier lobbyists'* techniques deserve the consideration of everyone else who lobbies. They are personally close to top legislators and achieved this because they have quality information and are competent and reliable. Closeness may mean they socialize with legislators (attend sporting events, hunt, fish, drink, golf). They are close enough friends to a few that they are like family, or business partners. Most legislators and aides would know and greet them. The sign of their access is that their phone calls, even to cabinet members, speakers, and committee chairs, are recognized and personally returned, not screened. Usually they were high-performing former state officials or legislators, or former aides of top people, or are notable from statewide political campaigns or parties. While their access is guaranteed, they do not take it for granted.

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2. *Id.*

3. *Available at* http://www.leg.state.fl.us - offices located at 111 W. Madison St., Room G-68, Tallahassee, FL 32399-1425, phone (850) 922-4992.

> They constantly maintain their own accessibility with cell phones and beepers and personal presence.

The premier lobbyists' method is to be the best informed, and they are relied upon for the accuracy of their information above all. They stay so well informed that they are virtually an unpaid staff to the government. They look like the people they influence, with impeccable dress and grooming and manners. They personally know all the staffers, secretaries, and aides. They are "fixers," to match up each legislator with what he or she wants (within the limits of campaign contributions and gifts). What legislators want may be a program, connections to others, campaign assistance, help for powerful constituents, or even simple things like an award or social inclusion. Premier lobbyists are at the ultimate bargaining table due to their capability. There, they personally craft the outcomes, or "deals," that make the essential compromises of a functional government. They are devoted to their work year-round and carry the history and memory of state affairs from session to session. If you are not "Premier," maybe you are "Second Tier?"

Second Tier lobbyists are known to many of the legislators as some of the campaign managers, fund raisers, party officials, or former legislators or aides, or some are presidents of large corporations or senior partners of law firms, or perhaps heads of important organizations, or former members of state boards or commissions or former holders of important local office. Their access is such that their phone calls to most top aides and members are recognized and screened, with return or response at least from someone. Their history may include a few legislative sessions as a lobbyist or member or aide. They are greeted, when seen, by many legislators and aides from outside their home area. They may be less fully devoted to the legislature than the Premier lobbyists, and work at other efforts also. They are highly informed and facilitate a lot in local and state politics. If the Second Tier is not your job description, try Third Tier.

Third Tier lobbyists are known to and recognized mainly by the local legislative delegation and their aides. They have helped legislators get speaking engagements, some have helped with contributions to campaigns, and they have appeared at hearings and been quoted in the press to have some public profile. They may have some extra credentials (attorney, head of local group, a scientist without especially high recognition in their field, or a small business owner). They have attended some parts of the legislative sessions, but for a limited time or for fewer issues. They are busy with more local issues usually, but are not in the inner circle of key state insiders. Being more a part of the crowd, they miss a lot of the

action and act more through the local delegation. The higher ranks use them to sound out questions and new information. Many think of themselves as Premier, although their phone calls are usually screened and lower staffers usually respond.

The *Grassroots Tier* is the most abundant and growing kind, and hugely important to the system. These lobbyists write and occasionally meet local legislators. They focus on local issues or act as local contacts on state issues. They would need an introduction to almost all of the legislators. They may have had a bit role in local campaigns: making calls, or handing out leaflets, or working polls. Their phone calls would be screened as a courtesy and if there is a reply it is a "thank you for your concern." They may have gone to the legislature for a couple days on an issue. A bit rough-cut in grooming or dress, perhaps, they care about issues, but have erratic information about any given topic, as lobbying is only a small portion of their life.

Hopefully, each understands just how many in the Grassroots Tier are needed to accomplish anything in a legislative agenda, where inertia is the rule. A few years back, then Speaker Thomas P. 'Tip' O'Neill told the Sierra Club it was the top lobby in the country, passing even the National Rifle Association, because of how well it mobilized its members' responsiveness. Grassroots lobbyists are a big part of that effectiveness. They have a collectively large share of the power, because all the other lobbyists are turning to a grassroots style of manufactured constituent support to sell their own efforts. From the view of the legislators, a constituent contact carries the implied reminder: accountability attaches to this decision. That's effective.

C. Rise in the Hierarchy by Referring to this Checklist

You may improve your lobbyist status, perhaps rapidly, by taking one step at a time as suggested by each question. Everyone postures as if holding a better status, but his father's advice to Laertes still holds: "to thine own self be true." Know your fit in the hierarchy, and improve upon it, by following this approach:

1. The source of my being useful to and recognized on sight by legislators is now (Check one, then work toward the next one on the list):

- I write them or letters to the editor on issues;
- I speak at hearings so they have seen me or read news articles quoting me;
- I have met many of them when they campaigned;
- I have had them speak to my organization;

- I helped get them an award for legislative achievement;
- I worked in their campaigns (made calls, leafleted some) or gave contributions in small amounts;
- I worked as their campaign advisor for key issue or strategy;
- I was one of a few key fundraisers or contributors to their campaign;
- I was the main manager or fundraiser to campaigns;
- I socialize some with legislators, such as hunt, fish, drinking buddy, golf partner;
- I am like family to some legislators as I socialize and personally interact with them so much.

2. My personal communication style (Check all that describe you, then work on all that are not checked):

- I have a personal touch for learning the names of staffers, secretaries, and aides;
- I have a high level of energy in conversation with others;
- I gather information to myself like I'm a magnet;
- I love making contacts and following up with them;
- I do my "homework" to have information on all aspects of what I handle;
- I use cell phones, beepers, and am always accessible;
- I work on legislative policy "24/7";
- When teamed up with another, I am the more talkative out-front person when approaching a public official, rather than the more reserved;
- I have great recollection of the history of development of what I work on, to bridge between prior years and drafts and the present discussions.

3. My appearance and image (Check all that describe you, then work on any that are not checked):

- I place a lot of importance on my personal appearance (dress, hair);
- I look like one of the people these legislators spend time with when among their friends and business associates;
- I react with vigor against anyone's suggestion I am an extremist or zealot;
- I react with great attention and urgency to any suggestion that I have inaccurate information or that I am not being honest.

4. My personal connection with legislators (Check the one that most fits you, then work on the next level by following other suggestions in this evaluation):

- They do not know me without an introduction;
- A few would recognize me at a reception, and come to greet me;
- Almost all the local delegation would come greet me at a reception;
- Almost all the aides as well as local delegation would come greet me at a reception;
- Many legislators from outside my home area would greet me at a reception;
- Many aides, as well as legislators, from outside my home area would greet me;
- Most legislators and aides would know and greet me.

5. How well-known I am? (Check your level now and work to the next one):

- My phone call to members of the local delegation would not be recognized;
- My phone calls to members of the local delegation would be recognized and returned;
- My phone calls to some top aides and top officials of the legislature would be returned; and
- My phone calls to cabinet members, speakers and committee chairs would be returned.

6. My lobbying credentials (Check what applies and work to better it in some way):

- I'm involved with local issues;
- I'm a professional person in a local practice (attorney, scientist, etc.);
- I've been highly recognized in my profession (bar association, scientific commission etc.);
- I've lobbied once before in Tallahassee for a week;
- I've lobbied an entire legislative session;
- I've lobbied a few legislative sessions;
- I've lobbied many legislative sessions;
- I'm the holder or former holder of a high position in my field (President of a large corporation; head of a national or large state organization; former member of a state board or commission or holder of important local office like county commissioner);

- I'm a notable in political campaigns or parties in the state;
- I'm a former state legislative aide;
- I'm a former state legislator.

7. How cooperatively I work (If any do not apply to you, work on them):

- I work in coalitions with non-traditional allies (i.e. some compatible large corporate interests, where you help their efforts and they help yours);
- I use grassroots and call on them for e-mails, letters, and to visit with me if possible (clients, local constituents);
- I am willing to be one in a system of hundreds of state lobbyists;
- I'm already virtually an unpaid staff of government due to the depth of my information;
- I'm intent enough to get to the ultimate bargaining table and apply give-and-take until I personally craft an outcome;
- I'm able to agree in my collective effort on the projects to pick out who is the "deal" maker for my clients, and give that person the authority for the ultimate compromise;
- I'm ready to staunchly defend the imperfect outcome I will have to agree to, and defend those whom I convinced to accept it .

D. Lobby in the Modern Style

Use these axioms of modern lobbying (derived from a book written about national lobbyists).[4] Develop them into your own "mind set" as a lobbyist:

- Use media and public relations for any public issue, as a great influence;
- Get into a coalition (sometimes of nontraditional allies, meaning combinations with other oddly compatible lobby interests);
- Gear up grassroots lobbying letters, calls and e-mails; plus have clients or local constituents go or accompany you to visit members and aides;
- Become depended-upon for information and background as part of an "entire industry," a kind of "unpaid staff" that provides the resources lacking in government employees;
- Initially collect background information and make contacts. Then, for the most part, function in the network with social contact including organized speaking, retreats, educational sessions, and personal involvement with the legislators.

4. JEFFREY H. BIRNBAUM, THE LOBBYISTS (1993) (the author followed nine top corporate lobbyists about Washington, D.C., by permission, in 1989 and 1990 for a truly inside story).

Perhaps only at the end you may need to ask for a legislator's help;
- Make your goal to be *accepted and trusted*. A test for acceptance is whether the phone calls are returned. The significance of trust is total. Your goal is to be *at the center and always there*;
- If you are the type that is a strategist and generalized, then bring around with you the experts on details, or have them ready for an immediate answer from a phone call;
- Be viewed by the legislator as a friend and resource;
- Use an appropriate label other than lobbyist, like consultant, or lawyer;
- Obey the pecking order that a Cabinet member or legislator is at the top, followed by their staffs, then the lobbyists. This is true in the domination of conversation and presence at any event;
- Constantly test the wind invitingly about issues, sound out if anyone senses how your message is received.

E. Approach to Use to Hostile, Neutral and Favorable Legislators

Everyone researches the personality and background of officials they will approach. But what do you do if they allow you to approach them? To persuade a legislator to accept your point, appeal to the degree of personal "environmental ethic" they seem to have:[5]

Hostile or uncaring listeners should respond best to protecting the environment *to serve the needs of humans* (economy, orderly society, efficiency). You can "sell" these by:

- Being satisfied to just start moving their opinion slightly your way;
- Stressing common ground;
- Using sound logic with extensive evidence;
- Working on your own image as a calm, reasonable, fair, and informed person;
- (Any image or appearance flaws quickly translate to rejection by them);
- *Generally caring* ones should also want to protect the environment *from respect for its "intrinsic value*." These *Neutrals* should be shown not only how they are directly affected by the urgency, but given background understanding and blends

5. THE RIGHT THING TO DO (James Rachels, ed., McGraw-Hill 2d ed. 1999) (The three ethical levels are included in the editor's introduction to Chapter 23 on Preserving the Environment).

of logic and emotional appeal. Presumably this is your largest target audience.

- *Philosophically committed* may align with stressing, "What kind of *people would we be* if we destroyed the natural environment?"[6] Approach these *Favorable* ones with emotional appeal, urge their public commitment, give action assignments, and teach your supportive reasoning to use as they go to others.[7]

Upon seeing you approaching the legislator will be pleased. You will be recognized as carrying a sensible approach to their perspective, with the information they need to reach agreement and get what they want, too.

F. Give a Legislator What He/She Wants

A biography of a prominent state lobbyist[8] gave his working motto as "Give a man what he wants." You may think you cannot "give a man what he wants." First, however, realize that many people do not know what they want, or they want some things that are easily given. Some may want to be flattered, others given opportunities to speak to or meet a larger constituency, some may want an award, others to be shown great natural features, some like to attend professional sports events, hunt, fish, or eat (Limit your activity to campaign contribution caps and gift sizes under the ethics rules, and reporting). Try going the social route only if you have the personal chemistry of a perfect companion; otherwise link up with someone who does.

Some who have been aggressive enough to reach state office have insatiable ambition, and you can be in the marketplace of helping satisfy their need to rise toward the top. An environmental person can be one with a lot of influence to a population of neutral or swing voters with less political party identities and more issue affiliations. As not every politician cares to get a positive environmental-activism reputation, there are limits, but few wish to end up with a negative one. Try to learn to read the legislator and identify what you can deliver out of what he or she wants. They all like good press.

Surely, delivery of a payback of the kind suited to your cause is essential. If it is good will or a campaign worker, just ensure that it happens. Combined with being liked and trusted, delivery of what

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6. *See id.* at Chapter 23.
7. THE SPEAKERS' HANDBOOK (Harcourt Brace 5th ed. 2000) (specifically chapter 20c).
8. John Dorschner, *The Great Persuader*, THE MIAMI HERALD SUNDAY MAGAZINE, May 3, 1998 (a biography and portrait of the work style of lobbyist Ron Book).

the legislator wants is not only gratifying, but also a powerful force in the lobbyists' setting.

G. Follow the Rules to Handle Conflicts of Interest in Lobbying

Legislative lobbying is quirky about conflicts of interest, comparative to litigation. The Rules Regulating the Florida Bar (hereinafter the "Rules") address conflicts of interest. Rule 4-1.7 of Rules, entitled "Other Conflict Situations," describes some as difficult to assess. Fundamentally antagonistic interests may not be represented in negotiation, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them. There are two key rules. First, the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to, and relationship with, the other client. Second, each client consents after consultation.

One need not be an attorney to lobby; but when an attorney does have clients, the Rules apply. If the client can accept the conflict, the lobbyist sometimes feels an advantage. This is the chance to craft a compromise each client can accept. Representing two affected interests may help sell the compromise legislatively using the coalition format.

III. INFLUENCING EXECUTIVE AGENCIES AND THE CABINET

A. Preliminaries: Register as an Executive Branch Lobbyist

In appearing before the executive branch, including the Governor and Cabinet, you may need to register and file reports as a lobbyist. Section 112.3215, *Florida Statues*, states: "Any person who, for compensation and on behalf of another, lobbies an agency of the executive branch of state government with respect to a decision in the area of policy or procurement may be required to register as an executive branch lobbyist." [9] Exceptions are for attorneys in formal administrative hearings, for example. Consult the guide. [10] The forms are online, but original signed documents must be filed to comply.

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9. FLA. STAT. § 112.3215 (2000).

10. *Available at* http://www.ethics.state.fl.us or Executive Branch Lobbyist Registration, 111 W. Madison St., Room G-68, Tallahassee, FL 32399-1425, phone (850) 922-4992.

B. Steps to Follow in Approaching Regulatory Agencies

An activity by a regulatory agency may place a young staff member in the lead, but there are larger numbers of persons involved in a controversial matter. A good example of this is the number of persons included in enforcement decisions at EPA described by Professor Joel Mintz.[11] Enforcement may start with a range of people potentially reporting a problem, then various investigators may evaluate it, and then a prosecutor will handle the decisions. However, behind the prosecutor are regional administrators or division directors, in communication with state politicians and environmental officials, and assistant administrators at EPA's headquarters who also deal with political figures, and the overall Department of Justice and state attorney general. The enforcement process is rigorous with many choices involved.

Therefore, whether you are involved with making regulations, or their enforcement, consider the many persons that will ultimately be involved. Many of them may be approached and lobbied by interested parties. Reaching each level may be needed, and some of the advice above on lobbying techniques before legislative bodies may be useful. There is a great difference in what you can do to help a politician with contributions and social connections, however, and what you can do to influence a regulatory agency staff or prosecutor. Generally, the better the information you give them to be effective, the better they can do their job. Registering your opinion of the performance with upper echelons of the agency and those influencing the agency should accompany your approach. The squeaky wheel gets the oil. The staff or prosecutor will need the funds and blessings of others to be able to keep your expectations in a priority position.

C. Steps to Follow in Approaching the Florida Cabinet[12]

To be successful before the Cabinet, you participate in both the meeting of the aides on the Wednesday of the week before the Cabinet meets, and the Cabinet meeting itself, usually on Tuesday of every other week. The aides' list (an essential item to use) is available from the Governor's Cabinet Affairs office, (850) 488-5152, or you may visit the web site for each Cabinet member. Notices of

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11. JOEL A. MINTZ, ENFORCEMENT AT THE EPA (1995) (*see particularly* Chapter Two, describing EPA's enforcement process and the Superfund program).

12. Kent J. Perez & Edwin A. Bayo, *Florida's Cabinet System Y2K and Beyond*, FLA. B.J., Nov. 1974, at 68; *see also* http://www.ethics.state.fl.us/.

both meetings should usually be in Florida Administrative Law Weekly.

The Governor and Cabinet sit together for various functions. An interesting topic is the Administration Commission, which determines many comprehensive planning and land development matters, the Land and Water Adjudicatory Commission, which is quasi-judicial (this may preclude meetings with you to discuss an item) hearing appeals on some of the same growth management matters, and the Board of Trustees of the Internal Improvement Trust Fund, which handles land acquisition and public lands. Some matters can be delegated to staff for decisions.

The Cabinet is the Governor and six Cabinet officers until the year 2003, when there will be three fewer Cabinet officers by constitutional amendment.

IV. COURT AND ADMINISTRATIAVE HEARING CASES – IDENTIFY AND PREPARE YOUR ENVIRONMENTAL AND LAND USE CASE PLAINTIFFS WITH PRECAUTION

Clients are often selected out of a larger number of potential plaintiffs, in consultation with the attorney who will bring the case. The first concern for selection is of course for the best standing. Another factor is what will be the core interest of each plaintiff. For instance, an environmental group is likely to work for the best outcome for resources, while a homeowners group may need to be very focused on its own stake in property values. An individual neighbor may prefer personal compensation, while an environmentalist further away lacks a compensable solution and will want to obtain good precedent. Many cases have multiple clients, but why have ten environmentalists who will all undergo the time and cost of being deposed, when one or two will do?

In most cases, a client should know to expect:

1. A deposition will be taken of them;
2. They will probably be required to attend and pay their share of mediation;
3. The defending parties will look for possibilities of seeking their costs if they prevail;
4. The defending parties will evaluate whether they can seek sanctions including at least attorneys' fees, or bring a SLAPP suit, which may be costly and aggravating to defend (*See infra*).

A. Before Suing, Take Steps to Ward Off the Potential Slapp Suit and Sanction Attempts

Before you begin your suit, read this. It is meant to save you months of agony and work.

It is currently necessary to evaluate the possibility that a developer or polluter or government unit whom your lawsuit targets, will sue or seek sanctions from your client and perhaps you and your firm. This practice is termed "Strategic Lawsuits Against Public Participation" (SLAPP) by public interest practitioners. Set up to preclude or control the potential damage of SLAPP tactics.

Formal sanctions in comprehensive plan consistency cases may stem from Section 163.3215 (6), Florida Statutes:

> (6) The signature of an attorney or party constitutes a certificate that he or she has read the pleading, motion, or other paper and that, to the best of his or her knowledge, information, and belief formed after reasonable inquiry, it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or for economic advantage, competitive reasons or frivolous purposes or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the court, upon motion or its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. (*emphasis added*)

This means both you and your client need to have: (a) Read the verified complaint before signing; and (b) Made a "reasonable inquiry" beforehand into its purpose.

Consider the likely scenario: The client will be deposed perhaps a year after the suit begins. They will then be asked about the purpose of the suit, their recollection of what inquiry they made about its facts and justification, if they recollect actually reading particular phrases of the pleading before signing, and what they meant by each allegation.

This scenario can put the plaintiff's attorney on the spot. The client would like to make firm statements about what they did, but they have had too much time to forget. Saying they acted on advice

of counsel may not be reasonable as to factual allegations. So, for the "reasonable inquiry," why not have both the attorney and client "overdo" the preparation, to negate an improper purpose, such as:

- Read the plan's provisions, the ordinance, the minutes of staff or commission, the development order, the application for the development order, any reports of any sources, the statutes and rules and city code provision you are suing under;
- Attend any city meetings on it;
- Attend environmental group meetings on it;
- Meet with city planning staff and discuss it before suit;
- Read the news clippings about the controversy; then, make lists of each of these things both the signing attorney and the signing client did for a reasonable inquiry, and save the list in your file to refresh recollection at the clients' deposition. Include having the client form a statement as to what is the purpose of the suit, or why they decided to sue, and even write that up for their recollection;
- Finally, have your client not only read the entire verified complaint before they sign, but have them initial each paragraph they have read in an extra copy for their recollection later. For each paragraph, a list of how they know what is alleged can be made. For instance, beside a traffic allegation, note the planner's report on traffic exceeding the level of service, combined with the level of service in the plan. From this you can also answer interrogatories. You know the client will be deposed, so tell them up front, and help them over-prepare.[13]

For federal cases, sanctions under Rule 11, Fed. R. Civ. P. may apply. These and the frivolous suit provisions of state law have been called substantially similar.[14] The federal cases have developed the analysis of these motions in great detail. The SLAPP-preventative suggestions above can be used to rebut Rule 11 sanction attempts.

B. If "Slapped," Gear Up Your Affirmative Defenses

When counterclaims, usually as tort actions for defamation or interference, are brought, take a deep breath, read the pleading and outline it carefully, and then work to kill it off with a Motion to Dismiss, or a Motion for Summary Judgment. Usually these are

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13. *See* Friends of Nassau County, Inc. v. Nassau County, 752 So. 2d 42 (Fla. 5th DCA 2000).

14. *See In re* Section 20 Land Group, Ltd., 252 B.R. 812 (Bankr. M.D. Fla. 2000).

jury trial claims, tried separately from the environmental case. Tort law principles give many defenses based on free speech. Motions are evaluated using case law analogies. Possible responses for reference are discussed here. Immediately attack pleadings that are too vague to state a cause of action. Enough attempts to state a cause of action will result in dismissal with prejudice.[15]

Require the time, place and nature of the alleged defamation or interfering remarks to be especially specific. While oral statements need not be set out verbatim, as one would expect written ones to be, they must at least set out the substance with sufficient particularity to enable the court to determine whether their "publication" might be tortious.[16]

Seek dismissal based on affirmative defenses that appear on the face of the pleading. "[I]t matters not that the defect or fact which appears on the face of the complaint would otherwise have to be raised by the answer of the defendant as an affirmative defense."[17] Facially insufficient allegations are dismissed as a matter of law.[18]

Some affirmative defenses that may appear on the face of the counterclaim include:

> *Pure opinion and fair comment. Colodny v. Iverson, Yoakum, Papiano & Hatch* discusses how giving ("publishing") to a newspaper a letter which states "pure opinion" is non-actionable.[19] Only communication of facts, or facts mixed with opinion, is actionable at all. The affirmative defense of *fair comment* is "akin" to pure opinion and also applies, as *Colodny* describes. To decide pure opinion, the court examines the statement in its totality, and the context in which it is made, including all the words and cautions used by the person making it and all the surrounding circumstances and the medium and audience. The "determination of whether a statement is one of opinion is a question of law."[20]

In matters of public controversy, the general facts about the controversy are ones of which a newspaper's audience is expected

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15. *See* American Seafood, Inc. v. Clawson, 598 So. 2d 273 (Fla. 3d DCA 1992).
16. *See* Nezelek v. Sunbeam Television Corp., 413 So. 2d 51 (Fla. 3d DCA 1982).
17. *See* Hawkins v. Williams, 200 So. 2d 800 (Fla. 1967); *see also* FLA. R. CIV. P. 1.110(d) (permitting affirmative defenses appearing on the face of a prior pleading to be asserted as grounds for dismissal for failure to state a cause of action).
18. *See* Kurtell & Co. v. Miami Tribune, Inc., 193 So. 2d 471 (Fla. 3d DCA 1967).
19. *See* Colodny v. Iverson, Yoakum, Papiano & Hatch, 936 F. Supp. 917 (M.D. Fla. 1996).
20. *See* Demby v. English, 667 So. 2d 350 (Fla. 1st DCA 1996).

to be aware. [21] Context, cautionary terms, medium, and audience under the pleadings may show a matter of pure opinion is involved.[22]

Qualified privilege and lack of requisite degree of malice. Limited public figure status and public controversy are discussed in *Della-Donna v. Gore Newspapers Company*.[23] A "public controversy" means "any topic upon which sizeable segments of society have different, strongly held views" or "whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution. If the issue was being debated publicly and if it had foreseeable and substantial ramifications for non-participants, it was a public controversy...."[24]

A limited-purpose public figure in such a controversy is one playing a sufficiently central role in the public controversy to which the alleged defamation was germane. Persons can become public figures through no purposeful action of their own, or involuntarily. But where one initiates a series of purposeful, considered actions, igniting a public controversy in which they continue to play a prominent role, they are limited public figures. In *Della-Donna*, this was true of an attorney and trustee of a large private trust in litigation over its beneficiary.

The consequence of the limited public figure status is that statements against it (that are not pure opinion) must involve "express malice" in a *defamation* action (described as ones not "made for a proper purpose in light of the interests sought to be protected by legal recognition of the privilege").[25] Three elements all must be present as the primary motivation: ill-will; hostility; and evil intention to injure and defame. The three elements are not present on the basis of only generalized feelings of hostility and malice toward the other person. This also requires "actual malice," meaning a statement made with knowledge that it was false or with reckless disregard of whether it was false or not.[26]

Even more is required for *interference* claims. A "sole basis" of express malice must be present.[27] It would not be a sole basis if, for example, another basis is apparent, like a statement containing a bona fide claim with a threat to protect it appropriately.

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21. *Id*.
22. *See Colodny*, 936 F. Supp. 917.
23. Della-Donna v. Gore Newspapers Company, 489 So. 2d 72 (Fla. 4th DCA 1986).
24. *Id*.
25. Nodar v. Galbreath, 462 So. 2d 803 (Fla. 1984).
26. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
27. Boehm v. Am. Bankers Ins. Group, Inc., 557 So. 2d 91 (Fla. 3d DCA 1990).

Statement of bona fide claim. Stating a bona fide claim and threatening to protect the claim by appropriate means is not actionable for interference.[28]

A person who interferes with the business relations of another with the motive and purpose, at least in part, to advance (or protect) his own business (or financial) interests, does not interfere with an improper motive. But one who interferes only out of spite, or to do injury to others, or for other bad motive, has no justification.[29]

While there may be no case addressing it, it seems that interfering to advance one's own environmental interests is not interfering with an improper motive either, and you could offer a jury instruction fashioned accordingly, citing public participation provisions like the "fullest extent" one of Section 163.3181(1), *Florida Statutes*.

There are many others of this nature.

C. Make Appropriate Use and Recognition of Personality Traits of Lawyers

Finally, try a short inquiry into the nature of yourself in comparison to those you deal with in litigation. *Circle only seven (7) of the below views of the attorney who you think is more likely to win a hearing on a motion.*

1. One should take action only when sure it is morally right.
2. Most people are self-centered.
3. It's always best to reveal your real reasons if you want to get cooperation from people.
4. There is no excuse for lying to someone else.
5. Sometimes people have to get hurt if important things are going to get done.
6. People can be trusted.
7. Life in the "fast lane" sounds great.
8. I am not very resistant to the influence of others around me.
9. Sometimes we all have to cheat a little to get what we want.
10. Often I enjoy just sitting around thinking.

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28. RESTATEMENT (SECOND) OF TORTS §773
29. *See* Florida Standard Jury Instruction MI 7.2.

11. It is always better to go for a win than to settle for a tie.

12. Often I feel worried.

13. People who can't make up their minds are a pain.

14. I don't let social competition bother me.

Analysis: The above is derived from what some psychologists argue can be used to evaluate for a "Machiavellian personality type."[30] Some psychologists attribute the type to being frequent in people who win at games or move up the ladder in organizations and politics.[31] Whether the type is valid is a matter of scientific debate. Those that credit it might be inferred to project that lawyers with the personality type would be more successful in hearings, negotiations, or trials, but this is unknown. It occurs here because it may be one example to give you insight into yourself, your opposing counsel, or clients. The answer is that items #2, 5, 7, 9, 11, 13 and 14 on the list are Machiavellian traits. By Machiavellian, the meaning is not necessarily negative, but it is suggested that such personalities do tend to succeed. Item #9, about cheating a little, may run afoul of professional ethics when applied to lawyers. Thus one adopting a Machiavellian approach must reconcile such external limits on their actions if not their outlook.

The concept of the psychologist is discussed in terms of a "duplicity" component. Manipulators are identified as action oriented, focused on self-interest, willing to cut corners, and casual about rectitude. Contrasted to them are moralists.

This foray into psychology (by one with no psychology training) is meant as food for thought. Manipulators and moralists (if people may really be differentiated this way) may be faced with one another in the courts. As people entrusted with the business of others as representatives in the courts, we need to place a part of our focus on what role personality plays in our efforts.

V. CONCLUSION

An environmental advocate can foretell somewhat the likelihood of their success and improve their approach, using the aforementioned principles. Our environmental lobbying will benefit from realizing our own "fit" in the lobbying hierarchy and acting in

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30. MASTERS & MCGUIRE, THE NEUROTRANSMITTER REVOLUTION (1994) (particularly the chapter titled "Seratonin and Social Rank among Human Males").

31. ALAN C. ELMS, PERSONALITY IN POLITICS (1976) (Describing the distinct personality syndrome in the chapter on The Machiavellian Personality.).

specific ways to improve it. Hopefully, a lobbyist will outline his or her own "to do" list that will enhance his or her effectiveness through the answers to the self-survey.

For those influencing executive agencies, an outline of the various persons forming a piece of the decision-making is helpful, along with a specific action list regarding each one. Some of the lobbying techniques spill over here.

For those before the courts and in administrative hearings, a specific list of client preparatory advice should be personalized to the case similar to the suggestions. Anticipate sanction attempts by a prepared approach such as the foregoing sampling of affirmative defenses.

Ultimately a lot depends on the personal traits of the lawyers involved. Recognition of the traits you have and will face-off against will help you prepare. Where manipulators are identified (some say they are abundant among successful people in law and politics) corresponding "hardball" toughness within ethical constraints is an option to consider. But your approach must match your traits. When you prepare the approach, you can remain ethical and be effective.

EXALTING THE CORPORATE FORM OVER ENVIRONMENTAL PROTECTION THE CORPORATE SHELL GAME AND THE ENFORCEMENT OF WATER MANAGEMENT LAW IN FLORIDA*

MARY JANE ANGELO,[1] CHARLES LOBDELL[2] AND TARA BOONSTRA[3]

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"Hermit crabs house themselves in the empty shell of snails, whelks, conchs, or other gastropod mollusks.

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* The views expressed in this article are those of the authors and do not necessarily reflect the views of the St. Johns River Water Management District Governing Board or staff.

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> They cannot live without a shell and must locate another empty shell when they outgrow the old one."[4]

I. INTRODUCTION

Just as the hermit crab cannot live without the protection of a shell, the land developer in Florida exists only within the protective shell of the corporate form. When a land developer has outgrown one shell – i.e., when the developer has completed a project or a phase of a project and is ready to move on to the next project or phase – the developer finds a new protective shell to occupy. The scurrying of developers from one protective corporate shell to another creates a version of a shell game with environmental agencies as the unsuspecting marks. "Pick the shell hiding the developer and win an environmental enforcement case." Similar to the gun lobby's favorite shibboleth "Guns don't kill people, people kill people," frustrated environmental permit enforcers in Florida may be tempted to adopt the slogan "Corporations don't pollute, the people behind the corporations pollute."

Current laws in Florida afford substantial protection to the "people behind the corporations" (corporate principals)[5] and generally do not allow environmental permitting agencies such as the water management districts to consider such people in their permitting or enforcement efforts. This article poses the question "Do existing corporate law principles of limited liability defeat the important public policy of water resource protection in Florida?" First, in Parts II and III, this article introduces the problem and provides an overview of Florida water management district permitting and enforcement authorities and processes. Next, in Part IV, this article explores the existing legal authorities for water management districts to take into consideration past acts of corporations and corporate principals in permitting and enforcement actions. Part V provides a review of corporate legal protection, describes the various types of business entities that may be permit applicants, and provides an overview of legal mechanisms that can defeat limited liability. Part VI reviews a variety of existing laws, both state and federal, that authorize a permitting agency to peak behind the corporate form. Finally, Part VII of this article presents a number of considerations for change to address the problem.

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4. COMPLETE FIELD GUIDE TO NORTH AMERICAN WILDLIFE (1981).

5. As shorthand, this article will use the term "corporate principals" to refer to the directors, shareholders, and officers of a corporation or other business entity.

II. THE PROBLEM

Under current law, the water management districts must accept a permit applicant at face value -- that is the name of the applicant on the application form is considered the applicant for the permit and information supplied in the name of that applicant is used in the permitting process. Whether the applicant applying for the permit is an established corporation with roots in the local community, or whether it is a limited liability company created by a developer last Tuesday, the two are treated equally under the permitting rules. It is this equal treatment that threatens to eviscerate a substantial part of the environmental protections afforded by a water management district's permitting program.

The permitting programs of the water management districts in Florida are premised on the statutory requirement that a permit applicant will receive a permit once that applicant has provided reasonable assurances that the applicant will comply with the agency's rules. These reasonable assurances form the basis for the permitting criteria for the agencies. Once the applicant has met the stated criteria, the permit for the requested activity is issued. As a deterrent to applicants that have violated conditions of earlier permits the water management districts must take into consideration an applicant's history of noncompliance when determining if the applicant has provided sufficient assurances to meet the agency's permitting criteria. Also, when calculating civil penalties against an entity that has violated the agency's rules or permit, the agency can use past violations as a factor to increase the recommended penalty against that entity. Business entities, though, are designed to limit the liability of people participating in business ventures and to encourage people to pool their money and resources for those ventures. The business entity is the outer form while the people provide the inner substance. Because the law treats this outer form with deference and ignores the actual people inside the entity, the water management districts are made unwilling participants in the perpetuation of a fiction. After all, the corporate form is a legal fiction. It exists only on paper; a "thing" created and controlled by statute. The corporate form has no existence outside the law. One cannot physically grasp a corporation. One can touch property owned by a corporation, one can point to a person who controls the corporation, one can receive a check from a corporate bank account, but one can never declare "*ecce corpus*!"[6] The people who run the businesses though are all too

6. Latin doggerel meaning roughly "behold the body."

real. Also real are the wetlands that are filled, the habitat that is lost, the floodwater on roads and in homes, and the water quality degradation that can occur when water management regulations are violated.

As an example of this problem, consider the following fact pattern:

> A developer who is an officer, director, and majority shareholder of a closely held Florida corporation obtains a permit in the name of his company from a water management district to construct a residential subdivision. During the construction of the project the developer violates the conditions of the permit or fails to follow the agency's rules. In response to the violation the water management district initiates an enforcement action against the developer's company that results in a final order or judgment. Contained within that final judgment or final order will be a finding of fact that the developer's company violated the permit or other agency rule. That company now has a history of noncompliance with the agency. There exists a written record of that company's failure to abide by the rules. The developer now wants to construct a new project, this time a commercial development. Knowing that the first company has a history of violations, and knowing that the past violations must be considered by the water management district during the permitting process in determining whether reasonable assurances have been provided that the project meets permitting criteria, the developer simply creates a new entity to be the permit applicant.[7] The developer can form an entirely new corporation, the developer can form a limited liability company with his original corporation as the manager, or he can form a limited

7. In the world of land development in Florida, it is not uncommon for a multi-phase residential or commercial development to have a new "developer" for each phase of the project. For instance, Phase One of a residential project may be called "Secret Oaks Manor" and may be developed by the "Secret Oaks Manor Development Corporation." Phase II, called "Secret Oaks Estates" is developed by "Secret Oaks Estates Developers, Inc." while Phase III, "Secret Oaks Forest" is developed by the Secret Oaks Forest Development Company. And so it goes for as many phases of the Secret Oaks as are developed. What may or may not be so "secret," however, is that each separate business entirety developer shares the same principals – i.e., regardless of the name, corporate registration and business structure, the "developers" behind each Secret Oaks phase are one in the same.

> liability partnership with a figurehead general partner and his company as the limited partner. This new business entity will not have a past that can be used against it and, even though it's the same person controlling the applicant entity, the water management district must look solely at the new entity and ignore the individual developer. From the standpoint of the application, the developer has disappeared, submerged within his new business entity. It is the ease with which new business entities can be created and the apparent blind eye that water management district permitting rules turn to that threatens to frustrate the substantial environmental laws of the permitting programs.[8]

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8. Although not a water management district case, the problem of the tension between corporate protection and environmental protection is illustrated by the much publicized case involving the Suwannee American Cement Company's application for an air construction permit to build a cement plant near Branford, Florida. In June 1999, the Florida Department of Environmental Protection (DEP) denied the air construction permit sought by Suwannee American Cement Company, Inc. DEP web site, *available at* http://www.dep.state.fl.us/offiesec/news/cement.htm (last visited Feb. 15, 2001). To deny the permit, DEP relied on a little-used rule that allows the agency to consider an applicant's previous violations when determining whether the applicant will comply with the new permit. Telephone interview with Jack Chisholm, DEP attorney (March 14, 2001). This rule provides that the Department shall take into consideration a permit applicant's violation of any Department rules at any installation when determining whether the applicant has provided reasonable assurances that Department standards will be met. FLA. ADMIN. CODE R. 62.4.070(5) (2000). Because Suwannee American was a newly formed corporation, the company had never held an DEP permit and therefore had no violations. *Id.* However, the company was linked to other permittees with a history of permit violations. Thus, in denying the permit, DEP cited the "compliance history of the applicant's related businesses" *at* http://www.dep.state.fl.us/offiesec/news/cement.htm. Although the exact relationship is unclear, Suwannee American is affiliated with Anderson Columbia, Inc., a corporation that owned the mine where the cement plant would be located and that is one of the largest road-paving firms in the state. Joe Anderson, II founded Anderson Columbia, and his two sons are the primary shareholders of five other companies. Taken together, the companies have obtained more than 80 state permits and have been cited for 15 violations in a 14-year period. *Enforcement Turnaround*, FLA. TIMES-UNION, Aug. 30, 1999. Suwannee American challenged the permit denial, alleging that DEP's decision was arbitrary because the agency had issued permits to companies with worse environmental records. Eventually Suwannee American and DEP settled the case, and DEP issued the permit one year after the initial denial *available at* http://www.dep.state.fl.us/offiesec/news/cement.htm (last visited Feb. 15, 2001). The Suwannee American case is instructive in highlighting the lack of a link between violations and future permits, and the difficulty in evaluating a new company's ability to comply with a permit. Because the case settled, however, DEP's reliance on FLA. ADMIN. CODE R. 62.4.070(5) (2000), and its expansive definition of "applicant" remains untested.

III. OVERVIEW OF WMD PERMITTING AND ENFORCEMENT

A. Background

In 1972, the Florida legislature enacted chapter 373 of the *Florida Statutes*, entitled the Florida Water Resources Protection Act. This Act, based in large part on the Model Water Code,[9] was intended to implement the policy of Article II, section 7, of the Florida Constitution, by preserving natural resources, fish and wildlife, minimizing degradation of water resources caused by stormwater discharges, and providing for the management of water and related land resources.[10] Under chapter 373, water management districts are responsible for addressing issues such as water supply, flood protection, water quality, and protection of natural systems. These responsibilities are carried out through the implementation of a number of regulatory and nonregulatory programs. One of the most far-sighted acts of the crafters of the Water Resources Act of 1972 was to recognize that water resources do not stop at city or county boundaries and to establish the State's five water management districts based on watershed boundaries rather than political boundaries. This regional/watershed-based aspect of water management is critical to the protection of water resources. Chapter 373 contains two primary regulatory tools for protecting water resources the Environmental Resource Permitting (ERP) program of Part IV and the Consumptive Use of Water Permitting (CUP) tool of Part II. The issues addressed in this article arise primarily in the context of ERP permitting and enforcement.

B. Environmental Resource Permitting

Virtually all land development above a certain size in Florida is regulated under the Environmental Resource Permitting ("ERP") program of Part IV, chapter 373, *Florida Statutes*. This program is extremely broad in its scope, which is not surprising given its roots in the Model Water Code, which intended to capture "virtually every type of artificial or natural structure or construction that can be used to connect to, draw water from, drain water into, or be placed across surface water ... [including] ... all structures and constructions that can have an effect on surface waters."[11]

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9. MALONEY, AUSNESS & MORRIS, A MODEL WATER CODE (1972).

10. FLA. STAT. § 373.016 (2000); Prugh v. St. Johns River Water Mgmt. Dist., 578 So. 2d 1130, 1131 n.2 (Fla. 5th DCA 1991).

11. MALONEY, AUSNESS & MORRIS, A MODEL WATER CODE 223 (1972).

Specifically, the jurisdiction of the ERP program includes the construction, alteration, operation, maintenance, abandonment, and removal of any "stormwater management system," "dam," "impoundment," "reservoir," "appurtenant works," "works," and all "dredging and filling" in surface waters or wetlands. Individually and collectively, these terms are referred to as "surface water management systems" or "systems".[12] Thus, the ERP program covers most land development systems, including buildings, parking lots, roads, ditches, pits and mines, whether in uplands, wetlands or other surface waters.[13]

The statutory authority for the Districts' ERP permitting program is derived from sections 373.413 and 373.416, *Florida Statutes*.[14] These sections authorize the water management districts to, among other things, "require such permits and impose such reasonable conditions as are necessary to assure" that the construction, alteration, operation or maintenance of a system will comply with the provisions of Part IV of chapter 373 and will not be harmful to the water resources of the district. Thus, the focus of the ERP program is a public health, welfare and safety purpose, to-wit protection of the water resources. The ERP program is often described as regulating water quality and water quantity and protecting natural water or wetland systems. The specific permitting criteria that address each of these areas of protection are found in each district's regulations. For the St. Johns River Water Management District,[15] the permitting criteria are found in sections 40C-4.301 and 4C-4.302 of the *Florida Administrative Code*. Section 40C-4.301 of the Code applies to all construction, alteration, operation, maintenance, removal or abandonment of surface waters management systems whether in uplands, wetlands or other surface

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12. FLA. ADMIN. CODE R. 40C-4.021(26) (2000).

13. A number of exemptions from ERP requirements for specific activities are found in both the statutes and regulations. FLA. STAT. §§ 373.406, 403.813 (2000); FLA. ADMIN. CODE R. 40C-4.051 (2000). One of the most significant exemptions is the exemption for the alteration of the topography of the land by agricultural, silvicultural, and horticultural activities.

14. Chapter 373, *Florida Statutes* authorizes the water management districts to require permits to protect the water resources of the District. Section 373.413 addresses the construction and alteration of systems. Section 373.416 addresses the maintenance and operation of systems. Section 373.426 addressees the abandonment and removal of systems. FLA. STAT. §§ 373.413, .416, .426 (2000).

15. Each water management district, except for the Northwest Florida Water Management District, has its own ERP regulations. All of these regulations, however, share many similarities. For the purposes of this article, the St. Johns River Water Management District's regulations, found at FLA. ADMIN. CODE R. 40C-4, will be used for illustrative purposes. The South Florida Water Management District's regulations are found at FLA. ADMIN. CODE R. 40E-4, the Southwest Florida Water Management District's rules are found at FLA. ADMIN. CODE R. 40D-4, and the Suwannee River Water Management District's rules are found at FLA. ADMIN. CODE R. 40B-4.

waters. The application of section 4.302 of the Code is limited to activities that occur in, on, or over wetlands or other surface waters.[16]

Among other things, the criteria in 40C-4.301 of the *Florida Administrative Code* expressly prohibits any activity that would cause adverse water quantity impacts, cause or contribute to a violation of a state water quality standard, or cause adverse impacts to the functions provided to fish and wildlife by wetlands and other surface water. Parroting the language of subsection 373.414(a), *Florida Statutes*, section 40C-4.302 of the *Florida Administrative Code* contains the public interest balancing test from the old Wetland Resource Management program, which requires consideration of seven different factors relating to water resource protection. The water quantity and water quality criteria in these rules often can be met through engineering design solutions,[17] whereas the criteria related to protecting wetland functions often are met through either avoiding wetland impacts or providing mitigation to offset impacts to wetlands.[18]

C. Enforcement Authorities

1. Legal Authorities

Chapter 373, *Florida Statutes*, provides a number of authorities for water management districts to bring administrative, civil and criminal enforcement actions against violators of water management district statutes, rules, permits, and orders. Parts I and VI of chapter 373 contain general enforcement authorities that apply to all water management district regulatory programs, whereas authorities specific to environmental resource permitting are found in Part IV. The authority for administrative enforcement is found in section 373.119, *Florida Statutes*, which provides that

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16. The two different sets of permitting criteria reflect the origins of the ERP program. Prior to the effective date of the ERP program, October 1995, two separate but overlapping regulatory programs governed land development in Florida the Management and Storage of Surface Waters ("MSSW") program in Chapter 373, *Florida Statutes*, and the Wetland Resource Management Program ("WRM", often referred to as "dredge and fill") from Chapter 403. The old MSSW program addressed land activities whether in uplands or wetlands, whereas the scope of the WRM program was limited to activities in wetlands. When the two programs were merged, as part of a legislatively-mandated streamlining effort, to form the ERP program, the bulk of both sets of criteria were retained.

17. District rules contain a number of "presumptive design" criteria, which if met provide a presumption that the applicable criteria will be met. FLA. ADMIN. CODE R. 40C-42.026 (2000).

18. Subsection 373.414(b), *Florida Statutes*, expressly provides that if an applicant is unable to otherwise meet the criteria of section 373.414, it may propose mitigation to offset the impacts from the regulated activity. FLA. STAT. § 373.414(b) (2000).

whenever a District's Executive Director has reason to believe that a violation of any provision of chapter 373, District rules, District orders, or permits, has occurred, is occurring, or is about to occur, the Executive Director may cause a written complaint to be served upon the alleged violator or violators. The administrative complaint will contain a proposed order that will become final unless the person named in the complaint requests an administrative hearing within 14 days after the complaint is served. Notably, this section does not authorize the water management districts to impose administrative penalties. To obtain penalties, the Districts must seek them in court under the Districts' civil enforcement authority in section 373.129, *Florida Statutes*. This section provides that the water management district Governing Board is authorized to commence and maintain proper and necessary actions in any court of competent jurisdiction for the following purposes to enforce rules, regulations, and orders; to enjoin or abate violations of provisions of law or District rules, regulations and order; to protect and preserve the water resources of the State; to recover a civil penalty not to exceed $10,000 per violation; and to recover investigative costs, court costs, and reasonable attorney's fees.

The Districts' criminal enforcement authority is found in section 373.613, *Florida Statutes*, which provides that any person who violates any provision of this law or any rule, regulation or order adopted or issued pursuant thereto is guilty of a misdemeanor of the second degree. Additional enforcement authorities specific to ERP violations are found in section 373.430, which provides that certain violations of the ERP rules constitute criminal misdemeanors or felonies.[19] Significantly, none of these enforcement authorities expressly limit against whom the districts may bring an action. Section 373.119 refers to "the alleged violator," section 373.129 merely refers to bringing an action to "enforce" rules or to enjoin or abate violations without reference to whom the actions can be brought against and sections 373.430 and 373.614 refer to "any person who violates" applicable laws. The term "person" is defined broadly to include individuals, firms, associations, organizations, partnerships, business trusts, corporations, companies, and governmental entities.[20]

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19. Part IV of Chapter 373 also authorizes the water management districts to revoke or modify a permit under certain specified circumstances. Under section 373.429 a water management district governing board or the DEP may revoke an ERP if the permitted stormwater management system or other permitted works becomes a danger to public health or safety, or if its operation is inconsistent with the objectives of the agency. FLA. STAT. § 373.429 (2000).

20. FLA. STAT. § 373.019(12) (2000).

2. Enforcement Processes and Options

The water management districts issue hundreds of permits each month. Unfortunately, there will always exist those persons who either cannot or will not comply with Florida law or the agency's rules and permits. These violations tend to fall into one of two categoriesfailure to comply with a condition of a permit issued by the water management district, or undertaking an activity not authorized by either a permit or the rules.

Resolution of a violation begins with the discovery of the violation, usually by either a staff member of a water management district or through a citizen's complaint. Once an agency staff member has inspected the property and determined that a violation does exist, the agency will mail a notice of violation to the responsible party. If the violation stems from noncompliance with an issued permit, the responsible party is the permittee. If no permit has been issued (or is under review by the agency), the notice of violation is sent to the owner of the property. The notice of violation will describe the violation observed, explain why that observed activity violates Florida law or the agency rules, and may set forth a corrective plan of action to resolve the matter. If, because of the nature of the violation, no corrective action plan can be formulated, the agency will request that the responsible party meet with the staff to develop the necessary corrective actions. Generally, the necessary corrective actions will require the responsible party to either obtain a permit from the water management district to authorize the earlier activity or restore the property to its pre-violation condition.

The water management districts have a number of options to resolve violations of their rules. The agency may seek to resolve the violation through an informal process, a consent order, an administrative complaint, or an action in court. The actual means chosen to enforce the rules is left to the discretion of the agency. Deciding which process to use is based on the severity of the violation and the willingness or cooperation of the responsible party to participate in the process.

The most common means to resolve a violation is through an informal resolution process. An informal process is used only for minor violations that are easily corrected and do not involve actual harm to the water resource. Such minor violations may include "paperwork" violations such as the failure to timely submit required monitoring reports or other documentation. After the notice of violation has been sent, and the responsible party agrees to implement the necessary corrective actions, agency staff will work with the responsible party to correct the violation. Given the

cooperation of the responsible party and minimal impact or threat caused by the violation, no formal enforcement action will be initiated and no civil penalty will be requested. Once the responsible party completes the necessary corrective actions in accordance with the agency's directions the violation is considered resolved and the entire matter concluded.

If, due to the severity of the violation, the agency determines that the informal resolution process is not appropriate for the violation, but the responsible party still wishes to resolve the violation amicably, the agency and the responsible party, also known as the respondent, may enter into a consent order. A consent order is a negotiated written agreement between the agency and the respondent setting forth the facts of the unauthorized activity or violation, conclusions of law stating why such activity is a violation of Florida law or agency rules, and containing the corrective actions necessary to bring the matter into compliance. Under the terms of the consent order, the responsible party admits to the violations and acknowledges its failure to comply with the agency rules. Unlike the informal resolution process that required the responsible party only to correct the violation, the agency generally will require the respondent to pay a civil penalty as one of the terms of the consent order in addition to performing the corrective actions. The means of determining the amount of the civil penalty will be explained below, but its purpose is to reflect the severity of the violation and to serve as a deterrent effect to encourage both the respondent and the public to comply with the agency's rules. An additional monetary amount will be added to the civil penalty by the agency to cover the agency's staff investigative costs and attorney's fees for investigating and settling the violation.

Once the consent order has been executed, and the respondent has paid the civil penalty and completed the corrective plan of action, no further enforcement action is taken against that respondent for that violation. From the agency's perspective the matter is considered finished. For a responsible party, however, a consent order often becomes the first record of its history of noncompliance with the agency. The agency now has a written record of that respondent's violations. The consent order is also available to the public under the Public Records law[21] and so the facts of the violation are easily obtained.

When the responsible party will not admit to the violation, or the agency and the responsible party are unable to reach an agreement to resolve the violation, the agency has the authority to

21. *Id*. ch. 119.

initiate an enforcement action against the responsible party through an administrative complaint.[22]

The administrative complaint will contain a statement of facts detailing the violation or unauthorized activity, a statement of law or rules applicable to the administrative complaint, and a proposed order listing the necessary corrective actions.[23] After being served with the administrative complaint, the respondent has fourteen days to request an administrative hearing if he wishes to challenge the agency's allegations in the administrative complaint.[24] If the respondent fails to file a request for administrative hearing within the required timeframe, the corrective actions as stated in the proposed order become final.[25] That means the proposed order becomes a final order of the agency.

If the respondent does file a request for an administrative hearing, the hearing is conducted in accordance with the Administrative Procedures Act of chapter 120, *Florida Statutes*.[26] Following the conclusion of the hearing, the administrative law judge will submit a recommended order to the agency that then issues the final order.[27] The agency's final order will contain a statement of facts, conclusions of law, and an order setting forth the actions that must be followed to correct the violation.[28]

One of the defining features of an administrative complaint is that the agency cannot obtain civil penalties through the administrative process, and, unless it recovers its investigative costs and attorney's fees[29] following an administrative hearing, the agency will recover no penalty or fine for the violation. Pursuant to section 120.69, *Florida Statutes*, however, the agency may file a petition to enforce the administrative complaint final order in circuit court. The agency may request that the circuit court assess penalties and require the payment of investigative costs and attorney's fees.

The administrative complaint, like the consent order, serves the purpose of documenting a respondent's history of noncompliance. The administrative complaint is another record of a party or entity's failure to comply with the agency rules

Water management districts also have the option of bypassing the administrative process and seeking relief in a court of competent

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22. *Id*. § 373.119(1).
23. *Id*.
24. *Id*.
25. *Id*.
26. *Id*. § 120.569; FLA. ADMIN. CODE ANN. ch. 28-106 (2000).
27. FLA. STAT. §§ 120.569(l), 57(k)-(l) (2000); FLA. ADMIN. CODE R. 28-106.216(1) (2000).
28. *Id*.
29. As allowed under FLA. STAT. § 120.595 (2000).

jurisdiction, either county or circuit.[30] The actual relief sought by the water management districts would depend on the type of violation and the remedy appropriate to resolve the matters at issue. The agencies may request injunctive relief, either an injunction preventing the defendant from carrying out certain activities (e.g., an injunction to stop the unauthorized filling of wetlands), or a mandatory injunction instructing the defendant to take certain actions to remedy the problem (e.g., an injunction requiring unauthorized fill to be removed from wetlands).[31] The agencies may also request a civil penalty be assessed against the defendant for the violations.[32] Water management districts are also authorized to recover investigative costs, court costs, and reasonable attorney's fees for the enforcement action.[33]

The filing of an enforcement action in court follows the normal pattern of a regular lawsuit and is bound by all the procedural requirements of the Florida Rules of Civil Procedure. The agency will first file a complaint in the appropriate county, usually where the violation occurred, the defendant will answer, discovery will ensue, and, when both parties are ready, the matter is set for trial. The agency must then prove its casethat the defendant violated Florida law or the agency's rules. Then a water management district must request the judgment against the defendant include a civil penalty.

Water management districts are also authorized to seek enforcement of their final agency actions, such as Consent Orders and Final Orders resulting from the filing of an administrative complaint, in circuit court.[34] This procedure is necessary because the agencies do not have authority on their own to enforce the final orders. If a respondent fails to comply with the final order of administrative complaint or consent order, the water management districts must resort to circuit court to enforce the terms of the final agency action. If forced to file an action under this statute, the agency may request, in addition to an order to comply with the final agency action, civil penalties for the failure to comply with that agency's order.[35]

The amount of the penalty is almost solely within the discretionary authority of the presiding judge. The only restriction on the amount is the statutory limit of $10,000 per day for each

30. *Id.* §§ 373.129, 136.
31. *Id.* §§ 373.129(2), 136(1).
32. *Id.* § 373.129(5).
33. *Id.* § 373.129(6).
34. *Id.* § 120.69(1)(a).
35. *Id.* § 120.69(2).

violation.[36] The agency bears the burden of presenting sufficient evidence of the severity of the violation and the actual harm or threat of harm to the natural resource to establish a recommended civil penalty. The recommended penalty is calculated by the agency in accordance with the procedures set forth in the penalty matrix.

The water management districts use a penalty matrix to determine the appropriate amount of the penalty for the violation.[37] The penalty matrix is part of the guidelines developed by the Department of Environmental Protection and the water management districts to resolve violations of their respective rules and permits. The penalty matrix considers two factorsthe potential for environmental harm and extent of deviation from a statutory or regulatory requirement. These two factors form the axes of the actual matrix. Each axis is then divided into three categories or levelsmajor, moderate, and minor. Each violation is assigned a level from each axis that corresponds to that violation's potential for environmental harm and deviation from the rules. As an example, a violation that is determined to represent a significant threat to human health but only deviates somewhat from the requirements of the law, would be classified as Moderate on the potential for environmental harm axis and as Minor on the deviation from regulatory requirement axis.

The matrix may be pictured as a square containing nine possible categories into which a violation will be placed depending on its factual elements. Each of these nine categories contains a recommended penalty range that is further refined by applying other factors surrounding the violation. Once the agency establishes a penalty based on the penalty matrix, the agency may adjust the penalty up or down based on a number of considerations. The agencies may take into account factors favorable to the violator such as a good faith effort to comply, a willingness to cooperate and inability to pay. On the other side of the equation, the agencies may consider such factors as the violator's refusal to stop an ongoing violation, a failure to cooperate, and the economic benefit the violator gained by its violation of the environmental laws. Using those factors, the recommended penalty is adjusted either up or

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36. *Id*. § 373.129(5).

37. The penalty matrix used by the water management districts is found within the "Guidelines for Characterizing Water Management Violations," dated Oct. 10, 1990. The Florida Department of Environmental Protection follows the revised penalty matrix contained within its SETTLEMENT GUIDLINES FOR CIVIL PENALTIES, DEP Directive 923, EffectiveAugust 12, 1997. Because the Florida Department of Environmental Protection cannot itself impose penalties on violators, the Settlement Guidelines are not adopted by rule. The penalty matrix remains as guideline and nothing more. *See*, Envirochem Envtl. Serv. v. Dep't of Envtl. Prot., 16 F.A.L.R. 1467 (Fla. Div. Admin. Hrgs. 1994).

down to arrive at a final number. It is this number that is presented to a responsible party for settlement purposes during the negotiation of a consent order, or, is presented to a judge during the penalty determination phase of enforcement litigation.

IV. LEGAL AUTHORITY FOR CONSIDERATION OF COMPLIANCE HISTORY (PAST VIOLATIONS) IN PERMITTING AND ENFORCEMENT

A person's or entity's history of non-compliance with water management district rules plays a role in both the permitting and enforcement process. Past violations and a failure to comply with the agency's rules are required to be taken into account when the agency reviews a new environmental resource permit (ERP) application from that party. The agency must also take past violations into account when determining a recommended penalty for any new violations for which that party is responsible. The three major water management districts, St. Johns River Water Management District, Southwest Florida Water Management District, and the South Florida Water Management District are required by law to consider a permit applicant's past history of violations when determining whether that permit applicant has provided reasonable assurances that the agency's permitting standards will be met. All three of these water management districts have a rule stating:

> When determining whether the applicant has provided reasonable assurances that the District permitting standards will be met, the District *shall* take into consideration a permit applicant's violation of any Department [of Environmental Protection] rules adopted pursuant to Sections 403.91-.929, F.S. (1984 Supp.), as amended, which the District had the responsibility to enforce pursuant to a delegation, or any District rules adopted pursuant to part IV, chapter 373, F.S., relating to any other project or activity and efforts taken by the applicant to resolve those violations (emphasis added).[38]

The Department of Environmental Protection (DEP) has a similar rule concerning an applicant's history and failure to comply with the Department's rules under its standards for issuing or denying permits. DEP "shall take into consideration a permit applicant's violation of any Department rules at any installations

38. FLA. ADMIN. CODE R. 40C-4.301(2), 40D-4.301(2), 40E-4.302(2), (2000) (respectively).

when determining whether the applicant has provided reasonable assurances that Department standards will be met."[39]

The term "applicant" is not defined in the water management district rules. The policy of the water management districts is to determine the identity of the applicant based on the name of the person or entity signing the application form for an environmental resource permit. If the signature on the application form is that of an individual person, then that person is considered the applicant. If the signature on the form is that of a person signing on behalf of a company or business, then that business entity is considered the applicant. The water management districts do not delve any further into the identity of the applicant. The representations of the identity of the applicant are taken at face value.

If the applicant for an ERP has violated the agency's rules in the past, the water management districts may impose additional conditions or requirements in the permit as a means of ensuring the applicant will meet the agency's permitting standards. One means of providing additional assurances that the permitting standards will be met is by the furnishing of financial assurances in the form of a bond by the applicant. The Suwannee Water Management District, Southwest Florida Water Management District, and South Florida Water Management District each have rules authorizing the districts to require a permit applicant to post a bond, made payable to that water management district, conditioned upon full compliance with the terms of the permit, including proper construction, operation, and maintenance of the facility.[40] Each Governing Board of those water management districts has the authority to determine the amount of the bond.[41] These rules do not specify under what circumstances a bond should be required and do not explicitly authorize the consideration of the applicant's compliance history in making such a determination. While the St. Johns River Water Management District does not have a specific binding rule, it has in some cases required the posting of a bond as a means of providing reasonable assurances from applicants with a history of violations. The DEP has a similar rule that allows them to require an applicant to submit proof of financial responsibility and may require the applicant to post an appropriate bond to guarantee compliance with the law and Department rules.[42]

In addition, the St. Johns River Water Management District, as well as the other water management districts and the Florida

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39. FLA. ADMIN. CODE R. 62-4.070(5) (2000).
40. FLA. ADMIN. CODE R. 40B-1.704, 40D-1.604, 40E-1.604, (2000) (respectively).
41. *Id*.
42. FLA. ADMIN. CODE R. 62-4.110 (2000).

Department of Environmental Protection, does have a financial assurance requirement for wetland mitigation projects that are estimated to cost more than $25,000.00.[43] This requirement is to ensure that sufficient funding is available to carry out construction, management, monitoring and any corrective action necessary to ensure the mitigation is successful. Financial assurance may be provided through a number of specified mechanisms including, among other things, a performance bond, irrevocable letter of credit, trust fund agreement, or deposit of cash into an escrow account,[44] and must be in an amount equal to 110 percent of the cost of the mitigation.[45]

If a bond has been furnished to provide additional reasonable assurance, and the permit applicant fails to comply with the permit conditions, then the water management district or DEP can draw on the bond. The money from the bond will be used by the agency to either complete or correct the facility so as to bring that system into compliance with the permit.

The posting of a bond is a common requirement for contractors and other entities that enter into contracts with the state or a local municipality. The bond provides an assurance that the contractor has sufficient financial capabilities to construct the project, and, if the contractor fails to comply with the terms of the contract, the state or municipality can draw on the bond to complete the project. Florida law requires the posting of a bond prior to the construction of public water and sewage systems,[46] a public building,[47] a public school,[48]and construction of a county road.[49] Florida law also authorizes the state, counties, and municipalities to require contractors to post a bond conditioned upon the contractors' compliance with state and local building codes.[50] So not only must the contractor complete the job in accordance with the contract, but the contractor must also follow all applicable building codes during the construction of the project.

A history of noncompliance can also be used as a basis for denying a permit application. While there are no reported cases where a water management district used a permit applicant's history of violations as grounds for denial, DEP has asserted Rule

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43. Rule 12.3.7, APPLICANT'S HANDBOOK MANAGEMENT AND STORAGE OF SURFACE WATERS (hereinafter A.H.), incorporated by reference in FLA. ADMIN. CODE R. 40C-4.091 (2000).
44. Rule 12.3.7.6, A.H.
45. Rule 12.3.7.2, A.H.
46. FLA. STAT. § 153.10.
47. *Id.* § 255.05(1)(a).
48. *Id.* § 237.201.
49. *Id.* § 336.44(4).
50. *Id.* § 489.131(3)(e).

62-4.070(5), *Florida Administrative Code*, as a consideration in the permitting process. In two of these administrative cases, the permit applicant's past violations of statutes and rules were considered by the DEP in determining whether the applicant had provided reasonable assurances that the standards in the permit application would be met. In both cases, the ALJ made a finding of fact that the past violations did not justify denial of the permit and recommended that the DEP issue the permit.[51]

One case that resulted in a different conclusion was *Department of Environmental Protection v. Mid-County Recycling Company*,[52] in which the ALJ recommended denial of the permit application to operate a Materials Recovery Facility, in part due to the applicant's previous permit violations on the same site. The applicant had received an earlier permit to operate the facility and while inspecting the permitted facility DEP discovered numerous permit violations. The applicant had violated the terms of the earlier permit by storing substantial quantities of waste outside the premises of the facility, by failing to consistently separate and reject unacceptable materials, and by failing to provide a suitable system for collection and treatment of leachate and liquid wastes.[53] The DEP eventually filed an administrative complaint against the permit applicant who then failed to comply with the corrective actions to bring the permit into compliance. The applicant was also uncooperative and did not follow through on its promises to repair the problems. The ALJ made a conclusion of law that "Mid-County's willful and repeated violations of its Permit conditions must be considered in determining whether Mid-County's Material Resource Facility (MRF) application gives reasonable assurances that it will meet all DEP standards."[54] The ALJ then found that "giving proper consideration to Mid-County's history of non-compliance with its Permit, as well as the lack of any assurance that Mid-County has the necessary expertise, Mid-County has not provided reasonable assurances that the MRF application will meet all of these DEP standards."[55] Based on those findings, the ALJ recommended denial

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51. In Patricia D'Hondt v. Constr. Burning, Inc., and Dep't of Envtl. Prot., 1996 WL 1060015 (Fla. Div. Admin. Hrgs. 1996), the applicant's air curtain incinerator failed inspections resulted in two consent orders with the Department, one of which included a $2,000.00 fine. In Julie Hellmuth v. Carolina Solite Corp. and Dep't of Envtl. Prot., 1995 WL 1052772 (Fla. Div. Admin. Hrgs. 1995), the past violations are not specified but the Administrative Law Judge found that the "violations were not severe and [the applicant] corrected the problems."

52. Dep't of Envtl. Prot. v. Mid-County Recycling Co., 1997 WL 1052392 (Fla. Div. Admin. Hrgs. 1997)

53. *Id.* at paragraphs 13-20.

54. *Id.* at paragraph 66.

55. *Id.* at paragraph 72.

of the MRF application. The DEP accepted that recommendation and denied the permit.

A party's failure to comply with an agency's rules is also taken into consideration during the enforcement process. A history of that party's noncompliance is a factor in the penalty matrix that is included in the calculation to determine an appropriate settlement penalty. In the "Guidelines for Characterizing Water Management Violations" used by the water management districts, a history of noncompliance will be used to boost the original penalty by an additional 10 percent or more. There are no concrete guidelines though as to what is considered a past violation, or if there is a "statute of limitations" that may limit the use of past violations given the length of time between the past and current violation.

The DEP also considers past violations when calculating the recommended settlement penalty. DEP Directive 923 states:

> This adjustment factor [history of noncompliance] can only be used to increase the amount of penalties derived from the penalty matrix. This adjustment factor should be used if a violation occurred within a four year period previous to the occurrence of the current violation and at minimum a non-compliance letter or Warning Letter was issued for the violation; the previous violations involved any of the programs regulated by the Department; and the previous violations occurred at the same facility as the current violation, or at another facility under the same management.[56]

Both the "Guidelines for Characterizing Water Management Violations," used by the water management districts, and "Settlement Guidelines for Civil Penalties," used by the DEP, refer to the violator as the "responsible party," a term that is not defined by any of the agencies. As a practical matter, when a violation of a permit has occurred, the issuing agency will seek to hold the permittee as the responsible party. If the violation does not involve an issued permit, the agency will seek to hold the person or entity that performed the unauthorized activity responsible. As with the consideration of who or what is the permit applicant, an agency will not look beyond the surface of an applicant's name when assessing blame.

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56. DEP Directive 923, *supra* note 37, at 9.

Because the agencies are not authorized to look behind the façade of the business entity, developers can easily avoid the additional conditions and restrictions imposed on a permit for past violations by simply creating a new business entity for each new project. By starting fresh with a new company, a developer never need fear that a water management district will deny a permit application for his past activities while running a different company.

V. REVIEW OF CORPORATE LEGAL PROTECTIONS

A. Theory of Corporate Structure

Environmental laws and business organization laws were enacted to accomplish very different purposes - - to protect the public interest and the environment and to provide a mechanism for pooling primarily financial resources while providing limited liability to corporate principals.[57] The fundamental tenet of corporate law is that a corporation is a separate legal entity distinct from its officers, directors, and shareholders. As such, the corporation itself is liable for its obligations and torts, and its officers, directors and shareholders generally are protected from personal liability. Traditionally, corporate shareholders are only investors in the corporation in which they own stock and are not liable for acts and obligations of the corporation beyond the extent of their investment. This is the premise for the doctrine of limited liability. Limited liability insulates not only individual shareholders, but also parent corporation shareholders. Under certain circumstances, however, corporate principals may be liable for the acts or obligations of the corporation. At least three legal mechanisms exist to reach corporate principals who attempt to hide

57. The issue of the friction between corporate protection and environmental protections recently has begun to emerge as an important topic in the environmental law discourse. For example, in 1996, the University of Oregon's Public Interest Environmental Law Conference held a symposium entitled *Environment and Business Toward Sustainability or Ecological Collapse.* Perhaps one of the most provocative participants in the symposium was Richard Grossman, whose paper *Revoking the Corporation*, 11 J. ENVTL. L. & LITIG. 141 (1996), advocates a return to the use of *quo warranto*, the proceeding where the "people" examined corporate acts when some harm had occurred and demanded to know by what authority has this subordinate entity (the corporation) taken such an action. If the corporation was found to have acted *ultra vires*, it was the people's right as sovereign to dissolve the corporation – "not simply to chide it, or scold it, or fine it … but to remove it." *Id.* While this remedy may be appropriate for certain types of environmental wrongs committed by corporate entities in circumstances such as where a large established manufacturer commits an environmental harm of such import that it is adjudged to no longer have the right to continue to transact business, the remedy would not redress the problem explored in this article – i.e., where new corporate entities are repeatedly created and then dissolved so as to avoid a "history" that can be used against them.

behind the shield of limited liability1) the judicially created doctrine of piercing of the corporate veil; 2) personal liability where a corporate principal has personally participated in the corporate wrongdoing in his or her individual capacity; and 3) where the legislature has provided explicit authority to reach the corporate principals. Each of these is addressed below.

B. Corporate Formation and Dissolution

Under Florida law, forming and dissolving a corporation is a relatively simple matter. To create a corporation, a person simply must submit articles of incorporation, basic information such as agent's name, and fees to the Department of State.[58] The corporation exists when the articles are filed, unless the articles specify a date within five days before the filing date, or a date after the filing date.[59] The Department of State now provides online access, so a person may create a corporation in minutes by responding to a few questions online and by providing a credit card number for fees that can be as low as $70.[60]

If forming a corporation is easy, dissolving one is even a simpler task. Corporations may dissolve in three ways.[61] First, a corporation may voluntarily dissolve upon action by its board of directors and shareholders and upon filing articles of dissolution with the Department of State.[62] Nothing in the voluntary dissolution procedure requires the corporation to account for its outstanding obligations.[63] After dissolution, the corporation does not operate, but it continues to exist for the purpose of winding up its affairs and liquidating its assets and liabilities.[64] The act of

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58. FLA. STAT. §§ 607.0120-.0122 (2000). The Department of State charges a fee of $35 for most document filings. FLA. STAT. § 607.0122 (2000).

59. FLA. STAT. § 607.0203 (2000). The provision that allows corporate existence to begin before actual filing protects promoters from personal liability for transactions before the filing date. Section 607.0123(3) also protects promoters by allowing documents to be filed to correct deficiencies in the original incorporation documents, and the original filing date is maintained as if the original documents had been valid, unless a party adversely relies on the original documents. STUART R. COHN & STUART D. AMES, FLORIDA BUSINESS LAWS ANNOTATED (West Group 1999).

60. Department of State Division of Corporations web site: https://ccfss1.dos.state.fl.us/corpweb/efiling/onlmenu.html, or http://www.dos.state.fl.us /doc /feecorp.html (last visited Apr. 23, 2001).

61. FLA. STAT. §§ 607.1401-.14401 (2000).

62. *Id.* §§ 607.1402-.1403 (for corporations that have commenced business). Shareholders may dissolve a corporation without action of the board of directors. *Id.* § 607.1402(5).

63. Curiously, a streamlined procedure for dissolving corporations that have not commenced business requires the corporation to state that no debt remains unpaid. *Id.* § 607.1401(4). This requirement does not exist for corporations that have commenced business.

64. *Id.* § 607.1405. Before the current statute became effective in 1990, a corporation could not voluntarily dissolve until liabilities had been discharged and assets had been distributed.

dissolution does not transfer the corporation's property, relieve directors or officers of their duties, or prevent proceedings against the corporation.[65] However, if the dissolved corporation notifies its known claimants, the corporation in effect creates a three-year statute of limitations within which claimants must file claims against shareholders for amounts distributed to shareholders in the liquidation.[66] The statute is silent as to unknown claimants.[67]

Second, the Department of State may dissolve a corporation for failing to comply with requirements.[68] As with voluntary dissolution, a dissolved corporation continues to exist for the purpose of winding up its affairs, liquidating assets and liabilities, and notifying claimants.[69] Third, a circuit court may dissolve a corporation upon request by the state, shareholder, or creditor and upon the showing of grounds required by statute.[70] Under all three dissolution methods, there is no requirement that a corporation transfer a permit, notify the permitting agency of the corporation's dissolution, or handle the obligations under the permit.

C. Business Entities

Corporations have been the focus of this article because the corporate form is the most common business entity encountered by the water management districts. It is the one type of business entity that most people are familiar with and, with the assistance of standardized forms available for no charge on the internet or for sale at stationery stores, is therefore the simplest entity to form. Developers, though, can find the corporate form too restrictive at times as Florida law imposes a number of requirements on the operation of a corporation.

For example, the initial directors are required to meet after incorporation to appoint officers and adopt bylaws;[71] the corporation must maintain a registered agent at all times;[72] shares in the corporation must be distributed and accounted for;[73] and the

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Now, however, a corporation can dissolve and then wind up its affairs. The filing of the articles of dissolution can affect the running of the statute of limitations. COHN & AMES, *supra* note 59, at 157.

65. FLA. STAT. § 607.1405(2) (2000).
66. *Id.* § 607.1406.
67. COHN & AMES, *supra* note 59, at 160.
68. FLA. STAT. §§ 607.1420-1421 (2000).
69. *Id.* §§ 607.1421(3).
70. *Id.* §§ 607.1430-1433.
71. *Id.* § 607.0205.
72. *Id.* §§ 607.0403–0505.
73. *Id.* §§ 607.0601–0627.

shareholders must hold an annual meeting.[74] While these requirements may not seem particularly onerous, other business entity types offer greater flexibility to a developer seeking a short-lived business entity that can easily be controlled and still offer a protective shell to shield the developer from personal liability.

Florida law allows for the creation of two business entities, the limited liability company and the limited partnership, that serve the developer in these situations by allowing the developer to hide its existence yet still grants the developer the power to control the new entity. Obviously not all limited liability companies and limited partnerships are formed with the purpose of hiding past mistakes, but their means of management and the protection from liability they offer make them suitable vehicles for developers seeking a "fresh start" with the regulatory agencies.

1. Limited Liability Companies

Limited liability companies are creatures of statute and controlled by the Florida Limited Liability Company Act under chapter 608, *Florida Statutes*. Unlike Florida corporations that are controlled by a board of directors who then select the officers to handle the day-to-day operations of the company, limited liability companies are controlled by either the member of the company or a manager. In a member-managed company, the members of the limited liability company, that is the persons or entities that contributed the initial cash, property, or services to create the company, manage the company in proportion to their percentage in the profits of the company.[75] Or, the articles of incorporation for the limited liability company may provide for a manager to run the company.[76]

Neither the members nor the manager of a limited liability company may be held liable for a debt, obligation, or liability of the limited liability company.[77] This protection from liability also extends to monetary damages to the limited liability company, except in limited circumstances such as a violation of criminal law.[78]

A developer merely has to find or create another person or entity to incorporate as a limited liability company. If the developer contributes the majority of the initial cash or property to the company, then he has the right to run a member-managed limited

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74. *Id.* § 607.0701.
75. *Id.* § 608.422(2)(a).
76. *Id.* § 608.422(3).
77. *Id.* § 608.4227(1).
78. *Id.* § 608.4228(1). *See The New Limited Liability Company in Florida*, 73 FLA. B.J. 42 (1999), for a further discussion of Florida limited liability companies.

liability company. Or, if the articles of incorporation call for a manager-managed company, the developer can name himself as the manager. In either case, the limited liability company is simply an extension of the original developer.

Limited partnerships are also controlled by statute under the Florida Revised Uniform Limited Partnership Act found in chapter 620, *Florida Statutes*. Limited partnerships are usually thought of as consisting of the general partner who runs the partnership while the limited partners are restricted to providing funds for the business and then sharing in the profits and losses. For assuming the role of a "silent partner," the limited partner is not liable for the obligations of the limited partnership unless he or she participates in control of the business.[79] "Control of the business," though, is rather broad and a number of statutory exemptions are provided which allow a limited partner to participate in the business. By statute, the following activities are not considered as participating in control of the business being a contractor for or an agent or employee of the limited partnership; consulting with or advising a general partner with respect to the business; acting as a surety, guarantor, or endorser for the limited partnership.[80] Similar to the limited liability company, a developer need only find another person to act as general partner to create a limited partnership.[81] The developer assumes the role of a limited partner, contributes the funds for the development project, and then "consults" or "advises" the general partner as necessary to run the partnership.

In both situations, the developer has created a new business entity that it can control and that will shield the developer from any liability imposed on the business entity. More importantly, the new business entity prevents the regulatory agencies from using the developer's history of noncompliance in either the permit application process or enforcement of its laws and rules.

D. Corporate Veil Piercing

As a general matter, limited liability will be preserved except where the corporate principals have abused the corporate form to the detriment of those dealing with the corporation.[82] Nevertheless, because limited liability has led to abuses of the corporate form,[83]

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79. FLA. STAT. § 620.129(1) (2000).

80. *Id.* § 620.129(2).

81. *See* Thomas O. Wells, *A Comparison Between Florida Limited Liability Companies and Florida Limited Partnerships*, 68 FLA. B.J. 58 (1994), for a further discussion of Florida limited partnerships and a comparison with limited liability companies.

82. House of Koscot Dev. Corp. v. Am. Line Cosmetics, Inc., 468 F.2d 64 (5th Cir. 1972).

83. *See* Marilyn Blumberg Cane & Robert Burnett, *Piercing the Corporate Veil in Florida*

courts have responded by developing the doctrine of "piercing the corporate veil" when a corporation is used in a manner not contemplated by law.[84] In such cases, if a corporation is found liable and is unable to satisfy the judgment, a claimant may attempt to pierce the corporate veil to recover from the corporation's shareholders or the parent or sister companies, which would otherwise not be liable.[85] Corporations may be formed for the purpose of limiting liability, and therefore the claimant has the burden of overcoming the presumption that shareholders are immune.[86] In essence, piercing the corporate veil is a way to enforce a judgment against a corporation.[87]

Each state has developed case law for circumstances in which the corporate veil may be pierced. In Florida, the standard is "improper conduct," which puts Florida somewhere between the states that require proof of fraud and states that allow piercing without proof of wrongdoing.[88] However, the Florida Supreme Court has not defined improper conduct, so litigants must examine various cases to understand the type of conduct that warrants veil piercing.[89]

In Florida, every case allowing veil piercing involved a sham corporation or using the corporate form to mislead or defraud creditors.[90] The case law indicates that where a shareholder (or a parent or sister company) uses the corporation to mislead creditors or to evade liability in a transaction that is personal (or for the benefit of the parent or sister company), then the corporate form has been abused and "improper conduct" might be established.[91] The proof might include evidence that the corporation had no interest in the matter (i.e., the transaction was unrelated to the corporation's business) or that the corporate property was converted or depleted for the benefit of the shareholder (or parent or sister company).[92] The cases suggest that an agency may be able to pierce the corporate veil in situations with facts similar to those presented below the corporation's transaction was really for an individual's personal benefit, evidenced by the conversion of corporate revenues

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Defining Improper Conduct, 21 NOVA L. REV. 663, 665 (1997), for a thorough discussion of corporate veil piercing in Florida. *See also* Renee A. Roche, *Beyond the Corporate Veil The Potential Liability of Officers and Agents*, 66 FLA. B.J. 22 (1992).

84. *Id*.

85. *Id*. at 665-66.

86. COHN & AMES, *supra* note 59, at 8.

87. Cane & Burnett, *supra* note 83, at 666.

88. *Id*. at 664, 668.

89. *Id*. at 664.

90. COHN & AMES, *supra* note 59, at 9.

91. *See* Cane & Burnett, *supra* note 83, at 674.

92. *See id*.

to personal assets and by the merging of corporate and personal assets and liabilities; [93] the corporation's property was converted or depleted for the personal benefit of shareholders, evidenced by tracing the corporation's property to the shareholders;[94] the corporation is a sham created for the sole purpose of holding a lease, evidenced by the fact that its officers and its sister company's officers were the same, and the corporation never had a bank account, never filed tax returns, had no assets, and conducted no other business;[95] the corporation was used to shield personal property from creditors, evidenced by a history of transfers of property;[96] the corporation had no interest in the transaction, and the corporate name was used as a convenience and to mislead or defraud creditors.[97]

Interestingly, the corporate veil was not pierced where the purpose of incorporation was to prevent a party to a transaction from knowing the identity of the other party.[98] That ruling could be relevant to situations where an individual would form a corporation to apply for a permit for the purpose of hiding the individual's identity from the agency. In addition, the corporate veil will probably not be pierced just because a poorly managed company is insolvent.[99]

Procedurally, to reach the assets of an individual or a parent or sister corporation, the agency must first obtain a judgment against the corporation and then seek to satisfy the judgment by piercing the corporate veil. Before the veil will be pierced, the agency must show "improper conduct" as described above, as well as establish that the conduct caused injury.[100] Practically speaking, this means two rounds of litigation first to establish liability, then to satisfy the judgment. Given an agency's limited resources and the uncertain outcome of such litigation, an agency may decline to pursue this avenue except in the most egregious cases.

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93. *See* Futch v. Head, 511 So. 2d 314 (Fla. 1st DCA 1987).

94. *See* Advertects, Inc. v. Sawyer Indus., 84 So. 2d 21 (Fla. 1955).

95. *See* USP Real Estate Inv. Trust v. Discount Auto Parts, Inc., 570 So. 2d 386 (Fla. 1st DCA 1990).

96. *See* Estudios Proyectos e Inversiones de Centro America, S.A. v. Swiss Bank Corp., S.A., 507 So. 2d 1119 (Fla. 3d DCA 1987).

97. *See* Biscayne Realty & Ins. Co. v. Ostend Realty Co., 148 So. 560 (Fla. 1933).

98. *See* 111 Properties, Inc. v. Lassiter, 605 So. 2d 123 (Fla. 4th DCA 1992).

99. *See* Cane & Burnett, *supra* note 83, at 673 (undercapitalization is relevant only if the corporation was undercapitalized for the purpose of misleading or defrauding creditors); *see also* COHN & AMES, *supra* note 59, at 8.

100. *See* Cane & Burnett, *supra* note 83, at 673; *see also* Dania Jai-Alai Palace, Inc. v. Sykes, 40 So. 2d 1114 (Fla. 1984) (the leading Florida case on corporate veil piercing); Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290 (11th Cir. 1998) (a case involving a parent and subsidiary applying Florida law).

E. Personal Liability

While piercing the corporate veil involves disregarding the corporate form where there has been improper conduct on the part of the corporate principal, personal liability may be directly imposed on corporate principals without the need to pierce the corporate veil, where such principals are found to have personally participated in the corporate wrongdoing. [101] In the environmental arena, there is an increasing tendency for courts to assess liability against corporate principals who are directly involved in a violation of an environmental statute that involves tort-like standards such as nuisance.[102] The majority of cases where courts have imposed personal liability for environmental wrongs have been federal cases involving hazardous waste statutes. Although many of these federal hazardous waste statutes are some of the most far-reaching statutes in terms of liability, it has taken almost two decades for the federal courts to resolve the issue of personal liability under these statutes.

The tension between corporation protection and environmental protection is evident even in the most environmentally protective statutes. Perhaps the most far-reaching environmental protection statute, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),[103] stretches concepts of liability to their outer extreme. Through CERCLA, Congress made clear its intent to impose strict liability, retroactive liability, and joint and several liability. Yet even with the wide net of

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101. The theory of personal liability of corporate officers evolved over the course of many years starting in 1943. *See* United States v. Dotterweich, 320 U.S. 277 (1943). In *Dotterweich*, the Court affirmed the conviction of a corporate officer under the Federal Food Drug and Cosmetic Act (FFDCA) for introducing misbranded drugs into interstate commerce. Although the Court did not expressly articulate a theory of personal liability for corporate officers, the Court found that the only way a corporation could act was through the actions of its employees and that because the purpose of the FFDCA was to protect public health, as a matter of public policy, the corporate officer should be held responsible. Almost thirty years later, the U.S. Supreme Court in another FFDCA case found a corporate owner/director liable for the corporation's violation of the Act, finding that a corporate agent, through whose act, default, or omission the corporation committed the crime, was himself guilty of the individual crime. *See* United States v. Park, 321 U.S. 658 (1975). This time, the Court clearly articulated the principle that the necessary element for liability of the corporate agent is for the agent to have had a "responsible relation to the situation." *Id.* at 669. Since *Parks*, numerous federal and state courts have assessed personal liability agents and corporate principals in a number of tort cases and under various public health, safety and welfare statutes. At least two Florida courts have assessed personal liability against corporate principals. *See, e.g.*, Orlovsky v. Solid Surf. Inc., 405 So. 2d 1363 (Fla. 4th DCA 1981); Adams v. Brickell Townhouse, Inc., 388 So. 2d 1279 (Fla. 3d DCA 1980).

102. *See, e,g.*, United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983) (corporate officer is liable if he personally participates in the wrongful, injury-producing act).

103. 42 U.S.C. § 9601-9675 (2000).

liability that CERCLA casts, Congress did not make clear whether corporate principals or parent corporations of responsible corporations should be brought within the purview of CERCLA. For years the federal circuit courts struggled with the issue of whether, and under what legal theory, parent corporations could be liable for their subsidiaries' violations of CERCLA. It was not until 1998 that the U.S. Supreme Court squarely addressed this issue in the case of *United States v. Bestfoods.*[104] In *Bestfoods*, the Supreme Court addressed the application of CERCLA's "owner/operator" provision to parent corporations. The issue was whether a parent corporation that actively participated in and exercised control over the operations of a subsidiary may be held liable as an "operator" under CERCLA. The Court ruled that there are two theories under which a parent corporation could be found liable for the CERLCA violations of its subsidiaries. Not surprisingly, the first theory articulated by the Court is that of corporate veil-piercing. More significant however, is the second theory of liability set forth in this case which does not involve veil piercing. Under this theory, the Court focused on the fact that under CERLCA section 107(a)(2), "operators" of hazardous waste facilities may be liable as well as the "owners" of such facilities. Thus, the Court reasoned that a parent corporation itself could be directly liable as an "operator" of a facility owned by its subsidiary if the parent itself, or in connection with its subsidiary, acted as the operator of the facility by actively participating in and exercising control over the operations of the facility.[105] Thus, it is now clear, that at least for environmental statutes that assess liability against "operators" as well as "owners," parent corporations may be directly liable.[106] Additionally, a number of lower courts have imposed personal liability against corporate officers under CERCLA under the provisions of the act

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104. 524 U.S. 51 (1998), *vacating and remaining sub nom.* United States v. Cordova Chem. Co., 113 F.3d 572 (6th Cir. 1997).

105. *See id.* at 64. The *Bestfoods* Court further clarified that to be personally liable, an operator must manage, direct, or conduct operations specifically related to the environmental pollution or make decisions about compliance with environmental regulations. *Id.* at 66-67.

106. For a thorough discussion of the *Bestfoods* decision and the evolution of the law leading up to it see Lucia Ann Silecchia, *Pinning the Blame & Piercing the Veil in the Mists of Metaphor The Supreme Court's New Standards for the CERCLA Liability of Parent Companies and a Proposal for Legislative Change*, 67 FORDHAM L. REV. 115 (1998), and Robert J. Sutphin, Jr., *Environmental Law-Owners or Operators Two District Paths to Parent Corporation Liability under CERCLA* – United States v. Bestfoods, 30 N.M.L. REV. 109 (2000). *See also* Joel R. Burcat & Craig P. Wilson, *Post-Dissolution Liability of Corporations and Their Shareholders under CERCLA*, 50 BUS. LAW. 1273 (1995); Charles E. Dadswell, Jr., *The Corporate Entity Is There Life After CERCLA?*, 7 COOLEY L. REV. 463 (1990); George W. Dent, Jr., *Limited Liability in Environmental Law*, 26 WAKE FOREST L. REV. 151 (1991); Larry S. Kane, *How Can We Stop Corporate Environmental Pollution? Corporate Officer Liability*, 26 NEW ENG. L. REV. 293 (1991).

that assess liability on "persons" who violate the act. Because CERCLA defines "persons" to include individuals as well as corporations, courts have found officers who personally participated in violations to be personally liable as "persons" under the act. [107]

Although the vast majority of the cases addressing direct liability of parent corporation as "operators" or personal liability of corporate officers as "persons" in the environmental arena are federal cases, parallels exist with Florida law and there is no reason why Florida courts could not take a similar approach in assessing liability for violations of Florida environmental laws. Notably, with regard to water management district enforcement, chapter 373 attaches liability to "persons."[108] "Persons" is defined broadly to include "any and all persons, natural or artificial ... ."[109] Thus, Florida courts could impose personal liability against corporate principals who personally participate in violations of chapter 373. Moreover, as with the federal environmental laws that contain tort-like nuisance standards, chapter 373 also embodies public nuisance tort concepts. Specifically in section 373.433, the legislature expressly declared that any work that violates Water Management District rules is a public nuisance. Thus, there are no grounds for distinguishing water management violations from federal hazardous waste violations for the purposes of imposing personal liability. In fact, in at least one case, a Florida court has imposed liability against a corporate officer for an environmental violation under a theory of personal liability. In *State, Department of Environmental Protection v. Harbor Utilities Company, Inc.*,[110] the court found that corporate officers, directors and managers may be subject to personal liability under Florida's Air and Water Pollution Control Act.[111] Although the case did not involve a violation of chapter 373, it did involve a violation of environmental statutory provisions that assess liability against "persons" who commit violations, much in

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107. *See, e.g.*, New York v. Shore Realty Corp., 763 F.2d 1886 (2d Cir. 1985) (corporate officer was liable because he knew that the hazardous waste was on the site and he directed and controlled all corporate decisions); United States v. Carolawn Co., 698 F. Supp. 616 (D.S.C. 1987) (three corporate officers liable because they were personally involved in day-to-day site operation); United States v. N.E.P.A.C.C.O., 579 F. Supp. 823 (W.D. Mo. 1984) (corporate vice president held personally liable because he had direct supervision over and actual knowledge of the waste disposal site).

108. FLA. STAT. § 373.119 (2000). Authorizing an administrative complaint to be served upon an alleged "violator," and provides that such order shall become final unless the "person" named therein requests an administrative hearing. *Id.* § 373.430. Providing that it shall be a violation of this part, and it shall be prohibited for any "person" to carry out any of the enumerated acts.

109. *Id.* § 373.019(5).

110. 684 So. 2d 301 (Fla. 2d DCA 1996).

111. FLA. STAT. §§ 403.031(5), .141, .161 (2000).

the same way as sections 373.119 and 373.430, *Florida Statutes*. In *Harbor Utilities*, the court was persuaded by the fact that the corporate officer/director had repeatedly represented that he held managerial authority to take "whatever action necessary" to bring the facility into compliance, yet failed to do so. The court found that the statutes at issue expressly assess liability against "persons," which includes individuals, and that there is no language in the statute to limit civil liability to permittees and facility owners only.[112] Likewise, there is nothing in the relevant provisions of Part IV of chapter 373 that would limit liability. Thus, personal liability may be a viable option for water management districts to pursue in bringing enforcement actions for violations of water management district rules or permits.

VI. ENVIRONMENTAL LAWS THAT LOOK BEHIND THE CORPORATE SHELL

Some current laws do exist that allow a permitting agency to take into consideration the people behind the corporate form in the permitting process. For example, the Florida Department of Environmental Protection may refuse to issue a waste management facility permit to an applicant based on that applicant's past conduct.[113] If the applicant has repeatedly violated the laws and rules governing the operation of waste management facilities and is deemed "irresponsible" by DEP, the applicant may find its permit application denied.[114] What gives this section its "teeth" above and beyond the general rule allowing DEP to deny a permit based on past conduct,[115] is the DEP's authority to look behind the applicant's corporate form in its permitting process for waste management facilities. DEP has defined the term "applicant" in this section to include:

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112. *Harbor Utilities*, 684 So. 2d at 303.

113. FLA. STAT. § 403.707(8) (2000).

114. *See id.*; FLA. ADMIN. CODE. R. 67-701.320(3)(2000). "Irresponsible" means:

> [A]n applicant owned or operated a solid waste management facility in this state, including transportation equipment or mobile processing equipment used by or on behalf of the applicant, which was subject to a state or federal notice of violation, judicial action, or criminal prosecution for activities that constitute violations under Chapter 403, *Fla. Stat.*, or the rules promulgated thereunder, and could have prevented the violation through reasonable compliance with Department rules.

FLA. ADMIN. CODE. R. 62-701.320(3)(b) (2000).

115. FLA. ADMIN. CODE. R. 62-4.070(5) (2000).

> [T]he owner or operator of the facility, or if the owner or operator is a business entity, a parent or subsidiary corporation, a partner, a corporate officer or director, or a stockholder holding more than 50 percent of the stock of the corporation.[116]

By broadly defining applicant to allow DEP to look behind the corporate form, DEP can learn the identity of the actual operators of the proposed waste management facility will be. If a business entity or person has violated the waste management laws in the past, they cannot hide that past conduct under the shell of a new entity. The Florida Secretary of State cannot be used by a past violator to expunge a history of noncompliance through a simple change of names. The past conduct of that entity or person, no matter under what name or form that conduct occurred, can be used by DEP to determine if the current permit applicant has provided reasonable assurances that it will comply with the agency's laws and rules.

The laws of Florida are not unique in considering an applicant's past violations during the permitting process or in factoring a party's history of noncompliance in the penalty amount for violations of environmental laws. Common to a number of federal environmental permitting programs is the requirement that past violations be considered by the trier of fact in determining the amount of the civil penalty. These types of laws are found in the Clean Water Act,[117] the Section 404 wetlands permitting program administered by the U.S. Army Corps of Engineers,[118] the Clean Air Act,[119] the Toxic Substances Control Act,[120] and the Surface Mining Control and Reclamation Act.[121]

The Surface Mining Control and Reclamation Act deserves special attention because it not only contains statutory language concerning past violations for determining penalties, but also addresses the issues raised in this article the use of various business entities to mask the actual controlling parties to obtain a permit unsoiled by past violations. The application for a surface coal mining and reclamation permit requires, in part, the following information:

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116. FLA. ADMIN. CODE. R. 67-701.320(3)(a) (2000).
117. 33 U.S.C. § 1319(d) (2000).
118. *Id*. § 1344(s)(4).
119. 42 U.S.C. § 7413(e)(1) (2000).
120. 15 U.S.C. § 2615(a)(2)(B) (2000).
121. 30 U.S.C. § 1268(a) (2000).

> [I]f the applicant is a partnership, corporation, association, or other business entity, the following where applicable the name and addresses of every officer, partner, director, or person performing a function similar to a director, of the applicant, together with the name and address of every person owning, of record 10 per centum or more of any class of voting stock of the applicant and a list of all names under which the applicant, partner, or principal shareholder previously operated a surface mining operation within the United States within a five-year period preceding the date of submission of the application.[122]

> [A] statement of whether the applicant, any subsidiary, affiliate, or persons controlled by or under a common control with the applicant, has ever held a Federal or State mining permit which in the five-year period prior to the date of submission of the application has been suspended or revoked has had a mining bond or similar security deposited in lieu of bond forfeited and, if so, a brief explanation of the facts involved.[123]

Usually, a permit application is signed only by the president or managing partner of the entity, and the agency has no means of learning the names of the other individuals involved in the business entity. By requiring the information stated above in a permit application, the issuing agency quickly learns who the real people are behind the entity applying for the permit. It is the people who run the business that concern the permitting agencies. Corporations and limited liability companies do not make decisions, the people who occupy the seats on the board of directors and act as officers make the decisions. They are the ones who decide if the business entity will comply with the permit condition and they are the ones who decide when and how to violate the permit.

While some of the information may be available from the entity's state division of corporations or other state agency, the respective state will have on file only that information that was submitted in the articles of incorporation or other documents forming the

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122. 30 U.S.C. § 1257(b)(4) (2000).
123. *Id*. § 1257(b)(5).

business entity.[124] Most states require a new business entity to file the names of the initial officers but there is no requirement that the state be kept appraised of stock ownership.

The requirement in the surface coal mining and reclamation permit that all persons owning 10 per centum or more of any class of voting stock be listed is important because there is no requirement that either an officer or director of a corporation or limited liability company own stock in that company. Compensation for both types of positions can be in cash or services.[125] And, while the board of directors may set policy and the officers control the day-to-day operations, the stockholders can use their ownership interest to control the business. The stockholders vote for the board of directors and can obviously back those individuals who will carry out the wishes of the major stockholders.[126] The "10 per centum of stock" requirement prevents an individual from setting up straw men as officers and directors of business and continuing to control the business through his or her majority ownership of stock. The owner of the business cannot hide behind those officers and directors and claim ignorance of the activities of the business.

The purpose of requiring this information in the surface coal mining and reclamation application is to alert the permitting agency of those individuals who were responsible for or involved in permit violations in the past. This information can then be used by the agency in determining whether the permit applicant has provided sufficient reasonable assurances that the applicant will comply with the conditions of the permit. If some of the individuals listed on the permit application have a history of permit violations, then the agency can use that history of noncompliance as grounds for requiring additional assurances before issuing the permit.

Although there are a number of environmental laws that authorize environmental agencies to look behind the corporate shell, Florida law currently does not contain any such provision that would authorize a water management district to do so in enforcing the provisions of part IV of chapter 373.

VII. CONSIDERATIONS FOR CHANGE

If the water management districts desire to enhance their ability to enforce the environmental laws that they administer, there are a number of changes in their practices, regulations, and statutes

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124. *See* FLA. STAT. § 607.0202 (2000). The articles of incorporation for corporation must contain the name and address of the individuals who are to serve as the initial directors.

125. *Id*. § 607.08101.

126. *Id*. § 607.0803(3) (2000).

that could be considered. First, the water management districts could focus their enforcement efforts on aggressively pursuing corporate principals of developer corporations that lack assets to bring projects into compliance or pay the necessary penalties by seeking to either pierce the corporate veil or pursue personal liability against corporate principals who personally participate in the environmental wrongdoings. Both of these options are available without any changes to existing law. However, as described above, the agencies would bear a heavy burden and the processes for obtaining such judgments can be cumbersome.

Another option that the water management districts may want to consider is pursuing statutory changes that would allow the consideration of corporate principals or related corporate entities in both determining whether reasonable assurances have been provided to issue a permit and in assessing penalties for violations that occur. Such statutory changes could involve changes to the definition of permit "applicant" to include not only the business entity that is applying for the permit itself, but also any corporate principal or related business entity. Similarly, statutory changes could be made that would make it clear that in either assessing a penalty informally through a voluntary consent order or in seeking to have a circuit court assess a penalty, the water management districts would have the authority to take into account the past water management violations of not only the business entity that is the permittee or the violator, but also of any principal of the corporation or related business entity. An approach similar to this was pursued by the DEP during the 2001 legislative session. The DEP staff drafted legislation to address the concepts discussed above.[127] The bill, entitled "The Florida Performance Based Environmental Permitting Act,"[128] would have, among other things, required a permit applicant to provide information not only on its past activities but also on the past activities of its related entities. The bill also would have authorized FDEP to evaluate the compliance history of the corporation and its related entities based on a point system in determining whether to issue a permit. Finally, the bill would provide incentives for permit applicants and other related entities with good compliance history. The draft legislation contained the following definitions:

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127. FDEP staff worked at models from other states at Florida's solid waste permitting laws, at tax and bankruptcy laws and at various debarment programs in developing the draft legislation. Telephone interview with Jack Chisholm, FDEP attorney (Mar. 14, 2001).

128. FLA. HB 1627 (2001); FLA. SB 2112 (2001), *available at* http:// www.oeg.state.fl.us (last visited Apr. 25, 2001).

> "Applicant" means the owner, operator, or president of the proposed activity requiring a permit as well as the permittee if different from the owner, operator, or president.
>
> "Related entities" means (1) an individual who is or was an officer, manager or partner of applicant during the past five years if the individual has or had operational control of the applicant or the applicant's environmental affairs, (2) a business entity where that individual worked, (3) a stock holder who owns more than 50 percent of the applicant, and (4) a parent corporation.

Although the bill did not pass and died in committee without much serious consideration, the concepts of considering related entities in determining whether to issue a permit are important concepts that should be considered in future legislative changes. Notably, the definition of "applicant" proposed in the bill includes the term "operator." The inclusion of this term would make clear that corporate principals or parent corporations that play an active role in the operations of the corporation, may have personal liability for environmental violations under the Supreme Court's *Bestfoods* approach.

If the water management districts pursue an approach similar to that set forth in the bill, a component could be a statutory change modeled on existing statutes such as the federal Surface Mining Control and Reclamation Act, described above, which requires that business entity applicants provide information on officers, partners, directors, and shareholders and a statement of whether any related entity has held a permit which has been revoked or suspended.

A third consideration for the water management districts would involve statutory changes of a different nature. Water management districts should consider whether to pursue statutory changes that would require corporate permit holders to notify the district within a specified period of time prior to their dissolution. This would allow the water management district to have notice of the impending dissolution in time to pursue any enforcement actions necessary to bring the permitted project into compliance prior to the corporate dissolution. This option has several drawbacks however. First, with regard to involuntary administrative dissolution, it is unlikely that the permit holder would be able to provide notice prior to such dissolution. More importantly, however, notice of dissolution does not address the true issue which is the problem of the corporation whether dissolved or still in existence, failing to

have sufficient assets itself to either carry out the activities necessary to bring the project into compliance or to pay an appropriate penalty.

To address these concerns, perhaps a better option for the water management districts to consider is a requirement that all permit applicants provide financial assurances in the form of a performance bond or letter of credit, up front before obtaining a permit, in an amount sufficient to cover the costs of properly constructing the surface water management system as well as the costs of properly maintaining such system and the costs of addressing problems with the system that may occur in the future. Although this approach would place a burden on the permit applicants who do not have a history of noncompliance and who do follow the rules, it would ensure that sufficient financial resources would be available to ensure that projects were properly built and maintained. If the water management districts do not find it appropriate to place the financial assurance burden on all permit applicants, another option would be for the water management districts to limit the requirement for financial assurance to permit applicants that either themselves have a history of noncompliance with water management district rules or whose corporate principals and/or related business entities have a history of noncompliance with water management district rules. This could be accomplished without a statutory change. Existing statute sections 373.413 and 373.416 already authorize the water management districts to impose such reasonable conditions as are necessary to assure that the construction alteration, operation, or maintenance of a system will not be harmful to the water resources of the district. These provisions provide sufficient authority for the water management districts to adopt regulations that impose conditions requiring financial assurance on permit applicants whose corporate principals or related business entities have shown a history of compliance problems such that financial assurances are necessary to ensure that the permitted project will not cause harm to the water resources of the district.

VIII. CONCLUSION

To resolve the tension between environmental protection and corporate protection, a delicate balance must be struck to ensure that goals of corporate protection are not exalted above the important public policy goals of environmental protection. A number of options exist for water management districts to enhance their enforcement of environmental laws despite the tendency of the developers to form new business entities for each project or phase

of a project. Some of these options can be pursued through existing laws such as under the theory of corporate veil piercing or personal liability. Other options would have to be accomplished through either statutory changes to authorize water management districts to consider the past violations of corporate principals and related business entities in determining whether to issue a permit and in determining the amount of a penalty to be assessed. Other options would not require statutory changes but, instead, could be accomplished through rule changes such as an option that would require permit applicants with a history of noncompliance or whose corporate principals or related business entities have a history of noncompliance to provide financial assurance that a project will be properly carried out and maintained prior to obtaining a permit.

SCRUTINIZING ENVIRONMENTAL ENFORCEMENT: A COMMENT ON A RECENT DISCUSSION AT THE AALS

JOEL A. MINTZ*

Table of Contents

I. INTRODUCTION

For much of the last century, the Association of American Law Schools ("AALS") has had a quiet yet significant role in the development of American law. Founded in 1900, the Association is composed of 162 United States law schools, each of whose faculty members are AALS members. The Association sponsors a number of events annually, the most significant of which is its annual meeting at the beginning of January, which typically attracts between 3500 and 4000 participants.[1]

Over a span of four days, this meeting features exhibits, breakfasts, luncheons, receptions sponsored by various law schools and organizations, field trips, half or full day "workshops" on particular topics, a plenary session (regarding a broad topic or theme), and numerous sessions sponsored by one or more of the

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1. Telephone Interview with Traci Thomas, AALS (Apr. 13, 2000). For an interesting discussion of the history of the AALS, *see* ROBERT STEVENS, LAW SCHOOL (1983).

AALS's sections (i.e., groups focused on particular fields of law or topic areas).[2]

Last year, the AALS annual meeting was held in Washington, D.C. (from Thursday, January 6th until Sunday, January 9th). One particularly provocative (and well attended) section-sponsored session at this meeting was a panel discussion (held on Friday, January 9th) that was organized by the Association's Environmental Law Section and entitled "Deterrence vs. Cooperation: The Struggle Over the Future Direction of Environmental Enforcement."

This session was moderated by Professor Clifford Rechtschaffen of Golden Gate Law School, a clinician and scholar who has written perceptively about enforcement in a lengthy and thoughtful law review piece.[3] Other participants included Lois Schiffer, the current Assistant Attorney General for Environment and Natural Resources in the U.S. Department of Justice; Steve Herman, the present Assistant Administrator for Enforcement and Compliance Assurance at the U.S. EPA; Terry Bossert, a private practitioner who served four years as the Chief Counsel of the Pennsylvania Department of Environmental Protection; Fran Dubrowski, a former Senior Attorney with the Natural Resources Defense Council; and Ernie Rosenberg, the President of a trade association (the Soap and Detergent Association) and, until November, 1999, a Vice President for Health and Environmental Issues with Occidental Petroleum.

The purpose of this essay is to summarize and analyze critically the thoughtful remarks of the participants in this panel discussion. I shall begin by recounting (and briefly supplementing) the opening remarks of Professor Rechtschaffen with respect to current trends in environmental enforcement and compliance assistance in the United States. I will then summarize the comments of the AALS session panelists with respect to four distinct topics that their discussion touched upon: the proper role of traditional deterrent enforcement efforts (and of governmental compliance assistance to regulated companies); the extent to which state environmental enforcement and compliance programs should be autonomous; the appropriate way (or ways) to measure enforcement success; and the complexity of environmental regulation. Finally, I will offer some thoughts as to the vital role that budgetary resources play with

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2. For a polemical critique of the last AALS annual meeting from a politically conservative point-of-view, *see* David Mayer, *Hobnobbing With Fellow Wizards: A Report On the Law Professors' Conferences In Washington, D.C.*, CAP. U. L. FEDERALIST SOC'Y NEWSL., Mar. 2000, *available at* http://www.law.capital.edu/student/federalistsociety.

3. *See* Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181 (1998).

respect to proposals to improve governmental environmental enforcement programs.

II. ENVIRONMENTAL ENFORCEMENT IN THE RECENT PAST: MAJOR TRENDS AND COMPETING THEORIES

Clifford Rechtschaffen opened the panel discussion by noting that, over the past five to ten years, there have been many calls to change the way the government enforces environmental laws. He posited that there are two "basic theories" of environmental enforcement: "deterrence-based" enforcement and a "cooperation-based" model.[4]

Deterrence-based enforcement reflects the traditional way that we regulate unlawful conduct in society. It is based upon the notion that regulated entities are rational economic actors who will comply with legal requirements where the economic (and other) costs of noncompliance are greater than the costs of compliance. The task for regulators, under this approach, is to make noncompliance penalties sufficiently high - and the probability that violations will be detected sufficiently great - that it will be economically irrational for regulated businesses not to comply with applicable standards. As Rechtschaffen stated, "Under this view, if there are violations they should be met with sanctions. Enforcement responses should be timely and appropriate; and the level of enforcement activity should have a deterrent effect."

In contrast with the deterrent approach, cooperation-based enforcement starts with the presumption that most businesses are generally inclined to comply with the law. In light of this, the imposition of sanctions on regulatory violators is disfavored or, under a more extreme position, even seen as a failure of the system to work. Instead, in a cooperation-based system, regulatory agencies have the job of providing advice and consultation to businesses in order to help them understand the pertinent rules. In the event of noncompliance, such agencies are tasked with counseling regulated entities as to how to come into compliance.

Professor Rechtschaffen pointed out that, in practice, no regulatory system rigidly adhered to one enforcement model or the other. He observed that EPA has primarily relied upon a deterrence-based approach, as evidenced by its penalty policy, its enforcement response policies, and other Agency policies and activities.

However, beginning in 1993, EPA has also engaged in significant "enforcement reform" by devoting more of its resources to promoting

4. *See id.* for a more comprehensive discussion of those theories.

and assisting compliance. The Agency has expanded its compliance assistance activities and it has adopted compliance incentive programs (such as its self-audit policy, its small business policy, and other similar initiatives). EPA has also engaged in a very ambitious national performance strategies program to develop new measures for evaluating the success of enforcement programs.

For their part, Rechtschaffen suggested, most state environmental agencies have also pursued a deterrent enforcement approach "in theory." Nonetheless, he believes that many states have been "less than enthusiastic" in practice about deterrence-based enforcement. In Rechtschaffen's words:

> In recent years, the states have been leading the charge to reform enforcement practices. The states now conduct between 80% and 90% of all [environmental] enforcement actions. They've been delegated authority to administer about 75% of the major environmental programs. Quite deliberately, the states have expanded the resources and effort they've allocated towards compliance assistance, and cut back on traditional enforcement activity. This includes inspections, enforcement, orders and penalties.[5]

Professor Rechtschaffen also made mention of what he termed "a growing body of evidence that rates of noncompliance with environmental laws are substantial and may be on the increase." He noted that the EPA itself has reported that the rate of "significant noncompliance" with the Clean Water Act and the Resource Conservation and Recovery Act (RCRA) ranges between 20% and 28%. Moreover, he stated an environmental organization, the Environmental Working Group, has concluded that, among major facilities in five industrial sectors, the rate of noncompliance with Clean Air Act requirements is approximately 40%.[6] Thus,

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5. Professor Rechtschaffen provided several examples in support of his point. He noted that the EPA has reported that, between 1993 and 1997, there was a 50% decline in RCRA enforcement activity on the part of the states. He mentioned that, in 1996, the Commonwealth of Virginia reported a 98% decline in the amount of penalties collected under its environmental statutes. He also observed that numerous states have adopted amnesty laws that mandate forgiveness for certain environmental statutes, and that 24 states have adopted some sort of environmental audit privilege or immunity law. *See* Rechtschaffen, *supra* note 3.

6. *See* Sylvia Lawrence, Principal Deputy Assistant Administrator of the Office of Enforcement and Compliance Assistance, U.S. EPA, Presentation: *Innovations in EPA's Compliance and Enforcement Program* (Feb. 3, 1999); *see also* ENVIRONMENTAL WORKING GROUP, ABOVE THE LAW: HOW THE GOVERNMENT LETS MAJOR POLLUTERS OFF THE HOOK

Rechtschaffen mentioned, citizens groups among others have taken the view that government agencies should be more aggressive and more focused on the goal of deterrence in their enforcement efforts.

How accurate and useful is Clifford Rechtschaffen's overview of recent trends and approaches in environmental enforcement? In my judgment, Rechtschaffen's summary is indeed perceptive and sound. This seems especially true when one takes account of his candid acknowledgment that he was "painting in broad strokes" in presenting his observations and of the time constraints he faced in the setting of a panel discussion.

I would add to Rechtschaffen's overview only one caveat, as well as brief mention of two trends that Professor Rechtschaffen would most likely have mentioned himself if he had had more time. In my experience with environmental enforcement (both as a participant and an observer), I have found that it is often risky to generalize about classes of actors or institutions in the field (such as federal enforcement officials, Congressional oversight committees, local agency inspectors, EPA regional offices, environmental citizens organizations, etc.). This is especially true with respect to states and state environmental agencies.

State agencies do differ from one another in the vigor and philosophical orientation of their enforcement programs. In addition, internal changes in the leadership of state governments (as state governors and legislators are replaced and reemerge in response to the outcomes of elections and constitutional term limits) frequently have important impacts on the direction and scope of state environmental enforcement programs. Moreover, within state agencies, enforcement approaches in different environmental media (air, water, waste, etc.) may be inconsistent, and state agencies are also subject to extensive turnover among their professional staffs that may influence the nature and extent of their enforcement efforts.

In noting those things, I do not question the overall validity of Professor Rechtschaffen's conclusion regarding state agency attitudes towards the role of environmental enforcement. His observation is largely correct in my view (as are the recent criticisms of state enforcement expressed by the EPA's Inspector General (IG) and the U.S. General Accounting Office).[7] I only wish to suggest that, like so many facets of environmental enforcement, the performance and attitudes of state environmental agencies is a matter about which it is not easy to generalize.[8]

(1999).

7. *See* Cohen, *infra* note 13 and accompanying text.

8. In one respect, however, this observation must be qualified. As discussed further *infra*,

Two recent trends that Rechtschaffen's thoughtful summary did not refer to are a marked increase in organized lobbying by state environmental agencies in favor of greater state autonomy in implementing federally mandated environmental requirements, and a significant paucity of resources (at all governmental levels) to establish and enforce environmental standards.

In the mid-1990's, the Environmental Council of States (ECOS) was created. This organization, whose members are political appointees that head state environmental agencies, led a well organized and politically effective effort to criticize EPA "arrogance" and discourage Agency "interference" with state agency decisions and activities. ECOS's rising national influence (which coincided with the advent of Republican Party control of the U.S. Congress and a majority of state governorships) has been the backcloth against which recent EPA conflicts and tensions with particular states (over enforcement as well as other issues) have been played out.

At the same time, both EPA and the states have been faced with ever-increasing regulatory mandates and enforcement responsibilities, and a stagnant or declining pool of budgetary resources. Adjusted for inflation, the EPA's budget has essentially remained constant since 1984.[9] At the same time, however, the requirements imposed upon the Agency during that period (under amendments to the Clean Air Act, Safe Drinking Water Act, Federal Insecticide Fungicide and Rodenticide Act, and other statutes) have increased many times. The situation at the state level is no more sanguine. In fact, according to the U.S. General Accounting Office, environmental regulations at both the federal and state levels consider inadequate resources to be the single greatest problem that they face.[10]

III. THE PROPER ROLE OF COMPLIANCE ASSURANCE

Notwithstanding its title, the AALS panel discussion on environmental enforcement focused on the relative appropriateness of deterrence-based and cooperation-based enforcement to a surprisingly minimal extent.

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over the past several years (as a political strategy intended to further what are evidently seen as their common interests) individual states have been speaking about enforcement and environmental federalism issues with something of a singular voice through the Environmental Council of States (ECOS).

9. *See* U.S. Gen. Accounting Office, *EPA and the States: Environmental Challenges Require A Better Working Relationship*, GAO/RCED-95-65 (1995).

10. *Id*.

Steve Herman confirmed one aspect of Cliff Rechtschaffen's summary by stating that "[at EPA], traditional enforcement is at the base of our program." He opined that "a law without a sanction is not worth very much" and noted that an EPA analysis of the "root courses of pollution" had found that, in a number of cases, companies had exceeded environmental standards in order to gain a competitive advantage over economic competitors in the same industry.

At the same time, however, Herman allowed that "all of the violators are not bad guys, and whether they are or not is irrelevant because our statutes are trying to protect us from bad behavior and pollution - whether it is from good guys or bad guys." He took the view that "different tools and approaches can reach different communities in different ways." Thus, EPA has supplemented its traditional judicial and administrative enforcement regimes with a self-disclosure policy which "has resulted in several hundred companies voluntarily disclosing their violations, and either having no penalty or a very mitigated penalty if the violations are corrected."[11]

Herman added that the Agency has opened "online compliance assistance centers" for several industrial sectors (including auto repair, dry cleaning, printing, etc.). People who work in those sectors may ask EPA questions, by e-mail, with regard to their compliance problems and issues. They may also discuss compliance problems among themselves on designated "chat rooms."

Terry Bossert indicated that the Pennsylvania Department of Environmental Protection "didn't hesitate" to use traditional enforcement tools where they were deemed appropriate. They were also willing to pursue compliance assistance when it was needed. To Bossert, "the debate should really be about the balance of the two enforcement tools, not one or the other." Moreover, in his opinion, governmental compliance assistance should be used primarily to help small companies which "lack the internal resources" to set up and adhere to functioning environmental management systems.

Fran Dubrowski briefly expressed a far more skeptical view of compliance assistance. She exclaimed, "[L]et's face it, there are some real horror stories buried in this very euphoric-sounding language about compliance assistance!" At the same time, however, Dubrowski indicated a preference for giving state agencies "an

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11. Incentives For Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706 (Dec. 22, 1995). *See also* Incentives For Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Apr. 11, 2000).

opportunity to manage for real world environmental results, as opposed to paper-shuffling."

Finally, Lois Schiffer also saw "a continuing need for strong and effective enforcement - both at the federal and the state level." She explained the essentiality of a deterrent enforcement approach through a simple yet persuasive analogy to income tax requirements:

> Most of us file now our tax forms on or before April 15th. If I came to you and I said it would be very nice if you did that, and I'll fill out the form and show you how to do it, but nothing bad will happen to you if you don't do it, you might do it anyway the first year. I could say that if you don't do it again I'll publish an announcement and you'll be shamed. That might get you to do it a second year. But if nothing bad happens to you, pretty soon you would wake up and say "I'm not going to do it."

In fact, deterrent enforcement is a critical element in any effective regulatory enforcement program. Without it, presently noncomplying companies will have a self-interested reason to continue to violate environmental standards. Noncomplying firms will be permitted to disrupt the marketplace by benefiting economically through their violations.[12] Moreover, some entities that presently comply with environmental requirements will be encouraged to "backslide" and, over the long term, environmental protection will once again become a low priority for numerous firms and communities.[13]

Despite this, as I have suggested in another essay,[14] governmental compliance assistance to certain regulated parties does have a legitimate place in the work of environmental agencies. Such assistance will be most effective if it is kept on a small scale, focused on smaller businesses and communities, provided mostly in the pre-enforcement stages of regulatory implementation, and given with discretion and care so as not to undermine planned and ongoing deterrent enforcement cases.

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12. For an interesting essay that expands upon this point, *see* Robert A. Kuehn, *The Limits of Devolving Enforcement of Federal Environmental Laws*, 70 TUL. L. REV. 2373, 2377-78 (1996).

13. Empirical research by social scientists over the past fifteen years supports these conclusions. For a useful summary, *see* Mark A. Cohen, *Empirical Research on the Deterrent Effect of Environmental Monitoring and Enforcement*, 30 ENVTL. L. REP. 10245 (Apr., 2000).

14. *See* Joel A. Mintz, *Rebuttal: EPA Enforcement and the Challenge of Change*, 26 ENVTL. L. REP. 10538 (Oct., 1996).

Compliance assistance is indeed a worthwhile supplement to a deterrent enforcement effort. Ideally, it can encourage regulatory compliance while building good will for regulatory agencies. At the same time, however, compliance assistance can be a prescription for regulatory timidity and inaction if it serves (whether intentionally or by default) to supplant a vigorous, even-handed program of deterrent enforcement.

IV. HOW MUCH ENFORCEMENT AUTHORITY SHOULD STATE ENVIRONMENTAL AGENCIES HAVE?

At the close of his opening summary at the AALS panel discussion, Clifford Rechtschaffen posed the following specific question to Terry Bossert: "There have been a series of reports by the U.S. General Accounting Office (GAO) and the EPA's Inspector General (IG) over the past five years, that document revealed very serious deficiencies in the way that states enforce environmental laws.[15] Yet EPA, through the National Environmental Performance Partnership System (NEPPS) has been seeking to provide greater autonomy to the states in how they enforce environmental laws. Is this greater autonomy justified?"

Bossert responded that, from a state perspective, he did not agree with some of the characterizations that were made by the GAO and EPA's IG. Nonetheless, he conceded, "there definitely have been glitches between the states and EPA."

Bossert expressed the view that EPA has been "too planning-focused" with regard to enforcement and that it has tried to force that orientation on state environmental agencies. He added, "By the same token the states have been too resistant to that and have too long relied on the excuse that 'Things come up; we have to deal with problems as they arise.'"

Bossert views the EPA's performance partnership system as a "potential opportunity" for the Agency to accommodate the states' needs to pursue enforcement and compliance assistance "where it is really needed." In his opinion, that may or may not be with regard to major industrial facilities, since such facilities may or may not

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15. *See* U.S. EPA Office of Inspector Gen., Consolidated Report on OECA's Oversight of Regional and State Air Enforcement Programs (Sept. 25, 1998); *State Alternative Environmental Compliance Strategies: Hearings Before the House Subcommittee on Oversight and Investigations of the House Commerce Committee*, 10th Cong. 97 (1997) (prepared testimony of Nikki Tinsley, Acting Inspector General, U.S. Environmental Protection Agency, summarizing several pertinent IG reports); U.S. Gen. Accounting Office, *Water Pollution: Observations on Compliance and Enforcement Activities Under the Clean Water Act*, GAO/T-RCED-91-90 (1991); U.S. Gen. Accounting Office, *Water Pollution: Many Violations Have Not Received Appropriate Enforcement Attention*, GAO/RCED-96-23 (1996).

cause the major environmental problems. The states thus need flexibility as to how best to use their own enforcement and compliance assistance resources.

At the same time, Bossert opined, performance partnership agreements also give EPA an opportunity to force the states to lay out a cogent strategy for balancing the use of traditional enforcement and compliance assistance. He candidly noted, when he served as General Counsel of the Pennsylvania Department of Environmental Protection, that "Trying to get some of the people in my own agency to recognize there was a benefit in that was like pulling teeth! . . . It was very difficult."

From the EPA's perspective, Steve Herman stated that federal environmental statutes contemplate both state and federal enforcement and "the system only works where there is both."

Herman took note of the fact that "there was – and to some extent still is – a significant tension and struggle between the states and the federal government." The emphasis on "partnership" and "state autonomy," without a clear definition of those terms, has led to "some very serious problems and misunderstandings." He stated that, particularly in 1994 and 1995, some states understood their partnership with the Agency to be a "one way street" in the sense that "the states would declare what they wanted to do and EPA would agree to it."

Herman mentioned that EPA's headquarters have instructed the Agency's regional personnel to have separate "enforcement planning meetings" with state officials in which national, regional, and state priorities are identified. However, he stated, "getting EPA regions and the states to agree on what the priorities are going to be, and the roles each are going to play, has been a major effort." In Herman's words:

> With some states there has been success in collaboration in some major cases. On the other hand, some states have taken the position that if an [enforcement] program is delegated to the state, EPA is out. We don't agree with that. We have a responsibility to maintain a level playing-field among the states so you don't have a "pollution-haven" formed in the states.[16]

16. Over the past few years there has been a heated debate among legal academics as to this notion, often referred to as the "race-to-the-bottom" rationale for federal environmental regulation. For a sampling of law review articles from that debate, *see* Richard Revesz, *Rehabilitating Interstate Competition: Rethinking the Race-to-the-Bottom Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); Daniel C. Esty,

Lois Schiffer disagreed with Rosenberg. She cited the example of the Smithfield Company, a meatpacking firm in Virginia that had stated it would leave that state if state officials enforced the Clean Water Act against it.

Despite these intergovernmental conflicts over questions of enforcement jurisdiction and methodology (which Steve Herman believes are "not very different from the federalism battles being fought in other contexts"), Herman believes that, from EPA's standpoint, genuine progress has been made in recent years. He stated that, "in many places, over the last three to four years, there has been a change." Now, according to Herman, "our regions have been getting more cooperation in terms of the [enforcement] planning process."[17]

Fran Dubrowski stated that she views greater autonomy for state agencies as "something of a mixed bag." She noted that, in mid-1999, EPA proposed to amend its Clean Water Act pretreatment regulations so as to allow local municipalities to ease the basic standards at issue with little guidance from or oversight by EPA. "Let's call a spade a spade," she declared. "That's not autonomy-giving. That's a rollback!"

Dubrowski observed that EPA has never "pulled a state program, despite extreme provocation" once that program has been delegated to the state. She cited as an example the Agency's inaction in the face of a decision of the Commonwealth of Virginia to disband its mobile laboratories. These labs had given that state the capability to do random spot-checks on the accuracy of Discharge Monitoring Reports (DMR's) submitted to state inspectors by industrial discharges. "Autonomy," she suggested, "has to be coupled with a broader sense of responsibility."

Revitalizing Environmental Federalism, 95 MICH. L. REV. 570 (1996); Joshua D. Sarnoff, *The Continuing Imperative (But Only From A National Perspective) For Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL'Y F. 225 (1997); Peter P. Swire, *The Race To Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions In Environmental Law*, 14 YALE J. ON REG. 67 (1996); Kirsten H. Engel and Scott R. Saleska, *"Facts Are Stubborn Things": An Empirical Reality Check In the Theoretical Debate Over The Race-To-The-Bottom In State Environmental Standard-Setting*, 8 CORNELL J.L. & PUB. POL'Y 55 (Fall 1998).

In the discussion, Ernie Rosenberg took issue with Steve Herman's last conclusion. He stated that "the level playing field is not a real issue in the enforcement area.... Corporations just don't make their decisions on the basis [of state enforcement policies and the stringency of regulations]." Instead, he indicated that "where states drive corporations away it is because of difficulties with getting on with business and the process and paperwork of the state."

17. Mr. Herman's observation is undoubtedly true in part. Nonetheless, recent conversations with EPA enforcement personnel in several regional offices lead me to believe that the new federal-state cooperation which Herman describes is not a universal phenomenon.

Finally, Ms. Dubrowski urged that the EPA set aside "a pot of money" to provide federal resources to substitute for state programs that are not being enforced. Unless that happens, she suggested, "the push for autonomy will not really have any credibility."

Ernie Rosenberg took a differing position. He indicated that "you don't really have any choice about giving the states additional autonomy at this stage of the game."

Rosenberg pointed out that, in annual Congressional budgetary deliberations, EPA competes with other agencies and departments (such as Housing and Urban Development, National Aeronautics and Space Administration, and Veterans Affairs) that are within the same budgetary "account" and have politically influential constituencies of their own. In view of this, Rosenberg opined, the prospects for an increase in EPA's resources are "minimal." Thus, he concluded, if EPA did set aside money for an enforcement contingency fund (to be expended in the event that state-level enforcement proved inadequate) that money "would just disappear in the next budget round."

Finally, Steve Herman responded to Fran Dubrowski's suggestion that EPA should be more aggressive in taking back enforcement programs it has delegated to state environmental agencies. Herman stated that the larger question raised by her proposal is the following: if the EPA does "pull back" a delegated program in a state, will the Agency do a better job of administering it than the state is already doing? In Herman's view, while this is partly a question of will and outlook, it is also, in very large part, a matter of resources.

Herman noted that EPA's personnel numbers are not growing while its responsibilities are on the increase. "What we're trying to do in the enforcement area and others," he explained, "is to see where we can get the biggest bang for the buck – in terms of protecting public health and the environment – with these resources we have." Given this, Herman indicated, EPA has been reluctant to withdraw state enforcement authority in certain states.

As mentioned earlier in this essay, state agencies tend to differ considerably with regard to environmental enforcement. Their performances in this area also vary over time. In view of this, EPA would do well to base its decisions as to where and when to delegate enforcement programs (and grant states "enforcement autonomy") on uniform objective criteria which go to state agencies' levels of personnel resources, experience, and past performance in inspection and enforcement. These criteria should be applied without regard to political favoritism, and EPA determinations with respect to delegations (and the level of EPA oversight of enforcement in

particular states) should be revisited, at regular intervals, to take account of charges in institutional performance at the state level.[18]

To at least some extent, Terry Bossert is right to suggest that EPA should accommodate the needs of particular states for flexibility in pursuing enforcement and compliance assistance. At the same time, however, where states are reluctant or unwilling to take enforcement actions against major industrial violators, the Agency should place the burden on state officials to show specifically why those sources are not causing major environmental harm.

Fran Dubrowski's intriguing proposal for a "contingency fund" to be used by EPA where the Agency must remove state enforcement authority due to inadequate performance may well be politically naive. Certainly, under current circumstances, withdrawals of state authority seem exceptionally unlikely. Nonetheless, other governmental entities in this country – most notably the United States military – do regularly maintain "reserve" personnel units, and there would seem to be little harm if the Agency's leadership at least requested the establishment of such a budgetary fund (for possible use in very rare cases of extreme noncooperation by state authorities).

V. HOW TO MEASURE ENFORCEMENT SUCCESS

The question of how environmental agencies should measure the success of their own enforcement programs has long been in controversy. At the AALS panel discussion, Terry Bossert suggested that it was appropriate for federal and state environmental agencies to measure the results of their enforcement activities in terms of their environmental impact. In his view, that approach is more important than such traditional measures as how many enforcement actions were initiated by the agency or how much money it has collected in penalties. Bossert suggested that if agencies focus exclusively on actions taken and penalties collected, "for the rank and file [within the agency] that becomes the be-all of their performance." However, such measures cast little light on how much the agency has done to promote future compliance.

Fran Dubrowski seemed to agree with Terry Bossert in part. She opined that enforcement and compliance programs should be assessed by asking two questions: 1) Are pollution levels going down; and 2) Is the public actively involved at all stages of implementation of the program?

Dubrowski noted that the Clinton Administration recently reported that some 40% of the nation's streams do not meet state

18. Rena Steinzor, *Devolution and the Public Health*, 24 HARV. ENVTL. L. REV. 351 (2000).

Water Quality Standards – approximately the same level of non-compliance as was reported in 1984 and 1994. However, state agencies have only surveyed 17% of river and stream miles, and much of that surveillance is based upon "evaluative guesses" rather than actual monitoring data. Thus, many undetected problems may not be revealed by these statistics.[19]

In order to assess enforcement based upon environmental indicators, Dubrowski suggested the water quality monitoring program needs to be changed and improved. There is a need for more monitoring stations and more sophisticated and accurate monitoring at those stations. Moreover, she stated, "we have to collect the data in a way that is coordinated as to sampling methods, locations of stations, and frequency of sampling (from jurisdiction to jurisdiction and from year to year)."

As to public participation in governmental enforcement programs, Dubrowski expressed the view that it is "widely viewed as broken." She stated:

> Decisions are often made behind closed doors. The public is involved too little and too late. That must be fixed. Programs should be evaluated in terms of that. Moreover, better means of evaluating public participation should be created than merely checking on whether letters [of notification as to meetings and hearings] are responded to.

Ernie Rosenberg was even more emphatic than Terry Bossert in his rejection of traditional methods of evaluating enforcement programs. He declared that "measuring the number of cases being brought is just useless." In Rosenberg's view, such data says nothing about the "overall universe of performance" within jurisdictions. In counting cases and penalties, he urged, "we're measuring failure, we're not measuring success."

Speaking for EPA, Steve Herman expressed a preference for gathering a comprehensive set of information to evaluate governmental enforcement performance. Herman stated "I'm for counting everything Terry [Bossert] and others want to count and for counting the enforcement actions."

Herman acknowledged that merely counting numbers of enforcement cases that have been initiated does not distinguish simple from complex cases. EPA has been attempting to measure

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19. J. Charles Fox, Testimony before Subcommittee on Department Operations, Oversight Nutrition and Forestry of the U.S. House of Representatives Committee on Agriculture (Oct. 28, 1999).

levels of pollution that are reduced as a result of specific enforcement actions. The Agency has also been trying to measure overall compliance rates in various industrial sectors and to evaluate the extent to which compliance assistance programs are effective in "getting results."[20]

Steve Herman noted that, in discussions with EPA, many states resist counting the number of traditional enforcement actions that they initiate. In some situations, in Herman's opinion, "that is a cover for not doing enforcement."

Mr. Herman noted that the Agency has given grants to 20 or more states to come up with new measures of enforcement effectiveness. "This is a difficult area," he observed, "and it will have to be a long-term effort."

Finally, Lois Schiffer took a position very similar to that expressed by Steve Herman. She indicated that environmental agencies need to measure both the environmental impacts of enforcement and overall numbers of enforcement actions and activities. According to Schiffer: "All of those . . . in the aggregate[,] give a picture of what's going on."

Ms. Schiffer made mention of the difficulties involved in measuring environmental results. She stated that it is <u>especially</u> hard to measure the deterrent effect that individual cases have "on other companies, down the road, who now have decided I might get caught too so I need to put on the pollution control equipment."[21]

Schiffer also agreed with Fran Dubrowski's view as to the importance of public participation in enforcement activities. In this regard, she noted, "you have to make sure you look at all the customers," including people who are hurt by pollution from non-complying facilities.

Who is right? How should governmental enforcement and compliance efforts be evaluated? No single measure (or set of measures) is likely to yield a fully accurate assessment of the strengths and weaknesses of environmental enforcement programs.[22] Contrary to the assertions of Bossert and Rosenberg,

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20. *See* U.S. EPA, National Performance Measures Strategy For EPA Enforcement and Compliance Assurance Program (1998).

21. While essentially correct, Ms. Schiffer's point here may well have been understated. In fact, at present, it seems virtually impossible (rather than merely "especially hard") to measure the kind of deterrent effect of particular enforcement cases that her statement refers to. This difficulty is because, in the current atmosphere, regulated companies are unwilling to admit or reveal instances when they have pursued pollution control measures more vigorously or carefully because they fear the potential consequences of environmental enforcement.

22. For a more extensive analysis of this question, *see* JOEL A. MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES 119-125 (1995).

numerical indications of enforcement actions initiated, penalties assessed, administrative orders issued, etc. are neither "useless" nor "unimportant." Taken together they are at least one yardstick, however crude or incomplete, of the tenacity and vigor with which environmental enforcement is being pursued.

At the same time, however, numerical indicators, standing alone, do have their shortcomings. Steve Herman is quite correct that such statistics frequently fail to distinguish simple enforcement cases from more complex (and resource consumptive) matters. Because of this, reliance on records of enforcement activity to measure enforcement success may well encourage enforcement officials to pursue minor, easily resolvable matters, while ignoring larger, more environmentally significant violations. Enforcement activity levels tell us nothing of the relative environmental impacts and benefits of enforcement actions. Moreover, raw enforcement activity statistics provide no indication of the promptness with which government officials initiate and complete enforcement cases and no data as to the number and severity of known violations that those officials have chosen not to address.

Fran Dubrowski's suggestion with regard to measuring enforcement success by environmental indicators has considerable appeal. If the purpose of environmental statutes and agencies is to roll back and prevent pollution, it seems logical to assess the efficacy of enforcement programs by their actual environmental results. Nonetheless, as Ms. Dubrowski's own comments regarding ambient water quality monitoring reflect, given the current, flawed state of environmental monitoring programs, reliance on ambient environmental data to evaluate environmental enforcement and compliance assistance efforts can be misleading.

Changes in environmental conditions may result from various factors wholly unrelated to enforcement, including weather conditions and variations in market conditions. For water, air and other media, the governmental records that are kept as to environmental trends are often incomplete, inconsistent, or inaccurate. It is particularly difficult to measure the environmental impact of enforcement or compliance with environmental requirements (such as spill prevention plans, contingency plans, employee training programs, etc.) that are primarily intended to prevent environmental problems rather than to eliminate existing difficulties. Moreover, many states have simply not devoted the numerous resources necessary to evaluate enforcement based upon environmental conditions.

The EPA was surely justified in attempting to estimate levels of pollution reduced as a result of specific enforcement actions. As the Agency has recognized, however, going beyond this to a more

sophisticated analysis of the reasons for environmental trends is a resource intensive task, fraught with practical obstacles.

A third approach to evaluating enforcement success – and one which EPA and some states have now begun to explore, albeit in a preliminary way – is to examine overall levels of compliance in various industrial sectors. This approach, however, when used to the exclusion of other types of measures, is also problematic for several reasons. First, it is difficult to assess industrial compliance rates accurately. At present, those rates are often rough approximations, indirectly supported by partial and incomplete data. Second, standing alone, rates of compliance provide no information as to the relative size or environmental importance of noncomplying pollution sources. Third, high rates of compliance do not necessarily reflect effective enforcement. Instead, they may reflect lax environmental standards, or plant closures resulting from causes wholly unrelated to environmental requirements. Thus, while useful, industrial compliance levels cannot be relied on as the sole (or even the primary) basis for evaluating environmental enforcement.[23]

Finally, as Fran Dubrowski and Lois Schiffer have urged, environmental enforcement programs may be judged by the effectiveness of their public participation programs. Few would suggest, I suspect, that this should be the only measure of enforcement effectiveness. Environmental agencies might do a fine job of inviting and promoting public participation and nonetheless have enforcement programs that are gravely flawed in other respects.

Nonetheless, enforcement programs that are open to public observation and comment are, at least potentially, more accountable to citizens with a stake in prompt, effective enforcement. Moreover, to the extent that environmental violations and enforcement actions are well publicized, the deterrent value of these enforcement actions may well be increased. Dubrowski's (and Schiffer's) recommendations regarding the role of public participation in enforcement are thus well taken.

In sum, no single measuring device can provide a sound basis for assessing the success of the environmental enforcement programs of governmental agencies. The EPA has been wise to expand the

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23. I do not wish to suggest, however, that industrial compliance levels are devoid of any value as a measure for environmental enforcement success. For a thoughtful analysis which concludes that, when types of pollution sources are controlled for, compliance rates may be meaningfully compared as to non-compliance times, *see* Victor B. Flatt, *A Dirty River Runs Through It (The Failure of Enforcement In the Clean Water Act)*, 25 B.C. ENVTL. AFF. L. REV. 1 (1997).

kind and amount of information it gathers for this purpose. The Agency would do well to continue on this course and to encourage state environmental agencies to do the same.

VI. THE COMPLEXITY OF ENVIRONMENTAL REGULATIONS

During the AALS panel discussion, Ernie Rosenberg emphasized that, from the standpoint of regulated industries, EPA's regulations have become needlessly complex. In fact, he contended that regulatory complexity creates "almost an assurance" that there will be non-compliance.

Mr. Rosenberg illustrated his point by recounting an anecdote concerning EPA's Clean Air Act maximum achievable control technology (MACT) standards as to emissions of toxic air pollutants. Those standards contain both generally applicable standards and sets of standards that are industry-specific in their applicability. According to Rosenberg, when those standards were first proposed, the Chemical Manufacturers' Association asked EPA to clarify which portions of the proposed industry-specific standards superceded which portions of the proposed general standards. The Agency responded that the regulations were too complicated for that question to be answered at the front end. Instead, the answer would emerge "in enforcement, later down the road."

Rosenberg also stated that, when he worked at Occidental Petroleum, he and his colleagues had calculated that, at one refining plant, there were "several hundred thousand regulatory transactions per year." (He defined "regulatory transaction" as "any thing you would install or do, changes you would make, etc., that have a regulatory consequence.") In light of this, he suggested "the number of opportunities you have to violate [regulatory requirements] has escalated exponentially."

Rosenberg argued that regulatory complexity frequently stems from "administrative convenience, especially with regard to who has the burden of proof as to compliance." However, he said, "there is a cost to doing that." As an alternative approach, he recommended that EPA look at "the clarity and simplicity of the rules involved" and at "whether or not each of those increments of complexity really give you a benefit from a [pollution] control standpoint and is justified, given the cost of coming into compliance."

Steve Herman responded to Ernie Rosenberg's statements by stating that EPA's regulations "are complicated, but not that complicated really." He noted that, in many instances, the industrial processes that are being regulated are themselves very complex. Regulatory complexity is sometimes a function of that fact. In addition, Herman stated that "if you write a simple,

straightforward regulation, the first time you try to enforce it the industry lawyers will drive a truck through it. So [in drafting regulations] people [in the Agency] try to nail everything down [with specific regulatory language]."

To what extent does the complexity of federal environmental regulations pose a barrier to industrial compliance? While they cannot be entirely discredited or ignored, Ernie Rosenberg's articulately stated concerns on this point do appear exaggerated. Steve Herman is quite right in concluding that the Agency's regulations are "not that complex" in most instances, and where they are complex, this is often the result of Agency accession to regulatory changes demanded (or forced) by regulated entities. Moreover, regulated industries generally have access to well compensated attorneys and consultants, as well as a plethora of written materials, that explain EPA regulations and their applicability in reasonably straightforward terms. That is especially true of the larger, more profitable companies within such industries.

Mr. Rosenberg's anecdote regarding EPA's proposed MACT regulations does make a fair point. All regulated entities should certainly be afforded fair advance notice of the requirements they must meet. To the extent it is accurate, Rosenberg's vignette does reflect a serious failing on the Agency's part in that instance. At the same time, however, this anecdote is not necessarily an indication that EPA's regulations are typically too opaque for regulated companies (or even EPA personnel) to comprehend and apply. One suspects that that problem occurs far more rarely than Rosenberg appears to have implied. Additionally, where EPA regulations have failed to provide regulated parties with clear notice as to what was expected of them, courts have not hesitated to preclude Agency enforcement of those requirements.[24]

Mr. Rosenberg's statement with respect to the excessive number of "regulatory transactions" required at refineries is also difficult to credit. As Steve Herman mentioned, many industrial processes (such as refineries) are highly complex. To regulate them effectively, EPA must, at times, draft regulations that are themselves complex and lengthy. Moreover, Rosenberg provided no indication of the methodology he used in arriving at the striking conclusion that Occidental's plant had "several hundred thousand" regulatory transactions per annum. Nor did he state how many of those "transactions" concerned environmental requirements or how

24. *See, e.g.*, General Electric Co. v. United States EPA, 53 F.3d 1324 (D.C. Cir. 1995).

many "nonregulatory transactions" occurred annually at the same plant, as a result of production-related activities.[25]

Regulatory simplification may, perhaps, be a worthy goal in the abstract. Nonetheless, EPA and state regulators have been perspicacious in recognizing the risks that will result to human health and the environment if that goal is pursued in a careless or heavy-handed way.

VII. CONCLUSION: THE CRITICAL SIGNIFICANCE OF ADEQUATE ENFORCEMENT RESOURCES

The AALS panel discussion considered above raised a number of controversial and provocative questions regarding environmental enforcement at the federal and state levels. Given their diverse backgrounds and interests, it was, perhaps, not surprising that the thoughtful participants in this discussion reached differing conclusions as to the appropriate roles of deterrent and cooperative enforcement, the extent to which state agency enforcement efforts should be autonomous, the most appropriate way to measure governmental enforcement performance, and the significance of regulatory length and complexity in an enforcement context. However, an unspoken yet common theme does appear to emerge from this session: almost every credible, serious solution advanced to improve the efficacy and fairness of environmental enforcement will require an allocation of additional budgetary resources to a federal or state environmental agency.

As discussed previously, governmental compliance assistance to small business and communities seems a worthwhile supplement to a vigorous, deterrent enforcement program. In order for it to be effective, however, compliance assistance must be provided by a sufficient number of well-trained professionals who hold numerous meetings with regulated individuals, create informative Web sites, respond to e-mail inquiries and other information requests, and perform other required tasks. Unless new experts are hired to perform those functions (in federal and state environmental agencies), government technical personnel will have to be transferred to compliance assistance units from deterrent enforcement programs. Such a change would likely undercut the latter programs (which are allegedly understaffed in many cases), and it would diminish the deterrent impacts of their work.

Similarly, as we have observed, EPA's hand would be strengthened in its ongoing disputes with recalcitrant states if the

25. In fairness, in the setting of a panel discussion, one would not typically expect a presentation of these sorts of details.

Agency had the means to establish a contingency fund to be used – in particular states where necessary – to substitute effective EPA enforcement for lax or non-existent state agency enforcement. Obviously, such a fund would require an infusion of new monies into EPA's budgetary accounts.

Given the inadequacies of record keeping for environmental enforcement, we have seen that it would be sensible to supplement traditional compilations of new enforcement cases and penalties with more and better data regarding the environmental effects of enforcement and compliance assistance, compliance rates in industrial sectors, and public participation. However, additional record keeping of this sort will also consume federal and state resources.

Finally, regulatory simplification is also a resource-intensive task. To the extent that it is sound policy for EPA to review its voluminous set of regulations with a view towards simplifying them – without creating "loopholes" that will negate their important purposes and goals – the Agency will need to add to its professional staff to carry out that task.

As noted above, EPA and state level environmental officials have faced chronic resource shortcomings in recent years. This deficiency is not a new situation. As early as 1980, EPA's former deputy administrator, John Quarles, bemoaned the fact that the Agency's statutory responsibilities had increased far more quickly than its pool of personnel had grown.[26] And in March, 1991, a GAO official testified that, for more than a decade, EPA's budget had been "essentially capped" despite an enormous growth in the Agency's duties.[27] The GAO's more recent reports (referred to earlier) demonstrate that EPA's budgetary shortages have only worsened during the rest of the 1990's – as have similar resource gaps among state environmental agencies.

As Ernie Rosenberg has pointed out, some of EPA's budgetary woes stem from the fact that the House and Senate appropriations subcommittees that control EPA's funding levels also have jurisdiction over some 24 other agencies (from the Department of Veterans Affairs to the National Aeronautics and Space Administration). Competition for resources within this limited budgetary account is exceptionally intense. Moreover, unlike

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26. This question appears in Steven A. Cohen, *EPA: A Qualified Success, in* CONTROVERSIES IN ENVTL. POL'Y 179 (Sheldon Kaminiecki, Robert O'Brien & Michael Clarke eds., 1986).

27. *See Observations on the Environmental Protection Agency's Budget Request for Fiscal Year 1992, Hearings Before the U.S. Senate Comm. On Environment and Public Works*, 102nd Cong., 1st Sess. (1992) (statement of Richard L. Hembra).

certain of the agencies and departments with which it competes, EPA does not have a single, well-organized, and unified constituency that regularly supports its budget requests.[28]

In view of this situation, what can be done? One helpful step would be for those who are concerned about the declining institutional capability of environmental agencies – from citizen environmental organizations to state and local officials and others – to communicate their concerns to federal and state legislators in an informed and systematic way. Some such communication does now occur. It would certainly be useful, however, if it was more frequent, intensive and coordinated.

Beyond this, over the long-term, environmental organizations would do well to add to their list of goals and priorities a long-overdue reform of Congress' appropriation process (at least as it affects the EPA). The persistently "stacked deck" that EPA faces, as it scrambles for budgetary allocations, need not be accepted as inevitable. Instead, Congress can and should be urged to take discrete steps to alter the roles and composition of some of its own committees.

Specifically, the House and Senate Appropriations Committees can be restructured to create a separate subcommittee for environmental matters. In addition, committee memberships in both houses of Congress can be modified so that there is an overlap between the members of the committees that draft legislation which EPA must implement and the committee members with control over the Agency's budget.

Those changes would not guarantee that EPA and state environmental agencies would begin to receive a share of the federal budget that more closely approximates their important needs in the areas of enforcement and compliance assistance. Nonetheless, they would undoubtedly make that result more likely. And without them, the prospects for significant improvements in federal and state environmental enforcement – and in balanced and accurate assessment of its effectiveness – seem dim indeed.

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28. For more extensive discussion of the institutional arrangements affecting Congressional decisions as to EPA's budget, *see* MINTZ, *supra* note 22, at 115-118.

TRANSLATING SCIENCE INTO LAW: PHOSPHORUS STANDARDS IN THE EVERGLADES

KEITH RIZZARDI*

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I. INTRODUCTION: PHOSPHORUS PROBLEMS IN THE EVERGLADES

Throughout the twentieth century, the United States Army Corps of Engineers (hereinafter the "Corps"), the State of Florida, and the South Florida Water Management District (Water Management District or District), a regional governmental agency serving as local sponsor to the Corps, constructed and operated a

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massive network of water management structures throughout southern Florida. The Central and Southern Florida Flood Control Project (C&SF Project), as the system became known, included over 1,200 miles of canals, pump stations, and other structures that drained wetlands and diverted waters to provide flood control and water supply for the people of southern Florida.[1] Unfortunately, the C&SF Project also had significant detrimental effects on the environment, especially to the water quality in the Everglades.

One of the major changes to the Everglades ecosystem involved the levels of phosphorus contained in the watershed,[2] which historically was very low.[3] But the C&SF Project and its accompanying changes to the Florida landscape created new sources of phosphorus, including 700,000 acres of Everglades Agricultural Area (EAA).[4] Once a part of the Everglades, the EAA is now a productive agricultural area whose phosphorus-laden runoff flows south into the remaining Everglades.[5] Similarly, modern urban lands west of Interstate Highway I-95 were once part of the Everglades, but today they are dotted with homes, developments, roads, and golf courses and have become another source of phosphorus for the Everglades.[6]

While the Water Management District was originally created to protect these agricultural and urban areas by operating the federal flood control project,[7] its role dramatically changed over time. By the 1970s, the agency's new responsibilities included the regulation of water quality and water supply and the protection of Florida's wetlands and water resources.[8] But events of the late 1980s and 1990s would add another responsibility to the Water Management District's growing list: Everglades restoration.

A. The 1988 Everglades Lawsuit

In 1988, the federal government sued the State of Florida and the Water Management District for the consequences of operating the flood control project that the United States had helped to design

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1. Stephen S. Light & J. Walter Dineen, *Water Control in the Everglades: A Historical Perspective, in* EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION 47-84 (Steve Davis & John Ogden eds., 1994).

2. Steven M. Davis, *Phosphorus Inputs and Vegetation Sensitivity in the Everglades, in* EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION, *supra* note 1, at 357-78.

3. DISCOVER A WATERSHED: THE EVERGLADES 131, (George B. & Sandra C. Robinson et al. eds., The Watercourse 1997).

4. Light & Dineen, *supra* note 1, at 60-61.

5. Davis, *supra* note 2, at 359-66.

6. South Florida Water Management District, Everglades Stormwater Program: Program Summary, at 15-21 (Jan. 2000).

7. 1929 Fla. Laws ch. 13711; 1949 Fla. Laws ch. 25214.

8. Florida Water Resources Act of 1972, 1972 Fla. Laws ch. 72-299.

and build.[9] The lawsuit, known as *United States v. South Florida Water Management District*,[10] alleged that state water quality standards were being violated on federal lands because discharges from agricultural and urban areas into the Everglades contained elevated levels of nutrients, particularly phosphorus.[11] The parties recognized that the Everglades was adversely impacted, and that native sawgrass prairies which required low phosphorus inputs were being overtaken by cattail and other vegetation that thrived on elevated phosphorus levels.[12] But the parties simply did not agree on who was responsible for the problem.[13]

B. The Settlement Agreement and Consent Decree

After two years of intense litigation, Florida Governor Lawton Chiles entered the courtroom in 1991 and announced that the State was willing to settle.[14] The federal lawsuit had forced Florida to confront its water quality problems, and to begin an effort to come into full compliance with the federal Clean Water Act (CWA).[15] Based on the CWA, all states are required to establish a set of state water quality standards, including designated uses for state waterbodies, an anti-degradation policy, and a set of water quality criteria for the various chemical constituents found in the watershed.[16] Florida's existing state water quality criterion for total phosphorus is a narrative standard that requires "no imbalance in

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9. Keith W. Rizzardi, *Alligators and Litigators: A Recent History of Everglades Regulation and Litigation*, 75 FLA. B.J. 18, Mar. 2001 (providing more details on Everglades related litigation).

10. United States v. South Florida Water Management District, 922 F.2d 704 (11th Cir. 1991).

11. United States v. South Florida Water Management District, Case No. 88-1886-Civ-Hoeveler, Complaint (October 11, 1988).

12. In early proceedings, attorneys for the South Florida Water Management District acknowledged that pollution existed in the Everglades, noting that the state was already undertaking significant pollution planning efforts. *See* United States v. South Florida Water Management District, Case No. 88-1886-Civ-Hoeveler, Transcript of Hearing Proceedings (November 1, 1989).

13. In hearings before Judge Hoeveler, Water Management District attorneys argued: "They (the federal government and U.S. Army Corps of Engineers) are accusing themselves of violating state law. They are saying that the Corps and the District structures have been operating without state permits . . . We are saying that the Corps has to be on this side of the courtroom. They are a defendant. They give us orders. They have Congressional mandates ... They may be the most important party in this courtroom." *Id.*

14. "I am ready to stipulate today that that water is dirty ... I am here, and I brought my sword. I want to find out who I can give that sword to and I want to be able to give that sword and have our troops start the reparation, the clean up . . . let us use our troops to clean up the battlefield now, to make right this water; to make this water clean and not to continue to force us to fight." *Id.* at Transcript of Hearing Proceedings (May 21, 1991).

15. 33 U.S.C. §§ 1251-1387 (1994).

16. 33 U.S.C. § 1313 (1994).

flora or fauna."[17] Although that narrative approach reflects the reality that appropriate nutrient concentrations vary between ecosystems, it also begs the fundamental question for the Everglades: at what point does "imbalance" begin?

To answer that question, the settling parties and other interest groups began a series of technical mediation and consensus building efforts. The result was a historic Settlement Agreement,[18] which was subsequently adopted in Miami by U.S. District Court Judge Hoeveler in a Consent Decree.[19] In the document, the parties agreed upon certain numeric limitations for phosphorus, which were to be monitored in interior areas of the Everglades.[20] Appendix A established interim and long-term inflow "limits" for Everglades National Park, with long-term limits ranging from an annual average of 8 to 14 parts per billion (ppb) of phosphorus, depending on rainfall volumes. Appendix B established similar interim and long-term limits for the Loxahatchee National Wildlife Refuge, ranging from 8 to 22 ppb, again, depending on rainfall. In addition, the body of the Settlement Agreement required the implementation of a research and monitoring program to formally interpret the state's existing narrative water quality criterion for phosphorus.[21] According to the judicial order entering the Settlement Agreement as a Consent Decree, these limits would ultimately be accomplished by the state agencies pursuant to their own regulatory authority and responsibilities under state law.[22]

C. Florida's Everglades Forever Act

Additional negotiations and consensus-building efforts eventually produced a Statement of Principles that described a comprehensive effort to restore the Everglades.[23] The principles of that document were incorporated into the 1994 Everglades Forever Act (the EFA), which provides direction and funding to the District and Florida Department of Environmental Protection (the Department) for the much of the Everglades restoration effort.[24]

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17. FLA. ADMIN. CODE R. 62-302.530 (2000).

18. *Supra* note 11, at Settlement Agreement (July 11, 1991).

19. *Id*. at Memorandum Opinion and Order Entering Settlement Agreement as Consent Decree (Feb. 24, 1992).

20. *Id*. at Settlement Agreement (July 26, 1991).

21. *Id*. at 8-9.

22. *See supra* note 11, at Memorandum Opinion and Order Entering Settlement Agreement as Consent Decree, at note 19 n. 6.

23. United States Department of the Interior, United States Army Corps of Engineers, South Florida Water Management District, Florida Department of Environmental Protection, United States Sugar Corporation, South Bay Growers, Inc., and Flo-Sun Incorporated, *Statement of Principles* (July 13-14, 1993). *See also* Rizzardi, *supra* note 9, at 22.

24. FLA. STAT. § 373.4592 (2000).

The EFA expanded the scope of the restoration to include state lands in addition to the federal lands, imposed new taxes and regulatory requirements on the agricultural areas upstream of the Everglades, and required the construction of six wetlands, known as Stormwater Treatment Areas, to filter agricultural runoff before it flowed into the Everglades.[25] But the EFA also specifically addressed the issue of phosphorus pollution in the Everglades, stating: "The Legislature finds that waters flowing into the Everglades Protection Area contain excessive levels of phosphorus. A reduction in the levels of phosphorus will benefit the ecology of the Everglades Protection Area."[26] That language is further supported by Section 4 of the EFA, which specifically requires the Department and District to complete any additional research necessary to "numerically interpret for phosphorus the Class III narrative nutrient criterion necessary to meet water quality standards in the Everglades."[27] Furthermore, if the phosphorus research and rulemaking effort is not completed in time, the EFA includes a default provision: "The phosphorus criterion shall be 10 parts per billion (ppb) in the Everglades Protection Area in the event the Department does not adopt by rule such criterion by December 31, 2003."[28] Ultimately, the EFA establishes a goal of full compliance with all water quality standards, including the phosphorus standard, by December 31, 2006.[29]

II. SCIENCE: RESEARCHING THRESHOLDS FOR PHOSPHORUS IMBALANCE

Since the passage of the EFA, scientists have conducted additional research to identify the appropriate phosphorus threshold – the point at which Everglades flora and fauna experience an imbalance.[30] Data assembled by scientists from the Water Management District, Florida Department of Environmental Protection, and Duke University Wetland Center will define the debate over the appropriate state water quality criterion for

25. *Id*. § 373.4592(4).

26. *Id*. § 373.4592(1)(d). The Everglades Protection Area is defined to include the remnant areas of the Everglades, including the northern section of the Everglades that is the Loxahatchee National Wildlife Refuge, the middle sections that are known as Water Conservation Areas 2 and 3, and the terminal, southern part of the Everglades that is Everglades National Park. *Id*. § 373.4592(2).

27. *Id*. § 373.4592(4)(e)2.

28. *Id*.

29. *Id*. § 373.4592(10).

30. EFA, FLA. STAT. § 373.4592(4)(e).

phosphorus in the Everglades.[31] But a close look at that data also helps to demonstrate the problem of translating science into law.

A. South Florida Water Management District's Research

The 2000 Everglades Consolidated Report (2000 ECR), an annually published and peer-reviewed document that reported on the research and permitting requirements of the District and Department, provided a detailed analysis of research data from locations in the Everglades.[32] The 2000 ECR described a nutrient gradient in the Everglades, with the highest concentrations of phosphorus in both the soil and the water column appearing in the northernmost parts of the Everglades and declining at downstream monitoring locations to the south.[33] The peer-reviewed document also described the adverse impacts of phosphorus upon Everglades periphyton communities – floating mats of microalgae and other microscopic life that are fed upon by aquatic organisms that form the base of the Everglades food web.[34] Ultimately, the 2000 ECR concluded that the periphyton communities were very sensitive to the nutrient changes and were affected at locations with elevated soil phosphorus levels and with phosphorus concentrations in the water column exceeding 10 ppb.[35]

B. Duke University Wetland Center's Research

Scientists at Duke University made different numerical interpretations of the phosphorus imbalance.[36] In its January 2000 Final Report, the Duke University Wetland Center agreed with District scientists in concept that a nutrient gradient existed in the Everglades and that flora and fauna changed along the gradient, depending upon nutrient levels.[37] However, their conclusions

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31. Although similar research is reportedly underway at Florida International University, only preliminary data has been available and has not been published as of the writing of this article. *See* Grover Payne, Temperince Bennett, & Kenneth Weaver, *Chapter 3: Ecological Effects of Phosphorus Enrichment in the Everglades, in* SOUTH FLORIDA WATER MANAGEMENT DISTRICT, 2001 EVERGLADES CONSOLIDATED REPORT, at 3-4 (Jan. 1, 2001).

32. *See* Paul McCormick, Susan Newman, Garry Payne, ShiLi Miao, & Thomas Fontaine, *Chapter 3: Ecological Effects of Phosphorus Enrichment in the Everglades, in* SOUTH FLORIDA WATER MANAGEMENT DISTRICT, EVERGLADES CONSOLIDATED REPORT, Jan. 1, 2000.

33. *Id.* at 3-14 to 3-17.

34. *Id.*; *see also* Joan Browder, Patrick Gleason, & David Swift, *Periphyton in the Everglades: Spatial Variation, Environmental Correlates, and Ecological Implications, in* EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION, *supra* note 1, at 379-418.

35. *See* McCormick et al., *supra* note 32, at 3-3.

36. Funding for the Duke University research was provided by the Everglades Agricultural Area Environmental Protection District. Curtis J. Richardson et al., Duke University Wetland Center, *FINAL REPORT The Ecological Basis for a Phosphorus (P) Threshold in the Everglades: Directions for Sustaining Ecosystem Structure and Function* (Jan. 2000).

37. *Id.* at 125-31.

differed from the District's on the point where imbalance occurs. According to Duke University's analysis, maintaining annual average water column TP concentrations in a range from 17-22 ppb would prevent significant alteration of the Everglades periphyton and other algal communities,[38] and a numeric phosphorus concentration of 20ppb would achieve a balance of flora and fauna.[39]

C. Florida Department of Environmental Protection's Analysis

The different conclusions reached by the District and Duke University research reports were further analyzed and reported upon by Department staff in the 2001 Everglades Consolidated Report (2001 ECR). [40] After review of the District's data, the Department noted that the reference cites used by the District – the areas least impacted by phosphorus – had annual total phosphorus concentrations ranging from 7.8 to 10.5 ppb in the Loxahatchee National Wildlife Refuge, the northernmost areas of the Everglades.[41] Additional data from Everglades areas to the south indicated total phosphorus concentration ranges for reference sites between 5.9 and 9.1 ppb.[42] Although the chapter acknowledged differences between the District's research data and the Duke University data, it also noted that the Duke University's data represented a small area of measurement and a limited period of time.[43] Those spatial and temporal limitations meant that the University's research was exposed to significantly more variability in phosphorus concentrations,[44] that the Duke University conclusions were probably biased high,[45] and that the District's research was more reliably associated with the biological responses actually observed.[46]

Based on this analysis, the Department's chapter in the 2001 ECR concluded that the default criterion of 10ppb found in the EFA would be protective of the natural flora or fauna in the Refuge and Water Conservation Area 2 without being overly protective or below the natural background levels.[47] The chapter further concluded that the default criterion may not be statistically differentiable from

38. *Id.* at 148.
39. *Id.* at 150.
40. *See* McCormick et al., *supra* note 32, at 3-47.
41. *Id.*
42. *Id.*
43. *Id.* at 11-14.
44. *Id.* at 13.
45. *Id.* at 13-14.
46. *Id.*
47. *Id.* at 3-47.

alternative numbers that could be identified through further research.[48]

D. Scientific Peer-Review Analysis

Each year, the Everglades Consolidated Report is subjected to a scientific peer-review process, in accordance with the law.[49] The 2001 ECR was no different. In its Final Report, the scientific peer-review panel addressed the conflicting science on phosphorus threshold concentrations discussed above. While the panel praised the Report as a defensible scientific account of the data[50] that used the best available information,[51] the peer-reviewers also expressed concerns with the analysis used by Duke University, considering it inappropriate for setting a phosphorus criterion.[52] Specifically, the panel noted the absence of spatial and temporal variability in the data and the use of arithmetic averages of data from a limited area instead of geometric averages based upon data from a broader range of areas.[53] However, the panel also noted that the Duke University approach was no less scientifically valid than other approaches and that the District and Department should continue working with Duke University scientists to extract as much value as possible from their research information and to reconcile the different conclusions.[54]

III. LAW: THE FORMAL ESTABLISHMENT OF EVERGLADES PHOSPHORUS STANDARDS

Eventually, the threshold research described above will be incorporated into state and federal law, although the application of that law will be difficult. Florida law calls for a rulemaking process, while federal law requires approval by the U.S. Environmental Protection Agency (U.S. EPA). Established tribal water quality criterion for phosphorus and the looming potential for litigation further complicate the process.

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48. *Id.*

49. *See* EFA, FLA. STAT. § 373.4592(4)(e) (2000).

50. SOUTH FLORIDA WATER MANAGEMENT DISTRICT, 2001 EVERGLADES CONSOLIDATED REPORT, *Appendix 1-1b Final Report of the Peer-Review Panel Concerning the 2001 Everglades Consolidated Report*, October 23, 2000, at A1-1b-28-29 (Jan. 1, 2001).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 26, 28.

A. State Water Quality Rulemaking and Permitting

As mentioned above, the EFA established not only a default criterion, but also a specific timeline for completing a rulemaking process pursuant to the Florida Administrative Procedure Act (APA).[55] With the research now complete and in compliance with the EFA's deadlines, the Department is required to file a Notice of Rulemaking on the phosphorus criterion no later than December 31, 2001,[56] and to adopt the criterion by December 31, 2003.[57] Failure to meet that final 2003 deadline will result in establishment of the statutorily-referenced 10 ppb as the default phosphorus criterion, although interested persons may seek a stay of its implementation.[58] However, even if the default criterion were to be established, it would be superseded by any alternative criterion adopted by the Department at some future time.[59]

The rulemaking process, however, may prove burdensome for the Department – or more precisely, the Environmental Regulation Commission (ERC), which is the legally-established standard-setting authority of the Department.[60] In setting standards, such as the numeric phosphorus criterion for the Everglades, the ERC is required to consider scientific and technical validity, economic impacts, and relative risks and benefits to the public and the environment.[61] That analysis will occur through the public process required by the Florida APA, including Notices of Rule Development,[62] rulemaking workshops,[63] rule adoption notices[64] and hearings,[65] and review by the Florida Administrative Procedures Committee.[66]

In addition to following this state-mandated process for establishing a numeric criterion, the ERC and Florida Department of Environmental Protection will also need to consider four other important concepts that are addressed in the EFA, the federal Settlement Agreement, and state and federal water quality law: (1) discharge limitations, (2) moderating provisions, (3) compliance

55. FLA. STAT. § 120.54 (2000).
56. *Id.* § 373.4592(4)(e)1.
57. *Id.* §373.4592(4)(e)2.
58. *Id.*
59. *Id.*
60. *Id.* § 403.804.
61. *Id.*
62. *Id.* § 120.54(2)(a).
63. *Id.* § 120.54(2)(c).
64. *Id.* § 120.54(3)(a).
65. *Id.* § 120.54(3)(c).
66. *Id.* § 120.54(3)(e)6.; *Id.* § 120.545.

methodologies, and (4) already impacted areas of the Everglades. Each one of these issues presents potential for litigation.

1. Discharge Limitations

Discharge limits are addressed in the EFA, which states that "the Department shall use the best available information to establish relationships between waters discharged to, and result water quality in, the Everglades Protection Area."[67] Those relationships are then required by law to be used "to establish discharge limits for discharges into the [Everglades Agricultural Area] canals and the Everglades Protection Area necessary to prevent an imbalance in the natural populations of flora and fauna, and to provide a net improvement in areas already impacted."[68]

Discharge limitations, also known as effluent limitations, are typically required in permits issued in accordance with the Clean Water Act[69] (which would include permits issued by the Florida DEP as the state agency responsible for the federally-delegated National Pollutant Discharge Elimination System permits).[70] For example, a permit condition could state that a permittee may not discharge concentrations of parameter ABC that exceed XYZ parts per billion. In fact, discharge limitations in permits are considered a primary mechanism for controlling discharges of pollutants into downstream receiving water bodies.[71]

2. Mixing Zones and Other Moderating Provisions

In some cases, discharge limitations are included in permits, but are accompanied by moderating provisions, such as variances, when supported by specific data. Moderating provisions can be based upon economic factors,[72] site-specific information,[73] or mixing zones,[74] which allow discharges not to meet water quality

67. *Id.* § 373.4592(4)(e)3.

68. *Id.*

69. 40 C.F.R. § 122.44(d)(vi)(A) (2000).

70. *See* FLA. STAT. § 403.0885.

71. U.S. EPA, NPDES PERMIT WRITER'S MANUAL, *Major Components of a Permit*, at § 3.2. These discharge limitations are typically based upon the lower of two possible limits: best available technology limits or water quality standards. *Id*; s*ee also* FLA. ADMIN. CODE R. 62-650.300 (2000).

72. 33 U.S.C. § 1311(c) (1994); 40 C.F.R. § 122.21 (2000); *see also*, FLA. STAT. § 403.201(1)(a) (2000).

73. *See, e.g.*, FLA. ADMIN. CODE. R. 62-302.800 (providing for site-specific alternative criteria that can be used in lieu of otherwise applicable state water quality criteria, where justified).

74. FLA. STAT. § 403.061(11); FLA. ADMIN. CODE R. 62-4.244. Mixing zones generally allow discharges not to meet water quality requirements within a limited, defined region downstream of the discharge point. FLA. ADMIN. CODE R. 62-4.244(1)(a). Notably, the EFA prohibits mixing zones for certain agricultural discharges regulated by best management

requirements within a limited, defined region downstream of the discharge point.[75] Notably, the EFA prohibits mixing zones for certain agricultural discharges regulated by best management practices.[76] Mixing zones are, however, otherwise allowed by law, even in Outstanding Florida Waters such as the Everglades, provided that the discharges are necessary and approved for water management purposes.[77]

3. Compliance Methodology

Determining whether compliance with the applicable numeric criterion, discharge limits, and moderating provisions has been achieved will require monitoring at appropriate locations. In the federal Settlement Agreement, specific interior marsh locations and structures were identified for monitoring of phosphorus levels in Loxahatchee National Wildlife Refuge and Everglades National Park.[78] The EFA, in turn, refers to these requirements, stating that "the method for measuring compliance with the phosphorus criterion shall be in a manner consistent with [the Settlement Agreement] that recognizes and provides for the incorporation of relevant research."[79] Establishment of these monitoring locations, and the overall compliance methodology, is therefore another critical responsibility of the ERC and Department.

4. Net Improvement in the Areas Already Impacted

The phrase "net improvement in the areas already impacted" is used twice in the EFA. The first use, as quoted above, is associated with the setting of discharge limits. The EFA's second use of the phrase is in the context of establishing a method for evaluating compliance. The specific statutory language states that:

> compliance with the phosphorus criterion shall be based upon a long-term geometric mean of concentration levels measured at sampling stations recognized from the research to be reasonably representative of receiving waters in the Everglades Protection Area, and so located as to assure that the Everglades Protection Area is not altered so as to

practices. FLA. STAT. § 373.4592(11)(b). However, mixing zones are otherwise allowed by law, even in Outstanding Florida Waters such as the Everglades, provided that the discharges are necessary and approved for water management purposes. FLA. STAT. § 403.061(11)(b).

75. FLA. ADMIN. CODE R. 62-4.244(1)(a).

76. FLA. STAT. § 373.4592(11)(b).

77. FLA. ADMIN. CODE R. 62-4.244(1)(a); FLA. STAT. § 403.061(11)(b).

78. Settlement Agreement, *supra* note 19, at Appendices A-1 and B-1.

79. FLA. STAT. § 373.4592(4)(e)3.

> cause an imbalance in natural populations of flora and fauna and to assure a net improvement in the areas already impacted.[80]

5. Potential Litigation

Once the ERC publishes a notice of its proposed rules associated with the EFA, interested persons will have an opportunity to challenge the proposed rule prior to it taking effect.[81] The potential for such challenges, which would be governed by the Florida APA, is obvious, given the conflicting science related to the numeric phosphorus criterion for the Everglades. In that event, the challenger will have the initial burden to prove that the rule is an invalid exercise of delegated legislative authority, and then the Department and ERC will have the burden of proving by a preponderance of the evidence that the proposed rule is not invalid as to the objections raised.[82] If the EFA's default criterion of 10ppb, however, is indeed proposed by the ERC as the new phosphorus criterion, challengers of the proposed rule might have an even more difficult legal burden to meet, since the statutorily-referenced standard of 10ppb may be presumptively valid.[83]

To the extent that the ERC's rulemaking addresses the other issues related to the phosphorus criterion, including discharge limits, moderating provisions, compliance methodologies, and the net improvement requirement, those provisions will also be subject to a rulemaking challenge under the Florida APA. Alternatively, if the Department incorporates these other issues into future agency actions, such as permit issuance, then a Florida APA challenge of the agency action may result. For example, if the criterion is established by rule, but discharge limits and moderating provisions are established in individual permits, then opponents of the agency action would file a rule challenge of the criterion pursuant to Section 120.56, Florida Statutes, and a separate challenge of the permit as an agency decision affecting substantial interests pursuant to Section 120.569, Florida Statutes. But regardless of which mechanism is used, litigation remains an obvious possibility.

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80. *Id.*

81. FLA. STAT. § 120.56.

82. *Id.* § 120.56(2)(a).

83. *See, e.g.*, Department of Children and Family Services v. Natural Parents of J.B., 736 So. 2d 111 (Fla. 4th DCA 1999).

B. Federal Approval of State Standards

While Florida law establishes a clear state process for adoption of a numeric phosphorus criterion, the federal Clean Water Act (CWA) provides an additional layer of federal review and approval for all state water quality standards.[84] At least once every three years, each state must submit its water quality standards to the U.S. EPA, including the narrative and numeric water quality criteria.[85] New or revised water quality standards are also submitted for review.[86]

Thus, the U.S. EPA will have an opportunity to review and approve Florida's numeric phosphorus criterion after it is adopted pursuant to the state process. That review will consider five major factors: (1) whether the criterion is consistent with the requirements of the CWA;[87] (2) whether the state adopted a numeric phosphorus criterion[88] that adequately protects the designated use of the Everglades as Class III waterbody[89] for recreation, propagation and maintenance of a healthy, well-balanced population of fish and wildlife;[90] (3) whether the state followed its legal procedures for adopting the criterion;[91] and (4) whether the criterion meets minimum requirements for all water quality standards,[92] including proper methods and analysis[93] sufficient to protect designated uses[94] and compliance with anti-degradation policies.[95] While those four factors are based upon the federal CWA and its associated regulations, (5) a final factor for the U.S. EPA will be a review of any rules associated with the discharge limitations and the need for net improvement in already impacted areas. The U.S. EPA already noted that the EFA's language regarding net improvement to already-impacted areas has not been reviewed for consistency with the requirements of the Clean Water Act;[96] however, the agency also

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84. Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1313(c) (1994) and 40 C.F.R. § 131 (2000).

85. 33 U.S.C. § 1313(c)(1) (1994); 40 C.F.R. § 123 (2000).

86. 33 U.S.C. § 1313(c)(2) (1994).

87. 40 C.F.R. § 131.5(a)(1) (1994).

88. Note that the EFA defines the "phosphorus criterion" as a numeric interpretation for phosphorus of the Class III narrative nutrient criterion. FLA. STAT. § 373.4592(2)(j).

89. The definition of a Class III waterbody, the designated use of the Everglades, is provided in FLA. ADMIN. CODE R. 62-302.400 (2000).

90. 40 C.F.R. § 131.5(a)(2).

91. *Id*. § 131.5(a)(3).

92. *Id*. § 131.5(a)(5) (cross-referencing the minimum requirements in 40 C.F.R. § 131.6).

93. *Id*. § 131.6(b).

94. *Id*. § 131.6(c).

95. *Id*. § 131.6(d).

96. Letter from John H. Hankinson, Jr., Regional Administrator, U.S. EPA, Region 4, to Frank Finch, Executive Director, South Florida Water Management District (Jan. 19, 2001).

acknowledged the possibility of using moderating provisions such as variances or mixing zones in permits related to the Everglades restoration.[97]

Upon completing review of Florida's proposed rules, the U.S. EPA will notify the state of its decision.[98] At that point, interested persons may have a right to seek judicial relief from the U.S. EPA decision pursuant to the Federal Administrative Procedures Act (APA).[99] However, even though the Federal APA empowers courts to hold unlawful and set aside a U.S. EPA agency action that is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,[100] the challenger will carry a heavy burden. The U.S. EPA's action on review of a water quality standard will be presumed valid and will be entitled to great deference.[101]

C. Influence of Indian Tribes and Tribal Water Quality Standards

Given the fact that their reservation is adjacent to and within the Everglades, the Miccosukee Tribe of Indians (Miccosukee Tribe) is frequently involved in Everglades restoration issues. In fact, tribal governments can be treated as states under the CWA,[102] and the Miccosukee Tribe has already adopted its own numeric interpretation of the phosphorus criterion in the Everglades – 10 parts per billion.[103] That standard was approved by the U.S. EPA in 1999.[104] However, for some locations associated with the Tribe's agricultural, commercial, and residential developments, the Tribe did not adopt the stringent 10 ppb requirements, adopting instead a narrative criterion for phosphorus.[105] In addition, for all other

97. *Id.* at 2.

98. 40 C.F.R. § 131.21(a).

99. 5 U.S.C. § 702 (1994).

100. *Id.* § 706(2)(A).

101. *See* Natural Resources Defense Council v. United States EPA, 16 F.3d 1395 (4th Cir. 1993); s*ee also* Natural Resources Defense Council v. United States EPA, 806 F. Supp. 1263 (E.D. Va. 1992); *see also* Natural Resources Defense Council v. United States EPA, 770 F. Supp. 1093 (E.D. Va. 1991).

102. 33 U.S.C. § 1377(e) (1994); *see also* 40 C.F.R. § 131.8.

103. Miccosukee Environmental Protection Code, Subtitle B: Water Quality Standards for Surface Waters of the Miccosukee Tribe of Indians of Florida, Section 3(N) (Adopted December 19, 1997). Notably, although the Tribe established a 10 ppb limit for most waters on Tribal lands, the Tribe adopted an alternative, less specific standard for lands used for residential, agricultural, and tourism purposes.

104. Letter from John H. Hankinson, Jr., Regional Administrator, U.S. EPA Region 4, to Billy Cypress, Chairman, Miccosukee Tribe of Indians (May 23, 1999).

105. Miccosukee Environmental Protection Code, *supra* note 103, at 22. For these Class III-B waters, the Tribe adopted a narrative standard stating that "nutrients shall not be discharged which result in undesirable aquatic life effects or which result in chronic or acute toxicity to aquatic life." *Id.* at 9.

areas, the strict 10 ppb standard was also accompanied by policies allowing for moderating provisions.[106]

The federal approval of the Miccosukee Tribe's 10 ppb standard raises potential complications for the process of adopting a numeric water quality criterion in Florida. Indeed, in a 2001 letter to the South Florida Water Management District's Executive Director, the U.S. EPA clearly stated that it believed that "adequate information currently exists to set the numeric criterion at 10 ppb."[107] The U.S. EPA's reaffirmation of support for a 10 ppb numeric phosphorus criterion raises an important question: what if the State of Florida adopted a standard less restrictive than 10 ppb? Although some states have adopted standards less stringent than the U.S. EPA's guidelines recommend,[108] in the case of the Everglades phosphorus criterion, such an action would almost certainly trigger a return to the courtroom. If the U.S. EPA approved[109] an alternative phosphorus criterion other than 10 ppb, the Miccosukee Tribe would inevitably challenge that decision, as it has repeatedly filed lawsuits related to the review of state water quality standards for the Everglades under the CWA.[110]

Finally, even if Florida were successful in adopting and obtaining approval of a new numeric criterion for phosphorus in the Everglades other than 10 ppb, the difference between the state's criterion and the Miccosukee Tribe's criterion could create a need for

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106. *Id*. at 24-27 (establishing policies for variances and mixing zones).

107. Letter from John H. Hankinson, *supra* note 96.

108. *See* Natural Resources Defense Council v. United States EPA, 802 F. Supp. 1263 (E.D. Va. 1992), aff'd 16 F.3d 1395 (4th Cir. 1993) (holding that EPA approval of state standard less stringent than EPA's recommended standard was not arbitrary and capricious where the state's standard was based upon scientifically-defensible assumptions).

109. Approval of a state's proposed water quality standard is not a rubber stamp. EPA has great authority under the CWA, including the ability to reject a state water quality standard and to even promulgate its own standards when the state refused to modify its standards. *See* Mississippi v. Costle, 625 F.2d 1269, 1275-77 (5th Cir. 1980) (holding that EPA's promulgation of a substitute water quality standard for a state's proposed standard was not a clear error in judgment and was not arbitrary and capricious).

110. In 1995, the Tribe sued the U.S. EPA alleging that the agency had a mandatory duty to review the EFA as a change in Florida's state water quality standards. Although the case was initially dismissed based on EPA's assertion that the EFA did not change state water quality standards, the decision in *Miccosukee Tribe v. United States*, Case No. 95-0533-Civ-Davis (July 26, 1995), was reversed and remanded to the lower court for fact-finding proceedings. Miccosukee Tribe v. United States, 105 F.3d 599 (11th Cir. 1997). To facilitate resolution of the matter, EPA did formally review the EFA, and concluded that the state law "did not change the water quality criterion, did not change designated uses of downstream waters, and did not change the state anti-degradation policy." U.S. ENVIRONMENTAL PROTECTION AGENCY, DETERMINATION CONCERNING THE EVERGLADES FOREVER ACT, at 10-14, 29 (Jan. 30, 1998). The lower court rejected that conclusion, holding that because additional water quality measures were not required until 2006, the EFA was a de facto suspension of water quality standards and that the EPA analysis was arbitrary and capricious. *See* Miccosukee Tribe v. United States, Case No. 95-0533-Civ-Davis, Omnibus Order at 26-28 (September 11, 1998).

consultation with the U.S. EPA Administrator.[111] The CWA envisioned the potential for "unreasonable consequences" when Indian tribes and states share common watershed boundaries.[112] In those cases, the U.S. EPA Administrator is required to establish a mechanism to resolve the disputes that addresses permit requirements, economic impacts, and present and historical uses of the waters to avoid the unreasonable consequences "in a manner consistent with the objectives" of the CWA.[113]

IV. TRANSLATION: THE ROLE OF POLICYMAKERS

By itself, the establishment of a new numeric water quality criterion for phosphorus in the Everglades achieves nothing. Rather, the new criterion represents a restoration objective, and setting that objective requires consideration of four essential policy questions. First, what is restoration – in other words, how high should the goal be set? Second, how to evaluate compliance – must compliance be instantaneous at the point of discharge into the Everglades, or somewhere downstream? Third, who pays – how should economic impacts be considered? Lastly, who cares – who is likely to file suit, and can the legal challenges be withstood? Each of these questions must be resolved through open discussions of matters of science, law, and public policy. The answers to those questions, coupled with the establishment of a numeric phosphorus criterion, will ultimately determine the course of the Everglades restoration.

A. Science and Policy: What is Restoration?

The term "Everglades restoration" is often used, but ill-defined. What constitutes restoration? Is restoration simply meeting state anti-degradation policies[114] and preventing conditions in the Everglades from getting worse? Is it full compliance with all state water quality standards? Perhaps it is a return to conditions before the 1900s, when the dredging and construction of south Florida's water management systems first began?

The quality of ecosystems has long been categorized based upon their abundance of nutrients, with low nutrient systems called oligotrophic, moderate nutrient systems called mesotrophic, and higher nutrient systems called eutrophic or hypereutrophic.[115] The

111. 33 U.S.C. § 1377(e) (1994).
112. *Id.*
113. *Id.*
114. *See* FLA. ADMIN. CODE. R. 62-4.242 (2000); 40 C.F.R. § 131.12 (2000).
115. Johan U. Grobbelaar & W. Alan House, *Phosphorus as a Limiting Resource in Inland Waters; Interactions with Nitrogen*, *in* PHOSPHORUS IN THE GLOBAL ENVIRONMENT (Holm

Everglades is well documented as a historically oligotrophic system,[116] a fact that led scientists researching the numeric threshold for phosphorus imbalance to focus primarily upon the sensitive algal communities of the Everglades, especially periphyton. This approach was recommended in the federal Settlement Agreement of the *United States v. SFWMD* lawsuit.[117] But even the Settlement Agreement recognized that there might be "other sensitive indicators of nutrient enrichment."[118]

As a result, in addition to studying periphyton communities, researchers from the District and Duke University also considered vegetation shifts in the Everglades – such as the shift from sawgrass which generally competes best at lower phosphorus levels, to cattail, a plant that out-competes sawgrass at higher phosphorus concentrations.[119] Despite this common focus, the groups reached different conclusions. Part of that dispute was based on simple differences in scientific and statistical approaches: District scientists looked for the *minimum threshold* level of phosphorus, above which any imbalance in periphyton or sawgrass communities first occurred;[120] whereas Duke University scientists looked for an *ecosystem level threshold* above which there was a high probability that imbalance in flora and fauna occurred.[121]

Notably, some groups even argue that balancing the periphyton or sawgrass communities to maintain an oligotrophic ecosystem is not a proper restoration goal and is an improper basis for establishing a phosphorus criterion for the Everglades. Instead, they argue that higher levels of phosphorus found in mesotrophic or eutrophic ecosystems are actually preferable, despite the Everglades' historically low nutrient conditions. For example, representatives of the Sugar Cane Growers Cooperative of Florida have argued that northern areas of the Everglades should have higher levels of phosphorus in order to encourage tree islands and create wading bird habitat.[122] Although these assertions were

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Tiessen ed., 1995).

116. Davis, *supra* note 2.

117. *See* Settlement Agreement, *supra* note 19, at Appendix D-2.

118. *Id*.

119. *See* McCormick et al., *supra* note 32, at 3-18 to 3-20; *see also*, Payne et al., *supra* note 31, at 3-31 to 3-35.

120. Payne et al., *supra* note 31, at 3-2, 3-3 and 3-16; *see also*, McCormick et al., *supra* note 32.

121. Payne et al., *supra* note 31, at 3-2, 3-3, 3-11, and 3-16; *see also* Richardson, et al., *supra* note 36.

122. Sujoy Roy & Steve Gherini, *An Overview of the Historical Everglades Ecosystem and Implications for Establishing Restoration Goals* (June 2000), *in* SOUTH FLORIDA WATER MANAGEMENT DISTRICT, 2001 EVERGLADES CONSOLIDATED REPORT, at Appendix 1-2c at 34 (Jan. 1, 2001).

rejected as impractical in the 2001 ECR,[123] they also highlight a fundamental fact: scientific assumptions and policy arguments regarding the definition of restoration will play an important part in the establishment of a numeric criterion for phosphorus.

B. Law and Policy: How to Evaluate Compliance?

In accordance with the Everglades Forever Act, District scientists have spent millions of dollars finding ways to optimize performance of the existing wetland marshes known as Stormwater Treatment Areas (STAs) and researching additional advanced treatment technologies capable of reaching low levels of phosphorus.[124] The research has focused particularly on "green" technologies to supplement the effectiveness of the STAs.[125] Prospective technologies include submerged aquatic vegetation or periphyton-dominated systems.[126] In the 2001 Everglades Consolidated Report, however, the Florida DEP acknowledged the potential limitations of these technologies, stating that "the use of more favored green technologies will result in small areas downstream of discharge locations that have [phosphorus] concentrations above 10ppb."[127]

This sentence in the 2001 ECR highlights another essential policy issue related to the phosphorus criterion that must be resolved: how will compliance be determined? Must the numeric criterion be met at the very moment waters pass into the Everglades, known as the "end of the pipe" approach? Alternatively, will the measurement be made at some locations downstream, based upon implementation of appropriate moderating provisions, such as mixing zones?[128] Finally, how frequently must the numeric criterion be met – at all times, or on an annual average? Resolution of these matters will again require a careful balancing of many factors.

C. Pure Policy: Who Pays? Who Cares?

The final factor that cannot be ignored in the debate over the establishment of a numeric criterion for phosphorus in the

123. Payne et al., *supra* note 31, at 3-42.

124. *See* Gregory Coffelt, Jana Newmann, et al., *Chapter 8: Advanced Treatment Technologies for Treating Stormwater Discharges Into Everglades Protection Area*, *in* SOUTH FLORIDA WATER MANAGEMENT DISTRICT, 2001 EVERGLADES CONSOLIDATED REPORT (Jan. 1, 2001).

125. *Id*.

126. *Id*.

127. Payne et al., *supra* note 31, at 3-42. In a January 19, 2001 letter, however, the United States EPA Regional Administrator expressed concern about allowing discharges into the Everglades "at levels higher than the numeric criterion to technically be in compliance." Letter from Hankinson, *supra* note 96, at 2. However, EPA also acknowledged that not enough research had been completed to draw any conclusions. *Id*. at 3.

128. *See supra* notes 75-79 and accompanying text.

Everglades is a reality of interest group politics. Many organizations have a stake in the Everglades restoration effort – including the agricultural groups who are concerned about economic impacts of increased taxes and regulatory burdens; conservation groups who are concerned with environmental protection issues; and even urban organizations and local governments whose discharges of stormwater into the Everglades could also be affected. For some of these groups, money is critical factor. Notably, however, while the Florida Environmental Regulatory Commission is explicitly required to consider economic issues,[129] the U.S. EPA is prohibited from doing so.[130] The potential for litigation – and its accompanying costs – is also likely to be an important policy issue considered during the development of a numeric phosphorus criterion for the Everglades.

V. CONCLUSION: A CALL FOR CONSENSUS

Many lawyers have experienced cases involving dueling experts – a common demonstration of the challenges presented by the intersection of science and law. In the case of the Everglades restoration, those common challenges are compounded by the uncommon complexity of the subject matter, the related state, federal and tribal laws, and the influence of policy issues and interest group politics upon the process.

Inevitably, the adoption of a numeric phosphorus water quality criterion – and any associated discharge limits, moderating provisions, or compliance methodology – will produce disagreements. Some interest groups will argue that what is done is not enough; others will argue that it is too much. Notably, even the legislature's default provision creating a 10 ppb phosphorus criterion if an alternative criterion is not established is subject to legal challenges and judicial intervention.[131] But a return to the courtroom is an obvious and unwelcome possibility that could halt the progress, at enormous expense. That possibility should alert all parties to the need for caution when the science of phosphorus thresholds is translated into law.

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129. FLA. STAT. § 403.804(1) (2000).

130. *See* Mississippi v. Costle, 625 F.2d 1269, 1275-77 (5th Cir. 1980) (EPA's refusal to consider economic factors in rejecting state's proposed water quality standard was not arbitrary and capricious and did not exceed authority of the Clean Water Act); *see also* Whitman v. American Trucking Ass'n., 531 U.S. 457, 467 (2001) (EPA could not consider implementation costs when setting air quality standards).

131. In the event that the 10ppb default phosphorus criterion were to take effect, a petition for a writ of mandamus could be filed to compel the Florida Department of Environmental Protection to establish an appropriate criterion by rule, and the 10 ppb criterion could be stayed by the Leon County court upon a demonstration of irreparable harm. FLA. STAT. § 373.4592(4)(e)2.

Doubt grows with knowledge.[132] As knowledge of the Everglades ecosystem expands, so does the potential for doubt, and with it, the potential for litigation. As a result, consensus should remain the primary goal of all the parties, enabling the Everglades restoration effort to continue. After all, the State of Florida and the United States Congress pledged $8 billion dollars for Everglades restoration, not for the payment of attorney's fees.[133]

132. Johann Wolfgang von Goethe, *quoted in*, THE QUOTABLE LAWYER 87 (David Shrager & Elizabeth Frost , eds., 1986).

133. *See* Water Resources Development Act of 2000, Pub. L. No. 106-541, § 601 (2000); *also* John J. Fumero & Keith W. Rizzardi, *The Everglades Ecosystem: From Engineering to Litigation to Consensus-Based Restoration*, 13 ST. THOMAS. L. REV. 667 (2001).

GREEN JUSTICE: A HOLISTIC APPROACH TO ENVIRONMENTAL INJUSTICE

NICOLE C. KIBERT*

Table of Contents

I. INTRODUCTION

Environmental injustice is a phenomena that occurs in the United States and around the world in which people of color and of lower socio-economic status are disproportionately affected by pollution, the siting of toxic waste dumps, and other Locally Unwanted Land Uses (LULUs). This paper addresses the historical and philosophical backgrounds of environmental injustice and reviews potential legal, practical, and philosophical solutions for achieving environmental justice.

Initially "environmental justice" was referred to as "environmental racism" because of the disproportionate impact on people of color; however, it is now clear that environmental health risks are foisted predominately on lower income groups of all racial and ethnic groups. In order to be inclusive, as well as to avoid the extra baggage that comes with calling an act "racist," practitioners almost exclusively use the term "environmental justice" rather than "environmental racism."[1] Though a discussion regarding nomenclature may seem superfluous, in the context of a discussion of the origins and strategies for achieving environmental justice it is actually integral. The way that a society assigns a connotation on

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1. Dr. Robert Bullard has said that "getting caught up in the term 'racism' is counterproductive" because that connotes intent, and regardless of whether intent is present, the result to the community is the same – a greater threat to their health from toxic sources. Steven Keeva, *A Breath of Justice: Along With Equal Employment Opportunity and Voting, Living Free From Pollution Is Emerging As A New Civil Right*, 80 A.B.A. J. 88 (Feb. 1994).

top of a word's denotation has an enormous impact on how a phrase will be interpreted by the general public. Use of the term "environmental justice" is a step in bringing the issue of a constitutional right to live in a healthy environment for all people – not just to those who are interested in racial equality.

II. WHAT IS ENVIRONMENTAL JUSTICE?

The United States Environmental Protection Agency defines "environmental justice" as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws regulations and policies.[2] Fair treatment means that no group - including racial, ethnic or socioeconomic groups - should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs.[3]

Many studies have shown that, over the past 20 years, minorities - African Americans in particular - are more likely to live in close proximity to an environmental hazard. Unfortunately, there are many examples to choose from to illustrate this observation. Colin Crawford, in his book, "Uproar at Dancing Creek," discusses in great detail the efforts of an entrepreneur to site a new hazardous waste facility in Noxubee County, Mississippi.[4] Conspicuously, when Crawford compared Noxubee County with other counties in Mississippi, he found that it had the highest annual average unemployment rate from 1970 –1993, a high rate of functional illiteracy with only 51.34 percent of its adult population having high school diplomas, and by far the lowest per capita income in the region.[5] In addition, of the 12,500 people who lived in Noxubee County, 70 percent were African American and poor.[6] Crawford found that siting of a hazardous waste dump in this poor, largely minority county was not an accident, but a calculated campaign. It pitted the poor African American majority and whites against the minority, but politically powerful, white population in a false promise of economic development that would bring new jobs. As Crawford stated, "people who most often bear the dangers of living near the excreta of our acquisitive industrial society are the

2. U.S. EPA, THE EPA'S ENVIRONMENTAL JUSTICE STRATEGY (1995).

3. U.S. EPA, GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE IN EPA'S NEPA COMPLIANCE ANALYSIS (1998).

4. COLIN CRAWFORD, UPROAR AT DANCING RABBIT CREEK: BATTLING OVER RACE, CLASS AND THE ENVIRONMENT (1996).

5. *Id*.

6. *Id*.

very same ones who have been most abused throughout our history."[7]

III. BRIEF HISTORY OF THE ENVIRONMENTAL JUSTICE MOVEMENT

The official history of environmental justice is approximately 20 years old. In 1979, in Houston, Texas, residents formed a community action group to block a hazardous waste facility from being built in their middle-class African American Neighborhood.[8] In 1982, environmental justice made news in Warren, North Carolina when a protest regarding the siting of a PCB landfill in a predominantly African American area resulted in over 500 arrests. The Warren protest was followed by a report by the General Accounting Office which found that three out of four landfills in EPA Region 4 were located in predominately African American areas, even though those areas comprised only 20 percent of the region's population.[9]

An additional report addressing environmental injustice was published in 1987 by the United Church of Christ entitled 'Toxic Waste and Race in the United States' which "found that the racial composition of a community – more than socioeconomic status – was the most significant determinant of whether or not a commercial hazardous waste facility would be located there."[10] The People of Color Environmental Leadership Seminar was held in 1991 in Washington D.C. and was attended by 650 people from around the world.[11] The attendees adopted a set of "principles for environmental justice" that were circulated at the Earth Summit in 1992 in Rio de Janeiro.[12] In 1992, the EPA established an Environmental Equity Workgroup. On recommendation from this group, the EPA started an Office of Environmental Justice.[13] In 1994, the Center for Policy Alternatives took another look at the United Church of Christ 1987 report.[14] They found that minorities are 47 percent more likely than others to live near hazardous waste facilities. [15]

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7. *Id.* at 367.

8. Robert D. Bullard & Glenn S. Johnson, *Environmental Justice: Grassroots Activism and Its Impact on Public Policy Decision Making*, 56 J. SOC. ISSUES 555 (2000).

9. U.S. EPA, THE HISTORY OF ENVIRONMENTAL JUSTICE, *available at* http://www.epa.gov/envjustice/history.html (last visited Mar. 4, 2001).

10. Keeva, *supra* note 1.

11. Bullard & Johnson, *supra* note 8.

12. *Id.*

13. U.S. EPA, *supra* note 9.

14. Bullard & Johnson, *supra* note 8.

15. *Id.*

The latest initiative in environmental justice occurred in 1994 when President Clinton issued Executive Order No. 12898[16] which ordered federal agencies to comply with Title VI[17] for all federally funded programs and activities that affect human health or the environment. Title VI states, "No person in the United States, shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[18] Though overdue by environmental justice activist standards, President Clinton's recognition of environmental justice increased government accountability, for which they were arguably already responsible, but now there was a clearly articulated standard.

IV. ORIGINS OF ENVIRONMENTAL INJUSTICE

The degradation of the environment is fundamentally tied to the disproportionate burden placed on the disenfranchised members of our society: minorities, women, and the poor. Several environmental philosophies have emerged – among them Deep Ecology, Ecological Feminism, and Bioregionalism – to attempt to explain how it became acceptable to exploit the environment while endangering the health of certain groups of humans in the name of economic development. In this section, a brief review of these ecological philosophies, as well as an examination of industrial risk analysis, are presented as possible explanations for the origins of environmental injustice.

Industries and governments use risk analysis to determine whether to allow projects to move forward. "When landscapes and ecosystems are regarded as commodities, then members of an ecosystem, including human beings, are treated as 'isolated and extractable units.'"[19] Industrial risk analysis determines how much exposure is acceptable in terms of "one-in-a-hundred-thousand or one-in-a-million additional 'acceptable' deaths for toxic chemical exposure."[20] While neutral on its face, risk analysis serves as a means for justifying disproportionate treatment for some "acceptable" percentage of an exposed human population. However, this method is fundamentally flawed because there is no set

16. Exec. Order No. 12,898, C.F.R. (1994)

17. 42 U.S.C. §§ 2000d–2000d-7 (2001).

18. *Id.*

19. WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND (1983).

20. Michael K. Heiman, *Waste Management and Risk Assessment: Environmental Discrimination Through Regulation, at* http://www.penweb.org/ej/wmra.html (last visited June 8, 2001).

standard for which tests to use in determining risks.[21] Therefore, extremely different conclusions can be reached about the same risk depending on which tests are used.[22] When a potentially hazardous project is being proposed, if it is a well-organized and economically well-off community, the community members will be able to come up with their own risk analysis numbers showing an unacceptable risk resulting in permit denial. However, if the negative impact is going to fall mainly on people who are not able to fight back, then the project will most likely go ahead with a risk analysis showing an acceptable risk by the permitting agency. There are alternatives to risk analysis that will be discussed *infra*, in the solutions for achieving environmental justice section.

Deep Ecology is an ecological philosophy that places humans within the context of ecological systems rather than outside or central to the system.[23] In addition, humans are considered to be equal, not superior or more important, in value to other components of an ecological system. It is a science based philosophy in that it is based on the connections of an ecological system, but it is also a true philosophy in that it encourages humans to delve "deep" into their fundamental values.[24] Arne Naess, considered the father of Deep Ecology, has developed a set of seven tenets which, when considered together, would form a type of ecological consciousness. The fourth tenet focuses on anti-class posture. "Diversity of human ways of life is, in part, due to (intended or unintended) exploitation and suppression on the part of certain groups. The exploiter lives differently from the exploited, but both are adversely affected in their potentialities of self-realization."[25] Naess and supporters of Deep Ecology believe that if we could focus on the impact of all of our actions on everything in the system (and importantly place humans within the system) that we could achieve social justice and live in harmony with the environment. Another one of the tenets is to fight against pollution and resource depletion. Taken together, these two tenets describe environmental justice: to treat all people equally while reducing pollution. Naess believes that when one of the tenets is considered independently problems will arise, and

21. Peter Montague, *The Waning Days of Risk Assessment*, *at* http://www.rachel.org /bulletin/ bulletin.cfm?Issue_ID=1479 (last visited June 8, 2001).

22. *Id*.

23. GREAT RIVER EARTH INSTITUTE, DEEP ECOLOGY: ENVIRONMENTALISM AS IF ALL BEINGS MATTERED, *available at* http://www.geocities.com/RainForest/1624/de.htm#Deep (last visited May 30, 2001).

24. Alan Drengson, *An Ecophilosophy Approach, the Deep Ecology Movement, and Diverse Ecosophies*, *available at* http://www.deep-ecology.org/drengson.html (last visited May 20, 2001).

25. Arne Naess, *The Shallow and The Deep, Long Range Ecology Movements*, *available at* http://www.alamut.com/subj/ideologies/pessimism/Naess_deepEcology.html (last visited June 8, 2001).

either the environment or a class of people will suffer. Therefore, Deep Ecology requires inclusive, open thinking rather than the current industrial risk analysis focus that we now predominately use when determining whether to allow a polluting industry to develop or continue, or when determining where they can dump their hazardous waste.

There is a small but growing section in the ecological philosophy movement called "bioregionalism" that envisions a redrawing of political boundaries to follow the contours of local ecosystems.[26] "The globalization of modern culture has contributed to the spread of institutional values which threaten cultural and ecological diversity."[27] This movement believes that it will be necessary for people to begin functioning on a regional level in order to preserve the environment and protect ourselves from the affects of polluting industry. Bioregionalists call this 'living in place.' Bioregionalism means that "you are aware of the ecology, economy, and culture of the place where you live, and are committed to making choices that enhance them."[28] More radically they believe that people need to live in a sustainable way that involves living in regional units that provide for its inhabitants while co-existing with the natural ecosystem. Environmental injustice occurs because the emphasis for development is often not based on local needs or the preservation of cultural or biological diversity. When the emphasis is on the industrial needs, rather than cultural or ecological needs, environmental injustice is destined to occur.

Some ecofeminist theorists have stated that the feminization of nature is what started the ability to degrade the earth and people without regret. Popular environmental slogans state "love your mother." However, equating the earth and nature to a woman can have negative consequences in a patriarchal society that does not respect women. A recent Earth First! slogan illustrates the problem: "The Earth is a witch, and the men still burn her." As an environmental movement we definitely do not want to encourage the idea that mother earth will absorb everything we lob at her without asking anything in return. "Mother in patriarchal culture is she who provides all of our sustenance and who makes disappear all of our waste products, she who satisfies all of our wants and needs endlessly without any cost to us. Mother is she who loves us and will take care of us no matter what." [29]

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26. Bron Taylor, *Bioregionalism: An Ethics of Loyalty to Place*, LANDSCAPE J. (Spring 2000).

27. Chet A. Bowers, *Toward a Bioregional Future, in* BIOREGIONALISM (Michael Vincent McGinnis ed., 1999).

28. GREAT RIVER EARTH INSTITUTE, BIOREGIONALISM, *available at* http://www.geocities.com/RainForest/1624/ bioregionalism.htm (last visited May 30, 2001).

29. Catherine Roach, *Loving Your Mother: On the Woman-Nature, in* ECOLOGICAL

Ecofeminist theorists contend that it is this feminism of nature that leads us to ignore that there will be a cost to constantly barraging the earth with our waste products no matter what we choose to call her.[30] Oppression of minorities has a separate starting point, other than feminization, for justifying their disenfranchisement, but the result is the same for them as for the planet -- continual dumping without any cost by the majority.

The Ecofeminist philosophy believes that all systems of oppression are intertwined together underneath "a logic of domination" that is perpetuated by a patriarchal system.[31] Thus, oppression of women, minorities, and the environment are all based on the dominant force in our culture that, at present, is driven by economic and patriarchal forces. If the same force drives all these oppressive systems, it seems that if we can figure out how to get out from beneath that dominant force, we will be able to create environmental justice and also equality of all of the many different ways to categorize people. Ecofeminists believe that they are addressing heterogeneous interests because they represent women who are obviously extremely varied between economic and racial classes.[32]

The origins of environmental injustice are intertwined with the degradation of the earth and other oppressive regimes. They can be linked to the dominant force of global economic development over all else, including the health of the earth and its inhabitants. Ecofeminists connect environmental injustice to a patriarchal-based society. Remedies for environmental injustice will have legal elements, but to really attempt to solve the problem, a culturally based remedy of education, empowerment, and a new ethic of care for each other and the earth will be necessary.

V. SOLUTIONS FOR ACHIEVING ENVIRONMENTAL JUSTICE

In light of the roots of environmental injustice, it is apparent that the solutions for addressing environmental injustice must include, while at the same time reach beyond, legal remedies. In this section, a discussion of legal remedies for environmental injustice will be followed by extra-legal solutions, both philosophical and practical, for moving towards environmental justice.

FEMINIST PHIL. (Karen J. Warren ed., 1996).

30. *Id.*

31. Karen Warren, *The Power and the Promise of Ecological Feminism, in* ECOLOGICAL FEMINIST PHIL. (Karen J. Warren ed., 1996).

32. Deane Curtin, *Toward an Ecological Ethic of Care, in* ECOLOGICAL FEMINIST PHIL. (Karen J. Warren ed., 1996).

A. Legal Solutions

According to Barry E. Hill, one of the problems in this area is that "Environmental lawyers are not conversant in civil rights approaches to litigation... On the other hand, civil rights lawyers are not very familiar with environmental law."[33] In order to successfully litigate for environmental justice, lawyers must be able to merge civil rights law and environmental law into one coherent area. Environmental justice lawyers must be well versed in multiple statutory areas both on federal and state levels. Cases have been successful when utilizing a barrage of legal theories in the same suit, including the 13th[34] and 14th[35] amendments, Title VI of the Civil Rights Act,[36] NEPA,[37] and a variety of local zoning and historic preservation acts.

Title VI prohibits *intentional discrimination*, but the Supreme Court has ruled that Title VI authorizes federal agencies to adopt implementing regulations that prohibit discriminatory *effects*.[38] Therefore, a facially neutral policy that has a discriminatory effect will violate the EPA's Title VI regulations unless the EPA proves that there is no less discriminatory alternative and so they are justified. Individuals have a private cause of action to enforce the non-discrimination requirements in Title VI or EPA's regulative procedures without exhausting administrative remedies.[39]

Some local governments and developers have asserted that Title VI hinders redevelopment, and the Mayor's Forum in 1998 actually passed a resolution to that effect. In response, the EPA produced a report on Brownfields to see if Title VI had an impact on delaying their redevelopment.[40] The report found that no Title VI complaints had been filed at any of the pilot study sites. The cited reasons for this were: "1. Early and meaningful community involvement, and 2. Redevelopment that creates a benefit for the local community."[41] In general, the study stated that if the community is involved Title VI actions won't be necessary; but in cases where a developer or local government essentially acts in isolation, Title VI challenges are likely.

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33. Keeva, *supra* note 1.
34. U.S. CONST. amend. XIII.
35. U.S. CONST. amend. XIV.
36. 42 U.S.C. §§ 2000d-2000d-7 (2001).
37. National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347 (1969).
38. U.S. EPA, INTERIM GUIDANCE FOR INVESTIGATION TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (1998).
39. *Id*.
40. U.S. EPA, BROWNFIELD TITLE VI CASE STUDIES: SUMMARY REPORT (1999).
41. *Id*. at 13.

In addition to litigation using equal protection or Title VI,[42] it is also possible that a new civil right could be developed, based not on color, economic status, or gender, but based on the right of all people to live free from environmental health risks. Carol Browner, the EPA Administrator during the Clinton Administration, stated in her introduction to the EPA's Environmental Justice Strategy, "President Clinton and I believe that all Americans deserve to be protected from pollution – not just those who can afford to live in the cleanest, safest communities. All Americans deserve clean air, pure water, land that is safe to live on, and food that is safe to eat."[43] An impetus was arguably present, at the very highest level of our government, for creating this independent civil right; perhaps it can still become a reality.

The State of Montana has recognized a fundamental constitutional right to a "clean and healthy" environment.[44] The Supreme Court of Montana recently upheld the validity of the right when the Montana Department of Environmental Quality attempted to pass a water quality statute that would exempt some discharges from review.[45] Therefore, it is possible, at least on a state level, to recognize a fundamental right to a healthy environment. Unfortunately, further development at a federal level is unlikely during the current political environment. However, the groundwork has already been laid for this new right to be given further recognition. In order to have a successful campaign to give all people the right to a healthy environment, it must be both legal and philosophical.

In the meantime, environmental justice advocates should continue to pursue Title VI and equal protection challenges in court, while simultaneously working politically to develop a new right to live in an environmentally safe place, no matter what the economic or racial status may be. This is obviously a long-term goal, but in order to have a chance to realize it, people must continue to work for the right to a safe environment, so when the time is right, it can be recognized. One way for environmental justice advocates to accelerate the process of recognition of a federal right to a healthy environment is by determining a philosophical route to follow which will aid in achieving the necessary paradigm shift. Some possible philosophical options are outlined in the next section of this paper.

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42. 42 U.S.C. §§ 2000d-2000d-7 (2001).

43. U.S. EPA, *supra* note 2, at 2.

44. MONT. CONST. art. II, § 3, and the Nondegradation Policy est. by MONT. CONST. art. IX, § 1.

45. Mont. Envtl. Info. Ctr. v. Dept. of Envtl. Quality, 988 P.2d 1236 (Mont. 1999).

B. Philosophical Solutions: A Cultural Paradigm Shift

The most obvious way to stop environmental injustice is to stop putting people at risk by allowing industry and the government to continue to utilize risk analysis as a method for determining whether pollution should be allowed. There are alternative methods of determining whether a project should proceed. The precautionary principle has been defined as "when an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. In this context the proponent of an activity, rather than the public, should bear the burden of proof."[46] This method focuses on how to avoid exposure rather than measuring the amount of acceptable risk. In order to encourage alternative methods, such as the precautionary principle, we will have to encourage the government to move away from risk analysis and place the burden on the potential polluter rather than the potentially ill-affected public. A shift such as this will take nothing less than a cultural paradigm shift in which permitting processes are completely open to the public, especially the potentially affected people, and a full range of options are discussed, including no action at all.[47]

Ecofeminists have stated that to begin working towards breaking down the oppression systems that perpetuate the degradation of both the earth and disenfranchised people, we must shift to an ethic "that makes a central place for values of care, love, friendship, trust, and appropriate reciprocity-values that presuppose that our relationships to others are central to our understanding of who we are."[48] This ideal is something that can also be included in environmental education programs, but to really work it has to be implemented on a much larger scale, on the level of a paradigm shift.

Even more fundamental than education or community empowerment is the question of how we, as Americans, choose to live. We are a disposable society. As long as we continue to live in this manner we will need to dispose of all of our dirty, dangerous waste. It is going to have to go somewhere. The question is where? We can choose to focus on trying to minimize disparate impact of where we place our waste, and especially our hazardous waste, or we can choose to individually shift our focus to how to live a less-

46. Carolyn Raffensperger & Joel Tickner, *Implementing the Precautionary Principle*, *available at* http://www.islandpress.com/ecocompass/prevent/ (last visited May 20, 2001).

47. Montague, *supra* note 21.

48. Curtin, *supra* note 32, at 66.

consumptive lifestyle, and to make a commitment to make our industries safer and cleaner for all of us.

There seems to be a prevailing idea, at least on a national level as evidenced by current administration, that America cannot afford to force or even encourage its industry to clean up its operations. Yet, it seems that the better question is how can we afford not to encourage industry to minimize its environmental impacts? The United States may maintain its level of economic productivity by allowing dirty industry to continue virtually unchecked. However, most American people will not see an increase in wealth from allowing dirty industry to persist, but they will suffer environmental health problems, illustrating a textbook example of disparate impact – the corporations get wealthier, while the population gets sicker.

Of course, most people don't believe there is a real problem, or that technology will save us. Perhaps the more frequent instances of rolling blackouts, potable water shortages, polluted waterways and increased particulate matter in the air causing increased pulmonary disease, such as asthma, will help convince the public that the corporate bottom line is not the best method of determining which political agendas to push.

Bioregionalists posit that if political power is regionally defined by landscape boundaries, and people learn how to respect and communicate with each other, there will not be the basic social inequity that there is today. They believe that living sustainably on a regional level will eliminate much of the need for the types of super-polluting industry and the accompanying waste disposal problem. They believe in causing a radical shift in our educational system from an "emphasis in liberal education and ideology to a context-driven, system based orientation."[49] Bioregionalists also understand that they alone cannot create the necessary paradigm shift needed to protect all inhabitants of the earth. "No single movement can succeed in inspiring transformation of the 'consumer-producer society' on its own."[50] So the movement attempts to remain open and inclusive, providing a basis for approaching the diverse needs of the various classes of people that are adversely affected by pollution. Functioning on a regional level, as suggested by bioregionalists, may be an ultimate long-term solution to both environmental injustice and degradation of the earth in that decision-making would be open, inclusive, and based on the best interests of the local people and environment.

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49. Michael Vincent McGinnis, *A Rehearsal to Bioregionalism, in* BIOREGIONALISM (Michael Vincent McGinnis ed., 1999).

50. Doug Aberley, *Interpreting Bioregionalism, in* BIOREGIONALISM (Michael Vincent McGinnis ed., 1999).

One way that bioregionalism is occurring today in some areas is through community supported agriculture.[51] In Gainesville, Florida, there is a program called Plowshares where community members buy shares in a farmer's yearly crop. Preferences for crops are tallied and then during the producing season, members collect their share of the crop on a weekly basis. By supporting local farms, shareholders are supporting the local economy, as well as ecology, by preserving open space. In addition, shareholders have the advantage of knowing exactly where their produce is coming from, as well as what the soil conditions are, and whether pesticides and fertilizers have been used. This type of project can contribute to achieving environmental justice by allowing community members to have access to healthy, organic food, and on a larger scale, by protecting local water sources from contamination by fertilizer and pesticide run-off.

Deep Ecologists also believe that WWe must make fundamental changes in basic values and practices or we will destroy the diversity and beauty of the world, and its ability to support diverse human cultures."[52] Like bioregionalists, supporters of Deep Ecology believe that we must shift our focus from a global economy to a local economy. We must do this to preserve not only biological diversity, but also cultural diversity. If we continue to follow the risk-analysis industrial model then we will be unable to protect the diversity of human cultures, let alone biological diversity. Deep Ecology, therefore, like bioregionalism and ecofeminism, calls for a rejection of the industrial model in favor of adopting ecocentric values: place-specific, ecological wisdom, and vernacular technology practices. These will vary by place due to the variance in culture, resources, and topography.

Suggestions for cultural remedies to achieve environmental injustice include community participation and empowerment, individual environmental education, and reduction of our consumptive lifestyles, which will minimize the need for polluting industry and its accompaniment of waste. Bioregionalists, Deep Ecologists, and eco-feminists envision a method of incorporating a new paradigm that will focus on living on an eco-system based scale rather than a global scale, which will enable us to live more sustainably and harmoniously on the earth and also allow for more complete social equity. In addition to philosophical solutions, a review of practical solutions to environmental injustice that are currently on-going may give environmental justice advocates some ideas for how to proceed.

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51. GREAT RIVER EARTH INSTITUTE, *supra* note 28.

52. Drengson, *supra* note 24.

C. Practical Solutions

As foreshadowed above by the EPA's Summary Report on Brownfields and Title VI, the key to movement towards environmental justice is to have free-flowing information and community participation.[53] However, it is important that the real picture is given to community members to avoid the situation that occurred in Noxubee County,[54] where the majority of the community was willing to risk the environmental health of all for a few jobs. Strategies for environmental justice must focus on the roots of the problems not just band-aid the wound.

Using Noxubee County again as an example, what kinds of economic development are likely in that area? In a largely uneducated population, development is going to be geared towards low-paying, unskilled labor. Crawford suggests, "If Noxubee County and places like it do not get hazardous waste dumps and incinerators. They will get the next worse thing." [55] In Noxubee, there is now a prison work center, and chicken-processing plant, which arguably is better than a toxic waste dump, but not much better. In order to escape from a dismal future, focus must be placed on empowerment of the community and people, raising educational levels of the population and generally giving hope for something better. Clean industry will be unlikely to invest until there is a more qualified workforce. Empowerment is possible. One activist said, "We are not saying 'not in my backyard' we are saying 'my backyard is full' now it is our turn for clean jobs."[56]

The EPA has funded EPA Challenge Grants that try to encourage empowerment of local communities and increase participation in decision making strategies and planning. The Gainesville, Florida "Depot Avenue Eco-Development Project" is an EPA funded project, which is attempting to meet these goals centered on the redevelopment of a local Brownfield site.[57] The project leaders have been holding planning meetings with community members for two years to try to determine what type of use will meet community needs, while attempting to avoid disenfranchisement of community members, and also while respecting historical neighborhood values. This is not a large-scale project, but it has demonstrated what can be done when there is a real commitment to community participation. Unfortunately,

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53. U.S. EPA, *supra* note 40.

54. CRAWFORD, *supra* note 4.

55. *Id*. at 353.

56. U.S. EPA, *supra* note 38, at 11.

57. Brad Guy, *Depot Avenue Eco-Development Project, available at* http: //www.cce.ufl.edu/current/depot/ index.html (last visited April 5, 2001).

projects like this are few and far between, and often developers do not want to spend the time and energy in trying to preserve a neighborhood or delve into community needs. Projects that have real public participation are mostly government funded. Therefore, we need to encourage the private sector to involve the community so that equitable decisions can be made.

Another way that we can start addressing the problem of environmental justice at its roots is to begin mandating that meaningful environmental education programs be implemented in public schools. An ideal environmental education program should include the goal of giving our youth a basic understanding of how the environment works, how our actions as humans impact the natural system, and how inequity works in making disenfranchised members of our society bear a disproportionate amount of the harm from our disposable culture. The beauty of environmental education is that it allows the integration of many different subject areas: science, social science, and history. In addition, a good program would be multi-layered, could begin in primary schools and continue on into secondary schools, building on information previously learned, while integrating service learning whenever possible with community based environmental projects.

VI. CONCLUSION

Today there are still a plethora of instances of environmental injustices at work in our society. In order to start really solving this problem, we have to examine the available solutions and also the origins of environmental injustice to ensure that we are not just "band-aiding" the problem. The origins of environmental injustice are in the fundamental disrespect that our culture has had for both the oppressed and the earth. In order to remedy this fundamental disrespect, we need to recognize that to respect all people and their right to live in a safe and healthy environment, is to also recognize that we need to live more harmoniously with nature. Borrowing from another Earth First! slogan, "This is not about getting back to nature, it is about understanding that we never left." Solutions include litigation using equal protection strategies, but also examining ways to create cultural change (for example, environmental education and adoption of new paradigms of respect for equality of all people and for the earth) that will cause environmental justice to become a reality and the ultimate recognition of a fundamental right to a healthy environment.

RECENT DEVELOPMENTS

JOHN T. CARDILLO*

Table of Contents

I. INTRODUCTION

This section highlights recent developments in federal and state environmental and land use case law, as well as notable legislation recently passed by the Florida Legislature. In addition to the sources cited in this section, the reader is encouraged to consult the official websites of the Florida Legislature,[1] the Florida Department of Environmental Protection,[2] and the Florida Department of Community Affairs.[3] Other useful sources the reader may wish to consult include the website of the Environmental & Land Use Law Section of The Florida Bar,[4] and the FLORIDA ENVIRONMENTAL COMPLIANCE UPDATE, available through Business & Legal Reports, Inc..[5]

II. FEDERAL DECISIONS

Palazzolo v. Rhode Island, et al., 121 S. Ct. 2448 (2001).

In *Palazzolo*, the Supreme Court reinforced landowners' rights in regulatory takings cases. If the government interferes with a landowner's ability to develop his land, the government may have to compensate that landowner for a regulatory taking.[6]

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* The Recent Developments Section was researched and written by John T. Cardillo, expected J.D. 2003, The Florida State University College of Law. The author would like to thank his computer for not breaking down.

1. www.leg.state.fl.us
2. www.dep.state.fl.us
3. www.dca.state.fl.us
4. www.eluls.org
5. www.blr.com
6. *See* Palazzolo v. Rhode Island, et al., 121 S. Ct. 2448 (2001).

The issues surrounding *Palazzolo* stem back to the 1960s. In 1959, Anthony Palazzolo, and associates, formed Shore Garden, Inc. ("SGI"), and purchased more than twenty acres of land in Westerly, Rhode Island.[7] The property, immediately across the street from the beach, faced Winnapaug Pond.[8] Most of the property was, and still is, salt marsh, subject to tidal flooding.[9] SGI submitted three different proposals for development, each with a different request to fill in part of the wetland.[10] All three petitions were denied.[11]

Before the next application for a permit to fill the land, two germane events occurred. First, in 1971, the Rhode Island legislature created the Council, an agency whose duty was to protect the coastal lands of Rhode Island.[12] The Council designated lands such as Palazzolo's, "protected coastal wetlands."[13] Second, in 1978, Palazzolo became SGI's sole shareholder.[14]

In 1983, and again in 1985, Palazzolo applied for permits to fill in part, or all, of the salt marsh land.[15] He was denied both times.[16] The Council stated that he failed to meet the requirements for a special exception.[17] Finally, in 1985, Palazzolo filed an inverse condemnation claim in Rhode Island state court, claiming that the permit denials deprived his property of all economically viable use. Palazzolo argued that the government's actions resulted in a total regulatory taking, pursuant to *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).[18]

The trial judge rejected Palazzolo's argument.[19] The appellate court affirmed the trial court on three grounds. First, Palazzolo's takings claim was not ripe for adjudication.[20] He still could find some form of lesser development that the Council might approve.[21] Second, Palazzolo's claims were time-barred.[22] The Council's

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7. *Id.* at 2455. As background to the case, the Court discusses the intriguing history of Westerly, Rhode Island. Incorporated in 1669, the town has developed into a charming beach resort, with mild temperatures in the summer. Thousands of visitors come to Westerly every summer to vacation. *Id.* at 2454-55.
8. *Id.*
9. *Id.*
10. *Id.*
11. *See id.*
12. *Id.* at 2456.
13. *Id.*
14. *Id.*
15. *Id.*
16. *See id.*
17. *Id.*
18. *Id.*
19. *See id.* at 2457.
20. *Id.*
21. *Id.*
22. *Id.*

regulation of coastal land was in effect when he took over as sole shareholder of SGI.[23] Third, Palazzolo's claim that the regulations deprived his land of economically beneficial use was incorrect.[24] He could still build a house worth $200,000 on the portion of his property that was not subject to flooding.[25] Additionally, the court held that the *Penn Central*[26] test did not apply to Palazzolo's claim.[27] The regulation predated his ownership of the property.[28] Therefore, Palazzolo had "no reasonable investment-backed expectations that were affected by this regulation."[29]

The United States Supreme Court granted certiorari on Palazzolo's case. First, the Court addressed the ripeness issue. The claim would not be ripe until the Council had reached a final decision regarding the applications for permits to fill the land.[30] Once it becomes clear that the Council cannot permit any development, a takings claim is likely to have ripened.[31] Based on the State's oral arguments and briefs, the Court concluded that the Council was not going to allow any fill for ordinary land use on the wetlands.[32] The landowner should not have to endure countless rounds of repetitive land use review processes, or futile applications with other agencies, just to show that his claim was ripe.[33]

The Court then considered whether Palazzolo's claim should be time-barred. The Court disagreed with the Rhode Island Supreme Court, and rejected the State's argument that Palazzolo, a post-enactment purchaser, could not challenge the regulations under the Takings Clause.[34] The Takings Clause occasionally allows a landowner to argue that a state's regulation is so unreasonable, that compensation should be awarded.[35] If the Court were to agree with the State's argument, "the post-enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no mater how extreme or unreasonable."[36] By enacting legislation after the purchase of a property, the State would be

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23. *Id.*
24. *Id.*
25. *See id.*
26. *Penn Central* test derives from Penn Cent. Co. v. New York City, 438 U.S. 104 (1978).
27. *Palazzolo*, 121 S. Ct. at 2457.
28. *Id.*
29. *Id.* (quoting *Penn Central*, *supra* note 26).
30. *Id.* at 2459 (citing Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)).
31. *Id.*
32. *See id.*
33. *See id.* at 2460.
34. *See id.* at 2464.
35. *Id.* at 2462.
36. *Id.*

allowed to put an expiration date on the Takings Clause.[37] Future generations have a right to challenge unreasonable limitations on land use.[38]

Nor did the Court accept the State's argument that putting the landowner on notice should bar the claim.[39] If landowners were barred from bringing claims simply because the state put them on notice, the landowners would be stripped of their ability to transfer interest which they had prior to the regulation.[40] The Court echoed their holding in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); prior owners of property must be allowed to transfer full property rights in conveying the lot.[41] Even if the landowners are on notice, post possession legislation should not time bar claims under the Takings Clause.[42]

Finally, the Court addressed the issue of whether or not the State's regulation deprived Palazzolo of all economic beneficial use of his property. Here, the Court agreed with the Rhode Island Supreme Court.[43] Palazzolo still could build a home on his property valued at least $200,000.[44] A regulation which permits this type of construction does not leave the property "economically idle."[45] The case was remanded for further proceedings.[46]

Aviall Services, Inc. v. Cooper Indus., Inc., 263 F.3d 134 (5th Cir. 2001).

In *Aviall*, the Fifth Circuit upheld the District Court for the Northern District of Texas's decision to grant summary judgment against Aviall Services, Inc. ("Aviall").[47]

In 1981, Aviall bought an aircraft engine maintenance business from Cooper Industries, Inc. ("Cooper").[48] Having discovered that Cooper had contaminated several facilities with petroleum and hazardous substances, Aviall began a decade-long environmental cleanup, spending millions of dollars.[49] Aviall, however, did not

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37. *Id.* at 2463.
38. *Id.*
39. *See id.*
40. *Id.*
41. *Id.*
42. *See generally id.*
43. *See id.* at 2465.
44. *Id.* at 2464.
45. *Id.* at 2465 (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)).
46. *Id.*
47. *See* Aviall Services, Inc. v. Cooper Indus., Inc., 263 F.3d 134 (5th Cir. 2001).
48. *Id.* at 136.
49. *Id.*

contact Cooper to discuss the clean up efforts until 1995.[50] Two years later, Aviall filed suit against Cooper, basing part of its claim on CERCLA's § 107(a) "cost recovery provision."[51] Aviall later amended its complaint, dropping the § 107 claim and added a claim for contribution under § 113(f)(1) of CERCLA.[52] The District Court granted Cooper's motion for summary judgment, holding that Aviall could not assert the contribution claim unless it was subject to an action which involved a § 107(a), or § 106 claim.[53]

After briefly reviewing the structure and history of CERCLA,[54] the Court discussed the merits of the case. The Circuit Court applied a plain meaning interpretation of CERCLA's contribution section to support the District Court's holding.[55] A common definition of contribution requires that a tortfeasor face judgment before it can seek contribution from other parties.[56] In spite of this definition, Aviall, who conceded that it did not have a § 106 or § 107(a) claim against Cooper, argued that the statutory language supported its current claim.[57]

Aviall argued that the use of "may" in the statute signified a non-exclusive means for contribution; it "may choose one of several ways" to seek contribution.[58] The court held that Aviall's interpretation of the word may was inconsistent with statutory construction.[59] The word "may" can convey exclusivity as in "shall" or "must."[60] Therefore, Aviall did not have broad options as to when it could bring its contribution claim.

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50. *Id*.

51. *See id*. (noting that the CERCLA's "cost recovery" program allows innocent parties to recover environmental response costs from liable parties).

52. *See id*. (noting that Aviall also brought a state contribution claim under Texas Solid Waste Disposal Act, TEX. HEALTH & SAFETY CODE ANN. § 361.344(a) (West 1992 & Supp. 2001)).

53. *Id*.

54. *See id*. at 137. In its review of CERCLA, the court gives four definitions for "potentially responsible parties" ("PRP's"), and notes that § 107(a) (the cost recovery provision) and § 113(f)(1) (contribution provision) are two ways for parties to recover environmental response costs. The court also distinguishes a contribution claim, which involves actions between PRP's, with cost recovery claims, which are initiated by a non-responsible party against a PRP.

55. *See id*. at 138. 42 U.S.C. § 9613(f), the contribution section of CERCLA, reads: "Any person may seek contribution from any other person who is liable or potentially liable under § 107(a), during or following any civil action under [§ 106] or under § 107(a)."

56. *See id*. (citing BLACK'S LAW DICTIONARY 329 (6th ed. 1990)).

57. *Id*.

58. *Id*.

59. *Id*.

60. *Id*. at 139 (quoting WEBSTER THIRD NEW INTERNATIONAL DICTIONARY 1396 (3d ed. 1993)).

Relying on the savings clause of § 113(f)(1),[61] Aviall argued that congressional intent was to allow a contribution claim, even if a party was not a defendant in a § 106 or § 107(a) action.[62] The court rejected this argument. The interpretation of a statute as a whole should not render a part of the statute inoperative.[63] A specific provision of a statute governs a general provision.[64] Congress did not intend for the savings clause to render the first sentence of § 113(f)(1) superfluous.[65] Instead, the provision was intended to preserve state law-based claims.[66]

Legislative history and a majority of case law also supported the court's decision. A 1986 amendment to CERCLA codified an express contribution provision in § 113(f)(1).[67]

Both House and Senate reports supported the Court's decision that a party, seeking contribution, must have faced, or potentially face, liability under § 106 or § 107(a).[68] While no federal circuit has directly weighed in on the question of contribution under CERCLA, several district courts support the Fifth Circuit Court's decision.[69]

Finally, the court considered Aviall's policy argument that upholding the district court's ruling would discourage voluntary cleanups because parties could not seek contribution unless they were defendants.[70] Although the court did not disregard this argument,[71] it held that its interpretation was consistent with the policy goals of CERCLA.[72] The court doubted that Congress intended to go beyond the traditional common law definition of

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61. *See id*. The savings clause of § 113(f)(1) reads: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§ 106] or [§ 107]."

62. *Id*.

63. *Id*. at 140 (citing Resolution Trust Corp. v. Miramon, 22 F.3d 1357 (5th Cir. 1994)).

64. *Id*. (citing Morales v. Trans World Airlines, 504 U.S. 374, 384 (1992)).

65. *Id*.

66. *Id*.

67. *See id*. at 141.

68. *See id*. The House report stated specifically: "This section clarifies and confirms the right of a person *held jointly and severally liable under* CERCLA to seek contribution from other potentially liable parties." H.R. REP. NO. 00-253(I)(1985), *reprinted in* U.S.C.C.A.N. 2835, 1985 WL 25943 at 26 (Leg. Hist.). The Senate report states: "parties found liable under section 106 or 107 have a right of contribution, allowing them to sue other liable or potentially liable parties to recover a portion of the costs paid." S. REP. NO. 99-11 at 43 (1985).

69. *See id*. at 141-43. *See also* Estes v. Scotsman Group, Inc., 16 F. Supp. 2d 983 (C.D. Ill. 1998); Deby, Inc. v. Cooper Indus., 2000 U.S. Dist. LEXIS 2677; U.S. v. Compaction Sys. Corp., 88 F. Supp. 2d 339 (D.N.J. 1999) (each with a holding that supports the holding in the case at bar). *But see* Johnson County Airport Comm'n v. Parsonitt Co., Inc., 916 F. Supp. 1090 (D. Kan. 1996); Ninth Ave. Remedial Group v. Allis Chalmers Corp., 974 F. Supp. 684 (N.D. Ind. 1997); Mathis v. Velsicol Chem. Corp., 786 F. Supp. 971 (N.D. Ga. 1991).

70. *Id*. at 144.

71. *Id*. The Court agreed that the text trumped policy preferences.

72. *Id*.

contribution, which requires pending or past judgment.[73] Furthermore, parties are not daunted from voluntary cleanup.[74] They can rely on state environmental laws to recover costs from liable parties.[75] Aviall, who has state law claims against Cooper, was such a party.[76]

Save Our Heritage, Inc. v. F.A.A.,
269 F.3d 49
(1st Cir. 2001).

In *Save Our Heritage, Inc.*, the First Circuit Court of Appeal denied preservationist organizations, towns, and stewards of several historic sites a petition for review of the Federal Aviation Administration's (FAA) decision to authorize a commuter airline between Boston and New York.[77]

Hanscom Field ("Hanscom"), a general aviation airport, 15 miles northwest of Boston, has been a major aviation facility since 1940.[78] To lessen the congestion of Boston's Logan International Airport, the Massachusetts Port Authority and the FAA recently expanded commercial passenger service to Hanscom.[79] The increased traffic has concerned certain Massachusetts community groups.[80]

In 1999, the FAA allowed Shuttle America Airlines ("Shuttle America") to begin operating flights from Hanscom.[81] In May 2000, Shuttle America sought to add New York's LaGuardia Airport ("LaGuardia") to its list of destinations from Hanscom.[82] To be prudent, the FAA conducted an environmental analysis, which showed that there would not be any potential adverse effect on the historic properties.[83] The petitioners Save Our Heritage and the Hanscom-area towns sent the FAA detailed criticisms to the contrary.[84] In October 2000, the FAA issued the amendment, and

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73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *See* Save Our Heritage, Inc. v. F.A.A., 269 F.3d 49 (1st Cir. 2001).
78. *Id.* at 53.
79. *Id.*
80. *Id.* The groups fear that increased noise, air pollution, and surface traffic from additional flights will harm the natural and historic resources near Hanscom. Among the sites of concern are: Minute Man National Historic Park, Walden Pond, and the homes of authors Ralph Waldo Emerson and Louisa May Alcott. *Id.*
81. *Id.*
82. *Id.* at 54.
83. *Id.* The FAA did not conduct an environmental study when it allowed Shuttle America to start flying from Hanscom in 1999. Nor did the FAA feel that the study was necessary in its decision to allow Shuttle America to fly from Hanscom to LaGuardia. *Id.*
84. *Id.*

Shuttle America began trips to LaGuardia.[85] The petitioners petitioned the First Circuit to review the FAA's decision.[86]

First, the court held that the plaintiffs had standing to challenge the FAA's order. The court utilized a three prong test to determine the standing issue: (1) the petitioner has to be someone who has suffered or is threatened by injury in fact to a cognizable interest; (2) the injury is casually connected to the defendant's action; and (3) the court can present a remedy for the injury.[87] The court was not persuaded by any of the FAA's three objections.[88] At least one of the plaintiffs in the groups had standing, which was sufficient to proceed with the entire case.[89] Even if the plaintiffs' claim would not trigger agency obligations, there was enough of a connection to the defendant's action to show minimal impact.[90] Finally, the plaintiffs did not have to negate every possibility that the number of flights would be the same, even if the court held in their favor.[91]

Next, the court addressed the FAA's contention that the petitioners were making untimely claims on prior orders.[92] The FAA argued that since the petitioners were disputing 1999 claims, which allowed Shuttle America to use the bigger planes needed to fly to New York, 49 U.S.C. § 46110(a) imposed a 60 day time limit on direct review.[93] The FAA argued that the petitioners did not file for review in 1999, and their claims should be barred.[94] Although the court agreed that the earlier orders were responsible for much of the impact, it held that the petitioners could claim that an additional impact would arise from the new LaGuardia flights.[95]

After discussing the standing and time issues, the court addressed the merits of the case. The Court faced two issues. First, did the FAA make a substantial error by concluding that the additional flights would have a di minimis environmental impact

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85. *Id.*

86. *Id.* The petitioners claimed that the FAA decision violated the National Environmental Policy Act of 1969 ("NEPA"), the National Historic Preservation Act of 1966 ("NHPA"), and the Department of Transportation Act of 1966. *Id.* at 54-55.

87. *Id.* at 55 (citing Cotter v. Mass. Ass'n of Minority Law Enforcement Officers, 219 F.3d 31,33 (1st Cir. 2000), *cert. denied*, 531 U.S. 1072, 121 (2001)).

88. *See id.* The FAA made three objections to the petitioners' standing: (1) none of the members of the organizations had shown they were among the injured; (2) there was no actual adverse effect on any petitioner because, the small number of flights would not have a significant environmental impact; and, (3) even if the order was overturned, the same number of flights could be flown between Boston and New York. *Id.*

89. *Id.*

90. *Id.* at 55-56.

91. *Id.* at 56.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

near Hanscom.[96] The FAA studied noise, fuel emissions, and surface traffic that could affect Hanscom.[97] Hanscom handled just under 100,000 flights in 1999.[98] The LaGuardia flights would add, at most, 10 additional flights per day.[99] Realistically, there would be a 2.5 percent increase in Hanscom flights per year, a trivial number.[100] The surface traffic impact was also minimal.[101] At worst, the peak traffic would increase on Route 2A, a main thorough way through the Hanscom area, by 2.65 percent.[102] Finally, the FAA correctly concluded that the fuel emissions with LaGuardia flights would be "below de minimus levels."[103] The FAA did not err by deciding that the additional flights would a have a small environmental impact near Hanscom.

The court noted that the petitioners could overcome the FAA's findings with an organized rebuttal.[104] The petitioners, however, made no direct attack on the aircraft noise or air pollution conclusions.[105] The court chided this reaction stating, "[G]auzy generalizations and pin-prick criticisms, in the face of specific findings and a plausible result, are not even a start at a serious assault."[106]

The court then discussed the second issue, whether the FAA made a procedural error by not consulting with governmental agencies concerned with historic preservation.[107] The court did not explicitly say that the FAA made an error.[108] A project is not environmentally controversial simply because vocal opponents exist.[109] The court concluded that even if the FAA had made an error by not making a more formal assessment, it was harmless.[110] The FAA did not refuse to study environmentally problematic consequences.[111] Contrarily, considering the small number of flights, it conducted a thorough examination of the effect on

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96. *Id.* at 57.
97. *Id.* at 58-59.
98. *Id.* at 58.
99. *Id.*
100. *Id.*
101. *Id.* at 59.
102. *Id.*
103. *See id.* at 59.
104. *Id.* at 60.
105. *Id.*
106. *Id.*
107. *Id.* at 57.
108. *See id.* at 61-62.
109. *Id.* at 61 (citing Found. For N. Am. Wild Sheep v. U.S. Dep't of Agric., 681 F.2d 1172, 1182 (9th Cir. 1982)).
110. *Id.*
111. *Id.* at 62.

Hanscom.[112] The court echoed its displeasure with the petitioners' lack of evidence to the contrary.[113] The FAA's decision was upheld.

III. FLORIDA DECISIONS

Pinecrest Lakes, Inc. v. Karen Shidel, 795 So. 2d 191 (Fla. 4th DCA 2001).

In *Pinecrest*, the Fourth District Court of Appeal faced an unprecedented issue of Florida law.[114] It concluded that a trial court has the authority to order the complete demolition of several multi-story buildings which are inconsistent with a county's comprehensive land use plan.[115]

Pinecrest Lakes, Inc. ("Pinecrest") had been developing a five hundred acre parcel of land in Martin County for over twenty years.[116] The development culminated in Phase Ten, the phase in dispute.[117] Each phase had to coordinate with the county's Comprehensive Plan as residential real estate; single-family homes on individual lots, with a maximum density of two units per acre ("UPA").[118] Phase Ten's final plan included 136 units, in two-story buildings, with a density of 6.5 UPA.[119] The county's growth management staff recommended that the County Commission approve Phase Ten.[120] Before permitting nineteen of the two-story buildings, the Commission heard protests from the area's residents, including Karen Shidel, a resident who opposed Phase Ten since its introduction in 1986.[121]

Shidel, along with Charles Brooks and other homeowners, filed a civil action in the Martin County Circuit Court, pursuant to *Florida Statutes* section 163.3215(1) (1995).[122] They alleged that the development order was inconsistent with the county's

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112. *See id.*
113. *See id.* at 63.
114. *See* Pinecrest Lakes, Inc. v. Karen Shidel, 795 So. 2d 191 (Fla. 4th DCA 2001).
115. *See id.* at 193.
116. *Id.*
117. *Id.*
118. *Id.* The Comprehensive Plan reads: "[w]here single family structures comprise the dominant structure type within these areas, new development of undeveloped abutting lands shall be required to include compatible structure types of land immediately adjacent to existing single family development." *Id.*
119. *See id.* at 194.
120. *Id.*
121. *Id.*
122. FLA. STAT. § 163.3215(1) (1995) reads: "Any aggrieved or adversely affected party may maintain an action for injunctive or other relief against any local government to prevent such local government from taking any action on a development order...which materially alters the use or density or intensity of use on a particular piece of property that is not consistent with the comprehensive plan adopted under this part." *Id.* n.5.

Comprehensive Plan.[123] The trial court, looking only at the record before the County Commission, ruled that the development order was consistent with the Comprehensive Plan.[124]

Knowing that the case was going to be appealed, and that if victorious the homeowners would seek demolition as a remedy,[125] the developer started building five of the units.[126] In 1997, the Fourth DCA reversed the trial court's decision, ruling that the development order did not comply with the county's Comprehensive Plan.[127] The DCA remanded the case for a trial de novo, and appropriate relief.[128]

On remand, the trial judge[129] first considered the consistency issue.[130] The Comprehensive Plan established a hierarchy of land uses.[131] New structures, added immediately adjacent to an existing structure, have to be "comparable and compatible" to the ones already built.[132] The new, two story apartment buildings from Phase Ten were not "comparable and compatible" to the already existing, single family homes of Phase One.[133] Nor were the buildings of comparable density.[134] The development order was inconsistent with the Comprehensive Plan.[135]

Having determined the consistency issue, the trial judge then considered an appropriate remedy.[136] Meanwhile, the developer continued with construction.[137] As a possible remedy, Shidel could seek injunctive relief.[138] The judge found that the developer, having continued construction while the appeal was pending, acted in bad faith, and at his own peril.[139] As a consequence, the land in dispute was to be restored to its status prior to construction,

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123. *See Pinecrest*, 795 So. 2d at 194.
124. *See id*.
125. When construction began, Shidel and Brooks sent the developer a letter informing him that if they won, they would seek demolition as a remedy. *Id*. at 195.
126. *Id*.
127. *See id*.
128. *Id*.
129. On remand, the case was assigned to a new judge. *See id*. n.7.
130. *Pinecrest*, 795 So. 2d at 195.
131. *Id*.
132. *Id*. at 196.
133. *Id*.
134. *Id*.
135. *Id*.
136. *See id*.
137. *Id*. The County conducted final inspection on two of the buildings, issued certificates of occupancy (CO), and allowed the residents to move into the buildings. *Id*.
138. *Id*. The judge found no evidence that Brooks and the Homeowner's Association were damaged by the diminution in value. The Homeowner's Association was not a person under FLA. STAT. § 163.3215(2), and could not seek relief. *Id*.
139. *Id*.

notwithstanding the completed buildings.[140] Following this judgment, the developer filed an appeal and moved for a stay pending review.[141] The trial court granted the stay,[142] and the DCA heard the appeal.

Similar to the trial judge, the DCA addressed the consistency issue first. The court upheld the trial judge's decision, rejecting the developer's argument that the trial court committed a reversible error by not deferring to the County Commission's interpretation of it's own Comprehensive Plan.[143] Section 163.3215(1) was silent regarding deference to the County Commission.[144] If the legislature intended for the courts to defer to the county commissions, there would be language to that effect in the statute.[145] A strict interpretation of the statute reads that all development must conform to the comprehensive plans.[146] Consistency with the comprehensive plan is not discretionary.[147] Pursuant to section 163.3215, citizen enforcement is the best method to ensure that development decisions will be consistent with comprehensive plans.[148] Therefore, the developer's argument that the court should have deferred to the county commission was inconsistent with the structure of section 163.3215.[149]

The Comprehensive Plan's tiering policy was enacted to handle how development should be added to the existing single-family residential communities.[150] The policy required a transition zone

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140. *Id.* At this point, five of the eight-unit buildings had been built, and fifteen of the sixteen units had been occupied. The remaining buildings were between 50 and 66 percent finished. *Id.*

141. *Id.*

142. *Id.* The court granted the stay only towards the demolition order. The lessees could continue in possession of the buildings under lease. The developer was prohibited from renewing any existing leases. *Id.* at 196-97.

143. *See id.* at 197. Intermingled with its analysis of the consistency issue, is a thorough examination of the history of land development statutes in Florida. *Id.* at 198. The court notes that since the first growth management statute, the Local Government Comprehensive Planning Act of 1975, two trends have developed in the field. *Id.* at 198-99. First, property owners' and citizen groups' standing to challenge land development decisions of local governments has become more liberal. *Id.* at 199-200. The Growth Management Act of 1985, which created FLA. STAT. § 163.3215, is largely responsible for this. *Id.* *See* Board of County Comm'rs of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993), which the Pinecrest court calls "the most significant land use decision by the supreme court in the past decade." *Id.* at 200. Second, counties, which initially had virtually exclusive interpretation of their comprehensive plans, have succumbed to the courts' stricter scrutiny of local government development orders. *Id.* at 201-02.

144. *Id.* at 202.

145. *Id.*

146. *See id.*

147. *Id.*

148. *Id.* at 202.

149. *Id.*

150. *Id.* at 203.

where Phase Ten and Phase One intersected.[151] In this zone, the Phase Ten development was to consist of buildings of "comparable density and compatible dwelling unit types."[152] The two story buildings, with a 6.6 UPA, were neither comparable nor compatible with the single-family dwellings of Phase One.[153] The trial court was correct in ruling that the Development Order was inconsistent with the Comprehensive Plan.[154]

The DCA then discussed the trial court's decision to demolish five of the multi-family residential buildings.[155] Pinecrest argued against the "enormity and extremity of the injunctive remedy imposed by the trial court," calling it the most radical remedy ever given by a Florida court regarding an inconsistency with the Comprehensive Plan.[156] As an alternative remedy, Pinecrest suggested that it could compensate Shidel for her $26,000 diminution in property.[157] Demolition of the buildings would result in a loss of $3.3 million dollars to the developer.[158]

Furthermore, Pinecrest argued that the trial court failed to consider the traditional elements for injunctive relief.[159] Injunctions are usually denied if the party seeking relief cannot demonstrate "a particular harm for which there is no adequate remedy at law."[160] The court returned to a plain reading of the statute, noting that the legislature has the authority to set forth a remedy of its choice.[161] A plain reading of section 163.321 showed that the legislature suggested injunctive relief as a means of supporting public interest.[162] In the case at bar, the public interest was to demolish the existing buildings that did not conform to the Comprehensive Plan.[163]

To enforce the injunctive relief, warranted by the statute, the party seeking the relief has to meet two elements.[164] The party must be (1) aggrieved or affected by (2) an approved project that is

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151. *Id.*
152. *Id.*
153. *Id.* The Phase One units had a .94 UPA. *Id.*
154. *See id.* at 204.
155. *See id.*
156. *Id.*
157. *See id.* at 207.
158. *Id.* at 204, 207.
159. *Id.* at 204
160. *Id.*
161. *See id.* at 204-05.
162. *See id.* at 205-06.
163. *See id.*
164. *See id.* at 206.

inconsistent with the Comprehensive Plan.[165] Shidel met both of these elements, and the remedy of demolition was appropriate.

The court was eager to point out its disapproval of the developer's suggestion that it could compensate Shidel for the diminution in her property. If the court allowed the developer to compensate an aggrieved party for the diminution in value of her property, other developers would be able to circumvent the statute with "pay offs."[166] Rarely would the diminution of value in a neighbor's property be more than the cost of a large development project.[167] Relying on *Welton v. 40 Oak Street Building, Corp.*,[168] the court held that financial relief to appellants is not the only factor in weighing equities.[169] The trial court had the power to order the remedy of demolition.

Dusseau v. Metropolitan Dade County Board of County Comm'rs, 794 So. 2d 1270 (Fla. 2001).

In *Dusseau*, the Supreme Court of Florida remanded a decision granting a special zoning exception.[170] The court asked the circuit court to apply the three-pronged *Vaillant* test on remand.[171]

University Baptist Church sought to build a new church in an area zoned for single-family one-acre estates.[172] Churches are permitted a special exception to the zoning requirements.[173] Charles Dusseau, and other residents in the area where the church was to be built, only approved of a "simple church."[174]

Before arriving in the supreme court, the project endured a long procedural history. The project was initially approved by local agencies.[175] Notwithstanding the approval, the Zoning Appeals

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165. *Id.*
166. *See id.* at 207-08.
167. *Id.*
168. 70 F.2d 377 (7th Cir. 1934).
169. *Id.* at 208.
170. *See* Dusseau v. Metropolitan Dade County Board of County Comm'rs, 794 So. 2d 1270 (Fla. 2001).
171. *See id.*
172. *Id.* at 1272. The Church wanted to build on 19.7 acres in Miami-Dade County, which they owned.
173. *See id.*
174. *Id.*
175. *Id.* Eleven local agencies initially approved the project: the Zoning and Planning Department, the Department of Environmental Resource Management, the Public Works Department, the Water and Sewer Authority, the Fire Department, the Metro-Dade Transit Agency, the School Board, the Solid Waste Department, the Parks Department, the Public Safety Department, and the Aviation Department.

Board denied the application.[176] After testimony from both sides and a hearing, the County Commission approved the project with a 9 to 2 vote.[177] Then, in a 2 to 1 vote, the circuit court reversed the commission's decision.[178] Finally, the Third District Court of Appeal quashed the circuit court's decision, granting the petition.[179]

The Florida Supreme Court first discussed the applicable law for reviewing a decision regarding the application for a special exception. In *Florida Power & Light Co. v. City of Dania*,[180] the court added that once an agency has ruled on the application for special exception, the parties may seek review under a two-tiered certiorari system.[181] Under the first tier, a party may seek review in a circuit court.[182] The circuit court then applies the three-prong *Vaillant* test: (1) was procedural due process accorded; (2) have the essential requirements of the law been observed; (3) were the administrative findings and judgment supported by "competent substantial evidence."[183] Under the second tier, the parties can seek review of the circuit court decision at the district court of appeal ("DCA") level.[184] Since the circuit court's decision is usually conclusive, the review at the DCA level is limited.[185] A key difference between the two levels of review is that the "competent substantial evidence" prong is absent from the district court standard.[186]

Having discussed the applicable law, the court turned to the merits of the case. The court found that the circuit court erred in its review of the Commission's decision.[187] Instead of reviewing the Commission's decision to grant the exception, the circuit court

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176. *Id.*

177. *Id.*

178. *Id.* The circuit court held that there was "no competent substantial evidence" that the church qualified for a special exception. Contrarily, there was "competent substantial evidence" that the church did not meet the code criteria for a special exception. Dusseau v. Board of County Comm'rs, No. 97-115 AP, slip op. at 8 (Fla. 11th Cir. Ct. May 22, 1998).

179. *Id.* at 1273. The Third DCA held that the circuit court concentrated primarily on the neighbors' attorney, and expert witness testimony. The circuit court "departed from the essential requirements of law" by reweighing, and completely ignoring, evidence which supported the Commission's ruling. Metropolitan Dade County v. Dusseau, 725 So. 2d 1169 (Fla. 3d DCA 1998).

180. 761 So. 2d 1089 (Fla. 2000).

181. *See Dusseau*, 794 So. 2d at 1273 (citing Florida Power & Light, 761 So. 2d at 1092).

182. *See id.* at 1273-74.

183. *See id.* at 1274. The Vaillant test derives from City of Deerfield Beach v. Vaillant, 419 So. 2d 624 (Fla. 1982).

184. *See id.*

185. *See id.*

186. *See id.* "The district court may not review the record to determine whether the agency decision is supported by competent substantial evidence." Florida Power & Light, 761 So. 2d at 1092-93.

187. *See Dusseau*, 794 So. 2d at 1275.

reweighed the evidence, and made a determination that there was no "competent substantial evidence" that the church met the criteria for a special exception.[188] Ultimately, the circuit court usurped the agency's fact-finding authority.[189]

While it completely disagreed with the circuit court's decision, the Florida Supreme Court partially disagreed with the DCA's decision.[190] The DCA correctly ruled that, by reweighing evidence and completely ignoring the Commission's decision, the circuit court erred.[191] The DCA, however, also erred by holding that the Commission's decision was supported by "competent substantial evidence."[192] The district court, which is allowed a limited review of the circuit court under the two tiered certiorari system, see, supra, did not have the authority to review this aspect of the Commission's decision.[193] Consequently, the district court usurped the circuit court's jurisdiction.[194]

The court remanded the case to the circuit court, to apply the three-pronged *Vaillant* test, and determine if the Commission's decision was correct.[195]

Central Florida Investments, Inc. v. Orange County Code Enforcement Bd.,
790 So. 2d 593 (Fla. 5th DCA 2001).

In *Central Florida Investments*, the Fifth District Court of Appeals affirmed an order dismissing a suit by Central Florida Investments, Inc., Westgate Lakes, Inc., and Westgate Lake Owners' Association, Inc. ("Central Florida"), against Orange County Code Enforcement Board ("County").[196] Central Florida failed to exhaust all administrative remedies before bringing suit against the County.[197]

Central Florida owns a condominium resort on Big Sand Lake in Orange County.[198] In July of 1993, Central Florida sought

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188. *Id.*
189. *Id.*
190. *See id.*
191. *Id.* (citing *Dusseau*, 725 So. 2d at 1171).
192. *Id.*
193. *Id.* at 1275-76.
194. *Id.*
195. *Id.* at 1276.
196. *See* Central Florida Investments, Inc. v. Orange County Code Enforcement Bd., 790 So. 2d 593 (Fla. 5th DCA 2001).
197. *See id.*
198. *Id.* at 595.

permission to rent out a ski boat, and six jet skis on the lake.[199] Although its neighbors approved of the plan, the County issued a notice that Central Florida was violating the Orange County Code by using motorized watercrafts on the lake.[200] Central Florida filed for a writ of certiorari to obtain an amendment to the development plan.[201] The court granted the petition, and issued a temporary injunction, allowing Central Florida to rent out the watercraft.[202] Despite its success, Central Florida withdrew its application for the amendment, and ceased renting out the watercraft.[203] Central Florida then filed an amended complaint against the County.[204] The County successfully moved to dismiss the suit, alleging that Central Florida failed to exhaust administrative remedies.[205] Central Florida appealed.[206]

The court rejected all three of Central Florida's arguments as to why they did not need to exhaust administrative remedies in the case at bar. First, Central Florida argued that it did not have to exhaust its remedies because there was no pending administrative proceeding; the County had already decided that Central Florida had no riparian rights on the lake.[207] The court could not find a statement by the County to support this assertion.[208] The County claimed that Central Florida's predecessor agreed to restrict motorized watercraft on the lake in exchange for zoning to allow timeshare units.[209] Central Florida argued that the agreement never existed.[210] The court felt that this dispute was all the more reason for Central Florida to exhaust all administrative remedies before pursuing a cause of action.[211]

Central Florida's second argument was that the lawsuit involved constitutional claims, which could not be determined by the County.[212] The court acknowledged that riparian rights exist in

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199. *Id.*

200. *Id.* In January 1993, the Zoning Development Review committee recommended approval of an amendment to the development plan, which would allow the watercraft on the lake.

201. *Id.* Central Florida also filed a lawsuit, claiming it should be able to use motorized watercraft on the lake.

202. *Id.*

203. *Id.*

204. *Id.* at 596.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 597.

210. *Id.*

211. *Id.*

212. *Id.*

Florida as a constitutional right.[213] A county, however, can regulate constitutional rights.[214] The court also acknowledged that landowners can make a general attack on the validity of an ordinance without exhausting administrative remedies.[215] When the landowner, however, alleges that the ordinance is unconstitutional "only as applied to particular property," the landowner must apply for a variance or exception before the party can seek judicial review.[216] Since Central Florida was challenging action specific to its property, without an application for a variance or special exception, it was required to exhaust all administrative remedies.[217]

Finally, Central Florida argued that further administrative action on its part would be futile; ultimately, its request would be denied.[218] Central Florida was specifically concerned with unfavorable comments made by the former County Chairman.[219] The court pointed out that there was a new chairman, and, regardless, the County chairperson does not speak for the entire county.[220] Central Florida still had an opportunity, if it exhausted all administrative remedies, to get the amendment it was seeking.[221]

IV. NOTABLE BILLS PASSED DURING FLORIDA'S 2001 LEGISLATIVE SESSION

The descriptions below are excerpts from the Environmental & Land Use Law Section of The Florida Bar summary of the 2001 legislative session, prepared by Eric T. Olsen of Hopping, Green, Sams and Smith, P.A., and Angela Dempsey, a Senior Assistant General Counsel at the Florida Department of Environmental Protection.[222] The reader is encouraged to research the Senate or House Committee summary reports compiled by legislative staff and listed at the Florida Legislature's web site.[223] Summaries for many of these bills are also available at either the Department of

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213. *Id.* (citing Feller v. Eau Gallie Yacht Basin, Inc., 397 So. 2d 1155 (Fla. 5th DCA 1981)).
214. *Id.* (citing Intracoastal N. Condo. Ass'n, Inc. v. Palm Beach County, 698 So. 2d 384 (Fla. 4th DCA), rev. denied, 703 So. 2d 476 (Fla. 1997)).
215. *Id.*
216. *Id.* (citing Lee County v. Morales, 557 So. 2d 652 (Fla. 2d DCA), rev. denied, 564 So. 2d 1086 (Fla. 1990)).
217. *Id.*
218. *Id.*
219. *Id.* at 598.
220. *Id.*
221. *Id.*
222. www.eluls.org
223. www.leg.state.fl.us

Community Affairs' site,[224] or the Department of Environmental Protection's web site.[225]

CS/HB 9 Solid Waste Management Facilities/Recycling Chapter *2001-224, Florida Statutes*

An individual who applies for a permit to build, or substantially remodel, a solid waste management facility, must notify the local government, which has jurisdiction over the facility, of the filing of the application on or before the day the application for permit is filed. The individual must also publish the notice in a newspaper of general circulation.

The bill amends section 403.71851, Florida Statutes, replacing lead-containing materials grants with electronic recycling grants. Pursuant to the bill, funds from the Solid Waste Management Trust Fund can be used as grants to Florida businesses that recycle electronic equipment. The bill also provides certain grants to counties to develop methods to collect and transport electronics for recycling. The methods must be comprehensive in nature.

Finally, the bill requires the DEP to review the waste reduction and recycling goals from part IV of Chapter 403, F.S. The DEP must make recommendations to the Governor, Senate President, and House Speaker by October 31, 2001.

HB 945 Palm Beach County Solid Waste Authorization

This bill codifies all prior special acts that relate to the Solid Waste Authority of Palm Beach County into a single act. The bill repeals prior acts, pursuant to section 189.429, F.S. HB 945 reenacts the majority of the Authority's current provisions, which include provisions for permitting, assessments and enforcement. Finally, the bill adds provisions for severability and liberal construction.

HB 1635 Environmental Litigation Reform Act *Chapter 2001-258, Florida Statutes*

This act was designed to simplify the DEP's various administrative fine authority provisions. By creating an administrative penalty schedule for cases with a penalty of $10,000 or less, the act establishes a more predictable and efficient process for the resolution of less serious environmental disputes.

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224. www.dca.state.fl.us
225. www.dep.state.fl.us

In the absence of resolution, the less serious environmental cases are sent to the administrative process instead of civil court. The administrative law judge (ALJ) has the discretion to adjust the penalty. Single violations range from $500-$5000 each. The ALJ can increase the penalty, provided it does not exceed $10,000. The ALJ may also decrease the penalty by 50%. If the violation was the result of circumstances beyond the reasonable control of the respondent, the ALJ can reduce the penalty by more than 50%.

The act allows other protections to violators. The hearing must be heard no later than 180 days of being sent to the Division of Administrative Hearings (DOAH). The parties can agree to a later date. If corrective actions are not pursued in the Notice of Violation (NOV), they are waived. The ALJ issues the final order, not the DEP. If DEP issued the NOV for an improper purpose, attorney's fees, not exceeding $15,000, can be awarded.

The act allows the respondent to "opt out" of the administrative process by filing a written notice within twenty days of service. DEP can still pursue the case in civil court. The DEP has to submit a report to the legislature within two years. The report shall contain the number of NOV's issued, penalties assessed, penalties collected, and the efficiencies gained from the act.

HB 1221 Water Management District Legislation Chapter 2001-256, *Florida Statutes*

This bill pertains to changes in the internal budgeting and land acquisition procedures for water management districts (districts). The bill also gives districts the authority to secure patents, copyrights, and trademarks in light of scientific breakthroughs which are anticipated as part of the Everglades research and development. The districts are given an option to convey their mineral interest in the properties that they sell. Districts may also withhold title information to prospective sellers. Assuming a district has contracted to assist in the purchase of certain properties, it is authorized to disclose appraisal and offer information with third parties.

The bill allows districts to lease cell towers, and similar structures, on district property. Regarding the district's budget, the bill revises notices and scheduling information. Sections 373.507 and 373.589, which deal with district audits, are repealed.

The bill allows any investor-owned utility, regulated by the Public Service Commission, to obtain all of its costs for the construction of alternative water supply facilities. HB 1221 adjusts the composition of the Manasota Basin Board, allots $100 million to South Miami for a drinking water facility.

CS/SB 1524 Comprehensive Everglades Restoration Chapter 2001-172, *Florida Statutes*

This bill creates an expedited permitting program for project components of the Comprehensive Everglades Restoration Plan (CERP). CERP works to protect and preserve water resources of the central and southern Florida ecosystem.

CS/SB 1524 creates section 373.1502, F.S., which provides special permits for CERP project components. The bill makes sure that permit applications provide reasonable assurances that the project component will result in the objectives set forth in the application, and any impacts to the wetlands or threatened or endangered species will be avoided.

Finally, construction can begin only after submission of a permit application and completion of DEP's review of the project. Permits must include conditions to ensure appropriate water quality monitoring during construction and operation. Permits may allow multiple project components.

CS/SB 1662 Environmental Protection Disposal Fee Chapter 2001-193, *Florida Statutes*

Private and governmental utilities, in certain counties, that dispose of wastewater residual sludge by land application in the Lake Okeechobee basin are authorized to impose a line item on local sewer rates. The line item will cover the cost of wastewater residual treatment methodology. The counties selected for this bill are Monroe, Miami-Dade, Broward, Palm Beach, Martin, St. Lucie, Indian River, Okeechobee, Highlands, Hendry and Glades.

If the county disposes of the residual sludge by land spreading, it may impose a line item fee called an "environmental protection disposal fee." This fee pertains to local sewer rates, if they meet disposal requirements.

The bill also contains specifications on how to use fee proceeds. It requires the Florida Public Service Commission, or the county receiving compensation from the fee, to conduct an audit at least every three years.

CS/HB 41 Water and Wastewater Regulation Chapter 2001-145, *Florida Statutes*

This bill deals with the process used in rates at the county level for regulation of investor-owned water and wastewater systems. The bill also addresses the recovery of rate case expense by all water and wastewater utilities.

Section 120.569 and 120.57, F.S., provisions are no longer explicitly made applicable to county regulatory proceedings. Pursuant to section 367.171(8), the Office of Public Counsel can provide legal representation in proceedings before counties. Upon conclusion of the period over which rate case expenses were apportioned, rates of water and wastewater companies shall be reduced. The reduction shall be in the amount of rate case expense included in rates.

HB 1863 Onsite Sewage Treatment Systems Chapter 2001-234, *Florida Statutes*

The Department of Health has regulatory authority over maintenance entities for performance-based treatment systems and aerobic treatment systems. Maintenance groups are required to employ licensed professionals who are responsible for maintenance and repair of systems under contract. This bill also discusses specific permitting requirements and fees for these systems. As an example, operating permits for commercial wastewater systems are valid for a year; operating permits for an aerobic treatment unit are valid for two years. Minimum qualifying criteria for the systems is created by rule. It must include matters such as training, access to spare parts, and service response time.

CS/SB 1030 Water Resources Chapter 2001-270, *Florida Statutes*

This bill changes several definitions for water supply and wastewater operations. The new definitions have regulatory consequences on operating and maintaining water and wastewater facilities. Local government agencies, which qualify for water pollution control financial aid, now include entities providing wastewater sewage and storm water services to airports, research parks, industrial parks, and ports.

Primary and secondary drinking water regulations apply to non-transient and transient noncommunity water systems. If a system uses groundwater for their water supply, variances and waivers will be authorized, from disinfection and certified operator requirements, for transient noncommunity water systems.

The DEP may require data showing that water delivered to the customer's tap meets applicable drinking water standards. This may cause retrofitting requirements for older systems which use copper pipes.

To conform to legislation, DEP must amend its public water supply and water well contractor licensing rules. DEP must adopt a rule for renewal of the licenses, including continuing education requirements. New license and fee requirements are imposed on

water distribution system operators. There is a new classification scheme for water and wastewater treatment systems. Classification by size, complexity and level of treatment is expanded to include water distribution systems.

Finally, this bill repeals sections 403.1822, 403.1823, 403.1826, and 403.1829, F.S.

CS/HB 589 Local Government Utilities Assistance Act Chapter 2001-229, *Florida Statutes*

This bill establishes a pilot program in the DEP to help local governments acquire privately owned water and wastewater utilities which have public health or economic problems. Regarding the Pasco County program, the DEP has to report to the legislature by January 1, 2004. The bill gives $500,000 to DEP for a uniform fiscal impact analysis model that aids local governments in evaluating the cost of infrastructure to support development.

Local governments, covered by the Pasco County pilot program, have to show the following in order to receive funds: 1) it has provided service consistently inadequate to meet public health or water quality standards; 2) it is unable to alleviate a public health or water quality threat through its own resources, without increasing its rates beyond community standards; 3) it desires to sell; and 4) presents a public health or water quality threat that would be more effectively addressed through public management or ownership.

CS/CS/SB 1204 FFWCC Technical Amendments *Chapter 2001-272*

Among the provisions in this bill that relate to the Florida Fish and Wildlife Conservation Commission (FFWCC), are the following: 1) designates the Railroad Retirement Board as an agency to make certain disability determinations; 2) changes the permit standards for marine aquaculture producers who are engaged in culturing shellfish; 3) provides for a legislator appointee to Atlantic States Marine Fisheries Commission and the Gulf States Marine Fisheries Commission; 4) transfers responsibilities for artificial reef permits to the DEP; 5) provides that FFWCC must approve posting and maintaining of regulatory markers in navigable waters; and 6) encourages the release and feeding of quail on lands managed by state agencies.

CS/SB 1468 Land Acquisition Chapter 2001-275, *Florida Statutes*

This bill makes minor changes to the Florida Forever criteria. The bill's legislative intent is to pay back $75 million to everglades restoration in fiscal year 2002-2003. The bill rewrote the acquisition criteria for Florida Forever, placing emphasis on water quality and quantity based acquisitions. An emphasis was also placed on recreation-based parcels.

The time period for evaluating whether lands should be surplused or disposed of by the Trustees is extended from every three years to every five years. Surplused lands are offered state and local governments for thirty days at appraised value, unless the Trustees determine a different sales price. If a parcel of land was donated to the state without payment of money, that land may be surplused based on one appraisal, unless the land is more than $1 million.

CS/CS/SB 1376 Financial Protection for Mining Operations Chapter 2001-134, *Florida Statutes*

This bill provides a funding source for DEP to respond to imminent hazard abatement activities, which are the result of a mining facility's financial troubles. The money from the Nonmandatory Land Reclamation Trust Fund, $50 million, must be repaid in a $75,000 per year stack fee. This fee, covering a five-year period, will also be applied to any new stacks constructed. DEP must provide notice to phosphogypsum stack owners regarding payment of the fee on August 1 of each year. The fee is payable by August 31 of each year.

This bill also authorizes the DEP to take necessary closure steps by court order, or through an agreement with the mine owner. The DEP can authorize a lien on the mine's real property and assets. The lien will be equal to the amount of money spent from Nonmandatory Land Reclamation Trust Fund.